No. _____

IN THE

Supreme Court of the United States

LEZMOND C. MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Petitioner, by his undersigned counsel, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel in the Ninth Circuit under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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DATED: March 24, 2016

By: Gia Kim
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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner, a Navajo, is a federal prisoner sentenced to death under the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3599. Petitioner's statements to the FBI constituted the primary evidence at his capital trial. The FBI took these statements while petitioner spent twenty-five days in tribal custody, with no right to the assistance of counsel. In a motion to vacate his sentence under 28 U.S.C. § 2255, petitioner presented evidence that a working arrangement between federal and tribal authorities resulted in his arrest on a minor tribal charge, and kept him in prolonged custody not authorized under Navajo Nation law, to deprive him of his federal procedural rights. Petitioner also alleged ineffective assistance at the guilt and penalty phases of his trial, and the depositions of his three trial attorneys revealed serious contradictions regarding the investigations undertaken and defenses pursued.

An evidentiary hearing is required in a Section 2255 case "[u]nless the motion and the files and records of the cases conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). In this case, the district court denied the Section 2255 motion without a hearing, and a divided court of appeals affirmed. The questions presented are:

1. Whether the court of appeals, in conflict with the Eighth and Tenth Circuits' grants of a hearing on similar records, erroneously concluded that petitioner could not establish, under any circumstances, that his attorneys had performed deficiently at the penalty phase of his trial.

2. Whether the court of appeals clearly misapprehended Section 2255(b)'s standards by viewing the facts in the light most favorable to the government, weighing the evidence, and silently resolving factual disputes to conclude that no evidentiary hearing was required.

3. Whether the court of appeals erroneously concluded that reasonable jurists could not debate whether an evidentiary hearing was warranted on petitioner's claim of federal-tribal collusion to deprive him of his rights to prompt presentment and assistance of counsel.

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PETITION FOR A WRIT OF CERTIORARI

Lezmond C. Mitchell petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-60a) is reported at 790 F.3d 881. The district court's memorandum of decision and orders (App., *infra*, 62a-129a) are not published in the *Federal Supplement* but are available at 2010 WL 3895691 and 2010 WL 5342960, respectively. A prior opinion of the court of appeals is reported at 502 F.3d 931.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2015. App., *infra*, 1a. A timely petition for rehearing was denied on October 26, 2015. App., *infra*, 61a. On December 30, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 24, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2255 provides, in relevant part:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> . . . .

STATEMENT OF THE CASE

Petitioner, a Navajo, was convicted and sentenced to death in federal district court for a carjacking resulting in the death of two Navajo victims on Navajo land. Petitioner's co-defendant on the carjacking charge, a juvenile who was already serving a life sentence for two first-degree murders in a separate case, was ineligible for the death penalty due to his age and was sentenced to life imprisonment. On direct appeal, a divided panel of the Ninth Circuit affirmed petitioner's convictions and sentence. *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007). This Court denied Mitchell's petition for certiorari.

Petitioner then filed a motion under 28 U.S.C. § 2255 to vacate his sentence. The district court denied the Section 2255 motion on the basis of trial counsels' depositions, without holding an evidentiary hearing. App., *infra*, 62a-129a. A divided panel of the court of appeals affirmed. App., *infra*, 1a-60a.

I. INVESTIGATION

On October 28, 2001, Alyce Slim and her granddaughter, Jane Doe,[1] traveled in Slim's pickup truck from Fort Defiance, Arizona, to Tohatchi, New Mexico, but they did not return as expected. Both towns are located on the Navajo Reservation ("Reservation"). On October 31, 2001, three men robbed a trading post on the Reservation. Two of the men were armed, and witnesses saw one of the robbers pumping gas into a pickup truck matching the description of Slim's vehicle. Slim's abandoned truck was recovered the next day.

A tip led to the arrests of petitioner and others on November 4, 2001. At the suggestion of an assistant United States attorney, the arrests were made pursuant to tribal warrants, not federal warrants. Petitioner had no right to appointed counsel in tribal custody. During petitioner's twenty-five days of tribal custody, the FBI interrogated him four times without an attorney present -- twice on November 4, on November 5, and on November 29. During the last two interrogations, no tribal investigators were present. According to the interrogating agents, the statements became more incriminating over time: petitioner made no admissions in the first interview, acknowledged being present when co-defendant Johnny Orsinger killed Slim and Doe and agreed to lead the FBI to the bodies in the second interview, and admitted participating in the killings in the third and fourth interviews. Although petitioner's statements to the FBI varied greatly in terms of

[1] In compliance with the privacy protections in 18 U.S.C. § 3509(d), the minor victim is referred to as "Jane Doe" throughout this petition.

how incriminating they were, each mentioned drinking, intoxication, or alcohol-induced blackouts at or near the time of the murders.

Orsinger led the FBI to the bodies of Slim and Doe on November 5, shortly before petitioner was brought to the scene. Slim had been stabbed thirty-three times, and Doe's cause of death was blunt force trauma to the head, consistent with large rocks found nearby. Their heads and hands had been removed postmortem.

The federal indictment was returned on November 21, and a federal arrest warrant obtained on November 23, but federal authorities waited an additional six days before taking petitioner into federal custody. Petitioner's last interview with the FBI took place in the federal courthouse on November 29, shortly before petitioner made his initial appearance and met his appointed attorneys in the same building.

II. TRIAL, SENTENCING, AND DIRECT APPEAL

Petitioner, age 20, and Orsinger, a juvenile, were each charged with carjacking resulting in the deaths of Slim and Doe, two counts of first-degree murder, felony murder/robbery, felony murder/kidnapping, robbery, and kidnapping. Carjacking resulting in death is punishable by death. 18 U.S.C. § 2119(3). Petitioner was also charged with two counts of robbery and two firearms violations in connection with the trading post robbery.

Petitioner was represented by three attorneys: Jeffrey Williams and Gregory Bartolomei, both assistant federal public defenders, and John Sears, an attorney in

private practice who served as learned counsel.[2] Williams and Sears focused on the guilt phase: although Williams was nominally lead counsel, Sears served as the primary courtroom presence. Bartolomei focused on the penalty phase.

The government's theory of the case was that petitioner and Orsinger traveled to Gallup, New Mexico, where they obtained knives; that Slim and Doe had picked up the defendants as they hitchhiked back; that the defendants had killed Slim as she stopped to drop them off at the side of the road and killed Doe after driving her to a remote area; and that the motive was to obtain a truck to use in the trading post robbery. As relevant here, several weeks prior to trial, the defense requested that the district court give the Ninth Circuit's model jury instruction on intoxication. Defense attorney Sears attempted to cross-examine the FBI case agent, Raymond Duncan, on petitioner's reports of drinking at the time of the murders, but the district court sustained the government's objection. The defense reiterated their request for the intoxication instruction near the end of the guilt phase, but the district court declined to give it, for lack of evidentiary support.

Following a five-day guilt phase, the jury returned guilty verdicts on all counts on May 8, 2003.

In the penalty phase, the government alleged all four statutory "gateway intent factors" under 18 U.S.C. § 3591(a)(2) for each victim. The government also alleged six statutory aggravating factors under 18 U.S.C. § 3592(c): (1) that the defendant committed the killing for pecuniary gain; (2) that the defendant

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[2] A federal capital defendant is entitled to two attorneys, "of whom at least 1 shall be learned in the law applicable to capital cases[.]" 18 U.S.C. § 3005.

committed the killing in an especially heinous, cruel, or depraved manner; (3) that the defendant committed the killing after substantial planning and premeditation; (4) that the victims were particularly vulnerable due to old age, youth, or infirmity; (5) that the defendant intentionally killed or attempted to kill more than one person in a single criminal episode; and (6) that Doe's death occurred during the commission and attempted commission of a kidnapping. Although the government relied on the guilt-phase evidence to satisfy the statutory gateway intent factors and statutory aggravators, it also presented victim-impact evidence from Slim and Doe's family members to prove the nonstatutory aggravating factor of injury, harm, and loss to the victims' families.

The district court initially instructed the jury on five mitigating factors requested by the defense: (1) petitioner's lack of a significant prior criminal record; (2) that another person equally culpable in the crime would not be punished by death; (3) that petitioner would be sentenced to life imprisonment without parole if not executed; (4) that petitioner had responded well to structured environments and would make an excellent adaptation to prison if sentenced to life without parole; and (5) that other factors in petitioner's childhood, background, record, character, or any other circumstance mitigated against a death sentence.

The defense mitigation presentation, conducted by Bartolomei, lasted about half a day. It consisted of testimony by five of petitioner's former educators, his uncle, two friends, and a videotape of petitioner's ailing grandmother; although several witnesses alluded vaguely to petitioner's uncaring family and absent

mother, the testimony focused on petitioner's nonviolent nature and positive attributes as an athlete, student, leader, and potential teacher.

In an apparent last-minute decision, attorney Williams decided to call the FBI case agent, Duncan, as the final live mitigation witness. Agent Duncan testified that while petitioner had told him he had bought liquor in Gallup, New Mexico, and had drunk to the point of blackout on the day of the offenses (Sunday, October 28, 2001), Duncan discounted those statements because petitioner was able to take law enforcement to the site of the bodies and Gallup is in a county that is dry on Sundays. Agent Duncan also testified that while petitioner had no prior felony convictions, Orsinger (petitioner's co-defendant on the carjacking resulting in death and murder charges) and Gregory Nakai (petitioner's co-defendant on the robbery charges) were convicted of similar charges for a separate double murder/carjacking they committed in August 2001 but were not facing the death penalty in that case. At the close of the penalty-phase evidence, the defense requested and received an instruction on the statutory mitigating factor of impaired capacity,[3] based on Duncan's testimony regarding petitioner's report of intoxication.

The government's penalty-phase closing argument focused on the brutality of, and alleged pecuniary motive for, the crimes. In the defense closing, Sears argued that petitioner had to be the actual killer to be statutorily eligible for the death penalty. In mitigation, the defense argued that petitioner had no criminal history

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[3] The Federal Death Penalty Act ("FDPA") defines "impaired capacity" as "[t]he defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge." 18 U.S.C. § 3592(a)(1).

and would have to serve life imprisonment, that he could serve as a "negative object lesson" for other prisoners, that Orsinger was more culpable and was not facing the death penalty, that petitioner's family was self-absorbed and absent, and that it was Orsinger, and not petitioner, who inflicted the fatal wounds. Defense counsel also read from a letter -- disclosed by the government on the eve of the penalty phase -- written by Levon Henry, Attorney General of the Navajo Nation, to Paul Charlton, United States Attorney for the District of Arizona, outlining the Navajo Nation's cultural and religious opposition to capital punishment and asking Charlton not to seek the death penalty in petitioner's case. In rebuttal, the government argued that petitioner did not have to be the actual killer to be eligible for the death penalty, that Orsinger's juvenile status rendered the defense's proportionality argument irrelevant, that petitioner squandered his positive qualities by associating with Orsinger, and that, while the Navajo Nation's views were not to be taken lightly, petitioner had rejected Navajo values through his actions.

On May 20, 2003, the jury recommended the death sentence. The jury found all gateway intent factors and statutory and nonstatutory aggravators true for both victims. The jury also found the following mitigating factors: twelve jurors found that petitioner did not have a significant prior record, that another person equally culpable would not be punished by death, and that petitioner would be sentenced to life imprisonment without possibility of release if not sentenced to death. Two jurors found that petitioner had responded well to structured environments and would adapt well to prison, one juror found impaired capacity, and six jurors found

mitigating elements in petitioner's background or any other circumstance of the offense. Seven jurors found the Navajo Nation letter mitigating -- a factor they had to write in because trial counsel had not sought an instruction on it. On September 15, 2003, the district court imposed the death sentence on the carjacking count, and two life sentences plus 384 months on the remaining counts.

A divided panel of the court of appeals affirmed petitioner's conviction and sentence on direct appeal. As relevant here, the court of appeals rejected petitioner's claim that his statements should have been suppressed due to federal-tribal collusion to deprive him of his federal procedural rights to prompt presentment and appointment of counsel by arresting him pursuant to a tribal warrant and keeping him in tribal custody. 502 F.3d at 959-62. The court of appeals concluded that trial counsel had failed to preserve the collusion issue and had developed no record on the issue. *Id.* at 960-61. The court of appeals further concluded that even if the collusion claim was reviewable for plain error or was properly preserved, petitioner did not meet his burden of showing "actual collaboration" between federal and tribal authorities. *Id.* at 960-62. The dissent, by contrast, would have suppressed the statements as the product of federal-tribal collusion. *Id.* at 997-1003 (Reinhardt, J., dissenting). This Court denied a petition for certiorari on June 9, 2008.

III. SECTION 2255 PROCEEDINGS

A. District Court

Petitioner filed a timely motion to vacate his conviction and sentence under 28 U.S.C. § 2255. As relevant here, petitioner alleged that trial counsel performed

deficiently by failing to investigate, prepare, and present mitigating evidence of substance abuse, social history, mental health issues, and executive functioning deficits at the penalty phase of his trial. The district court permitted the government to depose petitioner's trial attorneys. Those depositions, and the documentary evidence in the record, revealed the following:

- Voir dire began on April 1, 2003. Jail records indicate that in the sixteen months before trial, Sears visited petitioner for 28 minutes (in May 2002), Williams visited for 8 hours and 5 minutes (last visiting in October 2002), and Bartolomei visited for 39 hours and 40 minutes.
- Although petitioner had told his attorneys that he was not intoxicated at the time of the offenses, he had told the FBI otherwise in all four interviews.
- The only factual investigation of intoxication consisted of counsel looking at FBI crime-scene photographs for evidence of drinking, visiting the site where the bodies were found, and talking to petitioner. Defense counsel's files included no notes or reports by the assigned fact investigator, Karl Brandenberger. Brandenberger did not know that petitioner had ever used drugs.
- Trial counsel hired a mitigation specialist, Vera Ockenfels, to conduct a social history investigation. Ockenfels is an attorney with capital-defense experience. In a draft report, Ockenfels catalogued petitioner's long history of drug and alcohol abuse: an arrest for public intoxication a year

before the crimes; regular use of alcohol, marijuana, cocaine, and crack; increasingly heavy use of crystal meth and alcohol in the period preceding the offenses; and a referral for alcohol treatment in jail shortly after his arrest. The arrest for public intoxication stemmed from a rollover accident in which the driver was killed and petitioner was the passenger.

- Ockenfels believed that petitioner was minimizing his addictions and recommended that defense counsel consult with a psychopharmacologist to determine whether drug use, perhaps in combination with sleep deprivation, affected petitioner's mental state during the offenses. Despite conducting no additional investigation aside from looking for evidence of alcohol use in the FBI's crime-scene photographs, trial counsel did not follow up on their own expert's recommendation.
- Trial counsel did not seek to interview petitioner's co-defendants and roommates about his substance abuse at the time of the offenses even though, as late as May 1, Bartolomei indicated that the defense was considering calling the "Nakai brothers" as guilt-phase witnesses. Postconviction counsel obtained seven declarations from petitioner's associates, including co-defendant Gregory Nakai, regarding rampant drug and alcohol abuse, their availability to testify, and trial counsel's failure to interview them.

- In depositions, Sears and Williams claimed that they abandoned an intoxication defense early on because it lacked evidentiary support and detracted from the guilt-phase strategy of blaming Orsinger.
- Neither Sears nor Williams could explain why the defense had, in fact, sought a diminished-capacity/intoxication instruction at the guilt phase.
- At the defense's request, the juror questionnaires sought to ascertain the prospective jurors' stance on, and prior personal experience with, alcohol and drug abuse and alcohol- and drug-related incidents. During voir dire, no veniremembers expressed hostility toward evidence of drug or alcohol abuse; on the contrary, several veniremembers voiced sympathy for substance abusers or discussed positive experiences with substance abuse recovery.
- During voir dire, on April 10, 2003, petitioner's trial counsel estimated that the mitigation case would last three to four days. By the time the guilty verdicts were read, on May 8, 2003, trial counsel had revised his mitigation estimate downward to half a day.
- Ockenfels's report also described petitioner's childhood as marked by physical and verbal abuse, abandonment, instability, and isolation.
- Two of petitioner's trial attorneys, Williams and Bartolomei, did not consider this social history mitigating because petitioner's family was educated and employed; in any event, they thought it incompatible with the unifying theme of the penalty phase, namely, that petitioner was "a

life worth saving." By contrast, the third attorney, Sears, thought that aspects of petitioner's lonely and unhappy childhood had been presented as mitigation to the jury. But in fact, Sears had told the jury in penalty closing that "people come from bad backgrounds all the time and never get involved in anything like this."

- Ockenfels recommended that trial counsel consult with a forensic psychologist to marshal the social history evidence and present it to the jury in a compelling manner. Three weeks before trial began, Bartolomei represented to the district court that there would "probably" be an expert witness to assist in explaining petitioner's social history at the penalty phase. But trial counsel never followed up on Ockenfels's lead, and no expert of any kind testified on petitioner's behalf at the penalty phase.
- As postconviction investigation revealed, Ockenfels and trial counsel failed to uncover the extent of violence and dysfunction in petitioner's family. Petitioner's maternal grandparents, often his primary caretakers, fought violently with each other and petitioner's mother. Petitioner's grandfather, a school principal on the Reservation, had reportedly molested several children and sexually assaulted his wife's younger sister and half-sister. Petitioner's grandmother accused him of having a sexual relationship with their daughter, petitioner's mother. Nevertheless, petitioner was left for long periods of time in his grandfather's care.

- Bartolomei and Sears claimed that they made a strategic choice to avoid presenting unflattering evidence of intoxication or substance abuse at the penalty phase. But Bartolomei, who bore primary responsibility for the penalty-phase presentation, could not explain why co-counsel Williams decided to question Agent Duncan about intoxication on May 15, 2003. Nor could Bartolomei recall what prompted the related, eleventh-hour request to instruct the jury on the statutory mitigator of impaired capacity. The record shows that on May 8, 2003, a week before Williams decided to put Agent Duncan on the stand, the defense had not listed Duncan as one of the defense's anticipated mitigation witnesses.
- Trial counsel initially consulted psychologist Susan Parrish to assist in reviewing materials and brainstorming. She did not prepare a report. Bartolomei, who was in charge of this aspect of the case, described Parrish's role as one of coordination and consultation, not diagnosis. Williams, on the other hand, thought that Parrish had diagnosed petitioner as sociopathic but qualified his response by saying that Bartolomei would know better.
- Neuropsychologist Anne Herring conducted a pretrial neuropsychological evaluation of petitioner. She concluded that petitioner displayed mild executive functioning difficulties, specifically in planning and strategy formation, due to a tendency to respond impulsively and quickly. Although Herring believed that petitioner's executive functioning deficits

stemmed from emotional factors, rather than from traumatic brain injury, a brain scan revealed mild abnormalities that might have resulted from abuse, playing football, or fighting. Herring never heard back from defense counsel after preparing her report.

- Dr. Barry Morenz provided trial counsel with a psychiatric evaluation on March 3, 2003 -- less than a month before the start of trial. Dr. Morenz diagnosed petitioner with depressive disorder not otherwise specified, polysubstance abuse in a controlled environment, a provisional diagnosis of cognitive disorder not otherwise specified, antisocial personality disorder, and a history of head injuries. Morenz noted that a PET scan could corroborate the brain abnormalities documented by Herring. Trial counsel never obtained a PET scan. Although Bartolomei recalled personally discussing Morenz's report with him, Morenz stated that he never heard back from trial counsel after submitting his report.
- Trial counsel did not provide Dr. Morenz with information regarding petitioner's alcohol and drug use in the period preceding his offenses. After being informed of petitioner's drug and alcohol use in the months and days before the offenses, as detailed in the declarations obtained by Section 2255 counsel, Dr. Morenz indicated that this additional information could have made a "significant difference" in his diagnosis. The multiple eyewitness accounts indicated to Dr. Morenz that petitioner "might have been heavily under the influence of substances at the time of

the offenses and his perceptions of reality might have been altered," and Dr. Morenz would have been available to testify to this conclusion at trial.

- Section 2255 counsel consulted a psychiatrist, Dr. Pablo Stewart, to evaluate petitioner. Petitioner told Dr. Stewart that he had not slept for the three days prior to October 28, 2001, and that he drank malt liquor and used methamphetamine, ecstasy, and a combination of crack cocaine and marijuana before encountering Slim and Doe. Dr. Stewart diagnosed petitioner with Posttraumatic Stress Disorder, Substance Dependence, and Substance-Induced Psychotic Disorder at the time of the offenses. Dr. Stewart stated that he or a similar mental health professional would have testified that petitioner's severe intoxication and psychiatric disorders altered his cognitive and behavioral functioning, severely impaired his ability to premeditate or intend to commit murder, and made him unable to appreciate the wrongfulness of his actions.
- Petitioner's mitigation witnesses averred that trial counsel's preparation was limited to five-to-ten minute meetings on the morning they were set to testify, during which they were shown photographs of the victims' bodies and asked whether they still supported a sentence of life imprisonment.
- Several experienced death-penalty attorneys, including the defense team's mitigation specialist and a colleague in the same office, filed declarations stating that they had been consulted on petitioner's case prior to trial and

had found the mitigation investigation, as well as trial counsel's understanding of the proper scope of mitigation, to be seriously lacking.

In addition, postconviction counsel obtained new evidence concerning petitioner's federal-tribal collusion claim, which the court of appeals had previously denied as either forfeited or factually unsupported. These tribal court records show that Jason Kinlicheenie pleaded guilty to the trading post robbery in tribal court on November 5, 2001, six days after it occurred; the Navajo Nation pre-sentence report indicates that Kinlicheenie clearly implicated petitioner in the robbery. Yet petitioner pleaded guilty to a different, less serious charge of criminal damage in tribal court on November 7, 2001, three days after petitioner was arrested on a tribal warrant. The tribal court record further indicates that petitioner's sentence was "deferred until sentencing hearing," and that petitioner would be kept in tribal custody "until this judgment has been satisfied." On January 24, 2002, the tribal court granted the Navajo Nation's request for an "Order of Indefinite Continuance" "until such time [as] the Navajo Nation makes arrangements with the United States Attorneys Office for the proper disposition of this case." Finally, in October 2003, five months after petitioner was convicted and sentenced to death, the Navajo Nation requested and was granted closure of the tribal case due to petitioner's federal conviction and "long term federal incarceration."

Postconviction counsel also submitted a declaration from Kathleen Bowman, the longtime Public Defender of the Navajo Nation, who explained the import of the tribal charging decisions in petitioner's case. Bowman determined that petitioner's

tribal custody pending sentencing from November 7 (the date he pleaded guilty to criminal damage in tribal court) to November 29 (the date he was arrested on a federal warrant) violated Navajo law because the criminal damage charge, Navajo Nation Code Ann. tit. 17, § 380.A.1, was not punishable by jail time. Second, Bowman pointed out that the practical effect of pursuing the criminal damage charge instead of a tribal armed robbery charge was to deprive petitioner of an attorney. Bowman stated that, contrary to the court of appeals' understanding of Navajo criminal procedure in the direct appeal, 502 F.3d at 960 n.3, the Navajo Nation provides attorneys for indigent defendants charged with offenses carrying possible jail time: in other words, petitioner would have been appointed counsel for the more serious charge of tribal armed robbery, but not for the less serious criminal damage charge.

The district court denied petitioner's Section 2255 motion in full and concluded that no further evidentiary development, such as a hearing, was required on any of petitioner's twenty-eight claims. App., *infra*, 62a. Pursuant to 28 U.S.C. § 2253(c), the district court issued a certificate of appealability on several claims, including the ineffective assistance claims at issue here. The district court later denied petitioner's motion to alter or amend the judgment. App., *infra*, 123a.

B. Court of Appeals

A divided panel of the court of appeals affirmed the district court's denial of petitioner's Section 2255 motion. The court of appeals rejected petitioner's certified claims of ineffective assistance of counsel at both phases of his trial. The court of appeals concluded that petitioner had not shown that his attorneys had performed

deficiently under *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984),[4] and that counsel made reasonable strategic choices after adequate investigations of intoxication as a guilt-phase defense and petitioner's social history, substance abuse, and mental health as possible mitigation theories. App., *infra*, 10a-26a. The court of appeals did not reach the question of whether petitioner could establish prejudice under *Strickland*, 466 U.S. at 691-96, for either claim. The court of appeals further concluded that petitioner was not entitled to an evidentiary hearing because "[t]he material facts -- that is, what Mitchell's lawyers *did*, what they *didn't* do, and *why* -- are not disputed." App., *infra*, 10a. As relevant here, the court of appeals also declined to grant a certificate of appealability for petitioner's uncertified claim of federal-tribal collusion, which the district court had denied on the ground that it had been raised and rejected on direct appeal. App., *infra*, 26a n.7, 119a, 128a-129a.

The dissent countered that defense counsel performed deficiently in the penalty phase in two independent ways. App., *infra*, 35a. First, defense counsel unreasonably chose to present an anemic "good guy" defense in lieu of substantial mitigating evidence concerning petitioner's abusive childhood, substance abuse issues, and mental health problems. App., *infra*, 35a-44a. Second, defense counsel premised their decision on an unreasonably truncated investigation into these classic areas of mitigation, despite being on notice of promising leads. App., *infra*, 44a-56a. The dissent concluded that there was a reasonable probability that a

[4] The dissent would have denied the guilt-phase claim of ineffective assistance on the ground of prejudice, not deficient performance. App., *infra*, 34a n.11.

properly investigated and presented mitigation case would have convinced at least one juror to reject a death sentence and would have granted penalty-phase relief accordingly. App., *infra*, 56a-59a. The dissent also would have granted relief on petitioner's uncertified claim of federal-tribal collusion. App., *infra*, 33a n.9.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE IN CONFLICT REGARDING THE SHOWING REQUIRED TO OBTAIN A HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF A FEDERAL CAPITAL CASE.

This Court should grant review because the court of appeals' decision conflicts with published opinions of the Eighth and Tenth Circuits on the showing required to warrant an evidentiary hearing under Section 2255(b), and this inconsistent application of the statutory standard is particularly important in cases involving death sentences imposed under the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3599. Here, the court of appeals never recited or purported to apply Section 2255(b)'s requirement that a "prompt hearing" be granted "[u]nless the motion and files and records of the case *conclusively show* that the prisoner is entitled to no relief," 28 U.S.C. § 2255(b) (emphasis added). This is a "low threshold," *United States v. Howard*, 381 F.3d 873, 883 (9th Cir. 2004), and petitioner's burden for establishing entitlement to a hearing is "relatively light," *Smith v. United States*, 348 F.3d 545, 551 (6th Cir. 2003). The court of appeals held petitioner to an inappropriately high standard to obtain a hearing on his claim of penalty-phase ineffective assistance, putting it in conflict with the Eighth and Tenth Circuits.

The Eighth and Tenth Circuits have ordered evidentiary hearings in federal death penalty cases where, as here, trial counsel elected to present a "good guy" defense at the penalty phase, to the exclusion of available mitigating evidence regarding a troubled background, substance abuse, or mental health problems. In doing so, these courts did not consider whether the Section 2255 movant could necessarily or even probably establish deficient performance and prejudice. Rather, these courts considered only whether the record "affirmatively refute[d]" the ineffective assistance claim, *Sinisterra v. United States*, 600 F.3d 900, 907 (8th Cir. 2010), whether the claim was substantive enough to "merit[] further review," *id.*, and whether the movant "*may* be entitled to relief" on his claims. *United States v. Barrett*, 797 F.3d 1207, 1211 (10th Cir. 2015) (emphasis added). The uneven application of Section 2255(b)'s standard in federal capital cases conflicts with this Court's "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

In *Sinisterra*, the Eighth Circuit remanded for an evidentiary hearing on a record that is strikingly similar to the record in this case. 600 F.3d at 903. As in *Sinisterra*, petitioner was represented by attorneys who split responsibility for the guilt and penalty phases of trial and were not always on the same page. *Id.* at 903-07. As in *Sinisterra*, the roles of defense attorney, fact investigator, and mitigation investigator were not clearly defined. *Id.* at 904. As in *Sinisterra*, counsel arranged for a pretrial neuropsychological evaluation but did not pursue mental health issues despite receiving a report indicative of possible brain damage,

poor judgment, and increased impulsivity. *Id.* at 905. As in *Sinisterra*, defense counsel decided early on to portray the defendant as "a good worker and a good person," and therefore did not delve into issues of abuse, family discord, or mental health issues. *Id.* at 904-07. Approximately ten mitigation witnesses, mostly friends and family members speaking in support of the "good guy" theme, testified at both Sinisterra's and petitioner's respective penalty phases, with additional family testimony recorded on videotape. *Id.* at 904. The Eighth Circuit held that this record did "not conclusively show that Sinisterra's attorneys acted within the range of competence demanded of attorneys in criminal cases," and it remanded for a hearing on deficient performance and prejudice accordingly. *Id.* at 907-08.

Likewise, in *Barrett*, the Tenth Circuit remanded for an evidentiary hearing on ineffective assistance at the penalty phase of a federal capital trial. 797 F.3d at 1224. As in petitioner's case and *Sinisterra*, defense counsel presented about a dozen family members, friends, and acquaintances to testify that the defendant was "a loved family member and good person," as well as a "well-behaved prisoner," "good mechanic and a nonviolent person." *Id.* None of the mitigation witnesses "discussed Defendant's mental health or troubled background in any significant detail," and the "good guy" defense "apparently helped to some extent" because some jurors found some mitigating factors to be true. *Id.* Nevertheless, the Tenth Circuit concluded that the record sufficiently supported Barrett's claims of inadequate investigation of mental health evidence and social history mitigation to warrant a hearing even if the "good guy" theory was otherwise reasonable and

effective: "[A]n uninformed choice is not a reasonable tactical decision . . . . Defendant's trial attorneys had an obligation to investigate carefully before setting out on a course of action, and there is evidence that they did not do so." *Id.* at 1229. Petitioner has proffered an equivalent amount of evidence of deficient performance and prejudice, and he is equally entitled to prove his claims at a hearing.

This emphasis on district court fact development underlies this Court's holding in *Massaro v. United States*, 538 U.S. 500 (2003), that an ineffective assistance claim may always be brought in Section 2255 proceedings even if not previously raised on direct appeal. *Id.* at 509. The *Massaro* Court explained that "ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Id.* at 505. This Court envisioned a Section 2255 hearing in which the district court "may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance." *Id.* And it endorsed a Section 2255 proceeding in which the defendant "'has a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created.'" *Id.* at 506 (quoting *United States v. Griffin*, 699 F.2d 1102, 1109 (11th Cir. 1983)). Here, the court of appeals credited counsel's claims of strategy, even though these claims conflicted with the trial record as to

which defenses were actually presented at the guilt and penalty phases. Deciding ineffective assistance claims purely on the basis of counsel's deposition testimony was not what this Court intended when it encouraged such claims to be brought in Section 2255 proceedings in district court.

Indeed, this Court has held that Section 2255(b) requires an evidentiary hearing even in cases where the record appears to controvert the petitioner's allegations. In *Fontaine v. United States*, 411 U.S. 213 (1973) (per curiam), the Section 2255 movant alleged that his guilty plea was involuntary and set forth detailed factual allegations of physical abuse, hospitalization, and prolonged interrogation. *Id.* at 214-15. This Court held that an evidentiary hearing was required, even though the movant had previously represented in open court that his guilty plea was voluntary. *Id.* This Court reasoned that the "conclusively show" standard in Section 2255(b) requires an "assurance . . . that under no circumstances could the petitioner establish facts warranting relief under § 2255." *Id.* at 215. Similarly, in *Machibroda v. United States*, 368 U.S. 487 (1962), the Section 2255 movant alleged that the prosecutor had secretly promised him a sentence of no more than twenty years if he pleaded guilty, and that the movant had written to the sentencing court and the Attorney General of the United States about the prosecutor's promises and threats. *Id.* at 489. The district judge denied the claim without a hearing, noting that it had not received the letters referred to in the motion, and that the movant had not availed himself of prior opportunities to complain about the sentence. *Id.* at 493. Even though it found the allegations

"improbable," this Court concluded that a hearing was required under Section 2255 because the assertions were not "incredible" and "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." *Id.* at 494-96.

The lower courts' inconsistent application of Section 2255(b)'s standard for an evidentiary hearing is not limited to capital cases. *Compare Thomas v. United States*, 737 F.3d 1202, 1206 (8th Cir. 2013) ("Evidentiary hearings on 28 U.S.C. § 2255 motions are preferred, and the general rule is that a hearing is necessary prior to the motion's disposition if a factual dispute exists."), *with DeCologero v. United States*, 802 F.3d 155, 167 (1st Cir. 2015) ("Despite [Section 2255(b)'s] seemingly petitioner-friendly standard, we have stated that '[e]videntiary hearings on § 2255 petitions are the exception, not the norm[.]'"). But the problem takes on acute importance when the sentence a Section 2255 movant seeks to vacate is a sentence of death. "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Where, as here, petitioner has satisfied Section 2255(b)'s hearing standard by presenting detailed allegations that would entitle him to relief, and a similar showing has merited full factual development in other cases in other circuits, denial of a hearing renders the process too arbitrary to comport with the Constitution.

II. THE COURT OF APPEALS' CLEAR MISAPPREHENSION OF THE STANDARD FOR SECTION 2255 HEARINGS, IN ITSELF, JUSTIFIES THIS COURT'S REVIEW.

"When the district court denies § 2255 relief without an evidentiary hearing, the nature of the court's ruling is akin to a ruling on a motion for summary judgment." *United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007); *see also United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980) (where affidavits have been submitted, Section 2255(b) standard for a hearing is "essentially . . . whether summary judgment for the government is proper"). It is axiomatic that "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam). Rather, in the summary judgment context, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In other words, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Likewise, when a district court has denied a Section 2255 motion without a hearing, the court of appeals should "review the facts in the light most favorable to the § 2255 movant." *Poindexter*, 492 F.3d at 267. Here, in numerous respects, the court of appeals did not view the facts in the light most favorable to petitioner or draw inferences in his favor, and it tacitly resolved genuine issues of material fact and made credibility determinations throughout its decision. This clear violation of Section 2255(b)'s standard, as it incorporates the summary judgment standard, warrants this Court's intervention. *See Tolan*, 134 S.

Ct. at 1868 (granting certiorari, vacating judgment, and summarily remanding in light of court of appeals' "clear misapprehension of summary judgment standards").

The court of appeals dismissed the need for an evidentiary hearing because it concluded that the material facts, including petitioner's attorneys' reasons for acting as they did, were not in dispute. App., *infra*, 10a. Although whether petitioner's lawyers retained certain experts or interviewed certain witnesses is largely undisputed, significant questions exist regarding the handling and preparation of those experts and witnesses. And the overarching questions of whether petitioner's lawyers pursued or abandoned particular theories of the case, and why, were in fact hotly disputed. In particular, petitioner argued that, in many instances, one attorney's claim of a strategic decision was belied either by the record or the testimony of another attorney. It is only by crediting select portions of the depositions of petitioner's three defense attorneys, even when they contradicted each other or the record of trial proceedings, that the court of appeals elided the factual disputes that necessitate a hearing. *See Pham v. United States*, 317 F.3d 178, 184 (2d Cir. 2003) (in vacating and remanding summary denial of Section 2255 motion, holding that "the district court abused its discretion in its selective consideration of the record and its failure even to draw upon existing parts of the record to support its conclusions"); *id.* at 185 (Sotomayor, J., concurring) (same).

From start to finish, the court of appeals viewed the facts in the light least favorable to petitioner and selectively drew from the record to conclude that trial counsel did not perform deficiently. Contrary to the panel majority's positive

portrayal of defense counsel's experience (App., *infra*, 10a-11a), petitioner established that none had ever tried a federal capital case before a jury, and that Bartolomei, the attorney who bore primary responsibility for the penalty phase, had no capital litigation experience. The overall experience of the Arizona Federal Public Defender's Office in Indian reservation cases, which the court of appeals used to bolster its account of trial counsel's experience, is irrelevant because the death-eligible charge was carjacking resulting in death, for which it "does not matter that the crime occurred in Indian country[.]" App., *infra*, 5a, 11a.

The court of appeals also minimized the extent of intoxication evidence in the record. Although the court of appeals made passing reference to petitioner's "statements to FBI agents about his *substance abuse*" (App., *infra*, 11a, emphasis added), the fact is that petitioner gave four statements, over the course of twenty-five days, about his *intoxication* on the date of the offenses. In two of these statements, petitioner specifically stated that he was extremely intoxicated, to the point of blackouts and memory loss, at the time of the murders. Under prevailing professional norms, petitioner's later denials of intoxication were not a sufficient reason to forego further investigation. Rather, the American Bar Association standards in effect at the time of petitioner's trial indicate that counsel's "duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt[.]" *ABA Standards for Criminal Justice: Prosecution and Defense Function* 4-4.1 (3d ed. 1993); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005). In death-penalty cases, the duty is even more explicit: "The investigation

regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented." *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.7(A)(1) (rev. ed. Feb. 2003) ("2003 *ABA Death Penalty Guidelines*"). Petitioner's attorneys did not meet this standard.

The cursory intoxication investigation that counsel conducted did not satisfy prevailing professional norms. The court of appeals made much of the fact that defense counsel looked at crime-scene photographs and visited the site where the bodies were discovered. App., *infra*, 11a. But when faced with a crime scene that stretched from New Mexico to Arizona, counsel could not have reasonably thought this investigation sufficient. Further, at the time of petitioner's trial, prevailing professional norms demanded "[t]he assistance of an investigator who has received specialized training." 2003 *ABA Death Penalty Guidelines*, cmt. to Guideline 4.1. The ABA standards are "valuable measures of the prevailing professional norms of effective representation[.]" *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). The 2003 *ABA Death Penalty Guidelines* indicate that, at the time of petitioner's trial, "the prevailing national standard of practice forb[ade] counsel from shouldering primary responsibility for the investigation" because "[c]ounsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case." 2003 *ABA Death Penalty Guidelines*, cmt. to Guideline 4.1. Yet the defense team's

nominal fact investigator, Karl Brandenberger, played virtually no substantive role in this or any other facet of the guilt-phase investigation.

The court of appeals erroneously concluded that petitioner's attorneys reasonably abandoned a guilt-phase intoxication defense at an early stage because it lacked evidentiary support. App., *infra*, 12a. This conclusion was presumably based on the deposition of attorney Williams, who testified that he thought an intoxication defense "wasn't even close." But, crucially, Williams also testified that he did not select the guilt-phase strategy; Sears did. And Sears testified that he abandoned an intoxication defense after petitioner denied being intoxicated -- a fact not mentioned in the majority opinion. But in the face of "glaring inconsistencies" in a defendant's statements, it is "unreasonable" for defense counsel to "rely on any one of [those] statements in isolation when making tactical decisions about investigating the crime." *Duncan v. Ornoski,* 528 F.3d 1222, 1239 (9th Cir. 2008). Although the court of appeals suggested that petitioner's attorneys based their decision to forego an intoxication defense in part on "the strong circumstantial evidence to the contrary," App., *infra*, 12a, none of the attorneys actually cited any such reason as a factor in their decision-making. This supposedly strategic decision thus "resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations . . . ." *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003).

Further, Sears also testified that the defense team affirmatively decided not to present "anything related to intoxication" in the guilt phase because it would

undermine the "good person led astray" defense -- another fact not mentioned in the court of appeals' opinion. But the trial record shows that petitioner's attorneys never actually abandoned the intoxication defense; in fact, Williams requested a jury instruction on intoxication once trial was well underway, and Sears attempted to elicit evidence of drinking from the case agent to support that request. Yet the court of appeals found no tension between these actions and counsel's claims of a strategic decision to avoid a counterproductive intoxication defense altogether. App., *infra*, 12a & n.3. In light of these inexplicable contradictions, petitioner's allegation of ineffective assistance of counsel is not "so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989). Rather, these disputed material facts on key points -- whether petitioner's attorneys made a concerted decision to jettison the intoxication defense, when, and why -- necessitate an evidentiary hearing.

As with its treatment of petitioner's guilt-phase claim, the court of appeals overlooked significant factual disputes that preclude summary disposition of his penalty-phase claim. These disputes reflect a stark conflict as to which mitigation theories defense counsel actually prepared and presented to the jury and the reasons for abandoning those theories that were not presented. For instance, the court of appeals concluded that defense counsel reasonably decided, after constitutionally adequate investigation, to avoid a substance abuse mitigation defense for fear of alienating the jury. App., *infra*, 17a-18a. In support of this finding, the court of appeals cited Sears's deposition testimony stating that the juror

questionnaires revealed that the jury would be unsympathetic to "excuses," such as mental problems or substance abuse. App., *infra*, 17a-18a. The actual juror questionnaires for the seated jurors and alternates tell a different story, however. The questionnaires did not ask about jurors' view of mental illness or of "excuses" for criminal behavior more generally. And while the questionnaires did ask about prospective jurors' experience with substance abuse, none of the prospective jurors indicated any hostility toward the subject, and several prospective jurors expressed sympathy for, or an understanding of, addicts. In any event, while the questionnaire and voir dire responses may have conceivably justified a last-minute decision to forego *presenting* a substance-abuse mitigation defense, they could not justify the decision to stop *investigating* such a defense, which occurred much earlier. The utter absence of anti-"excuses" sentiment in the record reveals this so-called strategic reason to be another "post hoc rationalization of counsel's conduct." *Wiggins*, 539 U.S. at 526-27.

The court of appeals also silently resolved a fundamental factual dispute as to which mitigation theories defense counsel actually presented. The court of appeals concluded that defense counsel assiduously avoided presenting evidence of alcohol and drug abuse at the penalty phase, because such evidence would be viewed as a "poor excuse" for the crimes and would undermine "the more positive picture they wanted to paint." App., *infra*, 17a. But, as the dissent correctly notes, this supposed strategic decision did not stop defense counsel from eliciting evidence of petitioner's heavy drinking at the penalty phase, obtaining a jury instruction on

the statutory mitigating factor of impaired capacity, and arguing in closing that petitioner was drunk to the point of blacking out during the offenses. App., *infra*, 47a-48a. While petitioner submits the record shows that the court of appeals' resolution of this disputed factual issue was clearly erroneous, at a minimum, the direct conflict between what his attorneys did and what his attorneys later said they did merits a hearing to reconstruct and assess defense counsel's performance, without the "distorting effects of hindsight," *Strickland*, 466 U.S. at 689.

The court of appeals' erroneous conclusion that defense counsel made a conscious strategic decision to use the Navajo Nation's opposition to capital punishment as a primary mitigation theme exemplifies its skewed interpretation of the record. App, *infra*, 22a. The defense never sought a jury instruction on the Navajo Nation's stance, and the seven jurors who found it mitigating had to write it in. Moreover, the Navajo Nation letter was not the product of defense counsel's investigative efforts; it was turned over by the prosecution as potential *Brady* material on the day before the penalty phase began. The defense attorneys had erroneously assumed that the Navajo Nation did not oppose the imposition of the death penalty in petitioner's case and therefore did not pursue the issue. With respect to the Navajo Nation's position on the death penalty, as in so many other areas of mitigation, petitioner's attorneys unreasonably curtailed investigation by prematurely deciding that a particular route would be unproductive.

A major factual dispute also centers on whether defense counsel fully appreciated the scope of potential mitigation in a death penalty case. The court of

appeals relied on the social history report prepared by mitigation specialist Ockenfels to support its view of counsel's adequate investigation of social history and substance abuse theories. App., *infra*, 13a-14a, 22a. But Ockenfels herself believed that petitioner's attorneys had a mistakenly cramped conception of mitigation. Ockenfels stated that the attorneys, to her surprise, "treated mitigation as distinctly separate from the guilt phase, rather than an integral part of both the guilt and penalty phases of the trial." Ockenfels also reported that Bartolomei informed her that the defense team had rejected a substance abuse or intoxication mitigation theory in light of petitioner's denial of intoxication, which reflected a fundamental failure to comprehend that a history of substance abuse constituted an "important mitigating factor" in its own right. *See Frierson v. Woodford*, 463 F.3d 982, 994 & n.12 (9th Cir. 2006). The fact that defense counsel disregarded Ockenfels's recommendations to consult a psychopharmacologist or forensic psychologist to develop or present the mitigation leads that she had uncovered also undercuts the court of appeals' heavy reliance on her report.

The court of appeals' treatment of Dr. Barry Morenz's psychiatric report also tacitly resolves disputed issues of material fact. According to the court of appeals, "Dr. Morenz did not recommend further testing" of the deficits in executive functioning, impulsiveness, and poor planning revealed by neuropsychological testing and the court questioned whether "there is any further testing that could have been done." App., *infra*, 16a. But as noted by the dissent, Morenz actually advised that a PET scan could corroborate the frontal lobe abnormalities found by

the neuropsychologist, Anne Herring. App., *infra*, 53a-54a. And the court of appeals' finding that defense counsel discussed the psychiatric report with Morenz rests on selective consideration of the record (App., *infra*, 16a): Bartolomei vaguely recalled discussing the report with Morenz, but Morenz unequivocally stated that none of petitioner's attorneys ever contacted him after he submitted his report.

As the dissent points out, the court of appeals' reliance on the purported evaluation of psychologist Susan Parrish is misplaced. App., *infra*, 53a n.21. To support its conclusion that defense counsel adequately investigated petitioner's mental health, the court of appeals repeatedly asserts that Dr. Parrish diagnosed petitioner as a sociopath. App., *infra*, 7a, 14a, 23a. Again, this tacit finding is presumably based on the deposition testimony of Williams, who thought that Parrish had made this diagnosis. But Williams took care to qualify his discussion of Parrish with advisements that "Greg [Bartolomei] could probably tell you better" about Parrish's role because Bartolomei, and not Williams, had handled the penalty phase. Bartolomei, for his part, described Parrish's role as one of consultation and coordination, not diagnosis, and he did not think that Parrish ever made a DSM-IV assessment of petitioner. And there is no evidence that Dr. Parrish conducted "extensive testing." App., *infra*, 23a. The most Bartolomei could say is that he thought Parrish met with petitioner. By omitting the contrary evidence in the record, the court of appeals not only failed to view the facts in the light most favorable to petitioner, it effectively weighed disputed evidence and made impermissible credibility determinations.

In short, the record is replete with evidence that rebuts the court of appeals' rosy portrayal of defense counsel's performance in the penalty phase. Jail records, not mentioned by the panel majority, indicate that counsel did not spend "countless hours . . . with Mitchell." App, *infra*, 22a Rather, on the record before the court, the three defense attorneys together spent about 48 hours visiting petitioner in the sixteen months before trial, or an average of one hour per attorney per month. The court of appeals cited the defense attorneys' consultation of attorneys specializing in death penalty defense as further proof of their exhaustive efforts. App., *infra*, 22a. But the court of appeals did not mention that those experienced death penalty attorneys, including a colleague in the Arizona Federal Public Defender's Office, filed declarations in the Section 2255 proceedings stating that they contemporaneously viewed the mitigation investigation as inadequate -- powerful evidence that counsels' efforts did not measure up to "the prevailing professional practice at the time of the trial," *Bobby v. Van Hook*, 558 U.S. 4, 17 (2009).

In *Tolan*, a civil case, this Court summarily reversed the Fifth Circuit for "failing to credit evidence that contradicted some of its key factual conclusions," and thereby improperly weighing the evidence and resolving disputed issues in favor of the moving party. 134 S. Ct. at 1866. In four instances, this Court pointed out, the Fifth Circuit failed to view the evidence in the light most favorable to the nonmoving party and neglected to draw reasonable inferences in favor of that party. *Id.* at 1866-68. In this capital case, the court of appeal's selective consideration of the record and silent resolution of material factual disputes was even more

egregious. Just as this Court intervened in *Tolan* to enforce adherence to summary judgment standards in a case involving monetary damages, *id.* at 1868, it should grant review here, where the stakes are loss of liberty or even life, to ensure compliance with Section 2255(b)'s standards for an evidentiary hearing.

III. THIS COURT SHOULD GRANT A CERTIFICATE OF APPEALABILITY ON PETITIONER'S CLAIM OF FEDERAL-TRIBAL COLLUSION TO CLARIFY AN IMPORTANT QUESTION REGARDING THE PERMISSIBILITY OF WORKING ARRANGEMENTS BETWEEN FEDERAL AND OTHER AUTHORITIES.

This Court should grant a certificate of appealability because reasonable jurists could debate whether the district court erred in declining to reconsider the collusion issue on the merits simply because it had been raised and rejected on direct appeal. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In *Kaufman v. United States*, 394 U.S. 217 (1969), *overruled on other grounds by Stone v. Powell*, 428 U.S. 465 (1976), this Court reasoned that federal prisoners should be able to relitigate claims on Section 2255 review if "new law has been made or facts uncovered relating to the constitutional claim since the trial and appeal." *Id.* at 230 (internal quotation marks and citation omitted). The district court erred by disregarding this well-established exception to the relitigation bar for issues raised and rejected on direct appeal. Reasonable jurists could also debate whether the new facts on collusion, which include documentary proof of the Navajo Nation "mak[ing] arrangements with the United States Attorneys Office for the proper disposition" of petitioner's tribal case, mandate relief or an evidentiary hearing.

Although the prompt presentment requirement generally does not arise until a person is arrested for a federal offense, *United States v. Alvarez-Sanchez*, 511

U.S. 350, 358-59 (1994), "[t]he relevant delay may . . . be calculated from the time of arrest by state or local authorities on state charges 'if state or local authorities, acting in collusion with federal officers, were to arrest and detain someone in order to allow the federal agents to interrogate [him] in violation of [his] right to a prompt federal presentment.'" *United States v. Michaud*, 268 F.3d 728, 734 (9th Cir. 2001) (quoting *Alvarez-Sanchez*, 511 U.S. at 359). In *Anderson v. United States*, 318 U.S. 350 (1943), this Court held that confessions obtained during state pretrial detention were inadmissible as the product of "a working arrangement between the federal officers" and local law enforcement "which made possible the abuses" of repeated interrogation in custodial secrecy, even though "the federal officers themselves were not formally guilty of illegal conduct," and the federal arraignments occurred promptly after the federal arrests. *Id.* at 356.

The previously undiscovered information concerning petitioner's tribal court proceedings supplants the erroneous factual and legal assumptions underlying the court of appeals' decision on direct appeal. In view of the fact that Kinlicheenie implicated petitioner in the trading post robbery on November 4, and pleaded guilty to the tribal robbery charge on November 5, petitioner's delayed federal arrest provides strong evidence of collusion. Here, the federal indictment was not obtained until November 21, sixteen days after Kinlicheenie pleaded guilty to the robbery in tribal court. Even after the federal arrest warrant was issued on November 23, federal authorities let petitioner languish in tribal custody -- custody that was illegal under tribal law -- for six more days before arresting him. That "federal

agents would be free to question suspects for extended periods before bringing them out in the open" was the very scenario the prompt presentment requirement was designed to prevent. *Corley v. United States*, 556 U.S. 303, 320 (2009).

Further, the fact that a sentencing hearing on petitioner's minor criminal damage charge was never even scheduled and was instead indefinitely continued "until such time the Navajo Nation makes arrangements with the United States Attorneys Office for the proper disposition of this case" speaks to the deep involvement of federal authorities in tribal authorities' decision to pursue tribal charges against petitioner. In determining whether collusion existed, "it is important whether or not state officials will proceed with further action on the state charge independent of the outcome of the federal investigation." *Barnett v. United States*, 384 F.2d 848, 858 (5th Cir. 1967). Here, tribal authorities explicitly treated the tribal charge as subsidiary to and dependent on petitioner's federal prosecution, only dismissing the charge in light of petitioner's federal conviction and incarceration. This collaboration goes far beyond the "routine cooperation" between local and federal authorities in *Alvarez-Sanchez*, where local authorities executing a warrant to search for drugs simply alerted the Secret Service of counterfeit Federal Reserve notes discovered during the search. 511 U.S. at 352, 360. Instead, it represents the sort of "working arrangement" found impermissible in *Anderson*.

In addition, the record unequivocally shows that an assistant United States attorney participated in the pre-arrest briefing by conference call and recommended tribal arrests, in a message relayed by the FBI agents to the Navajo criminal

investigators at the briefing. *Cf. United States v. Jackson*, 448 F.2d 539, 545 (5th Cir. 1971) (state detention did not count for purposes of Federal Rule of Criminal Procedure 5(a) and *McNabb-Mallory* rule[5] because defendant's arrest on vagrancy charges was "without inducement or request by the federal authorities"); *United States v. Coppola*, 281 F.2d 340, 343 (2d Cir. 1960) (en banc) (no collusion where state arrests "were exclusively planned and executed by the Buffalo police without any suggestion or participation by the F.B.I."). Federal and tribal authorities also shared significant amounts of information and worked together almost every step of the way, at least until the FBI took over and began interviewing petitioner without Navajo law enforcement being present. *Cf. Michaud*, 268 F.3d at 735 (no evidence of actual collusion where "the exchange of information between federal and state investigators was sparse"). In the course of ruling on Orsinger's collusion motion, the district court credited FBI agents' testimony that they did not intend to deprive the defendants of their federal procedural rights, but that finding does not resolve the question of a higher-level working arrangement between federal and tribal prosecutors. By arranging petitioner's arrest on a tribal warrant for criminal damage, rather than on a tribal or federal warrant for robbery, federal and tribal authorities ensured that petitioner, who was indigent, would not be appointed counsel in either court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

JONATHAN C. AMINOFF
Deputy Federal Public Defender

DATED: March 24, 2016

By: Gia Kim
GIA KIM*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEZMOND C. MITCHELL, *Petitioner-Appellant,* v. UNITED STATES OF AMERICA, *Respondent-Appellee.*	No. 11-99003 D.C. No. 3:09-cv-08089-MHM OPINION

Appeal from the United States District Court
for the District of Arizona
Mary H. Murguia, Circuit Judge, Presiding*

Argued and Submitted February 20, 2014
Submission Vacated February 27, 2014
Resubmitted April 21, 2015
Pasadena, California

Filed June 19, 2015

Before: Stephen Reinhardt, Barry G. Silverman,
and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Silverman;
Partial Dissent by Judge Reinhardt

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* The Honorable Mary H. Murguia, then a district court judge, was the original trial judge in 2003 and presided over the 28 U.S.C. § 2255 proceedings that concluded in 2010. She was appointed to the United States Court of Appeals for the Ninth Circuit in 2011.

SUMMARY**

Habeas Corpus/Death Penalty

The panel affirmed the district court's denial of federal prisoner Lezmond Mitchell's 28 U.S.C. § 2255 motion challenging his convictions under the Major Crimes Act for multiple offenses committed on the Navajo reservation including two counts of first-degree murder and multiple counts of robbery, and his conviction and death sentence under the Federal Death Penalty Act of 1994 for carjacking resulting in death.

The § 2255 motion claimed that counsel was ineffective (1) at the guilt phase of the trial in failing to assert an intoxication defense, and (2) at the penalty phase for inadequately investigating, and for choosing not to present evidence of, Mitchell's mental health, history of substance abuse, and troubled upbringing.

The panel agreed with the district court that counsel did not fall below professional standards in either their investigation of a possible intoxication defense or their decision to pursue a different defense strategy of trying to portray Mitchell's accomplice as the main malefactor.

With respect to the penalty phase of the case, the panel also agreed with the district court that Mitchell's legal team

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

made a more-than-adequate investigation of possible mitigation, including his mental health and social history.

Dissenting in part, Judge Reinhardt would grant relief with respect to the penalty phase because Mitchell was deprived of his Sixth Amendment right to effective counsel. He wrote that counsel's "good guy" defense was unreasonable in light of the facts and circumstances of the crimes Mitchell committed, and also because the minimal investigation underlying counsel's choice of strategy was constitutionally deficient.

COUNSEL

Jonathan Aminoff and Gia Kim (argued), Deputy Federal Public Defenders, Los Angeles, California for Petitioner-Appellant.

John S. Leonardo, United States Attorney, Christina Cabanillas, Appellate Chief, and Vincent Q. Kirby (argued), Assistant United States Attorney, Phoenix, Arizona for Respondent-Appellee.

OPINION

SILVERMAN, Circuit Judge:

Defendant Lezmond Mitchell, then 20 years old, plotted with three others to carjack a vehicle for use in an armed robbery of a trading post located on the Navajo reservation in Arizona. On October 28, 2001, Mitchell and his 16-year-old accomplice, Johnny Orsinger, abducted 63-year-old Alyce

Slim and her nine-year old granddaughter. Slim and the child were traveling to New Mexico in Slim's GMC pickup truck. Somewhere near Sawmill, Arizona, Mitchell and Orsinger killed Slim by stabbing her 33 times. Her dead body was pulled into the rear of the truck, where the child was made to sit beside it. Mitchell then drove the truck into the nearby mountains.

Thirty or forty miles later, Slim's body was dragged out of the truck. Mitchell told the little girl to get out and "lay down and die." Mitchell then cut her throat twice. When she did not die, Mitchell and Orsinger each dropped large rocks on her head. Twenty-pound rocks bearing the child's blood were later found at the scene.

Mitchell and Orsinger left the murder scene, but later returned to hide evidence. While Mitchell dug a hole in the ground, Orsinger severed the heads and hands of both victims in an effort to prevent their identification. The dismembered parts were buried in the hole; the torsos were pulled into the woods. Mitchell and Orsinger later burned the victims' clothing and other personal effects. Mitchell washed the knives with alcohol to remove any blood.

Three days later, on October 31, 2001, Mitchell and two accomplices (Jason Kinlicheenie and Jakegory Nakai) drove to the Red Rock Trading Post in the GMC pickup truck stolen from Slim. The three men wore masks when they entered the store. Mitchell carried a 12-gauge shotgun. Nakai had a .22 caliber rifle. One of the gunmen struck the store manager in the head with his gun. When another employee said that she did not know the combination to the safe, one of the robbers said, "If you lie to me or you don't cooperate with us, we are going to kill you." Ultimately, the robbers made off with

$5,530 from the safe and cash registers, and the store manager's purse.

The robbers drove the stolen GMC pickup truck back to Kinlicheenie's car. Kinlicheenie followed Mitchell in the truck to an area near Wheatfield, Arizona, where Mitchell set the truck on fire with kerosene stolen from the trading post. They then went to Jakegory and Gregory Nakai's house and split up the money.

Mitchell was convicted in federal court of eleven counts in all, including two counts of first-degree murder, carjacking resulting in death, and multiple counts of robbery. The two murders were not punishable by death because they were committed on the Navajo reservation. Federal jurisdiction over those counts is based on the Major Crimes Act, 18 U.S.C. § 1153, and the Navajo Nation did not "opt in" to the death penalty under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591. However, federal jurisdiction over carjacking resulting in death does not derive from the Major Crimes Act; the federal nexus is interstate commerce. It does not matter that the crime occurred in Indian country, and therefore, the opt-in provision of the Federal Death Penalty Act does not apply. In other words, carjacking resulting in death carries the death penalty regardless of where it was committed. *See* William C. Canby, Jr., *American Indian Law in a Nutshell* 185–87 (6th ed. 2015).

Mitchell was sentenced to life imprisonment for the two murder counts, long consecutive prison sentences for the robbery and related counts, and death for carjacking resulting in death. His convictions and sentences were upheld on direct appeal. *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007). The United States Supreme Court denied a

petition for a writ of certiorari. *Mitchell v. United States*, 553 U.S. 1094 (2008).

Which brings us to the subject of this appeal. After exhausting his direct appeal, Mitchell brought a motion under 28 U.S.C. § 2255 alleging that his team of defense lawyers rendered ineffective assistance of counsel. The team was made up of two veteran deputy federal public defenders and a private lawyer highly experienced in capital cases appointed as "learned counsel." The § 2255 motion raised various issues, but it boiled down to these claims: (1) Counsel was ineffective in failing to assert an intoxication defense at the guilt phase of the trial; and (2) Counsel was ineffective at the penalty phase for inadequately investigating, and for choosing not to present evidence of, Mitchell's mental health, history of substance abuse, and troubled upbringing. The trial court denied the motion in a lengthy and thorough written order.

We agree with the district court that counsel did not fall below professional standards in either their investigation of a possible intoxication defense or their decision to pursue a different defense strategy. They did indeed investigate whether Mitchell was intoxicated at the time of the offenses. Mitchell adamantly denied to them that he was. Even so, they looked for evidence to contradict their client, such as liquor bottles left at the crime scene, but they couldn't find any. The only other living witness to the murders of Slim and her granddaughter was Johnny Orsinger, and he wasn't talking; he was under indictment himself and invoked his privilege against self-incrimination. Even assuming for the sake of argument that there was some evidence of alcohol involvement, the planning and premeditation of the vehicle theft as preparation for the pre-planned trading post robbery are inconsistent with a claim that Mitchell was too drunk to

know what he was doing. And after Mitchell was apprehended, he led authorities to the desolate crime scene, further evidence that he was not so intoxicated that he could not accurately recall events or appreciate where he was and what he was doing.

We agree with the district court that counsel conducted an adequate investigation and then made a reasonable strategic decision that it would be self-defeating to try to sell a jury on an intoxication defense on these facts, and that, instead, they would be better off trying to portray Orsinger as the main malefactor. Strategic decisions such as these are entitled to deference and do not support a claim of ineffective assistance.

With respect to the penalty phase of the case, we also agree with the district court that Mitchell's legal team made a more-than-adequate investigation of possible mitigation, including his mental health and social history. Early in the case, defense counsel had Mitchell examined by a psychologist, Susan Parrish, Ph.D. Dr. Parrish diagnosed Mitchell with antisocial personality disorder and cautioned counsel against calling her as a witness. Mitchell's lawyers also had him examined by a team of doctors led by psychiatrist Barry Morenz, M.D., at the University of Arizona medical school Mitchell also was examined by neuropsychologist Anne Henning, Ph.D., and by neurologist Ronnie Bergen, M.D. Mitchell underwent brain imaging read by James Guay, M.D. and an EEG read by Colin Bamford, M.D. He also had lab work done. Dr. Morenz then produced a 19-page, single-spaced report, in which he diagnosed Mitchell with, among other things, depressive disorder, cognitive disorder, polysubstance abuse, history of head injuries, and antisocial personality disorder. He also noted a "mild deficit" in executive functioning likely due to

emotional factors, not brain trauma. No further testing or consultation was suggested.

Mitchell's lawyers also hired an experienced "mitigation specialist," Vera Ockenfels, who produced a 42-page, single-spaced "social history" of Mitchell's life. The report is thorough in the extreme, containing sections with titles like "Conception, Pregnancy and Birth," and recounts not only Mitchell's life story and social history, but that of his parents and grandparents as well.

Only after reviewing all of this data, making numerous trips to the reservation, conducting many interviews themselves, and visiting with Mitchell himself, did defense counsel choose their mitigation strategy: Forego presenting evidence of Mitchell's drug use, mental health, and physical abuse and instead make the case that Mitchell had redeeming qualities that made his life worth saving, notwithstanding a rough start in life. Counsel presented evidence that Mitchell was unloved and rejected by his mother, struggled with his mixed Navajo and Anglo heritage, and felt caught between two different cultures. Despite these obstacles, Mitchell showed highly positive qualities. He was a good student, a speaker at his high school graduation, and a good athlete, liked by his teachers, and loved by others. In all, the defense presented nine witnesses in the penalty phase of the trial.

The defense also presented evidence that Mitchell had never before been convicted of a crime, that this offense was an aberrant act for him, and that Orsinger was the instigator and actual killer. Defense counsel also showed that the death penalty for Mitchell would create a terrible sentencing disparity. Besides this crime, Orsinger and Gregory Nakai had killed two other individuals during an earlier carjacking.

Orsinger had pistol whipped the victims and shot one victim in the head. Nakai had shot the other victim five times. Yet, neither Nakai nor Orsinger, who was a juvenile, would face the death penalty.

In addition, counsel presented evidence that the death penalty offends Navajo values, and the Navajo Nation did not want the United States Attorney to seek the death penalty in this case.

Mitchell's lawyers had to walk a very careful line to avoid opening the door to highly damaging evidence contained in the medical report, such as Mitchell's diagnosis as a sociopath, his history of swinging dogs and cats by their tails and then throwing them off of bridges just for fun, and his having told Dr. Morenz that he and his accomplice had to kill the little girl to avoid being caught.

We agree with the district court that Mitchell's defense team conducted a professional-caliber investigation and then, facing unenviable choices, made a reasonable strategic decision to defend the penalty phase of the trial the way it did. Strategic decisions such as this do not support a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *Mickey v. Ayers*, 606 F.3d 1223, 1238–39 (9th Cir. 2010).

We affirm.

I. *The Record.*

The facts of the crimes are summarized above and set forth in greater detail in the opinion in the direct appeal, *United States v. Mitchell, supra.*

The facts bearing on Mitchell's present claims of ineffective assistance of counsel were submitted to the district court in numerous declarations, other documents, and in the lengthy depositions of Mitchell's three trial lawyers taken by Mitchell's habeas counsel. The material facts – that is, what Mitchell's lawyers *did*, what they *didn't* do, and *why* – are not disputed. What *is* disputed is whether counsels' investigation and strategic decisions were reasonable as a matter of law. In the analysis that follows, we examine whether counsels' investigation and strategy fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88. Because the material facts are not in dispute – they either entitle Mitchell to relief or they don't – the district court did not abuse its discretion in declining to hold an evidentiary hearing. *United States v. Howard*, 381 F.3d 873, 877–79 (9th Cir. 2004).

II. *Defense counsel adequately investigated the possibility of an intoxication defense and reasonably decided against asserting it.*

Mitchell argues that his three lawyers – Deputy Federal Public Defenders Jeffrey Williams and Gregory Bartolomei, and private lawyer John Sears – failed to adequately investigate the possibility of an intoxication defense for use in the guilt-phase of the trial. The facts show otherwise.

Sears, who had practiced for 28 years and was experienced in criminal defense, was appointed as learned counsel[1] and took the lead on the guilt phase. Williams had 15 years of criminal defense experience, had already tried two

[1] 18 U.S.C. § 3005 requires the appointment of at least two defense counsel in capital cases, including one who is "learned in the law applicable to capital cases."

capital cases and had worked on several other capital cases when he was appointed in this case. Bartolomei had practiced for 23 years, mostly as a criminal defense attorney, and had previously attended the Death Penalty College at the Santa Clara University law school.[2] The Federal Public Defender's Office in Arizona is particularly well-experienced in defending Indian reservation cases.

Defense counsel were well aware of Mitchell's history of substance abuse. They knew about it from various sources, including the report of Vera Ockenfels, the lawyer whom they hired who specializes in developing mitigating evidence. They confronted Mitchell with his statements to FBI agents about his substance abuse, but Mitchell "adamantly" denied that he was under the influence of any substance at the time of the crimes. Unwilling to take Mitchell's word for it, his lawyers dutifully pored over photographs of the crime scene and visited the scene of the crimes themselves looking for any evidence of drinking or drugs. Liquor bottles left behind? Drug paraphernalia? They found nothing.

Mitchell's lawyers also knew that Johnny Orsinger, the only other living person present when the crimes were committed, used drugs and alcohol. Mitchell's lawyers sought to interview him, but Orsinger's lawyer wouldn't allow it. When Mitchell's lawyers subsequently subpoenaed Orsinger, he repeatedly asserted his Fifth Amendment privilege and refused to answer questions.

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[2] Santa Clara Law's Death Penalty College trains defense attorneys, along with their mitigation specialists, to represent defendants in death penalty cases. *See* http://law.scu.edu/dpc.

In short, counsel investigated the possibility of asserting an intoxication defense, but could find no admissible evidence that Mitchell was intoxicated at the time of the carjacking and murders.[3] To the contrary, Mitchell himself denied being intoxicated, and the manner in which the crimes were committed was inconsistent with a supposed inability to form intent due to intoxication, even if he *had* been drinking: the carjacking was premeditated and committed in preparation for the trading post robbery; the grandmother and little girl were killed and then dismembered to get rid of witnesses and dispose of evidence; and, with impeccable recall, Mitchell gave the FBI a highly detailed account of the crime and his complicity in it. Mitchell's ability to lead investigators back to the desolate scene of the crime is further indication that Mitchell was not unaware of where he was or what he was doing when the crimes were committed.

Mitchell's lawyers did not ignore the possibility of an intoxication defense. Just the opposite. They investigated it, they discussed it with Mitchell, they attempted to interview Orsinger, they looked for extrinsic evidence, they debated it among themselves, and only then, given the lack of evidence of intoxication and the strong circumstantial evidence to the contrary, did they decide that they would be unlikely to convince a jury to accept voluntary intoxication as a defense to these premeditated crimes. Lawyers who make professional decisions of this type, after a reasonable investigation such as occurred in this case, are "strongly presumed" to have rendered adequate assistance. *Cullen v.*

[3] Defense counsel tried, but failed, to get into evidence Mitchell's statement to the FBI that he had been drinking the day of the murders. Counsel then requested an intoxication instruction to preserve the record, even though they knew the request would be denied for lack of evidence. There is no reason to fault counsel for this.

Pinholster, 131 S. Ct. 1388, 1403 (2011) (internal quotation marks omitted); *Edwards v. Ayers*, 542 F.3d 759, 772–73 (9th Cir. 2008) (counsel acts reasonably by not asserting a defense that is not supported by sufficient admissible evidence). That is the situation here. The district court correctly denied Mitchell's § 2255 motion with regard to counsels' decision to forego an intoxication defense at the guilt phase of the trial.

III. *Counsel conducted a thorough investigation of mitigating evidence – social, medical, and psychiatric – only after which did they make a reasonable strategic decision about what evidence to present and what to forego.*

Given the strong evidence of Mitchell's guilt, including his well-corroborated confession, and the lack of any realistic defense, Mitchell's lawyers knew that the rubber-would-meet-the-road in the penalty phase of the trial, so they began to prepare for that part of the case immediately.

The defense team consistently met throughout the case to discuss the possible theories of mitigation. Deputy Federal Public Defender Greg Bartolomei was principally in charge of this aspect of the case. Early on, Bartolomei spoke to Mitchell in detail about the case, his childhood, interests, parents, grandparents, medical history, drug history, and schooling. The defense also hired Vera Ockenfels, a well-known and experienced "mitigation specialist," to marshal mitigating evidence. Ockenfels gathered all available records and interviewed Mitchell's mother, grandparents, uncle, other extended family members, friends, acquaintances, football coach, teachers, and other school employees. She located and

attempted to interview Mitchell's father.[4] Bartolomei traveled to the Navajo reservation with Ockenfels to interview Mitchell's mother, grandparents, uncle, friends, football coach and other employees at Mitchell's school. Deputy Federal Public Defender Jeff Williams separately interviewed Mitchell's mother, Sherry. Sherry mostly talked about herself, and she walked out of the interview with Williams. She had previously told the FBI that Mitchell belonged in prison.

Six months before the penalty trial, Ockenfels turned in her 42-page, single-spaced "social history report," consisting of a complete, thoroughly documented biography of Mitchell, his mother, and his maternal grandparents. The report noted Mitchell's struggle with his mixed race, large size, and lack of fluency in the Navajo language and culture; verbal and physical abuse of Mitchell during his childhood; and Mitchell's extensive history of alcohol and drug use. The report also documented Mitchell's own violent history: he joined a gang in third grade, formed his own gang by eighth grade, was suspended and expelled from school for fighting, and abused dogs and cats for entertainment. Ockenfels also obtained psychological records from Mitchell's school, and interviewed Dr. Edward Fields, a psychologist for the Chinle School District, who was Mitchell's therapist while he was in high school. The defense team personally met with Ockenfels and reviewed her report.

Defense counsel also hired several mental health professionals. Counsel initially hired Susan Parrish, Ph.D., a psychologist, who diagnosed Mitchell as a sociopath and

[4] Mitchell never knew his father, and his father died before the defense team was able to locate and interview him.

warned counsel against calling her to testify. Following up on Ockenfels's hunch that Mitchell may have blacked out or had a psychotic episode at the time of the crimes, defense counsel hired Barry Morenz, M.D., and his team of experts at the University of Arizona medical school to look for medical or psychiatric evidence that might be helpful. Defense counsel provided extensive background information to Dr. Morenz, including all of the prosecution's evidence in the case. In addition, Dr. Morenz conducted and documented in-depth background interviews of his own with Mitchell, defense investigator Karl Brandenberger, and mitigation specialist Ockenfels.

With Dr. Morenz at the helm, Mitchell was examined and evaluated by a psychiatrist, a neuropsychologist, and a neurologist at the University of Arizona and underwent numerous tests and studies. The neurological exams, EEG, MRI, and laboratory results were normal. Testing established that Mitchell had average intelligence. When all the data was in, Dr. Morenz diagnosed Mitchell with: (1) depressive disorder not otherwise specified based on Mitchell's statements that he felt despondent and hopeless; (2) polysubstance abuse based on abuse of alcohol, marijuana, cocaine, ecstasy, and other drugs on a regular basis for a number of years; (3) a cognitive disorder not otherwise specified based on executive functioning deficits that were mild and of uncertain etiology and clinical significance; and (4) an antisocial personality disorder based on Mitchell's history of childhood aggression, deceitfulness, frequent rule violation, cruelty to animals that would have warranted a conduct disorder diagnosis as an adolescent, a continued disregard for the rights of others, and a failure to show remorse for his behavior.

As already noted, neuropsychological testing by Dr. Morenz's team revealed "some mild deficits in executive functioning, impulsiveness and poor planning," that "were more likely related to emotional factors than traumatic brain injury." Mitchell now faults his lawyers for not pursuing that finding further, but it is significant to note that Dr. Morenz did not recommend further testing, if indeed there is any further testing that could have been done, relating to these "mild deficits" of likely "emotional" origin.

Defense counsel reviewed Dr. Morenz's comprehensive report, discussed it with him, and ultimately decided not to present mental health evidence for fear that it would open the door to even more damaging evidence and do more harm than good. Defense counsel knew that they would have to turn the report over to the prosecution if Dr. Morenz testified. They concluded that the report would open the door to "ugly" damaging facts that would have a "negative and adverse" effect on the jury. Specifically, the report documented Mitchell's diagnosis of antisocial personality disorder, history of violence, cruelty to animals, gang involvement, that his gang sold drugs to children, and that Mitchell had been involved in the shooting of an innocent girl during a dispute with a rival gang over marijuana. Worse, Mitchell told Dr. Morenz detailed facts regarding the crime that he had not already admitted to the police or FBI, including the fact that he decided to kill the child to prevent her from identifying him. Mitchell also told Dr. Morenz of his desire to kill the person who had ratted out their group to the police.

Defense counsel concluded that introducing evidence of Mitchell's mental health was fraught with danger, given the door that would be opened to extremely damaging evidence, and could negate the positive things that they had to say about

him. Counsel also decided that it would be wise to stay away from Mitchell's history of alcohol and drug abuse. In their professional opinion, jurors would be turned off by such evidence and view it as a poor excuse for extremely horrendous crimes. And, again, such evidence would contradict the more positive picture they wanted to paint.

In the § 2255 proceedings, Mitchell's new lawyers produced a new declaration from Dr. Morenz, dated in 2009. In this declaration, Dr. Morenz states that he could have testified that Mitchell "might" have been under the influence of drugs or alcohol at the time of the crime and that his perception of reality "might" have been altered. This new declaration changes nothing. Besides being equivocal, the problem remained that if Dr. Morenz had testified to such a possibility, the door would have been opened to a whole panoply of contrary evidence of which Dr. Morenz was aware, such as Mitchell telling Dr. Morenz *why* he and Orsinger killed the little girl. In his report, Dr. Morenz quoted Mitchell as telling him, "I'm running this equation in my head that 9 times out of 10 if we let the little girl go the cops will be after us."

In his deposition, defense lawyer John Sears testified that the defense team had used juror questionnaires to determine prospective jurors' attitudes towards potential issues, including their reactions to Native American crimes, vulnerable victims, and whether the jurors were open to "excuses," such as mental problems or substance abuse. The defense used a series of hypothetical questions to assess potential jurors' reactions and then factored those reactions into Mitchell's defense. The questionnaire responses by prospective jurors confirmed counsels' belief that the jury

would view both mental health and substance abuse mitigation defenses in a negative way.

Defense counsel made a reasonable professional judgment, after a careful investigation, that the introduction of mental health and drug abuse evidence would be more damaging than helpful. We do not second-guess strategic decisions such as this. *Mickey*, 606 F.3d at 1238–39.

So, if no mental health or substance abuse mitigation, then what?

Bartolomei, Williams, and Sears decided that the best way to save Mitchell from the death penalty was a mitigation strategy consisting of three main themes: First, Mitchell's life should be spared because he is not a worthless human being – that is, he is a person with significant redeeming qualities, who has overcome difficult challenges in his life, facts that weigh against simply discarding him like so much trash. Defense counsel presented the testimony of Dr. Robert Roessel, the executive director of Mitchell's high school, who testified that Mitchell had been an excellent student, respectful, an outstanding athlete, a member of the student council, and a speaker at graduation. Dr. Roessel testified that Mitchell was kind, and did well in school despite a difficult upbringing, a disinterested mother who never loved him, a school system that failed to nurture him, and confusion over his mixed Navajo and Anglo heritage. Because Mitchell's grandparents were also educators at the school, Dr. Roessel knew Mitchell's family. Dr. Roessel testified that Mitchell had his problems, but had positive qualities, too, and had the potential to teach others in prison. Dr. Roessel asked the jury to spare Mitchell's life.

The defense also presented the testimony of Ruth Roessel, Dr. Roessel's wife and a school teacher. Mrs. Roessel testified that she met Mitchell when he moved in with his grandfather in Round Rock and knew Mitchell at school. Mrs. Roessel also knew Mitchell's family. She testified that Mitchell was raised in a "cold home," but that he was always respectful to her and called her "shima," which means "my mother."

Mitchell's uncle, Ausca[5] Kee Charles Mitchell, testified that he worked at Mitchell's schools. Mitchell spent a lot of time with Uncle Ausca and his family, and was always respectful. Uncle Ausca and his family attended Mitchell's high school graduation ceremony. The defense introduced into evidence pictures of Mitchell with family on graduation day, Christmas, and other family gatherings. Uncle Ausca testified that Mitchell was a fast learner who had computer and vocational skills. He was a good kid until he met Johnny Orsinger. Although Uncle Ausca did not know Orsinger, he knew that Orsinger was dealing drugs at the school dorms. The teachers thought highly of Mitchell, but were "scared to death of Orsinger."

Marty William Conrad, the athletic director, social studies teacher and head football coach at Mitchell's high school, testified that Mitchell was a good football player, a leader on the team, interacted well with the players, and was well-behaved. Mr. Conrad testified that Mitchell was good enough to play college football, and he thought Mitchell was going to community college to play football. The defense introduced into evidence a picture of Mitchell with the football team.

[5] In the record, the name is also spelled Auska.

John F. Fontes, Jr., the assistant principal at Mitchell's high school, testified that he saw Mitchell daily at school. Mitchell was an excellent student, a good football player, and involved with student government during his senior year. Mitchell was never physically violent. The only disciplinary incident was a brief suspension for possessing a personal amount of marijuana. Mr. Fontes testified that Mitchell knew right from wrong, but tended to withdraw or not respond if he was fearful. Although Mr. Fontes had met Mitchell's uncle and grandfather, he had never met Mitchell's mother Sherry. The one time he called Sherry, she called his supervisor and advised the school not to contact her because she wanted nothing to do with Mitchell. Mr. Fontes testified that Mitchell was smart and had the potential to lead others in a positive way in a structured environment. He believed that Mitchell's life should be spared.

Mitchell's friend, Lorenzo Reed, Jr., testified that he had known Mitchell since third grade, and that they had attended high school together. Mitchell's mother had abandoned him, and it was painful for Mitchell. Mitchell moved in with Mr. Reed's family after he turned 18. Mitchell became part of the family, was respectful, and helped with the chores. Mitchell also was respectful while living with Mr. Reed's uncle in Phoenix. Mitchell briefly moved to California, but came back for Mr. Reed's high school graduation. Mr. Reed also asked the jury to spare Mitchell's life.

Sonja Hasley, Mitchell's high school English teacher, testified that Mitchell was an excellent student who helped her and other students in class. Mitchell was gentle, quiet, and respectful. When confronted with a violent situation, Mitchell wouldn't participate either verbally or physically. Mitchell's mother, Sherry, refused to come to the school, and

his grandparents never came to the school to discuss Mitchell's progress, either. Ms. Hasley testified that Mitchell's family acted contrary to the Navajo culture, in which mothers and grandmothers are very important. Ms. Hasley stated that Mitchell had the potential to be a good teacher in prison.

Tammy Sebahe, a member of Mr. Reed's family, testified that Mitchell lived with them, became part of their family, and still remained a part of their family. She had been visiting Mitchell for the previous year at jail, where they spoke over a phone with a glass wall separating them.

The defense also played the videotaped testimony of Mitchell's grandmother, Bobbi. Bobbi mostly talked about herself, a point that the defense would mention in closing argument as illustrative of the dysfunction in the family.

In closing argument, Sears argued that these facts showed that Mitchell had redeeming qualities despite his lack of family support, responded well to structure, and if sentenced to life without parole, he would adapt to prison and could have a positive impact on other inmates.

The second theme of the penalty phase strategy was that Johnny Orsinger was the mastermind behind these crimes, and that Mitchell was a follower. The defense introduced evidence that Orsinger and Gregory Nakai were not only the brains behind these crimes, but had committed a similar carjacking and multiple murder two months earlier. In fact, Orsinger had bragged that he had murdered the victims in this case — and yet, Orsinger and Nakai would be spared the death penalty. Orsinger was immune because he was 16, but the FBI agent could not explain why Nakai, who was the

same age as Mitchell and had also committed murder during a carjacking, had not been sentenced to death. Mitchell's lawyers hammered home the point that it would create an intolerable and irrational disparity for the two main culprits to get life sentences, while Mitchell, the follower, was sentenced to death.

The third theme was that the Navajo Nation opposes the death penalty, and did not want Mitchell sentenced to death. Mitchell's defense team even put before the jury a letter from the Navajo Nation to the United States Attorney – the prosecuting agency in this very case – stating its opposition to capital punishment in general, and in this case in particular.

The strategy chosen by Bartolomei, Williams, and Sears did not come to them in a dream, nor was it the result of a coin flip. They settled on their strategy only after commissioning an exhaustive social history of Mitchell and his family, having Mitchell studied stem-to-stern by a team of doctors in a variety of specialties at the University of Arizona medical school, conducting personal interviews with potential witnesses, making numerous trips to the Navajo reservation, and spending countless hours with Mitchell himself. Counsel, who had years of experience defending violent crimes committed on Indian reservations, also contacted other lawyers who specialized in death penalty defense and sought their advice. Counsel affirmatively considered the pros and cons of other approaches, and then reasonably chose the strategy that they thought had the best chance of success. Such a decision does not support a claim of ineffective assistance of counsel. *Elmore v. Sinclair*, 781 F.3d 1160, 1170–72 (9th Cir. 2015).

Apparently recognizing that trial counsel's strategic and tactical decisions are entitled to great deference, Mitchell argues that his lawyers' investigation was deficient, thereby tainting their strategy and tactics. For example, Mitchell contends that when Mitchell's lawyers learned that Dr. Morenz had diagnosed Mitchell with antisocial personality disorder (just as psychologist Dr. Parrish had) counsel should have had Mitchell examined again by yet another doctor in search of a less damning diagnosis. We agree with the district court that defense counsel did not act below professional standards in relying on the thorough and authoritative report of the highly qualified experts they hired, particularly when Drs. Parrish and Morenz independently agreed on the same primary diagnosis after extensive testing. *Crittenden v. Ayers*, 624 F.3d 943, 965–66 (9th Cir. 2010).

Although Mitchell claims that the investigation was inadequate, he has come forward with almost no new evidence not known to defense counsel and fully considered as possible mitigation. Mitchell's drug abuse and physical abuse were documented in detail in the Ockenfels and Dr. Morenz reports well before the guilt and penalty trials. Contrary to Mitchell's claim, defense counsel knew in 2003 that Mitchell and his friends had been partying and doing drugs in the months before the crimes. In fact, Dr. Morenz diagnosed polysubstance abuse based on Mitchell's extensive drug use history. The evidence of drug use and physical abuse was known to the defense team and considered by the team when it decided not to present intoxication or abuse mitigation evidence.

Mitchell points out that neither defense counsel's investigation, nor that of their mitigation specialist, Vera Ockenfels, uncovered the fact that Mitchell's grandfather

(with whom Mitchell had lived for a time) had molested two girls in Kansas sometime in the 1950s or '60s, about 20 years before Mitchell was born. Mitchell himself was never molested by the grandfather and Mitchell never met the girls. This bit of ancient family history was never disclosed to defense counsel, their investigator Karl Brandenburger, or Ockenfels, despite their numerous interviews with family members. The grandfather's behavior in the '50s or '60s toward people *other* than Mitchell, whom Mitchell does not even know, before he was even born, is of dubious relevance when it comes to mitigation. In any event, Mitchell was entitled to a reasonable investigation, not a perfect one. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

In 2009, habeas counsel managed to find a doctor, Pablo Stewart. M.D., who would give them a declaration stating that in 2001 Mitchell suffered from post traumatic stress disorder and substance-induced psychotic disorder. Dr. Stewart's declaration says that he could testify that Mitchell's intoxication and mental illness "synergized with each other resulting in the alteration of Mr. Mitchell's cognitive and behavioral function, which severely impaired his ability to premeditate or intend to commit murder." (Never mind that Mitchell stated that he and Orsinger killed and dismembered the grandmother and little girl to get rid of the witnesses to the theft of the vehicle they stole for use in the trading post robbery they planned to commit.) At most, Dr. Stewart's new diagnosis of Mitchell's mental state, eight years after-the-fact, is a "difference in medical opinion, not a failure to investigate." *Crittenden*, 624 F.3d at 965.

Finally, Mitchell faults defense counsel for not calling his mother, Sherry, to testify. But, Bartolomei testified that Sherry refused to cooperate and only wanted to talk about

how Mitchell's crimes impacted *her*. She walked out on her interview with Williams, and had told the FBI that Mitchell belonged in prison. Counsel reasonably concluded that Sherry was a "loose cannon" who was better kept away from the witness stand.

We agree with the district court that Mitchell's lawyers made an adequate investigation and then, with full knowledge of all of the relevant facts, made reasonable strategic decisions to present what they did and to stay away from things that they thought would do more harm than good. *Elmore*, 781 F.3d at 1170–72. The possibility that some of the evidence rejected by defense counsel "could have assisted [Mitchell's] case," is "little more than a challenge to his defense attorney's trial strategy with the benefit of hindsight." *Id.* at 1171. Like the defense team in *Elmore*, which reasonably chose a "remorse strategy" over a mental health strategy, Mitchell's defense team made a reasonable strategic decision to pursue what it believed to be the stronger life-worth-saving defense, along with evidence of sentencing disparity and evidence that the Navajo Nation wanted Mitchell's life spared. They reasonably chose not to present evidence that "would detract from, or destroy," the chosen strategy. *Id.* Considering the unusual brutality of these crimes – committed not in passion but in furtherance of a planned armed robbery – and that Mitchell himself refused to attend the penalty phase of the trial, it is a remarkable tribute to Mitchell's lawyers that they were able to get the jury to find several mitigating factors.[6] Even assuming for the sake

[6] At least one juror found every factor presented by the defense to be mitigating for both murders. Twelve jurors found that: (1) Mitchell did not have a significant prior criminal record; (2) another person who was equally culpable in the crime would not be punished with death; and (3) Mitchell would be sentenced to life in prison without the possibility of

of argument that some other lawyer might have preferred a different strategy, there is no showing that Mitchell's lawyers' strategy was unreasonable. *Bell v. Cone*, 535 U.S. 685, 701–02 (2002). Because Mitchell did not rebut the presumption that counsel rendered effective assistance, the district court correctly denied Mitchell's § 2255 motion with respect to the penalty phase of the trial.[7]

IV. *Conclusion*

The judgment of the district court is **AFFIRMED**.

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release if not sentenced to death. Two jurors found that Mitchell responded well to structure and would adapt to life in prison. One juror found that Mitchell's capacity to appreciate the wrongfulness of his conduct was so impaired as to constitute a defense to the charge. Six jurors found that Mitchell's childhood, background record, character or other circumstances of the offense mitigated against the death sentence. Finally, seven jurors found that the letter from the Navajo Nation opposing the death penalty was mitigating.

[7] We decline to grant a certificate of appealability for the uncertified issues raised in Mitchell's brief.

REINHARDT, Circuit Judge, dissenting in part:

I would grant Mitchell's petition for habeas relief with respect to the penalty phase of his trial because he was deprived of his Sixth Amendment right to effective counsel. Counsel's "good guy" defense was unreasonable in light of the facts and circumstances of the crimes Mitchell committed, and also because the minimal investigation underlying counsel's choice of strategy was constitutionally deficient. Before delving into the myriad ways in which counsel performed deficiently, however, I would note that this is a highly unusual death-penalty case in several respects, all of which exacerbate the impropriety of sending Mitchell to his death in violation of his constitutional rights to a fair trial, but none of which is more disturbing than the failure to give the jurors the opportunity to understand what made him the person he became before they voted to have him executed.

I.

Federal executions are quite rare and are normally reserved for the most heinous of crimes that are of national significance. There have been only three executions since the federal death penalty was reintroduced in 1988—one being in the Oklahoma City bombing case in which 168 people died and more than 600 were injured, and another being a drug kingpin found responsible for at least eight murders. Most recently, the death penalty was authorized for a perpetrator of the Boston Marathon bombing. However gruesome the crime in this case, Mitchell, who was twenty years old at the time and had no prior criminal record, does not fit the usual profile of those deemed deserving of execution by the federal government—a penalty typically enforced only in the case of mass murderers and drug overlords who order numerous

killings. Nor is this a case of national interest or significance. The penalty is possible only by virtue of the fact that Mitchell and a fellow Navajo, aged sixteen, stole a car in connection with the murders they committed. The murders by themselves did not subject Mitchell to the death penalty because, as explained below, the Navajo Nation has decided that the death penalty should not apply to intra-Indian crimes committed on its reservation. As a result, in the absence of the carjacking, Mitchell would not have been eligible for the death penalty.

Equally important, none of the people closely connected to the case wanted Mitchell to be subjected to the death penalty: not the victims' family, not the Navajo Nation—of which the victims and perpetrators were all members and on whose land the crime occurred—and not the United States Attorney whose job it was to prosecute Mitchell. So how did Mitchell nonetheless become one of a relatively small number of inmates on federal death row over the protestations of everyone with a personal stake in the case? A bit of background is necessary to answer that question.

The Navajo Nation is opposed to the death penalty, both as a general matter and in this case in particular, but it has only limited power over crimes committed on Navajo land.[1] In 1994, however, Congress enacted "a small but important development toward tribal self-determination" with respect to prosecutions by the federal government of crimes committed on tribal lands: the so-called tribal option, which allowed Native American tribes to decide whether the death penalty applies to most crimes committed by an Indian against another Indian on tribal lands (also known as "Indian

[1] *See* 18 U.S.C. § 1302(a)(7).

country").[2] In pressing for the tribal option, representatives of the Navajo Nation explained to Congress:

> It is incumbent upon the federal government to allow Indian tribes the choice of whether the death penalty should be extended to our territory. . . . [T]he death penalty is counter to the cultural beliefs and traditions of the Navajo people who value life and place great emphasis on the restoration of harmony through restitution and individual attention. *The vast majority of major crimes committed on the Navajo Nation and within other Indian reservations are precipitated by the abuse of alcohol. The death penalty will not address the root of the problem; rather rehabilitation efforts will be more effective.*[3]

As Kevin K. Washburn, the current Assistant Secretary for Indian Affairs for the U.S. Department of the Interior, a former law professor and United States Attorney, wrote, adoption of the tribal option reflected a "modest step[]" in

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[2] *See* 18 U.S.C. § 3598.

[3] *Crime Prevention and Criminal Justice Reform Act of 1994: Hearings on H.R. 3315 before the Subcommittee on Crime and Criminal Justice of House Judiciary Committee*, 103 Cong., 2d Sess., Feb. 22, 1994 (statement of Helen Elaine Avalos, Assistant Att'y Gen., Navajo Dep't of Justice, on behalf of Peterson Zah, President of the Navajo Nation) (emphasis added).

favor of a policy that "criminal justice in Indian country must be decolonized."[4]

Having been empowered by the tribal option to determine whether the death penalty should apply to most federal crimes committed against Navajo people on Navajo land, the Navajo Nation decided that it should not.[5] For this reason, Mitchell was not eligible for the death penalty with respect to any crimes for which he was prosecuted under the Major Crimes Act—including several counts of first-degree murder, kidnapping, and robbery. Maj. Op. at 5. However, notwithstanding the fact that his crime was committed "by one Indian against other Indians in Indian country," the death penalty applied to the federal crime of carjacking resulting in death.[6] The theory underlying this anomalous result is that carjacking is a crime of general, nationwide applicability—rather than a Major Crimes Act offense—and the tribal option is not applicable to such crimes. *See Mitchell I*, 502 F.3d at

[4] Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779, 830, 854 (2006).

[5] Indeed, only one Native American tribe has exercised the tribal option to permit the death penalty. *See* Washburn, *supra* note 4, at 831.

[6] *United States v. Mitchell* ("*Mitchell I*"), 502 F.3d 931, 946 (9th Cir. 2007). The Anti Car Theft Act of 1992 established the federal crime of carjacking, which is codified at 18 U.S.C. § 2119. *See* Pub. L. No. 102-519, § 101(a), 106 Stat. 3384 (1992). The Violent Crime Control and Law Enforcement Act of 1994 made carjacking resulting in death subject to the death penalty. *See* Pub. L. No. 103-322, § 60003(a)(14), 108 Stat. 1796 (1994).

946–49.[7] Thus, although the Navajo Nation had clearly voiced its opposition to the death penalty, even in cases of first-degree murder, the death penalty remained available to federal prosecutors in Mitchell's case because he stole a car in the course of committing his crimes.

Faced with the possibility that federal prosecutors would seek the death penalty, the daughter and mother of the victims strongly urged that the death penalty not be imposed and made a request to the federal prosecutor that he seek only life without parole. The Attorney General of the Navajo Nation Department of Justice, Levon B. Henry, also wrote a letter to the United States Attorney for the District of Arizona, Paul Charlton, "express[ing] the current positions of the Navajo Nation with respect to the possibility of the United States seeking capital punishment" in Mitchell's case. Henry explained that although "the details of the case[] were shocking," the Navajo Nation "would not support a death penalty," because "[o]ur culture and religion teaches us to value life and instruct against the taking of human life for vengeance." Moreover, Mitchell's execution would be directly contrary to the Navajo Nation's belief that rehabilitation, not the death penalty, is needed to address

[7] The Ninth Circuit has long held that intra-Indian offenses committed in Indian country may be prosecuted under federal criminal statutes of general, nationwide applicability such as § 2119 (absent exceptions not raised in this case), rather than solely under the Major Crimes Act—a holding I find to be of somewhat dubious merit but that a three-judge panel cannot revisit. *See, e.g.*, *United States v. Begay*, 42 F.3d 486, 497–98 (9th Cir. 1994). Because Congress limited the tribal option's application to offenses in which federal jurisdiction "is predicated solely on Indian country"—namely, Major Crimes Act offenses—the Navajo Nation's exercise of the tribal option against the death penalty does not "turn off" that penalty with respect to § 2119. *See Mitchell I*, 502 F.3d at 948–49.

crimes associated with drug and alcohol addiction, in which category, the Navajo Nation told Congress, the vast majority of major crimes committed on reservations fall. *See supra* p. 29 & note 3. As explained below, Mitchell had a long history of drug and alcohol abuse that contributed to the person he became and the crimes he committed.

In light of the position of the Navajo Nation and the family of the victims, United States Attorney Charlton, a local Arizonan appointed by President George W. Bush, who was intimately familiar with the relations between the Navajo tribe and the citizens of the State of Arizona, declined to seek the death penalty. However, in the words of the victims' family, the request that the federal government not seek the death penalty was ultimately "ignored and dishonored." Attorney General John Ashcroft overruled Charlton and forced a capital prosecution based on the carjacking aspect of the crime, thereby avoiding the application of the tribal option. The overruling by Ashcroft marked the beginning of an aggressive expansion of the federal death penalty, particularly into jurisdictions that did not permit the use of that penalty. Mitchell was the first object of the new policy.[8]

[8] The third person against whom the federal death penalty has been enforced since it was reinstated in 1988 was Louis Jones, Jr., who was neither a mass murderer nor a drug overlord who ordered numerous killings. Jones, an African-American war veteran, kidnapped and murdered an airwoman at an air force base. Jones was a highly decorated soldier, whose 22-year military career included service as an Army Ranger. Jones returned home from the first Gulf War with post-traumatic stress disorder and brain damage likely linked to his exposure to nerve gas during the war—known as Gulf War Syndrome—and displayed symptoms of that syndrome during his commission of the crime. He was executed over vigorous protests by United States Senators and others during the tenure of Attorney General Ashcroft.

The arbitrariness of the death penalty in this case is apparent. Mitchell raises a number of serious constitutional issues regarding both his conviction and his death sentence. Some were litigated on his direct appeal and decided against him by a fiercely contested two to one vote. Another critical fundamental constitutional question is decided on this appeal by a similar division and despite equally strong views expressed by both sides. Whatever a particular jurist, or even two, may believe regarding these issues, uncertainty remains, to say the least, as to whether the judicial proceedings afforded Mitchell comported with the constitutional protections to which he is entitled. That uncertainty alone is sufficient to raise serious questions regarding whether Mitchell should be put to death by his government.[9] Further, although Mitchell committed a horrible crime, it was hardly one of national import or of particular federal interest other than the fact that it involved the Navajo Nation, and all of the persons with the greatest stake in the outcome of the case

[9] I was a member of the divided panel that affirmed Mitchell's death sentence on direct appeal. I stand by my dissent explaining the constitutional infirmities in Mitchell's conviction and sentence that were considered there and that I still believe warrant relief. Rather than explain my reasons again here, a summary of the most significant constitutional violations follows: First, federal prosecutors colluded with tribal authorities to detain Mitchell and elicit confessions from him in violation of his federal rights to timely arraignment and to counsel. *Mitchell I*, 502 F.3d at 998–1002 (Reinhardt, J., dissenting). Next, the prosecutor struck the only African-American juror on the venire in violation of *Batson v. Kentucky*, 476 U.S. 79, (1986). *See Mitchell I*, 502 F.3d at 1003–06 (Reinhardt, J., dissenting). Then, as to the penalty phase, (1) the district court allowed Mitchell to be absent from the sentencing phase in direct contravention of the Federal Rules of Criminal Procedure, meaning the jurors did not have to face the man they were sending to his death; (2) the prosecutor made numerous improper statements intended to arouse the passion of the jury; and (3) the district court failed to instruct the jury on the proper burden of proof. *See id.* at 1006–14.

oppose his execution. The novel use of carjacking as a loophole to circumvent the tribal option also renders this an anomalous case. Mitchell will, unless spared by executive clemency, in all likelihood, suffer the ignominious fate of being the first person to be executed for an intra-Indian crime that occurred in Indian country. While this court's jurisprudence indeed gives the federal government the legal authority to exercise jurisdiction over this case for the purpose of obtaining capital punishment, succeeding in that objective over the express objections of the Navajo Nation and the victims' family reflects a lack of sensitivity to the tribe's values and autonomy and demonstrates a lack of respect for its status as a sovereign entity. Should the federal government pursue a death warrant for Mitchell, I hope that it will have better reasons for doing so than adherence to the wishes of a former attorney general.[10]

II.

I now turn to the legal question at issue on this appeal: whether Mitchell was deprived of effective assistance of counsel in violation of the Sixth Amendment.[11] I would hold

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[10] *See* Amnesty Int'l, *USA Capital Deficit: A Submission on the Death Penalty to the UN Human Rights Comm.*, at 8 (Sept. 2013), *available at* http://www.amnestyusa.org/sites/default/files/amr510622013en.pdf ("[T]here is nothing to stop any administration, consistent with the [International Convention on Civil and Political Rights], supporting reversal of the death sentence . . . .").

[11] With respect to the guilt-phase claim at issue on this appeal, I would hold that Mitchell was not prejudiced by any deficient performance on counsel's part. As noted *supra* note 9, I would have granted guilt- and penalty-phase relief based on claims raised on direct appeal. Most of the uncertified claims relate to those claims. I thus find it unnecessary to address the uncertified claims on this appeal.

that counsel performed deficiently at the penalty phase for two independent reasons: First, counsel's decision to present a tepid "good guy" defense—that Mitchell's was "a life worth saving"—was unreasonable in light of the nature of the horrific acts Mitchell committed and in light of the mitigating evidence in counsel's possession: evidence of drug and alcohol abuse, physical abuse, and of emotional and mental problems that would have helped the jury understand what led up to Mitchell's commission of those acts. Second, counsel did not perform a constitutionally adequate investigation into the mitigating evidence, failing to pursue obvious leads before deciding to abandon the latter defense. Counsel thus did not make a reasonable strategic decision to forego further investigation of mitigating evidence in favor of presenting a "good guy" defense—a defense it is difficult to conceive of any reasonable juror crediting. Finally, I conclude that there is a reasonable probability that but for counsel's deficient performance, at least one juror would have found (1) that the crimes were at least in part attributable to Mitchell's exceedingly unfortunate background, including his long history of drug and alcohol abuse, the physical and emotional abuse he suffered as a child, and his ensuing mental and emotional problems; (2) that these circumstances collectively rendered him less culpable than he might otherwise have been; and (3) that life without parole rather than the extreme penalty of death was the appropriate punishment.

A.

"[C]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." *Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2002), *as amended* (quotation marks omitted).

The ill-prepared "good guy" defense that counsel presented at the penalty phase in this case was clearly doomed from the start. The lead penalty-phase attorney Gregory Bartolomei had never tried a murder case, much less a capital one, and his so-called strategy was no strategy at all. After the defense essentially conceded the guilt phase in a gruesome double murder (it presented no witnesses), counsel planned a half-day penalty-phase defense seeking to portray Mitchell as generally a nice fellow. To do so instead of presenting evidence that his abusive childhood, drug and alcohol abuse, and mental and emotional problems contributed to his violent acts was "patently deficient" performance in violation of the Sixth Amendment. *Id.*

The majority identifies three "themes" of the penalty-phase defense: (1) that Mitchell had redeeming qualities making him a "life worth saving" (also known as a "good guy" defense); (2) "that Johnny Orsinger was the mastermind behind these crimes"; and (3) that the Navajo Nation did not want Mitchell sentenced to death. Maj. Opinion at 26–28. In reality, the defense that counsel presented centered almost exclusively on the first theme—that Mitchell had been a "good guy." That argument had no chance of convincing a jury to return a sentence other than death. Life without parole could hardly have been justified by the snippets of normal conduct which counsel chose to offer to the jury. The latter two themes were barely included in the defense as presented, but if properly developed, would have been wholly consistent with the defense that counsel should have offered: a far more plausible defense that sought to explain how the crimes ultimately were attributable in large measure to Mitchell's drug and alcohol addiction, wretched upbringing, and the ensuing mental and emotional difficulties from which he suffered.

In light of the shocking facts of the double murder of which the jury had just convicted Mitchell, the "limited strategy that [counsel] developed was unreasonably constricted." *Correll v. Ryan*, 539 F.3d 938, 945 (9th Cir. 2008). Focusing the penalty-phase presentation on evidence that Mitchell was "a 'good person' and one who had 'done good deeds' . . . was, in and of itself, unreasonable given the extreme unlikelihood that any testimony about [Mitchell's] character would have been sufficient to 'humanize[] him during the time frame of the murder conspiracy at issue.'" *Id.* at 946 (citation omitted).[12] *See also Hamilton*, 583 F.3d at 1122. In short, "a good character defense was unlikely to be persuasive to a jury that had just decided that [Mitchell] had carried out a grizzly murder." *Bemore v. Chappell*, No. 12-99005 (9th Cir. June 9, 2015).

The "most likely" evidence to sway the jury "was the type that would portray [Mitchell] as a person whose moral sense was warped by abuse, drugs [and alcohol] [or] mental incapacity." *Correll*, 539 F.3d at 946. Evidence that a defendant has these kinds of problems provides the jury with a coherent picture of the circumstances that led to his criminal acts, *see Sears v. Upton*, 561 U.S. 945, 951 (2010), and may lead the jury to reject a death sentence "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be

[12] "Defense counsel compounded the errors he committed during the investigative stage of the penalty phase by presenting almost none of the little mitigating evidence he had discovered." *Hamilton v. Ayers*, 583 F.3d 1100, 1119 (9th Cir. 2009). Moreover, as explained in the next section, choosing the "good guy" defense was also unreasonable in light of counsel's failure to adequately investigate other more compelling mitigation evidence.

less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (citation omitted). Despite possessing evidence that Mitchell had been physically abused as a child, had long been addicted to drugs and alcohol, and had serious mental and emotional problems, defense counsel presented no evidence of such "explanatory or exculpatory attributes" to the jury and did not pursue obvious leads regarding those issues. *Allen v. Woodford*, 395 F.3d 979, 1005–1007 (9th Cir. 2005). Indeed, counsel made no effort to explain to the jury how a "good guy" could also be a murderer, arguing only that "something happened" to Mitchell but "we are never going to know."[13] Counsel's failure to present any explanatory mitigating evidence and, as discussed below, to adequately investigate the existence and nature of such evidence, constituted deficient performance in light of the egregious facts and circumstances of Mitchell's crimes. *See Hamilton*, 583 F.3d at 1113 ("Counsel . . . has an obligation to present and explain to the jury all available mitigating evidence.").

To make matters worse, the "good guy" defense that counsel presented was weak and inadequately prepared—an "anemic strategy" at best. *Correll*, 539 F.3d at 945. Counsel called a number of witnesses to speak to Mitchell's good

[13] Counsel's penalty-phase presentation "left the false impression that [Mitchell's] childhood, while unhappy, was not unusual." *Hamilton*, 583 F.3d at 1120. The witnesses' testimony made only oblique, passing references to Mitchell's difficult home life—that he was raised by his grandparents, who were both educators, in a home where "the word [love] was never said" that "didn't give him love"; that his mother "wanted nothing to do with [him]"; and that it was a "cold home." In fact, the defense team intentionally downplayed evidence of Mitchell's troubled background—for example, advising one teacher to "stick to only what [she] knew about . . . Mitchell [from the] classroom" and not to mention "that he seemed like a boy without a family . . . ."

character, the vast majority of whom had known him only briefly, when he was in high school. The consensus was that Mitchell was a good high school student and athlete; that he was respectful; and that he might be a good teacher to other prisoners because he had some "computer skills" and "vocational skills that he could pass on." None of the witnesses offered more than a superficial impression of Mitchell, and most of them had not had any contact with him since well before the time of the crimes. Moreover, the conclusion from this "evidence" that Mitchell was a "good guy" seems to have been one that could have been drawn by no one other than his counsel. *Cf. Allen*, 395 F.3d at 1007 (holding that character witnesses whose "knowledge of [the defendant] was neither deep nor contemporaneous with [the] crimes" were unlikely to persuade the jury to choose life). Anything positive conveyed to the jury by this tepid testimony was surely undone when counsel referred to Mitchell in his closing argument as "a jackass," and said that "there is the possibility that if Lezmond Mitchell lives on, he might help someone else[.] Maybe he won't. Maybe he will."

"Witness preparation is a critical function of counsel," *Doe v. Ayers*, 782 F.3d 425, 442 (9th Cir. 2015), yet the character witnesses were woefully ill prepared. Many had no contact with defense counsel prior to short meetings on the day of their testimony—meetings at which counsel primarily showed them photos of the victims' bodies and asked whether they would still testify. Such "spur-of-the-moment mitigation presentations form no part of constitutionally adequate representation." *Id.* at 443; *see also Hamilton*, 583 F.3d at 1121 ("[T]he failure to prepare a witness adequately can render a penalty phase presentation deficient."). Even those who had met the defense team prior to the day of testimony were not prepared "to understand the proceeding in which

[they were] participating," *Doe*, 782 F.3d at 443, as counsel did not tell them what sorts of questions would be asked.

As a result, much of the good character testimony elicited was quite damaging. Although identifying Mitchell as a "very excellent student" and "an outstanding athlete," Dr. Roessel, executive director of Mitchell's high school, testified that Mitchell "broke into [his] office" to steal a computer and a shotgun, which he used in a robbery, and that he had been suspended for having a marijuana joint. His wife, Ruth Roessel, testified to the singular importance of grandmothers in Navajo families, which allowed the prosecutor to stress how devastating Slim's death must have been to her family. Mitchell's uncle testified that Mitchell once "disrespected [him], [his] wife, [and] [his] kids," by smoking pot in his house because "in the Native American church . . . marijuana is evil."

Meanwhile, the prosecution used the defense's "good guy" evidence to its own advantage, arguing that because Mitchell was smart and a leader, he would not have gotten involved in the crime purely by accident or because of Orsinger's influence; that he had squandered a chance to go to college; that his home life was better than average; and that his experiences and environment did not contribute to his crimes—concluding that their cruelty was "so inexplicable" that the only reasonable response was to punish the perpetrator with death. Defense counsel's failure to submit any evidence explaining what went wrong in Mitchell's life ensured that "the prosecutor's main argument to the jury during sentencing was the dearth of evidence in mitigation of the crimes." *Silva*, 279 F.3d at 830. In fact, not only did counsel fail to challenge the prosecution's assertion that Mitchell's background could not mitigate his culpability for

the crimes, "he effectively validated it," *Hamilton*, 583 F.3d at 1121, by stating in closing that "people come from bad backgrounds all the time and never get involved in anything like this."

The other two themes identified by the majority—that Orsinger was the mastermind and that the Navajo Nation opposed the death penalty—could not and did not redeem counsel's worthless and implausible "good guy" defense for two reasons. Most important, these two themes were irrelevant to counsel's choice between a doomed "good guy" defense and a far more plausible defense that sought to explain how and why Mitchell became a criminal, as the two subsidiary arguments were fully consistent with either choice. Counsel's decision to use them along with the doomed "good guy" theme did not in any way make the deficient performance in choosing that theme as the primary defense any less deficient.

Moreover, these two subsidiary themes were inadequately developed and halfheartedly presented to the jury. Virtually no evidence of the "Orsinger was the mastermind" theme was introduced in the penalty phase, and neither was a serious argument to that effect made to the jury. The sum total of penalty-phase evidence pertaining to this theme was Mitchell's uncle's speculative statement that Mitchell "was a good kid until he met Orsinger,"[14] and evidence that Orsinger had earlier committed a similar crime with someone else. Then, in closing, counsel asserted that although Mitchell admitted stabbing Slim, as well as cutting the child's throat and throwing rocks on her head, "there is no evidence . . .

[14] The uncle admitted on cross-examination that he had no first-hand knowledge of Orsinger.

Mitchell began the stabbing," that it was *possible* that Orsinger "threw the first rock," and that "the cause of death for that child *could* have been inflicted by the first rock." (emphasis added). These hypothetical suppositions did not constitute a reasonable argument for sparing Mitchell's life. As the prosecution pointed out, Mitchell was death-eligible whether he delivered the fatal blows or not.

The third theme—the Navajo Nation's opposition to the death penalty—could have been quite compelling, particularly if combined with evidence of Mitchell's drug and alcohol addiction. Unfortunately, the only evidence that the jury heard regarding the Navajo Nation's opposition to the death penalty consisted of counsel reading from Henry's letter. The jury was unaware that the victims' family had asked the prosecutor not to seek the death penalty. No defense witness testified about why the death penalty contravenes Navajo conceptions of justice, or about the tribe's belief that rehabilitation, not the death sentence, is needed to address major crimes committed on the reservation, most of which are associated with alcohol addiction. Indeed, counsel seems not to have even realized this *was* a potential theme; the Navajo Nation's opposition to Mitchell's execution was never formally presented to the jury as a mitigating factor.[15] In combination with the missing direct evidence of drug and alcohol addiction (along with the other evidence regarding Mitchell's emotional and mental problems and the physical abuse he suffered), evidence relating to the Navajo Nation's reasons for opposing his death

[15] The seven members of the jury who found the Navajo Nation's opposition to the death penalty mitigating included it as *write-in* non-statutory mitigator on the verdict form. By contrast, the verdict form included typed questions regarding the prosecution's non-statutory aggravating factors.

sentence could have provided substantial support for a defense that explained why Mitchell became what he did—although it provided no support for the "good guy" argument.

"Defense counsel's use of mitigation evidence to complete, deepen, or contextualize the picture of the defendant presented by the prosecution can be crucial to persuading jurors that the life of a capital defendant is worth saving." *Allen*, 395 F.3d at 1000. In this case, however, counsel's halfhearted attempt at a good character defense provided no context at all. The jury simply heard mixed evidence that Mitchell had been an ok guy to a few people at some point in his life, with no explanation whatsoever regarding why he committed extremely violent acts that jurors might well believe no decent human being would commit. To the contrary, the evidence that counsel failed to present—that Mitchell was addicted to alcohol and drugs, that he had been physically abused as a child, and that he had mental and emotional problems—could have helped persuade at least one juror that Mitchell was not as culpable as would have been the good guy from a fine family background that counsel sought to portray him as being. The strategy employed by Mitchell's counsel does not fit with the commission of the horrific acts of which the jury had just convicted him. Any reasonable juror would need some explanation of what was wrong with Mitchell—why what he did was not simply due to an evil nature. Simply saying he's really a good guy with some good qualities could not conceivably help. Counsel's strategy—if it can be called that—was outside "the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S.668, 689 (1984); *see also Silva*, 279 F.3d at 846 ("[A]n attorney's performance is not immunized from Sixth Amendment

challenges simply by attaching to it the label of 'trial strategy.'"). I would hold that for this reason alone counsel's performance was constitutionally deficient.

B.

Even assuming that counsel's "good guy" defense strategy might in some limited circumstances have been reasonable—and it's hard to make that assumption given the nature of the acts that Mitchell committed—the question remains "whether the investigation supporting their decision not to introduce mitigating evidence of [Mitchell's] background [and to rely on the 'good guy' defense] was *itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 511 (2003). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 690–91, before deciding on the strategy to be followed at the trial and the penalty phase, with a particular emphasis on the latter. In fact, "the reasonableness of counsel's investigatory and preparatory work at the penalty phase should be examined in a different, more exacting, manner than other parts of the trial." *Frierson v. Woodford*, 463 F.3d 982, 993 (9th Cir. 2006).

In Mitchell's case, counsel unduly circumscribed the scope of the mitigation investigation and prematurely settled on a "good guy" strategy before obtaining all the facts necessary to the making of an informed decision. Although "[n]o particular set of detailed rules" establishes the contours of competent representation, the Supreme Court and this

court recognize that "[r]estatements of professional standards . . . can be useful as 'guides' to what reasonableness entails . . . to the extent they describe the professional norms prevailing when the representation took place." *Doe*, 782 F.3d at 434 (quoting *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009)) (quotation marks omitted); *see also Wiggins*, 539 U.S. at 524. Counsel's investigation clearly fell short of the professional norms in place at the time of Mitchell's trial, which included "the duty to investigate mitigating evidence in exhaustive detail" and required "that counsel's investigation cover every period of the defendant's life from 'the moment of conception,' . . . and that counsel contact 'virtually everyone . . . who knew [the defendant] and his family' and obtain records 'concerning not only the client, but also his parents, grandparents, siblings, and children.'" *Bobby*, 558 U.S. at 8 (quoting *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("*ABA Guidelines*"), cmt. to Guideline 10.7 (rev. ed. Feb. 2003)).

Counsel was on notice that Mitchell struggled with drug and alcohol abuse but unreasonably decided not to investigate further. Vera Ockenfels, an experienced capital lawyer and mitigation specialist hired by the defense, provided a preliminary report that identified Mitchell as a "heavy" user of crystal methamphetamine, particularly in the months preceding the crimes, as well as a user of marijuana, cocaine, and alcohol.[16] She informed counsel "that Mitchell was

[16] Contrary to the majority's contention that Ockenfels' report was complete, Maj. Op. at 14, it was clearly a draft—the conclusion section of the report read "[TO BE DRAFTED FOLLOWING EDITS FROM ATTORNEYS]" and during post-convictions proceedings Ockenfels explained that it was a "draft document that [she] expected would be further developed and revised before it was finalized . . . ."

addicted to alcohol and drugs and that he had started using drugs at age eleven," and recommended that counsel further investigate Mitchell's history of addiction in consultation with a psychopharmacologist. This advice was not followed. In fact, when Ockenfels informed counsel that Mitchell's addiction could be used as mitigating evidence, Mitchell's lawyers simply responded that "there was 'no mitigation' in his case," and "that the team did not intend to pursue evidence of Mitchell's significant history of drug and alcohol abuse . . . because Mitchell had denied being drunk or high on drugs at the time of the killings."

Declining to pursue substance abuse evidence in favor of a "good guy" defense at this stage was unreasonable for several reasons: First, Ockenfels had explained that it was common for young Native American clients to deny addiction to their attorneys. Second, "[a] defendant's lack of cooperation does not eliminate counsel's duty to investigate." *Hamilton*, 583 F.3d at 1118; *see also ABA Guidelines*, cmt. to Guideline 10.7 (describing duty to conduct a "thorough and independent" investigation *regardless of "client statements concerning the facts of the alleged crime*" (emphasis added)).

Third and most important, whether Mitchell was intoxicated *during the commission of the crime* was not the relevant penalty-phase question. Even if evidence of substance abuse was "[in]sufficient to demonstrate that [the defendant] lacked the requisite mental state for the crime," it remained an "important mitigating factor" for the jury to consider in that it would have played a major part in explaining Mitchell's life story to the jury. *Frierson*, 463 F.3d

at 994 n.12.[17] Evidence that Mitchell was a chronic user of alcohol and drugs from a young age is the kind of "classic mitigating evidence" that counsel must pursue at the penalty phase, *Correll*, 539 F.3d at 952, irrespective of whether the defendant was under the influence at the time of the crimes. Substance abuse constitutes "behavior that can be characterized as self-medication for the everyday trauma of his life and for the mental health illnesses that were later diagnosed." *Id.* Evidence of Mitchell's addiction would have helped a jury to far better comprehend why he committed the crimes he did—particularly when linked to the abusive circumstances in which he was raised. Counsel had a duty to pursue this lead. Further investigation would have revealed that Mitchell's drug and alcohol problems escalated drastically in the months preceding the crimes. He heavily used crystal methamphetamine, powder and crack cocaine, ecstasy, LCD, PCP, marijuana, and alcohol, often staying up for three nights in a row. It would also have revealed a family history of alcoholism and the ugly and noxious family environment in which he was raised.

The majority dismisses counsel's decision not to investigate or present evidence of Mitchell's history of alcohol and drug abuse as a strategic decision based on "their professional opinion [that] jurors would be turned off by such evidence . . . ." Maj. Op. at 16–17. This explanation, however, is not only inconsistent with the many well-established judicial conclusions to the contrary, but it is

[17] *See also Correll*, 539 F.3d at 944 (finding ineffective assistance at penalty phase because "[d]espite his knowledge that [Defendant] was a drug user . . . defense counsel did not interview witnesses about th[is] issue[] or obtain records concerning these matters"); *ABA Guidelines*, cmt. to Guideline 10.7 (describing "substance abuse" as a mitigating factor counsel "needs to" explore).

directly contradicted by counsel's actions in this case, and thus can only constitute a "*post hoc* rationalization of counsel's conduct." *Wiggins*, 539 U.S. at 526–27. In fact, counsel *did* introduce evidence of intoxication at the penalty phase, albeit ineffectively, through the testimony of FBI Agent Duncan, who testified on cross-examination that he did *not* believe Mitchell's account of having been intoxicated the day of the crime. Counsel also requested and received a jury instruction on the statutory mitigating factor of impaired capacity and, during closing argument, asserted that "[Mitchell] was so drunk that he didn't even remember where this all happened and he blacked out . . . ." Thus, "counsel never actually abandoned the possibility" of introducing evidence of drug and alcohol abuse but instead presented a "halfhearted mitigation case" on the matter ineptly and without proper investigation. *Wiggins*, 539 U.S. at 526.

Most important, the weak evidence of drug and alcohol use that counsel haphazardly introduced was deployed for the wrong purpose. The point was not that Mitchell was intoxicated during the crimes to the point that he lost control—an unsubstantiated claim that likely *did* "turn off" the jury. Rather, evidence of Mitchell's long history of addiction commencing at an early age—which was easily corroborated, as post-conviction counsel found—could have been used effectively to give the jury a complete picture of why Mitchell became the person he was. Trial counsel, however, failed to conduct the investigation necessary to make a reasonably informed decision regarding whether to present evidence that Mitchell's struggle with addiction and his otherwise damaging life history mitigated his culpability. The resulting unexplored and undeveloped presentation that he was simply drunk at the time was wholly unbelievable and served only to undermine the "good guy" defense. Clearly no

reasonable strategic decision to withhold evidence of Mitchell's drug and alcohol addiction or to end the investigation into such evidence was made; nor could it have been made without investigating in "exhaustive detail" all aspects of Mitchell's life that could have contributed to his ultimately committing so horrendous an offense. *Bobby*, 558 U.S. at 8.[18]

Counsel did not, it is clear, adequately investigate Mitchell's family history or make a reasonable decision not to investigate further. Counsel was on notice from Ockenfels' draft report that Mitchell's home life was marked by abandonment, instability, isolation, and abuse. For example, Ockenfels found that Mitchell's mother, with whom he lived until seventh grade, was physically abusive, as was his grandmother, with whom he lived periodically. An uncle had observed that Mitchell "'never had a chance' with his family," while Dr. Roessell told Ockenfels that Mitchell "was 'on his own from the time he was born.'" Ockenfels concluded that by high school "the neglect [Mitchell] had endured had taken its toll and had hardened him."

Counsel did not follow up on any of these leads. The defense team's view was that "nothing [stood] out . . . . [The family was] educated. They were, at least . . . by reservation standards, . . . middle-class." In short, the attorneys ignored red flags regarding physical and emotional abuse, instead taking away from Ockenfels' report and their own interviews

[18] Moreover, the "two sentencing strategies" of (1) good character evidence and (2) explanatory mitigating evidence of drug and alcohol abuse, mental illness, or a difficult background "are not mutually exclusive." *Bemore*, No. 12-99005 (quotation marks omitted). Thus, counsel could not have made a reasonable strategic decision to cut off the investigation into the latter type of evidence to focus solely on the former.

with Mitchell's family only that "he came from basically a family of educators." They accordingly ceased investigating Mitchell's family background, unreasonably constricting the mitigation investigation and presentation to good character evidence.

This premature narrowing of the scope of the mitigation investigation was not within the range of reasonable professional conduct. "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) (quotation marks omitted). "[I]f what counsel knows or should know suggests further investigation might yield more mitigating evidence, counsel must conduct that investigation." *Doe*, 782 F.3d at 435. Had counsel conducted further inquiry, additional mitigating evidence ripe for presentation at the penalty phase would have been uncovered. The post-conviction investigation revealed that Mitchell's home was far more violent and dysfunctional than Ockenfels' incomplete draft report suggested; there was "constant uncertainty of what would happen . . . because of the verbal and sometimes physical abuse, and the emotional abuse . . . ."

One particularly egregious deficiency of the mitigation investigation into family history bears mention. Even though the defense team knew that Mitchell's grandfather George was "'the only one who raised [him]," they uncovered only very elementary background information about him—that he had ten siblings; that he had held "several teaching and administrative positions in several Reservation schools"; that he married Mitchell's grandmother when she was thirteen and was twenty years her senior; and that he was a "dour, sour man." Critically, counsel failed to investigate Ockenfels'

finding that both of Mitchell's grandparents and his uncle had told him that he was the product of rape and/or that his grandfather was also his father. Growing up with this "knowledge," true or false, is certain to adversely affect an individual's emotional well-being.

Had counsel further investigated George—consistent with the ABA Guidelines' requirement of an "extensive and generally unparalleled investigation into personal and family history" that includes "[t]he collection of corroborating information from multiple sources," *ABA Guidelines*, cmt. to Guideline 10.7—they would have learned that there were "persistent rumors regarding George molesting children." Residents of the reservation told post-conviction investigators that George was fired from a school principal position because he molested children. His wife's sisters also alleged that he raped them when they were nine and twelve years old, respectively, and his wife told a relative that he molested the three-year-old child of a neighbor. Mitchell's mother, Sherry, told post-conviction investigators that her mother (George's wife) repeatedly accused her of having a sexual relationship with George and that some people thought Mitchell was the product of incest.[19] Sherry also "stated an uncertainty whether or not George may have molested [Mitchell]."[20]

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[19] Although Sherry did not believe that her father had sex with her, she reported memories of a man with "whiskers" kissing her while she was asleep and of a vision that her "father had performed a binding ceremony with [her] when [she] was little" and that the "ceremony meant that . . . [she] would become his wife, which included having sex with him."

[20] Trial counsel "did not get much of a history of [Mitchell]'s life from his mother" Sherry because she stopped cooperating when Ockenfels, against her express instructions, told Mitchell certain things she had said. However, even without Sherry's cooperation, an adequate investigation

The majority dismisses the evidence that Mitchell's primary caregiver was a pedophile and rapist as of "dubious relevance" because the alleged conduct took place "sometime in the 1950s and 1960s, about 20 years before Mitchell was born," Mitchell never met the alleged victims, and there was no allegation that George ever molested Mitchell himself. Maj. Op. at 23–24. The conduct was not, however, limited to the 1950s and 1960s. For example, the complaints of sexual abuse lodged against George when he was a principal pertained to incidents in 1985 or 1986.

Moreover, the majority's belief that it is of little relevance that Mitchell was primarily raised by a man who was probably a child molester is puzzling for several reasons. First, this court routinely upholds lifetime requirements that sex offenders avoid *any* contact with minors, reasoning that "'the perpetrators of child sexual abuse crimes' often have 'deep-seated aberrant sexual disorders that are not likely to disappear within a few years . . . .'" *United States v. Williams*, 636 F.3d 1229, 1234 (9th Cir. 2011) (citation omitted). Second, the sexual abuse allegations against George could have been presented to the jury as evidence of the degree to which his family neglected him, as his "mother and grandmother knowingly gave up his care for extended periods of time . . . [to] a man whom they knew sexually preyed on children." Third, the atmosphere in a home dominated by a child molester was necessarily fraught with tension, sexual and otherwise, an atmosphere hardly conducive to the healthy emotional development of a young child. Fourth and most important, Mitchell's attorneys could not reach any conclusion regarding the relevance or value of mitigating

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would likely have uncovered the sexual abuse allegations made by other family members and residents of the Navajo Reservation.

evidence pertaining to the sexual abuse allegations until they reasonably investigated those allegations. It was undoubtedly constitutionally deficient performance for counsel to fail to perform any investigation whatsoever into the allegations after having been alerted to them by Ockenfels' draft report.

Finally, the investigation into Mitchell's mental health was also inadequate. "The presence of certain elements in a capital defendant's background, such as a family history of alcoholism, abuse, and emotional problems, triggers a duty to conduct further inquiry before choosing to cease investigating," *Doe*, 782 F.3d at 435 (quotation marks and citation omitted), but counsel failed to pursue clear leads regarding Mitchell's mental problems. First, counsel did not follow up on Ockenfels' finding that when Mitchell underwent counseling at age seventeen, a doctor found him to be "a very troubled young man" in need of "[i]ntensive psychotherapy" who experienced suicidal ideation when his family fought. Counsel also ignored Ockenfels' recommendation that they hire a forensic psychologist to explain how Mitchell's upbringing had caused him to turn to alcohol and drug abuse.

Second, the majority overstates its case when it asserts that Dr. Morenz, who oversaw the team evaluating Mitchell, "did not recommend further testing." Maj. Op. at 16.[21] Rather,

[21] The majority erroneously relies on the purported evaluation of psychologist Susan Parrish in ruling that counsel reasonably decided not to further investigate Mitchell's mental problems. *See* Maj. Op. at 14–15. It is unclear whether Dr. Parrish actually performed a complete psychiatric evaluation of Mitchell. Although one attorney stated in a post-conviction deposition that Dr. Parrish diagnosed Mitchell as a sociopath and indicated that she would not serve as a witness, Bartolomei, the attorney in charge of the penalty phase, testified that her role was "more to assist in

in addition to finding polysubstance abuse and "significant depressive symptoms," Dr. Morenz concluded that Mitchell may "have some subtle brain dysfunction in the frontal lobes caused by his head injuries . . . [that] might have contributed to Mr. Mitchell being more impulsive . . . including . . . during the time of the alleged instant offenses." He suggested that "[a] PET scan could be obtained that could, if abnormal, contribute further corroborating evidence to the diagnosis of a cognitive disorder not otherwise specified." Counsel neither discussed Dr. Morenz's report with him, followed up on these leads, nor presented any evidence of Mitchell's mental problems to the jury.

The majority asserts that counsel made a reasonable decision not to further investigate or to present mental health evidence for fear that doing so would open the door to damaging aspects of Dr. Morenz's report. Maj. Op. at 16–17. However, the question is not, as the majority appears to believe, whether it was reasonable not to call Dr. Morenz to the stand. There may be good reasons not to call a particular witness, but counsel cannot forego an entire line of inquiry on that basis unless there is no way, other than the problematic witness, to get that evidence before the jury. *See Karis v. Calderon*, 283 F.3d 1117, 1140 (9th Cir. 2002) (holding that even if "[i]t was within the range of reasonable tactics not to put [a certain witness] on the stand, . . . that does not excuse the failure to present the evidence of abuse through other witnesses"); *see also Doe*, 782 F.3d at 439 ("Other witnesses, such as those whom habeas counsel was able to find, were 'easily within [counsel's] reach,' and would have been discovered by trial counsel, '[h]ad [he] only looked.")

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coordinating or reviewing materials or giving ideas" and stated, "I don't believe she . . . ever [made] a DSM-IV assessment."

(quoting *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999)) (some alterations in original); *Wiggins*, 539 U.S. at 527 ("[A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). Nothing suggests that Dr. Morenz was the only mental health witness available. Indeed, Ockenfels referred counsel to a forensic psychologist whom she believed could provide a helpful synthesis of Mitchell's history to the jury. There is no indication in the record that counsel ever contacted him.

Moreover, at the penalty phase, "counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002). In this case, however, the inadequacy of counsel's investigation into Mitchell's personal and family history tainted the mental health investigation. For example, Dr. Morenz stated during post-convictions proceedings that he "would have developed further" whether Mitchell's "perceptions of reality might have been altered" at the time of the crimes had he known the full extent of Mitchell's addictions and Dr. Stewart, a psychiatrist who examined Mitchell post-conviction, reached a diagnosis of post-traumatic stress disorder based in part on the evidence uncovered post-conviction regarding the "severity and frequency" of the abuse Mitchell experienced as a child.

"*[A]ll* potentially mitigating evidence is relevant at the sentencing phase of a death case" and thus counsel had a duty to investigate further once put on notice that Mitchell struggled with addiction, that he had a troubled childhood,

and that he had mental and emotional problems. *Wallace*, 184 F.3d at 1117 n.5 (emphasis added). Counsel failed to appreciate, however, that evidence of these mitigating circumstances "may help" the penalty-phase defense "even if they don't rise to a specific, technically-defined level." *Id.* In short, "counsel were not in a position to make a reasonable strategic choice as to whether to focus on" a "good guy" defense, "the sordid details of [Mitchell's] life history, or both, because the investigation supporting their choice was unreasonable." *Wiggins*, 539 U.S. at 536. I would accordingly hold that for this reason as well counsel's performance was constitutionally deficient.

C.

In order to establish a violation of the defendant's Sixth Amendment right to effective counsel, it is not enough that counsel performed deficiently. The defendant must also have been prejudiced. In this case, when one evaluates "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding" and reweighs it against the aggravating evidence, "there is a reasonable probability that at least one juror would have struck a different balance between life and death" but for counsel's deficient performance. *Hamilton*, 583 F.3d at 1131 (quotation marks and citation omitted).

A number of factors tell us that a death sentence was far from a foregone conclusion in this case: (1) Notwithstanding the attorneys' deficient performance, the jurors found a number of mitigating factors, including, for example, a unanimous finding that Mitchell's lack of a prior record was mitigating and a finding by seven jurors that the Navajo Nation's opposition to the death penalty was mitigating.

(2) Neither the Arizona United States Attorney, the Navajo Nation, nor the victims' family wanted to see Mitchell executed. (3) Neither Orsinger, who was a minor at the time of the crime, nor his adult accomplice in another strikingly similar double murder were sentenced to death.

Most important, "there was a substantial amount of classic mitigating evidence that could have been presented, but was not." *Correll*, 539 F.3d at 952. Evidence that Mitchell suffered from severe drug and alcohol abuse problems, was raised by a child molester, experienced physical and emotional abuse, and had mental problems is "precisely the type of evidence we have found critical for a jury to consider when deciding whether to impose a death sentence," *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003), yet the case that counsel presented gave the mistaken impression that no such mitigating circumstances were present. *See supra* note 13. Indeed counsel gave the jurors precisely the opposite impression—that Mitchell simply came from a middle-class home of educators and had a rather unremarkable upbringing that made his inexplicably heinous crimes deserving of punishment by death.

"[B]oth this court and the Supreme Court have consistently held that counsel's failure to present readily available evidence of childhood abuse, mental illness, and drug addiction is sufficient to undermine confidence in the result of a sentencing proceeding, and thereby to render counsel's performance prejudicial." *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007); *see also Hamilton*, 583 F.3d at 1113 ("In a capital case, such evidence [of a disadvantaged background, emotional or mental problems] can be the difference between a life sentence and a sentence of death."). Here, evidence of Mitchell's abusive history, as

well as his addiction and mental problems, would have been especially compelling when combined with evidence that the Navajo Nation opposes the death penalty in part because addiction plays a substantial role in most "major crimes committed on the Navajo Nation" and the Navajos fervently believe that treatment, not execution, is the proper long-term answer. *Supra* p. 29 & note 3.

True, "[t]he aggravating evidence in [Mitchell's] case was strong, but it was not so overwhelming as to preclude the possibility of a life sentence. Heinous crimes do not make mitigating evidence irrelevant." *Hovey v. Ayers*, 458 F.3d 892, 930 (9th Cir. 2006); *see also Hamilton*, 583 F.3d at 1134 ("[E]ven the gruesome nature of a crime does not necessarily mean the death penalty [i]s unavoidable." (quotation marks and citations omitted)). In my view, notwithstanding Mitchell's terrible criminal acts, the likelihood of a different outcome (which required the casting of only a single vote against the imposition of the death penalty) had counsel competently investigated and presented the mitigation case that could have been put before the jury is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, in my opinion, counsel's constitutionally deficient performance was indeed prejudicial.

In this respect, I would add a final thought. This is a purely federal habeas case—a federal court's review of a *federal* conviction. Any concern that we might have regarding the doctrine of comity when we review a state conviction does not apply. That is, this case involves prosecution and judicial review by one sovereign—the federal government—and not a federal court's review of the criminal adjudication of a second sovereign government—a state. In this case, we owe no deference to what another

sovereign's court has done and we are perfectly free to review the important questions in this case de novo. The majority, however, fails to recognize this key distinction from the usual habeas cases heard by our court seeking relief from a state conviction, inappropriately relying on cases in which the Antiterrorism and Effective Death Penalty Act applies. In this case, the only other sovereign government to which comity might apply is the Navajo Nation, which vigorously opposes Mitchell's death sentence. Although there is no obligation to defer to its legal rulings, perhaps the jury would have given more weight to its pleas had Mitchell's counsel presented a case that helped explain how his disadvantaged background, addiction, and mental and emotional difficulties contributed to his commission of his crimes and rendered him less culpable, even though the federal government itself seemed totally unmoved by the concerns and interests of the sovereign primarily affected.

Conclusion

The majority tragically errs in sending Mitchell on to his death notwithstanding the fact that he was deprived of effective representation and a fair trial. I sincerely hope that the executive branch will not compound the error by carrying out Mitchell's execution in violation of the Constitution, as well as in contravention of the wishes of the Navajo Nation and the family of the victims. It is time for those with the ultimate power to decide the fate of federal prisoners to arrive at a more sensible policy regarding the execution of our citizens by the federal government and to apply it to Mitchell's case. At the very least, arbitrariness must not be a

factor.[22] There are currently fifty-nine inmates on federal death row awaiting execution, yet just three executions have been carried out since the reinstatement of the federal death penalty in 1988. There is little value in adding to this backlog someone like Mitchell who committed a crime solely of local interest to the Navajo Nation, brutal as that crime may have been. Most important, there is still a place in our federal system for clemency—for the commutation of a death sentence to life without the possibility of parole (or even, given Mitchell's age at the time of the crimes, life *simpliciter*). A very recent ABC News/Washington Post poll shows that for the first time a majority of our citizens favors life without parole over the government's taking of human life.[23] I am hopeful that if and when the President is required to determine whether capital punishment is the appropriate remedy for Mitchell's offenses, he (or she) will bear in mind both the interests of justice and the wishes of the victims' family, the Navajo Nation, and the American people.

I dissent.

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[22] President Obama ordered the Justice Department to consider a formal moratorium on federal executions, but that effort stalled when Attorney General Holder announced his plans to resign. *See* Matt Apuzzo, *U.S. Backed Off on Push to End Death Penalty*, N.Y. Times, April 30, 2015, at A1.

[23] Damla Ergun, *New Low in Preference for the Death Penalty*, ABC News (June 5, 2014), http://abcnews.go.com/blogs/politics/2014/06/new-low-in- preference-for-the-death-penalty/.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEZMOND C. MITCHELL, Petitioner - Appellant, v. UNITED STATES OF AMERICA, Respondent - Appellee.	No. 11-99003 D.C. No. 3:09-cv-08089-MHM District of Arizona, Phoenix ORDER

Before: REINHARDT, SILVERMAN, and WARDLAW, Circuit Judges.

Judges Silverman and Wardlaw have voted to deny Petitioner-Appellant's petition for rehearing and to deny the petition for rehearing en banc. Judge Reinhardt has voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lezmond Mitchell, Petitioner, vs. United States of America, Respondent.	No. CV-09-8089-PCT-MHM No. CR-01-1062-PCT-MHM DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Petitioner Lezmond Mitchell, a federal prisoner under sentence of death, moves this Court to vacate his conviction and sentence under 28 U.S.C. § 2255. (Doc. 30.)[1] The Government filed a response opposing the motion, and Petitioner replied. (Docs. 49, 55.) After consideration of the motion and responsive pleadings, as well as the trial record and the numerous exhibits proffered by the parties, the Court concludes that Petitioner is not entitled to postconviction relief and that further evidentiary development is neither required nor warranted.

PROCEDURAL HISTORY

On May 8, 2003, a jury convicted Petitioner of first degree murder, felony murder,

[1] "Doc." refers to documents filed in the instant civil case. "CR Doc." refers to documents filed in the criminal case, No. CR-01-1062-PCT-MHM.

robbery, kidnapping, use of a firearm during a crime of violence, and armed carjacking resulting in death. Petitioner and the victims were members of the Navajo Indian reservation, where the crimes occurred. Under the Federal Death Penalty Act, Petitioner faced capital punishment on the carjacking conviction. Following a penalty phase hearing, the jury unanimously returned a recommendation of death as to each of the two murder victims. This Court imposed that sentence on September 15, 2003. On September 5, 2007, the United States Court of Appeals for the Ninth Circuit affirmed on direct appeal. *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007). The Supreme Court denied a petition for certiorari on June 9, 2008. *Mitchell v. United States*, 128 S. Ct. 2902 (2008).

Petitioner filed the instant motion on June 8, 2009, and an amended motion on November 12, 2009. (Doc. 9, 30.) The Government filed its response on April 1, 2010. (Doc. 49.) Petitioner filed a reply on July 7, 2010. (Doc. 55.)

FACTUAL BACKGROUND

The Ninth Circuit summarized the relevant facts as follows:

> In October 2001, Mitchell, then 20 years old, Jason Kinlicheenie, Gregory Nakai and Jakegory Nakai decided to rob a trading post on the Arizona side of the Navajo Indian reservation. Mitchell and 16 year-old Johnny Orsinger set out from Round Rock, Arizona, for Gallup, New Mexico, on October 27 to look for a vehicle they could steal to use during the robbery. They bought one knife and stole another while there. Hitchhiking back to the reservation, they were picked up by a trucker who took them part of the way.
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> Meanwhile, on the afternoon of Sunday, October 28, 2001, Alyce Slim (63 years old) and her nine year-old granddaughter, Jane Doe, left Fort Defiance, Arizona to go to Tohatchi, New Mexico where Slim hoped to secure the services of Betty Denison, a traditional medicine person, for leg ailments. It is a 35 minute drive that the two made in Slim's pewter-colored double cab Sierra GMC pickup truck. They got to Tohatchi about 4 p.m. Denison was unable to assist her, but thought another medicine woman, Marie Dale, might be able to help. She, Slim, and Jane drove to Twin Lakes, New Mexico where Slim arranged an appointment with Dale for the next day. The three returned to Denison's home where they dropped Denison off around 5 p.m., then Slim and her granddaughter left. That is the last time they were seen alive.
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> Somewhere in route, and somehow, Mitchell and Orsinger got into Slim's truck. Slim and Jane were in front, Mitchell in the right-rear passenger seat and Orsinger in the left. Slim stopped near Sawmill, Arizona, to let Mitchell and Orsinger out of the car, but Orsinger started stabbing her with a knife and Mitchell joined in. Slim ended up being stabbed 33 times, both from the left and right, with sixteen incised wounds on her hands that indicated she fought the attack. Once dead, her body was pulled onto the rear seat. Jane

was put next to her. Mitchell drove the truck some 30-40 miles into the mountains with Jane beside her grandmother's body.

There, Slim's body was dragged out. Jane was ordered out of the truck and told by Mitchell "to lay down and die." Mitchell cut Jane's throat twice, but she didn't die. Orsinger and he then dropped large rocks on her head, which killed her. Twenty-pound rocks containing blood tied to Jane were found near the bodies.

Mitchell and Orsinger returned to the site with an axe and shovel. Mitchell dug a hole while Orsinger severed the heads and hands of Jane and Slim. Together, they dropped the severed body parts (along with Mitchell's glove) into the hole, and covered them. The torsos were pulled into the woods. Later they burned the victims' clothing, jewelry, and glasses. Mitchell and Orsinger washed the blood from the knives in a nearby stream; the next day, Mitchell also washed the knives with alcohol to remove any blood.

Jane's mother, Marlene, became concerned when Jane and Slim, who was Marlene's mother, had not returned home. She tried to call Slim on her cell phone Sunday night, then the next morning at home, but got no answer. After checking at Slim's house and Jane's school, Marlene filed a missing persons report on Tuesday.

On Wednesday, October 31, 2001, the Red Rock Trading Post, a convenience store and gas station located in Navajo territory, was robbed by three masked men. Kinlicheenie supplied the masks as well as his parents' car for use after the truck was abandoned; Mitchell carried a 12-gauge shotgun, and Jakegory Nakai had a .22 caliber rifle. Charlotte Yazzie, the store manager, was mopping the floor when one of the robbers assaulted her, striking her with his firearm and pulling her behind a desk. Watching this, another store clerk, Kimberly Allen, ducked behind shelving. A second robber saw Allen and pushed her against the counters. When Allen said she didn't know the combination to the safe, the gunman told her, "If you lie to me or you don't cooperate with us, we are going to kill you." He told Allen to turn on the gas pump. As she did, she saw a pickup truck parked outside, which she described as a double cab beige Chevrolet. Yazzie was taken into a back room where the robbers demanded, and she provided, more money. Mitchell, Nakai and Kinlicheenie emptied the cash registers and safe and then tied down Allen and Yazzie in the vault room. They made off with $5,530 and Yazzie's purse.

The robbers drove back to Kinlicheenie's car and he followed the truck to a place about a mile and a half south of Wheatfields, Arizona, where Mitchell set fire to it using kerosene stolen from the Trading Post. They returned to the Nakai residence and split the money. Mitchell got $300 from Kinlicheenie.

As it happens, a customer and his girlfriend pulled into the parking lot while the robbery was in progress and saw two of the masked gunmen, one of whom was wearing purple gloves. The customer also saw a beige, extended cab Sierra or Silverado model truck parked at the fuel tank. The customer's girlfriend took down the license plate number and gave it to one of the Trading Post employees. The next day, a Navajo police officer discovered an abandoned pickup truck a mile and a half south of Wheatfields, Arizona, within the Navajo Indian reservation. The officer detected the odor of

gasoline, and portions of the truck's interior were burned. It turned out to be Slim's 2001 GMC Sierra pickup. Criminal investigators discovered a purple latex glove and Halloween masks inside the truck, as well as Mitchell's fingerprints and Slim's blood.

Based on this information and a tip, investigators focused on Orsinger, Orsinger's father, Mitchell, Jakegory Nakai and Gregory Nakai, among others. On the morning of November 4, 2001, FBI Agent Ray Duncan conducted a briefing with criminal investigators and SWAT team officers of the Navajo Department of Law Enforcement. Tribal warrants were issued and executed at the house of Gregory Nakai. Mitchell, Jimmy Nakai, and Gregory Nakai were arrested. Mitchell had been asleep and wore only a t-shirt and shortcuts. He asked for his pants, which he told an FBI agent were near a bunk bed on the floor. As the agent was picking them up, a silver butterfly knife fell from a pocket.

Gregory Nakai and his mother, Daisy Nakai, consented to a search of the house. Two FBI agents, an evidence technician, and a Navajo criminal investigator conducted the search. They retrieved the silver butterfly knife and found a second butterfly knife with a black handle. Trace amounts of blood from the silver knife were matched to Slim. The search also turned up a newspaper that had a front page story on the Trading Post robbery, and a cell phone belonging to Slim.

Agent Duncan and a Navajo criminal investigator met with Mitchell at the Navajo Department of Criminal Investigations around 1:30 p.m. Mitchell signed a waiver of his *Miranda* rights and, after flipping a coin, agreed to talk. When asked about his whereabouts on the weekend of October 27, Mitchell stated that he had been drinking around Round Rock. He denied being involved in the disappearances and robbery. Mitchell then agreed to a polygraph examination, which FBI Special Agent Kirk conducted about 5:30 p.m. Mitchell was reminded that his *Miranda* rights still applied and he signed an FBI consent form after reading it. Kirk told Mitchell that the test results indicated he had lied. Mitchell made inculpatory statements about the robbery and agreed to a tape recorded interview after again being reminded of his *Miranda* rights. Mitchell admitted his involvement in the Trading Post robbery, and also confirmed that he was present when "things happened" to Slim and Jane. He agreed to help investigators find the bodies. The interview ended around 11:00 p.m.

Orsinger was arrested the next day, November 5, 2001, and he, too, agreed to take agents to the bodies. Orsinger had difficulty doing so, and agents called for Mitchell to be brought out. Mitchell directed Navajo police officers to the site. While there, Mitchell acknowledged to Kirk that his *Miranda* rights were in effect and agreed to answer more questions. According to the agent, Mitchell stated that he had stabbed the "old lady," and that the evidence would show and/or witnesses would say that he had cut the young girl's throat twice. Mitchell said he told Jane to "lay down on the ground and die," and that he and Orsinger then gathered rocks, and with Orsinger leading on, the two took turns dropping them on Jane's head. Mitchell indicated that he and Orsinger retrieved an axe and shovel, severed the heads and hands, buried the parts in a foot-deep hole, burned the victims' clothing, and cleaned the knives in a stream.

Mitchell was returned to tribal jail and taken before a tribal judge on

> November 7. A federal indictment was issued on November 21, and on November 29 an FBI agent picked up Mitchell from the tribal jail and drove him to the courthouse in Flagstaff, Arizona. Just before arraignment, agents read Mitchell his *Miranda* rights and obtained a signed waiver. Mitchell explained that one to two weeks before the Trading Post robbery, he had talked with Jakegory Nakai about committing a robbery. He and Orsinger hitchhiked from Round Rock, Arizona to Gallup, New Mexico to purchase liquor and while in Gallup, the two visited a shopping mall where they purchased one knife and stole another. They caught a ride to Ya Ta Hey, New Mexico, where they were picked up by an older lady and a young girl near the border. Mitchell asked to be let off near Sawmill, Arizona, and when the truck stopped, Orsinger began stabbing the woman. Mitchell admitted that he stabbed her four to five times. They put the older woman and the little girl into the back, and drove into the mountains where they dragged Slim's body out, threw rocks on the girl's head, and severed the victims' heads and hands. Mitchell said this was Orsinger's idea, because he would also have severed the feet.

Mitchell, 502 F.3d at 942-45.

LEGAL STANDARD

Pursuant to 28 U.S.C. § 2255(a), a federal prisoner may seek relief from his sentence on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." A claim for relief under § 2255 must be based on constitutional error, jurisdictional error, or "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

A § 2255 movant is entitled to an evidentiary hearing if (1) he alleges "specific facts which, if true, would entitle him to relief; and (2) the petition, files and record of the case cannot conclusively show that he is entitled to no relief." *United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004) (citing 28 U.S.C. § 2255(b)). Vague, palpably incredible, or frivolous allegations warrant summary dismissal without a hearing. *See Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994).

DISCUSSION

I. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Petitioner was represented at trial and sentencing by three attorneys: John M. Sears, Esq., and Assistant Federal Public Defenders Jeffrey A. Williams and Gregory A. Bartolomei. The Government deposed each in February 2010 and appended transcripts of these depositions to its opposing memorandum. The Court has reviewed these materials as well as the substantial number of documents proffered by Petitioner in support of his claims. For the reasons set forth herein, the Court determines that counsel did not perform ineffectively at trial.[2]

A. Legal Standard

Claims of ineffective assistance of counsel are governed by the principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. *Id.* at 687-88.

The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Thus, to satisfy *Strickland*'s first prong, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992).

With respect to *Strickland*'s second prong, a petitioner must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

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[2] The Court summarily rejects the Government's assertion that many of Petitioner's ineffectiveness claims are procedurally barred because they could have been raised on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 509 (2003) (holding that failure to raise an ineffectiveness claim on direct appeal does not bar the claim from being brought in a § 2255 proceeding).

probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A court need not address both components of the inquiry, or follow any particular order in assessing deficiency and prejudice. *Id.* at 697. If it is easier to dispose of a claim on just one of the components, then that course should be taken. *Id.*

B. Intoxication Defense (Claim A)

On the day of his arrest, after initially denying involvement in the disappearance of the murder victims, Petitioner gave a recorded statement to FBI and Navajo Nation investigators during which he admitted getting a ride in Slim's truck and seeing Orsinger stab Slim and cut the child's throat. During this interview, Petitioner repeatedly claimed to have been drinking and said he "blacked out" at times while in the truck. (Doc. 9, Ex. 18 at 5-9.) The next day, Petitioner led investigators to the crime scene and admitted his role in stabbing Slim, but claimed that he was so drunk at the time of the murder he could not remember how many times he had stabbed her. (Doc. 9, Ex. 20.) In a statement several weeks later, Petitioner asserted that he had consumed "a couple of forty ounce bottles of beer prior to going to Gallup" and bought more liquor once there. (Doc. 9, Ex. 21.) To his defense attorneys Petitioner claimed that he was "sober" at the time of the crimes. (Doc. 30 at 78.)

In his motion to vacate, Petitioner argues that trial counsel failed to thoroughly investigate intoxication as a defense because they did not "seek any evidence independent of their own client regarding his state of intoxication." (*Id.* at 74-75.) He asserts that, because counsel failed to uncover Petitioner's longstanding substance abuse history, they unreasonably accepted his claimed sobriety "even though it was contradicted by significant portions of the discovery and by percipient witnesses." (*Id.* at 78.) He further argues there is a reasonable probability he would not have been convicted of carjacking – the capital count – had evidence of impaired executive functioning been presented to the jury.

1. Relevant Facts

In support of his § 2255 application, Petitioner has proffered declarations from numerous individuals familiar with his drug and alcohol use, including co-defendants

Gregory Nakai and Johnny Orsinger. Nakai states that in the summer prior to the crimes, his "group," including Petitioner, smoked marijuana daily, ate mushrooms occasionally, and increasingly used a lot of crystal meth and cocaine.[3] (Doc. 12, Ex. 107.) Orsinger declares that in October 2001:

> We used as much drugs as we ever did, everything we could get a hold of by any means. We didn't smoke just marijuana – we always added something to our cigarettes to make the marijuana stronger. I always added cocaine and meth to my marijuana before I smoked it; I don't know exactly what Lezmond added to his marijuana but it was along those lines. By the time we got to Gallup, Lezmond and I had been awake for several days drinking beer and using drugs. We'd been awake for so many days, it felt like walking around in a cloud. It was like we were puppets, our bodies kept moving forward, but I'm not sure how.

(Doc. 12, Ex. 109 at 2-3.) Orsinger does not recall whether he spoke with anyone from Petitioner's defense team but states: "If it'd been explained to me that our drug and alcohol use, and how many days we had been awake by then, could've been helpful to my case too, I would've provided the information in this declaration." (*Id.* at 3.)

Petitioner has also proffered a declaration from Vera Ockenfels, a licensed attorney who served as the mitigation specialist for Petitioner's defense team. She asserts that she prepared an exhaustive study of Petitioner's social and psychological background and reported to counsel that Petitioner was addicted to alcohol and drugs and had been abusing drugs since age eleven. (Doc. 30, Ex. 131 at 2.) According to Ockenfels, "there was substantial evidence that Mitchell was drunk and high on drugs at the time of the killings." (*Id.* at 3.) Her declaration does not specifically identify this evidence but refers to "government-provided discovery." (*Id.*) Ockenfels also claims that she recommended defense counsel interview Orsinger about whether he and Petitioner had consumed alcohol and drugs prior to the killings but that counsel said Orsinger's lawyer would not permit such an interview. According to her declaration, she later learned that the defense investigator,

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[3] Jakegory Nakai, Jimmy Nakai, and Padrian George (who lived with the Nakais but was not charged in the crimes) similarly attest to the increased use of drugs and alcohol between August and November 2001. (Doc. 30, Exs. 136 & 137; Doc. 12, Ex. 100.)

Karl Brandenburger, had in fact interviewed Orsinger.[4]

In his deposition, Jeffrey Williams states that he and Petitioner's other lawyers investigated the viability of an intoxication defense. Williams spoke with Petitioner about his drug and alcohol history, and reviewed Ockenfels's report:

> I thought the drug use was primarily marijuana. I know he experimented with some harder stuff. But I was never under the impression that he was addicted to meth or coke. In fact, I think I recall meth was probably just getting on the reservation back then. It wasn't very common.

(Doc. 49, Ex. 1 at 30; *see also id.* at 17.) In addition, counsel confronted Petitioner with his post-arrest statements to the FBI about blacking out. (*Id.* at 17-18.) Petitioner "adamantly" denied being under the influence of anything at the time of the crimes; "[i]n fact, there was some discussion about making sure they were clear-headed." (*Id.* at 33.) Williams also attempted to interview co-defendant Orsinger, but Orsinger's attorney refused the meeting. (*Id.* at 20, 93.) Williams was also unaware of anything in Orsinger's statement to investigators indicating that he or Petitioner had been under the influence of intoxicants at the time of the offense. (*Id.* at 22.) Finally, counsel looked at the crime scene photos but could find no corroborating evidence of drinking or drug use. (*Id.* at 58.) In Williams's view, a defense of intoxication "wasn't even close." (*Id.* at 32.)

According to counsel Gregory Bartolomei, Petitioner "made it clear that he had not been ingesting or drinking the day of the crime and the whole period of time right through." (Doc. 49, Ex. 2 at 9-10; *see also id.* at 26-27, 38.) Thus, although Ockenfels viewed Petitioner's substance abuse as a problem, counsel could not relate it to the date of the crime; counsel said "it didn't seem to apply." (*Id.* at 21.) Bartolomei also states that Ockenfels was mistaken about Orsinger being interviewed by Brandenburger. (*Id.* at 22-23, 75.) Rather, Brandenburger delivered a subpoena during trial but Orsinger refused to testify. (*Id.* at 23,

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[4] Petitioner has proffered a declaration from a habeas investigator, who interviewed Brandenberger. (Doc. 12, Ex. 123.) She claims that Brandenberger said he interviewed Orsinger prior to trial and referred her to his notes because "he remembered nothing about the interview." (*Id.* at 2.) However, it appears Brandenberger's notes are missing. (*See* Doc. 30 at 74 n.9; Doc. 49, Ex. 2 at 63.)

75; *see also* RT 5/6/03 at 3332-34.)

Counsel John Sears similarly states that Petitioner denied being intoxicated: "What sticks in my mind is the idea that by the time they were on the road and picked up by the victims in this case, he said they were not high." (Doc. 49, Ex. 3 at 76.) Sears further states that the defense team opted against an intoxication defense, not only because there was little supporting evidence, but because it would have contradicted the theme that Petitioner "was a good person led astray under circumstances" and that co-defendant Orsinger was the impetus for the violence. (Doc. 49, Ex. 3 at 12, 14-15.) He explains:

> There was a particular concern – this case arose not long – went to trial not long after September 11. And based on the extensive jury selection process and the questionnaire responses that were generated, I personally observed [what] I thought was a real hardening and real shift in the attitude of the potential jurors and the seated jurors about lots of things that, historically, I had used in other capital cases and that, put in simplest terms, that things that you would say about a defendant, about a defendant's background or a defendant's mental challenges by way of explanation or even a defense in 2003 were likely to be looked at as excuses for terrible conduct and would be negative.
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> And I was not comfortable and would not have been comfortable going forward with an argument not simply because – that he was intoxicated and impaired at the time of the offense [–] not because I was concerned about what the truth was. The decision really was more nuanced than that. The decision was based, in part, on that and our belief that he was more likely to be telling us what really happened in private than puffing himself up for Johnny Orsinger, but more to the question of whether this was a winning defense to present to the jury.
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> In the context of 2002-2003, given what had happened and who had died and how they died, we made a collective decision, I believe, that ultimately that the best defense was simply that this was Johnny, that Johnny – this was – everything about this crime, the way it was committed, why it was committed, the senselessness of it, all those things were Johnny Orsinger and not Mr. Mitchell.
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> And the presentation of this "We were all drunk," "We were all high," or some combination of that or "blacking out" didn't fit in our minds with that argument. I don't know that we saw it as an either/or proposition, that you could only present one.
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> But we concluded that strategically it just didn't make any sense to argue this is what happened, this is how it happened. But "By the way, I don't really remember because I was blacking out," we just didn't see that as an appropriate way to present that information to the jury.

(*Id.* at 35, 77-78.)

2. Analysis

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable." *Id.* at 690. Moreover, "[t]he law does not require counsel to raise every available nonfrivolous defense." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1422 (2009). Here, Petitioner has not shown that counsel's representation fell below an objective standard of reasonableness.

First, the record establishes that counsel reasonably investigated the viability of an intoxication defense. They spoke with their client, who adamantly denied being intoxicated at the time of the offense, despite his statements to law enforcement that he had been drinking. They reviewed the crime scene photos, looking for corroborating evidence such as beer or liquor bottles. They enlisted a social historian, who gathered records, investigated Petitioner's background, and documented his substance abuse history. (Doc. 43, Ex. 93 at 32-33.) They also enlisted mental health experts to evaluate him. (Doc. 43, Ex. 94 at 15-16; Doc. 49, Ex. 1 at 16-17.) They tried to get information from co-defendant Orsinger, who refused to cooperate and invoked his Fifth Amendment right not to testify. (*See* RT 5/6/03 at 3327-34.)

Given these efforts, this case is clearly distinguishable from *Jennings v. Woodford*, on which Petitioner relies. In *Jennings*, the Ninth Circuit found ineffectiveness where counsel failed to perform a thorough investigation or consult with his client before settling on a weak alibi defense. 290 F.3d 1006, 1013-16 (9th Cir. 2002). Specifically, the court faulted counsel for failing to obtain and review voluminous medical records, investigate his client's family history, seek the appointment of experts to evaluate his client's mental state, follow up on a report from his client's ex-wife that the defendant had once attempted suicide and was diagnosed as schizophrenic, talk to his client or others about his drug use, or investigate past involuntary commitments. Petitioner's counsel, by contrast, conducted a

thorough investigation before making a tactical decision to forgo an intoxication defense.

Second, the choice not to present a voluntary intoxication defense was reasonable given the lack of evidentiary support. *See Williams v. Woodford*, 384 F.3d 567, 617 (9th Cir. 2004) (finding no ineffectiveness for failing to assert diminished capacity defense given lack of credible evidence of contemporaneous drug use). It is undisputed that Petitioner and Orsinger were the only individuals involved with the carjacking and murders and were, therefore, the only eyewitnesses who could provide any specific details about alcohol and drug consumption at the time of the offense. However, Petitioner denied being intoxicated and chose not to testify. There was nothing in Orsinger's statements regarding drug or alcohol use, and in any event Orsinger refused to testify.[5] Petitioner did tell investigators he was "too fucked up that night" to remember where they went to dump the bodies, how they got back to the road afterwards, or what happened to the truck after they got back to town. (Doc. 9, Ex. 18 at 5-9.) However, Petitioner had no difficulty later leading authorities to the crime scene in a remote, undeveloped area.[6] And although counsel could have presented witnesses familiar with Petitioner's substance abuse history, including his alleged escalating use of alcohol and drugs in the months or even days preceding the offense, such evidence would not have been particularly probative of his mental state on the day in question.

Finally, counsel's decision to focus on reasonable doubt and "Johnny did it" defenses in lieu of voluntary intoxication was not unreasonable. Although these defenses were not

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[5] Orsinger claims now, in a post-conviction declaration, that he and Petitioner had been awake for days drinking beer and using drugs prior to the offense. However, this information was not available at the time of trial, and counsel cannot be faulted for failing to discover it given Orsinger's counsel's refusal to consent to an interview with Petitioner's counsel. *See Strickland*, 466 U.S. at 689 (observing that "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

[6] Darrell Boye, a Navajo Nation investigator, testified at the voluntariness hearing that Petitioner directed them to a remote sheep camp off of a logging road and that while en route giving directions Petitioner repeatedly recognized various landmarks such as a mobile home, a trash pit, and a specific tree. (RT 1/30/03 at 64-65.)

necessarily inconsistent, "[e]vidence of drug and alcohol abuse is a 'two-edged sword,' and a lawyer may reasonably decide that it could hurt as much as help the defense." *Housel v. Head*, 238 F.3d 1289, 1296 (11th Cir. 2001) (internal citation omitted). Sears explained that in his experience there had been a "shift in the attitude" of juries against using excuses such as drunkenness to explain terrible conduct. (Doc. 49, Ex. 3 at 35, 77-78.) Williams said he was concerned about losing credibility with the jury by, for example, saying Petitioner was not at the scene when he clearly was there: "I was concerned about losing them in the guilt phase and then not having them at all for the sentencing phase." (Doc. 49, Ex. 1 at 31.) Thus, counsel strategically chose to try to preserve their credibility with the jury by not asserting a defense they thought would fail. *Cf. Williams*, 384 F.3d at 618 ("We cannot fault [counsel's] reasonable strategic decision to capitalize on any lingering doubts of the jurors and to keep from them mental-state and drug-use evidence that might jeopardize their lingering doubts.").

Given the weaknesses in the voluntary intoxication defense, counsel's strategic choice not to pursue that defense was reasonable and does not constitute an action outside the range of professionally competent assistance. *See Strickland,* 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

C. Custodial Statements (Claim E)

Petitioner contends that counsel were ineffective in failing to assert that Petitioner's *Miranda* waiver was involuntary as a result of his mental deficiencies and cultural heritage in combination with the investigators' interrogation techniques. (Doc. 30 at 131-32.) The Court disagrees.

Before trial, defense counsel enlisted the services of Dr. Barry Morenz, an Associate Professor of Clinical Psychiatry at the University of Arizona Health Sciences Center. Dr. Morenz met with Petitioner twice between October 2002 and January 2003, had him examined by a neuropsychologist and neurologist, and arranged for a brain imaging study, an MRI, and an EEG. (Doc. 43, Ex. 94.) The neurological exams were all normal; the

neuropsychological testing revealed some mild deficits in executive functioning, which Dr. Morenz opined might contribute to Petitioner being more impulsive in his actions. (*Id.* at 18-19.) Dr. Morenz also noted that Petitioner communicated "more articulately and intelligently" than he had anticipated based on listening to the taped police interview and stated that his "cognition was grossly intact." (*Id.* at 17.)

Defense counsel Bartolomei testified in his deposition that nothing in Morenz's report raised any questions in his mind concerning the voluntariness of Petitioner's statements. (Doc. 49, Ex. 2 at 58.) Sears observed that Petitioner "was engaged, appropriate, understood, or at least appeared to understand all of what was being discussed in his presence. I thought he was a particularly intelligence [sic] person given his background circumstances." (Doc. 49, Ex. 3 at 20.) In his deposition, Williams acknowledged that there was no evidence to suggest Petitioner did not know what he was doing when he waived his rights or that he did not understand what he was waiving. (Doc. 53 at 4-5.) Out of an abundance of caution counsel requested a voluntariness hearing, but he did not "remember anything that was suggested that the statements were in any way involuntary." (*Id.* at 5.)

At the pretrial voluntariness hearing, Petitioner testified and acknowledged being advised of his rights and signing waiver forms. (RT 1/30/03 at 126, 132.) He asserted that he agreed to cooperate because the FBI agents said it would benefit him at sentencing. (*Id.* at 119-20.) Counsel argued that the Government had coerced Petitioner's statements through the use of polygraph testing, crime scene confrontation, and the delayed filing of charges in federal court. (RT 1/31/03 at 42-49.) Counsel further remarked that Petitioner was an "[u]neducated, unskilled, unsophisticated young [man] living in a remarkably remote third-world environment on the eastern part of the Navajo Reservation" and that FBI agents had promised benefits in exchange for his cooperation. (*Id.* at 52, 60.)

The record establishes that counsel investigated Petitioner's mental capabilities and discovered nothing to indicate that his custodial statements were involuntary due to lack of intelligence or other cognitive infirmity. Nor did Petitioner suggest that, due to his Navajo upbringing, he misunderstood or was unaware of the rights he waived. Rather, he testified

that he knowingly agreed to waive his rights in the hope of receiving a lighter sentence or other benefit in exchange for his cooperation. The Court concludes that counsel's actions in challenging voluntariness based on interrogation techniques and Petitioner's lack of sophistication were well within the parameters of reasonable professional assistance guaranteed by the Sixth Amendment. Given the paucity of evidence suggesting that Petitioner suffered from mental deficiencies or that his Navajo heritage impacted his ability to understand his rights, counsel were not deficient for failing to assert these additional grounds in support of their involuntariness argument.

Moreover, Petitioner has not shown a reasonable probability that his statements would have been suppressed had counsel proffered the available mental health and cultural evidence gathered by Dr. Morenz and the mitigation specialist. There is simply no evidence to support the claim that Petitioner's statements were not knowing, intelligent, and voluntary. Thus, the failure to introduce evidence of his alleged deficiencies and Navajo upbringing did not prejudice him. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1080-81 (9th Cir. 2000).

D. Medical Examiner (Claim F)

Petitioner told FBI agents that "the evidence would probably show or the witnesses would say that he had cut the throat of the young girl twice." (RT 4/30/03 at 2727.) He also admitted that both he and Orsinger took turns dropping large rocks on the girl's head and that Orsinger then used an axe to sever the victims' heads and hands. (*Id.* at 2727-28.)

After her initial examination of the child's body, the medical examiner, Dr. Jerri McLemore, spoke with one of the FBI agents, who asked her to look for any cut marks on the child's neck. (RT 5/6/03 at 3267.) A second examination revealed a small incise wound that was partially obscured by the postmortem decapitation. (*Id.* at 3267-68.) Although Dr. McLemore made this discovery, the agent wrote in his report that she had attributed the finding to a forensic anthropologist. (*Id.*) Relying on the agent's report and having not interviewed Dr. McLemore before trial, defense counsel moved in limine to preclude her from testifying about a wound she had not observed. It was only then that defense counsel learned through voir dire of Dr. McLemore that the forensic anthropologist referenced in the

agent's report had consulted with Dr. McLemore only about the bones in the victim's neck and hands and that it was McLemore who had discovered the soft tissue neck injury. (*Id.* at 3268.)

Dr. McLemore ultimately testified that the child died as a result of multiple blunt force injuries to the head. (RT 5/6/03 at 3340-48.) She could not assess the depth of the incised neck wound but described it as being consistent with having a sharp object drawn across the skin. (*Id.* at 3322, 3337-39, 3353.) According to Petitioner, however, McLemore listed "neck injuries" in the "cause of death" section of her autopsy report. (Doc. 30, Ex. 139.)[7]

Petitioner argues that counsel were ineffective for failing to interview Dr. McLemore before trial and thus were unprepared to "challenge the ambiguity in her testimony and contradictory autopsy report." (Doc. 30 at 133-34.) He alleges that counsel missed an opportunity to infer bias "in McLemore's over-inclusiveness of neck wounds as a contributing cause of death," and asserts that jurors with reasonable doubt whether Petitioner hit the child's head with a rock were left to speculate whether she could have died from the knife wounds he had inflicted. (*Id.*) He also faults counsel for relying on the FBI agent's report which erroneously credited a forensic anthropologist with discovery of the neck wound. (*Id.* at 134.)

Contrary to Petitioner's assertion, the Government did not argue or suggest to the jury that the child died as a result of the incised neck wound. Rather, this evidence served only to corroborate Petitioner's own statement that he had cut her throat before he and Orsinger dropped rocks on her head. In addition, Dr. McLemore's autopsy report was not admitted into evidence, so the jury was unaware of any "ambiguity" or "conflict" from her identifying without specificity "neck injuries" in the "cause of death" section of her report. (*See* CR Doc. 322 (Exhibit Lists).)

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[7] Petitioner did not include a copy of Dr. McLemore's autopsy report in his supporting exhibits but did obtain a declaration from a forensic pathologist who had reviewed it. (Doc. 30-2, Ex. 139.) In assessing Petitioner's claim, the Court has assumed the accuracy of this pathologist's description of Dr. McLemore's report.

In his deposition, defense counsel Williams stated that there was no question concerning the cause of the child's death and acknowledged that he was "comfortable" with the information he had concerning Dr. McLemore's anticipated testimony. (Doc. 49, Ex. 1 at 40-41.) He did not recall why he did not interview her before trial, but did not believe she had anything to contribute to the defense's theory of the case. (*Id.* at 42.) Williams further explained that given the gruesomeness of the medical examiner's testimony and photographs, he wanted to minimize her time on the stand. (*Id.*) Sears also did not recall why they chose not to interview McLemore, except to say that the defense theme "was aimed at Johnny Orsinger did it as opposed to how these people died. I came away with the conclusion that there was very little question about how they died, particularly when their heads were cut off." (Doc. 49, Ex. 3 at 55.) He was also "convinced" that McLemore was not going to say that Petitioner "inflicted some particular injury;" rather, her testimony would be limited to the injuries sustained by the victims. (*Id.* at 57.) Thus, the decision not to interview her before trial "probably had to do with what we thought was our ability to make the points we wanted to make on cross-examination simply from [her] report." (*Id.* at 56.)

It is evident from this record that counsel's decision not to interview Dr. McLemore fell within the wide range of reasonable professional assistance. There was no dispute as to the cause of death – blunt force head trauma; thus, Dr. McLemore's credibility on this point was not at issue. In addition, there was no dispute that the young girl had an incised neck wound. Admittedly, a pretrial interview with the medical examiner would have corrected defense counsel's erroneous belief that it was an unqualified forensic anthropologist who had made the discovery. However, Petitioner does not challenge that the wound existed, and it was the fact of the wound (not the circumstances of its discovery) that was most damaging to the defense case because it corroborated Petitioner's statement that he had cut the girl's throat. Therefore, Petitioner cannot establish prejudice from counsel's failure to interview the medical examiner before trial.

E. DNA Evidence (Claim G)

On appeal, Petitioner challenged the admission of "confusing, misleading, and

irrelevant DNA testimony" from the Government's expert, Benita Bock. *Mitchell*, 502 F.3d at 969. The Ninth Circuit considered "the coherence of the expert's explanation of what constituted a 'match,' an 'exclusion,' and a 'cannot exclude'" and determined that admission of her testimony did not constitute plain error:

> According to the government's expert, a "match" exists when the person possesses all 14 of the "alleles" (DNA sequence segments) taken from a sample at different "loci" (positions on a chromosome), but the person is "excluded" when he possesses none of the alleles taken from the sample. Mitchell's complaint centers on confusion about what it meant that a person "could not be excluded." Undoubtedly the expert's explanation was not a model of clarity. She basically said it meant that alleles of more than one person are present in the sample, yet never clearly articulated what exactly the fact that a person cannot be excluded from a sample says about the probability that the person's DNA is present in the sample, or how likely it would be that a person would possess any given number of alleles in a mixture and yet still not have contributed the DNA.
>
> Mitchell suggests that "cannot exclude" is the very definition of non-probative. Thus, he submits, evidence beyond that matching Slim's blood to the truck and knives found in the Nakai house, and matching Doe's blood to the rocks, should not have been admitted because it told the jury nothing. We do not agree; the expert's testimony indicates that a "cannot exclude" finding can tell a lot, and can increase the probability that the person's DNA is present, depending on the number of loci at which the person cannot be excluded.
>
> Apart from the evidence that Mitchell concedes was properly admitted, the jury was told that there was a mixture of at least three persons' DNA on the black butterfly knife from which the expert concluded that Mitchell and Jakegory could not be excluded at all 14 loci, Slim could not be excluded at 13 of the 14, and Orsinger's father and Gregory Nakai also could not be excluded; that there was a mixture of at least two people on the chrome knife, and Slim matched the major component at all 14 loci, which would be expected to occur in 1/650 billion Navajos; that Mitchell could not be excluded at 12 of 14 loci on Slim's cell phone; that Mitchell could not be excluded from a Halloween mask because he had some of the alleles found, but alleles he could not have produced were also present; and that Mitchell could not be excluded as a contributor at all six loci that could be tested on a glove buried with the body parts. The jury likely understood from this evidence that DNA linked Mitchell to the black knife and Slim's cell phone, and somewhat linked him to the mask and glove. It definitely connected Slim's blood to the chrome knife found in Mitchell's pants. In sum, Mitchell has shown no plain error.

Id. at 969-70.

In these proceedings, Petitioner contends that defense counsel's handling of the DNA evidence was constitutionally deficient because they failed to elicit an explanation of the relevance of statistical probability analysis from either Bock or a defense expert. As a result,

the jury "had to speculate whether a given set of statistics applied equally to all samples in evidence" even though not all of the DNA profiles matched at all 14 loci. (Doc. 30 at 138, 140.) He further asserts that counsel asked Bock leading questions that improperly identified either Petitioner or one of the victims as a source of the DNA found on crime scene evidence and failed to challenge Bock's and the prosecutor's repeated references to a DNA "match" with either the victims or Petitioner. (*Id.* at 141-42.) Finally, he alleges based on habeas counsel's review of the trial file that the Government provided the defense with test results for only four of the 11 samples introduced at trial, thus inhibiting their ability to review the testing for accuracy and to cross-examine Bock, and criticizes counsel's failure to obtain independent testing of the samples.[8] (*Id.* at 144.)

In their depositions, Williams and Sears testified that Petitioner's statements obviated any defense based on his not being present. (Doc. 49, Ex. 1 at 31, 89; Doc. 49, Ex. 3 at 26-27.) Consequently, counsel believed

> the most we could say on behalf of Mr. Mitchell was that, although he was there, the horrible behavior in this case was instigated by and almost entirely carried out by Johnny Orsinger and that Mr. Mitchell's presence there seemed to have somehow been part of a plan to ride herd on Johnny Orsinger to keep him from doing what he ultimately did, that the plan as we came to understand it was simply to get a truck to use in [the trading post] robbery and not to kill people in the course of doing that.

(Doc. 49, Ex. 3 at 44.) In his statements Petitioner also admitted stabbing Slim a number of times, taking the victims into the mountains, and being there when the child was murdered. In addition, blood on the chrome knife found in Petitioner's pants matched Slim's DNA at all 14 loci. Thus, counsel did not think "it was plausible or possible under the circumstances to say that Mr. Mitchell had no role in the murders" and it made no sense to attack the DNA

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[8] In his reply brief, Petitioner expands this claim and argues, for the first time, that counsel were ineffective for providing "an unreasonable and unsound defense regarding fingerprint identification evidence." (Doc. 55 at 38.) Petitioner's attempt to raise a new claim in his reply is improper. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). Moreover, this new allegation was not filed within the one-year limitation period set forth in 28 U.S.C. § 2255(f). Accordingly, Petitioner's belatedly-raised claim concerning counsel's handling of the fingerprint evidence cannot serve as a basis for habeas relief.

evidence because

> the idea that we would somehow be suggesting to the jury that Mr. Mitchell wasn't there or that he was sitting quietly while Mr. Orsinger committed all these crimes, there was just too much evidence putting Mr. Mitchell in contact with the knives and putting Mr. Mitchell at the stabbing, at the carjacking, and at the subsequent mutilation of the bodies.
>
> . . . .
>
> . . . [T]he DNA evidence in this case was not likely to produce an argument that was completely exculpatory to Mr. Mitchell, that it was not – that it was simply part of the Government's evidence against Mr. Mitchell, that their case was not based on the DNA evidence completely.
>
> So I can't – I can't say for you that the DNA evidence was contradictory to the defense that we put on at trial. We were simply trying to demonstrate to the jury that Mr. Orsinger was the person with this prior behavior. Mr. Orsinger was the person that inflicted the majority of the wounds. Mr. Orsinger was the wild card in this transaction.
>
> It was not, in our judgment, appropriate or productive for us to argue that Mr. Mitchell either wasn't there or didn't handle the weapons or didn't participate in the [trading post] robbery.

(Doc. 49, Ex. 3 at 45-46; *see also* Doc. 49, Ex. 1 at 45, 89.) Because Petitioner's case did not hinge on the DNA evidence, counsel were not particularly focused or concerned with the possibility Bock would somehow overstate the results of her investigation. (Doc. 49, Ex. 3 at 48.) Counsel also recalled no problems with disclosure concerning DNA test results. (Doc. 49, Ex. 1 at 90; Doc. 49, Ex. 3 at 57.)

The record clearly establishes that counsel made a strategic choice not to confront the DNA evidence, which was hardly the linchpin of the Government's case. Petitioner's "disagreement with trial counsel's tactical decision cannot form the basis for a claim of ineffective assistance of counsel." *Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001). Moreover, Petitioner has not shown that retention of a defense DNA expert, retesting of the samples, or more extensive cross-examination of Bock would likely have resulted in either the development of exculpatory evidence or the exclusion of the Government's evidence. *See Leal v. Dretke*, 428 F.3d 543, 549 (5th Cir. 2005). Rather, he only speculates that such steps would have been helpful. "Such speculation, however, is insufficient to establish prejudice." *Wildman*, 261 F.3d at 839.

F. Jury Selection (Claim H)

Petitioner contends that trial counsel's representation was deficient because they failed to challenge or appropriately question Venirepersons 55, 59, and 83, and failed to adequately challenge seated Jurors 43 and 48 as well as Alternate Juror 51. (Doc. 30 at 149.) He further argues that counsel made "almost" no attempt to rehabilitate any juror who expressed opposition to capital punishment. (*Id.* at 151-53.) Finally, he alleges that appellate counsel was ineffective for not arguing on appeal that this Court had improperly excused Native American venirepersons due to their alleged opposition to the death penalty and the fact that Navajo was their first language. (*Id.* at 154.) The Court finds each of these allegations meritless.

1. Venirepersons 55, 59, and 83

"The conduct of voir dire 'will in most instances involve the exercise of a judgment which should be left to competent defense counsel.'" *Hovey v. Ayers*, 458 F.3d 892, 910 (9th Cir. 2006) (citing *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980)). Consequently, counsel are accorded particular deference when conducting voir dire. *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001). Their actions are considered to be matters of trial strategy, and a "strategic decision cannot be the basis for a claim of ineffectiveness assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Id.*

With respect to venirepersons 55, 59, and 83, Petitioner offers only conclusory allegations of deficient performance unsupported by legal argument. These "fall far short of stating a valid claim of constitutional violation." *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995). Moreover, none of these individuals sat as jurors in this case. Thus, Petitioner cannot demonstrate prejudice from counsel's failure to challenge them because "the Supreme Court has made clear that a court's failure to strike for cause a biased veniremember violates neither the Sixth Amendment guarantee of an impartial jury, nor the Fifth Amendment right to due process when the biased veniremember did not sit on the jury." *Mitchell*, 502 F.3d at 954 (citations omitted).

2. Jurors 43, 48, and 51

Petitioner argues that counsel should have challenged for cause or exercised a peremptory strike against these jurors because 43 believed that life without the possibility of parole was a more severe sentence than death (RT 4/11/03 at 1333), 48 felt the death penalty was appropriate when "[t]here was no regard at all for human life" (RT 4/15/03 at 1502), and 51 gave contradictory answers about whether, if Petitioner was convicted, he would go into the penalty phase thinking that Petitioner deserved to die (RT 4/23/03 at 2048-50).

Petitioner again fails to provide any substantive legal argument to demonstrate counsel's deficiencies with regard to these jurors. Moreover, the Court concludes that counsel made a reasonable strategic decision not to challenge the jurors. Juror 43 stated unequivocally on more than one occasion that he would keep an open mind and would wait to hear all of the evidence and instructions before deciding on an appropriate sentence; he also stated that he had no moral, religious, or personal beliefs that would prevent him from imposing either the death penalty or life imprisonment. (RT 4/11/03 at 1333-35.) Juror 48 similarly claimed she had no beliefs that would interfere with her ability to impose sentence and that she could imagine herself voting for a punishment other than death if Petitioner were convicted. (RT 4/15/03 at 1492-93, 1503.) Finally, with respect to Juror 51, it is evident from the transcript that the juror did not understand counsel's initial question. After clarification, he stated that he would not prejudge the punishment issue if Petitioner was found guilty and that he could imagine voting for a sentence other than the death penalty. (RT 4/23/03 at 2049-50.)

3. Rehabilitation of Prospective Jurors

Petitioner asserts that defense counsel "failed entirely, or almost entirely, to attempt to rehabilitate a substantial number of prospective jurors in this case." (Doc. 30 at 151.) He contends that counsel either failed to test jurors' stated opposition to the death penalty or failed to reexamine jurors after the prosecution led them to give disqualifying answers. (*Id.*)

Defense counsel Sears conducted the vast majority of the voir dire for the defense.

He observed the demeanor of the potential jurors and had access to additional information from each of their questionnaires. During individual voir dire, Sears actively questioned all of the prospective jurors and tried on numerous occasions to rehabilitate jurors he perceived to be favorable to the defense. This Court observed counsel's actions over the course of 13 days of jury selection and readily concludes that his conduct during voir dire was reasonable and vigorous, and did not "permeate[ ] the entire trial with obvious unfairness." *Hughes*, 258 F.3d at 457 (6th Cir. 2001); *see also Keith v. Mitchell*, 455 F.3d 662, 676 (6th Cir. 2006).

4. Venirepersons 3, 6, 22, and 24

In his opening brief on appeal, Petitioner raised numerous issues concerning jury selection. *See Mitchell*, 502 F.3d at 949-59. One of these asserted that Venirepersons 3, 22, and 24 were improperly excused on the basis of race. *Id.* at 953. In his appellate reply brief he also argued that, under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), they were improperly excused on the basis of their opposition to the death penalty. The Ninth Circuit deemed this argument waived because it was not contained in the opening brief. *Id.* at 953 n.2. Petitioner now contends that appellate counsel was ineffective for failing to properly challenge the dismissal of Venirepersons 3, 22, and 24, as well as Venireperson 6, due to their alleged opposition to the death penalty.

The Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). A claim of ineffective assistance of appellate counsel is reviewed under the standard set out in *Strickland. See Miller v. Keeney*, 882 F.2d 1428, 1433-34 (9th Cir. 1989). A petitioner must show that counsel's appellate advocacy fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, the petitioner would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *see Miller*, 882 F.2d at 1434 n.9 (citing *Strickland*, 466 U.S. at 688, 694).

Although the appellate court declined to address Petitioner's *Witherspoon* argument directly, in analyzing his race-based argument it concluded that the removal of Venirepersons 3 and 22 based on their perceived inability to set aside their opposition to the death penalty

was "well-supported in the record" and that this Court did not err in removing Venireperson 24 based on his beliefs against sitting in judgment of another Navajo. *Id.* at 953. In addition, Venireperson 6 was unequivocal in her repeated assertions that she would not vote for the death penalty under any circumstance. (RT 4/2/03 at 191-92, 197.) On this record, Petitioner cannot show that appellate counsel's failure to challenge the removal of Venirepersons 3, 6, 22, and 24 was objectively unreasonable or that he was prejudiced thereby.

Petitioner also asserts ineffectiveness based on appellate counsel's failure to properly raise a challenge to the Court's excusal of Venirepersons 1, 2, 9, and 11, in part due to their use of Navajo as a first language, without providing interpreters. Counsel summarily mentioned the issue in a footnote in the opening brief, but the Ninth Circuit found this insufficient to raise the claim on appeal. *Mitchell*, 502 F.3d at 954 n.2. Petitioner does no better here. Other than one citation to a case based on the New Mexico Constitution's guaranteed right of every citizen to sit on a jury regardless of the "inability to speak, read or write the English or Spanish languages," *State v. Rico*, 52 P.3d 942, 943 (N.M. 2002) (quoting N.M. Const. art. VII, § 3), Petitioner provides no authority that a federal court must provide interpreters to potential jurors with difficulty understanding the English language, especially in light of the Jury Service and Selection Act's requirement that all jurors be proficient in English. *See* 28 U.S.C. § 1865(b)(2); *cf. People v. Lesara*, 206 Cal.App.3d 1304, 1309-10 (Cal.App. 1988) (finding constitutional state requirement that jurors possess sufficient knowledge of English and rejecting argument that California Constitution requires that jurors with limited English be provided interpreters). Counsel's failure to adequately present this claim in the appellate brief does not establish constitutionally deficient representation. *Gustave*, 627 F.2d at 906 ("There is no requirement that an attorney appeal issues that are clearly untenable.").

G. Buttons Worn by Victims' Family (Claim T)

At some point during trial, defense counsel Williams saw some members of the victims' family sitting in the courtroom wearing "In Memory Of"-type buttons and asked the prosecution to have the buttons removed. (Doc. 49, Ex. 1 at 58-59, 78.) The Government

complied, and the issue was "resolved relatively quickly." (*Id.* at 59.) Counsel notified the Court the following week in connection with a different matter. (RT 5/6/03 at 3409-10.) According to Williams, the button was not very big and he "would have had to have been fairly close" to have seen it. (Doc. 49, Ex. 1 at 79.) On appeal, the Ninth Circuit concluded that the button display did not deprive Petitioner of a fair trial. *Mitchell*, 502 F.3d at 971-72.

In these proceedings, Petitioner argues that counsel were ineffective for not objecting to the buttons in a timely manner. (Doc. 30 at 226.) He asserts that the issue should have been brought to the Court's attention immediately instead of defense counsel working out the issue informally with the prosecution. (*Id.*) However, it was within counsel's broad discretion to resolve the issue with the Government without involving the Court. Moreover, according to counsel, the buttons were difficult to see without being close to the wearer. The Court can discern neither deficient performance nor prejudice from counsel's actions in this regard.[9]

H. Trial Trifurcation (Claim U)

Under the Federal Death Penalty Act, a "separate sentencing hearing" shall be held to determine the punishment to be imposed. 18 U.S.C. § 3593(b). At this hearing, the parties may submit information "as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered." 18 U.S.C. § 3593(c). The jury must unanimously find beyond a reasonable doubt the existence of at least one statutory aggravating factor under § 3592 and one "gateway intent" factor under § 3591 to render a defendant eligible for the death penalty ("eligibility decision"). 18 U.S.C. §§ 3591(a) & 3593(c)-(d). Assuming this occurs, the jury then considers all of the proven aggravating and

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[9] Petitioner also urges the merits of the button issue, separate from his ineffectiveness claim. (Doc. 30 at 223.) However, that issue was raised and decided on appeal. *Mitchell*, 502 F.3d at 971-72. A court may entertain a successive claim in a § 2255 petition if the law has changed or if necessary to serve the ends of justice. *Polizzi v. United States*, 550 F.2d 1133, 1135-36 (9th Cir. 1976). Because Petitioner has not demonstrated that his new arguments are based on a change in the law or that a manifest injustice will occur if the claim is not considered, this Court declines to reconsider the issue.

mitigating factors, including any non-statutory aggravators, to determine propriety of a death sentence ("selection decision"). 18 U.S.C. § 3593(e).

Petitioner contends that counsel were ineffective for not seeking to separate the eligibility and selection decisions within the penalty phase, "thus subjecting Mitchell to an overly prejudicial sentencing hearing" because the prosecution offered highly emotional testimony from the victims' family to prove a non-statutory aggravating factor that was relevant only to the selection decision, not the death eligibility decision. (Doc. 30 at 230.) He further asserts that the jury found him eligible for the death penalty based on inadmissible, inflammatory victim impact evidence. (*Id.* at 236-37.)

No court has held that the federal constitution requires that the eligibility and selection decisions be made in separate hearings. *See United States v. Fell*, 531 F.3d 197, 240 (2d Cir. 2008) (holding that Federal Death Penalty Act not unconstitutional because it fails to require separate hearings for eligibility and selection decisions); *see also United States v. Bolden*, 545 F.3d 609, 618-19 (8th Cir. 2008) (citing *Fell* with approval). Thus, counsel's decision not to seek trifurcation of the jury's determinations as to guilt, capital eligibility, and sentence was within the wide range of reasonable professional assistance guaranteed by the Sixth Amendment.

Moreover, Petitioner cannot establish prejudice because there is no reasonable probability the jury would have reached a different verdict as to his eligibility for capital punishment had counsel successfully moved the Court to hold separate hearings for the eligibility and selection decisions. With respect to Slim's death, the Government alleged five statutory aggravating factors: that she was killed for pecuniary gain and in an especially heinous, cruel, or depraved manner; that substantial planning and premeditation preceded the offense; that the victim was vulnerable due to age or infirmity; and that more than one person was killed in a single criminal episode. *See* 18 U.S.C. §§ 3592(c)(6), (8), (9), (11) & (16). The Government noticed these same factors with regard to the child's death and also alleged that she was killed during the commission of a kidnapping. *See* 18 U.S.C. § 3592(c)(1). The jury unanimously found the existence of each alleged aggravating factor as well as all four

of the gateway intent factors set forth in 18 U.S.C. § 3591. (CR Docs. 330, 331.) These findings are easily supported by the evidence presented at trial, as well as the jury's guilty verdicts on premeditated first degree murder, kidnapping, and robbery. There is simply no question that the jury would have found at least one requisite mental state and one statutory aggravating factor even had it not heard testimony from the victims' family members.

I. Cumulative Effect (Claim BB)

Petitioner asserts that is entitled to relief based on the cumulative effect of counsel's alleged ineffectiveness. As already discussed, Petitioner has not established that defense counsel's representation was deficient with respect to any individual allegation of ineffectiveness. Accordingly, there can be no cumulative prejudicial effect from the alleged deficiencies. *See United States v. Baldwin*, 987 F.2d 1432, 1439 (9th Cir. 1993) (finding no cumulative prejudice where defendant failed to establish individual ineffectiveness claims).

II. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

The right to effective assistance of counsel applies not just to the guilt phase but "with equal force at the penalty phase of a bifurcated capital trial." *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir. 2002) (quoting *Clabourne v. Lewis*, 64 F.3d, 1373, 1378 (9th Cir. 1995)). In assessing whether counsel's performance was deficient under *Strickland*, the test is whether counsel's actions were objectively reasonable at the time of the decision. *Strickland*, 466 U.S. at 689-90. The question is "not whether another lawyer, with the benefit of hindsight, would have acted differently, but 'whether counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998) (quoting *Strickland*, 466 U.S. at 687).

A. Mitigation Evidence (Claims B & D)

Petitioner argues that counsel were ineffective for not investigating and presenting his social history, including his drug and alcohol abuse, as a mitigating circumstance. He asserts that his "troubled, dysfunctional upbringing provided a compelling story for why he turned to drugs and alcohol so early in life" and that counsel failed to consult and present testimony

from "appropriate and necessary" experts concerning his executive functioning deficits, substance abuse, upbringing, and family background. (Doc. 30 at 91, 112.) He further contends that counsel did not give their experts adequate background information or properly prepare the penalty phase witnesses to testify. Finally, he argues that evidence of intoxication at the time of the offense would have established the "impaired capacity" statutory mitigating factor under 18 U.S.C. § 3592(a)(1).

1. Relevant Facts

The penalty phase began on May 14, 2003, six days after the jury returned its guilty verdict. Over the course of two days, the parties proffered witnesses and exhibits relevant to sentencing. The Government relied on the evidence presented at trial to establish the gateway intent factors in 18 U.S.C. § 3591, as well as the alleged statutory aggravating factors. To establish harm to the victims' family as a non-statutory aggravating factor, the Government called four family members, who described the impact of the murders, including the loss of Slim as the family's matriarchal teacher of Navajo heritage, traditions, and practices. (RT 5/14/03 at 3754-81.)

As discussed more fully below in Section II.B, Petitioner refused to attend the evidentiary portion of the penalty phase and did not testify. However, the defense submitted as exhibits numerous photographs of Petitioner; documents related to other crimes committed by Orsinger and Nakai; Kinlicheenie's plea agreement; and a letter written by the Attorney General of the Navajo Nation to the United States Attorney indicating opposition to capital punishment, both generally and in Petitioner's case. The defense also called a number of Petitioner's family members, friends, and teachers, and played a videotaped interview of his maternal grandmother, who was too ill to appear in person.

Dr. Robert Roessel testified that he was the executive director of Petitioner's Navajo community high school and frequently interacted with him. (RT 5/14/03 at 3795.) Petitioner, who was only one quarter Navajo, was respectful and had no disciplinary problems except for a brief suspension in his senior year after being caught with marijuana. Dr. Roessel described Petitioner as an excellent student and outstanding athlete, who played

football, was active on the student council, and spoke at his high school graduation in 2000. However, the next year Petitioner broke into Roessel's office, stole a computer and shotgun, and used the latter to rob a store.

Dr. Roessel knew Petitioner's family well and believed Petitioner was unloved. According to Dr. Roessel, Petitioner never knew his father and his mother was never around. Petitioner's difficulties were compounded because he was not full-blooded Navajo and had failed to accept the teachings of the Navajo culture. Although Petitioner's mother was an educator, she never participated in any student-parent meetings at the school or spoke with any of Petitioner's teachers. Petitioner lived primarily with his maternal grandparents, who were also teachers and school administrators. At some point his grandmother, Bobbi Mitchell, moved to California and left him with his Navajo grandfather, George Mitchell; Petitioner was unhappy, moved in with friends, and "began to go downhill." (*Id.* at 3804-05.) Despite the instant crimes, Dr. Roessel testified that Petitioner's life was worth sparing because he had good potential and could possibly teach others while in prison.

Dr. Roessel's wife, Ruth, also worked at Petitioner's high school, saw him regularly, and knew his family. She explained that grandparents are extremely important in Navajo families for teaching customs and traditions, but that Petitioner's grandfather was a "cold" person. (*Id.* at 3825-28.)

Auska Mitchell, Petitioner's uncle, testified that Petitioner got along well with his wife and children and were loved by them. Along with George and Bobbi Mitchell, Auska and his family went to Petitioner's graduation to hear his speech; Petitioner's mother did not attend. (*Id.* at 3892-93.) Petitioner was always respectful except for one time when Auska found a marijuana pipe in Petitioner's bag. After being confronted, Petitioner cried, apologized, and participated in a cleansing ceremony. Auska testified that Petitioner's life should be spared because he had been a good person until he met Johnny Orsinger, was a fast learner, and had vocational and computer skills he could pass on. (*Id.* at 3896.)

Petitioner's high school coach testified that Petitioner was an excellent player, was a team leader, got along well with others, never had any outbursts, and had an opportunity

to play football in college. (*Id.* at 3904-07.) John Fontes, the assistant principal at Petitioner's high school, recalled that Petitioner was initially withdrawn when he transferred from another high school but over time became an excellent student who became involved with both football and student government. (*Id.* at 3912.) He remarked that Petitioner improved dramatically on standardized tests, jumping from tenth grade level to post-high school within six months. Petitioner was never involved in any confrontations with teachers or other students, had good relationships with other members of the faculty, and helped build a courtyard at the school. Fontes never met Petitioner's mother. The one time he tried to reach her – concerning his marijuana suspension – she had someone contact Fontes's supervisor with the directive that Fontes was to make no further attempts to contact her because "she wanted nothing to do with Lezmond Mitchell." (*Id.* at 3917.) In Fontes's view, Petitioner's life was worth sparing because he had demonstrated the potential to learn, would work well in a structured environment, had the ability to teach and lead others in a positive way, was an excellent reader and writer, and was good in other vocational areas. (*Id.* at 3919-22.) This viewpoint was echoed by Petitioner's English teacher, who also described Petitioner as an excellent reader and writer. She testified that Petitioner was very bright, thoughtful, and hungry for knowledge, and that he helped her teach students of low reading ability. (*Id.* at 3938-45.) She also characterized him as a "gentle" person who would "disengage" rather than become violent or angry in any confrontation. (*Id.* at 3940.)

Shortly after turning 18, Petitioner moved in with the family of an old friend, Lorenzo Reed. Reed testified that Petitioner's mother had essentially abandoned him and that this was a source of pain for Petitioner. (*Id.* at 3929-30.) Petitioner helped out around the house and was respectful to Reed's grandmother, Betty Goldtooth, who was the head of the household. A couple of months after his graduation, Petitioner moved into Reed's uncle's home in Phoenix. He worked odd jobs for a short time and then went to California to live with his maternal grandmother. During this period, he encouraged Reed to finish high school and then returned to the reservation to attend Reed's graduation in 2001. (*Id.* at 3934.) Another member of the Goldtooth household testified that Petitioner was trusted and often left alone

in the house, that he had become a member of their family, and that she visited him regularly while he was in jail pending trial. (*Id.* at 3953-54.)

FBI Agent Raymond Duncan also testified during the penalty phase. (*Id.* at 3957-3998.) Defense counsel elicited details about Johnny Orsinger and Gregory Nakai being convicted of the murder, kidnapping, and carjacking of two men on the reservation two months before the Slim carjacking. Orsinger shot one in the head and Nakai shot the other; Petitioner was not involved. In addition, Duncan confirmed that Kinlicheenie never told investigators that Petitioner went to Gallup armed or with the intent to commit a carjacking, that Orsinger had bragged to Kinlicheenie about being a killer, and that Orsinger's young age precluded the death penalty for his role in the instant offenses. Duncan also testified that Petitioner had claimed to be so drunk on the day of the murders that he had passed out at some point and was unsure where Slim had picked them up. However, on cross-examination, he revealed that Petitioner was able to lead investigators to the bodies. Duncan further testified that, although Petitioner claimed he had drunk two 40-ounce bottles of beer and later bought additional liquor in Gallup, alcohol was not sold in Gallup on Sundays and the carjacking took place on a Sunday.

John Sears gave the closing argument for the defense. He acknowledged the brutality of the crimes but asserted that "sometimes seemingly good people can do terrible things, can be in a situation that produces a terrible result." (RT 5/16/03 at 4136.) Sears focused heavily on fairness and proportionality, arguing that neither Orsinger nor Nakai faced the death penalty for their crimes and that Orsinger had killed four people and was more culpable than Petitioner. He stressed the similarities between the two double homicides – carjacking, murder, mutilation of the victims' bodies, and destruction of evidence. He also argued that it was Orsinger who instigated the offenses against Slim and her granddaughter, citing evidence at trial suggesting Orsinger inflicted the majority of the stab wounds against Slim and dropped the first rock on the child. In addition, Sears asserted that Petitioner had been drinking and was so drunk he could not remember where everything happened.

Sears also stressed Petitioner's circumstances, including the fact that he was only 21

years old and would spend the rest of his natural life in a prison cell, something he argued could be seen as a sentence worse than death. He reemphasized that Petitioner had no criminal record, that he had been a good student and leader, and that good people sometimes do bad things. He said that something had happened to Petitioner and suggested it was a confluence of growing up without a father, being rejected by his mother, being raised by a grandmother who was concerned only about herself,[10] being of mixed race and not knowing who he was or how to fit into Navajo culture, being adrift after high school graduation, and hanging around Johnny Orsinger, who had already participated in two murders and was clearly a disturbed teenager.

Sears proposed that Petitioner could have a positive effect on others, even if just by serving as a negative role model. He read from the Navajo Nation's letter asking the United States Attorney not to seek the death penalty against Petitioner, emphasizing that Navajo culture values life and instructs against the taking of life for vengeance. Finally, he pleaded for mercy.

After deliberating for one-and-a-half days, the jury returned its sentencing verdicts. For each victim, the jury unanimously found all four gateway intent factors as well as each of the statutory and non-statutory aggravating factors alleged by the Government. (CR Docs. 330 & 331.) In mitigation, the jury unanimously found that Petitioner did not have a significant prior criminal record; that an equally-culpable co-defendant would not be

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[10] Bobbi Mitchell's videotaped statement was not transcribed into the record, but during closing argument counsel summarized it as follows:

> And you saw his grandmother. I'm sorry, but I listened to her. She was my witness. But she spoke for 29 minutes without talking about Lezmond. She talked about herself. And at the end she talked about Lezmond. I know that undercuts the value of what she says, but for God's sake, that's powerful information about what happened to Lezmond. His grandmother who raised him is asked to give a statement to a jury that's concerning whether he should die and she wants to talk about her own resume.

(RT 5/16/03 at 4156.)

punished by death; and that Petitioner would be sentenced to life in prison without any possibility of release if not sentenced to death. (CR Doc. 330 at 6-7; CR Doc. 331 at 5-6.) In addition, seven jurors concluded that the Navajo Nation letter constituted a mitigating factor, six found that Petitioner's background mitigated against death, two decided that Petitioner would adapt well to prison life if he were sentenced to life without the possibility of release, and one found that Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired. (*Id.*) After weighing the aggravating and mitigating factors, the jury unanimously recommended the death penalty as punishment for the murders of both Alyce Slim and her granddaughter.

2. Scope of Investigation

Petitioner argues that counsel failed to adequately investigate his family background, history of abuse and neglect, brain dysfunction, drug and alcohol addiction, and intoxication at the time of the offense. The Court disagrees and finds that counsel conducted a reasonable mitigation investigation.

In his deposition, defense counsel Williams stated that "it seemed pretty clear from the outset that this [case] was going to be getting to the penalty phase" and that they needed to do everything they could to find some way of explaining Petitioner's behavior. (Doc. 49, Ex. 1 at 27, 29.) Bartolomei said that over the course of the representation, Bartolomei established a relationship with Petitioner and took the lead on the mitigation investigation. "I saw him a lot, met with him a lot, and basically spent time with him." (Doc. 49, Ex. 2 at 8.) They spoke in great detail on topics such as Petitioner's childhood, interests, mother, grandparents, medical history, and schooling; counsel learned that Petitioner had anger issues towards his mother and problems relating to his grandfather. (*Id.* at 13-16.)

Counsel also enlisted the aid of an experienced mitigation specialist, Vera Ockenfels, who was referred by the Arizona Federal Public Defender's Capital Habeas Unit. (*Id.* at 14.) Ockenfels gathered all available records and traveled with Bartolomei to the Navajo reservation to interview Petitioner's mother, grandparents, uncle, football coach, teachers,

and friends.[11] (*Id.* at 14, 17-20, 58-59; Doc. 49, Ex. 3 at 37-38.) Ockenfels also interviewed additional family members, school employees, and acquaintances. Petitioner's mother, Sherry Mitchell, was disagreeable and at some point refused to cooperate. According to Bartolomei, she "just started rambling and talking about herself and being embarrassed herself and how this affected her life and things like that." (Doc. 49, Ex. 2 at 17.) He further noted that she had spoken to the FBI after Petitioner's arrest and made some "unhelpful" comments about him. (*Id.*) Counsel Williams also met separately with Sherry, but she had an attitude, seemed more concerned about herself, and walked out of the interview. (Doc. 49, Ex. 1 at 27-28.) Counsel also tried to locate Petitioner's father, who was a native of the Marshall Islands, but he had died just weeks before their investigator went there to find him.[12] (Doc. 49, Ex. 2 at 24.)

Ockenfels prepared a detailed, 42-page social history of Petitioner. (Doc. 43, Ex. 93.) In these proceedings, Petitioner asserts in a conclusory fashion that the report is "sufficient in some areas, incomplete in others, but overall is inadequate." (Doc. 30 at 66, 109.) However, he does not specify any of the alleged inadequacies. In addition, Petitioner has proffered a 55-page declaration from a social worker retained by habeas counsel to identify social history information, but, other than providing some additional anecdotal detail, her report does not differ appreciably from Ockenfels's narrative. (Doc. 30-3, Ex. 143.) Both documents provide biographical background on Sherry Mitchell and her parents, George and Bobbi Mitchell. Both observe that Sherry and Bobbi were frequently embroiled in personal jealousies and arguments, were each emotionally and physically abusive, and were concerned more for their careers than for Petitioner. Both note that George and Bobbi argued frequently

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[11] Petitioner does not allege that counsel neglected to gather important, relevant life history records and concedes that "[a]ll of Mitchell's school records were in trial counsel's files." (Doc. 30 at 32.)

[12] Petitioner complains that counsel failed to develop the paternal side of his family but does not clearly identify any significant information that was not already known to counsel. He acknowledges that counsel and their investigator gathered records about his father and interviewed his father's widow and brother. (Doc. 30 at 23.)

and lived apart more often than not, and that Petitioner never knew his father, was essentially abandoned by his mother, was frequently shuffled between towns and schools, and was primarily raised in an isolated part of the Navajo reservation by George, who was 60 years older and emotionally distant. Both also state that Petitioner struggled with identity and self-confidence issues, due in part to his mixed race, his large size, and his lack of fluency in the Navajo language and culture. Finally, both note that Petitioner likely turned to drugs and alcohol as a result of abandonment and the lack of a stable, nurturing home.

In her report, Ockenfels also documented behavioral problems that began at an early age, likely as a result of the "emotional turmoil [Petitioner] suffered at home." (Doc. 43, Ex. 93 at 20.) These included being defiant and headstrong, yelling and cussing at teachers, and being unruly in the classroom. By the seventh grade, Petitioner fought frequently with other students and in tenth grade was suspended for throwing a chunk of plasterboard at a teacher. Soon after starting eleventh grade, he lost control during a fight and knocked over a security guard while trying to get to his opponent. In lieu of expulsion, he transferred schools and underwent counseling. According to Ockenfels's investigation, starting in the third grade Petitioner had turned to gangs to fulfill his need for a family and by the eighth grade had formed his own, the East Side Thugs. (*Id.* at 35-37.) Ockenfels further noted that Petitioner experienced mounting anger through the years, which he sometimes took out on animals by, for example, flinging dogs by their tails off of bridges and shooting dogs and cats "purely for its entertainment value." (*Id.* at 24-25.)

It is evident from this record that counsel conducted an adequate investigation of Petitioner's family background and history of abuse and neglect. Although Petitioner argues otherwise, he also acknowledges in his motion that the "facts and witnesses concerning Mitchell's poor school performance and the abuse and neglect he suffered was readily available to trial counsel – most, if not all, was provided to them by their own mitigation investigator well before trial." (Doc. 30 at 36.) Petitioner also asserts that if counsel had not alienated Sherry Mitchell and had investigated Bobbi Mitchell "thoroughly," they would have discovered that Bobbi was mentally ill. (Doc. 30 at 120.) However, he fails to provide

any evidence that Bobbi was ever diagnosed with a mental disease or defect and it appears this assertion is based purely on speculation. Such unsupported allegations are insufficient to establish ineffective assistance of counsel.[13]

In addition to undertaking an extensive social history investigation, counsel investigated Petitioner's mental health and state of mind at the time of the offense. They first had him examined by a psychologist, Dr. Susan Parrish. She did not prepare a report but, according to Williams, concluded that Petitioner was sociopathic and advised counsel not to call her as a witness. (Doc. 49, Ex. 1 at 16-17.) Petitioner then underwent extensive testing and examination by a team of experts at the University of Arizona, including a psychiatrist, a neuropsychologist, and a neurologist. The neurological exams, EEG, MRI, and laboratory results were all normal. (Doc. 43, Ex. 94 at 18.) Neuropsychological testing revealed "some mild deficits in executive functioning (impulsiveness and poor planning)" that "were more likely related to emotional factors rather than traumatic brain injury." (*Id.*) The neuropsychologist also determined that Petitioner was of average general intelligence. (Doc. 35-1 at 1.)

Dr. Barry Morenz diagnosed Petitioner as suffering from a depressive disorder, not otherwise specified (because Petitioner "at times feels despondent and hopeless"); polysubstance abuse in a controlled environment (based on Petitioner's abuse of "alcohol, marijuana, cocaine, Ecstasy and other drugs on a regular basis for a number of years"); a cognitive disorder not otherwise specified (deemed "provisional" because Petitioner's executive functioning deficits "were mild and of uncertain etiology and clinical significance"); and an antisocial personality disorder. (Doc. 43, Ex. 94 at 17-18.) With regard to the latter, the psychiatrist noted that Petitioner had

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[13] Even if Petitioner could establish that Bobbi Mitchell suffered from a mental illness and that this information was readily available to counsel, the Court concludes that such evidence likely would have had no impact on defense counsel's sentencing strategy. As discussed below in Section II.A.3, counsel sought to portray Petitioner's positive attributes, including coming from a family of educators and educated people, and believed emphasis on his family's negative characteristics would have undermined this goal.

> a history beginning in childhood of aggression, deceitfulness, frequent rule violation and cruelty to animals such that he would have warranted a conduct disorder diagnosis as an adolescent. Since he has turned 18 this pattern has continued. He has been deceitful, impulsive, aggressive and irresponsible. He has disregarded the rights of others. He also shows little remorse for his behaviors. These factors indicate he warrants the diagnosis of an antisocial personality disorder.

(*Id.* at 18.)

Counsel also obtained Petitioner's only available pre-offense psychological records. Intelligence testing conducted when Petitioner was seven indicated that he had a full scale IQ of 107 and his reading recognition, spelling, and arithmetic tested at the 2.5 grade level. No further testing took place until Petitioner was 17, when he underwent counseling with Dr. Edward Fields after his near expulsion from high school for fighting. Dr. Fields administered an MMPI test and reported that

> [t]he preliminary results are consistent with his reported problems. Overall they describe a very troubled young man. Intensive psychotherapy is in order. It can be done on an out patient basis if he will cooperate and attend scheduled appointments. Failing that, a residential placement may be necessary. He could be in serious jeopardy otherwise. The risk is anti-social behavior that could produce serious law encounters.

(Doc. 43, Ex. 93 at 26.)

Petitioner asserts summarily that counsel "failed to consult with appropriate and necessary experts" and, for those they did consult, failed to "give them adequate background information about Mitchell." (Doc. 130 at 112, 114.) In support he proffers a declaration from a newly-retained expert, Dr. Pablo Stewart, who opines that Petitioner suffers from Posttraumatic Stress Disorder (PTSD) based on the "violence and abuse" he suffered and witnessed as child, as well as Substance Dependence. (Doc. 30-2, Ex. 135 at 31-33.) Dr. Stewart further opines that, as a result of Petitioner's drug and alcohol abuse in the period preceding the crime, he suffered a Substance-Induced Psychotic Disorder (SIPD) at the time of the offense. (*Id.* at 43.) He concludes that he or a similar mental health professional could have testified that Petitioner's severe intoxication, SIPD, and PTSD "synergized with each other resulting in the alteration of Mr. Mitchell's cognitive and behavioral functioning, which severely impaired his ability to premeditate or intend to commit murder." (*Id.* at 53.)

The Court accords little value to Dr. Stewart's report because it focuses on what "defense counsel could have presented, rather than upon whether counsel's actions were reasonable." *Babbitt*, 151 F.3d at 1174. Nothing in Dr. Stewart's declaration supports Petitioner's assertion that counsel failed to consult with appropriate experts. *Cf. Frierson v. Woodford*, 463 F.3d 982, 991-92 (9th Cir. 2006) (finding counsel ineffective for relying only on psychiatrist and not consulting with neurologist where defendant had history of multiple head trauma and medical records referenced organic brain dysfunction); *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (finding counsel ineffective for relying on psychiatrist and psychologist and not consulting with expert in neurology or toxicology after learning defendant had been exposed to high levels of toxic chemicals and pesticides). Nor does Dr. Stewart suggest that the experts who evaluated Petitioner before trial were unqualified to assess his mental state at the time of the offense. *See Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is certainly within the wide range of professionally competent assistance for an attorney to rely on properly selected experts.") (internal quotation omitted). Also, Petitioner does not allege that any of the experts with whom the defense consulted suggested that additional testing or consultation with other types of experts would be helpful. *See Babbitt*, 151 F.3d at 1174 ("The experts [counsel] had retained did not state that they required the services of these additional experts. There was no need for counsel to seek them out independently.").

Petitioner baldly asserts that "the mental health professionals to whom counsel provided *some* information were given *nothing* regarding Mitchell's life history." (Doc. 30 at 67.) However, he proffers no evidence to substantiate this allegation. Nor does he assert that any of the experts actually requested additional social history information. *See Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) (holding that counsel does not have a duty to gather background information for an expert in the absence of a specific request to do so). In his report, Dr. Morenz states that he interviewed Petitioner twice for a total of six hours and spoke with the defense investigator for one hour and with Ockenfels for one-and-a-half hours "to review the information they had obtained about Mr. Mitchell."

(Doc. 43, Ex. 94 at 2.) In addition, his report provides a detailed narrative of Petitioner's developmental and educational history, including the fact that Petitioner never knew his father, that Bobbi was reared in a violent and chaotic household, that George and Bobbi lived more apart than together, that there was considerable conflict with some physical abuse between Sherry and Bobbi, that there was little warmth in the Mitchell family and individual members were physically and emotionally isolated, that Sherry was unaffectionate and whipped Petitioner, that George and Bobbi also whipped him and frequently fought, and that Petitioner is not fluent in Navajo and received little education about Navajo culture. There is simply no support for Petitioner's assertion that the experts with whom counsel consulted lacked sufficient background information to effectively render an opinion concerning his mental health.

Petitioner also asserts that counsel failed to adequately investigate his increased drug and alcohol consumption in the months preceding the crime. He argues that there were numerous witnesses "who could have directly or indirectly corroborated Mitchell's statement to the case agent that he was drunk." (Doc. 30 at 94.) Petitioner has proffered declarations from the Nakai brothers and Padrian George who assert that everyone staying at the Nakai house between August and October 2001 drank excessively and used a lot of drugs, including cocaine, Ecstasy, and methamphetamine. (Doc. 12, Exs. 100 &107; Doc. 30-2, Exs. 136 & 137.) A declaration from Orsinger states that by the time he and Petitioner got to Gallup, they "had been awake for several days drinking beer and using drugs." (Doc. 12, Ex. 109 at 3.) Petitioner has not offered his own declaration but apparently told Dr. Stewart during a 2009 evaluation that

> he had not slept for the three nights previous, and that he drank malt liquor and smoked a variety of drugs two nights before to the point of intoxication. He remembers using methamphetamine, both snorting it and smoking it, during the week before October 28, increasing in its use before going to Gallup. He also ingested Ecstasy and smoked crack cocaine and marijuana rolled together into P-dog cigarettes. Lezmond recalls that he and Orsinger made it to Gallup on Saturday morning, October 27, and left that afternoon, and returned to the Nakia's [sic] on Monday morning, October 29.
>
> Lezmond continued smoking crack cocaine and marijuana, as well as drinking for a few days following October 28, and using other drugs until his

arrest on November 4, 2001.

(Doc. 30-2, Ex. 135 at 24-25.) Petitioner has also obtained a declaration from Dr. Morenz, who states that, if the declarations from individuals who saw Petitioner use alcohol and drugs before the offense are "[t]aken as true," knowledge of Petitioner's "substance and alcohol use in the months and days preceding the capital offenses in late October 2001, *could* have made a significant difference" in that he "would have developed further with Mr. Mitchell that he *may* have been under the influence of major, strong, and powerful illicit drugs at the time of the offenses . . . and his perceptions of reality *might* have been altered." (Doc. 30-3, Ex. 144 (emphasis added).) This evidence, Petitioner contends, would have established as a mitigating factor under 18 U.S.C. § 3592(a)(1) that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law's requirements was significantly impaired.

As set forth in Section I.B above, Petitioner adamantly and repeatedly denied to his attorneys that he was under the influence of either drugs or alcohol at the time of the killings. He also told Ockenfels that he last used cocaine in July 2001 and crystal methamphetamine in September 2001, the month before the offense. (Doc. 43, Ex. 93 at 33.) Dr. Morenz reviewed the FBI reports and was on notice of Petitioner's statements about being intoxicated and blacking out during the offense. (Doc.43, Ex. 94 at 2.) He was also aware of Petitioner's drug and alcohol problems, having diagnosed Petitioner with polysubstance abuse. Petitioner has not alleged that Dr. Morenz failed to inquire whether he was under the influence of intoxicants at the time of the offense. Given the available information, it is reasonable to conclude Dr. Morenz would have explored this topic during his lengthy meetings with Petitioner. Additionally, Petitioner provided him the following detailed statement about the offense:

> Mr. Mitchell states that they had been "shooting the breeze" about robbing the trading post for 1-2 months before they actually committed the robbery. Mr. Mitchell acknowledges that he and Johnny went to steal a truck so they could move the safe of the trading post if they couldn't open it during the robbery. . . . Mr. Mitchell states that he had wanted to steal an unoccupied truck, not carjack one where they would have to confront a driver and possibly passengers.

> Mr. Mitchell states they were given a ride by the victims. Mr. Mitchell states that when the victims stopped to let Mr. Mitchell and Johnny out of the vehicle, he started to get out of the vehicle and then Johnny started cutting up the driver. Mr. Mitchell wasn't sure what to do but he decided to get back in the truck and he stated, "I was going to be a good soldier and help him out." Mr. Mitchell put his hand over the little girl's mouth so she wouldn't yell. Mr. Mitchell stated, "The old lady died. Johnny put her in the back seat." Mr. Mitchell lifted the little girl into the back seat and then he got in the front. Mr. Mitchell states that Johnny drove for a while but his driving was erratic, so Mr. Mitchell took over. Mr. Mitchell states that it took a couple of hours to get to the location where the girl was killed. Mr. Mitchell commented that Gregory Nakai told them "no more dead bodies," referring to the cowboys that they had apparently killed some time before (Mr. Mitchell was not involved but knew about the killings). Mr. Mitchell states that Johnny wanted him to kill the girl and he refused. Mr. Mitchell states that Johnny cut the girl up but she didn't die. Mr. Mitchell states that Johnny wanted him to help him find a big rock to hit the girl with and kill her. A bigger rock was located and Johnny hit the girl three times with it. Mr. Mitchell thinks she was probably already dead when Johnny hit her with the larger rock. Mr. Mitchell states that he never did anything violent directly to either of the victims. Mr. Mitchell states that he threw the rock Johnny used to hit the girl in order to hide it. They left the corpses covered in some leaves.
>
> Cleaning fluids were in the car, so Mr. Mitchell and Johnny cleaned out the car the best they could but there was still a lot of blood on the seats, in the vents and on the ceiling. They couldn't completely clean the truck of all the blood. They burned some of the victim's belongings and then they stashed the truck near Mr. Mitchell's grandfather's house and went to Gregory Nakai's house.
>
> The next day, Gregory told them to go back up and cut off the heads and the hands of the victims so they couldn't be identified. When they returned to where they left the corpses, they took off the clothes of the victims (with the exception of the underwear) and burned them. They buried the heads and the hands but not the bodies. They believed that the bobcats would get the bodies soon enough. They went back to Gregory Nakai's house and burned their own clothing from the day before. Four days later Mr. Mitchell, Johnny and others committed robbery of a nearby trading post and were arrested.
>
> Mr. Mitchell states that Gregory Nakai didn't want to do the robbery, he felt that he was already getting enough heat about the cowboys they had killed. Mr. Mitchell states that he believed they could do the robbery without any difficulty but he had not planned on killing anyone, he just wanted to steal a truck but not do a carjacking. Mr. Mitchell states, "Other than that, everything went smooth." I asked Mr. Mitchell how he felt about the victims. Mr. Mitchell replied, "Kind of fucked up because of the old lady and the little girl...that fucking shit disgusts me but it couldn't have been avoided. I'm running this equation in my head that 9 times out of 10 if we let that little girl go the cops will be after us."

(Doc. 43, Ex. 93 at 6-7.) Given this admission, which exhibits Petitioner's rational consideration about destroying evidence and killing the child to avoid apprehension, it is highly unlikely that providing Dr. Morenz with evidence of Petitioner's increased drug and

alcohol use in the weeks or even days before the murder would have led to his opining that Petitioner was unable to appreciate the consequences of his actions or to control his conduct. Indeed, the declaration Dr. Morenz prepared for these proceedings is highly equivocal, stating only that Petitioner's perception of reality "might" have been altered by intoxicants. *See West v. Ryan*, 608 F.3d 477, 487 n.10 (9th Cir. 2010) (postconviction letter from expert asserting that he "may have" diagnosed defendant with PTSD had counsel provided additional social history insufficient to establish deficient performance).

Moreover, none of the declarations of individuals living at the Nakai house provide any specific information about any substances Petitioner consumed on the day of or before the offense; instead, they contain only general statements that the use of drugs and alcohol increased after August 2001. *See Williams*, 384 F.3d at 615-16 (noting weakness of lay testimony that failed to provide any facts suggesting the defendant's drug use had the specific effect of diminishing his mental capacity at or near the times of the crimes). The only other participant in the carjacking and murders, Johnny Orsinger, now claims that he and Petitioner had been using drugs, but he too neglects to identify any specifics about the type or quantity. Further, at the time of Petitioner's trial, Orsinger refused to testify and was not an available witness. Petitioner also "insisted [to his attorneys] that he was sober and straight," and Bartolomei observed that Petitioner and Orsinger were

> given a ride by a trooper, some sort of police officer, as they were hitchhiking. They spent the day at the mall. They bought, you know, whatever they bought, knives and what have you. And then they got a ride from a Hispanic, Mexican fellow. And the fact that he was given a ride by Ms. Slym [sic], [I] don't know that it makes sense that she would give a ride to two people who were whacked out.

(Doc. 49, Ex. 2 at 38-39.) Petitioner's own detailed recollection of the crime (including his recitation to Dr. Morenz), the multi-hour duration of the ordeal, the extended drive to a remote area, and his ability to lead investigators back to the crime scene severely undercut the argument that he was too intoxicated to understand the nature of his actions or to control his conduct. In light of the information available to counsel, including Petitioner's insistence that he was not intoxicated, the Court concludes that the scope of their investigation into

Petitioner's alleged intoxication at the time of the crime was reasonable.

In sum, the Court finds that counsel undertook a thorough investigation for potential mitigating evidence. While additional interviews of family and friends can always be conducted, Petitioner has not established that such efforts would have uncovered significant information about Petitioner's life history that was not already known to counsel. *See Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009) ("[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative."). In addition, counsel enlisted appropriate experts and conducted a reasonable investigation concerning Petitioner's state of mind and possible intoxication at the time of the offense. Accordingly, the Court concludes that this

> is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, *cf. Wiggins [v. Smith*, 539 U.S. 510, 525 (2003)], or would have been apparent from documents any reasonable attorney would have obtained, *cf. Rompilla v. Beard*, 545 U.S. 374, 389-93 (2005). It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments." 466 U.S. at 699.

Id.

3. Mitigation Presentation

Petitioner also argues that counsel were ineffective for not presenting to the jury all of the evidence they had collected. Specifically, he asserts that counsel should have called lay and expert witnesses to testify concerning his intoxication at the time of the offense. He further contends that counsel should have utilized a social historian to discuss his life history and enlisted mental health experts to explain his executive functioning deficits, substance abuse, and addictions. Finally, he argues that the witnesses who did testify at the penalty hearing were unprepared and provided only a vague portrait of his childhood.

In their depositions, counsel explained that, in the absence of credible evidence to explain Petitioner's conduct (e.g., mental illness), they chose to focus on Petitioner's positive traits to demonstrate that "there was some value to his life and some reason why he should be spared." (Doc. 49, Ex. 1 at 53; *see also* Doc. 49, Ex. 2 at 54; Doc. 49, Ex. 3 at 31.)

Counsel Sears testified that in his experience, in a post-9/11 atmosphere, focusing on a defendant's background as a means of explaining terrible conduct could be viewed negatively by a jury. (Doc. 49, Ex. 3 at 35.) Thus, defense counsel wanted to stress Petitioner's potential and hoped at least one juror would be swayed by the fact that Orsinger did not face the death penalty yet was more culpable, that Petitioner was treated poorly by his mother and was caught between different cultures, and that life without the possibility of parole in prison would not be a "cake walk." (Doc. 49, Ex. 1 at 53; Doc. 49, Ex. 3 at 30-33.)

Counsel have substantial leeway in making strategic and tactical decisions about how to present a case at a capital sentencing hearing and are not required to present every conceivable mitigation defense if, after proper investigation and review, they conclude that it is not in the defendant's best interest to do so. *Darden v. Wainwright*, 477 U.S. 168 (1986). As explained below, the Court finds that the above-described investigation was sufficient to support counsel's reasonable strategic decision not to present evidence regarding Petitioner's family and life history, drug and alcohol dependence, executive functioning deficits, and state of mind at the time of the offense because (1) the evidence was not particularly helpful, (2) presentation of the evidence would have opened the door to damaging rebuttal testimony, and (3) lingering doubt concerning Petitioner's role in the offense and emphasis of his positive attributes were viable defenses. *Cf. Williams*, 384 F.3d at 615-16.

Minimal Mitigation Value

Much of the evidence Petitioner now argues should have been presented offered only weak mitigation and would have detracted from counsel's goal of portraying Petitioner as someone with good qualities, who had the potential to be a leader in prison. (Doc. 49, Ex. 2 at 53-54.) For example, counsel had significant evidence of Bobbi and Sherry Mitchell's history of personal problems and abuse. Although an argument could be made that being raised by such dysfunctional individuals rendered Petitioner less blameworthy, counsel believed that focusing on their negative characteristics worked against the defense position that Petitioner came from a family of educators and educated people and thus had positive

traits. (*Id.* at 80.) Similarly, although Dr. Morenz's report documented Petitioner's chaotic upbringing and drug and alcohol abuse, it also revealed that Petitioner had a history of aggression and cruelty to animals. Counsel did not want the jury to learn of Petitioner's anger and antisocial traits because "the facts in this case already instill fear in people," and they did not want to present anything that made Petitioner "look like someone the jury should be afraid of." (*Id.* at 78-79.) The Court concludes that counsel made a reasonable strategic decision to keep potentially damaging facts about Petitioner's upbringing from the jury. *See Williams*, 384 F.3d at 616.

The Court also finds reasonable counsel's conclusion that a diminished capacity defense based on Petitioner's drug and alcohol abuse was not viable. First, there was little evidentiary support for such a defense. Petitioner adamantly denied being intoxicated at the time of the killings. Nothing in Orsinger's statement to investigators indicated that he and Petitioner had been under the influence of an intoxicant. Although Orsinger now claims in a post-conviction declaration that they had not slept for days and were using a lot of drugs, he refused to testify and was not an available witness. The Nakai brothers and Padrian George claim that drinking and drug use at the Nakai home escalated in the months preceding the offense. However, even assuming these witnesses were available to testify, none could have established that Petitioner's thoughts or actions on the day of the carjacking were materially affected by drugs or alcohol. Nor did Dr. Morenz's evaluation provide any basis for establishing that Petitioner was unable to appreciate the consequences of his actions or to control his conduct. Second, the facts of the crime as relayed by Petitioner to Dr. Morenz reflect deliberate and methodical action to eliminate witnesses and destroy evidence as a means of avoiding apprehension. This clearly undermines any claim that Petitioner was unable to appreciate the wrongfulness of his conduct. Third, counsel believed an intoxication defense would "detract from the positive things we wanted to present about Lezmond." (Doc. 49, Ex. 2 at 41-43.) "Given the facts of the crimes and the lack of credible evidence of contemporaneous drug use impacting [Petitioner's] mental state, [counsel's] decision that a defense of diminished mental capacity was not feasible certainly fell 'within the wide range

of reasonable professional assistance.'" *Williams*, 384 F.3d at 617 (citing *Strickland*, 466 U.S. at 689).

Counsel also exercised reasonable professional judgment in not presenting evidence of Petitioner's executive functioning deficits. According to the neuropsychologist, Petitioner "appeared to have mild difficulty in certain components of executive functioning, specifically in planning and strategy formation. His difficulty was thought to be largely due to a tendency to respond impulsively and quickly." (Doc. 35-1 at 1-2.) Dr. Morenz characterized the deficits as "mild and of uncertain etiology and clinical significance." (Doc. 43, Ex. 94 at 18.) This is hardly helpful mitigation. *See West v. Ryan*, 608 F.3d at 489 (finding it reasonable for counsel not to introduce at sentencing an expert's "underwhelming report"). Moreover, as discussed next, presentation of such evidence would have opened the door to the admission of the remainder of Dr. Morenz's report, including his diagnosis of antisocial personality disorder.

Potentially Damaging Rebuttal

The decision not to present evidence of Petitioner's dysfunctional upbringing, drug and alcohol dependence, executive functioning deficits, and intoxication at the time of the crime was not unreasonable given the risk of opening the door to damaging rebuttal evidence. For example, counsel considered calling Sherry Mitchell as a witness, if only "to show what a piece of crap she was," but she was a "loose cannon" and they were concerned "she would have pointed a finger at Lezmond and basically condemned him right there." (Doc. 53-1 at 4; Doc. 49, Ex. 2 at 44-45.) She had also contacted investigators shortly after Petitioner's arrest and made remarks to the effect that "he was where he belonged." (Doc. 49, Ex. 2 at 45.) Similarly, enlisting an expert to testify to the social history compiled by Ockenfels would have likely required disclosure of many of the damaging facts contained in her report, including Petitioner's aggressive behavior in school throughout his childhood, his gang activities, and his abuse of animals, all of which the prosecution would undoubtedly have sought to elicit in rebuttal. Such evidence of Petitioner's violent tendencies would have been at odds with the positive portrait counsel wished to paint and would have undermined the

argument that it was Orsinger, not Petitioner, who instigated the violent attack on the victims. *See Burger v. Kemp*, 483 U.S. 776, 793 (1987) (finding reasonable counsel's decision not to present evidence of defendant's violent tendencies that was at odds with strategy of portraying defendant's actions as result of co-defendant's strong influence on his will); *Cox v. Ayers*, 613 F.3d 883, 897 (9th Cir. 2010) (finding reasonable decision not to present evidence suggesting violent propensities where goal was to portray defendant as less culpable than co-defendant).

Evidence highlighting Petitioner's addictions also could have hurt as much as helped the mitigation case. Courts have repeatedly observed that evidence of drug and alcohol abuse is often a "double-edged sword" because it is equally possible a sentencer will fault a defendant for his failure to effectively address an addiction problem or construe him as a continuing threat to society. *See, e.g., Wackerly v. Workman*, 580 F.3d 1171, 1178 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 3387 (2010); *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir. 1999).

Finally, testimony from Dr. Morenz concerning Petitioner's mild executive functioning deficits would have required disclosure of his report, which, in addition to detailing Petitioner's behavioral problems and animal abuse, revealed that Petitioner began selling drugs while in middle school and was seemingly unremorseful for the tragic deaths of Slim and her granddaughter. Bartolomei was concerned that this report would negatively affect the jury: "I don't think the jury would have been very sympathetic to hearing even more negative things about this young man." (Doc. 49, Ex. 2 at 32.) Additionally, Dr. Morenz diagnosed Petitioner as suffering from an antisocial personality disorder. The Ninth Circuit has repeatedly observed that such a diagnosis may be potentially more harmful than helpful. *See, e.g., Daniels v. Woodford*, 428 F.3d 1181, 1204, 1210 (9th Cir. 2005) (indicating that testimony suggesting that a capital defendant is a sociopath" is aggravating rather than mitigating); *Beardslee v. Woodford*, 358 F.3d 560, 583 (9th Cir. 2004) (acknowledging that an antisocial personality diagnosis can be damaging to a capital defendant); *Clabourne v. Lewis*, 64 F.3d 1373, 1384 (9th Cir. 1995) (noting that mental

health records omitted from the sentencing hearing "hardly turned out to be helpful" because they indicated that the defendant had an antisocial personality").

Viable Defenses

For the penalty phase, defense counsel selected witnesses whom they thought could "show [Petitioner's] humanity." (Doc. 49, Ex. 2 at 51.) Counsel met with each witness before his or her testimony, either at counsel's office or outside the courtroom to explain their goal of eliciting testimony about the witness's personal knowledge of Petitioner and his positive qualities. Counsel did not want the witnesses to testify about Petitioner's drug use, drug dealing, or dysfunctional upbringing. To the contrary, their strategy was to focus on Petitioner's future potential, the fact that he had good qualities and leadership skills, and to argue that his life was worth saving. (Doc. 49, Ex. 2 at 51-54.) This was not an unreasonable tactical decision.

Similarly, the Court cannot fault counsel's decision to focus on the disparity between Petitioner and Orsinger. Although Petitioner had conceded to Agent Duncan that he stabbed Slim a few times and tried to cut the young girl's throat, counsel reasonably argued that Orsinger was the more culpable participant because he had previously committed murder and instigated the attacks against Slim and her granddaughter. Thus, lingering doubt existed about the extent of Petitioner's role in the killings. The fact that Orsinger was not facing the death penalty was a powerful argument for mercy and proportionality in Petitioner's case. *See Pizzuto v. Arave*, 385 F.3d 1247, 1253 (9th Cir. 2004) (noting that the relative culpability of co-defendants is a well-recognized mitigating circumstance).

In sum, counsel made a significant effort, based on a reasonable investigation, to present to the jury a sympathetic portrait of Petitioner and to focus the jury's attention on reasons to spare Petitioner's life. Petitioner has not presented a sufficient basis to question the reasonableness of the sentencing strategy utilized by defense counsel, especially in the face of a difficult case. Consequently, Petitioner has not shown that counsel's performance was constitutionally deficient. *See Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

unchallengable.").

To establish ineffective assistance of counsel, a petitioner must also demonstrate prejudice from any deficiencies by counsel. Because Petitioner has not established deficient performance, the Court finds it unnecessary to address whether he was prejudiced by counsel's decision not to present evidence of Petitioner's dysfunctional family and life history, drug and alcohol dependence, executive functioning deficits, and state of mind at the time of the offense. *See id.* at 697 (stating that a court need not address both prongs of an ineffectiveness claim).

B. Mental Competency (Claim S)

At some point during trial, Petitioner told counsel that he was contemplating waiving his presence during any sentencing proceedings. (RT 5/9/03 at 3616.) Shortly after the jury returned its guilty verdict, counsel informed the Court that Petitioner had become uncooperative, no longer wanted to participate in his defense, wanted to waive his appearance, and would not be testifying during the penalty phase. (RT 5/8/03 at 3589-91.) After numerous attempts to change Petitioner's mind over the course of several days, the Court ultimately accepted the waiver after determining that Petitioner's decision was knowing, intelligent, and voluntary. (RT 5/8/03 at 3598-99; RT 5/9/03 at 3604-10; RT 5/13/03 at 3664-69; RT 5/14/03 at 3841-51.) Throughout the penalty phase, the Court frequently verified that Petitioner continued to waive his presence. (RT 5/15/03 at 3886, 3950; RT 5/16/03 at 4054, 4107, 4169.) Petitioner observed the proceedings over a closed-circuit TV in a holding cell adjacent to the courtroom and appeared in court only for return of the sentencing verdicts. (RT 5/16/03 at 4169; RT 5/20/03 at 4195.)

In his § 2255 motion, Petitioner argues that counsel were ineffective for not asserting that he was mentally incompetent, due to his drug addiction, to waive presence at sentencing. (Doc. 30 at 221.) He has proffered two affidavits from inmates who were housed in the same jail as Petitioner at the time of Petitioner's trial. One claims that he saw Petitioner use heroin and drink jail-brewed alcohol on a regular basis. (Doc. 12, Ex. 97.) The other asserts that he saw Petitioner use heroin and marijuana regularly, take other drugs such as crystal

methamphetamine and cocaine periodically, and drink homemade liquor daily. (Doc. 55, Ex. 161.) In addition, he asserts that Dr. Morenz's report put counsel on notice of both Petitioner's history of drug and alcohol abuse and his access to drugs and alcohol while in jail. Therefore, Petitioner argues, counsel should have requested a competency hearing once Petitioner refused to participate in the penalty phase.

An attorney has a duty to inquire into a defendant's competency and request a competency hearing if there is indicia of incompetence that "would provide reasonable counsel 'reason to doubt' the defendant's ability to understand the proceedings, communicate with counsel, and assist in his own defense." *Jermyn v. Horn*, 266 F.3d 257, 300 (3d Cir. 2001). After considering the facts available to counsel, the Court concludes that Petitioner's ineffectiveness claim fails.

On direct appeal, Petitioner argued that this Court erred in not *sua sponte* holding a hearing to determine whether he was mentally competent to waive his presence. In rejecting the claim, the Ninth Circuit concluded that there was no reasonable doubt as to Petitioner's competency:

> It is clear from the record that Mitchell understood the nature of the proceedings and that his chances of avoiding the death penalty could ride on his presence. He points to no psychiatric evidence that he was somehow clinically incompetent. Finally, Mitchell was not disruptive, did not launch into emotional outbursts, maintained appropriate demeanor, and did not behave erratically. *Cf. Torres v. Prunty,* 223 F.3d 1103, 1109 (9th Cir. 2000) (describing bizarre courtroom conduct by a habeas petitioner who had been diagnosed with a severe delusional disorder, which included wearing jailhouse blues; threatening to assault his attorney; continually disrupting the proceedings; and insisting that he be handcuffed as well as shackled). In short, Mitchell gave the judge no "reason to doubt [his] competence." *Godinez v. Moran,* 509 U.S. 389, 402 n.13, 113 S. Ct. 2680, 125 L.Ed.2d 321 (1993).
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> While Mitchell recognized that his decision might be self-defeating, he made it anyway. The court did its best to talk Mitchell out of doing something that it believed was imprudent and not in his best interests. Mitchell acknowledged what the court, and his counsel, thought but, as he put it at one point, "Isn't that my decision?" As manifest by the extensive exchanges, Mitchell was alert, understood what he was doing, and gave no hint of lacking a rational grasp on the proceedings.

Mitchell, 502 F.3d at 986-87.[14]

The only new evidence Petitioner proffers that was not before the appellate court are two declarations from prisoners claiming they observed Petitioner consume drugs and alcohol while in jail pending trial. However, neither of these individuals was at the same detention facility when the guilt phase of Petitioner's trial concluded in May 2003. One was transferred out of the jail in April 2003 while the other states that he was sentenced and sent to prison before Petitioner's trial concluded. (Doc. 12, Ex. 97 at 1; Doc. 55, Ex. 161 at 4.)

Moreover, in their depositions, counsel denied having any reason to suspect that Petitioner was intoxicated during the trial or mentally incompetent to waive his presence at sentencing. Sears stated that Petitioner was "engaged, appropriate, understood, or at least appeared to understand all of what was being discussed in his presence." (Doc. 49, Ex. 3 at 20.) He also noted that he had experience with incompetent clients and would have known whether Petitioner was under the influence of drugs or alcohol. (*Id.* at 21-22, 28-29.) Williams likewise testified that he never smelled alcohol and that Petitioner was "always linear" in his thinking. (Doc. 49, Ex. 1 at 25-26, 50.) Bartolomei was surprised to see a reference in Dr. Morenz's report to substance abuse in jail because Petitioner was housed in a highly restricted area and had very limited access to other inmates. (Doc. 49, Ex. 2 at 26-27, 64-65.) He also observed no signs of intoxication and no reason to suspect that Petitioner did not understand what was going on, stating that nothing "raised a red flag" even after Petitioner refused to participate in the penalty phase. (*Id.* at 12, 48-49.)

Because there was nothing to alert counsel that their client may have been incompetent, the failure to request a competency hearing was not constitutionally deficient. *See Boyde v. Brown*, 404 F.3d 1159, 1167 (9th Cir. 2005) (finding no ineffectiveness where there was no substantial basis for questioning defendant's competence); *de Kaplany v. Enomoto*, 540 F.2d 975, 986-87 (9th Cir. 1976) (finding no ineffectiveness where counsel

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[14] To the extent Petitioner is reasserting in his petition that the Court should have *sua sponte* ordered a mental competency hearing, the Court declines to consider the issue because it was raised and decided on direct appeal. *See Polizzi*, 550 F.2d at 1135-36.

had no reason to doubt defendant's competency and available psychiatric reports did not suggest incompetence).

III. CONFLICT OF INTEREST

In Claim C of his motion to vacate, Petitioner alleges that his right to effective assistance of counsel was violated because a conflict of interest prevented trial counsel from "thoroughly investigat[ing]" his case. (Doc. 30 at 100.) Specifically, he contends that "the Federal Public Defender's Office represented two clients who had actively conflicting interests though they were not co-defendants in the same case." (*Id.*) He further asserts that "[a]t some point before trial, Assistant Federal Public Defender Karen M. Wilkinson notified Federal Public Defender Jon Sands that she was representing a client who had some involvement in the Mitchell case." (*Id.*) According to Petitioner, Sands directed Wilkinson to withdraw as counsel from her case and erected an "ethical wall" around her, prohibiting her from disclosing any information about her former client. (*Id.*) Petitioner also argues that discovery is necessary to compel the FPD to disclose the basis of the conflict.

A. Relevant Facts

Petitioner's claim rests entirely on a declaration of his appellate counsel, Celia Rumann, who for some period during Petitioner's appeal proceeding was also employed as an Assistant FPD in Arizona. Rumann states that in 2007, prior to the Ninth Circuit's ruling on September 5, 2007, she discovered that Wilkinson "had to withdraw from a case because she had learned that her client had some relationship to the *Lezmond Mitchell* case." (Doc. 12, Ex.115 at 1.) Rumann further declares that she emailed Wilkinson and Sands in August 2007 requesting further information about the conflict, including the identity of the person Wilkinson had represented and when and how the conflict had been discovered. According to Rumann, Wilkinson told her she had been instructed not to discuss the matter. Subsequently Rumann met with FPD Sands and trial counsel Bartolomei, who acknowledged that Wilkinson had withdrawn from the other client's case, did not believe there was a conflict for Rumann, but would not stop Rumann if she sought to withdraw from the appeal.

In her declaration, Rumann further states that "another deputy in the office, possibly

Karen Wilkinson, [] told me that a 'wall' was between me and the trial attorneys, that is, the Office [of the FPD] created an information barrier to keep me from learning privileged information from the trial team, and, I assume, vice versa." (*Id.* at 3.) Rumann also states that a wall must have been in existence because she learned, after filing Petitioner's appellate briefs, that the FPD had case-related boxes in storage and when she reviewed those materials discovered items she had never seen before, such as hard copies of the jurors' questionnaires and counsel's notes of the jury interviews. (*Id.* at 4-5.)

In his deposition, Bartolomei clarified that the conflict issue arose *after* Petitioner had been convicted and the case was on appeal. (Doc. 49, Ex. 2 at 83.) He also denied that there was an ethical wall around either Wilkinson or Rumann, other than Wilkinson being advised not to discuss her case, and said he had turned over all of his case materials to Rumann. (*Id.* at 63, 84 & attached clarification). Bartolomei further denied knowing the identity of Wilkinson's client and asserted attorney-client privilege in response to questions concerning Wilkinson's case.

B. Analysis

To establish an ineffectiveness claim based on a conflict of interest, it is not sufficient to show that a "potential" conflict existed. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). Rather, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). An actual conflict of interest for Sixth Amendment purposes is one that "adversely affects counsel's performance." *Mickens,* 535 U.S. at 171. The Ninth Circuit has held that "[t]he showing must be that counsel was influenced in his basic strategic decisions by loyalty to another client or former client." *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003) (internal citation omitted).

In his motion to vacate, Petitioner asserts summarily that the FPD's "restrictions on trial counsel prevented them from looking into how Wilkinson's unnamed [client] affected the investigation of this case. Thus the conflict adversely affected their performance." (Doc. 30 at 100-01.) However, Bartolomei's deposition testimony established that the alleged

conflict did not arise until *after* Petitioner was convicted, and Petitioner has proffered no evidence to the contrary. This time-line is supported by the fact that Jon Sands was not appointed as Federal Public Defender until December 2003 (months after Petitioner's conviction) and, therefore, could not have prohibited Wilkinson from disclosing information about her former client "before trial" as alleged by Petitioner in this claim. Simply put, trial counsel's investigation and preparation for trial could not have been affected by an alleged conflict that arose after he was already convicted and sentenced.

Although his § 2255 motion refers only to trial counsel, in the concluding paragraph of Claim C Petitioner asserts that the alleged conflict also adversely affected appellate counsel Rumann. (*See* Doc. 30 at 103.) In addition, Petitioner's reply brief asserts that a dispute of fact exists as to whether Rumann was walled off from the deputies who tried his case and that discovery and an evidentiary hearing are therefore necessary to resolve this claim. (Doc. 55 at 19.) The Court disagrees.

A discovery request in a habeas case will not be granted unless it is supported by specific factual detail. *See Rich v. Calderon,* 187 F.3d 1064, 1067 (9th Cir. 1999) (upholding denial of discovery request where petitioner failed to allege facts that, if established, would entitle him to relief); *see also Aubut v. State of Maine,* 431 F.2d 688, 689 (1st Cir. 1970) ("Habeas corpus is not a general form of relief for those who seek to explore their case in search of its existence."). In addition, a petitioner is entitled to a hearing on a conflict of interest claim only if he alleges "specific facts which, if true, would indicate that: (1) an attorney's relationship to a third party influenced the attorney not to pursue a particular litigation strategy, and (2) the foregone litigation strategy would have been a viable alternative." *Rodrigues*, 347 F.3d at 824. "This standard requires the defendant to do more than simply allege a 'conflict' or baldly assert that the asserted conflict had an 'adverse effect.'" *Id.*

Here, Petitioner fails to allege specifically how Rumann's performance was adversely affected by the alleged conflict with Wilkinson's client. Although the identity of the client is unknown, there appears to be no dispute that Wilkinson's representation was limited and

that she withdrew upon learning that her client had some connection to Petitioner's case. In addition, Rumann states that she learned of the Wilkinson matter in 2007, shortly before the Ninth Circuit decided Petitioner's appeal. Thus, the existence of the alleged conflict could have had no impact on Petitioner's appeal, both because the briefing had already been completed and because appellate counsel was necessarily limited to raising issues based on the existing court record. *See* Fed. R. App. P. 28(a)(7) (requiring brief to contain "a statement of facts relevant to the issues submitted for review with appropriate references to the record"). Similarly, even if the FPD purposefully walled off Rumann from information concerning Wilkinson's case, Petitioner has failed to allege with any specificity how this adversely affected her representation on appeal.

Having reviewed Claim C and the allegations and supporting material submitted therewith, the Court concludes that the discovery and hearing Petitioner seeks will not assist him in demonstrating entitlement to relief based on an alleged conflict of interest. Merely establishing that counsel had a potential conflict of interest is insufficient to provide relief where there is no showing that, due to the conflict, some "plausible alternative defense strategy or tactic might have been pursued but was not." *Foote v. Del Papa,* 492 F.3d 1026, 1029-30 (9th Cir. 2007). Claim C is denied as meritless.

IV. PROCEDURAL ISSUES

A. Statute of Limitations

A motion by a federal prisoner for relief under § 2255 is subject to a one-year time limitation that generally runs from "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255(f)(1). A judgment is final when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003); *see also United States v. Aguirre-Ganceda*, 592 F.3d 1043, 1045 (9th Cir.), *cert. denied*, 130 S. Ct. 3444 (2010). Although a prisoner has the right under Rule 15 of the Federal Rules of Civil Procedure to file an amended petition as a matter of right before the filing of a responsive pleading, untimely claims raised in an amendment relate back to

timely-filed ones only when they are "tied to a common core of operative facts"; untimely claims do not relate back if they arise out of "events separate in 'both time and type' from the originally raised episodes." *Mayle v. Felix*, 545 U.S. 644, 657 (2005).

In this case, the Supreme Court denied Petitioner's certiorari petition on June 9, 2008, *Mitchell*, 128 S. Ct. at 2902, and Petitioner timely filed his § 2255 motion on June 8, 2009. On November 12, 2009, before the Government submitted its response, Petitioner filed an amended § 2255 motion. One of the changes contained in the amended petition was the addition of new Claim N, which alleges that Petitioner's right to a jury of his peers was violated when the Court transferred the case from Prescott to Phoenix due to security concerns regarding Orsinger and failed to transfer the case back to Prescott after severing Petitioner's and Orsinger's trials. (Doc. 30 at 190-92.) The Government now contends that Claim N should be dismissed as untimely. (Doc. 49 at 54.)

Petitioner argues that Claim N relates back to original Claim M (redesignated as Claim O in the amended petition). (Doc. 55 at 49.) In that claim, Petitioner asserted that his right to a fair and representative jury was violated when Native Americans were systematically excluded from jury service. (Doc. 9 at 136.) His argument was based, in part, on the fact that the case had been transferred to Phoenix and that the later severance of Orsinger's and Petitioner's cases eliminated the reason for the transfer. (*Id.* at 137.) The Court finds Claim N timely because it relates back to a substantially-similar allegation contained within his original § 2255 motion. However, as discussed next, the Court declines to address the claim because it was previously raised on appeal.

B. Claims Previously Raised on Appeal

A district court may refuse to consider any claim raised in a § 2255 motion that was previously presented and considered on direct appeal. *Polizzi v. United States*, 550 F.2d 1133, 1135-36 (9th Cir. 1976). A claim was previously presented if "the basic thrust or 'gravamen' of the legal claim is the same, regardless of whether the basic claim is supported by new and different legal arguments." *Molina v. Rison*, 886 F.2d 1124, 1129 (9th Cir. 1989). A court may entertain a successive claim if the law has changed or if necessary to

serve the ends of justice. *Polizzi*, 550 F.2d at 1135-36.

Respondents assert that Claims I, N, O, Q, R, W, X, and Z were previously raised on direct appeal and are thus precluded from review by this Court. (Doc. 49 at 37, 54, 55, 58, 61, 69, 70, 73.) As set forth next, the Court concludes that Petitioner raised each of these claims on direct appeal, that none rely on a change in the law, and that the ends of justice do not warrant their re-examination.

In Claim I Petitioner contends that he was deprived of his right to an impartial jury when Venireperson 3 was excluded because of his views opposing the death penalty. Because Petitioner waited until his appellate reply brief to raise this claim, the Ninth Circuit deemed it waived. *See Mitchell*, 502 F.3d at 953 n.2. The appellate court's waiver ruling does not negate the fact that Petitioner has raised in these proceedings the same legal claim that was presented on appeal.[15] Thus, the claim is impermissibly successive.

In Claim N Petitioner alleges that his right to a representative jury was violated when the Court failed to transfer his case back to the Prescott division after severing Orsinger's trial. On appeal, Petitioner asserted a fair-cross-section violation. While he alleged that his trial was improperly transferred, he "abandon[ed] the point by developing no argument with respect to it." 502 F.3d at 950. He also complained that the last-minute severance "dramatically changed the nature of the case for which he was selecting a jury." *Id.* at 959. The Court can discern no basis for exempting Claim N from the presumption against reconsideration of a claim raised on appeal.

In Claim O Petitioner asserts that his right to a jury chosen from a fair and representative jury venire was violated when Native Americans were systemically excluded from jury service. Petitioner raised this same claim on direct appeal. The Ninth Circuit concluded that he had failed to "show that the underrepresentation of Native Americans on venires such as his was either substantial or systematic." *Mitchell*, 502 F.3d at 951.

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[15] In Section I.F.4 above, the Court rejected Petitioner's assertion that appellate counsel was ineffective for not properly presenting on appeal a *Witherspoon* challenge to Venireperson 3.

Petitioner does not allege a manifest injustice or change in the law; rather, he asserts only that the Ninth Circuit erred in relying on absolute disparity instead of a standard deviation analysis. This is insufficient to overcome the presumption against consideration of successive claims.

In Claim Q Petitioner argues that the Government failed to disclose a letter from the Attorney General of the Navajo Nation indicating the Nation's opposition to capital punishment in general and in Petitioner's case.[16] The Ninth Circuit denied this claim on direct appeal, finding that any disclosure violation was harmless. *Id.* at 989. In the instant motion, Petitioner argues only that the alleged violation prejudiced his sentencing. Again, this is insufficient to overcome the presumption against consideration of successive claims.

In Claim R Petitioner asserts that federal investigators colluded with Navajo Nation law enforcement to violate his Fifth and Sixth Amendment rights. Petitioner acknowledges that this claim was litigated on direct appeal, *see id.* at 960-63, but asserts that the Ninth Circuit's analysis was limited to the record and that the claim must be reevaluated in light of new evidence concerning counsel's failure to "appropriately challenge" his custodial statements. (Doc. 55 at 53.) Petitioner's claim clearly rests on the same ground as that presented on appeal and is therefore impermissibly successive. *See Molina*, 886 F.2d at 1128 ("*Sanders* [*v. United States*, 373 U.S. 1 (1963),] states that an involuntary confession claim is still the same 'ground' even if the present claim is based on factual premises that are very different from those on which the earlier claim was based.").

In Claims W, X, and Z Petitioner alleges that the Federal Death Penalty Act is applied inconsistently, impermissibly discriminates against minorities, and fails to provide

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[16] In Claim Q Petitioner also asserts that the Government located and began processing the crime scene prior to being led to the site by either Petitioner or Orsinger, contrary to testimony at trial. (Doc. 30 at 202.) This claim is based on information provided to habeas counsel by a law enforcement officer who refused to sign a declaration; therefore, according to Petitioner, discovery and a hearing to explore this claim are necessary. (*Id.* at 202 n.27.) However, unsupported or speculative allegations are insufficient to justify an evidentiary hearing. *Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994).

constitutionally-required plain-error review. He presented the same arguments to the Ninth Circuit, which rejected each. *See Mitchell*, 502 F.3d at 982, 983 & 967 n.10.

Because Claims I, N, O, Q, R, W, X, and Z were previously raised on direct appeal and Petitioner has not alleged that any are based on a change in law or that a manifest injustice will occur if the claims are not addressed on the merits, the Court declines to reconsider them in these proceedings.

C. Claims that Could Have Been Raised on Appeal

A § 2255 motion is an "extraordinary remedy" and "'will not be allowed to do service for an appeal.'" *Bousley v. United States*, 523 U.S. 614, 621 (1998) (quoting *Reed v. Farley*, 512 U.S. 339, 354 (1994)). Consequently, "[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that he is 'actually innocent.'" *Id.* at 622 (citations omitted); *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993). To establish cause for a procedural default, a petitioner must show, for example, that the claim rests upon a new legal or factual basis that was unavailable at the time of direct appeal, that interference by officials prevented the claim from being brought earlier, or that counsel rendered constitutionally ineffective assistance. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007). If cause is established, a petitioner must further establish prejudice by demonstrating "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional magnitude." *Braswell*, 501 F.3d at 1150 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

Respondents contend that Petitioner could have raised Claims J, L, M, P, and Y on direct appeal and thus these claims are procedurally defaulted. (Doc. 49 at 44, 52, 53, 57, 73.) Petitioner asserts that appellate counsel's ineffectiveness in not raising these claims constitutes cause to overcome any default. He also asserts an independent ineffectiveness claim based on appellate counsel's ineffectiveness in failing to raise these claims (Claim AA). (Doc. 30 at 264.)

Appellate counsel is not constitutionally required to "raise every 'colorable' claim." *Jones v. Barnes*, 463 U.S. 745, 754 (1983). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997). Therefore, whether appellate counsel acted unreasonably in failing to raise a particular issue is often intertwined with the merits of the issue and whether the defendant would have prevailed on appeal. *See Wildman*, 261 F.3d at 840.

Claims J, L, M, and P relate to jury selection. Specifically, Petitioner argues that the Court failed to enforce the legal standard for hardship dismissals, that voir dire was inadequate, that the cumulative effect of all errors during the jury selection process deprived him of due process, and that the juror questionnaire was inadequate. In Claim Y, Petitioner asserts in a conclusory manner that his capital sentence is unconstitutionally discriminatory. After reviewing these claims, the Court concludes that none would have succeeded on appeal because Petitioner has shown neither persuasive legal authority demonstrating error nor prejudice from the alleged errors. Thus, appellate counsel was not ineffective in failing to raise them and appellate ineffectiveness does not excuse Petitioner's procedural default. Claims J, L, M, P, and Y are procedurally barred.

D. Challenge to Court's Request to Interview Jurors

In Claim K Petitioner argues that the Court violated his constitutional rights during these § 2255 proceedings by denying his motion to interview jurors because such interviews "are a vital part of the investigative process." (Doc. 30 at 177.) Because this claim alleges error in a postconviction proceeding, not at trial or sentencing, the Court concludes that it fails to state a cognizable claim for relief under § 2255. *See Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam); *see also United States v. Dago*, 441 F.3d 1238, 1248 (10th Cir. 2006) (concluding that delay in § 2255 proceeding "does not give rise to an independent due process claim that would justify granting a defendant habeas relief."). Claim K fails to state a ground for relief.

E. Lethal Injection Claim

In Claim V, Petitioner alleges that execution using Arizona's current lethal injection protocol would violate his rights under the Eighth Amendment. However, he acknowledges that this claim is not yet ripe and that he may present it in a separate civil rights action under 42 U.S.C. § 1983. (Doc. 30 at 241.) The Court agrees and therefore dismisses Claim V without prejudice. *See Mitchell*, 502 F.3d at 983 (declining to reach the issue and citing *Hill v. McDonough*, 547 U.S. 573, 579-80 (2006), which recognized that challenge to execution method may be brought in § 1983 action).

CONCLUSION

The Court determines that Petitioner has failed to allege facts that, if true, would entitle him to relief. Therefore, an evidentiary hearing is neither required nor warranted. For the reasons set forth herein, the Court further concludes that Petitioner is not entitled to relief under 28 U.S.C. § 2255. Accordingly, his motion is denied.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, this Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a COA or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate whether the petition states a valid claim of the

denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of the following claims:

> Claim A – Whether counsel's failure to investigate, prepare, and present evidence of intoxication resulted in ineffective assistance at trial;
>
> Claim B – Whether counsel's failure to investigate, prepare, and present evidence of addiction and intoxication resulted in ineffective assistance at sentencing; and
>
> Claim D – Whether counsel's failure to investigate, prepare, and present evidence of Mitchell's social history and executive functioning deficits resulted in ineffective assistance at sentencing.

For the reasons stated in this Order, the Court declines to issue a COA with respect to any other claims or procedural issues.

Based on the foregoing,

IT IS ORDERED that Petitioner's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, Or, in the Alternative, Pursuant to 28 U.S.C. § 2241 (Dkt. 30) is **DENIED**. The Clerk of Court shall enter judgment accordingly and terminate this action.

IT IS FURTHER ORDERED GRANTING a Certificate of Appealability as to the following issues:

> Claim A – Whether counsel's failure to investigate, prepare, and present evidence of intoxication resulted in ineffective assistance at trial;
>
> Claim B – Whether counsel's failure to investigate, prepare, and present evidence of addiction and intoxication resulted in ineffective assistance at sentencing; and
>
> Claim D – Whether counsel's failure to investigate, prepare, and present evidence of Mitchell's social history and executive functioning deficits resulted in ineffective assistance at sentencing.

DATED this 30th day of September, 2010.

Mary H. Murguia
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Lezmond Mitchell, Petitioner, vs. United States of America, Respondent.	No. CV-09-8089-PCT-MHM DEATH PENALTY CASE **ORDER**

On September 30, 2010, the Court denied Petitioner's amended motion to vacate his conviction and sentence under 28 U.S.C. § 2255, granted a certificate of appealability on several claims, and entered judgment. (Doc. 56.) Subsequently, Petitioner filed a timely motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. 58.) Respondent opposed the motion, and Petitioner filed a reply. (Docs. 61, 65.) For the reasons that follow, the motion is denied.

DISCUSSION

A motion to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure is in essence a motion for reconsideration. Such a motion offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). The Ninth Circuit has consistently held that a motion brought pursuant to Rule 59(e) should only be granted in "highly unusual circumstances." *Id.*; *see 389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). Reconsideration is appropriate only if (1) the court is

presented with newly discovered evidence, (2) there is an intervening change in controlling law, or (3) the court committed clear error. *McDowell v. Calderon,* 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam); *see School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs, *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1988), or to ask the court to "rethink what it has already thought through," *United States v. Rezzonico*, 32 F. Supp.2d 1112, 1116 (D. Ariz. 1998) (quotation omitted).

Petitioner first asserts that the Court committed clear error in failing to hold an evidentiary hearing and in utilizing an "irregular procedure" to resolve his amended § 2255 motion. (Doc. 58 at 3.) He also presents new evidence and argues that the Court erred in failing to hold an evidentiary hearing on the majority of his claims. Finally, he asserts that the Court erred in finding Claims Q and R to be procedurally precluded on the ground that each was raised on direct appeal.

Briefing Procedures

Petitioner first contends that the Court's "irregular procedure violated Congressional intent, § 2555, and applicable case law, and resulted in an unfair proceeding." (Doc. 58 at 6-7.) In his view, the Rules Governing Section 2255 Proceedings require a district court to provide "*bipartite* fact development, *then* determine whether a hearing is warranted." (*Id.* at 7.) He further asserts that the Court denied his request for an evidentiary hearing "without the benefit of briefing," that his "investigation into developing his right to a hearing and relief was on-going," and that he would have moved for discovery had the Court "followed the established procedure for adjudicating § 2255 motions." (*Id.* at 3, 5 n.5, 6.)

Petitioner has failed to establish clear error. The Court appointed counsel in this matter on April 25, 2008. On May 22, 2009, Petitioner filed a motion for discovery to interview the trial jurors, which the Court denied. On June 8, 2009, Petitioner filed his § 2255 motion to vacate, appended to which were numerous exhibits in support of his claims. Pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings, the Court directed

the Government to file a response and issued a scheduling order. In November 2009, Petitioner filed an amended motion to vacate along with additional supporting exhibits. One month later, the Court granted the Government's request for an order declaring Petitioner's attorney-client privilege waived as to his claims of trial counsel ineffectiveness and found good cause for depositions of Petitioner's trial counsel under Rule 6 of the Rules Governing Section 2254 Proceedings in the event any of his trial attorneys would not submit to an informal interview. The Government filed its response to Petitioner's § 2255 motion in April 2010, along with transcripts of trial counsel's depositions. Petitioner filed a reply three months later. At that point, the petition was fully briefed, and nothing precluded the Court from considering the claims, the proffered exhibits, and the trial record to determine whether an evidentiary hearing was either required or warranted, pursuant to Rule 8 of the Rules Governing Section 2254 Proceedings.

Petitioner has cited no statute, rule, or caselaw that *requires* a district court to order separate briefing on the necessity for discovery or an evidentiary hearing. Petitioner correctly notes that Rule 6 permits discovery for good cause; however, it is incumbent on the parties to request it. In this case, Petitioner did not file any motions for discovery other than to interview the trial jurors. His amended § 2255 motion asked that Petitioner be permitted to "pursue such discovery as may be necessary to fully develop the facts" (Doc. 30 at 279); however, this general request failed to comply with the requirements of Rule 6.[1] *See* Rules Governing § 2255 Proceedings, Rule 6(b), 28 U.S.C. foll. § 2255 ("A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents."). Moreover, nothing precluded Petitioner from filing a motion for discovery in conjunction

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[1] The only arguably specific request for discovery contained in the § 2255 motion related to Claim C, counsel's alleged conflict of interest. Petitioner requested that the Court compel the Office of the Federal Public Defender to disclose the basis of a conflict that prompted one of its attorneys to be relieved as counsel for an unnamed client, who had some connection to this case. (Doc. 30 at 113.) The Court addressed this request in its September 30, 2010 order and declines to reconsider it. (*See* Doc. 56 at 54-55.)

with his § 2255 motion or seeking leave of the Court for separate briefing on the necessity for discovery and an evidentiary hearing. There was no clear error in the Court's procedures.

Evidentiary Hearing

Petitioner asserts that his proffered evidence contradicted trial counsel's deposition testimony and thus an evidentiary hearing was necessary to conduct a thorough evaluation of counsel's performance and resolve factual disputes. Petitioner further faults the Court for "ignoring" his proffered evidence and crediting counsel's deposition testimony, asserting that a live hearing was necessary to "develop fully the circumstances of counsel's decision making." (Doc. 58 at 10 n.7.) In evaluating Petitioner's claims, the Court considered trial counsel's deposition testimony, as well as Petitioner's proffered evidence, and determined that Petitioner's allegations, if true, would not entitle him to relief. In doing so, it found there were no material factual disputes that required a hearing to resolve. The instant motion challenges these conclusions but does not establish clear error; rather, it asks the Court to "rethink what it has already thought through." *Rezzonico*, 32 F. Supp.2d at 1116. The Court declines to reconsider its determination that an evidentiary hearing was neither warranted nor required for any of Petitioner's claims.

Claim Q

In Claim Q Petitioner alleged a *Brady* violation based on the Government's failure to disclose a letter from the Attorney General of the Navajo Nation indicating the Nation's opposition to capital punishment. Because this claim was raised and rejected on direct appeal as harmless, the Court declined to consider it. The instant motion asserts this was clear error because Petitioner requires extra-record factual development to establish prejudice.

"Issues raised at trial and considered on direct appeal are not subject to collateral attack under 28 U.S.C. § 2255." *Egger v. United States*, 509 F.2d 745, 748 (9th Cir. 1975). In *Sanders v. United States,* 373 U.S. 1, 15 (1963), the Court determined that the rules governing motions under § 2255 should be the same as the rules governing successive collateral attacks and such motions should be denied if: (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application,

(2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. The appellate court rejected Petitioner's claim on the merits, and Petitioner did not assert in his § 2255 motion that a manifest injustice would occur if the claim was not addressed on the merits. Petitioner has not established that the Court clearly erred in declining to reach the merits of Claim Q. *See Olney v. United States*, 433 F.2d 161, 162 (9th Cir. 1970) ("Having raised this point unsuccessfully on direct appeal, appellant cannot now seek to relitigate it as part of a petition under § 2255.")

Claim R

In Claim R Petitioner alleged that federal investigators colluded with Navajo Nation law enforcement to violate his Fifth and Sixth Amendment rights and thus his statements to law enforcement were involuntary. Similar to Claim Q, the Court declined to reach the merits of this claim because it had been raised and rejected on direct appeal. Petitioner argues that the facts necessary to prove the claim were not available to appellate counsel and thus the Court erred in not reaching its merits.

In support of his Rule 59 motion, Petitioner has submitted a declaration from Kathleen Bowman, the Public Defender of the Navajo Nation. (Doc. 60-1.) According to Bowman, Petitioner's extended detention in tribal custody was in violation of tribal law; Petitioner would have been entitled to a Navajo Nation public defender had the Nation not dropped its armed robbery offense against him; there is no distinction between federal and tribal law for armed robbery, rendering suspect the federal agents' testimony that Petitioner was arrested on tribal charges because they lacked sufficient evidence to arrest him on federal charges; and collaborative efforts between federal and tribal authorities usually result in misuse of Navajo Nation investigators by the United States. (*Id.* at 6-13.)

Setting aside the issue of delay in presenting this new evidence, nothing in Bowman's declaration supports a showing of "'actual collaboration' intended to deprive [Petitioner] of federal procedural rights." *United States v. Mitchell*, 502 F.3d 931, 961 (2007). The Ninth Circuit rejected Petitioner's collusion claim on the merits, and Petitioner did not establish

that a manifest injustice would occur if the claim were not reconsidered in post-conviction proceedings. The Court did not clearly err in finding Claim R procedurally precluded from review on the merits. *See Olney*, 433 F.2d at 162.

Based on the foregoing,

IT IS HEREBY ORDERED that Petitioner's Motion to Alter or Amend the Judgment Pursuant to Federal Rule of Civil Procedure 59(e) (Doc. 58) is **DENIED.**

DATED this 21st day of December, 2010.

Mary H. Murguia
United States District Judge

No. _____

IN THE

Supreme Court of the United States

LEZMOND C. MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

CERTIFICATE OF SERVICE

I, Gia Kim, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), do swear or declare that on March 24, 2016, as required by Supreme Court Rule 29, I served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents with Federal Express for priority overnight delivery.

The names and addresses of those served are as follows:

Donald B. Verrilli, Jr.
Solicitor General
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 514-2217
Counsel for Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 24, 2016.

Gia Kim

GIA KIM*
Deputy Federal Public Defender
Attorney for Petitioner
**Counsel of Record*