No. 09-99017

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERIC OWEN MANN,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–03-00213-CKJ

RESPONDENTS-APPELLEES' MOTION FOR REHEARING AND REHEARING EN BANC

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RULE 35 STATEMENT OF REASONS TO GRANT REHEARING

Federal "habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Ryan v. Gonzales*, 568 U.S. ___, 133 S. Ct. 696, 708 (2013) (internal quotation marks omitted); *Harrington v. Richter*, 562 U.S. 86,___, 131 S. Ct. 770, 787 (2011). Despite this admonition, in this premediated double murder case, the panel majority jettisoned AEDPA's clear instruction that federal courts adopt a "highly deferential standard" where state court decisions are given the benefit of the doubt. Instead of assessing the reasonableness of the state court decision, the panel majority instead speculated that the state court's imprecise language led it to use the wrong standard in reviewing Mann's ineffective assistance of counsel claim. The panel majority's exercise in speculation is "precisely what *Strickland* and AEDPA seek to prevent." *Richter*, 131 S. Ct. at 789.

To the extent there is ambiguity in the state court's decision, the panel majority failed to accord it the benefit of a doubt required by AEDPA. The Supreme Court has repeatedly admonished this Court for failing to give state court decisions proper AEDPA deference. *See, e.g.*, *Richter*, 131 S. Ct. at 780, 792 ("That judicial disregard [for AEDPA deference] is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review."); *Felkner v.*

Jackson, 562 U.S. 594,___, 131 S. Ct. 1305, 1307 (2011) (*per curiam*) ("There was simply no basis for the Ninth Circuit to reach the opposite conclusion"); *Premo v. Moore*, 562 U.S. 115,___, 131 S. Ct. 733, 740 (2011) (Ninth Circuit "was wrong to accord scant deference to counsel's judgment, and "doubly wrong" to find the state court's judgment unreasonable); *Rice v. Collins*, 546 U.S. 333, 337-38 (2006) ("the panel majority improperly substituted its evaluation of the record for that of the state trial court."); *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (*per curiam*) ("This conclusion failed to give appropriate deference to the state court's decision."); *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (this Court's conclusion "gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials."); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (This Court's "readiness to attribute errors is inconsistent with the presumption that state courts know and follow the law").

The questions of what to do under AEDPA with ambiguous language, and whether to assess the reasonableness of a state court decision rather than its reasoning, are recurring ones in which this Court has run afoul of Supreme Court precedent. Here, given the conflict between the panel majority's decision and Supreme Court precedent, this case is of "exceptional importance" to the Ninth Circuit. *See* Rule 35(a)(2). The record in this case reveals no "extreme

malfunction" that would justify federal intervention. In counsel's judgment whether the panel majority properly jettisoned AEDPA review standard makes this case appropriate for en banc review.

Additionally, the dissent by Circuit Judge Kozinski identifies a circuit split with the panel majority's decision and questions whether the en banc decision in *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) is still good law.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Trial and Sentencing*

Over a quarter of a century ago, Eric Mann shot and killed his friend Richard Alberts, and then shot and watched Ramon Bazurto die. (Exh. A, at 5-6.) The double homicide was part of Mann's plan to "rip off" Alberts' $20,000 in a cocaine deal. (*Id*. at 5.) Jurors convicted Mann of first-degree premeditated murder of Richard Alberts and Ramon Bazurto. (*Id*. at 8.)

Under state procedural rules then in effect, the capital sentencing proceeding could not occur until at least 60 days after the verdict. Ariz. R. Crim. P. 26.3(c) (1994). Mann sought and was given an extension to investigate additional mitigation. (Exh. A, at 8.)

At the mitigation hearing, Mann's counsel built his case with four witnesses. (*Id*. at 9.) Additionally, Judge John F. Kelly, who had presided over the trial and would preside over the PCR proceedings, had the report of Dr.

Todd C. Flynn, a court-appointed psychologist who the defense had requested. (*Id*.; ER 15.) Mann's attorney also had Mann prepare for the court a lengthy autobiography, which included "vivid details" of his troubled family background as well as information about his June 1985 vehicle accident—4 years before the two murders—in which a teenage girl and her mother were killed and Mann was treated for only a fractured tibia. (*Id*. at 8; ER 16; ER 674; ER 688-713 ER 1228-51.)

After completing his mitigation investigation, Mann's attorney filed a sentencing memorandum presenting 10 non-statutory mitigating circumstances and argued for a sentence other than death. (Exh. A, at 8.) Judge Kelly found Mann had proved six of the proffered mitigating factors, but he rejected "cooperation with authorities, nonviolent history, disparity of treatment, and remorse." (*Id*. at 9.) In balancing the proven mitigation against the aggravating factors of pecuniary gain, multiple homicides, and Bazurto's especially cruel, heinous, and depraved murder, Judge Kelly determined that the mitigation did not warrant leniency. (*Id*., citing Ariz. Rev. Stat. §§ 13-703(F)(5), -(F)(6),-(F)(8) (1995)).

The Arizona Supreme Court affirmed Mann's convictions and, after independently reviewing the death sentences, found that the "mitigating factors were insufficient to justify leniency." (*Id*. at 10.)

B. *State PCR Proceedings*

Following the Supreme Court's denial of certiorari, Mann filed a PCR petition in the trial court asserting 13 claims which Judge Kelly reviewed on the merits. (*Id*.; Exh. B, at ER 68-73.) The relevant claim here, Claim 2 (PCR Claim 7) in Mann's habeas petition, involves a claim of ineffective assistance of counsel for failing to present alleged mitigation from Mann's 1985 accident. (*Id*. at ER 70-71.) The source of the ambiguity in resolving PCR Claim 7 is that Judge Kelly, in finding no prejudice under *Strickland*, referred to what he had previously decided in the newly-discovered evidence Claims 3 and 4 concerning the 1985 accident. (*Id*.; Exh. A, at 22-23.)

Prior to the PCR evidentiary hearing, Dr. James Comer, a clinical neuropsychologist, and Dr. Richard Hinton, a psychologist, evaluated Mann. (*Id*. at 11.) To show that his attorney performed ineffectively at sentencing, Mann offered, along with other evidence, the opinions of Doctors Comer and Hinton indicating that after the 1985 accident Mann's personality and behavior changed, becoming more impulsive and violent, perhaps due to a brain injury. (ER 23.) Mann contended that these changes were responsible for his conduct at the time of the double murder. (*Id*.) Mann argued "that a competent lawyer would have presented this evidence in mitigation at sentencing and that doing so would have resulted in a reasonable probability of a different sentence." (ER

23-24.)

Based on the entire record, however, Judge Kelly expressly found that Mann "dealt drugs and used guns against others before and after the accident; that he did not misperceive a threat and overreact, but rather, carefully planned to kill Alberts, then made a choice, after a period of thought and said, Well, I've got to do it, apparently meaning that to go through with the plan he would also have to murder Bazurto.'" (ER 69) (internal quotations omitted). Judge Kelly thus found that Mann "was not prejudiced by counsel's performance" and denied Claim 7. (ER 71.)

After Judge Kelly denied all of Mann's PCR claims, Mann petitioned for review by the Arizona Supreme Court. (Exh. A, at 11.) Following briefing by the parties, the Arizona Supreme Court summarily denied review. (*Id*.; ER 357-82.)

C. *Federal Habeas District Court Proceedings*

Thereafter, Mann timely filed a petition for a writ of habeas corpus. (Exh. A, at 11.) On August 10, 2009, the district court denied, on the merits, Mann's amended habeas petition:

> First, Petitioner contends that Judge Kelly, by finding that the omitted evidence "would not have changed the sentence," applied an incorrect standard in assessing prejudice under *Strickland*. The Court disagrees. Judge Kelly was the sentencer; when presented with the additional evidence Petitioner contended should have been offered at sentencing, he determined not merely that there was no reasonable

> probability that the new information would have changed the sentence, but that it in fact would not have changed the sentence. Judge Kelly, by determining that there was *no probability* that a different sentence would have resulted if Sherman had presented the omitted information concerning Petitioner's social history and the effects of the 1985 traffic accident, necessarily found that Petitioner failed to satisfy the *Strickland* "reasonable probability" standard for prejudice.

(ER 22-23; emphasis original.)

D. *The Panel Majority's Decision*

On appeal, two members of the panel disagreed with the district court's understanding of Judge Kelly's application of *Strickland*'s prejudice standard. (Exh. A, at 20-24.) To the extent there was ambiguity in Judge Kelly's order, the panel majority refused to give the state court "the benefit of the doubt." (*Id*. at 24.) Rather than follow the holding of *Visciotti* which requires that the state court decision be given the benefit of the doubt under AEDPA, the majority distinguished *Visciotti* on the particular facts of that case. (*Id*. at 24-25.)

Instead, the panel majority relied on *Sears v. Upton*, 561 U.S. 945 (2010) (*per curiam*), a non-AEDPA case where "it *is plain from the face of the state court's opinion* that it failed to apply the correct prejudice inquiry." *Id*. at 946 (emphasis added).

The panel majority also faulted Judge Kelly for not citing *Strickland* in his PCR order dismissing Mann's claims. While the majority is correct that the state court in its decision did not cite to *Strickland*, Judge Kelly did specifically

cite to *State v. Nash*, 694 P.2d 222 (Ariz. 1985). (Exh. B, at ER 70.) Quoting *Strickland*, *Nash* held that the prejudice standard was further defined by requiring the defendant to show "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 228 (emphasis added).

Circuit Judge Kozinski, in dissent, concluded that the majority failed to apply Congress's "clear instructions" that federal courts apply a "highly deferential standard" giving state-court decisions the "benefit of the doubt." (Exh. A, at 40) (quoting *Visciotti*, 537 U.S. at 24).

> In clear violation of this principle, the majority today seizes upon imprecise language in a single sentence of a state court's otherwise well-reasoned and comprehensive opinion, and uses it to sweep aside AEDPA's restrictions on the scope of our review.

(*Id*.) The dissent questioned whether under 28 U.S.C. § 2254(d) a state court's reasonable "decision" can be reversed by what the federal court believes is "incorrect reasoning," and it questioned whether *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) (*en banc*), still remains good law in light of *Richter* and the circuit split with the First, Sixth, and Seventh Circuits. *Id*. at 42–43, citing *Harrington v. Richter*, 562 U.S. 86 (2011).

Also, the dissent identified an additional circuit split where the Fifth and Seventh Circuits held that a state court's omission of the "reasonable probability" phase in the *Strickland* prejudice standard "does *not* constitute legal

error when the state court has cited to a case articulating the correct *Strickland* standard" and the state court analysis suggests the new evidence has little or no value. (*Id*. at 44-45.)

Even disregarding Congress's AEDPA restrictions on § 2254(d)(1) reviews, the dissent noted the panel majority's *Strickland* analysis "was neither 'highly deferential' nor shorn of 'the distorting effects of hindsight.'" (*Id*. quoting *Strickland*). Nor did their analysis establish that Mann's trial counsel either rendered constitutionally deficient performance during the mitigation phase or that the new evidence would not have changed the "profile of a violent, cold-blooded killer who reveled in his victims' suffering" as found by the sentencing judge. (*Id*. at 45-50.)[1]

ARGUMENT

Because the panel majority failed to accord Judge Kelly's decision, that Mann was not prejudiced by the lack of additional information concerning the 1985 vehicle accident, the benefit of the doubt, the en banc court should accept review and affirm the district court's decision.[2]

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[1] The district court had also concluded that even if AEDPA did not bar relief, "Mann failed to establish that counsel's performance prejudiced him under *Strickland*." (*Id*. at 20.)

[2] The panel majority left unresolved one issue, an IAC claim based on trial counsel failure to retain an independent mental health expert for the penalty phase. (Exh. A, at 39.) However, because the United States Supreme Court has

(continued ...)

A. *AEDPA requires any ambiguity in the state court decision to be given the benefit of the doubt.*

Over 13 years ago, after presiding over the PCR evidentiary hearing and considering the briefing of the parties, Judge Kelly found that the new information developed since he sentenced Mann to death for the cold-blooded murders would not have changed his mind—Mann had not established *Strickland* prejudice.

It is true that under the *Strickland* prejudice prong a defendant need not demonstrate that his attorney's deficient performance more-likely-than-not altered the result of the case. *Strickland*, 466 U.S. at 693-94. But the panel majority's speculation that Judge Kelly applied a "more-likely-than-not" standard in finding "no prejudice" finds little support in the record. In deciding PCR Claim 7, Judge Kelly cited to *Nash*, which expressly articulated *Strickland*'s "reasonable probability" standard, and then immediately stated Mann "has failed to show prejudice." (Exh. B, at ER 70.) He did not cite to any "more-likely-than-not" standard. Nevertheless, the panel majority speculates

(... continued)
never clearly held that it is constitutionally deficient performance for an attorney to fail to seek the appointment of an independent mental health expert, the claim is meritless. *See Knowles v. Mirzayance*, 556 U.S. 111, 121-22 (2009); *see also Pizzuto v. Arave*, 280 F.3d 49, 962-63 (9th Cir. 2002).

that Judge Kelly applied such a standard because of Judge Kelly's later reference to PCR Claims 3 and 4 (discussing the physical and nonphysical effects from Mann's 1985 accident). (Exh. A, at 21-23; Exh. B, at ER 69-70.) Based on this reference, the panel majority found that when Judge Kelly concluded in his 2001 decision—a time when Judge sentencing was still in effect in Arizona—that Mann was not prejudiced, Judge Kelly must have applied the newly-discovered evidence standard of "more-likely-than-not." (*Id*. at 23.) The majority's speculation is based on the last portion of Judge Kelly's decision discussing PCR Claim 7. There he wrote "[a]dditional evidence that pertains to the 1985 accident and its effects is discussed under 'Issues Three and Four' above, where this Court found that it would not have changed the sentence imposed. For that reason, Defendant was not prejudiced by counsel's performance and the claim is denied." (ER 70-71.)

A clear reading of Judge Kelly's decision on PCR claims 3 and 4 fails to suggest that he applied a "more-likely-than not" standard. Judge Kelly simply stated that "nothing presented would have changed the verdict or sentence imposed." (ER 69). The most reasonable interpretation of this statement is, as the sentencer, the new information definitely would not have changed the verdict or sentence. Given the law and circumstances in 1995 and 2001, it is unreasonable that Judge Kelly meant something less, such as the evidence would

likely not have changed the sentence he imposed. Rather, it makes perfect sense that the sentencer would have rejected PCR claims 3, 4 and 7 for the same reason, the new information that trial counsel failed to present *definitely* would not have affected his decision concerning the sentence.

The record does not support the speculation that Judge Kelly, in finding no *Strickland* prejudice, used the "more-likely-than-not" standard instead of the "reasonable probability" standard. As the dissent points out, "the opinion is at worst ambiguous." (Exh. A, at 44.) In a sense, Judge Kelly's shorthand decision is akin to a summary denial of the prejudice prong—if fairminded jurists could disagree with the decision being contrary to *Strickland*, Mann is not entitled to relief. *Richter*, 131 S. Ct. at 786. Furthermore, when reviewed under § 2254(d)(1), such state-court decisions must be given the benefit of the doubt. *Visciotti*, 537 U.S. at 24. This, the panel majority failed to do.

Rather than speculate that Judge Kelly misapplied *Strickland*'s prejudice standard, the Supreme Court requires, as the dissent emphasized, that this Court must presume the state court knew the law it was applying. *Visciotti*, 537 U.S. at 24. This Court, in fact, applies "a blanket presumption that state judges know and follow the law." *Lopez v. Schriro*, 491 F.3d 029, 1046 (9th Cir. 2007).

The Supreme Court demands that the federal courts must construe any ambiguity in the state court's favor. *Visciotti*, 537 U.S. at 24; *Holland v.*

Jackson, 542 U.S. 649, 655 (2004) (*per curiam*). This principle is not novel; this Court has previously acknowledged that it cannot "presume from an ambiguous record that the state court applied an unconstitutional standard." *Poyson v. Ryan*, 73 F.3d 1185, 1199 (9th Cir. 2014).

Furthermore, under AEDPA, federal courts cannot "demand a formulary statement" by the state court. *Early v. Packer*, 537 U.S. 3, 9 (2002); *see Carter v. Thompson*, 690 F.3d 837, 844 (7th Cir. 2012). However, "[t]he majority ignores each of these guiding principles, treating AEDPA as a straightjacket to be escaped, rather than a policy judgment to be obeyed." (Exh. A, at 41.)

B. *The panel majority's decision directly conflicts with the Fifth and Seventh Circuits.*

The state court here found the new information to be of little or no value, stating that "nothing presented would have changed the verdict or the sentence imposed." (Exh. B, at ER 69.) The Fifth and Seventh Circuits have both held that a state's failure to use the term "reasonable probability" in explaining the *Strickland* prejudice standard "does *not* constitute legal error when the state court has cited to a case articulating the correct *Strickland* standard and the overall import of the state court's reasoning suggests that it believed the new evidence had little or no value." (Exh. A, at 44-45) (emphasis original).

In *Charles v. Stephens*, the state PCR court concluded that the state prisoner had failed to show that the results of the proceedings would have been

different if certain hospital records had been presented. 736 F.3d 380, 392 (5th Cir. 2013). In making this finding, the state court omitted *Strickland*'s "reasonable probability" modifier. *Id*. Nevertheless, the Fifth Circuit applied AEDPA deference to the *Strickland* claim. *Id*. at 393.

Sussman v. Jenkins, 636 F.3d 329, 359-60 (7th Cir. 2011), is also in direct conflict with the panel majority's analysis. There too the state court omitted the "reasonable probability" language. *Id*. at 359. However, the Seventh Circuit held the omission did not render the decision contrary to *Strickland*. *Id*.; *see also Bledsoe v. Bruce*, 569 F.3d 1223, 1231 (10th Cir. 2009); *Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 786 (11th Cir. 2003).

The panel majority here erred in not according Judge Kelly's decision deference it was entitled to under AEDPA. Moreover, with that deference Judge Kelly's decision was objectively reasonable in light of the record before him. (*See* Exh. A, at 45-51) (Kozinski, J., dissenting). Even if the panel majority had articulated a strong case for relief, it would not mean "the state court's contrary conclusion was unreasonable." *Richter*, 131 A. Ct. at 786.

C. In light of Richter this Court should revise the en banc case Frantz v. Hazey.

In *Frantz*, the en banc court held, under AEDPA's § 2254(d)(1), that it was permissible for a federal habeas court to review the reasoning used by the state court rather than simply the "decision" of the state court adjudicating the

merits of the state prisoner's claim.[3] 533 F.3d at 733-35. Circuit Judge Kozinski expressly joined in this decision. *Id*. at 748 (J. Kozinski, concurring). Here, however, Judge Kozinski correctly questions this holding in light of *Richter*'s holding a state court need not give reasons in order for the decision to be deemed a merits ruling. (Exh. A, at 42.)

> Even before *Richter*, we were on the wrong end of a circuit split on this issue. *See Clements v. Clarke*, 592 F.3d 45, 55-56 (1st Cir. 2010) ("It is the result to which we owe deference, not the opinion expounding it."); *Holder v. Palmer*, 588 F.3d 328, 341 (6th Cir. 2009) ("[M]istaken analysis of Strickland's performance prong does not move the state court's decision out from under AEDPA . . . ."); *Malinowski v. Smith*, 509 F.3d 328, 339 (7th Cir. 2007) ("[E]ven if the [state court] had applied the wrong standard, the proper standard results in the same conclusion . . . .").

(Exh. A., at 43.) *See also Wright v. Moore*, 278 F.3d 1245, 1255 (11th Cir. 2002) (under § 2254(d)(1), the Eleventh Circuit reviews the state court's "decision" and not necessarily its rationale).

A state court need not cite controlling Supreme Court precedent, or even be aware of it. *Early v. Packer*, 537 U.S. 3, 11 (2002). Confronted with a summary denial, a federal court "must determine what arguments or theories . . . could have supported the state court's decision; and then [] ask whether it is possible fairminded jurists could disagree that those arguments or theories are

[3] In fact, § 2254(d)(1) and (2) speaks only of "decision," and does not mention rationale.

inconsistent with the hold in prior decision of [the Supreme] Court." *Richter*, 131 S. Ct. at 786. "After *Richter*, it seems clear that we should assess the reasonableness of a state court's decision, not its reasoning." (Exh. A, at 42.) Here, Judge Kelly's decision was reasonable.

D. *Footnote one is unnecessary, unsupported by the record, and should be deleted from the published opinion.*

The panel resolved Mann's other IAC claim finding "under either version of the facts, counsel's decision not to call Mann as a witness was strategic[.]" (Exh. A, at 12-13.) Nevertheless, the panel listed in footnote one a "few facts in the record" that *appear* "to be inconsistent with counsel's version." (*Id*. at 14.) But these facts were admittedly irrelevant to resolving the claim. *Id*.

First, this footnote adds nothing to the panel's decision and the only apparent purpose is to suggest in a published opinion that a member of the bar, Mann's trial counsel, perjured himself. That is not fair and does nothing to advance the administration of criminal justice.

Second, this Court is improperly substituting its judgment for the trial court who presided over the trial and observed and heard Mann and his attorney testify to these events 14 years ago—including the facts noted in the footnote—and yet expressly found his attorney "to be more credible." (Exh. B, at ER 72.) While reasonable minds reviewing a state court record might disagree on an issue of credibility, on habeas review such disagreement is insufficient "to

supersede the trial court's credibility determination." *Collins*, 546 U.S. at 341-42.

Furthermore, in setting forth factual findings in the footnote that appear inconsistent with Mann's attorney's sworn testimony, the panel omits the most important fact noted by the district court—"During the evidentiary hearing, the State introduced a letter written by Petitioner *after* his conviction and sentencing in which he thanked [his attorney] and stated *that he could not have a better lawyer*." (ER 10; emphasis added.) On February 1, 1995, the trial court sentenced Mann to death. Mann's letter is dated the very next day. (ER 526.) Only years later does Mann claim he wanted to testify in 1994.

The footnote is dicta, contrary to the record, and an unfair unnecessary and should be deleted.

. . . .

. . . .

CONCLUSION

The Court should accept en banc review, vacate the panel opinion, and affirm the district court's dismissal of Mann's petition for a writ of habeas corpus.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 3,814 words.

/s/_____
JOHN PRESSLEY TODD

EXHIBITS

No. 09-99017

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIC OWEN MANN,

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V.

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On Appeal from the United States District Court
District of Arizona, No. 4:03cv00213-CKJ

PETITIONER-APPELLANT'S RESPONSE TO MOTION FOR REHEARING AND REHEARING EN BANC

DEATH PENALTY CASE

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I. Introduction

In 1994, Karen Miller informed law enforcement that she had witnessed Eric Mann murder two men several years earlier in 1989. According to the medical examiner, the victims' deaths would have been instantaneous, or nearly so. (ER 1523, 1527, 1539-40.) Miller certainly had the leading hand in Mann's conviction, but from the start, she was not a hostile witness when it came to the punishment phase. On her own accord, Miller wrote a five-page letter to the ultimate sentencer, Judge John Kelly, in which she stated her plea that Mann be spared from a death sentence. (ER 1318-22.)

Miller informed Judge Kelly how gentle, loving and understanding Mann had been in the early years of their relationship, and she related that Mann had a social conscience; she described how Mann would go out of his way to help clothe and feed the homeless and other strangers who needed a helping hand. (*Id.* at 1319.) It was not discovered until the postconviction proceedings that Mann's personality had drastically changed following a head injury and resulting brain damage he suffered in a 1985 accident. Two people were killed in the accident, and Mann would undergo seven different surgeries to treat his own injuries. (Dkt. 11 at 20-25.)

Nevertheless, despite Miller's status as *the* principal witness in the proceedings and her expressed willingness to share mitigating evidence, she was

never interviewed by trial counsel. (ER 558, 561, 1318.) The case went to sentencing with Miller's letter but nothing more from her, despite the fact that she had known Mann for nearly a third of his life, from the time he was just 22 years old. (ER 618-20.) Counterintuitively, trial counsel represented to Judge Kelly prior to sentencing that he interpreted the Arizona Supreme Court's capital-sentencing decisions to require that he conduct an exhaustive social-history investigation concerning Mann, but as he later admitted, this was never done. (ER 1388, 559-61, 576-77.)

Nearly all of the significant mitigating evidence presented at Mann's sentencing came from his own hand in a lengthy autobiography he provided to Judge Kelly. This letter revealed that Mann's childhood was rife with severe parental alcoholism, poverty and domestic violence; however, most important, Mann was able to share that he was introduced to criminal activity under the tutelage of his own father and elder brother, not due to traits of a defective antisocial personality. (Dkt. 11 at 9-14.)

The sentencing record also showed that Mann had no criminal record associated with violence or harming others prior to the instant offense. (ER 10-72, 1347-63, 1950-58.) In addition, Mann authored a separate lengthy letter to Judge Kelly expressing his remorse for the victims and their families. (ER 1252-54.)

Regrettably, Mann's sentencing proceedings were clouded by a diagnosis of antisocial personality disorder, which allowed the sentencer to conclude that Mann was a remorseless, incurable killer. (ER 1345.) When such evidence is "left unchallenged in a capital case [as it surely was in Mann's case] antisocial personality disorder and related constructs are quite literally the kiss of death." Kathleen Wayland & Sean O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 Hofstra L. Rev. 519, 530 (2013). As explained in the panel majority decision, the inaccurate, misleading diagnosis of Mann as a remorseless psychopath was attributable to ineffective counsel, and the misleading evidence played a leading role in prejudicing the sentencing outcome. (Dkt. 56 at 10.)

"An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable . . . ." *Strickland v. Washington*, 466 U.S 668, 694 (1984). "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of the breakdown of the adversarial process that our system counts on to produce just results." *Id*. at 696. The quoted passages from *Strickland* have resonance here. The panel majority was correct to conclude that Mann's sentencing violated the guarantees of the Sixth Amendment. The decision should not be reheard or reconsidered.

II. Arguments

A. This case is not appropriate for panel rehearing or rehearing en banc.

Rule 40(a)(2) of the Federal Rules of Appellate Procedure requires that a petition for panel rehearing must "state with particularity each point of law or fact that the petition[ing party] believes the court has overlooked or misapprehended and must argue in support of the petition." Here, Respondents have failed to identify any point of fact or law that the panel majority overlooked or misapprehended with respect to that portion of the decision where the panel decided *de novo* that Mann was denied his Sixth Amendment right to effective assistance of counsel. That is to say, Respondents have provided no argument of fact or law challenging the decision set out in that portion of the Slip Opinion. (Dkt. 56 at 25-38.)

Further, Respondents have not provided the required statement under Rule 35(b)(1)(A) or (B), nor have they provided a statement under Circuit Rule 35-1 that suggests or specifies reasons why a rehearing en banc would be appropriate to reconsider that portion of the decision, (Dkt. 56 at 25-38), where the panel decided *de novo* that Mann was denied his Sixth Amendment right to effective assistance of counsel.

Lacking any of the required statements by Respondents that the panel majority's *de novo* ruling on Mann's ineffective-assistance-of-counsel claim

should be reconsidered by the panel or reheard by the Court en banc, Mann agrees there is no reason for the panel or the Court to do so.

In its Rule 35 Statement of Reasons, Respondents cite the following reasons for granting en banc review: (1) "given the conflict between the panel majority's decision [finding the state-court decision "contrary to" *Strickland*] and Supreme Court precedent, this case is of 'exceptional importance to the Ninth Circuit,'" and (2) "the dissent by Circuit Judge Kozinski identifies a circuit split with the panel majority's decision and questions whether the en banc decision in *Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008) is still good law."

We address each of these stated reasons below and demonstrate *Frantz* remains good law as confirmed in decisions of the Supreme Court, and the panel majority's decision does not conflict with the Supreme Court or any other circuit's cases.

B. The Supreme Court's decision in *Harrington v. Richter* did not modify the Supreme Court's formulation for the assessment of reasoned state-court decisions.

Relying on Judge Kozinski's dissent from the panel decision, Respondents argue that in light of *Harrington v. Richter*, 562 U.S. 86 (2011), this Court should revise its en banc decision in *Frantz v. Hazey*, 533 F.3d 724 (9th Cir. 2008). As explained below, *Frantz* was correctly decided and remains good law post-*Harrington*.

In *Frantz*, after applying legal principles clearly established by the Supreme Court, this Court held in broad terms that a decision by a state court is "contrary to" the clearly established law of the Supreme Court within the meaning of 28 U.S.C. § 2254(d)(1), "if it applies a rule that contradicts the governing law set forth in Supreme Court cases." *Id*. at 733 (citing *Price v. Vincent*, 538 U.S. 634, 640 (2003)). The Court rejected the suggestion that it "defer to some *hypothetical* alternative rationale when the state court's *actual* reasoning evidences a § 2254(d)(1) error," *id.* at 738, and it held that "[t]o identify a § 2254(d)(1) 'contrary to' error, [it would] analyze the court's actual reasoning . . ." *Id*. at 739. The Court further held that after it determined a state court had decided a federal claim in a manner "contrary to" clearly established law, then it must review the claim *de novo*. *Id*. at 735-36. In making this decision, the Court relied on several Supreme Court cases, including, *Panetti v. Quarterman*, 551 U.S. 930, 948-52 (2007); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) and *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). *Id*. at 735. With the above predicate established, we must ask whether the Supreme Court's decision in *Harrington* undermines *Frantz* and the clearly established Supreme Court precedents that underlay the *Frantz* decision. The answer: it does not.

Harrington decided a single statutory-interpretation question, holding that § 2254(d)(1) applies when a state court issues a summary denial of relief

unaccompanied by any reasoning. 562 U.S. at 97-100. It further held that when the state court provides no explanation for its decision, "a habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court." *Id* at 101-02.[1] Notably, the Court did not overrule its longstanding jurisprudence with respect to the review of reasoned state-court decisions under subsection 2254(d)(1). Nevertheless, any question concerning the reach of *Harrington* has been settled by the Court's post-*Harrington* decision in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

In *Lafler*, the Court reviewed a reasoned state-court decision to determine if § 2254(d)(1) applied to limit habeas relief. *Id.* at 1390. The Court applied its clearly established pre-*Harrington* precedents, i.e., the same precedents applied by this Court in *Frantz*, holding that: "[a] decision is contrary to clearly established law if the state court 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases.'" *Id*. (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (opinion for the Court by O'Connor, J.)). The Court then went on to

[1] The Court specifically rejected any concern that its decision would encourage state courts to issue summary rulings in order to insulate their decisions from the more rigorous review applied to reasoned state-court decisions, 562 U.S. at 99; therefore, Judge Kozinski's rationale for extending *Harrington*'s reach to reasoned state-court decisions to avoid incentivizing summary denials is not persuasive.

examine the state-court decision's language, and conspicuously, it did not apply *Harrington* to assess hypothetical reasons that could have supported the state court's decision. *Id.* The Supreme Court concluded that the state court had applied an "incorrect standard," at variance with *Strickland*. Therefore, the Court determined that the state-court decision was "contrary to clearly established federal law," *id*., and with its finding that § 2254(d)(1) would not limit habeas relief, the Court reviewed the federal claim *de novo*. *Id.* (citing *Panetti v. Quarterman*, 551 U.S. at 948).

Post-*Harrington*, the Supreme Court has not retreated from its clearly established method for determining whether a reasoned state-court decision is "contrary to" established federal law under § 2254(d)(1).

We have not been able to identify the post-*Harrington* decision of any other federal circuit (and Respondents cite none) where a court has abandoned the prescribed method for examining reasoned state-court decisions for compliance with the "contrary to" clause of 2254(d)(1).[2] Nevertheless, Respondents refer us to

[2] Our canvas reveals that other circuits have continued to examine the state court's actual reasoning in deciding whether a decision is contrary to established federal law. *See Avila v. Richardson*, 751 F.3d 534, 535, 537 (7th Cir. 2014). The Fifth Circuit has also refused to apply *Harrington* to reasoned state-court decisions. *See Salt v. Epps*, 676 F.3d 468, 477-78, n.48 (5th Cir. 2012). Similarly, post-*Harrington*, the Eleventh Circuit has continued to examine 2254(d)(1) issues based on the actual reasoning contained in the state-court decision. *See Sochor v. Secretary, Dept. of Corrections*, 685 F.3d 1016, 1030 (11th Cir. 2012).

three pre-*Harrington* cases cited in Judge Kozinski's dissent, offered to suggest disagreement among the circuits over whether it is the reasoning or the decision of the state court that is subject to scrutiny under § 2254(d)(1). The pre-*Harrington* cases are *Clements v. Clarke*, 592 F.3d 45, 55-56 (1st Cir. 2010); *Holder v. Palmer*, 588 F.3d 328, 341 (6th Cir. 2009) and *Malinowski v. Smith*, 509 F.3d 328, 339 (7th Cir. 2007). We address each of these cases briefly below but stress that none of these cases can be reasonably applied to trump established Supreme Court precedent, including the Supreme Court's most recent pronouncement in *Lafler*, which like *Frantz*, examines the actual reasoning of the state-court decision to identify § 2254(d)(1) error.[3]

The legal principles this Court adopted in *Frantz* have been reaffirmed by the Supreme Court in its post-*Harrington* decision in *Lafler*. There is no reason to revisit the correctly decided en banc decision in *Frantz*.

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[3] The decision in *Clements* turned on the court's deciding whether a federal claim was adjudicated on the merits; which is not at issue here. 592 F.3d at 53. The Seventh Circuit decision in *Malinowski*, which determined the state court had not unreasonably applied federal law relied on the state court's actual reasoning, so its analysis is consistent with *Frantz*. 509 F.3d at 339. The Sixth Circuit's decision in *Holder* does appear to examine the state court's decision, rather than the defects in its reasoning, but its review runs afoul of the Supreme Court's methodology. *See Lafler*, 132 S. Ct. at 1390 and the Court's earlier cases; *and see Frantz*, 533 F.3d at 733-38 (reviewing Supreme Court cases).

C. The decision of the panel majority conforms to the AEDPA's requirements and is not in conflict with Supreme Court or other circuit decisions.

There is an important precept to the proper analysis of Judge Kelly's decision and whether the panel majority has properly categorized it as contrary to clearly established federal law. That is, a state court's citation to *Strickland* or even correctly reciting the *Strickland* performance and prejudice test does not insulate it from further review. Time and again, the Supreme Court has found state-court decisions to run afoul of the "contrary to" and "unreasonable application" clauses of subsection 2254(d)(1) despite the fact that the state-court decision cited *Strickland* and/or its specific test for deficient performance and prejudice.

For example, in *Williams*, the state court not only correctly recited *Strickland*'s "reasonable probability" test, but the state court also actually decided the petitioner had failed to demonstrate a reasonable probability for a different outcome. 529 U.S. at 417-18 (Rehnquist, J., dissenting). Nevertheless, the Supreme Court did not apply a blanket presumption that state courts know and follow the law. Instead, because the language of the state-court decision suggested that it had incorporated a "fundamental fairness" test into its prejudice assessment, the decision was held "contrary to" *Strickland*. *Id.* at 397-98, 413-14.

In *Porter v. McCollum*, despite the fact that the Florida court had not just once, but twice, stated that it applied the *Strickland* prejudice test, *see Porter v. State*, 788 So. 2d 917, 921, 925 (2001), it was not presumed the state court knew and followed the law; rather, based on the state-court decision's language, the Supreme Court found the state court had failed to apply the *Strickland* prejudice test to Porter's case. 558 U.S. 30, 41-44 (2009).

In *Lafler v. Cooper*, the state-court decision recited verbatim *Strickland*'s two-prong test. 132 S. Ct. at 1395 (Scalia, J., dissenting). Nevertheless, the Court did not throw up its hands in deference to the state-court decision in the face of an arguable ambiguity; nor did it find the state court must have known and followed the law it had explicitly cited. Instead, the Court examined the language of the state-court decision and concluded the state court had applied an incorrect standard to the evaluation of counsel's performance, "contrary to" *Strickland*. *Id.* at 1390.

Sears v. Upton, 561 U.S. 945 (2010), was a non-AEDPA case, but it still provides helpful insight here. There, the Court reviewed a state-court decision that explicitly "stated the proper [*Strickland*] prejudice standard," but this did not result in an ambiguity or a blanket assumption the state court knew and followed the law. Nor did it insulate the state-court decision from reversal when other language in the decision suggested a departure from the standard. *Id.* at 951-56.

What these Supreme Court cases teach us is that even when a state court indicates it has relied on *Strickland* and recites the correct *Strickland* test, there is no blanket presumption the state court knows and follows the law. What's more, the Supreme Court has never imposed a burden on itself or the lower courts to find a lack of ambiguity in a state-court decision before finding it contrary to federal law. Indeed, we have not been able to identify a single Supreme Court case applying the "contrary to" clause of subsection (d)(1) where the Court has measured it's assessment against some plausible ambiguity in the state court decision; such analysis is completely absent from its decisions. Instead, what the Supreme Court cases illuminate is that a federal court must examine the language and reasoning in a state court's decision "to determine the rule that *actually* governed the state court's analysis." *Frantz*, 533 F.3d at 737. That is what the panel majority has done.

Despite Respondents' protestation, Judge Kelly's decision does not suffer from ambiguity, and it requires no speculation for interpretation. Out of the thirteen claims presented in Mann's PCR petition, Judge Kelly applied the identical legal standard to decide the prejudicial effect of four of those claims. Two of these four claims were newly-discovered-evidence claims, and two were ineffective-assistance claims. One of the ineffective-assistance claims (Claim Seven) is the subject of this appeal. (Judge Kelly's order, found at ER 69-71, is

also attached as Exhibit B to Respondents' Motion for Rehearing). In his disposition of these four claims, Judge Kelly held that to prevail, Mann would need to prove his new evidence would have changed the sentence imposed. (*Id.*) This would have been an appropriate disposition of the newly-discovered-evidence claims (*see* Dkt. 56 at 22-23); but applied to Mann's ineffective-assistance claim Seven, it unambiguously violates *Strickland*. *See Correll v. Ryan*, 465 F.3d 956, 1018 (2008) (citing *Williams v. Taylor*, 529 U.S. at 398; *Rompilla v. Beard*, 545 U.S. at 390 (2005) ("although we suppose it is possible that [the sentencer] could have heard it all and still decided on the death penalty, that is not the test"); *Mosley v. Atchison*, 689 F.3d 838, 849-50 (7th Cir. 2012) (despite state court's citation of cases reciting correct *Strickland* prejudice standard, state court's decision requiring proof that results of proceeding would have been different was "contrary to" *Strickland*).

However, if there was any doubt about whether Judge Kelly failed to apply the reasonable-probability test to Mann's ineffective-assistance-of-counsel claim, Judge Kelly's stated reasoning eliminates it. In Mann's state PCR, his ineffective-assistance claim (Claim Seven) and the newly-discovered-evidence claims (Three and Four) relied on the same evidence to prove prejudice. However, the disposition of Claims Three and Four hinged on the "more probable than not" prejudice standard for newly discovered evidence (Dkt. 56 at 22-23), a more

strenuous standard than the *Strickland* reasonable-probability test. *See Williams*, 529 U.S. at 405-06.

The plain language of his decision reveals that Judge Kelly imported his reasoning for finding a lack of prejudice on the newly-discovered-evidence claims into his explanation for finding a lack of prejudice on the subject ineffective-assistance-of-counsel claim. (Dkt. 56 at 22-25.) Judge Kelley wrote:

> Additional evidence that pertains to the 1985 accident and its effects is discussed under "Issues Three and Four" above, where this Court found that it would not have changed the sentence imposed. *For that reason*, Defendant was not prejudiced by counsel's performance and the claim is denied.

When denying the ineffective-assistance claim for lack of prejudice, Judge Kelly explained that he had already found the evidence insufficient to prove "that it would . . . have changed the sentence imposed [with respect to the newly-discovered-evidence claims] . . . [and] [**f]or that reason** [Mann] was not prejudiced by counsel's performance." (ER 70-71) (emphasis added). The panel majority was correct to conclude that Judge Kelly failed to adopt the reasonable-probability test and that his decision was contrary to *Strickland*.[4]

[4] Mann identified two additional fatal flaws in the state-court decision that render it contrary to *Strickland*; namely (1) Judge Kelly failed to reweigh the totality of the mitigation evidence against the aggravation in violation of *Strickland*, *see Williams*, 529 U.S. at 416; *Gray v. Branker*, 529 F.3d 220, 235 (4th Cir. 2008); and (2) the state court applied an unlawful causal-nexus test to exclude all of Mann's

Respondents argue Judge Kelly's lack-of-prejudice finding is adequate because all he said was that he "would not have changed his mind," or "his decision concerning the sentence." (Dkt. 57 at 10.) This argument results in the outright admission that Judge Kelly's decision was "contrary to" *Strickland*. *See Harris v. Thompson*, 698 F.3d 609, 648 (7th Cir. 2012) (state court improperly relied on trial judge's finding that more diligent performance would not have changed his mind). "Under *Strickland*, the assessment of prejudice is an objective inquiry that 'should not depend on the idiosyncrasies of the particular decisionmaker,' which 'are irrelevant to the prejudice inquiry."' *Id.* (quoting *Strickland*, 466 U.S. at 695).

Readily distinguishable from this case are the Supreme Court cases *Woodford v. Visciotti*, 537 U.S. 19 (2002) and *Holland v. Jackson*, 542 U.S. 649 (2004). In both of these cases—unlike Judge Kelly's decision—the state courts recited *Strickland*'s reasonable-probability test, but they also used the word "probable" without the modifier "reasonably" elsewhere in their decisions. The Supreme Court held that "such use of the unadorned word 'probably' is permissible shorthand when the complete *Strickland* standard is elsewhere recited." *Holland*, 542 U.S. at 655 (citing *Visciotti*, 537 U.S. at 23-24). On those facts, the Court indulged the presumptions that the state courts be given the benefit

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mitigation evidence from consideration. Mann is not waiving his reliance on those grounds here. (*See* Dkt. 11 at 62-66, Dkt. 21 at 33-39.)

of the doubt and that state courts know and follow the law. Clearly, however, Mann's case is inapposite to *Holland* and *Visciotti*. Unlike the state-court decision here, the decisions in *Holland* and *Visciotti* recited the reasonable-probability test. Moreover, in stark contrast to Judge Kelly's decision, there is no evidence in either *Holland* or *Visciotti* that the state court conflated prejudice standards on newly discovered evidence and ineffective assistance of counsel.

We respectfully disagree with Respondents and the dissenting opinion that the panel majority's "approach conflicts directly with" or is in "deep tension with" other circuit decisions. (*See* Dkt. 56 at 45.) Those cases share a single similarity with Mann's case: the state-court decisions omit the modifier "reasonable" from their prejudice analysis. But those cases are starkly inapposite. In none of those cases is there any evidence that the state courts conflated prejudice rulings on newly-discovered-evidence and ineffective assistance claims, as Judge Kelly did.

The panel majority's decision is correct insofar as it labeled the state-court decision contrary to established federal law. This allowed the panel to review Mann's claim *de novo*. *Frantz*, 533 F.3d at 739. The panel majority's decision is not in conflict with any Supreme Court or other circuit decision. Therefore the decision is unsuitable for en banc review.

III. Conclusion

Appellant/Petitioner respectfully requests this Court deny Respondents' motion for rehearing and suggestion for rehearing en banc.

RESPECTFULLY SUBMITTED this 27th day of February, 2015.

JON M. SANDS
Federal Public Defender
Cary Sandman
Assistant Federal Public Defender

/s/Cary Sandman
Cary Sandman
Counsel for Petitioner

Certificate of Compliance Pursuant to
Circuit Rules 35-4 and 40-1

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached Petitioner-Appellant's Response to Motion for Panel Rehearing and Rehearing en Banc is proportionately spaced, has a typeface of 14 points or more and contains 3,836 words.

DATED: February 27, 2015.

s/ Cary Sandman
Counsel for Petitioner-Appellant

Certificate of Service

I hereby certify that on February 27, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Tamelyn McNeill
Legal Assistant
Capital Habeas Unit