Jon M. Sands
Federal Public Defender
District of Arizona
Cary Sandman (AZ Bar No. 004779)
*Amanda C. Bass (AL Bar No. 1008H16R)
*Eric Zuckerman (PA Bar No. 307979)
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
cary_sandman@fd.org
amanda_bass@fd.org
eric_zuckerman@fd.org
602.382.2816 Telephone
602.889.3960 Facsimile

*Admitted pro hac vice
Counsel for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PINAL

STATE OF ARIZONA, Plaintiff, v. CLARENCE WAYNE DIXON, Defendant.	Pinal County Case No. S1100CR202200692 Maricopa County Case No. CR2002-019595 Arizona Supreme Court Case No. CR-08-0025-AP **REPLY IN SUPPORT OF MOTION TO DETERMINE MENTAL COMPETENCY TO BE EXECUTED** **(Capital Case)** (Hon. Robert Carter Olson)

Clarence Wayne Dixon, through undersigned counsel, hereby replies[1] in support of his Motion to Determine Mental Competency to be Executed ("Motion"). The State's Response to Mr. Dixon's Motion is unavailing, first, because Mr. Dixon has demonstrated

[1] Mr. Dixon has concurrently filed a Motion to Exceed the 6-page limit on reply memoranda found in Ariz. R. Crim. P. 1.9(c).

his entitlement to a hearing on his mental incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007); second, because the State fails to show that a hearing is not required under A.R.S. § 13-4022 and *Ford*; and finally, because the State has presented no evidence whatsoever to rebut the expert opinion of psychiatric expert, Lauro Amezcua-Patino, M.D., that Mr. Dixon is presently mentally incompetent to be executed.

I. Mr. Dixon has demonstrated his entitlement to a competency hearing under *Ford v. Wainwright* and *Panetti v. Quarterman*

"[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford*, 477 U.S. at 409–10. In so holding the Supreme Court reasoned that it "is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417. "Under *Ford*, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition." *Panetti*, 551 U.S. at 934–35.

The Court clarified *Ford*'s substantive incompetency standard in *Panetti* where it rejected "a strict test for competency [to execute] that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." *Id.* at 960. Repudiating a competency standard that focuses on a prisoner's mere "awareness of the State's rationale for an execution," *id.* at 959, the Court held that a prisoner must also have a rational understanding of the State's reason for his execution—that is, he must be able to "comprehend[] the *meaning and purpose* of the punishment to which he has been sentenced," *id.* at 960 (emphasis added).

Mr. Dixon's Motion to Determine Mental Competency to be Executed and supporting expert psychiatric evidence made "a substantial threshold showing" that he is mentally incompetent to be executed under *Ford* and *Panetti* so as to mandate a hearing.

Ford, 477 U.S. at 426 (Powell, J., concurring); *Panetti*, 551 U.S. at 934–35; *id.* at 949 (discussing *Ford*'s holding that once a prisoner has made "a substantial threshold showing of insanity, the protection afforded by procedural due process includes a fair hearing in accord with fundamental fairness" (internal quotations omitted)). That expert evidence—which remains uncontroverted—shows that: (1) Mr. Dixon is diagnosed with paranoid schizophrenia (Motion, Ex. 9 at 11); (2) schizophrenia "is a neurodevelopmental disorder" that "is diagnosed based on the presence and severity of symptoms, including hallucinations, delusions, [and] thought disorder" (*id.*); (3) Mr. Dixon's "capacity to understand the rationality of his execution is contaminated by the schizophrenic process which results in his deluded thinking about the law, the judicial system, his own lawyers, and his ultimate execution despite multiple attempts over many years to disabuse him of his irrational beliefs[]" (*id.* at 13); and (4) Mr. Dixon has a present "inability to form a rational understanding of the State's reasons for his execution[]" (*id.* at 12–13).

The State has presented no medical or psychiatric evidence to rebut the showing that Mr. Dixon presently "lacks a rational understanding of the State's reasons for his execution[]" (*id.* at 13), and therefore he is incompetent to be executed. Instead, the State offers the subjective opinion of its lawyers that "Dixon's focus on the legal theory challenging the DNA evidence as the fruit of a purportedly unlawful arrest in fact demonstrates that *he rationally understands that the State seeks to execute him based on his conviction of the 1978 murder*." (Response at 7 (emphasis added).) But that is precisely the incorrect standard for assessing a prisoner's incompetency to be executed that the Supreme Court rejected in *Panetti*. 551 U.S. at 959 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.").

This Court's acceptance of the State's argument would simply replicate the error committed by the Texas court in *Panetti* where, despite the fact that the petitioner—like Mr. Dixon—made an unrebutted "substantial showing of incompetency," *id.* at 938, 948, the state court reached its competency determination without holding a hearing or

providing the petitioner with an adequate opportunity to provide his own expert evidence at a hearing, *id.* at 950. The Supreme Court found the Texas court's procedures so deficient that its adjudication of Panetti's incompetency claim "cannot be reconciled with any reasonable application of the controlling standard in *Ford*[,]" *id.* at 952–53, and that there was "a strong argument the court violated state law by failing to provide a competency hearing[,]" *id.* at 950. This Court should refrain from making the same mistake.

The State's argument also defies *Ford*. A majority of the *Ford* Court found constitutionally inadequate Florida's procedures for determining whether a prisoner is mentally incompetent to be executed because those procedures—which were ex parte and confined exclusively within the Executive Branch—denied the petitioner the opportunity to prove his incompetency claim through a meaningful fact-finding process. 477 U.S. at 413–14 ("[C]onsistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate."); *id.* at 424 (Powell, J., concurring) ("It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless or until he recovers his sanity cannot be deprived without a 'fair hearing.' Indeed, fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause."); *id.* at 430 (O'Connor, J., concurring) (finding that "Florida's procedures are inadequate to satisfy even the minimal requirements of due process in this context[]").

The Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* at 416–17 (footnote omitted). Arizona implements *Ford*'s mandate in A.R.S. § 13-4022. This Court conscientiously applied A.R.S. § 13-4022, *Ford*, and *Panetti* when it granted Mr. Dixon's Motion and ordered a hearing.

II. Mr. Dixon's Motion satisfies A.R.S. § 13-4022(C) and the State fails to show otherwise

The State maintains that Mr. Dixon has failed to establish "reasonable grounds for a competency examination" because "the Maricopa County PCR Court, federal district court, and Ninth Circuit unanimously concluded[] that Dixon's focus on the [NAU] issue, though legally untenable, failed to demonstrate a lack of competency." (Response at 6.) But that argument fails for three reasons.

First, the State's argument ignores that prior courts were all adjudicating a Sixth Amendment ineffective-assistance-of-counsel ("IAC") claim under the "highly deferential" standard set forth by *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential."), rather than an Eighth Amendment incompetency-to-be-executed claim arising under *Ford*, which is the claim at issue in these proceedings. Second, whether or not courts have previously determined that Mr. Dixon was competent to stand trial 20 years ago is irrelevant to the question of whether Mr. Dixon is mentally competent to be executed now. And finally, while the State may disagree with Dr. Amezcua-Patino's expert opinion that Mr. Dixon's deluded and conspiratorial thought content—which are functions of his diagnosed paranoid schizophrenia—render him incompetent to be executed, it has so far presented no evidence to rebut it.

The State concedes that Mr. Dixon's Motion is timely (*see* Response at 6 n.1) but disputes that he has demonstrated "reasonable grounds for a competency determination" under A.R.S. § 13-4022(C) because prior courts allegedly found Mr. Dixon competent to stand trial and waive counsel 20 years ago despite his perseveration over the legal issue involving the NAU police. (Response at 6–9). The State's argument completely ignores that these prior courts were all adjudicating a Sixth Amendment ineffective-assistance-of-counsel ("IAC") claim under the "highly deferential" standard set forth by *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential.").

In state postconviction proceedings, Mr. Dixon argued that his trial lawyer was

ineffective in violation of his Sixth Amendment rights for "fail[ing] to challenge [his] competency to waive counsel when he knew of Dixon's serious mental health history, his two prior Rule 11 proceedings and his NGRI after which Dixon was ordered committed to the Arizona State Hospital and not yet restored to competency." (Ex. 16 at 3.) The postconviction court, applying *Strickland*, rejected Mr. Dixon's IAC claim after finding that his trial lawyer "did not act unreasonably in failing to challenge [Dixon's] competency before he was allowed to waive counsel, nor was his performance deficient at any point during his representation." (Ex. 17 at 7.)

During federal habeas proceedings, meanwhile, Mr. Dixon again asserted his Sixth Amendment IAC claim, arguing that he "received ineffective assistance of trial counsel when his lawyer failed to challenge Dixon's competency to stand trial and waive counsel[.]" (Ex. 18 at i.) Mr. Dixon also argued that he was "tried and sentenced while legally incompetent" in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (*Id.*) Not only was Mr. Dixon's IAC claim subject to *Strickland*'s "highly deferential" standard, but federal habeas review of the claim was also subject to added deference under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2254. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

The federal district court recognized that "[s]urmounting *Strickland*'s high bar is never an easy task, . . . and [e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." (Ex. 19 at 10 (internal quotation omitted) (citing *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010), and *Richter*, 562 U.S. at 105 ("The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so[.]" (internal citations omitted))).). Bound by these deferential standards of review, the district court denied Mr. Dixon's IAC claim without reviewing it on the merits and only after concluding that "[t]he PCR court's

rejection of this claim satisfies neither § 2254(d)(1) nor (2)." (Ex. 19 at 15.) With respect to Mr. Dixon's claim that his constitutional rights were violated when was tried and sentenced while legally incompetent, the district court found the claim procedurally defaulted and never reviewed it on the merits either. (Ex. 19 at 15–16, 21 (holding that because "Dixon did not raise these claims in state court, [ ] they are procedurally defaulted[]").)

Mr. Dixon reurged both claims on appeal to the Ninth Circuit. (Ex. 20 at i), and that court similarly denied relief under *Strickland*'s and AEDPA's "highly deferential" standards, s*ee Dixon v. Ryan*, 932 F.3d 789, 802 (9th Cir. 2019) ("In the AEDPA context, . . . the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable, which is different from asking whether defense counsel's performance fell below *Strickland*'s standard. . . . Accordingly, establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is . . . difficult." (cleaned up)).

As the foregoing illustrates, none of the courts on whose decisions the State's Response relies adjudicated an Eighth Amendment incompetency-to-be-executed claim arising under A.R.S. § 13-4022, *Ford*, or *Panetti*—which is the claim at issue here and the one on which Mr. Dixon's Motion relies. Nor could those courts have done so since incompetency-to-be-executed claims only become ripe once a prisoner's execution date has been set. *See Panetti*, 551 U.S. at 943–47.

Even assuming the State were correct (it is not, as already discussed) that courts have previously determined that Mr. Dixon was mentally competent for purposes of standing trial nearly 20 years ago, that is simply irrelevant to the question of whether Mr. Dixon is mentally competent to be executed now. *See Ford*, 477 U.S. at 410 ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."). Moreover, the State's claim that *prior* competency findings necessarily foreclose a *current* inquiry into whether Mr. Dixon is mentally competent to be executed was squarely rejected by the U.S. Supreme Court in *Panetti* where it held that "[p]rior findings of competency do not foreclose a prisoner from proving he is incompetent to be

executed because of his present mental condition." 551 U.S. at 934. The Supreme Court did not stop there. It further held that "[u]nder *Ford*, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, *entitles* him to an adjudication to determine his condition." *Panetti*, 551 U.S. at 934–35 (emphasis added). This is precisely what Mr. Dixon's Motion seeks.

The State's Response also fails to explain how the record before the Court in support of Mr. Dixon's Motion falls short of constituting "reasonable grounds" for his mental competency to be executed to be assessed. (*See* Response at 6–9.) Mr. Dixon's Motion is supported by the expert psychiatric report of Dr. Amezcua-Patino and 131 pages of exhibits. (*See generally* Motion & Exs. 1–15.) Dr. Amezcua-Patino opines that, "In my best opinion, Clarence [Dixon] suffers from a psychiatrically determinable impairment that significantly affects his ability to develop a rational understanding of the State's reasons for his execution." (*Id.* Ex. 9 at 12.) While the State may disagree with Dr. Amezcua-Patino's expert psychiatric opinion, it fails to rebut it and will have the opportunity to do so at the May 3, 2022 hearing ordered by the Court in this matter. And as already discussed *supra*, the State's attempt to contest Dr. Amezcua-Patino's opinion based on prior courts' rejection of an IAC claim misses the mark.

II. Conclusion

For all of the foregoing reasons and those set forth in his Motion and supporting exhibits, Mr. Dixon respectfully asks that the Court grant his Motion and affirm the May 3, 2022 hearing date.

/ /

Respectfully submitted this 18th day of April, 2022

Jon M. Sands
Federal Public Defender

Cary Sandman
Amanda C. Bass
Eric Zuckerman
Assistant Federal Public Defenders

s/ Amanda C. Bass
Counsel for Defendant

Certificate of Service

I hereby certify that on April 18, 2022, I electronically filed the foregoing Reply in Support of Motion to Determine Mental Competency to be Executed with the Pinal Clerk's Office by using the Court's eFiling system. Copies of the foregoing were electronically mailed this date to:

Jeffrey L. Sparks
Acting Unit Chief
Arizona Attorney General's Office
Jeffrey.Sparks@azag.gov

Gregory Hazard
Assistant Arizona Attorney General
Attorney General's Office
Gregory.Hazard@azag.gov

Capital Litigation Docket
Arizona Attorney General's Office
CLDocket@azag.gov

Colleen Clase
Attorney for Leslie James
Colleen.avcv@gmail.com

s/ Jessica Golightly
Assistant Paralegal
Capital Habeas Unit

State of Arizona v. Clarence Wayne Dixon
Exhibits to Reply in Support of Motion to Determine
Mental Competency to be Executed

Exhibit 16 Petition for Post-Conviction Relief at 1–3, *State v. Dixon*, No. CR 2002-019595 (Maricopa Cnty. Super. Ct. Mar. 18, 2013)

Exhibit 17 Minute Entry dismissing Petition for Post-Conviction Relief at 4–7, *State v. Dixon*, No. CR 2002-019595 (Maricopa Cnty. Super. Ct. July 3, 2013)

Exhibit 18 Petition for Writ of Habeas Corpus at i, *Dixon v. Ryan*, No. CV-14-258-PHX-DJH (D. Ariz. Dec. 19, 2014), ECF No. 27

Exhibit 19 Order re Claims 1, 2 at 8–22, *Dixon v. Ryan*, No. CV-14-258-PHX-DJH (D. Ariz. Mar. 16, 2016), ECF No. 61

Exhibit 20 Opening Brief of Appellant at i, *Dixon v. Ryan*, No. 16-99006 (9th Cir. Feb. 17, 2017), ECF No 16

Exhibit 16

DROBAN & COMPANY PC
Kerrie M. Droban, SBID# 016464
39506 N. Daisy Mountain Dr., Suite 122-441
Anthem, Arizona 85086
Telephone: (480) 612-3058
FAX: (623) 551-3289 or (623) 551-3891
e-mail: kerriedroban@yahoo.com

Attorney for Petitioner

IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. CLARENCE WAYNE DIXON, Petitioner.	Case No.: CR2002-019595 **PETITION FOR POST-CONVICTION RELIEF** **(CAPITAL CASE)** **(EVIDENTIARY HEARING REQUESTED)** (Assigned to The Hon. Joseph Welty)

Petitioner, **CLARENCE WAYNE DIXON**, (hereinafter "Dixon") by and through his counsel undersigned, and the law firm of DROBAN & COMPANY, PC, respectfully petitions this court for post-conviction relief pursuant to Rule 32.1Arizona Rules of Criminal Procedure, based on ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution.

More specifically, assigned lead Deputy Maricopa County Public Defender failed to challenge Dixon's waiver of counsel when he knew Dixon likely suffered from psychological impairments at the time of the murder, previously participated in two Rule 11 proceedings and was declared NGRI (and *not* restored to competency) only *thirty-six* hours before the murder by former Judge Sandra O'Connor who committed Dixon to the Arizona State Hospital.

While counsel eventually disclosed this information to Dixon's subsequent advisory counsel, Mr. Kenneth Countryman and Nathaniel Carr, they too failed to alert Judge Klein of Dixon's mental status, challenge Dixon's competency to represent himself or develop and present significant mitigation that would have confirmed Dixon suffered from schizophrenia and other

mental impairments. Had a jury been privy to said information it would likely have sentenced Dixon to life; similarly, had the Judge known of Dixon's mental health history he may never have permitted Dixon to waive counsel. Moreover, it is likely the judge would have ordered Dixon to submit to competency proceedings and/or commitment at the Arizona State Hospital.

Petitioner additionally continues to assert that Arizona's death penalty statute on its face and as applied in this case violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Constitution. See, Rule 32.1(A), *Arizona Rules of Criminal Procedure.* Petitioner's sentence should be vacated and reduced to life because the mitigating circumstances available to counsel at the time of Dixon's trial and as further developed in this PCR clearly outweigh aggravation in this case. Alternatively, Dixon's death sentence should be vacated and his case remanded for further proceedings consistent with the mental health issues identified and detailed in this petition.

This Petition is more fully supported by the following Memorandum of Points and Authorities, entire record in this case and separately filed Appendix of Exhibits, Affidavits and Declarations which are filed contemporaneously with this Petition.

RESPECTFULLY SUBMITTED this 18th day of March, 2013.

By: _____
Kerrie M. Droban
Attorney for Petitioner

ISSUES PRESENTED FOR RELIEF

1. The Arizona Supreme Court deprived Dixon of his rights to a fair sentencing and due process under the Fifth, Eighth, and Fourteenth amendments to the United States Constitution when it affirmed his death sentence on independent review[1].

2. Dixon received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution when his deputy Maricopa County Public Defender failed to challenge Dixon's competency to waive counsel when he knew of Dixon's serious mental health history, his two prior Rule 11 proceedings and his NGRI after which Dixon was ordered committed to the Arizona State Hospital and not yet restored to competency.

3. Dixon was deprived effective representation when his advisory counsel failed to challenge Dixon's competency to waive counsel, inform the Court of Dixon's mental illness, and develop significant mitigation that, had it been presented to the jury, would have revealed Dixon's schizophrenia and likely have altered the verdict in favor of a life sentence.

[1] *State v. Dixon* 226 Ariz. 545, 250 P.3d 1174 (2011); In the interest of brevity, this PCR will focus on issues 2 and 3 without waiving the first.

Exhibit 17

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
07/03/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2002-019595 07/02/2013

HON. ANDREW G. KLEIN

CLERK OF THE COURT
C. Vila
Deputy

STATE OF ARIZONA

LAURA PATRICE CHIASSON
COLLEEN CLASE

v.

CLARENCE WAYNE DIXON (A)

KERRIE M DROBAN

APPEALS-PCR
CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

MINUTE ENTRY

The Court has reviewed the Defendant's Petition for Post-Conviction Relief (filed 3/18/2013), the State's Response to Petition for Post-Conviction Relief (filed 6/3/2013), and the Defendant's Reply (filed 6/17/2013), as well as the Court's file. This is the Defendant's first Rule 32 proceeding following the Arizona Supreme Court's affirmance of his conviction and death sentence in *State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174 (2011).

At trial, Defendant waived representation and appeared *pro se*, assisted by advisory counsel. Defendant was convicted by jury verdict of first degree murder, both premeditated and felony murder. The jury unanimously found at the aggravation phase that Defendant had previously been convicted of a crime punishable by life imprisonment, A.R.S. § 13-751(F) (1), and that the murder was especially cruel and heinous A.R.S. § 13-751(F) (6). Following a penalty phase, the jury determined that the mitigation presented was not sufficiently substantial to call for leniency and returned a verdict of death. The Arizona Supreme Court affirmed the trial court on all of the issues Defendant raised on direct appeal.

Defendant bears the burden of establishing that counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Moreover, judicial scrutiny of counsel's performance must be highly deferential. "A fair assessment of attorney performance requires that every effort 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." *See id* at 689.

Strickland further instructs:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

See id. at 694.

Defendant cites consistently to the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to establish deficient performance in connection with both trial and advisory counsels' representation. However, it has been held by both the U.S. Supreme Court and Arizona Supreme Court that the ABA standards are only guides to what reasonableness means, not its definition. See *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *State v. Kiles*, 222 Ariz. 25, 213 P.3d 174 (2009). Instead, the proper standard for attorney performance is that of "reasonably competent assistance." *See Trapnell v. United States*, 725 F.2d 149, 153-5 (2d Cir. 1983).

The Court begins with the presumption that the actions of counsel were reasonable and their performance not deficient. The Court will first address the argument that Defendant received ineffective assistance from the Deputy Public Defender who represented him before his waiver of counsel, and then will address issues related to advisory counsel.

A. <u>Deputy Public Defender</u>

Defendant alleges that the Deputy Public Defender, who represented him before he was allowed to represent himself, was ineffective because he failed to challenge Defendant's competency to waive counsel. Defendant claims that his counsel should have apprised the Court

of his serious mental health history, his prior Rule 11 proceeding(s), and his Not Guilty By Reason of Insanity verdict ("NGRI") entered just 36 hours before Deanna Bowdoin's murder. However, this Court, without remembering specifically all the events from seven years ago, believes that it must have been aware of these matters. In that event, Defendant would not have been prejudiced by any perceived failure on counsel's part to inform the Court of them.

It has always been this Court's practice to thoroughly review every file assigned to the Court before taking the bench to address issues pertinent to that file. Such a practice would have been followed here, especially given the magnitude presented by a death penalty case.

The Court believes it addressed with all counsel in chambers before Defendant was permitted to waive his right to counsel some of Defendant's mental health history to gain a better understanding of the issues that faced the Court if it granted Defendant's request. The Court also informed counsel on the record that it had extensively reviewed the file before proceeding with the March 16, 2006 hearing on Defendant's right to waive counsel.

A review of the file would have revealed that on September 25, 2003, a "Notice of Possible Defense of Insanity" was filed based upon the fact that Defendant was adjudged to be NGRI on January 5, 1978. The Court's file would have further shown that Defendant made several requests to extend certain filing deadlines because he was contemplating a possible insanity defense. Accordingly, because this Court was in possession of information that placed Defendant's mental health at issue, Defendant's counsel could not have been ineffective in failing to give the Court information it already had.

For example, Defendant contends that his Public Defender should have informed the Court before the waiver of counsel hearing that Defendant had been involved in Rule 11 proceedings. But it is clear that the Court already knew of this. Otherwise, why would the Court have questioned Defendant about his experience in Rule 11 court during the colloquy concerning the waiver of counsel? Defendant acknowledged being in Rule 11 in 1977 but stated unequivocally that he did not have any mental problems that would prevent him from proceeding to trial. His counsel agreed that Defendant had no mental problems that would place his ability to waive the right to counsel in jeopardy.

To the extent Defendant argues that it was incumbent on this Court to order that he undergo a competency evaluation before allowing him the right to waive trial, the truth is that Defendant was adamant that he would not submit to such an evaluation. He objected to a competency evaluation and said that if one was ordered he would refuse to participate. See Defendant's Objection to Prescreening Evaluation filed on April 14, 2003.

This Court held a lengthy colloquy with Defendant before accepting both his oral and written waiver of counsel. Defendant was fully explained the benefits of having an attorney represent him and the significant dangers in representing himself. He was told that his chances of success were lessened if he represented himself, and he indicated that he understood. He was told that he would have full responsibility for all aspects of his case, which was complicated, and he was made aware of the dangers and disadvantages of self-representation. He was also informed that he could still request a lawyer at any point in the proceeding and that, if he did, one would be appointed for him.

This Court had a history with this Defendant before the March 16, 2006 hearing on the waiver of counsel and remembers him well. During Defendant's previous appearances, the Court had ample opportunity to observe Defendant, speak with him, and review his written work product. At all times, the Court found Defendant to be able to adequately advance his positions, he was cogent in his thought processes, lucid in argument, and always able to respond to all questions with appropriate answers. At no time did Defendant appear to this Court to be anything but reasoned in his approach.

The test for whether a competency hearing is mandated is not whether a defendant was insane at some point in the past, or whether he was free of all mental illnesses at the time of the waiver. *State v. Harding*, 137 Ariz. 278, 286, 670 P.2d 383, 391 (1983). Rather, it is whether, on the basis of facts and circumstances known to the trial judge, there was or should have been a good faith doubt about Defendant's ability to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and make a reasoned choice among the alternatives presented. *State v. Martin*, 102 Ariz. 142, 146, 426 P.2d 639, 643 (1967).

Again, this Court had the opportunity to read the Defendant's motions, listen to his arguments, and to observe his behavior and demeanor at numerous *pro se* appearances during the pretrial and trial phases. Based on those observations, this Court concluded that Defendant's thoughts and actions demonstrated coherent and rational behavior.

Defendant, concerned about whether he could represent himself, requested multiple continuances, subsequently asked for hybrid representation during trial when complicated DNA evidence was being presented, and expressed often on the record his frustration with jail facilities, access to records and research, and communication with advisory counsel. All of these actions demonstrated appropriate and logical conduct on Defendant's part.

The Court is a *de facto* witness and may consider its own observations in making a competency determination. *State v. Glassel*, 211 Ariz. 33, 116 P.3d 1193 (2005). Doubts about a defendant's competence may be removed by his conduct in court proceedings. *See State v. Conde*, 174 Ariz. 30, 846 P.2d 843 (App. 1992).

The Court's observations about Defendant's competence over a 2-1/2 year time period, including the nearly 3 months of concentrated trial time, have been borne out over the intervening years as Defendant, to the Court's knowledge, has not been placed on medication, there is no evidence that he suffered from delusions (other than comments Defendant made during a neuropsychological evaluation more than four years post-trial), there was no psychiatric intervention, and he was able to write lucid pleadings.

The right to represent oneself is a constitutional right. *Faretta v. California*, 422 U.S. 806, 819–20, 95 S.Ct. 2525, 2533 (1975). A demand to proceed *pro se* should be unequivocal. *State v. Hanson*, 138 Ariz. 296, 300, 674 P.2d 850, 854 (App.1983). Courts therefore are to indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

As Defendant's Petition points out, in order to waive counsel and represent himself, a defendant must be competent. *See State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998). Under the Due Process Clause of the Fourteenth Amendment, the competency standard for waiving the right to counsel is the same as the competency standard for standing trial. *See Godinez v. Moran*, 509 U.S. 389, 399-400, 113 S.Ct. 2680 (1993). A defendant is competent to stand trial if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788 (1960).

In this case, this Court never questioned the Defendant's competence, nor were any issues raised by the Deputy Public Defender who had been representing him for quite some time. The Court did not believe a competency hearing was warranted. Indeed, Defendant made it abundantly clear that he would object to such a hearing and would not cooperate if it had been ordered. Thus, in the Court's view, Defendant's waiver of counsel was a knowing, voluntary, and intelligent decision on the part of a competent individual.

If at any point in the proceedings this Court saw any evidence of Defendant's incompetence that would have placed his right to continue waiving counsel in jeopardy, an immediate hearing would have been held. Defendant's public defender and advisory counsel also would have immediately sought a hearing, but never did, if they believed for a minute that Defendant's competence was an issue. Based upon the foregoing, the Deputy Public Defender did not act unreasonably in failing to challenge Defendant's competency before he was allowed to waive counsel, nor was his performance deficient at any point during his representation.

B. Advisory Counsel

Exhibit 18

Jon M. Sands
Federal Public Defender
District of Arizona
Sarah Stone (AZ Bar No. 022713)
Karen M. Wilkinson (AZ Bar No. 014095)
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
sarah_stone@fd.org
karen_wilkinson@fd.org
602.382.2816
602.889.3960 facsimile

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Clarence Wayne Dixon, Petitioner, vs. Charles L. Ryan, et al., Respondents.	CV-14-258-PHX-DJH DEATH-PENALTY CASE

PETITION FOR WRIT OF HABEAS CORPUS
28 U.S.C. § 2254

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Exhibit 19

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Clarence Wayne Dixon, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-14-258-PHX-DJH **ORDER** DEATH PENALTY CASE

Clarence Dixon is an Arizona death row inmate. Before the Court is Dixon's petition for writ of habeas corpus. (Doc. 27.) Respondents filed an answer to the petition, and Dixon filed a reply. (Docs. 36, 39.) Also before the Court is Dixon's motion for evidentiary development, which Respondents oppose. (Docs. 49, 55.) For the reasons set forth below, the Court concludes that Dixon is not entitled to habeas relief or evidentiary development.

I. BACKGROUND

In 2008, Dixon was convicted of first-degree murder and sentenced to death for the 1978 murder of Deana Bowdoin. The following facts surrounding the crime are taken from the opinion of the Arizona Supreme Court upholding the conviction and sentence. *State v. Dixon*, 226 Ariz. 545, 548–49, 250 P.3d 1174, 1177–78 (2011).

On January 6, 1978, Deana, a 21-year-old Arizona State University senior, had dinner with her parents and then went to a nearby bar to meet a female friend. The two arrived at the bar at 9:00 p.m. and stayed until approximately 12:30 a.m., when Deana

Dr. Marchildon found no evidence of mental illness. He concluded that Dixon understood the charges and the nature of the legal proceedings. (*Id*.) He noted that Dixon's "hospital stay has been uneventful. He has participated in psychotherapeutic sessions, has received no neuroleptic drugs, and has displayed no behavior or ideation which would indicate mental illness." (*Id*.)

On December 5, 1977, Dixon appeared before Judge O'Connor, waived his right to a jury trial, and agreed that the case could be determined on the record. (*See id.* App. M.) On January 5, 1978, Judge O'Connor found Dixon "not guilty by reason of insanity." (*Id*.) The Court ordered that Dixon remain released pending civil proceedings. (*Id*.) Dixon murdered Deana less than two days later.

A second basis for allegations of incompetence is Dixon's so-called "perseveration" and "delusional conduct" concerning a particular legal issue arising from the 1985 rape case. This issue involved Dixon's theory that NAU officers lacked the statutory authority to investigate the case; therefore, according to Dixon, his prior conviction was "fundamentally flawed" and the DNA comparison made pursuant to his invalid conviction should be suppressed. (*See* ROA 143 at 8, 9.)[3] In his motion to the trial court, Dixon noted that his argument regarding the lack of statutory authority to investigate was rejected in the 1985 proceedings; he also listed other instances in which he had raised the claim and it had been denied. (*Id.* at 3–4.) Dixon was convinced, however, that the issue was never "fully and correctly adjudicated." (*Id.* at 9.)

1. Claim 1

Dixon alleges that he received ineffective assistance of trial counsel when his lawyer failed to challenge Dixon's competency to stand trial and to waive counsel. (Doc. 27 at 43.) The PCR court denied this claim on the merits. (ME 7/2/13.)[4]

a. Background

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[3] "ROA" refers to the record on appeal from Dixon's trial and sentencing (Case No. CR-08-0025-AP).

[4] "ME" refers to the minute entries of the state court.

The Maricopa County Public Defender's Office initially represented Dixon. His case was assigned to Vikki Liles, who was joined by Garrett Simpson as second chair in July 2005. Liles objected to court-ordered testing of Dixon's IQ and to a pre-screening evaluation for competency and sanity. (ROA 35, 36.) At a hearing in April 2004, Liles reiterated that Dixon would not participate in an IQ test or a competency examination. (ME 4/16/03.) Liles told the court, however, that Dixon's mental health needed to be investigated for a possible insanity defense and as a potential mitigating circumstance. (RT 4/16/03.)[5] On September 25, 2003, Liles filed a Notice of Possible Insanity Defense. (ROA 68.) In April 2005, however, Liles informed the court that Dixon would not offer an insanity defense. (ME 4/15/05.)

In February 2006, Simpson replaced Liles as lead counsel. He drafted a Motion to Dismiss, arguing that Dixon's sanity had not been restored at the time of the murder. (*See* PCR Pet., Ex. E) Thereafter, Dixon moved to waive counsel. (ROA 131.) The court granted the motion after a colloquy with Dixon. (RT 3/16/06; ME 3/16/06.) Simpson was appointed as advisory counsel. (ME 3/23/06.)

In his PCR petition, Dixon alleged that Simpson performed ineffectively by failing to challenge Dixon's competency to waive counsel. (PCR Pet. at 10.) He contended that Simpson was on notice of Dixon's lack of competence based on his knowledge of the 1977 Rule 11 exams and not guilty by reason of insanity verdict ("NGRI"), and because of Dixon's "perseveration" on the "NAU issue." (*Id.*)

During the PCR proceedings, Dr. John Toma performed a "full neuropsychological and psychological evaluation" of Dixon. In his report, dated June 30, 2012, Dr. Toma diagnosed Dixon with schizophrenia, paranoid type. (PCR Pet., Appx. A at 24.) According to Dr. Toma, Dixon "was clearly not capable of representing himself and his competence to proceed should have been questioned, especially given the fact

[5] "RT" refers to the court reporter's transcript.

that he was not treated for his psychiatric disorder, the main symptom of which is paranoid ideation." (*Id.*)

b. Ineffective Assistance of Counsel

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; *see Wong v. Belmontes,* 558 U.S. 15 (2009) (per curiam); *Bobby v. Van Hook,* 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010). 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.*

With respect to *Strickland*'s second prong, a defendant 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 probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"Surmounting *Strickland*'s high bar is never an easy task," *Padilla v. Kentucky,* 559 U.S. 356, 371 (2010), and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105. As the Court explained in *Richter*:

> Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." [*Strickland*, 466 U.S.] at 689. The

> question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. [*Id.*] at 690.
>
> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Id. (additional citations omitted); *see Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (discussing "doubly deferential judicial review that applies to a *Strickland* claim under the § 2254(d)(1) standard").

c. Analysis

In rejecting this claim during the PCR proceedings, Judge Andrew Klein, who also presided over Dixon's trial, explained that at the time Dixon waived counsel the court was aware of the 1977 Rule 11 proceedings and NGRI verdict, as well as the fact that Dixon's counsel were contemplating an insanity defense in this trial. (ME 7/2/13 at 5.) As Judge Klein explained, "this Court was in possession of information that placed Defendant's mental health at issue. . . . Defendant's counsel could not have been ineffective in failing to give the Court information it already had." (*Id.*)

Judge Klein Court further noted that Dixon "was adamant that he would not submit to [a competency evaluation]." (*Id.*) In an affidavit prepared in 2013, Simpson likewise attested that "Dixon was vehemently opposed" to "seeking a determination of competency."[6] (PCR Pet., Appx. C at 2, ¶ 7.)

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[6] Simpson also stated in his affidavit that he had initially prepared the motion to dismiss based on the 1978 insanity verdict, but before he could speak with Dixon's counsel on the 1977 case, the attorney was quoted in a local publication as having stated

As a basis for his conclusion that Dixon was not incompetent, Judge Klein also discussed his first-hand impressions of Dixon:

> This Court has a history with this Defendant before the March 16, 2006 hearing on the waiver of counsel and remembers him well. During Defendant's previous appearances, the Court had ample opportunity to observe Defendant, speak with him, and review his written work product. At all times, the Court found Defendant to be able to adequately advance his positions, he was cogent in his thought processes, lucid in argument, and always able to respond to all questions with appropriate answers. At no time did Defendant appear to this Court to be anything but reasoned in his approach.

(ME 7/2/13 at 6.) Finally, the court noted that the record did not contain evidence of mental health issues following the NGRI verdict:

> Twenty-seven years elapsed between the date of the murder and the date of the March 2006 hearing on Defendant's competence to intelligently, knowingly and voluntarily waive counsel and to proceed *pro se*. Defendant makes no suggestion that either his competency or his sanity were of concern in proceedings related to the intervening crimes in Maricopa County (late 1978 court proceedings) or in Coconino County (1985 court proceedings; 1987 appellate decision) notwithstanding the early-1978 NGRI finding. Moreover, Defendant provides no evidence that he required treatment for the mental illness or that it interfered with his functioning.

(*Id.* at 12.)

The court concluded that Simpson "did not act unreasonably in failing to challenge Defendant's competency before he was allowed to waive counsel, nor was his performance deficient at any point during his representation." (*Id.* at 7.) The court's ruling was neither contrary to nor based on an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

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that Dixon was not mentally ill and had "conned" Judge O'Connor. (*Id*. at ¶¶ 5−6.) Simpson spoke with the attorney, who "maintained that he made no such statements," but nonetheless Simpson "felt compelled to move to withdraw" as advisory counsel. (*Id*. at ¶ 6.) Simpson also attested that Dixon was "adamant that he did not want to be characterized as insane or mentally ill. I should have seen this as a symptom of his illness but I did not." (*Id*. at ¶ 7.)

A criminal defendant has a Sixth Amendment right to waive counsel and conduct his own defense. *Faretta v. California*, 422 U.S. 806, 819 (1975). However, he may not waive his right to counsel unless he does so "competently and intelligently." *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). The standard for determining competency to waive counsel is the same as the standard for competency to be tried. *Id.* at 399. It requires that a defendant have (1) "'a rational as well as factual understanding of the proceedings against him,' and (2) 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'" *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)). Whether a defendant is capable of understanding the proceedings and assisting counsel is dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his competence. *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

"A claim that counsel was deficient for failing to move for a competency hearing will succeed only when there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt defendant's competency, and there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered." *Hibbler v. Benedetti*, 693 F.3d 1140, 1149–50 (9th Cir. 2012) (quotations omitted). Dixon can make neither showing.

First, there were not sufficient indicia of incompetence to give Simpson reason to doubt Dixon's competence. The fact that Dixon had a distant history of mental health problems was not in itself sufficient to show that he was incompetent to waive counsel. *See Hoffman v. Arave*, 455 F.3d 926, 938 (9th Cir. 2006) ("We have held that those with mental deficiencies are not necessarily incompetent to stand trial."), *vacated on other grounds by Arave v. Hoffman*, 552 U.S. 117, 117–19 (2008) (per curiam)); *United States v. Garza*, 751 F.3d 1130, 1135–37 (9th Cir. 2014) (finding no need for competency hearing where defendant was diagnosed with anxiety and dementia but his behavior, in and out of court, was not erratic and there was no clear connection between any mental

disease and a failure on defendant's part to understand the proceedings or assist in his own defense); *Boyde v. Brown*, 404 F.3d 1159, 1166–67 (9th Cir. 2005) (finding inmate's "major depression" and "paranoid delusions" did not raise a doubt regarding his competence to stand trial). Dixon was initially found incompetent to stand trial for the 1977 assault. Six weeks later, after hospitalization and treatment, he showed no signs of mental illness and was found competent. Apart from these events thirty years ago, with which the trial judge was already familiar, there was not a significant history of mental illness that Simpson failed to bring to the court's attention.

Finally, Dixon's obsession with the NAU suppression motion was not so bizarre as to suggest incompetence. "Criminal defendants often insist on asserting defenses with little basis in the law, particularly where, as here, there is substantial evidence of their guilt," but "adherence to bizarre legal theories" does not imply incompetence. *United States v. Jonassen*, 759 F.3d 653, 660 (7th Cir. 2014) (noting defendant's "persistent assertion of a sovereign-citizen defense"); *see United States v. Kerr*, 752 F.3d 206, 217-18 (2d Cir.), *as amended* (June 18, 2014) ("Kerr's obsession with his defensive theories, his distrust of his attorneys, and his belligerent attitude were also not so bizarre as to require the district court to question his competency for a second time."). "[P]ersons of unquestioned competence have espoused ludicrous legal positions," *United States v. James*, 328 F.3d 953, 955 (7th Cir. 2003), "but the articulation of unusual legal beliefs is a far cry from incompetence." *United States v. Alden*, 527 F.3d 653, 659–60 (7th Cir. 2008) (explaining that defendant's "obsession with irrelevant issues and his paranoia and distrust of the criminal justice system" did not imply mental shortcomings requiring a competence hearing).

Apart from the NAU suppression issue, Dixon has failed to identify an instance in which he behaved irrationally, appeared not to understand the proceedings, or did not communicate effectively with counsel. *See Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988) (rejecting ineffective assistance of counsel claim when defendant made only "conclusory allegations that he was incompetent to stand trial" and gave "no concrete

examples suggesting that at the time of his trial he did not have the ability to consult with his lawyer or he did not understand the proceedings against him."); *Stanley*, 633 F.3d at 863 (finding that state court reasonably rejected prisoner's ineffective assistance claim where the record contained "insufficient evidence of [the prisoner's] incompetence during the guilt phase to justify a conclusion that defense counsel were ineffective in failing to move for competency proceedings.").

Second, there was not a reasonable probability that Dixon would have been found incompetent even if counsel had raised the issue. *Hibbler*, 693 F.3d at 1149–50. As an initial matter, Dixon was adamant that he did not want to be evaluated for competency. *See Douglas v. Woodford*, 316 F.3d 1079, 1086 (9th Cir. 2003) (explaining that counsel "did not err by failing to obtain further testing, as [counsel] could not secure such testing without his client's cooperation"). In addition, Judge Klein was familiar with Dixon's past mental health issues, but having interacted with Dixon through several years of court proceedings, he observed no indications of incompetence. Under these circumstances, it is difficult to see how a competency examination would have been ordered even if Simpson had requested one. As discussed below, there is no reasonable probability that Dixon would have been found incompetent if he had undergone an evaluation.

The PCR court's rejection of this claim satisfies neither § 2254(d)(1) nor (2). A "reasonable argument" could be made that Simpson "satisfied *Strickland*'s deferential standard." *Richter*, 566 U.S. at 105; *see Hibbler*, 693 F.3d at 1150. The PCR court's factual determinations were not objectively unreasonable in light of the state court record. *See Taylor*, 366 F.3d at 1000; *Hibbler*, 693 F.3d at 1149. Claim 1 is therefore denied.

2. Claims 2 and 3

In Claim 2, Dixon alleges that that he was tried and sentenced while legally incompetent. (Doc. 27 at 54.) Claim 3 consists of two allegations: that the trial court (A) "erred when it found [Dixon] competent to waive counsel and represent himself" and (B) "abdicated its obligation . . . to ascertain whether Dixon was competent to stand trial, despite the fact that considerable evidence was before the court he was not." (*Id.* at 61,

66.) Dixon did not raise Claims 2 or 3(B) in state court. He raised Claim 3(A), which the PCR court denied on the merits. (ME 7/2/13 at 7.)

a. Background

On March 16, 2006, the trial court conducted a hearing on Dixon's request to waive counsel. The court first inquired why Dixon wished to represent himself. (RT 3/16/03 at 3−4.) Dixon explained that it involved a disagreement about a motion counsel did not feel she could legally or ethically file. (*Id.* at 4.)

The trial court warned Dixon that if he represented himself he would be held to the standards of a lawyer. (*Id.*) The court also noted there would be a significant delay in beginning the trial. (*Id*.) Dixon acknowledged there were over 3,000 documents that he needed to review. (*Id*.) He would also have to read the rules of criminal procedure and find a textbook on trial procedure and preparation. (*Id*. at 6.)

The court nevertheless explained that in setting a trial date it would have to balance competing interests, including those of the victims and the State, and might ultimately select a date when Dixon did not feel he was ready. (*Id*.) Dixon stated he was aware of that, but indicated that he was hindered in preparing for trial by the inefficiency of Inmate Legal Services. (*Id*.) The court explained that Dixon would not be afforded greater freedoms than other inmates and would not get everything he requested simply because he represented himself. (*Id*. at 6−7.) Dixon stated that he understood. (*Id*. at 7.)

Dixon told the court he had fourteen years of education, that he read and understood the English language, and that the only medication he had taken in the last twenty-four hours were "[a]sprin, ibuprofen, and that's it." (*Id.* at 7−8.) He told the court that he had not taken any psychotropic medications or anything that prevented him from understanding what the court was stating. (*Id*. at 8.) When asked if he had ever been in a Rule 11 proceeding for mental problems, Dixon responded that he had, "way back in 1977." (*Id*.) The court inquired further:

> THE COURT: Okay. But since then have you had any kind of mental problems that would prevent you from having a trial, that you're aware of?

> THE DEFENDANT: No, I'm not.
>
> THE COURT: Okay. And let me ask counsel if you know of any in your evaluation that would make this court's decision as to whether to grant the waiver of right to counsel in jeopardy.
>
> [SIMPSON]: Not that I'm aware of.

(*Id*.)

The court told Dixon that "an attorney can be of great benefit to you" and there were "some significant dangers and disadvantages to representing yourself." (*Id*. at 9.) Dixon responded "I'm aware that a fool, a fool has himself for a client, yes." (*Id*. at 10.)

The court responded, "Not that you're a fool or anyone is a fool, but I have yet to see someone represent himself in this court and fare better than I think he or she would have done had they had a lawyer." (*Id*.) Dixon understood that in choosing to represent himself, he may have decreased his chance of success at trial. (*Id*.)

The court reiterated that Dixon had the right to an attorney who would represent him at all critical stages of trial. (*Id.*) Dixon said he understood. (*Id.*) The court asked Dixon whether he was aware that he was charged "with the most serious of crimes imaginable." (*Id*.) Dixon stated that he was. (*Id.*)

The court instructed the prosecutor to read the indictment to Dixon. (*Id*. at 11.) Dixon stated that he understood the charges and potential sentences. (*Id*. at 11−12.)

Dixon also indicated that he understood that if he were allowed to represent himself, he would have "sole responsibility for [his] defense, introducing witnesses, doing investigation, doing legal research, filing and arguing motions, examining and cross-examining witnesses, giving opening statement and final argument to the jury," and that because of his custody status he would have more difficulty investigating the case than attorneys would. (*Id*. at 12−13.) The court again explained Dixon would be held to the same standard as an attorney. (*Id*. at 13.) Dixon said he understood. (*Id*.) The court explained that "this type of case is probably the most complex of all criminal cases"; that the law is "complicated," "unsettled," and "constantly evolving"; that trying the case

required knowledge of both case law and statutory authority; and that the trial would involve numerous witnesses and exhibits. (*Id*. at 13−14.) Dixon stated that he was "aware of all that." (*Id*. at 14.)

Dixon was also aware that in a capital case two certified lawyers are typically appointed to represent the defendant. (*Id.*) The court explained that if Dixon were given advisory counsel, "their job is not to try your case" or "give you advice," but to "assist you as needed." (*Id*.) Dixon acknowledged that if he represented himself, he "[bore] all responsibilities." (*Id*.)

Dixon understood that he could change his mind about self-representation "at any time." (*Id.* at 15.) He also understood that if he misbehaved or violated the rules, the court could have a lawyer take over the case. (*Id*. at 15−16.)

When asked if he had any questions about anything he had discussed with the court, Dixon replied "No, your Honor. I believe you'll be fair and impartial in this case." (*Id*. at 16.) The court then gave Dixon time to read the written waiver. (*Id*.) Dixon read the waiver, told the court he understood, and then signed it. (*Id*. at 17.)

The court gave Dixon's counsel and the prosecutor the opportunity to make a record. (*Id.*) Neither suggested there was any reason to doubt Dixon's competency. (*Id.* at 17–18.)

Based upon Dixon's answers, the avowals of counsel, and the totality of the circumstances, the trial court expressly found that Dixon had made a knowing, intelligent, and voluntary waiver of his right to counsel and was competent to represent himself. (*Id*. at 21−22.)

b. Analysis: Claim 3(A)

With respect to Claim 3(A), the PCR court, citing *Godinez*, 509 U.S. at 399–400, and *Dusky*, 362 U.S. at 402, found that Petitioner was competent and that his waiver of counsel was "knowing, voluntary, and intelligent." (*Id.*) This decision was neither contrary to nor an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts.

The PCR court stated that under *Godinez* "the competency standard for waiving the right to counsel is the same as the competency standard for standing trial." (*Id.*) Dixon asserts that the standards for competency to be tried and competency for self-representation diverged with the Supreme Court's opinion in *Indiana v. Edwards*, 554 U.S. 164 (2008). In *Edwards*, the Court held that the Constitution "permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." 554 U.S. at 178. The Court explained that a defendant who is otherwise able to satisfy the *Dusky* competence standard may nevertheless be "unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Id.* at 175–76. Accordingly, a court is permitted, but not required, to appoint counsel for a "gray area" defendant. *Edwards*, 554 U.S. at 175. The Ninth Circuit has interpreted *Edwards* as holding that "[t]he standard for a defendant's mental competence to stand trial is now different from the standard for a defendant's mental competence to represent himself or herself at trial." *United States v. Ferguson*, 560 F.3d 1060, 1068 (9th Cir. 2009).

While noting that a "higher standard" applies to assessing a defendant's competency for self-representation, compared to the competency to stand trial or to waive counsel, the Court in *Edwards* expressly declined to adopt a "specific standard" to determine when a defendant lacks the mental capacity to defend himself. 554 U.S. at 172–76, 178. The Court noted that the trial judge "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." *Id.* at 176.

Even under a "higher" standard, Dixon was competent to represent himself. As the PCR court made clear, Dixon was able to carry out the basic tasks needed to present his own defense. His behavior at trial was not "decidedly bizarre," nor did he do "absolutely nothing" to defend himself at trial and sentencing. *Ferguson*, 560 F.3d 1068–69 (remanding to determine applicability of *Edwards*). Instead, Dixon was clearly "aware of

what was occurring" and "participated extensively throughout his trial." *United States v. Thompson*, 587 F.3d 1165, 1173 (9th Cir. 2009); *see United States v. Johnson*, 610 F.3d 1138, 1146 (9th Cir. 2010) (finding district court did not err in concluding that defendants were competent to represent themselves, noting the "defendants gave opening statements, testified, examined and cross-examined witnesses, challenged jury instructions, and delivered closing arguments of significant length").

In arguing that the trial court erred in finding he was competent to represent himself, Dixon again relies on the 1977 Rule 11 reports and NGRI verdict and his persistent pursuit of the NAU suppression issue. As already discussed, however, Judge Klein was aware of these issues at the time he found Dixon competent to waive counsel and represent himself.

Dixon also cites Dr. Toma's report from 2012, which opined that Dixon "was clearly not capable of representing himself and his competence to proceed should have been questioned." (PCR Pet., App. A. at 24.) Dr. Toma's opinion was formed four years after Dixon's trial. Judge Klein, who observed Dixon while presiding over pretrial and trial proceedings, "was in the best position to observe [Dixon's] behavior and to make the determination that [he] had the mental capacity to represent [himself]." *Johnson*, 610 F.3d at 1146; *see Edwards*, 554 U.S. at 177.

In his decision denying this claim during the PCR proceedings, the court noted that Dixon displayed no signs that he was not competent to represent himself. Judge Klein explained:

> [T]his Court had the opportunity to read the Defendant's motions, listen to his arguments, and to observe his behavior and demeanor at numerous *pro se* appearances during the pretrial and trial phases. Based on those observations, this Court concluded that Defendant's thoughts and actions demonstrated coherent and rational behavior.
>
> Defendant, concerned about whether he could represent himself, requested multiple continuances, subsequently asked for hybrid representation during the trial when complicated DNA evidence was being presented, and expressed often on the record his frustration with jail

> facilities, access to records and research, and communications with advisory counsel. All of these actions demonstrated appropriate and logical conduct on Defendant's part.
>
> The Court's observation about Defendant's competence over a 2½ year time period, including the nearly 3 months of concentrated trial time, have been borne out over the intervening years as Defendant, to the Court's knowledge, has not been placed on medication, there is no evidence that he suffered from delusions (other than comments Defendant made during a neuropsychological evaluation more than four years post-trial), there was no psychiatric intervention, and he was able to write lucid pleadings.

(ME 7/2/13 at 6–7.)

On habeas review, a state court's determination that the petitioner was competent is entitled to a presumption of correctness unless that determination is rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Torres v. Prunty*, 223 F.3d 1103, 1110 n. 6 (9th Cir. 2000). In *Demonsthenes v. Baal*, 495 U.S. 731, 735 (1990), the Supreme Court reiterated that a state court's conclusion regarding a defendant's competency is a factual determination that is entitled to a presumption of correctness. *Id.* (citing *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam)); *Evans v. Raines*, 800 F.2d 884, 887 (9th Cir. 1986).

Based on the facts discussed above, and supported by this Court's review of the state court record, including the pretrial and trial transcripts, the PCR court's determination that Dixon was competent to waive counsel was not an unreasonable determination of the facts pursuant to § 2254(d)(2), *Maggio v. Fulford*, 462 U.S. at 117, nor was it contrary to or an unreasonable application of clearly established federal law under § 2254(d)(1). Claim 3(A) is denied.

c. Analysis: Claims 2 and 3(B)

As noted, Dixon did not raise these claims in state court, so they are procedurally defaulted. Dixon asserts that under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the ineffective assistance of his PCR counsel constitutes cause and prejudice to excuse the default. Dixon is incorrect. *Martinez* held that "[i]nadequate assistance of counsel at

initial-review collateral proceedings may establish cause for a prisoner's procedural default of *a claim of ineffective assistance at trial*." *Martinez*, 132 S. Ct. at 1315 (emphasis added). *Martinez* applies only to ineffective assistance of trial or, in the Ninth Circuit, appellate counsel. It has not been expanded to other types of claims. *Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9th Cir. 2015) (explaining that the Ninth Circuit has "not allowed petitioners to substantially expand the scope of *Martinez* beyond the circumstances present in *Martinez*"); *Hunton v. Sinclair*, 732 F.3d 1124, 1126–27 (9th Cir. 2013) (denying petitioner's claim that *Martinez* permitted the resuscitation of a procedurally defaulted *Brady* claim, holding that only the Supreme Court could expand the application of *Martinez* to other areas).

Because Claims 2 and 3(B) do not allege ineffective assistance of trial or appellate counsel, their default cannot be excused under *Martinez*. Because Dixon does not show cause for his default of either claim in state court, or a fundamental miscarriage of justice, the claims are barred from federal review. The claims are also meritless because, as discussed above, the trial court adequately addressed the issue of Dixon's competence and reasonably determined that he was competent to stand trial and represent himself.

3. Claim 4

Dixon alleges that his Sixth and Fourteenth Amendment rights were violated when advisory counsel failed to raise the issue of his competency with the trial court. (Doc. 27 at 69.) The PCR court rejected this claim on the merits. (ME 7/2/13 at 8–9.) The court explained that Dixon, having voluntarily and intelligently waived counsel, had "no constitutional right to challenge the advice or services provided by advisory counsel." (*Id.* at 8.) The court further determined that even if such a right existed, there was no ineffective assistance of advisory counsel because the court was already aware of Dixon's mental health issues. (*Id.* at 9.) This decision does not entitle Dixon to relief under § 2254(d).

After the trial court found Dixon competent and accepted his waiver of counsel, it appointed Simpson to serve as advisory counsel. After Simpson withdrew, the court

Exhibit 20

No. 16-99006

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE WAYNE DIXON,
Petitioner-Appellant,

vs.

CHARLES RYAN, et. al,
Respondents-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:14-cv-00258-DJH

OPENING BRIEF OF APPELLANT

JON M. SANDS
Federal Public Defender
District of Arizona

Paula K. Harms, AZ Bar No. 022489
Amanda C. Bass, AL Bar No. 1008H16R
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 Telephone
(602) 889-3960 Facsimile
Paula_Harms@fd.org
Amanda_Bass@fd.org
Attorneys for Appellant Dixon

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