

WO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Michael Apelt,

No. CV-98-00882-PHX-ROS

Petitioner,

ORDER

V.

Charles L. Ryan,

Respondent.

Michael Apelt is an Arizona death row inmate seeking federal habeas relief under a wide variety of theories. The Court previously rejected most of Apelt's conviction-related claims. (Doc. 210.) This Order addresses his remaining conviction-related claims and all of his sentencing-related claims.

BACKGROUND

Because this order deals almost exclusively with Apelt's sentencing claims, a full explanation of his crimes and trial is unnecessary. In brief, Apelt, his brother Rudi, Rudi's wife, and Apelt's some-time girlfriend Anke Dorn, traveled from their native Germany to America in August 1988. In California and then in Arizona the brothers and Dorn embarked on a series of "cons" involving the brothers trying to entice women into romantic relationships by holding themselves out as successful businessmen. The

1 brothers hoped to obtain money from these relationships. On October 6, 1988, Apelt met
2 Cindy Monkman. A relationship developed and, on October 28, 1988, Cindy and Apelt
3 were married in Las Vegas.

4 Immediately after the marriage Apelt insisted the couple take out life insurance on
5 Cindy. The couple had difficulty obtaining the size of policy Apelt wanted and so it was
6 not until December 22, 1988, that a large policy for Cindy was approved. The very next
7 day, Apelt, Rudi, and Dorn agreed to kill Cindy. That evening, Apelt drove Cindy to a
8 remote location where he met Rudi who had traveled there in a separate car with Dorn.
9 Dorn stayed in the car while Apelt and Rudi murdered Cindy. After the murder Apelt,
10 Rudi, and Dorn went out to dinner.

11 Cindy's body was found on the afternoon of December 24. She had been stabbed
12 once in the lower chest and four times in the back. Her throat had been slashed so deeply
13 that her head was nearly severed from her body. There were numerous bruises on her
14 face and body.

15 Almost immediately the police suspected Apelt and Rudi were involved. The
16 police questioned the brothers but they denied any involvement. When the police
17 questioned Dorn, however, she confessed. Both Apelt and Rudi were arrested and tried
18 separately. Dorn was granted immunity and testified at both trials. Apelt was
19 represented at trial by attorney Michael Villareal. A jury found Apelt guilty of
20 conspiracy to commit first-degree murder and first-degree murder. The judge then set the
21
22
23
24
25
26
27
28

1 matter for sentencing.¹
 2

3 On June 8, 1990, in anticipation of the hearing regarding aggravation and
 4 mitigation, Villareal filed a motion to authorize extraordinary expenses “to travel to
 5 Germany in order to locate and contact witnesses regarding Michael Apelt’s past life in
 6 order to establish mitigating factors.” (ROA 298.) Villareal also filed a motion seeking
 7 an interpreter to assist him in Germany (ROA 297) and a 60-day continuance of the
 8 aggravation/mitigation hearing based on the need to conduct additional investigation.
 9 (ROA 296; RT 6/11/90 at 3–6.) In support of these requests, Villareal argued he needed
 10 to “locate and contact witnesses regarding [Apelt’s] past life in order to establish
 11 mitigating factors. This work must be undertaken in Germany as [Apelt] was born and
 12 raised there and his contacts in the United States are minimal.” (ROA 296.)
 13

14 At a hearing on June 11, 1990, Villareal explained to the court that, at some point
 15 during the prosecution, his co-counsel had gone to Germany at her own expense as part
 16 of a family vacation. As described by Villareal, that trip was an attempt to “build[] up a
 17 character defense.” While there, co-counsel had looked into Apelt being in “some type of
 18 psychological institution early in his life.” Co-counsel had not uncovered any
 19 information that Villareal used at trial but Villareal argued it was now “important and
 20 necessary . . . that [he] travel . . . to Germany to locate and contact witnesses there.”
 21 Villareal explained he planned to “explore” the “issue of that psychological
 22

23
 24
 25
 26
 27 ¹ Rudi was also convicted of first degree murder and conspiracy to commit first
 28 degree murder. Rudi was sentenced to death for the murder conviction. *State v. (Rudi)*
Apelt, 176 Ariz. 369, 371, 861 P.2d 654, 656 (1993). In 2009, however, a state court
 found Rudi intellectually disabled and vacated his death sentence. (Doc. 285, Ex. 27.)

1 hospitalization.” In addition, Villareal needed to “check into” “other matters that came to
2 light in [Apelt’s] past regarding a difficult child birth, things of [that] sort.” (RT 6/11/90
3 at 7–8.) Villareal stressed that he had “leads” in Germany and was not “going over there
4 on a fishing expedition.” (*Id.*) Finally, Villareal explained he had sought assistance from
5 the German consulate but had learned the German government would not become
6 involved in the case unless Apelt had been sentenced to death. (*Id.* at 9–10.)

7 The court granted the request for additional time but denied Villareal’s request for
8 travel funds. In doing so, the court noted the case had already been “very expensive” and
9 it ordered Villareal to submit a “verification as to those items that you feel that your trip
10 to Germany is a necessity for.” (*Id.* at 10.) Villareal never submitted the “verification”
11 the court requested and the court later formally denied the motion. The order denying the
12 motion explained the “extra expense of funds has not been demonstrated as a necessity
13 [sic] for the defense of the defendant.” (ROA 302.)

14 On July 31, 1990, a week before Apelt’s rescheduled aggravation/mitigation
15 hearing, Villareal again moved for a continuance and renewed his request for funds to
16 travel to Germany. (ROA 307; *see* RT 8/7/90 at 4.) Villareal stated he had “not been
17 able to investigate [Apelt’s] background in order to ascertain what mitigating evidence
18 exists.” (ROA 307.) He explained it was “obvious that any mitigating evidence [would]
19 only be found in Germany” and that it was “impossible” for him “to know with any
20 reasonable certainty what [would] be uncovered when a thorough background check . . .
21 is undertaken.” (*Id.*) The court did not rule on the motion prior to the hearing.
22
23
24
25
26
27
28

1 At the aggravation/mitigation hearing, Villareal argued in support of his motion by
2 informing the court he had been unable “to prepare a proper mitigation” case because the
3 court had denied his funding request. (RT 8/7/90 at 5.) Villareal, apparently reading
4 from a booklet authored by a defense organization, outlined “the types of things that are
5 obvious in a mitigation hearing” and that he would investigate if he traveled to Germany.
6 Those things included “documentary evidence, . . . birth records, school records, mental
7 health records, hospital records, institutional records, juvenile prisons, jails, mental
8 hospitals, military records, court records, any prior pre-sentence report, prior mental
9 health evaluations, probation records, [and] parole records.” Villareal also stated he
10 wished to interview witnesses in an “exhaustive search to find evidence in mitigation that
11 . . . the defendant himself may not know would be relevant to present to a court in a pre-
12 sentence hearing of this nature.” For example, Villareal wished to talk to “parents,
13 siblings, all other relatives, teachers, . . . employers, co-workers, . . . mental health
14 professionals, . . . [and] any persons that other people may notify me of who could be
15 helpful in the investigation for mitigating evidence.” (*Id.*) Despite this lengthy list of
16 evidence and witnesses, Villareal did not provide *specifics* regarding Apelt’s life and
17 situation or the witnesses he wished to interview.
18

19 The state did not take a position on the funding issue but opposed delaying the
20 aggravation/mitigation hearing any further. The state pointed out that Villareal had failed
21 to make the showing of necessity required by the court’s prior order. (*Id.* at 7–8.) The
22 court then denied the motion, finding Villareal had not offered a “valid reason” to travel
23

1 to Germany or to further continue the hearing. (*Id.* at 9.) The aggravation/mitigation
 2 hearing proceeded.
 3

4 The hearing began with the state presenting its aggravation case. During its
 5 presentation, the prosecutor called a police officer to testify. According to that officer, he
 6 and the prosecutor had traveled to Germany in search of aggravating evidence. The
 7 officer explained that during the trip to Germany, he had uncovered evidence of Apelt's
 8 criminal record, including a felony burglary conviction. (RT 8/7/90 at 16–22, 26.) The
 9 officer further explained he had spoken with Apelt's ex-wife and she had stated Apelt
 10 "would go over dead bodies to obtain money." The ex-wife also claimed Apelt had asked
 11 her to donate a kidney for money. (Doc. 326-2 at 24.) Finally, the officer explained that
 12 he had spoken with Dorn's parents who had informed him that they considered Apelt so
 13 dishonest that they once threatened to shoot Apelt if he visited their home. (*Id.* at 23–25,
 14 27.)

18 After the officer's testimony, the state presented its argument. The prosecutor
 19 claimed there were "no mitigating factors" and the case did not involve any "of the
 20 factors that are so frequently offered to avoid the death penalty, such as poor childhood."
 21 To stress this point, the prosecutor pointed out that Apelt "himself told the probation
 22 officer that he had a normal childhood."² (Doc. 326-2 at 34.) The prosecutor further
 23
 24

26 ² This reference regarding the probation officer was based on a pre-sentencing
 27 report prepared after the probation officer interviewed Apelt. During the interview Apelt
 28 had refused to discuss the crime but he had discussed his family history. Apelt had told
 the probation officer "there was no trouble in [his parents'] marital relationship" and he
 did not mention any "problems that occurred during his childhood years."

1 stated “there is no evidence of any mental disease or defect such that might mitigate his
2 crime and call for leniency.” (Doc. 326-2 at 34.) The prosecutor ended her argument by
3 claiming Apelt was a “psychopath or a sociopath” and by reiterating “there are no
4 mitigating factors.” (Doc. 326-2 at 35.) It was then Villareal’s turn to present a
5 mitigation case.

6 Villareal’s argument and presentation of evidence in mitigation was very weak.
7 One of Villareal’s first claims was a strange argument that the state had not established
8 Apelt’s crime was especially cruel. According to Villareal, the “many stab wounds”
9 were due to Cindy’s “strong struggle to survive,” and that struggle “made the crime not
10 cruel, not heinous, not depraved, but made it difficult.” (Doc. 326-2 at 40). Villarreal
11 then asked the court to find as mitigating circumstances Apelt’s age, remorse, new-found
12 Christian faith, lack of a serious criminal record, military service, good behavior at trial,
13 and the immunity agreement granted to Dorn. (*Id.* at 41–52.) He also asked the court
14 consider the wishes of Cindy’s sister and friend that Apelt not receive the death penalty,
15 the fact that Germany had abolished the death penalty, and the alleged disproportionality
16 of the death penalty in this case as compared to other murder cases. (*Id.*) Finally,
17 Villareal argued generally that there were mitigating factors relating to Apelt’s
18 background—including mental-health issues, a difficult childhood, low intelligence, and
19 lack of education—that he could not present because the court had denied his motion for
20 funds to travel to Germany. (*Id.* at 47-48.)

21 Villareal introduced eight exhibits he was somehow able to obtain from Germany.
22

1 The eight exhibits were:
2

- 3 1. A letter from Apelt's brother disputing that Apelt could have been
4 involved in the murder;
- 5 2. A letter from one of Apelt's friends stating Apelt had been a "good and
6 honest friend";
- 7 3. A letter from Apelt's uncle stating he had known Apelt since childhood
8 and Apelt had been raised to "become [a] good human being[]";
- 9 4. A letter from Apelt's mother stating, in part, "Even though my sons had
10 contact with the law, they were never capable of such violence. I can just
11 say as their mother, that they grew up normally。";
- 12 5. A letter from Apelt's sister stating "my brothers are and were no angels but
13 it takes a lot to commit such a brutal crime" and "I do not believe that my
14 brothers are able to commit such a mine [sic] and brutal crime。";
- 15 6. A letter from a doctor stating Apelt "was treated for various illnesses"
16 between August 1984 and July 1988;
- 17 7. A letter from a past employer stating Apelt's behavior from September
18 1984 to February 1987 was "unobjectionable"; and
- 19 8. A certificate from the German military stating Apelt had served from 1982
20 to 1983.

21 After hearing all of the evidence, the court set the formal sentencing for the following
22 week.

23 At the sentencing, the trial court found three aggravating factors had been proven:
24 Apelt procured Cindy's murder with the promise of pecuniary gain, *see* A.R.S. § 13-
25 703(F)(4); murdered Cindy with the expectation of pecuniary gain, *see* A.R.S. § 13-
26 703(F)(5); and murdered Cindy in an especially cruel, heinous or depraved manner, *see*

1 A.R.S. § 13-703(F)(6).³ (RT 8/13/90 at 7.) The court found no mitigation sufficiently
 2 substantial to warrant leniency and sentenced Apelt to death. (*Id.* at 8–9, 12–13.) Apelt
 3 appealed.
 4

5 Villareal handled Apelt’s direct appeal. While that appeal was pending, Villareal
 6 filed a petition for post-conviction relief (“PCR”). That petition was based on newly-
 7 discovered evidence that allegedly exonerated Apelt.⁴ The trial court eventually denied
 8 the PCR petition and Apelt petitioned the Arizona Supreme Court for review. *See State*
 9 *v. Apelt*, 861 P.2d 634, 638 (Ariz. 1993). The Arizona Supreme Court consolidated the
 10 petition for review with Apelt’s still-pending direct appeal. *Id.* On November 9, 1993,
 11 the Arizona Supreme Court rejected all of the claims in the petition and appeal and
 12 affirmed Apelt’s death sentence.
 13

14 The Arizona Supreme Court filed a petition for post-conviction relief on Apelt’s
 15 behalf and Apelt received new counsel for that petition. Because Villareal had already
 16

17 ³ In 2008, the Arizona Legislature reorganized and renumbered Arizona’s
 18 sentencing statutes. *State v. Chappell*, 225 Ariz. 229, 234, n.3, 236 P.3d 1176, 1181
 19 (2010). The Court cites the version in use at the time of Apelt’s trial.
 20

21 ⁴ It is worth pointing out that there was no understandable reason for Villareal to
 22 file, immediately after trial, a very limited PCR. At that time, Arizona courts allowed for
 23 PCR petitions to be filed while a direct appeal was pending. *See State v. Valdez*, 770
 24 P.2d 313, 319 (Ariz. 1989). Those PCR petitions could include allegations of ineffective
 25 assistance of counsel. *Id.* However, counsel had to be careful when filing a PCR petition
 26 because the failure to assert claims in a prisoner’s first PCR petition could result in that
 27 claim being precluded later. *State v. Gaffney*, 589 P.2d 914, 915 (Ariz. Ct. App. 1979)
 28 (discussing preclusion of matters not raised in first PCR). Moreover, it was well-
 established as of 1990 that counsel should not present claims asserting his own
 ineffectiveness. *State v. Suarez*, 670 P.2d 1192, 1204 (Ariz. Ct. App. 1983) (noting “it is
 improper for appellate counsel to argue his own ineffectiveness at trial”). Based on this,
 Villareal’s decision to file a PCR petition immediately after trial, limited to an
 evidentiary matter, was rather unusual. The record contains no explanation for this
 decision.

1 filed one such petition while the direct appeal was pending, this was Apelt's second PCR.
2
3 Apelt's new counsel ("PCR counsel") argued Villareal's performance had been both
4 deficient and prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). (ROA
5 PCR 2, Item 19.) As relevant here, PCR counsel contended Villareal performed
6 deficiently by failing to support his request for funds to travel to Germany with a more
7 specific factual and legal showing of why the trip was reasonably necessary to Apelt's
8 defense. (*Id.* at 4). PCR counsel also claimed Villareal performed deficiently by failing
9 "to investigate the mitigation through less expensive and more practical means, such as
10 hiring a German investigator in Germany." (*Id.* at 7).
11

12 In support of these claims regarding Villareal's performance, PCR counsel pointed
13 out Villareal had been aware Apelt had been hospitalized in Germany but Villareal
14 "failed to gather the records and background information necessary for a thorough and
15 complete mental health evaluation." Villareal had also "failed to investigate, develop,
16 and present substantial mental health evidence"; failed "to identify, locate and investigate
17 potential mitigation witnesses"; and "failed to properly develop or present adequately
18 expert testimony." (*Id.* at 4-5.) PCR counsel further claimed Villareal had failed to
19 present evidence that Apelt "came from a family background of gross poverty,
20 alcoholism and violence which included emotional, physical and sexual abuse"; that
21 Apelt "has a history of mental illness and has received psychiatric/psychotherapeutic
22 treatment in Germany"; that Apelt "was in special education as a child," "suffered from a
23 nervous disorder," and had attempted suicide; and that Apelt was "mentally, physically,
24

1 and sexually abused by older men throughout his childhood and mentally disturbed while
2 in school.” (*Id.* at 10-11.)

3 These claims by PCR counsel were supported by “a plethora of documents from
4 Germany obtained by . . . counsel thorough correspondence.” (*Id.* at 10.) The documents
5 submitted by PCR counsel included a “report on the situation of the Apelt family,”
6 prepared by the Dusseldorf Industrial Welfare Organization. The report was based on
7 information provided by Apelt’s mother and the social worker who had worked with the
8 family when Apelt was a child. (*Id.*, Ex. 2(a).) The documents also included an affidavit
9 from Apelt’s mother. (*Id.*, Ex. 2(d).) The report and affidavit recounted what follows.

10 Apelt’s father was an abusive alcoholic who beat his wife and children, including
11 Apelt, with an iron rod. (*Id.*, Ex. 2(a) at 4.) Apelt’s father sexually abused his wife and
12 attempted to engage in sexual misconduct against his daughters. (*Id.*) As a child, Apelt
13 was sexually molested by older men on two occasions. (*Id.*, Ex. 2(d).) The first time was
14 when Apelt was seven. He was taken from his yard and driven to a house where he was
15 forced to have intercourse. (*Id.*) The second time was when Apelt was thirteen. Apelt
16 had been walking home from school when he and a friend were tricked into going into a
17 cellar where a man holding a knife forced Apelt to have intercourse. (*Id.*) The incidents
18 left Apelt “mentally disturbed.” (*Id.*)

19 Apelt’s family was very poor while he was growing up. The family of nine lived
20 in a five-bedroom apartment and his father did not work on a regular basis. The family
21 survived on government support and his mother’s earnings as a cleaning lady. (*Id.*) The
22

1 children were forced to go to work at age fourteen. (*Id.*) All of the Apelt children
 2 “immediately after reaching emancipation, left home in order to escape the abusive,
 3 sexually abusive and violent situations.” (*Id.*)

4 Beyond the report from the governmental agency and affidavit from Apelt’s
 5 mother, PCR counsel also submitted a medical report from the Psychosomatic Clinic in
 6 Dusseldorf where Apelt had received in-patient treatment. (*Id.*, Ex. 2(b).) That medical
 7 report was from 1986 and it described Apelt as suffering from “shortness of breath,
 8 vertigo, and pain in the left arm.” (*Id.* at 1.) The report indicated Apelt may have
 9 suffered medical complications during his birth. (*Id.* at 2.) The report recounted that
 10 Apelt had attended special education because he spoke with a lisp. (*Id.* at 2.)

11 Finally, PCR counsel included an affidavit from Villareal in which he attested that
 12 “[a]ny lack of investigation during the penalty phase . . . was not a tactical or strategic
 13 decision.” (Doc. 326, Ex. 34.) Without any elaboration, Villareal averred Apelt “did not
 14 take an active role in the development of mitigation.” (*Id.*)

15 Based on this new evidence, PCR counsel moved for an evidentiary hearing on
 16 Apelt’s ineffective assistance claims. (*Id.* at 9.) The PCR court denied the request for a
 17 hearing and rejected all of the claims in the petition. On the ineffective assistance of
 18 counsel claims, the court held the claims were procedurally improper because they had
 19 not been presented in the first PCR. Alternatively, the court held Apelt’s claims of
 20 ineffective assistance of counsel at sentencing were not

21 colorable . . . because Apelt fails to make a sufficient preliminary showing
 22 that counsel’s performance fell below objective standards of

1
2
3

reasonableness, and fails to make a preliminary showing that, in light of the allegations, there exists a reasonable probability that the result of the trial or sentencing hearing would have been different.

4

(ROA PCR 2, Item 42 at 2.)

5
6
7
8
9
10
11
12
13
14
15
16
17

Following denial of a motion for rehearing, the PCR court permitted PCR counsel to withdraw but denied Apelt's request to reopen the PCR proceeding. (ROA PCR 2, at Items 62, 63.) After obtaining new counsel, Apelt filed a petition for review with the Arizona Supreme Court. In support of that petition, Apelt's new counsel submitted a psychiatric report prepared by Dr. Herschel Rosenzweig. (*Id.* at Ex. E.) Dr. Rosenzweig did not arrive at clear diagnoses but suggested the following possible diagnoses: attention-deficit disorder; post-traumatic-stress disorder; personality change due to organic brain damage; learning disorder not otherwise specified; borderline intellectual functioning; and personality disorder not otherwise specified. (*Id.* at 9.) The Arizona Supreme Court summarily denied review.

18
19
20
21
22
23
24
25
26
27
28

Apelt filed his federal petition for writ of habeas corpus on May 14, 1998. (Docs. 1, 46, 63.) Before this Court could resolve the petition, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In *Atkins*, the Supreme Court held the Eighth Amendment prohibits states from executing intellectually disabled persons. Based on the possibility that *Atkins* applied to Apelt, this Court stayed Apelt's sentencing-related claims to permit him to return to state court and exhaust an *Atkins* claim. (Doc. 117.) In the meantime, this Court considered and denied Apelt's conviction-related claims. (Docs. 132, 180, 210.)

Following an evidentiary hearing, the state court rejected Apelt's *Atkins* claim. (See Doc. 285, Ex. 27.) Apelt was then permitted to amend his federal habeas petition to raise an *Atkins* claim. (Doc. 275.) This Court also dismissed, in whole or in part, six of Apelt's sentencing-related claims on procedural grounds, six as plainly meritless, and one as not cognizable on habeas review. (*Id.*) The Court ordered merits briefing on the remaining claims: Claims 11, 14, 15, 17, 26, and 27. (*Id.*) Subsequently, the Court granted Apelt's motion for supplemental briefing and ordered the parties to address, in light of another United States Supreme Court decision, the procedural default and merits of Claims 1-B, 1-D, and 12. (Doc. 315.) The parties submitted the supplemental briefing and all of Apelt's remaining claims are now ripe for resolution.

DISCUSSION

Deciding Apelt’s claims requires resolution of two preliminary issues. First, the Court must determine the procedural status of the claims. That is, the Court must decide which specific claims Apelt raised in state court and how they were resolved on their merits. Second, the Court must determine the standard that applies to the claims raised and resolved in state court. Only after deciding these preliminary issues can the Court examine the merits of Apelt’s claims.

I. Procedural Status of Claims

“State prisoners seeking a writ of habeas corpus from a federal court must first exhaust their remedies in state court.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). To exhaust claims, a petitioner must “present his claims to the highest court of the

1 state.” *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011) (quotation omitted). And if
 2 “a petitioner tries to present a claim to the state court but is prevented from doing so by
 3 his failure to comply with a state procedural rule, the claim is ‘technically exhausted’ but
 4 procedurally defaulted.” *Nguyen v. Curry*, 736 F.3d 1287, 1292 (9th Cir. 2013). When a
 5 claim is procedurally defaulted, a federal court usually cannot reach the merits of that
 6 claim. *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007).

7 Before 2012, the procedural default of a particular claim would be excused “only
 8 if a habeas petitioner [could] demonstrate both ‘cause’ for the default and resulting
 9 ‘prejudice.’” *Nguyen*, 736 F.3d at 1292. But in 2012, the Supreme Court altered the
 10 landscape for some claims regarding ineffective assistance of counsel. In *Martinez v.*
 11 *Ryan*, 132 S. Ct. 1309 (2012), the Court explained:

12 Where, under state law, claims of ineffective assistance of trial counsel
 13 must be raised in an initial-review collateral proceeding, a procedural
 14 default will not bar a federal habeas court from hearing a substantial claim
 15 of ineffective assistance at trial if, in the initial-review collateral
 16 proceeding, there was no counsel or counsel in that proceeding was
 17 ineffective.

18 *Id.* at 1320. The Ninth Circuit reformulated this language in *Cook v. Ryan*, 688 F.3d 598,
 19 607 (9th Cir. 2012). According to *Cook*, a petitioner may establish cause for a procedural
 20 default “by demonstrating two things: (1) ‘counsel in the initial-review collateral
 21 proceeding, where the claim should have been raised, was ineffective under the standards
 22 of *Strickland* . . .’ and (2) ‘the underlying ineffective-assistance-of-trial-counsel claim is a
 23 substantial one, which is to say that the prisoner must demonstrate that the claim has
 24 some merit.’” *Id.*

1 The Court previously addressed the procedural status of Claims 11, 14, 15, 17, 26,
 2 and 27 and concluded those claims should proceed to a merits decision. (Doc. 275). But
 3 during early briefing on the procedural status of Claims 1-B, 1-D, and 12, Respondents
 4 argued those claims were “procedurally barred from federal review.” (Doc. 48 at 47, 52.)
 5 The Court agreed and found Claims 1-B, 1-D, and 12 procedurally defaulted. But that
 6 decision was before *Martinez*, meaning the Court must now reevaluate the status of those
 7 claims.

8 According to Apelt, the default of Claims 1-B, 1-D, and 12 is excused under
 9 *Martinez* by Villareal’s ineffective performance as PCR counsel. (Doc. 326.)
 10 Respondents’ contrary position is slightly confusing. It is undisputed Respondents
 11 previously argued these claims were procedurally defaulted. But Respondents now point
 12 out the state court made an alternative merits ruling on claims 1-B and 12.⁵ (Doc. 335 at
 13 8.) Based on that alternative merits ruling, Respondents argue Claims 1-B and 12 “fall
 14 outside *Martinez*’s limited reach.” (Doc. 335 at 8.) As best as can be determined,
 15 Respondents’ position is as follows. Claims 1-B and 12 were procedurally defaulted and
 16 should be barred from federal review. But if this Court were to find *Martinez* applicable
 17 such that the procedural default might be excused, the Court would have to consider the
 18 state court’s alternative merits ruling. This issue matters because the standard of review
 19
 20
 21
 22
 23
 24
 25
 26

27 ⁵ Respondents argue “Claim 1-D was never presented in state court.” (Doc. 335 at
 28 16 n.6). Thus, the state court’s alternative merits ruling could not have resolved the
 claim.

1 differs when evaluating a state court ruling on the merits versus a claim never addressed
2 by a state court.
3

4 Normally, procedural default occurs when a claim is not raised in state court.
5 Thus, a federal court using *Martinez* to excuse a procedural default usually results in the
6 court examining the claim *de novo*. But in this case, the state court found Claims 1-B and
7 12 procedurally defaulted *and* rejected them on their merits. In these circumstances,
8 Respondents are correct that excusing the procedural default simply means the Court
9 must consider the merits ruling.
10

11 The Ninth Circuit recently addressed a situation very similar to that presented
12 here. In *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014), a state petition for post-
13 conviction relief included a claim for ineffective assistance of counsel based on counsel's
14 conduct at sentencing. The state court rejected that claim. In doing so, the state court
15 held the claims procedurally improper and without merit. *Id.* at 383. The Ninth Circuit
16 held that even assuming *Martinez* could excuse the procedural issue, the alternative
17 merits ruling must still receive the normal deference applicable to state court rulings. *Id.*
18 (“AEDPA deference applies to this alternative holding on the merits.”).
19

20 Given the holding in *Clabourne*, the fact that the state court found Claims 1-B and
21 12 procedurally improper does not mean the Court can ignore the alternative merits
22 ruling. Instead, the Court must accept that the two claims were resolved by the state
23 court on their merits and review their rejection under the deferential standard applicable
24 to Apelt's other claims.
25
26
27
28

II. General Standard for Obtaining Relief

Almost all of Apelt’s claims are governed by the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Pursuant to 28 U.S.C. § 2254(d), a petitioner is not entitled to habeas relief on any claim unless the state court’s adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court has emphasized that “an *unreasonable* application of federal law is different from an *incorrect* application of federal law.” *Williams v. Taylor*, 529 U.S. 362, 410 (2000). Thus, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 411. Rather, the application must be “objectively unreasonable.” *Id.* at 409. This distinction creates “a substantially higher threshold” for obtaining relief than *de novo* review. *Schriro v. Landigan*, 550 U.S. 465, 473 (2007). Thus, AEDPA imposes a “highly deferential standard for evaluating state-court rulings,” *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), and “demands that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011). And even “[w]here a state court’s

1 decision is unaccompanied by an explanation, the habeas petitioner's burden still must be
 2 met by showing there was no reasonable basis for the state court to deny relief." *Id.* at
 3 784.

4 "[R]eview under § 2254(d)(1) is limited to the record that was before the state
 5 court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388,
 6 1398 (2011) (holding that "the record under review is limited to the record in existence at
 7 that same time, *i.e.*, the record before the state court."); *see Murray v. Schriro*, 745 F.3d
 8 984, 998 (9th Cir. 2014) ("Along with the significant deference AEDPA requires us to
 9 afford state courts' decisions, AEDPA also restricts the scope of the evidence that we can
 10 rely on in the normal course of discharging our responsibilities under § 2254(d)(1).").
 11 Evidentiary development becomes available only if § 2254(d)(1) is satisfied. *See*
 12 *Pinholster*, 131 S. Ct. at 1411; *Sully v. Ayers*, 725 F.3d 1057, 1075–76 (9th Cir. 2013);
 13 *Henry v. Ryan*, 720 F.3d 1073, 1093 n.15 (9th Cir. 2013). That is, the record can be
 14 expanded only once a petitioner shows there was no reasonable basis for the state court to
 15 have denied relief.

16 **III. Claim 12**

17 In Claim 12, Apelt alleges Villareal performed ineffectively at sentencing by
 18 failing to investigate and present mitigating evidence. Apelt asserts Villareal was
 19 obligated to conduct a "thorough, multi-generational social history." (Doc. 326 at 43.)
 20 According to Apelt, Villareal's failure or inability to do so led to the omission of "classic
 21 mitigating evidence" about Apelt's background and mental health. (*Id.*) As described
 22

1 above, the second PCR court's alternative ruling denying Claim 12 was a decision on the
2 merits. Accordingly, this Court must determine whether there is any reasonable
3 argument that Villareal's performance at sentencing met the well-established
4 constitutional minimum for effective assistance of counsel. In short, there is no such
5 reasonable argument.

6

7 **A. Standard for Claim of Ineffective Assistance of Counsel**

8 As a claim of ineffective assistance of counsel, Claim 12 is governed by the
9 principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under
10 *Strickland*, Apelt must show Villareal "provided deficient assistance and that there was
11 prejudice as a result." *Richter*, 562 U.S. at 104. "Deficient assistance" requires a
12 showing that Villareal's "representation fell below an objective standard of
13 reasonableness." *Strickland*, 466 U.S. at 688. And "prejudice" requires establishing "a
14 reasonable probability that, but for [Villareal's] unprofessional errors, the result of the
15 proceeding would have been different." *Id.* at 694.

16 The inquiry under *Strickland* is meant to be highly deferential and "every effort
17 [must] be made to eliminate the distorting effects of hindsight." *Id.* at 689. Under
18 AEDPA, *Strickland* must be applied in a "doubly deferential" way. *Knowles v.*
19 *Mirzayance*, 556 U.S. 111, 123 (2009). That is, "the question is not whether [Villareal's]
20 actions were reasonable. The question is whether there is any reasonable argument that
21 [Villareal] satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. 86 at 105. As
22 explained above, the Court must answer this question using only the evidence presented
23

1 to the state court.⁶ Therefore, the evidence generated during these federal proceedings
 2 will not be considered.⁷
 3

4 **B. Villareal's Performance was Deficient**

5 In general, counsel in a capital case has an “obligation to conduct a thorough
 6 investigation of the defendant’s background.”⁸ *Williams*, 529 U.S. at 396. While the
 7 exact contours of that obligation may vary, “[c]ertain forms of investigation are
 8 fundamental to preparing for virtually every capital sentencing proceeding. At the very
 9 least, counsel should obtain readily available documentary evidence such as school,
 10 employment, and medical records, and obtain information about the defendant’s character

13
 14 ⁶ The exact evidence the Court may consider is complicated in one respect. When
 15 conducting its analysis, this Court must review the “last reasoned state court opinion.”
Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). And when the state’s highest court denies
 16 the claim summarily, the federal court looks through to the last reasoned decision. *See*
Johnson v. Williams, 133 S. Ct. 1088, 1094 n.1 (2013). The last reasoned decision here is
 17 that of the second PCR court, meaning one would expect the record to be limited to that
 18 available to the second PCR court. The Ninth Circuit recently suggested, however, that
 19 when looking through to the last reasoned state court decision, a court may review
 20 evidence not presented to the court that made that decision. *Cannedy v. Adams*, 706 F.3d
 21 1148, 1159 & n.5 (9th Cir. 2013). In *Cannedy*, the “last reasoned state court opinion”
 22 was from the California Court of Appeals but the petitioner had submitted new evidence
 23 when seeking review by the California Supreme Court. The Ninth Circuit held it was
 24 proper to examine the evidence submitted to the California Supreme Court. *Id.* The
 25 Court will do the same here and consider the evidence presented to the trial court as well
 26 as the Arizona Supreme Court. But the evidence presented only to the Arizona Supreme
 27 Court is of little weight. Therefore, the result would be the same even if the Court were
 28 to ignore that evidence.

7 The evidence offered by habeas counsel presents a substantially more detailed
 8 account of the alleged physical and sexual abuse Apelt and his family suffered at the
 9 hands of his father; evidence that Apelt suffered from developmental delays, intellectual
 10 deficits, and mental health problems; and records showing he was discharged from the
 11 army for “mental inadequacy.” (See Doc. 326, Ex’s 1, 4, 9, 11, 17, 26.)

8 The Court is aware that determining whether the state court reasonably applied
 9 federal law requires examination of the law at the time the state court made its decision.
Greene v. Fisher, 132 S. Ct. 38, 44 (2011). But as recently recognized by the Ninth
 10 Circuit, later developments in the law can “provide[] direction for determining . . . what
 11 constitutes an unreasonable application of Strickland.” *Andrews v. Davis*, No. 09-99012,
 12 2015 WL 4636957, at *16 (9th Cir. Aug. 5, 2015).

1 and background.” *Robinson v. Schriro*, 595 F.3d 1086, 1108-09 (9th Cir. 2010) (citations
 2 omitted). A mitigation investigation should also “include inquiries into social
 3 background and evidence of family abuse,” *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th
 4 Cir. 2005), as well as “evidence of mental impairment” such as that found in “mental
 5 health records.” *Lambright v. Schriro*, 490 F.3d 1103, 1117 (9th Cir. 2007) (quotations
 6 omitted). “Although counsel will typically begin the investigation by interviewing the
 7 defendant, the investigation cannot end there unless the ‘defendant has given counsel
 8 reason to believe that pursuing certain investigations would be fruitless or even
 9 harmful.’” *Robinson*, 595 F.3d at 1109 (quoting *Strickland*, 466 U.S. at 691).

10
 11
 12
 13 Villareal clearly did not meet these responsibilities. Based on the state court
 14 record, Villareal did not collect records from social service agencies, welfare agencies,
 15 doctors, hospitals, or employers.⁹ Villareal did not interview potential mitigation
 16 witnesses, including Apelt’s family members, or consult with any mental health experts.
 17 Villareal did not obtain Apelt’s readily-available mental health records from the Pinal
 18 County jail which described Apelt receiving various medications as well as Apelt’s
 19 placement on suicide watch. And Villareal did not present a single witness at the
 20 sentencing hearing. This was deficient performance.¹⁰
 21
 22
 23

24
 25
 26
 27
⁹ Villareal did supply the trial court with one letter from a doctor and one letter
 28 from an employer. Those documents, however, had very minimal value. The letter from
 the doctor stated only that Apelt had been treated for unnamed illnesses. The letter from
 the employer indicated Apelt was an “unobjectionable” employee. It is unclear why
 these documents were submitted.

¹⁰ Courts have consistently found deficient performance in cases where defense
 counsel failed to obtain records, interview witnesses, or otherwise perform an adequate

1 In reaching the conclusion that Villareal's performance was deficient, the Court
 2 has taken into account Villareal's statement that Apelt did not actively participate in the
 3 sentencing phase of trial. It is clear, however, that when certain avenues of investigation
 4 are foreclosed, counsel must seek "alternative sources of information and evidence."
 5 *Hamilton v. Ayers*, 583 F.3d 1100, 1118 (9th Cir. 2009) (quoting *Silva v. Woodford*, 279
 6 F.3d 825, 847 (9th Cir. 2002)). Assuming Villareal attempted but failed to obtain
 7 mitigating information from Apelt, Apelt's "lack of cooperation [did] not eliminate
 8 [Villareal's] duty to investigate." *Id.* That is, Villareal could not "rely solely on
 9 information provided by [Apelt] and his family in determining the extent of a proper
 10 mitigation investigation." *Black v. Bell*, 664 F.3d 81, 104 (6th Cir. 2011) (citing
 11 *Rompilla v. Beard*, 545 U.S. 374, 388–89 (2005)). Rather, any noncooperation by Apelt
 12 simply meant Villareal still had a duty to conduct an independent investigation.¹¹

13 investigation at sentencing. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 39-40 (finding
 14 deficient performance where counsel "had only one short meeting with [the defendant]
 15 regarding the penalty phase" and "did not . . . interview any members of [the defendant's]
 16 family" or obtain school records); *Summerlin*, 427 F.3d at 631 (finding deficient
 17 performance where counsel "conducted no investigation of [the defendant's] family and
 18 social history" and "did not speak with [the defendant's] family or friends"); *Robinson*,
 19 595 F.3d at 1109-10 (finding deficient performance where counsel "conducted no
 20 investigation of Robinson's family history; he did not speak with any member of
 21 Robinson's family; he did not request school, medical, or employment records; and he
 22 did not request a mental health evaluation"); *Hamilton*, 583 F.3d at 1115 ("Counsel acted
 23 deficiently in failing to pursue . . . classic mitigating evidence."); *Lambright*, 490 F.3d at
 24 1121 (finding that counsel's "limited, cursory, and incomplete presentation of mitigating
 25 evidence . . . falls far below that which any reasonably competent attorney would provide
 in a capital case"); *Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998) (finding
 26 deficient performance where counsel "engaged in virtually no investigation and presented
 27 very little argument at the sentencing phase of the trial").

28 ¹¹ The present case can be compared to another capital trial that occurred around
 the same time as Apelt's trial. The other case also involved a seemingly non-cooperative
 defendant and an alleged failure to investigate and present mitigating evidence.
Landrigan v. Schriro, 441 F.3d 638 (9th Cir. 2006), *rev'd* 550 U.S. 465 (2007). In that
 case, counsel's investigation included obtaining "several medical documents indicating

No doubt conducting an adequate mitigation investigation was hampered by Villareal’s need to obtain funding to travel to Germany. But Villareal’s performance nevertheless was legally deficient. Villareal failed to provide additional information to the trial court, as invited by the court, which perhaps would have persuaded the court to authorize funding for travel to Germany. There is nothing in the record explaining why Villareal decided not to press the court with the details supporting an investigation in Germany. It is telling that PCR counsel obtained voluminous material regarding mitigation without traveling to Germany. Again, the record does not explain why Villareal was unable to obtain the same information with or without a trip to Germany.¹²

Respondents disagree and argue Villareal’s conduct might be explained as a strategic decision to focus on good character evidence rather than evidence of Apelt’s mental illness. (Doc. 335 at 41.) This argument ignores that Villareal intended to seek information about Apelt’s mental health, including his hospitalization in Germany. (RT

[the defendant had] a long history of substance abuse.” *Id.* at 643. Counsel also arranged for a psychological examination of the defendant and spoke with two of the defendant’s family members. The Ninth Circuit described that investigation as “rather asthenic” that “might well” be “prejudicially asthenic” in some circumstances. *Landrigan v. Stewart*, 272 F.3d 1221, 1227 (9th Cir. 2001). But relief in that case was denied because the defendant stated, on the record, that he did not wish to present mitigating evidence. The “rather asthenic” investigation conducted in that case is more than what was performed in this case and there is no indication Apelt instructed Villareal not to present mitigating evidence.

¹² Under the Ethical Rules governing Arizona attorneys at the time, Villareal had an ethical obligation to either provide competent representation or move to withdraw. State Bar of Arizona Ethics Opinion 86-04 (stating ER 1.16 required attorney to “withdraw from the representation of a client if . . . the representation [would] result in violation of the Rules of Professional Conduct” and providing “competent representation” was required by ER 1.1). If the court’s refusal to provide adequate funding rendered Villareal unable to provide competent representation, Villareal had an ethical obligation to seek to withdraw. This presupposes that Villareal would have pursued with the court all persuasive means of obtaining funding.

1 6/11/90 at 8; RT 8/7/90 at 5.) Thus, Apelt's mental health was not an issue Villareal
2 strategically neglected. Rather, he knew it was material evidence and, inexplicably,
3 failed to pursue it. *See Wiggins*, 539 U.S. at 527 (finding deficient performance where
4 "known evidence would lead a reasonable attorney to investigate further").
5

6 Respondents' argument also ignores that Villareal failed to present evidence of
7 Apelt's childhood poverty and abuse—humanizing information that would have been
8 within the parameters of good character evidence. Moreover, Villareal himself admitted
9 there was no strategic basis for his failure to investigate or present more relevant
10 mitigating evidence.
11

12 In sum, Villareal "did not perform any real investigation into mitigating
13 circumstances, and gave no tactical reasons for his failure to do so." *Robinson*, 595 F.3d
14 at 1109 (quotation omitted). The deficits of the mitigation investigation were neither
15 strategic nor tactical and Villareal did not seek alternative means of investigation when
16 the court denied his requests for funds to travel to Germany. No fairminded jurist could
17 conclude Villareal's performance was sufficient.
18

19 **C. Apelt was Prejudiced by Villareal's Deficient Performance**

20 Having established Villareal's performance was deficient, Apelt must establish he
21 was prejudiced as a result. Under *Strickland*, Villareal's performance was prejudicial if
22 there is a reasonable probability that the result of the proceeding would have been
23 different absent Villareal's deficient performance. *Strickland*, 466 U.S. at 694. A
24 "reasonable probability" is "less than the preponderance more-likely-than-not standard."
25
26
27
28

Summerlin, 427 F.3d at 643. Rather, it is “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. In the specific context of capital sentencing, “it is not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances.” *Correll v. Ryan*, 539 F.3d 938, 951-52 (9th Cir. 2008). Instead, the focus should be on “the magnitude of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented.” *Hovey v. Ayers*, 458 F.3d 892, 929 (9th Cir. 2006) (quotation omitted).

Given Villareal’s weak presentation at sentencing, the prejudice inquiry is straightforward. Villareal’s case in mitigation contained no evidence of Apelt’s alleged poverty, no evidence of childhood physical abuse, no evidence of repeated childhood sexual abuse, and no meaningful evidence of mental health problems. The only information available to the sentencing court regarding Apelt’s childhood seemed to show Apelt had no problems during his childhood. (ROA 308 at 8.) In fact, the prosecutor stressed Apelt’s alleged “normal childhood” and Villareal also submitted a statement from Apelt’s mother stating Apelt had a normal childhood.¹³ (Doc. 326-2 at 34.) In short, the sentencing court was presented with a picture of Apelt’s background that bore “no relation” to the picture presented by PCR counsel with apparently reliable evidence. *Rompilla*, 545 U.S. at 392-93. The magnitude of the difference between the

¹³ At sentencing, Apelt's mother stated in a letter Apelt had a "normal childhood." But during the PCR proceedings, she stated Apelt's childhood contained numerous traumatic events. The present record contains no way of resolving this inconsistency.

1 mitigating evidence that was presented at sentencing and the evidence that could have
 2 been presented through a competent investigation is sufficient to undermine confidence
 3 in the outcome. No fairminded jurist could conclude otherwise.

4

5 **D. Evidentiary Development**

6

7 Apelt has established the PCR court's denial of Claim 12 was an unreasonable
 8 application of *Strickland* under 28 U.S.C. § 2254(d)(1). Apelt seeks development of the
 9 claim, including expansion of the record and an evidentiary hearing. (Doc. 326 at 53–
 10 55.) At the evidentiary hearing, Apelt plans to present testimony from Villareal, a mental
 11 health expert, social history witnesses, and Apelt's family members. (*Id.* at 54–55.)
 12 Because § 2254(d)(1) does not preclude relief on Claim 12, *Pinholster* does not prohibit
 13 evidentiary development in this Court. *Pinholster*, 131 S. Ct. at 1400–01 (“Section
 14 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas
 15 relief”); *see Henry*, 720 F.3d at 1093 n.15 (explaining that *Pinholster* bars evidentiary
 16 hearing unless Apelt satisfies § 2254(d)). As the Eleventh Circuit recently explained:
 17

18

19 Nothing in *Pinholster*, or any other principle of habeas corpus, bars a
 20 District Court from conducting an evidentiary hearing where, as here: (1)
 21 the federal claim was adjudicated on the merits in state court; (2) there is a
 22 determination based only on the state court record that the petitioner has
 23 cleared the § 2254(d) hurdle; and (3) the habeas petitioner tried, but was not
 24 given the opportunity to develop the factual bases of the claim in state court
 within the meaning of 28 U.S.C. § 2254(e)(2).

25 *Madison v. Commissioner, Alabama Dept. of Corrections*, 761 F.3d 1240, 1249–50 (11th
 26 Cir. 2014) (footnote omitted). The Ninth Circuit has not provided clear guidance on
 27 whether an evidentiary hearing is required in cases such as this. *See, e.g., Bemore v.*
 28

Chappell, No. 12-99005, 2015 WL 3559153 (9th Cir. June 9, 2015) (granting relief without remanding for evidentiary hearing).

Having determined the denial of Apelt's IAC claims was objectively unreasonable, it is unclear whether an evidentiary hearing is required or advisable when deciding whether to grant relief. It is undisputed Villareal presented only a modicum of information and failed to investigate what appears to be substantial mitigating evidence PCR counsel later discovered and presented. Holding an evidentiary hearing would seemingly allow Apelt simply to present *more* evidence establishing Villareal's performance was defective. Perhaps an evidentiary hearing is appropriate to allow Respondents to challenge the veracity of Apelt's evidence. But Respondents have not so requested a hearing. Accordingly, the Court will order briefing on whether an evidentiary hearing should be held and, if so, the proposed scope of that hearing.

IV. Claims 1-B, 1-D, 11, 14, 15, 17, 26, and 27

Apelt has a variety of other claims, none of which entitle him to relief. Because resolution of these claims will be relevant should ultimate relief not be afforded on Claim 12, the Court will address them.

A. Claims 1-B and 1-D

In Claim 1-B, Apelt contends he was “severely mentally ill and grossly over-medicated” at the time of trial, and that Villareal was ineffective for failing to challenge his competency to stand trial. (See Doc. 326 at 16.) In Claim 1-D, Apelt makes the same

1 allegations with respect to his competence at sentencing.¹⁴ (*Id.*) Apelt is not entitled to
 2 relief on these claims.
 3

4 “Competence to stand trial requires that a defendant have (1) ‘a rational as well as
 5 factual understanding of the proceedings against him,’ and (2) ‘sufficient present ability
 6 to consult with his lawyer with a reasonable degree of rational understanding.’” *Stanley v.*
 7 *Cullen*, 633 F.3d 852, 860 (9th Cir. 2011) (quoting *Dusky v. United States*, 362 U.S. 402,
 8 402 (1960) (per curiam)). “A claim that counsel was deficient for failing to move for a
 9 competency hearing will succeed only when there are sufficient indicia of incompetence
 10 to give objectively reasonable counsel reason to doubt defendant’s competency, and there
 11 is a reasonable probability that the defendant would have been found incompetent to
 12 stand trial had the issue been raised and fully considered.” *Hibbler v. Benedetti*, 693 F.3d
 13 1140, 1149-50 (9th Cir. 2012) (quotations omitted).
 14

17 Respondents contend Villareal made a reasoned decision not to challenge Apelt’s
 18 competency and that the record contains no support for the proposition that Apelt was not
 19 competent to stand trial. (Doc. 335 at 20.) The Court agrees.
 20

21 Villareal did not neglect to consider the issue of Apelt’s competency. Prior to
 22 trial, co-counsel traveled to Germany, in part to investigate Apelt’s placement in a
 23 psychological institution there. Counsel did not find evidence to support the filing of a
 24

25 ¹⁴ Because, as Apelt concedes, the claims “share the same factual nexus” (Doc.
 26 326 at 16 n.6), the Court considers them together. The standard of review applicable to
 27 the two claims is different in that Claim 1-D was not addressed by the state court while
 28 Claim 1-B was addressed by the alternative ruling. Accordingly, AEDPA deference
 applies to Claim 1-B but not Claim 1-D. In the end, however, it does not matter as both
 claims fail regardless of the applicable standard.

1 motion to determine competency. (RT 6/11/90 at 7.) More significantly, the record does
 2 not support a finding that Apelt lacked a rational and factual understanding of the
 3 proceedings or the ability to consult with counsel with a reasonable degree of rational
 4 understanding.¹⁵
 5

6 Apelt was actively involved in his defense. He filed a *pro per* motion to change
 7 counsel. (ROA 237.) He complained Villareal failed to communicate adequately with
 8 him by phone or in writing; “refused to investigate specific details . . . that would
 9 exonerate [him],” including “autopsy reports, photos, initial police reports stating
 10 defendant is not suspected”; and failed to “forward requested materials from the legal
 11 library.” (*Id.*) Apelt also authored jailhouse notes to his brother which indicated Apelt
 12 was keenly aware of the factual details of his case, including the evidence against him,
 13 and was rationally communicating with counsel about his defense. (RT 5/8/90 at 61–63.)
 14

15 The record further shows Apelt was actively involved in the trial proceedings. For
 16 example, Apelt notified Villareal that certain jurors had observed him being escorted
 17 from the courtroom wearing shackles. (RT 4/26/90 (legal argument) at 3-4.) When
 18 Villareal recounted the incident to the judge, Apelt corrected Villareal’s description of
 19 the jurors’ location. (*Id.* at 3.) He drew a diagram of the jury box to help Villareal and
 20
 21
 22
 23
 24

25
 26 ¹⁵ In rejecting Apelt’s claim that appellate counsel’s ineffectiveness constituted
 27 cause to excuse the default of a claim alleging that the trial court committed
 28 constitutional error by failing to conduct a competency hearing, this Court determined
 that “the trial and sentencing record in this case would not alert a reasonable appellate
 attorney to the feasibility of a procedural incompetency claim.” (Doc. 132 at 16.)

1 the court identify the jurors who had seen him. (*Id.*) He also told Villareal that the
2 incident jeopardized his right to a fair trial. (*Id.*)

3 In addition, Apelt's trial testimony gave no cause for Villareal to doubt his
4 competence. Apelt recounted the travels that led him, Rudi, and Dorn to Mexico, San
5 Diego, and finally Phoenix. (RT 5/8/90 at 141–51.) He also testified at length and in
6 detail, recounting the events that led to his marriage and denying he had murdered Cindy.
7 (RT 5/8/90 at 140–77; RT 5/9/90 at 4–141.) Apelt even explained the purchase of the life
8 insurance policy as an investment for their children. (*Id.* at 156–57.) “That a defendant
9 is alert, unafraid to address the court, and able to use somewhat technical legal terms
10 appropriately is a factor suggesting that a competency hearing is not required.” *Stanley*,
11 633 F.3d at 861 (quotations omitted); *see Turrentine v. Mullin*, 390 F.3d 1181, 1209
12 (10th Cir. 2004) (recognizing that “evidence of a petitioner’s lucid and intelligible
13 testimony at trial refutes [a] claim of trial counsel’s failure to argue competency”).

14 To counter the idea that he was aware of the accusations against him and was
15 competent to assist counsel, Apelt relies on records indicating that at the time of his trial
16 he had been prescribed a number of medications, including Valium, Thorazine, Halcion,
17 Ativan, Parafon Forte, and Sinequan. (Doc. 326 at 18–19; *id.*, Ex. 36.) Prior to
18 sentencing, the medical director of inmate health services at the Pinal County Jail
19 determined that Apelt was “overmedicated” and removed some of the medications, but
20 left in place the Halcion, Valium and Parafon Forte prescriptions. (Doc. 326, Ex. 36.)

1 In addition, Apelt has submitted a letter, dated January 16, 2004, from Dr. Edward
2 Fisher, a pharmacology and toxicology expert who reviewed Apelt's medical records.
3 (Id., Ex. 38.) Dr. Fisher wrote that the medications Apelt was prescribed are powerful
4 drugs "generally considered to possess significant central nervous system (CNS)
5 depressant effects." (Id.) According to Dr. Fisher, when the drugs are prescribed in
6 combination, "the risk of adverse effects increases significantly." (Id.) Such "adverse
7 effects" include "oversedation, confusion, loss of self-control, impaired judgment, and
8 anterograde amnesia." (Id.)

9 Apelt asserts "the drugs [and] doses administered to him, likely interfered with his
10 ability to consult with his lawyer and understand the proceedings." (Doc. 326 at 19.)
11 Apelt does not, however, cite any evidence that the drugs did in fact affect his
12 competence. In *United States v. Shan Wei Yu*, 484 F.3d 979, 985 (8th Cir. 2008), the
13 Eighth Circuit found the defendant's consumption of Prozac, Seroquel, Ativan, and
14 sleeping pills did not require the trial court to conduct a competency hearing absent
15 evidence of incompetency. The court noted that "[n]o party suggested at trial . . . that Yu
16 was incompetent or unable to understand the proceedings, and Yu testified coherently as
17 to the nature of his defense." *Id.* The court also found "Yu's complaints about his
18 attorneys . . . evidence that Yu understood the case against him and was capable of
19 consulting with counsel." *Id.* As in *Yu*, the record here shows Apelt was aware of the
20 factual details of his case, communicated rationally with Villareal, and participated
21 actively in his defense.

1 Apelt also cites the fact that he had been placed on suicide watch while awaiting
 2 trial and had been admitted to the custody of the correctional health services on another
 3 occasion. (Doc. 326 at 18.) The fact that Apelt had a history of mental health problems
 4 was not in itself sufficient to show he was incompetent to stand trial. *See Hoffman v.*
 5 *Arave*, 455 F.3d 926, 938 (9th Cir. 2006) (“We have held that those with mental
 6 deficiencies are not necessarily incompetent to stand trial.”), *vacated on other grounds by*
 7 *Arave v. Hoffman*, 552 U.S. 117, 117-19 (2008) (per curiam)). And Apelt has failed to
 8 identify an instance in which he behaved irrationally, appeared not to understand the
 9 proceedings, or did not communicate effectively with Villarreal.

10
 11
 12
 13 In sum, Apelt has not met his burden of showing Villareal performed ineffectively
 14 under *Strickland* by failing to seek a competency hearing. There were not sufficient
 15 indicia of incompetence to give Villareal reason to doubt Apelt’s competency, and there
 16 was not a reasonable probability that Apelt would have been found incompetent if the
 17 issue been raised and considered. Claims 1-B and 1-D are denied.

18
 19 **B. Claim 11**

20
 21 Apelt’s Claim 11 alleges the trial court denied him “the tools of an adequate
 22 defense in violation of his rights under the Eighth and Fourteenth Amendments to the
 23 United State Constitution” when it denied counsel Villareal’s request to travel to
 24 Germany to investigate mitigating evidence. (Doc. 285 at 11-18.) The state court’s
 25 decision was not unreasonable.

1 On direct appeal, the Arizona Supreme Court rejected Apelt's argument that the
 2 trial court erred in denying his request for money to travel to Germany. The court noted
 3 “[a] defendant has a due process right to such assistance upon a . . . showing of
 4 necessity.” *State v. Apelt*, 861 P.2d 634, 650 (Ariz. 1993). In denying relief on this
 5 claim, the Arizona Supreme Court cited *Caldwell v. Mississippi*, 472 U.S. 320, 323
 6 n.1 (1985), which held there was “no deprivation of due process in the trial judge’s
 7 decision” to deny the appointment of defense experts where a defendant “offered little
 8 more than undeveloped assertions that the requested assistance would be beneficial.”
 9 The Arizona Supreme Court’s application of *Caldwell* was not unreasonable.
 10

11 In his motion for additional funding and in his arguments to the court, Villareal
 12 offered only generalized assertions that further investigation in Germany would be
 13 beneficial. Prior to the aggravation/mitigation hearing, the only specific areas of
 14 potential mitigating evidence counsel mentioned were a psychological hospitalization and
 15 a difficult birth. (RT 6/11/90 at 7–8.) The court provided Villareal an opportunity to
 16 supplement his request, but he failed to provide the additional information. (*Id.* at 10;
 17 ROA 302.) Villareal again failed to offer any specific information when he renewed his
 18 funding request and moved for a continuance prior to the aggravation/mitigation hearing.
 19 (ROA 307.) At the hearing, Villareal listed the types of records and witnesses that should
 20 be reviewed in a mitigation case but again failed to provide *specific* information in
 21 support of his request for funding. (RT 8/7/90 at 5.)
 22

23 Villareal’s submissions to the trial court did not make the “threshold showing” that
 24

1 additional funds “would be helpful.” *Williams v. Stewart*, 441 F.3d 1030, 1054 (9th Cir.
 2 2006). In a case presenting analogous facts, the Ninth Circuit held a trial court did not
 3 commit constitutional error when it denied funding for an investigator to travel to West
 4 Virginia in search of mitigating information. *Id.* The court noted “[t]he only information
 5 [the petitioner] submitted to the trial court regarding this request was a list of many
 6 people who lived in the area of West Virginia where [he] was raised.” *Id.* The petitioner
 7 had not proffered “any information other than possible witness names and that they
 8 would be helpful.” *Id.*

12 The information provided by Villareal was similarly undeveloped. Beyond the
 13 fact that Apelt was born and raised in Germany, Villareal failed to support his argument
 14 that it was necessary for him to travel to Germany to gather mitigating evidence; nor did
 15 he file the statement of necessity required by the trial court. Because Villareal offered
 16 only “undeveloped assertions” in support of his request for funds to travel to Germany,
 17 the Arizona Supreme Court did not unreasonably apply *Caldwell* in denying this claim.
 18 Apelt is not entitled to relief on Claim 11.

21 **C. Claim 14**

22 Apelt’s Claim 14 alleges the state courts violated his rights under the Eighth and
 23 Fourteenth Amendments by finding he procured the commission of the murder under
 24 A.R.S. § 13-703(F)(4). The Court disagrees.

26 Section 13-403(F)(4) establishes an aggravating factor where the defendant
 27 “procured the commission of the offense by payment, or promise of payment, of anything

1 of pecuniary value.” The factor applies “not only to hired killer situations, but also to
 2 those cases in which the murder was committed with a ‘financial motivation.’” *State v.*
 3 *Adamson*, 665 P.2d 972 (Ariz. 1983).

4 The trial court found the factor had been proven: “The defendant conspired with
 5 another to assist in the commission of the offense with the expectation and promise to the
 6 other to share in the receipt of the insurance proceeds on the life of the victim in the sum
 7 of \$400,000.” (RT 8/13/90 at 7.) The Arizona Supreme Court affirmed the trial court’s
 8 finding:

9 We agree that the evidence showed beyond a reasonable doubt that [Apelt]
 10 killed Cindy in order to receive the \$400,000 insurance proceeds (§ 13–
 11 703(F)(5)). No further discussion is necessary.

12 We also agree that the evidence establishes beyond a reasonable doubt that
 13 [Apelt] procured Rudi’s assistance in the murder by promising him a share
 14 of the insurance proceeds, thus satisfying the § 13-703(F)(4) factor.

15 *Apelt*, 861 P.2d at 652.

16 On habeas review of a state court’s finding of an aggravating factor, a federal
 17 court is limited to determining “whether the state court’s [application of state law] was so
 18 arbitrary and capricious as to constitute an independent due process or Eighth
 19 Amendment violation.” *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). In making that
 20 determination, the reviewing court must inquire “whether, after viewing the evidence in
 21 the light most favorable to the prosecution, any rational trier of fact could have found that
 22 the factor had been satisfied.” *Id.* at 781 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319
 23 (1979)).
 24
 25
 26
 27
 28

1 In addition, under section 28 U.S.C. § 2254(d) federal courts “must apply the
2 standards of *Jackson* with an additional layer of deference.” *Juan H. v. Allen*, 408 F.3d
3 1262, 1274 (9th Cir. 2005); *see Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (per
4 curiam) (noting *Jackson* claims are “subject to two layers of judicial deference”);
5 *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (per curiam). Therefore, on habeas review, “a
6 federal court may not overturn a state court decision rejecting a sufficiency of the
7 evidence challenge simply because the federal court disagrees with the state court. The
8 federal court instead may do so only if the state court decision was ‘objectively
9 unreasonable.’” *Johnson*, 132 S. Ct. at 20162 (quoting *Renico v. Lett*, 559 U.S. 766, 773
10 (2010)).

11 Although Apelt asserts “there is no evidence that [he] promised Rudi anything in
12 exchange for Rudi’s role in the murder” (Doc. 285 at 19), the gravamen of his argument
13 is that Dorn’s testimony was inconsistent, unreliable, and not sufficient to support a
14 finding that Apelt procured his brother’s assistance in the murder. This argument is
15 unconvincing.

16 Dorn testified that on the day before the murder Apelt brought Cindy’s life
17 insurance paperwork to the motel where Dorn and Rudi were staying and told them “we
18 can have a lot of money, and we don’t have to worry anymore . . . if he would go out and
19 kill Cindy.” (RT 5/2/90 at 51.) Apelt contends that this is inconsistent with testimony in
20 which Dorn stated Apelt said “he” would be rich if Cindy died. (See *id.* at 49.) The fact
21 that Apelt used the singular pronoun on an earlier occasion is not inconsistent with a
22

1 finding that he intended to share the insurance proceeds with Rudi in exchange for Rudi's
 2 participation in the murder.
 3

4 Apelt challenges Dorn's credibility because she was a coconspirator who testified
 5 against the brothers under a grant of immunity. On habeas review, however, this Court is
 6 not permitted to re-assess Dorn's credibility. *See Rice v. Collins*, 546 U.S. 333, 341-42
 7 (2006) ("Reasonable minds reviewing the record might disagree about . . . credibility, but
 8 on habeas review, that does not suffice to supersede the trial court's credibility
 9 determination."). In addition, all evidence must be considered in the light most favorable
 10 to the prosecution, *Jeffers*, 497 U.S. at 782, and if the facts support conflicting inferences,
 11 such as Dorn's putatively inconsistent testimony, a reviewing court "must presume—
 12 even if it does not affirmatively appear in the record—that the trier of fact resolved any
 13 such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*,
 14 443 U.S. at 326.

15 Applying the levels of deference required under *Jackson* and AEDPA, the Court
 16 finds Apelt is not entitled to relief. A rational trier of fact could have concluded, as the
 17 trial court did, that the factor was proven, and the decision of the Arizona Supreme Court
 18 affirming that finding was not objectively unreasonable. Claim 14 is denied.¹⁶
 19

20
 21
 22
 23
 24
 25
 26
 27
 28

¹⁶ In his merits brief Apelt raised for the first time an argument that his constitutional rights were violated because the (F)(4) and F(5) factors were "double-counted" in aggravation. (See Doc. 285 at 21.) Apelt did not pursue this argument in his reply brief. (See Doc. 301 at 13-18.) Even if Apelt has properly raised such a claim, the holding in *State v. Carlson*, 48 P.3d 1180 (Ariz. 2002), does not, as he contends, entitle him to habeas relief. In *Carlson*, the Arizona Supreme Court held that "[e]ven if there is but one transaction leading to the murder, a judge can properly use a single fact to

1

D. Claim 15

Apelt's Claim 15 alleges the state courts violated his rights under the Eighth and Fourteenth Amendments by finding the murder was committed in an especially cruel, heinous, or depraved manner under A.R.S. § 13-703(F)(6). Apelt is incorrect.

1

The (F)(6) aggravating factor, phrased in the disjunctive, is satisfied if the murder is either especially heinous, or cruel, or depraved. *See, e.g., State v. Murray*, 906 P.2d 542, 570 (Ariz. 1995). The especially cruel prong is satisfied “if the victim consciously experienced physical or mental pain and suffering prior to dying.” *State v. Lopez*, 847 P.2d 1078, 1090 (Ariz. 1992). Evidence about “[a] victim’s certainty or uncertainty as to his or her ultimate fate can be indicative of cruelty and heinousness.” *State v. Gillies*, 691 P.2d 655, 660 (Ariz. 1984). Factors supporting a finding that a murder was heinous and depraved include the infliction of gratuitous violence and the helplessness of the victim. *See Gretzler*, 659 P.2d at 11.

8

The trial court found the (F)(6) factor was satisfied: "The nature of the wounds (fifty-three separate injuries, five stab wounds and a cut of the throat which nearly decapitated the victim, and a shoe print on her face) establish that the killing was especially cruel to the victim or heinous or depraved in its execution." (RT 8/13/90 at 7.)

24

support the application of more than one aggravating factor" so long as he does not give full weight to each factor. 48 P.3d at 1191. While the court noted that *Apelt* was the "rare" instance where both the (F)(4) and (F)(5) had been applied, the court also explained that it "did not consider the single transaction problem in that case." *Id.* *Carlson* does not, therefore, support *Apelt*'s argument that double-counting is a grounds for relief.

1 The Arizona Supreme Court upheld the trial court's finding, noting the circumstances of
2 the murder supported the finding. *Apelt*, 861 P.2d at 652-53.
3

4 Apelt contends the Arizona Supreme Court unreasonably applied *Jackson*, and
5 made an unreasonable determination of the facts, in concluding that the (F)(6) factor had
6 been established. (Doc. 285 at 29.) Specifically, he asserts “[t]here was simply no
7 evidence that the victim consciously suffered during her death.” (*Id.* at 28.) Apelt is
8 wrong.
9

10 The Court's review of this claim is limited to assessing “whether, after viewing the
11 evidence in the light most favorable to the prosecution, any rational trier of fact could
12 have found that the factor had been satisfied.” *Jeffers*, 497 U.S. at 781 (quoting *Jackson*,
13 443 U.S. at 319). Here, a rational fact-finder, viewing the evidence in the light most
14 favorable to the State, could have inferred, as the state courts did, that Cindy was
15 conscious and suffered mental and physical pain before being killed by the Apelts.
16 Evidence suggested Cindy was forcibly removed from the apartment and was bound at
17 some point. Scraped knees and evidence of a defensive wound indicated she was
18 conscious before she suffered her fatal wounds. Apelt contends this evidence, along with
19 evidence of the numerous nonfatal wounds Cindy suffered, does not conclusively prove
20 she was conscious and experienced pain before she died because the coroner's testimony
21 about the nature and timing of the injuries was equivocal. (Doc. 285 at 27-28.) But
22 interpreted in the light most favorable to the prosecution, this evidence was sufficient for
23 a rational fact-finder to conclude Cindy was conscious and suffered mental and physical
24
25
26
27
28

1 pain before she was killed.
 2

3 The state court's denial of Claim 15 was not objectively unreasonable.¹⁷ Apelt is
 4 not entitled to relief on Claim 15.

5 **E. Claim 17**
 6

7 Apelt's claim 17 alleges the trial court failed to properly consider the mitigating
 8 factors proffered at sentencing and that the Arizona Supreme Court failed to properly
 9 consider and independently reweigh the evidence, in violation of Apelt's rights under the
 10 Eighth and Fourteenth Amendments. Principally, he asserts the Arizona Supreme Court
 11 erred by excluding from its consideration certain mitigating evidence in violation of
 12 *Tennard v. Dretke*, 542 U.S. 274 (2004). Apelt is not entitled to relief on this claim.

14 Once a determination is made that a person is eligible for the death penalty, the
 15 sentencer must consider relevant mitigating evidence, allowing for "an individualized
 16 determination on the basis of the character of the individual and the circumstances of the
 17 crime." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The Supreme Court has
 18 explained that "evidence about the defendant's background and character is relevant
 19 because of the belief, long held by this society, that defendants who commit criminal acts
 20 that are attributable to a disadvantaged background may be less culpable than defendants
 21 who have no such excuse." *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (quoting *Penry*
 22 v. *Lynauh*, 492 U.S. 302, 319 (1989)). Therefore, the sentencer in a capital case is

27 ¹⁷ Having determined the state courts reasonably found the cruelty prong had been
 28 proven, it is unnecessary for the Court to address the parties' arguments concerning the
 heinous or depraved prongs.

1 required to consider any mitigating information offered by a defendant, including non-
2 statutory mitigation.
3

4 However, while the sentencer must not be foreclosed from considering relevant
5 mitigation, “it is free to assess how much weight to assign such evidence.” *Ortiz v.*
6 *Stewart*, 149 F.3d 923, 943 (9th Cir. 1998). There is no set formula for weighing
7 mitigating evidence, and the sentencer may be given “unbridled discretion in determining
8 whether the death penalty should be imposed after it has found that the defendant is a
9 member of the class made eligible for that penalty.” *Zant v. Stephens*, 462 U.S. 862, 875
10 (1983).

11 Apelt’s sentencing did not violate these requirements. At sentencing, the trial
12 court found Apelt had failed to establish any statutory mitigating factors. The court then
13 stated it had considered and rejected the nonstatutory mitigating circumstance offered by
14 counsel: “The defendant presented other matters for the court to consider which the court
15 has considered which include his remorse, cooperation and good behavior, his new found
16 religious beliefs, his military service, and other matters which appear of record, but none
17 of which are found to be significant mitigating factors; all of which have been
18 considered.” (RT 8/13/90 at 8–9.) On direct appeal, the Arizona Supreme Court
19 independently reviewed the aggravating and mitigating circumstances, and found Apelt’s
20 mitigation insufficiently substantial to warrant leniency. *Apelt*, 861 P.2d at 653-54.
21 Given that the state courts considered all proffered mitigation, there was no constitutional
22 violation.
23
24
25
26
27
28

1 The trial court expressly stated it had “considered” all of Apelt’s proffered
2 mitigating factors. (RT 8/13/90, at 8–9.) This statement is virtually dispositive of
3 Apelt’s claim. *See Parker v. Dugger*, 498 U.S. 308, 314–15 (1991) (“We must assume
4 that the trial court considered all [mitigating] evidence before passing sentence. For one
5 thing, he said he did.”). As for the Arizona Supreme Court, its independent review did
6 not exclude Apelt’s mitigating evidence from consideration. Apelt focuses on the court’s
7 statement that Apelt “failed to advance any credible argument as to why some factors
8 should be considered mitigating at all.” *Apelt*, 861 P.2d at 653–54. But that statement did
9 not refer to the entirety of Apelt’s mitigation evidence but rather to Apelt’s argument that
10 certain circumstances—namely his cooperation with the presentence investigation, the
11 plea bargain offered to Rudi, and Dorn’s immunity—were in fact mitigating at all. *Id.*
12 Again, there is no constitutional requirement that the sentencer assign proffered
13 mitigating evidence any particular weight. *See Harris*, 513 U.S. at 512.

14 Finally, Apelt asserts the Arizona courts imposed a causal nexus requirement in
15 violation of Supreme Court rulings. The argument that the courts employed such a test in
16 Apelt’s case, however, is unsupported by the record. The sentencing court expressly
17 stated that it had “considered” all of the proffered mitigation, and the opinion of the
18 Arizona Supreme Court does not discuss a causal connection requirement.

19 The state courts considered all the mitigating evidence Apelt presented.
20 Therefore, Apelt is not entitled to relief on Claim 17.

F. Claim 26

Apelt's claim 26 contends he is intellectually disabled and therefore, under *Atkins v. Virginia*, 536 U.S. 304 (2002), his execution is prohibited by the Eighth Amendment.¹⁸ (Doc. 285 at 35.)

In *Atkins*, the United States Supreme Court held that “death is not a suitable punishment for” an intellectually disabled criminal and the Eighth Amendment prohibits the execution of such persons. *Atkins*, 536 U.S. at 321. The Supreme Court explained that “clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.” *Id.* at 318. However, the Supreme Court reserved for the states “the task of developing appropriate ways to enforce the constitutional restriction” against executing intellectually disabled persons. *Id.* at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

Arizona law defines intellectual disability as “a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.” A.R.S. § 13-753(K)(3). “Significantly subaverage general intellectual functioning” means a full scale intelligence quotient of 70 or lower. A.R.S. § 13-753(K)(5). The statute directs the

¹⁸ The terms “intellectual disability” and “mental retardation” “describe the identical phenomenon.” *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014). Unless appearing in a quote, the Court uses the former.

1 trial court, in determining IQ, to “take into account the margin of error for the test
 2 administered.” *Id.*

3 Arizona law defines “adaptive behavior” as “the effectiveness or degree to which
 4 the defendant meets the standards of personal independence and social responsibility
 5 expected of the defendant’s age and cultural group.” A.R.S. § 13–753(K)(1). The statute
 6 “requires an overall assessment of the defendant’s ability to meet society’s expectations
 7 of him” and “does not require a finding of [intellectual disability] based solely on proof
 8 of specific deficits or deficits in only two areas.”¹⁹ *State v. Grell*, 135 P.3d 696, 709
 9 (Ariz. 2006).

10 Under Arizona law, a defendant bears the burden of proving intellectual disability
 11 by clear and convincing evidence. A.R.S. § 13–753(G). A “determination by the trial
 12 court that the defendant’s intelligence quotient is sixty-five or lower establishes a
 13 rebuttable presumption that the defendant has [an intellectual disability].” *Id.* Even if
 14 such a presumption is established, however, a defendant retains the burden of persuasion
 15 on the issue of intellectual disability. *See State v. Arellano (Apelt)*, 143 P.3d 1015, 1019
 16 (Ariz. 2006).

17 The state court held an evidentiary hearing on the *Atkins* issue from April 30,
 18 2007, through May 11, 2007, and on September 28, 2007. At the conclusion of the

19 By contrast, the Diagnostic and Statistical Manual-IV (DSM-IV) instructs that
 20 poor adaptive skills exist when there are deficits in at least two of the following areas:
 21 communication, self-care, home living, social/interpersonal skills, use of community
 22 resources, self-direction, functional academic skills, work, leisure, health, and safety. *See*
 23 *Grell*, 135 P.3d at 709 n.12.

1 hearing, the court found that Apelt had not proven he was intellectually disabled. (Doc.
 2 285, Ex. 27.) Apelt challenges that ruling, arguing the court committed several errors in
 3 its interpretation of the evidence with respect to both the subaverage intelligence and
 4 adaptive behavior prongs. (See Doc. 285 at 39.) Respondents contend the state court's
 5 ruling was neither contrary to nor an unreasonable application of *Atkins*, and did not
 6 involve an unreasonable determination of the facts. (Doc. 291 at 55.) The Court agrees.
 7

8 Under AEDPA, Apelt must show that the state court's decision was contrary to or
 9 an unreasonable application of *Atkins*, 28 U.S.C. § 2254(d)(1), or was based on an
 10 unreasonable determination of the facts in light of the evidence presented at the
 11 evidentiary hearing, § 2254(d)(2). Under 28 U.S.C. § 2254(e)(1), "a determination of a
 12 factual issue made by a State court [is] presumed to be correct," and a petitioner has "the
 13 burden of rebutting the presumption of correctness by clear and convincing evidence."
 14 The parties agree that the question of whether Apelt is intellectually disabled is a factual
 15 issue and subject to review under (d)(2).²⁰ (See Doc. 301 at 31.)

16 Apelt's arguments consist of disagreements with the state court's analysis of the
 17 evidence presented in the *Atkins* proceedings. He identifies several alleged errors. With
 18 respect to subaverage intelligence, Apelt asserts the court relied on an "unverifiable IQ
 19

20 Respondents argue that the "rational factfinder" standard of review, *see Jackson*, 443 U.S. at 307, should apply to Apelt's *Atkins* claim, so that the state court's ruling that Apelt did not prove intellectual disability must be upheld if any rational trier of fact could have reached the same conclusion. (Doc. 291 at 58.) Because the applicability of the rational factfinder standard in the *Atkins* context appears unsettled, *compare United States v. Webster*, 421 F.3d 308, 311 (5th Cir. 2005), *with Hooks v. Workman*, 689 F.3d 1148, 1166 (10th Cir. 2012), the Court will review the state court's findings under 28 U.S.C. § 2254(d)(2) and (e)(1).

1 score from Apelt's childhood" and applied an "inappropriate margin of error to IQ
2 scores." (Doc. 285 at 39.) With respect to adaptive behavior, Apelt asserts the court
3 "overemphasized" his post-incarceration behavior and "disregarded and misinterpreted
4 evidence of adaptive behavior deficits." (*Id.*) As discussed below, these alleged errors
5 do not entitle Apelt to habeas relief.
6

7

8 **i. Subaverage intelligence**

9 During the evidentiary hearing, the court heard testimony from Dr. Helmut Kury,
10 a psychologist, and Dr. Ronald Ruff, a neuropsychologist, on behalf of Apelt, and Dr.
11 John Moran, a clinical psychologist, on behalf of the State. Drs. Ruff and Kury
12 performed IQ tests on Apelt. The record also contains an IQ score from a test
13 administered when Apelt was a child. In addition, Dr. Harry Tamm, a neurologist
14 retained by Apelt, reviewed the results of an EEG and an MRI brain scan.
15

16 Drs. Ruff and Kury concluded Apelt is intellectually disabled. Specifically, they
17 found that he suffers from "Mild Mental Retardation." (Doc. 285, Ex. 3 at 5.) Dr. Moran
18 concluded Apelt is not intellectually disabled under Arizona law. (Doc. 285, Ex. 5 at 59.)
19 After considering the evidence, the court determined Apelt failed to establish he has
20 significantly subaverage general intellectual functioning under A.R.S. § 13-753(K)(5).
21 (Doc. 285, Ex. 27 at 3–4.) The court explained Apelt had been tested as a child and
22 found to have an "overall IQ" of 88 based on the German children's version of the
23 Hamburg Wechsler Adult Intelligence Scales (HAWIE).¹ The court also found that
24 Apelt had malingered during more recent exams.
25

1 Apelt criticizes the court's decision to accept the validity of the childhood IQ
2 score of 88 despite the lack of raw testing data and information about the qualifications of
3 those who administered and scored the test, and notwithstanding the skepticism of Drs.
4 Kury and Ruff, who opined that the score was erroneous. Apelt also challenges the
5 court's conclusion that he malingered during the IQ tests administered by Drs. Kury and
6 Ruff. But having reviewed the record, the court's factual findings are not unreasonable
7 under § 2254(d)(2).

8 In 2004, Dr. Kury administered eight separate IQ tests, averaged them, and arrived
9 at a full-scale IQ score of 65. (RT 5/3/07 at 37, 79-80, 83-89; *see* Doc. 285, Ex. 1 at 25-
10 26.) Dr. Kury testified that the applicable margin of error is \pm 15 points, and agreed that
11 there "is a 95 percent certainty that Michael Apelt's IQ of 65 average, really falls
12 somewhere between 50 or 80." (*Id.* at 111-12.) In 2000, Dr. Ruff administered a battery
13 of IQ tests and determined that Apelt's full-scale IQ was 61, with a margin of error of \pm 5
14 points. (RT 5/10/07 at 88-111, 194.)

15 Dr. Kury testified that he detected "slight malingering" by Apelt but it did not
16 "significantly" affect the IQ scoring. (RT 5/3/07 at 86.) He further stated there were
17 "indications" of malingering but they were not "strong enough" for him to "change his
18 opinions." (*Id.* at 95.) According to Dr. Kury, even if malingering had affected the
19 testing, so that Apelt's IQ was higher than the reported 65, "it would still be a problem
20 case." (*Id.*) Dr. Kury also testified Apelt's reported childhood IQ score of 88 was too
21
22
23
24
25
26
27
28

1 high “in principle” for him to have been placed in special education, and “usually” a child
2 with that score would not be sent to such a school. (*Id.* at 88.)
3

4 Dr. Ruff testified that Apelt’s “IQ was probably impaired by the time he reached
5 18.” (5/10/07 at 105.) He explained, “I am not exactly sure what IQ he had at age 18,”
6 but assuming Apelt’s IQ was 88 at age nine, Dr. Ruff did not believe it remained at that
7 level. (*Id.* at 102.) Instead, it likely “tapered downward” because Apelt was placed in a
8 special education school where he lacked the proper instruction and stimulation to
9 develop his intellectual capacity. (*Id.* at 103–04.)
10

11 Dr. Ruff acknowledged it was possible Apelt maledgered on some tests. (*Id.* at
12 207.) He administered a test to detect maledgering, which Apelt passed. (*Id.* at 234.)
13 The fact that Apelt passed the test, however, “[d]oes not mean that I don’t think there
14 were moments when he didn’t exaggerate, given [sic] poor efforts.” (*Id.*) Dr. Ruff
15 further clarified that, “I cannot from one test conclude that all of the other data attention
16 [sic] is reliable. I want to say that test, he passed. That is all.” (*Id.*)
17

18 In his report, Dr. Moran wrote that Apelt “was assessed to have an IQ of 88 and
19 thus would not be considered mentally retarded before age 18.” (Doc. 285, Ex. 5 at 59.)
20 He testified, however, that both Apelt’s childhood HAWIE-R score of 88 and his 2004
21 adult score of 47, on a test administered by Dr. Kury, were probably in error. (RT 5/8/07
22 at 48–49.)
23

24 Dr. Moran further testified that during their interviews it appeared Apelt was
25 “dissimulating” or maledgering to show that his intellectual function was lower than it
26

1 actually was. (RT 5/10/07.) Rather than trying to mask his deficiencies, as people with
2 intellectual disability often do, Apelt was trying to “demonstrate . . . his incompetence or
3 deficiencies.” (RT 5/10/07 at 36.)

4 From this evidence, it was not unreasonable for the court to conclude Apelt had
5 not established by clear and convincing evidence that he had subaverage intelligence at
6 age 18. The experts expressed skepticism about Apelt’s childhood IQ score of 88, but the
7 only specific challenge they offered was that Apelt would not have been placed in a
8 special education school if his IQ had been that high. That argument is unpersuasive as a
9 criticism of the test because no one contests that Apelt’s IQ was measured at 88 and,
10 notwithstanding that result, he was in fact placed in a special education school.

11 Apelt argues the court unreasonably found the experts failed to account for the
12 decline in Apelt’s IQ from 88 to its present level. As noted, Dr. Ruff testified that
13 Apelt’s IQ may have declined due to his placement in a special education school. The
14 fact that the court was not persuaded by this explanation does not render its findings
15 about Apelt’s IQ scores unreasonable.

16 Apelt also contends the court “misstated Dr. Tamm’s opinion.” (Doc. 285 at 47.)
17 Dr. Tamm, reviewing Apelt’s EEG and MRI, found abnormalities “consistent with the
18 hypothesis that [Apelt] suffered some remote brain damage, probably early in life.” (*Id.*,
19 Ex. 7.) As the court noted, Dr. Tamm characterized these abnormalities as “mild” and
20 “nonspecific,” possibly representative of a “normal variant.” (*Id.*) The court found Apelt
21 did not suffer any brain injury that would explain the decrease in his IQ. (*Id.*, Ex. 27 at
22

1
2 4.) Contrary to Apelt's argument, the court did not find that the absence of brain damage
3 precluded a finding of intellectual disability.

4 As to Apelt's other criticisms of the state court's analysis, the fact that the court
5 accepted the 15 point margin of error testified to by Dr. Kury does not affect the
6 reasonableness of the court's findings. Apelt asserts that with the application of the
7 proper, five point margin of error to the IQ score of 65 obtained by Dr. Kury, there is a
8 95% chance that Apelt's IQ is between 60 and 70, rather than between 50 and 80, as the
9 court stated in its ruling.
10
11

12 Dr. Kury repeatedly testified that the applicable margin of error was 15 percent.
13 (RT 5/3/07 at 105–06; RT 5/4/07 at 38–39.) Even assuming, as Apelt suggests, that this
14 testimony was the result of a faulty translation, Apelt does not explain how the
15 application of a wider margin of error affected the court's analysis of Apelt's IQ at the
16 age of 18.²¹
17
18

19 Finally, the court did not clearly err when it noted the experts found evidence of
20 malingering. As discussed above, all of the experts testified that they detected some
21 degree of malingering or dissimulation on Apelt's part. Even Apelt's experts, Drs. Kury
22 and Ruff, could not exclude the possibility that Apelt maledgered during the IQ tests. Dr.
23 Kury testified the indications were not strong enough for him to change his overall
24 opinion about Apelt's intellectual disability. (RT 5/3/07 at 86.) Dr. Ruff testified that
25
26
27

28 ²¹ Dr. Kury, a German national, testified through a translator.

1 Apelt passed a malingering test but he could not conclude that all the testing data were
 2 reliable. (RT 5/10/07 at 234.)

3 Based on this testimony, the court did not clearly err by taking into account
 4 evidence of malingering when it considered whether Apelt met his burden of establishing
 5 subaverage intelligence.

6 **ii. Adaptive behavior**

7 Drs. Ruff and Moran assessed Apelt's adaptive behavior, reaching opposite
 8 conclusions.²² The state court determined Apelt failed to prove he suffered from
 9 significant deficits in adaptive behavior. Applying the standard set forth in *Grell*—that
 10 Arizona law “does not require a finding of mental retardation based solely on proof of
 11 specific deficits or deficits in only two areas,” 135 P.3d at 709—the court found that
 12 Apelt did not suffer from significant deficits in adaptive behavior. Apelt contends the
 13 court erred by improperly discounting Dr. Ruff’s conclusions. He argues Dr. Ruff’s
 14 methodology and opinions were more credible than those of the state’s expert, Dr.
 15 Moran.

16 Dr. Ruff administered the Independent Living Scales and Adaptive Behavior
 17 Assessment System, and reviewed collateral records from Apelt’s family, friends, and
 18 teachers. (See Doc. 285 at 52.) Dr. Ruff concluded Apelt suffered from significant
 19 deficits in four of the 11 areas specified by the DSM-IV: social/interpersonal skills,
 20 financial responsibility, functional academics, and work. (See RT 5/10/07 at 113–29.)

21
 22 ²² Dr. Kury did not conduct an adaptive functioning analysis. He opined, however,
 23 that Apelt was intellectually disabled. (RT 5/3/07 at 80–81.)

Dr. Moran disagreed and explained Apelt's conduct was actually indicative of anti-social personality disorder. (RT 5/8/07 at 41-44.)

The court was entitled to assess the relative credibility of the two experts and their opinions about these areas of Apelt’s conduct. *See O’Neal v. Bagley*, 743 F.3d 1010, 1023 (6th Cir. 2013) (“With expert testimony split, as it often is, the state court chose to credit [the two experts] over [Apelt’s expert], and we cannot say from this vantage that it was unreasonable to do so.”). And the court’s decision to credit one qualified expert over another is not enough to merit relief. Therefore, the Court did not clearly err when it found Apelt failed to prove he met the adaptive behavior prong of intellectual disability.²³

iii. Conclusion

When assessing the reasonableness of the state court’s factual findings, this Court “must be particularly deferential to [its] state-court colleagues.” *Taylor v. Maddox*, 266 F.3d 992, 1000 (9th Cir. 2004). To grant relief, it “must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.” *Id.*

²³ The state court found also that Apelt had “failed to prove by even a preponderance of the evidence that the onset of his subaverage intellectual functioning and adaptive behavior deficits occurred before he reached the age of eighteen.” (Doc. 285, Ex. 27 at 7.) Accordingly, the court concluded Apelt had “failed to show by even a preponderance of the evidence that he is mentally retarded.” (*Id.*) Having determined the state court did not err with respect to the subaverage intelligence and adaptive behavior prongs, the Court need not address the third prong.

1 In addressing Apelt's intellectual disability claim, the state court took into account
2 the credibility of the witnesses, including each party's experts and their opposing
3 opinions. The court's factual findings and credibility determinations are presumed to be
4 correct. 28 U.S.C. § 2254(e)(1); *see also Thompson v. Keohane*, 516 U.S. 99, 111
5 (1995). And Apelt has not rebutted the court's factual findings with clear and convincing
6 evidence. *Id.* The court's ruling on the *Atkins* issue was not based on an unreasonable
7 determination of the facts under § 2254(d)(2); *see also Richter*, 562 U.S. at 101.
8

9

10 **G. Claim 27**

11 Apelt's Claim 27 contends the clear and convincing standard by which the state
12 court required him to prove his intellectual disability violated *Cooper v. Oklahoma*, 517
13 U.S. 348 (1996), and his rights to due process and freedom from cruel and unusual
14 punishment.

15 *Cooper* prohibits a state from forcing a defendant to prove his competency to
16 stand trial by clear and convincing evidence. 517 U.S. at 358-69. The Court in *Atkins*,
17 however, expressly permitted states to establish their own procedures for determining
18 intellectual disability. 536 U.S. at 317-18; *see Bobby v. Bies*, 556 U.S. 825, 831 (2009)
19 (reiterating that *Atkins* "did not provide definitive procedural or substantive guides").
20 Therefore, there is no clearly established federal law setting a burden of proof in *Atkins*
21 cases or extending *Cooper* to claims of intellectual disability. *See Hill v. Humphrey*, 662
22 F.3d 1335, 1349 (11th Cir. 2011) (noting "the absence of any Supreme Court burden of
23 proof holding in mental retardation execution cases"). Therefore, the decision of the state
24

25
26
27
28

1 court to impose a clear and convincing standard is neither contrary to nor an unreasonable
2 application of clearly established federal law. 28 U.S.C. § 2254(d)(1). Apelt is not
3 entitled to relief on Claim 27.

5 **CONCLUSION**
6

7 For the reasons set forth above, Apelt is not entitled to relief on Claims 1-B, 1-D,
8 11, 14, 15, 17, 26 and 27. The decisions of the state court rejecting these claims were not
9 contrary to or an unreasonable application of clearly established federal law, or based on
10 an unreasonable determination of the facts.²⁴ 28 U.S.C. § 2254(d).
11

12 With respect to Claim 12, Apelt has established the state court rejection of this
13 claim was unreasonable. The parties will be directed to submit supplemental briefs on
14 whether an evidentiary hearing is needed.
15

16 **CERTIFICATE OF APPEALABILITY**

17 Although this is not a final order in these proceedings, the Court has endeavored to
18 determine, if judgment is ultimately entered against Apelt, whether a certificate of
19 appealability (COA) should be granted on the issues addressed herein.
20

21 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when a petitioner “has
22 made a substantial showing of the denial of a constitutional right.” This showing can be
23 established by demonstrating that “reasonable jurists could debate whether (or, for that
24 matter, agree that) the petition should have been resolved in a different manner” or that
25

27 ²⁴ Because Claim 1-D was never presented in state court, it appears the standard of
28 review is different. However, Claim 1-D fails on the merits regardless of the standard.
See note 9.

1 the issues were "adequate to deserve encouragement to proceed further." *Slack v.*
2 *McDaniel*, 529 U.S. 473, 484 (2000).

3
4 The Court finds that reasonable jurists could debate its resolution of Claims 11 and
5 26. For the reasons stated in this order, the Court finds that reasonable jurists could not
6 debate its resolution of the remaining claims.
7

8 Accordingly,

9
10 **IT IS HEREBY ORDERED** denying Claims 1-B, 1-D, 11, 14, 15, 17, 26, and
11 27.

12
13 **IT IS FURTHER ORDERED** no later than September 18, 2015, each side shall
14 submit a brief of no more than fifteen pages addressing whether an evidentiary hearing on
15 Claim 12 is needed and, if so, the proposed scope of the evidentiary hearing. No later
16 than September 28, 2015, each side shall submit responsive briefs of no more than ten
17 pages. No replies are permitted absent further order.

18 Dated this 1st day of September, 2015.
19

20
21
22
23
24
25
26
27
28



Honorable Roslyn O. Silver
Senior United States District Judge