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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 John Montenegro Cruz,
10 Petitioner,
11 v.
12 David Shinn, et al.,
13 Respondents.

No. CV-13-00389-TUC-JGZ

ORDER

DEATH PENALTY CASE

14
15 Petitioner John Montenegro Cruz is an Arizona death row inmate who has filed for
16 habeas relief in this Court. The Court held an evidentiary hearing on Claim 2 of Cruz’s
17 habeas petition, alleging ineffective assistance of counsel at sentencing. The hearing was
18 ordered upon this Court’s determination that the state court’s rejection of Claim 2 was
19 based on an unreasonable determination of facts.¹ (Doc. 60 at 125.) Accordingly, the
20 Court’s review of Claim 2 is *de novo*. For the reasons set forth below, the claim is denied.

21 **I. OVERVIEW**

22 Cruz was convicted and sentenced to death for the 2003 murder of Tucson Police
23 Officer Patrick Hardesty. Though he contested his guilt at trial, Cruz admits in these
24 proceedings that he was responsible for Officer Hardesty’s murder and does not contest the
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27 ¹ Under 28 U.S.C. § 2254(d)(2), a habeas petitioner is not entitled to relief on a
28 claim adjudicated on the merits in state court unless that adjudication “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.”

1 facts establishing his guilt. (RT 5/13/19 at 4-5; *see* Doc. 112.)² The following facts
2 concerning the crime are based on the Arizona Supreme Court’s opinion in *State v. Cruz*,
3 181 P.3d 196, 202-03 (Ariz. 2008), this Court’s review of the record, and the parties’
4 stipulation of material facts (Doc. 112 at 2–18).³

5 On May 26, 2003, Tucson police officers Patrick Hardesty and Benjamin Waters
6 responded to a hit-and-run accident. The investigation led them to a nearby apartment
7 occupied by two women and Cruz, who fit the description of the hit-and-run driver. The
8 officers asked Cruz to step outside and identify himself. Cruz gave his name as “Frank
9 White.” Officer Hardesty contacted police dispatch but was unable to verify the identity.
10 He asked Cruz for identification. Cruz replied that he had left it in the car.

11 As Officer Hardesty and Cruz approached the car, Cruz leaned in as if retrieving
12 something, then “took off running.” Officer Hardesty chased Cruz on foot, while Officer
13 Waters drove his patrol car around the block in an attempt to cut Cruz off.

14 When Officer Waters turned the corner, he saw Cruz throw a gun to the ground.
15 Officer Hardesty was nowhere in sight. Officer Waters got out of his car and drew his
16 service weapon on Cruz. Cruz refused Waters’ order to lie on the ground and told Waters
17 to “just do it, just go ahead and kill me now, just kill me.” When Officer Waters holstered
18 his weapon, Cruz leapt over a fence and continued to flee until Waters apprehended Cruz,
19 after a brief struggle.

20 Officer Hardesty’s body was discovered immediately. He had been shot five times.
21 Two bullets were stopped by his protective vest, two bullets entered his abdomen below
22 the vest, and a fifth bullet entered his left eye, killing him almost instantly. Four of the five
23 shots were fired from no more than twelve inches away.

24 The handgun thrown down by Cruz was a .38 caliber Taurus revolver holding five
25 cartridges. All five had been fired. The five slugs recovered from Officer Hardesty’s body

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27 ² “RT” refers to the reporter’s transcripts from Cruz’s state court proceedings (in
28 2005) and the evidentiary hearing in federal court (in 2019).

³ The facts are described in greater detail in this Court’s previous order (Doc. 60).

1 and vest had been fired from the Taurus revolver. Five unfired .38 cartridges matching the
2 cartridges fired from the Taurus were found in Cruz’s pocket when he was apprehended.

3 Cruz was indicted on one count of first-degree murder. The State filed a notice of
4 intent to seek the death penalty alleging a single aggravating factor: “The murdered person
5 was an on duty peace officer who was killed in the course of performing the officer’s
6 official duties and the defendant knew, or should have known, that the murdered person
7 was a peace officer.” A.R.S. § 13-703(F)(10) (2003) (currently found at § 13-751(F)(8)).
8 A jury convicted Cruz of first-degree murder and found the (F)(10) aggravating factor.

9 In the penalty phase, Cruz alleged a number of mitigating factors. Defense counsel
10 presented testimony from eleven lay witnesses and five expert witnesses, including Dr.
11 Hector Barillas, a clinical psychologist; Dr. Laura McCloskey, a developmental
12 psychologist with a focus on children and violence; Dr. Mike Austein, a specialist in
13 addiction medicine; and Dr. Edward French, a pharmacologist. The jury did not find the
14 proffered mitigation sufficiently substantial to call for leniency and determined that Cruz
15 should be put to death.

16 On direct appeal, the Arizona Supreme Court affirmed Cruz’s conviction and death
17 sentence. *Cruz*, 181 P.3d at 218. The court found that Cruz was neither suffering from any
18 significant mental illness nor under the influence of drugs at the time of the crime. *Id.* at
19 217. The court held that the jury did not abuse its discretion by determining that Cruz
20 should be sentenced to death, concluding:

21 Although Cruz’s early life was certainly not ideal, absent is the type of
22 horrible abuse often found in our capital jurisprudence. Cruz was neither
23 suffering from any significant mental illness nor under the influence of drugs
24 at the time of the crime. The evidence presented on most of these mitigating
25 circumstances was weak, and Cruz established little or no causal relationship
between the mitigating circumstances and the crime. Moreover, much of the
mitigating evidence offered by Cruz was effectively rebutted by the State.

26 *Id.* at 217–18.

27 Cruz filed a petition for post-conviction relief (“PCR”) raising allegations of
28 ineffective assistance of counsel, including a claim that counsel performed ineffectively at

1 sentencing by failing to conduct an adequate mitigation investigation, thereby failing to
2 bring relevant information to the attention of the mental health experts. (Doc. 31-3, Ex. W
3 at 32.) The PCR court rejected this claim as not colorable because trial counsel’s choices
4 in connection with mitigation were reasonable and represented sound trial strategy and
5 “none of the factors addressed by defendant, either alone or in connection with other
6 mitigation, would alter the sentence of death as found by a jury.” (Doc. 32-6, Ex. RR. at
7 13–18.) The Arizona Supreme Court denied review on May 29, 2013. (Doc. 32-6, Ex. XX.)

8 Cruz filed his petition for writ of habeas corpus in this Court on May 1, 2014. (Doc.
9 28.) In Claim 2 of his habeas petition, Cruz alleged that the PCR court’s denial of his claim
10 that sentencing counsel performed ineffectively by failing to investigate and present
11 mitigation constituted an unreasonable application of clearly established federal law and
12 was based on an unreasonable determination of facts under 28 U.S.C. § 2254(d)(1) and (2).
13 (Doc. 28 at 189–199.) Cruz also asserted that he was entitled to *de novo* review and an
14 evidentiary hearing on this claim. (Doc. 38 at 51.) The Court agreed and ordered an
15 evidentiary hearing, which was held on May 13–17 and 20, 2019. (Doc. 60.)

16 **II. DISCUSSION**

17 Cruz contends that counsel performed ineffectively at sentencing by undertaking a
18 speedy trial strategy focused on the guilt phase of trial in acquiescence to Cruz’s claim of
19 innocence despite his purported inability to remember the event. He contends that the
20 resulting mitigation investigation was significantly truncated, omitting key mitigation
21 evidence as a result of the push to enforce Cruz’s speedy trial rights. According to Cruz,
22 the most prominent omission was evidence of a neurodevelopmental disorder and brain
23 damage, most likely caused by prenatal alcohol exposure, paired with evidence that
24 witnesses had observed his mother drinking while she was pregnant with him. Also omitted
25 or downplayed, according to Cruz, was evidence of his lifelong depression; his learning
26 disability, as identified in elementary school records; his chaotic upbringing among drug-
27 using and drug-selling family members; and evidence of his mother’s mental health issues
28 and her poor treatment of Cruz. Finally, Cruz faults trial counsel for failing to present direct

1 evidence of his state of mind at the time of the crime—namely, that his capacity to conform
2 his conduct to the law was significantly impaired.

3 **A. Applicable law**

4 Claims of ineffective assistance of counsel (“IAC”) are governed by the principles
5 set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Cullen v. Pinholster*, 563 U.S.
6 170, 189 (2011). To obtain relief, a prisoner must show that “counsel’s conduct so
7 undermined the proper functioning of the adversarial process that the trial cannot be relied
8 on as having produced a just result.” *Strickland*, 466 U.S. at 686. *Strickland*’s two-pronged
9 test requires a showing that counsel performed deficiently and that the deficient
10 performance prejudiced the defense. *Id.* at 687. To satisfy *Strickland*’s first prong, a
11 defendant “must overcome the presumption that, under the circumstances, the challenged
12 action ‘might be considered sound trial strategy.’” *Id.* at 689. With respect to *Strickland*’s
13 second prong, a petitioner must affirmatively prove prejudice by “show[ing] that there is a
14 reasonable probability that, but for counsel’s unprofessional errors, the result of the
15 proceeding would have been different. A reasonable probability is a probability sufficient
16 to undermine confidence in the outcome.” *Id.* at 694.

17 In assessing prejudice in a capital sentencing, the evidence in aggravation is
18 reweighed against “the totality of available mitigating evidence.” *Wiggins v. Smith*, 539
19 U.S. 510, 534 (2003). The totality of the evidence includes “both that adduced at trial, and
20 the evidence adduced in the habeas proceedings.” *Id.* at 536 (quoting *Williams v. Taylor*,
21 529 U.S. 362, 397–98 (2000)) (internal quotation marks and emphasis omitted).

22 Whether counsel’s allegedly deficient performance was prejudicial is necessarily a
23 fact-driven determination that hinges on the difference between what mitigation was
24 presented at trial and what mitigation could have been presented. In *Apelt v. Ryan*, 878
25 F.3d 800, 832 (9th Cir. 2017), the Ninth Circuit described this prejudice analysis as a three-
26 part test:

27 First, the court evaluates and weighs the totality of the available
28 mitigating evidence; second, it evaluates and weighs “the aggravating

1 evidence and any rebuttal evidence that could have been adduced by the
2 government had the mitigating evidence been introduced”; and third, it
3 reweighs “the evidence in aggravation against the totality of available
4 mitigating evidence . . . to determine ‘whether there is a reasonable
5 probability that, absent the errors, the sentencer . . . would have concluded
6 that the balance of aggravating and mitigating circumstances did not warrant
7 death.’”

8 *Id.* (quoting *Andrews v. Davis*, 866 F.3d 994 (9th Cir. 2017), *on reh’g en banc*, 944 F.3d
9 1092 (9th Cir. 2019)).

10 “In the context of the penalty phase of a capital case, it is enough to show ‘a
11 reasonable probability that at least one juror would have recommended a sentence of life
12 instead of death.’” *Andrews*, 944 F.3d at 1108 (quoting *Wiggins*, 539 U.S. at 537). “The
13 likelihood of that result must be ‘substantial, not just conceivable.’” *Id.* (quoting
14 *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

15 A court need not address both components of the *Strickland* inquiry or follow any
16 particular order in assessing deficiency and prejudice. *Strickland*, 466 U.S. at 697. If it is
17 easier to dispose of a claim on just one of the components, then that course should be taken.
18 *Id.* Here, the Court focuses on the prejudice prong of *Strickland*. See *Jackson v. Calderon*,
19 211 F.3d 1148, 1155 n.3 (9th Cir. 2000); *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th
20 Cir. 1998). For purposes of this analysis, the Court assumes, without deciding, that trial
21 counsel’s performance at sentencing was deficient. The Court also assumes that if trial
22 counsel had performed competently, there is a reasonable probability that Cruz would have
23 (1) agreed to permit counsel to offer at sentencing the mitigation evidence presented at the
24 evidentiary hearing and (2) would have agreed to the development of an integrated defense
25 theory, i.e., holding the State to its burden of proof, while not overtly denying his
26 responsibility for the crime. (Doc. 144 at 71.)

27 Cruz asserts that “a properly conducted mitigation investigation would have
28 explained how numerous events outside of [his] control shaped and limited his choices
over a lifetime,” and “would have helped the jury understand [his] ‘choices’ in a very
different light.” (Doc. 28 at 182.) The evidence Cruz alleges was omitted from his

1 sentencing proceeding can be categorized in various ways, as it has been in the parties’
2 briefs. For simplicity, the Court has divided discussion of the evidence into two categories:
3 (1) evidence of Cruz’s drug addiction, his mental state at the time of the offense, and the
4 nexus of these circumstances to the crime; and (2) evidence about Cruz’s background,
5 including his social history and his neurodevelopment and mental health issues. The Court
6 will assess the evidence in that order, considering both the mitigating evidence that was
7 presented and the evidence that could have been presented but was not.

8 **B. Cruz’s mental state at the time of the offense**

9 Cruz asserts that counsel’s truncated investigation and ineffectual use of experts,
10 including the failure to provide the experts with all the relevant facts, meant that the
11 diminished capacity defense offered by the defense at sentencing “was a nullity.” (Doc. 28
12 at 185.) The Court disagrees. The diminished capacity mitigation presented at the penalty
13 phase was far from a nullity. The jury heard evidence that Cruz was a drug addict who used
14 cocaine and methamphetamine at or near the time of the offense; that these drugs could
15 and likely did predispose him to criminal behavior, impulsivity, paranoia, and poor
16 judgment; and that his ability to conform his conduct to the law or appreciate the
17 wrongfulness of his conduct was impaired as a result of his drug use and mental health
18 issues.

19 **1. Mitigation evidence presented during sentencing**

20 At the sentencing hearing, Tara White, Cruz’s wife, testified that she married Cruz
21 in 1996 and their son was born in 2000. (RT 3/2/05 at 107–08.) A few months after they
22 were married, Cruz was arrested in Illinois for a marijuana offense. (*Id.* at 113.) After
23 Cruz’s release from prison around 1998, the couple moved to Zuni, New Mexico, where
24 Cruz helped to run the White family businesses. (*Id.* at 115–16.) In 2001, Cruz started using
25 drugs and “went nuts.”⁴ (*Id.* at 117–18, 129.) Tara testified that she and Cruz smoked

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27 ⁴ To the extent the development of evidence of Cruz’s drug use and addiction is
28 informed by his social history and background, the jury heard such evidence during the
penalty phase, as discussed in more detail below. This section addresses Cruz’s drug use

1 marijuana and that Cruz used cocaine. (*Id.* at 111, 117.) Cruz had mood swings and was
2 sad and depressed. (*Id.* at 112.) Cruz, whose father died when Cruz was fifteen, told Tara
3 that “since his dad died of a brain aneurysm, he was going to die, too,” and “his mom didn’t
4 care.” (*Id.* at 120.) Cruz’s use of drugs caused the marriage to disintegrate, and Tara and
5 Cruz mutually agreed that he should leave. (*Id.* at 130.)

6 Romelia Cruz Holguin, Cruz’s paternal aunt, described an occasion near the
7 beginning of May 2003, close in time to the offense, when Cruz came to her house and
8 appeared “nervous and edgy,” “angry,” and “paranoid,” as well as sad, depressed and
9 withdrawn. (*Id.* at 94–95.) Cruz was limping and explained he had jumped out of a second-
10 or third-story window to avoid the police. (*Id.* at 94–96, 100.) Albert Montenegro, Jr.
11 (“Albert Jr.”), Cruz’s cousin on his mother’s side, testified Cruz had been smoking “meth”
12 before he was arrested on May 26, 2003, and that when Cruz used “meth” he would usually
13 get paranoid. (*Id.* at 150–51.)

14 Dr. Barillas assessed Cruz’s history of drug and alcohol abuse as “significant” and
15 “quite extensive,” starting in his teens after his father’s death, becoming worse after the
16 age of twenty-one, and culminating in his use of drugs just twenty-four to forty-eight hours
17 before Officer Hardesty’s murder. (RT 3/3/05 at 49–50, 56.)

18 Dr. Barillas also told the jury that Cruz had Post-Traumatic Stress Disorder
19 (“PTSD”) stemming from incidents in which he was shot at and beaten by people who
20 wanted to kill him. (*Id.* at 67, 69.) According to Dr. Barillas, Cruz’s PTSD affected the way
21 he perceived events in his life and caused him to overreact in certain situations; this
22 condition was exacerbated by Cruz’s use of drugs, especially stimulants. (*Id.* at 73.) Dr.
23 Barillas acknowledged that the report of Dr. Shannah Biggan, a neuropsychologist,
24 contradicted his findings in part because she did not find any evidence of anxiety, and
25 PTSD is an anxiety disorder. (*Id.* at 105–06, 118.) He questioned her results, however,
26 because she had reached that conclusion without performing any specific tests for anxiety.

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28 at or near the time of the offense, from which an inference as to his state of mind during
the offense might be drawn.

1 (*Id.* at 106–07.)

2 When questioned about Cruz’s ability to conform his conduct to the law, Dr. Barillas
3 testified that he could not specifically render an opinion on Cruz’s state of mind at the time
4 of Officer Hardesty’s murder because he never spoke to Cruz about the crime. (*Id.* at 83.)
5 He did opine however, that within a larger framework Cruz’s ability to conform his conduct
6 to the requirements of the law was impaired. (*Id.*)

7 After reviewing Cruz’s records, Dr. Austein classified Cruz as a drug addict. (*Id.* at
8 23.) Although Dr. Austein could not specifically opine whether Cruz was under the
9 influence during the murder, Cruz’s drug history combined with the presence of drugs in
10 his system at the time of his arrest suggested that, at a minimum, he could have been in a
11 “fog” at the time of the murder as a result of his habitual drug use. (*Id.* at 33–35.)

12 Dr. French, a pharmacologist, testified about the effects of certain drugs. He testified
13 that cocaine is a stimulant that induces the “fight or flight” response. (RT 3/04/05 at 109.)
14 Crystal methamphetamine produces similar effects and also leads to neurotoxicity, or
15 damage to the brain cells. (*Id.* at 113–14, 117.) Dr. French reviewed records from Cruz’s
16 hospitalization after the murder indicating he had a high level of methamphetamine in his
17 system, suggesting he had used within the past two to three days, or even as little as a
18 several hours earlier. (*Id.* at 121.) Dr. French explained that methamphetamine users are
19 “hyper, . . . they can be very jittery. . . [and] restless . . . they can also feel anxious, they
20 can become irritable, they can become impulsive, which can lead to bad things.” (*Id.* at
21 123–24.) Additionally, “the danger with methamphetamine” was that when using the drug,
22 a person might overreact to certain situations. (*Id.* at 128.) Methamphetamine and cocaine
23 users were at their most dangerous when “starting to crash” from a high, because “they are
24 really irritable, they can get really paranoid and then all of a sudden something can set them
25 off. They can be startled, they can be confronted and they can have unpredictable violence.”
26 (*Id.* at 130.)

27 **2. New evidence presented during post-conviction proceedings**

28 During the PCR proceedings, Defendant submitted the preliminary report of

1 additional findings by Dr. Barillas who wrote that although he was not asked at trial about
2 Cruz’s mental state at the time of the offense, he was then of the opinion that Cruz was
3 probably under the influence of cocaine and amphetamine at or shortly before the time of
4 his arrest. (Doc. 31-6, Ex. X, Ex. 39 at 2.) Thus, Cruz’s “judgment was probably impaired
5 to conform his conduct to the requirement of the law.” (*Id.*)

6 Dr. Mark Cunningham, a clinical and forensic psychologist retained during the PCR
7 proceedings, submitted a report in which he opined that adult outcome is a function of the
8 interaction of risk factors and protective factors in childhood. Dr. Cunningham explained
9 that as risk factors increase, and protective factors decrease, there is an increasing
10 probability of adult maladjustment, substance abuse, personality disturbance, delinquency,
11 criminality, and criminal violence. Dr. Cunningham identified several risk factors Cruz
12 was exposed to as a child, including (1) transgenerational family dysfunction and
13 hereditary predisposition to psychological disorder, personality pathology, and alcohol and
14 drug abuse and dependence; (2) neurodevelopmental issues including probable fetal
15 substance exposure, learning problems in school, chronic stress in childhood, and head
16 injuries; (3) parenting and family influence characterized by Cruz’s mother’s psychological
17 disorders and substance abuse, parental conflict and neglect, domestic violence and family
18 modeling of aggression and crime; and (4) childhood onset of alcohol and drug abuse, teen
19 onset of psychological disorders, and cocaine and methamphetamine abuse, with
20 accompanying paranoia and psychological decompensation at the time of the offense.
21 (Doc. 31-6, Ex. X, Ex. 41 at 12–13.) Dr. Cunningham discussed Cruz’s risk factors and
22 concluded that the jury was deprived of critical evidence regarding “the logical nexus
23 between the adverse developmental factors in Cruz’s background and the capital offenses.”
24 (*Id.* at 52.)

25 3. New evidence presented during federal habeas proceedings

26 At the 2019 evidentiary hearing before this Court, Cruz called seventeen witnesses,
27 including members of the defense team, family members, and six mental health experts.

28 David Basham, one of Cruz’s trial attorneys, testified that Cruz maintained his

1 innocence and pressed for a speedy trial. (RT 5/13/19 at 28.) Counsel did not attempt to
2 dissuade Cruz from his commitment to this approach. (*Id.* at 29–30, 36–37, 127, 141.)
3 Basham did not attempt to explain to Cruz that he was likely to be convicted given the
4 strength of the evidence against him. (*Id.* at 80.)

5 Dr. Robert Smith, a psychologist, testified that he evaluated Cruz in 2014, and
6 diagnosed Cruz with severe early onset depressive disorder and severe hallucinogen and
7 stimulant use disorder. (RT 5/17/19 at 20.) Based on the reports of other experts, Dr. Smith
8 also included rule-out diagnoses of PTSD, neurodevelopmental disorder, and brain
9 damage. (*Id.*)

10 Dr. Smith found that Cruz had a number of risk factors for substance addiction,
11 including genetic factors; the circumstances of his childhood, with family members who
12 were addicted to drugs and alcohol; rejection by parents and stepparents; the death of his
13 father; abandonment; lack of stability; and absence of adult supervision. (*Id.* at 23–25.) Dr.
14 Smith also testified that Cruz was at risk for self-medication through drugs. (*Id.* at 25–26.)

15 Dr. Smith concluded that at the time of the murder Cruz’s capacity to conform his
16 conduct to the law was “definitely impaired”:

17 I think that if we take a look at the environment, at that point we know
18 that John had been using substances. His depression was not treated. He had
19 never received any treatment for his neurocognitive disorders. He had been
20 up for many, many days and he’s highly stressed, and he’s now in a situation
21 in which he’s facing charges. Police officers are present.

21 So in a highly stressful situation like this, all of these factors, the
22 substances, the depression, the neurocognitive disorders together with the
23 sleep deprivation and his history, he’s not going to be able to cope and make
24 very conscious and thoughtful decisions about his actions. Instead, what he
25 did is he reacted.

24 (*Id.* at 36–37.)

25 Dr. Cunningham testified that Cruz had been exposed to a total of twenty-eight
26 damaging or limiting childhood developmental factors. (RT 5/20/19 at 46.) These adverse
27 factors, which were known and he could have testified to in 2005 (*id.* at 39), consisted of
28 family dysfunction and distress (*id.* at 69–76), hereditary predisposition to psychological

1 disorder and personality pathology (*id.* at 77–78), and hereditary predisposition to
2 substance abuse and dependence (*id.* at 78–81); neurodevelopmental factors, principally
3 fetal alcohol exposure (*id.* at 81–86); family and parenting factors, including the mother’s
4 psychological disorders and substance abuse (*id.* at 86–90), parental marital conflict and
5 domestic violence (*id.* at 90–91), emotional and supervisory neglect (*id.* at 92–96), physical
6 and psychological abuse (*id.* at 96–98), household and caretaker instability (*id.* at 98–99),
7 death of his father (*id.* at 99–102), and corruptive and criminal modeling by maternal uncles
8 (*id.* at 102); and a “disturbed trajectory”—that is, the outcome that resulted from the above
9 adverse factors, including teen onset drug abuse, cocaine and methamphetamine abuse, and
10 stimulant-induced agitated psychological status at the time of the offense (*id.* at 103–104).

11 **4. Cruz was not prejudiced by counsel’s alleged failure to**
12 **investigate Cruz’s mental state at the time of the offense**

13 Cruz contends that counsel’s strategy to forgo any investigation into his mental
14 state, including his abuse of drugs, at the time of the offense constituted ineffective
15 assistance. He argues that counsel’s “acquiescence in Petitioner’s denial of responsibility;
16 then using that uninformed decision to forgo investigation of Petitioner’s mental state, and
17 then failing to engage in a continuing dialogue with the Petitioner so he was able to
18 comprehend the risks of this strategy to the penalty phase, was contrary to prevailing
19 professional norms and unreasonable.” (Doc. 144 at 29.) According to Cruz, this strategy
20 prevented counsel from presenting evidence of Cruz’s diminished capacity at the time of
21 the crimes. (*Id.*) Assuming counsel’s performance was deficient, however, the Court
22 concludes that it was not prejudicial.

23 Trial counsel presented evidence of Cruz’s mental state at the time of the murder.
24 Specifically, during trial the defense presented evidence of Cruz’s drug use and how it
25 could have affected him at the time of the murder. This evidence was proffered by
26 testimony from family members that Cruz was using methamphetamine around the time of
27 the murder and that he was “paranoid” when under its influence. (RT 3/2/05 at 150–51.)
28 Testimony during sentencing showed that Cruz appeared paranoid near in time to the

1 murder (*Id.* at 95, 100–101). Dr. Barillas testified that Cruz’s ability to conform his conduct
2 to the law was impaired primarily by drug use. (RT 3/3/05 at 81–83.) The jury also heard
3 that Cruz had methamphetamine and cocaine metabolites in his system shortly after the
4 murder. (RT 3/4/05 at 119–22.)

5 Dr. Austein, the addiction specialist, testified that the use of methamphetamine can
6 induce paranoia and violent behavior, and that Cruz’s drug history and drug use around the
7 time of the offense suggested that he could have been in a “fog” during the murder. (RT
8 3/3/05 at 21–22, 33–35.) Dr. French, the pharmacologist, testified about the negative
9 cognitive effects that cocaine and methamphetamine intoxication can produce. (RT 3/4/05
10 at 109–10, 113–14, 123–24, 128–130.)

11 The evidence offered by the experts at the evidentiary hearing was largely
12 cumulative to the evidence presented at sentencing. *See Leavitt v. Arave*, 646 F.3d 605,
13 615 (9th Cir. 2011) (“[C]umulative evidence is given less weight because it is not as likely
14 to have affected the outcome of the sentencing.”). Moreover, the experts Cruz called at the
15 evidentiary hearing drew no more of a causal nexus between Cruz’s drug use and the
16 murder than was established by the experts at the original trial.

17 Dr. Smith and Dr. Cunningham testified at the evidentiary hearing that Cruz did not
18 make very conscious or thoughtful decisions; instead he “reacted,” and was in a stimulant-
19 induced agitated psychological state at the time of the offense. But Drs. Austein and French
20 had similarly testified at sentencing that use of stimulants like cocaine and
21 methamphetamine can lead to impulsivity, paranoia, overreaction to situations, psychosis,
22 and violent behavior. Likewise, Drs. McCloskey and Barillas testified at sentencing that
23 Cruz’s childhood, mental issues, and drug use were related to the murder because they
24 predisposed Cruz to criminal behavior, impulsivity, and poor judgment. Notably, the jury
25 may not have looked favorably on additional evidence of Cruz’s drug abuse, especially in
26 close proximity to the time of the murder. *See Mayfield v. Woodford*, 270 F.3d 915, 931
27 n.17 (9th Cir. 2001) (“We note that juries are unlikely to favor defenses based on abuse of
28 dangerous drugs in evaluating a defendant’s culpability for violent behavior.”); *see also*

1 *Hayes v. Woodford*, 301 F.3d 1054, 1071 n.15 (9th Cir. 2002) (courts “cannot assume that
2 all juries would be sympathetic” to substance abuse), *on reh’g en banc sub nom. Hayes v.*
3 *Brown*, 399 F.3d 972 (9th Cir. 2005) (panel decision reversed on other grounds); *Duvall v.*
4 *Reynolds*, 139 F.3d 768, 782 (10th Cir. 1998) (jury may have viewed substance abuse
5 history as aggravating rather than mitigating).

6 Most importantly, evidence from both the guilt and penalty phases of trial, as well
7 as evidence admitted during these proceedings regarding Cruz’s actions at the time of the
8 crime itself, suggest that Cruz was not in a “fog” or unable to appreciate the wrongfulness
9 of his conduct or conform his conduct to the law. *See Apelt*, 878 F.3d at 832 (“[The court]
10 evaluates and weighs ‘the aggravating evidence and any rebuttal evidence that could have
11 been adduced by the government had the mitigating evidence been introduced.’”). The
12 Arizona Supreme Court recently explained that “substance abuse and mental health issues
13 are entitled to little weight when there is no connection to the crime and no effect on the
14 defendant’s ability to conform to the requirements of the law or appreciate the
15 wrongfulness of his conduct.” *State v. Poyson*, 475 P.3d 293, 298 (Ariz. 2020) (citations
16 omitted).⁵ The court stated that in considering impairment as a mitigating circumstance, it
17 “will not find that a defendant’s ability to conform or appreciate the wrongfulness of his
18 conduct was impaired when the defendant’s actions were planned and deliberate, or when
19 the defendant seeks to cover up his crime.” *Id.*

20 In *Poyson*, the court found “scant evidence” that the defendant was “actually
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22 ⁵ Although *Poyson* involved the independent review of mitigating evidence by the
23 Arizona Supreme Court, the Court cites the case as an example of the minimal weight given
24 to an expert’s “state of mind” evidence in light of evidence adduced from the crime itself
25 that negates a defendant’s suggestion that he could not conform his conduct to the
26 requirements of the law or appreciate the wrongfulness of his actions. The Court is
27 cognizant that “capital sentencing requires ‘an individualized determination on the basis of
28 the character of the individual and the circumstances of the crime.’” *Shinn v. Kayer*, 141
S.Ct. 517, 526 (2020) (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)) (“Because the
facts in each capital sentencing case are unique, the weighing of aggravating and mitigating
evidence in a prior published decision is unlikely to provide clear guidance about how a
state court would weigh the evidence in a later case.”).

1 intoxicated” on the day of the murders even though he had smoked marijuana to allay
2 effects of a hangover from heavy drinking the night before. *Id.* The court noted that the
3 defendant took substantial preparatory steps before the murders and made conscious
4 attempts to conceal his crimes afterwards, indicating his drug and alcohol use neither
5 rendered him unable to conform his conduct to the requirements of the law nor left him
6 unable to appreciate the wrongfulness of his actions. *Id.* at 299. The court also found,
7 despite evidence that Poyson suffered from mental health issues, no evidence suggesting
8 that these difficulties significantly impaired him because he took “deliberate and calculated
9 steps to ensure that his murderous plot and flight . . . would be successful and that he would
10 avoid capture by law enforcement.” *Id.* Accordingly, the court assigned little weight to
11 Poyson’s mitigation evidence. *Id.*

12 Like *Poyson*, Cruz “exhibited numerous examples of ‘goal-oriented’ behavior” at
13 the time of the murder “that belie a claim of substantial impairment.” *Id.* At the time of the
14 offense, Cruz had a warrant for his arrest. (RT 5/20/19 at 120–21.) During this same time,
15 Cruz was using methamphetamine and cocaine, not getting enough sleep, using aliases,
16 and carrying a gun. (RT 5/17/19 at 49–52; RT 5/20/10 at 122–23.) Cruz also told people
17 that he was running from the police (RT 5/17/19 at 57), and that if he was ever charged
18 with murdering a police officer, it would be a setup. (RT 3/2/05 at 96–97.)

19 The night before the murder, Cruz met a woman named Myra Moore at her
20 apartment and used the name of Frank as an alias. (RT 2/3/05 at 199.) Moore and Cruz
21 smoked methamphetamine together and engaged in sexual activity. (RT 5/17/19 at 58.)
22 Cruz spent the night at Moore’s apartment and Moore later testified that Cruz was in
23 possession of a gun. (RT 2/3/05 at 202–03.)

24 The following day, Cruz and his friend Chuck Bevilacqua went to a nearby Food
25 City to eat. (RT 5/17/19 at 58.) While exiting the parking lot, Cruz caused a traffic accident
26 while driving Bevilacqua’s car. (*Id.* at 59.) To avoid contact with the police, Cruz drove
27 back into the parking lot, parked the car, and left the scene. He then walked to and sought
28 refuge in Moore’s apartment. (*Id.* at 59.)

1 Officers Hardesty and Waters were dispatched to investigate the collision. After
2 speaking to witnesses, the officers went to Moore’s apartment. (*Id.*) On entering the
3 apartment, they noticed Cruz sitting on a mattress. (*Id.* at 60.) Because Cruz resembled the
4 description of the driver provided to the officers, Officer Waters asked him to step outside
5 the apartment to speak with him. (*Id.*) Cruz was not combative. Rather, he cooperated with
6 police but gave a false name of Frank White to avoid being arrested on the outstanding
7 warrant. (*Id.*) When police could not verify his identity, Cruz created a ruse, calmly asking
8 to go to a car (that was not his own) to retrieve his identification. (*Id.* at 61.) By doing so,
9 he created distance between himself and the officers. Cruz walked to the driver’s side of
10 the car, leaned in toward the center console, looked back at Officer Hardesty, and then ran
11 through a gap in a fence of a residence. (*Id.*)

12 Cruz’s conduct was not consistent with a man in a fog or spiraling out of control.
13 Rather, his behavior suggests a deliberate, calculated attempt to escape from the police so
14 he would not be arrested on the warrant.

15 Officer Hardesty chased Cruz on foot, while Officer Waters got in his patrol car and
16 drove to an area where he anticipated Cruz would eventually arrive. (*Id.* at 62.) Cruz was
17 armed at the time, a fact of which the officers were unaware. (RT 2/1/05 at 114–115.)
18 Nevertheless, at that point, Cruz made the decision to try to run away from rather than
19 engage in an armed confrontation with police.

20 From the evidence, it is reasonably inferred that when Cruz realized he could not
21 outrun Hardesty, he made the decision to draw his weapon and shoot. He was able to fire
22 five shots at Officer Hardesty before Officer Hardesty could even draw his weapon. (RT
23 2/2/2005 at 27–28.) All five shots struck Officer Hardesty; two rounds were stopped by his
24 vest; two rounds entered his abdomen; and one round entered his left eye. (5/17/19 at 63.)
25 Four of the five shots were fired at a distance of no more than a foot away. *Cruz*, 218 Ariz.
26 at 155–56, 181 P.3d at 202–03.

27 After shooting Hardesty, Cruz continued to run to try to evade arrest. When Officer
28 Waters spotted Cruz, Cruz promptly threw his gun to the ground, (RT 5/17/19 at 65), which

1 suggests awareness that he had shot Officer Hardesty and his intent not to be caught with
2 the murder weapon. Cruz continued to flee through the property (*id.*), moving away from
3 the murder weapon while still trying to find a way to escape.

4 Waters exited his car and confronted Cruz with his weapon drawn. Cruz refused
5 Waters' order to lie on the ground (RT 2/1/05 at 117–19) and told Waters to “just do it, just
6 go ahead and kill me now, just kill me,” (*id.* at 120), again demonstrating awareness that
7 “his actions were wrong, morally and legally.” *Poyson*, 475 P.3d at 299. When Officer
8 Waters then holstered his weapon, Cruz leapt over a fence and continued to flee until
9 Waters tackled him and placed him in handcuffs. (RT 2/1/05 at 121–123.)

10 Further demonstrating his continued awareness of the wrongfulness of his actions
11 and an intent to avoid responsibility, after his arrest, Cruz continued to provide the false
12 name of Frank White to police and paramedics (EH Ex. 7 at Bates 3445; EH Ex. 3 at Bates
13 3009) and the false story that he was in town visiting his sister and that a man named Arturo
14 Sandoval shot the police officer.

15 On these facts, there is not a reasonable probability that at least one juror would
16 have recommended a sentence of life instead of death had the new evidence regarding state
17 of mind been presented at sentencing. The evidence supported the conclusion that Cruz's
18 behavior was motivated by his goal of avoiding going back to prison and also of escaping
19 responsibility for killing Officer Hardesty. It is unlikely that a reasonable juror would have
20 concluded that his behavior resulted from paranoia or a lack of cognition or neurological
21 deficits; Cruz understood that if his identity was discovered, the officers would place him
22 under arrest. He understood that if he was associated with Officer Hardesty's killing, his
23 freedom would be curtailed. Whatever effects his drug use had on his behavior at the time
24 of the murder, they did not impair his ability to appreciate the wrongfulness of his conduct
25 or conform his conduct to the law.

26 **C. Social history, neurodevelopment and mental health issues**

27 Cruz asserts that counsel's failure to complete a mitigation investigation prevented
28 the jury from hearing evidence of his tragic social history, neurocognitive impairments,

1 and depression. This evidence, he alleges, would have helped the jury understand Cruz’s
2 “choices” in a very different light. Instead, Cruz asserts, his jury “heard absolutely none of
3 that evidence, evidence which ‘might well have influenced the jury’s appraisal of
4 [Petitioner’s] moral culpability.’” *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting
5 *Williams*, 529 U.S. at 398); see *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on*
6 *other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) (explaining that evidence about
7 the defendant’s background and character is relevant because of the belief, long held by
8 this society, that defendants who commit criminal acts that are attributable to a
9 disadvantaged background may be less culpable).

10 **1. Mitigation evidence presented during sentencing**

11 During sentencing, defense counsel presented testimony from family members and
12 others who knew Cruz regarding his childhood, young adult life, and social history. Father
13 Ricardo Ford, a Catholic priest who knew Cruz’s family, testified that Cruz grew up in
14 Barrio Hollywood, a neighborhood Ford knew well with marvelous “old traditional
15 families,” but “also huge addiction problems.” (RT 3/1/05 at 54–55, 58–59.)

16 Cruz’s mother, Julie Lingenfelter (née Montenegro)⁶, testified that she was sexually
17 abused by her father, Albert Montenegro, from a very young age until she was fifteen years
18 old. (*Id.* at 80, 82, 84.) Albert was a “terrible person,” a “real pervert,” who physically
19 abused his children, sometimes “just for fun.” (*Id.* at 81, 82.) Julie developed anorexia and
20 bulimia when she was ten or eleven years old and attempted to commit suicide three times
21 by age fifteen. (*Id.* at 82, 92.) Though Albert was no longer “in the picture” when Ford first
22 knew the family, Julie had talked to Ford in generalities about the abuse. Later, Ford
23 learned from others about Albert’s abuse of his children. (*Id.* at 65–66.) Father Ford
24 described Maria Montenegro, Julie’s mother, as a good, patient person, with good values,
25 who was a hard worker, ran several businesses, and struggled to try to “put back together
26 [a] constantly pretty dysfunctional situation.” (*Id.* at 59–60, 62, 67, 68.) Julie testified,

27
28 ⁶ Because many of Cruz’s family members share the same last name, the Court
refers to most of Cruz’s family members by their first names.

1 however, that Maria was not often in the house and it “broke [Maria’s] heart” when she
2 found out about Albert’s abuse of Julie. (*Id.* at 83–84.)

3 Despite Julie’s early difficulties, Ford described her as very likeable and motivated;
4 after she married Cruz’s father, she graduated from nursing school and became a highly
5 respected nurse working at Kino hospital. (RT 3/1/05 at 65, 69.) Nonetheless, over time,
6 Ford explained, she became an extremely nervous person, whom he remembered
7 “trembling a lot.” (*Id.* at 65.) Though Ford agreed Julie was a “woman of good values,” he
8 questioned whether she would have actually passed those on to Cruz because “there were
9 absentee problems there.” (*Id.* at 70.)

10 Julie testified that she was close to Cruz when he was a baby but explained that
11 when he got older, she “didn’t really touch him, hug him, kiss him, hold him as much as a
12 mother should have”; she didn’t love him and “kept [her] distance” from him. (*Id.* at 92,
13 109.) When Cruz was four or five years old, Julie left him—without thinking of the
14 consequences—with her mother-in-law and sister for nearly a year while she took care of
15 a sick brother. (*Id.* at 88.)

16 Susan Alcaraz, Cruz’s maternal aunt, testified that she cared for Cruz when his
17 mother was going to school or working, and during his parents’ subsequent divorce, for
18 days, weeks, or months at a time. (*Id.* at 136.) Father Ford confirmed that both of Cruz’s
19 parents would be away and Cruz’s “[A]unt Susie” would take care of him. (*Id.* at 73.) Susan
20 testified that Cruz needed his mom’s love, but Julie “had a lot of problems” and “couldn’t
21 express and show him . . . love.” (*Id.* at 145, 149–50.) Similarly, Delia Cruz, Cruz’s paternal
22 aunt, testified that Julie “had a lot of problems” and wasn’t there physically or mentally for
23 her son, who was mostly “left with the sitter,” though Julie did show him love and tried to
24 instill family values in him. (RT 3/2/05 at 42–43, 58.) Romelia, Cruz’s paternal aunt, also
25 testified that Julie was “[n]ot a very comforting” mother, and that she, Romelia, took care
26 of Cruz “so much so to the point . . . he would call [Romelia] ‘Mommy.’” (*Id.* at 80, 83.)

27 Julie testified that she was also physically and emotionally abused by her husband,
28 Cruz’s father, John Cruz, Sr. (RT 3/1/05 at 97–98, 100–101, 120.) Cruz Sr. began

1 physically abusing Julie the day after their marriage and during her pregnancy, and it “just
2 kept on going”; he would hit her for anything she didn’t do perfectly. (*Id.* at 97–98, 104–
3 05, 120.) Later, Cruz witnessed this abuse and was also a victim. Julie testified that Cruz’s
4 father spanked Cruz when he was little “for any little thing he did wrong,” leaving a lot of
5 bruises. (*Id.* at 97–98, 104.)

6 Julie didn’t seek a divorce at the time because she was brought up to believe that
7 you “just stay married” no matter what. (*Id.* at 100.) She realized this belief system was
8 “not normal” after taking psychology courses during nursing school. (*Id.*) When Julie
9 rebelled against Cruz Sr.’s wishes by finishing nursing school, he became more violent,
10 hitting her more often. (*Id.* at 100–01.) When Julie threatened him with divorce, he kicked
11 her; she hit the wall, fell down, and he hit her on the nose. (*Id.* at 101.) That weekend, when
12 Cruz was eight-years old, Cruz Sr. went off “out of control,” and beat Cruz with a belt for
13 “just normal punishment,” hitting him “like 60 to 80 times” on his face, head, back
14 shoulders, arms, “everywhere on the body.” (*Id.* at 101–04.)

15 Julie testified that she did not go to the authorities, or to any shelter other than her
16 mother’s house, because it was “not in [her] culture” at the time, and she was also
17 submissive and scared because Cruz Sr. had a rifle and she feared he would “do something
18 worse to me.” (*Id.* at 102, 120–21.) Julie testified that it “just got to the point where I
19 couldn’t let [Cruz Sr.] hit [her] son like this” and the next day she went back and told him
20 she was going to get a divorce. (*Id.* at 103, 121.) Julie told Cruz Sr. she was leaving, took
21 Cruz by the hand and walked to the car. (*Id.* at 103.) Cruz’s father came outside with a
22 loaded rifle and pointed it at her, but she and Cruz ran to the car and left. (*Id.*)

23 At Cruz’s sentencing, some witnesses testified they were aware of this physical
24 abuse but none testified that they had personally witnessed it. Susan testified that Cruz Sr.
25 was emotionally and verbally abusive, and though she remembered hearing Julie
26 complaining to her about the physical abuse, she never saw evidence of such abuse against
27 Cruz or his mother. (*Id.* at 137, 149.) Romelia testified that one time when she visited Cruz
28 and Julie’s apartment when Cruz was young, she saw Cruz’s bassinet was “thrown by the

1 side.” (RT 3/2/05 at 82–83.) Cruz’s father explained to her that he and Julie were just
2 “rough-housing.” (*Id.* at 83.) Though Romelia did not testify she witnessed any physical
3 abuse, she told Dr. Barillas that she knew it had happened. (RT 3/3/05 at 86.) Joe Cruz,
4 Cruz’s paternal uncle, testified that he witnessed no verbal or physical abuse between
5 Cruz’s mother and father, although his brother was kind of a “prankster” and would upset
6 Cruz’s mother. (RT 3/2/05 at 19–20, 31.) Joe was not aware of any abuse of Cruz by his
7 father and believed Cruz’s mother treated him well. (*Id.* at 32.) Delia also described Cruz’s
8 father as a prankster but agreed that he was a loving father who showed Cruz affection,
9 provided for him, and had good values that he would have tried to impart to his son. (*Id.* at
10 41, 56–57.)

11 Julie and Cruz Sr. went through a “very messy divorce,” fighting over the custody
12 of Cruz. (RT 3/1/05 at 103.) Father Ford was asked to testify as a witness in the divorce
13 proceedings and recalled Cruz as a “stressed out” child at the time who cared about both
14 of his parents. (*Id.* at 62–64.) Julie testified that, despite not reporting the beatings, her
15 mother and sister reported at the custody hearing about “all the bruises [they] saw” on both
16 her and Cruz. (*Id.* at 105, 121.)

17 After Cruz’s parents divorced, Ford believed Julie, though not a “bad person,” may
18 have been “overdoing” her medications. (*Id.* at 71–72.) Ford described this as a “distinct
19 change” that occurred sometime into her nursing career, where he “saw her as kind of
20 coming apart.” (*Id.* at 72.) Julie testified that “[f]rom the beginning” she took a “big bag
21 full of medications.” (*Id.* at 107.) Julie testified that around 1992, she had a “nervous
22 breakdown” due to the sexual abuse and was later diagnosed with PTSD and bipolar
23 disorder. (*Id.* at 82, 106.) Julie testified that, though she didn’t know it, she had some of
24 the same kind of mental issues and symptoms from the time she was married. (*Id.* at 108.)

25 Despite the contentious custody battle, Julie testified that “no matter what” Cruz
26 “just adored his father,” and loved him even though he beat him, so she let Cruz go back
27 to his father “with the condition he would not beat him.” (RT 3/1/05 at 110, 121.) Susan
28 also testified that Cruz “adored” and “loved” his dad, and that the divorce “devastated”

1 him. (*Id.* at 138.) Delia also confirmed that the divorce “devastated” Cruz. (RT 3/2/05 at
2 45.)

3 When Cruz was thirteen years old, his father remarried a fifteen- or sixteen-year-
4 old girl who was jealous of Cruz, locked him out of the house, and was cruel and abusive
5 towards him. (RT 3/1/05 at 110–11, 148; RT 3/2/05 at 37.) Delia described her as an
6 insecure child bride with a “bipolar personality” who “wasn’t that much of a loving person”
7 towards Cruz. (RT 3/2/05 at 44–45, 59.) Romelia recalled Cruz telling her that when his
8 stepmother wouldn’t let him in the house, he would stay at the park, and that is how “he
9 spent the majority of his life, like an outcast.” (*Id.* at 86.) She recalled that Cruz had a lot
10 of problems in school. (*Id.* at 94.)

11 After living with his father for three years, Cruz moved to California to live with his
12 mother and Steve Lingenfelter, whom Julie had married in Los Angeles in 1986. (RT
13 3/1/05 at 109, 111.) Julie testified that she and Steve agreed to give Cruz a home and
14 provide him with anything he wanted. (*Id.* at 123.) A month after Cruz moved to California,
15 when Cruz was fifteen, his father suffered a brain aneurysm and died. (*Id.* at 111–12.) Cruz
16 became very depressed and his grades declined. (*Id.* at 115.) Cruz’s mother sent him to a
17 psychologist, but it didn’t really help. (*Id.*) Cruz became concerned that he had the same
18 problem as his father and that he was going to die at a young age as well. (RT 3/1/05 at
19 115, 130–31.) Delia testified that Cruz was filled with “so much pain and devastation and
20 . . . just emptiness” after the death of his father. (RT 3/2/05 at 46.)

21 Albert Jr. testified that he and Cruz went to high school together and drank alcohol
22 and used drugs, including marijuana, cocaine, acid, and mushrooms. (RT 3/2/05 at 145,
23 148.) He testified that Cruz changed after his father died, becoming isolated and staying
24 inside, not wanting to talk to anybody “for years.” (*Id.* at 148–49.) Susan also noted a
25 marked difference in his behavior after his father died, testifying that Cruz changed and
26 “started doing marijuana, and so he was a little bit reckless.” (RT 3/1/05 at 145.) Susan
27 also noted that at that time Cruz was lonely and didn’t have his mother’s “special love”
28 because Julie had a “lot of problems” and had “had a breakdown.” (*Id.*)

1 Cruz lived with his mother and Steve in California until he was seventeen years old.
2 (*Id.* at 117.) Cruz’s mother explained that he lived on the first floor of their house until he
3 had some “women or girls over” and she found “a little bit of pot in the garage.” (*Id.* at
4 117, 124–25.) Julie wanted him to live upstairs where she could keep a close eye on him
5 but Cruz did not want to do that. (*Id.*) Susan also described “some problems” and a falling
6 out between Cruz and Steve. (*Id.* at 154.) Julie testified that Cruz wanted to return to
7 Tucson, so Cruz was sent to live with his maternal grandmother. (*Id.* at 117, 125.) Cruz’s
8 adult uncles, Eddie and Luis, both of whom had alcohol and drug problems, also lived with
9 his grandmother. (*Id.* at 85–87, 118.) Romelia was aware that the Montenegros “partied a
10 lot” and suspected that Cruz also used drugs. (RT 3/02/05 at 87, 92.) She recalled that Cruz
11 had a lot of problems in school. (*Id.* at 94.) Lora Galioto, the mother of one of Cruz’s
12 children, testified that Cruz used pot and LSD during high school and dropped out of
13 school. (RT 3/3/05 at 119, 124.) Galioto recalled that the members of the Montenegro
14 household used drugs, mostly cocaine, while Cruz lived there. (*Id.* at 125–26.) Even after
15 he moved out of the home, Cruz maintained contact with his drug-using uncles. (*Id.* at 129.)

16 At sentencing, the defense also presented expert testimony from Drs. Barillas,
17 McCloskey, Austein, and French regarding Cruz’s social history, neurodevelopment and
18 mental health.

19 Dr. Barillas interviewed Cruz several times, reviewed records, and conducted
20 interviews of family members. (RT 3/3/05 at 38–39.) He gave Cruz a variety of tests to
21 assess intelligence and memory and to determine whether Cruz had any kind of brain
22 dysfunction. (*Id.* at 40–41.) In writing his report, Dr. Barillas reviewed and relied on the
23 report of Dr. Biggan, who had determined that although Cruz had some weaknesses in his
24 memory, he had no serious memory problems or learning disorders that were so prominent
25 as to be a real deficit.⁷ (*Id.* at 40, 47–48, 106.) After conducting various performance
26

27 ⁷ Dr. Barillas noted weaknesses in Cruz’s memory when he was assessing Cruz but
28 could not finish the testing due to an incident at the jail. He suggested that a
neuropsychological evaluation was warranted to “answer that question” and to “look

1 measures, Dr. Barillas incorporated Dr. Biggan’s conclusion that Cruz was performing
2 within the average range of intellectual functioning and had no deficits suggestive of
3 significant organic or neuropsychological impairment. (RT 3/3/05 at 104, 107; EH Ex. 218
4 at Bates 12540.) Dr. Barillas noted that Cruz’s use of LSD was extensive; Cruz also used
5 hallucinogenic mushrooms and marijuana, then later cocaine, and, after the age of twenty-
6 one, methamphetamine. (*Id.* at 49–50, 56.) Dr. Barillas diagnosed Cruz with intoxicant
7 abuse disorder. (*Id.* at 51.)

8 Dr. Barillas opined that factors that may have influenced Cruz’s involvement with
9 drugs included the loss of his father and lack of emotional support from his mother, in
10 addition to negative peer and family influences, specifically from the Montenegro side of
11 the family. (*Id.* at 53, 57–59.) Dr. Barillas commented on Cruz’s childhood environment,
12 stating that Cruz’s father was a poor role model, with a history of marital problems,
13 domestic violence, and possibly alcohol abuse, and that the lack of affection Cruz received
14 from his mother made him feel “pretty abandoned.” (*Id.* at 59–61.) Such lack of affection
15 for a child was “absolutely” a significant psychological event. (*Id.* at 60.) Dr. Barillas found
16 that there was no clear evidence of learning problems; suggesting that Cruz’s poor school
17 performance was attributable to the divorce. (*Id.* at 61–62.) Additionally, Dr. Barillas stated
18 that being the object of physical abuse is considered a risk factor for violent recidivism and
19 can contribute to a decision to use drugs. (*Id.* at 63.) Similarly, witnessing abuse in the
20 household could make a person insecure with respect to their own well-being. (*Id.* at 62–
21 63.)

22 Dr. Barillas acknowledged that Cruz never told him he had been physically abused
23 by his father and that there was some evidence of a close, loving relationship between the
24 two. (*Id.* at 87.) He also admitted that it was possible Cruz’s mother might have been trying
25 to make excuses for him. (*Id.* at 88.) Nonetheless, Dr. Barillas opined, based on how open
26 _____
27 further into the possibility of malingering.” (RT 3/3/05 at 40, 47.) Dr. Biggan conducted a
28 full neuropsychological assessment and concluded Cruz was not malingering. (*Id.* at 48.)
Dr. Barillas also reported that Cruz tended to minimize his mental health issues, reporting
only that he had “a lot of anxiety.” (RT 03/3/05 at 80–81.)

1 Julie was in discussing her own faults, that she was trying to be truthful. (*Id.*) Dr. Barillas
2 did not remember if Cruz reported that there was domestic violence in the home. (*Id.* at 87,
3 89.) He testified that Cruz reported that he was emotionally abused by his father and that
4 his mother “wasn’t there” for him. (*Id.* at 112.) Dr. Barillas agreed that Cruz’s tendency to
5 minimize his problems might explain why he would not talk about physical abuse. (*Id.* at
6 113.)

7 Dr. McCloskey reviewed records, including child custody records from Cruz’s
8 parents’ divorce proceedings, interviewed family members, and spoke with Cruz. (RT
9 3/4/05 at 23.) Dr. McCloskey testified that in 1979 a restraining order was issued against
10 Cruz’s father because the court believed there was apparently a “violent threat to the
11 mother.” (*Id.* at 25–26.) A custody report from 1980 confirmed that there was domestic
12 violence in Cruz’s home based on interviews with Cruz’s mother and grandmother. (*Id.* at
13 26.) The author of the report recognized that Cruz’s father “had terrible anger, that was
14 visible in her interview with him,” consistent, in Dr. McCloskey’s opinion, “with a
15 batterer.” (*Id.* at 27.) Based on the evidence she reviewed, Dr. McCloskey opined that Cruz
16 was abused psychologically and physically and was neglected from middle childhood on.
17 (*Id.* at 25.) Cruz was also exposed to chronic, severe domestic violence from the time he
18 was an infant. (*Id.*) Dr. McCloskey explained that because children’s brains aren’t fully
19 developed, “exposure to domestic violence under the age of six results in real impairments
20 in children.” (*Id.* at 36.)

21 Dr. McCloskey opined that in adulthood Cruz’s mother showed “very profound
22 pathologies, mental health problems” that don’t just “crop up overnight . . . she must have
23 had [them] when she was younger.” (*Id.* at 33.) Dr. McCloskey testified that Julie created
24 a terrible anxiety problem for Cruz by “screaming at her kid one minute” and being “very
25 withdrawn” at other times. (*Id.* at 34.)

26 Dr. McCloskey reported that the records also indicated, consistent with Father
27 Ford’s testimony regarding the divorce, that Cruz showed “extremely unusual levels of
28 anxiety” and was “terrified of taking sides of one parent or another.” (*Id.* at 29.)

1 Dr. McCloskey explained that Cruz’s failure to recollect much of his childhood,
2 known as “childhood amnesia,” is fairly common in people that have been abused. (*Id.* at
3 29–30, 100.)

4 Dr. McCloskey further detailed Cruz’s family history of abuse. She testified that the
5 domestic violence in the Cruz household affected all aspects of Cruz’s life:

6 Yes, I think the domestic violence, especially that cloud of that—the kind of
7 horrible shadow of that marriage which was so brutal, you know, this woman
8 was hit all the time. John witnessed it. She was thrown on the ground. She
9 was afraid he was going to kill her and the child at one point. It was—it was
10 chronic and it was severe, and I think it did really at some time—this boy—
11 it stunted his growth. Then the lack of really a functional family for him to
12 go back to after the divorce really solidified I think his—his drug use and
13 problems.

14 (*Id.* at 44.) Dr. McCloskey suggested the “terribly high level of anxiety” that Cruz had
15 experienced during the divorce proceedings was “potential clinical evidence of . . .
16 potentially some post-traumatic stress disorder in childhood.” (*Id.* at 29.)

17 According to Dr. McCloskey, the point at which Cruz “snapped” was when his
18 father died. (*Id.* at 34–35.) Dr. McCloskey explained:

19 So John was not in a good situation, but this was a stressor he couldn’t
20 possibly cope with. He did not have the mature coping skills for and started
21 doing drugs to—to self-medicate. I think the year his father died he told me
22 he took, I don’t know, hundreds of acid trips and this is just really a sign
23 because acid does kind of mimic the state of psychosis. So this is kind of a
24 sign of a child, he’s very, very disturbed who wants to escape into another
25 world of—of almost schizophrenia.

26 (*Id.* at 35.)

27 Dr. Austein did not interview Cruz but reviewed interviews with Cruz, documents
28 regarding Cruz’s history, and the reports of Drs. Biggan and Barillas. (RT 3/3/05 at 7–8.)
Dr. Austein testified about general principles of addiction, including that drug addiction
causes familial, employment, and financial problems, and often leads to crime. (*Id.* at 16–
17.) He testified that drug addiction is frequently the result of attempts at self-medication,
which can stem from mental illness or lack of self-worth and lack of affection and love

1 from family. (*Id.* at 13–14, 18–19.) Dr. Austein added that amphetamine use in particular
2 is associated with psychosis that may lead to violence and paranoia. (*Id.* at 21–22.)

3 **2. New evidence presented during post-conviction proceedings**

4 Margaret DiFrank, who conducted mitigation interviews during the trial after the
5 original mitigation specialist left the case, also conducted a mitigation investigation during
6 the PCR proceedings. She contacted family members, some of whom had not been
7 contacted during the initial mitigation investigation, and obtained information that Cruz’s
8 trial counsel had failed to discover. (*See* Doc. 112 at 15.)

9 Mitigation specialist Teresa McMahill summarized the new evidence DiFrank
10 gathered that would have been helpful to Cruz at sentencing:

11 Most significantly with regard to records, the post-conviction relief
12 mitigation specialist retrieved the voluminous mental health file that existed
13 on Mr. Cruz’s mother. These records outlined his mother’s long history of
14 serious and debilitating mental illness, which undoubtedly adversely affected
15 Mr. Cruz as he was growing up and about which the jury heard very little.

16 From the interviews the new mitigation specialist conducted, she learned that
17 Mr. Cruz’s father and paternal grandfather were cruel and sadistic; his
18 mother habitually abused drugs when he was a young boy and snorted
19 cocaine in his presence; his maternal grandfather sexually abused Mr. Cruz’s
20 cousin (as well as Mr. Cruz’s mother); several relatives had serious drug
21 and/or alcohol problems; the extent of the drug dealing and use that occurred
22 in Mr. Cruz’s maternal grandmother’s home—where he frequently lived—
23 was much greater than revealed at trial; a number of relatives suffered from
24 mental illness; Petitioner was physically abused by his mother—not just his
25 father; his mother became very promiscuous after divorcing Mr. Cruz’s
26 father, and several relatives were aware of the abuse [of] Mr. Cruz and his
27 mother by his father. At trial, the sole source of information about this abuse
28 was Mr. Cruz’s mother, and her testimony was discredited because there was
no corroboration.

(Doc. 31-4, Ex. X: Ex. 16 at 7–8.)

Cruz submitted reports from Dr. McCloskey and Dr. Barillas. Dr. McCloskey
reviewed the interviews and statements of Cruz’s family that DiFrank had obtained during
the PCR proceedings. (Doc. 31-6, Ex. X: Ex. 38 at 2.) Dr. McCloskey opined that the new
interviews corroborated earlier reports of domestic violence and abuse of Cruz by his

1 father. (*Id.*) Dr. McCloskey noted that the “child abuse descriptions in the current report
2 add different perpetrators and different types of maltreatment; the severity and duration are
3 also worse than revealed several years ago.” (*Id.* at 3.) Dr. McCloskey concluded that Cruz
4 “was abused and abandoned at an early age; he was the victim of physical assaults from
5 his father, stepfather, and maternal uncles, and he was socialized into a world of drug
6 dealing while living with his uncles.” Dr. McCloskey opined that:

7 The extraordinary neglect and abuse explains how Cruz’s life became
8 embedded in criminal activities and how violence was the main currency of
9 the world in which he lived. . . . A raft of traumatic events and bad influences
10 compounded to shape John Cruz’s development. The choices John Cruz
11 made emanated from this history, and in part were determined by forces well
beyond his control for much of his early life.

12 (*Id.* at 12–13.)

13 Dr. Barillas reviewed the new information provided to him by PCR counsel and
14 DiFrank and concluded that it raised the question of a possible Attention
15 Deficit/Hyperactivity Disorder (ADHD) diagnosis, which was not addressed during the
16 direct testimony of Dr. McCloskey and could establish a link between the impulsivity
17 associated with the condition and its high correlation with intoxicant abuse in adolescence.
18 (Doc. 31-6, Ex. X: Ex. 39 at 2.) Dr. Barillas concluded that Cruz “had symptoms and
19 conditions that were not self-evident at the time of trial.” (EH Ex. 213 at Bates 14478; Doc.
20 112 at 17.)

21 **3. New evidence presented during federal habeas proceedings**

22 Among the lay witnesses who testified on Cruz’s behalf at the federal evidentiary
23 hearing, Ana Montenegro, Cruz’s maternal aunt, and Romelia, his paternal aunt, testified
24 that they observed Cruz’s mother Julie consume alcohol while she was pregnant with him.
25 Ana testified that Julie drank regularly when she was pregnant with Cruz. (RT 5/17/19 at
26 71–72.) Ana testified that she remembered this because she was pregnant with her own
27 child at the same time Julie was pregnant with Cruz. (*Id.* at 72.) On cross-examination,
28 however, Ana admitted her son was thirteen months younger than Cruz, so she could not

1 have been pregnant at the same time as Julie. (*Id.* at 80, 87.) Romelia testified that she saw
2 Julie drinking alcohol at her wedding when she was pregnant with Cruz. (RT 5/16/19 at
3 129.) Romelia, who was thirteen years old at the time, could not recall anything specific
4 about the type of drink or the quantity. (*Id.* at 153.) Susan Alcaraz testified that she spent
5 a lot of time with Julie and while she did not recall whether Julie drank at her wedding,
6 Susan never saw her drink while she was pregnant. (*Id.* at 34–35.)

7 Irma Dominquez, Cruz’s cousin, testified that, contrary to the presentation at trial,
8 Steve Lingenfelter did not try to be a good stepfather to Cruz, nor did he and Julie welcome
9 Cruz into their home with open arms. (*Id.* at 86.) Irma also testified that she believed Cruz
10 suffered from depression. (*Id.* at 90.)

11 Lora Hastings, the mother of one of Cruz’s children, testified about Julie’s substance
12 abuse and Cruz’s depression. (RT 5/17/19 at 94, 98–100.)

13 As far as expert witnesses, Dr. Barillas testified that his 2004 evaluation of Cruz
14 was “tainted and not complete” and unreliable because it was based on missing
15 information. (RT 5/15/19 at 35.) For example, Dr. Barillas was never provided with school
16 records establishing Cruz had been placed in adaptive education classes, indicating he had
17 been designated learning disabled and placed in the learning disability resource room. (*Id.*
18 at 23, 36; EH Ex 31 at Bates 185.) Dr. Barillas also testified that he was not provided with
19 information that Cruz’s mother drank while pregnant (*id.* at 29) or information about
20 Cruz’s depression (*id.* at 34–35). Dr. Barillas also testified that at trial he provided
21 inaccurate testimony regarding Cruz’s grades, incorrectly describing Cruz’s grades as As
22 and Bs. (*Id.* at 32.)

23 Dr. Biggan, the neuropsychologist, examined Cruz in 2004 but did not testify at his
24 trial. At the evidentiary hearing, she testified that she diagnosed Cruz with
25 neuropsychological deficits, namely deficits in working memory and processing speed,
26 albeit not serious ones. (*Id.* at 68–69.) She noted there was possible significance in the
27 measured disparity between Cruz’s IQ scores. (*Id.* at 70–71.)

28 Dr. Biggan would have recommended additional testing if she had been aware of

1 Cruz’s learning disability, potential prenatal exposure to alcohol, reported amnesia, and
2 motor skills deficits. (*Id.* at 79–81.) She would have performed further testing to evaluate
3 whether these deficits would degrade when Cruz was under stress. (*Id.* at 81.)

4 Dr. Paul Connor, a psychologist, diagnosed Cruz with neurodevelopmental disorder
5 with prenatal alcohol exposure. He testified that Cruz’s “pattern of current
6 neuropsychological functioning, the history of report of prenatal exposure to alcohol, and
7 the historical records, both testing that’s been done over the last ten or so years and some
8 childhood records, are very much consistent with a fetal alcohol spectrum disorder.” (*Id.*
9 at 96–97.)

10 Dr. Connor further testified that Cruz suffers from brain impairments consistent
11 with fetal alcohol spectrum disorder (FASD), explaining that “his pattern of functioning
12 was entirely consistent with the diagnosis of a neurodevelopmental disorder associated
13 with prenatal alcohol exposure, ND-PAE.”⁸ (*Id.* at 138–39.) Finally, Dr. Connor testified
14 that the impairments he had identified were likely to “become much more problematic for
15 [Cruz]” when he was in “higher stress, higher speed situations.” (*Id.* at 143–44.)

16 Dr. Connor also testified that Cruz “exhibited secondary disabilities, disabilities that
17 are typically secondary to a fetal alcohol spectrum disorder,” including trouble at school,
18 early substance abuse, and troubles with the law. (*Id.* at 142–43.)

19 Dr. Thomas Hyde, a neurologist, evaluated Cruz in 2014. (RT 5/20/19 at 8.) Dr.
20 Hyde testified that his findings on physically examining Cruz were consistent with defects
21 shown by the neuropsychological testing. (*Id.* at 9.) Dr. Hyde found some of the
22 abnormalities to be consistent with a developmental disorder such as a fetal alcohol
23 disorder. (*Id.* at 10–12, 15–19, 29.)

24
25 ⁸ Dr. Connor explained that ND-PAE is a diagnostic label from the Diagnostic and
26 Statistical Manual (DSM) V. In 2004, under the applicable DSM IV, or DSM-4TR, his
27 diagnosis for Cruz would have been “cognitive disorder not otherwise [specified],” which
28 was “a little bit more of a broad category.” (RT 5/15/19 at 98.) Dr. Connor would have
noted that there was a pattern of performance with a fetal alcohol spectrum disorder to be
left for a medical doctor for their diagnosis. (*Id.*)

1 Dr. Cunningham testified about the basis for his conclusion that Cruz suffered from
2 prenatal exposure to alcohol:

3 Well, there are three things that have happened. First, there are now two
4 family witnesses that describe observing [Cruz’s mother] drinking during the
5 pregnancy, and then there is a much more refined neuropsychological
6 assessment . . . that identifies deficits that are consistent with fetal alcohol
7 exposure. And so those, added to the inferential factors that I identified
8 previously, significantly increase the indicia of support for fetal alcohol
9 exposure.

8 (*Id.* at 82.)

9 **4. Cruz was not prejudiced by counsel’s alleged failure to investigate**
10 **his social history, mental health and neurodevelopment**

11 “Under clearly established federal law, consideration of the defendant’s life history
12 is a ‘constitutionally indispensable part of the process of inflicting the penalty of
13 death.’” *Andrews*, 944 F.3d at 1117 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112
14 (1982)). “Evidence of abuse inflicted as a child is especially mitigating, and its omission
15 is particularly prejudicial.” *Id.* “A jury’s consideration of abuse and disadvantage suffered
16 during [childhood] is especially critical, given our society’s ‘long held’ belief that
17 ‘defendants who commit criminal acts that are attributable to a disadvantaged background
18 . . . may be less culpable than defendants who have no such excuse.’” *Id.* (quoting *Boyd*
19 *v. California*, 494 U.S. 370, 382 (1990)) (emphasis omitted).

20 This is not, however, a case where the jurors who sentenced Cruz to death did so
21 “knowing hardly anything about him.” *Id.* (quoting *Porter*, 558 U.S. at 33 (internal citation
22 omitted)). As detailed in this Order, substantial mitigating evidence was presented at
23 sentencing regarding Cruz’s childhood and social background. The Court finds that the
24 additional evidence of Cruz’s upbringing is largely cumulative to the evidence already
25 presented and would have made little difference to the jury’s sentencing determination. *See*
26 *Wong v. Belmontes*, 558 U.S. 15, 22–23 (2009) (finding no prejudice where additional
27 evidence was cumulative to that presented at trial); *Babbitt v. Calderon*, 151 F.3d 1170,
28 1176 (9th Cir. 1998), *as amended* (Aug. 27, 1998) (finding no prejudice where evidence

1 omitted from sentencing was “largely cumulative of the evidence actually presented”).

2 Much of the most significant newly discovered mitigating evidence related to Julie.
3 The evidence presented at the evidentiary hearing established that she suffered from
4 lifelong addictions to alcohol and drugs as well as mental illness, and that these conditions
5 contributed to the severe neglect and emotional abuse of Cruz throughout his childhood
6 and thereafter. Additionally, evidence from the hearing established that not just one, but
7 both of Cruz’s stepparents severely neglected and emotionally abused Cruz.

8 The new evidence regarding the circumstances of Cruz’s life presented at the
9 hearing, though more detailed and thorough, was consistent with the mitigating evidence
10 presented at sentencing. At sentencing, the jury heard that Cruz was physically and
11 psychologically abused and that his mother neglected and abandoned him. Both she and
12 two experts testified to that effect. The jury also was presented with testimony that Cruz’s
13 stepparents were unloving, and, in the case of Cruz’s stepmother, abusive.

14 The jury heard that Julie suffered an abusive childhood and had several mental
15 health issues. She testified that she was sexually abused by her father (RT 3/1/2005 at 79–
16 80); in her teens she suffered from anorexia and bulimia and tried to commit suicide
17 multiple times (*id.* at 82); and she had been diagnosed with PTSD and bipolar disorder (*id.*
18 at 105–107).

19 Cruz maintains that the new evidence shows that his mother “suffered from lifelong
20 addictions to alcohol and drugs as well as mental illness,” contributing to “a severe form
21 of neglect and emotional abuse of [Cruz] throughout his childhood and thereafter.” (Doc.
22 144 at 49.) To the extent the evidence painted a more complete picture of Julie’s serious
23 mental health issues and substance and alcohol addictions, this did not conflict with the
24 evidence presented at trial that Julie was a functioning adult for much of Cruz’s childhood,
25 attending nursing school when Cruz was a boy and practicing as a nurse for eighteen years.
26 (RT 3/1/05 at 100, 107.) And, testimony from Romelia supports the conclusion that Julie’s
27 problems with alcohol were noticeable only *after* Cruz’s father passed away. (RT 5/16/19
28 at 130.) The additional evidence that Julie’s mental health seriously deteriorated in 1994,

1 (see RT 3/1/05 at 106), would have had minimal mitigating effect because she was older,
2 Cruz was out of the house, and it occurred more than a decade before Cruz murdered
3 Officer Hardesty.

4 The jury was led to infer that Julie, suffering from her own mental health issues,
5 was incapable of providing a sound home and family environment for Cruz. The jury was
6 aware that Julie admitted to neglecting Cruz emotionally, at least when he was an older
7 child. She testified that although she felt close to Cruz when he was a baby, “[w]hen he got
8 a little bit bigger, like 7, 8, 9, [she] didn’t really touch him, hug him, kiss him, hold him as
9 much as a mother should have.” (RT 3/1/05 at 92.) She “kind of kept [her] distance more
10 than [she] should have.” (*Id.* at 109.) She admitted she didn’t even “love him.” (*Id.*) She
11 later realized that it was “terribly wrong to have children when I couldn’t give them the
12 kind of closeness that they should have.” (*Id.* at 92.) Though there was testimony during
13 sentencing that Cruz’s mother made some effort to show him love and tried to instill family
14 values in him, both Cruz’s maternal and paternal aunts corroborated the testimony that
15 Julie had a lot of problems, was not physically or mentally supportive or very comforting
16 to Cruz, and couldn’t express or show him love—perhaps from a younger age than Julie
17 was willing to admit. (RT 3/1/05 at 136, 145, 149–50; 3/2/05 at 42–43, 58, 83.) Father Ford
18 suggested that Julie may have been “overdoing medicines.” (RT 3/1/05 at 71.)

19 Testimony at sentencing from Dr. McCloskey also corroborated Julie’s testimony.
20 Dr. McCloskey explained that Cruz was neglected and “essentially abandoned at different
21 points in his childhood.” (RT 3/4/05 at 25, 34.) Dr. Barillas similarly testified that Cruz
22 “had practically no affection from his mother, and that made him feel pretty abandoned.”
23 (RT 3/3/05 at 60.) Dr. McCloskey also opined that, in addition to being neglected from
24 middle childhood on, Cruz was psychologically and physically abused and exposed to
25 chronic, severe domestic violence from the time he was an infant. (RT 3/4/05 at 25.)

26 The jury heard that when Cruz’s parents divorced, Cruz left his mother’s custody as
27 she moved to California and remarried. (*Id.* at 109.) Julie explained that she let Cruz go
28 with his father “with the condition that he would not beat him.” (*Id.* at 110.) Though

1 conflicting testimony was presented, the jury was aware of testimony that Cruz’s father
2 had violent propensities and a history of physically abusing both Cruz and his mother.
3 While Cruz did not report that he was abused, Dr. McCloskey testified that it was “fairly
4 common” for children to develop “childhood amnesia” and fail to recollect any abusive
5 events. (RT 3/4/05 at 29–30, 100.)

6 Cruz maintains that the new evidence demonstrated that both stepparents “severely
7 neglected and emotionally abused [him].” (Doc. 144 at 49.) The jury, however, heard
8 Cruz’s mother testify that Cruz’s stepmother, just a child herself, locked Cruz out of the
9 house and was abusive toward him. (RT 3/1/05 at 110–11.) This testimony was also
10 corroborated by Cruz’s paternal aunt. (RT 3/2/05 at 84–85.) Moreover, although Julie
11 testified that she and Steve welcomed Cruz to live with them and agreed to provide him
12 with a home and anything he wanted, at trial Dr. McCloskey provided contrasting
13 information about Cruz’s family situation in California, stating that Steve “did not like
14 him” and that Cruz had a lonely existence with his mother and stepfather. (RT 3/4/05 at
15 35.) Dr. Barillas similarly testified that Cruz “had practically no affection from his mother,
16 and that made him feel pretty abandoned.” (RT 3/3/05 at 60.)

17 From this testimony presented at trial, the “sentencing jury was thus ‘well
18 acquainted’ with” Cruz’s “background and potential humanizing features.” *Belmontes*, 558
19 U.S. at 23 (citing *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007)). “Additional evidence
20 on these points would have offered an insignificant benefit, if any at all.” *Id.* In Arizona,
21 “[a]n abusive family background is usually given significant weight as a mitigating factor
22 only when the abuse affected the defendant’s behavior at the time of the crime.” *State v.*
23 *Mann*, 934 P.2d 784, 795 (Ariz. 1997) (citations omitted). Cruz was thirty-three years old
24 and significantly distanced from his abusive childhood when he murdered Officer
25 Hardesty. He had not lived with his mother since he was a teenager and had fathered three
26 children and married in the meantime, living for some time with his wife’s family in New
27 Mexico. *See Poyson*, 475 P.3d at 300 (“When childhood abuse is established by a
28 preponderance of the evidence, its mitigating weight depends on the age of the defendant

1 at the time of the murder and the causal connection between the abuse and crime
2 committed.”); *State v. Pandeli*, 161 P.3d 557, 575 (Ariz. 2007) (“Pandeli murdered [the
3 victim] when he was in his late twenties, reducing the relevance of his traumatic
4 childhood.”); *State v. Hampton*, 140 P.3d 950, 968 (Ariz. 2006) (weight of “horrendous”
5 childhood lessened where defendant was 30 years old at time of the murder.) Cruz’s failure
6 to show a causal connection between the abuse and the murder entitles this mitigating
7 factor to little weight. Further, while the new evidence went into much greater detail
8 regarding Julie’s background, including her mental health issues, sexual and physical
9 abuse, and drug and alcohol addiction, and may have provided a causative explanation for
10 Julie’s treatment of Cruz, it would not have carried substantially more weight than what
11 was presented to the jury at sentencing because it did not substantially enlarge, in strength
12 or subject matter, the evidence of abuse and neglect suffered by Cruz that was presented to
13 the jury. *See Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (“[T]o establish prejudice,
14 the new evidence that a habeas petitioner presents must differ in a substantial way—in
15 strength and subject matter—from the evidence actually presented at sentencing.”).
16 Finally, evidence about a defendant’s family, including serious substance abuse, mental
17 illness, and criminal problems is “by no means clearly mitigating” as a jury may conclude
18 that the defendant is “simply beyond rehabilitation.” *Pinholster*, 563 U.S. at 201; *cf. Atkins*
19 *v. Virginia*, 536 U.S. 304, 321 (2002) (recognizing that mitigating evidence can be a “two-
20 edged sword” that juries might find to show future dangerousness).

21 The Court also concludes that Cruz was not prejudiced by counsel’s alleged failure
22 to discover and present evidence of Cruz’s “brain damage and its corresponding relation to
23 a fetal alcohol spectrum disorder.” (Doc. 144 at 48.) Cruz contends that counsel performed
24 ineffectively by failing to present evidence that he suffered from brain impairment.⁹ This

25
26 ⁹ Relying on the Court’s assessment of Claim 1 of Cruz’s habeas petition (Doc. 60),
27 Respondents assert that the jury heard evidence of Cruz’s brain damage. (*See* Doc. 143 at
28 27.) This is incorrect. The Court compared the evidence presented during PCR proceedings
to the evidence supporting Claim 1 of the habeas petition for purposes of determining
whether the claim was fundamentally altered. The evidence was not before the jury.

1 includes evidence that Cruz’s mother consumed alcohol while pregnant with him and
2 evidence that “trial counsel had in their possession a school record demonstrating that
3 Petitioner’s third grade teacher recommended he be tested for a learning disability because
4 his ‘motor skills were very poorly developed and his memory was poor.’” (*See* Doc. 144
5 at 42.) Cruz argues that, “In the hands of effective counsel, this record would have
6 precipitated further investigation to determine if Petitioner had ever been diagnosed with a
7 learning disability.” (*Id.*) Cruz notes that, “Trial counsel’s own file[] already contained a
8 school record establishing that Petitioner was diagnosed with a learning disability and
9 placed in adaptive education classes.” (*Id.*) Yet defense counsel failed to provide this
10 information to the defense team’s mental health experts, Dr. Barillas, Dr. McCloskey, and
11 Dr. Biggan.

12 Assuming without deciding that counsel performed deficiently in failing to discover
13 and share the information that Cruz was diagnosed with a learning disability in elementary
14 school and that his mother may have used alcohol during pregnancy, Cruz was not
15 prejudiced by this failure. First, based on Romelia’s age at the time, and the inconsistencies
16 in Ana’s testimony, there is no reasonable probability that an objective fact-finder would
17 have found credible the new evidence that Julie consumed alcohol during her pregnancy.
18 *See Correll v. Ryan*, 539 F.3d 938, 952 n.6 (9th Cir. 2008) (a district court errs by drawing
19 conclusions as to the sufficiency of a petitioner’s new evidence of brain damage and should
20 decide only whether there exists a “reasonable probability” that “an objective fact-finder”
21 in a state sentencing hearing would be persuaded by the new evidence).

22 In addition, Dr. Biggan testified that fetal alcohol exposure often creates severe
23 neuropsychological impairment, often with reductions in IQ and intellectual function, but
24 Cruz’s IQ was average. (RT 5/15/19 at 83.) And both Dr. Biggan and Dr. Connor noted
25 that Cruz did not appear to have facial dysmorphism, a necessary feature to support a
26 diagnosis of fetal alcohol syndrome. (*Id.* at 83, 103.) Thus, the Court finds that there is not
27 a reasonable probability that “an objective fact-finder” in a state sentencing hearing would
28 have concluded, based on the evidence presented, that Cruz’s pattern of functioning was

1 most consistent with a neurodevelopmental disorder associated with prenatal alcohol
2 exposure.

3 Next, these additional pieces of evidence would have had minimal relevance to the
4 murder. Cruz did not suffer from a learning disability when Dr. Biggan administered her
5 neuropsychological evaluation. (RT 3/3/05 at 106.) Neuropsychological testing performed
6 by Dr. Biggan demonstrated “no severe deficits in [Cruz’s] cognitive functions reflected in
7 the current testing [that] might suggest significant organic or [] neuropsychological
8 impairment.” (*Id.* at 107.) Dr. Biggan’s evaluation of Cruz demonstrated that he performed
9 within the average range of intellectual functioning and that his current test scores did not
10 reflect a learning disability. Instead, her academic achievement measures were consistent
11 with his measured IQ, both of which were within the normal range. (*Id.* at 106–07.)

12 At the evidentiary hearing, Dr. Barillas agreed that the additional information
13 concerning suspected fetal alcohol exposure did not change the results of his testing, but
14 only provided a potential cause of the deficits that were previously noted in the scores
15 presented to the jury. (RT 05/15/19 at 37–38.) Those deficits, moreover, were not strongly
16 suggestive of fetal alcohol exposure.

17 Though fetal alcohol exposure could provide a potential cause for Cruz’s deficits in
18 working memory and processing speed, Dr. Hyde could not rule out other causes for Cruz’s
19 deficits—such as head trauma or Cruz’s extensive use of drugs. (RT 5/20/19 at 19–20, 25–
20 28.) Dr. McCloskey also explained to the jury that exposure to domestic violence under the
21 age of six before a child’s brain is fully developed, such as Cruz experienced, results in
22 real impairments. (RT 3/04/05 at 36.)

23 Finally, as previously discussed, at trial the jury did hear testimony from Dr. Barillas
24 that Cruz’s ability to conform his actions to the law was impaired—not just at the time of
25 Officer Hardesty’s murder, but within a larger framework.

26 Cruz also was not prejudiced by counsel’s alleged failure to offer evidence of his
27 depression. (*See* Doc. 144 at 58, 71.) The record shows that the new evidence resembled
28 the evidence the jury was presented with that Cruz suffered from depression and self-

1 medicated as a result. *See Belmontes*, 558 U.S. at 22; *Babbitt*, 151 F.3d at 1176. Dr.
2 McCloskey testified about Cruz’s depression and its effects: “something else that has come
3 up in both the records and in the interviews is that he has very dark moods, he’s very
4 depressed and it’s not that uncommon for people to do drugs to sort of self-medicate to
5 treat their depression” (RT 3/4/05 at 49.)

6 Cruz’s assertions that his jury “heard absolutely none of the evidence” of his
7 remarkably tragic social history, coupled with the evidence of neurocognitive impairments
8 and resulting depression, and that his “choices were predicated on factors that shaped his
9 development, over which he had no control,” contributing to the tragic events of May 26,
10 2003, (Doc. 144 at 73) (quoting *Porter*, 558 U.S. at 41), are contravened by the evidence.
11 While the evidence that Cruz says his trial counsel should have offered at the sentencing
12 hearing would have done more than “barely . . . alter[] the sentencing profile” presented to
13 the jury, *see Strickland*, 466 U.S. at 77, the jury was not presented with an entirely
14 innocuous picture of Cruz’s homelife or an inaccurate picture of his cognitive condition.
15 *See Ramirez v. Ryan*, 937 F.3d 1230, 1246 (2019) (finding a reasonable probability of a
16 different outcome where the picture of mitigation presented at sentencing was relatively
17 innocuous compared to the details of “privation and abuse” that later emerged about
18 Ramirez’s life as well as the fact that he was “borderline mentally retarded”).

19 The differences between the mitigating evidence presented to Cruz’s jury and the
20 new evidence stands in contrast to the stark differences between the old and new evidence
21 in cases where relief was granted on claims of ineffective assistance of sentencing counsel.
22 For example, in *Rompilla v. Beard*, 545 U.S. 374, 391–93 (2005), the new evidence of
23 organic brain damage, extreme mental disturbance, neglect, and mental retardation bore
24 “no relation to the few naked pleas for mercy actually put before the jury.” In *Wiggins v.*
25 *Smith*, 539 U.S. 510, 512 (2003), “powerful” new evidence contrasted sharply with the
26 “halfhearted mitigation case” counsel presented to the jury. The omitted evidence included
27 the severe privation and abuse Wiggins experienced during the first six years of his life
28 while in the custody of his alcoholic, absentee mother; physical torment, sexual

1 molestation, and repeated rape during his subsequent years in foster care; time spent
2 homeless; and diminished mental capacities. *Id.* at 535. In *Williams v. Taylor*, 529 U.S.
3 362, 398 (2000), trial counsel argued in mitigation that Williams turned himself in,
4 cooperated with police, and expressed remorse for his actions. New evidence offered a
5 graphic description of Williams’s childhood, which was filled with abuse and privation. *Id.*
6 He was “borderline mentally retarded” and did not advance beyond sixth grade in school.
7 *Id.* at 396. Prison records documented his commendations for helping to crack a prison
8 drug ring and for returning a guard’s missing wallet, and prison officials described
9 Williams as among the inmates “least likely to act in a violent, dangerous or provocative
10 way.” *Id.* Finally, in *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005), counsel presented
11 no affirmative evidence in mitigation, relying entirely on a guilt-phase psychiatric report
12 concluding that no insanity defense was available. *Id.* at 635, 642. A minimal investigation
13 would have revealed a tortured family history, including the fact that Summerlin’s
14 alcoholic mother beat him frequently and punished him by locking him in a room filled
15 with ammonia fumes; that at his mother’s behest he received electroshock treatments to
16 control his explosive temper; that he had a learning disability that left him functionally
17 mentally retarded; and that he had been diagnosed as a paranoid schizophrenic and treated
18 with anti-psychotic medication. *Id.* at 631. In contrast to these cases, the new mitigating
19 information Cruz has developed from both lay and expert witnesses is largely consistent
20 with or cumulative of, but not substantially stronger or more compelling than, the evidence
21 presented to the jury.

22 **D. Conclusion**

23 The Court has considered the totality of the available evidence, both that adduced
24 at trial and in subsequent proceedings, weighed it against the aggravating factor, and
25 determined that there is not a reasonable probability that the sentencer, presented with that
26 evidence, “would have recommended a sentence of life instead of death.” *See Andrews*,
27 944 F.3d at 1108 (quoting *Wiggins*, 539 U.S. at 537).

28 While “[t]here will always be more documents that could be reviewed, more family

1 members that could be interviewed and more psychiatric examinations that could be
2 performed,” *Leavitt*, 646 F.3d at 612, the new evidence of Cruz’s social history,
3 neuropsychological development, mental health, and state of mind at the time of the crime
4 does not have significant mitigating value in view of what was already available to the
5 sentencing jury. This is especially true given the absence of a relationship between the
6 mitigating circumstances and the murder of Officer Hardesty. The aggravating factor—the
7 murder of an on-duty police officer killed in the course of his official duties—“carries
8 significant weight. The unprovoked murder of a peace officer, so the defendant can avoid
9 his obligation under the law, is really no less than a personal declaration of war against a
10 civilized society.” *Martinez v. Ryan*, 926 F.3d 1215, 1237 (9th Cir. 2019).

11 Accordingly, even if counsel “had been professionally deficient in failing to
12 investigate and present these additional facts, it is not reasonably probable that the outcome
13 of the aggravation/mitigation balancing would have been different.” *Miles v. Ryan*, 713
14 F.3d 477, 494 (9th Cir. 2013). Even if counsel’s mitigation investigation were deficient,
15 Cruz has failed to meet his burden of showing that he was prejudiced. *See Strickland*, 466
16 U.S. at 694.

17 **III. CERTIFICATE OF APPEALABILITY**

18 Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, a petitioner
19 cannot take an appeal unless a certificate of appealability has been issued by an appropriate
20 judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases provides that the
21 district judge must either issue or deny a certificate of appealability when it enters a final
22 order adverse to the applicant. If a certificate is issued, the court must state the specific
23 issue or issues that satisfy 28 U.S.C. § 2253(c)(2).

24 Under § 2253(c)(2), a certificate of appealability may issue only when the petitioner
25 “has made a substantial showing of the denial of a constitutional right.” This showing can
26 be established by demonstrating that “reasonable jurists could debate whether (or, for that
27 matter, agree that) the petition should have been resolved in a different manner” or that the
28 issues were “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*,

1 529 U.S. 473, 484 (2000). The Court finds that reasonable jurists could debate its resolution
2 of Claim 2.


3 Based on the foregoing,

4 **IT IS HEREBY ORDERED** that Cruz's Petition for Writ of Habeas Corpus (Doc.
5 28) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

6 **IT IS FURTHER ORDERED** granting a certificate of appealability with respect
7 to Claim 2.

8 **IT IS FURTHER ORDERED** that the Clerk of Court forward a courtesy copy of
9 this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ
10 85007-3329.

11 Dated this 31st day of March, 2021.

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15 Honorable Jennifer G. Zipp
16 United States District Judge
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