

Landrigan v. Trujillo

**MOTION FOR AUTHORIZATION TO FILE
A SECOND OR SUCCESSIVE APPLICATION
FOR A WRIT OF HABEAS CORPUS**

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October 25, 1990

ATTACHMENT 1

1 Petitioner was a fugitive from Oklahoma. He had been serving time in
2 an Oklahoma prison for second degree murder.

3 Petitioner was sentenced to death on the murder charge on
4 October 25, 1990 by Judge Cheryl K. Hendrix. (M.E. 10/25/90.) He was
5 sentenced to twenty years on the burglary count and six months on the
6 theft count.

7 On direct appeal Petitioner's convictions and sentence were
8 upheld. State v. Landrigan, 859 P.2d 111 (1993). Petitioner then
9 filed a Petition for Post Conviction Relief. (R.O.A., Instruments,
10 Petition for Post-Conviction Relief.) On July 17, 1995, the Superior
11 Court summarily dismissed the Petition and denied Petitioner's
12 request for an evidentiary hearing. (R.O.A., M.E. 7/17/95.) On
13 December 5, 1995, Petitioner filed a Petition For Review with the
14 Arizona Supreme Court. (Petition for Review, 12/5/95.) On June 19,
15 1996, the Arizona Supreme Court denied the Petition for Review.
16 (Denial of Petition for Review, 6/21/96.) A warrant of execution was
17 issued by the Arizona Supreme Court on October 29, 1996, fixing the
18 date of Petitioner's execution as December 3, 1996. (Warrant of
19 Execution, 10/29/96.)

20
21 Petitioner filed what he titled his Preliminary Petition for
22 Writ of Habeas Corpus and Request for Appointment of Counsel in this
23 Court on October 16, 1996. (File doc. 1.) Counsel was appointed on
24 October 23, 1996. (File doc. 2.) Subsequently, Petitioner filed a
25 Motion For Stay of Execution on November 1, 1996. (File doc. 9.)
26 Petitioner was granted a stay of execution on November 4, 1996. (File

1 doc. 7.) On July 31, 1997, Petitioner filed his finalized Petition
2 for Writ of Habeas Corpus. (File doc. 30.) Respondents filed an
3 answer addressing the procedural status of each claim raised in the
4 finalized Petition on September 15, 1997. (File doc. 39.) Petitioner
5 filed a motion to amend the petition to include two additional claims
6 on September 15, 1997. (File doc. 38.) This Court allowed
7 Petitioner to amend his Petition. (File doc. 45.) Respondents filed
8 an amended answer. (File doc. 44.) Petitioner then filed a traverse
9 on November 11, 1997. (File doc. 54.) On December 12, 1997,
10 pursuant to an order of this Court dated November 24, 1997, (file
11 doc. 55), Petitioner filed a corrected traverse, which included
12 arguments as to cause and prejudice and/or a fundamental miscarriage
13 of justice to overcome any potential procedural default. (File doc.
14 56.)³ As directed in the order of November 24, 1997, Respondents
15 filed a reply and Petitioner filed a sur-reply. (File docs. 55,
16 60, 62.)

18 PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

19 Before a federal court may review a petitioner's claims on the
20 merits, the petitioner must have presented in state court every claim
21 raised in the federal habeas petition. This is referred to as the
22

23 ³ In its original scheduling order the Court directed the
24 Petitioner to present alternative arguments of cause and prejudice
25 and/or a fundamental miscarriage of justice regarding any
26 potentially defaulted claims. Petitioner failed to do so in his
initial traverse. This Court then issued an order directing
Petitioner to comply with the original scheduling order in the case.
Petitioner filed a corrected traverse which addressed the issue of
cause and prejudice and fundamental miscarriage of justice.

1 "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 731
2 (1991); Rose v. Lundy, 455 U.S. 509, 520 (1982). To properly exhaust
3 state remedies, the petitioner must "fairly present" his claims to
4 the state's highest court in a procedurally appropriate manner.
5 Castille v. Peoples, 489 U.S. 346, 351 (1989).

6 A claim is fairly presented if the petitioner has described the
7 operative facts and the legal theories on which his federal habeas
8 claim is based. Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard v.
9 Connor, 404 U.S. 270, 277-78 (1971).⁴ In state court, the petitioner
10 must describe not only the operative facts but also the asserted
11 constitutional principle. The United States Supreme Court stated:

12 If state courts are to be given the opportunity to
13 correct alleged violations of prisoners' federal rights,
14 they must surely be alerted to the fact that the prisoners
15 are asserting claims under the United States Constitution.
16 If a habeas petitioner wishes to claim that an evidentiary
17 ruling at a state court trial denied him the due process of
18 law guaranteed by the Fourteenth Amendment, he must say so,
19 not only in federal court, but in state court.

20 Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 888 (1995).
21 Similarly, a claim may be considered unexhausted if it includes new
22 factual allegations which were not presented to the state court. New
23 factual allegations render a claim unexhausted when they
24 fundamentally alter the legal claim already considered by the state
25 court. Vasquez v. Hillery, 474 U.S. 254, 260 (1986). Federal-state

26 ⁴ Resolving whether a petitioner has fairly presented his claim
to the state court, thus permitting federal review, is an
intrinsically federal issue which must be determined by the federal
court. Wylde v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995), cert.
denied, 116 S. Ct. 1578 (1996); Harris v. Champion, 15 F.3d 1538,
1556 (10th Cir. 1994).

1 comity favors the principle that federal courts should not "entertain
2 new evidence that places [a] claim in a significantly different
3 posture, when that evidence was never presented to the state courts."
4 Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir.1988). By requiring
5 that the habeas petitioner provide the state courts with both the
6 same legal theory and the same factual predicate, the federal court
7 ensures that the same method of legal analysis to be used by the
8 federal court in resolving the petitioner's claim was also readily
9 available to the state court when it adjudicated the claim. Landano
10 v. Rafferty, 897 F.2d 661, 669 (3rd Cir.), cert. denied, 498 U.S. 811
11 (1990).

12 If there are claims which have not been raised previously in
13 state court, the federal court must determine whether the petitioner
14 has state court remedies currently available to him. If there are
15 none, the claims are "technically" exhausted. Jackson v. Cupp, 693
16 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107,
17 125 n.28 (1982)). However, before the Court may review a technically
18 exhausted claim on the merits, the petitioner must demonstrate
19 legitimate cause and actual prejudice to excuse his failure to raise
20 the claims in state court, or show that a fundamental miscarriage of
21 justice would result. Similarly, if a claim was raised in state
22 court but found precluded or waived, the Court may not hear the claim
23 absent a showing of cause and prejudice or fundamental miscarriage of
24 justice. Sawyer v. Whitley, 505 U.S. 333, 338 (1992); Coleman, 501
25 U.S. at 735 n.1; Engle, 456 U.S. at 129.

26 Ordinarily "cause" to excuse a default exists if a petitioner

1 can demonstrate that "some objective factor external to the defense
2 impeded counsel's efforts to comply with the State's procedural
3 rule." Coleman, 501 U.S. at 753. Objective factors which constitute
4 cause include interference by officials which makes compliance with
5 the state's procedural rule impracticable, a showing that the factual
6 or legal basis for a claim was not reasonably available to counsel,
7 and constitutionally ineffective assistance of counsel. Murray v.
8 Carrier, 477 U.S. 478, 488 (1986).

9 "Prejudice" is actual harm resulting from the alleged
10 constitutional error. Id. at 494. If a petitioner cannot meet the
11 cause and prejudice standard, the federal court still may hear the
12 merits of procedurally barred claims if the failure to hear the
13 claims would constitute a "miscarriage of justice." Sawyer v.
14 Whitley, 505 U.S. 333, 339 (1992)

15 The fundamental miscarriage of justice exception is also known
16 as the "actual innocence" exception. There are two types of claims
17 recognized under this exception: 1) that a petitioner is "innocent of
18 the death sentence," or, in other words, that the death sentence was
19 erroneously imposed; and 2) that a petitioner is actually innocent of
20 the capital crime. In the first instance, the petitioner must show
21 by clear and convincing evidence that, but for a constitutional
22 error, no reasonable juror would have found the existence of an
23 aggravating circumstance or some other condition of eligibility for
24 the death sentence under the applicable state law. Id. at 336, 345.
25 Claims regarding errors in the submission of mitigation evidence do
26 not relate to a "condition of eligibility" and cannot form a basis

1 for relief under this exception. Id. at 345-47.

2 Claims of actual innocence of the crime itself are judged under
3 a different standard. The petitioner must show that "a constitutional
4 violation has probably resulted in the conviction of one who is
5 actually innocent." Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851,
6 867 (1995). In order to meet this standard, the "petitioner must
7 show that it is more likely than not that no reasonable juror would
8 have found petitioner guilty beyond a reasonable doubt." Id.⁵

9 Furthermore:

10 [A] substantial claim that constitutional error has caused
11 the conviction of an innocent person is extremely rare. .
12 . . To be credible, such a claim requires petitioner to
13 support his allegations of constitutional error with new
14 reliable evidence -- whether it be exculpatory scientific
15 evidence, trustworthy eyewitness accounts, or critical
16 physical evidence -- that was not presented at trial.
17 Because such evidence is obviously unavailable in the vast
18 majority of cases, claims of actual innocence are rarely
19 successful.

20 Id. at 324, 115 S.Ct. at 865.

21 _____
22 ⁵ Substantive (or "free-standing") claims of actual innocence
23 must be distinguished from procedural claims. See Schlup, 115 S. Ct.
24 at 860. In Herrera v. Collins, 506 U.S. 390 (1993), the petitioner
25 advanced his claim of innocence to support a novel substantive
26 constitutional claim that the execution of an innocent person would
violate the Eighth Amendment even if the proceedings that had
resulted in his conviction and sentence were entirely fair and error-
free. In that case an extraordinarily high standard of review was
applied. In contrast, in Schlup the petitioner accompanied his
innocence claim with an assertion of constitutional errors at trial
(ineffectiveness of counsel and withholding of evidence). In such a
case, if a petitioner "presents evidence of innocence so strong that
a court cannot have confidence in the outcome of the trial unless the
court is also satisfied that the trial was free of nonharmless
constitutional error, the petitioner should be allowed to pass
through the gateway and argue the merits of his underlying claims."
Schlup, 115 S. Ct. at 861.

1 Even if a petitioner has presented his claim to the state court,
2 it may still be procedurally defaulted and the federal court may
3 decline to review the claim on the merits. If the state court finds
4 that the claim was precluded, that ruling may provide an independent
5 and adequate state law ground for denying an on-the-merits review in
6 a federal habeas action. A federal habeas court will not review the
7 claim unless cause and prejudice or a fundamental miscarriage of
8 justice is established. Noltie v. Peterson, 9 F.3d 802, 804-05 (9th
9 Cir. 1993). A state procedural bar is "adequate" if the rule is
10 consistently applied by the state courts. Wells v. Maass, 28 F.3d
11 1005, 1010 (9th Cir. 1994). A state court ruling is not based upon
12 "independent" state law grounds if it "fairly appears to rest
13 primarily on federal law, or to be interwoven with the federal law."
14 Coleman, 501 U.S. at 735, 111 S.Ct. at 2557.
15

16 Arizona Rule of Criminal Procedure 32 is the state's procedural
17 default rule which governs when petitioners may seek relief in post-
18 conviction proceedings and raise federal constitutional challenges to
19 their convictions and/or sentences in state court. Rule 32.2
20 provides, in part:

21 a. Preclusion. A defendant shall be precluded from
22 relief under this rule based upon any ground:

23 (2) Finally adjudicated on the merits on appeal or
24 in any previous collateral proceeding;

25 (3) That has been waived at trial, on appeal, or
26 in any previous collateral proceeding.

b. Exceptions. Rule 32.2(a) shall not apply to

1 claims for relief based on Rules 32.1(d), (e), (f), and
2 (g). When a claim under [these sub-sections] is raised in
3 a successive or untimely petition, the petition must set
4 forth the reasons for not raising the claim in the previous
5 petition in a timely manner. If meritorious reasons do not
appear substantiating the claim and indicating why the
claim was not stated in the previous petition or in a
timely manner, the petition shall be summarily dismissed.

6 Ariz. R. Crim. P. 32.2 (emphasis added). Thus, pursuant to Rule
7 32.2(a)(3), petitioners generally will not be granted relief on any
8 claim which could have been raised in the direct appeal or in a prior
9 Rule 32 petition for post-conviction relief. The preclusive effect
10 of Rule 32.2 can be avoided only if a claim falls within certain
11 exceptions (sub-sections (d) through (g) of Rule 32.1) and the
12 petitioner can justify why the claim was not raised in a timely
13 manner.

14 Therefore, in the present case, if there are claims which have
15 not been raised previously in state court, the Court must determine
16 whether Petitioner has state court remedies currently available to
17 him pursuant to Rule 32. If there are none, he has "technically
18 exhausted" the claims. However, this Court will not review the
19 claims on the merits unless the Petitioner demonstrates legitimate
20 cause and actual prejudice to excuse his failure to raise the claims
21 in earlier state court proceedings, or shows that a fundamental
22 miscarriage of justice would result. Coleman, 501 U.S. at 735 n.1,
23 111 S.Ct. at 2557 n.1; Engle, 456 U.S. at 129, 102 S.Ct. at 1572-73.
24 Similarly, if a claim was raised in state court but found precluded
25 or waived, the federal court will not hear the claim absent a showing
26

1 of cause and prejudice or a fundamental miscarriage of justice.

2 DISCUSSION

3 Applying the above stated law to the present case, the Court
4 finds that Petitioner's claims are either actually exhausted or
5 technically exhausted with the exception of claims 14 and 15. Claim
6 1 (Sixth and Fourteenth Amendment impartial jury issues only), claim
7 4 (Eighth and Fourteenth Amendment Beck claim only), claim 6 (in
8 part), claim 7 (Sixth and Fourteenth Amendment challenges only),
9 claim 8 (allegations that the trial court improperly restricted its
10 consideration of proffered mitigation evidence and that the Arizona
11 Supreme Court failed to conduct an independent review only), claim
12 10 (Eight and Fourteenth Amendment issues only), claim 11 (in part),
13 and claim 13 (Eighth and Fourteenth Amendment challenges only) will
14 be decided on the merits in a separate order. Claim 14 is dismissed
15 as premature. Claim 15 is found to be not cognizable in a habeas
16 proceeding and is dismissed. All other claims are procedurally
17 defaulted. A discussion of claims 1 through 17 is set forth below.⁶

18
19 Claim 1: The death qualification of the jury by the trial court
20 violated Petitioner's rights as guaranteed by the
21 Fifth, Sixth, Eighth and Fourteenth Amendments to the
22 U.S. Constitution.

23
24 Petitioner presented this claim in his Petition for Post-

25
26 ⁶ Petitioner has embellished his Petition for Writ of Habeas
Corpus with numerous pictures of Petitioner as a child. This Court
does not find the photographs relevant in deciding the procedural or
merit issues in this case. Hence, the Court has disregarded all
photographs of Petitioner as a child which appear in the Petition for
Writ of Habeas Corpus.

1 Conviction Relief. (R.O.A., Instruments, Petition for Post-conviction
2 Relief at 3-5.) He contended that death qualification of the jury
3 violated his constitutional right to an impartial jury under the
4 Sixth and Fourteenth Amendments. (R.O.A., Instruments, Petition for
5 Post-conviction Relief at 4.) Petitioner has exhausted the Sixth and
6 Fourteenth Amendment allegations of claim 1. The trial court stated
7 in its order that the claim was precluded. (M.E. 7/17/95.) However,
8 the court then held that Petitioner's claim was without merit and
9 cited to State v. West, 862 P.2d 192 (1993). (M.E. 7/17/95.) In
10 West, the Arizona Supreme Court found that "death qualification" of
11 the jury did not violate the defendant's state and federal
12 constitutional rights. In deciding Petitioner's claim on both a
13 preclusion and merit basis the state court did not clearly rest its
14 decision on state law grounds. The state court's merit discussion
15 interwove state and federal law. Therefore, this Court finds that
16 Petitioner has fairly presented and exhausted claim 1 regarding an
17 alleged violation of his constitutional right to an impartial jury
18 under the Sixth and Fourteenth Amendments.

19
20 Petitioner attempts to raise for the first time in this federal
21 habeas proceeding, a violation of his Fifth and Eighth Amendment
22 rights. These claims were not raised at the state court level and
23 therefore have not been fairly presented nor exhausted. If
24 Petitioner were to return to state court now and attempt to litigate
25 these issues, the claims would be found precluded pursuant to Ariz.
26 R. Crim. P. 32.2(a)(3). Petitioner therefore must demonstrate

1 legitimate cause and actual prejudice or a fundamental miscarriage
2 of justice before this Court will conduct an on-the-merits review.

3 Petitioner argues that even if some issues were not presented in
4 state court, they are not procedurally barred in federal court
5 because his direct appeal was mandatory and the Arizona Supreme Court
6 was required to review the entire record for fundamental error.
7 Thus, Petitioner argues, all issues have been exhausted and he does
8 not need to show cause and prejudice.

9 The Court does not agree. The Ninth Circuit has addressed the
10 issue of Arizona's fundamental error review in the context of
11 procedural default and stated:

12 Poland next argues that the "fundamental error" review
13 of the Arizona Supreme Court constitutes a fair
14 presentation of an issue to that court, even if not argued
15 by the parties nor mentioned in the court's opinion. This
16 contention was considered and specifically rejected in
17 Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir.
18 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 588, 136 L.
19 Ed. 2d 517 (1996). See also Krone v. Hotham, 181 Ariz.
20 364, 890 P.2d 1149, 1151 (Ariz. 1995) (usual rules of
21 preclusion apply in capital cases); State v. Curtis, 185
22 Ariz. 112, 912 P.2d 1341 (Ariz. Ct. App. 1995) (review for
23 fundamental error of issues not raised on appeal does not
24 enable petitioner to raise the issue belatedly in post-
25 conviction proceeding).

26 Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997). The Court
recognizes and follows Martinez-Villareal and Poland, which are
controlling Ninth Circuit precedent on this issue.

Furthermore, in Woratzek v. Lewis, 863 F. Supp. 1079, 1095 (D.
Ariz. 1994), aff'd, 97 F.3d 329 (9th Cir. 1996), the Court rejected
a petitioner's argument that Arizona's automatic direct appeal and
search of the record for fundamental error obviates the possibility

1 that a federal constitutional claim is defaulted. The Woratzeck
2 court also rejected the petitioner's argument that Arizona defines
3 fundamental error as federal constitutional error. Id.

4 Petitioner also alleges that he has cause to excuse the default,
5 because he was denied adequate process at the state court level and
6 therefore he was denied an opportunity to develop and litigate claims
7 at the state court level through no fault of his own. Petitioner did
8 not raise any violation of his Fifth and Eighth Amendment rights as
9 they apply to death qualification of the jury at the state court
10 level. Because he did not present to the state court these
11 allegations there was nothing to develop or litigate. Further,
12 claims of error in the state post-conviction review process are not
13 addressable through habeas corpus proceedings. Franzen v. Brinkman,
14 877 F.2d 26 (9th Cir. 1989), cert. denied, 493 U.S. 1012 (1989);
15 Bonin v. Vasquez, 794 F. Supp. 957, 989 (C.D. Calif. 1992), aff'd,
16 59 F.3d 815 (9th Cir. 1995). Arizona provides capital prisoners with
17 an adequate collateral review process. See Poland v. Stewart, 117
18 F.3d 1094, 1105-1106 (9th Cir. 1997); and Martinez-Villareal v. Lewis,
19 80 F.3d 1301, 1306 (9th Cir. 1996). Based upon a review of the record
20 it appears that the state court complied with all applicable rules
21 and procedures in reviewing Petitioner's Petition for Post-conviction
22 Relief. This Court does not find that Petitioner was denied due
23 process in his state post-conviction proceedings and therefore finds
24 no cause to excuse any procedural default.
25

26 Petitioner next argues that cause exists to excuse the default

1 of any claims presented in his finalized Petition because his direct
2 appeal counsel was ineffective for failing to raise the issues on
3 direct appeal. Although ineffective assistance of counsel in
4 violation of the Sixth Amendment is sufficient to constitute cause
5 to overcome a procedural default, before it may be used to establish
6 cause, a claim of ineffective assistance of counsel must first be
7 submitted and exhausted before the state courts as an independent
8 claim. See Murray v. Carrier, 477 U.S. 478, 489-90 (1986); Tacho v.
9 Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (stating that before an
10 ineffectiveness claim may be used as cause to overcome a procedural
11 default, it must first be presented as a separate claim in state
12 court); see also Mu'min v. Pruett, 125 F.3d 192, 198-99 (4th Cir.
13 1997) (same); Momient-El v. DeTella, 118 F.3d 535, 541-42 (7th Cir.
14 1997) (reversing district court when district court did not require
15 the ineffectiveness claim to be brought as a separate claim in state
16 court before being used as cause to overcome procedural default);
17 Wylde v. Hundley; 69 F.3d 247, 253 (8th Cir. 1995) (same). The
18 failure of direct appeal counsel to raise this claim has never been
19 submitted by Petitioner to the state courts as an independent
20 ineffective assistance of counsel claim. Therefore, it may not be
21 considered as cause to overcome the procedural default. See Carrier,
22 477 U.S. at 489. Absent a demonstration of legitimate cause, there
23 is no need for this Court to engage in a prejudice analysis.
24

25 Petitioner argues that if any defaulted claim does not receive
26 an on-the-merits review in this Court that a fundamental miscarriage

1 of justice will occur. Petitioner makes three allegations throughout
2 his corrected traverse to support this allegation. Petitioner
3 alleges in claim 1 that the death qualification of the jury was
4 structural error and therefore automatic reversal of his conviction
5 is required. (File doc. 56 at 45.) This allegation does not support
6 any claim that Petitioner is actually innocent of the offense for
7 which he was convicted or that he is actually innocent of the death
8 sentence imposed. Given the overwhelming evidence of Petitioner's
9 guilt at trial, Petitioner has not presented this Court with new or
10 additional evidence of innocence so strong that the Court cannot have
11 confidence in the outcome of the trial. See Schlup 115 S.Ct. at 861.
12

13
14 Petitioner also contends in subsequent claims, addressed
15 separately later in this Order, that a fundamental miscarriage of
16 justice will occur if a claim does not receive a review on the merits
17 because the state "believed" that a life sentence was an appropriate
18 sentence in this case. (File doc. 56 at 49.) Again, Petitioner does
19 not offer evidence that he is either actually innocent of the offense
20 or that he is innocent of the death penalty. The fact that the state
21 may have offered Petitioner a plea bargain at some stage of the
22 proceedings does not demonstrate that the death penalty was
23 erroneously imposed. The trial judge found that the state had proven
24 two aggravating circumstances beyond a reasonable doubt. Petitioner
25 had previously been convicted of a felony involving the use of
26 violence on another person and that the Petitioner committed the

1 offense in expectation of the the receipt of something of pecuniary
2 value. (M.E. 10/25/90 at 4.) She found the mitigating factors
3 presented by Petitioner insufficient to call for leniency. (M.E.
4 10/25/90 at 5.) The sentence was upheld by the Arizona Supreme Court.
5 State v. Landrigan, 176 Ariz. at 6, 859 P. 2d at 116. This Court
6 does not find that Petitioner's allegations that the state "believed"
7 he should not receive the death penalty, as evidenced by its offer
8 of a plea bargain, demonstrates that he is innocent of the sentence
9 imposed. Petitioner has failed to show by clear and convincing
10 evidence that but for a constitutional error, no reasonable sentencer
11 would have found him eligible for the death penalty under Arizona
12 law. See Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992).

13
14 Petitioner's third argument regarding fundamental miscarriage of
15 justice alleges that the sentencer was not presented with "all the
16 evidence concerning the propriety of a death sentence" and if the
17 evidence had been presented no reasonable sentencer would have
18 imposed the death penalty. (File doc. 56 at 48.) This claim is
19 based upon Petitioner's allegation that there is no certainty
20 regarding the basis for Petitioner's conviction - - premeditated or
21 felony murder. However, the trial judge was clear that she based the
22 sentence on a finding of felony murder. (M.E. 10/25/90 at 4.) It
23 is of no help to Petitioner to assert that a finding of premeditated
24 murder would demonstrate that he was innocent of the sentence
25 imposed. As stated previously, Petitioner has failed to show by
26 clear and convincing evidence that but for a constitutional error,

1 no reasonable sentencer would have found him eligible for the death
2 penalty under Arizona law. Id. Therefore, claim 1 will be reviewed
3 on the merits only regarding Petitioner's Sixth and Fourteenth
4 Amendment impartial jury issues.

5 Claim 2: The finding that the murder was committed in
6 expectation of pecuniary gain under A.R.S. §13-
7 703(F)(5) was not supported by the evidence. The use
8 of the pecuniary gain aggravating factor duplicated an
9 element of the crime in a prosecution under felony-
murder. As a result, Petitioner's rights guaranteed
by the Fifth, Sixth, Eighth and Fourteenth Amendments
to the United States Constitution were violated.

10 Petitioner alleges that he raised this claim in his direct
11 appeal. In his direct appeal Petitioner raised the issue of the
12 pecuniary gain factor not being supported by the evidence, however,
13 Petitioner referenced no federal constitutional violations and did
14 not cite any federal case law. His claim was based solely on state
15 law. (Appellant's Opening Brief at 20.) It is not enough for a
16 petitioner to recite the factual allegations and allege violations
17 of state law. Petitioner must also allege federal constitutional
18 violations at the state court level if he wishes to preserve the issue
19 for review by the federal court. The Supreme Court stated:

20
21 If state courts are to be given the opportunity to
22 correct alleged violations of prisoners' federal rights,
23 they must surely be alerted to the fact that the prisoners
24 are asserting claims under the United States Constitution.
If a habeas petitioner wishes to claim that an
evidentiary ruling at a state court trial denied him the
due process of law guaranteed by the Fourteenth Amendment,
he must say so, not only in federal court, but in state court.

25 Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 888 (1995).

26 Petitioner has not presented in any manner, to the state court,

1 his claim that the use of the pecuniary gain aggravating factor
2 duplicated an element of the crime. Therefore, petitioner has not
3 fairly presented his federal constitutional claims to the state
4 court.

5 Petitioner's argument that the claim was presented through the
6 Arizona Supreme Court's fundamental error review has already been
7 rejected by this Court. (See discussion supra at 13-14.) This Court
8 does not find that Petitioner attempted to present a colorable
9 constitutional claim and was thwarted in his attempt. Petitioner
10 simply failed to include any mention of federal constitutional issues
11 related to the finding that the murder was committed in expectation
12 of pecuniary gain and therefore the federal constitutional claims
13 were not considered by the state court. If Petitioner were to return
14 to state court, he would be precluded from raising these claims
15 pursuant to Ariz. R. Crim. P. 32.2(a)(a). Therefore, Petitioner has
16 no state court remedies available and the claims are technically
17 exhausted.
18

19 As discussed above, Petitioner cannot demonstrate legitimate
20 cause and actual prejudice or a fundamental miscarriage of justice
21 to excuse the default. (See discussion supra at 14-17.)⁷ Therefore
22

23 ⁷ Petitioner advances the same arguments in support of cause and
24 prejudice and a fundamental miscarriage of justice throughout his
25 Supplemental Traverse. Therefore, this Court's holding as to each
26 individual claim considers each of the arguments in context of that
claim. However, the Court does not find it efficient or illuminating
to reiterate multiple times its holding and reasoning in rejecting
Petitioner's arguments.

1 this Court will not review claim 2 on the merits.

2 Claim 3: The state suppressed exculpatory information and
3 permitted a witness to present false testimony. As a
4 result Petitioner's rights guaranteed by the Fifth,
Sixth, Eighth and Fourteenth Amendments were violated.

5 Petitioner alleges that this claim was presented in his Petition
6 for Post-Conviction Relief. (File doc. 56 at 49.) In his post-
7 conviction proceeding, a claim of "newly discovered evidence" was
8 asserted. Petitioner alleged only that the state had failed to
9 inform him that Dyer's paycheck had not been cashed.⁸ Subsequent to
10 trial, but prior to the direct appeal, Petitioner's investigator
11 discovered the information which established that Dyer's paycheck had
12 not been cashed. In his Petition for Post-conviction Relief,
13 Petitioner presented this claim as one of newly discovered evidence.
14 He did not assert any federal constitutional issues. (R.O.A.,
15 Instruments, Petition for Post-conviction Relief at 5-10.) Thus, he
16 has not fairly presented the claim of the uncashed paycheck to the
17 state court as a violation of any federal constitutional rights and
18 therefore it is not exhausted. The state court found that the
19 evidence was not "newly discovered" and that the fact that the
20 paycheck was not cashed would not have changed the verdict or the
21

22
23 ⁸ Petitioner alleges that the cashing of the paycheck was a
24 crucial piece of evidence establishing an element of the predicate
25 felony which supported his conviction for felony murder. If the
26 paycheck was not cashed, so petitioner alleges, there is no basis for
felony murder. Similarly, if the paycheck had not been cashed, then
it is far less likely that Petitioner committed a murder for
pecuniary gain and the pecuniary gain aggravating factor would not
have been present.

1 sentence. (M.E. 7/17/95 at 3.) Pursuant to Ariz. R. Crim. P.
2 32.2(a)(3), Petitioner would be precluded from now pursuing this
3 claim in state court on a constitutional basis. Because Petitioner
4 has no state court remedies remaining, this Court finds that the
5 claim is technically exhausted. Petitioner must demonstrate cause
6 and prejudice or a fundamental miscarriage of justice before this
7 Court will review the claim on the merits. As Petitioner is unable
8 to prove cause and prejudice or a fundamental miscarriage of justice,
9 the claim involving Dyer's uncashed paycheck will not be reviewed on
10 the merits. (See discussion supra at 14-17.)

11 Petitioner also alleges that the state withheld exculpatory
12 evidence or failed to test certain evidence. These claims have never
13 been presented at the state court level and remain unexhausted.
14 Ariz. R. Crim. P. 32.2(a)(3) would preclude Petitioner from raising
15 these claims at the state court level now. Petitioner has not
16 demonstrated that any exception to the preclusive effects of Rule
17 32.2 apply. According to Petitioner, the facts underlying the
18 allegation that the prosecution withheld exculpatory evidence were
19 available to Petitioner at the time he was pursuing his state court
20 remedies. (File doc. 56 at 49-51.) Given the overwhelming evidence
21 of Petitioner's guilt at trial, Petitioner has not presented this
22 Court with new or additional evidence of innocence so strong that the
23 Court cannot have confidence in the outcome of the trial. See Schlup
24 115 S.Ct. at 861. Therefore, unless Petitioner can show cause and
25 prejudice or a fundamental miscarriage of justice this Court will not
26

1 review the claims on the merits.

2 Petitioner argues that his direct appeal counsel was ineffective
3 for failing to raise the above issues. However, as discussed above,
4 Petitioner has not raised the alleged ineffectiveness of his direct
5 appeal counsel as a separate claim in state court. (See discussion
6 supra at 15.) Because the claim that direct appeal counsel was
7 ineffective for failing to raise issues related to exculpatory
8 material was not presented to the state court, the claim cannot now
9 constitute cause to excuse a default. See Murray v. Carrier, 477
10 U.S. 478, 489-90 (1986); Tacho v. Martinez, 862 F.2d 1376, 1381 (9th
11 Cir. 1988) (stating that before an ineffectiveness claim may be used
12 as cause to overcome a procedural default, it must first be presented
13 as a separate claim in state court.)

14 As discussed previously this is not a case where Petitioner was
15 denied the opportunity to develop or litigate claims which were
16 before the state court. Petitioner, with the exception of the
17 uncashed paycheck claim, did not include the claims involving alleged
18 exculpatory evidence in any pleading before the state court and
19 therefore the state court could not consider them. Petitioner has
20 failed to establish either cause and prejudice or a fundamental
21 miscarriage of justice sufficient to excuse any procedural default.
22 (See discussion supra at 14-17.). Claim 3 will not be reviewed on
23 the merits.
24

25 Claim 4: The failure by the trial court to offer the jury
26 instruction on lesser included offenses violated

1 Landrigan's rights under the Fifth, Sixth, Eighth and
2 Fourteenth Amendments.

3 The parties agree that Petitioner has fairly presented and
4 exhausted this claim as to the Eighth and Fourteenth Amendments.
5 Petitioner raised this claim in his direct appeal citing Beck v.
6 Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980). (Appellant's Opening
7 Brief at 13.) This court will review on the merits Petitioner's claim
8 that the trial court's failure to offer the jury instruction on
9 lesser included offenses violated his rights under the Eighth and
10 Fourteenth Amendments.

11 Petitioner did not however, raise any violations of the Fifth
12 and Sixth Amendment at the state court level. These claims were not
13 fairly presented. Petitioner's failure to present these claims was
14 not due to a barrier imposed by any circumstances outside of his
15 control. Petitioner would be precluded from raising these claims now
16 in state court pursuant to Ariz. R. Crim. P. 32.2(a)(3). Petitioner
17 has not demonstrated cause and prejudice or a fundamental miscarriage
18 of justice and therefore the Fifth and Sixth Amendment claims will
19 not receive an on-the merits review by this Court. (See discussion
20 supra at 14-17.)

21
22 Claim 5: Insufficient evidence existed to sustain Petitioner's
23 convictions and the sentences. Petitioner's
24 conviction and sentence violate the Fifth, Sixth,
25 Eighth and Fourteenth Amendments.

26 In his direct appeal Petitioner argued that insufficient
evidence existed to prove that Petitioner committed a murder in the

1 course of or in furtherance of second degree burglary or in immediate
2 flight from such crime. He based his claim upon the trial court's
3 failure to grant either his motion for a judgment of acquittal or in
4 the alternative for a new trial. Nowhere in his argument does he
5 present issues relating to the violation of any federal
6 constitutional rights. (Appellant's Opening Brief at 8-10.) The
7 Arizona Supreme Court, in rendering its opinion, similarly did not
8 discuss or mention any federal constitutional rights. State v.
9 Landrigan, 176 Ariz. 1, 859 P.2d 111 (1993). Petitioner's argument
10 that the claim was presented through the Arizona Supreme Court's
11 review for fundamental error has previously been rejected. (See
12 discussion supra at 13-14.) If Petitioner were to return to state
13 court to exhaust this issue, the court would find it to be precluded
14 pursuant to Ariz. R. Crim. P. 32.2(a)(3). Petitioner's failure to
15 allege, develop or litigate this claim as a federal constitutional
16 issue was not hindered by any circumstance outside of his control.
17 This Court declines to review claim 5 on the merits because
18 Petitioner has failed to show legitimate cause and actual prejudice
19 or a fundamental miscarriage of justice. (See discussion supra at 14-
20 17.)

22 Claim 6: Petitioner's rights guaranteed by the Fifth, Sixth,
23 Eighth and Fourteenth Amendments were violated as a
24 result of the ineffective assistance of counsel that
25 he received at the sentencing phase of the capital
26 proceeding.

The parties agree that this claim is exhausted and that this

1 Court should undertake an on-the-merits review of Petitioner's claim
2 that counsel was ineffective for advising Petitioner not to cooperate
3 with the probation officer. This claim was presented in Petitioner's
4 direct appeal. (Appellant's Opening Brief at 26-7.)

5 In his Petition for Post-Conviction Relief, Petitioner claimed
6 that his trial counsel was ineffective for failing to contact his
7 biological father and adopted sister and counsel failed to explore
8 additional grounds for arguing mitigation evidence. Specifically,
9 Petitioner argued that counsel should have presented evidence at
10 sentencing regarding the biological component of violence and
11 Petitioner's predisposition for violence given the history of his
12 biological family. (R.O.A., Instruments, Petition for Post-
13 Conviction Relief at 11-17.) The trial court found that counsel had
14 not been ineffective and additionally found that the claims could be
15 precluded because they had already been decided by the Arizona
16 Supreme Court on direct appeal. (M.E. 7/17/95 at 3-4.) Because the
17 state court issued a ruling on the merits of the claim this Court
18 finds that the claim is actually exhausted. This court will hear
19 claim 6 on the merits.
20

21 Claim 7: Petitioner's rights to have a jury determine the
22 existence of mitigating circumstances and take part in
23 the sentencing decision, as guaranteed by the Fifth,
Sixth, Eighth and Fourteenth Amendments were violated.

24 Petitioner raised this issue as a due process violation in his
25 direct appeal. (Appellant's Opening Brief at 15-16.) The Arizona
26 Supreme Court addressed the issue of Petitioner's Sixth and

1 Fourteenth Amendment rights. This claim was fairly presented and
2 exhausted regarding Petitioner's Sixth and Fourteenth Amendment
3 rights. This Court will review the alleged Sixth and Fourteenth
4 Amendment violations of Petitioner's right to have a jury determine
5 the existence of mitigating circumstances and take part in the
6 sentencing decision on the merits.

7 Petitioner has not raised the Fifth and Eighth Amendment claims
8 in any state court. These claims have not been fairly presented to
9 the state court. It appears from the record that Petitioner made no
10 attempt to present, develop or litigate the Fifth and Eighth
11 Amendment aspects of this claim at the state court level.
12 Petitioner's argument that the Arizona Supreme Court implicitly
13 considered these issues in its fundamental review process is
14 rejected. (See discussion supra at 13-14.)
15

16 If Petitioner were to return to state court to exhaust the
17 claims, he would be precluded from doing so pursuant to Ariz. R.
18 Crim. P. 32.2(a)(3). Petitioner must demonstrate cause and prejudice
19 or a fundamental miscarriage of justice before the portion of claim
20 7 related to violations of the Fifth and Eighth Amendments will be
21 heard on the merits. Because Petitioner has failed to establish
22 either legitimate cause and actual prejudice or a fundamental
23 miscarriage of justice, this Court will not review the Fifth and
24 Eighth Amendment aspects of claim 7. (See discussion supra at 14-
25 17.)
26

1 Claim 8: The trial court's failure to consider evidence of
2 mitigation offered at trial and the Arizona Supreme
3 Court's failure to consider evidence of mitigation in
4 its independent review violated Petitioner's Fifth,
5 Sixth, Eighth, and Fourteenth Amendment rights.

6 Petitioner raised this claim, in part, in his direct appeal.
7 Petitioner argued that the sentencing authority must consider any
8 aspect of the Petitioner's character or record of any circumstances
9 of the offense offered by the Petitioner as mitigation. He alleged
10 that "the trial court acknowledged but did not properly use the
11 mitigating evidence before it." (Appellant's Opening Brief at 23 and
12 25.) This claim has been properly exhausted, in part, and this Court
13 will review on the merits Petitioner's allegation that the trial
14 court improperly restricted its consideration of proffered mitigation
15 evidence.

16 In Petitioner's Motion for Reconsideration of the Arizona
17 Supreme Court's direct appeal opinion, he alleges that the Arizona
18 Supreme Court also failed to properly consider certain mitigation
19 evidence. (Motion for Reconsideration, 3/12/93 at 3-5.) He cited
20 to federal caselaw to buttress his argument. Respondents filed an
21 opposition to the motion. (Response to Motion for Reconsideration,
22 3/30/93.) The Arizona Supreme Court denied, without comment,
23 Petitioner's Motion for Reconsideration. Petitioner did not present
24 the claim in his Petition for Post-conviction Relief.

25 Respondents concede that Petitioner presented the issue to the
26 state's highest court in a procedurally appropriate manner and the

1 Arizona Supreme Court had the opportunity to consider the claim on
2 the merits. Therefore, this Court will review on the merits
3 Petitioner's claim that the Arizona Supreme Court failed to consider
4 evidence of mitigation in its independent review in violation of
5 Petitioner's Eighth and Fourteenth Amendment rights.

6 Petitioner has not presented the above claims in the context of
7 the Fifth and Sixth Amendments nor has he demonstrated cause and
8 prejudice or a fundamental miscarriage of justice as reason to excuse
9 the default. (See discussion supra at 14-17.). Petitioner's
10 allegations that the failure to consider mitigating evidence by the
11 the trial court and the Arizona Supreme Court violated his Fifth and
12 Sixth Amendment rights will not be reviewed on the merits.

13 Additionally, Petitioner has not presented the claim that the
14 trial court made an inadequate record of its review of proffered
15 mitigating evidence in state court. Petitioner would be precluded
16 from presenting this claim at the state court level now, pursuant to
17 Ariz. R. Crim. P. 32.2 (a)(3). Absent a demonstration of actual
18 cause and legitimate prejudice or a fundamental miscarriage of
19 justice this Court will not review that portion of claim 8 on the
20 merits. Petitioner has failed to show cause and prejudice or a
21 fundamental miscarriage of justice and therefore, the claim that the
22 trial court made an inadequate record of its review of mitigation
23 evidence will not receive an on-the-merits review. (See discussion
24 supra at 14-17.)
25
26

1 Claim 9: The imposition of the death penalty was contrary to
2 the sentencing findings made by the trial court.
3 Imposition of the death penalty violated Petitioner's
 rights under the Fifth, Sixth, Eighth and Fourteenth
 Amendments.

4 Petitioner asserted the factual basis of this claim in his direct
5 appeal. (Appellant's Opening Brief at 21-22.) He did not support
6 his claim with any federal constitutional law or statutes. In fact
7 he cites very little state law authority for his argument and
8 acknowledges that the sentencing judge had found at least one valid
9 aggravating factor. The Arizona Supreme Court did not rely on
10 federal law in addressing the merits of this issue. Therefore,
11 Petitioner has not fairly presented claim 9 as it implicates his
12 federal constitutional rights to the state court. Petitioner's
13 argument that the claim was fairly presented because the Arizona
14 Supreme Court conducted an independent, fundamental review of
15 Petitioner's death sentence has been rejected. (See discussion supra
16 at 13-14.) If Petitioner were to return to state court and raise
17 this claim it would be found to be precluded pursuant to Ariz. R.
18 Crim. P. 32.2(a)(3). Unless Petitioner can demonstrate legitimate
19 cause and actual prejudice or a fundamental miscarriage of justice,
20 this Court will not review claim 9 on the merits. As previously
21 discussed, Petitioner has failed to demonstrate legitimate cause and
22 actual prejudice. Nor has he shown that he is actually innocent of
23 the offense or the death penalty. (See discussion supra at 14-17.)
24 Claim 9 will not receive an on-the-merits review by this Court.
25
26

1 to develop or litigate this claim was not caused or hampered by
2 circumstances which were beyond his control. As previously
3 discussed, Petitioner has failed to demonstrate either cause and
4 prejudice or a fundamental miscarriage of justice. (See discussion
5 supra at 14-17.) Therefore, claim 10 alleging violations of
6 Petitioner's Fifth and Sixth Amendment rights is procedurally
7 defaulted and will not be reviewed on the merits by this Court.

8 **Claim 11:** The statutory provisions governing the Arizona capital
9 punishment scheme violates the Fifth, Sixth, Eighth
10 and Fourteenth Amendments.

11 In his direct appeal, the Petitioner alleged that the Arizona
12 death penalty statute violated the Eighth Amendment because it did
13 not sufficiently channel the sentencer's discretion. (Appellant's
14 Opening Brief at 17-19.) In his Petition for Post-Conviction Relief,
15 Petitioner raised six additional challenges to the Arizona death
16 penalty statute. These claims are as follows:

- 17 a. The Arizona death penalty scheme is unconstitutional
18 because the County Attorney has unfettered discretion to
19 decide whether to seek the death penalty. This violates
20 the Eighth and Fourteenth Amendments because it permits
21 arbitrary and capricious imposition of the death penalty.
- 22 b. The Arizona death penalty statute is unconstitutional
23 because it does not require that the state prove that the
24 death penalty is appropriate. This violates the Eighth and
25 Fourteenth Amendments because neither the statute nor case
26 law require that the state prove that death is an
appropriate sentence in a particular case.
- c. The Arizona death penalty statute is unconstitutional
because it precludes weighing all mitigation evidence and
places the burden of proving mitigation sufficiently
substantial to outweigh the presumption of death on capital

1 defendants. This violates the Eighth and Fourteenth
2 Amendments to the U.S. Constitution.

3 d. The Arizona death penalty statute is unconstitutional
4 because it provides no mechanism by which the [petitioner]
5 may explore potential biases or prejudices of the
6 sentencer. This violates the Fifth, Sixth and Fourteenth
7 Amendments.

8 e. The death penalty is cruel and unusual punishment which
9 violates the Eighth Amendment.

10 f. Proportionality review is constitutionally required.

11 (R.O.A., Instruments, Petition for Post-Conviction Relief at 18-22.)

12 In its minute entry of July 17, 1995, the trial court stated:

13 If the [petitioner] was serious about having these issues
14 properly addressed, they should have been raised on appeal.
15 Because they were not raised, they were waived and the
16 [petitioner] is precluded from being granted relief. The
17 [petitioner] probably did not raise the issues on appeal because
18 they are without merit.

19 (M.E. 7/17/95 at 5.) The trial court then discussed each issue on
20 the merits interweaving federal and state law. The opinion of the
21 state court does not clearly rest on independent and adequate state
22 law grounds. Therefore, Petitioner's claims as they were raised in
23 Petitioner's post-conviction relief motion, are exhausted and will
24 be reviewed by this Court on the merits.⁹

25 In his Petition for Writ of Habeas Corpus, Petitioner raises
26 additional issues which have not been presented to the state court.
He alleges:

27 a. The death penalty is not the least restrictive nor

28 ⁹ Petitioner does not raise the issue that proportionality
29 review is constitutionally required in claim 11 of his habeas
30 petition. He does raise this issue as claim 13.

- 1 effective means of deterrence;
- 2 b. societal interests do not justify the death penalty;
- 3 c. there is no compelling state interest in the death penalty;
- 4 d. placement of a burden on Petitioner to prove mitigating
5 circumstances creates an undue risk that the death penalty
6 will be imposed where a lesser sentence is appropriate;
- 7 e. the statute does not require that the sentencer find beyond
8 a reasonable doubt that the statutory sentencing formula
9 has been met;
- 10 f. fails to ensure arbitrary and discriminatory imposition of
11 the death penalty will not occur.

12 (File doc. 30 at 44-46.) These issues have not been presented to the
13 state court and would be precluded pursuant to Ariz. R. Crim. P.
14 32.2(a)(3) if Petitioner attempted to return to state court and
15 litigate them now. There is nothing in the record to indicate that
16 Petitioner's failure to present, develop or litigate these issue was
17 hampered by circumstances beyond his control. Petitioner has failed
18 to show legitimate cause and actual prejudice or a fundamental
19 miscarriage of justice and therefore the issues listed above will not
20 be reviewed on the merits by this Court. (See discussion supra at 14-
21 17.)

22 Claim 11 will be reviewed on the merits regarding Petitioner's
23 allegations that the Arizona death penalty statute violates the
24 Eighth Amendment because it does not sufficiently channel the
25 sentencer's discretion. The Court will also review the additional
26 issues, listed above, which were asserted by Petitioner in his
Petition for Post-conviction Relief.

1 Claim 12: The Arizona death penalty statute violates Article VI
2 of the United States Constitution and various
3 international laws including but not limited to, the
4 Organization of American States Treaty and the
5 American Declaration of the Rights and Duties of Man.

6 Petitioner did not raise this issue at the state court level.
7 Petitioner alleges that this claim was raised both in his direct
8 appeal and in his Petition for Post-Conviction Relief. (File doc.
9 at 56 at 84.) The claims presented by Petitioner in his direct appeal
10 brief and his Motion for Post-Conviction Relief are clearly different
11 from the claim he is now propounding in his habeas petition.
12 Petitioner's claim that the Arizona death penalty statute violates
13 the United States Constitution is not the same as allegations of
14 violation of international law. The issues raised by Petitioner in
15 his direct appeal and post-conviction proceedings do not contain any
16 reference to the Organization of American States Treaty or the
17 American Declaration of the Rights and Duties of Man. This claim has
18 not been fairly presented to the state court and is not actually
19 exhausted. Pursuant to Rule 32.2(a)(3) of the Ariz. R. of Crim. P.
20 Petitioner would now be precluded from raising this claim in state
21 court. The claim is technically exhausted. Having failed to show
22 cause and prejudice or a fundamental miscarriage of justice,
23 Petitioner is procedurally barred from presenting this claim for an
24 on-the-merits review in this Court. (See discussion supra at 14-17.)

25 Claim 13: The death sentence imposed against Petitioner is
26 inappropriate because he was denied the procedural
 safeguard of a meaningful proportionality review by
 the state appellate court. This limitation by the

1 state court violated Petitioner's rights as guaranteed
2 by the Fifth, Sixth, Eighth and Fourteenth Amendments.

3 Petitioner asserted in his direct appeal brief that "there is
4 no meaningful proportionality review that would allow this court to
5 narrow the class of death-eligible cases at the appellate stage of
6 the proceedings." (Appellant's Opening Brief at 19.) He cites this
7 as a violation of his Eighth Amendment rights. Petitioner also
8 raised this claim, in part, in his Petition for Post-Conviction
9 Relief. (R.O.A., Instruments, Petition for Post-Conviction Relief
10 at 22.) Petitioner has actually exhausted this claim regarding the
11 alleged violation of his Eighth Amendment rights. He has failed to
12 present this claim in the context of the Fifth, Sixth or Fourteenth
13 Amendments. Should Petitioner attempt to return to state court and
14 raise the claim now in the context of Fifth, Sixth or Fourteenth
15 Amendment violations the claim would be precluded pursuant to Ariz.
16 R. Crim. P. 32.2(a)(3). Thus, Petitioner has no remaining state
17 court remedies and the claim is technically exhausted. Before this
18 Court can conduct an on-the-merits review of a claim which is
19 technically exhausted Petitioner must prove either cause and
20 prejudice or a fundamental miscarriage of justice. As previously
21 noted, Petitioner cannot meet either of these criteria. (See
22 discussion supra at 14-17.) Therefore, the on-the-merits review of
23 claim 13 is confined to Eighth Amendment issues only.
24

25 Claim 14: Petitioner is not competent to be executed.

26 Pursuant to Martinez-Villareal v. Stewart, 118 F.3d 628,634 (9th

1 Cir. 1997), a competency to be executed claim "must be raised in a
2 first habeas petition, whereupon it also must be dismissed as
3 premature due to the automatic stay that issues when a first petition
4 is filed." The United States Supreme Court affirmed the Ninth
5 Circuit opinion, approving the above procedure. Stewart v. Martinez-
6 Villareal, 1998 WL 244206 (U.S.Ariz.) The Court further held that
7 once the claim becomes ripe for review, it shall not be treated as
8 a second or successive petition when presented to the federal
9 district court. Therefore, this Court dismisses without prejudice
10 claim 14 as premature.

11 **Claim 15: Petitioner is being denied a fair clemency process in
12 violation of the Fifth, Sixth, Eighth and Fourteenth
13 Amendments.**

14 Petitioner's claim that the Arizona clemency board procedure is
15 unconstitutional is not currently cognizable as a habeas claim. See
16 Woratzeck v. Stewart 118 F.3d 648, 652 (9th Cir. 1997). The
17 appropriate vehicle for challenging the clemency board procedures
18 would be a claim pursuant to 42 U.S.C.A. §1983. See Ohio Adult
19 Parole Authority v. Woodard, 118 S.Ct. 1244 (1998). Therefore, claim
20 15 is dismissed.

21 **Claim 16: Counsel was ineffective in his representation on
22 direct appeal. This violated Petitioner's rights as
23 guaranteed by the Fifth, Sixth, Eighth and Fourteenth
24 Amendments.**

25 Petitioner has not presented this claim to the state court. If
26 Petitioner were to return to state court to exhaust this claim it
would be found precluded pursuant to Ariz. R. Crim. P. 32.2. Because

1 Petitioner has no state court remedies remaining to address this
2 claim, it is technically exhausted. In order for this claim to be
3 reviewed on the merits by this Court, Petitioner must demonstrate
4 cause and prejudice or a fundamental miscarriage of justice.
5 Petitioner alleges that cause exists to excuse this default. He
6 asserts that counsel appointed to represent him in his post-
7 conviction relief action, was ineffective for failing to raise the
8 claim. Petitioner has no constitutional right to counsel in
9 collateral proceedings. Petitioner does not have a constitutional
10 right to effective assistance of counsel at the post-conviction stage
11 of his state court proceedings. See Coleman, 501 U.S. at 751-53;
12 Poland, 117 F.3d at 1105; Gallego v. McDaniel, 124 F.3d 1065, 1078
13 (9th Cir. 1997); and Moran v. McDaniel, 80 F.3d 1261, 1271 (9th Cir.
14 1996). Therefore, any alleged ineffectiveness of post-conviction
15 counsel cannot constitute cause to excuse the default. Similarly,
16 Petitioner cannot demonstrate that a fundamental miscarriage of
17 justice would occur if this claim was not reviewed on the merits.
18 (See discussion supra at 16-17.) Claim 16 will not be reviewed on
19 the merits by this Court.

20
21 Claim 17: Petitioner's rights as guaranteed by the Fifth, Sixth,
22 Eighth and Fourteenth Amendments were violated as a
23 result of the ineffective assistance of counsel that
24 he received at the state post-conviction proceedings.

25 This claim is barred from an on-the-merits review. Petitioner
26 failed to raise this claim in any state court proceeding. He is
precluded from raising it now pursuant to Ariz. R. Crim. P. 32.2.

1 Further, this Court agrees that the claim is not cognizable on habeas
2 review as Petitioner has no constitutional right to counsel in
3 collateral proceedings. Petitioner does not have a constitutional
4 right to effective assistance of counsel at the post-conviction stage
5 of his state court proceedings. See Coleman, 501 U.S. at 751-53;
6 Poland, 117 F.3d at 1105; Gallego v. McDaniel, 124 F.3d 1065, 1078
7 (9th Cir. 1997); and Moran v. McDaniel, 80 F.3d 1261, 1271 (9th Cir.
8 1996). Even if Petitioner were to assert a colorable claim he
9 cannot surmount the fair presentation and exhaustion hurdle.
10 Furthermore, he cannot demonstrate cause and prejudice or a
11 fundamental miscarriage of justice which would dictate that the claim
12 be reviewed. (See discussion supra at 14-17.). Claim 17 will not
13 be reviewed by this Court on the merits.

14 CONCLUSION

15 This Court requests briefing and will review on the merits claim
16 1 (regarding Petitioner's Sixth and Fourteenth Amendment impartial
17 jury issues only), claim 4 (regarding Petitioner's Eighth and
18 Fourteenth Amendment Beck claim only), claim 6 (in part), claim 7
19 (regarding Petitioner's Sixth and Fourteenth Amendment challenges
20 only), claim 8 (regarding Petitioner's allegations that the trial
21 court improperly restricted its consideration of proffered mitigation
22 evidence and that the Arizona Supreme Court failed to conduct an
23 independent review), claim 10 (in part), claim 11 (in part), and
24 claim 13. Claim 14 is dismissed as premature. Claim 15 is
25 dismissed as not being properly brought in a habeas action. All other
26

1 claims have been found to have been procedurally defaulted and
2 Petitioner has failed to demonstrate cause and prejudice to excuse
3 the default. Similarly, Petitioner has not demonstrated that a
4 fundamental miscarriage of justice will occur if the defaulted claims
5 are not subject to an on-the-merits review. With the exception of
6 claims 14 and 15, there are no claims for which Petitioner has a
7 state court remedy remaining. This Court finds that the remaining
8 claims are either actually or technically exhausted. Therefore,
9 there is no need to hold the Amended Petition in abeyance to allow
10 Petitioner to exhaust any claims in state court. In addition, the
11 Court finds that Petitioner is not entitled to an evidentiary hearing
12 on the procedural posture of this case. Keeney v. Tamayo-Reyes, 504
13 U.S. 1, 11, 112 S. Ct. 1715, 1721 (1992); Jeffries v. Blodgett, 5
14 F.3d 1180, 1187 (9th Cir. 1993).

15 **Accordingly,**

16 **IT IS ORDERED** denying Petitioner's request to hold the Amended
17 Petition in abeyance pending exhaustion of claims in state court.

18 **[File doc.56]**

19 **IT IS FURTHER ORDERED** denying Petitioner's request for discovery
20 and additional briefing on issues of cause and prejudice. **[File doc.**

21 **56]**

22 **IT IS FURTHER ORDERED** denying Petitioner's request for an
23 evidentiary hearing on procedural default issues. **[File docs. 54 and**

24 **56]**
25
26

ATTACHMENT 2

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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY

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

RECEIVED
NOV 03 1999
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

JEFFREY TIMOTHY LANDRIGAN,)
Petitioner,)
v.)
TERRY STEWART, et al.,)
Respondents.)

No. CIV-96-2367-PHX-ROS
ORDER

Pending before the Court is Petitioner's Motion for Leave to File Second Set of Amendments to First Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 by a Person in State Custody (File doc. 122).

DISCUSSION

Federal Rule of Civil Procedure 15(a) allows a party to amend his complaint by leave of the court at any time, and such leave "shall be freely given when justice so requires." In deciding a motion for leave to amend, the court considers the following factors: bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings. Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995), cert. denied, 516 U.S. 1051, (1996). Each factor is not given equal weight. Id. Futility of amendment can, by itself, justify the denial of a motion for leave to amend. Id.

Petitioner recently moved the Court to stay and hold this action in abeyance while the Arizona courts review his latest petition for post-conviction relief which raises a claim under

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1 Lackey v. Texas, 514 U.S. 1045 (1995), that execution after more than nine years¹ on death row
2 constitutes cruel and unusual punishment. On October 4, 1999, the Court denied that motion,
3 finding in part that it would be futile for Petitioner to amend his Amended Petition to include
4 a Lackey claim. Petitioner now seeks to file a second set of amendments to his Amended
5 Petition for Writ of Habeas Corpus to include such a claim.

6 Nothing in the present motion persuades the Court to depart from its initial finding that
7 it would be futile to allow Petitioner to amend his Amended Petition to include such a claim.
8 See McKenzie v. Day, 57 F.3d 1493 (9th Cir.), cert. denied, 514 U.S. 1104 (1995)(prolonged
9 incarceration under a sentence of death does not offend the Eighth Amendment); White v.
10 Johnson, 79 F.3d 432, 438 (5th Cir.), cert. denied, 519 U.S. 911 (1996) (delay of 17 years);
11 Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir.), cert. denied, 515 U.S. 1173 (1995) (delay of
12 15 years). In addition, this case is governed by the Antiterrorism and Effective Death Penalty
13 Act of 1996 (AEDPA). As amended by the AEDPA, 28 U.S.C. § 2254 provides in pertinent
14 part:

15 An application for a writ of habeas corpus on behalf of a person in
16 custody pursuant to the judgment of a State court shall not be
17 granted with respect to any claim that was adjudicated on the
merits in State court proceedings unless the adjudication of the
claim --

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

20 28 U.S.C. § 2254(d). Since there are no Supreme Court cases establishing the type of claim
21 Petitioner now seeks to assert, this Court would be unable to find that the state court's
22 adjudication of Petitioner's Lackey claim, whatever it may be,² was contrary to or involved an
23 unreasonable application of clearly established Supreme Court law.

24 ///

25 _____
26 ¹ Petitioner has now been on death row for ten years.

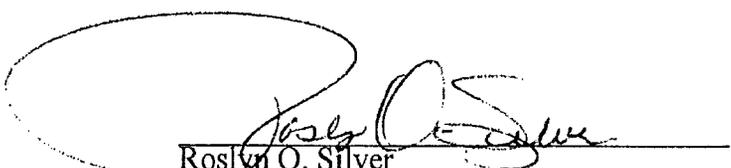
27 ² Although the Lackey claim is still pending in state court, Respondents have expressly
28 waived exhaustion of this claim. (See File doc. 114 at 4).

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Accordingly,

IT IS THEREFORE ORDERED that Petitioner's Motion for Leave to File Second Set of Amendments to First Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 by a Person in State Custody (File doc. 122) is **DENIED**.

DATED this 27 day of October, 1999.


Roslyn O. Silver
United States District Judge

Copies to all counsel of record.

ATTACHMENT 3

1 sentenced Petitioner to 20 years on the burglary count, six months on the theft count, and death
2 on the murder charge.

3 In State v. Landrigan, the court upheld Petitioner's convictions, summarizing the facts
4 as follows:

5 Evidence at trial established that the victim's body was found in his
6 residence on December 15, 1989. According to the testimony of a friend
7 ("Michael"), the victim had been a promiscuous homosexual who frequently tried
8 to "pick up" men by flashing a wad of money. This would invariably occur after
he got paid. The victim told Michael that he had recently met a person named
"Jeff," with whom he wanted to have sex. The victim's physical description of
Jeff was later found to closely approximate defendant.

9 Michael received three phone calls from the victim on Wednesday,
10 December 13, 1989. During the first, the victim said he had picked up Jeff, that
they were at the apartment drinking beer, and he wanted to know whether
11 Michael was coming over to "party." Approximately 15 minutes later, the victim
called a second time and said that he was in the middle of sexual intercourse with
12 Jeff. Shortly thereafter, the victim called to ask whether Michael could get Jeff
a job. Jeff spoke with Michael about employment, and asked if he was going to
13 come over. Michael said no. During one of these conversations, the victim
indicated that he had picked up his paycheck that day.

14 The victim failed to show up for work the following day, and calls to him
went unanswered. On Friday, a co-worker and two others went to the victim's
15 apartment and found him dead. He was fully clothed, face down on his bed, with
a pool of blood at his head. An electrical cord hung around his neck. There were
16 facial lacerations and puncture wounds on the body. A half-eaten sandwich and
a small screwdriver lay beside it. Blood smears were found in the kitchen and
17 bathroom. Partial bloody shoeprints were on the tile floor.

18 Cause of death was ligature strangulation. Medical testimony at the
19 presentence hearing indicated that the victim probably was strangled after being
rendered unconscious from blows to the head with a blunt instrument.

20 Acquaintances testified that the apartment usually was neat. When the
21 body was found, however, the apartment was in disarray. Drawers and closets
were open; clothes and newspapers were strewn on the floor. The remnants of
22 a Christmas present lay open and empty at the foot of the bed. In the kitchen area
were two plates, two forks, a bread wrapper, luncheon meat, cheese wrappers,
23 and an open jar of spoiled mayonnaise. A five-pound bag of sugar was spilled on
the floor. A clear impression of the sole of a sneaker appeared in the sugar.
Neither the paycheck nor its proceeds were located. Although the apartment had
24 been ransacked, nothing else seemed to be missing.

25 When [Landrigan] first was questioned, he denied knowing the victim or
26 ever having been to his apartment. When arrested, however, he was wearing a
shirt that belonged to the victim. Seven fingerprints taken from the scene
27 matched [Landrigan's]. The impression in the sugar matched his sneaker, down
to a small cut on the sole. Tests also revealed that a small amount of blood had
28 seeped into the sneaker. The blood matched that found on the shirt worn by the
victim.

1 [Landrigan's] ex-girlfriend testified that she had three telephone
2 conversations with him in December of 1989. During one of those, [Landrigan]
3 told her that he was "getting along" in Phoenix by "robbing." [Landrigan] placed
4 the last call to her from jail sometime around Christmas. He said that he had
5 "killed a guy ... with his hands" about a week before.

6 The jury found [Landrigan] guilty of theft, second degree burglary, and
7 felony murder for having caused the victim's death "in the course of and in
8 furtherance of" the burglary. The jury also determined that [Landrigan]
9 previously had been convicted in Oklahoma of assault and battery with a deadly
10 weapon, second degree murder, and possession of marijuana. At the time of the
11 Arizona incident, [Landrigan] was an escapee from an Oklahoma prison.

12 At the sentencing hearing, the trial judge found two statutory aggravating
13 circumstances under A.R.S. § 13-703(F): that [Landrigan] was previously
14 convicted of a felony involving the use or threat of violence on another person;
15 and, that [Landrigan] committed the offense in expectation of the receipt of
16 anything of pecuniary value. In making the latter finding, the trial judge noted
17 that the victim's apartment had been ransacked, and it appeared the culprit was
18 looking for something.

19 The trial judge found no statutory mitigating circumstances sufficient to
20 call for leniency. As for non-statutory mitigating circumstances, she identified
21 family love and absence of premeditation. She stated, however, that the
22 mitigating factors did not outweigh the aggravating circumstances. [Landrigan]
23 was sentenced to an aggravated term of 20 years on the burglary count, to six
24 months in the county jail for theft, and to death for murder.

25 State v. Landrigan, 176 Ariz. 1, 3-4, 859 P.2d 111, 113-114, cert. denied, 510 U.S. 927 (1993).

26 After the Arizona Supreme Court upheld Petitioner's conviction, he filed a Petition for
27 Post-Conviction Relief pursuant to Rule 32, Ariz.R.Crim.P. The Rule 32 Court summarily
28 dismissed the Petition and denied Petitioner's request for an evidentiary hearing on July 17,
1995. Petitioner filed a Petition for Review with the Arizona Supreme Court on December 5,
1995, which was denied on June 19, 1996. The Arizona Supreme Court issued a warrant for
Petitioner's execution on October 29, 1996, fixing the date for execution as December 3, 1996.

On October 16, 1996, Petitioner filed his Preliminary Petition for Writ of Habeas Corpus
in this Court and a finalized Petition on July 31, 1997.¹ Respondents filed an Answer to the

¹ As with his Petition for Writ of Habeas Corpus, Petitioner has embellished his Amended
Memorandum (File doc. 91) with a number of pictures of the Petitioner and his family. The
photographs are not relevant in deciding the merit issues in this case, and the Court has therefore
disregarded all photographs of the Petitioner and his family which appear in the Amended
Memorandum.

1 finalized Petition on September 15, 1997. Petitioner subsequently moved to amend his Petition
2 to include two additional claims on September 15, 1997, which the Court allowed. Respondents
3 filed an Amended Answer.

4 On November 11, 1997, Petitioner filed a traverse. On December 12, 1997, Petitioner
5 filed a corrected traverse pursuant to an order of this Court. Respondents filed a Reply to the
6 corrected traverse, and Petitioner filed a Sur-Reply.

7 On June 10, 1998, the Court entered its order regarding the procedural status of
8 Petitioner's claims and ordered the parties to brief the merits of the remaining claims. Along
9 with his memorandum on the merits, Petitioner filed a Motion to Expand the Record Under Rule
10 7 of the Rules Governing Section 2254 Cases on November 17, 1998. On March 5, 1999,
11 Petitioner filed a Second Motion to Expand the Record.

12 Petitioner filed his Motion to Stay on August 25, 1999, asking the Court to stay these
13 proceedings.

14 STANDARD OF REVIEW

15 This case is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996,
16 28 U.S.C. § 2254, (AEDPA). Pursuant to § 2254(d):

17 An application for a writ of habeas corpus on behalf of a person in
18 custody pursuant to the judgment of a State court shall not be
19 granted with respect to any claim that was adjudicated on the
merits in State court proceedings unless the adjudication of the
claim --

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

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

24 Determination of factual issues by the state court "shall be presumed to be correct." 28 U.S.C.

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26 _____
27 "File doc." refers to the documents in this Court's file. "R.T." signifies the reporters' transcripts,
28 "M.E" refers to the minute entries of the state court, and "R.O.A." refers to the state court record on
appeal.

1 § 2254(e)(1). The burden is on the Petitioner to rebut that presumption of correctness by clear
2 and convincing evidence. Id.

3 **DISCUSSION**

4 **Claim 1: The death qualification of the jury by the trial court violated**
5 **Petitioner's rights as guaranteed by the Sixth and Fourteenth**
6 **Amendments.**

7 "[A] sentence of death cannot be carried out if the jury that imposed or recommended
8 it was chosen by excluding veniremen for cause simply because they voiced general objections
9 to the death penalty or expressed conscientious or religious scruples against its infliction."
10 Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). "A 'death-qualified' jury is one from which
11 prospective jurors have been excluded for cause in light of their inability to set aside their views
12 about the death penalty that 'would prevent or substantially impair the performance of [their]
13 duties as [jurors] in accordance with [their] instructions and [their] oath.'" Buchanan v.
14 Kentucky, 483 U.S. 402, 408, n.6 (1987) (internal quotes, cites, omitted).

15 Petitioner's "death qualification" claim is premised upon the presentation of death penalty
16 questions to members of the venire by the trial court. The specific questions to which Petitioner
17 objects are as follows:

18 Are there any of you here that have strong feelings
19 concerning the death penalty whereby you would tend to avoid
20 finding a defendant guilty knowing that the possible punishment
21 (sic) could be death?

22 * * *

23 Is there anyone here that has strong opinions concerning the
24 death penalty, with your opinions being so strong it might
25 influence the way you view the evidence in this case?

26 Is there anyone here who would prefer not to sit as a juror
27 because of the nature of the charges?

28 Petitioner claims that it was prejudicial to inquire into the venire members' beliefs regarding the
death penalty prior to the commencement of the trial, because jurors do not participate in the
sentencing process and are instructed not to consider sentence during deliberation on questions
of guilt.

Petitioner does not assert that any of the venire members were excluded from the jury

1 based upon their answers to the trial court's questions.² Of the seventeen jurors who expressed
2 a preference not to sit on a jury in a capital case, none were excluded for cause. (R.T., 6/18/90,
3 12:10 p.m., at 59). Rather, three were peremptorily stricken by the prosecution, three were
4 excused for medical reasons or planned vacations, four were excluded by peremptory challenges
5 exercised by Petitioner's counsel, one actually served on the jury, and six were neither chosen
6 nor stricken. (R.O.A., Photostated Instruments, Item 63; R.T. 6/18/90, 6:10 p.m., at 3-4).

7 Petitioner has failed to demonstrate that the trial court's questions to the venire were
8 contrary to or constituted an unreasonable application of Witherspoon. The jury at Petitioner's
9 trial was not "death-qualified," because no jurors were excluded for cause as a result of the
10 opinions they expressed about the death penalty.³ The Court will therefore deny Petitioner's
11 First Claim for Relief.

12 **Claim 4: The failure by the trial court to offer the jury instruction on lesser**
13 **included offenses violated Landrigan's rights under the Eighth and**
14 **Fourteenth Amendments.**

15 Petitioner claims the trial court erred in failing to instruct the jury on the noncapital
16 offenses of second degree murder or manslaughter as lesser included offenses. The Court
17 disagrees.

18 ² Petitioner claims that if prospective jurors have concerns about the death penalty, they "will
19 remove themselves from the pool." (File doc. 91, p. 72). Petitioner erroneously imputes the authority
20 of the trial court to exclude prospective jurors for cause to the jurors themselves. It is the trial court that
21 excludes prospective jurors from the jury panel. Furthermore, the concern of a constitutional inquiry
relating to exclusion of jurors focuses on impermissible state action, namely the improper exclusion of
prospective jurors by the court or counsel.

22 ³ Petitioner does not appear to assert that it is improper to use peremptory challenges to
23 exclude members of the venire from the jury based upon their views concerning the death penalty.
24 There is no Supreme Court precedent on this issue, and the trial court's allowance of the use of
25 peremptory challenges in this manner must therefore be upheld under § 2254(d)(1). Nevertheless, the
26 Court notes that the use of peremptory challenges to exclude venire members for their opinions
27 concerning the death penalty has generally been held proper. See, e.g., Burks v. Borg, 27 F.3d 1424,
1429 (9th Cir. 1994), cert. denied 513 U.S. 1160 (1995); Pitsonbarger v. Gramley, 141 F.3d 728, 735
28 (7th Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 448 (1998); Brown v. Dixon, 891 F.2d 490, 497 (4th Cir.
1989), cert. denied, 495 U.S. 953 (1990) ("state may use its peremptory challenges to purge a jury of
veniremen not excludible for cause under Witherspoon"); State v. Detrich, 188 Ariz. 57, 66, 932 P.2d
1328, 1337, cert. denied, 522 U.S. 879 (1997).

1 Petitioner was convicted of felony-murder. Under Arizona law, neither second-degree
2 murder nor manslaughter are lesser included offenses of felony-murder. State v. Dickens, 187
3 Ariz. 1, 23, 926 P.2d 468, 490 (Ariz. 1996), cert. denied, 522 U.S. 920 (1997) ("there are no
4 lesser included offenses to felony murder"). Thus, the trial court was not required to instruct
5 the jury as to those separate offenses. Hopkins v. Reeves, 524 U.S. 88, 118 S.Ct. 1895, 1900-01
6 (1998).

7 The rule in Beck v. Alabama, 447 U.S. 625 (1980) is not as broad as Petitioner suggests.
8 Rather, Beck requires that where a lesser included offense exists for the charged crime, and
9 where there is evidence to support a verdict on the lesser included offense, the failure to permit
10 a jury instruction on the lesser included offense is unconstitutional. Beck, 447 U.S. at 638.⁴ It
11 does not require that the trial court invent lesser included offenses to capital crimes *sua sponte*
12 merely so that the jury may consider a noncapital alternative where no such alternative exists
13 under state law. Hopkins, 524 U.S. at ___, 118 S.Ct. at 1901.

14 Moreover, the jury was instructed as to two alternative, noncapital offenses in this case:
15 burglary and theft. The jury was thus not presented with an "all or nothing" choice to either
16 convict Petitioner of a capital offense or acquit him altogether. See Schad, 501 U.S. at 646.

17 Petitioner further argues that the Court, in determining whether a jury instruction on
18 second degree murder should have been given, should consider the fact that Petitioner was
19 initially charged with second degree murder and that the state offered him a plea bargain to
20 second degree murder. Petitioner has failed to cite any Supreme Court authority in support of
21 this contention. In fact, the Hopkins decision suggests that if an instruction on second degree
22 murder had been given despite the fact Petitioner was not being tried for second degree murder,
23 and if Petitioner had been convicted of second degree murder and not felony-murder, such an
24 instruction would have constituted reversible error. Hopkins, 524 U.S. at ___, 118 S.Ct. at 1900.
25 Moreover, in capital cases, plea negotiations in which the state offers a defendant to plead to

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27 ⁴ Beck does not require that the jury be instructed on all available lesser included offenses.
28 Schad v. Arizona, 501 U.S. 624, 646 (1991). Rather, it requires that where lesser included offenses are
available, at least one must be given. 501 U.S. at 647-648.

1 a crime which does not result in a sentence of death are the only type of negotiations which are
2 reasonably expected to be accepted by the defendant. Therefore, the state's offer to Petitioner
3 to plead to second degree murder does not necessarily indicate that the state believed a death
4 sentence to be inappropriate in this case. The Court finds that the state court's resolution of this
5 claim is not contrary to or an unreasonable application of Beck or Hopkins, and thus will deny
6 Petitioner's Fourth Claim for Relief.

7 **Claim 6: Petitioner's rights guaranteed by the Fifth, Sixth, Eighth and**
8 **Fourteenth Amendments were violated as a result of the ineffective**
9 **assistance of counsel that he received at the sentencing phase of the**
10 **capital proceeding.**

11 To prevail on a claim of ineffective assistance of counsel, a petitioner must show that
12 counsel's performance was deficient and that the deficient performance prejudiced his defense.
13 Strickland v. Washington, 466 U.S. 668, 687 (1984). The performance inquiry is whether
14 counsel's assistance was reasonable considering all the circumstances. 466 U.S. at 688-89. "[A]
15 court must indulge a strong presumption that counsel's conduct falls within the wide range of
16 reasonable professional assistance; that is, the defendant must overcome the presumption that,
17 under the circumstances, the challenged action might be considered sound trial strategy." 466
18 U.S. at 689 (internal quotes omitted).

19 A petitioner must affirmatively prove prejudice. 466 U.S. at 693. The petitioner "must
20 show that there is a reasonable probability that, but for counsel's unprofessional errors, the result
21 of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is
22 a probability sufficient to undermine confidence in the outcome." Id. "The assessment of
23 prejudice should proceed on the assumption that the decision-maker is reasonably,
24 conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at
25 695.

26 A court need not address both components of the inquiry, or follow any particular order.
27 If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,
28 without evaluating counsel's performance, that should be done. 466 U.S. at 697.

1 **A. Conduct Subject to Merits Review.**

2 Prior to proceeding to a consideration of the merits of Claim 6, the Court must first
3 clarify which allegations of ineffectiveness are properly subject to merits review by this Court.
4 When the Court determines that a claim for ineffective assistance of counsel is subject to merits
5 review, such a determination does not call into question all conduct of the Petitioner's counsel
6 during trial and sentencing. Rather, the scope of such review is limited to the specific
7 allegations of deficiency which were exhausted in the state court proceedings. Coleman v.
8 Thompson, 501 U.S. 722, 731 (1991); Carriger v. Lewis, 971 F.2d 329, 333-334 (9th Cir. 1992),
9 cert. denied, 507 U.S. 992 (1993).

10 To properly exhaust state remedies, the petitioner must "fairly present" his claims to the
11 state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346,
12 351 (1989). A claim is fairly presented if the petitioner has described the operative facts and
13 the legal theories on which his federal habeas claim is based. Anderson v. Harless, 459 U.S.
14 4, 6 (1982). If a claim includes new factual allegations which were not presented to the state
15 court and which fundamentally alter the legal claim already considered by the state court, a
16 claim may be rendered unexhausted. Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

17 If there are claims which have not been raised previously in state court, the federal court
18 must determine whether the petitioner has state court remedies currently available to him. If
19 there are none, the claims are "technically" exhausted. Jackson v. Cupp, 693 F.2d 867, 869 (9th
20 Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n. 28 (1982)). However, before the Court
21 may review a technically exhausted claim on the merits, the petitioner must demonstrate
22 legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or
23 show that a fundamental miscarriage of justice would result. Ordinarily "cause" to excuse a
24 default exists if a petitioner can demonstrate that "some objective factor external to the defense
25 impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at
26 753. "Prejudice" is actual harm resulting from the alleged constitutional error. Murray v.
27 Carrier, 477 U.S. 478, 494 (1986). A fundamental miscarriage of justice would result if the
28 petitioner is "innocent of the death sentence" or the petitioner is actually innocent of the capital

1 crime.

2 **1. Ineffective Assistance of Counsel Claims**
3 **Raised in Amended Memorandum.**

4 In his Amended Memorandum, Petitioner claims that his counsel failed to conduct a
5 reasonable pretrial investigation and failed to present available mitigating evidence at
6 sentencing. Specifically, Petitioner claims his counsel's conduct was deficient in the following
7 respects:

- 8 (1) Counsel failed to contact other family members, including Petitioner's birth
9 father, adoptive parents, and adoptive sister;
- 10 (2) Counsel failed to contact acquaintances and other officials who would have
11 been willing to provide information;
- 12 (3) Counsel failed to present evidence indicating Petitioner suffers from organic
13 brain damage;
- 14 (4) Counsel failed to present adequately mitigating psychiatric evidence
15 concerning Petitioner's mental and emotional problems;
- 16 (5) Counsel failed to present adequate live testimonial evidence, expert and
17 otherwise; and
- 18 (6) Counsel failed to present evidence by Petitioner's family and friends regarding
19 Petitioner's personality, behavioral, and familial background.

20 (File doc. 91 at 81).

21 Petitioner states that had defense counsel contacted other family members,
22 acquaintances, and officials, counsel would have obtained mitigating information relating to
23 Petitioner's biological family, including any mental or physical disorders, dysfunctional
24 lifestyles, Petitioner's biological mother's use of drugs and alcohol during her pregnancy,
25 Petitioner's behavior as an infant, Petitioner's conduct as a child, and Petitioner's deportment as
26 an adult. Id. Petitioner also states that many of those individuals were aware of Petitioner's drug
27 use and other problems. Id.

28 Respondents urge that many of Petitioner's claims of deficient conduct on the part of
defense counsel which Petitioner now raises in his Amended Memorandum are procedurally
barred. Respondents assert that the Court's Order dated June 10, 1998, limited the merits review
of Petitioner's sixth claim to the following questions:

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- (1) Was Petitioner's counsel ineffective for advising him not to cooperate with the probation officer?
- (2) Was Petitioner's counsel ineffective for failing to explore additional grounds for arguing mitigation evidence, including the failure to contact Petitioner's biological father or adopted sister or failure to argue Petitioner's genetic propensity for violent conduct?

(File doc. 95 at 15). In order to clarify which of Petitioner's specific claims the Court held are available for merits review, the Court will review which specific claims it found were raised and exhausted in the state court.

2. Ineffective Assistance of Counsel Claims Raised and Exhausted in State Court.

Petitioner raised claims for ineffective assistance of counsel at two separate stages of the state court proceedings. On direct appeal, Petitioner claimed that his counsel's conduct was deficient in that counsel told the probation officer not to interview Petitioner for purposes of the aggravation/mitigation hearing. (Appellant's Opening Brief, p. 26). In his Petition for Post-Conviction Relief, Petitioner claimed that his counsel failed to contact Petitioner's biological father and adoptive sister, failed to present evidence that in an earlier conviction for second degree murder, Petitioner was acting in self-defense, and failed to explore additional grounds for arguing mitigation evidence. (R.O.A., Photostated Instruments, Item 137 at 13-14).

Petitioner contended that his adoptive sister would have verified that his adoptive mother was an alcoholic and that her alcoholism caused significant problems within the family unit which adversely affected Petitioner. *Id.* at 14. Petitioner also claimed that his adoptive sister would have provided additional information concerning family problems. *Id.*

Petitioner claimed that an investigation of his biological family would have revealed a long history of violent behavior and that his family's history of violence would have demonstrated his biological propensity for violence. *Id.* at 14-15. He further stated that his propensity for violence was greater in light of the fact that he was raised by an alcoholic mother in a dysfunctional home and the fact that his biological mother had used drugs and alcohol during her pregnancy. *Id.* at 15.

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(d) His biological mother's use of drugs and alcohol during her pregnancy.

The remaining allegations of ineffective assistance of counsel were not fairly presented to the state court. If Petitioner were to return to state court, those allegations would be precluded pursuant to Ariz.R.Crim.P. 32.2(a)(3), and they are technically exhausted. Petitioner has failed to demonstrate cause or prejudice for his failure to present these allegations to the state court, nor has he demonstrated that a fundamental miscarriage of justice will occur if the Court does not review those allegations. The Court therefore limits its review of Petitioner's Sixth Claim for Relief to the four enumerated allegations, including subparts (a) through (d) of allegation four, listed above.

B. Review on the Merits

1. Factual Background

At the presentence hearing on October 25, 1990, Petitioner declined to present evidence of mitigation. Petitioner's defense counsel explained to the sentencing judge that Petitioner did not want to present mitigating evidence, stating as follows:

MR. FARRELL: . . . Mr. Landrigan has made it clear to me — Jeffrey, the defendant — that he does not wish anyone from his family to testify on his behalf today.

* * *

MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.

I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor. They are looking after Jeff's interests.

I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

(R.T. 10/25/90 at 3-4). The court then engaged in the following colloquy with Petitioner:

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances

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to my attention?

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

(R.T. 10/25/90 at 4). The court then proceeded with the hearing.

Petitioner's counsel intended to call Petitioner's ex-wife, Sandra Landrigan, to testify as to mitigating circumstances. Sandra Landrigan indicated that she would not testify because Petitioner had asked her not to do so. (R.T. 10/25/90 at 5). Petitioner's counsel proffered that he would have elicited testimony from Sandra Landrigan relating to her relationship with Petitioner, his history of substance abuse, his child, what type of father and spouse he was, that he was a responsible person, and that he was a loving and caring husband. (R.T. 10/25/90 at 6-7). Petitioner's counsel also expected Sandra Landrigan to testify about the details of Petitioner's previous second degree murder conviction, including the fact that the aggression was initiated by the victim and the Petitioner was defending himself. (R.T. 10/25/90 at 8-10). Petitioner then contradicted this proffered version of the facts relating to the prior murder conviction by claiming that the Petitioner, not the victim, had been the initial aggressor. (R.T. 10/25/90 at 11-12).

Petitioner's counsel also intended to call Petitioner's biological mother, Virginia Gipson, to testify as to mitigating evidence. (R.T. 10/25/90 at 2-3). Petitioner's counsel proffered that he would have elicited testimony from Virginia Gipson relating to factors which might have affected her pregnancy, including her use of drugs during the pregnancy. (R.T. 10/25/90 at 13-14). Petitioner's counsel then stated that he planned to substantiate Ms. Gipson's testimony with expert testimony regarding the neurological and antisocial effects of drug usage on an unborn fetus. (R.T. 10/25/90 at 14-15).

Later in the hearing, the Court asked Petitioner if he had anything to say on his own

1 behalf. (R.T. 10/25/90 at 21). Petitioner responded as follows:

2 THE DEFENDANT: Yeah. I'd like to point out a few things about
3 how I feel about the way this shit, this whole scenario went down.
4 I think that it's pretty fucking ridiculous to let a fagot be the one to
5 determine my fate, about how they come across in his defense,
6 about I was supposedly fucking this dude. This never happened.
7 I think the whole thing stinks. I think if you want to give me the
8 death penalty, just bring it right on. I'm ready for it.

6 (R.T. 10/25/90 at 21-22).

7 **2. Ineffective Assistance of Counsel —**
8 **Improper Advice to Probation Officer**

9 On direct appeal, Petitioner claimed that his defense counsel was ineffective for
10 improperly instructing the probation officer not to interview Petitioner. (Appellant's Opening
11 Brief at 26-27). The Arizona Supreme Court held that the defense counsel's instruction to the
12 probation officer "was clearly within the wide range of professionally competent assistance,
13 given defendant's stated desire not to have mitigating evidence presented in his behalf, and his
14 tendency to volunteer damaging statements like those made to the trial judge at the hearing."
15 State v. Landrigan, 176 Ariz. at 8, 859 P.2d at 118. In this Court, Petitioner has not argued his
16 claim that the instruction to the probation officer constituted ineffective assistance of counsel
17 in either his memorandum or reply on the merits. This constitutes abandonment of this claim
18 as a source of ineffective assistance of counsel. See United States v. Vought, 69 F.3d 1498,
19 1501 (9th Cir. 1995) (failure to address claim in appellate brief is abandonment of claim).

20 **3. Ineffective Assistance of Counsel —**
21 **Failure to Discover and Present Mitigation**
22 **Evidence**

23 In his Petition for Post-Conviction Relief, Petitioner claimed that his counsel was
24 ineffective regarding his proffer of mitigation evidence at the presentence hearing and his
25 failure to investigate and present additional mitigation evidence on Petitioner's behalf. In their
26 response, Respondents argued that Petitioner waived any claim of ineffective assistance of
27 counsel by expressly instructing his defense counsel not to present mitigating evidence.⁵

28 ⁵ It is important to note that the sentencing judge did consider the defense attorney's proffer
and accepted it as true for purposes of sentencing. (R.T. 10/25/90 at 30). However, the proffer was

1 (R.O.A., Photostated Instruments, Item 138 at 5). The Rule 32 court found and ruled as follows:

2 Since defendant instructed his attorney not to present any evidence
3 at the sentencing hearing, it is difficult to comprehend how
4 defendant can claim counsel should have presented other evidence
5 at sentencing. . . . Since the defendant instructed his attorney not to
6 bring any mitigation to the attention of the court, he cannot now
7 claim counsel was ineffective because he did not "explore
8 additional grounds for arguing mitigation evidence".

9 (M.E. of 7/17/95 at 3-4). The Rule 32 court impliedly ruled that Petitioner's trial counsel
10 behaved reasonably by failing to introduce additional mitigation evidence given Petitioner's
11 instruction to counsel. The initial question presented is whether the Rule 32 court's implicit
12 determination that Petitioner's trial counsel acted reasonably was "an unreasonable application
13 of controlling Supreme Court precedent" or "an unreasonable determination of the facts in light
14 of the evidence presented in the State court proceeding" such that Petitioner is entitled to habeas
15 relief. 28 U.S.C. §§ 2254(d)(1)&(2).

16 The Court finds that even if the Rule 32 court's determination that Petitioner's counsel
17 acted reasonably involved an unreasonable application of controlling Supreme Court precedent
18 or was an unreasonable determination of facts in light of the evidence presented, Petitioner has
19 failed to demonstrate he was prejudiced by his trial counsel's alleged failure to discover and
20 present mitigation evidence. The Court expanded the record to include numerous affidavits and
21 other evidence which Petitioner claims to be mitigating, including, *inter alia*, evidence of
22 Petitioner's troubled background, his history of drug and alcohol abuse, and his family's history
23 of criminal behavior. The Court has reviewed the expanded record *de novo* and concludes that
24 Petitioner has failed to demonstrate a reasonable probability that the result of the proceeding
25 would have been different if his trial counsel had discovered and presented the evidence he
26 claims should have been discovered and presented in mitigation. See Strickland, 466 U.S. at
27 694. He has failed to show that there is a "reasonable probability that, absent the errors, the
28 sentencer -- including an appellate court, to the extent it independently reweighs the evidence --

limited to the two witnesses whom the defense attorney intended to examine if Petitioner had not
objected. The proffer did not include any other mitigating evidence which may have been discovered
through additional investigation.

1 would have concluded that the balance of aggravating and mitigating circumstances did not
2 warrant death." *Id.* at 695. The Court will thus deny Petitioner's request for relief on Claim 6.

3 **Claim 7: Petitioner's rights to have a jury determine the existence of mitigating**
4 **circumstances and take part in the sentencing decision, as guaranteed**
5 **by the Sixth and Fourteenth Amendments.**

6 Petitioner claims his rights under the Sixth and Fourteenth Amendments were violated
7 in that the trial judge, rather than the jury, made the factual determinations requisite to the
8 imposition of his death sentence as well as the ultimate determination of sentence. Petitioner
9 asserts that under the circumstances presented in this case, the Court should disregard the ruling
10 in Walton v. Arizona, 497 U.S. 639 (1990), which upheld the Arizona capital punishment
11 sentencing scheme. The Supreme Court in Walton specifically held that sentencing by the
12 judge rather than the jury in capital cases is not unconstitutional, and "the Sixth Amendment
13 does not require that the specific findings authorizing the imposition of the sentence of death
14 be made by the jury." 497 U.S. at 647-48, citing Hildwin v. Florida, 490 U.S. 638, 640-641
15 (1989) (per curiam). The Court declines Petitioner's invitation to disturb the clearly established
16 law of Walton, and thus will deny Petitioner's Seventh Claim for Relief.

17 Petitioner cites Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999), and urges
18 this Court to revisit and "reexamine Walton." It is true, as Petitioner states, that the Jones
19 decision questions the constitutional soundness of the Walton decision.⁶ Justice Stevens, in his
20 concurrence, and the Chief Justice, Justices Kennedy, O'Connor, and Breyer, in their dissent,
21 expressly noted the doubt cast on the Walton opinion by the Jones decision. 526 U.S. at ___, 119
22 S.Ct. at 1229, 1238. Justice Kennedy further noted, however, that although the Walton decision
23 should be reconsidered, it was not necessary to do so in joining in the opinion of the Court. *Id.*,
24 526 U.S. at ___, 119 S.Ct. at 1229.

25 Without reaching the issue whether Petitioner's assertion is Teague-barred, the Court
26 finds that it does not have the authority to overrule the clearly established Supreme Court law

27 ⁶ It should be noted that the facts in Jones dealt with the statutory interpretation of a federal
28 carjacking statute and did not involve any interpretation of capital sentencing under federal habeas
review.

1 as set forth in Walton. The reconsideration of Walton was not required in Jones, nor did a
2 thorough reconsideration of Walton take place. The Walton decision has not been overruled
3 by the Supreme Court, and unless it is, Walton is the clearly established Supreme Court law for
4 purposes of habeas review under § 2254(d).

5 **Claim 8: The trial court's failure to consider evidence of mitigation offered at**
6 **trial and the Arizona Supreme Court's failure to consider evidence of**
7 **mitigation in its independent review violated Petitioner's Fifth, Sixth,**
8 **Eighth, and Fourteenth Amendment rights.**

9 In his Eighth Claim for Relief, Petitioner claims:

10 The trial court's failure to consider evidence of mitigation offered
11 at trial and the Arizona Supreme Court's failure to consider
12 evidence of mitigation in its independent review violated
13 Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

14 In a capital case, a sentencing judge may not refuse to consider, as a matter of law, any relevant
15 mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982); Lockett v. Ohio,
16 438 U.S. 586, 604 (1978) (plurality opinion). Nor may the court confine its consideration of
17 mitigating evidence to the mitigating factors listed in a state statute. Hitchcock v. Dugger, 481
18 U.S. 393, 399 (1987). The primary concern is "that the sentencing decision be based on the
19 facts and circumstances of the defendant, his background, and his crime." Clemons v.
20 Mississippi, 494 U.S. 738, 748 (1990). The sentencing judge "must consider all relevant
21 mitigating evidence and weigh it against the evidence of the aggravating circumstances."
22 Eddings, 455 U.S. at 117. The sentencing judge "may determine the weight to be given relevant
23 mitigating evidence," but the judge may not give it no weight by excluding such evidence from
24 the judge's consideration." Id. at 115. However, "the traditional authority of a court to exclude,
25 as irrelevant, evidence not bearing on the defendant's character, prior record, or the
26 circumstances of his offense" continues to exist. Lockett, 438 U.S. at 604, n. 12.

27 Ninth Circuit case law is instructive concerning what constitutes a reasonable application
28 of Eddings for purposes of the AEDPA. When considering mitigation evidence, the sentencing
judge "is free to assess how much weight to assign to such evidence[.]" Ortiz v. Stewart, 149
F.3d 923, 943 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1777 (1999). The trial court
is not required to "itemize and discuss every piece of evidence offered in mitigation." Jeffers

1 v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (en banc), cert. denied, 514 U.S. 1071 (1995). It must
2 simply be clear that the court considered all mitigating evidence which was offered. Id. A
3 finding that there are "no mitigating circumstances" does not violate the Constitution. Ortiz,
4 149 F.3d at 943. "It is sufficient that a sentencing court state that it found no mitigating
5 circumstances that outweigh the aggravating circumstances." Poland v. Stewart, 117 F.3d 1094,
6 1101 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1533 (1998). In Ortiz, 149 F.3d at 943,
7 the trial court found that "after considering all of these factors there are no mitigating
8 circumstances sufficiently substantial to call for leniency." (internal quotes omitted). There
9 was no refusal to consider mitigating evidence by the trial court. Id. Rather, the court
10 considered the mitigating evidence "and found it inadequate to justify leniency." Id.

11 State appellate courts are not required to reweigh the mitigating and aggravating
12 circumstances when errors have occurred in a capital sentencing proceeding. Clemons, 494
13 U.S. at 754. Nevertheless, several states, otherwise known as "weighing states," have chosen
14 this method for reviewing capital sentencings. "[I]n a 'weighing' state such as Arizona, when
15 a trial court bases its decision to impose a death sentence on both valid and invalid aggravating
16 factors, a state appellate court can affirm the sentence only after performing a harmless-error
17 review, or reweighing the mitigating evidence against the remaining valid aggravating factors."
18 Jeffers, 38 F.3d at 414 (citing Clemons, 494 U.S. at 741.). Upon review, it must be determined
19 that the state appellate court actually reweighed the mitigating and aggravating circumstances.
20 Richmond v. Lewis, 506 U.S. 40, 48 (1992). A mere recitation by the appellate court that it has
21 weighed the mitigating circumstances against the aggravating circumstances is insufficient.
22 Jeffers, 38 F.3d at 422 (citing Clemons, 494 U.S. at 744). If the appellate court applied the
23 proper standard of review, then Petitioner will not be entitled to habeas relief on this claim.
24 Clemons, 494 U.S. at 748-749.

25 **A. The trial court's alleged failure to consider mitigation**
26 **evidence**

27 Petitioner claims that the sentencing court erred by refusing to consider a number of
28 different mitigating factors. He claims that the sentencing court "simply dismissed the

1 remaining proffered statements concerning evidence of mitigation. . . . limit[ing] the proffered
2 mitigation to Landrigan's mental state at the time of the crime." Id.

3 Petitioner's assertion appears, in part, to be correct. To the extent Petitioner argues that
4 the trial court failed to consider evidence of Petitioner's "respectful demeanor during trial" or
5 his difficult family history, the Court disagrees. The trial court expressly found that Petitioner
6 did not have a difficult family history. (M.E. of 10/25/90 at 4-5). In addition, the trial court
7 stated that "although the defendant may have been respectful and proper during trial, his
8 demeanor at sentencing was not," and the trial court determined that there was no mitigation
9 evidence of "respectful demeanor." Id. The Court will not disturb these factual determinations,
10 which are supported by the record and which Petitioner has failed to rebut by clear and
11 convincing evidence. 28 U.S.C. § 2254(e)(1). However, to the extent Petitioner argues that the
12 trial court failed to consider evidence of Petitioner's intoxication at the time of the offense⁷ or
13 his history of drug and alcohol abuse as nonstatutory mitigating circumstances, the Court
14 agrees. Respondents admitted as much on direct appeal, where they stated:

15 [Petitioner] proffered his purported alcohol and drug abuse solely
16 in the context of A.R.S. § 13-703(G)(1), claiming that it impaired
17 his capacity to appreciate the wrongfulness of his conduct or to
18 conform his conduct to the requirements of the law. . . . [Petitioner]
19 did not proffer his purported alcohol and drug abuse as a
20 nonstatutory -- character -- mitigating circumstance. As previously
21 noted, the eighth and fourteenth amendments prohibit only the
22 preclusion or refusal to consider proffered mitigation. . . . Since
23 [Petitioner] did not proffer his purported alcohol and drug abuse as
24 nonstatutory "character" mitigation, the trial court did not
25 improperly "restrict" consideration of the proffered mitigation.

26 (Appellee's Answering Brief at 40).⁸

27 Petitioner proffered mitigating evidence concerning his drug and alcohol use. In his
28

25 ⁷ The trial court's failure to consider Petitioner's intoxication at the time of the offense was
26 cured by the Arizona Supreme Court's consideration of that evidence. See infra.

27 ⁸ Respondents have since argued that the trial court "discussed and considered *every* proffered
28 mitigating circumstance." (File doc. 95 at 24). They do not contend, however, that the trial court
weighed all mitigating circumstances against the aggravating circumstances, as was required.

1 Sentencing Memorandum Concerning Mitigation ARS § 13-703(G)⁹, Petitioner raised, inter
2 alia, "the following aspects of his character, propensities, record, and the following
3 circumstances of the offense, as mitigating evidence sufficiently substantial to call for
4 leniency:"

- 5 (1) Petitioner's ingestion of drugs and alcohol prior to the murder; and
- 6 (2) Petitioner's long history of drug and alcohol abuse.

7 (R.O.A., Photostated Instruments, Item 91). Specifically, Petitioner proffered the following
8 mitigating circumstances relating to drug and alcohol use:

- 9 (1) Petitioner and the victim were drinking alcohol, smoking marijuana, and
10 taking drugs at the victim's apartment;
- 11 (2) Petitioner has a long history of substance abuse concerning alcohol and
12 drugs; and
- 13 (3) Petitioner's intoxication on the night the victim was killed substantially
14 impaired his ability to appreciate the wrongfulness of his conduct.

15 (R.O.A., Photostated Instruments, Item 91 at 6-8). In addition, Petitioner attached two exhibits
16 to his Sentencing Memorandum which demonstrated that Petitioner started drinking at the age
17 of thirteen and was admitted at age seventeen to an Alcohol Treatment Program at St. Johns
18 Hospital in Tulsa, Oklahoma. Id. at Exhibit B. At the presentence hearing, Petitioner's attorney
19 proffered that Petitioner met his wife at a substance abuse rehabilitation center. (R.T. of
20 10/25/90 at 6). The Presentence Investigation prepared by the probation officer also
21 demonstrated that Petitioner had a history of drug and alcohol abuse:

22 The defendant apparently has a history of alcohol and
23 amphetamine abuse. The defendant's Oklahoma Department of

24 ⁹ A.R.S. § 13-703(G) provides in pertinent part:

25 Mitigating circumstances shall be any factors proffered by the defendant or the state
26 which are relevant in determining whether to impose a sentence less than death,
27 including any aspect of the defendant's character, propensities or record and any of the
28 circumstances of the offense, including but not limited to the following:

4. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform
his conduct to the requirements of law was significantly impaired, but not so
impaired as to constitute a defense to prosecution. . . .

1 Corrections records also show that he had a number of disciplinary
2 actions for possession of a controlled substance while in custody.

3 (R.O.A., Photostated Instruments, Item 95 at 5).

4 When weighing the mitigating circumstances against the aggravating circumstances at
5 the presentence hearing, the trial court stated as follows:

6 After weighing and considering the aggravating circumstances that
7 the defendant had two prior felony convictions involving the use of
8 violence on another person and committed the offense with the
9 expectation of pecuniary gain, and considering the mitigating
10 circumstances of love of family, love of his family for him, . . . and
11 no premeditation . . . I find that the mitigating circumstances do not
12 outweigh the aggravating circumstances.

13 (R.T. of 10/25/90 at 33). In weighing the mitigating circumstances against the aggravating
14 circumstances during the presentence hearing, the trial court did not consider mitigating
15 circumstances relating to Petitioner's intoxication at the time of the offense or his history of drug
16 and/or alcohol abuse. The trial court then sentenced Petitioner to death. Id. at 34.

17 At the hearing, the trial court concluded that Petitioner's proffered evidence of his drug
18 or alcohol intoxication at the time of the offense did not satisfy the requirements of A.R.S. § 13-
19 703(G)(1). The trial court stated as follows:

20 The defendant's state of intoxication has been alleged as a
21 mitigating circumstances (sic) under element (G)(1), that the
22 defendant's capacity to appreciate the wrongfulness of his conduct
23 and his ability to conform his conduct to the requirements of law
24 was (sic) significantly impaired, but not so impaired as to
25 constitute a defense to prosecution. In the sentencing
26 memorandum it is argued that evidence was presented at trial that
27 the defendant drank quite a bit, smoked marijuana and did drugs.
28 I do not recall any testimony about drinking or drug use.¹⁰ I do

29 ¹⁰ In fact, there was testimony regarding drinking and drug use prior to the murder, which the
30 Arizona Supreme Court recognized. A witness at trial testified concerning a telephone conversation
31 he had with the victim on the evening of the murder:

32 A We discussed he had gone down to pick up some beer and picked up a guy named
33 Jeff and brought Jeff back to the apartment so they could drink some beer and smoke
34 some joints. . . .

35 Q What did he say about Jeff?

1 recall some evidence regarding the use of marijuana. However, no
2 evidence has been presented to show that the apparent use of
3 marijuana affected the defendant's capacity to appreciate the
4 wrongfulness of his conduct or impaired his ability to conform his
5 conduct to the requirements of law. Additionally, drug or alcohol
6 intoxication, in and of itself, is not a mitigating circumstance.

7 (R.T. of 10/25/90 at 28-29).

8 The trial court also entered a written sentencing order. (M.E. of 10/25/90). In addition
9 to finding that two aggravating circumstances were proven beyond a reasonable doubt, the trial
10 court stated:

11 The defendant alleged A.R.S. § 13-703(G)(1) as a mitigating
12 circumstance. Assuming, intoxication and/or drug use (although
13 not demonstrated) and defendant's predisposition to addiction
14 based upon his mother's use of drugs during pregnancy, the
15 defendant has failed to show by even slight evidence that any or all
16 of the factors diminished or to the slightest degree diminished the
17 defendant's capacity to appreciate the wrongfulness of his conduct
18 or to conform his conduct to the requirement of the law. . . .

19 Id. at 4-5.

20 The trial court's determination that Petitioner's use of drugs or alcohol did not impair
21 Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct
22 to the requirements of the law is a finding of fact which the Court will not disturb. See 28
23 U.S.C. § 2254(e)(1). However, the trial court's determination that such evidence was not
24 mitigating evidence under § 13-703(G)(1) did not excuse the trial court from considering that
25 evidence as non-statutory mitigation when weighing the mitigating and aggravating
26 circumstances. See Smith v. Stewart, 140 F.3d 1263, 1271 (9th Cir.), cert. denied, __ U.S. __,
27 119 S.Ct. 336 (1998) (long use of drugs could have mitigating effect and must be considered

28

A That he had picked Jeff up at a Burger King and that he was the same Jeff that he had
told me about prior and they were getting drunk, or they were drinking and wanted to
know if I was going to come over.

(R.T. of 6/19/90 at 49). The same witness testified earlier that the victim was a drinker and drank "a
12-pack a day, five days a week," and every time the victim would start drinking beer he would get
drunk. (Id. at 46). He further testified that the victim was intoxicated at the time of the phone call. (Id.
at 66). Police found a bong in the apartment and surmised it was used to smoke marijuana. (Id. at 110).

1 as nonstatutory mitigating factor even if it does not satisfy § 13-703(G)(1)).

2 The trial court concluded that "drug or alcohol intoxication, in and of itself, is not a
3 mitigating circumstance." Petitioner's intoxication by drugs or alcohol, if any, at the time of the
4 offense is relevant evidence bearing on the circumstances of the offense and should have been
5 considered as mitigating evidence. Cf. Lockett, supra; A.R.S. § 13-703(G). In addition,
6 Petitioner's history of drug or alcohol abuse is relevant mitigating character evidence. Smith
7 v. Stewart, 140 F.3d at 1271; cf. Eddings, supra; Lockett, supra. The trial court was entitled to
8 give as little or as much weight to such evidence as it found appropriate, but it was not entitled
9 to exclude that evidence from consideration altogether. The trial court's failure to consider
10 Petitioner's intoxication by drugs and/or alcohol at the time of the offense, and its failure to
11 consider Petitioner's history of drug and/or alcohol abuse, was contrary to the clearly established
12 Supreme Court law of Eddings, Lockett, and Hitchcock, supra.

13 **B. Arizona Supreme Court's alleged failure to conduct proper**
14 **independent review**

15 The fact that the trial court failed to consider relevant mitigation evidence does not
16 necessarily indicate that Petitioner is entitled to habeas relief. Because the Arizona Supreme
17 Court conducts an independent review of capital sentencing determinations, any errors
18 committed by the sentencing judge can be cured on direct appeal.

19 On direct appeal, the Arizona Supreme Court stated as follows:

20 We have independently reviewed the record to determine the
21 presence or absence of aggravating and mitigating circumstances,
22 and the propriety of the death penalty. State v. Richmond, 114
23 Ariz. 186, 196, 560 P.2d 41, 51 (1976). Defendant claims the
24 record does not support a finding that the murder was committed
25 with the expectation of the receipt of anything of pecuniary value,
26 pursuant to A.R.S. S 13-703(F)(5).

27 We disagree. Not only is the actual receipt of money or valuables
28 not required to find the expectation of pecuniary gain, State v.
LaGrand, 153 Ariz. 21, 36, 734 P.2d 563, 578 (1987), but here
defendant was convicted of theft and burglary on evidence we have
deemed sufficient. Defendant admitted he was getting money by
robbing. The victim, who was pursuing defendant as a sexual
partner, was an obvious target. The apartment was ransacked. The
killing hardly appears to have been unexpected or accidental. See
State v. Nash, 143 Ariz. 392, 405, 694 P.2d 222, 235 (1985)
(unexpected or accidental death during course of or flight from

1 robbery will not support aggravating circumstance of pecuniary
2 gain). Physical and testimonial evidence supports the finding that
3 pecuniary consideration was a cause, not merely a result, of the
4 murder. LaGrand, 153 Ariz. at 35, 734 P.2d at 577 ("When the
5 defendant comes to rob, the defendant expects pecuniary gain and
6 this desire infects all other conduct of the defendant").

7 The record also supports the finding of a second aggravating
8 circumstance, that defendant previously was convicted of a felony
9 involving the use or threat of violence on another person under
10 A.R.S. S 13- 703(F)(2). See Okla.Stat. tit. 21, SS 641, 642, 645
11 (1971) (assault and battery with a dangerous weapon). Defendant
12 on appeal does not contest this finding. The state produced
13 certified public records from Oklahoma, and its expert matched
14 defendant's fingerprints with those on the records.

15 We also agree that the record does not present mitigating evidence
16 sufficiently substantial to call for leniency. The trial judge
17 properly rejected defendant's suggestion that intoxication was a
18 mitigating circumstance under A.R.S. S 13-703(G)(1). The only
19 evidence on this subject was testimony from the friend who said
20 the victim called and told him that he and Jeff were drinking beer.
21 There was no evidence that defendant was impaired, that he did not
22 have the capacity to appreciate the wrongfulness of his conduct, or
23 that he could not conform his conduct to the requirements of the
24 law.

25 State v. Landrigan, 176 Ariz. at 6-7, 859 P.2d at 116-117.

26 The Arizona Supreme Court's recitation that it "independently reviewed the record to
27 determine the presence or absence of aggravating and mitigating circumstances, and the
28 propriety of the death penalty" is pertinent, but not dispositive. Although it is clear that the
Arizona Supreme Court independently determined the existence of two aggravating
circumstances, it does not appear that it considered the proffered mitigating evidence as
nonstatutory mitigating evidence. Rather, it agreed with the sentencing court that Petitioner's
intoxication at the time of the incident was not statutory mitigating evidence under A.R.S. § 13-
703(G) "sufficiently substantial to call for leniency." *Id.* at 7, 859 P.2d at 117. The Arizona
Supreme Court did not address the argument raised in Petitioner's direct appeal brief that the
sentencing court improperly failed to consider and weigh evidence of mitigation, nor did it
address whether Petitioner's history of drug and alcohol abuse should have been considered as
nonstatutory mitigating factors. Instead, it appears the Arizona Supreme Court accepted the
argument set forth in the Appellee's Answering Brief that "[s]ince appellant did not proffer his

1 purported alcohol and drug abuse as nonstatutory 'character' mitigation, the trial court did not
2 improperly 'restrict' consideration of the proffered mitigation." (Appellee's Answering Brief at
3 40). The Court finds that the Arizona Supreme Court did not "[conduct] appellate reweighing
4 as [the Court] understand[s] the concept." Clemons, 494 U.S. at 752.

5 C. Remedy

6 The question becomes one of remedy. The appropriate standard of review is harmless
7 error review. See Hitchcock v. Dugger, 481 U.S. 393, 1824 (1987); Bryson v. Ward, 187 F.3d
8 1193, 1205 (10th Cir. 1999); Boyd v. French, 147 F.3d 319, 327 (4th Cir. 1998), cert. denied,
9 __ U.S. __, 119 S.Ct. 1050 (1999); Sweet v. Delo, 125 F.3d 1144, 1158 (8th Cir. 1997), cert.
10 denied, __ U.S. __, 118 S.Ct. 1197 (1998); Demps v. Dugger, 874 F.2d 1385, 1389-90 (11th Cir.
11 1989), cert. denied, 494 U.S. 1090 (1990) (pre-Brecht). An error is not harmless if it "had
12 substantial and injurious effect or influence in determining" the sentence. Brecht v. Abrahamson,
13 507 U.S. 619, 623 (1993).

14 "Review for harmless error requires not only an evaluation of the remaining
15 incriminating evidence in the record, but also the most perceptive reflections as to the
16 probabilities of the effect of error on a reasonable trier of fact." United States v. Garibay, 143
17 F.3d 534, 539 (9th Cir. 1998) (citing United States v. Harrison, 34 F.3d 886, 892 (9th Cir. 1994)).
18 "Highly significant is the nature of the information and its connection to the case." Mach v.
19 Stewart, 137 F.3d 630, 634 (9th Cir. 1998). "Where the record is so evenly balanced that a
20 conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless
21 and relief should be granted." Jeffries v. Wood, 114 F.3d 1484, 1489 (9th Cir.), cert. denied,
22 __ U.S. __, 118 S.Ct. 586 (1997). "Petitioner must establish that there is a reasonable
23 probability that life imprisonment would have been imposed had the error(s) not occurred."
24 Davis v. Singletary, 853 F.Supp. 1492, 1581 (M.D.Fla. 1994), aff'd, 119 F.3d 1471 (1997), cert.
25 denied, __ U.S. __, 118 S.Ct. 1848 (1998). "Nonstatutory mitigating evidence not considered
26 by the [sentencer] affects the [sentencer's] recommendation if it amounts to a significant
27 mitigating circumstance." Jackson v. Dugger, 931 F.2d 712, 716 (11th Cir.), cert. denied, 502
28 U.S. 973 (1991) (cites omitted).

1 The Court finds that the failure of the sentencing judge and the Arizona Supreme Court
2 to consider Petitioner's alleged history of drug and alcohol abuse as a mitigating circumstance
3 did not have a substantial and injurious effect on the sentence. The Court has reviewed the
4 evidence in the expanded record attesting to Petitioner's history of drug and alcohol abuse,
5 including numerous declarations by family, friends, and neighbors. For example, the Court has
6 considered the declaration by Petitioner's adoptive sister, Shannon Sumter, who states that
7 Petitioner started "doing drugs when he was pretty young," that Petitioner's "behavior was
8 exaggerated by his drug use," and that he came close to death many times because of drug
9 overdoses and alcohol abuse. (File doc. 90, Exh. 17). The Court has also considered the
10 declaration by Petitioner's childhood friend, Robert Forrest, who states that Petitioner was
11 introduced to drugs during junior high school, and that by 1978, Forrest and Petitioner were
12 taking "cocaine and crystal" and Petitioner was into "meth." (*Id.*, Exh. 20). In addition, the
13 Court has considered the declaration by Petitioner's former wife, Sandra Martinez, who states
14 that she smoked marijuana with Petitioner when they were young teenagers, and when they
15 were in their late teens, they met again at a drug rehabilitation center. (*Id.*, Exh. 27).

16 Having considered the aggravating and mitigating circumstances found by the trial court,
17 and having considered Petitioner's alleged history of drug and alcohol abuse as a mitigating
18 circumstance, the Court finds that Petitioner has failed to establish a reasonable probability that
19 life imprisonment would have been imposed by a reasonable trier of fact had the errors not
20 occurred. If a reasonable trier of fact had considered Petitioner's history of drug and alcohol
21 abuse as a mitigating circumstance while weighing the mitigating circumstances against the
22 aggravating circumstances, that trier of fact would not have concluded that the mitigating
23 circumstances were sufficiently substantial to call for leniency. The Court will thus deny
24 Petitioner's request for habeas relief on Claim 8.

25 **Claim 10: The consideration of victim impact evidence violated Petitioner's**
26 **rights under the Eighth and Fourteenth Amendments.**

27 Petitioner alleges that the trial court unconstitutionally considered victim impact
28 evidence prior to imposing sentence in violation of Booth v. Maryland, 482 U.S. 496 (1987),

1 overruled in part by Payne v. Tennessee, 501 U.S. 808 (1991). In particular, Petitioner claims
2 that two statements contained in the presentence report, one by the brother of the victim and one
3 by a police officer, were improperly admitted for the trial court's consideration prior to the
4 imposition of sentence. Those two statements are as follows:

5 (1) "Charles Dyer, the victim's brother, advised this officer that he
6 felt the defendant deserved the death penalty. He further related
7 that the man killed someone and it does not matter whose brother
8 was the victim."

9 (2) "Detective Chambers advised this officer that he does not have
10 a great deal of compassion for the defendant. He further related he
11 could not think of anything mitigating in this case and believes the
12 defendant should get a maximum sentence."

13 In Booth, 482 U.S. at 509, the Supreme Court held that the introduction of a victim
14 impact statement during the sentencing phase of a capital case violated the Eighth Amendment.
15 In Payne v. Tennessee, 501 U.S. at 831, the Supreme Court revisited Booth and overruled it in
16 part. In Payne, the Court held that the Eighth Amendment does not erect a *per se* barrier to the
17 admission of victim impact evidence. Id. (O'Connor, J., concurring). The Payne ruling did not
18 disturb the Booth holding *vis a vis* the inadmissibility of characterizations and opinions from
19 the victim's family about the crime, the defendant, or the appropriate sentence to be imposed.
20 Id. at n. 2. In response to the concerns of Booth, the Payne Court held that "[i]n the event that
21 evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair,
22 the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501
23 U.S. at 825.

24 In the present case, the Court finds that the Superior Court's ruling was not contrary to,
25 nor constituted an unreasonable application of, Booth or Payne, *supra*. In Arizona, the trial
26 judge, rather than a jury, determines the penalty in a capital case. A.R.S. § 13-703. "Trial
27 judges are presumed to know the law and to apply it in making their decisions." Walton v.
28 Arizona, 497 U.S. at 653. In its July 17, 1995, Order, the Rule 32 court stated:

It is assumed the trial court considers only relevant information and disregards anything irrelevant or inflammatory from victims in the presentence report. State v. Michael Apelt, 176 Ariz. 349, 359, 861 P.2d 634 (1993). Defendant has not shown that the statements of the victim's family were considered by the trial court.

1 (M.E. of 7/17/95 at 5).¹¹ The Court will thus deny Petitioner's Tenth Claim for Relief.

2 **Claim 11: The statutory provisions governing the Arizona capital punishment**
3 **scheme violate the Fifth, Sixth, Eighth and Fourteenth Amendments.**

4 In his Amended Memorandum, Petitioner raises the following challenges to the Arizona
5 statutes governing capital punishment:

6 (1) By requiring mitigating evidence to meet a threshold for
7 qualification, the statutes impose an unconstitutional barrier to the
8 consideration of mitigating evidence;

9 (2) The statutes fail to genuinely narrow the class of persons
10 eligible for the death penalty and fail to provide for meaningful
11 proportionality review;

12 (3) The mandatory death sentence, which must be imposed if there
13 are statutory aggravating circumstances and no mitigating
14 circumstances sufficient to warrant leniency, results in an arbitrary
15 and irrational death sentence; and

16 (4) The death penalty is a cruel and unusual punishment.

17 The Court will address each of these four claims in turn.

18 **A. Threshold for Mitigation Evidence**

19 Petitioner claims that it is unconstitutional to require persons convicted of a capital
20 offense to prove there is mitigating evidence sufficiently substantial to call for leniency before
21 such evidence will be considered. Petitioner has misunderstood the effect of the Arizona
22 statute. The statute does not provide a threshold qualification for "consideration" of mitigating
23 evidence. Rather, it requires the court to consider all relevant mitigating evidence and then
24 determine whether the evidence, when weighed against the aggravating factors, is sufficiently
25 substantial to call for leniency. The Constitution requires no more. Walton v. Arizona, 497
26 U.S. 639, 649-650, 674-675 (1990); see also Eddings v. Oklahoma, 455 U.S. 104, 113-114,
27

28 ¹¹ Ninth Circuit caselaw also suggests that the trial court's decision was not an unreasonable
application of Booth or Payne. "[I]n the absence of any evidence to the contrary, [the Court] must
assume that the trial judge properly applied the law and considered only the evidence he knew to be
admissible." Gretzler v. Stewart, 112 F.3d 992, 1009 (9th Cir. 1997), cert. denied, 522 U.S. 1081
(1998). Because Petitioner has presented no evidence that the sentencing court improperly considered
victim impact evidence, he has failed to defeat the presumption that the trial court properly applied the
law.

1 (1982); Penry v. Lynaugh, 492 U.S. 302, 318 (1989). The Court will therefore deny Petitioner's
2 request for relief on this aspect of his Eleventh Claim for Relief.

3 **B. Death Eligibility Classification and Proportionality**
4 **Review**

5 In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court held the
6 death penalty statutes of Georgia and Texas were unconstitutional because they allowed
7 arbitrary and unguided imposition of capital punishment. Furman caused many states to enact
8 new capital statutes. A number of these statutes survived the Supreme Court's further guidance
9 in Gregg v. Georgia, 428 U.S. 153 (1976). Observing that the death penalty is "unique in its
10 severity and irrevocability," Gregg, 428 U.S. at 187, the Supreme Court concluded that a death
11 sentence may not be imposed unless the sentencing authority focuses its attention "on the
12 particularized nature of the crime and the particularized characteristics of the individual
13 defendant." 428 U.S. at 206. In doing so, a court must find the presence of at least one
14 aggravating factor and then weigh that factor against the evidence of mitigating factors. Id. at
15 206. The Supreme Court refined these general requirements in Zant v. Stephens, 462 U.S. 862,
16 877 (1983), holding that in order for a capital sentencing scheme to pass constitutional muster
17 it must "genuinely narrow the class of persons eligible for the death penalty and must
18 reasonably justify the imposition of a more severe sentence on the defendant compared to others
19 found guilty of" the capital crime. A death penalty scheme must provide an "objective,
20 evenhanded and substantively rational way" for determining whether a defendant is eligible for
21 the death penalty. Zant, 462 U.S. at 879.

22 In addition to the requirements for determining eligibility for the death penalty, the
23 Supreme Court has imposed a separate requirement for the selection decision, "where the
24 sentencer determines whether a defendant eligible for the death penalty should in fact receive
25 that sentence." Tuilaepa v. California, 512 U.S. 967, 972 (1994). "What is important at the
26 selection stage is an individualized determination on the basis of the character of the individual
27 and the circumstances of the crime." Zant, 462 U.S. at 879. Accordingly, a statute which
28 "provides for categorical narrowing at the definition stage, and for individualized determination

1 and appellate review at the selection stage" will ordinarily meet Eighth Amendment and Due
2 Process concerns, 462 U.S. at 879, so long as a state ensures "that the process is neutral and
3 principled so as to guard against bias or caprice." Tuilaepa, 512 U.S. at 973.

4 Defining specific "aggravating circumstances" is the accepted "means of genuinely
5 narrowing the class of death-eligible persons and thereby channeling the [sentencing authority's]
6 discretion." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). Such a circumstance must meet
7 two requirements. First, "the [aggravating] circumstance may not apply to every defendant
8 convicted of a murder; it must apply only to a subclass of defendants convicted of murder."
9 Tuilaepa, 512 U.S. at 972; see Arave v. Creech, 507 U.S. 463, 474 (1993). Second, "the
10 aggravating circumstance may not be unconstitutionally vague." Tuilaepa, 512 U.S. at 972; see
11 Arave, 507 U.S. at 473; Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

12 Petitioner contends that Arizona's capital sentencing scheme generally fails to narrow
13 the class of those eligible for capital punishment. The Court disagrees. Arizona's death penalty
14 statute allows only certain, specific aggravating circumstances to be considered in determining
15 eligibility for the death penalty. A.R.S. § 13-703(F). In the case at hand, the sentencing court
16 found two aggravating circumstances: first, that Petitioner was previously convicted of felonies
17 involving the use or threat of violence on another person, specifically murder in the second
18 degree and assault and battery with a deadly weapon, § 13-703(F)(2); and second, that the jury
19 found Petitioner guilty of burglary and theft and that the Petitioner committed the offense with
20 the expectation that he would receive something of pecuniary value, § 13-703(F)(5).¹² The
21 Arizona Supreme Court reviewed these findings and agreed with the sentencing court.
22 Landrigan, 176 Ariz. at 6, 859 P.2d at 116.

23 "The presence of aggravating circumstances serves the purpose of limiting the class of
24 death-eligible defendants, and the Eighth Amendment does not require that these aggravating
25 circumstances be further refined or weighed by [the sentencing authority]." Blystone v.

26
27 ¹² M.E. of 10/25/90 at 4. At the presentence hearing, the sentencing court misspoke,
28 erroneously substituting §§13-703(F)(3) & (4) for § 13-703(F)(5). R.T. of 10/25/90 at 25. However,
the sentencing court applied the proper standard as set forth in § 13-703(F)(5) in issuing sentence.

1 Pennsylvania, 494 U.S. 299, 306-07 (1990). Not only does Arizona's sentencing scheme
2 generally narrow the class of death-eligible persons, §§ 13-703(F)(2) and (5) do so
3 specifically.¹³ Arizona's sentencing scheme is thus not contrary to or an unreasonable
4 application of clearly established federal law as determined by the Supreme Court. The Court
5 therefore will deny Petitioner's request for relief regarding this aspect of his Eleventh Claim for
6 Relief.

7 Petitioner also claims the Arizona death penalty statutes fail to provide for meaningful
8 proportionality review and are thus unconstitutional. Petitioner raises this same argument in his
9 Thirteenth Claim for Relief, and the Court will therefore address the merits of this claim in the
10 context of the Thirteenth Claim for Relief.

11 **C. Arbitrary and Irrational Nature of Mandatory Death 12 Sentence**

13 Petitioner claims that the mandatory imposition of the death penalty where the court
14 finds there are aggravating factors and no mitigating factors sufficient to warrant leniency
15 results "in an arbitrary and irrational death sentence." Petitioner cites no cases or other legal
16 authority in furtherance of this position. Petitioner's contention was expressly rejected in the
17 plurality opinion in Walton, 497 U.S. at 651-652 (citing Blystone v. Pennsylvania, 494 U.S. 299
18 (1990) (death sentence imposed only after determination that aggravating factors outweigh
19 mitigating factors, or there are no mitigating factors, held constitutional). The Court will thus
20 deny Petitioner's request for relief as to this aspect of Petitioner's Eleventh Claim for Relief.

21 **D. Cruel and Unusual Punishment**

22 For a variety of reasons, Petitioner claims that the death penalty constitutes cruel and
23 unusual punishment. Pursuant to Gregg v. Georgia, 428 U.S. 153, 169 (1976), the Court rejects
24 Petitioner's contention and will deny Petitioner's Eleventh Claim for Relief in its entirety.
25
26

27 ¹³ Petitioner does not argue that § 13-703(F)(2) or (5) apply to every defendant convicted
28 of murder.

1 **Claim 13:** The death sentence imposed against Petitioner is inappropriate
2 because he was denied the procedural safeguard of a meaningful
3 proportionality review by the state appellate court. The limitation by
4 the state court violated Petitioner's rights as guaranteed by the Eighth
5 and Fourteenth Amendments.

6 Petitioner claims that his death sentence is not proportional to similar homicide cases and
7 that the denial of state appellate court proportionality review of his sentence was
8 unconstitutional. Petitioner admits that there is no federal right to proportionality review where
9 state law does not provide for such review. Pulley v. Harris, 465 U.S. 37, 43-45 (1984).

10 The Arizona Supreme Court did not conduct a proportionality review in this case. State
11 v. Landrigan, 176 Ariz. 1, 8, 859 P.2d 111, 118 (1993). In State v. Salazar, 173 Ariz. 399, 416-
12 417, 844 P.2d 566, 583-584 (1992), cert. denied, 509 U.S. 912 (1993), the Arizona Supreme
13 Court held that proportionality reviews would no longer be conducted in death penalty cases.
14 Thus, Petitioner had no constitutional right to proportionality review by the Arizona Supreme
15 Court, and the Court will deny Petitioner's Thirteenth Claim for Relief.

16 **Claims 6, 10, and 13 — Request for Evidentiary Hearing**

17 Petitioner has requested an evidentiary hearing be held on his Sixth, Tenth, and
18 Thirteenth Claims for Relief. Pursuant to Rule 8 of the Rules Governing Section 2254 Cases
19 in the United States District Court, the Court must determine whether an evidentiary hearing
20 is required. "If it appears that an evidentiary hearing is not required, the judge shall make such
21 disposition of the petition as justice shall require." Rule 8(a).

22 An evidentiary hearing can be either mandatory or discretionary. "A habeas petitioner
23 is entitled to an evidentiary hearing on a claim if (1) the petitioner's allegations, if proved, would
24 entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing,
25 reliably found the relevant facts." Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992)
26 (internal quotes omitted), cert. denied, 517 U.S. 1111 (1996); Correll v. Stewart, 137 F.3d 1404,
27 1411 (9th Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 450 (1998) (colorable claim of ineffective
28 assistance of counsel required); Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998) ("In
habeas proceedings, an evidentiary hearing is required when the petitioner's allegations, if
proven, would establish the right to relief."). "[A]n evidentiary hearing is not required on issues

1 that can be resolved by reference to the state court record[,] Totten, 137 F.3d at 1176, or if the
2 claim "presents a purely legal question." Hendricks, 974 F.2d at 1103.

3 In Townsend v. Sain, 372 U.S. 293, 313 (1963), the Supreme Court established six
4 circumstances under which there is presumptively no "full and fair hearing" at the state level:

5 (1) the merits of a material factual dispute were not resolved in a state court
6 hearing;

7 (2) the state factual determination is not fairly supported by the record as a whole;

8 (3) the fact-finding procedure employed by the state court was not adequate to
9 afford a full and fair hearing;

10 (4) there is a substantial allegation of newly discovered evidence;

11 (5) the material facts were not adequately developed at the state court hearing; or

12 (6) for any reason it appears that the state trier of fact did not afford the habeas
13 applicant a full and fair fact hearing.

14 The Townsend decision was subsequently overruled in part by Keeney v. Tamayo-Reyes, 504
15 U.S. 1 (1992), in which the Court held that if the failure to develop a material fact is attributable
16 to the petitioner, a federal evidentiary hearing is required only upon a showing of cause and
17 prejudice.

18 The Tamayo-Reyes Court did not alter the discretionary power of district courts to hold
19 evidentiary hearings. See Seidel v. Merkle, 146 F.3d 750, 754 (9th Cir. 1998), cert. denied, ___
20 U.S. ___, 119 S.Ct. 850 (1999); Pagan v. Keane, 984 F.2d 61, 64 (2d Cir. 1993). Nor does it
21 appear that the AEDPA altered that part of Townsend not overruled in Tamayo-Reyes. Rather,
22 the AEDPA simply provides further limitations on a district court's discretion to hold an
23 evidentiary hearing where "the applicant has failed to develop the factual basis of a claim in
24 State court proceedings." 28 U.S.C. § 2254(e)(2). The AEDPA does not preclude an
25 evidentiary hearing where the failure to develop the facts is not attributable to the petitioner.
26 Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997) (court dismissed restraint petition without
27 hearing); see also Lawrie v. Snyder, 9 F.Supp.2d 428 (D. Del. 1998), certification den'd, 176
28 F.3d 472 (3d Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 1493 (1999). (AEDPA superseded
Tamayo-Reyes but left intact remainder of Townsend). Therefore, in deciding whether a

1 hearing is mandatory, this Court needs to consider the Townsend "full and fair hearing" standard
2 as well as the limitations set forth in § 2254(e)(2).

3 **A. Sixth Claim for Relief (Ineffective Assistance of**
4 **Counsel)**

5 Petitioner requests that an evidentiary hearing be held so that he can offer testimony from
6 his trial counsel and from another attorney to demonstrate that Petitioner's trial counsel's
7 conduct was deficient under the first prong of Strickland. Petitioner also states he would offer
8 expert testimony regarding Petitioner's organic brain dysfunction, neurobiological dysfunction,
9 and competency to assist with his defense.

10 The expert testimony Petitioner hopes to develop relating to Petitioner's organic brain
11 dysfunction and incompetency at the time of sentencing cannot be properly considered by this
12 Court. Petitioner failed to raise allegations of organic brain dysfunction or incompetency at
13 sentencing in any of his state court pleadings or in his Amended Petition for Habeas Corpus
14 Relief. In addition, he has failed to demonstrate cause and prejudice for his failure to raise these
15 allegations in state court, and he has failed to show that a fundamental miscarriage of justice
16 will occur if the Court does not review these allegations. Thus, these allegations are
17 procedurally barred from review on the merits. Vasquez v. Hillery, 474 U.S. 254, 260 (1986);
18 see Discussion supra at 9.

19 No evidentiary hearing was held on the merits of this claim in the state court, although
20 Petitioner requested an evidentiary hearing on more than one occasion. State v. Landrigan, 176
21 Ariz. at 8, 859 P.2d at 118 ("no hearing occurred because [Landrigan] moved to dismiss his
22 petition for post-conviction relief"¹⁴; R.O.A., Photostated Instruments, Item 137 at 17 (request
23 for evidentiary hearing in subsequent petition for post-conviction relief); M.E. of 7/17/95 (Rule
24 32 court did not grant request for evidentiary hearing); R.O.A., Photostated Instruments, Item

25 ¹⁴ Petitioner filed two separate petitions for post-conviction relief in the Rule 32 court. The first
26 was filed on July 23, 1991, and Petitioner moved to dismiss it without prejudice on November 1, 1991.
27 (R.O.A., Photostated Instruments, Items 102 & 109). The Rule 32 court dismissed the first petition
28 without prejudice on November 21, 1991. (M.E. 11/21/91). The second petition was filed on January
31, 1995. (R.O.A., Photostated Instruments, Item 137).

1 144 at 20 (renewed request for evidentiary hearing to Arizona Supreme Court). Thus, any
2 failure to develop the material facts of Petitioner's claim of ineffective assistance of counsel is
3 not attributable to Petitioner, and 28 U.S.C. § 2254(e)(2) does not prevent the Court from
4 exercising its discretion and granting Petitioner an evidentiary hearing on his Sixth Claim For
5 Relief. Accord Jones v. Wood, 114 F.3d at 1012-13.

6 The Court finds, however, that Petitioner has not set forth a colorable claim of ineffective
7 assistance of counsel because there is no prejudice. Even if his allegations were proven that his
8 counsel rendered deficient performance by failing to discover and present mitigation evidence,
9 Petitioner would not be entitled to relief. The evidence Petitioner claims his counsel should
10 have discovered and presented to the sentencing court would not have led the sentencing court
11 to "[conclude] that the balance of aggravating and mitigating circumstances did not warrant
12 death." See Strickland, 466 U.S. at 695. The Court will therefore deny Petitioner's request for
13 an evidentiary hearing on Claim 6.

14 **B. Tenth Claim for Relief (Victim Impact Evidence)**

15 The Court finds that an evidentiary hearing is not required for Petitioner's Tenth Claim
16 for Relief (Victim Impact Evidence). The evidence which Petitioner seeks to develop is
17 evidence that the sentencing judge impermissibly considered victim impact evidence in
18 imposing sentence. This presents a purely legal question. The presumption that the sentencing
19 judge correctly applied the law and considered only admissible evidence governs. Walton, 497
20 U.S. at 653; see also Gretzler, 112 F.3d at 1009.

21 **C. Thirteenth Claim for Relief (Proportionality Review)**

22 The Court finds that an evidentiary hearing is not required for Petitioner's Thirteenth
23 Claim for Relief (Proportionality Review). Petitioner was not entitled to proportionality review
24 as a matter of law. Pulley, 465 U.S. at 43-45.

25 **Claims 6, 10, and 13 — Request for Discovery**

26 Petitioner has requested discovery on his Sixth, Tenth, and Thirteenth Claims for Relief.
27 Discovery in habeas corpus cases is governed by Rule 6 of the Rules Governing Section 2254
28 Cases in the United States District Court, which provides in pertinent part:

1 (a) Leave of court required. A party shall be entitled to invoke the
2 processes of discovery available under the Federal Rules of Civil
3 Procedure if, and to the extent that, the judge in the exercise of his
discretion and for good cause shown grants leave to do so, but not
otherwise.

4 "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery
5 as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). "[W]here
6 specific allegations before the court show reason to believe that the petitioner may, if the facts
7 are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the
8 courts to provide the necessary facilities and procedures for an adequate inquiry." Harris v.
9 Nelson, 394 U.S. 286, 300 (1969).

10 **A. Sixth Claim for Relief (Ineffective Assistance of Counsel)**

11 The Court finds that Petitioner is not entitled to additional discovery on his Sixth Claim
12 for Relief (Ineffective Assistance of Counsel). Petitioner has requested that he be allowed to
13 obtain testimony from the Maricopa County Public Defender relating to the funding policies of
14 the Public Defender's Office in 1989 and 1990. The Court finds that while such evidence may
15 be relevant to Petitioner's claim that his counsel rendered deficient performance, the Court has
16 determined that Petitioner was not prejudiced by his counsel's alleged failures. Thus, the
17 additional discovery Petitioner seeks will not advance his Sixth Claim for Relief.

18 **B. Tenth Claim for Relief (Victim Impact Statements)**

19 The Court finds that Petitioner is not entitled to discovery on his Tenth Claim for Relief.
20 Petitioner has requested that he be allowed to take the deposition of Judge Hendricks, the
21 sentencing judge, regarding her recollection of the victim impact testimony. Petitioner has
22 failed to demonstrate good cause to support such discovery. Moreover, "It is a firmly
23 established rule that a judge may not be asked to testify about his mental processes in reaching
24 a judicial decision." Thompson v. Crawford, 656 F. Supp. 1183, 1184 (S.D.Fla. 1987); see also
25 Washington v. Strickland, 693 F.2d 1243, 1263 (5th Cir. 1982), rev'd on other grounds, 466 U.S.
26 668 (1984); Perkins v. LeCureux, 58 F.3d 214, 220 (6th Cir.), cert. denied, 516 U.S. 992 (1995).

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