EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

SAMUEL V. LOPEZ, Petitioner, v. DORA B. SCHRIRO, *et al.* Respondents,	No. CIV 98-0072-PHX-SMM MEMORANDUM REGARDING MERITS OF CONSTITUTIONAL VIOLATIONS 1(C), (D), 7 AND 8, AND MOTION FOR DISCOVERY AND AN EVIDENTIARY HEARING

In its November 3, 2005 Order, this Court agreed to consider four of the constitutional violations that occurred at Petitioner's capital sentencing trial: his

appointed counsel's incompetence in preparing his only mitigation witness, a mental health expert, to testify, and failing to challenge statements contained in the presentence report alleging that Petitioner committed a sexual assault four days after the victim's murder, the trial court's failure to consider constitutionally relevant mitigating evidence supporting a life sentence, and the state court's use of an unconstitutional aggravating factor to enhance Mr. Lopez's sentence to death. Dkt. No. 160, p. 22. Based on the facts and law discussed below, Petitioner's death sentence is unlawful, must be vacated, and this matter remanded to the state court for further proceedings. Alternatively, this Court should grant an evidentiary hearing so that it can consider the relevant evidence establishing the unconstitutionality of Mr. Lopez's death sentence.

We begin at the beginning of these sentencing violations: appointed counsel's actions at Mr. Lopez's 1990 capital sentencing proceedings, and the prejudice those actions caused.

I. TRIAL COUNSEL'S FAILURE TO CONDUCT A REASONABLE INVESTIGATION AND PREPARE HIS KEY WITNESS AT SENTENCING PREJUDICED PETITIONER.

A. Trial Counsel Did Not Conduct An Independent, Thorough Investigation of Petitioner's Background.

I. The Facts Counsel Learned While Representing Petitioner on Direct Appeal.

George Sterling was appointed by the Arizona courts to represent Mr. Lopez on his direct appeal following his 1987 conviction for first degree murder and death sentence.

Resps.Ans.Re Procedural Status of Claims ("Resps.Ans."), Ex. H.[1] To prepare Mr. Lopez's appeal to the Arizona Supreme Court, Mr. Sterling necessarily reviewed the record of the 1987 trial proceedings, including transcripts, pleadings and related sentencing proceedings.[2] From that review, Mr. Sterling learned what Mr. Lopez's trial attorney, Maricopa County public defender Joel Brown, did to prepare for Mr. Lopez's capital sentencing proceeding in 1987: 1) Mr. Brown telephoned Dr. Otto Bendheim and asked him to interview Mr. Lopez and review police reports Mr. Brown sent him. The police reports included a statement Raymond Hernandez provided to police about Mr. Lopez's radically different behavior when he is intoxicated, see Ex. 1, attached, 2) Mr. Brown prepared and filed a three-page "Sentencing Memorandum" in which he argued that the record was "undisputed as to the fact that the defendant was heavily intoxicated a few hours, at most, before the murder of" the victim, and "there is little question that the degree of intoxication substantially impaired his judgment and his ability to appreciate the nature of his actions," Resps.Ans., Ex. G, p. 2;[3] and 3) a few days before Mr. Lopez's

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[1]As discussed in previous documents, at the time Judge D'Angelo sentenced Mr. Lopez to death 1987, and re-sentenced him to death in 1990, Judge D'Angelo had also presided over the first degree murder trial of Mr. Lopez's younger brother, George Lopez, and following George's conviction, sentenced him to death. Dkt. # 107.

[2]Mr. Sterling passed away on May 28, 2005.

[3]Nine sentences in Mr. Brown's three-page memorandum were devoted to discussing this mitigating factor. The remaining discussion addressed the State's use of Mr. Lopez's earlier unrelated arrest for resisting arrest to establish the aggravating circumstance of a prior conviction involving the use or threat of violence. Resps.Ans., Ex. G, pp. 2-3.

sentencing hearing, Mr. Brown "talked" by phone to one of Mr. Lopez's brothers, Frank Lopez,[4] and his mother, Concha Lopez to see if they could attend the hearing. R.T. 6-25-87, p. 4.[5]

From this review, Mr. Sterling discovered what Judge D'Angelo wrote in his 1987 Special Verdict sentencing Mr. Lopez to death, "No evidence was presented by the defendant at the presentence hearing," ROA 46, p. 5, and what Judge D'Angelo stated during Mr. Lopez's sentencing hearing:

> The court is now concerned with the fact that but for the sentencing memorandum received just yesterday, the defense failed to present any mitigating circumstances to the court at the hearing....

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[4]In addition to his brother Frank, Mr. Lopez had six other living siblings. As discussed in previous briefing submitted to this Court, see Dkt 107, Pet.Brf.Purs.Ct's Jan.7,2003 Order, pp. 20-21, Jose Lopez, who is 2 ½ years younger than Sam Lopez, was represented by another attorney in Mr. Brown's office at the Maricopa County Public Defender's Office on capital charges before Judge D'Angelo. Sam Lopez's nineteen-year-old brother, George, was a co-defendant in Jose's case. George's capital murder charges were also before Judge D'Angelo. Pursuant to a plea agreement, Jose pleaded guilty and in April, 1986, Judge D'Angelo sentenced him to a sentence of life without the possibility of parole for twenty-five years. *State v. (Jose Villegas) Lopez*, 153 Ariz. 285, 736 P.2d 369 (1987). George's case proceeded to trial with Judge D'Angelo presiding, George was convicted of first degree murder on March 27, 1986. On May 2, 1986, Judge D'Angelo sentenced George to death. *State v. (George) Lopez*, 158 Ariz. 258, 260, 762 P.2d 545, 547 (1988). After George's death sentence was vacated by the Arizona Supreme Court, like Sam Lopez's here, it was assigned to a different judge who sentenced George to a life sentence. See Dkt No. 107, Pet.Brf.Purs.Ct's Jan.7,2003 Order, Ex. 4.

[5]Six days earlier, Mr. Brown told Judge D'Angelo that he had "been trying this week" to "get[] in contact with his family, Mr. Lopez' family by the sentencing date," but had "not had any success at doing that." He also said, "[t]he only person is his mother." R.T. 6-19-87, p. 12.

Resps.Ans., Ex. F, p.3.[6]

From reading the trial transcripts and record, Mr. Sterling also learned that Mr. Brown's representation of Mr. Lopez at his capital trial was equally wanting. Mr. Sterling read again Judge D'Angelo's recorded comments about Mr. Brown's abysmal representation:

> At the time of trial the court was concerned over the lack of any evidence presented on behalf of defendant. I believe I so expressed to counsel, either formally or informally.

Resps.Ans., Ex. F, p. 2.

In addition to discovering Mr. Brown's meager efforts in representing Mr. Lopez at his capital trial and sentencing, Mr. Sterling also learned the little Joel Brown had to have known about Mr. Lopez from reading police and pre-sentence reports: Mr. Lopez was homeless, living in the neighborhood park, R.T. 4-21-87, pp. 108, sleeping in the car of his friend, Cipriano Chavez, where he stored the few clothes he had, R.T. 4/22/87, p. 31-32, using the water fountain in the park to bathe, was often unclean and hungry, and just as often intoxicated by alcohol, marijuana and sniffing toxic fumes from paint cans. R.T. 4-16-87, pp. 16, 18, 28-30; 4-21-87, 13, 124; Presentence Report dated Sept. 1, 1981.

Mr. Sterling also learned that four days after the victim's death, Mr. Lopez was arrested for the sexual assault of a girlfriend he had dated, Ms. Cecilia Rodriguez. R.T. 4-

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[6]"Resps.Ans." refers to Respondents' Answer Re: Procedural Status Of Claims (Mar. 10, 1999) .

16-87, pp. 31-33. From reading the 1987 Presentence Report, Mr. Sterling learned that the presentence author of that report, Robert Cherkos, considered and relied on Mr. Lopez's arrest for "sexually assaulting" a woman who "managed to get away" in reaching this conclusion:

> [D]efendant has proven he is a danger to society and capable of committing the most heinous of crimes [and] should be sentenced in such a fashion so that he will be permanently removed from the community.

ROA 48i. As Mr. Sterling read that report, and Judge D'Angelo's signature at the end of that report below the statement "I have reviewed and considered the probation officer's report," he knew this terrible allegation had become a centerpiece of the State's case for executing Mr. Lopez.

After reading the records and transcripts, Mr. Sterling filed his opening brief in the Arizona Supreme Court in Mr. Lopez's direct appeal. In that brief, Mr. Sterling described what he had learned about Mr. Brown's representation of Mr. Lopez at his capital trial:

> The only evidence and testimony submitted at the trial was that of the prosecution.

Resp.Ans., Ex. H, p. 4. Mr. Sterling described what he had learned about Mr. Brown's abandonment of Mr. Lopez again at the sentencing hearing where Mr. Lopez's life was at stake:

> [T]he trial court held the presentence hearing. . . . Once again the only evidence presented was the prosecutor's evidence as to two aggravating factors....
> The next morning, following the trial court's inquiry of defense counsel as to a total lack of any defense effort or evidence, Judge D'Angelo rendered and filed his

> special verdict finding the two statutory aggravating as alleged ... and a total absence of any mitigating factors ....

Id., p. 5.

Because Mr. Brown had conducted no investigation of Mr. Lopez's life and social history, and presented no evidence of his own to support a sentence less than death, Mr. Sterling had no choice but to rely on the prosecutor's description of Mr. Lopez's altered, intoxicated state at the time of the crime in his appellate brief:

> Other neighbors across the street saw Sammy Lopez in that area where Essie lived at about 11:00 to 12:00 on the night ... and at that time they saw him he was intoxicated or high on something. He was not acting normally...

Id., p. 12, citing R.T. 4/20/87, p. 15. Mr. Sterling relied as well on the testimony of two prosecution witnesses to demonstrate Mr. Lopez's extraordinarily impaired state shortly before the crime occurred:

> [T]wo lay witnesses (Rodriguez and Sabori) met with a highly intoxicated and aberational [sic] Appellant shortly before and in the immediate vicinity of the crime.

Id., p. 4. He quoted Ms. Sabori's testimony describing Mr. Lopez's abnormal state:

> [Mr. Lopez] was different from the way he was at the park....then Angel told me they had been drinking together.

Id., p. 16. He also quoted Ms. Sabori's description of Mr. Lopez when, after she declined his invitation to "get high," Mr. Lopez went "to the side of the apartments on the alley side," returning a few moments later:

> He was different, he was shaking, like shaking, and he ... acted like he was mad, like everything bothered him. He just couldn't stand still... he had to hold himself on the wall, stand on the wall, just stand on the pole. [His

hands] were shaking.

Id., p. 16, quoting R.T. 4/21/87, pp. 72-74.

Mr. Sterling relied as well on Pauline Rodriguez's trial testimony corroborating Ms. Sabori's description of Mr. Lopez's deranged state:

> ....he was not himself.... I know him before when he was sober and stuff.... I can't say it was beers, but he was loaded on something. .... He was acting strange... in a real bad mood.

Id., p. 17, quoting R.T. 4-21-87, p. 83. He quoted the 1987 presentence report writer's conclusion that Mr. Lopez "'had a pattern of alcohol and substance abuse' which the previous presentence report in CR-151615 equally documents as involving long term vapor or paint sniffing." *Id.*, pp. 17-18. He argued Judge D'Angelo erred in rejecting "undisputed evidence" of Mr. Lopez's "alcohol or drug intoxication" on the night of the crime, and that error "coupled with available evidence of longstanding abuse of vapors/paint" "clearly deprived" Mr. Lopez of a "singular mitigating factor" supporting a life sentence. *Id.*, p. 18.

In attacking Judge D'Angelo's use of Mr. Lopez's prior conviction for resisting arrest as an aggravating factor supporting a death sentence, Mr. Sterling discussed the facts underlying that arrest. He wrote that Mr. Lopez had been "inhaling toxic substances," and relied on Mr. Lopez's description of how his intoxicated state affected him: "I panicked ... and when I panicked ... I accidently touched one of [the officer's] hands...." *Id.*, pp. 11-12. In attacking Mr. Brown's representation of Mr. Lopez, Mr. Sterling explained that trial counsel's "total failure ... to offer any trial evidence,

presentence evidence, or even produce a single witness" for Mr. Lopez at his capital sentencing hearing left "even the trial court ... concerned" about the fairness of the proceedings. *Id.*, pp. 31-32.

Following the parties' briefing and oral argument, the Arizona Supreme Court affirmed Mr. Lopez's convictions, but vacated his death sentence. The appellate court found Judge D'Angelo erred when he relied on Mr. Lopez's earlier conviction for resisting arrest to establish Arizona's (F)(2) aggravating circumstance because that crime did "not qualify" as a prior conviction involving the use or threat of violence on another. *State v. Lopez*, 163 Ariz. 108, 114, 786 P.2d 959, 965 (1990). The state court, however, disagreed that Judge D'Angelo erred when he rejected Mr. Lopez's "alleged intoxication at the time of the murder" as a mitigating circumstance. *Id.*, 163 Ariz. at 115, 786 P.2d at 966. Noting that Joel Brown "offered no evidence concerning intoxication at [the] sentencing hearing," but "relied instead on the state's opening statement and the testimony of two trial witnesses as proof that [Mr. Lopez's] intoxication was a significant impairment," the Court concluded:

> Based upon <u>our review of the record</u>, we agree with the trial court's assessment of the [mitigation] evidence.

Id. (emphasis added).[7] But because the appellate court did "not know and [could not]

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[7]As discussed below, the barrier the Arizona Supreme Court's erected before it would consider evidence of Mr. Lopez's noticeably impaired mental state–that such evidence "impair significantly his capacity to appreciate his conduct or conform to the law"--is unconstitutional. See *Tennard v. Dreke*, 124 S.Ct. 2562 (2004).

ascertain" what decision Judge D'Angelo would have reached absent consideration of the invalid prior conviction aggravating circumstance, it vacated Mr. Lopez's death sentence, and remanded for a new sentencing trial. *Id.*, 163 Ariz. at 116, 786 P.2d at 967.

ii. Trial counsel did not investigate Petitioner's background or key evidence the State relied on to support Petitioner's death sentence.

Once the proceedings returned to the trial court for a new sentencing, Mr. Sterling decided to continue representing Mr. Lopez. At the outset of his representation of Mr. Lopez in his re-sentencing, Mr. Sterling knew two important facts: 1) Mr. Brown had not investigated Mr. Lopez's background and other sources for facts supporting a sentence less than death, and 2) the Arizona appellate court agreed with Judge D'Angelo that the record evidence of Mr. Lopez's impaired state did not establish mitigation. Given these facts, it is all the more shocking how little Mr. Sterling did at Mr. Lopez's re-sentencing.

Mr. Sterling did file a motion seeking a jury to decide the facts the State alleged increased Mr. Lopez's punishment to a sentence of death, Def.Req.Jur.Sent. (Jun. 15, 1990).[8] But despite knowing that Judge D'Angelo had earlier sentenced to death Mr. Lopez's younger brother, George, for an unrelated homicide, Mr. Sterling never sought a judge unbiased by those prejudicial facts and influences. Instead Mr. Sterling pointedly reminded Judge D'Angelo that the Arizona Supreme Court had reversed and vacated

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[8]At the time of Mr. Lopez's 1990 re-sentencing neither Arizona nor the U.S. Supreme Court had yet recognized a defendant's right to a jury determination of the facts the prosecution alleges increases a sentence of life to death. *Ring v. Arizona,* 536 U.S. 584, 609 (2002); *Walton v. Arizona*, 497 U.S. 639 (1990).

George Lopez's convictions, and after George was convicted of murder again, the new judge sentenced George to a term of years, not death. R.T. 8-3-90, p. 23.

Just as baffling, Mr. Sterling did not conduct the investigation he had recognized Mr. Brown failed to conduct not conducting in the 1987 proceedings–an investigation courts have long recognized as essential to competent representation. *See e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003)(granting relief based on counsel's error in failing to investigate readily available mitigation); *Williams (Terry) v. Taylor*, 529 U.S. 362, 395-396 (2000)("counsel did not begin to prepare for [sentencing] until a week before the trial" and "did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 404.1, commentary, p. 4-55 (2d 3d 1980)"); *Strickland v. Washington*, 466 U.S. 668, 691 (1984)(counsel "has a duty to make reasonable investigations"). Instead of undertaking that thorough investigation, Mr. Sterling contacted Dr. Bendheim, the same psychiatrist Mr. Brown telephoned before the 1987 sentencing hearing. R.T. 6-25-87, p. 3.

Dr. Bendheim was a forensic psychiatrist certified by the American Board of Neurology and Psychiatry, who, at the time of his testimony at Mr. Lopez's re-sentencing proceedings, had been practicing for over fifty years.[9] As Dr. Bendheim later explained in his videotaped testimony, Ex. 2, p. 3, and documented in his 1987 Report, *see*

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[9]Dr. Bendheim has since passed away. The videotape of his testimony is attached to Resps.Ans., Ex. L. The videotape is also found at R.T. 7-13-90 (p.m.), Exhibit 6. For ease of reference, however, Petitioner attaches as Exhibit 2 here the transcript of Dr. Bendheim's testimony.

Resps.Ans., Ex. K, pp. 1-2, Mr. Brown sent him police reports regarding the crime that included records regarding Mr. Lopez's previous charges and arrests, and a police interview of Raymond Hernandez. Ex. 2, p.13.

Dr. Bendheim also had "a telephone interview with Mr. Joel Brown...." *Id.*, p. 16. Mr. Brown told Dr. Bendheim that "'[m]any, many character witnesses described [Mr. Lopez] as a mild person unless he's drinking. It's like he is a different person when he drinks.'" *Id.*, pp. 16-17. Mr. Brown asked Dr. Bendheim to review the documents, interview Mr. Lopez and prepare a "pre-sentence report possibly to be used in mitigation" like the "usual format of the Rule 26.5 questionnaire the court submit[s] regarding pre-sentencing reports."[10] Ex. 2, pp. 3-4, 12-15; Resps.Ans., Ex. K, pp. 1-2. After reviewing the documents and interviewing Mr. Lopez for an unknown duration of time,[11] Dr. Bendheim later testified that he concluded Mr. Lopez possibly suffered from a substance abuse disorder, "particularly in regards to alcohol to which apparently he reacted in a pathological, unusual fashion, known as "pathological intoxication." Ex. 2, p.4. Dr. Bendheim explained that his diagnosis was necessarily "tentative" because he "wasn't present" when the crime occurred, and Mr. Lopez could not confirm that his character changes when he is impaired. *Id.*, pp. 5-6.

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[10]Dr. Bendheim appears to be referencing the presentence reports Arizona trial courts are required to order for matters where a defendant's potential sentence is greater than a year. *See e.g.*, Ariz.Crim.P. Rules 16.4, 26.5 and 26.6.

[11]Dr. Bendheim did not remember the length of his interview with Mr. Lopez. He speculated it may have lasted 1 ½ to 2 hours. Exhibit 2, p. 4.

Dr. Bendheim also later testified that Mr. Lopez told him during their interview that he was not intoxicated on the night the crime occurred. *Id.*, p. 6. Dr. Bendheim did not believe Mr. Lopez's denial, however, because the records he had reviewed demonstrated Mr. Lopez was "apparently at least under the influence of alcohol" a short time before the crime occurred. *Id.*, p. 6.

Dr. Bendheim testified that he had prepared a report after interviewing Mr. Lopez and reviewing the court documents, opining that at the time of the crime, Mr. Lopez possibly "was intoxicated and may have had a `pathological intoxication,' an unusual reaction to even minor amounts of alcohol...." Resps.Ans., Ex. K, p. 5. In that report, Dr. Bendheim wrote:

> [he] found no evidence of mental illness with the possible exception of substance abuse disorder, particularly Marijuana and paint sniffing, but there is no evidence that this took place just prior to the incident. However, pathological intoxication cannot entirely be ruled out.

Id. Mr. Brown did not call Dr. Bendheim as a witness at Mr. Lopez's 1987 sentencing.

In the 1990 re-sentencing proceedings, Dr. Bendheim testified that Mr. Sterling had contacted him "about a month ago," which would have been sometime around the middle of June, 1990. Ex. 2, p. 7.[12] Mr. Sterling asked Dr. Bendheim to review his report again because Mr. Sterling "wanted to know about this intoxicated pathology." *Id.* Mr. Sterling sent Dr. Bendheim two additional documents to review that Dr. Bendheim had

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[12]The mitigation/aggravation trial took place on July 13, 1990. Resps.Ans., Exs. I-J. The Arizona Supreme Court's decision granting Mr. Lopez a re-sentencing hearing was issued on January 18, 1990. *State v. Lopez,* 163 Ariz. 108, 786 P.2d 959.

not previously seen. *Id.*, p. 8. The first was the 1985 presentence report prepared by Neal Nicolay discussing the circumstances of Mr. Lopez's arrest and conviction for resisting arrest. Ex. 8 to R.T. 7-13-90 (p.m.). The second was the November 3, 1986, Phoenix Police Department report, No. 86-147145, that Mr. Sterling described as "a sexual assault incident that occurred" involving Cecilia Rodriguez. Ex. 2, p. 8; Ex. 7 to R.T. 7-13-90 (p.m.).

Dr. Bendheim testified these two documents "change [] slightly" his 1987 conclusions. He opined that these "crimes," "at least one crime of extreme violence," were committed "under the influence of intoxication." Ex. 2, pp. 9- 10. When asked how these facts altered his prior conclusions, Dr. Bendheim testified:

> I would probably have added ... that there had been other incidents where the defendant displayed criminal behavior out of character for his usual conduct and in a bizarre reaction pattern to intoxicants.

Id. Based on these two documents, Dr. Bendheim now "could state pretty firmly that this person is subject to unusual reactions of behavior and conduct, including criminology and including assaultiveness when under the influence" of "alcohol or drugs," and "this type of intoxication definitely diminishes capacity." *Id.*, pp. 10-11. He "speculated, but on fairly good grounds," with "probability," "that this murder would not have occurred" if Mr. Lopez had not been intoxicated. *Id.*, pp. 11-12.

On cross-examination, however, Dr. Bendheim agreed that the predisposing factors for alcohol idiosyncratic intoxication (unusual fatigue, debilitating physical illness

and advancing age)[13] were not present in Mr. Lopez. *Id.*, p. 21-22. He acknowledged he had "no other source of information" about Mr. Lopez's changed character other than Mr. Hernandez and "the verbal input of Mr. Brown." *Id.*, p. 17.[14] He agreed as well that the author of the November 13, 1985 presentence report addressing Mr. Lopez's conviction for resisting arrest had noted that he found nothing in Mr. Lopez's probation files indicating any problems Mr. Lopez suffered as a result of sniffing paint. *Id.*, p. 24.

Even more devastating to Mr. Sterling's reliance on a single witness to establish a single mitigating factor was what happened next when the prosecutor informed Dr. Bendheim that despite what Mr. Brown had told him at the time of Mr. Lopez's trial:

> There were no witnesses who testified under oath or gave statements to the court at any time concerning Mr. Lopez's difficulties or problems with substance abuse ...

Id., p. 26. Dr. Bendheim conceded that "assuming there is no evidence in the record anywhere to substantiate that people have claimed this," his conclusions were "more

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[13]Idiosyncratic intoxication was a recognized mental disorder in the Diagnostic and Statistical Manual of Mental Disorders III-R (1987). The diagnostic criteria were:

A. Maladaptive behavioral changes, e.g., aggressive or assaultive behavior, occurring within minutes of ingesting an amount of alcohol insufficient to induce intoxication in most people.

B. The behavior is atypical of the person when not drinking.

C. Not due to any physical or mental disorder.

DSM III-R at 129.

[14]At the time of his deposition, Dr. Bendheim no longer had the police reports Mr. Brown had sent him, including the police interview of Mr. Hernandez. He had not interviewed Mr. Hernandez, and did not know how long Mr. Hernandez had known Mr. Lopez. *Id.*, p. 14.

speculative." *Id.*, p. 27. As a result, Dr. Bendheim's "pretty firm[]," "probab[le]" opinion about Mr. Lopez's mental state that had been based "on fairly good grounds" transformed at the end of his testimony into a "tentative," and "to a very large degree speculative" diagnosis. *Id.*, pp. 26-27, 30.

Other than the documents identified above, Mr. Sterling did not provide Dr. Bendheim any evidence to support his now tentative conclusion that Mr. Lopez suffered from pathological intoxication. Instead, he asked Dr. Bendheim to speculate that "we have witnesses that are saying after two or three beers this guy goes bizarre...." *Id.*, p. 35. Dr. Bendheim testified that if he heard "witnesses say that" he "would entertain the diagnosis very seriously." *Id.*, p. 36. The exchange between Mr. Sterling and Dr. Bendheim makes it transparently clear that Mr. Sterling had spent virtually no time talking to or preparing Dr. Bendheim for his deposition.

Because Mr. Sterling had not investigated Mr. Lopez's medical, mental health or social history background, the only "witnesses" besides Raymond Hernandez to whom Mr. Sterling could have been referring were prosecution witnesses Yodilia Sabori and Pauline Rodriguez.[15] But despite Mr. Sterling's long-standing knowledge of both the content of their pretrial statements <u>and</u> trial testimony, he did not provide Dr. Bendheim, his <u>only</u> mitigation witness, these documents to support his trial testimony and expert opinion.

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[15]As discussed above, Dr. Bendheim had previously reviewed the statement Raymond Hernandez provided police.

Mr. Sterling's omissions were the very same omissions Mr. Brown had made before him. Mr. Brown, too, never provided Dr. Bendheim either the trial testimony or the witness interviews of Pauline Rodriguez and Yodilia Sabori. Instead, Mr. Brown briefly mentioned their trial testimony in a sentencing memorandum he filed shortly before the sentencing hearing. *State v. Lopez*, 163 Ariz. at 115, 768 P.2d at 966; Resps.Ans., Ex. G, pp. 1-2. Mr. Brown, too, never conducted an independent and reasonable investigation of Mr. Lopez's background.

The consequences of Mr. Sterling's neglect were patent. Ironically, the prosecutor described best Mr. Sterling's rehashing of the same evidence that was before the judge at the 1987 sentencing:

> On the mitigating factor, he's not met his burden of proof. If you will recall, the first time around, they made a similar argument. They tried to establish the alcohol consumption impaired his ability. And this court found, the first time around, that that was not sufficient enough to constitute a mitigating factor.
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> On appeal, the Arizona Supreme Court said, Judge D'Angelo, you were right. *They have rephrased the argument, is all they've done.* Now they throw out this theory of pathological intoxication. The problem is, it's not there. Otto Bendheim couldn't say it was there three years ago. And they've tried to dress it up to make it look a little better, but it isn't there. The best he can say is a tentative diagnosis. How reliable can that be?

R.T. 8-30-90, pp. 26-27(emphasis added).

Mr. Sterling's failure to conduct an adequate investigation had another harmful consequence. The state's expert, Dr. Dean, who is not board certified in psychiatry, R.T. 7-13-90 (p.m.), p. 20, concluded that although Mr. Lopez's actions were consistent with

intoxication, *id.* at 32-34, and his personality and behavior changed when he is intoxicated, *id.*, p. 50, Dr. Dean needed "an adequate history of similar responses in the past...." *Id.*, p. 52. Because Mr. Sterling had not conducted that investigation, he could not provide Dr. Dean with the evidence showing just such similar responses in the past, as well as abundant evidence establishing Mr. Lopez's severe addictions, history of trauma, mental illness and cognitive impairments. See Ex. 3.

Mr. Sterling committed other serious errors as a result of his failure to conduct an independent investigation. As discussed above, Mr. Sterling presumed, without conducting any independent investigation, that Mr. Lopez sexually assaulted Cecilia Rodriguez a few days after the victim's murder. Mr. Sterling knew that the presentence report prepared before the 1987 sentencing specifically addressed Mr. Lopez's arrest for this alleged crime and its author had opined that "the defendant has proven he is a danger to society and capable of committing the most heinous of crimes." ROA 71, p. 8.[16] Had Mr. Sterling investigated the reasons the police did not pursue these charges,[17] he would have discovered that no crime had occurred. Ex. 4. The medical expert who examined

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[16]Because Mr. Sterling never investigated the facts of this arrest, the presentence report writer in the 1990 re-sentencing proceedings also addressed and considered this arrest: "[Mr. Lopez's] apprehension [for the victim's murder] occurred while he was being investigated for another sexual assault involving assaultive conduct." ROA 99, p. 7.

[17]Although the State withheld these material facts exonerating Mr. Lopez of a crime, had Mr. Sterling investigated the facts as he was required to do, *see Rompilla v. Beard*, 125 S.Ct. 2456, 2465-2468 (2005), he at least would have discovered the examining physician's conclusion that no rape or assault occurred.

Ms. Rodriguez at the hospital found no evidence of a sexual assault, Ms. Rodriguez's assertion that Mr. Lopez choked her was contradicted by the evidence, and Ms. Rodriguez's other statements about the events of that night were not credible. *Id.*

Evidence that Mr. Lopez did not assault Ms. Rodriguez was extraordinarily important. The former presentence report writer relied on this "fact" to recommend Mr. Lopez "be permanently removed from the community." ROA 71, p.8. The 1990 presentence report writer described this encounter as "another sexual assault involving assaultive conduct." ROA 99, p. 7. The State's expert, Dr. Dean, heavily relied on this report as evidence that Mr. Lopez did not have an unusual reaction when intoxicated. R.T. 7-13-90 (p.m.), pp. 33-34, 38-39. The prosecutor used this lie to argue why the judge should reject Mr. Lopez's proffered mitigating evidence. He argued:

> You look at these facts, *you look at this man's history. You look at the fact that four days after he murdered this woman he's out there raping another woman. He's threatening to kill her.* Where is there any mitigation in this man's life, either past, present or future, that is in any way socially redeeming? There is none. There's no mitigation here. There is extreme aggravation.

R.T. 8-3-90, p. 27 (emphasis added).[18] In his July 23, 1990 Supplemental Sentencing

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[18]This Court recently denied Mr. Lopez's *Brady* violation based on these facts, concluding that the State's withholding of evidence exculpating Mr. Lopez of this crime was not material because it was not relevant to statutory aggravation. Dkt. 160, Order Re: Procedural Status of Sentencing Claims, pp.17-18 (Ariz.D.Ct. Nov. 3, 2005). Petitioner disagrees that the State's suppression of this important fact did not harm him. This fact was relevant to the trial and appellate court's rejection of mitigation. Both Mr. Sterling, the State's expert, Dr. Dean, and the Arizona Supreme Court presumed this fact true, and the State never corrected those false beliefs. Judge D'Angelo specifically relied on this lie to reject Petitioner's only mitigating evidence. R.T. 7-13-90 (p.m.), pp. 30, 32-34.

Memorandum, the prosecutor wrote:

> Dr. Bendheim attempted to corroborate his previous report by referring to a Presentence Report conducted in connection with CR 151615 (Exhibit 8) and a sexual assault report wherein defendant Lopez was a suspect, dated November 3, 1987 (Exhibit 7). *It should be noted that the sexual assault report was in connection with a crime that was committed four days after defendant Lopez raped and murdered Essie Holmes.* The facts in both these reports do not establish pathological intoxication. On the contrary, they depict an individual who, even though intoxicated, is fully aware of the ramifications of his actions. *In particular, the sexual assault report clearly indicates that the defendant planned and executed the rape of Cecilia Rodriguez.* There is no evidence in that report that the defendant became psychotic after a small amount of intoxicating liquor. *In fact, the facts establish that he had been drinking for some time prior to his decision to forcibly drag Cecilia Rodriguez to the automobile where he ultimately raped her. These facts clearly show that the defendant does not suffer from any type of pathological intoxication.*

ROA 98, pp. 4-5 (emphasis added).

Because Mr. Sterling did not conduct the investigation that prior counsel also failed to conduct in Mr. Lopez's case, and that the law required Mr. Sterling conduct, but instead, with the exception of two documents (the interviews of Rodriguez and Sabori), relied on the very same record before Judge D'Angelo that resulted in Mr. Lopez's death sentence in 1987, Mr. Lopez's re-sentencing trial lasted one day. Mr. Sterling presented one witness to testify on Mr. Lopez's behalf in mitigation at the hearing, Richard Bailey, a classification officer at the Maricopa County Jail. R.T.7-13-90 (p.m.), pp. 56-58. Mr.

The Arizona Supreme Court did as well: "Furthermore, four days after the murder in this case, and before he was apprehended, defendant while admittedly intoxicated, planned and methodically carried out a sexual assault." *State v. Lopez*, 175 Ariz. at 413, 857 P.2d at 1267-1268.

Bailey testified that he met Mr. Lopez about three months ago when Mr. Lopez was transferred from the prison to the jail for his re-sentencing proceedings. Mr. Bailey had visited Mr. Lopez on a weekly basis and found him to be an exemplary prisoner who caused no problems. *Id.*, pp. 56-57.

Mr. Sterling submitted as an exhibit the videotaped deposition of Dr. Bendheim discussed above, R.T. 7-13-90 (a.m.), p. 4, Ex. 6, the three documents Dr. Bendheim discussed during his testimony, *id.*, Exs. 7-9,[19] and as noted above, transcripts of the interviews of two prosecution trial witnesses, Yodilia Sabori and Pauline Rodriguez, who had seen Mr. Lopez shortly before the crime occurred. *Id.*, pp. 6-7, Exs. 10-12.[20] Although the interviews of Ms. Sabori and Ms. Rodriguez took place in 1987, Mr. Sterling inexplicably did not provide the transcripts of those interviews, or even the witnesses' trial testimony, to Dr. Bendheim for his consideration in formulating his expert

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[19]Exhibit 7 is the police report addressing Ms. Rodriguez's now known to be false allegations. Exhibit 8 is the 1985 probation report by Neal Nicolay discussing Mr. Lopez's resisting arrest conviction, and Exhibit 9 is Dr. Bendheim's 1987 psychiatric report concerning Mr. Lopez.

[20]In the morning of Mr. Lopez's one-day sentencing trial, Mr. Sterling presented the testimony of pathologist, Dr. Philip Keen, to attack the sole aggravating factor supporting a sentence of death: that the crime had been committed in an especially heinous, depraved and cruel manner. R.T. 7-13-90, pp. 8-30. Mr. Sterling introduced five documents relating to Keen's testimony. *Id.* The most charitable characterization that can be said about Mr. Sterling's presentation of this evidence is that it was ill-conceived. Had Mr. Sterling bothered to investigate, he would have discovered, as discussed below, that Mr. Lopez's frantic, disorganized behavior at the time of the crime resulted from multiple neurological disabilities he suffered since childhood that were exacerbated by inhalants and alcohol and "increase[d] his sense of threat and perception of danger." Exhibit 3, p. 95.

opinion, even after it became clear that Dr. Bendheim had not seen this evidence and that this type of evidence was important to his diagnosis.

Mr. Sterling also did not conduct the comprehensive investigation of Petitioner's background and social history required of competent counsel in a capital case. Mr. Sterling had "a duty to make a `diligent investigation into his client's troubling background and unique personal circumstances.'" *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005), *quoting (Terry) Williams v. Taylor*, 519 U.S. 362, 415 (2000)(O'Connor, J., concurring). "[A]ll relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999); *see also Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999); Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. REV. 299, 323-24 (1983) ("Trial counsel has a duty to investigate the client's life history, and emotional and psychological make-up .... There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings.... The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized."); Lois Heaney, National Jury Project, Constructing a Social History, H49-HS0 (1983) (a social history of a defendant should include investigating school and other institutional records, as well as any experiences of child abuse, learning disabilities, emotional problems, substance abuse, and involvement with criminal justice, mental health or social service agencies); Michael Morrissey,

Investigating the Death Case, in Illinois Death Penalty Defense Manual, at 7-9 to 7-13 (Andrea D. Lyon ed., 1988)(describing need for defense counsel investigating penalty phase to obtain school and military records, alcohol and drug history, juvenile court records, prison records, mental health records, criminal records).

This "duty is intensified ... by the unique nature of the death penalty[.]" ABA Guidelines §11.4.1 cmt. "To perform effectively at the penalty phase of a capital case," Mr. Sterling needed to "conduct sufficient investigation and engage in sufficient preparation to be able to `present[] and explain[] the significance of all available [mitigating] evidence.'" *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001)(en banc)(internal citation omitted). To do that, he needed to make "inquiries into social background and evidence of family abuse...." Courts have long recognized that "[e]vidence of a difficult family history ... is typically introduced by defendants in mitigation," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), because it bears on the defendant's character, and is based on "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The investigation Mr. Sterling was required to conduct included examining "the defendant's physical health history, particularly for evidence of potential organic brain damage and other disorders," "his history of drug and alcohol abuse..." *Summerlin*, 417 F.3d at 630. It also "'should always include efforts to secure information in the

possession of the prosecution and law enforcement authorities.'" *Rompilla v. Beard*, 125 S.Ct. at 2466 (internal citation omitted). *See also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases §11.4.1.D.4 (1989);[21] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases §10.7, comment (rev. ed. 2003)("Counsel must ... investigate prior convictions ...."). In sum, "counsel has a duty to investigate the case thoroughly." *Id.*, §10.7 cmt.

But here, just as in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), trial "counsel abandoned [his] investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources...." *See* ABA Guidelines (2003) §11.4.1©) and §11.8.6. As a result, he did not discover readily available mitigation supporting a life sentence for Mr. Lopez, and important evidence disproving Mr. Lopez's sexual attack of Ms. Rodriguez four days after the murder. As discussed below, this evidence was central to a reliable and convincing diagnosis by Dr. Bendheim and understanding of the many reasons supporting a life sentence for Mr.

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[21]The ABA Guidelines were first adopted in February 1989, and "applied the clear requirements for investigation set forth in the earlier Standards [for Criminal Justice] to death penalty cases." *Rompilla v. Beard*, 125 S.Ct. at 2466-2467 & n. 7 (applying ABA Guidelines to 1988 capital trial); *Bean v. Calderon*, 163 F.3d 1073, 1080 (9th Cir. 1998)("conducting an adequate investigation and preparing witnesses for trial testimony were not alien concepts in 1981, but were an integral thread in the fabric of constitutionally effective representation."); *Marshall v. Cathel*, 428 F.3d 452, 467 (3d Cir. 2005)("A separate penalty phase investigation was the very foundation of reasonable representation in 1986."); *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003)(ABA Guidelines did not "represent norms newly discovered after *Strickland*."). The updated ABA Guidelines reinforce the same minimal standards of investigation as the 1989 ABA Guidelines. *See Rompilla v. Beard, supra.*

Lopez.

B. Counsel's failure to conduct a reasonable investigation prejudiced Petitioner.

Had trial counsel conducted the investigation he was required to conduct, he would have discovered important, relevant mitigating evidence supporting a life sentence, evidence which he could have provided to his expert so that his expert could reach a valid and supportable diagnosis. As explained by psychiatrist George Woods, Mr. Lopez "was born into a volatile, chaotic, and unpredictable environment to cold, unaffectionate, and distant caretakers." Ex. 3, p. 3. Little is known about the background of Mr. Lopez's father, Arcadio Lopez, other than that he was born in Tombstone, Arizona. What is known is that Arcadio was a life-long alcoholic who suffered depression, and who repeatedly and brutally beat and raped his common law wife, Conception (or Concha as she is known), Lopez, Mr. Lopez's mother. The beatings were so terrible that Mr. Lopez and his brothers often feared their father had finally killed their mother. Without provocation or justification, Arcadio beat and terrorized Mr. Lopez and his brothers as well, threatening to kill them. Ex. 3, p. 4-6. Although Arcadio was arrested once, he soon was released and returned to terrorizing his family. Ex. 3, p. 46.

Mr. Lopez's mother came from a large, extremely impoverished family who migrated from Mexico to a small farming town in Texas. Concha was regularly beaten by her harsh, cruel mother for minor infractions. Her punishments included being forced to stand outside for hours in the hot sun without water, or whipped with a belt if her clothing

was torn, or her shoes not shined to her mother's standards. And, when any one child engaged in some perceived transgression, her mother punished them all. Ex. 3, pp. 17-31.

Concha attended a segregated school for Mexican children, and after school, she worked in the cotton fields where crop-dusting planes flew overhead, spraying pesticides directly on Concha and her family, and on the open water barrels from which they drank. *Id.* When Concha was seventeen years old, she was raped and impregnated by a much older, close family friend. When her mother discovered what had happened, she blamed Concha, and beat her because she had "dishonored" her family. *Id.*, pp. 24-27. She was banished to a back room of the small family house so that no one could see her. Once her child was born, Concha's mother made her leave her newborn child, and exiled her from the family home. She moved to Arizona where an aunt lived. *Id.*

In Arizona, while working in the agriculture fields, as she had in Texas, Concha met Arcadio who operated the bus that she and the other workers took to the fields. One day, Arcadio showed up at Concha's apartment with his possessions and moved in with her against her wishes. *Id.*, pp. 4-6, 28, 33-35. Arcadio was a brutal man who raped and beat Concha repeatedly. As discussed more below, Concha's life experiences left her profoundly grief-stricken, traumatized and unable to protect herself against Arcadio's physical and sexual abuse, or to properly raise Mr. Lopez and his seven brothers. She did not display love or affection for her children, and neglected them. With the benefit of the results of a social history investigation that Mr. Sterling should have conducted and provided Dr. Bendheim, and interviews of Mr. Lopez and family members, psychiatrist

Dr. George Woods explains:

> It is also important to understand Concha's own abuse history, cultural beliefs, and genetic heritage and how they found expression in the manner in which she reared Sammy and his siblings. Her deep religious and cultural beliefs gave her a path, if not the strength, to survive major stressors during the course of her life and are represented in her language, beliefs about family, and her self concepts. Concha's determination to keep her family together at all costs -- even when the price was chronic brutality at the hands of the children's father -- springs from her strong cultural beliefs about her obligations as mother, even though she was not able to actualize those beliefs with any of her children, due to her own trauma and neglect.

Id., p. 8.

The trauma Mr. Lopez suffered, thus, began at the hands of his father who was "violent and unpredictable," and whose alcoholic rages and mental illness worsened over Mr. Lopez's childhood. Because Mr. Lopez was in "constant danger" as a child, fearing for his own life as well as the lives of his mother and brothers, he developed an "anticipatory stress response" characterized by "symptoms of hyperarousal, hypervigilance, high anxiety, agitation, guardedness, paranoia, and sleeping difficulties." *Id.*, p. 4. To this day, Mr. Lopez's "ability to respond appropriately to emotional stimuli," known as affective dysregulation," is "grossly impaired...." *Id.*, p. 4.

The omnipresent chaos and danger in Mr. Lopez's childhood caused him to experience, among other things, "night terrors," a "common symptom in children who are traumatized...." *Id.*, p. 5. Mr. Lopez's family vividly describes Mr. Lopez's suffering as a child that worsened "after a particularly brutal beating from [his father]." His family found him "crouched in the corner of the kitchen in the middle of the night shaking with

fear. Sammy's mother was the only one who could wake him; once awake, Sammy burst into tears." *Id.*

Besides living in constant terror in his own home, Mr. Lopez lived in "profound conditions of neglect and poverty." School records document both these conditions. When he was just seven years old and enrolled in school for the first time, school officials reveal that "he suffered from frequent tooth pain, cavities, repetitive tonsillitis, and ear infections." School personnel and others told Concha that Mr. Lopez needed to be examined by appropriate medical personnel, but his mother was too poor and ill-equipped to obtain the help he needed. *Id.*, pp. 5-6, 69 .

Mr. Lopez was described as a sad, fearful, lonely boy with low self-esteem, who, not surprisingly given his background, mistrusted others. *Id.*, pp. 55-58. In a desperate attempt to control the stress and anxieties he suffered, he developed "certain behaviors, like keeping his belongings in perfect order." *Id.* This behavior, known as obsessive compulsive spectrum disorder, is consistent with Mr. Lopez's "attempts to control his overwhelming anxiety secondary to his traumatic stress." Without "these mechanisms or his self-medicating" through paint-sniffing and alcohol, Mr. Lopez's "affective dysregulation would take over, and [his] chaotic behavior would ensue." *Id.*, p. 58.

When Mr. Lopez was seven years old, he suffered yet another loss. His ten-month-old sister, Gloria, was born with a serious birth defect that required repeated hospitalizations. Mr. Lopez, his mother and seven brothers believed her birth to be a miracle and the family's salvage in the otherwise wretched life they lived. But in yet

another tragedy to befall this family, Gloria died following an unsuccessful surgery. Mr. Lopez's mother reacted to the loss of her only daughter by falling even deeper into her already debilitating depression. As a result, she was even less capable of caring for her eight sons. Mr. Lopez's father's reaction was quite different: he abandoned his family and never returned. *Id.*, pp. 59-60.

Although Mr. Lopez and his family never knew what happened to Arcadio, records show that after he abandoned his family, he moved to California. There, he worked sporadically in the agriculture fields, and was frequently arrested for drunkenness. He eventually drank himself to death when he was only 56 years old, from "liver failure due to cirrhosis, lying in a field surrounded by empty beer and wine bottles." *Id.*, p. 28-29.

Arcadio's abandonment of his family had three immediate and direct consequences. It left Mr. Lopez and his siblings uncertain, and thus, anxious, as to whether his father was truly gone from the family, or instead would return at some unknown time and continue to beat and terrorize them. It required Mr. Lopez's oldest brother, Junior, who was in the 9th grade at the time, to drop out of school so he could work and care for Mr. Lopez and his six other brothers, and it deepened even more his family's abject poverty and harsh living conditions. *Id.*, pp. 60-61.

Unfortunately, because Junior was still a child himself, and knew only the child-rearing practices of his father to model, Junior continued to physically abuse and threaten Mr. Lopez, and his other siblings. *Id.*, pp. 62-65. When Mr. Lopez tried to intervene in one particularly terrible beating Junior was inflicting on their younger brother, Joe, Junior

turned his anger and fury on Mr. Lopez, punching him repeatedly about the face and head with his fists. Apparently realizing that he was doing what his father had done, Junior suddenly stopped the beating, and ran out the door. *Id.*

But like his father, Junior, too, soon abandoned his mother and younger brothers. He married, moved out of the family house, and rarely had contact with his mother and brothers. *Id.*

But before Junior left, Mr. Lopez's family suffered yet another terrible trauma. While walking home from the store, Concha was brutally assaulted and raped. Once she was released, she ran home nearly naked, where Mr. Lopez and some of his brothers were. Because the family had no telephone to call for help, Concha went to a neighbor's house where she was able to contact the police and get a ride to a medical facility for treatment of her injuries. *Id.*, pp. 61-62. As Dr. Woods explains, the "witnessing of sexual assaults and abuse of loved ones can often be more devastating for children than if they were actually sexually assaulted and abused themselves." *Id.*, p. 62.

Shortly after this latest catastrophic event, Concha allowed another man to move into the family home. Pedro, like Arcadio, was an alcoholic and a physically abusive and dangerous man. Also like Arcadio, Pedro provided no financial assistance to the family. He kept guns in the house and liked to shoot up the house. He terrorized Mr. Lopez, beating him up, pointing a gun at him, and threatening to kill him. *Id.*, pp. 65-67. He soon began moving in his children from another marriage. *Id.*

Had he investigated Mr. Lopez's social history, Mr. Sterling also would have

learned that Mr. Lopez lived in the poorest of neighborhoods in Southwest Phoenix:

> Southwest Phoenix is a racially segregated and violently charged community reserved for the metal recycling industry, foundries, and impoverished Latino families. Even among this impecunious community, Sammy's family stood out as being extraordinarily poor.

Id., p. 4. It has long been known that "[e]arly and chronic poverty has the worst effects on child development. Chronic poverty is dehumanizing as it damages parents' capacities for maintaining any kind of hope." *Id.*, p. 36. For Mr. Lopez, his poverty and the disadvantages he experienced "led to inadequate nutrition, inadequate housing and homelessness, inadequate child care, higher exposure to environmental toxins, such as the industrial and gas/diesel pollutants that surrounded their neighborhood, exposure to community violence, and lack of access to health care." *Id.* Records document that at one of Concha's homes, it was so cold that the water froze. *Id.*, pp. 58-59.

Mr. Lopez and his family, like other "Latino families living in Southwest Phoenix experienced pervasive racism and segregation. Poverty, drugs, and crime plagued the community and destroyed dreams of a better future." *Id.*, pp. 35-36. His family's poverty resulted in Concha constantly changing residences because she could not pay the rent. Once Concha was evicted for failure to pay the rent, and with nowhere to go, she and her children moved their belongings and stayed overnight in the neighborhood park. *Id.*, pp. 35-39. A neighbor who knew the Lopez family explained:

> Concha and her boys were her neighbors for many years in the 1960s and 1970s. Our children were friends with her children and Concha and I were friends. Our neighborhood was not just poor, but filled with drugs and crime. We had to work all day to keep food on the table and have a roof

> over our heads. That meant our children were left to the many dangers of the neighborhood. I have experience with the dangers. Two of my seven children were in prison for many years. Another son was shot in our neighborhood. Concha's life was even harder because she did not have a husband to help her.

Ex. 33.

Mr. Lopez's only escape from this pervasive neglect and abuse was the school he attended. He enjoyed school and worked hard to succeed there. Ex. 3., pp. 68-70. But his family's instability made it difficult for Mr. Lopez to keep up with the other students. His "intense fears" and preoccupation that he, his brothers and mother would not survive the ever-present danger in his home from his father, and then Pedro, as well as the neighborhood violence and racism where he lived, also surely interfered with his success at school. As Dr. Woods explains:

> The constant mortal terror in the Lopez family prevented Sammy from developing what many of us take for granted: the comforting certainty that the world is a safe and secure place and that caretakers are ready, willing, and capable of providing us with safety and comfort. Emotions in Sammy's family were dangerous, erratic and pathologically extreme. Like all children, Sammy and his brothers craved affection from their mother, which provides the sense of security needed for normal development. Suffering, however, from her own severe psychological impairments, Concha could not provide her sons with the love and attention they so desperately needed.

Id., p. 7. Neurpsychological testing reveals that Mr. Lopez suffers significant brain damage that also would have contributed to his academic failures. But because he was well-behaved and well-liked, he was socially promoted to the next grade despite his inability to master the class materials. *Id.*, p. 68.

Frustrated, bewildered and depressed, Mr. Lopez left school in the ninth grade.

Id., p. 9. He soon turned to the same methods of survival that his older brothers used to get through each day: consuming alcohol and drugs. He sniffed paint daily, eventually suffering neurological damage. He was "homeless, living in cars, staying in the neighborhood park and the local cemetery." In "a desperate attempt to obtain money for drugs," he began to rob houses in the neighborhood when the residents were not at home. *Id.*, p. 7. As one of his brothers explained, "[d]rinking and taking drugs was the only way [we] knew to bury all the bad feelings that were too much for a kid to handle." *Id.*, p. 72.

Had Mr. Sterling conducted the investigation he was required to conduct, he also would have discovered that the "prevalence of alcoholism and drug addiction" in Mr. Lopez's "immediate and extended family is remarkable and widespread. Alcoholism contributed to the chronic and pervasive interpersonal violence, poverty, chaos, and rejection that characterized [his] early life and potentiated other stressors he faced." *Id.*, p. 29.

"The relationship between chronic exposure to trauma, early childhood neglect, and alcoholism" is well documented in Mr. Lopez's immediate family, and his maternal relatives. *Id.*, p. 30. Mr. Lopez's "father, mother, many of his brothers, and numerous maternal relatives display symptoms of depression, alcoholism, and post traumatic stress disorder that have significantly impaired their ability to function...." Their intoxication, like that of Mr. Lopez, "is frequently accompanied by bizarre changes in their behavior." *Id.*

For most of Mr. Lopez's brothers, their alcoholism and/or drug addictions have resulted in legal problems. Mr. Lopez's older brother, Eddie, is an alcoholic who has been arrested many times for alcohol-related offenses. His brother, Jimmy, too is an alcoholic, although he apparently has avoided any legal ramifications resulting from his addiction. His brother, Steve, is an alcoholic, who was also addicted to inhaling organic solvents. He would sniff paint until he passed out. In 1978, Steve was arrested for armed robbery. Mr. Lopez's brother, Frank, suffers alcohol problems and has been arrested for drunken driving. Mr. Lopez's brothers, Joe and George, began drinking when they were 10 years old, and like Mr. Lopez, were heavy drinkers by the time they were teenagers, when they also began inhaling solvents, paint and glue and gas. *Id.*, pp. 72-76. "Mental impairments in the family increased the likelihood of addictive disease, and many family members attempted to self-medicate with alcohol and drugs." *Id.*, pp. 32-33.

Had Mr. Sterling conducted this investigation, he would have discovered that Mr. Lopez quickly became addicted to inhaling these solvents and "continued to inhale these highly toxic substances into his adulthood despite their disastrous consequences." *Id.*, p.79. Dr. Woods explains:

> Inhalants enter the blood supply within seconds to produce intoxication. Effects of inhalants can cause an intoxicating effect resembling alcohol. The effects produce a decrease in inhibition, loss of control, mood swings, violence, speech and coordination problems, hallucinations, and delirium. The recovery time varies from user to user; some can require hours to come down, others do not come down at all.

Id.

This new information would have provided the support Dr. Bendheim needed to change his tentative diagnosis regarding Mr. Lopez's impairments to one that he could state with a reasonable degree of medical certainty: Mr. Lopez's background and history established relevant mitigating evidence supporting a life sentence. With the information and records about Mr. Lopez and his family that Dr. Bendheim did not have, Dr. Woods concludes:

> Sammy's friends and family have documented that he suffers from a pathological response to alcohol, becoming unpredictable, irrational, agitated, and at times psychotic. When Sammy drinks, even just a small amount of alcohol, he quickly and dramatically changes. Sammy's intoxication and addictive disease were the direct consequence of a devastating accumulation of risks that shaped his development and behavior. As a child, Sammy had to contend with multiple risks: family mental illness, abandonment, family addictive and neurological disease, poverty, and constant life threatening danger at home and in his community. Each alone constituted a significant obstacle to healthy development, but in combination they resulted in devastating mental impairments.

Id., p. 7.

Instead, because he had not conducted the reasonable investigation he was obligated to conduct, Mr. Sterling knew nothing about Mr. Lopez's background and social history except what he read in the court and prison documents. Mr. Sterling's own words to Mr. Lopez's sentencer best illustrate his incompetence and the resulting prejudice Mr. Lopez suffered::

> There's nothing societally [sic] redeeming in the defendant's background. I wish we could all argue with [the prosecutor] on that. Probably can't.

R.T. 8-3-90, p. 27. In fact, as shown here, had he only looked, Mr. Sterling would have

discovered a far different truth:

> Genetic heritage and acquired brain damage combined to leave Sammy with crippling mental impairments. As a pre-adolescent, Sammy exhibited clear diagnostic signs of acute trauma. This not merely the product of neglect and mistreatment; it was also the effect of growing up in constant fear for his life and the life of his mother. The chronic and horrific violence Sammy suffered, the physical and sexual assaults, he witnessed against his mother, and endlessly repeated abandonments and ongoing neglect by his attachment figures left Sammy utterly unprotected from this recipe for developmental disaster. He has spent his entire life reaping the tragic seeds of his childhood.

Id., p. 4. Dr. Woods explains that Mr. Lopez suffers:

> impaired cognitive ability to inhibit his behavior once that behavior has started as well as his inability to effectively weigh and deliberate, particularly in a fast changing, chaotic environment.

Id., p. 90. His low average IQ and "brain impairment creates a vulnerability to atypical drug responses." *Id.* His "cognitive impairments are manifested by his inability to organize. He acts impulsively, has mental inflexibility (concrete thinking), and perseverates. [His] inability to organize only augments his overwhelming traumatic-induced stress." *Id.*, p. 91.

As discussed above, this mitigating evidence and records available to Mr. Sterling had he only conducted a reasonable investigation establishes the prejudice Mr. Lopez suffered as a result of his counsel's failures. Had he only looked, Mr. Sterling would have discovered evidence demonstrating valuable mitigating evidence:

> Sammy long-standing mental disorder is characterized by paranoia, delusions, confusion, suspiciousness, loss of contact with reality and disordered thinking. Sammy is cognitively concrete and measures his interactions with others against his delusional belief system that others will

> harm him. He holds onto this belief regardless of evidence to the contrary. This disorder affects all aspects of his life, including written and verbal communications with others, the safety of meals he is provided, special meanings of words that only he understands, and strict, but secret, rules that must be followed in interpersonal relationships. Sammy displayed signs of a thought disturbance at times present in his speech patterns. He perseverates, displays impoverished speech, and has a limited range of affect.

Id., p. 93.

Mr. Sterling fell below the standard of competent counsel when he "failed to conduct an investigation that would have uncovered" witnesses and records "graphically describing" his "nightmarish childhood...." *Williams v. Taylor*, 529 U.S. at 395. Based on the information Mr. Sterling knew about Mr. Lopez, "[n]o reasonable lawyer would forego examination" of available records about Mr. Lopez and his family members, and no reasonable lawyer would forego interviewing available key witnesses who held valuable information about Mr. Lopez's life circumstances, and provide that information to his expert. *Id.* Counsel's "duty to conduct a full and complete mitigation investigation before making tactical decisions," is "sancrosanct." *Earp v. Ornoski*, 431 F3d 1158 (9th Cir. 2005); *see also Douglas v. Woodford*, 316 F.3d 1079, 1088 (9th Cir. 1999)("When it comes to the penalty phase of a capital trial, '[i]t is imperative that all relevant mitigation information be unearthed for consideration.'")(internal citation omitted).

Mr. Sterling's errors and omissions "clearly demonstrate that trial counsel did not fulfill [his] obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396. When looking at "the totality of the available mitigation

evidence," both the little presented at trial and that presented here, there is a reasonable probability that the result would have been different had counsel performed competently. *Id.* (new sentencing required where counsel failed to fulfill obligation to conduct thorough investigation of the defendant's background because he failed to uncover and present mitigating evidence); *Wiggins*, 539 U.S. at 530-31 (counsel's failure to present other available mitigating evidence and records about defendant's background prejudiced defendant where counsel's investigation was limited to a pre-sentence investigation report and social service records when other records were available); *Hendricks v. Calderon* 864 F.Supp. 929, 946 (N.D. Cal. 1994), *aff'd Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1994)("the existence of a substantial amount of mitigating evidence that was not presented to the jury is one factor relied upon to indicate that the petitioner was prejudiced by trial counsel's deficient performance.").

Mr. Sterling's failure to conduct a thorough investigation was not the result of some strategic decision not to offer more evidence in mitigation. *See, e.g., Strickland*, 466 U.S. at 673; *Wiggins*, 539 U.S. at 521. Mr. Sterling made clear he provided all that he knew:

> As to mitigation, I think a very important thing must be done before I go into it. At the first trial, and at the first sentencing, there was no mitigation offered. I'm stuck with the trial record in this case, where the defense offered no witnesses, no testimony. But on remand, we have presented to the court as much as I can find, so that this court knows this defendant.

R.T. 8-3-90, p. 18. This was all Mr. Sterling knew because he confined his investigation to the pre-trial and trial records generated in <u>this</u> case. *See Wiggins*, 539 U.S. at 521-22;

Strickland, 466 U.S. at 690-91. But even under those self-imposed (and plainly unconstitutional) constraints, he committed yet another serious error. Mr. Sterling did not even provide Dr. Bendheim the readily available trial testimony and interview transcripts of witnesses Pauline Rodriguez and Yodilia Sabori.[22] These were the very records that Dr. Bendheim needed to bolster his previous tentative conclusions and opinions about Mr. Lopez. Resps.Ans., Ex. P. And, as discussed above, he also did not interview readily available key witnesses or obtain readily available important records about Mr. Lopez's background and that of his family. See Ex. 3, and attachments thereto. The Sixth Amendment required more. *Williams v. Taylor*, 529 U.S. at 395-396.

Because Mr. Sterling did not conduct the investigation he was require to conduct, the sentencer did not hear any of the compelling evidence presented here support a life sentence. As a result, Judge D'Angelo concluded:

> Testimony was presented on behalf of the Defendant that he possibly suffered from a condition known as "pathological intoxication." Said testimony did not rise to any level of medical certainty, but rather was based upon a "hypothesis" or "speculation." The State presented evidence to rebut the "hypothesis" and "speculation," and the Court specifically finds that the Defendant failed to meet his burden of proof of establishing this mitigation factor by a preponderance of the evidence. Thus, this mitigation factor does not exist.

ROA 57, p. 6. Mr. Sterling's errors and omissions had another disastrous result as well: Judge D'Angelo found no other mitigating circumstances of any kind. *Id.*

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[22]As discussed earlier, Mr. Sterling only provided Dr. Bendheim two additional documents: a police report regarding the alleged, but not know to be false, sexual assault of Cecilia Rodriguez, and a presentence report discussing Mr. Lopez's arrest and conviction for resisting arrest.

The trial court's decision denying relief was contrary to and an unreasonable application of federal law. Petitioner alleged a colorable claim that counsel's failure to investigate available mitigating evidence that if true entitled him to relief. He alleged that counsel unreasonably and inexplicably confined his investigation into mitigating evidence to records produced during Mr. Lopez's trial proceedings. In doing so, he failed to obtain the records and evidence produced here showing, among other important findings, that 1) Mr. Lopez and nearly every one of his family members had a long history of serious substance abuse, extreme trauma and severe neglect," 2) that the "life-threatening" trauma Mr. Lopez suffered "disrupted his normal development," 3) that Mr. Lopez suffered depression, intrusive thoughts and "learned to use drugs, alcohol, and organic solvents to quell those frightening emotions," 4) that Mr. Lopez's repeated use of these drugs changed the structure of his brain and had a "disinhibiting effect" on his behavior, and increased "his sense of threat and perception," 5) that Mr. Lopez had "a history of irrational behavior during periods of intoxication," and 6) that his neurological deficits," including impaired cognitive functioning, "augmented by bone-and-soul-crushing beatings, paranoia, poverty, neglect," and self-medication are consistent with the "chaotic event" of the victim's unfortunate murder. Ex. 3, pp. 91-95. Had Mr. Sterling discovered these facts, he could have provided them to Dr. Bendheim who doubtlessly would have reached the same conclusions as Dr. Woods. Equally important, he could have answered the concerns raised by Dr. Dean's testimony.

Based on these facts and law, Petitioner is entitled to a new sentencing where the

evidence that Mr. Sterling could have presented had he investigated can be introduced. But at the very least, he has presented a colorable claim of counsel's ineffectiveness in failing to investigation and present available mitigating evidence, and that counsel's ineffectiveness prejudiced him. *See Wiggins*, 539 U.S. at 521. Comparing the negligible evidence Mr. Sterling presented at Mr. Lopez's sentencing trial with the wealth of evidence presented here, the prejudice Mr. Lopez suffered is clear. *See, e.g., Williams*, 529 U.S. at 368 (prejudice found despite fact that petitioner's other crimes included a "brutal[] assault[] [of] an elderly woman [that left] her in a vegetative state"); *Landrigan v. Schriro*, __ F.3d __, 2006 WL 549027 (9th Cir. Mar. 8, 2006)(colorable claim of ineffective assistance of counsel found where counsel failed to uncover "Landrigan's tortured family history," in capital case where defendant had escaped from prison where he was incarcerated for "murder[ing] his best friend" and while in prison "brutally stabbed a fellow inmate," and then traveled to Arizona where he engaged in consensual sexual relations with victim and then killed him); *Earp v. Ornoski*, 431 F.3d 1158, 1164 (9th Cir. 2005)(colorable claim of ineffective assistance of counsel found where defense counsel failed to uncover and present records and/or testimony documenting history of emotional, psychological and neurological problems, family history of substance abuse and mental illness, and results of neurological and psychiatric evaluations in case where defendant convicted of raping and murdering eighteen-month old child).

C. Petitioner Diligently Pursued Relief On This Claim In State Court.

In the state postconviction proceedings, Mr. Lopez alleged that trial counsel's

performance was deficient because, among other things, counsel failed to "properly marshal all of the obviously relevant information" and "provide the expert with all of the necessary information to render a complete diagnosis...." ROA 138, p. 3. Petitioner's postconviction counsel contacted Dr. Bendheim and provided him some additional materials that Mr. Sterling had not provided. The materials included the trial testimony and witness interviews of Pauline Rodriguez and Yodilia Sabori. Resps.Ans., Ex. P, pp. 9-10, & Ex. 3. As shown above, the testimony of these witnesses contained important mitigating evidence. After reviewing these additional documents, Dr. Bendheim offered a "more certain diagnosis": Mr. Lopez was pathologically intoxicated at the time of the crime. *Id.*, Ex. 3.

Based on these facts and law, Petitioner is entitled to a new sentencing where the evidence that Mr. Sterling could have presented had he investigated can be introduced. The state court's summary ruling denying relief is contrary to and an unreasonable application of clearly established law as discussed above. 28 U.S.C. §2254(d)(1) and (2). As we have shown, valuable evidence mitigating this crime was readily available had counsel only bothered to look. This evidence is the very kind of evidence that supports a life sentence: serious mental illnesses, trauma and abuse throughout Mr. Lopez's life, significant cognitive impairments, and severe alcohol and organic solvent addiction. *Rompilla*, 125 S.Ct. at 2468-2469. And, it is evidence that completely changes the picture Judge D'Angelo had at trial. *Id.*, at 2468; *Wiggins,* 539 U.S. at 537 ("Had the jury been able to place Petitioner's excruciating life history on the mitigating side of the scale,

there is a reasonable probability that at least one juror would have struck a different balance."). This "undiscovered 'mitigating evidence taken as a whole, might well have influenced the [sentencer's] appraisal of [Mr. Lopez's] culpability." *Rompilla,* 125 S.Ct. at 2469. For all these reasons, counsel's complete failure to provide minimally competent representation prejudiced Petitioner and he is entitled to relief. *See also*, *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) ("even though [counsel] obtained school records, counsel failed to examine [...] employment records, medical records, prison records, past probation reports, and military records"); *Jermyn v. Horn*, 266 F.3d 257, 307 (3d Cir. 2001) (counsel ineffective where failed to obtain school records that disclosed childhood abuse); *Carter v. Bell*, 218 F.3d 581, 588-89 (6th Cir. 2000) (counsel ineffective where failed to obtain a release from client to view prison records, and did not seek any other available records regarding the client or his family); *Glenn v. Tate*, 71 F.3d 1204, 1208 (6th Cir. 1995) (counsel ineffective where failed to examine the client's school, medical, mental health, or probation records); *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995) (counsel ineffective where failed to request hospital, school, and child welfare records).

D. Petitioner Is Entitled to an Evidentiary Hearing in This Court

At the very least, Petitioner is entitled to an evidentiary hearing where this evidence can be presented. In the state postconviction proceedings, postconviction counsel alleged that trial counsel's performance was deficient because, among other things, counsel failed to "properly marshal all of the obviously relevant information" and

"provide the expert with all of the necessary information to render a complete diagnosis...." ROA 138, p. 3. Postconviction counsel contacted Dr. Bendheim and provided him some additional materials that Mr. Sterling had not provided. The materials included the trial testimony and witness interviews of Pauline Rodriguez and Yodilia Sabori. Resps.Ans., Ex. P, pp. 9-10, & Ex. 3. As shown above, the testimony of these witnesses contained important mitigating evidence. After reviewing these additional documents, Dr. Bendheim offered a "more certain diagnosis:" Mr. Lopez was pathologically intoxicated at the time of the crime. *Id.*, Ex. 3.

Postconviction counsel then requested an evidentiary hearing and/or relief at which he could do and present what trial counsel was obligated to do and present but did not: "marshal[] all ... relevant" and "necessary information" for the expert. ROA 138, p. 3. Under Arizona law, a "defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant's allegations are true, might have changed the outcome." *State v. Watton,* 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

Petitioner met that showing: he alleged counsel's failure to conduct a reasonable investigation to gather all the relevant facts and provide them to the expert. He alleged that he needed to do what counsel did not–gather all the available relevant and necessary information for the expert.

But despite this showing requiring a hearing under Arizona law, the state postconviction court summarily denied relief on this claim without a hearing. Without any kind of analysis, the state court concluded that "counsel's performance" was not

ineffective, and Petitioner had not shown "a reasonable probability that" the result would have been different." ROA 167. Similarly without any explanation, the state court concluded that even if Mr. Sterling had provided additional, relevant information and materials to Dr. Bendheim that he needed to support his expert opinion, it would not have made a difference. ROA 167.

Where, as here, petitioner alleges a colorable claim of ineffective assistance of counsel and made reasonable efforts to develop this claim in the state courts, a hearing is warranted. *Williams (Michael) v. Taylor*, 120 S.C. 1479, 1494 (2000)(If a petitioner "has made a reasonable effort" to develop evidence and claims in state proceedings, "§2254(e)(2) will not bar him from developing them in federal court."). Petitioner did not fail to develop this claim, but requested a hearing in the state courts where these and other facts supporting this claim could be discovered and presented.

II. Trial Counsel Was Ineffective for Failing to Challenge Inaccuracies in the Presentence Report.

Trial Counsel was also ineffective because he failed to challenge unadjudicated crimes presented to the court through presentence reports. The presentence reports prepared in 1987 and in 1990 contained references to arrests for crimes which Mr. Lopez was not charged. ROA 71, ROA 99.

One of the most damaging references was to an alleged sexual assault incident four after the Holmes homicide. The complainant in that charge, Cecilia Rodriguez, was ntance of Mr. Lopez with whom he had a consensual sexual relationship. Ms.

Rodriguez admitted to being with Mr. Lopez on the afternoon when the assault was supposed to have occurred. They were both drinking at a mutual acquaintance's home. Mr. Lopez and Ms. Rodriguez left the party together to get more liquor. Ms. Rodriguez claimed that on the way to the liquor store, Mr. Lopez sexually assaulted her. However, medical experts found no evidence of sexual assault. In fact, the state did not press charges against Mr. Lopez because Ms. Rodriguez was not "credible." Exhibit 4. Indeed, the sexual assault charge was not supported by <u>any</u> credible evidence. Nevertheless, Judge D'Angelo considered this sexual assault in making his sentencing determination.

Counsel not only failed to challenge this evidence, he embraced the evidence as if it were true. Counsel's actions were well below objective standards of reasonableness and meet the deficient performance prong of *Strickland*. Mr. Lopez pleaded not guilty to the crime of first degree murder. Indeed, Mr. Lopez has no memory of the murder. The evidence supporting the jury's verdict was circumstantial. It is inconceivable that a competent counsel would concede, without conducting any investigation of any kind, that his client had committed a sexual assault just days after the murder.

Mr. Lopez was prejudiced by trial counsel's unprofessional errors. The effect of this concession was to paint Mr. Lopez as a monster. Indeed, counsel's failure to investigate opened the door to an extremely damaging and prejudicial argument from the prosecutor:

> You look at these facts, you look at this man's history. You look at the fact that four days after he murdered this woman, he's out there raping another woman. He's threatening to kill

> her. Where is there any mitigation in this man's life, either past or present or future, that is in any way socially redeeming? There is none. No mitigation here. There is extreme aggravation.

R.T. 8-30-90, p. 27.

The trial judge's summary dismissal of Mr. Lopez's claim was contrary to and an unreasonable application of *Strickland*. 28 U.S.C. §2254 (d). It was also an unreasonable application of the law to the facts presented. 28 U.S.C. § 2254(d). At the very least, Mr. Lopez was entitled to an evidentiary hearing in state court.

For all of the reasons stated above, Mr. Lopez did not fail to develop this claim and he is entitled to an evidentiary hearing. *Williams v. Taylor*; 28 U.S.C. §2254 (e).

III. The Trial Court Violated Mr. Lpez's Eighth and Fourteenth Amendment Rights By Failing To Consider, Give Effect To, and Weigh Mitigating Evidence.

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (same); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (same). Even where particular mitigating evidence does "not relate specifically to . . . [the defendant's] culpability for the crime he committed," the defendant is constitutionally entitled to offer such evidence because it might "serve 'as a basis for a sentence less than death.'" *Skipper*, 476 U.S. at 4-5 (quoting *Lockett*, 438

U.S. at 604). In particular, the Supreme Court has recently confirmed that a defendant's history of childhood abuse can have an especially "powerful" effect on the jury's sentencing deliberations. *See Wiggins v. Smith*, 123 S. Ct. 2527, 2542-44 (2003).

A corollary to the *Lockett* rule is that a sentencer in a capital case may not refuse to consider any relevant mitigation evidence. *Hitchcock v. Dugger*, 107 S.Ct 1821, 1824 (1987); *Eddings v. Oklahoma*, 102 S.Ct. 869, 876-77 (1982); *Smith v. McCormick*, 915 F.2d 1153, 1167 (9th Cir. 1990).

> The sentencer . . . may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration.

Eddings, 455 U.S. at 115-116, 102 S.Ct. at 877. When it is not clear whether the sentencer actually considered all the mitigation evidence, the appellate court may not speculate about the sentencer's thinking, but instead must remand the case to resolve any ambiguity. *Id.* at 119, 102 S.Ct. at 879 (O'Connor, J., concurring). *See also*, *Penry v. Lynaugh*, 109 S.Ct 2934 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). A "mitigating circumstance" is any factor relevant in determining whether to impose a sentence less than death.

Even though trial counsel failed to uncover and present the volumes of mitigation which we present here, there was mitigation evidence in the record that the trial court did not weigh or consider in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Instead, Judge D'Angelo found that there was no mitigation

of any kind. ROA 103. The Arizona Supreme Court agreed, and affirmed that finding. *State v. Lopez*, 175 Ariz. at 417, 857 P.2d at 1271.

In fact, Arizona law precluded the consideration of much of the relevant mitigation that was present in the record. The Arizona courts required a capital defendant to prove a causal nexus between the mitigation proof offered and the offense before a sentencer may weigh or consider the evidence. *See State v. Stanley,* 167 Ariz. 519, 809 P.2d 944 (1991). The trial judge, of course, is presumed to have followed the law of the Arizona Supreme Court. *See Bell v. Cone*, 543 U.S. 447, 125 S.Ct. 847 (2005). The Arizona Supreme Court's decision affirming the trial judge's finding that no mitigation of any kind existed presumably followed its own law. *Id.* The Arizona Supreme Court's decision is contrary to clearly established federal law that the defendant must be allowed to introduce, and the sentencer must consider, "*any aspect of a defendant's character or record* . . . that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. *Tennard v. Dretke* 542 U.S. 274, 124 S.Ct. 2562 (2004)(Texas law requiring a showing of a nexus between the offense and mitigation unconstitutional).

A. Mitigation Evidence Contained in the Trial Court Record

Here, Mr. Lopez introduced substantial evidence of intoxication from alcohol and/or toxic inhalants at the time of the crime from a variety of witnesses. Unrebutted evidence was submitted at Mr. Lopez's capital trial and sentencing hearing that at the time of the crime, Mr. Lopez was hungry, broke and homeless, that he regularly drank alcohol, smoked marijuana and inhaled toxic substances, and had a documented history of

doing so at least as far back as 1975. *See, e.g.*, R.T. 7-13-90(p.m.), Exs. 8 and 9; ROA 99. A number of witnesses also confirmed Mr. Lopez's regular use of alcohol and toxic inhalants. R.T. 7/13/90 (p.m.), Exs. 6 and 11; R.T. 4-21-87, pp. 39-40. Unrebutted expert testimony established that Mr. Lopez has a low IQ.

Although Mr. Lopez denied substance abuse problems and that he was intoxicated at the time of the crime, Dr. Otto Bendheim, board certified in neurology and psychiatry, testified that he did not believe Mr. Lopez's denials. Dr. Bendheim testified that such denials "are very common" from "people who have alcohol problems." R.T. 7-13-90 (p.m.), Ex. 6. Dr. Robert Dean, who is not board certified in neurology or psychiatry, and who had not examined or spoken to Mr. Lopez, agreed that it is common for people to deny or minimize their use of alcohol, and that such denials are properly disregarded. R.T. 7-13-90(p.m.), pp. 17-18, 45, 47. Dr. Dean also testified that a person will not know if he suffers from pathological intoxication because he will have no memory of the event, including any criminal conduct committed. For that reason, experts must rely on reports of others who witnessed the person's behavior. *Id.* at 43-44.

Witnesses described Mr. Lopez as "shy", "mild and meek," "quiet," and "real nice" when he is not under the influence of intoxicants. R.T. 7-13-90 (p.m.), Exs. 6 and 11. Witnesses who were with Mr. Lopez shortly before the crime testified that he had been drinking, but then left the area where they had been talking for four or five minutes to get "high." When Mr. Lopez returned, "major changes" had taken place in him from the way he was only a few moments before. Mr. Lopez was "shaking," acting "mad,"

couldn't "stand still," was staggering, needing to hold onto a pole to stand up against the wall, and "falling down." R.T. 4-21-87, pp. 73-78; R.T. 7-13-90 (p.m.), Ex. 10. Still others described Mr. Lopez as "not himself," "different," "loaded on something," and "angry." *Id.*, pp. 83-84, 87.

Based on these facts, Dr. Bendheim testified that the homicide was attributable to Mr. Lopez's intoxicated state at the time of the crime, and Mr. Lopez's unusual reactions to intoxicants in which he displayed criminal conduct, "including assaultiveness when under the influence." R.T. 7-13-90 (p.m.), Ex. 6. Dr. Bendheim also testified that as a result of this intoxication, which he described as "pathological intoxication," Mr. Lopez's capacity to understand the consequences of his behavior was diminished, and that had Mr. Lopez not been in this state, the homicide would not have occurred. *Id.*

Although Dr. Dean disagreed that Mr. Lopez suffered from pathological intoxication, he testified that Mr. Lopez's actions were consistent with someone who was intoxicated. R.T. 7-13-90 (P.M.), p. 34. This testimony supported an intoxication instruction to the jury. Dr. Dean also testified that he believed paint sniffing and other toxic inhalants would cause responses similar to those caused by pathological intoxication. *Id.*, p. 46.

The record also showed that Mr. Lopez came from a poor, dysfunctional family who suffered severe problems and financial hardships that were exacerbated by his father's abandonment of Mr. Lopez, his seven brothers and his mother when Mr. Lopez was a young boy. R.T. 7-13-90 (p.m.), Ex. 8. Mr. Lopez completed only the tenth grade,

and has only a sixth grade reading level. ROA 99. Several of Mr. Lopez's brothers have substance abuse problems, and have been imprisoned, including one brother for a serious assault and two brothers for a homicide. *See, e.g.*, R.T. 7-13-90 (p.m.), Ex. 8; *State v. Lopez*, 158 Ariz. 258, 762 P.2d 545 (1988); *State v. Lopez*, 153 Ariz. 285, 736 P.2d 369 (1987). The trial judge was well aware of this dysfunctional family with a history of substance abuse problems, as he had previously presided over the homicide trial of Mr. Lopez's younger brother, George, and sentenced him to death, and accepted the guilty plea of Mr. Lopez's brother, Jose, who received a stipulated life sentence. *State v. Lopez*, 158 Ariz. at 260, 762 P.2d at 547.

Mr. Lopez also presented mitigating evidence that he exhibited "exemplary" behavior during his recent incarceration. R.T. 7-13-90(p.m.), p. 57. Although Mr. Lopez encountered difficulties initially adjusting to prison, as prisoners typically do, his behavior changed and at the time of his resentencing, Mr. Lopez was described as a "model prisoner." *Id.*

B. The Trial Judge's Failure to Consider Mitigation.

Notwithstanding that Mr. Lopez's mitigation evidence showed a number of reasons why he should not die, Judge D'Angelo apparently failed to consider and clearly failed to weigh this evidence as either statutory or nonstatutory mitigating evidence. Judge D'Angelo concluded the evidence that Mr. Lopez suffered from pathological intoxication did not support the statutory mitigating circumstance that Mr. Lopez's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements

of the law was impaired, 9-3-90 Special Verdict, p. 6, and that Mr. Lopez's good behavior during incarceration was not established. *Id.*, p. 7. Judge D'Angelo said nothing, however, about the remaining mitigating evidence presented (including the unrebutted testimony that Mr. Lopez was intoxicated at the time of the crime and came from a dysfunctional family with a history of substance abuse problems), as either statutory or nonstatutory mitigating factors, and conducted no weighing of the sole aggravating factor against any of this mitigating evidence. *Id.*, pp. 8-9.

The state appellate court did not cure these constitutional violations, but either repeated or compounded them. It concluded that Mr. Lopez had not proven intoxication or pathological intoxication, either as statutory or nonstatutory mitigating factors. It said nothing, however, about the unrebutted evidence that Mr. Lopez was intoxicated at the time of the crime, or any of the other record mitigation evidence. *State v. Lopez*, 175 Ariz. at 414, 857 P.2d at 1268. It affirmed Judge D'Angelo's rejection of good conduct during incarceration. *Id.*, 175 Ariz. at 417, 857 P.2d at 1271.

C. Arizona Law Unconstitutionally Restricts the Sentencer's Consideration of Relevant Mitigation Evidence.

It is clear that the trial judge did not consider this mitigation because Arizona law prohibited the Court from considering the evidence without also establishing a causal nexus. The Arizona Supreme Court failure to see the error was contrary to and an unreasonable application of clearly established federal law as articulated in *Lockett v. Ohio*, *Eddings v. Oklahoma, Hitchcock v.Dugger*, and their progeny. *Tennard v. Dretke*,

542 U.S. at 285, 124 S.Ct. at 2570-2571.

Like the Texas rule at issue in *Tennard*, the Arizona nexus rule is firmly rooted in the Arizona Supreme Court's jurisprudence. The following discussion outlines just two areas of mitigation, both of which are relevant to Mr. Lopez's case, where the Arizona Supreme Court has refused to consider or give effect to mitigation proof absent a showing of a connection between the proffered evidence and the crime.

1. Abused childhood.

In *State v. Jackson*, 186 Ariz. 20, 918 P.2d 1038 (1996), the state court wrote, "(w)e are aware that children who are emotionally and physically abused are adversely affected to some extent for the rest of their lives. ... But we have never reduced a defendant's death sentence on such a basis." *Id.*, 186 Ariz. at 31, 918 P.2d at 1049. The clear implication from this statement is that the Arizona court has not, and will not, reduce a death sentence based on an abusive upbringing, which means that the court will not fairly consider such evidence as mitigating.

The Arizona Supreme Court's holding in *Jackson* stands in direct contradiction of United States Supreme Court holdings on this issue. "There can be no doubt that evidence of a turbulent family history, [and] of beatings by a harsh father ... is particularly relevant [to mitigation]." *Eddings v. Oklahoma*, 455 U.S. at 115. "Defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

California v. Brown, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring).[23]

In *State v. Murray*, 184 Ariz. 9, 906 P.2d 542 (1995), the Arizona Supreme Court reversed the trial court's finding that "Robert suffered from a dysfunctional childhood" as mitigating, *Id.*, 184 Ariz. at 40, 906 P.2d at 573, because it did not "impact his behavior in a way that was beyond his control." *Id.* With regard to Roger Murray, the court reprises the same reasoning as with Robert to discount the horribly abusive childhood that Roger Murray suffered as mitigating. *Id.*, 184 Ariz. at 44, 906 P.2d at 577.

In *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999), Mr. Sharp presented testimony of his terribly abusive childhood, including evidence that he was "sodomized by an older stepbrother from the age of five through thirteen." *Id.*, 193 Ariz. at 415, 973 P.2d at 1182. The court rejected this evidence as mitigating because it was "self-reported" by Mr. Sharp and because there was no "causal connection" between Mr. Sharp's upbringing and the homicide. *Id.*

In *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995), the court held that the fact

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[23] *See also, Burger v. Kemp*, 483 U.S. 776, 789, n.7 (1987)(there is "no doubt" that evidence of a defendant's "exceptionally unhappy and unstable childhood" is "relevant mitigating evidence"); *Parker v. Dugger*, 498 U.S. 308, 314 (1991)(capital defendant has a right to present evidence of a "difficult childhood, including an abusive, alcoholic father); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)(evidence of childhood abuse is relevant to a capital defendant's "moral culpability" and jurors must be allowed to consider that evidence in assessing punishment); *Smith v. Dugger*, 758 F.Supp. 688, 694 (N.D.Fla. 1990)(granting writ of habeas corpus and vacating death sentence because capital defendant was precluded from presenting evidence of "history of childhood deprivation" and "lack of adequate parenting"); *Elledge v. State*, 613 So.2d 434, 436 (Fla. 1993)(evidence of an abused childhood is a mitigating circumstance that must be given consideration by the sentencer in a capital case).

that Mr. Walden was raised in a dysfunctional family was "not a mitigating circumstance" because Mr. Walden "does not explain how this had anything at all to do with the rapes and murder." *Id.*, 183 Ariz. at 620, 905 P.2d at 999.

In *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998), the Arizona Supreme Court held that Mr. Djerf did not prove a difficult family background because it was not "linked" to the crimes for which he was convicted.

In *State v. Ross,* 180 Ariz. 598, 886 P.2d 1354 (1994), the Arizona Supreme Court held that Mr. Ross's "childhood background of emotionally and physically abusive foster homes and sexual abuse" did not constitute a mitigating factor because "(t)here is no indication here that (Mr.) Ross was unable to control his actions because of a difficult childhood." 180 Ariz. at 607, 886 P.2d at 1363.

In *State v. Mann,* 188 Ariz. 220, 934 P.2d 784 (1997), the court noted that Mr. Mann presented evidence that his abusive family background "directly contributed to (Mr. Mann's) behavior because he lacked 'healthy socialization experiences.'" *Id.*, 188 Ariz. at 231, 934 P.2d at 795. Nonetheless, the Arizona Supreme Court held that Mr. Mann did not "show any connection" between his background and the crimes for which he was convicted. *Id.*

In *State v. Pandeli,* 200 Ariz. 365, 26 P.3d 1136 (Ariz.2001), the Arizona Supreme Court agreed that Mr. Pandeli was subject to repeated sodomy throughout his childhood, had a neglectful mother and absent father, attempted suicide several times, had learning disabilities and unsound mental health, was forced to sell his body on the streets, and had

a sexual history wrought with violence and confusion. Although the Arizona Supreme Court found Mr. Pandeli's proffered evidence of his "family and developmental history" and "mental/emotional health" credible, it refused to consider this evidence as mitigation because there was no causal connection between his abysmal childhood and his appreciation of the wrongfulness of the conduct or ability to control his conduct. *Id.*, 200 Ariz. at 379-380, 26 P.3d at 1150-51. The Arizona Supreme Court upheld the trial court's finding that proof of childhood sexual abuse and physical abuse does not constitute nonstatutory mitigation absent a scientifically supported causal connection. *Id.*

In *State v. Hoskins,* 199 Ariz. 127, 14 P.3d 997 (2000), the Arizona Supreme Court acknowledged that Mr. Hoskins suffered from a horrific childhood, which included such traumatic events as molestation by his older sibling, statutory rape, beatings, neglect, suicide attempts, self-medication with alcohol beginning at age six, and multi-generational family history of alcohol addiction and drug abuse. Shockingly, the Arizona Supreme Court discounted this evidence entirely, holding that absent proof of causal connection, "the factual circumstances of defendant's childhood, though extremely difficult, *do not translate into relevant mitigation* of his premeditated crimes." *Id.,* 199 Ariz. at 153, 14 P.3d at 1023 (2000)(emphasis added). The Arizona Supreme Court does not hesitate to make clear its preclusion of this evidence: "Family dysfunction ... *can be mitigating only when* actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts. We reaffirm that doctrine here." *Id.*, 199 Ariz. at 151, 14 P.3d at 1021 (emphasis added).

The United States Supreme Court does not permit the consideration of mitigating factors to be restricted to only those shown to have caused defendant's actions at the time of the crime. Instead, the Court stresses the important and relevant nature of evidence of childhood abuse, which is undeniably mitigating. It is constitutional error to refuse to consider evidence of childhood abuse as non-statutory mitigation, even if that evidence does not provide a legal excuse from criminal responsibility. *Eddings*, 455 U.S. at 114. Courts in other jurisdictions have faithfully followed United States Supreme Court's precedent and determine that evidence of a traumatic upbringing is mitigating. *See Wright v. Cowan*, 149 F.Supp.2d 523, 527-38 (C.D.Ill.,2001) (traumatic childhood is mitigating); *Boyd v. French*, 147 F.3d 319, 325 (4th Cir. 1998) (troubled upbringing entitled is mitigating); *Blanco v. State*, 706 So.2d 7, 10-11 (Fla. 1997) (impoverished childhood is mitigating); *State v. Raglin*, 699 N.E.2d 482, 497 (Ohio 1998) (difficult childhood can be entitled to meaningful weight); *Guthrie v. State,* 689 So.2d 948 (Ala.Cr.App. 1996) (finding as nonstatutory mitigation that defendant's childhood was "not all that it could have been"); *Coleman v. State*, 741 N.E.2d 697 (Ind. 2000) ("difficult childhood" was entitled to some mitigating weight), *Buttrum v. State*, 293 S.E.2d 334 (Ga. 1982)(deprived childhood is mitigating).

2. History of Alcohol or Substance Abuse.

In *State v. Kayer*, 194 Ariz. 423, 984 P.2d 31 (1999), the Arizona Supreme Court held that the trial court did not err in finding that defense did not prove the statutory mitigator of impaired capacity or the nonstatutory mitigator of mental impairment. The

court held that the extensive evidence of Mr. Kayer's alcoholism, substance abuse, and mental illness did not meet the standard for establishing the mitigating factor that Mr. Kayer was unable to appreciate the wrongfulness of his conduct because Mr. Kayer did not prove that there was a "causal link" between his mitigating evidence and "the crime itself." *Id.*, 984 P.2d at 45-46.

In *State v. Rienhardt*, 190 Ariz. 579, 951 P.2d 454 (1997), the court refused to consider the "substantial" evidence regarding Mr. Rienhardt's history of drug and alcohol abuse as mitigation, holding that there was "no evidence connecting (Mr.) Rienhardt's history to the crime itself." *Id.*, 190 Ariz. at 592, 951 P.2d at 467.

In *State v. Medrano*, 185 Ariz. 192, 914 P.2d 225 (1996), the Arizona Supreme Court held that, despite expert and lay witnesses' testimony regarding the defendant's long time drug problem **and** drug use on the night of the homicide, the defendant failed to establish either a statutory or non-statutory mitigating circumstance. *See Jeffers v. Lewis*, 974 F.2d 1075 (9th Cir. 1992)(after court determines that mitigating evidence did not satisfy statutory mitigating circumstance, it must consider whether evidence is sufficient to be nonstatutory mitigating circumstance). The court also held that the trial judge did not apply an improper standard in assessing whether the defendant's drug use was a mitigating circumstance despite the trial judge's explicit statement that he personally rejected drug use as an "excuse" for murder.

In *State v. Stanley,* 167 Ariz. 519, 530-531, 809 P.2d 944, 955-956 (1991), the Arizona Supreme Court held that Mr. Stanley's "chronic alcohol and drug problems" did

not constitute a mitigating circumstance because they did not "overwhelm ... his ability to control his physical behavior." The court specifically noted that Mr. Stanley "had sought help" for his substance abuse addiction.

In *State v. Jeffers*, 135 Ariz. 404, 431, 661 P.2d 1105, 1132 (1983), the Arizona Supreme Court considered Mr. Jeffers "long term heroin" use only to diminish the effect of Mr. Jeffers' heroin use on the day of the homicide. The court noted that "evidence showed that long term heroin users like (Mr. Jeffers) develop a tolerance to the drug" and that Mr. Jeffers "had not used an excessive amount of heroin, by (Mr. Jeffers') standards, on the day of the murder." *Id.*

Other courts around the country, applying the standards enunciated by the United States Supreme Court,[24] have come to a dramatically different conclusion than the Arizona Supreme Court regarding whether a history of alcohol or substance abuse constituted a mitigating circumstance. As one court stated, "Documented alcohol and drug problems can be probative mitigating evidence. (Mr. Boliek's) long history of drug abuse was especially crucial at the mitigation stage (of his trial) in light of testimony that he had been using large amounts of drugs and alcohol before and during (the homicide)." *Boliek v. Delo*, 912 F.Supp. 1199, 1207-1208 (W.D.Mo. 1995), *rev'd on other grounds*,

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[24]In *Skipper v. South Carolina*, the Court held that it was "now well established" that a capital sentencer may "not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Skipper*, 476 U.S. at 4, quoting, *Eddings*, 455 U.S. at 110; and *Lockett*, 438 U.S. at 604.

Boliek v. Bowersox, 96 F.3d 1070 (8th Cir. 1996). *See also*, *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991). In *State v. Quisenberry,* 401 S.E.2d 632 (N.C. 1999), the Supreme Court of North Carolina held that the defendant's "pattern of drug and alcohol abuse extending over a period of approximately eight years" was relevant mitigating evidence. *Id.*, 401 S.E.2d at 634. *See also, Scott v. State*, 603 So.2d 1275, 1277 (Fla. 1992)("long term drug and alcohol abuse" is a mitigating factor); and *State v. King*, 718 S.W.2d 241, 248 (Tenn. 1986).

3. The Trial Court Unconstitutionally Failed to Weigh and Consider Relevant Mitigation Evidence.

It is clear from the record and deeply rooted Arizona law, that the trial judge did not consider or weigh the mitigation evidence in the record which established Mr. Lopez's long-standing substance abuse disorder, his impoverished upbringing, his low IQ, his dysfunctional family, his homelessness, or the neglect of his family, or any of the other relevant mitigation present in the record. It is equally clear that the Arizona Supreme Court's failure to correct this error was the result of their own unconstitutionally restrictive relevance standards for mitigation, standards which fly in the face of *Lockett* and its progeny. The United State Supreme Court has recently reaffirmed that "[v]irtually no limits are placed on the relevant mitgating evidence a capital defendant may introduce concerning his own circumstances." *Tennard v. Dretke*, 542 U.S. at 285, 124 S.Ct. at 2570.

Similarly, the Arizona courts erred in rejecting evidence that Mr. Lopez suffered

from pathological intoxication. The facts supporting this diagnosis were unrebutted and proven by a preponderance of the evidence.

Pathological intoxication is a major mental disorder identified as Alcohol idiosyncratic intoxication in Diagnostic Statistical Manual of Mental Disorders (3rd ed. Rev.) (DSM III-R). Three criteria must be present before this diagnosis can be made: maladaptive behavior changes occurring shortly after ingesting an amount of alcohol insufficient to induce intoxication in most people, behavior atypical of the person when not drinking, and the behavior is not due to any physical or other mental disorder. DSM III-R at 129.

The evidence presented at Mr. Lopez's capital sentencing hearing established these criteria. Evidence was presented that Mr. Lopez is shy, mild and meek when he is sober, but that he changes dramatically when he is intoxicated or under the influence of toxic vapors. Evidence also established that Mr. Lopez consumes little intoxicating substances before reacting in this way. Based on these facts, Dr. Bendheim's diagnosis was proved by a preponderance of the evidence. Although Dr. Bendheim did not testify to a reasonable degree of medical certainty, such testimony was not required to satisfy the burden of proof. Although Dr. Dean disagreed with Dr. Bendheim's diagnosis of pathological intoxication, he agreed that "descriptions of the subject's behavior while under the influence of alcohol would either confirm or nonconfirm [sic] the diagnosis." R.T. 7-13-90(p.m.), p. 52. Dr. Dean also agreed that witnesses described Mr. Lopez's personality as changing substantially when intoxicated. R.T. 7-13-90 (p.m.), p. 50.

The Arizona courts also erred in rejecting evidence that Mr. Lopez suffered from intoxication at the time of the crime, and that the crime would not have occurred but for that intoxicated state. This evidence established both the statutory mitigating factor of significant impairment under A.R.S. §13-703(G)(1), and nonstatutory mitigation.

The evidence was unrebutted that Mr. Lopez was significantly impaired at the time of the crime. Although Dr. Dean disagreed with Dr. Bendheim's diagnosis of pathological intoxication, Dr. Dean never disagreed with or disputed evidence that Mr. Lopez was intoxicated at the time of the crime and that the murder was attributable to that intoxication. Although Mr. Lopez denied intoxication, neither Drs. Bendheim nor Dean credited that denial. Witnesses who observed Mr. Lopez shortly before the crime described him as "not himself," "different," "shaking," staggering, "falling down," and "loaded on something."

The Arizona courts also erred in rejecting evidence of Mr. Lopez's good behavior while incarcerated. The evidence that Mr. Lopez's conduct in prison had changed and that, at the time of the resentencing, he was a model prisoner was unrebutted. The Arizona courts summarily rejected this evidence based on conduct that occurred years before the resentencing. The Arizona courts failure to consider relevant mitigating evidence violated Mr. Lopez's rights under the Eighth and Fourteenth Amendment, and as a result, Mr. Lopez's death sentence is unconstitutional.

Based on these facts and law, the Arizona Supreme Court decision is thus contrary to and an unreasonable application of clearly established federal law. 28 U.S.C. §

2254(d). It is likewise an unreasonable application of the law to the facts presented. *Id.*

IV. Mr. Lopez's Capital Sentence Is Predicated on an Unconstitutional Aggravating Circumstance.

The Arizona courts violated Mr. Lopez's rights under the Sixth, Eighth, and Fourteenth Amendments in finding that the F(6) heinous, cruel and depraved aggravating circumstance exists in his case and their decision rejecting his claim is contrary to and an unreasonable application of *Godfrey v.* Georgia, 446 U.S. 420 (1980); *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853 (1988) and their progeny. Further, the Arizona court decision upholding the application of this vague and unconstitutional aggravator to the facts of this case was an unreasonable application of the facts to the law. *Id.*, 28 U.S.C. § 2254(d).

There is no doubt that the statutory language defining the heinous, cruel and depraved aggravating circumstance under A.R.S. 13-703(F)(6) at the time of Mr. Lopez's sentencing trial is unconstitutionally vague and overbroad on its face. *Walton v. Arizona*, 497 U.S. 639(1990). In this case, the Arizona courts failed to adequately narrow the application of this aggravating circumstance and as a result, the application against the defendant is unconstitutional. *See Arave v. Creech*, 507 U.S. 463 (1992); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Under Arizona law, the question of heinousness or depravity focuses on the mental state of the defendant. *State v. Gretzler*, 135 Ariz. 41, 51, 659 P.2d 1, 10 (1983). Arizona law holds that a crime is heinous or depraved if it meets one of five (5) factors articulated

in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983). The five factors are: 1) relishing; 2) gratuitous violence; 3) needless mutilation; 4) senselessness and 5) helplessness. *Id.* Each of these factors is meant to be an expression of the defendant's mental state. None of these five factors exist in the instant case.

To support a finding of cruelty, the state must prove beyond a reasonable doubt that the "victim consciously experienced physical or mental pain prior to death ... **and the defendant knew or should have known that suffering would occur.**" *State v. Trostle*, 191 Ariz. 4, 951 P.2d, 869, 883 (1997)(emphasis added). Here there was no evidence to support the finding of cruelty.

The trial judge did not make specific findings with respect to the *Gretzler* factors or to the cruelty prong. Rather, the judge simply found that under the circumstances of the case, in his opinion, the murder was especially heinous, cruel and depraved. The Arizona Supreme Court attempted to cure this error by putting its own gloss on the trial judges finding. It held that the murder constituted gratuitous violence, senselessness, helplessness and was cruel. In fact, the evidence does not support the state court's conclusion.

As a matter of Arizona law, senselessness and helplessness alone are insufficient to support a finding of heinousness or depravity. *Trostle*, 191 Ariz. 4. In this case, neither finding is supported by the evidence. The Arizona supreme court stretches the definition of senselessness beyond its constitutional boundaries in violation of clearly established federal law when it found that because the sexual assault could have been

accomplished without the homicide, the murder was senseless. This finding begs the question. If this were to be the law, then every felony murder would be senseless because every felony, except murder, can be accomplished without killing. As a result, the aggravating factor would not serve its narrowing function and the imposition of a death sentence on this basis is arbitrary and capricious. *Godfrey v. Georgia,* 446 U.S. 420; *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853.

Likewise there is no evidence that the victim was helpless. To the contrary, the victim was middle-aged woman of similar size and build to Mr. Lopez. R.T. 7/13/90 (a.m.), Ex. 1. The testimony of Dr. Phillip Keen establishes that in, fact the victim, was not helpless. *Id.* at 22, 29.

Finally, there is no evidence of gratuitous violence in this case. Dr. Keen testified that the wounds inflicted were to a lethal part of the body. Rather than support a finding of gratuitous violence, the evidence as to the number of wounds and the weapon used support the conclusion that the homicide was an impulsive act that got out of control due to a psychotic reaction.

Judge D'Angelo and the Arizona Supreme Court ignored Dr. Keen's testimony as well as the testimony as to Mr. Lopez's mental state as it relates to this aggravator. Judge D'Angelo did not even understand that Dr. Keen's testimony was offered in rebuttal to the (F)(6) aggravator. Instead, he characterized the testimony as being offered as non-statutory mitigation. ROA 103. Also, the evidence as to Mr. Lopez's mental state presented at trial and resentencing established that Mr. Lopez was incapable of forming

the requisite mental state required for a finding under the (F)(6) aggravator. Mr. Lopez could not form the intent for the heinous or depraved prong, nor, could he foresee the cruelty of the crime because of his severely impaired state of mind. ROA 71; ROA 99; R.T. 7-13-90 (a.m.), Ex. 3; R.T. 7-13-90 (p.m.), Exs. 6, 8, 9, 10, and 11.

Mr. Lopez's sentence is based entirely on the unconstitutional application of this single aggravating circumstance. The aggravating circumstance is not supported by the evidence and the Arizona courts applied an unconstitutionally vague and overbroad construction of this aggravator to this case. Their decision is contrary to and an unreasonable application of *Godfrey*, *Maynard*, and their progeny. Further, the Arizona court's decision involves an unreasonable application of the facts. 28 U.S.C. § 2254 (d). Accordingly, Mr. Lopez's sentence is in violation of the Sixth, Eighth, and Fourteenth Amendments and should be set aside.

For all these reasons, Petitioner asks this Court to grant Petitioner relief on these claims and vacate his death sentence, or alternatively, to schedule an evidentiary hearing.

Respectfully submitted this 6th day of April, 2006.

BY: */s/ Kelley J. Henry*
Kelley J. Henry
Assistant Federal Public Defender
Denise I. Young

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed electronically.

Notice of this Filing will be sent by operation of this Court's electronic filing system to counsel for respondent, Ms. Dawn Northup, Esq., 1275 W. Washington, Phoenix, AZ 85007-2997 on this the 6th day of April, 2006.

/s/ Kelley J. Henry
Counsel for Petitioner

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Samuel V. Lopez, Petitioner, vs. Dora Schriro, et al., Respondents.	No. CV-98-0072-PHX-SMM DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Petitioner, Samuel V. Lopez, filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. In this Order, the Court reviews the merits of the seven remaining claims. For the reasons set forth herein, the Court concludes that Petitioner is not entitled to relief.

BACKGROUND

In the late morning of October 29, 1986, in response to a concerned caller, the police made a "check welfare" visit to the apartment of Estafana Holmes, a fifty-nine-year-old woman.[1] Inside they found Holmes's partially nude body blindfolded with her pajama pants and with a scarf stuffed in her mouth. The apartment was blood-spattered and in disarray with broken and displaced furnishings. The victim's throat had been sliced, and she had been

[1] This factual summary is based on the Court's review of the record and the Arizona Supreme Court's opinion upholding Petitioner's convictions, *State v. Lopez*, 163 Ariz. 108, 110, 786 P.2d 959, 961 (1990).

stabbed more than twenty times in her left breast, upper chest, and lower abdomen. The victim had seminal fluid in her vagina and anus.

Petitioner was seen in the neighborhood the night before the crime as well as in the early morning after the murder, looking wet as if he had just washed himself. While under questioning several days later about an unrelated matter, Petitioner asked about a woman who had been stabbed and had her throat slashed. The cutting of the victim's throat had not been publically released. Petitioner's fingerprints were matched to prints found in the victim's apartment, and his bodily fluids were consistent with the semen found in her body.

On April 27, 1987, a jury convicted Petitioner of first degree murder, sexual assault, kidnaping, and burglary. Maricopa County Superior Court Judge Peter D'Angelo presided over Petitioner's trial and sentenced him to death for the murder and to prison terms for the other offenses. On direct appeal the Arizona Supreme Court affirmed Petitioner's convictions and prison sentences; however, the court vacated one of the aggravating factors supporting Petitioner's death sentence and remanded for re-sentencing on the murder. *State v. Lopez*, 163 Ariz. 108, 116, 786 P.2d 959, 967 (1990) (*Lopez I*). On August 3, 1990, Judge D'Angelo re-sentenced Petitioner to death, and the Arizona Supreme Court affirmed. *State v. Lopez*, 175 Ariz. 407, 857 P.2d 1261 (1993) (*Lopez II*).

Petitioner filed a petition seeking habeas relief in this Court on January 13, 1998 (Dkt. 1),[2] which he amended on November 16, 1998 (Dkt. 27). After briefing (Dkts. 37, 50, 56, 62), Petitioner withdrew Claim 13 (Dkt. 93), and the Court dismissed Claims 3, 4, 6, 7, 9-11, and 14 as procedurally barred, Claims 12 and 17 as premature, and Claim 10 (in the alternative), 15, and 16 as meritless (Dkts. 92, 160).[3] The parties briefed the merits of the

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[2] "Dkt." refers to the documents in this Court's case file.

[3] At the time the Court ruled on the procedural status of Petitioner's conviction-related claims, it simultaneously granted a stay of his sentencing-related claims while Petitioner pursued relief in state court based on *Ring v. Arizona*, 536 U.S. 584 (2002). (Dkt. 92 at 35.) The stay was in effect from January 7, 2003, until July 12, 2004. (Dkts. 92, 144).

remaining claims. (Dkts. 107, 116, 126, 178, 196, 199.) Subsequently, the Court dismissed Claim 1A, while ruling on a corresponding motion for evidentiary hearing, and granted evidentiary development as to Claim 1B. (Dkt. 131.)

LEGAL STANDARD FOR RELIEF UNDER THE AEDPA

The Antiterrorism and Effective Death Penalty Act (AEDPA) established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists

of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 127 S. Ct. 649, 653 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381; *see Musladin*, 127 S. Ct. at 654; *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004). Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark*, 331 F.3d at 1069.

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer,* 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406; *see Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004).

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context

where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Landrigan*, 127 S. Ct. at 1939; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Landrigan*, 127 S. Ct. at 1939-40; *Miller-El II*, 545 U.S. at 240.

DISCUSSION

Claim 1B

Petitioner alleges that trial counsel was ineffective for failing to ensure that a biased juror did not sit on the jury. In a prior order, the Court found that there was a material factual dispute regarding whether a juror that had been struck for cause by the trial court actually served on Petitioner's jury. (Dkt. 131 at 21.) The Court further found that if Petitioner proved his allegations he would be entitled to relief on this claim (*id.* at 21-22); thus, all that remains is purely a factual dispute. The Court granted evidentiary development and expansion of the record as to any evidence developed (*id.* at 23); the parties have submitted their additional evidence (Dkts. 135, 136, 140, 149).

Both parties agree, and the evidence confirms, that a Norman White served on the jury

and was polled at the time of Petitioner's verdict.[4] The dispute centers on whether that White is the same juror who earlier had been struck by the court. Petitioner relies primarily on the trial transcript, which contains the following exchange indicating that White was excused for cause and replaced by a Timothy Kett, in response to the court's question asking whether any juror had family or close friends that served as law enforcement officers:

> THE COURT: Mr. White?
>
> A JUROR: A cousin. 12 years on the police department, and close friends retired police officers.
>
> THE COURT: Anything about those relationships that would lead you to believe you'd give any more or less credence to the testimony of the police officer simply because he or she were a police officer?
>
> A JUROR: I feel in the line of work police do, I'd have to be partially influenced by their good, solid police work.
>
> THE COURT: You don't think you could judge that testimony objectively and on the same standards as you would any other witness?
>
> A JUROR: I believe I could do that.
>
> THE COURT: Well, let's make sure. You're not telling me you would believe a police officer more than you would a civilian witness?
>
> A JUROR: I'd have more faith in the police officer.
>
> THE COURT: Well, we'll get back to the other question then. You think you would give more weight to the testimony of a witness simply because he was a police officer?
>
> A JUROR: I believe I would.
>
> THE COURT: You couldn't judge that testimony objectively, on the same standards as you would any other witness?
>
> A JUROR: I believe I would have to judge in the favor of police officers' testimony.
>
> THE COURT: All right, sir. I'll excuse you, please report back to the jury commissioner.
>
> The clerk will call the name of another juror.

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[4] White died in March 1995 (Dkt. 136, Ex. 1); no evidence regarding this issue was gathered from him.

THE CLERK: Timothy Kett.

(RT 4/16/87 at 57-59.)

Respondents rely on contrary evidence. First, the court's minute entry indicates that Kett was called as a replacement for a William Knighton who was excused for cause. (ROA ME 35 at 53.)[5] Similarly, the trial court's hand-marked jury list indicates that Knighton was struck for cause, and White was not struck and served on the jury. (ROA 36.) The court reporter provided an affidavit, at the request of the State, in which she averred that her notes indicate she did not specifically hear the name White at the disputed place in the transcript.[6] (Dkt. 116, Ex. D.) Rather, she heard only a long "i" sound, and selected White's name from the jury list and inserted it in her transcription. (*Id.*)

At the State's request, Knighton reviewed the voir dire transcript and, in an affidavit, expressed confidence that the questioning regarding the credibility of a police officer's testimony was addressed to him and not White as reflected in the transcript. (Dkt. 135, Ex. A at 1.) Knighton stated that he recalled telling the judge he would give more credence to, and have more faith in, a police officer's testimony than he would a civilian's. (*Id.* at 1, 2.) Petitioner's counsel deposed Knighton, and his testimony was consistent with his affidavit. (*Compare* Dkt. 135, Ex. A *with* Dkt. 149, Ex. 3.)

Despite evidentiary development, Petitioner is unable to prove that a biased juror

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[5] "ROA" refers to the docket numbers from the three-volume record on appeal from post-conviction proceedings prepared for Petitioner's petition for review to the Arizona Supreme Court (Case No. CR-97-0423-PC). "ME" refers to the trial court's minute entries, contained in one volume of the three-volume ROA. "RT" refers to the reporter's transcripts from Petitioner's state court proceedings. "PR Dkt." refers to the docket numbers of documents filed at the Arizona Supreme Court during Petitioner's petition for review (Case No. CR-97-0423-PC). The state court original reporter's transcripts and certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court on July 29, 1999. (Dkt. 57.)

[6] When Petitioner's counsel asked the court reporter for a copy of these notes they could no longer be located. (Dkt. 136, Ex. 2.)

served on his jury. Based on the evidence proffered, the only plausible explanation is that the transcript contained an error. Accepting Petitioner's theory – that White was dismissed on page fifty-eight of the transcript – leaves no record to explain Knighton's dismissal. No one contends that Knighton served on the jury, the hand-marked jury list indicates he was struck for cause, the parties' peremptory strikes are all allotted to other jurors, and the transcript is devoid of any reference to Knighton being struck. Further, Knighton has a specific recollection of both his initial exchange with the judge, reflected on pages fifty to fifty-one of the transcript, and informing the judge that he would have more faith in a police officer, a belief he affirmed during his deposition (Dkt. 149, Ex. 3 at 64). Finally, the court's minute entry indicates Knighton was excused for cause and replaced by Kett.

Because Petitioner has not shown that a biased juror served on his jury, his allegation of ineffectiveness necessarily fails and he is not entitled to relief. Claim 1B is dismissed.

Claim 1C

In the Amended Petition, Petitioner alleges that his counsel "failed to properly investigate and prepare the case for trial and sentencing including failing to prepare the defense expert Dr. Bendheim." (Dkt. 27 at 10.) Petitioner incorporated the general factual background of the petition into Claim 1, which included the following facts: Petitioner was homeless, poor, and intoxicated and "high on something" on the night of the murder; the killing appeared to be impulsive and done by someone psychotic; Petitioner's counsel presented no evidence at the sentencing proceeding; the judge found no mitigating circumstances at Petitioner's first sentencing; on resentencing, there was evidence that Petitioner came from a dysfunctional family with a history of substance abuse and violence, and that he had a history of substance abuse and psychiatric disorders; on resentencing, there was evidence that Petitioner had a different personality when intoxicated, and Dr. Bendheim testified that Petitioner likely suffered from pathological intoxication. (*Id.* at 3, 5-6, 7-8.)

In the body of Claim 1C, Petitioner reiterates some of the same facts and further

alleges that Petitioner's father abandoned the family, they suffered from financial hardship and extreme poverty, Petitioner had a history of exposure to toxic substances, and he dropped out of high school with a sixth grade reading level. (*Id.* at 11-12, 13.) Petitioner alleges that his counsel failed to provide Dr. Bendheim with copies of witness testimony regarding Petitioner's intoxication on the night of the crime and failed to provide other background information noted in the claim. (*Id.* at 12-13.) Finally, Petitioner asserts that it was necessary for Petitioner's counsel to investigate this information and provide it to the expert so that the expert could establish a baseline of Petitioner's cognitive functioning, compare it to his functioning when intoxicated, assess whether intoxication would exacerbate any underlying psychological conditions, assess Petitioner for the presence of addictive disease and/or neurological deficits, and evaluate any other influences on his behavior or thought processes during the murder. (*Id.* at 13.)

Exhaustion

In their Answer Re: Procedural Status of Claims, Respondents stated as to the entirety of Claim 1: "Petitioner presented these claims first, in his petition for post-conviction relief, and then, in a petition for review to the Arizona Supreme Court. Thus, they have been properly exhausted." (Dkt. 37 at 12.) Based on this assertion, the Court ordered briefing on Claim 1C as set forth in the Amended Petition. (Dkt. 160 at 7, 22.) Now, in their merits brief, Respondents argue that the claim alleged in this Court is much broader than the claim Petitioner exhausted in state court, and that the claim as now stated is procedurally defaulted. (Dkt. 196 at 12.)

To the extent Respondents contend that Claim 1C as stated in Petitioner's merits brief is substantially broader than that alleged in the Amended Petition, the Court disagrees. A comparison of the allegations in the Amended Petition and Petitioner's merits brief reveals that they are substantially similar, although Petitioner conducted an investigation between the filing of the two documents and has now submitted supporting evidence for his

allegations. (*Compare* Dkt. 27 at 3-13, *with* Dkt. 178 at 2-45.) Thus, Respondents should have raised exhaustion and procedural default in their Answer, before Petitioner's counsel expended the time and funds to conduct an investigation. However, because Respondents are now contending that the allegations in the Amended Petition are substantially altered from those exhausted in state court, and Petitioner has had an opportunity to, and did, respond to that defense (Dkt. 199 at 21-23), the Court will review that assertion.[7]

Principles of Exhaustion and Procedural Default

Under the AEDPA, a writ of habeas corpus cannot be granted unless it appears that the petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982). To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). If a habeas claim includes new factual allegations not presented to the state court, it may be considered unexhausted if the new facts "fundamentally alter" the legal claim presented and considered in state court.

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[7] Although Petitioner notes that Respondents initially conceded exhaustion as to Claim 1C, he does not allege that Respondents have waived exhaustion; rather, he contends that the claim was properly exhausted in state court. (Dkt. 199 at 21-23.) Further, this Court is permitted to sua sponte consider procedural default even if not properly raised by Respondents. *See Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003); *cf. Day v. McDonough*, 547 U.S. 198, 209 (2006) (holding that district courts may sua sponte consider the timeliness of a habeas petition, just as circuit courts have held can be done for other affirmative defenses such as procedural default). Although the State provided no explanation for its failure to raise this defense in its Answer, because Respondents asserted procedural default during the district court briefing process, the Court finds it should be considered. *See Perruquet v. Briley*, 390 F.3d 505, 518 (7th Cir. 2004) (reaching procedural default on appeal even though not raised by the state in district court because comity and federalism weighed against looking at a claim that no state court was given the opportunity to review, and de novo review was inconsistent with the high level of deference to state court decisions mandated by the AEDPA and would amount to a windfall to the habeas petitioner).

Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

Exhaustion requires that a petitioner clearly alert the state court that he is alleging a specific federal constitutional violation. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004); *see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (general appeal to due process not sufficient to present substance of federal claim); *Lyons v. Crawford*, 232 F.3d 666, 669-70 (2000), *as amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence, right to be tried by impartial jury, and ineffective assistance of counsel lacked specificity and explicitness required); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion."). A petitioner must make the federal basis of a claim explicit either by citing specific provisions of federal law or case law, *Lyons*, 232 F.3d at 670, or by citing state cases that plainly analyze the federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc); *cf. Fields v. Washington*, 401 F.3d 1018, 1022 (9th Cir. 2005) (mere citation to a state case that conducts both a state and federal law analysis does not, by itself, satisfy exhaustion).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and post-conviction relief proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state

court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. The procedural bar relied on by the state court must be independent of federal law and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). A state procedural default is not independent if, for example, it depends upon a federal constitutional ruling. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam). A state bar is not adequate unless it was firmly established and regularly followed at the time of the purported default. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available pursuant to Rule 32, the claim is "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray*, 518 U.S. at 161-62.

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of a procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly exhaust the claim in state court and prejudice from the alleged constitutional violation, or shows that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750. Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 753. Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available, and constitutionally ineffective assistance of

counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). There are two types of claims recognized under the fundamental miscarriage of justice exception to procedural default: (1) that a petitioner is "innocent of the death sentence," – in other words, that the death sentence was erroneously imposed; and (2) that a petitioner is innocent of the capital crime.

Exhaustion and Procedural Default Analysis

In his PCR petition, Petitioner alleged ineffective assistance of counsel (IAC) because counsel failed to properly prepare his expert, Dr. Otto Bendheim. (ROA 116 at 9.) Specifically, Petitioner alleged that counsel failed to provide Dr. Bendheim with four documents – the pretrial statements and trial testimony of Pauline Rodriguez and Yodilia Sabori. (*Id.*) Petitioner alleged this was deficient because the statements were available to counsel and they were particularly relevant to the doctor's assessment of pathological intoxication at the time of the crime as these witnesses saw Petitioner's actions and behaviors just a few hours before the murder. (*Id.* at 10.) Petitioner alleged he was prejudiced by counsel's failure because this information was the best evidence in support of pathological intoxication and, if it had been provided to Dr. Bendheim initially, he could have provided a more complete and stronger diagnosis at the time of sentencing. (*Id.* at 10-11.) The allegations in the Petition for Review are essentially identical and focus solely on counsel's failure to provide Dr. Bendheim the statements by Rodriguez and Sabori that were identified in the PCR petition. (PR Dkt. 1 at 11-13.)

By continuing to characterize the claim as he did in state court – that counsel failed to prepare his expert witness – Petitioner attempts to shoehorn in the much broader claim that counsel failed to conduct an exhaustive social history investigation (which he should have used to prepare his expert). However, the claim asserted in state court was a very narrow one, focused solely on counsel's failure to provide the expert with four specific documents from percipient witnesses to support his tentative diagnosis of pathological intoxication. In contrast, the claim as alleged in this Court is counsel's failure to conduct a comprehensive investigation of Petitioner's background so that the expert could provide a complete and

thorough assessment of Petitioner's cognitive functioning, as well as any psychological conditions, addictive diseases, or neurological deficits, and any other possible influences on Petitioner's behavior and thought processes at the time of the crime. (Dkt. 28 at 9-10, 11-13.) In support of his exhaustion argument, Petitioner contends that his allegations in state court went beyond counsel's failure to provide Dr. Bendheim the four documents specifically identified and included counsel's failure to provide "all relevant information"; in support of this proposition, Petitioner quotes from his PCR reply brief and his Petition for Review. (Dkt. 199 at 22.) This argument is not supported by the record. The quotes on which Petitioner relies regarding "all the relevant evidence" that counsel should have given Dr. Bendheim, when viewed in the context of the entire argument in those documents and his whole PCR proceeding, clearly refer to the statements by Rodriguez and Sabori that were relevant to his assertion of pathological intoxication not to potentially mitigating background information; they do not reference additional evidence never investigated. (ROA 116 at 9-11; ROA 138 at 3; PR Dkt. 1 at 11-13.)

The claim as alleged in this Court was not fairly presented because "[a] thorough description of the operative facts before the highest state court is a necessary prerequisite to satisfaction of the standard of *O'Sullivan* and *Harless* that 'a federal habeas petitioner [must] provide the state courts with a 'fair opportunity' to apply controlling legal precedent to the facts bearing upon his constitutional claim.'" *Kelly v. Small*, 315 F.3d 1063, 1069 (9th Cir. 2003) (quoting *Harless*, 459 U.S. at 6), *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007). It is not sufficient that Petitioner raised a claim of IAC at sentencing based on other deficiencies, without identifying the deficiencies on which he now relies. *See Carriger v. Lewis*, 971 F.2d 329, 333-34 (9th Cir. 1992) (treating distinct failures by trial counsel as separate claims for exhaustion and procedural default); *Matias v. Oshiro*, 683 F.2d 318, 319-20 & n.1 (9th Cir. 1982) (finding lack of fair presentation when claim broadened to include eight specific deficiencies by counsel that were not raised in state court); *Flieger v. Delo*, 16 F.3d 878, 885 (8th Cir. 1994) (raising specific claims of IAC in

state court does not exhaust all such claims for federal habeas review); *cf. Strickland v. Washington*, 466 U.S. 668, 690 (1984) (requiring identification of the specific "acts or omissions" of counsel being challenged). In sum, the factual breadth of this claim as alleged in Petitioner's Amended Petition was not presented in state court and is fundamentally altered from that presented during the PCR proceedings. *Vasquez*, 474 U.S. at 260.

Petitioner is now precluded by Arizona Rules of Criminal Procedure 32.2(a)(3) and 32.4 from obtaining relief in state court on the new broad allegations set forth as Claim 1C. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h); *Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002) ("the ground of ineffective assistance of counsel cannot be raised repeatedly"; therefore, if additional ineffectiveness allegations are raised in a successive petition, the claims in the later petition necessarily will be precluded). Thus, these portions of the claim are technically exhausted but procedurally defaulted, absent a showing of cause and prejudice or a fundamental miscarriage of justice. In reply to Respondents' argument that this claim is procedurally defaulted, Petitioner did not allege cause and prejudice or a miscarriage of justice to overcome this default.[8] (Dkt. 199 at 13-23.)

The portions of Claim 1C that extend beyond the narrow claim raised in Petitioner's PCR petition and Petition for Review are dismissed as procedurally barred.

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[8] To properly exhaust the broad IAC allegations of Claim 1C, PCR counsel should have included them in the PCR petition. *See State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997). While *constitutionally* ineffective assistance of counsel can constitute cause for failure to properly exhaust a claim in state court, Petitioner had no constitutional right to counsel in state PCR proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989); thus, no constitutional violation can arise from ineffectiveness of PCR counsel and, even if alleged, it cannot serve as cause. *Coleman*, 501 U.S. at 752; *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993).

Petitioner previously argued, as to other claims, that there would be a fundamental miscarriage of justice if his defaulted claims were not reviewed on the merits because he is both innocent of the crime and innocent of the death penalty. In prior orders, the Court rejected those arguments (Dkt. 92 at 24-24; Dkt. 160 at 11-13); the grounds for those denials are equally applicable to any miscarriage of justice arguments regarding Claim 1C.

Analysis of the Exhausted Portion of Claim 1C

Petitioner's claim is exhausted to the extent it alleges IAC for failing to provide Dr. Bendheim with the pretrial statements and trial testimony of Pauline Rodriguez and Yodilia Sabori.

Background

At Petitioner's re-sentencing, counsel presented a video deposition of Dr. Otto Bendheim,[9] a psychiatrist, to support a mitigating factor of pathological intoxication.[10] For his evaluation of Petitioner, Dr. Bendheim interviewed him and reviewed police reports regarding the murder, prior charges and arrests, and descriptions of the crime scene. (Dkt. 178, Ex. 2 at 3.) Dr. Bendheim found that Petitioner possibly suffered from pathological intoxication, which he described as causing a person to react to even small quantities of alcohol in a very unusual manner and frequently with extreme violence. (*Id.* at 4-5.) Although Petitioner had informed Dr. Bendheim that he was not intoxicated on the night of the crime, the doctor did not believe him because other evidence indicated to the contrary. (*Id.* at 6.) Dr. Bendheim found that Petitioner was subject to unusual, out-of-character

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[9] Petitioner submitted in this Court a transcript of Dr. Bendheim's video deposition. (Dkt. 178, Ex. 2.)

[10] At sentencing, Petitioner's expert and the State's expert both acknowledged the existence of pathological intoxication and agreed that it is included in the Diagnostic and Statistical Manual of Mental Disorders. (Dkt. 178, Ex. 2 at 21-22; RT 7/13/90 P.M. at 36.) At the time of Petitioner's sentencing, the disorder was defined as:

> A. Maladaptive behavioral changes, e.g., aggressive or assaultive behavior, occurring within minutes of ingesting an amount of alcohol insufficient to induce intoxication in most people.
> B. The behavior is atypical of the person when not drinking.
> C. Not due to any physical or other mental disorder.

Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, 291.40 Alcohol Idiosyncratic Intoxication, at 128-29 (3d ed.-rev. 1987).

reactions including assaultiveness when under the influence of alcohol or drugs, and that "with a great preponderance of probability not certainty," the murder would not have occurred if Petitioner had not been intoxicated at the time of the crime. (*Id.* at 10, 12.) Dr. Bendheim was clear that he could not diagnosis Petitioner with medical certainty, that the diagnosis was tentative, and that it was "to a very large degree" speculative. (*Id.* at 29-30.) On cross-examination, Dr. Bendheim agreed that his opinion was premised, in part, on information that Petitioner acts radically different when intoxicated, and he conceded that his diagnosis would be even more speculative if there were not witnesses or evidence to substantiate that assumption. (*Id.* at 16-17, 26-27.)

In rebuttal, the State presented Dr. Robert Dean, a psychiatrist that had spent much of his career focusing on alcoholism. (RT 7/13/90 P.M. at 17-19.) Dr. Dean testified that he had read a lot about pathological intoxication but that his only professional experience was with one patient presumed to have the condition during his residency. (*Id.* at 23-24.) Further, Dr. Dean stated that the condition was uncommon, and he was not aware of any cases in his twenty-five years of psychiatric practice. (*Id.* at 26.) Dr. Dean explained that there are predisposing factors that may trigger a pathological intoxication reaction; specifically, any condition that could cause brain damage, such as an organic pathology in the brain predisposing the person to epileptic seizures, a stroke, or a degenerative condition. (*Id.*) Although the affected person would not recall what occurred while they were experiencing the intoxication, Dr. Dean testified that the person would normally be aware of the condition because the condition would occur every time he consumed a small triggering amount of alcohol, others would likely report his abnormal behavior, or the amnesiac time lapse would be evident. (*Id.* at 28-29.) Dr. Dean disagreed with Dr. Bendheim's tentative diagnosis and stated why Petitioner's behavior indicated to him that he did not suffer from pathological intoxication. (*Id.* at 32-34.)

At sentencing, the judge found that Petitioner had failed to establish pathological intoxication as a mitigating factor:

> Testimony was presented on behalf of the defendant that he possibly suffered from a condition known as pathological intoxication. Said testimony did not rise to any level of medical certainly, but rather was based upon hypothesis or speculation. The State presented evidence to rebut the hypothesis and speculation. And the court specifically finds that the defendant failed to meet his burden of proof in establishing this mitigating factor by a preponderance of the evidence. Thus this mitigating factor does not exist.

(RT 8/3/90 at 40.)

This claim was raised in Petitioner's PCR petition; he relied on the trial testimony of Rodriguez and Sabori and attached their pretrial interviews and a new affidavit from Dr. Bendheim. (ROA 116, Exs. 3, 30, 31.) Sabori stated that she had seen Petitioner around the neighborhood in the week she had been living there but first spoke to him the night of the murder. (RT 4/21/87 at 68-69; ROA 116, Ex. 31 at 1-2.) She met him at a neighborhood park around 8 p.m. and talked to him for much of the time she was there until 11:15 p.m. (RT 4/21/87 at 70-71; ROA 116, Ex. 31 at 3-4.) Shortly after she went home, approximately ten or fifteen minutes later, Petitioner showed up at her apartment door and she went outside to talk to him. (RT 4/21/87 at 72-73, 77; ROA 116, Ex. 31 at 2, 4.) Sabori reported that Petitioner had been drinking and was intoxicated when he arrived at her apartment, and he was acting differently than he had been at the park. (RT 4/21/87 at 72-72, 77; ROA 116, Ex. 31 at 5.) Petitioner asked Sabori if she got high, and she told him no. (RT 4/21/87 at 73; ROA 116, Ex. 31 at 6.) She testified that Petitioner then disappeared down the alley for a few minutes; when he returned he was shaking and could not stand still, and he acted like he was mad and everything bothered him. (RT 4/21/87 at 73-74; ROA 116, Ex. 31 at 6-7.) When Sabori tried to go inside, Petitioner closed her hand in the door and tried to prevent her from going in so that she would keep talking to him. (ROA 116, Ex. 31 at 7-8.)

Pauline Rodriguez had known Petitioner from the neighborhood and because he had dated her sister for a few months before the murder. (*Id.*, Ex. 30 at 2; RT 4/21/87 at 82.) The evening of the murder she saw him outside her apartment, and she testified that he was "loaded on something." (RT 4/21/87 at 83; ROA 116, Ex. 30 at 4.) She described his tone of voice as angry, and he argued with her and used obscenities. (RT 4/21/87 at 84; ROA

116, Ex. 30 at 7.) She came to the door when Sabori called out to her because Petitioner was preventing Sabori from reentering her apartment. (ROA 116, Ex. 30 at 2-3.) On the other occasions on which she had seen him sober, he was very nice and not mean. (*Id.* at 6; RT 4/21/87 at 87-88.)

In his 1994 affidavit, Dr. Bendheim stated that, having reviewed the statements of Sabori and Rodriguez, his "tentative diagnosis of pathological intoxication [was] more probable than previously expressed," and he could "now make a more certain diagnosis of pathological intoxication." (ROA 116, Ex. 3.) The PCR court denied this claim, finding that counsel's conduct was within prevailing professional norms and that there was no reasonable probability that the sentence would have been different if counsel had not been deficient. (ROA ME 140 at 1-2.)

Analysis

IAC claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. 466 U.S. at 687-88.

The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Thus, to satisfy *Strickland*'s first prong, deficient performance, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

Because an IAC claim must satisfy both prongs of *Strickland*, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed"). A petitioner must affirmatively

prove prejudice. *Id.* at 693. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The calculus involved in assessing prejudice "should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* at 695.

With respect to prejudice at sentencing, the *Strickland* Court explained that "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. In *Wiggins*, the Court further noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." 539 U.S. at 534. The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced in the habeas proceeding." *Id.* at 536 (quoting *Williams v. Taylor*, 529 U.S. at 397-98).

In forming his opinion and diagnosis for Petitioner's resentencing, Dr. Bendheim relied on a statement by a Mr. Hernandez that Petitioner was mean when he was drunk, but mild and meek when sober. (Dkt. 178, Ex. 2 at 14-15.) Dr. Bendheim also relied on a representation from Petitioner's counsel that "many character witnesses described [Petitioner] as a mild person unless he's drinking. It's like he is a different person when he drinks." (*Id.* at 17, 35.) Dr. Bendheim acknowledged that if that representation – that Petitioner acts radically different when intoxicated – could not be substantiated, then his diagnosis would be more speculative. (*Id.* at 25, 27.) Further, Dr. Bendheim was aware that Petitioner was alleged to have been drinking and/or taking drugs an hour to an hour-and-a-half prior to the murder. (*Id.* at 6, 17.) Similarly, although Dr. Bendheim acknowledged that his hypothesis was "perhaps weakened a bit" by Petitioner's denial of intoxication at the time of the crime, he stated that he did not believe Petitioner in light of other evidence in the

documents he reviewed. (*Id.* at 6-7.)

The new information provided to Dr. Bendheim during the PCR proceeding was minimally different from that on which he previously relied. Rodriguez and Sabori indicated that Petitioner behaved differently, meanly, when intoxicated; Dr. Bendheim had already taken that fact into account from other sources. Further, Rodriguez and Sabori stated their belief that Petitioner was intoxicated in the hours before the murder; again, Dr. Bendheim relied on this fact in making his tentative diagnosis and assessment that the murder would not have occurred if Petitioner had not been intoxicated. Thus, these statements provided merely slightly more corroboration of the information and assumptions on which Dr. Bendheim's testimony was based at the time of resentencing. This limited enhancement was reflected in his new affidavit, which stated that, after reviewing the new statements, his "tentative diagnosis of pathological intoxication [was] more probable than previously expressed," and he could "now make a more certain diagnosis of pathological intoxication." (ROA 116, Ex. 3.)

Dr. Bendheim's affidavit acknowledges that his diagnosis remains tentative and does not suggest it is yet at a level of medical certainty. Further, in his deposition, Dr. Bendheim stated that his diagnosis at the time of resentencing was tentative because he was not present at the time of the crime and Petitioner could not confirm that he undergoes a significant personality change when intoxicated. (Dkt. 178, Ex. 2 at 5-6.) The additional statements he reviewed do not alter the grounds he cited for his tentativeness. Additionally, because the "new" documents he reviewed are substantially similar to the information on which his initial opinion was based, the sentencing court would not be likely to provide his viewpoint with significantly more weight. This is particularly true because the State's expert, Dr. Dean, reviewed the pretrial interview statements of Rodriguez and Sabori on a break from testifying at Petitioner's resentencing and stated that the information they provided did not alter his disagreement with Dr. Bendheim's tentative diagnosis. (RT 7/13/90 P.M. at 50.) Thus, the trial court's reliance on the State's rebuttal of Dr. Bendheim's testimony would remain well-

founded. Finally, in resentencing Petitioner the trial court did not credit any other mitigation evidence as noteworthy. (RT 8/3/90 at 40-43.)

In light of the above, the Court finds that, even if Dr. Bendheim initially had been provided all of the documents he eventually reviewed, there is not a reasonable probability that the outcome of the sentencing would have been different. The PCR court's denial of this claim was not an unreasonable application of Supreme Court law. Claim 1C, to the extent exhausted, is denied.

Claim 1D

Petitioner alleges his trial counsel was ineffective for failing to challenge the inclusion of unadjudicated crimes in the presentence report (PSR). Specifically, Petitioner alleges he was prejudiced by the inclusion in the PSR of a sexual assault he allegedly committed four days after the charged homicide, which he asserts painted him as a monster.[11]

In the 1990 PSR, the author stated that Petitioner was taken into custody four days after the murder for an alleged sexual assault; while Petitioner was in custody, the police matched his fingerprint and palm print to those found in the murder victim's home and he was booked for the murder. (ROA 99 at 2.) Similarly, in the discussion section of the PSR, the author noted that Petitioner was apprehended for the murder while he was being investigated for sexual assault. (*Id.* at 8.) Petitioner alleges that counsel's failure allowed for the following argument by the prosecutor:

> You look at these facts, you look at this man's history. You look at the fact that four days after he murdered this woman he's out there raping another woman. He's threatening to kill her. Where is there any mitigation in this man's life, either past, present or future, that is in any way societally redeeming? There is none. There's no mitigation here. There is extreme aggravation.

(RT 8/3/90 at 27.) Petitioner raised this claim in his PCR petition. (ROA 116 at 6-8.) The

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[11] Petitioner refers generally to other uncharged conduct included in the PSR, but does not allege that it prejudiced him; therefore, those vague allegations are dismissed. *See Shah v. United States*, 878 F.2d 1156, 1161 (9th Cir. 1989) (holding that vague and conclusory allegations of ineffective assistance do not warrant habeas relief).

PCR court denied the claim finding that Petitioner had not demonstrated that his counsel's performance was deficient nor that he had been prejudiced by his counsel's actions. (ROA ME 140.)

Without citation, Petitioner alleges that the judge considered the uncharged conduct in sentencing Petitioner. First, at the sentencing hearing, the court did not mention the alleged sexual assault in relation to aggravation or mitigation (RT 8/13/90); in its Special Verdict, the court acknowledged that it had reviewed the presentence report, but again did not mention the alleged sexual assault (ROA 67). Second, absent evidence to the contrary, a judge is presumed to focus only on relevant sentencing factors. *State v. Beaty*, 158 Ariz. 232, 244, 762 P.2d 519, 531 (1988). Petitioner was sentenced by a judge, not a jury, and "[t]rial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

"Non-statutory" aggravation evidence is not recognized in Arizona; the only aggravating circumstances allowed to support a death sentence are enumerated in the governing statute, A.R.S. § 13-703(F), and the sentencing court may only consider evidence in aggravation that tends to establish a statutory aggravating factor. *State v. Gulbrandson*, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995); *State v. Atwood*, 171 Ariz. 576, 673, 832 P.2d 593, 656 (1992), *overturned on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). Because the alleged sexual assault was not relevant, and there is no evidence to the contrary, the trial judge must be presumed not to have relied on the alleged assault in finding the one aggravating factor – that the crime was especially cruel, heinous, and depraved. *See Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997) (citing *Walton*, 497 U.S. at 653). Similarly, despite the prosecutor's argument cited by Petitioner, the alleged sexual assault was not relevant rebuttal to any "good character" mitigation because no such evidence was proffered.

Finally, in ruling on the PCR petition, the trial court determined that Petitioner had

not established a reasonable probability that his sentence would have been different absent counsel's alleged deficiency (ROA ME 140). *See Portillo v. United States*, 588 F.2d 714, 717 (9th Cir. 1978) (finding that a petitioner fails to demonstrate a reliance on false information in a PSR when the judge rules that he would have issued the same sentence without it). In sum, when there is no evidence that the judge relied on the challenged information, Petitioner fails to demonstrate prejudice under *Strickland*. *See Jones v. United States*, 783 F.2d 1477, 1482 (9th Cir. 1986). This claim is denied.

Claim 2

Petitioner argues that the trial court's failure to instruct the jury on a lesser included charge of second degree murder violated his right to due process. Specifically, Petitioner contends the evidence of his intoxication and the circumstances of the crime (that the assailant acted impulsively and out of control), support the inference that he was not guilty of premeditated first degree murder but of the lesser included offense of second degree murder. Additionally, Petitioner argues that the Arizona Supreme Court did not apply the proper standard to this claim rendering its ruling contrary to, and an unreasonable application of, clearly established Supreme Court law.

Background

Petitioner was charged under dual theories of first degree murder – felony murder and premeditated murder. The jury was instructed that the necessary mental state for premeditated first degree murder was satisfied if the defendant "**intended to** or **knew**" he would cause death. (ROA 43 at 10 (emphasis added).) With respect to kidnaping and burglary the jury was instructed that the state had to prove that the defendant had acted with "the intent to." (*Id.* at 12, 15.) The jury was also given the following instruction regarding intoxication:

> when the actual existence of the culpable mental state of intentionally or with the intent to is a necessary element to constitute any particular species or degree of offense, you may take into consideration the fact that the accused was intoxicated at the time in determining the culpable mental state with which he committed the act.

(*Id.* at 22.) Petitioner was convicted of kidnaping, burglary, and first degree murder; with respect to the murder conviction, the jury was not asked to make a special finding regarding guilt on felony murder and/or premeditated murder. (ROA 46, 47, 50.)

On direct appeal, Petitioner argued that he was entitled to a second degree murder instruction based on voluntary intoxication. (Appellant's Opening Br. at 25-26.) The Arizona Supreme Court found that intoxication could negate the mental state of "intentionally" but did not preclude a finding of "knowingly." *Lopez I*, 163 Ariz. at 112, 786 P.2d at 963. Because acting "knowingly" is sufficient to establish premeditation under Arizona law, the court concluded that evidence of intoxication did not require a second degree murder instruction. *Id.* at 112-13, 786 P.2d at 963-64.

Relevant Arizona Law

Under Arizona law there is no lesser included offense for felony murder. *See State v. Celaya*, 135 Ariz. 248, 255, 660 P.2d 849, 856 (1983) (citing *State v. Arias*, 131 Ariz. 441, 641 P.2d 1285 (1982)). However, second degree murder is a lesser included offense of premeditated first degree murder. Pursuant to the relevant portion of the first degree murder statute: "A person commits first degree murder if . . . [i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation." A.R.S. § 13-1105.A.1 (West 1988). Second degree murder is defined as follows:

> A person commits second degree murder if without premeditation:
>
> 1. Such person intentionally causes the death of another person; or
>
> 2. Knowing his conduct will cause death or serious physical injury, such person causes the death of another person; or
>
> 3. Under circumstances manifesting extreme indifference to human life, such person recklessly engages in conduct which creates a grave risk of death and thereby causes the death of another person.

A.R.S. § 13-1104.A (West 1988).

The distinction between first and second degree murder is the element of premeditation. *See State v. Marvin*, 124 Ariz. 555, 557, 606 P.2d 406, 408 (1980); *Vickers*

v. Ricketts, 798 F.2d 369, 371(9th Cir. 1986). Premeditation is established under Arizona law if:

> the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

A.R.S. § 13-1101.1 (West 1988).

Analysis

A capital defendant is entitled to an instruction on a lesser included offense "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Beck v. Alabama*, 447 U.S. 625, 635 (1980) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). The Supreme Court holds that this safeguard is necessary because "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the 'third option' of conviction on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. An instruction on a lesser included offense is required by due process only if warranted by the evidence. *Hopper v. Evans*, 456 U.S. 605, 611 (1982).

"Contrary to" Prong

Petitioner is correct that the Arizona Supreme Court did not cite *Beck* in its analysis of Claim 2. However, a state court decision is not rendered contrary to clearly established Supreme Court law solely by lack of citation to that law. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (noting that a state court need not even be aware of controlling Supreme Court law as long as "neither the reasoning nor the result" of its decision contradicts that law). Rather, a decision is contrary to Supreme Court law if it (1) arrives at an opposite conclusion on a question of law, or (2) arrives at a different result when faced with materially identical facts. *Williams*, 529 U.S. at 405.

The Arizona Supreme Court's analysis of Claim 2 is consistent with and not contrary

to the governing principles set forth in *Beck* and *Hooper*. Petitioner's sole argument before the supreme court was that voluntary intoxication mandated a second degree murder instruction. The court determined that, because intoxication did not entirely negate premeditation, evidence of intoxication alone did not warrant a second degree murder instruction. *Lopez I*, 163 Ariz. at 112-13, 786 P.2d at 963-64. Because Petitioner did not argue that any other evidence indicated a jury could rationally find Petitioner guilty of second degree and not first degree murder, as would be required under *Beck*, the Arizona Supreme Court did not reach a conclusion contrary to clearly established Supreme Court law. Additionally, Petitioner has not pointed to, and the Court is not aware of, any Supreme Court cases with materially identical facts in which a second degree murder instruction was required.

Unreasonable Application Prong

Petitioner cites evidence at trial indicating he was intoxicated during the relevant time period. Evidence of voluntary intoxication at the time of the crimes is not sufficient, as a matter of law, to negate premeditation. In *State v. Schurz*, 176 Ariz. 46, 54-55, 859 P.2d 156, 164-65 (1993), the Arizona Supreme Court noted that under A.R.S. § 13-503, "the jury may consider voluntary intoxication in determining culpable mental state only when the culpable mental state of 'intentionally or with the intent to' is a necessary element of the offense." *See also State v. Ramos*, 133 Ariz. 4, 5, 648 P.2d 119, 120 (1982) (in light of the passage of § 13-503 "the jury may consider [voluntary] intoxication only if the crime charged requires the culpable mental state of intentionally or with the intent to"). The *Schurz* court further noted that under A.R.S. § 13-1105(A)(1) the culpable mental state for murder in the first degree is "[i]ntending or knowing that his conduct will cause death." 176 Ariz. at 54-55, 859 P.2d at 164-65. These statutory provisions were passed in 1980 and were in effect at the time of the victim's murder. *See Ramos*, 133 Ariz. at 5, 648 P.2d at 120. In light of these statutory changes, the court stated:

> The question before us is whether voluntary intoxication is material

> because the charge against the defendant is "intending *or* knowing" rather than merely "knowing." Knowing is a less culpable mental state than intent but is included within it so that whenever a jury determines that a defendant has acted intentionally, it has necessarily concluded that he acted knowingly. A.R.S. § 13-202(C). *Having concluded that the defendant acted knowingly, the jury may not consider voluntary intoxication with respect to the defendant's culpable mental state. It follows that the giving of a voluntary intoxication instruction in a murder case in which both intent and knowing are alleged would be improper.* It would be plainly violative of A.R.S. § 13-503. In short, the "intending" component of an allegation of "intending or knowing" is superfluous. The jury should never reach the question of intent and, thus, the voluntary intoxication instruction would always be erroneous. As a matter of logic and statutory construction, an allegation of "intending or knowing" is indistinguishable from an allegation of "knowing." An inexorable result of the statute, then, is that voluntary intoxication under A.R.S. § 13-503 will be considered by the jury only when intent is alleged and knowing is not alleged.

Schurz, 176 Ariz. at 55, 859 P.2d at 165 (emphasis added).

In light of the provisions in A.R.S. §§ 13-503 and 13-1105(A)(1), the holdings of the Arizona Supreme Court, and the fact that the trial court instructed the jury that the proper mental state in support of premeditated first degree murder is that the defendant intended *or* knew his conduct would cause the death of another, voluntary intoxication does not negate a finding of first degree murder. Therefore, Petitioner was not entitled to a second degree murder instruction based on possible intoxication.

Petitioner also asserts that evidence that the murder was chaotic and impulsive in nature supported a lesser included second degree murder instruction. Although the murder scene was chaotic, there was no significant evidence presented at trial indicating a lack of premeditation. Specifically, there was no evidence of "sudden quarrel or heat of passion" that would negate a finding of premeditation under statutory law. *See* A.R.S. § 13-1101.1 (West 1988). The crime scene indicated an extended and significant struggle between the perpetrator and the victim, as reflected by the following evidence: the screen door was pushed outwards and had blood on it (RT 4/20/87 at 49); the bookcase was not upright and items from it were on the floor (*id.*); there were blood spatters on the living room walls, in the bed area, on the bathroom door, and on the kitchen walls and table (*id.* at 51-54); and the victim had defensive wounds on her arm (*id.* at 77; RT 4/22/87 vol. II at 9). Additionally,

the victim was stabbed approximately twenty-three times and her throat was cut (RT 4/22/87 vol. II at 5), the body was found with a pillow over her face, she was blindfolded with her pajama bottoms, and a long scarf was stuffed in her mouth (RT 4/20/87 at 44, 45; RT 4/22/87 vol. II at 5).

This evidence highlights the prolonged nature of the crime, and the fact that Petitioner's actions were premeditated and designed to cause death. *See Carriger v. Lewis*, 971 F.2d 329, 336 (9th Cir. 1992) (en banc) (relying on evidence that the victim was bound, beaten and strangled to conclude second degree murder instruction not warranted). The evidence presented at Petitioner's trial is entirely distinguishable from the *Vickers* case, upon which Petitioner relies, because Vickers presented evidence that he was prone to impulsive aggression and that he suffered from a brain disorder that caused his aggressive behavior. *Vickers*, 798 F.2d at 372. In contrast, Petitioner cites primarily limited testimony that he was intoxicated to some degree on the night of the crimes.

Finally, Petitioner was convicted of not only first degree murder, but also kidnaping, sexual assault, and burglary. Both kidnaping and burglary required the jury to find that Petitioner acted intentionally. These verdicts reflect a finding by the jury that, to the extent Petitioner was intoxicated, he was still capable of forming intent. Even if the jury thought the evidence of intoxication negated the culpable mental state of "intent to" for murder, by statutory definition intoxication cannot diminish the mental state of "knowingly." Petitioner has not pointed to anything in the record that would undercut the overwhelming evidence indicating that Petitioner's acts were done with "knowledge" that they would kill the victim. Additionally, the opening and closing arguments indicate that the thrust of Petitioner's defense was that he did not commit murder at all (RT 4/20/87 at 23, 26; RT 4/27/87 at 23, 27-39), not that he committed a lesser degree murder of murder. *See Beck*, 447 U.S. at 637 (reasoning that safeguard of lesser included instruction is necessary when evidence leaves no question defendant committed serious violent crime but there is doubt on an element of the capital offense). For all of these reasons, a lesser included offense instruction was not

required.

Petitioner was not constitutionally entitled to a second degree murder instruction; thus, it was not objectively unreasonable for the Arizona Supreme Court to deny this claim. Claim 2 is denied.

Claim 5: Insufficient Evidence of Sexual Assault

Petitioner argues there was insufficient evidence to support his conviction for sexual assault. In particular, he contends there was no evidence of force or trauma to the victim's vaginal area, and the evidence did not prove Petitioner was the source of the semen found in the victim's body. Petitioner argues that the evidence established only that the semen came from a blood type B secretor and that a large number of people of various races are in that group; additionally, there was no eyewitness testimony regarding the attacker's race.

The Arizona Supreme Court denied this claim based on the clearly established Supreme Court law set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Lopez I*, 163 Ariz. at 112, 786 P.2d at 963. In *Jackson*, the Court held that when assessing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S. at 319. This type of claim is properly analyzed under the deferential standard of § 2254(d)(1); thus, the Court asks whether it was an objectively unreasonable application of *Jackson* for the Arizona Supreme Court to deny this claim. *See Sarausad v. Porter*, 479 F.3d 671, 677-78 (9th Cir.), *vacated in part on other grounds*, 503 F.3d 822 (9th Cir. 2007).

Petitioner was convicted under A.R.S. § 13-1406(A), which provides that sexual assault is committed "by intentionally or knowingly engaging in sexual intercourse . . . with any person without consent of such person." First, despite the absence of physical trauma to the victim's vaginal area, there is sufficient and uncontradicted evidence that someone had sexual intercourse with the victim without her consent. The evidence established that there was semen and sperm in the victim's body (RT 4/22/87 vol. II at 19), and the toxocologist

believed the sexual act occurred just prior to death (*id.* at 24). There was considerable evidence of a significant struggle with the perpetrator and a lack of consent by the victim – the victim's throat was cut and she sustained more than twenty stab wounds (*id.* at 5), the body was found essentially naked with a pillow over her face, she was blindfolded with her pajama bottoms, and a long scarf was stuffed in her mouth (*id.*; RT 4/20/87 at 44, 45).

Second, there was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that Petitioner was the source of the semen and the person who had committed the sexual assault. The semen in the victim's body was from a blood type B secretor, the category to which Petitioner belongs; this type is found in four percent of the caucasian population, ten percent of the black population, and seven percent of the Hispanic population. (RT 4/22/87 vol. II at 44.) Blood found inside the victim's apartment, that did not belong to the victim, was consistent with Petitioner's blood type, which is found in less than one percent of the population. (*Id.* at 74.) Petitioner's palm print was found on the victim's kitchen wall (RT 4/22/87 vol. I at 16); Petitioner's finger print was found on the victim's window frame and on a piece of glass from a window broken out from the apartment (*id.* at 19, 22). There was diluted blood in the victim's sink, indicating someone had used it to wash up. (RT 4/20/87 at 56.) A neighbor of the victim saw Petitioner walking down her street between 5:30 and 6:00 the morning of the crime, and he looked wet to her like he had washed off. (RT 4/21/87 at 94-95.)

In light of all the above evidence, which was essentially uncontroverted, the Court finds pursuant to *Jackson* that a rational jury could have found Petitioner guilty beyond a reasonable doubt of sexual assault. The Arizona Supreme Court's decision was not unreasonable; therefore, this claim is denied.

Claim 7: Failure to Consider Mitigation

Petitioner alleges that the sentencing judge failed to consider and weigh mitigating evidence, and that Arizona law precluded consideration of evidence not proven to have a causal connection to the crime.

Petitioner alleges that he presented the following significant evidence: he was intoxicated at the time of the crime; he suffered from pathological intoxication; he was homeless at the time of the crime; he had a history of substance abuse including the inhalation of toxic substances; he came from a dysfunctional family with severe problems and financial hardships; he had been abandoned by his father at a young age; he dropped out of high school and reads on a sixth grade level; some of his brothers have serious substance abuse problems and were imprisoned for violent behavior including homicide; and he had become a model prisoner. Petitioner alleges the judge failed to consider and weigh this evidence, as demonstrated by his failure to find that Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired, *see* A.R.S. § 13-703(g)(1), and his finding that Petitioner did not establish good behavior during incarceration. Further, the judge failed to mention Petitioner's intoxication and dysfunctional family with a history of substance abuse. Petitioner argues that the trial court failed to consider this evidence because Arizona law prohibited its consideration if no nexus to the crime was established.

Background

After remand, during the resentencing proceeding, Petitioner urged the court to find two mitigating circumstances – diminished capacity due to pathological intoxication and that Petitioner had evolved into a model prisoner. (ROA 97 at 8-10; RT 7/13/90 P.M. at 4-5, 56-69; RT 8/3/90 at 19-25.) The other mitigating circumstances identified by Petitioner in the Amended Petition appear to have been taken primarily from the PSR.

At sentencing, the judge stated, "the court has reviewed all of the evidence and exhibits presented at the hearing on July 13. The court has further reviewed the State's supplemental sentencing memoranda and the defendant's post hearing memoranda concerning aggravating and mitigating factors." (RT 8/3/90 at 2.) The court noted that it conducted a new proceeding at which Petitioner was given the opportunity to establish any mitigating circumstances "of any nature whatsoever," whether set forth in the statute or not.

(*Id.* at 35-36.) The court further stated, "the court has considered all testimony and materials and evidence received at the time of the hearing on July 13, 1990." (*Id.* at 36.) The court made findings as to each available statutory mitigating circumstance, including Petitioner's argument that he was unable to appreciate the wrongfulness of his conduct or conform it to the law. (*Id.* at 40-41.) Further, the court considered and rejected Petitioner's argument that he was a model prisoner. (*Id.* at 41-42.) The court again reiterated that it had considered all trial evidence relevant to aggravating and mitigating circumstances and the testimony presented at the separate sentencing hearing, and that counsel had been given an opportunity to argue the existence of any mitigating circumstances whether statutory or not. (*Id.* at 42.) The court concluded there were no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at 43.)

The Arizona Supreme Court reviewed the evidence Petitioner presented during his resentencing proceeding regarding intoxication as evidence of the (G)(1) statutory mitigating factor. The court found that "[t]he trial court weighed this new evidence along with all of the other evidence in the record," but that Petitioner had failed to establish the (G)(1) factor. *Lopez II*, 175 Ariz. at 413, 857 P.2d at 1267. The court further agreed with the trial court that Petitioner had not proven pathological intoxication, therefore, it was not a mitigating circumstance. *Id.* at 414, 857 P.2d at 1268. Finally, the court rejected Petitioner's argument that the trial court failed to consider intoxication as non-statutory mitigation. *Id.* at 415-16, 857 P.2d at 1269-70. The Arizona Supreme Court agreed with the trial court that Petitioner's behavior in prison was not mitigating. *Id.* at 416-17, 857 P.2d at 1270-71.

Analysis

A sentencing court is required to consider any mitigation offered by a defendant, including non-statutory mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Ceja v. Stewart*, 97 F.3d 1246, 1251 (9th Cir. 1996). In *Lockett* and subsequently in *Eddings v. Oklahoma*, the Supreme Court held that under the Eighth and Fourteenth Amendments the sentencer must be allowed to consider, and may not refuse to consider, any constitutionally

relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982). Constitutionally relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. However, while the sentencer must not be foreclosed from considering relevant mitigation, "it is free to assess how much weight to assign such evidence." *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998); *see Eddings*, 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given the relevant mitigating evidence."). On habeas review, a federal court does not evaluate the substance of each piece of evidence submitted as mitigation; rather, it reviews the state court record to ensure the state court allowed and considered all relevant mitigation. *See Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (when it is evident that all mitigating evidence was considered, the trial court is not required to discuss each piece of evidence).

As noted by Petitioner (Dkt. 178 at 52-53), the judge made specific findings on the mitigating factors urged by Petitioner – pathological intoxication and model prisoner behavior. While Petitioner disagrees with the court's findings, the court clearly considered the evidence, which is the constitutional issue. Petitioner argues that a constitutional violation arises because the judge did not mention any other mitigation and did not weigh it against the aggravation. While Petitioner did not contend in state court that any other evidence in the record was specifically mitigating, the judge clearly articulated more than once that he considered all the mitigation presented, whether statutory or not, and found that it did not warrant leniency. The lack of discussion regarding specific mitigation does not amount to a constitutional violation. *See Parker v. Dugger*, 498 U.S. 308, 314-15, 318 (1991) (the sentencing court properly considered all information, including nonstatutory mitigation, where the court stated that it considered all the evidence and found no mitigating circumstances that outweighed the aggravating circumstances); *Moormann v. Schriro*, 426 F.3d 1044, 1055 (9th Cir. 2005) ("the trial court need not exhaustively analyze each mitigating factor as long as a reviewing federal court can discern from the record that the

state court did indeed consider all mitigating evidence offered by the defendant").

Although not articulated as such, Petitioner's argument appears to be that because the trial court did not find his mitigation sufficient for leniency it must not have considered all of it. There is a distinction between "a failure to consider relevant evidence and a conclusion that such evidence was not mitigating"; the latter determination does not implicate a defendant's federal constitutional rights. *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir. 2006). Thus, the fact that the court found the evidence "inadequate to justify leniency . . . did not violate the Constitution." *Ortiz*, 149 F.3d at 943; *Eddings*, 455 at 114-15.

Petitioner contends that Arizona law required application of a causal connection between mitigating evidence and the crime; therefore, this Court must assume the trial court applied the requirement and on that basis excluded consideration of certain mitigation. First, this misconstrues Arizona law. *See State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (mitigating evidence must be considered regardless of whether there is a "nexus" between the mitigating factor and the crime, but the lack of a causal connection may be considered in assessing the weight of the evidence). Second, pointedly absent from Petitioner's argument is any citation to the record indicating the court applied a causal connection. While Petitioner is correct in the abstract that courts generally presume a judge followed the law, such a presumption is only required when the court's decision leaves something unspoken. *See Bell v. Cone*, 543 U.S. 447, 455-457 (2005). In this case, the trial court clearly stated that it considered everything presented upon resentencing for purposes of aggravation and mitigation. That is all the constitution requires. *See Ortiz*, 149 F.3d at 943. Presuming the trial court applied a causal connection requirement and thereby excluded consideration of evidence as mitigation is contrary to the record and Arizona law. Finally, Petitioner's argument would require presuming that the trial court both applied Arizona law in an unconstitutional manner but did not apply governing federal constitutional law.

Moreover, the Arizona Supreme Court independently reviewed the record and agreed that "there are no mitigating circumstances, statutory or otherwise, sufficiently substantial

to call for leniency." *Lopez II*, 175 Ariz. at 417, 857 P.2d at 1271. Even if the trial court had committed constitutional error at sentencing, a proper and independent review of the mitigation and aggravation by the Arizona Supreme Court cured any such defect. *See Clemons v. Mississippi*, 494 U.S. 738, 750, 754 (1990) (holding that appellate courts are able to fully consider mitigating evidence and are constitutionally permitted to affirm a death sentence based on independent re-weighing despite any error at sentencing). Claim 7 is denied.

Claim 8: Unconstitutional Application of the (F)(6) Aggravating Factor

Petitioner alleges there was insufficient evidence to support the trial court's finding of the (F)(6) aggravating factor – that the crime was cruel, heinous, and depraved.

Background

The trial court found that the crime was both cruel and heinous/depraved. The court cited the following trial evidence to support the cruelty finding:

> The evidence established beyond a reasonable doubt that on October 29, 1986, the defendant broke into the home of Estafana Holmes. He raped her, beat her and then brutally murdered her.
>
> The evidence at trial shows that there was a tremendous struggle inside the victim's residence. Blood spatter was located on the floor in the kitchen, living room and the bathroom. Blood spatter was also observed on the walls in the kitchen and the bathroom. Samples of the blood were consistent with the victim's. The pools of blood reflected in the photographs admitted into evidence clearly indicate that at one point during the struggle the victim was at least erect bleeding on to the floor, standing erect bleeding on to the floor. Undoubtedly she was either fighting the defendant and/or begging for her life. Other signs of struggle inside the residence include a front screen door that was bent inward and a broken window. Evidence indicates that the window was broken from the inside out.
>
> The victim, Estafana Holmes, was 59 years old. She was a small woman. She was approximately five foot two inches tall, weighed 124 pounds. When Miss Holmes' body was discovered on the morning of the 29th, she was nude from the waist down. The defendant had taken her pajama bottoms, tied them snugly around her eyes. A white lace scarf had been crammed tightly into her mouth.
>
> Dr. Thomas Jarvis testified that Miss Holmes had approximately 23 stab wounds in the left breast and upper chest area. Many of these wounds would have by themselves been potentially fatal. Her throat was cut. She had three superficial lacerations on her right arm. She had superficial lacerations on her

> right arm which were characterized as defensive type wounds. The victim had three lacerations on her scalp and a stab wound to her left cheek.
>
> According to Dr. Jarvis, these wounds were not fatal, but would have caused a considerable amount of bleeding. Essie Holmes had bruises on her head and left hand. Dr. Jarvis noticed dried blood streaming down her body and blood-sustained [sic] feet. In his opinion, Mrs. Holmes was at some point either standing or sitting erect. Vaginal swabs taken at the autopsy showed the presence of semen and spermatozoa. According to Dr. Jarvis, none of the wounds were post-mortem.

(RT 8/3/90 at 37-39.)

In support of the court's finding that the crime was heinous or depraved, the court cited the following evidence: "The defendant's sexual assault of the victim, whether occurred before or after death, the securing, the securing of the pajama bottoms about her eyes, the cramming of a scarf in the victim's mouth, all constitute evidence of the defendant's heinous and depraved mind." (*Id.* at 39.)

The Arizona Supreme Court upheld both prongs of the (F)(6) factor, finding:

> A murder is especially cruel if the victim consciously experiences physical abuse or mental anguish before death. Mental suffering includes uncertainty over one's ultimate fate. The victim's suffering, however, must have been foreseeable to the defendant.
>
> The victim in this case was stabbed 23 times in the upper chest and three times in the abdomen. Her throat was cut. She was sexually assaulted and had semen in both her vagina and anus. She had defensive wounds on her forearms. There were bruises on her body. The apartment was knocked asunder, evidencing a terrific struggle for life during which the victim was obviously conscious. The top of the victim's shoes were bloodied, indicating that she had been standing up at some point after being stabbed. This grisly and ultimately fatal nightmare lasted from three minutes to as long as 15 minutes.
>
> Obviously, the victim endured great physical and mental suffering over a relatively protracted period of time while she struggled for her life. Her suffering was not only foreseeable, it was unavoidably obvious to the defendant.
>
> . . . .
>
> Heinousness and depravity focus on the defendant's state of mind at the time of the offense. In *Gretzler*, the court set forth several specific factors, which earlier cases suggested could appropriately be considered in determining whether a murder was especially heinous or depraved. They were: (1) whether defendant relished the murder; (2) whether defendant inflicted gratuitous violence beyond that necessary to kill; (3) whether the defendant

> mutilated the victim's body; (4) whether the crime was senseless; and (5) whether the victim was helpless.
>
> Several of these items are satisfied here. The defendant inflicted gratuitous violence on the victim. Notwithstanding Dr. Keen's testimony that the wounds were all consistent with an attempt to inflict death, and the defendant's interpretation of that testimony as meaning that he repeatedly stabbed the victim out of surprise that she did not immediately die, the clear fact is that the multiple stab wounds in the chest and the abdomen, along with the throat cutting, certainly qualify as gratuitous violence. We reject defendant's argument that he should be credited with a wholesome mind because he chose a murder weapon that did not cause death instantaneously. Moreover, the knife wounds to the face, the sexual assault, the binding of the victim's eyes, and the gagging of her mouth were not directed toward killing the victim and clearly bespeak gratuitous violence.
>
> The murder also was senseless. Although the defendant clearly intended to kill the victim, there was no reason to do so. The sexual assault could have been committed without the murder, and no other reason for the killing is apparent from the record. Nothing in the record suggests that the defendant and the victim knew each other or had any prior contact.
>
> This case also meets the "helplessness" test of *Gretzler*. The victim was a 59-year-old, 124-pound woman. The defendant is a young man, then aged 24, and in apparent good health. The victim was gagged so she could not call out for help. At some point, she was blindfolded so she could not see. Although there was evidence of a prolonged struggle, for all practical purposes this uneven match was over after the first serious wounds were inflicted on the victim. In prior cases, we have held that a victim is helpless when disabled and unable to resist the murder.

Lopez II, 175 Ariz. at 411-12, 857 P.2d at 1265-66 (citations omitted).

Analysis

The appropriate standard on federal habeas review of a state court's application of an aggravating circumstance is the "rational factfinder" standard; i.e., "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating factor to exist. *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990) (quoting *Jackson*, 443 U.S. at 319). This type of claim is properly analyzed under the deferential standard of § 2254(d)(1); thus, the Court asks whether it was an objectively unreasonable application of *Jackson* for the Arizona Supreme Court to deny this claim. *See Sarausad*, 479 F.3d at 677-78.

To dispute the cruelty finding, it appears Petitioner is arguing that he could not foresee

that the victim would suffer because of his impaired state of mind. As stated by the Arizona Supreme Court and recited above, and as noted by Petitioner (Dkt. 178 at 65), it is sufficient if the victim's suffering is foreseeable; the State is not required to prove that a defendant in fact foresaw the suffering. *See State v. Trostle*, 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997) (the requirement is that defendant knew or "should have known" the victim would suffer). The lengthy, brutal struggle and numerous injuries which the victim endured unquestionably caused her to suffer physically and mentally, and that suffering was necessarily foreseeable.

Petitioner also argues that he could not form the mental state necessary for the heinous/depraved prong of the (F)(6) factor. Although Arizona caselaw refers to a defendant's "state of mind" at the time of the offense as the relevant issue for the heinous/depraved prong, the determination is based on the perpetrator's "words and acts" not on a subjective mental state. *See State v. Fulminante*, 161 Ariz. 237, 255, 778 P.2d 602, 620 (1988). More specifically, there are five non-exclusive factors used by the courts to determine if a murder was heinous or depraved: relishing of the murder, the infliction of gratuitous violence, mutilation of the victim's body, senselessness of the murder, and the helplessness of the victim. *Id.* at 256, 778 P.2d at 621 (citing *State v. Gretzler*, 135 Ariz. 42, 52-53, 659 P.2d 1, 11-12 (1983)). Thus, a defendant's brain function or mental health are not assessed in applying the (F)(6) prong; rather, impaired capacity is appropriately categorized as mitigation.

Petitioner also argues that the findings of senselessness, helplessness, and gratuitous violence are not supported by the evidence. Viewing the evidence in the light most favorable to the State, a rationale trier of fact could find each one of these *Gretzler* factors. A fact finder could determine from the record that the purpose of the crime was the sexual assault, and the murder was not necessary to achieve that goal. Therefore, the murder was senseless. The age and size disparity between Petitioner and the victim, and the fact that she was gagged and blindfolded at some point during the assault, support the finding that she was helpless. Finally, as stated by the Arizona Supreme Court, the more than twenty stab

wounds, the cutting of the victim's throat, and the numerous other injuries, as well as the gagging and sexual assault of the victim all evidence gratuitous violence.

Even if Petitioner were to rebut one prong of the (F)(6) factor, Arizona law indicates that the finding of either especial cruelty or especial depravity alone will establish the (F)(6) factor and that the validity, or lack thereof, of the other prong does not affect the weight given to the circumstance. *See, e.g., State v. Djerf*, 191 Ariz. 583, 597, 959 P.2d 1274, 1288 (1998) ((F)(6) circumstance upheld based on cruelty alone without considering validity of depravity finding); *State v. Towery*, 186 Ariz. 168, 188, 920 P.2d 290, 310 (1996) (same); *State v. Roscoe*, 184 Ariz. 484, 500-01, 910 P.2d 635, 651-52 (1996) (upholding (F)(6) factor based on cruelty after invalidating depravity finding); *State v. Bolton*, 182 Ariz. 290, 312, 896 P.2d 830, 852 (1995) ((F)(6) factor upheld based on cruelty alone without considering depravity finding).

A rational fact finder could determine that the (F)(6) aggravating factor was satisfied; therefore, the Arizona Supreme Court's denial of this claim was not an unreasonable application of *Jackson*. Claim 8 is denied.

CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. The Court further finds that additional evidentiary development in this matter is neither warranted nor required.

CERTIFICATE OF APPEALABILITY

In the event Petitioner appeals from this Court's judgment, and in the interests of conserving scarce resources that might be consumed drafting and reviewing a request for a certificate of appealability (COA) to this Court, the Court on its own initiative has evaluated the claims within the petition for suitability for the issuance of a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a

COA or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate whether (1) the petition states a valid claim of the denial of a constitutional right and (2) the court's procedural ruling was correct. *Id.*

The Court finds that its procedural ruling finding Claim 1C procedurally defaulted in part, as discussed in this Order, is adequate to proceed on appeal. For the reasons stated in the Court's orders regarding the procedural status of Petitioner's claims filed on January 7, 2003 (Dkt. 92), and November 7, 2005 (Dkt. 160), the Court declines to issue a COA with respect to any other claims or portions of claims that were found to be procedurally barred. The Court finds that reasonable jurists, applying the deferential standard of review set forth in the AEDPA, which requires this Court to evaluate state court decisions in the light of clearly established federal law as determined by the United States Supreme Court, could not debate its resolution of the merits of Petitioner's claims as set forth in this Order nor its orders of March 25, 2004 (Dkt. 131), and November 7, 2005 (Dkt. 160).

Accordingly,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 27) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered on January 14, 1998 (Dkt. 3) is **VACATED**.

IT IS FURTHER ORDERED GRANTING a Certificate of Appealability as to the following issue:

Whether Claim 1C of the Amended Petition – alleging ineffective assistance

of counsel for failure to investigate and prepare the case for sentencing including failure to prepare the expert – is, in part, procedurally barred.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Rachelle M. Resnick, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 15th day of July, 2008.

Stephen M. McNamee
United States District Judge

EXHIBIT C

FILED ___ LODGED
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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

Roger Mark Scott, Petitioner, v. Terry Stewart, et al., Respondents.	CV-97-1554-PHX-PGR **ORDER**

Petitioner Roger Mark Scott ("Petitioner") filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (File doc. 1).[1] The Second Amended Petition raises seven claims, including numerous subclaims. (File doc. 111). This Order addresses procedural bar and other issues raised by Respondents' Answer to the Petition. For the reasons set forth herein, the Court finds that Claims 1 (in part), 2, 3 (in part), 5 (in part), and 6(D) are procedurally barred. Claims 1 (in part), 3 (in part), 5 (in part), 6(B), and 6(F) are not cognizable on federal habeas review. Claims 3 (in part), 4, 6(A) (in part), 6(C), and 7 are meritless. Claims 6(A) (in part) and 6(E) are premature and not yet ripe for review. Claim 1 (in part) will be decided on the merits in a

[1] Petitioner filed his initial Petition for Writ of Habeas Corpus on July 25, 1997. (File doc. 1). This Court has therefore applied the applicable provisions of the Antiterrorism and Effective Death Penalty Act to this case. *See* Lindh v. Murphy, 521 U.S. 320, 336 (1997).

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

(119)

separate order.

BACKGROUND

In the late morning on Saturday, December 2, 1989, Petitioner and James Styers took Debra Milke's son, Christopher, to the desert to kill him. State v. Scott, 177 Ariz. 131, 134, 865 P.2d 792, 795 (1993). Milke and Styers had offered Petitioner $250 if he would drive the car. Id. In the desert, they stopped the car near a wash, and Petitioner and Styers took Christopher into the wash "to look for snakes." Id. Styers told Petitioner that he planned to leave Christopher's body close to the road so that it would be found in a few days. Id. Styers then told Petitioner to drive the car north a little ways, then to turn around and pick Styers up south of the wash. Id.

Petitioner drove north, turned around, and came back to the wash area but was unable to pull over because there was traffic behind him. Id. After making several passes by the wash, Petitioner pulled over and got out of the car. Id. He then heard three shots being fired. Id. Styers came out to the road and got into the car. Id. As Petitioner drove, Styers tossed the bullet shells out the window between 99th and 83rd Avenues. Id.

Petitioner drove to the Metrocenter shopping mall. Id. Styers reported to mall security that he had taken Christopher to the mall to see Santa Claus, but that Christopher had disappeared while Styers was using the restroom. Id. Metrocenter security then called the police. Id.

In the mid-afternoon, Styers and a Sears employee approached Petitioner in the mall and asked him if he had seen Christopher. Id. Petitioner said that he had not seen Christopher and that Petitioner had come to the mall with a friend named Phil. Id. Styers and Petitioner then went into the parking lot, where Styers gave Petitioner the gun and Styers' tennis shoes. Id. Petitioner threw the shoes into a planter in the parking lot and took the gun home. Id. at 134-35, 865 P.2d at 795-96.

Styers remained at the mall. Id. at 135, 865 P.2d at 796. At about 12:30 a.m. the next day, Styers told the police that he had been with Petitioner and Christopher during the previous morning. Id. Police then went to Petitioner's home, and Petitioner told police the same story

that Styers had told them. Id. A few hours later, police asked Petitioner to come to the police station, and Petitioner voluntarily went to the station. Id. At the station, Petitioner twice repeated the story he earlier gave to the police. Id.

At about 12:45 p.m. on Sunday, a detective read Petitioner his Miranda rights. Id. A few hours later, Petitioner told the detective that the "Phil" story was a lie, and he then led police to Christopher's body. Id. He also showed police where Styers had thrown the bullet shells and the tennis shoes which had been thrown in the planter. Id.

Petitioner was charged with first degree murder, conspiracy to commit first degree murder, and kidnaping. (R.O.A., Item No. 1). A jury found Petitioner guilty on all three counts. (R.O.A., Item Nos. 59, 60, 62). Petitioner was sentenced to death on the first degree murder count. (M.E. 4/22/91).

A notice of appeal was filed on April 30, 1991. (R.O.A., Item No. 499). The Arizona Supreme Court denied the appeal and affirmed Petitioner's convictions and sentences on December 21, 1993. Scott, 177 Ariz. at 145, 865 P.2d at 806. Petitioner filed a Motion for Reconsideration on January 5, 1994, which was summarily denied on February 15, 1994. An unsuccessful petition for writ of certiorari was filed in the United States Supreme Court. Scott v. Arizona, 513 U.S. 842 (1994) (denying certiorari review).

A notice for post-conviction relief was filed on October 14, 1994. On May 31, 1995, Petitioner filed a Petition for Post-Conviction Relief ("PCR") pursuant to Ariz. R. Crim. P. 32. (R.O.A., Item No. 532). In the post-conviction proceedings, the trial court ("Rule 32 court") scheduled oral argument (M.E. 11/6/95) and an evidentiary hearing (M.E. 1/18/96). The Rule 32 court subsequently requested both parties to submit proposed findings of fact and conclusions of law. (R.O.A., Item No. 609). The Rule 32 court eventually dismissed the PCR. (M.E. 6/11/96).

Following a change of counsel in the post-conviction proceedings, Petitioner filed a Motion to Vacate Order Denying Post-Conviction Relief (R.O.A., Item No. 634). He also filed a Motion for Extension of Time and Leave to File a Motion for Rehearing Nunc Pro Tunc and Amended Petition for Post-Conviction Relief (R.O.A., Item No. 636). The Rule 32 court

denied both motions. (M.E. 12/11/96).

Petitioner filed a Petition for Review in the Arizona Supreme Court seeking review of the post-conviction proceedings. (R.O.A., Item No. 649). He subsequently filed an Amended Petition for Review. (R.O.A., Item No. 654). The Arizona Supreme Court denied the Amended Petition for Review without comment on June 24, 1997.

On July 25, 1997, Petitioner filed a Petition for Writ of Habeas Corpus in this Court. (File doc. 1). He filed an Amended Petition (File doc. 53) on May 5, 1998, and a Second Amended Petition (File doc. 111) on July 26, 1999. Along with his Second Amended Petition he submitted a supporting memorandum. (File doc. 112). Respondents filed an Answer regarding the procedural status of Petitioner's claims on August 3, 1999. (File doc. 113).[2] Petitioner filed his Traverse on August 23, 1999. (File doc. 115). Respondents filed a reply on September 3, 1999, and Petitioner filed a sur-reply on September 16, 1999. (File docs. 116 & 117).

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 520 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351 (1989). A petitioner must also seek discretionary review with the state's highest court where such review "is part of the [state's] ordinary appellate review procedure[.]" O'Sullivan v. Boerckel, 526 U.S. 838, 119 S. Ct. 1728, 1733 (1999).

A claim is fairly presented if the petitioner has described the operative facts and the legal theories on which his federal habeas claim is based. Anderson v. Harless, 459 U.S. 4, 6 (1982);

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[2] The parties had previously briefed the procedural status of Petitioner's claims in relation to the first Amended Petition. See file docs. 78, 86, 89, and 92.

Picard v. Connor, 404 U.S. 270, 277-78 (1971).[3] In state court, the petitioner must describe not only the operative facts but also the asserted constitutional principle. The United States Supreme Court stated:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners 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.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995).[4] Similarly, a claim may be considered unexhausted if it includes new factual allegations which were not presented to the state court. New factual allegations render a claim unexhausted when they fundamentally alter the legal claim already considered by the state court. Vasquez v. Hillery, 474 U.S. 254, 260 (1986). Federal-state comity favors the principle that federal courts should not "entertain new evidence that places [a] claim in a significantly different posture, when that evidence was never presented to the state courts." Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988), cert. denied, 490 U.S. 1059 (1989). A federal habeas court will not review the claim unless cause and prejudice or a fundamental miscarriage of justice is established.

If there are claims which have not been raised previously in state court, the federal court must determine whether the petitioner has state court remedies currently available to him. If there are none, the claims are "technically" exhausted. Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n. 28 (1982)). However, before the Court may review a technically exhausted claim on the merits, the petitioner must demonstrate legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or

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[3] 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. Wyldes v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995), cert. denied, 517 U.S. 1172 (1996); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

[4] If the petitioner has not fairly presented a federal claim to the state's highest court, his claim may nevertheless not be procedurally barred if the state court sua sponte reaches the merits of the federal claim. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991).

show that a fundamental miscarriage of justice would result. Similarly, if a claim was raised in state court but found precluded or waived, the Court may not hear the claim absent a showing of cause and prejudice or a fundamental miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 338 (1992); Coleman, 501 U.S. at 735 n.1; Engle, 456 U.S. at 129.

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

"Prejudice" is actual harm resulting from the alleged constitutional error. Id. at 494. If a petitioner cannot meet the cause and prejudice standard, the federal court still may hear the merits of procedurally barred claims if the failure to hear the claims would constitute a "miscarriage of justice." Sawyer, 505 U.S. at 339.

The fundamental miscarriage of justice exception is also known as the "actual innocence" exception. There are two types of claims recognized under this exception: 1) that a petitioner is "innocent of the death sentence," or, in other words, that the death sentence was erroneously imposed; and 2) that a petitioner is actually innocent of the capital crime. In the first instance, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable [fact finder]" would have found the existence ofian aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. at 336. Claims regarding errors in the submission of mitigation evidence do not relate to a "condition of eligibility" and cannot form a basis for relief under this exception. Id. at 345-47.

Claims of actual innocence of the crime itself are judged under a different standard. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995). In order to meet this standard, the "petitioner must show that it is more likely than not that no reasonable juror would

have found petitioner guilty beyond a reasonable doubt." Id.[5] Furthermore:

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

Id. at 324.

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

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

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[5] Substantive (or "free-standing") claims of actual innocence must be distinguished from procedural claims. See Schlup, 513 U.S. at 313-14. In Herrera v. Collins, 506 U.S. 390 (1993), the petitioner advanced his claim of innocence to support a novel substantive 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, 513 U.S. at 316.

provides, in part:

> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
>
> . . . .
>
> (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
>
> *(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.*
>
> b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), and (g). When a claim under [these sub-sections] is raised in a successive or untimely petition, the petition must set forth the reasons for not raising the claim in the previous 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.

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

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

DISCUSSION

Claim 1: Petitioner did not receive competent representation during pretrial, trial, sentencing, appeal, and post-conviction proceedings in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 2, Section 24 of the Arizona Constitution.

In Claim 1, Petitioner alleges that he was never represented by competent counsel during any of the state proceedings and that he was thus denied a fair trial. Specifically, he claims his counsel was ineffective in the following respects:

(1) Trial counsel failed to spend adequate time to develop a coherent defense;

(2) Trial counsel failed to provide relevant materials to Dr. Tatro, one of the two court-appointed psychiatrists, and failed to meet or confer with Dr. Tatro prior to Dr. Tatro's evaluation;

(3) Trial counsel failed to ask Dr. Tatro to testify;

(4) Trial counsel failed to request another psychiatric evaluation or to relitigate the psychiatric issues even though it was clear that Petitioner could not understand the criminal process;

(5) Trial counsel failed to get Petitioner to understand and accept the plea offered by the prosecution;

(6) Trial counsel failed to launch an adequate challenge to the voluntariness of Petitioner's confession;

(7) Trial counsel failed to object to the prosecution's use of Petitioner's Rule 11.4 statements;

(8) Trial counsel introduced hearsay statements by Styers implicating Petitioner as the person who shot Christopher;

(9) Trial counsel failed to gather and present available mitigation evidence to the sentencing judge;

(10) Trial counsel asked the sentencing court not to consider the pre-sentence report, even though the report contained requests for leniency;

(11) Appellate counsel failed to investigate the ineffective assistance of trial counsel issues;

(12) Appellate counsel failed to present mitigating evidence;

(13) Appellate counsel failed to challenge the voluntariness of Petitioner's confession;

(14) Appellate counsel failed to address the sentencing judge's failure to consider the requests for leniency;

(15) Appellate counsel failed to challenge the improper use of 801(d) evidence; and

(16) Appellate counsel failed to challenge the finding of the pecuniary gain aggravating factor.

He also claims his post-conviction counsel was ineffective for failing to conduct an independent investigation, for inadequately presenting only one claim to the Rule 32 court, and for failing to present the remainder of Petitioner's constitutional claims to the Rule 32 court.

Only violations "of the Constitution or laws or treaties of the United States" may be litigated in the context of a petition for writ of habeas corpus. 28 U.S.C. § 2254(a). Therefore, Petitioner's claim that his post-conviction counsel was ineffective is not cognizable on federal habeas review since there is no right to the effective assistance of post-conviction counsel. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); see also 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during . . . State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). In addition, to the extent Petitioner claims his rights under the Arizona Constitution were violated, such claims are also not cognizable on federal habeas review.

In his PCR, Petitioner asked the Rule 32 court to set aside his sentence because his trial and appellate counsel failed to raise, and the state court failed to consider, the fact that the victim's father had asked for leniency as a mitigating circumstance. (PCR at 1). Petitioner claimed that "[b]ecause the 'plea for leniency' was considered neither at trial nor appeal, [he] is entitled to be resentenced." (PCR at 3). In his Reply in support of his PCR, Petitioner identified the claim as an ineffective assistance of counsel claim. (Reply in Support of PCR at 1). The Rule 32 court dismissed the PCR, finding that although the request for leniency was a mitigating circumstance, Petitioner had failed to show that he was prejudiced by his counsel's failure to urge that circumstance before or during the sentencing hearing. (M.E. 6/11/96) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

In a subsequent motion, Petitioner, through new post-conviction counsel, sought leave to file an amended PCR, claiming that the first post-conviction counsel failed to raise several viable claims. The Rule 32 court denied the motion pursuant to Ariz. R. Crim. P. 32. (M.E.

12/11/96). Petitioner filed an Amended Petition for Review seeking review of the Rule 32 court's dismissal of the PCR and denial of Petitioner's request to file an amended PCR. The Arizona Supreme Court denied the Amended Petition for Review without comment.

Respondents concede that to the extent Petitioner claims his trial counsel was ineffective for failing to argue the victim's father's plea of leniency, such a claim was properly exhausted. The Court will therefore review the merits of that allegation. In all other respects, however, the Court finds that Claim 1 was not fairly presented to the state court. Petitioner did not raise any other allegations of ineffective assistance of counsel in a procedurally appropriate manner to the state's highest court. See Castille, 489 U.S. at 351. Although he attempted to raise many of these allegations in an amended PCR, the state court found that an amended PCR could not be properly filed under Ariz. R. Crim. P. 32.

A state court's ruling that a claim is precluded may constitute an adequate and independent ground upon which procedural default may be found. In order for an adequate state ground to bar federal review, the state must apply state law that is firmly established and regularly applied at the time of the default. See Ford v. Georgia, 498 U.S. 411, 423-24 (1991). The Rule 32 court's preclusion ruling, which is based upon Rule 32, Ariz. R. Crim. P., is a state procedural ruling that is regularly and consistently followed in Arizona and therefore constitutes an adequate and independent ground upon which a procedural default can be found. See Poland v. Stewart, 117 F.3d 1094, 1106 (1997), cert. denied, 523 U.S. 1082 (1998); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir.), cert. denied, 519 U.S. 1030 (1996). If Petitioner were now to return to state court, these ineffective assistance of counsel allegations would be precluded pursuant to Ariz. R. Crim. P. 32.2(a)(3) and they are technically exhausted. Petitioner must therefore demonstrate cause and prejudice or a fundamental miscarriage of justice in order for the Court to review these allegations on the merits.

Petitioner claims that cause exists to set aside the default in the following respects: (1) his post-conviction counsel was ineffective under the Sixth and Fourteenth Amendments, (2) the Rule 32 court appointed Petitioner incompetent post-conviction counsel and disregarded Petitioner's pleas concerning the incompetence of his counsel in violation of Petitioner's right

to due process, (3) the Rule 32 court did not permit Petitioner to file an amended PCR, and (4) the State argued that Petitioner should not be allowed to file an amended PCR.[6] "[T]he exhaustion doctrine . . . generally requires that a claim of ineffective assistance [of counsel] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Murray, 477 U.S. at 488-89. Since there is no constitutional right to be represented by competent counsel during post-conviction proceedings, Petitioner cannot demonstrate cause. Finley, 481 U.S. at 555. In addition, even ifithere were a right to competent post-conviction counsel under Arizona law, the deprivation of that right does not constitute an independent constitutional violation which may be used to establish cause. See Bonin v. Vasquez, 999 F.2d 425, 430-31 (9th Cir. 1993).

The Rule 32 court's decision not to allow Petitioner to file an amended PCR was well within its discretion. See Ariz. R. Crim. P. 32.6(d) ("no amendments shall be permitted except by leave of court upon a showing of good cause"). Moreover, even if the Rule 32 court erroneously failed to substitute post-conviction counsel or to allow Petitioner to file an amended PCR, such errors would not constitute cause for the failure of Petitioner's first PCR counsel to raise these ineffective assistance of counsel claims in a procedurally appropriate manner. The Court also rejects Petitioner's assertion that cause exists because the State argued that Petitioner should not be allowed to file an amended PCR. Absent a legitimate showing of cause, the Court will not conduct a prejudice analysis.

Petitioner summarily argues that a fundamental miscarriage of justice will occur if the Court does not review this claim on the merits. He claims that his death sentence is undermined

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[6] Petitioner also argues that the state court failed to conduct a proportionality review in violation of the Eighth Amendment and that the denial of jury participation in the determination of aggravating circumstances constitutes structural error. The Court fails to see the relevance of any of these arguments to the cause analysis. Petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. Independent substantive claims of constitutional error of the type asserted here are not objective factors external to the defense which can be used to establish cause for Petitioner's failure to raise the ineffective assistance of counsel claims in state court.

because his counsel failed to provide available mitigating evidence to the sentencing court, including the prosecution's plea offer, the victim's father's request for leniency, and testimony from Dr. Tatro. He also claims that Dr. Tatro's evaluation undermines the finding of guilt.

The Court will construe these arguments as "innocent of the death sentence" and "innocent of the crime" arguments. Petitioner has not shown "by clear and convincing evidence that, but for a constitutional error, no reasonable [fact finder]" would have found the existence of an aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Sawyer, 505 U.S. at 336. Petitioner has also not shown that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup, 513 U.S. at 327. Rather, Petitioner's claims concern alleged errors in the submission of mitigation evidence, and since such submissions do not relate to a "condition of eligibility," they cannot form a basis for relief under the fundamental miscarriage of justice exception. Sawyer, 505 U.S. at 345-47. Accordingly, Petitioner has not demonstrated that a fundamental miscarriage of justice will occur if the Court does not review the remainder of Claim 1 on the merits.

The Court will review Claim 1 on the merits only insofar as Petitioner claims that his trial counsel was ineffective for failing to argue the victim's father's plea of leniency. In all other respects, Claim 1 is either procedurally defaulted or not cognizable on habeas review, and the Court will not review those aspects of Claim 1 on the merits.

Claim 2: Petitioner was not competent to stand trial or to make an informed decision to reject the plea offer.

Petitioner admits that this claim was not presented to the state court. (File doc. 111 at 11). The Court therefore finds that this claim was not fairly presented to the state court, and if Petitioner were now to return to state court, this claim would be precluded pursuant to Ariz. R. Crim. P. 32.2(a)(3). Petitioner must therefore demonstrate cause and prejudice or a fundamental miscarriage of justice in order for the Court to review the merits of Claim 2.

Petitioner claims that cause exists to set aside the default because (1) all prior counsel were ineffective, (2) the Rule 32 court did not allow him to file an amended PCR, and (3) the

State argued that Petitioner should not be allowed to file an amended PCR. In order for a claim of ineffective assistance of counsel to constitute cause to set aside the default, it must have been presented to the state courts as an independent claim. Murray, 477 U.S. at 488-89. The only claim of ineffective assistance of counsel which was fairly presented to the state court does not establish cause with respect to Claim 2. In addition, the Rule 32 court's decision not to allow Petitioner to file an amended PCR does not constitute cause to set aside the default, because that decision constituted an adequate and independent ground upon which a procedural default can be found. See discussion, supra at 11. Even if the Rule 32 court had erred in making that decision, such an error does not provide cause for the failure of Petitioner's counsel to present this claim to the state court in a procedurally appropriate manner. Finally, the Court rejects any assertion that the State's argument that Petitioner not be allowed to file an amended PCR constitutes cause. Absent a legitimate showing of cause, the Court will not determine prejudice.

Petitioner has not demonstrated that a fundamental miscarriage of justice will occur if the Court does not review this claim on the merits. See discussion, supra, at 12-13. The Court will therefore not review Claim 2 on the merits.

Claim 3: Prior counsel failed to adequately present both statutory and nonstatutory mitigating factors in violation of Petitioner's Eighth and Fourteenth Amendment rights under the United States Constitution and his rights under the Arizona Constitution, Article II, Sections 1, 2, 4, 15, and 24.

In Claim 3, Petitioner claims that his trial counsel, the sentencing judge, and the prosecution should have been aware of potential mitigation which needed to be considered. Although not stated in so many words, it appears that Petitioner is claiming that his trial counsel was ineffective for failing to present available mitigating evidence and that the sentencing judge violated Petitioner's Eighth and Fourteenth Amendment rights by failing to consider that evidence.

To the extent Petitioner claims his trial counsel was ineffective for failing to present mitigation evidence, such a claim is procedurally barred. See discussion, supra, at 9-13. In addition, insofar as Petitioner claims that his rights under the Arizona Constitution were violated, such a claim is not cognizable on federal habeas review. 28 U.S.C. § 2254(a).

To the extent Petitioner claims that the sentencing judge failed to consider mitigation evidence, the Court finds this claim is meritless. See 28 U.S.C. § 2254(b)(2)(West 1999) (district court may deny habeas application on merits notwithstanding failure to exhaust). Petitioner has not claimed that the sentencing judge failed to consider any specific mitigating evidence that was actually presented to the sentencing judge.[7] Rather, he claims that evidence of potential mitigation "was alluded to at different times throughout the State proceedings but was not coherently or intelligently presented to the trial court with substantiation and in such a manner that the trial court could make the necessary finding that the mitigation explained how Petitioner ended up participating in this crime." The Court will not further review Claim 3.

Claim 4: Petitioner's sentence was disproportionate when his role is compared with the roles played by his two co-defendants. The state court erred in failing to perform a proportionality study, violating the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

In Claim 4, Petitioner argues that the state court should have performed a proportionality review before imposing the death sentence. Petitioner admits that he did not present this claim to the state court. (File doc. 111 at 13).

Regardless of whether Petitioner properly exhausted this claim, the Court finds that Claim 4 is meritless. See 28 U.S.C. § 2254(b)(2). There is no federal right to proportionality review where state law does not provide for such review. Pulley v. Harris, 465 U.S. 37, 43-45 (1984). In State v. Salazar, 173 Ariz. 399, 416-17, 844 P.2d 566, 583-84 (1992), cert. denied, 509 U.S. 912 (1993), the Arizona Supreme Court held that proportionality reviews would no longer be conducted in death penalty cases. Since Petitioner possessed no constitutional right to a proportionality review, the Court will deny Claim 4.

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[7] Although he alleges that the record suggests that he had an alcoholic father, he states that evidence of his father's alcoholism was not presented to the state court as mitigation. (File doc. 112 at 52). Accordingly, the state court committed no constitutional violation by not considering such mitigation. See Jeffers v. Lewis, 38 F.3d 411, 418 n. 2 (9th Cir. 1994) (en banc), cert. denied, 514 U.S. 1071 (1995).

Claim 5: The trial court's failure to make an inquiry into Petitioner's reasons for expressing concern about his trial counsel prior to trial and his adamant concerns about post conviction relief counsel was a violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment rights to a fair trial, competent counsel, and due process.

In Claim 5, Petitioner alleges that the trial court failed to make an appropriate inquiry after Dr. Tatro alerted the trial court that Petitioner had expressed concern and disappointment regarding his appointed counsel. He also claims that the Rule 32 court failed to conduct a similar inquiry after Petitioner complained about the performance of post-conviction counsel. Petitioner admits that he did not present this claim to the state court. (File doc. 111 at 14).

To the extent Petitioner claims that the Rule 32 court failed to conduct an inquiry, such a claim is not cognizable on habeas review since it is an alleged error in the state post-conviction review process. See Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir.), cert. denied, 493 U.S. 1012 (1989). Insofar as Petitioner claims that the trial court failed to conduct an inquiry prior to trial, the Court finds this claim was not fairly presented to the state court. If Petitioner were now to return to state court, this claim would be precluded pursuant to Ariz. R. Crim. P. 32.2(a)(3). Furthermore, Petitioner has not demonstrated cause for his failure to present this claim to the state court,[8] nor has he demonstrated that a fundamental miscarriage of justice will occur if the Court does not review this claim on the merits.[9] The Court finds this aspect of Claim 5 procedurally defaulted. The Court will not review Claim 5 on the merits.

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[8] In his Traverse, Petitioner appears to argue that cause exists to set aside the default. However, his cause argument does not specify with any degree of clarity which claims should be reviewed notwithstanding a procedural bar. The Court will assume that Petitioner's cause argument relates to Claim 5. Even making that assumption, however, the Court must reject Petitioner's cause argument. See discussion, supra, at 11-12.

[9] Petitioner has asserted only one fundamental miscarriage of justice argument, which this Court has already rejected. See discussion, supra, at 12-13.

Claim 6:

(A) The methods of execution used in Arizona constitute cruel and unusual punishment in violation of the Eighth Amendment.

Petitioner claims that the two methods of execution which are used in Arizona constitute cruel and unusual punishment. Specifically, he claims that both the gas chamber and lethal injection methods of execution violate the Eighth Amendment.

Regardless of whether Petitioner properly exhausted this claim, the Court finds that Petitioner's allegation that death by lethal injection is unconstitutional lacks merit. See 28 U.S.C. § 2254(b)(2); Poland, 117 F.3d at 1105. In addition, Petitioner's allegation that death by lethal gas is unconstitutional is not ripe for review, because has not yet chosen lethal gas as the method of execution to be used in his case. Id. at 1104; see A.R.S. § 13-704(B) ("A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection."). The Court will therefore dismiss this Petitioner's claim that death by lethal gas is unconstitutional.[10] The Court will not further review Claim 6(A).

(B) Treatment of inmates awaiting execution violates the Eighth Amendment.

Petitioner alleges that the treatment a death row inmate receives in the last twenty-four to forty-eight hours before an execution is inhumane. Petitioner admits that this allegation was not presented to the state court. (File doc. 111 at 16).

The Court finds that Claim 6(B) is not cognizable on federal habeas review. Habeas relief can only be granted on claims that a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the 'legality or duration' of confinement. A

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[10] Although this allegation is not ripe for review, the Court notes that since at least one of the two methods of execution available in Arizona is not unconstitutional, if Petitioner selects execution by lethal gas, he will waive his right to claim a constitutional violation. Stewart v. LaGrand, 526 U.S. 115, 119 S. Ct. 1018, 1020 (1999).

civil rights action, in contrast, is the proper method of challenging 'conditions of ... confinement.'" Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991) (citing Preiser v. Rodriguez, 411 U.S. 475, 484, 498-99 (1973)).

In Claim 6(B), Petitioner challenges only the conditions of confinement which may exist in the last twenty-four to forty-eight hours prior to his execution, not "the fact or duration of his physical confinement." See Preiser, 411 U.S. at 498. Claim 6(B) is thus not cognizable on habeas review. Moreover, even if such a claim were cognizable, it is not ripe for review since Petitioner has yet to be confined in the manner which he claims is unconstitutional. The Court will not review Claim 6(B) on the merits.

(C) The failure to consider the cost of executions as a mitigating factor violates Skipper v. South Carolina, 476 U.S. 1 (1986) and Ake v. Oklahoma, 470 U.S. 68 (1985).

Petitioner argues that the cost of implementing the death penalty should have been considered as a mitigating factor. Petitioner admits that he did not present this allegation to the state court. (File doc. 111 at 16).

Regardless of whether Petitioner properly exhausted this claim, the Court finds that Claim 6(C) is meritless. See 28 U.S.C. § 2254(b)(2). While a sentencing authority must consider all relevant mitigating evidence, "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense" continues to exist. Lockett v. Ohio, 438 U.S. 586, 604 n.12 (1978) (plurality opinion). The Arizona Supreme Court has rejected the argument that the cost of executions should be considered as a mitigating factor, because "the economic cost of the death penalty is unrelated to [the defendant], his character or record, or the circumstances of his offense." State v. Clabourne, 194 Ariz. 379, 983 P.2d 748, 757 (1999). The Court will therefore not further review Claim 6(C).

(D) The statute fails to provide for standardization in violation of the Eighth Amendment.

Petitioner claims that the Arizona death penalty statute is unconstitutional because it fails to channel the prosecutor's discretion and results in the arbitrary and capricious imposition of

the death penalty. Petitioner admits that he did not present this allegation to the state court. (File doc. 111 at 17).

The Court finds that Claim 6(D) was not fairly presented to the state court. If Petitioner were now to return to state court, this claim would be precluded pursuant to Ariz. R. Crim. P. 32.2(a)(3). In order for the Court to review Claim 6(D) on the merits, Petitioner must demonstrate either cause and prejudice or a fundamental miscarriage of justice.

Petitioner has not demonstrated that cause exists to set aside the default. See discussion, supra, at 11-12. Petitioner has also not demonstrated that a fundamental miscarriage of justice will occur if the Court does not review this allegation on the merits. See discussion, supra, at 12-13. The Court will thus not review Claim 6(D) on the merits.

(E) Petitioner is not competent to be executed.

Both Petitioner and Respondents admit that this allegation is not ripe and is premature. (File doc. 115 at 38; file doc. 113 at 29). Pursuant to Martinez-Villareai v. Stewart, 118 F.3d 628, 634 (9th Cir. 1997), aff'd, 523 U.S. 637 (1998), such a claim "must be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed." Therefore, the Court will dismiss Claim 6(E) without prejudice as premature.

(F) Petitioner is being denied a fair clemency process in violation of the Fifth, Eighth, and Fourteenth Amendments.

In Claim 6(F), Petitioner alleges that he cannot have fair clemency proceedings given the attorney general's role as the Board's legal advisor and as an advocate against Petitioner. He also alleges that the Board's selection process, composition, training, and procedures will also prevent him from receiving a fair and impartial hearing.

The Court finds that Claim 6(F) is not cognizable on federal habeas review. Habeas relief can only be granted on claims that a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Challenges to state clemency procedures or proceedings do not represent an attack on the prisoner's detention and thus do not

constitute proper grounds for habeas relief.[11] See Franzen, 877 F.2d at 26.

Claim 7: Aggravating factors, which must be found to exist beyond a reasonable doubt, are elements of the offense, not sentencing enhancers, and to find otherwise violates the Sixth Amendment to the United States Constitution's Due Process Clause.

Petitioner claims that aggravating factors, which must be found to exist beyond a reasonable doubt, are elements of the offense, not sentencing enhancers, and must therefore be found by a jury. Regardless of whether Petitioner properly exhausted this claim, the Court finds that Claim 7 is meritless. See 28 U.S.C. § 2254(b)(2). Aggravating circumstances are not elements of first degree murder. Walton v. Arizona, 497 U.S. 639, 648 (1990); see also Poland v. Arizona, 476 U.S. 147, 156 (1986) ("Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment."). The Court will not further review Claim 7.

CONCLUSION

For the reasons set forth herein, the Court finds that Claims 1 (in part), 2, 3 (in part), 5 (in part), and 6(D) are procedurally barred. Claims 1 (in part), 3 (in part), 5 (in part), 6(B), and 6(F) are not cognizable on federal habeas review. Claims 3 (in part), 4, 6(A) (in part), 6(C), and 7 are meritless. Claims 6(A) (in part) and 6(E) are premature and not yet ripe for review. Claim 1 (in part) will be decided on the merits in a separate order.

Based on the foregoing,

IT IS ORDERED that, no later than thirty (30) days following entry of this Order, Petitioner shall file a Memorandum regarding the merits of Claim 1 (in part).

IT IS FURTHER ORDERED that no later than thirty (30) days following the filing of Petitioner's Memorandum, Respondents shall file a Response Re: Merits.

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[11] Such claims, when they arise, are properly pursued under 42 U.S.C. § 1983. See, e.g., Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 118 S. Ct. 1244, 1254 (1998) (O'Connor, Souter, Ginsburg, and Breyer, JJ., concurring, and Stevens, J., concurring separately) ("minimal procedural safeguards apply to clemency proceedings"); Woratzeck v. Arizona Bd. of Executive Clemency, 117 F.3d 400, 402-03 (9th Cir. 1997) (proper vehicle for challenging clemency proceedings is a claim under 42 U.S.C. § 1983).

IT IS FURTHER ORDERED that no later than fifteen (15) days following the filing of Respondents' Response, Petitioner may file a Reply.

IT IS FURTHER ORDERED that Claims 1 (in part), 2, 3 (in part), 5 (in part), and 6(D) are procedurally barred.

IT IS FURTHER ORDERED that Claims 1 (in part), 3 (in part), 5 (in part), 6(B), and 6(F) are dismissed as not cognizable on federal habeas review.

IT IS FURTHER ORDERED that Claims 3 (in part), 4, 6(A) (in part), 6(C), and 7 are meritless and hereby denied with prejudice.

IT IS FURTHER ORDERED that Claims 6(A) (in part) and 6(E) are dismissed without prejudice as premature and not yet ripe for review.

IT IS FURTHER ORDERED that if, pursuant to Local Rule 1.10(p), Petitioner or Respondents file a Motion for Reconsideration of this Order, such motion shall be filed within fifteen (15) days of the filing of this Order. The filing and disposition of such motion does not toll the time for the filing of any merits brief scheduled under this Order.

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

DATED this 31st day of March, 2000.

Paul G. Rosenblatt
United States District Judge

Copies to all counsel of record.

EXHIBIT D

JUDITH ALLEN

JUDITH ALLEN, CLERK
BY [illegible] DEP.

FILED

95 MAY -3 AM 8:40

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Attorney for Petitioner

DA 19

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	No. CR 163419
Respondent,	)	**MOTION FOR DISCOVERY**
v.	)	
SAMUEL VILLEGAS LOPEZ,	)	
Petitioner.	)	(Assigned to the Honorable Peter T. D'Angelo, Judge)

Petitioner, pursuant to ARIZONA RULES OF CRIMINAL PROCEDURE 15 and 32, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the UNITED STATES CONSTITUTION, art. 2, 4, 13, 15 and 24 of the ARIZONA CONSTITUTION, moves that this Court order production of the materials specified below. This motion is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 3rd day of May, 1995.

By Robert W. Doyle
ROBERT W. DOYLE
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner requests that this Court order the individuals named below to produce for inspection and copying the specified documents, wherever such documents may be located, with such production to be arranged with undersigned counsel within thirty days of the day that discovery is ordered.

Counsel for Petitioner requests this discovery at this time due to recent events in this case. At the time counsel was appointed, many items typically associated with the discovery process in a death penalty case were absent from the Petitioner's permanent file. Counsel contacted all previous attorneys for the Petitioner and was told that discovery efforts had yielded no results and that they currently retained no records. Later, lawyers working separately from Petitioner's counsel were able to obtain hundreds of pages of documents including grammar school records, high school records, medical records, family member's records, and records of the Petitioner's previous imprisonment. All of these records were available in 1986 and afterward. All of the records recently found were available on request without a court order or subpoena.

These events make it absolutely necessary for Petitioner's current counsel to exhaust all efforts and find any relevant documents missed in prior efforts. Having found hundreds of pages of important documents without court assistance, Petitioner now needs an order of the Court to finish the search.

DOCUMENTS REQUESTED

Petitioner requests that this Court order the Maricopa County Attorney and/or the Arizona Attorney General to disclose to undersigned counsel, and permit him to inspect, copy and photograph, the following items:

1. All statements, memoranda or utterances by Petitioner, however recorded or preserved, whether or not signed or acknowledged by Petitioner, whether made to police officers or to other people, and the names, addresses and telephone number of any and all witnesses to the making of said statements, utterances or memoranda. If such statements were oral, they shall be reduced to written form and provided to defense counsel. If any such statements were tape recorded and/or videotaped, the defense shall be permitted to copy such videotape and/or tape recording and, in addition, any transcript made thereof. Any notes of any such statements, utterances or memoranda shall be preserved, and a copy provided to the defense.

2. Any information in the State's possession or available to the State that is exculpatory or favorable to Petitioner on the issue of guilt regarding any element of the offense of first degree murder related to the death of Estefana Arguijo Holmes or regarding any element of the other charged offenses in this case, including but not limited to:

a. All information provided by or relating to Cipriano Chayrez, including all records relating to any felony convictions, any then- or presently-pending charges, any then-pending parole or probation, any where in Arizona, both at the time of the offense and presently pending;

b. all information provided by or relating to an individual referred to as "Angel"[1] , including all records relating to any felony convictions, any then- or presently-pending charges, any then-pending parole or probation, any where in Arizona, both at the time of the offense and presently pending;

c. all information provided by or relating to an individual named Thomas Otto Watkins, including all records relating to any felony convictions, any then- or presently-pending charges, any then-pending parole or probation, any where in Arizona, both at the time of the offense and presently pending;

[1] See Testimony of Yodilia Sabori (Record of Transcript, 4/21/87; pg. 72)

d. all information provided by or relating to an individual named Cecilia Rodriquez (or Cecilia Rodriguez), including all records relating to any felony convictions, any then- or presently-pending charges, any then-pending parole or probation, any where in Arizona, both at the time of the offense and presently pending;

e. all evidence provided by or relating to any of the following prosecution witnesses, including all records relating to any felony convictions, any then- or presently-pending charges, any then-pending parole or probation, any where in Arizona, both at the time of the offense and presently pending for;

Detective Billy F. Butler

Officer Manny Gonzalez

Robert Norman Burden

Detective Larry Martinsen

Seargeant Kenneth Johnson

Yodilia Sabori

Pauline Rodriguez

Irene Rose Powers

Mike Carillo, Sr.

Mike Carillo, Jr.

Matilda Carillo

Severo Sammy Castillo

Alfred Carson Walker

Fred Carmack

Thomas Jarvis

Ramon Moreno

Bernice Hutcherson/Hutchins/Hutchinson

Kevin Sanchez

Benita Harwood

Ray Gieszl

Officer Raw

Thomas Otto Watkins

Bertha Anderson

Detective Dan Ray

Detective John Norman

Raymond Hernandez

Officer Mike Springer

Seargeant J. Burkett

Carl Rivera

Suzanne Rivera

Isabel Rivera

Sgt. H. Miller

Officer L. Stika, #3959

Officer L. Piano, #4426

Officer J. Sutto, #4482

Officer L. Ford, #3206

Officer K. Sanchez, #4230

Detective J. Chaney

R. Davis, #A348

f. any and all information including letters, reports, notes, records of telephone calls, memoranda, and any other records or documents disclosing bias or prejudice or prejudgment by citizens of Maricopa County, Arizona, against Petitioner, and the identity of the persons who appear biased, prejudice or to have prejudged the case, and/or bearing on any such witness' physical or psychological limitation on their ability to perceive, recollect or communicate

concerning the subject matter of his/her testimony; the witness' character for honesty or veracity or their opposites; the existence or non-existence of any expressed bias, interest or other motive in testifying; any admission of untruthfulness. And, all notes and reports of observations of police officers and investigators concerning the state of sobriety or mental capacity at the time of the charged offenses of those persons;

g. all reports, notes, documents, diagrams, memoranda and records, however recorded or preserved, prepared by any police officer, or at a police officer's direction, in connection with the charged offense, or any incident to be offered by the State in aggravation, including but not limited to, the investigating officers' logs, defendant's booking sheet and defendants' arrest sheet;

h. any and all other information respecting any state witness that is favorable to Petitioner on the issue of guilt regarding any element of the offenses of first degree murder or the other charged offenses in this case;

i. any and all information in any form whatsoever, that derives from any person, that is exculpatory with respect to Petitioner having committed the charged offenses, including but not limited to statements made by any prosecution witness who testified at Petitioner's trial;

j. an opportunity to view and examine all physical evidence obtained in the investigation of the charged offenses, including a copy of all property record sheets, and copies of all photographs, photographic negatives, motion pictures, videotapes, slides or transparencies taken of any physical evidence and the scene of the offense, and copies of all photographs taken of Petitioner at or near the time of the offenses; including the booking photograph of Petitioner;

k. any and all information tending to show the existence of any statutory mitigating circumstance, including but not limited to the following:

i) any and all information tending to show that at the time of the charged offenses and with regard to one or more of the charged offenses Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct tot he requirements of law was significantly impaired, even if not so impaired as to constitute a defense to the charged offenses;

ii) any and all information tending to show that at the time of the charged offenses and with regard to one or more of the charged offenses Petitioner was under unusual and substantial duress, even if not such as to constitute a defense to the charged offenses;

iii) any and all information tending to show that Petitioner's participation in the one or more of the charged offenses was relatively minor even if not so minor as to constitute a defense to either of the charges;

iv) any and all information tending to show that Petitioner could not reasonably have foreseen that his conduct in the course of the commission of the offenses for which he was convicted would cause, or would create a grave risk of causing, death to another person;

l. any information tending to show the existence of any nonstatutory mitigating circumstance;

m. any information tending to partially or totally negate or mitigate any of the evidence offered by the state at Petitioner's trial in support of any alleged aggravating circumstance;

3. The names and addresses of experts who personally examined Petitioner or any information relating to any of the charged offenses, together with the results of physical examinations and of scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with this case, including but not limited to all information relating to mental health examinations of Petitioner fingerprint analyses, weapons analyses, testing, whether chemical, biological, medical,

criminological, laboratory, or other, post-mortem or forensic examinations and related testing of Estefana Arguijo Holmes;

4. All material or information which tends to mitigate or negate the defendant's guilt as to the charged offenses, or which would tend to reduce Petitioner's punishment therefor;

5. Any written or recorded material or information within the State's possession or control or available to the state regarding:

a. whether there has been any electronic surveillance of any conversations to which the accused was a party, or of the accused's and his family's residence;

b. what search warrants have been executed in connection with this case;

c. the names and current addresses of all informants involved in this case;

6. All papers, documents, photographs or tangible objects which were used at trial or were obtained from or purportedly belong to Petitioner;

7. All documents relating to Petitioner including:

a. all juvenile detention, jail, prison, parole, probation and presentence investigation records;

b. all sentencing reports;

c. all arrest, conviction, and adult and juvenile criminal offense records;

d. all records of any law enforcement authority, including any document relating to any plea negotiations between Petitioner and the State;

e. all records of any detention or court authority;

f. all records that the prosecution or any law enforcement official has submitted to any professional personnel for examination or analysis in connection with this case;

g. all institutional records of any kind, including but not limited to those prepared at any Arizona Department of Corrections facility, Maricopa County

jail or detention facility, as well as any other institutional record that relates to Petitioner;

h. all psychiatric documents relating to the conduct or results of any testing, examinations or interviews of Petitioner, including but not limited to reports by the Arizona Department of Corrections, Maricopa County Hospital, the City of Phoenix Doctor's Office, Maricopa County Jail or Detention or any other agency, and any other psychiatric, psychological or mental health records concerning Petitioner; and

i. all documents relating to any tests of any kind done on Petitioner, including but not limited to any tests done on samples of Petitioner's blood, saliva, hair or semen;

8. All document relating to any State witness at Petitioner's trial, including:

a. all records regarding any inducement offered for testimony;

b. all juvenile detention, jail, prison, parole, probation and presentence investigation records;

c. all sentencing reports;

d. all arrest, conviction, and adult and juvenile criminal offense records;

e. all records of any law enforcement authority, including all documents relating to any plea negotiations between any State witness and the State;

f. all records of any detention or court authority;

g. all records of any prosecuting authority;

h. all psychiatric, psychological and mental health records;

i. all education records;

j. all documents relating to any lie detector test taken by any State witness;

k. all other records and reports;

9. All documents relating to Cipriano Chayrez including:

a. all juvenile detention, jail, prison, parole, probation and presentence investigation records;

b. all sentencing reports;

c. all arrest, conviction, and adult and juvenile criminal offense records;

d. all records of any law enforcement authority, including but not limited to all documents relating to any plea negotiations;

e. all records of any detention or court authority;

f. all records of any prosecuting authority;

g. all psychiatric, psychological and mental health records;

h. all education records;

i. all documents relating to any lie detector test taken;

j. all statements related to the charged offenses in this case;

k. all other records and reports;

10. All documents relating to "Angel" including:

a. all notes, memorandum, reports relevant tot he location and identification of "Angel";

b. all juvenile detention, jail, prison, parole, probation and presentence investigation records;

c. all sentencing reports;

d. all arrest, conviction, and adult and juvenile criminal offense records;

e. all records of any law enforcement authority, including but not limited to all documents relating to any plea negotiations;

f. all records of any detention or court authority;

g. all records of any prosecuting authority;

h. all psychiatric, psychological and mental health records;

i. all education records;

j. all documents relating to any lie detector test taken;

k. all statements related to the charged offenses in this case;

l. all other records and reports;

11. All documents relating to Cecilia Rodriquez or Cecilia Rodriguez including:

a. all notes, memorandum, reports relevant tot he location and identification of Cecilia Rodriquez/Rodriguez;

b. all juvenile detention, jail, prison, parole, probation and presentence investigation records;

c. all sentencing reports;

d. all arrest, conviction, and adult and juvenile criminal offense records;

e. all records of any law enforcement authority, including but not limited to all documents relating to any plea negotiations;

f. all records of any detention or court authority;

g. all records of any prosecuting authority;

h. all psychiatric, psychological and mental health records;

i. all education records;

j. all documents relating to any lie detector test taken;

k. all statements related to the charged offenses in this case;

l. all other records and reports, including but not limited to any tape recordings, transcripts or notes of or regarding Ms. Cecilia Rodriquez or Cecilia Rodriguez, as well as all tape recordings, transcripts or notes regarding any other contact with Ms. Rodriquez/Rodriguez;

12. Each document relating to the state's use of peremptory challenges during Petitioner's trial, including but not limited to any information gathered about the jury venirepersons;

13. Each document relating to any communication between the state and any petit jury member in Petitioner's trial before, during or after the trial.

MATERIALS IN THE POSSESSION OF THE MARICOPA COUNTY SUPERIOR AND COURTS

Petitioner moves that this Court order the Clerk of the Maricopa County Superior Court to disclose to Petitioner's counsel, and permit inspection, copying and photographing of all records of any proceeding from the juvenile docket of that court involving Petitioner, Cipriano Chayrez, and "Angel".

MATERIALS IN THE POSSESSION OF (1) THE MARICOPA COUNTY, ARIZONA, SHERIFF'S DEPARTMENT, (2) CITY OF PHOENIX, ARIZONA, POLICE DEPARTMENT, (3) ARIZONA DEPARTMENT OF PUBLIC SAFETY, AND (4) ARIZONA DEPARTMENT OF CORRECTIONS

Petitioner moves that this Court order the Sheriff's Department of Maricopa County, Arizona, the City of Phoenix Police Department, the Arizona Department of Public Safety and the Arizona Department of Corrections to disclose to counsel, and permit inspection, copying and photographing of all materials referenced in paragraphs 1 through 13 (including all subparagraphs), above.

CONCLUSION

Recent discovery shows that there are serious problems with discovery undertaken by Petitioner's previous attorneys. A defendant's right to discovery is founded on an accused's fundamental and constitutional right to a fair trial and due process of law. Brady v. Maryland, 373 U.S. 83 (1963), Napue v. Illinois, 360 U.S. 264 (1959); Giles v. Maryland, 386 U.S. 66 (1967); Davis v. Alaska, 415 U.S. 308 (1974); RULE

15 of the ARIZONA RULES OF CRIMINAL PROCEDURE, and the constitutional and statutory provisions cited in the opening paragraph of this motion. Petitioner respectfully that this Court order the production of the materials specified above.

DATED this 3rd day of May, 1995.

By Robert W. Doyle
ROBERT W. DOYLE
Attorney for Petitioner

COPIES of the foregoing
delivered this 3rd day of
May, 1995 to:

Hon. Peter T. D'Angelo
Judge of the Superior Court

Ms. Dawn Northup
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85003

By Robert W. Doyle
ROBERT W. DOYLE
Attorney for Petitioner

EXHIBIT E

DA 8

FILE

JUDITH ALLEN
BY: DEP
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, vs. SAMUEL VILLEGAS LOPEZ, Petitioner,	NO. CR-163419 MOTION FOR EXTENSION OF TIME PURSUANT TO ARIZONA RULE OF CRIMINAL PROCEDURE 32.4(C) Assigned to: Hon. Peter T. D'Angelo

Petitioner moves that this Court grant him a thirty-day extension of time, until May 3, 1995, in which to file his petition for post-conviction relief, pursuant to ARIZONA RULE OF CRIMINAL PROCEDURE 32.4(c), the Fifth, Sixth, Eighth and Fourteenth Amendments to the UNITED STATES CONSTITUTIONS and related provisions of the ARIZONA CONSTITUTION and laws. The most factually compelling reason to provide additional time is that counsel and his staff have uncovered approximately 1,500 pages of documents to be examined and considered before filing.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

Undersigned counsel was appointed by this Court to represent Petitioner in his post-conviction proceedings. ARIZ. R. CRIM. P. 32.4(c). A preliminary petition for post-conviction relief was timely filed.

Subsequently, the parties agreed to file a stipulated request to permit Petitioner to file a supplemental petition by April 3, 1995, and to extend the State's deadline for filing its response

to forty-five days after April 3, 1995. While the parties did file a stipulated request, that request contained a typographical error. Thus, while the parties did agree in the stipulated request that Petitioner should have until April 3, 1995, to file a supplemental petition, the parties also and mistakenly asked that the State be granted until April 3, 1995, to file its response.

On February 8, 1995, this Court entered an order granting the requested extensions in time. Unfortunately, the order reflects the filed stipulation's typographical error, for it grants Petitioner no additional time in which to file a supplemental petition but does grant the State until April 3, 1995, to file its response.

Having believed that he had been granted until April 3, 1995, to file a supplemental petition, undersigned counsel and staff have been diligently conducting further investigation. A substantial amount of evidence relevant to Petitioner's post-conviction proceedings has been uncovered, but the investigation is not complete. For this reason, and for the additional reasons set out below, Petitioner respectfully requests that this Court grant him leave to file a supplemental post-conviction petition by or on May 3, 1995.

I. GOOD CAUSE EXISTS TO GRANT PETITIONER AN ADDITIONAL THIRTY DAYS IN WHICH TO FILE A SUPPLEMENTAL PETITION FOR POST-CONVICTION RELIEF.

RULE 32.4(c) of the ARIZONA RULES OF CRIMINAL PROCEDURE provides that post-conviction petitions may be amended upon a showing of good cause. ARIZ. R. CRIM. P. 32.4(c). In this case, good cause exists for additional time to complete the investigation necessary to fully presenting the claims of relief contained in his post-conviction petition and necessary to fully identifying and raising additional claims for post-conviction relief. Undersigned counsel has never before represented a capital defendant in post-conviction proceedings. Since filing the preliminary petition in this case, counsel has learned that much work remains to be done to adequately present Petitioner's case. While this necessary investigation is ongoing, much remains to be done. This postconviction case seeking relief from

Petitioner's capital convictions and sentences is factually and legally extremely complex, and there are numerous potential guilt and penalty phase witnesses, and other technical issues.

A significant part of what might appear to be delay in this case can be attributed to inaccurate information received early in the investigation. In fact, then, undersigned counsel has not engaged in delay, and filed the preliminary petition in the initial time allotted. Before filing the preliminary petition, undersigned counsel interviewed two previous attorneys for Petitioner who said that their investigations found little or no documents concerning Petitioner. In just 60 days, current counsel's investigatory staff has found an immense amount of material. This material must be reviewed and carefully considered before filing a supplemental petition.

Although a substantial amount of investigation has been accomplished since this Court's February 2 order, the investigation necessary to effectively representing Petitioner in these capital proceedings is far from complete. For example, while many records critical to Petitioner's post-conviction petition have been obtained and reviewed, additional records have been requested but not yet received. It often takes several weeks or months to get responses on record requests. In addition, Petitioner comes from a very large family; while diligent efforts have been made and are ongoing, to date only a few family members have been contacted -- though the vast majority have been located. Many others are out-of-state. Interviewing and obtaining affidavits from Petitioner's family is an essential part of presenting potential guilt and penalty phase claims for post-conviction relief, including the issue of Petitioner's pathological intoxication. As the Court is aware, Petitioner's family did not significantly participate at either the first or second sentencing.

Significant progress has been made in the past 60 days. Records that previous lawyers for Petitioner did not locate have been found. These documents include over 1,500 pages, which counsel needs to review in greater detail. Undersigned counsel continues to receive additional relevant documents. Family members have been located and are being interviewed. Much work that previous counsel failed to do is now being accomplished.

Finally, counsel has time-consuming responsibilities in numerous other cases in which he is counsel of record. These include two cases in which undersigned counsel was recently appointed, one a capital case on direct appeal, and the other a capital case in post-conviction proceedings.

II. THE FEDERAL AND STATE CONSTITUTIONS AS WELL AS THE VERY PURPOSE OF ARIZONA'S RULE 32 POST-CONVICTION PROCEEDINGS REQUIRE COUNSEL TO CONDUCT AN OUTSIDE-THE-RECORD INVESTIGATION INTO POTENTIAL GUILT AND SENTENCING PHASE CLAIMS FOR POST-CONVICTION RELIEF.

There are at least two reasons why undersigned counsel should be permitted additional time to complete his thorough investigation and amend his petition in this case. First, since Petitioner is entitled to effective assistance of post-conviction counsel as a matter of state and federal law, he is entitled to undersigned counsel's conducting a thorough investigation. Second, since Arizona's Rule 32 post-conviction proceedings are designed to permit petitioners to litigate, among other things, claims that they were denied effective assistance of counsel at trial, denying additional time to complete the investigation and amend the petition would be contrary to the very purpose of these proceedings.

A. Petitioner Is Entitled To Effective Assistance Of Post-conviction Counsel As A Matter Of State And Federal Law And, Therefore, Post-conviction Counsel Must Conduct A Thorough Investigation Into Guilt And Penalty Phase Issues.

Arizona law guarantees effective assistance of counsel to post-conviction petitioners. The Arizona Court of Appeals holds that, "for the right to counsel [under Arizona law] to be meaningful, it must encompass effective assistance of counsel" in state post-conviction proceedings. *State v. Krum*, 184 Ariz. Adv. Rep. 3 (Div. One, Feb. 14, 1995) (citing *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984)). *See also*, ARIZ. R. CRIM. P. 32.2 (amended) (comment) (postconviction petitioner's failure to raise issue may be challenged as

constituting ineffective assistance). Furthermore, ARIZ. R. CRIM. PRO., RULE 32 plainly contemplates investigation of issues outside the record. *See, e.g., State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994) (declining to address on direct appeal ineffective assistance of counsel claims because they are fact intensive and, therefore, trial courts are far better situated to address them). Thus, effective representation of Petitioner requires that investigation outside the record be completed. *Cf. Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (counsel's duty to make reasonable investigations or to make reasonable decision not to make particular investigations); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (counsel's failure to investigate mental condition cannot be construed as trial tactic); *Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991) (defense counsel is obligated to conduct mitigation investigation even where defendant instructs counsel not to present mitigation evidence); Liebman, J. FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 7.1, p. 66 (1988) (proper representation on post-conviction requires a thorough factual investigation of all aspects of the trial and appeal).

The Sixth Amendment to the UNITED STATES CONSTITUTION also guarantees effective assistance of counsel to post-conviction petitioners in the same procedural posture as Petitioner. Specifically, where state post-conviction review serves as the only appeal on certain issues, those state post-conviction procedures must meet the same constitutional standards as must be met by the procedures for the first direct appeal of right. *See Coleman v. Thompson*, 111 S. Ct. 2546 (1991).

In *Evitts v. Lucey*, 469 U.S. 387 (1985), the United States Supreme Court held that Fourteenth Amendment's equal protection guarantee requires that the constitutional right to counsel on the first direct appeal of right in state court encompasses the right to effective assistance of counsel on that appeal. The Court went on to hold that "where the merits of <u>the one and only appeal</u> an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.* at 357 (emphasis in

original).

In Arizona, criminal defendants are entitled to appeal from their convictions and sentences. However, Arizona provides that the first place criminal defendants may raise certain claims is in Rule 32 post-conviction proceedings, most notably ineffective assistance of trial counsel claims. *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994). In Arizona, then, the Rule 32 post-conviction proceeding is the one and only appeal of those claims which criminal defendants have in Arizona. Under *Evitts*, then, if the merits of these claims by post-conviction petitioners in Arizona "are decided without benefit of counsel, ... an unconstitutional line has been drawn between rich and poor." *Id.* at 357. For these reasons, post-petitioners in Arizona are entitled as a matter of federal law to the effective assistance of counsel, at least with regard to those claims which can be raised for the first time only in post-conviction proceedings such as ineffective assistance of trial counsel.

Petitioner, then, is entitled to effective assistance of post-conviction counsel as a matter of state and federal law. Since trial counsel "must at a minimum, <u>conduct a reasonable investigation</u> enabling him to make informed decisions about how best to represent his client," *Sanders v. Ratelle*, 21 F.2d 1446, 1456 (9th Cir. 1994), post-conviction counsel must determine whether trial counsel conducted a reasonable investigation. Similarly, under Arizona state law, "effective counsel must carefully investigate all available defenses[.]" *State v. Ring*, 131 Ariz. 374, 641 P.2d 862 (1982)(citing to *State v. Lopez*, 3 Ariz. App. 200, 412 P.2d 882 (1966). In the instant case, then, undersigned counsel must make an informed decision whether trial counsel rendered effective assistance by, among other things, conducting a reasonable investigation.

B. Independent Of Petitioner's Right To Effective Assistance Of Post-conviction Counsel, State And Federal Due Process And Equal Protection Guarantees --As Well As Common Sense-- Requires That A Thorough Investigation Be Conducted In Order To Permit Post-conviction Claims To Be Fully Presented In These Proceedings.

Arizona Rule 32 post-conviction proceedings are designed to permit petitioners

to litigate, among other things, claims that they were denied effective assistance of counsel at trial. In *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994), the Arizona Supreme Court very recently reaffirmed that claims that trial counsel was ineffective should be raised in post-conviction proceedings and not on direct appeal. Ineffectiveness claims should be brought in RULE 32 proceedings, the Court explained, because they are fact intensive and, therefore, trial courts are far better situated to address them.

As noted above, trial counsel "must at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client," *Sanders v. Ratelle*, 21 F.2d 1446, 1456 (9th Cir. 1994). As noted above as well, under Arizona state law, "effective counsel must carefully investigate all available defenses[.]" *State v. Ring*, 131 Ariz. 374, 641 P.2d 862 (1982)(citing to *State v. Lopez*, 3 Ariz. App. 200, 412 P.2d 882 (1966). In order for post-conviction counsel to determine whether trial counsel conducted the required investigation, post-conviction counsel must be afforded a reasonable opportunity to conduct an independent investigation.

IIII. CONCLUSION.

For all these reasons, good cause exists to grant this motion for an extension of time in which to complete the investigation and file a supplemental petition for post-conviction relief. Petitioner respectfully requests that the Court grant a thirty-day extension of time provided for in ARIZ. R. CRIM. PRO. 32.4(c), setting the due date for the petition at May 3, 1995.

Respectfully submitted this 24th day of March, 1995.

By Robert W. Doyle
Robert Doyle
Counsel for Petitioner

Copies of the foregoing mailed
this 24th day of March, 1995,
to:

Hon. Peter T. D'Angelo
Judge, Maricopa County Superior Court

Dawn Northrup
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85003

by: [signature]

EXHIBIT F

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

5

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FILED APR 07 '95 6 CLERK OF THE SUPERIOR COURT

April 3, 1995 HON. PETER T. D'ANGELO C. Bowen
Deputy

Nº CR 163419

STATE OF ARIZONA

v.

SAMUEL LOPEZ

Attorney General
By: Dawn M. Northup

Public Defender
By: Robert W. Doyle

Samuel Lopez
ASPC - CB6
ADOC #43833
P. O. Box 629
Florence, AZ 85232

Pursuant to Defendant's motion to extend and good cause appearing,

IT IS ORDERED extending the time to and including **May 3, 1995** within which to file a supplemental Petition for Post-Conviction Relief.

The Court notes that the Request for Post-Conviction Relief was filed on May 24, 1995. Further, that Mr. Doyle was appointed on August 19, 1994. This is the fourth extension on Defendant's behalf since that time. There will be no further extensions.

IT IS FURTHER ORDERED extending the time within which to file a Response and Reply accordingly.

(122)

EXHIBIT G

DA 16

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, v. SAMUEL VILLEGAS LOPEZ Petitioner.	No. CR 163419 **REPLY TO RESPONSE TO PETITION AND SUPPLEMENTAL PETITION FOR POST-CONVICTION RELIEF**

Petitioner replies to the State's response to the petition and supplemental petition for post-conviction relief. This reply is support by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 8th day of August, 1995.

LAW OFFICE OF
ROBERT W. DOYLE

Robert W. Doyle

ROBERT W. DOYLE
Attorney for Petitioner

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MEMORANDUM OF POINTS AND AUTHORITIES

1. It was Ineffective Assistance of Counsel to Heed the Petitioner's Request for a Change of Judge.

In the petition and his affidavit, Petitioner makes it clear that he asked his attorneys to file for a notice of change of judge. He asked this with the knowledge that the trial judge in this case had previously sentenced one of his brothers to death and the other to life in prison. In order to establish ineffective assistance of counsel, Petitioner must show his counsel rendered performance below prevailing professional norms and that there is a reasonable probability of a different outcome. State v. Atwood, 171 Ariz. 576, 832 P.2d 593 (1992). The case cited by Petitioner, State v. Vickers, 138 Ariz. 450, 675 P.2d 710 (1983), makes it very clear that a motion for change of judge in certain unusual circumstances in death penalty litigation is appropriate. Given the authority of the Vickers' case, it was deficient performance for Petitioner's counsel not to consider his request and to make the motion. As to prejudice, it is nearly impossible for the Petitioner to show the kind of prejudice that the response suggests. The response indicates that given the evidence, it is unlikely that the juror's verdicts or the sentence would have been different if another judge had presided over the case. To prove to the contrary, Petitioner would have to show that one of the other approximately 40 Superior Court judges in Maricopa County in 1987 would have considered a life sentence for the Petitioner. This is an impossible burden to carry and far beyond the requirements needed for Rule 32 relief. Petitioner has stated a colorable claim, requiring an evidentiary hearing on this issue.

2. It was Ineffective Assistance of Counsel to Fail to Object to the Presentence Reports.

During the sentencing phase, Petitioner's attorneys never challenged the information on Petitioner in the presentence reports. The State's response concedes that State v. Shuler, 162 Ariz. 19, 780 P.2d 1067 (Ct. App. 1989), requires the prosecution to show more than the mere circumstance of arrest. In this case, there were no more than unsubstantiated hearsay comments taken under circumstances that demonstrate no indicia of trustworthiness. The information supplied concerning alleged prior bad acts and prior arrests concerning the Petitioner fell well below the standard necessary to be considered in a presentence report. These notations were not appropriate to be submitted in a report prepared for a capital sentencing. As such, it was clearly deficient performance by Petitioner's counsel not to object to these matters and to have them stricken from the presentence report and the court's consideration.

The response also turns the burden in Shuler on its head. It was the State's burden to show that these items were reliable. Had Petitioner's counsel objected, the prosecution would have been put on its burden, under Shuler, to produce evidence of the underlying facts to demonstrate that some bad act was probably committed by the Petitioner. State v. Shuler, 162 Ariz. at 21, 780 P.2d at 1069. By failing to contest the issue, Petitioner's counsel did not put the State to its proof on these matters and let the court consider them unchallenged. This is clearly deficient performance.

As to prejudice, it is hard to imagine what kind of evidence in the presentence report could be more damaging. The hearsay information presented portrayed the Petitioner as a person capable of violent crimes on different occasions under different circumstances. The information in the arrest record also seriously damaged Petitioner's position. There is no way to downplay the impact of this improper information in a death penalty situation, especially for a Petitioner whose previous criminal convictions show little or no propensity towards violence.

3. It was Ineffective Assistance of Counsel to Fail to Properly Prepare the Expert Witness.

The focus of the Petitioner's argument is that counsel failed to give Dr. Bendheim all the information at one time to get his best and most certain opinion. The impact of Dr. Bendheim's testimony has been severely weakened by the fact that it has come before the court in bits and pieces. Had Petitioner's attorneys properly marshaled all of the obviously relevant information for Dr. Bendheim's opinion, it would have clearly carried more weight than when first considered. The error was made by counsel, not by the expert. Failing to provide an expert with all of the necessary information to render a complete diagnosis, when that information is known to counsel and readily available, is deficient performance. Petitioner is prejudiced because the impact of Dr. Bendheim's opinion has been severely weakened by being presented to the court only a piece at a time. Petitioner has established a colorable claim and an evidentiary hearing is needed.

4. Petitioner's Claim of Victim Impact Evidence is Not Precluded.

In response to the claim of improper victim impact evidence, the State does not defend that the evidence was proper. Instead the State relies upon the procedural claim that this matter is now precluded by Rule 32.2, Arizona Rules of Criminal Procedure. Petitioner's claim is not precluded. Petitioner was sentenced in 1987 and 1990. Preclusion would not apply to this claim because Payne v. Tennessee, was not decided until June 27, 1991. Payne v. Tennessee, 501 U.S. _____, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). This petition is the first opportunity to present a claim under Payne v. Tennessee to this court and is not precluded. In the alternative, this would further demonstrate ineffective assistance of counsel at sentencing and can be considered as such if preclusion applies.

5. D.N.A. Testing is Appropriate at this Time.

Petitioner, through counsel, accepts the State's offer to have D.N.A. testing done. Petitioner reserves the right to full discovery concerning the testing procedures and test results.

6. It was Ineffective Assistance of Counsel Not to Make Sure that a Juror Who Had Been Stricken Did Not Serve on the Jury.

The State response to the supplemental petition that a reasonable interpretation of the record reveals something different that what the record clearly states. Just as Rule 32 petitions must be based on something other than mere speculation, so to the response of the State must be based on something other than conjecture. The State also claims that this error is unimaginable. Experienced trial participants have found over the years that the unimaginable tends to be not only possible but commonplace.

The State's explanation for the potential error by the court staff is improper grounds for a summary dismissal of this claim. The basis of the State's response is an affidavit. At very least, Petitioner should have the opportunity to challenge the State's evidence in the proper forum and manner. For Rule 32 purposes, the appropriate forum is an evidentiary hearing.

CONCLUSION

Summary dismissal would be an inappropriate ruling on the issues presented in the petition. Arizona law favors full adjudication of such cases by an evidentiary hearing. On the claims presented, Petitioner is clearly entitled to have an evidentiary hearing by virtue of his stating a colorable claim in each matter.

RESPECTFULLY SUBMITTED this 8th day of August, 1995.

By Robert W. Doyle
ROBERT W. DOYLE
Attorney for Petitioner

COPIES of the foregoing mailed/delivered on this 8th day of August, 1995 to:

Hon. Peter T. D'Angelo
Judge of the Superior Court
201 W. Jefferson
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Ms. Dawn M. Northup, Esq.
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Phoenix, Arizona 85007

Mr. Samuel V. Lopez
Petitioner

By Robert W. Doyle
ROBERT W. DOYLE
Attorney for Petitioner

EXHIBIT H

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DA 21

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Respondent, v. SAMUEL V. LOPEZ, Petitioner.	No. CR 163419 **MOTION FOR REHEARING** (Assigned to the Honorable Peter T. D'Angelo, Judge)

Petitioner requests that this court reconsider its summary dismissal of the petition for post-conviction relief, especially on Issue IV found in the original Petition for Post-Conviction Relief. This motion is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 20th day of May, 1997.

LAW OFFICE OF
ROBERT W. DOYLE

R. Doyle

ROBERT W. DOYLE
Attorney for Petitioner

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MEMORANDUM OF POINTS AND AUTHORITIES

In its minute entry order of April 30, 1997, this court found in part, "No timely reply is noted." In this case, a timely reply was filed (copy attached). Counsel requests that the minute entry order be changed to reflect that a timely reply was filed in this matter.

Counsel also reurges the court to consider its rulings in light of the timely reply which has been tendered to the court for its consideration. In particular, the Petitioner requests that the court reconsider its ruling on Part IV of the original petition. In the minute entry order of April 30, 1997 the court ruled that this claim was precluded by failure to urge these matters on direct appeal. It is the Petitioner's position that his claim is based upon case law decided after his original sentencing and his resentencing. Petitioner was originally sentenced in 1987 and, after appeal, resentenced on August 3, 1990. Payne v. Tennessee, upon which this issue is based, was not decided until June 27, 1991 which is subsequent both to the original sentencing and to the resentencing. Further, the reply also amends the original claim that, if found to be precluded, this should also be considered as ineffective assistance of counsel for failure to argue this proposition earlier (Reply to Response to Petition, page 3). The original Petition and Supplement both raise numerous claims of ineffective assistance of counsel, and the original Petition includes a specific claim of ineffective assistance of counsel for failure to object to the presentnece report (Part IIIA of the Petition for Post-Conviction Relief). A claim of ineffective assistance of counsel would not be precluded as this is the Petitioner's first petition for post-conviction relief and claims of ineffective assistance of counsel cannot be argued on direct appeal.

For these reasons, Petitioner requests that the court amend its minute entry order to show that a timely reply was filed. Petitioner further requests that the court consider the items raised in the reply as they apply to each of the claims. Most specifically, Petitioner requests that

the court reconsider its finding of preclusion on Part IV and rule upon the merits of the claim or consider the amendment to raise this claim as ineffective assistance of counsel.

RESPECTFULLY SUBMITTED this 20th day of May, 1997.

LAW OFFICE OF
ROBERT W. DOYLE

ROBERT W. DOYLE
Attorney for Petitioner

COPIES of the foregoing
mailed/delivered this 20th day of
May, 1997, to the following:

Hon. Peter T. D'Angelo
Judge of the Superior Court
101 W. Jefferson
Phoenix, AZ 85003

Ms. Dawn Northup
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85003

Mr. Samuel V. Lopez
Petitioner

By _____
ROBERT W. DOYLE
Attorney for Petitioner