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

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Richard Dale Stokley,

) No. CV-98-332-TUC-FRZ

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Petitioner,

) DEATH PENALTY CASE

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v.

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Dora B. Schriro, et al.,¹

) **ORDER AND OPINION RE:
PROCEDURAL STATUS OF CLAIMS**

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Respondents.

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Petitioner Richard Dale Stokley (“Petitioner”), a state prisoner under sentence of death, petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He alleges that he was convicted and sentenced in violation of the United States Constitution. (Dkt. 1.)² This Order addresses procedural bar and other issues raised by Respondents’ answer to the petition.

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FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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In 1992, Petitioner was convicted by a jury of two counts of kidnapping, one count of sexual conduct with a minor under the age of fifteen, and two counts of premeditated first degree murder in the deaths of two thirteen-year-old girls in a remote area in Southeast

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¹ Dora B. Schriro, Director of the Arizona Department of Corrections, is substituted for her predecessor pursuant to Fed. R. Civ. P. 25(d)(1).

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² “Dkt.” refers to documents in this Court’s file.

1 Arizona. Cochise County Superior Court Judge Matthew W. Borowiec sentenced Petitioner
2 to death for the murders and to various prison terms for the other counts. On direct appeal,
3 the Arizona Supreme Court affirmed. See State v. Stokley, 182 Ariz. 505, 898 P.2d 454
4 (1995), cert. denied, 516 U.S. 1078 (1996).

5 Petitioner, represented by court-appointed counsel, Harriette Levitt, filed a petition
6 for post-conviction relief (“PCR”) pursuant to Rule 32 of the Arizona Rules of Criminal
7 Procedure in January 1997. The petition raised two claims. Two months later, the PCR court
8 summarily denied relief. Subsequently, Petitioner sought special action relief in the Arizona
9 Supreme Court from a dispute concerning Levitt’s continued appointment as counsel. In
10 June 1997, the Arizona Supreme Court denied Petitioner’s request to terminate Levitt’s
11 appointment but directed Levitt to file a supplemental PCR petition. That petition, raising
12 six additional claims, was filed in October 1997 and denied by the PCR court in February
13 1998. On June 25, 1998, the Arizona Supreme Court summarily denied review of the PCR
14 court’s rulings.

15 Petitioner filed a Petition for Writ of Habeas Corpus in this Court on July 14, 1998.
16 He subsequently filed an amended petition and a second amended petition. (Dkts. 20, 33.)
17 Respondents filed an answer, limited by the Court’s order to issues of exhaustion and
18 procedural default. (Dkt. 44.) Briefing concluded in April 2000, after Petitioner filed a
19 traverse, Respondents filed a reply, and Petitioner filed a sur-reply. (Dkts. 49, 59, 64.)

20 While the procedural status of Petitioner’s claims was under advisement, the Ninth
21 Circuit Court of Appeals issued a decision in Smith v. Stewart, 241 F.3d 1191 (9th Cir.
22 2001), that called into question Arizona’s doctrine of procedural default. Due to the practice
23 of bifurcating the briefing of procedural and merits issues then-employed by the District of
24 Arizona in capital habeas cases, the Court, in the interest of judicial economy, deferred ruling
25 on the procedural status of Petitioner’s claims pending further review of Smith. (Dkt. 69.)
26 In June 2002, the United States Supreme Court reversed the Ninth Circuit. Stewart v. Smith,
27 536 U.S. 856 (2002) (per curiam). Contemporaneously, the Supreme Court decided Ring v.
28 Arizona, 536 U.S. 584 (2002), which found Arizona’s sentencing scheme unconstitutional

1 because judges, not juries, determined the existence of the aggravating circumstances
2 necessary to impose a death sentence. The Court continued deferring ruling in this matter
3 pending a determination whether Ring applies retroactively to cases on collateral review.
4 The U.S. Supreme Court resolved that issue in June 2004. Schriro v. Summerlin, 542 U.S.
5 348 (2004).

6 **PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT**

7 Because this case was filed after April 24, 1996, it is governed by the Antiterrorism
8 and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (“AEDPA”). Lindh v. Murphy,
9 521 U.S. 320, 336 (1997); Woodford v. Garceau, 538 U.S. 202, 210 (2003). The AEDPA
10 requires that a writ of habeas corpus not be granted unless it appears that the petitioner has
11 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); see also Coleman v.
12 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509 (1982). To properly
13 exhaust state remedies, the petitioner must “fairly present” his claims to the state’s highest
14 court in a procedurally appropriate manner. O’Sullivan v. Boerckel, 526 U.S. 838, 848
15 (1999).

16 A claim is “fairly presented” if the petitioner has described the operative facts and the
17 federal legal theory on which his claim is based so that the state courts have a fair
18 opportunity to apply controlling legal principles to the facts bearing upon his constitutional
19 claim. Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard v. Connor, 404 U.S. 270, 277-78
20 (1971).³ Commenting on the importance of fair presentation, the United States Supreme
21 Court has stated:

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

27 ³ Resolving whether a petitioner has fairly presented his claim to the state court is an
28 intrinsically federal issue to be determined by the federal court. Wylde v. Hundley, 69 F.3d
247, 251 (8th Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

1 Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam). Following Duncan, the Ninth
2 Circuit has held that a state prisoner has not “fairly presented” (and thus exhausted) federal
3 claims in state court unless he specifically indicated to that court that the claims were based
4 on federal law. See, e.g., Lyons v. Crawford, 232 F.3d 666, 669-70 (2000), as amended by
5 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence, right to be tried
6 by impartial jury and ineffective assistance of counsel lacked specificity and explicitness
7 required to present federal claim); Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000)
8 (broad reference to “due process” insufficient to present federal claim); see also Hiivala v.
9 Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (“The mere similarity between a claim of state
10 and federal error is insufficient to establish exhaustion.”). A petitioner must make the federal
11 basis of a claim explicit either by citing specific provisions of federal law or federal case law,
12 even if the federal basis of a claim is “self-evident,” Gatlin v. Madding, 189 F.3d 882, 888
13 (9th Cir.1999), or by citing state cases that explicitly analyze the same federal constitutional
14 claim, Peterson v. Lampert, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). Such explicit fair
15 presentation must be made not only to the trial or post-conviction court, but to the state’s
16 highest court. Baldwin v. Reese, 541 U.S. 27, 32 (2004). If a petitioner’s habeas claim
17 includes new factual allegations not presented to the state court, the claim may be considered
18 unexhausted if the new facts “fundamentally alter” the legal claim presented and considered
19 in state court. Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

20 A habeas petitioner’s claims may be precluded from federal review in either of two
21 ways. First, a claim may be procedurally defaulted in federal court if it was actually raised
22 in state court but found by that court to be defaulted on state procedural grounds. Coleman,
23 501 U.S. at 729-30. Second, a claim may be procedurally defaulted in federal court if the
24 petitioner failed to present the claim in any forum and “the court to which the petitioner
25 would be required to present his claims in order to meet the exhaustion requirement would
26 now find the claims procedurally barred.” Coleman, 501 U.S. at 735 n.1. This is often
27 referred to as “technical” exhaustion because, although the claim was not actually exhausted
28 in state court, the petitioner no longer has an available state remedy. See Gray v. Netherland,

1 518 U.S. 152, 161-62 (1996) (“A habeas petitioner who has defaulted his federal claims in
2 state court meets the technical requirements for exhaustion; there are no remedies any longer
3 ‘available’ to him.”).

4 Rule 32 of the Arizona Rules of Criminal Procedure governs when petitioners may
5 seek relief in post-conviction proceedings and raise federal constitutional challenges to their
6 convictions or sentences in state court. Rule 32.2 provides, in part:

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

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

12 (3) *That has been waived at trial, on appeal, or in any previous collateral*
13 *proceeding.*

14 b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on
15 Rules 32.1(d), (e), (f), (g) and (h). When a claim under [these sub-sections]
16 is to be raised in a successive or untimely post-conviction relief proceeding,
17 the notice of post-conviction relief must set forth the substance of the specific
18 exception and the reasons for not raising the claim in the previous petition or
19 in a timely manner. If the specific exception and meritorious reasons do not
20 appear substantiating the claim and indicating why the claim was not stated in
21 the previous petition or in a timely manner, the notice shall be summarily
22 dismissed.

23 Ariz. R. Crim. P. 32.2 (West 2003) (emphasis added). Thus, pursuant to Rule 32.2(a)(3),
24 petitioners may not be granted relief on any claim which was waived at trial, on appeal, or
25 in a previous PCR petition. Similarly, pursuant to Rule 32.4, petitioners must seek relief in
26 a timely manner. Only if a claim falls within certain exceptions (subsections (d) through (h)
27 of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition
28 or was not presented in a timely manner will the preclusive effect of Rule 32.2 be avoided.
Ariz. R. Crim. P. 32.2(a) (3), 32.4(a).

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 remedies
currently available to him pursuant to Rule 32. If no remedies are currently available,
petitioner’s claims are “technically” exhausted but procedurally defaulted. Coleman, 501
U.S. at 732, 735 n.1. In addition, if there are claims that were fairly presented in state court

1 but found defaulted on state procedural grounds, such claims also will be found procedurally
2 defaulted in federal court so long as the state procedural bar was independent of federal law
3 and adequate to warrant preclusion of federal review. Harris v. Reed, 489 U.S. 255, 262
4 (1989). A state procedural default is not independent if, for example, it depends upon an
5 antecedent federal constitutional ruling. See Stewart v. Smith, 536 U.S. at 860. A state bar
6 is not adequate unless it was firmly established and regularly followed at the time of
7 application by the state court. Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

8 Because the doctrine of procedural default is based on comity, not jurisdiction, federal
9 courts retain the power to consider the merits of procedurally defaulted claims. Reed v.
10 Ross, 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of
11 procedurally defaulted claims unless a petitioner demonstrates legitimate cause for the failure
12 to properly exhaust in state court and prejudice from the alleged constitutional violation, or
13 shows that a fundamental miscarriage of justice would result if the claim were not heard on
14 the merits in federal court. Coleman, 501 U.S. at 735 n.1.

15 Ordinarily “cause” to excuse a default exists if a petitioner can demonstrate that “some
16 objective factor external to the defense impeded counsel’s efforts to comply with the State’s
17 procedural rule.” Id. at 753. Objective factors which constitute cause include interference
18 by officials which makes compliance with the state’s procedural rule impracticable, a
19 showing that the factual or legal basis for a claim was not reasonably available to counsel,
20 and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488
21 (1986). “Prejudice” is actual harm resulting from the alleged constitutional error or violation.
22 Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice resulting
23 from a procedural default, a habeas petitioner bears the burden of showing not merely that
24 the errors at his trial constituted a possibility of prejudice, but that they worked to his actual
25 and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.
26 United States v. Frady, 456 U.S. 152, 170 (1982).

27 If a petitioner cannot meet the “cause and prejudice” standard, the Court still may
28 consider the merits of procedurally defaulted claims if the failure to hear the claims would

1 constitute a “fundamental miscarriage of justice.” Sawyer v. Whitley, 505 U.S. 333 (1992).
 2 The “fundamental miscarriage of justice” exception is also known as the actual innocence
 3 exception. There are two types of claims recognized under this exception: (1) that a
 4 petitioner is “innocent of the death sentence,” or, in other words, that the death sentence was
 5 erroneously imposed; and (2) that a petitioner is innocent of the capital crime. In the first
 6 instance, the petitioner must show by clear and convincing evidence that, but for a
 7 constitutional error, no reasonable factfinder would have found the existence of any
 8 aggravating circumstance or some other condition of eligibility for the death sentence under
 9 the applicable state law. Id. at 336. In the second instance, the petitioner must show that “a
 10 constitutional violation has probably resulted in the conviction of one who is actually
 11 innocent.” Schlup v. Delo, 513 U.S. 298, 327 (1995). To establish the requisite probability,
 12 the petitioner must show that “it is more likely than not that no reasonable juror would have
 13 found petitioner guilty beyond a reasonable doubt.” Id. However:

14 [A] substantial claim that constitutional error has caused the conviction of an
 15 innocent person is extremely rare. . . . To be credible, such a claim requires
 16 petitioner to support his allegations of constitutional error with new reliable
 17 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.

18 Id. at 324.

19 HABEAS CLAIMS

20 Petitioner’s second amended petition asserts federal constitutional violations based
 21 on the following issues:

- 22 A-1 Counsel’s failure at sentencing to adequately investigate and prepare evidence
 of Petitioner’s mental state as mitigation;
- 23 A-2 Counsel’s failure at sentencing to adequately rebut “heinous, cruel or
 24 depraved” aggravating factor;
- 25 A-3 Counsel’s failure at sentencing to adequately rebut the prosecution’s bad
 character evidence;
- 26 B-1 Trial court’s failure to consider and give effect at sentencing to evidence of
 27 Petitioner’s mental and organic impairments, dysfunctional family history,
 good behavior while incarcerated, cooperation with police, potential for
 28 rehabilitation as mitigating factors, and the co-defendant’s guilty plea and
 lesser sentence as mitigation;

- 1 B-2 Arizona Supreme Court's failure to consider and give effect at sentencing to
2 evidence of Petitioner's mental and organic impairments, dysfunctional family
3 history, good behavior while incarcerated, cooperation with police, potential
4 for rehabilitation, and the co-defendant's guilty plea and lesser sentence as
5 mitigating factors;
- 6 C Imposition of death sentence where equally or more culpable co-defendant
7 spared;
- 8 D Imposition of "heinous, cruel or depraved" aggravating factor based on co-
9 defendant's conduct and intent;
- 10 E Insufficient evidence to support "heinous, cruel or depraved" aggravating
11 factor;
- 12 F-1 Counsel's failure at trial to adequately investigate and prepare a mental state
13 defense;
- 14 F-2 Counsel's failure to impeach witness James Robinson;
- 15 F-3 Counsel's failure to effectively cross-examine co-defendant Randy Brazeal;
- 16 G State's failure to disclose information material to the defense regarding the co-
17 defendant's involvement in a satanic cult;
- 18 H-1 Counsel's failure on appeal to argue in favor of the existence of specific
19 mitigation evidence;
- 20 H-2 Counsel's incompetence on appeal for arguing a claim based on a non-existent
21 felony-murder instruction and advancing the existence of irrelevant statutory
22 mitigating factors;
- 23 I Absence of a jury determination of aggravating factors under capital
24 sentencing scheme;
- 25 J Failure of capital sentencing scheme to channel sentencing discretion;
- 26 K Arbitrary and irrational imposition of death penalty under Arizona law;
- 27 L Execution by lethal injection; and
- 28 M Execution after an extraordinarily lengthy period of incarceration.

DISCUSSION

Respondents concede Claims C, G, and K are properly exhausted and entitled to review on the merits. However, Respondents assert that the balance of Petitioner's claims were not fairly presented in state court, or were found precluded on state law grounds, and are therefore procedurally barred from habeas review. Petitioner contends that all of his claims may be reviewed on the merits. For the reasons set forth below, the Court finds that

1 Claims A-2, A-3, B-2, D, F-1, F-2, F-3, H-1, H-2, and L are procedurally barred; Claims B-1,
2 I, J, K, and M are plainly meritless; and Claims A-1, C, E, and G are properly exhausted and
3 appropriate for review on the merits following supplemental briefing.

4 **A. Exhaustion Analysis**

5 **Claim A-1**

6 Petitioner asserts that counsel failed to adequately investigate Petitioner's mental state
7 at the time of the crime and thereby failed to present compelling mitigation evidence at
8 sentencing. (Dkt. 33 at 19-31.) In particular, Petitioner faults counsel's failure to obtain a
9 neuropsychological exam after a pre-trial examiner found that Petitioner had organic brain
10 damage. (*Id.* at 23.) Respondents contend this claim is barred from federal review because
11 the PCR court expressly held it precluded under state law. (Dkt. 44 at 26.) The Court
12 disagrees.

13 In his supplemental PCR in state court, Petitioner argued that counsel rendered
14 ineffective assistance by ignoring "red flags" concerning Petitioner's psychological makeup,
15 including his behavioral background, past head injuries and documented brain damage, as
16 well as his history of depression, substance abuse, and borderline personality disorder.
17 (Supp. ROA III at 6.)⁴ He further complained that a psychiatric evaluation was never
18 conducted for mitigation purposes prior to sentencing. (*Id.*) In denying the claim, the PCR
19 court stated:

20 Claim B, alleging ineffective representation for failure to adequately argue
21 Stokley's alleged mental incapacity as mitigation for sentencing purposes, is

22 ⁴ "ROA I" refers to the six-volume record on appeal prepared for Petitioner's direct
23 appeal to the Arizona Supreme Court (Case No. CR-92-278-AP). "ROA II" refers to the
24 two-volume record on appeal prepared for Petitioner's petition for review of the denial of
25 PCR relief. (Case No. CR-97-0287-PC). "ROA III" refers to the one-volume record on
26 appeal prepared as a supplemental record for Petitioner's petition for review of the denial of
27 PCR relief (Case No. CR-97-0287-PC). "AP doc." and "SA doc." refer to the documents
28 filed in the Arizona Supreme Court during Petitioner's direct appeal (Case No. CR-92-0278-
AP) and petition for special action (Case No. CV-97-0203-SA), respectively. "RT" refers
to Reporter's Transcript. The original trial and sentencing transcripts as well as certified
copies of the various records on appeal were provided to this Court by the Arizona Supreme
Court. (Dkt. 68.)

1 precluded under Rule 32.2(a)(2) and A.R.S. § 13-4232(A)(2) because the
2 Arizona Supreme Court rejected the factual basis of this claim on direct
3 appeal. Moreover, Stokley offers nothing specific nor material concerning his
4 mental condition that was not before this Court at sentencing or considered
5 when the appellate court conducted its independent review. Thus, this claim
6 is also precluded for lack of sufficient argument, and it is meritless for lack of
7 a showing of prejudice.

8 (Id. at 54-55.) The PCR court clearly ruled on the merits of Petitioner's claim and, therefore,
9 Petitioner is not precluded from federal habeas review of this claim. See Poland (Patrick)
10 v. Stewart, 169 F.3d 573, 578 (9th Cir. 1999) (noting that a claim found precluded by Ariz.
11 R. Crim. P. 32.2(a)(2) appears to be a "classic exhausted claim"). Accordingly, Claim A-1
12 will be addressed on the merits.

13 **Claims A-2 and A-3**

14 Petitioner asserts ineffectiveness based on counsel's failure to adequately rebut one
15 of the aggravating factors and the prosecution's "bad character" evidence. Petitioner
16 contends these claims are properly exhausted because they are not fundamentally different
17 than Claim A-1. The Court disagrees. Claims A-2 and A-3 assert distinct factual theories
18 of ineffectiveness separate from that alleged in Claim A-1. Consequently, the presentation
19 of Claim A-1 did not fairly alert the state court to the factual bases underlying Claims A-2
20 and A-3. See Carriger v. Lewis, 971 F.2d 329, 333-34 (9th Cir. 1992) (en banc) (treating
21 distinct failures by trial counsel as separate claims for purposes of exhaustion and procedural
22 default); Matias v. Oshiro, 683 F.2d 318, 319-20 & n.1 (9th Cir. 1982) (finding no fair
23 presentation of eight grounds of ineffectiveness not raised in state court); Flieger v. Delo, 16
24 F.3d 878, 885 (8th Cir. 1994) (raising specific claims of ineffectiveness in state court does
25 not exhaust all such claims for federal habeas review); cf. Strickland v. Washington, 466 U.S.
26 668, 690 (1984) (requiring identification of the specific "acts or omissions" of counsel and
27 a determination of whether those acts are outside the range of competent assistance).

28 If Petitioner were to return to state court now and attempt to litigate these issues, the
claims would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the

1 Arizona Rules of Criminal Procedure because none fall within an exception to preclusion.⁵
2 See Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, these allegations are “technically”
3 exhausted but procedurally defaulted because Petitioner no longer has an available state
4 remedy. Coleman, 501 U.S. at 732, 735 n.1. Claims A-2 and A-3 will be procedurally
5 barred absent a showing of cause and prejudice, or a fundamental miscarriage of justice.

6 **Claim B-1**

7 Petitioner asserts that the sentencing judge failed to consider and give effect to
8 proffered mitigation evidence and that this claim was exhausted on direct appeal.
9 Respondents contend that on direct appeal Petitioner did not challenge the “legal scope of
10 the sentencing court’s consideration of the proffered mitigation evidence but only the
11 ‘adequacy’ of that review, i.e., the unfavorable result.” (Dkt. 44 at 30.) The Court agrees.

12 In his Opening Brief, Petitioner included an argument entitled, “MITIGATING
13 CIRCUMSTANCES WERE NOT OUTWEIGHED BY AGGRAVATING FACTORS IN
14 APPELLANT’S CASE.” (Opening Br. at 34.) In the body of the argument, Petitioner

15 _____
16 ⁵ To the extent the Court finds throughout this Order that Petitioner does not have an
17 available remedy in state court, Petitioner does not assert the application of any of the
18 preclusion exceptions. See Ariz. R. Crim. P. 32.2(b)(2); 32.1(d)-(h). Further, Petitioner does
19 not argue that any of the claims are of the type that cannot be waived absent a personal
20 knowing, voluntary and intelligent waiver. Cf. Cassett v. Stewart, 406 F.3d 614, 622-23 (9th
21 Cir. 2005), cert. denied 126 S. Ct. 1336 (2006) (addressing waiver because raised by
22 petitioner). The Court finds there is no available remedy in state court for these claims
23 pursuant to Rule 32.2(a)(3) and they do not fall within the limited framework of claims
24 requiring a knowing, voluntary and intelligent waiver before the application of a preclusion
25 finding. See Ariz. R. Crim. P. 32.2(a)(3) cmt. (West 2004) (noting that most claims of trial
26 error do not require a personal waiver); Stewart v. Smith, 202 Ariz. 446, 449, 46 P.3d 1067,
27 1070 (2002) (identifying the rights to counsel, to a jury trial and to a 12-person jury under
28 the Arizona Constitution as the type of claims that require personal waiver); see also State
v. Espinosa, 200 Ariz. 503, 505, 29 P.3d 278, 280 (Ct. App. 2001) (withdrawal of plea offer
in violation of due process not a claim requiring personal waiver); but cf. Cassett, 406 F.3d
at 622-23 (finding claim not defaulted because unclear whether personal waiver would be
required under state law). Additionally, if a new ineffectiveness allegation is raised in a
successive petition, the claim in the later petition will be precluded automatically, without
review of the constitutional magnitude of the claim. See Smith, 202 Ariz. at 450, 46 P.3d at
1071. Because Petitioner raised Claim A-1 in his first PCR proceeding, Claims A-2 and A-3
are necessarily precluded.

1 identified statutory and non-statutory mitigating factors and argued that had “the trial court
2 conducted a proper review of the factors mitigating against imposition of the death penalty,
3 it is clear that Appellant would have been sentenced instead to life imprisonment.” (Id. at
4 38.) Petitioner did not assert a violation of any federal constitutional provisions and did not
5 cite any relevant federal case law, such as Lockett v. Ohio or Eddings v. Oklahoma, which
6 hold that “the Eighth and Fourteenth Amendments require that the sentencer . . . not be
7 precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or
8 record and any of the circumstances of the offense that the defendant proffers as a basis for
9 a sentence less than death.” Eddings, 455 U.S. 104, 110 (1982) (quoting Lockett, 438 U.S.
10 586, 604 (1978)) (emphasis in original). Rather, Petitioner argued only that the available
11 mitigating evidence outweighed the aggravating factors and that he should have been
12 sentenced to life imprisonment. This was insufficient to fairly present a claim that the
13 sentencing judge unconstitutionally refused to consider mitigating evidence.

14 Petitioner argues that, even if not fairly presented, the Arizona Supreme Court actually
15 considered Claim B-1 because it addressed each proffered mitigating factor in its decision,
16 determining that some were not mitigating and that none warranted leniency. Stokely, 182
17 Ariz. at 468-74, 868 P.2d at 519-25. This, Petitioner argues, amounted to an implicit, but
18 erroneous, determination by the state high court that the Eighth and Fourteenth Amendments
19 permit “narrowing” and “elimination” of mitigating evidence. The Court disagrees.
20 Nowhere in the Arizona Supreme Court’s decision does it address, as a matter of federal
21 constitutional law, a refusal by the sentencing judge to consider specific categories of
22 mitigation evidence. Therefore, the claim was not actually exhausted on the merits by the
23 Arizona Supreme Court.

24 Finally, Petitioner argues that the claim was exhausted vis-a-vis the state supreme
25 court’s independent sentencing review. The Arizona Supreme Court, through its
26 jurisprudence, has repeatedly stated that it independently reviews each capital case to
27 determine whether the death sentence is appropriate. Stokely, 182 Ariz. at 516 898 P.2d at
28 465. In conducting this review, the court reviews the record regarding aggravation and

1 mitigation findings, and then decides independently whether the death sentence should be
2 imposed. State v. Brewer, 170 Ariz. 486, 493-94, 826 P.2d 783, 790-91 (1992). The court
3 also determines “whether the sentence of death was imposed under the influence of passion,
4 prejudice, or any other arbitrary factors,” State v. Richmond, 114 Ariz. 186, 196, 560 P.2d
5 41, 51 (1976), sentence overturned on other grounds, Richmond v. Cardwell, 450 F. Supp.
6 519 (D. Ariz. 1978), and will address sentencing-related issues even if not directly raised in
7 the appeal. See, e.g., State v. McKinney, 185 Ariz. 567, 581, 917 P.2d 1214, 1228 (1996)
8 (*sua sponte* striking application of (F)(2) aggravating factor); State v. Stuard, 176 Ariz. 589,
9 605, 863 P.2d 881, 897 (1993) (*sua sponte* finding defendant’s psychiatric condition
10 sufficiently substantial to warrant leniency). Arguably, the court’s review rests on both state
11 and federal grounds. See Brewer, 170 Ariz. at 493, 826 P.2d at 790 (finding that statutory
12 duty to review death sentences arises from need to ensure compliance with constitutional
13 safeguards imposed by the Eighth and Fourteenth amendments); State v. Watson, 129 Ariz.
14 60, 63, 628 P.2d 943, 946 (1981) (discussing Gregg v. Georgia, 428 U.S. 153 (1976) and
15 Godfrey v. Georgia, 446 U.S. 420 (1980) and stating that independent review of death
16 penalty is mandated by the U.S. Supreme Court and necessary to ensure against arbitrary and
17 capricious application).

18 The pivotal issue here is whether the state court’s independent sentencing review
19 exhausted Claim B-1. Petitioner references no authority suggesting that the scope of
20 Arizona’s independent sentencing review encompasses any and all constitutional error at
21 sentencing, and this Court has found none. Rather, it appears from Brewer that the state
22 court’s review is limited to ensuring that imposition of a death sentence rests on permissible
23 grounds. Brewer, 170 Ariz. at 494, 826 P.2d at 791; see also State v. Watson, 129 Ariz. at
24 63, 628 P.2d at 946; cf. Nave v. Delo, 62 F.3d 1024 (8th Cir. 1995) (holding claim of
25 unconstitutional sentencing instruction outside scope of Missouri Supreme Court’s
26 mandatory capital sentencing review). Whether Arizona’s independent review exhausts a
27 federal constitutional challenge to a trial court’s alleged failure to consider and weigh
28 specific mitigation evidence is an open question in the Ninth Circuit. Cf. Beaty v. Stewart,

1 303 F.3d 975, 987 (9th Cir. 2002). Rather than resolve this difficult procedural issue, the
2 Court finds it judicially expedient to address Claim B-1 on the merits. See 28 U.S.C. §
3 2254(b)(2); Rhines v. Weber, 125 S. Ct. 1528, 1535 (2005) (holding that a stay is
4 inappropriate in federal court to allow claims to be raised in state court if they are subject to
5 dismissal under § 2254 (b)(2) as “plainly meritless”).

6 The Eighth and Fourteenth Amendments require a sentencer to consider “any aspect
7 of a defendant’s character or record and any of the circumstances of the offense” that a
8 defendant proffers as a basis for a sentence less than death. Eddings, 455 U.S. at 110
9 (quoting Lockett, 438 U.S. at 604). However, it is left to the sentencer to determine the
10 *weight* to accord such evidence. Id. at 114-15. For purposes of federal habeas review, a
11 sentencing court in Arizona “need not exhaustively analyze each mitigating factor ‘as long
12 as a reviewing federal court can discern from the record that the state court did indeed
13 consider all mitigating evidence offered by the defendant.’” Moormann v. Schriro, 426 F.3d
14 1044, 1055 (9th Cir. 2005), cert. denied 126 S. Ct. 2984 (2006) (quoting Clark v. Ricketts,
15 958 F.2d 851, 858 (9th Cir. 1991), and summarily dismissing Eddings claim where
16 sentencing court explicitly stated it would “consider all evidence presented at trial, in the pre-
17 sentencing report, and at sentencing in rendering its sentencing decision”); see also Jeffers
18 v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (rejecting Eddings/Lockett claim where
19 sentencing court stated it considered all evidence presented in trial, post-trial hearings, and
20 the presentencing report).

21 In this case, the trial court held a four-day aggravation/mitigation hearing in June
22 1992. At sentencing on July 14, 1992, the trial court specifically indicated that it had
23 considered all of the evidence presented in mitigation:

24 This court has considered the testimony and evidence presented at trial
25 and the separate sentencing hearing, and the memoranda, exhibits, and
26 arguments of counsel. A presentence report was prepared, but on request of
counsel for the defendant, it was not read; its contents remain unknown to this
court.

27 (ROA I at 1281; RT 7/14/92 at 23.) In its special verdict, the sentencing court expressly
28 addressed each mitigating circumstance urged by Petitioner, including leniency, lack of prior

1 felony record, cooperation with law enforcement, unequal sentence of the co-defendant,
2 alcohol abuse and intoxication, ability for rehabilitation, difficulty in early years and prior
3 home life, mental condition and behavior disorders, good character, good behavior while
4 incarcerated, and lack of future dangerousness, but concluded that none were mitigating.
5 (ROA I at 1288-91; RT 7/14/92 at 34-42.) Similarly, the Arizona Supreme Court considered
6 the proffered evidence, including, at the request of appellate counsel, the presentence report
7 not considered by the trial judge. Although the appellate court found some of the proven
8 factors to be mitigating, it concluded that none was sufficiently substantial to call for
9 leniency. Id. On this record, it is evident that the state courts considered the evidence
10 proffered by Petitioner; the federal constitution does not require that such evidence be found
11 mitigating. Petitioner is not entitled to relief on Claim B-1, and it will be dismissed with
12 prejudice.

13 **Claim B-2**

14 Petitioner asserts that the Arizona Supreme Court adopted the sentencing court's
15 erroneous findings that he had not been significantly impaired at the time of the crime, and
16 refused to consider, as a matter of law, any mitigating evidence related to Petitioner's
17 troubled family background, good behavior in jail, cooperation with police, and personality
18 disorder. (Dkt. 33 at 40, 43.) Respondents contend Petitioner failed to exhaust any claim of
19 error by the Arizona Supreme Court. (Id. at 38.) The Court agrees.

20 Following the Arizona Supreme Court's decision, Petitioner filed a motion for
21 reconsideration. (AP doc. 37.) He argued the court had erred in finding that his arrest
22 history negated any claims of peacefulness and law-abiding nature. (Id. at 2.) He further
23 asserted it had been inappropriate for the court to hold him accountable for past anti-social
24 acts, which he was incapable of controlling due to brain damage, and to fail to fully consider
25 his capacity for rehabilitation. (Id.) Petitioner plainly failed to alert the Arizona Supreme
26 Court to the operative facts and federal constitutional theory underlying the instant habeas
27 claim.

28 To satisfy the fair presentation requirement, Petitioner was obligated to give the

1 Arizona state courts at least one “*fair opportunity to act on [his] claims.*” O’Sullivan, 526
2 U.S. at 844. Because Claim B-2 alleges error occurring during the Arizona Supreme Court’s
3 sentencing review, that review itself did not provide the court notice of, or an opportunity to
4 correct, the alleged error. Petitioner filed a motion for reconsideration, but neglected to use
5 that opportunity to fairly present this claim to the Arizona Supreme Court. See Correll v.
6 Stewart, 137 F.3d 1404, 1418 (9th Cir. 1998) (finding procedural default of claim based on
7 error of the Arizona Supreme Court where petitioner failed to file motion for reconsideration,
8 which is “an avenue of relief that the Arizona Rules of Criminal Procedure clearly outline”).
9 Nor did Petitioner raise this claim in his PCR. Thus, Petitioner failed to fairly present the
10 claim to the Arizona Supreme Court as required for exhaustion. See Bell v. Cone, 543 U.S.
11 447, 451 n.3 (2005) (stating that a petitioner must present every claim to the state’s highest
12 court if there is an available means).

13 Petitioner is now precluded by Rules 32.2(a)(3) and 32.4 from obtaining relief on
14 Claim B-2 in a PCR proceeding in state court. See Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h);
15 supra note 5. Similarly, the fifteen-day deadline for the filing of a motion for reconsideration
16 in the Arizona Supreme Court is long past. See Ariz. R. Crim. P. 31.18(b). Thus, Claim B-2
17 is technically exhausted but procedurally defaulted, and will be barred absent a showing of
18 cause and prejudice or a fundamental miscarriage of justice.

19 **Claims D and L**

20 Petitioner asserts that Claims D (finding of “especially heinous, cruel or depraved”
21 aggravating factor based on co-defendant’s conduct and intent) and L (execution by lethal
22 injection) were presented to the state court during the PCR proceedings. Specifically,
23 Petitioner asserts these claims were included in a motion for reconsideration filed by
24 substitute PCR counsel (see discussion infra on “Cause and Prejudice” for background
25 regarding appointment of substitute PCR counsel). Regardless, Petitioner did not present
26 these claims to the Arizona Supreme Court in either the initial petition for review or the
27 supplemental petition for review from the denial of PCR relief. (See ROA II at 312.) In
28 capital cases, claims must be fairly presented to the Arizona Supreme Court. See Swoopes

1 v. Sublett, 196 F.3d 1008, 1011 (9th Cir. 1999) (applying O’Sullivan v. Boerckel, 526 U.S.
2 at 838).

3 The Court concludes that Claims D and L are technically exhausted but procedurally
4 defaulted because they do not allege facts or law which would exempt them from preclusion
5 and untimeliness pursuant to Rules 32.2(a)(3) and 32.4(a) were Petitioner to return to state
6 court now. See Ariz. R. Crim. P. 32.2(b), 32.1(d)-(h); supra note 5. Absent a showing of
7 cause and prejudice or miscarriage of justice to excuse the default, Claims D and L will be
8 procedurally barred.

9 **Claim E**

10 Petitioner alleges that insufficient evidence supported the finding of the “especially
11 heinous, cruel or depraved” aggravating factor. Respondents concede this claim was raised
12 on direct appeal but argue it was presented entirely on state-law grounds. (Dkt. 44 at 32.)
13 Petitioner counters that the claim was either expressly or implicitly rejected on the merits by
14 the Arizona Supreme Court during its independent review. (Dkt. 49 at 60.) The Court
15 agrees.

16 As already set forth, the Arizona Supreme Court has a duty to independently review
17 the propriety of a capital defendant’s sentence to ensure that it rests on constitutionally
18 permissible grounds. See Brewer, 170 Ariz. at 493, 826 P.2d at 790; Watson, 129 Ariz. at
19 63, 628 P.2d at 946. Although the scope of this review is limited, the Court finds that a claim
20 alleging unconstitutional application of an enumerated aggravating factor falls within the
21 narrow class of claims implicitly rejected by the Arizona Supreme Court when it affirmed
22 Petitioner’s sentence. See Beam v. Paskett, 3 F.3d 1301, 1306 (9th Cir. 1993), overruled on
23 other grounds by, Lambright v. Stewart, 191 F.3d 1181 (9th Cir. 1999) (holding that, because
24 the Idaho Supreme Court was statutorily required to review the petitioner’s capital sentence
25 to determine if it was infected by “passion, prejudice, or any other arbitrary factor,” that court
26 must have implicitly ruled on the constitutionality of the trial judge’s application of the
27 “continuing threat” factor to the petitioner). Accordingly, Claim E will be addressed on the
28 merits.

1 **Claims F-1, F-2, and F-3**

2 Petitioner acknowledges that Claim F-1, alleging counsel’s ineffectiveness at trial for
3 failing to investigate and present an adequate mental state defense, was not actually presented
4 in state court but nonetheless asserts exhaustion because it “is, in substance, ‘identical’ to the
5 allegations asserted against trial counsel at sentencing.” (Dkt. 49 at 61.) Petitioner further
6 argues that the allegations of ineffectiveness in Claims F-2 and F-3 are appropriate for review
7 on the merits because they do not fundamentally alter the “underlying claim of ineffective
8 assistance” in F-1 that was exhausted in state court. The Court disagrees.

9 A claim based on counsel’s performance at sentencing is patently different than a
10 claim based on counsel’s performance at trial. Petitioner was required to fairly present in
11 state court the factual basis of the acts alleged to constitute ineffective assistance. “A
12 thorough description of the operative facts before the highest state court is a necessary
13 prerequisite to satisfaction of the standard of O’Sullivan and Harless that ‘a federal habeas
14 petitioner [must] provide the state courts with a ‘fair opportunity’ to apply controlling legal
15 precedent to the facts bearing upon his constitutional claim.” Kelly v. Small, 315 F.3d 1063,
16 1069 (9th Cir. 2003) (quoting Harless, 459 U.S. at 6); see also Moormann v. Schriro, 426
17 F.3d at 1056 (noting that a petitioner cannot add unrelated alleged instances of
18 ineffectiveness to any ineffectiveness claim raised in state court); Carriger v. Lewis, 971 F.2d
19 at 333-34 (treating distinct failures by trial counsel as separate claims for exhaustion and
20 procedural default).

21 Here, it is undisputed that Petitioner did not identify to the state courts that his rights
22 to the effective assistance of counsel were violated because his trial counsel failed to
23 investigate, prepare and present a “mental-state” conviction phase defense negating
24 premeditation. Rather, Claim F-1 is a new allegation of ineffectiveness raised here for the
25 first time. Petitioner contends, however, that he alerted the state courts to his claim that his
26 rights to the effective assistance of counsel at the conviction phase were violated by alleging
27 that trial counsel failed to adequately argue his “mental incapacity” as a mitigating factor at
28 the sentencing phase. Thus, the determinative question is whether the conviction phase

1 mental defense issue fundamentally alters the ineffective assistance of counsel claim that was
2 presented to the state courts. This Court concludes that it does.

3 Although the legal basis for the claim of ineffective assistance of counsel essentially
4 remains the same, the additional facts “fundamentally alter” the gravamen of the claim and
5 place it in a significantly different posture. Cf. Weaver v. Thompson, 197 F.3d 359, 364 (9th
6 Cir. 1999) (holding that jury misconduct claim was properly exhausted when petitioner
7 presented incidents of improper jury contact that differed in number, but not in kind, from
8 those presented to state courts). The essential factual theory – that counsel failed to present
9 an effective *conviction phase defense*, as opposed to presenting an adequate *mitigation*
10 *argument*, are not the same. Indeed, a claim based on counsel’s failure to present evidence
11 of an impulsive character trait to negate premeditation under State v. Christensen, 129 Ariz.
12 32, 628 P.2d 580 (1981) (see discussion infra regarding “Fundamental Miscarriage of
13 Justice”), is both factually *and* legally distinct from a claim that counsel failed to investigate
14 and present evidence to establish diminished capacity to control conduct or to appreciate the
15 difference between right and wrong under A.R.S. 13-703(G)(1), even if both claims involve
16 allegations of brain damage. Petitioner did not adequately exhaust Claim F-1, F-2 or F-3.

17 The Court concludes that Claims F-1, F-2, and F-3 are technically exhausted but
18 procedurally defaulted because they do not allege facts or law which would exempt them
19 from preclusion and untimeliness pursuant to Rules 32.2(a)(3) and 32.4(a) were Petitioner
20 to return to state court now. See Ariz. R. Crim. P. 32.2(b), 32.1(d)-(h); supra note 5; see also
21 Smith, 202 Ariz. at 450, 46 P.3d at 1071 (stating that new ineffectiveness allegations raised
22 in a successive petition are precluded automatically if the petitioner raised separate
23 ineffectiveness allegations in a first petition). The Court will not address Claims F-1, F-2 and
24 F-3 on the merits absent a showing of cause and prejudice or a fundamental miscarriage of
25 justice.

26 **Claims H-1 and H-2**

27 Petitioner concedes these claims concerning appellate counsel’s representation were
28 not presented in state court, but asserts generally they are not defaulted because he has an

1 available remedy in state court to exhaust them. (Dkt. 49 at 67.) However, he does not assert
2 the application of any of Arizona's preclusion exceptions for the filing of a successive PCR
3 petition. The Court finds that Claims H-1 and H-2 are technically exhausted but procedurally
4 defaulted because they do not allege facts or law which would exempt them from preclusion
5 and untimeliness pursuant to Rules 32.2(a)(3) and 32.4(a) were Petitioner to return to state
6 court now. See Ariz. R. Crim. P. 32.2(b)(2); 32.1(d)-(h); supra note 5; see also Smith, 202
7 Ariz. at 450, 46 P.3d at 1071. They will not be addressed on the merits absent a showing of
8 cause and prejudice or a fundamental miscarriage of justice.

9 **B. Cause and Prejudice**

10 Throughout his pleadings, Petitioner asserts that any default of his claims is
11 attributable to PCR counsel, Harriette Levitt. Recognizing that ineffectiveness of PCR
12 counsel cannot constitute cause, see Coleman, 501 U.S. at 752-55, Petitioner argues instead
13 that cause rests on the separate question of whether a client is bound by a lawyer's default
14 where there is an absence of an attorney-client relationship. (Dkt. 49 at 6-7.) Specifically,
15 Petitioner asserts that Levitt's default should not be attributed to him because she acted
16 outside the agency relationship and thus her errors must be construed as external
17 impediments that prevented Petitioner's compliance with state procedural rules. (Id. at 7-8,
18 15.) Petitioner also asserts that cause is established because the state courts "forced" him to
19 accept PCR counsel with whom he had an "irreconcilable conflict" (id. at 13), and violated
20 his right to due process by denying him a "meaningful ability" to utilize state PCR
21 procedures to test the legality of his conviction and sentence (id. at 20 n.13). The Court is
22 not persuaded.

23 **Relevant Factual Background**

24 On April 17, 1996, the trial court appointed Harriette Levitt to represent Petitioner in
25 his PCR proceedings. (ROA II at 21.) The PCR petition was originally due August 17,
26 1996. On September 27, 1996, Levitt filed an untimely motion requesting a sixty-day
27 extension in order "to complete her review of the trial file and transcripts, investigate the case
28

1 and prepare the Rule 32 petition.”⁶ (Id. at 22.) The PCR court granted the motion and reset
2 the deadline to December 2, 1996. (Id. at 23.) On November 7, 1996, Levitt filed a second
3 continuance motion, and the court extended the deadline to January 8, 1997. (Id. at 24-26.)
4 On that date, Petitioner filed a petition that raised only two claims. (Id. at 28-35.)

5 Following receipt of the PCR petition, on January 15, 1997, Petitioner wrote a letter
6 to Denise Young, then an attorney with the Arizona Capital Representation Project,
7 complaining that he had “been ‘dump-trucked’ on [his] Rule 32, and . . . need[ed] help in the
8 worst way.” (Id. at 285.) Petitioner characterized the PCR petition as “rushed,” “negligent,”
9 and “quite a joke.” (Id.) He explained that the petition consisted of “2 pretty lame issues
10 which are laid out entirely . . . on 3 pages.” (Id.) Petitioner estimated that, out of the 240
11 days total, Levitt had spent only 71 days working on his petition, and that she “made very
12 little effort to even familiarize herself with [his] case, much less did she try to do an effective
13 appeal.” (Id.) Petitioner asked Young whether there was any way to “file a motion to stop
14 this mess and get an attorney who will care enough to do a competent job.” (Id. at 286.) He
15 characterized the situation as “ineffective assistance of counsel in stereo.” (Id.)

16 On February 15, 1997, Petitioner wrote a similar letter to the PCR court. (Id. at 288-
17 89.) He explained to the court that he telephoned Levitt on January 31, 1997, and told her
18 that he was “concerned and dissatisfied with her work and the brevity of this 6-page, 2 issue
19 Rule 32.” (Id. at 289.) Petitioner stated that Levitt had explained the brevity of the petition
20 by claiming that “[s]ome [Rule 32 petitions] are even briefer than that.” According to
21 Petitioner, Levitt further told him that his “trial attorneys didn’t make any mistakes” and
22 “[t]here are no more issues that can be raised in my case.” (Id.) Finally, Petitioner claimed
23 that Levitt stated, “[t]his Rule 32 won’t take long in the courts, and that then [Petitioner’s]
24 case will go into federal court where it will lose,” and he would “probably be executed in 2
25 or 3 years.” (Id.) Petitioner expressed his opinion that “it [is] evident that my present appeal
26 has been handled with a lick and a promise, rather than being given the conscientious
27

28 ⁶ Levitt noted that the request for an extension of time was not timely filed “due to a clerical error.” (Id.)

1 analysis and preparation which should be applied.” (Id.) He then quoted a legal article,
2 which set forth the steps post-conviction counsel should undertake in order to “represent
3 adequately a defendant sentenced to death in a first post-conviction proceeding.” (Id.) Based
4 on the article, Petitioner asserted that “[t]he Rule 32 prepared by Ms. Levitt is a disgrace, and
5 a good example of the very ‘ineffective assistance of counsel’ which it is meant to relieve.”
6 (Id.) Petitioner closed his letter by “ask[ing] the Court to stop this Rule 32 petition and
7 appoint an attorney who will apply his or her self and try to do a competent job in this
8 matter.” (Id.) According to Petitioner, the trial judge refused to read the letter and had his
9 secretary transmit it to Levitt for handling. (Dkt. 49 at 12.)

10 On March 6, 1997, the PCR court denied the petition. On March 10, 1997, Levitt
11 filed a request to withdraw from the case, citing complaints from Petitioner about her
12 performance, “irreconcilable differences,” and a “complete breakdown of the attorney/client
13 relationship.” (ROA II at 83-84.) Levitt suggested that new counsel be appointed to
14 represent Petitioner so that the PCR petition could be “decided on the merits, without
15 collateral issues relating to the Rule 32 attorney’s effectiveness.” (Id.) The PCR court
16 permitted Levitt to withdraw and appointed attorney Carla Ryan to represent Petitioner “for
17 the completion of the Rule 32 petition.” (Id. at 85.)

18 Shortly after Ryan was appointed, on March 17, 1997, counsel for the State of
19 Arizona filed a motion to vacate the order replacing Levitt or, alternatively, to clarify the
20 limited role of her substitute, Ryan. (Id. at 94-96.) The State argued that the PCR court
21 should reinstate Levitt as counsel and vacate the appointment of Ryan because “this Court
22 has already denied the Rule 32 petition by final order, and because there is no justification
23 [for] removing one attorney who has already reviewed the record (at Cochise County’s
24 expense) for another who has not, simply because [Petitioner] is dissatisfied with the way
25 Ms. Levitt has handled the case so far.” (Id. at 95.) The State further argued that the only
26 remaining task in the PCR proceeding is “for counsel who filed the petition to take steps
27 toward seeking reconsideration and/or review by the Arizona Supreme Court,” which
28 required “neither the approval nor the participation of [Petitioner].” (Id.) In the alternative,

1 the State asked the court to “expressly limit [Ryan’s] appointment to pursuing the remedies
2 specified under Rule 32.9(a) and (c) (motion for rehearing and petition for review),” on the
3 grounds that “[t]he rules do not allow” Ryan to supplement the already-adjudicated petition
4 in some manner. (Id. at 96.)

5 In response, Ryan argued that the State lacked standing to make requests regarding
6 the appointment of PCR counsel. (Id. at 114.) Ryan further argued that Petitioner was
7 entitled to the effective assistance of counsel in his PCR proceeding, and that the
8 appointment of substitute counsel was critical in this case because “the focus of a conflict
9 between an attorney and a client is not whether counsel is legally competent, but the
10 relationship itself.” (Id. at 116-18.) Finally, Ryan argued that Petitioner was entitled to seek
11 to amend or supplement his PCR petition. (Id. at 118.) Ryan also filed motions for the
12 appointment of co-counsel and to extend the time for filing a motion for reconsideration of
13 the denial of the PCR petition. (Id. at 98-102.)

14 In response to Ryan’s motion for co-counsel, the State argued that her request
15 evidenced her intent “to ignore the finality of this Court’s order denying the Rule 32
16 petition,” because “[s]he requests additional time and the appointment of co-counsel to
17 ‘complete’ the petition because ‘numerous valid [unspecified] issues were not raised,’ and
18 because . . . Levitt allegedly was ‘ineffective’ as Rule 32 counsel.” (Id. at 110.) The State
19 argued that amendments to a Rule 32 petition are not permitted without leave of court and
20 a showing of extraordinary circumstances, and that any new claims would be precluded by
21 Rule 32.2(a)(2) in any event. The State also contended that, because there is no right to the
22 effective assistance of counsel in Rule 32 proceedings, Petitioner’s and Ryan’s opinions
23 about Levitt’s performance were irrelevant, as were Levitt’s reasons for requesting
24 withdrawal. (Id.)

25 In reply to the State’s opposition to the motion for co-counsel, Ryan again asserted
26 that Petitioner was entitled to the effective assistance of counsel in his PCR proceeding and
27 therefore she should be afforded “a meaningful opportunity to re-evaluate the prior
28 proceedings,” including Petitioner’s trial and direct appeal. (Id. at 155.) Ryan also filed a

1 motion to disqualify the Attorney General's office from the case or, alternatively, to hold the
2 office in contempt on the basis of prosecutorial misconduct for personally attacking, and
3 making unsupported accusations against, her. (Id. at 121-28.) In response, the State argued
4 that its objections to Ryan's representation were made in a good faith attempt to keep the
5 PCR proceeding "on track." (Id. at 234.)

6 On April 16, 1997, Ryan filed a motion for reconsideration of the dismissal of the
7 PCR petition and a request for leave to amend that petition. (Id. at 245-65.) The thrust of
8 the motion to amend was that "Petitioner received ineffective assistance of counsel on his
9 original petition" and counsel's "deficient performance prejudiced" Petitioner. (Id. at 250-
10 59.) Ryan argued that Levitt had provided ineffective assistance of counsel in Petitioner's
11 PCR proceeding because she: (i) filed a petition "that consisted of a little over 3 pages of
12 legal argument and raised only two issues"; (ii) claimed to have been working on Petitioner's
13 PCR petition on October 4, 1996, even though she did not receive the trial transcripts until
14 October 31, 1996; (iii) spoke only once with Petitioner over the telephone and never visited
15 him prior to filing the PCR petition; and (iv) did not conduct an investigation or request
16 funds for experts or investigators. (Id. at 250-51.) Petitioner argued that he was prejudiced
17 by Levitt's deficient performance because "she raised only two fairly minor issues," whereas
18 Ryan had identified thirty-one "potential issues" that "[i]ndividually and/or cumulatively . . .
19 would have changed the outcome in this case." (Id. at 255-60.)

20 On April 29, 1997, the PCR court rescinded its order appointing Ryan and reappointed
21 Levitt. In doing so, it adopted the State's argument that Levitt should remain on the case
22 because there remained only a motion to reconsider and a petition for review to prepare. (Id.
23 at 296.) The court denied Petitioner's request for the appointment of co-counsel on the
24 ground that the PCR petition "has been completed" and further held that counsel for the State
25 had not engaged in prosecutorial misconduct. (Id.)

26 On May 7, 1997, after having been reinstated as counsel by the PCR court, Levitt filed
27 a Petition for Review ("PR") of the denial of Petitioner's PCR petition in the Arizona
28 Supreme Court. (Id. at 301-15.) The PR requested review of both the summary denial of the

1 PCR petition and rescission of the order that substituted Ryan as PCR counsel. (Id. at 306.)
2 After addressing the issues raised in the PCR petition, Levitt included a discussion titled,
3 “Issues Raised By Carla Ryan.” (Id. at 310-13.) There, Levitt explained that “[t]he lion’s
4 share” of filings by Ryan constituted “an attack on the effectiveness of [Levitt], all of which
5 is meritless.” (Id. at 310.)

6 Levitt acknowledged that Ryan’s motion for reconsideration included a “laundry list”
7 of possible claims. (Id. at 311.) However, she characterized them as “inappropriate and
8 largely meritless” and suggested the claims fell into four different categories: (i) those that
9 “were already raised, either on appeal or in the Rule 32 petition”; (ii) those that “clearly
10 relate to strategic decisions by the respective attorneys and cannot properly be urged as
11 arguments supporting a claim of ineffective assistance of counsel”; (iii) those that “are
12 contrary to well-established caselaw and should not be raised because they cannot
13 legitimately be argued”; and (iv) those that “are either not supported by the facts of the case
14 or are completely meritless.” (Id. at 311-12.) Levitt further argued that, although she had
15 not performed deficiently, she had requested permission to withdraw and Petitioner had
16 expressed dissatisfaction with her. On the basis of these two factors, Levitt argued that the
17 PCR court’s “decision to appoint new counsel was originally the correct one and should have
18 remained intact.” (Id. at 311.) Levitt acknowledged that she had not requested funds for an
19 investigator in preparing the PCR petition because “[n]ot every case necessitates hiring
20 expert witnesses or investigators when an attorney can conduct such investigation herself.”
21 (Id. at 312.) She asserted that the affidavits attached to the petition demonstrated that an
22 investigation had been undertaken with respect to the two issues raised in the petition. (Id.)

23 That same day, May 7, 1997, Petitioner (through Ryan) sought interlocutory review
24 via a special action petition in the Arizona Supreme Court. (SA doc. 3.) On May 9, 1997,
25 the Arizona Supreme Court stayed all proceedings in the PCR court and appointed Ryan to
26 represent Petitioner in the special action proceeding. (SA doc. 4.) On June 27, 1997, the
27 Arizona Supreme Court issued an order accepting jurisdiction of Petitioner’s special action
28 but holding that the PCR court had not exceeded its jurisdiction or acted arbitrarily in

1 vacating its previous order allowing Levitt to withdraw as counsel. (SA doc. 11.) Although
2 denying Petitioner's request to vacate the order reinstating Levitt as PCR counsel, the court
3 directed that Levitt could file a "supplemental" PCR petition raising any additional claim
4 "that, in her professional judgment, is not precluded and has merit, even though it may not
5 have been included in her first petition for post-conviction relief." (*Id.*) Levitt subsequently
6 filed a supplemental petition, which raised six additional claims – four of which were
7 identified as "Additional Issues Petitioner Wishes to Raise" that Levitt described as either
8 precluded or meritless and not "in good faith" arguable by counsel. (ROA III at 7-8.) The
9 PCR court denied the supplemental petition, Levitt filed a supplemental PR, and the Arizona
10 Supreme Court summarily denied review of both the PR and the supplemental PR.

11 **Discussion**

12 Petitioner argues that any procedural default committed by Levitt is excused because
13 she never established an attorney-client relationship with him and, due to "irreconcilable
14 conflicts," was not acting as his agent. (Dkt. 49 at 10.) Petitioner argues that a constructive
15 denial of counsel occurred here because: (i) Levitt never met to confer with him before or
16 after filing the PCR Petition, (ii) none of the issues raised (or not raised) in that petition were
17 ever discussed with him; and (iii) Levitt prepared and filed the PCR Petition without his
18 approval. (*Id.* at 11, 14.)

19 Generally, cause exists only when "some objective factor external to the defense
20 impeded counsel's efforts to comply with a state procedural rule." *Murray*, 477 U.S. at 488.
21 Because an attorney, as the agent of the client, is not external to the defense, attorney
22 inadvertence and ignorance rarely provides cause for a default. *Coleman*, 501 U.S. at 753.
23 The exception to this rule is where the attorney's neglect violates a defendant's Sixth
24 Amendment right to the effective assistance of counsel. *Id.* at 753-54. Thus, the ineffective
25 assistance of counsel can establish sufficient cause only when it rises to the level of an
26 independent constitutional violation. *Coleman*, 501 U.S. at 755. When a petitioner has no
27 constitutional right to counsel, there can be no constitutional violation arising out counsel's
28 ineffectiveness. *Id.* at 752.

1 Although Petitioner asserts that he is not alleging ineffectiveness of PCR counsel as
2 cause, the complained-of acts by Levitt are, in essence, precisely that. As such, Levitt's
3 representation of Petitioner during the PCR proceeding necessarily fails to establish cause
4 because there is no constitutional right to counsel in state PCR proceedings. See
5 Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Murray v. Giarratano, 492 U.S. 1, 7-12
6 (1989) (the Constitution does not require states to provide counsel in PCR proceedings even
7 when the putative petitioners are facing the death penalty); Bargas v. Burns, 179 F.3d 1207,
8 1215 (9th Cir. 1999) (holding that ineffective assistance of counsel in post-conviction
9 proceeding cannot constitute cause); Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993)
10 (refusing to extend the right of effective assistance of counsel to state collateral proceedings);
11 Harris v. Vasquez, 949 F.2d 1497, 1513-14 (9th Cir. 1990).

12 The fact that the PCR proceeding was Petitioner's first and only opportunity to assert
13 claims of ineffective assistance of trial and appellate counsel does not change the analysis.
14 In Evitts v. Lucey, 469 U.S. 387, 396 (1985), the Court held that a petitioner is entitled to
15 effective assistance of counsel on a first appeal as of right. However, since Evitts was
16 decided, the courts have clarified that it's holding applies strictly to a first appeal as of right,
17 even if particular types of claims could not have been raised in that appeal, because there is
18 no constitutional right to counsel in state PCR proceedings. See Finley, 481 U.S. at 558;
19 Ellis v. Armenakis; 222 F.3d 627, 633 (9th Cir. 2000); Moran v. McDaniel, 80 F.3d 1261,
20 1271 (9th Cir. 1996); Bonin v. Calderon, 77 F.3d 1155, 1159 (9th Cir. 1996) (ineffective
21 assistance of counsel claim defaulted for not being raised in first habeas petition, even though
22 the same counsel represented petitioner in both proceedings, because no right to counsel in
23 habeas proceedings); Jeffers v. Lewis, 68 F.3d 299, 300 (9th Cir. 1995) (en banc) (plurality)
24 (ruling an Arizona petitioner had "no Sixth Amendment right to counsel during his state
25 habeas proceedings even if that was the first forum in which he could challenge
26 constitutional effectiveness on the part of trial counsel"); see also Evitts, 469 U.S. at 396 n.7
27 (noting that discretionary appeals are treated differently because there is no right to counsel).
28 Petitioner's argument fails because there is no constitutional right to counsel for PCR

1 proceedings even if it was his first opportunity to raise an ineffective assistance of counsel
2 claim.

3 Petitioner relies on Hollis v. Davis, 941 F.2d 1471 (11th Cir. 1991), in support of his
4 argument that “[a] habeas petitioner must be deemed to establish cause for a default when
5 he/she can demonstrate that it was caused by a lawyer acting outside of the agency
6 relationship.” (Dkt. 49 at 8.) In Hollis, trial counsel did not challenge the exclusion of
7 blacks from the jury pool. Trial counsel later testified that he did not know that it was illegal
8 to exclude blacks from jury service. Id. at 1476. The Hollis court listed a number of possible
9 sources for counsel’s belief, including the “possibility that [trial counsel] knew of the right,
10 but didn’t raise it out of fear for his own practice and reputation.” Id. at 1478. The Eleventh
11 Circuit found that if it were shown that counsel did not challenge the jury’s composition out
12 of fear of social ostracism or loss of clients, it would constitute cause for procedural default.
13 Id. at 1479.

14 Petitioner’s situation in the present case is distinguishable from Hollis. The default
15 in Hollis was caused by trial, not PCR, counsel, and there is no allegation here that Levitt
16 failed to fairly present claims because she feared social ostracism or loss of clients. Rather,
17 Petitioner complains that Levitt failed to raise claims because she was incompetent and failed
18 to sufficiently communicate with him. Such complaints amount to a claim of ineffectiveness,
19 which, as already stated, cannot establish cause. Indeed, if the Court were to accept
20 Petitioner’s argument, then any PCR proceeding in which a petitioner challenged the
21 competency of, or sufficiency of communication with, PCR counsel would be suspect.
22 Because there is no right to the effective assistance of PCR counsel, the Court must reject this
23 allegation of cause.

24 Similarly, the Court finds the decision in Manning v. Foster, 224 F.3d 1129 (9th Cir.
25 2000), to be distinguishable. In Manning, the Ninth Circuit held that a “conflict of interest,
26 independent of a claim of ineffective assistance of counsel . . . constitute[s] cause where the
27 conflict *caused the attorney to interfere with the petitioner’s right to pursue his habeas*
28 *claim.*” 224 F.3d at 1134 (emphasis added). In that case, trial counsel “misled [Manning]

1 in such a way as to prevent him from claiming that [trial counsel's] assistance had been
2 ineffective." Id. at 1132. Consequently, "there was a clear conflict between Manning's
3 interest in presenting and prevailing in his ineffective assistance claim and [trial counsel's]
4 interest in protecting himself from the damage such an outcome would do to his professional
5 reputation and from exposure to potential malpractice liability or bar discipline." Id. at 1134.

6 Unlike in Manning, Levitt did not affirmatively mislead Petitioner or deny him access
7 to a post-conviction proceeding. Her actions in representing Petitioner were not adverse to
8 him or prompted by self-interest. Moreover, because Levitt was appointed to prepare a PCR
9 petition, and Petitioner had no right to the effective assistance of such counsel, any alleged
10 ineffectiveness by her did not pose the type of conflict evident in Manning, wherein trial
11 counsel had "great incentives to prevent a client from prevailing in an ineffective assistance
12 claim." Id. Levitt filed a petition pursuant to Arizona's Rule 32, raising the claims she
13 believed, rightly or wrongly, to be meritorious. "[T]he mere fact that counsel failed to
14 recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing
15 it, does not constitute cause for a procedural default." Poland v. Stewart, 169 F.3d 573, 587
16 (9th Cir.1999) (citing Murray, 477 U.S. at 486).

17 Finally, the Court finds no merit in Petitioner's contention that due process requires
18 PCR counsel to be effective. Petitioner cites no case, and the Court has found none, which
19 holds that a state is required by the federal constitution to provide counsel in PCR
20 proceedings. The fact that a state may, "as a matter of legislative choice," Ross v. Moffitt,
21 417 U.S. 600, 618, (1974), provide for counsel in discretionary appeals following a first
22 appeal of right does not extend the Sixth Amendment's guarantee of effective counsel to
23 discretionary appeals. See Evitts, 469 U.S. at 394, 397 n.7; Finley, 481 U.S. at 559 (where
24 a state provides a lawyer in a state post-conviction proceeding, it is not "the Federal
25 Constitution [that] dictates the exact form such assistance must assume," rather, it is in a
26 state's discretion to determine what protections to provide). Further, the Ninth Circuit has
27 held explicitly that "ineffective assistance of counsel in habeas corpus proceedings does not
28 present an independent violation of the Sixth Amendment enforceable against the states

1 through the Due Process Clause of the Fourteenth Amendment.” Bonin, 77 F.3d at 1160.
2 Because Petitioner’s PCR proceeding took place after his appeal of right, it was a
3 discretionary proceeding that did not confer a constitutional right to the effective assistance
4 of counsel. Thus, even assuming PCR counsel’s performance did not conform to minimum
5 standards, it did not violate the federal constitution and cannot excuse the procedural default
6 of any claims.

7 Petitioner has not shown cause for his procedural defaults. Therefore, the Court
8 declines to address prejudice. See Thomas v. Lewis, 945 F.2d 1119, 1123 n.10 (9th Cir.
9 1991). In addition, the Court finds no disputed issues of fact warranting an evidentiary
10 hearing on these issues. See Campbell v. Blodgett, 997 F.2d 512, 524 (9th Cir. 1992) (“An
11 evidentiary hearing is not necessary to allow a petitioner to show cause and prejudice if the
12 court determines as a matter of law that he cannot satisfy the standard.”). Petitioner’s request
13 for a hearing on cause and prejudice is therefore denied.

14 **C. Fundamental Miscarriage of Justice**

15 If a petitioner cannot meet the cause and prejudice standard, the Court still may hear
16 the merits of procedurally defaulted claims if the failure to hear the claims would constitute
17 a “fundamental miscarriage of justice.” Sawyer, 505 U.S. at 336. Petitioner asserts that a
18 fundamental miscarriage of justice will occur if his defaulted claims are not considered on
19 the merits because he is innocent of premeditated murder. Specifically, he argues that, but
20 for counsel’s ineffectiveness at trial in failing to present evidence of an impulsive personality
21 trait, no reasonable juror would have found the element of premeditation. To establish a
22 fundamental miscarriage of justice on this basis, Petitioner must support his allegation of
23 constitutional error with new reliable evidence, such as exculpatory scientific evidence,
24 trustworthy eyewitness accounts or critical physical evidence, that was not presented at trial.
25 Schlup v. Delo, 513 U.S. at 324.

26 Petitioner proffers opinions from two new experts, who conclude that Petitioner’s
27 neurologic deficits caused him to act reflexively at the time of the offense. (Dkt. 49, ex. 1
28 at 10; dkt. 64, ex. 3 at 7.) Arizona law permits a defendant to present evidence to show that

1 he has a character trait for acting reflexively, rather than reflectively, for the purpose of
2 challenging a finding of premeditation, i.e., to show that he did not actually reflect after
3 forming the requisite intent. See State v. Christensen, 129 Ariz. at 35-36, 628 P.2d at 583-
4 84; Vickers v. Ricketts, 798 F.2d 369, 371 (9th Cir. 1986); see also State v. Dann, 205 Ariz.
5 557, 565, 74 P.3d 231, 239 (2003) (citing cases); State v. Thompson, 204 Ariz. 471, 427-28,
6 65 P.3d 420, 478-79 (2003) (premeditation means that the defendant intended to kill or knew
7 that he would kill and that, after forming intent or knowledge, he actually reflected on the
8 decision before killing, thus differentiating premeditated murder from second degree
9 murder); State v. Willoughby, 181 Ariz. 530, 539, 892 P.2d 1319, 1328 (1995) (same).

10 In Christensen, the defendant sought, pursuant to Rule 404(a)(1) of the Arizona Rules
11 of Evidence, admission of expert testimony regarding his tendency to act without reflection.
12 The Arizona Supreme Court held it was error to exclude such testimony because
13 “establishment of [this character trait] tends to establish that appellant acted impulsively.
14 From such a fact, the jury could have concluded that he did not premeditate the homicide.”
15 Id. at 35, 628 P.2d at 583. The holding was limited, however, in that an expert *cannot* testify
16 to whether the defendant was acting impulsively at the time of the offense. Id. at 35-36, 628
17 P.2d at 583-84. In addition, Arizona has long rejected the affirmative defense of diminished
18 capacity. State v. Mott, 187 Ariz. 536, 540-41, 931 P.2d 1046, 1050-51 (1997) (citing State
19 v. Schantz, 98 Ariz. 200, 212-13, 403 P.2d 521, 529 (1965)); see also Clark v. Arizona, 126
20 S. Ct. 2709 (2006) (upholding constitutionality of Arizona’s Mott rule). Consequently, a
21 defendant cannot, during trial, present evidence of mental disease or defect to show that he
22 was *incapable* of forming a requisite mental state for a charged offense. Mott, 187 Ariz. at
23 540, 931 P.2d at 1050; Schantz, 98 Ariz. at 213, 403 P.2d at 529.

24 It is clear from a review of Arizona law that evidence of impulsivity is admissible only
25 to show a general character trait; an expert’s opinion that a defendant acted impulsively at
26 the time of the offense or lacked the ability to premeditate is not admissible. In light of the
27 limited nature of the impulsivity evidence Petitioner argues should have been presented by
28 trial counsel, and after reviewing the record, the Court concludes there was sufficient other

1 evidence from which a reasonable juror could find that Petitioner acted with premeditation.
2 In particular, Petitioner told police he and his co-defendant, Randy Brazeal, raped the girls
3 and said Brazeal told him, “Now we got to kill them.” (Dkt. 59, ex. F at 12.) Petitioner also
4 stated:

5 [Petitioner]: This didn’t start out . . . like ah . . . somethin’ bad.

6 [Police]: Huh-hum.

7 [Petitioner]: And I wasn’t going to violate them myself, but the boy .
8 . . ah . . . I don’t know, man. (inaudible).

9 [Police]: This is all Randy’s idea?

10 [Petitioner]: Yes, And I, I, I don’t have any reason to tell you . . . a lie.
11 Yes, it was. Yes. I was drinking very heavily and yes,
12 I allowed myself to . . . I don’t know. That’s what I
13 don’t understand.

14 [Police]: Okay. Whose knife was it, Richard?

15 [Petitioner]: Ah . . . mine.

16
17 [Police]: Okay. What happened then, after that, after Randy told
18 you that he wanted to kill them?

19 [Petitioner]: He grabbed one and I had to grab the other one.

20 [Police]: Okay. So . . .

21 [Petitioner]: I’ve never done anything like that before and I . . .
22 choked ‘em. There was one foot moving though I knew
23 they was brain dead but I was getting scared.

24 (Id. at 8-9.) Petitioner’s own statement provides evidence from which a reasonable juror
25 could determine that he reflected on the decision to kill the girls after Brazeal told him they
26 needed to be killed, presumably to eliminate them as witnesses. In addition, if defense
27 counsel had presented evidence of an impulsive character trait, this would have opened the
28 door to rebuttal from two of Petitioner’s ex-wives that he had, on different occasions,
threatened to kill them and throw their bodies down mine shafts (RT 6/18/92 at 74-77, 100-
03), as happened to the victims in this case. See Ariz. R. Evid. 405; cf. LaGrand v. Stewart
133 F.3d 1253, 1272 (9th Cir. 1998) (observing that decision not to present impulsivity
defense not ineffective where it would open door to defendant’s prior record). The Court

1 concludes that Petitioner's new expert evidence fails to establish that *no* reasonable juror
2 would have found him guilty of premeditated murder. Because Petitioner has failed to make
3 the requisite showing of actual innocence, he has not established that a fundamental
4 miscarriage of justice will result if his defaulted claims are not considered on the merits.

5 Petitioner also alleges there will be a fundamental miscarriage of justice if his
6 defaulted sentencing-related claims are not considered on the merits because he is innocent
7 of the death penalty. To establish a fundamental miscarriage of justice on this basis,
8 Petitioner must show by clear and convincing evidence that, but for a constitutional error, no
9 reasonable factfinder would have found the existence of any aggravating circumstance or
10 some other condition of eligibility for the death sentence under the applicable state law.
11 Sawyer, 505 U.S. at 336. In Arizona, eligibility for the death penalty is predicated on the
12 existence of at least one statutory aggravating factor. See LaGrand v. Stewart, 133 F.3d at
13 1262; Villafuerte v. Stewart, 111 F.3d 616, 629 (9th Cir. 1997).

14 Petitioner's sole argument that he is innocent of the death penalty is that "no
15 reasonable sentencer would have imposed the death sentence if the omitted mitigating
16 evidence was presented at sentencing." (Dkt. 49 at 33.) Petitioner does not even attempt to
17 demonstrate that no reasonable factfinder would have found two of the aggravating factors
18 at issue, the finding of which render him eligible for the death penalty. See Sawyer, 505 U.S.
19 at 347 (focus is on eligibility, not on additional mitigation); LaGrand, 133 F.3d at 1262
20 ("actual innocence of the death penalty must focus on eligibility for the death penalty, and
21 not on additional mitigation"); Villafuerte, 111 F.3d at 629. For that reason, Petitioner
22 cannot establish a fundamental miscarriage of justice based on innocence of the death
23 penalty.

24 **D. Plainly Meritless Claims**

25 Pursuant to 28 U.S.C. § 2254(b)(2), the Court may dismiss plainly meritless claims
26 regardless of whether the claim was properly exhausted in state court. See Rhines v. Weber,
27 125 S. Ct. at 1535 (holding that a stay is inappropriate in federal court to allow claims to be
28 raised in state court if they are subject to dismissal under § 2254(b)(2) as "plainly meritless").

1 After review of Petitioner's amended petition, the Court concludes that the following claims
2 are plainly meritless. Accordingly, each will be dismissed with prejudice.

3 **Claim I**

4 Petitioner alleges a violation of his Sixth, Eighth and Fourteenth Amendment rights
5 because he was not afforded a jury trial on the aggravating factors that rendered him eligible
6 for the death penalty. In Ring v. Arizona, 536 U.S. at 609, the Supreme Court found that
7 Arizona's aggravating factors are an element of the offense of capital murder and must be
8 found by a jury. However, in Schriro v. Summerlin, 524 U.S. 348 (2004), the Court held that
9 Ring does not apply retroactively to cases already final on direct review. Because
10 Petitioner's direct review was final prior to Ring, he is not entitled to federal habeas relief
11 premised on that ruling.

12 **Claim J**

13 Petitioner alleges that Arizona's capital sentencing scheme fails to adequately channel
14 sentencing discretion because first degree murder is too broadly defined, the "especially
15 heinous, cruel or depraved" aggravating factor fails to narrow the scope of capital offenses,
16 there is an absence of objective standards for weighing aggravating and mitigating
17 circumstances, and the Arizona Supreme Court failed to conduct a meaningful
18 proportionality review, in violation of the Eighth and Fourteenth Amendments. The Arizona
19 Supreme Court rejected this claim on direct appeal. Stokely, 182 Ariz. at 516, 898 P.2d at
20 465.

21 In Smith (Bernard) v. Stewart, the Ninth Circuit summarily rejected the petitioner's
22 claims regarding constitutionality of Arizona's death penalty, including allegations that
23 Arizona's statute does not properly narrow the class of death penalty recipients, that Arizona
24 lacks proportionality review, that sentencing judges do not have proper guidance, and that
25 the death penalty constitutes cruel and unusual punishment. 140 F.3d 1263, 1271 (9th Cir.
26 1998). Similarly, in Ortiz v. Arizona, the court noted that "[a]lthough the Constitution
27 requires that the states devise procedures to guide a sentencer's discretion, the absence of
28 specific standards instructing the sentencer how to weigh the aggravating and mitigating

1 factors does not render a death penalty statute unconstitutional.” 149 F.3d 923, 944 (9th Cir.
2 1998) (citing Zant v. Stephens, 462 U.S. 862, 880 (1983)). Finally, in Walton v. Arizona,
3 the U.S. Supreme Court expressly found that the Arizona Supreme Court’s construction of
4 the “especially heinous, cruel and depraved” aggravating factor meets constitutional
5 requirements by providing sufficient guidance to the sentencer. 497 U.S. 639, 654 (1990),
6 overruled on other grounds by Ring v. Arizona, 536 U.S. 584 (2002).

7 Regarding proportionality review, the federal constitution is not implicated where
8 state law does not provide for such review. Pulley v. Harris, 465 U.S. 37, 43-44, 50-51
9 (1984). In State v. Salazar, 173 Ariz. 399, 416-17, 844 P.2d 566, 583-84 (1992), the Arizona
10 Supreme Court held that proportionality reviews would no longer be conducted in death
11 penalty cases. Petitioner’s appeal was decided subsequent to Salazar. Thus, he possessed
12 no constitutional right to a proportionality review at the time of his appeal and, consequently,
13 cannot show that the Arizona Supreme Court’s decision denying relief on this claim was
14 contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. §
15 2254(d)(1).

16 **Claim K**

17 Petitioner argues generally that the death penalty was imposed arbitrarily in his case
18 when compared with other cases involving either a sentence of death or a sentence of life
19 imprisonment, in violation of the Eighth and Fourteenth Amendments. The Arizona Supreme
20 Court expressly denied this claim, stating that Arizona’s “death penalty statute narrowly
21 defines death-eligible persons as those convicted of first degree murder, where the state has
22 proven one or more statutory aggravating factors beyond a reasonable doubt.” Stokely, 182
23 Ariz. at 516, 898 P.2d at 465.

24 The Ninth Circuit has previously rejected the claim that Arizona applies its death
25 penalty in an arbitrary, irrational and disproportionate fashion, Ortiz, 149 F.3d at 944, and
26 Petitioner is not constitutionally entitled to a proportionality comparison of his case to other
27 cases, Pulley, 465 U.S. at 43-44. Furthermore, in Petitioner’s case, the sentencer found three
28 aggravating factors that rendered him death-eligible, thereby providing a rational basis for

1 imposing the death penalty. Although Petitioner challenges application of the “especially
2 heinous, cruel or depraved” factor in Claims D and E, he does not dispute the validity of the
3 other two factors: he was an adult at the time the crimes were committed and the victims
4 were under the age of fifteen, A.R.S. § 13-703(F)(9), and he was convicted of one or more
5 other homicides which were committed during the commission of the offense, A.R.S. § 13-
6 703(F)(8). Accordingly, Petitioner cannot establish that the death penalty in his case was
7 imposed in an arbitrary and irrational manner or that the Arizona Supreme Court’s resolution
8 of this claim was contrary to, or an unreasonable application of, clearly established federal
9 law. 28 U.S.C. § 2254(d)(1).

10 **Claim M**

11 Petitioner asserts that execution following an extraordinarily lengthy period of
12 incarceration serves no valid penological purpose and therefore violates the Eighth and
13 Fourteenth Amendments. The Supreme Court has not decided whether lengthy incarceration
14 prior to execution can constitute cruel and unusual punishment. See Lackey v. Texas, 514
15 U.S. 1045 (1995) (mem.) (Stevens, J. & Breyer, J., discussing denial of certiorari and noting
16 the claim has not been addressed). In contrast, circuit courts including the Ninth Circuit,
17 hold prolonged incarceration under a sentence of death does not offend the Eighth
18 Amendment. See McKenzie v. Day, 57 F.3d 1493, 1493-94 (9th Cir. 1995) (en banc); White
19 v. Johnson, 79 F.3d 432, 438 (5th Cir. 1996) (delay of 17 years); Stafford v. Ward, 59 F.3d
20 1025, 1028 (10th Cir. 1995) (delay of 15 years). Moreover, because the Supreme Court has
21 never held that prolonged incarceration violates the Eighth Amendment, Petitioner cannot
22 establish a right to federal habeas relief under 28 U.S.C. § 2254(d). See Allen v. Ornoski,
23 435 F.3d 946, 958-60 (9th Cir. 2006).

24 **CONCLUSION**

25 The Court finds that Claims A-2, A-3, B-2, D, F-1, F-2, F-3, H-1, H-2, and L are
26 procedurally defaulted and that Petitioner has failed to establish cause and prejudice or a
27 fundamental miscarriage of justice to overcome the defaults. Accordingly, these claims are
28 procedurally barred and will be dismissed with prejudice. The Court further finds that

1 Claims B-1, I, J, K, and M are plainly meritless; these claims will also be dismissed with
2 prejudice. Petitioner has fairly presented and actually exhausted Claims A-1, C, E, and G;
3 these claims will be decided on the merits in a separate order following additional briefing.

4 Accordingly,

5 **IT IS ORDERED** that the following claims are **DISMISSED WITH PREJUDICE**:

- 6 (a) Claims A-2, A-3, B-2, D, F-1, F-2, F-3, H-1, H-2, and L based on a procedural bar; and
7 (b) Claims B-1, I, J, K, and M on the merits as a matter of law.

8 **IT IS FURTHER ORDERED** that, no later than **sixty (60) days** following entry of
9 this Order, Petitioner shall file a Memorandum regarding the merits *only* of Claims A-1, C,
10 E, and G. The Merits Memorandum shall specifically identify and apply appropriate AEDPA
11 standards of review *to each claim for relief* and shall not simply restate facts and argument
12 contained in the amended petition. Petitioner shall also identify in the Merits Memorandum:
13 (1) each claim for which further evidentiary development is sought; (2) the facts or evidence
14 sought to be discovered, expanded or presented at an evidentiary hearing; (3) why such
15 evidence was not developed in state court; and (4) why the failure to develop the claim in
16 state court was not the result of lack of diligence, in accordance with the Supreme Court's
17 decision in Williams v. Taylor, 529 U.S. 420 (2000).

18 **IT IS FURTHER ORDERED** that no later than **forty-five (45) days** following the
19 filing of Petitioner's Memorandum, Respondents shall file a Response Re: Merits.

20 **IT IS FURTHER ORDERED** that no later than **twenty (20) days** following the
21 filing of Respondents' Response, Petitioner may file a Reply.


22 **IT IS FURTHER ORDERED** that if, pursuant to LRCiv 7.2(g), Petitioner or
23 Respondents file a Motion for Reconsideration of this Order, such motion shall be filed
24 within **fifteen (15) days** of the filing of this Order. The filing and disposition of such motion
25 shall not toll the time for the filing of the merits briefs scheduled under this Order.

26 **IT IS FURTHER ORDERED** that the Clerk of the Court shall, pursuant to Fed. R.
27 Civ. P. 25(d), substitute, as a Respondent, Dora B. Schriro for Terry Stewart as Director of
28 the Arizona Department of Corrections. The Clerk shall update the title of this case to reflect

1 this substitution.

2 **IT IS FURTHER ORDERED** that the Clerk of Court forward a courtesy copy of this
3 Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, Arizona
4 85007-3329.

5 DATED this 30th day of August, 2006.

6 
7 FRANK R. ZAPATA
8 United States District Judge
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