No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Richard Dale Stokley, Petitioner

vs.

Charles L. Ryan, et al., Respondents.

***** CAPITAL CASE *****
EXECUTION SCHEDULED FOR 10:00 A.M. MST
(12:00 P.M. EST) ON WEDNESDAY, DECEMBER 5, 2012

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD DALE STOKLEY, Petitioner - Appellant, v. CHARLES L. RYAN, Respondent - Appellee.	No. 09-99004 D.C. No. 4:98-CV-00332-FRZ District of Arizona, Tucson AMENDED ORDER

Before: McKEOWN, PAEZ, and BEA, Circuit Judges.

Richard Dale Stokley, a state prisoner, was sentenced to death in 1992 for the murders of two 13-year-old girls. After pursuing direct review and post-conviction relief in the Arizona state courts, he filed a habeas petition in federal district court, which was denied on March 17, 2009. Stokley's appeal from that decision was denied by this court in *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011). On October 1, 2012, the Supreme Court denied Stokley's petition for certiorari. *Stokley v. Ryan*, No. 11-10249, 2012 WL 1643921 (Oct. 1, 2012). Stokley now asks this court to stay issuance of the mandate on the ground that the Supreme Court's holding in *Maples v. Thomas*, 132 S. Ct. 912 (2012), constitutes an intervening change in the law that could warrant a significant change in result. In

Maples, the Court held that abandonment by post-conviction counsel could provide cause to excuse procedural default of a habeas claim. *Id.* at 927.

Under Federal Rule of Appellate Procedure 41(d)(2)(D), this court "must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Fed. R. App. P. 41(d)(2)(D). Nonetheless, this court has the authority to issue a stay in "exceptional circumstances." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990). To constitute an exceptional circumstance, an intervening change in law must require a significant change in result for the parties. *See Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) ("[A]n intervening change in the law is an exceptional circumstance that may warrant the amendment of an opinion on remand after denial of a writ of certiorari."); *Adamson v. Lewis*, 955 F.2d 614, 619-20 (9th Cir. 1992) (en banc) (finding an absence of exceptional circumstances where subsequent Supreme Court authority did not require a significant change in result). The question before us is whether Stokley has presented such an exceptional circumstance.

Stokley asks for a remand to the district court for an evidentiary hearing to determine whether, under *Maples*, he was "abandoned" by his state post-conviction attorney and thus has cause to excuse his procedural default of his underlying

claim that the Arizona Supreme Court failed to consider mitigating evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982), and *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). Under *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), Stokley is barred from litigating this procedurally defaulted claim in a federal habeas proceeding unless he can show both cause for the default and actual prejudice resulting from the alleged error. Because Stokley cannot establish prejudice and thus does not meet the exceptional circumstances threshold, we deny his motion to stay the mandate.

We assume without deciding that there was a *Maples* error. But regardless of whether *Maples* provides Stokley cause to excuse his procedural default, Stokley has not made a sufficient showing of actual prejudice. Stokley must establish "not merely that the [alleged error] . . . created a *possibility* of prejudice, but that [it] worked to his *actual* and substantial disadvantage," infecting the entire proceeding with constitutional error. *See Murray v. Carrier*, 477 U.S. 478, 494 (1986) (citation omitted) (emphasis in original); *see also Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (prejudice requires a showing that the error has a "substantial and injurious effect" on the sentence).

Stokley has a colorable claim that the Arizona Supreme Court, when it reviewed evidence of his abusive childhood and his behavior during pre-trial

incarceration, violated the *Eddings* principle that the court must consider, as a matter of law, all relevant mitigating evidence. *See Arizona v. Stokley*, 898 P.2d 454, 473 (Ariz. 1995) ("A difficult family background alone is not a mitigating circumstance. . . . This can be a mitigating circumstance only 'if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control.' . . . Although he may have had a difficult childhood and family life, [Stokley] failed to show how this influenced his behavior on the night of the crimes.") (citations omitted)); *id.* ("Although long-term good behavior during post-sentence incarceration has been recognized as a possible mitigating factor, . . . we, like the trial court, reject it here for pretrial and presentence incarceration.").

However, on balance, the Arizona Supreme Court's opinion suggests that the court did weigh and consider all the evidence presented in mitigation at sentencing. *See Stokley*, 898 P.2d at 468 ("Consistent with our obligation in capital cases to independently weigh all potentially mitigating evidence . . . [w]e turn, then, to a consideration of the mitigating factors."); *id.* at 472 ("As part of our independent review, we will address each alleged mitigating circumstance."); *id.* at 468 ("The sentencing judge must consider 'any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether the

death penalty should be imposed.' . . . The sentencing court must, of course, consider all evidence offered in mitigation, but is not required to accept such evidence." (citations omitted)); *id.* at 465 ("[T]his court independently reviews the entire record for error, . . . considers any mitigating circumstances, and then weighs the aggravating and mitigating circumstances sufficiently substantial to call for leniency."); *id.* at 473 ("Family history in this case does not warrant mitigation. Defendant was thirty-eight years old at the time of the murders."). The Arizona Supreme Court carefully discussed all the statutory and non-statutory mitigating factors, step by step, in separate paragraphs in its opinion. *See id.* at 465-74.

However, even assuming the Arizona Supreme Court did commit causal nexus error as to Stokley's good behavior in jail and his difficult childhood, Stokley cannot demonstrate actual prejudice because he has not shown that the error, if any, had a substantial and injurious impact on the verdict. An error requires reversal only if it "had substantial and injurious effect or influence in determining the . . . verdict.'" *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); cf. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1408 (2011) (holding in a *Strickland* challenge that the test for prejudice at sentencing in a capital case 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." (internal quotation marks omitted)).

The Arizona Supreme Court reviewed and discussed each of the aggravating and mitigating factors individually. The court found three statutory aggravating circumstances were proven beyond a reasonable doubt: (1) Stokley was an adult at the time the crimes were committed and the victims were under the age of fifteen; (2) Stokley was convicted of another homicide committed during the commission of the offense; and (3) Stokley committed the offense in an especially heinous, cruel, and depraved manner. 898 P.2d at 465-68. The Arizona Supreme Court's conclusion that there were no grounds here substantial enough to call for leniency is consistent with the sentencing court's determination that "even if any or all of the mitigating circumstances existed, 'balanced against the aggravating circumstances found to exist, they would not be sufficiently substantial to call for leniency.'"[1] *Id.* at 471. And, the sentencing court noted as to Stokley's childhood

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[1] The sentencing court found the following facts beyond a reasonable doubt. Stokley was convicted of murdering two 13-year-old girls over the July 4th weekend in 1991. Stokley is a person of above average intelligence. At the time of the crime, he was 38 years old. Stokley intended that both girls be killed. He killed one of the girls and his co-defendant killed the other. Before the men manually strangled the girls to death, both men had sexual intercourse with the victims. Both bodies "were stomped upon with great force," and one of the children bore "the clear chevron imprint" from Stokley's tennis shoes on her chest,

(continued...)

that "[t]he evidence, at best, is inconsistent and contradictory." The Arizona courts considered the mitigation evidence—including good behavior in jail and childhood circumstances— insufficient to warrant leniency. In light of the Arizona courts' consistent conclusion that leniency was inappropriate, there is no reasonable likelihood that, but for a failure to fully consider Stokley's family history or his good behavior in jail during pre-trial incarceration, the Arizona courts would have come to a different conclusion. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (referencing harmless error in connection with the exclusion of non-statutory mitigating evidence). In sum, because the claimed causal nexus error, if any, did not have a substantial or injurious influence on Stokley's sentence, Stokley cannot establish prejudice. *Brecht*, 507 U.S. at 630-34.

In light of the high bar that must be met for this court to stay the mandate, Stokley's motion to stay the mandate is DENIED.

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[1](...continued)
shoulder, and neck. Both victims were stabbed in their right eyes with Stokley's knife, one through to the bony structure of the eye socket. The girls likely were unconscious at the time of the stabbing. The girls' bodies were dragged to and thrown down a mine shaft.

Stokley v. Ryan, 09-99004

PAEZ, Circuit Judge, dissenting:

Maples changed the law. Stokley asks us not for habeas relief, but to stay the mandate in light of this change and remand for full consideration of whether he can overcome procedural default on his colorable *Eddings* and *Skipper* claims that were not raised because Harriette Levitt abandoned him. The *only* analysis we should do here is to determine whether he has made a prima facie case for abandonment under *Maples* to establish cause, and shown that his prejudice argument has some merit in that he does not raise a frivolous claim. His claim that the Arizona Supreme Court committed causal nexus error in declining to consider mitigating evidence is anything but frivolous. It is a constitutional claim and one that this court should not extend itself to decide on the merits before it was briefed or argued by *either* party.

The majority assumes without deciding that there was a *Maples* error. Respectfully, that was the only question before this court. The majority brushes it aside to get to the final end game, but further confuses our law on prejudice and standards for error review in the process. Because I cannot agree with the majority's approach, I strongly dissent.

I first address why *Maples* error exists in this case. Then I turn to the

majority's incorrect and unrestrained analysis of prejudice.

I. Stokley has shown abandonment

Maples is not limited solely to *actual* abandonment. To obtain the remand he requests, Stokley need only make a prima facie showing of abandonment under *Maples* that might constitute cause to overcome procedural default. *See Moorman v. Schriro*, 672 F.3d 644, 647-48 (9th Cir. 2012). Despite the extremely limited briefing on the pending motion, Stokley has made such a prima facie case of abandonment. Moreover, as the majority recognizes, he has a colorable underlying constitutional claim. Our inquiry should end there. I would grant the motion and remand to the district court for determination of cause and prejudice and, if appropriate, the merits of Stokley's constitutional claim.[1]

Maples rests squarely on agency principles. 132 S. Ct. at 922-24. To explain how an agency relationship may be actually or constructively severed, the Supreme Court relied on Justice Alito's concurrence in *Holland v. Florida*, 560 U.S. ——, 130 S. Ct. 2549 (2010), to distinguish attorney negligence from abandonment. "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful

[1] I agree with the majority's assumption that *Maples* may be sufficient to establish the "exceptional circumstance" necessary to justify the exercise of this court's power to stay the mandate following a denial of certiorari.

sense of that word." 132 S. Ct. at 923 (citing *Holland*, 130 U.S. at 2568 (Alito, J., concurring)). Justice Alito's concurrence in *Holland* also noted that the agency relationship is constructively severed "particularly so if the litigant's reasonable efforts to terminate the attorney's representation have been thwarted by forces wholly beyond the petitioner's control." *Holland*, 130 S. Ct. at 2568. Indeed, our court's precedent—while not finding abandonment—recognizes that *Maples* rests on agency principles and that a serious breach of loyalty can sever the attorney-client relationship in a manner that may constitute constructive abandonment sufficient to establish cause. *See Towery v. Ryan*, 673 F.3d 933, 942-43 (9th Cir. 2012) *cert. denied*, 132 S. Ct. 1738 (2012) (separately analyzing two prongs of actual abandonment or "serious breach of loyalty" and distinguishing *Holland*, which involved violations of fundamental canons of professional responsibility, from Towery's circumstances, which did not).

In light of *Maples*, it is now recognizable that Stokley's situation in postconviction proceedings was worse than simply "unenviable." 659 F.3d at 810. Here, the attorney-client relationship was irrevocably broken. Further, the record demonstrates that, once the state was successful in forcing it to be put back together, postconviction counsel Harriette Levitt actively undermined the work of Stokley's replacement counsel and prevented Stokley from investigating and

raising his own claims. While it has no legal bearing on the present issue, I note at the outset that Harriette Levitt is the same attorney whose conduct was at issue in the Supreme Court's recently-created ineffective assistance of counsel exception to the once settled rule in *Coleman*. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Whereas the petitioner in *Maples* "in reality . . . had been reduced to pro se status," 132 S. Ct. at 927, Levitt's actions regarding Stokley's attempts to fairly present his claims arguably left him in a situation worse than a pro se petitioner. If there were ever a case for constructive abandonment under *Maples*, this is it.

Levitt filed her first post-conviction petition eight months after being assigned to the case. During these eight months, she initiated no contact with Stokley. The only communication she had with Stokley was a twenty-minute collect phone call he placed to her. Levitt did not conduct any independent investigation during this period, other than a few telephone calls lasting less than a total of two hours. According to Stokley, Levitt did not even receive the trial transcripts until more than six months after her appointment, and after the deadline for filing Stokley's petition had passed.

When Levitt finally filed Stokley's petition, she raised only two claims and wrote only three and a half pages of legal argument. Levitt's billing records indicate that, aside from reviewing Stokley's file and transcript, she spent no more

than ten hours researching and writing his petition for post-conviction relief. Stokley immediately recognized the inadequacy of the petition and called Levitt to object. Levitt told him that his "trial attorneys didn't make any mistakes" and that he would "probably be executed in 2 or 3 years."

Stokley then took every action he could think of to object to Levitt's continued representation. He wrote a letter to the Superior Court judge, expressing his concerns about the brevity of the petition and Levitt's lack of interest and diligence. He wrote that he found it "evident that my present appeal has been handled with a lick and a promise, rather than being given the conscientious analysis and preparation which should be applied." He asked the court to "appoint an attorney who will apply his or her self and try to do a competent job in this matter." He sent a similar letter to the Arizona Capital Representation Project asking for help. The Superior Court forwarded Stokley's letter to Levitt but took no other action.

Stokley also filed a complaint with the State Bar of Arizona protesting Levitt's handling of his case. The Bar overlooked the posture of Stokley's case and responded that his complaint could be dealt with in *post-trial* proceedings, noting that "[i]f there [was] a judicial determination that the lawyer acted improperly, [the Bar] would review the matter at that time."

Not surprisingly, the Superior Court denied Levitt's two-claim petition. Levitt then filed a motion to withdraw as Stokley's counsel, citing the Bar complaint filed against her. She wrote that "[t]here has . . . been a complete breakdown of the attorney-client relationship." The court granted the request and appointed Carla Ryan as replacement counsel.

The state immediately moved to reinstate Levitt as Stokley's counsel. The state argued that the initial petition had already been denied, and so there was "no valid reason for . . . paying yet another defense attorney to review the voluminous record for the first time." The state argued in the alternative for the court to limit the scope of Ryan's representation, arguing that, if replacement counsel were appointed, she should be forbidden to "supplement the already-adjudicated petition in some manner," because Arizona rules "do not allow for any such thing." Notably, however, the Arizona Supreme Court eventually did permit Levitt to file a supplemental Rule 32 petition, specifically allowing her to "raise any issue . . . even though it may not have been included in her first petition for post-conviction relief." The state also objected to Ryan's request for co-counsel in an unprofessionally worded opposition, arguing that Ryan was requesting a "side-kick" to "milk[] this case for all it is worth as a cash cow. . . . Capital litigation is not an unlimited pot-boiler for the enrichment of private attorneys." The Superior

Court ordered Levitt reinstated, over the objections of both Levitt and Stokley.

Ryan was Stokley's attorney for only one month. During that month, she spent much of her time responding to the state's attempt to have her removed as counsel. Ryan also moved for reconsideration of the denial of Stokley's post-conviction petition, and sought to amend the petition. Her proposed amended petition included a list of thirty-one new possible claims for relief. Ryan included a claim regarding the ineffectiveness of Levitt. She argued that "the substance of the Petition is deficient" and noted misstatements of law prejudicial to Stokley. Ryan specifically noted that she had not had an opportunity to do a full investigation, and that "other issues may need to be raised."

After one month, Ryan was removed and Levitt was reinstated. Once reinstated, Levitt actively moved to defend herself and undermine Stokley's case. Levitt systematically argued against the claims raised by Ryan. She noted that some were "already raised," others "relate[d] to strategic decisions by the respective attorneys," others were "contrary to well-established caselaw," and still others were "not supported by the facts of the case." Unexplainably, one of the claims Levitt derided as completely meritless was resurrected as the first of two additional claims in the supplemental Rule 32 petition. Thus, Levitt's petition for review and later supplemental filing suggest an overriding concern with defending

herself from the "attack on the effectiveness of undersigned counsel, all of which is meritless" rather than any loyal advocacy.

After Levitt was reinstated, Stokley wrote a letter to the Arizona Supreme Court asking for the reappointment of Ryan. This request was denied. Stokley then attempted to prepare his own claims and asked Levitt for a copy of the record. Levitt refused to give it to him. By failing to do so, she interfered with Stokley's attempts to fairly present his claims.

The record shows that (1) both Stokley and his counsel agreed that their relationship had completely broken down; (2) Stokley took numerous steps to try to terminate the relationship and to obtain new counsel; (3) Levitt was reinstated as counsel over Stokley's and her own objections; (4) Levitt was the subject of a Bar complaint; and (5) after she was reinstated as Stokley's attorney, Levitt's primary concern was to defend herself against misconduct charges. She disavowed and undermined the work Ryan had done on Stokley's behalf, and refused Stokley access to his case file which limited his ability to marshal evidence and raise his own claims. Levitt ultimately came to the point where she was actively working against Stokley.

Stokley did everything in his power to sever his relationship with Levitt. The state vigorously advocated to make sure that Levitt was reinstated as his counsel.

After the state prevailed, Levitt in effect worked in the state's interest rather than in her client's. As Stokley has argued before the district court and in the moving papers here, Levitt "took up the mantle of the prosecutor." It is hard to imagine a clearer case for constructive abandonment.

The touchstone for understanding the Court's decision in *Maples* is Justice Alito's concurrence in *Holland*, which the Court relies upon in explaining the meaning of "abandonment." *Holland*, 130 S.Ct. at 2568. Justice Alito was not describing what happened in Stokley's case. But he might as well have been.

II. Stokley's colorable *Eddings* claim is sufficient prejudice to obtain remand.

Addressing prejudice at this stage is inconsistent with our prior precedent. Nevertheless, I feel compelled to respond to the majority's argument.

The majority first states that, while Stokley's causal nexus claim is colorable, the Arizona Supreme Court committed no actual error. This is incorrect. The majority goes on to assume that, even if the Arizona Supreme Court committed causal nexus error, the error was harmless. I address the second issue first, where the majority conflates structural and harmless error in a manner that confuses our prior case law and, without analysis, potentially closes an open and important

question in the habeas law of our circuit.[2] Whatever the ultimate outcome in Stokley's case might have been had we remanded, by conflating structural and harmless error the majority creates tension with our prior case law and in my view sets a bad precedent.

Our prior cases have treated *Eddings* error as structural. We have consistently reversed and remanded *Eddings* cases to the Arizona courts for resentencing, without inquiring as to the likelihood of a different sentencing result. *See, e.g., Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008). If an *Eddings* error is structural, as our cases suggest, prejudice is *per se*.

Citing *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987), the panel concludes that *Eddings* errors are subject to harmless error review under *Brecht v.*

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[2] As I understand it, the Supreme Court has not addressed whether *Eddings* error is structural nor has this court squarely examined the issue. *Compare Landrigan v. Stewart*, 272 F.3d 1221, 1230 & n.9 (9th Cir. 2001) (applying harmless error review to the state court's failure to consider the defendant's alleged intoxication and past history of drug use as a nonstatutory mitigating factor), *adopted by Landrigan v. Schriro*, 501 F.3d 1147, 1147 (9th Cir. 2007) (en banc) (order), *with Williams v. Ryan*, 623 F.3d 1258, 1270-71 (9th Cir. 2010) (granting habeas relief for an *Eddings* violation without conducting a harmless error analysis), *and Styers v. Schriro*, 547 F.3d 1026, 1035-36 (9th Cir. 2008) (same). Other circuits are split on the issue. *Compare Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999) (collecting cases applying harmless error review), *with Nelson v. Quarterman*, 472 F.3d 287, 314 (5th Cir. 2006) (en banc) (declining to apply harmless error review).

Abrahamson, 507 U.S. 619 (1993). Even assuming *Eddings* error is nonstructural, the panel appears to have erred in applying *Brecht* here because the state did not argue harmlessness in this court (until its response to the petition for rehearing), an issue on which the state bears the burden. *See Hitchcock*, 481 U.S. at 399 ("Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid."). As best I can tell, after finding *Eddings* error on habeas review, we have never engaged in harmless error review of the sort engaged in here.

Turning back to the majority's finding that no *Eddings* violation occurred, I am unpersuaded by the panel's analysis. Here, the Arizona Supreme Court did precisely what the Eighth Amendment prohibits—it treated mitigating evidence of Stokley's abusive childhood as nonmitigating as a matter of law merely because it lacked a causal connection to the crime. The state court said:

> According to a clinical psychologist, defendant had a chaotic and abusive childhood, never knowing his father and having been raised by various family members. A difficult family background alone is not a mitigating circumstance. *State v. Wallace*, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047 (1990). This can be a mitigating circumstance only "if a defendant can show that something

> in that background had an effect or impact on his behavior that was beyond the defendant's control." *Id.* . . . Although [Stokley] may have had a difficult childhood and family life, he failed to show how this influenced his behavior on the night of the crimes.

State v. Stokley, 898 P.2d 454, 473 (Ariz. 1995) (emphasis added).

This is a clear-cut *Eddings* violation, and the panel majority's failure to recognize it cannot be squared with circuit precedent. We cannot avoid finding an *Eddings* violation, as the panel majority suggests, merely because the Arizona Supreme Court said it considered all mitigating evidence. *See Styers*, 547 F.3d at 1035. When a state court "considers" mitigating evidence, but deems it irrelevant or nonmitigating *as a matter of law* because of the absence of a causal connection to the crime, the court has not considered the evidence in any meaningful sense. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Unlike the majority I would not reach the issues of either prejudice with respect to procedural default or the merits of the constitutional claim at this stage. When first presented with this claim that the Arizona Supreme Court erred in its review of the death sentence under *Eddings* and *Skipper*, the district court declined to reach the merits because the claim was technically exhausted and procedurally barred. Case 4:98-cv-00332-FRZ, Dkt 70, Order and Opinion on Procedural Status

of Claims at 15-16. *No court* has considered the issue of prejudice—either as to procedural default or to the merits of the constitutional claim—because, prior to *Maples*, there was no cause for the procedural default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). All that is required for prejudice at this stage is that the claim has some merit. *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012).

Without the benefit of any briefing or lower court consideration on the issue of prejudice arising from the defaulted *Eddings* and *Skipper* claims, we are not in a position to do what the majority does here. Rather than foreclosing these claims at this stage, I would stay the mandate and remand this case to the district court for the limited purpose of allowing it to determine in the first instance whether cause and prejudice exist, and to consider the merits of the claim if warranted. We would then be in a far better position to review the issue.

For all of the above reasons, I respectfully dissent.

FILED

NOV 27 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD DALE STOKLEY, Petitioner - Appellant, v. CHARLES L. RYAN, Respondent - Appellee.	No. 09-99004 D.C. No. 4:98-CV-00332-FRZ District of Arizona, Tucson AMENDED ORDER

Before: THOMAS, Circuit Judge and Capital Case and En Banc Coordinator

The full court has been advised of the petition for rehearing en banc. Pursuant to the rules applicable to capital cases in which an execution date has been scheduled, a deadline was set by which any judge could request a vote on whether the panel's November 15, 2012 order should be reheard en banc. The panel elected to amend its original order, and the full court was advised of the planned amendment.

A judge requested a vote on whether to hear the panel's order en banc. A majority of the active, non-recused judges eligible to vote on the en banc call did not vote to rehear the panel order en banc. Therefore, the petition for rehearing en banc is DENIED.

No further petitions for panel rehearing or rehearing en banc will be entertained. En banc proceedings with respect to the original order and the amended order are concluded.

The dissents from the denial of rehearing en banc follow this amended order.

REINHARDT, Circuit Judge, joined by PREGERSON, WARDLAW, W. FLETCHER, FISHER, PAEZ, and BERZON, Circuit Judges, dissenting from the denial of *en banc* rehearing:

This is a death penalty case in which, due to the panel's perceived need to resolve, all-too-hastily, several important issues arising out of the recently-decided case of *Maples v. Thomas*, 132 S. Ct. 912 (2012), the majority, without proper briefing, made a number of serious errors that warrant review by the *en banc* court. So great was its perceived need for speed that the panel was still amending its order and changing its rationale while the *en banc* process was underway. Stokley, the individual whose life was at stake, was afforded little opportunity to explore the issue that the majority of the panel raised *sua sponte*, and then held to be dispositive. Nevertheless, a majority of the court voted to let the panel majority's order stand. As a result of our failure to go *en banc*, an execution which is scheduled for next week will occur, in violation of fundamental constitutional principles, absent intervention by the Supreme Court—the only remaining body that can ensure that Stokley receives his constitutional rights.

The case arises from Stokley's motion for a stay of mandate and for a remand to the district court in light of the Court's recent decision in *Maples*.[1]

[1]The panel does not contest that this motion is properly raised as a motion to stay the mandate. It had issued a published opinion before *Maples* was decided, but there it addressed an entirely different underlying claim. *Stokley v. Ryan*, 659

Stokley claimed that, like Maples, he had been abandoned by his post-conviction counsel, and that this abandonment constituted adequate cause to excuse his failure to raise on state post-conviction review the claim that, on direct appeal, the Arizona Supreme Court had violated *Eddings v. Oklahoma,* 455 U.S. 104 (1982). The panel does not, in its amended order, contest Stokley's *Maples* claim, except to hold that he suffered no prejudice as a result.

Eddings makes clear that a defendant is entitled to rely on *any* mitigating evidence that might make a fact-finder less likely to impose a death sentence—including evidence that does not have a causal connection to the crime at issue. 445 U.S. at 114-15. The Arizona Supreme Court violated *Eddings* in its decision affirming the death penalty imposed on Stokley, by failing to consider mitigating evidence that did not have a nexus to his crime.[2] The panel majority excuses the Arizona Supreme Court's violation of *Eddings* as merely harmless error, thus deciding, *sub silentio*, that an *Eddings* error is subject to harmless error analysis. It then holds that Stokley is unable to demonstrate the prejudice necessary to excuse the procedural default of his *Eddings* claim, and on that basis denies his motion for a stay of mandate and for a remand to present his claim,

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F.3d 802 (9th Cir. 2011).

[2]*See, e.g., State v. Stokley*, 898 P.2d 454, 473 (Ariz. 1995) (disregarding evidence of "chaotic and abusive childhood" because Stokley "failed to show how this influenced his behavior on the night of the crimes").

under *Maples*, that he was abandoned by his attorney—and ultimately the right to a proper review of his capital sentence by the Arizona Supreme Court under standards consistent with the Constitution.[3]

We err in declining to convene *en banc* to address this capital case, for several reasons. First, we should decide *en banc* the question of whether a court's error under *Eddings* is structural or is subject to harmless error analysis. Second, even if an *Eddings* error were not structural, we should decide *en banc* whether the panel ought to have reached that issue—an issue that was not properly presented to it—or should first have remanded it to the district court. Finally, even if the error were not structural *and* if we were not required to remand as to prejudice, we should have determined whether the state carried its burden of showing that the error was harmless.

Whether a court's error under *Eddings* is structural or is subject to harmless error analysis is an unresolved question of exceptional importance. The circuits are divided on the question; the Fifth Circuit has held that such an error is structural, while other circuits have held the opposite. *Compare Nelson v. Quarterman*, 472 F.3d 287, 314-315 (5th Cir. 2006) (en banc), *cert. denied,* 551

[3]Although the panel here erroneously found no prejudice, it did not rule on the question of cause in its amended order, and a remand, on that question at least, would be necessary.

U.S. 1141 (2007) *with Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999) (collecting cases applying harmless error review). Even our own court's decisions appear divided on this issue. *Compare Williams v. Ryan*, 623 F.3d 1258, 1270-71 (9th Cir. 2010) (conducting no harmless error analysis) *with Landrigan v. Stewart*, 272 F.3d 1221, 1230 & n.9 (9th Cir. 2001). The Supreme Court has previously granted certiorari to address this question, *see Smith v. Texas*, 549 U.S. 948 (2006) (mem.), although it nevertheless eventually declined to address it, *see Smith v. Texas*, 550 U.S. 297, 316 (2007) (Souter, J., concurring). A petition for certiorari raising this precise question is currently pending before the Supreme Court. *See Thaler v. McGowen*, No. 12-82 (U.S. filed July 17, 2012), *available at* 2012 WL 2992072.

The panel's hastily-reached decision, without adequate briefing, that such error is not structural is simply inconsistent with the Supreme Court's precedents regarding the importance, in capital cases, of permitting the fact-finding body to properly weigh all mitigating factors. These precedents require that the fact-finding body give meaningful weight to mitigating factors—a requirement that is as much substantive as it is procedural. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and *give*

effect to that evidence in imposing sentence." (emphasis added)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Such an error cannot be cured by this court, and particularly, given the deference due to the state court, by this court sitting in habeas review. We should not engage in an independent weighing of these factors, especially when the state court originally did so under a mistaken conception of its legal duty. Such an independent weighing creates the substantial "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Penry*, 492 U.S. at 328 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (remanding for a re-determination of the aggravating and mitigating factors). That risk, as the Supreme Court has held, is "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* Thus, not only should we go *en banc*, but we should conclude that the error is structural, and that the Arizona Supreme Court should be given the opportunity to apply the proper Constitutional standards.

Further, even were we to conclude that an *Eddings* violation is not structural, the panel majority's decision to address the question of prejudice would constitute error. The state made no mention of this question in its opposition to Stokley's motion for a stay of mandate, and the district court had had no opportunity to consider *Maples* at all. The simplest course would have been to remand, to give

both parties the opportunity to fairly address the issue and to obtain the views of the district court. *See, e.g., Maples*, 132 S. Ct. at 927-28 (remanding for a determination regarding prejudice); *Martinez v. Ryan*, 132 S. Ct. 1309, 1320-21 (2012) (same). The panel, however, did not remand—instead, it addressed the issue of prejudice *sua sponte*, despite the state's failure to raise it. This is particularly surprising, given that, if an *Eddings* error is not structural, the state bears the burden of demonstrating that the error is harmless. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (noting the state's duty to demonstrate that error is harmless, and holding that "[i]n the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.").

As it was, the first substantive discussion of prejudice in this case was in the panel majority's original order denying Stokley's motion—although prejudice was simply an alternative basis for the order. The principal basis for the majority's holding was that Stokley had not been abandoned by his counsel, and thus that no cause existed for the procedural default. Stokley's first opportunity to brief the issue of prejudice was in his petition for *en banc* rehearing, although he was compelled to argue primarily that the panel erred in holding that he had not been abandoned by counsel under *Maples* and that the he had not waived the issue of

prejudice. The panel majority paid little heed to Stokley's briefing: a mere two days after his petition for *en banc* rehearing was filed, this court denied it; later that day, the panel majority amended its order—not to reflect Stokley's limited briefing regarding prejudice, but rather to render the issue of prejudice the *sole* basis of its amended order (thus eliminating all discussion of the merits of Stokley's *Maples* claim), while leaving its discussion of prejudice largely unchanged.[4]

Finally, even if the *Eddings* violation in this case were subject to harmless error review, and even if it were appropriate for the panel to reach the issue without a remand to the district court, it is clear that the *Eddings* error in this case was indeed prejudicial. If we are to determine whether there is harmless error here, then the Court's decision in the *Eddings* line of cases must be our guide: the focus of our inquiry ought to be whether there is a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Penry*, 492 U.S. at 328 (citing *Lockett*, 438 U.S. at 605 (1978)). Here, the comity and

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[4]The panel's original order was based, in part, on an alleged representation by Stokley's counsel that no remand was necessary on the issue of prejudice. *See* Maj. Op. (Nov. 15, 2012) at 3 n.1 ("Stokley's counsel . . . did not raise any issues that required factual development through the requested evidentiary hearing."). The recording of oral argument clearly conveys counsel's statement to the contrary—that further development of the record was needed because "there has never really been a discussion of prejudice" and Stokley's pleadings regarding the issue were simply "notice pleading." The panel's amended opinion omits the assertion that counsel has waived this issue.

federalism concerns that typically limit our inquiry when we sit in habeas review, *see Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011), suggest that the Arizona Supreme Court should be given an opportunity to re-weigh these factors when that risk is at least substantial, as it is here. This is particularly so given that the Arizona Supreme Court undertakes an independent and *de novo* weighing of aggravating and mitigating factors in its initial review of every capital case (including this one), and thus is uniquely situated to cure this error as well as being already familiar with the facts of this case. *See State v. Stokley*, 898 P.2d at 454.

Here, there clearly is a sufficient risk that the death penalty will be imposed in spite of factors that call for lenity. The Arizona Supreme Court permitted an *Eddings* error to affect its consideration of at least three of the mitigating factors it considered. *See State v. Stokley*, 898 P.2d at 469 (substance abuse), 470 (head injuries and impulse control), 473 (family history and childhood abuse). Although, as the Arizona Supreme Court pointed out, these factors did not have a direct nexus to the crime in question, the court's refusal to grant them weight undoubtedly limited its ability to "express[] its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* That this risk exists is particularly likely in light of the fact that Stokley's co-perpetrator—who actually instigated the crime—received a sentence of only 20 years, and has already been released from

prison. The facts of this crime, absent a consideration of Stokley's particular circumstances, thus do not inexorably lead to a finding that the death penalty should have been imposed. Thus, were we to engage in a harmless error analysis, we should hold that Stokley had established the requisite prejudice with respect to his *Maples* claim.[5]

For these reasons, I respectfully dissent.

[5]The more proper body to undertake this analysis, however (if not the Arizona Supreme Court), is the district court. The district court could make this decision on remand with the benefit of a thorough examination of the full record before the state court—examining the evidence and arguments made in support of each aggravating and mitigating factor—as well as with full briefing and argument.

Stokley v. Ryan, No. 09-99004

W. FLETCHER, Circuit Judge, with whom Judges PREGERSON, REINHARDT, WARDLAW, FISHER, PAEZ, and BERZON join, dissenting from the denial of *en banc* rehearing:

I fully concur in the dissents of Judges Reinhardt and Watford from our failure to take this case en banc. I add only the following.

In our haste, we have forgotten our role as an intermediate federal appellate court. We have taken the role of the federal district court, refusing to allow that court to deal in the first instance with Stokley's motion under *Maples v. Thomas*, 132 S. Ct. 912 (2012). And we have taken the role of the Arizona Supreme Court, refusing to allow that court to assess the importance of Stokley's mitigating evidence that was previously disregarded, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Further, we have allowed a three-judge panel of this court to decide, without briefing from the parties, that *Eddings* error is not structural, despite cases in this circuit to the contrary, *see Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008), and despite suggestions from the Supreme Court that such error may indeed be structural. *See Smith v. Texas*, 549 U.S. 948 (2006) (mem.); *Smith v. Texas*, 550 U.S. 297, 316 (2007) (Souter, J., concurring); *Thaler v. McGowen,* 2012 WL 2955935 (Nov. 26, 2012) (denying cert. in *McGowen v. Thaler*, 675 F.3d 482 (5th Cir. 2012), in which

Fifth Circuit held that *Eddings* error in jury instruction is structural).

There is no reason for such haste. Stokley has asserted plausible claims under *Maples* and *Eddings*. They may or may not prove to be winning claims. But we should not allow the State of Arizona to kill Stokley before they have been properly considered.

Stokley v. Ryan, No. 09-99004

WATFORD, Circuit Judge, joined by PREGERSON, WARDLAW, W. FLETCHER, FISHER, PAEZ, BERZON, CHRISTEN, and NGUYEN, Circuit Judges, dissenting from the denial of *en banc* rehearing:

I do not think there is any question here that the Arizona Supreme Court violated the rule established in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Assuming, as the panel majority does, that abandonment has been shown under *Maples v. Thomas*, 132 S. Ct. 912 (2012), Stokley has established cause for his procedural default. There are two unresolved questions with respect to prejudice. The first is whether this court must actually decide the merits of the underlying *Eddings* claim or need only find that the claim is substantial, as in *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012); the second is whether an *Eddings* violation is structural error or is instead subject to harmless error review. These important and unsettled issues should be resolved by the court sitting *en banc*.

Stokley v. Ryan, No. 09-99004

PREGERSON, Circuit Judge, dissenting from the denial of *en banc* rehearing:

I concur in the dissents of Judge Reinhardt, Judge Fletcher, and Judge Watford from our court's refusal to take *Stokley v. Ryan* en banc.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD DALE STOKLEY, Petitioner - Appellant, v. CHARLES L. RYAN, Respondent - Appellee.	No. 09-99004 D.C. No. 4:98-CV-00332-FRZ District of Arizona, Tucson ORDER

Before: McKEOWN, PAEZ, and BEA, Circuit Judges.

Richard Dale Stokley, a state prisoner, was sentenced to death in 1992 for the murders of two 13-year-old girls. After pursuing direct review and post-conviction relief in the Arizona state courts, he filed a habeas petition in federal district court, which was denied on March 17, 2009. Stokley's appeal from that decision was denied by this court in *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011). On October 1, 2012, the Supreme Court denied Stokley's petition for certiorari. *Stokley v. Ryan*, No. 11-10249, 2012 WL 1643921 (Oct. 1, 2012). Stokley now asks this court to stay issuance of the mandate on the ground that the Supreme Court's holding in *Maples v. Thomas*, 132 S. Ct. 912 (2012), constitutes an intervening change in the law that could warrant a significant change in result. In

Maples, the Court held that abandonment by post-conviction counsel could provide cause to excuse procedural default of a habeas claim. *Id.* at 927.

Under Federal Rule of Appellate Procedure 41(d)(2)(D), this court "must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Fed. R. App. P. 41(d)(2)(D). Nonetheless, this court has the authority to issue a stay in "exceptional circumstances." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990). To constitute an exceptional circumstance, an intervening change in law must require a significant change in result for the parties. *See Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) ("[A]n intervening change in the law is an exceptional circumstance that may warrant the amendment of an opinion on remand after denial of a writ of certiorari."); *Adamson v. Lewis*, 955 F.2d 614, 619-20 (9th Cir. 1992) (en banc) (finding an absence of exceptional circumstances where subsequent Supreme Court authority did not require a significant change in result). The question before us is whether Stokley has presented such an exceptional circumstance.

Stokley asks for a remand to the district court for an evidentiary hearing to determine whether, under *Maples*, he was "abandoned" by his state post-conviction attorney and thus has cause to excuse his procedural default of his underlying

claim that the Arizona Supreme Court failed to consider mitigating evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982), and *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986).[1] Stokley contends that his state post-conviction counsel erred in failing to raise a claim that the mitigating evidence did not require a nexus to the crime. Under *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), Stokley is barred from litigating this procedurally defaulted claim in a federal habeas proceeding unless he can show both cause for the default and actual prejudice resulting from the alleged error. Because Stokley cannot establish either cause or prejudice, and thus does not meet the exceptional circumstances threshold, we deny his motion to stay the mandate.

Although we credit Stokley's argument that the logic in *Maples* may encompass other forms of abandonment arising out of the principles of agency law, we nonetheless conclude that there was no abandonment here. As we observed in our prior decision, Stokley was placed in an "unenviable situation during the state post-conviction proceedings" because of the actions of his state post-conviction lawyer, Harriette Levitt. 659 F.3d at 810. However, Stokley was always actively

[1] At the hearing on this motion, Stokley's counsel stated that the record contained sufficient evidence to justify the relief requested and did not raise any issues that required factual development through the requested evidentiary hearing. Thus, remanding the case at this stage for an evidentiary hearing would serve no purpose.

represented by counsel. Although Stokley complained to the trial judge about Levitt, the trial court affirmatively ordered continued representation by Levitt and the Arizona Supreme Court affirmed that order. The state courts did not view the relationship as a failed one. Unlike in *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010), where there was a "near-total failure to communicate," the clash here was one of substantive disagreement, not abandonment. And, unlike in *Maples*, Stokley was not "left without any functioning attorney of record." 132 S. Ct. at 927.

Levitt raised two claims in Stokley's petition for post-conviction relief. Another lawyer subsequently filed a pleading suggesting an additional 31 claims for habeas relief. Levitt considered and, in large part, rejected the proposed additional claims. Tellingly, current counsel does not attempt to revive the claims that Levitt rejected. Levitt then raised two further claims in a supplemental petition for post-conviction relief. It is within the responsibility of counsel to evaluate potential claims and make strategic decisions about which ones to bring. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). Levitt made that judgment, but neither she nor the other attorney flagged a possible claim under *Eddings v. Oklahoma* or *Skipper v. South Carolina*. Although Stokley may have a

credible argument about Levitt's ineffectiveness and negligence, he has not demonstrated that Levitt abandoned him within the scope of *Maples*.[2]

Even if *Maples* provides Stokley cause to excuse his procedural default, Stokley has not made a sufficient showing of actual prejudice. Stokley must establish "not merely that the [alleged error] . . . created a *possibility* of prejudice, but that [it] worked to his *actual* and substantial disadvantage," infecting the entire proceeding with constitutional error. *See Murray v. Carrier*, 477 U.S. 478, 494 (1986) (citation omitted) (emphasis in original); *see also Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (prejudice requires a showing that the error has a "substantial and injurious effect" on the sentence).

Stokley has a colorable claim that the Arizona Supreme Court, when it reviewed evidence of his abusive childhood and his behavior during pre-trial incarceration, violated the *Eddings* principle that the court must consider, as a

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[2] Under *Teague v. Lane*, 489 U.S. 288, 310 (1989), new *constitutional* rules of criminal procedure do not apply retroactively to cases filed by state prisoners seeking collateral federal habeas relief. *Teague* does not preclude retroactive application of *Maples* here. *Maples* did not establish a *constitutional* rule, but simply provided a new avenue of establishing cause for a procedural default based on "principles of agency law and fundamental fairness." *Maples*, 132 S. Ct. at 928; *see also Reina-Rodriguez v. United States*, 655 F.3d 1182, 1188 (9th Cir. 2011) (holding that a threshold question in determining if *Teague* applies is whether the articulated rule is a new *constitutional* rule, and that "if the new rule is not founded on constitutional concerns, it does not implicate *Teague*").

matter of law, all relevant mitigating evidence. *See State v. Stokley*, 898 P.2d 454, 473 (Ariz. 1995) ("A difficult family background alone is not a mitigating circumstance. . . . This can be a mitigating circumstance only 'if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control.' . . . Although he may have had a difficult childhood and family life, [Stokley] failed to show how this influenced his behavior on the night of the crimes.") (citations omitted)); *id.* ("Although long-term good behavior during post-sentence incarceration has been recognized as a possible mitigating factor, . . . we, like the trial court, reject it here for pretrial and presentence incarceration.").

However, on balance, the Arizona Supreme Court's opinion suggests that the court did weigh and consider all the evidence presented in mitigation at sentencing. *See Stokley*, 898 P.2d at 468 ("Consistent with our obligation in capital cases to independently weigh all potentially mitigating evidence . . . [w]e turn, then, to a consideration of the mitigating factors."); *id.* at 472 ("As part of our independent review, we will address each alleged mitigating circumstance."); *id.* at 468 ("The sentencing judge must consider 'any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether the death penalty should be imposed.' . . . The sentencing court must, of course,

consider all evidence offered in mitigation, but is not required to accept such evidence." (citations omitted)); *id.* at 465 ("[T]his court independently reviews the entire record for error, . . . considers any mitigating circumstances, and then weighs the aggravating and mitigating circumstances sufficiently substantial to call for leniency."); *id.* at 473 ("Family history in this case does not warrant mitigation. Defendant was thirty-eight years old at the time of the murders."). The Arizona Supreme Court carefully discussed all the statutory and non-statutory mitigating factors, step by step, in separate paragraphs in its opinion. *See id.* at 465-74.

However, even assuming the Arizona Supreme Court did commit causal nexus error as to Stokley's good behavior in jail and his difficult childhood, Stokley cannot demonstrate actual prejudice because he has not shown that the error, if any, had a substantial and injurious impact on the verdict. An error requires reversal only if it "had substantial and injurious effect or influence in determining the . . . verdict.'" *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); cf. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1408 (2011) (holding in a *Strickland* challenge that the test for prejudice at sentencing in a capital case 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." (internal quotation marks omitted)).

The Arizona Supreme Court reviewed and discussed each of the aggravating and mitigating factors individually. The court found three statutory aggravating circumstances were proven beyond a reasonable doubt: (1) Stokley was an adult at the time the crimes were committed and the victims were under the age of fifteen; (2) Stokley was convicted of another homicide committed during the commission of the offense; and (3) Stokley committed the offense in an especially heinous, cruel, and depraved manner. 898 P.2d at 465-68. The Arizona Supreme Court's conclusion that there were no grounds here substantial enough to call for leniency is consistent with the sentencing court's determination that "even if any or all of the mitigating circumstances existed, 'balanced against the aggravating circumstances found to exist, they would not be sufficiently substantial to call for leniency.'"[3] *Id.* at 471. The Arizona courts considered the mitigation

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[3] The sentencing court found the following facts beyond a reasonable doubt. Stokley was convicted of murdering two 13-year-old girls over the July 4th weekend in 1991. Stokley is a person of above average intelligence. At the time of the crime, he was 38 years old. Stokley intended that both girls be killed. He killed one of the girls and his co-defendant killed the other. Before the men manually strangled the girls to death, both men had sexual intercourse with the victims. Both bodies "were stomped upon with great force," and one of the children bore "the clear chevron imprint" from Stokley's tennis shoes on her chest,

(continued...)

evidence—including good behavior in jail and childhood circumstances—insufficient to warrant leniency. In light of the Arizona courts' consistent conclusion that leniency was inappropriate, there is no reasonable likelihood that, but for a failure to fully consider Stokley's family history or his good behavior in jail during pre-trial incarceration, the Arizona courts would have come to a different conclusion. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (referencing harmless error in connection with the exclusion of non-statutory mitigating evidence). In sum, because the claimed causal nexus error, if any, did not have a substantial or injurious influence on Stokley's sentence, Stokley cannot establish prejudice. *Brecht*, 507 U.S. at 630-34.

In light of the high bar that must be met for this court to stay the mandate, Stokley's motion to stay the mandate is DENIED.

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[3](...continued)
shoulder, and neck. Both victims were stabbed in their right eyes with Stokley's knife, one through to the bony structure of the eye socket. The girls likely were unconscious at the time of the stabbing. The girls' bodies were dragged to and thrown down a mine shaft.

Stokley v. Ryan, 09-99004

PAEZ, Circuit Judge, dissenting:

I agree that *Maples* is not limited solely to *actual* abandonment, but I am not persuaded by the majority's conclusion that Stokley was not abandoned because, technically, he "was always actively represented by counsel." To obtain the remand he requests, Stokley need only make a prima facie showing of abandonment under *Maples* that might constitute cause to overcome procedural default. *See Moorman v. Schriro*, 672 F.3d 644, 647-48 (9th Cir. 2012). Despite the limited briefing on the pending motion, Stokley has alleged a prima facie case of abandonment that may demonstrate cause to overcome procedural default under *Maples*. Moreover, as the majority recognizes, he has a colorable constitutional claim. Our inquiry should end there. I would grant the motion and remand to the district court for determination of cause and prejudice and, if appropriate, the merits of Stokley's constitutional claim.[1]

Maples rests squarely on agency principles. 132 S. Ct. at 922-24. To explain how an agency relationship may be actually or constructively severed, the Supreme

[1] I agree with the majority's assumption that *Maples* may be sufficient to establish the "exceptional circumstance" necessary to justify the exercise of this court's power to stay the mandate following a denial of certiorari. I also agree with the majority's analysis that *Maples* applies retroactively to Stokley's case.

Court relied on Justice Alito's concurrence in *Holland v. Florida*, 560 U.S. ——, 130 S. Ct. 2549 (2010), to distinguish attorney negligence from abandonment. "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." 132 S. Ct. at 923, citing *Holland*, 130 U.S. at 2568 (Alito, J., concurring). Justice Alito's concurrence in *Holland* also noted that the agency relationship was constructively severed "particularly so if the litigant's reasonable efforts to terminate the attorney's representation have been thwarted by forces wholly beyond the petitioner's control." *Holland*, 130 S. Ct. at 2568. Indeed, our court's precedent—while not finding abandonment—recognizes that *Maples* rests on agency principles and that a serious breach of loyalty can sever the attorney-client relationship in a manner that may constitute constructive abandonment sufficient to establish cause. *See Towery v. Ryan*, 673 F.3d 933, 943 (9th Cir. 2012) *cert. denied*, 132 S. Ct. 1738 (2012) (separately analyzing two prongs of actual abandonment or "serious breach of loyalty" and distinguishing *Holland*, which involved violations of fundamental canons of professional responsibility, from Towery's circumstances, which did not).

Stokley has presented a prima facie case of constructive abandonment like that in *Holland* for three reasons. First, like Holland, he contemporaneously

alleged that postconviction appointed counsel Harriette Levitt was acting against his interests when he wrote three letters to the Arizona courts describing the breakdown in their relationship and insisting that she not be reinstated as his counsel. Further, Stokley—again, like Holland—complained to the state bar, which Levitt acknowledged in her motion to withdraw, citing "a complete breakdown of the attorney-client relationship." Second, Stokley also made reasonable efforts to terminate Levitt's representation, only to be thwarted by the State's vigorous advocacy that ultimately achieved Levitt's reinstatement. Finally, a week after Levitt was reinstated by the superior court as Stokley's counsel, she filed a petition for review of the denial of the post-conviction relief petition that systematically argued against the claims raised by substitute counsel, Carla Ryan, in a motion during Ryan's brief representation of Stokley. Nevertheless, Levitt concluded in that petition that Ryan should have been kept on the case.

On the basis of these actions, Stokley alleges—and the record supports—a prima facie case that Levitt had a conflict of interest and that her actions, as Stokley has argued before the district court and in the moving papers here, "took up the mantle of the prosecutor." Whereas the petitioner in *Maples* "in reality . . . had been reduced to pro se status," 132 S. Ct. at 927, Levitt's actions regarding Stokley's attempts to fairly present his claims could arguably have left him in a

situation worse than a pro se petitioner.[2]

In light of *Maples*, it is now recognizable that Stokley's situation in postconviction proceedings was worse than simply "unenviable." 659 F.3d at 810. While it has no legal bearing on the present issue, I note at the outset that Harriette Levitt is the same attorney whose conduct was at issue in the Supreme Court's recently-created ineffective assistance of counsel exception to the once settled rule in *Coleman*. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

Stokley alleged abandonment by Levitt at the time his disputes with her were at issue. His three letters to the Arizona courts provide evidence of the breakdown in relationship and allege specific details of their interactions and her lack of interest or diligence in his case that might, if true, prove that Levitt was not acting as Stokley's agent in any meaningful sense of that word. Perhaps most disturbingly, Stokley's letter to the Arizona Supreme Court makes allegations that, if true, could indicate a conflict of interest that would constitute a serious breach of the duty of loyalty. Describing what happened after Levitt withdrew and Ryan was appointed, Stokley wrote:

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[2] Moreover, at oral argument counsel for Stokley noted that Levitt refused to provide the record to Stokley even after he asked for it. If true, this refusal further supports a prima facie case of a serious breach of the duty of loyalty and interference with Stokley's attempts to fairly present his claims.

> But that's when I learned that it's really the Attorney General's Office that controls these appointments. They embarked on a childish and improper personality war, in which they praised Harriette Levitt while denigrating Carla Ryan in court documents. Subsequently, Judge Borowiec caved in easily and let the AG dictate who would represent me. This was wrong, should not have occurred, and this court erred in not correcting it as was asked in the Special Action. This appeal is about life or death, and should not be about personalities or interference by the AG because they prefer one attorney over another. Sure they'd prefer an attorney who does nothing over one who fights.

The record shows that the State vigorously advocated for Ryan's removal and Levitt's reinstatement, which is ultimately what happened. Four days after the superior court allowed Levitt to withdraw and appointed Ryan, the State moved to vacate Levitt's withdrawal or, alternatively, to "clarify" the role of substitute counsel. The next day, Ryan filed a request for appointment of co-counsel. The State opposed that motion as well in an unprofessionally worded opposition, first rearguing that Levitt should be reinstated because there was no reason for her withdrawal, reiterating that because there "is no right to effective assistance of counsel in Rule 32 proceedings" that "Stokley's and Ryan's opinions about Levitt's performance are irrelevant, as were Levitt's reasons for requesting withdrawal." The State also argued that "without a doubt, Ryan's request for a side-kick (from her own law firm) contemplates milking this case for all it is worth as a cash cow" and that "Ryan should be taken off the case and her motions denied.

Capital litigation is not an unlimited pot-boiler for the enrichment of private attorneys." The State also alleged that Ryan would not follow the rules.[3]

The trial court issued a minute order on April 27, 1997, vacating its previous order allowing Levitt to withdraw and reinstating her as counsel, stating only that the State's position was "well taken." The majority suggests that Levitt's May 7, 1997 petition for review (in which she argued systematically against the potential claims Ryan raised) and subsequent October 10, 1997 supplemental Rule 32 petition for post-conviction relief (in which she raised two additional claims beyond the two in her initial petition) reflect strategic choices. Levitt's filings, however, suggest an overriding concern with defending herself from the "attack on the effectiveness of undersigned counsel, all of which is meritless" while simultaneously suggesting that "new counsel [Ryan] should have been kept on the case." Indeed, a claim derided as "completely meritless" in Levitt's May 7, 1997

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[3] The majority's holding that Stokley "was always actively represented by counsel" is true only in the most strictly formal sense and obscures the real issue, which is Levitt's abandonment that was fully consummated after her forced reinstatement. During the short time Ryan was representing Stokley, she was not only compelled to deal with the state's motions interfering with her representation, but she also sought extensions of time to file a petition for review. The placeholder claims raised in Ryan's motion for reconsideration and request for leave to amend the postconviction petition were *later* systematically dismantled by Levitt in her May 7, 1997 petition for review. Indeed, as noted above, it is conceivable that Levitt's action could have left Stokley in a situation worse than a pro se petitioner.

petition for review filed shortly after her reinstatement was resurrected as the first of two additional claims in the supplemental Rule 32 petition Levitt later filed after the Arizona Supreme Court affirmed her reinstatement.[4] These filings do not support the majority's suggested narrative of a loyal advocate making difficult strategic decisions in the best interest of her client. Thus, I do not agree with the majority that the breakdown of relationship was nothing more than a "substantive disagreement."

This record, in addition to her own filings, supports a prima facie case of abandonment by Levitt sufficient to require remand for a full determination of whether cause and prejudice exist sufficient to overcome the procedural default.

Furthermore, unlike the majority I would not address the issues of either prejudice with respect to procedural default or the merits of the constitutional claim at this stage. When first presented with this claim that the Arizona Supreme Court erred in its review of the death sentence under *Eddings* and *Skipper*, the district court declined to reach the merits because the claim was technically exhausted and procedurally barred. Case 4:98-cv-00332-FRZ, Dkt 70, Order and Opinion on Procedural Status of Claims at 15-16. *No court* has considered the issue of

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[4] The merits of this claim are not at issue here. The claim concerned the ineffectiveness of trial counsel for failing to object to gruesome autopsy photographs.

prejudice—either as to procedural default or to the merits of the constitutional claim—because, prior to *Maples*, there was no cause for the procedural default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The relief requested by the present motion specifically asks us to stay the current proceedings and remand to the district court because "this Court lacks a complete record upon which it could address the merits of a *Maples* argument." Motion at 5. The majority omits the context of counsel's statements at argument about the sufficiency of the evidence in the record. When asked *only* about cause, "putting aside prejudice and putting aside the merits of the claim, just as to cause," counsel stated that no further evidentiary material was necessary to justify a finding that Levitt abandoned Stokley. Counsel immediately then said that "it would only be the prejudice and the merits of the underlying claim" that would warrant further development in the district court.

Without the benefit of any briefing on the issue of prejudice arising from the defaulted *Eddings* and *Skipper* claims, we are not in a position to decide whether Stokley can prove cause and prejudice sufficient to overcome procedural default. Rather than foreclosing these claims at this stage, I would stay the mandate and remand this case to the district court for the limited purpose of allowing it to determine in the first instance whether cause and prejudice exist, and to consider the merits of the claim if warranted. We would then be in a far better position to review

the issue.

For all of the above reasons, I respectfully dissent.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Richard Dale Stokley, Petitioner, v. Dora B. Schriro, et al.,[1] Respondents.	No. CV-98-332-TUC-FRZ DEATH PENALTY CASE **ORDER AND OPINION RE: PROCEDURAL STATUS OF CLAIMS**

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.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

[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).

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

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

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

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

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

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

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

Because this case was filed after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 ("AEDPA"). Lindh v. Murphy, 521 U.S. 320, 336 (1997); Woodford v. Garceau, 538 U.S. 202, 210 (2003). The AEDPA requires that a writ of habeas corpus not 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 properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999).

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

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

Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam). Following Duncan, the Ninth Circuit has held that a state prisoner has not "fairly presented" (and thus exhausted) federal claims in state court unless he specifically indicated to that court that the claims were based on federal law. See, e.g., 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 to present federal claim); Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000) (broad reference to "due process" insufficient to present federal claim); see also 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 federal case law, even if the federal basis of a claim is "self-evident," Gatlin v. Madding, 189 F.3d 882, 888 (9th Cir.1999), or by citing state cases that explicitly analyze the same federal constitutional claim, Peterson v. Lampert, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). Such explicit fair presentation must be made not only to the trial or post-conviction court, but to the state's highest court. Baldwin v. Reese, 541 U.S. 27, 32 (2004). If a petitioner's habeas claim includes new factual allegations not presented to the state court, the claim may be considered unexhausted if the new facts "fundamentally alter" the legal claim presented and considered in state court. Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

A habeas petitioner's claims may be precluded from federal review in either of 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. Second, a claim may be procedurally defaulted in federal court if the petitioner failed to present the claim in any forum 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. This is often referred to as "technical" exhaustion because, although the claim was not actually exhausted in state court, the petitioner no longer has an available state remedy. See Gray v. Netherland,

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

Rule 32 of the Arizona Rules of Criminal Procedure governs when petitioners may seek relief in post-conviction proceedings and raise federal constitutional challenges to their convictions or sentences in state court. Rule 32.2 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), (g) and (h). When a claim under [these sub-sections] is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and 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 notice shall be summarily dismissed.

Ariz. R. Crim. P. 32.2 (West 2003) (emphasis added). Thus, pursuant to Rule 32.2(a)(3), petitioners may not be granted relief on any claim which was waived at trial, on appeal, or in a previous PCR petition. Similarly, pursuant to Rule 32.4, petitioners must seek relief in a timely manner. 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 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

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

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 procedurally defaulted claims unless a petitioner demonstrates legitimate cause for the failure to properly exhaust 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 735 n.1.

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 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 or violation. Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice resulting from a procedural default, a habeas petitioner bears the burden of showing not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension. United States v. Frady, 456 U.S. 152, 170 (1982).

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

constitute a "fundamental miscarriage of justice." Sawyer v. Whitley, 505 U.S. 333 (1992). 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 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 factfinder would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. at 336. In the second instance, 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). To establish the requisite probability, 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. However:

> [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.

HABEAS CLAIMS

Petitioner's second amended petition asserts federal constitutional violations based on the following issues:

A-1 Counsel's failure at sentencing to adequately investigate and prepare evidence of Petitioner's mental state as mitigation;

A-2 Counsel's failure at sentencing to adequately rebut "heinous, cruel or depraved" aggravating factor;

A-3 Counsel's failure at sentencing to adequately rebut the prosecution's bad character evidence;

B-1 Trial court's failure to consider and give effect at sentencing to evidence of Petitioner's mental and organic impairments, dysfunctional family history, good behavior while incarcerated, cooperation with police, potential for rehabilitation as mitigating factors, and the co-defendant's guilty plea and lesser sentence as mitigation;

B-2 Arizona Supreme Court's failure to consider and give effect at sentencing to evidence of Petitioner's mental and organic impairments, dysfunctional family history, good behavior while incarcerated, cooperation with police, potential for rehabilitation, and the co-defendant's guilty plea and lesser sentence as mitigating factors;

C Imposition of death sentence where equally or more culpable co-defendant spared;

D Imposition of "heinous, cruel or depraved" aggravating factor based on co-defendant's conduct and intent;

E Insufficient evidence to support "heinous, cruel or depraved" aggravating factor;

F-1 Counsel's failure at trial to adequately investigate and prepare a mental state defense;

F-2 Counsel's failure to impeach witness James Robinson;

F-3 Counsel's failure to effectively cross-examine co-defendant Randy Brazeal;

G State's failure to disclose information material to the defense regarding the co-defendant's involvement in a satanic cult;

H-1 Counsel's failure on appeal to argue in favor of the existence of specific mitigation evidence;

H-2 Counsel's incompetence on appeal for arguing a claim based on a non-existent felony-murder instruction and advancing the existence of irrelevant statutory mitigating factors;

I Absence of a jury determination of aggravating factors under capital sentencing scheme;

J Failure of capital sentencing scheme to channel sentencing discretion;

K Arbitrary and irrational imposition of death penalty under Arizona law;

L Execution by lethal injection; and

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

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, I, J, K, and M are plainly meritless; and Claims A-1, C, E, and G are properly exhausted and appropriate for review on the merits following supplemental briefing.

A. Exhaustion Analysis

Claim A-1

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

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

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

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[4] "ROA I" refers to the six-volume record on appeal prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-92-278-AP). "ROA II" refers to the two-volume record on appeal prepared for Petitioner's petition for review of the denial of PCR relief. (Case No. CR-97-0287-PC). "ROA III" refers to the one-volume record on appeal prepared as a supplemental record for Petitioner's petition for review of the denial of PCR relief (Case No. CR-97-0287-PC). "AP doc." and "SA doc." refer to the documents 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.)

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

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

Claims A-2 and A-3

Petitioner asserts ineffectiveness based on counsel's failure to adequately rebut one of the aggravating factors and the prosecution's "bad character" evidence. Petitioner contends these claims are properly exhausted because they are not fundamentally different than Claim A-1. The Court disagrees. Claims A-2 and A-3 assert distinct factual theories of ineffectiveness separate from that alleged in Claim A-1. Consequently, the presentation of Claim A-1 did not fairly alert the state court to the factual bases underlying Claims A-2 and A-3. See Carriger v. Lewis, 971 F.2d 329, 333-34 (9th Cir. 1992) (en banc) (treating distinct failures by trial counsel as separate claims for purposes of exhaustion and procedural default); Matias v. Oshiro, 683 F.2d 318, 319-20 & n.1 (9th Cir. 1982) (finding no fair presentation of eight grounds of ineffectiveness not raised in state court); Flieger v. Delo, 16 F.3d 878, 885 (8th Cir. 1994) (raising specific claims of ineffectiveness 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 and a determination of whether those acts are outside the range of competent assistance).

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

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

Claim B-1

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

In his Opening Brief, Petitioner included an argument entitled, "MITIGATING CIRCUMSTANCES WERE NOT OUTWEIGHED BY AGGRAVATING FACTORS IN APPELLANT'S CASE." (Opening Br. at 34.) In the body of the argument, Petitioner

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[5] To the extent the Court finds throughout this Order that Petitioner does not have an available remedy in state court, Petitioner does not assert the application of any of the preclusion exceptions. See Ariz. R. Crim. P. 32.2(b)(2); 32.1(d)-(h). Further, Petitioner does not argue that any of the claims are of the type that cannot be waived absent a personal knowing, voluntary and intelligent waiver. Cf. Cassett v. Stewart, 406 F.3d 614, 622-23 (9th Cir. 2005), cert. denied 126 S. Ct. 1336 (2006) (addressing waiver because raised by petitioner). The Court finds there is no available remedy in state court for these claims pursuant to Rule 32.2(a)(3) and they do not fall within the limited framework of claims requiring a knowing, voluntary and intelligent waiver before the application of a preclusion finding. See Ariz. R. Crim. P. 32.2(a)(3) cmt. (West 2004) (noting that most claims of trial error do not require a personal waiver); Stewart v. Smith, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002) (identifying the rights to counsel, to a jury trial and to a 12-person jury under 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.

identified statutory and non-statutory mitigating factors and argued that had "the trial court conducted a proper review of the factors mitigating against imposition of the death penalty, it is clear that Appellant would have been sentenced instead to life imprisonment." (Id. at 38.) Petitioner did not assert a violation of any federal constitutional provisions and did not cite any relevant federal case law, such as Lockett v. Ohio or Eddings v. Oklahoma, which hold that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, 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." Eddings, 455 U.S. 104, 110 (1982) (quoting Lockett, 438 U.S. 586, 604 (1978)) (emphasis in original). Rather, Petitioner argued only that the available mitigating evidence outweighed the aggravating factors and that he should have been sentenced to life imprisonment. This was insufficient to fairly present a claim that the sentencing judge unconstitutionally refused to consider mitigating evidence.

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

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

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

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

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

The Eighth and Fourteenth Amendments require a sentencer to consider "any aspect of a defendant's character or record and any of the circumstances of the offense" that a defendant proffers as a basis for a sentence less than death. Eddings, 455 U.S. at 110 (quoting Lockett, 438 U.S. at 604). However, it is left to the sentencer to determine the *weight* to accord such evidence. Id. at 114-15. For purposes of federal habeas review, a sentencing court in Arizona "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.'" Moormann v. Schriro, 426 F.3d 1044, 1055 (9th Cir. 2005), cert. denied 126 S. Ct. 2984 (2006) (quoting Clark v. Ricketts, 958 F.2d 851, 858 (9th Cir. 1991), and summarily dismissing Eddings claim where sentencing court explicitly stated it would "consider all evidence presented at trial, in the pre-sentencing report, and at sentencing in rendering its sentencing decision"); see also Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (rejecting Eddings/Lockett claim where sentencing court stated it considered all evidence presented in trial, post-trial hearings, and the presentencing report).

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

> This court has considered the testimony and evidence presented at trial and the separate sentencing hearing, and the memoranda, exhibits, and 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.

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

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

Claim B-2

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

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

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

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

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

Claims D and L

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

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

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

Claim E

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

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

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

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

A claim based on counsel's performance at sentencing is patently different than a claim based on counsel's performance at trial. Petitioner was required to fairly present in state court the factual basis of the acts alleged to constitute ineffective assistance. "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); see also Moormann v. Schriro, 426 F.3d at 1056 (noting that a petitioner cannot add unrelated alleged instances of ineffectiveness to any ineffectiveness claim raised in state court); Carriger v. Lewis, 971 F.2d at 333-34 (treating distinct failures by trial counsel as separate claims for exhaustion and procedural default).

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

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

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

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

Claims H-1 and H-2

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

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

B. Cause and Prejudice

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

Relevant Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

Although Petitioner asserts that he is not alleging ineffectiveness of PCR counsel as cause, the complained-of acts by Levitt are, in essence, precisely that. As such, Levitt's representation of Petitioner during the PCR proceeding necessarily fails to establish cause because there is 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) (the Constitution does not require states to provide counsel in PCR proceedings even when the putative petitioners are facing the death penalty); Bargas v. Burns, 179 F.3d 1207, 1215 (9th Cir. 1999) (holding that ineffective assistance of counsel in post-conviction proceeding cannot constitute cause); Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993) (refusing to extend the right of effective assistance of counsel to state collateral proceedings); Harris v. Vasquez, 949 F.2d 1497, 1513-14 (9th Cir. 1990).

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

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

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

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

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

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

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

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

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

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

C. Fundamental Miscarriage of Justice

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

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

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

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

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

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

> [Petitioner]: This didn't start out . . . like ah . . . somethin' bad.
>
> [Police]: Huh-hum.
>
> [Petitioner]: And I wasn't going to violate them myself, but the boy . . . ah . . . I don't know, man. (inaudible).
>
> [Police]: This is all Randy's idea?
>
> [Petitioner]: Yes, And I, I, I don't have any reason to tell you . . . a lie. Yes, it was. Yes. I was drinking very heavily and yes, I allowed myself to . . . I don't know. That's what I don't understand.
>
> [Police]: Okay. Whose knife was it, Richard?
>
> [Petitioner]: Ah . . . mine.
>
> . . . .
>
> [Police]: Okay. What happened then, after that, after Randy told you that he wanted to kill them?
>
> [Petitioner]: He grabbed one and I had to grab the other one.
>
> [Police]: Okay. So . . .
>
> [Petitioner]: I've never done anything like that before and I . . . choked 'em. There was one foot moving though I knew they was brain dead but I was getting scared.

(Id. at 8-9.) Petitioner's own statement provides evidence from which a reasonable juror could determine that he reflected on the decision to kill the girls after Brazeal told him they needed to be killed, presumably to eliminate them as witnesses. In addition, if defense counsel had presented evidence of an impulsive character trait, this would have opened the 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

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

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

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

D. Plainly Meritless Claims

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

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

Claim I

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

Claim J

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

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

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

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

Claim K

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

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

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

Claim M

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

CONCLUSION

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 procedurally defaulted and that Petitioner has failed to establish cause and prejudice or a fundamental miscarriage of justice to overcome the defaults. Accordingly, these claims are procedurally barred and will be dismissed with prejudice. The Court further finds that

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

Accordingly,

IT IS ORDERED that the following claims are **DISMISSED WITH PREJUDICE**: (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 (b) Claims B-1, I, J, K, and M on the merits as a matter of law.

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

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

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

IT IS FURTHER ORDERED that if, pursuant to LRCiv 7.2(g), 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 shall not toll the time for the filing of the merits briefs scheduled under this Order.

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

this substitution.

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

DATED this 30th day of August, 2006.

FRANK R. ZAPATA
United States District Judge

Supreme Court of Arizona, In Banc.
STATE of Arizona, Appellee,
v.
Richard Dale STOKLEY, Appellant.
No. CR-92-0278-AP.

June 27, 1995.

Defendant was convicted in the Superior Court, Cochise County, No. CR-91-00284A, Matthew W. Borowiec, J., of two counts of first-degree murder, two counts of kidnapping, and one count of sexual conduct with minor under the age of 15, and he was sentenced to death. On appeal, the Supreme Court, Moeller, V.C.J., held that: (1) pretrial publicity did not warrant change of venue; (2) autopsy photographs of victims were admissible; (3) death penalty statute was not unconstitutional; (4) in addition to two other aggravating circumstances under death penalty statute, murders were especially heinous, cruel, and depraved; (5) defendant failed to show, as mitigating circumstances, that his ability to control his actions was significantly impaired by alcohol, prior head injuries or mental disorders; and (6) nonstatutory mitigating circumstances, to extent shown, did not warrant overturning death sentence.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿1150

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1150 k. Change of Venue. Most Cited Cases
Trial court's ruling on motion for change of venue based on pretrial publicity is discretionary decision and will not be overturned absent abuse of discretion and prejudice to defendant. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[2] Criminal Law 110 ⚿126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In General. Most Cited Cases
With respect to motion for change of venue, two step inquiry for pretrial publicity asks whether publicity pervaded court proceedings to extent that prejudice can be presumed, and if not, then whether defendant showed actual prejudice among members of jury, with defendant having burden of showing prejudice. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[3] Criminal Law 110 ⚿134(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k129 Application
110k134 Affidavits and Other Proofs
110k134(1) k. In General. Most Cited Cases

For court to presume prejudice based on pretrial publicity, defendant must show pretrial publicity so outrageous that it promises to turn trial into mockery of justice or mere formality. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[4] Criminal Law 110 ⚿1134.8

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.8 k. Jurisdiction and Venue. Most Cited Cases
(Formerly 110k1134(2))
In reviewing claim of error in denying motion for change of venue based on pretrial publicity, court reviews entire record to reach conclusion on presumed prejudice, without regard to answers given in voir dire. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[5] Criminal Law 110 ⚿134(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k129 Application
110k134 Affidavits and Other Proofs
110k134(1) k. In General. Most Cited Cases
Widespread media coverage, age and popularity of minor victims, and impact murders had in area, including petition drives and fundraisers for victims' families, did not provide basis to presume prejudice from pretrial publicity so as to warrant change of venue in capital murder prosecution; while most prospective jurors had heard about case, voir dire on publicity issue was thorough, anyone who had signed "no plea bargain" petition was subject to further voir dire, jurors who could not be fair or impartial were dismissed, and empaneled jury was repeatedly warned to avoid media coverage of trial. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[6] Criminal Law 110 ⚿126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In General. Most Cited Cases
For venue purposes, relevant inquiry for actual prejudice from pretrial publicity is effect of publicity on objectivity of jurors, not fact of publicity itself. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[7] Criminal Law 110 ⚿1035(5)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(5) k. Competency of Jurors and Challenges. Most Cited Cases
Issue of whether death-qualified jurors were biased and not drawn from fair cross-section of community would normally be waived where counsel for capital murder defendant made no objection on that basis, absent contention of fundamental error.

[8] Criminal Law 110 ⚿1035(5)

110 Criminal Law
110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(5) k. Competency of Jurors and Challenges. Most Cited Cases
Death-qualified jury, as selected by asking panelists whether they had conscientious or religious objections to death penalty that would prevent them from voting for first degree murder conviction, was not fundamental error, despite defendant's contention that death-qualified juries were pro-prosecution and thus biased, and that death-qualified jury was not drawn from fair cross-section of community.

[9] Criminal Law 110 ⚿1036.1(6)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(3) Particular Evidence
110k1036.1(6) k. Documentary Evidence. Most Cited Cases
Absent fundamental error, admission of photograph exhibits cannot be raised on appeal if no objections were made at trial.

[10] Criminal Law 110 ⚿1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
Supreme Court will find fundamental error only when it goes to foundation of case, takes from defendant a right essential to defense, or is of such magnitude that it cannot be said it is possible for defendant to have had fair trial.

[11] Criminal Law 110 ⚿438(7)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(7) k. Photographs Arousing Passion or Prejudice; Gruesomeness. Most Cited Cases
Even if inflammatory, probative value of autopsy photographs of murder and sexual assault victims outweighed any prejudicial effect in capital murder trial; photographs showed manner of killing and identity of killer, particularly photos showing stomp marks on victim's body matching shoes worn by defendant, photos were introduced during testimony of forensic pathologist who conducted autopsies, and, although exhibits showed skin discoloration, abrasions, stomp and bruise marks, and cuts to victims' right eyes, they were not gruesome enough to be inflammatory. 17A A.R.S. Rules of Evid., Rules 401, 403.

[12] Criminal Law 110 ⚿438(1)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(1) k. In General. Most Cited Cases

(Formerly 110k798(.5), 203k308(4))

Criminal Law 110 ⚿438(7)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(7) k. Photographs Arousing Passion or Prejudice; Gruesomeness. Most Cited Cases
Admission of photographs requires three-part inquiry, regarding relevance, tendency to insight passion or inflame jury, and probative value versus potential to cause unfair prejudice. 17A A.R.S. Rules of Evid., Rules 401, 403.

[13] Criminal Law 110 ⚿438(1)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(1) k. In General. Most Cited Cases
Photographs are relevant if they aid jury in understanding issue. 17A A.R.S. Rules of Evid., Rule 401.

[14] Criminal Law 110 ⚿798(.6)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k798 Manner of Arriving at Verdict
110k798(.6) k. Several Counts or Offenses. Most Cited Cases

Homicide 203 ⚿1377

203 Homicide
203XII Instructions
203XII(B) Sufficiency
203k1374 Grade, Degree or Classification of Offense
203k1377 k. First Degree, Capital, or Aggravated Murder. Most Cited Cases
(Formerly 203k308(4), 203k289)

Homicide 203 ⚿1409

203 Homicide
203XII Instructions
203XII(B) Sufficiency
203k1408 Killing in Commission of or with Intent to Commit Other Unlawful Act
203k1409 k. In General. Most Cited Cases
(Formerly 203k308(4), 203k289)
Even assuming jury was instructed on felony murder, no error would be presented in instructing jury on both premeditated murder and felony murder, despite capital defendant's contention that, because of instructions, verdicts on murder counts may not have been unanimous.

[15] Jury 230 ⚿24

230 Jury
230II Right to Trial by Jury
230k20 Criminal Prosecutions
230k24 k. Assessment of Punishment. Most Cited Cases
With respect to death penalty, there is no constitutional right to have jury determine aggravating or mitigating

circumstances. A.R.S. § 13-703.

[16] Sentencing and Punishment 350H ⚿1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of Proof. Most Cited Cases
(Formerly 203k358(1))
Requiring capital murder defendants to prove any mitigating circumstances by preponderance of evidence is constitutional. A.R.S. § 13-703.

[17] Sentencing and Punishment 350H ⚿1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of Proof. Most Cited Cases
(Formerly 110k1208.1(6))
Although state must prove aggravating circumstances beyond reasonable doubt for death penalty purposes, court is not required to find beyond reasonable doubt that aggravating circumstances outweigh mitigating circumstances. A.R.S. § 13-703.

[18] Sentencing and Punishment 350H ⚿1625

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 k. Aggravating or Mitigating Circumstances. Most Cited Cases
(Formerly 110k1206.1(2))
Alleged lack of objective standards for determining whether aggravating circumstances outweighed mitigating circumstances did not invalidate death penalty statute. A.R.S. § 13-703.

[19] Sentencing and Punishment 350H ⚿1648

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1648 k. Matters Relating to Racial or Other Prejudice. Most Cited Cases
(Formerly 110k1208.1(4.1))
With respect to application of death penalty, defendant alleging discrimination must prove decision maker in his case acted with discriminatory purpose. A.R.S. § 13-703.

[20] Sentencing and Punishment 350H ⚿1648

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1648 k. Matters Relating to Racial or Other Prejudice. Most Cited Cases
(Formerly 203k356)
Absent evidence that capital murder defendant's economic status or gender contributed to his sentence or biased sentencing process, defendant could not challenge his death sentence based on his contention that poor, male defendants were discriminated against in application of death penalty. A.R.S. § 13-703.

[21] Sentencing and Punishment 350H ⚿1612

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1612 k. Death Penalty as Cruel or Unusual Punishment. Most Cited Cases
(Formerly 110k1213.8(8))

Sentencing and Punishment 350H ⚿1616

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1613 Requirements for Imposition
350Hk1616 k. Avoidance of Arbitrariness or Capriciousness. Most Cited Cases
(Formerly 110k1213.8(8))
Death penalty is not cruel and unusual so long as it is not imposed in arbitrary and capricious manner. U.S.C.A. Const.Amend. 8; A.R.S. § 13-703.

[22] Sentencing and Punishment 350H ⚿1610

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1610 k. In General. Most Cited Cases
(Formerly 203k356)
Death penalty is not imposed arbitrarily and irrationally, but rather Arizona death penalty statute narrowly defines death-eligible persons as those convicted of first degree murder, where state has proven one or more statutory aggravating factors beyond reasonable doubt. U.S.C.A. Const.Amend. 8; A.R.S. § 13-703.

[23] Sentencing and Punishment 350H ⚿1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases
(Formerly 110k1134(3))
Supreme Court does not conduct proportionality reviews in capital punishment cases. A.R.S. § 13-703.

[24] Sentencing and Punishment 350H ⚿1625

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 k. Aggravating or Mitigating Circumstances. Most Cited Cases
(Formerly 203k351)
The especially heinous, cruel, or depraved aggravating circumstance under death penalty statute is constitutional. A.R.S. § 13-703, subd. F, par. 6.

[25] Sentencing and Punishment 350H ⚿1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of Review. Most Cited Cases
(Formerly 110k1134(3), 110k1134(2))
When death sentence is imposed, Supreme Court independently reviews entire record for error, determines whether aggravating circumstances have been proved beyond reasonable doubt, considers any mitigating

circumstances, and then weighs aggravating and mitigating circumstances in deciding whether there were mitigating circumstances sufficiently substantial to call for leniency. A.R.S. § 13-703.

[26] Sentencing and Punishment 350H ⚿1652

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1652 k. Aggravating Circumstances in General. Most Cited Cases
(Formerly 110k1208.1(6))
To make defendant death eligible, state must prove beyond reasonable doubt at least one statutory aggravating circumstance. A.R.S. § 13-703, subd. E.

[27] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
Heinous, cruel, or depraved circumstance is phrased in the disjunctive in death penalty statute, so if any one of the three factors is found, circumstance is satisfied. A.R.S. § 13-703, subd. F, par. 6.

[28] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
For purposes of heinous, cruel, or depraved aggravating circumstance under death penalty statute, cruelty focuses on victim and is found where there has been infliction of pain and suffering in wanton, insensitive, or vindictive manner. A.R.S. § 13-703, subd. F, par. 6.

[29] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
For purposes of heinous, cruel, or depraved circumstance under death penalty statute, crime is especially cruel when defendant inflicts mental anguish or physical abuse before victim's death. A.R.S. § 13-703, subd. F, par. 6.

[30] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
For purposes of applying heinous, cruel, or depraved circumstance under death penalty statute, mental anguish results especially if victim experiences significant uncertainty as to ultimate fate. A.R.S. § 13-703, subd. F, par. 6.

[31] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
Evidence that at least some of victims' injuries occurred while victims were conscious was sufficient for finding of cruelty under death penalty statute's aggravating circumstance provisions; cause of death for both girls was asphyxia due to manual strangulation, forensic pathologist testified victim of strangulation is generally conscious for few minutes and that death usually takes twelve to fifteen minutes, and victims' injuries were consistent with struggle and occurred while victims were alive or shortly after death. A.R.S. § 13-703, subd. F, par. 6.

[32] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
Under death penalty statute's aggravating circumstance provisions, heinousness and depravity focus on defendant's mental state and attitude as reflected by his words or actions. A.R.S. § 13-703, subd. F, par. 6.

[33] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
In determining whether crime is "especially heinous or depraved" within meaning of death penalty statute, court looks to apparent relishing of the murder, infliction of gratuitous violence on victim beyond murderous act itself, mutilation of victim's body, senselessness of the crime, and helplessness of victim. A.R.S. § 13-703, subd. F, par. 6.

[34] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
In determining whether crime is especially heinous or depraved within meaning of death penalty statute, senselessness of the crime and helplessness of victim are usually less probative of defendant's state of mind that are apparent relishing of murder, infliction of gratuitous violence on victim beyond murderous act itself, or mutilation of victim's body. A.R.S. § 13-703, subd. F, par. 6.

[35] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))

Sentencing and Punishment 350H ⚿1733

350H Sentencing and Punishment
350HVIII The Death Penalty

350HVIII(F) Factors Related to Status of Victim
350Hk1733 k. Witnesses. Most Cited Cases
(Formerly 203k357(11), 203k357(8))
Witness elimination is given some weight in finding "especially heinous or depraved" aggravating circumstance under death penalty statute, but witness elimination factor only applies if victim witnessed another crime and was killed to prevent testimony about that crime, statement by defendant or other evidence of his state of mind shows witness elimination was motive, or some extraordinary circumstances show murder was motivated by desire to eliminate witnesses. A.R.S. § 13-703, subd. F, par. 6.

[36] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
Murders of two thirteen-year old girls were especially heinous and depraved within meaning of death penalty statute, where girls were driven to remote rural area in middle of night, sexually assaulted, stabbed, stomped, stripped, strangled, and thrown down mine shaft, they were defenseless against attacks and suffered from gratuitous violence and needless mutilation, and defendant's statement to police revealed motivation to eliminate girls as witnesses. A.R.S. § 13-703, subd. F, par. 6.

[37] Sentencing and Punishment 350H ⚿300

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(E) Presentence Report
350Hk300 k. Use and Effect of Report. Most Cited Cases
(Formerly 110k986.4(1))
Generally, presentence report may be considered on matters of mitigation if it contains information favorable to capital murder defendant. 17 A.R.S. Rules Crim.Proc., Rule 26.4.

[38] Criminal Law 110 ⚿1134.23

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.23 k. Sentencing. Most Cited Cases
(Formerly 110k1134(2))

Sentencing and Punishment 350H ⚿1746

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)1 In General
350Hk1746 k. Other Discovery and Disclosure. Most Cited Cases
(Formerly 203k358(1))

Sentencing and Punishment 350H ⚿1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of Review. Most Cited Cases
With respect to sentencing in capital murder case,

Supreme Court did not approve of practice of withholding information from trial court and then presenting it to appellate court, where presentence report was sealed by stipulation of parties in trial court and defense counsel asked trial court not to read it, arguing that any mitigating evidence contained in presentence report could be adequately covered by other exhibits and defense witnesses, but, at request of defendant's appellate counsel, Supreme Court would examine and consider presentence report, consistent with Court's obligation in capital cases to independently weigh all potentially mitigating evidence. A.R.S. § 13-703.

[39] Sentencing and Punishment 350H ⚿1746

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)1 In General
350Hk1746 k. Other Discovery and Disclosure. Most Cited Cases
(Formerly 203k358(1))

With respect to sentencing in capital murder cases, counsel are encouraged to present all arguably mitigating evidence to trial court and not to hold some back for appeal, and, if counsel are concerned that there is detrimental information in presentence report that would only be appropriate to consider on noncapital counts, one possible solution would be to proceed to sentencing on capital counts first, although even without such precautions, trial judges know that they are limited on capital counts to statutory aggravating factors properly admitted and proved beyond reasonable doubt. A.R.S. § 13-703, subd. C.

[40] Sentencing and Punishment 350H ⚿1656

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1656 k. Factors Extrinsic to Statute or Guideline in General. Most Cited Cases
(Formerly 110k1208.1(6), 110k1208.1(5))

Sentencing and Punishment 350H ⚿1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of Proof. Most Cited Cases
(Formerly 110k1208.1(6))

On capital counts, trial courts are limited to statutory aggravating factors properly admitted and proved beyond reasonable doubt, and they may not consider other evidence as aggravating. A.R.S. § 13-703, subd. C.

[41] Sentencing and Punishment 350H ⚿1665

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1665 k. In General. Most Cited Cases
(Formerly 110k1208.1(6))

Sentencing and Punishment 350H ⚿1702

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1702 k. Offender's Character in General. Most Cited Cases
(Formerly 110k1208.1(6))

Sentencing and Punishment 350H ⚿1704

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1703 Other Offenses, Charges, Misconduct
350Hk1704 k. In General. Most Cited Cases
(Formerly 110k1208.1(6))
Sentencing judge must consider any aspect of defendant's character or record and any circumstance of offense relevant to determining whether death penalty should be imposed. A.R.S. § 13-703.

[42] Sentencing and Punishment 350H ⚿1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of Proof. Most Cited Cases
(Formerly 110k1208.1(6))
For purposes of capital sentencing, defendant must prove mitigating factors by preponderance of evidence. A.R.S. § 13-703.

[43] Sentencing and Punishment 350H ⚿1757

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 k. Evidence in Mitigation in General. Most Cited Cases
(Formerly 110k1208.1(6), 110k1208.1(5))
For capital sentencing purposes, sentencing court must consider all evidence offered in mitigation, but is not required to accept such evidence. A.R.S. § 13-703.

[44] Sentencing and Punishment 350H ⚿1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most Cited Cases
(Formerly 110k1208.1(5))
Under death penalty statute, mitigating circumstance of capacity to appreciate wrongfulness of conduct or to conform conduct to requirements of law is disjunctive factor, so that proof of incapacity as to either ability to appreciate or conform establishes mitigating circumstance. A.R.S. § 13-703, subd. G, par. 1.

[45] Sentencing and Punishment 350H ⚿1712

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1712 k. Intoxication or Drug Impairment at Time of Offense. Most Cited Cases
(Formerly 110k1208.1(5))
Voluntary intoxication may be mitigating circumstance under death penalty statute if defendant proves by preponderance of evidence that his capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law was significantly impaired, but not so impaired as to constitute defense to prosecution. A.R.S. § 13-703, subd. G, par. 1.

[46] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k358(1))
Capital murder defendant failed to show, as mitigating factor for sentencing purposes, that he was significantly impaired by alcohol so as to be unable to appreciate wrongfulness or to conform conduct, despite clinical psychologist's testimony of impaired capacity, based solely on defendant's self-reported consumption and self-reported blackout on night of crimes; defendant disposed of bodies and burned victim's clothing, he was able to accurately guide officers back to crime scene, and he had substantial recall of events and attempted to cover up crimes. A.R.S. § 13-703, subd. G, par. 1.

[47] Sentencing and Punishment 350H 1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most Cited Cases
(Formerly 110k1208.1(5))
Head injuries that lead to behavioral disorders may be considered mitigating circumstance for death penalty purposes. A.R.S. § 13-703.

[48] Sentencing and Punishment 350H 1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k357(4))
Capital murder defendant's prior head injuries did not show that he was unable to conform or appreciate wrongfulness of his conduct, for purposes of mitigation, despite evidence that head injuries caused impulsive behavior, since this evidence was substantially offset by fact that defendant's test results showed above average intelligence, and he did not exhibit impulsive behavior in commission of crimes, but rather he appreciated wrongfulness of his conduct, as evidenced by his statement to police. A.R.S. § 13-703, subd. G, par. 1.

[49] Sentencing and Punishment 350H 1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most Cited Cases
(Formerly 203k357(4))
Evidence of defendant's mental disorders, including testimony of history of depression and other serious psychological problems, pattern of impulsivity, and suicide attempts, was insufficient to show, as mitigating factor under death penalty statute, that defendant's ability to control his actions was substantially impaired, since defendant's actions showed that he appreciated wrongfulness of his conduct, and that he made conscious and knowing decision to murder victims. A.R.S. § 13-703, subd. G, par. 1.

[50] Sentencing and Punishment 350H 1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most Cited Cases
(Formerly 110k1208.1(5))
For purposes of finding mitigating circumstance under

death penalty statute, character or personality disorders alone are generally not sufficient to find that defendant was significantly impaired, and mental disease or psychological defect usually must exist before significant impairment is found. A.R.S. § 13-703, subd. G, par. 1.

[51] Sentencing and Punishment 350H ⚿1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct. Most Cited Cases
(Formerly 203k357(12))

Sentencing and Punishment 350H ⚿1683

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1683 k. More Than One Killing in Same Transaction or Scheme. Most Cited Cases
(Formerly 203k357(12))
Capital murder defendant's allegedly minor participation in co-defendant's crimes was not mitigating factor that sentencing court was required to take into consideration in deciding whether to impose death penalty, based on defendant's contention that jury's guilty verdict could have been based upon felony murder theory; jury was not instructed on felony murder, jury found defendant guilty of two counts of first degree premeditated murder, and defendant killed one victim and intended that second victim be killed. A.R.S. § 13-703, subd. G, par. 3.

[52] Sentencing and Punishment 350H ⚿1670

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1670 k. Intent of Offender. Most Cited Cases
(Formerly 203k357(3))
Capital murder defendant's contention that there did not appear to be any plan at beginning of episode to cause harm or fatal injury to victims did not support finding, as mitigating factor for sentencing purposes, of no reasonable foreseeability that conduct would create grave risk of death, absent any facts or evidence supporting defendant's theory; after abducting two teenage girls from campsite, defendant and second man sexually assaulted and killed them. A.R.S. § 13-703, subd. G, par. 4.

[53] Sentencing and Punishment 350H ⚿1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most Cited Cases
(Formerly 110k1208.1(5))

Sentencing and Punishment 350H ⚿1711

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1711 k. Substance Abuse and Addiction. Most Cited Cases
(Formerly 110k1208.1(5))
If impairment does not rise to level of statutory mitigating circumstance, trial court in death penalty case should still consider whether such impairment constitutes nonstatutory mitigation, when viewed in light of defendant's alleged history of alcohol and drug abuse.

[54] Sentencing and Punishment 350H ⚿1711

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1711 k. Substance Abuse and Addiction. Most Cited Cases
(Formerly 203k357(4))
Capital murder defendant failed to prove historic alcohol or drug use was nonstatutory mitigating factor, for purposes of sentencing him for murders of two teenage girls; various relatives and acquaintances testified that defendant was alcoholic and that he considered himself to be one, clinical psychologist agreed with that assessment, defendant claimed to have consumed at least pint of whiskey every day and to have used various illicit drugs in past, and he had prior alcohol related arrests. A.R.S. § 13-703.

[55] Sentencing and Punishment 350H ⚿1708

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1703 Other Offenses, Charges, Misconduct
350Hk1708 k. Lack of Significant Prior Record. Most Cited Cases
(Formerly 110k1208.1(5))
Lack of prior felony convictions may constitute nonstatutory mitigating circumstance in death penalty sentencing. A.R.S. § 13-703.

[56] Sentencing and Punishment 350H ⚿1708

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1703 Other Offenses, Charges, Misconduct
350Hk1708 k. Lack of Significant Prior Record. Most Cited Cases
(Formerly 110k1208.1(5))
In death penalty cases, arrests or misdemeanor convictions may be considered when lack of felony convictions is advanced as mitigating factor. A.R.S. § 13-703.

[57] Sentencing and Punishment 350H ⚿1708

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1703 Other Offenses, Charges, Misconduct
350Hk1708 k. Lack of Significant Prior Record. Most Cited Cases
(Formerly 110k1208.1(5))
Thirty-eight year old defendant's lack of felony record was nonstatutory mitigating circumstance for purposes of sentencing in death penalty case, but weight to be given it was substantially reduced by his other past problems with law; defendant had history of misdemeanor arrests and offenses, including conviction for disorderly conduct, two arrests for public drunkenness, and arrests for assaults on two former wives. A.R.S. § 13-703.

[58] Sentencing and Punishment 350H ⚿1719

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1719 k. Assistance to Authorities and Cooperation. Most Cited Cases
(Formerly 203k357(4))
Capital murder defendant's cooperation with police was not mitigating circumstance, for purposes of sentencing him for murders of two teenage girls, where his

cooperation followed initial denial of any knowledge of girls, and he confessed only after hearing that co-defendant had been arrested. A.R.S. § 13-703.

[59] Sentencing and Punishment 350H ⚷1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)
Although sentences of co-defendants may be considered in mitigation for death penalty sentencing purposes, difference in sentences may not be considered in mitigation where difference is result of appropriate plea bargaining. A.R.S. § 13-703.

[60] Sentencing and Punishment 350H ⚷1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)

Sentencing and Punishment 350H ⚷1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 110k983)
Although sentences of co-defendants may be considered in mitigation for death penalty sentencing purposes, even unexplained disparity has little significance where the first degree murder is found especially cruel, heinous, or depraved. A.R.S. § 13-703.

[61] Sentencing and Punishment 350H ⚷1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)
Co-defendant's twenty year sentence was not mitigating circumstance for purpose of sentencing capital murder defendant for murders of two teenage girls, where sentence negotiated by co-defendant was result of disparity of evidence at time of co-defendant's trial, causing state to enter into plea agreement, and co-defendant was twenty years old, whereas defendant was thirty-eight. A.R.S. § 13-703.

[62] Sentencing and Punishment 350H ⚷1653

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1653 k. Mitigating Circumstances in General. Most Cited Cases
(Formerly 110k1208.1(5))
Claimed right to leniency in context of alleged harshness and disproportionality of death penalty was not mitigating circumstance. A.R.S. § 13-703.

[63] Sentencing and Punishment 350H ⚷1718

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1718 k. Remorse and Actual or Potential Rehabilitation. Most Cited Cases
(Formerly 203k357(4))
Prospect for rehabilitation was not mitigating circumstance for purpose of sentencing capital murder defendant, despite testimony of criminal justice consultant that defendant had potential for rehabilitation; after long history of alcohol abuse and tumultuous behavior, defendant showed no evidence of ability to rehabilitate. A.R.S. § 13-703.

[64] Sentencing and Punishment 350H ⚿1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1716 k. Childhood or Familial Background. Most Cited Cases
(Formerly 203k357(4))
Capital murder defendant's family history did not warrant mitigation in death penalty sentencing, since defendant was thirty-eight years old at time of murders, and, although he may have had difficult childhood and family life, he failed to show how this influenced his behavior on night of crimes; according to clinical psychologist, defendant had chaotic and abusive childhood, never knowing his father and having been raised by various family members. A.R.S. § 13-703.

[65] Sentencing and Punishment 350H ⚿1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1716 k. Childhood or Familial Background. Most Cited Cases
(Formerly 110k1208.1(5))
Difficult family background alone is not mitigating circumstance in death penalty sentencing, and it can be mitigating circumstance only if defendant can show that something in that background had effect or impact on his behavior that was beyond his control. A.R.S. § 13-703.

[66] Sentencing and Punishment 350H ⚿1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1716 k. Childhood or Familial Background. Most Cited Cases
(Formerly 110k1208.1(5))
Adult offenders have more difficult burden in showing difficult family background as mitigating circumstance in death penalty sentencing, because of greater degree of personal responsibility for their actions. A.R.S. § 13-703.

[67] Sentencing and Punishment 350H ⚿1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most Cited Cases
(Formerly 203k357(4))
Murder defendant's documented mental disorders were entitled to some weight as nonstatutory mitigation, for purposes of death penalty sentencing. A.R.S. § 13-703.

[68] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k358(1))
For death penalty sentencing purposes, murder defendant failed to prove good character as mitigating factor by preponderance of evidence, where two former wives of defendant testified that defendant had physically abused them, threatened them with death, and threatened that their bodies would be thrown down mine shaft. A.R.S. § 13-703.

[69] Sentencing and Punishment 350H ⚿1721

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1721 k. Other Matters Related to Offender. Most Cited Cases
(Formerly 203k357(4))
Murder defendant's good behavior during pretrial and presentence incarceration was not mitigating factor for death penalty sentencing purposes. A.R.S. § 13-703.

[70] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k358(1))
Although murder defendant presented some evidence that he would no longer be dangerous if confined to prison for life, as mitigating factor for death penalty sentencing purposes, he failed to prove it by preponderance of evidence, particularly in view of his history of violence and threats of violence and his actions in case. A.R.S. § 13-703.

[71] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k358(1))
Although remorse may be considered in mitigation in death penalty cases, murder defendant failed to prove by preponderance of evidence that he was remorseful; criminal justice consultant testified that defendant had feelings of remorse, and defendant stated to court prior to sentencing that he had been made scapegoat, that he did not deny culpability but that there was no premeditation on his part, that he was guilty of being irresponsible person for most of his life, and that no words could express his sorrow and torment. A.R.S. § 13-703.

[72] Sentencing and Punishment 350H ⚿1683

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1683 k. More Than One Killing in Same Transaction or Scheme. Most Cited Cases
(Formerly 203k357(12))

Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty

350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k357(3))
Evidence showed that defendant personally killed first victim and, at the least, intended that second victim be killed, and thus defendant did not establish, as mitigating circumstance for capital sentencing purposes, lack of evidence showing that he actually killed or intended to kill second victim; evidence, including his own statement to police, proved that defendant and co-defendant agreed that girls had to be killed, and defendant acknowledged agreement to kill girls and admitted stabbing both. A.R.S. § 13-703.

**460 *511 Grant Woods, Atty. Gen. by Paul J. McMurdie, Chief Counsel, Crim. Appeals Section, Phoenix, Eric J. Olsson, Tucson, for appellee.

**461 *512 Ivan S. Abrams, Douglas, for appellant.

OPINION

MOELLER, Vice Chief Justice.

JURISDICTION

This is a capital case in which we review Richard Stokley's convictions for two counts of first degree murder, two counts of kidnapping, and one count of sexual conduct with a minor under the age of fifteen. We also review the two death sentences imposed on the murder counts. Appeal to this court is automatic. Ariz.R.Crim.P. 31.2(b). We have jurisdiction pursuant to Ariz.Rev.Stat.Ann. (A.R.S.) §§ 13-4031 (1989) and 13-4033 (1989 and Supp.1994). We affirm the convictions and sentences.

FACTS AND PROCEDURAL HISTORY

On the Fourth of July weekend, 1991, two thirteen year old girls, Mary and Mandy,[FN1] attended a community celebration near Elfrida, Arizona. The thirty-eight year old defendant also attended the festival to work as a stuntman in Old West reenactments.

FN1. We do not use the victims' last names in this published opinion.

Mary and Mandy, along with numerous other local children, camped out at the celebration site on July 7. That night co-defendant Randy Brazeal, age twenty, showed up at the campsite. Brazeal had previously dated Mandy's older sister and knew Mandy. During the evening, Brazeal approached the girls' tent and had a discussion with Mary and Mandy. The girls were also seen standing next to Brazeal's car speaking to Brazeal, who was in the driver's seat, while defendant was in the passenger seat. Around 1:00 a.m. on July 8, 1991, the girls told a friend they were going to the restroom. They never returned.

The next day Brazeal surrendered himself and his car to police in Chandler, Arizona. The hood of the car had semen stains, as well as dents matching the shape of human buttocks. Palm prints on the hood matched Brazeal. The back seat had semen stains matching defendant and also had blood stains. Police found a bloody pair of men's pants in the car.

Meanwhile, defendant called a woman in Elfrida asking her to send someone to pick him up in Benson, Arizona. The woman asked about the missing girls, to which defendant replied, "What girls? I don't know anything about any girls." Police arrested defendant that same day at a Benson truck stop. Police found blood stains on his shoes, and his pants looked as if they had recently been cut

off at the knee.

After reading defendant his *Miranda* rights, police questioned defendant at the Benson police station. At first he denied any knowledge of the girls, but after hearing about Brazeal's arrest and being asked about "a particular mine shaft around Gleason," he admitted that he and Brazeal had sexually assaulted the girls. He admitted having sex with "the brown haired girl" (Mandy) and stated that Brazeal had sex with both of them. He also said he and Brazeal had discussed killing the girls, after which defendant choked one and Brazeal strangled the other. He admitted, "I ... choked 'em.... There was one foot moving though I knew they was brain dead but I was getting scared.... They just wouldn't quit. It was terrible." Defendant also admitted using his knife on both girls. After killing the girls, they dumped the bodies down a mine shaft.

Defendant led the police to the abandoned mine shaft and expressed hope that the trial would not take long so he could "get the needle and get it over with." After explaining how they had moved timbers covering the shaft to dump the bodies, he pointed out where he and Brazeal had burned the girls' clothes.

Police recovered the nude bodies from the muddy mine shaft. Autopsies showed that both girls had been sexually assaulted, strangled (the cause of death), and stabbed in the right eye. The strangulation marks showed repeated efforts to kill, as the grip was relaxed and then tightened again. Both victims suffered internal and external injuries to their necks. Mandy also had stomp marks on her body that matched the soles of defendant's**462 *513 shoes. Evidence was consistent with each victim being killed by a different perpetrator. In particular, Mary's body had a mark on the neck consistent with Brazeal's boot, whereas bruise marks on Mandy matched the soles of defendant's shoes. And more force was used in strangling Mandy than Mary. DNA analysis indicated that both defendants had intercourse with Mandy. Mary's body cavities were filled with mud, making DNA analysis impossible.

The jury found defendant guilty of two counts of kidnapping, one count of sexual conduct with a minor under the age of fifteen (Mandy), and two counts of premeditated first degree murder. It acquitted him on two counts of sexual assault (Mary and Mandy) and one count of sexual conduct with a minor under the age of fifteen (Mary). Defendant and the state stipulated to sentences on the noncapital offenses. The trial court accepted the stipulation and sentenced accordingly.

Following a sentencing hearing on the capital counts, the trial court rendered a detailed, twelve-page special verdict. The trial court found that the facts established beyond a reasonable doubt that (1) both adults engaged in sex with the girls, (2) the defendants agreed to kill both girls, (3) defendant intentionally killed Mandy, (4) Brazeal intentionally killed Mary, (5) both Mary and Mandy suffered great physical pain and mental anguish during strangulation, (6) defendant admitted choking both victims, (7) both bodies were stomped, with that of Mandy bearing the imprint of defendant's sneaker, (8) defendant stabbed both girls, Mandy through the right eye and Mary in the vicinity of the right eye, and (9) although alcohol was involved, defendant had sufficient recall and understanding of the events the next day.

The trial court found three statutory aggravating circumstances for both murders: (1) victim under age fifteen (A.R.S. § 13-703(F)(9) (amended 1993)); (2) multiple homicides (A.R.S. § 13-703(F)(8) (1989)); and (3) especially heinous, cruel or depraved (A.R.S. § 13-703(F)(6) (1989)). The court rejected all the claimed mitigating circumstances offered by defendant, including law abiding past, cooperation with police, alcohol use, prior head injuries, and co-defendant Brazeal's twenty-year sentence. The trial court also expressly stated that it was unable to find any other mitigating

circumstances not expressly offered by defense counsel. The court sentenced defendant to death for both murders.

TRIAL ISSUES

I. Change of Venue

Several months before trial, defendant made a motion for change of venue because of pretrial publicity, which the trial court denied, expressly granting leave to renew the motion. Defendant did not renew the motion. Appellate counsel urges us to hold that failure to change venue constituted fundamental error.

[1][2] A trial court's ruling on a motion for change of venue based on pretrial publicity is a discretionary decision and will not be overturned absent an abuse of discretion and prejudice to the defendant. *State v. Salazar*, 173 Ariz. 399, 406, 844 P.2d 566, 573 (1992), *cert. denied*, 509 U.S. 912, 113 S.Ct. 3017, 125 L.Ed.2d 707 (1993). There is a two-step inquiry for pretrial publicity: (1) did the publicity pervade the court proceedings to the extent that prejudice can be presumed?; if not, then (2) did defendant show actual prejudice among members of the jury? The defendant has the burden of showing prejudice. *State v. Bible*, 175 Ariz. 549, 564, 566, 858 P.2d 1152, 1167, 1169 (1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994); Ariz.R.Crim.P. 10.3(b). Because defendant made no effort to show actual prejudice of the jury at the time of trial and because our examination of the voir dire fails to show such prejudice, we consider whether the pretrial motion demonstrated a situation in which prejudice should be presumed.

[3][4] For a court to presume prejudice, defendant must show "pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality." *Bible*, 175 Ariz. at 563, 858 P.2d at 1166. To reach a conclusion on presumed prejudice, we review the entire record, without regard **463 *514 to the answers given in voir dire. *Id.* at 565, 858 P.2d at 1168.

[5] Defendant cites the widespread media coverage of the incident and the trial, the age and popularity of the victims, and the impact the murders had in southern Arizona, including petition drives and fundraisers for the victims' families, as precluding the possibility of obtaining a fair and impartial jury. He submitted to the trial court a copy of a flyer for a fundraiser for the victims' funeral expenses, numerous newspaper articles, and petitions signed by hundreds of area residents requesting that a plea agreement not be given. The newspaper articles generally discussed facts of the incident, arrest, pretrial proceedings, and the plea agreement of co-defendant Brazeal. Defendant fails to show how these articles, the petitions, and the flyer resulted in a trial that was "utterly corrupted." *Id.* (quoting *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975)).

[6] It would be strange to presume prejudice in a case in which the record negates actual prejudice. The relevant inquiry for actual prejudice is the effect of the publicity on the objectivity of the jurors, not the fact of the publicity itself. *Bible*, 175 Ariz. at 566, 858 P.2d at 1169. Defendant did not show that the jurors had "formed preconceived notions concerning the defendant's guilt and that they [could not] lay those notions aside." *State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984).

Although almost all of the prospective jurors had heard about the case, the voir dire by both the judge and defense counsel thoroughly probed the issue of publicity. There was extensive voir dire, both collectively and individually. The judge also asked specifically if any of the panel members had signed the "no plea bargain" petition. Anyone who had was subject to further voir dire. Only those prospective jurors that indicated that they could set aside the publicity and decide the case on the evidence

presented remained on the jury panel. Jurors who could not be fair or impartial were dismissed. *See* State v. Atwood, 171 Ariz. 576, 632, 832 P.2d 593, 649 (1992), *cert. denied,* 506 U.S. 1084, 113 S.Ct. 1058, 122 L.Ed.2d 364 (1993). The empaneled jury was repeatedly warned to avoid media coverage of the trial. There is no basis on which to presume prejudice.

II. Death Qualifying Potential Jurors

During voir dire the panelists were asked whether they had conscientious or religious objections to the death penalty that would prevent them from voting for a first degree murder conviction. Only one panelist raised her hand; she faced further inquiry by the court and stated that it would not influence her decision on whether defendant was guilty. No prospective jurors were excused because of their views on capital punishment.

[7][8] Defendant argues that death-qualified juries are pro-prosecution and therefore biased and that a death-qualified jury is not drawn from a fair cross-section of the community. Because defense counsel made no objection on this basis, the issue would normally be waived. *State v. Herrera,* 176 Ariz. 9, 15, 859 P.2d 119, 125, *cert. denied,* 510 U.S. 966, 114 S.Ct. 446, 126 L.Ed.2d 379 (1993). However, defendant appears to be arguing that death qualification of a jury is fundamental error.

There is no error, fundamental or otherwise. Defendant acknowledges that accepting his argument would require changing both state and federal case law. *See Wainwright v. Witt,* 469 U.S. 412, 424 n. 5, 105 S.Ct. 844, 852 n. 5, 83 L.Ed.2d 841 (1985); *Salazar,* 173 Ariz. at 411, 844 P.2d at 578.

III. Photographs of the Victims

The trial court admitted into evidence five autopsy photographs of the victims. Defendant made no objections at trial. Defendant argues on appeal that admission of these exhibits was fundamental error.

[9][10] Absent fundamental error, the admission of the exhibits cannot be raised on appeal if no objections were made at trial. *State v. Harding,* 137 Ariz. 278, 291, 670 P.2d 383, 396 (1983), *cert. denied,* 465 U.S. 1013, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984); *see State v. Wilcynski,* 111 Ariz. 533, 535, 534 P.2d 738, 740, *cert. denied,* 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975). We will ****464 *515** find fundamental error only "when it goes to the foundation of the case, takes from a defendant a right essential to the defense, or is of such magnitude that it cannot be said it is possible for the defendant to have had a fair trial." *State v. Cornell,* 179 Ariz. 314, 329, 878 P.2d 1352, 1367 (1994).

[11] Exhibit 36 is a photograph of the right side of Mandy's face, showing a laceration below the right eye and what appear to be stomp marks below the cheek. Exhibit 37 shows a tennis shoe stomp mark on Mandy's torso. Exhibit 38 shows a stomp mark on her left shoulder, along with a portion of her chin and cheek. Exhibit 39 shows bruise marks below the neck and around the chin of Mandy. Exhibit 40 includes the lower face, neck, and shoulder area of Mary and shows bruises and abrasions around the neck and chin area.

[12][13] The admission of photographs requires a three-part inquiry: (1) relevance; (2) tendency to incite passion or inflame the jury; and (3) probative value versus potential to cause unfair prejudice. *State v. Amaya-Ruiz,* 166 Ariz. 152, 170, 800 P.2d 1260, 1278 (1990), *cert. denied,* 500 U.S. 929, 111 S.Ct. 2044, 114 L.Ed.2d 129 (1991); *see* Ariz.R.Evid. 401-03. The photographs are relevant if they aid the jury in understanding an issue.

Ariz.R.Evid. 401; *State v. Moorman*, 154 Ariz. 578, 586, 744 P.2d 679, 687 (1987). These photographs show the manner of killing and the identity of the killer, particularly those photos showing stomp marks that match the shoes worn by defendant. They were introduced during the testimony of the forensic pathologist who conducted the autopsies. Although these exhibits show discoloration of the skin, abrasions, stomp and bruise marks, and cuts to the victims' right eyes, they are not gruesome enough to be inflammatory. "Such photographs cannot be deemed sufficiently gruesome to inflame the jurors because 'the crime committed was so atrocious that photographs could add little to the repugnance felt by anyone who heard the testimony.' " *State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (citation omitted), *cert. denied*, 510 U.S. 894, 114 S.Ct. 258, 126 L.Ed.2d 210 (1993). Even if inflammatory, the probative value of the photos outweighs any prejudicial effect. *See* Ariz.R.Evid. 403; *State v. Chapple*, 135 Ariz. 281, 288-90, 660 P.2d 1208, 1215-17 (1983); *State v. Steele*, 120 Ariz. 462, 464, 586 P.2d 1274, 1276 (1978).

The trial court did not abuse its discretion in admitting the photographs, *Lopez*, 174 Ariz. at 139, 847 P.2d at 1086, and certainly did not commit fundamental error.

IV. Verdict

[14] Defendant contends that the jury was instructed on both premeditated murder and felony murder and, therefore, the verdicts of the murder counts may not have been unanimous. Defendant's argument is fundamentally flawed. Contrary to his assertion, the jury was not instructed on felony murder. The jury unanimously found defendant guilty of two premeditated murders.

But even if defendant's factual predicate were correct, no error would be presented. *Schad v. Arizona*, 501 U.S. 624, 645, 111 S.Ct. 2491, 2504, 115 L.Ed.2d 555 (1991); *State v. Lopez*, 163 Ariz. 108, 111, 786 P.2d 959, 962 (1990); *State v. Libberton*, 141 Ariz. 132, 136, 685 P.2d 1284, 1288 (1984). "First degree murder is only one crime regardless of whether it occurs as premeditated or felony murder and the defendant is not entitled to a verdict on the precise manner in which the act was committed." *State v. Gillies*, 135 Ariz. 500, 510, 662 P.2d 1007, 1017 (1983).

SENTENCING ISSUES

I. Constitutionality of Arizona's Death Penalty Statute

Defendant makes several arguments that we have recently rejected and now deal with summarily.

[15] A. There is no constitutional right to have a jury determine aggravating or mitigating circumstances. *Walton v. Arizona*, 497 U.S. 639, 647-49, 110 S.Ct. 3047, 3054-55, 111 L.Ed.2d 511 (1990); *State v. Apelt*, 176 Ariz. 369, 373, 861 P.2d 654, 658 (1993), *cert. denied*, 513 U.S. 834, 115 S.Ct. 113, 130 L.Ed.2d 59 (1994).

****465 *516** [16] B. Requiring defendants to prove any mitigating circumstances by a preponderance of the evidence is constitutional. *Walton*, 497 U.S. at 649-51, 110 S.Ct. at 3055-56.

[17] C. Although the state must prove aggravating circumstances beyond a reasonable doubt, *State v. Herrera*, 174 Ariz. 387, 397, 850 P.2d 100, 110 (1993), the court is not required to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. *State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989), *aff'd*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *cf. Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155 (1988) ("[W]e have never held that a specific method

for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.").

[18] D. Defendant contends that there is a lack of objective standards for determining whether aggravating circumstances outweigh mitigating circumstances. This argument has been rejected. *Salazar*, 173 Ariz. at 411, 844 P.2d at 578; *State v. Correll*, 148 Ariz. 468, 484, 715 P.2d 721, 737 (1986).

[19][20] E. Defendant argues that poor, male defendants are discriminated against in the application of the death penalty. A defendant alleging discrimination must prove "the decisionmaker[ ] in *his* case acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767, 95 L.Ed.2d 262 (1987). Defendant offers no evidence that his economic status or gender contributed to his sentence or biased the sentencing process. *See Jeffers v. Lewis*, 38 F.3d 411, 419 (9th Cir.1994), *cert. denied*, 514 U.S. 1071, 115 S.Ct. 1709, 131 L.Ed.2d 570 (1995); *see also State v. White*, 168 Ariz. 500, 513, 815 P.2d 869, 882 (1991) (death penalty statute is gender neutral), *cert. denied*, 502 U.S. 1105, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992). Absent evidence of purposeful discrimination, this argument has been rejected. *Apelt*, 176 Ariz. at 373, 861 P.2d at 658.

[21][22] F. The death penalty is not cruel and unusual if it is not imposed in an arbitrary and capricious manner. *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935-36, 49 L.Ed.2d 859 (1976); *State v. Blazak*, 131 Ariz. 598, 601, 643 P.2d 694, 697, *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). Although defendant argues that the death penalty is imposed arbitrarily and irrationally in Arizona, that argument has been rejected by this court. *Salazar*, 173 Ariz. at 411, 844 P.2d at 578. The death penalty statute narrowly defines death-eligible persons as those convicted of first degree murder, where the state has proven one or more statutory aggravating factors beyond a reasonable doubt. *State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991).

[23] G. This court does not conduct proportionality reviews. *Salazar*, 173 Ariz. at 416, 844 P.2d at 583.

[24] H. The especially heinous, cruel, or depraved aggravating circumstance (A.R.S. § 13-703(F)(6)) is constitutional. *Walton*, 497 U.S. at 655, 110 S.Ct. at 3058.

II. Independent Review

[25] When a death sentence is imposed in Arizona, this court independently reviews the entire record for error, determines whether the aggravating circumstances have been proved beyond a reasonable doubt, considers any mitigating circumstances, and then weighs the aggravating and mitigating circumstances in deciding whether there are mitigating circumstances sufficiently substantial to call for leniency. *State v. Brewer*, 170 Ariz. 486, 500, 826 P.2d 783, 797, *cert. denied*, 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147 (1992).

III. Aggravating Factors

[26] To make a defendant death eligible, the state must prove beyond a reasonable doubt at least one statutory aggravating circumstance. A.R.S. § 13-703(E) (1989) (amended 1993); *Brewer*, 170 Ariz. at 500, 826 P.2d at 797. In this case, the trial court found that the state proved three aggravating circumstances:

****466 *517** A. Defendant was an adult at the time the crimes were committed and the victims were under the age of fifteen. A.R.S. § 13-703(F)(9) (1989) (amended 1993).

B. Defendant has been convicted of one or more other homicides which were committed during the commission of the offense. A.R.S. § 13-703(F)(8) (1989).

C. Defendant committed the offense in an especially heinous, cruel, or depraved manner.

A.R.S. § 13-703(F)(6) (1989).

The first two aggravators are not challenged on appeal. Our review of the record confirms that they were proved beyond a reasonable doubt. *See State v. Kiles*, 175 Ariz. 358, 369 n. 5, 857 P.2d 1212, 1223 n. 5 (1993), *cert. denied*, 510 U.S. 1058, 114 S.Ct. 724, 126 L.Ed.2d 688 (1994); *see Greenway*, 170 Ariz. at 167-68, 823 P.2d at 34-35 (explaining that the (F)(8) aggravating factor applies to multiple murders); *State v. Gallegos*, 178 Ariz. 1, 15, 870 P.2d 1097, 1111, *cert. denied*, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994) (finding (F)(9) aggravating circumstance). We turn, then, to the third aggravating circumstance, which is challenged on appeal.

A. Especially Heinous, Cruel, or Depraved

1. Especially Cruel

[27][28][29][30] The heinous, cruel, or depraved circumstance is phrased in the disjunctive, so if any one of the three factors is found, the circumstance is satisfied. *Brewer*, 170 Ariz. at 501, 826 P.2d at 798. Cruelty focuses on the victim and is found where there has been an infliction of pain and suffering in a wanton, insensitive, or vindictive manner. *Correll*, 148 Ariz. at 480, 715 P.2d at 733. A crime is especially cruel when the defendant "inflicts mental anguish or physical abuse before the victim's death." *Walton*, 159 Ariz. at 586, 769 P.2d at 1032. Mental anguish results "especially if a victim experiences significant uncertainty as to the ultimate fate." *Brewer*, 170 Ariz. at 501, 826 P.2d at 798.

[31] The trial court found cruelty, noting:

> The victims were alive for some minutes from the start of the fatal assaults. They experienced great physical pain and mental anguish as they fought to free themselves. There [was] frequent repositioning of the hands of the killers on the throats of the victims, and the reasserting of the pressure until they were unconscious. Medical evidence cannot establish the moment of cessation of consciousness, when, supposedly, physical pain ceases, but did show that death was not instantaneous.
>
> It was a cruel death for both victims, considering the extent of physical injuries to the bodies, much of which must have been experienced while conscious.
>
> The defendant entered into an agreement with Brazeal to kill both girls.... The defendant, just as surely as he did with Mandy ..., intended the killing of Mary.... The elements of these aggravating circumstances apply to the defendant as to both murders.

The forensic pathologist who conducted the autopsies testified that the cause of death for both girls was asphyxia due to manual strangulation. The pathologist testified that a victim of strangulation is generally conscious for a few minutes and that death usually takes twelve to fifteen minutes. There was evidence of repetitive gripping of Mary's neck. The abrasions on Mandy's neck were consistent with fingernail scratches. Both suffered injuries, including bruises, abrasions, and stab wounds near or in

the right eye that occurred while still alive or shortly after death. Both victims also suffered hemorrhaging in the vaginal area, consistent with sexual activity before death. The stomp marks on Mandy's body, face, and neck were caused while the victim was alive or shortly after death. Mandy also suffered a complete fracture of the cranium and laceration of the skull. Both victims had injuries indicative of a struggle. The evidence showed that at least some of the injuries occurred while the victims were conscious, sufficient for a finding of cruelty under A.R.S. § 13-703(F)(6). *See Kiles*, 175 Ariz. at 371, 857 P.2d at 1225. "It is clear that [defendant] knew or should have known that his actions would cause suffering." **467*518*State v. Runningeagle*, 176 Ariz. 59, 65, 859 P.2d 169, 175, *cert. denied*, 510 U.S. 1015, 114 S.Ct. 609, 126 L.Ed.2d 574 (1993).

2. Especially Heinous or Depraved

[32][33][34][35] Heinousness and depravity "focus on the defendant's mental state and attitude as reflected by his words or actions." *Brewer*, 170 Ariz. at 502, 826 P.2d at 799. We look for the following circumstances in determining whether a crime is especially heinous or depraved: (1) apparent relishing of the murder; (2) infliction of gratuitous violence on the victim beyond the murderous act itself; (3) mutilation of the victim's body; (4) senselessness of the crime; and (5) helplessness of the victim. *State v. Gretzler*, 135 Ariz. 42, 51-52, 659 P.2d 1, 10-11, *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983); *see also State v. Barreras*, 181 Ariz. 516, 522, 892 P.2d 852, 858 (1995). The last two factors are usually less probative of defendant's state of mind than the first three factors. *Barreras*, 181 Ariz. at 522, 892 P.2d at 858; *State v. King*, 180 Ariz. 268, 287, 883 P.2d 1024, 1043 (1994) ("[O]nly under limited circumstances will the senselessness of a murder or helplessness of the victim ... lead to [finding heinousness or depravity]."). Witness elimination is also given some weight in finding the circumstance. *State v. Ross*, 180 Ariz. 598, 606, 886 P.2d 1354, 1362 (1994). However,

> the witness elimination factor only applies if: 1) the victim witnessed another crime and was killed to prevent testimony about that crime, 2) a statement by the defendant or other evidence of his state of mind shows witness elimination was a motive, or 3) some extraordinary circumstances show the murder was motivated by a desire to eliminate witnesses.

Barreras, 181 Ariz. at 523, 892 P.2d at 859.

[36] The trial court found that the stabbings to the eyes of the victims and stompings were acts of gratuitous violence and mutilations, that the killings were senseless, that the victims were helpless, and that defendant was motivated by a desire to eliminate witnesses-the "young lives were snuffed out, as insects, merely to eliminate them as witnesses." In particular, the trial court noted in its special verdict that both victims were stabbed in the right eye-"gratuitous violence which, surely, could not have been calculated to lead to death." The stab wound to Mandy's eye penetrated to the bone, causing the eyeball to completely collapse. The eyelid was not punctured, leading the forensic examiner to conclude that Mandy was most likely unconscious during the stabbing. The court also found the stomping to be "unnecessary and gratuitous violence, designed to still the unconscious bodies and assuage the killers' discomfort from the reflexes of death." The court concluded, "The manner of killing and disposition of the bodies demonstrate an obdurate disregard for human life and human remains."

"The killing of a helpless child is senseless and demonstrates a disregard for human life satisfying two of the five *Gretzler* factors." *State v. Stanley*, 167 Ariz. 519, 528, 809 P.2d 944, 953, *cert. denied*, 502 U.S. 1014, 112 S.Ct. 660, 116 L.Ed.2d 751 (1991); *see also Kiles*, 175 Ariz. at 373, 857 P.2d at 1227 ("The killing of two helpless children is senseless and demonstrates a total

disregard for human life ... and is also evidence of a 'shockingly evil state of mind.' ") (citations omitted). The two teenage girls were driven to a remote rural area in the middle of the night, sexually assaulted, stabbed, stomped, stripped, strangled, and thrown down a mine shaft. They were defenseless against the attacks, *see Kiles*, 175 Ariz. at 373, 857 P.2d at 1227, and suffered from gratuitous violence and needless mutilation.

In addition, defendant's statement to police revealed a motivation to eliminate the girls as witnesses. Defendant stated that his co-defendant proposed that the girls be killed because co-defendant had sexually assaulted them. The following dialogue occurred after defendant described the agreement to kill the girls:

Defendant: He [Brazeal] said I'm gonna have to kill them. I said, "Why?" He said, "Well, I fucked this one and I fucked that one and they're gonna rat and they're gonna get you too."

....

****468 *519** Detective: What happened then, after that, after Randy told you that he wanted to kill them?

Defendant: He grabbed one and I had to grab the other one ... and I choked 'em.

Detective: Okay, you choked both of them?

Defendant: No. I didn't choke both of them. I got one and he got the other one ... And they wouldn't quit. It was terrible.

Detective: Okay, is that when you used the knife?

Defendant: Yup.

This dialogue shows witness elimination as a motivation, satisfying one of the three witness elimination factors. We have reviewed the entire record and affirm the findings of the trial court regarding the especially heinous and depraved nature of these crimes.

IV. The Presentence Report

[37] Before referring to the specifics of the statutory and nonstatutory mitigating circumstances, we wish to comment on the presentence report in this case. Generally, the presentence report, prepared pursuant to Rule 26.4, Ariz.R.Crim.P., may be considered on matters of mitigation if it contains information favorable to the defendant. *State v. Scott*, 177 Ariz. 131, 145, 865 P.2d 792, 806 (1993), *cert. denied*, 513 U.S. 842, 115 S.Ct. 129, 130 L.Ed.2d 73 (1994); *State v. Rumsey*, 136 Ariz. 166, 171, 665 P.2d 48, 53 (1983), *aff'd*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). However, in this case, by stipulation of the parties in the trial court, the presentence report was sealed and defense counsel asked the trial court not to read it. In urging this procedure in the trial court, defendant's trial counsel argued that any mitigating evidence contained in the presentence report "can be adequately covered" by other exhibits and defense witnesses. Thus, pursuant to the stipulation and at the express request of defendant, the trial judge did not read the presentence report.

[38][39][40] At oral argument, however, defendant's appellate counsel urged us to review the presentence report. We do not approve of the practice of withholding information from the trial court and then presenting it to the appellate court. Counsel are encouraged to present all

arguably mitigating evidence to the trial court and not to hold some back for appeal. If counsel is concerned that there is detrimental information in the presentence report that would only be appropriate to consider on the noncapital counts, one possible solution would be to proceed to sentencing on the capital counts first. Even without such precautions, however, trial judges know that, on the capital counts, they are limited to statutory aggravating factors properly admitted and proved beyond a reasonable doubt. A.R.S. § 13-703(C) (Supp.1994); *see Rumsey*, 136 Ariz. at 172, 665 P.2d at 54. They may not consider other evidence as aggravating. *See State v. Beaty*, 158 Ariz. 232, 246, 762 P.2d 519, 533 (1988) (judge presumed to apply proper standard), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 708 (1989).

Consistent with our obligation in capital cases to independently weigh all potentially mitigating evidence, and pursuant to the request of defendant, we have examined and considered the presentence report that was withheld from the trial judge. Nothing in it persuades us that the trial court erred in imposing the death sentence. We turn, then, to a consideration of the mitigating factors.

V. Statutory Mitigating Circumstances

[41][42][43] The sentencing judge must consider "any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether the death penalty should be imposed." *Kiles*, 175 Ariz. at 373, 857 P.2d at 1227 (internal quotations omitted). A defendant must prove mitigating factors by a preponderance of the evidence. *Greenway*, 170 Ariz. at 168, 823 P.2d at 35. The sentencing court must, of course, consider all evidence offered in mitigation, but is not required to accept such evidence. *State v. Ramirez*, 178 Ariz. 116, 131, 871 P.2d 237, 252, *cert. denied*, 513 U.S. 968, 115 S.Ct. 435, 130 L.Ed.2d 347 (1994).

Defendant raised only one statutory mitigating circumstance at sentencing:

****469 *520** A. Capacity to appreciate wrongfulness of conduct. A.R.S. § 13-703(G)(1) (1989).

On appeal, he raises additional statutory mitigating circumstances:

B. Relatively minor participation. A.R.S. § 13-703(G)(3) (1989).

C. No reasonable foreseeability that conduct would create grave risk of death to another. A.R.S. § 13-703(G)(4) (1989).

We address each in turn.

A. Capacity to Appreciate Wrongfulness of Conduct or to Conform Conduct to Requirements of the Law

[44] Defendant argues that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired for three reasons: alcohol consumption, earlier head injuries, and mental disorders. This factor is disjunctive, "so that proof of incapacity as to either ability to appreciate or conform establishes the mitigating circumstance." *State v. Wood*, 180 Ariz. 53, 70, 881 P.2d 1158, 1175 (1994).

1. Alcohol

[45] Defendant argues that heavy consumption of alcohol seriously undermined "his ability to appreciate the

stupidity and illegality of his conduct." Opening Brief at 37. Voluntary intoxication may be mitigating if the defendant proves by a preponderance of the evidence that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-703(G)(1); *see also Atwood*, 171 Ariz. at 650-51, 832 P.2d at 667-68.

[46] There was evidence that defendant and co-defendant consumed alcohol on the day of the murders. James Robinson, who was present at the campsite the night of the crimes, testified that defendant consumed beer and whiskey that night, but that he was not so drunk that he could not maneuver himself. Roy Waters, age fifteen, testified that he saw defendant drinking beer in the afternoon and that he appeared drunk. Cory Rutherford, age thirteen, testified that he observed defendant drinking out of a bottle. Various witnesses testified that co-defendant Brazeal was drinking and appeared intoxicated, more so than defendant. At approximately 12:30 a.m. on the morning of the murders, defendant, accompanied by Brazeal, purchased a six-pack of Budweiser and a pint of Jim Beam. The morning after the campout, the owner of the site where the girls camped found an empty quart bottle of whiskey, an empty half pint bottle of whiskey, and an empty package of Budweiser, but these items were never tied to defendant. Based entirely on defendant's self-reported consumption and self-reported blackout on the night of the crimes, a clinical psychologist opined that defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired at the time of the incident.

However, there is much evidence showing defendant was not significantly impaired by alcohol at the time of the murders and did not suffer a blackout at the time of the crimes. Defendant disposed of the bodies and burned the clothing of the victims, thus showing that he knew the conduct was wrongful. *See Gallegos*, 178 Ariz. at 17, 870 P.2d at 1113; *Atwood*, 171 Ariz. at 651, 832 P.2d at 668. He was able to accurately guide the officers back to the crime scene. Defendant also had substantial recall of the events, [FN2] *see State v. Herrera*, 176 Ariz. 21, 33, 859 P.2d 131, 143, *cert. denied*, 510 U.S. 951, 114 S.Ct. 398, 126 L.Ed.2d 346 (1993), and attempted to cover up the crimes, *see Salazar*, 173 Ariz. at 413, 844 P.2d at 580, causing the trial court to find that defendant's capacity to appreciate wrongfulness was not substantially impaired. **470*521 *State v. Cook*, 170 Ariz. 40, 64, 821 P.2d 731, 755 (1991), *cert. denied*, 506 U.S. 846, 113 S.Ct. 137, 121 L.Ed.2d 90 (1992). "[S]tacked against the testimony offered in mitigation by defendant is the evidence that defendant *did know* that his ... conduct was wrongful." *Atwood*, 171 Ariz. at 651, 832 P.2d at 668.

FN2. For example, during the initial interview, defendant corrected the chronology of events:

> Detective: So, okay, you guys killed the girls and burned their clothes, threw them down the mine shaft.
>
> Defendant: Killed them. Threw them down the mine shaft. Burned their clothes.

We agree with the trial court that defendant failed to show that he was significantly impaired during the time of the crimes so as to meet the statutory mitigation requirements.

2. Head Injuries

[47][48] Head injuries that lead to behavioral disorders may be considered a mitigating circumstance. *See State v. Rockwell*, 161 Ariz. 5, 15, 775 P.2d 1069, 1079 (1989). Evidence indicates that defendant suffered three head injuries since 1982. A neurologist who reviewed the

medical records testified that defendant had suffered a compound depressed skull fracture, underwent surgery, and suffered permanent damage in 1982 from being hit with a heavy beer mug. In 1986, he struck his head on the pavement after jumping onto the hood of his wife's moving vehicle. About a year before the murders, he suffered a severe head injury when another wife hit him with a cast iron skillet. Other head injuries alleged by defendant were uncorroborated.

According to the neurologist, such injuries "could impair his ability to understand his environment, to interpret it correctly and to respond correctly to it," potentially manifesting in decreased control of impulsive behavior and decreased cognitive ability. Alcohol use increases any lack of control. The neurologist concluded that defendant's brain "integrity" was moderately to severely impaired due to previous brain or head injuries, resulting in impulsive behavior. A clinical psychologist said that defendant suffers from an inability to control impulse and that this problem is exacerbated by alcohol.

The trial court found: "Having suffered head injuries and having difficulty with impulse control sheds little light on defendant's conduct in this case. The evidence does not show defendant acted impulsively, only criminally, with evil motive." While we give more mitigating weight to this element than did the trial court, it is substantially offset by the fact that defendant's test results showed that he has above average intelligence (an I.Q. of 128), and the facts show that he did not exhibit impulsive behavior in the commission of the crimes. *See Brewer*, 170 Ariz. at 505-06, 826 P.2d at 802-03. Defendant appreciated the wrongfulness of his conduct, *id.* at 506, 826 P.2d at 803, as evidenced the next day by his comment to the interrogating officer, "I ... choked 'em.... There was one foot moving though I knew they was brain dead but I was getting scared.... And they just wouldn't quit. It was terrible." His prior head injuries do not show that defendant was unable to conform or appreciate the wrongfulness of his conduct.

3. Mental Disorders

[49] While a patient at a Texas hospital in 1971, defendant was diagnosed with a passive-aggressive personality. In 1978, he was re-admitted to the same hospital for psychotic depression. Defendant reported feeling suicidal, along with a fear that he might harm someone else. The final diagnosis of the second hospitalization was that defendant suffered from a personality disorder with differential to include passive-aggressive personality, antisocial personality, and borderline personality.

In a proceeding to determine defendant's competency to stand trial, a clinical psychologist found that defendant "does not appear to be suffering from any psychotic disorder but he has a history of depression and other serious psychological problems," including a pattern of impulsivity. Defendant's Trial Exhibit 24. Defendant also claimed to have attempted suicide twice. The psychologist testified that defendant suffered from a borderline personality disorder and depression. He concluded that defendant is a "seriously dysfunctional individual."

[50] Character or personality disorders alone are generally not sufficient to find that defendant was significantly impaired. *Apelt*, 176 Ariz. at 377, 861 P.2d at 662. A mental disease or psychological defect usually must **471 *522 exist before significant impairment is found. *Id.*

Despite this evidence, "[t]his case does not involve the same level of mental disease or psychological defects considered in other cases in which the § 13-703(G)(1) mitigating circumstance was found to exist." *Brewer*, 170 Ariz. at 505, 826 P.2d at 802. Defendant failed to show that his ability to control his actions was substantially impaired; his actions showed that he appreciated the wrongfulness of his conduct. Evidence showed that

defendant was familiar with the mine shaft and discussed killing the girls with Brazeal. Defendant sexually assaulted Mandy, choked her and stomped on her body, and agreed that Mary should also be killed. Defendant then attempted to cover up the crimes by dumping the bodies in the mine shaft and burning the girls' clothes. "The record reveals that defendant made a conscious and knowing decision to murder the victim[s] and was fully aware of the wrongfulness of his actions." *Id.* at 506, 826 P.2d at 803. This evidence fails to meet the statutory burden by a preponderance of the evidence.

B. Relatively Minor Participation

[51] Defendant raises this argument for the first time on appeal. According to A.R.S. 13-703(G)(3), mitigation exists where the defendant shows that he was "legally accountable for the conduct of another ..., but his participation was relatively minor, although not so minor as to constitute a defense to prosecution." The argument consists of one sentence in the brief: "Given the overwhelming possibility that the jury's guilty verdict was based upon the felony murder theory, this factor should have been considered in mitigation." Opening Brief at 37. However, as we have previously noted, the trial court did not instruct the jury on felony murder. The jury found defendant guilty of two counts of first degree premeditated murder. Defendant brutally killed Mandy and intended that Mary be killed. His actions were substantial; we therefore reject this argument. *See Herrera*, 176 Ariz. at 20, 859 P.2d at 130.

C. No Reasonable Foreseeability that Conduct Would Create Grave Risk of Death to Another

[52] In an attempt to come within the ambit of A.R.S. § 13-703(G)(4), defendant argues for the first time on appeal that "[a]t the time this episode first began, it does not appear that any plan existed to cause harm or fatal injury to the victims." Opening Brief at 38. He cites no facts or evidence to support this argument. After a review of the entire record, we also find no facts or evidence to support this statutory mitigating circumstance. *See State v. Greenawalt*, 128 Ariz. 150, 173, 624 P.2d 828, 851, *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981).

VI. Nonstatutory Mitigating Circumstances

Nonstatutory mitigating factors raised at trial and discussed in the special verdict were:

1. historic substance abuse;

2. lack of prior felony record;

3. cooperation with police;

4. co-defendant Brazeal's twenty-year sentence;

5. leniency in sentencing;

6. ability to be rehabilitated;

7. difficulty in early years and prior home life;

8. mental condition and behavior disorders;

9. good character of defendant;

10. good behavior while incarcerated; and

11. lack of future dangerousness if confined to prison.

The trial court rejected all of these. The trial court also stated, "[T]his court is unable to glean any mitigating circumstances not suggested by [defendant's] counsel." In conclusion, the trial court found that even if any or all of the mitigating circumstances existed, "balanced against the aggravating circumstances found to exist, they would not be sufficiently substantial to call for leniency."

Additional nonstatutory mitigating circumstances raised on appeal are:

12. felony murder theory;

**472 *523 13. remorse; and

14. lack of evidence showing that defendant actually killed or intended to kill Mary.

As part of our independent review, we will address each alleged mitigating circumstance.

1. Historic Substance Abuse

[53][54] If impairment does not rise to the level of a statutory mitigating circumstance, the trial court should still consider whether such impairment constitutes nonstatutory mitigation, when viewed in light of defendant's alleged history of alcohol and drug abuse. *Gallegos*, 178 Ariz. at 17, 870 P.2d at 1113. Various relatives and acquaintances testified that defendant was an alcoholic and that he considered himself to be one. A clinical psychologist agreed with that assessment. Other acquaintances testified that they had seen defendant drunk before. Defendant claims to have consumed at least a pint of whiskey every day and to have used various illicit drugs in the past. In 1977, he was arrested twice for drunkenness; the cases were dismissed. Defendant was convicted of driving while intoxicated in 1986 and 1989. He was arrested in 1991 for driving under the influence of alcohol and the case was dismissed.

As we have recommended in past cases, the trial judge here was very thorough in considering the statutory and nonstatutory mitigating circumstances. *Gallegos*, 178 Ariz. at 22-23, 870 P.2d at 1118-19. With respect to the item of historic substance abuse, the trial court stated in its special verdict, "Alcohol abuse over an extended period of defendant's life, and his drinking at the time of the killings are not mitigating circumstances under the facts of this case." We have reviewed the entire record and agree with the trial court that defendant has failed to prove his alcohol or drug use is a nonstatutory mitigating factor.

2. Lack of Prior Felony Record

[55][56] Lack of prior felony convictions may constitute a nonstatutory mitigating circumstance. *Scott*, 177 Ariz. at 144, 865 P.2d at 805. However, "arrests or misdemeanor convictions may be considered when lack of felony convictions 'is advanced as a mitigating factor.' " *Id.* at 145, 865 P.2d at 806 (quoting *State v. Rossi*, 171 Ariz. 276, 279, 830 P.2d 797, 800, *cert. denied*, 506 U.S. 1003, 113 S.Ct. 610, 121 L.Ed.2d 544 (1992)).

[57] Although defendant has no prior felony conviction, he also does not have a law abiding past. He has a history of misdemeanor arrests and offenses including a conviction for disorderly conduct in 1973, two arrests for public drunkenness in 1977, and arrests for assaults on

two former wives, one in 1978 and the other in 1986. Unlike the trial court, in our independent reweighing, we conclude that this thirty-eight year old defendant's lack of a felony record is a nonstatutory mitigating circumstance, but the weight to be given it is substantially reduced by his other past problems with the law. *See* Scott, 177 Ariz. at 144-45, 865 P.2d at 805-06; *Cook*, 170 Ariz. at 63 n. 12, 821 P.2d at 754 n. 12.

3. Cooperation with Police

[58] Defendant's cooperation with police followed an initial denial of any knowledge of the girls. He only confessed after hearing that co-defendant had been arrested. This does not constitute a mitigating circumstance. *State v. Spencer*, 176 Ariz. 36, 45, 859 P.2d 146, 155 (1993), *cert. denied*, 510 U.S. 1050, 114 S.Ct. 705, 126 L.Ed.2d 671 (1994); *Atwood*, 171 Ariz. at 653, 832 P.2d at 670.

4. Disparity of Co-defendant's Sentence

[59][60][61] Although sentences of co-defendants may be considered in mitigation, *Cook*, 170 Ariz. at 65, 821 P.2d at 756; *State v. Watson*, 129 Ariz. 60, 64, 628 P.2d 943, 947 (1981), where the difference in sentences is a result of appropriate plea bargaining, it may not be considered in mitigation. *State v. Gillies*, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985). "[I]t is not mere disparity between the two sentences that is significant, but, rather, unexplained disparity." *State v. Schurz*, 176 Ariz. 46, 57, 859 P.2d 156, 167, *cert. denied*, 510 U.S. 1026, 114 S.Ct. 640, 126 L.Ed.2d 598 (1993). Where the first degree murder is found especially cruel, heinous, or depraved, "even unexplained disparity has little significance." ****473 *524** *Id.* The sentence negotiated by co-defendant was the result of a disparity of evidence at the time of co-defendant's trial, causing the state to enter into a plea agreement. In addition, it must be remembered that co-defendant was twenty years old. *But see* Walton, 159 Ariz. at 589, 769 P.2d at 1035 (affirming death sentence of twenty year old defendant). Defendant was thirty-eight.

5. Leniency in Sentencing

[62] The trial court correctly held that "the claimed right to leniency in the context of the alleged harshness and disproportionality of the death penalty is not a mitigating circumstance." Special Verdict at 8.

6. Prospect for Rehabilitation

[63] Although a criminal justice consultant testified that defendant has the potential for rehabilitation, the trial court found such prospects slim. We agree with the trial court. After a long history of alcohol abuse and tumultuous behavior, defendant showed no evidence of ability to rehabilitate. *See* Atwood, 171 Ariz. at 654, 832 P.2d at 671 ("[D]efendant's interest in rehabilitation was insufficient to call for leniency when compared to the harm caused by his conduct and his continued threat to the public peace.").

7. Family History

[64][65][66] According to a clinical psychologist, defendant had a chaotic and abusive childhood, never knowing his father and having been raised by various family members. A difficult family background alone is not a mitigating circumstance. *State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047, 110 S.Ct. 1513, 108 L.Ed.2d 649 (1990). This can be a mitigating circumstance only "if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's

control." *Id.* Adult offenders have a more difficult burden because of the "greater degree of personal responsibility for their actions." *Gretzler*, 135 Ariz. at 58, 659 P.2d at 17.

Family history in this case does not warrant mitigation. Defendant was thirty-eight years old at the time of the murders. Although he may have had a difficult childhood and family life, he failed to show how this influenced his behavior on the night of the crimes. *See White*, 168 Ariz. at 513, 815 P.2d at 882.

8. Mental Condition and Behavior Disorders

[67] Although this element was rejected by the trial court, we conclude, pursuant to our independent review, that defendant's documented mental disorders are entitled to some weight as nonstatutory mitigation. *See* discussion *supra* part V(A)(3) (statutory mitigation).

9. Good Character of Defendant

[68] To impeach this alleged mitigating circumstance, the state called two former wives of defendant. Both testified that defendant had physically abused them, threatened them with death, and threatened that their bodies would be thrown down a mine shaft. Defendant failed to prove good character by a preponderance of the evidence.

10. Good Behavior while Incarcerated

[69] Although long-term good behavior during post-sentence incarceration has been recognized as a possible mitigating factor, *Watson*, 129 Ariz. at 63-64, 628 P.2d at 946-47, we, like the trial court, reject it here for pretrial and presentence incarceration. *See State v. Lopez*, 175 Ariz. 407, 416, 857 P.2d 1261, 1270 (1993) ("[D]efendant would be expected to behave himself in county jail while awaiting [sentencing]."), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994).

11. Lack of Future Dangerousness if Confined to Prison

[70] Although defendant presented some evidence that he would no longer be dangerous if confined to prison for life, we find that he fails to prove this by a preponderance of the evidence, particularly in view of his history of violence and threats of violence and his actions in this case.

12. Felony Murder Instruction

Defendant claims that a felony murder instruction was given and that this should be considered in mitigation. *See supra* part V(B) (statutory mitigation). However, there was no felony murder instruction.

****474 *525 13. Remorse**

[71] Although remorse may be considered in mitigation, *Brewer*, 170 Ariz. at 507, 826 P.2d at 804; *State v. Tittle*, 147 Ariz. 339, 344, 710 P.2d 449, 454 (1985), defendant failed to prove by a preponderance of the evidence that he was remorseful. A criminal justice consultant testified that defendant had feelings of remorse. In addition, during defendant's statement to the court prior to sentencing, defendant stated,

I think it's very clever the way I have been made a scapegoat in this case. I do not deny culpability, but there was no premeditation on my part. What I am

guilty of is being an irresponsible person for most of my life, running from responsibility, living in a fantasy world and it was my irresponsibility on the night that this incident occurred that involved me in the incident. There is no words that can express the grief and the sorrow and the torment I have experienced over this, but I am just going to leave everything in the hands of God because that's where it is anyway.

Defendant's statement and the testimony of the consultant were inadequate to prove the mitigating circumstance by a preponderance of the evidence.

14. Lack of Evidence Showing that Defendant Actually Killed or Intended to Kill Mary

[72] Although defendant claims that there was insufficient evidence to show that he killed or intended to kill Mary, the evidence, including his own statement to police, proves that he and Brazeal agreed that the girls must be killed. In his statement to the detective, defendant acknowledged the agreement to kill the girls and admitted stabbing both girls. Clearly, he was an active participant in the killing of both girls. The jury, in its guilty verdict, and the trial court, in its special verdict, so found. After a review of the entire record, we agree that defendant personally killed Mandy and, at the least, intended that Mary be killed.

CONCLUSION

There are three statutory aggravating circumstances. There are no statutory mitigating circumstances. We have considered the nonstatutory mitigating factors of lack of prior felony record and his mental condition and behavior disorders. We find the mitigation, at best, minimal. Certainly, there is no mitigating evidence sufficiently substantial to call for leniency. We have searched the record for fundamental error and found none. The convictions and sentences are affirmed.

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Stanley G. Feldman, Chief Justice

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Robert J. Corcoran, Justice

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Thomas A. Zlaket, Justice

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Frederick J. Martone, Justice

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State v. Stokley
182 Ariz. 505, 898 P.2d 454

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