No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Rudolph Wood III, Petitioner,

vs.

Charles L. Ryan, et al, Respondents.

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

*****CAPITAL CASE*****
EXECUTION SCHEDULED FOR JULY 23, 2014 AT 10:00 AM (MST) / 1:00 P.M. (EDT)

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Wood v. Ryan
APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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JOSEPH RUDOLPH WOOD, III, Petitioner - Appellant, v. CHARLES L. RYAN; et al., Respondents - Appellees.	No. 14-16380 D.C. No. 4:98-cv-00053-JGZ District of Arizona, Tucson ORDER

Before: THOMAS, GOULD, and BYBEE, Circuit Judges.

The petiton for panel rehearing is denied.

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JUL 22 2014

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, III, Petitioner - Appellant, v. CHARLES L. RYAN; et al., Respondents - Appellees.	No. 14-16380 D.C. No. 4:98-cv-00053-JGZ District of Arizona, Tucson ORDER

Before: THOMAS, Circuit Judge and Capital Case 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 July 22, 2014 opinion and order denying a stay of execution should be reheard en banc. No judge requested a vote on whether to hear the panel's opinion and order en banc. Therefore, the petition for rehearing en banc is DENIED. No further petitions for rehearing en banc will be entertained. En banc proceedings are concluded. The panel will issue a separate order as to the petition for panel rehearing.

FILED

JUL 22 2014

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

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, III, Petitioner - Appellant, v. CHARLES L. RYAN; TERRY L. STEWART, Director; GEORGE HERMAN, Warden, Arizona State Prison - Eyman Complex, Respondents - Appellees.	No. 14-16380 D.C. No. 4:98-cv-00053-JGZ OPINION

Appeal from the United States District Court
for the District of Arizona
Jennifer G. Zipps, District Judge, Presiding

Submitted July 21, 2014*
San Francisco, California

Before: THOMAS, GOULD, and BYBEE, Circuit Judges.

PER CURIAM:

Joseph Wood, an Arizona state prisoner whose execution is set for July 23, 2014, appeals the district court's denial of his motion for relief from judgment

* The panel unanimously concludes this case is suitable for decision without oral argument.

pursuant to Federal Rule of Civil Procedure 60(b), his motion for a stay of execution, and his motion to amend or alter judgment pursuant to Federal Rule of Civil Procedure 59(e). We affirm.[1]

I

Wood shot and killed his estranged girlfriend, Debra Dietz, and her father, Eugene Dietz, in 1989.[2] Following a jury trial, Wood was convicted of two counts of first degree murder and two counts of aggravated assault. He was sentenced to death for each murder. The Arizona Supreme Court affirmed the convictions and sentences in 1994. *State v. Wood*, 881 P.2d 1158 (Ariz. 1994). The United States Supreme Court denied certiorari in 1995. *Wood v. Arizona*, 515 U.S. 1147 (1995).

Wood filed his first state petition for post-conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure ("PCR") in 1992. The trial court stayed the petition pending the outcome of the direct appeal to the Arizona Supreme Court. He filed a new PCR petition in 1996. The trial court denied the petition on June 6, 1997. The Arizona Supreme Court denied a petition for review on November 14, 1997.

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[1] The background is taken substantially from the district court order denying Wood's Rule 60(b) motion.

[2] The factual details are described in the Arizona Supreme Court's opinion on direct appeal. *State v. Wood*, 881 P.2d 1158, 1165–66 (Ariz. 1994).

Wood filed a petition for writ of habeas corpus on February 3, 1998, and an amended petition on November 30, 1998. On March 22, 2006, the district court issued an order addressing the procedural status of Wood's claims. The court addressed the remaining claims on the merits and denied habeas relief in an order and judgment dated October 25, 2007. Wood appealed to this Court. In August 2012, Wood moved to remand the case to the district court, arguing pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), that his post-conviction counsel's ineffective performance constituted cause for the default of his ineffective assistance of counsel claims. We denied the motion. On September 10, 2012, we affirmed the district court's denial of habeas relief. *Wood v. Ryan*, 693 F.3d 1104 (9th Cir. 2012). The United States Supreme Court denied certiorari on October 7, 2013. *Wood v. Ryan*, 134 S. Ct. 239 (2013).

The State filed a motion for a warrant of execution on April 22, 2014. The warrant was granted on May 28, and execution was set for July 23, 2014.

On July 17, 2014, Wood filed in district court a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) and a motion for a stay of execution. The district court denied the motions on July 20, 2014. Wood then filed a motion to amend or alter a judgment pursuant to Federal Rule of Civil Procedure 59(e) on July 21, 2014, and requested a Certificate of Appealability as to

the prior denial of the Rule 60(b) motion. The district court denied the Rule 59(e) motion on July 21, 2014, but granted a Certificate of Appealability as to both orders.

We review the district court's denial of Rule 60(b) and 59(e) motions under the deferential abuse of discretion standard. *Phelps v. Alameida*, 569 F.3d 1120, 1131 (9th Cir. 2009) (Rule 60(b)); *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (Rule 59(e)).

II

The district court did not abuse its discretion in denying the Rule 60(b) motion. Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6) permits reopening for "any . . . reason that justifies relief" other than the more specific reasons set out in Rule 60(b)(1)–(5). Fed. R. Civ. P. 60(b)(6). The party seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Such circumstances "rarely occur in the habeas context." *Id.*

Citing *Martinez*, Wood asserts he is entitled to relief from judgment based on the ineffective assistance of his post-conviction counsel, which prevented the district court from reaching the merits of three of his claims. Wood contends that the *Martinez* decision is an extraordinary circumstance justifying relief as to his three procedurally defaulted claims. To prevail, Wood must show not only that the *Martinez* decision is an extraordinary circumstance justifying relief, but also that he can succeed under *Martinez*. *Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012).

We have carefully reviewed the district court opinion. Under our deferential standard of review, we cannot say that the district court abused its discretion in denying the Rule 60(b) motion substantially for the reasons stated in the district court opinion.

We also see no abuse of discretion in the district court's denial of Wood's claim regarding the denial of his motion for evidentiary development. Wood raised sentencing counsel's ineffectiveness in Claim X.C.3 of his habeas petition. The district court denied the ineffectiveness claim on the merits and also denied Wood's request for evidentiary development as to that claim. We affirmed the district court's merits decision and denial of evidentiary development. *Wood*, 693 F.3d at 1122. Wood now argues that the denial of evidentiary development is an

extraordinary circumstance justifying relief from judgment. The district court denied the Rule 60(b) motion as to this claim because it is in substance an unauthorized second or successive habeas petition, and we agree.

A Rule 60(b) motion is proper when it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. Wood argues that he is not challenging the substance of the district court's prior ineffectiveness ruling, but instead that he is challenging the denial of evidentiary development designed to substantiate that claim. However, a Rule 60(b) motion constitutes a second or successive petition if it "seek[s] leave to present 'newly discovered evidence' in support of a claim previously denied." *Gonzalez*, 545 U.S. at 531 (internal citation omitted); *see also Post v. Bradshaw*, 422 F.3d 419, 424–25 (6th Cir. 2005) ("all that matters is [whether petitioner] is seeking vindication of or advancing a claim by taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition." (internal alterations and quotation marks omitted)). The substance of the claim Wood asserts was previously decided on the merits, and a Rule 60(b) motion that seeks leave to develop new evidence as to the claim must be denied as an unauthorized second or successive petition. *Gonzalez*, 545 U.S. at 531. Therefore, the district court was without jurisdiction to consider

it. *See Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) ("When the AEDPA is in play, the district court may not, in the absence of proper authorization from the court of appeals, consider a second or successive habeas application." (internal quotation marks omitted)); *see also Burton v. Stewart*, 549 U.S. 147, 152–53 (2007) (determining that district court lacked jurisdiction to consider second or successive habeas application).

III

The district court did not abuse its discretion in denying Wood's Rule 59(e) motion to alter or amend its judgment denying Rule 60(b) relief. In his motion, Wood reargued that the ineffectiveness of sentencing counsel issue was not an unauthorized second or successive petition. As the district court correctly observed, a Rule 59(e) motion is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A district court may grant a Rule 59(e) motion if it "'is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (en banc) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). Wood's Rule 59(e)

motion merely asked the district court to reconsider the judgment it entered the previous day. The district court did not abuse its discretion in denying the motion.

IV

Wood also seeks a stay of his execution from this court. "[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. Thus, like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (internal citations omitted). Wood has failed to show "a significant possibility of success on the merits." Additionally, the public interest in the enforcement of the judgment and the filing of the Rule 60(b) motion on the eve of the execution both weigh against issuing a stay. *See Cook v. Ryan*, 688 F.3d 598, 612–13 (9th Cir. 2012). We must therefore deny Wood's request for a stay.

V

The district court did not abuse its discretion in denying the Rule 60(b) motion, the Rule 59(e) motion, or the motion for a stay of execution. Wood also

fails to meet the requirements for a stay of execution. The district court's judgment is affirmed. Wood's motion for a stay of execution is denied.

AFFIRMED.

Counsel

Jon M. Sands, Federal Public Defender, Dale A. Baich & Robin C. Conrad, Assistant Federal Public Defenders, District of Arizona, Phoenix Arizona, on behalf of Plaintiff-Appellant.

Thomas C. Horne, Attorney General, Jeffrey A. Zick, Chief Counsel, John Pressley Todd, Special Assistant Attorney General, Jeffrey L. Sparks & Matthew Binford, Assistant Attorneys General, State of Arizona, Phoenix, Arizona, for Defendants-Appellees.

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joseph Rudolph Wood, III, Petitioner, vs. Charles L. Ryan, et al., Respondents.	No. CV-98-0053-TUC-JGZ Death Penalty Case Order

Petitioner Joseph Wood is an Arizona death row inmate. His execution is scheduled for July 23, 2014. On Thursday, July 17, 2014, Petitioner filed a motion seeking relief under Rule 60(b)(6) and a motion for a stay of execution. (Docs. 116, 117.) Briefing was completed Saturday, July 19. On Sunday, July 20, the Court denied the motions. (Doc. 124.)

Now before the Court is Petitioner's motion, filed Monday, July 21, asking the Court to alter or amend its judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. 125.) In the alternative, Petitioner seeks a certificate of appealability with respect to the Court's denial of his Rule 60(b)(6) motion. (*Id.*)

DISCUSSION

A motion to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure is in essence a motion for reconsideration. Rule 59(e) offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). The Ninth Circuit has consistently held that a motion brought pursuant to Rule 59(e) should only be granted in "highly unusual circumstances." *Id.*; *see 389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

Reconsideration is appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam); *see School Dist. No. 1J, Multnomah County, Or. v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs. *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 925–26 (9th Cir. 1988). Nor is it the time to ask the court to "rethink what it has already thought through." *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D. Ariz. 1998).

Petitioner argues that the Court erred in finding that his claim of ineffectiveness of sentencing counsel (Claim D) constituted an unauthorized second or successive petition under 28 U.S.C. § 2244(b)(3). (Doc. 124 at 20–22.) Petitioner asserts that this

Court's denial of funds for neurological testing prevented him from presenting what is a fundamentally altered, and therefore unexhausted and procedurally defaulted, claim of ineffective assistance of counsel. (Doc. 125 at 3–4.) He characterizes this argument as an "attack on the integrity of his federal habeas corpus proceedings." (Doc. 125 at 2.)

While Petitioner is asking the Court "to rethink what it has already thought through," the Court will briefly address Petitioner's argument.

In Claim 10(C)(3)(a) of his habeas petition, Petitioner alleged that trial counsel performed ineffectively at sentencing by failing to adequately prepare and present evidence of Petitioner's diminished capacity, including personality changes following several serious head injuries, and his social history, including his family history of alcoholism and mental illness. Petitioner also alleged that counsel performed ineffectively by failing to obtain and present an in-depth neurological evaluation. (Doc. 24 at 136–42.)

The Court found that Claim 10(C)(3)(a) had been properly exhausted in Petitioner's PCR proceedings in state court. (Doc. 63 at 37.) The Court considered the claim on the merits and denied relief. (Doc. 79 and 45–62.) The Ninth Circuit Court of Appeals affirmed. *Wood v. Ryan*, 693 F.3d 1104, 1120 (9th Cir. 2012). The Court of Appeals also affirmed this Court's denial of evidentiary development, explaining that "Wood is not entitled to an evidentiary hearing or additional discovery in federal court because this ineffective assistance of counsel claim is governed by 28 U.S.C. §

2254(d)(1), as it was adjudicated on the merits in the PCR proceedings. Review of such claims 'is limited to the record that was before the state court that adjudicated the claim on the merits.'" *Id.* at 1122 (quoting *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011)).

In seeking to reopen judgment with respect to allegations of ineffective assistance of sentencing counsel, Petitioner is advancing a habeas claim. Therefore, the motion is a second or successive petition. This is true whether he is raising a new, fundamentally altered claim or supporting a previous claim with new evidence. *See Gonzales v. Crosby*, 535 U.S. 524, 531–32 (2005). "It makes no difference that the motion itself does not attack the district court's substantive analysis of those claims but, instead, purports to raise a defect in the integrity of the habeas proceedings. . . ." *Post v. Bradshaw*, 422 F.3d 419, 424 (6th Cir. 2005).

Accordingly,

IT IS HEREBY ORDERED that Petitioner's motion to alter or amend judgment is denied. (Doc. 125.)

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IT IS FURTHER ORDERED that to the extent a certificate of appealability is needed, the Court finds that reasonable jurists could debate its denial of Petitioner's Rule 60(b)(6) motion. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the Court grants a certificate of appealability on this issue.

Dated this 21st day of July, 2014.

Jennifer G. Zipps
United States District Judge

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Joseph Rudolph Wood, III, Petitioner, vs. Charles L. Ryan, et al., Respondents.	No. CV-98-0053-TUC-JGZ Death Penalty Case ORDER

Petitioner Joseph Wood is an Arizona death row inmate. His execution is scheduled for July 23, 2014. Before the Court are Petitioner's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) and Motion for Stay of Execution, which were filed July 17, 2014. (Docs. 116, 117.) Respondents filed a response in opposition, to which Petitioner filed a reply. (Docs. 122, 123.)

Citing *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Petitioner asserts he is entitled to relief based on the ineffectiveness of his post-conviction counsel, which prevented this Court from addressing the following allegations: that the trial court prevented Petitioner from obtaining neurological mitigating evidence; that trial counsel was

ineffective for failing to impeach a State's witness; that appellate counsel had a conflict of interest; and that trial counsel performed an inadequate mitigation investigation. (*See* Doc. 116 at 2, 4–14.) For the reasons set forth below, Petitioner's Rule 60(b) motion is denied, as is his motion for a stay of execution.

BACKGROUND

Petitioner shot and killed his estranged girlfriend, Debra Dietz, and her father, Eugene Dietz, on August 7, 1989. Following a jury trial, Petitioner was convicted of two counts of first degree murder and two counts of aggravated assault. He was sentenced to death for each murder and for a term of imprisonment for each aggravated assault. The Arizona Supreme Court affirmed the convictions and sentences on October 11, 1994. *State v. Wood,* 881 P.2d 1158 (1994). The United States Supreme Court denied certiorari on June 19, 1995. *Wood v. Arizona,* 515 U.S. 1147 (1995).

Petitioner filed his first Rule 32 petition for post-conviction relief ("PCR") on February 11, 1992. The trial court stayed the petition pending the outcome of the direct appeal to the Arizona Supreme Court. Following its receipt of the mandate, the trial court appointed new counsel to represent Petitioner. He filed a new PCR petition on March 1, 1996. The trial court denied the petition on June 6, 1997. The Arizona Supreme Court denied a petition for review on November 14, 1997.

Petitioner filed a petition for writ of habeas corpus on February 3, 1998, and an amended petition on November 30, 1998. (Docs. 1, 23.) On March 22, 2006, the Court issued an order addressing the procedural status of Petitioner's claims. (Doc. 63.) The

Court addressed the remaining claims on the merits and denied habeas relief in an order and judgment dated October 25, 2007. (Docs. 79, 80.) Petitioner appealed to the Ninth Circuit Court of Appeals.

In August 2012, Petitioner moved the Ninth Circuit to remand the case to this Court. Motion for Remand, *Wood v. Ryan*, 693 F.3d 1104 (No. 74). He argued, pursuant to *Martinez*, that PCR counsel's ineffective performance constituted cause for the default of his ineffective assistance of counsel claims. *Id.* The Court of Appeals denied remand. *Id.* (No. 77.)

On September 10, 2012, the Ninth Circuit affirmed this Court's denial of habeas relief, *Wood v. Ryan*, 693 F.3d 1104 (9th Cir. 2012). The United States Supreme Court denied certiorari on October 7, 2013. *Wood v. Ryan*, 134 S. Ct. 239 (2013).

Petitioner filed a second PCR petition on August 2, 2002. The trial court denied the petition on November 7, 2002. The Supreme Court denied the petition for review on May 26, 2004.

The State filed a Motion for Warrant of Execution on April 22, 2014. The warrant was granted on May 28, and execution was set for July 23, 2014.

On April 30, 2014, the Court granted Petitioner's motion to substitute the Federal Public Defender's Office ("FPD") as co-counsel. (Doc. 105.)

Petitioner filed a third PCR petition on May 6, 2014, raising two claims: (1) there has been a significant change in the law of "causal connection," as it relates to the consideration of mitigating evidence at sentencing, and (2) appellate counsel provided

ineffective assistance as a result of an actual conflict of interest. The court denied the petition on July 9, 2014.

On July 14, 2014, Petitioner filed a petition for review in the Arizona Supreme Court. The court denied the petition on July 17, 2014.

On July 17, 2014, Petitioner filed the instant motion for relief from judgment and motion for a stay, and this Court set a briefing schedule. (Docs. 116, 117, 118.)

DISCUSSION

I. *Martinez v. Ryan*

In *Martinez*, the Court created a narrow exception to the well-established rule in *Coleman v. Thompson*, 501 U.S. 722, 731 (1991), that ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse the procedural default of an ineffective assistance of counsel claim. Under *Martinez*, a petitioner may establish cause for the procedural default of a claim of ineffective assistance of trial counsel by demonstrating two things: (1) "counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)," and (2) "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting *Martinez*, 132 S. Ct. at 1318).

The Ninth Circuit recently extended the holding in *Martinez* to apply to procedurally defaulted claims of ineffective assistance of appellate counsel. *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1294–95 (9th Cir. 2013).

II. Rule 60(b)(6)

Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on several grounds, including the catch-all category "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). A motion under subsection (b)(6) must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and requires a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). "Such circumstances will rarely occur in the habeas context." *Id.*

A. Extraordinary circumstances

Petitioner contends that the *Martinez* decision constitutes an extraordinary circumstance. When a petitioner seeks post-judgment relief based on an intervening change in the law, the Ninth Circuit has directed district courts to balance numerous factors on a case-by-case basis. *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009); *see also Lopez v. Ryan*, 678 F.3d 1131, 1135–37 (9th Cir. 2012). These factors include whether "the intervening change in the law . . . overruled an otherwise settled legal precedent"; whether the petitioner was diligent in pursuing the issue; whether "the final judgment being challenged has caused one or more of the parties to change his position in reliance on that judgment"; whether there is "delay between the finality of

the judgment and the motion for Rule 60(b)(6) relief"; whether there is a "close connection" between the original and intervening decisions at issue in the Rule 60(b) motion; and whether relief from judgment would upset the "delicate principles of comity governing the interaction between coordinate sovereign judicial systems." *Phelps*, 569 F.3d at 1135–40. Having carefully balanced these factors, the Court concludes that they weigh against granting post-judgment relief.

B. Second or successive petitions

For habeas petitioners, Rule 60(b) may not be used to avoid the prohibition set forth in 28 U.S.C. § 2244(b) against second or successive petitions.[1] In *Gonzalez*, the Court explained that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim *on the merits*." 545 U.S. at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at n.4. The Court further explained that a Rule 60(b) motion does *not* constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits

[1] Section 2244(b)(3) requires prior authorization from the court of appeals before a district court may entertain a second or successive petition under § 2244(b)(2). Absent such authorization, a district court lacks jurisdiction to consider the merits of a second or successive petition. *United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011); *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001).

determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.*

III. Petitioner's Claims

Petitioner seeks relief from this Court's judgment finding three of his habeas claims defaulted. (Doc. 116 at 17–18.) He also contends that he is entitled to relief from the Court's denial on the merits of his claim that trial counsel performed an inadequate mitigation investigation. (*Id.*) The Court will briefly outline these claims. A more complete discussion can be found in the Court's order on the procedural status of Petitioner's claims and the Court's order denying Petitioner's amended petition for writ of habeas corpus. (Docs. 63, 79.)

A. Failure to fund neurological testing

In Claim VI of his habeas petition, Petitioner argued that the trial court violated his rights when it denied funding for neurometric brain mapping and thereby prevented the presentation of mitigating evidence of organic brain dysfunction. (Doc. 24 at 81–88.) This Court concluded that Petitioner failed to properly exhaust the claim in state court and therefore the claim was procedurally barred. (Doc. 63 at 32.) The Ninth Circuit agreed. *Wood*, 693 F.3d at 1121.

B. Failure to impeach Officer Anita Sueme

At trial the State argued that the sequence of bullets remaining in Petitioner's weapon indicated that the gun had been cocked and uncocked without firing. Officer Sueme was one of officers at the crime scene. She testified that she recovered

Petitioner's weapon but never opened the cylinder. In recounting her story to a crime writer, however, Sueme purportedly stated that she had picked up the gun, opened the cylinder, and removed some of the bullets.

In the pending 60(b) motion, Petitioner contends that counsel performed ineffectively by failing to impeach Officer Sueme with her prior inconsistent statement because rebutting evidence that Petitioner had cocked and uncocked the gun would have undermined the "grave risk to another" aggravating factor found by the sentencing court. (Doc. 116 at 10, 22–25.) In Claim X(C)(2) of his habeas petition, Petitioner raised a different argument, alleging that counsel performed ineffectively by failing to impeach Sueme because the testimony would have "wholly rebutted a key factual component of the state's premeditation argument." (Doc. 24 at 131.)

This Court found habeas Claim X(C)(2) procedurally barred because it was not presented to the state court. (Doc. 63 at 36.) The Ninth Circuit Court of Appeals agreed. *Wood*, 693 F.3d at 1119.

C. Appellate counsel conflict of interest

Petitioner was represented on appeal by Barry Baker Sipe. Following his appointment as appellate counsel, Baker Sipe sought leave to withdraw on the ground that he was joining the Pima County Legal Defender's Office, which had previously represented the victim, Debra Dietz, in a separate matter. (*See* Doc. 63 at 39–40.) A justice on the Arizona Supreme Court granted the motion and remanded to the trial court to appoint new counsel. (*Id.* at 40.) Prior to the Arizona Supreme Court's order,

however, the trial judge held a hearing at which it considered the conflict issue. (*Id.*) The judge expressed his desire to keep Baker Sipe on the case and proposed to review *in camera* the Legal Defender's file concerning its representation of Debra Dietz. (*Id.*) The judge also stated that he did not want to keep Baker Sipe on the case and "have it reversed because of some conflict that I don't see." (*Id.*) Baker Sipe responded that he had "done a lot" on the appeal, had "a good relationship with Mr. Wood" and essentially acquiesced to the trial court's proposal. (*Id.*) After the Arizona Supreme Court's order had issued, the trial judge appointed the Legal Defender's Office to represent Petitioner on direct appeal. (*Id.*) Petitioner did not renew his request for the substitution of counsel on direct appeal, nor did he raise the issue in his PCR proceedings.

In Claim XI(A) of his habeas petition, Petitioner alleged that Baker Sipe performed ineffectively by failing to withdraw due to a conflict of interest. (Doc. 24 at 148–50.) He argued that the claim was properly exhausted when the Arizona Supreme Court granted the motion to withdraw. This Court disagreed, holding that the Arizona Supreme Court "had no cause to consider the claim presented in this action"—i.e., that appellate counsel performed ineffectively due to the conflict of interest. (Doc. 63 at 40.) The claim was therefore procedurally defaulted and barred. (*Id.* at 40–41.) The Ninth Circuit affirmed. *Wood*, 693 F.3d at 1121.

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D. Inadequate mitigation investigation

In Claim X(C)(3) of his habeas petition, Petitioner alleged that counsel performed ineffectively at sentencing by failing to obtain and present an in-depth neurological evaluation of Petitioner and other mitigation evidence concerning his family history of alcoholism and mental health issues. (Doc. 24 at 136–43.) The Court found that the claim had been properly exhausted (Doc. 63 at 37) and proceeded to consider it on the merits. The Court concluded that Petitioner was not entitled to relief because he failed to show that he was prejudiced by counsel's performance under *Strickland*, 466 U.S. at 700, and the deferential standard of review required by the AEDPA. (Doc. 79 at 62.) Specifically, the Court found that the new information offered by Petitioner was inconclusive or cumulative of evidence counsel did present at sentencing. The Court of Appeals affirmed. *Wood*, 693 F.3d at 1120.

This Court also denied Petitioner's request for evidentiary development in the form of resources to retain a neuropsychologist and a mitigation specialist. (Doc. 79 at 67–72.) The Court concluded that Petitioner's ineffective assistance claim could be resolved on the record and that even if the new facts alleged by Petitioner proved true, he would not be entitled to habeas relief. (*Id.* at 72.) The Court of Appeals found that the Court did not abuse its discretion by denying evidentiary development. *Wood*, 693 F.3d at 1122.

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IV. ANALYSIS

A. Defaulted Claims

Petitioner contends, and the Court agrees, that pursuant to Rule 60(b)(6) he may seek reconsideration of the claims this Court found procedurally barred. *See Gonzalez*, 545 U.S. at 532. These include the claims that the trial court failed to provide funding (hereinafter Claim A); that trial counsel performed ineffectively in cross-examining Officer Sueme (Claim B); and that appellate counsel labored under a conflict of interest (Claim C).

As previously noted, a motion under subsection (b)(6) must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and requires a showing of "extraordinary circumstances." *Gonzalez*, 545 U.S. at 532, 535. Petitioner does not satisfy these criteria.

Petitioner filed his Rule 60(b)(6) motion more than six years after the Court's order denying habeas relief, more than two years after the decision in *Martinez*, seven weeks after the warrant for his execution issued, and just three business days before his scheduled execution. The Court is skeptical that this meets the benchmark of filing "within a reasonable time." *See Kingdom v. Lamerque*, 392 Fed.Appx. 520, 2010 WL 3096376, at *1 (9th Cir. 2010) (finding prisoner's 60(b)(6) motion untimely when it was filed two years after judgment); *Ramsey v. Walker*, 304 Fed.Appx. 827, 829, 2008 WL 5351670, at *2 (11th Cir. 2008) ("[D]istrict court did not abuse its discretion in denying Ramsey's Rule 60(b) motion because it was not filed within a reasonable time of the

court's denial of his § 2254 petition. Notably, he filed the motion more than six years after the denial of his § 2254 petition and two years after the cases on which he relied were decided."); *Horton v. Sheets*, No. 2:07-cv-525, 2012 WL 3777431, 2 (S. D. Ohio August 3, 2012) ("A motion filed under Rule 60(b)(6) must be filed within a "reasonable time." Petitioner, however, waited more than two years after the Supreme Court issued its decision in *Holland* to file his motion for reconsideration."). Assuming, however, that the motion is timely, it fails to satisfy the "extraordinary circumstances" criterion.

1. Extraordinary circumstances are not present

Petitioner also fails to show that the decision in *Martinez* constitutes an extraordinary circumstance entitling him to relief. In reaching this conclusion the Court applies the *Phelps* factors as follows.

a. Change in law

The first factor considers the nature of the intervening change in the law. In *Lopez,* another capital case from Arizona in which the petitioner sought relief under Rule 60(b) based on *Martinez,* the court found that the Supreme Court's creation of a narrow exception to otherwise settled law in *Coleman* "weigh[ed] slightly in favor of reopening" the petitioner's habeas case. 678 F.3d at 1136. "Unlike the 'hardly extraordinary' development of the Supreme Court resolving an existing circuit split, *Gonzalez*, 545 U.S. at 536, the Supreme Court's development in *Martinez* constitutes a remarkable—if 'limited,' *Martinez*, 132 S. Ct. at 1319—development in the Court's

equitable jurisprudence." *Id.* Thus, based on *Lopez*, this factor weighs slightly in Petitioner's favor. *But see Nash v. Hepp*, 740 F.3d 1075, 1078 (7th Cir. 2014) (finding that the change in law represented by *Martinez* "is not an extraordinary circumstance justifying relief under Rule 60(b)(6)"); *Arthur v. Thomas*, 739 F.3d 611, 633 (11th Cir. 2014) ("the change in decisional law created by the *Martinez* rule does not constitute an 'extraordinary circumstance.' Thus, the district court did not abuse its discretion when it denied Arthur's Rule 60(b)(6) motion."); *Adams v. Thaler*, 679 F.3d 312, 219 (5th Cir. 2012) (finding Fifth Circuit precedents hold a change in decisional law after entry of judgment does not constitute exceptional circumstances under Rule 60(b)(6)).

b. Diligence

The second *Phelps* factor "considers the petitioner's exercise of diligence in pursuing the issue during the federal habeas proceedings." *Lopez*, 678 F.3d at 1136. This factor weighs against Petitioner.

Petitioner did not allege ineffectiveness of PCR counsel in his habeas proceedings before this Court (*see* Doc. 32 at 113–19, 144–45, 151–52), or on appeal from this Court's denial of relief, Appellant's Opening Brief, *Wood v. Ryan*, 693 F.3d 1104 (No. 26-1). He did not raise the issue two years ago, when *Martinez* was decided. His motion to remand, filed five months after *Martinez*, presented only a generalized argument that *Martinez* was applicable to Petitioner's ineffective assistance claims. It was only in the pending Rule 60(b) motion that Petitioner offered any argument that *Martinez* applied to excuse the procedural default of specific claims. In sum, this is not

a case, such as *Phelps*, where the petitioner "pressed all possible avenues of relief" on the identical legal position ultimately adopted in a subsequent case as legally correct. 569 F.3d at 1137; *see Lopez*, 678 F.3d at 1136.[2]

Petitioner asserts that he was diligent because his motion was brought two months after the FPD was appointed as co-counsel, and it was only after the appointment that a proper mitigation investigation could be performed.[3] The Court rejects the notion that a challenge to its procedural rulings must await the results of a more-thorough mitigation investigation performed by newly-appointed counsel. Moreover, Claims B and C bear no relationship to the results of that investigation.

c. Finality

The third factor asks whether granting relief under Rule 60(b) would "'undo the past, executed effects of the judgment,' thereby disturbing the parties' reliance interest in the finality of the case." *Phelps*, 569 F.3d at 1137 (quoting *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987)). In *Lopez*, the court found that the State's and the victim's interest in finality, especially after a warrant of execution has been obtained and an

[2] In *Lopez*, the court did not fault the petitioner for failing to raise the cause issue in his original federal habeas proceeding before the district court, noting that the issue was "squarely foreclosed by binding circuit and Supreme Court precedent." 678 F.3d at 1136 n.1. The court nonetheless found a lack of diligence because the petitioner failed to raise the issue in his petition for certiorari from the denial of federal habeas relief, filed in August 2011, which was the "same time frame . . . other petitioners, like Martinez, were challenging *Coleman." Id.* at 1136.

[3] Petitioner was examined by a clinical psychologist and a neuropsychologist on June 17 and June 25 and 26, 2014. (Doc. 116 at 14.) Petitioner states that he will supplement his motion with the experts' reports when they are available. (*Id.*)

execution date set, weighed against granting post-judgment relief. 678 F.3d at 1136; *see Jones v. Ryan*, 733 F.3d 825, 840 (9th Cir. 2013) ("This factor weighs strongly against Jones."); *see also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (discussing finality in a capital case). Accordingly, this factor weighs heavily against reopening Petitioner's habeas case.

d. Delay

"The fourth factor concerns delay between the finality of the judgment and the motion for Rule 60(b)(6) relief." *Lopez*, 678 F.3d at 1136. This factor examines whether a petitioner seeking to have a new legal rule applied to an otherwise final case has petitioned the court for reconsideration "with a degree of promptness that respects the strong public interest in timeliness and finality." *Phelps*, 569 F.3d at 1138 (internal quotation omitted). In this context courts have measured finality from the denial of certiorari.

This factor favors neither party. Petitioner filed his 60(b)(6) motion nine months after the United States Supreme Court denied certiorari. *See Jones*, 733 F.3d at 840 (finding two month gap not a long delay, so the factor "weighs slightly in Jones's favor"). The Court finds no support for Petitioner's argument that delay in this context is measured from the date of the substitution of co-counsel.

e. Close connection

The fifth factor "is designed to recognize that the law is regularly evolving." *Phelps*, 569 F.3d at 1139. The mere fact that tradition, legal rules, and principles

inevitably shift and evolve over time "cannot upset all final judgments that have predated any specific change in the law." *Id.* Accordingly, the nature of the change is important and courts should examine whether there is a "close connection" between the original and intervening decision at issue in a Rule 60(b)(6) motion. *Id.*

Martinez held that the ineffective assistance of PCR counsel could serve as cause to excuse the procedural default of an ineffective assistance of counsel claim. *Martinez* has no connection with Claim A, which does not allege ineffective assistance of counsel. *See, e.g.*, *Hunton v. Sinclair*, 732 F.3d 1124, 1126–27 (finding *Martinez* does not excuse default of *Brady* claim). *Martinez* is, however, closely connected with Claim B, which alleges ineffective assistance of trial counsel. The Court finds that Claim C, which alleges a conflict of interest affecting appellate counsel's performance, is also connected *Martinez*. This factor weighs in favor of Petitioner.

f. Comity

The last factor concerns the need for comity between independently sovereign state and federal judiciaries. *Phelps*, 569 F.3d at 1139. The Ninth Circuit has determined that principles of comity are not upset when an erroneous legal judgment, if left uncorrected, "would prevent the true merits of a petitioner's constitutional claims from ever being heard." *Id.* at 1140. For example, in *Phelps* the district court dismissed the petition as untimely, thus precluding any federal habeas review of the petitioner's claims. The court found that this favored the grant of post-judgment relief because

dismissal of a first habeas petition "denies the petitioner the protections of the Great Writ entirely." *Id.*

Here, the Court's judgment did not preclude review of all of Petitioner's federal constitutional claims. A number of the claims, including trial counsel's alleged ineffectiveness at sentencing, were addressed on the merits in both the district and appellate courts. The comity factor does not favor Petitioner.

g. Conclusion

The Court has evaluated each of the factors set forth in *Phelps* in light of the particular facts of this case. The change in law and close connection factors weigh slightly in Petitioner's favor. They are far outweighed by the diligence, finality, and comity factors. Accordingly, the Court concludes that with respect to Claim A, B, and C, Petitioner's motion to reopen judgment fails to demonstrate the extraordinary circumstances necessary to grant relief under Rule 60(b)(6).

2. Claims B and C are not substantial

In addition to failing to meet the "extraordinary circumstances" requirement of 60(b)(6), Claims B and C fail under *Martinez*'s own terms, which require a petitioner to "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 132 S. Ct. at 1318.

As noted above, Claim B consists of a different argument than the claim raised in the habeas petition. The presentation of a new, procedurally-defaulted claim does not

warrant reopening the habeas proceeding under Rule 60(b). *See Jones*, 733 F.3d at 836 (explaining that Rule 60(b) is not "a second chance to assert new claims").

The Court further finds that neither the original ineffective assistance claim nor the restyled Claim B is substantial as required under *Martinez*. First, there was abundant evidence of premeditation. *See Wood*, 881 P.2d at 1169. Next, evidence inconsistent with the theory that Petitioner cocked and uncocked the weapon would not have negated other substantial evidence supporting the grave risk of death factor. In affirming this factor, the Arizona Supreme Court also relied on the presence of others in the confined garage where the murders happened, the fact that Petitioner pointed the gun at another employee, and the fact that another employee fought with Petitioner for control of the gun. *Id.* at 1174–75. Impeaching Officer Sueme with her prior statement would not have affected this evidence, and would not have created a reasonable probability of a different result.

In Claim C Petitioner alleges that appellate counsel Baker Sipe labored under a conflict of interest because his new employer had represented Ms. Dietz in another matter. Analyzed as a claim of ineffective assistance of appellate counsel, this claim is not substantial.

To establish a Sixth Amendment violation based on conflict of interest, the defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 338 (1980); *Mannhal v. Reedt*, 847 F.2d 576, 579 (9th Cir. 1988). Generally, it is more difficult to demonstrate an actual conflict

resulting from successive, rather than simultaneous, representation. *Mannhalt,* 847 F.2d at 580. Conflicts of interest based on successive representation may arise if the current and former cases are substantially related, if the attorney reveals privileged communications of the former client, or if the attorney otherwise divides his loyalties. *Id.* Ultimately, however, an actual conflict of interest is one "that affected counsel's performance—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor,* 535 U.S. 162, 171 (2002). The simple "possibility of conflict is insufficient to impugn a criminal conviction." *Cuyler*, 446 U.S. at 350.

Petitioner's principal defense at trial was that the State failed to prove premeditation and that Petitioner acted impulsively when he committed the murders. *See Wood*, 881 P.2d at 1167 ("Premeditation was the main trial issue. The defense was lack of motive to kill either victim and the act's alleged impulsiveness, which supposedly precluded the premeditation required for first degree murder."). Petitioner asserts that appellate counsel abandoned that defense because it would have required him to attack Ms. Dietz by advancing the theory that she and Petitioner were involved in a "covert relationship." (Doc. 116 at 11.) According to the Petition, Baker Sipe instead pursued a weaker theory that Petitioner was insane at the time of the shootings. (*Id.*)

Petitioner's argument does not convince the Court that appellate counsel's performance was affected by his office's prior representation of Ms. Dietz. Whether or not Baker Sipe "abandoned" the trial defense of impulsivity, the Arizona Supreme Court considered the issue and noted that there was "a great deal of evidence that

unequivocally compels the conclusion that Defendant acted with premeditation." *Wood*, 881 P.2d at 1169. The court detailed the evidence as follows:

> Defendant disliked and had threatened Eugene. Three days before the killing, Defendant left threatening phone messages with Debra showing his intent to harm her. Defendant called the shop just before the killings and asked whether Debra and Eugene were there. Although Defendant regularly carried a gun, on the morning of the murders he also had a spare cartridge belt with him, contrary to his normal practice. Defendant calmly waited for Eugene to hang up the telephone before shooting him. There was no evidence that Eugene did or said anything to which Defendant might have impulsively responded. Finally, Defendant looked for Debra after shooting Eugene, found her in a separate area, and held her before shooting her, stating, "I told you I was going to do it, I have to kill you."

Id.

An appellate argument that Ms. Dietz and Petitioner were in a "covert relationship" would have had no bearing on the issue of premeditation. Petitioner has posited only a "theoretical division of loyalties." *Mickens*, 535 U.S. at 171.

B. Ineffective Assistance of Counsel Claim is a Second or Successive Petition

In Claim D, Petitioner seeks relief under Rule 60(b)(6) from this Court's denial of his claim that trial counsel performed ineffectively at sentencing by failing to produce mitigating evidence of organic brain damage. Petitioner argues that he is not attacking the substance of the Court's merits ruling, *see Gonzales*, 545 U.S. at 532, but rather challenging the integrity of the proceedings, in this case the Court's denial of

Petitioner's motion for evidentiary development. (Doc. 116 at 16–18.) Petitioner's argument is unpersuasive.

A Rule 60(b) motion constitutes a second or successive habeas petition when it "seeks vindication of" or "advances" one or more "claims." *Gonzalez*, 545 U.S. at 531; *see Post v. Bradshaw*, 422 F.3d 419, 424 (6th Cir. 2005). A "claim" is "an asserted federal basis for relief from a state court's judgment of conviction," and "[a] motion can . . . be said to bring a 'claim' if it attacks the federal court's previous resolution of a claim *on the merits*." *Gonzales*, 545 U.S. at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at n.4. A motion does not attack a merits ruling when the motion "merely asserts that a previous ruling which precluded a merits determination was in error." *Id.*

With respect to Claim D, Petitioner's Rule 60(b) motion seeks to advance a claim that this Court previously considered and dismissed on the merits. *See Post*, 422 F.3d at 424. It is therefore a second or successive habeas petition. "It makes no difference that the motion itself does not attack the district court's substantive analysis of those claims but, instead, purports to raise a defect in the integrity of the habeas proceedings." *Id.* By challenging this Court's denial of resources, Petitioner seeks to vindicate his habeas claim that counsel performed ineffectively at sentencing. *Id.* (explaining that in characterizing 60(b) motion as second or successive petition "all that matters is that [petitioner] is "seek[ing] vindication of" or "advanc[ing]" a claim by taking steps that

lead inexorably to a merits-based attack on the prior dismissal of his habeas petition") (quoting *Gonzalez*, 545 U.S. at 531–32).

Gonzalez makes explicit that a Rule 60(b) motion is in effect a successor petition if it "seek[s] leave to present 'newly discovered evidence' in support of a claim previously denied." 545 U.S. at 531. Thus, Petitioner's contention that newly-discovered evidence of his neuropsychological status will bolster Claim D confirms that the claim is in substance a second or successive petition asserting a merits-based challenge to the Court's previous ruling.

Claim D will be denied as an unauthorized second or successive petition. 28 U.S.C. § 2244(b)(3).

CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Petitioner's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) is DENIED. (Doc. 116.)

IT IS FURTHER ORDERED that Petitioner's Motion for Stay of Execution is DENIED as MOOT. (Doc. 117.)

Dated this 20th day of July, 2014.

Jennifer G. Zipps
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, III, *Petitioner-Appellant,* v. CHARLES L. RYAN, interim Director, Arizona Department of Corrections, *Respondent-Appellee.*	No. 08-99003 D.C. No. 4:98-CV-00053-JMR OPINION

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
November 18, 2011—San Francisco, California

Filed September 10, 2012

Before: Sidney R. Thomas, Ronald M. Gould, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Thomas

COUNSEL

Julie S. Hall (argued), Law Offices of Julie S. Hall, Oracle, Arizona; and Kevin C. Lerch, Law Office of Kevin C. Lerch, Tucson, Arizona, for petitioner-appellant Joseph Rudolph Wood, III.

Terry Goddard, Attorney General; Kent Cattani (argued), Chief Counsel, Capital Litigation Section; and Amy Pignatella Cain, Assistant Attorney General, Tucson, Arizona, for respondents-appellees Charles L. Ryan et al.

OPINION

THOMAS, Circuit Judge:

Joseph R. Wood III, an Arizona state prisoner, appeals the district court's denial of his habeas corpus petition challenging his state convictions for murder and aggravated assault and the imposition of the death penalty. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

I

Petitioner Joseph Wood shot and killed his estranged girlfriend, Debra Dietz, and her father, Eugene Dietz, on August

7, 1989 at a Tucson automotive paint and body shop owned and operated by the Dietz family. The Arizona Supreme Court described the facts as follows:

> Since 1984, Defendant and Debra had maintained a tumultuous relationship increasingly marred by Defendant's abusive and violent behavior. Eugene generally disapproved of this relationship but did not actively interfere. In fact, the Dietz family often included Defendant in dinners and other activities. Several times, however, Eugene refused to let Defendant visit Debra during business hours while she was working at the shop. Defendant disliked Eugene and told him he would "get him back" and that Eugene would "be sorry."
>
> Debra had rented an apartment that she shared with Defendant. Because Defendant was seldom employed, Debra supported him financially. Defendant nevertheless assaulted Debra periodically. [FN1]. She finally tried to end the relationship after a fight during the 1989 July 4th weekend. She left her apartment and moved in with her parents, saying "I don't want any more of this." After Debra left, Defendant ransacked and vandalized the apartment. She obtained an order of protection against Defendant on July 8, 1989. In the following weeks, however, Defendant repeatedly tried to contact Debra at the shop, her parents' home, and her apartment. [FN2].
>
> > FN1. Debra was often bruised and sometimes wore sunglasses to hide blackened eyes. A neighbor who heard "thuds and banging" within Debra's apartment called police on June 30, 1989, after finding Debra outside and "hysterical." The

> responding officer saw cuts and bruises on Debra.
>
> FN2. Defendant left ten messages on Debra's apartment answering machine on the night of Friday, August 4, 1989. Some contained threats of harm, such as: "Debbie, I'm sorry I have to do this. I hope someday somebody will understand when we're not around no more. I do love you babe. I'm going to take you with me."

Debra and Eugene drove together to work at the shop early on Monday morning, August 7, 1989. Defendant phoned the shop three times that morning. Debra hung up on him once, and Eugene hung up on him twice. Defendant called again and asked another employee if Debra and Eugene were at the shop. The employee said that they had temporarily left but would return soon. Debra and Eugene came back at 8:30 a.m. and began working in different areas of the shop. Six other employees were also present that morning.

At 8:50 a.m., a Tucson Police officer saw Defendant driving in a suspicious manner near the shop. The officer slowed her patrol car and made eye contact with Defendant as he left his truck and entered the shop. Eugene was on the telephone in an area where three other employees were working. Defendant waited for Eugene to hang up, drew a revolver, and approached to within four feet of him. The other employees shouted for Defendant to put the gun away. Without saying a word, Defendant fatally shot Eugene once in the chest and then smiled. When the police officer saw this from her patrol car she immediately called for more officers. Defendant left the

> shop, but quickly returned and again pointed his revolver at the now supine Eugene. Donald Dietz, an employee and Eugene's seventy-year-old brother, struggled with Defendant, who then ran to the area where Debra had been working.
>
> Debra had apparently heard an employee shout that her father had been shot and was trying to telephone for help when Defendant grabbed her around the neck from behind and placed his revolver directly against her chest. Debra struggled and screamed, "No, Joe, don't!" Another employee heard Defendant say, "I told you I was going to do it, I have to kill you." Defendant then called Debra a "bitch" and shot her twice in the chest.
>
> Several police officers were already on the scene when Defendant left the shop after shooting Debra. Two officers ordered him to put his hands up. Defendant complied and dropped his weapon, but then grabbed it and began raising it toward the officers. After again ordering Defendant to raise his hands, the officers shot Defendant several times.

State v. Wood, 881 P.2d 1158, 1165-66 (Ariz. 1994). Wood was arrested and indicted on two counts of first degree murder and two counts of aggravated assault against the police officers who subdued him. *Id.* at 1166.

At trial, Wood conceded his role in the killings, but argued that they were impulsive acts that were not premeditated. *Id.* After a five-day trial, the jury found Wood guilty on all counts. *Id.* at 1169. Following an aggravation and mitigation hearing, the trial court sentenced Wood to imprisonment for the assaults and to death for each murder. *Id.* at 1165.

In 1994, the Arizona Supreme Court affirmed Wood's convictions and sentences. *Id.* The court also independently

reviewed the evidence of aggravating and mitigating circumstances and determined that the trial court correctly concluded that the aggravating circumstances outweighed the mitigating circumstances, thereby supporting the imposition of the death penalty. *Id*. The United States Supreme Court denied certiorari, *Wood v. Arizona*, 515 U.S. 1147 (1995), and Wood's petition for rehearing, *Wood v. Arizona*, 515 U.S. 1180 (1995).

In 1996, Wood filed a state petition for post-conviction review (PCR). The state post-conviction court and the Arizona Supreme Court denied relief. In 2002, Wood filed a second PCR petition. The state post-conviction court and Arizona Supreme Court again denied relief.

In 1998, Wood filed a Petition for Writ of Habeas Corpus in federal district court, followed by the filing of an Amended Petition later that year. In 2006, the district court issued an order on the procedural status of Wood's claims, finding certain claims properly exhausted and ordering merits briefing on those claims and dismissing others as procedurally barred. Order Re: Procedural Status of Claims, Wood v. Schriro, No. CV-98-053-TUC-JMR (D. Ariz. Mar. 21, 2006), ECF No. 63. In 2007, the district court denied Wood's remaining habeas claims on the merits. *Wood v. Schriro*, No. CV-98-053-TUC-JMR, 2007 WL 3124451, at *46 (D. Ariz. Oct. 24, 2007).

We review the district court's denial of Wood's habeas petition *de novo* and its findings of fact for clear error. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). We review the denial of Wood's request for an evidentiary hearing for an abuse of discretion. *Id*. Wood filed his habeas petition after April 24, 1996, thus the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies. *Woodford v. Garceau*, 538 U.S. 202, 204-07 (2003). To obtain relief under AEDPA, Wood must show that the state court's decision (1) "was contrary to" clearly established federal law as determined by the Supreme Court, (2) "involved an unreasonable application of"

such law, or (3) "was based on an unreasonable determination of the facts" in light of the record before the state court. *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 785 (2011) (quoting 28 U.S.C. § 2254(d)).

II

The district court correctly determined that Wood was not entitled to habeas relief on his claims that the prosecutor committed prejudicial misconduct in violation of his rights to due process and a fair trial. The district court denied five claims on the merits and concluded that four claims were procedurally barred.

A

The district court was correct in its denial of Wood's prosecutorial misconduct claims on the merits. Wood argues that the prosecutor committed prejudicial misconduct by: (1) cross-examining a psychologist about whether another doctor had considered hypnotizing or administering amobarbital to Wood; (2) eliciting testimony about a prior arrest, his employment history, and his personal relationships with previous girlfriends and with Ms. Dietz; (3) cross-examining a psychologist about Wood's mental state; (4) cross-examining a lay witness about Wood's mental state; and (5) committing cumulative error.

A prosecutor's actions constitute misconduct if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The "appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.' " *Id.* (quoting *Donnelly*, 416 U.S. at 642). On habeas review, constitutional errors of the "trial type," including prosecutorial misconduct, warrant relief only if they "had

substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (internal quotation marks omitted).

1

[1] The district court properly denied Wood's claim that the prosecutor committed misconduct by asking Dr. Allender, a psychologist called as an expert witness by the defense, whether he had considered hypnotizing or administering amobarbital to Wood. *Wood*, 2007 WL 3124451, at *6-8. On direct examination, Wood's counsel asked Dr. Allender questions about Wood's alleged inability to remember the shootings. On cross-examination, the prosecutor probed Dr. Allender's understanding of Wood's alleged memory loss. Wood alleges the prosecutor committed misconduct by asking the following line of questions:

> Q: Didn't Dr. Morris [another psychologist who examined Wood] suggest that hypnosis or amobarbital might be ideal to discover whether [Wood] was malingering?
>
> A: He suggested that those might be techniques.
>
> Q: With hypnosis, you place them under hypnosis in order to find out what the truth of the matter was?
>
> A: What the theory would be is if it is an unconscious process, that you can probably do hypnosis or use the sodium amobarbital to get past the conscious defense or unconscious defense mechanisms.
>
> Q: So you didn't, did you attempt, did you request a hypnosis evaluation?
>
> A: I didn't because I didn't, I'm not as convinced about those techniques as Dr. Morris is.

> Q: Amobarbital, is that a truth serum?
>
> A: That is what they call it, that is what people have called it along the way.

[2] The Arizona Supreme Court denied this claim on direct review. *Wood*, 881 P.2d at 1172-73. In doing so, the Arizona Supreme Court reasonably applied clearly established law. Although Wood argues that the evidence obtained by hypnosis or sodium amobarbital would have been scientifically unreliable, the Arizona Supreme Court acknowledged that "courts generally exclude testimony induced or 'refreshed' by drugs or hypnosis" but determined that the prosecutor's questions about amobarbital and hypnosis in Wood's case were "within the wide latitude permitted on cross-examination" because they were "not intended to impugn [Wood] but to test the basis and credibility of Dr. Allender's opinions concerning whether [Wood] was faking his asserted memory loss at the time of the murders." *Id.* at 1172-73.

Wood also contends that Dr. Allender appeared unqualified because he did not consider this potential evidence, but the record belies this assertion. Dr. Allender testified that he did not perform hypnosis or administer amobarbital because he was not convinced about the reliability of these tests. By questioning the reliability of the tests, Dr. Allender demonstrated his credibility as an expert by showing that a competent psychologist questions the use of methods and practices that do not provide credible results. The prosecutor's questions did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181.

2

[3] The district court also correctly denied Wood's claims that the prosecutor committed misconduct by eliciting testimony about Wood's prior arrest, employment history, per-

sonal relationships with previous girlfriends, and self-centered relationship with Ms. Dietz. *Wood*, 2007 WL 3124451, at *8-11. The Arizona Supreme Court addressed the prior arrest and employment history claims. *Wood*, 881 P.2d at 1170-72. However, it did not address the claims about Wood's prior relationships with other girlfriends or his allegedly self-centered relationship with Ms. Dietz, so we must review these two claims *de novo*. *See Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011).

The Arizona Supreme Court reasonably determined that the prosecutor's passing reference to Wood's prior arrest on cross-examination did not violate Wood's right to due process. On direct examination, Dr. Allender testified that he reviewed police reports from the Tucson and Las Vegas police departments. The prosecutor then followed up on cross-examination by asking questions about these reports:

> Q: Directing your attention, you said you had some Las Vegas reports?
>
> A: Yes.
>
> Q: You had police reports from 1979?
>
> A: I believe I did. I would have to flip through and look for it if you want me to.
>
> [The Court]: Maybe if you ask —
>
> Q: Do you recall in 1979 an incident when [Wood] was arrested for some criminal activity?
>
> A: I think I found a report from '79 from Las Vegas.

[4] The Arizona Supreme Court determined that this line of questioning did not deprive Wood of a fair trial because "the prosecutor simply asked Dr. Allender to elaborate on the

reports he first mentioned on direct examination. The jury never learned the details of the conduct underlying Defendant's Las Vegas arrest." *Wood*, 881 P.2d at 1172. The court concluded that "[b]ecause Dr. Allender relied on the reports in forming his opinion of Defendant, the prosecutor's cross-examination was proper." *Id.* This brief mention of Wood's prior misdemeanor did not deprive him of a fair trial. The prosecutor referred to the misdemeanor only in passing during the examination and he did not mention it in his closing argument.

The trial court had granted a motion in limine excluding the introduction of this prior misdemeanor into evidence, and the Arizona Supreme Court determined that Wood would have been entitled to a limiting instruction that references to the police reports were admissible only to show the basis of Dr. Allender's opinions had he objected. *Id.* at 1172. But to the extent Wood argues this merits reversal, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

[5] The prosecutor's references to Wood's employment history, prior relationships, and self-centered relationship with Ms. Dietz also do not rise to the level of a due process violation. The Arizona Supreme Court properly concluded that the challenged testimony regarding Wood's employment history was merely "perfunctory and undetailed" such that "its admission d[id] not rise to the level of fundamental error." *Wood*, 881 P.2d at 1170. Similarly, the prosecutor's questions that elicited Wood's former girlfriend's testimony that Wood was unfaithful and Margaret Dietz's testimony that Wood was selfish in his relationship with Debra Dietz were also perfunctory and undetailed and they did not violate Wood's due process rights.

3

[6] The prosecutor did not commit prejudicial misconduct by cross-examining Dr. Allender about Wood's mental state.

Wood alleges that the prosecutor committed misconduct by improperly raising the issue of Wood's mental state at the time of the incident in the following line of questions:

> Q. Let me ask you, sir, I don't know, you are talking about impulsivity here today. Of the defendant. You said the defendant has a trait of acting impulsively?
>
> A. [Dr. Allender] That's my belief, yes.
>
> Q. Under the facts of this case as you understand them, sir, how would a person who was not impulsive have committed this offense?
>
> A. Had it been thought through and premeditated, then I would say it was not impulsive. I see impulsivity as acting without forethought.
>
> Q. Well, how would a non-impulsive person have committed this offense?
>
> A. I think they would have planned it out.
>
> Q. So what you are saying is that this wasn't planned out, from what you know about the facts of this case it wasn't planned?
>
> A. It is hard for me to say whether it is planned. Well, I think Mr. Wood behaved in a general sequence but given his lack of recall for the specific offense, it is hard for me to know whether this was planned out or not.

[7] The district court correctly concluded that this line of cross-examination did not warrant the grant of habeas relief. Even if the prosecutor's questions arguably touched on Wood's state of mind at the time of the crimes, Dr. Allender's answers did not. He merely testified that he was not certain

if Wood had planned the shootings. This testimony did not conflict with Wood's impulsivity theory and did not deprive Wood of a fair trial.

4

[8] The prosecutor did not commit prejudicial misconduct by cross-examining Mona Donovan, a mutual friend of Wood and Ms. Dietz, about Wood's mental state. On direct examination, Donovan testified that Wood sometimes acted impulsively. On cross-examination, the prosecutor asked Donovan about her pre-trial statement that Wood's anger increased as a situation worsened. Wood argues that the prosecutor committed misconduct by asking the following questions about an incident at Ms. Dietz's apartment:

> Q: When [Wood] trashed the apartment, he trashed the apartment to get some of his possessions and avenge his anger? I was reading the question [defense counsel] asked you on page 11, do you know why he broke in? Answer, to get some of his possessions, to avenge some of his anger by breaking possessions of [Ms. Dietz's]. Do you recall that?
>
> A: Yes.
>
> Q: In fact I think there was a telephonic interview that you gave to a legal assistant in my office on the 9th of October, do you recall when you were asked why he did that, indicating that he probably, he was probably very angry and did it out of spite?
>
> A: I don't recall the telephone conversation.
>
> Q: Does that sound like something you would say?
>
> A: I really don't know, I don't remember.

> Q: Would you agree with that statement?
>
> A: That he would do it out of spite?
>
> The Court: Let's quit asking this witness, the witness why this defendant did or didn't know why he did something, there's no way she could know it.
>
> Q: You indicated did you not that he avenged some of his anger by breaking and destroying some possessions of [Ms. Dietz's]?
>
> A: Yes.
>
> The Court: Did you hear what I just said, quit asking her about his mental state. Quit asking her about his mental state.
>
> Q: Well, when you say the word avenge, what do you mean by the word avenge? Do you mean to get revenge?
>
> A: Yeah, I guess so.

Wood contends the prosecutor committed misconduct by asking Ms. Donovan to speculate about Wood's mental state after the trial judge ruled that the question was improper. Because the Arizona Supreme Court did not address this claim on the merits, we review it *de novo*. *Stanley*, 633 F.3d at 860.

[9] The district court correctly concluded that the questioning did not violate Wood's right to a fair trial. Although the prosecutor should have dropped this line of questioning after the trial judge admonished him once, the improper follow-up question about Wood's mental state during an event unrelated to the killings was not so prejudicial that it rendered the trial fundamentally unfair. The fact that Wood had vandalized Ms.

Dietz's apartment had already been established. Additionally, the information elicited by the prosecutor was consistent with the defense theory that Wood was impulsive and had anger-control problems. Donovan's testimony regarding Wood's motives in vandalizing the apartment was only tangentially related to the issue of Wood's state of mind at the time of the shootings.

5

[10] Finally, the cumulative impact of each of the incidents of alleged prosecutorial misconduct did not violate Wood's right to a fair trial. Even when separately alleged incidents of prosecutorial misconduct do not independently rise to the level of reversible error, "[t]he cumulative effect of multiple errors can violate due process." *United States v. Nobari*, 574 F.3d 1065, 1082 (9th Cir. 2009) (internal quotation marks omitted). However, Wood's allegations of prosecutorial misconduct do not rise to the level of a due process violation even when considered in the aggregate.

B

Wood raises additional prosecutorial misconduct claims that the district court dismissed as procedurally defaulted. Wood claims that the prosecutor committed prejudicial misconduct by: (1) eliciting evidence that Wood was incarcerated while awaiting trial; (2) eliciting false testimony regarding the position of the bullets in the gun's cylinder; (3) impugning defense counsel's motives; and (4) eliciting inflammatory victim impact evidence. We affirm the district court's dismissal of these claims because they were not fairly presented to the state courts.

To fairly present a claim in state court, a petitioner must describe the operative facts supporting that claim. *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008); *see also Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S.

270, 275-78 (1971). Wood concedes that the specific facts underlying these claims were not presented on direct appeal, but he argues that they merely constitute additional particular instances of prosecutorial misconduct that do not fundamentally alter the claim raised on direct appeal. However, a general allegation that a prosecutor engaged in pervasive misconduct is not sufficient to alert a state court to separate specific instances of purported misconduct. *See Picard*, 404 U.S. at 275-78.

In the alternative, Wood argues that the first and last of these claims — that the prosecutor committed misconduct by eliciting evidence that Wood was incarcerated while awaiting trial and eliciting inflammatory victim impact evidence — were not defaulted because they were incorporated by reference to his state PCR petition in his petition for review.

The district court properly determined that these claims were not fairly presented to the Arizona Supreme Court. As the Supreme Court has explained:

> [O]rdinarily, a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as the lower court opinion in the case, that does so.

Baldwin v. Reese, 541 U.S. 27, 32 (2004).

Additionally, "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

[11] Arizona law requires that a petitioner present the issues and material facts supporting a claim in a petition for

review and prohibits raising an issue through incorporation of any document by reference, except for appendices. Ariz. R. Crim. P. 32.9(c)(1)(iv). Wood failed to comply with these requirements and thereby failed to fairly present these claims to the Arizona Supreme Court.

Finally, Wood argues that even if his false testimony claim is procedurally defaulted, the district court erred by not reaching the merits of this claim because failure to do so would cause a fundamental miscarriage of justice. To establish a "fundamental miscarriage of justice," Wood 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) (internal quotation marks omitted). He must demonstrate that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* As a result, the Supreme Court has noted that this exception "would remain 'rare' and would only be applied in the 'extraordinary case.' " *Id.* at 321.

[12] Wood does not meet this burden because considerable evidence of his premeditation was introduced at trial. The morning of the crime, Wood called the shop to determine whether Debra and Eugene Dietz were there and, although he regularly carried a gun with him, he brought more ammunition to the shop than was his habit. *Wood*, 881 P.2d at 1169. He waited to shoot Eugene until after Eugene had hung up the telephone, actively searched for Ms. Dietz, and held her before shooting her, stating, "I told you I was going to do it, I have to kill you." *Id.* Evidence was also introduced detailing Wood's history of violence against Ms. Dietz, as were taped messages in which Wood threatened her life. *Id.* at 1165 nn.1-2. Given this evidence against Wood, it is not more likely than not that no reasonable juror would have found him guilty of premeditated murder beyond a reasonable doubt.

III

The district court correctly determined that Wood was not entitled to habeas relief on his claims that he was denied

effective assistance of counsel at trial, sentencing, and on appeal.

To establish ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Deficient performance is established when "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In determining deficiency, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. at 689 (internal quotation marks omitted). To establish prejudice, Wood must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Under AEDPA review, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Richter*, 131 S. Ct. at 785.

Ineffective assistance of counsel at sentencing claims are also assessed according to the *Strickland* standard. 466 U.S. at 695. 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." *Id*. AEDPA's "objectively unreasonable" standard also applies to ineffective assistance of counsel at sentencing claims that are considered and denied by a state PCR court. *See Bell v. Cone*, 535 U.S. 685, 698-99 (2002).

A

The district court correctly dismissed Wood's claims that his trial counsel's performance was constitutionally ineffec-

tive. He contends that his trial counsel performed deficiently by inadequately investigating and preparing his mental health defense and failing to object to alleged instances of prosecutorial misconduct.

1

[13] Wood's counsel's investigation and preparation of Wood's mental health defense was not constitutionally ineffective. At trial, Wood conceded his role in the killings but argued that they were not premeditated because he had acted impulsively. *Wood*, 881 P.2d at 1166. Wood alleges that his counsel rendered ineffective assistance in asserting an impulsivity defense by failing to provide Dr. Allender with sufficient background material to testify effectively about his mental health at trial. The record indicates that counsel adequately prepared Dr. Allender for his testimony. At counsel's request, Dr. Allender thoroughly examined Wood over the course of two days. During these examinations, Dr. Allender administered several psychological tests and discussed Wood's drug and alcohol abuse, hospitalization history — including his history of head injuries — and the incident itself. Dr. Allender also reviewed psychological evaluations by Dr. Boyer, Dr. Morris, and Dr. Morenz, the three other mental health experts who also examined Wood. Each of these evaluations discussed Wood's personal history of alcohol abuse, his suicide attempts, and his head injuries. Given this background preparation, Dr. Allender was prepared to testify about Wood's mental state.

Furthermore, Wood has not demonstrated prejudice. Counsel presented an impulsivity defense and Wood has not demonstrated a reasonable probability that a different or more comprehensive presentation of that defense would have resulted in a different verdict, especially in the face of the overwhelming evidence of premeditation. *See Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995). Thus, the PCR

court did not unreasonably apply *Strickland* when it rejected this claim.

2

[14] The district court properly rejected Wood's claims that his trial counsel was constitutionally ineffective for failing to object to the alleged incidents of prosecutorial misconduct. The PCR court did not unreasonably apply *Strickland* in determining that Wood failed to demonstrate prejudice. Many of counsel's decisions not to object at trial were consistent with his presentation of an impulsivity defense. For example, evidence elicited by the prosecutor concerning instances of Wood's erratic behavior was consistent with the strategy of offering Wood's impulsive personality as a defense to the element of premeditation. *See Wood*, 881 P.2d at 1170. Additionally, the jury's finding of premeditation was supported by strong evidence at trial. *See Wood*, 881 P.2d at 1169. In light of this evidence, Wood has not demonstrated a reasonable probability that the result of the trial would have been different had defense counsel objected to the alleged instances of prosecutorial misconduct.

B

[15] The district court also properly dismissed as procedurally defaulted Wood's claim that his trial counsel was constitutionally ineffective for failing to impeach three witnesses. Wood claims that his trial counsel rendered ineffective assistance by failing to impeach Anita Sueme, Eric Thompson, and Donald Dietz for allegedly giving prior statements inconsistent with their trial testimony. We affirm the district court's dismissal of this claim because it was not fairly presented to the state courts.

To fairly present a claim in state court, a petitioner must describe the operative facts supporting that claim. *Davis*, 511 F.3d at 1009; *see also Anderson*, 459 U.S. at 6; *Picard*, 404

U.S. at 275-78. Wood concedes that he did not raise these particular claims on direct appeal, but as with some of his claims of prosecutorial misconduct, *see supra* Section II.B, he argues that they merely constitute additional particular instances of ineffective assistance of counsel that do not fundamentally alter the claim raised on direct appeal. However, as with the claims of prosecutorial conduct discussed previously, a general allegation of ineffective assistance of counsel is not sufficient to alert a state court to separate specific instances of ineffective assistance. *See Picard*, 404 U.S. at 275-78.

C

The district court did not err in denying Wood's claim that his counsel failed to effectively assist him at sentencing. Specifically, Wood contends that his counsel failed to prepare and present evidence of his diminished capacity, failed to prepare him for his pre-sentence interview, and failed to assert his military service as a mitigating factor.

1

Wood argues that his counsel failed to properly marshal evidence of Wood's personality changes following head injuries and his social background, including his alcoholism and mental illness. However, information regarding each of these issues was put before the trial court. Evidence of Wood's reported head injuries was presented through Dr. Allender's testimony during the guilt stage of the trial. Dr. Allender testified that Wood's head injuries did not cause a significant behavioral change. Wood's head injuries were also discussed in the other mental health experts' Rule 11 reports.

[16] Counsel was not ineffective for failing to present additional evidence and argument at sentencing about Wood's head injuries because it had already been presented at trial. *See Bell*, 535 U.S. at 699-700. Additional evidence of Wood's social background, including his history of substance abuse,

was also presented at sentencing by Dr. Breslow, a psychiatric chemical dependency expert. Dr. Breslow reviewed Wood's medical and military records, statements from trial witnesses, and the mental-health evaluations prepared by Dr. Morris, Dr. Morenz, and Dr. Allender. He testified that Wood suffers from alcohol, stimulant, amphetamine, and cocaine dependencies. He explained that Wood's substance abuse had a profound effect on Wood's personality by impairing his judgment, making him more impulsive, and likely impacting his behavior at the time of the killings. Thus, counsel developed and presented this mitigating evidence in detail and the PCR court reasonably rejected Wood's claim.

[17] Wood also argues that his counsel never requested or acquired an in depth neurological evaluation. However, the PCR court found that Wood's counsel requested a brain mapping test, on Dr. Breslow's recommendation, although that request was denied by the trial court. Counsel attempted to acquire the recommended evaluation and his failure to obtain it does not render his performance constitutionally ineffective.

2

[18] The district court properly concluded that the PCR court reasonably denied Wood's ineffective assistance of counsel claim that his counsel failed to prepare him for his pre-sentence interview. Wood argues that he was not adequately prepared because he did not express remorse for his actions in his interview with the probation officer. But Wood included expressions of remorse in a letter delivered by counsel to the sentencing judge. The record also indicates that the court did not consider Wood's lack of remorse in the presentence report as a factor in his sentence. Therefore, Wood does not demonstrate prejudice from counsel's performance because he "has failed to show that the information relative to remorse contained in the pre-sentence report had any effect on the sentencing court's decision to impose the death penalty." *Clark v. Ricketts*, 958 F.2d 851, 857-58 (9th Cir. 1991).

3

[19] The district court properly concluded that the PCR court reasonably denied Wood's ineffective assistance of counsel claim on the ground that his counsel did not explicitly present his military service as a mitigating factor in sentencing. Counsel presented Wood's military records for consideration by the trial court and the sentencing judge is presumed to have known and applied the law correctly, which meant giving consideration to this mitigating evidence.

4

The district court did not err in concluding that the PCR court reasonably denied Wood's claim that the cumulative effect of trial counsel's deficiencies entitles him to a new trial and sentencing proceeding. "Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003) (citations omitted). Wood's assertion of cumulative error fails because his individual claims of his counsel's errors at trial and sentencing are not supportable, and they do not entitle him to relief even when aggregated.

D

The district court correctly denied Wood's claim that he was denied effective assistance of counsel because one of his appellate attorneys had an alleged conflict of interest, but did not withdraw from representation. Wood did not raise this particular ineffective assistance claim on direct appeal or in his PCR proceedings, so the district court dismissed it as unexhausted and procedurally defaulted.

IV

[20] The district court properly denied Wood's claim that the state trial court erred by denying Wood's request for fund-

ing to obtain a neurometric brain mapping test. The district court dismissed this claim as procedurally defaulted because Wood did not fairly present it to the state courts. Wood contends that he properly exhausted this claim by presenting it to the Arizona Supreme Court on direct appeal and by presenting it in post-conviction proceedings. He also contends that the Arizona Supreme Court necessarily considered this claim during its independent sentencing review.

Wood did not exhaust his claim on direct review. Wood discussed the denial of the funding request only in his description of the trial court's proceedings; he did not argue that the denial of the funding request violated his constitutional rights. This passing reference was not sufficient to fairly alert the Arizona Supreme Court to this claim. *See Castillo v. McFadden*, 399 F.3d 993, 1002-03 (9th Cir. 2004).

Wood also did not properly exhaust this claim in post-conviction proceedings. Although Wood raised this claim in the PCR petition, he did not include it in his petition for review to the Arizona Supreme Court. Wood argues that he incorporated his PCR petition by reference into his petition for review before the Arizona Supreme Court. Again, as discussed in Part II.B of this opinion, this incorporation by reference was not a sufficient method of fairly presenting this claim to the Arizona Supreme Court. *See Baldwin*, 541 U.S. at 32.

The Arizona Supreme Court's independent sentencing review did not serve to exhaust this claim. In capital cases, the Arizona Supreme Court independently reviews the facts that established the aggravating and mitigating factors in order to justify the sentence imposed. *Correll v. Ryan*, 539 F.3d 938, 951 (9th Cir. 2008). However, this independent review does not necessarily exhaust all claims of constitutional error. *See Moormann v. Schriro*, 426 F.3d 1044, 1057-58 (9th Cir. 2005). We agree with the district court that the Arizona Supreme Court would not necessarily consider whether the

trial court's denial of a funding request limited Wood's ability to present mitigating evidence.

V

[21] Finally, the district court did not abuse its discretion by denying Wood's request for an evidentiary hearing, evidentiary development, and expansion of the record. During PCR proceedings, Wood requested, but did not receive, an evidentiary hearing on his ineffective assistance of counsel claims. The district court concluded that Wood may have diligently attempted to develop the factual basis for his claims, but the district court still denied these requests under 28 U.S.C. § 2254(e)(2) after determining that Wood had not alleged the existence of disputed facts which, if true, would entitle him to relief.

Wood contends that he was prejudiced by counsel's deficient handling of mental health evidence at the guilt and sentencing stages of trial. However, the record details counsel's performance, including his effort to investigate, prepare, and present a guilt-stage defense based on Wood's character trait of impulsivity. Therefore, Wood is not entitled to an evidentiary hearing because his ineffective assistance of counsel claims can be "resolved by reference to the state court record." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) (citations omitted). Furthermore, Wood is not entitled to an evidentiary hearing or additional discovery in federal court because this ineffective assistance of counsel claim is governed by 28 U.S.C. § 2254(d)(1), as it was adjudicated on the merits in the PCR proceedings. Review of such claims "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1398 (2011).

VI

[22] For these reasons, we therefore affirm the district court's denial of Wood's habeas petition and request for an evidentiary hearing.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

FILED

SEP 04 2012

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH RUDOLPH WOOD, III, Petitioner - Appellant, v. CHARLES L. RYAN, interim Director, Arizona Department of Corrections, Respondent - Appellee.	No. 08-99003 D.C. No. 4:98-CV-00053-JMR District of Arizona, Tucson ORDER

Before: THOMAS, GOULD, and BYBEE, Circuit Judges.

The motion to remand this appeal to the district court is DENIED.

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Joseph Rudolf Wood, III, Petitioner, vs. Dora B. Schriro, et al., Respondents.	No. CV-98-053-TUC-JMR DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Petitioner Joseph Rudolf Wood, III, filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, alleging that he is imprisoned and sentenced in violation of the United States Constitution. (Dkt. 23.)[1] In an Order dated March 3, 2006, the Court found that the following claims were properly exhausted and would be addressed on the merits: 1-B(1); 1-B(2)(a)-(d); 1-B(5); 1-B(7); 1-C (in part); 5; 9; 10-B; 10-C(1)(a), (b), (c), (e), and (f); 10-C(3)(a), (b), and (d); 10-D (in part); and 11-B (in part). (Dkt. 63.) The parties have completed their briefing on the merits of these claims. (Dkts. 69, 74, 78.) The Court has considered the claims and, for the reasons set forth herein, determines that Petitioner is not entitled to relief.

BACKGROUND

Petitioner shot and killed his estranged girlfriend, Debra Dietz, and her father, Eugene Dietz, on August 7, 1989, at a Tucson automotive paint and body shop owned and operated

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

by the Dietz family. The Arizona Supreme Court provided the following description of the events surrounding the crimes:

> Since 1984, Defendant and Debra had maintained a tumultuous relationship increasingly marred by Defendant's abusive and violent behavior. Eugene generally disapproved of this relationship but did not actively interfere. In fact, the Dietz family often included Defendant in dinners and other activities. Several times, however, Eugene refused to let Defendant visit Debra during business hours while she was working at the shop. Defendant disliked Eugene and told him he would "get him back" and that Eugene would "be sorry."
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> Debra had rented an apartment that she shared with Defendant. Because Defendant was seldom employed, Debra supported him financially. Defendant nevertheless assaulted Debra periodically. She finally tried to end the relationship after a fight during the 1989 July 4th weekend. She left her apartment and moved in with her parents, saying "I don't want any more of this." After Debra left, Defendant ransacked and vandalized the apartment. She obtained an order of protection against Defendant on July 8, 1989. In the following weeks, however, Defendant repeatedly tried to contact Debra at the shop, her parents' home, and her apartment.
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> Debra and Eugene drove together to work at the shop early on Monday morning, August 7, 1989. Defendant phoned the shop three times that morning. Debra hung up on him once, and Eugene hung up on him twice. Defendant called again and asked another employee if Debra and Eugene were at the shop. The employee said that they had temporarily left but would return soon. Debra and Eugene came back at 8:30 a.m. and began working in different areas of the shop. Six other employees were also present that morning.
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> At 8:50 a.m., a Tucson Police officer saw Defendant driving in a suspicious manner near the shop. The officer slowed her patrol car and made eye contact with Defendant as he left his truck and entered the shop. Eugene was on the telephone in an area where three other employees were working. Defendant waited for Eugene to hang up, drew a revolver, and approached to within four feet of him. The other employees shouted for Defendant to put the gun away. Without saying a word, Defendant fatally shot Eugene once in the chest and then smiled. When the police officer saw this from her patrol car she immediately called for more officers. Defendant left the shop, but quickly returned and again pointed his revolver at the now supine Eugene. Donald Dietz, an employee and Eugene's seventy-year-old brother, struggled with Defendant, who then ran to the area where Debra had been working.
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> Debra had apparently heard an employee shout that her father had been shot and was trying to telephone for help when Defendant grabbed her around the neck from behind and placed his revolver directly against her chest. Debra struggled and screamed, "No, Joe, don't!" Another employee heard Defendant say, "I told you I was going to do it, I have to kill you." Defendant then called Debra a "bitch" and shot her twice in the chest.
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> Several police officers were already on the scene when Defendant left

> the shop after shooting Debra. Two officers ordered him to put his hands up. Defendant complied and dropped his weapon, but then grabbed it and began raising it toward the officers. After again ordering Defendant to raise his hands, the officers shot Defendant several times.

State v. Wood, 180 Ariz. 53, 60-61, 881 P.2d 1158, 1165-66 (1994) (footnotes omitted).

Petitioner was indicted on two counts of first degree murder and two counts of aggravated assault against the officers. At trial Petitioner did not dispute his role in the killings. His defense was that he had acted impulsively and without premeditation. He also disputed the motive ascribed to him by the prosecution, that he attacked the Dietzes because he was upset that Debra Dietz had ended their relationship.

The jury convicted Petitioner on all counts. The court sentenced him to death for the murders based on two aggravating circumstances, that Petitioner was convicted of one or more other homicides during the commission of the offenses, pursuant to A.R.S. § 13-703(F)(8), and that in the commission of the offenses he knowingly created a grave risk of death to another person, under § 13-703(F)(3).

Petitioner's convictions and sentences were affirmed on direct appeal. *Wood*, 180 Ariz. 53, 881 P.2d 1158. Petitioner filed a motion for reconsideration, which was summarily denied. The United States Supreme Court subsequently denied certiorari. *Wood v. Arizona*, 515 U.S. 1147 (1995).

On March 1, 1996, Petitioner filed a petition for post-conviction relief ("PCR") pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. (ROA-PCR 310.)[2] On June

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[2] "ROA-PCR" refers to the page number of documents filed in the Arizona Supreme Court during Petitioner's petition for review (Case No. CR 97-0377-PC). "ROA" refers to the documents filed in the Arizona Supreme Court during Petitioner's direct appeal (Case No. CR 91-0233-AP). "ME" refers to the minute entries of the trial court. "RT" refers to the court reporter's transcripts. Original reporter's transcripts and certified copies of the appellate and post-conviction records were provided to this Court by the Arizona Supreme Court on July 3, 2000. (Dkt. 47.)

6, 1997, that petition was denied.[3] (ME 6/6/97.) The Arizona Supreme Court summarily denied a petition for review. Petitioner thereafter commenced this action.

AEDPA STANDARD FOR RELIEF

Petitioner's habeas claims are governed by the applicable provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh*, 521 U.S. at 333 n.7).

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

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

28 U.S.C. § 2254(d).

The phrase "adjudicated on the merits" refers to a decision resolving a party's claim which is based on the substance of the claim rather than on a procedural or other non-substantive ground. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04

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[3] Pima County Superior Court Judge Thomas Meehan presided over Petitioner's trial and sentencing. Following Judge Meehan's death, the case was reassigned to Judge Howard Hantman, who presided over the PCR proceedings.

(1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 127 S. Ct. 649, 653 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381; *see Musladin*, 127 S. Ct. at 654; *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004). Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark*, 331 F.3d at 1069.

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

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Landrigan*, 127 S. Ct. at 1939; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Landrigan*, 127 S. Ct. at 1939-40; *Miller-El II*, 545 U.S. at 240. However, it is only the state court's factual findings, not its ultimate decision, that are subject to § 2254(e)(1)'s presumption of correctness. *Miller-El I*, 537 U.S. at 341-42 ("The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.").

As the Ninth Circuit has noted, application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale.

See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. *Pirtle*, 313 F.3d at 1167 (citing *Delgado*, 223 F.3d at 981-82); *see also Himes*, 336 F.3d at 853. Only when a state court did not decide the merits of a properly raised claim will the claim be reviewed de novo, because in that circumstance "there is no state court decision on [the] issue to which to accord deference." *Pirtle*, 313 F.3d at 1167; *see also Menendez v. Terhune*, 422 F.3d 1012, 1025-26 (9th Cir. 2005); *Nulph v. Cook*, 333 F.3d 1052, 1056-57 (9th Cir. 2003).

DISCUSSION

In addition to the standards discussed above, the Court's review of Petitioner's claims is guided by two fundamental, related principles. The first of these concerns the limited role of habeas review and recognizes that "[d]irect review is the principal avenue for challenging a conviction." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). Therefore, as the Supreme Court has explained:

> When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

The second principle is that, in the context of habeas review, an error at trial is harmless unless it had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Therefore, trial errors are often found harmless where the record is replete with overwhelming evidence of the petitioner's guilt. *See Neder v. United States*,

527 U.S. 1, 18-19 (1999).

As noted, in the instant case premeditation was the only contested issue with respect to the first degree murder charges.[4] This Court agrees with the Arizona Supreme Court's finding that the element of premeditation was supported by a "clear quantum of evidence." *Wood*, 180 Ariz. at 65, 881 P.2d at 1170. Thus, the Court's analysis of Petitioner's conviction-related claims is informed by the strength of the evidence of his guilt of first degree murder.

I. Prosecutorial Misconduct

Petitioner alleges that the prosecutor engaged in prejudicial misconduct throughout his trial in violation of his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments. The appropriate standard of federal habeas review for a claim of prosecutorial misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)) (petitioner not entitled to relief in the absence of a due process violation even if the prosecutor's comments were "undesirable or even universally condemned"). Therefore, in order to succeed on these claims, Petitioner must prove not only that the prosecutor's remarks and other conduct were improper but that they

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[4] Under A.R.S. § 13-1105(A)(1), "A person commits first degree murder if: Intending or knowing that the person's conduct will cause death, the person causes the death of another person . . . with premeditation." A defendant kills with premeditation if he "acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion." A.R.S. § 13-1101(1). A period of reflection of "any length of time" after forming the intent to kill is sufficient to show premeditation. *Clabourne v. Lewis*, 64 F.3d 1373, 1380 (9th Cir. 1995). Premeditation may be proven by circumstantial evidence, including "threats made by the defendant to the victim, a pattern of escalating violence between the defendant and the victim, or the acquisition of a weapon by the defendant before the killing." *State v. Thompson*, 204 Ariz. 471, 479, 65 P.3d 420, 428 (2003) (because premeditation can rarely be established by direct evidence, "the state may use all circumstantial evidence at its disposal to prove premeditation").

"so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*; *see Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (relief on such claims is limited to cases in which the petitioner can establish that prosecutorial misconduct resulted in actual prejudice) (citing *Brecht v. Abrahamson*, 507 U.S. at 637-38); *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor").

A. Cross-Examination of Dr. Allender re: Hypnosis & Truth Serum

Petitioner alleges in Claim 1-B(1) that the prosecutor engaged in misconduct during his cross-examination of Petitioner's mental health expert, Dr. James Allender, a neuropsychologist, by asking Dr. Allender if he had used hypnosis or "truth serum" to assess whether Petitioner's reported amnesia regarding the crime was genuine. (Dkts. 24 at 4-20, 69 at 5-7.) Petitioner contends that this line of inquiry was improper because it included questions about Petitioner's failure to take tests whose results were inadmissible, invited the jury to make inferences about that failure, and constituted an improper comment on his right to remain silent and not to inculpate himself under the Fifth Amendment.

Background

Prior to trial, defense counsel moved for a Rule 11 competency examination. (ROA 33.) Dr. Catherine Boyer, a psychologist, conducted a pre-Rule 11 evaluation and prepared a report. (ROA-PCR 1212-18.) Larry Morris, a psychologist, and Barry Morenz, a psychiatrist, conducted Rule 11 examinations. (ROA-PCR 1220-26, 1228-31.) Drs. Morris and Morenz concluded that Petitioner was competent to stand trail. (*Id.*) Both experts noted that Petitioner reported no memory of the events surrounding the shootings. (*Id.*) Dr. Morris opined that the memory loss could have been the result of a dissociative episode, induced by the trauma of the shootings, or the product of malingering. (*Id.* at 1225-26.) Dr. Morris indicated that he was "unable to differentiate between these possibilities" but that "[p]erhaps an additional examination using hypnosis or an amobarbital interview may assist in this

regard." (*Id.* at 1226.)

Petitioner maintained that he had no memory of the events surrounding the shootings. To support the theory that he acted impulsively and without premeditation in killing the victims, Petitioner presented the testimony of Dr. Allender. Dr. Allender testified that he could eliminate "organicity" or "brain damage" as the cause of Petitioner's purported memory loss. (RT 2/22/91 at 153.) He then explained:

> I think the two most probable explanations for the memory gap would then be either an unconscious defense mechanism where he's trying to repress negative events and therefore he can't remember them. Or an alternative explanation is that he is malingering or he's faking it because it might be to his advantage to not remember and he may think it is to his advantage not to remember.

(*Id.*) When asked by defense counsel whether he believed that Petitioner's memory loss was genuine, Dr. Allender replied:

> I think it is difficult for me to really separate out whether it is an unconscious process that causes him to keep the memories out of his awareness or whether it is something that he thinks it is to his advantage to not talk about. For me it is difficult to be conclusive on one side of the fence or the other. I think there was evidence in testing that he has this denial and repression as a mechanism that he used at times, it is hard to say he's using it specifically at this time.

(*Id.* at 153-54.)

On cross-examination, the prosecutor engaged Dr. Allender in the following colloquy concerning the authenticity of Petitioner's reported memory loss:

> Q. There are other tests available are there not to assist you in attempting to ascertain if someone is being truthful?
>
> A. There are some tests, the MMPI has a subscale that looks at an individual's approach to the testing.
>
> Q. And in fact you had the opportunity to read Dr. Morris's report?
>
> A. I did and I got the raw data for his MMPI.
>
> Q. Didn't Dr. Morris suggest that hypnosis or amobarbital might be ideal to discover whether this defendant was malingering?
>
> A. He suggested that those might be techniques.

Q. With hypnosis, you place them under hypnosis in order to find out what the truth of the matter was?

A. What the theory would be is if it is an unconscious process, that you can probably do hypnosis or use the sodium amobarbital to get past the conscious defense or unconscious defense mechanisms.

Q. So you didn't, did you attempt, did you request a hypnosis evaluation?

A. I didn't because I'm not as convinced about those techniques as Dr. Morris.

Q. Amobarbital, is that a truth serum?

A. That is what they call it, that is what people have called it along the way.

(*Id.* at 173-74.) The prosecutor then moved on to questions about the tests Dr. Allender did administer. Petitioner did not testify.

Analysis

On direct appeal, the Arizona Supreme Court held that the prosecutor's cross-examination of Dr. Allender did not constitute misconduct. The court noted that the prosecutor's questions about hypnosis and "truth serum" were in reference to techniques suggested by Dr. Morris. In rejecting this claim, the court explained:

> Defendant claims this exchange prejudiced him much like questioning a defendant about refusing to take a polygraph test. It is true that, as with polygraph test results, courts generally exclude testimony induced or "refreshed" by drugs or hypnosis. *Jeffers*, 135 Ariz. at 431, 661 P.2d at 1132; *State v. Mena*, 128 Ariz. 226, 228-29, 624 P.2d 1274, 1276-77 (1981). Defendant's analogy, however, is misguided. The prosecutor's cross-examination was not intended to impugn Defendant but to test the basis and credibility of Dr. Allender's opinions concerning whether Defendant was faking his asserted memory loss at the time of the murders. Dr. Morris had examined Defendant and recommended the disputed testing. Dr. Allender relied in part on Dr. Morris's written evaluation in forming his own opinions about Defendant. Without reaching the issue of admissibility of expert testimony based upon the results of hypnotic or amobarbital examination of a subject, we conclude the prosecutor acted within the wide latitude permitted on cross-examination. *Stabler*, 162 Ariz. at 374, 783 P.2d at 820.

Wood, 1180 Ariz. at 67-68, 881 P.2d at 1172-72.

This decision was neither contrary to nor an unreasonable application of clearly established federal law. As the Arizona Supreme Court noted, this portion of the

prosecutor's cross-examination was intended to test the credibility of Dr. Allender's testimony about the cause of Petitioner's reported memory loss. *Id.* In conducting the cross-examination, the prosecutor questioned Dr. Allender about the information he had reviewed, including Dr. Morris's report, which recommended that Petitioner's claim of memory loss be subjected to testing through hypnosis or amobarbital. (*Id.*; *see* RT 2/22/91 at 173-74.) Because Dr. Allender had relied on Dr. Morris's report, the prosecutor was attempting to discover the reasons Dr. Allender did not pursue the testing recommended by Dr. Morris. The issue addressed by the prosecutor's questions was whether Petitioner was malingering with respect to his claim of memory loss; the issue was not the ultimate one of Petitioner's state of mind at the time of the shootings and whether he truly acted impulsively rather than with premeditation. Because he claimed no memory of the events, the truthfulness of his version of the shootings was never an issue; therefore, the prosecutor's questions about truth serum and hypnosis were not a challenge to Petitioner's theory of impulsivity. If, as Petitioner asserts, the prosecutor was not referring to the truth-seeking methods described in Dr. Morris's report, but instead was simply trying to prejudice Petitioner with references to inadmissible information, presumably he also would have asked Dr. Allender why he did not subject Petitioner to a polygraph examination.

For the same reason, the prosecutor's cross-examination of Dr. Allender did not implicate Petitioner's Fifth Amendment rights or prejudice his fair trial rights. The prosecutor's questions did not violate Petitioner's right to remain silent. Petitioner did not testify at trial; nor could he have given testimony concerning the central issue in the case – his state of mind at the time of the shootings – because he asserted that he had no memory of those events. Nothing in the prosecutor's examination of Dr. Allender on the issue of memory loss could have altered that circumstance.

Petitioner contends that the answers prompted by the prosecutor's improper questions left the jury with the impression that Dr. Allender "was either incompetent or attempting to

deceive them by failing to gather evidence that would have greatly informed their decision." (Dkt. 69 at 7.) To the contrary, in answering the prosecutor's questions, Dr. Allender supplied the reasonable explanation that he did not employ hypnosis or administer amobarbital because he was skeptical of those techniques. (RT 2/22/91 at 174.) In addition, despite his equivocations about the cause of Petitioner's memory loss, Dr. Allender testified in support of the key defense theory, that Petitioner acted on impulse rather than with reflection when he shot the victims. In his testimony, Dr. Allender described the tests he administered to Petitioner. He then expressed his conclusion that Petitioner "appeared to be an individual that would act in an impulsive fashion, responding more to emotions rather than thinking things out" (*id.* at 153), adding that "[t]here's no doubt in my mind that he will act impulsively" (*id.* at 190). He further testified that Petitioner "demonstrate[d] a tendency to have his reality testing deteriorate when faced with emotionally charged stimuli"; in such situations, "his judgment and interpretation of events would become clouded." (*Id.* at 152.) Moreover, Dr. Allender's opinion concerning Petitioner's impulsiveness was supported by the testimony of several lay witnesses. (*See*, *e.g.*, RT 2/22/91 at 59-60, 72, 80, 88.)

Petitioner's due process and Fifth Amendment rights were not violated by the prosecutor's cross-examination of Dr. Allender. The decision of the Arizona Supreme Court denying this claim was neither contrary to nor an unreasonable application of clearly established federal law.

B. Bad Character Evidence

Petitioner alleges in Claim 1-B(2) that the prosecutor engaged in misconduct by eliciting inadmissible "bad character" evidence that Petitioner (a) had previously been arrested, (b) had a bad employment record, (c) had been unfaithful to his girlfriends, and (d) had a self-centered relationship with Debra Dietz. (Dkts. 24 at 20-29, 69 at 7-9.) Respondents contend, inter alia, that none of this evidence prejudiced Petitioner because it was not inconsistent with, and in some cases supported, the defense theory based on

Petitioner's character trait of impulsivity. (Dkt. 74 at 13.)

Of these allegations, the Arizona Supreme Court addressed only the first – i.e., the prosecutor's allusion to Petitioner's prior conviction – as a claim of prosecutorial misconduct. The state supreme court, adopting the analytical framework suggested by Petitioner's opening appellate brief, addressed the remaining allegations as claims of evidentiary error. For the purposes of this Court's analysis, however, the same standard applies whether the claim is that Petitioner's rights were violated by the "court's action in admitting the evidence [or] the prosecutor's action in presenting the evidence." *Sweet v. Delo*, 125 F.3d 1144, 1154 (8th Cir. 1997). The issue is whether the prosecutor's conduct – which resulted in the admission of the challenged testimony – deprived Petitioner of a fair trial.[5] *Id.*

As described in more detail below, along with the applicable principles of habeas review and the provisions of the AEDPA, several factors lead to the conclusion that Petitioner was not deprived of a fair trial and is not entitled to habeas relief. First, there was strong evidence that the killings were premeditated. *See Wood*, 180 Ariz. at 63-64, 881 P.2d at 1168-69. In addition, under the defense theory of impulsivity, much of the evidence concerning Petitioner's prior conduct was not harmful to his case and was in fact consistent with the presentation of Petitioner as an individual who was quick to anger and acted reflexively. Finally, the harmful effect of the contested testimony was limited by the fact that Petitioner's credibility was not an issue; he did not testify at trial and did not remember the events surrounding the shootings. *See Hodge v. Hurley*, 426 F.3d 368, 388 (6th Cir. 2005) (noting that "derogatory statements and bad-character arguments are particularly likely to be prejudicial in a case . . . depending almost entirely on a determination of whether the

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[5] Because there is no state court ruling on these claims, this Court's review is de novo. *Pirtle*, 313 F.3d at 1167. The same standard applies to the remaining prosecutorial misconduct claims, Claims 1-B(5), 1-B(7), and 1-C.

defendant or an accuser is a more credible witness").

Prior Arrest

Defense counsel filed and the trial court granted a motion in limine to exclude evidence of Petitioner's prior conviction. (ROA 191-201; ME 2/19/91 at 2.) On direct examination, counsel asked Dr. Allender what materials he had reviewed in preparing to examine Defendant. Dr. Allender replied, in part, "a variety of police reports from the Tucson Police Department, as well as from the Las Vegas Police Department." (RT 2/22/91 at 146.) During the prosecutor's cross-examination of Dr. Allender, the following exchange occurred:

> Q. Directing your attention, you said you had some Las Vegas police reports?
>
> A. Yes.
>
> Q. You had police reports from 1979?
>
> A. I believe I did. I would have to flip through and look for it if you want me to.
>
> Q. Do you recall in 1979 an incident when he was arrested for some criminal activity?
>
> A. I think I found a report from '79 from Las Vegas.

(RT 2/22/91 at 161.) There was no further testimony concerning the incident.

The Arizona Supreme Court found that Petitioner was not entitled to relief based upon this line of questioning:

> Defendant alleges this was improper because the trial court had ruled inadmissible Defendant's 1979 Las Vegas misdemeanor assault conviction. On cross-examination, however, the prosecutor simply asked Dr. Allender to elaborate on the reports he first mentioned on direct examination. The jury never learned the details of the conduct underlying Defendant's Las Vegas arrest. Because Dr. Allender relied on the reports in forming his opinion of Defendant, the prosecutor's cross-examination was proper.
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> Defendant was entitled, however, to a limiting instruction that references to the Las Vegas police reports were admissible only to show the basis of Dr. Allender's opinions. *See Lundstrom*, 161 Ariz. at 148, 776 P.2d at 1074. Defense counsel did not request such an instruction. On this record, we conclude that the absence of such an instruction did not deprive Defendant of a fair trial. There was no fundamental error.

Wood, 180 Ariz. at 66, 881 P.2d at 1171.

This ruling does not entitle Petitioner to habeas relief. In general, state law matters, including a trial court's evidentiary rulings, are not proper grounds for habeas corpus relief. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (internal quotation omitted); *see Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). The Arizona Supreme Court having determined that the cross-examination was proper, this Court's role is limited to deciding whether admission of the testimony was so prejudicial as to offend due process.

The United States Supreme Court has "very narrowly" defined the category of infractions that violate the due process test of fundamental fairness. *Dowling v. United States*, 493 U.S. 342, 352 (1990). Pursuant to this narrow definition, the Court has declined to hold, for example, that evidence of other crimes or bad acts is so extremely unfair that its admission violates fundamental conceptions of justice. *Estelle v. McGuire*, 502 U.S. at 75 & n.5; *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). Thus, there is no clearly established Supreme Court precedent which holds that a state violates due process by admitting evidence of prior bad acts. *See Bugh v. Mitchell*, 329 F.3d 496 (6th Cir. 2003). In *Bugh*, the Sixth Circuit held that the state court decision allowing admission of evidence pertaining to the petitioner's alleged prior, uncharged acts of child molestation was not contrary to clearly established Supreme Court precedent because there was no such precedent holding that the state violated due process by permitting propensity evidence in the form of other bad acts evidence. *Id.* at 512-13; *see also Alberni v. McDaniel*, 458 F.2d 860, 863 (9th Cir. 2006) (no clearly established federal law forbidding the use of propensity evidence as violative of due process, citing *Estelle v. McGuire*, 502 U.S. at 75 n.5).

The admission of testimony alluding to the Las Vegas arrest did not violate

Petitioner's due process rights.

Behavioral Evidence

As noted above, the Arizona Supreme Court did not specifically address these allegations as claims of prosecutorial conduct. Instead, the claims were raised and rejected as instances evidentiary error, with the supreme court holding that the testimony was either properly admitted or did not prejudice Petitioner. For example, the court addressed and denied the claim that the trial court erroneously admitted information concerning Petitioner's employment history:

> On appeal, Defendant objects for the first time to the admission of testimony revealing that Defendant had been fired from two jobs, once for fighting with a co-worker and once due to his "temperament." Because these claims were not raised below, we review only for fundamental error. *West*, 176 Ariz. at 445, 862 P.2d at 204. Arguably, this testimony concerns prior bad acts inadmissible under Rule 404. The state claims Defendant made a tactical decision not to object to the testimony because it tended to show Defendant's impulsivity. We decline to resolve the issue, however, because even if the testimony was erroneously admitted, its admission does not rise to the level of fundamental error. The testimony in both instances was perfunctory and undetailed. Moreover, there was other compelling evidence of Defendant's ill temper, much of it introduced by Defendant himself on the issue of impulsivity.

Id. at 65, 881 P.2d at 1170.

The supreme court's characterization of evidence concerning Petitioner's checkered employment history applies as well to the admission of testimony that Petitioner was "self-centered," discourteous, and unfaithful to Debra Dietz. Such evidence did not deny Petitioner a fair trial. Given the defense argument that Petitioner had no motive to kill Ms. Dietz because their relationship was intact, information concerning the nature of that relationship was relevant. In addition, evidence concerning other aspects of Petitioner's behavior toward Ms. Dietz was not overly prejudicial when viewed in the context of properly-admitted evidence that Petitioner was physically abusive and that she feared him and wanted to end the relationship. *Wood*, 180 Ariz. at 62, 881 P.2d at 1167; *see also Ortiz v. Stewart*, 149 F.3d 923, 934-37 (9th Cir. 1998) (alleged incidents of prosecutorial

misconduct, including "inflammatory" questioning of a child witness about her fear of the petitioner, did not render the proceedings fundamentally unfair when viewed in the "larger context" of the trial). Furthermore, the prosecutor's conduct was far less egregious than that which occurred in *Washington v. Hofbauer*, 228 F.3d 689, 699-701 (6th Cir. 2000), relied on by Petitioner, where the prosecutor not only attacked the defendant's character but repeatedly misrepresented crucial facts and vouched for the credibility of the witnesses whose testimony was the sole evidence of the defendant's guilt. Finally, any prejudice from the admission of the contested evidence was reduced by the testimony of other witnesses who indicated that Petitioner and Debra Dietz had a loving relationship and that she willingly provided him financial support. (RT 2/22/91 at 91.) Therefore, Petitioner is not entitled to relief on this claim.

C. Cross-Examination of Dr. Allender re: Mental State

Petitioner alleges in Claim 1-B(5) that the prosecutor improperly questioned Dr. Allender about Petitioner's mental state at the time of the crime. (Dkts. 24 at 37-40, 69 at 9-10.) This claim refers to the following portion of the prosecutor's cross-examination of Dr. Allender:

> Q. Let me ask you, sir, I don't know, you are talking about impulsivity here today. Of the defendant. You said the defendant has a trait of acting impulsively?
>
> A. That's my belief, yes.
>
> Q. Under the facts of this case as you understand them, sir, how would a person who was not impulsive have committed this offense?
>
> A. Had it been thought through and premeditated, then I would say that it was not impulsive. I see impulsivity as acting without forethought.
>
> Q. Well, how would a non-impulsive person have committed this offense?
>
> A. I think they would have planned it out.
>
> Q. So what you are saying is that this wasn't planned out, from what you know about the facts of this case it wasn't planned?
>
> A. It is hard for me to say whether it is planned. Well, I think Mr. Wood

> behaved in a general sequence but given his lack of recall for the specific offense, it is hard to know whether this is planned out or not.

(RT 2/22/91 at 165-66.)

Prior to trial, the court and counsel discussed the parameters of Dr. Allender's testimony. (RT 2/19/91 at 22-24.) The discussion concluded with the court explaining that Dr. Allender's testimony would be subject to the holding in *State v. Christensen*, 129 Ariz. 32, 35-36, 628 P.2d 580, 583-84 (1981) – that is, Dr. Allender would be allowed to testify about Petitioner's character trait of impulsivity but not to testify that Petitioner was or was not acting impulsively at the time of the shootings, and that the State would be allowed, with some exceptions, to present evidence inconsistent with the character trait of impulsivity. (*Id.* at 23-24.)

The cross-examination was not improper; it simply asked the expert to describe how a non-impulsive person would have committed this double-homicide. While the prosecutor's questions arguably implicated the issue of Petitioner's state of mind at the time of the crimes, Dr. Allender's answers did not deprive Petitioner of a fair trial. Dr. Allender's testimony with respect to the ultimate issue of premeditation was simply that he was not certain if Petitioner had "planned out" the shootings. Given the constraints imposed by Petitioner's lack of memory of the incident, together with the evidence describing Petitioner's behavior during the shootings, Dr. Allender's testimony, though not unconditionally favorable to Petitioner, was accurate and did not conflict with the defense theory. Therefore, Petitioner is not entitled to relief on this claim.

D. Cross-Examination of Mona Donovan re: Mental State

Petitioner alleges in Claim 1-B(7) that he is entitled to habeas relief because the prosecutor engaged in misconduct by eliciting testimony from defense witness Mona Donovan regarding Petitioner's mental state at the time of the crime after the court had ruled the question improper. (Dkts. 24 at 42-43, 69 at 10-11.)

On direct examination by defense counsel, Ms. Donovan testified that Petitioner acted

impulsively at times. (RT 2/22/91 at 88.) As an example, she cited the occasion when he vandalized the apartment he and Debra Dietz had shared and destroyed some of her possessions. (*Id.* at 96.) On cross-examination, the prosecutor asked Ms. Donovan about her previous statement indicating that Petitioner would not become "instantly" violent but that his anger would magnify as a situation worsened. (*Id.* at 108.) The following exchange then occurred, which Petitioner characterizes as involving prosecutorial misconduct:

> Q: When [Petitioner] trashed the apartment, he trashed the apartment to get some of his possessions and avenge his anger? I was reading the question [defense counsel] asked you on page 11, do you know why he broke in? Answer, to get some of his possessions, to avenge some of his anger by breaking possessions of [Debra's]. Do you recall that?
>
> A: Yes.
>
> Q: In fact I think there was a telephonic interview that you gave to a legal assistant in my office on the 9th of October, do you recall when you were asked why he did that, indicating that he probably, he was probably very angry and did it out of spite?
>
> A: I don't recall the telephone conversation.
>
> Q: Does that sound like something you would say?
>
> A: I really don't know, I don't remember.
>
> Q: Would you agree with that statement?
>
> A: That he would do it out of spite?
>
> The Court: Let's quit asking this witness, the witness why this defendant did or didn't know why he did something, there's no way she could know it.
>
> Q: You indicated did you not that he avenged some of his anger by breaking and destroying some possessions of [Debra's]?
>
> A: Yes.
>
> The Court: Did you hear what I just said, quit asking her about his mental state. Quit asking her about his mental state.
>
> Q: Well, when you say the word avenge, what do you mean by the word avenge? Do you mean to get revenge?
>
> A: Yeah, I guess so.

(*Id.* at 108-10.)

This testimony, while not flattering to Petitioner, did not prejudice his defense. First, the fact that Petitioner had vandalized Debra Dietz's apartment was already established. (*See, e.g.*, RT 2/20/91 at 112-13.) In addition, the information elicited by the prosecutor was not inconsistent with the defense theory that the shootings were the product of Petitioner's impulsivity and anger-control problems. Moreover, the trial court effectively overruled, sua sponte, the prosecutor's questions, ameliorating any prejudice from counsel's failure to object and limiting any improper focus on the specifics of Petitioner's state of mind. Finally, Ms. Donovan's testimony regarding Petitioner's motives in vandalizing the apartment was equivocal and at most tangentially related to the issue of Petitioner's state of mind at the time of the shootings, further limiting any potential harm to the defense. Petitioner is not entitled to relief on this claim.

E. Cumulative Impact

Petitioner alleges in Claim 1-C that his constitutional rights were violated by the cumulative impact of the alleged prosecutorial misconduct asserted in the previously-discussed claims. (Dkts. 24 at 46-50, 69 at 11-16.) In addressing claims based on the cumulative impact of instances prosecutorial misconduct, courts compare the cumulative effect of the alleged misconduct as balanced against the strength of admissible evidence of guilt. *See United States v. Beeks*, 224 F.3d 741, 745 (8th Cir. 2000); *United States v. Cormier*, 468 F.3d 63, 74 (1st Cir. 2006); *Malicoat v. Mullin*, 426 F.3d 1241, 1263 (10th Cir. 2005). For example, in *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988), the Ninth Circuit, noting the "centrality of the credibility contest between the defendants and the co-conspirator witnesses," held that the prejudicial effect of the prosecutorial misconduct was exacerbated by the fact that the conviction rested entirely on uncorroborated testimony and that the cumulative misconduct implicated the credibility of the co-conspirators. *See also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (holding that cumulative

effect of errors was prejudicial where "evidence against the defendant was not overwhelming and the case was a close one").

In Petitioner's case, by contrast, the evidence of guilt on the only contested issue – premeditation – was very strong. Consisting of eyewitness accounts of Petitioner's conduct during the shootings, an undisputed history of violence by Petitioner against Debra Dietz, and taped messages in which Petitioner threatened her life, the strength of the evidence was unaffected by any aspect of the prosecutor's conduct. *See Jackson v. Calderon*, 211 F.3d 1148, 1161 (9th Cir. 2000) (finding no prejudice from cumulated deficiencies of counsel's performance where evidence of premeditation was persuasive). This scenario stands in stark contrast to the situation addressed in *Hodge v. Hurley*, 426 F.3d at 388-89, relied upon by Petitioner. In any event, the alleged misconduct, if misconduct at all, was de minimis.

F. Conclusion

Given the nature and context of the alleged misconduct, which involved neither misrepresentation of the facts nor vouching for witnesses, together with the strong evidence of Petitioner's guilt, the prosecutor's conduct did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181; *see also Ortiz*, 149 F.3d at 937; *Turner v. Marshall*, 63 F.3d 807, 818 (9th Cir. 1995).

II. Confrontation Clause Violation

Petitioner alleges in Claim 5 that the trial court violated his confrontation rights under the Sixth Amendment by admitting into evidence several out-of-court statements made by the decedents. (Dkts. 24 at 69-80, 69 at 16-20.) These included statements by Debra Dietz concerning her fear of Petitioner and her desire to end their relationship and Eugene Dietz's comments about his antagonistic relationship with Petitioner. A number of witnesses, including neighbors, family members, and police officers, testified to these statements. The testimony was admitted after the trial court denied Petitioner's pretrial motion to suppress all hearsay testimony relating to statements by Debra Dietz and despite defense counsel's

continuing objection to such testimony.

Background

The Arizona Supreme Court rejected this claim on direct appeal. The court held that the statements were either properly admitted under the state's evidentiary rules or, where erroneously admitted, did not deprive Petitioner of a fair trial or violate his Confrontation Clause rights. *Wood*, 180 Ariz. at 62-65, 881 P.2d at 1167-70. The court first explained that the testimony regarding Debra Dietz's fear of Petitioner and her wish to end their relationship was relevant and admissible pursuant to Arizona Rule of Evidence 803(3)[6]:

> The statements about Debra's fear and desire to end the relationship helped explain Defendant's motive. The disputed trial issues were Defendant's *motive* and *mental state* – whether Defendant acted with premeditation or as a result of a sudden impulse. The prosecution theorized that Defendant was motivated by anger or spite engendered by Debra's termination of the relationship. Debra's statements were relevant because they showed her intent to end the relationship, which in turn provided a plausible motive for premeditated murder. In addition, Debra's statements were also relevant to refute Defendant's assertion that he and Debra had secretly maintained their relationship after July 4, 1989.
>
> . . . Although hearsay, these statements fall within a well-established exception allowing admission of hearsay statements concerning the declarant's then-existing state of mind, emotion, or intent, if the statements are not offered to prove the fact remembered or believed by the declarant. Ariz.R.Evid. 803(3).
>
> Debra's statements were not offered to prove any fact. Instead, they related solely to her state of mind when the statements were made and thus fit within the Rule 803(3) exception. The trial court did not err in admitting this testimony.

Id. at 62-63, 881 P.2d at 1167-68 (citations and footnote omitted). The court reached the

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[6] Rule 803(3) of the Arizona Rules of Evidence provides, in relevant part, that the following statements are not excluded by the hearsay rule:

> **(3) Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . .

same conclusion with respect to statements made by Eugene Dietz concerning the animosity between he and Defendant, finding that they were relevant and properly admitted under Rule 803(3). *Id.* at 64-65, 881 P.2d at 1169-70.

The state supreme court found that other statements were improperly admitted but that their admission constituted harmless error. The first of these statements occurred during the State's direct examination of a neighbor who lived next door to Petitioner and Debra Dietz:

> Q. Did she [Debra] ever have another conversation with you later on when she related the same information to you?
>
> A. Yes, she did. I remember that instance very clearly . . . she told me that she did not want to stay at the apartment because Joe had threatened her life.

(RT 2/20/91 at 46-47.)

The Arizona Supreme Court held that this statement "falls outside the state of mind exception and should not have been admitted." *Wood*, 180 Ariz. at 63, 881 P.2d at 1168. The court then reviewed the statement's erroneous admission under the harmless error standard:

> We review a trial court's erroneous admission of testimony under a harmless error standard. *Bible*, 175 Ariz. at 588, 858 P.2d at 1191. Unless an error amounts to a structural defect, it is harmless if we can say "beyond a reasonable doubt that the error had no influence on the jury's judgment." *Id.; see also Sullivan v. Louisiana*, 508 U.S. 275, ----, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993) (error is only harmless if guilty verdict "was surely unattributable to the error"). We consider particular errors in light of the totality of the trial evidence. *State v. White*, 168 Ariz. 500, 508, 815 P.2d 869, 877 (1991), *cert. denied*, 502 U.S. 1105, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992). An error that requires reversal in one case may be harmless in another due to the fact-specific nature of the inquiry. *Bible*, 175 Ariz. at 588, 858 P.2d at 1191.
>
> Premeditation was the key trial issue, and we recognize that a prior threat is relevant to that issue. Premeditation requires proof that the defendant "made a decision to kill prior to the act of killing." *State v. Kreps*, 146 Ariz. 446, 449, 706 P.2d 1213, 1216 (1985). The interval, however, can be short. *Id.* Either direct or circumstantial evidence may prove premeditation. *State v. Hunter*, 136 Ariz. 45, 48, 664 P.2d 195, 198 (1983).
>
> Initially, we note that a tendency to act impulsively in no way precludes a finding of legal premeditation. Defendant offered little evidence to support

> his claim that he acted without premeditation on the morning of the murders. A defense expert briefly testified that Defendant displayed no signs of organic brain damage or psychotic thinking. The essence of his testimony militating against premeditation was that Defendant "appeared to be an individual that would act in an impulsive fashion, responding more to emotions rather than thinking things out." This expert, however, examined Defendant for a total of six hours more than thirteen months after the murders, and there was no testimony correlating this trait to Defendant's conduct on August 7, 1989. Other witnesses testified that Defendant had, at various times, acted violently for no apparent reason. These instances usually occurred, however, when Defendant had been abusing alcohol or drugs. There was no evidence that Defendant consumed alcohol or drugs before the murders.
>
> There was, on the other hand, a great deal of evidence that unequivocally compels the conclusion that Defendant acted with premeditation. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191. Defendant disliked and had threatened Eugene. Three days before the killing, Defendant left threatening phone messages with Debra showing his intent to harm her. Defendant called the shop just before the killings and asked whether Debra and Eugene were there. Although Defendant regularly carried a gun, on the morning of the murders he also had a spare cartridge belt with him, contrary to his normal practice. Defendant calmly waited for Eugene to hang up the telephone before shooting him. There was no evidence that Eugene did or said anything to which Defendant might have impulsively responded. Finally, Defendant looked for Debra after shooting Eugene, found her in a separate area, and held her before shooting her, stating, "I told you I was going to do it, I have to kill you."
>
> The hearsay statement about threats came from the state's first witness on the first day of a five-day trial. The prosecutor neither emphasized it nor asked the witness to elaborate. Nor did the prosecutor mention the statement in closing argument. *Cf. Charo*, 156 Ariz. at 563, 754 P.2d at 190 (noting prosecution's emphasis of improperly-admitted evidence during closing argument in finding reversible error). We note, also, that other statements, properly admitted, established that Defendant had threatened Debra on other occasions. We stress that this court cannot and does not determine an error is harmless merely because the record contains sufficient untainted evidence. *Bible*, 175 Ariz. at 590, 858 P.2d at 1193. Given this record, however, we are convinced beyond a reasonable doubt that the statement did not influence the finding of premeditation implicit in the verdict. *See State v. Coey*, 82 Ariz. 133, 142, 309 P.2d 260, 269 (1957) (finding no reversible error in admission of hearsay statement bearing on pre-meditation). The error was harmless.

Id. at 63-64, 881 P.2d at 1168-69 (footnote omitted).

The Arizona Supreme Court next considered the testimony of a witness who recounted Eugene Deitz's statement that "Nobody is going to stop [Petitioner] until he kills somebody," determining that it too fell outside the state-of-mind exception and was therefore erroneously admitted. *Id.* at 65, 881 P.2d at 1170. The court concluded, however, that

admission of the statement, which was not objected to, did not deprive Petitioner of a fair trial under a fundamental error analysis:

> Error is only fundamental if it goes to the essence of a case, denies the defendant a right essential to a defense, or is of such magnitude that the defendant could not have received a fair trial. *State v. Cornell*, 179 Ariz. 314, 329, 878 P.2d 1352, 1367 (1994).
>
> The "essence" of this case was Defendant's mental state at the time of the murders. Eugene's statement of belief does not clearly establish premeditation nor refute Defendant's defense of impulsivity. Given the clear quantum of evidence supporting premeditation, admission of this lone statement did not deprive Defendant of a fair trial. *See id.* at 51. We conclude that admission of Eugene's hearsay statement does not meet the "stringent standard" of fundamental error. *Bible*, 175 Ariz. at 573, 858 P.2d at 1176.

Id. 65, 881 P.2d at 1170.

Finally, the Arizona Supreme Court considered and rejected Petitioner's claim that admission of the hearsay statements violated his Sixth Amendment rights, holding that "[t]here is no Confrontation Clause violation when the hearsay testimony of a deceased declarant is admitted pursuant to a firmly-rooted hearsay exception" such as the Rule 803(3) state-of-mind exception. *Wood*, 180 Ariz. at 64, 881 P.2d at 1169 (citing *White v. Illinois*, 502 U.S. 346, 356 (1992)). The court further explained that "a Confrontation Clause violation can be harmless error" and that the trial court's erroneous admission of two of the decedents' statements constituted harmless error. *Id.* (citing *Harrington v. California*, 395 U.S. 250, 253 (1969)).

Analysis

State law violations, such as violations of the Arizona Rules of Evidence, do not generally provide grounds for habeas relief. *See Estelle v. McGuire*, 502 U.S. at 67-68; *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Therefore, this Court need not consider Petitioner's assertion that the trial court misapplied state evidentiary rules when it admitted the statements under Rule 803(3). However, a state court's evidentiary ruling becomes subject to federal habeas review when the ruling violates federal law, either by infringing

upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. *See Estelle v. McGuire*, 502 U.S. at 68; *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *see also Hayes v. York*, 311 F.3d 321, 324-25 (4th Cir. 2002); *Jammal v. Van de Kamp*, 926 F.2d at 919-20. Petitioner contends that the admission of the statements violated his rights under the Confrontation Clause of the Sixth Amendment. As noted, the Arizona Supreme Court disagreed, finding that the statements were properly admitted under the firmly-rooted state-of-mind exception or were erroneously admitted but did not deprive Petitioner of a fair trial. This Court must determine if that ruling involved an unreasonable application of clearly established federal law.

At the time of Petitioner's conviction, the controlling law was defined by *Ohio v. Roberts*, which held that the Confrontation Clause allowed the admission of hearsay evidence against criminal defendants if it fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *see White*, 502 U.S. at 356. The state-of-mind exception was a firmly-rooted hearsay exception and the admission of such testimony did not, as a general rule, violate the Confrontation Clause. *See, e.g.*, *Horton v. Allen*, 370 F.3d 75, 85 (1st Cir. 2004). Subsequently, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court expressly overruled *Roberts* and held that it is a violation of the Sixth Amendment Confrontation Clause to admit testimonial evidence at trial unless the declarant is unavailable and there was a prior opportunity to cross-examine him or her. 541 U.S. at 68. In *Whorton v. Bockting*, however, 127 S. Ct. 1173, 1184 (2007), the Supreme Court concluded that *Crawford* does not apply retroactively to cases on collateral review.

As already noted, in considering this claim on direct appeal the Arizona Supreme Court applied the holdings in *Roberts* and *White*. Because these cases were the controlling precedent at the time, and because *Crawford* cannot be applied retroactively, the Arizona Supreme Court's decision is reviewed under the "unreasonable application" standard of §

2254(d)(1).[7]

Regardless of whether the challenged statements were erroneously admitted under Arizona's evidentiary rules, this Court agrees with the Arizona Supreme Court that Petitioner was not prejudiced by their admission. The evidence of premeditation was strong. Petitioner left ten messages on Debra Dietz's answering machine on the night of Friday, August 4, 1989, three days before the killings. Some of the messages included threats: "Debbie, I'm sorry I have to do this. I hope someday somebody will understand when we're not around no more. I do love you babe. I'm going to take you with me." *See Wood*, 180 Ariz. at 60 n.2, 881 P.2d at 1165 n.2. Just prior to the killings, Petitioner phoned the auto shop to see if Eugene and Debra Dietz were present. *Id.* at 64, 881 P.2d at 1169. While holding onto Ms. Dietz immediately before shooting her, Petitioner stated, "I told you I was going to do it, I have to kill you." *Id.* Immediately after the killings, Petitioner repeated that "if he and Debra couldn't be together in life, they would be together in death." *Id.* at 63, n.6, 881 P.2d at 1168, n.6.

Moreover, the statements were cumulative of other, properly admitted testimony concerning the victims' relationship with Petitioner. *See Apanovitch v. Houk*, 466 F.3d 460, 486-88 (6th Cir. 2006). In *Apanovitch*, the Sixth Circuit, on habeas review, ruled that the trial court's admission of hearsay testimony from six witnesses regarding the murder victim's state of mind, including her fear of the defendant, did not deprive the defendant of a fair trial.

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[7] In any event, all but two of the challenged statements were nontestimonial and therefore not subject to the principles of *Crawford*. *See Crawford*, 541 U.S. at 51-52 (defining testimonial statements as those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," and distinguishing a "formal statement to government officers" from "a casual remark to an acquaintance"); *see also Horton v. Allen*, 370 F.3d at 83-84.

Petitioner contends that the remaining statements were testimonial because they were made by Debra to police officers. However, because the ruling in *Crawford* does not apply retroactively, the state court's decision to admit the statements does not entitle Petitioner to relief.

Id. at 487-88. Some of the testimony was admitted in error, with the witnesses improperly extending their testimony beyond the victim's state of mind to her description of the behavior that caused her to fear the defendant. *Id.* at 487. The Sixth Circuit explained, however, that the improper testimony was duplicative of unchallenged testimony by the defendant's co-worker, who testified as to the defendant's interest in the victim, and the bulk of the testimony – that the victim had expressed fear of a man who fit the defendant's description – was appropriate under the state-of-mind exception. *Id.* at 487-88. In these circumstances, the court found, there was no due process violation. *Id.*

Similarly, the admission of the victims' hearsay statements here did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. at 623; *see Bains v. Cambra*, 204 F.3d 964, 977-78 (9th Cir. 2000) (erroneous admission of hearsay statements concerning murder victim's fear of defendant did not have substantial and injurious effect on verdict). Because the Arizona Supreme Court reasonably applied clearly established federal law in rejecting this claim, Petitioner is not entitled to habeas relief. *See Mitchell v. Esparza*, 540 U.S. 12 (2003) (stating that habeas relief is appropriate only if state court's application of harmless-error review was objectively unreasonable).

III. Application of (F)(3) Aggravating Factor

Petitioner alleges in Claim 9 that the "grave risk to others" aggravating factor was found in violation of the federal Constitution.[8] Specifically, Petitioner contends that there were no facts elicited at trial to support a finding that anybody but the victims was put in grave risk by Petitioner's actions during the shootings. (Dkts. 24 at 97-110, 69 at 20-22.) According to Petitioner, the (F)(3) factor could only have been satisfied if he "had fired

[8] Under A.R.S. § 13-703(F)(3), it is an aggravating factor if, "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered in the commission of the offense."

randomly into the auto shop, while intending to kill only the Dietzes, or if he had fired at the Dietzes from such a distance that it put other, unintended victims in the zone of danger." (*Id.* at 21.)

On direct appeal, the Arizona Supreme Court rejected this argument:

> We have never . . . limited this factor to cases in which another person was directly in the line of fire. For example, we have found a zone of danger where the defendant shot his intended victim while a third person was nearby and then pointed his gun at the third person before returning his attention to the victim. *State v. Nash*, 143 Ariz. 392, 405, 694 P.2d 222, 235, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985). We noted there that in the absence of such a combination of factors – the third person's proximity during the actual shooting and the defendant's pointing his gun – the general rule is that mere presence of bystanders or pointing a gun at another to facilitate escape does not bring a murderous act within A.R.S. § 13-703(F)(3). *Id.* at 405, 684 P.2d at 235. No single factor is dispositive of this circumstance. Our inquiry is whether, during the course of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injury.

Wood, 180 Ariz. at 69, 881 P.2d at 1174 (additional citations omitted). The court then explained that "in this case, several factors *in combination* support the conclusion that Defendant knowingly created a grave risk of death to others":

> [A]t least three other employees were present in the confined garage where Defendant shot Eugene. One was standing only six to eight feet away from Eugene at the time of the shooting. After Defendant shot Eugene, he turned toward another employee as if "he was going to shoot but [that employee] . . . really got out of there fast." When Defendant pointed his gun at Eugene again, one employee fought with Defendant and even grabbed the gun's barrel. Moreover, a firearms expert testified that the position of the fired and unfired cartridges in the murder weapon showed that Defendant had cocked and uncocked the gun twice between shooting Eugene and Debra. Thus, there is evidence Defendant knowingly prepared the gun to fire both when he assumed a shooting stance toward one employee and when he grappled with the other. All this occurred during Defendant's commission of the two murders.

Id. at 69-70, 881 P.2d at 1174-75 (citations omitted). The court concluded that "under these circumstances the judge's finding that Defendant created a grave risk of death to at least these two employees is correct." *Id.* at 70, 881 P.2d at 1175.

Analysis

As noted above, a state court's errors in applying state law do not give rise to federal

habeas corpus relief. *See Estelle v. McGuire*, 502 U.S. at 71-72. On habeas review of a state court's finding of an aggravating factor, a federal court is limited to determining "whether the state court's [application of state law] was so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation." *Lewis v. Jeffers*, 497 U.S. at 780. In making that determination, the reviewing court must inquire "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found that the factor had been satisfied.'" *Id*. at 781 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Based upon the combination of circumstances discussed by the Arizona Supreme Court, a rational trier of fact could have found that Petitioner's "murderous act itself put other people in a zone of danger." *Wood*, 180 Ariz. at 69, 881 P.2d at 1174 (quoting *State v. McCall*, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983)). The trial testimony shows that in addition to shooting the victims at close range, Petitioner pointed his gun at one person and wrestled with Donald Dietz while Dietz tried to prevent Petitioner from shooting his brother Eugene a second time. (RT 2/20/91 at 166, 173, 181-84.) During these incidents, which occurred between the shooting of Mr. Dietz and the shooting of his daughter, Petitioner cocked and uncocked his gun twice. (RT 2/22/91 at 11-15.) Certainly a rational factfinder could determine, as the trial court and state supreme court did, that Petitioner's actions created a real and substantial likelihood that Donald Dietz could have been shot to death as he struggled with Petitioner. *See Miller v. Lockhart*, 65 F.3d 676, 687 (8th Cir. 1995) (great-risk-of-death-to-others aggravating circumstance was supported by evidence that the victim was shot with handgun in downtown business district during morning hours and the inference that the sound of handgun would attract others to scene).

The decision of the Arizona Supreme Court denying this claim is neither contrary to nor an unreasonable application of clearly established federal law. Therefore, Petitioner is not entitled to relief on Claim 9.

IV. Ineffective Assistance of Counsel at Trial

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

The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Thus, to satisfy *Strickland*'s first prong, deficient performance, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* For example, while trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, . . . a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. To determine whether the investigation was reasonable, the court "must conduct an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (citation and quotation marks omitted). As the Supreme Court recently reiterated: "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made" and by applying deference to counsel's judgments. *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (quoting *Strickland*, 466 U.S. at 689).

Because an IAC claim must satisfy both prongs of *Strickland*, the reviewing court "need not determine whether counsel's performance was deficient before examining the

prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed"). A petitioner must affirmatively prove prejudice. *Id.* at 693. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The calculus involved in assessing prejudice "should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* at 695.

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In answering that question, a reviewing court necessarily considers the strength of the state's case. *See Allen v. Woodford*, 395 F.3d 979, 999 (9th Cir. 2005) ("even if counsel's conduct was arguably deficient, in light of the overwhelming evidence of guilt, [the petitioner] cannot establish prejudice"); *Johnson v. Baldwin*, 114 F.3d 835, 839-40 (9th Cir. 1997) (where state's case is weak, there is a greater likelihood that the outcome of the trial would have been different in the absence of deficient performance).

Also inherent in the prejudice analysis demanded by *Strickland* is the principle that in order to demonstrate that counsel failed to litigate an issue competently, a petitioner must prove that the issue was meritorious. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). For example, with respect to allegations that counsel was ineffective for failing to file a motion, to demonstrate prejudice a petitioner "must show that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him." *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) (citing *Morrison*, 477 U.S. at 373-74); *see also Boyde v. Brown*, 404 F.3d 1159, 1173-74 (9th Cir. 2005).

Therefore, in evaluating a number of the following IAC claims, this Court is informed by the holding of the Arizona Supreme Court on the merits of the underlying issues.

Finally, under the AEDPA, federal review of state court decisions is subject to another level of deference. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). In order to merit habeas relief, therefore, Petitioner must make the additional showing that the state court's ruling that counsel was not ineffective constituted an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(1).

A. Failure to Provide Materials to Dr. Allender

Petitioner alleges in Claim 10-B that trial counsel rendered ineffective assistance by failing to provide sufficient background materials to the defense neuropsychologist, Dr. James Allender. (Dkts. 24 at 111-23, 69 at 25-28.)

Background

In assessing this, and other claims challenging counsel's handling of evidence concerning Petitioner's mental state, it is necessary to review the information available to and generated by the mental health experts who examined Petitioner in preparation for the guilt-stage of trial.

Dr. Catherine Boyer

In preparing her pre-Rule 11 competency examination, Dr. Catherine Boyer conducted a clinical interview of Petitioner and reviewed police reports, Petitioner's statements while hospitalized after the shootings, and the grand jury transcript. (ROA-PCR 1212.) During the interview, Petitioner provided "considerable background information." (ROA-PCR 1213.) He detailed his own problems with alcohol and reported that his father was also an alcoholic. (*Id.*) He stated that he experienced violent rages when he was drinking; he also experienced rages when he was not drinking but was able to control himself in those situations. (*Id.*) His drinking caused frequent blackouts. (*Id.*) Petitioner also reported a history of drug use involving cocaine and methamphetamine. (*Id.*) He described two suicide

attempts in 1983. (ROA-PCR 1214.) On the first occasion he was hospitalized after taking an overdose of pills. (*Id.*) The second attempt involved Petitioner locking himself in the bathroom and threatening to kill himself with a razor. (*Id.*) Finally, Petitioner recounted "approximately four episodes of unconsciousness subsequent to head injuries, some of them after motorcycle accidents or fights." (*Id.*) One of these periods of unconsciousness lasted approximately an hour; on one occasion he was hospitalized for observation. (*Id.*) According to Petitioner, "he did not notice any difficulties in functioning subsequent to these injuries" but other people told him that he had become "more moody, 'going from calm to upset.'" (*Id.*)

Dr. Boyer concluded that Petitioner appeared to be competent to stand trial. (ROA-PCR 1217.) She also addressed the issue of possible "organic impairment " caused by head injuries and substance abuse. (*Id.*) Dr. Boyer opined that while "it would not be surprising for [Petitioner] to have some organic impairment," "he does not appear to have serious cognitive deficiencies and any impairment is likely to be mild." (*Id.*) Dr. Boyer further indicated that any change in Petitioner's emotional "lability" or ability to exercise self-control was likely the product of alcohol intoxication rather than a head injury. (*Id.*) According to Dr. Boyer:

> The best way to document the possible emotional effects of such a head injury would be to interview those who knew [Petitioner] both prior and subsequent to that injury and to obtain their observations about his behavior. More in-depth neuropsychological and neurological assessment could be conducted, although even if they showed some deficiencies, it is unlikely that they would be sufficient to preclude his being aware of his own behavior. They might provide some information which could be mitigating, however.

(*Id.*)

Dr. Larry Morris

Dr. Larry Morris, who performed the first of the two Rule 11 evaluations, conducted a clinical diagnostic interview, administered the MMPI-2, and reviewed police reports, witness interviews, grand jury testimony, and the autopsy report. (ROA-PCR 1220-21.)

Petitioner again recounted his family background, including his father's alcoholism. (ROA-PCR 1221-22.) He described his own problems with alcohol abuse, explaining that when intoxicated he had difficulty controlling his anger. (ROA-PCR 1222-23.) Petitioner reported that he sought help, received treatment at the Veteran's Administration Hospital in Tucson, remained sober for two years, but relapsed when his father began drinking again. (ROA-PCR 1223.) He also began using cocaine and "crank." (*Id.*) Petitioner informed Dr. Morris that he did not abuse drugs or alcohol in the hours prior to the shootings; he last used speed on the preceding Friday and had only two drinks on Sunday. (ROA-PCR 1224.)

The results of the MMPI-2 indicated "severe psychopathology characterized by both cognitive and emotional disturbances." (ROA-PCR 1225.) According to Dr. Morris, individuals with Petitioner's anti-social profile experience mistrust, are unskilled socially, and have difficulty establishing interpersonal relationships. (*Id.*) They "tend to be argumentative, hostile and aggressive. Angry acting-out is a strong possibility. . . . Impulsivity and poor judgment are cardinal features of this profile type." (*Id.*) However, while Dr. Morris found that Petitioner was a "dysfunctional individual," he concluded that Petitioner was competent to stand trial. (*Id.*)

Subsequent conversations between Dr. Morris and defense counsel clarified Dr. Morris's opinion with respect to Petitioner's condition, specifically as to whether or not he had a character trait of impulsivity. (ROA-PCR 1042-45, 1056-59.) In one conversation counsel sought Dr. Morris's opinion as to the import of the increasingly frantic phone messages Petitioner left with Debra Dietz prior to the shootings. (*Id.*) Despite the existence of such evidence, Dr. Morris explained to counsel that he did not believe Petitioner qualified for a defense under the holding in *State v. Christensen*:[9]

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[9] In *Christensen*, the defendant sought to admit expert testimony regarding his tendency to act without reflection. 129 Ariz. 32, 628 P.2d 580 (1981). The Arizona Supreme Court held that it was error to exclude such testimony because "establishment of the character trait of acting without reflection tends to establish that appellant acted impulsively.

> He's an impulsive guy and he's kind of angry, but he certainly doesn't fit the *Christensen* definition for that. I mean I can testify that he's angry and impulsive, but if we're going to try and use *Christensen* and if you really get into the details of that, I'll have to say that I really don't think he fits *Christensen*, because I don't think that he does.

(*Id.* at 1074.) Counsel later pressed Dr. Morris: "Well, I don't want you to say or do anything you can't do in good conscious [sic], but you – are you saying you don't find elements of impulsive behavior in [Petitioner]?" (*Id.* at 1078.) Dr. Morris replied: "Not to the extent that I could testify with a, you know, a considerable amount of confidence that this is a Christenson [sic] kind of defense." (*Id.*)

Counsel decided not to call Dr. Morris as a witness. Instead, he determined that Dr. Allender would be able to offer more favorable testimony regarding Petitioner's character trait of impulsivity. (*Id.* at 1116.)

Dr. Barry Morenz

Dr. Barry Morenz conducted the second Rule 11 evaluation. He interviewed Petitioner and reviewed the reports of Drs. Boyer and Morris, police reports, grand jury testimony, and autopsy reports. (ROA-PCR 1228.) Dr. Morenz's report recounted Petitioner's background, including his problems with alcohol and drugs, his suicide attempts, and his head injuries. (ROA-PCR 1229-30.) With respect to the latter, Dr. Morenz indicated that Petitioner "suffered several episodes of head injury with loss of consciousness, the longest lasting approximately for an hour. [Petitioner] states that other people told him that he had been somewhat more moody since this last head injury in 1981. He claims no awareness of this." (ROA-PCR 1231.) Dr. Morenz diagnosed Petitioner with alcohol abuse and found that he was competent to stand trial. (*Id.*)

Dr. James Allender

In the report he prepared for trial, Dr. James Allender indicated that he had reviewed

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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 psychological evaluations performed by Drs. Morris, Boyer, and Morenz; police reports and interviews with officers; and interviews with Petitioner and Petitioner's father. (ROA-PCR 1089.) Dr. Allender also performed a battery of tests and a clinical interview of Petitioner. (*Id.*) According to Dr. Allender, Petitioner "reported that he had suffered three motorcycle accidents in which he might have sustained a head injury." (ROA-PCR 1090.) Dr. Allender's report also detailed Petitioner's history of drug and alcohol abuse. (*Id.*) While stating that "[n]europsychological evaluation was requested given [Petitioner's] history of potentially significant head injuries and his reported memory deficit," Dr. Allender concluded that Petitioner's "report of no significant change in his thinking and the lack of significant findings on neuropsychological assessment suggest little evidence for cognitive impairment due to his motorcycle accidents." (ROA-PCR 1092.) Dr. Allender did opine that Petitioner possibly suffers from a verbal learning disability. (*Id.*) He also concluded that Petitioner's "reality testing deteriorates in emotionally charged situations" and that on such occasions he "would act in an angry and impulsive way." (*Id.*)

PCR Proceedings

Petitioner presented this IAC claim to the PCR court. In support he submitted affidavits from Dr. Allender dated April 22 and June 21, 1996. (ROA-PCR 1042-45, 1056-59.) In these affidavits, Dr. Allender listed the information provided to him by defense counsel, complained that counsel did not adequately explain the legal concepts of impulsivity and diminished capacity, and asserted that counsel's failure to prepare him adequately prevented him from asking counsel for additional information. (*Id.*) Dr. Allender then opined that the additional information he reviewed since the trial – indicating that Petitioner may have been experiencing drug withdrawal, that his mental state was rapidly deteriorating as evidenced by phone messages he left Debra Dietz in the days prior to the shootings, and that he was victimized by Ms. Dietz's manipulative and deceptive behavior – all would have supported a finding that Petitioner acted impulsively at the time of the killings. (*Id.*)

In rejecting Petitioner's claim that counsel's failure to provide background materials to Dr. Allender was constitutionally ineffective, the PCR court determined that Petitioner had not established that he was prejudiced by counsel's performance. It stated:

> In view of the testimony of numerous witnesses, including Dr. Allender, addressing the issue of Petitioner's impulsivity, the Court finds that Petitioner has not shown how the provision of the then existing medical and military records to expert witnesses would have affected the outcome of the trial.

(ME 6/6/97 at 5.)

Analysis

Petitioner asserts that counsel failed to provide sufficient background regarding Petitioner to Dr. Allender. However, the record refutes this allegation. Petitioner himself provided information to Dr. Allender regarding his history of alcohol abuse. (RT 2/22/91 at 150.) At trial, Dr. Allender testified that Petitioner:

> told me that for approximately ten years since around 1980 he had difficulty with alcohol abuse. Okay. He represented that in 1980 he was drinking to the level that he was suffering from blackouts. That is enough drinking to where you no longer can remember the next morning what you did.
>
> He also reported that this led him to getting into fights and trouble for insubordination.
>
> He told me in 1984 he came back to the States, he had been in the military prior and he went through an in-patient treatment program for alcohol abuse and that he was sober for approximately two and a half years but then by around 1986 or '87 he began using cocaine, speed and crank and that up until the time, the last year or so he was drinking every other night, quite a bit, maybe up to ten drinks a night. And also using methamphetamine which was his drug of choice.

(RT 2/22/91 at 150.)

Dr. Allender further testified that, in evaluating Petitioner, he reviewed the reports of other doctors. (*Id*. at 145–46.) Each of these reports discussed Petitioner's personal and family history of alcohol abuse. (*See* ROA-PCR at 1213-14, 1221-23, 1230-31.)

Petitioner likewise provided information about his head injuries to Dr. Allender. (RT 2/22/91 at 149.) Dr. Allender testified that Petitioner reported "three different head injuries that he had. Each time it was related to a motorcycle accident, each time as I recall he was

wearing a helmet." (*Id*.) Trial counsel likewise provided information to Dr. Allender about Petitioner's head injuries. (*Id*. at 145.) Dr. Allender testified that counsel "had mentioned these things to me" when he stated that Petitioner "had a history of head injuries and he had some reported difficulties in recalling." (*Id*.)

Furthermore, Petitioner cannot show prejudice because counsel did in fact present an impulsivity "defense," and Petitioner has not demonstrated a reasonable probability that a different or more comprehensive presentation of that defense would have resulted in a different verdict, particularly in the face of the strong evidence of premeditation.[10] *See Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995) ("any error of counsel for capital murder defendant in failing to conduct further investigation of possible diminished capacity defense did not prejudice defendant given that defense proceeded on theory of diminished capacity and contrary evidence of defendant's intent to kill and ability to reflect those actions was overwhelming").

Petitioner's theory at trial was that he acted reflexively and without premeditation – consistent with his character trait of impulsivity – when he shot Eugene and Debra Dietz. Dr. Allender's testimony, which included a discussion of Petitioner's medical history, focused on Petitioner's trait for impulsivity. (RT 2/22/91 at 142-90.) Complementing Dr. Allender's testimony concerning Petitioner's impulsivity was the testimony of several lay witnesses, including Petitioner's friends and family. Jennifer Schaffer, a former girlfriend of Petitioner, testified that his mood would change when he had been drinking; he would

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[10] As Respondents note, and as trial counsel was aware, a defense of diminished capacity was not available under Arizona law. *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997) (Arizona does not allow expert testimony regarding a defendant's mental disorder short of insanity as an affirmative defense or to negate the *mens rea* element of a crime); *see also Clark v. Arizona*, 126 S. Ct. 2709 (2006) (upholding the rule established in *Mott*). Thus, counsel was prohibited from presenting evidence of mental disease or defect to show that Petitioner was incapable of premeditating the killings. *Mott*, 187 Ariz. at 540, 931 P.2d at 1050

become depressed and angry. (*Id.* at 27.) She further testified that Petitioner would become paranoid and "hyper" when he was on crank and cocaine, drugs that she observed him using during the period before the shootings. (*Id.* at 30-33.) Mona Donovan testified that Petitioner was unpredictable and impulsive, even when he was not drinking, and that it was impossible to predict how he would react to situations. (*Id.* at 87-88.) Cheryl Whitmer, another girlfriend, described her observations of Petitioner's emotional state on the night before the shooting. According to Ms. Whitmer, Petitioner did not appear to be himself; he was upset and worried. (*Id.* at 117.) He complained of a headache, and she gave him some prescription pain pills. (*Id.* at 117-20.) Later that night she saw him again; he was sweating and crying, upset about not seeing Debra Dietz. (*Id.* at 119-23.) She also recounted an incident when Petitioner yelled obscenities and broke Ms. Dietz's belongings when she failed to meet him at the apartment. (*Id.* at 136-38.)

Petitioner's parents outlined his family background and emotional development, including his military service, his father's alcoholism, his own problems with alcohol abuse, and his volatile relationship with Ms. Dietz. (*Id.* at 56-60, 66.) Their testimony also described incidents of reflexive, irrational behavior. To detail Petitioner's impulsivity and anger-control problems, Petitioner's mother described an incident in which Petitioner suddenly became upset and went from the kitchen to the living room and swept everything off the buffet; immediately after the incident he was okay again. (*Id.* at 59-69.) Petitioner's father testified that Petitioner "was an ideal child" but that he began to act impulsively and irrationally after leaving the military. (*Id.* at 70-71, 71-74, 80-81.) He also recounted incidents when Petitioner was "[i]rrational and . . . too quick to respond to situations without any forethought." (*Id.* at 72.) On one occasion Petitioner chased down a boy who had fired an air rifle at his house. (*Id.*) On another occasion he locked himself in the bathroom, where he broke the mirror and pulled the toilet loose from the floor. (*Id.* at 73.) In a third incident he was "totally out of control" and pushed his father. (*Id.*) Petitioner's father proceeded to

describe additional incidents when Petitioner was "irrational and uncontrollable." (*Id.* at 80.)

Given the substantial evidence presented by counsel supporting Petitioner's defense of impulsivity, Petitioner cannot demonstrate either deficient performance or prejudice. The PCR did not unreasonably apply *Strickland* when it rejected this claim.

B. Failure to Object to Prosecutorial Misconduct

Petitioner alleges in Claim 10-C(1) that trial counsel rendered ineffective assistance by failing to object to the instances of alleged prosecutorial misconduct outlined in Claim 1. Specifically, Petitioner contends that counsel should have objected when the prosecutor asked Dr. Allender whether he had hypnotized or administered "truth serum" to Petitioner; elicited bad character evidence; examined Dr. Allender regarding Petitioner's mental state at the time of the crime; elicited testimony regarding Petitioner's state of mind at the time of the crime; and elicited irrelevant and inflammatory comments from the victims' family members.

Respondents counter that counsel's failure to object to such testimony was consistent with "a trial strategy in which [Petitioner's] murders of Eugene and Debra were characterized as the result of his impulsive behavior rather than with premeditation." (Dkt. 74 at 29.) Respondents also contend that because there was no prosecutorial misconduct, objections would have been futile. (*Id.*)

The PCR court correctly denied these claims, finding that Petitioner had failed to show prejudice. (ME 6/6/97 at 4, 7.) As an initial matter, the Arizona Supreme Court determined that, with the exceptions noted above, the testimony elicited through the prosecutor's "misconduct" was admissible. *Wood*, 180 Ariz. at 62-65, 881 P.2d at 1167-70. Therefore, counsel's failure to object cannot be criticized as deficient performance because such objections would have been overruled. *See Boyde v. Brown*, 404 F.3d at 1173-74 (counsel is not required to take a futile action). With respect to those instances where the testimony was objectionable, Petitioner was not prejudiced because the testimony was not

inconsistent with his defense theory and because the jury's finding of premeditation was supported by strong evidence.

Moreover, Petitioner has not demonstrated that counsel's performance was deficient. The only issue at the guilt-stage of trial was Petitioner's state of mind at the time of the murders. The testimony elicited by the prosecutor did not prejudice Petitioner with respect to his defense of impulsivity. Indeed, as Respondents contend, evidence elicited by the prosecutor concerning instances of erratic behavior was consistent with the strategy of offering Petitioner's impulsive personality and bad temper as a defense to the element of premeditation. The conclusion that counsel's decision not to object was part of an overall strategy is supported by counsel's presentation in the defense case of similar evidence of Petitioner's impulsive personality and inability to control his anger. *See Wood*, 180 Ariz. at 65, 881 P.2d at 1170.

Even if the information elicited by the prosecutor had been more damaging to the defense case, "[d]ecisions not to object to *inadmissible evidence* already heard by the jury can in many cases be classified as part of a deliberate strategy to avoid calling the jury's attention to that evidence." *Hodge v. Hurley*, 426 F.3d at 385-86; *see United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991). Such considerations may have motivated counsel not to object to emotional testimony from the victims' family members.[11] *See, e.g.*, *Nance v. Norris*, 392 F.3d 284, 293 (8th Cir. 2004) (no IAC where counsel failed to object to witness's inadmissible call for imposition of death penalty because a "reasonable lawyer may wish to refrain from objecting to this type of statement when uttered by the victim's grieving mother, in front of a jury").

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[11] Moreover, some of this testimony was not objectionable. For example, Donald Deitz's description of Petitioner's demeanor during the shootings (RT 2/20/91 at 181-84) was clearly relevant to the issue of premeditation. In addition, any prejudicial impact from the family members' testimony was lessened when the trial court instructed the jury not to be influenced by sympathy or prejudice. (RT 2/25/91 at 34.)

Strickland requires this Court to presume that counsel's strategy was reasonable. 466 U.S. at 688-89. Given this presumption, which is supported by the incontrovertible evidence that Petitioner killed the two victims, leaving only the element of premeditation in question, the fact that counsel's defense strategy was not ultimately successful is not sufficient for a finding of ineffective assistance. As the *Strickland* Court explained: "It is all too tempting for a defendant to second-guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission was unreasonable." *Id.* at 689; *see, e.g.*, *United States v. Mejia-Mesa*, 153 F.3d 925, 931 (9th Cir. 1998) ("While [a defendant] may argue that it may have been better to make a certain objection, a few missed objections alone, unless on a crucial point, do not rebut the strong presumption that counsel's actions (or failures to act) were pursuant to his litigation strategy and within the wide range of reasonable performance."); *Seehan v. Iowa*, 72 F.3d 607, 610-12 (8th Cir. 1995).

Finally, in assessing the reasonableness of the PCR court's rejection of this claim, the Court again notes that the Arizona Supreme Court held that the admission of improper evidence did not deprive Petitioner of a fair trial. *Wood*, 180 at 61-65, 881 P.2d at 1166-70. The Arizona Supreme Court reached this conclusion based upon its determination that the evidence of premeditation was particularly strong. *Id.* at 64, 881 P.2d at 1169; *see Jackson v. Calderon*, 211 F.3d at 1161 (even when cumulated, any failures of trial counsel did not create a reasonable probability that, but for the cumulative effect of the errors, the result would have been different, given persuasive case of deliberation and premeditation despite the defendant's PCP intoxication); *Bland v. Sirmons*, 459 F.3d 999, 1032-33 (10th Cir. 2006) (state court did not act contrary to or unreasonably apply federal law in determining that petitioner was not prejudiced by counsel's failure to object to prosecutor's improper characterization of jury instructions and calling petitioner an "evil man" and a "heartless and vicious killer" on basis that timely objections would not have affected outcome of trial.).

For the reasons set forth above, Petitioner is not entitled to relief on this claim.

IV. Ineffective Assistance of Counsel at Sentencing

Petitioner contends that counsel did not adequately investigate and present various categories of mitigation information related to Petitioner's social and medical background and failed to prepare Petitioner for his presentence interview. (Dkts. 24 at 136-48, 69 at 28-31.) He also contends that he was prejudiced by the cumulative impact of counsel's deficient sentencing-stage performance. (*Id.*)

The right to effective assistance of counsel applies not just to the guilt phase, but "with equal force at the penalty phase of a bifurcated capital trial." *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir. 2002) (quoting *Clabourne v. Lewis*, 64 F.3d, 1373, 1378 (9th Cir. 1995)). With respect to prejudice at sentencing, the *Strickland* Court explained that "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. In *Wiggins*, the Court further noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." 539 U.S. at 534. The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced in the habeas proceeding." *Id.* at 536 (quoting *Williams v. Taylor*, 529 U.S. at 397-98).

The clearly-established federal law governing this claim includes the Supreme Court's decision in *Bell v. Cone*, 535 U.S. 685, which clarifies the standard this Court must apply in reviewing the PCR court's rejection of Petitioner's sentencing-stage IAC claim. After noting the deferential standards set forth in the AEDPA and required by its own precedent, the Supreme Court explained that for a habeas petitioner's IAC claim to succeed:

> he must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he

> must show that [the state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Id. at 698-99 (citation omitted).

In evaluating Petitioner's claim of sentencing-stage IAC, this Court will follow *Strickland*'s instruction that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." 466 U.S. at 697.

A. Failure to Present Mitigation Evidence

Petitioner alleges in Claim 10-C(3)(a) that counsel's performance at sentencing was constitutionally ineffective because counsel failed to adequately prepare and present evidence of Petitioner's diminished capacity, including personality changes following several serious head injuries; his social background, including a family history of alcoholism and mental illness; and his military service. Petitioner also alleges that counsel was ineffective in failing to obtain and present an in-depth neurological evaluation to connect Petitioner's mental deficits to the crime. (Dkts. 24 at 136-43, 69 at 28.) Respondents contend that Petitioner was not prejudiced because counsel did in fact present the trial court with information about his family background, medical history, substance abuse problems, and military service, and because he attempted to secure neurological testing. (Dkt. 74 at 46-55.) As set forth below, the Court agrees that Petitioner was not prejudiced by these aspects of counsel's performance and therefore is not entitled to habeas relief.

Background

Defense counsel filed an eighteen-page sentencing memorandum. (ROA 482-99.) The memorandum challenged the aggravating factors advanced by the State and set forth the mitigation argument that the crime was a product of Petitioner's mentally impaired state – an impairment caused by Petitioner's chemical abuse and addiction, the presence of alcoholism in his family background, and his dysfunctional relationship with Debra Dietz. (*Id.*)

Counsel attached a number of documents to the memorandum. The first was the transcription of counsel's interview of Petitioner's father. (ROA 501-16.) In that interview Mr. Wood detailed his own alcoholism, the effects of which Petitioner was exposed to while growing up, and Petitioner's problems with alcohol. (*Id.*) Counsel asked if there was any history of mental illness in the family; Mr. Wood replied that there was not. (*Id.*) Mr. Wood also explained that Petitioner's drinking and behavior had gotten out of control. (*Id.*) Counsel asked if Petitioner had experienced any head injuries as a child; Mr. Wood explained that Petitioner had been knocked unconscious at age two or three afer running into a wall, and that he had been involved in motorcycle accidents. (*Id.*) The next attachment consisted of Petitioner's military records, which included medical reports and the records from his treatment for alcoholism at the Tucson V.A. hospital. (ROA 517-763.) Finally, counsel attached the transcript of his pretrial interview with Mona Donovan, who described positive aspects of Petitioner's character despite the chaotic nature of his relationship with Debra Dietz. (ROA 764-87.) Contained in these voluminous documents was information concerning all of the areas of mitigation Petitioner now contends were ignored at sentencing.[12]

Prior to sentencing, counsel moved for the appointment of Dr. Michael Breslow, a "psychiatric chemical dependency expert." (ROA 463-66.) The court granted the motion. (ME 6/13/91.) Counsel also sought the appointment of a "neurometric brainmapping technician" "for the purpose of diagnosing the absence or presence of organic brain damage and/or psychopathology." (ROA 471.) The request was based upon Dr. Breslow's suggestion that Petitioner's involvement in three motorcycle accidents supported the "possibility" of "organic brain disease." (*Id.* at 478.) The trial court denied the motion,

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[12] Prior to sentencing, counsel also obtained Petitioner's school records. (Dkt. 25, Ex. 9.) These records, which counsel did not present to the court, indicate that Petitioner was a mediocre student who had difficulties with English. (*Id.*) Petitioner graduated from high school in 1977 ranked 316 out of 428 students. (*Id.*)

finding that "there appear[ed] to be no support for this type of examination." (ME 6/24/91.)

In addition to these motions seeking the appointment of experts at sentencing, counsel moved to replace the probation officer assigned to prepare the presentence report (ROA 458-62) and to suppress the report (ROA 794-97) on the grounds that the probation officer was hostile to Petitioner and her report was biased. The court denied both motions. (ME 6/13/91.)

Dr. Breslow interviewed Petitioner twice. (RT 7/12/91 at 8.) He also reviewed a variety of background information, including Petitioner's medical and military records; statements from trial witnesses; and the mental-health evaluations prepared by Drs. Morris, Morenz, and Allender. (*Id.* at 8-9.)

At the presentencing hearing, counsel presented Dr. Breslow's testimony. Dr. Breslow testified that he diagnosed Petitioner with a "narcissistic personality feature which means that he tends to be very sensitive to any slight criticisms or rejections and tends to respond with anger inappropriately in those situations." (*Id.* at 10.)

Dr. Breslow then testified that Petitioner "suffers from alcohol dependency and stimulant dependent. And also amphetamines and cocaine dependent." (*Id.*) He explained that "[b]oth of these have been going on for many years. Probably since his early twenties with the alcohol dependency. Approximately five to six years on the stimulant dependency." (*Id.*) Dr. Breslow described alcoholism as a disease with a "chronic persistent deteriorating course." (*Id.*) He also testified with respect to the "genetic component" of alcoholism:

> Q: Do you find that there was any [family history] in his case with alcohol?
>
> A: Yes. His father and his father's father suffered from alcoholism.
>
> Q: Did you learn anything about his family life with his father and mother in connection with this alcoholism?
>
> A: Yes. There was marked influence of alcohol in his family while he was growing up. And as a result affected both of his parents on an emotional as well as a lot of other aspects and there was a lot of hostility, a lot of hostile fights, a lot of unpredictability in the home

involving the parents drinking.

(*Id.* at 11.)

Dr. Breslow then explained that the lack of consistent parental role models contributed to Petitioner's difficulty in expressing and controlling his anger. (*Id.* at 11-12.) The fact that Petitioner's family moved frequently also prevented him from forming connections with other adults who could have served as role models. (*Id.*)

Counsel next questioned Dr. Breslow about the way in which Petitioner's personality was affected by his problems with substance abuse:

> Q: What effects to [sic] [Petitioner's] addiction to alcohol and his chemical dependency have in terms of anger control?
>
> A. It has a profound effect. Although [Petitioner] usually would become angry to what he sees as something a lot more intentional than you would and because of his prior involvement with drugs and alcohol he is unable to control the behavior. And I looked back over his military records and the personal [sic] reports from the people who knew him and almost exclusively at the time when he was violent were times when he was intoxicated.
>
> Q: What effect would it have upon his judgment?
>
> A: Well, it would certainly have impaired his judgment and made him more impulsive.
>
> Q: Would you explain impulsivity?
>
> A: Impulsivity would mean that a person would act without prior fault. That is that he had a feeling and/or idea that he would act on it whether that was the truth or not without reflecting on this and maybe thinking about the alternatives or consequences might be.
>
> Q: So, impulsivity or an impulsive person acts reflectiveness [sic] and without reflection in other words.
>
> A: Correct.

(*Id.* at 13-14.)

Counsel proceeded to question Dr. Breslow about Petitioner's lack of memory and his mental condition at the time of the shootings. Dr. Breslow indicated that one explanation was that "organic brain syndrome and contusion resulting from an intoxicant substance in

the brain, affecting the brain cells." (*Id.* at 15.) He also opined that Petitioner could have "been under the influence of drugs or the consequences of drug usage" at the time and detailed other factors affecting Petitioner's condition:

> Well, he certainly hadn't had a full nights sleep. And I think probably more significant than that was the fact that he had been using drugs on a daily basis on at least an eight month period prior to the shooting and for sure if he missed a day or two he would be in profound withdrawal and you would expect to see some simulance [sic] of symptoms of depression, irritability, and restlessness and some of those symptoms were described by witnesses the night prior to the shooting.

(*Id.* at 17-18.) Dr. Breslow then recounted the trial testimony concerning Petitioner's deteriorating emotional condition and reiterated that Petitioner's behavior prior to the shootings was consistent with the symptoms of drug withdrawal and that withdrawal "would effect [sic] his mood and concentration and judgment." (*Id.* at 19.)

Counsel asked Dr. Breslow for his "professional opinion about whether [Petitioner's] chemical dependency and alcohol – well, let's just call it substance dependency – substantially impair his ability to conform to the norm of lawful behavior?" (*Id.* at 19-20.) Dr. Breslow answered:

> Well, throughout his life he demonstrated transgression of the law to normal accepted behavior intoxicated and otherwise this strange impulsivity and similar behavior when he was not using drugs and alcohol in addition as a result of his chronic alcohol and drug use I would expect that he does have limited ways of dealing with intense feelings, in particular anger, and as a consequence of his own views as well as that which occurred in his family he never learned and he had a retarded ability to learn at a later age, those same coping skills.

(*Id.* at 20.) Dr. Breslow further testified that Petitioner's "illness" had a "significant impact on his behavior at the time of these killings" because "[t]here is no way that amount of drugs and alcohol usage in a persons [sic] childhood as well as using as an adult could not influence their behavior and judgment in all areas." (*Id.*)

Finally, Dr. Breslow explained how Petitioner's narcissistic personality trait interacted with other factors to affect his conduct at the time of the shootings:

> For a person who is narcissistic, has narcissistic tendencies, even the slightest

rejection can be quite emotional and traumatic.

> For instance, an individual being a few minutes late to an agreed upon greeting [sic] can be taken as quite a rejection or an individual not making contact on an agreed point in time would be taken as a severe rejection and could result in much more intense feelings of anger and a sadness, much more than you would expect to see in other individuals.
>
> And, in addition, his relationship with Debbie Dietz was one that revolved at times around alcohol and drug usage and the relationship itself was unstable and it was – there is an unclear – there was an unclear communication and inconsistencies and this cycle, this pattern, and this violence, and this breaking up and getting back together, and this unclear relationship and these ill defined expectations.

(*Id.* at 21.)

Counsel's examination of Dr. Breslow concluded with the following colloquy:

> Q: At the time of the shooting do you believe that there had been some form of objection [sic] that had been troubling [Petitioner]?
>
> A: Yes. By his report he was expecting to see Debbie Dietz Saturday or Sunday sometime during the week and apparently an agreed upon meeting place and that did not occur and he received no communication from her and for a person who is very sensitive to rejection such as [Petitioner] this would be taken as quite a blow and result in substantial feelings of anger and sadness.
>
> Q: And of course you can't – he couldn't handle this very well?
>
> A: I would have the opinion that he could not handle the anger very good because he is very limited – his judgment is very impaired because of his past drug and alcohol use.

(*Id.* at 21-22.)

Following Dr. Breslow's testimony, which was not subject to cross-examination, counsel argued that Petitioner's history of alcohol abuse should be considered in mitigation:

> And I think that because we have established his long-term illness, his chronic progressive alcoholism and drug dependency and consequently the effect on his ability to function in a rational manner as a rational person. The fact that it has given him anger and impulse control problems and that he cannot handle the stress and anger like ordinary rational people do that the Court can conclude that in the event, or that the events in this case were cause [sic] substantially by his illness and the problems that the illness imposed upon him in terms of being able to behave according to the norms of the law.
>
> I believe that this mitigating factor is sufficient for the Court to conclude in this case that the death penalty is inappropriate.

(*Id.* at 28.)

Following the presentencing hearing, counsel filed a proposed special verdict form arguing, inter alia, that Petitioner's chemical dependency difficulties established a mitigating circumstance under A.R.S. § 13-703(G)(1).[13] (ROA 789-93.)

In sentencing Petitioner, the court found that Petitioner had proved in mitigation a lack of prior felony convictions and "any other mitigating circumstances set forth in the presentence report, including testimony by the psychiatrist in mitigation of the sentence, including the chemical and alcohol abuse problems the defendant has suffered from." (ROA 816.) The court concluded, however, that the mitigating circumstances were not sufficiently substantial to call for leniency. (*Id.*)

Analysis

A review of the specific areas of information cited by Petitioner as being omitted at sentencing reveals that in fact information regarding each issue was put before the trial court.

Head injuries & brain mapping

Petitioner raises two allegations. First, that counsel failed to present evidence of Petitioner's reported head injuries and their effect on his personality, and, second, that counsel erred in failing to secure neurological testing or "brain mapping." As the background recounted above demonstrates, neither of these allegations is meritorious.

The trial court was presented with evidence of Petitioner's reported head injuries through Dr. Allender's testimony during the guilt stage of trial. Dr. Allender testified that Petitioner's head injuries did not cause "a significant behavior change." (RT 2/22/91 at 151.) Petitioner's history of head injuries was also discussed in the reports of the other mental health experts. (ROA-PCR 1214, 1231.) Counsel was not ineffective for failing to present

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[13] A.R.S. § 13-703(G)(1) provides that a mitigating circumstance exists if "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."

evidence and argument at sentencing about Petitioner's head injuries because it had already been presented. *See Bell v. Cone*, 535 U.S. at 699 (counsel not ineffective for failing to present at sentencing evidence already presented at trial). Moreover, at the time of sentencing, counsel had at best equivocal information that Petitioner's head injuries caused the kind of damage that would have affected his behavior at the time of the killings. Dr. Boyer, for instance, had opined that Petitioner's substance abuse was the likely cause of any changes in his personality (ROA-PCR 1217), and, as just noted, Dr. Allender reported that Petitioner did not experience any significant behavioral change (RT 2/22/91 at 151). The Court also notes that there is no documentary support, in the form of medical records, for Petitioner's reported head injuries, all but one of which were purportedly caused by motorcycle accidents. A reference in his military records to a 1981 accident indicates only that Petitioner suffered injuries to his ribs, shoulder, and thumb. (ROA 599, 708.)

With respect to neurological testing, the PCR court found "that Mr. Couser did submit materials supporting his request for brain mapping. There being no factual support for this claim of ineffective assistance of counsel, the Court finds that Mr. Couser's performance in this regard was within the range of professionally competent assistance." (ME 6/6/97 at 8.) The PCR court was correct – this IAC claim is not supported by the facts. Counsel's performance cannot be deemed ineffective when he undertook the action Petitioner faults him for not taking.

Attached to Petitioner's amended habeas petition is an affidavit by Mark Walter, a clinical psychologist. (Dkt. 25, Ex. 7.) Dr. Walter attests that Petitioner's history of head injuries and substance abuse indicates that he suffers from "probable organic brain damage" and that this condition, along with his substance abuse problems and narcissistic and paranoid personality features, supports a "psychological profile for impulsive actions"; according to Dr. Walter, this profile could have been presented more "forcefully" at trial. (*Id.* at 3.) Dr. Walter further attests that Petitioner's deteriorating psychological condition

was evident in the phone messages he left with the victim and was supported by Ms. Whitmer's trial testimony. (*Id.* at 4.) Finally, Dr. Walter states that "brain-mapping would provide tangible scientifically measurable evidence of frontal lobe dysfunctions which are associated with impulsivity problems and a lack of deliberative thinking." (*Id.* at 4.)

This affidavit is not helpful to Petitioner. First, the information it contains was, with the exception of the evidence of brain damage, presented at trial. Second, with respect to the issue of brain damage, as the PCR court noted in denying this aspect of the IAC claim, counsel filed a motion seeking authorization for brain mapping (ROA 471-78), but the trial court denied it as unsupported (ME 6/24/91).

Alcoholism

As previously discussed, the focus of the evidence and argument presented by counsel at sentencing was Petitioner's history of alcoholism and substance abuse, including its genetic component, its impact on his personality and behavior, and the effects of withdrawal. Counsel submitted Petitioner's treatment records and the affidavit of Petitioner's father and presented Dr. Breslow's testimony at the presentencing hearing. The issue of Petitioner's alcohol and substance abuse problems, together with his father's history of alcoholism, was addressed at trial and in the reports of all the mental health experts.

The PCR court considered and rejected this claim when it explained that Petitioner failed to establish that counsel's performance at the presentencing hearing resulted in prejudice:

> Without deciding whether [trial counsel's] failure to argue the suggested mitigating factors falls below the level of professionally competent assistance in a capital case, the Court adopts that portion of the State's Response [to the PCR petition] at page 69 line 7 through page 73 line 13 in support of its finding that [Petitioner] has failed to show a reasonable probability that, had [trial counsel] advanced each of these factually unsupported or legally irrelevant arguments, none of these arguments was reasonably likely to have meaningfully affected the outcome of sentencing. No prejudice having been shown, the claim is denied.

(ME 6/6/97 at 9.)

The cited portions of the State's response assert that counsel was not ineffective with respect to presenting evidence, inter alia, of Petitioner's drug and alcohol use, including evidence that he was intoxicated or experiencing withdrawal at the time of the shootings. The State noted that Dr. Breslow testified that Petitioner may have been suffering from withdrawal, and that Petitioner himself had stated that he was not intoxicated during the killings.

Because counsel developed and presented this mitigating circumstance in detail, the PCR court was not unreasonable in rejecting this claim. This aspect of counsel's performance does not entitle Petitioner to habeas relief.

Military service

At the guilt stage of trial, Dr. Allender and Petitioner's parents testified concerning Petitioner's military service. (RT 2/22/91 at 56, 71, 150.) The sentencing memorandum submitted by counsel included Petitioner's military records, which incorporated various positive performance evaluations. (*See, e.g.*, ROA 625-33.) At the sentencing hearing, Dr. Breslow disclosed that he had read Petitioner's records from the Air Force, which again put the trial court on notice of Petitioner's military service. (RT 7/12/91 at 9.) The presentence report likewise indicated that Petitioner was in the United States Air Force from July 1977 until March 1983. (*See* ROA-PCR 1281; *see also* RT 7/12/91 at 32.) Petitioner cannot demonstrate that he suffered prejudice as a result of counsel's failure to argue that his military service was a mitigating factor because the trial court was well aware of that aspect of Petitioner's background.

Application of clearly-established federal law

In support of this claim, Petitioner relies on three recent decisions in which the Supreme Court reviewed claims of IAC at sentencing under the provisions of the AEDPA and held that the petitioners were entitled to relief: *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). These

cases are readily distinguished from Petitioner's by the quality of the mitigating evidence that counsel failed to present at sentencing.

In *Rompilla*, for example, counsel failed to examine the file on the defendant's prior conviction, despite the fact that the prosecution announced that it was going to use the prior offense as an aggravating factor. 545 U.S. at 383. Had counsel examined the file, they would have discovered a wealth of mitigating information about Rompilla's childhood and mental health that was "very different[] from anything defense counsel had seen or heard" and that "would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla and his family members, and from the reports of the mental health experts." *Id.* at 390-91. According to the undiscovered information, Rompilla's parents were severe alcoholics; his mother drank during her pregnancy with Rompilla. *Id.* at 391-92. His parents fought violently, with his mother stabbing his father on one occasion. *Id.* at 392. His father was a violent man who frequently beat Rompilla's mother; he also beat Rompilla with his fists and other implements. *Id.* His father locked Rompilla and his brother in a small, excrement-filled dog pen. *Id.* Rompilla was not allowed to visit other children or to speak to anyone on the phone. *Id.* The family lived in extreme poverty. *Id.* They had no indoor plumbing, and Rompilla slept in the attic with no heat. *Id.* The children attended school in rags. *Id.* School and juvenile records further showed that Rompilla's IQ was in the mentally retarded range and that after nine years of school he had only a third grade level of cognition. *Id.* at 391, 393. Other information suggested a diagnosis of schizophrenia and other disorders. *Id.* at 391.

These unexamined records contained "red flags" that subsequently led to testing by mental health experts during Rompilla's postconviction proceedings. *Id.* at 392. The results of these tests revealed that Rompilla "suffer[ed] from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions." *Id.* His problems stemmed from his troubled childhood and were likely caused by fetal alcohol

syndrome. *Id.* The experts also opined that Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense. *Id.*

Weighing the information counsel should have presented but did not, the Supreme Court concluded: "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 393. There was a reasonable probability, therefore, that if the information had been presented, the jury would have reached a different conclusion at sentencing. *Id.*

Similarly, in *Wiggins* trial counsel failed to present evidence, readily available from school records and medical reports, of the defendant's "excruciating life history," 539 U.S. at 537, which involved "severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother" followed by "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," *id.* at 535. Wiggins's background also featured periods of homelessness. *Id.* at 535. He suffered from "diminished mental capacities." *Id.* In holding that Wiggins had demonstrated prejudice from counsel's performance at sentencing, the Court noted that this "powerful mitigating narrative," *id.* at 537, constituted the kind of "troubled history we have declared relevant to assessing a defendant's moral culpability," *id.* at 535. If such information had been added to the case counsel did present at sentencing, which focused only on Wiggins's lack of a previous record and the fact that he accepted responsibility for the murder, there was a reasonable probability that the jury would have returned with a different sentence. *Id.* at 536.

In *Williams*, sentencing counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams's nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395. Counsel thereby failed to present evidence that Williams's parents had been imprisoned for the criminal neglect of Williams and his siblings,

that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration, and that he had spent time in an abusive foster home. *Id.* Counsel also failed to introduce evidence that Williams was "borderline mentally retarded" and did not advance in school beyond the sixth grade. *Id.* In addition, they failed to discover prison records that presented positive information about Williams, including commendations he had received for his role in helping to crack a prison drug ring and returning a guard's missing wallet, as well as the testimony of prison officials who described Williams as the "least likely [inmate] to act in a violent, dangerous or provocative way." *Id.* at 396. Such information, had counsel presented it at sentencing, "might well have influenced the jury's appraisal of [Williams's] moral culpability." *Id.* at 398.

Petitioner also cites a number of Ninth Circuit cases, including cases involving Petitioner's counsel, Lamar Couser, in which the court granted relief on sentencing-stage IAC claims. These cases are likewise distinguishable. In *Clabourne v. Lewis*, 64 F.3d 1375, 1384 (9th Cir. 1995), Mr. Couser's performance was found to be ineffective because "[h]e did not call any witnesses, introduce any evidence of Clabourne's history of mental illness, or argue any mitigating circumstance besides Clabourne's mental condition at the time of the offense." Instead, counsel argued that the evidence produced at trial concerning Clabourne's mental illness could be considered in mitigation of the sentence. *Id.* The Ninth Circuit noted, however, that the case counsel presented during the guilt stage of trial "was hardly sufficient to make a case for mitigation" because he called only one witness, "an expert he had contacted scant days earlier" and who "was wholly unprepared to testify as to Clabourne's mental state at the time of the offense; not having interviewed Clabourne, and having less than two days to prepare his testimony, [the expert] had to rely on vague recollections of having treated Clabourne some six years earlier." *Id.* Counsel's deficient performance resulted in a failure to develop key mitigation evidence, including information

indicating that Clabourne suffered from mental disorders that allowed him to be manipulated by his co-defendant into committing the crime. *Id.* at 1385-86.

As already noted, in contrast to his performance in *Clabourne*, here Mr. Couser presented evidence concerning Petitioner's mental state at both the guilt and sentencing stages of trial. This evidence was offered through the testimony of expert and lay witnesses, who detailed and explained Petitioner's impulsive character and the negative effect alcohol and drugs had on his personality. Further, unlike the expert in *Clabourne*, Drs. Allender and Breslow had personally examined Petitioner and reviewed his treatment records.

In *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999), another case involving Mr. Couser, counsel failed to discover and provide to their mental health experts various test results and information about Wallace's background. The deficient performance left the sentencing judge with an incomplete and inaccurate picture of Wallace's history and mental health. Among the information omitted was the fact that Wallace came from "one of the most dysfunctional family backgrounds" his mental health expert had ever encountered, an environment that was "marred by an almost unimaginable level of chaos, neglect, bizarre and insane behavior, and extreme violence between the parents." *Id.* at 1116. Wallace's mother was a psychotic alcoholic; his father, also an alcoholic, beat Wallace's mother. *Id.* Wallace sniffed glue and gasoline daily between the ages of ten and twelve. *Id.* He experienced "clinically significant head traumas." *Id.* He also suffered from major depressive disorder and possibly organic brain disorder. *Id.* At the time of the murders, his ability to conform his conduct to the requirements of the law was "significantly impaired." *Id.*

The principal distinction between the cases relied upon by Petitioner and trial counsel's representation of Petitioner is that in the latter instance, counsel's performance did not result in the omission of vital mitigation information. To the extent that mitigating information about Petitioner's mental and neurological condition existed, counsel presented it, eliciting testimony that Petitioner had a personality trait of impulsivity, which was the

product of his narcissistic personality and exacerbated by his alcoholism and chemical dependency.

Principles discussed in other Supreme Court cases more readily apply to Petitioner's claim of sentencing-stage IAC. These cases include *Woodford v. Visciotti*, 537 U.S. 19 (2002), *Bell v. Cone*, 535 U.S. 685 (2002), and *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007). In these cases, the Supreme Court, applying the deferential standards of the AEDPA, held that the state court did not unreasonably apply *Strickland* when it determined that the petitioner was not entitled to habeas relief based on sentencing counsel's performance.

In *Visciotti*, counsel failed to investigate and present readily available mitigating information consisting of potential organic brain damage, possible seizure disorder, extensive drug use beginning at the age of eight, and a "dysfunctional" family background characterized by violence between the parents, frequent moves, severe economic difficulties, and "continual psychological abuse." *See Visciotti v. Woodford*, 288 F.3d 1097, 1109-14 (9th Cir. 2002). Instead of developing and presenting such evidence, counsel attempted to create sympathy for Visciotti's family by calling his siblings and parents to testify during the penalty phase.[14] *Id.* at 1103, 1115. The California Supreme Court assumed, arguendo, that counsel's sentencing-stage performance was deficient but determined that Visciotti was not prejudiced. *See* 537 U.S. at 26. The Ninth Circuit disagreed, finding that the state supreme court's decision was unreasonable and contrary to *Strickland*, and that if counsel had not performed deficiently there was a reasonable probability that the jury would have returned with a life sentence. 288 F.3d at 1117-19. The United States Supreme Court reversed, holding that the state supreme court properly considered the totality of available mitigating

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[14] During the guilt stage of trial, counsel had presented testimony that Visciotti "had minimal brain injury of a type associated with impulse disorders and specific learning disorders." *Visciotti*, 288 F.3d at 1102. However, the expert had been retained only three days prior to his testimony, and counsel had failed to provide him with any records. *Id.* at 1110-11.

evidence and the prejudicial impact of counsel's performance at sentencing. 537 U.S. at 25-26. Citing *Bell v. Cone*, 535 U.S. at 699, 701, the Court explained that habeas relief was not "permissible under § 2254(d)" because the decision of the state court, notwithstanding any independent assessment rendered by a federal habeas court, was not objectively unreasonable. 537 U.S. at 26. Significantly, the mitigating information omitted by Visciotti's attorney was much stronger than the evidence Petitioner alleges was omitted by Mr. Couser during his sentencing.

In *Cone*, a jury convicted the defendant of murdering an elderly couple and sentenced him to death after a hearing in which defense counsel presented no witnesses and made no closing argument. 535 U.S. at 691. Instead, counsel cross-examined the prosecution's witnesses and directed the jury's attention to mitigation evidence that had already been presented in the guilt phase of the trial, including the defendant's drug addiction and mental problems. *Id.* The Supreme Court determined that Cone's IAC claim could not satisfy the deferential standards set forth in the AEDPA. *Id.* at 698-99.

Like Petitioner's trial counsel, Cone's attorney "was faced with the formidable task of defending a client who had committed a horribly brutal and senseless crime." *Id.* Like Petitioner's counsel, Cone's attorney presented a defense at the guilt stage of the trial based on Petitioner's mental state, so that "he was able to put before the jury extensive testimony about what he believed to be the most compelling mitigation evidence in the case," including evidence about Petitioner's history of drug and alcohol abuse and its effects on him at the time of the crimes. *Id.* Like Petitioner's counsel, at sentencing Cone's attorney argued for mitigation based on his client's insufficient capacity. *Id.* at 699-700. Unlike Cone's attorney, however, Petitioner's counsel also presented expert testimony at sentencing to address the issue of his client's mental health and offered a closing argument.

Finally, in *Landrigan*, the Supreme Court held that counsel's failure to adequately investigate and develop potential mitigating was not prejudicial because such evidence was

"weak." 127 S. Ct. at 1944. This evidence included Landrigan's exposure to alcohol and drugs in utero, abandonment by his biological mother, his own drug and alcohol abuse, his family's history of violence, and a possible genetic predisposition to violence. *Id.* at 1943. Nevertheless, the Court concluded that there was no reasonable probability that presentation of the additional evidence would have changed the outcome at sentencing. *Id.* at 1944. Again, this "weak" evidence was more substantial than any mitigating information now offered or suggested by Petitioner.

Based upon a review of clearly-established federal law, Petitioner was not prejudiced by counsel's performance at sentencing. The Court has assessed prejudice with respect to Petitioner's sentencing-stage IAC claims by reevaluating Petitioner's sentence in the light of the evidence introduced in these habeas proceedings. The new information is largely inconclusive or cumulative, such that it "barely . . . alter[s] the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700; *see Babbitt v. Calderon*, 151 F.3d 1170, 1175 (9th Cir. 1998) (no prejudice where counsel failed to present cumulative mitigating evidence). The trial court was presented with information concerning each area of mitigation now urged by Petitioner – his impulsive personality, history of drug and alcohol abuse, and chaotic family background. Petitioner has failed to affirmatively demonstrate that, but for counsel's failure to present additional mitigating information, there exists a reasonable probability that the trial court would not have sentenced Petitioner to death.

Finally, applying the additional level of deference mandated by the AEDPA, the PCR court's denial of this claim did not constitute an unreasonable application of *Strickland*. Therefore, Petitioner is not entitled to relief on Claim 10-C(3)(a).

B. Failure to Prepare for Presentence Interview

Petitioner alleges in Claim 10-C(3)(b) that counsel failed to prepare him for his presentence interview with a probation officer and that such failure amounted to constitutionally ineffective assistance. (Dkts. 24 at 143-45, 69 at 28.)

During the PCR proceedings, Petitioner filed an affidavit stating that Mr. Couser "never counseled me on the preparation of the presentence report." (ROA-PCR 1010.) The PCR court nevertheless rejected this claim:

> The Court finds that although Mr. Couser's deposition testimony contradicts the Petitioner's claim that he was not counseled in preparation for the presentence interview, even assuming the facts to be as alleged, the Petitioner has failed to show a reasonable probability that the outcome would have been meaningfully altered had he been counseled. The petition raises only one specific issue, the expression of remorse, on which pre-interview counseling might have aided the Petitioner. However, the Petitioner did include expressions of remorse in a letter delivered by counsel to Judge Meehan on the day of sentencing. In the absence of a showing that the Petitioner was prejudiced by the presumed failure to counsel his client before the interview, the claim is denied.

(ME 6/6/97 at 8.)

As the PCR court noted, Petitioner's contention about this aspect of counsel's performance does not comport with the averments of Mr. Couser in a deposition conducted during the state post-conviction relief proceedings. (*See* Dkt. 25, Ex. 16; RT 2/16/96 at 109-10.) During his deposition, counsel conceded that he had no specific recollection of what he told Petitioner about the presentence interview process; he explained, however, that it was his general practice to discuss such matters with his clients and was "sure I must have" with Petitioner as well. *Id*. Petitioner's self-serving, uncorroborated assertion to the contrary is the only support for the proposition that his attorney did not counsel him concerning the preparation of the presentence report.

Even if Petitioner's assertion about counsel's performance were verified, Petitioner cannot show that he suffered prejudice as a result of his trial counsel's actions or inactions. Petitioner asserts that with the proper guidance from trial counsel, he would have expressed greater remorse during the presentence interview. (Dkt. 24 at 144.) In fact, Petitioner felt no remorse and it was not incumbent upon counsel to manufacture remorse or prompt

Petitioner to express such feelings where none existed.[15] In any event, as the PCR court noted, Petitioner did express remorse in a letter submitted to the sentencing judge. (Dkt. 25, Ex. 6.) Moreover, the court did not consider Petitioner's lack of remorse in the presentence report as a factor in sentencing Petitioner. (ME 7/12/91.) Thus, Petitioner cannot demonstrate prejudice from counsel's performance because he "has failed to show that the information relative to remorse contained in the presentence report had any effect on the sentencing court's decision to impose the death penalty." *Clark v. Ricketts*, 958 F.2d 851, 857-58 (9th Cir. 1991). The PCR court's denial of this claim was not an unreasonable application of *Strickland*.

C. Failure to Present Military Service as Mitigation

Petitioner asserts in Claim 10-C(3)(d) that counsel's performance at sentencing was ineffective because he failed to urge Petitioner's military service as a mitigating circumstance. (Dkts. 24 at 146-47, 69 at 28.) The facts are to the contrary. As noted above, counsel presented the entirety of Petitioner's military records for consideration by the trial court. The sentencing judge is presumed to have known and applied the law correctly, *Walton v. Arizona*, 496 U.S. 639, 653 (1990), which meant giving consideration to any mitigating evidence. Furthermore, any additional focus on the positive aspects of the records could have proved to have a "double edge" effect, *Wiggins*, 539 U.S. at 535, opening the door for the prosecutor to note the instances of misconduct resulting in disciplinary action and loss of rank. The PCR court did not apply *Strickland* unreasonably when it rejected this

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[15] The presentence report quotes Petitioner's feelings with respect to remorse as follows:

> I have no remorse for that family. After the jury verdict was announced the mother (Peggy Dietz) stood and raised her fist as if to say they'd won. They didn't win anything. I'm alive and they're dead. The only thing that still hurts is that I won't see Deb anymore.

(ROA-PCR 1287.)

claim.

D. Cumulative Impact

Petitioner alleges in Claim 10-D that his constitutional rights were violated by the cumulative impact of IAC as alleged in Claims 10-B and 10-C. (Dkts. 24 at 147, 69 at 31.) The Court has considered Petitioner's individual claims of sentencing error and found none supportable. Accordingly, Petitioner's assertion of cumulative error also fails.

VI. Ineffective Assistance of Appellate Counsel

Petitioner alleges in Claim 11-B that appellate counsel rendered ineffective assistance in preparing the appellate brief. (Dkts. 24 at 148-64, 69 at 31-33.) Specifically, he contends that appellate counsel failed to properly brief his claims of evidentiary error and identify separate grounds of prosecutorial misconduct.

Appellate counsel filed a 100-page opening brief. The Arizona Supreme Court commented on the quality of the brief, noting, with respect to claims of evidentiary error, that the brief consisted of fourteen pages of excerpts from trial testimony as to which "appellate counsel has failed to articulate separate grounds of objection." *Wood*, 180 Ariz. at 61, 881 P.2d at 1166. Faced with this "unhelpful appellate practice," the Arizona Supreme Court examined Petitioner's evidentiary claims for fundamental error. *Id.* at n.3. Alleging that the prosecutor "ran amok," appellate counsel also raised several specific claims of prosecutorial misconduct, including those set forth in habeas Claims 1-B(1), 1-B(2)(a), 1-B(5), and 1-B(7). (Opening Brief at 60-66.)

The PCR court denied this claim, finding that appellate counsel's performance was neither deficient nor prejudicial. (ME 6/6/97 at 10.)

Analysis

The Fourteenth Amendment guarantees a criminal defendant the right to effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). A claim of ineffective assistance of appellate counsel is reviewed according to the

standard set out in *Strickland*. *See Miller v. Keeney*, 882 F.2d 1428, 1433-34 (9th Cir. 1989). Petitioner must show that counsel's appellate advocacy fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, Petitioner would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *see also Miller*, 882 at 1434 n.9 (citing *Strickland*, 466 U.S. at 688, 694).

As the Arizona Supreme Court noted, Petitioner's criticisms of the opening brief's format are well-taken. With respect to the claims of evidentiary error, for example, appellate counsel fails to offer detailed analysis (Opening Brief at 19-38); the factual bases for some claims of prosecutorial misconduct likewise are not detailed (*id.* at 65-66). However, under *Strickland*, the standard for effective performance is not perfect advocacy. *See Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000). Instead, counsel's performance "must be only objectively reasonable, not flawless or to the highest degree of skill." *Id.* Ultimately, however, the Court again finds it unnecessary to determine whether appellate counsel's performance was objectively reasonable because Petitioner has clearly failed to satisfy *Strickland*'s second prong.

Petitioner has made no showing that he would have prevailed on appeal if appellate counsel had presented his claims in a more substantive and organized fashion. Instead, Petitioner has simply described the deficiencies in appellate counsel's brief and concluded that they entitle him to relief. These conclusory allegations are insufficient to establish prejudice. *See Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989) (general complaints about the quality of the appellate brief are not sufficient to establish prejudice). Petitioner has provided no basis for his contention that a more coherent presentation of the same issues was reasonably likely to have led to a reversal.

Petitioner cites *Howard v. Gramley*, 225 F.3d 784 (7th Cir. 2000). The decision in *Howard*, however, supports a determination that Petitioner is not entitled to relief on this claim. Although the Seventh Circuit found that appellate counsel's performance was

deficient because he failed to raise the issue of prosecutorial misconduct, the court did not grant relief, holding that the petitioner was not prejudiced by counsel's failures because "there is no reason to think that presenting these arguments to the Illinois appellate courts would have increased the likelihood of reversal." *Id.* at 793. In the present case, appellate counsel did in fact raise claims of prosecutorial misconduct (Opening Brief at 60-66) as well as claims of evidentiary error (*id.* at 19-38). Although appellate counsel may have presented many of the claims in a perfunctory and poorly-organized manner, the Arizona Supreme Court did consider the claims. *Wood*, 180 Ariz. at 61-68, 881 P.2d at 1166-73. A more artful presentation by appellate counsel would not have transformed the merits of the claims such that the outcome of the appeal would have been different.

For the reasons stated above, the decision of the PCR court denying Petitioner's claim of appellate IAC was not an unreasonable application of *Strickland*. Therefore, Petitioner is not entitled to relief on Claim 11-B.

EVIDENTIARY DEVELOPMENT

Petitioner seeks an evidentiary hearing, evidentiary development, and expansion of the record. (Dkt. 69 at 33-41.) He also seeks resources, in the form of a mitigation specialist and a neuropsychologist, asserting that such resources are "necessary to assist Petitioner in demonstrating the prejudice resulting from [trial] counsel's errors: the mental health evidence which should have been discovered and presented to Dr. Allender to support Petitioner's defense to first-degree murder and to establish the mitigation discussed [in Petitioner's memorandum on the merits]." (*Id.* at 38-39.) Petitioner asserts that he was diligent in developing the factual bases of his claims in state court because he sought an evidentiary hearing and requested expert funds. (*Id.* at 34-36.) Respondents counter that Petitioner was not diligent in state court and therefore is not entitled to a hearing or expansion of the record. (Dkt. 74 at 64-71.)

Legal Principles

In evaluating Petitioner's requests, the Court applies the relevant provisions of 28 U.S.C. § 2254(e)(2):

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Section 2254(e)(2) similarly limits a petitioner's ability to present new evidence through a motion to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases.[16] *See Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005) (holding that the conditions of § 2254(e)(2) generally apply to petitioners seeking relief based on new evidence, even when they do not seek an evidentiary hearing) (citing *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam)).

The Supreme Court has interpreted subsection (e)(2) as precluding an evidentiary hearing in federal court if the failure to develop a claim's factual basis is due to a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). A hearing is not barred, however, when a petitioner diligently attempts to develop the factual basis of a claim in state court and is

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[16] Rule 7 authorizes a federal habeas court to expand the record to include additional material relevant to the determination of the merits of a petitioner's claims. "The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath, to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record." Rule 7(b), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.

"thwarted, for example, by the conduct of another or by happenstance was denied the opportunity to do so." *Id.*; *see also Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999) (allowing hearing when state court denied opportunity to develop factual basis of claim).

The diligence assessment is an objective one, requiring a determination of whether a petitioner "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams*, 529 U.S. at 435. For example, when there is information in the record that would alert a reasonable attorney to the existence and importance of certain evidence, the attorney fails to develop the factual record if he does not make reasonable efforts to sufficiently investigate and present the evidence to the state court. *See id*. at 438-39, 442; *Alley v. Bell*, 307 F.3d 380, 390-91 (6th Cir. 2002). Absent unusual circumstances, diligence requires that a petitioner "at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437; *see also Bragg v. Galaza*, 242 F.3d 1082, 1090 (9th Cir.), *amended on denial of reh'g*, 253 F.3d 1150 (9th Cir. 2001). The mere request for an evidentiary hearing, however, may not be sufficient to establish diligence if a reasonable person would have taken additional steps. *See Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000) (counsel failed to present affidavits of family members that were easily obtainable without court order and with minimal expense); *Koste v. Dormire*, 345 F.3d 974, 985-86 (8th Cir. 2003); *McNair v. Campbell*, 416 F.3d 1291, 1299-1300 (11th Cir. 2005).

Pursuant to *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), *and limited by* § 2254 (e)(2), a federal district court must hold an evidentiary hearing in a § 2254 case when: (1) the facts are in dispute; (2) the petitioner "alleges facts which, if proved, would entitle him to relief;" and (3) the state court has not "reliably found the relevant facts" after a "full and fair evidentiary hearing," at trial or in a collateral proceeding. *See also Hill v. Lockhart*, 474 U.S. 52, 60 (1985)

(upholding the denial of a hearing when petitioner's allegations were insufficient to satisfy the governing legal standard); *Bashor v. Risley*, 730 F.2d 1228 (9th Cir. 1984) (hearing not required when claim must be resolved on state court record or claim is based on non-specific conclusory allegations); *see also Landrigan*, 127 S. Ct. at 1940 ("Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.").

Analysis

During the PCR proceedings Petitioner requested, but did not receive, an evidentiary hearing on his IAC claims. (*See* RT 11/6/96 at 3, 6; ME 11/6/96.) As discussed above, he also attached a number of exhibits to his PCR petition, including affidavits from Dr. Allender. Arguably, these efforts constituted a diligent attempt to develop the factual basis for Petitioner's claims. However, even assuming Petitioner diligently sought to develop the claims in state court, an evidentiary hearing is unnecessary because he has not alleged the existence of disputed facts which, if true, would entitle him to relief. *Townsend*, 372 U.S. at 312-13.[17]

Petitioner contends that he was prejudiced by counsel's deficient handling of mental health evidence at both the guilt and sentencing stages of trial. The merits of that contention can be resolved without further evidentiary development. The record adequately details counsel's performance, including his effort to investigate, prepare, and present a guilt-stage defense based on Petitioner's character trait of impulsivity. Therefore, because his IAC claims can be "resolved by reference to the state court record," Petitioner is not entitled to an evidentiary hearing. *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998); *see also*

[17] This conclusion is not affected by the Court's consideration of the exhibits attached to the habeas petition, with which Petitioner seeks to expand the state court record. Of the sixteen exhibits, only Dr. Walters's report and the collection of Petitioner's report cards constitute new information relevant to Petitioner's IAC claims. (Dkt. 25, Ex's 7, 9.)

Griffey v. Lindsey, 345 F.3d 1058, 1067 (9th Cir. 2003) (hearing is not warranted if Petitioner's claims can "be resolved by reference to the state court record and the documentary evidence); *Cardwell v. Greene*, 152 F.3d 331, 338-39 (4th Cir. 1998) (denying an evidentiary hearing on IAC claims where the petitioner "failed to forecast any evidence beyond that already contained in the record, or otherwise explain how his claim would be advanced by an evidentiary hearing.").

In *Totten*, the Ninth Circuit held that the petitioner was not entitled to an evidentiary hearing to determine whether trial counsel's decision not to pursue a mental impairment defense was deficient because Petitioner had failed to show that a hearing would shed new light on the question of prejudice. *Id.* at 1176-77. The record demonstrated that an impairment defense was wholly inconsistent with the petitioner's deliberate actions in committing the offenses and thus would have been unlikely to alter the verdict. *Id.* Similarly, as discussed above, Petitioner has not shown that an evidentiary hearing would produce any new information concerning Petitioner's mental state that could have affected the jury's finding of premeditation. To the contrary, counsel presented the testimony of a neuropsychologist and lay witnesses who described Petitioner's impulsive personality. The jury nevertheless convicted Petitioner of first degree murder based on the "clear quantum" of evidence of premeditation. *Wood*, 180 Ariz. At 65, 881 P.2d at 1170.

The same analysis applies to Petitioner's claims of IAC at sentencing. Counsel argued and presented testimony that Petitioner's ability to conform his conduct to the requirements of law was diminished by his alcohol and drug abuse coupled with his impulsive personality. Dr. Walters's affidavit adds only further speculation that Petitioner suffers from organic brain damage along with a call for diagnostic testing. As discussed above, based on the recommendation of Dr. Breslow, counsel moved for such testing and presented Dr. Breslow's testimony regarding the causes of Petitioner's impulsivity. (ROA 471.) The record, which contains, among other items, all of the reports prepared by the mental health experts who had

evaluated Petitioner, is sufficient to resolve this claim. *See Johnson v. Luebbers*, 288 F.3d 1048, 1058-60 (8th Cir. 2002) (district court did not abuse its discretion in denying habeas corpus petitioner's request for an evidentiary hearing on claim that his counsel was ineffective for failing to present mitigating evidence of petitioner's mental health and diminished mental capacity where record already contained facts necessary to resolve claim). A review of the entire record indicates that the facts alleged by Petitioner, even if proved true, would not entitle him to relief on his claim that the PCR court unreasonably applied *Strickland* in denying his IAC claims. *See Landrigan*, 127 S. Ct at 1940. Therefore, Petitioner is not entitled to an evidentiary hearing.

CERTIFICATE OF APPEALABILITY

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

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a certificate of appealability ("COA") or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's

procedural ruling was correct. *Id.*

The Court finds that reasonable jurists, applying the deferential standard of review set forth in the AEDPA, which requires this Court to evaluate state court decisions in the light of clearly established federal law as determined by the United States Supreme Court, could not debate its resolution of the merits of Petitioner's claims as set forth in this Order. Further, for the reasons stated in the Court's Order regarding the procedural status of Petitioner's claims filed on March 3, 2006 (Dkt. 63), the Court declines to issue a COA with respect to any claims that were found to be procedurally barred.

CONCLUSION

For the reasons set forth above, Petitioner is not entitled to habeas relief. The Court further finds that an evidentiary hearing in this matter is neither warranted nor required.

Accordingly,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 23) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED DENYING a Certificate of Appealability.

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

DATED this 19th day of October, 2007.

John M. Roll
Chief United States District Judge

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, vs. JOSEPH RUDOLPH WOOD, III, Appellant.	Supreme Court No. CR-91-0233-AP Pima County No. CR-28449 **O P I N I O N**

Appeal from the Superior Court in Pima County

The Honorable Thomas Meehan, Judge (deceased)

AFFIRMED

Grant Woods, Attorney General — Phoenix
By: Paul J. McMurdie
Bruce M. Ferg — Tucson
- and -
Stephen D. Neely, Pima County Attorney — Tucson
By: Thomas J. Zawada
Attorneys for State of Arizona

Pima County Legal Defender — Tucson
By: Barry J. Baker Sipe
Attorneys for Joseph Rudolph Wood, III

FELDMAN, Chief Justice

A Pima County jury convicted Joseph Rudolph Wood, III ("Defendant") of two counts of first degree murder and two counts of aggravated assault. The trial court sentenced him to death for each murder and to imprisonment for the assaults. Appeal to this court from the death sentences is automatic. Ariz. R. Crim. P. 26.15, 31.2(b). We have jurisdiction under Ariz. Const. art. VI, § 5(3), A.R.S. §§ 13-4031 and 13-4033(A), and Ariz. R. Crim. P. 31.

FACTS AND PROCEDURAL HISTORY

Defendant shot and killed his estranged girlfriend Debra Dietz ("Debra") and her father Eugene Dietz ("Eugene") on Monday, August 7, 1989, at a Tucson automotive paint and body shop ("the shop") owned and operated by the Dietz family.

Since 1984, Defendant and Debra had maintained a tumultuous relationship increasingly marred by Defendant's abusive and violent behavior. Eugene generally disapproved of this relationship but did not actively interfere. In fact, the Dietz family often included Defendant in dinners and other activities. Several times, however, Eugene refused to let Defendant visit Debra during business hours while she was working at the shop. Defendant disliked Eugene and told him he would "get him back" and that Eugene would "be sorry."

Debra had rented an apartment that she shared with Defendant. Because Defendant was seldom employed, Debra supported him financially.

Defendant nevertheless assaulted Debra periodically.[1] She finally tried to end the relationship after a fight during the 1989 July 4th weekend. She left her apartment and moved in with her parents, saying "I don't want any more of this." After Debra left, Defendant ransacked and vandalized the apartment. She obtained an order of protection against Defendant on July 8, 1989. In the following weeks, however, Defendant repeatedly tried to contact Debra at the shop, her parents' home, and her apartment.[2]

Debra and Eugene drove together to work at the shop early on Monday morning, August 7, 1989. Defendant phoned the shop three times that morning. Debra hung up on him once, and Eugene hung up on him twice. Defendant called again and asked another employee if Debra and Eugene were at the shop. The employee said that they had temporarily left but would return soon. Debra and Eugene came back at 8:30 a.m. and began working in different areas of the shop. Six other employees were also present that morning.

At 8:50 a.m., a Tucson Police officer saw Defendant driving in a suspicious manner near the shop. The officer slowed her patrol car and made eye contact with Defendant as he left his truck and entered the shop. Eugene was on the telephone in an area where three other employees were working. Defendant waited for Eugene to hang

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[1] Debra was often bruised and sometimes wore sunglasses to hide blackened eyes. A neighbor who often heard "thuds and banging" within Debra's apartment called police on June 30, 1989, after finding Debra outside and "hysterical." The responding officer saw cuts and bruises on Debra.

[2] Defendant left ten messages on Debra's apartment answering machine on the night of Friday, August 4, 1989. Some contained threats of harm, such as: "Debbie, I'm sorry I have to do this. I hope someday somebody will understand when we're not around no more. I do love you babe. I'm going to take you with me."

up, drew a revolver, and approached to within four feet of him. The other employees shouted for Defendant to put the gun away. Without saying a word, Defendant fatally shot Eugene once in the chest and then smiled. When the police officer saw this from her patrol car she immediately called for more officers. Defendant left the shop, but quickly returned and again pointed his revolver at the now supine Eugene. Donald Dietz, an employee and Eugene's seventy-year-old brother, struggled with Defendant, who then ran to the area where Debra had been working.

Debra had apparently heard an employee shout that her father had been shot and was trying to telephone for help when Defendant grabbed her around the neck from behind and placed his revolver directly against her chest. Debra struggled and screamed, "No, Joe, don't!" Another employee heard Defendant say, "I told you I was going to do it, I have to kill you." Defendant then called Debra a "bitch" and shot her twice in the chest.

Several police officers were already on the scene when Defendant left the shop after shooting Debra. Two officers ordered him to put his hands up. Defendant complied and dropped his weapon, but then grabbed it and began raising it toward the officers. After again ordering Defendant to raise his hands, the officers shot Defendant several times.

A grand jury indicted Defendant on two counts of first degree murder and two counts of aggravated assault against the officers. Although he did not testify, Defendant did not dispute his role in the killings but argued he had acted impulsively and without premeditation. A jury found Defendant guilty on all counts. The trial court sentenced him to death for each of the murders and to concurrent

fifteen-year prison terms for the aggravated assaults, to be served consecutively to the death sentences. This appeal followed.

DISCUSSION

A. TRIAL ISSUES

Defendant makes many ineffective assistance of counsel claims. Such claims generally should be pursued in post-conviction relief proceedings pursuant to Ariz. R. Crim. P. 32. Because they are fact-intensive and often involve matters of trial tactics and strategy, trial courts are far better-situated to address these issues. State v. Valdez, 160 Ariz. 9, 14-15, 770 P.2d 313, 318-19 (1989). We decline to address them here and turn instead to the other issues presented.

1. *Admission of alleged "other act," hearsay, and irrelevant testimony*

Defendant alleges that the trial court improperly admitted testimony from various witnesses, violating his confrontation and due process rights. Unfortunately, appellate counsel has failed to articulate separate grounds of objection to each portion of testimony.[3] We will, therefore, separate and address the challenged testimony in seven categories. Because the trial court is in the best position to judge the admissibility of proffered testimony, we review most

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[3] Defense counsel reproduced 20 excerpts of trial testimony amounting to 14 pages in his opening brief and then made a generic claim that all the testimony was improperly admitted on hearsay, relevance, opinion testimony, or Rule 404 grounds. To say the least, this is an unhelpful appellate practice. On appeal, counsel must clearly identify the objectionable portions of testimony and the specific basis for each claimed error. *See* Ariz. R. Crim. P. 31.13(c)(1)(iv). Because this is a capital case and we must search for fundamental error, we will examine the evidentiary claims before considering the question of any waiver by appellate counsel.

evidentiary claims on a discretionary standard. *See, e.g.*, State v. Prince, 160 Ariz. 268, 274, 772 P.2d 1121, 1127 (1989); State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

a. ***Character evidence and prior acts***

The trial court denied Defendant's motion to suppress evidence of his prior bad acts. Defendant alleges that the trial court improperly admitted testimony concerning his alleged violent acts against Debra in violation of Ariz. R. Evid. 404(a). We disagree.

Rule 404(a) generally precludes admission of other acts to prove a defendant's character or "to show action in conformity therewith" on a particular occasion. State v. Bible, 175 Ariz. 549, 575, 858 P.2d 1152, 1178, *cert. denied*, 114 S. Ct. 1578 (1993). Evidence of certain types of prior acts is admissible, however, "for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). This list of permissible purposes is merely illustrative, not exclusive. State v. Jeffers, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983), *cert. denied*, 464 U.S. 865, 104 S. Ct. 199 (1985), *rev'd on other grounds*, Jeffers v. Ricketts, 832 F.2d 476, 480-81 (9th Cir. 1987); Morris K. Udall et al., ARIZONA PRACTICE-LAW OF EVIDENCE § 84, at 179 n.6 (3d ed. 1991).

This court has "long held that where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible." Jeffers, 135 Ariz. at 418, 661 P.2d at 1119 (citing Leonard v. State, 17 Ariz. 293, 151 P. 947 (1915)). Such evidence "tends to show the malice, *motive* or

premeditation of the accused." *Id.* at 418, 661 P.2d at 1119 (emphasis added). In some cases, of course, such evidence may also show lack of premeditation. In either event, it is relevant. Defendant's abuse of Debra falls squarely within this rule and, under the facts of this case, tends to show both motive and premeditation.

Premeditation was the main trial issue. The defense was lack of motive to kill either victim and the act's alleged impulsiveness, which supposedly precluded the premeditation required for first degree murder. *See* A.R.S. § 13-1105(A)(1). Defendant's prior physical abuse of and threats against Debra were relevant to show his state of mind and thus were properly admitted under Rule 404(b). *See* State v. Featherman, 133 Ariz. 340, 344-45, 651 P.2d 868, 872-73 (Ct. App. 1982) (evidence of prior assault on victim admissible to show defendant's intent in murder prosecution).

b. *Hearsay statements of Debra Dietz*

A number of witnesses testified to statements made by Debra about her fear of Defendant and her desire to end their relationship. Defendant claims the trial court erred in admitting this testimony over a continuing objection that the statements were irrelevant and hearsay.[4] We address each contention.

Evidence is relevant "if it has any basis in reason to prove a material fact in issue or if it tends to cast light on the crime charged." State v. Moss, 119 Ariz. 4, 5, 579 P.2d 42, 43 (1978);

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[4] The trial court denied Defendant's pretrial motion to suppress all hearsay testimony relating to statements by Debra and recorded defense counsel's continuing objection to such testimony. This is a proper method of preserving error for appeal. State v. Christensen, 129 Ariz. 32, 36, 628 P.2d 580, 584 (1981).

Ariz. R. Evid. 401. We have found similar testimony relevant in analogous cases. For instance, in State v. Fulminante, evidence of the victim's fear of the defendant and their acrimonious relationship was relevant to the defendant's motive and admissible to refute defense claims that the relationship was harmonious. 161 Ariz. 237, 251, 778 P.2d 602, 616 (1989), *aff'd*, 499 U.S. 279, 111 S. Ct. 1246 (1991).[5] Contrary to Defendant's assertion, State v. Charo, 156 Ariz. 561, 754 P.2d 188 (1988), and State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981), are consistent with this general rule. Those cases hold merely that evidence of the victim's fear of the defendant is not relevant to prove the defendant's conduct or identity. Charo, 156 Ariz. at 564-65; 754 P.2d at 191-92; Christensen, 129 Ariz. at 36, 628 P.2d at 584. In the present case, by contrast, Defendant's conduct and identity were undisputed.

The statements about Debra's fear and desire to end the relationship helped explain Defendant's motive. The disputed trial issues were Defendant's *motive* and *mental state*--whether Defendant acted with premeditation or as a result of a sudden impulse. The prosecution theorized that Defendant was motivated by anger or spite engendered by Debra's termination of the relationship.[6] Debra's statements were relevant because they showed her intent to end the relationship, which in turn provided a plausible motive for premeditated murder. *See*

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[5] Other jurisdictions follow this approach. *See, e.g.*, United States v. Donley, 878 F.2d 735, 738 (3d Cir. 1989) (victim's statements regarding plan to end relationship relevant to defendant's mental state in murder prosecution), *cert. denied*, 494 U.S 1058, 110 S. Ct. 1528 (1990); State v. Payne, 394 S.E.2d 158, 165 (N.C.), *cert. denied*, 498 U.S. 1092, 111 S. Ct. 977 (1990).

[6] Immediately after the murders, Defendant repeatedly said that "if he and Debra couldn't be together in life, they would be together in death."

Fulminante, 161 Ariz. at 251, 778 P.2d at 616. In addition, Debra's statements were also relevant to refute Defendant's assertion that he and Debra had secretly maintained their relationship after July 4, 1989. *Id.*

Defendant contends that even if the statements were relevant, they were still inadmissible hearsay. Although hearsay, these statements fall within a well-established exception allowing admission of hearsay statements concerning the declarant's then-existing state of mind, emotion, or intent, if the statements are not offered to prove the fact remembered or believed by the declarant. Ariz. R. Evid. 803(3).

Debra's statements were not offered to prove any fact. Instead, they related solely to her state of mind when the statements were made and thus fit within the Rule 803(3) exception. Fulminante, 161 Ariz. at 251, 778 P.2d at 616 (victim's desire to move from defendant's home properly admitted under Rule 803(3)). The trial court did not err in admitting this testimony.

c. ***The neighbor's testimony***

The following exchange occurred during the state's direct examination of a neighbor who lived next to the apartment shared by Defendant and Debra:

> Q. Did she [Debra] ever have another conversation with you later on when she related the same information to you?

A. Yes, she did. I remember that instance very clearly . . . *she told me that she did not want to stay at the apartment because Joe had threatened her life.*[7]

Neither Defendant nor the state addressed why this particular testimony may have been offered, either at trial or on appeal. The statement that Defendant had threatened Debra does not reflect Debra's state of mind but rather appears to be a statement of "memory or belief to prove the fact remembered or believed." Ariz. R. Evid. 803(3). This declaration therefore falls outside the state of mind exception and should not have been admitted. Charo, 156 Ariz. at 563-64, 754 P.2d at 190-91; Christensen, 129 Ariz. at 36, 628 P.2d at 584. Defendant preserved this claim by his continuing objection at trial, so we must consider the effect of its admission.

We review a trial court's erroneous admission of testimony under a harmless error standard. Bible, 175 Ariz. at 588, 858 P.2d at 1191. Unless an error amounts to a structural defect, it is harmless if we can say "beyond a reasonable doubt that the error had no influence on the jury's judgment." *Id.; see also* Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 (1993) (error is only harmless if guilty verdict "was surely unattributable to the error"). We consider particular errors in light of the totality of the trial evidence. State v. White, 168 Ariz. 500, 508, 815 P.2d 869, 877 (1991), *cert. denied*, 112 S. Ct. 1199 (1992). An error that requires reversal in one case may be harmless in another due to the fact-specific nature of the inquiry. Bible, 175 Ariz. at 588, 858 P.2d at 1191.

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[7] Reporter's Transcript ("R.T."), Feb. 20, 1991, at 46-47 (emphasis added).

Premeditation was the key trial issue, and we recognize that a prior threat is relevant to that issue. Premeditation requires proof that the defendant "made a decision to kill prior to the act of killing." State v. Kreps, 146 Ariz. 446, 449, 706 P.2d 1213, 1216 (1985). The interval, however, can be short. *Id.* Either direct or circumstantial evidence may prove premeditation. State v. Hunter, 136 Ariz. 45, 48, 664 P.2d 195, 198 (1983).

Initially, we note that a tendency to act impulsively in no way precludes a finding of legal premeditation. Defendant offered little evidence to support his claim that he acted without premeditation on the morning of the murders. A defense expert briefly testified that Defendant displayed no signs of organic brain damage or psychotic thinking. The essence of his testimony militating against premeditation was that Defendant "appeared to be an individual that would act in an impulsive fashion, responding more to emotions rather than thinking things out." This expert, however, examined Defendant for a total of six hours more than thirteen months after the murders, and there was no testimony correlating this trait to Defendant's conduct on August 7, 1989. Other witnesses testified that Defendant had, at various times, acted violently for no apparent reason. These instances usually occurred, however, when Defendant had been abusing alcohol or drugs. There was no evidence that Defendant consumed alcohol or drugs before the murders.

There was, on the other hand, a great deal of evidence that unequivocally compels the conclusion that Defendant acted with premeditation. *See* Bible, 175 Ariz. at 588, 858 P.2d at 1191. Defendant disliked and had threatened Eugene. Three days before the killing, Defendant left threatening phone messages with Debra showing his intent

to harm her.[8] Defendant called the shop just before the killings and asked whether Debra and Eugene were there. Although Defendant regularly carried a gun, on the morning of the murders he also had a spare cartridge belt with him, contrary to his normal practice. Defendant calmly waited for Eugene to hang up the telephone before shooting him. There was no evidence that Eugene did or said anything to which Defendant might have impulsively responded. Finally, Defendant looked for Debra after shooting Eugene, found her in a separate area, and held her before shooting her, stating, "I told you I was going to do it, I have to kill you."

The hearsay statement about threats came from the state's first witness on the first day of a five-day trial. The prosecutor neither emphasized it nor asked the witness to elaborate. Nor did the prosecutor mention the statement in closing argument. *Cf.* Charo, 156 Ariz. at 563, 754 P.2d at 190 (noting prosecution's emphasis of improperly-admitted evidence during closing argument in finding reversible error). We note, also, that other statements, properly admitted, established that Defendant had threatened Debra on other occasions. We stress that this court cannot and does not determine an error is harmless merely because the record contains sufficient untainted evidence. Bible, 175 Ariz. at 590, 858 P.2d at 1193. Given this record, however, we are convinced beyond a reasonable doubt that the statement did not influence the finding of premeditation implicit in the verdict. See State v. Coey, 82 Ariz. 133, 142, 309 P.2d 260, 269 (1957) (finding no reversible error in admission of hearsay statement bearing on premeditation). The error was harmless.

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[8] *See supra*, note 2.

d. *Constitutional claims*

Defendant urges that admission of this and other hearsay statements violated his right to confront witnesses in contravention of the Sixth and Fourteenth Amendments. The state claims that Defendant failed to properly raise this claim in either this or the trial court. We need not reach these issues, however, because of our disposition of Defendant's hearsay claims. There is no Confrontation Clause violation when the hearsay testimony of a deceased declarant is admitted pursuant to a firmly-rooted hearsay exception. White v. Illinois, 112 S. Ct. 736, 743 (1992); Bible, 175 Ariz. at 596, 858 P.2d at 1199. The Rule 803(3) state of mind exception is such a recognized exception. *See, e.g.*, Lenza v. Wyrick, 665 F.2d 804, 811 (8th Cir. 1981). Additionally, as in this case, a Confrontation Clause violation can be harmless error. Harrington v. California, 395 U.S. 250, 253, 89 S. Ct. 1726, 1728 (1969); State v. Wilhite, 160 Ariz. 228, 233, 772 P.2d 582, 587 (Ct. App. 1989).

e. *Hearsay statements of Eugene Dietz*

Defendant alleges next that several witnesses improperly testified about hearsay statements made by Eugene Dietz. To the extent these statements concerned Eugene's state of mind about the animosity between him and Defendant, the statements, like Debra's, were relevant and properly admitted under Rule 803(3). *See* Fulminante, 161 Ariz. at 251, 778 P.2d at 616.

One witness testified, however, that Eugene said, "Nobody is going to stop [Defendant] until he kills somebody." This does not fall within the Rule 803(3) state of mind exception because it is a statement of belief to prove the fact believed. Christensen, 129

Ariz. at 36, 628 P.2d at 584. Defendant did not object to this testimony, however, nor was it the subject of any pretrial motion. This claim thus is waived unless it rises to the level of fundamental error. State v. West, 176 Ariz. 432, 445, 862 P.2d 192, 204 (1993), *cert. denied*, 114 S. Ct. 1635 (1994). Error is only fundamental if it goes to the essence of a case, denies the defendant a right essential to a defense, or is of such magnitude that the defendant could not have received a fair trial. State v. Cornell, 170 Ariz. Adv. Rep. 43, 50-51 (1994).

The "essence" of this case was Defendant's mental state at the time of the murders. Eugene's statement of belief does not clearly establish premeditation nor refute Defendant's defense of impulsivity. Given the clear quantum of evidence supporting premeditation, admission of this lone statement did not deprive Defendant of a fair trial. *See id.* at 51. We conclude that admission of Eugene's hearsay statement does not meet the "stringent standard" of fundamental error. Bible, 175 Ariz. at 573, 858 P.2d at 1176.

f. Defendant's statements

Defendant next claims that his own statements were hearsay and improperly admitted. This claim is meritless. A defendant's out-of-court statements are not hearsay when offered by the state. Ariz. R. Evid. 801(d)(2)(A); State v. Atwood, 171 Ariz. 576, 635, 832 P.2d 593, 652 (1992).

g. Other evidentiary claims

On appeal, Defendant objects for the first time to the admission of testimony revealing that Defendant had been fired

from two jobs, once for fighting with a co-worker and once due to his "temperament." Because these claims were not raised below, we review only for fundamental error. West, 176 Ariz. at 445, 862 P.2d at 204. Arguably, this testimony concerns prior bad acts inadmissible under Rule 404. The state claims Defendant made a tactical decision not to object to the testimony because it tended to show Defendant's impulsivity. We decline to resolve the issue, however, because even if the testimony was erroneously admitted, its admission does not rise to the level of fundamental error. The testimony in both instances was perfunctory and undetailed. Moreover, there was other compelling evidence of Defendant's ill temper, much of it introduced by Defendant himself on the issue of impulsivity.

Defendant's final evidentiary claim concerns testimony of a witness who related a neighbor's report that Defendant had vandalized Debra's apartment. This testimony was hearsay and should not have been admitted. *See* Ariz. R. Evid. 801 and 802. Again, Defendant did not object to this testimony. Because other witnesses presented direct testimony on the same issue, we conclude Defendant was not prejudiced. *See* Fulminante, 161 Ariz. at 250, 778 P.2d at 615. We find no fundamental error.

2. ***Failure to instruct on manslaughter***

The trial court instructed the jury on both first and second degree murder under A.R.S. §§ 13-1105(A)(1) and 13-1104. Defendant claims the trial court committed reversible error by failing to *sua sponte* instruct the jury on the lesser-included offense of manslaughter. We disagree. It is true that in capital cases, trial courts must instruct on all lesser-included homicide offenses supported by

the evidence. State v. Comer, 165 Ariz. 413, 422, 799 P.2d 333, 342 (1990), *cert. denied*, 499 U.S. 943, 111 S. Ct. 1404 (1991). It is equally true, however, that such instructions need not be given if unsupported by the evidence. State v. Clabourne, 142 Ariz. 335, 345, 690 P.2d 54, 64 (1984).

The manslaughter statute provides, in relevant part:

> A. A person commits manslaughter by:
>
> 1. Recklessly causing the death of another person; or
>
> 2. Committing second degree murder . . . upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim; or
>
> 3. Committing second degree murder . . . while being coerced to do so by the use or threatened immediate use of unlawful deadly physical force . . .

A.R.S. § 13-1103(A). There was no evidence to support a manslaughter instruction. These were not reckless shootings. Nor was there evidence Defendant was provoked or coerced. Defendant intentionally shot both victims at close range. The claim is meritless. *See* State v. Ortiz, 158 Ariz. 528, 534, 764 P.2d 13, 19 (1988).

3. *Sufficiency of evidence of aggravated assault*

The trial court denied Defendant's motion for directed verdicts on the aggravated assault counts. Defendant now alleges those convictions are not supported by sufficient evidence because neither police officer testified to a subjective fear of imminent physical harm. We have previously rejected this same argument. Valdez, 160 Ariz. at 11, 770 P.2d at 315. To be guilty of aggravated assault, "the defendant need only intentionally act using a deadly weapon or

dangerous instrument so that the victim is placed in reasonable apprehension of imminent physical injury." *Id.* Either direct or circumstantial evidence may prove the victim's apprehension. There is no requirement that the victim testify to actual fright. *Id.*

There was ample circumstantial evidence supporting the conclusion that the officers were apprehensive or in fear of imminent harm. The police officers knew that at least one victim had been shot and that other shots had been fired. Defendant grabbed his revolver and began to aim at the officers despite their orders not to do so. Police officers, of course, are not immune from the fear that anyone would reasonably feel under these circumstances. *See* In re Juvenile Appeal No. J-78539-2, 143 Ariz. 254, 256, 693 P.2d 909, 911 (1984) (sufficient evidence of apprehension where police officer-victim drew gun and assumed protective stance). The jury could have concluded the officers must have acted with apprehension or fear when they used deadly force against Defendant. The evidence certainly supports that conclusion.

4. *Prosecutorial misconduct*

Defendant alleges the prosecutor "ran amok" at trial, particularly in his cross-examination of Dr. Allender, Defendant's psychological expert.[9] Because defense counsel made no trial objection, again we review these claims only for fundamental error. Bible, 175 Ariz. at 601, 858 P.2d at 1204. In determining whether a prosecutor's conduct amounts to fundamental error, we focus on the probability

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[9] Defendant styles several additional alleged instances of prosecutorial misconduct as ineffective assistance of counsel claims, based on his defense counsel's failure to object. As previously noted, these claims are better left to Rule 32 proceedings. *See* Valdez, 160 Ariz. at 14-15, 770 P.2d at 318-19. We do not address them.

it influenced the jury and whether the conduct denied the defendant a fair trial. *See id.*

Subject to Rule 403 limitations, expert witnesses may disclose facts not otherwise admissible if they form a basis for their opinions and are of a type normally relied on by experts. Ariz. R. Evid. 703; State v. Lundstrom, 161 Ariz. 141, 145, 776 P.2d 1067, 1071 (1989). If such facts are disclosed, they are admissible only to demonstrate the basis for the expert's testimony. Lundstrom, 161 Ariz. at 146, 776 P.2d at 1071. However, to offset the potential advantage this rule bestows on the proponent of expert opinion, "it is proper to inquire into the reasons for [the] opinion, including the facts upon which it is based, and to subject the expert to a most rigid cross-examination concerning his opinion and its sources." State v. Stabler, 162 Ariz. 370, 374, 783 P.2d 816, 820 (Ct. App. 1989); Ariz. R. Evid. 705. This latitude on cross-examination extends to matters otherwise inadmissible. United States v. A & S Council Oil Co., 947 F.2d 1128, 1135 (4th Cir. 1991) ("Rule 703 creates a shield by which a party may enjoy the benefit of inadmissible evidence by wrapping it in an expert's opinion; Rule 705 is the cross-examiner's sword, and, within very broad limits, he may wield it as he likes.").

With these principles in mind, we turn to the alleged misconduct. On direct examination, defense counsel asked Dr. Allender what materials he reviewed in preparing to examine Defendant. Dr. Allender replied, in part, "a variety of police reports from the Tucson Police Department, as well as from the Las Vegas Police Department." On cross-examination, the following exchange occurred:

> Q. Directing your attention, you said you had some Las Vegas police reports?

A. Yes.

Q. You had police reports from 1979?

A. I believe I did. I would have to flip through and look for it if you want me to.

Q. Do you recall in 1979 an incident when he was arrested from some criminal activity?

A. I think I found a report from '79 from Las Vegas.

R.T., Feb. 22, 1991, at 160-61. Defendant alleges this was improper because the trial court had ruled inadmissible Defendant's 1979 Las Vegas misdemeanor assault conviction. On cross-examination, however, the prosecutor simply asked Dr. Allender to elaborate on the reports he first mentioned on direct examination. The jury never learned the details of the conduct underlying Defendant's Las Vegas arrest. Because Dr. Allender relied on the reports in forming his opinion of Defendant, the prosecutor's cross-examination was proper.

Defendant was entitled, however, to a limiting instruction that references to the Las Vegas police reports were admissible only to show the basis of Dr. Allender's opinions. *See* Lundstrom, 161 Ariz. at 148, 776 P.2d at 1074. Defense counsel did not request such an instruction. On this record, we conclude that the absence of such an instruction did not deprive Defendant of a fair trial. There was no fundamental error.

Defendant also argues that the prosecutor improperly cross-examined Dr. Allender about the possibility of testing Defendant to determine the validity of his claim that he had no memory of the day of the murders. The full extent of that questioning was as follows:

Q. Didn't Dr. Morris [another psychologist who examined Defendant] suggest that hypnosis or amobarbital might be ideal to discover whether this defendant was malingering?

A. He suggested that those might be techniques.

Q. With hypnosis, you place them under hypnosis in order to find out what the truth of the matter was?

A. [Answer about the theory of hypnosis and amobarbital.]

Q. So you didn't, did you attempt, did you request a hypnosis evaluation?

A. I didn't because I'm not as convinced about those techniques as Dr. Morris.

Q. Amobarbital, is that a truth serum?

A. That is what they call it, that is what people have called it along the way.

R.T., Feb. 22, 1991, at 173-74.

Defendant claims this exchange prejudiced him much like questioning a defendant about refusing to take a polygraph test. It is true that, as with polygraph test results, courts generally exclude testimony induced or "refreshed" by drugs or hypnosis. Jeffers, 135 Ariz. at 431, 661 P.2d at 1132; State v. Mena, 128 Ariz. 226, 228-29, 624 P.2d 1274, 1276-77 (1981). Defendant's analogy, however, is misguided. The prosecutor's cross-examination was not intended to impugn Defendant but to test the basis and credibility of Dr. Allender's opinions concerning whether Defendant was faking his asserted memory loss at the time of the murders. Dr. Morris had examined Defendant and recommended the disputed testing. Dr. Allender relied in part on Dr. Morris's written evaluation in forming his own opinions about Defendant. Without reaching the issue of admissibility of expert testimony based upon the results of hypnotic or amobarbital examination of a subject, we conclude the prosecutor acted within the wide latitude permitted on cross-examination. Stabler, 162 Ariz. at 374, 783 P.2d at 820.

5. *The Wussler instruction*

Defendant next claims the trial court violated his due process rights by instructing the jury that it must acquit Defendant of the principle charge before considering any lesser included offenses. Although we have previously rejected a similar claim, *see* State v. Wussler, 139 Ariz. 428, 429-30, 679 P.2d 74, 75-76 (1984), we need not address it here.[10] The record reveals that the trial court *refused* the state's request to give such an instruction. Rather, the trial court instructed the jury that if it determined Defendant was guilty of either first or second degree murder, but had a reasonable doubt as to which one, it must find him guilty of second degree murder. That instruction was not improper.

6. *Alleged plea bargain veto by victims' family*

On appeal, Defendant urges for the first time that his due process and equal protection rights were violated when the victims' family allegedly "vetoed" a plea bargain in which the state would not seek the death penalty in exchange for a guilty plea to all counts. Defendant attacks the family's involvement in both the plea bargaining process and the decision to seek the death penalty. Defendant rests his claim on the following passage from his trial counsel's opposition to a motion to continue, which the state filed at the request of the victims' family:[11]

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[10] We presently have before us a case raising the so-called Wussler issue. *See* State v. Cañez, Ariz. Sup. Ct. No. CR-93-0161-PR.

[11] At one time, Defendant's trial was set for December 12, 1991. The victims' family asked the state to seek a continuance until after the holiday season because they feared jurors might be "more concerned with the fast approaching Christmas Holiday." The family communicated these concerns to the trial court in a letter. The court

> In this case, the family has already put the quietus on any plea negotiations. Undersigned counsel and the prosecutor had earlier discussions about the defendant entering into a guilty plea to two counts of First Degree Murder, with two life sentences . . . . Upon conferring with the Dietz family, the prosecutor announced he could not make such an offer. Clearly the County Attorney has permitted the family to put the finishing stroke to a fair and economical end to this case.

Opposition to Motion to Continue Trial, filed Nov. 19, 1990, at 2.

The state properly may consider the wishes of the victim's family in deciding whether to seek the death penalty, so long as it does not accord undue weight to those wishes. State v. Lavers, 168 Ariz. 376, 397, 814 P.2d 333, 354 (1991), *cert. denied*, 112 S. Ct. 343 (1991). Moreover, Arizona crime victims have a constitutional and procedural *right* to confer with the state on any prospective plea bargain. *See* Ariz. Const. art. II, § 2.1(4); Ariz. R. Crim. P. 39(b)(7). In the present case we need not consider the breadth of that right because the record does not support Defendant's contention that the family's wishes were the controlling factor in the state's decision to forego a plea and pursue the death penalty. Other than the passage quoted above, the record is silent on plea negotiations and the state's decision to seek death. Since that passage appears to be little more than defense counsel's rhetorical comment, and there is no evidence in the present record that the state gave any undue consideration to the desires of the victims' family, we find no error. *See* Lavers, 168 Ariz. at 397-98, 814 P.2d at 354-55.

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denied the state's motion. Subsequently, the trial court continued the trial at the parties' mutual request due to scheduling conflicts.

B. SENTENCING ISSUES

In all capital cases we independently review the aggravating and mitigating circumstances to determine whether the former outweigh the latter and warrant imposition of the death penalty. State v. Johnson, 147 Ariz. 395, 400, 710 P.2d 1050, 1055 (1985). Our duty is to ensure that Arizona's capital sentencing scheme "genuinely narrow[s] the class of persons eligible for the death penalty." Arave v. Creech, 113 S. Ct. 1534, 1542 (1993).

1. *Aggravating circumstances*

Following an aggravation-mitigation hearing, the trial court entered a special verdict pursuant to A.R.S. § 13-703(D). The trial court found two aggravating circumstances beyond a reasonable doubt: (1) Defendant was convicted of one or more other homicides, as defined in A.R.S. § 13-1101, which were committed during the commission of each offense; and (2) in the commission of the offenses Defendant knowingly created a grave risk of death to another person or persons in addition to the victims of the offenses. *See* A.R.S. §§ 13-703(F)(8) and (F)(3).

There is no question about the first aggravating circumstance. Defendant does not challenge the trial court's finding that he was convicted of another homicide during the commission of each offense. This was a double murder. The trial court properly found the A.R.S. § 13-703(F)(8) aggravating circumstance. *See* Lavers, 168 Ariz. at 393, 814 P.2d at 350.

The trial court also found beyond a reasonable doubt that in the commission of the murders, Defendant knowingly created a grave

risk of death to another person in addition to the victims. *See* A.R.S. § 13-703(F)(3). Defendant urges that this finding was erroneous because he did not actually shoot at any person other than the victims and because no bystanders were within his "line of fire." Although there is merit to Defendant's arguments, we reject such a narrow reading of this aggravating circumstance under the unusual facts of this case.

The "grave risk of death to another" factor applies only if the defendant's "murderous act itself put other people in a zone of danger." *See, e.g.*, State v. McCall, 139 Ariz. 147, 160-61, 677 P.2d 920, 933-34 (1983) (citing cases), *cert. denied*, 467 U.S. 1220, 104 S. Ct. 2670 (1984). We have never, however, limited this factor to cases in which another person was directly in the line of fire. For example, we have found a zone of danger where the defendant shot his intended victim while a third person was nearby and then pointed his gun at the third person before returning his attention to the victim. State v. Nash, 143 Ariz. 392, 405, 694 P.2d 222, 235, *cert. denied*, 471 U.S. 1143, 105 S. Ct. 2689 (1985). We noted there that in the absence of such a combination of factors--the third person's proximity during the actual shooting and the defendant's pointing his gun--the general rule is that mere presence of bystanders or pointing a gun at another to facilitate escape does not bring a murderous act within A.R.S. § 13-703(F)(3). *Id.* at 405, 684 P.2d at 235 (citing Jeffers, 135 Ariz. at 429, 661 P.2d at 1130 (pointing gun to quiet third person)); *see also* State v. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985) (risk to others factor could not be found merely because defendant took weapon into crowded public place where bystander could be hurt). No single factor is dispositive of this circumstance.

Our inquiry is whether, during the course of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injury.

In this case, several factors *in combination* support the conclusion that Defendant knowingly created a grave risk of death to others.[12] First, at least three other employees were present in the confined garage where Defendant shot Eugene. *See* State v. McMurtrey, 151 Ariz. 105, 108, 726 P.2d 202, 205, *cert. denied*, 480 U.S. 911, 107 S. Ct. 1359 (1987) (presence of others in immediate area supports grave risk circumstance). One was standing only six to eight feet away from Eugene at the time of the shooting. *See* Nash, 143 Ariz. at 404-05, 694 P.2d at 234-35. After Defendant shot Eugene, he turned toward another employee as if "he was going to shoot but [that employee] . . . really got out of there fast."[13] *See* id. at 405, 694 P.2d at 235 (defendant's aiming at bystander, who dived under desk to escape injury, supports factor). When Defendant pointed his gun at Eugene again, one employee fought with Defendant and even grabbed the gun's barrel. Moreover, a firearms expert testified that the position of the fired and unfired cartridges in the murder weapon showed that Defendant had cocked and uncocked the gun twice between shooting Eugene and Debra. Thus, there is evidence Defendant knowingly prepared the gun to fire both when he assumed a shooting stance toward one employee and when he grappled with the other. All this occurred during Defendant's commission of the two murders. Without retreating

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[12] In its special verdict, the trial court failed to specify which of the several persons present at the murder scene Defendant placed at grave risk of death. We thus review the record to determine whether the factor applies beyond a reasonable doubt to any of those persons.

[13] R.T., Feb. 20, 1991, at 166.

from Nash and Smith, we believe that under these circumstances the judge's finding that Defendant created a grave risk of death to at least these two employees is correct.[14]

2. *Mitigating factors*

In capital sentencing proceedings, the trial court must consider the mitigating factors in A.R.S. § 13-703(G) as well as any aspect of the defendant's background or the offense relevant to determining whether the death penalty is appropriate. Bible, 175 Ariz. at 605, 858 P.2d at 1208. Defendant must establish mitigating factors by a preponderance of the evidence. *Id.* We independently examine the record for mitigating evidence to determine whether the death sentence is justified. State v. Fierro, 166 Ariz. 539, 551, 804 P.2d 72, 84 (1991).

In its special verdict, the trial court stated it found the following mitigating factors:

> Lack of any prior felony convictions and any other mitigating circumstances set forth in the presentence report, including all testimony presented by the psychiatrist . . . [in] mitigations [sic] of sentence. Including the chemical substance abuse problems which you have suffered from, the Court finds that . . . [the] mitigating circumstances are not sufficiently mitigating to outweigh the aggravating factors found by this Court beyond a reasonable doubt.

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[14] The state urges also that the A.R.S. § 13-703(F)(3) circumstance was satisfied when, after the murders, Defendant raised his gun toward the two police officers. Our disposition of this issue makes addressing this argument unnecessary. We note, however, that the statutory elements of aggravated assault are not necessarily interchangeable with the requirements for the grave risk of death to another aggravating circumstance. *See* Jeffers, 135 Ariz. at 428, 664 P.2d at 1129.

R.T., July 12, 1991, at 32. Defendant argues that the trial court erroneously failed to find several statutory mitigating circumstances. We address each claim in turn.

Defendant urges that the trial court erred in not finding his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-703(G)(1). This factor is phrased disjunctively so that proof of incapacity as to either ability to appreciate or conform establishes the mitigating circumstance. State v. Rossi, 154 Ariz. 245, 251, 741 P.2d 1223, 1229 (1987). Defendant offered expert testimony in support of his claim that his actions were due largely to his chronic alcohol and drug dependency and his impulsive personality. The trial court noted this testimony but nevertheless concluded this mitigating circumstance did not apply. We agree that the record does not support Defendant's mitigation claim under A.R.S. § 13-703(G)(1).

Defendant offered no evidence that he did not appreciate the wrongfulness of his conduct, and we have found none in the record. Indeed, Defendant's own words belie the notion. After police shot him, Defendant heard the police radio dispatcher ask whether "the bad guy" had been apprehended. Defendant, who was conscious and coherent, stated, "I'm the bad guy." There is no evidence Defendant's capacity to appreciate the wrongfulness of his actions was diminished.

We also conclude there is insufficient evidence that Defendant's ability to conform his conduct to the law was significantly impaired. The only evidence for this proposition appears in Dr. Allender's trial testimony and Dr. Breslow's sentencing hearing testimony. Neither could directly address Defendant's conduct on the date of the murders

because Defendant maintained during their evaluations that he had no recall of the events of the shootings. The essence of Dr. Allender's testimony was that Defendant "appeared to be an individual who would act in an impulsive fashion, responding more to emotions rather than thinking things out." Dr. Breslow testified that Defendant has a narcissistic personality, which means "he tends to be very sensitive to any slight criticisms or rejections and tends to respond with anger inappropriately." In his opinion, Defendant's substance abuse history had a significant impact on his behavior at the time of the killings.[15]

Generally, "a mere character or personality disorder alone is insufficient to constitute a mitigating circumstance." *See, e.g.*, State v. Brewer, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992) (citing cases). Both Dr. Breslow and Dr. Allender stated that Defendant does not suffer from any form of mental illness, but only from a form of personality trait that drug and alcohol abuse often exacerbated. Defendant admitted, however, that he had used no drugs for three days prior to the murders and had consumed only two alcoholic drinks over twelve hours before the murders. This case falls far short of those meeting the A.R.S. § 13-703(G)(1) mitigating circumstance. *Cf., e.g.*, State v. Jimenez, 165 Ariz. 444, 459-59, 799 P.2d 785, 797-800 (1990) (defendant suffered from psychotic illness, experienced hallucinations,

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[15] Two factors weaken Dr. Breslow's testimony. First, before examining Defendant but after studying prior evaluations and records, Dr. Breslow stated in a letter to defense counsel that Defendant's "drug and alcohol use was not of an early enough onset and chronicity to result in significant impairment in impulse control or other maturation affecting the ability to process feelings and behavior." This information may have prompted Defendant to modify his responses in his subsequent interview with Dr. Breslow. Second, Dr. Breslow first examined Defendant only nine days before his sentencing hearing. *See* Rossi, 154 Ariz. at 251, 741 P.2d at 1229 (commenting on the significance of psychological evaluations based on interviews long after commission of crime).

and heard voices); Rossi, 154 Ariz. at 249-51; 741 P.2d at 1227-29 (defendant suffered from cocaine intoxication with delusions and hallucinations).

We further believe Defendant's impulsive personality and history of substance abuse merit little, if any, independent consideration in mitigation. As noted, Defendant was not under the influence of any intoxicating substance at the time of the murders. *See* Bible, 175 Ariz. at 606, 858 P.2d at 1209. The evidence did not show that Defendant's impulsive personality rendered him unable to control his conduct. Poor impulse control, standing alone, has little mitigating weight. Brewer, 170 Ariz. at 506, 826 P.2d at 803.

We reject Defendant's claim that he was "under unusual and substantial duress, although not such as to constitute a defense to prosecution." A.R.S. § 13-703(G)(2). For this mitigating circumstance to apply, "one person must coerce or induce another person to do something against his will." State v. Castañeda, 150 Ariz. 382, 394, 724 P.2d 1, 13 (1986). Moreover, impulse control problems cannot constitute duress. *Id.* There is no evidence Defendant was coerced in any way. Thus, the A.R.S. § 13-703(G)(2) mitigating circumstance does not apply.

Defendant also argues that he "could not reasonably have foreseen that his conduct in the course of the commission of the offense for which [he] was convicted would cause, or would create grave risk of causing, death to another person." A.R.S. § 13-703(G)(4). This claim is meritless. Defendant intentionally murdered both victims in cold blood, drawing his gun and shooting in a confined area where he knew others were present.

Despite close scrutiny, the record discloses no other nonstatutory mitigating circumstances. *See* Bible, 175 Ariz. at 606, 858 P.2d at 1209. The trial court correctly noted Defendant's lack of prior felony convictions as a nonstatutory mitigating factor. *See* Brewer, 170 Ariz. at 507, 826 P.2d at 804. This carries little weight, however, because Defendant previously pleaded guilty in Nevada to two counts of assault with a deadly weapon, classified there as "gross misdemeanors." Defendant originally was charged with felonies in Nevada, and the seriousness of his conduct compels us to discount this factor.[16] *See* Lavers, 168 Ariz. at 395, 814 P.2d at 352 (prior nonfelony violent acts may rebut claim of no prior felony record).

Defendant claims as a mitigating factor that he was reared in a dysfunctional family. Nothing in the record substantiates this claim, however, other than his father's alcoholism and his family's periodic moves due to military transfers. Defendant failed, moreover, to demonstrate how his allegedly poor upbringing related in any way to the murders. *See* State v. Wallace, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047, 110 S. Ct. 1513 (1990).

3. *State's cross-appeal*

The trial court specifically declined to find as an aggravating circumstance that Defendant murdered the victims in an "especially heinous, cruel or depraved manner." *See* A.R.S. § 13-703(F)(5).

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[16] According to the Nevada presentence report, Defendant parked his motorcycle so it obstructed a truck. The truck owner knocked on Defendant's door and asked him to move his motorcycle. Defendant replied, "Just a minute," then returned and threatened the owner and his girlfriend with a shotgun. Defendant tried to kick the owner, who retreated. Defendant then fired the shotgun at the owner's feet, injuring him.

In its cross-appeal, the state urges that the trial court erred in failing to find this factor and asks that this court independently make such a finding. Our disposition of the other issues on appeal, however, makes it unnecessary to reach this issue. *See* State v. Milke, 177 Ariz. 118, 129, 865 P.2d 779, 790 (1993) (noting that reviewing courts should not address issues that are unnecessary to disposition of an appeal).

4. *Propriety of the death sentences*

We have independently reviewed the facts establishing the aggravating and mitigating circumstances. State v. Hill, 174 Ariz. 313, 330, 848 P.2d 1375, 1388 (1993). We have also reviewed the record for evidence of additional mitigating evidence and have found none. The state proved the existence of the A.R.S. §§ 13-703(F)(3) and (8) aggravating circumstances beyond a reasonable doubt. After review of the entire record, we conclude there are no statutory and no substantial, nonstatutory mitigating factors. Taken in isolation, Defendant's substance abuse and alleged impulsive personality are not sufficiently substantial to call for leniency. The trial court correctly concluded the aggravating circumstances outweigh the mitigating circumstances. Cf. Cornell, 170 Ariz. Adv. Rep. 43. A.R.S. § 13-703(E) requires imposition of the death penalty.

DISPOSITION

We have examined the entire record for fundamental error pursuant to A.R.S. § 13-4035, Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), and State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969).

We have found none. Accordingly, we affirm Defendant's convictions and sentences.

STANLEY G. FELDMAN, Chief Justice

CONCURRING:

JAMES MOELLER, Vice Chief Justice

ROBERT J. CORCORAN, Justice

THOMAS A. ZLAKET, Justice

FREDERICK J. MARTONE, Justice