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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-99005
D.C. No. 2:04-cv-00534-NVW

[Filed January 12, 2018]

ROBERT ALLEN POYSON, *Petitioner-Appellant*,	)
v.	)
CHARLES L. RYAN, *Respondent-Appellee*.	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted February 15, 2012
San Francisco, California

Filed March 22, 2013
Amended November 7, 2013
Argued and Submitted En Banc September 18, 2017
Amended January 12, 2018

Before: Sidney R. Thomas, Chief Judge, and Raymond C. Fisher and Sandra S. Ikuta, Circuit Judges.

Order;
Opinion by Judge Fisher;
Concurrence by Judge Ikuta

SUMMARY*

Habeas Corpus / Death Penalty

The panel granted a petition for panel rehearing, filed an amended opinion reversing the district court's denial of Robert Allen Poyson's habeas corpus petition challenging his death sentence, and remanded.

The panel held that the Arizona Supreme Court denied Poyson his Eighth Amendment right to individualized sentencing by applying an unconstitutional causal nexus test to his mitigating evidence of a troubled childhood and mental health issues. The panel held that the error had substantial and injurious effect or influence in determining the sentence, and therefore granted habeas relief on this claim.

The panel denied relief on Poyson's claim that the Arizona courts failed to consider his history of substance abuse as a nonstatutory mitigating factor. The panel wrote that the state courts did consider the evidence and simply found it wanting as matter of fact. The panel wrote that the state supreme court did not

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

misconstrue the state trial court's findings, so it did not deprive Poyson of meaningful appellate review of his death sentence.

The panel agreed with the district court that Poyson's ineffective assistance of counsel claim is procedurally defaulted because it is fundamentally different from the claim he presented in state court.

The panel denied Poyson's motion for reconsideration of its March 2013 order denying his motion for remand under *Martinez v. Ryan*, 566 U.S. 1 (2012).

Judge Ikuta concurred because the three-judge panel is bound by the decision in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc), but wrote separately to highlight how *McKinney*'s erroneous conclusion that a causal nexus error had a "substantial and injurious effect" on a state court's decision infects the panel's decision in this case.

COUNSEL

Therese Michelle Day (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

J.D. Nielsen (argued) and Jon G. Anderson, Assistant Attorneys General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Capital Litigation Section, Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

ORDER

The petition for panel rehearing filed April 12, 2013 (Dkt. 69), which remains pending pursuant to this court's April 2, 2014 order (Dkt. 79), is **GRANTED**.

The opinion filed November 7, 2013, and reported at 743 F.3d 1183, is **AMENDED**. An amended opinion is filed concurrently with this order.

No further petitions for rehearing may be filed.

OPINION

FISHER, Circuit Judge:

Robert Allen Poyson was convicted of murder and sentenced to death in 1998. After pursuing direct review and seeking postconviction relief in state court, he filed a habeas petition in federal district court. The district court denied the petition, and Poyson appeals.

Poyson raises three claims on appeal, each of which has been certified by the district court pursuant to Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c): (1) the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence; (2) the Arizona courts failed to consider mitigating evidence of his history of substance abuse; and (3) his trial counsel provided ineffective assistance of counsel during the penalty phase of his trial by failing to investigate the possibility that he suffered from fetal alcohol spectrum disorder. We agree with Poyson on his first claim. We conclude his second claim is without merit. And we hold his third claim is procedurally defaulted.

As to the first claim, we hold the Arizona Supreme Court denied Poyson his Eighth Amendment right to individualized sentencing by applying an unconstitutional causal nexus test to his mitigating evidence of a troubled childhood and mental health issues. We reach this conclusion because (1) the Arizona Supreme Court sentenced Poyson in 2000, which was in the midst of the 15-year period during which that court consistently applied an unconstitutional causal nexus test to evidence of a capital defendant's family background or mental condition, *see McKinney v. Ryan*, 813 F.3d 798, 802–03 (9th Cir. 2015) (en banc); (2) in sentencing Poyson, the Arizona Supreme Court gave Poyson's proffered evidence *no weight*, and it expressly did so *because of* the absence of a causal connection between the evidence and his crimes, *see State v. Poyson*, 7 P.3d 79, 90–91 (Ariz. 2000); (3) in affording that evidence no weight, the Arizona Supreme Court cited a passage in one of its earlier cases that we have specifically identified as articulating that court's unconstitutional causal nexus test, *see id.* (quoting *State v. Brewer*, 826 P.2d 783, 802 (Ariz. 1992)); *McKinney*, 813 F.3d at 815; and (4) although the Arizona Supreme Court couched its decision in terms of "mitigating weight" and "mitigating value," our case law makes clear that the court deemed the evidence nonmitigating *as a matter of law*, *see McKinney*, 813 F.3d at 816–17. The Arizona Supreme Court's application of this unconstitutional causal nexus test was "contrary to" the Supreme Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *see* 28 U.S.C. § 2254(d)(1), and constituted a violation of Poyson's rights under the Eighth Amendment. We further hold the error "had substantial and injurious effect or influence in

determining" the sentence. *McKinney*, 813 F.3d at 822 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). We therefore grant habeas relief on Poyson's causal nexus claim.

We deny habeas relief on Poyson's claim that the Arizona courts failed to consider his history of substance abuse as a nonstatutory mitigating factor. Poyson argues the state courts unconstitutionally refused to *consider* mitigating evidence, a claim arising under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The state courts, however, did consider the evidence. They simply found it wanting as a matter of fact, finding the evidence failed to prove a history of substance abuse. There was therefore no constitutional violation under *Lockett* and *Eddings*. Nor was there a constitutional violation under *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The state supreme court did not misconstrue the state trial court's findings, so it did not deprive Poyson of meaningful appellate review of his death sentence.

Finally, we agree with the district court that Poyson's ineffective assistance of counsel claim is procedurally defaulted because it is fundamentally different from the claim he presented in state court. Although it is true that "new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not 'fundamentally alter the legal claim already considered by the state courts.'" *Beaty v. Stewart*, 303 F.3d 975, 989–90 (9th Cir. 2002) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)). Poyson's federal petition raises a theory of deficient performance – failure to investigate and present mitigating evidence

of fetal alcohol spectrum disorder – that the state courts had no "meaningful opportunity to consider." *Vasquez*, 474 U.S. at 257. The claim is therefore procedurally defaulted.

I. BACKGROUND

A. The Crimes

Poyson was born in August 1976. The facts of his crimes, committed in 1996, were summarized as follows by the Arizona Supreme Court in *State v. Poyson*, 7 P.3d 79, 83 (Ariz. 2000).

Poyson met Leta Kagen, her 15 year-old son, Robert Delahunt, and Roland Wear in April 1996. Poyson was then 19 years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to 48 year-old Frank Anderson and his 14 year-old girlfriend, Kimberly Lane. They, too, needed a place to live, and Kagen invited them to stay at the trailer.

Anderson informed Poyson that he was eager to travel to Chicago, where he claimed to have organized crime connections. Because none of them had a way of getting to Chicago, Anderson, Poyson and Lane formulated a plan to kill Kagen, Delahunt and Wear in order to steal the latter's truck.

On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property, ostensibly for sex. There, Anderson commenced an attack on the boy by slitting his throat with a bread knife. Poyson heard Delahunt's screams and ran to the travel trailer. While Anderson held Delahunt down,

Poyson bashed his head against the floor. Poyson also beat Delahunt's head with his fists, and pounded it with a rock. This, however, did not kill Delahunt, so Poyson took the bread knife and drove it through his ear. Although the blade penetrated Delahunt's skull and exited through his nose, the wound was not fatal. Poyson thereafter continued to slam Delahunt's head against the floor until Delahunt lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. In all, the attack lasted about 45 minutes.

After cleaning themselves up, Poyson and Anderson prepared to kill Kagen and Wear. They first located Wear's .22 caliber rifle. Unable to find ammunition, Poyson borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to rescue him. Poyson loaded the rifle and tested it for about five minutes to make sure it would function properly. He then stashed it near a shed. Later that evening, he cut the telephone line to the trailer so that neither of the remaining victims could call for help.

After Kagen and Wear were asleep, Poyson and Anderson went into their bedroom. Poyson first shot Kagen in the head, killing her instantly. After quickly reloading the rifle, he shot Wear in the mouth, shattering Wear's upper right teeth. A struggle ensued, during which Poyson repeatedly clubbed Wear in the head with the rifle. The fracas eventually moved outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him to the ground. While the victim was lying there, Poyson

twice kicked him in the head. He then picked up the cinder block and threw it several times at Wear's head. After Wear stopped moving, Poyson took his wallet and the keys to Wear's truck. To conceal the body, Poyson covered it with debris from the yard. Poyson, Anderson and Lane then took the truck and traveled to Illinois, where they were apprehended several days later.

B. Trial and Conviction

A grand jury indicted Poyson on three counts of first degree murder, one count of conspiracy to commit murder and one count of armed robbery. The jury convicted on all counts in March 1998, following a six-day trial.

C. Sentencing

1. *Mitigation Investigation*

Following the guilty verdicts, the state trial court approved funds to hire a mitigation specialist to assist in preparing for Poyson's sentencing. Counsel retained investigator Blair Abbott.

In a June 1998 memorandum, Abbott informed counsel that Poyson's mother, Ruth Garcia (Garcia), used drugs during the first trimester of her pregnancy and recommended that counsel investigate the possibility that Poyson suffered brain damage as a result. The memorandum advised counsel that "one of the significant issues should be the hard core drug abuse of both [of Poyson's] parents, preconception and in the first trimester of Ruth's pregnancy." Abbott wrote that "Ruth Garcia's heavy drug abuse in the pre pregnancy and early on in the pregnancy undoubtedly caused severe damage to her unborn child."

In September 1998, Abbott mailed trial counsel "Library & Internet research regarding drug & alcohol fetal cell damage; reflecting how these chemicals when taken in the first trimester [a]ffect subsequent intelligence, conduct, emotions, urges etc [sic] as the child grows into adulthood."

2. *Presentence Investigation Report*

The probation office prepared a presentence investigation report in July 1998. Poyson told the probation officer that he had a bad childhood because he was abused by a series of stepfathers, who subjected him to physical, mental and emotional abuse. Poyson also said he suffered from impulsive conduct disorder, which was diagnosed when he was 13. Poyson would not answer any questions on his substance abuse history or juvenile record.

3. *Presentencing Hearing*

In October 1998, the trial court held a one-day presentencing hearing. Poyson's trial counsel called three witnesses to present mitigating evidence: his aunt, Laura Salas, his mother, Ruth Garcia, and the mitigation investigator, Blair Abbott. Counsel also introduced 56 exhibits. Poyson did not testify. The witnesses testified about Poyson's drug and alcohol abuse and the mental and physical abuse inflicted on Poyson by his stepfather, Guillermo Aguilar, and maternal grandmother, Mary Milner. They also testified that Poyson's stepfather, Sabas Garcia (Sabas), committed suicide in 1988, and that Sabas' death had a devastating effect on Poyson. They further testified that Garcia used drugs and alcohol during the first three months of her pregnancy with Poyson.

4. *Poyson's Sentencing Memorandum*

In early November 1998, Poyson filed a sentencing memorandum urging the court to find three statutory and 25 nonstatutory mitigating circumstances.[1] As relevant here, Poyson argued his history of drug and alcohol abuse, troubled childhood and personality disorders constituted both statutory and nonstatutory mitigating circumstances.

a. *Substance Abuse*

Poyson argued his substance abuse was a statutory mitigating circumstance because it impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law at the time of the murders. *See* Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998). In the alternative, he argued that, even if his substance abuse was not causally related to the murders, it constituted a nonstatutory mitigating circumstance. In support of these arguments, Poyson

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[1] At the time of Poyson's sentencing, Arizona law required the sentencing judge to impose a sentence of death if the court found one or more aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E) (1998). The law enumerated 10 aggravating circumstances, *see id.* § 13-703(F), and five statutory mitigating circumstances – including diminished capacity, duress, minor participation and the defendant's age, *see id.* § 13-703(G). The sentencing court also was required to consider any *nonstatutory* mitigating circumstances offered by the defendant – i.e., "any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." *Id.*

emphasized his parents' use of drugs and alcohol at the time of his conception, his mother's use of drugs and alcohol during pregnancy, an incident in which Poyson was involuntarily intoxicated at the age of three or four, Poyson's abuse of alcohol beginning at age 13 and Poyson's five-month placement at WestCare, a residential treatment facility, for substance abuse treatment in 1992, when he was 15. Poyson also pointed to evidence that he used PCP two days before the murders, used alcohol the night before the murders, used marijuana the day of the murders and suffered a PCP flashback during Delahunt's murder.

b. *Troubled Childhood*

Poyson argued his troubled childhood was a statutory mitigating circumstance because it affected his behavior at the time of the murders. In the alternative, he argued his troubled childhood constituted a nonstatutory mitigating circumstance. Poyson emphasized his mother's use of drugs and alcohol during the first trimester of pregnancy. He argued alcohol and drug use during pregnancy can cause brain damage and birth defects and lead a child to engage in delinquent and criminal behavior. He also attached to the sentencing memorandum several scientific articles on fetal alcohol syndrome. The memorandum pointed out that Poyson never knew his biological father, lacked a stable home life, was physically and mentally abused by several adults (including Aguilar and Milner), was devastated by Sabas' suicide and was sexually abused and sodomized by a neighbor on one occasion shortly after Sabas' death. Poyson emphasized that his delinquent behavior

and substance abuse began shortly after the death of Sabas and the sexual assault.

c. *Mental Health Issues*

The sentencing memorandum argued Poyson suffered from several personality disorders, constituting a nonstatutory mitigating circumstance. The memorandum pointed to a 1990 psychiatric evaluation by Dr. Bruce Guernsey. According to the sentencing memorandum, Guernsey diagnosed Poyson with severe "conduct disorder," reported that Poyson exhibited symptoms of antisocial behavior, "manic depression" or "impulsive conduct disorder" and recommended Poyson be prescribed medication to control his behavior. Poyson also pointed to a 1990 Juvenile Predisposition Investigation by Nolan Barnum. Barnum too recommended Poyson be prescribed medication to control his behavior. A 1993 psychological evaluation performed by Jack Cordon and Ronald Jacques from the State Youth Services Center in St. Anthony, Idaho, diagnosed Poyson with "mild mood disturbance." Dr. Celia A. Drake, who Poyson's counsel retained to perform a forensic evaluation of Poyson, diagnosed "Adjustment Disorder with depressive mood, mild intensity," and "Anti-social Personality Disorder." Dr. Drake also found Poyson's overall intellectual functioning to be "in the low average range."

5. *Sentencing Hearing and Imposition of Sentence*

The state trial court held a sentencing hearing and imposed sentence in late November 1998.

The court found the state had proved, beyond a reasonable doubt, three aggravating circumstances for

the murders of Delahunt and Wear: the murders were committed in expectation of pecuniary gain; the murders were especially cruel; and multiple homicides committed during the same offense. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(5), (6), (8) (1998). The court found two aggravating circumstances applicable to Kagen's murder: pecuniary gain; and multiple homicides. *See id.* § 13-703(F)(5), (8).

The court found Poyson failed to prove any statutory mitigating factors. Poyson's difficult childhood and mental health issues were not statutory mitigating factors under § 13-703(G)(1) because they did not significantly impair Poyson's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[2] The court explained:

> There has certainly been evidence that the defendant had gone through a turbulent life, perhaps had mental-health issues that would distinguish him from the typical person on the street.
>
> Listening to his description of how these murders were committed, based upon a description of somewhat a methodical carrying out of a plan, the Court sees absolutely nothing on the record, in this case, to suggest the applicability of this mitigating circumstance.

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[2] *See* Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998) ("Mitigating circumstances [include] [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.").

Turning to nonstatutory mitigating factors, the court first explained the three-step analysis it used to evaluate each nonstatutory mitigating circumstance proffered by Poyson: "[1] to analyze whether the defense has shown this fact by a preponderance of evidence, and then if they have, [2] to determine whether I would assign that any weight as a mitigating factor, and of course, for any that . . . pass both of those two tests, [3] I have to weigh them all along with the other factors in the final [sentencing] determination in this case." The court then proceeded to consider Poyson's mental health issues, troubled childhood and history of substance abuse as potential mitigating factors.

a. *Mental Health Issues*

The court rejected Poyson's mental health issues as a nonstatutory mitigating factor at the second step in the analysis. The court found Poyson had proven he suffered from personality disorders, but gave them no weight because they were not causally related to the murders:

> [T]he defendant had some mental health and psychological issues. I think . . . the defense has established that there were certain . . . personality disorders that the defendant, in fact, may have been suffering from.
>
> The Court, however, does not find that they rise to the level of being a mitigating factor because I am unable to draw any connection

whatsoever with such personality disorders and the commission of these offenses.[3]

b. *Troubled Childhood*

The court similarly rejected Poyson's difficult childhood as a nonstatutory mitigating factor. At step one, the court found the "defense has shown that defendant suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse." At step two, however, the court gave these circumstances no mitigating weight because they were not causally connected to the murders: "The Court finds absolutely nothing in this case to suggest that his latter conduct was a result of his childhood." The court also found "the defense has established, by a preponderance of the evidence, that the defendant lost a parent figure and was subjected to sexual abuse at a relatively young age." The court rejected this factor at step two, however, because it was "not convinced that there is any connection between that abuse, that loss, and his subsequent criminal behavior."

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[3] The court rejected evidence of Poyson's low IQ for similar reasons. At the first step in the analysis, the court found that "there is certain evidence in this case that would support the proposition that the defendant's mental capacity may be diminished, at least compared to the norm in the population, and that his I.Q. may be low, at least compared to the norm in the population." The court, however, gave this circumstance no mitigating weight in light of the planning and sophistication that went into the crimes – "certain prep[ar]atory steps that were taken – admittedly, not overly-sophisticated, but attempts were made to do certain things, to disable warning systems to enable these murders to be committed and to get away with the loot that was the purpose of the murders; specifically, the vehicle."

c. *Substance Abuse*

Finally, the court rejected Poyson's history of substance abuse at both steps one and two in the analysis: Poyson failed to establish a significant history of drug or alcohol abuse and, even if he could do so, the court would have given the evidence no weight because he failed to establish a causal connection between the substance abuse and the crimes. The court said:

> The argument is made that the defendant was subjected to alcohol abuse and drug abuse. Other than very vague allegations that he has used alcohol in the past or has used drugs in the past, other than a fairly vague assertion that he was subject to some sort of effect of drugs and/or alcohol at the time, that these offenses were committed, I really find very little to support the allegation that the defendant has a significant alcohol and/or drug abuse, and again, going back to the methodical steps that were taken to murder three people to get a vehicle to get out of Golden Valley, it's very difficult for me to conclude that the defendant's ability to engage in goal-oriented behavior was, in any way, impaired at the time of the commission of these offenses.

Ultimately, the state trial court found only one nonstatutory mitigating factor – Poyson's cooperation with law enforcement. The court concluded this one mitigating factor was insufficiently substantial to call for leniency and imposed a sentence of death.

6. *Arizona Supreme Court Decision*

The Arizona Supreme Court affirmed Poyson's conviction and sentence on direct appeal. *See State v. Poyson*, 7 P.3d 79 (Ariz. 2000). As required by Arizona law, the court "independently review[ed] the trial court's findings of aggravation and mitigation and the propriety of the death sentence." Ariz. Rev. Stat. Ann. § 13-703.01(A) (2000).

With respect to statutory mitigating factors, the supreme court agreed with the trial court that Poyson's drug use was not a statutory mitigating circumstance under § 13-703(G)(1). *See Poyson*, 7 P.3d at 88–89. In the court's view, there was "scant evidence that he was actually intoxicated on the day of the murders." *Id.* at 88. "Although Poyson purportedly used both marijuana and PCP 'on an as available basis' in days preceding these crimes, the only substance he apparently used on the date in question was marijuana," and Poyson "reported smoking the marijuana at least six hours before killing Delahunt and eleven hours before the murders of Kagen and Wear." *Id.* The evidence that Poyson experienced a PCP flashback during the murder of Delahunt was not credible, and even if the flashback occurred, it lasted only a "few moments." *Id.* at 88–89. Poyson was "not under the influence of PCP at any other time." *Id.* at 89. Poyson's claims of substantial impairment were also belied by his deliberate actions, including concocting a ruse to obtain bullets from a neighbor, testing the rifle to make sure it would work properly when needed, cutting the telephone line and concealing the crimes. *See id.* The court then turned to nonstatutory mitigation, agreeing with the trial court that Poyson's substance abuse,

mental health and abusive childhood were not nonstatutory mitigating circumstances.

a. *Substance Abuse*

As to substance abuse, the supreme court agreed with the trial court that Poyson's evidence failed at step one because it did not show a history of drug or alcohol abuse:

> The trial judge refused to accord any weight to the defendant's substance abuse as a nonstatutory mitigating circumstance. It characterized the defendant's claims that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders as little more than "vague allegations." As discussed above, we agree.

Id. at 90.

b. *Mental Health Issues*

With respect to mental health issues, the supreme court agreed with the trial court that Poyson's personality disorders, although proven at step one, were entitled to no weight at step two because they were not causally connected to the murders:

> The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning

> within the family setting" to which the defendant could look for guidance. However, we find no indication in the record that "the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required." *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *see also* [*State v. Medina*, 193 Ariz. 504, 517, 975 P.2d 94, 107 (1999)] (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). We therefore accord this factor no mitigating weight.

Id. at 90–91 (last alteration in original).

c. *Troubled Childhood*

The supreme court also agreed with the trial court's assessment of Poyson's troubled childhood. The court found Poyson established an abusive childhood at step one, but gave this consideration no weight at step two because of the absence of a causal nexus:

> Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor. Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value.

Id. at 91.

Ultimately, the Arizona Supreme Court found three aggravating factors (pecuniary gain, murder committed in an especially cruel manner and multiple homicides), one statutory mitigating factor (Poyson's age) and three nonstatutory mitigating factors (cooperation with law enforcement, potential for rehabilitation and family support). *See id.* at 90–91.[4] The court concluded the mitigating evidence was not sufficiently substantial to call for leniency and affirmed the death sentence. *See id.* at 91–92; Ariz. Rev. Stat. Ann. § 13-703.1(B) (2000).

D. State Postconviction Review

The Arizona Superior Court denied Poyson's petition for postconviction relief in 2003. The court provided a reasoned decision on Poyson's claim of penalty phase ineffective assistance of counsel (his third claim in this appeal) but not on Poyson's claims that the Arizona courts failed to consider relevant mitigating evidence (his first and second claims on appeal). In 2004, the Arizona Supreme Court summarily denied Poyson's petition for review.

E. Federal District Court Proceedings

Poyson filed a federal habeas petition in 2004. In 2010, the district court denied the petition. The court rejected on the merits Poyson's claims that the Arizona courts failed to consider mitigating evidence. The court also concluded Poyson's penalty phase ineffective assistance of counsel claim was procedurally defaulted because it was "fundamentally different than [the

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[4] The Arizona Supreme Court thus found three more mitigating factors than the trial court found. The appellate court nonetheless agreed with the trial court that a death sentence was warranted.

claim] presented in state court." Poyson timely appealed.

F. Proceedings in This Court

We originally heard argument on Poyson's appeal in February 2012. We issued an opinion in March 2013, *Poyson v. Ryan*, 711 F.3d 1087 (9th Cir. 2013), and an amended opinion in November 2013, *Poyson v. Ryan*, 743 F.3d 1185 (9th Cir. 2013). In April 2014, we stayed proceedings on Poyson's petition for panel rehearing pending the resolution of en banc proceedings in *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013).[5] Our en banc court decided *McKinney* in December 2015. *See McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). In May 2016, we extended the stay on Poyson's petition for rehearing pending resolution of Supreme Court proceedings in *McKinney*. In October 2016, following the Supreme Court's denial of the petition for writ of certiorari in *McKinney*, we further extended the stay and directed the parties to file supplemental briefs addressing the impact of *McKinney* on the issues presented in this appeal. Following the parties' briefing, we heard oral argument on the petition for

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[5] In May 2014, while our stay was in place, the Supreme Court denied Poyson's petition for writ of certiorari. *See Poyson v. Ryan*, 134 S. Ct. 2302 (2014). The Court also denied Poyson's motion to defer consideration of the petition for writ of certiorari. *See id.* The state contends we were required to lift our stay and issue the mandate once the Supreme Court denied certiorari. We disagree. Because we issued our stay under Fed. R. App. P. 41(d)(1), rather than Fed. R. App. P. 41(d)(2), the authorities upon which the state relies, including Rule 41(d)(2)(D), do not apply here. *See Alphin v. Henson*, 552 F.2d 1033, 1034–35 (4th Cir. 1977), *cited with approval by Bell v. Thompson*, 545 U.S. 794, 806 (2005).

rehearing in September 2017. This amended opinion follows.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We review de novo the district court's denial of Poyson's petition for habeas corpus, and we review the district court's findings of fact for clear error. *See Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007). Dismissals based on procedural default are reviewed de novo. *See Robinson v. Schriro*, 595 F.3d 1086, 1099 (9th Cir. 2010). We address Poyson's three claims in turn.

III. DISCUSSION

A. Causal Nexus Test

Poyson argues the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence of his mental health issues, traumatic childhood and substance abuse history, in violation of his Eighth and Fourteenth Amendment rights to an individualized sentencing. He contends the state courts improperly refused to consider this evidence in mitigation because he failed to establish a causal connection between the evidence and the murders. He argues the state courts' actions violate his constitutional rights as recognized in *Tennard v. Dretke*, 542 U.S. 274, 283–87 (2004), *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam), and earlier decisions. These cases hold that requiring a defendant to prove a nexus between mitigating evidence and the crime is "a test we never countenanced and now have unequivocally rejected." *Smith*, 543 U.S. at 45.

Because Poyson filed his federal habeas petition after April 24, 1996, he must not only prove a violation of these rights but also satisfy the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Fenenbock v. Dir. of Corr. for Cal.*, 681 F.3d 968, 973 (9th Cir. 2012).

Under AEDPA, we may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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). We review the last reasoned state court decision addressing the claim, which for Poyson's causal nexus claim is the Arizona Supreme Court's decision affirming Poyson's death sentence on direct appeal. *See Crittenden v. Ayers*, 624 F.3d 943, 950 (9th Cir. 2010). Poyson relies on AEDPA's "contrary to" prong, arguing the Arizona Supreme Court's decision in *State v. Poyson*, 7 P.3d 79 (Ariz. 2000), was contrary to *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

1. *Exhaustion*

As a threshold matter, we agree with Poyson that he has fully exhausted this claim. The state argues that in state court Poyson raised a causal nexus claim with respect to only mental health issues and his troubled childhood, not his history of substance abuse. We disagree. Having reviewed the record, we conclude

Poyson exhausted the claim with respect to all three categories of mitigating evidence. *See Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004) ("A petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts.").

2. *The Arizona Supreme Court's Decision Was Contrary to Clearly Established Federal Law*

Lockett, *Eddings* and *Penry* held "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." *Penry*, 492 U.S. at 318. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." *Id.* at 319. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* "[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Id.* (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

Under these decisions, a state court may not treat mitigating evidence of a defendant's background or character as "irrelevant or nonmitigating as a matter of law" merely because it lacks a causal connection to the crime. *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir. 2012), *overruled on other grounds by McKinney*, 813 F.3d at 824. The sentencer may, however, consider "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011), *overruled on other*

grounds by McKinney, 813 F.3d at 818. "The . . . use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence." *Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 2548 (2013), *and overruled on other grounds by McKinney*, 813 F.3d at 819. As the Court explained in *Eddings*:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings, 455 U.S. at 113–15.

In *McKinney*, 813 F.3d at 815, we held, "[f]or a little over fifteen years, the Arizona Supreme Court routinely articulated and insisted on [an] unconstitutional causal nexus test." Under this test, "family background or a mental condition could be given weight as a nonstatutory mitigating factor, but only if defendant established a causal connection between the background or condition and his criminal behavior." *Id.* Beginning in 1989, "[a]s a matter of law, a difficult family background or mental condition did not qualify as a nonstatutory mitigating factor unless it had a causal effect on the defendant's behavior in committing the crime at issue." *Id.* at 816. The Arizona Supreme Court "finally abandoned its unconstitutional

causal nexus test for nonstatutory mitigation" in the mid-2000s. *Id.* at 817.

McKinney recognized that, in AEDPA cases, "we apply a 'presumption that state courts know and follow the law' and accordingly give state-court decisions 'the benefit of the doubt.'" *Id.* at 803 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). But that "presumption is rebutted . . . where we know, based on its own words, that the Arizona Supreme Court did not 'know and follow' federal law." *Id.* at 804.

McKinney also recognized that "[t]he Arizona Supreme Court articulated the causal nexus test in various ways but always to the same effect." *Id.* at 816. "The Arizona Court frequently stated categorically that, absent a causal nexus, would-be nonstatutory mitigation was simply 'not a mitigating circumstance.'" *Id.* (quoting *State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989)). "Sometimes, the court stated that evidence offered as nonstatutory mitigation that did not have a causal connection to the crime should be given no 'weight.'" *Id.* Other times, "the Arizona Supreme Court stated that evidence of a difficult family background or mental illness was 'not necessarily' or not 'usually' mitigating, and then (often in the same paragraph) held as a matter of law that the evidence in the specific case before the Court was not mitigating because it had no causal connection to the crime." *Id.* at 817.

In the case before us, we conclude the Arizona Supreme Court applied an unconstitutional causal nexus test to Poyson's mitigating evidence of a difficult childhood and mental health issues. *First*, the court gave no weight at all to the evidence, and it did so because the evidence bore no causal connection to the

crimes. *See Poyson*, 7 P.3d at 90–91. With respect to Poyson's childhood, the court ruled:

> Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor. Again, however, **defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value**.

Poyson, 7 P.3d at 91 (emphasis added). With respect to Poyson's mental health issues, the court ruled:

> The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning within the family setting" to which the defendant could look for guidance. However, **we find no indication in the record that "the disorder controlled [his] conduct** or impaired his mental capacity to such a degree that leniency is required." *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *see also Medina*, 193 Ariz. at 517, 975 P.2d at 107 (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's desire to emulate his friends, not his mental disorder, was the cause

> of his criminal behavior). **We therefore accord this factor no mitigating weight**.

Id. at 90–91 (emphasis added) (alterations in original). This is some evidence that the court applied an unconstitutional causal nexus test in Poyson's case. *See McKinney*, 813 F.3d at 821 (holding the Arizona Supreme Court applied an unconstitutional causal nexus test based in part on "the factual conclusion by the sentencing judge, which the Arizona Supreme Court accepted, that McKinney's PTSD did not 'in any way affect[ ] his conduct in this case'" (alteration in original)).

Second, the Arizona Supreme Court affirmed Poyson's death sentence in 2000, in the midst of the 15-year period during which that court "*consistently* articulated and applied its causal nexus test." *McKinney*, 813 F.3d at 803 (emphasis added). Indeed, the Arizona court issued its decision in Poyson's case just a few months before it decided *State v. Hoskins*, 14 P.3d 997 (Ariz. 2000), *supplemented*, 65 P.3d 953 (Ariz. 2003), a case *McKinney* singled out as exemplifying the Arizona Supreme Court's unconstitutional practice. *See McKinney*, 813 F.3d at 814–15. This fact further supports the conclusion that the Arizona Supreme Court applied an unconstitutional causal nexus test in Poyson's case.

Third, in applying a causal nexus test to Poyson's mental health evidence, the Arizona Supreme Court cited a passage from *State v. Brewer*, 826 P.2d 783, 802 (1992), that *McKinney* specifically identified as applying an unconstitutional causal nexus test. *Compare Poyson*, 7 P.3d at 90–91 (quoting *Brewer* and stating "we find no indication in the record that 'the

disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required'" (alteration in original)), *with McKinney*, 813 F.3d at 815 (citing this precise language in *Brewer* as exemplifying the Arizona Supreme Court's unconstitutional causal nexus test). This fact too supports the conclusion that the Arizona Supreme Court applied an unconstitutional causal nexus test in Poyson's case. *See McKinney*, 813 F.3d at 821 (concluding the Arizona Supreme Court applied an unconstitutional test in part based on the court's "pin citation to the precise page in [*State v. Ross*, 886 P.2d 1354, 1363 (Ariz. 1994),] where it had previously articulated that test").

Fourth, although the Arizona Supreme Court said the evidence in Poyson's case was "without mitigating value" and would be accorded "no mitigating weight," suggesting the possibility that the court applied a causal nexus test as a permissible weighing mechanism, *McKinney* makes clear that the court instead applied an unconstitutional causal nexus test, treating the evidence as irrelevant or nonmitigating *as a matter of law*. *See id.* at 816 (holding the state court applied an unconstitutional test where "the court stated that evidence offered as nonstatutory mitigation that did not have a causal connection to the crime should be given no 'weight'"); *id.* (holding the state court applied an unconstitutional causal nexus test where it said "a difficult family background is not always entitled to great weight as a mitigating circumstance" (quoting *State v. Towery*, 920 P.2d 290, 311 (Ariz. 1996))); *id.* at 820 (holding the state court applied an unconstitutional causal nexus test where it said "[a] difficult family background, including

childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted a defendant's ability to perceive, to comprehend, or to control his actions" (quoting *State v. McKinney*, 917 P.2d 1214, 1226 (Ariz. 1996))).

For these reasons, we conclude the Arizona Supreme Court applied an unconstitutional causal nexus test to Poyson's evidence of a troubled childhood and mental health issues. "This holding was contrary to *Eddings*." *Id.* at 821. Accordingly, as in *McKinney*, we "hold that the decision of the Arizona Supreme Court applied a rule that was 'contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* (alteration in original) (quoting 28 U.S.C. § 2254(d)(1)).

With respect to Poyson's evidence of a history of substance abuse, however, we conclude there was no *Eddings* error. The state supreme court rejected this evidence at step one in the analysis, adopting the trial court's finding as a matter of fact that Poyson had failed to establish a history of substance abuse by a preponderance of the evidence. *See Poyson*, 7 P.3d at 90. The court's treatment of Poyson's substance abuse evidence thus was not contrary to *Eddings*.

3. *On De Novo Review, Poyson Has Shown the Arizona Supreme Court Applied an Unconstitutional Causal Nexus Test*

Because AEDPA is satisfied, we review Poyson's constitutional claim de novo. *See Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc). We begin by asking whether Poyson has shown a constitutional violation. If Poyson has made this showing, we consider

whether he was prejudiced under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Poyson has satisfied the first part of this inquiry. The Supreme Court's decisions in *Tennard v. Dretke*, 542 U.S. 274, 287 (2004), *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam), *Lockett*, *Eddings* and *Penry* all prohibit a state from requiring a defendant to prove a nexus between mitigating evidence and the crime. As discussed above, the Arizona Supreme Court violated this rule in Poyson's case. Poyson has therefore established that the Arizona Supreme Court applied an unconstitutional causal nexus test to evidence of his troubled childhood and mental health issues.

4. *Poyson Was Prejudiced*

"The harmless-error standard on habeas review provides that 'relief must be granted' if the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *McKinney*, 813 F.3d at 822 (quoting *Brecht*, 507 U.S. at 623). "There must be more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht*, 507 U.S. at 637). "[T]he court must find that the defendant was actually prejudiced by the error." *Id.* (quoting *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam)). Under this standard:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to

> support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

McKinney, 813 F.3d at 822 (alteration in original) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Accordingly, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless. And, the petitioner must win." *Id.* (alteration in original) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)).

Our analysis once again is guided by *McKinney*, where we held the causal nexus error was prejudicial under circumstances similar to those presented here. *See id.* at 822–24. Here, as in *McKinney*, there were three aggravating factors – pecuniary gain; especially cruel, heinous or depraved murders; and multiple homicides. *See Poyson*, 7 P.3d at 87–88; *McKinney*, 813 F.3d at 823. Here, as in *McKinney*, the improperly disregarded evidence concerned the defendant's traumatic childhood and mental health issues. *See Poyson*, 7 P.3d at 90–91; *McKinney*, 813 P.3d at 819.

As in *McKinney*, moreover, the evidence of a traumatic childhood in this case was particularly compelling. Both of Poyson's parents abused drugs and alcohol at the time of his conception. His mother used LSD on a daily basis. She continued to abuse drugs and alcohol – including daily use of LSD – while she was pregnant with Poyson. Poyson never knew his biological father, an alcoholic. During his childhood, his

mother was in relationships with many different men, and Poyson lacked a stable home life. One of these men, Guillermo Aguilar, physically and mentally abused Poyson, subjecting Poyson to repeated beatings. Aguilar brutally whipped Poyson with an electrical cord, and he eventually was sent to jail for abusing Poyson and his siblings. Others of these men abused drugs and alcohol. One even drank and did drugs with Poyson.

Poyson also suffered a number of physical and developmental problems as a child. He was developmentally delayed in areas such as crawling, walking and speaking. He had a speech impediment, fell behind in school and received special education services. He sustained several head injuries. Once, when he and his brother were playing, he had a stick impaled in his head. He suffered severe headaches, and passed out unconscious on several occasions. He was involuntarily intoxicated as a young child. He was subjected to physical abuse not only by Aguilar but also by his mother, who once hit him so hard it dislodged two teeth, and in particular by his maternal grandmother, Mary Milner, who beat him repeatedly and savagely.

When Poyson was 10 or 11 years old, he suffered two traumatic events that, according to witnesses at Poyson's sentencing, forever changed his life. Of the many adult men in Poyson's life, Poyson was close with just one of them, Sabas Garcia, his stepfather and the one true father figure Poyson ever had. When Poyson was 10 or 11, however, Sabas committed suicide by shooting himself in the head. Poyson was devastated by Sabas' death, which changed Poyson completely. He

became distant, spending time away from home. He didn't care anymore. He began using and abusing drugs and alcohol, and he began having behavioral problems. His contacts with law enforcement also began at this time, and his performance in school suffered dramatically. Before Sabas' death, Poyson had overcome his earlier developmental challenges to become an A or B student, but after Sabas' death he began receiving Cs, Ds and Fs, and he eventually dropped out of school. His family life became even less stable. He bounced around from relative to relative, living from time to time with his mother, an aunt, his grandmother and another stepfather. Shortly after Sabas' death, moreover, Poyson suffered a second severe trauma in his life when he was lured to the home of a childhood friend and violently raped. The attacker threw Poyson face down on a bed and brutally sodomized him.

Under the circumstances of this case, which closely track those in *McKinney*, we conclude the Arizona Supreme Court's application of an unconstitutional causal nexus test "had a 'substantial and injurious effect or influence' on its decision to sentence [Poyson] to death." *McKinney*, 813 F.3d at 824 (quoting *Brecht*, 507 U.S. at 623).

B. Failure to Consider Substance Abuse

At sentencing, Poyson presented evidence of a history of drug and alcohol abuse, but the state trial court and the state supreme court declined to treat the evidence as a nonstatutory mitigating factor. The trial court found Poyson had presented only "very vague allegations that he has used alcohol . . . or . . . drugs in the past," and found "very little to support the

allegation that the defendant has a significant alcohol and/or drug abuse" history. The supreme court agreed that Poyson's claims to have "used drugs or alcohol in the past" were "little more than 'vague allegations.'" *Poyson*, 7 P.3d at 90.

Poyson contends the state courts' conclusions that he provided only "vague allegations" of substance abuse were unreasonable determinations of the facts under 28 U.S.C. § 2254(d)(2) and violated his constitutional rights under *Lockett*, 438 U.S. at 605, *Eddings*, 455 U.S. at 112, and *Parker v. Dugger*, 498 U.S. 308, 321 (1991). We disagree.

Poyson's claim – that "[b]ecause his death sentence is based upon [an] unreasonable determination of facts, [he] is entitled to habeas relief" – misunderstands the law. Even assuming that the state courts' determination that Poyson provided only "vague allegations" of substance abuse was an unreasonable determination of the facts under § 2254(d)(2), an issue we need not reach, Poyson's claim fails because he cannot demonstrate his constitutional rights were violated. *See Wilson v. Corcoran*, 562 U.S. 5–6 (2010) (per curiam) (holding that although § 2254(d)(2) relieves a federal court of AEDPA deference when the state court makes an unreasonable determination of facts, it "does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law"); *see also Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc) (holding AEDPA does not "require any particular methodology for ordering the § 2254(d) and § 2254(a) determination[s]"). An unreasonable determination of the facts would not, standing alone,

amount to a constitutional violation under *Lockett*, *Eddings* or *Parker*.

Lockett invalidated an Ohio death penalty statute that precluded the sentencer from considering aspects of the defendant's character or record as a mitigating factor. *See* 438 U.S. at 604. *Eddings* held that a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See* 455 U.S. at 113–15. Here, the state courts considered Poyson's evidence of substance abuse, but found it wanting as a matter of fact and that Poyson failed to prove a history of substance abuse. Thus, there was no constitutional violation under *Lockett* and *Eddings*.

Nor has Poyson shown a constitutional violation under *Parker*. There, the state supreme court reweighed aggravating and mitigating circumstances before affirming a death sentence. *See Parker*, 498 U.S. at 321–22. The court's reweighing, however, was premised on its erroneous assumption that the state trial court had found that there were no mitigating circumstances. *See id.* The Supreme Court held the state supreme court's action deprived the defendant of "meaningful appellate review," and thus that the sentencing violated the defendant's right against "the arbitrary or irrational imposition of the death penalty." *Id.* at 321. In Poyson's view, *Parker* stands for the broad proposition that, "[w]hen a state court's imposition of the death penalty is based not on the characteristics of the accused and the offense but instead on a *misperception of the record*, the defendant is not being afforded the consideration that the Constitution requires." In *Parker*, however, the state supreme court had misconstrued the state trial court's

findings, something that did not occur here. *Parker* does not hold that a state court's erroneous factual finding in assessing mitigation evidence necessarily amounts to a constitutional violation. Rather, it suggests the opposite:

> This is not simply an error in assessing the mitigating evidence. Had the Florida Supreme Court conducted its own examination of the trial and sentencing hearing records and concluded that there were no mitigating circumstances, a different question would be presented. Similarly, if the trial judge had found no mitigating circumstances and the Florida Supreme Court had relied on that finding, our review would be very different.

Id. at 322.

In sum, we hold Poyson is not entitled to habeas relief, because he has not shown a constitutional violation under *Lockett*, *Eddings* or *Parker*. Because Poyson has raised arguments under only *Lockett*, *Eddings* and *Parker*, we need not decide whether, or under what circumstances, a state court's erroneous factfinding in assessing mitigating evidence can itself rise to the level of a constitutional violation.

C. Penalty Phase Ineffective Assistance of Counsel

In his federal habeas petition, Poyson argued he received ineffective assistance of counsel during the penalty phase of his trial because his trial counsel failed to investigate the possibility that he suffered from fetal alcohol spectrum disorder (FASD). The district court ruled Poyson failed to present this claim

to the state courts, and hence that the claim was procedurally defaulted. Poyson challenges that ruling on appeal. We review de novo. *See Robinson*, 595 F.3d at 1099.

A state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. *See Picard v. Connor*, 404 U.S. 270, 275 (1971); *Weaver v. Thompson*, 197 F.3d 359, 363–64 (9th Cir. 1999); 28 U.S.C. § 2254(b)(1)(A). This rule "reflects a policy of federal-state comity, an accommodation of our federal system designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard*, 404 U.S. at 275 (citations and internal quotation marks omitted). "A petitioner can satisfy the exhaustion requirement by providing the highest state court with a fair opportunity to consider each issue before presenting it to the federal court." *Weaver*, 197 F.3d at 364.

"[A] petitioner may provide further facts to support a claim in federal district court, so long as those facts do not 'fundamentally alter the legal claim already considered by the state courts.'" *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)).[6] "[T]his rule allows a petitioner who presented a particular [ineffective assistance of counsel] claim, for example that counsel was ineffective in presenting humanizing testimony at

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[6] For purposes of review under 28 U.S.C. § 2254(d)(1), factual allegations must be based on the "record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

sentencing, to develop additional facts supporting that particular claim." *Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th Cir. 2005) (citing *Weaver*, 197 F.3d at 364). "This does not mean, however, that a petitioner who presented any ineffective assistance of counsel claim below can later add unrelated alleged instances of counsel's ineffectiveness to his claim." *Id.* (citing *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc)).

1. *State Proceedings*

In his state habeas petition, Poyson raised two ineffective assistance of counsel claims relevant here. In the first claim, Poyson alleged trial counsel "was ineffective because he failed to request the appointment of experts in the field of mental health early in the case." He alleged the investigation for both phases of the trial should have begun "immediately" upon counsel's appointment, including "the immediate appointment of experts for both parts of the trial." Counsel's failure "to immediately secure the appointment of mental health experts . . . prejudiced" him in two ways. First, it precluded him from presenting a defense of "diminished capacity" with respect to the Delahunt murder during the guilt phase of the trial. Second, "the failure of counsel to immediately pursue mitigation caused the loss of mitigating information" that could have been presented at sentencing. Poyson presented a report by a neuropsychologist retained during the state habeas proceedings, Robert Briggs, Ph.D. According to Poyson, Briggs' report showed Poyson "was brain-damaged" at the time of the murders, but had since "recovered, due to his long stay first in jail, then on condemned row,

without chemical or physical insult to his brain." In Poyson's view, "the report leaves no doubt that neurophyschological testing shows that he was impaired at the time of the crime." This mitigating evidence had been "lost forever."

In the state petition's second claim, Poyson alleged trial counsel failed to properly present mitigation and psychological evidence because counsel "did nothing to show the trial court how [his] abusive childhood caused, or directly related to, [his] conduct during the murders." He alleged trial counsel were deficient because they were "required to make some attempt to correlate Mr. Poyson's physically and psychologically abusive background with his behavior," because "a connection between the two would be much more powerful in mitigation than the abuse standing alone."

2. *Federal Petition*

Poyson's federal petition presented a substantially different claim – counsel's failure to investigate Poyson's possible fetal alcohol spectrum disorder. Poyson alleged trial counsel were ineffective because they "failed to make any effort to investigate and develop" evidence that Poyson suffered from FASD. He alleged defense counsel "failed to investigate the obvious possibility that [he] suffered from FASD," made "no effort" to "pursue this fertile area of mitigation" and "ignored obvious evidence that [he] was exposed to drugs and alcohol *in utero*." Poyson further alleged he was prejudiced by counsel's deficient performance:

> Their failure to adequately investigate and substantiate [evidence that Petitioner was

> exposed to drugs and alcohol *in utero*] profoundly prejudiced Petitioner. Adequate explanation during the pre-sentence hearing of the effect of FASD on Petitioner's brain would likely have convinced the trial court that Petitioner had a lesser degree of culpability.

3. *Analysis*

The district court concluded the claim raised in the federal petition had not been fairly presented to the Arizona courts:

> This Court concludes that the claim asserted in the instant amended petition is fundamentally different than that presented in state court. Petitioner's argument in support of [this claim] is based entirely on trial counsel's alleged failure to investigate and develop mitigation evidence based on Petitioner's *in utero* exposure to drugs and alcohol. This version of Petitioner's sentencing [ineffective assistance of counsel] claim has never been presented to the Arizona courts. While it is true that new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not "fundamentally alter the legal claim already considered by the state courts." *Beaty v. Stewart*, 303 F.3d 975, 989–90 ([9th Cir.] 2002) (citing *Vasquez*, 474 U.S. at 260). To do so deprives the state court of "a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez*, 474 U.S. at 257. Here, Petitioner is not simply proffering additional evidentiary support for a factual theory presented to the state court.

> Rather, he is alleging an entirely new theory of counsel ineffectiveness; one that has not previously been presented in state court.

We agree. Poyson presented not only new facts in support of a claim presented to the state court, but also a fundamentally new theory of counsel's ineffectiveness – one that the Arizona courts lacked "a meaningful opportunity to consider." *Vasquez*, 474 U.S. at 257. The district court therefore properly dismissed Poyson's penalty phase ineffective assistance of counsel claim as procedurally defaulted.

IV. CONCLUSION

We reverse the district court's judgment denying the writ of habeas corpus. We remand with instructions to grant the writ with respect to Poyson's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law. *See McKinney*, 813 F.3d at 827. We do not reach Poyson's contention, raised for the first time in his supplemental briefing, that he is entitled to a new sentencing proceeding before a jury under *Ring v. Arizona*, 536 U.S. 584 (2002), *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Magwood v. Patterson*, 561 U.S. 320, 332 (2010).

REVERSED AND REMANDED.

* * *

Poyson's motion for reconsideration of our March 2013 order denying his motion for a remand under *Martinez v. Ryan*, 566 U.S. 1 (2012), is without merit. Our intervening decision to remand in *Dickens v. Ryan*,

740 F.3d 1302, 1320 (9th Cir. 2014) (en banc), did not change our holding in *Sexton v. Cozner*, 679 F.3d 1150, 1161 (9th Cir. 2012), that a remand is not required where, as here, the record is sufficiently complete for us to hold that counsel's representation was not ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). The additional evidence Poyson offers does not show remand was necessary. That Dr. Robert Briggs was placed on and then removed from probation by the Arizona Board of Psychological Examiners does not change our previous conclusion that Poyson's postconviction relief counsel reasonably relied on Dr. Briggs, the retained neuropsychological expert who was aware of Poyson's exposure to drugs and alcohol in utero but did not advise counsel that Poyson suffered from fetal alcohol spectrum disorder. The motion (Dkt. 74) is therefore **DENIED**.

IKUTA, Circuit Judge, concurring:

Our en banc decision in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc) (*McKinney II*), erred in concluding that any *Eddings* error had a "substantial and injurious effect," *id.* at 822 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)), on the Arizona Supreme Court's decision to affirm the defendant's death sentence. *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214 (1996) (*McKinney I*). As a result, our decision today is wrongly decided. Nevertheless, as a three-judge panel, we are bound by *McKinney II* until either the Supreme Court or a future en banc panel overrules it. Therefore, I concur in the majority opinion and write separately only to point out how *McKinney II*'s error in applying *Brecht* infects our decision here.

I

Under AEDPA, we must determine whether the decision of the Arizona Supreme Court is contrary to or an unreasonable application of clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). It is clearly established that a sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Okla.*, 455 U.S. 104, 114 (1982) (italics in original); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978). While the sentencer "may determine the weight to be given relevant mitigating evidence," it "may not give it no weight by excluding such evidence from [its] consideration." *Eddings*, 455 U.S. at 114–15. Applying *Lockett* and *Eddings*, the Supreme Court held that a state cannot adopt a "causal nexus" rule, that is, a rule precluding a sentencer from considering mitigating evidence unless there is a causal nexus between that evidence and the crime. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). The sentencer may, however, consider "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011) *overruled on other grounds by McKinney II*, 813 F.3d at 819.

In this case, the Arizona Supreme Court stated only that it accorded no mitigating weight to Poyson's evidence of mental health and an abusive childhood. *State v. Poyson*, 198 Ariz. 70, 81–82 (2000). Before *McKinney II*, we held that this decision was not an unreasonable application of *Lockett*, *Eddings*, and *Tennard* because we could not presume that the Arizona Supreme Court had refused to consider the mental health and abusive childhood evidence as a

matter of law. *See Poyson v. Ryan*, 711 F.3d 1087, 1090 (9th Cir. 2013). Rather, as instructed by the Supreme Court, we adopted the "presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *see Poyson*, 711 F.3d at 1099.

McKinney II flipped this presumption. It held that we must presume the Arizona Supreme Court applied the unconstitutional causal nexus test between 1989 and 2005, even when, as here, the court expressly discussed the weight of the evidence. 813 F.3d at 803, 809, 816. This reasoning is contrary to *Visciotti*, as the *McKinney II* dissent made clear. *See McKinney II*, 813 F.3d at 827–850 (Bea, J., dissenting). No further elaboration of this error is needed.

II

I write separately to highlight *McKinney II*'s second error: its conclusion that a causal nexus error has a "substantial and injurious effect" on a state court's decision. 813 F.3d at 822–23.

A

Under *Brecht*, even if a state court unreasonably errs in applying Supreme Court precedent, a federal court may not provide habeas relief unless the error had a "substantial and injurious effect." 507 U.S. at 623. "There must be more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht*, 507 U.S. at 637). Rather, a "court must find that the defendant was actually prejudiced by the error." *Id.* (quoting *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam)). Even an *Eddings* error may be harmless.

Greenway v. Ryan, 866 F.3d 1094, 1100 (9th Cir. 2017) (per curiam).

In determining that the Arizona Supreme Court's presumed causal nexus error in *McKinney I* was prejudicial, *McKinney II* failed to provide a reasoned or reasonable application of *Brecht*. Instead, without any meaningful analysis, *McKinney II* conclusorily held that the evidence presumed excluded under Arizona's presumed causal nexus test "would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." *McKinney II*, 813 F.3d at 823. Therefore, *McKinney II* held, the Arizona Supreme Court's "application of the test had a 'substantial and injurious effect or influence' on its decision to sentence [the defendant] to death." *Id.* at 823–24 (quoting *Brecht*, 507 U.S. at 623). In reaching this conclusion, *McKinney II* came close to enunciating a per se rule that when a state court's application of a causal nexus test excludes mitigating evidence, such an error will not be harmless.

Such a quasi per se rule may be plausible when the sentencer in a particular case is a jury. If a state rule excludes certain mitigating evidence from the jury's consideration as a matter of law, either the evidence will not be presented to the jury or the jury will be instructed to disregard it if they find no causal nexus. Because we presume a jury follows its instructions, *Penry v. Johnson*, 532 U.S. 782, 799 (2001), and a jury generally does not give reasons for its decision, it is reasonable to presume that the jury could not meaningfully consider even strong mitigating evidence in reaching its verdict if it were excluded under a

causal nexus rule, *see Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 (2007). A court could determine that strong mitigating evidence which was excluded from consideration "would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." *McKinney II*, 813 F.3d at 823. Accordingly, in the absence of other factors (such as the presence of aggravating factors that "overwhelmingly outweighed" the mitigating evidence, *see Greenway*, 866 F.3d at 1100), an *Eddings* error could have a substantial and injurious effect.

But the quasi per se rule adopted by *McKinney II* is entirely implausible when the sentencer is a state supreme court. Unlike a jury, a state supreme court has the authority to review and consider all the evidence in the record; this is particularly important, when as in Arizona, the state supreme court "reviews capital sentences de novo, making its own determination of what constitute legally relevant aggravating and mitigating factors, and then weighing those factors independently." *McKinney II*, 813 F.3d at 819 (citing Ariz. Rev. Stat. Ann. § 13-755). A state supreme court's decision that certain categories of evidence are not mitigating is effectively the court's conclusion that such evidence does not merit much weight. Just like a jury, a state supreme court can reasonably conclude that if a defendant's mental impairments did not play a part in causing the defendant to commit a brutal offense, the impairments do not mitigate the defendant's behavior.

A state supreme court's conclusion about the mitigating weight of various types of evidence does not

have the effect of excluding evidence as a matter of law. Nor does such a conclusion preclude a state supreme court from weighing the evidence differently in a different case. While a jury must follow instructions, the state court is free to disregard its instructions to itself because a state supreme court may always revisit its precedent. As the Arizona Supreme Court has explained, "while we should and do pay appropriate homage to precedent, we also realize that we are not prisoners of the past." *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 107 (1993) (quoting *Wiley v. The Indus. Comm'n of Ariz.*, 174 Ariz. 94, 103 (1993)). Indeed, even *McKinney II* acknowledged that by the mid-2000s, the Arizona Supreme Court had stopped applying the precedent that *McKinney II* presumed compelled the use of a causal nexus test. 813 F.3d at 817.

Finally, unlike a jury, a state supreme court generally explains its reasons, and so may articulate its conclusion that defendant's impairments merited little or no mitigating weight. *See Greenway*, 866 F.3d at 1100. Where a state supreme court has reached a reasoned conclusion that aggravating circumstances outweigh mitigating evidence in a particular case, there does not seem to be a reasonable possibility that the state supreme court would reach a different result merely because a federal court announces that the state court has secretly maintained an unconstitutional causal nexus rule all along. *See id.*

B

Because *McKinney II* failed to distinguish between a state supreme court and a jury, its *Brecht* analysis fails.

In *McKinney I*, the Arizona Supreme Court explained that it "conducts a thorough and independent review of the record and of the aggravating and mitigating evidence to determine whether the sentence is justified, . . . consider[ing] the quality and strength, not simply the number, of aggravating or mitigating factors." 185 Ariz at 578. In its opinion, the Arizona Supreme Court reviewed the defendant's evidence of childhood abuse and post-traumatic stress disorder (PTSD). *Id.* at 587. It determined that the judge had fully considered evidence from several witnesses that defendant had "endured a terrible childhood," as well as the PTSD diagnosis. *Id.* But the court held that "a difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions." *Id.* After considering the defendant's abusive childhood and its impact on his behavior and ability to conform his conduct, the Arizona Supreme Court found there was no error in determining that the evidence of childhood abuse was "insufficiently mitigating to call for leniency." *Id.*

In light of the Arizona Supreme Court's reasoned consideration and weighing of the mitigating evidence, there was no basis for concluding that this same evidence would have a different impact – let alone a substantial impact – on the same court on resentencing simply because a federal court provides a reminder that *Eddings* precludes a sentencer from applying the causal nexus rule. *McKinney II*, 813 F.3d at 823–24. *Brecht* does not permit "mere speculation" about the potential prejudice to a defendant. *Davis*, 135 S. Ct. at

2198 (quoting *Calderon* 525 U.S. at 146). Because there is not a reasonable possibility that the presumed legal error influenced the Arizona Supreme Court, or have more than a slight effect, the sentence should stand. *See Kotteakos v. United States*, 328 U.S. 750, 764 (1946); *Davis*, 135 S. Ct. at 2198. *McKinney II* erred in ruling otherwise.

III

Because we are bound by *McKinney II*'s erroneous application of *Brecht*, its error infects this appeal as well. In our case, the Arizona Supreme Court considered Poyson's mitigating evidence regarding his mental health and abusive childhood, but stated merely that it accorded these factors "no mitigating weight." *Poyson*, 198 Ariz. at 81–82. On the other hand, the Arizona Supreme Court found that the evidence supported aggravating circumstances of (1) pecuniary gain, (2) especially cruel, heinous, or depraved murder, and (3) multiple homicide. *Id* at 78–79. Based on its findings, the court upheld Poyson's death sentence. *Id* at 82. The court did so while performing its duty to "independently review and reweigh the aggravating and mitigating circumstances in every capital case . . . ." *Id.* at 81.

Here, the Arizona Supreme Court reviewed and considered Poyson's mitigating evidence, and balanced it against the case's aggravating circumstances. Accordingly, there is no basis for concluding that our correction of any presumed *Eddings* error "would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." *McKinney II*, 813 F.3d at 823. We should therefore conclude that any

presumed causal nexus error was not prejudicial, and therefore Poyson is not entitled to relief.

Because we are bound by *McKinney II* (at least for the time being), we are unable to reach this correct conclusion. As a result, I reluctantly concur in the majority opinion.

APPENDIX B

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-04-0534-PHX-NVW
DEATH PENALTY CASE

[Filed February 19, 2010]

Robert Allen Poyson,	)
	)
Petitioner,	)
	)
vs.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

Before the Court is Petitioner's Rule 59(e) Motion to Alter or Amend the Judgment. (Dkt. 77.) On January 20, 2010, the Court denied Petitioner's amended habeas corpus petition, granted a certificate of appealability with respect to three claims, and entered judgment. (Dkts. 75, 76.) In the present motion, Petitioner asks the Court to alter or amend its judgment with respect to two claims.

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. Such a motion 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 (1) the court is presented with newly discovered evidence, (2) there is an intervening change in controlling law, or (3) 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 Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1988), or 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) (quotation omitted).

Petitioner asserts that the Court committed clear error in denying Claim 7(A) on the merits and Claim 22 as procedurally barred. The Court disagrees.

Claim 7(A)

Petitioner alleged that appellate counsel performed at a constitutionally ineffective level by failing to raise

a challenge to the trial court's voir dire procedures, including the court's refusal to allow defense counsel to question individual jurors outside the presence of the panel. This Court rejected the claim, finding that Petitioner could not show prejudice from appellate counsel's failure to raise the issue because the Arizona Supreme Court, as noted by the trial court on post-conviction review, had rejected a similar challenge to the voir dire process in *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869 (1997).

Petitioner argues that the Court clearly erred in relying on *Trostle* when denying this claim. According to Petitioner, because trial counsel in *Trostle* did not object to the voir dire process, the claim was waived and therefore was subject to fundamental error review by the Arizona Supreme Court. By contrast, Petitioner's counsel did raise objections to the trial court's refusal to allow individualized voir dire, so if appellate counsel had raised the claim on appeal it would have been reviewed simply for error. In support of this argument, Petitioner relies on *State v. Blakley*, 204 Ariz. 429, 434-35, 65 P.3d 77, 82-83 (2003), in which the Arizona Supreme Court found that the trial court erred in failing to allow defense counsel to ask follow-up questions of individual jurors. Reversing on other grounds, the court found it unnecessary to address whether the defendant was entitled to relief

based on the inadequate voir dire.[1] *Id.* at 435, 65 P.2d at 83.

The Court finds Petitioner's argument unpersuasive. First, Petitioner's reading of *Trostle* is tendentious. In *Trostle*, the Arizona Supreme Court, while finding that the claim was waived based on trial counsel's failure to object to the judge's voir dire procedures, further explained: "Waiver aside, the court did not abuse its discretion. None of the jurors exhibited a closed mind. All stated that they could follow the court's instructions and decide the case on the evidence." 191 Ariz. at 12, 951 P.2d at 877. Therefore, no matter what standard of review it applied, the court in *Trostle* found that the voir dire process, though it could have been "more extensive" and used "other techniques," did not deprive the defendant of a fair jury. *Id.* In Petitioner's case, the record likewise shows that the jurors chosen following similar voir dire procedures did not exhibit partiality but instead indicated that they could follow the court's instructions and decide the case on the evidence. In addition, it was the holding in *Trostle*, not *Blakley*, decided three years after Petitioner's appeal, which appellate counsel had to take into account when choosing which claims to raise. Finally, the ruling in *Blakley*, which made no determination as to whether the trial court's deficient voir dire procedures entitled the defendant to relief, does not constitute a sufficient

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[1] The court nonetheless noted, "In any event, the defendant failed to show what specific areas of inquiry he would have pursued if permitted, the questions he intended to ask, and the information he hoped to gain with further interrogation." *Blakley*, 204 Ariz. at 435, 65 P.2d at 83.

basis on which Petitioner can affirmatively establish that he was prejudiced by appellate counsel's performance.

Because the Court did not err in its analysis of Claim 7(A), Petitioner is not entitled to relief under Rule 59(e). For the reasons set forth in its order and memorandum denying the amended habeas petition (Dkt. 75 at 41-44, 59-60), the Court will not expand the certificate of appealability to include Claim 7(A).

Claim 22

In his habeas petition, Petitioner alleged that Arizona's lethal injection protocol violated the Eighth Amendment. He did not raise such a claim in state court. This Court found the claim technically exhausted but procedurally barred due to an absence of available state remedies. Petitioner alleges that this determination was clearly erroneous, citing recent state court orders in other capital cases which, noting the Supreme Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), have permitted the filing of successive state post-conviction petitions challenging Arizona's lethal injection protocol. Based on these rulings, Petitioner requests the Court to stay his habeas proceedings while he returns to state court to exhaust this claim.

Even assuming that the Court's procedural analysis was erroneous, Petitioner is not entitled to relief under Rule 59(e) because Claim 22 is plainly meritless. The United States Supreme Court has never held that lethal injection constitutes cruel and unusual punishment, *see Baze*, 553 U.S. 35, and the Ninth Circuit has concluded that death by lethal injection in Arizona does not violate the Eighth Amendment. *See*

LaGrand v. Stewart, 133 F.3d 1253, 1265 (9th Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997); *see also Dickens v. Brewer*, No. 07-CV1 770-NVW, 2009 WL 1904294 (D. Ariz. July 1, 2009) (Arizona's lethal injection protocol does not violate Eighth Amendment).

Because this claim is plainly meritless and Petitioner has failed to show good cause for not raising the claim in state court, it would be an abuse of discretion for the Court to permit stay and abeyance. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) (stay and abeyance is appropriate only "when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court" and the unexhausted claims are not plainly meritless).

Accordingly,

IT IS HEREBY ORDERED that Petitioner's Rule 59(e) Motion to Alter or Amend Judgment (Dkt. 77) is **DENIED**.

DATED this 18th day of February, 2010.

/s/Neil V. Wake
Neil V. Wake
United States District Judge

APPENDIX C

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-04-0534-PHX-NVW
DEATH PENALTY CASE

[Filed January 20, 2010]

Robert Allen Poyson,	)
	)
Petitioner,	)
	)
vs.	)
	)
Charles L. Ryan, et al.,[1]	)
	)
Respondents.	)
	)

MEMORANDUM OF DECISION AND ORDER

Petitioner Robert Poyson, a state prisoner under sentence of death, has filed an Amended Petition for Writ of Habeas Corpus. (Dkt. 27.)[2] Petitioner alleges, pursuant to 28 U.S.C. § 2254, that he is imprisoned

[1] Charles L. Ryan, Interim Director of the Arizona Department of Corrections, is substituted as Respondent pursuant to Federal Rule of Civil Procedure 25(d).

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

and sentenced in violation of the United States Constitution. Also before the Court is Petitioner's second motion to expand the record. (Dkt. 72.) For the reasons set forth below, the Court concludes that Petitioner is not entitled to habeas relief or expansion of the record.

BACKGROUND

A jury convicted Petitioner on three counts of first degree murder, one count of conspiracy to commit first degree murder, and one count of armed robbery. The following facts concerning the crimes are taken from the decision of the Arizona Supreme Court affirming Petitioner's convictions and sentences, *State v. Poyson*, 198 Ariz. 70, 74, 7 P.3d 79, 83 (2000), and from this Court's review of the record.

Petitioner met Leta Kagen, her 15-year-old son, Robert Delahunt, and Roland Wear in April of 1996. Petitioner was 19 years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to 48-year-old Frank Anderson and his 14-year-old girlfriend, Kimberly Lane. They also needed a place to live, and Kagen invited them to stay at the trailer.

Anderson informed Petitioner that he was eager to travel to Chicago, where he claimed to have connections to the mafia. Because none of them had a way of getting to Chicago, Anderson, Petitioner, and Lane formulated a plan to kill Kagen, Delahunt, and Wear in order to steal Wear's truck.

On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property.

There, Anderson attacked Delahunt, slitting his throat with a bread knife. Petitioner heard Delahunt's screams and ran to the trailer. While Anderson held Delahunt down, Petitioner bashed his head against the floor. He also beat the victim's head with his fists and pounded it with a rock. This did not kill Delahunt, so Petitioner took the bread knife and, using a rock as a hammer, drove it through Delahunt's ear. Although the blade penetrated the victim's skull and exited through his nose, the wound was not fatal. Petitioner continued to slam Delahunt's head against the floor until he lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. The attack lasted about 45 minutes.

After cleaning themselves up, Petitioner and Anderson prepared to kill Kagen and Wear. They first located Wear's .22 caliber rifle. Unable to find any ammunition, Petitioner borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to help rescue him. Petitioner loaded the rifle and tested it to make sure it would function properly. He then stashed it near a shed. Later that evening, he cut the telephone line to the trailer so that neither of the remaining victims could call for help.

After Kagen and Wear were asleep, Petitioner and Anderson went into their bedroom. Petitioner first shot Kagen in the head, killing her instantly. After reloading the rifle, he shot Wear in the mouth, shattering his upper right teeth. A struggle ensued, during which Petitioner repeatedly clubbed Wear in the head with the rifle. The altercation eventually moved

outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him down. While the victim was lying on the ground, Petitioner kicked him in the head. He then picked up the cinder block and threw it several times at Wear's head. When Wear stopped moving, Petitioner took his wallet and the keys to his truck. Petitioner covered the body with debris from the yard. Petitioner, Anderson, and Lane then took the truck and drove to Illinois, where they were apprehended several days later.

The trial court sentenced Petitioner to death for the murders, and to terms of imprisonment for the other offenses. Following his unsuccessful direct appeal, Petitioner filed a petition for certiorari, which was denied. *Poyson v. Arizona*, 531 U.S. 1165 (2001). In 2002, Petitioner filed in state court a petition for post-conviction relief (PCR) and a supplemental petition pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. (Dkt. 31, Ex. J.) The PCR court denied relief without holding an evidentiary hearing.[3] (Dkt. 32, Ex. N.) In March 2004, the Arizona Supreme Court summarily denied a petition for review. (*Id.*, Ex. S.) Thereafter, Petitioner initiated the instant habeas proceedings.

APPLICABLE LAW

Because it was filed after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). *Lindh*

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[3] Judge Steven F. Conn, of the Mohave County Superior Court, presided over Petitioner's trial and the PCR proceedings.

v. Murphy, 521 U.S. 320, 336 (1997); *see also Woodford v. Garceau*, 538 U.S. 202, 210 (2003).

For properly exhausted claims, 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*, 550 U.S. 465, 475 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

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

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

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

"The threshold question under AEDPA is whether [a 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*, 549 U.S. 70, 76 (2006). 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*, 549 U.S. at 77. 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 v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

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.

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; *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 on 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 I*, 537 U.S. at 340; *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); *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.

DISCUSSION

Nineteen of Petitioner's habeas claims remain before this Court.[4] Respondents contend that six of the claims – Claims 4, 8, 15, 16, 19, and 21 – are procedurally defaulted. The Court finds it unnecessary to address the procedural status of these claims, as they are plainly meritless and will be dismissed for the reasons set forth below. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of unexhausted claims on the merits); *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

Claims 2 and 3

In Claim 2, Petitioner alleges that his death sentences were unconstitutionally imposed because at the time of sentencing Arizona law required a defendant to establish a causal connection between the proffered mitigating evidence and the crime. (Dkt. 27 at 39.) In Claim 3, Petitioner alleges that the trial court violated his constitutional rights by failing to consider his mitigating evidence. (*Id.* at 44.)

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[4] In a prior order denying Petitioner's Motion for Discovery and Evidentiary Hearing and his First Motion to Expand the Record, the Court dismissed Claims 5-C, 5-D, 6, and 22 as procedurally barred and Claims 1 and 21 as meritless. (Dkt. 54.)

Respondents concede that Claim 3 is exhausted. They contend that Claim 2 is exhausted only to the extent it was raised on direct appeal, where Petitioner argued that the trial court erred in failing to find a connection between the crimes and mitigating evidence with respect to Petitioner's mental health and dysfunctional family background. (Dkt. 31, Ex. B at 29, 31.) However, since that is the substance of the allegations in Claim 2, the Court finds the claim exhausted and will consider it on the merits.

Background

1. Trial court

In his sentencing memorandum, defense counsel proffered three statutory and 24 nonstatutory mitigating factors, including circumstances related to Petitioner's mental health, substance abuse, and abusive childhood. (ROA doc. 118.)[5] Attached to the memorandum were articles addressing prenatal exposure to drugs and alcohol. (*Id.*) Counsel also

[5] "ROA doc." refers to the two-volume Record on Appeal containing consecutively-numbered pleadings prepared by the Clerk of the Mohave County Superior Court for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-98-0510-AP). "PCR-ROA" refers to the four-volume Post-Conviction Record on Appeal prepared by the Clerk of the Mohave County Superior Court for the petition for review to the Arizona Supreme Court from the denial of the PCR petition (Case No. CR-03-0084-PC). "M.E." refers to a one-volume set of Minute Entries prepared by the Clerk of the Mohave County Superior Court for the direct appeal to the Arizona Supreme Court. "RT" refers to the reporter's trial transcript. The original trial transcripts and certified copies of the state court records were provided to this Court by the Arizona Supreme Court. (*See* Dkt. 36.)

submitted a psychological evaluation prepared by Dr. Celia Drake. (Dkt. 32, Ex. T.) Dr. Drake noted factors in Petitioner's life that predisposed him to substance abuse, delinquency, and crime. (*Id.*) These included a chaotic home environment with no consistent father figure, childhood neglect, physical abuse, sexual assault, and a possible genetic link through his biological father. (*Id.* at 21-22.) Dr. Drake diagnosed Petitioner with adjustment disorder with depressed mood, mild intensity; antisocial personality disorder; alcohol abuse; and polysubstance dependence. (*Id.* at 20.)

At the presentence hearing, the defense called three witnesses: Petitioner's mother, his aunt, and Blair Abbott, a mitigation investigator. (RT 11/20/98.) Their testimony indicated that Petitioner never knew his biological father. (*Id.* at 31-32, 129.) Petitioner was raised by his mother and a series of stepfathers, some of whom drank and used drugs and were physically abusive and one of whom, Petitioner's favorite, committed suicide when Petitioner was 10 or 11. (*Id.* at 35-47, 50.) Petitioner's mother drank and used drugs during the first three months of her pregnancy. (*Id.* at 27-29, 132.) Shortly after his stepfather's suicide, Petitioner was sexually abused by an acquaintance. (*Id.* at 138.) Thereafter, Petitioner's behavior deteriorated; he began abusing alcohol and drugs, skipping school, and getting into trouble with the law. (*Id.* at 54, 60, 105,142-43.) The testimony also indicated that Petitioner was developmentally delayed and suffered head injuries and fainting spells. (*Id.* at 51, 119,143-45.) Abbott testified that Petitioner told him he had used PCP two days prior to the murders and that he experienced a flashback while he was killing Delahunt.

(*Id.* at 149-50.) He also reported using alcohol the night before the murders and marijuana that morning. (*Id.*)

In sentencing Petitioner, the trial court found that the State proved three aggravating factors beyond a reasonable doubt: that each of the murders was committed in expectation of pecuniary gain, pursuant to A.R.S. § 13-703(F)(5); that the murders of Delahunt and Wear were especially cruel under § 13-703(F)(6); and that Petitioner was convicted of multiple homicides committed during the same offense under § 13-703(F)(8). The court found that Petitioner failed to prove any statutory mitigating factors and proved only one nonstatutory mitigating circumstance, his cooperation with the police.

With respect to A.R.S. § 13-703(G)(1), which establishes a mitigating factor based on impairment of a defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, the trial court made the following findings:

> There has certainly been evidence that the defendant has gone through a turbulent life, perhaps had mental-health issues that would distinguish him from the typical person on the street.
>
> Listening to his description of how these murders were committed, based upon a description of somewhat a methodical carrying out of a plan, the Court sees absolutely nothing in the record, in this case, to suggest the applicability of this mitigating circumstance.

(RT 11/20/98 at 48-49.)

With respect to age as a mitigator under § 13-703(G)(5), the court described its application of the factor as "a little more problematic." (*Id.* at 50.) The court explained:

> The defendant was 19 at the time. I am certain that both sides can cite cases in support of their respective positions for people around this same age in which this was found a mitigating factor or people around the same age for which this was not found a mitigating factor.
>
> I think the one thing that cases make it clear is that age is not just a number that we look at. We don't plug the number into some computer. If it's below a certain amount, it's mitigation; if it's above a certain amount, it's not mitigation.
>
> The issue is not how young or old a person is but what connection there may be with their age and the behavior that they engaged in. The defendant was relatively young, chronologically speaking.
>
> As far as the criminal justice system goes, he was not so young. He had been part of that system for some period of time. He was no longer living at home. He had effectively been emancipated for a period of time. He was working on at least a sporadic basis, and there are certainly no questions in this case as to what the defendant's age was, but I do not find his age to have been a mitigating circumstance under the circumstances of this case.

(*Id.* at 50-51.)

The court then turned to nonstatutory mitigation, first explaining its approach to analyzing such information:

> what I have attempted to do . . . is to sort of engage in a two-part analysis . . . and that is to analyze whether the defense has shown this fact by a preponderance of the evidence, and then if they have, to determine whether I would assign that any weight as a mitigating factor, and of course, for any . . . that pass both of those tests, I have to weigh them all along with the other factors in the final determination of this case.

(*Id.* at 52.)

The court proceeded to discuss in detail the nonstatutory mitigating circumstances proffered by Petitioner, including his mental health, family background, remorse, and substance abuse issues. With respect to proffered mitigation concerning Petitioner's mental health and intelligence, the court found:

> Again, the defendant had some mental health and psychological issues. I think, depending on what you define a mental or personality disorder to be, . . . the defense has established that there were certain men – personality disorders that the defendant, in fact, may have been suffering from.
>
> The Court, however, does not find that they rise to the level of being a mitigating factor because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses.

So, the Court finds that the defense has failed to establish, by a preponderance of the evidence, that the personality disorders of the defendant were a nonstatutory mitigating factor.

. . . .

The defense has also argued, as a nonstatutory mitigating factor, the defendant's diminished mental capacity and his low I.Q., and this – this may, to some extent, be incorporated within one of the statutory factors, but there is nothing to prevent me from discussing a fine variation of that as a possible nonstatutory mitigating factor.

The Court would concede that there is certain evidence in this case that would support the proposition that the defendant's mental capacity may be diminished, at least compared to the norm in the population, and that his I.Q. may be low, at least compared to the norm in the population.

However, when you weigh that against the defendant's description of the murders, certain preparatory steps that were taken – admittedly, not overly-sophisticated, but attempts were made to do certain things, to disable warning systems to enable these murders to be committed and to get away with the loot that was the purpose of the murders; specifically, the vehicle.

The Court finds that even though there is evidence that the defendant may have a diminished mental capacity and a lower-than-

> average I.Q., that the defense has failed to establish, by a preponderance of the evidence, the nonstatutory factor of the defendant's diminished capacity and low I.Q.

(*Id.* at 52-53, 56-57.)

The court then considered aspects of Petitioner's childhood and family background as mitigating evidence:

> I was certainly struck, at the presentencing hearing, by the fact that Mr. Poyson had a childhood that I certainly would not have wanted to have been a part of and would not have wanted my children to be a part of or anyone that I know.
>
> I can think of people that I know who have been abused as children, who have had parents die when they were young, who have been exposed to separation and anxiety that would certainly be comparable to that that was suffered by Mr. Poyson, and I can think of people who have gone through things remarkably similar to Mr. Poyson and have become productive upstanding members of the community, and I am finding that [the] defense has shown that defendant suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse.
>
> The Court finds absolutely nothing in this case to suggest that his latter conduct was a result of his childhood.

The Court finds that the defense has failed to establish, by a preponderance of the evidence, the nonstatutory mitigating factors of his dysfunctional family and child background, the physical and sexual abuse in his childhood or the mental abuse in his childhood.

. . . .

As far as childhood neglect is concerned, that would be the same as the finding I made earlier concerning certain levels [sic] of his childhood. The defense has shown, by a preponderance of the evidence, that the defendant was subjected to neglect in his childhood, but have failed to show, by a preponderance of the evidence, that that would be a mitigating factor.

. . . .

Family tragedy. It is certainly easy, I'm sure for someone who has not had a parent die young, or a substitute parent die young or someone who has not been sexually abused as a child, to make light of this, and I have absolutely no intention of doing that. I have been reading presentence reports for 20 years now and I'm absolutely convinced that people who are sexually abused as children are far more likely to offend as adults.

There may have been minimal testimony that was presented which supported a finding of this, but the Court is convinced that the defense has established, by a preponderance of the evidence, that the defendant lost a parent figure and was subjected to sexual abuse at a relatively young

> age. The Court is not convinced that there is any connection between that abuse, that loss, and his subsequent criminal behavior.
>
> So, the Court does find that the defenses [sic] established, by a preponderance of the evidence, that the defendant was subject to family tragedy and family loss, but they have not established by a preponderance of the evidence that that would be a mitigating factor in this case.

(*Id.* at 54-55, 63, 66-67.)

The court also assessed the evidence concerning Petitioner's history of substance abuse and his use of drugs and alcohol at the time of the crimes:

> The argument is made that the defendant was subjected to alcohol abuse and drug abuse. Other than very vague allegations that he has used alcohol in the past or has used drugs in the past, other than a fairly vague assertion that he was subject to some sort of effect of drugs and/or alcohol at the time that these offenses were committed, I really find very little to support the allegation that the defendant has a significant alcohol and/or drug abuse [sic], and again, going back to the methodical steps that were taken to murder three people to get a vehicle to get out of Golden Valley, it's very difficult for me to conclude that the defendant's ability to engage in goal-oriented behavior was, in any way, impaired at the time of the commission of these offenses.
>
> The Court finds that the defense has failed to establish, by a preponderance of the evidence,

> the nonstatutory mitigating factors of the defendant's alcohol abuse and/or drug abuse.

(*Id.* at 68-69.)

The court also considered Petitioner's remorse as a potential mitigator, concluding that Petitioner had established that he was remorseful about the murders but that it was not a nonstatutory mitigating factor because he had time "to reflect upon what he was doing, since killing three people did take some period of time, and considering the fact that his remorse could have kicked in at some point and maybe prevented one or two of these murders from taking place – keeping in mind the fact that even though he may have discussed turning himself in; he, in fact, did not turn himself in." (*Id.* at 53.)

Although noting that Petitioner had eventually cooperated with law enforcement and was well behaved during the trial, the court rejected as a mitigating circumstance Petitioner's potential to be rehabilitated. (*Id.* at 57.) The court also found that Petitioner failed to show family support as a mitigating factor. (*Id.* at 67-68.)

2. Arizona Supreme Court

On direct appeal, the Arizona Supreme Court first reviewed the statutory mitigating factors, agreeing with the trial court that Petitioner had failed to prove that drugs "significantly impaired his ability to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law" under A.R.S. § 13-703(G)(1). *Poyson*, 198 Ariz. at 79-80, 7 P.3d at 88-89. The court explained:

We cannot say that the defendant's drug use rendered him unable to conform his conduct to the requirements of the law. First of all, there is scant evidence that he was actually intoxicated on the day of the murders. Although Poyson purportedly used both marijuana and PCP "on an as available basis" in days preceding these crimes, the only substance he apparently used on the date in question was marijuana. However, the defendant reported smoking the marijuana at least six hours before killing Delahunt and eleven hours before the murders of Kagen and Wear. Thus, even if he was still "high" at the time of these crimes, it is unlikely that he was so intoxicated as to be unable to conform his conduct to the requirements of the law. In order to constitute (G)(1) mitigation, the defendant must prove substantial impairment from drugs or alcohol, not merely that he was "'buzzed.'" *State v. Schackart,* 190 Ariz. 238, 251, 947 P.2d 315, 328 (1997).

Defendant also claims to have had a PCP "flashback" during the murder of Delahunt. The trial court did not find the evidence credible on this point. We agree. Other than the defendant's self-reporting, nothing in the record supports this claim, nor is there evidence that any such "flashback" had an effect on his ability to control himself. Even taking the evidence at face value, the episode appears to have lasted only a few moments during Delahunt's murder. The defendant was apparently not under the influence of PCP at any other time. Thus, the flashback could not have affected his decision to

begin the attack or to continue it once the flashback subsided; nor could it have played a role in his decision to kill Kagen and Wear later that night. We are therefore not convinced that Poyson's ability to control his conduct was significantly affected by PCP use.

Other evidence in the record belies the defendant's claim of impairment. For instance, he was able to concoct a ruse to obtain bullets from the neighbor. He also had the foresight to test the rifle, making sure it would work properly when needed, and to cut the telephone line to prevent Kagen and Wear from calling for help. These actions, coupled with the deliberateness with which the murders were carried out, lead us to conclude that the defendant was not suffering from any substantial impairment on the day in question. *See State v. Tittle,* 147 Ariz. 339, 343-44, 710 P.2d 449, 453-54 (1985) (detailed plan to commit murder was inconsistent with claim of impairment).

Poyson's attempts to conceal his crimes also indicate that he was able to appreciate the wrongfulness of his actions. For example, he had Kimberly Lane sneak him into the main trailer after murdering Delahunt so that he could wash the blood from his hands. He also covered Wear's body with debris in order to delay its discovery by police after he and the others had fled. These actions show that he "understood the wrongfulness of his acts and attempted to avoid prosecution." *State v. Jones,* 185 Ariz. 471, 489,

> 917 P.2d 200, 218 (1996) ((G)(1) not satisfied where defendant took significant steps to conceal his crimes and evade capture); *see also State v. Sharp,* 193 Ariz. 414, 424, 973 P.2d 1171, 1181, *cert. denied,* 528 U.S. 936, 120 S.Ct. 341, 145 L.Ed.2d 266 (1999) ((G)(1) not proven where defendant attempted to hide evidence that might link him to the crime). We also note that the defendant was able to recall in remarkable detail how he committed these murders. We have found this to be a significant fact in rejecting a perpetrator's claim that he could not appreciate the wrongfulness of his actions. *See, e.g., State v. Gallegos,* 185 Ariz. 340, 345, 916 P.2d 1056, 1061 (1996); *Rossi,* 154 Ariz. at 251, 741 P.2d at 1229; *State v. Wallace,* 151 Ariz. 362, 369, 728 P.2d 232, 239 (1986). We hold, therefore, that the defendant failed to prove the (G)(1) mitigating circumstance.

Id.

The court next considered Petitioner's youth as a statutory mitigating factor, disagreeing with the trial court that Petitioner's age of 19 did not satisfy A.R.S. § 13-703(G)(5) but finding that the factor was entitled to little weight:

> Although Poyson was only nineteen at the time of the murders, the trial court ruled that his age was not a statutory mitigating factor under A.R.S. § 13-703(G)(5). The judge acknowledged that he was "relatively young, chronologically speaking," but said that he was not so young, "[a]s far as the criminal justice system goes." The court cited the fact that the

defendant had lived on his own for some time before the crimes and had been working. Defendant argues that because of his age and immaturity, he was easily influenced by others, including his co-defendants in this case.

"The age of the defendant at the time of the murder can be a substantial and relevant mitigating circumstance." *State v. Laird,* 186 Ariz. 203, 209, 920 P.2d 769, 775 (1996). We have found the (G)(5) factor to exist in cases where defendants were as old as nineteen and twenty. Chronological age, however, is not the end of the inquiry. To determine how much weight to assign the defendant's age, we must also consider his level of intelligence, maturity, past experience, and level of participation in the killings. If a defendant has a substantial criminal history or was a major participant in the commission of the murder, the weight his or her age will be given may be discounted.

At his sentencing hearing, Poyson presented evidence that he was of "low average" intelligence. We agree with the trial court that this fact was shown by a preponderance of the evidence. Defendant also presented some evidence that he was immature and easily led by others. One of his cousins, for example, believed that because he lacked a consistent father figure growing up, he was prone to be influenced by older men like Frank Anderson. Arguably, these facts weigh in favor of assigning some mitigating weight to the defendant's age. However, he was no stranger to the criminal justice system. As a

> juvenile, he had committed several serious offenses, including burglary and assault, for which he served time in a detention facility. Moreover, it is clear that he was a major participant in these murders at both the planning and execution stages.
>
> We conclude that Poyson's age is a mitigating circumstance. However, in light of his criminal history and his extensive participation in these crimes, we accord this factor little weight. *See Jackson,* 186 Ariz. at 31-32, 918 P.2d at 1049-50 (discounting defendant's age based on his high level of participation in the murder); *Gallegos,* 185 Ariz. at 346, 916 P.2d at 1062 (same); *Bolton,* 182 Ariz. at 314, 896 P.2d at 854 (same).

Id. at 80-81, 7 P.3d at 89-90 (citations omitted).

Finally, the Arizona Supreme Court independently reviewed and reweighed the aggravating and mitigating circumstances to determine the propriety of the death sentence. *Poyson*, 198 Ariz. at 81-82, 7 P.3d at 90-91. Like the trial court, the state supreme court engaged in an extensive evaluation of the proffered nonstatutory mitigating circumstances. The court considered the evidence as follows:

> **Drug Use**
>
> The trial judge refused to accord any weight to the defendant's substance abuse as a nonstatutory mitigating circumstance. It characterized the defendant's claims that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders

as little more than "vague allegations." As discussed above, we agree.

Mental Health

The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning within the family setting" to which the defendant could look for guidance. However, we find no indication in the record that "the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required." *State v. Brewer,* 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *see also Medina,* 193 Ariz. at 517, 975 P.2d at 107 (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). We therefore accord this factor no mitigating weight.

Abusive Childhood

The trial court found that the defendant failed to prove a dysfunctional family background or that he suffered physical or sexual abuse as a child. Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He

also self-reported one instance of sexual assault by a neighbor. Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value.

Remorse

The trial court found that the defendant was remorseful about the commission of the offenses but gave that circumstance no weight. The court thought that if he were truly remorseful, he would have prevented one or two of the killings or would have turned himself in. Defendant presented some evidence of remorse. Sgt. Stegall testified that during questioning Poyson expressed remorse, particularly about the murder of Delahunt. In his statement to Detective Cooper, the defendant said that he felt "bad" about all of the murders. We find this evidence unpersuasive and, like the trial judge, accord it no real significance.

Potential for Rehabilitation

The trial court ruled that the defendant failed to prove that he could be rehabilitated. The judge said that "[i]f there is anything that has been presented to even suggest that, I must have missed it." Dr. Drake's report suggests that the defendant is rehabilitatable, based on his past history of success in other institutional settings. She said that "[t]here are some indications that he . . . was responsive to the structure provided in various placements. In discharge summaries from all three institutions in which he was placed there was documented

progress." We find that this evidence has some mitigating value. *See State v. Murray,* 184 Ariz. 9, 40, 906 P.2d 542, 573 (1995) (potential for rehabilitation can be a mitigating circumstance).

Family Support

The trial court found that the defendant failed to establish any meaningful family support. At the mitigation hearing, the defendant's mother and aunt testified. Other relatives cooperated with Mr. Abbott, the defense mitigation specialist, during his investigation, and several family members wrote letters asking the court to spare Poyson's life. We accord this factor minimal mitigating weight. *See State v. Gonzales,* 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995) (family support can be given de minimis weight in mitigation).

After our independent review, we conclude that even crediting defendant's cooperation with law enforcement, age, potential for rehabilitation, and family support, the mitigating evidence in this case is not sufficiently substantial to call for leniency.

Id.

Analysis

Once a determination is made that a person is eligible for the death penalty, the sentencer must then consider relevant mitigating evidence, allowing for "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The Supreme Court has explained that

"evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background [or to emotional and mental problems] may be less culpable than defendants who have no such excuse." *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)). Therefore, the sentencer in a capital case is required to consider any mitigating information offered by a defendant, including non-statutory mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (right to individualized sentencing in capital cases violated by Ohio statute that permitted consideration of only three mitigating factors); *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (*Lockett* violated where state courts refused as a matter of law to consider mitigating evidence that did not excuse the crime). In *Lockett* and *Eddings*, the Court held that under the Eighth and Fourteenth Amendments the sentencer must be allowed to consider, and may not refuse to consider, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604.

However, while the sentencer must not be foreclosed from considering relevant mitigation, "it is free to assess how much weight to assign such evidence." *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998); *see also State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (mitigating evidence must be considered regardless of whether there is a "nexus" between the mitigating factor and the crime, but the lack of a causal connection may be considered in assessing the weight

of the evidence). As the *Eddings* court explained: "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." 455 U.S. at 114-15.

In its analysis of Claims 2 and 3, the Court takes several principles into account. First, the Supreme Court has held that if a death penalty scheme provides a rational criterion for eligibility and no limitation on the consideration of relevant circumstances that could mitigate against a death sentence, then "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Romano v. Oklahoma*, 512 U.S. 1, 7 (2004) (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)). The Court has emphasized that there is no required formula for weighing mitigating evidence, and the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Zant v. Stephens*, 462 U.S. 862, 875 (1983); *see Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."); *Harris v. Alabama*, 513 U.S. 504, 512 (1995) (Constitution does not require that a specific weight be given to any particular mitigating factor); *Tuilaepa*, 512 U.S. at 979-80.

Conversely, while the sentencer in a capital case may be afforded unbridled discretion in considering the appropriate sentence, "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion)); *see Johnson v. Texas*, 509 U.S. 350, 362 (1993). The Supreme Court has explained that "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *Johnson*, 509 U.S. at 361-62 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment)). Thus, "[a]lthough *Lockett* and *Eddings* prevent a State from placing relevant mitigating evidence 'beyond the effective reach of the sentencer,' *Graham v. Collins*, [506 U.S. 461, 475 (1993)], those cases and others in that decisional line do not bar a State from guiding the sentencer's consideration of mitigating evidence." *Johnson*, 509 U.S. at 362.

Finally, on habeas review, a federal court does not evaluate the substance of each piece of evidence submitted as mitigation. Instead, it reviews the record to ensure the state court allowed and considered all relevant mitigating information. *See Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (when it is evident that all mitigating evidence was considered,

the trial court is not required to discuss each piece of evidence); *see also Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1227 (2008) (rejecting claim that the sentencing court failed to consider proffered mitigation where the court did not prevent the defendant from presenting any evidence in mitigation, did not affirmatively indicate there was any evidence it would not consider, and expressly stated it had considered all mitigation evidence proffered by the defendant). As the Ninth Circuit explained in *LaGrand v. Stewart*, 133 F.3d 1253, 1263 (9th Cir. 1998), rejecting the petitioner's argument that the state courts failed to consider the mitigation evidence "fully":

> federal courts do not review the imposition of the sentence *de novo*. Here, as in the state courts' finding of the existence of an aggravating factor, we must use the rational fact-finder test of *Lewis v. Jeffers*. That is, considering the aggravating and mitigating circumstances, could a rational fact-finder have imposed the death penalty?

The court reiterated that such a determination takes into account the strength of the aggravating factors, which, in the LaGrand case, included pecuniary gain and a murder committed in an especially cruel, heinous, or depraved manner. *Id.*

Applying these principles, it is apparent in Petitioner's case that the trial court and the Arizona Supreme Court fulfilled their constitutional obligation by allowing and considering all of the mitigating evidence.

In Claim 2, Petitioner relies on *Tennard v. Dretke*, 542 U.S. 274, 289 (2004), for the proposition that the death penalty was unconstitutionally imposed in his case because Arizona law required capital defendants to show a causal connection or nexus between the proffered mitigation evidence and the crimes. (Dkt. 27 at 39-44.) In Claim 3, Petitioner alleges that the trial court did not give adequate weight to several mitigating circumstances proffered at sentencing, including his impaired capacity, remorse, and alcohol and drug use. (Dkt. 27 at 44-48.) The following analysis, while focusing on the causal connection issue, necessarily addresses the arguments raised in both claims.

With respect to Claim 2, the Court disagrees that the holding in *Tennard* entitles Petitioner to habeas relief. In *Tennard*, the Supreme Court revisited Texas's capital sentencing procedure, which it had addressed in several previous cases, including *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). The sentencing procedure at issue required the jury to answer three special questions: first, whether the conduct of the defendant was deliberate and committed with the reasonable expectation that death would result; second, whether there is a reasonable probability that the defendant would commit further acts of violence that would constitute a continuing threat to society; and third, if raised by the evidence, whether the defendant's conduct was unreasonable in response to any provocation by the deceased. *Penry I*, 492 U.S. at 310. If the jury answered each question affirmatively, the court must sentence the defendant to death. *Id.*

In *Penry I*, the Supreme Court held that this special issues scheme violated the Eighth Amendment by failing to allow jurors to give full effect to evidence of the defendant's mental retardation and childhood abuse. *Id.* at 319-28. The Court explained that in the context of the special issues, Penry's mental retardation had relevance beyond the issue of the deliberateness of the crime and, with respect to future dangerousness, would be viewed as aggravating rather than mitigating evidence, in that it suggested Penry would be unable to learn from his mistakes. *Id.* at 322-23. In *Penry II*, the Court held that the defects in Texas's sentencing scheme were not cured by a supplemental instruction directing the jury to consider and weigh mitigating circumstances and stating that jurors could answer no to a special issue if they believed that a life sentence was appropriate. 532 U.S. at 789-90. The Court found that the instruction failed to address the fact that "none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse." *Id.* at 798. Also, because such evidence did not fit within the scope of the special issues, "answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction." *Id.* at 799-800.[6]

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[6] In *Brewer v. Quarterman*, 550 U.S. 286 (2007), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), the Supreme Court again found that the Texas special issues framework, without an additional instruction on mitigating evidence, did not allow juries to give effect to evidence of mental illness, an abusive childhood, and substance abuse.

In *Tennard*, the Court held that the habeas petitioner was entitled to a certificate of appealability on his claim that Texas's capital sentencing scheme failed to provide a constitutionally adequate opportunity to present his low IQ as a mitigating factor. 542 U.S. 289. Tennard was sentenced to death after the jury provided affirmative answers to the deliberateness and future dangerousness special issues. The district court denied Tennard's federal habeas petition in which he claimed that his death sentence violated the Eighth Amendment as interpreted in *Penry*, and denied a certificate of appealability (COA). The Fifth Circuit agreed that Tennard was not entitled to a COA. *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002). This decision was based on the circuit court's application of a threshold test for the constitutional relevance of mitigating evidence, according to which relevant mitigating evidence is evidence of a "uniquely severe permanent handicap" that bore a "nexus" to the crime. *Id.* at 595. The court concluded that low IQ evidence alone does not constitute a uniquely severe condition and that no evidence tied Tennard's IQ to retardation. *Id.* at 596. The court also determined that even if Tennard's low IQ amounted to mental retardation evidence, he failed to show that his crime was attributable to his mental capacity. *Id.* at 597-97.

The Supreme Court reversed, holding that Tennard was entitled to a COA with respect to the district court's denial of his *Penry* claim. *Tennard*, 542 U.S. at 289. In doing so, the Court rejected the Fifth Circuit's "screening test," explaining that "impaired intellectual functioning is inherently mitigating," *id.* at 287 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)),

and that the relevance of "low IQ evidence" does not depend on a "nexus" between the evidence and the crime, *id.* The Court stated that "we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence – and thus that the *Penry* question need not even be asked – unless the defendant also establishes a nexus to the crime." *Id.* In *Smith v. Texas*, 543 U.S. 37, 44-45 (2004) (per curiam), the Court again rejected the causal nexus screening test, this time as it was applied by the state appellate court in finding evidence of Smith's low IQ and troubled childhood irrelevant for mitigation purposes.

In *Tennard* the Supreme Court condemned the circuit's ruling because it barred review of whether the Texas special issues framework could give full effect to relevant mitigating evidence proffered by Tennard. The holding in *Tennard* does not entitle Petitioner to relief because Arizona law did not impose any such barrier to consideration of Petitioner's mitigating evidence.

As an initial matter, Arizona's death penalty statute, unlike the special issues framework in Texas, explicitly provides for the type of review mandated by *Lockett* and *Eddings*:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following [enumerated statutory mitigating factors].

A.R.S. § 13-703(G)(1) (West 1996) (transferred and renumbered as A.R.S. § 13-751 in 2009).[7] Arizona's sentencing statute thus establishes a framework for the consideration of mitigating evidence far less restrictive than that provided by the special issues system that was the subject of *Tennard*, *Penry*, and *Johnson*.

Because the statute mandates the consideration of any relevant mitigating evidence, the only question is whether the Arizona courts' application of a causal connection to certain types of mitigating evidence violates *Lockett* and *Eddings*.[8] The Court concludes that it does not. Instead, Arizona's causal nexus test is

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[7] Prior to *Lockett*, Arizona's death penalty statute, A.R.S. § 13-454, enumerated certain mitigating factors but did not contain a catch-all provision. In *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), the Arizona Supreme Court held that § 13-454, with its restriction on the consideration of mitigating factors outside those specified in the statute, did not satisfy *Lockett*. Shortly after *Watson*, the Arizona legislature amended the mitigation portion of the death penalty statute to conform with *Lockett* by requiring the sentencer in a capital case to consider any relevant mitigating information. A.R.S. § 13-703(G).

[8] Contrary to Petitioner's argument (Dkt. 27 at 43), Arizona's causal nexus test does not prevent the consideration of mitigating evidence, such as evidence of a defendant's good character, that is unrelated to the crime. *See, e.g.*, *State v. Greene*, 192 Ariz. 431, 443, 967 P.2d 106, 118 (1998) ("past good conduct and character is a relevant mitigating circumstance"). In addition, where a causal connection has been shown between mitigating evidence of mental illness, a low IQ, or a dysfunctional family background, Arizona courts give the evidence "substantial weight." *State v. Roque*, 213 Ariz. 193, 231, 141 P.2d 368, 406 (2006); *see State v. Trostle*, 191 Ariz. 4, 21, 951 P.2d 869, 886 (1997); *State v. Stuard*, 176 Ariz. 589, 609, 863 P.2d 881, 901 (1993).

a permissible means of guiding a sentencer's discretion in considering and weighing mitigating evidence.

The Court finds support for this conclusion in cases such as *Johnson v. Texas* and *Saffle v. Parks*, 494 U.S. 484 (1990), which stand for the proposition that states may "structure and shape consideration of mitigating evidence." *Johnson*, 509 U.S. at 362 (interior quotations omitted). In *Johnson*, the petitioner argued that the Texas special issues framework prevented the jury from giving effect to his youth as a mitigating circumstance. 509 U.S. at 366. The Court disagreed, holding that the jury, which had been instructed to consider all mitigating evidence, could give effect to evidence of Johnson's age in the context of the future dangerousness special issue. *Id.* at 367-70. The Court further explained that "accepting petitioner's arguments would entail an alteration of the rule of *Lockett* and *Eddings.* Instead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Id.* at 372.

In *Saffle v. Parks*, the Supreme Court held that an instruction directing the jury to avoid any influence of sympathy when imposing sentence did not violate *Lockett* and *Eddings* by barring relevant mitigating evidence from being presented and considered during the penalty phase of a capital proceeding. The Court rejected Parks's argument that "jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether," stating that the "argument

misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration. It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that 'the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence.'" *Id.* at 492-93 (citation omitted) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)). The Court explained: "The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice." *Id.* at 493. The Court further observed that "there is no contention that the State altogether prevented Parks' jury from considering, weighing, and giving effect to all of the mitigating evidence that Parks put before them; rather, Parks's contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered. As we have concluded above, the former contention would come under the rule of *Lockett* and *Eddings*; the latter does not." *Id.* at 491; *see Eddings*, 455 at 113 (distinguishing between "evaluat[ing] the evidence in mitigation and finding it wanting as a matter of fact" and refusing as a "matter of law . . . even to consider the evidence"); *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir. 2006) ("We have recognized a distinction between a failure to consider relevant mitigating evidence and a conclusion that such evidence was not mitigating.").

Petitioner's contention is that the Arizona courts, by way of the causal nexus test applied to certain types of mitigating evidence, impermissibly limited the manner

in which his mitigating evidence was considered. However, because the state courts did not altogether prevent the sentencer from considering and weighing Petitioner's mitigating evidence, *Lockett* and *Eddings* were not violated.

The state courts did not give the proffered mitigating evidence "no weight *by excluding such evidence from their consideration*." *Eddings*, 455 U.S. at 114-15 (emphasis added). Petitioner's "mitigating evidence was not placed beyond the [sentencer's] effective reach," nor was the "sentencer . . . precluded from even considering certain types of mitigating evidence." *Johnson*, 509 U.S. at 366. The state courts did not violate *Lockett* and *Eddings* by excluding any of Petitioner's proffered mitigating evidence. *See Skipper v. South Carolina*, 476 U.S. 1, 8-9 (1986) (*Lockett* and *Eddings* violated when trial court excluded as irrelevant testimony from jailer regarding defendant's positive adjustment to incarceration); *Davis v. Coyle*, 475 F.3d 761, 771-73 (6th Cir. 2007) (*Lockett* and *Eddings* violated when resentencing court disallowed relevant evidence of good behavior in prison); *Jones v. Polk*, 401 F.3d 257, 262-64 (4th Cir. 2005) (violation where court excluded testimony that defendant had expressed remorse). To the contrary, as illustrated above, the sentencing court and the Arizona Supreme Court were afforded "full access" to the proffered mitigation information, *Marsh*, 548 U.S. at 174, which they carefully analyzed and weighed.

The trial court and the state supreme court thoroughly discussed the mitigating circumstances advanced by Petitioner at sentencing, including his family background, mental health, and substance

abuse. The fact that the courts accorded these factors little or no weight does not amount to a constitutional violation under *Lockett* and *Eddings*. *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998); *Ceja v. Stewart*, 97 F.3d 1246, 1251 (9th Cir. 1996); *Atkins v. Singletary*, 965 F.2d 952, 962 (11th Cir. 1992) ("Although Atkins argues that the trial judge did not *consider* nonstatutory factors, it is more correct to say that the trial judge did not *accept* – that is, give much weight to – Atkins' nonstatutory factors. Acceptance of nonstatutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer *consider* the factors."); *State v. Mata*, 185 Ariz. 319, 331 n.6, 916 P.2d 1035, 1047 (1996) ("Defendant seems to believe that a trial court only 'considers' mitigating evidence if it imposes a mitigated sentence. The law is to the contrary. So long as the trial court considers the evidence, the judge is not bound to conclude that the evidence calls for leniency."). The Court is simply unaware of any support for the proposition that mitigating evidence, once admitted and under consideration, is entitled to any specific weight. *See, e.g.*, *Allen v. Buss*, 558 F.3d 657, 667 (7th Cir. 2009) ("The rule of *Eddings* is that a sentencing court may not exclude relevant mitigating evidence. But of course, a court may choose to give mitigating evidence little or no weight.") (internal citations omitted); *United States v. Johnson*, 495 F.3d 951, 966 (8th Cir. 2007) (jurors in capital sentencing are "obliged to consider relevant mitigating evidence, but are permitted to accord that evidence whatever weight they choose, including no weight at all"); *Schwab v. Crosby*, 451 F.3d 1308, 1329-30 (11th Cir. 2006) ("The Constitution requires that the sentencer be allowed to consider and give effect to evidence offered in

mitigation, but it does not dictate the effect that must be given once the evidence is considered; it does not require the sentencer to conclude that a particular fact is mitigating or to give it any particular weight.").

The Court is likewise unaware of any precedent holding that it is inappropriate for a sentencer, when weighing mitigating evidence concerning a defendant's background, substance abuse, or mental health, to consider the extent to which the evidence offers an explanation of the criminal conduct. *See Allen v. Woodford*, 395 F.3d 979, 1005-10 (9th Cir. 2005) (noting that mitigating evidence may serve both a "humanizing" and an "explanatory" or "exculpatory" purpose, with greater weight generally being ascribed to the latter category).

The Ninth Circuit has addressed the *Tennard* issue in two recent cases: *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 379 (2009); and *Schad v. Ryan*, --- F.3d ----, No. 07-99005, 2010 WL 92758 (9th Cir. Jan. 12, 2010). In *Styers*, the Arizona Supreme Court struck one of the aggravating factors found by the sentencing court, then reweighed the remaining aggravating factors against the mitigating circumstances. *State v. Styers*, 177 Ariz. 104, 117, 865 P.2d 765, 777 (1993). In affirming the death sentence, the court stated that evidence Styers suffered from post-traumatic stress disorder did not "constitute mitigation" because Styers could not connect his condition to his behavior at the time of the crimes. *Id.* The Ninth Circuit held that the Arizona Supreme Court "appears" to have imposed an improper nexus test, which resulted in a failure to consider the mitigating evidence in violation of *Smith* and *Eddings*.

Styers, 547 F.3d at 1035-36. In *Schad*, by contrast, the Ninth Circuit found no such violation because the state courts did not "refuse[] to consider any evidence Schad offered"; the courts did not "exclude[] mitigation evidence" and "the record shows that the sentencing court did consider and weigh the value" of the mitigating evidence. *Schad*, --- F.3d ----, 2010 WL 92758, at *17. The Court of Appeals noted that the trial court weighed evidence concerning Schad's childhood but found it was not "a persuasive mitigating circumstance" and the Arizona Supreme Court "conducted an independent review of the entire record regarding the aggravating and mitigating factors." *Id.* In Petitioner's case, like *Schad*, the record shows that the trial court did not exclude or refuse to consider any mitigating evidence, and the Arizona Supreme Court independently reweighed the aggravating and mitigating circumstances. *Poyson*, 198 Ariz. at 81-82, 7 P.3d at 90-91. In carrying out its independent review, the supreme court considered and evaluated all the proffered mitigating circumstances, including Petitioner's mental health issues and troubled childhood, but determined that in the absence of a causal relationship to the murders they had little or no mitigating "weight" or "value." The court did not state that the lack of a causal connection foreclosed consideration of the evidence or that such evidence could not "constitute" mitigation.

While *Tennard* and *Smith* invalidated the use of a causal connection test as a screening mechanism that excluded consideration of relevant mitigating evidence, they did not address the legitimacy of such a test as a means of guiding the sentencer's discretion or assessing the weight of mitigating evidence. This Court

concludes that Arizona's causal nexus test provides a rational standard by which to "structure and shape consideration of mitigating evidence." *Johnson*, 509 U.S. at 362. It is difficult to conceive that a violation of *Lockett* and *Eddings* occurs when a sentencing judge in Arizona, having admitted and considered all proffered mitigating evidence as required by statute, takes into account the relationship between the evidence and the crime when determining the appropriate sentence.[9]

Conclusion

Arizona law requires the sentencer in a capital case to consider all relevant mitigating evidence. In Petitioner's case, the trial court at sentencing and the

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[9] In cases such as Petitioner's, decided prior to *Ring v. Arizona*, 536 U.S. 584 (2002), the trial judge, rather than the jury, made the findings that a defendant was eligible for the death penalty and that death was the appropriate sentence. By rendering written findings detailing their consideration of aggravating and mitigating circumstances, Arizona judges made explicit their thought processes, including the manner in which they weighed information about a defendant's mental health, substance abuse, or family background. Of course, there is no such record of the deliberations of a sentencing jury. There is every likelihood that a capital sentencing jury, presented with, for example, evidence of a defendant's mental illness, would consider the effect, if any, of such a condition on the defendant's criminal conduct. This would not result in an Eighth Amendment violation, because once a proper eligibility determination is made, a jury's sentencing discretion may be "unbridled." *Zant v. Stephens*, 462 U.S. at 875. An Arizona sentencing judge undertakes the same weighing process, with the single difference that his or her deliberations are recorded. While this phenomenon has exposed judges' sentencing decisions to a unique level of scrutiny, particularly since the ruling in *Tennard*, there is nothing in the structure of Arizona's death penalty statute that limited the judges' consideration of mitigating evidence.

Arizona Supreme Court on direct review considered and weighed all of Petitioner's proffered mitigating evidence. The fact that the weighing process was guided in part by the application of a causal nexus test did not violate Petitioner's right to have all relevant mitigating evidence considered. Weighing the mitigating circumstances proffered by Petitioner against the three strong aggravating factors proven by the State, a rational factfinder could have sentenced Petitioner to death. Claims 2 and 3 are therefore denied.

Claim 4

Petitioner alleges that the trial court conducted an "inadequate voir dire" by failing to use a juror questionnaire and refusing to allow individualized questioning of prospective jurors. (Dkt. 27 at 48.) Respondents contend that the claim is unexhausted and procedurally barred because it was not presented to the state courts in a procedurally appropriate manner.

Petitioner did not raise this claim on direct appeal. (Dkt. 31, Ex. B.) In his PCR petition, Petitioner did not raise an independent claim of inadequate voir dire but alleged that appellate counsel performed ineffectively by failing to challenge the trial court's voir dire procedures. (*Id.*, Ex. J at 18-22.) Petitioner's petition for review included the appellate ineffective assistance claims only in an appendix. (Dkt. 32, Ex. O.) In reply to Respondents' challenge to the procedural status of the claim, Petitioner cites ineffective assistance of appellate counsel as cause for any default.

The Court considers Petitioner's claim of ineffective assistance of appellate counsel in Claim 7(A) below and finds it without merit because the underlying challenges to the trial court's voir dire procedures would not have entitled him to relief. For the reasons set forth in its analysis of Claim 7(A), the Court will consider and deny Claim 4 on the merits regardless of its procedural status. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of unexhausted claims on the merits); *Rhines*, 544 U.S. at 277.

Claim 5

Petitioner alleges that he received ineffective assistance of counsel during the guilt phase of his trial. (Dkt. 27 at 51.) He contends that trial counsel failed to (A) examine crucial physical evidence in a timely fashion, (B) retain experts to assist in developing appropriate defenses, and (E) move for a mistrial based on a venire member's prejudicial statement.

Claims of ineffective assistance of counsel are governed by the principles 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. *Id.* 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, a defendant must overcome "the presumption

that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Id.* at 687-88.

With respect to *Strickland*'s second prong, a petitioner must affirmatively prove prejudice by "show[ing] 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." *Strickland*, 466 U.S. at 694.

Because an ineffective assistance of counsel 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." *Id.* 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").

Under the AEDPA, this Court's review of the state court's decision is subject to another level of deference. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002); *see Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (noting that a "doubly deferential" standard applies to *Strickland* claims under the AEDPA). Therefore, to prevail on this claim, Petitioner must make the additional showing that the state court, in ruling that counsel was not

ineffective, applied *Strickland* in an objectively unreasonable manner. 28 U.S.C. § 2254(d)(1).

Physical evidence

Petitioner alleges that trial counsel performed ineffectively by failing, in a timely manner, to examine a bloody palm print, interview the State's fingerprint expert, and hire a defense expert to challenge the evidence. (Dkt. 27 at 54-56.)

On February 4, 1998, the trial court ordered the prosecution and defense to disclose, no later than two weeks before the trial date of March 2, 1998, the names and addresses of witnesses and any statements or reports prepared by such witnesses. (RT 2/4/98 at 26.) On February 25, defense counsel interviewed Glenda Hardy, a fingerprint examiner for the Arizona Department of Public Safety. (RT 3/2/98 at 7-8.) During the interview, Hardy referred to a "bloody palm print" that was found on a shelf in the trailer where Delahunt was killed and that she identified as belonging to the Petitioner. (*Id.* at 8.) Defense counsel asked the trial court to exclude the palm print because the State had violated the discovery deadline; alternatively, counsel sought a continuance so a defense expert could analyze the print. (*Id.* at 9.) Counsel asserted that Hardy's previous reports had referred only to "latent" prints and did not mention a "bloody palm print." (*Id.* at 7-8.) He also argued that the late disclosure was prejudicial because the palm print was the only physical evidence linking Petitioner to the murders. (*Id.* at 8.) The court denied the defense motions, finding that while the State "didn't refer to [the palm print] with as much specificity as they could have," it had complied with the discovery requirements by disclosing the existence of

"latent prints." (*Id.* at 18-19.) The court further noted that "the problem here is simply that the defense did not make the connection as to what this was." (*Id.* at 18.) At trial, Hardy testified that Petitioner's palm print was found in a "red liquid" on a shelf in the trailer. (RT 3/5/98 at 120.)

In his PCR petition, Petitioner alleged that counsel was ineffective for failing to examine this physical evidence. (Dkt. 31, Ex. J at 25-26.) The PCR court denied the claim, finding that Petitioner could not establish that he was prejudiced by counsel's performance. (Dkt. 32, Ex. N at 15.) In support of this determination, the PCR court cited the opinion of the Arizona Supreme Court, which, in addressing Petitioner's challenge to the admissibility of the palm print evidence, explained:

> Assuming, *arguendo,* that the trial court should not have admitted the palm print, we nevertheless conclude that the error was harmless. During his interview with Detective Cooper, Poyson gave a tape-recorded statement in which he admitted his involvement in these murders. The jury heard the tape at trial. Along with this voluntary confession, the State presented physical evidence from the scene and testimony by the medical examiner, all of which confirmed that the murders occurred exactly as the defendant said they had. Given the weight of this evidence, a jury would almost certainly have returned a guilty verdict even without the palm print. Any error in admitting it or in denying the motion for a continuance was harmless beyond a reasonable doubt.

Poyson, 198 Ariz. at 77-78, 7 P.3d at 86-87 (citations omitted). The PCR court also noted that Petitioner failed to show what evidence would have been developed if trial counsel had retained a fingerprint expert. (Dkt. 32, Ex. N at 16.)

The PCR court's denial of this claim was neither contrary to nor an unreasonable application of *Strickland*. Petitioner cannot show that he was prejudiced by counsel's performance. First, as both the PCR court and the Arizona Supreme Court recognized, the evidence of Petitioner's guilt, namely his confession and corroborating evidence from the autopsies, was substantial enough that there was no reasonable probability of a different outcome if defense counsel had challenged the palm print evidence more thoroughly. In addition, as the PCR court explained, Petitioner cannot show prejudice because there is no suggestion that the evidence was susceptible to any such challenge. Petitioner does not assert that a defense expert would have testified that the print did not belong to him or that the State's methodology in collecting and analyzing the print was suspect. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (speculation as to what expert might say "is insufficient to establish prejudice"); *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) (same); *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002) ("complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what the witness would have testified are largely speculative" and "to demonstrate the requisite *Strickland* prejudice, [petitioner] must show not only that [the] testimony would have been favorable, but also that the witness would have testified at trial.") (citations omitted).

Experts

Petitioner contends that trial counsel performed ineffectively by failing to retain experts to assist in developing appropriate defenses. Specifically, Petitioner asserts that counsel should have retained mental health experts to show that he suffers from neurological impairments caused by fetal alcohol syndrome and that such impairments rendered him incapable of premeditation. (Dkt. 27 at 57-58.) Petitioner also argues that counsel should have sought an expert in the field of coerced confessions. (*Id.* at 58.)

Mental health experts

Prior to trial, defense counsel moved for an examination under Rule 11 to assess Petitioner's competency to stand trial and his mental condition at the time of the offenses. (ROA docs. 17, 27.) The motion was granted, and two experts performed examinations. (ME 7/25/97.) Counsel did not retain additional mental health experts for the guilt phase of trial.[10]

In his PCR petition, Petitioner alleged that trial counsel performed ineffectively by failing to "immediately secure the appointment of mental health experts." (Dkt. 31, Ex. J at 14.) According to Petitioner, this failure prevented him from presenting a "diminished capacity" defense under *State v. Christensen*, 129 Ariz. 32, 35-36, 628 P.2d 580, 583-84 (1981). (*Id.*) Petitioner further contended that the testimony of such an expert would have supported an

[10] Another examination was conducted in preparation for the sentencing phase. (Dkt. 32, Ex. T.)

instruction on second degree murder, which the trial court refused to give. (*Id.* at 15.)

During the PCR proceedings, Petitioner sought and was authorized funds to retain a neuropsychological expert, Dr. Robert Briggs. (PCR-ROA Vol. VIII, Mtn. for Funds for Expert Witness; M.E. 2/1/02.) He appended Dr. Briggs's report to his PCR petition in support of this claim. (Dkt. 32, Ex. U.) While the report detailed Petitioner's prenatal exposure to drugs and alcohol and a childhood head injury, Dr. Briggs's testing revealed no significant neuropsychological impairment or cognitive dysfunction. (*Id.* at 1, 6.) The testing also revealed, contrary to the evidence proffered at sentencing, that Petitioner's IQ was in the high average range. (*Id.* at 5-6.)

In considering this claim, the PCR court concluded that nothing in the Briggs report indicated that a pre-trial neuropsychological examination would have yielded results more favorable to the defense than those obtained by the two experts who examined Petitioner pursuant to Rule 11. Accordingly, the court found that Petitioner had failed to establish a colorable claim of ineffective assistance. (Dkt. 32, Ex. N at 4-6.) The court detailed its analysis as follows:

> [T]he Defendant's attorney did request a Rule 11 mental health evaluation just months after the arrest of the Defendant. The comments made by trial counsel in requesting and eventually getting such an examination made it clear that he understood the importance of such an examination. Pursuant to Rule 11 he actually obtained not just one but two mental health examinations of the Defendant relatively soon

after the time in question. The appointed mental health experts were directed to address not only the Defendant's competency to stand trial but also his mental condition at the time of the alleged offense.

Rule 32 counsel asserts that an earlier evaluation of the Defendant's mental state might have provided a basis for a diminished capacity defense under State v. Christensen, 129 Ariz. 32 (1981). That assertion overlooks not only what the cited case stands for but also what was discovered through the Rule 11 process in this case. Christensen does not stand for the proposition that Arizona recognizes a diminished capacity defense. It simply holds that a defendant's tendency under stress to act more reflexively than reflectively may be relevant to determine whether he acted with premeditation and that expert testimony establishing such tendency should be admissible. Rule 32 counsel actually cites one of the Rule 11 mental health expert's finding of impulsivity on the part of the Defendant, affirming that the Rule 11 process did yield information about the Defendant's mental state to enable a claim to be made that he did not act with premeditation. Rule 32 counsel is not claiming that trial counsel was ineffective for failure to use the information gained through the Rule 11 process but that he was ineffective for failing to obtain such information in a timely manner. The record does not support this claim.

Rule 32 counsel has sought to strengthen this claim for relief by attaching to his Petition a written report by Dr. Robert Briggs, a clinical neuropsychologist. This apparently resulted from an examination of the Defendant performed in March, 2002, more than 5 years after the crimes with which he was charged, more than 4 years after the trial on those charges and more than 3 years after the sentencing. The Court assumes for purposes of addressing this issue that Dr. Briggs, if called to testify at an evidentiary hearing, would testify consistently with his report. . . .

The assertion by Rule 32 counsel that the results of Dr. Briggs' evaluation would have assisted trial counsel more than the reports done pursuant to Rule 11 is belied by reading that evaluation. One cannot help but note initially how often Dr. Briggs refers in his report to the investigation done by the court-appointed investigator and to the mental health reports done by the court-appointed experts. The value of these earlier investigations and evaluation was obviously as clear to trial counsel as it was to the mental health expert hired years after the fact. Contrary to the assertion of Rule 32 counsel, Dr. Briggs' report does not indicate that he found any evidence that the Defendant at the time of his examination or any time in the past was "brain damaged." The report does identify that the Defendant had previously suffered a head injury and that an improvement in neurological functions would occur with the passage of time, assisted by sobriety, after such

> an injury. Dr. Briggs does not, however, indicate that such process would not have occurred prior to the commission of the crimes in this case. Dr. Briggs found the Defendant's performance to be within the normal range of neuropsychological functioning. He found no pattern of cognitive dysfunction. He found that the Defendant's brain was intact and that he had good abilities when he accesses it. There is no indication that an examination done by Dr. Briggs 5 years earlier might have yielded results more favorable to the defense at trial or sentencing than those obtained from the experts requested by trial counsel.

(*Id.* at 4-6.)

In his habeas petition, Petitioner alleges that "neurological impairments that resulted from [fetal alcohol syndrome] arguably prevented Petitioner from engaging in the reflection necessary to form the *mens rea* of premeditation." (Dkt. 27 at 58.) He also contends that expert testimony concerning his neurological impairment would have supported an instruction on a lesser degree of murder. (*Id.*)

The Court first notes, consistent with the PCR court's ruling, that according to Dr. Briggs's report there is no evidence that Petitioner suffers from neurological impairment. (Dkt. 32, Ex. U at 6.) Therefore, Petitioner cannot support his conclusory allegation that counsel performed deficiently by failing to find an expert who would have testified to such impairment.

To the extent this claim relies on counsel's failure to secure an expert witness to opine that Petitioner was incapable of premeditation, its premise is faulty. "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997). A defendant cannot present evidence of mental disease or defect to show that he was *incapable* of forming a requisite mental state for a charged offense. *Id.* at 540, 931 P.2d at 1050; *see Clark v. Arizona*, 548 U.S. 735 (2006) (upholding the constitutionality of the *Mott* rule and finding that the exclusion of expert testimony regarding diminished capacity does not violate due process).

Arizona law does permit a defendant to present evidence that he has a *character trait* for acting reflexively, rather than reflectively, for the purpose of negating a finding of premeditation. *See Christensen*, 129 Ariz. at 35-36, 628 P.2d at 583-84; *Vickers v. Ricketts*, 798 F.2d 369, 371 (9th Cir. 1986). The *Christensen* rule is limited, however, in that an expert cannot testify as to whether the defendant was acting impulsively at the time of the offense. *Id.* at 35-36, 628 P.2d at 583-84; *see also State v. Arnett*, 158 Ariz. 15, 22, 760 P.2d 1064, 1071 (1988) (emphasizing that although expert testimony is admissible to establish personality trait of acting without reflection, testimony of a defendant's probable state of mind at time of the offense is not permitted); *State v. Rivera*, 152 Ariz. 507, 514, 733 P.2d 1090, 1097 (1987) (same). Therefore, expert testimony of the type Petitioner faults counsel for failing to obtain could not have addressed Petitioner's alleged inability to form the requisite

mental state, *State v. Schantz*, 98 Ariz. 200, 212-13, 403 P.2d 521, 529 (1965), or his probable state of mind at the time of the offense, *Christensen*, 129 Ariz. at 35-36, 628 P.2d at 583-84.

Finally, the failure to more fully pursue impulsivity as a defense was not unreasonable because there was no evidence that the killings were impulsive rather than premeditated. Thus, even if counsel had retained an expert to testify about Petitioner's alleged character trait of impulsivity, there was no reasonable probability of a different verdict on the murder counts.

In Arizona, first degree murder is distinguished from the lesser-included offense of second degree murder only by the element of premeditation. *Christensen*, 129 Ariz. at 35, 628 P.2d at 583. A defendant kills with premeditation if he "acts with either the intention or knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection." A.R.S. § 13-1101(1) (West 1978). "An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion." *Id.*

In denying defense counsel's request for a second degree murder instruction, the trial court cited the numerous circumstances indicating that the all of the murders were premeditated. (RT 3/6/98 at 114-16.) First, the court noted that Petitioner engaged in a sustained struggle with Robert Delahunt, during which the victim "was still moving, he was still gurgling, he was still saying things" and that Petitioner, though his confession indicated that he initially did not want to kill Delahunt, "obviously changed his mind at some point and began a course of conduct that was focused

upon one and only one goal, and that was to obliterate Robert Delahunt as a person." (*Id.* at 115.) Addressing the additional murders, the court explained:

> with Leta Kagen the evidence is basically that they talked about it beforehand, he got the gun, he went to get the bullets, basically went in and shot and killed a person as they slept, or as they awoke from sleep, and that was the goal.
>
> He immediately reloaded, shot another person [Wear], and then the same process with Mr. Delahunt began over again, a series of assaults that were committed upon him which did not cease until he was dead, which of course was the plan that had been discussed initially.

(*Id.* at 115-16.) Based on this evidence, the court stated, "I just cannot see how anyone can look at that statement by the Defendant and find an issue on premeditation that would justify the giving of a second degree murder instruction." (*Id.* at 16.)

This Court agrees with the trial court's assessment of the evidence. The murders were part of the plan devised by Petitioner and Anderson to kill the residents and take Wear's truck. They were the product of deliberation and took place over the course of several hours. Thus, the circumstances of the murders clearly indicate that they were preceded by actual reflection as required for a showing of premeditation.

There is no reasonable probability the jury would have acquitted Petitioner of first degree murder had trial counsel introduced evidence of neurological impairment and an impulsive personality. No expert would have been allowed to testify that Petitioner was

acting impulsively at the time of the murder. *Christensen*, 129 Ariz. at 35-36, 628 P.2d at 583-84. Rather, the testimony "would have been limited to a general description of [Petitioner's] behavioral tendencies." *Summerlin v. Stewart*, 341 F.3d 1082, 1095 (9th Cir. 2003) (en banc), *rev'd on other grounds,* 542 U.S. 348 (2004). As such, it would have had little or no probative value in determining whether Petitioner lacked premeditation at the time of the offense, particularly in light of the evidence that the murders were planned beforehand. Finally, the record does not support Petitioner's argument that an expert opinion about Petitioner's impairment and impulsivitiy would have convinced the judge to instruct the jury on second degree murder.

Involuntary confession expert

With respect to defense counsel's failure to obtain an expert on involuntary confessions, the PCR court determined that Petitioner failed to make a colorable claim under *Strickland*:

> The Defendant has failed to establish what such an expert would have found regarding his manner of reacting to coercion or persuasion in a custodial interrogation setting. Since no showing has been made as to what any such experts would have been able to testify to, it is impossible to determine that failing to hire them in the first place could be ineffectiveness under the second prong of the Strickland test. There has been presented to the Court no more evidence now that the Defendant's confession

> was involuntary than there was at the voluntariness trial or at trial.

(Dkt. 31, Ex. N at 18-19.)

This was a reasonable application of *Strickland*. Petitioner presented nothing but speculation to support his argument that an expert on coerced confessions could have been retained and would have testified that Petitioner's confession was involuntary. As already noted, this is insufficient to establish prejudice under *Strickland*. *See Wildman*, 261 F.3d at 839; *Grisby*, 130 F.3d at 373; *Evans*, 285 F.3d at 377.

Voir dire

Petitioner claims that trial counsel performed ineffectively by failing to move for mistrial based on a venire member's prejudicial statement. (Dkt. 27 at 66-67.)

During voir dire, a prospective juror stated, in the presence of the entire panel, that she was employed by Child Protective Services and was aware that another CPS agent had previously examined the victims' home. (RT 3/2/98 at 157-58.) Based on this knowledge, the prospective juror indicated that she had formed an opinion about the case which she would be unable to set aside. (*Id.* at 158.) The court excused her. (*Id.* at 159-60.)

In his PCR petition, Petitioner alleged that trial counsel performed ineffectively by failing to move for a mistrial. (Dkt. 31, Ex. J at 16-17.) The court rejected the allegation, finding that "[t]rial counsel was not ineffective for failing to request a mistrial . . . because any such request would have been denied by this

Court." (Dkt. 32, Ex. N at 8.) The court further explained:

> The issue is whether [the prospective juror's] comments contaminated the other jurors by providing them unsworn information about the case. Other than the fact CPS had done an investigation, it is hard to tell what facts the excused juror conveyed to the other jurors. The juror did not say what information he learned from his colleague, why he would be unable to set it aside, and whether the opinion he formed was that the Defendant was or was not guilty. The statements by the juror were no more likely to contaminate the panel than were similar statements by jurors who had been exposed to media coverage of the case. . . . Perhaps one could argue that the panel might place greater emphasis on information gained through a governmental agency than through the media, although the Court wonders whether the average citizen in Arizona finds CPS more or less trustworthy than the media.

(*Id.* at 7-8.)

This ruling was not an unreasonable application of *Strickland*. Counsel's performance was not ineffective. The potential juror's remarks were not so prejudicial as to taint the entire panel; therefore, as the PCR court stated, even if counsel had moved for a mistrial, the motion would not have been granted.

The Arizona Supreme Court addressed a similar scenario in *State v. Doerr*, 193 Ariz. 56, 61-62, 969 P.2d 1168, 1173-74 (1998). In *Doerr*, a prison guard and a

former crime lab specialist were among the panel members for a murder trial. *Id.* During voir dire, the guard remarked that while on the job he had encountered only three inmates who were not guilty, while the crime lab specialist commented that he could not be fair to the defense because he highly respected some of the State's witnesses. *Id.* Both panel members were excused for cause. *Id.* The defendant's motion for a mistrial was denied. *Id.* On appeal, the Arizona Supreme Court denied relief because there was no evidence that the panel was prejudiced. *Id.* at 62, 969 P.2d at 1174. The court observed that the statements merely expressed personal biases; they could not "reasonably be considered inflammatory" and "did not comment on the defendant's guilt or innocence"; and the judge had instructed the jurors to base their verdict only on the evidence presented at trial. *Id.* The court also noted that the trial judge "was in the best position to assess [the comments'] impact on the jurors." *Id.*

All of these factors apply in Petitioner's case. The CPS worker's comments were not inflammatory; they were ambiguous and at most expressed an undefined personal bias. The judge instructed the jury to "determine the facts only from the evidence produced in court." (RT 3/9/98 at 87.) The judge found no indication that the comments contaminated the jury. Nor were the comments likely to have affected the jury's decision, given the nature of the evidence against Petitioner, namely his own detailed confession to the crimes. Under these circumstances, and taking into account the judge's explicit statement that such a motion would have been denied, trial counsel's failure to move for a mistrial did not constitute ineffective assistance.

Conclusion

The PCR court's denial of these claims did not constitute an unreasonable application of *Strickland*. Therefore, Claims 5(A), 5(B), and 5(E) are denied.

Claim 7

Petitioner alleges that he received ineffective assistance of appellate counsel. (Dkt. 27 at 74.) Specifically, he cites appellate counsel's failure to challenge (A) the jury selection procedure, (B) the "mere presence" jury instruction, and (C) the trial court's consideration of victim impact evidence.

The Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). A claim of ineffective assistance of appellate counsel is reviewed under the standard set out in *Strickland*. *See Miller v. Keeney*, 882 F.2d 1428, 1433-34 (9th Cir. 1989). A 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, the petitioner would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *see Miller*, 882 F.2d at 1434 n.9 (citing *Strickland*, 466 U.S. at 688, 694).

"A failure to raise untenable issues on appeal does not fall below the *Strickland* standard." *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002); *see also Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel could not be found to have rendered ineffective assistance for failing to raise issues that "are without merit"); *Boag v. Raines*, 769 F.2d 1341,

1344 (9th Cir. 1985). No does appellate counsel have a constitutional duty to raise every nonfrivolous issue requested by a petitioner. *Miller*, 882 F.2d at 1434 n.10 (citing *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983)); *see Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998) (counsel not required to file "kitchen-sink briefs" because doing so "is not necessary, and is not even particularly good appellate advocacy"). Courts have frequently observed that the "weeding out of weaker issues is . . . one of the hallmarks of effective appellate advocacy." *Miller*, 882 F.2d at 1434; *see Smith v. Murray*, 477 U.S. 527, 536 (1986). Therefore, even if appellate counsel declines to raise weak issues, he will likely remain above an objective standard of competence and will have caused no prejudice. *Id.*

The PCR court found that Petitioner failed to show he was prejudiced by appellate counsel's performance. (Dkt. 32, Ex. N at 8-12, 25, 26-27.) This ruling did not constitute an unreasonable application of *Strickland*. As described below, the issues appellate counsel failed to raise are without merit. Therefore, Petitioner has not met his burden of affirmatively proving that he was prejudiced by appellate counsel's performance.

Jury selection

In his PCR petition, Petitioner alleged that appellate counsel was ineffective for failing to raise several challenges to the jury selection procedures used at trial, including the court's failure to utilize a jury questionnaire or allow individualized voir dire. (Dkt. 31, Ex. J at 18-22.)

Citing pretrial publicity, defense counsel requested that the court use a juror questionnaire during voir

dire. (ROA doc. 49.) The trial judge denied the request, explaining that he had experience in high profile murder cases and believed he was capable of conducting a fair and thorough voir dire without the use of a questionnaire. (RT 2/4/98 at 18-19.) The judge characterized the use of questionnaires as a time-consuming process that was not likely to result in more openness in the juror's responses; he also noted that the use of a questionnaire was not required by the rules or case law. (*Id.*)

During voir dire, the judge allowed counsel to ask questions of the panel members, but did not allow questions he found argumentative or irrelevant to the issues in the case. (RT 3/2/98 at 185-87, 203-05.) The judge himself questioned the panel extensively on their exposure to pretrial publicity. (*Id.* at 40-97.) Prior to doing so, he explained the purpose of his questions:

> I am going to be attempting to find out at this time what any of you know or think you know or may have heard or read about this case. And at some point I am going to be asking for a show of hands. I want to make sure that you all understand that I am going to be phrasing the questions to you in a way that is going to attempt to minimize the possibility that any one of you will blurt out something that you know about this case that I don't want the other 114 people to know about this case.
>
> So, please, when I ask you the questions don't volunteer any information to me. I will try to be asking you very limited questions. If any of you have some further information that I need to develop I will try to do that through my

> questions. I particularly don't want you to volunteer any information. And if it becomes necessary, we will be talking to some of you individually without all of the other jurors being present.

(*Id.* at 40.) The judge continued, "The test is going to be whether you can put aside anything that you may have been exposed to about this case and make a decision on the guilt or innocence of the Defendant . . . based solely on the evidence presented in court." (*Id.* at 42.) The judge proceeded to ask the panel about their exposure to media coverage of the case, questioning individual jurors who indicated that they had read or heard about the case, and excusing those who stated that they could not set aside such information and serve as impartial jurors. (*See id.* at 42-82.)

As previously noted, Petitioner did not challenge the voir dire process on appeal. The PCR court ruled that appellate counsel's omission of the issue did not state a colorable claim for relief. (Dkt. 32, Ex. N at 12.) The court explained:

> The first sub-issue raised by the Defendant regarding the jury selection process is the Court's refusal to use a jury questionnaire. Rule 18.5(d), Arizona Rules of Criminal Procedure, provides that the rule does not preclude the use of written questionnaires to be completed by the prospective jurors in addition to oral examination. This rule clearly does not mandate the use of a questionnaire. The Court is unaware of any appellate decision, and the defense has cited none which has found the refusal to use a juror questionnaire to be error. . . . Arguing this

issue on appeal would not have resulted in any relief, so the failure to argue it was not ineffective assistance.

The second sub-issue raised by the Defendant regarding the jury selection process is the Court's refusal to question prospective jurors individually. The position of the defense apparently is that the Court should have called and sworn one prospective juror at a time and questioned each out of the presence of the remaining prospective panel. Such a procedure is not required or even contemplated under Rule 18. The Court has no doubt that it has the discretion to utilize such a procedure where necessary to protect contamination of the entire panel, but there is no indication that any such contamination occurred in this case. The process used in this case was similar to that used in State v. Trostle, 191 Ariz. 4 (1997). The Arizona Supreme Court found that process to be acceptable, although perhaps not the best possible. . . . . Arguing this issue on appeal would not have resulted in any relief, so the failure to argue it was not ineffective assistance.

The third sub-issue raised by the Defendant . . . is what counsel characterizes as the Court's refusal to allow any questioning by trial counsel of either individual jurors or the entire seated panel. . . . That is not the Court's recollection. . . . What the Court recalls happening, and what the citations by the State confirm, is that the Court allowed trial counsel to ask questions of individuals and the panel but

exercised its authority under Rule 18.5(d) to impose reasonable limitations with respect to questions allowed or to limit voir dire on grounds of abuse. . . . Arguing this issue on appeal would not have resulted in any relief, so the failure to argue it was not ineffective assistance.

The fourth sub-issue . . . is the refusal to allow sequestered follow-up questions of certain jurors. . . . The Court thinks [Petitioner's counsel] is arguing that it should have allowed trial counsel to question individual jurors separately regarding pretrial publicity. The State has addressed this issue as if it were the broader issue of failing to raise pretrial publicity. . . . Assuming that the Court's assessment of the issue being raised is more accurate than the State's, this is an aspect of the jury selection process that it would do differently today. However, it is an aspect which appears to have been condoned, albeit tepidly, by the Trostle court. . . . Assuming the State's response more accurately assessed the issue being raised by the defense, the record should reflect that the jury eventually selected to try this case was made up of either persons who knew nothing about the case or persons whose prior knowledge would not prevent them from being fair and impartial jurors. Arguing this issue on appeal, whether the issue was as perceived by the Court or the State, would not have resulted in any

> relief, so the failure to argue it was not ineffective assistance.

(*Id.* at 10-12.)

This ruling does not represent an unreasonable application of *Strickland*. Appellate counsel's failure to raise the claim was not prejudicial because the claim is not meritorious. While there is no Supreme Court precedent specifically addressing the use of juror questionnaires, clearly established Supreme Court law requires that a defendant be provided adequate voir dire such that unqualified jurors can be identified and the defendant can be tried by an impartial jury. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The Constitution does not dictate the format voir dire must take or specific questions that must be asked, and the trial judge has great discretion in how voir dire is conducted. *Id*. Failure to ask specific questions in voir dire only violates the Constitution if it renders the trial fundamentally unfair. *Mu'Min v. Virginia*, 500 U.S. 415, 425-26 (1991). Petitioner has made no showing that the questions the court did not allow defense counsel to ask rendered Petitioner's trial fundamentally unfair.[11]

Also, as the PCR court pointed out, the state supreme court in *State v. Trostle*, 191 Ariz. 4, 11-12, 951 P.2d 869, 876-77 (1997), denied relief on similar challenges to the voir dire process, stating that the trial

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[11] Defense counsel attempted to ask, and the court disallowed, questions such as the following, put to an individual juror: "when you hear things like a 15-year old boy was beaten, had a knife driven through his ear, what kind of reaction does that trigger?" (RT 3/2/98 at 186.)

court did not abuse its discretion in failing to use written questionnaires or question the jurors individually or in small groups. *Id.* The court noted that the trial judge "examined each person about his or her media exposure, memory of details, and ability to keep an open mind," that "[n]one of the jurors exhibited a closed mind," and "[a]ll stated that they could follow the court's instructions and decide the case on the evidence." *Id.* at 12, 951 P.2d at 877. Given this holding, which upheld the same procedures used in Petitioner's trial, there is no reasonable probability that Petitioner's appeal would have succeeded had counsel raised the issue.

"Mere presence" jury instruction

The trial court instructed the jury: "The Defendant's guilt cannot be established by his mere presence at a crime scene or mere association with another person at a crime scene. The fact that the Defendant may have been present does not in and of itself make the Defendant guilty of the crime charged." (RT 3/9/98 at 96.) The court declined to provide the instruction proffered by defense counsel.[12] Appellate counsel did not raise the issue. The PCR court rejected Petitioner's argument that this constituted ineffective assistance,

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[12] Defense counsel submitted the following instruction:

> Guilt cannot be established by the defendant's mere presence at a crime scene, *even with the knowledge that a crime is occurring*, or by mere association with another person at a crime scene. The fact that the defendant may have been present does not in and of itself make the defendant guilty of the crime charged.

(ROA doc. 80 (emphasis added).)

explaining: "There was no evidence at trial indicating that the Defendant was a mere bystander to the murderous acts of others. He was an active participant in the killing of 3 people. Failure to argue the propriety of the mere presence instruction on appeal was not ineffective because doing so would not have been successful." (Dkt. 32, Ex. N at 25.)

The PCR court's ruling was not an unreasonable application of *Strickland.* Petitioner cannot show he was prejudiced by appellate counsel's failure to challenge the premeditation instruction because the instruction was unobjectionable under Arizona case law. *State v. Prasertphong*, 206 Ariz. 70, 89, 75 P.3d 675, 694 (2003), *judgment vacated and case remanded on other grounds,* 541 U.S. 1039 (2004) (noting that the instruction correctly stated the law and rejecting defendant's argument that instruction "was constitutionally infirm because it did not reflect that he did not knowingly participate in the crimes and did not express that mere association is insufficient for guilt"). Therefore, there was no probability that raising the issue would have resulted in a different outcome on appeal.

Victim impact evidence

Petitioner contends that appellate counsel performed ineffectively in failing to challenge the trial court's consideration of victim impact evidence when sentencing Petitioner to death. The PCR court rejected this claim:

> Statements on behalf of the victims were included in the presentence report and were read and considered by the Court prior to

> sentencing. The Defendant in this case was convicted of non-capital offenses for which determinate sentences of specific years had to be imposed. A sentencing court in doing so may properly consider victim impact evidence. Such evidence may also be considered to rebut mitigating evidence offered by the defense, although the Court does not recall doing so in this case. More to the point, there is no indication in the Court's special verdict that it improperly considered statements on behalf of the victims in determining whether the State had proven beyond a reasonable doubt the capital aggravating factors, several of which were supported by overwhelming evidence. Appellate counsel would not have been successful raising this issue on appeal and failing to do so did not render him ineffective.

(Dkt. 32, Ex. N at 26-27.)

The PCR court applied *Strickland* reasonably in rejecting this claim. In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the United States Supreme Court held that while a state may permit the admission of victim impact evidence, it is not allowed to present evidence concerning a victim's opinion about the appropriate sentence. Judges are presumed to know and follow the law, *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), and here the trial judge did not cite the victim's opinions as a reason for imposing the death penalty. *See Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997) ("in the absence of any evidence to the contrary, [the Court] must assume that the trial judge

properly applied the law and considered only the evidence he knew to be admissible"); *State v. Gulbrandson*, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995) ("[W]e generally have assumed that trial judges are capable of focusing on the relevant sentencing factors and ignore any "irrelevant, inflammatory, and emotional" statements when making the sentencing decision. We will do so again in this case because nothing in the record indicates that the trial judge gave weight to the victims' statements.") (citations omitted); *State v. Bolton*, 182 Ariz. 290, 315-16, 896 P.2d 830, 855-56 (1995). Thus, there was no basis on which to assert a *Payne* violation and there is no reasonable probability that the Arizona Supreme Court would have granted relief had counsel raised the claim on appeal.

Conclusion

Because the claims appellate counsel failed to raise are without merit, Petitioner cannot show a reasonable probability that he would have prevailed on appeal if they had been raised. Therefore, he has failed to show that he was prejudiced by appellate counsel's performance and he is not entitled to relief on Claim 7.

Claim 8

Petitioner alleges that his constitutional rights were violated by the cumulative impact of the ineffective performance of trial and appellate counsel. (Dkt. 27 at 77.) Respondents counter that the claim is unexhausted and procedurally barred because it was not raised in state court. The Court agrees. The claim is also meritless. As set forth above, Petitioner has failed to prove he was prejudiced by any of counsel's alleged

deficiencies. Where there is no prejudice from the individual alleged deficiencies, there can be no cumulative prejudicial effect. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002). Claim 8 is denied.

Claim 9

Petitioner alleges that Arizona's death penalty statute is unconstitutional because it does not sufficiently channel the sentencer's discretion and fails to provide objective standards for weighing aggravating and mitigating circumstances. (Dkt. 27 at 78.) This claim is meritless. Rulings of both the Ninth Circuit and the United States Supreme Court have upheld Arizona's death penalty statute against allegations that particular aggravating factors do not adequately narrow the sentencer's discretion. *See Lewis v. Jeffers*, 497 U.S. 764, 774-77 (1990); *Walton*, 497 U.S. at 649-56; *Woratzeck v. Stewart*, 97 F.3d 329, 335 (9th Cir. 1996).

Claim 10

Petitioner alleges that the Arizona Supreme Court erred in its application of the cruel, heinous or depraved aggravating factor. (Dkt. 27 at 82.)

Background

The trial court determined that the murders of Delahunt and Wear were especially cruel and thus satisfied the aggravating factor set forth in A.R.S. § 13-703(F)(6). The court made the following findings:

> The testimony, I think, was very clear that as to Robert Delahunt and Roland Wear, they were eventually killed only after a protracted and

> horrible struggle had taken place in which the two of them were literally fighting for their lives; a fight which they eventually lost, and it's very clear that each of them maintained consciousness for a considerable period of time. Robert Delahunt, after having his throat slashed. Roland Wear, after actually having been shot, and having a struggle.
>
> It is indisputable that the two of them have to have suffered physical pain, have to have realized, at some point, that the struggle was going to continue until they were dead, and they had to have been literally looking at death in the eye, knowing that that was coming for a considerable period of time.

(RT 11/20/98 at 43-44.)

The Arizona Supreme Court affirmed the trial court's findings, noting that "the State proved beyond a reasonable doubt that Delahunt and Wear engaged in protracted struggles for their lives, during which they undoubtedly experienced extreme mental anguish and physical pain." *Poyson*, 198 Ariz. at 78, 7 P.3d at 87. The court elaborated:

> The existence of mental distress is apparent from the length of time during which both victims fought off the attacks of the defendant and Frank Anderson, as well as the victims' statements during the attacks. After Delahunt's throat was slashed, he struggled with Anderson and the defendant for some forty-five minutes before dying. He had two defensive wounds on his left hand, confirming that he was conscious

throughout the ordeal. *See Medrano*, 173 Ariz. at 397, 844 P.2d at 564; *State v. Amaya-Ruiz*, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990). According to the defendant's confession, Delahunt repeatedly asked why he and Anderson were trying to kill him. Likewise, after being shot in the mouth, Wear fought with Poyson and Anderson for several minutes before he died. During the attack, Wear begged the defendant not to hurt him, saying "Bobby, stop. Bobby don't. I never did anything to hurt you." In our view, it is beyond dispute that these victims suffered unspeakable mental anguish. *See Medina*, 193 Ariz. at 513, 975 P.2d at 103 (concluding that victim's cries of "Please don't hit me. Don't hit me. Don't. Don't," evidenced both physical and mental pain and suffering); *State v. Rienhardt,* 190 Ariz. 579, 590, 951 P.2d 454, 455 (1997) (upholding cruelty finding where victim experienced twenty minute ride to the desert after being told he would be killed, and made statements revealing that he feared for his life).

Clearly, the victims also suffered severe physical pain. Delahunt's throat was slashed by Anderson. Defendant then slammed the victim's head against the floor and pounded it with a rock. Later, he drove a knife into Delahunt's ear while the boy was still conscious and struggling. Similarly, Wear suffered a gunshot wound to the mouth that shattered several of his teeth. He was then struck in the head numerous times with a rifle. Like Delahunt, he was conscious during much of the attack. Thus, the State

> proved beyond a reasonable doubt that the victims suffered great physical pain before their deaths. *See State v. Apelt (Michael)*, 176 Ariz. 349, 367, 861 P.2d 634, 652 (1993) (affirming cruelty finding where victim was conscious when struck repeatedly with great force, stabbed in the back and chest, and her throat was slashed); *State v. Brewer,* 170 Ariz. 486, 501, 826 P.2d 783, 799 (1992) (upholding cruelty finding where victim was conscious during forty-five minute attack).

Id.. at 78-79, 7 P.3d at 87-88.

Analysis

With respect to a state court's application of an aggravating factor, habeas review "is limited, at most, to determining whether the state court's finding was so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation." *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)). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

The especially cruel prong of (F)(6) addresses the suffering of the victim. *See State v. Murray*, 184 Ariz. 9, 37, 906 P.2d 542, 570 (1995). Thus, "a crime is

committed in an especially cruel manner when the [defendant] inflicts mental anguish or physical abuse before the victim's death." *State v. Walton*, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1993). Petitioner contends that there was insufficient evidence to support a finding that Delahunt and Wear experienced either mental anguish or physical suffering prior to their deaths. First, citing *State v. Schackart*, 190 Ariz. 238, 248, 947 P.2d 315, 325 (1997), Petitioner argues that the victims did not suffer mentally because they did not experience "significant uncertainty" about their ultimate fate; in Petitioner's view, any anxiety they otherwise would have experienced during their ordeal was ameliorated by the fact that they knew they would be killed. (Dkt. 27 at 83.) Thus, according to Petitioner, Delahunt, having overheard the conversation between his prospective killers, "knew of the conspiracy to kill him" and therefore "when Anderson and Petitioner attacked him, Delahunt could have been reasonably confident that the attack would end in his death." (*Id.*) Likewise, Wear, having just witnessed his lover being shot to death in their bed, "could have been reasonably confident that the attack on him would end in his death as well." (*Id.* at 84.)

As a factual matter, the Court is skeptical that either victim, while fighting for his life against two brutal attackers, experienced an appreciable reduction in mental suffering by being spared confusion as to the outcome of the battle. As a legal matter, the fact that Delahunt and Wear understood the stakes and the probable result of the attacks does not foreclose a finding of mental anguish. "Evidence about '[a] victim's *certainty or uncertainty* as to his or her ultimate fate can be indicative of cruelty and heinousness.'" *State v.*

Kemp, 185 Ariz. 52, 65, 912 P.2d 1281, 1294 (1996) (quoting *State v. Gillies*, 142 Ariz. 564, 569, 691 P.2d 655, 660 (1984) (emphasis added)). In any event, the Court finds, as did the Arizona Supreme Court, that both Delahunt and Wear, notwithstanding Petitioner's assertion that they had received adequate notice of their ultimate fate, clearly manifested signs of mental anguish when they pleaded for mercy.

Even if Delahunt and Wear did not experience mental anguish when they were being stabbed, shot, and beaten to death, there is no doubt that Petitioner subjected both victims to appalling physical cruelty. Petitioner argues that the victims were not conscious during this abuse and therefore did not suffer. This is directly contrary to the evidence. As already noted, both victims cried out to Petitioner in the midst of the attacks, clearly indicating that they were conscious when they suffered a number of their wounds. While each victim may have been rendered unconscious by the blows to the head which ultimately killed them, prior to receiving those fatal injuries they suffered grievous wounds during their struggles against Petitioner. After Anderson slashed Delahunt's throat, Petitioner slammed his head into the floor, struck his head with a rock and a cinder block, and pounded a knife through his ear. The violence continued for a period of 45 minutes, precisely because Delahunt continued to struggle. Petitioner shot Wear in the mouth then clubbed him repeatedly with the rifle; Wear continued to struggle and was knocked to the ground by a cinder block thrown by Anderson; Petitioner kicked Wear in the head and finally killed him by throwing the cinder block at his head several times.

A reasonable factfinder could have determined that the murders were especially cruel. Claim 10 is denied.

Claim 11

Petitioner alleges that he was denied his constitutional right to voir dire the trial judge concerning his views on the death penalty. (Dkt. 27 at 86.) The Arizona Supreme Court's rejection of this claim, *Poyson*, 198 Ariz. at 83, 7 P.3d at 92, was neither contrary to nor an unreasonable application of clearly established federal law.

Petitioner cites no authority in support of this claim. Although the Constitution requires that a defendant receive a fair trial before a fair and impartial judge with no bias or interest in the outcome, *see Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997), trial judges, like other public officials, operate under a presumption that they properly discharge their official duties. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996); *see also State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984) (trial judge is presumed to be free of bias and prejudice). The presumption of regularity applies absent clear evidence to the contrary. *See Armstrong*, 517 U.S. at 464; *see also State v. Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223, 1226 (1987) (mere possibility of bias or prejudice does not entitle a criminal defendant to voir dire the trial judge at sentencing). Petitioner made no allegation of bias or prejudice when he raised this issue before the Arizona Supreme Court (*see* Opening Br. at 38) and makes no such allegation here (Dkt. 27 at 86-87). Claim 11 is denied.

Claim 12

Petitioner alleges that Arizona's death penalty scheme discriminates against poor young males. (Dkt. 27 at 87.) This claim, which the Arizona Supreme Court rejected on appeal, *Poyson*, 198 Ariz. at 83, 7 P.3d at 92, is meritless. Clearly established federal law holds that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination'" and must demonstrate that the purposeful discrimination "had a discriminatory effect" on him. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). Therefore, to prevail on this claim, Petitioner "must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* Petitioner does not attempt to meet this burden. He offers no evidence specific to his case that would support an inference that his sex, age, or economic status played a part in his sentence. *See Richmond v. Lewis*, 948 F.2d 1473, 1490-91 (1990), *vacated on other grounds*, 986 F.2d 1583 (9th Cir. 1993) (holding that statistical evidence that Arizona's death penalty is discriminatorily imposed based on race, sex, and socioeconomic background is insufficient to prove that decisionmakers in petitioner's case acted with discriminatory purpose).

Claim 13

Petitioner alleges that Arizona's death penalty scheme is unconstitutional because the prosecutor's discretion to seek the death penalty is "limitless, standardless and arbitrary." (Dkt. 27 at 89.) This claim is meritless. In *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998), the Ninth Circuit disposed of the argument that Arizona's death penalty statute is

constitutionally infirm because "the prosecutor can decide whether to seek the death penalty." *See Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (pre-sentencing decisions by actors in the criminal justice system that may remove an accused from consideration for the death penalty are not unconstitutional); *Silagy v. Peters*, 905 F.2d 986, 993 (7th Cir. 1990) (holding that the decision to seek the death penalty is made by a separate branch of the government and is therefore not a cognizable federal issue).

Claim 14

Petitioner alleges that Arizona's pecuniary gain aggravating factor, A.R.S. § 13-703(F)(5), is unconstitutional because it fails to narrow the class of death-eligible defendants. (Dkt. 27 at 91.) He also argues that the factor was not proven in his case. (*Id.* at 93.) Both arguments are without merit.

Rulings of the Ninth Circuit and the United States Supreme Court have upheld Arizona's death penalty statute against allegations that particular aggravating factors, including the pecuniary gain factor, do not adequately narrow the sentencer's discretion. *See Jeffers*, 497 U.S. at 774-77; *Walton*, 497 U.S. at 649-56; *Woratzeck*, 97 F.3d at 335. The Ninth Circuit has also explicitly rejected the contention that Arizona's death penalty statute is unconstitutional because it "does not properly narrow the class of death penalty recipients." *Smith*, 140 F.3d at 1272.

With respect to the application of the pecuniary gain factor to Petitioner's sentence, the trial court concluded that the State had proven that Petitioner committed the murders in order to gain something of

pecuniary value, namely Wear's truck. (RT 11/20/98 at 42.) The court observed: "The fact is that the desire to get the means of transportation to get them out of Golden Valley and get to Chicago, or wherever it was that they were going, was the sole reason, the driving force behind the commission of these murders." (*Id.*) The Arizona Supreme Court agreed:

> In this case, the record is replete with evidence that the defendant and Anderson committed the murders in order to steal Roland Wear's truck. As soon as Anderson arrived in Golden Valley, he told the defendant that he was eager to leave. Two days later, the pair agreed to kill Delahunt, Wear and Kagen so that they could steal the truck and drive to Chicago. As Poyson admitted in his confession, this was the motive for the killings. This evidence is sufficient to support the pecuniary gain aggravator.

Poyson, 198 Ariz. at 78, 7 P.3d at 87.

"[A] finding that a murder was motivated by pecuniary gain for purposes of § 13-703(F)(5) must be supported by evidence that the pecuniary gain was the impetus of the murder, not merely the result of the murder." *Moormann v. Schriro*, 426 F.3d 1044, 1054 (9th Cir. 2005). A rational factfinder could have determined that Petitioner, after planning the crimes with Anderson, killed the victims in order to gain access to Wear's vehicle. A rational factfinder could reach such a determination because Petitioner confessed to doing precisely that. The record suggests no other motivation for the murders.

Petitioner contends that the murders were committed in order to prevent the victims from reporting the theft of the truck. (Dkt. 27 at 94.) This argument is unavailing. A "financial motive need not be the only reason the murder was committed for the pecuniary gain aggravator to apply." *State v. Kayer*, 194 Ariz. 423, 434, 984 P.2d 31, 42 (1999). The fact that the murders may have been motivated in part by the perpetrators' desire to eliminate witnesses does not foreclose a finding that the murders were committed for pecuniary gain. *State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991); *see State v. Jones*, 197 Ariz. 290, 309, 4 P.2d 345, 364 (2000) (factor satisfied where defendants "murdered the individuals to facilitate the robberies and then escape punishment"); *Trostle*, 191 Ariz. at 18, 951 P.2d at 883 (factor satisfied where defendant planned to steal a truck and "the victim was killed to delay reporting of the theft and to eliminate the only witness"). Here, the indisputable purpose of all of the killings was "to further the defendant's motive of pecuniary gain from the robbery." *Walton*, 159 Ariz. at 588, 769 P.2d at 1034.

Petitioner is not entitled to relief on Claim 14.

Claim 15

Petitioner alleges that Arizona's death penalty scheme is unconstitutional because it requires the sentencer to impose the death penalty whenever it finds an aggravating factor and no mitigating circumstances sufficient to warrant leniency. (Dkt. 27 at 89.) Respondents contend that the claim is unexhausted and procedurally barred. Regardless of its procedural status, the claim is plainly meritless and

will be denied. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277.

Walton rejected the claim that Arizona's death penalty statute is impermissibly mandatory and creates a presumption in favor of the death penalty because it provides that the death penalty "shall" be imposed if one or more aggravating factors are found and mitigating circumstances are insufficient to call for leniency. 497 U.S. at 651-52 (citing *Blystone*, 494 U.S. 299; *Boyde*, 494 U.S. 370); *see Marsh*, 548 U.S. at 173-74 (relying on *Walton* to uphold Kansas's death penalty statute, which directs imposition of the death penalty when the state has proved that mitigating factors do not outweigh aggravators); *Smith*, 140 F.3d at 1272 (summarily rejecting challenges to the "mandatory" quality of Arizona's death penalty statute). Claim 15 is denied.

Claim 16

Petitioner alleges that Arizona's death penalty scheme is unconstitutional because it requires the State to prove only a defendant's eligibility for the death penalty as opposed to the appropriateness of the death penalty for that defendant. (Dkt. 27 at 96.) Respondents contend that the claim is unexhausted and procedurally barred. Regardless of its procedural status, the claim is plainly meritless and will be denied.

With respect to a capital defendant's eligibility for the death penalty, Arizona's statute complies with constitutional requirements by allowing only certain, specific aggravating circumstances to be considered. *See Blystone*, 494 U.S. at 306-07 ("The presence of

aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by [the sentencing authority]."). In addition to the requirements for determining eligibility for the death penalty, the Supreme Court has imposed a separate requirement for the selection decision, "where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." *Tuilaepa*, 512 U.S. at 972. A statute which "provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage" will ordinarily meet constitutional concerns, *Zant*, 462 U.S. at 879, so long as a state ensures "that the process is neutral and principled so as to guard against bias or caprice," *Tuilaepa*, 512 U.S. at 973. As set forth above, Arizona's capital sentencing statute requires the sentencing court to consider as mitigating circumstances "any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." A.R.S. § 13-703(G). Moreover, each death sentence is independently reviewed by the Arizona Supreme Court, which reweighs the aggravating and mitigating factors to determine the propriety of the death sentence. *See, e.g.*, *Poyson*, 198 Ariz. at 81, 7 P.3d at 90 (citing former A.R.S. § 13-703.01(A)). Because it provides for "categorical narrowing" at the definition stage and for an "individualized determination" at the selection stage, Arizona's death penalty scheme is not unconstitutional. *See Walton*, 497 U.S. at 652.

Petitioner's assertion that such an individualized consideration did not occur in his case is without support in the trial court's special verdict or the opinion of the Arizona Supreme Court. Claim 16 is therefore denied.

Claim 17

Petitioner alleges that his death sentences are unconstitutional because he was not afforded the procedural safeguard of proportionality review. (Dkt. 27 at 97.) This claim is meritless. There is no federal constitutional right to proportionality review of a death sentence, *McCleskey*, 481 U.S. at 306 (citing *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984)), and the Arizona Supreme Court discontinued the practice in 1992, *State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992). The Ninth Circuit has explained that the interest implicated by proportionality review – the "substantive right to be free from a disproportionate sentence"– is protected by the application of "adequately narrowed aggravating circumstance[s]." *Ceja*, 97 F.3d at 1252. Claim 17 is denied.

Claim 18

Petitioner alleges that his death sentences are unconstitutional because a judge rather than a jury found the facts necessary for imposition of the death penalty. (Dkt. 27 at 100.) He also contends that his rights were violated because he did not receive notice of the aggravating factors in an indictment. (*Id.*) Both allegations are without merit.

First, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that aggravating factors that render a defendant eligible for the death penalty must

be found by a jury. However, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court ruled that *Ring* does not apply retroactively to cases already final on direct review. Because direct review of Petitioner's case was final prior to *Ring*, he is not entitled to federal habeas relief premised on that ruling.

Next, while the Due Process Clause guarantees defendants a fair trial, it does not require states to observe the Fifth Amendment's provision for presentment or indictment by a grand jury. *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688 n. 25 (1972). The Arizona Supreme Court has expressly rejected the argument that *Ring* requires that aggravating factors be alleged in an indictment and supported by probable cause. *McKaney v. Foreman*, 209 Ariz. 268, 270, 100 P.3d 18, 20 (2004). Petitioner cites no authority to the contrary. Claim 18 is denied.

Claim 19

Petitioner alleges that he is being denied a fair clemency process. (Dkt. 27 at 105.) In particular, he asserts the proceeding will not be fair and impartial based on the Clemency Board's selection process, composition, training, and procedures, and because the Attorney General will act as the Board's legal advisor and as an advocate against Petitioner. (Dkt. 27 at 105.)

This claim is meritless. First, because Petitioner has not sought clemency, the claim is premature and not ripe for adjudication. More significantly, however, the claim is not cognizable on federal habeas review. Habeas relief can only be granted on a claim that a prisoner "is in custody in violation of the Constitution

or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner's challenge to state clemency procedures does not constitute an attack on his detention and thus is not a proper ground for habeas relief. *See Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989); *see also Woratzeck v. Stewart*, 118 F.3d 648, 653 (9th Cir. 1997) (per curiam) (clemency claims are not cognizable under federal habeas law). Therefore, Claim 19 is dismissed.

Claim 20

Petitioner alleges, citing *Ford v. Wainwright*, 477 U.S. 399 (1986), that he is incompetent to be executed. (Dkt. 27 at 108.) This claim is not yet ripe for federal review. Under *Martinez-Villareal v. Stewart*, 118 F.3d 628, 634 (9th Cir. 1997), *aff'd,* 523 U.S. 637 (1998), a claim of incompetency for execution had to "be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed." The Supreme Court revisited *Martinez-Villareal* and concluded in *Panetti v. Quarterman*, 551 U.S. 930 (2007), that it is unnecessary to raise unripe *Ford* claims in the initial habeas petition in order to preserve any possible unripe incompetency claim. *Id.* at 946-47. Thus, if this claim becomes ripe for review, it may be presented to the district court; it will not be treated as a second or successive petition. *See id.* Claim 20 is dismissed without prejudice as premature.

EXPANSION OF THE RECORD

Petitioner seeks to expand the record to include a psychological report, dated May 18, 2009, prepared by Dr. Robert Smith. (Dkt. 72.) Dr. Smith, whose

evaluation of Petitioner took place in October 2005, opines that "Mr. Poyson was, at the time of the instant offense, suffering from several psychological disorders, including Posttraumatic Stress Disorder, Dysthymic Disorder and Substance Dependence," that these "psychological disorders played a significant role in his involvement in the instant offense," and that the disorders "were magnified by the effects of the alcohol and drugs that he used, causing Mr. Poyson to be desperate, impulsive, aggressive, emotionally labile and illogical." (*Id.*, Ex. A at 15.) Petitioner indicates that the report is relevant to Claim 5(B), alleging ineffective assistance due to counsel's failure to obtain experts to assist in developing defenses to the charges against him. Respondents oppose the motion on the grounds that it is untimely, having been filed more than three and a half years after the deadline for motions for evidentiary development, and because it fails to meet the requirements of 28 U.S.C. § 2254(e)(2).

The Court denied Petitioner's previous request for evidentiary development of Claim 5(B), which sought to expand the record to include evidence that Petitioner suffers from fetal alcohol syndrome, finding that Petitioner was not diligent in developing the factual basis of the claim in state court. (Dkts. 54 at 24-25, 66 at 8-11.) The same rationale applies to Petitioner's second motion to expand the record. Petitioner had an opportunity during the PCR proceedings to develop evidence that he suffers from posttraumatic stress disorder and the other conditions noted in Dr. Smith's report. His failure to do so constitutes a lack of diligence which precludes the Court from expanding the record. *See* 28 U.S.C. § 2254(e)(2); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241-42 (9th Cir. 2005).

CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. The Court further finds that Petitioner is not entitled to expansion of the record.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing § 2254 Cases, the Court has evaluated the claims within the petition for suitability for the issuance of a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

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

The Court finds that reasonable jurists could debate its resolution of Claims 2 and 3 on the merits and its dismissal of Claim 6 as procedurally barred. For the reasons stated in this order, and in the order of July 25, 2006 (Dkt. 54), the Court declines to issue a COA with respect to any other claims.

Based on the foregoing,

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

IT IS FURTHER ORDERED that Petitioner's motion for expansion of the record (Dkt. 72) is **DENIED**.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on March 23, 2004 (Dkt. 3), is **VACATED.**

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

> Whether Claims 2 and 3 of the Amended Petition – alleging that Petitioner's rights were violated when the state courts applied a causal connection test to his mitigating evidence and refused to consider all of the mitigating evidence – are without merit.
>
> Whether Claim 6 of the Amended Petition – alleging ineffective assistance of counsel at sentencing – is procedurally barred.

IT IS FURTHER ORDERED that the Clerk of Court forward a courtesy copy of this Order to the

Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 20th day of January, 2010.

/s/Neil V. Wake
Neil V. Wake
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CV 04-534 PHX-NVW

[Filed January 20, 2010]

Robert Allen Poyson,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, per the Court's order entered January 20, 2010, that Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is denied.

Judgment is entered for respondents and against petitioner. The action is dismissed.

January 20, 2010

RICHARD H. WEARE
District Court
Executive/Clerk

s/ Linda S Patton
By: Deputy Clerk

cc: (all counsel)

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-99005

D.C. No. 2:04-cv-00534-NVW
District of Arizona, Phoenix

[Filed October 6, 2016]

ROBERT ALLEN POYSON,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
CHARLES L. RYAN,	)
	)
Respondent-Appellee.	)
	)

ORDER

Before: THOMAS, Chief Judge, and FISHER and IKUTA, Circuit Judges.

The stay of the mandate, issued April 2, 2014 and extended May 13, 2016, is continued pending further order of this court.

The parties shall file supplemental briefs addressing the impact of *McKinney v. Ryan*, 813 F.3d

798 (9th Cir. 2015) (en banc), *cert. denied* (Oct. 3, 2016), on the issues presented in this appeal.

The petitioner's supplemental brief shall be no longer than 20 pages or 5,600 words and shall be filed within 21 days after entry of this order. The respondent's supplemental brief shall be no longer than 20 pages or 5,600 words and shall be filed within 21 days after the petitioner's supplemental brief is filed. The petitioner may file an optional reply brief not to exceed 10 pages or 2,800 words within 14 days after respondent's supplemental brief is filed. The supplemental briefs may be filed electronically without submission of paper copies.

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-99005

D.C. No. 2:04-cv-00534-NVW
District of Arizona, Phoenix

[Filed May 13, 2016]

ROBERT ALLEN POYSON,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
CHARLES L. RYAN,	)
	)
Respondent - Appellee.	)
	)

ORDER

Before: THOMAS, Chief Judge, and FISHER and IKUTA, Circuit Judges.

On April 2, 2014, the court stayed the mandate and proceedings on the petition for panel rehearing pending resolution of en banc proceedings in *McKinney v. Ryan*, No. 09-99018. That stay is hereby extended pending resolution of Supreme Court proceedings in the case.

See McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) (en banc), *petition for cert. filed* (U.S. Mar. 28, 2016) (No. 15-1222).

APPENDIX G

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

May 19, 2014

Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Robert Allen Poyson
v. Charles L. Ryan, Director, Arizona Department of Corrections
No. 13-9097
(Your No. 10-99005)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner to defer consideration of the petition for a writ of certiorari is denied. The petition for a writ of certiorari is denied.

Sincerely,

/s/Scott S. Harris
Scott S. Harris, Clerk

APPENDIX H

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-99005

D.C. No. 2:04-cv-00534-NVW

[Filed April 2, 2014]

ROBERT ALLEN POYSON, *Petitioner-Appellant*,	)
v.	)
CHARLES L. RYAN, *Respondent-Appellee*.	)

Filed April 2, 2014

Before: Sidney R. Thomas, Raymond C. Fisher, and Sandra S. Ikuta, Circuit Judges.

ORDER

The order filed November 7, 2013 is **AMENDED**. The order, as amended, reads as follows:

Judge Thomas has voted to grant the petition for rehearing en banc. Judge Ikuta has voted to deny the

petition for rehearing en banc and Judge Fisher has so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

Appellant's petition for rehearing en banc, filed April 12, 2013, is **DENIED**.

Appellant's petition for panel rehearing, filed April 12, 2013, remains pending. The panel will stay proceedings on the petition for panel rehearing pending resolution of en banc proceedings in *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013), *rehearing en banc granted*, 2014 WL 1013859 (Mar. 12, 2014).

This opinion filed at 711 F.3d 1087 (9th Cir. 2013) is amended, and an Amended Opinion was filed concurrently with the original version of this Order.

No further petitions will be entertained.

The clerk shall stay the mandate.

APPENDIX I

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 11, 2014

Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Robert Allen Poyson
v. Charles L. Ryan, Director, Arizona Department of Corrections
No. 13-9097
(Your No. 10-99005)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on March 7, 2014 and placed on the docket March 11, 2014 as No. 13-9097.

Sincerely,

Scott S. Harris, Clerk

by

Redmond K. Barnes
Case Analyst

APPENDIX J

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-99005

D.C. No. 2:04-cv-00534-NVW

[Filed November 7, 2013]

ROBERT ALLEN POYSON, *Petitioner-Appellant*,	)
v.	)
CHARLES L. RYAN, *Respondent-Appellee*.	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted
February 15, 2012—San Francisco, California

Filed March 22, 2013
Amended November 7, 2013

Before: Sidney R. Thomas, Raymond C. Fisher, and Sandra S. Ikuta, Circuit Judges.

Order;
Dissent to Order by Chief Judge Kozinski;
Opinion by Judge Fisher;
Partial Concurrence and Partial Dissent by Judge Thomas

SUMMARY*

Habeas Corpus/Death Penalty

The panel issued an order denying a petition for panel rehearing and rehearing en banc, filed an amended opinion, and ordered that no further petitions will be entertained.

In the amended opinion, the panel affirmed the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition by an Arizona state prisoner challenging a conviction and capital sentence for murder.

The panel first held that the Arizona Supreme Court did not deny petitioner his right to individualized sentencing by applying an unconstitutional causal nexus test to potentially mitigating evidence, because the panel could not presume a constitutional violation from an ambiguous record that did not contain a "clear indication" that the court applied such a test as an unconstitutional screening mechanism, as opposed to a permissible means of determining the weight or significance of mitigating evidence.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel next denied relief on petitioner's claim that the Arizona courts failed to consider his history of substance abuse as a nonstatutory mitigating factor. The panel explained that the state courts considered the evidence and found it wanting as a matter of fact because it failed to prove a history of substance abuse, and that the state supreme court did not misconstrue the state trial court's findings so as to deny petitioner of meaningful appellate review.

Finally, the panel agreed with the district court that petitioner's ineffective assistance of counsel claim is procedurally defaulted because it is fundamentally different from the claim presented in state court such that the state courts had no meaningful opportunity to consider it.

Concurring in part and dissenting in part, Judge Thomas would hold that the state court unconstitutionally excluded mitigating evidence from consideration because it was not causally related to the crimes.

Chief Judge Kozinski dissented from the denial of rehearing en banc, joined by Judges Pregerson, Reinhardt, Thomas, McKeown, Wardlaw, W. Fletcher, Paez, Berzon, Murguia, Christen and Watford. Chief Judge Kozinski adopted the explanation in Judge Thomas' amended dissent that the majority's decision, to declare the record too ambiguous to interpret, contravenes Supreme Court authority and undermines Circuit law. Chief Judge Kozinski pointed out that the court must "suture [a] fissure in our circuit law," regarding the standard of review of a state court's application of the causal nexus test.

COUNSEL

Jon M. Sands, Federal Public Defender, Michael L. Burke (argued), Assistant Federal Public Defender, Ngozi V. Ndulue, Assistant Federal Public Defender, Phoenix, Arizona, for Petitioner-Appellant.

Thomas C. Horne, Attorney General, Kent Cattani, Division Chief, Criminal Appeals/Capital Litigation Division, Jon G. Anderson (argued), Assistant Attorney General, Capital Litigation Section, Phoenix, Arizona, for Respondent-Appellee.

ORDER

Judge Thomas has voted to grant the petition for panel hearing and petition for rehearing en banc. Judges Fisher and Ikuta have voted to deny the petition for panel rehearing. Judge Ikuta has voted to deny the petition for rehearing en banc and Judge Fisher has so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

Appellant's petition for panel rehearing and rehearing en banc, filed April 12, 2013, is **denied.** Chief Judge Kozinski's dissent from denial of en banc rehearing is filed concurrently with this Order.

* * * * *

This opinion filed at 711 F.3d 1087 (9th Cir. 2013) is amended, and an Amended Opinion is filed concurrently with this Order.

No further petitions will be entertained.

Chief Judge KOZINSKI, with whom Judges PREGERSON, REINHARDT, THOMAS, MCKEOWN, WARDLAW, W. FLETCHER, PAEZ, BERZON, MURGUIA, CHRISTEN and WATFORD join, dissenting from the order denying the petition for rehearing en banc:

Just how obvious does a state court's constitutional error have to be when a man's life is on the line? According to the panel majority, indisputably obvious, which is "beyond a reasonable doubt" stood on its head. Judge Thomas's powerful dissent explains how the majority's decision to "throw up [its] hands and declare the record too ambiguous to definitively interpret one way or the other," Amended Dissent at 49 n.3, contravenes Supreme Court authority and undermines our circuit law. *See Tennard* v. *Dretke*, 542 U.S. 274 (2004); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Lopez* v. *Ryan*, 630 F.3d 1198 (9th Cir. 2011). No need to repeat his arguments; we adopt them, chapter and verse.

The issue will not go away. There are many more cases in the pipeline where state courts in our circuit applied a causal nexus test before affirming a sentence of death. We can't long continue down the path forged by the majority, which forces panels to choose between two materially different standards of review in causal nexus cases: the newly minted "clear indication"

standard and our traditional approach of scrutinizing the record and asking whether it "appears" that a constitutional violation occurred. *Styers* v. *Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008).

We must suture this fissure in our circuit law, and soon. Tragically for Robert Poyson, when we do so, it will come too late to save him. But come it will.

OPINION

FISHER, Circuit Judge:

Robert Allen Poyson was convicted of murder and sentenced to death in 1998. After pursuing direct review and seeking postconviction relief in state court, he filed a habeas petition in federal district court. The district court denied the petition, and Poyson appeals.

Poyson raises three claims on appeal, each of which has been certified by the district court pursuant to Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c): (1) the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence; (2) the Arizona courts failed to consider mitigating evidence of his history of substance abuse; and (3) his trial counsel provided ineffective assistance of counsel during the penalty phase of his trial by failing to investigate the possibility that he suffered from fetal alcohol spectrum disorder. We conclude the first two claims are without merit and the third is procedurally defaulted. Accordingly, we affirm.

The Arizona Supreme Court did not deny Poyson his right to individualized sentencing by applying an unconstitutional causal nexus screening test to

potentially mitigating evidence. Under our case law, we cannot hold that a state court employed an unconstitutional nexus test "[a]bsent a clear indication in the record that the state court applied the wrong standard." *Schad v. Ryan*, 671 F.3d 708, 724 (9th Cir. 2011) (per curiam). The record here shows that the Arizona Supreme Court considered the absence of a causal connection to the murders in evaluating Poyson's mitigating evidence, but it does not reveal whether the court applied a nexus test as an unconstitutional screening mechanism or as a permissible means of determining the weight or significance of mitigating evidence. *See Lopez v. Ryan*, 630 F.3d 1198, 1203–04 (9th Cir. 2011). We therefore must hold that the Arizona Supreme Court's decision was not "contrary to" Supreme Court precedent under 28 U.S.C. § 2254(d)(1). *See Schad*, 671 F.3d at 723–24.

We also deny habeas relief on Poyson's claim that the Arizona courts failed to consider his history of substance abuse as a nonstatutory mitigating factor. Poyson argues that the state courts unconstitutionally refused to *consider* mitigating evidence, a claim arising under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The state courts, however, did consider the evidence. They simply found it wanting as a matter of fact, finding that the evidence failed to prove a history of substance abuse. There was therefore no constitutional violation under *Lockett* and *Eddings*. Nor was there a constitutional violation under *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The state supreme court did not misconstrue the state trial court's findings, so it did not deprive Poyson of meaningful appellate review of his death sentence.

Finally, we agree with the district court that Poyson's ineffective assistance of counsel claim is procedurally defaulted because it is fundamentally different from the claim presented in state court. Although it is true that "new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not 'fundamentally alter the legal claim already considered by the state courts.'" *Beaty v. Stewart*, 303 F.3d 975, 989–90 (9th Cir. 2002) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)). Poyson's federal petition raises a theory of deficient performance – failure to investigate and present mitigating evidence of fetal alcohol spectrum disorder – that the state courts had no "meaningful opportunity to consider." *Vasquez*, 474 U.S. at 257. The claim is therefore procedurally defaulted.

I. BACKGROUND

A. The Crimes

Poyson was born in August 1976. The facts of his crimes, committed in 1996, were summarized as follows by the Arizona Supreme Court in *State v. Poyson*, 7 P.3d 79, 83 (Ariz. 2000).

Poyson met Leta Kagen, her 15 year-old son, Robert Delahunt, and Roland Wear in April 1996. Poyson was then 19 years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to 48 year-old Frank Anderson and his 14 year-old girlfriend, Kimberly Lane. They, too, needed a place to live, and Kagen invited them to stay at the trailer.

Anderson informed Poyson that he was eager to travel to Chicago, where he claimed to have organized crime connections. Because none of them had a way of getting to Chicago, Anderson, Poyson and Lane formulated a plan to kill Kagen, Delahunt and Wear in order to steal the latter's truck.

On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property, ostensibly for sex. There, Anderson commenced an attack on the boy by slitting his throat with a bread knife. Poyson heard Delahunt's screams and ran to the travel trailer. While Anderson held Delahunt down, Poyson bashed his head against the floor. Poyson also beat Delahunt's head with his fists, and pounded it with a rock. This, however, did not kill Delahunt, so Poyson took the bread knife and drove it through his ear. Although the blade penetrated Delahunt's skull and exited through his nose, the wound was not fatal. Poyson thereafter continued to slam Delahunt's head against the floor until Delahunt lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. In all, the attack lasted about 45 minutes.

After cleaning themselves up, Poyson and Anderson prepared to kill Kagen and Wear. They first located Wear's .22 caliber rifle. Unable to find ammunition, Poyson borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to rescue him. Poyson loaded the rifle and tested it for about five minutes to make sure it would function properly. He then stashed it near a shed. Later that evening, he cut the telephone line to the

trailer so that neither of the remaining victims could call for help.

After Kagen and Wear were asleep, Poyson and Anderson went into their bedroom. Poyson first shot Kagen in the head, killing her instantly. After quickly reloading the rifle, he shot Wear in the mouth, shattering Wear's upper right teeth. A struggle ensued, during which Poyson repeatedly clubbed Wear in the head with the rifle. The fracas eventually moved outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him to the ground. While the victim was lying there, Poyson twice kicked him in the head. He then picked up the cinder block and threw it several times at Wear's head. After Wear stopped moving, Poyson took his wallet and the keys to Wear's truck. To conceal the body, Poyson covered it with debris from the yard. Poyson, Anderson and Lane then took the truck and traveled to Illinois, where they were apprehended several days later.

B. Trial and Conviction

A grand jury indicted Poyson on three counts of first degree murder, one count of conspiracy to commit murder and one count of armed robbery. The jury convicted on all counts in March 1998, following a six-day trial.

C. Sentencing

1. *Mitigation Investigation*

Following the guilty verdicts, the state trial court approved funds to hire a mitigation specialist to assist in preparing for Poyson's sentencing. Counsel retained investigator Blair Abbott.

In a June 1998 memorandum, Abbott informed counsel that Poyson's mother, Ruth Garcia (Garcia), used drugs during the first trimester of her pregnancy and recommended that counsel investigate the possibility that Poyson suffered brain damage as a result. The memorandum advised counsel that "one of the significant issues should be the hard core drug abuse of both [of Poyson's] parents, preconception and in the first trimester of Ruth's pregnancy." Abbott wrote that "Ruth Garcia's heavy drug abuse in the pre pregnancy and early on in the pregnancy undoubtedly caused severe damage to her unborn child."

In September 1998, Abbott mailed trial counsel "Library & Internet research regarding drug & alcohol fetal cell damage; reflecting how these chemicals when taken in the first trimester [a]ffect subsequent intelligence, conduct, emotions, urges etc [sic] as the child grows into adulthood."

2. *Presentence Investigation Report*

The probation office prepared a presentence investigation report in July 1998. Poyson told the probation officer that he had a bad childhood because he was abused by a series of stepfathers, who subjected him to physical, mental and emotional abuse. Poyson also said he suffered from impulsive conduct disorder, which was diagnosed when he was 13. Poyson would not answer any questions on his substance abuse history or juvenile record.

3. *Presentencing Hearing*

In October 1998, the trial court held a one-day presentencing hearing. Poyson's trial counsel called three witnesses to present mitigating evidence: his

aunt, Laura Salas, his mother, Ruth Garcia, and the mitigation investigator, Blair Abbott. Counsel also introduced 56 exhibits. Poyson did not testify. The witnesses testified about Poyson's drug and alcohol abuse and the mental and physical abuse inflicted on Poyson by his stepfather, Guillermo Aguilar, and maternal grandmother, Mary Milner. They also testified that Poyson's stepfather, Sabas Garcia (Sabas), committed suicide in 1988, and that Sabas' death had a devastating effect on Poyson. They further testified that Garcia used drugs and alcohol during the first three months of her pregnancy with Poyson.

4. *Poyson's Sentencing Memorandum*

In early November 1998, Poyson filed a sentencing memorandum urging the court to find three statutory and 25 nonstatutory mitigating circumstances.[1] As relevant here, Poyson argued that his history of drug and alcohol abuse, troubled childhood and personality

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[1] At the time of Poyson's sentencing, Arizona law required the sentencing judge to impose a sentence of death if the court found one or more aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E) (1998). The law enumerated 10 aggravating circumstances, *see id.* § 13-703(F), and five statutory mitigating circumstances – including diminished capacity, duress, minor participation and the defendant's age, *see id.* § 13-703(G). The sentencing court also was required to consider any *nonstatutory* mitigating circumstances offered by the defendant – i.e., "any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." *Id.*

disorders constituted both statutory and nonstatutory mitigating circumstances.

Substance Abuse: Poyson argued that his substance abuse was a statutory mitigating circumstance because it impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law at the time of the murders. *See* Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998). In the alternative, he argued that, even if his substance abuse was not causally related to the murders, it constituted a nonstatutory mitigating circumstance. In support of these arguments, Poyson emphasized his biological parents' use of drugs and alcohol at the time of his conception, his mother's use of drugs and alcohol during pregnancy, an incident in which Poyson was involuntarily intoxicated at the age of three or four, Poyson's abuse of alcohol beginning at age 13 and Poyson's five-month placement at WestCare, a residential treatment facility, for substance abuse treatment in 1992, when he was 15. Poyson also pointed to evidence that he used PCP two days before the murders, used alcohol the night before the murders, used marijuana the day of the murders and had suffered a PCP flashback during Delahunt's murder.

Troubled Childhood: Poyson argued that his troubled childhood was a statutory mitigating circumstance because it affected his behavior at the time of the murders. In the alternative, he argued that his troubled childhood constituted a nonstatutory mitigating circumstance. Poyson emphasized his mother's use of drugs and alcohol during the first trimester of pregnancy. He argued that alcohol and

drug use during pregnancy can cause brain damage and birth defects and lead a child to engage in delinquent and criminal behavior. He also attached to the sentencing memorandum several scientific articles on fetal alcohol syndrome. The memorandum pointed out that Poyson never knew his biological father, lacked a stable home life, was physically and mentally abused by several adults (including Aguilar and Milner), was devastated by Sabas' suicide and was sexually abused and sodomized at a young age.[2] Poyson emphasized that his delinquent behavior and substance abuse began shortly after the death of Sabas and the sexual assault.

Mental Health Issues: The sentencing memorandum argued that Poyson suffered from several personality disorders, constituting a nonstatutory mitigating circumstance. The memorandum pointed to a 1990 psychiatric evaluation by Dr. Bruce Guernsey. According to the sentencing memorandum, Guernsey diagnosed Poyson with severe "conduct disorder," reported that Poyson exhibited symptoms of antisocial behavior, "manic depression" or "impulsive conduct disorder" and recommended that Poyson be prescribed medication to control his behavior. Poyson also pointed to a 1990 Juvenile Predisposition Investigation by Nolan Barnum. Barnum too recommended that Poyson be prescribed medication to control his behavior. A 1993 psychological evaluation performed by Jack Cordon and Ronald Jacques from the State Youth Services Center in St. Anthony, Idaho, diagnosed Poyson with "mild mood disturbance." Dr. Celia A.

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[2] Poyson presented evidence that he was sexually assaulted by a neighbor on one occasion shortly after Sabas' death.

Drake, who Poyson's counsel retained to perform a forensic evaluation of Poyson, diagnosed "Adjustment Disorder with depressive mood, mild intensity," and "Anti-social Personality Disorder." Dr. Drake found Poyson's overall intellectual functioning to be "in the low average range."

5. *Sentencing Hearing and Imposition of Sentence*

The trial court held a sentencing hearing and imposed sentence in late November 1998.

The court found that the state had proved, beyond a reasonable doubt, three aggravating circumstances for the murders of Delahunt and Wear: the murders were committed in expectation of pecuniary gain, the murders were especially cruel and multiple homicides committed during the same offense. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(5), (6), (8) (1998). The court found two aggravating circumstances applicable to Kagen's murder: pecuniary gain and multiple homicides. *See id.* § 13-703(F)(5), (8).

The court found that Poyson failed to prove any statutory mitigating factors. Poyson's difficult childhood and mental health issues were not statutory mitigating factors under § 13-703(G)(1) because they did not significantly impair Poyson's capacity to appreciate the wrongfulness of his conduct or to

conform his conduct to the requirements of law.[3] The court explained:

> There has certainly been evidence that the defendant had gone through a turbulent life, perhaps had mental-health issues that would distinguish him from the typical person on the street.
>
> Listening to his description of how these murders were committed, based upon a description of somewhat a methodical carrying out of a plan, the Court sees absolutely nothing on the record, in this case, to suggest the applicability of this mitigating circumstance.

Turning to nonstatutory mitigating factors, the court first explained the three-step analysis it used to evaluate each nonstatutory mitigating circumstance proffered by Poyson: "[1] to analyze whether the defense has shown this fact by a preponderance of evidence, and then if they have, [2] to determine whether I would assign that any weight as a mitigating factor, and of course, for any that . . . pass both of those two tests, [3] I have to weigh them all along with the other factors in the final [sentencing] determination in this case."

Mental Health Issues: The court rejected Poyson's mental health issues as a nonstatutory mitigating

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[3] *See* Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998) ("Mitigating circumstances [include] [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.").

factor at the second step in the analysis. The court found that Poyson had proven that he suffered from personality disorders, but gave them no weight because they were not causally related to the murders:

> [T]he defendant had some mental health and psychological issues. I think . . . the defense has established that there were certain . . . personality disorders that the defendant, in fact, may have been suffering from.
>
> The Court, however, does not find that they rise to the level of being a mitigating factor because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses.[4]

Troubled Childhood: The court similarly rejected Poyson's difficult childhood as a nonstatutory mitigating factor. At step one, the court found that the "defense has shown that defendant suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected

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[4] The court rejected evidence of Poyson's low IQ for similar reasons. At the first step in the analysis, the court found that "there is certain evidence in this case that would support the proposition that the defendant's mental capacity may be diminished, at least compared to the norm in the population, and that his I.Q. may be low, at least compared to the norm in the population." The court, however, gave this circumstance no mitigating weight in light of planning and sophistication that went into the crimes – "certain prep[ar]atory steps that were taken – admittedly, not overly-sophisticated, but attempts were made to do certain things, to disable warning systems to enable these murders to be committed and to get away with the loot that was the purpose of the murders; specifically, the vehicle."

to certain levels of mental abuse." At step two, however, the court gave these circumstances no mitigating weight because they were not causally connected to the murders: "The Court finds absolutely nothing in this case to suggest that his latter conduct was a result of his childhood."[5]

Substance Abuse: Finally, the court rejected Poyson's history of substance abuse at both steps one and two in the analysis: Poyson failed to establish a significant history of drug or alcohol abuse and, even if he could do so, the court would have given the evidence no weight because he failed to establish a causal connection between the substance abuse and the crimes. The court said:

> The argument is made that the defendant was subjected to alcohol abuse and drug abuse. Other than very vague allegations that he has used alcohol in the past or has used drugs in the past, other than a fairly vague assertion that he was subject to some sort of effect of drugs and/or alcohol at the time, that these offenses were committed, I really find very little to support the allegation that the defendant has a significant alcohol and/or drug abuse, and again, going back to the methodical steps that were taken to murder three people to get a vehicle to get out of

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[5] The court also found that "the defense has established, by a preponderance of the evidence, that the defendant lost a parent figure and was subjected to sexual abuse at a relatively young age." The court rejected this factor at step two, however, because it was "not convinced that there is any connection between that abuse, that loss, and his subsequent criminal behavior."

> Golden Valley, it's very difficult for me to conclude that the defendant's ability to engage in goal-oriented behavior was, in any way, impaired at the time of the commission of these offenses.

The court found only one nonstatutory mitigation factor – Poyson's cooperation with law enforcement. The court concluded that this one mitigating factor was insufficiently substantial to call for leniency and imposed a sentence of death.

6. *Arizona Supreme Court Decision*

The Arizona Supreme Court affirmed Poyson's conviction and sentence on direct appeal. *See State v. Poyson*, 7 P.3d 79 (Ariz. 2000). As required by Arizona law, the court "independently review[ed] the trial court's findings of aggravation and mitigation and the propriety of the death sentence." Ariz. Rev. Stat. Ann. § 13-703.01(A) (2000).

The court agreed with the trial court that Poyson's drug use was not a statutory mitigating circumstance under § 13-703(G)(1). *See Poyson*, 7 P.3d at 88–89. In the court's view, there was "scant evidence that he was actually intoxicated on the day of the murders." *Id.* at 88. "Although Poyson purportedly used both marijuana and PCP 'on an as available basis' in days preceding these crimes, the only substance he apparently used on the date in question was marijuana," and Poyson "reported smoking the marijuana at least six hours before killing Delahunt and eleven hours before the murders of Kagen and Wear." *Id.* The evidence that Poyson experienced a PCP flashback during the murder of Delahunt was not credible, and even if the

flashback occurred, it lasted only a "few moments." *Id.* at 88–89. Poyson was "not under the influence of PCP at any other time." *Id.* at 89. Poyson's claims of substantial impairment were also belied by his deliberate actions, including concocting a ruse to obtain bullets from a neighbor, testing the rifle to make sure it would work properly when needed, cutting the telephone line and concealing the crimes. *See id.*

Substance Abuse: The court also agreed with the trial court that Poyson's substance abuse, mental health and abusive childhood were not nonstatutory mitigating circumstances. As to substance abuse, the court agreed with the trial court that Poyson had failed at step one because the evidence did not show a history of drug or alcohol abuse:

> The trial judge refused to accord any weight to the defendant's substance abuse as a nonstatutory mitigating circumstance. It characterized the defendant's claims that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders as little more than "vague allegations." As discussed above, we agree.

Id. at 90.

Mental Health Issues: With respect to mental health issues, the court agreed with the trial court that Poyson's personality disorders, although proven at step one, were entitled to no weight at step two because they were not causally connected to the murders:

> The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake

> diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning within the family setting" to which the defendant could look for guidance. However, we find no indication in the record that "the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required." *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *see also* [*State v. Medina*, 193 Ariz. 504, 517, 975 P.2d 94, 107 (1999)] (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). We therefore accord this factor no mitigating weight.

Id. at 90–91.

Troubled Childhood: The court also agreed with the trial court's assessment of Poyson's troubled childhood. The court found that Poyson established an abusive childhood at step one, but gave this consideration no weight at step two because of the absence of a causal nexus:

> Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor. Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to

> control his conduct. Thus, the evidence is without mitigating value.

Id. at 91.

The court found three aggravating factors (pecuniary gain, murder committed in an especially cruel manner and multiple homicides), one statutory mitigating factor (Poyson's age) and three nonstatutory mitigating factors (cooperation with law enforcement, potential for rehabilitation and family support). *See id.* at 90–91.[6] The court concluded that the mitigating evidence was not sufficiently substantial to call for leniency and affirmed the sentence of death. *See id.* at 91–92; Ariz. Rev. Stat. Ann. § 13-703.1(B) (2000).

D. State Postconviction Review

The Arizona Superior Court denied Poyson's petition for postconviction relief in 2003. The court provided a reasoned decision on Poyson's claim of penalty phase ineffective assistance of counsel (his third claim in this appeal) but not on Poyson's claims that the Arizona courts failed to consider relevant mitigating evidence (his first and second claims on appeal). In 2004, the Arizona Supreme Court summarily denied Poyson's petition for review.

E. Federal District Court Proceedings

Poyson filed a federal habeas petition in 2004. In 2010, the district court denied the petition. The court rejected on the merits Poyson's claims that the Arizona

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[6] The Arizona Supreme Court thus found three more mitigating factors than the trial court found. The appellate court nonetheless agreed with the trial court that a death sentence was warranted.

courts failed to consider mitigating evidence. The court concluded that Poyson's penalty phase ineffective assistance of counsel claim was procedurally defaulted because it was "fundamentally different than [the claim] presented in state court." Poyson timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We review de novo the district court's denial of Poyson's petition for habeas corpus, and we review the district court's findings of fact for clear error. *See Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007). Dismissals based on procedural default are reviewed de novo. *See Robinson v. Schriro*, 595 F.3d 1086, 1099 (9th Cir. 2010). We address Poyson's three claims in turn.

III. DISCUSSION

A. Causal Nexus Test

Poyson argues that the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence of his mental health issues, traumatic childhood and substance abuse history, in violation of his Eighth and Fourteenth Amendment rights to an individualized sentencing. He contends that the state courts improperly refused to consider this evidence in mitigation because he failed to establish a causal connection between the evidence and the murders. He argues that the state courts' actions violate his constitutional rights as recognized in *Tennard v. Dretke*, 542 U.S. 274, 283–87 (2004), *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam), and several earlier decisions. These decisions hold that requiring a defendant to prove a nexus between mitigating

evidence and the crime is "a test we never countenanced and now have unequivocally rejected." *Smith*, 543 U.S. at 45.

Because Poyson filed his federal habeas petition after April 24, 1996, he must not only prove a violation of these rights but also satisfy the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Fenenbock v. Dir. of Corr. for Cal.*, 681 F.3d 968, 973 (9th Cir. 2012).

Under AEDPA, we may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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). We review the last reasoned state court decision addressing the claim, which for Poyson's causal nexus claim is the Arizona Supreme Court's decision affirming Poyson's death sentence on direct appeal. *See Crittenden v. Ayers*, 624 F.3d 943, 950 (9th Cir. 2010). Poyson relies on AEDPA's "contrary to" prong, arguing that the Arizona Supreme Court's decision in *State v. Poyson*, 7 P.3d 79 (Ariz. 2000), was contrary to *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

1. *Exhaustion*

As a threshold matter, we agree with Poyson that he has fully exhausted this claim. The state argues

that in state court Poyson raised a causal nexus claim with respect to only mental health issues and his troubled childhood, not his history of substance abuse. We disagree. Having reviewed the record, we conclude that Poyson exhausted the claim with respect to all three categories of mitigating evidence. *See Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004) ("A petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts.").

2. *Whether the Arizona Supreme Court's Decision Was Contrary to Clearly Established Federal Law*

Lockett, *Eddings* and *Penry* held that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." *Penry*, 492 U.S. at 318. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." *Id.* at 319. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* "[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Id.* (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (internal quotation marks omitted).

Under these decisions, a state court may not treat mitigating evidence of a defendant's background or character as "irrelevant or nonmitigating as a matter of law" merely because it lacks a causal connection to

the crime. *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir. 2012) (per curiam). The sentencer may, however, consider "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011). "The . . . use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence." *Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2011) (per curiam). As the Court explained in *Eddings*:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings, 455 U.S. at 113–15.

Consistent with these principles, we have granted habeas relief when state courts have applied a causal nexus test as a screening mechanism to deem evidence irrelevant or nonmitigating as a matter of law. In *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008) (per curiam), we granted relief where the state court held that a defendant's post-traumatic stress disorder could not constitute mitigation unless the defendant could connect the condition to the crime. *See id.* at 1035. In *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010), we granted relief where the state court held that, "[w]ithout a showing of some impairment at the time of

the offense, drug use cannot be a mitigating circumstance of any kind." *Id.* at 1270–71 (alteration in original) (quoting *State v. Williams*, 904 P.2d 437, 453 (Ariz. 1995)) (internal quotation marks omitted).

In contrast, we have refused to find a constitutional violation when the state court employed a causal nexus test as a permissible weighing mechanism. *See Towery*, 673 F.3d at 945–46. We have also denied relief when the record contains no indication that the state court employed a causal nexus test at all. *See Schad*, 671 F.3d at 724 (denying relief where "there is no indication that the state courts applied a nexus test, either as a method of assessing the weight of the mitigating evidence, or as an unconstitutional screening mechanism to prevent consideration of any evidence"); *Lopez*, 630 F.3d at 1203–04 (denying relief where the state courts made no mention of a causal nexus test, because "there is no reason to infer unconstitutional reasoning from judicial silence").

Here, the record shows that the Arizona Supreme Court applied a causal nexus test to Poyson's evidence of mental health issues and a difficult childhood, *see Poyson*, 7 P.3d at 90–91, but does not reveal whether the court considered the absence of a causal nexus as a permissible weighing mechanism, as in *Towery*, or as an unconstitutional screening mechanism, as in *Styers* and *Williams*. This ambiguity precludes us from granting habeas relief. We held in *Schad* that, "[a]bsent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Eddings*'s constitutional mandates." 671 F.3d at 724. That principle governs here: we cannot assume the state court applied the wrong standard.

The Arizona Supreme Court's decision therefore was not contrary to clearly established federal law under § 2254(d)(1).

We reach the same conclusion with respect to the Arizona Supreme Court's evaluation of Poyson's evidence of a history of substance abuse. The state court rejected this evidence at step one in its analysis, finding as a matter of fact that Poyson had failed to establish a significant history of substance abuse by a preponderance of the evidence. The record does not indicate that the court considered this evidence at step two, or that, if it did so, it employed an impermissible causal nexus test in doing so. *See Poyson*, 7 P.3d at 90. The court's treatment of Poyson's substance abuse evidence thus was likewise not contrary to *Lockett*, *Eddings* and *Penry*.

We recognize the possibility that the Arizona Supreme Court applied an unconstitutional causal nexus test. The record, however, contains no clear indication that the court did so. We may not presume a constitutional violation from an ambiguous record. We therefore hold that the district court properly denied habeas relief on Poyson's causal nexus claim. *See Schad*, 671 F.3d at 724.

The dissent contends that *Schad*'s presumption that state courts follow constitutional requirements should not apply here for six reasons. First, the dissent argues that we should find error in Poyson's case based on the Arizona Supreme Court's use of an unconstitutional causal nexus test in other cases at the time of Poyson's sentencing. Dissent 43. This argument might be persuasive if the Arizona courts *consistently* applied an unconstitutional causal nexus test during the relevant

period. That is not the case, however. As we recognized in *Lopez*,

> Our review of the case law confirms Arizona's unsettled past with respect to this issue. Some cases decided prior to *Tennard* applied a causal nexus requirement in an impermissible manner. Other cases, however, properly looked to causal nexus only as a factor in determining the weight or significance of mitigating evidence.

630 F.3d at 1203–04 (footnote omitted); *see also Towery*, 673 F.3d at 946 (also recognizing that the Arizona Supreme Court's decisions have been inconsistent on this question). Under these circumstances, the most we can say is that Arizona's troublesome history *weakens* the presumption that the Arizona Supreme Court followed the law in Poyson's case; it does not flip the presumption altogether.[7]

Second, the dissent argues that the presumption that state courts follow constitutional mandates applies only to a silent record and not to the interpretation of a state court's language. Dissent 47. This argument overlooks the Supreme Court's decision in *Woodford v. Visciotti*, 537 U.S. 19 (2002). There, the state court applied an arguably erroneous test for determining

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[7] Under circuit precedent, moreover, our focus must be on the record in *this* case. *See Lopez*, 630 F.3d at 1204 ("In light of this backdrop, which highlights a range of treatment of the nexus issue, there is no reason to infer unconstitutional reasoning from judicial silence. Rather, we must look to what the record actually says."); *Towery*, 673 F.3d at 946. We reject the suggestion that because other Arizona cases may have involved causal nexus error we should presume that this case did as well.

prejudice under *Strickland v. Washington*, 466 U.S. 468 (1984). Some language in the state court's decision cited the test correctly, whereas other language misstated the test. *See Visciotti*, 537 U.S. at 22–24. We held that the state court had applied an erroneous test, but the Supreme Court reversed, holding that our "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Id.* at 24. After *Visciotti*, therefore, we must consider the presumption that state courts follow the law not only when we draw inferences from the court's silence but also when, as here, we construe a state court's ambiguous language.

Third, quoting Justice O'Connor's concurrence in *Eddings*, the dissent argues that "the qualitatively different nature of a death sentence requires reviewing courts 'to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.'" Dissent 47 (quoting *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring)). A majority of the Court, however, has never adopted Justice O'Connor's suggestion that ambiguity alone requires habeas relief. Unlike *Eddings*, moreover, this case is governed by AEDPA, and AEDPA does not allow us to presume from an ambiguous record that the state court applied an unconstitutional standard. To the contrary, such a "readiness to attribute error" would be flatly "incompatible with § 2254(d)'s highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Visciotti*, 537 U.S. at 24 (citation and internal quotation marks omitted); *cf. Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007) (holding that alleged ambiguity in the state court's language was

insufficient "to overcome the presumption that the state court knew and followed the law").

Fourth, according to the dissent, our holding imposes a heightened standard of proof on the petitioner and means that "a habeas petitioner can secure relief only by conclusively establishing the absence of *any* ambiguity in the state court record." Dissent 49. Not so. The problem in this case is not the existence of *some* ambiguity in the record; it is that the record is *insolubly* ambiguous, *cf. Doyle v. Ohio*, 426 U.S. 610, 617 (1976), meaning that the record is inconclusive as to whether the Arizona Supreme Court applied a nexus test as a permissible weighing mechanism or as an impermissible screening mechanism. As we have noted elsewhere, a party who bears the burden of proving a fact by a preponderance of the evidence cannot carry that burden by relying on an inconclusive record. *See Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012) (en banc) (explaining that "the burden of persuasion . . . determines 'which party loses if the evidence is closely balanced'" (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005))). Our opinion merely adheres to that principle. Because Poyson bears the burden of proof, by a preponderance of the evidence, he cannot prevail on the record before us. *See Schad*, 671 F.3d at 724 ("Absent a clear indication in the record that the state court applied the wrong standard, we . . . must hold there was no constitutional error in the [state] courts' consideration of the mitigating evidence."). We have not imposed a heightened burden of proof.

Fifth, the dissent argues that this case is "substantially indistinguishable" from *Styers*, where we

granted habeas relief. Dissent 50. In *Styers*, the Arizona Supreme Court rejected evidence that the defendant suffered from post-traumatic stress disorder as a result of combat service in Vietnam, stating: "This could also, in an appropriate case, constitute mitigation. . . . However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder." *Styers*, 547 F.3d at 1035 (quoting *State v. Styers*, 865 P.2d 765, 777 (Ariz. 1993)). The state court's language in *Styers* plainly implied that the evidence *could* be mitigating only if it was causally connected to the crime – i.e., that the evidence *could not* be mitigating absent a causal connection to the crime. The record in *Styers*, therefore, contained a clear indication that the state court applied an unconstitutional causal nexus test – it was not insolubly ambiguous. *See Eddings*, 455 U.S. at 114 (holding that "the sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence"); *Towery*, 673 F.3d at 946 (explaining that the Eighth Amendment prohibits "treating the evidence as irrelevant or nonmitigating as a matter of law"). The record here contains no comparable indication. The court did not say that Poyson's evidence *could not* be mitigating; it said only that the evidence *was not* mitigating, a conclusion that could as easily reflect permissible weighing as impermissible screening.

Finally, the dissent argues that the state court violated the Eighth Amendment by discarding Poyson's evidence "before the critical stage of its analysis – the final balancing of mitigating and aggravating circumstances that determined his sentence." Dissent

54. The state court, however, had discretion to accord Poyson's evidence no weight. *See Eddings*, 455 U.S. at 114–15; *Schad*, 671 F.3d at 723. Assuming the state court permissibly accorded the evidence no weight, we do not see how the court could have committed constitutional error by excluding the evidence from the ultimate sentencing determination. Had the state court afforded the evidence some weight, but declined to consider it in the final sentencing analysis, this would be a different case.

At bottom, the ambiguous record in this case is no different from those in *Schad* and *Lopez*, two cases in which we declined to grant habeas relief. In both of those cases, we denied relief notwithstanding Arizona's troublesome history of applying an unconstitutional causal nexus test – and notwithstanding the existence of an ambiguous record. Here too, in the absence of a clear indication in the record that the state court applied an unconstitutional standard, we see no alternative but to affirm.

B. Failure to Consider Substance Abuse

At sentencing, Poyson presented evidence of a history of drug and alcohol abuse, but the state trial court and the state supreme court declined to treat the evidence as a nonstatutory mitigating factor. The trial court found that Poyson had presented only "very vague allegations that he has used alcohol . . . or . . . drugs in the past," and found "very little to support the allegation that the defendant has a significant alcohol and/or drug abuse" history. The supreme court agreed that Poyson's claims to have "used drugs or alcohol in the past" were "little more than 'vague allegations.'" *Poyson*, 7 P.3d at 90.

Poyson contends the state courts' conclusions that he provided only "vague allegations" of substance abuse were unreasonable determinations of the facts under 28 U.S.C. § 2254(d)(2) and violated his constitutional rights under *Lockett*, 438 U.S. at 605, *Eddings*, 455 U.S. at 112, and *Parker v. Dugger*, 498 U.S. 308, 321 (1991). We disagree.

Poyson's claim – that "[b]ecause his death sentence is based upon [an] unreasonable determination of facts, [he] is entitled to habeas relief" – misunderstands the law. Even assuming that the state courts' determination that Poyson provided only "vague allegations" of substance abuse was an unreasonable determination of the facts under § 2254(d)(2), an issue we need not reach, Poyson's claim fails because he cannot demonstrate that his constitutional rights were violated. *See Wilson v. Corcoran*, 131 S. Ct. 13, 17 (2010) (per curiam) (holding that while § 2254(d)(2) relieves a federal court of AEDPA deference when the state court makes an unreasonable determination of facts, it "does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law"); *see also Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc) (holding that AEDPA does not "require any particular methodology for ordering the § 2254(d) and § 2254(a) determination[s]"). An unreasonable determination of the facts would not, standing alone, amount to a constitutional violation under *Lockett*, *Eddings* or *Parker*.

Lockett invalidated an Ohio death penalty statute that precluded the sentencer from considering aspects of the defendant's character or record as a mitigating

factor. *See* 438 U.S. at 604. *Eddings* held that a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See* 455 U.S. at 113–15. Here, the state courts considered Poyson's evidence of substance abuse, but found it wanting as a matter of fact and that Poyson failed to prove a history of substance abuse. Thus, there was no constitutional violation under *Lockett* and *Eddings*.

Nor has Poyson shown a constitutional violation under *Parker*. There, the state supreme court reweighed aggravating and mitigating circumstances before affirming a death sentence. *See Parker*, 498 U.S. at 321–22. The court's reweighing, however, was premised on its erroneous assumption that the state trial court had found that there were no mitigating circumstances. *See id.* The Supreme Court held that the state supreme court's action deprived the defendant of "meaningful appellate review," and thus that the sentencing violated the defendant's right against "the arbitrary or irrational imposition of the death penalty." *Id.* at 321. In Poyson's view, *Parker* stands for the broad proposition that, "[w]hen a state court's imposition of the death penalty is based not on the characteristics of the accused and the offense but instead on a *misperception of the record*, the defendant is not being afforded the consideration that the Constitution requires." In *Parker*, however, the state supreme court had misconstrued the state trial court's findings, something that did not occur here. *Parker* does not hold that a state court's erroneous factual finding in assessing mitigation evidence necessarily amounts to a constitutional violation. Rather, it suggests the opposite:

> This is not simply an error in assessing the mitigating evidence. Had the Florida Supreme Court conducted its own examination of the trial and sentencing hearing records and concluded that there were no mitigating circumstances, a different question would be presented. Similarly, if the trial judge had found no mitigating circumstances and the Florida Supreme Court had relied on that finding, our review would be very different.

Id. at 322.

In sum, we hold that Poyson is not entitled to habeas relief because he has not shown a constitutional violation under *Lockett*, *Eddings* or *Parker*. Because Poyson has raised arguments under only *Lockett*, *Eddings* and *Parker*, we need not decide whether, or under what circumstances, a state court's erroneous factfinding in assessing mitigating evidence can itself rise to the level of a constitutional violation.

C. Penalty Phase Ineffective Assistance of Counsel

In his federal habeas petition, Poyson argued that he received ineffective assistance of counsel during the penalty phase of his trial because his trial counsel failed to investigate the possibility that he suffered from fetal alcohol spectrum disorder (FASD). The district court ruled that Poyson failed to present this claim to the state courts, and hence that the claim was procedurally defaulted. Poyson challenges that ruling on appeal. We review de novo. *See Robinson*, 595 F.3d at 1099.

A state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. *See Picard v. Connor*, 404 U.S. 270, 275 (1971); *Weaver v. Thompson*, 197 F.3d 359, 363–64 (9th Cir. 1999); 28 U.S.C. § 2254(b)(1)(A). This rule "reflects a policy of federal-state comity, an accommodation of our federal system designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard*, 404 U.S. at 275 (citations and internal quotation marks omitted). "A petitioner can satisfy the exhaustion requirement by providing the highest state court with a fair opportunity to consider each issue before presenting it to the federal court." *Weaver*, 197 F.3d at 364.

"[A] petitioner may provide further facts to support a claim in federal district court, so long as those facts do not 'fundamentally alter the legal claim already considered by the state courts.'" *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)).[8] "[T]his rule allows a petitioner who presented a particular [ineffective assistance of counsel] claim, for example that counsel was ineffective in presenting humanizing testimony at sentencing, to develop additional facts supporting that particular claim." *Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th Cir. 2005) (citing *Weaver*, 197 F.3d at 364). "This does not mean, however, that a petitioner who presented any ineffective assistance of counsel claim

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[8] As the Supreme Court has recently clarified, these factual allegations must be based on the "record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

below can later add unrelated alleged instances of counsel's ineffectiveness to his claim." *Id.* (citing *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc)).

1. *State Proceedings*

In his state habeas petition, Poyson raised two ineffective assistance of counsel claims relevant here. In the first claim, Poyson alleged that trial counsel "was ineffective because he failed to request the appointment of experts in the field of mental health early in the case." He alleged that the investigation for both phases of the trial should have begun "immediately" upon counsel's appointment, including "the immediate appointment of experts for both parts of the trial." Counsel's failure "to immediately secure the appointment of mental health experts . . . prejudiced" him in two ways. First, it precluded him from presenting a defense of "diminished capacity" with respect to the Delahunt murder during the guilt phase of the trial. Second, "the failure of counsel to immediately pursue mitigation caused the loss of mitigating information" that could have been presented at sentencing. Poyson presented a report by a neuropsychologist retained during the state habeas proceedings, Robert Briggs, Ph.D. According to Poyson, Briggs' report showed that Poyson "was brain-damaged" at the time of the murders, but had since "recovered, due to his long stay first in jail, then on condemned row, without chemical or physical insult to his brain." In Poyson's view, "the report leaves no doubt that neurophyschological testing shows that he was impaired at the time of the crime." This mitigating evidence had been "lost forever."

In the state petition's second claim, Poyson alleged that trial counsel failed to properly present mitigation and psychological evidence because counsel "did nothing to show the trial court how [his] abusive childhood caused, or directly related to, [his] conduct during the murders." He alleged that trial counsel were deficient because they were "required to make some attempt to correlate Mr. Poyson's physically and psychologically abusive background with his behavior," because "a connection between the two would be much more powerful in mitigation than the abuse standing alone."

2. *Federal Petition*

Poyson's federal petition presented a substantially different claim – counsel's failure to investigate Poyson's possible fetal alcohol spectrum disorder. Poyson alleged that trial counsel were ineffective because they "failed to make any effort to investigate and develop" evidence that Poyson suffered from FASD. He alleged that defense counsel "failed to investigate the obvious possibility that [he] suffered from FASD," made "no effort" to "pursue this fertile area of mitigation" and "ignored obvious evidence that [he] was exposed to drugs and alcohol *in utero*." Poyson further alleged that he was prejudiced by counsel's deficient performance:

> Their failure to adequately investigate and substantiate [evidence that Petitioner was exposed to drugs and alcohol *in utero*] profoundly prejudiced Petitioner. Adequate explanation during the pre-sentence hearing of the effect of FASD on Petitioner's brain would

likely have convinced the trial court that Petitioner had a lesser degree of culpability.

3. *Analysis*

The district court concluded that the claim raised in the federal petition had not been fairly presented to the Arizona courts:

> This Court concludes that the claim asserted in the instant amended petition is fundamentally different than that presented in state court. Petitioner's argument in support of [this claim] is based entirely on trial counsel's alleged failure to investigate and develop mitigation evidence based on Petitioner's *in utero* exposure to drugs and alcohol. This version of Petitioner's sentencing [ineffective assistance of counsel] claim has never been presented to the Arizona courts. While it is true that new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not "fundamentally alter the legal claim already considered by the state courts." *Beaty v. Stewart*, 303 F.3d 975, 989–90 ([9th Cir.] 2002) (citing *Vasquez*, 474 U.S. at 260). To do so deprives the state court of "a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez*, 474 U.S. at 257. Here, Petitioner is not simply proffering additional evidentiary support for a factual theory presented to the state court. Rather, he is alleging an entirely new theory of counsel ineffectiveness; one that has not previously been presented in state court.

We agree. Poyson presented not only new facts in support of a claim presented to the state court, but also a fundamentally new theory of counsel's ineffectiveness – one that the Arizona courts lacked "a meaningful opportunity to consider." *Vasquez*, 474 U.S. at 257. The district court therefore properly dismissed Poyson's penalty phase ineffective assistance of counsel claim as procedurally defaulted.

AFFIRMED.

THOMAS, Circuit Judge, concurring in part and dissenting in part:

The Arizona Supreme Court unconstitutionally excluded mitigating evidence from its consideration because the evidence was not causally related to the crimes. As a result, Poyson was deprived of his right to an individualized capital sentencing determination under the Eighth and Fourteenth Amendments. *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 317 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978). Because the majority's contrary conclusion cannot be reconciled with controlling Supreme Court precedent, I respectfully dissent.

I

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Lockett, 438 U.S. at 604 (alteration in original) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Accordingly, the Supreme Court has held since 1978 that a defendant facing a capital sentence must have the opportunity to present all relevant evidence in mitigation. *See id.* at 604–05. Merely admitting the evidence at the penalty phase does not satisfy the constitutional mandate. Rather, to ensure that a sentence of death reflects "a reasoned *moral* response to a defendant's background, character, and crime," *Penry I*, 492 U.S. at 328 (emphasis in original) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in the judgment)), the procedure for evaluating mitigating evidence must ensure that the sentencer is "able to consider *and give effect to* that evidence in imposing sentence," *id.* at 319 (emphasis added) (citing *Hitchcock v. Dugger*, 481 U.S. 393 (1987)); *see also Eddings*, 455 U.S. at 113–14. A sentencer "give[s] effect to" mitigating evidence by weighing all such admissible evidence against any aggravating circumstances proven by the state. *See, e.g.*, *Eddings*, 455 U.S. at 114–15; *Towery v. Ryan*, 673 F.3d 933, 944–45 (9th Cir. 2012). Only by viewing all sentencing evidence in context can a court render the individualized determination of moral culpability that the Constitution requires. *See Lambright v. Schriro*, 490 F.3d 1103, 1115 (9th Cir. 2007) (per curiam).

A court violates the constitutional command by categorically screening out certain mitigating evidence as a matter of law, before it may be weighed in combination with all other relevant sentencing evidence. *Tennard v. Dretke*, 542 U.S. 274, 284–86 (2004); *Eddings*, 455 U.S. at 113–14 (holding that the sentencer may not "refuse to consider, *as a matter of*

law, any relevant mitigating evidence") (emphasis in original). Relevance is the only prerequisite to full consideration of mitigating evidence. *See Tennard*, 542 U.S. at 284–85. While the state court may assign a relative weight to each item of admissible mitigating evidence, *Towery*, 673 F.3d at 944, it cannot impose any additional criteria, such as a causal nexus requirement, to screen such evidence from the sentencer's ultimate view of the defendant. A sentencing procedure that automatically assigns a "weight" of zero to any mitigating evidence lacking a causal nexus to the crime is indistinguishable from an analytical "screen" that excludes such evidence from consideration as a matter of law. Thus, regardless of what label it bears, such a "weighing" procedure plainly violates *Eddings*. Simply altering the label attached to an unconstitutional process does not magically render it constitutional.

At the time it decided this case, the Arizona Supreme Court applied a causal nexus test similar to the one the U.S. Supreme Court held unconstitutional in *Tennard*. *See*, *e.g.*, *State v. Sansing*, 77 P.3d 30, 37 (Ariz. 2003) ("Mere evidence of drug ingestion or intoxication, however, is insufficient to establish statutory mitigation. The defendant must also prove a causal nexus between his drug use and the offense.") (footnote omitted); *State v. Cañez*, 42 P.3d 564, 594 (Ariz. 2002) (en banc) (citation omitted) ("[A] causal nexus between the intoxication and the offense is required to establish non-statutory impairment mitigation"); *State v. Kayer*, 984 P.2d 31, 45 (Ariz. 1999) (en banc) ("A defendant must show a causal link between the alcohol abuse, substance abuse, or mental illness and the crime itself" for such evidence to be considered a mitigating factor); *State v. Clabourne*, 983

P.2d 748, 756 (Ariz. 1999) (en banc) (defendant's difficult childhood not a mitigating factor because "he has failed to link his family background to his murderous conduct or to otherwise show how it affected his behavior"); *State v. Djerf*, 959 P.2d 1274, 1289 (Ariz. 1998) (en banc) (defendant's experience of childhood abuse cannot be considered as a mitigating factor unless there is a causal connection between the abuse and the crime); *State v. Jones*, 937 P.2d 310, 322 (Ariz. 1997) (defendant did not establish impaired capacity as either a statutory or non-statutory mitigating factor because "no testimony establishes, either because of his use of drugs or because he was coming down off of the drugs, that defendant could not appreciate the wrongfulness of his conduct or conform his conduct to the law"); *State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989) (en banc) ("A difficult family background, in and of itself, is not a mitigating circumstance.").

Arizona's causal nexus test not only violated *Eddings*, but a long line of Supreme Court cases holding that all relevant mitigating evidence must be considered in capital sentencing. These cases establish that evidence of a defendant's background and character, including childhood trauma or mental health problems, is relevant in mitigation even if it does nothing to explain why the defendant committed the crime of conviction. *See Penry I*, 492 U.S. at 322–23; *Lockett*, 438 U.S. at 604. *See also Lambright*, 490 F.3d at 1115. Such evidence may reasonably diminish the defendant's moral culpability, *see Penry I*, 492 U.S. at 322–23, and "might cause a sentencer to determine that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant," *Lambright*, 490 F.3d at 1115.

Placing such evidence beyond the sentencer's effective reach is "simply unacceptable in any capital proceeding," *id.* (citing *Lockett*, 438 U.S. at 605), because it deprives the sentencer of the complete, multifaceted rendering of the defendant that must be the basis for capital sentencing.

Arizona's unconstitutional causal nexus test remained in force until *Tennard*, and it was in use when the Arizona Supreme Court considered Poyson's appeal.

II

In reviewing pre-*Tennard* Arizona capital cases, we do not presume that the Arizona Supreme Court unconstitutionally refused to consider relevant mitigating evidence in its re-weighing of aggravating and mitigating factors.[1] Rather, we examine the record to determine whether the Arizona Supreme Court applied an unconstitutional causal nexus test to screen mitigating evidence from consideration in a particular case. In *Schad v. Ryan*, we affirmed the denial of habeas relief when the record contained "no indication that the state courts applied a nexus test, either as a

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[1] Contrary to the majority's suggestion, Poyson does not ask us to *presume* that, because the Arizona courts frequently applied an unconstitutional causal nexus test at the time of his sentencing, the state court did so in his case. Rather, the Arizona courts' routine—if not perfectly consistent—practice of unconstitutional capital sentencing before *Tennard* provides probative evidence that the state court in Poyson's case committed the same error. To consider that evidence, which is plainly material to Poyson's claim, is not to apply an impermissible presumption that the state court erred here.

method of assessing the weight of the mitigating evidence, or as an unconstitutional screening mechanism . . . .” 671 F.3d 708, 724 (9th Cir. 2009) (per curiam). In doing so, *Schad* was consistent with the Supreme Court’s instruction that “[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.” *Bell v. Cone*, 543 U.S. 447, 455 (2005) (per curiam) (citations omitted).

Similarly, in *Towery*, we rejected the defendant’s claim that the Arizona Supreme Court unconstitutionally screened mitigating evidence that lacked a causal nexus to the crime. 673 F.3d at 944. We stressed that the state supreme court had articulated the proper standard for considering mitigating evidence. *See id.* In independently reviewing Towery’s mitigating evidence, the state court recognized that, “[h]aving considered family background during the penalty phase, the sentencer must give the evidence such weight that the sentence reflects a ‘reasoned moral response’ to the evidence.” *Id.* (alteration in original) (quoting *State v. Towery* (*Towery I*), 920 P.2d 290, 311 (Ariz. 1996)). In light of the whole record, this statement demonstrated the Arizona Supreme Court’s awareness that it must weigh *all* relevant mitigating evidence against the aggravating circumstances, even if it ultimately assigned relatively little weight to that mitigating evidence which lacked a strong causal link to the crime. *See id.* at 944–45.

In contrast, in *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008), we looked beyond the Arizona Supreme Court’s characterization of its own reasoning where the form of its analysis evidenced unconstitutional

screening. *See id.* at 1035 ("In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had 'considered all of the proffered mitigation'. . . However, its analysis prior to this statement indicates otherwise.") (internal citation omitted). Though the state court claimed that it "considered" all mitigating evidence, its analysis showed that it impermissibly screened Styers' mitigating mental health evidence solely because it lacked a causal nexus to the crime. Declining to elevate form over substance, we granted the writ upon concluding that "the Arizona Supreme court *appears* to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body." *Id.* (emphasis added) (citing *Smith v. Texas*, 543 U.S. 37, 45 (2004)).

Recently, in *Lopez v. Ryan*, 630 F.3d 1198 (9th Cir. 2011), we declined to presume from Arizona case law alone that "a tacit causation rule underpinned the state court's decision" in the case at hand. *Id*. at 1203. Rather than "infer[ring] unconstitutional reasoning from judicial silence," *Lopez* instructs that we should "look to what the record actually says." *Id.* at 1204 (citing *Schad*, 606 F.3d at 1046–47).

The import of all these cases is that we should not presume any constitutional error from a silent record, nor should we accept without further examination a state court's characterizations of its own reasoning. Rather, we should look to the substance of the record itself to determine whether the state court unconstitutionally excluded relevant mitigating evidence from consideration at sentencing.

Though it insists otherwise, the majority treats the statement in *Schad* that relief should be denied "[a]bsent a clear indication in the record that the state court applied the wrong standard" to create a new, more stringent test for determining whether a state court applied an unconstitutional causal nexus analysis. 671 F.3d at 724. The majority then applies this "test" to resolve purported ambiguities in the record in the state's favor.

However, in stating that we should identify "a clear indication in the record" that the state court violated *Tennard* before granting habeas relief, the *Schad* panel was merely explaining *Bell*'s rule against presuming error from a silent record. No Supreme Court case imposes a "clear indication" test, nor does any case impose a rule that we must resolve ambiguities against the petitioner. To the contrary, as Justice O'Connor wrote in her *Eddings* concurrence, the qualitatively different nature of a death sentence requires reviewing courts "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." 455 U.S. at 119 (O'Connor, J., concurring). In short, if there is any legitimate reason to believe that a court has excluded mitigating evidence from consideration, we should grant habeas relief so that a proper weighing of aggravating and mitigating factors can occur. The appropriate approach, taken in our more recent cases, is simply to evaluate "what the record actually says." *Lopez*, 630 F.3d at 1204 (citing *Schad*, 606 F.3d at 1046–47).[2]

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[2] *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), is not to the contrary. There, the Supreme Court simply rejected our reading of the state court's opinion; it did not instruct us to deny

Moreover, because the *Schad* panel found "*no* indication that the state courts applied a nexus test, either as a method of assessing the weight of the mitigating evidence, or as an unconstitutional screening mechanism . . . ," 671 F.3d at 724 (emphasis added), the case simply does not address what a "clear indication" of unconstitutional causal nexus screening looks like, nor the relationship between the purported "clear indication" requirement and the statutory standards governing habeas review. Thus, even assuming that a "clear indication" of unconstitutional causal nexus screening is in fact an independent prerequisite to granting habeas relief, *Schad* entirely fails to support the majority's proposition that a "clear indication" can exist only in the absence of any ambiguity in the state court's analysis. The notion that a habeas petitioner can secure relief only by

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habeas relief whenever the state court fails to provide a "clear indication" of constitutional error. *See id.* at 24. While acknowledging that certain language in the state court's opinion could be read as misstating the *Strickland* standard, the *Woodford* Court faulted us for rejecting other, stronger evidence in the opinion indicating that the state court applied the correct standard. *See id.* If anything, *Woodford* supports a close reading of state court decisions on habeas review to determine whether they contravene or unreasonably apply federal law. *See id.* at 23–24. As *Woodford* itself demonstrates, this approach does not offend "the presumption that state courts know and follow the law." *Id.* at 24 (citations omitted). Moreover, to the extent the majority finds the Arizona Supreme Court's opinion in this case ambiguous on the causal nexus issue, *Woodford* is of little help, as it simply does not address the analysis of an ambiguous state court decision on habeas review. *See id.* at 23 (asserting that the state court opinion at issue "painstakingly describes the [correct] *Strickland* standard").

conclusively establishing the absence of *any* ambiguity in the state court record is patently inconsistent with the preponderance standard that defines the petitioner's burden.[3] Assuming that we and the district court faithfully apply the statutory standard for granting a certificate of appealability, we should only

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[3] The majority insists that, under its reasoning, Poyson need not prove the absence of any meaningful ambiguity in the state court record to secure relief. Rather, the majority asserts that Poyson's claim must fail because the record in this case "is *insolubly* ambiguous." Maj. Op. 30. Thus, we now have new categories of ambiguity: ambiguous, *meaningfully* ambiguous, and *insoluably* ambiguous. Not only are these labels distinctions without difference, these new tests are not to be found in any Supreme Court jurisprudence, which governs our considerations of AEDPA cases, nor our own. The majority does not cite a single case in which we have rejected a prisoner's habeas claim because we simply could not figure out what the state court had said. Instead, it relies on decisions denying relief because the record—ambiguous as it might have been—ultimately showed that the state court employed a causal nexus test as a permissible weighing mechanism or did not rely on causal nexus analysis at all. Maj. Op. 26–27 (citing *Towery*, 673 F.3d at 945; *Schad*, 671 F.3d at 724; *Lopez*, 630 F.3d at 1203–04). To the extent the majority suggests that the state court decision at issue in this case is unprecedented in the extent of its ambiguity, that proposition is belied by the state court decision in *Styers*, which, as explained below, employed strikingly similar language yet was sufficiently comprehensible to support habeas relief. Of course, Poyson bears the burden of proof, but there is no authority for the proposition that we may throw up our hands and declare the record too ambiguous to definitively interpret one way or the other. The majority fails to recognize that the preponderance standard, by definition, permits the party bearing the burden to proof to prevail without establishing his position beyond reasonable doubt. The effect of the majority rule is to alter the burden of proof, and it flatly contracts our analysis in *Styers*.

have the opportunity to review claims as to which the record is somewhat ambiguous. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1081 (9th Cir. 2000) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) (to obtain a certificate of appealability, a habeas petitioner must demonstrate "'that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner . . . .'"). To secure relief, the petitioner need not show that there is no conceivable ambiguity in the record that could support the state's position; rather, he must persuade us that his evidence that the state court's decision was contrary to clearly established federal law is stronger than the state's.

III

I disagree with the majority's conclusion that the state court's decision is simply too ambiguous to permit meaningful habeas review. Rather, when we examine "what the record actually says," *Lopez*, 630 F.3d at 1204 (citation omitted), the Arizona Supreme Court's use of an unconstitutional causal nexus test to screen Poyson's mitigating evidence of mental health problems and childhood abuse is readily apparent.[4]

The Arizona Supreme Court's analysis in this case is substantially indistinguishable from its decision in *Styers*, in which we found sufficient evidence of a constitutional violation to grant habeas relief. In *Styers*, the Arizona Supreme Court listed each item of proffered mitigation evidence: First, it noted that

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[4] I agree with the majority that the Arizona Supreme Court did not violate *Eddings* in rejecting Poyson's evidence of substance abuse as a mitigating factor, as it found that he failed to establish a significant history of substance abuse as a matter of fact.

"Defendant had no prior convictions for either misdemeanors or felony offense[s]" and stated that "[t]his is relevant mitigating evidence." *State v. Styers*, 865 P.2d at 777 (citation omitted). Next, it stated that "Defendant's service in Vietnam and honorable discharge are also relevant mitigating circumstances." *Id.* (citation omitted). Then, the court noted that "Defendant also suffered from post-traumatic stress disorder prior to and around the time of the murder as a result of his combat service in Vietnam." *Id.* The court said that "[t]his could also, in an appropriate circumstance, constitute mitigation. However, two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and murder." *Id.* (internal citation omitted). The state court did not recite a comprehensive list of the mitigating factors it considered in its independent review of Styers' death sentence; thus, it did not clarify whether Styers' post-traumatic stress disorder would in fact "constitute mitigation." Instead, the court asserted that "[w]e have considered all of the proffered mitigation and, like the trial court, find it is not sufficiently substantial to warrant leniency." *Id.* at 777.

On habeas review, we relied on this analysis to find that the state court violated Styers' right to an individualized capital sentencing under *Eddings* and *Smith*, notwithstanding its claim to have considered all of Styers' proffered mitigating evidence. *Styers*, 547 F.3d at 1035. Though the state court acknowledged that evidence of post-traumatic stress disorder is, as a general matter, relevant in mitigation, we found that its "use of the conjunctive adverb 'however,' following its acknowledgment that such evidence 'could' in certain cases constitute mitigation, indicates that this

was not such a case." *Id.* In the context of its entire analysis, this turn of phrase revealed that the state court had applied a causal nexus test "directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body." *Id.* We reaffirmed this interpretation in *Schad*, describing *Styers* as a case in which the state court "*expressly* disregarded" mitigating psychiatric evidence due to the defendant's "failure to demonstrate a causal connection between the disorder and the crime." *Schad*, 671 F.3d 708, 724 (9th Cir. 2009) (emphasis added).

Upon close examination, the state court's analysis in Poyson's case is strikingly similar to that in *Styers*. With respect to Poyson's mental health evidence, the Arizona Supreme Court acknowledged that Poyson "suffers from 'certain personality disorders'" and did not question that evidence of such disorders is relevant in mitigation. *State v. Poyson*, 7 P.3d at 90. It then stated, echoing its reasoning in *Styers*: "[h]owever, we find no indication in the record that 'the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required.'" *Id.* at 90–91 (quoting *State v. Brewer*, 826 P.2d 783, 802 (Ariz. 1992)). It therefore accorded Poyson's evidence of mental health problems "no mitigating weight." *Id.* at 91. Similarly, the state court acknowledged that Poyson was physically, mentally, and sexually abused as a child. *Id.* It then stated: "however, defendant did not show that his traumatic childhood somehow

rendered him unable to control his conduct. Thus, the evidence is without mitigating value." *Id*.[5]

If anything, the state court provided more evidence of unconstitutional causal nexus screening in Poyson's case than it did in Styers'. For at the end of its opinion, the state court listed all of the mitigating circumstances it considered in its independent review of Poyson's death sentence. *Id.* It omitted from this critical tally both Poyson's personality disorders and his abusive childhood. *See id.* (listing only "cooperation with law enforcement, age, potential for rehabilitation, and family support" as mitigating evidence in the case); *see also* Maj. Op. 21–22 (acknowledging that the state court found—and weighed—only one statutory mitigating factor (age) and three nonstatutory

[5] Though we review the Arizona Supreme Court's opinion in this case, the sentencing court's analysis is relevant to the extent that the state supreme court generally adopted its reasoning. Without a doubt, the sentencing court's discussion of Poyson's proffered mitigating evidence lends greater force to his *Penry* claim. For example, the sentencing court accepted that Poyson suffers from personality disorders, yet the sentencing judge concluded that this evidence did not "rise to the level of being a mitigating factor *because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses*." (emphasis added). To the extent that the court excluded the evidence on the ground that Poyson's mental health problems were not sufficiently severe, it erred. Evidence of mental health problems is relevant in mitigation, and a defendant need not show that such problems rise to a specified level of severity to establish their relevance. *See Tennard*, 542 U.S. at 284–85. The sentencing court improperly rejected Poyson's personality disorders as mitigating evidence because of the lack of causal connection between those disorders and the murders at issue.

mitigating factors (cooperation with law enforcement, potential for rehabilitation, and family support)).

Bell forbids our *presuming* constitutional error based on a silent record. However, like the panel that granted the writ in *Styers*, we are not bound to accept a state court's characterization of its own analysis when its reasoning reveals a deprivation of constitutional rights in violation of clearly established law. This is particularly true when the result of the state court's error is to deprive a human being of his life.

The Eighth and Fourteenth Amendments prohibit state courts from screening mitigating evidence from full consideration based on a lack of causal nexus to the crime of conviction. In reviewing Poyson's sentence, however, the Arizona Supreme Court applied a formula that automatically assigned a "weight" or "value" of zero to all mitigating evidence that lacked a causal nexus to the crime. Most significantly, this total devaluation of Poyson's mitigating evidence occurred logically prior to the state court's balancing of aggravating and mitigating circumstances. *See State v. Poyson*, 7 P.3d at 90–91. As such, the Arizona Supreme Court failed to "consider all relevant mitigating evidence *and weigh it against the evidence of the aggravating circumstances*," *Eddings*, 455 U.S. at 117 (emphasis added), which prevented Poyson from presenting the totality of his individualized circumstances to the court exercising authority to condemn him to death. The "consideration" of Poyson's mitigating evidence was without meaning where the court discarded that evidence before the critical stage of its analysis—the final balancing of mitigating and

aggravating circumstances that determined his sentence. To label the process "weighing" does not make it so; screening by any other name is still screening.

The Arizona Supreme Court did not consider mitigating evidence offered by Poyson because it lacked a causal nexus to the crime. In doing so, it committed *Eddings* error. Remand is required.

I respectfully dissent, in part.

APPENDIX K

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-99005

D.C. No. 2:04-cv-00534-NVW

[Filed March 22, 2013]

ROBERT ALLEN POYSON, *Petitioner-Appellant*,	)
v.	)
CHARLES L. RYAN, *Respondent-Appellee*.	)

OPINION

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted
February 15, 2012—San Francisco, California

Filed March 22, 2013

Before: Sidney R. Thomas, Raymond C. Fisher, and
Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Fisher;
Partial Concurrence and Partial Dissent by
Judge Thomas

SUMMARY*

Habeas Corpus/Death Penalty

The panel affirmed the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition by an Arizona state prisoner challenging a conviction and capital sentence for murder.

The panel first held that the Arizona Supreme Court did not deny petitioner his right to individualized sentencing by applying an unconstitutional causal nexus test to potentially mitigating evidence, because the panel could not presume a constitutional violation from an ambiguous record that did not reveal whether the court applied such a test as an unconstitutional screening mechanism or as a permissible means of determining the weight or significance of mitigating evidence.

The panel next denied relief on petitioner's claim that the Arizona courts failed to consider his history of substance abuse as a nonstatutory mitigating factor. The panel explained that the state courts considered the evidence and found it wanting as a matter of fact because it failed to prove a history of substance abuse, and that the state supreme court did not misconstrue

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the state trial court's findings so as to deny petitioner of meaningful appellate review.

Finally, the panel agreed with the district court that petitioner's ineffective assistance of counsel claim is procedurally defaulted because it is fundamentally different from the claim presented in state court such that the state courts had no meaningful opportunity to consider it.

Judge Thomas concurred in part, but dissented because he would hold that the state court unconstitutionally excluded mitigating evidence from consideration because it was not causally related to the crimes.

COUNSEL

Jon M. Sands, Federal Public Defender, Michael L. Burke (argued), Assistant Federal Public Defender, Ngozi V. Ndulue, Assistant Federal Public Defender, Phoenix, Arizona, for Petitioner-Appellant.

Thomas C. Horne, Attorney General, Kent Cattani, Division Chief, Criminal Appeals/Capital Litigation Division, Jon G. Anderson (argued), Assistant Attorney General, Capital Litigation Section, Phoenix, Arizona, for Respondent-Appellee.

OPINION

FISHER, Circuit Judge:

Robert Allen Poyson was convicted of murder and sentenced to death in 1998. After pursuing direct review and seeking postconviction relief in state court,

he filed a habeas petition in federal district court. The district court denied the petition, and Poyson appeals.

Poyson raises three claims on appeal, each of which has been certified by the district court pursuant to Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c): (1) the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence; (2) the Arizona courts failed to consider mitigating evidence of his history of substance abuse; and (3) his trial counsel provided ineffective assistance of counsel during the penalty phase of his trial by failing to investigate the possibility that he suffered from fetal alcohol spectrum disorder. We conclude the first two claims are without merit and the third is procedurally defaulted. Accordingly, we affirm.

The Arizona Supreme Court did not deny Poyson his right to individualized sentencing by applying an unconstitutional causal nexus screening test to potentially mitigating evidence. Under our case law, we cannot hold that a state court employed an unconstitutional nexus test "[a]bsent a clear indication in the record that the state court applied the wrong standard." *Schad v. Ryan*, 671 F.3d 708, 724 (9th Cir. 2011) (per curiam). The record here shows that the Arizona Supreme Court considered the absence of a causal connection to the murders in evaluating Poyson's mitigating evidence, but it does not reveal whether the court applied a nexus test as an unconstitutional screening mechanism or as a permissible means of determining the weight or significance of mitigating evidence. *See Lopez v. Ryan*, 630 F.3d 1198, 1203–04 (9th Cir. 2011). We therefore must hold that the Arizona Supreme Court's decision

was not "contrary to" Supreme Court precedent under 28 U.S.C. § 2254(d)(1). *See Schad*, 671 F.3d at 723–24.

We also deny habeas relief on Poyson's claim that the Arizona courts failed to consider his history of substance abuse as a nonstatutory mitigating factor. Poyson argues that the state courts unconstitutionally refused to *consider* mitigating evidence, a claim arising under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The state courts, however, did consider the evidence. They simply found it wanting as a matter of fact, finding that the evidence failed to prove a history of substance abuse. There was therefore no constitutional violation under *Lockett* and *Eddings*. Nor was there a constitutional violation under *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The state supreme court did not misconstrue the state trial court's findings, so it did not deprive Poyson of meaningful appellate review of his death sentence.

Finally, we agree with the district court that Poyson's ineffective assistance of counsel claim is procedurally defaulted because it is fundamentally different from the claim presented in state court. Although it is true that "new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not 'fundamentally alter the legal claim already considered by the state courts.'" *Beaty v. Stewart*, 303 F.3d 975, 989–90 (9th Cir. 2002) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)). Poyson's federal petition raises a theory of deficient performance – failure to investigate and present mitigating evidence of fetal alcohol spectrum disorder – that the state courts had no "meaningful opportunity to consider."

Vasquez, 474 U.S. at 257. The claim is therefore procedurally defaulted.

I. BACKGROUND

A. The Crimes

Poyson was born in August 1976. The facts of his crimes, committed in 1996, were summarized as follows by the Arizona Supreme Court in *State v. Poyson*, 7 P.3d 79, 83 (Ariz. 2000).

Poyson met Leta Kagen, her 15 year-old son, Robert Delahunt, and Roland Wear in April 1996. Poyson was then 19 years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to 48 year-old Frank Anderson and his 14 year-old girlfriend, Kimberly Lane. They, too, needed a place to live, and Kagen invited them to stay at the trailer.

Anderson informed Poyson that he was eager to travel to Chicago, where he claimed to have organized crime connections. Because none of them had a way of getting to Chicago, Anderson, Poyson and Lane formulated a plan to kill Kagen, Delahunt and Wear in order to steal the latter's truck.

On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property, ostensibly for sex. There, Anderson commenced an attack on the boy by slitting his throat with a bread knife. Poyson heard Delahunt's screams and ran to the travel trailer. While Anderson held Delahunt down, Poyson bashed his head against the floor. Poyson also beat Delahunt's head with his fists, and pounded it

with a rock. This, however, did not kill Delahunt, so Poyson took the bread knife and drove it through his ear. Although the blade penetrated Delahunt's skull and exited through his nose, the wound was not fatal. Poyson thereafter continued to slam Delahunt's head against the floor until Delahunt lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. In all, the attack lasted about 45 minutes.

After cleaning themselves up, Poyson and Anderson prepared to kill Kagen and Wear. They first located Wear's .22 caliber rifle. Unable to find ammunition, Poyson borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to rescue him. Poyson loaded the rifle and tested it for about five minutes to make sure it would function properly. He then stashed it near a shed. Later that evening, he cut the telephone line to the trailer so that neither of the remaining victims could call for help.

After Kagen and Wear were asleep, Poyson and Anderson went into their bedroom. Poyson first shot Kagen in the head, killing her instantly. After quickly reloading the rifle, he shot Wear in the mouth, shattering Wear's upper right teeth. A struggle ensued, during which Poyson repeatedly clubbed Wear in the head with the rifle. The fracas eventually moved outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him to the ground. While the victim was lying there, Poyson twice kicked him in the head. He then picked up the cinder block and threw it several times at Wear's head.

After Wear stopped moving, Poyson took his wallet and the keys to Wear's truck. To conceal the body, Poyson covered it with debris from the yard. Poyson, Anderson and Lane then took the truck and traveled to Illinois, where they were apprehended several days later.

B. Trial and Conviction

A grand jury indicted Poyson on three counts of first degree murder, one count of conspiracy to commit murder and one count of armed robbery. The jury convicted on all counts in March 1998, following a six-day trial.

C. Sentencing

1. *Mitigation Investigation*

Following the guilty verdicts, the state trial court approved funds to hire a mitigation specialist to assist in preparing for Poyson's sentencing. Counsel retained investigator Blair Abbott.

In a June 1998 memorandum, Abbott informed counsel that Poyson's mother, Ruth Garcia (Garcia), used drugs during the first trimester of her pregnancy and recommended that counsel investigate the possibility that Poyson suffered brain damage as a result. The memorandum advised counsel that "one of the significant issues should be the hard core drug abuse of both [of Poyson's] parents, preconception and in the first trimester of Ruth's pregnancy." Abbott wrote that "Ruth Garcia's heavy drug abuse in the pre pregnancy and early on in the pregnancy undoubtedly caused severe damage to her unborn child."

In September 1998, Abbott mailed trial counsel "Library & Internet research regarding drug & alcohol fetal cell damage; reflecting how these chemicals when taken in the first trimester [a]ffect subsequent intelligence, conduct, emotions, urges etc [sic] as the child grows into adulthood."

2. *Presentence Investigation Report*

The probation office prepared a presentence investigation report in July 1998. Poyson told the probation officer that he had a bad childhood because he was abused by a series of stepfathers, who subjected him to physical, mental and emotional abuse. Poyson also said he suffered from impulsive conduct disorder, which was diagnosed when he was 13. Poyson would not answer any questions on his substance abuse history or juvenile record.

3. *Presentencing Hearing*

In October 1998, the trial court held a one-day presentencing hearing. Poyson's trial counsel called three witnesses to present mitigating evidence: his aunt, Laura Salas, his mother, Ruth Garcia, and the mitigation investigator, Blair Abbott. Counsel also introduced 56 exhibits. Poyson did not testify. The witnesses testified about Poyson's drug and alcohol abuse and the mental and physical abuse inflicted on Poyson by his stepfather, Guillermo Aguilar, and maternal grandmother, Mary Milner. They also testified that Poyson's stepfather, Sabas Garcia (Sabas), committed suicide in 1988, and that Sabas' death had a devastating effect on Poyson. They further testified that Garcia used drugs and alcohol during the first three months of her pregnancy with Poyson.

4. *Poyson's Sentencing Memorandum*

In early November 1998, Poyson filed a sentencing memorandum urging the court to find three statutory and 25 nonstatutory mitigating circumstances.[1] As relevant here, Poyson argued that his history of drug and alcohol abuse, troubled childhood and personality disorders constituted both statutory and nonstatutory mitigating circumstances.

Substance Abuse: Poyson argued that his substance abuse was a statutory mitigating circumstance because it impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law at the time of the murders. *See* Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998). In the alternative, he argued that, even if his substance abuse was not causally related to the murders, it constituted a nonstatutory mitigating circumstance. In support of these arguments, Poyson emphasized his biological parents' use of drugs and alcohol at the time of his

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[1] At the time of Poyson's sentencing, Arizona law required the sentencing judge to impose a sentence of death if the court found one or more aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E) (1998). The law enumerated 10 aggravating circumstances, *see id.* § 13-703(F), and five statutory mitigating circumstances – including diminished capacity, duress, minor participation and the defendant's age, *see id.* § 13-703(G). The sentencing court also was required to consider any *nonstatutory* mitigating circumstances offered by the defendant – i.e., "any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." *Id.*

conception, his mother's use of drugs and alcohol during pregnancy, an incident in which Poyson was involuntarily intoxicated at the age of three or four, Poyson's abuse of alcohol beginning at age 13 and Poyson's five-month placement at WestCare, a residential treatment facility, for substance abuse treatment in 1992, when he was 15. Poyson also pointed to evidence that he used PCP two days before the murders, used alcohol the night before the murders, used marijuana the day of the murders and had suffered a PCP flashback during Delahunt's murder.

Troubled Childhood: Poyson argued that his troubled childhood was a statutory mitigating circumstance because it affected his behavior at the time of the murders. In the alternative, he argued that his troubled childhood constituted a nonstatutory mitigating circumstance. Poyson emphasized his mother's use of drugs and alcohol during the first trimester of pregnancy. He argued that alcohol and drug use during pregnancy can cause brain damage and birth defects and lead a child to engage in delinquent and criminal behavior. He also attached to the sentencing memorandum several scientific articles on fetal alcohol syndrome. The memorandum pointed out that Poyson never knew his biological father, lacked a stable home life, was physically and mentally abused by several adults (including Aguilar and Milner), was devastated by Sabas' suicide and was sexually abused and sodomized at a young age.[2] Poyson emphasized that his delinquent behavior and substance

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[2] Poyson presented evidence that he was sexually assaulted by a neighbor on one occasion shortly after Sabas' death.

abuse began shortly after the death of Sabas and the sexual assault.

Mental Health Issues: The sentencing memorandum argued that Poyson suffered from several personality disorders, constituting a nonstatutory mitigating circumstance. The memorandum pointed to a 1990 psychiatric evaluation by Dr. Bruce Guernsey. According to the sentencing memorandum, Guernsey diagnosed Poyson with severe "conduct disorder," reported that Poyson exhibited symptoms of antisocial behavior, "manic depression" or "impulsive conduct disorder" and recommended that Poyson be prescribed medication to control his behavior. Poyson also pointed to a 1990 Juvenile Predisposition Investigation by Nolan Barnum. Barnum too recommended that Poyson be prescribed medication to control his behavior. A 1993 psychological evaluation performed by Jack Cordon and Ronald Jacques from the State Youth Services Center in St. Anthony, Idaho, diagnosed Poyson with "mild mood disturbance." Dr. Celia A. Drake, who Poyson's counsel retained to perform a forensic evaluation of Poyson, diagnosed "Adjustment Disorder with depressive mood, mild intensity," and "Anti-social Personality Disorder." Dr. Drake found Poyson's overall intellectual functioning to be "in the low average range."

5. *Sentencing Hearing and Imposition of Sentence*

The trial court held a sentencing hearing and imposed sentence in late November 1998.

The court found that the state had proved, beyond a reasonable doubt, three aggravating circumstances for the murders of Delahunt and Wear: the murders

were committed in expectation of pecuniary gain, the murders were especially cruel and multiple homicides committed during the same offense. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(5), (6), (8) (1998). The court found two aggravating circumstances applicable to Kagen's murder: pecuniary gain and multiple homicides. *See id.* § 13-703(F)(5), (8).

The court found that Poyson failed to prove any statutory mitigating factors. Poyson's difficult childhood and mental health issues were not statutory mitigating factors under § 13-703(G)(1) because they did not significantly impair Poyson's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[3] The court explained:

> There has certainly been evidence that the defendant had gone through a turbulent life, perhaps had mental-health issues that would distinguish him from the typical person on the street.
>
> Listening to his description of how these murders were committed, based upon a description of somewhat a methodical carrying out of a plan, the Court sees absolutely nothing on the record, in this case, to suggest the applicability of this mitigating circumstance.

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[3] *See* Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998) ("Mitigating circumstances [include] [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.").

Turning to nonstatutory mitigating factors, the court first explained the three-step analysis it used to evaluate each nonstatutory mitigating circumstance proffered by Poyson: "[1] to analyze whether the defense has shown this fact by a preponderance of evidence, and then if they have, [2] to determine whether I would assign that any weight as a mitigating factor, and of course, for any that . . . pass both of those two tests, [3] I have to weigh them all along with the other factors in the final [sentencing] determination in this case."

Mental Health Issues: The court rejected Poyson's mental health issues as a nonstatutory mitigating factor at the second step in the analysis. The court found that Poyson had proven that he suffered from personality disorders, but gave them no weight because they were not causally related to the murders:

> [T]he defendant had some mental health and psychological issues. I think . . . the defense has established that there were certain . . . personality disorders that the defendant, in fact, may have been suffering from.
>
> The Court, however, does not find that they rise to the level of being a mitigating factor because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses.[4]

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[4] The court rejected evidence of Poyson's low IQ for similar reasons. At the first step in the analysis, the court found that "there is certain evidence in this case that would support the proposition that the defendant's mental capacity may be diminished, at least compared to the norm in the population, and

Troubled Childhood: The court similarly rejected Poyson's difficult childhood as a nonstatutory mitigating factor. At step one, the court found that the "defense has shown that defendant suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse." At step two, however, the court gave these circumstances no mitigating weight because they were not causally connected to the murders: "The Court finds absolutely nothing in this case to suggest that his latter conduct was a result of his childhood."[5]

Substance Abuse: Finally, the court rejected Poyson's history of substance abuse at both steps one and two in the analysis: Poyson failed to establish a significant history of drug or alcohol abuse and, even if he could do so, the court would have given the evidence no weight because he failed to establish a causal

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that his I.Q. may be low, at least compared to the norm in the population." The court, however, gave this circumstance no mitigating weight in light of planning and sophistication that went into the crimes – "certain prep[ar]atory steps that were taken – admittedly, not overly-sophisticated, but attempts were made to do certain things, to disable warning systems to enable these murders to be committed and to get away with the loot that was the purpose of the murders; specifically, the vehicle."

[5] The court also found that "the defense has established, by a preponderance of the evidence, that the defendant lost a parent figure and was subjected to sexual abuse at a relatively young age." The court rejected this factor at step two, however, because it was "not convinced that there is any connection between that abuse, that loss, and his subsequent criminal behavior."

connection between the substance abuse and the crimes. The court said:

> The argument is made that the defendant was subjected to alcohol abuse and drug abuse. Other than very vague allegations that he has used alcohol in the past or has used drugs in the past, other than a fairly vague assertion that he was subject to some sort of effect of drugs and/or alcohol at the time, that these offenses were committed, I really find very little to support the allegation that the defendant has a significant alcohol and/or drug abuse, and again, going back to the methodical steps that were taken to murder three people to get a vehicle to get out of Golden Valley, it's very difficult for me to conclude that the defendant's ability to engage in goal-oriented behavior was, in any way, impaired at the time of the commission of these offenses.

The court found only one nonstatutory mitigation factor – Poyson's cooperation with law enforcement. The court concluded that this one mitigating factor was insufficiently substantial to call for leniency and imposed a sentence of death.

6. *Arizona Supreme Court Decision*

The Arizona Supreme Court affirmed Poyson's conviction and sentence on direct appeal. *See State v. Poyson*, 7 P.3d 79 (Ariz. 2000). As required by Arizona law, the court "independently review[ed] the trial court's findings of aggravation and mitigation and the propriety of the death sentence." Ariz. Rev. Stat. Ann. § 13-703.01(A) (2000).

The court agreed with the trial court that Poyson's drug use was not a statutory mitigating circumstance under § 13-703(G)(1). *See Poyson*, 7 P.3d at 88–89. In the court's view, there was "scant evidence that he was actually intoxicated on the day of the murders." *Id.* at 88. "Although Poyson purportedly used both marijuana and PCP 'on an as available basis' in days preceding these crimes, the only substance he apparently used on the date in question was marijuana," and Poyson "reported smoking the marijuana at least six hours before killing Delahunt and eleven hours before the murders of Kagen and Wear." *Id.* The evidence that Poyson experienced a PCP flashback during the murder of Delahunt was not credible, and even if the flashback occurred, it lasted only a "few moments." *Id.* at 88–89. Poyson was "not under the influence of PCP at any other time." *Id.* at 89. Poyson's claims of substantial impairment were also belied by his deliberate actions, including concocting a ruse to obtain bullets from a neighbor, testing the rifle to make sure it would work properly when needed, cutting the telephone line and concealing the crimes. *See id.*

Substance Abuse: The court also agreed with the trial court that Poyson's substance abuse, mental health and abusive childhood were not nonstatutory mitigating circumstances. As to substance abuse, the court agreed with the trial court that Poyson had failed at step one because the evidence did not show a history of drug or alcohol abuse:

> The trial judge refused to accord any weight to the defendant's substance abuse as a nonstatutory mitigating circumstance. It characterized the defendant's claims that he had

> used drugs or alcohol in the past or was under the influence of drugs on the day of the murders as little more than "vague allegations." As discussed above, we agree.

Id. at 90.

Mental Health Issues: With respect to mental health issues, the court agreed with the trial court that Poyson's personality disorders, although proven at step one, were entitled to no weight at step two because they were not causally connected to the murders:

> The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning within the family setting" to which the defendant could look for guidance. However, we find no indication in the record that "the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required." *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *see also* [*State v. Medina*, 193 Ariz. 504, 517, 975 P.2d 94, 107 (1999)] (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's desire to emulate his friends, not his mental disorder, was the cause

> of his criminal behavior). We therefore accord this factor no mitigating weight.

Id. at 90–91.

Troubled Childhood: The court also agreed with the trial court's assessment of Poyson's troubled childhood. The court found that Poyson established an abusive childhood at step one, but gave this consideration no weight at step two because of the absence of a causal nexus:

> Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor. Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value.

Id. at 91.

The court found three aggravating factors (pecuniary gain, murder committed in an especially cruel manner and multiple homicides), one statutory mitigating factor (Poyson's age) and three nonstatutory mitigating factors (cooperation with law enforcement, potential for rehabilitation and family support). *See id.* at 90–91.[6] The court concluded that the mitigating evidence was not sufficiently substantial to call for

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[6] The Arizona Supreme Court thus found three more mitigating factors than the trial court found. The appellate court nonetheless agreed with the trial court that a death sentence was warranted.

leniency and affirmed the sentence of death. *See id.* at 91–92; Ariz. Rev. Stat. Ann. § 13-703.1(B) (2000).

D. State Postconviction Review

The Arizona Superior Court denied Poyson's petition for postconviction relief in 2003. The court provided a reasoned decision on Poyson's claim of penalty phase ineffective assistance of counsel (his third claim in this appeal) but not on Poyson's claims that the Arizona courts failed to consider relevant mitigating evidence (his first and second claims on appeal). In 2004, the Arizona Supreme Court summarily denied Poyson's petition for review.

E. Federal District Court Proceedings

Poyson filed a federal habeas petition in 2004. In 2010, the district court denied the petition. The court rejected on the merits Poyson's claims that the Arizona courts failed to consider mitigating evidence. The court concluded that Poyson's penalty phase ineffective assistance of counsel claim was procedurally defaulted because it was "fundamentally different than [the claim] presented in state court." Poyson timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We review de novo the district court's denial of Poyson's petition for habeas corpus, and we review the district court's findings of fact for clear error. *See Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007). Dismissals based on procedural default are reviewed de

novo. *See Robinson v. Schriro*, 595 F.3d 1086, 1099 (9th Cir. 2010). We address Poyson's three claims in turn.

III. DISCUSSION

A. Causal Nexus Test

Poyson argues that the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence of his mental health issues, traumatic childhood and substance abuse history, in violation of his Eighth and Fourteenth Amendment rights to an individualized sentencing. He contends that the state courts improperly refused to consider this evidence in mitigation because he failed to establish a causal connection between the evidence and the murders. He argues that the state courts' actions violate his constitutional rights as recognized in *Tennard v. Dretke*, 542 U.S. 274, 283–87 (2004), *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam), and several earlier decisions. These decisions hold that requiring a defendant to prove a nexus between mitigating evidence and the crime is "a test we never countenanced and now have unequivocally rejected." *Smith*, 543 U.S. at 45.

Because Poyson filed his federal habeas petition after April 24, 1996, he must not only prove a violation of these rights but also satisfy the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Fenenbock v. Dir. of Corr. for Cal.*, 681 F.3d 968, 973 (9th Cir. 2012).

Under AEDPA, we may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States," or "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). We review the last reasoned state court decision addressing the claim, which for Poyson's causal nexus claim is the Arizona Supreme Court's decision affirming Poyson's death sentence on direct appeal. *See Crittenden v. Ayers*, 624 F.3d 943, 950 (9th Cir. 2010). Poyson relies on AEDPA's "contrary to" prong, arguing that the Arizona Supreme Court's decision in *State v. Poyson*, 7 P.3d 79 (Ariz. 2000), was contrary to *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

1. *Exhaustion*

As a threshold matter, we agree with Poyson that he has fully exhausted this claim. The state argues that in state court Poyson raised a causal nexus claim with respect to only mental health issues and his troubled childhood, not his history of substance abuse. We disagree. Having reviewed the record, we conclude that Poyson exhausted the claim with respect to all three categories of mitigating evidence. *See Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004) ("A petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts.").

2. *Whether the Arizona Supreme Court's Decision Was Contrary to Clearly Established Federal Law*

Lockett, *Eddings* and *Penry* held that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." *Penry*, 492 U.S. at 318. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." *Id.* at 319. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* "[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Id.* (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (internal quotation marks omitted).

Under these decisions, a state court may not treat mitigating evidence of a defendant's background or character as "irrelevant or nonmitigating as a matter of law" merely because it lacks a causal connection to the crime. *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir. 2012) (per curiam). The sentencer may, however, consider "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011). "The . . . use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence." *Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2011) (per curiam). As the Court explained in *Eddings*:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings, 455 U.S. at 113–15.

Consistent with these principles, we have granted habeas relief when state courts have applied a causal nexus test as a screening mechanism to deem evidence irrelevant or nonmitigating as a matter of law. In *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008) (per curiam), we granted relief where the state court held that a defendant's post-traumatic stress disorder could not constitute mitigation unless the defendant could connect the condition to the crime. *See id.* at 1035. In *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010), we granted relief where the state court held that, "[w]ithout a showing of some impairment at the time of the offense, drug use cannot be a mitigating circumstance of any kind." *Id.* at 1270–71 (alteration in original) (quoting *State v. Williams*, 904 P.2d 437, 453 (Ariz. 1995)) (internal quotation marks omitted).

In contrast, we have refused to find a constitutional violation when the state court employed a causal nexus test as a permissible weighing mechanism. *See Towery*, 673 F.3d at 945–46. We have also denied relief when the record contains no indication that the state court employed a causal nexus test at all. *See Schad*, 671

F.3d at 724 (denying relief where "there is no indication that the state courts applied a nexus test, either as a method of assessing the weight of the mitigating evidence, or as an unconstitutional screening mechanism to prevent consideration of any evidence"); *Lopez*, 630 F.3d at 1203–04 (denying relief where the state courts made no mention of a causal nexus test, because "there is no reason to infer unconstitutional reasoning from judicial silence").

Here, the record shows that the Arizona Supreme Court applied a causal nexus test to Poyson's evidence of mental health issues and a difficult childhood, *see Poyson*, 7 P.3d at 90–91, but does not reveal whether the court considered the absence of a causal nexus as a permissible weighing mechanism, as in *Towery*, or as an unconstitutional screening mechanism, as in *Styers* and *Williams*. This ambiguity precludes us from granting habeas relief. We held in *Schad* that, "[a]bsent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Eddings*'s constitutional mandates." 671 F.3d at 724. That principle governs here: we cannot assume the state court applied the wrong standard. The Arizona Supreme Court's decision therefore was not contrary to clearly established federal law under § 2254(d)(1).

We reach the same conclusion with respect to the Arizona Supreme Court's evaluation of Poyson's evidence of a history of substance abuse. The state court rejected this evidence at step one in its analysis, finding as a matter of fact that Poyson had failed to establish a significant history of substance abuse by a preponderance of the evidence. The record does not

indicate that the court considered this evidence at step two, or that, if it did so, it employed an impermissible causal nexus test in doing so. *See Poyson*, 7 P.3d at 90. The court's treatment of Poyson's substance abuse evidence thus was likewise not contrary to *Lockett*, *Eddings* and *Penry*.

We recognize the possibility that the Arizona Supreme Court applied an unconstitutional causal nexus test. The record, however, contains no clear indication that the court did so. We may not presume a constitutional violation from an ambiguous record. We therefore hold that the district court properly denied habeas relief on Poyson's causal nexus claim. *See Schad*, 671 F.3d at 724.

The dissent contends that *Schad*'s presumption that state courts follow constitutional requirements should not apply here for three reasons. First, citing the Arizona Supreme Court's historical use of an unconstitutional causal nexus test at the time of Poyson's sentencing, the dissent argues that we should presume error. Dissent 37–38. This argument would be persuasive if the Arizona courts *consistently* applied an unconstitutional causal nexus test during the relevant period. That is not the case, however. As we recognized in *Lopez*,

> Our review of the case law confirms Arizona's unsettled past with respect to this issue. Some cases decided prior to *Tennard* applied a causal nexus requirement in an impermissible manner. Other cases, however, properly looked to causal nexus only as a factor in determining the weight or significance of mitigating evidence.

630 F.3d at 1203–04 (footnote omitted); *see also Towery*, 673 F.3d at 946 (also recognizing that the Arizona Supreme Court's decisions have been inconsistent on this question). Under these circumstances, the most we can say is that Arizona's troublesome history *weakens* the presumption that the Arizona Supreme Court followed the law in Poyson's case; it does not flip the presumption altogether.

Second, the dissent argues that the presumption that state courts follow constitutional mandates applies only to a silent record and not to the interpretation of a state court's language. Dissent 41–42. This argument overlooks the Supreme Court's decision in *Woodford v. Visciotti*, 537 U.S. 19 (2002). There, the state court applied an arguably erroneous test for determining prejudice under *Strickland v. Washington*, 466 U.S. 468 (1984). Some language in the state court's decision cited the test correctly, whereas other language misstated the test. *See Visciotti*, 537 U.S. at 22–24. We held that the state court had applied an erroneous test, but the Supreme Court reversed, holding that our "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Id.* at 24. After *Visciotti*, therefore, we must consider the presumption that state courts follow the law not only when we draw inferences from the court's silence but also when, as here, we construe a state court's ambiguous language.

Third, quoting Justice O'Connor's concurrence in *Eddings*, the dissent argues that "the qualitatively different nature of a death sentence requires reviewing courts 'to remove any legitimate basis for finding ambiguity concerning the factors actually considered by

the trial court.'" Dissent 42 (quoting *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring)). A majority of the Court, however, has never adopted Justice O'Connor's suggestion that ambiguity alone requires habeas relief. Unlike *Eddings*, moreover, this case is governed by AEDPA, and AEDPA does not allow us to presume from an ambiguous record that the state court applied an unconstitutional standard. To the contrary, such a "readiness to attribute error" would be flatly "incompatible with § 2254(d)'s highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Visciotti*, 537 U.S. at 24 (citation and internal quotation marks omitted); *cf. Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007) (holding that alleged ambiguity in the state court's language was insufficient "to overcome the presumption that the state court knew and followed the law").

At bottom, the ambiguous record in this case is no different from those in *Schad* and *Lopez*, two cases in which we declined to grant habeas relief. In both of those cases, we denied relief notwithstanding Arizona's troublesome history of applying an unconstitutional causal nexus test – and notwithstanding the existence of an ambiguous record. Here too, in the absence of a clear indication in the record that the state court applied an unconstitutional standard, we see no alternative but to affirm.

B. Failure to Consider Substance Abuse

At sentencing, Poyson presented evidence of a history of drug and alcohol abuse, but the state trial court and the state supreme court declined to treat the evidence as a nonstatutory mitigating factor. The trial

court found that Poyson had presented only "very vague allegations that he has used alcohol . . . or . . . drugs in the past," and found "very little to support the allegation that the defendant has a significant alcohol and/or drug abuse" history. The supreme court agreed that Poyson's claims to have "used drugs or alcohol in the past" were "little more than 'vague allegations.'" *Poyson*, 7 P.3d at 90.

Poyson contends the state courts' conclusions that he provided only "vague allegations" of substance abuse were unreasonable determinations of the facts under 28 U.S.C. § 2254(d)(2) and violated his constitutional rights under *Lockett*, 438 U.S. at 605, *Eddings*, 455 U.S. at 112, and *Parker v. Dugger*, 498 U.S. 308, 321 (1991). We disagree.

Poyson's claim – that "[b]ecause his death sentence is based upon [an] unreasonable determination of facts, [he] is entitled to habeas relief" – misunderstands the law. Even assuming that the state courts' determination that Poyson provided only "vague allegations" of substance abuse was an unreasonable determination of the facts under § 2254(d)(2), an issue we need not reach, Poyson's claim fails because he cannot demonstrate that his constitutional rights were violated. *See Wilson v. Corcoran*, 131 S. Ct. 13, 17 (2010) (per curiam) (holding that while § 2254(d)(2) relieves a federal court of AEDPA deference when the state court makes an unreasonable determination of facts, it "does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law"); *see also Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc) (holding that AEDPA does not "require

any particular methodology for ordering the § 2254(d) and § 2254(a) determination[s]"). An unreasonable determination of the facts would not, standing alone, amount to a constitutional violation under *Lockett*, *Eddings* or *Parker*.

Lockett invalidated an Ohio death penalty statute that precluded the sentencer from considering aspects of the defendant's character or record as a mitigating factor. *See* 438 U.S. at 604. *Eddings* held that a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See* 455 U.S. at 113–15. Here, the state courts considered Poyson's evidence of substance abuse, but found it wanting as a matter of fact and that Poyson failed to prove a history of substance abuse. Thus, there was no constitutional violation under *Lockett* and *Eddings*.

Nor has Poyson shown a constitutional violation under *Parker*. There, the state supreme court reweighed aggravating and mitigating circumstances before affirming a death sentence. *See Parker*, 498 U.S. at 321–22. The court's reweighing, however, was premised on its erroneous assumption that the state trial court had found that there were no mitigating circumstances. *See id.* The Supreme Court held that the state supreme court's action deprived the defendant of "meaningful appellate review," and thus that the sentencing violated the defendant's right against "the arbitrary or irrational imposition of the death penalty." *Id.* at 321. In Poyson's view, *Parker* stands for the broad proposition that, "[w]hen a state court's imposition of the death penalty is based not on the characteristics of the accused and the offense but instead on a *misperception of the record*, the defendant

is not being afforded the consideration that the Constitution requires." In *Parker*, however, the state supreme court had misconstrued the state trial court's findings, something that did not occur here. *Parker* does not hold that a state court's erroneous factual finding in assessing mitigation evidence necessarily amounts to a constitutional violation. Rather, it suggests the opposite:

> This is not simply an error in assessing the mitigating evidence. Had the Florida Supreme Court conducted its own examination of the trial and sentencing hearing records and concluded that there were no mitigating circumstances, a different question would be presented. Similarly, if the trial judge had found no mitigating circumstances and the Florida Supreme Court had relied on that finding, our review would be very different.

Id. at 322.

In sum, we hold that Poyson is not entitled to habeas relief because he has not shown a constitutional violation under *Lockett*, *Eddings* or *Parker*. Because Poyson has raised arguments under only *Lockett*, *Eddings* and *Parker*, we need not decide whether, or under what circumstances, a state court's erroneous factfinding in assessing mitigating evidence can itself rise to the level of a constitutional violation.

C. Penalty Phase Ineffective Assistance of Counsel

In his federal habeas petition, Poyson argued that he received ineffective assistance of counsel during the penalty phase of his trial because his trial counsel

failed to investigate the possibility that he suffered from fetal alcohol spectrum disorder (FASD). The district court ruled that Poyson failed to present this claim to the state courts, and hence that the claim was procedurally defaulted. Poyson challenges that ruling on appeal. We review de novo. *See Robinson*, 595 F.3d at 1099.

A state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. *See Picard v. Connor*, 404 U.S. 270, 275 (1971); *Weaver v. Thompson*, 197 F.3d 359, 363–64 (9th Cir. 1999); 28 U.S.C. § 2254(b)(1)(A). This rule "reflects a policy of federal-state comity, an accommodation of our federal system designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard*, 404 U.S. at 275 (citations and internal quotation marks omitted). "A petitioner can satisfy the exhaustion requirement by providing the highest state court with a fair opportunity to consider each issue before presenting it to the federal court." *Weaver*, 197 F.3d at 364.

"[A] petitioner may provide further facts to support a claim in federal district court, so long as those facts do not 'fundamentally alter the legal claim already considered by the state courts.'" *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)).[7] "[T]his rule allows

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[7] As the Supreme Court has recently clarified, these factual allegations must be based on the "record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

a petitioner who presented a particular [ineffective assistance of counsel] claim, for example that counsel was ineffective in presenting humanizing testimony at sentencing, to develop additional facts supporting that particular claim." *Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th Cir. 2005) (citing *Weaver*, 197 F.3d at 364). "This does not mean, however, that a petitioner who presented any ineffective assistance of counsel claim below can later add unrelated alleged instances of counsel's ineffectiveness to his claim." *Id.* (citing *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc)).

1. *State Proceedings*

In his state habeas petition, Poyson raised two ineffective assistance of counsel claims relevant here. In the first claim, Poyson alleged that trial counsel "was ineffective because he failed to request the appointment of experts in the field of mental health early in the case." He alleged that the investigation for both phases of the trial should have begun "immediately" upon counsel's appointment, including "the immediate appointment of experts for both parts of the trial." Counsel's failure "to immediately secure the appointment of mental health experts . . . prejudiced" him in two ways. First, it precluded him from presenting a defense of "diminished capacity" with respect to the Delahunt murder during the guilt phase of the trial. Second, "the failure of counsel to immediately pursue mitigation caused the loss of mitigating information" that could have been presented at sentencing. Poyson presented a report by a neuropsychologist retained during the state habeas proceedings, Robert Briggs, Ph.D. According to Poyson,

Briggs' report showed that Poyson "was brain-damaged" at the time of the murders, but had since "recovered, due to his long stay first in jail, then on condemned row, without chemical or physical insult to his brain." In Poyson's view, "the report leaves no doubt that neurophyschological testing shows that he was impaired at the time of the crime." This mitigating evidence had been "lost forever."

In the state petition's second claim, Poyson alleged that trial counsel failed to properly present mitigation and psychological evidence because counsel "did nothing to show the trial court how [his] abusive childhood caused, or directly related to, [his] conduct during the murders." He alleged that trial counsel were deficient because they were "required to make some attempt to correlate Mr. Poyson's physically and psychologically abusive background with his behavior," because "a connection between the two would be much more powerful in mitigation than the abuse standing alone."

2. *Federal Petition*

Poyson's federal petition presented a substantially different claim – counsel's failure to investigate Poyson's possible fetal alcohol spectrum disorder. Poyson alleged that trial counsel were ineffective because they "failed to make any effort to investigate and develop" evidence that Poyson suffered from FASD. He alleged that defense counsel "failed to investigate the obvious possibility that [he] suffered from FASD," made "no effort" to "pursue this fertile area of mitigation" and "ignored obvious evidence that [he] was exposed to drugs and alcohol *in utero*." Poyson further

alleged that he was prejudiced by counsel's deficient performance:

> Their failure to adequately investigate and substantiate [evidence that Petitioner was exposed to drugs and alcohol *in utero*] profoundly prejudiced Petitioner. Adequate explanation during the pre-sentence hearing of the effect of FASD on Petitioner's brain would likely have convinced the trial court that Petitioner had a lesser degree of culpability.

3. *Analysis*

The district court concluded that the claim raised in the federal petition had not been fairly presented to the Arizona courts:

> This Court concludes that the claim asserted in the instant amended petition is fundamentally different than that presented in state court. Petitioner's argument in support of [this claim] is based entirely on trial counsel's alleged failure to investigate and develop mitigation evidence based on Petitioner's *in utero* exposure to drugs and alcohol. This version of Petitioner's sentencing [ineffective assistance of counsel] claim has never been presented to the Arizona courts. While it is true that new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not "fundamentally alter the legal claim already considered by the state courts." *Beaty v. Stewart*, 303 F.3d 975, 989–90 ([9th Cir.] 2002) (citing *Vasquez*, 474 U.S. at 260). To do so deprives the state court of "a meaningful opportunity to

> consider allegations of legal error without interference from the federal judiciary." *Vasquez*, 474 U.S. at 257. Here, Petitioner is not simply proffering additional evidentiary support for a factual theory presented to the state court. Rather, he is alleging an entirely new theory of counsel ineffectiveness; one that has not previously been presented in state court.

We agree. Poyson presented not only new facts in support of a claim presented to the state court, but also a fundamentally new theory of counsel's ineffectiveness – one that the Arizona courts lacked "a meaningful opportunity to consider." *Vasquez*, 474 U.S. at 257. The district court therefore properly dismissed Poyson's penalty phase ineffective assistance of counsel claim as procedurally defaulted.

AFFIRMED.

THOMAS, Circuit Judge, concurring in part and dissenting in part:

The Arizona Supreme Court unconstitutionally excluded mitigating evidence from its consideration because the evidence was not causally related to the crimes. As a result, Poyson was deprived of his right to an individualized capital sentencing determination under the Eighth and Fourteenth Amendments. *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 317 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978). Because the majority's contrary conclusion

cannot be reconciled with controlling Supreme Court precedent, I respectfully dissent.

I

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Lockett*, 438 U.S. at 604 (alteration in original) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Accordingly, the Supreme Court has held since 1978 that a defendant facing a capital sentence must have the opportunity to present all relevant evidence in mitigation. *See id.* at 604–05. Merely admitting the evidence at the penalty phase does not satisfy the constitutional mandate. Rather, to ensure that a sentence of death reflects "a reasoned *moral* response to a defendant's background, character, and crime," *Penry I*, 492 U.S. at 328 (emphasis in original) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in the judgment)), the procedure for evaluating mitigating evidence must ensure that the sentencer is "able to consider *and give effect to* that evidence in imposing sentence," *id.* at 319 (emphasis added) (citing *Hitchcock v. Dugger*, 481 U.S. 393 (1987)); *see also Eddings*, 455 U.S. at 113–14. A sentencer "give[s] effect to" mitigating evidence by weighing all such admissible evidence against any aggravating circumstances proven by the state. *See, e.g.*, *Eddings*, 455 U.S. at 114–15; *Towery v. Ryan*, 673 F.3d 933, 944–45 (9th Cir. 2012). Only by viewing all sentencing evidence in context can a court render the

individualized determination of moral culpability that the Constitution requires. *See Lambright v. Schriro*, 490 F.3d 1103, 1115 (9th Cir. 2007) (per curiam).

A court violates the constitutional command by categorically screening out certain mitigating evidence as a matter of law, before it may be weighed in combination with all other relevant sentencing evidence. *Tennard v. Dretke*, 542 U.S. 274, 284–86 (2004); *Eddings*, 455 U.S. at 113–14 (holding that the sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence") (emphasis in original). Relevance is the only prerequisite to full consideration of mitigating evidence. *See Tennard*, 542 U.S. at 284–85. While the state court may assign a relative weight to each item of admissible mitigating evidence, *Towery*, 673 F.3d at 944, it cannot impose any additional criteria, such as a causal nexus requirement, to screen such evidence from the sentencer's ultimate view of the defendant.

At the time it decided this case, the Arizona Supreme Court applied a causal nexus test similar to the one the U.S. Supreme Court held unconstitutional in *Tennard*. *See*, *e.g.*, *State v. Sansing*, 77 P.3d 30, 37 (Ariz. 2003) ("Mere evidence of drug ingestion or intoxication, however, is insufficient to establish statutory mitigation. The defendant must also prove a causal nexus between his drug use and the offense.") (footnote omitted); *State v. Cañez*, 42 P.3d 564, 594 (Ariz. 2002) (en banc) (citation omitted) ("[A] causal nexus between the intoxication and the offense is required to establish non-statutory impairment mitigation"); *State v. Kayer*, 984 P.2d 31, 45 (Ariz. 1999) (en banc) ("A defendant must show a causal link

between the alcohol abuse, substance abuse, or mental illness and the crime itself" for such evidence to be considered a mitigating factor); *State v. Clabourne*, 983 P.2d 748, 756 (Ariz. 1999) (en banc) (defendant's difficult childhood not a mitigating factor because "he has failed to link his family background to his murderous conduct or to otherwise show how it affected his behavior"); *State v. Djerf*, 959 P.2d 1274, 1289 (Ariz. 1998) (en banc) (defendant's experience of childhood abuse cannot be considered as a mitigating factor unless there is a causal connection between the abuse and the crime); *State v. Jones*, 937 P.2d 310, 322 (Ariz. 1997) (defendant did not establish impaired capacity as either a statutory or non-statutory mitigating factor because "no testimony establishes, either because of his use of drugs or because he was coming down off of the drugs, that defendant could not appreciate the wrongfulness of his conduct or conform his conduct to the law"); *State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989) (en banc) ("A difficult family background, in and of itself, is not a mitigating circumstance.").

Arizona's causal nexus test not only violated *Eddings*, but a long line of Supreme Court cases holding that all relevant mitigating evidence must be considered in capital sentencing. These cases establish that evidence of a defendant's background and character, including childhood trauma or mental health problems, is relevant in mitigation even if it does nothing to explain why the defendant committed the crime of conviction. *See Penry I*, 492 U.S. at 322–23; *Lockett*, 438 U.S. at 604. *See also Lambright*, 490 F.3d at 1115. Such evidence may reasonably diminish the defendant's moral culpability, *see Penry I*, 492 U.S. at 322–23, and "might cause a sentencer to determine

that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant," *Lambright*, 490 F.3d at 1115. Placing such evidence beyond the sentencer's effective reach is "simply unacceptable in any capital proceeding," *id.* (citing *Lockett*, 438 U.S. at 605), because it deprives the sentencer of the complete, multifaceted rendering of the defendant that must be the basis for capital sentencing.

Arizona's unconstitutional causal nexus test remained in force until *Tennard*, and it was in use when the Arizona Supreme Court considered Poyson's appeal.

II

In reviewing pre-*Tennard* Arizona capital cases, we do not presume that the Arizona Supreme Court unconstitutionally refused to consider relevant mitigating evidence in its re-weighing of aggravating and mitigating factors. Rather, we examine the record to determine whether the Arizona Supreme Court applied an unconstitutional causal nexus test to screen mitigating evidence from consideration in a particular case. In *Schad v. Ryan*, we affirmed the denial of habeas relief when the record contained "no indication that the state courts applied a nexus test, either as a method of assessing the weight of the mitigating evidence, or as an unconstitutional screening mechanism . . . ." 671 F.3d 708, 724 (9th Cir. 2009) (per curiam). In doing so, *Schad* was consistent with the Supreme Court's instruction that "[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing

more than a lack of citation." *Bell v. Cone*, 543 U.S. 447, 455 (2005) (citations omitted).

Similarly, in *Towery*, we rejected the defendant's claim that the Arizona Supreme Court unconstitutionally screened mitigating evidence that lacked a causal nexus to the crime. 673 F.3d at 944. We stressed that the state supreme court had articulated the proper standard for considering mitigating evidence. *See id.* In independently reviewing Towery's mitigating evidence, the state court recognized that, "[h]aving considered family background during the penalty phase, the sentencer must give the evidence such weight that the sentence reflects a 'reasoned moral response' to the evidence." *Id.* (alteration in original) (quoting *State v. Towery* (*Towery I*), 920 P.2d 290, 311 (Ariz. 1996)). In light of the whole record, this statement demonstrated the Arizona Supreme Court's awareness that it must weigh *all* relevant mitigating evidence against the aggravating circumstances, even if it ultimately assigned relatively little weight to that mitigating evidence which lacked a strong causal link to the crime. *See id.* at 944–45.

In contrast, in *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008), we looked beyond the Arizona Supreme Court's characterization of its own reasoning where the form of its analysis evidenced unconstitutional screening. *See id.* at 1035 ("In conducting its independent review of the propriety of Styers' death sentence, the Arizona Supreme Court stated that it had 'considered all of the proffered mitigation'. . . However, its analysis prior to this statement indicates otherwise.") (internal citation omitted). In that case, the state court recognized that Styers' evidence of post-

traumatic stress disorder "could . . . in an appropriate case, constitute mitigation." *Id.* (quoting *State v. Styers*, 865 P.2d 765, 777 (Ariz. 1993)). But it ultimately rejected Styers' evidence for lack of a causal nexus to the crime, noting that "two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder." *Id.* (quoting *State v. Styers*, 865 P.2d at 777). Though the state court claimed that it "considered" all mitigating evidence, its analysis showed that it impermissibly screened Styers' mitigating mental health evidence solely because it lacked a causal nexus to the crime. Declining to elevate form over substance, we granted the writ upon concluding that "the Arizona Supreme court *appears* to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body." *Id.* (emphasis added) (citing *Smith v. Texas*, 543 U.S. 37, 45 (2004)).

Recently, in *Lopez v. Ryan*, 630 F.3d 1198 (9th Cir. 2011), we declined to presume from Arizona case law alone that "a tacit causation rule underpinned the state court's decision" in the case at hand. *Id*. at 1203. Rather than "infer[ring] unconstitutional reasoning from judicial silence," *Lopez* instructs that we should "look to what the record actually says." *Id.* at 1204.

The import of all these cases is that we should not presume any constitutional error from a silent record, nor should we accept without further examination a state court's characterizations of its own reasoning. Rather, we should look to the substance of the record itself to determine whether the state court

unconstitutionally excluded relevant mitigating evidence from consideration at sentencing.

The majority appears to treat the statement in *Schad* that relief should be denied "[a]bsent a clear indication in the record that the state court applied the wrong standard" to create a new, more stringent test for determining whether a state court applied an unconstitutional causal nexus analysis. 671 F.3d at 724. The majority then applies this "test" to resolve purported ambiguities in the record in the state's favor.

However, in stating that we should identify "a clear indication in the record" that the state court violated *Tennard* before granting habeas relief, the *Schad* panel was merely explaining *Bell*'s rule against presuming error from a silent record. No Supreme Court case imposes a "clear indication" test, nor does any case impose a rule that we must resolve ambiguities against the petitioner. To the contrary, as Justice O'Connor wrote in her *Eddings* concurrence, the qualitatively different nature of a death sentence requires reviewing courts "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." 455 U.S. at 119 (O'Connor, J., concurring). In short, if there is any legitimate reason to believe that a court has excluded mitigating evidence from consideration, we should grant habeas relief so that a proper weighing of aggravating and mitigating factors can occur. The appropriate approach, taken in our more recent cases, is simply to evaluate "what the

record actually says." *Lopez*, 630 F.3d at 1204 (citing *Schad*, 606 F.3d at 1046–47).[1]

III

Unlike the majority, I do not find the Arizona Supreme Court's opinion ambiguous in communicating its use of an unconstitutional causal nexus test to screen Poyson's mitigating evidence of mental health problems and childhood abuse.[2] When we examine

---

[1] *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), is not to the contrary. There, the Supreme Court simply rejected our reading of the state court's opinion; it did not instruct us to deny habeas relief whenever the state court fails to provide a "clear indication" of constitutional error. *See id.* at 24. While acknowledging that certain language in the state court's opinion could be read as misstating the *Strickland* standard, the *Woodford* Court faulted us for rejecting other, stronger evidence in the opinion indicating that the state court applied the correct standard. *See id.* If anything, *Woodford* supports a close reading of state court decisions on habeas review to determine whether they contravene or unreasonably apply federal law. *See id.* at 23–24. As *Woodford* itself demonstrates, this approach does not offend "the presumption that state courts know and follow the law." *Id.* at 24 (citations omitted). Moreover, to the extent the majority finds the Arizona Supreme Court's opinion in this case ambiguous on the causal nexus issue, *Woodford* is of little help, as it simply does not address the analysis of an ambiguous state court decision on habeas review. *See id.* at 23 (asserting that the state court opinion at issue "painstakingly describes the [correct] *Strickland* standard").

[2] I agree with the majority that the Arizona Supreme Court did not violate *Eddings* in rejecting Poyson's evidence of substance abuse as a mitigating factor, as it found that he failed to establish a significant history of substance abuse as a matter of fact.

"what the record actually says" in this case, the constitutional error is readily apparent.

Like the sentencing court, the Arizona Supreme Court accepted, as a factual matter, Poyson's evidence of mental health problems. *See State v. Poyson*, 7 P.3d 79, 90 (Ariz. 2000) (discussing expert testimony regarding Poyson's antisocial personality disorder). However, it "accord[ed] this factor no mitigating weight" because it found "no indication in the record that 'the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required.'" *Id.* at 90–91 (alteration in original) (quoting *State v. Brewer*, 826 P.2d 783, 802 (Ariz. 1992)). Though the court used the language of "weighing," it plainly excluded the evidence of Poyson's antisocial personality disorder from its final analysis of mitigating and aggravating circumstances, solely because it lacked a causal nexus to the crime. *See id.* at 91 (listing only Poyson's "cooperation with law enforcement, age, potential for rehabilitation, and family support" as mitigating evidence in the case, and finding that evidence "not sufficiently substantial to call for leniency").

The court's discussion of Poyson's abusive childhood more clearly reveals its use of a causal nexus screening analysis. The court summarily recounted Poyson's evidence of physical, emotional, and sexual abuse as a child. *See id.* However, because Poyson "did not show that his traumatic childhood somehow rendered him unable to control his conduct," the court found the evidence "without mitigating value." *Id.* As a result, the Arizona Supreme Court omitted the evidence of

Poyson's abusive childhood from its final tally of mitigating circumstances. *See id.*

As in *Styers*, this analysis demonstrates that the Arizona Supreme Court, like the sentencing court below,[3] screened Poyson's evidence of childhood abuse and mental health problems from its final balancing of aggravating and mitigating factors because that evidence lacked a causal nexus to the crime. And like the panel that granted the writ in *Styers*, we are not bound to accept a state court's characterization of its own analysis when its reasoning reveals a deprivation of constitutional rights in violation of clearly established law. This is particularly true when the

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[3] Though we review the Arizona Supreme Court's opinion in this case, the sentencing court's analysis is relevant to the extent that the state supreme court generally adopted its reasoning. Without a doubt, the sentencing court's discussion of Poyson's proffered mitigating evidence lends greater force to his *Penry* claim. For example, the sentencing court accepted that Poyson suffers from personality disorders, yet the sentencing judge concluded that this evidence did not "rise to the level of being a mitigating factor *because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses*." It is unclear what the sentencing judge meant in saying that Poyson's personality disorders did not "rise to the level of being a mitigating factor." To the extent that the court excluded the evidence on the ground that Poyson's mental health problems were not sufficiently severe, it erred. Evidence of mental health problems is relevant in mitigation, and a defendant need not show that such problems rise to a specified level of severity to establish their relevance. *See Tennard*, 542 U.S. at 284–85. What is clear from this statement is that the sentencing court rejected Poyson's personality disorders as mitigating evidence because of the lack of causal connection between those disorders and the murders at issue.

result of the state court's error is to deprive a human being of his life.

The Eighth and Fourteenth Amendments prohibit state courts from screening mitigating evidence from full consideration based on a lack of causal nexus to the crime of conviction. In reviewing Poyson's sentence, however, the Arizona Supreme Court applied a formula that automatically assigned a "weight" or "value" of zero to all mitigating evidence that lacked a causal nexus to the crime. Most significantly, this total devaluation of Poyson's mitigating evidence occurred logically prior to the state court's balancing of aggravating and mitigating circumstances. *See State v. Poyson*, 7 P.3d at 90–91. As such, the Arizona Supreme Court failed to "consider all relevant mitigating evidence *and weigh it against the evidence of the aggravating circumstances*," *Eddings*, 455 U.S. at 117 (emphasis added), which prevented Poyson from presenting the totality of his individualized circumstances to the court exercising authority to condemn him to death. The "consideration" of Poyson's mitigating evidence was without meaning where the court discarded that evidence before the critical stage of its analysis—the final balancing of mitigating and aggravating circumstances that determined his sentence. To label the process "weighing" does not make it so; screening by any other name is still screening.

The Arizona Supreme Court did not consider mitigating evidence offered by Poyson because it lacked a causal nexus to the crime. In doing so, it committed *Eddings* error. Remand is required.

I respectfully dissent, in part.

APPENDIX L

198 Ariz. 70 , 7 P.3d 79 (2000)

SUPREME COURT OF ARIZONA
En Banc

No. CR-98-0510-AP

[Filed July 6, 2000]

STATE of Arizona,	)
	)
Appellee.	)
	)
v.	)
	)
Robert Allen POYSON,	)
	)
Appellant.	)
	)

Attorneys and Law Firms

Janet Napolitano, Attorney General By Paul J. McMurdie and J.D. Nielsen, Phoenix, for Appellee.

John W. Rood, III, Phoenix, for Appellant.

OPINION

ZLAKET, Chief Justice.

¶ 1 A jury convicted defendant Robert Allen Poyson on three counts of first degree murder, one count of conspiracy to commit first degree murder, and one

count of armed robbery. The trial court sentenced him to death for the murders, and to terms of imprisonment for the other offenses. Defendant appeals from his capital convictions and sentences.[1] We review this case pursuant to Art. 6, § 5(3) of the Arizona Constitution, A.R.S. § 13-4031, and Rule 31.2(b), Ariz. R.Crim. P. For the following reasons, we affirm.

FACTS

¶ 2 Poyson met Leta Kagen, her fifteen year-old son, Robert Delahunt, and Roland Wear in April of 1996. The defendant was then nineteen years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to forty-eight year-old Frank Anderson and his fourteen year-old girlfriend, Kimberly Lane. They, too, needed a place to live, and Kagen invited them to stay at the trailer.

¶ 3 Anderson informed the defendant that he was eager to travel to Chicago, where he claimed to have organized crime connections. Because none of them had a way of getting to Chicago, Anderson, Poyson and Lane formulated a plan to kill Kagen, Delahunt, and Wear in order to steal the latter's truck.

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[1] Poyson also filed a notice of appeal from his robbery and conspiracy convictions but did not raise or brief any issues pertaining to them. We therefore affirm those convictions and sentences. *See State v. Van Adams*, 194 Ariz. 408, 411 n. 1, 984 P.2d 16, 19 n. 1 (1999), *cert. denied*, 528 U.S. 1172, 120 S.Ct. 1199, 145 L.Ed.2d 1102 (2000); Ariz.R.Crim. P. 31.2(b).

¶ 4 On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property, ostensibly for sex. There, Anderson commenced an attack on the boy by slitting his throat with a bread knife. Poyson heard Delahunt's screams and ran to the travel trailer. While Anderson held Delahunt down, the defendant bashed his head against the floor. He also beat the victim's head with his fists, and pounded it with a rock. This, however, did not kill Delahunt, so Poyson took the bread knife and drove it through his ear. Although the blade penetrated the victim's skull and exited through his nose, the wound was not fatal. Defendant thereafter continued to slam Delahunt's head against the floor until he lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. In all, the attack lasted about 45 minutes. Remarkably, Kagen and Wear, who were in the main trailer with the radio on, never heard the commotion coming from the small trailer.

¶ 5 After cleaning themselves up, Poyson and Anderson prepared to kill Kagen and Wear. They first located Wear's .22 caliber rifle. Unable to find any ammunition, the defendant borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to help rescue him. Defendant loaded the rifle and tested it for about five minutes to make sure it would function properly. He then stashed it near a shed. Later that evening, he cut the telephone line to the trailer so that neither of the remaining victims could call for help.

¶ 6 After Kagen and Wear were asleep, Poyson and Anderson went into their bedroom. Defendant first shot Kagen in the head, killing her instantly. After quickly reloading the rifle, he shot Wear in the mouth, shattering his upper right teeth. A struggle ensued, during which the defendant repeatedly clubbed Wear in the head with the rifle. The fracas eventually moved outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him to the ground. While the victim was lying there, the defendant twice kicked him in the head. He then picked up the cinder block and threw it several times at Wear's head. After Wear stopped moving, the defendant took his wallet and the keys to his truck. In order to conceal the body, the defendant covered it with debris from the yard. Poyson, Anderson, and Lane then took the truck and traveled to Illinois, where they were apprehended several days later.

TRIAL ISSUES

Admission of Statements to Police

¶ 7 Poyson was arrested just after 10:00 p.m. on August 23, 1996, at an Evanston, Illinois homeless shelter. Over the next twenty-four hours, he was questioned three times at the Evanston police station and made incriminating statements. He now challenges the admission of those statements at trial, contending that they were involuntary, given without proper *Miranda* warnings, and recorded in violation of the Illinois eavesdropping statute.

¶ 8 Soon after he was brought into custody, the defendant was placed in an interview room and handcuffed to a beam mounted on the wall. He was

then questioned by Sgt. Ralph Stegall of the Illinois State Police. After being advised of his *Miranda* rights, the defendant confessed to the murders of Delahunt, Kagen, and Wear. This first interview began at 10:40 p.m. and lasted just over two hours. Defendant was then left alone in the interview room for about an hour and a half. During this period, he was given a cigarette, a cold soda and a cheeseburger. He was also allowed to use the bathroom. Stegall then conducted a second interview, which began at 2:55 a.m. and ended at 3:25 a.m. Defendant was advised of his *Miranda* rights and again made incriminating statements. Afterward, he was taken back to his holding cell, where he slept for five or six hours.

¶ 9 The final interview began on the evening of August 24, 1996, at 8:38 p.m. and lasted about two hours. This time, the defendant was interviewed by Detective Eric Cooper of the Mohave County Sheriff's Office, who had flown to Illinois. Defendant was advised of his rights and then gave a detailed, tape-recorded account of his involvement in the murders. He drank a soda during the interview and smoked a cigarette during a five to ten minute break.

¶ 10 Poyson argues that these confessions were given under conditions so oppressive that his statements must be deemed involuntary. In Arizona, confessions are presumed to be involuntary, and the State has the burden of proving otherwise. *See State v. Scott*, 177 Ariz. 131, 136, 865 P.2d 792, 797 (1993). In ruling on voluntariness, a court must examine the totality of circumstances. *See id.; State v. Arnett*, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978). Although "personal circumstances, such as intelligence and

mental or emotional status, may be considered in a voluntariness inquiry, the critical element ... is whether police conduct constituted overreaching." *State v. Stanley*, 167 Ariz. 519, 524, 809 P.2d 944, 949 (1991); *see also Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986) (holding that "coercive police activity is a necessary predicate" to an involuntariness finding); *Scott*, 177 Ariz. at 136, 865 P.2d at 797. A trial court's finding of voluntariness will be sustained absent clear and manifest error. *See Scott*, 177 Ariz. at 136, 865 P.2d at 797; *Arnett*, 119 Ariz. at 38, 579 P.2d at 546.

¶ 11 Defendant relies on his allegedly vulnerable mental state at the time of the statements. He emphasizes that he was depressed and remorseful when he made them. Defendant also cites his age (twenty at the time of the confessions), his "low average intelligence," and his fright at being interrogated by the police. He does not, however, point to any evidence in the record indicating that the officers exploited his remorse, his age, or his fear to gain a confession. In fact, we find no suggestion of police overreaching. The three interviews were not long, and occurred over a twenty-four hour period. One lasted only thirty minutes. The others were each about two hours in length. We find no indication that the questioning was particularly intense or marked by coercion. The officers scrupulously advised the defendant of his *Miranda* rights. Although handcuffed, he could comfortably sit or stand as he chose. *See United States v. Elie*, 111 F.3d 1135, 1144 (4th Cir.1997) (noting that handcuffing alone does not establish involuntariness). The officers never denied the defendant an opportunity to eat, drink, smoke, or use the bathroom. In fact, they made

sure those needs were taken care of while he was in their custody.

¶ 12 Poyson makes much of the fact that the interviews took place at night and suggests that the police exploited his fatigue to extract a confession. We reject this contention. Sgt. Stegall testified that the defendant was alert and answered questions coherently. Defendant never asked for an opportunity to sleep nor did he otherwise indicate that he was too tired to continue the interviews. Nothing in the record establishes a sleep-deprived condition that the police should have recognized on their own. After the first two interviews with Stegall, the defendant was left undisturbed in his cell for over fourteen hours. By his own account, he slept five or six of those hours. Nothing the police did prevented him from getting more sleep prior to the final interview that evening with Detective Cooper.

¶ 13 In short, the State proved that the defendant's statements were voluntary. *See, e.g., State v. Spears*, 184 Ariz. 277, 285-86, 908 P.2d 1062, 1070-71 (1996) (confession during a 4:00 a.m. interview held voluntary where defendant was in custody for sixteen hours without being offered food, drink or bedding, and without having used the bathroom); *Scott*, 177 Ariz. at 136-37, 865 P.2d at 797-98 (confession held voluntary where defendant went to police station at 2:00 a.m., was questioned for fourteen hours, and was given soft drinks and cigarettes upon request).

¶ 14 Defendant next argues that he did not receive proper *Miranda* warnings before the interview with Detective Cooper. The officer testified that he advised Poyson of his rights before he turned on the tape

recorder. Although the warnings themselves were not recorded, the following exchange took place when the questioning began:

> Cooper: [A] couple of minutes ago, Bobby, I advised you of your *Miranda* rights, is that correct?
>
> Poyson: Yes, you did.
>
> Cooper: And did I do it from memory or did I read 'em?
>
> Poyson: You read 'em and from memory.
>
> Cooper: Okay. And did you understand those rights?
>
> Poyson: Yes, I did.
>
> Cooper: Okay, Do you re—can you just repeat 'em back to me?
>
> Poyson: I HAVE THE RIGHT TO REMAIN SILENT. AND ANYTHING I SAY CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW.
>
> I HAVE THE RIGHT TO AN ATTORNEY. IF I CANNOT AFFORD ONE, ONE WILL, ONE WILL [sic] BE APPOINTED TO ME.
>
> Cooper: Okay. And did you understand all that?
>
> Poyson: Yes, I did.

[Capitals in original]. Defendant argues that because he did not say the words, "I have the right to an attorney present *during questioning*" when repeating

what he had been told, there is evidence that Cooper never specifically advised him of that right. Thus, he asserts, the *Miranda* warnings were defective. After hearing testimony at the suppression hearing, the trial court found that the officer properly advised Poyson and concluded that the defendant simply "paraphras[ed] his rights in a manner less sophisticated than might be done by a lawyer or a police officer."

¶ 15 The trial court's ruling on a motion to suppress will be upheld absent clear and manifest error. *See State v. Spreitz*, 190 Ariz. 129, 144, 945 P.2d 1260, 1274 (1997); *Stanley*, 167 Ariz. at 523, 809 P.2d at 948. Here, the court's finding was not clearly erroneous. Cooper testified that he read Poyson his rights, and the defendant has never explicitly denied that fact. When questioned at the suppression hearing, Poyson said that he could not recall whether he was so advised; however, he conceded on cross-examination that it was possible the officer may have done so. On re-direct, the defendant repeated this testimony. Perhaps the best evidence on this subject is the statement itself, in which the defendant admits that Cooper read him his rights both from a card and from memory. This admission was made only minutes after the warnings were read, when the defendant's recollection was fresh. Based on such evidence, the trial court could reasonably find that Poyson was fully advised, even though he was not able to recite the *Miranda* litany verbatim.

¶ 16 Finally, the defendant contends that the interview with Cooper was taped in violation of the Illinois eavesdropping statute and should have been

suppressed. Illinois law makes it a crime to record a conversation without the permission of the parties. *See* 720 Ill. Comp. Stat. Ann. 5/14-1 to 5/14-5 (West 1993 & Supp.1999). Statements obtained in violation of the statute are inadmissible in both civil and criminal cases. See id. 5/14-5.

¶ 17 The trial court found that Cooper obtained permission prior to questioning, although the only recorded request for permission occurs about a third of the way through the interview. Cooper said that he asked for, and received, consent to tape the interview before it began. Sgt. Stegall testified that he did not specifically recall whether Cooper requested permission to record the interview. Nevertheless, he said that he would not have participated in the interview unless Cooper had secured permission. Defendant denied that Cooper ever sought his consent to record their discussion. It is clear that the trial judge regarded Cooper and Stegall as the more credible witnesses. We cannot say that his resolution of this factual conflict was clearly erroneous.

Admission of the Palm Print

¶ 18 Defendant argues that the trial court erred in denying his motion to preclude evidence of a palm print found in the small travel trailer where Robert Delahunt was murdered.

¶ 19 On February 4, 1998, the court ordered both the prosecution and defense to "disclose to the other side any names of witnesses, addresses of witnesses, [and] statements or reports that have been written by such witnesses" no later than two weeks before the trial date of March 2, 1998. On February 25, defense

counsel interviewed Glenda Hardy, a print examiner for the Arizona Department of Public Safety. During the interview, Ms. Hardy referred to a "bloody palm print" that was taken from a shelf in the travel trailer where Delahunt was killed, which she identified as belonging to the defendant.

¶ 20 Defendant asked the trial court to exclude the palm print because the State had violated the discovery deadline. He asserted that Hardy's previous reports had referred only to "latent" prints (which he understood to mean "invisible") and had never mentioned a "bloody palm print." The late disclosure was unduly prejudicial, he argued, because "[u]p to that point, there was no physical evidence linking Robert Poyson to those homicides." The court denied the motion on the ground that previous reports had disclosed the existence of "latent prints." "Perhaps [the State] didn't refer to [the palm print] with as much specificity as they could have," the court said, "but I think the State has complied with the discovery requirements." For the same reason, the court also denied the defendant's motion to continue in order to have an expert analyze the palm print.

¶ 21 A trial court's erroneous decision to admit evidence not timely disclosed by the prosecution may, under some circumstances, be deemed harmless. *See State v. Krone*, 182 Ariz. 319, 321, 897 P.2d 621, 623 (1995). Error is harmless if the reviewing court can say, beyond a reasonable doubt, that it did not contribute to or affect the verdict. *See State v. Fulminante*, 193 Ariz. 485, 500, 975 P.2d 75, 90 (1999); *Krone*, 182 Ariz. at 321, 897 P.2d at 623; *State v. McVay*, 127 Ariz. 450, 453, 622 P.2d 9, 12 (1980). This is a fact-specific

inquiry; there is no bright-line method of determining whether a particular error is harmless. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶ 22 Assuming, arguendo, that the trial court should not have admitted the palm print, we nevertheless conclude that the error was harmless. During his interview with Detective Cooper, Poyson gave a tape-recorded statement in which he admitted his involvement in these murders. The jury heard the tape at trial. Along with this voluntary confession, the State presented physical evidence from the scene and testimony by the medical examiner, all of which confirmed that the murders occurred exactly as the defendant said they had. Given the weight of this evidence, a jury would almost certainly have returned a guilty verdict even without the palm print. Any error in admitting it or in denying the motion for a continuance was harmless beyond a reasonable doubt. *See, e.g., State v. Sharp*, 193 Ariz. 414, 420, 973 P.2d 1171, 1177, *cert. denied*, 528 U.S. 936, 120 S.Ct. 341, 145 L.Ed.2d 266 (1999) (admission of victim's broken and bloodied eyeglasses, which were found hidden under defendant's mattress, was harmless error in light of overwhelming evidence against defendant); *State v. Spreitz*, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997)(erroneous admission of gruesome autopsy photos was harmless due to the overwhelming evidence of defendant's guilt, "including, most importantly, his own uncoerced confession"); *Bible*, 175 Ariz. at 588, 858 P.2d at 1191 (erroneous admission of DNA evidence was harmless where other evidence unequivocally pointed to defendant's guilt).

SENTENCING ISSUES

AGGRAVATION

¶ 23 The trial court found that the State proved the following three aggravating factors beyond a reasonable doubt: that each of these murders was committed in expectation of pecuniary gain, *see* A.R.S. § 13-703(F)(5); that the murders of Delahunt and Wear were especially cruel, *see id.* § 13-703(F)(6); and that the defendant was convicted of multiple homicides committed during the same offense. *See id.* § 13-703(F)(8). Defendant does not challenge these findings. Nevertheless, we must independently review the aggravating circumstances identified by the trial court. *See* A.R.S. § 13-703.01(A); *State v. Tankersley*, 191 Ariz. 359, 371, 956 P.2d 486, 498 (1998).

Pecuniary Gain

¶ 24 For the pecuniary gain factor to apply, the State must prove beyond a reasonable doubt that receiving something of value was a "motive, cause or impetus [for the murder] and not merely the result." *State v. Spencer*, 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993). In this case, the record is replete with evidence that the defendant and Anderson committed the murders in order to steal Roland Wear's truck. As soon as Anderson arrived in Golden Valley, he told the defendant that he was eager to leave. Two days later, the pair agreed to kill Delahunt, Wear and Kagen so that they could steal the truck and drive to Chicago. As Poyson admitted in his confession, this was the motive for the killings. This evidence is sufficient to support the pecuniary gain aggravator. *See State v. Trostle*, 191 Ariz. 4, 17-18, 951 P.2d 869, 882-83 (1997) (upholding

(F)(5) finding where the defendant's motivation for the murder was to facilitate stealing a truck).

Especially Cruel, Heinous or Depraved

¶ 25 A murder is especially cruel if the victim consciously suffers physical pain or mental anguish before death. *See, e.g., State v. Bolton*, 182 Ariz. 290, 311, 896 P.2d 830, 851 (1995); *State v. Medrano*, 173 Ariz. 393, 397, 844 P.2d 560, 564 (1992). "Mental anguish can result when the victim experiences significant uncertainty about his or her ultimate fate." *State v. Schackart*, 190 Ariz. 238, 248, 947 P.2d 315, 325 (1997); *see also State v. Medina*, 193 Ariz. 504, 513, 975 P.2d 94, 103 (1999). Here, the State proved beyond a reasonable doubt that Delahunt and Wear engaged in protracted struggles for their lives, during which they undoubtedly experienced extreme mental anguish and physical pain.

¶ 26 The existence of mental distress is apparent from the length of time during which both victims fought off the attacks of the defendant and Frank Anderson, as well as the victims' statements during the attacks. After Delahunt's throat was slashed, he struggled with Anderson and the defendant for some forty-five minutes before dying. He had two defensive wounds on his left hand, confirming that he was conscious throughout the ordeal. *See Medrano*, 173 Ariz. at 397, 844 P.2d at 564; *State v. Amaya-Ruiz*, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990). According to the defendant's confession, Delahunt repeatedly asked why he and Anderson were trying to kill him. Likewise, after being shot in the mouth, Wear fought with Poyson and Anderson for several minutes before he died. During the attack, Wear begged the defendant

not to hurt him, saying "Bobby, stop. Bobby don't. I never did anything to hurt you." In our view, it is beyond dispute that these victims suffered unspeakable mental anguish. *See Medina*, 193 Ariz. at 513, 975 P.2d at 103 (concluding that victim's cries of "Please don't hit me. Don't hit me. Don't. Don't," evidenced both physical and mental pain and suffering); *State v. Rienhardt*, 190 Ariz. 579, 590, 951 P.2d 454, 455 (1997) (upholding cruelty finding where victim experienced twenty minute ride to the desert after being told he would be killed, and made statements revealing that he feared for his life).

¶ 27 Clearly, the victims also suffered severe physical pain. Delahunt's throat was slashed by Anderson. Defendant then slammed the victim's head against the floor and pounded it with a rock. Later, he drove a knife into Delahunt's ear while the boy was still conscious and struggling. Similarly, Wear suffered a gunshot wound to the mouth that shattered several of his teeth. He was then struck in the head numerous times with a rifle. Like Delahunt, he was conscious during much of the attack. Thus, the State proved beyond a reasonable doubt that the victims suffered great physical pain before their deaths. *See State v. Apelt (Michael)*, 176 Ariz. 349, 367, 861 P.2d 634, 652 (1993) (affirming cruelty finding where victim was conscious when struck repeatedly with great force, stabbed in the back and chest, and her throat was slashed); *State v. Brewer*, 170 Ariz. 486, 501, 826 P.2d 783, 799 (1992) (upholding cruelty finding where victim was conscious during forty-five minute attack).

Multiple Homicides

¶ 28 The murders occurred over a relatively short period of time (about five hours), at the same residence, and were a part of a single course of conduct. *See State v. Djerf*, 191 Ariz. 583, 597, 959 P.2d 1274, 1288 (1998) (upholding (F)(8) finding where all four murders were committed in the same house during a period of about five hours). Thus, Poyson was convicted of one or more other homicides committed during the course of each victim's murder. *See* A.R.S. § 13-703(F)(8). This aggravating factor was proven beyond a reasonable doubt.

MITIGATION

¶ 29 The trial court found that the defendant did not prove any of the statutory mitigating factors set out in A.R.S. § 13-703(G)(1)-(5). Defendant challenges the court's (G)(1) and (G)(5) findings. We independently review the mitigating circumstances. *See* A.R.S. § 13-703.01(A).

Drug Use

¶ 30 The trial court rejected Poyson's claim that drugs significantly impaired his ability to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law. *See* A.R.S. § 13-703(G)(1). It reasoned that because the defendant was able to carry out the plan to murder Kagen, Wear, and Delahunt, it is unlikely that he was impaired by drugs. Defendant, on the other hand, argues that his drug use in the days leading up to, and on the day of, the murders caused significant impairment.

¶ 31 A.R.S. § 13-703(G)(1) is phrased disjunctively. *See State v. Rossi*, 154 Ariz. 245, 251, 741 P.2d 1223, 1229 (1987). Thus, the defendant can show either that he was unable to conform his conduct to the requirements of the law, or that he could not appreciate the wrongfulness of his conduct; he is not required to prove both. *See id.* In this case, we hold that the defendant has failed to prove either prong of the statute.

¶ 32 We cannot say that the defendant's drug use rendered him unable to conform his conduct to the requirements of the law. First of all, there is scant evidence that he was actually intoxicated on the day of the murders. Although Poyson purportedly used both marijuana and PCP "on an as available basis" in days preceding these crimes, the only substance he apparently used on the date in question was marijuana. However, the defendant reported smoking the marijuana at least six hours before killing Delahunt and eleven hours before the murders of Kagen and Wear. Thus, even if he was still "high" at the time of these crimes, it is unlikely that he was so intoxicated as to be unable to conform his conduct to the requirements of the law. In order to constitute (G)(1) mitigation, the defendant must prove substantial impairment from drugs or alcohol, not merely that he was "'buzzed.'" *State v. Schackart*, 190 Ariz. 238, 251, 947 P.2d 315, 328 (1997).

¶ 33 Defendant also claims to have had a PCP "flashback" during the murder of Delahunt. The trial court did not find the evidence credible on this point. We agree. Other than the defendant's self-reporting, nothing in the record supports this claim, nor is there

evidence that any such "flashback" had an effect on his ability to control himself. Even taking the evidence at face value, the episode appears to have lasted only a few moments during Delahunt's murder. The defendant was apparently not under the influence of PCP at any other time. Thus, the flashback could not have affected his decision to begin the attack or to continue it once the flashback subsided; nor could it have played a role in his decision to kill Kagen and Wear later that night. We are therefore not convinced that Poyson's ability to control his conduct was significantly affected by PCP use.

¶ 34 Other evidence in the record belies the defendant's claim of impairment. For instance, he was able to concoct a ruse to obtain bullets from the neighbor. He also had the foresight to test the rifle, making sure it would work properly when needed, and to cut the telephone line to prevent Kagen and Wear from calling for help. These actions, coupled with the deliberateness with which the murders were carried out, lead us to conclude that the defendant was not suffering from any substantial impairment on the day in question. *See State v. Tittle*, 147 Ariz. 339, 343-44, 710 P.2d 449, 453-54 (1985) (detailed plan to commit murder was inconsistent with claim of impairment).

¶ 35 Poyson's attempts to conceal his crimes also indicate that he was able to appreciate the wrongfulness of his actions. For example, he had Kimberly Lane sneak him into the main trailer after murdering Delahunt so that he could wash the blood from his hands. He also covered Wear's body with debris in order to delay its discovery by police after he and the others had fled. These actions show that he

"understood the wrongfulness of his acts and attempted to avoid prosecution." *State v. Jones*, 185 Ariz. 471, 489, 917 P.2d 200, 218 (1996) ((G)(1) not satisfied where defendant took significant steps to conceal his crimes and evade capture); *see also State v. Sharp*, 193 Ariz. 414, 424, 973 P.2d 1171, 1181, *cert. denied*, 528 U.S. 936, 120 S.Ct. 341, 145 L.Ed.2d 266 (1999) ((G)(1) not proven where defendant attempted to hide evidence that might link him to the crime). We also note that the defendant was able to recall in remarkable detail how he committed these murders. We have found this to be a significant fact in rejecting a perpetrator's claim that he could not appreciate the wrongfulness of his actions. *See, e.g., State v. Gallegos*, 185 Ariz. 340, 345, 916 P.2d 1056, 1061 (1996); *Rossi*, 154 Ariz. at 251, 741 P.2d at 1229; *State v. Wallace*, 151 Ariz. 362, 369, 728 P.2d 232, 239 (1986). We hold, therefore, that the defendant failed to prove the (G)(1) mitigating circumstance.

Age

¶ 36 Although Poyson was only nineteen at the time of the murders, the trial court ruled that his age was not a statutory mitigating factor under A.R.S. § 13-703(G)(5). The judge acknowledged that he was "relatively young, chronologically speaking," but said that he was not so young, "[a]s far as the criminal justice system goes." The court cited the fact that the defendant had lived on his own for some time before the crimes and had been working. Defendant argues that because of his age and immaturity, he was easily influenced by others, including his co-defendants in this case.

¶ 37 "The age of the defendant at the time of the murder can be a substantial and relevant mitigating

circumstance." *State v. Laird*, 186 Ariz. 203, 209, 920 P.2d 769, 775 (1996). We have found the (G)(5) factor to exist in cases where defendants were as old as nineteen and twenty. *See State v. Trostle*, 191 Ariz. 4, 21, 951 P.2d 869, 886 (1997) (twenty); *State v. Bolton*, 182 Ariz. 290, 314, 896 P.2d 830, 854 (1995) (nineteen); *State v. Herrera, Jr.*, 176 Ariz. 21, 34, 859 P.2d 131, 144 (1993) (twenty); *State v. Greenway*, 170 Ariz. 155, 170, 823 P.2d 22, 37 (1991) (nineteen). Chronological age, however, is not the end of the inquiry. To determine how much weight to assign the defendant's age, we must also consider his level of intelligence, maturity, past experience, and level of participation in the killings. *See Trostle*, 191 Ariz. at 21, 951 P.2d at 886; *Laird*, 186 Ariz. at 209, 920 P.2d at 775. If a defendant has a substantial criminal history or was a major participant in the commission of the murder, the weight his or her age will be given may be discounted. *See, e.g., State v. Gallegos*, 185 Ariz. 340, 346, 916 P.2d 1056, 1062 (1996); *Bolton*, 182 Ariz. at 314, 896 P.2d at 854; *Greenway*, 170 Ariz. at 170, 823 P.2d at 37.

¶ 38 At his sentencing hearing, Poyson presented evidence that he was of "low average" intelligence. We agree with the trial court that this fact was shown by a preponderance of the evidence. Defendant also presented some evidence that he was immature and easily led by others. One of his cousins, for example, believed that because he lacked a consistent father figure growing up, he was prone to be influenced by older men like Frank Anderson. Arguably, these facts weigh in favor of assigning some mitigating weight to the defendant's age. However, he was no stranger to the criminal justice system. As a juvenile, he had committed several serious offenses, including burglary

and assault, for which he served time in a detention facility. Moreover, it is clear that he was a major participant in these murders at both the planning and execution stages.

¶ 39 We conclude that Poyson's age is a mitigating circumstance. However, in light of his criminal history and his extensive participation in these crimes, we accord this factor little weight. *See Jackson*, 186 Ariz. at 31-32, 918 P.2d at 1049-50 (discounting defendant's age based on his high level of participation in the murder); *Gallegos*, 185 Ariz. at 346, 916 P.2d at 1062 (same); *Bolton*, 182 Ariz. at 314, 896 P.2d at 854 (same).

INDEPENDENT REWEIGHING

¶ 40 A.R.S. § 13-703.01(A) requires us to independently review and reweigh the aggravating and mitigating circumstances in every capital case in order to determine the propriety of the death sentence. *See, e.g., State v. Medina*, 193 Ariz. 504, 516, 975 P.2d 94, 106 (1999). As noted above, the trial court found, as to victims Wear and Delahunt, that the State had proven three statutory aggravators: A.R.S. §§ 13-703(F)(5), murder committed for pecuniary gain; (F)(6), murder committed in an especially cruel manner; and (F)(8), multiple homicides. As to the victim Kagen, the court concluded that the State had proven two aggravators: (F)(5) and (F)(8). The trial court also held that the defendant had failed to prove any statutory mitigators. We agree with the court's findings regarding the aggravating factors. However, as indicated above, we believe the defendant's age is a mitigating circumstance that should be given some weight, albeit minimal.

¶ 41 Poyson also presented evidence regarding several nonstatutory mitigating factors but the trial judge found that he had proven only one by a preponderance of the evidence: cooperation with law enforcement. As to the others, the court concluded that either (1) the mitigator had not been proven, or (2) the mitigator had been proven but was not entitled to any weight. Defendant challenges several of these rulings. We briefly summarize the court's findings and the evidence presented at the sentencing hearing.

Drug Use

¶ 42 The trial judge refused to accord any weight to the defendant's substance abuse as a nonstatutory mitigating circumstance. It characterized the defendant's claims that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders as little more than "vague allegations." As discussed above, we agree.

Mental Health

¶ 43 The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning within the family setting" to which the defendant could look for guidance. However, we find no indication in the record that "the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required." *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *see also Medina*, 193

Ariz. at 517, 975 P.2d at 107 (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). We therefore accord this factor no mitigating weight.

Abusive Childhood

¶ 44 The trial court found that the defendant failed to prove a dysfunctional family background or that he suffered physical or sexual abuse as a child. Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor. Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value.

Remorse

¶ 45 The trial court found that the defendant was remorseful about the commission of the offenses but gave that circumstance no weight. The court thought that if he were truly remorseful, he would have prevented one or two of the killings or would have turned himself in. Defendant presented some evidence of remorse. Sgt. Stegall testified that during questioning Poyson expressed remorse, particularly about the murder of Delahunt. In his statement to Detective Cooper, the defendant said that he felt "bad" about all of the murders. We find this evidence unpersuasive and, like the trial judge, accord it no real significance.

Potential for Rehabilitation

¶ 46 The trial court ruled that the defendant failed to prove that he could be rehabilitated. The judge said that "[i]f there is anything that has been presented to even suggest that, I must have missed it." Dr. Drake's report suggests that the defendant is rehabilitatable, based on his past history of success in other institutional settings. She said that "[t]here are some indications that he ... was responsive to the structure provided in various placements. In discharge summaries from all three institutions in which he was placed there was documented progress." We find that this evidence has some mitigating value. *See State v. Murray*, 184 Ariz. 9, 40, 906 P.2d 542, 573 (1995) (potential for rehabilitation can be a mitigating circumstance).

Family Support

¶ 47 The trial court found that the defendant failed to establish any meaningful family support. At the mitigation hearing, the defendant's mother and aunt testified. Other relatives cooperated with Mr. Abbott, the defense mitigation specialist, during his investigation, and several family members wrote letters asking the court to spare Poyson's life. We accord this factor minimal mitigating weight. *See State v. Gonzales*, 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995) (family support can be given de minimis weight in mitigation).

¶ 48 After our independent review, we conclude that even crediting defendant's cooperation with law enforcement, age, potential for rehabilitation, and

family support, the mitigating evidence in this case is not sufficiently substantial to call for leniency.

ISSUES RAISED TO AVOID PRECLUSION

¶ 49 Defendant seeks to preserve numerous constitutional challenges to Arizona's death penalty scheme. We have dispositively addressed these issues in previous cases as follows:

¶ 50 Prosecutor has unfettered discretion to seek the death penalty, rejected in *State v. Sharp*, 193 Ariz. 414, 426, 973 P.2d 1171, 1183, *cert. denied*, 528 U.S. 936, 120 S.Ct. 341, 145 L.Ed.2d 266 (1999).

¶ 51 Pecuniary gain aggravating factor does not sufficiently narrow the class of death eligible individuals, rejected in *State v. West*, 176 Ariz. 432, 448-49, 862 P.2d 192, 208-09 (1993).

¶ 52 Judge alone makes aggravation or mitigation findings, rejected in *State v. Schackart*, 190 Ariz. 238, 260, 947 P.2d 315, 337 (1997).

¶ 53 The death penalty discriminates against young, poor and male defendants, rejected in *Schackart*, 190 Ariz. at 260, 947 P.2d at 337.

¶ 54 Capital punishment is unconstitutional on its face and as applied, rejected in *State v. White*, 194 Ariz. 344, 355, 982 P.2d 819, 830 (1999), *cert. denied* 529 U.S. 1005, 120 S.Ct. 1272, 146 L.Ed.2d 221 (2000) (not unconstitutional on its face); *State v. Van Adams*, 194 Ariz. 408, 422, 984 P.2d 16, 30 (1999), *cert. denied*, 528 U.S. 1172, 120 S.Ct. 1199, 145 L.Ed.2d 1102 (2000) (not per se cruel and unusual punishment); *Schackart*, 190

Ariz. at 260, 947 P.2d at 337 (not imposed arbitrarily and irrationally).

¶ 55 No opportunity to death-qualify the sentencing judge, rejected in *Schackart*, 190 Ariz. at 260, 947 P.2d at 337.

¶ 56 A.R.S. § 13-703(F)(6) violates the Equal Protection Clause, rejected in *State v. Gallegos*, 185 Ariz. 340, 348, 916 P.2d 1056, 1064 (1996).

¶ 57 No statutory standards for weighing, rejected in *Schackart*, 190 Ariz. at 260, 947 P.2d at 337.

¶ 58 No proportionality review, rejected in *Schackart*, 190 Ariz. at 260, 947 P.2d at 337.

¶ 59 Statute does not require sentencer to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, rejected in *White*, 194 Ariz. at 355, 982 P.2d at 830.

DISPOSITION

¶ 60 For the foregoing reasons, we affirm the defendant's convictions and sentences.

CONCURRING: CHARLES E. JONES, Vice Chief Justice, STANLEY G. FELDMAN, Justice, FREDERICK J. MARTONE, Justice and RUTH V. McGREGOR, Justice.