No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD KENNETH DJERF,
Petitioner,

vs.

DAVID SHINN,
Director of the Arizona Department of Corrections, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD KENNETH DJERF, Petitioner-Appellant, v. CHARLES L. RYAN, Respondent-Appellee.	No. 08-99027 D.C. No. 2:02-cv-00358-JAT District of Arizona, Phoenix ORDER

Before: McKEOWN, GOULD, and IKUTA, Circuit Judges.

The panel has voted to deny the petition for rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX B

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD KENNETH DJERF, *Petitioner-Appellant*, v. CHARLES L. RYAN, *Respondent-Appellee.*	No. 08-99027 D.C. No. 2:02-cv-00358-JAT OPINION

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted March 26, 2019
San Francisco, California

Filed July 24, 2019

Before: M. Margaret McKeown, Ronald M. Gould, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's dismissal of an Arizona state prisoner's 28 U.S.C. § 2254 habeas corpus petition challenging his conviction by guilty plea for four counts of first-degree murder and his capital sentence.

Following a period of appointed representation, petitioner waived counsel and represented himself. He entered guilty pleas, and counsel resumed representation for sentencing.

The panel held that counsel did not provide constitutionally ineffective pre-trial assistance by failing adequately to communicate with petitioner or visit him in jail, or to diligently interview witnesses, review discovery, and examine evidence. The panel concluded that, under any standard of review, counsel's conduct was not objectively unreasonable. Accordingly, petitioner's claims of involuntary waiver of counsel and invalid guilty pleas, premised on ineffective pre-trial assistance, failed. Further, petitioner's procedural default of the ineffective assistance claims was not excused.

The panel affirmed the district court's denial of petitioner's claim that counsel provided ineffective assistance during sentencing by failing to investigate, develop, and present additional mitigation evidence related

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

to his family background and mental health. The panel concluded that the state post-conviction court did not unreasonably apply Supreme Court precedent in holding that there was no ineffective assistance of counsel during sentencing, and the district court did not abuse its discretion in denying petitioner's request for an evidentiary hearing on that claim.

Finally, any error in the Arizona court's impermissibly ignoring mitigating evidence of petitioner's family background because it lacked a causal nexus to his crimes was harmless.

COUNSEL

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

Ginger Jarvis (argued), Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

OPINION

McKEOWN, Circuit Judge:

Richard K. Djerf killed the mother, father, brother, and sister of a former friend to avenge a petty theft. He was promptly arrested and charged with numerous crimes. After a year and a half of appointed representation, he waived counsel and represented himself. Djerf pleaded guilty to four counts of first-degree murder, and counsel resumed representation for sentencing. The trial judge imposed a capital sentence for each of the murder convictions. The Arizona Supreme Court did the same on de novo review. Arizona courts denied Djerf's requests for post-conviction relief, and the district court dismissed his federal habeas petition. We affirm.

FACTUAL BACKGROUND[1]

Djerf and Albert Luna, Jr. were friends from their job at the local supermarket, but in early 1993 Albert stole several electronics and a firearm from Djerf's apartment. Djerf reported the incident and his suspicions about Albert's involvement to the police, who took no action. Djerf sought revenge several months later. Late one morning, Djerf arrived at the Luna family home with a handgun, knife, latex gloves, handcuffs, and fuse cord, using a vase with fake flowers as a ruse to gain entry. Albert's mother and five-year-old brother were home; Djerf bound them and asked the mother whether she or her young son should die first and whether she knew Albert's whereabouts. Djerf briefly

[1] The following account of Djerf's crimes was set forth by the Arizona Supreme Court on direct review. *See State v. Djerf*, 959 P.2d 1274, 1279–80 (Ariz. 1998) (en banc).

untied the mother, forcing her to load electronics and other valuables from the home into the family car.

Several hours later, Albert's eighteen-year-old sister came home. Djerf bound and gagged her, cut off her clothes, and raped her before repeatedly stabbing her in the chest and head and slitting her throat. Djerf then told Albert's mother what he had done to her daughter.

Shortly after, Albert's father came home. Djerf handcuffed him and forced him to crawl on all fours and lay face down on his bed. Djerf struck him in the head several times with a baseball bat, removed his handcuffs, bound his hands with tape, and left him for dead. Djerf told the mother that he had killed her husband.

Djerf then attempted, but failed, to snap the boy's neck and to electrocute him with a stripped electrical wire. The father, who had survived the earlier beating, charged and stabbed Djerf with a pocketknife. During the ensuing struggle, Djerf stabbed the father and then fatally shot him six times in front of the mother and boy. Djerf asked the mother whether she wanted to watch the boy die, or for him to watch her die, before shooting both in the head. He covered the bodies and the house with gasoline, turned on two stove burners, and placed cardboard and a rag on the stove, before fleeing the house in the family's car. The cardboard and rag never ignited. When Albert returned to the house, he discovered the gruesome scene and notified the police.

Over the next several days, Djerf described the murders to his girlfriend and two other friends. Djerf was arrested shortly after.

PROCEDURAL BACKGROUND

A grand jury charged Djerf with four counts of first-degree murder, as well as first-degree burglary, kidnapping, sexual assault, aggravated assault, attempted arson, theft, and unlawful use of a prohibited weapon. Michael Vaughn and Alan Simpson were appointed as counsel, and they represented Djerf at numerous hearings over the next year and a half. In February 1995, Djerf wrote to the trial judge to express his displeasure with the frequency of counsels' communication, their responsiveness, and their efforts to keep him apprised of trial strategy. Djerf requested that Vaughn and Simpson be withdrawn as counsel and asked to represent himself.

At a hearing several days later, the judge questioned Djerf at length to ensure he understood the disadvantages of self-representation and the severity of the potential penalties he faced. Counsel expressed their belief that Djerf was competent, but strongly advised against self-representation. The judge reiterated this advice, but nonetheless concluded Djerf knowingly, intelligently, and voluntarily waived his right to counsel, accepted the waiver of counsel, and appointed Vaughn and Simpson in an advisory capacity.

A few weeks later, the State requested an evaluation of Djerf's competence. In a prescreening report, Dr. Jack Potts concluded that Djerf understood the nature of the charges and possible penalties, the pending proceedings, his constitutional rights, and the necessary waiver of those rights if he entered a guilty plea. According to the report, Djerf understood he faced a "far greater burden" if he represented himself, but believed he had "very little to lose" given that the case against him was so strong. The report concluded that Djerf was competent to represent himself and that

further evaluation of his competency was unnecessary. The trial judge agreed.

Several months later, Djerf sent a letter to the prosecutor offering to accept the maximum non-capital sentences on all charges in exchange for an agreement not to pursue the death penalty, though he admitted he had little negotiating leverage. The prosecutor declined, affirming the State's intention to pursue death sentences on the murder charges. The prosecutor offered to dismiss all other charges if Djerf would plead guilty to the murder charges "with no agreements as to sentence." Djerf consulted with Vaughn and decided to accept the offer. During the change of plea hearing, the judge conducted a thorough canvass and accepted Djerf's guilty pleas.

Several weeks later, in September 1995, Djerf asked to remove Vaughn and Simpson as advisory counsel in light of their purported lack of attention and failure to communicate, and to appoint "effective" and "experienced" counsel for sentencing. Djerf stated that he "would prefer that counsel represent me for sentencing, but . . . I have pretty much lost trust in Mr. Vaughn and Mr. Simpson." The trial judge denied the motion, noting the substantial work counsel had performed on Djerf's case and their considerable experience in serious criminal cases. The judge concluded that "appoint[ing] some new attorney now at this stage would . . . not be in the interest of justice" because it would cause further delay and Djerf might have the same complaints about different lawyers.

Djerf ultimately withdrew his waiver of counsel, and the court reappointed Vaughn and Simpson. The State presented its aggravation case over the course of five days in October 1995.

After obtaining several continuances, Simpson presented Djerf's mitigation case in February 1996.[2] A jail guard testified to Djerf's conduct in detention, referencing several minor disciplinary infractions but indicating he was not an especially problematic inmate. Arthur Hanratty, a court-appointed investigator, testified about Djerf's upbringing, based on interviews with Djerf's parents and sister and a review of background records, school documents, and other materials. Counsel also introduced a recorded interview with Djerf corroborating much of Hanratty's testimony. The court then granted continuances for counsel's ongoing development of potential mental health expert evidence. Counsel ultimately opted not to present any such evidence.

In late spring 1996, counsel filed a presentence memorandum, and the mitigation hearing resumed, with another jail guard testifying to Djerf's respectful behavior and duties as a jail trustee serving meals. At the final sentencing hearing several weeks later, Djerf declined multiple offers to address the court before a sentence was rendered. The judge concluded that the State had proven three statutory aggravating factors for each murder and a fourth for the murder of the five-year-old boy. *See* Ariz. Rev. Stat. § 13-703(F)(5), (6), (8), (9) (1996). According to the judge, Djerf failed to prove any statutory or non-statutory mitigating factors: he "failed to show his difficult family background is a mitigating circumstance" because "[t]here is no evidence that any alleged difficult family background had any effect on the defendant's behavior during these killings that was beyond the defendant's control." The judge

[2] Vaughn was unable to attend the hearing because he "had to attend to matters in another court."

entered capital sentences for each of the four murder convictions.

In May 1998, the Arizona Supreme Court affirmed the convictions and, on de novo review, imposed the same capital sentences. *Djerf*, 959 P.2d at 1281–90. The court decided that Djerf's pre-trial waiver of counsel was valid and that the trial judge did not abuse his discretion by declining to conduct a competency hearing. *Id.* at 1281–84. The court also concluded that three aggravating factors had been proven for all four of the murders, a fourth aggravating factor applied to the murder of the boy, and Djerf failed to prove any mitigating factors. *Id.* at 1286–90. According to the Arizona Supreme Court, Djerf's difficult family background was not mitigating because such evidence "is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior." *Id.* at 1289 (citing *State v. Ross*, 886 P.2d 1354, 1363 (Ariz. 1994)). The U.S. Supreme Court denied Djerf's petition for writ of certiorari. *Djerf v. Arizona*, 525 U.S. 1024 (1998) (mem.).

In February 2000, the Arizona Supreme Court appointed Jamie McAlister as counsel for Djerf's state post-conviction proceedings. A year and a half later, a different trial judge dismissed Djerf's petition for post-conviction relief. In early 2002, the Arizona Supreme Court summarily denied a petition for review.

Djerf then filed a federal habeas petition in district court. *See* 28 U.S.C. § 2254. In September 2004, Djerf requested discovery and an evidentiary hearing. A year later, the district court denied Djerf's request and dismissed several claims as either procedurally barred or non-cognizable. In September 2008, the district court denied the remaining claims, but granted a certificate of appealability for two of

them: (i) whether Djerf's pre-trial waiver of counsel was involuntary because he was forced to decide between self-representation and incompetent counsel, and (ii) whether Simpson and Vaughn provided ineffective assistance of counsel during sentencing by failing to investigate and present further mitigation evidence related to Djerf's family background and mental health. Djerf appealed.

In March 2009, Djerf filed another petition for post-conviction relief in state court claiming his guilty pleas were not knowing, intelligent, or voluntary and that McAlister provided ineffective assistance during the initial post-conviction proceedings. The state court rejected the first claim as precluded because it was denied by the Arizona Supreme Court on direct appeal. The court then dismissed the second claim on the grounds that Djerf did not have a constitutional right to counsel in post-conviction proceedings. A few months later, the Arizona Supreme Court summarily dismissed the petition.

In 2012, the U.S. Supreme Court decided *Martinez v. Ryan*, which held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. 1, 9 (2012). We granted Djerf's motion for a partial remand to permit him to pursue several claims, including whether McAlister's allegedly inadequate representation excused Djerf's failure to exhaust certain claims in the initial state post-conviction proceedings.

In April 2017, the district court denied all remaining claims, holding that Djerf did not establish cause and prejudice to set aside the procedural default of his pre-trial ineffective assistance claim. On appeal to this court, Djerf argued that the Arizona courts impermissibly ignored his family background mitigation evidence by employing an

unconstitutional "causal nexus" test. *See generally Eddings v. Oklahoma*, 455 U.S. 104 (1982). We expanded the certificate of appealability to include the causal nexus claim and the claims denied by the district court on partial remand.

JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We review de novo the district court's denial of a writ of habeas corpus and for clear error its findings of fact. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). Because Djerf's federal habeas petition was filed after April 24, 1996, he must satisfy the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, we may not grant relief unless a state court's ruling "was contrary to . . . clearly established Federal law[] as determined by the Supreme Court," "involved an unreasonable application of" such law, or "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). In conducting this review, we look to the last reasoned state court decision for each claim. *White v. Ryan*, 895 F.3d 641, 665 (9th Cir. 2018).

ANALYSIS

Djerf contends that Simpson and Vaughn provided ineffective assistance during their pre-trial representation. He acknowledges that he failed to raise, and therefore procedurally defaulted, this claim in the initial state post-conviction proceedings. However, he argues that *Martinez* excuses the procedural default, because McAlister's ineffective assistance during post-conviction proceedings was the reason he failed to raise the claim. Djerf advances two other claims premised on Simpson and Vaughn's purportedly deficient pre-trial representation: his waiver of

counsel was involuntary because he was forced to decide between ineffective counsel and self-representation, and his guilty pleas were invalid because the trial judge failed to disclose that he was forfeiting his right to proceed with competent counsel. Because the record does not establish that Simpson and Vaughn's pre-trial representation was constitutionally deficient, the procedural default is not excused, and the waiver of counsel and guilty pleas claims fail.

Djerf advances two other claims on appeal. He contends that Simpson and Vaughn provided ineffective assistance during sentencing by failing to investigate and present further evidence of his difficult family background and mental health issues. Affording the necessary deference to the state court's denial of this claim under AEDPA, we affirm. Finally, Djerf contends that the Arizona courts impermissibly ignored mitigating evidence of his family background because it lacked a causal nexus to his crimes. We conclude any such error was harmless.

I. Claims Premised on Ineffective Pre-Trial Representation

As noted, several of Djerf's claims are premised on ineffective pre-trial assistance by Vaughn and Simpson. Specifically, Djerf contends that they failed to adequately communicate with or visit him in jail, or to diligently interview witnesses, review discovery, and examine evidence. The record belies these complaints. Jail visitor logs and Djerf's own correspondence demonstrate that counsel visited him in the months preceding his request for self-representation and communicated with him regularly over the telephone and at court. The record likewise establishes that counsel performed significant work during this time: they interviewed more than fifty witnesses, with

some interviews lasting several days; they initiated negotiations for a plea deal; they filed various motions on Djerf's behalf and attended regular hearings; they prepared for parallel, consolidated proceedings involving use and treatment of DNA evidence; and they spent nearly an entire day reviewing the physical evidence in police custody. During his waiver of counsel hearing, and again in a hearing at the onset of sentencing proceedings, Djerf acknowledged that Vaughn and Simpson had done considerable work on his behalf during their months of representation. The record demonstrates that brief continuances sought by counsel were reasonably necessary to permit the continued preparation for trial and accommodate health issues and other case responsibilities, not, as Djerf asserts, because counsel had failed to start any serious work on his case.

We see no indication that Simpson and Vaughn's "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). They satisfied their "duty to make reasonable investigations" by interviewing dozens of witnesses and seeking out and reviewing evidence. *Id.* at 691. The record rebuts Djerf's conclusory allegations that counsel "did nothing at all to prepare a defense." *Crandell v. Bunnell*, 25 F.3d 754, 755 (9th Cir. 1994) (per curiam). At no point was there a "complete breakdown in communication," *Daniels v. Woodford*, 428 F.3d 1181, 1201 (9th Cir. 2005), nor did counsel ever fail to "consult with the defendant on important decisions [or] to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. Again, despite Djerf's suggestions to the contrary, the record does not reveal any significant periods of time during which counsel failed to communicate with or respond to him. *See Crandell*, 25 F.3d at 755 (suggesting that complete silence for the first two

months of representation raised questions about competence of counsel). Under any standard of review, Simpson and Vaughn's conduct was not objectively unreasonable.

Because the record fails to establish that Vaughn and Simpson provided constitutionally inadequate pre-trial assistance, it also fails to establish that Djerf was forced to choose between self-representation and incompetent counsel. As a result, his claim that his waiver of counsel was involuntary fails. So does his related argument that the trial judge erred by failing to further investigate his motivation for removing counsel and therefore discover the purportedly ineffective representation.[3] Djerf's challenge to the validity of his guilty pleas also fails—the record does not establish that counsel were incompetent, so Djerf did not forfeit any right to proceed with competent counsel. No clearly established Supreme Court precedent entitles Djerf to relief on his waiver of counsel and guilty plea claims, and the Arizona courts reasonably applied the facts in the record to deny them.

For the same reasons, we conclude that the procedural default of the underlying ineffective assistance claim is not excused. To excuse a procedural default, a habeas petitioner must establish both "cause" and "prejudice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Typically, ineffective

[3] Djerf also argues that his waiver of counsel and request for self-representation in February 1995 should have been construed as a request to substitute counsel and that the trial court erred by failing to do so. This argument is not consistent with the record; Djerf several times expressly stated his desire to represent himself, despite strong discouragement from the judge and counsel. At no point prior to or during the February 1995 hearing did Djerf intimate a desire for other counsel. In view of this record, the Arizona Supreme Court's denial of this claim was not an unreasonable application of Supreme Court precedent. *See Djerf*, 959 P.2d at 1283–84.

assistance of post-conviction counsel cannot excuse a procedural default. *See Martinez*, 566 U.S. at 9, 13–14. However, *Martinez* created a narrow exception in Arizona and other states that bar ineffective assistance claims on direct appeal; in those states, the initial collateral proceedings are the first opportunity to bring such claims. *Id.* The Supreme Court subsequently expanded this exception, holding that where a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). To satisfy "cause" in this context, Djerf must show that McAlister was ineffective under *Strickland*—that is, McAlister's post-conviction representation was deficient because she failed to bring the pre-trial ineffective assistance claim, and there is a "reasonable probability" that, had the claim been raised, "the result of the post-conviction proceedings would have been different." *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 819 (9th Cir. 2015) (en banc). To satisfy "prejudice," Djerf must show that the underlying claim is "substantial"—that is, that it has "some merit." *Id.* There is considerable overlap between these requirements, since each considers the strength and validity of the underlying ineffective assistance claim. *See id.*

Even if we were to assume that Djerf's pre-trial ineffective assistance claim was substantial (which would be a stretch in light of the record and the service performed by counsel), there is no reasonable probability that advancing that claim during initial post-conviction proceedings would have altered the result. *See Rodney v. Filson*, 916 F.3d 1254,

1260 (9th Cir. 2019) (clarifying that a petitioner represented by counsel in post-conviction proceedings must satisfy both *Strickland* prongs). Djerf's post-hoc criticisms of counsel's pace of preparation were contradicted by his statements at the time, as well as those of the prosecutor and trial judge. The record shows regular visits and communication between counsel and Djerf, and Djerf has not identified any authority, existing then or now, suggesting that the frequency and nature of communication was constitutionally infirm. Even if Djerf had been able to show that the representation was constitutionally deficient, he would have struggled to show that the purported deficiencies resulted in sufficient prejudice to warrant overturning his four murder convictions. We cannot excuse the procedural default of this claim under these circumstances.

II. Ineffective Representation During Sentencing

We next turn to Djerf's claim that Simpson and Vaughn rendered ineffective assistance during sentencing by failing to further investigate, develop, and present additional mitigation evidence related to his family background and mental health. The trial judge's post-conviction denial of this claim was the last reasoned state court decision, so we review that ruling under AEDPA. *See Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). In the district court, Djerf requested an evidentiary hearing in connection with this claim. As explained below, the state post-conviction court did not unreasonably apply Supreme Court precedent in holding there was no ineffective assistance of counsel during sentencing and the district court did not err in denying Djerf's request to expand the record.

A. Family Background

Djerf's argument that counsel provided ineffective assistance by failing to obtain more background records and conduct more interviews was rejected by the post-conviction judge because Djerf failed to present any supporting evidence, and instead merely "speculate[d] that if his childhood was investigated, some mitigating evidence might have been discovered." We review the post-conviction judge's determination under AEDPA and determine it was not an unreasonable application of Supreme Court precedent.

Throughout the entirety of his state post-conviction and federal habeas proceedings, Djerf has failed to identify any evidence related to his childhood that counsel should have, but did not, uncover. Crucially, Djerf did not point the post-conviction judge to any evidence sentencing counsel failed to present that was meaningfully different from what was introduced at mitigation. It was Djerf's burden to establish a reasonable probability that the result of the proceedings would have been different but for counsel's purported errors. *Strickland*, 466 U.S. at 694. *Strickland* prejudice is not established by mere speculation that witness testimony "might have given information helpful to" the defense. *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001). Under the significant deference required by AEDPA, the post-conviction judge's denial of this claim was neither an unreasonable application of clearly established law nor an unreasonable determination of the facts in light of the evidence in the record at that time.

B. Mental Health

Djerf's argument that counsel provided ineffective assistance by failing to investigate and develop additional

mental health mitigating evidence was rejected by the post-conviction judge for a similar reason: Djerf merely relied on expert reports prepared prior to sentencing to speculate that "there might be other mitigating information that should have been presented." Under AEDPA, the state court's ruling that Djerf did not suffer ineffective assistance of counsel due to the alleged failure to develop additional mental health mitigating evidence was not an unreasonable application of Supreme Court precedent.

In his initial post-conviction proceedings, Djerf's appointed mental health expert conducted extensive neurological testing. However, Djerf did not introduce any reports or other evidence from this expert in support of his petition. Instead, he submitted Dr. Potts's prescreening report from April 1995 and reports prepared by Dr. McMahon, Dr. Walter, and Dr. Duane prior to sentencing.

In the winter of 1995–96, Dr. McMahon conducted several hours of psychological testing and prepared a report, noting that Djerf's results were suggestive of "learning disabilities and/or some diffuse neuropsychological dysfunction." He recommended further evaluation. Dr. Walter then completed neuropsychological testing; he reported that Djerf performed "relatively well in [a] number of areas," though there were indications that he might have a "focal cerebral deficit in the right temporal area." To better understand the possible "right temporal disturbance," Dr. Walter recommended further neuropsychiatric evaluation to seek out possible "abnormal electrical activity." Dr. Duane then conducted an electro-encephalogram and advanced brain-mapping. Dr. Duane summarized Djerf's developmental history, noting that as an infant, Djerf "fell over and hit his head with a large knot" and reportedly fell often in the subsequent years. Dr. Duane concluded that the

test results were consistent with a personality disorder, not brain dysfunction. Dr. McMahon compiled the results of all these findings and conclusions into a final report. Dr. McMahon intimated that the test results are consistent with an antisocial personality disorder, not a delusional disorder or schizophrenia. Dr. McMahon acknowledged that Djerf likely has "some learning disabilities that . . . affect his ability to organize a situation and make effective decisions," but concluded "there is an absence of a sufficiently severe mental defect that it would have precluded his appreciating the wrongfulness of his acts, or resulted in an inability to conform his behavior to the requirement of the law." Counsel received each report, and, several days after receiving Dr. McMahon's final report, notified the court they would not be submitting any expert mental health evidence in mitigation.

The post-conviction judge considered and rejected Djerf's argument that sentencing counsel provided ineffective assistance because they failed to adequately investigate and develop evidence of "a serious brain-related injury" that Djerf experienced as a child.[4] At least two of

[4] Djerf argues that AEDPA deference does not apply here because the post-conviction judge made a factual error. Indeed, the judge incorrectly stated that the reports prepared by Dr. McMahon, Dr. Walter, and Dr. Duane had been "considered by the court prior to sentencing." Counsel did not submit the reports to the court. However, this minor error does not unlock de novo review. *See* 28 U.S.C. § 2254(d). The judge rejected this claim because Djerf failed to show there was helpful mental evidence that sentencing counsel could have, but failed to, develop. Djerf's speculation that such evidence *might* have existed was insufficient. Whether the sentencing court reviewed certain reports prior to sentencing had no bearing on this holding. De novo review is authorized when a "decision . . . *was based* on an unreasonable determination of the facts," not every time an order or opinion includes an incorrect factual finding. 28 U.S.C. § 2254(d) (emphasis added).

the experts who evaluated Djerf prior to sentencing were aware of his alleged childhood head injury. Djerf does not specify what further information counsel should have but failed to uncover and provide to the experts to assist in their evaluations: Djerf's mother admitted she did not seek medical attention for her son, and no other family member recalled the injury or any side effects. The McMahon, Walter, and Duane reports could reasonably be read to rule out schizophrenia or any other comparably mitigating disorder. Djerf asked the post-conviction judge to deduce from these reports that unidentified background evidence would have changed the diagnosis or that other experts, equipped with such information, might have diagnosed him with schizophrenia. It was not unreasonable for the judge to decline the invitation to make this speculative leap. That Djerf later found experts who might nominally disagree with the earlier findings, *see infra* p.23–24, does not render the state court's ruling unreasonable, as no evidence establishing a diagnosis helpful to the defense was in the state post-conviction record. *See Murray v. Schriro*, 745 F.3d 984, 1000 (9th Cir. 2014) (AEPDA review limited to evidence in state court record). Any argument that sentencing counsel erred by failing to present reports or testimony from Dr. McMahon, Dr. Walter, or Dr. Duane during mitigation is equally unavailing. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that [they] did so for tactical reasons . . . ." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). Given that many aspects of their reports were harmful to Djerf's mitigation case, that presumption remains unrebutted here. For all of these reasons, we hold that the post-conviction judge

reasonably applied *Strickland* in concluding that sentencing counsel did not provide ineffective assistance.[5]

We need not reach the second prong of *Strickland*, but if we did, we would conclude that the sentencing counsel's failure to investigate, develop, and present additional mental health evidence was not prejudicial. Again, it is not clear what evidence counsel would have uncovered had they more vigorously investigated the purported head injury, or that the discovery of such evidence would have resulted in expert evidence supporting a schizophrenia diagnosis. Such speculation rarely creates a "reasonable probability" that a different result would have occurred absent the purportedly deficient representation. *Strickland*, 466 U.S. at 694. The prejudice inquiry also requires consideration of the State's aggravation case, which was remarkably strong: at least three aggravating factors applied for each victim, including undisputed, vivid details of gruesome physical, sexual, and emotional abuse preceding the killings. The post-conviction judge reasonably concluded that any deficient performance by sentencing counsel was harmless under *Strickland*.

[5] Djerf claims that the post-conviction judge never reached the question of deficient performance and instead ruled only on prejudice. Accordingly, he insists we review *Strickland* performance de novo. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam). We disagree; read fairly, the judge's ruling addresses both prongs of the analysis. But even if we agreed with Djerf's take on the ruling, we would reach the same ultimate conclusion under de novo review. Counsel conducted a "thorough investigation of law and facts relevant to [Djerf's] plausible options" for mitigation, and we must therefore afford significant deference to their tactical decisions. *Hernandez v. Chappell*, 923 F.3d 544, 550 (9th Cir. 2019) (quoting *Strickland*, 466 U.S. at 690). Their investigation of possible mental health mitigation evidence was not unreasonable under prevailing professional norms. *Strickland*, 466 U.S. at 688.

C. Evidentiary Hearing

In the district court, Djerf requested an evidentiary hearing in connection with his ineffective assistance of sentencing counsel claim, and he now seeks a remand to permit expansion of the record and reconsideration of this claim. The district court denied the request because Djerf had not been diligent in developing the proffered factual basis in state court. For the following reasons, we affirm.

Under *Cullen v. Pinholster*, when a claim is subject to AEDPA review, a district court is limited to the record that was before the state court that adjudicated the claim on the merits. 563 U.S. 170, 185 (2011). The entirety of the ineffective sentencing counsel claim is subject to AEDPA deference, so no evidentiary expansion is permitted. Even if we granted a remand, *Pinholster* would prohibit the introduction of new evidence.

However, *Pinholster* was issued several years after Djerf requested and the district court denied an evidentiary hearing. Lacking *Pinholster*'s guidance, the district court considered whether Djerf satisfied the exception for evidentiary expansion under 28 U.S.C. § 2254(e)(2)(A)(ii), which requires that "a factual predicate that could not have been previously discovered through the exercise of due diligence." *See Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc) (expansion of the record is "severely restrict[ed]" when lack of diligence prevented factual development in post-conviction proceedings). *Pinholster* clarified that this statutory exception applies only to claims reviewed de novo; evidentiary expansion is prohibited for a claim subject to AEDPA review, regardless of diligence. 563 U.S. at 185–86.

Even if we assume, as the district court did, that Djerf's claim was covered by § 2254(e)(A)(2)—because we reviewed the ineffective assistance of sentencing counsel claim de novo—we conclude that the district court did not abuse its discretion by declining to expand the record. *See West v. Ryan*, 608 F.3d 477, 484 (9th Cir. 2010) (reviewing decision to expand record for abuse of discretion).

As a threshold matter, Djerf's request for an evidentiary hearing in the initial post-conviction proceedings was not sufficient to demonstrate diligence. *Cf. Baja v. Ducharme*, 187 F.3d 1075, 1078–79 (9th Cir. 1999); *see also Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000) ("Mere requests for evidentiary hearings will not suffice; the petitioner must be diligent in pursuing the factual development of his claim."). Moreover, Djerf fails to identify any new evidence that he presented to the state court in support of that request or any proffer he made to demonstrate why an evidentiary hearing at that time would have been worthwhile.

In the district court, Djerf sought a hearing to present testimony from his sister, his mother, Simpson, and Hanratty. A short declaration from his sister offered a few new, minor details about Djerf's upbringing—e.g., their father spanked him as a child—but otherwise only corroborated the family background evidence originally presented in mitigation. Djerf fails to explain how the testimony from the other witnesses would vary meaningfully from the family background evidence presented in mitigation, or why such evidence could not have been procured through the exercise of diligence during the initial post-conviction proceedings.

Djerf also seeks to present testimony from new medical experts who will testify in support of his theory that he

suffered from schizophrenia at the time of his crimes. Djerf and post-conviction counsel knew that brain dysfunction and schizophrenia had been investigated by sentencing counsel and several experts. Yet, despite having an appointed expert in the post-conviction proceedings, Djerf did not present any new medical, psychological, or neurological evidence at that time. Djerf fails to explain why the factual basis for this claim would have evaded discovery if he and his post-conviction counsel had been diligent. In sum, Djerf did little to show that an evidentiary hearing was warranted as to his family background or mental health, and the district court did not abuse its discretion by refusing to hold one.

III. Causal Nexus

Finally, we turn to Djerf's claim that the Arizona courts impermissibly refused to consider mitigating evidence of his difficult family background because it lacked a causal connection to his crimes. We focus on the Arizona Supreme Court's de novo review of Djerf's sentence and consider the trial judge's rulings only to the extent that they were "adopted or substantially incorporated" by the higher court. *McKinney*, 813 F.3d at 819. We have addressed many causal nexus appeals in recent years and need not repeat the history and nuance of this doctrine, which is extensively detailed in other decisions. *See, e.g.*, *id.* at 811–24. In short, the Supreme Court has clearly established that a sentencing court must consider all mitigating evidence; state law may not, for example, impose a threshold requirement that a defendant demonstrate a causal connection to the offense. *See Smith v. Texas*, 543 U.S. 37, 43–49 (2004) (per curiam); *Tennard v. Dretke*, 542 U.S. 274, 283–88 (2004); *Penry v. Lynaugh*, 492 U.S. 302, 319–28 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings*, 455 U.S. at 110–17; *Lockett v. Ohio*, 438 U.S. 586, 597–609

(1978). Of course, the sentencing court is free to assign little weight to mitigating evidence, but such evidence may not be stripped of all weight as a matter of law. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995). However, relief is only available when a causal nexus error was prejudicial—that is, when it was not harmless. *McKinney*, 813 F.3d at 821–22. We assume, without deciding, that the Arizona Supreme Court committed a causal nexus error here and move directly to the harmlessness inquiry.

The question is whether the Arizona Supreme Court's refusal to consider Djerf's family background evidence "had substantial and injurious effect or influence in determining" his sentence. *Id.* at 822 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). We review aggravating factors proven by the State and other mitigating evidence presented to the sentencing court, then we ask whether consideration of the improperly ignored evidence "would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it." *Id.* at 823. We conclude here it would not—any error was harmless.

The State established three aggravating factors for each of the victims: Djerf committed each murder expecting receipt of something of pecuniary value; the murders were committed "in an especially heinous, cruel or depraved manner"; and the murders were committed in tandem. Ariz. Rev. Stat. § 13-703(F)(5), (6), (8) (1996). Because one of the victims was under eighteen, the State established another aggravating factor for his murder. *Id.* § 13-703(F)(9). Each of these factors is significant, but the undisputed facts substantiating the "heinous, cruel, or depraved" finding are especially powerful: with clear premeditation and preparation, Djerf imposed appalling psychological and physical suffering upon four strangers from a single family

before killing them in cold blood. The State's aggravation case stands out as one of, if not the, strongest we have reviewed in recent years.

On the other hand, Djerf's mitigation case was, as he admits on appeal, quite meager. Djerf was twenty-three years old at the time of the crimes, did not resist arrest, was mostly well-behaved for the duration of his post-arrest detention, and purported to accept responsibility and feel remorse for his conduct. The trial judge concluded that Djerf's relative youth was not a mitigating factor because there was no indication that he lacked substantial judgment or an ability to appreciate the consequences of his actions. Djerf's compliance with arresting officers was likewise not mitigating because, by that time, his friends were cooperating with the police and he had no other option. Subsequent statements by Djerf blaming Albert Luna for the crime and indicating that he could envision himself killing again undermined his purported acceptance of responsibility and remorse. So did the tactical justifications for his guilty plea. The trial judge found that Djerf had adjusted to confinement since his arrest, but several disciplinary infractions kept that factor from warranting leniency. The trial judge also concluded that Djerf did not suffer from any psychological disorders, noting that he expressly disclaimed any such problems. None of these considerations warranted leniency.

On direct appeal, Djerf challenged the court's findings regarding age, remorse, and acceptance of responsibility. *Djerf*, 959 P.2d at 1288–90. The Arizona Supreme Court largely reiterated the trial judge's reasoning and reached the same conclusions, finding that these considerations did not warrant leniency. *Id.*

That brings us to the evidence of a difficult family background—evidence that we assume the Arizona courts improperly ignored. Djerf's mother experienced some complications during pregnancy and childbirth. She recalled her son falling on his head as a toddler, though Djerf's father does not recall any injuries. Neither parent was especially affectionate or doting with their son, and they divorced when he was approximately six years old; Djerf maintained relationships and alternately lived with each parent in the subsequent years. Both parents raised their voice on occasion, and the mother's new husband once pushed Djerf up against a wall. However, there is no evidence that Djerf experienced physical or emotional abuse throughout his childhood. His mother recalled him rarely interacting with friends, while his father thought he had "normal" relationships until high school. At that point, his father thought Djerf became "more of a loner," although he regularly spent time with friends. Djerf's mother and sister insisted that Djerf's father drank heavily, though Djerf did not recall ever seeing him intoxicated. His sister also remembered their father as "loving" and a "good provider." She recalled a time from their childhood when Djerf handcuffed her, but she did not recall anything else notable about the incident. Djerf dropped out of high school, but later obtained his diploma.

We have previously found a causal nexus error to be harmless when there is "overwhelming" evidence of aggravating circumstances and proffered mitigation evidence is "limited" or "relatively minor." *Murray v. Schriro*, 882 F.3d 778, 815–16 (9th Cir. 2018); *Apelt v. Ryan*, 878 F.3d 800, 840 (9th Cir. 2017); *Greenway v. Ryan*, 866 F.3d 1094, 1100 (9th Cir. 2017) (per curiam). That is precisely the case here. This is not an instance where improperly ignored mitigation evidence addressed

"sustained, severe childhood abuse" "beyond the comprehension and understanding of most people." *McKinney*, 813 F.3d at 823. In *Poyson v. Ryan*, there was evidence of repeated physical and emotional childhood abuse, sexual assault, coerced alcohol and drug use, developmental delays, the sudden death of a close parental figure, and severe head injuries resulting in headaches and loss of consciousness. 879 F.3d 875, 892–93 (9th Cir. 2018). Despite significant aggravating factors, we concluded that exclusion of this "particularly compelling" mitigation evidence was prejudicial because it may have persuaded the sentencing court to impose a non-capital sentence. *Id.* The mitigating evidence here is categorically less compelling, and the aggravating circumstances are more severe.

This is also not a situation where the evidence was objectively "important" and "interlinked" with other theories of mitigation, such that improperly excluding that evidence deprived all other mitigation evidence of persuasive force. *See Spreitz v. Ryan*, 916 F.3d 1262, 1279–80 (9th Cir. 2019). We do not mean to suggest that Djerf experienced an idyllic childhood. Rather, there was no evidence of severe abuse, trauma, or other troubling experiences that might warrant leniency in light of overwhelming aggravating circumstances. We have no choice but to conclude that any causal nexus error committed by the Arizona Supreme Court was harmless.

CONCLUSION

The record fails to establish that Djerf's pre-trial counsel were incompetent or provided constitutionally deficient representation. This conclusion defeats Djerf's challenges to his waiver of counsel and guilty pleas, as both claims are premised on constitutionally inadequate representation. Because there is not a reasonable probability that state post-

conviction proceedings would have turned out differently if Djerf had advanced a pre-trial ineffective assistance of counsel claim, we cannot excuse the procedural default of that claim. The state court reasonably concluded that sentencing counsel was not ineffective, and the district court did not abuse its discretion by denying Djerf's request for an evidentiary hearing on that claim. Finally, we conclude any causal nexus error during Djerf's sentencing was harmless.

AFFIRMED.[6]

[6] After oral argument, the Supreme Court granted certiorari in *McKinney v. Arizona*, No. 18-1109, 2019 WL 936074 (June 10, 2019), to address the appropriate procedures for resentencing after a capital sentence is vacated in light of a prejudicial *Eddings* error. Djerf moved to stay these proceedings pending resolution of that case. Dkt. 119. Because no resentencing is warranted here, the motion is **DENIED**.

APPENDIX C

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Richard Kenneth Djerf, Petitioner, vs. Dora B. Schriro, et al., Respondents.	No. CV-02-0358-PHX-JAT DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Richard Kenneth Djerf ("Petitioner") is a state prisoner under sentence of death. Pursuant to the Court's general procedures governing resolution of capital habeas proceedings, the parties have completed briefing of both the procedural status and the merits of Petitioner's habeas claims.

Before the Court is Petitioner's First Amended Petition, which raises twenty claims for habeas relief. (Dkt. 55.)[1] In a previous Order, this Court denied Petitioner's motion for discovery and an evidentiary hearing and denied several claims based on procedural bar. (*See* Dkt. 94.) This Order resolves the remaining claims. The Court concludes that Petitioner is not entitled to habeas relief.

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

FACTUAL AND PROCEDURAL BACKGROUND

While working at a local supermarket, Petitioner met and became friends with Albert Luna, Jr.[2] Luna subsequently burglarized Petitioner's apartment, taking his television, a VCR unit, stereo equipment, a car alarm, and an AK-47 assault rifle. Petitioner suspected Luna and informed police, but Luna was not arrested. The matter festered for several months until Petitioner, angered by the burglary and frustrated by police inaction, decided to seek revenge.

Late on the morning of September 14, 1993, Petitioner went to the Luna family home armed with a nine-millimeter Beretta handgun, a knife, latex gloves, handcuffs, red fuse cord, and flowers as a ruse to gain entry. When Luna's mother, Patricia, opened the door to receive the flowers, Petitioner pushed his way into the house, brandishing his gun. While holding Damien, Patricia's five-year-old son, hostage, Petitioner robbed the Luna family by forcing Patricia to put certain household items into the Luna family car. Afterwards, he took Patricia and Damien into the kitchen and bound them to chairs with rope and black electrical tape. More than once, he asked Patricia whether she or her son should die first. He also asked her the whereabouts of Albert Jr.

At around 3:00 p.m., Rochelle, Patricia's eighteen year-old daughter, came home from school. At knifepoint, Petitioner took Rochelle to her bedroom, gagged her with tissue paper and tape, tied her wrists to her bed, cut and removed her clothes with a knife, and raped her. Petitioner killed Rochelle by stabbing her four times in the chest and slitting her throat, severing her jugular vein. Two of the chest wounds and the throat wound were potentially fatal. Rochelle also suffered multiple shallow knife wounds to the back of her head while she was alive, and one stab wound to her right temple, which may have been postmortem. Her earring had been torn through the earlobe. At some point while still alive, Rochelle

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[2] Except where otherwise indicated, this factual summary is taken from the decision of the Arizona Supreme Court in *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998).

vomited behind her gag and choked on her own vomit. Petitioner left the bedroom and told Patricia he had raped and killed her daughter.

Shortly thereafter, Albert Luna, Sr., arrived home from work. At gunpoint, Petitioner handcuffed Albert's arms behind his back and forced him into the master bedroom, placing him face down on the bed. He struck Albert in the back of the head multiple times with an aluminum baseball bat, inflicting lacerations and spattering blood throughout the room. The hemorrhaging that Albert suffered from these wounds was potentially fatal. Petitioner removed the handcuffs but taped Albert's hands and wrists together and left him for dead. Petitioner walked back to the kitchen and told Patricia that he had killed her husband.

Petitioner next attempted to snap Damien's neck by twisting his head abruptly from behind, "like he had seen in the movies." In fact, Petitioner "turned [Damien's head] all the way around and nothing happened," so he stopped. Petitioner then attempted to electrocute Damien, cutting an electrical cord from a lamp, stripping its insulation, and taping it to the skin on Damien's calf. The cord was found unplugged at the scene.

Despite his injuries, Albert was able to free himself from the tape. He went to the kitchen and charged Petitioner with his pocketknife, seriously wounding him. However, during the ensuing struggle, Petitioner stabbed Albert and shot him six times, killing him. Petitioner then asked Patricia, "Do you want to watch your kid die, or do you want your kid to watch you die?" Petitioner then killed both Patricia and Damien, shooting them in the head at close range. Petitioner's attack on the Luna family lasted for more than six hours.

In an attempt to conceal the murders, Petitioner planned to set the house on fire with red fuse wire. He splashed gasoline on the bodies and throughout the house and got ready to light the fuse. He changed his mind when he noticed children playing outside, which meant that he could not leave the house immediately without being seen. Instead, he turned on two of the kitchen stove burners, placed an empty pizza box and a rag on the burners, and left the house. Petitioner stole the Luna's car and drove to his apartment. When his girlfriend, Emily Boswell, arrived, he told her that he had been stabbed by two men trying

to rob him. He was later admitted to the hospital.

Albert Jr. did not return to the family home until late that night. Numerous unanswered calls to his family had made him anxious, so he drove to the home. When he entered the house and discovered the bodies, he immediately left and contacted police. When the police arrived, the stove burners were red hot but the pizza box and rag had not ignited.

Petitioner admitted to Boswell that he murdered four people in the Luna family and described to her the brutality of the murders. He told Boswell that the blood dripping from Patricia's gunshot wound was "really awesome" and "you should have been there." Petitioner's friend, Travis Webb, checked him out of the hospital, but Petitioner was unwilling to go back to his own apartment. Webb rented a motel room for Petitioner. Petitioner contacted a friend, Daniel Greenwood, in California, to whom he again admitted his guilt in the four murders. Petitioner also told Webb that he committed the four Luna murders.

Phoenix police executed search warrants on the motel room, Petitioner's car, and his apartment. The police found handcuffs, Petitioner's nine-millimeter Beretta handgun, artificial flowers, a vase, and a red fuse cord. Petitioner also was in possession of the Luna family's personal belongings, including a CD player, two VCR units, a U.S. West caller ID unit, watches, Rochelle's necklace, Patricia's car keys, a telephone, and food stamps. When they arrested Petitioner that same day, the police also found a handcuff key and a newspaper section containing an article about the killings.

Petitioner was indicted for the four murders, burglary, kidnapping, sexual assault, aggravated assault, attempted arson, theft, and misconduct involving weapons. The trial court appointed two attorneys to represent Petitioner, Michael Vaughn and Alan Simpson. Subsequently, Petitioner filed a motion to change counsel and proceed *pro se* for all future proceedings. The court held that Petitioner voluntarily, knowingly, and intelligently waived his right to counsel. The trial court granted Petitioner's motion to proceed *pro se* but kept Vaughn and Simpson as advisory counsel.

The prosecution filed a motion to determine Petitioner's competence to waive counsel and conduct his own defense. Petitioner consented to such an evaluation to "remove any doubt as to . . . competence." The trial court ordered a prescreening evaluation to determine whether a complete competency examination was warranted. Dr. Jack Potts evaluated Petitioner and pronounced him competent. The trial court reaffirmed its finding that Petitioner be allowed to proceed *pro se*.

Petitioner decided to enter into a plea agreement with the State, pleading guilty to four counts of first degree murder. The agreement expressly stated that no limits would be placed on sentencing and Petitioner could be sentenced to death for any or all of the murder counts. In exchange, the State agreed to dismiss the remaining criminal counts. At the plea hearing, the trial court informed Petitioner of certain constitutional rights being relinquished under the plea agreement, acknowledged Dr. Potts' prescreening report and reaffirmed the finding of competency, and concluded that Petitioner's guilty pleas were made knowingly, intelligently, and voluntarily.

Petitioner subsequently withdrew his waiver of counsel and accepted representation for the remainder of the sentencing proceedings. Petitioner requested and received the appointment of three mental health experts, a psychologist, a neuropsychologist, and a neurologist. Ultimately, Petitioner chose not to submit any reports from his mental health experts. The trial court conducted aggravation and mitigation hearings. The court then rendered its special verdict, concluding that the prosecution had proven four statutory aggravating circumstances: that the murders were committed for pecuniary gain; that they were committed in an especially heinous, cruel, or depraved manner; that multiple homicides were committed; and that at the time of the offense Petitioner was an adult and one of the victims, Damien Luna, was under fifteen years of age. The trial court determined that Petitioner failed to prove any statutory mitigating factors or the non-statutory mitigating factors of post-arrest conduct, disadvantaged childhood, psychological disorder, remorse, adjustment to confinement, or acceptance of responsibility. The court imposed the death

sentence on each of the homicide counts. On direct appeal, the Arizona Supreme Court affirmed, *see State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998), and the United States Supreme Court denied a petition for writ of certiorari. *Djerf v. Arizona*, 525 U.S. 1024 (1998).

In 2000, the Arizona Supreme Court issued the mandate in Petitioner's case and appointed post-conviction relief ("PCR") counsel. (ROA-PCR 1-3.)[3] PCR counsel filed an initial petition. (ROA-PCR 6.) Counsel requested and the court granted the appointment of a mental health expert. (ROA-PCR 9, 11, 13-14.) Counsel filed an amended PCR petition. (ROA-PCR 19.) Counsel chose not to include any mental health report in support of the amended petition. (*Id.*) After the amended petition was filed, Petitioner's mental health expert conducted additional testing, but the results of such testing were not submitted to the court. (ROA-PCR 21-22.) The trial court summarily denied PCR relief. (ROA-PCR 27.) The Arizona Supreme Court denied a petition for review. (PR Doc. 6.) Petitioner then commenced these proceedings.

After briefing the procedural status and merits of his habeas claims, Petitioner filed a motion for discovery, an evidentiary hearing and expansion of his state court record. This Court denied Petitioner's motion, concluded that Claims Three, Twelve, and Twenty were procedurally barred, and dismissed Claim Six as a non-cognizable habeas claim. (Dkt.94.) The Court now resolves the procedural status and merits of the remaining claims.

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[3] "ROA" refers to the four volumes of records from Maricopa County Superior Court, which was prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-93-07792). "RT" refers to the reporter's transcripts of Petitioner's trial and sentencing proceedings. "ME" refers to the minute entries of the trial court. "ROA-PCR" refers to the volume of records from Maricopa County Superior Court, which was prepared for Petitioner's PCR proceedings (Case No. CR-93-07792). "PR Doc." refers to the volume of records from the Arizona Supreme Court denying Petitioner's Petition for Review following denial of PCR relief (Case No. CR 01-0293-PC). A certified copy of the state court record was provided to this Court by the Arizona Supreme Court on April 2, 2002. (*See* Dkt. 17.)

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). If a habeas claim includes new factual allegations not presented to the state court, it may be considered unexhausted if the new facts "fundamentally alter" the legal claim presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

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

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and post-conviction relief (PCR) proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive

effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

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

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

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

not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id*. at 753. Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available, and constitutionally ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish prejudice, a habeas petitioner bears the burden of demonstrating "not merely that the errors at his trial constituted a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982).

AEDPA STANDARD FOR RELIEF

Petitioner filed his amended petition after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Therefore, the provisions of the AEDPA govern consideration of Petitioner's claims. The AEDPA established a more rigorous standard for habeas relief. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) (*Miller-El I*). As the Supreme Court has explained, 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 phrase "adjudicated on the merits" refers to a decision resolving

a party's claim which is based on the substance of the claim rather than on a procedural or other non-substantive ground. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-804 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 653 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381; *see Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004). Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark*, 331 F.3d at 1069.

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has

observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406; *see Lambert*, 393 F.3d at 974.

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

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El I*, 537 U.S. at 340. 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 ("The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.").

As the Ninth Circuit has noted, application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Pirtle v. Morgan*, 313 F.3d 1160,

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

DISCUSSION

Claim One

Petitioner contends that the trial court failed to adequately inquire into the reason he filed a motion to substitute counsel and proceed *pro se* at his trial; consequently, Petitioner argues, he did not make a knowing, intelligent, or voluntary waiver of counsel because the trial court forced him to choose between incompetent counsel and no counsel at all. (Dkt. 55 at 45.)

Background

Following indictment in September 1993, Petitioner was appointed two counsel, Michael Vaughn and Alan Simpson. (ME 10/8/93; ROA 6.) On February 15, 1995, Petitioner filed a *pro se* motion for change of counsel, asking the court to remove Vaughn and Simpson and allow him to proceed *pro se*. (ROA 117.) On February 17, during a previously scheduled hearing for pretrial motions, the trial court acknowledged receipt of Petitioner's motion. (RT 2/17/95; ME 1/13/95.) The court asked Petitioner if he continued to desire to proceed *pro se*, to which he responded affirmatively. (RT 2/17/95 at 2.) Rather than resolve the matter, the court determined that Petitioner should think about his decision for a few days and scheduled a hearing on his motion for February 23. (*Id.* at 3, 18; ME

2/17/95.) Due to the unresolved motion, however, the court asked Petitioner if he wanted his counsel to litigate the motions for which argument had already been scheduled. (RT 2/17/95 at 6.) Petitioner conferred with his counsel and informed them that he wanted them to argue those motions to the court. (*Id.* at 6-7.) At no time during the hearing did Petitioner express any dissatisfaction with his counsel. (RT 2/17/95.)

Between indictment and the motion to proceed *pro se*, the trial court conducted monthly pretrial conferences, as well as other hearings dealing with pretrial motions. Because the trial court had been monitoring the case on a monthly basis, the court was familiar with the progress of the case and whether counsel was effectively handling Petitioner's defense. During this time period, two firm trial dates had to be continued due to the scheduling of a consolidated DNA hearing before another trial judge. Ten criminal cases, including Petitioner's, had been consolidated for the purposes of hearing expert testimony regarding the DNA evidence that was to be presented in each case.[4]

On February 21, the trial court received a letter from a Petitioner advising the court that he did not believe he was receiving proper representation from counsel because they had not properly or consistently communicated with him about the status of his case. (ROA 122.) In the letter, dated February 14, Petitioner expressed concern about this lack of communication because trial was scheduled for March 1.[5] (*Id.*)

On February 23, the court convened a hearing to resolve Petitioner's motion to proceed *pro se*. (RT 2/23/95.) Prior to asking Petitioner why he had filed the motion, the court inquired whether he had discussed this matter with his counsel. (*Id.* at 4.) Petitioner

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[4] Due to the postponement of the consolidated DNA hearing, the trial court did not reestablish a firm trial date for Petitioner's trial until its pretrial hearing on July 12, 1995. The consolidated DNA hearing was held during the months of June and July, 1995.

[5] Evidently, prior to the writing of this letter, Petitioner had not been advised that his non-firm trial date of March 1 was going to be continued and that a firm trial date for his trial was not going to be established until after the consolidated DNA hearing was concluded.

informed the court that he had "very thoroughly" discussed the matter with counsel. (*Id.*) Before concluding that Petitioner had knowingly, intelligently, and voluntarily waived his right to counsel, the court went over in detail the ramifications of his decision. (*Id.* at 18-19.)

In addition, the court inquired about why Petitioner wanted to remove Vaughn and Simpson and represent himself. (*Id.* at 11.) Petitioner advised the court that he was not happy with his representation because counsel had not been keeping him advised of what was happening in his case and that "I just assume that I can do this myself." (*Id.*) The trial court strongly disagreed that Vaughn and Simpson were not representing him well, noting their interviews with many witnesses,[6] their work on the consolidated DNA hearing, and their handling of other experts in fingerprints and handwriting analysis. (*Id.* at 11-12.) Petitioner indicated that he understood all the work his counsel had put into his case. (*Id.*) Other than lack of communication, Petitioner did not present any other allegations of ineffectiveness. (RT 2/17/95; 2/23/95.)

On direct appeal, the Arizona Supreme Court rejected Petitioner's argument that his waiver of counsel was not intelligent, knowing, and voluntary.

> At the initial hearing on February 23, held on the waiver of counsel motion, the trial court fully informed defendant of his right to counsel, the minimum, maximum, and presumptive sentences, the dangers of self-representation, and the difficulties involved in defending oneself without formal legal training. Defendant's attorneys informed the court they did not think it was in defendant's best interest that he defend himself, but both indicated to the court they believed he was competent to do so. When asked, defendant told the trial court his reason for requesting the waiver was that he felt there was insufficient communication between himself and his attorneys. The trial court explained to defendant that his attorneys had been fully engaged, working on his behalf.

Djerf, 191 Ariz. at 591, 959 P.2d at 1282.

The Arizona Supreme Court also rejected Petitioner's argument that it was error for the trial court not to construe his motion as a request for new counsel instead of a motion to

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[6] At a subsequent status conference, a record of witness interviews was made indicating that counsel for Petitioner personally interviewed more than fifty witnesses, with some witness interviews lasting several days. (RT 9/8/95 at 13-14.)

proceed *pro se*, because he indicated to the trial court that he was dissatisfied with his counsel.

> In a supplemental brief, defendant argues that the trial court abused its discretion by granting defendant's request to remove trial counsel and to substitute himself as counsel pro se. He asserts that the trial judge erred by failing to inquire into the reasons defendant wanted his own substitution as counsel and alleges that the court's actions fail the test of *United States v. Gonzalez*, 113 F.3d 1026, 1028 (9th Cir.1997) (when deciding motion for change of counsel, reviewing court looks at adequacy of trial court's inquiry, extent of conflict between defendant and counsel, and timeliness of motion). *See also United States v. D'Amore*, 56 F.3d 1202, 1204-05 (9th Cir.1995). In support, defendant refers to a letter he wrote to the judge dated February 14, 1995, describing dissatisfaction with what he perceived as a lack of communication between himself and trial counsel. Because the letter preceded his February 15 motion to "substitute himself" as counsel, defendant argues, the trial judge should have known that defendant "was really seeking the representation of counsel who would communicate with him."
>
> Although not expressly stated in his supplemental brief, defendant apparently wishes now to treat the motion at issue as one to change counsel, rather than to waive counsel and substitute self. The impetus for his characterization seems to be (1) the aforementioned letter and (2) the title of the form upon which he asked to represent himself. The motion was titled "CHANGE OF COUNSEL" and stated:
>
> I, RICHARD K. DJERF, hereby request that MICHEAL [sic] VAUGHN/ALAN SIMPSON be withdrawn as my counsel of record, and that RICHARD K. DJERF be substituted as my attorney in all future proceedings in the trial court.
>
> Defendant's later characterization of the motion as one to obtain new counsel is contradicted by the record. In his letter of February 14, defendant enumerated his complaints about counsel, but never once suggested that he wanted new counsel appointed. At a hearing on February 17, the trial judge (who had not yet received the letter but did have the motion) stated that what he had before him was "basically" a motion for self-representation by defendant and asked defendant if he still desired to represent himself. Defendant replied in the affirmative, and the trial judge scheduled the February 23 hearing. (The trial court did not receive defendant's letter until February 21.) At the February 23 hearing, the court treated the motion as stated on its face, to proceed *pro se*, and neither defendant nor his attorneys objected to this or gave any sign that this was not consistent with defendant's intent. Defendant never characterized his request as one for new counsel, not in his letter nor at the hearing nor at any time prior to his supplemental brief in this court. He requested only that he be allowed to represent himself. Further, in a later motion, defendant himself characterized his February 15 motion as a request to proceed *pro se*.[FN4]
>
> FN4. "Because the defendant was constantly being put aside by his court appointed attorneys, the defendant decided to represent himself. On February 15 the defendant, requesting to represent himself, filed his motion. The

> defendant figured that the only way to eliminate these problems was to defend himself." Defendant's Motion for Change of Counsel, Sept. 6, 1995.
>
> Because defendant had an absolute constitutional right to act *pro se*, the trial court correctly determined that defendant was competent and that the waiver of counsel was made voluntarily, knowingly, and intelligently. Defendant's argument is meritless, and *Gonzalez*, which describes the test for whether a trial court has abused its discretion in denying a motion to change counsel, is inapplicable.

Djerf, 191 Ariz. at 592-93, 959 P.2d at 1283-84.

Analysis

A defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 836 (1975). However, before a defendant may waive counsel, the court must ensure that his waiver is made knowingly, intelligently, and voluntarily. *See Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Petitioner contends that he was forced to choose between incompetent counsel and proceeding *pro se* and therefore his waiver of counsel was not knowing, intelligent, and voluntary. (Dkt. 55 at 46.)

Under the Sixth Amendment, the main purpose of providing assistance of counsel is to ensure that criminal defendants receive a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). In evaluating Sixth Amendment claims, the appropriate inquiry is on the adversarial process, not on the defendant's relationship with his lawyer. *See United States v. Cronic*, 466 U.S. 648, 657 (1984). Thus, in *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983), the Court held that the Sixth Amendment requires only competent representation and does not guarantee a meaningful relationship between the defendant and counsel.

Petitioner has cited no Supreme Court case – and this Court is not aware of any – that stands for the proposition that the Sixth Amendment is violated when a defendant is represented by two lawyers free of any actual conflicts of interest, but who the defendant maintains are not communicating with him on a regular basis. *See Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) (en banc) (applying the AEDPA and denying habeas relief in the absence of controlling Supreme Court precedent regarding petitioner's motion to change counsel due to dislike and distrust of his lawyer). Absent an affirmative obligation

imposed on the states by a holding of the United States Supreme Court, the trial court did not err in accepting Petitioner's waiver of counsel and allowing him to proceed with self-representation.

Petitioner further contends his waiver of counsel was not knowing, intelligent, and voluntary because counsels' lack of communication with him violated *Strickland* and he cannot be forced to choose between proceeding with ineffective counsel or proceeding *pro se*. (Dkt. 55 at 46.) The Arizona Supreme Court's finding that Petitioner unequivocally desired to proceed *pro se* and did not desire substitute counsel is supported by the state court record; it was not an unreasonable determination of the facts. *See* 28 U.S.C. § 2254 (d)(2). Based upon these facts, this case is controlled by *Faretta* and *Edwards*, not *Strickland*. In neither *Faretta* nor *Edwards* did the Supreme Court ever require or indicate that before a trial court may accept a waiver of counsel from a criminal defendant desiring to proceed *pro se*, it must initiate or conduct an inquiry sufficient to determine whether defendant is alleging that he is being forced to choose between incompetent counsel and proceeding *pro se*. *Cf. Cook v. Schriro*, No. 06-99005, 2008 WL 3484870 (9th Cir. Aug. 14, 2008) (applying the AEDPA and noting that the Supreme Court has never held that a trial court has a duty to inquire into a defendant's relationship with counsel when he invokes his constitutional right of self-representation). Rather, *Faretta* and *Edwards* only require that the trial court initiate a probing and thorough colloquy with the defendant regarding his right to counsel, the dangers of self-representation, and the difficulties in representing oneself, so that the defendant is aware of the potential consequences of his decision and his choice to waive counsel is "made with eyes wide open." *Faretta*, 422 U.S. at 835 (additional quotation omitted). Petitioner does not challenge the sufficiency of the trial court's *Faretta/Edwards* colloquy.

Even if the Supreme Court had mandated a type of trial court inquiry when a defendant alleges that he is proceeding *pro se* due to allegations of incompetent counsel, Petitioner never attempted to allege how his counsel were performing ineffectively, other

than to complain that they were not communicating with him on a consistent basis. Contrary to Petitioner's allegations of ineffective performance, the factual record and the comments from the trial judge demonstrate that Petitioner's counsel were diligently preparing for his trial. (RT 2/17/95; RT 2/23/95.)

Moreover, a lack of communication between counsel and a criminal defendant, without more, is generally insufficient to constitute ineffective assistance of counsel. *See United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991); *see also United States v. Ceballos*, 302 F.3d 679, 696 (7th Cir. 2002). The record in this case does not show that a total lack of communication or a complete breakdown of the attorney/client relationship occurred. *See Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000) (en banc). Even if such a breakdown had occurred, Petitioner does not attempt to demonstrate that how his case was prejudiced by any perceived lack of communication. *Id.* at 1028. For the reasons discussed above, Petitioner is not entitled to relief on Claim One.

Claim Two

Petitioner contends that his guilty plea was not knowing, intelligent, and voluntary because the trial court did not adequately inform him that by pleading guilty, he was forfeiting his right to proceed to trial represented by competent counsel. (Dkt. 55 at 51-52.) Petitioner contends that the trial court only informed him that he could proceed *pro se* or be represented by Vaughn and Simpson, whom Petitioner contends were incompetent.[7] (*Id.*) Respondents counter that Claim Two was not presented to the state court and that it is now

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[7] Petitioner also argues that the Arizona Supreme Court *sua sponte* exhausted this claim because in its appellate opinion the court indicated that it reviewed the guilty plea colloquy and found it constitutional. (Dkt. 72 at 29-30, citing *Djerf*, 191 Ariz. at 594, 959 P.2d at 1285.) The Arizona Supreme Court's review of a guilty plea colloquy does not exhaust arguments that were not specifically presented to it. *See Moormann v. Schriro*, 426 F.3d 1044, 1057 (9th Cir. 2005) (stating that independent sentencing review does not exhaust issues not included in the scope of review of the death sentence, including unpresented claims regarding constitutional attacks upon Arizona's death penalty); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) ("Arizona's fundamental error review does not excuse a petitioner's failure to raise his claims with the Arizona Supreme Court.")

technically exhausted and procedurally defaulted. (Dkt. 66 at 20-21.) Petitioner responds that even if he did not exhaust Claim Two, it may not be found technically exhausted and procedurally defaulted because he can file a successive PCR and have the claim reviewed on the merits as a claim of sufficient constitutional magnitude since it involves waiving his right to trial. *See Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002). (Dkt. 72 at 30-31.)

The Court agrees with Respondents that Petitioner did not exhaust Claim Two in state court. (*See* Opening Br. at 25-28.) In his opening brief, Petitioner argued that during the guilty plea colloquy, he had a constitutional right to be advised by the trial court that capital sentencing proceedings were similar to a trial and that despite his guilty plea, he would be not be free from trial-like proceedings at sentencing. (*Id.*) Thus, Petitioner did not present Claim Two on direct appeal.

If Petitioner were to return to state court now and attempt to litigate Claim Two, the PCR court would not reach the merits because the claim is untimely under Rule 32.4(a) of the Arizona Rules of Criminal Procedure and does not fall within an exception to preclusion. Arizona restricts the filing of a successive PCR to certain exceptional claims. *See* Ariz. R. Crim. P. 32.2(b). These exceptions include claims based on newly discovered evidence, a significant change in the law, and actual innocence of the crime or of the death penalty. To commence a successive PCR proceeding, a petitioner files a successive notice of post-conviction relief in the PCR court. In the successive notice, the petitioner indicates the type of exceptional claim being raised and the meritorious reasons entitling the claim to go forward. If a petitioner's notice does not meet these requirements, the PCR court is required to summarily dismiss the notice, without preparation of a petition. *See* Ariz. R. Crim. P. 32.2(b); *State v. Rosales*, 205 Ariz. 86, 90, 66 P.3d 1263, 1267 (App. 2003) (If "a trial court is presented with a successive notice of post-conviction relief in which no claims under Rule 32.1(d) through (h) are articulated, supported by facts, and excused for being tardily raised, the court could dismiss the entire proceeding on the notice, implicitly finding that all

potential claims are precluded by being waived in the previous proceeding. Such a ruling would necessarily include potential claims under Rule 32.1(a) through (c), for which no exception to the preclusion or timeliness rules exists."). Thus, if Petitioner filed an untimely successive PCR, he could only raise claims pursuant to Rule 32.1(d)-(h). Claim Two does not fall within an exception to preclusion under 32.2(b).

Therefore, this claim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *See Coleman*, 501 U.S. at 732, 735 n.1. Accordingly, Claim Two will not be considered on the merits absent a showing of cause and prejudice or fundamental miscarriage of justice. Petitioner does not present any arguments in favor of cause and prejudice or a fundamental miscarriage of justice. Claim Two is therefore denied.

Claim Four

Petitioner argues that trial counsel rendered ineffective assistance of counsel ("IAC") at sentencing by failing to investigate and present adequate mitigation evidence regarding his dysfunctional family background and mental health. (Dkt. 55 at 55-63.) Specifically, Petitioner asserts that trial counsel failed to argue that he suffers from schizophrenia. (*Id.*)

Background

On August 16, 1995, Petitioner pleaded guilty to four counts of first degree murder. Subsequently, Petitioner decided to discontinue proceeding *pro se* and moved to have counsel represent him at sentencing. (ROA 203.) On October 5, 1995, the trial court granted Petitioner's motion, appointing former advisory counsel Vaughn and Simpson to represent him at sentencing. (ROA 209.)

Dysfunctional family

The trial court held a mitigation hearing in February 1996, at which Petitioner's investigator, Art Hanratty, testified. (RT 2/9/96.) Hanratty relayed mitigation information he had obtained from Petitioner's father, mother, and sister. (*Id.*) He testified that Petitioner's parents divorced when he was young and that he was mostly raised by his father,

who was in the Navy. (*Id.* at 44-45, 71.) Although Petitioner's father worked two jobs to support the family financially, he did not offer much emotional support for Petitioner by way of hugging or touching or words of encouragement. (*Id.* at 46, 62, 71.) Petitioner's father drank beer, and had alcoholic episodes where he was passed out inside his home. (*Id.* at 60-61.) Petitioner's father never physically abused him; he only yelled and hollered to get his point across. (*Id.* at 54-55.) They did not have family dinners and Petitioner usually ate in his room while watching television. (*Id.* at 59.) When Petitioner started high school, his father did not like some of Petitioner's friends, so he did not allow him to bring them to the house. (*Id.* at 58.) As a result, Petitioner started leaving the home on weekends; however, the father did not check up on him to make sure he was all right. (*Id.*)

Hanratty further testified that Petitioner's mother had informed him that Petitioner suffered a closed head injury when he was a toddler. (RT 2/9/96 at 53-54.) Petitioner did not lose consciousness, but he had a large bump on his forehead, which did not require medical attention. (*Id.* at 54.) Petitioner reinjured this area of his head a number of times as a toddler. (*Id.*)

While Petitioner's father was away at sea, Petitioner's mother became pregnant, resulting in a child being born out-of-wedlock. (*Id.* at 44.) This led to the dissolution of the marriage. (*Id.*) Petitioner's mother described his father as an alcoholic. (*Id.* at 49.) After the divorce, Petitioner's mother remarried. (*Id.* at 45.) Petitioner's step-father did not like having children in his home, so Petitioner came to live with his father. (*Id.*) Once when Petitioner was visiting his mother, his step-father slammed him against the wall. (*Id.* at 53.) Petitioner's mother never physically abused him; she only yelled and hollered while disciplining the children. (*Id.* at 52.) Because the step-father did not like children, when Petitioner visited his mother on summer vacation, he spent his time fishing and riding horses, mostly alone. (*Id.* at 50-51.)

Hanratty testified that Petitioner's sister, who is two years younger, often saw her father passed out drunk on the couch. (*Id.* at 43, 61.) Petitioner's sister indicated that she

loved her dad and described him as a good loving father. (*Id.* at 71.)

Mental health

Counsel sought and obtained authorization for the appointment of three mental health experts, Dr. Mickey McMahon, a psychologist, Dr. Marc Walter, a neuorpsychologist, and Dr. Drake Duane, a neurologist. In January 1996, Dr. McMahon prepared an initial report suggesting that Petitioner undergo neuropsychological testing. (ROA 253.) Accordingly, Dr. Walter performed such testing and prepared a report suggesting that Petitioner may have "focal cerebral deficit." (ROA 260.) Dr. Walter recommended further testing by a neurologist. (*Id.*)

In March 1996, Petitioner was examined by Dr. Duane. (RT 3/12/96; ROA 262; RT 4/9/96.) In his interview notes, Dr. Duane specifically noted the report of a closed head injury occurring while Petitioner was a toddler. (ROA-PCR, Am.Pet., Ex. D.) Dr. Duane performed routine EEG testing and advanced brain-mapping testing upon Petitioner. (*Id.*) Dr. Duane's findings were forwarded to Dr. McMahon, but not to the prosecution or the court. (RT 4/9/96.) Dr. Duane concluded that Petitioner's testing indicated a personality disorder, not brain dysfunction as Dr. Walter had theorized. (ROA-PCR, Am.Pet., Ex. D.)

Dr. McMahon was responsible for compiling the results of testing obtained by all three mental health professionals. (RT 3/12/96 at 13-15.) The court set April 22, 1996, as the deadline for submission of his final report. (RT 4/9/96 at 5.) On April 19, 1996, Dr. McMahon compiled the mental health reports and faxed trial counsel his conclusion that Petitioner suffered from an antisocial personality disorder. (ROA-PCR, Am.Pet., Ex. D.) Dr. McMahon specifically rejected a diagnosis of schizophrenia and rejected any diagnosis that Petitioner suffered from any mental health issue that precluded his ability to appreciate the wrongfulness of his behavior or resulted in an inability to conform his behavior to the requirement of the law. (*Id.*) On April 23, 1996, trial counsel notified the court they would not be utilizing either Dr. McMahon's report or his testimony at sentencing. (RT 4/23/96 at 2.) Trial counsel requested and the court established a deadline for Dr. Walter to submit a

final report. (*Id.* at 5.) However, there is no record of Dr. Walter completing and submitting such a report.

PCR proceedings

Petitioner presented Claim Four during his PCR proceedings. (ROA-PCR, Am. Pet. at 14-15.) Prior to filing his amended PCR petition, Petitioner sought and obtained appointment of a mental health expert, Dr. Richard Samuels. On two occasions, the PCR court granted contact visits for Dr. Samuels to perform mental health testing upon Petitioner. (ROA-PCR, Orders, 9/11/00 & 12/8/00.) Even though Dr. Samuels conducted a neuropsychological examination of Petitioner, PCR counsel did not submit any expert report in support of Claim Four.

Ultimately, the PCR court concluded that Petitioner had not established a colorable IAC claim and summarily dismissed the claim without granting an evidentiary hearing. (ROA-PCR, Order, 6/14/01.) The court explained:

> The only evidence defendant presents to support this claim are psychiatric and psychological evaluations of defendant done either before the entry of the plea or before sentencing. Based on these numerous reports, which were available and considered by the court prior to sentencing, defendant simply speculates that there might be other mitigating information that should have been presented. This showing does not constitute a colorable claim for relief.

(*Id.*) Regarding the allegation that trial counsel failed to conduct an adequate social and family history investigation, the PCR court stated that "[Petitioner] has failed to present any evidence to support this claim; instead, he simply speculates that if his childhood was investigated, some mitigating evidence might have been discovered." (*Id.*)

Analysis

The right to effective assistance of counsel applies not just to the guilt phase, but "with equal force at the penalty phase of a bifurcated capital trial." *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir. 2002) (quoting *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995)). To prevail on an IAC claim, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. The performance inquiry asks whether counsel's assistance was reasonable considering

all the circumstances. *Id.* at 688. Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Hayes v. Woodford*, 301 F.3d 1054, 1066 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 691). A reasonable mitigation investigation must involve not only the search for good character evidence but also evidence that may demonstrate that the criminal act was attributable to a disadvantaged background or to emotional and mental problems. *Boyde v. California*, 494 U.S. 370, 382 (1990).

With respect to prejudice, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Dysfunctional family evidence

In contrast to the performance of trial counsel in the recent Supreme Court cases of *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000), Petitioner's counsel investigated and presented testimony describing Petitioner's dysfunctional childhood. (RT 2/9/96.) As described above, counsel offered a detailed picture of Petitioner's family background during sentencing. (*Id.*) Again in contrast to *Rompilla*, *Wiggins*, and *Williams*, in Petitioner's case there is no compelling dysfunctional family evidence that was not presented and considered at sentencing. For instance, in the litigation of this claim during the PCR proceedings, Petitioner did not present any additional childhood background evidence in support of his claim that counsel's investigation and presentation at sentencing was deficient. (*See* ROA-PCR, Order, 6/14/01.) The PCR court's decision that counsel did not render deficient performance at sentencing in their investigation and presentation of dysfunctional family evidence was not contrary to or an unreasonable application of controlling Supreme Court

precedent.

This Court has already denied further evidentiary development of this claim to allow new declarations from Petitioner's mother and sister because Petitioner was not diligent in presenting these current declarations to the state court. (*See* Dkt. 94 at 20-24, citing 28 U.S.C. § 2254(e)(2).) However, even were this Court to consider the current declarations, the information is cumulative to what the trial court already considered and would not have made a difference in the court's decision to sentence Petitioner to death. *See Wiggins*, 539 U.S. at 536 (stating that the habeas court reweighs the evidence in aggravation against the totality of available mitigating evidence, which includes that adduced at trial, and the evidence adduced in the habeas proceeding). For instance, in her declaration Petitioner's mother merely discusses her prior marriages, her current marriage, the alcoholism of Petitioner's father, and the fact that his alcoholism hurt the family. (Dkt. 78, Ex. 4.) However, this information had already been presented at sentencing, even if not quite as comprehensively. Petitioner's sister adds that their father did administer corporal punishment upon Petitioner, but does not allege that such punishment was excessive. (Dkt. 79 at 3.) While spanking may be different from hollering and yelling, she never contends that Petitioner's father was physically abusive. (*Id.*)

Mental health evidence

Petitioner further contends that trial counsel failed to adequately investigate and present mental health evidence at sentencing because the mental health experts counsel utilized overlooked the possibility that Petitioner suffered from schizophrenia. (Dkt. 55 at 63, dkt. 72 at 35.)

The Court disagrees that trial counsel's mental health experts did not consider the possibility that Petitioner was schizophrenic. Rather, at sentencing, Dr. McMahon considered but rejected a diagnosis of schizophrenia. (*See* ROA-PCR, Am.Pet., Ex. D.) As already detailed, in order to properly investigate and present mental health mitigation evidence at sentencing, trial counsel obtained evaluations from three mental health experts,

a psychologist, a neuropsychologist, and a neurologist. Petitioner's psychologist, Dr. McMahon, was given the responsibility of compiling the results of mental health testing obtained by all three professionals. (RT 3/12/96 at 13-15.) Dr. McMahon compiled the reports and informed trial counsel of his conclusion that Petitioner suffered from an antisocial personality disorder. (ROA-PCR, Am.Pet., Ex. D.) Dr. McMahon rejected a diagnosis of schizophrenia and rejected any diagnosis that Petitioner suffered from any mental health issue that precluded his ability to appreciate the wrongfulness of his behavior or resulted in an inability to conform his conduct to the requirement of the law. (*Id.*)

The Court concludes that trial counsel did not perform deficiently in investigating and evaluating Petitioner's mental health prior to sentencing. The record shows that trial counsel, based on the conclusions of the defense experts, considered but rejected the possibility that Petitioner suffered from schizophrenia. (ROA-PCR, Am.Pet., Ex. D.) Dr. McMahon was also briefed by trial counsel and investigator Hanratty regarding Hanratty's investigation of Petitioner's dysfunctional childhood background. (*Id.*) The PCR court's conclusion that trial counsel did not perform deficiently in their investigation of Petitioner's mental health at sentencing is not contrary to or an unreasonable application of Supreme Court precedent. Absent deficient performance, there is no need to evaluate prejudice. *Strickland*, 466 U.S. at 687. Petitioner is not entitled to relief on Claim Four.

Claim Five

Petitioner presents three separate allegations of IAC during the direct appeal proceedings. (Dkt. 55 at 64-67.)

Subclaim 1

Petitioner contends that appellate counsel should have expressly challenged whether Petitioner's waiver of counsel was voluntary. (*Id.* at 65-66.) This allegation is exhausted as having been specifically considered on direct appeal. *Djerf*, 191 Ariz. at 592, n.1, 959 P.2d at 1283, n.1. On habeas review, the Court concludes it is meritless.

The Fourteenth Amendment guarantees a criminal defendant the right to effective

assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). A claim of ineffective assistance of appellate counsel is reviewed according to the standard set out in *Strickland*. *See Miller v. Keeney*, 882 F.2d 1428, 1433-34 (9th Cir. 1989). Petitioner must show that counsel's appellate advocacy fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, Petitioner would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *see also Miller*, 882 F.2d at 1434 n.9 (citing *Strickland*, 466 U.S. at 688, 694).

Although Petitioner may be technically correct that appellate counsel did not properly argue that his waiver of counsel was involuntary, the issue was *sua sponte* addressed and resolved by the Arizona Supreme Court:

> Although the argument heading in defendant's brief states that defendant's waiver of counsel was not knowing or voluntary, the entire textual analysis goes to the knowing and intelligent factor. The U.S. Supreme Court, in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1980), held that voluntariness and intelligence/knowledge are two separate inquiries. *The record, as described, is uncontrovertible. Defendant's waiver was clearly voluntary.*

Djerf, 191 Ariz. at 592, n.1, 959 P.2d at 1283, n.1 (emphasis added).

Based on this holding, the Court need not evaluate whether appellate counsel engaged in deficient performance because Petitioner cannot establish prejudice. *See Smith*, 528 U.S. at 285-86 (stating that petitioner must establish a reasonable probability that, but for counsel's deficient performance, Petitioner would have prevailed on appeal). The Arizona Supreme Court held that Petitioner's waiver of counsel was voluntary. Therefore, Petitioner would not have prevailed even if appellate counsel had specifically argued that the waiver was not voluntary. Furthermore, counsel's performance cannot be deemed ineffective based on a failure to raise a futile issue. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996); *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994). Subclaim 1 is denied.

Subclaim 2

Petitioner contends that appellate counsel performed ineffectively by failing to

challenge the trial court's error at his change of plea hearing when the court failed to advise him that he had the constitutional right to proceed to trial with competent counsel. (Dkt. 55 at 66-67.) Respondents contend that the claim is procedurally defaulted. (Dkt. 66 at 29.)

Petitioner did not present this allegation during the PCR proceedings. (*See* ROA-PCR 19 at 12; ROA-PCR 27.) If Petitioner were to return to state court now and attempt to litigate the issue, the claim would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h); *see also supra* Claim Two. Therefore, this subclaim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1.[8] Accordingly, subclaim 2 will not be considered on the merits absent a showing of cause and prejudice or fundamental miscarriage of justice.

Petitioner argues that ineffective assistance of PCR counsel constitutes cause to excuse the procedural default. (Dkt. 72 at 37-38.) Ineffective assistance of counsel can excuse a procedural default only when it rises to the level of an independent constitutional violation. *Coleman*, 501 U.S. at 755. When a petitioner has no constitutional right to

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[8] To the extent the Court concludes in this Order that Petitioner does not have an available remedy in state court, because claims or portions of claims would be precluded as waived pursuant to Rule 32.2(a)(3), Petitioner does not assert that any exceptions to preclusion are applicable. *See Beaty v. Stewart*, 303 F.3d 975, 987 & n.5 (9th Cir. 2002) (finding no state court remedies and noting that petitioner did not raise any exceptions to Rule 32.2(a)). The Court finds that none of the preclusion exceptions enumerated in Rule 32.2(b)(2) is applicable. Furthermore, Petitioner does not argue that any of the claims are of the type that cannot be waived absent a personal knowing, voluntary and intelligent waiver, *cf. Cassett v. Stewart*, 406 F.3d 614, 622-23 (9th Cir. 2005) (addressing waiver because raised by petitioner), and the Court concludes, as to all of the claims in this Order for which the Court determines there is no available remedy in state court pursuant to Rule 32.2(a)(3), that none of the claims fall within the limited framework of claims requiring a knowing, voluntary and intelligent waiver. *See* Ariz. R. Crim. P. 32.2(a)(3) cmt. (West 2004) (noting that most claims of trial error do not require a personal waiver); *Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002); *see also State v. Espinosa*, 200 Ariz. 503, 505, 29 P.3d 278, 280 (Ct. App. 2001).

counsel, there can be no constitutional violation arising out of ineffectiveness of counsel. *Id*. at 752. There is no constitutional right to counsel in state PCR proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989) (the Constitution does not require states to provide counsel in PCR proceedings even when the putative petitioners are facing the death penalty); *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993) (refusing to extend the right of effective assistance of counsel to state collateral proceedings).

The Ninth Circuit has considered and rejected the argument that cause exists to overcome a procedural default where PCR counsel failed to assert a claim during PCR proceedings. *See Ortiz*, 149 F.3d at 932; *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996); *Moran v. McDaniel*, 80 F.3d 1261, 1271 (9th Cir. 1996); *Bonin v. Calderon*, 77 F.3d 1155, 1158-59 (9th Cir. 1996)). Because Petitioner has not established cause to overcome the default, the Court need not analyze prejudice. *See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). Petitioner does not allege a fundamental miscarriage of justice. Therefore, subclaim 2 is denied.

Subclaim 3

Petitioner alleges that appellate counsel's performance was ineffective because she failed to raise any challenges to the constitutionality of Arizona's death penalty scheme. (Dkt. 55 at 67.) Respondents contend that the claim is procedurally defaulted. (Dkt. 66 at 29.) Petitioner counters that he exhausted the claim in his petition for review following denial of PCR relief. (Dkt. 72 at 38-39.)

Background

During PCR proceedings, Petitioner raised a number of substantive challenges to the constitutionality of Arizona's death penalty statute. (ROA-PCR 19 at 27-33.) However, Petitioner did not also raise an IAC of appellate counsel claim contending that counsel should have raised these death penalty challenges on appeal. The PCR court found Petitioner's substantive death penalty challenges precluded as waived pursuant to Ariz. R. Crim. P.

32.2(a)(3) because Petitioner should have presented these issues on direct appeal. (ROA-PCR 27.)

In the introductory section of his petition for review, Petitioner, for the first time, changed the nature of the claim and asserted that appellate counsel had been ineffective for failing to raise these substantive death penalty challenges on direct appeal. (PR Doc. 1 at 2.) In the argument section of his petition for review, Petitioner did not continue to allege IAC of appellate counsel, but reverted back to substantively challenging the constitutionality of Arizona's death penalty statute. (*Id.* at 18-20.) The Arizona Supreme Court denied review. (PR Doc. 6.)

Analysis

To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan*, 526 U.S. at 848. Under the Arizona Rules of Criminal Procedure, Rule 32.9(c)(1) requires that in the petition for review, the defendant must specify the issues that were decided by the PCR court and those issues which defendant wishes to present to the appellate court for review. Petitioner did not comply with Rule 32.9(c)(1). He did not acknowledge to the Arizona Supreme Court that he had not presented, and the PCR court had not resolved, the claim that appellate counsel was ineffective for failing to argue that Arizona's death penalty was unconstitutional. (PR Doc. 1.) Compliance with the rule is required to properly exhaust the claim to the Arizona Supreme Court in a procedurally appropriate manner. *O'Sullivan*, 526 U.S. at 848. Therefore, subclaim 3 is unexhausted.

If Petitioner were to return to state court now and attempt to exhaust this claim, the claim would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h); *see also supra* Claim Two. Therefore, this subclaim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Petitioner does not

attempt to show cause and prejudice or a fundamental miscarriage of justice. Therefore, subclaim 3 is denied.

Claim Seven

Petitioner contends that his constitutional rights were violated by the cumulative effect of trial counsel's deficient performance or by the cumulative effect of trial, appellate and PCR counsel's deficient performance. (Dkt. 55 at 82.) Petitioner concedes that this claim was not presented to the Arizona Supreme Court but argues, citing 28 U.S.C. § 2254(b)(1)(B)(i), that the claim should be reviewed on the merits because there is no available state corrective process.[9] According to Petitioner, there is no available state corrective process because he could not have raised a claim of ineffective PCR counsel until a successive PCR and the Arizona Supreme Court has already rejected the argument that a capital defendant is entitled to effective assistance during PCR proceedings. (Dkt. 72 at 46-47.)

Section 2254(b)(1)(B)(i) applies "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam). The Court concludes that Arizona's Rule 32 provides sufficient opportunity to adjudicate a prisoner's ineffective assistance of counsel claims. The fact that counsel in this case did not raise all of Petitioner's constitutional claims does not render the state's collateral review process unavailable or ineffective.

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[9]Title 28 U.S.C. § 2254 provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

If Petitioner were to return to state court now and attempt to litigate this claim, it would be found waived and/or untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, Petitioner's cumulative error claim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *See Coleman*, 501 U.S. at 732, 735 n.1; *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002). The claim will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice. Petitioner does not raise any cause and prejudice or fundamental miscarriage of justice argument. Therefore, Claim Seven is denied.

Claim Eight

Petitioner contends that the trial court erred when it concluded that the aggravating factors outweighed the mitigating factors and imposed the death penalty. (Dkt. 55 at 83.) Regardless of whether this claim is exhausted, it is meritless. *See* 28 U.S.C. § 2254(b)(2) (allowing the denial of an unexhausted claim on the merits); *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

The Constitution does not require that a capital sentencer be instructed on how to weigh any particular fact in the capital sentencing decision. *See Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994). The sentencer has broad discretion to determine whether death is appropriate once a defendant is found eligible for the death penalty. *Id.* The Constitution does not require that a specific weight be given to any particular mitigating factor, *see Harris v. Alabama*, 513 U.S. 504, 512 (1995); nor must a death penalty statute enunciate specific standards to guide the sentencer's consideration of aggravating and mitigating circumstances. *See Tuilaepa*, 512 U.S. at 979-80; *see also Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998) (summarily rejecting challenges to the "mandatory" quality of Arizona's death penalty statute). The Arizona Supreme Court's rejection of this claim, *Djerf*, 191 Ariz. at 595-599, 959 P.2d at 1286-1290, was neither contrary to nor an unreasonable application of clearly

established federal law. Petitioner is not entitled to relief on Claim Eight.

Claim Nine

Petitioner alleges that the state courts did not properly apply A.R.S. § 13-703(F)(6) for the murders of Albert Luna, Damien Luna, Rochelle Luna, or Patricia Luna. (Dkt. 55 at 84-93.) He contends that there is insufficient evidence to support the (F)(6) aggravating circumstance in his case. (*Id.*)

A finding of either cruelty or heinousness/depravity will suffice to establish this factor. *See, e.g., State v. Roscoe*, 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996). The Arizona Supreme Court concluded that all four murders were especially cruel. Because the cruelty prong was established, the court did not reach the question of whether the murders were committed with a heinous or depraved mental state. *See Djerf*, 191 Ariz. at 597, 959 P.2d at 1288.

Analysis

With respect to the cruelty prong of (F)(6), Petitioner challenges only the finding regarding Patricia Luna. (Dkt. 55 at 84-93.) The Arizona Supreme Court held that the murder was especially cruel based on the following:

> [Patricia] feared for her life and was uncertain as to her fate for hours. She was forced to watch defendant stab and shoot her husband to death and to hear defendant tell her he had murdered her daughter. Clearly, Patricia Luna's murder was especially cruel.

Djerf, 191 Ariz. at 596, 959 P.2d at 1287.

Whether a state court correctly applied an aggravating factor to the facts is a question of state law, and federal habeas review is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). A state court's finding of an aggravating factor is arbitrary or capricious only if no reasonable sentencer could have so concluded. *Id*. at 783. The question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact" could have made the finding

beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A habeas court faced with a record of historical facts which supports conflicting inferences must presume that the trier of fact resolved any such conflicts in favor of the prosecution. *Id*. at 326.

Under Arizona law, cruelty is established when the victim consciously suffers physical pain or emotional distress. *See State v. Bible*, 175 Ariz. 549, 604, 858 P.2d 1152, 1207 (1993); *see also State v. Beaty*, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988). The Arizona Supreme Court found that all four murders were especially cruel. *Djerf*, 191 Ariz. at 588-89, 596, 959 P.2d at 1279-80, 1287. This Court agrees with the Arizona Supreme Court that Petitioner murdered Patricia Luna with especial cruelty. She suffered physically and mentally for hours, uncertain of her fate. Petitioner tormented her, killing her husband as she watched and telling her how her daughter died and how she and her son would die. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have made the cruelty finding beyond a reasonable doubt. The Arizona Supreme Court's decision was not an unreasonable application of clearly established federal law.

Next, Petitioner argues that the trial court erred in determining that all four murders were committed in a heinous or depraved manner. Despite Petitioner's attack upon the trial court, the relevant state court decision under habeas review is the last reasoned state decision regarding a claim. *See Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-804 (1991)). The Arizona Supreme Court rendered the last state court decision on the merits of this issue. The court did not reach the question of whether the murders were committed in a heinous or depraved manner because it had already concluded that all four murders were committed in a especially cruel manner and because such a finding alone established the (F)(6) aggravating circumstance. *See Djerf*, 191 Ariz. at 597, 959 P.2d at 1288. A state's construction of its own law is binding on the federal court. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). The standard for establishing an aggravating circumstance is a state-law question. *See Jeffers*, 497 U.S. at 780. Petitioner is not entitled to relief on Claim Nine.

Claim Ten

Petitioner challenges the state courts' conclusion that the pecuniary gain aggravating circumstance was satisfied. He contends that there was insufficient evidence to show that the murders were committed for pecuniary gain under A.R.S. § 13-703(F)(5). (Dkt. 55 at 93-94.)

A finding that a murder was motivated by pecuniary gain for purposes of § 13-703(F)(5) must be supported by evidence that pecuniary gain was the impetus, not merely the result, of the murder. *See Moormann v. Schriro*, 426 F.3d 1044, 1054 (9th Cir. 2005); *see also State v. Cañez*, 202 Ariz. 133, 159, 42 P.3d 564, 590 (2002) (killing the victim and sole witness of a robbery is powerful circumstantial evidence of an intent to facilitate escape or hinder detection and providing sufficient evidence that the catalyst for the robbery was pecuniary gain). Killing for the purpose of financial gain is sufficient to establish the aggravator. *See State v. Walton*, 159 Ariz. 571, 588 (1989). When a robber executes victims to facilitate his escape and hinder detection, so as to successfully take and keep the stolen items, he furthers his pecuniary gain motive. *See id.*

On direct review of this claim, the Arizona Supreme Court rejected Petitioner's argument that pecuniary gain did not motivate the murders:

> [A]fter gaining entry to the Luna home, defendant immediately forced Patricia to place items of personal property into the family car. Then, after fleeing the scene in the car, defendant removed and kept those items before leaving the car in the parking lot. The trial court correctly found that the state had proved beyond a reasonable doubt that the (F)(5) aggravating factor of pecuniary gain exists.

Djerf, 191 Ariz. at 597, 959 P.2d at 1288.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have made the pecuniary gain finding beyond a reasonable doubt. The Arizona Supreme Court's finding upholding the aggravating circumstance was not arbitrary or capricious so as to constitute an independent due process or Eighth Amendment violation. Because the Arizona Supreme Court's decision was not an unreasonable application of

clearly established federal law, Petitioner is not entitled to relief for Claim Ten.

Claim Eleven

Petitioner alleges that the state courts failed to properly consider and weigh the mitigating evidence he presented regarding his cooperative post-arrest conduct, troubled family background, adjustment to confinement, and remorse. (Dkt. 55 at 94-97.) Respondents agree that part of Claim Eleven is exhausted but contend that Petitioner did not exhaust his allegations regarding post-arrest conduct and adjustment to confinement. (Dkt. 66 at 43.) Petitioner concedes this point but argues that these aspects of the claim were exhausted by the Arizona Supreme Court's independent review of his death sentence. (Dkt. 72 at 49.)

The Arizona Supreme Court independently reviews each capital appeal to determine whether the death sentence was properly imposed. In *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983), the court stated that the purpose of independent review is to assess the presence or absence of aggravating and mitigating circumstances and the weight to give to each. *See State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (1982). To ensure compliance with Arizona's death penalty statute, the court reviews the record regarding aggravation and mitigation findings, and then decides independently whether the death sentence should be imposed. *See State v. Brewer*, 170 Ariz. 486, 493-94, 826 P.2d 783, 790-91 (1992). In conducting its review, the court also determines whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors. *See State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *sentence overturned on other grounds*, *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978).

Arguably, such a review rests on both state and federal grounds. *See Brewer*, 170 Ariz. at 493, 826 P.2d at 790 (statutory duty to review death sentences arises from need to ensure compliance with constitutional safeguards imposed by the Eighth and Fourteenth amendments); *State v. Watson*, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981) (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Godfrey v. Georgia*, 446 U.S. 420 (1980), and stating

that independent review of death penalty is one method a state may utilize to prevent arbitrary and capricious application of the death penalty).

While the Arizona Supreme Court's independent review does not encompass any and all alleged constitutional error at sentencing, the Court finds that it did encompass Petitioner's claim that the trial court violated the Eighth and Fourteenth Amendments by failing to consider all proffered mitigating evidence. *See Watson*, 129 Ariz. at 63-64, 628 P.2d at 946-47 (citing *Godfrey* as support for decision to overturn death sentence based on an independent re-weighing of aggravating and mitigating factors). In this case, the Arizona Supreme Court conducted an independent review of the trial record, weighed all the aggravating and mitigating factors, and concluded that the trial court did not err in its imposition of the death penalty. *Djerf*, 191 Ariz. at 595, 959 P.2d at 1286. The state supreme court's review of the trial court's consideration of the mitigating evidence sufficiently exhausted Claim Eleven. Therefore, the Court will review Claim Eleven in its entirety.

Regarding the allegations exhausted by independent review, when a state court decides the merits of a claim without providing its rationale, under the AEDPA the habeas court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853. Although the state court record is reviewed independently, the habeas court nevertheless defers to the state court's ultimate decision. *Pirtle*, 313 F.3d at 1167. Further, 28 U.S.C. § 2254(e)(1) requires federal habeas courts to presume the correctness of a state court's factual findings unless the petitioner rebuts this presumption with "clear and convincing evidence." *See Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007).

Legal Standards

In capital sentencing proceedings, the sentencer must not be precluded from considering relevant mitigation evidence. *See Lockettv. Ohio*, 438 U.S. 586 (1978). In *Lockett* and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Supreme Court held that under

the Eighth and Fourteenth Amendments the sentencer must be allowed to consider, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Eddings*, 455 U.S. at 113-14. Constitutionally relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. However, while the sentencer must not be foreclosed from considering relevant mitigation information, "it is free to assess how much weight to assign to such evidence." *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998); *see Eddings*, 455 at 114-15 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence").

On habeas review, the federal court does not evaluate the substance of each piece of evidence submitted as mitigation; rather, it reviews the state court record to ensure that the state court allowed and considered all relevant mitigation. *See Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (when it is evident that all mitigating evidence was considered, the trial court is not required to discuss each piece of such evidence). Thus, "the trial court need not exhaustively analyze each mitigating factor 'as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant.'" *Moormann*, 426 F.3d at 1055 (quoting *Clark v. Ricketts*, 958 F.2d 851, 858 (9th Cir. 1991)); *see Parker v. Dugger*, 498 U.S. 308, 314-15, 318 (1991) (the sentencing court properly considered all information, including nonstatutory mitigation, where the court stated that it considered all the evidence and found no mitigating circumstances that outweighed the aggravating circumstances); *LaGrand v. Stewart*, 133 F.3d 1253, 1263 (9th Cir. 1998).

Although the sentencer may not refuse to consider constitutionally relevant mitigating evidence, it is constitutionally permissible for a state death penalty statute to impose on defendants the burden of establishing the existence of a mitigating circumstance by a preponderance of the evidence. *See Walton*, 497 U.S. at 649-51 (plurality opinion); *see also Delo v. Lashley*, 507 U.S. 272, 275 (1993) (per curiam) (stating that "we recently made clear

that a State may require the defendant to bear the risk of nonpersuasion as to the existence of mitigating circumstances") (other citation omitted). In a weighing state like Arizona, if the sentencer determines that a mitigating circumstance has been established by a preponderance of the evidence, the Eighth and Fourteenth Amendments further require that such evidence be given whatever effect, or weight, the sentencer deems appropriate. *See Richmond v Lewis*, 506 U.S. 40, 47-48 (1992); *see also Johnson v. Texas*, 509 U.S. 350, 367 (1993) (sentencer must be able to give effect to relevant mitigation that has been established by the evidence). However, the Constitution does not require that a death penalty statute assign a specific weight to any particular mitigating factor established at sentencing. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995). The *Harris* Court held that requiring states to assign particular weight to mitigation would "place within constitutional ambit micromanagement tasks that properly rest within the [s]tate's discretion to administer its criminal justice system." *Id*. Thus, it is an issue of state law whether a mitigating circumstance exists and, if established, the weight to be assigned to it. *See Ortiz*, 149 F.3d at 943; *see also Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir. 2006) (once mitigation is allowed in, a finding that there are no mitigating circumstances does not violate the Constitution).

Merits

Petitioner contends that the state courts failed to properly consider and give effect to the following non-statutory mitigation circumstances presented at sentencing: (1) cooperative post-arrest conduct, (2) a troubled family background, (3) adjustment to confinement, and (4) remorse. (Dkt. 55 at 94-97.)

Independent Review of the State Court Sentencing Record

At sentencing, the trial court found three aggravating circumstances for three of the murders and four aggravating circumstances for the fourth murder. (RT 5/22/96 at 8-17; ROA 274.) The court then made findings with respect to statutory and nonstatutory mitigating factors. (RT 5/22/96 at 19-23.) The court found that Petitioner had not proved

any of the statutory mitigating factors. (*Id.* at 17-19.) Regarding non-statutory mitigation, the court indicated that it had considered all aspects of the Petitioner's character, propensities, or record and any of the circumstances of the offense to determine whether there were mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at 19.) In its consideration of mitigation, the court indicated that it had reviewed the change of plea proceedings, the file, the arguments of counsel regarding mitigation findings, Petitioner's sentencing memorandum, the testimony presented at the sentencing hearings, and Petitioner's interview conducted by his attorney. (*Id.* at 3, 19.) In his sentencing memorandum and at the sentencing hearings, Petitioner argued and presented testimony in support of mitigation. (ROA 269; RT 2/9/96; RT 5/10/96.)

At sentencing, the trial court found that Petitioner's post-arrest conduct was not a mitigating circumstance, because Petitioner had no place to go and his friends were talking to the police. Consequently, his compliance with the arresting officers was not a mitigating circumstance. (RT 5/22/96 at 20.) Next, the court found that there was no evidence that Petitioner's alleged difficult family background had any effect upon his behavior during the killings that was beyond his control. (*Id.*) Next, the court found that while Petitioner had adjusted to confinement, he was not a model inmate; he had several disciplinary write-ups for jail infractions. (*Id.* at 21.) Finally, the court found that Petitioner was not remorseful, blaming Albert Luna, Jr., for the murders. (*Id.* at 20-21.) Petitioner also told a reporter that under the right circumstances he could kill again. (*Id.*) The court found that Petitioner's guilty plea was a tactical decision made in the face of overwhelming evidence of guilt. (*Id.* at 21.)

On direct appeal, the Arizona Supreme Court rejected Petitioner's argument that the trial court failed to consider and give effect to his mitigation evidence. *Djerf*, 191 Ariz. at 595, 597-99, 959 P.2d at 1286, 1288-90. The supreme court addressed Petitioner's arguments related to difficult family background and remorse:

> Defendant claims that the trial court erred in refusing to give weight to

> a stressful family background and that not doing so violates the directive in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), that the trial judge must consider all mitigating evidence proffered by defendant. This court has held that *Lockett* and *Eddings* require only that the sentencer consider evidence proffered for mitigation. *State v. Gonzales*, 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995), *cert. denied*, 516 U.S. 1052, 116 S.Ct. 720, 133 L.Ed.2d 673 (1996). The sentencer, however, is entitled to give it the weight it deserves. *Id*. Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior. *Ross*, 180 Ariz. at 607, 886 P.2d at 1362. The trial court considered the evidence but found it irrelevant and declined to give it weight because proof was lacking that his family background had any effect on the crimes.
>
> Defendant introduced evidence that he was separated from his mother at a young age and raised by a father who was cold and aloof. Defendant insisted, however, that he was not physically abused by his father, and no evidence was introduced to show otherwise. We conclude that defendant's family background, in light of the entire record, will not mitigate the death sentences imposed for these murders.
>
> . . . .
>
> A sense of remorse may be a mitigating circumstance. *Brewer*, 170 Ariz. at 507, 826 P.2d at 804. Defendant claims that, because his guilty pleas were an effort to spare the feelings of the remaining members of the Luna family and because statements in letters he wrote allegedly demonstrated remorse for the killings, the trial court erred in concluding that defendant felt no remorse.
>
> On this record, we conclude that defendant has not proven remorse by a preponderance of the evidence. First, the evidence does not support defendant's contention that his guilty pleas were meant to spare the remaining members of the Luna family. Rather, as the trial court's special verdict correctly notes, the guilty pleas were a "tactical decision made in the face of overwhelming guilt."
>
> Second, it is true that while in jail defendant wrote to friends that the Luna family "did not deserve that" and that he did not deserve to live. This argument is contradicted, however, by defendant's attempt to place the blame for the murders on his girlfriend, on the Glendale police, and on Albert Luna, Jr. Defendant also told the reporter that "under the right circumstance, he could kill again."

Djerf, 191 Ariz. at 598, 959 P.2d at 1289.

Discussion

The state courts carried out their constitutional obligation to consider all of the evidence offered in mitigation, including the non-statutory mitigation cited in Claim Eleven.

As discussed above, the trial court made specific on-the-record findings with respect to these four factors. (ROA 274; RT 5/22/96 at 20.) The trial court stated that it had considered all of the mitigation arguments and evidence presented in Petitioner's sentencing memorandum and at the sentencing hearings. (ROA 269; RT 2/9/96; RT 5/10/96.) Thus, the trial court considered all of Petitioner's arguments and evidence in support of mitigation, including all the non-statutory mitigation which comprises Claim Eleven. The trial court simply disagreed with Petitioner regarding the import of such mitigation. However, the fact that the sentencing court in this case found the evidence inadequate to justify leniency, does not violate the Constitution. *See Ortiz,* 149 F.3d at 943; *see also Eddings*, 455 at 114-15. After independent review, the Court concludes that the trial court considered all of the mitigation evidence presented by Petitioner, thereby fulfilling the directive set forth in *Lockett* and *Eddings*. *See Parker,* 498 U.S. at 318.

On direct appeal, Petitioner specifically challenged the trial court's findings regarding difficult family history and remorse. (*See* Opening Br. at 35-36.) The Arizona Supreme Court addressed Petitioner's arguments and considered Petitioner's mitigation regarding difficult family history and remorse. *Djerf*, 191 Ariz. at 598, 959 P.2d at 1289. Furthermore, on direct appeal, the Arizona Supreme Court specifically stated that they independently considered the complete record of mitigation evidence Petitioner presented during sentencing before concluding that it was not sufficient to warrant leniency. *Djerf*, 191 Ariz. at 595, 598-99, 959 P.2d at 1286, 1289-90. Thus, the Court concludes that the Arizona Supreme Court properly considered all of the mitigation evidence presented by Petitioner at sentencing, thereby fulfilling the directive set forth in *Lockett* and *Eddings*. *See Parker*, 498 U.S. at 318. The supreme court's decision that Petitioner's mitigation record was insufficient to warrant leniency is not contrary to or an unreasonable application of clearly established federal law.

Finally, Petitioner argues that *Tennard v. Dretke*, 542 U.S. 274 (2004), supports his contention that the trial court failed to properly consider his non-statutory mitigation evidence. (Dkt. 72 at 49-50.) In *Tennard*, the Court reiterated the general principle that it

is not enough simply to allow the defendant to present mitigating evidence, the sentencer must be able to consider and give effect to that evidence. 542 U.S. at 283. The *Tennard* Court ruled that mitigation evidence may not be made to pass through a threshold screening test before it is available for consideration as mitigation by the sentencer. *Id.* The Court struck down a standard that kept certain mitigation evidence from consideration. *Id.* at 287-88 (the threshold screening test at issue required both a uniquely severe permanent handicap and a causal nexus between the criminal act and the severe permanent condition before the mitigation could be considered).

Petitioner does not identify the non-statutory mitigation evidence to which his *Tennard* argument is directed. (Dkt. 72 at 49-53.) Nonetheless, it is readily apparent that the trial court and the Arizona Supreme Court performed their constitutional duty and properly considered the mitigating evidence, even citing *Lockett* and *Eddings*.[10] *See Djerf*, 191 Ariz. at 595, 597-99, 959 P.2d at 1286, 1288-90; *See* RT 5/22/96. The fact that the state courts found the non-statutory mitigation evidence inadequate to warrant leniency does not violate the Constitution. *See Ortiz*, 149 F.3d at 943; *see also Williams*, 441 F.3d at 1057. The trial court and the Arizona Supreme Court properly considered Petitioner's non-statutory mitigation evidence. Petitioner is not entitled to relief on Claim Eleven.

Claim Thirteen

Petitioner alleges that he was entitled to a jury determination on the aggravating factors that rendered him eligible for a death sentence. (Dkt. 55 at 108.) In *Ring v. Arizona*,

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[10] In its discussion of mitigating information concerning Petitioner's difficult family background, the supreme court, after discussing the mandate of *Lockett* and *Eddings*, clarified that consideration of mitigation is separate and apart from whether a court is required to give any weight to the mitigation evidence. *See Djerf*, 191 Ariz. at 598, 959 P.2d at 1289. Following this discussion, the court summarized the trial court's treatment of the mitigation evidence, stating that the trial court had considered the evidence but declined to give it weight, finding it "irrelevant." *Id.* The Court does not construe this comment to mean that the trial court was precluded from considering, or refused to consider, the proffered mitigation. Rather, use of the term "irrelevant" indicates that the mitigation was found insufficient to warrant leniency.

536 U.S. 584 (2002), the Supreme Court ruled that Arizona's aggravating factors are an element of the offense of capital murder and must be found by a jury. However, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme Court held that *Ring* does not apply retroactively to cases, like Petitioner's, already final on direct review. Petitioner concedes that pursuant to *Summerlin*, he is not entitled to relief. (Dkt. 72 at 55.)

Claim Fourteen

Petitioner challenges the constitutionality of Arizona's statutory scheme for imposing the death penalty. (Dkt. 55 at 109-114.) Petitioner alleges that the death penalty statute establishes a presumption in favor of death because a death sentence is imposed if the aggravating circumstances outweigh the mitigation presented. (*Id.*) He also contends that Arizona's system of utilizing aggravating factors is unconstitutionally broad because the factors do not genuinely narrow the class of murderers who may be subject to the death penalty. (*Id.*) Respondents concede that this claim is properly exhausted. (Dkt. 66 at 49.)

It is unclear why Respondents concede exhaustion of this claim because the PCR court found it procedurally defaulted. (*See* ROA-PCR 27; *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002) ("A claim is procedurally defaulted if the state court declined to address the issue on the merits for procedural reasons.") Nevertheless, regardless of exhaustion, this claim is without merit. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277 (2005).

In *Walton*, the Supreme Court rejected the argument that Arizona's death penalty statute is impermissibly mandatory or that it 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 (relying on *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), and *Boyde v. California*, 494 U.S. 370 (1990)). The Court held that Arizona's death penalty statute provides for discretion through individualized sentencing where the sentencer considers all relevant mitigation that bears on the circumstances of the crime and on the defendant. *Id.*; *see also Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 2524 (2006)

(relying on *Walton* to uphold Kansas's death penalty statute, which imposed the death penalty when the established mitigation did not outweigh the aggravating circumstances). Petitioner is not entitled to relief on Claim Fourteen.

Claim Fifteen

Petitioner contends that Arizona's death penalty statute is unconstitutional because its application arbitrarily and capriciously discriminates against young male indigent defendants. (Dkt. 55 at 114.) Respondents argue that Petitioner procedurally defaulted this claim in state court. (Dkt. 66 at 51.) Petitioner responds that the Arizona Supreme Court's independent sentencing review exhausted this claim. However, this is not the type of claim exhausted by the supreme court's independent sentencing review. *See Moormann*, 426 F.3d at 1057-58.

Petitioner presented this claim during PCR proceedings, but the PCR court concluded it was procedurally defaulted as waived pursuant to Ariz. R. Crim. P. 32.2(a)(3), indicating it should have been raised on direct appeal. (ROA-PCR 27.). Rule 32.2(a)(3) was an adequate procedural bar at the time of Petitioner's procedural default of Claim Fifteen; Arizona's procedural bar for waived claims is firmly established and regularly followed. *See, e.g., Ortiz v. Stewart*, 149 F.3d 923, 931-32 (9th Cir. 1998) (citing cases). Because the procedural bar is adequate and independent, federal review of this claim is foreclosed unless Petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice.

Petitioner asserts ineffective assistance of appellate counsel as cause to excuse the default. (Dkt. 72 at 57.) Before ineffective assistance of appellate counsel may be utilized as cause to excuse a procedural default, the particular IAC allegation must first be exhausted before the state courts as an independent claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000); *Murray v. Carrier*, 477 U.S. at 489-90; *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988). During PCR proceedings, Petitioner did not fairly present any appellate IAC claims based on counsel's failure to raise this claim on appeal. (ROA-PCR 27.) Therefore, appellate IAC cannot constitute cause. Because Petitioner has failed to

establish cause, there is no need to address prejudice. Petitioner does not attempt to demonstrate that a fundamental miscarriage of justice will occur if this claim is not resolved on the merits. Therefore, Claim Fifteen is procedurally barred.

Claim Sixteen

Petitioner contends that Arizona's death penalty statute is unconstitutional because it allows State prosecutors unbridled discretion to determine whether to pursue the death penalty. Petitioner concedes that he that he did not properly exhaust this claim to the Arizona Supreme Court. (Dkt. 55 at 116; Dkt. 66 at 51.) A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman*, 501 U.S. at 731. To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *See O'Sullivan*, 526 U.S. at 848.

Petitioner contends that the Arizona Supreme Court's independent sentencing review exhausted Claim 16. (Dkt. 72 at 57.) Again, this is not the type of claim exhausted by the supreme court's independent sentencing review. *See Moormann*, 426 F.3d at 1057-58. Petitioner failed to properly exhaust this claim in state court. If Petitioner were to return to state court now and attempt to litigate this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, Claim Sixteen is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim Sixteen will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, none of which Petitioner attempts to demonstrate. Claim Sixteen is denied.

Claim Seventeen

Petitioner alleges his constitutional rights will be violated because he will not receive a fair clemency proceeding. In particular, he alleges the proceeding will not be fair and

impartial based on the Board's selection process, composition, training, and procedures, and because the Attorney General will act as the Clemency Board's legal advisor and as an advocate against Petitioner. (Dkt. 55 at 117-121.)

Petitioner acknowledges that because he has not sought clemency this claim is premature and not ripe for adjudication. More significantly, however, this 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 (i.e., his conviction or sentence) and thus is not a proper grounds 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 Seventeen is dismissed as not cognizable.

Claim Eighteen

Claim Eighteen alleges that Petitioner will be incompetent to be executed under the Sixth, Eighth, and Fourteenth Amendments, and *Ford v. Wainwright*, 477 U.S. 399 (1986). (Dkt. 55 at 121-23.) Petitioner recognizes that this claim is not yet ripe for federal review. (Dkt. 66 at 53-54.) Pursuant to *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*, 127 S. Ct. 2842 (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 2854. 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*. at 2854-55. Therefore, the Court dismisses Claim Eighteen without prejudice as premature.

Claim Nineteen

Petitioner alleges that execution after an extended period of incarceration on death row fails to serve any legitimate penological purpose and violates his Eighth Amendment right to be free from cruel and unusual punishment. (Dkt. 55 at 123-33.) Petitioner concedes he did not present this claim to the state courts but argues it could not be raised in state court because of an absence of available state corrective process. (*Id.* at 123.) Regardless of exhaustion, the Court will deny Claim Nineteen as plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277.

The Supreme Court has not held that lengthy incarceration prior to execution constitutes cruel and unusual punishment. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Stevens, J. & Breyer, J., discussing denial of certiorari and noting the claim has not been addressed). Circuit courts, including the Ninth Circuit, have held that prolonged incarceration under a sentence of death does not offend the Eighth Amendment. *See McKenzie v. Day*, 57 F.3d 1493, 1493-94 (9th Cir. 1995) (en banc); *White v. Johnson*, 79 F.3d 432, 438 (5th Cir. 1996) (delay of 17 years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (delay of 15 years). Accordingly, Petitioner cannot establish a right to federal habeas relief. *See Allen v. Ornoski*, 435 F.3d 946, 958-60 (9th Cir. 2006).

CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. The Court further finds that an evidentiary hearing in this matter is neither warranted nor required.[11] Therefore, Petitioner's First Amended Petition for Writ of Habeas Corpus is denied and judgment will be entered accordingly.

CERTIFICATE OF APPEALABILITY

In the event Petitioner appeals from this Court's judgment, and in the interests of

[11] The Court previously denied Petitioner's request for evidentiary development as to specific claims (Dkt. 94), but conducted an independent review as to all the claims as required by Rule 8 of the Rules Governing Section 2254 Cases.

conserving scarce resources that might be consumed drafting and reviewing an application for a certificate of appealability (COA) to this Court, the Court on its own initiative has evaluated the claims within the petition for suitability for the issuance of a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d at 864-65.

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

The Court finds that reasonable jurists could debate its resolution Claim Four. For the remaining claims, the Court declines to issue a COA for the reasons set forth in the instant Order and this Court's previous Order. (Dkt. 94.)

Based on the foregoing,

IT IS HEREBY ORDERED that Petitioner's First Amended Petition for Writ of Habeas Corpus (Dkt. 55) is **DENIED WITH PREJUDICE.** The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on March 1, 2002, is **VACATED**. (Dkt. 3.)

IT IS FURTHER ORDERED that a Certificate of Appealability is **GRANTED** as to the following issue: Whether the Court erred in determining that Claim Four, alleging IAC

of counsel at sentencing based on counsel's failure to investigate and present mitigation information regarding his dysfunctional family background and mental health, is without merit.

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

DATED this 29th day of September, 2008.

James A. Teilborg
United States District Judge

APPENDIX D

APPENDIX D

(31)

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA,	)	Supreme Court
	)	No. CR-96-0296-AP
Appellee,	)	
vs.	)	Maricopa County
	)	No. CR 93-07792
RICHARD KENNETH DJERF,	)	
	)	
Appellant.	)	O P I N I O N
	)	

Appeal from the Superior Court of Maricopa County

The Honorable Michael D. Ryan, Judge

AFFIRMED

Grant Woods, Attorney General — Phoenix
by Paul J. McMurdie, Chief Counsel
Criminal Appeals Division
Attorneys for Appellee

Lisa Marie Martin — Phoenix
Attorney for Appellant

J O N E S, Vice Chief Justice

¶1 The defendant, Richard Kenneth Djerf, accepted a plea agreement which resulted in convictions of four counts of first degree murder. He was sentenced to death on each count. This is a mandatory appeal of the death sentences pursuant to Rules 26.15 and 31.2 of the Arizona Rules of Criminal Procedure. The court has jurisdiction under article VI, section 5(3), of the Arizona Constitution and A.R.S. section 13-4301. We affirm the convictions and sentences.

FACTS

¶2 The defendant and Albert Luna, Jr. met and became friends while working as night custodians at a Safeway supermarket. In January 1993, Luna entered defendant's apartment without defendant's permission and took several items, including a television, a VCR unit, stereo equipment, a car alarm, and an AK-47 assault rifle. Although defendant told Glendale police he suspected Luna had committed the crime, the police took no action. The matter festered for several months until the defendant, still angered by the burglary and frustrated by police inaction, determined to take revenge.

¶3 In the late morning hours of September 14, 1993, defendant went to the Luna family home, taking his nine-millimeter Beretta handgun, a knife, latex gloves, handcuffs, red fuse cord,

and artificial flowers in a vase to use as a ruse to gain entry. When Luna's mother, Patricia, answered the door to receive the flowers, defendant pushed his way into the house, showing her his gun. Defendant took Patricia into the master bedroom and bound her, letting her five-year-old son, Damien, run free. Later, while holding Damien hostage, defendant freed Patricia and forced her to place items of property into the Luna family car, including two VCR units, a telephone, a caller ID box, a stereo CD player, four watches, change, and a money clip with food stamps. He then took Patricia and Damien into the kitchen and bound them to chairs with rope and black electrical tape. More than once, he asked Patricia whether she or her son should die first. He also asked her if she knew the whereabouts of her son, Albert Jr.

¶4 Around 3:00 p.m., Rochelle, Patricia's daughter, age eighteen, came home. Defendant took Rochelle to her bedroom, gagged her with tissue paper and tape, tied her wrists to the bed, cut and removed her clothes with a knife, and raped her. Defendant then stabbed Rochelle four times in the chest and slit her throat, severing the jugular vein. Two of the chest wounds and the throat wound were potentially fatal. Rochelle further suffered multiple shallow knife wounds to the back of her head while she was alive, and one, probably postmortem, superficial stab wound to her right temple. Her earring had been torn through the earlobe. At some

point while still alive, Rochelle vomited behind the gag and aspirated the vomit. Defendant then told Patricia he had raped and killed her daughter.

¶5 Around 4:00 p.m., Albert Luna, Sr. arrived home from work. Defendant handcuffed him, forced him to crawl to the master bedroom, and placed him face down on the bed. He struck Albert in the back of the head multiple times with an aluminum baseball bat, inflicting three large lacerations and spattering blood throughout the room. The medical examiner testified that hemorrhaging from these wounds was potentially fatal. Defendant removed the handcuffs from Albert, taped his hands and wrists together, and left him for dead. He then walked to the kitchen and told Patricia that he had killed her husband.

¶6 Defendant next attempted to snap Damien's neck by twisting the head abruptly from behind, "like he had seen in the movies." In fact, he "turned [Damien's head] all the way around and nothing happened," so he freed the child's head. In an attempt to electrocute Damien, defendant cut an electrical cord from a lamp in the kitchen, stripped the insulation from the wires, and taped it to the skin on Damien's calf. The cord was found unplugged at the scene.

¶7 Albert, although badly injured, freed himself from the tape around his wrists, went to the kitchen, and charged defendant

with a pocketknife, wounding him seriously. During the ensuing struggle, defendant stabbed Albert with enough force to drive a knife through the right arm and into the torso. Defendant managed to pull the Beretta from his belt and shot Albert six times. Albert fell at the feet of his wife and son.

¶8 Defendant asked Patricia, "Do you want to watch your kid die, or do you want your kid to watch you die?" Defendant then shot both Patricia and Damien in the head at close range.

¶9 Defendant splashed gasoline on the bodies and throughout the house. His girlfriend, Emily Boswell, testified that defendant told her he lit the red fuse cord but put it out when he realized there were children playing outside and he could not leave the house immediately without being seen. A short while later, he turned on two of the kitchen stove burners, placed an empty pizza box and a rag on the stove, and left the house. Defendant then drove to his apartment in the Lunas' family car, the stolen property inside, where he encountered Boswell at about 6:00 p.m. He told Boswell that he had been stabbed by two men who tried to rob him. He later went to the hospital and was admitted.

¶10 For some reason, the pizza box and rag failed to ignite the gasoline. Albert Jr. had not gone to his home the night of September 13, and did not return until 11:45 p.m. the day of the murders, September 14. Numerous unanswered calls to the house had

made him anxious. When Luna entered the home and discovered the bodies of his parents and brother, he immediately left and drove to his girlfriend's house where he called the police.

¶11 The next day, September 15, defendant disclosed to Boswell that he had murdered four members of the Luna family and described to her how he had done it. Defendant told Boswell that the blood dripping from Patricia's gunshot wound was "really awesome" and "you should have been there." On September 16, a friend, Travis Webb, checked defendant out of the hospital, but defendant was unwilling to go to his own apartment. Webb rented a motel room, where defendant stayed until September 18. Also on September 16, defendant called another friend, Daniel Greenwood, in California, and once again, revealed his role in the four murders. While in the motel room, defendant also told Webb of his involvement in the murders at the Luna home.

¶12 On September 18, Phoenix police executed search warrants on the motel room and defendant's car and apartment. The police found handcuffs, a nine-millimeter Beretta, a stereo CD player, two VCR units, a US West caller ID unit, artificial flowers and a vase, watches, Rochelle's charm necklace, a cardboard knife sheath, Patricia's car keys, a telephone, loose change, food stamps, and a red fuse cord. Police arrested defendant the same day. At the time of arrest, the police found a handcuff key and a newspaper

section containing an article about the killings in his possession.

PROCEDURAL HISTORY

¶13 A Maricopa County Grand Jury indicted defendant for the following crimes: Count One, first degree murder of Albert B. Luna, Sr.; Count Two, first degree murder of Damien Luna; Count Three, first degree murder of Patricia Luna; Count Four, first degree murder of Rochelle Luna; Count Five, first degree burglary; Counts Six through Nine, kidnapping; Count Ten, sexual assault; Counts Eleven through Fifteen, aggravated assault; Count Sixteen, attempted arson of an occupied structure; Count Seventeen, theft; and Count Eighteen, misconduct involving weapons.

¶14 Michael Vaughn and Alan Simpson were appointed as trial counsel, but on February 15, 1995, defendant filed a motion to remove both and to substitute himself as counsel *pro se* for all future proceedings in the trial court.

¶15 The court held a hearing on defendant's requests on February 23 and found, based on the record, that defendant's waiver of counsel was made voluntarily, knowingly, and intelligently. The trial court granted defendant's motion for *pro se* representation, and Vaughn and Simpson were appointed as advisory counsel.

¶16 On March 17, three weeks later, the state filed a motion for a Rule 11 evaluation to determine defendant's competence to waive counsel and conduct his own defense in view of an apparent

suicide attempt soon after his arrest. Defendant filed a motion agreeing to such an evaluation, to "remove any doubt as to . . . competence." The trial court ordered preparation of a prescreening evaluation to determine whether a Rule 11 examination was warranted. Dr. Jack Potts evaluated defendant and pronounced him competent. Based largely on Dr. Potts' findings, the trial court concluded that no reasonable grounds existed to grant a complete Rule 11 competency hearing and reaffirmed its finding that defendant should be allowed to proceed *pro se*.

¶17 Defendant then entered into the plea agreement with the state. By its terms, defendant pled guilty to four counts of first degree murder in the deaths of Albert Sr., Damien, Patricia, and Rochelle Luna. The agreement expressly stated that no limits would be placed on sentencing and defendant could be sentenced to death for any or all of the murder counts. In return, the state agreed to dismiss the remaining counts.

¶18 On August 16, 1995, the trial court held a hearing on the plea agreement. After informing defendant of specified constitutional rights which would be relinquished by accepting the plea agreement, acknowledging Dr. Potts' prescreening report, and reaffirming the finding of competency, the trial court found that the guilty pleas had been made knowingly, intelligently, and voluntarily.

¶19 Approximately seven weeks later, defendant withdrew his waiver of counsel and accepted representation. Several days of presentence hearings ensued, following which the trial court rendered its special verdict. The trial court found that the state had proven beyond a reasonable doubt that the murders were committed for pecuniary gain (A.R.S. section 13-703(F)(5)), in an especially heinous, cruel, or depraved manner (A.R.S. section 13-703(F)(6)), and during the commission of one or more other homicides (A.R.S. section 13-703(F)(8)), and that at the time of the offense, defendant was an adult and one of the victims, Damien Luna, was under fifteen years of age (A.R.S. section 13-703(F)(9)). The trial court also found that defendant had failed to prove either the statutory mitigating factors or the non-statutory mitigating factors -- post-arrest conduct, disadvantaged childhood, psychological disorder, remorse, adjustment to confinement, and acceptance of responsibility. Accordingly, the court imposed the death sentence on defendant on each of the four counts.

ISSUES

I. Waiver of Counsel

¶20 Defendant first argues that the trial court abused its discretion in finding that no Rule 11 hearing should be conducted and that defendant's waiver of counsel was knowing and intelligent. He argues that a lack of communication with counsel and defendant's

depressive behavior precluded a knowing and intelligent waiver.

¶21 The federal and state constitutions guarantee the right to waive counsel and to represent oneself. U.S. Const. amend. VI; U.S. Const. amend. XIV; Ariz. Const. art. II, section 24. Self-representation is a "fundamental constitutional right." *Montgomery v. Sheldon*, 181 Ariz. 256, 259, 889 P.2d 614, 617 (1995) (citing *Faretta v. California*, 422 U.S. 806, 836, 95 S. Ct. 2525, 2541 (1975)). One important restriction on that right is that the waiver of counsel must be made voluntarily, knowingly, and intelligently. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884 (1981); *State v. Cornell*, 179 Ariz. 314, 322, 878 P.2d 1352, 1360 (1994). In *Edwards*, the U.S. Supreme Court stated that a waiver of counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards*, 451 U.S. at 482, 101 S. Ct. at 1884. The trial court may also consider evidence as to defendant's knowledge and understanding when he waived counsel. *State v. Martin*, 102 Ariz. 142, 146, 426 P.2d 639, 643 (1967). However, a mentally incompetent defendant is incapable of voluntarily, knowingly, and intelligently waiving the right to counsel. *Cornell*, 179 Ariz. at 321, 878 P.2d at 1360.

¶22 Rule 11 of the Arizona Rules of Criminal Procedure allows any party to move for a competency hearing. Ariz. R. Crim. P. 11.2. A competency hearing may be had for the purpose of determining whether the defendant is mentally able to stand trial, as well as to determine whether the defendant is competent to conduct his own defense. *Martin*, 102 Ariz. at 145-46, 426 P.2d at 642-43; *see also State v. Westbrook*, 101 Ariz. 206, 417 P.2d 530 (1966). After the motion is made, if the court finds that "reasonable grounds" exist for a mental examination, it will appoint two medical experts to examine the defendant and to testify concerning those findings at a subsequent hearing. Ariz. R. Crim. P. 11.3; *State v. Johnson*, 147 Ariz. 395, 398, 710 P.2d 1050, 1053 (1985) (using "reasonable grounds" test to decide whether hearing may help determine defendant's competence to stand trial); *State v. Herrera*, 176 Ariz. 21, 31, 859 P.2d 131, 141 (1993) (same); *Martin*, 102 Ariz. at 146, 426 P.2d at 643 (using "reasonable grounds" test to decide whether hearing may help determine defendant's competence to waive counsel). Evidence that creates a reasonable doubt in the court's mind as to a defendant's competency is sufficient to establish reasonable grounds. *State v. Williams*, 166 Ariz. 132, 139, 800 P.2d 1240, 1247 (1987); *State v. Borbon*, 146 Ariz. 392, 395, 706 P.2d 718, 721 (1985).

¶23 At the initial hearing on February 23, held on the waiver

of counsel motion, the trial court fully informed defendant of his right to counsel, the minimum, maximum, and presumptive sentences, the dangers of self-representation, and the difficulties involved in defending oneself without formal legal training. Defendant's attorneys informed the court they did not think it was in defendant's best interest that he defend himself, but both indicated to the court they believed he was competent to do so. When asked, defendant told the trial court his reason for requesting the waiver was that he felt there was insufficient communication between himself and his attorneys. The trial court explained to defendant that his attorneys had been fully engaged, working on his behalf.

¶24 Defendant argues that the trial court should not have found his waiver knowing and intelligent[1] when the stated reason for the waiver was a lack of communication with appointed counsel. Defendant cites no authority for this proposition. This court has held that dissatisfaction with counsel does not, of itself, warrant a competency hearing. *Johnson*, 147 Ariz. at 399, 710 P.2d at 1054. Indeed, "[i]f every personal conflict between a criminal defendant

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[1]Although the argument heading in defendant's brief states that defendant's waiver of counsel was not knowing or voluntary, the entire textual analysis goes to the knowing and intelligent factor. The U.S. Supreme Court, in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1980), held that voluntariness and intelligence/knowledge are two separate inquiries. The record, as described, is uncontrovertible. Defendant's waiver was clearly voluntary.

and his appointed counsel gave rise to reasonable grounds for a competency hearing, then almost every defendant would receive one." *Id.* Absent some indication that a defendant was irrational or delusional, dissatisfaction with one's counsel is immaterial. *Id.*; *see also Harding v. Lewis*, 641 F. Supp. 979, 989 (D. Ariz. 1986) ("The question of why a defendant chooses to represent himself is immaterial."). Defendant's dissatisfaction with counsel, standing alone, is of no moment in deciding whether the waiver was voluntary, knowing, and intelligent.

¶25 Given the care taken by the trial judge to inform defendant of the ramifications of his decision, defendant's appropriate and rational responses, and the attorneys' assurances of competency, one may only conclude that defendant fully understood the consequences of his waiver. *Martin*, 102 Ariz. at 145-46, 426 P.2d at 642-43. The court's finding that the waiver was made knowingly and intelligently was not error.[2]

¶26 Moreover, the findings in Dr. Potts' prescreening report do not, as defendant argues, cast doubt on the trial court's

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[2]Defendant argues that the trial court abused its discretion in allowing the waiver of counsel. However, as stated in *State v. Cornell*, 179 Ariz. 314, 321, 878 P.2d 1352, 1359 (1994), the applicable standard of review governing the issue of a defendant's waiver of counsel has not yet been settled by this court. The parties have not argued the standard of review to us, and we decline to address it here. However, we note that our holding on this issue would be the same under either a de novo or a deferential standard.

determination of competency. After the initial hearing on waiver, the state moved for the Rule 11 hearing. In order to aid in its determination whether reasonable grounds existed for such hearing, the court solicited a preliminary psychiatric report from Dr. Potts. The report stated that defendant was competent to stand trial, to proceed *in propria persona*, and to enter a plea agreement. The report also stated that the trial court and attorneys "will have to be aware of Defendant's past proclivity towards depressive reactions and monitor whether or not they feel he is effectively continuing with his Pro Per status." Defendant argues that the trial court abused its discretion in denying the Rule 11 hearing in light of this statement[3] and defendant's actual depressive behavior.

¶27 The report further concludes that defendant had a rational and factual understanding of the charges and of the legal proceedings facing him, that Dr. Potts found no evidence that defendant was suicidal, that he had no problems with his appetite

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[3]Defendant states in his brief that the trial court abused its discretion in that "there was no mechanism put in place for [defendant's depressive] tendencies to be monitored as the prescreening directed in order to continue to properly assess defendant's continued ability to represent himself." Any suggestion that the prescreening report directed that a "mechanism" separate from the observations of the court and attorneys themselves be put in place to monitor defendant amounts to a misstatement of the facts. The report directed that the monitoring be done by the court and the attorneys.

or sleep patterns, and that he had last been treated by a psychiatrist some seven months before. Finally, the state correctly argued that Dr. Potts' conclusion that the court and the attorneys should continue to monitor defendant's ability to represent himself is no more than the duty mandated by *State v. Mott*, 162 Ariz. 452, 459-60, 784 P.2d 278, 285-86 (App. 1990) (after waiver, court must continue to monitor defendant's behavior and order hearings on issue of competency "if it becomes aware of any evidence of defendant's incompetency to represent himself that would jeopardize his right to a fair trial").

¶28 Dr. Potts expressly determined that there was no reason further to question defendant's competency. Defendant's counsel at no time indicated to the court that defendant showed signs of incompetence. Accordingly, we conclude without difficulty that the evidence established defendant's competency and that there were no reasonable grounds on which to justify a Rule 11 hearing. *Williams*, 166 Ariz. at 139, 800 P.2d at 1247; Ariz. R. Crim. P. 11.3.

II. "Change of Counsel" Issue

¶29 In a supplemental brief, defendant argues that the trial court abused its discretion by granting defendant's request to remove trial counsel and to substitute himself as counsel *pro se*. He asserts that the trial judge erred by failing to inquire into

the reasons defendant wanted his own substitution as counsel and alleges that the court's actions fail the test of *United States v. Gonzalez*, 113 F.3d 1026, 1028 (9th Cir. 1997) (when deciding motion for change of counsel, reviewing court looks at adequacy of trial court's inquiry, extent of conflict between defendant and counsel, and timeliness of motion). *See also United States v. D'Amore*, 56 F.3d 1202, 1204-05 (9th Cir. 1995). In support, defendant refers to a letter he wrote to the judge dated February 14, 1995, describing dissatisfaction with what he perceived as a lack of communication between himself and trial counsel. Because the letter preceded his February 15 motion to "substitute himself" as counsel, defendant argues, the trial judge should have known that defendant "was really seeking the representation of counsel who would communicate with him."

¶30 Although not expressly stated in his supplemental brief, defendant apparently wishes now to treat the motion at issue as one to change counsel, rather than to waive counsel and substitute self. The impetus for his characterization seems to be (1) the aforementioned letter and (2) the title of the form upon which he asked to represent himself. The motion was titled "CHANGE OF COUNSEL" and stated:

> I, RICHARD K. DJERF, hereby request that MICHEAL [sic] VAUGHN/ALAN SIMPSON be withdrawn as my counsel of record, and that RICHARD K. DJERF be substituted as my attorney in all future proceedings in the trial court.

¶31 Defendant's later characterization of the motion as one to obtain new counsel is contradicted by the record. In his letter of February 14, defendant enumerated his complaints about counsel, but never once suggested that he wanted new counsel appointed. At a hearing on February 17, the trial judge (who had not yet received the letter but did have the motion) stated that what he had before him was "basically" a motion for self-representation by defendant and asked defendant if he still desired to represent himself. Defendant replied in the affirmative, and the trial judge scheduled the February 23 hearing. (The trial court did not receive defendant's letter until February 21.) At the February 23 hearing, the court treated the motion as stated on its face, to proceed *pro se*, and neither defendant nor his attorneys objected to this or gave any sign that this was not consistent with defendant's intent. Defendant never characterized his request as one for new counsel, not in his letter nor at the hearing nor at any time prior to his supplemental brief in this court. He requested only that he be allowed to represent himself. Further, in a later motion, defendant himself characterized his February 15 motion as a request to proceed *pro se*.[4]

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[4]"Because the defendant was constantly being put aside by his court appointed attorneys, the defendant decided to represent himself. On February 15 the defendant, requesting to represent himself, filed his motion. The defendant figured that the only way to eliminate these problems was to defend himself." Defendant's

¶32 Because defendant had an absolute constitutional right to act *pro se*, the trial court correctly determined that defendant was competent and that the waiver of counsel was made voluntarily, knowingly, and intelligently. Defendant's argument is meritless, and *Gonzalez*, which describes the test for whether a trial court has abused its discretion in denying a motion to change counsel, is inapplicable.

¶33 Finally, the September 1995 motion which the trial judge denied was mentioned in defendant's brief only to bolster the argument that his February 15 motion was intended to request different counsel, not to challenge the denial.[5]

Motion for Change of Counsel, Sept. 6, 1995.

[5]The trial court's denial of the September motion does not constitute an abuse of discretion under Arizona law. This court, in *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), points out that although irreconcilable conflict is not permitted, conflict between counsel and a criminal defendant is but one factor a court may consider in deciding whether to substitute counsel. *Id.* at 591, 858 P.2d at 1194 (citing *State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987)). Other factors include: the timing of the motion, inconvenience to witnesses, the time period already elapsed between the alleged offense and trial, the proclivity of the defendant to change counsel, and quality of counsel. *LaGrand*, 152 Ariz. at 486-87, 733 P.2d at 1069-70. The trial court concluded reasonably that further delay and inconvenience caused by bringing new counsel current in a death penalty case on the eve of the presentencing hearing was insupportable, and, in any event, that trial/advisory counsel was of high quality. Moreover, although defendant stated that he had lost confidence in Mr. Vaughn and Mr. Simpson, a mere allegation of lost confidence does not require appointment of substitute counsel. *State v. Crane*, 166 Ariz. 3, 11, 799 P.2d 1380, 1388 (App. 1990).

III. Guilty Pleas

¶34 Defendant argues that by failing to inform him of the trial-like nature of the presentencing hearing, the trial court abused its discretion in finding that defendant's guilty pleas were informed and intelligent.

¶35 A plea of guilty, when accepted, involves the waiver of constitutionally protected rights. Accordingly, waiver "must be 'an intentional relinquishment or abandonment of a known right or privilege.'" *Boykin v. Alabama*, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 1712 n.5 (1969) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938)). A plea of guilty, like a waiver of counsel, must be entered voluntarily, intelligently, and knowingly. *Id.* at 242, 89 S. Ct. at 1712. Because the death sentence may result from a guilty plea, the court must take special care "to make sure [a defendant] has a full understanding of what the plea connotes and of its consequence." *Id.* at 243-44, 89 S. Ct. at 1712. The standard of review is whether the trial court abused its discretion in finding that the defendant waived his rights and entered into a plea agreement. *State v. Brewer*, 170 Ariz. 486, 495, 826 P.2d 783, 792 (1992). The court must determine if "reasonable evidence" supports the finding that the defendant was competent to enter the plea. *Id.* (citing *State v. Bishop*, 162

Ariz. 103, 104, 781 P.2d 581, 582 (1989)). Under this standard, the court considers the facts in a light most favorable to sustaining the trial court's finding. *Bishop*, 162 Ariz. at 104, 781 P.2d at 582.

¶36 Both state and federal law require that the trial court, before accepting a guilty plea, determine that the defendant understands (1) the nature of the charges, (2) the nature and range of possible sentences, including any special conditions, (3) the constitutional rights waived by pleading guilty, (4) the right to plead not guilty, and (5) that the right to appeal is also waived if the defendant is not sentenced to death. Ariz. R. Crim. P. 17.2; *Boykin*, 395 U.S. at 243; *State v. Barnes*, 167 Ariz. 186, 189, 805 P.2d 1007, 1010 (1991).

¶37 This record shows that the trial judge fully satisfied each requirement and informed defendant before the guilty pleas were accepted that a presentence hearing would be held to determine sentencing. Defendant does not dispute the record. Rather, he asserts that the trial court erred in failing to inform him that the presentence hearing would be trial-like in that evidence and testimony would be given and witnesses would be examined and cross-examined. Defendant argues that had he understood the character of the hearing, he would not have pled guilty and would instead have gone to trial. His guilty pleas were thus neither informed nor

intelligent.

¶38 Defendant cites no authority for this argument. Moreover, the record reveals that at no time before the pleas were accepted did defendant inform the trial court that he entered the plea agreement in order to avoid a proceeding resembling a trial. The statement in the record upon which he relies[6] was made to a news reporter, who repeated it in testimony to the trial court during the presentence hearing, long after the plea had been accepted. The trial court correctly determined that defendant knowingly, intelligently, and voluntarily waived his rights. Acceptance of the pleas was not an abuse of discretion.[7]

IV. Mitigation/Aggravation

¶39 Pursuant to A.R.S. section 13-703, this court, in assessing the propriety of death sentences, reviews *de novo* the

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[6]Defendant told the reporter he pled guilty because "if he had a jury hearing all of the things that had happened at the Luna house, that it would inflame them, and it would be harder on him than if he just went before a judge." Special Verdict at 18.

[7]Defendant made no motion nor did he indicate at any time a desire to withdraw the pleas. A trial court may allow the withdrawal of a guilty plea "when necessary to correct manifest injustice." Ariz. R. Crim. P. 17.5. Even assuming that defendant's lack of understanding of a presentence hearing could be considered "manifest injustice," a trial court cannot, *sua sponte*, vacate the acceptance of a guilty plea. *State v. De Nistor*, 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985); *State v. Cooper*, 166 Ariz. 126, 131, 800 P.2d 992, 997 (App. 1990). To do so would violate the double jeopardy clause. *De Nistor*, 143 Ariz. at 412, 694 P.2d at 242. Because defendant never moved to withdraw the plea, the trial court committed no error.

findings of the trial court regarding aggravating and mitigating circumstances. A.R.S. section 13-703.01; *State v. Jones*, 185 Ariz. 471, 492, 917 P.2d 200, 221 (1996); *State v. Roscoe*, 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996). The state must prove the existence of statutory aggravating factors beyond a reasonable doubt. *Brewer*, 170 Ariz. at 500, 826 P.2d at 797. Defendant need only prove mitigating circumstances by a preponderance of the evidence. *Id.* at 504, 826 P.2d at 801. On appeal, this court must determine whether defendant's evidence of mitigating factors, assessed separately or cumulatively, is sufficient to outweigh evidence of the aggravating factors introduced by the state. *Id.*

A. Evidentiary Standard at Presentence Hearing

¶40 Defendant argues that the trial court applied the wrong standard to the evidence of aggravation and thus allowed introduction of irrelevant and prejudicial information. He reasons that the court must have improperly considered irrelevant and prejudicial evidence because the judge stated immediately before sentencing that he had considered *"all"* the testimony and evidence presented, and the judge failed to find mitigation.

¶41 We presume the trial court disregards all inadmissible evidence in reaching a decision. *State v. Gonzales*, 111 Ariz. 38, 41, 523 P.2d 66, 69 (1974) (citing *State v. Garcia*, 97 Ariz. 102, 397 P.2d 214 (1964)); *see also State v. Cameron*, 146 Ariz. 210,

215, 704 P.2d 1355, 1360 (App. 1985). The plain statement that a trial court considers *all* the evidence does not suggest an improper decision. Nothing in this record indicates that the judge accorded weight to irrelevant or prejudicial evidence. Indeed, the record is devoid of such matters.

¶42 We hold that the trial judge's statement that he considered *all* evidence and found no mitigating factors will not rebut the presumption that inadmissible evidence was disregarded. In practical terms, the argument is wholly non-meritorious.

B. A.R.S. Section 13-703(F)(6): Especially Heinous, Cruel or Depraved Manner

¶43 The trial judge found that each of the four murders was especially cruel and that each was committed in a heinous or depraved manner.

¶44 Conduct that is especially cruel, heinous or depraved in the commission of murder will invoke the (F)(6) statutory aggravating factor. Because this subsection is stated in the disjunctive, a finding of either cruelty or heinousness/depravity will suffice to establish this factor. *Roscoe*, 184 Ariz. at 500, 910 P.2d at 651. Defendant argues that the state failed to prove especial cruelty beyond a reasonable doubt in the murders of Albert, Rochelle, and Damien, and failed to prove heinousness/depravity in all four murders.

1. Cruelty

¶45 A murder is especially cruel if the victim consciously suffers physical or mental anguish. *Id.* at 500, 910 P.2d at 651; *State v. Bible*, 175 Ariz. 549, 605, 858 P.2d 1152, 1208 (1993). The physical or mental pain suffered must be reasonably foreseeable. *State v. Adamson*, 136 Ariz. 250, 266, 665 P.2d 972, 988 (1983). Mental anguish includes uncertainty as to one's ultimate fate. *State v. Lavers*, 168 Ariz. 376, 392, 814 P.2d 333, 349 (1991). It may also include knowledge that a loved one has been killed. *State v. Gretzler*, 135 Ariz. 42, 53, 659 P.2d 1, 12 (1983). However, where shots, stabbings, or blows are inflicted in rapid succession, quickly leading to unconsciousness, a finding of cruelty based on physical pain is unwarranted without additional supporting evidence that the victim suffered before becoming unconscious. *State v. Soto-Fong*, 187 Ariz. 186, 203-04, 928 P.2d 610, 627-28 (1996).

a. Albert Luna, Sr.

¶46 Defendant argues that Albert's murder was not cruel because "medical evidence revealed . . . no classic defense injuries and the sequence of his wounds could not be determined." The evidence demonstrated, however, that Albert was conscious during part or all of the initial beating with the baseball bat. Even if unconscious, he later regained awareness and strength and, suffering great pain from the wounds, struggled with defendant in

the kitchen. Defendant stabbed Albert so fiercely that the knife blade pierced his right forearm and penetrated the torso, where it was later found embedded. Even if subsequent gunshots fired in quick succession into Albert's body were not especially cruel, ample evidence indicates that this victim suffered intense physical pain and anguish before his death. The trial court did not err in finding that Albert's murder was especially cruel.

b. Damien Luna

¶47 Defendant contends that the murder of Damien Luna was not cruel because no evidence proved Damien had experienced electric shock, nor was there evidence of trauma to Damien's back or upper extremities. Defendant did attempt physically, though unsuccessfully, to break Damien's neck and to electrocute the five-year-old boy. In addition, Damien was present when defendant told Patricia he had killed Rochelle, and the boy saw defendant murder his father. The entire incident lasted several hours, during which Damien unquestionably became uncertain as to his own fate. The trial court did not err in finding Damien's murder to be especially cruel.

c. Rochelle Luna

¶48 Defendant argues that Rochelle's murder was not cruel because no evidence establishes her conscious state when the stab wounds were inflicted and because the vomit found behind the gag

and in the lungs may have been caused by heat or the fact that she had just eaten a large meal.

¶49 The medical examiner gave no opinion whether Rochelle was conscious when the stab wounds were inflicted. This court has found, however, that evidence that a victim was bound signifies consciousness. There is no reason to bind an unconscious person who offers no resistance. *Bible*, 175 Ariz. at 605, 858 P.2d at 1208.

¶50 Rochelle suffered uncertainty and anguish as to her fate from the time she was forced into the bedroom, gagged with tape and tissue, and bound to the bed. This court has found that uncertainty as to one's fate lasting for a much shorter period warrants a finding of cruelty. *Herrera*, 176 Ariz. at 34, 859 P.2d at 144 (finding eighteen seconds of uncertainty enough to establish mental anguish/cruelty).

¶51 Moreover, the medical examiner revealed contusions and abrasions on Rochelle's wrists, indicating a struggle against the restraints. She was thus conscious for some period after being bound, and the evidence is clear that even if Rochelle fell unconscious before having her clothing stripped from her body and an earring torn from her ear, vomiting behind the gag and aspirating the vomit, being raped and having her throat slit and nine stab wounds inflicted upon her, she suffered unspeakable

anguish during the attack on her person. Uncertainty as to her fate is clear on this record. We conclude the state proved beyond a reasonable doubt that Rochelle's murder was especially cruel.

d. Patricia Luna

¶52 Defendant does not dispute the especial cruelty of Patricia's murder. She feared for her life and was uncertain as to her fate for hours. She was forced to watch defendant stab and shoot her husband to death and to hear defendant tell her he had murdered her daughter. Clearly, Patricia Luna's murder was especially cruel.

2. Heinous or Depraved

¶53 While cruelty involves the victim's physical and mental pain, the heinous or depraved factor involves the killer's "vile state of mind at the time of the murder." *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10. Heinous or depraved conduct may be found through the following five factors: (1) relishing the murder, (2) inflicting gratuitous violence, (3) victim mutilation, (4) senselessness of the crime, and (5) helplessness of the victim. *Id.* at 52, 659 P.2d at 11; *Roscoe*, 184 Ariz. at 500, 910 P.2d at 651. However, senselessness and helplessness alone usually will not suffice to establish heinousness or depravity. *Roscoe*, 184 Ariz. at 500, 910 P.2d at 635. Additionally, murder to eliminate a witness may also support a finding of heinousness or depravity.

State v. Ross, 180 Ariz. 598, 606, 886 P.2d 1354, 1362 (1994).

¶54 The trial court found that all four murders were heinous or depraved. Defendant challenges those findings with respect to all four. However, as noted, because A.R.S. section 13-703(F)(6) is stated in the disjunctive, a finding of either especial cruelty *or* heinousness/depravity will suffice to establish this aggravating factor. *Roscoe*, 184 Ariz. at 500, 910 P.2d at 651. Because especial cruelty was clearly proved beyond a reasonable doubt in all four murders, we uphold the (F)(6) aggravating factor on the basis of cruelty alone and do not reach the question of heinousness and depravity.

C. A.R.S. Section 13-703(F)(5): Pecuniary Gain

¶55 Where a defendant commits murder in anticipation of pecuniary gain, the (F)(5) factor is invoked. A.R.S. § 13-703(F)(5). To establish murder for pecuniary gain, evidence must show that financial gain was a motive. *Soto-Fong*, 187 Ariz. at 208, 928 P.2d at 632. Defendant argues that, although he removed and retained items from the Luna home, his motive was not pecuniary gain, but revenge on Luna.

¶56 The argument lacks merit because, after gaining entry to the Luna home, defendant immediately forced Patricia to place items of personal property into the family car. Then, after fleeing the scene in the car, defendant removed and kept those items before

leaving the car in the parking lot. The trial court correctly found that the state had proved beyond a reasonable doubt that the (F)(5) aggravating factor of pecuniary gain exists.

D. Remaining Aggravating Factors: A.R.S. Sections 13-703(F)(8) - Other Homicides; (F)(9) - under age 15

¶57 We further agree with the trial court that the state proved beyond a reasonable doubt in each of the four murders the existence of the (F)(8) aggravating factor, that is, that defendant was convicted of one or more other homicides committed during the course of the murder. A.R.S. § 13-703(F)(8). The trial court noted that the murders were spatially, temporally, and motivationally connected. *State v. Rogovich*, 188 Ariz. 38, 45, 932 P.2d 794, 801 (1997). They occurred within a brief period, at the same house, and were part of a continuous course of conduct. *Lavers*, 168 Ariz. at 394, 814 P.2d at 351. We note also that, once proved, this aggravating factor applies to each first degree murder conviction. *State v. Greenway*, 170 Ariz. 155, 167-68, 823 P.2d 22, 34-35 (1991).

¶58 We also agree that the state has proved beyond a reasonable doubt that Damien Luna was less than fifteen years of age at the time of his murder, thus establishing the existence of the (F)(9) aggravating factor.

E. Mitigating Factors

¶59 The trial court expressly found that defendant failed to prove the statutory mitigating factors alleged and also failed to prove asserted non-statutory mitigators: post-arrest conduct, disadvantaged childhood, psychological disorder, remorse, adjustment to confinement, and acceptance of responsibility. Defendant challenges the court's findings regarding the factors of age, difficult family background, and remorse for the crime.

1. Age

¶60 A defendant may present his or her age as a mitigating factor under A.R.S. section 13-703(G)(5). Here, defendant was twenty-three years old when the murders were committed. This court has rejected age as a statutory mitigating circumstance in cases in which the defendant was substantially younger. *See, e.g., State v. Jackson*, 186 Ariz. 20, 31-32, 918 P.2d 1038, 1049-50 (1996) (age sixteen not mitigating factor); *State v. Walton*, 159 Ariz. 571, 589, 769 P.2d 1017, 1035 (1989) (age twenty not mitigating factor); *State v. Gerlaugh*, 144 Ariz. 449, 460-61, 698 P.2d 694, 705-06 (1985) (age nineteen not mitigating factor). This court has held that "[c]hronological age . . . is not always dispositive of one's maturity," *Brewer*, 170 Ariz. at 507, 826 P.2d at 804, and that the court must also consider defendant's intelligence, maturity, past experience, and the extent and duration of the crime. *Id.*; *Jackson*, 186 Ariz. at 30, 918 P.2d at 1048. The trial court in

this case found that defendant's age was not a mitigator because evidence was absent that he "lacked substantial judgment" and his temporary *pro se* representation established that he was capable of making reasoned decisions. We agree with these evidentiary findings and conclude that rejection of age as a statutory mitigating factor is also supported by defendant's intelligence level which tested as normal.

2. Difficult Family Background

¶61 Defendant claims that the trial court erred in refusing to give weight to a stressful family background and that not doing so violates the directive in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869 (1982), that the trial judge must consider all mitigating evidence proffered by defendant. This court has held that *Lockett* and *Eddings* require only that the sentencer consider evidence proffered for mitigation. *State v. Gonzales*, 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995), *cert. denied*, 516 U.S. 1052, 116 S. Ct. 720 (1996). The sentencer, however, is entitled to give it the weight it deserves. *Id.* Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior. *Ross*, 180 Ariz. at 607, 886 P.2d at 1362. The trial court considered the evidence but found it irrelevant and declined

to give it weight because proof was lacking that his family background had any effect on the crimes.

¶62 Defendant introduced evidence that he was separated from his mother at a young age and raised by a father who was cold and aloof. Defendant insisted, however, that he was not physically abused by his father, and no evidence was introduced to show otherwise. We conclude that defendant's family background, in light of the entire record, will not mitigate the death sentences imposed for these murders.

3. Remorse

¶63 A sense of remorse may be a mitigating circumstance. *Brewer*, 170 Ariz. at 507, 826 P.2d at 804. Defendant claims that, because his guilty pleas were an effort to spare the feelings of the remaining members of the Luna family and because statements in letters he wrote allegedly demonstrated remorse for the killings, the trial court erred in concluding that defendant felt no remorse.

¶64 On this record, we conclude that defendant has not proven remorse by a preponderance of the evidence. First, the evidence does not support defendant's contention that his guilty pleas were meant to spare the remaining members of the Luna family. Rather, as the trial court's special verdict correctly notes, the guilty pleas were a "tactical decision made in the face of overwhelming guilt."

¶65 Second, it is true that while in jail defendant wrote to friends that the Luna family "did not deserve that" and that he did not deserve to live. This argument is contradicted, however, by defendant's attempt to place the blame for the murders on his girlfriend, on the Glendale police, and on Albert Luna, Jr. Defendant also told the reporter that "under the right circumstance, he could kill again."

¶66 Defendant failed to prove remorse by a preponderance of evidence and failed to prove that he has accepted responsibility for his crimes.

E. Summary of Aggravation/Mitigation Findings

¶67 The state has proved beyond a reasonable doubt the aggravating circumstances that each murder was committed in an especially cruel manner and for pecuniary gain. Each of the murders was committed during the commission of one or more other homicides. In addition, as an aggravating circumstance in Damien's murder, we find that defendant was an adult and the victim was under fifteen years of age. The defendant has failed to prove any statutory mitigating factors or any nonstatutory mitigating factors by a preponderance of the evidence. Because three aggravating circumstances exist (cruelty, pecuniary gain, other homicides) in three of the murders and the same three plus a fourth (victim under fifteen years) exist in the fourth murder and no statutory or

nonstatutory mitigating circumstances have been adequately shown, we affirm each of the four death sentences imposed.

DISPOSITION

¶68 Upon full review, we affirm defendant's convictions and sentences.

Charles E. Jones, Vice Chief Justice

CONCURRING:

Thomas A. Zlaket, Chief Justice

Stanley G. Feldman, Justice

Frederick J. Martone, Justice

James Moeller, Justice (retired)