

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Joe Clarence Smith, Petitioner,

vs.

Charles L. Ryan, Director of the Arizona Department of Corrections, and Ron Credio, Warden of the Arizona State Prison-Eyman Complex, Respondents.

*** CAPITAL CASE ***

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Order Denying Rehearing and Rehearing En Banc, <i>Smith v. Ryan</i> , No. 14-99008 (9th Cir. June 20, 2017), ECF No. 65.....	A-1
Order Denying Motion to Remand and Amend Habeas Petition, <i>Smith v. Ryan</i> , No. 14-99008 (9th Cir. Feb. 17, 2017), ECF No. 56	A-2
Opinion, <i>Smith v. Ryan</i> , No. 14-99008 (9th Cir. May 26, 2016), ECF No. 43-1.....	A-3
Order Denying Petition for Writ of Habeas Corpus, <i>Smith v. Ryan</i> , No. CV-12-00318-PHX-PGR (D. Ariz. Mar. 24, 2014), ECF No. 47	A-55
Order Denying Petition for Review, <i>State v. Smith</i> , No. CR-11-0336-PC (Ariz. Feb. 15, 2012).....	A-125
Ruling Dismissing Petition for Post-Conviction Relief, <i>State v. Smith</i> , No. CR 0000-095116 (Maricopa Co. Super. Ct. Sept. 9, 2011).....	A-126
Direct Appeal Opinion, <i>State v. Smith</i> , No. CR-04-0208-AP (Ariz. May 31, 2007)	A-132
Mandate, <i>Smith v. Ryan</i> , No. 14-99008 (9th Cir. June 28, 2017), ECF No. 68...	A-168
Petition for Panel Rehearing and Petition for Rehearing En Banc, <i>Smith v. Ryan</i> , No. 14-99008 (9th Cir. Mar. 17, 2017), ECF No. 61-1	A-169
Reply to Motion to Remand and Amend Habeas Petition to Include a <i>Hurst</i> Claim, <i>Smith v. Ryan</i> , No. 14-99008 (9th Cir. Jan. 30, 2017), ECF No. 55	A-186
Motion to Remand and Amend Habeas Petition to Include a <i>Hurst</i> Claim, <i>Smith v. Ryan</i> , No. 14-99008 (9th Cir. Jan. 11, 2017), ECF No. 51-1	A-198
28 U.S.C. § 2244.....	A-219
Arizona Revised Statute § 13-454 (Supp. 1975–1978)	A-221
Final Jury Instructions Penalty Phase (Spencer), <i>State v. Smith</i> , No. CR 0000-095116 (Maricopa Co. Super. Ct. Apr. 22, 2004)	A-224
Final Jury Instructions Penalty Phase (Lee), <i>State v. Smith</i> , No. CR 0000-095116 (Maricopa Co. Super. Ct. May 27, 2004)	A-237

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 20 2017

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

JOE CLARENCE SMITH,

Petitioner-Appellant,

v.

CHARLES L. RYAN; RON CREDIO,

Respondents-Appellees.

No. 14-99008

D.C. No. 2:12-cv-00318-PGR

District of Arizona,

Phoenix

ORDER

Before: PAEZ, CLIFTON, and OWENS, Circuit Judges.

The panel has voted to deny the petition for rehearing.

The full court has been advised of the petition for 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.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 17 2017

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

JOE CLARENCE SMITH,

Petitioner-Appellant,

v.

CHARLES L. RYAN; RON CREDIO,

Respondents-Appellees.

No. 14-99008

D.C. No. 2:12-cv-00318-PGR
District of Arizona,
Phoenix

ORDER

Before: PAEZ, CLIFTON, and OWENS, Circuit Judges.

Petitioner-Appellant's motion to remand and amend his habeas petition is DENIED. Petitioner-Appellant's alternative request for leave to file a second or successive habeas petition is also DENIED.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE CLARENCE SMITH, <i>Petitioner-Appellant,</i> v. CHARLES L. RYAN; RON CREDIO, <i>Respondents-Appellees.</i>
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No. 14-99008

D.C. No.
2:12-cv-00318-PGR

OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, Senior District Judge, Presiding

Argued and Submitted December 8, 2015
San Francisco, California

Filed May 26, 2016

Before: Richard A. Paez, Richard R. Clifton,
and John B. Owens, Circuit Judges.

Opinion by Judge Paez

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Arizona state prisoner Joseph Clarence Smith's 28 U.S.C. § 2254 habeas corpus petition challenging his death sentence, imposed at 2004 resentencing proceedings, for the murders of Sandy Spencer and Neva Lee.

The panel held that Smith's contention that the trial court's admission of testimonial hearsay during the aggravation phase of resentencing proceedings violated his Sixth Amendment confrontation rights is foreclosed by *Williams v. New York*, 337 U.S. 241 (1949), which held that the Confrontation Clause does not bar courts from considering unfronted statements during sentencing proceedings.

The panel held that in light of Smith's reliance on his sexual sadism diagnosis and the U.S. Supreme Court's pronouncement that the prosecution enjoys wide latitude in admitting rebuttal evidence, it was reasonable for the Arizona Supreme Court to conclude that the prosecution's introduction of substantial evidence of Smith's prior crimes during the penalty-phase hearings fell within the boundaries of due process. The panel held that introduction of this rebuttal evidence did not violate the Eighth Amendment. The panel held that any change between Arizona's 1970's and 2003 capital sentencing statutes was procedural rather than

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

SMITH V. RYAN

3

substantive, and that the state trial court's rejection of Smith's claim that admission of the rebuttal evidence during the 2004 penalty-phase hearings violated his rights under the Ex Post Facto Clause was therefore not contrary to nor an unreasonable application of *Carmell v. Texas*, 529 U.S. 513 (2000).

The panel held that any vagueness challenge to the application of the Arizona (E)(2) aggravator (for a previous conviction for a felony involving the use or threat of violence on another person) fails because both the trial court and the Arizona Supreme Court applied the narrowed definition of the aggravator. The panel held that application of the (E)(2) aggravator to the facts of Smith's case was not contrary to nor an unreasonable application of clearly established federal law.

The panel held that the Arizona Supreme Court's rejection of Smith's argument that application of the Arizona (E)(6) aggravator (for offenses committed in an especially heinous, cruel, or depraved manner) violates the Eighth Amendment was not an unreasonable application of clearly established federal law.

The panel held that because Smith cannot establish prejudice from counsel's failure to obtain brain scans, his claim of ineffective assistance at his 2004 resentencing proceedings is not substantial, and his procedural default on that claim cannot be excused under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

COUNSEL

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

Jon G. Anderson (argued), Assistant Attorney General, Thomas C. Home, Attorney General, and Jeffrey A. Zick, Chief Counsel, Office of the Arizona Attorney General, Phoenix, Arizona, for Respondent-Appellee.

OPINION

PAEZ, Circuit Judge:

In 1977, Joseph Clarence Smith, Jr. was convicted of two murders and sentenced to death. This is the second time we have reviewed Smith's habeas challenge to his death sentence. In *Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999), we reversed in part and ordered that a writ of habeas corpus issue directing the State of Arizona to resentence Smith for the murders of Sandy Spencer and Neva Lee. Smith was resentenced to death in 2004 for each murder. After exhausting his remedies in state court, Smith filed a new petition in federal court. Applying the standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, the district court again denied relief. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

I.**A.**

In 1973, Smith was convicted of raping Alice Archibeque. While on probation for the Archibeque rape, Smith raped Dorothy Fortner and killed Sandy Spencer and Neva Lee. Smith was convicted of the Fortner rape and in subsequent proceedings he was convicted of murdering Spencer and Lee and sentenced to death.

In our 1999 opinion, we summarized the facts of the underlying murders and trial court proceedings. For context, we repeat that summary here:

On January 1, 1976, officials of the Maricopa County Sheriff's Department found the nude body of Sandy Spencer in the desert outside Phoenix. One month later in a different desert location, police discovered the nude body of Neva Lee. Both teenage hitchhikers had been suffocated by having dirt forced into their mouths, which were taped shut. The assailant stabbed both women multiple times, punctured them with needles, and bound their wrists with rope.

Smith, who was on probation from a rape conviction, became the prime suspect. Police put him under surveillance. When that failed to produce probable cause for an arrest, police had a female officer pose as a hitchhiker to lure Smith into committing false imprisonment or battery. He eventually

picked up the officer, took her to his father's machine shop, and grabbed her by both arms. After a prearranged signal, police entered and arrested him for false imprisonment.

During Smith's imprisonment, police questioned him about the Lee and Spencer murders. At first, he denied his involvement. But months later, at his own initiation, Smith gave investigators a bizarre account of the Lee slaying. He told police that he was present at the crime because a friend, John Jameson, forced him at gunpoint to drive the victim to the desert. Once there, Jameson ordered Lee to have sexual intercourse with Smith in order to frame Smith for her rape. Smith said Jameson then decided to kill Lee. His account conflicted with some physical evidence found at the scene. Smith later contended that he told police no such story.

Smith went on trial for the Lee murder first. Throughout the trial, he maintained his innocence, contending that other people committed the crime and that investigators conspired to frame him. Jameson testified at the trial. He denied being present at the murder, but said that a man known as "Squirrel" bragged about killing two women and showed Jameson pictures of the dead women. The jury returned a general verdict finding Smith guilty of murder.

Smith then went on trial for the Spencer slaying. The following day, he pleaded guilty to the crime shortly after Di Anne Jameson—Smith’s girlfriend, John Jameson’s ex-wife, and a key prosecution witness—told the court that she had been improperly contacted by a defense investigator and by Smith’s mother. During the plea colloquy, the prosecutor expressed doubts about Smith’s emotional stability to enter a voluntary plea. Nonetheless, the trial court accepted the plea. Three weeks later, Smith unsuccessfully sought to withdraw the plea, explaining that he had only pleaded guilty out of concern that his parents and Ms. Jameson would be arrested.

Smith, 189 F.3d at 1006–07. After the sentencing hearing for both convictions, the trial judge found three aggravating circumstances warranting the death penalty and no mitigating circumstances. *Id.* at 1007. The judge sentenced Smith to death for each of the murder convictions.

On direct appeal in 1979, the Arizona Supreme Court affirmed Smith’s convictions but remanded his case for resentencing because Arizona had revised its capital sentencing scheme to permit defendants to present additional mitigating evidence. *Id.* at 1007 & n.2; *see also State v. Watson*, 586 P.2d 1253, 1257 (Ariz. 1978) (invalidating as unconstitutional the capital sentencing scheme’s limit on defendants’ right to present mitigation evidence). Notwithstanding the opportunity to present additional mitigating evidence at Smith’s resentencing, Smith’s counsel simply resubmitted the same evidence he had presented in the

prior proceeding. *Smith*, 189 F.3d at 1007. The trial judge again found no mitigating circumstances and sentenced Smith to death for each of the murders of Lee and Spencer. *Id.* at 1008. On direct appeal for the second time, the Arizona Supreme Court affirmed Smith's death sentences. *Id.*

After unsuccessfully seeking post-conviction relief in state court, Smith filed a federal habeas petition under 28 U.S.C. § 2254 challenging both his convictions and death sentences. *Id.* at 1008. In 1999, we concluded that Smith's counsel performed deficiently at the resentencing proceeding. *Id.* at 1014. We reversed in part and ordered the district court to issue the writ and direct that Smith be resentenced. *Id.*

B.

In 2002 the Arizona legislature responded to the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), by shifting from judge to jury the role of finding facts necessary to impose the death penalty. *See* 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 § 3 (West); *see also State v. Glassel*, 116 P.3d 1193, 1202 (Ariz. 2005). This change, coupled with the time necessary for counsel to gather evidence and prepare, delayed resentencing until 2004, when the Arizona Superior Court held separate proceedings to sentence Smith. *State v. Smith*, 159 P.3d 531, 536 (Ariz. 2007).

Like the current framework, Arizona's capital sentencing scheme in 2004 began with an "aggravation phase" in which the jury determined whether the prosecution had proved beyond a reasonable doubt any alleged statutory aggravating

circumstances. Ariz. Rev. Stat. § 13-703.01(C), (E) (2003).¹ If the jury found at least one of the aggravating circumstances, the proceeding moved to a “penalty phase” in which the jury heard mitigating evidence and determined whether to impose death. *See* Ariz. Rev. Stat. § 13-703.01(D), (F)–(G) (2003); *see also* *State v. McGill*, 140 P.3d 930, 946 n.9 (Ariz. 2006) (Hurwitz, J., concurring in part and dissenting in part) (describing Arizona’s capital sentencing procedure). Although the Superior Court applied the then-current capital sentencing framework—including broad mitigation evidence and jury factfinding—the state sought to prove the statutory aggravators codified in the 1977 scheme. *Smith*, 159 P.3d at 536. In two separate proceedings, first for

¹ When Smith was first sentenced, Arizona’s capital sentencing scheme was codified in Arizona Revised Statutes section 13-454 (Supp. 1973). In 2004, the procedure for imposing a death sentence was set forth in Arizona Revised Statutes section 13-703.01 (2003). The current procedure is codified at Arizona Revised Statutes section 13-752 (2012). Two changes between the 1977 and 2004 iterations, both referenced above, are noteworthy. First, unlike the scheme in place when Smith was indicted, the framework in place when Smith was resentenced in 2004 allowed a defendant to present any relevant mitigation evidence. *Compare* Ariz. Rev. Stat. § 13-454(D), (F) (Supp. 1973), *with* Ariz. Rev. Stat. § 13-701.01(G) (2003). Second, whereas the 1977 statute committed factfinding to a judge, the 2004 statute committed it to a jury. *Compare* Ariz. Rev. Stat. § 13-454(C)–(D) (Supp. 1973), *with* Ariz. Rev. Stat. § 13-703.01(S) (2003).

In Arizona and elsewhere, a capital sentencing proceeding consists of an “aggravation phase,” which is sometimes referred to as the “eligibility phase,” and a “penalty phase,” which is sometimes referred to as the “selection phase.” *See State v. McGill*, 140 P.3d 930, 946 n.9 (Ariz. 2006) (Hurwitz, J., concurring in part and dissenting in part). We use “aggravation phase” to refer to the first phase of a capital sentencing proceeding and “penalty phase” to refer to the second.

Spencer and second for Lee, the juries unanimously found three aggravating factors.

First, the juries found that Smith had been convicted of another offense exposing him to a life sentence or the death penalty, Arizona Revised Statutes section 13-454(E)(1) (1977).² To establish the (E)(1) aggravator, the prosecution introduced Smith's prior 1973 and 1976 convictions for raping Archibeque and Fortner.

Second, both juries found that Smith had been previously convicted of a felony involving "the use or threat of violence," Ariz. Rev. Stat. § 13-454(E)(2) (1977). To establish the (E)(2) aggravator, the prosecution first offered the Lee murder at the Spencer sentencing and then offered the Spencer murder at the Lee sentencing.

Third, the juries found that the Spencer and Lee murders were especially cruel, heinous, or depraved within the meaning of Arizona Revised Statutes section 13-454(E)(6) (1977). To establish the (E)(6) aggravator, the prosecution elicited testimony regarding the women's injuries and the cause of death for each. The prosecution offered evidence that both women had been asphyxiated by dirt forced into

² In 1977, these three aggravating factors were codified in Arizona Revised Statutes section 13-454(E). By 2004, the aggravators appeared at Arizona Revised Statutes section 13-703(F). Currently, the aggravators are set forth in Arizona Revised Statutes section 13-751(F). The (E)(1) and (E)(6) aggravators were the same in each version. Between 1977 and 2004, the (E)(2) factor was changed from prior felonies involving the threat of violence to prior felonies for a "serious offense." Ariz. Rev. Stat. § 13-703(F)(2). For ease of reference and continuity with the relevant Arizona Supreme Court decision and the district court order, we refer to the aggravating factors simply as (E)(1), (E)(2), and (E)(6).

their airways, that before death both had been bound at the wrists and ankles with ligatures, and that each suffered puncture and stab wounds. As the Arizona Supreme Court recounted, Spencer “suffered nineteen stab wounds to the pubic region and a vaginal tear that was caused by penetration. She also had three stab wounds to her breasts and a sewing needle was found embedded in her left breast.” Lee “also had puncture and stab wounds to her chest, abdomen, and breasts and damage to her vulva.”

As mitigation evidence, Smith offered expert testimony demonstrating mental impairment and psychological problems, including signs of dissociative identity disorder.³ Smith’s expert also concurred with the prosecution expert’s diagnosis that Smith suffered from sexual sadism. Smith’s mother and sister testified to Smith’s personal history and several prison employees and a prison expert testified to his good behavior in prison.

Both juries returned a death verdict and the court entered a sentence of death by lethal injection.

On his third direct appeal, Smith raised six primary arguments. Among those arguments, and relevant to this federal habeas proceeding, Smith challenged the sufficiency of the evidence supporting the (E)(2) aggravator, the prosecution’s use of autopsy-related hearsay evidence at the Lee sentencing in violation of the Confrontation Clause, U.S. Const., amend. VI, § 2, and the prosecution’s use of prejudicial rebuttal evidence. Smith also asserted twelve one-paragraph claims which he conceded were foreclosed by state

³ The parties agree that for the purposes of this appeal, the Spencer and Lee mitigation evidence was the same.

law. Among those truncated claims, Smith asserted that Arizona's capital sentence scheme provides no objective standards to guide the jury in the penalty phase and thus violates the Eighth and Fourteenth Amendments. The Arizona Supreme Court rejected each of Smith's challenges and affirmed both death sentences. *Smith*, 159 P.3d 531. The U.S. Supreme Court denied Smith's petition for certiorari. *Smith v. Arizona*, 552 U.S. 985 (2007); 128 S. Ct. 2997 (mem.).

Two years later, in November 2009, the Arizona Supreme Court appointed counsel for Smith's post-conviction proceedings. In mid-2011, Smith filed his post-conviction relief petition in state superior court, referred to in Arizona as a Rule 32 petition. *See* Ariz. R. Crim. P. 32.1.⁴ The post-conviction court rejected each of Smith's arguments and dismissed his Rule 32 petition. In February 2012, the Arizona Supreme Court denied review without comment.

⁴ Smith raised three issues in his Rule 32 petition. First, the prosecution's use of autopsy-related hearsay testimony at both sentencing proceedings violated Smith's Sixth Amendment confrontation rights in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). Second, the prosecution erroneously and prejudicially suggested that Smith bore the burden to prove that he should not receive the death penalty. Third, newly discovered evidence of Smith's organic brain damage would have affected the jury's determination of his sentence. Smith's appellate counsel failed to raise the Confrontation Clause claim in the Spencer case and failed to raise the burden of proof issue in either case. Smith argued that counsel's omissions were the result of ineffective assistance of counsel in violation of the Sixth Amendment.

C.

In December 2012, Smith timely filed a new § 2254 habeas petition in federal court, in which he raised thirty-nine claims challenging his death sentences and requested an evidentiary hearing. Among those claims, Smith raised the following seven arguments which he has pressed on appeal:

Claim 13—The admission of autopsy-related hearsay evidence violated his Sixth Amendment right of confrontation;

Claim 15—The use of Smith’s conviction for murdering Spencer to satisfy the (E)(2) aggravator in the Lee sentencing, and vice versa, violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights;

Claims 18, 19, and 20—The sentencing judge denied Smith his Sixth and Fourteenth Amendment rights to representation and due process when he responded to a jury question in the Spencer case in the absence of Smith’s counsel, and counsel’s failure to be available during jury deliberations and to raise that failure on appeal constituted ineffective assistance of counsel;

Claim 23—The prosecution presented irrelevant and unfairly prejudicial rebuttal evidence in violation of Smith’s Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment and to due process;

Claim 29—Executing Smith after thirty-five years on death row would be cruel and unusual punishment in violation of the Eighth Amendment;

Claim 30—Arizona’s (E)(6) aggravator for especially heinous, cruel, or depraved murders fails to narrow the class of death-eligible offenders as required by the Eighth and Fourteenth Amendments; and

Claim 39—Smith’s counsel at sentencing rendered ineffective assistance in derogation of the Sixth Amendment by failing to develop and present mitigating evidence.

The district court denied the petition and request for an evidentiary hearing and it subsequently denied Smith’s motion to alter or amend the judgment. The district court concluded that Smith’s claims alleging Sixth Amendment confrontation and Fourteenth Amendment due process violations arising from admission of autopsy-related hearsay evidence and prejudicial rebuttal evidence—Claims 13 and 23—were “adequate to deserve encouragement to proceed further” or “debatable by reasonable jurists,” and issued a certificate of appealability (“COA”). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The district court declined to extend the COA to any of Smith’s other claims.

Smith timely appealed. In his opening brief, Smith addressed the two certified claims and the seven other uncertified claims described above. We ordered the Attorney General to respond to Smith’s uncertified claims, and we deferred ruling on whether to grant a COA on those issues. *See* 9th Cir. Rule 22-1(e). We construe Smith’s opening brief as a motion to expand the COA pursuant to Circuit Rule 22-1(e), and we grant a COA on three of his uncertified claims—his challenges to Arizona’s (E)(2) and (E)(6)

aggravators, Claims 15 and 30, and his claim of ineffective assistance of counsel, Claim 39.⁵

II.

We review de novo the district court's denial of Smith's petition for a writ of habeas corpus and review its factual findings for clear error. *Hurles v. Ryan*, 752 F.3d 768, 777 (9th Cir. 2014). Because Smith filed his federal habeas petition after 1996, AEDPA governs. *Id.* We may not grant relief "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). Only Supreme Court holdings clearly establish federal law for the purposes of § 2254(d)(1), but circuit precedent is persuasive authority in assessing what law is "clearly established" and whether the state court applied the law reasonably. *Murray v. Schriro*, 745 F.3d 984, 997 (9th Cir. 2014).

A state court unreasonably applies federal law when it "correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case." *White v. Woodall*, —U.S.—, 134 S. Ct. 1697, 1706 (2014).

⁵ We decline to expand the COA to encompass Smith's claims regarding jury deliberations and his claim that execution after a thirty-five-year delay constitutes cruel and unusual punishment, which are identified as Claims 18, 19, 20, and 29. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

“It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous.” *Andrade*, 538 U.S. at 75 (internal quotation marks omitted). Rather, the state court’s application of Supreme Court holdings “must be ‘objectively unreasonable,’ not merely wrong; even ‘clear error’ will not suffice.” *Woodall*, —U.S.—, 134 S. Ct. at 1702 (quoting *Andrade*, 538 U.S. at 75–76). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

III.

A.

Smith contends in Claim 13 that the state trial court’s admission of testimonial hearsay during the aggravation phase of the resentencing proceeding in the Lee case violated his Sixth Amendment right to confront witnesses. Smith argues that the sentencing court impermissibly admitted the out-of-court statements of the medical examiner who conducted Lee’s autopsy through the testimony of the then-current chief medical examiner and a detective who was present at the autopsy. Smith asserts that the Arizona Supreme Court’s ruling that this testimony did not violate the Confrontation Clause unreasonably applied clearly established federal law and unreasonably determined the facts in light of the record, and that the district court erred in concluding to the contrary.

The U.S. Supreme Court has never established a right to confront witnesses at sentencing. To the contrary, Smith's argument is foreclosed by *Williams v. New York*, 337 U.S. 241 (1949), "which held that the Confrontation Clause does not bar courts from considering unconfrosted statements during sentencing proceedings." *Sivak v. Hardison*, 658 F.3d 898, 927 (9th Cir. 2011) (rejecting a Confrontation Clause challenge to the use of hearsay in a capital sentencing proceeding under pre-AEDPA standards); *see also United States v. Littlejohn*, 444 F.3d 1196, 1197 (9th Cir. 2006); *United States v. Petty*, 982 F.2d 1365 (9th Cir.), *amended by* 992 F.2d 1015 (9th Cir. 1993). We therefore conclude that the Arizona Supreme Court did not act unreasonably in rejecting Smith's Sixth Amendment confrontation claim.⁶

B.

In Claim 23, Smith argues that the district court erred in finding that Smith suffered no constitutional violation when the prosecution introduced substantial evidence of Smith's prior crimes during both the Lee and Spencer penalty-phase hearings. Smith contends that the admission of that evidence

⁶ Smith also asserts that the Arizona Supreme Court's confrontation analysis "resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). This argument need not detain us, however, because even if we found § 2254(d)(2) satisfied, *Williams*, 337 U.S. 241, and *Sivak*, 658 F.3d at 927, foreclose Smith's Confrontation Clause challenge. *Cf. Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) ("[W]e may not grant habeas relief simply because of § 2254(d)(1) error and . . . if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised."); *see also Taylor v. Maddox*, 366 F.3d 992, 1008–16 (9th Cir. 2004) (holding that state courts made unreasonable factual determination and then proceeding to evaluate constitutional claim).

was unconstitutional under the Due Process Clause of the Fourteenth Amendment, the Eighth Amendment, and the Ex Post Facto Clause, U.S. Const., art. 1, § 9, cl. 3.

1.

During both penalty phases of the Spencer and Lee resentencing proceedings, Smith offered mitigation evidence related to his mental health, his family background and relationships, and his good behavior in prison. Particularly relevant to this habeas claim, Smith's mental health expert, Dr. Parrish, agreed with the prosecution's mental health expert, Dr. Moran, that Smith suffered from "sexual sadism." During the Lee proceeding, Dr. Parrish explained the meaning of sexual sadism to the jury.⁷ When questioned by defense counsel, Dr. Parrish identified Smith as a sexual sadist and agreed that sexual sadism could have caused Smith to lose control during the commission of his crimes. Dr. Parrish's testimony at the Spencer proceedings was very similar. Smith's counsel previewed the sexual sadism diagnosis in his opening statement during the Spencer penalty phase, although the focus was on Smith's asthma and anxiety diagnoses.

During rebuttal at both the Lee and Spencer proceedings, the prosecution called a number of witnesses to testify about the facts of Smith's two prior convictions and the facts of the

⁷ Dr. Parrish explained that the "essential features of a paraphilia," the type of mental disorder encompassing sexual sadism, are "recurrent, intense, sexually arousing fantasies, sexual urges or behaviors, generally involving nonhuman objects: No. 1, nonhuman objects. No. 2, the suffering or humiliation of one's self or one's partner. No. 3, children or other nonconsenting persons that occur over a period of at least six months."

Lee and Spencer murders. The quantity and intensity of evidence was extensive and powerful.

During the Spencer penalty phase, the prosecution questioned at length five witnesses about the details of Smith's crimes. Dr. Moran described how the escalation of violence in Smith's crimes—from the Archibeque rape to the two murders—was typical for individuals with sexual sadism diagnoses. Dr. Moran related how, while raping Archibeque, Smith "us[ed] handcuffs," "state[d] it would be necessary to kill the victim," "related numerous things to the victim about bodies being found in the desert," and more. Dr. Moran opined that Smith's acts became more "degrading" during the later Fortner rape, when Smith "obtained a Pepsi bottle from somewhere within the car, placed it in her vagina, forced her to commit an act of fellatio, [and] also committed sodomy upon her." Finally, Dr. Moran explained that the "amount of violence was increasing" during the Lee and Spencer murders, as evidenced by "sewing needles that were embedded in [Spencer's] breast," the "cutting of [Lee's] vagina," and the murder victims' death by strangulation—"by forcing dirt down their throat [and] covering their mouth with duct tape." Dr. Moran then repeated the facts of the four crimes a second time in response to further questioning by the prosecution.

The prosecution also called two law enforcement officers. First, the prosecution called Detective Charles Adams, who had investigated the Archibeque case. At the prosecution's prompting, Adams "basically summarize[d his] report" for the jury. Adams explained how Smith offered Archibeque a ride, took her to his home, and raped her in the presence of his wife using handcuffs. Smith then drove both women to the desert, saying it "would be necessary to kill

[Archibeque],” raped her again outside the car while his wife waited, and ultimately released Archibeque on the promise that she would bring him \$200 the next day. The prosecution then called Detective Dominguez, who described the elaborate story Smith told to police to explain his involvement in the Lee and Spencer murders. Dominguez also described arriving at the scene where Lee’s body was found. Lee was “completely nude” with “visible trauma on the body,” including “ligature markings around the ankles and wrists” and “trauma into the chest area.” Dominguez also testified about attending Lee’s autopsy. He recounted the medical examiner pointing out “stab wounds to the vaginal area,” a “puncture wound of the right breast by the nipple area,” “five stab wounds to the chest area,” and that her “deep throat area, was full of dirt.”

The prosecution also elicited the facts of Smith’s prior crimes during its cross examination of James Aiken, a corrections expert. Aiken had testified on direct examination that a “toothbrush with [a] razor blade attached” found in Smith’s prison locker was likely a “defensive weapon.” Smith had called Aiken to testify generally about Smith’s good conduct in prison. Ignoring the scope of Aiken’s direct examination testimony, the prosecution related, one by one, the facts of the Archibeque, Fortner, Spencer, and Lee crimes, and after each description, asked whether Aiken still believed the toothbrush was a defensive weapon.

Dorothy Fortner, the victim in Smith’s second rape conviction, provided the most damaging evidence against Smith’s mitigation case. Fortner recounted how Smith convinced her to accept a ride by claiming he was friends with her boyfriend and then took her to an “unpaved portion of the desert.” Fortner, who was four or five months pregnant

at the time, described how she “asked him a hundred times to let [her] go.” Instead, Smith ran a knife “up and down [her] torso” and asked her if she “would like to be killed fast or slow.” Fortner testified that Smith raped her “repeatedly” inside and outside the car, at one point using “a Coke bottle or Pepsi bottle.” Smith “tried to strangle” her and made her urinate in front of his car while he watched. Fortner ended her testimony by relating how Smith said “he was going to cut [her] open with his knife and take [her] infant out and lay her on the desert floor and let her die, and let [Fortner] die next to her on the desert floor, and that he was going to watch this.”

The jury faced a similar wave of witnesses during the Lee penalty-phase proceedings. Dr. Moran described how Smith’s crimes fit the description of sexual sadism and Detective Adams gave a similar description of the Archibeque crime. In place of Detective Dominguez’s testimony about Lee’s murder, Detective Jessie Locksa testified about the similarly gruesome details of Spencer’s murder. Unlike the Spencer proceeding, however, Fortner did not testify.

2.

a.

Smith first argues that the prosecution’s introduction of “extensive, inflammatory evidence” violated his Fourteenth Amendment due process right to fundamental fairness because it was “tantamount to the prosecution offering nonstatutory aggravating circumstances.” The Arizona Supreme Court rejected this argument on direct appeal. *Smith*, 159 P.3d at 543. The state supreme court concluded

that the prosecution’s rebuttal evidence was “relevant to the diagnosis of sexual sadism,” and that it did not “render[] his sentencing proceedings fundamentally unfair.” *Id.* at 542–43. Smith did not raise this due process claim during his state post-conviction proceedings, but he renewed it in his federal habeas petition. The district court ruled that the Arizona Supreme Court’s “decision was neither contrary to nor an unreasonable application of clearly established federal law.”

b.

Under the state’s death penalty scheme, the Arizona Supreme Court had little difficulty concluding that the prosecution’s rebuttal evidence was relevant to Smith’s mitigation case because the evidence “assisted the jury in its evaluation of” the expert testimony regarding Smith’s mental health at the time of the murders. *Id.* at 542.⁸ Arizona Revised Statutes section 13-703.01(G) provides that both the prosecution and the defense “may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency.” Once Smith introduced evidence of his sexual sadism diagnosis in support of his mitigation case, the prosecution was entitled to present evidence related to that diagnosis.

As the Arizona Supreme Court noted, both parties’ mental health experts “relied on the underlying facts of” Smith’s prior crimes to make their diagnoses. *Id.* Thus, the

⁸ Normally, “violations of state law are not cognizable on federal habeas review.” *Rhoades v. Henry*, 611 F.3d 1133, 1142 (9th Cir. 2010). When the state law error rises to the level of a due process violation, however, federal habeas review is available. *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990).

prosecution was entitled to present those underlying facts to the jury, so jurors could assess Smith's diagnosis and its mitigating impact, if any. Smith also argued that his sexual sadism was at least partially responsible for his inability to control his actions. Again, that assertion opened the door for the prosecution to rebut Smith's claim by offering the facts of Smith's crimes as evidence that he acted deliberately or purposefully. The state court's relevancy finding is a question of state law, which we must accept unless rebutted by clear and convincing evidence. *See* 28 U.S.C.A. § 2254(e)(1); *see also Miller-El v. Cockrell*, 537 U.S. 322, 330 (2003). Smith has failed to meet that high burden here.

Even if evidence is relevant, however, it may still violate the Due Process Clause if it is "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *see also Lisenba v. California*, 314 U.S. 219, 236 (1941) (holding that in "a criminal trial, denial of due process" occurs when the "absence of [fundamental] fairness fatally infected the trial"). Here, the Arizona Supreme Court's conclusion that the prosecution's rebuttal evidence did not render Smith's sentencings fundamentally unfair was not an "unreasonable application of[] clearly established Federal law." 28 U.S.C. § 2254(d)(1).

In *Dawson v. Delaware*, the U.S. Supreme Court held that "just as the defendant has the right to introduce any sort of relevant mitigating evidence, the State is entitled to rebut that evidence with proof of its own." 503 U.S. 159, 167 (1992). The Court endorsed the "principle of broad rebuttal asserted by Delaware," although it ultimately rejected the State's rebuttal evidence on First Amendment grounds. *Id.* at 168. In light of the U.S. Supreme Court's instruction that both the defense and prosecution should be given wide latitude when

introducing evidence in the penalty phase, it was reasonable for the Arizona Supreme Court to conclude that the prosecution's rebuttal evidence, while powerful, did not render Smith's sentencing proceedings fundamentally unfair.

The fact that the trial court imposed some limits on the prosecution's rebuttal evidence bolsters the reasonableness of the Arizona Supreme Court's conclusion. In response to the defense's argument in both proceedings that allowing evidence about all of Smith's eleven other adjudicated and unadjudicated crimes would be overbroad, the trial court limited the scope of the prosecution's evidence to crimes for which Smith had been either charged or convicted.⁹

Further, to the extent that Smith's ultimate due process concern is that the jury considered the prosecution's rebuttal evidence as evidence of non-statutory aggravators, both the trial court and the prosecution were careful to clarify that the rebuttal evidence could *not* be used for that purpose. The judge instructed the jury as follows:

Pursuant to law, the State has presented evidence to rebut the defendant's mitigation evidence. This evidence is not a new aggravating circumstance. It is presented solely to give you a more complete picture of the defendant's character, propensities or record, and to aid you in properly weighing whether the mitigation is sufficiently

⁹ Smith states that the trial court's limiting order only applied to the Lee proceeding. Nonetheless, it appears that during the Spencer proceeding, the prosecution also limited the rebuttal evidence to those crimes for which Smith had been charged or convicted.

substantial to call for leniency and the imposition of a life sentence.

The prosecution made similar remarks to the jury in both cases. The trial court's emphasis on the limited, permissible role of the rebuttal evidence weighs against a finding that the sentencing hearings were rendered fundamentally unfair. *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (holding that a limiting instruction by the trial court precluded a finding that improperly admitted evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process").

There is little doubt that the prosecution's powerful rebuttal evidence was prejudicial to Smith. Witness after witness testified in detail about the psychological and physical violence that Smith inflicted on his victims, painting a picture of exceptional violence. Nonetheless, in light of Smith's reliance, minimal as it may have been, on his sexual sadism diagnosis and the U.S. Supreme Court's pronouncement that the prosecution enjoys wide latitude in admitting rebuttal evidence, it was reasonable for the Arizona Supreme Court to conclude that the evidence fell within the boundaries of due process.

3.

a.

Smith also contends that the introduction of the prosecution's rebuttal evidence violated the Eighth Amendment. The Arizona Supreme Court summarily rejected that claim, citing its decision in *State v. Hampton*, 140 P.3d 950 (2006). *Smith*, 159 P.3d at 542 n.11. Although

Hampton is a state court decision, it cites U.S. Supreme Court precedent for the proposition that the “Eighth Amendment does not . . . limit the State to urging statutory aggravating factors at the penalty stage.” *Hampton*, 140 P.3d at 961 n.10. Smith did not assert this claim during his state post-conviction proceedings, but he renewed it in his federal habeas petition. The district court did not conduct a separate analysis of Smith’s Eighth Amendment claim. Referring to Smith’s due process and Eighth Amendment claims together, the district court ruled that the Arizona Supreme Court’s “decision was neither contrary to nor an unreasonable application of clearly established federal law.”

b.

The district court correctly rejected Smith’s Eighth Amendment claim. The U.S. Supreme Court has held that “statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.” *Zant v. Stephens*, 462 U.S. 862, 878 (1983). The Court proceeded to conclude, however, that “the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.” *Id.* That same year, relying on *Zant*, the U.S. Supreme Court held that “nothing in the Eighth Amendment . . . prohibits the admission of [the defendant’s] criminal record” even where the trial judge’s consideration of the “criminal record as an aggravating circumstance was improper as a matter of state law.” *Barclay v. Florida*, 463 U.S. 939, 956 (1983).

Barclay and *Zant* support the Arizona Supreme Court’s decision to reject Smith’s Eighth Amendment claim. In this

case, the prosecution introduced evidence to rebut Smith's contention that his mental health, including his sexual sadism diagnosis, constituted a mitigating circumstance. Although the evidence of Smith's prior crimes would have been improper non-statutory aggravating evidence during the aggravation phase of the sentencing proceedings, under *Barclay*, the Eighth Amendment did not prohibit its introduction during the penalty phase. Therefore, the Arizona Supreme Court's determination was not an unreasonable application of clearly established federal law.

4.

a.

Finally, Smith claims that admission of the prosecution's rebuttal evidence violated his rights under the Ex Post Facto Clause. Smith argues that the Arizona sentencing law in place at the time he committed the Lee and Spencer murders limited evidence during the penalty phase to "1) evidence that is mitigating, and 2) evidence that rebuts mitigation." He contends that the trial court violated the Ex Post Facto Clause by applying the capital sentencing statute in place in 2004, Ariz. Rev. State. § 13-703.01, when Smith was resentenced, and interpreting it to allow the introduction of a greater range of evidence. In a minute order rejecting Smith's Ex Post Facto argument, the trial court determined that "it always has been and remains the law that both the defendant and state may present all relevant evidence, whether directly or on rebuttal, to aid the jury in determining whether there is mitigation sufficiently substantial to call for leniency."

Smith did not raise an Ex Post Facto Clause claim on direct appeal or in his state post-conviction relief petition. In

fact, the district court is the only post-conviction court to address this claim. In rejecting that claim, the district court concluded that any change to Arizona's sentencing scheme was procedural rather than substantive, and therefore did not implicate the Ex Post Facto Clause. Smith's ex post facto claim is procedurally defaulted, but because the State waived this affirmative defense, we address it on the merits. *See McDaniels v. Kirkland*, 813 F.3d 770, 775 n.3 (9th Cir. 2015) (reaching merits of claim where state waived the defense of procedural default).

b.

As an initial matter, it is questionable whether Arizona's 2003 sentencing statute represented a change in the law when compared to the 1970's sentencing statute. Arizona Revised Statutes section 13-454(B) (1977), which was in effect when Smith committed the Lee and Spencer murders, provided that during sentencing, "[t]he prosecution and the defendant shall be permitted to rebut any information received at the [sentencing] hearing." The sentencing statute in effect in 2004 stated:

At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

Ariz. Rev. Stat. § 13-703.01 (2003). Both versions of Arizona's statute use broad language to describe admissible

rebuttal evidence: one permits “any information” and the other “any evidence.” While one *could* interpret the later statute to permit the introduction of a wider scope of rebuttal evidence, it is also fair to read it as largely restating the same objectives of the earlier statute. Thus, the state trial court reasonably concluded that the “new death penalty sentencing scheme merely clarifies and does not change the standard for admitting rebuttal evidence,” and the district court agreed with that conclusion.

Even if Smith is correct that the later version of the statute broadens the range of admissible rebuttal evidence, the trial and district courts concluded that any change to that law was “procedural.” Legal changes must be substantive, rather than procedural, to give rise to an Ex Post Facto Clause violation. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

U.S. Supreme Court precedent forecloses Smith’s argument that any alleged change in the 2003 statute was substantive. In *Carmell v. Texas*, the Supreme Court distinguished between rule changes affecting the “admissibility of evidence” and rules affecting “whether the properly admitted evidence is sufficient to convict the defendant.” 529 U.S. 513, 546 (2000). In *Carmell*, the defendant challenged a statutory change that eliminated the requirement of corroborating evidence in certain rape cases, allowing a conviction to be obtained on the basis of the victim’s testimony alone. *Id.* at 544–45. That change in law violated the Ex Post Facto Clause because it did “not merely regulate the mode in which the facts constituting guilt may be placed before the jury, . . . but govern[ed] the sufficiency of those facts for meeting the burden of proof.” *Id.* at 545 (internal alterations and quotation marks omitted). The Supreme Court contrasted the change regarding corroboration

evidence with changes related to rules governing witness competency or “what kind of evidence may be introduced at trial.” *Id.* at 545, 550.

As the district court properly concluded, in the context of Smith’s case, any change to Arizona’s capital sentencing statute falls squarely in the “admissibility of evidence” category and constitutes a procedural change in law. Whether the prosecution may present more or different rebuttal evidence under the statute in place in 2004 does not change the fact that Smith had already been found death-eligible. Smith challenges only the evidence ruled admissible by the trial court in the penalty phases of the Spencer and Lee sentencing proceedings, not evidence admitted at the aggravation phases nor at the guilt phase of his trial in the Lee case. Given this procedural context, Smith cannot argue that the changes to the capital sentencing statute’s text resulted in a substantive change triggering Ex Post Facto Clause concerns because the rebuttal evidence was not used to “convict” him. *Carmell*, 529 U.S. at 546. *Carmell* instructs that “[t]he issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant.” *Id.*¹⁰ Thus,

¹⁰ Although it does not qualify as clearly established law for AEDPA purposes, the Arizona Supreme Court addressed a very similar Ex Post Facto Clause challenge to the 2003 Arizona death sentencing scheme as a whole and reached the same conclusion as the district court and superior court here. In *State v. Ring*, the Arizona Supreme Court held generally that the “framework of a state’s statutory capital sentencing scheme is procedural in nature” and specifically held that the changes the Arizona legislature made to the “capital sentencing procedures do not resemble the type of after-the-fact legislative evil contemplated by contemporary understandings of the ex post facto doctrine.” 65 P.3d 915, 928 (Ariz. 2003).

the state trial court's rejection of Smith's Ex Post Facto argument was not contrary to nor an unreasonable application of *Carmell*. 28 U.S.C.A. § 2254(d)(1).

In sum, none of Smith's three arguments related to the prosecution's rebuttal evidence warrant habeas relief.

C.

Smith next contends (in Claim 15) that the application of the (E)(2) aggravator to his case violated the Eighth and Fourteenth Amendments, because it is impermissibly vague as interpreted by the Arizona Supreme Court.¹¹ Under the state criminal code in effect at the time of the 2004 resentencing proceedings, the (E)(2) aggravator applied when the “defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.”¹² The prosecution used the Lee murder as an aggravating factor during the Spencer sentencing and vice versa.

¹¹ The state is mistaken when it suggests that Smith “abandoned” his vagueness challenge by failing to raise it in his habeas petition. Smith alleged in Claim 15 that the application of (E)(2) to his case violated, among other things, the Eighth and Fourteenth Amendments. He also argued in the district court that the Arizona Supreme Court's definition of murder as necessarily involving violence “failed to appropriately narrow the aggravating circumstance.” Smith did not abandon this claim.

¹² The Arizona Legislature subsequently amended Arizona Revised Statutes section 13-703(F)(2) (formerly Ariz. Rev. Stat. § 13-454(E)(2)), to require that a prior conviction be for a “serious offense.” First-degree murder is expressly identified as such an offense. See Ariz. Rev. Stat. § 13-703(I)(1).

1.

On direct appeal, Smith argued that the trial court erred in denying a judgment of acquittal with respect to the (E)(2) aggravator because Arizona’s first-degree murder statute, Ariz. Rev. Stat. § 13-452 (Supp. 1957–1978) does not necessarily require the use or threat of force. The Arizona Supreme Court rejected that argument, and held that under the text of section 13-452,¹³ first-degree murder could not be committed without the use of force. *Smith*, 159 P.3d at 537. The state supreme court separately held that Arizona had not violated Smith’s Eighth and Fourteenth Amendment rights by failing to “sufficiently narrow” the application of (E)(2). *Id.* at 546. Smith did not challenge the (E)(2) aggravator in state post-conviction proceedings, but he renewed that claim in his federal habeas petition. The district court denied the claim, finding that the Arizona Supreme Court’s interpretation of Arizona’s murder statute was not arbitrary and capricious. Before this court, Smith argues that “by failing to sufficiently narrow the (E)(2) aggravating circumstance, the [Arizona] supreme court rendered it unconstitutionally vague” and that in doing so it unreasonably applied clearly established Supreme Court law.

2.

The U.S. Supreme Court has long held that states must carefully define their death aggravators to avoid violating the Eighth and Fourteenth Amendments; undefined aggravators are subject to vagueness challenges. *Lewis v. Jeffers*,

¹³ Section 13-452 defined first-degree murder as “murder . . . perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing.” *See Smith*, 159 P.3d at 537.

497 U.S. 764, 774 (1990); *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980). Those challenges “characteristically assert that the . . . challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*.” *Maynard v. Cartwright*, 486 U.S. 356, 361–62 (1988). Thus, a “narrowing construction” is required to “channel the sentencer’s discretion by clear and objective standards.” *Jeffers*, 497 U.S. at 774 (quotation marks omitted). Without narrowly defined aggravators, the sentencer cannot make “a principled distinction between those who deserve the death penalty and those who do not.” *Id.* at 776.

The Arizona Supreme Court has provided a narrowing construction for the (E)(2) aggravator. It has instructed, “[i]n order to constitute an aggravating circumstance under [(E)(2)], the prior conviction must be for a felony which *by its statutory definition* involves violence or the threat of violence on another person.” *State v. Gillies*, 662 P.2d 1007, 1018 (Ariz. 1983) (emphasis added); *see also State v. Fierro*, 804 P.2d 72, 82 (Ariz. 1990). In other words, the specific facts of the defendant’s crime are irrelevant for triggering the (E)(2) aggravator. *Gillies*, 662 P.2d at 1018. In *Gilles*, the Arizona Supreme Court explained that its construction of the (E)(2) aggravator “guarantees due process to a criminal defendant.” *Id.* It remarked that “[e]vidence of a prior conviction is reliable, the defendant having had his trial and exercised his full panoply of rights which accompany his conviction.” *Id.* Thus, focusing on the definition of the crime of conviction and the conviction itself prevents “a second trial on [the] defendant’s prior conviction to establish” the (E)(2) aggravating circumstance. *Id.*

In addition to focusing on “the statutory definition of the prior crime, and not its specific factual basis,” the Arizona Supreme Court has further narrowed the (E)(2) aggravator by defining “violence” as the “exertion of any physical force so as to injure or abuse.” *State v. Henry*, 863 P.2d 861, 879 (Ariz. 1993) (quoting *State v. Arnett*, 579 P.2d 542, 555 (Ariz. 1978)). The state supreme court additionally explained that the physical force exerted must be “employed or threatened with the intent to injure or abuse” for the (E)(2) aggravator to apply. *Fierro*, 804 P.2d at 82.

Through this case law, Arizona has offered a narrowed construction of the (E)(2) aggravator. The U.S. Supreme Court, however, has yet to analyze any “prior crime of violence” aggravator. This means there is no clearly established federal law explaining how a state must narrow an aggravator like (E)(2) in order to sufficiently “channel the sentencer’s discretion by clear and objective standards.” *Jeffers*, 497 U.S. at 774. Without any guidance from the Supreme Court, we cannot say that Arizona’s construction of (E)(2) is unreasonable.

Even when a state properly adopts a narrowing construction of an aggravator, a defendant may still have a colorable vagueness claim if the state court fails to actually apply the narrowing construction. For example, in *Godfrey v. Georgia*, the Supreme Court held that, although the Georgia high court had properly created three factors to consider when applying its “(b)(7)” aggravator,¹⁴ the state

¹⁴ Georgia’s (b)(7) aggravator applied when an offense was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.” Ga. Code § 27-2534.1(b)(7) (1978).

supreme court had failed to assess those factors in Godfrey's case. 446 U.S. at 431–32. Thus, it is not enough to adopt a narrowing construction; a state court also must use that narrowed definition, or it risks violating the Eighth and Fourteenth Amendments.

Here, any (E)(2) vagueness challenge fails because both the trial court and Arizona Supreme Court applied the narrowed definition of the (E)(2) aggravator to Smith's case. After the close of evidence during the aggravation phase in the Spencer proceeding but before the jury commenced deliberations, the trial court rejected Smith's motion for acquittal on the (E)(2) aggravator, noting that by providing the jury with the definition of first-degree murder and the guilty verdict in the Lee case, the court had "sufficiently narrow[ed]" the jury's discretion.¹⁵ It is clear that the trial court properly instructed the jury using the narrowed definition of the (E)(2) aggravator. Similarly, the Arizona Supreme Court held that a "prior felony conviction qualifie[s]" as an aggravator under [(E)(2)] only if the elements of the offense—without regard to the underlying facts of the

¹⁵ The trial court instructed the jury as follows:

First, you must decide whether the defendant has been convicted of the first-degree murder of Neva Lee. Second, you must decide whether that first-degree murder conviction was a felony that necessarily involved the use or threat of violence on another person.

The jury returned a verdict of "proven." The trial court gave a similar instruction in the Lee sentencing proceeding, except that "Neva Lee" was changed to "Sandy Spencer" and a sentencing order was provided to the jury to show Smith's conviction for killing Spencer, rather than a guilty verdict.

crime—required the use or threat of violence on another person.” *Smith*, 159 P.3d at 537. In evaluating Smith’s case, the Arizona Supreme Court described the (E)(2) inquiry as “whether first-degree murder necessarily require[s] the use or threat of violence.” *Id.* That the Arizona courts recognized and applied the narrowed definition of (E)(2) forecloses Smith’s constitutional vagueness claim.

Nor did Arizona Supreme Court act contrary to clearly established federal law in its application of the narrowed (E)(2) aggravator to the facts of Smith’s case. *See Jeffers*, 497 U.S. at 780 (explaining that even if a court utilizes a constitutionally narrowed aggravator, it may still violate the Eighth and Fourteenth Amendments if it “misapplie[s] its own aggravating circumstance to the facts of [the] case”). At the close of the aggravation phase in both cases, the jury was instructed on Arizona’s statutory definition of first-degree murder and provided with a copy of the Lee and Spencer indictments, the Lee guilty verdict (for the Spencer jury), and the Spencer sentencing order (for the Lee jury). The judge instructed the jury in each case to ignore the “specific facts” of Smith’s offenses and examine only the statute and verdicts. Using those sources, the jury considered whether Smith had been convicted of a crime that necessarily involved violence and concluded that he had. On direct review, the Arizona Supreme Court agreed that first-degree murder is a crime that necessarily involves violence, concluding that the jury’s determination was correct as a matter of law. *Smith*, 159 P.3d at 537.

The standard under which a habeas court reviews an as-applied challenge is very deferential. In *Jeffers*, the U.S. Supreme Court held that “federal habeas review of a state court’s application of a constitutionally narrowed aggravating

circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." 497 U.S. at 780. The Supreme Court further held that the appropriate standard of review for a vagueness inquiry is the "rational factfinder" standard, which asks whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact" could have found the aggravating circumstance. *Id.* at 781.

The Arizona Supreme Court's determination that applying the (E)(2) aggravator to Smith's case was not arbitrary or capricious was not an unreasonable application of *Jeffers*. Citing a case from the U.S. Court of Appeals for the Second Circuit, the Arizona Supreme Court held that "even surreptitious poisoning involves the use of force" because a defendant "who uses poison to kill another person 'intentionally avails herself of the physical force exerted by poison on a human body.'" *Smith*, 159 P.3d at 537 (quoting *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 174–75 (2d. Cir. 2006)). In a footnote, the state supreme court also remarked that it previously upheld the use of first-degree murder as an (E)(2) aggravator in a capital case. *Id.* at 537 n.5; see *State v. Gretzler*, 659 P.2d 1, 16 (Ariz. 1983) (holding that the "trial court correctly found" the (E)(2) aggravator "based on the defendant's nine prior convictions for first degree murder"). In light of the state supreme court's reliance on this precedent, its decision cannot be described as arbitrary and capricious.

Nor does the Arizona Supreme Court's decision to allow any first-degree murder to serve as an (E)(2) aggravator lead to "standardless sentencing discretion" in contravention of clearly established Supreme Court law as Smith claims. It is

true that the U.S. Supreme Court has required constitutionally narrowed aggravators so that “capital punishment [cannot] be imposed in any murder case.” *Godfrey*, 446 U.S. at 422–23. For example, in *Godfrey* a plurality of the Court rejected Georgia’s “wantonly vile” aggravator, because a “person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman.’” *Id.* at 428–29. But (E)(2) is different because, unlike the aggravator in *Godfrey*, it looks not to the crime for which the defendant is being sentenced but to his past offenses. There is nothing to suggest that the Supreme Court’s warning not to make every murder eligible for the death penalty would extend to every murderer who has *already* committed murder in the past.

Because the application of the (E)(2) aggravator was in no way contrary to or an unreasonable application of clearly established federal law, we affirm the district court’s denial of Smith’s challenge to the (E)(2) aggravator.

D.

In Claim 30, Smith similarly argues that the (E)(6) aggravator for offenses committed in an especially heinous, cruel, or depraved manner violates the Eighth Amendment, and that the Arizona Supreme Court’s rejection of this argument was an unreasonable application of clearly established federal law.

1.

Prior to the resentencing proceedings, Smith moved to dismiss the (E)(6) aggravator as unconstitutionally vague. Smith argued that the (E)(6) aggravator “provides no

meaningful guidance for identifying the most blameworthy killings, and offers no protection from an arbitrary and capricious application of the death penalty.” The trial court denied Smith’s motion. The court briefly discussed the U.S. Supreme Court’s decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988), and cited to three U.S. Supreme Court decisions upholding Arizona’s (E)(6) aggravator: *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002); *Lewis v. Jeffers*, 497 U.S. 764 (1990); and *Richmond v. Lewis*, 506 U.S. 40 (1992). The trial court concluded that “by giving detailed and clear jury instructions concerning the definition and application of the ([E])(6) aggravating factors, the jury will be carefully focused and limited in its fact finding and deliberative duties as to each factor so as to prevent any arbitrary and capricious aggravation and sentencing findings and decisions from being made.”

At the Spencer and Lee resentencings, the court instructed the juries on the (E)(6) aggravator, and both juries found that each of the three factors supporting the (E)(6) aggravator had been proven beyond a reasonable doubt.¹⁶

¹⁶ At the Spencer resentencing, the trial judge instructed the jury as follows:

Next aggravating circumstance alleged is the especially cruel, heinous or depraved.

Concerning this aggravating circumstance, all first degree murders are to some extent heinous, cruel or depraved. However, this aggravating circumstance cannot be found to exist unless the murder is especially heinous, cruel or depraved, that is, where the circumstances of the murder raise it above the norm of other first degree murders.

The terms “cruel, heinous,” or “depraved” are to be considered in the disjunctive; therefore, proof of any one of these factors is sufficient to establish this aggravating circumstance.

Cruelty involves the infliction of physical pain and/or mental anguish on the victim before death. A crime is committed in an especially cruel manner when a defendant either knew or should have known that the manner in which the crime was committed would cause the victim to experience physical pain and/or mental anguish before death. The victim must be conscious for at least some portion of the time when pain and/or anguish was inflicted.

Terms heinous or depraved, the term “heinous” and “depraved” focus on a defendant’s state of mind at the time of the offense, as reflected by his words and acts.

A murder is especially heinous if it is hatefully or shockingly evil; grossly bad. A murder is especially depraved if it is marked by debasement, corruption, perversion or deterioration. In order to find heinousness or depravity, you must find that the defendant had such a mental state as exhibited by engaging in at least one of the following actions:

First, infliction of gratuitous violence on the victim;

Second, needless mutilation of the victim’s body after death.

In this context, “gratuitous violence” refers to violence committed upon the victim beyond that necessary to kill. In this context, “needless mutilation” means that the defendant, in an act separate from the killing itself, committed other acts with the intent to mutilate the victim’s corpse.

The Arizona Supreme Court has interpreted Arizona's capital sentencing statute to provide that proving any of the three factors is sufficient to trigger the (E)(6) aggravator. *See State v. Cromwell*, 119 P.3d 448, 456 (Ariz. 2005) ("As in prior decisions, we note once again that the [(E)](6) aggravator is stated in the disjunctive, indicating that evidence of any one of the statutory prongs, 'heinous,' 'cruel,' or 'depraved' will support a finding that the (F)(6)

To assist you in determining whether or not murder is heinous or depraved, you may consider whether:

The murder was senseless; or

Second. Helplessness of the victim.

All murders are senseless because of the brutality and finality. Yet not all are senseless as the term is used to distinguish those first degree murders that warrant a death sentence from those that do not. Rather, than senseless murder is one that is unnecessary to achieve a defendant's criminal purpose.

"Helplessness" is proven when the victim is unable to resist.

Neither senselessness nor helplessness, standing alone, are sufficient to prove that this murder was heinous or depraved.

As previously stated, the terms especially cruel, heinous or depraved are considered separately; therefore, the presence of any one of these factors, or combination of factors, is sufficient to establish the aggravating circumstance.

The trial judge delivered a nearly identical instruction at Lee's resentencing.

aggravator is present.”). On direct review, the Arizona Supreme Court independently determined that the prosecution proved the (E)(6) aggravator beyond a reasonable doubt, concluding that “overwhelming evidence established that the murders of Spencer and Lee were especially cruel.” *Smith*, 159 P.3d at 544.¹⁷

The state supreme court agreed with the trial court’s definition of cruelty in its jury instructions, explaining, “The ‘cruelty’ prong of the (E)(6) aggravator focuses on the victim’s mental anguish and physical suffering. A finding of cruelty requires proof that the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur.” *Id.* (quotation marks omitted). The Arizona Supreme Court noted that both victims were bound and had their mouths taped shut, which would have been unnecessary if they were unconscious. *Id.* That court also observed that both victims had their noses and mouths filled with dirt and died of asphyxiation. *Id.* Because such treatment would cause mental anguish and physical pain, and because “[a]t a minimum, Smith should have known pain and anguish would occur,” the Arizona Supreme Court independently determined that the prosecution had proved cruelty. *Id.* at 544–45. And because proof of any of the three factors was sufficient, the state supreme court did not consider the juries’ separate findings of heinousness and depravity. *Smith*, 159 P.3d at 546.

¹⁷ At the time of the murders, state law required that the Arizona Supreme Court “independently review[] the aggravation and mitigation evidence to determine whether the death sentence was appropriate.” *Smith*, 159 P.3d at 544 n. 15 (citing *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976)).

Smith challenged the (E)(6) aggravator in the district court, arguing that it failed to narrow the class of death-eligible defendants. In light of the U.S. Supreme Court's opinions in *Walton*, 497 U.S. at 652–56, and *Jeffers*, 497 U.S. at 774–77, the district court denied habeas relief.

2.

a.

In *Walton*, the U.S. Supreme Court rejected a vagueness challenge to Arizona's (E)(6) aggravator. 497 U.S. at 652–57. Like Smith, Walton argued that the “especially heinous, cruel, or depraved aggravating circumstance as interpreted by the Arizona courts fails to channel the sentencer's discretion as required by the Eighth and Fourteenth Amendments.” *Id.* at 652.

The Supreme Court acknowledged that the aggravator was facially vague as written. *Id.* at 654. Nonetheless, it rejected the challenge and upheld the (E)(6) aggravator, holding that the Arizona Supreme Court's narrowing construction satisfied constitutional requirements. *Id.* at 654. The U.S. Supreme Court distinguished its prior holdings in *Cartwright*, in which it reversed a death sentence based on Oklahoma's similar “especially heinous, atrocious, or cruel” aggravator, and in *Godfrey*, in which it reversed a death sentence based on Georgia's “outrageously or wanton or vile, horrible or inhuman” aggravator. Unlike *Walton*, in both *Cartwright* and *Godfrey* “the defendant[s] [were] sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague. Neither jury was given a constitutional limiting definition of

the challenged aggravating factor.” *Walton*, 497 U.S. at 653 (citations omitted).

In *Walton*, by contrast, the Arizona Supreme Court explained that “‘a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim’s death,’ and that [m]ental anguish includes a victim’s uncertainty as to his ultimate fate.” *Id.* at 654 (alteration in original) (quoting *State v. Walton*, 769 P.2d 1017, 1032 (Ariz. 1989)). The U.S. Supreme Court held that Arizona’s narrowing instruction gave “meaningful guidance to the sentencer” and therefore was constitutionally sufficient. *Id.* at 655. The Court also said it would not “fault the state court’s statement that a crime is committed in an especially ‘depraved’ manner when the perpetrator ‘relishes the murder, evidencing debasement or perversion,’ or ‘shows an indifference to the suffering of the victim and evidences a sense of pleasure’ in the killing.” *Id.* (quoting *Walton*, 769 P.2d at 1033).

In another opinion decided the same day, the Supreme Court also reversed our holding that Arizona’s construction of the (E)(6) aggravator contravened *Cartwright* and *Godfrey*. *Jeffers*, 497 U.S. at 774. Again, the Court distinguished both cases. In *Jeffers*, the Arizona Supreme Court had applied a narrowing construction with respect to the terms “heinous” and “depraved,” looking to the “infliction of gratuitous violence on the victim” and “the apparent relish with which the defendant commit[ted] the murder.” *Id.* at 770. Those narrowing constructions sufficiently channeled the sentencer’s discretion. *Id.* at 776–77. The Court repeated its prior holding, concluding that *Walton* “squarely foreclose[d] any argument that Arizona’s subsection ([E])(6) aggravating circumstances, as construed by the Arizona Supreme Court,

fails to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Id.* at 777–78 (internal quotation marks omitted).

Two years later, the U.S. Supreme Court took up another challenge involving Arizona's (E)(6) aggravator. *Richmond*, 506 U.S. at 46. The Arizona Supreme Court had not crafted the (E)(6) aggravator's narrowing construction before the defendant was sentenced, and thus the sentencing judge could not have relied on the aggravator without violating the defendant's constitutional rights. *Id.* at 47.¹⁸ Nonetheless, as in *Walton* and *Jeffers*, the U.S. Supreme Court again approved of the narrowing construction adopted after the defendant had been sentenced, *id.* at 48, as set forth by the Arizona Supreme Court in *State v. Gretzler*, 659 P.2d at 10–11 (Ariz. 1983):

[T]he statutory concepts of heinous and depraved involve a killer's vile state of mind at the time of the murder, as evidenced by the killer's actions. Our cases have suggested specific factors which lead to a finding of heinousness or depravity[:]

. . . .

[One such factor] is the infliction of gratuitous violence on the victim.

¹⁸ The Court ultimately granted habeas relief because the Arizona Supreme Court's independent review had not cured the deficient instruction. *Richmond*, 506 U.S. at 51–52.

. . . .

[Another] is the needless mutilation of the victim.

Richmond, 506 U.S. at 50–51.

b.

Comparing the (E)(6) instruction given in Smith’s case with the formulations approved by the U.S. Supreme Court in *Walton*, *Jeffers*, and *Richmond* demonstrates that the Arizona Supreme Court’s decision rejecting Smith’s claim was not an unreasonable application of clearly established federal law. Smith’s sentencing juries received instructions on cruelty similar to those approved in *Walton*, requiring a finding that the defendant knew or should have known that his actions would cause physical pain or mental anguish before death and that the victim was conscious to experience that pain or anguish. *See Walton*, 497 U.S. at 654.

Similarly, Smith’s sentencing juries were instructed that heinousness required a “hatefully or shockingly evil” murder, that depravity was “marked by debasement, corruption, perversion or deterioration,” and that finding either heinousness or depravity required proof that the killing involved the “infliction of gratuitous violence” or “needless mutilation of the victim’s body after death.” *See Richmond*, 506 U.S. at 50–51; *Jeffers*, 497 U.S. at 770. Indeed, to further guide the juries, the state trial court defined “gratuitous violence” as “violence committed upon the victim beyond that necessary to kill” and “needless mutilation” as

mutilation of the victim’s corpse “in an act separate from the killing itself.”¹⁹

c.

In an effort to avoid the U.S. Supreme Court decisions approving Arizona’s narrowing construction, Smith argues that *Ring v. Arizona*, 536 U.S. 584 (2002), “implicitly overruled” *Walton* on this point because it held that jurors rather than judges must find aggravating factors, thereby abrogating *Walton*’s contrary determination. Smith argues that the U.S. Supreme Court “reluctant[ly]” accepted Arizona’s narrowing construction in *Walton* only because when *Walton* was decided, judges rather than juries found the

¹⁹ Smith challenges the “needless mutilation” instruction because it failed to define “mutilation,” in contrast to the Nevada instruction that we approved in *Deutscher v. Whitley*, 884 F.2d 1152, 1162 & n.1 (9th Cir. 1989) (approving the “mutilation” instruction given to the jury regarding Nevada’s “torture, depravity, mutilation” aggravator), *judgment vacated sub nom. Angelone v. Deutscher*, 500 U.S. 901 (1991). *Deutscher*’s approval of Nevada’s mutilation instruction, however, does not render Smith’s mutilation instruction an unreasonable application of clearly established federal law.

In *Deutscher*, 884 F.2d at 1162–63, and then in *Valerio v. Crawford*, 306 F.3d 742, 755–56 (9th Cir. 2002) (en banc), we held Nevada’s depravity instructions unconstitutionally vague and compared them to the impermissible aggravators in *Godfrey* and *Cartwright*. Unlike the instructions in Smith’s case, however, Nevada’s improper depravity instruction did not require the jury to find any particular fact or look to any identified factors. See *Deutscher*, 884 F.2d at 1162 n.1 (“[D]epravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.”); *Valerio*, 306 F.3d at 752 (same).

(E)(6) factors or (E)(6) aggravator. According to Smith, “[t]he change in Arizona’s law, from judge to jury sentencing, renders Arizona’s heinous, cruel, or depraved aggravating circumstances unconstitutional.”

Smith’s argument does not support granting habeas relief. Smith argues that *Ring* undermines the constitutionality of Arizona’s (E)(6) aggravator jury instructions—as approved by the U.S. Supreme Court in *Walton*, *Jeffers*, and *Richmond*—despite the Court’s silence in *Ring* on the effect of its holding on those prior cases.²⁰ But “[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* [Supreme Court] precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error.” *White*, 134 S. Ct. at 1706. As the Court has explained, “if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision.” *Id.* (internal quotation marks omitted). The Court has not “squarely established” that the instruction approved of in its prior decisions is insufficient when put to a jury. *Id.* Irrespective of whether invalidation of the jury instructions in *Walton*, *Jeffers*, and *Richmond* is “the logical next step” after *Ring*, the Court “ha[s] not yet taken that step, and there are reasonable arguments on both sides—which is all [Arizona] needs to prevail in this AEDPA case.” *Id.* at 1707.

²⁰ In *Ring*, the Supreme Court had no reason to evaluate the (E)(6) aggravator because on direct review the state supreme court had found insufficient evidence to support its application, relying instead on a different aggravator. 536 U.S. at 596.

In light of the Court's decisions in *Godfrey*, *Cartwright*, *Walton*, *Jeffers*, *Richmond*, and *Ring*, neither the state trial court's decision to give the (E)(6) narrowing instruction, nor the Arizona Supreme Court's (E)(6) analysis, was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

E.

Finally, in Claim 39 Smith argues that the district court erred in denying his claim of ineffective assistance of counsel at his 2004 resentencing proceedings. Specifically, Smith points to a positron emission tomography ("PET") scan and diffusion tensor imaging ("DTI") study that revealed evidence of organic brain damage. Smith argues that his counsel's failure to obtain and present those scans at his resentencings constituted ineffective assistance of counsel.

1.

In Smith's Rule 32 petition, he alleged that the PET scan constituted newly discovered evidence that entitled him to post-conviction relief. The petition did not allege ineffective assistance of counsel. The superior court denied Smith's petition, ruling that the PET scan could have been obtained or "discovered" prior to his resentencing, and that the scan was cumulative of Dr. Parrish's testimony. The Arizona Supreme Court denied review.

In the district court, Smith argued for the first time that his counsel's failure to obtain the PET scan and DTI study constituted ineffective assistance. The district court denied relief on this claim on several grounds. The court found that

Smith's sentencing counsel had not been ineffective, noting that Smith had been examined by ten doctors and psychiatrists prior to the resentencing proceedings, none of whom had found any organic brain damage. The district court also found that Dr. Parrish's testimony, along with testimony about Smith's difficult childhood and history of asthma, sufficiently addressed the concerns expressed by our 1999 opinion, *see Smith*, 189 F.3d 1004, and that the strength of the prosecution's rebuttal evidence foreclosed a finding of prejudice. The district court further concluded that Smith had procedurally defaulted his ineffective assistance of counsel claim by failing to raise it before the Arizona state courts.

2.

Smith failed to raise his ineffective assistance of counsel claim in his state post-conviction proceedings, as required by Arizona law. *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014). Thus, we agree with the district court that Smith's ineffective assistance of counsel claim was procedurally defaulted.

Smith argues that his default is excused under *Martinez v. Ryan*, —U.S.—, 132 S. Ct. 1309, 1316–17 (2012). We have held that

[t]o establish 'cause' to overcome procedural default under *Martinez*, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is 'substantial'; (2) the petitioner was not represented or had ineffective counsel during the PCR proceeding; (3) the [Rule 32] proceeding was the initial review proceeding; and (4) state law

required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding.

Dickens, 740 F.3d at 1319 (citing *Trevino v. Thaler*, —U.S.—, 133 S. Ct. 1911, 1918 (2013)). Smith satisfies the third and fourth prongs of the *Dickens* test because Arizona law does not permit defendants to raise ineffective assistance claims on direct appeal, and Smith failed to allege such a claim in his Rule 32 petition. *See Martinez*, 132 S. Ct. at 1316–17; *Dickens*, 740 F.3d at 1319. The first prong of the test, however, requires that the underlying ineffective assistance of counsel claim be “substantial.” Under that standard, an underlying claim is “insubstantial” if it “does not have any merit or . . . is wholly without factual support.” *Martinez*, 132 S. Ct. at 1319. Thus, to assess whether Smith has satisfied the first prong required to excuse his procedural default under *Dickens*, we conduct a preliminary assessment of his underlying claim.

To establish ineffective assistance of counsel, Smith must demonstrate (1) that counsel was ineffective and (2) that counsel’s deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). To satisfy the second prong, Smith “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

Here, even if counsel’s failure to obtain the brain scans constituted deficient performance, Smith cannot establish prejudice. In a capital case, “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.” *Id.* at 695. The prosecution’s evidence in both the Spencer and Lee sentencing hearings was extensive. The jurors were presented with evidence of Smith’s prior rapes, including the brutal rape of Dorothy Fortner while she was pregnant. They also heard, in graphic detail, how Smith tortured and suffocated Spencer and Lee. Moreover, the brain scans that Smith obtained in the Rule 32 proceedings were largely cumulative of the mitigating evidence presented by Dr. Parrish. Dr. Parrish conducted a battery of neuropsychological tests on Smith, and she testified that he suffered mild to moderate brain impairment and that his results fell in the “brain damaged range.” Given the strength of the prosecution’s rebuttal evidence and the cumulative nature of the brain scans, Smith cannot establish that any deficient performance by counsel affected the sentences imposed. Because Smith cannot establish prejudice, we need not consider whether the performance of Smith’s sentencing counsel fell below a reasonable standard of professional competence.

Smith’s underlying claim is not substantial, therefore Smith’s procedural default cannot be excused under *Martinez*. 132 S. Ct. at 1317. We thus conclude that Smith’s ineffective assistance of counsel claim was procedurally defaulted.

IV.

For the forgoing reasons, we affirm the district court’s denial of Smith’s petition.

AFFIRMED.

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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

8

9 Joe Clarence Smith,) No. CV-12-00318-PHX-PGR

10 Petitioner,) DEATH PENALTY CASE

11 vs.)

12 Charles L. Ryan, et al.,) **ORDER**

13 Respondents.)

14

15

16 Before the Court is Petitioner's Motion for Evidentiary Development. (Doc. 42.)

17 Petitioner, a state prisoner under sentence of death, seeks discovery, expansion of the record,

18 and an evidentiary hearing in support of a number of claims contained in his petition for writ

19 of habeas corpus. (Doc. 25.) As explained below, to a large extent the Court's analysis of the

20 requested evidentiary development entails a consideration of the merits of the underlying

21 habeas claims. Accordingly, the following order addresses both the motion for evidentiary

22 development and the petition. For the reasons set forth herein, the Court denies the bulk of

23 Petitioner's requests for evidentiary development and denies habeas relief.

24 **BACKGROUND**

25 A number of courts have had the opportunity to address the details of Petitioner's

26 crimes in the nearly four decades since they were committed. The following information is

27 taken from the Arizona Supreme Court's opinion upholding Petitioner's death sentences

28 following his second resentencing, *State v. Smith (Smith IV)*, 215 Ariz. 221, 159 P.3d 531

(2007), and from this Court's review of the record from those proceedings.

1 On January 1, 1976, the nude body of Sandy Spencer, age 18, was found in the desert
2 northwest of Phoenix. Her nose and mouth had been stuffed with dirt and taped shut, causing
3 asphyxiation. Ligature marks on her wrists and ankles indicated that she had been bound
4 before death and the ligatures had been removed after death. Before or near the time of death,
5 Spencer also suffered 19 stab wounds to the pubic region and a vaginal tear caused by
6 penetration. She also had three stab wounds to her breasts. A sewing needle, two and a
7 quarter inches long, was embedded in her left breast.

8 On February 2, 1976, 14-year-old Neva Lee's naked body was discovered in the
9 desert near the Salt River Indian Reservation. Like Spencer, Lee had died from "asphyxiation
10 due to airway obstruction with soil." There were ligature marks on her wrists and ankles, the
11 result of injuries suffered before death. She also had puncture and stab wounds to her chest,
12 abdomen, and breasts, and damage to her vulva.

13 In November 1976, a Maricopa County grand jury indicted Petitioner for two counts
14 of first-degree murder. The superior court severed the counts, requiring separate trials. A jury
15 convicted Petitioner of first-degree murder on June 17, 1977, for the murder of Neva Lee.
16 On July 7, 1977, Petitioner pleaded guilty to first-degree murder for the murder of Sandy
17 Spencer. The superior court sentenced Petitioner to death on both counts. The Arizona
18 Supreme Court affirmed the convictions, but remanded for resentencing in light of *State v.*
19 *Watson*.¹ *State v. Smith (Smith I)*, 123 Ariz. 231, 243, 599 P.2d 187, 199 (1979).

20 At resentencing, Petitioner's counsel presented no new mitigation evidence and
21 Petitioner was again sentenced to death. The sentences were affirmed on appeal. *State v.*
22 *Smith (Smith II)*, 131 Ariz. 29, 35, 638 P.2d 696, 702 (1981).

24
25 ¹ In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court held that limiting the
26 evidence that could be presented in mitigation in capital cases violates the Eighth and
27 Fourteenth Amendments. The Arizona Supreme Court subsequently held, in *State v. Watson*,
28 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978), that A.R.S. § 13-454(F) unconstitutionally
limited a defendant's ability to present mitigation evidence in a capital case. Petitioner's
death sentence were vacated to allow him to present further mitigation evidence. *Smith I*, 123
Ariz. at 243, 599 P.2d at 199.

1 From 1984 through 1991, Petitioner filed a series of unsuccessful petitions for post-
2 conviction relief (“PCR”). Petitioner subsequently filed a habeas corpus petition, which this
3 Court denied. *Smith v. Stewart*, 91-CV-1577 (D. Ariz. Jan. 21, 1997).

4 On appeal, a divided panel of the Ninth Circuit held that Petitioner’s counsel had been
5 ineffective at the resentencing by failing to present new mitigating evidence and instead
6 relying on the evidence submitted at the original sentencing. *Smith v. Stewart (Smith III)*, 189
7 F.3d 1004, 1014 (9th Cir. 1999). The majority cited, as potentially mitigating circumstances
8 that were not presented at the second sentencing proceeding, evidence that Petitioner suffered
9 from asthma, possessed multiple personalities and suffered from other mental disorders, had
10 experienced a difficult family background, and maintained a good relationship with his
11 girlfriend. *Id.* at 1009–10. The majority emphasized that “[t]estimony by a doctor that Smith
12 lost contact with reality during his violent outbursts, which were themselves a result of
13 psychological tension built up between the two sides of his split personality, could have led
14 a judge to feel that he was not deserving of the ultimate punishment.” *Id.* at 1014.

15 The resentencing proceeding for the murder of Sandy Spencer began before a jury in
16 April 2004. In the aggravation phase, the State sought to prove the following aggravators:
17 that Petitioner had a prior conviction for an offense punishable under Arizona law by a
18 sentence of life in prison or death, pursuant to A.R.S. § 13–454(E)(1); that he had a prior
19 felony conviction involving the use or threat of violence on another, under § 13–454(E)(2);
20 and that the offense was committed in an especially heinous, cruel, or depraved manner,
21 under § 13–454(E)(6).² In support of the (E)(1) aggravating factor, the jury heard testimony
22 that Petitioner had previously been convicted of three counts of rape and sentenced to five
23 years to life, 10 years to life, and 75 years to life. The State used Petitioner’s conviction for
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25
26 ² At the time of Petitioner’s offense in 1976, Arizona’s capital sentencing scheme was
27 set forth in A.R.S. § 13–454. At the time of Petitioner’s resentencing in 2004, it had been
28 amended and renumbered as A.R.S. § 13–703. It is presently set forth in A.R.S. § 13-751.

1 the murder of Lee to prove the (E)(2) aggravating factor. In support of the (E)(6) aggravator,
2 the State offered testimony about the stab and puncture wounds to Spencer's body and her
3 death by asphyxiation. The jury made separate findings that each aggravating factor had been
4 proved beyond a reasonable doubt. With respect to the (E)(6) factor, the jury made additional
5 findings that each prong—cruelty, heinousness, and depravity—had been proved.

6 In the penalty phase, the defense presented testimony from a neuropsychologist, Dr.
7 Susan Parrish. She testified that Petitioner suffered from moderate brain impairment, anxiety,
8 and dissociative disorder, conditions likely caused by his severe childhood asthma and
9 related factors. She also diagnosed Petitioner as a sexual sadist, as did the State's expert.
10 According to Dr. Parrish, the murders were a consequence of these conditions.

11 In addition to this expert mental health evidence, defense counsel presented lay
12 testimony from a witness who observed Petitioner's "split personalities," as well as evidence
13 concerning Petitioner's behavior while in prison, his family background, and his relationship
14 with his mother and sister. The jury determined that Petitioner should be sentenced to death
15 for the murder of Spencer.

16 The resentencing proceeding for the murder of Neva Lee began on May 5, 2004,
17 before a new jury. The State again sought to prove the (E)(1), (E)(2), and (E)(6) aggravators.
18 Testimony related to the three prior rape convictions and the Spencer murder was offered to
19 prove the (E)(1) and (E)(2) aggravators, respectively. The State also offered testimony about
20 the injuries to Lee and her cause of death to support the (E)(6) aggravator. The jury made
21 separate findings that all three aggravators had been proved beyond a reasonable doubt,
22 including each prong of (E)(6). The mitigation and rebuttal evidence in the penalty phase was
23 substantially the same as in the Spencer proceeding. This jury also determined that Petitioner
24 should be sentenced to death. The superior court sentenced Petitioner to death on both
25 counts.
26

27 Petitioner appealed. Appellate counsel filed a 106-page opening brief raising six
28 substantive issues and summarily raising 12 additional issues to avoid federal habeas

1 preclusion. (Doc. 30, Ex. A.) The Arizona Supreme Court affirmed Smith’s death sentences.
2 *Smith IV*, 215 Ariz. 221, 159 P.3d 531.

3 Petitioner sought post-conviction relief, raising three claims: (1) a Confrontation
4 Clause violation regarding the testimony of the medical examiner, Dr. Phillip Keen, in both
5 the Lee and Spencer resentencings, together with a claim of ineffective assistance of
6 appellate counsel in not raising the claim on appeal; (2) prosecutorial misconduct in both the
7 Lee and Spencer resentencing closing arguments, and a claim of ineffective assistance of
8 appellate counsel for failing to raise the issue; and (3) newly-discovered mitigating evidence
9 indicating that Petitioner had organic brain damage. (*Id.*, Ex. B.)

10 The state PCR court denied relief. (*Id.*, Ex. C.) It found that the allegations in Claim
11 1 were precluded as adjudicated on appeal and not colorable. (*Id.* at 2–3.) On Claim 2 the
12 court found Petitioner had not presented a colorable claim of ineffective assistance of
13 appellate counsel. (*Id.* at 3–4.) The court determined that any misconduct in the closing
14 arguments was harmless. (*Id.* at 4.) With respect to Claim 3 the court found that the newly-
15 presented evidence did not constitute “newly discovered material facts” pursuant to Rule
16 32.1(e) of the Arizona Rules of Criminal Procedure, and also found that the new evidence
17 was “cumulative” to evidence that had been presented at resentencing. (*Id.* at 5–6.)
18 Petitioner’s petition for review to the Arizona Supreme Court was summarily denied on
19 February 15, 2012. (Doc. 30, Ex’s D, E.)

20
21 On December 21, 2012, Petitioner filed the instant petition for writ of habeas corpus,
22 raising 39 claims for relief. (Doc. 25.) He filed his motion for evidentiary development on
23 June 19, 2013.

24 DISCUSSION

25 The Court will first address the claims for which Petitioner seeks evidentiary
26 development. The Court will then address the claims Petitioner exhausted in state court.
27 Finally, the Court will consider Claim 39, alleging ineffective assistance of counsel at
28 resentencing for failing to present mitigating evidence of brain damage.

I. EVIDENTIARY DEVELOPMENT & MARTINEZ

Petitioner seeks expansion of the record under Rule 7 of the Rules Governing Section 2254 Cases with evidence demonstrating that appellate and post-conviction counsel rendered ineffective assistance. (Doc. 42 at 26–35.) These materials consist of correspondence from Petitioner’s trial counsel, Dawn Sinclair, to post-conviction counsel, Michael Dew (Doc. 42-1, Ex. B); Mr. Dew’s billing records (*id.*, Ex. C); the billing records of Petitioner’s post-conviction mitigation specialist (*id.*, Ex. D); a declaration from trial counsel Sinclair (*id.*, Ex. E); and a declaration from Dr. Joseph Wu, an expert retained by Dew who performed a PET scan of Petitioner’s brain (*id.*, Ex. F). Respondents oppose expansion of the record to include these materials. Petitioner also seeks, and Respondents oppose, an evidentiary hearing under Rule 8 of the Rules Governing Section 2254 cases.

Petitioner has raised a series of habeas claims that were never presented in state court. The claims are procedurally defaulted.³ Petitioner asserts, however, that pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), his default of the claims is excused by the ineffective assistance of his post-conviction counsel. To support this argument Petitioner seeks to expand the record to include, for example, correspondence from trial counsel Sinclair to post-conviction counsel Dew to show that the latter was aware of various allegations of ineffectiveness of appellate counsel.

The Ninth Circuit has summarized the holding in *Martinez* as follows:

a petitioner may establish cause for procedural default of a trial [ineffective assistance of counsel] claim, where the state (like Arizona) required the petitioner to raise that claim in collateral proceedings, by demonstrating two things: (1) “counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v.*

³ “A federal court may not grant habeas relief to a state prisoner unless he has properly exhausted his remedies in state court.” *Peterson v. Lampert*, 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc). An unexhausted claim will be procedurally defaulted if state procedural rules would now bar the petitioner from bringing the claim in state court. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002).

1 *Washington*, 466 U.S. 668 (1984),” and (2) “the underlying ineffective-
2 assistance-of-trial-counsel claim is a substantial one, which is to say that the
3 prisoner must demonstrate that the claim has some merit.”

4 *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting *Martinez*, 132 S. Ct. at 1318).

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

8 In order to determine whether post-conviction counsel’s performance excused the
9 procedural default of Petitioner’s claims of ineffective assistance of appellate counsel, the
10 Court must determine whether those claims are substantial or have some merit. *See Sexton*
11 *v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) (“To establish that PCR counsel was
12 ineffective, Sexton must show that trial counsel was likewise ineffective. . .”).

13 Ineffective assistance of appellate counsel claims are evaluated under the standard set
14 forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Moormann v. Ryan*, 628 F.3d 1102,
15 1106 (9th Cir. 2010) (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). First, the petitioner
16 must show that counsel’s performance was objectively unreasonable, which in the appellate
17 context requires the petitioner to demonstrate that counsel acted unreasonably in failing to
18 discover and brief a merit-worthy issue. *Id.* Second, the petitioner must show prejudice,
19 which in this context means that he must demonstrate a reasonable probability that, but for
20 appellate counsel’s failure to raise the issue, he would have prevailed in his appeal. *Id.*

21 As discussed below, Petitioner cannot demonstrate that his claims of ineffective
22 assistance of appellate counsel are substantial because the claims appellate counsel failed to
23 raise were without merit. Appellate counsel therefore did not perform incompetently by
24 failing to raise the claims, and Petitioner suffered no prejudice from counsel’s performance.
25 *See Jones v. Smith*, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (finding no prejudice when
26 appellate counsel fails to raise an issue on direct appeal that is not grounds for reversal);
27 *Miller v. Kenney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (explaining that appellate counsel
28 remains above an objective standard of competence and does not cause prejudice when he

declines to raise a weak issue on appeal); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (“Failure to raise a meritless argument does not constitute ineffective assistance.”).

The Court notes that it has reviewed the materials with which Petitioner seeks to expand the record and determined that their contents do not affect the Court’s analysis of Petitioner’s habeas claims. The materials are relevant, with the exception of Claim 39, only to the performance prong of Petitioner’s claims of ineffective assistance of appellate and post-conviction counsel.⁴ As detailed below, the Court has determined that Petitioner was not prejudiced by appellate counsel’s performance. Petitioner’s attempts to excuse the default of these claims under *Martinez* fail because the underlying ineffectiveness claims are not substantial. Because the claims are both defaulted and meritless, expansion of the record will be denied.

For the same reason, Petitioner is not entitled to an evidentiary hearing. Having reviewed the entire record, including the evidence presented by Petitioner in the PCR proceedings and in his motion to expand the record, the Court concludes that an evidentiary hearing is not warranted. *See* Rule 8(a) of the Rules Governing Section 2254 Cases. Whether Petitioner’s allegations of ineffective assistance of trial and appellate counsel are “substantial” under *Martinez* is resolvable on the record. *Cf. Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc) (explaining that “a district court *may take evidence to the extent necessary* to determine whether the petitioner’s claim of ineffective assistance of trial counsel is substantial under *Martinez*”) (emphasis added).

Claims 1 and 2

In Claim 1 Petitioner alleges that during the Spencer resentencing he was denied his

⁴ Trial counsel Sinclair’s letters and affidavit discuss the issues she believed should have been raised by appellate counsel, express concerns over appellate counsel’s failure to raise the issues or make effective arguments, and describe PCR counsel Dew’s failure to visit her office to review the record. (Doc. 42-1, Ex’s B and E.) Dr. Wu attests that he performed a PET scan on Petitioner, revealing brain abnormalities, and that such scans were widely used at the time of the resentencing proceedings. (*Id.*, Ex. F).

1 right to a fair trial, an impartial jury, and reliable sentencing proceedings when the trial court
2 failed to remove an “automatic death penalty” juror from the venire.⁵ (Doc. 25 at 14–18.) In
3 Claim 2 Petitioner alleges that appellate counsel rendered ineffective assistance by failing
4 to raise this claim. (*Id.* at 18–19.)

5 Respondents do not allege that Claim 1 was defaulted. Instead, they argue that the trial
6 court did not unreasonably apply clearly established federal law when it denied defense
7 counsel’s challenge for cause.⁶ (Doc. 30 at 25.) Petitioner contends that the Court must
8 review the claim *de novo*. (Doc. 44 at 6.) Under either standard of review, Petitioner is not
9 entitled to habeas relief.

10 The Constitution requires that a defendant be tried by a fair and impartial jury
11 comprised of members who will not automatically vote for the death penalty and will fairly
12 consider the evidence offered in mitigation. *Morgan v. Illinois*, 504 U.S. 719 (1992). Federal
13 habeas relief may be granted based on a state court’s failure to strike a juror for cause only
14 where there is no fair support in the record for the court’s determination that the juror was
15 unbiased. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). A state court’s determination of
16 juror impartiality is entitled to a presumption of correctness on federal habeas review. *Id.* at
17 429; see *Uttecht v. Brown*, 551 U.S. 1, 9 (2007) (“Deference to the trial court is appropriate
18 because it is in a position to assess the demeanor of the venire, and of the individuals who
19 compose it, a factor of critical importance in assessing the attitude and qualifications of
20 potential jurors.”).

21
22 Juror 31B was one of a group of jurors who responded in the affirmative when asked
23 if they had the same concerns as another prospective juror who stated that he would

24
25 ⁵ In his reply to the Respondents’ answer to his motion for evidentiary development,
26 Petitioner clarifies that only one of the prospective jurors cited in his habeas petition—Juror
27 31B—served on the jury that sentenced him to death. (Doc. 44 at 7.)

28 ⁶ As discussed below, under 28 U.S.C. § 2254(d)(1), a petitioner is entitled to habeas
relief on claims adjudicated on the merits in state court only where the state court’s decision
was contrary to, or involved an unreasonable application of, clearly established federal law.

1 automatically vote for the death penalty for a serial killer. (RT 3/30/04 at 167.)⁷ The court
2 followed up by asking whether the prospective jurors would “be able to listen to the
3 mitigation, and if the mitigation was sufficiently substantial in your mind, individually vote
4 for leniency.” (*Id.* at 168.) Juror 31B responded, “Yes.” (*Id.*) She subsequently indicated that
5 she would be open to considering mitigating circumstances when deciding on a penalty. (RT
6 3/31/04 at 15.)

7 Defense counsel move to strike Juror 31B for cause. (*Id.* at 113.) The court denied the
8 motion, noting that the juror had also stated “that she wanted to hear all the evidence before
9 she would make any decision, which to the Court means that she would follow her duties and
10 responsibilities.” (*Id.* at 115.)

11 The trial court correctly determined that Juror 31B was not an “automatic death juror.”
12 The record clearly supports the court’s finding that the juror would not automatically vote
13 for the death penalty and categorically reject any mitigating evidence offered by Petitioner.
14 Therefore, the trial court did not violate Petitioner’s rights under *Morgan* by denying his
15 motion to strike the juror for cause.

16 Appellate counsel did not perform ineffectively by failing to raise this issue because
17 it was without merit. Because there is no sufficiently substantial claim involved, the default
18 of the claims is not excused under *Martinez*. Claims 1 and 2 are denied.

20 **Claim 3**

21 Petitioner alleges that he was denied effective assistance of counsel when, “during the
22 38 days in 2002 in which the State of Arizona did not have a death penalty, his attorneys
23 failed to invoke his right to immediate sentencing under the Sixth Amendment, which would
24 have entitled him to a life sentence for the murders.” (Doc. 25 at 19.) The claim was not
25 presented in state court, but Respondents have not asserted a defense of procedural default.

26 On June 24, 2002, the United States Supreme Court held that Arizona’s death penalty
27

28 ⁷ “RT” refers to court reporter’s transcript.

1 statute violated the Sixth Amendment because it allowed a judge, rather than a jury, to find
2 the facts making a defendant eligible for the death penalty. *Ring v. Arizona*, 536 U.S. 584
3 (2002). According to Petitioner, therefore, from June 24, 2002, until August 1, 2002, when
4 the legislature enacted new legislation, Arizona was without a valid death penalty statute, so
5 if “Petitioner’s trial counsel invoked his right to immediate sentencing at any time during that
6 38-day period, the court would have had no option but to sentence Petitioner to life
7 sentences.” (Doc. 25 at 21.)

8 Respondents contend that Petitioner cannot show prejudice from counsel’s
9 performance under *Strickland* and *Lockhart v. Fretwell*, 506 U.S. 364 (1993). (Doc. 32–35.)
10 The Court agrees that Petitioner has not met his burden of showing prejudice.

11 Petitioner’s claim of ineffective assistance is premised on the assertion that Arizona
12 had no death penalty during the period in question and that he had a right to “immediate
13 sentencing,” which, if asserted, automatically would have entitled him to a life sentence.
14 Nothing cited by Petitioner supports these premises. Petitioner refers to *State v. Nicholas*
15 *Sizemore*, S-0900-CR-20010338 (Navajo County), indicating that the case involved a
16 defendant facing a possible death sentence who “invoked [his] right to immediate sentencing
17 and was accordingly sentenced to life.” (Doc. 25 at 21.) However, Petitioner does not specify
18 the legal basis for the superior court’s ruling, provide copies of any unpublished orders from
19 the case, or explain how the case supports his argument that if, between June 24 and August
20 1, 2002, he had moved to be re-sentenced on his 1977 first-degree murder convictions, the
21 court “would have had no option but to sentence Petitioner to life sentences.” (*Id.*)

22 Even if Petitioner had provided any support for his argument that he was entitled to
23 a life sentence during the 38-day window, the Court concludes that he was not prejudiced by
24 counsel’s performance. In this case a focus on “mere outcome determination” is
25 inappropriate, because counsel’s performance did not render “the result of the proceeding . . .
26 fundamentally unfair or unreliable.” *Lockhart v. Fretwell*, 506 U.S. 364, 369–70 (1993) (“To
27 set aside a conviction or sentence solely because the outcome would have been different but
28

1 for counsel's error may grant the defendant a windfall to which the law does not entitle
 2 him."). Instead, the consequence of counsel's failure to move for immediate sentencing was
 3 that Petitioner was properly re-sentenced after a jury trial, as required by *Ring*. Claim 3 is
 4 denied.

5 **Claims 5 and 6**

6 In Claim 5 Petitioner alleges that he was re-sentenced while legally incompetent.
 7 (Doc. 25 at 32.) In Claim 6 he alleges that resentencing counsel rendered ineffective
 8 assistance by failing to ask the court to determine Petitioner's competency. Neither claim was
 9 presented in state court. Petitioner contends that the default of Claim 6 is excused by the
 10 ineffective assistance of PCR counsel.

11 "The conviction of an accused person while he is legally incompetent violates due
 12 process." *Pate v. Robinson*, 383 U.S. 375, 378 (1966). The test for competence is "whether
 13 a criminal defendant has a sufficient present ability to consult with his lawyer with a
 14 reasonable degree of rational understanding—and whether he has a rational as well as factual
 15 understanding of the proceedings against him." *Drope v. Missouri*, 420 U.S. 162, 172 (1975)
 16 (quoting *Dusky v. United States*, 362 U.S. 402 (1960)).

17 A petitioner in a habeas proceeding who claims that he was incompetent at the time
 18 of trial must first come forward with "meaningful evidence" of mental incompetency. See
 19 *Demosthenes v. Baal*, 495 U.S. 731 (1990). "[E]vidence of a defendant's irrational behavior,
 20 his demeanor at trial, and any prior medical opinion on competence" are relevant
 21 considerations. *Drope*, 420 U.S. at 180. A conclusory allegation of mental illness without
 22 more is not substantial evidence sufficient to raise a reasonable doubt concerning
 23 competency to stand trial. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 510 (9th Cir. 1994).

24 In support of Claims 5 and 6, Petitioner's counsel assert that:

25
 26 Upon information and belief, Petitioner was rendered legally incompetent by
 27 a dissociative disorder that prevented him from consulting with and
 28 meaningfully assisting the attorneys appointed to represent him during his re-
 sentencing proceedings. Because of this dissociative disorder, undersigned
 counsel have a good faith reason to believe that Petitioner may have lacked a

1 “rational as well as factual understanding of the proceedings against him.”
2 (Doc. 25 at 33–34.) These conclusory statements do not constitute substantial evidence of
3 incompetence.

4 There is no record of irrational behavior and all previous psychological reports found
5 Petitioner competent to stand trial. Dr. Parrish, who was retained by sentencing counsel,
6 diagnosed Petitioner with dissociative disorder. As was clear from her testimony, however,
7 the disorder manifested itself during moments of crisis and extreme stress, causing a
8 “deterioration in [Petitioner’s] function” (RT 4/14/04 at 42) and overriding the controls on
9 his behavior (5/20/04 at 30). Thus, the dissociative identity disorder was in effect when
10 Petitioner was committing rape and murder. Nowhere does Dr. Parrish suggest that the
11 disorder had any bearing on Petitioner’s competence during his resentencing proceedings 28
12 years later.

13 Counsel did not perform ineffectively by failing to seek a competency determination
14 at resentencing. PCR counsel did not perform ineffectively by failing to raise this
15 insubstantial claim. Claims 5 and 6 are denied.

16 **Claims 7, 8, and 9**

17 Claims 7 through 9 allege constitutional violations arising from the testimony of the
18 judge who presided over Petitioner’s murder trials and sentenced him to death. Claim 7
19 alleges that the testimony violated Petitioner’s right to due process, an impartial jury, and
20 freedom from arbitrary and capricious imposition of the death penalty. (Doc. 25 at 37–43.)
21 Claim 8 alleges ineffective assistance of trial counsel based on the failure of Petitioner’s
22 attorneys to object to the testimony. (*Id.* at 43–45.) Claim 9 alleges ineffective assistance of
23 appellate counsel. (*Id.* at 45–46.)

24 The prosecution called retired Arizona Supreme Court Justice Robert Corcoran to
25 testify during the Spencer resentencing. (RT 4/20/04 at 48.) Petitioner did not object. (*Id.*)
26 Justice Corcoran, who as a superior court judge had presided over Petitioner’s trials for the
27 Lee and Spencer murders and accepted Petitioner’s guilty plea in the Spencer case, testified
28

1 generally about the procedures involved when a defendant pleads guilty. (*Id.* at 51–52.) With
2 respect to the Spencer case, Justice Corcoran testified that, after having a colloquy with
3 Petitioner and obtaining an adequate factual basis, he accepted Petitioner’s guilty plea. (*Id.*
4 at 54–56.) Justice Corcoran further testified that Petitioner subsequently moved to withdraw
5 his guilty plea, but Corcoran denied the motion. (*Id.* at 56–57.)

6 On cross-examination, Petitioner’s counsel asked Justice Corcoran about Petitioner’s
7 statements regarding the facts of the murder. (*Id.* at 57–60.) On re-direct examination,
8 Corcoran testified that, although pleading defendants often attempt to “minimize their own
9 involvement,” Petitioner never told the court that he did not remember what happened on the
10 night of the Spencer murder. (*Id.* at 62.)

11 Petitioner contends that Justice Corcoran’s testimony was inappropriate under Rule
12 605 of the Arizona Rules of Evidence, which provides that “[t]he judge presiding at trial may
13 not testify as a witness at the trial. (Doc. 25 at 41.) Justice Corcoran was not the judge
14 presiding over Petitioner’s resentencing proceedings, so Rule 605 was not violated.

15 Petitioner further argues that the testimony was unfairly prejudicial under Rule 403
16 in that it “effectively took from the jurors their personal responsibility for Petitioner’s death
17 sentence” because Justice Corcoran “had already made that decision for them years before.”
18 (Doc. 25 at 40.) According to Petitioner, the testimony violated his due process rights. The
19 Court disagrees.

20 The due process inquiry on federal habeas review is whether the admission of
21 evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *See*
22 *Romano v. Oklahoma*, 512 U.S. 1, 12–13 (1994). “A habeas petitioner bears a heavy burden
23 in showing a due process violation based on an evidentiary decision.” *Boyde v. Brown*, 404
24 F.3d 1159, 1172 (9th Cir. 2005); *see Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir.
25 1991) (explaining that to violate the federal constitution, the admission of evidence must “so
26 fatally infect[] the proceedings as to render them fundamentally unfair.”). The Supreme
27 Court has emphasized that “it is not the province of a federal habeas court to reexamine state-

1 court determinations on state-law questions. In conducting habeas review, a federal court is
2 limited to deciding whether a conviction violated the Constitution, laws, or treaties of the
3 United States.” *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see Wilson v. Corcoran*, 131
4 S. Ct. 13, 16 (2010).

5 In *Romano*, the Supreme Court held that the admission of evidence during the
6 sentencing phase of a capital trial indicating that a different jury had sentenced the defendant
7 to death in an earlier case did not impermissibly undermine the jury’s sense of responsibility
8 for determining whether the death penalty should be imposed. 512 U.S. at 9–10. The Court
9 explained that the jury was not “affirmatively misled regarding its role in the sentencing
10 process,” and concluded that the evidence of a prior death sentence was not misleading
11 because it was neither false at the time it was admitted, nor did it pertain to the jury’s role in
12 the sentencing process. *Id.* The Court also noted that the trial judge’s instructions emphasized
13 the importance of the jury’s role. *Id.* at 9.

14 Justice Corcoran’s testimony did not address the death sentence he imposed for the
15 Spencer murder, so it did not relieve the jurors of their burden in choosing which penalty to
16 impose at resentencing. Instead, the jurors were instructed that it was their decision whether
17 death was the appropriate punishment. (RT 4/21/04 at 169–70.)

18 Trial counsel did not perform ineffectively by failing to object to Justice Corcoran’s
19 testimony because such objections would have been overruled. Appellate counsel did not
20 perform ineffectively because the underlying issue was without merit. *See Moormann*, 628
21 F.3d at 1106. Because there is no sufficiently substantial claim involved, the default of these
22 claims is not excused under *Martinez*. Claim 7, 8, and 9 are denied.

23 **Claims 10, 11, and 12**

24 Claims 10, 11, and 12 arise from the admission of allegedly improper opinion
25 testimony during the Lee resentencing. Detective Rufino Dominguez investigated the scene
26 where Lee’s body was found and was present at her autopsy. He testified that there were
27 ligature markings on Lee’s ankles and wrists and that the footprints at the scene indicated a
28

1 struggle had taken place. (RT 5/17/04 at 53–54.) The testimony supported the cruel, heinous,
2 or depraved aggravating factor.

3 In Claim 10 Petitioner contends that this testimony was inadmissible under Rule 702
4 of the Arizona Rules of Evidence because there was no indication that Detective Dominguez
5 had specialized training or knowledge qualifying him to offer expert opinions, and that
6 admission of the testimony violated Petitioner’s due process and fair trial rights. (Doc. 25 at
7 47–49.) Claims 11 and 12 allege ineffective assistance of trial and appellate counsel. (*Id.* at
8 49–50; Doc. 44 at 32–34.)

9 To be entitled to habeas relief Petitioner must show that the admission of Detective
10 Dominguez’s testimony was not merely erroneous under state law but resulted in the
11 violation of a federal right. *See Wilson*, 131 S. Ct. at 16. He has not made that showing.

12 As an initial matter, the Court finds that admission of the testimony did not violate
13 Rule 702. Under Rule 702, a witness may qualify as an expert based on his “knowledge, skill
14 experience, training, or education.” An expert witness is “one who possesses skill and
15 knowledge superior to than of men in general.” *State v. Graham*, 135 Ariz. 209, 212, 660
16 P.2d 460, 463 (1983) (quotation omitted). Detective Dominguez had been with the homicide
17 unit for 17 years, and he had viewed ligature marks on other bodies. (RT 5/17/04 at 44–45,
18 53.) His knowledge and experience as a homicide detective qualified him to testify about the
19 ligature marks and footprints. *See Graham*, 135 Ariz. at 212, 660 P.2d at 463.

20 More significantly, Petitioner cannot show that admission of such evidence was
21 fundamentally unfair and resulted in prejudice. Detective Dominguez’s opinions were
22 cumulative to other evidence. Autopsy and crime scene photographs were admitted into
23 evidence, and Dr. Keen, a medical examiner, testified that the photos showed ligature injuries
24 to Lee’s wrists. (RT 5/17/04 at 115–16.) Detective Dominguez’s testimony therefore did not
25 have a substantial and injurious effect on the jury’s verdict. *Brecht v. Abrahamson*, 507 U.S.
26 619, 637 (1993). The Arizona Supreme Court also reached this conclusion in rejecting
27 Petitioner’s Confrontation Clause challenge to Dominguez’s testimony:
28

Even without the detective's contested testimony, the jury still heard evidence that Lee suffered stab and puncture wounds to her chest, breasts, and abdomen; puncture wounds and bleeding were observed around her vulva; none of the wounds would have been fatal; she died from "asphyxiation due to airway obstruction with soil"; she had ligature marks on her wrists and ankles; there were struggle areas found at the scene; the stab wounds occurred around the time of death; the ligature marks were made before death; and a person could be conscious from forty-five seconds to several minutes while being asphyxiated. Thus, Detective Dominguez's testimony added very little to the evidence the jury already had before it to find that the murder of Lee was especially cruel, heinous, or depraved. Therefore, even if the admission of this testimony was erroneous, the error was harmless beyond a reasonable doubt.

Smith IV, 215 Ariz. at 230, 159 P.3d at 540.

Petitioner cannot show that any error from admitting Detective Dominguez's opinions was prejudicial under *Brecht*. Claim 10 is denied.

Trial counsel did not perform ineffectively by failing to object to Detective Dominguez's testimony because such objections would have been overruled. Claim 11 is therefore meritless and will be denied. Appellate counsel did not perform ineffectively because the underlying issue was without merit. *See Moormann*, 628 F.3d at 1106. Because there is no sufficiently substantial claim involved, default of the claims is not excused under *Martinez*. Claim 12 is denied.

Claims 16 and 17

In Claim 16 of his habeas petition, Petitioner alleges that his rights to counsel, to a reliable sentence, and to due process were violated when the trial court instructed the jury to consider a statutory mitigating factor, despite defense counsel's objection. (Doc. 25 at 73–77.) In Claim 17 Petitioner alleges that appellate counsel rendered ineffective assistance by failing to raise the claim on appeal. (*Id.* at 77–79.)

At the close of evidence in the Spencer and Lee resentencings, the trial court instructed the jury on the statutory mitigating factor of "significant impairment" as set forth A.R.S. § 13–751(G)(1).⁸ (RT 4/21/04 at 164; RT 5/27/04 at 8.) Defense counsel objected,

⁸ A.R.S. § 13–751(G) provides:

1 arguing that the (G)(1) factor represented a “straw horse” for the prosecution to attack and
 2 diminished the value of the other, non-statutory mitigating evidence concerning Petitioner’s
 3 mental health. (See RT 4/21/04 at 123; RT 5/26/04 at 146.)

4 In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Supreme Court held that “the Eighth
 5 and Fourteenth Amendments require that the sentencer . . . not be precluded from
 6 considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any
 7 of the circumstances of the offense that the defendant proffers as a basis for a sentence less
 8 than death.” Petitioner contends that the trial court violated *Lockett*, and violated his right to
 9 counsel, because defense counsel did not proffer, and in fact objected to, the statutory
 10 mitigating factor of significant impairment. (Doc. 25 at 74.)

11 Petitioner’s challenge to the significant impairment instruction as given by the trial
 12 court is clearly without merit. In *Boyde v. California*, 494 U.S. 370, 380 (1990), the Supreme
 13 Court instructed that the “proper inquiry in such a case is whether there is a reasonable
 14 likelihood that the jury has applied the challenged instruction in a way that prevents the
 15 consideration of constitutionally relevant evidence.” There is no such reasonable probability
 16 here, given the context of the jury instructions as a whole. See *Cupp v. Naughten*, 414 U.S.
 17 141, 146–47 (1973); *Boyde*, 494 U.S. at 383.

18 In both resentencing proceedings, jurors heard several days of testimony concerning
 19 Petitioner’s mental condition and its effect on the crimes. In addition, defense counsel
 20 questioned the expert witnesses about Petitioner’s ability to conform his conduct to the
 21

22
 23 The trier of fact shall consider as mitigating circumstances any factors
 24 proffered by the defendant or the state that are relevant in determining whether
 25 to impose a sentence less than death, including any aspect of the defendant’s
 26 character, propensities or record and any of the circumstances of the offense,
 including but not limited to the following:

27 1. The defendant’s capacity to appreciate the wrongfulness of his conduct or
 28 to conform his conduct to the requirements of law was significantly impaired,
 but not so impaired as to constitute a defense to prosecution.

1 requirements of the law. In cross-examining the state's expert witness, Dr. Moran, counsel
 2 asked whether Petitioner's mental disorder "contributed to him having a less well-established
 3 capacity to control his behaviors." (RT 4/19/04 at 42.) Dr. Moran responded, "Yes." (*Id.*)
 4 Counsel also elicited responses from Dr. Moran to the effect that Petitioner's disorder
 5 overrode "his ability to choose the right thing to do." (*Id.*) Dr. Parrish likewise testified that
 6 Petitioner's mental disorder caused "diminished control" and "overrode the other controls
 7 that he had on his behavior." (RT 5/24/04 at 30.)

8 The trial court gave the following jury instruction concerning mitigating
 9 circumstances:

10 Mitigating circumstances are circumstances that do not justify or excuse
 11 the offense, but which, in fairness or mercy, may be considered as extenuating
 12 or reducing the degree of moral culpability and punishment. Mitigating factors
 13 may be any factors presented by the defendant or the State that are relevant in
 14 determining whether to impose a sentence of less than death, including any
 aspect of the defendant's character, propensities or record and any of the
 circumstances of the offense. During this penalty phase you have heard
 evidence presented regarding the following:

15 The defendant's mental state at the time of the offense.

16 The defendant's capacity to appreciate the wrongfulness of his conduct
 17 or to conform his conduct to the requirements of law was significantly
 impaired, but not so impaired as to constitute a defense to prosecution.

18 Difficult family background.

19 Good family and interpersonal relationships and impact of execution on
 20 family.

21 Good conduct in prison.

22 (RT 4/21/04 at 168–69.) Nothing in the instruction prevented the jury from giving effect to
 23 all of the mitigating evidence it heard.

24 Petitioner contends that by instructing the jury specifically on the significant
 25 impairment mitigating circumstance, the court imposed a higher burden on the jury's
 26 consideration of mental health mitigating evidence in general. As the Supreme Court noted
 27 in *Boyde*, however, "[j]urors do not sit in solitary isolation booths parsing instructions for
 28 subtle shades of meaning in the same way that lawyers might. Differences among them in

1 interpretation of instructions may be thrashed out in the deliberative process, with
 2 commonsense understanding of the instructions in the light of all that has taken place at the
 3 trial likely to prevail over technical hairsplitting.” 494 U.S. at 381. A jury provided with the
 4 instructions excerpted above, and having heard the extensive mental health evidence
 5 presented at trial, would apply a commonsense understanding of all the mitigating evidence
 6 rather than engaging in hairsplitting over the significant impairment factor.

7 Because Petitioner cannot show that there was a “reasonable likelihood” that the jury
 8 applied the instruction in a way that prevented consideration of mitigating evidence, *Boyde*,
 9 494 U.S. at 380, the allegations in Claim 16 are without merit. Because Claim 16 is without
 10 merit, appellate counsel’s failure to raise the issue does not constitute ineffective assistance
 11 of counsel. *See Moormann*, 628 F.3d at 1106. Because the allegation of appellate counsel
 12 ineffectiveness is plainly without merit and therefore not a “substantial” claim, Petitioner’s
 13 default of the claim is not excused by post-conviction counsel’s failure to raise the claim.
 14 *Martinez*, 132 S. Ct. at 1318

15 Claims 16 and 17 are denied as procedurally defaulted and meritless.

16 **Claims 18, 19, and 20**

17 During deliberations at the Spencer resentencing, the jury sent a question to the court:
 18 “If the jury does not come to a unanimous decision, with [sic] happens? Does the case get
 19 retried?” (RT 4/22/04 at 67.) The court was unable to contact defense counsel. (*Id.* at 66.)
 20 After 30 minutes, the court decided to answer the question as follows: “This issue is not
 21 relevant for deliberations. Please follow the instructions. What happens in the future is not
 22 be [sic] considered in your deliberations.” (*Id.* at 67.) The court told Petitioner, who was
 23 present, that it would notify his lawyer. (*Id.*) The jury returned its verdict the next day. (RT
 24 4/23/04 at 4.)

25 In Claim 18 Petitioner alleges that he was denied his right to counsel at a critical stage
 26 of the proceedings in violation of *United States v. Cronin*, 466 U.S. 648 (1984). (Doc. 25 at
 27 79–82.) Claims 19 and 20 allege ineffective assistance of trial and appellate counsel. (*Id.* at
 28

1 82–86.) These claims are without merit.

2 There is no Supreme Court authority establishing that a judge’s communication with
3 a jury during deliberations constitutes a “critical stage.” *Musladin v. Lamarque*, 555 F.3d 830
4 (9th Cir. 2009). The Ninth Circuit has rejected the argument that “answering a jury question
5 or request without first consulting defendant’s counsel is structural error always requiring
6 reversal.” *United States v. Mohsen*, 587 F.3d 1028, 1031 (9th Cir. 2009). Instead, harmless
7 error review applies. *See United States v. Rosales–Rodriguez*, 289 F.3d 1106, 1110 (9th Cir.
8 2002) (applying harmless error analysis to a trial judge’s *ex parte* unsolicited note to the jury
9 with a supplemental instruction regarding the substitution of an alternate juror); *United States*
10 *v. Barragan–Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998) (applying harmless error analysis
11 to trial judge’s lack of response to a jury note); *United States v. Frazin*, 780 F.2d 1461, 1469
12 (9th Cir. 1986) (applying harmless error where trial judge responded to a note indicating the
13 jury was deadlocked with an *ex parte* instruction to continue deliberations).

14 In *Musladin*, the Ninth Circuit held that the state court was not unreasonable in
15 finding that the court’s communication to the jury, in which the judge responded to a
16 question about the meaning of “express malice” by referring the jury back to the original
17 instruction, was not a “critical stage” under *Cronic*. 555 F.3d at 842–43. Because the state
18 court’s decision not to apply *Cronic* was not objectively unreasonable, habeas relief could
19 be granted only if the denial of counsel was prejudicial. *Id.* at 843. In assessing the
20 reasonableness of the state court’s decision, the Ninth Circuit noted that “where the judge
21 simply directs the jury to his previous instructions the potential impact of defense counsel’s
22 inability to participate is significantly lessened. . . .” *Id.*

23 In applying the harmless error test, the Ninth Circuit in *Frazin* identified three relevant
24 factors: the probable effect of the message actually sent, the likelihood that the court would
25 have sent a different message had it consulted with defense counsel beforehand, and whether
26 any changes in the message that appellants might have obtained would have affected the
27 verdict in any way. 780 F.2d at 1470–71. Based on these factors it is clear that Petitioner was
28

1 not harmed by the court's response to the jury question notwithstanding defense counsel's
2 absence. The jury asked whether Petitioner would be retried if it could not reach a unanimous
3 verdict. The court responded that the question was not relevant to the jury's deliberations,
4 and referred the jurors back to the instructions. Petitioner does not suggest that defense
5 counsel, if present, could have offered a different response to the question, let alone a
6 response that would have affected the verdict.

7 Petitioner was not prejudiced when the trial judge answered the jury question in
8 counsel's absence. Claims 18 and 19 are therefore without merit and will be denied.
9 Petitioner is not entitled to habeas relief on Claim 20, alleging ineffective assistance of
10 appellate counsel, because the underlying claim is meritless. *See Moormann*, 628 F.3d at
11 1106.

12 **Claims 21 and 22**

13 In Claim 21 Petitioner alleges that there was insufficient evidence to support the
14 finding of cruelty as an aggravating factor during the re-sentencing proceedings. Specifically,
15 Petitioner argues that there was insufficient evidence that the victims were conscious prior
16 to their asphyxiation. (Doc. 25 at 86–90.) In Claim 22 Petitioner alleges that appellate
17 counsel rendered ineffective assistance in failing to raise this claim. (*Id.* at 90–91.)

18 Notwithstanding appellate counsel's failure to raise the claim, the Arizona Supreme
19 Court, in its independent review of Petitioner's death sentence, considered and rejected the
20 argument that the cruelty factor had not been proved:
21

22 The "cruelty" prong of the (E)(6) aggravator focuses on the victim's
23 mental anguish and physical suffering. A finding of cruelty requires proof that
24 the victim "consciously experienced physical or mental pain prior to death, and
25 the defendant knew or should have known that suffering would occur."

26 Spencer and Lee both died of asphyxiation after having their noses and
27 mouths filled with dirt and taped shut. They also had marks on their wrists and
28 ankles from ligatures that had been placed before death. Although the medical
examiner could not conclusively establish consciousness before they had been
bound, the tape and ligatures would have been unnecessary if the victims were
unconscious. Asphyxiation caused by stuffing a victim's nose and mouth with
dirt while bound would undoubtedly cause mental anguish and physical pain.
At a minimum, Smith should have known pain and anguish would occur.

1 Proof of cruelty is sufficient to establish the (E)(6) aggravator because
2 the aggravator is stated in the disjunctive. Because we independently conclude
3 that the murders of Spencer and Lee were cruel, we need not consider the
4 separate findings of heinousness and depravity.

5 *Smith*, 215 Ariz. at 234–35, 159 P.3d at 544–45 (citations omitted).

6 Petitioner was not prejudiced by appellate counsel’s failure to present this issue
7 because the Arizona Supreme Court would have rejected the claim if it had been raised.
8 Therefore, Claim 22 is without merit, and Petitioner is not entitled to habeas relief.

9 Likewise, Petitioner is not entitled to relief on Claim 21. The Arizona State Supreme
10 Court’s finding that the murders were especially cruel was not “so arbitrary or capricious as
11 to constitute an independent due process or Eighth Amendment violation.” *Lewis v. Jeffers*,
12 497 U.S. 764, 780 (1990); see *Styers v. Schriro*, 547 F.3d 1026, 1033 (9th Cir. 2008). “A
13 state court’s finding of an aggravating circumstance in a particular case—including a de novo
14 finding by an appellate court that a particular offense is ‘especially heinous . . . or
15 depraved’—is arbitrary or capricious if and only if no reasonable sentencer could have so
16 concluded.” *Id.* at 783 (quoting *Jackson v. Virginia*, 443 U.S. 307 (1979)). A rational
17 factfinder could have found that the victims were conscious and experienced mental and
18 physical pain at the time of their murders.

19 Claims 21 and 22 are denied.

20 **Claims 24 and 25**

21 In Claim 24 Petitioner alleges several instances of prosecutorial misconduct. (Doc.
22 25 at 100–11.) Claim 25 alleges that appellate counsel rendered ineffective assistance by
23 failing to raise these claims on direct appeal. (*Id.* at 111–12.)

24 Petitioner contends that the prosecutor committed misconduct during his cross-
25 examination of one of Petitioner’s witnesses; by vouching for the medical examiner; and by
26 various comments made during his opening statements and closing arguments, including
27 comments about the burden of proof. None of the alleged instances of misconduct entitles
28 Petitioner to habeas relief.

1 “A prosecutor’s actions constitute misconduct if they ‘so infected the trial with
2 unfairness as to make the resulting conviction a denial of due process.’” *Wood v. Ryan*, 693
3 F.3d 1104, 1113 (9th Cir. 2012) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).
4 The “appropriate standard of review for such a claim on writ of habeas corpus is ‘the narrow
5 one of due process, and not the broad exercise of supervisory power.’” *Darden*, 477 U.S. at
6 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). “On habeas review,
7 constitutional errors of the ‘trial type,’ including prosecutorial misconduct, warrant relief
8 only if they ‘had substantial and injurious effect or influence in determining the jury’s
9 verdict.’” *Wood*, 693 F.3d at 1113 (quoting *Brecht*, 507 U.S. at 637–38).

10 Cross-examination

11 Petitioner alleges that the prosecutor improperly cross-examined a defense witness.
12 (Doc. 25 at 101–02.) During the mitigation phase of the Spencer resentencing, the defense
13 offered the testimony of James Aiken, a corrections expert who discussed Petitioner’s
14 disciplinary record as a death row prisoner, which Aiken characterized as minor. Aiken
15 testified about a March 24, 1978, major violation received by Petitioner for possessing a
16 toothbrush with a blade attached to it. (RT 4/21/04 at 23.) Aiken characterized the weapon
17 as defensive, noting that it was discovered after Petitioner had been attacked by other inmates
18 earlier that month. (*Id.* at 23–24.)

19 On cross-examination, Aiken acknowledged that he was unfamiliar with the facts of
20 Petitioner’s crimes. (*Id.* at 52.) The prosecutor proceeded to question Aiken about
21 Petitioner’s use of a knife in the prior rapes and in the Spencer and Lee murders. (*Id.* at
22 55–56.) Aiken testified that these details did not change his opinion that the weapon found
23 in Petitioner’s cell was defensive in nature. (*Id.* at 56.)

24 The prosecutor’s question were well within the latitude allowed in cross examination.
25 See *Wood*, 693 F.3d at 1114. The prosecutor did not misstate or manipulate the evidence. See
26 *Darden*, 477 U.S. at 182. There was no misconduct.

27 Next, Petitioner alleges that the prosecutor improperly vouched for the work of non-
28

1 testifying medical examiners. (Doc. 25 at 102.) Dr. Phillip Keen testified at the resentencing
 2 proceedings after reviewing the work of the medical examiners who performed the Spencer
 3 and Lee autopsies, Drs. Karnitschnig and Jarvis, respectively. The prosecutor asked Dr. Keen
 4 whether Drs. Karnitschnig and Jarvis were “qualified forensic pathologists.” (RT 4/6/04 at
 5 29.) Dr. Keen testified that they were “board certified and qualified and trained and
 6 functioned as good, competent pathologists.” (*Id.*)

7 To prove a claim of improper vouching, Petitioner must show the prosecutor placed
 8 “the prestige of the government behind a witness through personal assurances of the
 9 witness’s veracity.” *United States v. Younger*, 398 F.3d 1179, 1190 (9th Cir. 2005). This
 10 colloquy with Dr. Keen about the professional qualifications of his colleagues did not
 11 constitute vouching.

12 Opening statement and closing argument

13 Petitioner next alleges that the prosecutor committed misconduct during the
 14 aggravation phase of the Spencer resentencing by making derogatory comments about the
 15 defense in closing argument. (Doc. 25 at 102–03.) In discussing the concept of reasonable
 16 doubt, the prosecutor stated that “[d]efense attorneys for many years make a career arguing
 17 reasonable doubt.” (RT 4/6/04 at 118.) He then urged the jurors to read the definition of
 18 reasonable doubt provided in the court’s instructions. (*Id.*) In his rebuttal argument the
 19 prosecutor commented, with respect to the issue of whether Spencer was conscious when she
 20 was killed, “I guess I am not trying to make light, I guess that the defense wants you to think
 21 that the defendant walked up to Sandy, and she passed out. I mean, isn’t that what we need
 22 to have her, she just passed out?” (*Id.* at 129.)

23 These comments did not constitute misconduct. Prosecutors and defense lawyers are
 24 given “wide latitude” in closing arguments. *United States v. Sayetsitty*, 107 F.3d 1405, 1409
 25 (9th Cir. 1997); see *United States v. Wilkes*, 662 F.3d 524, 538 (9th Cir. 2011). “Prosecutors
 26 have considerable leeway to strike ‘hard blows’ based on the evidence and all reasonable
 27 inferences from the evidence.” *United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2000)
 28

(citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). The prosecutor’s comments about reasonable doubt did not amount to an *ad hominem* attack on defense counsel. *See Williams v. Borg*, 139 F.3d 737, 744–45 (9th Cir. 1998) (finding no misconduct when prosecutor referred to defense’s closing argument as “trash”); *United States v. Ruiz*, 710 F.3d 1077, 1086 (9th Cir. 2013) (finding that “the prosecutor’s characterization of the defense’s case as ‘smoke and mirrors’ was not misconduct”); *Runneagle v. Ryan*, 686 F.3d 758, 781 (9th Cir. 2012) (finding no due process violation where comments merely characterized evidence).

Petitioner also cites the prosecutor’s comment that, “We’re not here to solve this crime. This was done by an independent jury” (RT 4/6/04 at 129), noting that, in fact, Petitioner pleaded guilty to the Spencer murder. (Doc. 25 at 110.) Petitioner does not indicate in what manner the prosecutor’s misstatement about how the conviction was reached could be prejudicial in the context of an argument about the existence of aggravating factors. The Court finds the comment harmless.

Petitioner also alleges that the prosecutor engaged in misconduct in his opening statement during the penalty phase of the Spencer resentencing when he commented that a sentence of less than death would amount to a “free murder” for Petitioner. (Doc. 25 at 103.) The comment was made in the context of the prosecutor’s preview of testimony from Department of Corrections witnesses, who would explain that Petitioner was already serving a life sentence for other crimes so that if a death sentence were not imposed Petitioner “would do the same time in the same place for the rest of his life, as if he had not murdered anyone.” (RT 4/19/04, a.m., at 21.) Defense counsel did not object to the comment, but later cited it in their motion for a new trial. (ROA 991.)⁹

⁹ “ROA” refers to the record on appeal from resentencing (CR-04-0208-AP). As is the general practice in this District, the original reporter’s transcripts, the trial court’s presentence report, and certified copies of the trial records were provided to this Court by the Arizona Supreme Court. (See Doc. 39.)

1 Respondents contend that the comment was not prejudicial given the jury instructions
2 provided by the court. (Doc. 30 at 124.) At the close of evidence, the court instructed the jury
3 that what the lawyers say during their opening statements and closing arguments is “not the
4 law and the evidence.” (RT 4/21/04 at 167.) The court also explained that Petitioner was
5 serving three consecutive life sentences for three rapes; that he was not eligible for release
6 until he had served 90 years in prison; that “[i]f the jury imposes a life sentence concerning
7 the murder of Sandy Spencer, then the Court will be required to sentence the defendant to
8 life in prison without eligibility for release under any circumstances until not less than 25
9 years has been served”; and that this information was not aggravating or mitigating but was
10 “being explained to you only to complete the information regarding the defendant’s current
11 and future imprisonment.” (*Id.* at 171.)

12 These instructions were sufficient to eliminate any potential prejudice from the
13 prosecutor’s comment about a “free murder.” In *Runnigeagle*, the Ninth Circuit found no
14 due process violation from the prosecutor’s statement that “[t]he evil is among us,” because
15 “before opening statements and after the close of the trial, the court instructed the jurors that
16 what the attorneys said in opening was not evidence, that they should decide the case only
17 on the evidence, and that they should not be influenced by sympathy or prejudice.” 686 F.3d
18 at 781. In *Darden*, during closing the prosecutor referred to the defendant as an “animal” and
19 said that he should not be allowed out of a cell unless he was on a leash and that he wished
20 he could see Darden “sitting here with no face, blown away by a shotgun.” 477 U.S. at
21 181–83 nn.11 & 12. The Court found that these improper statements did not deprive Darden
22 of a fair trial, because of the substantial evidence against him and because the trial court
23 instructed the jury that the arguments made by counsel were not evidence. *Id.* at 181–83; see
24 *Donnelly*, 416 U.S. at 645 (holding that an improper statement by a prosecutor during closing
25 argument did not amount to a due process violation in part because the judge instructed the
26 jury that the remark was not evidence).

27
28 Petitioner argues that the prosecutor engaged in misconduct by urging the jurors to

1 revisit the photographs of the victims, by emphasizing Petitioner's lack of remorse, and by
2 asking the jurors to put themselves in the victim Lee's place. (Doc. 25 at 108–10.) While the
3 last of these was arguably improper argument, it does not entitle Petitioner to relief. In
4 *Drayden v. White*, 232 F.3d 704, 712–14 (9th Cir. 2000), the prosecutor's closing argument
5 featured a soliloquy delivered in the murder victim's persona. The court found that the
6 performance, "as deplorable as it was," did not violate the defendant's due process rights
7 given the trial court's instruction to the jury that statements by the attorneys are not evidence
8 and that jurors must not be influenced by sympathy, passion, or prejudice. *Id.* at 713. The
9 trial court here gave similar instructions. (RT 5/27/04 at 6.)

10 Petitioner makes other allegations of misconduct, including that the prosecutor
11 improperly denigrated the defense, mischaracterized the evidence, and misstated the standard
12 for consideration of Petitioner's mental health evidence. (See Doc. 25 at 104–06.) None of
13 these merit relief. Prosecutors are allowed to strike "hard blows" based on reasonable
14 inferences from the evidence, *Henderson*, 241 F.3d at 652, and any improper or erroneous
15 statements by the prosecutor were corrected by the jury instructions.

16 Burden of proof

17 Petitioner contends that the prosecution committed misconduct during its closing
18 argument in both the Spencer and Lee resentencings when he stated that the defendant had
19 the "burden of showing mitigation sufficiently substantial to call for leniency." (RT 5/27/04
20 at 82; see, e.g., RT 4/22/04 at 6, 7.) The trial court overruled defense objections to the
21 statements. (See RT 4/22/04 at 32–33.)

22 Unlike his other allegations of prosecutorial misconduct, Petitioner raised this claim
23 in his PCR petition, together with a claim of ineffective assistance of appellate counsel. (Doc.
24 30-2, Ex. B at 20.) The PCR court denied the ineffective assistance claim, finding that
25 Petitioner was not prejudiced by counsel's failure to raise the misconduct claim because the
26 prosecutor's misstatement of the law was harmless. (*Id.*, Ex. C at 4.) The PCR court noted
27 that jurors are presumed to follow the court's instructions, which, in this case, did not place
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1 the burden on the defendant to show the mitigating evidence was sufficiently substantial to
2 call for lenience. (*Id.*) Instead, as the PCR court correctly noted, the trial court simply
3 instructed the jurors make an individual determination as to the sufficiency of the mitigating
4 evidence. (*Id.*)

5 The record shows that the trial court first instructed the jury that the defendant bore
6 the burden of proving the existence of mitigating circumstances by a preponderance of the
7 evidence. (*See* RT 4/21/04 at 167–68.) The court then explained:

8 Although a final decision on a penalty of death or life in prison must be
9 unanimous, the determination of what circumstances are mitigating and the
10 weight to be given to the mitigating circumstances is for each of you to resolve
11 individually, based upon all the evidence that has been presented in both the
12 aggravation and penalty phases. You must individually determine the nature
13 and extent of the mitigating circumstances. Then, in light of all the aggravating
circumstances that have been proved to exist, you must individually determine
if the totality of the mitigating circumstances is sufficiently substantial to call
for leniency and a life sentence. You must not weigh each mitigating
circumstance against each aggravating circumstance.

14 (*Id.* at 169–70.) As noted, the court also instructed the jury that the arguments of counsel are
15 not the law. (*Id.* at 167.)

16 In denying defense counsel’s objections to the prosecutor’s statement concerning the
17 burden of proof, the trial judge explained that, while he had removed such language from his
18 instructions, he believed the prosecutor did not misstate the law by placing the burden on the
19 defendant. (RT 4/22/04 at 32.)

20 As the PCR court noted, in 2005, after Petitioner’s resentencing, the Arizona Supreme
21 Court, in *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 471, 123 P.3d 662, 665
22 (2005), rejected the State’s request that it approve an instruction placing on the defendant the
23 burden of proving the mitigating evidence sufficiently substantial to call for lenience. The
24 court clarified that there is no “affirmative duty on the defendant to prove that mitigation is
25 sufficiently substantial to call for leniency.” *Id.* The court further explained “that the
26 determination whether mitigation is sufficiently substantial to warrant leniency is not a fact
27 question to be decided based on the weight of the evidence, but rather is a sentencing
28

1 decision to be made by each juror based upon the juror's assessment of the quality and
2 significance of the mitigating evidence that the juror has found to exist." *Id.* at 473, 123 P.3d
3 at 667.

4 In reaching its conclusion that Petitioner was not prejudiced by the prosecutor's
5 comments, the PCR court relied on *State v. Tucker*, 215 Ariz. 298, 316, 160 P.3d 177, 196
6 (2007), which held that the trial court did not commit structural or fundamental error when
7 it instructed the jury during the penalty phase of a capital murder trial that the defendant had
8 the burden to prove that the mitigation evidence was sufficiently substantial to call for
9 leniency. The court explained that the instruction did not reduce the State's burden of proof
10 or preclude the jurors from considering relevant mitigation evidence. *Id.*

11 The Court finds that Petitioner's rights were not violated by the prosecutor's
12 comments about the burden of proof and that the state court's denial of this claim was not
13 objectively unreasonable. The trial court properly instructed the jurors to "individually
14 determine the nature and extent of the mitigating circumstances" and "individually determine
15 if the totality of the mitigating circumstances is sufficiently substantial to call for leniency
16 and a life sentence." (See RT 4/21/04 at 169–70.)

17 Summary

18 Finally, the Court concludes that the cumulative impact of each of the incidents of
19 alleged prosecutorial misconduct did not violate Petitioner's right to a fair trial. "Even when
20 separately alleged incidents of prosecutorial misconduct do not independently rise to the
21 level of reversible error, "[t]he cumulative effect of multiple errors can violate due process.'" *Wood*, 693 F.3d at 1116 (quoting *United States v. Nobari*, 574 F.3d 1065, 1082 (9th Cir.
22 2009)). Here, however, Petitioner's allegations of prosecutorial misconduct do not rise to the
23 level of a due process violation even when considered in the aggregate.

24 In sum, the allegations of prosecutorial misconduct set forth in Claim 24 lack merit.
25 Appellate counsel did not perform at a constitutionally ineffective level by failing to raise
26 them. Claims 24 and 25 are therefore denied.
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1 **Claim 26**

2 Petitioner alleges that his rights to a fair and impartial jury were violated by the jury's
3 consideration of extraneous evidence during deliberations. (Doc. 25 at 113–14.) He seeks
4 discovery and expansion of the record to include the transcript of the related hearing. (Doc.
5 42 at 24–46.) Respondents do not oppose expanding the record to include the transcript, and
6 the Court will grant the request. (Doc. 43 at 19.)

7 Petitioner did not raise this claim on appeal. However, Respondents do not assert that
8 the claim is procedurally defaulted and therefore waive the affirmative defense of procedural
9 default. *Franklin v. Johnson*, 290 F.3d 1223, 1229–32 (9th Cir. 2002).

10 On June 10, 2004, the trial court contacted counsel to inform them that the jury
11 commissioner's office had received a call about possible juror misconduct in the Lee
12 resentencing. (ROA 1083.) Petitioner filed a motion for a new trial, which included an
13 allegation of juror misconduct based on the above information. (*Id.*) The motion stated that
14 someone in the jury commissioner's office reported an anonymous call from an individual
15 whose spouse observed a juror discussing the case with a co-worker. (*Id.* at 2.) Counsel
16 indicated that he had identified the juror, Craig Abney, but not the co-worker and the witness
17 to the conversation, and asked for additional time to investigate the claim. (*Id.*)

18 On July 15, 2004, Petitioner supplemented his motion for new trial regarding the juror
19 misconduct allegation. (ROA 1085.) On September 10, 2004, the trial court held an
20 evidentiary hearing. Two of Abney's co-workers provided hearsay testimony that he had
21 spoken about the case at work. (*See* Doc. 42-1, Ex. A, transcript of 9/10/04 hearing.)
22 Specifically, they testified that Abney told a co-worker, during the jury selection phase of the
23 Lee trial, that he found some of the attorneys' questions "kind of stupid." (*Id.*) While the trial
24 was ongoing, a co-worker asked Abney if Petitioner was guilty and Abney responded in the
25 affirmative. After Abney was discharged, a co-worker asked him, "Did you fry the bastard?"
26 Abney replied, "Yes." (*Id.*)

27 In a minute entry following the hearing, the trial court assumed that Abney had made
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1 the statements but found “no showing that these comments, made during jury selection, near
2 the end of the trial and after the trial concluded, either actually prejudiced the jury
3 proceedings against the defendant or were such that prejudice could fairly be presumed from
4 the facts.” (Doc. 40-7 at 82.) Although Abney had “apparently violated the court’s
5 admonition by commenting on the case during the ongoing trial,” the court concluded that
6 “there is absolutely no evidence that he received or considered any extrinsic evidence, or that
7 his comments about the jury selection process and that the defendant was guilty in any way
8 tainted his conduct as a juror.” (*Id.*)

9 Petitioner seeks to depose Abney and two of his co-workers who did not testify at the
10 evidentiary hearing in state court. (Doc. 42 at 25–26.) Respondents object to this discovery
11 on the grounds that the consideration of new evidence concerning this claim is barred under
12 *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). (Doc. 43 at 19–20.) The Court agrees.
13 Petitioner is not entitled additional discovery because his claim of jury misconduct was
14 adjudicated on the merits in state court. Under *Pinholster*, review of such claims “is limited
15 to the record that was before the state court that adjudicated the claim on the merits.” *Id.* at
16 1388; *see, e.g., Wood*, 693 F.3d at 1122.

17 Petitioner contends that he is entitled to discovery because he has demonstrated, under
18 28 U.S.C. § 2254(d)(1), that the state court’s resolution of this claim was contrary to or an
19 unreasonable application of clearly established federal law. The Court disagrees. Petitioner
20 has not shown that there is “no reasonable basis” for the trial court’s ruling, as required under
21 § 2254(d)(1). *Pinholster*, 131 S. Ct. at 1402; *see Harrington v. Richter*, 131 S. Ct. 770,
22 786–87 (2011) (explaining that “a state prisoner must show that the state court’s ruling on
23 the claim being presented in federal court was so lacking in justification that there was an
24 error well understood and comprehended in existing law beyond any possibility for
25 fairminded disagreement”).¹⁰

26
27
28 ¹⁰ In addition, Petitioner has not shown “good cause” for discovery, as required by
Rule 6 of the Rules Governing § 2254 Cases in the United States District Courts. He has

Petitioner identities no clearly established federal law holding that a defendant's right to a fair and impartial jury is violated under the circumstances of this case, where a juror disobeyed the admonition not to discuss the case but where there was no consideration of extrinsic evidence or other misconduct. Petitioner fails to show that the state court erred, let alone was objectively unreasonable, in its application of *Turner v. Louisiana*, 379 U.S. 466 (1965); *Remmer v. United States*, 347 U.S. 227 (1954); and *Mattox v. United States*, 146 U.S. 140 (1892). As the Ninth Circuit recently explained, in rejecting a habeas claim based on juror misconduct, "The Supreme Court . . . has found juror misconduct to warrant reversal in cases involving *extended* external influences on jurors or confirmed juror *bias*—neither of which is present here." *Henry v. Ryan*, 720 F.3d 1073, 1086 (9th Cir. 2013).

Claim 26 is denied. Discovery is denied. The record will be expanded to include the transcript of the September 10, 2004, hearing.

Claim 27

Petitioner alleges that he was denied his right to meaningful appellate review because the record on appeal did not include the transcript from the juror misconduct hearing. (Doc. 25 at 115.) Petitioner argues that the lack of a transcript prevented effective appellate advocacy and prevented the Arizona Supreme Court from conducting an adequate review of his death sentences. The Court disagrees.

Petitioner has the burden of establishing prejudice from the lack of a complete transcript in light of the alleged value of the transcript and the availability of alternatives that would fulfill the same functions. *Madera v. Risley*, 885 F.2d 646, 648–49 (9th Cir. 1989); see *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994) (explaining that when court reporter failed to record all proceedings verbatim, defendant had to demonstrate specific prejudice resulted to obtain reversal); *White v. State of Florida, Department of Corrections*, 939 F.2d 912, 914 (11th Cir. 1991) ("in a federal habeas corpus case brought by a state

failed to offer specific allegations showing that, if the facts are fully developed regarding this claim, he would be entitled to relief. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

1 prisoner, the absence of a perfect transcript does not violate due process absent a showing
2 of specific prejudice”); *Bransford v. Brown*, 806 F.2d 83, 85 (6th Cir. 1986) (“in order to
3 demonstrate denial of a fair appeal, petitioner must show prejudice resulting from the missing
4 transcripts”).

5 Petitioner has failed to show any “specific prejudice” resulting from the omission of
6 records on appeal. First, the lack of transcript did not prevent appellate counsel from raising
7 the issue of juror misconduct. The record contained trial counsel’s motion for a new trial and
8 the trial court’s minute entry following the evidentiary hearing. Moreover, as discussed
9 above, in denying the motion for a new trial, the court accepted as true the testimony
10 presented in the hearing but found that Petitioner was not deprived of a fair trial. (Doc. 40-7
11 at 82, ME 9/10/04.) Finally, while the hearing has recently been transcribed (Doc. 42-1, Ex.
12 A), Petitioner does not contend that the transcript, had it been available, would have affected
13 the Arizona Supreme Court’s review of Petitioner’s death sentences.

14 Claim 27 is without merit and will be denied.

15 **Claim 28**

16 Petitioner alleges that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by
17 failing to disclose information material to his resentencing proceedings. (Doc. 25 at 118.)
18 Petitioner never presented this claim to the state courts. He seeks to excuse his default of the
19 claim by alleging ineffective assistance of PCR counsel under *Martinez*. (*Id.* at 119.)
20 Petitioner acknowledges that he can offer no support for the allegations in Claim 28. (Doc.
21 44 at 99.) Because Petitioner has provided no support for either a *Brady* claim or a claim that
22 PCR performed ineffectively, *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995); *James v.*
23 *Borg*, 24 F.3d 20, 26 (9th Cir. 1994), Claim 28 is denied.

24 **Claim 31**

25 Petitioner alleges that the “numerous errors committed during [his] re-sentencing
26 proceedings cumulatively produced a proceeding that was fundamentally unfair and violated
27 his due process.” (Doc. 25 at 126.) Petitioner asserts that his default of the claim is excused
28

1 by the ineffective performance of appellate and PCR counsel. (Doc. 44 at 104–05.)

2 Respondents contend that there is no clearly established federal law entitling a
3 petitioner to habeas relief under the doctrine of cumulative error. (Doc. 30 at 142.) Petitioner
4 cites *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007), in which the Ninth Circuit, quoting
5 *Donnelly*, 416 U.S. at 643, held that cumulative error warrants habeas relief where the errors
6 “so infected the trial with unfairness as to make the resulting conviction a denial of due
7 process.”

8 Petitioner is not entitled to relief on this claim because, as explained throughout this
9 order, there were no constitutional errors affecting his due process rights. *See Mancuso v.*
10 *Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002). (“Because there is no single constitutional error
11 in this case, there is nothing to accumulate to the level of a constitutional violation.”); *cf.*
12 *Parle*, 505 F.3d at 928 (“If the evidence of guilt is otherwise overwhelming, the errors are
13 considered ‘harmless’ and the conviction will generally be affirmed.”).

14 Because Petitioner’s cumulative error claim is meritless, appellate counsel was not
15 ineffective for failing to raise it and PCR counsel was not ineffective for failing to raise a
16 claim of ineffectiveness of appellate counsel. Claim 31 is denied.

17 **II. EXHAUSTED CLAIMS**

18 These claims are governed by the Antiterrorism and Effective Death Penalty Act
19 (“AEDPA”). Pursuant to 28 U.S.C. § 2254(d), a petitioner is not entitled to habeas relief on
20 any claim unless the state court’s adjudication of the claim:
21

22 (1) resulted in a decision that was contrary to, or involved an unreasonable
23 application of, clearly established Federal law, as determined by the Supreme
Court of the United States; or

24 (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.

25 The Supreme Court has emphasized that “an *unreasonable* application of federal law
26 is different from an *incorrect* application of federal law.” *Williams v. Taylor*, 529 U.S. 362,
27 410 (2000). Thus, “a federal habeas court may not issue the writ simply because that court
28

concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 411. Rather, that application must be “objectively unreasonable.” *Id.* at 409. This distinction creates “a substantially higher threshold” for obtaining relief than *de novo* review. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). AEDPA thus imposes a “highly deferential standard for evaluating state-court rulings,” *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), and “demands that state-court decisions be given the benefit of the doubt,” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Richter*, 131 S. Ct. at 785–86.

Claim 4

Petitioner alleges that the trial court violated his right to a fair and impartial jury by improperly limiting the scope of *voir dire* and inappropriately rehabilitating prospective jurors. (Doc. 25 at 22.) Petitioner raised this claim on direct appeal, and the Arizona Supreme Court denied it. *Smith IV*, 215 Ariz. at 230–32, 159 P.3d at 540–42.

Background

Prior to the Spencer resentencing, the State filed a motion requesting the court to prohibit the defense from asking prospective jurors about specific types of mitigation or aggravation, while Petitioner moved for individual, sequestered *voir dire* and the opportunity for defense counsel “to examine potential jurors with sufficient latitude to satisfy constitutional requirements.” (ROA 793, 802.) The trial court issued an order noting its responsibilities under *Morgan v. Illinois* and proposing to “thoroughly examine potential jurors” and allow the parties “reasonable time to conduct individual *voir dire* of potential jurors,” as provided by Rule 18.5 of the Arizona Rules of Criminal Procedure. (ROA 865 at 1–2.) The court prohibited “questions of potential jurors that will elicit their views on specific types of aggravating or mitigating circumstances,” and questions about case-specific information intended to “groom” or “condition” the potential jurors or commit them to taking

1 certain positions. (*Id.* at 2.) The court stated that it would “do all that is reasonable and
2 appropriate to insure all concerned, that the jury selected will act fairly and impartially,
3 follow the law and base their decisions solely on the evidence presented.” (*Id.*)

4 The court also ruled, with respect to its use of a juror questionnaire, that the questions
5 could not delve “into their feelings about specific aggravators and mitigators.” (RT 3/18/04
6 at 134.) Petitioner objected, arguing that the questionnaire should include questions about
7 specific mitigating evidence, particularly mental health evidence, rather than questions “in
8 the abstract.” (*Id.* at 134–38.) The court advised the parties that it was his “responsibility to
9 see if the jury can fairly and impartially follow the law with obvious opportunity for you and
10 the State to ask additional questions.” (*Id.* at 142.) The court promised that “[w]e are going
11 to do it right, no matter what it takes, one day or ten days.” (*Id.* at 145.)

12 Prospective jurors filled out a 22-page questionnaire. As *voir dire* proceeded the court
13 reiterated that the parties were not to ask about particular aggravating or mitigating
14 circumstances. (RT 3/24/04 at 80–90. at 91.) When defense counsel requested more
15 specificity about the proper scope of questioning, the court cited *United States v. McVeigh*,
16 153 F.3d 1166 (10th Cir. 1998), and advised counsel that it would interrupt if a party asked
17 an inappropriate question, whether or not the opposing party had objected. (*Id.* at 93–95.)
18 Petitioner submitted a list of proposed questions; the trial court found all but one to be
19 improper. (RT 3/25/04 at 15–18.)

20 The court presided over the initial individual questioning of prospective jurors. (RT
21 3/25/04.) The next day, however, the court decided to proceed with group *voir dire*, rather
22 than individual *voir dire*, unless the latter was necessitated by a potential juror’s answers.
23 (RT 3/26/04 at 3–4.) The court indicated that it was changing procedures to elicit more
24 informative answers, not to save time. (*Id.* at 5–6, 8.) The court also stated that it would “do
25 the bulk of *voir dire*.” (*Id.* at 12.)

26 During *voir dire* the court explained the law concerning aggravation and mitigation,
27 questioned the prospective jurors based on information from their questionnaire answers, and
28

1 allowed the parties to question the prospective jurors. Jury selection in the Spencer case
 2 lasted seven days. The Lee jury selection, following the same procedures, took six days.

3 Analysis

4 The Arizona Supreme Court first addressed Petitioner's claim that the trial court's
 5 limitations on the questioning of prospective jurors violated *Morgan v. Illinois*, 504 U.S. 719,
 6 which held that potential jurors must be asked whether they would automatically impose the
 7 death penalty if a defendant is found guilty. The court rejected Petitioner's claim:

8 Although there is no "catechism for *voir dire*," the defendant's right to
 9 an impartial jury nonetheless requires "adequate *voir dire* to identify
 10 unqualified jurors." *Id.* at 729. The Court further held that simply asking
 11 potential jurors whether they can follow the law and be fair and impartial is
 12 insufficient. *Id.* at 735–36.

13 *Morgan*, however, does not require that Smith be permitted to ask the
 14 questions that he claims were improperly limited. First, we have previously
 15 held that a trial court may prohibit a defendant from asking potential jurors
 16 about their understanding of the phrase "sufficiently substantial to call for
 17 leniency." Such questioning is not allowed because the phrase is necessarily
 18 subjective. *Id.* Moreover, the manner in which Smith's counsel posed the
 19 question improperly asked the potential jurors, without having heard any of the
 20 evidence, to opine on what it would take to meet that standard.

21 Second, the superior court did not abuse its discretion in refusing to
 22 allow Smith's open-ended questions about the best reason for having or not
 23 having the death penalty, the importance of considering mitigation, and the
 24 type of offense for which the juror would consider death to be appropriate.
 25 Each of these questions was quite broad and went well beyond the
 26 constitutionally required determination of whether the juror would consider
 27 mitigation.

28 Finally, Smith complains that he was not permitted to ask jurors
 whether they would automatically impose the death penalty if they found
 specific aggravators. *Morgan* was not meant to allow a defendant to "ask a
 juror to speculate or precommit on how that juror might vote based on any
 particular facts." *United States v. McVeigh*, 153 F.3d 1166, 1207 (10th Cir.
 1998). Defendants also cannot seek to "condition" or "commit [jurors] to
 certain positions prior to receiving the evidence." Smith's question attempted
 to do just that. . . .

In addition, *Morgan* does not, as Smith seems to contend, prohibit the
 trial court from asking jurors whether they will follow the law. As long as
 counsel has sufficient opportunity to determine whether a particular juror
 would automatically impose the death penalty upon a guilty verdict, such
 general questioning may occur without running afoul of the mandate of
Morgan. 504 U.S. at 736. Smith had several opportunities to determine
 whether any of the jurors would automatically impose death. The jurors filled

1 out questionnaires, which contained the *Morgan* question, along with other
 2 questions about the death penalty, and Smith had ample opportunity to
 3 question potential jurors—including asking some jurors the very questions that
 he complains were limited.

4 *Smith IV*, 215 Ariz. at 230–32, 159 P.3d at 540–42 (citations omitted).

5 The court next considered and rejected Petitioner’s claim that the trial judge “abused
 6 his discretion by interrupting *voir dire* and ‘rehabilitating’ potential jurors.” *Id.* at 231, 159
 7 P.3d at 541. The court noted that Petitioner “had multiple opportunities to question the
 8 potential jurors to determine whether they would automatically impose the death penalty”
 9 and that the “interruptions consisted almost entirely of explanations of the law and
 10 clarification of the questions being asked or answers being given.” *Id.* Citing *Wainwright v.*
 11 *Witt*, 469 U.S. 412, 435 (1985), the court explained that “a judge may interject to make
 12 certain a juror understands the legal requirements for service, the law on a particular subject,
 13 and the question being asked”; therefore, the judge’s “interjections were permissible and did
 14 not amount to an abuse of discretion.” *Id.* Finally, the court found no abuse of discretion
 15 because “Smith fails to offer any examples of deliberating jurors whom the trial judge
 16 improperly rehabilitated to support his argument that automatic death jurors sat on either
 17 jury.” *Id.* at 231–32, 159 P.3d 541–42.

18 Petitioner contends that the Arizona Supreme Court unreasonably applied *Morgan* by
 19 requiring him to identify a deliberating juror who was improperly rehabilitated by the judge.
 20 (Doc. 25 at 30; see Doc. 44 at 14–15.) The Court disagrees with this characterization of the
 21 Arizona Supreme Court’s decision and its application of *Morgan*.

22 A defendant is entitled to “a fair trial by a panel of impartial, indifferent jurors,”
 23 which, under *Morgan*, requires “an adequate *voir dire* to identify unqualified jurors,”
 24 including those who would “impose death regardless of the facts and circumstances of the
 25 conviction.” 504 U.S. at 727, 729, 736. “If even one such juror is empaneled and the death
 26 sentence is imposed, the State is disentitled to execute the sentence.” *Id.* at 729 (emphasis
 27 added).
 28

1 The Arizona Supreme Court found that the trial court allowed adequate *voir dire* and
 2 that the limits placed on the questions Petitioner sought to ask did not prevent him from
 3 identifying so-called “automatic death jurors.” The trial court used a juror questionnaire that
 4 contained the *Morgan* questions. The court questioned the jurors and allowed the parties to
 5 conduct additional *voir dire*. Petitioner contends that the court inappropriately rehabilitated
 6 prospective jurors. In rejecting this claim, the Arizona Supreme Court correctly noted that
 7 Petitioner has not identified any such jurors. *See Morgan*, 504 U.S. at 729; *Ross v.*
 8 *Oklahoma*, 487 U.S. 81, 85 (1988) (“[a]ny claim that the jury was not impartial” rests “on
 9 the jurors who ultimately sat”); *United States v. Mitchell*, 502 F.3d 931, 954 (9th Cir. 2007).

10 The Arizona Supreme Court’s denial of this claim was not contrary to or an
 11 unreasonable application of clearly established federal law, nor was it based on an
 12 unreasonable determination of the facts. 28 U.S.C. 2254(d); *see Richter*, 131 S. Ct. at
 13 786–87. Petitioner is not entitled to habeas relief. Claim 4 is denied.

14 **Claim 13**

15 Petitioner alleges that he was denied his constitutional right to confront witnesses at
 16 the Lee resentencing when the court admitted (1) Dr. Keen’s testimony about the condition
 17 of Lee’s body and (2) Detective Dominguez’s testimony about another police officer’s report.
 18 (Doc. 25 at 51.) Petitioner raised this claim on direct appeal, and it was rejected by the
 19 Arizona Supreme Court. *Smith IV*, 215 Ariz. at 228–230, 159 P.3d at 538–40.

20 In his petition for post-conviction relief, Petitioner again raised a claim alleging that
 21 his Confrontation Clause rights were violated by Dr. Keen’s testimony. (Doc. 30-2, Ex. B
 22 at 13–19.) The PCR court denied the claim. (*Id.*, Ex. C at 2–3.)

23 Background

24 The state offered the testimony of Dr. Keen and Detective Dominguez in support of
 25 the cruel, heinous, or depraved aggravating factor.
 26

27 Prior to resentencing proceedings the parties were able to locate the full report of the
 28 Spencer autopsy, which was performed by Dr. Jarvis, but only the one-page cover sheet from

1 the Lee autopsy, performed by Dr. Karnitschnig. The remaining portion of the report, filled
2 out according to a specific and detailed autopsy protocol, had been lost or destroyed. (RT
3 2/17/04 at 108.)

4 The State proposed calling Dr. Phillip Keen, the Chief Medical Examiner for
5 Maricopa County, to testify in lieu of Drs. Jarvis and Karnitschnig.¹¹ Petitioner opposed the
6 request. (ROA at 777). The trial court preliminarily ruled that Dr. Keen could testify about
7 Dr. Karnitschnig's findings because they were offered to explain Dr. Keen's own findings
8 and opinions, not to prove the truth of matters asserted by Dr. Karnitschnig. (ROA 865.)

9 Before the Lee resentencing began, Petitioner moved to preclude testimony from Dr.
10 Keen and Detective Dominguez. The court ruled that Dr. Keen could testify about his own
11 opinions, and, to the extent that he did so, could testify in reliance on Dr. Karnitschnig's
12 findings and opinions. (ROA 1018.) The court rejected Petitioner's Confrontation Clause
13 claim, based on *Crawford v. Washington*, 541 U.S. 36 (2004), finding the statements were
14 non-hearsay. (*Id.* at 2.) The court also ruled that Detective Dominguez could testify about
15 statements that Dr. Karnitschnig made during the Lee autopsy. (*Id.*) It found that Dr.
16 Karnitschnig's statements themselves were admissible as a present sense impression under
17 Rule 803(1) of the Arizona Rules of Evidence. (*Id.*)

18 Detective Dominguez testified about his own observations of Lee's body at the crime
19 scene. (RT 5/17/04 at 45–52.) Lee was completely nude, and there were stab wounds in the
20 abdominal area and ligature marks around the ankles and wrists. (*Id.* at 53-54, 78.) He
21

22
23 ¹¹ The trial court took judicial notice that Dr. Jarvis was deceased. (RT 3/18/04 at 18.)
24 In fact, Dr. Jarvis was still alive at the time of resentencing. The prosecutor informed the
25 court that Dr. Karnitschnig had retired and was located outside of Maricopa County. (ROA
26 754 at 2.) Dr. Karnitschnig had testified at the original trial and sentencing. (RT 5/11/04 at
27 12–13.) The prosecutor conceded that the doctor was not legally unavailable, but explained
28 that, based on the prosecutor's personal knowledge, the doctor was unlikely to honor a
subpoena. (*Id.* at 15.)

1 testified that he and his partner, Detective Paul, attended the Lee autopsy on February 3,
2 1976. (*Id.* at 50, 55–58, 62, 76.) Detective Paul took notes. (*Id.* at 58.) As Dr. Karnitschnig
3 assessed the body, he commented on her injuries, including measurements, which Detective
4 Paul wrote down. (*Id.* at 59–60.) After Detective Paul prepared his report, Detective
5 Dominguez read it, found that it accurately reflected Dr. Karnitschnig’s statements, adopted
6 it as his own, and signed it. (*Id.* at 62, 77–78; *see* ROA 1007, second attachment.) Detective
7 Dominguez testified that he independently remembered the various injuries described by Dr.
8 Karnitschnig and only relied on the written report for measurements of Lee’s wounds. (*Id.*
9 at 61.)

10 Petitioner renewed his objections to the testimony. (*Id.* at 82–84.) The court overruled
11 the objections on the grounds that Detective Dominguez had “co-authored the report,” and
12 thus had refreshed his memory with his own recorded recollection, and that Dr.
13 Karnitschnig’s statements themselves were admissible as present sense impressions. (*Id.* at
14 89–91.)

15 Dr. Keen testified that he had reviewed autopsy and crime scene photographs and Dr.
16 Karnitschnig’s testimony from prior proceedings, as well as the cover sheet of the missing
17 autopsy report, on the back of which Dr. Karnitschnig had written his summary findings from
18 the Lee autopsy. (RT 5/17/04 at 105.) Dr. Keen explained that these materials are “things that
19 are generally relied on upon by experts in [his] field to generate opinions.” (*Id.* at 107.)

20 Dr. Keen further testified that he had independently verified the existence of the
21 wounds he observed in the photographs, relying on Dr. Karnitschnig’s prior testimony for
22 measurements of the wounds, which typically are found in the autopsy report. (*Id.* at 109,
23 131.) Concurring with Dr. Karnitschnig’s findings, Dr. Keen concluded that Lee died from
24 “asphyxiation due to airway constriction with soil,” because none of her other injuries would
25 have resulted in death. (*Id.* at 112, 127, 128, 132–33, 137–38.) He testified that loss of
26 consciousness from suffocation can take from 45 seconds to several minutes. (*Id.* at 137.)

27 From his own review of the autopsy photographs, Dr. Keen concluded that Lee had
28

1 at least two “rather sizeable stab wounds in the upper gastric region of the abdomen.” (*Id.* at
2 113.) The photographs also showed stabbing injuries around Lee’s vulva. (*Id.* at 124–26.) Dr.
3 Keen opined that the stab wounds and the suffocation occurred around the time of death. (*Id.*
4 at 127, 135.) The photographs also showed ligature injuries to Lee’s wrists. (*Id.* at 114–16.)

5 Petitioner moved to strike Dr. Keen’s testimony in its entirety. (RT 5/17/04 at 142.)
6 The trial court denied the motion, explaining that Dr. Keen had specifically differentiated
7 “whether it was his independent opinion versus what it wasn’t his opinion.” (*Id.*) The court
8 also ruled that Dr. Keen had reasonably relied on Dr. Karnitschnig’s prior testimony, the
9 police report, and the autopsy photographs. (*Id.*) The court agreed to give a cautionary
10 instruction that had been requested by the defense. (*Id.* at 144–45, 150–51.)

11 After the State rested, Petitioner renewed his objections and moved to strike all of
12 Detective Dominguez’s testimony and part of Dr. Keen’s testimony, with the exception of
13 his testimony about Lee’s chest wounds and the contusions on her wrists and ankles. (RT
14 5/18/04 at 10.) The trial court again denied the motions (*Id.* at 20–21.) However, the court
15 gave the jury the following limiting instruction: “Dr. Phillip Keen has testified regarding his
16 findings regarding certain wounds on Neva Lee’s body and the cause of Neva Lee’s death.
17 The information relied upon by Dr. Keen is not evidence and you cannot consider it as such.”
18 (RT 5/18/04 at 29.)

19
20 Analysis: Detective Dominguez’s testimony

21 The Arizona Supreme Court held that the testimony from Dr. Keen did not violate the
22 Confrontation Clause and that the admission of testimony from Detective Dominguez, even
23 if erroneous, was harmless.

24 With respect to Detective Dominguez’s testimony, the court first noted that the police
25 report and the statements made by the medical examiner during the autopsy both qualified
26 as hearsay exceptions, the former as a recorded recollection under Rule 803(5) and the latter
27 as a present sense impression under Rule 803(1). *Smith IV*, 215 Ariz. at 229, 159 P.3d at 539.

28 Turning to Petitioner’s Confrontation Clause claim, the court reasoned that,

1 “[b]ecause . . . any potential error in admitting the testimony was harmless beyond a
 2 reasonable doubt, we need not decide whether admission of Detective Dominguez’s
 3 statements violated the Confrontation Clause.” *Id.* The court explained:

4 Even without the detective’s contested testimony, the jury still heard
 5 evidence that Lee suffered stab and puncture wounds to her chest, breasts, and
 6 abdomen; puncture wounds and bleeding were observed around her vulva;
 7 none of the wounds would have been fatal; she died from “asphyxiation due
 8 to airway obstruction with soil”; she had ligature marks on her wrists and
 9 ankles; there were struggle areas found at the scene; the stab wounds occurred
 10 around the time of death; the ligature marks were made before death; and a
 person could be conscious from forty-five seconds to several minutes while
 being asphyxiated. Thus, Detective Dominguez’s testimony added very little
 to the evidence the jury already had before it to find that the murder of Lee
 was especially cruel, heinous, or depraved. Therefore, even if the admission
 of this testimony was erroneous, the error was harmless beyond a reasonable
 doubt.

11 *Id.* at 229–30, 159 P.3d at 539–40 (citations omitted).

12 The Arizona Supreme Court’s ruling was not contrary to or an unreasonable
 13 application of clearly established federal law, nor was it based on an unreasonable
 14 application of the facts. A petitioner’s claim that his confrontation rights were violated is
 15 subject to harmless error analysis. *See, e.g., Bullcoming v. New Mexico*, 131 S. Ct. 2701,
 16 2719 n.11 (2011); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Winzer v. Hall*, 494
 17 F.3d 1192, 1201 (9th Cir. 2007) (“Violation of the Confrontation Clause is trial error subject
 18 to harmless-error analysis . . . because its effect can be ‘quantitatively assessed in the context
 19 of other evidence presented’ to the jury.”). Thus, Petitioner would be entitled to habeas relief
 20 only if the Confrontation Clause error had a “substantial and injurious effect or influence in
 21 determining the jury’s verdict.” *Brecht*, 507 U.S. at 637; *see also Fry v. Pliler*, 551 U.S. 112,
 22 121 (2007) (explaining that on federal habeas review, courts must assess the prejudicial
 23 impact of constitutional error in a state court criminal trial under the *Brecht* standard).

24 Even without Detective Dominguez’s testimony about the autopsy, there was
 25 sufficient evidence concerning the circumstances of Lee’s death, particularly the nature of
 26 her wounds and the manner in which she was killed, as evidenced by the autopsy
 27 photographs and Dr. Keen’s testimony, for the jury to find that the murder was committed
 28

1 in an especially cruel, heinous, or depraved manner. Detective Dominguez's testimony
 2 relating statements made by Dr. Karnitschnig's during the autopsy did not have a substantial
 3 and injurious effect on the jury's verdict.

4 Analysis: Dr. Keen's testimony

5 The Arizona Supreme Court rejected Petitioner's claim that Dr. Keen's testimony was
 6 inadmissible hearsay and violated his right to confront the previous medical examiner. The
 7 court first explained that the testimony was admissible under Rule 703:

8 Expert testimony that discusses reports and opinions of another is
 9 admissible under this rule if the expert reasonably relied on these matters in
 10 reaching his own conclusion. Such testimony is not hearsay because it is
 11 offered not to prove the truth of the prior reports or opinions, but rather is
 12 offered only to show the basis of the testifying expert's opinion. A testifying
 13 expert, however, may not act as a "conduit for another non-testifying expert's
 opinion." Smith contends, with respect to Dr. Keen's testimony on the cause
 of death, size of wounds, and timing of infliction, that Dr. Keen acted as a
 conduit for the prior medical examiner's opinion.

13 . . .

14 Thus, Dr. Keen was not a mere conduit for the opinions of the prior
 15 medical examiner; rather, his ultimate opinions were independent of the
 16 testimony of the prior medical examiner. Because the underlying data and
 opinions were used to show the basis for these conclusions, and not to prove
 the truth of the matters asserted, there was no hearsay problem.

17 *Smith IV*, 215 Ariz. at 228, 159 P.3d at 538. (citations omitted).

18 The court also concluded that because Dr. Keen's testimony was not used to prove the
 19 truth of the matter asserted, Petitioner's Confrontation Clause rights were not violated. *Id.*
 20 at 229, 159 P.3d at 539. In reaching this determination, the court cited *Crawford*, which held
 21 that the Confrontation Clause bars the "admission of testimonial statements of a witness who
 22 did not appear at trial unless he was unavailable to testify, and the defendant had had a prior
 23 opportunity for cross-examination." 541 U.S. at 54.

24 Petitioner raised this claim again in his petition for post-conviction relief, citing
 25 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), as a significant change in law.¹² (Doc.
 26

27 ¹² In *Melendez-Diaz*, the Supreme Court held that forensic laboratory certificates of
 28 analysis fell within the core class of testimonial statements covered by the Confrontation

30-2, Ex. B at 13.) The PCR court found the claim precluded because it had already been ruled on by the Arizona Supreme Court. The PCR court also found that, even if *Melendez-Diaz* did represent a significant change in the law, its holding was inapplicable to Petitioner’s claim because Dr. Keen was not a “mere conduit” for the prior medical examiner’s opinions. (*Id.*, Ex. C at 3.)¹³

Petitioner argues that the state courts unreasonably applied *Crawford* and *Melendez-Diaz* in denying this claim. The Court disagrees. There is no clearly established federal law addressing whether the evidence at issue here—the cover page of an autopsy report summarizing a medical examiner’s findings—is testimonial in nature. As the First Circuit observed, in the wake of the rulings in *Melendez-Diaz* and *Bullcoming*,¹⁴ “Even now, it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.” *Nardi v. Pope*, 662 F.3d 107, 112 (1st Cir. 2011). Courts have repeatedly identified “a split in circuit authority on the issue.” *King v. Brazelton*, No. CV-13-1019-DSF (DFM), 2013 WL 6072019, at *8 (C.D.Cal. Nov. 18, 2013) (“Such a split further confirms the absence of any clearly established federal law that would render the California

Clause. 557 U.S. at 310.

¹³ The PCR court cited *State v. Snelling*, 225 Ariz. 182, 236 P.3d 409, 414 (2010). In *Snelling*, the Arizona Supreme Court held that the testimony of a medical examiner was not hearsay, and thus, the admission of the testimony did not violate Snelling’s confrontation rights. Although the appellate court recognized that the medical examiner relied on an autopsy report that she did not conduct or observe, the court determined that she was not a “conduit” merely for the admission of otherwise inadmissible hearsay evidence because she also studied crime scene photographs and used her own training to come to an independent conclusion.

¹⁴ In *Bullcoming*, the Supreme Court held that the admission of a forensic lab report completed by a non-testifying analyst through the “surrogate testimony” of the analyst’s colleague who neither performed nor observed the procedure violated the Confrontation Clause. 131 S. Ct. at 2715–16.

Supreme Court’s adjudication objectively unreasonable.”¹⁵); see *Kruger v. Katavich*, No. SA-CV-12-1006-SVW (VBK), 2013 WL 2153954, at *6 (C.D.Cal. May 9, 2013) (finding the state court’s denial of *Crawford* claim was not an unreasonable application of clearly established federal law because “no Supreme Court holding has identified an autopsy report as a ‘testimonial’ statement”).

Cases from the Ninth Circuit reinforce this Court’s conclusion that the state courts did not violate clearly established federal law in denying Petitioner’s Confrontation Clause claims. See *Flournoy v. Small*, 681 F.3d 1000 (9th Cir. 2012); *McNeiece v. Lattimore*, 501 Fed.Appx. 634 (9th Cir. 2012). In *Flournoy*, the Ninth Circuit considered a claim in which a forensic analyst testified as an expert based on the work and conclusions of another analyst. The testifying expert performed a technical review of the unavailable analyst’s work and gave an independent conclusion about the test results. 681 F.3d at 1002. Noting that *Melendez Diaz* “held only that a lab report could not be admitted without a witness appearing to testify in person,” the Ninth Circuit proceeded to discuss the effect of the holding in *Bullcoming*. *Id.* at 1005. The court observed that:

Justice Sotomayor provided the decisive fifth vote for the majority in *Bullcoming*. In her separate opinion, she specifically identified Confrontation Clause questions that in her view remained unanswered by the Court’s holdings in that 2011 case, let alone by *Crawford*. These unresolved areas included the treatment of experts testifying to their opinions based on reports not admitted into evidence, as well as the degree of proximity the testifying witness must have to the scientific test. See *id.* at 2722 (“We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others’ testimonial statements if the testimonial statements were not themselves admitted as evidence.”); *id.* (“[T]his is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. . . . We need not address what degree of involvement is sufficient. . . .”). Both of these open issues were relevant to *Flournoy*’s case. If those areas remained unsolved as of 2011, it is impossible to conclude that the California court’s conclusions in this case were contrary to clearly established federal law at the time.

¹⁵ As examples of this split in circuit authority the court compared *United States v. Ignasiak*, 667 F.3d 1217, 1230–31 (11th Cir. 2012), holding that autopsy reports are testimonial, with *United States v. James*, 712 F.3d 79, 99 (2d Cir. 2013), holding that an autopsy report is not testimonial.

1 *Id.*

2 In this case, to the extent that any of the materials reviewed by Dr. Keen, including
3 the autopsy cover page, could properly be characterized as testimonial, they were not
4 admitted into evidence. Therefore, as explained in *Flournoy*, a determination that Dr. Keen's
5 testimony did not violate the Confrontation Clause was not an unreasonable application of
6 clearly established federal law.

7 In *McNeiece v. Lattimore*, the trial court admitted into evidence as a business record
8 excerpts of an autopsy report showing a diagram of the victim's body with descriptions of
9 the bullet wounds. 501 Fed.Appx. at 636. The Ninth Circuit found that the state appellate
10 court's determination that these excerpts were non-testimonial was not contrary to or an
11 unreasonable application of *Crawford. Id.* The trial court also allowed a pathologist who had
12 not conducted the autopsy to testify about the diagrams and to offer his opinions based on
13 the report and other evidence. Again, the Ninth Circuit held that the state court did not
14 unreasonably apply clearly established federal law when it determined that the testimony did
15 not violate the Confrontation Clause. *Id.* (citing *Flournoy*, 681 F.3d at 1004–05).

16 The Supreme Court's recent decision in *Williams v. Illinois*, 132 S. Ct. 2221 (2012),
17 is also instructive on the state of clearly established federal law. In *Williams*, the Court found
18 no violation of the Confrontation Clause when an expert in a rape case expressed an opinion
19 based on a DNA profile produced by an outside laboratory. The Court explained that when
20 such an expert testifies, "the defendant has the opportunity to cross-examine the expert about
21 any statements that are offered for their truth. Out-of-court statements that are related by the
22 expert solely for the purpose of explaining the assumptions on which that opinion rests are
23 not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Id.* at
24 2228. As the Tenth Circuit commented in *United States v. Pablo*, 696 F.3d 1280, 1293 (10th
25 Cir. 2012), after *Williams*, "the manner in which, and degree to which, an expert may merely
26 rely upon, and reference during her in-court expert testimony, the out-of-court testimonial
27 conclusions in a lab report made by another person not called as a witness is a nuanced legal
28

1 issue without clearly established bright line parameters.” *See also United States v. Gomez*,
2 725 F.3d 1121, 1129 (9th Cir. 2013); *Rodriguez v. Lewis*, No. CV-13-1075-CAS (OP), 2013
3 WL 1401215, at *27 (C.D.Cal. Dec. 26, 2013).

4 Accordingly, the state courts’ adjudication of Petitioner’s right of confrontation claim
5 concerning Dr. Keen’s testimony was neither contrary to nor involved an unreasonable
6 application of clearly established federal law. *See Knowles v. Mirzayance*, 556 U.S. 111, 122
7 (2009) (holding that “it is not ‘an unreasonable application of clearly established Federal
8 law’ for a state court to decline to apply a specific legal rule that has not been squarely
9 established by this Court”); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (“Given the lack of
10 holdings from this Court regarding” the claim, “it cannot be said that the state court
11 ‘unreasonabl[y] appli[ed] clearly established Federal law.’”); *Brewer v. Hall*, 378 F.3d 952,
12 955 (9th Cir. 2004) (“If no Supreme Court precedent creates clearly established federal law
13 relating to the legal issue the habeas petitioner raised in state court, the state court’s decision
14 cannot be contrary to or an unreasonable application of clearly established federal law.”). For
15 this reason alone, Petitioner’s claim does not warrant habeas relief.

16 Finally, even if Dr. Keen’s testimony did violate Petitioner’s right of confrontation,
17 Petitioner would not be entitled to habeas relief. As noted above, a Confrontation Clause
18 claim is subject to harmless error analysis. *See, e.g., Bullcoming*, 131 S. Ct. at 2719 n.11; *Van*
19 *Arsdall*, 475 U.S. at 684; *Winzer*, 494 F.3d at 1201. Petitioner is entitled to habeas relief only
20 if the error had a substantial and injurious effect in determining the verdict. *Brecht*, 507 U.S.
21 at 637.

22 The State presented Dr. Keen’s testimony to prove the cruel, heinous, or depraved
23 aggravating factor. The jury found that all three prongs had been proved.

24 As the record demonstrates and the Arizona Supreme Court found, “Dr. Keen formed
25 his own conclusions based on the partial autopsy report, photographs of Lee’s body, and the
26 testimony of the prior medical examiner,” and “independently concluded that the ligatures
27 were placed on the wrists and ankles before death, the cause of death was asphyxiation, and
28

the stab wounds were inflicted near the time of death.” *Smith IV*, 215 Ariz. at 228, 159 P.3d at 538. Dr. Keen testified about Lee’s stab wounds and ligature marks. His findings were arrived at independently—that is, not as a “mere conduit” for Dr. Karnitschnig’s conclusions—and in reliance on information typically used by medical examiners to reach their opinions. Detective Dominguez also testified about his personal observations of the condition of Lee’s body, which was documented in photographs provided to the jury. This evidence, by depicting “gratuitous violence” and “needless mutilation,”¹⁶ supported the jury’s verdict that Petitioner committed the murder in an especially heinous or depraved manner, notwithstanding the timing of the wounds or the victim’s consciousness. Therefore, even excluding any testimony in which Dr. Keen merely parroted Dr. Karnitschnig, there was sufficient evidence to support the (E)(6) aggravating factor. Any error was harmless.

For the reasons discussed, Claim 13 is denied.

Claim 14

Petitioner alleges ineffective assistance of counsel based on appellate counsel’s failure to argue that Petitioner’s Confrontation Clause rights were violated when Dr. Keen testified during the Spencer re-sentencing. (Doc. 25 at 65–68.) Dr. Keen’s testimony and findings concerning Spencer’s death paralleled those he offered with respect to Lee, with the significant difference that in the Spencer case Dr. Keen was able to review the full autopsy report prepared by Dr. Jarvis.

Petitioner raised this claim in his PCR petition. (Doc. 30-2, Ex. B at 18.) The court denied the claim. (*Id.*, Ex. C at 3.) It noted that the autopsy report was not admitted in

¹⁶ The court instructed the jury: “A murder especially heinous if it is hatefully or shockingly and [sic] evil, that is grossly bad. A murder is especially depraved if it is marked by debasement, corruption, perversion, or deterioration.” (RT 5/18/04 at 34–35.) Heinousness and depravity are shown by “[i]nfliction of gratuitous violence on the victim; needless mutilation of the victim’s body after death.” (*Id.* at 35.) In determining whether the murder was heinous or depraved the jury could also consider whether the murder was senseless or the victim was helpless. (*Id.*)

evidence and that “Dr. Keen’s ultimate opinions were independent of the testimony of the prior medical examiner.” (*Id.*) The court concluded that appellate counsel did not render deficient performance by choosing “not to raise this meritless issue” and there was no prejudice because “the Supreme Court would have rejected this issue as to the Spencer case for the same reasons it rejected the issue in the Lee case.” (*Id.*)

The PCR’s court’s ruling is neither contrary to nor an unreasonable application of *Strickland*. As just discussed, the Arizona Supreme Court denied an identical Confrontation Clause claim relating to testimony about the Lee autopsy. Appellate counsel’s failure to raise a weaker claim challenging testimony about the Spencer autopsy does not constitute ineffective assistance. *See Miller v. Kenney*, 882 F.2d at 1434; *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983) (“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”). Claim 14 is denied.

Claim 15

Petitioner alleges that his constitutional rights were violated when the state courts allowed, pursuant to A.R.S. § 13-454(E)(2), one murder conviction to serve as an aggravating factor in Petitioner’s sentence for the other murder. (Doc. 25 at 69.) Petitioner argues that first-degree murder does not by definition entail the use or threat of violence, which is required for an offense to qualify as an aggravator under (E)(2).¹⁷ (*Id.*)

Petitioner raised this claim on appeal and the Arizona Supreme Court denied it. The court first noted that “[a] prior felony conviction qualified as an aggravator under former A.R.S. § 13–454(E)(2) only if the elements of the offense—without regard to the underlying facts of the crime—required the use or threat of violence on another person.” *Smith IV*, 215

¹⁷ The legislature subsequently amended A.R.S. § 13–703(F)(2) (formerly A.R.S. § 13–454(E)(2)). The amended aggravator requires only that the prior conviction be for a “serious offense.” First-degree murder is expressly identified as such an offense, A.R.S. § 13–703(I)(1).

1 Ariz. at 227, 159 P.3d at 537. The court focused, therefore, on the language of the statute,
2 reasoning as follows:

3 The statute in effect at the time of the murders defined first-degree
4 murder as “murder . . . perpetrated by means of poison or lying in wait, torture
5 or by any other kind of wilful, deliberate or premeditated killing.” A.R.S. §
6 13–452. Smith contends that “under the statutory definition, first degree
murder could be committed by lacing a victim’s food or drink with poison. A
murder committed in this manner would not involve the use or threat of
violence.” We reject this contention.

7 Under A.R.S. § 13–454(E)(2), violence is defined as the use or threat
8 of force with the intent to injure or abuse. We hold that even surreptitious
9 poisoning involves the use of force. A person who uses poison to kill another
10 person “intentionally avails herself of the physical force exerted by poison on
a human body.” Poison invades a victim’s body, attacking vital organs, until
it causes death. It is this result that an assailant seeks in choosing to poison his
victim.

11 First-degree murder, as defined in A.R.S. § 13–452, therefore cannot be
12 committed without the use of force, whether that force be exerted by the
13 defendant or by some instrumentality that the defendant has put to this use.
14 Accordingly, we affirm the trial court’s denial of Smith’s motion for a
judgment of acquittal on the (E)(2) aggravator because a prior first-degree
murder conviction does establish this aggravator.

15 *Id.* (citations omitted).

16 Petitioner claims that this decision was contrary to or an unreasonable application of
17 clearly established federal and based on an unreasonable determination of the facts. (Doc.
18 25 at 69–70.) The Court disagrees.

19 The United States Supreme Court has “repeatedly held that a state court’s
20 interpretation of state law . . . binds a federal court sitting in habeas corpus.” *Bradshaw v.*
21 *Richey*, 546 U.S. 74, 76 (2005). A state court’s finding of the existence of an aggravating
22 factor is a question of state law. *Jeffers*, 497 U.S. at 780; *see Harris v. Vasquez*, 868 F.3d
23 1116, 1118–19 (9th Cir. 1989) (noting that whether a prior conviction qualifies for a sentence
24 enhancement under California law is not a cognizable federal habeas claim); *see also*
25 *Hawkins v. Mullin*, 291 F.3d 658, 662–63 (10th Cir. 2002) (explaining that habeas court is
26 bound by state court’s interpretation of its felony-murder statute).

27 Federal habeas review is limited to determining whether the state court’s finding was
28

1 so arbitrary or capricious as to constitute an independent due process or Eighth Amendment
2 violation. *Jeffers*, 497 U.S. at 780. To assess the sufficiency of the evidence in support of the
3 factor, a court applies the “rational factfinder” standard and asks “whether, after viewing the
4 evidence in the light most favorable to the prosecution, any rational trier of fact could have
5 found” the aggravating factor to exist. *Id.* at 781 (quoting *Jackson*, 443 U.S. at 319).

6 The Arizona Supreme Court’s interpretation of its own first-degree murder statute was
7 not arbitrary or capricious. Defining first-degree murder as a crime of violence, necessarily
8 involving force, did not violate Petitioner’s due process or Eighth Amendment rights. The
9 court’s interpretation of the first degree murder statute did not, as Petitioner asserts, result
10 in a failure to narrow the aggravating circumstances relied on by the State. A reasonable juror
11 could have found that the (E)(6) aggravating factor had been proved.

12 Petitioner suggests ways that premeditated murder can be committed without the use
13 of or threat of force—by starving an infant, for instance. (Doc. 25 at 71–72). The fact that
14 Petitioner can imagine such scenarios does not lessen the binding nature of the Arizona
15 Supreme Court’s interpretation of Arizona law.

16 Claim 15 is denied.

17 **Claim 23**

18 Petitioner alleges that his due process and Eighth Amendment rights were violated by
19 the admission of irrelevant and unduly prejudicial rebuttal evidence. (Doc. 25 at 92.) The
20 Arizona Supreme Court rejected this claim on direct appeal. *Smith IV*, 215 Ariz. at 232–33,
21 159 P.3d at 542–43. Petitioner also argues that admission of the rebuttal testimony violated
22 the *Ex Post Facto* Clause. (Doc. 25 at 95–100.)

23 Background

24 The trial court granted the State’s motion to present evidence in rebuttal. (ROA 865
25 at 12.) The court stated that “both parties are entitled to present relevant information for and
26 against the imposition of a mitigated sentence, including reliable hearsay, without violating
27 the defendant’s right to due process and confrontation.” (*Id.* at 11.) The court noted,
28

1 however, that it would “carefully control the nature and scope of information allowed in
2 rebuttal.” (*Id.* at 12.) The court also rejected Petitioner’s argument that presentation of the
3 evidence would constitute an *ex post facto* violation. (*Id.*)

4 As discussed above, Petitioner presented mitigation regarding his mental health. Dr.
5 Parrish diagnosed Petitioner with moderate brain impairment, an anxiety disorder leading to
6 dissociative states, and sexual sadism. She testified that Petitioner was in a dissociative state
7 and acted out of impulse when he committed the murders. Dr. Parrish further testified that
8 Petitioner did not have an anti-social personality disorder, citing evidence that he was
9 capable of empathy as shown by the fact that he cared for animals and maintained a good
10 relationship with his mother.

11 Dr. Moran, the State’s expert witness, also diagnosed Petitioner as a sexual sadist. He
12 disagreed, however, with Dr. Parrish’s diagnosis of an anxiety disorder. In making their
13 diagnoses, both Dr. Moran and Dr. Parrish reviewed the underlying facts of Petitioner’s
14 crimes.

15 In rebuttal at both resentencing proceedings, the State offered testimony concerning
16 the details of Petitioner’s three prior rape conviction and his murder convictions. A detective
17 described the circumstances of Petitioner’s first two rape convictions, which involved a
18 woman to whom he and his wife had offered a ride. Petitioner forcibly raped the victim
19 twice, once at Petitioner’s house in his wife’s presence, and again after having driven the
20 victim to the desert, raping her inside his car while his wife sat outside on the trunk. (RT
21 4/19/04 at 85–87; RT 5/25/04 at 88–90.) Petitioner repeatedly threatened to kill the victim
22 and spoke about bodies being found in the desert. (*Id.*) He released her, however, after she
23 promised to bring him money the following day. (*Id.* at 87.)

24 The victim from Petitioner’s third rape conviction testified during the Spencer
25 sentencing. She testified that she was walking home when Petitioner stopped his car and
26 offered her a ride. (RT 4/20/04 at 32.) Instead of taking her home, Petitioner drove her to the
27 desert where he bound her hands, forced her to engage in intercourse, tried to strangle her,
28

1 raped her with a Pepsi bottle, forced her to give and receive oral sex, sodomized her, and
 2 forced her to urinate while he watched. (*Id.* at 33–38.) Brandishing a knife, he repeatedly
 3 threatened to kill her. He told her he was a “sadist,” and asked her if she wanted pins or the
 4 knife stuck in her nipple. (*Id.* at 35, 39, 41.) Petitioner finally drove the victim back into town
 5 and released her. (*Id.* at 42–43.) She was 17 years old at the time of the attack, and four or
 6 five months pregnant. (*Id.* at 31–32.) She did not testify during the Lee sentencing.

7 At the close of evidence the trial court provided the following instruction with respect
 8 to the prosecution’s rebuttal evidence:

9 Pursuant to law, the State has presented evidence to rebut the
 10 defendant’s mitigating evidence. This evidence is not a new aggravating
 11 circumstance. It is presented solely to give you a more complete picture of the
 12 defendant’s character, propensities or record, and to aid you in determining
 whether the mitigation is sufficiently substantial to call for lenience and the
 imposition of a life sentence.

13 (RT 4/21/04 at 169; RT 5/27/04 at 9.)

14 Analysis

15 On direct appeal Petitioner argued that admission of the rebuttal evidence violated his
 16 due process and Eighth Amendment rights. The Arizona Supreme Court denied the claim.
 17 The court first cited A.R.S. § 13–703(C), under which the State and the defendant are
 18 permitted to produce any evidence at the penalty phase relevant to any of the mitigating
 19 circumstances, and A.R.S. § 13–703.01(G), which allows both parties to present evidence
 20 that is relevant to whether the mitigation presented is sufficiently substantial to call for
 21 leniency. *Smith IV*, 215 Ariz. at 232, 159 P.3d at 542. The court explained that:

22 The superior court correctly determined that this testimony was relevant
 23 to the diagnosis of sexual sadism, which was the thrust of Smith’s mitigation.
 24 Indeed, the mental health experts relied on the underlying facts of these crimes
 25 to diagnose Smith. This testimony thus assisted the jury in its evaluation of
 that testimony and in determining whether Smith’s mental illness played a role
 in each murder.

26 *Id.*

27 The court next considered whether admission of the rebuttal evidence violated
 28 Petitioner’s due process rights:

1 The relevance determination, however, does not end our inquiry. The
 2 Due Process Clause constrains admission of rebuttal evidence and requires that
 3 unduly prejudicial evidence be excluded if it makes the proceeding
 4 “fundamentally unfair.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The
 5 Supreme Court has said that establishing a denial of due process in a criminal
 6 trial requires a finding “that the absence of that fairness fatally infected the
 7 trial; the acts complained of must be of such quality as necessarily prevent a
 8 fair trial.” *Lisenba v. California*, 314 U.S. 219, 236 (1941).

9 Although trial courts “should exclude [rebuttal] evidence that is either
 10 irrelevant to the thrust of the defendant’s mitigation or otherwise unfairly
 11 prejudicial,” none of the testimony about which Smith complains rendered his
 12 sentencing proceedings fundamentally unfair. The superior court carefully
 13 assessed and scrutinized the prejudicial nature of the rebuttal evidence. The
 14 court limited the scope of the rape victim’s testimony in the Lee sentencing
 15 proceeding based on the mitigation evidence that was presented and also
 16 limited the bad acts testimony that could be presented. Given the relevance to
 17 Smith’s mitigation, the limits imposed by the trial court, and the deference
 18 given prejudice assessments, we conclude that no violation of Smith’s due
 19 process rights occurred.

20 *Id.* at 232–33, 159 P.3d at 542–43 (citations and footnote omitted).

21 This decision was neither contrary to nor an unreasonable application of clearly
 22 established federal law. “[J]ust as the defendant has the right to introduce any sort of relevant
 23 mitigating evidence, the State is entitled to rebut that evidence with proof of its own.”
 24 *Dawson v. Delaware*, 503 U.S. 159, 167 (1992) (citing *Payne*, 501 U.S. at 825). “What is
 25 important . . . is an *individualized* determination on the basis of the character of the individual
 26 and the circumstances of the crime.” *Barclay v. Florida*, 463 U.S. 939, 958 (1983) (quoting
 27 *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

28 The State was entitled to present evidence rebutting Petitioner’s mitigation evidence.
 The rebuttal evidence was directly relevant to the opinions of Petitioner’s mental health
 expert, who testified that the murders were a result of Petitioner’s sexual sadism and
 committed impulsively while he was in a dissociative state. Evidence about the
 circumstances of Petitioner’s previous crimes, which Drs. Parrish and Moran also reviewed
 in reaching their diagnoses, assisted the jury in evaluating the expert testimony. Given its
 direct relevance to Petitioner’s case in mitigation, the State’s rebuttal evidence did not render
 the sentencing unfair. *Cf. United States v. Gabrion*, 648 F.3d 307, 341 (6th Cir. 2011), *aff’d*

1 *en banc*, 719 F.3d 511 (6th Cir. 2013) (finding that a psychiatrist’s testimony about
2 defendant’s history of violence toward women and animals was not outside the scope or
3 prejudicial where it was offered to rebut mitigation evidence from mental health experts that
4 downplayed defendant’s dangerousness).

5 Petitioner also alleges an *ex post facto* violation, arguing that under the statute in place
6 at the time of his original sentencing, A.R.S. § 13-454(B), the parties were permitted to
7 present only mitigation evidence and rebuttal mitigation evidence. Petitioner asserts that the
8 trial court, in applying A.R.S. § 13-703.01(G), the statute in effect at the time of 2004
9 resentencing, allowed the prosecution to present evidence that exceeded the scope of rebuttal
10 and was “tantamount to the state offering non-statutory aggravating circumstances.”(Doc.
11 25 at 96.)

12 Petitioner’s counsel at resentencing argued that application of the new statute resulted
13 in an *ex post facto* violation. The court rejected the argument, explaining that “[t]he new
14 death penalty sentencing scheme merely clarifies and does not change the standard for
15 admitting rebuttal evidence that was applicable when the defendant was last sentenced in
16 1979” and concluding that “because the new statutes merely implement new sentencing
17 procedures and do not make any substantive change in the existing law, they do not violate
18 either the federal or state Ex Post Facto clauses.” (ROA 865 at 12.)

19 Petitioner did not raise this issue on appeal. The Court need not address Petitioner’s
20 argument that his default of the claim is excused under *Martinez*. The claim is plainly
21 meritless.
22

23 The *Ex Post Facto* Clause provides that “no State shall . . . pass any . . . ex post facto
24 Law.” U.S. Const. art. I, § 10, cl. 1. The Clause prohibits the legislative enactment of any law
25 that “changes the punishment, and inflicts a greater punishment, than the law annexed to the
26 crime, when committed.” *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) (quoting *Calder*
27 *v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798)).

28 The *Ex Post Facto* Clause does not apply to procedural changes. *See Dobbert v.*

1 *Florida*, 432 U.S. 282, 293 (1977) (“Even though it may work to the disadvantage of a
 2 defendant, a procedural change is not *ex post facto*.”). To implicate the *Ex Post Facto* Clause,
 3 a change must affect “substantial personal rights,” not just “modes of procedure which do
 4 not affect matters of substance.” *Id.* (quotation marks and citation omitted).

5 To the extent that the admission of the State’s rebuttal evidence under § 13-703.01(G)
 6 reflected any change in the Arizona death penalty statute, there was no *ex post facto* violation
 7 because the change was “procedural.” It “neither made criminal a theretofore innocent act,
 8 nor aggravated a crime previously committed, nor provided greater punishment, nor changed
 9 the proof necessary to convict.” *Dobbert*, 432 U.S. at 293; *see Gentry v. Sinclair*, 705 F.3d
 10 884, 909–10 (9th Cir. 2013) (explaining that an *ex post facto* problem does not arise for a law
 11 that does nothing more than admit evidence of a particular kind in a criminal case that was
 12 not admissible under the rules of evidence at the time the offense was committed). Nor was
 13 there was no change in the quantum of evidence necessary to sentence Petitioner to death.
 14 *See Carmell v. Texas*, 529 U.S. 513, 546 (2000) (“The issue of the admissibility of evidence
 15 is simply different from the question whether the properly admitted evidence is sufficient to
 16 convict the defendant.”).

17 Claim 23 is denied.

18 **Claim 29–30, 32–38**

19 On appeal Petitioner summarily raised a series of constitutional challenges to
 20 Arizona’s death penalty scheme. *Smith IV*, 215 Ariz. at 235–36, 159 P.3d at 545–46. The
 21 Arizona Supreme Court’s rejection of these claims, *id.*, was neither contrary to nor an
 22 unreasonable application of clearly established federal law.

23 **Claim 29**

24 Petitioner alleges that his right to be free from cruel and unusual punishment would
 25 be violated if the State of Arizona were to execute him after 35 years on death row. (Doc. 25
 26 at 120.) The United States Supreme Court has never held that lengthy incarceration prior to
 27 execution constitutes cruel and unusual punishment. *See Lackey v. Texas*, 514 U.S. 1045
 28

(1995) (mem.) (Stevens, J. & Breyer, J., discussing denial of certiorari and noting the claim has not been addressed); *Thompson v. McNeil*, 556 U.S. 1114 (2009) (mem.) (Stevens, J. & Breyer, J., dissenting from denial of certiorari; Thomas, J., concurring, discussing *Lackey* issue). Circuit courts, including the Ninth Circuit, have also held that prolonged incarceration under a sentence of death does not violate 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); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995). Claim 29 is denied.

Claim 30

Petitioner alleges that Arizona’s “heinous, cruel, or depraved” aggravating circumstance does not genuinely narrow the class of death-eligible offenders. (Doc. 25 at 122.) Rulings of both the Ninth Circuit and the United States Supreme Court have upheld Arizona’s death penalty statute against allegations that particular aggravating factors, including the former § 13-454(E)(6) factor, do not adequately narrow the sentencer’s discretion. *See Jeffers*, 497 U.S. at 774–77; *Walton v. Arizona*, 497 U.S. 639, 652–56 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). Claim 30 is denied.

Claim 32

Petitioner alleges that the death penalty is categorically cruel and unusual punishment. (Doc. 25 at 128.) The Supreme Court has held otherwise. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Claim 32 is denied.

Claim 33

Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth and Fourteenth Amendments because it requires a defendant to affirmatively prove that the court should spare his life. (Doc. 25 at 129.) The Supreme Court has rejected the argument that “Arizona’s allocation of the burdens of proof in a capital sentencing proceeding violates the Constitution.” *Walton*, 497 U.S. at 651. Claim 33 is denied.

Claim 34

Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth and

1 Fourteenth Amendments because it requires a death sentence whenever an aggravating
2 circumstance and no mitigating circumstances are found with respect to an eligible
3 defendant. (Doc. 25 at 130.) The Supreme Court has rejected the claim that Arizona’s death
4 penalty statute is impermissibly mandatory and creates a presumption in favor of the death
5 penalty. *Walton*, 497 at 651–52; *see also Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006).
6 Claim 34 is denied.

7 **Claim 35**

8 Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth and
9 Fourteenth Amendments because it does not sufficiently channel the discretion of the
10 sentencing authority. (Doc. 25 at 131.) The Ninth Circuit has rejected the contention that
11 Arizona’s death penalty statute is unconstitutional because it “does not properly narrow the
12 class of death penalty recipients.” *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998).
13 Claim 35 is denied.

14 **Claim 36**

15 Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth
16 Amendment because it denies capital defendants the benefit of proportionality review. (Doc.
17 25 at 32.) There is no federal constitutional right to proportionality review of a death
18 sentence. *McCleskey*, 481 U.S. 279, 306 (1987) (citing *Pulley v. Harris*, 465 U.S. 37, 43–44
19 (1984)). The Ninth Circuit has explained that the interest implicated by proportionality
20 review—the “substantive right to be free from a disproportionate sentence”—is protected by
21 the application of “adequately narrowed aggravating circumstance[s].” *Ceja v. Stewart*, 97
22 F.3d 1246, 1252 (9th Cir. 1996). Claim 36 is denied.

23 **Claim 37**

24 Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth and
25 Fourteenth Amendments because it affords the prosecutor unbridled discretion to seek the
26 death penalty. (Doc. 25 at 134.) Prosecutors have wide discretion in making the decision
27 whether to seek the death penalty. *See McCleskey*, 481 U.S. at 296–97; *Gregg*, 428 U.S. at
28

199 (pre-sentencing decisions by actors in the criminal justice system that may remove an accused from consideration for the death penalty are not unconstitutional). The Ninth Circuit has rejected the argument that Arizona’s death penalty statute is constitutionally infirm because “the prosecutor can decide whether to seek the death penalty.” *Smith*, 140 F.3d at 1272. Claim 37 is denied.

Claim 38

Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth and Fourteenth Amendments because it does not set forth objective standards to guide the sentencer in weighing the aggravating circumstances against the mitigating circumstances. (Doc. 25 at 135.) The Supreme Court has held that a capital sentencer “need not be instructed how to weigh any particular fact in the capital sentencing decision.” *Tuilaepa v. California*, 512 U.S. 967, 979 (1994). Claim 38 is denied.

III. INEFFECTIVE ASSISTANCE: MITIGATION EVIDENCE

Claim 39

Petitioner alleges that counsel rendered ineffective assistance at resentencing by failing to adequately investigate, develop, and present mitigating evidence. (Doc. 25 at 136.) Petitioner specifically faults counsel for failing to obtain a PET (Positron Emission Topography) scan of Petitioner’s brain, which would have shown brain injury. (*Id.* at 139.) Petitioner did not raise this claim in state court. As previously noted, he requests expansion of the record and an evidentiary hearing to address his claim that PCR counsel’s deficient performance can excuse the procedural default of the claim. (Doc. 42.)

Background

As described above, the Ninth Circuit determined that trial counsel performed ineffectively during Petitioner’s resentencing in 1979. *Smith III*, 189 F.3d 1004. The court noted that counsel failed to offer mitigating evidence of Petitioner’s asthmatic condition, multiple personalities, and family background. *Id.* at 1009–10. The court particularly noted that expert evidence to the effect that Petitioner “lost contact with reality during his violent

1 outbursts, which were themselves a result of psychological tension built up between the two
2 sides of his split personality” could have convinced a sentencer to exercise leniency. *Id.* at
3 1014.

4 Counsel at Petitioner’s 2004 resentencings presented evidence addressing each of the
5 issues noted in *Smith III*. The evidence and arguments focused on Petitioner’s mental health
6 and family background, as well as his good conduct in prison and lack of future
7 dangerousness.

8 Counsel called nine mitigation witnesses in the Spencer resentencing, including Dr.
9 Parrish, a neuropsychologist who testified about Petitioner’s mental health and brain
10 function; Petitioner’s mother and sister, who testified about the family dynamics, including
11 Petitioner’s relationship with his father, as well as Petitioner’s struggles with asthma and his
12 social isolation; three corrections officers and James Aiken, an expert on correctional
13 facilities and the classification of inmates, who testified about Petitioner’s positive adaptation
14 to life in prison; and an attorney and a family friend, both of whom witnessed Petitioner’s
15 “split personalities” while he was incarcerated following the murders. Dr. Parrish, the
16 corrections officers, and Petitioner’s mother and sister offered similar testimony during the
17 Lee resentencing. Nonetheless, the jury in each case, after finding that three aggravating
18 factors had been proved, determined that Petitioner should be sentenced to death.

19
20 While PCR counsel did not raise a claim of ineffective assistance based on
21 resentencing counsel’s failure to present mitigating evidence, he did argue that newly-
22 discovered evidence would probably have changed the sentence. (Doc. 30-2, Ex. B, PCR
23 petition at 21.) This evidence consisted of a PET scan and DTI (Diffusion Tensor Imaging)
24 scan, administered by Dr. Joseph Wu in 2010 and 2011, that showed organic brain damage
25 consistent with head trauma. (*Id.*, PCR petition, exhibits A–C.) In addition, Dr. Francisco
26 Gomez, a neuropsychologist, performed a forensic psychological evaluation, which took into
27 account the evidence of brain injury. (*Id.*, PCR petition exhibit D.) The PCR court denied the
28 claim, finding that the new evidence was “cumulative” to that already presented at

1 sentencing. (Doc. 30-2, Ex. C at 6.)

2 Analysis

3 To prevail on a claim of ineffective assistance of counsel, a petitioner must show that
4 counsel's representation fell below an objective standard of reasonableness and that the
5 deficiency prejudiced the defense. *Strickland*, 466 at 687–88. The inquiry under *Strickland*
6 is highly deferential, and “every effort [must] be made to eliminate the distorting effects of
7 hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate
8 the conduct from counsel's perspective at the time.” *Id.* at 689. To this end, reviewing courts
9 “must indulge a strong presumption” that counsel “rendered adequate assistance and made
10 all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 689–90.

11 Counsel has a duty to make reasonable investigations or to make a reasonable decision
12 that makes particular investigations unnecessary. *Id.* at 691. However, there is no “set of
13 detailed rules for counsel's conduct” and “a particular decision not to investigate must be
14 directly assessed for reasonableness in all the circumstances, applying a heavy measure of
15 deference to counsel's judgments.” *Id.* at 688–90; *see also Pinholster*, 131 S. Ct. at 1406–07
16 (noting that *Strickland* “rejected the notion that the same investigation will be required in
17 every case”).

18 To demonstrate prejudice, a petitioner “must show that there is a reasonable
19 probability that, but for counsel's unprofessional errors, the result of the proceeding would
20 have been different.” *Id.* at 694. When challenging a death sentence, “the question is whether
21 there is a reasonable probability that, absent the errors, the sentencer . . . would have
22 concluded that the balance of aggravating and mitigating circumstances did not warrant
23 death.” *Strickland*, 466 U.S. at 695. In determining whether there is a reasonable probability
24 of a different result, a reviewing court “reweigh[s] the evidence in aggravation against the
25 totality of available mitigating evidence.” *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The
26 “totality of the available evidence” includes “both that adduced at trial, and the evidence
27 adduced” in subsequent proceedings. *Id.* at 536 (quoting *Williams v. Taylor*, 529 U.S. 362,
28

397–98 (2000)); *see Schurz v. Ryan*, 730 F.3d 812, 816 (9th Cir. 2013).

Applying these standards, the Court concludes that counsel’s performance at resentencing was neither deficient nor prejudicial.

No deficient performance

Counsel did not perform deficiently by failing to secure a PET scan or DTI scan. Prior to his 2004 resentencing proceedings, Petitioner had been examined by at least 10 mental health professionals: Drs. Chalise, Melendez, Tucher, Bendheim, Gray, Hoogerbeets, Garcia-Bunuel, Cleary, Goldberg, and Tatro. (ROA 803, Ex’s A–K.) In 1977, Dr. Garcia-Bunuel ordered an EEC, a CBF (cerebral blood flow), a brain scan, and a complete battery of psychological tests. (*Id.*, Ex. H.) The results were negative for “any cerebral or inter-cranial pathology.” (*Id.*, Ex. K.) None of the other experts suggested that Petitioner suffered from organic brain impairment or a neurological disorder. (*Id.*, Ex’s A–K; *see* RT 4/12/04 at 39; RT 5/20/04 at 152; RT 5/24/04 at 13.)

For the 2004 resentencing proceedings counsel retained Dr. Susan Parrish, a neuropsychologist with more than 25 years of experience, who testified at both the Spencer and Lee resentencings. Dr. Parrish performed a neuropsychological examination of Petitioner and diagnosed him with mild to moderate brain impairment. (*See* RT 4/12/04 at 40, 56.) She testified, as did Petitioner’s mother, that Petitioner suffered a head injury in car accident when he was infant. (RT 4/8/04 at 68–70; RT 4/12/04 at 46–47; RT 5/24/04 at 56, 57.)

Dr. Parrish also testified that Petitioner suffered from dissociative identity disorder and was in an “altered state,” acting impulsively and without control, when he committed the murders. (*See* RT 4/14/04 at 42, 45, 50; RT 5/24/04 at 30.) She testified that dissociation is a “breakdown in the integration of memory, consciousness, perception, thinking.” (RT 4/12/04 at 14.) Multiple personality disorder is the most extreme form of dissociation. (*Id.*) Because the failure to present such “split personality” evidence was the principal basis on which the Ninth Circuit found prior counsel ineffective, *Smith III*, 189 F.3d at 1014, counsel performed reasonably in securing Dr. Parrish’s testimony at the 2004 resentencing.

1 Dr. Parrish's testimony also addressed Petitioner's upbringing, including the physical
 2 and psychological effects of his severe asthma, which led to anxiety and social isolation and
 3 may have contributed to his impaired brain function and dissociative identity disorder. (See
 4 RT 4/14/04 at 14–20; RT 5/20/04 at 110–16.) She testified about Petitioner's relationship
 5 with his father, who was emotionally distant and physically abused him on one occasion, and
 6 with his over-protective mother. (*Id.* at 20–29.) She testified that Petitioner did not have an
 7 anti-social personality. (See RT 4/12/04 at 163–67.) She noted that he was able to feel
 8 empathy; he cared about animals and people, and maintained a close relationship with his
 9 mother. (*Id.* at 167.) Again, the absence of such evidence about Petitioner's background
 10 factored into the Ninth Circuit's ruling that prior counsel performed ineffectively. *Smith III*,
 11 189 F.3d at 1109–10. Counsel reasonably sought to address these issues by presenting Dr.
 12 Parrish's testimony.

13 Dr. Parrish testified that the neuropsychological examination she performed, the
 14 Halstead-Reitan Battery,¹⁸ is a more sensitive instrument for identifying brain impairment
 15 than CAT scans or MRIs, explaining that “you can have neuropsych impairment and have
 16 nothing show up on a CAT scan, or an MRI, for that matter.” (RT 4/12/04 at 40; see RT
 17 4/15/04 at 53–54.) If Dr. Parrish was incorrect in her assessment of the relative value of
 18 neuropsychological tests versus brain scans, her error does not reflect a failure on counsel's
 19 part. See *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010) (explaining that an “expert's
 20 failure to diagnose a mental condition does not constitute ineffective assistance of counsel,
 21 and [a petitioner] has no constitutional guarantee of effective assistance of experts”); see also
 22 *Richter*, 131 S. Ct. at 789 (“There were any number of experts whose insight might have
 23 been useful to the defense. Counsel is entitled to balance limited resources in accord with
 24 effective trial tactics and strategies.”).

26 Finally, Dr. Parrish testified that she agreed with the State's expert, Dr. Moran, who

28 ¹⁸ Dr. Parrish studied under Ralph Reitan, who developed the Halstead-Reitan Battery.
 (See RT 4/12/04 at 8.)

1 diagnosed Petitioner as a sexual sadist. Dr. Parrish explained that this condition, combined
2 with Petitioner's brain impairment and dissociative disorder, caused Petitioner to commit the
3 murders. (See RT 4/14/04 at 45; RT 5/20/04 at 103, 120, 131–32.)

4 Counsel's performance was reasonable. The failure to obtain more-sophisticated tests
5 such as a PET scan did not constitute deficient performance based on the information
6 available to counsel from prior mental health examinations, the new information provided
7 by Dr. Parrish, and the wide range of other mitigating evidence counsel pursued and
8 presented. For the same reasons counsel's performance did not prejudice Petitioner.

9 *No prejudice*

10 Petitioner was not prejudiced by counsel's failure to secure a PET scan or DTI
11 because the information resulting from those tests duplicates the evidence counsel presented
12 at sentencing. The PCR court considered the new evidence and found it cumulative:

13 At the penalty phases Defendant presented evidence of brain
14 impairment through his expert, Dr. Parrish. His mother also testified that he
15 suffered a head injury as a baby. Thus, although the PET scan confirms the
16 frontal lobe injury, it is cumulative. Dr. Parrish opined that Defendant suffered
from sexual sadism and that he was unable to control his actions at the time of
the murders.

17 Defendant's new expert, Dr. Gomez, notes in his report that the PET
18 scan is consistent with Dr. Parrish's neuropsychological examination. He
19 agrees that Defendant suffers from sexual sadism and further opines that it is
20 likely Defendant is unable to control his impulses because of his brain
impairment. Thus, Defendant's proposed new evidence is similar to Dr.
Parrish's testimony and therefore cumulative.

21 (Doc. 30-2, Ex. C at 6.)

22 Petitioner was not prejudiced by PCR counsel's failure to raise an argument
23 predicated on a claim that the PCR court considered and rejected. Similarly, resentencing
24 counsel's failure to secure a PET scan did not prejudice Petitioner.

25 Dr. Wu reviewed the PET scan and DTI of Petitioner brain's and found a pattern
26 consistent with a history of head trauma as a child. (Doc. 30-2, Ex. B, PCR petition, exhibit
27 B.) Specifically, he identified impairment in Petitioner's frontal lobes. (*Id.*) Dr. Wu explained
28 that "[t]he abnormalities noted on the PET scan are also consistent with the

1 neuropsychological testing deficits noted by Dr. Parrish such as impairment on the Halstead
2 Reitan Neuropsychological Test Battery.” (*Id.*, PCR petition, exhibit C at 5.)

3 Dr. Gomez reviewed Dr. Wu’s report and conducted a neuropsychological
4 examination. (*Id.*, PCR petition, exhibit D.) He explained that “impairment of frontal lobes
5 diminishes an individual’s ability to control their behavior under conditions of duress.” (*Id.*
6 at 12.) The remainder of Dr. Gomez’s conclusions are not meaningfully distinguishable from
7 the opinions offered by Dr. Parrish.

8 Dr. Gomez opined that “it appears that Mr. Smith has neurocognitive impairments that
9 affect his ability to regulate his impulses and/or aggression” and that “Mr. Smith has a
10 psychosexual disorder that coupled with neurocognitive impairment decreases his ability to
11 inhibit his deviant behavior.” (*Id.*) Dr. Parrish testified that Petitioner suffered from
12 neurological impairment and sexual sadism as well as anxiety and dissociative identity
13 disorder. (See RT 4/12/04 at 40–45, 55, 148, 161; 4/14/04 at 36–49; RT 5/20/04 at 75,
14 131–32.) These conditions resulted in “diminished control over his behavior.” (RT 5/20/04
15 at 132; see RT 4/14/04 at 45.) Dr. Parrish also discussed the frontal lobe as the “center of
16 executive control” and further testified that because “the brain is responsible for impulse
17 control . . . when you have brain impairment, oftentimes you have disinhibitive behavior,
18 impulsive behavior.” (RT 5/20/04 at 83, 84.)

19 To assess whether there is a reasonable probability of a different result, the reviewing
20 court reweighs the evidence in aggravation against the totality of available mitigating
21 evidence, including the evidence produced in subsequent proceedings, *Wiggins*, 539 U.S. at
22 534, 536, which, in this case, consists of the findings of Drs. Wu and Gomez.

23 The difference between what was presented at sentencing and what Petitioner now
24 contends should have been presented constitutes little more than a better-defined explanation
25 of the origin of Petitioner’s brain impairment. Petitioner emphasizes the fact that Dr. Parrish
26 could not accurately date the onset of his impairment. She did testify, however, that
27 Petitioner committed the murders while acting out of impulses which his mental condition,
28

1 including his sexual sadism, left him unable to control. Moreover, Dr. Parrish's testimony
 2 did not exclude the possibility that brain damage was present and, along with his anxiety,
 3 dissociative disorder, and sexual sadism, contributed to his lack of control at the time of the
 4 murders.

5 The findings of Drs. Wu and Gomez do not offer a new or more mitigating
 6 explanation of the effects of Petitioner's neurological and mental status at the time of the
 7 crimes, and there is not a reasonable probability that placing a different emphasis on the
 8 cause of his impulsive behavior would have persuaded the jury to vote for a life sentence. *See*
 9 *Forrest v. Steele*, No. 09-8002-CV-W-ODS, 2012 WL 1668358, at * 4 (W.D. Mo. May 12,
 10 2012) ("The PET scan would have confirmed the experts' testimony, but would not have
 11 added anything to it."); *Walls v. McNeil*, No. 3:06cv237/MCR, 2009 WL 3187066, at *32–33
 12 (N.D. Fla. Sept. 30, 2009) (denying ineffective claim based on failure to conduct PET scan
 13 where "any results that the PET scan might have revealed were already presented to the jury
 14 by the defense experts," including testimony suggesting that defendant had "significant
 15 neuropsychological deficits"). In sum, the PET scan evidence "would have barely altered the
 16 sentencing profile presented" to the jury. *Strickland*, 466 U.S. at 699–700; *see Bible v. Ryan*,
 17 571 F.3d 860, 872 (9th Cir. 2009) ("We hold that the absence of evidence that was
 18 cumulative of what had already been presented and that was speculative in nature does not
 19 undermine our confidence in the outcome of Bible's sentencing hearing.").

20
 21 Balanced against this slightly revised picture of Petitioner's neurological status are
 22 the aggravating factors found by the jury, which could not be weightier or more severe. There
 23 is little likelihood that the additional evidence cited by Petitioner would have resulted in a
 24 different verdict. *See Samayoa v. Ayers*, 649 F.3d 919, 929 (9th Cir. 2011) (finding no
 25 prejudice from failure to present additional mitigation where the crimes and petitioner's
 26 propr record were "brutal and horrific"); *Leavitt v. Arave*, 646 F.3d 605, 616 (9th Cir. 2011)
 27 ("Given the exceptional depravity of this murder, it is unlikely that additional evidence of
 28 a brain abnormality would have made a difference."); *Bible*, 571 F.3d at 872 (finding no

1 prejudice where the “significant amount of aggravating circumstances” consisted of the
 2 especially cruel murder of a 9-year-old child).

3 Thirty-eight years ago, Petitioner “committed two crimes of unspeakable cruelty and
 4 brutality.” *Smith III*, 189 F.3d at 1014 (Fernandez, J., dissenting). Fifteen years ago a panel
 5 of the Ninth Circuit granted habeas relief on Petitioner’s claim that counsel performed
 6 ineffectively at his 1979 resentencing. The panel concluded that “we cannot say with any
 7 confidence that information about the split nature of Smith’s personality would not have led
 8 a sentencing judge to conclude that Smith was not deserving of the death penalty.” *Id.* That
 9 evidence, and much more, has now been presented, and the juries that heard it determined
 10 that death was the appropriate sentence.

11 Neither resentencing counsel nor PCR counsel performed at a constitutionally
 12 ineffective level. Claim 39 is denied.

13 **CERTIFICATE OF APPEALABILITY**

14 Rule 22(b) of the Federal Rules of Appellate Procedure provides that an applicant
 15 cannot take an appeal unless a certificate of appealability (“COA”) has been issued by an
 16 appropriate judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases provides
 17 that the district judge must either issue or deny a certificate of appealability when it enters
 18 a final order adverse to the applicant. If a certificate is issued, the court must state the specific
 19 issue or issues that satisfy 28 U.S.C. § 2253(c)(2). Pursuant to 28 U.S.C. § 2253(c)(2), a
 20 COA may issue only when the petitioner “has made a substantial showing of the denial of
 21 a constitutional right.” This showing can be established by demonstrating that “reasonable
 22 jurists could debate whether (or, for that matter, agree that) the petition should have been
 23 resolved in a different manner” or that the issues were “adequate to deserve encouragement
 24 to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*,
 25 463 U.S. 880, 893 & n. 4 (1983)).

26
 27 The Court finds that Claims 13 and 23 are adequate to deserve encouragement to
 28 proceed further or are debatable by reasonable jurists. The Court finds, for the reasons set out

1 in this Order, that the dismissal of the remainder of Petitioner's claims is not debatable
2 among reasonable jurists, and none of the claims deserves encouragement to proceed further.
3 Accordingly, the Court declines to issue a COA on any of these issues.

4 **CONCLUSION**

5 The Court has carefully reviewed the entire record, including the materials with which
6 Petitioner seeks to expand the record, to determine whether Petitioner is entitled to
7 evidentiary development or habeas relief. He is not.

8 Petitioner's allegations of ineffective assistance of trial and appellate counsel are not
9 "substantial" under *Martinez* and do not serve as cause for default of the claims for which
10 Petitioner requests evidentiary development. Petitioner's exhausted claims do not entitle him
11 to habeas relief under 28 U.S.C. § 2254(d)(1) or (2).

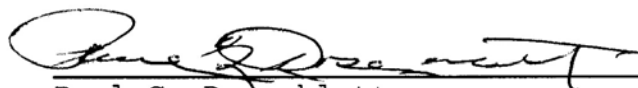
12 Accordingly,

13 IT IS HEREBY ORDERED granting in part Petitioner's motion for evidentiary
14 development (Doc. 42). The record will be expanded to include the transcript of the
15 September 10, 2004 hearing (Doc. 42-1, Ex. A). The remainder of the motion is denied.

16 IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus
17 (Doc. 25) is denied. The Clerk of Court shall enter judgment accordingly.

18 IT IS FURTHER ORDERED granting a Certificate of Appealability with respect to
19 Claims 13 and 23.
20

21 DATED this 24th day of March, 2014.

22
23 
24 Paul G. Rosenblatt
United States District Judge



Supreme Court

RACHELLE M. RESNICK
CLERK OF THE COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

February 15, 2012

RE: STATE OF ARIZONA v JOE CLARENCE SMITH
Arizona Supreme Court No. CR-11-0336-PC
Maricopa County Superior Court No. CR0000-095116

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 15, 2012, in regard to the above-referenced cause:

ORDERED: Petition for Review from the Denial of Rule 32 Relief (Capital) (Denial of Post-Conviction Relief) = DENIED.

FURTHER ORDERED: The Warrant of Execution shall be issued forthwith.

Justice Bales did not participate in the consideration of this matter.

Rachelle M. Resnick, Clerk

TO:

Kent E Cattani

Jon G Anderson

Michael J Dew

Joe Clarence Smith, ADOC 036085, Arizona State Prison, Florence -

Eyman Complex-SMU II

Diane Alessi

Amy Sara Armstrong

Dale A Baich

Carson McWilliams

Charles L Ryan

chj

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-095116

09/09/2011

HONORABLE JANET E. BARTON

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

JON G. ANDERSON

v.

JOE CLARENCE SMITH JR.

MICHAEL J DEW

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

RULING / CAPITAL CASE

The Court has reviewed Defendant Joe Clarence Smith's Petition for Post-Conviction Relief, the State's Response, and Defendant's Reply, as well as the Court's file. This is Defendant's first Rule 32 proceeding following the Arizona Supreme Court's affirmation of his death sentences in *State v. Smith (Smith IV)*, 215 Ariz. 221, 159 P.3d 531 (2007).

Background

Sandy Spencer's nude body was found in the desert northwest of Phoenix in January 1976. She had multiple stab wounds, and her nose and mouth had been stuffed with dirt and taped shut, causing asphyxiation. Neva Lee's nude body was found in the desert in February 1976. She also had been asphyxiated and her wounds were similar to Spencer's. Defendant was charged with both murders in November 1976. The charges were severed for trial. A jury convicted him of the first-degree murder of Neva Lee, following which he pled guilty to first-degree murder of Sandy Spencer. The trial court sentenced him to death for both murders in 1977.

The Arizona Supreme affirmed the convictions, but remanded for resentencing to allow Defendant to present additional mitigation. *State v. Smith (Smith I)*, 123 Ariz. 231, 599 P.2d 187 (1979). At resentencing, Defendant's counsel presented no new mitigation and Defendant was again sentenced to death. *State v. Smith (Smith II)*, 131 Ariz. 29, 638 P.2d 696 (1981).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-095116

09/09/2011

On federal habeas review, the Ninth Circuit Court of Appeals held that Defendant's counsel had been ineffective at resentencing, resulting in vacation of the death sentences and remand to the trial court for resentencing in 2000. *Smith v. Stewart (Smith III)*, 189 F.3d 1004 (9th Cir. 1999). Due to *Ring v. Arizona*, 536 U.S. 584 (2002), a new sentencing proceeding for each murder was held before a separate jury. The juries resentenced Defendant to death for both murders in 2004.

In its independent review of the death sentences on direct appeal, the Arizona Supreme Court found the three alleged aggravating circumstances proven beyond a reasonable doubt. Defendant's three prior rape convictions conclusively established that he had been convicted of another offense that carried a possible sentence of life imprisonment or death (A.R.S. §13-454(E)(1)).¹ His prior conviction of Lee's murder met the requirements of a prior felony conviction that involved the use or threat of violence on another (A.R.S. §13-454(E)(2)) in the Spencer case and vice versa. The Court also found that overwhelming evidence established that the murders of Spencer and Lee were especially cruel (A.R.S. §13-454(E)(6)). They both died of asphyxiation after having their noses and mouths filled with dirt and taped shut. Such asphyxiation would undoubtedly cause mental anguish and physical pain. The Court decided that because it independently concluded that the murders were especially cruel, it need not consider the jury's separate findings of heinousness and depravity.

The Court noted that the focus of Defendant's mitigation related to his mental health. He established that he suffered from sexual sadism with a form of anxiety disorder, which contributed to the commission of the murders. The remainder of the mitigation focused on his good conduct in prison and his family life. The role of Defendant's mental health in the commission of the murders was accorded less weight due to testimony that he could have controlled his impulses and that he likely knew what he was doing and that it was wrong. His good conduct while in prison and family life was also lessened based on conflicting testimony regarding their presence or substantiality. The Court then decided that the mitigation presented was not sufficiently substantial to warrant leniency given the nature of the crimes committed and the aggravators.

Claim One

Defendant claims that his confrontation rights were violated by allowing Dr. Keen to testify about each victim's injuries and cause of death even though Dr. Keen did not perform the autopsies.

¹ Now A.R.S. §13-751(F)(1). The Court's reference is to the statutes in effect at the time Defendant committed his crimes.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-095116

09/09/2011

As to the Lee case, the Court finds this claim precluded from relief because it was adjudicated on appeal. *See, Smith IV*, 215 Ariz. at ¶¶21-26. The Arizona Supreme Court held that pursuant to Rule 703, Arizona Rules of Evidence, expert testimony that discusses reports and opinions of another is admissible if the expert reasonably relied on these matters in reaching his own conclusion. The Court further found that contrary to Defendant's contention, Dr. Keen had not been a "mere conduit for the opinions of the prior medical examiner; rather, his ultimate opinions were independent of the testimony of the prior medical examiner." *Id.* at ¶25. For this reason, *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527 (2009), even assuming it is a significant change in the law, does not apply to Defendant. The Arizona Supreme Court has noted the distinction between this issue and *Melendez-Diaz* in subsequent cases. *See, e.g., State v. Snelling*, 225 Ariz. 182, ¶21, 236 P.3d 409 (2010).

As to the Spencer case, Defendant did not raise this issue on appeal. In an effort to avoid preclusion,² he claims that his appellate counsel provided ineffective assistance by failing to raise the issue on appeal. To establish ineffective assistance of appellate counsel, Defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of the appeal would have been different. *State v. Bennett*, 213 Ariz. 562, 568, 146 P.3d 63, 69 (2006). Appellate counsel is not ineffective for selecting some issues and rejecting others. Once the issues have been narrowed and presented, appellate counsel's waiver of other possible issues binds the defendant. *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1381 (App. 1995).

The Court finds that Defendant's claim is not colorable. The trial court took judicial notice that the medical examiner who performed the autopsy was deceased and therefore clearly unavailable to testify. As in the Lee case, the Spencer autopsy report was not admitted into evidence; Dr. Keen's ultimate opinions were independent of the testimony of the prior medical examiner. Appellate counsel's choice to not raise this meritless issue is not deficient performance. Moreover, Defendant cannot establish prejudice because the Supreme Court would have rejected this issue as to the Spencer case for the same reasons it rejected the issue as to the Lee case.

Claim Two

Defendant claims that appellate counsel also provided ineffective assistance by failing to argue that he was denied a fair sentencing by the prosecutor's misstatement of the law in penalty phase closing arguments in both trials.

² An issue is precluded if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceedings. *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-095116

09/09/2011

These closing arguments occurred in May and April 2004, before the Supreme Court issued *State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 123 P.3d 662 (2005). Over Defendant's objection, the trial court allowed the prosecutor to argue that Defendant bore the burden to prove that his mitigation was sufficiently substantial to call for leniency. See, RT 4/22/04, at 29 (Spencer); 5/27/04, at 82, 84 (Lee). *Baldwin* held that neither party bore the burden of proving or disproving this issue. Thus, based on a subsequent Supreme Court decision, the prosecutor's arguments misstated the law.

Even though error occurred, however, Defendant has failed to show that his appellate counsel provided ineffective assistance by failing to raise it. The error, if any, was harmless. Each jury was instructed that the attorneys' arguments were not law or evidence and that it must follow the court's instructions. They were not instructed that Defendant must prove his mitigation was sufficiently substantial to call for leniency. Rather, they were instructed that this was an individual determination to be made by each of them. The Court finds that because jurors are presumed to follow the instructions, the prosecutor's statements would have been found by the Supreme Court to be harmless. See, *State v. Tucker*, 214 Ariz. 298, ¶89, 160 P.3d 177 (2007)(prosecutor's statement regarding weight of mitigation was not unduly prejudicial and did not contribute to jury's verdict because trial judge advised jury that comments made during closing were not law or evidence; court presumes jurors follow the judge's instructions); *State v. Newell*, 212 Ariz. 389, ¶¶64-70, 132 P.3d 833 (2006)(prosecutor's comments about DNA in closing argument improper but were not so prejudicial as to deny him fair trial).

Appellate counsel's performance was not deficient in rejecting this issue. Moreover, as the State points out, in *Tucker* the Supreme Court held that *Baldwin* error in instructing the jury that the defendant bears the burden to prove that his mitigation is sufficiently substantial to call for leniency did not warrant reversal because it did not reduce the State's burden of proof or preclude the jurors from considering relevant mitigation evidence during the penalty phase. *Tucker*, 215 Ariz. at ¶68. If error in incorrectly instructing the jury on the law was not reversible, then clearly the prosecutor's misstatement of this same law would not have warranted reversal where, as here the instructions were correct. Defendant has not shown either deficient performance or prejudice regarding this claim.

Claim Three

Defendant claims that a November 2010 PET scan of his brain showing long-term organic brain damage is newly-discovered evidence entitling him to new penalty phases. The Court disagrees.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-095116

09/09/2011

Pursuant to Rule 32.1(e), a defendant may seek relief on the grounds that newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:

- (1) The newly discovered material facts were discovered after the trial.
- (2) The defendant exercised due diligence in securing the newly discovered material facts.
- (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

Rule 32.1(e), Ariz.R.Crim.P.

Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence. *State v. Saenz*, 197 Ariz. 487, 4 P3d 1030 (App. 2000), review denied. The evidence must have been in existence at the time of trial, but not discovered until after trial. *State v. Sanchez*, 200 Ariz. 163, ¶11, 24 P.3d 610 (App. 2001). “For it to be considered newly discovered, evidence ‘must truly be newly discovered, i.e., discovered after the trial.’” *Saenz*, 197 Ariz. at 491 (quoting *State v. Jeffers*, 135 Ariz. 404, 426, 661 P.2d 1105, 1127 (1983)).

The Court finds that Defendant’s proposed evidence does not meet the requirements of Rule 32.1(e). While, as Defendant points out, this evidence was discovered after trial, he has failed to show why it could not have been discovered before trial. The Ninth Circuit granted Defendant new sentencing hearings because his attorney at his 1979 resentencing failed to fully investigate his mental condition. *Smith III*, 189 F.3d at 1008-12. This finding was based on subsequent investigation conducted by Defendant’s federal habeas attorneys and presented at the federal habeas hearing. *See, e.g.*, 189 F.3d at 1012 (where court refers to later examination by Dr. Tatro). Thus, trial counsel was clearly on notice that Defendant’s mental illness would compose the thrust of his mitigation, and trial counsel clearly presented this mitigation.

Apparently, a PET scan was not performed during the approximately four years of additional investigation from the Ninth Circuit’s ruling to the resentencing hearings at issue here.³ Defendant has failed to show that he exercised due diligence in obtaining this new

³ Defendant does not raise a claim of ineffective assistance of counsel in the penalty phase. *See*, Defendant’s Reply at 6.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-095116

09/09/2011

evidence. *See, State v. Mata*, 185 Ariz. 319, 916 P.2d 1035 (1996)(“Defendant has not presented ‘newly discovered’ facts, as A.R.S. §13-4231 requires, but facts to which he has had access for eighteen years throughout these protracted proceedings. Simply because defendant presents the court with evidence for the first time does not mean that such evidence is ‘newly discovered.’”).

In addition, the mere fact that another expert or experts will supplement the opinions of Defendant’s other experts does not render this evidence “newly-discovered.” At the penalty phases, Defendant presented evidence of brain impairment through his expert, Dr. Parrish. His mother also testified that he suffered a severe head injury as a baby. Thus, although the PET scan confirms the frontal lobe injury, it is cumulative. Dr. Parrish opined that Defendant suffered from sexual sadism and that he was unable to control his actions at the time of the murders. The State’s expert, Dr. Moran, also opined that Defendant suffered from sexual sadism but further opined that he was nevertheless able to control his actions and knew what he was doing was wrong.

Defendant’s new expert, Dr. Gomez, notes in his report that the PET scan is consistent with Dr. Parrish’s neuropsychological examination. (Petition at Ex. D). He agrees that Defendant suffers from sexual sadism and further opines that it is likely Defendant is unable to control his impulses because of his brain impairment. Thus, Defendant’s proposed new evidence is similar to Dr. Parrish’s testimony and therefore cumulative.

Conclusion

A colorable claim entitling Defendant to an evidentiary hearing is one which, if taken as true, “might have changed the outcome.” *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Like the ultimate decision whether to grant or deny post-conviction relief, whether a claim is colorable, warranting an evidentiary hearing “is, to some extent, a discretionary decision for the trial court.” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

Based on all of the above, the Court finds that Defendant has failed to state any colorable claims for relief. As no purpose would be served by any further proceedings,

IT IS ORDERED dismissing Defendant’s Petition for Post-Conviction Relief.

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-04-0208-AP
	)	
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR 95116
JOE CLARENCE SMITH,	)	
	)	
Appellant.	)	
	)	O P I N I O N
	)	

Appeal from the Superior Court in Maricopa County
The Honorable Thomas W. O'Toole, Judge

SENTENCES AFFIRMED AS MODIFIED

TERRY GODDARD, ARIZONA ATTORNEY GENERAL	Phoenix
By Kent E. Cattani, Chief Counsel,	
Capital Litigation Section	
Jon G. Anderson, Former Assistant Attorney General	
Attorneys for State of Arizona	
SUSAN M. SHERWIN, MARICOPA COUNTY LEGAL ADVOCATE	Phoenix
By Kerri L. Chamberlin, Deputy Legal Advocate	
Attorneys for Joe Clarence Smith	

R Y A N, Justice

¶1 In 2004, Joe Clarence Smith was resentenced to death for two murders committed in 1975 and 1976. An automatic notice of appeal was filed under Arizona Rules of Criminal Procedure 26.15 and 31.2(b) and Arizona Revised Statutes ("A.R.S.") section 13-4031 (2001). We have jurisdiction under Article 6, Section 5(3), of the Arizona Constitution and A.R.S. § 13-4031.

I

¶2 On January 1, 1976,¹ the nude body of Sandy Spencer was found in the desert northwest of Phoenix. Her nose and mouth had been stuffed with dirt and taped shut, causing asphyxiation. Ligature marks on her wrists and ankles indicated that she had been bound before death and the ligatures had been removed after death. Before or near the time of death, Spencer also suffered nineteen stab wounds to the pubic region and a vaginal tear that was caused by penetration. She also had three stab wounds to her breasts and a sewing needle was found embedded in her left breast.

¶3 On February 2, 1976, Neva Lee's nude body was discovered in the desert near the Salt River Indian Reservation. She, like Spencer, had died from "asphyxiation due to airway obstruction with soil." Ligature marks were present on her wrists and ankles - a result of injuries suffered before death. She also had puncture and stab wounds to her chest, abdomen, and breasts and damage to her vulva.

¶4 In November 1976, a Maricopa County grand jury indicted Smith for two counts of first-degree murder. The superior court severed the counts, requiring separate trials. A

¹ In 1976 Smith was on probation for two prior rape convictions. See *State v. Smith*, 116 Ariz. 387, 388, 569 P.2d 817, 818 (1977). Probation was revoked in September 1976 after his third rape conviction. *Id.* at 389, 569 P.2d at 819.

jury convicted Smith of first-degree murder on June 17, 1977, for the murder of Neva Lee. Smith then pleaded guilty on July 7, 1977, to first-degree murder for the murder of Sandy Spencer. The superior court subsequently sentenced Smith to death on both counts. This Court affirmed the convictions, but remanded for resentencing in light of *State v. Watson*, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978). *State v. Smith (Smith I)*, 123 Ariz. 231, 243, 599 P.2d 187, 199 (1979).²

¶5 At resentencing, Smith's counsel presented no new mitigation evidence and Smith was again sentenced to death. On automatic appeal, the sentences were affirmed. *State v. Smith (Smith II)*, 131 Ariz. 29, 35, 638 P.2d 696, 702 (1981).

¶6 From 1984 through 1991, Smith filed a series of unsuccessful petitions for post-conviction relief. Smith subsequently filed a habeas corpus petition in the United States District Court for the District of Arizona, which was denied.

¶7 On appeal, however, a divided panel of the Ninth Circuit held that Smith's counsel had been ineffective at the resentencing. *Smith v. Stewart (Smith III)*, 189 F.3d 1004, 1014

² *Lockett v. Ohio* held that limiting the evidence that could be presented in mitigation in capital cases violates the Eighth and Fourteenth Amendments. 438 U.S. 586, 604-05 (1978). *Watson* accordingly held that A.R.S. § 13-454(F) (Supp. 1957-1978) unconstitutionally limited a defendant's ability to present mitigation evidence in a capital case. 120 Ariz. at 445, 586 P.2d at 1257. Smith's death sentences, therefore, were vacated

(9th Cir. 1999). The majority concluded that counsel's failure to present more mitigation evidence after this Court had held that Arizona's mitigation statute was not limited to the listed statutory mitigating factors was equivalent to presenting no evidence in mitigation. *Id.* at 1009-11. The majority pointed to evidence of multiple personalities, other mental disorders, and good relationships as potential mitigating evidence that was not presented at the second sentencing proceeding. *Id.* at 1009-10. Believing that this evidence may have changed the mind of the sentencing judge, the court remanded the case to the district court with directions to vacate the death sentences and remand the cases for resentencing. *Id.* at 1013-14. On November 21, 2000, the federal district court issued an order in accordance with the Ninth Circuit's mandate.

¶8 The Maricopa County Superior Court held the first status conference on the case in December 2000. Because more than twenty-four years had passed since the commission of the murders, counsel for both sides required considerable time to gather evidence and prepare for the resentencing proceedings.

¶9 The Supreme Court's subsequent invalidation of Arizona's judge-sentencing procedure in capital cases caused further delay. See *Ring v. Arizona (Ring II)*, 536 U.S. 584

to allow him to present further mitigation evidence. *Smith I*, 123 Ariz. at 243, 599 P.2d at 199.

(2002); *State v. Ring (Ring III)*, 204 Ariz. 534, 65 P.3d 915 (2003). In response to *Ring II*, the Arizona Legislature “subsequently amended Arizona's death penalty statutes. The amended sentencing statutes assigned to juries the responsibility of finding aggravating circumstances and determining whether to impose the death penalty.” *State v. Glassel*, 211 Ariz. 33, 42, ¶ 12, 116 P.3d 1193, 1202 (2005), *cert. denied*, 126 S. Ct. 1576 (2006) (citations omitted); see also 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, §§ 1, 3.

¶10 The sentencing proceeding for the murder of Sandy Spencer finally began before a jury in April 2004.³ In the aggravation phase, the State sought to prove the following aggravators: prior conviction for an offense punishable under Arizona law by a sentence of life in prison or death, A.R.S. § 13-454(E)(1) (Supp. 1957-1978); prior felony conviction that involved the use or threat of violence on another, *id.* § 13-454(E)(2); and the offense was committed in an especially heinous, cruel, or depraved manner, *id.* § 13-454(E)(6). In support of the (E)(1) aggravator, the jury heard testimony that Smith had previously been convicted of three counts of rape and sentenced to five years to life, ten years to life, and seventy-five years to life. The State used Smith's conviction for the

³ The superior court denied the State's motion to consolidate the two counts.

murder of Lee to prove the (E)(2) aggravator. In support of the (E)(6) aggravator, the State offered testimony about the stab and puncture wounds to Spencer's body and the asphyxiation. The jury made separate findings that each aggravator had been proved beyond a reasonable doubt. As to the (E)(6) aggravator, the jury made additional findings that each prong - cruelty, heinousness, and depravity - had been proved.

¶11 In the penalty phase, the defense presented testimony about Smith's mental health, his behavior while in prison, his struggles with asthma, and his family life. The jury determined that Smith should be sentenced to death for the murder of Spencer.

¶12 The sentencing proceeding for the murder of Lee, which began on May 5, 2004, before a new jury, substantially mirrored the Spencer proceeding. The State again sought to prove the (E)(1), (E)(2), and (E)(6) aggravators. Testimony related to the three prior rape convictions and the Spencer murder was offered to prove the (E)(1) and (E)(2) aggravators, respectively. The State also offered testimony about the injuries to Lee and her cause of death to support the (E)(6) aggravator. The jury once again made separate findings that all three aggravators had been proved beyond a reasonable doubt, including each prong of the (E)(6) aggravator. The mitigation and rebuttal evidence in the penalty phase was substantially the

same as in the Spencer proceeding. This jury also determined that Smith should be sentenced to death.

¶13 Accordingly, the superior court sentenced Smith to death by lethal injection on both counts.

II

¶14 Smith first argues that the trial court erred in denying a judgment of acquittal on the (E)(2) aggravator because first-degree murder, under A.R.S. § 13-452 (Supp. 1957-1978), did not necessarily require the use or threat of violence.⁴ Because this issue concerns a question of law, our review is de novo. See *State v. McGill*, 213 Ariz. 147, 156, ¶ 40, 140 P.3d 930, 939 (2006), *cert. denied*, 127 S. Ct. 1914 (2007).

¶15 A prior felony conviction qualified as an aggravator under former A.R.S. § 13-454(E)(2) only if the elements of the offense – without regard to the underlying facts of the crime – required the use or threat of violence on another person. *State v. Gillies*, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983); see also *State v. Fierro*, 166 Ariz. 539, 549, 804 P.2d 72, 82 (1990) (“If, under the statutory definition of the crime, the defendant could commit or be convicted of the crime without the use or

⁴ The legislature has since foreclosed this argument by amending A.R.S. § 13-703(F)(2) (Supp. 2006) (formerly A.R.S. § 13-454(E)(2)). 1993 Ariz. Sess. Laws, 1st Reg. Sess., ch. 153, § 1. The amended aggravator requires only that the prior conviction be for a “serious offense”; first-degree murder is expressly identified as such an offense, A.R.S. § 13-703(I)(1).

threat of violence, the prior conviction cannot qualify as a statutory aggravating circumstance.”). Consideration of the underlying facts is impermissible because it would amount to a second trial. *Gillies*, 135 Ariz. at 511, 662 P.2d at 1018; see also *State v. Schaaf*, 169 Ariz. 323, 334, 819 P.2d 909, 920 (1991). Therefore, we focus on the language of the statute to determine whether first-degree murder necessarily required the use or threat of violence.

¶16 The statute in effect at the time of the murders defined first-degree murder as “murder . . . perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing.” A.R.S. § 13-452. Smith contends that “under the statutory definition, first degree murder could be committed by lacing a victim’s food or drink with poison. A murder committed in this manner would not involve the use or threat of violence.” We reject this contention.

¶17 Under A.R.S. § 13-454(E)(2), violence is defined as the use or threat of force with the intent to injure or abuse. *Fierro*, 166 Ariz. at 549, 804 P.2d at 82. We hold that even surreptitious poisoning involves the use of force. A person who uses poison to kill another person “intentionally avails herself of the physical force exerted by poison on a human body.” *Vargas-Sarmiento v. U.S. Dep’t of Justice*, 448 F.3d 159, 174-75

(2d Cir. 2006). Poison invades a victim's body, attacking vital organs, until it causes death. It is this result that an assailant seeks in choosing to poison his victim.

¶18 First-degree murder, as defined in A.R.S § 13-452, therefore cannot be committed without the use of force, whether that force be exerted by the defendant or by some instrumentality that the defendant has put to this use. Accordingly, we affirm the trial court's denial of Smith's motion for a judgment of acquittal on the (E)(2) aggravator because a prior first-degree murder conviction does establish this aggravator.⁵

III

¶19 Smith next argues that the trial court erred by admitting hearsay testimony during the Lee aggravation phase, which violated the Confrontation Clause.⁶ He also argues that

⁵ Our previous cases are consistent with this result. We have upheld a finding of the (E)(2) aggravator based on prior first-degree murder convictions from California. *State v. Gretzler*, 135 Ariz. 42, 57, 659 P.2d 1, 16 (1983). California's first-degree murder statute in 1973, the year Gretzler committed the murders, stated that first-degree murder could be committed by poisoning. Cal. Penal Code § 189 hist. n. (West, Westlaw through 1987 legislation).

⁶ The State correctly concedes that the Confrontation Clause applies when the evidence presented is used to prove an aggravator. *McGill*, 213 Ariz. at 159, ¶ 51, 140 P.3d at 942; *State v. Greenway*, 170 Ariz. 155, 161 n.1, 823 P.2d 22, 28 n.1 (1991).

this error cannot be harmless because this testimony was the basis of the (E)(6) aggravator.

¶20 A trial court's decision to admit evidence over objection is reviewed for an abuse of discretion. *State v. Hampton*, 213 Ariz. 167, 178, ¶ 45, 140 P.3d 950, 961 (2006), *cert. denied*, 127 S. Ct. 972 (2007). Legal and constitutional questions are reviewed de novo. *McGill*, 213 Ariz. at 156, 157-58, ¶¶ 40, 45, 140 P.3d at 939, 940-41.

A

¶21 First, Smith argues that the State's medical examiner, Dr. Keen, improperly relayed to the jury the previous medical examiner's findings and opinions. He claims that this testimony introduced inadmissible hearsay and violated his right to confront the previous medical examiner.

¶22 Rule 703 of the Arizona Rules of Evidence states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

¶23 Expert testimony that discusses reports and opinions of another is admissible under this rule if the expert reasonably relied on these matters in reaching his own conclusion. *State v. Rogovich*, 188 Ariz. 38, 41-42, 932 P.2d 794, 797-98 (1997); *State v. Villafuerte*, 142 Ariz. 323, 327,

690 P.2d 42, 46 (1984); *State v. Noleen*, 142 Ariz. 101, 104, 688 P.2d 993, 996 (1984). Such testimony is not hearsay because it is offered not to prove the truth of the prior reports or opinions, but rather is offered only to show the basis of the testifying expert's opinion. See *Rogovich*, 188 Ariz. at 42, 932 P.2d at 798; *State v. Lundstrom*, 161 Ariz. 141, 148, 776 P.2d 1067, 1074 (1989). A testifying expert, however, may not act as a "conduit for another non-testifying expert's opinion." *Lundstrom*, 161 Ariz. at 148, 776 P.2d at 1074. Smith contends, with respect to Dr. Keen's testimony on the cause of death, size of wounds, and timing of infliction, that Dr. Keen acted as a conduit for the prior medical examiner's opinion.

¶24 Smith's characterization of Dr. Keen's testimony is inaccurate. Dr. Keen formed his own conclusions based on the partial autopsy report,⁷ photographs of Lee's body, and the testimony of the prior medical examiner, all of which would normally be relied upon by a medical examiner to make independent determinations about injuries and causes of death. Dr. Keen referred to some of the testimony of the prior medical examiner, but he did so because it helped form the basis for his own conclusions and observations. His testimony about the injuries Lee suffered was based on his independent verification

⁷ Except for the cover page, the original medical examiner's report of the Lee autopsy could not be found.

of those injuries from the photographs taken in 1976. Further, he independently concluded that the ligatures were placed on the wrists and ankles before death, the cause of death was asphyxiation, and the stab wounds were inflicted near the time of death. Dr. Keen discussed the prior medical examiner's testimony about the location and size of the wounds because he used that information to determine that none of the other wounds would have caused Lee's death; therefore, he concurred with that medical examiner's determination that the cause of death was asphyxiation.

¶25 Thus, Dr. Keen was not a mere conduit for the opinions of the prior medical examiner; rather, his ultimate opinions were independent of the testimony of the prior medical examiner. Because the underlying data and opinions were used to show the basis for these conclusions, and not to prove the truth of the matters asserted, there was no hearsay problem. See *Rogovich*, 188 Ariz. at 42, 932 P.2d at 798; *Lundstrom*, 161 Ariz. at 148, 776 P.2d at 1074.

¶26 There was also no Confrontation Clause violation. We have previously held:

Facts or data underlying the testifying expert's opinion are admissible for the limited purpose of showing the basis of that opinion, not to prove the truth of the matter asserted. Testimony not admitted to prove the truth of the matter asserted by an out-of-court declarant is not hearsay and does not violate the confrontation clause.

Rogovich, 188 Ariz. at 42, 932 P.2d at 798 (citation omitted). The Supreme Court has made plain that the Confrontation Clause is not violated by use of a statement to prove something other than the truth of the matter asserted. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); see also *Tennessee v. Street*, 471 U.S. 409, 414 (1985). Therefore, Smith's confrontation right was not violated by Dr. Keen's testimony.

B

¶127 Smith also raises hearsay and Confrontation Clause claims because Detective Dominguez testified to statements made by the prior medical examiner during the autopsy of Lee, which were recorded in a police report.

¶128 Because both the police report and the statements of the medical examiner who conducted the autopsy are hearsay, each must independently qualify under a hearsay exception to be admissible. Ariz. R. Evid. 805. Here, each clearly falls within an exception.

¶129 A testifying witness may use a memorandum or record to testify if the witness had knowledge of the matter referred to in the memorandum or record at one time, but no longer has sufficient memory to testify fully; the witness made or adopted the memorandum or record when the matter was fresh in the

witness's memory;⁸ and the memorandum or record correctly reflects the knowledge the witness had. Ariz. R. Evid. 803(5).

¶30 Although he no longer recalled specific details of the autopsy, Detective Dominguez testified that he remembered the medical examiner pointing out the trauma areas and relaying the measurements, which his partner then wrote down.⁹ Detective Dominguez adopted the report as his own by signing it shortly after it was created. At the same time, he reviewed the report for accuracy and believed that it accurately reflected the information that had been given by the medical examiner at the autopsy. Therefore, the detective's use of the report met the requirements of Arizona Rule of Evidence 803(5).

¶31 The medical examiner's statements also fall under a hearsay exception. Statements qualify as a present sense impression if they "describe an event or condition, that was perceived by the declarant, and the statement [is] made immediately after [or contemporaneous with] the event." *State v. Tucker*, 205 Ariz. 157, 166, ¶ 43, 68 P.3d 110, 119 (2003);

⁸ The memorandum need not be made by or at the direction of the witness. "It is sufficient if the witness read the memorandum at a time when his memory was fresh and recognized that it accurately recorded the event." 1 Joseph M. Livermore, Robert Bartels & Anne Holt Hameroff, *Arizona Practice: Law of Evidence* § 803.5, at 360 (4th ed. 2000).

⁹ Detective Dominguez and his partner were present for the entire autopsy of Lee.

see also Ariz. R. Evid. 803(1). The medical examiner's statements are present sense impressions because they describe the condition of the body, were made by the person perceiving the information, and were made as he perceived the conditions.¹⁰ Accordingly, Detective Dominguez's testimony was not inadmissible hearsay.

¶32 Smith's Confrontation Clause claim with respect to Detective Dominguez's testimony turns on whether the statements made by the medical examiner during the autopsy were "testimonial." See *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006) (citing *Crawford*, 541 U.S. at 51) (holding that the Confrontation Clause encompasses only testimonial hearsay). Because we conclude that any potential error in admitting the testimony was harmless beyond a reasonable doubt, we need not decide whether admission of Detective Dominguez's statements violated the Confrontation Clause. See *State v. King*, 212 Ariz. 372, 380, ¶ 36, 132 P.3d 311, 319 (App. 2006).

¶33 Even without the detective's contested testimony, the jury still heard evidence that Lee suffered stab and puncture wounds to her chest, breasts, and abdomen; puncture wounds and bleeding were observed around her vulva; none of the wounds

¹⁰ Cf. *United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir. 1995) (holding that officers who are "note-takers" could testify to statements made by surveillance officers because the

would have been fatal; she died from "asphyxiation due to airway obstruction with soil"; she had ligature marks on her wrists and ankles; there were struggle areas found at the scene; the stab wounds occurred around the time of death; the ligature marks were made before death; and a person could be conscious from forty-five seconds to several minutes while being asphyxiated. Thus, Detective Dominguez's testimony added very little to the evidence the jury already had before it to find that the murder of Lee was especially cruel, heinous, or depraved. Therefore, even if the admission of this testimony was erroneous, the error was harmless beyond a reasonable doubt.

IV

¶34 Smith also argues that the trial court erred in sentencing him to death by lethal injection. The State concedes that A.R.S. § 13-704(B) (2001) applies to Smith and allows him to choose between death by lethal injection or lethal gas, as long as he does so twenty days before the execution date.

¶35 We have authority under A.R.S. § 13-4037(A) (2001) to correct the sentences. Accordingly, we vacate the lethal injection portion of Smith's sentences and order that Smith be permitted to choose either lethal injection or lethal gas, as long as he does so at least twenty days before the execution

statements fell under the federal present sense impression exception to the hearsay rule).

date. If Smith fails to choose, the death penalty will be carried out by lethal injection. *Id.* § 13-704(B).

V

¶36 Smith argues that the superior court's limitation on questions, improper interjections, and attempts at juror rehabilitation during voir dire denied him the ability to obtain fair and impartial juries.

¶37 A trial court has discretion to determine the scope of voir dire, which we will not overturn absent an abuse of that discretion. *State v. Mauro*, 159 Ariz. 186, 202, 766 P.2d 59, 75 (1988); *State v. Melendez*, 121 Ariz. 1, 3, 588 P.2d 294, 296 (1978); see also Ariz. R. Crim. P. 18.5(d), (e) & cmt.

A

¶38 Smith complains that the trial court's limitations on the questions that he could ask left only general "follow the law" questions, and thus violated the rule of *Morgan v. Illinois*, 504 U.S. 719 (1992).

¶39 In *Morgan*, the Supreme Court held that potential jurors must be asked whether they would automatically impose the death penalty if a defendant is found guilty, because a juror who would do so must be struck for failure to be impartial. *Id.* at 729, 736. Although there is no "catechism for voir dire," the defendant's right to an impartial jury nonetheless requires "adequate voir dire to identify unqualified jurors." *Id.* at

729. The Court further held that simply asking potential jurors whether they can follow the law and be fair and impartial is insufficient. *Id.* at 735-36.

¶40 *Morgan*, however, does not require that Smith be permitted to ask the questions that he claims were improperly limited. First, we have previously held that a trial court may prohibit a defendant from asking potential jurors about their understanding of the phrase “sufficiently substantial to call for leniency.” *Glassel*, 211 Ariz. at 46, ¶ 40, 116 P.3d at 1206. Such questioning is not allowed because the phrase is necessarily subjective. *Id.* Moreover, the manner in which Smith’s counsel posed the question improperly asked the potential jurors, without having heard any of the evidence, to opine on what it would take to meet that standard. See *Melendez*, 121 Ariz. at 3, 588 P.2d at 296.

¶41 Second, the superior court did not abuse its discretion in refusing to allow Smith’s open-ended questions about the best reason for having or not having the death penalty, the importance of considering mitigation, and the type of offense for which the juror would consider death to be appropriate. See *Glassel*, 211 Ariz. at 47, ¶ 44, 116 P.3d at 1207. Each of these questions was quite broad and went well beyond the constitutionally required determination of whether the juror would consider mitigation.

¶42 Finally, Smith complains that he was not permitted to ask jurors whether they would automatically impose the death penalty if they found specific aggravators. *Morgan* was not meant to allow a defendant to “ask a juror to speculate or precommit on how that juror might vote based on any particular facts.” *United States v. McVeigh*, 153 F.3d 1166, 1207 (10th Cir. 1998). Defendants also cannot seek to “condition” or “commit [jurors] to certain positions prior to receiving the evidence.” *Melendez*, 121 Ariz. at 3, 588 P.2d at 296. Smith’s question attempted to do just that. As we have already held, a trial court is not required to allow a defendant to ask about how a juror would assess specific mitigation. *State v. Johnson*, 212 Ariz. 425, 434, ¶ 31, 133 P.3d 735, 744 (2006), *cert. denied*, 127 S. Ct. 559 (2006). We hold that the same is true of voir dire focused on the assessment of specific aggravators. See, e.g., *People v. Brown*, 665 N.E.2d 1290, 1303 (Ill. 1996) (holding that *Morgan* did not require questions about specific aggravators to be asked of potential jurors).

¶43 In addition, *Morgan* does not, as Smith seems to contend, prohibit the trial court from asking jurors whether they will follow the law. As long as counsel has sufficient opportunity to determine whether a particular juror would automatically impose the death penalty upon a guilty verdict, such general questioning may occur without running afoul of the

mandate of *Morgan*. 504 U.S. at 736. Smith had several opportunities to determine whether any of the jurors would automatically impose death. The jurors filled out questionnaires, which contained the *Morgan* question, along with other questions about the death penalty, and Smith had ample opportunity to question potential jurors – including asking some jurors the very questions that he complains were limited. See *Johnson*, 212 Ariz. at 435, ¶ 34, 133 P.3d at 745; *Glassel*, 211 Ariz. at 47, ¶ 44, 116 P.3d at 1207.

B

¶44 Smith also contends that the superior court judge abused his discretion by interrupting voir dire and “rehabilitating” potential jurors. We focus only on the complaints related to deliberating jurors, as any error with respect to non-deliberating jurors was harmless. *Glassel*, 211 Ariz. at 46, ¶ 41, 116 P.3d at 1206.

¶45 The record refutes Smith’s claim that the trial judge’s interruptions denied him the right to adequately exercise his challenges. Smith had multiple opportunities to question the potential jurors to determine whether they would automatically impose the death penalty. Further, the trial judge’s interruptions consisted almost entirely of explanations of the law and clarification of the questions being asked or answers being given. Because the trial judge is responsible for

ensuring that voir dire is conducted in a manner that results in a fair and impartial jury for both sides, Ariz. R. Crim. P. 18.5(d), (e) & cmt., a judge may interject to make certain a juror understands the legal requirements for service, the law on a particular subject, and the question being asked. See *Wainwright v. Witt*, 469 U.S. 412, 435 (1985) (stating that a trial court “is free to interrupt questioning to clarify any particular statement”). Therefore, the court’s interjections were permissible and did not amount to an abuse of discretion.

¶46 Smith fails to offer any examples of deliberating jurors whom the trial judge improperly rehabilitated to support his argument that automatic death jurors sat on either jury. Accordingly, we find no abuse of discretion on this claim.

VI

¶47 Smith next argues that the trial court erred when it failed to exclude rebuttal evidence that was unduly prejudicial, cumulative, did not refute any mitigator, and served as an improper aggravator.¹¹

¶48 We review a trial court’s evidentiary decisions for an abuse of discretion, *Hampton*, 213 Ariz. at 178, ¶ 45, 140 P.3d at 961, giving deference to its determination on relevance,

¹¹ We recently rejected the claim that the Eighth Amendment limits the state to urging statutory aggravating factors when presenting rebuttal evidence during the penalty phase. See *Hampton*, 213 Ariz. at 178, ¶ 46 n.10, 140 P.3d at 961 n.10.

McGill, 213 Ariz. at 156-57, ¶ 40, 140 P.3d at 939-40, and unfair prejudice, *State v. Vickers*, 159 Ariz. 532, 540, 768 P.2d 1177, 1185 (1989) (dealing with Arizona Rule of Evidence 403, which is fundamentally the same as the relevance assessment under A.R.S. § 13-703(C) (Supp. 2004), *McGill*, 213 Ariz. at 157, ¶ 40, 140 P.3d at 940).

¶49 Under A.R.S. § 13-703(C), the state and the defendant are permitted to produce any evidence at the penalty phase relevant to any of the mitigating circumstances, regardless of whether the rules of evidence would allow it in another phase of the trial. Furthermore, A.R.S. § 13-703.01(G) (Supp. 2004) permits both parties to present evidence that is relevant to whether the mitigation presented is sufficiently substantial to call for leniency.

¶50 In rebuttal at both sentencing proceedings, the State offered testimony concerning the facts of Smith's prior rape and murder convictions. A detective described to the juries the circumstances of Smith's first two rape convictions, which involved a woman to whom Smith and his wife had offered a ride. Smith forcibly raped the victim twice, once while at Smith's house with his wife present, and again in the desert inside of Smith's car while his wife sat outside on the trunk of the car. Smith repeatedly threatened to kill the victim and spoke about

bodies being found in the desert. He released her, however, after she promised to bring him money the following day.

¶51 The jury in the Spencer sentencing proceeding heard testimony related to Smith's third prior rape conviction from the victim. She testified that Smith offered her a ride home, but instead drove her into the desert. While there, Smith bound her hands, forced her to engage in intercourse, raped her with a Pepsi bottle, forced her to give and receive oral sex, sodomized her, and forced her to urinate while he watched. He repeatedly threatened to kill her while brandishing a knife, told her that he was a "sadist," and asked her whether she wanted pins or the knife stuck in her nipple. Eventually, Smith drove the victim back into town and released her.

¶52 Finally, each jury was told about the facts of Smith's other murder conviction - the Spencer jury was told about the Lee murder and vice versa.

¶53 The superior court correctly determined that this testimony was relevant to the diagnosis of sexual sadism, which was the thrust of Smith's mitigation.¹² Indeed, the mental health experts relied on the underlying facts of these crimes to diagnose Smith. This testimony thus assisted the jury in its

¹² Smith concedes the relevance of this testimony, but objects to the way it was presented. In particular, he complains that allowing the rape victim to testify was inappropriate. Smith

evaluation of that testimony and in determining whether Smith's mental illness played a role in each murder.

¶54 The relevance determination, however, does not end our inquiry. *Hampton*, 213 Ariz. at 179, ¶ 48, 140 P.3d at 962. The Due Process Clause constrains admission of rebuttal evidence, *id.*, and requires that unduly prejudicial evidence be excluded if it makes the proceeding "fundamentally unfair," *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The Supreme Court has said that establishing a denial of due process in a criminal trial requires a finding "that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

¶55 Although trial courts "should exclude [rebuttal] evidence that is either irrelevant to the thrust of the defendant's mitigation or otherwise unfairly prejudicial," *Hampton*, 213 Ariz. at 180, ¶ 51, 140 P.3d at 963, none of the testimony about which Smith complains rendered his sentencing proceedings fundamentally unfair. The superior court carefully assessed and scrutinized the prejudicial nature of the rebuttal evidence. The court limited the scope of the rape victim's testimony in the Lee sentencing proceeding based on the

acknowledges, however, that he would not have objected had the mental health experts testified to the same facts.

mitigation evidence that was presented and also limited the bad acts testimony that could be presented.¹³ Given the relevance to Smith's mitigation, the limits imposed by the trial court, and the deference given prejudice assessments, we conclude that no violation of Smith's due process rights occurred.

VII

¶56 Finally, Smith argues that his death sentences should be vacated because his state and federal speedy trial rights have been violated by the twenty-seven year delay between his convictions and his resentencing.

¶57 We review issues of state and federal constitutional law de novo. *State v. McCann*, 200 Ariz. 27, 28, ¶ 5, 21 P.3d 845, 846 (2001). Any factual determination related to these issues, however, is reviewed for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004); *State v. Stielow*, 14 Ariz. App. 445, 448, 484 P.2d 214, 217 (1971).

¹³ The State initially wanted to ask the mental health experts about eleven different acts because they related to the diagnoses. The court's ruling limited the testimony to the three rape convictions, the murder convictions, and another rape conviction that was overturned on appeal, see *State v. Smith*, 123 Ariz. 243, 253, 599 P.2d 199, 209 (1979). The State later chose not to present evidence of the conviction that had been overturned on appeal.

A

¶58 Although this Court and the Supreme Court have never explicitly held that the speedy trial right applies to sentencing, neither court has foreclosed that possibility. See *Pollard v. United States*, 352 U.S. 354, 361 (1957); *State v. Blazak*, 131 Ariz. 598, 600, 643 P.2d 694, 696 (1982) (citing *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475 (1980)). In *Pollard*, the Supreme Court assumed, without deciding, that the Sixth Amendment right to a speedy trial extends to sentencing. 352 U.S. at 361. We do the same today.

¶59 In addressing Smith's speedy trial claim we must assess the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); see also *State v. Brannin*, 109 Ariz. 525, 528-29, 514 P.2d 446, 449-50 (1973) (applying the *Barker* factors to analyze a speedy trial claim). The most important factor is prejudice; delay is the least, simply acting as a gatekeeper. See *Barker*, 407 U.S. at 530 (calling the delay factor a "triggering mechanism," and stating that unless the delay is "presumptively prejudicial" in length the other factors need not be addressed); *Schaaf*, 169 Ariz. at 327, 819 P.2d at 913.

B

¶60 We reject Smith's argument that the relevant delay, for purposes of the speedy trial analysis, is twenty-seven years. "[W]e . . . do not believe that the period of time between notice of appeal and retrial upon reversal can be counted as part of the time to be considered in a constitutional denial of a defendant's right to speedy trial." *State v. Ward*, 120 Ariz. 413, 416, 586 P.2d 974, 977 (1978). Once there has been a conviction, the defendant has been sentenced, and he has appealed, the trial court has no need or authority to proceed any further. *Id.* at 415-16, 586 P.2d at 976-77 (quoting *State v. Ames*, 190 So. 2d 223, 227 (La. 1966)). Were we to accept Smith's argument, it would undercut the principle that a defendant can be retried after appellate reversal without running afoul of the speedy trial right. See *United States v. Ewell*, 383 U.S. 116, 121 (1966) (citing *Ball v. United States*, 163 U.S. 662, 671-72 (1896), and *United States v. Tateo*, 377 U.S. 463, 465, 473-74 (1964)).

¶61 Therefore, absent evidence that the state deliberately delayed the proceedings and the defendant was prejudiced by the delay, we do not count the time on appeal. *United States v. Loud Hawk*, 474 U.S. 302, 316 (1986); *Ward*, 120 Ariz. at 416, 586 P.2d at 977. Because Smith does not allege any such actions by the State, we concern ourselves here only with the time after

the superior court was revested with jurisdiction. *Ward*, 120 Ariz. at 416, 586 P.2d at 977; see also *United States v. Alston*, 412 A.2d 351, 359 (D.C. 1980). Smith has conceded that there was no speedy trial violation if the time on appeal is not counted; therefore, we need not address the remaining *Barker* factors.¹⁴

VIII

¶62 Because both murders occurred before August 1, 2002, we must independently review the “findings of aggravation and mitigation and the propriety of the death sentence[s].”¹⁵ A.R.S. § 13-703.04(A) (Supp. 2006); see also 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, §§ 1, 7(B) (providing that § 13-703.04(A) applies to any sentencing or resentencing in a first-degree murder case that occurs after the effective date of the act when the offense was committed before the act’s effective date). If we decide “that the mitigation is sufficiently substantial to

¹⁴ Smith also claims that executing him after twenty-seven years on death row would violate his Eighth Amendment right to be free from cruel and unusual punishment. We expressly rejected this argument in *State v. Schackart*, 190 Ariz. 238, 259, 947 P.2d 315, 336 (1997), and do so again here, particularly because much of the delay resulted from Smith’s pursuit of his rights to post-conviction relief, as opposed to intentional delay by the State in carrying out the death sentence.

¹⁵ At the time of the murders, this Court independently reviewed the aggravation and mitigation evidence to determine whether the death sentence was appropriate. *State v. Richmond*,

warrant leniency," we must impose a life sentence. A.R.S. § 13-703.04(B). If it is not, we must affirm the death sentence. *Id.*

¶63 In both sentencing proceedings, the State proved three aggravating factors beyond a reasonable doubt. Smith's three prior rape convictions conclusively established that he had been convicted of another offense that carried a possible sentence of life imprisonment or death. See A.R.S. § 13-454(E)(1). As discussed above, his prior convictions for first-degree murder met the requirements of A.R.S. § 13-454(E)(2). Finally, overwhelming evidence established that the murders of Spencer and Lee were especially cruel. See *Id.* § 13-454(E)(6).

¶64 The "cruelty" prong of the (E)(6) aggravator focuses on the victim's mental anguish and physical suffering. A finding of cruelty requires proof that the victim "consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur." *State v. Trostle*, 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997) (citation omitted).

¶65 Spencer and Lee both died of asphyxiation after having their noses and mouths filled with dirt and taped shut. They also had marks on their wrists and ankles from ligatures that

114 Ariz. 186, 196, 560 P.2d 41, 51 (1976). Section 13-703.04 is a codification of this review.

had been placed before death. Although the medical examiner could not conclusively establish consciousness before they had been bound, the tape and ligatures would have been unnecessary if the victims were unconscious. See *State v. Djerf*, 191 Ariz. 583, 596, ¶ 49, 959 P.2d 1274, 1287 (1998). Asphyxiation caused by stuffing a victim's nose and mouth with dirt while bound would undoubtedly cause mental anguish and physical pain. At a minimum, Smith should have known pain and anguish would occur.

¶66 Proof of cruelty is sufficient to establish the (E)(6) aggravator because the aggravator is stated in the disjunctive. *State v. Cromwell*, 211 Ariz. 181, 189, ¶ 43, 119 P.3d 448, 456 (2005), *cert. denied*, 126 S. Ct. 2291 (2006). Because we independently conclude that the murders of Spencer and Lee were cruel, we need not consider the separate findings of heinousness and depravity. *Id.*

¶67 The focus of Smith's mitigation evidence related to his mental health. Smith's mental health expert testified that he suffered from sexual sadism with a form of anxiety disorder, which contributed to the commission of the murders. The role of Smith's mental health in the commission of these murders, and therefore the quality of the mitigation, however, is called into serious question by testimony that Smith could have controlled his impulses and that he likely knew what he was doing and that it was wrong.

¶68 The remainder of Smith's mitigation focused on his good conduct while in prison and his family life. But conflicting testimony regarding the presence or substantiality of these mitigators also lessens their impact.

¶69 After review of the record, we hold that even if all of Smith's claimed mitigators were established, the mitigation presented was not sufficiently substantial to warrant leniency given the nature of the crimes committed and the aggravators that we have found proven beyond a reasonable doubt. See A.R.S. § 13-703.04(B). We therefore affirm the death sentences. *Id.*

IX

¶70 Smith raises twelve challenges to the constitutionality of Arizona's death penalty scheme to preserve them for further review. He acknowledges, however, that we have already decided these issues. Smith asserts:

¶71 (1) The prosecutor's discretion to seek the death penalty has no standards and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 1, 4, and 15, of the Arizona Constitution. We rejected this argument in *State v. Finch*, 202 Ariz. 410, 419, ¶ 50, 46 P.3d 421, 430 (2002) (citing *State v. Rossi*, 146 Ariz. 359, 366, 706 P.2d 371, 378 (1985)).

¶72 (2) Arizona's death penalty, as applied, discriminates against poor, young, and male defendants in

violation of Article 2, Sections 1, 4, and 13, of the Arizona Constitution. This argument was rejected in *State v. Sansing*, 200 Ariz. 347, 361, ¶ 46, 26 P.3d 1118, 1132 (2001), *vacated on other grounds*, 536 U.S. 954 (2002), and *Schackart*, 190 Ariz. at 260, 947 P.2d at 337.

¶73 (3) The death penalty is cruel and unusual punishment under any circumstances and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. The Supreme Court rejected this argument in *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976); we rejected it in *State v. Harrod*, 200 Ariz. 309, 320, ¶ 59, 26 P.3d 492, 503 (2001), *vacated on other grounds*, 536 U.S. 953 (2002), and *Blazak*, 131 Ariz. at 601, 643 P.2d at 698.

¶74 (4) The absence of proportionality review of death sentences by Arizona courts denies capital defendants due process of law and equal protection, and amounts to cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. *State v. Gulbrandson*, 184 Ariz. 46, 73, 906 P.2d 579, 606 (1995) (citing *Pulley v. Harris*, 465 U.S. 37, 43-44 & n.6 (1984), and *State v. Salazar*, 173 Ariz. 399, 416, 844 P.2d 566, 583 (1992)), rejected this argument.

¶75 (5) Arizona's capital sentencing scheme is unconstitutional because it does not require that the state prove that the death penalty is appropriate, which violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. This argument was rejected in *State v. Van Adams*, 194 Ariz. 408, 423, ¶ 55, 984 P.2d 16, 31 (1999) (citing *Gulbrandson*, 184 Ariz. at 72, 906 P.2d at 605).

¶76 (6) The death penalty is cruel and unusual because it is irrationally and arbitrarily imposed. The statute requires that the death penalty be imposed if the jurors find one or more aggravating circumstances and no mitigation that is sufficiently substantial to call for leniency. Furthermore, the death penalty serves no purpose that is not adequately addressed by a sentence of life imprisonment. Therefore, it violates the defendant's right to due process under the Fourteenth Amendment to the United States Constitution and Article 2, Sections 1 and 4, of the Arizona Constitution. This proposition was recently rejected in *Cromwell*, 211 Ariz. at 192, ¶ 63, 119 P.3d at 459. See also *State v. Pandeli*, 200 Ariz. 365, 382, ¶ 88, 26 P.3d 1136, 1153 (2001), *vacated on other grounds*, 536 U.S. 953 (2002); *State v. Beaty*, 158 Ariz. 232, 246-47, 762 P.2d 519, 533-34 (1988).

¶77 (7) Section 13-703 provides no objective standards to guide the jurors in weighing the aggravating and mitigating circumstances and therefore violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. This argument was rejected in *Pandeli*, 200 Ariz. at 382, ¶ 90, 26 P.3d at 1153 (citing *State v. White*, 194 Ariz. 344, 355, ¶ 49, 982 P.2d 819, 830 (1999)).

¶78 (8) Section 13-703 does not sufficiently narrow the class of murders that are death eligible because the aggravating factors are so broad that they encompass nearly every murder; therefore, it violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15, of the Arizona Constitution. This claim was also rejected in *Pandeli*, 200 Ariz. at 382, ¶ 90, 26 P.3d at 1153.

¶79 (9) Execution by lethal injection is cruel and unusual punishment. The Court rejected this proposition in *Van Adams*, 194 Ariz. at 422, ¶ 55, 984 P.2d at 30 (citing *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995)).

¶80 (10) A proportionality review of a defendant's death sentence is constitutionally required. *Gulbrandson*, 184 Ariz. at 73, 906 P.2d at 606 (citing *Pulley*, 465 U.S. at 43-44 & n.6), rejected this argument.

¶81 (11) Arizona's death penalty statute violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 4 and 15, of the Arizona Constitution because it does not require multiple mitigating factors to be considered cumulatively or require the fact-finder to make specific findings as to each mitigating factor. The Court recently rejected this argument in *State v. Anderson*, 210 Ariz. 327, 359, app. A, 111 P.3d 369, 401 (2005), *cert. denied*, 126 S. Ct. 193 (2005). See also *Van Adams*, 194 Ariz. at 423, ¶ 55, 984 P.2d at 31.

¶82 (12) Arizona's death penalty statute is constitutionally deficient because it requires defendants to prove that their lives should be spared. *State v. Roseberry*, 210 Ariz. 360, 375, app., 111 P.3d 402, 417 (2005), *cert. denied*, 126 S. Ct. 444 (2005), rejected this proposition. See also *State v. Fulminante*, 161 Ariz. 237, 258, 778 P.2d 602, 623 (1988) (holding that shifting the burden of proof on mitigation to the defendant is not unconstitutional).

X

¶83 For the foregoing reasons, we affirm Smith's sentences as modified to comply with A.R.S. § 13-704(B).

Michael D. Ryan, Justice

CONCURRING:

Ruth V. McGregor, Chief Justice

Rebecca White Berch, Vice Chief Justice

Andrew D. Hurwitz, Justice

Maurice Portley, Judge*

* Pursuant to Article 6, Section 3, of the Arizona Constitution, the Honorable Maurice Portley, Judge of the Arizona Court of Appeals, Division One, was designated to sit in this matter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 28 2017

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

JOE CLARENCE SMITH,

Petitioner - Appellant,

v.

CHARLES L. RYAN and RON
CREDIO,

Respondents - Appellees.

No. 14-99008

D.C. No. 2:12-cv-00318-PGR
U.S. District Court for Arizona,
Phoenix

MANDATE

The judgment of this Court, entered May 26, 2016, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

No. 14-99008

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE CLARENCE SMITH,
Petitioner–Appellant,

v.

CHARLES L. RYAN and RON CREDIO,
Respondents–Appellees.

On Appeal from the United States District Court
District of Arizona, No. 2:12-cv-00318-PGR

PETITION FOR PANEL REHEARING AND PETITION
FOR REHEARING EN BANC

DEATH-PENALTY CASE

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TABLE OF CONTENTS

Table of Authorities ii

Introduction1

Statements Pursuant To Federal Rules Of Appellate Procedure 35(b)(1) and
40(a)(2).....3

Argument.....4

 1. The panel’s decision conflicts with the United States Supreme
 Court’s decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and
 could create an intra-circuit conflict.4

Conclusion10

Certificate of Compliance12

Certificate of Service13

TABLE OF AUTHORITIES

Federal Cases

<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	9
<i>Hankerson v. North Carolina</i> , 432 U.S. 233 (1977)	5
<i>Henry v. Ryan</i> , 720 F.3d 1073 (9th Cir. 2013)	7
<i>Henry v. Ryan</i> , 748 F.3d 940 (9th Cir. 2014)	8, 10
<i>Henry v. Ryan</i> , 766 F.3d 1059 (9th Cir. 2014)	8
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016)	3, 4
<i>In re Exxon Valdez</i> , 270 F.3d 1215 (9th Cir. 2001)	7
<i>Ivan V. v. City of New York</i> , 407 U.S. 203 (1972)	5
<i>Mayfield v. Woodford</i> , 270 F.3d 915 (9th Cir. 2001)	9-10
<i>McKinney v. Ryan</i> , 730 F.3d 903 (9th Cir. 2013)	7
<i>McKinney v. Ryan</i> , 813 F.3d 798 (9th Cir. 2015)	7
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016)	5-6
<i>Newhouse v. Robert’s Ilima Tours, Inc.</i> , 708 F.2d 436 (9th Cir. 1983)	9
<i>Poyson v. Ryan</i> , 743 F.3d 1185 (9th Cir. 2013)	8
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	2
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	6, 7
<i>Smith v. Ryan</i> , 823 F.3d 1270 (9th Cir. 2016)	2
<i>Smith v. Stewart</i> , 189 F.3d 1004 (9th Cir. 1999)	1
<i>Stanley v. Schriro</i> , 598 F.3d 612 (9th Cir. 2010)	9
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016)	6
<i>Workman v. Bell</i> , 484 F.3d 837 (6th Cir. 2007)	9

Federal Statutes

28 U.S.C. § 2254 (2012)	2
-------------------------------	---

State Cases

<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016)	4
<i>Rauf v. State</i> , 145 A.3d 430 (Del. 2016)	4
<i>State v. Smith</i> , 599 P.2d 199 (Ariz. 1979)	1

State Statutes

Ariz. Rev. Stat. § 13-751(E) 5

INTRODUCTION

Joe Clarence Smith, a death-sentenced prisoner in Arizona, respectfully requests that this panel or the en banc Court reconsider his Motion to Remand and Amend Habeas Petition to Include a *Hurst* Claim. Order, *Smith v. Ryan*, No. 14-99008 (9th Cir. Feb. 17, 2017), ECF No. 56 (copy attached). Doing so will afford Mr. Smith what he has three times been denied—a constitutional sentencing proceeding.

In 1977, Mr. Smith was convicted and sentenced to death in separate cases for the murders of Sandy Spencer and Neva Lee. (ER 253.) On appeal, the Arizona Supreme Court reversed Mr. Smith's sentences because he had been sentenced under an unconstitutional sentencing scheme that limited his ability to present mitigating evidence. *State v. Smith*, 599 P.2d 199 (Ariz. 1979).

At his second sentencing, counsel relied solely on the evidence presented at the initial sentencing, and the trial judge again imposed death sentences for both killings. (ER 226.) The Arizona Supreme Court affirmed. (ER 235.) The federal district court denied habeas relief, but this Court reversed, ruling that Mr. Smith was denied effective assistance of counsel at his 1979 resentencing. *Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999).

Mr. Smith returned to Maricopa County Superior Court for his third sentencing. While awaiting resentencing, the United States Supreme Court held in

Ring v. Arizona, 536 U.S. 584 (2002), that Arizona’s capital sentencing scheme, in permitting the trial judge rather than the jury to find facts that make a defendant death-eligible, violated the Sixth Amendment.

In 2004, Mr. Smith proceeded to jury resentencing under the Arizona statutory scheme enacted in response to *Ring*. He was resentenced separately for the two crimes. Neither jury was instructed that the fact that the aggravating circumstances outweighed the mitigating circumstances had to be found beyond a reasonable doubt. (ECF No. 51-2 at 12, 26.) Both juries returned death sentences, and the trial court imposed the sentences of death by lethal injection. (ER 130–31; ER 390–99; ER 587.) Mr. Smith filed a petition for post-conviction relief, which was denied. (ER 83–88.) The Arizona Supreme Court denied review. (ER 82.)

Mr. Smith then filed a federal habeas petition under 28 U.S.C. § 2254. (ECF No. 10-10 at 2–155.) The district court denied relief. (ER 81.) A panel of this Court affirmed the district court’s denial. *Smith v. Ryan*, 823 F.3d 1270 (9th Cir. 2016). Mr. Smith then sought rehearing and rehearing en banc, which was denied. Order, *Smith v. Ryan*, No. 14-99008 (9th Cir. Sept. 23, 2016), ECF No. 49. Mr. Smith subsequently filed a petition for a writ of certiorari in the United States Supreme Court from the opinion of this Court, which is currently pending. Pet. for Writ of Cert., *Smith v. Ryan*, No. 16-8071 (U.S. Feb. 21, 2017).

On January 11, 2017, Mr. Smith moved this Court to remand his case to the district court so that he could amend his habeas petition to include a claim under the recently decided Supreme Court case *Hurst v. Florida*, 136 S. Ct. 616 (2016). Mot., *Smith v. Ryan*, No. 14-99008 (9th Cir. Jan. 11, 2017), ECF No. 51. This Court denied his request, and Mr. Smith seeks rehearing by the panel and by the en banc Court.

**STATEMENTS PURSUANT TO FEDERAL RULES OF
APPELLATE PROCEDURE 35(B)(1) AND 40(A)(2)**

ISSUE 1: The United States Supreme Court, in *Hurst v. Florida*, 136 S. Ct. 616 (2016), for the first time held that the failure to require a jury to make the determination that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt violates the Constitution. Because the Supreme Court announced a new and retroactive rule of constitutional law, the rule of *Hurst* applies to Mr. Smith. Under *Hurst*, he is entitled to relief because his juries were not properly instructed regarding the burden of proof applicable at the penalty phase of a capital trial. The panel did not articulate its reason for denying Mr. Smith's motion. Another panel of this Court, however, will decide the question at issue here—whether *Hurst* announced a new, retroactive rule. See Am. Opening Br., *Dixon v. Ryan*, No. 16-99006 (9th Cir. Feb. 17, 2017), ECF No. 16. Therefore, in order to avoid conflict with *Hurst* and maintain uniformity in this Court's

decisions, Mr. Smith requests that his motion be reheard or reinstated and stayed until the Court has addressed directly the import of *Hurst*.

ARGUMENT

1. The panel’s decision conflicts with the United States Supreme Court’s decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and could create an intra-circuit conflict.

The panel’s denial of Mr. Smith’s motion conflicts with the new rule announced by the Supreme Court in *Hurst*, wherein the Court held for the first time that the failure to require a jury to make its penalty-phase weighing finding—that aggravating circumstances outweigh mitigating circumstances—beyond a reasonable doubt violates the Constitution. *See Hurst*, 136 S. Ct. at 622; *see also Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curiam) (striking down Delaware’s capital sentencing scheme on the basis of *Hurst* and determining that the Sixth Amendment requires a jury to find, beyond a reasonable doubt, each aggravating circumstance and that the aggravation outweighs mitigation); *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016) (finding that *Hurst* “mandates that all the findings necessary for the imposition of a death sentence are ‘elements’ that must be found by a jury” and holding that “before the trial judge may consider imposing a sentence of death, the jury in a capital case must . . . unanimously find that the aggravating factors outweigh the mitigating circumstances”).

At Mr. Smith's penalty-phase hearings, jurors were instructed that they must "individually decide whether there is mitigation, the weight to be given to the mitigation, and whether the mitigation is sufficiently substantial to call for leniency." (ECF No. 51-2 at 12, 26.) Jurors were not instructed as to any standard of proof to use when weighing the aggravating and mitigating circumstances. More specifically, they were not told that they must find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances before rendering a verdict of death. The instructions' lack of any standard of proof is consistent with Arizona law. *See* ARIZ. REV. STAT. § 13-751(E). As a result of *Hurst*, however, it is clear that because Arizona's capital sentencing statute, much like Florida's unconstitutional sentencing scheme, did not require that Mr. Smith's jury make the weighing determination beyond a reasonable doubt, it violated Mr. Smith's constitutional rights.

Although *Hurst* announced a new rule, Mr. Smith is entitled to relief because it applies retroactively. The Supreme Court has held that the beyond-a-reasonable-doubt standard is substantive and entitled to retroactive effect. *See Hankerson v. North Carolina*, 432 U.S. 233, 241–42 (1977); *Ivan V. v. City of New York*, 407 U.S. 203, 204–05 (1972) (per curiam). Because *Hurst* announced a rule about the beyond-a-reasonable-doubt standard, it too is therefore substantive and retroactive. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729

(2016) (“The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.”); *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004) (explaining that substantive rules “are more accurately characterized as” not “subject to the bar” on retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989)). Alternatively, even if deemed procedural, *Hurst* announced a watershed rule of criminal procedure that “‘implicate[s] the fundamental fairness and accuracy’” of sentencing. *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (citation omitted); *see also Summerlin*, 542 U.S. at 352.

Because of the procedural posture of his case, Mr. Smith’s motion to remand and amend his habeas petition was the only vehicle through which he could seek relief for the constitutional violation that occurred at his resentencing. By denying his motion, the panel did not afford him the relief to which he is entitled, and the decision is in conflict with the Supreme Court’s recent decision in *Hurst*.

Additionally, another panel of this Court will decide the question central to Mr. Smith’s motion. In *Dixon v. Ryan*, the appellant moved to expand briefing in this Court to include a claim under *Hurst*. Mot. to Expand Br., *Dixon v. Ryan*, No. 16-99006 (9th Cir. Jan. 11, 2017), ECF No. 13. That motion was granted. Order, *Dixon*, No. 16-99006 (Jan. 19, 2017), ECF No. 14. An amended opening brief was filed on February 17, 2017. Am. Opening Br., *Dixon*, No. 16-99006 (Feb.

17, 2017), ECF No. 16. The case directly presents the questions of if *Hurst* announced a new constitutional rule and, if so, whether that rule applies retroactively on collateral review. *Id.* at 84–99. If the Court answers affirmatively to both questions in *Dixon*, but Mr. Smith’s motion has already been denied, an intra-circuit conflict will arise because similarly situated appellants will not have been afforded the same relief. *Cf. In re Exxon Valdez*, 270 F.3d 1215, 1235–36 (9th Cir. 2001) (“[I]f there is an irreconcilable conflict between two cases from this circuit, a panel’s only choice is to call for rehearing en banc.” (citing *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc))).

This situation is similar to *Henry v. Ryan*. In that capital habeas case, a panel of this Court affirmed the denial of habeas relief. *Henry v. Ryan*, 720 F.3d 1073 (9th Cir. 2013). The petitioner unsuccessfully moved for panel rehearing and rehearing en banc. Order, *Henry v. Ryan*, No. 09-99007 (9th Cir. Nov. 1, 2013), ECF No. 95. Then, the Court took en banc a case that would answer a question central to *Henry*. See *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013), *on reh’g en banc*, 813 F.3d 798 (9th Cir. 2015). Henry sought full-court reconsideration of the denial of his petition for rehearing en banc. Mot. for Full-Court Recons., *Henry*, No. 09-99007 (Mar. 14, 2004), ECF No. 97. That motion was denied. Order, *Henry*, No. 09-99007 (Mar. 27, 2014), ECF No. 98. The petitioner then filed a motion for reconsideration with the panel that had decided his appeal, seeking a

stay pending resolution of the case taken en banc. Mot. for Panel Recons., *Henry*, No. 09-99007 (Apr. 2, 2014), ECF No. 99. A similar stay had been granted in another case.¹ The panel denied Henry's motion, *Henry v. Ryan*, 748 F.3d 940 (9th Cir. 2014), but the en banc Court reheard the denial of the motion for reconsideration of the order denying the petition for panel rehearing, *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014). As explained by Judge Fletcher in his concurring opinion:

If the panel's order stands, Henry will be executed. He will be executed even if we hold en banc [the legal question at issue in Henry's favor]. That is, Henry will be executed even if our law, established in [the en banc decision], says that he should not be. There is an easy and procedurally proper way to avoid this result. We can stay proceedings in *Henry*, as we have in [other cases], to allow for the orderly and fair administration of our system of justice.

Id. at 1067 (Fletcher, J., concurring in grant of rehearing en banc).

The same is true here. If either the panel or the en banc Court does not rehear Mr. Smith's motion, he could be entitled to relief after *Hurst* has been addressed in *Dixon*, but he will not be afforded the benefit of that decision. Rehearing Mr. Smith's motion therefore will prevent the arbitrary application of

¹ In *Poyson v. Ryan*, a panel of the Court sua sponte amended its previous order denying panel rehearing. It reinstated the petition and stayed it pending resolution of the en banc case. *Poyson v. Ryan*, 743 F.3d 1185, 1187 (9th Cir. 2013), as amended (Apr. 2, 2014).

the death penalty wherein some receive constitutional protections while others do not. *See, e.g., Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

This Court has the power to use its procedures to promote consistency and equity. *Cf. Newhouse v. Robert's Ilima Tours, Inc.*, 708 F.2d 436, 442 (9th Cir. 1983) (noting that the mandate may be recalled or amended “to protect the integrity of [the appellate] process” or “to prevent injustice” (internal citations omitted)). And the need for the fair and uniform administration of the death penalty weighs in favor of granting Mr. Smith’s petition for rehearing. *See Workman v. Bell*, 484 F.3d 837, 844 (6th Cir. 2007) (Cole, J., dissenting) (explaining that “manifest miscarriage of justice” and “inconsistency in the administration of the death penalty” would ensue where capital petitioner alleging fraud was denied a stay of execution and similarly situated capital petitioner raising the same claim did receive a stay and the court “could very well resolve the ambiguity surrounding what legal standard applies to [both capital petitioners’] claims of fraud”). If Mr. Smith’s motion is not reheard, he will be deprived unjustly of the opportunity to vindicate his constitutional rights in this death-penalty case, thus suffering irreparable prejudice. *Cf. Stanley v. Schriro*, 598 F.3d 612, 615 (9th Cir. 2010) (“We simply cannot in good conscience continue to send men to their deaths without ensuring that their cases were not prejudiced . . . at any phase of the proceedings.”); *Mayfield v. Woodford*, 270 F.3d

915, 933 (9th Cir. 2001) (en banc) (Gould, J., concurring) (advocating that a capital defendant, “for whom life or death hangs in the balance, deserves the benefit of the doubt”). In contrast, any prejudice to Respondents would be minimal. As explained by Judge Fletcher:

Although there may be times when getting the right answer should yield to the interest in finality, this is not one of them. The mandate in [this] capital habeas appeal has not yet issued, and “[u]ntil the mandate issues, we retain jurisdiction, and we are capable of modifying or rescinding [our] opinion.”

Henry, 748 F.3d at 942 (Fletcher, J., dissenting from denial of motion for reconsideration) (quoting *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004)). Therefore, in addition to conflicting with *Hurst*, denying the instant petition could create an intra-circuit conflict and result in the inequitable treatment of similarly situated appellants.

CONCLUSION

Petitioner Joe Clarence Smith respectfully requests that the panel rehear his motion to remand his case to the district court in order to amend his habeas petition to include a claim under *Hurst* and that the en banc Court rehear the case or that his motion be reinstated and stayed pending resolution of *Dixon v. Ryan*, No. 16-99006.

Respectfully submitted this 17th day of March 2017.

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 3-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached petition for panel rehearing or rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 2,437 words.

Dated: March 17, 2017

s/ Ashwin Cattamanchi
Counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Robin Stoltze
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joe Clarence Smith

Petitioner-Appellant,

v.

Charles L. Ryan and Ron Credio,

Respondents-Appellees.

No. 14-99008

District Court No. 2:12-cv-00318-PGR

Reply to Motion to Remand and
Amend Habeas Petition to Include a
Hurst Claim

Death-Penalty Case

Petitioner Joe Clarence Smith, through undersigned Counsel, respectfully moves this Court to remand his case to the district court so that he may amend his habeas petition under Rule 15 of the Federal Rules of Civil Procedure by supplementing it with a newly available claim based on *Hurst v. Florida*, 136 S. Ct. 616 (2016). (ECF No. 51, Mot.) Respondents oppose Mr. Smith's request to return to district court as well as his alternative request for authorization to file a second or

successive habeas petition. (ECF No. 54-1, Resp.) For the reasons discussed below and in Mr. Smith's Motion, this Court should reject Respondents' contentions and grant Mr. Smith the requested relief.

I. Remand is warranted because Mr. Smith seeks relief under a new, retroactive rule of constitutional law.

A. *Hurst* announced a new rule.

Respondents argue that Mr. Smith's requested remand in order to amend his habeas petition should be denied because prior Supreme Court case law foreclosed the claim that Mr. Smith now seeks to raise. (Resp. at 2–5.) Respondents are correct that the right Mr. Smith seeks to assert was not previously available. In *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016), the Supreme Court for the first time recognized the constitutional right to have every factual finding at sentencing, including the weighing of aggravating and mitigating circumstances, made by a jury beyond a reasonable doubt. *See also Rauf v. State*, 145 A.3d 430, 432–34 (Del. 2016) (per curiam) (determining that under *Hurst* the Sixth Amendment requires a jury to find, beyond a reasonable doubt, that aggravation outweighs mitigation); *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016) (finding that under *Hurst*, weighing of aggravating and mitigating circumstances is fact to be found by jury). Because *Hurst*'s result was not dictated by precedent at the time Mr. Smith's conviction became final, *Hurst* announced a new rule. *See Teague v. Lane*, 489 U.S. 288, 301 (1989). Despite

Respondents’ assertion, Mr. Smith is not asking this Court to overrule Supreme Court precedent, but instead to recognize the result of *Hurst*. (*Id.* at 3.)

Respondents attempt to avoid the import of *Hurst* by arguing that its holding was a limited application of *Ring v. Arizona*, 536 U.S. 584 (2002). (Resp. at 4.) But the Court in *Hurst* went beyond merely applying *Ring*, which concerned only which entity—a judge or jury—could find the aggravating circumstances that render a defendant eligible for the death penalty. *See Ring*, 536 U.S. at 609. The *Hurst* Court instead found, for the first time, that the relative weight of the aggravating and mitigating circumstances is a factual finding necessary to make a defendant eligible for a sentence of death. *See Hurst*, 136 S. Ct. at 622. And a jury’s factual finding in capital sentencing only passes constitutional muster if it is made unanimously, based on proof beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (stating that charges against the accused, and the corresponding maximum penalty he faces, must be determined “beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens”). *Hurst* therefore announced a new rule of constitutional law.

B. *Hurst* is retroactive.

Respondents argue that even if *Hurst* did announce a new rule, Mr. Smith could not benefit from it because it would not have retroactive application. (Resp. at 5–9.) First, contrary to Respondents’ assertion, in the context of initial habeas

petitions lower courts may determine that a case is retroactive, not just the Supreme Court. *See Krieger v. United States*, 842 F.3d 490, 498 (7th Cir. 2016) (“[D]istrict and appellate courts, no less than the Supreme Court, may issue opinions on initial petitions for collateral review holding in the first instance that a new rule is retroactive in the absence of a specific finding to that effect by the Supreme Court.” (internal quotations omitted)); *Butterworth v. United States*, 775 F.3d 459, 465 (1st Cir. 2015); *United States v. Swinton*, 333 F.3d 481, 485–87 (3d Cir. 2003); *see also Dodd v. United States*, 545 U.S. 353, 365 n.4 (2005) (Stevens, J., dissenting) (commenting that the Court, and every Circuit to address the issue, assumed that the retroactivity decision found in 28 U.S.C. § 2244(d)(1)(C) could “be made by any lower court”).¹

Even if a Supreme Court holding as to retroactivity were required, the Court’s previous cases dictate that *Hurst* is retroactive. The Supreme Court has held that the beyond-a-reasonable-doubt standard is substantive and entitled to retroactive effect. *See Hankerson v. North Carolina*, 432 U.S. 233, 241–42 (1977); *Ivan V. v. City of New York*, 407 U.S. 203, 204–05 (1972) (per curiam). The Court’s existing precedent therefore makes the *Hurst* reasonable-doubt holding also substantive and retroactive. *See Tyler v. Cain*, 533 U.S. 656, 666 (2001) (noting that a case may be

¹ The requirement that the Supreme Court itself make a new rule retroactive is found instead in the context of authorization to file a second or successive habeas petition. *See* 28 U.S.C. § 2244(b)(2)(A).

made retroactive over multiple decisions); *id.* at 668 (O'Connor, J., concurring) (“This Court may ‘ma[k]e’ a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule.” (alteration in original)); *Guardado v. Jones*, No. 4:15cv256-RH, 2016 WL 3039840, at *2 (N.D. Fla. May 27, 2016) (distinguishing *Ring*’s retroactivity analysis from *Hurst*’s and deeming it “reasonabl[e]” to argue that *Hurst* is retroactive because it concerns the beyond-a-reasonable-doubt standard). Respondents do not respond to Mr. Smith’s argument that *Hurst* announced a substantive rule. He therefore refers the Court to the reasons more fully explored in his Motion. (Mot. at 9–10.)

Additionally, when a new rule is substantive in nature, the Court does not have to explicitly declare it retroactive to make it so; substantive rules should always be given retroactive effect. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) (“The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.”); *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004) (explaining that substantive rules “are more accurately characterized as” not “subject to the bar” on retroactive application under *Teague*); *Price v. United States*, 795 F.3d 731, 734–35 (7th Cir. 2015) (authorizing a successive petition based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which had not yet explicitly

been deemed retroactive by the Supreme Court, because *Johnson* was substantive in nature).

Even if deemed procedural, *Hurst* announced a watershed rule of criminal procedure that “‘implicate[s] the fundamental fairness and accuracy’” of sentencing. *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (citation omitted); *see also Summerlin*, 542 U.S. at 352. *Hurst* mandates the use of the beyond-a-reasonable-doubt standard, which “is a prime instrument for reducing the risk of convictions resting on factual error.” *Ivan V.*, 407 U.S. at 204 (quoting *In re Winship*, 397 U.S. 358, 363 (1970)); *see also Summerlin*, 542 U.S. at 352; *Teague*, 489 U.S. at 31–13. Supreme Court precedent therefore logically dictates that *Hurst* is a new watershed rule of criminal procedure and therefore retroactive.

C. Because amendment is appropriate, remand is not futile.

Mr. Smith asks this Court to remand his case to the district court so that he may amend or supplement his habeas petition under Federal Rule of Civil Procedure 15 in order to bring a claim under *Hurst* that was not previously available. Respondents assert that remand would be futile because amendment in the district court is not properly available. (Resp. at 9–10.) Respondents’ arguments are unavailing because Mr. Smith has presented a timely and colorable claim that his sentencing was unconstitutional.

1. Mr. Smith's Hurst claim is timely.

Mr. Smith's claim is timely under 28 U.S.C. § 2244(d) as long as it was brought within the one-year statute of limitations. The one-year clock began running on January 12, 2016, when *Hurst* was issued. Respondents' contention that the statute of limitations began to run when Mr. Smith's conviction became final in 2007 ignores the clear language of § 2244(d)(1). That section states that "[t]he limitation period shall run from the *latest* of" several triggering events. 28 U.S.C. § 2244(d)(1) (emphasis added). In this case, the latest triggering event was "the date on which the constitutional right asserted was initially recognized by the Supreme Court." *Id.* § 2244(d)(1)(C). As discussed above, *Hurst*'s reasonable-doubt holding qualifies as a newly recognized, retroactive constitutional right. His claim is therefore timely.²

² Respondents assert that the timing of Mr. Smith's Motion was in bad faith. (Resp. at 17–18.) Mr. Smith first notes that his claim is timely, so any finding of bad faith or undue delay would effectively prevent Mr. Smith from enjoying the full statutory time period Congress has deemed appropriate. Further, despite Respondents' assertion to the contrary, Mr. Smith could not have raised his *Hurst* claim in his petition for rehearing before this Court, as the Court had not heard the claim before. (Resp. at 17.) See FED. R. APP. P. 40(a)(2) (explaining requirements for petition for panel rehearing); 9TH CIR. R. 35-1 (explaining requirements for petition for rehearing en banc). And the filing of the instant Motion is irrelevant to the United States Supreme Court's consideration of Mr. Smith's forthcoming petition for certiorari, so his failure to mention the instant Motion in his motion for an extension of time in which to file his petition for certiorari does not evidence bad faith. (Resp. at 18.) See S. CT. R. 10 (discussing considerations governing review, which require lower court opinion on issue).

2. Procedural default is an affirmative defense that should be addressed by the district court in the first instance.

Respondents argue that Mr. Smith's requested remand should be denied because his claim is procedurally defaulted. (Resp. at 11–15.) Procedural default is an affirmative defense. *See Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005). Whether Mr. Smith can successfully overcome this default through a showing of cause and prejudice, or whether he can return to state court to exhaust his claim through a state court remedy under Arizona Rule of Criminal Procedure 32.1(g), is properly decided by the district court in the first instance. *See Windham v. Merkle*, 163 F.3d 1092, 1101 (9th Cir. 1998) (remanding for the district court to determine cause and prejudice to overcome default in the first instance).

3. Mr. Smith has a colorable and viable claim that his sentence was unconstitutionally imposed.

Respondents make two unpersuasive attacks on the underlying merits of Mr. Smith's claim. First, Respondents assert that this Court can dismiss Mr. Smith's *Hurst* claim under 28 U.S.C. § 2254(b)(2). (Resp. at 15.) That provision allows federal courts to deny unexhausted claims on the merits only “where it is perfectly clear that the applicant does not raise even a colorable federal claim . . . [and] it is perfectly clear that the petitioner has no chance of obtaining relief.” *Cassett v. Stewart*, 406 F.3d 614, 623–24 (9th Cir. 2005) (internal quotation marks omitted). Respondents also argue that because Mr. Smith's claim is “plainly meritless,” his

proposed amendment would be futile under Federal Rule of Civil Procedure 15. (Resp. at 10.) But a “determination of futility contemplates whether, upon de novo review, the amendment could present a viable claim on the merits for which relief could be granted.” *Murray v. Schriro*, 745 F.3d 984, 1014-15 (9th Cir. 2014).

Under either of Respondents’ attacks on the merits of Mr. Smith’s claim at this juncture, the requested remand to allow for amendment is appropriate. Mr. Smith’s claim relies on a reading of *Hurst* that is supported by two state supreme courts. *See Rauf*, 145 A.3d at 432–34; *Hurst*, 202 So. 3d at 53. He has clearly presented a “colorable” or “viable” claim that he was subjected to an unconstitutional sentencing procedure. The lack of a beyond-a-reasonable-doubt instruction at the weighing stage of Mr. Smith’s sentencing permitted the jury to sentence Mr. Smith to death based on a lesser quantum of evidence than the Constitution requires.

Mr. Smith has presented a colorable claim that he was unconstitutionally sentenced to death. The heightened concern for fairness in a capital case is a key consideration in allowing amendment. The “‘qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed,’ as well as a heightened scrutiny in reviewing such a decision.” *Douglas v. Workman*, 560 F.3d 1156, 1194 (10th Cir. 2009) (internal citation omitted) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Mr. Smith therefore

respectfully asks that this Court allow him to return to district court in order to pursue his newly available claim.

II. Mr. Smith has, in the alternative, met the requirements for authorization to file a second or successive habeas petition.

Mr. Smith has met the requirements for authorization to file a second or successive habeas petition under 28 U.S.C. § 2244(b). As discussed above, *Hurst* established a new rule that every factual finding at sentencing, including the weighing of aggravating and mitigating circumstances, be made by a jury beyond a reasonable doubt. And the rule is made retroactive by the logical implication of previous Supreme Court law. *See Tyler*, 533 U.S. at 666; *Price*, 795 F.3d at 734. Mr. Smith has therefore met the requirements of 28 U.S.C. § 2244(b)(2)(A). Respondents' arguments to the contrary are unavailing. (Resp. at 18–20.) Furthermore, Mr. Smith notes that upon considering whether § 2244(b) has been met, inquiry into exhaustion and the underlying merits of the claim are inappropriate. *See Ochoa v. Sirmons*, 485 F.3d 538, 542–44 (10th Cir. 2007).

III. Conclusion

For the reasons stated in the Motion and above, Mr. Smith requests that this Court remand his case to the district court so that he may bring a newly available claim that his sentence was unconstitutional. Alternatively, he asks that this Court authorize him to file a second or successive habeas petition under 28 U.S.C. § 2244(b)(2)(A).

Respectfully submitted this 30th day of January, 2017.

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Certificate of Service

I hereby certify that on January 30, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Joe Clarence Smith,

Petitioner-Appellant,

vs.

Charles L. Ryan and Ron Credio,

Respondents-Appellees.

No. 14-99008

District Court No. 2:12-cv-00318-PGR

Motion to Remand and Amend
Habeas Petition to Include a *Hurst*
Claim

Death Penalty Case

Joe Clarence Smith, a death-sentenced prisoner in Arizona, by and through undersigned counsel, respectfully moves this Court to remand his case to the district court in order to amend his habeas petition under Rule 15 of the Federal Rules of Civil Procedure by supplementing it with the newly available claim based on *Hurst v. Florida*, 136 S. Ct. 616 (2016). In the

alternative, Mr. Smith asks the Court to authorize him to file a second or successive habeas petition under 28 U.S.C. § 2244(b)(2)(A).

Background

In 1977, Mr. Smith was convicted and sentenced to death in separate cases for the murders of Sandy Spencer and Neva Lee. (ER 253.) On appeal, the Arizona Supreme Court reversed Mr. Smith's sentence because he had been sentenced under an unconstitutional sentencing scheme that limited his ability to present mitigating evidence. *State v. Smith*, 599 P.2d 199 (Ariz. 1979).

At his second sentencing, counsel relied solely on the evidence presented at the initial sentencing, and the trial judge again imposed death sentences for both killings. (ER 226.) The Arizona Supreme Court affirmed. (ER 235.) The federal district court denied habeas relief, but this Court reversed, ruling that Mr. Smith was denied effective assistance of counsel at his 1979 resentencing. (ER 146.)

Mr. Smith returned to Maricopa County Superior Court for his third sentencing. While he was awaiting resentencing, the United States Supreme Court held in *Ring v. Arizona*, 536 U.S. 584, 609 (2002), that

Arizona's capital sentencing scheme, in permitting the trial judge, rather than the jury, to find facts that make a defendant death-eligible, violated the Sixth Amendment.

In 2004, Mr. Smith proceeded to jury resentencing under the Arizona statutory scheme enacted in response to *Ring*. He was first resentenced for the murder of Sandy Spencer, followed by resentencing for the murder of Neva Lee. The jury returned a verdict of death in both cases, and the court imposed sentences of death by lethal injection. (ER 130–31, 390–91, 587.) The Arizona Supreme Court affirmed. (ER 128.) The Arizona superior court denied Mr. Smith's Rule 32 petition on September 9, 2011, (ER 83), and the Arizona Supreme Court denied review on February 15, 2012 (ER 82).

Mr. Smith then timely filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Arizona on December 21, 2012. (ECF No. 25.) The district court denied relief. (ER 81.) A panel of this Court affirmed the district court's denial of habeas relief, *Smith v. Ryan*, 823 F.3d 1270 (9th Cir. 2016), and denied Mr. Smith's subsequent motion for rehearing by the panel and by

the en banc Court, *Smith v. Ryan*, No. 14-99008, No. 49 (9th Cir. Sept. 23, 2016).

Argument

- I. In light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), Mr. Smith’s sentencing was unconstitutional because it did not require the jury to find the facts necessary to impose death beyond a reasonable doubt.**

At Mr. Smith’s penalty phase hearing, jurors were instructed that they “must individually decide whether there is mitigation, the weight to be given to the mitigation, and whether the mitigation is sufficiently substantial to call for leniency.” (Ex. A at 10; Ex. B at 10.) Jurors were not instructed as to any standard of proof to use when weighing the aggravating and mitigating circumstances. More specifically, they were not told that they must find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances before rendering a verdict of death.

The instructions’ lack of any standard of proof is consistent with Arizona law. By statute, Arizona’s capital sentencing scheme provides that the trier of fact shall impose a death sentence if it determines that at least one enumerated aggravating circumstance has been proven “and

then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.” A.R.S. § 13-751(E). In other words, Arizona’s capital sentencing scheme fails to require that the jury find, beyond a reasonable doubt, that the mitigation is not sufficiently substantial to call for leniency. *See id.* The Arizona Supreme Court has in fact held that “the determination whether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror’s assessment of the quality and significance of the mitigating evidence that the juror has found to exist.” *State ex rel. Thomas v. Granville (Baldwin)*, 123 P.3d 662, 667 (Ariz. 2005); *see also State v. Hausner*, 280 P.3d 604, 632–33 (Ariz. 2012); *State v. Villalobos*, 235 P.3d 227, 239 (Ariz. 2010).

In January 2016, however, the U.S. Supreme Court decided *Hurst*, and for the first time held that the failure to require a jury to make its weighing finding beyond a reasonable doubt violates the Constitution. The Court emphasized that under *Ring*, “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of

death.” *Hurst*, 136 S. Ct. at 619. The Court also recognized that under *Alleyne v. United States*, 133 S. Ct. 2151 (2013), a defendant’s Sixth Amendment right, “in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.” *Id.* at 621. Further, “any fact that ‘exposes the defendant to a greater punishment than that authorized by the jury’s guilty verdict’ is an ‘element’ that must be submitted to a jury.” *Id.* (brackets omitted) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

In *Hurst*, the State of Florida argued that the weighing process fell outside the ambit of *Ring* and *Apprendi*, as the defendant was death eligible after the jury implicitly found at least one aggravating circumstance. *Id.* at 622. In rejecting this contention, *Hurst* held that the weighing decision had to be made by a jury, beyond a reasonable doubt. *Id.*

The Supreme Court recognized that its holding in *Hurst* required it to overrule previous decisions that had held the Sixth Amendment did not require some specific findings authorizing imposition of the death penalty to be made by a jury, *see id.* at 623–24 (discussing *Hildwin v.*

Florida, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984)), but noted that “in the *Apprendi* context, we have found that stare decisis does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law.” *Id.* at 623–24 (internal quotation marks omitted).

Recently, the Delaware Supreme Court agreed that *Hurst* required that the jurors find unanimously and beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances. The court ruled that following *Hurst*, Delaware’s statute was unconstitutional because the jury was not required to make the weighing finding beyond a reasonable doubt. *See Rauf v. State*, 145 A.3d 430, 433–34 (Del. 2016) (per curiam). Likewise, the Florida Supreme Court concluded that under *Hurst*, “the weighing of the aggravating circumstances against the mitigating circumstances [i]s [an] element[] of the crime that need[s] to be found by a jury to the same extent as other elements of the crime.” *Asay v. State*, Nos. SC16–223, –102, –628, 2016 WL 7406538, at *8 (Fla. Dec. 22, 2016) (per curiam).

Following *Hurst*, it is now apparent that the weighing of

aggravating and mitigating circumstances is a factual finding that must be made beyond a reasonable doubt by a jury. *See* 136 S. Ct. at 621–22. Arizona’s capital sentencing statute, much like Florida’s unconstitutional capital sentencing scheme, did not require that Mr. Smith’s jury make this finding beyond a reasonable doubt, and therefore violated his constitutional rights. *See* A.R.S. § 13-751(E).

II. *Hurst* constitutes a new rule of constitutional law and warrants retroactive application.

Hurst announces a new rule because its results were not dictated by precedent in existence at the time that Mr. Smith’s conviction became final. *See Teague v. Lane*, 489 U.S. 288, 301 (1989). In fact, *Hurst* specifically overruled previously well-settled Supreme Court precedent, *Spaziano* and *Hildwin*. *Hurst*, 136 S. Ct. at 623–24 (“Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*.”).

Hurst also warrants retroactive application. “Under *Teague*, as a general matter, ‘new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.’” *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016)

(quoting *Teague*, 489 U.S. at 310). There are two exceptions, however, to *Teague*'s general rule. "First, 'new substantive rules generally apply retroactively.'" *Id.* (brackets omitted) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004)). "Second, new watershed rules of criminal procedure, which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will also have retroactive effect." *Id.* (internal quotation marks omitted).

Hurst is substantive because it implicates the standard of proof by which the weighing finding must be made and therefore should apply retroactively. 136 S. Ct. at 621–22. "[T]he reasonable-doubt standard is indispensable," *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972) (per curiam), and "reflect[s] a profound judgment" about the justice system, *Apprendi*, 530 U.S. at 478 (alteration in original). Indeed, as rules about the standard of proof lessen the "risk that a defendant . . . faces a punishment that the law cannot impose upon him," they are substantive in nature. *Summerlin*, 542 U.S. at 351–52; cf. *In re Winship*, 397 U.S. 358, 363 (1970). As a result, the Supreme Court has deemed retroactive cases applying the beyond-a-reasonable-doubt standard. See *Hankerson v. North*

Carolina, 432 U.S. 233, 241–42 (1977) (making retroactive the requirement that the prosecution prove beyond a reasonable doubt each element of a crime); *Ivan V.*, 407 U.S. at 204 (making retroactive the application of that standard of proof to juvenile adjudications). As *Hurst* extends the beyond a reasonable doubt standard to a capital jury’s weighing of aggravating and mitigating circumstances, it too is substantive and retroactive. See *Guardado v. Jones*, No. 4:15-CV-256-RH, 2016 WL 3039840, at *2 (N.D. Fla. May 27, 2016) (distinguishing *Ring*’s retroactivity analysis from *Hurst*’s and deeming it “reasonabl[e]” to argue that *Hurst* is retroactive).

Even if it is deemed procedural and not substantive, *Hurst*’s beyond-a-reasonable-doubt holding would constitute a “watershed” procedural rule under *Teague*. See *Powell v. State*, No. 310, 2016, 2016 WL 7243546, *4 (Del. Sup. Ct. Dec. 15, 2016) (making retroactive its prior decision in *Rauf*, which invalidated Delaware’s death penalty statute under *Hurst*, because it fell “squarely within the second exception set forth in *Teague* requiring retroactive application of ‘new rules’ of criminal procedure”). This is because *Hurst* “implicate[s] the fundamental fairness and accuracy,” of sentencing, *Welch*, 136 S. Ct. at 1264, by mandating the

use of the beyond-a-reasonable-doubt standard, which “is a prime instrument for reducing the risk of convictions resting on factual error,” *Ivan V.*, 407 U.S. at 203. *Hurst*, if deemed procedural, would therefore constitute a watershed new rule and would be retroactive.

III. This Court should direct the district court on remand to allow Mr. Smith to amend his federal habeas petition.

Mr. Smith asks this Court to remand his case to the district court to allow him to amend or supplement his petition under Federal Rule of Civil Procedure 15 in order to bring a *Hurst* claim. When a habeas petition has not yet been finally adjudicated, a petitioner seeking to add a claim should seek to amend under Rule 15. *See* 28 U.S.C. § 2242; *Goodrum v. Busby*, 824 F.3d 1188, 1194 (9th Cir. 2016). Mr. Smith’s petition has not been finally adjudicated because the mandate from this Court has not yet been issued. *See United States v. Pete*, 525 F.3d 844, 853 (9th Cir. 2008) (noting that appellate decision is not final until mandate issues). This Court retains jurisdiction over Mr. Smith’s case until the mandate is issued and can therefore properly rule on Mr. Smith’s motion and direct the district court to permit amendment. *Cf. Sgaraglino v. State Farm Fire &*

Cas. Co., 896 F.2d 420, 421 (9th Cir. 1990) (ruling that appellate court did not have jurisdiction to rule on motion after mandate had issued).

Permission to amend should be granted with “extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003); *see also Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038–39 (9th Cir. 2002) (“It is not unreasonable that plaintiffs may seek amendment after an adverse ruling, and in the normal course district courts should freely grant leave to amend when a viable case may be presented.”); *Moss v. U.S. Secret Service*, 675 F.3d 1213, 1232 (9th Cir. 2012) (remanding case so that plaintiff could seek amendment to cure his insufficient allegations when it was “possible . . . that the complaint could be saved by amendment”); *New York City Employees’ Retirement System v. Jobs*, 593 F.3d 1018, 1025 (9th Cir. 2010) (“We have never held . . . that a plaintiff who omits previously dismissed claims from an amended complaint waives his right to re-allege these claims in further amendments at the district court level.”); *Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009) (treating a claim raised while appeal was pending as a supplement to the petitioner’s original § 2254 petition). Because Mr. Smith presents a timely

and previously unavailable claim that his sentencing was unconstitutional, the Court should remand his case to the district court and allow amendment. Mr. Smith's proposed claim is attached as Exhibit C. In the interests of judicial economy and preserving resources, Mr. Smith requests that he be temporarily relieved of any obligation under Local Rule 15.1 to attach a complete proposed amended habeas petition. He asks that the attached claim be deemed added to Mr. Smith's habeas corpus petition, and will file the required complete proposed amended petition upon remand and granting of the motion for leave to amend.

A. Mr. Smith's claim is timely, and he has not unduly delayed bringing his *Hurst* claim.

Mr. Smith is now moving to amend within a year of the *Hurst* decision, making the amendment timely. *See* 28 U.S.C. § 2244(d)(1)(C). Additionally, Mr. Smith has not unduly delayed bringing the claim, as his motion comes not long after the first courts have held that *Hurst* requires a jury's weighing finding to be made beyond reasonable doubt, *see Rauf*, 145 A.3d 430 (decided Aug. 2, 2016); *Asay*, 2016 WL 7406538 (decided Dec. 22, 2016), and that the principles of *Hurst* are retroactive, *see Powell*, 2016 WL

7243546, at *4 (deeming *Rauf*, the state-court decision based on *Hurst*, retroactive); *Guardado*, 2016 WL 3039840, at *2 (distinguishing *Ring*'s retroactivity analysis from *Hurst*'s and deeming it "reasonabl[e]" to argue that *Hurst* is retroactive).

At the time Mr. Smith's habeas petition was filed—before *Hurst* was decided—federal precedent foreclosed a claim challenging Arizona's failure to require that the jury make its weighing finding beyond a reasonable doubt. Only since *Hurst* has been decided is such a claim viable. There is therefore no undue delay or bad faith in seeking to amend now. *See Waldrip*, 548 F.3d at 733 (holding that the court "cannot fault the state for not pursuing a motion which would have been futile at the time").

Mr. Smith has also not acted in bad faith or with dilatory motive. Mr. Smith had to balance the timing of his request to amend in order to have sufficient support for his claim so that his motion is not considered futile. *See Waldrip*, 548 F.3d at 733. Two of the key cases, *Asay* and *Powell*, were not decided until December. Without case law to support his new claim or the retroactivity of *Hurst*, this Court would be more likely to find both amendment and Mr. Smith's motion futile. *See e.g.*, Decision & Order,

Raglin v. Mitchell, No. 1:00-cv-767 (S.D. Ohio July 28, 2016), ECF No. 263 at 3616–18 (denying motion to amend to add *Hurst* claim because court found that *Hurst* is not retroactive) (attached as Exhibit D).

B. The State is not prejudiced by the amendment.

Granting Mr. Smith leave to amend would not prejudice the State. In determining what constitutes prejudice, courts look to whether the new claim would “require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction.” *Phelps v. McClellan*, 30 F.3d 658, 662–63 (2d Cir. 1994); *see also Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004) (citing favorably the Second Circuit’s standard for prejudice).

Here, the proposed amended claim does not raise any significant new factual issues, and it would not require the State to perform any further discovery or investigation. The main factual issue in this claim is whether the jury was instructed to make its weighing finding beyond a reasonable doubt. On this issue, the trial record speaks for itself: The juries were not given that instruction. (Ex. A; Ex. B.) The State therefore cannot meet its

burden of showing prejudice.

IV. The Court should alternatively authorize Mr. Smith to file a successive habeas petition under 28 U.S.C. § 2244(b)(2)(A)

Although less disruption and delay in proceedings would occur from remanding Mr. Smith's case and amending his petition, if this Court denies his request to do so, Mr. Smith asks in the alternative for authorization to file a second-or-successive habeas petition. A proposed second-or-successive petition is attached as Exhibit E.

AEDPA permits review of a claim in a second-or-successive habeas petition where "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). Section 2244(b)(2)(A) is understood as setting forth three prerequisites for a permissible second or successive petition: (1) the claim must rely on a "'new rule' of constitutional law"; (2) the rule "must have been 'made retroactive to cases on collateral review by the Supreme Court'"; and (3) "the claim must have been 'previously unavailable.'" *Tyler v. Cain*, 533 U.S. 656, 662 (2001). In *Hurst*, the Supreme Court announced, for the first time, that the weighing

decision underlying the death sentence must be found by a jury beyond a reasonable doubt. 136 S. Ct. at 621–22. The *Hurst* decision creates a new, previously unavailable and retroactive rule of constitutional law and provides grounds for Mr. Smith’s request to file a second-or-successive habeas petition pursuant to § 2244(b)(2)(A).

As required by § 2244(b)(2)(A), *Hurst* is a new rule of constitutional law, as discussed above. It is a substantive rule, also as discussed above, and the United States Supreme Court has made *Hurst* retroactive. The Supreme Court has recognized that it could make a new rule retroactive, for purposes of § 2244(b)(2)(A), “through multiple holdings that logically dictate the retroactivity of the new rule.” *Tyler*, 533 U.S. at 668 (O’Connor, J., concurring); *see also id.* 670–73 (Breyer, J., dissenting, joined by Stevens, Souter, & Ginsburg, JJ); *id.* at 667 (majority noting that a case may be made retroactive over multiple decisions). Justice O’Connor explained in her concurrence that “[i]f we hold in Case One that a particular type of rule applies retroactively . . . and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively. . . . In such circumstances, we can be said to have ‘made’ the

given rule retroactive.” *Id.* at 668–69 (O’Connor, J., concurring). Because the Supreme Court has held that rules extending the application of the beyond-a-reasonable-doubt standard are substantive and entitled to retroactive effect, see *Hankerson v. North Carolina*, 432 U.S. 233, 241–42 (1977); *Ivan V.*, 407 U.S. at 203–04, the Supreme Court’s decisions make the *Hurst* decision—extending the beyond-a-reasonable-doubt standard—substantive and retroactive. Further, if a new rule is substantive in nature, the Supreme Court does not have to explicitly declare it to be retroactive because the general rule is that substantive rules should be given retroactive effect. See *Price v. United States*, 795 F.3d 731, 734 (allowing successive petition to be filed based upon the holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), because *Johnson* was substantive in nature, even though the Supreme Court had not explicitly declared it retroactive).

Even if it is deemed procedural and not substantive, *Hurst*’s beyond-a-reasonable-doubt holding would constitute a “watershed” procedural rule under *Teague*. See *Powell v. State*, No. 310, 2016, 2016 WL 7243546, at *4 (Del. Dec. 15, 2016) (per curiam) (deeming *Rauf*, the state-court decision based on *Hurst*, retroactive). *Hurst* “implicate[s] the fundamental fairness

and accuracy” of sentencing, *Welch*, 136 S. Ct. at 1264, because *Hurst* mandates the use of the beyond-a-reasonable-doubt standard, which “is a prime instrument for reducing the risk of convictions resting on factual error,” *Ivan V.*, 407 U.S. at 203. *Hurst*, if deemed procedural, would therefore constitute a watershed new rule and would be retroactive.

Because Mr. Smith’s claim is based on *Hurst*, a new constitutional rule, it meets the requirements of § 2244(b)(2)(A). Mr. Smith therefore meets the criteria to return to district court and present the claim in a second-or-successive habeas petition. This Court should therefore grant Mr. Smith authorization to pursue a second-or-successive petition. *See Jones v. Ryan*, 733 F.3d 825, 842 (9th Cir. 2013) (framing the decision to authorize a second-or-successive habeas petition as turning on a determination of whether the requirements of § 2244(b)(2)(A) have been met); *Cooper v. Woodford*, 358 F.3d 1117, 1123 (9th Cir. 2004) (granting authorization by “hold[ing] only that [petitioner] has made out a prima facie case that entitles him to file a second or successive application”); *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (“If in light of the documents submitted with the application it appears reasonably likely that the

application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application.’” (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

Conclusion

Petitioner Joe Clarence Smith respectfully requests that the Court remand his case to the district court for the reasons stated, or, in the alternative, authorize him to file a successive habeas petition in district court under 28 U.S.C. § 2244(b)(2)(A).

Respectfully submitted this 11th day of January, 2017.

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Certificate of Service

I hereby certify that on January 11, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Mercedes V. Rodriguez
Assistant Paralegal
Capital Habeas Unit

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, ch. 646, 62 Stat. 965.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755-761).

Section consolidates sections 455-461 of title 28, U.S.C., 1940 ed.

The requirement for return within 3 days “unless for good cause additional time, not exceeding 20 days is allowed” in the second paragraph, was substituted for the provision of such section 455 which allowed 3 days for return if within 20 miles, 10 days if more than 20 but not more than 100 miles, and 20 days if more than 100 miles distant.

Words “unless for good cause additional time is allowed” in the fourth paragraph, were substituted for words “unless the party petitioning requests a longer time” in section 459 of title 28, U.S.C., 1940 ed.

The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker v. Johnston*, 1941, 61 S.Ct. 574, 312 U.S. 275, 85 L.Ed. 830.

Changes were made in phraseology.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the dis-

trict court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, ch. 646, 62 Stat. 965; Pub. L. 89-711, §1, Nov. 2, 1966, 80 Stat. 1104; Pub. L. 104-132, title I, §§101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

HISTORICAL AND REVISION NOTES

This section makes no material change in existing practice. Notwithstanding the opportunity open to litigants to abuse the writ, the courts have consistently refused to entertain successive “nuisance” applications for habeas corpus. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Hatton Sumners of the Committee on the Judiciary and referred to that Committee.

The practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts. See *Dorsey v. Gill*, 1945, 148 F.2d 857, 862, in which Miller, J., notes that “petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1, 1939, and April 1944 presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions; a third, 24; a fourth, 22; a fifth, 20. One hundred nineteen persons have presented 597 petitions—an average of 5.”

SENATE REVISION AMENDMENTS

Section amended to modify original language which denied Federal judges power to entertain application for writ where legality of detention had been determined on prior application and later application presented no new grounds, and to omit reference to rehearing in section catch line and original provision authorizing hearing judge to grant rehearing. 80th Congress, Senate Report No. 1559, Amendment No. 45.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-132, §106(a), substituted “, except as provided in section 2255.” for “and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.”

Subsec. (b). Pub. L. 104-132, §106(b), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: “When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.”

Subsec. (d). Pub. L. 104-132, §101, added subsec. (d).

1966—Pub. L. 89-711 designated existing provisions as subsec. (a), struck out provision making the subsection’s terms applicable to applications seeking inquiry into detention of persons detained pursuant to judgments of State courts, and added subsecs. (b) and (c).

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

This section makes no substantive change in existing law. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing law and promotes uniform procedure.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

This section is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing practice without substantial change.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. It is declaratory of existing law and practice.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. At common law the return was conclusive and could not be controverted but it is now almost universally held that the return is not conclusive of the facts alleged therein. 39 C.J.S. pp. 664-666, §§98, 99.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursu-

§ 13-453

CRIMINAL CODE

Note 10

10. Review

Record which revealed that trial court had taken utmost precaution to insure that defendants' guilty pleas were intelligently, knowingly and voluntarily entered, particularly with respect to determination that there was factual basis for pleas, established that defendants' pleas of guilty to crimes of second-degree murder and assault with deadly weapon were made voluntarily and intelligently. *State v. Nunez* (1973) 109 Ariz. 408, 519 P.2d 380.

Where defendant was only 16 years of age at time he committed murder, and jury at his first trial did not decree his execution, reviewing court would carefully examine propriety of death penalty decree by jury at retrial. *State v. Maloney* (1970) 106 Ariz. 318, 461 P.2d 793, certiorari denied 91 S.Ct. 52, 400 U.S. 811, 27 L.Ed.2d 75.

Penalty for homicide which is fixed within limitations of statute will not be

revised by Supreme Court unless it clearly appears that sentence imposed is excessive and resulted in an abuse of discretion. *State v. Jones* (1962) 96 Ariz. 1, 355 P.2d 1019, certiorari denied 65 S.Ct. 97, 373 U.S. 861, 13 L.Ed.2d 56.

Determination of punishment in murder case is wholly within jury's discretion upon consideration of all aspects of case, and verdict must stand unless abuse is clearly shown. *State v. McGee* (1962) 91 Ariz. 101, 370 P.2d 261, certiorari denied 63 S.Ct. 76, 371 U.S. 844, 9 L.Ed.2d 79.

Individual views of members of Supreme Court on issues of capital punishment were irrelevant in determining whether trial court had abused its discretion in imposing death sentence, and Supreme Court was limited to judicial function of interpreting and applying the law as it found it. *State v. Penton* (1969) 86 Ariz. 111, 341 P.2d 237.

§ 13-454. Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree

A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsections E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

CRIMINAL CODE

§ 13-454

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was impossible.
2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Added Laws 1973, Ch. 138, § 5.
For severability of sentence clause, see note following section 13-452.

Former section 13-451, relating to burden on defendant of proving mitigating circumstances or excuse, was repealed by Laws 1973, Ch. 138, § 1, effective August 8, 1973.

The subject matter of former section 13-451 is now covered by this section.

Supplementary Index to Notes Justification or excuse, in general 1.5

1. Construction and application

Former § 13-451, which placed on defendant in homicide case burden of proving mitigation, after commission had been proved, acknowledged factual presumptions or inferences of malice and intent which arose when homicide was proved and shifted to defendant the burden of going forward with evidence but could not shift burden of proof from state to defendant. *State v. Maloney* (1968) 101 Ariz. 111, 416 P.2d 641, appeal after remand 102 Ariz. 406, 433 P.2d 625, appeal after remand 106 Ariz. 348, 461 P.2d 793, certiorari denied 91 R.Ct. 82, 100 U.S. 811, 27 L.Ed.2d 75.

Rule that in prosecution for homicide defendant may set up defense of insanity, alibi and self-defense under general plea of not guilty was not changed by adoption of rules of criminal procedure. *State v. Alford* (1966) 85 Ariz. 219, 103 P.2d 866.

1.5 Justification or excuse, in general
Provocation or other circumstances may reduce crime from murder to man-

slaughter. *State v. Sellers* (1970) 100 Ariz. 314, 476 P.2d 722.

3. — Justification or excuse

Although it might have been preferable not to instruct jury that "You are further instructed that upon a trial for homicide the commission of the homicide by the defendant being proved, the burden of proving the circumstances or mitigation to justify or excuse it revolves upon the defendant unless the proof on the part of the prosecution tends to show that the alleged crime committed only amounts to manslaughter or that the homicide was justifiable or excusable", no prejudicial error resulted. *State v. Young* (1973) 108 Ariz. 221, 508 P.2d 51.

In determining whether defendant accused of homicide acted in necessary self-defense or what appeared to be necessary self-defense, it is jury's duty to look at transaction from what it believes from the evidence was standpoint of defendant as a reasonable person at the time, and considered same in light of facts and circumstances as it believes they appeared to defendant as a reasonable person at the time. *State v. Anderson* (1967) 102 Ariz. 295, 423 P.2d 672.

When state has proved beyond reasonable doubt that defendant committed homicide, it has by operation of former § 13-451, automatically proved that defendant acted intentionally and maliciously unless there is some evidence of mitigation, justification or excuse without any other proof defendant would be guilty of second-degree murder. *State v. Maloney* (1968) 101 Ariz. 111, 416 P.2d 641, appeal after remand 102 Ariz. 406, 433 P.2d 625, appeal after remand 106 Ariz. 348, 461 P.2d 793, cer-

counsel. *Griakwold v. Gomes* (1974) 111 Ariz. 69, 623 P.2d 490.

§ 13-453. Punishment for murder.

Law Review Commentaries

Death penalty and Supreme Court. Arthur J. Goldberg, 15 Ariz. Law Rev. 366 (1973).

Death penalty, validity of Arizona's response to Furman v. Georgia. Ariz. State L.J., 1974, p. 267.

Supplementary Index to Notes

Conspiracy 1.3

1/2. Validity

This section prescribing life imprisonment for first-degree murder with the possibility of never being eligible for parole did not violate prisoner's rights against cruel and inhuman punishment. *State v. Parlo* (1974) 110 Ariz. 617, 621 P.2d 604, certiorari denied 95 S.Ct. 324.

1.3 Conspiracy

Sentence of not less than 11 nor more than 12 months' imprisonment after defendant's conviction on charge of conspiracy to commit murder was proper. *State v. Durgin* (1974) 110 Ariz. 260, 517 P.2d 1246.

4.5 Discretion of court

Requiring concurrent life sentences on each murder conviction to commence after completion of 75 to 99-year term imposed on weapons charge was not an abuse of discretion. *State v. Bojorquez* (1975) 111 Ariz. 619, 535 P.2d 6.

§ 13-454. Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree

Law Review Commentaries

Death penalty and Supreme Court. Arthur J. Goldberg, 15 Ariz. Law Rev. 366 (1973).

Death penalty, validity of Arizona's response to Furman v. Georgia. Ariz. State L.J., 1974, p. 267.

§ 13-455. Manslaughter defined

Supplementary Index to Notes

Presumption of malice 5.0
Provocation 5.5

5. Defenses

In prosecution of defendant for homicide, testimony by which defendant attempted to show that he had cause to fear for his life when decedent crossed street was admissible over hearsay objection, and exclusion of such evidence was reversible error once the issue of self-defense had been validly injected into the case. *State v. Belcher* (1972) 109 Ariz. 661, 614 P.2d 472.

5.5 Provocation

To reduce homicide committed upon sudden quarrel or in heat of passion from murder to manslaughter, passion must be aroused by adequate provocation. *State v. Edgin* (1974) 110 Ariz. 416, 520 P.2d 288.

21. Lying in wait

Concealment is an essential element of murder by lying in wait. *State v. Miller* (1974) 110 Ariz. 489, 520 P.2d 1113.

8.5 Second degree murder

Thirty to 40-year sentence for second-degree murder committed by person with predilection for violence was not excessive. *State v. Drury* (1974) 110 Ariz. 447, 520 P.2d 496.

Where court was weighing factors relative to the goal of punishment and was not imposing an increased punishment because of a recidivist statute, consideration of defendant's prior invalid misdemeanor convictions in assessing the punishment for second-degree murder was proper. *State v. Caruthers* (1974) 110 Ariz. 346, 619 P.2d 34.

10. Review

Where sentence for second-degree murder was within statutory limits, reviewing court would not disturb trial court's judgment. *State v. Lambert* (1974) 110 Ariz. 460, 520 P.2d 608.

Where more than 11 years had passed between time of defendant's trial and conviction for first-degree murder and hearing on delayed appeal at which it was determined that reporter's transcript of preliminary hearing and trial proceedings were not available, and the trial judge who tried the matter was no longer alive, hearing to reconstruct transcript of trial would not cure error and new trial was necessary. *State v. Hart* (1974) 110 Ariz. 66, 614 P.2d 1243.

5.0 Presumption of malice

Legal presumption of malice arises from deliberate use of deadly weapon in such a way that it is likely to and does produce death, because it is presumed that there is deliberate formed design existing in mind of defendant to kill. *State v. Edgin* (1974) 110 Ariz. 416, 520 P.2d 288.

9. Instructions

Where defendant denied that he had killed homicide victim, and there was no evidence that defendant had been aroused by adequate provocation, court did not err in refusing to instruct jury on lesser offense of manslaughter. *State v. Edgin* (1974) 110 Ariz. 416, 520 P.2d 288.

Though evidence as a whole supported instruction for murder and involuntary manslaughter, there was no evidence of any unintentional act which would have supported an instruction for involuntary manslaughter. *State v. Duke* (1974) 110 Ariz. 220, 618 P.2d 670.

Always Consult 1973 Supplementary Pamphlet



FILED
4-22-04 11:00am
MICHAEL K. JEANES, Clerk
By [Signature]
Deputy

*Original
Read 4/21-4/22/04
✓
Verdict
4/23/04
✓*

FINAL JURY INSTRUCTIONS

PENALTY PHASE

CR 95116

STATE OF ARIZONA

VS.

JOSEPH CLARENCE SMITH, JR.

TABLE OF CONTENTS

	PAGES
A. INTRODUCTION	3
B. JUROR DUTIES	3
C. DEFENDANT NEED NOT TESTIFY.....	4
D. PRIOR VERDICTS AND FINDINGS	5
E. PENALTY PHASE PROCEEDINGS.....	5
1. BURDEN OF PROOF.....	5
2. MITIGATING CIRCUMSTANCES.....	5
3. MITIGATION REBUTTAL EVIDENCE.....	6
4. WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND DELIBERATION ON THE PENALTY.....	7
F. VICTIM IMPACT INFORMATION.....	8
G. DEFENDANT'S CURRENT AND FUTURE CUSTODY STATUS.....	8
H. FUTURE DANGEROUSNESS, INCAPACITATION AND REHABILITATION.....	9
I. QUESTION TO BE DECIDED.....	9
J. VERDICT FORM.....	10
K. DUTY TO CONFER AND CONSULT WITH OTHER JURORS.....	10
L. DELIBERATION SCHEDULE, DELIBERATION PROCEDURE, QUESTIONS AND MESSAGES.....	11

A. INTRODUCTION

The parties have now completed presentation of the evidence.

The following instructions that were given to you in the aggravation phase and preliminary penalty phase remain in effect unless changed by these instructions:

- Credibility of witnesses
- Lawyers comments are not evidence
- Direct and circumstantial evidence
- Expert testimony
- Juror notes
- Stipulations
- Overview of penalty phase

B. JUROR DUTIES

I am now going to give you the final instructions on the law that you must follow to decide the issues in this penalty phase of the trial.

As you are aware, in the guilt phase of the trial the Defendant was found guilty of the first-degree murder of Sandy Spencer.

In the aggravation phase, the following three aggravating factors were found to exist:

1. The Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The Defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

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

It is now your duty to determine whether the Defendant should be sentenced to death or life imprisonment for his conviction of the first degree murder of Sandy Spencer.

In answering this question, it is your duty to follow these instructions on the law. It is also your duty to determine the facts. "Facts" means what actually happened. You are to determine the facts only from the evidence produced in court. You should not guess about any fact, and you must not be influenced by sympathy or prejudice in determining these facts. You must not be concerned with any opinion that you feel I have about the facts or issues in any phase of the trial. You are the sole judges of what happened and of the issues to be decided.

In their opening statements and closing arguments, the attorneys have again talked to you about the law and the evidence. What they said is not the law and evidence. However, it may help you to understand the law and the evidence.

C. DEFENDANT NEED NOT TESTIFY

The Defendant is not required to testify or make any statement in the penalty phase and you are precluded from drawing any inferences against him if he did not ^{to} testify or make a statement. The decision of whether or not to testify or make a statement is left

to the Defendant acting with the advice of his attorneys. You must not let this decision affect your deliberation in any way.

D. PRIOR VERDICTS AND FINDINGS

In the guilt phase of the trial, the Defendant was convicted of first- degree murder. In the aggravation phase, you unanimously found beyond a reasonable doubt that the above aggravating factors were proven. Thus, the issues of guilt and aggravation have been finally decided, and you are not to reconsider these decisions.

E. PENALTY PHASE PROCEEDINGS.

1. BURDEN OF PROOF

In the penalty phase, the defendant has the burden of proving by a preponderance of the evidence the existence of mitigating circumstances. A matter is proved by a preponderance of the evidence if it is shown to be more likely true than not. This is a lesser burden than “proof by clear and convincing evidence” and “proof beyond a reasonable doubt.”

2. MITIGATING CIRCUMSTANCES

Mitigating circumstances are circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment. Mitigating circumstances may be any factors presented by the defendant or the state that are relevant in determining whether to impose a sentence of less than death,

including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense. During this penalty phase, you have heard evidence presented regarding the following:

- The defendant's mental state at the time of the offense.
- The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
- Difficult family background.
- Good family and interpersonal relationships and impact of execution on family.
- Good conduct in prison.

You are not limited to these mitigating circumstances. You must also consider any other information admitted as evidence that is relevant in determining whether to impose a sentence less than death so long as it relates to an aspect of the Defendant's character, propensities, or record and any of the circumstances of the offense.

3. MITIGATION REBUTTAL EVIDENCE

Pursuant to law, the State has presented evidence to rebut the defendant's mitigation evidence. This evidence is not a new aggravating circumstance. It is presented solely to give you a more complete picture of the defendant's character, propensities or record, and to aid you in properly weighing whether the mitigation is

sufficiently substantial to call for leniency and the imposition of a life sentence.

4. WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND DELIBERATING ON THE PENALTY

Although a final decision on a penalty of death or life in prison must be unanimous, the determination of what circumstances are mitigating and the weight to be given to the mitigating circumstances is for each of you to resolve, individually, based upon all the evidence that has been presented in both the aggravation and penalty phases. You must individually determine the nature and extent of mitigating circumstances. Then, in light of all of the aggravating circumstances that have been proved to exist, you must individually determine if the totality of the mitigating circumstances is sufficiently substantial to call for leniency and a life sentence. You must not weigh each mitigating circumstance against each aggravating circumstance.

Any verdict of death or life imprisonment must be unanimous. Your verdict must be a reasoned moral response based on the law and evidence presented to you. If, after considering all of the aggravation and mitigation evidence, you have a doubt whether a death sentence should be imposed, then you should resolve that doubt in favor of a life sentence.

F. VICTIM IMPACT INFORMATION

The victim's father and sister have made statements relating to the personal characteristics of Sandy Spencer and the impact of her murder on her family. This information is not a new aggravating circumstance and you cannot consider it as such. Just as the law allows you to see the defendant as a unique person and to see the loss that will result from his execution, the law also allows you to see the murder victim as a unique person and to see the loss resulting from her murder. You are to consider this information only for this limited purpose.

G. DEFENDANT'S CURRENT AND FUTURE CUSTODY STATUS

Under Arizona law and the evidence, regardless of whether the jury imposes either a life or death sentence, the defendant will never be released from prison. The defendant is currently serving three consecutive life sentences for three separate rapes, as detailed in exhibit 19. These sentences were imposed on September 7, 1976, when the defendant was 26 years of age. The law and the terms and conditions of these sentences provide that in no case is the defendant eligible for commutation of sentence, pardon or parole until he has served 90 years in prison. If the jury imposes a life sentence concerning the murder of Sandy Spencer, then the Court

will be required to sentence the defendant to life in prison without eligibility for release under any circumstances until not less than 25 years has been served. The court will also determine whether that sentence shall be served concurrent with the three life sentences or consecutive to those sentences. In either case, the law requires that the defendant receive credit for all time spent in custody before the sentence is imposed.

The above information is not an aggravating or mitigating circumstance. It is being explained to you only to complete the information regarding the defendant's current and future imprisonment.

H. FUTURE DANGEROUSNESS, INCAPACITATION AND REHABILITATION

In determining the defendant's character, propensities or record and the circumstances of the offense, you may consider the defendant's future dangerousness, incapacitation and rehabilitation. The likelihood that the defendant will or will not pose a threat to other inmates, guards or to society may be considered in determining a just sentence.

I. QUESTION TO BE DECIDED

The question you must answer is:

**SHOULD THE DEFENDANT BE SENTENCED TO
DEATH OR LIFE IMPRISONMENT FOR THE FIRST
DEGREE MURDER OF SANDY SPENCER?**

As previously stated, in deciding this question you must individually decide whether there is mitigation, the weight to be given to the mitigation, and whether the mitigation is sufficiently substantial to call for leniency and the imposition of a life sentence. In doing this, you must weigh all the evidence presented in the aggravation phase and all of the evidence presented in this penalty phase.

J. VERDICT FORM

The penalty issue is now submitted to you for a decision. Juror #8, who presided over your deliberations in the aggravation phase, will continue to be your foreperson and will sign any verdict. A sample of the verdict form is attached for your review. The form reads as follows:

[Review Verdict Form]

All twelve of you must agree on a penalty before you may impose a penalty of death or life imprisonment.

K. DUTY TO CONFER AND CONSULT WITH OTHER JURORS

When you deliberate, it is your sworn duty to discuss the case with one another in an effort to reach a just verdict if you can do so.

Each of you must decide the issues in the case for yourself, but only after you have given full weight and consideration to all of the evidence, discussed it fully with each other, and listened to the views of your fellow jurors. While you are discussing the case, do

not hesitate to re-examine your own views and change your mind if you become convinced that you are wrong. However, do not give up your honest beliefs simply because other jurors think differently, or merely to finish the case.

Remember that you are the judges – judges of the facts. Your only interest is to seek the truth and do justice from the evidence and law presented.

L. DELIBERATION SCHEDULE, DELIBERATION PROCEDURE, QUESTIONS AND MESSAGES

1. Deliberation Schedule and Breaks

Upon retiring to deliberate, your first task is to set your deliberation schedule. You may deliberate in the morning and afternoon or only half-days. You are in charge of your schedule and may set and vary it by agreement and with the approval of court. After you have set your schedule, please send it to me by a note via the bailiff for my review and approval.

You are to discuss the case and deliberate only when all jurors are present in the jury room. You are not to discuss the case with each other or anyone else during breaks or recesses. The admonition I have given you during the trial remains in effect when you are not deliberating.

2. Review Instructions

After setting your schedule and before discussing the evidence, I suggest that you next review the applicable jury instructions and the verdict form. It is very helpful for you to discuss and understand the instructions and verdict form before discussing the evidence and making decisions. Again, during your deliberations you must follow the instructions and refer to them to answer any questions about applicable law, procedure, definitions, etc.

3. Juror Questions And Messages

Should any of you, or the jury as a whole, have a question or message for the court during your deliberations, please write it out on the "Jury Note and Question" form provided. All questions or messages must be communicated to the court in writing and must be signed by you or your foreperson.

The court will consider your question or note and consult with counsel before answering it in writing. The court will answer it as quickly as possible.

While the court is considering your question or note, please continue your deliberations, if possible.

No member of the jury should ever attempt to communicate with me except by a signed writing. I will communicate with you on

anything concerning the case only in writing, or orally with a court reporter present.

Remember that you are not to tell anyone, including me, how you stand, numerically or otherwise, until after you have reached a verdict and have been discharged.

Alternates

H 16

H 14

H 3



FILED
5/27/04 2:4 pm
MICHAEL K. JEANES, Clerk
By S. Mena
Deputy

Final
(Reft to jury)
5/27/04
70

FINAL JURY INSTRUCTIONS

PENALTY PHASE

CR 95116

STATE OF ARIZONA

VS.

JOSEPH CLARENCE SMITH, JR.

May 27, 2004

TABLE OF CONTENTS

	PAGES
A. INTRODUCTION	3
B. JUROR DUTIES	3
C. DEFENDANT NEED NOT TESTIFY.....	4
D. PRIOR VERDICTS AND FINDINGS	5
E. PENALTY PHASE PROCEEDINGS.....	5
1. BURDEN OF PROOF.....	5
2. MITIGATING CIRCUMSTANCES.....	5
3. MITIGATION REBUTTAL EVIDENCE.....	6
4. WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND DELIBERATION ON THE PENALTY.....	7
F. VICTIM IMPACT INFORMATION.....	8
G. DEFENDANT'S CURRENT AND FUTURE CUSTODY STATUS.....	8
H. FUTURE DANGEROUSNESS, INCAPACITATION AND REHABILITATION.....	9
I. QUESTION TO BE DECIDED.....	10
J. VERDICT FORM.....	10
K. DUTY TO CONFER AND CONSULT WITH OTHER JURORS.....	10
L. DELIBERATION SCHEDULE, DELIBERATION PROCEDURE, QUESTIONS AND MESSAGES.....	11

A. INTRODUCTION

The parties have now completed presentation of the evidence. The following instructions given in the aggravation phase and preliminary penalty phase remain in effect unless changed by these instructions:

- Credibility of witnesses
- Lawyers comments are not evidence
- Direct and circumstantial evidence
- Expert testimony
- Juror notes
- Stipulations
- Overview of penalty phase

B. JUROR DUTIES

I am now going to give you the final instructions on the law that you must follow to decide the issues in this penalty phase of the trial.

As you are aware, in the guilt phase of the trial the Defendant was found guilty of the first-degree murder of Neva Lee.

In the aggravation phase, the following three aggravating factors were found to exist:

1. The Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable. (three counts of rape concerning two separate victims)
2. The Defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person. (first-degree murder of Sandy Spencer)

3. The Defendant committed the murder of Neva Lee in an especially heinous, cruel or depraved manner.

It is now your duty to determine whether the Defendant should be sentenced to death or life imprisonment for his conviction of the first-degree murder of Neva Lee.

In answering this question, it is your duty to follow these instructions on the law. It is also your duty to determine the facts. "Facts" means what actually happened. You are to determine the facts only from the evidence produced in court. You should not guess about any fact, and you must not be influenced by sympathy or prejudice in determining these facts. You must not be concerned with any opinion that you feel I have about the facts or issues in any phase of the trial. You are the sole judges of what happened and of the issues to be decided.

In their opening statements and closing arguments, the attorneys will again talk to you about the law and the evidence. What they say is not the law and evidence. However, it may help you to understand the law and the evidence.

C. DEFENDANT NEED NOT TESTIFY

The Defendant is chosen to not testify or make a statement in the penalty phase. ^{you} You are precluded from drawing any inferences against him because he did not to testify or make a statement. The decision of whether or not to testify or make a statement is left to the

Defendant acting with the advice of his attorneys. You must not let this decision affect your deliberation in any way.

D. PRIOR VERDICTS AND FINDINGS

In the guilt phase of the trial, the Defendant was convicted of first- degree murder. In the aggravation phase, you unanimously found beyond a reasonable doubt that the above three aggravating factors were proven. Thus, the issues of guilt and aggravation have been finally decided, and you are not to reconsider these decisions.

E. PENALTY PHASE PROCEEDINGS.

1. BURDEN OF PROOF

In the penalty phase, the defendant has the burden of proving by a preponderance of the evidence the existence of mitigating circumstances. A matter is proved by a preponderance of the evidence if it is shown to be more likely true than not. This is a lesser burden than “proof by clear and convincing evidence” and “proof beyond a reasonable doubt.”

2. MITIGATING CIRCUMSTANCES

Mitigating circumstances are circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment. Mitigating circumstances may be any factors presented by the defendant or the state that are relevant in determining whether to impose a sentence of less than death,

including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense. During this penalty phase, you have heard evidence presented regarding the following:

- The defendant's mental state at the time of the offense.
- The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
- Difficult family background.
- Good family and interpersonal relationships and impact of execution on family.
- Good conduct in prison.

You are not limited to considering these mitigating circumstances. You must also consider any other information admitted as evidence that is relevant in determining whether to impose a sentence less than death so long as it relates to an aspect of the Defendant's character, propensities, or record and any of the circumstances of the offense.

3. MITIGATION REBUTTAL EVIDENCE

Pursuant to law, the State has presented evidence to rebut the defendant's mitigation evidence. This evidence is not a new aggravating circumstance. It is presented solely to give you a more

complete picture of the defendant's character, propensities or record, and to aid you in determining whether the mitigation is sufficiently substantial to call for leniency and the imposition of a life sentence.

4. WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND DELIBERATING ON THE PENALTY

Although a final decision on a penalty of death or life in prison must be unanimous, the determination of what circumstances are mitigating and the weight to be given to the mitigating circumstances is for each of you to resolve, individually, based upon all the evidence presented in both the aggravation and penalty phases. To do this, you must individually determine the nature and extent of mitigating circumstances. Then, in light of all of the aggravating circumstances that have been proved to exist, you must individually determine if the totality of the mitigating circumstances is sufficiently substantial to call for leniency and a life sentence. You must not weigh each mitigating circumstance against each aggravating circumstance.

Any verdict of death or life imprisonment must be unanimous. Your verdict must be a reasoned moral response based on the law and evidence presented to you and not an emotional response. If, after considering all of the aggravation and mitigation evidence, you

have a doubt whether a death sentence should be imposed, then you should resolve that doubt in favor of a life sentence.

F. VICTIM IMPACT INFORMATION

The victim's brother has made a statement relating to the personal characteristics of Neva Lee and the impact of her murder on her family. This information is not a new aggravating circumstance and you cannot consider it as such. Just as the law allows you to see the defendant as a unique person and to see the loss that will result from his execution, the law also allows you to see the murder victim as a unique person and to see the loss resulting from her murder. You are to consider this information only for this limited purpose.

G. DEFENDANT'S CURRENT AND FUTURE CUSTODY STATUS

Under Arizona law and the evidence, regardless of whether the jury imposes either a life or death sentence, the defendant will never be released from prison. The defendant is currently serving three consecutive life sentences for three separate rapes, as detailed in exhibit 1. These sentences were imposed on September 7, 1976, when the defendant was 26 years of age. The law and the terms and conditions of these sentences provide that in no case is the defendant eligible for commutation of sentence, pardon or parole until he has served 90 years in prison.

If the jury imposes a life sentence concerning the murder of Neva Lee, then the Court will be required to sentence the defendant to life in prison without eligibility for release under any circumstances until not less than 25 years has been served. The court will also determine whether that sentence shall be served concurrent with the three life sentences or consecutive to those sentences. In either case, the law requires that the defendant receive credit for all time spent in custody before the sentence is imposed.

The above information is not an aggravating or mitigating circumstance. It is being explained to you only to complete the information regarding the defendant's current and future imprisonment.

H. FUTURE DANGEROUSNESS, INCAPACITATION AND REHABILITATION

In determining the defendant's character, propensities or record and the circumstances of the offense, you may consider the defendant's future dangerousness, incapacitation and rehabilitation. The likelihood that the defendant will or will not pose a threat to other inmates, guards or to society may be considered in determining a just sentence.

I. QUESTION TO BE DECIDED

The question you must answer is:

**SHOULD THE DEFENDANT BE SENTENCED TO
DEATH OR LIFE IMPRISONMENT FOR THE FIRST
DEGREE MURDER OF NEVA LEE?**

As previously stated, in deciding this question you must individually decide whether there is mitigation, the weight to be given to the mitigation, and whether the mitigation is sufficiently substantial to call for leniency and the imposition of a life sentence. In doing this, you must weigh all the evidence presented in the aggravation phase and all of the evidence presented in this penalty phase.

J. VERDICT FORM

The penalty issue is now submitted to you for a decision. Juror #15, who presided over your deliberations in the aggravation phase, will continue to be your foreperson and will sign any verdict. A sample verdict form is attached for your review. The form reads as follows:

[Review Verdict Form]

All twelve of you must agree on a penalty before you may impose a penalty of death or life imprisonment.

K. DUTY TO CONFER AND CONSULT WITH OTHER JURORS

When you deliberate, it is your sworn duty to discuss the case with one another in an effort to reach a just verdict if you can do so.

Each of you must decide the issues in the case for yourself, but only after you have given full weight and consideration to all of the evidence, discussed it fully with each other, and listened to the views of your fellow jurors. While you are discussing the case, do not hesitate to re-examine your own views and change your mind if you become convinced that you are wrong. However, do not give up your honest beliefs simply because other jurors think differently, or merely to finish the case.

Remember that you are the judges – judges of the facts. Your only interest is to seek the truth and do justice from the evidence and law presented.

L. DELIBERATION SCHEDULE, DELIBERATION PROCEDURE, QUESTIONS AND MESSAGES

1. Deliberation Schedule and Breaks

Upon retiring to deliberate, your first task is to set your deliberation schedule. You may deliberate in the morning and afternoon or only half-days. You are in charge of your schedule and may set and vary it by agreement and with the approval of court. After you have set your schedule, please send it to me by a note via the bailiff for my review and approval.

You are to discuss the case and deliberate only when all jurors are present in the jury room. You are not to discuss the case with each other or anyone else during breaks or recesses. The

admonition I have given you during the trial remains in effect when you are not deliberating.

2. Review Instructions

After setting your schedule and before discussing the evidence, I suggest that you next review the applicable jury instructions and the verdict form. It is very helpful for you to discuss and understand the instructions and verdict form before discussing the evidence and making decisions. Again, during your deliberations you must follow the instructions and refer to answer any questions about applicable law, procedure, de..... etc.

*List of witnesses
Jury Verdict
if needed*

3. Juror Questions And Messages

Should any of you, or the jury as a whole, have a question or message for the court during your deliberations, please write it out on the "Jury Note and Question" form provided. All questions or messages must be communicated to the court in writing and must be signed by you or your foreperson.

The court will consider your question or note and consult with counsel before answering it in writing. The court will answer it as quickly as possible.

While the court is considering your question or note, please continue your deliberations, if possible.

No member of the jury should ever attempt to communicate with me except by a signed writing. I will communicate with you on anything concerning the case only in writing, or orally with a court reporter present.

Remember that you are not to tell anyone, including me, how you stand, numerically or otherwise, until after you have reached a verdict and have been discharged.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Joe Clarence Smith, Petitioner,

vs.

Charles L. Ryan, Director of the Arizona Department of Corrections, and Ron Credio, Warden of the Arizona State Prison-Eyman Complex, Respondents.

CERTIFICATE OF SERVICE

I, Karen S. Smith, a member of the bar of this Court, hereby certify that on November 17, 2017, the original and 10 copies of the Petition for Writ of Certiorari and supporting documents were sent by Federal Express, postage prepaid, to the Clerk of Court, 1 First Street NE, Washington DC 20543. I certify that one copy of these documents was mailed first-class mail to John Todd, at 1275 West Washington, Phoenix, AZ 85007.

I further certify that all parties required to be served have been served.

Respectfully submitted:

November 17, 2017.

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