

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Chad Alan Lee, Petitioner,

vs.

Ryan Thornell, et al., 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 A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHAD ALAN LEE,	No.09-99002
<i>Petitioner-Appellant,</i>	D.C. No. 2:01- CV-02178-EHC
v.	
RYAN THORNELL,	ORDER AND AMENDED OPINION
<i>Respondent-Appellee.</i>	

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted November 14, 2023
San Francisco, California

Filed June 11, 2024
Amended September 30, 2024

Before: Consuelo M. Callahan, Jacqueline H. Nguyen, and
Daniel A. Bress, Circuit Judges.

Order;
Opinion by Judge Bress

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court’s denial of Chad Lee’s 28 U.S.C. § 2254 habeas corpus petition, and the denial of Lee’s motion for leave to amend, in a case in which Lee was convicted and sentenced to death for three murders.

In Claim 2, Lee argued that his trial counsel was constitutionally ineffective at sentencing because he failed to investigate and present mitigating evidence that Lee suffered from Fetal Alcohol Syndrome and Fetal Alcohol Effect. He maintained that his *in utero* exposure to alcohol caused organic brain damage, a substantial mitigating factor. Because Lee did not raise this claim in his postconviction relief petition, it is procedurally defaulted. The evidence that Lee would bring forward to establish cause and prejudice, as well as the underlying ineffective assistance of trial counsel claim, was not developed in the state court proceedings. Lee assigned further error to the district court’s failure to hold an evidentiary hearing to further develop these facts.

Lee offered two novel theories for obtaining a federal evidentiary hearing notwithstanding 28 U.S.C. § 2254(e)(2), which places strict limits on when federal courts can hold evidentiary hearings and consider new evidence when the habeas petitioner has failed to develop the factual basis for his claim in state court proceedings. The panel held that (1) Lee’s theory based on his alleged abandonment by state postconviction counsel lacks merit; (2) Lee’s theory—that

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

the Arizona Supreme Court did not follow a “meaningful process” when it appointed postconviction counsel, such that the requirements of § 2254(e)(2) do not apply—also fails; and (3) Lee’s two theories also do not provide “cause” to excuse his failure to raise his ineffective assistance claim in state postconviction proceedings.

The panel held that even if Lee could demonstrate cause to excuse the procedural default, Lee cannot demonstrate prejudice. Lee’s prejudice argument depended on the new evidence of alleged organic brain damage from fetal alcohol exposure that Lee did not put forward in state court, and § 2254(e)(2) prevents federal courts from considering that evidence. Lee did not argue that, absent his new evidence, he can demonstrate ineffective assistance of trial counsel for failure to investigate and present fetal-alcohol evidence at sentencing. His ineffective assistance claim necessarily fails, and he cannot show prejudice to excuse his procedural default. But even considering Lee’s new theory and evidence, Lee still cannot show prejudice because his underlying ineffective assistance claim lacks merit. That is, because Lee can show neither that his trial counsel performed deficiently nor that his alleged deficient performance prejudiced him, Lee cannot demonstrate prejudice from postconviction counsel’s failure to raise the fetal alcohol ineffective assistance theory in state postconviction proceedings.

In Proposed Claim 26, Lee asserted that the Arizona Supreme Court erred on direct appeal by unconstitutionally requiring him to establish a causal nexus between his crimes and his mitigating evidence. The panel held that the district court correctly denied leave to add this claim because it was untimely under 28 U.S.C. § 2244(d)(1). The panel rejected Lee’s argument that Proposed Claim 26 shared a common

core of operative facts with Claim 19, which argued that Arizona’s capital sentencing scheme is unconstitutionally overbroad. The panel held that even if it were timely, Proposed Claim 26 is procedurally defaulted. The panel held that Proposed Claim 26 also fails on the merits because the Arizona Supreme Court did not apply an unconstitutional causal nexus test, and Lee cannot in any event show prejudice.

COUNSEL

Timothy M. Gabrielsen (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender, District of Arizona; Federal Public Defender’s Office, Tucson, Arizona; for Petitioner-Appellant.

Jason D. Lewis (argued), David E. Ahl and Andrew S. Reilly, Assistant Attorneys General, Capital Litigation Section; Jeffrey L. Sparks, Deputy Solicitor General, Capital Litigation Chief; Kristin K. Mays, Arizona Attorney General; Office of the Arizona Attorney General, Phoenix, Arizona; for Respondent-Appellee.

ORDER

The opinion filed on June 11, 2024, and appearing at 104 F.4th 120 is amended as follows. At Slip Op. page 33, line 18 [104 F.4th at 138], remove “*see also Jones*, 2024 WL 2751215, at *9 (noting that the Arizona Supreme Court has apparently never ‘vacated the judgment of death in a case involving multiple murders—let alone a case involving all of the aggravating circumstances present here’).”

With this amendment, the panel unanimously voted to deny the petition for panel rehearing and rehearing en banc. 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 rehearing, Dkt. No. 160, is DENIED. No further petitions for rehearing will be entertained.

OPINION

BRESS, Circuit Judge:

In April 1992, Chad Lee killed three people in three weeks. He was sentenced to death for each murder. The Arizona Supreme Court affirmed Lee’s convictions and sentence on direct appeal and denied his petitions for state postconviction relief. Lee then sought federal habeas relief under 28 U.S.C. § 2254, which the district court denied. We affirm.

I

A

We describe the facts of Lee's offenses, drawing largely from the Arizona Supreme Court's decisions on direct appeal. *State v. Lee*, 944 P.2d 1204, 1209 (Ariz. 1997) (*Lee I*); *State v. Lee*, 944 P.2d 1222, 1226 (Ariz. 1997) (*Lee II*).

On April 6, 1992, Lee, then 19 years old, and his accomplice, David Hunt, age 14, called Pizza Hut from a pay phone and ordered a pizza delivered to a vacant house. When Linda Reynolds arrived with the pizza, Lee and Hunt pointed a rifle at her and forced her to remove her shorts and shirt. The two put Reynolds in Lee's car, and Lee drove her into the desert. Hunt drove Reynolds's car to meet them.

Once in the desert, Lee and Hunt removed Reynolds's car stereo, smashed the windows and other parts of her car with a bat, punctured the tires, cut various hoses and wires to disable the engine, and shot a bullet through the hood. Lee later testified that he destroyed Reynolds's car to prevent her from escaping.

Lee and Hunt forced Reynolds to remove her shoes, socks, and pantyhose and to walk barefoot into the desert. Hunt then raped her, and Lee forced Reynolds to perform oral sex on him. After finding Reynolds's bank card in her wallet, Lee drove Reynolds and Hunt to an ATM. Lee gave Reynolds his flannel shirt to wear and then forced Reynolds to withdraw \$20 of the \$27 she had left in her account.

From there, Lee and Hunt drove Reynolds back into the desert. Reynolds tried to escape, but Hunt forced her back to the car. By the time she was returned to the car, her face and lips were bloody. According to Lee, Lee and Hunt

argued in front of Reynolds over whether to kill her, and Reynolds “freaked” and tried to grab the gun.

Lee shot Reynolds once in the head. But Reynolds was still alive. Lee retrieved a knife from his car and twice stabbed Reynolds in the chest to “put her out of her misery.” Lee and Hunt then drove away. Medical evidence indicated that Reynolds “would have been alive for at least a couple minutes, and probably more,” following the stabbings. The next day, Lee pawned Reynolds’s car stereo, wedding ring, and gold ring for a total of \$170.

Ten days later, on April 16, 1992 around midnight, Lee used another payphone to call a taxi. David Lacey was dispatched to pick up Lee. Meanwhile, Hunt drove Lee’s car to the location where Lee and Hunt planned to rob the driver. When Lacey arrived, Lee pulled out a revolver and demanded money. According to Lee, Lacey attempted to grab the gun. Lee then fired nine shots, four of which hit Lacey. Lee took “forty dollars from Lacey’s pockets and dumped his body by the side of the road.” Lee then drove Lacey’s cab to a dirt road, where he searched the cab’s contents and shot its windows and tires.

On April 27, 1992, Lee entered a convenience store around 1:00 a.m. to purchase cigarettes. When Harold Drury, the store clerk, opened the cash drawer, Lee shot Drury in the shoulder, causing Drury to fall backwards. Lee then “shot Drury in the top of the head, the forehead, the cheek, and the neck.” After Drury slumped to the floor, Lee “walked around the counter and shot Drury two more times in the right temple.” Lee retrieved the cigarettes and took the cash drawer before leaving the store. Hunt was waiting in Lee’s car, and they left together.

B

Not long after, in May 1992, police apprehended Lee and Hunt after various pieces of physical evidence connected them to the murders. *Lee I*, 944 P.2d at 1210. As to Linda Reynolds, Lee was indicted for first-degree murder, kidnapping, two counts of sexual assault, armed robbery, and theft. *Id.* at 1211. Lee was also indicted for the first-degree murders and armed robberies of David Lacey and Harold Drury. *Id.* Lee was tried in the Superior Court of Maricopa County in 1994. The trial court severed the counts involving Reynolds and Lacey (*Lee I*) from the counts involving Drury (*Lee II*). *Lee II*, 944 P.2d at 1226.

To prepare for a possible capital sentencing, Lee's trial counsel, Alan Simpson, applied for funds to hire Dr. Mickey McMahon, a clinical psychologist. When doing so, Simpson flagged Lee's deprived childhood and evidence of Lee's psychological and cognitive defects. Simpson specifically noted that Lee's sister's "strongest memory of her mother was sitting in a chair, a beer and cigarette in one hand, a book in another."

Simpson did other work to investigate mitigating circumstances, as well. Simpson obtained Lee's school records, which indicated that at the time Lee dropped out in the ninth grade, he had a cumulative GPA of 1.20. Based on "[p]reliminary discussions with Dr. McMahon," Simpson "believe[d] that [Lee's] background contributed to the development of . . . recognized psychological and cognitive defects over which [Lee] had no control." A letter written to Simpson by his investigator, Ed Aitken, indicates that both Simpson and Aitken suspected early on that Lee may have suffered from "alcohol syndrome." As we discuss in greater

detail below, however, Dr. McMahon did not believe that Lee suffered from such a syndrome.

In the *Lee I* trial, Lee was convicted of all charged offenses, including two counts of first-degree murder for the killings of Reynolds and Lacey. 944 P.2d at 1211. During sentencing proceedings, Dr. McMahon provided extensive testimony to establish a mitigating portrait of Lee based on his troubled family background, “follower” personality, age, and mental shortcomings.

Dr. McMahon described the parental abandonment that Lee suffered during his early childhood and its severe consequences for Lee’s adolescent development. Dr. McMahon also testified that Lee suffered from attention deficit disorder. To demonstrate that Lee was “a dependent kind of person” and “submissive,” Dr. McMahon testified about the results of a personality test that he administered to Lee, indicating that on a scale of 1.0 (non-leader) to 10.0 (leader), Lee scored a 1.1. According to Dr. McMahon, Lee experienced “times when his ability to perceive reality is significantly compromised.” As a result, Lee would sometimes “not appreciate the total impact of the situation he is in and how it affects him and the people around him.”

In *Lee I*, the trial court sentenced Lee to consecutive, aggravated terms of imprisonment totaling 101 years for the noncapital convictions. *Lee I*, 944 P.2d at 1211. For each of the murders, and operating pre-*Ring v. Arizona*, 536 U.S. 584 (2002), the court sentenced Lee to death. *Id.* The trial court found the following aggravating circumstances for both death sentences: previous death-eligible conviction, previous violent felony, and pecuniary gain. *Id.* In addition, the court found that the Reynolds murder was especially cruel, heinous, and depraved. *Id.* As mitigating factors, the

trial court acknowledged “defendant’s age, lack of significant prior criminal history, deprived childhood, cooperation with law enforcement officials and assistance in recovery of weapons, and remorse.” *Id.*

In the *Lee II* trial, a unanimous jury found Lee guilty of felony murder and premeditated murder. *Lee II*, 944 P.2d at 1226. After considering the same mitigating evidence presented in *Lee I*, the trial court sentenced Lee to death for the murder and a consecutive 21-year term for the armed robbery. *Id.* The court found four statutory aggravating circumstances for the death sentence: previous death-eligible convictions for the Reynolds and Lacey murders, previous violent felonies, pecuniary gain, and offense committed in an especially cruel, heinous, or depraved manner. *Id.* at 1227. The trial court found Lee’s “age, lack of significant prior criminal history, and deprived childhood to be mitigating circumstances.” *Id.*

The Arizona Supreme Court affirmed Lee’s convictions and sentences in two separate opinions. *Lee I*, 944 P.2d 1204; *Lee II*, 944 P.2d 1222. The court “independently reviewed and weighed the aggravating and mitigating circumstances” related to each murder. *Lee II*, 944 P.2d at 1233–34; *see also Lee I*, 944 P.2d at 1221. As to the Drury murder, the court found that “the state proved the following aggravation beyond a reasonable doubt: (a) previous death-eligible conviction, (b) previous violent felony, (c) pecuniary gain, and (d) that the murder was committed in an especially heinous and depraved manner.” *Lee II*, 944 P.2d at 1234. It also found that Lee “proved the following mitigation by a preponderance of the evidence: (a) age, (b) lack of significant prior criminal history, and (c) deprived childhood.” *Id.* As to the Reynolds murder, the Arizona Supreme Court found the same aggravating and mitigating

factors, with the additional mitigating factors of “cooperation with law enforcement officials” and “remorse.” *Lee I*, 944 P.2d at 1211. The court found that all these aggravating and mitigating factors applied to the Lacey murder, except that the Lacey murder was not depraved. *Id.* at 1220.

The U.S. Supreme Court denied Lee’s petition for certiorari in March 1998.

C

In Lee’s state postconviction proceedings, the Arizona Supreme Court appointed attorney Jess Lorona to represent Lee. Lorona investigated Lee’s case in preparation for filing Lee’s petition for state postconviction relief. Lorona contacted Lee’s trial counsel, Simpson, and obtained documents from him. Lorona’s billing records indicate that Lorona also contacted the attorneys who represented Lee on direct appeal.

Lee wrote two letters to Lorona requesting status updates. Lorona responded on March 8, 2000, and April 13, 2000. In the first letter, Lorona informed Lee that Lorona had obtained an extension for filing the petition for postconviction relief and noted that Lorona and his investigator had been interviewing witnesses and working on the case. The second letter reiterated that Lorona and his investigator had been interviewing witnesses, enclosing a copy of the filed petition for postconviction relief, which Lorona had submitted on March 15, 2000.

Lorona dedicated most of the postconviction petition to arguing that Arizona’s death penalty scheme was unconstitutional. Lorona also argued that the trial court had erred in different respects, such as in not severing the trials

for the Reynolds and Lacey murders. Although Lorona did also assert five claims of ineffective assistance of trial counsel, he did not raise the ineffective assistance claim at issue here, which pertains to Simpson's alleged failure to investigate and present mitigating evidence of Fetal Alcohol Syndrome.

In response to Lorona's petition, the State argued that the non-ineffective assistance of trial counsel claims were precluded because they were either decided on direct appeal or could have been raised at that time. As to the ineffective assistance claims, the State maintained that Lee had "failed to raise any colorable claims," so the State "request[ed] that [Lee] be ordered to file an amended petition within 30 days, in order to explain how his [ineffective assistance] allegations . . . are colorable." Lorona did not amend the petition or file a reply, despite filing a motion for an extension of time.

The state trial court (the same judge who had presided over Lee's trials and sentenced him to death) denied Lee's petition for postconviction relief. The court agreed with the State that all the non-ineffective assistance claims were precluded because they were either raised or could have been raised on direct appeal. As to the ineffective assistance claims, the court found that none were colorable, on that basis rejecting the State's assertion that Lee should have filed an amended petition. The court explained:

First, based on the Court's observations in the pretrial stage, at trial, and finally at sentencing, Defendant received an excellent defense from a very competent and experienced attorney. Second, Defendant has not and cannot demonstrate prejudice. There

is no need for an evidentiary hearing as to the allegations of ineffective assistance of trial counsel because Defendant cannot meet either of the two prongs set forth in *Strickland*.

The court noted that Lee's "counsel provided the Court with much evidence as to Defendant's deprived childhood and the Court considered it and counted it as a mitigating factor. The Court didn't have to have counsel 'draw a line' to show the nexus, but that childhood could not overcome the aggravating factors found by the Court in these homicides."

In a second postconviction petition filed in September 2005, Lee argued that the Arizona Supreme Court in *Lee I* improperly refused to consider Lee's mitigating evidence because it lacked a causal nexus to his crime. The state trial court rejected this "successive Notice of Post-Conviction Relief," finding that Arizona Rule of Criminal Procedure 32.2(a) precluded Lee from pursuing a claim that "should have been raised on direct appeal or in the first Rule 32 [postconviction] proceedings." The Arizona Supreme Court denied review. Lee also submitted a third petition for postconviction relief in 2009, which was likewise denied.

D

On November 8, 2001, Lee filed two petitions for § 2254 relief in federal court. The petitions were consolidated. On March 3, 2003, Lee filed his first amended petition. Two claims are relevant here.

Claim 2. Claim 2 focused on the performance of Lee's trial counsel, Simpson. It alleged that Simpson "provided constitutionally ineffective assistance of counsel by failing to investigate and prepare adequate and appropriate

mitigation for the sentencing phases of [Lee’s] two trials,” specifically by failing to pursue counsel’s suspicion that Lee “might have had neurological damage as a result of prenatal exposure to alcohol.” In February 2005, the district court dismissed Claim 2, finding it procedurally defaulted because Lee had failed to raise this argument in state court.

Proposed Claim 26. In July 2006, Lee sought to add to his § 2254 petition a proposed Claim 26, in which he asserted that the Arizona Supreme Court unconstitutionally required him to establish a causal nexus between his crimes and his mitigating evidence, in violation of *Tennard v. Dretke*, 542 U.S. 274 (2004). In November 2006, the district court denied the motion to amend because “add[ing] this claim would be futile because it is time barred, procedurally barred, and without merit.”

In 2009, Lee appealed the denial of § 2254 relief. Shortly after appellate briefing was completed, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012). In *Martinez*, the Court held that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* at 9. This court then granted Lee’s motion for a limited remand to permit the district court to reconsider its denial of Claim 2 and other claims in light of *Martinez*.

In his remand briefing in the district court, Lee supported Claim 2 with new evidence, including declarations from additional experts. These medical professionals discussed the evidence of Lee’s alleged Fetal Alcohol Syndrome and Fetal Alcohol Effect—resulting from Lee’s *in utero* exposure to alcohol—and the impact on Lee’s brain development and maturity. Lee also included declarations

from friends and family members about his difficult childhood.

The district court again denied all claims, including Claim 2. The court found that Simpson's performance was not deficient, and that even if it was, Lee was not prejudiced, meaning that Lee had not excused his procedural default. The court found that any evidence of fetal alcohol-related brain damage would not have affected Lee's sentence because of (1) Lee's "lead role in the murders and robberies"; (2) the strength of the aggravating factors; and (3) the state trial court's acceptance of other mitigating circumstances. The district court also denied Lee's requests for depositions of Simpson and Lorona and for an evidentiary hearing because it found the underlying claim to lack merit. The district court granted a certificate of appealability on Claim 2. It later admitted additional materials that Lee proffered into the record.

E

In August 2019, we expanded the certificate of appealability to include the question of whether the district court erred in denying leave for Lee to add his Proposed Claim 26, the causal nexus claim. We also ordered replacement briefs to be filed. In May 2021, we issued an order holding the case in abeyance pending *Shinn v. Ramirez*, 596 U.S. 366 (2022). After *Shinn* was decided, the parties then filed a further round of replacement briefs.

We review de novo the district court's denial of Lee's § 2254 petition. *Cain v. Chappell*, 870 F.3d 1003, 1012 (9th Cir. 2017). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies in this case because Lee's federal habeas petition was filed in 2001, after AEDPA's

effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

II

In Claim 2, Lee argues that his trial counsel, Alan Simpson, was constitutionally ineffective at sentencing because he failed to investigate and present mitigating evidence that Lee suffered from Fetal Alcohol Syndrome and Fetal Alcohol Effect. Lee maintains that his *in utero* exposure to alcohol caused organic brain damage, a substantial mitigating factor. To establish a Sixth Amendment claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), Lee must show that his trial counsel was deficient and that this deficient performance prejudiced Lee. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 104 (2011).

Because Lee did not raise this claim in his state postconviction relief petition, it is procedurally defaulted. *See Shinn*, 596 U.S. at 371 (“A federal habeas court generally may consider a state prisoner’s federal claim only if he has first presented that claim to the state court in accordance with state procedures.”). To enable a federal court to consider this claim, Lee must “demonstrate ‘cause’ to excuse the procedural defect and ‘actual prejudice.’” *Id.* (citation omitted); *see also, e.g., McLaughlin v. Oliver*, 95 F.4th 1239, 1246 (9th Cir. 2024). However, the evidence that Lee would bring forward to establish cause and prejudice, as well as the underlying ineffective assistance of trial counsel claim, was not developed in the state court proceedings. The district court also declined to hold an evidentiary hearing to further develop these facts, to which Lee assigns further error.

A

The most immediate difficulty for Lee is 28 U.S.C. § 2254(e)(2), which places strict limits on when federal courts can hold evidentiary hearings and consider new evidence when the habeas petitioner has failed to develop the factual basis for his claim in state court proceedings.¹ In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court held that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* at 9. This stands as a “narrow exception” to the usual rule that “in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default.” *Shinn*, 596 U.S. at 380 (quoting *Davila v. Davis*, 582 U.S. 521, 529 (2017)).

In *Shinn*, however, the Supreme Court held that the special rule of *Martinez* did not create an exception to § 2254(e)(2) to excuse a habeas petitioner’s failure to develop in state court proceedings evidence of trial counsel’s ineffectiveness. 596 U.S. at 371. As *Shinn* now makes clear, even when “postconviction counsel negligently failed to

¹ Under 28 U.S.C. § 2254(e)(2), “[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that— (A) the claim relies on— (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

develop the state-court record,” a federal court “shall not hold an evidentiary hearing” unless one of the two exceptions in § 2254(e)(2) is met. *Id.* Under *Shinn*, “[b]ecause ‘§ 2254(e)(2) is a statute that the courts have no authority to amend,’ its strictures must be enforced according to their terms, with no *Martinez*-style judge-made equitable exceptions for only ‘a subset of claims.’” *McLaughlin*, 95 F.4th at 1248 (brackets omitted) (quoting *Shinn*, 596 U.S. at 385–87). And § 2254(e)(2)’s “restrictions also apply ‘when a prisoner seeks relief based on new evidence *without* an evidentiary hearing.’” *Id.* (quoting *Shinn*, 596 U.S. at 389).

Thus, although Lee could try to argue cause and prejudice under *Martinez* to excuse the procedural default of Claim 2, there remains the problem that Lee cannot present evidence of either counsel’s alleged ineffectiveness that was not presented in state court unless he can satisfy § 2254(e)(2). Presumably because § 2254(e)(2) presents an independent obstacle to success on his claim, Lee is clear in his briefing that he is not relying on the *Martinez* procedural default exception. He in fact specifically represents that “it could not be clearer that Lee does not rely on *Martinez*.” Lee also does not argue that he meets the § 2254(e)(2) exceptions.

Instead, Lee offers two novel theories for obtaining a federal evidentiary hearing notwithstanding § 2254(e)(2). It appears that Lee raises the same two arguments in support of his claim that he has established “cause” to excuse his procedural default. As we now explain, these two theories are unpersuasive.

B

First, Lee argues that he is entitled to a federal evidentiary hearing because Lorona, his state postconviction counsel, abandoned him. Lee theorizes that counsel's abandonment severed the principal-agent relationship, meaning that Lee did not "fail[] to develop the factual basis of [his] claim in State court proceedings," within the meaning of § 2254(e)(2). We understand Lee to also be invoking Lorona's alleged abandonment of Lee as "cause" to excuse Lee's failure to raise the Fetal Alcohol Syndrome and Fetal Alcohol Effects argument in state postconviction proceedings.

Lee's abandonment theory lacks merit. Even assuming, notwithstanding *Shinn v. Ramirez*, that attorney abandonment could provide grounds for avoiding the strictures of § 2254(e)(2), Lee's argument fails because Lorona did not abandon Lee. Abandonment occurs when counsel fails to "operat[e] as [petitioner's] agent in any meaningful sense of that word." *Maples v. Thomas*, 565 U.S. 266, 287 (2012) (first alteration in original) (quoting *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring in part and concurring in judgment)). Abandonment can be evidenced by "counsel's near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years," *id.* at 282 (citation omitted), or by counsel's decision to "withdraw from the case" without notifying the petitioner or securing suitable replacement counsel, *id.* at 283. By contrast, an attorney's "negligent conduct" does not constitute abandonment. *Id.* at 281; *see also Gibbs v. Legrand*, 767 F.3d 879, 885–87 (9th Cir. 2014).

Lorona did not abandon Lee in the state postconviction proceedings. When Lee wrote letters to Lorona, Lorona responded and reported his work on the case. This is a far cry from a “near-total failure to communicate with petitioner,” or similarly egregious conduct, that constitutes abandonment. *Maples*, 565 U.S. at 282 (quotation omitted). Further, Lorona’s billing records—which included more than 150 entries between June 1999 and July 2000—show that Lorona conducted regular work on Lee’s case, including collaborating with an investigator and consulting with Lee’s trial counsel. The many motions Lorona filed also reflect his efforts in representing Lee. Ultimately, Lorona filed a substantial petition for state postconviction relief that raised nine claims, including several ineffective assistance claims. These actions are not the equivalent of abandonment.

Lee nevertheless argues that abandonment can be detected in Lee’s contemporaneous letters to Lorona, in which Lee expresses frustration with Lorona’s progress and asks for status updates. But any dissatisfaction that Lee felt toward Lorona does not negate the work that Lorona was doing on the case. Lee also complains that Lorona failed to meet with Simpson and confer with Lee. But the record shows that Lorona consulted with Simpson by phone and communicated with Lee by letter. A failure to conduct in-person meetings is not tantamount to a “near-total failure to communicate with petitioner” and does not constitute abandonment. *Id.* at 282.

Lee further contends that Lorona failed to “perform reasonably necessary legal work” and failed to plead “a colorable claim.” Even if true, these allegations suggest at most that Lorona was “negligent,” not that he failed to “operat[e] as [Lee’s] agent in any meaningful sense of that word.” *Id.* at 287 (internal citation and quotation marks

omitted). Lorona's failure to file an amended petition or reply brief after obtaining an extension again reflects negligence at most. *See Gibbs*, 767 F.3d at 887 (noting that in a prior case, an "attorney's alleged negligence did not rise to the level of abandonment or egregious misconduct because he actually represented his client and filed a habeas petition, albeit an imperfect one." (citing *Towery v. Ryan*, 673 F.3d 933, 936 (9th Cir. 2012) (per curiam))). Lee's abandonment theory thus fails to save him from the requirements of § 2254(e)(2). It also does not establish "cause" to excuse his procedural default.

Second, Lee argues that the requirements of § 2254(e)(2) do not apply because the Arizona Supreme Court did not follow a "meaningful process" when it appointed Lorona as Lee's postconviction counsel. Essentially, Lee argues that the Arizona Supreme Court's constitutionally inadequate appointment process provides both cause for Lee's procedural default and grounds for avoiding the requirements of § 2254(e)(2). This argument also fails. Once again, even assuming this theory could provide grounds for avoiding § 2254(e)(2), *but see Shinn*, 596 U.S. at 385–86, it is meritless because there is no basis to conclude that the Arizona Supreme Court followed an inadequate process in appointing postconviction counsel.

In claiming a deficient appointment process, Lee points to the fact that the Arizona Supreme Court's committee for appointing postconviction counsel initially recommended against the appointment of Lorona, and that a memorandum from that committee noted, "Too many cases per attorney – Lorona 5." According to Lee, this indicates that the Arizona Supreme Court did not act in "good faith" when it appointed Lorona.

This argument fails. The record shows that the Arizona Supreme Court’s committee engaged in a thoughtful vetting process for selecting counsel for capital defendants in their state postconviction proceedings. Over two hundred letters were sent to attorneys requesting that they apply for appointment, after which applicants were screened and interviewed. Though Lorona was not initially selected for an interview, the committee report noted that judges had “very positive” experiences with him. In noting that there were “too many cases per attorney” in the case of Lorona, the committee’s memorandum just as probably reflects an acknowledgment that Lorona’s caseload was substantial. It does not show, as Lee contends, that the court selected an “utterly unqualified” attorney to represent Lee.

Section 2254(e)(2) thus applies. Because Lee does not argue that he can otherwise satisfy the requirements of that provision, he was not entitled to a federal evidentiary hearing or to introduce new evidence in federal court, and his claim must rest on the state court record. *See McLaughlin*, 95 F.4th at 1248. And for the reasons we have set forth, Lee’s two theories also do not provide “cause” to excuse his failure to raise his ineffective assistance claim in state postconviction proceedings.

C

Even if Lee could demonstrate cause to excuse the procedural default—whether based on his postconviction counsel’s failure to raise his current Sixth Amendment theory in state court, or on any other theory—Lee still cannot demonstrate prejudice. Lee’s prejudice argument depends on the new evidence that Lee did not put forward in state court, and, as we discussed above, § 2254(e)(2) prevents federal courts from relying upon that new evidence. *See*

McLaughlin, 95 F.4th at 1248. Lee does not argue that, absent his new evidence, he can demonstrate ineffective assistance of trial counsel for failure to investigate and present fetal-alcohol evidence at sentencing. His ineffective assistance claim necessarily fails, and he cannot show prejudice to excuse his procedural default.

But even considering Lee’s new theory and evidence, Lee still cannot show prejudice. *See Martinez*, 566 U.S. at 10. To show prejudice even under *Martinez*, a petitioner must “demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Id.* at 14; *see also Dickinson v. Shinn*, 2 F.4th 851, 858 (9th Cir. 2021). Lee cannot demonstrate prejudice from the procedural default because his underlying *Strickland* claim lacks merit. That is, because Lee can show neither that his trial counsel performed deficiently nor that this alleged deficient performance prejudiced him, *see Richter*, 562 U.S. at 104, Lee cannot demonstrate prejudice from his postconviction counsel’s failure to raise the fetal alcohol ineffective assistance theory in state postconviction proceedings.

1

First, Lee cannot show deficient performance by his trial counsel. Under *Strickland*’s performance prong, “[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690. We “then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.* In performing

this analysis, the question is whether “counsel’s representation fell below an objective standard of reasonableness.” *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 688). “Representation is constitutionally ineffective only if it ‘so undermined the proper functioning of the adversarial process’ that the defendant was denied a fair trial.” *Id.* at 110 (quoting *Strickland*, 466 U.S. at 686).

In the capital sentencing context, “‘counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary’ during the penalty phase of a trial.” *Bolin v. Davis*, 13 F.4th 797, 804 (9th Cir. 2021) (emphasis in original) (quoting *Carter v. Davis*, 946 F.3d 489, 513 (9th Cir. 2019) (per curiam)). But when assessing counsel’s performance, we “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689; *see also Cullen v. Pinholster*, 563 U.S. 170, 196 (2011).

In this case, Simpson’s performance in the penalty phases was within the “wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. At sentencing, Simpson put forward wide-ranging mitigating evidence on Lee’s behalf, including about Lee’s age, deprived childhood, mental capacity and personality traits, remorse, lack of prior criminal record, and strong support from Lee’s family and friends. Among other things, Simpson put on evidence showing how Lee was “ping-pong[ed]” between homes as a young child and received no familial affection, with his parents often leaving Lee with another family and then not contacting him. Simpson also emphasized Lee’s diminished mental capacity and psychological orientation, which placed him in the 99th

percentile of “the compliance scale” and showed that he was a “follower, not a leader.” Simpson put on evidence that these mitigating factors were the only explanation for Lee’s otherwise inexplicable crimes, especially when Lee had no criminal record apart from stealing a bicycle at the age of fifteen.

Although Simpson did not introduce evidence of fetal brain damage from alcohol exposure, Simpson did put forward evidence of how Lee’s mother abused alcohol, including before Lee was born. Simpson’s investigator testified that Lee’s “mother abused alcohol for a number of years, including, prior to his birth.” Specifically, “[d]uring the period of before he was born,” Lee’s mother would be furnished with “a case of beer every other day, and then that was augmented” to a “case of beer every other day with two 12-packs in between.”

Simpson’s efforts in representing Lee did not go unnoticed. The same state trial judge who presided over Lee’s trials commented when denying Lee’s state postconviction petition that Lee “received an excellent defense from a very competent and experienced attorney.” The trial judge reached this conclusion based on his own “observations in the pretrial stage, at trial, and finally at sentencing.” These comments from a judge who observed Lee’s counsel’s performance firsthand support the conclusion that counsel did not act deficiently. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (“[T]he judge presiding on postconviction review was ideally situated to make this assessment because she is the same judge who sentenced Landrigan . . .”); *Mann v. Ryan*, 828 F.3d 1143, 1157–58 (9th Cir. 2016) (en banc) (similar). In short, based on the record before the state court, there would be no basis

to conclude that Simpson's presentation of mitigating evidence fell below Sixth Amendment standards.

Notwithstanding this, Lee argues that Simpson was constitutionally ineffective for failing to present evidence of neurological damage caused by *in utero* exposure to alcohol. But even if we considered Lee's proffered evidence, Lee cannot overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Lee principally argues that Simpson performed deficiently by relying upon psychologist Dr. Mickey McMahon as his expert. Lee contends that Simpson should have also retained an expert specially qualified in evaluating persons who had been exposed to alcohol *in utero*. In a declaration submitted to the district court, Simpson claimed that "[e]arly in the investigation of [Lee's] case, I began to suspect that he might have been exposed to alcohol *in utero* and that he had sustained neurological damage as a result of that exposure." But when Simpson raised this possibility with Dr. McMahon, Dr. McMahon responded that the theory lacked merit because Lee "did not display the 'facial characteristics' of a child with fetal alcohol syndrome." Dr. McMahon "therefore dismissed the possibility that [Lee] suffered any neurological impairment as a result of *in utero* alcohol exposure." Simpson claims that he "[t]rust[ed] Dr. McMahon's assessment of the fetal alcohol exposure issue" and did not retain an additional expert to look into the issue further.

Simpson's reliance on Dr. McMahon did not amount to constitutionally ineffective assistance of counsel. "Counsel's failure to consult" with additional experts is "not unreasonable" when "counsel did retain medical experts

whom he thought well-qualified.” *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998). In *Babbitt*, for example, we rejected the argument that defense counsel should have retained experts with particular expertise in post-traumatic stress disorder. *Id.* Instead, it was sufficient that counsel had retained qualified experts who “did not state that they required the services of . . . additional experts.” *Id.* As we have explained, “[i]t is certainly within the ‘wide range of professionally competent assistance’ for an attorney to rely on properly selected experts.” *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) (quoting *Strickland*, 466 U.S. at 690); see also *Stokley v. Ryan*, 659 F.3d 802, 813 (9th Cir. 2011) (“[N]either of the experts counsel hired unequivocally stated that Stokley should be examined by a neuropsychologist—and counsel was under no obligation to seek neuropsychological testing in the absence of any such recommendation.”).

In this case, Simpson reasonably selected Dr. McMahon as an expert. As noted in a contemporaneous letter Simpson wrote to Lee’s probation officer, Simpson believed that “Dr. McMahon has had a strong background in corrections, both adult and juvenile.” Dr. McMahon’s resume lists qualifications that would have enabled him to evaluate Lee for psychological impairments. Dr. McMahon held a doctorate in clinical psychology and had been a certified psychologist for nearly two decades by the time of Lee’s 1993 trial. Since 1975, he had been a consultant to various government entities, including the Maricopa County Criminal Court Division, the Juvenile Court, and the Arizona Department of Corrections in matters including the “[p]sychological evaluations and treatment of . . . [c]hildren and parents in cases of: child abuse, incorrigibility, delinquency, neglect, etc.” Dr. McMahon also had

experience examining patients “[f]or loss of specific neuropsychological abilities associated with organic brain damage,” “[o]rganic [m]ental [d]isorder,” and “alcohol/substance abuse disorders.” In addition, Dr. McMahon had served as an expert in past criminal cases, including evaluating mitigating circumstances, with “[p]articular attention paid to the role of alcohol and substance abuse in the committing offense.”

Given Dr. McMahon’s qualifications and experience, Simpson was not ineffective in relying on Dr. McMahon. Although Simpson in a later declaration faulted himself for relying on Dr. McMahon, that declaration, expressed through “the distorting lens of hindsight,” does not reflect “what was known and reasonable at the time the attorney made his choices.” *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995) (citation omitted). The declaration does not show that Simpson “questioned or should have questioned the competence” of Dr. McMahon at the time of his investigation into Lee’s mitigating circumstances. *Harris*, 949 F.2d at 1525.

Because it was reasonable for Simpson to retain Dr. McMahon, it was also reasonable for Simpson to not seek further expert assistance based on Dr. McMahon’s disavowal of the theory that Lee might have developed neurological impairments from fetal alcohol exposure. When a retained expert “did not state that [he] required the services of . . . additional experts,” there is “no need for counsel to seek them out independently.” *Babbitt*, 151 F.3d at 1174; *see also Payton v. Cullen*, 658 F.3d 890, 896 (9th Cir. 2011) (“Having retained qualified experts, it was not objectively unreasonable for [the attorney] not to seek others.”). Counsel has a duty to provide the retained expert with “pertinent information about the defendant,” *Caro v.*

Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002), and to investigate issues for which the expert has specifically “recommended further inquiry,” *Bemore v. Chappell*, 788 F.3d 1151, 1172 (9th Cir. 2015). But here, Simpson provided Dr. McMahon with his suspicions about Lee’s fetal alcohol exposure, and McMahon did not recommend further inquiry or retaining another expert. Simpson thus had no further constitutional duty to retain a different expert.

This conclusion is not undermined by Lee’s argument that Fetal Alcohol Syndrome and Fetal Alcohol Effects were well-known in 1994 and that Dr. McMahon should have diagnosed it then. As one of Lee’s new experts acknowledges, the Diagnostic and Statistical Manual of Mental Disorders (DSM) available at the time of the 1994 trial and sentencing did not contain a specific diagnostic code for a neurodevelopmental disorder associated with prenatal alcohol exposure, which exists only in “current diagnostic terminology.” Another of Lee’s new experts further recognizes that “[t]he majority of individuals [with Fetal Alcohol Syndrome and Fetal Alcohol Effect], particularly those born before 1973, went undiagnosed, and to this day the greatest majority of individuals continue to go undiagnosed.”

It is thus doubtful that Dr. McMahon was incompetent for failing to diagnose Lee in 1994. But even if he were, it would not change our bottom-line conclusion about Lee’s Sixth Amendment theory. “An expert’s failure to diagnose a mental condition does not constitute ineffective assistance of counsel, and [a petitioner] has no constitutional guarantee of effective assistance of experts.” *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010). Thus, “[e]ven if the mental health professional[] who evaluated [Lee] at the time of his trial incorrectly concluded that [Lee] did not have organic

brain damage, [Lee's] claim fails.” *Id.* Dr. McMahon’s alleged misdiagnosis does not demonstrate ineffective assistance of counsel.

Finally, Lee claims that Simpson was deficient because he failed to abide by the standards set forth in the 2003 revised edition of the American Bar Association (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, reprinted at 31 HOFSTRA L. REV. 913 (2003). Lee relies on the commentary to Guideline 10.11, which explains that expert testimony concerning “the permanent neurological damage caused by fetal alcohol syndrome” could “lessen the defendant’s moral culpability for the offense or otherwise support[] a sentence less than death.” *Id.* at 1060–61.

Once again, Lee fails to demonstrate Simpson’s deficient performance. A violation of the ABA Guidelines does not necessarily equate to a constitutional violation. *See Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam) (explaining that the ABA standards “can be useful as ‘guides’ to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place”); *Sansing v. Ryan*, 41 F.4th 1039, 1057 (9th Cir. 2022); *McGill v. Shinn*, 16 F.4th 666, 690 (9th Cir. 2021). Here, the 2003 ABA Guidelines on which Lee relies had not been promulgated at the time of Lee’s sentencing, and the then-prevailing 1989 ABA Guidelines did not yet contain the guidance in question. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989). Regardless, Simpson did put on mitigating evidence of Lee’s mental and psychological deficiencies, and he raised the fetal alcohol issue with Dr. McMahon. We cannot conclude that Simpson failed to abide by prevailing

professional standards given his efforts to develop and present mitigating evidence.

2

Even assuming Simpson performed deficiently, Lee still could not show prejudice from the procedural default because any ineffective assistance of counsel did not prejudice Lee. “In the capital sentencing context, the prejudice inquiry asks ‘whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’” *Shinn v. Kayer*, 592 U.S. 111, 117–18 (2020) (per curiam) (quoting *Strickland*, 466 U.S. at 695). The standard is “highly demanding,” *id.* at 118 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986)), and “requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors.” *Thornell v. Jones*, 2024 WL 2751215, at *10 (U.S. May 30, 2024). The “reasonable probability” standard further requires a “‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Shinn*, 592 U.S. at 118 (quoting *Pinholster*, 563 U.S. at 189). In this case, even if Simpson had presented the fetal alcohol brain damage theory that Lee now proffers, there would not be a “substantial” likelihood that Lee would have evaded a death sentence. *Id.*

To start, it is speculative whether Lee’s new evidence would have materially added to the overall case in mitigation. Lee argues that new evidence of alleged organic brain damage would have cast him in a more sympathetic light. But as we have discussed above, trial counsel had already endeavored to show why, based on mitigating

factors, Lee was undeserving of the death penalty. These mitigating factors included Lee's difficult and deprived childhood, age, lack of prior criminal history, difficulties in school, learning disability, mental limitations, and passive and suggestible personality. The sentencing hearing also included evidence that Lee's mother had abused alcohol before Lee was born.

The trial court acknowledged Lee's mitigating evidence, noting, for example, that Lee had a "dysfunctional" and "deprived childhood" in which he "was almost treated as chattel for his father," with parents who "seemingly never showed any affection toward the defendant" and "provided virtually no care." But referencing other mitigating circumstances that it did not find Lee had proven, the state trial court still noted that "even if this court were to consider every one of the factors proposed by the defendant as a mitigating circumstance," they would not be "sufficiently substantial to call for leniency" given the aggravating features of Lee's crimes. Under these circumstances, we are hard-pressed to conclude there is a substantial likelihood that evidence of fetal-alcohol issues would have resulted in a different sentence. *See Floyd v. Filson*, 949 F.3d 1128, 1139–40 (9th Cir. 2020) (holding that testimony on fetal alcohol syndrome would not have changed the balance of mitigating and aggravating factors); *cf. Bemore*, 788 F.3d at 1159–60, 1174–76 (recognizing that evidence of "organic brain damage" created a reasonable probability of a different sentence when trial counsel presented no mental health mitigation evidence to the sentencing jury and instead presented other theories that damaged the defendant's credibility).

Lee argues that evidence of Fetal Alcohol Syndrome and Fetal Alcohol Effect would have specifically helped to

explain his poor judgment and suggestibility. But at sentencing, Simpson had already put on evidence to build on those themes. Among other things, and in addition to Lee's age, Simpson introduced evidence through Dr. McMahon that Lee was in the 99th percentile of the "compliance scale" and the 96th percentile of the "suggestibility scale," that he was "a virtual door mat" in his extreme tendency to be a follower, and that he had "a diminished capacity to appreciate the consequences of his actions." Lee's new experts argue that his fetal alcohol brain damage provided an explanation for his developmental immaturity, but trial counsel had already worked to develop that impression of Lee. In light of this evidence, there is no reasonable probability that a different sentence would have resulted if Simpson had put on evidence of organic brain damage. *Shinn*, 592 U.S. at 117–18; *see also Floyd*, 949 F.3d at 1138–40.

In any event, even if this new evidence might have changed the complexion of the mitigation story to some extent, there is no reasonable probability that it would have overcome the extreme aggravating circumstance of Lee's offenses, especially considering the role he played in the murders. In evaluating prejudice, Lee "must show a reasonable probability" that a capital sentence would have been rejected after the sentencer "weighed the entire body of mitigating evidence . . . against the entire body of aggravating evidence." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam); *see also Pinholster*, 563 U.S. at 198 (finding no prejudice when "[t]he State presented extensive aggravating evidence"). And "where the aggravating factors greatly outweigh the mitigating evidence, there may be no 'reasonable probability' of a different result," even if the petitioner presents "substantial evidence of the kind that a

reasonable sentencer might deem relevant to the defendant's moral culpability.” *Jones*, 2024 WL 2751215, at *7 (quotations omitted).

In this case, Lee's crimes involved numerous aggravating factors. Notwithstanding Lee's age and claimed follower personality, Lee played a lead role in three senseless murders of complete strangers in a matter of three weeks. *See Belmontes*, 558 U.S. at 25 (explaining that “the cold, calculated nature of the . . . murder” served as a “counterpoint” to new evidence of defendant's “impairment of the neurophysiological mechanisms for planning and reasoning”); *id.* at 28 (noting that evidence that defendant had committed another murder was “the most powerful imaginable aggravating evidence”).

And the murders involved other aggravating circumstances beyond their number. All three of the murders Lee committed involved pecuniary gain. The Reynolds and Drury murders involved phone calls that effectively lured the victims into the harrowing situations that would lead to their deaths. In the cases of Lacey and Drury, Lee fired numerous shots at each victim, plainly shooting to kill. And the murder of Linda Reynolds stands out for its unique depravity. Lee and Hunt kidnapped and sexually assaulted Reynolds, forced her to withdraw the last twenty dollars from her bank account, and then debated in Reynold's presence whether to kill her. Then Lee shot Reynolds and stabbed her to finish the job, with the two men leaving Reynolds to die in the desert. As the trial court observed in the case of Reynolds, “[t]he amount of time which elapsed throughout the [w]hole ordeal, and the injuries and indignities suffered, amount to the height of cruelty.”

Balancing the mitigating evidence against the horrific nature of Lee's crimes, in which he played a central role, Lee cannot establish prejudice from his trial counsel's failure to present evidence of alleged organic brain damage from fetal alcohol exposure. Lee thus cannot demonstrate prejudice from the procedural default of not raising this issue in state postconviction proceedings.

III

We next turn to Lee's proposed claim (Proposed Claim 26) that the Arizona Supreme Court erred on direct appeal by refusing to consider mitigating evidence that lacked a causal nexus to his crimes. Lee challenges the following portion of the Arizona Supreme Court's opinion in *Lee I*:

This court finds that the trial court properly rejected defendant's claim that he was merely a follower when he was armed with his own weapons in both murders, initiated both robberies by making the phone calls, pulled the trigger in both murders, and stabbed Reynolds. *Further, defendant has failed to establish a nexus between his deprived childhood and his crimes.* Upon independent review of all mitigation evidence offered by defendant, this court finds no mitigating circumstances beyond those found by the trial court.

944 P.2d at 1221 (emphasis added). Lee interprets this passage as applying a causal nexus test, in which the court did not consider his deprived childhood and other mitigating circumstances because it required that he demonstrate a

nexus between that evidence and the murders, in violation of *Tennard v. Dretke*, 542 U.S. 274 (2004).

The district court denied Lee leave to add this claim to his § 2254 petition, finding that amendment would be futile because the claim was untimely, procedurally defaulted, and lacking merit. We agree on each point.

A

The district court correctly denied leave to add Proposed Claim 26 because it was not timely presented for review. AEDPA imposes a one-year statute of limitations on habeas claims by state prisoners. *See* 28 U.S.C. § 2244(d)(1). Although Lee’s original § 2254 petition was timely, he did not seek leave to add his causal nexus claim until years later. Lee argues, however, that under Federal Rule of Civil Procedure 15(c)(1)(B), Proposed Claim 26 was timely because it relates back to Claim 19 of his earlier petition, and is a “mere amplification” of that claim.

An amended pleading “relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.” Fed. R. Civ. P. 15(c)(1)(B). Specifically, a claim relates back if the original and amended claims are “tied to a common core of operative facts.” *Mayle v. Felix*, 545 U.S. 644, 664 (2005). Conversely, a claim does not relate back if it is “supported by facts that differ in both time and type from those the original pleading set forth.” *Id.* at 650.

The district court correctly rejected Lee’s argument that Proposed Claim 26 shared a common core of operative facts with his Claim 19. Claim 19 argued that “Arizona’s

statutory scheme for imposing the death penalty is unconstitutional because it does not sufficiently channel the sentencer's discretion." The factual basis of Claim 19 rests on an asserted overbreadth of Arizona's capital sentencing scheme, *i.e.*, that it does not sufficiently narrow the class of individuals who could be subject to the death penalty. Proposed Claim 26, by contrast, rests on the Arizona Supreme Court's evaluation of mitigation evidence in Lee's particular case.

Lee argues that Proposed Claim 26 should nonetheless relate back because, based on several indirect links, it is ultimately connected to Claim 19. Lee notes that Claim 19 cites *Woodson v. North Carolina*, 428 U.S. 280 (1976), and that *Woodson* in turn was cited in *Lockett v. Ohio*, 438 U.S. 586, 601 (1978). Lee goes on to explain that we have cited *Lockett* and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), in describing the Arizona Supreme Court's past unconstitutional applications of a causal nexus test. To provide the final link, Lee maintains that *Tennard* relied on the *Lockett-Eddings* line of cases in rejecting a Fifth Circuit nexus test analogous to Arizona's.

Lee's attempt to connect Proposed Claim 26 to Claim 19 does not satisfy Rule 15. The connection between cases that Lee advances is too generic to satisfy the "relating back" standard because the two claims at issue do not rest on a common core of operative facts. *Mayle*, 545 U.S. at 664. The district court thus did not err in denying Lee leave to add Proposed Claim 26 because it would be untimely under § 2244(d)(1).

B

Even if it were timely, Proposed Claim 26 is also procedurally defaulted. A state procedural bar will foreclose

federal court review of a claim in a § 2254 petition “if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.” *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (emphasis and brackets in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Here, Lee attempted to raise the causal nexus claim in his second postconviction petition in state court. The state trial court rejected this petition as improperly successive, holding that Arizona Rule of Criminal Procedure 32.2(a) precluded Lee from pursuing a claim that “should have been raised on direct appeal or in the first Rule 32 proceedings.” The Arizona Supreme Court then denied review. The independent and adequate state law grounds for dismissal provide another reason why Lee’s Proposed Claim 26 is futile. *See Kemna*, 534 U.S. at 375.

Lee does not challenge the independence of Arizona’s procedural bar. Instead, he disputes whether the bar is “firmly established and regularly followed” by the Arizona courts, a requirement for a claim to be procedurally defaulted under a state procedural rule. *Id.* at 376 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)); *see also Murray v. Schriro*, 745 F.3d 984, 1016 (9th Cir. 2014). Lee’s argument lacks merit.

Once the State carries the initial burden of showing an applicable state procedural bar, the burden shifts to the petitioner to raise “specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule.” *Williams v. Filson*, 908 F.3d 546, 577 (9th Cir. 2018) (citation omitted). If the petitioner makes this showing, the burden then shifts back to the State to demonstrate that the rule has been consistently and regularly

applied. *Id.* In this case, Lee has not cited “authority demonstrating inconsistent application” of the procedural bar. *Id.*

Lee points to *Spreitz v. Ryan*, 916 F.3d 1262 (9th Cir. 2019), a case in which we ruled that the petitioner’s causal nexus claim was not procedurally defaulted. But *Spreitz* is inapposite because the petitioner there raised a causal nexus claim in his first state postconviction proceeding. *Id.* at 1273 (“The first opportunity [petitioner] had to raise that claim was before the PCR court, at which time he did so.”). *Spreitz* supports the proposition that a claim is not procedurally defaulted if the petitioner brought the claim at the earliest opportunity in his postconviction proceedings. Here, Lee failed to raise his claim in the first Rule 32 proceedings, so he cannot rely on *Spreitz* to avoid procedural default.

Next, Lee points to *(Ernesto) Martinez v. Ryan*, 926 F.3d 1215, 1235 (9th Cir. 2019), and *Djerf v. Ryan*, 931 F.3d 870, 885 (9th Cir. 2019), two cases in which we considered causal nexus claims on the merits without addressing the issue of procedural default. But the fact that no issue of procedural default was raised or addressed in these cases does not demonstrate that Arizona has not regularly applied the procedural rule at issue here. Lee has identified no Arizona authority supporting that theory. And to the extent Lee argues that the procedural default here is different because the error of which he complains occurred on direct appeal before the Arizona Supreme Court, he cites no authority indicating that Arizona courts have not required such a claim to be brought in an initial state postconviction petition.

Alternatively, Lee argues that, if Proposed Claim 26 is procedurally defaulted, he can show cause and prejudice to

excuse the default for all the reasons he gave for Claim 2. As explained above, however, those theories lack merit.

C

Finally, even if Proposed Claim 26 was timely and not procedurally defaulted, the claim fails on the merits. Contrary to Lee, the Arizona Supreme Court did not refuse to consider mitigating evidence because it lacked a causal nexus to Lee's crimes. The court instead gave less weight to Lee's mitigating evidence than Lee would have wanted, which the court was permitted to do. And even assuming the Arizona Supreme Court did apply an unconstitutional causal nexus test, Lee's claim would still fail because any error was harmless.

1

The Arizona Supreme Court did not apply an unconstitutional causal nexus test. For a death sentence to meet the requirements of the Eighth and Fourteenth Amendments, the sentencer must not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114 (emphasis in original). But sentencers may "determine the weight to be given relevant mitigating evidence," so long as they do not "exclud[e] such evidence from their consideration." *Id.* at 114–15; *see also Jones*, 2024 WL 2751215, at *6 ("*Eddings* held that a sentencer may not 'refuse to consider . . . any relevant mitigating evidence.' It did not hold that a sentencer cannot find mitigating evidence unpersuasive.") (quoting *Eddings*, 455 U.S. at 114); *Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."); *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998) ("While it is true

that a sentencer may not ‘refuse to consider, *as a matter of law*, any relevant mitigating evidence,’ a sentencer is free to assess how much weight to assign to such evidence.” (citations omitted)), *abrogated on other grounds by Martinez*, 566 U.S. at 9. The question is thus whether the Arizona Supreme Court refused to consider Lee’s mitigating evidence because there was no causal nexus, or instead found that it did not outweigh the aggravating circumstances here.

Lee construes the Arizona Supreme Court’s opinion as excluding the consideration of mitigating evidence altogether when it stated that “defendant has failed to establish a nexus between his deprived childhood and his crimes.” *Lee I*, 944 P.2d at 1221. Lee also points out that the Arizona courts have, in the past, run afoul of the constitutional principle from *Eddings* at times. As we explained in *McKinney v. Ryan*, 813 F.3d 798, 815 (9th Cir. 2015) (en banc), “the Arizona Supreme Court routinely articulated and insisted on its unconstitutional causal nexus test” for about “fifteen years” spanning roughly the mid-1980s to 2000. The Arizona Supreme Court decided *Lee I* in this timeframe. Lee argues that, “consistent with” this history, here “the Arizona Supreme Court . . . necessarily screened that evidence and discounted it as having no value as mitigation because it bore no causal connection to the murder.”

As we have explained, however, *McKinney* “resolved only the ‘precise question’ whether the state court had applied the causal-nexus test in that specific case.” *Greenway v. Ryan*, 866 F.3d 1094, 1095–96 (9th Cir. 2017) (per curiam) (quoting *McKinney*, 813 F.3d at 804). *McKinney* did not hold “that Arizona had always applied” this unconstitutional test. *Id.* at 1095. We “therefore must

examine the state court decisions in [Lee's] case to determine whether they took into account all mitigating factors.” *Id.* at 1096. This inquiry includes looking to the trial judge’s ruling to the extent it was “adopted or substantially incorporated” by the higher court. *McKinney*, 813 F.3d at 819.

Here, the state courts’ rulings indicated their consideration of all mitigating factors. For example, in *Lee I*, the Arizona Supreme Court explained:

For each of the murders, we find that (1) defendant has proved by a preponderance of the evidence the mitigating circumstances of defendant’s age, lack of significant prior criminal history, deprived childhood, cooperation with law enforcement officials and assistance in recovery of weapons, and remorse; and (2) the mitigating circumstances are not sufficiently substantial, taken either separately or cumulatively, to call for leniency.

944 P.2d at 1221. Though the court noted that “defendant has failed to establish a nexus between his deprived childhood and his crimes,” the Arizona Supreme Court did not state that it was not considering such evidence altogether. *Id.*

The Arizona high court’s reference to “nexus” was not an invocation of the unconstitutional test. The court instead stated that a trial court “must consider all evidence offered in mitigation.” *Id.* at 1220. It further explained that trial courts “should consider each mitigating circumstance individually and all mitigating circumstances cumulatively

when weighing the mitigating and aggravating factors.” *Id.* at 1221 (citation and emphases omitted). The Arizona Supreme Court also stated that it “[f]ound] no mitigating circumstances beyond those found by the trial court,” and the reference to the mitigating circumstances found by the trial court included the evidence of Lee’s deprived childhood. *Id.* The trial court had earlier explained that it considered “the defendant’s deprived childhood” to be a mitigating circumstance that was “proved by a preponderance of the evidence.” Thus, both the state trial court and high court considered Lee’s deprived childhood as a mitigating factor. The Arizona high court simply rejected Lee’s request to “give *greater weight* to his deprived childhood.” *Id.* (emphasis added).

Further, this case is distinguishable from *McKinney*. In *McKinney*, we found that the Arizona Supreme Court had applied an unconstitutional causal nexus test based on a confluence of three facts:

(1) the factual conclusion by the sentencing judge, which the Arizona Supreme Court accepted, that McKinney’s PTSD did not “in any way affect[] his conduct in this case,” (2) the Arizona Supreme Court’s additional factual conclusion that, if anything, McKinney’s PTSD would have influenced him *not* to commit the crimes, and (3) the Arizona Supreme Court’s recital of the causal nexus test for nonstatutory mitigation and its pin citation to the precise page in [*State v.*

Ross, 886 P.2d 1354 (Ariz. 1994)], where it had previously articulated that test.

813 F.3d at 821 (first alteration in original). From these facts, we “conclude[d] that the Arizona Supreme Court held, as a matter of law, that McKinney’s PTSD was not a nonstatutory mitigating factor, and that it therefore gave it no weight.” *Id.*

None of those circumstances exists here. The sentencing judge never concluded that Lee’s deprived childhood did not “in any way affect[] his conduct in this case.” *Id.* (alteration in original). Nor did the Arizona Supreme Court state that Lee’s deprived childhood would have made his crime less likely. And the Arizona Supreme Court did not recite the causal nexus test from *Ross* or give a pin citation to its previous articulation of the test in *Ross*.

Lee argues that the Arizona Supreme Court in this case cited approvingly *State v. Stokley*, 898 P.2d 454 (Ariz. 1995), a case that applied a causal nexus test. True, *Stokley* applied a causal nexus test, and the Arizona Supreme Court cited *Stokley* in both its opinions in Lee’s appeals. See *Lee I*, 944 P.2d at 1218, 1221; *Lee II*, 944 P.2d at 1230, 1232. But in both opinions, the Arizona Supreme Court cited *Stokley* only for the uncontested propositions that it needed to “independently weigh[] the aggravating and mitigating circumstances related to each death sentence imposed on the defendant,” *Lee I*, 944 P.2d at 1221, *Lee II*, 944 P.2d at 1231–32, and that “trial judges are presumed to know the law,” *id.* at 1230 (citation and quotation marks omitted).

2

Finally, even if the Arizona Supreme Court applied an unconstitutional causal nexus test, Lee cannot show

prejudice. In evaluating whether a causal nexus error was prejudicial, we consider whether it had a “substantial and injurious effect or influence in determining the [sentencer’s] verdict.” *McKinney*, 813 F.3d at 822 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). To do so, we “review aggravating factors proven by the State and other mitigating evidence presented to the sentencing court,” and then “ask whether consideration of the improperly ignored evidence ‘would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it.’” *Djerf*, 931 F.3d at 885 (quoting *McKinney*, 813 F.3d at 823).

When there is “overwhelming evidence supporting the aggravating factors,” a causal nexus error will not create prejudice if “whatever weight” would have been afforded to the proffered mitigation evidence “would not be sufficient to call for leniency.” *Apelt v. Ryan*, 878 F.3d 800, 840 (9th Cir. 2017); *see also Greenway*, 866 F.3d at 1100 (“[E]ven if we were to determine that the state court did apply the causal-nexus test in violation of *Eddings*, there could have been no prejudice because the aggravating factors overwhelmingly outweighed all the evidence that Greenway asserted as mitigating.”); *Djerf*, 931 F.3d at 885–86 (finding a causal nexus error harmless where “the undisputed facts substantiating the ‘heinous, cruel, or depraved’ finding [were] especially powerful”).

As we have discussed above, Lee’s crimes involved significant aggravating factors. His difficult childhood and other mitigating circumstances would not have created a “substantial impact” on the sentencer’s judgment. *Id.* at 885; *see also Stokley v. Ryan*, 705 F.3d 401, 405 (9th Cir. 2012) (“In light of the Arizona courts’ consistent conclusion that leniency was inappropriate, there is no reasonable likelihood

that, but for a failure to fully consider Stokley's family history or his good behavior in jail during pre-trial incarceration, the Arizona courts would have come to a different conclusion.""). As the trial court observed at sentencing in *Lee I*,

[E]ven if this Court were to consider every one of the factors proposed by defendant as a mitigating circumstance, when balanced against the aggravating factors of the cruelty, heinousness and depravity of Linda Reynolds murder, and the depravity of David Lacey's murder, together with the factor that Lacey's murder came just nine days after Mrs. Reynolds[s] murder, those mitigating circumstances would not be sufficiently substantial to call for leniency.

The trial court in *Lee II* made similar comments when considering the murder of Harold Drury. Given the aggravating circumstances, any application of a causal nexus test by the Arizona Supreme Court would have been harmless.

In sum, based on untimeliness, procedural default, and overall lack of merit, we affirm the district court's denial of Lee's request for leave to amend his § 2254 petition to add Proposed Claim 26.

* * *

For the foregoing reasons, the denial of Lee's § 2254 petition and denial of Lee's motion to amend are

AFFIRMED.

APPENDIX B

1 Jess A. Lorona, 009186
2 Ryan Woodrow & Rapp, P.L.C.
3 3101 North Central Avenue, Suite 1500
4 Phoenix, Arizona 85012
5 (602) 280-1000

6 Attorneys for Defendant

7 SUPERIOR COURT OF ARIZONA

8 MARICOPA COUNTY

9 STATE OF ARIZONA)

Cause No. CR 92-04225

10 Plaintiff,)

PETITION FOR POST-
CONVICTION RELIEF

11 Vs.)

12 CHAD ALAN LEE,)

13 Defendant.)
14

15 The Defendant, by and through his counsel undersigned, hereby submits his
16 Petition for Post-Conviction Relief pertaining to this matter, pursuant to Rule 32,
17 Arizona Rules of Criminal Procedure, and requests that his conviction and sentence be
18 vacated and that he be granted a new trial.

- 19
- 20 1. Petitioner's name: Chad Lee
 - 21 2. Petitioner is now confined in ASPC, Florence, SMU II, Eyman Unit.
 - 22 3. A) Petitioner was convicted of first-degree murder for the death of
23 Harold Drury and armed robbery. In a separate proceeding, Petitioner was
24 convicted of kidnapping, sexual assault, armed robbery, theft, and two counts of
25 first degree murder for the deaths of Linda Reynolds and David Lacey.
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1 B) Petitioner was sentenced to death on all three of his first-degree
2 murder convictions.

3 C) The Cause Number on both of Petitioner's proceedings is CR92-
4 04255..

5 4. Petitioner presents the following issues as the basis of his claim for
6 relief.

7 I. Petitioner was denied his rights to due diligence process,
8 fundamental fairness and fair and impartial jury by the Trial
9 Court's failure to sever the Reynolds and Lacey homicides.
10

11 The Petitioner submits that the counts related to the Reynolds and Lacey victims
12 were improperly joined because none of the three conditions required by Rule 13.3 (a)
13 were met. Further, the Petitioner submits that the trial court erred in denying
14 Defendant's right to a severance under Rule 13.4 (b).
15

16 II. Petitioner was denied his rights to due process and fundamental
17 fairness by this Trial Court's failure to close the Reynolds and
18 Lacey case to the media.
19

20 Petitioner submits that the trial court erred when it denied his motion to close
21 pretrial and trial proceedings to the media. As a result thereof, the Petitioner was denied
22 his right to a fair trial because of media publicity. Despite the fact that there was a
23 passage of time between the crimes and the trial, the Petitioner submits that the media
24 coverage prejudiced him.
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III. The Trial Court's failure to appoint second counsel violated petitioner's Sixth Amendment right to the effective assistance of counsel.

The United States Constitution and the Arizona Constitution both provide that a defendant in a criminal case has the right to effective assistance of counsel. U.S. Const. Amend. VI, XIV; Ariz. Const. Art. II, §24. The United States Supreme Court has also upheld that mandate. Strickland v. Washington, 466 U.S. 668 (1984). The Fourteenth Amendment to the United States Constitution prohibits any state from taking action which would "deny to any person within its jurisdiction the equal protection of the laws." In other words, the equal protection clause requires that people in similar situations be treated alike. As of January 1, 1998, Arizona will require the appointment of two attorneys in all capital trial proceedings. Ariz.R.Crim.P. 6.2 (amended June 25, 1997). Petitioner was denied access to second counsel in his triple death penalty case while others similarly situated at the time were allowed discretionary appointment of second counsel and those similarly situated as of 1998 will be allowed mandatory appointment of second counsel.

Capital cases by their very nature are complex and the potential punishment is irrevocable and severe. If the State does not appoint second counsel in such cases, a trial with one attorney can be characterized as a “meaningless ritual.” Douglas v. California, 372 U.S. 353 (1963). If Petitioner had the resources, he certainly would have retained second counsel for himself, however, he could not. He had to rely on the State’s appointment. It has been held that (in a criminal trial), the ability to pay costs in

1 advance bears no relationship to a defendant's guilt or innocence." Furthermore, that
2 "there can be no equal justice where the kind of trial a man gets depends on the amount
3 of money he has." Griffin v. Illinois, 351 U.S. 12 (1956).

4 The "right to the assistance of counsel," as held in Herring v. New York, 422
5 U.S. 853 (1975), "has been understood to mean that there can be no restrictions upon the
6 function of counsel in defending a criminal prosecution in accord with the traditions of
7 the adversary fact-finding process (which in capital cases have included two attorneys)."

8
9 Further, the federal system has adopted the requirement that in federal capital
10 cases, the defendant is entitled to the appointment of two defense counsel. United
11 States v. McCullah, 76 F.3d 1087 (10th Cir. 1996), under 18 U.S.C. §3005; see also 21
12 U.S.C. §848(q)(4)(B), (q)(6) and (q)(8). The ABA Standards for counsels in capital
13 cases also recommends the appointment of two attorneys in all stages of capital cases.
14 A.B.A. STD.

15
16 The Arizona Supreme Court in affirming the trial court's refusal to allow
17 petitioner second counsel in this case is in conflict with federal law and the Sixth and
18 Fourteenth Amendments to the United States Constitution.

19
20 IV. The Trial Court abused its discretion at sentencing in the
21 Reynolds and Lacey case by not taking into account the
22 cumulative effect of Petitioner's mitigating evidence.

23 V. The Trial Court erred in not finding aggravating circumstances
24 of pecuniary gain beyond a reasonable doubt.

25 VI. The Trial Court's finding of pecuniary gain as an aggravating
26

factor is unconstitutional where it repeats the elements of first degree murder based on an underlying armed robbery.

Petitioner's sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the sentencing court relied on the duplicative aggravating circumstance of "pecuniary gain" to aggravate a first degree felony murder for robbery. The Arizona Supreme Court held that the Arizona legislature may properly establish a sentencing scheme in which an element of a crime could also be used for enhancement and aggravation purposes. State v. Lee, 250 Ariz.Adv.Rep. 34, 944 P.2d 1222. However, the use of duplicative aggravating factors in a capital case creates an unconstitutional skewing of the weighing process which necessitates a reweighing of the aggravating and mitigating circumstances. United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996).

A sentencing jury cannot consider both robbery and pecuniary gain aggravators; "When life is at stake, a jury cannot be allowed to doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators. Willie v. State, 585 So.2d 660 (Miss. 1991). Further, where evidence in support of factors is identical, counting both robbery and pecuniary gain as aggravating circumstances amounts to impermissible double counting. Jenkins v. State, 606 So.2d 604 (Miss. 1992). In Providence v. State, 337 So.2d 783 (Fla. 1976), the Florida Supreme Court held that the aggravating factors of murder in the commission of a robbery and murder for pecuniary gain could not be applied to a murder committed in the commission of a robbery. The court reasoned that "one who commits a capital crime

1 in the course of a robbery will always begin with two aggravating circumstances against
2 him while those who commit such a crime in the course of any other enumerated felony
3 will not be similarly disadvantaged." Providence, 337 So.2d at 786.

4 Similarly, the Alabama Supreme Court prohibited the use of a felony committed
5 during a robbery and pecuniary gain as aggravating circumstances to a robbery-murder.
6 See Cook v. State, 369 So.2d 1251, 1256 (Ala. 1978). The North Carolina Supreme
7 Court also limited the use of the aggravating special circumstance "avoiding or
8 preventing lawful arrest" and that the "capital felony was committed to disrupt or hinder
9 the lawful exercise of any governmental function or the enforcement of laws." State v.
10 Goodman, 257 S.E.2d 569, 587 (N.C. 1979).

11
12 The courts in these other jurisdictions had similar objectives in limiting the use
13 of overlapping special circumstances- to guide and focus the jury's "objective
14 consideration of particularized circumstances of the individual offense," so as to avoid
15 unnecessary and prejudicial inflation of aggravating circumstances based on one aspect
16 of the defendant's crime. Jurek v. Texas, 428 U.S. 262, 274, 49 L.Ed.2d 929, 96 S.Ct.
17 2950 (1976). In states where the court decides penalty, instead of the jury, the goals are
18 the same, to provide particular standards so as to avoid the risk of arbitrary and
19 capricious infliction of the death penalty condemned by the United States Supreme
20 Court.
21

22
23 The finding of more than one special circumstance has crucial significance in the
24 penalty phase. The finding of special circumstances has a direct effect on whether the
25 court imposes the ultimate punishment of death and thus, the finding of multiple special
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1 circumstances based on an indivisible course of conduct is constitutionally
2 impermissible.

3 The death penalty places a defendant in a unique situation which has been
4 recognized by the Supreme Court. See Lockett v. Ohio, 438 U.S. 586, 605, 57 L.Ed.2d
5 973, 98 S.Ct. 2954 (1978). Because of this unique situation, the sentencer must not be
6 given unbridled discretion in determining the fates of those charged with capital crimes.
7 California v. Brown, 479 U.S. 538, 541 (1986).
8

9 The purpose of the aggravating factors is to narrow the class of individuals
10 eligible for the death penalty, thereby channeling a sentencer's discretion. Lowenfield v.
11 Phelps, 484 U.S. 231, 244, 98 L.Ed.2d 568, 108 S.Ct. 546 (1988). By permitting a court
12 to consider multiple special circumstances as aggravating factors in its determination of
13 penalty, the court's focus is channeled away from this role of examining the aggravating
14 and mitigating circumstances and instead focused on the fact that *more* special
15 circumstances exist than actually do.
16

17 In allowing the double counting of pecuniary gain and robbery felony murder,
18 the Arizona Supreme Court fails to adequately channel the sentencing discretion of the
19 trial courts in capital cases, and in fact increases the risk that courts will arbitrarily and
20 capriciously impose the death penalty. This violates Petitioner's Fifth, Eighth and
21 Fourteenth Amendment constitutional rights.
22

23 VII. The Trial Court erred in not finding that the following
24 mitigating factors called for a sentence less than death in the
25 Reynolds and Lacey case.
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- A. The Petitioner was merely a follower.
- B. Petitioner's depraved childhood.
- C. Petitioner's Age.
- D. Petitioner's lack of any significant prior criminal history.
- E. Petitioner's cooperation with law enforcement and assistance in the recovery of weapons.
- F. Remorse.

VIII. Petitioner was denied the effective assistance of trial and appellate counsel which violated Petitioner's Fifth and Sixth Amendment rights under the U.S. Constitution and under Article II, Section 4 and 24 of the Arizona Constitution.

The United States Constitution and the Arizona Constitution both provide that a defendant in a criminal case has the right to effective assistance of counsel. U.S. Const. Amend. VI, XIV; Ariz. Const. Art. II, §24. The United States Supreme Court has also upheld that mandate. Strickland v. Washington, 466 U.S. 668 (1984). The Fourteenth Amendment to the United States Constitution prohibits any state from taking action which would "deny to any person within its jurisdiction the equal protection of the laws." In other words, the equal protection clause requires that people in similar situations be treated alike. As of January 1, 1998, Arizona will require the appointment of two attorneys in all capital trial proceedings. Ariz.R.Crim.P. 6.2 (amended June 25, 1997). Petitioner was denied access to second counsel in his triple death penalty case while others similarly situated at the time were allowed discretionary appointment of

1 second counsel and those similarly situated as of 1998 will be allowed mandatory
2 appointment of second counsel.

3 Capital cases by their very nature are complex and the potential punishment is
4 irrevocable and severe. If the State does not appoint second counsel in such cases, a
5 trial with one attorney can be characterized as a "meaningless ritual." Douglas v.
6 California, 372 U.S. 353 (1963). If Petitioner had the resources, he certainly would
7 have retained second counsel for himself, however, he could not. He had to rely on the
8 State's appointment. It has been held that (in a criminal trial), the ability to pay costs in
9 advance bears no relationship to a defendant's guilt or innocence." Furthermore, that
10 "there can be no equal justice where the kind of trial a man gets depends on the amount
11 of money he has." Griffin v. Illinois, 351 U.S. 12 (1956).

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14 The "right to the assistance of counsel," as held in Herring v. New York, 422
15 U.S. 853 (1975), "has been understood to mean that there can be no restrictions upon the
16 function of counsel in defending a criminal prosecution in accord with the traditions of
17 the adversary fact-finding process (which in capital cases have included two attorneys)."

18
19 Further, the federal system has adopted the requirement that in federal capital
20 cases, the defendant is entitled to the appointment of two defense counsel. United
21 States v. McCullah, 76 F.3d 1087 (10th Cir. 1996), under 18 U.S.C. §3005; see also 21
22 U.S.C. §848(q)(4)(B), (q)(6) and (q)(8). The ABA Standards for counsels in capital
23 cases also recommends the appointment of two attorneys in all stages of capital cases.
24 A.B.A. STD.

1 The Arizona Supreme Court in affirming the trial court's refusal to allow
2 petitioner second counsel in this case is in conflict with federal law and the Sixth and
3 Fourteenth Amendments to the United States Constitution.

4 When determining whether to reverse a conviction on the grounds of
5 ineffective assistance of counsel, the court applies a two-prong test. Defendant must
6 affirmatively show that (1) counsel's performance fell below an objective standard of
7 reasonableness, as defined by prevailing professional norms, and (2) the deficient
8 performance resulted in prejudice to the defense. Strickland v. Washington, 466 U.S.
9 688, 104 S.Ct. 2052 (1984); State v. Nash, 143 Ariz. 392, 397, 694 P.2d 222, 227
10 (1985); State v. Lee, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984). If an
11 effectiveness claim cannot prove prejudice, the court need not inquire into counsel's
12 performance. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. Prejudice is shown if
13 the defendant establishes with reasonable probability that the verdict might have been
14 affected by alleged error of counsel. See State v. Walton, 159 Ariz. 571, 572, 760
15 P.2d 1017, 1038 (1989), affd 110 S.Ct. 3047 (1990). Prejudice will be presumed
16 when counsel fails entirely to subject a defendant's case to meaningful adversarial
17 testing. United States v. Cronin, 466 U.S. 648, 659, 14 S.Ct. 2139, 2047 (1984).
18 However, when counsel's actions (or inactions) fall short of this complete deprivation,
19 defendant must show that the guilty verdict was undermined by counsel's omissions or
20 misconduct. Cronin, 466 U.S. at 659, n.26, 104 S.Ct. at 2147, n.26.

21 To determine whether defendant presented a claim of Actual effectiveness, the
22 court considers whether counsel's conduct also undermines the proper functioning of
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1 the adversarial process that the trial cannot be relied on as having produced a just
2 result. Strickland, 466 U.S. at 686. In any case, when presenting an ineffectiveness
3 claim, the performance inquiry must be whether counsel's assistance was reasonable
4 considering all the circumstances.

5 In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
6 (1984), the United States Supreme Court established a two-prong test to evaluate
7 ineffective assistance claims. To obtain reversal of a conviction, the defendant must
8 prove: (1) that counsel's performance fell below an objective standard of
9 reasonableness; and (2) that counsel's deficient performance prejudiced the defendant
10 resulting in an unreliable outcome of the proceeding. Id. at 687-88, 104 S.Ct. at
11 2064. In deciding whether counsel's performance was ineffective in a death penalty
12 case, a court must consider the totality of the circumstances. Id. at 695, 104 S.Ct. at
13 2069.

14
15 The Ninth Circuit Court of Appeals has further defined the Strickland test
16 holding that a petitioner is not required to show by a preponderance of the evidence
17 that the results of his case would have been different but for counsel's ineffectiveness,
18 but only a showing sufficient to undermine confidence in the outcome. Brown v.
19 Myers, 137 F.3d 1154, 1157 (9th Cir. 1998).

20
21 Under the performance prong of Strickland, there is a strong presumption that
22 counsel's conduct falls within the wide range of reasonable professional assistance.
23 Id. at 689, 104 S.Ct. at 2052. Thus, [j]udicial scrutiny of counsel's performance must
24 be highly deferential. Id. The test is not whether another attorney with the benefit of
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1 hindsight would have acted differently, but whether counsel's errors in the case were
2 such that he or she was not functioning as counsel to the defendant. *Id.* at 687, 698,
3 104 S.Ct. 2052. In determining the choice of strategy, an attorney must complete a
4 thorough investigation of the law and facts of the case so he may make informed
5 decisions. *Id.* at 690-91, 104 S.Ct. at 2065-66; *Caro v. Calderon*, 1999 WL 6573 3
6 (9th Cir. 1999); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994).

7
8 In interpreting the prejudice prong, the Supreme Court has identified a narrow
9 category of cases in which prejudice is presumed. *Strickland*, 466 U.S. at 692. The
10 presumption applies when there has been an [a]ctual or constructive denial of the
11 assistance of counsel altogether, or when there are various kinds of state interference
12 with counsel's assistance, *Id.* at 692. Prejudice is demonstrated when a reasonable
13 probability exists that, but for counsel's errors, the finder of fact would have
14 reasonable doubt of defendant's guilt. A counsel's performance is deficient if, when
15 all the circumstances are taken into consideration, it falls below an objective standard
16 of reasonableness measured under prevailing professional norms. *Jones v. Wood*, 114
17 F.3d 1002, 1010 (9th Cir. 1997) (citing *Harris v. Wood*, 64 F.3d 1432, 1435 (9th
18 Cir. 1995)). The defendant submits that material issues of law or fact exists which
19 would entitle him to relief under Rule 32. Defendant has set forth colorful claims
20 which might have changed the outcome of the defendant's case. *State vs. Schrock*,
21 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986); *State v. Ambrosio*, 156 Ariz. 71, 73,
22 750 P.2d 14, 16 (App. 1988).
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1 Claim I: The Petitioner was denied effective assistance of counsel
2 as a result of trial counsel's failure to establish with specificity why the
3 trial court's failure to sever the Reynolds and Lacey counts would
4 prevent him from testifying about the Reynolds counts while remaining
5 silent regarding the Lacey counts.

6 Prior to the trial of the Lacey and Reynolds counts, trial counsel moved to sever
7 said counts and argued several reasons for doing so. Additionally, trial counsel argued
8 that the court's failure to sever the counts would prevent the Petitioner from testifying
9 about the Reynolds counts while remaining silent regarding the Lacey counts. At the
10 hearing regarding the severance motion, trial counsel submitted an affidavit of
11 Petitioner's wherein Petitioner set forth what he wanted to testify to regarding the
12 Reynolds counts. However, in said affidavit the Petitioner did not provide or give
13 reasons for not testifying regarding the Lacey counts. Petitioner submits that trial
14 counsel's failure to provide the specificity of the facts and set forth strong arguments as
15 to why the Petitioner would not testify regarding the Lacey counts was ineffective.

18 Claim II: Petitioner was denied effective assistance of
19 counsel as a result of counsel's failure to request a more
20 specific jury instruction on the limited admissibility of the
21 evidence as it pertains to one charge versus another.
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1 When evidence is inadmissible for one purpose but not for another is admitted, upon
2 request, the court shall instruct the jury to restrict the evidence to its proper scope. Arizona
3 Rules of Evidence 105. In the case at bar, trial counsel did not request a more specific jury
4 instruction and the limited admissibility as necessary to preserve the alleged error for appeal.

5 Claim III: Petitioner was denied effective assistance of counsel as a
6 result of counsel's failure to provide to the trial court specific
7 examples of prejudice resulting from the trial court's failure to
8 appoint a second attorney.
9

10 Trial counsel requested the appointment of second attorney to assist him in the
11 petitioner's matters due to "numerous serious charges."

12 The Arizona Supreme Court in its opinion regarding the issue of appointment of second
13 counsel, indicated that the Arizona Supreme Court had adopted a rule requiring the
14 appointment of two attorneys in capital cases which became effective January 1, 1998. The
15 trial pertaining to the Petitioner's matters were in 1994. Unfortunately, said rule was not in
16 effect at the time that trial counsel urged the court to appoint second counsel to assist him.
17 However, trial counsel failed to provide the court with sufficient evidence to warrant the
18 appointment of second counsel when such evidence existed. More specifically, the discovery
19 involved in three separate homicides was voluminous and there were a number of witnesses.
20 Trial counsel would have established prejudice and he failed to do so.
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23 Claim IV: The Petitioner was denied effective assistance of counsel
24 as a result of counsel's failure to object to the Lacey and Reynolds
25 jury panel based on media exposure to the facts of Petitioner's
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1 case. Trial counsel filed a motion before the trial court arguing
2 that the Petitioner's pretrial and trial proceedings should be closed
3 to the media and that Petitioner would be denied his right to fair
4 trial because of media publicity. The Petitioner submits that there
5 were examples of pretrial publicity that existed that could have
6 been provided to the court, however, were not provided to the
7 court by trial counsel. Further, Petitioner submits that had
8 counsel taken the time to voir dire prospective jurors in his cause,
9 he would have been able to discern preconceived notions of guilt
10 and ultimately be able to show prejudice.

11
12 Claim V: Petitioner was denied effective assistance of counsel as a
13 result of counsel's failure to establish a nexus between his
14 deprived childhood and his crimes.
15

16 In mitigation, trial counsel presented evidence regarding the Petitioner's deprived
17 childhood. However, trial counsel failed to establish a nexus between the Petitioner's deprived
18 childhood and the crimes committed by Petitioner. Petitioner submits that trial counsel's failure
19 to establish such a nexus prevented the trial court from effectively considering deprived
20 childhood as a mitigating factor.
21

22 IX. Death Penalty

23 Claim I: Arizona's Death Penalty is per se unconstitutional under
24 the U.S. and Arizona Constitutions.

25 The fundamental Eighth Amendment principle established in Furman v. Georgia, 408
26

1 U.S. 238 (1972), and expressed in the resulting body of law is that state death sentencing
2 procedures must provide a meaningful basis for distinguishing the few cases in which [the
3 death penalty] is imposed from the many cases in which it is not. *Id.*, 408 U.S. at 313 (1972)
4 (White, J., concurring). Recent United States Supreme Court cases reiterate that there is a
5 required threshold below which the death penalty cannot be imposed. In this context, the
6 State must establish rational criteria that narrow the decision maker's judgment as to whether
7 the circumstances of a particular case meet the threshold. *Blystone v. Pennsylvania*, 494
8 U.S. 299 (1990) (quoting *McCleskey v. Kemo*, 481 U.S. 279 (1987)).

10 In Arizona and most other states, these criteria are established by statutory
11 aggravating circumstances. Aggravating circumstances must genuinely narrow the class of
12 persons eligible for the death penalty and must reasonable justify the imposition of a more
13 severe sentence on the defendant compared to others found guilty of murder. *Zant v.*
14 *Stephens*, 462 U.S. 862, 877 (1983) (footnote omitted); *Arabe v. Creech*, 113 S.Ct. 1534,
15 1542 (1993); *Stringer v. Black*, 112 S.Ct. 1130, 1138 (1992).

17 A properly applied narrowing device therefore provides not only a principled way to
18 distinguish the capital homicide from the many noncapital homicides, but also differentiate[s]
19 this [death penalty] case in an objective, evenhanded, and substantively rational way from the
20 many . . . murder cases in which the death penalty may not be imposed. *Zant v. Stephens*,
21 462 U.S. at 879.

23 The Arizona death penalty scheme, taken as a whole, fails to genuinely narrow the
24 class of persons eligible for the death penalty. Arizona has one of the broadest first degree
25 murder statutes in the nation, given the broad definition of premeditation and the multitude of
26

1 potential underlying crimes for felony murder in which the prosecution is not required to
2 prove the elements of malice, deliberation, premeditation or that defendant intended to kill
3 the victim. Ariz. Rev. Stat. Ann. 13-1105. Thus, unlike the first degree murder statute at
4 issue in Lowenfield v. Phelos, 484 U.S. 231 (1988), Arizona's first degree murder statute
5 does not perform any narrowing function at the guilt-innocence phase.
6

7 Arizona's aggravating circumstances are also exceptionally broad. Any murder that
8 has no apparent motive, State v. Wallace, 151 Ariz. 363, 368, 728 P.2d 232, 237 (1986), or
9 that is motivated by a desire to eliminate a witness, State v. Smith, 141 Ariz. 510, 511-12,
10 687 P.2d 1265, 1266-67 (1984) or that is motivated by hatred or revenge (and is therefore
11 relished is a death penalty crime. Any murder in which the killer uses excessive force, State
12 v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983), or in which he uses
13 insufficient force, State v. Chaney, 141 Ariz. 295, 312, 686 P.2d 1265, 1282 (1984) is a
14 death penalty crime. Any murder in which the victim experiences fear or uncertainty as to
15 his fate, or in which he is conscious and able to feel pain during the killing, is cruel and
16 therefore a death penalty crime. State v. Correll, 148 Ariz. 468, 480-81, 715 P.2d 721, 733
17 (1986).
18

19
20 The Chief Justice of the Arizona Supreme Court recently described the
21 unconstitutionally broad net cast by Arizona's death penalty statute:

22 If there is some real science to separating especially heinous, cruel, or depraved killers
23 from ordinary heinous, cruel, or depraved killers, it escapes me. It also has escaped the
24 court. Compare State v. Jiminez, 165 Ariz. 444, 454, 455, 799 P.2d 785, 794-796 (1990)
25 (although heinous and depraved, the court held that the evidence was insufficient to find that a
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1 murder was especially cruel where the defendant strangled his five-year-old victim and left her
2 under a bed but returned after hearing her cry to strangle her again), with State v. Petitioner,
3 158 Ariz. 232, 237, 242, 762 P.2d 519, 524, 529 (1988) (court held that murder was
4 especially cruel where defendant asphyxiated his thirteen-year-old victim by clamping his hand
5 over her mouth, causing her to vomit), cert. denied, 491 U.S. 910, 109 S.Ct. 3200 (1989);
6 compare also, State v. Chaney, 141 Ariz. 295, 312-13, 686 P.2d, 1282-1283 (1984) (court
7 held that murder was especially heinous, cruel and depraved where the defendant shot his
8 victim with an automatic weapon), and State v. Johnson, 147 Ariz. 395, 397, 400-01, 710
9 P.2d 1050, 1052, 1055-56 (1985) (court held that senseless murder was not especially
10 heinous, cruel, or depraved where the defendant killed his victim with a shot gun blast while
11 the victim lay sleeping).
12

13
14 One becomes death eligible if, hand trembling because of fear, mental illness, or drug
15 use, one fails to aim accurately or kill with the first blow and the victim fortuitously suffers
16 and dies slowly. See Chaney, 141 Ariz. at 312, 686 P.2d at 1282 (affirming death penalty in
17 case where defendant's gunfire did not kill the victim instantaneously, but, instead, the victim
18 suffered for thirty minutes before losing consciousness and dying). The assassin who
19 senselessly shoots with steady hand and kills in cold blood or uses a weapon with ruthless
20 efficiency and dispatch and causes immediate death does not kill cruelly and may not be death
21 eligible. See Johnson, 147 Ariz. at 397, 400-01, 710 P.2d at 1052, 1055-56 (cruelty not
22 even considered where the defendant shot his sleeping victim, who rapidly bled to death). If
23 this, too, is real science, its logic escapes me. State v. Salazar, 844 P.2d 566, 587-88
24 (1992).
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Additionally, any homicide committed during a robbery is a death penalty crime. See Ariz. Rev. Stat. Ann. 13-703(F)(5). In short, the State could establish an aggravating circumstance in almost every case. Under this scheme, the Arizona death penalty net has been cast so wide that it no longer complies with the Eighth Amendment and should be declared unconstitutional.

Claim II: Arizona's Death Penalty is cruel and unusual punishment.

For the death penalty to be imposed consistent with the Eighth and Fourteenth Amendments, it must have a rational basis. Otherwise, the death penalty would constitute the senseless and discriminatory deprivation of life such that it would offend fundamental notions of due process and would be cruel and unusual punishment. We have, in America, reached the stage where there is no rational basis for the death penalty. It has been 17 years since the United States Supreme Court decided Gregg v. Georgia, 428 U.S. 153 (1976). Since that time, there have been approximately 333,500 non-negligent homicides in the United States. U.S. Department of Justice Uniform Crime Reports, 1, 58 (U.S. Department of Justice, Washington D.C. 1992). Currently, there are 2,729 persons on death row in the United States. Death Row USA (NAACP Legal Defense Fund, Spring 1993). The percentage of persons given the death penalty in relation to the number of non-negligent homicides since 1976 is .0082, or less than one percent (1%).

Since July 1, 1976, when Gregg v. Georgia was decided, approximately 200 persons have been executed in this country. The percentage of persons executed in relation to the total number of non-negligent homicides is .000597, or less than one-tenth of one percent.

1 Gregg v. Georgia reaffirmed the principle that the Eighth Amendment must draw its
2 meaning from the evolving standards of decency that mark the progress of a maturing
3 society. 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 100-101 (1958)).

4 The Court in Gregg further noted that retribution and deterrence were justifiable goals of,
5 and, therefore, justification for, capital punishment. 428 U.S. at 183-84.

6 The death penalty has no deterrent effect. Since 1990, the rate of murders and non-
7 negligent homicides has increased in this country by 5.4%, since 1987 it has increased by
8 22.9%, and since 1982 it has increased by 17.6%. The imposition of the death penalty has
9 not deterred violent crime, a fact of which this court can and should take judicial notice. See
10 Rule 201, Federal Rules of Evidence. The death penalty has no rational basis.

11 Given the above figures, it is apparent that the death sentence as actually imposed in
12 the United States serves no purpose of deterrence or retribution and, therefore, constitutes the
13 purposeless and excessive infliction of pain and suffering unjustified by any valid state
14 interest. Thus, defendant's death sentence violates his rights under the Eighth and Fourteenth
15 Amendments.

16
17 Claim III: Arizona's Death Penalty Scheme does not provide for
18 sufficient reliability and is imposed arbitrarily and
19 capriciously.
20
21

22 In 1974, Furman v. Georgia, 408 U.S. 238 (1972), struck down all existing death
23 penalty statutes because the court concluded that the death penalty was being imposed in an
24 arbitrary and irrational manner. The death penalty continues to be imposed in an arbitrary
25 and irrational fashion by Arizona courts. Defendant's death sentences were imposed
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1 arbitrarily when compared with other cases involving either a sentence of death or a sentence
2 of life imprisonment. There is still no rational, constitutionally permissible basis for
3 distinguishing defendant's case, or the few cases in which the death penalty has been imposed
4 in Arizona and in the United States from the many cases in which it has not been imposed.

5 The pattern of imposition of the death penalty in Arizona and in the United States
6 shows that prosecutors, juries, and courts have made the decisions to seek or to impose the
7 death penalty on the basis of factors, other than the strength and seriousness of the case that
8 are wholly irrelevant to a constitutional purpose of criminal punishment. The decision to
9 seek and impose defendant's death sentence was influenced by such considerations.

10 The arbitrary application of the death penalty in defendant's case amounts to cruel and
11 unusual punishment in violation of the Eighth amendment and violates defendant's right to
12 due process under the Fourteenth Amendment.

13 Claim IV: Arizona's Death Penalty Scheme discriminates.

14 The Arizona death penalty is applied in a manner that discriminates against poor
15 defendants, young defendants, and male defendants. Arizona's death row is populated by
16 indigent males. Only one woman has been sentenced to death under the present sentencing
17 law, although approximately ten percent of potentially capital homicides in the State of
18 Arizona are committed by women. There is nothing regarding the nature of the crime, or the
19 aggravating and mitigating circumstances that can explain this pattern other than
20 discrimination on the basis of class and sex. If defendant were a woman, given the same
21 circumstances of this crime and having been exposed to the same conditions that defendant
22 suffered, a guilty plea would have been accepted in exchange for consecutive life sentences.

1 The discriminatory application of the Arizona death penalty violates defendant's rights
2 under the Eighth and Fourteenth Amendments.

3 The petition further submits that the death penalty scheme in Arizona is
4 unconstitutional as it discriminates against particular groups and has been applied in a
5 discriminatory fashion in Arizona.
6

7 Claim V: Arizona's Death Penalty Scheme is not sufficiently
8 narrowing or channeling.

9 Arizona's death penalty scheme is unconstitutional for failing to sufficiently channel
10 the Court's discretion. The scheme is unconstitutional on the basis that the aggravating
11 factors fail to genuinely narrow the class of the defendant eligible for the death penalty and
12 the aggravating factors are too broad to be meaningful.
13

14 Claim VI: Arizona's Death Penalty Scheme does not provide for
15 discretion or mercy.

16 Defendant's submits that the death penalty scheme in Arizona is unconstitutional as it
17 gives the State unlimited discretion in seeking the death penalty. Petitioner further submits
18 that opportunities for mercy in prosecutorial discretion, plea bargaining, jury discretion and
19 conviction of lesser included offenses, computation, or clemency, render the scheme
20 unconstitutional.
21

22 Claim VII: Arizona's Death Penalty Scheme is unconstitutional
23 because the trial judge, rather than a jury, determines
24 sentencing.
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1
2 Under Arizona's capital sentencing scheme, the trial judge alone makes the
3 determination whether sufficient aggravating factors exist to warrant sentencing the defendant
4 to death after he is found guilty of first-degree murder by a jury. A.R.S. Section 13-703(B).¹
5 In this case, defendant was sentenced to death by a judge without the benefit of a jury deciding
6 whether he was guilty, beyond a reasonable doubt, of certain aggravating factors. Instead,
7 under a statute at odds with other state death penalty schemes, and now suspect under Jones v.
8 United States, the trial judge alone made further factual findings as to additional elements--
9 statutory aggravating factors--which were used to determine whether the defendant could be
10 sentenced to death.
11

12 The right to a jury trial in criminal proceedings is guaranteed by the United States
13 Constitution, in Article III¹ and reinforced in the Sixth Amendment.² As early as the time of
14 the American Revolution, the general principle was well established in English law that "juries
15 must answer to questions of fact and judges to questions of law. This is the fundamental
16 maxim acknowledged by the Constitution." Scott, TRIAL BY JURY AND THE REFORM OF
17 CIVIL PROCEDURE, 31 HARV. L. REV. 669, 677 (19180).
18

19 The Supreme Court incorporated this right into the Fourteenth Amendment, making it
20 applicable in all state criminal trials. Duncan v. Louisiana, 391 U.S. 145 (1968). In so doing,
21

22
23 ¹ United States Constitution, article III, Section 2 provides in part: "The trial of all crimes, except
24 in cases of impeachment, shall be by jury. . . ."

25 ² In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an
26 impartial jury. . . ." U.S. CONST. AMEND. VI.
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1 the Court expressed, a "reluctance to entrust plenary powers of the life and liberty of the
2 citizen to one judge or to a group of judges." Id. At 156.

3 The indictment of the defendant's case did not allege the Enmund/Tison elements or any
4 aggravating factors. And the jury was never instructed to make factual findings on those issues.
5 Likewise the jury did not find beyond a reasonable doubt the element of Enmund/Tison or any
6 aggravating circumstances spelled out in A.R.S. Section 13-703(F).

7
8 Even if Arizona did not intend that the aggravating circumstances outlined in A.R.S.
9 Section 13-703(F) be elements of a first degree murder charge carrying a death sentence, both
10 State and Federal Constitutions require that the aggravating factors be deemed elements in
11 order for the defendant to be sentenced to death--the maximum penalty set forth in A.R.S.
12 Section 13-703(A). The Fifth Amendment requires that the accused be provided notice of the
13 aggravating factors, as elements, in the indictment. Hamling v. United States, 418 U.S. 87, 117
14 (1974); Smith v. United States, 360 U.S. 1, 9 (1959). Also, the state must prove each element
15 beyond a reasonable doubt to a jury. United States v. Gaudin, 515 U.S. 506, 509-12 (1995);
16 Duncan v. State of Louisiana, 391 U.S. 145, 149 (1968) (trial by jury); In re Winship, 397 U.S.
17 358, 364 (1970) (proof beyond a reasonable doubt).

18
19 In addition, the Supreme Court has established that, where a fact of an offense
20 significantly increase the authorized penalty beyond the statutory maximum, due process
21 requires that the fact be proved beyond a reasonable doubt at a trial by jury. (See, e.g.,
22 Mullaney v. Wilbur, 421 U.S. 684, 697-700 (1975); McMillan v. Pennsylvania, 477 U.S. 79,
23 84-91 (1986); Almendarez-Torres v. United States, 523 U.S. 224, ___, 118 S.Ct. 1219, 1223
24 (1998); Jones v. United States, 119 S.Ct. 1215; United States v. Rodriguez-Moreno, ___ U.S.
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1 ___, ___, 119 S.Ct. 1239, 1243 (1999).

2 The Supreme Court has never permitted a judge to determine the existence of a fact of
3 the offense that makes an offense a capital offense. A defendant has a right to have that fact
4 pleaded and proved beyond a reasonable doubt at a jury trial. That did not happen here, and it
5 does not happen under the Arizona death penalty sentencing scheme. Under the Constitution,
6 the defendant has the right to have the state present these facts and prove them, beyond a
7 reasonable doubt, to a jury.
8

9 **Mullaney**

10 In Mullaney, the Supreme Court addressed a Maine statute defining a single crime of
11 homicide, which was divided into two punishment categories: murder carrying a maximum
12 sentence of life imprisonment and manslaughter punishable by not more than 20 years
13 imprisonment. *Id.*, 421 U.S. at 691-692. Where the prosecution established an intentional and
14 unlawful homicide at trial, Maine law required the jury to conclusively presume the existence
15 of malice aforethought as an element of murder, unless the defendant proved ?that he acted in
16 the heat of passion on sudden provocation,? which would reduce the crime to manslaughter.
17 *Id.*, 421 U.S. at 686.
18

19 The Supreme Court in Mullaney held that the Maine homicide scheme violated due
20 process by relieving the prosecution of the burden of proving beyond a reasonable doubt the
21 absence of heat of passion so as to subject the defendant to the grater maximum penalty
22 authorized for murder. In reaching its decision, the Court accepted the interpretation of the
23 Maine Supreme Court that murder and manslaughter are punishment categories of the single
24 crime of homicide, rather than separate offenses. *Id.* 421 U.S. at 689-90. Even though the
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1 absence of heat of passion was not a "' fact necessary to constitute the crime' of felonious
2 homicide in Maine", *Id.*, 421 U.S. at 697 (emphasis in original), the Court concluded that due
3 process does not permit a state to relieve the prosecution of proving a fact of the offense beyond
4 a reasonable doubt where doing so would expose the defendant to a significantly greater
5 maximum term of imprisonment:

6 . . . the criminal law of Maine, like that of other jurisdictions, is concerned not
7 only with guilt or innocence in the abstract but also with the degree of criminal
8 culpability. Maine has chosen to distinguish those who kill in the heat of
9 passion from those who kill in the absence of this factor. Because the former are
10 less 'blameworthy], . . . they are subject to substantially less severe penalties.
11 By drawing this distinction, while refusing to require the prosecution to establish
beyond a reasonable doubt the fact upon which it turns, Maine denigrates the
interest found critical in *Winship*.

12 The safeguards of due process are not rendered unavailing simply because a
13 determination may already have been reached that would stigmatize the
14 defendant and that might lead to a significant impairment of personal liberty.
15 The fact remains that the consequences resulting from a verdict of murder, as
16 compared with a verdict of manslaughter, differ significantly. Indeed, when
17 viewed in terms of the potential difference in restrictions of personal liberty
attendant to each conviction, the distinction established by Maine between
murder and manslaughter may be of greater impotence than the difference
between guilt or innocence for many lesser crimes.

18 *Id.*, 421 U.S. at 698. The Court emphasized that, if *Winship*'s rule that the prosecution must
19 prove beyond a reasonable doubt each element of a crime "were limited to those facts that
20 constitute a crime as defined by state law, a state could undermine may of the interest that
21 decision sought to protect" simply by redefin[ing] the elements that constitute different crimes,
22 characterizing them as factors that bear solely on the extent of punishment." *Mullaney*, 421
23 U.S. at 698.²

1
2 **McMillan**

3 In McMillan v. Pennsylvania, 477 U.S. 79 (1986), the petitioners challenged the
4 constitutionality of a Pennsylvania statutes under the Fourteenth Amendment's Due Process
5 clause and the Sixth Amendment's jury trial guarantee. The Pennsylvania statute "provide[d]
6 that anyone convicted of certain enumerated felonies is subject to a mandatory minimum
7 sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the
8 evidence, that the person "' visibly possessed a firearm' during the commissions of the
9 offense." *Id.*, at 81 (emphasis added). The Court reaffirmed that, as the Court recognized in
10 Patterson v. New York, 432 U.S. 197 (1977), "there are constitutional limits to the State's
11 power" in defining crimes; "in certain limited circumstances Winship's reasonable-doubt
12 requirement applies to facts not formally identified as elements of the offense charged."
13
14 McMillan, 477 U.S. at 86.

15
16 In rejecting the argument that the Pennsylvania statute improperly relieved the
17 prosecution of its burden of proving all elements necessary to establish guilt as the Maine
18 statute did in Mullaney, the Court in McMillan stressed that the statute "neither alters the
19 maximum penalty for the crime committed nor creates a separate offense calling for a separate
20 penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within
21 the range already available to it without the special finding of visible possession of a firearm."
22 *Id.*, at 87-88. The Court relied on this same ground in distinguishing Specht v. Patterson, 386
23 U.S. 605 (1967), where the Court had overturned a Colorado law that permitted a sex-offender
24 sentence of not more than 10 years to be increased upon certain post-sentencing judicial
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1 findings to an indefinite term of up to life imprisonment. McMillan, 477 U.S. at 88.

2 **Almendarez-Torres**

3 Last term, in Almendarez-Torres, 523 U.S. 244, ___, 118 S.Ct. 1219, 1223 (1998), the
4 Supreme Court considered a challenge to 8 U.S.C. Section 1326, which makes it illegal for a
5 deported alien to re-enter the United States without the permission of the Attorney General.
6 Section 1326 carried a maximum penalty of 2 years imprisonment, except that the maximum
7 increases to 10 years under subsection (b)(1) if the defendant was convicted of a felony before
8 deportation, and to 20 years under subsection (b)(2) if the conviction was for an "aggravated
9 felony." The defendant argued that the existence of a prior aggravated felony conviction under
10 Section 1326(b)(2) is an element of an aggravated offense, not simply a sentencing factor.
11 Because his prior conviction was not alleged in the indictment, as is required for all elements of
12 an offense, the defendant contended that he was unlawfully sentenced in excess of the two-year
13 maximum term of imprisonment.
14

15
16 After rejecting the argument that Congress intended that a defendant's prior aggravated
17 felony conviction be included as an element of an aggravated offense under 8 U.S.C. Section
18 1326(b)(2), the Court addressed whether the Constitution nonetheless required that a
19 defendant's conviction must be treated as an element in order to subject the defendant to the 20-
20 year statutory maximum set forth in Section 1326(b)(2), rather than the two-year maximum set
21 forth in Section 1326(a). The Court held that the statute was not unconstitutional for treating
22 recidivism as a sentencing factor, rather than as an element of the offense. Almendarez, 118
23 S.Ct. at 1223.
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1 In doing so, the Almendarez-Torres decision relied on the nature of the underlying
2 factor at issue—recidivism--as the critical reason why a defendant's prior conviction does not
3 need to be treated as an element of a Section 1326(b)(2) offense to pass constitutional muster.
4 The majority repeatedly stressed that the Constitution does not require that a defendant's prior
5 conviction be deemed an element of a Section 1326(b)(2) offense because recidivism is
6 uniquely a sentencing factor that relates only to punishment, rather than to the circumstances of
7 the offense.
8

9 Recidivism is distinguishable from the facts of an offense because the existence of prior
10 convictions, unlike facts relating to an offense, are easily verifiable matters that do not require
11 additional findings of fact by a jury. Moreover, the Court in Almendarez-Torres correctly noted
12 that, due to the nature of recidivism, defendants may be significantly prejudiced if a prior
13 conviction was considered to be an element of an offense so that a jury would learn that the
14 defendant had been convicted of a prior felony. : Id., 118 S.Ct. at 1226. This same risk of
15 prejudice is not present when a jury is presented with evidence of a fact relating to the charged
16 offense.
17

18 The majority in Almendarez-Torres downplayed the importance that McMillan placed
19 on the fact that the Pennsylvania statute did not increase the maximum penalty as the reason
20 why a fact of the offense did not need to be treated as an element for the statute to pass
21 constitutional scrutiny. The Court in Almendarez-Torres indicated, however, that McMillan's
22 language was not determinative "in light of the particular sentencing factor at issue in this
23 case--recidivism." Almendarez-Torres, 118 S.Ct. at 1231. The Court similarly distinguished
24 Mullaney and Patterson on the ground that the immigration statute at issue "involves a
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1 sentencing factor--the prior commission of an aggravated felony--that is neither 'presumed' to
2 be present, nor need to 'proved' to be present, in order to prove the commission of the relevant
3 crime." *Id.*, 118 S.Ct. at 1229 (emphasis added). Almendarez-Torres thus made clear that its
4 decision rested on the unique nature of recidivism as a sentencing factor unrelated to the
5 commission of the offense, rather than on the cutting back on the principle that a fact of an
6 offense that significantly increased the maximum penalty must be deemed an element of an
7 offense under the Constitution. See also WELSH S. WHITE, FACT-FINDING AND THE
8 DEATH PENALTY: THE SCOPE OF A CAPITAL DEFENDANT'S RIGHT TO JURY
9 TRIAL, 65 NOTRE DAME LAW REVIEW 1, 25-27 (1989) (consistent with Supreme Court
10 authority, a fact should be deemed an element of an offense if the fact relates to the
11 circumstance of a crime rather than the character of the offender and the fact leads to a
12 significantly enhanced sentence.)
13
14

15 Jones

16 In Jones v. United States, 526 U.S. ___, 119 S.Ct. 1215 (1999), the Supreme Court held
17 that provisions of the federal carjacking statute³ that established higher penalties when the
18 offense results in serious bodily injury or death were additional elements of the offense, and not
19 mere sentencing considerations. *Id.*, 119 S.Ct. at 1228. The Court, relying on principles
20 established by Coke and Blackstone, as well as the Sixth and Fourteenth Amendments and a
21 long line of precedents, clearly stated that a fact is an element of the offense--and not a
22 sentencing consideration--*when it defines an aggravated form of the crimes resulting in a*
23 *harsher penalty.* *Id.*, 119 S.Ct. at 1219-27. This finding found support through traditional
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27 ³ Title 18 U.S.C. Section 2119.
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1 treatment by Congress in defining other crimes as well as through the practice of state
2 legislatures. *Id.*, 119 S.Ct. at 1220-21.

3 Four Justices recognized the significant of *Jones* and its impact on *Walton*. *Jones*, 119
4 S.Ct. at 1228. They argued that a "careful reading of *Walton's* rationale" was necessary in
5 order for *Walton* to square with *Jones*. *Jones*, 119 S.Ct. at 1228. Because of the conflict
6 between *Jones* and *Walton*, a majority of the Supreme Court invited a reexamination of *Walton*.

7
8 Justice Stevens, in joining this Court's opinion in *Jones*, stated that *Walton* should be
9 overruled.

10 Like Justice Scalia, *see post*, at 1229, I am convinced that it is unconstitutional
11 for a legislature to remove from the jury the assessment of facts that increase the
12 prescribed range of penalties to which a criminal defendant is exposed. It is
13 equally clear that such facts must be established by proof beyond a reasonable
14 doubt. That is the essence of the Court's holding in *In re Winship*, 397 U.S. 358
15 (1970), *Mullaney v. Wilbur*, 421 U.S. 684, (1975), and *Patterson v. New York*,
16 432 U.S. 197 (1977). To permit anything less "with respect to a fact which the
17 State deems so important that it must either be proved or presumed is
18 impermissible under the Due Process Clause." This principle was firmly
19 embedded in our jurisprudence through centuries of common law decisions.
20 Indeed, in my view, a proper understanding of this principle encompasses facts
21 that increase the minimum as well as the maximum permissible sentence, and
22 also facts that must be established before a defendant may be put to death. If
23 *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and Part II of the Court's
24 opinion in *Walton v. Arizona*, . . . departed from that principle, as I think they
25 did, . . . they should be reconsidered in due course. It is not, however, necessary
26 to do so in order to join the Court's opinion today, which I do.

21 *Jones v. United States*, 119 S.Ct. 1228-29 (Stevens, J., concurring), (citations omitted).

22 Justice Scalia also concurred with the opinion of the Court. He believed that the
23 opinion resolved the ambiguities which existed in the statute in question in *Jones*. However,
24 Justice Scalia unequivocally stated "it is unconstitutional to remove from the jury the
25 assessment of facts that alter the . . . prescribed range of penalties to which a criminal defendant

1 is exposed." Jones v. United States, 119 S.Ct. at 1229 (Scalia, J., concurring). In other words,
2 according to Justice Scalias, the accused in a criminal proceeding has a right to have a jury
3 decide the facts, which under a sentencing scheme, would make him eligible for a more severe
4 sentence.

5 Four Justices agreed with Justices Stevens and Scalia that, under the rationale
6 enunciated in the Jones opinion, the statutory scheme previously approved in Walton is now
7 seriously in question. Jones v. United States, 119 S.Ct. at 1238 (Kennedy, J., The Chief Justice,
8 O'Connor and Breyer, JJ., join dissenting). The four Justices expounded as to why Jones is in
9 conflict with Walton.
10

11 A further disconcerting result of today's decision is the needless doubt the
12 Court's analysis casts upon our cases involving capital sentencing. For example,
13 while in Walton v. Arizona, . . . , we viewed the aggravating factors at issue as
14 sentencing enhancements and not as elements of the offense, the same is true of
15 serious bodily injury under the reading of Section 2119 the Court rejects as
16 constitutionally suspect. The question is why, given that characterization, the
17 statutory scheme in Walton was constitutionally permissible. Under the relevant
18 Arizona statute, Walton could not have been sentenced to death unless the trial
19 judge found at least one of the enumerated aggravating factors. See Ariz. Rev.
20 Stat. Ann. Section 13-703 (1989). Absent such a finding, the maximum
21 potential punishment provided by law was a term of imprisonment. *If it is*
22 *constitutionally impermissible to allow a judge's finding to increase the*
maximum punishment for carjacking by 10 years, it is not clear why a judge's
finding may increase the maximum punishment for murder from imprisonment to
death. In fact, Walton would appear to have been a better candidate for the
Court's new approach than in the instant case. In Walton, the question was the
aggravated character of the defendant's conduct, not, as here, a result that
followed after the criminal conduct had been completed.

23 Id. (emphasis supplied). In conclusion, the dissenting Justices invited review of Walton.

24 "The implication [of Jones] is clear. Reexamination of this area of our capitals jurisprudence
25 can be expected." Id.

1 What is clear from Jones, is that six Justices have stated that Walton should, at a
2 minimum, be revisited. This case presents the Court with the opportunity to reexamine Walton.

3 In Jones, the Court expressly stated, "our decision today does not announce any new
4 principle of constitutional law, but merely interprets a particular federal statute in light of a set
5 of constitutional concerns that have emerged through a series of our decisions over the past
6 quarter century." Id., 119 S.Ct. 1228, n. 11. In fact, Jones was based on the canon that the jury
7 decides the facts and judges decide the law. Id., 119 S.Ct. at 1226. This precept dates back to a
8 principle established as early as 1628 and has remained constants. Id., 119 S.Ct. at 1226, n.8.

9
10 The constitutional right to a jury trial embodies "a profound judgment about the
11 way in which law should be enforced and justice administered." Duncan v.
12 Louisiana, 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20 L.Ed.2d 491 (1968). If it
13 is a structural guarantee that "reflect[s] a fundamental decision about the
14 exercise of official power--a reluctance to entrust plenary powers over the life
and liberty of the citizen to one judge or to a group of judges." Id., at 156, 88
S.Ct., at 1451.

15 Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring opinion). See also Jones
16 v. United States, 119 S.Ct. at 1225-1226 ("The principle that the jury were the judges of the
17 fact and the judges the deciders of law was stated an established principle as early as 1628 by
18 Coke.") The right to a jury trial is an historic bedrock principle. It "implicat[es] the
19 fundamental fairness and accuracy of the criminal proceeding." Teague v. Lane, 489 U.S. at
20 311.

21
22 Defendant Lee was denied this "grand bulwark" of liberty, Jones v. United States, 119
23 S.Ct. at 1225, when the judge alone decided the distinct threshold issue of whether certain
24 aggravating factors made him eligible to be considered for the qualitatively more severe
25 sentence of death. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). That determination
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involved a function within the exclusive province of the jury.

The Supreme Court has never permitted a judge to determine the existence of the fact of the offense that makes it a capital offense, *i.e.*, the fact that makes the defendant eligible for the death penalty. Petitioner had a right to have that fact pleaded and proved beyond a reasonable doubt at a jury trial. Consequently, under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article II, Sections 4, 23 and 24, Petitioner's death sentence must be set aside.

Claim VIII: The Trial Court's Failure to Find Aggravating
Circumstances Beyond a Reasonable Doubt Violated
Petitioner's Statutory and Constitutional Rights.

Under Arizona law, aggravating circumstances must be found beyond a reasonable doubt. State v. Jordan, 126 Ariz. 283, 286, 614 P.2d 825, 828 (cert. den.), 449 U.S. 986 (1980). The trial court in the defendant's case found that defendant committed the crime for pecuniary gain, the defendant committed the crime in an especially heinous, cruel or depraved manner, and the defendant has been convicted of one or more other homicides as defined by 13-1101. But nowhere in the record does the trial court find that this aggravating circumstance was proven beyond a reasonable doubt, as it was required to do. See, Creech v. Arabe, 928 F.2d 1481 (9th Cir. 1991) (sentencing court failed to make necessary finding in capital case beyond a reasonable doubt). The Arizona Supreme Court in State v. Petitioner, 158 Ariz. 232, 246, 762 P.2d 519, 533 (1988), determined that the trial court is presumed to follow the law and is not required to make that finding on the record. That presumption did not prevent the Ninth Circuit from reversing a capital case where the trial judge failed to

1 specifically find aggravating circumstance beyond a reasonable doubt. Creech v. Arabe, 928
2 F.2d at 1490. After finding that there was evidence by which the trial court could have found
3 the aggravating circumstance beyond a reasonable doubt, the Ninth Circuit nevertheless
4 reversed the case and remanded for determination of such a finding.

5 Claim IX: Petitioner's rights to trial by jury was infringed because
6 the trial court sat as the trier of fact and made
7 Edmund/Tison findings.
8

9 The Arizona death penalty scheme provide for death eligibility based on factual
10 findings by the trial judge who sits as the trier of fact in deciding whether aggravating factors
11 have been shown beyond a reasonable doubt. Petitioner maintains that his right to a jury trial
12 should encompass the right to have the evidence of aggravating factors submitted to the trial
13 jury. Arizona's death penalty scheme is supported by Walton v. Arizona, 497 U.S. 639, 647
14 (1990). The United States Supreme Court, in Jones v. United States, 526 U.S. ___, 119 S.Ct.
15 1215 (1999), a majority of the Supreme Court invited a reexamination of Walton based the
16 ruling in Jones. Based on Jones submitting aggravating factor to the trial judge instead of the
17 jury violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution
18 and the parallel guarantees set forth in Article II, Section 4, 23 and 24 of the Arizona
19 Constitution.
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22 At issue in Jones was whether provisions of the federal carjacking statute that
23 established higher penalties when the offense resulted in serious bodily injury or death set
24 forth additional elements of an offense or mere sentencing considerations. The Supreme
25 Court held that the statutory provisions were elements of the offense.
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1 In reaching this decision, six Justices opined that the Supreme Court's decision in
2 Walton v. Arizona, *supra*--which upheld a statutory scheme that directed a judge rather than
3 a jury to make findings of fact as to aggravating circumstances in a capital case--is now
4 suspect. Arizona's death penalty scheme is subject to further scrutiny in light of Jones.

5 Claim X: Arizona's Death Penalty Scheme is unconstitutional for
6 failing to provide the Defendant with a right to voir dire
7 the sentencing judge.
8

9 The scheme is unconstitutional for failing to provide the petitioner with a right to voir
10 dire the sentencing judge as to whether the judge is for or against the death penalty. In other
11 words, petitioner should be entitled to death qualifying a judge in the same manner that state
12 death qualifies a jury.

13 Claim XI: The death penalty aggravator of pecuniary gain is too
14 vague.
15

16 This aggravation is unconstitutional for failing to distinguish between murder for hire
17 and a routine felony where death occurs.

18 Claim XII: Arizona's Death Penalty Scheme is unconstitutional for
19 failing to give proper guidance as to what constitutes
20 mitigation.
21

22 Arizona's death penalty scheme is unconstitutional because the judge is precluded
23 from considering all the mitigating evidence and because the judge has precluded from
24 weighing evidence that does not make the evidence standard and there are reservations about
25 the appropriateness of the death penalty. Additionally, Arizona death penalty scheme is
26

1 unconstitutional because it places on the defendant the burden of proof.

2 Claim XIII: Arizona's Death Penalty Scheme is unconstitutional for
3 failing to channel sentencing discretion by providing
4 standards for balancing aggravating and mitigating
5 factors.

6 The scheme is unconstitutional because no objective standards exist to assist the
7 sentencing court in weighing aggravating circumstances against mitigating circumstances.
8

9 Claim XIV: Arizona's Death Penalty Scheme is unconstitutional for
10 not requiring the Trial Court to make detailed factual
11 findings in its special verdict.

12 Arizona death penalty scheme is unconstitutional and is not requiring the trial court to
13 make a proportionally review.
14

15 Claim XV: Arizona's Death Penalty Scheme is unconstitutional as
16 not requiring a proportionally review.

17 Claim XVI: The method of execution in Arizona is cruel and unusual
18 punishment.

19 Claim XVII: Death qualifying a jury which does not decide the penalty
20 the Petitioner is to receive is a violation of petitioner's
21 Sixth Amendment right to a fair and impartial jury where
22 all potential jurors who indicate their opposition to the
23 death penalty are dismissed.
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1 The Sixth Amendment to the United States Constitution guarantees a trial by a fair and
2 impartial jury. U.S. Const. Amend. VI. The Fourteenth Amendment guarantees a right of jury
3 trial in all state criminal cases which were tried in federal court, would come within the Sixth
4 Amendment's guarantee of trial by jury. Duncan v. Louisiana, 391 U.S. 145 (1968).
5 Necessarily included in the right to an impartial jury is a guarantee of neutrality. Witherspoon
6 v. Illinois, 391 U.S. 520-521, and fn 18 (1968).

7 Here, the voir dire process was skewed to produce a jury uniquely likely to find
8 petitioner guilty in violation of his right to a fair and impartial jury and to due process where the
9 court, in death qualifying the venire, dismissed potential jurors simply because they indicated
10 an opposition to the death penalty. Arizona does not afford defendants the right to sentencing
11 by jury. Rather, the trial judge presides at the death penalty hearing and determines the
12 sentence. Petitioner was denied his constitutional rights to a fair and impartial jury, to a fair
13 trial, to due process and equal protection because the death qualification which took place in his
14 case resulted in the exclusion of jurors who were not properly excludable for cause.
15

16 The proper standard for determining death penalty bias in capital cases was pronounced
17 in Wainwright v. Witt, 469 U.S. 412 (1985):
18

19 "[T]he proper standard for determining when a prospective juror
20 may be excused for cause because of his or her views on capital
21 punishment . . . is whether the jurors views would 'prevent or
22 substantially impair the performance of his duties as a juror in
23 accordance with his instructions and his oath.'" Id. At 424
(quoting Adams v. Texas, 448, U.S. 38 (1980)).

24 Given that the prospective jurors would never be called upon to decide if petitioner
25 should be sentenced to death, the only relevant death qualification question was whether the
26 possibility of the death penalty in the event of a conviction for first degree murder would
27

1 substantially impair the juror's ability to fairly decide the petitioner's guilt or innocence. Here,
2 however, the death qualification in this case resulted in the improper exclusion of prospective
3 jurors who were otherwise qualified to serve and in fact resulted in a jury panel skewed toward
4 finding petitioner guilty. [Insert footnote: Jurov, New Data on the Effect of a "Death
5 Qualified" Jury on the Guilt Determination Process, 84 Harv.L.Rev. 567 (1971); see also, Eay
6 v. New York, 332 U.S. 261 (1947).]

8 The United States Supreme Court in Wainwright v. Witt, 469 U.S. 423, 425 (1985),
9 recognized that a searching inquiry is often necessary before jurors can be excluded on the basis
10 of moral, philosophical or practical reservations regarding a particular punishment.

11 The importance of seeking to rehabilitate prospective jurors who have indicated
12 opposition to the death penalty is exemplified in the United States Supreme Court decision,
13 Gray v. Mississippi, 481 U.S. 648, 662-663 (1987), in which a plurality of the Court noted as to
14 potential jurors who stated that they were opposed to the death penalty "... despite their initial
15 responses, the venire members might have clarified their positions upon further questioning and
16 revealed that their concerns about the death penalty were weaker than they originally stated ..."

18 Since the death-qualification process has the potential to exclude a significant
19 percentage of potential jurors who could otherwise be impartial during the determination of
20 guilt, death-qualification has an important impact on the trial and must be done, if it is, very
21 carefully. See Grishy v. Mabry, 569 F.2d 1273, 1283 (E.D. Ark. 1983), modified 758 F.2d 26
22 (8th Cir. 1985), rev'd sub. nom, Lockhart v. McCree, 476 U.S. 162 (1966). It is a grievous error
23 for the court to merely transplant death-qualification as conducted in jury sentencing states,
24 lock , stock, and barrel. In Arizona, if such is permitted at all, it must be "unmistakably clear"
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1 that punishment related attitudes would prevent prospective jurors from being fair and impartial
2 triers of a defendant's guilt or innocence before such jurors are removed. Witherspoon v.
3 Illinois, *supra*, at 522, n.21.

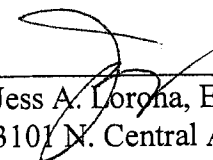
4 Here, the court did nothing to make sure the jurors automatically excluded because of
5 their anti-death penalty views would have been unable to be fair and impartial in determining
6 guilt. The court was allowed to dismiss a percentage of potential jurors who could have been
7 favorable to Petitioner, effectively narrowing the panel of jurors to those who were naturally
8 prone toward conviction and the death penalty. The court's actions prejudiced Petitioner by
9 failing to protect Petitioner's constitutional rights to a fair and impartial jury, a fair trial and due
10 process.
11

12 Conclusion

13
14 Petitioner would request that this Court relieve him from his unconstitutional sentence
15 of death and that he be granted a new trial and grant such other relief as the Court deem just
16 and proper.
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1 RESPECTFULLY SUBMITTED this 18th day of March, 2000.

2 WALKER RYAN, P.L.C.

3 By 

4 Jess A. Lirona, Esq.

5 3101 N. Central Ave., Suite 1500

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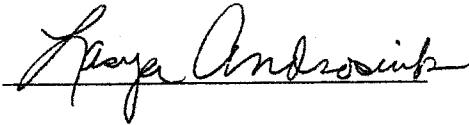
7 Attorneys for Petitioner

8 Copy of the foregoing hand-delivered
9 this 15th day of March, 2000, to:

10 Honorable Ronald S. Reinstein
11 201 West Jefferson
12 Phoenix, Arizona 85003

13 Copy of the foregoing mailed
14 this same date to:

15 J. D. Nielsen, Esq.
16 Assistant Attorney General
17 1275 West Washington
18 Phoenix, Arizona 85007-2997

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APPENDIX C

MICHAEL K.) S. CLERK
BY [Signature] SEP

FILED

2000 MAY -1 PM 6:47

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ATTORNEYS FOR PLAINTIFF

ARIZONA SUPERIOR COURT
COUNTY OF MARICOPA

STATE OF ARIZONA,

PLAINTIFF,

-VS-

CHAD ALAN LEE,

DEFENDANT.

CR-92-04225

RESPONSE TO PETITION FOR POST-CONVICTION
RELIEF

THE HON. RONALD S. REINSTEIN

Respondents hereby respond to Petitioner's Petition for Post-Conviction Relief, and for the reasons given in the accompanying Memorandum of Points and Authorities, respectfully request the Court to:

(1) summarily dismiss claims 1-7, and 9, as precluded from post-conviction relief pursuant to Rules 32.2a(2) and/or a(3) of the Arizona Rules of Criminal Procedure; (2) order Petitioner to amend his Petition within 30 days, in order to explain how his allegations in Claim 8 are colorable; (3) grant Respondents 10 days leave to respond to the amended petition; and (3) set a date for an informal conference, pursuant to Rule 32.7, in order to schedule a hearing date concerning Claim 8, as well as to discuss matters pertaining to the requested hearing.

240

1 DATED this 1st day of May, 2000.

2 Respectfully submitted,

3 JANET NAPOLITANO
4 ATTORNEY GENERAL

5 
6 J. D. NIELSEN
7 ASSISTANT ATTORNEY GENERAL

8 ATTORNEYS FOR PLAINTIFF
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MEMORANDUM OF POINTS AND AUTHORITIES

A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

In two separate trials, Petitioner was convicted of three counts of first-degree murder, two counts of armed robbery, kidnapping, sexual assault, and theft. The following facts, as found by the Arizona Supreme Court, supported the convictions:

On April 6, 1992, [Petitioner] and David Hunt called Pizza Hut from a pay phone and placed an order to be delivered to a vacant house. When Linda Reynolds arrived with the pizza order, [Petitioner] and Hunt confronted her with a rifle, forced her to remove her shorts and shirt, and abducted her. [Petitioner] drove his Pontiac LeMans into the desert with Reynolds, and Hunt drove Reynolds' car to meet them.

[Petitioner] removed the stereo from Reynolds' car and then destroyed the car by smashing the windows and various parts with a bat, puncturing the tires, and disabling the engine by cutting hoses and spark plug wires. Reynolds watched as one of the two, either [Petitioner] or Hunt, shot a bullet through the hood of her car. [Petitioner] testified he destroyed Reynolds' car so that she could not escape.

Reynolds was forced to remove her pantyhose, socks, and shoes and to walk barefoot with Hunt in the desert north of her car where he raped her. Hunt then walked Reynolds back toward her car, where [Petitioner] forced Reynolds to perform oral sex on him.

After finding Reynolds' bank card in her wallet, defendant drove her and Hunt to Reynolds' bank to withdraw money from an automated teller machine (ATM). [Petitioner] gave Reynolds his flannel shirt to wear, walked her to the ATM, and forced her to withdraw twenty dollars. [Petitioner] and Hunt then drove Reynolds back to the desert north of where they had destroyed her car. Reynolds momentarily escaped, but Hunt found her and forced her back to the car. When she returned, her face and lips were bloody.

[Petitioner] claimed that he and Hunt argued in front of Reynolds about whether to release her. Defendant testified that Hunt was opposed to releasing her because she would be able to identify them. [Petitioner] stated that as he was escorting Reynolds away from Hunt, [Petitioner] shot her in the head as she attempted to take the gun from him. Further, [Petitioner] testified that he ran back to the car, got a knife, went back to Reynolds, and stabbed her twice in the left side of her chest to stop her suffering. [Petitioner] returned to his car and drove away with Hunt.

....

Shortly after midnight on April 16, 1992, nine days after the Reynolds murder, [Petitioner] called for a cab from a pay telephone at a convenience store. David Lacey's cab was dispatched, and he picked up [Petitioner]. Hunt, who had waited near the convenience store, drove [Petitioner's] car to the location where he and defendant intended to rob Lacey. When Lacey stopped the cab and turned around to get paid, [Petitioner] pulled out his revolver and demanded money. [Petitioner] claimed that Lacey turned around and attempted to grab the gun. [Petitioner] then fired nine shots, four of which hit Lacey. [Petitioner] removed forty dollars from Lacey's pockets and dumped his body by the side of the road. With Hunt following, [Petitioner] drove the cab to a dirt road where he shot the cab's windows and tires and rifled through its contents. Petitioner's cigarette lighter and bloody fingerprint on a receipt were later found in the abandoned cab.

.....

Around 1:00 a.m. on April 27, 1992, [Petitioner] entered an AM-PM market to purchase some cigarettes. After the store clerk, Harold Drury, opened the cash drawer, [Petitioner] displayed his revolver and shot Drury in the shoulder, causing him to fall slightly backwards. [Petitioner] then shot Drury in the top of the head, the forehead, the cheek, and the neck. Drury slumped to the floor. [Petitioner] walked around the counter and shot Drury two more times in the right temple. One bullet went through Drury's head and broke the display case next to his body. Defendant picked up the cigarettes, took the entire cash drawer from the register, and left the store. Scott Hunt was in [Petitioner's] car waiting to leave the scene.

Hunt immediately drove [Petitioner] across the street where [Petitioner] removed the cylinder from his revolver and threw both parts into a dumpster. Hunt then drove for several miles, and defendant attempted to throw the cash drawer into a creek bed. The drawer, however, smashed into a concrete abutment on the overpass, prompting [Petitioner] and Hunt to go back, pick up the drawer, and throw it into the creek bed.

State v. Lee (I), 189 Ariz. 590, 595-96, 944 P.2d 1204, 1209-10 (1997); *State v. Lee (II)*, 189 Ariz. 608, 612, 944 P.2d 1222, 1226 (1997).¹

On May 13, 1992, the State charged Petitioner with 3 counts of first degree murder, 2 counts of sexual assault, one count of kidnapping, 3 counts of armed robbery, and one count of theft, in connection with the murders of Linda Reynolds, David Lacey, and Harold Drury.² (R.O.A. (*Lee I*) at 1.) The Court partially granted Petitioner's severance motion, ordering that the counts involving victims Reynolds and Lacey be tried separately from those involving victim Drury. (R.T. 3/18/94, at 7; R.O.A. (*Lee I*) at 125.) In separate trials, the jurors convicted Petitioner on all counts, and this Court sentenced him as follows:

LEE I		
COUNT	OFFENSE	SENTENCE
1	First Degree Murder (Reynolds)	Death.
2	Sexual Assault (Reynolds)	21 years, consecutive to Count 1.
3	Sexual Assault (Reynolds)	21 years, consecutive to Count 2.

1. *Lee (I)* involved charges concerning the Reynolds and Lacey murders; *Lee (II)* concerned the Drury murder.

2. In the same indictment, Petitioner was also charged with attempted first degree murder and armed robbery in connection with another victim, Linda Egan. (R.O.A. (*Lee I*) at 1.) However, the Egan counts were not tried in either *Lee (I)* (victims Reynolds and Lacey) or *Lee (II)* (victim Drury).

LEE I

COUNT	OFFENSE	SENTENCE
4	Kidnapping (Reynolds)	21 years, consecutive to Count 3.
5	Armed Robbery (Reynolds)	14 years, consecutive to Count 4.
6	Theft (Reynolds)	10 years, consecutive to Count 5.
7	First Degree Murder (Lacey)	Death.
8	Armed Robbery (Lacey)	14 years, consecutive to Count 7.

(R.O.A. (Lee I) at 138.)

LEE II

COUNT	OFFENSE	SENTENCE
9	First Degree Murder (Drury)	Death.
10	Armed Robbery (Drury)	21 years, consecutive to Count 8.

(P.I. (Lee II) at 170.)

On direct appeal from the trial concerning the Reynolds and Lacey homicides, Petitioner raised the following issues:

1. The Court erred when it denied Petitioner's motion to sever the trials on the Reynolds and Lacey homicides;
2. Petitioner's statements to police were coerced;
3. The Court erred when it denied Petitioner's motion for the appointment of a second attorney;
4. The Court erred when it found death-eligible aggravating factors, and when it imposed the death penalty;
5. The Court erred when it denied Petitioner's motion to close the proceedings to the media;
6. The Court erred when it denied Petitioner's motion to limit cross-examination of Petitioner at sentencing;
7. The Court erred when it instructed the jurors to consider the lesser included offense only if it found Petitioner not guilty of the greater offense; and
8. The Court erred when it denied Petitioner's motion for a directed verdict.

1 Exhibit A (Petitioner's Opening Brief—Reynolds and Lacey). Additionally, Petitioner raised the
2 following "miscellaneous issues":

- 3 1. The Court erred when it considered victim impact evidence at sentencing;
- 4 2. Petitioner had the right to a jury trial at sentencing;
- 5 3. Death by lethal gas constitutes cruel and unusual punishment; and
- 6 4. Arizona's statutory scheme for imposition of the death penalty is unconstitutional.

7 *Id.*

8 On direct appeal from the trial concerning the Drury homicide, Petitioner raised the following
9 issues:

- 10 1. Petitioner's statements to police were coerced;
- 11 2. The Court erred when it denied Petitioner's motion for the appointment of a second
12 attorney;
- 13 3. The Court erred when it permitted Detective Hodges to testify as an expert;
- 14 4. The Court erred when it instructed the jurors not to consider a lesser degree of culpability
15 unless they determined that Petitioner was not guilty of the greater offense;
- 16 5. The Court erred when it permitted the state to introduce "superfluous" photographic
17 evidence;
- 18 6. The Court erred when it denied Petitioner's motion for judgment of acquittal;
- 19 7. The Court erred when it denied Petitioner's request for a mistrial based on prosecutorial
20 misconduct;
- 21 8. The Court erred when it denied Petitioner's motion to close the proceedings to the media;
- 22 9. The Court erred when it denied Petitioner's motion to assign separate sentencing courts;
- 23 10. The Court erred by death qualifying the jurors;
- 24 11. The Court erred when it ruled that if Petitioner testified, extrinsic evidence would be
25 admissible to impeach him;
- 26 12. The Court erred in finding aggravating factors, and in finding that aggravating factors
27 outweighed the mitigating factors; and
- 28 13. The Court erred when it aggravated Petitioner's armed robbery conviction.

26 Exhibit B (Petitioner's Opening Brief—Drury).

27 The Arizona Supreme Court subsequently affirmed Petitioner's convictions and sentences on direct
28 appeal. *Lee (I)*, 189 Ariz. at 607, 944 P.2d at 1221; *Lee (II)*, 189 Ariz. at 621, 944 P.2d at 1235.

1 In his petition for post-conviction relief, Petitioner raises the following claims:

- 2 1. The Court erred when it denied Petitioner's motion to sever the Reynolds and Lacey
3 homicides;
- 4 2. The Court erred when it denied his motion to close the Reynolds and Lacey case to the
5 media;
- 6 3. The Court's failure to appoint second counsel violated Petitioner's Sixth Amendment right
7 to effective assistance of counsel;
- 8 4. The Court abused its discretion at sentencing in the Reynolds and Lacey case by not taking
9 into account the cumulative effect of Petitioner's mitigating evidence;
- 10 5. The Court erred in the aggravating circumstances of pecuniary gain;
- 11 6. The Court's finding of pecuniary gain as an aggravating factor is unconstitutional because
12 it repeats the elements of first degree murder based on an underlying armed robbery;
- 13 7. The Court erred in not finding that specific mitigating factors called for a sentence less than
14 death in the Reynolds and Lacey case;
- 15 8. Petitioner was denied the effective assistance of trial and appellate counsel which violated
16 Petitioner's Fifth and Sixth Amendment rights under the U.S. Constitution and under Article
17 II, Section 4 and 24 of the Arizona Constitution; and
- 18 9. Arizona' death penalty statute is unconstitutional, and was unconstitutionally imposed in this
19 case.

20 B. ARGUMENT.

- 21 1. CLAIMS 1-7 AND 9 ARE PRECLUDED FROM POST-CONVICTION RELIEF REVIEW.

22 a. LEGAL BACKGROUND.

23 Petitioners are precluded from seeking post-conviction relief on claims that were adjudicated, or
24 could have been raised and adjudicated, in a prior appeal or a prior petition for post-conviction relief.
25 Rule 32.2(a)(2), (3), Ariz. R. Crim. P.; *State v. Curtis*, 185 Ariz. 112, 113, 912 P.2d 1341, 1342 (App.
26 1995). Moreover, the proper state avenue of relief from a decision by the Arizona Supreme Court is
27 through a Rule 31.18 motion for reconsideration filed with that Court, rather than through a Rule 32
28 post-conviction relief action filed with the trial court. Rule 31.18; *Correll v. Stewart*, 137 F.3d 1404,
1417-18 (9th Cir. 1998). This is because lower Arizona courts do not have the authority to overturn an
Arizona Supreme Court decision. *State v. Walker*, 185 Ariz. 228, 242, 914 P.2d 1320, 1334 (App.
1995); *State v. Albe*, 148 Ariz. 87, 89, 713 P.2d 288, 290 (App. 1984).

1 Claims 1-7, and 9 have either been adjudicated, or could have been raised and adjudicated, in the
2 direct appeals in this matter, and hence are precluded from Rule 32 review. Moreover, with respect to
3 the claims which were previously raised on direct appeal (Claims 1-4, 6, 7, 9(1), 9(3), 9(5), 9(7), 9(10),
4 9(12), 9(13), 9(16), and 9(17)), Petitioner failed to file a Rule 31.18 motion for reconsideration with the
5 Arizona Supreme Court.

6 a. PETITIONER'S ALLEGATION (CLAIM 1) THAT THE COURT ERRED WHEN
7 IT DENIED PETITIONER'S MOTION TO SEVER THE TRIALS OF THE
8 REYNOLDS AND LACEY HOMICIDES IS PRECLUDED.

9 Petitioner claims that the Court erred when it denied his motion to sever the trials of the Reynolds
10 and Lacey homicides. This claim is precluded. Petitioner raised this issue on direct appeal, and the
11 Arizona Supreme Court adjudicated it on its merits. Exhibit A, at 21-29; *Lee (I)*, 189 Ariz. at 597-600,
12 944 P.2d at 1211-14. Thus, the claim is precluded pursuant to Rule 32.2(a)(2).

13 b. PETITIONER'S ALLEGATION (CLAIM 2) THAT THE COURT ERRED WHEN
14 IT DENIED HIS MOTION TO CLOSE THE REYNOLDS AND LACEY CASE TO
15 THE MEDIA IS PRECLUDED.

16 Petitioner raised this issue on appeal, and the Arizona Supreme Court adjudicated it on its merits.
17 Exhibit A, at 48-51; *Lee (I)*, 189 Ariz. at 601-02, 944 P.2d at 1215-16. Thus, the claim is precluded
18 pursuant to Rule 32.2(a)(2).

19 c. PETITIONER'S ALLEGATION (CLAIM 3) THAT THE COURT ERRED WHEN
20 IT DENIED HIS MOTION TO APPOINT A SECOND ATTORNEY IS
21 PRECLUDED.

22 Petitioner raised this issue on appeal, and the Arizona Supreme Court adjudicated it on its merits.
23 Exhibit A, at 32-36; Exhibit B, at 21-24; *Lee (I)*, 189 Ariz. at 601, 944 P.2d at 1215; *Lee (II)*, 189
24 Ariz. at 613, 944 P.2d at 1227. Thus, the claim is precluded pursuant to Rule 32.2(a)(2).

25 d. PETITIONER'S ALLEGATION (CLAIM 4) THAT THE COURT ABUSED ITS
26 DISCRETION AT SENTENCING IN THE REYNOLDS AND LACEY CASE BY
27 NOT TAKING INTO ACCOUNT THE CUMULATIVE EFFECT OF
28 PETITIONER'S MITIGATING EVIDENCE IS PRECLUDED.

29 Petitioner raised this issue on appeal, and the Arizona Supreme Court adjudicated it on its merits.
30 Exhibit A, at 45-48; *Lee (I)*, 189 Ariz. at 606-07, 944 P.2d at 1220-21. Thus, the claim is precluded
31 pursuant to Rule 32.2(a)(2). To the extent, if any, that this claim differs from the claim raised on appeal,
32 the claim is precluded pursuant to Rule 32.2(a)(3).

1 e. PETITIONER'S ALLEGATION (CLAIM 5) THAT THE COURT ABUSED ITS
2 DISCRETION WHEN IT FOUND THE AGGRAVATING CIRCUMSTANCE OF
3 PECUNIARY GAIN IS PRECLUDED, AS WELL AS MOOT.

4 Because Petitioner failed to raise this issue on appeal, the claim is precluded pursuant to Rule
5 32.2(a)(3). Moreover, because the Arizona Supreme Court independently found that the state had proved
6 the pecuniary gain aggravating factor beyond a reasonable doubt in all three homicides,³ the issue is
7 moot.

8 f. PETITIONER'S ALLEGATION (CLAIM 6) THAT THE COURT'S FINDING
9 OF PECUNIARY GAIN AS AN AGGRAVATING FACTOR IS
10 UNCONSTITUTIONAL BECAUSE IT REPEATS THE ELEMENTS OF FIRST
11 DEGREE MURDER BASED ON AN UNDERLYING ARMED ROBBERY IS
12 PRECLUDED.

13 Petitioner raised this issue on appeal, and the Arizona Supreme Court adjudicated it on its merits.
14 Exhibit B, at 54-55; *Lee (II)*, 189 Ariz. at 620-21, 944 P.2d at 1234-35. Thus, the claim is precluded
15 pursuant to Rule 32.2(a)(2).

16 g. PETITIONER'S ALLEGATION (CLAIM 7) THAT THE COURT ERRED IN
17 FAILING TO FIND THAT THE MITIGATING FACTORS IN THE REYNOLDS
18 AND LACEY TRIAL CALLED FOR A SENTENCE LESS THAN DEATH IS
19 PRECLUDED, AS WELL AS MOOT.

20 Petitioner contends that the Court erred when it failed to find that the following mitigating factors
21 outweighed the aggravating factors concerning the Reynolds and Lacey homicides:

- 22 1. That Petitioner was merely a follower;
- 23 2. Petitioner's depraved childhood;
- 24 3. Petitioner's age;
- 25 4. Petitioner's lack of significant prior criminal history;
- 26 5. Petitioner's cooperation with law enforcement and his assistance in the recovery of weapons;
27 and
- 28 6. Petitioner's remorse.

29 Petitioner raised this issue on appeal, and the Arizona Supreme Court adjudicated it on its merits.
30 Exhibit A, at 45-48; *Lee (I)*, 189 Ariz. at 607, 944 P.2d at 1221. Thus, the issue is precluded pursuant
31 to Rule 32.2(a)(2). Moreover, because the Arizona Supreme Court independently weighed the
32

33 3. See *Lee (I)*, 189 Ariz. at 607, 944 P.2d at 1221; *Lee (II)*, 189 Ariz. at 610-20, 944 P.2d at 1233-34.

1 aggravating and mitigating circumstances, and found that the aggravating circumstances outweighed the
2 mitigating circumstances, the issue is moot.

3 h. PETITIONER'S ALLEGATIONS (CLAIM 9) THAT ARIZONA'S DEATH
4 PENALTY STATUTE IS UNCONSTITUTIONAL, AND WAS
UNCONSTITUTIONALLY IMPOSED IN THIS CASE, ARE PRECLUDED.

5 In Claim 9, Petitioner raises the following sub-claims pertaining to the constitutionality of the
6 Arizona death penalty statute, and its application to his case:

- 7 1. Arizona's death penalty is *per se* unconstitutional under the United States and Arizona
8 Constitutions;
- 9 2. Arizona's death penalty constitutes cruel and unusual punishment;
- 10 3. Arizona's death penalty does not provide for sufficient reliability and is imposed arbitrarily
and capriciously;
- 11 4. Arizona's death penalty is discriminatory;
- 12 5. Arizona's death penalty is not sufficiently narrowed or channeled;
- 13 6. Arizona's death penalty does not provide for discretion or mercy;
- 14 7. Arizona's death penalty is unconstitutional because a trial court, rather than a jury,
15 determines the sentence;
- 16 8. Arizona's death penalty is unconstitutional because a trial court is not required to make a
17 finding on the record that an aggravating circumstance was proven beyond a reasonable
18 doubt;
- 19 9. Petitioner's right to trial by jury was violated because the trial court sat as the trier of fact
20 and made *Enmund/Tison* findings;
- 21 10. Arizona's death penalty is unconstitutional because it fails to allow a defendant to death
22 qualify the trial court;
- 23 11. The pecuniary gain aggravator is unconstitutionally vague;
- 24 12. Arizona's death penalty is unconstitutional because it fails to give proper guidance
25 concerning what constitutes mitigation, and because it places the burden of proving
26 mitigation upon defendants;
- 27 13. Arizona's death penalty is unconstitutional because it fails to channel sentencing discretion
28 by providing standards for balancing aggravating and mitigating factors;
14. Arizona's death penalty is unconstitutional for not requiring the trial court to make detailed
factual findings in its special verdict;
15. Arizona's death penalty is unconstitutional because it does not require a proportionality
review;
16. The method of execution in Arizona constitutes cruel and unusual punishment; and

1 17. Petitioner's right to a fair and impartial jury was violated because all potential jurors who
2 indicated their opposition to the death penalty were dismissed.

3 All of these issues are precluded because either: (1) Petitioner raised them on appeal, and the
4 Arizona Supreme Court adjudicated them on their merits;⁴ or (2) Petitioner failed to raise them on
5 appeal. Rules 32.2(a)(2), (a)(3).

6 2. PETITIONER FAILS TO DEMONSTRATE THAT HE WAS DENIED EFFECTIVE
7 ASSISTANCE OF COUNSEL (CLAIM 8).⁵

8 Petitioner contends that he was denied effective assistance of counsel. However, he has failed to
9 raise any colorable claims regarding this issue. Moreover, even if any of these claims are deemed
10 colorable, Petitioner is not entitled to relief because he has failed to demonstrate prejudice. Nevertheless,
11 to avoid potential delay in federal court proceedings that are expected to follow Petitioner's state court
12 proceedings, Respondents request that an evidentiary hearing be held regarding Claim 8. Moreover,
13 because Respondents have a right to know the bases of the allegations made in Claim 8, Respondents
14 respectfully request that Petitioner be ordered to file an amended petition within 30 days, in order to
15 explain how his allegations in Claim 8 are colorable.

16 a. LEGAL BACKGROUND.

17 To prevail on a claim of ineffective assistance of counsel, Petitioner must prove that "counsel's
18 conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied
19 on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052
20 (1984). To prove this, Petitioner must show that: (1) his counsel's performance was deficient; and (2)
21 the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687; *State v. Ysea*, 191 Ariz.
22 372, ¶ 15, 956 P.2d 499 (1998). A petitioner must prove both prongs of this test in order to be entitled
23 to relief on grounds of ineffective assistance of counsel. *Strickland*, 466 U.S. at 687, 697; *Ysea*, 191
24 Ariz. at ¶ 15.

25 1. DEFICIENT PERFORMANCE.

26
27 4. Exhibit A, at 62-63; Exhibit B, at 56; *Lee (I)*, 189 Ariz. at 607, 944 P.2d at 1221; *Lee (II)*, 189 Ariz. at 613, 944
28 P.2d at 1227.

5. In the caption to Claim 8, Petitioner references his appellate counsel. However, all of his substantive arguments
concerning this claim relate only to his trial counsel.

1 In order to prove deficient performance, a petitioner must do more than simply show that counsel
2 committed an error—he must demonstrate that his attorney's errors were of such a grievous nature that
3 they violate the right to counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687; *State*
4 *v. Valdez*, 160 Ariz. 9, 16, 770 P.2d 313, 319 (1989). The proper measure of attorney performance
5 under this standard is reasonableness, considering all the circumstances. *Strickland*, 466 at 688; *Caro*
6 *v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1998). Thus, the question is not what the best lawyer would
7 have done, or even what most good lawyers would have done, but instead whether some reasonable
8 lawyer could have acted similarly to defense counsel. *Coleman v. Calderon*, 150 F.3d 1105, 1113
9 (9th Cir. 1998).

10 A reviewing court's inquiry into the reasonableness of an attorney's performance is further guided
11 by two principles. First, the inquiry must be highly deferential. *Strickland*, 466 at 689; *State v. Vickers*,
12 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994). This means that the petitioner must overcome a strong
13 presumption that, under the circumstances presented, the challenged action or omission might be
14 considered sound trial strategy. *Strickland*, 466 U.S. at 689; *Vickers*, 180 Ariz. at 526, 885 P.2d at
15 1091. Indeed, strategic decisions made after thorough investigation relevant to plausible options "are
16 virtually unchallengeable." *Strickland*, 466 U.S. at 690; *Furman v. Wood*, 169 F.3d 1230, 1235 (9th Cir.
17 1999). This is because an attorney "is strongly presumed to have rendered adequate assistance and made
18 all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at
19 690. Moreover, because of this strong presumption, any strategic reason for counsel's action or inaction
20 will likely lead to a determination that the attorney rendered adequate assistance. *Grisby v. Blodgett*, 130
21 F.3d 365, 372 (9th Cir. 1997); *Vickers*, 180 Ariz. at 526, 885 P.2d at 1091.

22 The second principle guiding a court's inquiry into the reasonableness of an attorney's
23 performance concerns the focus of the inquiry. The reasonableness of the attorney's performance must
24 be viewed as of the time of the conduct, and in light of the facts of the particular case. *Strickland*,
25 466 U.S. at 690; *Ysea*, 191 Ariz. at ¶ 16, 956 P.2d at ¶ 16 ("To avoid evaluating past conduct with the
26 magnifying glass of hindsight, we evaluate counsel's performance in the context of the circumstances
27 surrounding the offense and the prevailing professional norms in the legal community at the time [of the
28 challenged conduct].") Likewise, because an attorney's actions are usually based on informed choices

1 made by, and information supplied by, the petitioner, the reasonableness of the attorney's actions should
2 also be determined in light of the petitioner's own actions or statements. *Strickland*, 466 U.S. at 691.
3 Thus, when a petitioner has given counsel reason to believe that pursuing certain investigations would
4 be fruitless or harmful, counsel's failure to pursue those investigations cannot be characterized as
5 unreasonable. *Id.* at 691.

6 2. PREJUDICE.

7 In addition to proving deficient performance, a petitioner seeking to overturn a conviction on
8 grounds of ineffective assistance of counsel must affirmatively prove that he suffered prejudice from his
9 attorney's performance. *Strickland*, 466 U.S. at 692-93; *Ysea*, 191 Ariz. at ¶ 15, 956 P.2d at ¶ 15.
10 Thus, it is not enough for a defendant to demonstrate that the errors had some conceivable effect on the
11 outcome—rather, he must prove that there is a reasonable probability that, but for counsel's
12 unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at
13 694; *Ysea*, 191 Ariz. at ¶ 17, 956 P.2d at ¶ 17. For these purposes, a "reasonable probability" is a
14 probability sufficient to undermine confidence in the outcome. *Strickland, Id.*; *Ysea, Id.*

15 3. PETITIONER'S BURDEN IN RAISING A COLORABLE 16 INEFFECTIVENESS CLAIM.

17 In order to raise a colorable claim of ineffectiveness, a petitioner must identify the acts or
18 omissions of counsel that are alleged to be the result of unreasonable professional judgment. *Strickland*,
19 466 U.S. at 690. Conclusory allegations not supported by specifics do not warrant relief, nor do vague
20 or speculative assertions. *State v. Krum*, 183 Ariz. 288, 295, 903 P.2d 596, 603 (1995) (Rule 32
21 petitioner must "some substantial evidence" in support of his claims); *State v. Borbon*, 146 Ariz. 392,
22 399, 706 P.2d 718, 725 (1985) ("Rule 32 does not require the trial court to conduct evidentiary hearings
23 based on mere generalizations and unsubstantiated claims").

24 b. PETITIONER'S SPECIFIC CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

25 1. THE SEVERANCE MOTION.

26 Petitioner first contends that his counsel was ineffective because he failed "to establish with
27 specificity why the trial court's failure to sever the Reynolds and Lacey counts would prevent him from
28 testifying about the Reynolds counts while remaining silent regarding the Lacey counts." Specifically,

1 Petitioner complains that although his trial counsel submitted an affidavit setting forth his reasons for
2 wanting to testify regarding the Reynolds counts, his counsel did not provide this Court with his reasons
3 for not wanting to testify regarding the Lacey counts. However, because Petitioner fails to specify, either
4 in the body of his petition, or by affidavit, his reasons for not wanting to testify regarding the Lacey
5 matter, this Court cannot determine whether his counsel was ineffective regarding this sub-claim. Thus,
6 because he has presented only conclusory allegations, and vague or speculative assertions, the sub-claim
7 is not colorable. *Strickland*, 466 U.S. at 690; *Krum*, 183 Ariz. at 295, 903 P.2d at 603; *Borbon*, 146
8 Ariz. at 399, 706 P.2d at 725. Moreover, even if this sub-claim was colorable, Petitioner is not entitled
9 to relief, because he has failed to prove prejudice—he fails to argue, much less demonstrate, that he
10 suffered prejudiced from the joined trial.

11 2. FAILURE TO REQUEST INSTRUCTION ON LIMITED ADMISSIBILITY OF
12 THE EVIDENCE.

13 Petitioner next claims that his attorney was ineffective because he failed to request a jury
14 instruction based on Rule 105 of the Arizona Rules of Evidence. Rule 105 provides:

15 When evidence which is admissible as to one party or for one purpose but not
16 admissible as to another party or for another purpose is admitted, the court, upon request,
17 shall restrict the evidence to its proper scope and instruct the jury accordingly.

18 Because Petitioner fails to specify what evidence was presented at trial which would entitle him to such
19 an instruction, and because he presents no arguments why his attorney's failure to request such an
20 instruction amounts to deficient performance, this sub-claim is not colorable. Moreover, even if this sub-
21 claim was colorable, Petitioner is not entitled to any relief, because the only "prejudice" Petitioner
22 asserts he suffered is that "trial counsel did not request a more specific jury instruction and the limited
23 admissibility as necessary to preserve the alleged error for appeal." The mere failure to preserve an
24 alleged error for appeal does not equate to prejudice under *Strickland*—rather, Petitioner must prove that
25 there is a reasonable probability that, but for counsel's unprofessional error, the result of the trial would
26 have been different. *Strickland*, 466 U.S. at 694; *Ysea*, 191 Ariz. at ¶ 17, 956 P.2d at ¶ 17.

27 3. FAILURE TO PROVIDE THE COURT SPECIFIC EXAMPLES OF ALLEGED
28 PREJUDICE RESULTING FROM THE COURT'S FAILURE TO APPOINT A
SECOND ATTORNEY.

1 Petitioner argues that his trial counsel was ineffective because he failed to provide the Court with
2 "sufficient evidence to warrant the appointment of second counsel when such evidence existed."
3 However, the only "sufficient evidence" Petitioner points to is that the discovery "was voluminous,"
4 and "there were a number of witness." Thus, because he has presented only conclusory allegations and
5 vague or speculative assertions, this sub-claim is not colorable. However, even if this sub-claim was
6 deemed colorable, Petitioner is not entitled to relief, because he fails to present any arguments
7 concerning how he was prejudiced due to his representation at trial by one attorney.

8 4. FAILURE TO OBJECT TO THE LACEY AND REYNOLDS JURY PANEL
9 BASED ON MEDIA EXPOSURE.

10 Petitioner next complains that his counsel was ineffective for failing to object to the Lacey and
11 Reynolds jury panel based on media exposure to the facts of Petitioner's case. In his petition, he states:

12 The Petitioner submits that there were examples of pretrial publicity that existed that
13 could have been provided to the court, however, [they] were not provided to the court by
14 trial counsel. Further, Petitioner submits that had counsel taken the time to voir dire
15 respective jurors in his cause, he would have been able to discern preconceived notions of
16 guilt and ultimately be able to show prejudice.

17 Because Petitioner fails to identify any of these examples of pretrial publicity, and because he fails
18 to demonstrate how voir dire would have enable him to "discern preconceived notions of guilt" held by
19 members of the jury panel, this sub-claim is not colorable. Moreover, even if this sub-claim was
20 colorable, Petitioner is not entitled to any relief, because he fails to argue, much less demonstrate, that
21 he suffered prejudice from the service of the jurors who were ultimately impaneled at trial.

22 5. FAILURE TO ESTABLISH A NEXUS BETWEEN PETITIONER'S DEPRIVED
23 CHILDHOOD AND HIS CRIMES.

24 Finally, Petitioner claims that his trial counsel was ineffective at sentencing because he failed to
25 establish a nexus between Petitioner's allegedly deprived childhood and the crimes he later committed.
26 Petitioner offers no facts to establish such a nexus, and thus the sub-claim is not colorable. Additionally,
27 because he fails to demonstrate that he would not have been sentenced to death by the Court had it
28 considered his childhood in mitigation, Petitioner has failed to prove prejudice.

29 C. CONCLUSION.

30 Based on the foregoing, Respondents respectfully request the Court to: (1) summarily dismiss
31 claims 1-7, and 9, as precluded from post-conviction relief pursuant to Rules 32.2a(2) and/or a(3) of

1 the Arizona Rules of Criminal Procedure; (2) order Petitioner to amend his Petition within 30 days, in
2 order to explain how his allegations in Claim 8 are colorable; (3) grant Respondents 10 days leave to
3 respond to the amended petition; and (4) set a date for an informal conference, pursuant to Rule 32.7,
4 in order to schedule a hearing date concerning Claim 8, as well as to discuss matters pertaining to the
5 hearing.

6
7
8 RESPECTFULLY SUBMITTED this 1st day of May, 2000.

9 JANET NAPOLITANO
10 ATTORNEY GENERAL

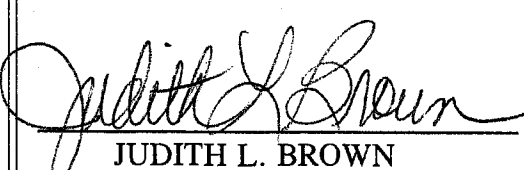
11 
12 J. D. NIELSEN
13 ASSISTANT ATTORNEY GENERAL
14 CRIMINAL APPEALS SECTION

15 ATTORNEYS FOR PLAINTIFF
16
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1 COPIES of the foregoing were deposited
2 for mailing this 1st day of May, 2000, to:

3 HONORABLE RONALD S. REINSTEIN
4 Maricopa County Superior Court
5 201 W. Jefferson
6 Phoenix, AZ 85003

7 JESS A. LORONA
8 Ryan, Woodrow, & Rapp, P.L.C.
9 3101 N. Central Ave., Ste. 1500
10 Phoenix, AZ 85012
11 Attorney for Defendant

12 
13 JUDITH L. BROWN

14 CRM94-0874
15 102651
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APPENDIX D

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Ryan Woodrow & Rapp, P.L.C.

Attorneys at Law
3101 North Central Avenue, Suite 1500
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Jess A. Lorona
No. 009186

Attorney for Defendant Lee

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA,

Plaintiff,

vs.

CHAD ALAN LEE,

Defendant.

ACTION NO: CR 92-04225

**MOTION TO EXTEND TIME TO FILE
AMENDED PETITION**

(Assigned to the Honorable
Ronald S. Reinstein)

The Defendant, by and through his counsel undersigned hereby respectfully moves this honorable court to extend the time within which the Defendant may file his reply to the State's Response to the Defendant's Post-Conviction Relief or, in the alternative, the time period within which the Defendant may amend his Petition pertaining to this matter.

This Motion is made on the grounds for the reasons that counsel for Petitioner is presently involved in a Federal Court District trial and needs additional time to file the appropriate pleadings in this matter.

This motion is made in good faith and not for the mere purpose of delay.

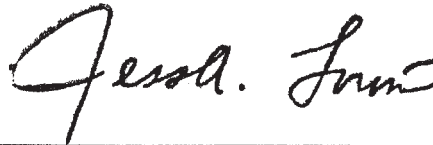
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FILED
2000 JUN -2 PM 3:22
K. JEANES, CLERK
DEP

1 DATED this 2nd day of June, 2000.

2 RYAN WOODROW & RAPP, P.L.C.

3
4 

5 By: _____
6 Jess A. Lorona
7 3101 North Central Avenue, Suite 1500
8 Phoenix, Arizona 85012
9 Attorney for Defendant

10 ORIGINAL for the foregoing
11 FILED this 2nd day of June,
12 2000, with:

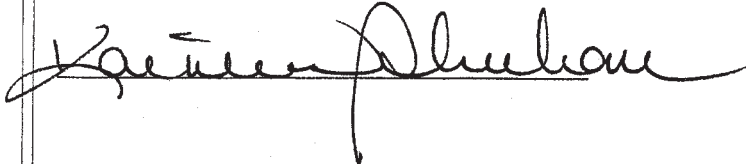
13 Clerk
14 Maricopa County Superior Court
15 201 W. Jefferson
16 Phoenix, Arizona 85003

17 COPY of the foregoing
18 HAND-DELIVERED this
19 2nd day of June, 2000, to:

20 The Honorable Ronald S. Reinstein
21 201 W. Jefferson, #401
22 Phoenix, Arizona 85003

23 COPY of the foregoing
24 MAILED this 2nd day of
25 June, 2000, to:

26 J.D. Nielsen, Esq.
27 Assistant Attorney General
28 Criminal Appeals Section
1275 W. Washington
Phoenix, Arizona 85007-2997



APPENDIX E

PEP. FOR COURT OF ARIZONA
RICOPA COUNTY

06/12/2000

CLERK OF THE COURT
FORM R000A

HON. RONALD S. REINSTEIN

K. Branding
Deputy

CR 1992-004225

FILED: JUN 27 2000

STATE OF/ARIZONA

JIM D NIELSEN

v.

CHAD ALLEN/LEE

JESS A LORONA

APPEALS-PCR-CCC
VICTIM WITNESS DIV-CA-CCC

ORDER EXTENDING TIME FOR FILING PCR

The court has considered the defendant's Motion to Extend Time to File Amended Petition. State having no objection,

IT IS ORDERED extending the time for filing amended petition for post-conviction relief to July 13, 2000.

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APPENDIX F

PEP OR COURT OF ARIZONA
RICOPA COUNTY

12/28/2000

CLERK OF THE COURT
FORM G000A

HON. RONALD S. REINSTEIN

L. Maccherola
Deputy

CR 92-04225

FILED: DEC 29 2000

STATE OF ARIZONA

ATTORNEY GENERAL
BY: PAUL MCMURDIE

v.

CHAD ALAN LEE

JESS A LORONA # 009186

CHAD ALAN LEE
110783
P O BOX 3400
FLORENCE AZ
85232

MINUTE ENTRY

Defendant's Petition for Post-Conviction Relief, the State's Response, and the Court's file and notes have been considered. Defendant elected not to file a Reply.

Any claims which were previously raised or could have been raised on appeal or in prior Rule 32 proceedings are precluded from relief pursuant to Rule 32.2 of the Arizona Rules of Criminal Procedure and A.R.S. §13-4232.

Defendant has raised nine separate claims for relief in the Petition for Post-Conviction Relief. All of the claims except for Claim 8, dealing with ineffective assistance of counsel, either were raised and adjudicated on direct appeal to the Arizona Supreme Court, or were waived because they could have been raised. As the State points out in its Response, Defendant also did not file a Motion for Reconsideration in the Arizona

Docket Code 167

Page 1

244

PEP R COURT OF ARIZONA
PIMA COUNTY

12/28/2000

CLERK OF THE COURT
FORM G000A

HON. RONALD S. REINSTEIN

L. Maccherola
Deputy

CR 92-04225

Supreme Court as to any of the claims raised on appeal and determined by the Supreme Court.

Specifically, the following claims were previously raised on appeal and were adjudicated on the merits by the Arizona Supreme Court,

Claim 1 - That Defendant was denied his rights to due diligence process, fundamental fairness, and a fair and impartial jury by the Court's failure to sever the Reynolds and Lacey homicides;

Claim 2 - That Defendant was denied his rights to due process and fundamental fairness by the Court's failure to close the Reynolds and Lacey case to the media;

Claim 3 - That Defendant's Sixth Amendment right to the effective assistance of counsel was violated by the Court's failure to appoint second counsel;

Claim 4 - That the Court abused its discretion at sentencing in the Reynolds and Lacey case by not taking into account the cumulative effect of Defendant's mitigation evidence.

Claim 6 - That the Court's finding of pecuniary gain as an aggravating factor is unconstitutional where it repeats the elements of first degree murder based on an underlying armed robbery;

Claim 7 - That the Court erred in not finding the listed mitigating factors called for a sentence less than death in the Reynolds and Lacey case;

Claim 9 - As to the death penalty claims:

SUPERIOR COURT OF ARIZONA
COCONA COUNTY

12/28/2000

CLERK OF THE COURT
FORM G000A

HON. RONALD S. REINSTEIN

L. Maccherola
Deputy

CR 92-04225

- Sub-Claim 1 - That Arizona's death penalty is per se unconstitutional under both the United States and Arizona Constitutions;
- Sub-Claim 3 - That Arizona's death penalty scheme does not provide for sufficient reliability and is imposed arbitrarily and capriciously;
- Sub-Claim 5 - That Arizona's death penalty scheme is not sufficiently narrowing or channeling;
- Sub-Claim 7 - That Arizona's death penalty scheme is unconstitutional because the trial judge, rather than a jury, determines sentencing;
- Sub-Claim 10 - That Arizona's death penalty scheme is unconstitutional for failing to provide the Defendant with a right to voir dire the sentencing judge;
- Sub-Claim 12 - That Arizona's death penalty scheme is unconstitutional for failing to give proper guidance as to what constitutes mitigation;
- Sub-Claim 13 - That Arizona's death penalty scheme is unconstitutional for failing to channel sentencing discretion by providing standards for balancing aggravating and mitigating factors;
- Sub-Claim 16 - That the method of execution in Arizona is cruel and unusual punishment;
- Sub-Claim 17 - That death-qualifying a jury which does not decide the penalty the Defendant is to receive is a violation of Defendant's Sixth Amendment right to a fair and impartial jury where all potential jurors who indicate their opposition to the death penalty are dismissed.

SUPERIOR COURT OF ARIZONA
COCONA COUNTY

12/28/2000

CLERK OF THE COURT
FORM G000A

HON. RONALD S. REINSTEIN

L. Maccherola
Deputy

CR 92-04225

Because all of these claims were previously raised on direct appeal to the Arizona Supreme Court and decided against Defendant, they are all precluded from relief pursuant to Rule 32.2 (a) (2) and A.R.S. § 13-4232. It is therefore ordered dismissing with prejudice each of those claims.

In addition, the following claims raised in Defendant's Petition for Post-Conviction Relief were not raised on direct appeal to the Arizona Supreme Court, but could have been raised. They are therefore waived and also are precluded pursuant to Rule 32.2(a) (3) and A.R.S. § 13-4232:

Claim 5 - That the Court erred in not finding aggravating circumstances of pecuniary gain beyond a reasonable doubt.

Death Penalty Sub-Claim 2 - That Defendant was denied effective assistance of counsel as a result of counsel's failure to request a more specific jury instruction of the limited admissibility of the evidence as it pertains to one charge versus another;

Death Penalty Sub-Claim 4 - That Defendant was denied effective assistance of counsel as a result of counsel's failure to object to the Lacey and Reynolds jury panel based on media exposure to the facts of Defendant's case;

Death Penalty Sub-Claim 6 - That Arizona's death penalty scheme does not provide for discretion or mercy;

Death Penalty Sub-Claim 8 - That the Court's failure to find aggravating circumstances beyond a reasonable doubt violated Defendant's statutory and constitutional rights;

Death Penalty Sub-Claim 9 - That Defendant's rights to trial by jury were infringed because the court sat as the trier of fact and made *Enmund/Tison* findings;

12/28/2000

CLERK OF THE COURT
FORM G000A

HON. RONALD S. REINSTEIN

L. Maccherola
Deputy

CR 92-04225

Death Penalty Sub-Claim 11 - That the Death penalty aggravating circumstance of pecuniary gain is too vague;

Death Penalty Sub-Claim 14 - That Arizona's death penalty scheme is unconstitutional for not requiring the Court to make detailed factual findings in its special verdict;

Death Penalty Sub-Claim 15 - That Arizona's death penalty scheme is unconstitutional as not requiring a proportionality review.

Since all of these claims could have been raised on appeal but were not,

IT IS ORDERED they are precluded from relief and are dismissed with prejudice.

As to Claim 8 - That Defendant was denied the effective assistance of trial and appellate counsel which violated Defendant's Fifth and Sixth Amendment rights under the United States Constitution and under Article II, Sections 4 and 24 of the Arizona Constitution, the Court notes that it sat as the trial judge in both of Defendant's cases and was able to observe and consider trial counsel's performance at trial and sentencing. While Defendant captioned this claim as also involving appellate counsel none of the sub-claims raised have anything to do with appellate counsel's effectiveness.

The State has taken the position that Defendant should file an amended Petition on Claim 8 to explain how the allegations raised are colorable. However, the Court finds that none of the claims of ineffective assistance of trial counsel are colorable. First, based on the Court's observations in the pretrial stage, at trial, and finally at sentencing, Defendant received an excellent defense from a very competent and experienced attorney. Second, Defendant has not and cannot demonstrate prejudice. There is no need for an evidentiary hearing as to the allegations of ineffective assistance of trial counsel because

12/28/2000

CLERK OF THE COURT
FORM G000A

HON. RONALD S. REINSTEIN

L. Maccherola
Deputy

CR 92-04225

Defendant cannot meet either of the two prongs set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), that counsel's performance was deficient and that the deficient performance resulted in prejudice. Defendant is not entitled to relief.

As to Sub-Claim 1 - regarding counsel's failure to specify why failure to sever the Reynolds and Lacey cases would prevent him from testifying about the Reynolds counts while remaining silent as to the Lacey counts, the court notes that Defendant confessed to both crimes. The Court was aware the Defendant wanted to explain his remorse and lack of intent to kill Ms. Reynolds while he had no such explanation in the Lacey case. Defendant not only failed to specify his reasons in his Petition, or by way of affidavit, he has not proven or even alleged any prejudice.

As to Sub-Claim 2 - regarding the failure to request an instruction on the limited admissibility of the evidence pursuant to Rule 105 of the Arizona Rules of Evidence, Defendant failed to provide any argument as to why such failure was deficient under the circumstances of the case given the other instructions in the case. There is no probability at all that such failure resulted in prejudice to Defendant in that the result would not have been different.

As to Sub-Claim 3 - as to the Court's failure to appoint second counsel and counsel's failure to provide the court with evidence to warrant second counsel, in fact counsel did articulate reasons in his notice. Most important as to this sub-claim however, is the fact that Defendant was not prejudiced by not having second counsel because first, his attorney did a very good job in representing Defendant, and second, the result with more than one attorney would not have been different.

As to Sub-Claim 4 - relating to failure of counsel to object to the jury panel because of media exposure, this case was no different than many other high-profile trials. Moreover,

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PEP COURT OF ARIZONA
RICOPA COUNTY

12/28/2000

CLERK OF THE COURT
FORM G000A

HON. RONALD S. REINSTEIN

L. Maccherola
Deputy

CR 92-04225

this Court was well aware of all the pretrial publicity in the case. The voir dire of the jury in this case produced a jury that was fair and impartial. Finally, Defendant cannot show any prejudice suffered by him based on the jury which ultimately sat on the case.

As to Sub-Claim 5 - That counsel failed to establish a nexus between Defendant's deprived childhood and his crimes, counsel provided the Court with much evidence as to Defendant's deprived childhood and the Court considered it and counted it as a mitigating factor. The Court didn't have to have counsel "draw a line" to show the nexus, but that childhood could not overcome the aggravating factors found by the Court in these homicides. Therefore, Defendant cannot demonstrate prejudice on this sub-claim.

Based on all the above, since Defendant has failed to raise a colorable claim of ineffective assistance of counsel, and even if he had, Defendant has failed to demonstrate prejudice,

IT IS ORDERED dismissing Claim 8.

Pursuant to Rule 32.6(c) of the Arizona Rules of Criminal Procedure,

IT IS ORDERED dismissing Defendant's Petition for Post-Conviction Relief in that no material issues of law or fact have been raised which would entitle Defendant to relief, and there would be no purpose served by any further proceedings.

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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

8 Chad Alan Lee,

9

10 Petitioner,

11 v.

12 Dora B. Schriro, et al.,

13 Respondents.

14

) No. CV-01-2178-PHX-EHC
) No. CV-01-2179-PHX-EHC

) DEATH PENALTY CASE

) **MEMORANDUM OF DECISION**
) **AND ORDER**

15

16 Chad Alan Lee (Petitioner) has filed an Amended Petition for Writ of Habeas Corpus

17 pursuant to 28 U.S.C. § 2254, alleging that he is imprisoned and sentenced to death in

18 violation of the United States Constitution. (Dkt. 59.)¹ For the reasons set forth herein, the

19 Court determines that Petitioner is not entitled to habeas relief.

20 **BACKGROUND**

21 In two separate trials, Petitioner was tried for committing three murders during a crime

22 spree in April 1992. In the first trial, Petitioner was convicted of first degree murder in the

23 deaths of Linda Reynolds and David Lacey, as well as kidnapping, sexual assault, armed

24 robbery, and theft with respect to Reynolds and armed robbery with respect to Lacey.

25 Several months later, Petitioner was convicted of the murder and armed robbery of Harold

26 Drury. Maricopa County Superior Court Judge Ronald S. Reinstein sentenced Petitioner to

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¹ “Dkt.” refers to the documents in this Court’s file.

1 death for each of the murders and to various terms of imprisonment for the non-capital
2 counts. Petitioner appealed the judgments from each trial separately. In the first of two
3 consecutive opinions affirming Petitioner's convictions and sentences, the Arizona Supreme
4 Court summarized the pertinent facts and procedural history surrounding the Reynolds/Lacey
5 crimes:²

6 *Murder of Linda Reynolds*

7 On April 6, 1992, defendant and David Hunt called Pizza Hut from a
8 pay phone and placed an order to be delivered to a vacant house. When Linda
9 Reynolds arrived with the pizza order, defendant and Hunt confronted her with
10 a rifle, forced her to remove her shorts and shirt, and abducted her. Defendant
11 drove his Pontiac LeMans into the desert with Reynolds, and Hunt drove
12 Reynolds' car to meet them.

13 Defendant removed the stereo from Reynolds' car and then destroyed
14 the car by smashing windows and various parts with a bat, puncturing the tires,
15 and disabling the engine by cutting hoses and spark plug wires. Reynolds
16 watched as one of the two, either defendant or Hunt, shot a bullet through the
17 hood of her car. Defendant testified he destroyed Reynolds' car so that she
18 could not escape.

19 Reynolds was forced to remove her pantyhose, socks, and shoes and to
20 walk barefoot with Hunt in the desert north of her car where he raped her.
21 Hunt then walked Reynolds back toward her car, where defendant forced
22 Reynolds to perform oral sex on him.

23 After finding Reynolds' bank card in her wallet, defendant drove her
24 and Hunt to Reynolds' bank to withdraw money from an automated teller
25 machine (ATM). Defendant gave Reynolds his flannel shirt to wear, walked
26 her to the ATM, and forced her to withdraw twenty dollars. Defendant and
27 Hunt then drove Reynolds back to the desert north of where they had
destroyed her car. Reynolds momentarily escaped, but Hunt found her and
forced her back to the car. When she returned, her face and lips were bloody.

Defendant claimed that he and Hunt argued in front of Reynolds about
whether to release her. Defendant testified that Hunt was opposed to releasing
her because she would be able to identify them. Defendant stated that as he
was escorting Reynolds away from Hunt, defendant shot her in the head as she
attempted to take the gun from him. Further, defendant testified that he ran
back to the car, got a knife, went back to Reynolds, and stabbed her twice in
the left side of her chest to stop her suffering. Defendant returned to his car
and drove away with Hunt.

² This Court has independently reviewed the state court records and concludes
that the Arizona Supreme Court's factual recitations on appeal accurately recount the
evidence adduced at each trial.

1 On April 7, 1992, defendant pawned Reynolds' wedding ring, gold ring,
2 and car stereo for a total of \$170. He filled out a sales slip and used his
driver's license as identification.

3 *Murder of David Lacey*

4 Shortly after midnight on April 16, 1992, nine days after the Reynolds
5 murder, defendant called for a cab from a pay telephone at a convenience
6 store. David Lacey's cab was dispatched, and he picked up defendant. Hunt,
7 who had waited near the convenience store, drove defendant's car to the
8 location where he and defendant intended to rob Lacey. When Lacey stopped
9 the cab and turned around to get paid, defendant pulled out his revolver and
10 demanded money. Defendant claimed that Lacey turned around and attempted
to grab the gun. Defendant then fired nine shots, four of which hit Lacey.
Defendant removed forty dollars from Lacey's pockets and dumped his body
by the side of the road. With Hunt following, defendant drove the cab to a dirt
road where he shot the cab's windows and tires and rifled through its contents.
Defendant's cigarette lighter and bloody fingerprint on a receipt were later
found in the abandoned cab.

11 After hearing news reports that police had found distinctive shoeprints
12 at the Reynolds and Lacey crime scenes, defendant drove to a forest north of
Prescott and burned the shoes he had worn during both murders. At the same
13 time, defendant burned and buried two .22 caliber rifles including one gun he
used to shoot Reynolds. Defendant left the knife he used to stab Reynolds
14 stuck into a tree at the same location.

15 *Investigation*

16 Police began their investigation of Reynolds' disappearance the evening
of April 6, 1992, at her last delivery site and found her body on April 7. They
17 obtained videotape from the ATM that depicted a Pontiac LeMans with
Reynolds sitting in the front passenger seat and also showed her at the ATM
18 with defendant standing next to her.

19 A patrol officer who responded to two Lacey crime scenes noticed that
the shoeprints found at both scenes matched a shoeprint he had seen on a flyer
20 containing information about the Reynolds murder. Subsequently, the Phoenix
Police Department, investigating the Reynolds murder, and the Maricopa
21 County Sheriff's Department, investigating the Lacey murder, began a joint
investigation because of striking similarities between the two crimes.

22 Pizza Hut provided police with information about past orders that
23 included Hawaiian pizza similar to the last order delivered by Reynolds. One
such order had been placed from the home of Hunt's stepmother. On May 1,
24 1992, Hunt's stepmother told police that Hunt and defendant had ordered
Hawaiian pizza in the past and that she had recognized defendant's photograph
25 in the newspaper. She gave police Hunt's father's address where police found
Hunt, his father, and defendant. Defendant and Hunt agreed to provide police
26 a sample of their fingerprints and did so that day. A few hours later,
defendant, Hunt, and their girlfriends left town in defendant's car.

27 On May 3, 1992, at 4:00 p.m., defendant, Hunt, and their girlfriends

1 were stopped by police in Oak Creek Canyon in connection with an armed
2 robbery in Flagstaff. Defendant was advised of his *Miranda* rights and
3 transported to the Flagstaff Police Department. That evening defendant was
4 advised of his *Miranda* rights again and signed a waiver form.

5 Later that day, a palm print found on Reynolds' car was identified as
6 belonging to Hunt. While attempting to alert law enforcement officers to
7 detain defendant's car, police learned that it had been impounded in Flagstaff.
8 Detectives from the Phoenix Police Department and the Maricopa County
9 Sheriff's Department drove to Flagstaff to interview defendant and Hunt. On
10 the way, the detectives received information that the bloody fingerprint found
11 on the receipt in Lacey's cab matched defendant's print.

12 The detectives interviewed the girlfriends, then Hunt, and then
13 defendant. In defendant's interview, which began at 2:45 a.m., May 4, after
14 he was again read his *Miranda* rights, he confessed to robbing and murdering
15 Reynolds and Lacey and told detectives how and where he had disposed of the
16 weapons. He offered to assist police officers in locating the weapons he used
17 to murder Reynolds.

18 On May 5, 1992, a Phoenix Police detective met with defendant at the
19 Coconino County Jail and again advised him of his *Miranda* rights. Defendant
20 agreed to talk and then accompanied the police officers, directing them to the
21 campsite where he had hidden a single-shot, sawed-off .22 caliber rifle and
22 semi-automatic .22 caliber rifle and left a knife in a nearby tree. Defendant
23 told officers that he used the knife to stab Reynolds and the single-action rifle
24 to shoot her. Defendant further confessed in detail about his involvement in
25 both murders to the Phoenix Police detective and later to two other officers
26 during transport back to Coconino County Jail.

27 On May 6, 1992, a Maricopa County Sheriff's Department detective
reinterviewed defendant about the Lacey murder and robbery because the tape
recorder had not functioned properly during the prior interview. On tape,
defendant waived his *Miranda* rights and retold how he planned the robbery
and shot Lacey to death.

Finally, defendant testified at trial and admitted that he made the pizza
order, destroyed Reynolds' car, shot and stabbed Reynolds, and pawned her
rings and stereo. Defendant also admitted that he called the cab and shot
Lacey in the head. Further, defendant testified at trial that all statements he
made to police officers were of his own free will, that he was advised of his
Miranda rights, and that he told officers he understood his rights.

State v. Lee (Lee I), 189 Ariz. 590, 595-97, 944 P.2d 1204, 1209-11 (1997). In its opinion
regarding the Drury crimes, the Arizona Supreme Court stated:

Around 1:00 a.m. on April 27, 1992, defendant Lee entered an AM-PM
market to purchase some cigarettes. After the store clerk, Harold Drury,
opened the cash drawer, defendant displayed his revolver and shot Drury in the
shoulder, causing him to fall slightly backwards. Defendant then shot Drury
in the top of the head, the forehead, the cheek, and the neck. Drury slumped
to the floor. Defendant walked around the counter and shot Drury two more

1 times in the right temple. One bullet went through Drury's head and broke the
2 display case next to his body. Defendant picked up the cigarettes, took the
entire cash drawer from the register, and left the store. Scott Hunt was in
defendant's car waiting to leave the scene.

3
4 Hunt immediately drove defendant across the street where defendant
removed the cylinder from his revolver and threw both parts into a dumpster.
5 Hunt then drove for several miles, and defendant attempted to throw the cash
drawer into a creek bed. The drawer, however, smashed into a concrete
6 abutment on the overpass, prompting defendant and Hunt to go back, pick up
the drawer, and throw it into the creek bed.

7 Shortly after the murder, customers found Drury behind the counter and
8 called the police. Upon entering the store, the police saw the cash register
open and the cash drawer missing. The register tape showed an incomplete
9 transaction for cigarettes.

10 During three separate interviews, defendant confessed to robbing the
AM-PM market and shooting Drury: May 4, 1992, at 2:45 a.m. at the
11 Coconino County Jail where defendant was in custody for other crimes; May
5, 1992, when defendant showed police where he had disposed of the
12 Reynolds (*Lee I*) murder weapons; and May 6, 1992, at the Maricopa County
Sheriff's Office in Phoenix where the interview was recorded.

13 During the first interview, defendant described to detectives where the
drawer first landed and where he eventually threw it into the creek bed. On
14 their return to Phoenix, the detectives located the pieces of the cash drawer and
the drawer itself in the weeds under the bridge that defendant identified. They
15 photographed each scene and preserved the evidence.

16 *State v. Lee (Lee II)*, 189 Ariz. 608, 612, 944 P.2d 1222, 1226 (1997).

17 In March 2000, following an unsuccessful petition for certiorari in the United States
18 Supreme Court, *Lee v. Arizona*, 523 U.S. 1007 (1998), Petitioner filed a consolidated petition
19 for post-conviction relief (PCR) pursuant to Rule 32.1 of the Arizona Rules of Criminal
20 Procedure, challenging his convictions and sentences in all three murders and raising
21 numerous claims for relief. (See Dkt. 68, Ex. F.) The trial court denied PCR relief on
22 December 29, 2000, and the Arizona Supreme Court summarily denied a petition for review.
23 (*Id.*, Exs. G, H, I.)

24 In November 2001, Petitioner filed two petitions for habeas corpus relief in this Court,
25 which consolidated the petitions pursuant to Rule 42(a) of the Federal Rules of Civil
26 Procedure. (Dkt. 3.) In March 2003, Petitioner filed a consolidated amended petition raising
27 twenty-five grounds for relief and, in a series of motions, sought evidentiary development

of Claims 1-6, 8, 10, and 22-25. (Dkts. 59, 60, 89, 101.) In resolving the motions, the Court determined that Claims 1 and 22 failed to state cognizable grounds for relief; Claims 2, 4, 5, 6, and 25 were procedurally barred; Claims 3, 4, and 24 failed on the merits; and Claim 23 was premature. (Dkts. 94, 106, 125.)

This order addresses Petitioner's remaining claims, Claims 7-21, including Respondents' assertions that a number of these claims are procedurally barred from federal habeas review.

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a writ of habeas corpus cannot be granted unless it appears that the petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982). To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). If a habeas claim includes new factual allegations not presented to the state court, it may be considered unexhausted if the new facts "fundamentally alter" the legal claim presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and post-conviction relief proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

1 A habeas petitioner's claims may be precluded from federal review in two ways.
2 First, a claim may be procedurally defaulted in federal court if it was actually raised in state
3 court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S.
4 at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present
5 it in state court and "the court to which the petitioner would be required to present his claims
6 in order to meet the exhaustion requirement would now find the claims procedurally barred."
7 *Id.* at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the
8 district court must consider whether the claim could be pursued by any presently available
9 state remedy). If no remedies are currently available pursuant to Rule 32, the claim is
10 "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see*
11 *also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

12 Because the doctrine of procedural default is based on comity, not jurisdiction, federal
13 courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*,
14 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of a
15 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure
16 to properly exhaust the claim in state court and prejudice from the alleged constitutional
17 violation, or shows that a fundamental miscarriage of justice would result if the claim were
18 not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

19 Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some
20 objective factor external to the defense impeded counsel's efforts to comply with the State's
21 procedural rule." *Id.* at 753. Objective factors which constitute cause include interference
22 by officials which makes compliance with the state's procedural rule impracticable, a
23 showing that the factual or legal basis for a claim was not reasonably available, and
24 constitutionally ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488
25 (1986).

26 There are two types of claims recognized under the fundamental miscarriage of justice
27 exception to procedural default: (1) that a petitioner is "innocent of the death sentence," –

1 in other words, that the death sentence was erroneously imposed; and (2) that a petitioner is
 2 innocent of the capital crime. In the first instance, the petitioner must show by clear and
 3 convincing evidence that, but for constitutional error, no reasonable factfinder would have
 4 found the existence of any aggravating circumstance or some other condition of eligibility
 5 for the death sentence under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 336,
 6 345 (1992). In the second instance, the petitioner must show that “a constitutional violation
 7 has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513
 8 U.S. 298, 327 (1995).

9 **LEGAL STANDARD FOR RELIEF UNDER THE AEDPA**

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

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

14 (2) resulted in a decision that was based on an unreasonable determination of
 15 the facts in light of the evidence presented in the State court proceeding.

16 28 U.S.C. § 2254(d). The phrase “adjudicated on the merits” refers to a decision resolving
 17 a party’s claim which is based on the substance of the claim rather than on a procedural or
 18 other non-substantive ground. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). The
 19 relevant state court decision is the last reasoned state decision regarding a claim. *Barker v.*
 20 *Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-
 21 04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

22 “The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule
 23 of law that was clearly established at the time his state-court conviction became final.”
 24 *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection
 25 (d)(1), the Court must first identify the “clearly established Federal law,” if any, that governs
 26 the sufficiency of the claims on habeas review. “Clearly established” federal law consists
 27 of the holdings of the Supreme Court at the time the petitioner’s state court conviction

1 became final. *Williams*, 529 U.S. at 365; see *Carey v. Musladin*, 127 S.Ct. 649 (2006); *Clark*
2 *v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the
3 Supreme Court has not “broken sufficient legal ground” on a constitutional principle
4 advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529
5 U.S. at 381. Nevertheless, while only Supreme Court authority is binding, circuit court
6 precedent may be “persuasive” in determining what law is clearly established and whether
7 a state court applied that law unreasonably. *Clark*, 331 F.3d at 1069.

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

19 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas court
20 may grant relief where a state court “identifies the correct governing legal rule from [the
21 Supreme] Court’s cases but unreasonably applies it to the facts of the particular . . . case” or
22 “unreasonably extends a legal principle from [Supreme Court] precedent to a new context
23 where it should not apply or unreasonably refuses to extend that principle to a new context
24 where it should apply.” *Williams*, 529 U.S. at 407. In order for a federal court to find a state
25 court’s application of Supreme Court precedent “unreasonable” under § 2254(d)(1), the
26 petitioner must show that the state court’s decision was not merely incorrect or erroneous,
27 but “objectively unreasonable.” *Id.* at 409; *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)

1 (per curiam).

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

15 As the Ninth Circuit has noted, application of the foregoing standards presents
16 difficulties when the state court decided the merits of a claim without providing its rationale.
17 See *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Pirtle v. Morgan*, 313 F.3d 1160,
18 1167 (9th Cir. 2002); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). In those
19 circumstances, a federal court independently reviews the record to assess whether the state
20 court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d
21 at 853; *Pirtle*, 313 F.3d at 1167. Although the record is reviewed independently, a federal
22 court nevertheless defers to the state court’s ultimate decision. *Pirtle*, 313 F.3d at 1167
23 (citing *Delgado*, 223 F.3d at 981-82); see also *Himes*, 336 F.3d at 853. Only when a state
24 court did not decide the merits of a properly raised claim will the claim be reviewed de novo
25 because in that circumstance “there is no state court decision on [the] issue to which to
26 accord deference.” *Pirtle*, 313 F.3d at 1167; see also *Menendez v. Terhune*, 422 F.3d 1012,
27 1025-26 (9th Cir. 2005); *Nulph v. Cook*, 333 F.3d 1052, 1056-57 (9th Cir. 2003).

PETITIONER'S CLAIMS

Claim 7 - Petitioner's constitutional rights were violated by the cumulative effect of his trial counsel's deficient performance, or in the alternative, by the cumulative effect of the inadequate assistance he received from all of his state-appointed attorneys.

Respondents contend that Petitioner never presented a "cumulative" claim of ineffective assistance of counsel (IAC) in state court and that any habeas claim predicated on this notion is procedurally barred. (Dkt. 68 at 36.) The Court agrees. Petitioner neglected to raise Claim 7 in state court. If he were to return to state court now, the claim would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to Arizona's rule of preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, Claim 7 is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1.

Petitioner implicitly acknowledges that he never raised Claim 7 in state court, but asserts he is excused from doing so because the claim includes an allegation of PCR counsel's ineffectiveness and "the Arizona Supreme Court has previously rejected the argument that a capital defendant is entitled to the effective assistance of post-conviction counsel." (Dkt. 82 at 53.) Therefore, Petitioner asserts, it is futile to attempt to exhaust this claim in state court. (*Id.*) The Court disagrees.

In *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981), the Ninth Circuit recognized an exception to the exhaustion requirement if exhaustion in state court would be futile. Subsequently, in *Engle v. Isaac*, 456 U.S. 107, 130 (1982), the Supreme Court criticized the futility doctrine, ruling that it does not excuse the failure to exhaust a habeas claim in state court proceedings. The Court stated:

If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.

1 *Id.* Following *Engle*, the Ninth Circuit rejected the futility doctrine and held that the
 2 apparent futility of presenting habeas claims to state courts does not constitute cause to
 3 overcome a procedural default. *See Roberts v. Arave*, 847 F.2d 528, 530 (9th Cir. 1988).
 4 Therefore, the Court finds that futility does not constitute cause to excuse the default of
 5 Claim 7. Petitioner does not argue that the failure to consider Claim 7 on the merits may
 6 result in a fundamental miscarriage of justice. Accordingly, the Court finds that Claim 7 is
 7 procedurally barred.³

8 **Claim 8 - The trial court violated Petitioner's constitutional rights when**
 9 **it erroneously refused to suppress the statements he involuntarily made**
 10 **to police.**

11 Petitioner asserts that the trial court's failure to suppress his statements to the police
 12 violated his constitutional rights. (Dkt. 59 at 114.) Specifically, he asserts that his statements
 13 were not voluntary and that his waiver of his constitutional rights was neither knowing nor
 14 intelligent. (*Id.* at 112.)

15 *Background*

16 Petitioner was arrested in Oak Creek Canyon near Sedona, Arizona on the afternoon
 17 of May 3, 1992, after a police officer observed the car he was driving and believed it matched
 18 the description of a car used by persons involved in an armed robbery earlier that day in a
 19 store parking lot in Flagstaff. *Lee I*, 189 Ariz. at 596, 944 P.2d at 1210. Petitioner was
 20 taken to the Flagstaff police department where he was eventually interrogated by two
 21 officers: Lee Luginbuhl with the Maricopa County Sheriff's Office, who was investigating
 22 the murder of David Lacey, and Mike Chambers of the Phoenix Police Department, who was
 23 investigating the murder of Linda Reynolds. During this interrogation, Petitioner confessed
 24 to robbing and killing Lacey, Reynolds, and Drury. (RT 3/16/94 at 147-80; RT 3/17/94 at

25 ³ Moreover, as fully explained by the Court in its February 2005 order with
 26 regard to Claim 1 (alleging IAC of PCR counsel), that aspect of Claim 7 alleging
 27 ineffectiveness by PCR counsel fails to state a cognizable ground for federal habeas relief.
 (See dkt. 94 at 6-8.)

1 67-98; *see also* RT 8/25/94 at 11-23, 58-68.)⁴ In the days that followed, Petitioner made
2 similar statements to other officers. (RT 3/15/94 at 164-80; RT 8/21/94 at 8-12; 18-23; 32-
3 36; RT 112-13.)

4 Prior to trial, Petitioner moved to suppress his statements. At a hearing on the motion,
5 several law enforcement officers testified to the sequence of events following Petitioner's
6 arrest. The arresting officer stated that he read Petitioner his *Miranda* rights from a card at
7 the time of his arrest. (RT 1/28/94 at 31.) After being taken to the Flagstaff police station,
8 Detective Mike Cicchinelli read Petitioner his *Miranda* rights and questioned him about an
9 armed robbery. (*Id.* at 11-12.) Petitioner indicated he understood his rights, agreed to waive
10 them, and signed a card to this effect. (*Id.* at 12.) The detective testified that he did not
11 promise, threaten, or coerce Petitioner to waive his rights. (*Id.*)

12 After learning that Petitioner was in custody, Detectives Luginbuhl and Chambers
13 drove to Flagstaff, arriving at the station at about 9:00 or 10:00 p.m. (*Id.* at 50, 80.) After
14 talking to the others who were arrested with Petitioner, including David Hunt, they
15 commenced an interrogation with Petitioner at about 2:45 a.m. on the morning of May 4. (*Id.*
16 at 50-51.) The interrogation lasted a little over an hour, concluding just before 4:00 a.m. (*Id.*
17 at 55.) The officers attempted to tape record the interview, but the recorder malfunctioned.
18 (*Id.* at 53-54, 90-91.)

19 When Detective Chambers and Luginbuhl first entered the interview room, Petitioner
20 was seated at a table, had his head down, and appeared to be sleeping. (*Id.* at 87.) Petitioner
21 was Mirandized prior to questioning, stated he understood his rights, and agreed to talk. (*Id.*
22 at 52-53, 89-90.) Petitioner was allowed to go to the restroom just before questioning started
23 and was given water to drink. According to the detectives, Petitioner never indicated that he
24 did not wish to answer questions, was alert, spoke coherently, and did not seem to be under

25
26 ⁴ "RT" refers to the reporter's transcripts in both the Reynolds/Lacey and Drury
27 trials. As is customary in this District, the Arizona Supreme Court provided the original
transcripts to this Court for use in these proceedings. (*See* Dkt. 18.)

1 the influence of drugs or alcohol. (*Id.* at 54, 91-92.) They further stated that they made no
2 promises and did not threaten or coerce Petitioner. (*Id.* at 55; 92-93.)

3 During the course of questioning by Detectives Chambers and Luginbuhl, Petitioner
4 indicated he left the murder weapons at a remote location near Prescott. (RT 3/16/94 at 178-
5 79.) The next day, following up on these statements, Phoenix Police Detective Charles
6 Gregory interviewed Petitioner. Gregory read Petitioner his *Miranda* rights, and Petitioner
7 stated he understood his rights and agreed to talk. (RT 1/28/94 at 116-17.) Petitioner then
8 told Gregory the general location near Prescott where he left the weapons and subsequently
9 led officers to a campsite where the weapons were found. (*Id.* at 118-20.) According to
10 Gregory, Petitioner did not appear tired or fatigued, spoke coherently, and seemed to
11 understand everything. Gregory also testified that he made no promises and did not coerce
12 Petitioner into answering questions. (*Id.* at 122-23.)

13 While en route back to Flagstaff with Detectives Terry Kenney and Raoul Osegueda,
14 Petitioner asked to talk “off the record.” (*Id.* at 146.) When told that was not possible,
15 Petitioner nevertheless related to them his involvement in the three murders. (*Id.* at 147,
16 155.) According to the detectives, Petitioner told this story voluntarily, without prompting,
17 and without any promises, threats, or use of coercion. (*Id.* at 146-48, 155-57.)

18 On the afternoon of May 6, 1992, Detective Luginbuhl recorded an interview with
19 Petitioner regarding the Lacey murder. Prior to questioning, Petitioner was Mirandized,
20 stated he understood his rights, and agreed to be interviewed. (*Id.* at 59.) Petitioner’s speech
21 was coherent. (*Id.* at 60.) Luginbuhl testified that he made no promises to Petitioner and
22 used no coercion to get him to speak. (*Id.*) During this interview, Petitioner repeated his
23 involvement in the murders. (RT 8/25/94 at 20-23.)

24 Petitioner also testified at the suppression hearing. On direct examination, he stated
25 he was a poor student and had a grade point average of 1.2, ranking him 462 out of a class
26 of 543. (RT 1/31/94 at 5-6.) He thinks he was Mirandized when initially arrested, but could
27 not remember if he was Mirandized after being brought to the Flagstaff police department;

1 he conceded signing a waiver. (*Id.* at 7, 10.) Petitioner was tired when he was brought to
2 the station, dozed while waiting in an interrogation room, and was dozing with his head on
3 the table when Detective Chambers entered the room. (*Id.* at 15.) He described himself as
4 “walking into walls” at the time the interview began and only a “little bit” alert. (*Id.* at 17.)
5 Petitioner did not remember being Mirandized prior to the interview with Chambers and
6 Luginbuhl, did not understand that he did not have to speak with them, and claimed he would
7 not have agreed to talk if he had fully understood his rights. (*Id.* at 19-22.)

8 Petitioner thought he told Chambers and Luginbuhl he would show them the
9 campground near Prescott where the weapons and other evidence were left. (*See* RT 1/31/94
10 at 21-22.) He admitted talking about his involvement in the murders to police officers during
11 the trip to and from the campground but said he made those statements because he “didn’t
12 think it mattered” in light of the fact that he had already confessed to Chambers and
13 Luginbuhl. (*Id.* at 22-23.) If he had not already made those incriminating statements,
14 Petitioner stated he never would have lead officers to the murder weapons or made further
15 incriminating statements. (*Id.* at 24.)

16 On cross-examination, Petitioner could not remember but indicated it was possible he
17 was advised of his rights upon his initial arrest, as well as after he was brought to the police
18 station and questioned by Detective Cicchinelli about an armed robbery, and again at the
19 beginning of his interrogation by Chambers and Luginbuhl. (*Id.* at 26-67.) He further
20 testified that none of the detectives made any promises or threats, or used coercion to get him
21 to talk. He did not remember asking for an attorney during questioning. (*Id.*)

22 Petitioner’s psychological expert, Mickey McMahon, Ph.D., also testified at the
23 suppression hearing. He opined that Petitioner suffered from Attention Deficit Disorder
24 (ADD) and consequently might have had difficulty processing the meaning of his *Miranda*
25 rights. (RT 1/28/94 at 164-186.) Dr. McMahon also opined that Petitioner displayed a
26 submissive personality. As a result, Petitioner was prone to be submissive to authority and
27 likely to relinquish his right to silence out of a desire to please authority figures such as

1 police officers. (*Id.* at 168-71.) Under cross-examination, Dr. McMahon stated that someone
 2 who suffers from ADD and a submissive personality was capable of understanding their
 3 rights and could also have committed a crime and confessed to that crime because they were
 4 guilty. (*Id.* at 211-16.) The State's rebuttal expert, clinical psychologist Jeffrey Harrison,
 5 testified that Petitioner might suffer from a mild learning disability but opined that this would
 6 not have impaired his ability to understand his *Miranda* rights. (RT 2/10/94 at 6, 8-9.)

7 In denying the motion to suppress, the trial court found that Petitioner had been
 8 advised of his rights on at least five occasions and that a preponderance of the evidence
 9 established Petitioner was properly advised and understood his rights. (ME doc. 82.)⁵ The
 10 court concluded that Petitioner's statements were not the result of promises, force, threats,
 11 or coercion, but were made knowingly, intelligently, and voluntarily. (*Id.*)

12 On direct appeal, the Arizona Supreme Court upheld the trial court's ruling:

13 Defendant claims that the trial court abused its discretion by ignoring
 14 his physical and mental condition at the time of the May 4, 1992 interrogation
 15 in Flagstaff. Defendant claims that at the 2:45 a.m. interview he was
 16 exhausted and disoriented because of the time of night, because police had
 17 disturbed his sleep by checking on him, and because he had not slept well
 while camping the previous two nights. He further claims that his will was
 overborne by the interrogating officers because he has attention deficit
 disorder and quickly succumbs to authority figures, a tendency he argues had
 been substantiated by psychological testing.

18 To determine the voluntariness of a statement, the appropriate inquiry
 19 is whether, under the totality of the circumstances, the statement was the
 20 product of coercive police tactics. *State v. Tucker*, 157 Ariz. 433, 445-46, 759
 21 P.2d 579, 591-92 (1988) (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107
 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986)). "The trial court's determination that
 a confession was voluntary will not be disturbed on appeal absent clear error."
Id. at 444, 759 P.2d at 590.

22 The trial court conducted a suppression hearing and found that
 23 defendant had been advised of his *Miranda* rights on at least five separate
 24 occasions by different police officers, that he understood his rights on each of
 those occasions, and that he knowingly, intelligently, and voluntarily waived
 those rights. The trial court also found that his statements were knowingly and
 voluntarily made and were not given as a result of police misconduct. These

26 ⁵ "ME doc." refers to one volume of enumerated minute entries from the Drury
 27 record on appeal filed with the Arizona Supreme Court in Case No. CR-94-0367-AP. (See
 dkt. 18.)

findings are not only supported by testimony of police officers, but also by defendant's testimony at trial that all statements he made to police officers were of his own free will, that he was advised of his *Miranda* rights, and that he told officers he understood his rights. The record does not suggest that police tactics were coercive. We find no clear error in the trial court's denial of defendant's motion to suppress his statements.

Lee I, 189 Ariz. at 600-01, 944 P.2d at 1214-15.⁶

Analysis

In evaluating the voluntariness of a confession, "the test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *Derrick v. Peterson*, 924 F.2d 813, 817 (9th Cir. 1990) (citing *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963)). Coercive police activity, including lengthy questioning, deprivation of food or sleep, physical threats of harm, and psychological persuasive, is a necessary predicate to a finding that a confession is not voluntary. *Colorado v. Connelly*, 479 U.S. 157, 167, (1986). Personal characteristics of the defendant are constitutionally irrelevant absent proof of coercion. *Derrick*, 924 F.2d at 818.

The waiver of a defendant's right to silence must also be knowing and voluntary; that is, the defendant understood the right to remain silent and that relinquishment of that right meant anything he said could be used as evidence against him. *Colorado v. Spring*, 479 U.S. 564, 574 (1987). A defendant need not know and understand every possible consequence of a waiver of his rights. *Id.* *Miranda* warnings ensure a defendant understands these rights by informing him that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. *Id.*

Although the ultimate issue of voluntariness is a mixed question of law and fact, *Miller v. Fenton*, 474 U.S. 104, 111-12 (1985), subject to review under the standards set forth in 28 U.S.C. § 2254(d)(1), any subsidiary factual findings made by the state court are entitled

⁶ Petitioner also raised this issue in the Drury appeal. The Arizona Supreme Court rejected this claim in summary fashion, noting it had discussed and rejected the claim in *Lee I*. See *Lee II*, 189 Ariz. at 613, 944 P.2d at 1227.

1 to a “presumption of correctness” under § 2254(e)(1). These include findings concerning the
2 tactics used by the police and other circumstances of the interrogation. *Miller*, 474 U.S. at
3 112, 117. With respect to such findings, Petitioner bears the burden of rebutting the
4 presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see*
5 *Williams*, 529 U.S. at 407; *Villafuerte v. Stewart*, 111 F.3d 616, 626 (9th Cir. 1997).

6 In this case, undisputed evidence was presented at the suppression hearing that
7 Petitioner was informed of his *Miranda* rights on five separate occasions in the days
8 following his arrest on May 3, 1992, including prior to the commencement of the
9 interrogation by Detectives Luginbuhl and Chambers in the early morning hours of May 4,
10 when he made his initial confession to the murders of Reynolds, Lacey, and Drury. During
11 that interview (and on the other occasions when he admitted guilt), Petitioner indicated he
12 understood those rights and that he agreed to waive them and talk to the officers. Regarding
13 his statements to Officers Kenney and Osegueda while being transported from the Prescott
14 campground where the weapons were found, testimony indicated he made spontaneous
15 inculpatory statements without being questioned or prompted.

16 Petitioner argues that his statements and waiver of rights were not voluntary because
17 he was “sleep-deprived and emotionally exhausted when the police began questioning him.”
18 (Dkt. 59 at 112.) Although Petitioner’s interview on May 4 did not commence until around
19 2:45 a.m., the evidence shows Petitioner was alone for hours prior to commencement of the
20 interview and that he was not hindered from sleeping and did in fact sleep during this period.
21 Nothing in the record contradicts the officers’ testimony that Petitioner was alert, coherent,
22 and not under the influence of drugs and alcohol. Nor is there any allegation that Petitioner
23 was threatened, coerced, or given promises in exchange for his waiver of rights.

24 Petitioner also argues that he was “vulnerable to the officers’ interrogation tactics”
25 because of neurological impairments related to fetal alcohol exposure. (Dkt. 59 at 112.) As
26 discussed by the Court in its March 24, 2006 order, Petitioner is not entitled to expand the
27 record with new evidence pertaining to his alleged *in utero* alcohol exposure because

1 Petitioner had an opportunity during the state court pretrial suppression hearing to fully
2 develop any facts relevant to his voluntariness claim. (Dkt. 106 at 5.) Although he did
3 present evidence from an expert that he suffered from a low mental capacity and ADD, he
4 did not make any assertions of neurological impairment resulting from fetal alcohol
5 exposure. Because Petitioner did not act with diligence to develop this aspect of Claim 8 and
6 does not assert that he can satisfy the requirements of 28 U.S.C. § 2254(e)(2)(A) & (B), this
7 Court may not consider Petitioner's new allegations of neurological impairment in
8 determining whether his waiver of rights was voluntary.

9 The Court concludes, based on its review of the record, that the Arizona Supreme
10 Court's conclusion that Petitioner's statements were voluntary was not contrary to, or an
11 unreasonable application of, clearly established Supreme Court law nor was it based on an
12 unreasonable determination of the facts. 28 U.S.C. § 2254(d). This conclusion is further
13 supported by Petitioner's own testimony at trial, wherein he explicitly stated he encountered
14 no coercion from the officers during any of his interrogations:

15 Q. You are not afraid of Detective Chambers?

16 A. No.

17 Q. You are not afraid of Detective Luginbuhl?

18 A. No.

19 Q. And neither Detective Luginbuhl or Detective Chambers ever made any
20 threats toward you, did they?

21 A. No.

22 Q. They never coerced you in any way to make any statements, did they?

23 A. I don't know. I really don't know exactly about coerce or anything like
24 that.

25 Q. Coercion? They didn't force you to say what you said to them, did
26 they?

27 A. No.

Q. You said what you said to them of your own freewill, didn't you?

A. Yes.

1 Q. As a matter of fact all the detectives that you spoke to in this case,
2 Luginbuhl, Chambers, Gregory, Osegueda, Kenny Martinez, you told
3 them everything of your own free will?

4 A. Yes.

(RT 3/21/94 at 144-45.)

5 Similarly, the Arizona Supreme Court's determination that Petitioner's waiver of his
6 constitutional rights was knowing and voluntary was not contrary to, or an unreasonable
7 application of, clearly established Supreme Court law nor was it based on an unreasonable
8 determination of the facts. 28 U.S.C. § 2254(d). The evidence indicated Petitioner was
9 informed of his *Miranda* rights on five separate occasions, which Petitioner does not dispute.
10 Although Petitioner asserted during his testimony at the suppression hearing and again at trial
11 that he did not understand these rights, he acknowledged telling officers he understood these
12 rights when questioned. (See RT 3/21/94 at 146.) In addition, during the suppression
13 hearing, Petitioner's own expert witness stated that Petitioner had an IQ of 100 and that, even
14 though he suffered from ADD, was capable of understanding his rights. Likewise, although
15 the State's rebuttal expert described Petitioner as possibly mildly learning impaired, he also
16 opined that this impairment would not have prevented Petitioner from understanding his
17 *Miranda* rights.

18 **Claim 9 - The trial court violated Petitioner's constitutional rights when**
19 **it erroneously refused to sever the Reynolds and Lacey counts.**

20 Prior to his first trial, Petitioner moved to sever the Reynolds and Lacey counts. The
21 trial court denied the motion, concluding that the counts were properly joined for trial:

22 The Court Finds that the offenses charged in the Reynolds and Lacey
23 deaths are of the same or a similar character and also that they are alleged to
24 have been part of a common scheme or plan. There are many similarities in
the alleged offenses which involve two separate victims, and the allegations
clearly involve a plan to rob individuals who have ready cash available in
order to obtain money.

25 (ME doc. 125.)

26 On appeal, citing state law, the Arizona Supreme Court rejected the trial court's
27 rationale that joinder of the Reynolds/Lacey counts in one trial was appropriate because they

1 arose from a common plan or scheme, concluding “that the counts were not properly joined
 2 under Rule 13.3(a)(3) and that the trial court abused its discretion by denying defendant’s
 3 severance motion.” *See Lee I*, 189 Ariz. at 599, 944 P.2d at 1213. However, the court
 4 further noted:

5 The trial court’s error will not justify reversal if the evidence of other
 6 crimes would have been admissible at separate trials under Rule 404(b).
 7 Admission of evidence of prior bad acts is controlled by four protective
 8 provisions: (1) the evidence must be admitted for a proper purpose under Rule
 9 404(b); (2) the evidence must be relevant under Rule 402; (3) the trial court
 10 may exclude evidence if its probative value is substantially outweighed by the
 11 potential for unfair prejudice under Rule 403; and (4) the court must give an
 12 appropriate limiting instruction if requested under Rule 105.

13 *Id.* (citations omitted). The court then analyzed each of these factors and concluded that “if
 14 the trial court had severed the Reynolds and Lacey counts, evidence of each would have been
 15 mutually admissible. The trial court’s error in finding a common scheme or plan as a basis
 16 for denying defendant’s severance motion was thus harmless and does not justify reversal.”
 17 *Id.* at 600, 944 P.2d at 1214.

18 *Analysis*

19 Improper joinder does not, in itself, violate the Constitution. *United States v. Lane*,
 20 474 U.S. 438, 446 n.8 (1986). Misjoinder rises to the level of a constitutional violation only
 21 if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair
 22 trial. *Id.*; *see also Fields v. Woodford*, 309 F.3d 1095, 1110 (9th Cir. 2002); *Sandoval v.*
 23 *Calderon*, 241 F.3d 765, 771-72 (9th Cir. 2000). Prejudice exists if the impermissible joinder
 24 had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Bean*
 25 *v. Calderon*, 163 F.3d 1073, 1086 (citing *Brecht v. Abramson*, 507 U.S. 619, 637 (1993)).

26 Petitioner asserts that “the cross-contamination caused by the prosecution’s
 27 simultaneous presentation of evidence of both the Reynolds and Lacey crimes rendered [his]
 trial and sentencing fundamentally unfair. The particularly troubling facts of the Reynolds
 murder prevented the jury from an impartial consideration of the evidence against [Petitioner]
 on the Lacey counts.” (Dkt. 59 at 115.) Petitioner also contends that failing to sever the
 Reynolds and Lacey counts “prevented him from testifying about the Reynolds counts while

1 exercising his constitutional right against self-incrimination on the Lacey counts,” thereby
2 forcing him to forego his right against self-incrimination on the Lacey counts. (Dkt. 82 at
3 57.)

4 The Arizona Supreme Court’s harmlessness determination was based on its
5 conclusion that under Arizona law all of the evidence presented at the joint trial would have
6 been cross-admissible in separate trials. It is not the province of this court to sit in review
7 of that determination. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Moreover, the
8 evidence of Petitioner’s guilt for both the Reynolds and Lacey murders was overwhelming.
9 Petitioner has failed to establish that the failure to sever the Reynolds and Lacey counts had
10 a substantial and injurious effect on the jury’s verdicts. Consequently, the failure to sever
11 did not render Petitioner’s ensuing joint trial fundamentally unfair and did not violate his
12 right to due process. *See Brecht*, 507 U.S. at 637; *see also Lane*, 474 U.S. at 446 n.8.

13 **Claim 10 - The trial court violated Petitioner’s constitutional rights when,**
14 **in *Lee II*, it required that he be shackled.**

15 On the morning of the first day of jury selection in the Drury trial, Petitioner, while
16 in a holding cell, assaulted a deputy and attempted to escape. (RT 8/23/94 at 19-26.)
17 Consequently, he was brought into the courtroom that day in both leg and wrist restraints.
18 (*Id.* at 21.) In argument to the court, Petitioner’s counsel moved to have the restraints on
19 Petitioner’s hands removed so he could take notes and aid in his defense and also argued that
20 such restraints would likely be apparent to the jury. (*Id.* at 22.) Counsel also requested that,
21 should the Court continue to restrict Petitioner’s legs, simple restraints instead of a “hobble”
22 be used because “they are less visibly noticeable than the traditional hobble sometimes used.”
23 (*Id.* at 25.) A deputy told the judge that he could not insure the safety of everyone in the
24 courtroom and that “this gentleman has nothing to lose and as long as he has his hands free,
25 he is going to be a hazard to anybody in this courtroom.” (*Id.* at 24.) The prosecutor also
26 relayed that Petitioner previously had been caught with a shank hidden in his shower slippers
27 at the jail. (*Id.*) When the trial court questioned Petitioner concerning his future behavior
in court, Petitioner stated, “Behave myself, I guess.” (*Id.* at 21.) In a minute entry issued

1 later that day, the trial court directed that Petitioner be restrained by a leg brace in lieu of a
 2 hobble and that he be allowed one free hand and a pencil to assist counsel during trial. (ME
 3 doc. 147 at 6.)

4 Petitioner raised this issue on direct appeal. In upholding the trial court's decision to
 5 restrain Petitioner during trial, the Arizona Supreme Court stated:

6 Defendant argues that the trial court erred by shackling him during trial
 7 because he took copious notes during *Lee I* and shackling his hands affected
 8 his ability to participate in the Drury trial. Complying with defendant's
 9 request, the court ordered that he be restrained with a leg brace in lieu of a
 10 hobble and that he be allowed one free hand to use a short pencil for assisting
 11 counsel during trial.

12 "Whether a defendant will be shackled is within the sound discretion
 13 of the trial court." *State v. Bracy*, 145 Ariz. 520, 532, 703 P.2d 464, 476
 14 (1985). Courtroom security is within the discretion of the trial court "absent
 15 incontrovertible evidence" of harm to the defendant. *State v. McKinney*, 185
 16 Ariz. 567, 576, 917 P.2d 1214, 1223, *cert. denied*, 519 U.S. 934, 117 S.Ct.
 17 310, 136 L.Ed.2d 226 (1996) (quoting *State v. Boag*, 104 Ariz. 362, 366, 453
 18 P.2d 508, 512 (1969)). When the trial court's decision to restrain a defendant
 19 is supported by the record, this court will uphold the decision, even when the
 20 jury sees the restraints. *Id.* The trial court may consider past felony
 21 convictions for crimes of violence as well as prior escapes in deciding whether
 22 to shackle a defendant. *Bracy* at 532, 703 P.2d at 476.

23 Here, the defendant had prior convictions for three armed robberies and
 24 two first degree murders. Further, the record shows that defendant received
 25 a head injury as a result of tackling a deputy and attempting to escape from a
 26 holding cell before coming to court for the first day of trial and jury selection.
 27 The record clearly supports the trial court's decision to restrain defendant, and
 we find no abuse of discretion.

Lee II, 189 Ariz. at 617, 944 P.2d at 1231.

Analysis

21 The Due Process Clause forbids the routine use of physical restraints visible to the
 22 jury. *Deck v. Missouri*, 544 U.S. 622, 626 (2005). The use of restraints requires a
 23 determination by the trial court that the restraints are justified by a specific state interest
 24 particular to a defendant's trial. *Id.* at 629; *see Ghent v. Woodford*, 279 F.3d 1121, 1132 (9th
 25 Cir. 2002) (criminal defendant has a constitutional right to be free of shackles in the presence
 26 of the jury absent an essential interest that justifies the physical restraints); *Rhoden v.*
 27 *Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (same). This is because a "jury's observation

1 of a defendant in custody may under certain circumstances ‘create the impression in the
2 minds of the jury that the defendant is dangerous or untrustworthy’ which can unfairly
3 prejudice a defendant’s right to a fair trial notwithstanding the validity of his custody status.”
4 *United States v. Halliburton*, 870 F.2d 557, 559 (9th Cir. 1989) (quoting *Holbrook v. Flynn*,
5 475 U.S. 560, 569 (1986)).

6 To obtain habeas relief, a court must find that the defendant was physically restrained
7 in the presence of the jury, that the shackling was seen by the jury, and that the physical
8 restraint was not justified by state interests. *Ghent*, 279 F.3d at 1132. A jury’s “brief or
9 inadvertent glimpse” of a shackled defendant is not inherently or presumptively prejudicial.
10 *Id.* at 1133; *see also Duckett v. Godinez*, 67 F.3d 734, 749 (9th Cir. 1995) (claim of
11 unconstitutional shackling subject to harmless-error analysis); *United States v. Olano*, 62
12 F.3d 1180, 1190 (9th Cir. 1995). An unjustified decision to restrain a defendant at trial
13 requires reversal only if the shackles or handcuffs had “a substantial and injurious effect or
14 influence in determining the jury’s verdict.” *Castillo v. Stainer*, 983 F.2d 145, 148 (9th Cir.
15 1992), *amended by* 997 F.2d 669 (9th Cir. 1993) (quoting *Brecht*, 507 U.S. at 623)).

16 Petitioner summarily asserts that his “restraints were visible to the jury.” (Dkt. 59 at
17 117.) However, there is nothing in the record to support this assertion, and Petitioner has not
18 proffered any evidence to substantiate this claim.⁷ Petitioner has not cited, and this Court
19 is not aware, of any controlling Supreme Court law indicating that a defendant’s
20 constitutional rights are violated by shackling that is not visible to a jury.

21 Even assuming members of the jury were aware that Petitioner was restrained,
22 Petitioner is not entitled to relief because the Arizona Supreme Court’s determination that
23 the shackling was justified was not based on an unreasonable application of the facts. The
24 trial court identified serious safety concerns created by Petitioner’s holding cell assault on
25 a deputy on the first day of trial. In addition, Petitioner previously had been caught with a

26
27 ⁷ Petitioner’s motion for discovery and an evidentiary hearing on this claim was
denied by the Court in an earlier order. (See dkt. 94 at 22-23.)

1 shank while in jail. The courtroom deputy stated that he could not insure the safety of those
 2 in the courtroom if Petitioner's hands were not restrained, and when the trial court questioned
 3 Petitioner concerning his prospective courtroom behavior, he answered equivocally. (RT
 4 8/23/94 at 24, 21.) Under these circumstances, and in light of the trial court's attempt to
 5 balance the safety concerns at issue with the prejudicial effect of restraints on Petitioner by
 6 ordering that less apparent leg restraints be used and that one of Petitioner's hands be free
 7 to take notes during the proceedings, the Court concludes that the Arizona Supreme Court's
 8 determination that Petitioner's restraint during the Drury trial was appropriate was not
 9 contrary to or an unreasonable application of controlling Supreme Court law. *See Deck*, 544
 10 U.S. at 629; *see also Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994) (shackling of
 11 defendant during trial did not violate due process where defendant had displayed a propensity
 12 for violence and trial court determined he might try to escape).

13 **Claim 11 - The trial court violated Petitioner's constitutional rights when**
 14 **it death qualified the venire.**

15 Petitioner next contends that his constitutional rights were violated when the trial
 16 court "death qualified" the venire. (Dkt. 59 at 118.) He contends his right to a fair and
 17 impartial jury was denied because the death qualification improperly excluded jurors for
 18 cause. He argues that jurors did not at the time of trial play a role in sentencing and that the
 19 "trial court did nothing to clarify that the members of the venire who were automatically
 20 excluded because of their anti-death penalty views would have been unable to be fair and
 21 impartial in determining guilt." (*Id.* at 120.)

22 As a threshold matter, Respondents contend that although Petitioner presented this
 23 claim in his appeal in *Lee II* (Drury proceeding), he did not raise such a claim with respect
 24 to *Lee I* (Reynolds and Lacey proceeding). Upon review, the Court agrees that this claim has
 25 been properly exhausted with respect to the Drury proceeding only.

26 *Background*

27 The jury questionnaire used in the Drury trial informed jurors that although they did
 not have a role in passing sentence, Petitioner could be sentenced to death if convicted of

1 first degree murder. (ROA doc. 162 at 2-3.)⁸ The questionnaire then asked potential jurors
 2 if they had conscientious or religious beliefs or feelings about the death penalty that would
 3 affect their ability to serve as fair and impartial jurors. (*Id.* at 3.) The questionnaire further
 4 asked if those feelings or beliefs were so strong “that you could not return a verdict of guilty
 5 of Murder in the 1st Degree even if you felt the State proved the defendant guilty beyond a
 6 reasonable doubt?” (*Id.*) Three potential jurors indicated in the questionnaire that they
 7 opposed the death penalty and that this opposition would render them unable to return a
 8 guilty verdict with regard to the first degree murder charge. After further questioning in
 9 court re-affirmed these views, the trial court dismissed the jurors for cause. (RT 8/23/94 at
 10 37-42, 43-47, 57-60.)

11 Petitioner challenged these strikes on direct appeal. In upholding the trial court’s
 12 ruling, the Arizona Supreme Court stated:

13 Defendant argues that the trial court erred by death qualifying members
 14 of the venire and dismissing potential jurors who indicated they were opposed
 15 to the death penalty. This court rejected that argument in *State v. Willoughby*,
 16 181 Ariz. 530, 546, 892 P.2d 1319, 1335 (1995) (no violation of Sixth
 Amendment right to fair and impartial jury where prospective jurors were
 questioned regarding their views on death penalty and two were excused after
 they said they could not convict at all, knowing the judge might order death
 sentence), *cert. denied*, 516 U.S. 1054, 116 S.Ct. 725, 133 L.Ed.2d 677 (1996).

17 *Lee II*, 189 Ariz. at 617, 944 P.2d at 1231.

18 *Analysis*

19 Clearly established federal law holds that the death-qualification process in a capital
 20 case does not violate a defendant’s right to a fair and impartial jury. *See Lockhart v. McCree*,
 21 476 U.S. 162, 178 (1986); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Adams v. Texas*,
 22 448 U.S. 38, 45 (1980); *see also Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996) (death
 23 qualification of Arizona jurors not inappropriate). As a result, the mere fact the trial court
 24 death-qualified the venire does not establish a federal constitutional violation.

25
 26 ⁸ “ROA doc.” refers to four volumes of sequentially-numbered documents in the
 27 Drury record on appeal filed with the Arizona Supreme Court in Case No. CR-94-0367-AP.
 (See Dkt. 18.)

1 Petitioner argues that *Gray v. Mississippi*, 481 U.S. 648 (1987), places an obligation
2 upon the trial judge in questioning jurors on this question to determine, despite their initial
3 indications, if they could still be fair and impartial. (Dkt. 59 at 119.) He argues that under
4 *Gray*, “[a] potential juror may only be excluded if he or she is ‘irrevocably committed’ to
5 voting against the death penalty prior to trial, regardless of the facts and circumstances of the
6 case.” (*Id.*)

7 The Court has reviewed the trial court’s questioning of the three potential jurors at
8 issue. In each case, the court did follow up on their questionnaire responses and attempted
9 to determine if these jurors could render a fair and impartial verdict despite their opposition
10 to the death penalty. In each instance, the juror indicated that he or she still could not act
11 fairly and impartially. (RT 8/23/94 at 40-42, 45-47, 57-60.) Thus, the trial court satisfied
12 the test urged by Petitioner.

13 Petitioner also argues that death-qualification was inappropriate because at the time
14 of these proceedings the judge and not the jury passed sentence. Thus, the jurors would
15 never be called upon to decide if he should be sentenced to death. Petitioner cites no
16 Supreme Court authority indicating that this fact renders death-qualification unconstitutional
17 nor is the Court aware of any authority for this proposition. As a result, this argument cannot
18 form a basis for federal habeas relief. *See Williams*, 529 U.S. at 381; *Musladin*, 549 U.S. at
19 76. Moreover, each of these jurors indicated that the mere possibility that a death sentence
20 might be imposed by the judge would render them unable to fairly consider the evidence and
21 render a guilty verdict if the evidence so warranted. (RT 8/23/94 at 40-42, 45, 58-59.) For
22 all of these reasons, the decision of the Arizona Supreme Court that the strikes for cause were
23 proper was neither contrary to nor an unreasonable application of controlling Supreme Court
24 law.

25 **Claim 12 - The trial court violated Petitioner’s constitutional rights when**
26 **it instructed the jury on the definition of premeditation.**

27 Petitioner alleges that the trial court’s jury instruction regarding premeditation
violated his federal right to due process. (Dkt. 59 at 120.) He concedes this claim was never

1 presented in state court and requests permission to hold these proceedings in abeyance while
2 he returns to state court to exhaust it. (*Id.*; Dkt. 82 at 65.) Petitioner argues he has an
3 available remedy under Arizona's Rule 32 to file an untimely successive PCR petition
4 because the claim is based on a change in the law. *See* Ariz. R. Crim. P. 32.2(g). The Court
5 disagrees and notes that during the pendency of these proceedings Petitioner did return to
6 state court to file a successive petition. He did not include Claim 12 in that petition, which
7 was summarily dismissed by the state court. (*See* Dkt. 125.) Regardless, the Court finds that
8 Claim 12 is plainly meritless.

9 An allegedly improper jury instruction will merit habeas relief only if "the instruction
10 by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*
11 *v. McGuire*, 502 U.S. at 72; *see Jeffries v. Blodgett*, 5 F.3d 1180, 1195 (9th Cir. 1993). The
12 instruction "'may not be judged in artificial isolation,' but must be considered in the context
13 of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughten*, 414 U.S.
14 141, 147 (1973)). It is not sufficient for a petitioner to show that the instruction is erroneous;
15 instead, he must establish that there is a reasonable likelihood that the jury applied the
16 instruction in a manner that violated a constitutional right. *Id.*; *Carriger v. Lewis*, 971 F.2d
17 329, 334 (9th Cir. 1992) (en banc). "The burden of demonstrating that an erroneous
18 instruction was so prejudicial that it will support a collateral attack on the constitutional
19 validity of a state court's judgment is even greater than the showing required to establish
20 plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). Petitioner
21 cannot make this showing.

22 At trial, the court provided the following instruction with respect to premeditation:

23 Premeditation means the defendant's intention or knowledge existed
24 before the killing, long enough to permit reflection. However, the reflection
25 differs from intent or knowledge that conduct will cause death. *It may be as*
instantaneous as successive thoughts in the mind and it may be proven by
circumstantial evidence.

26 It is this period of reflection, regardless of its length, which
27 distinguishes first degree murder from intentional or knowing second degree
murder. An act is not done with premeditation if it is the instant sudden
quarrel or heat of passion.

(RT 3/23/94 at 81 (emphasis added); *see also* RT 8/29/94 at 57-58.) This instruction, with its statement that premeditation requires a “period of reflection,” accurately described state law regarding premeditation. At the time of Petitioner’s trial, A.R.S. § 13-1101(1) defined premeditation as follows:

“Premeditation” means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.⁹

A.R.S. § 13-1101(1) (1997). Arizona courts had further explained: “The necessary premeditation, however, may be as instantaneous as successive thoughts of the mind, and may be proven by either direct or circumstantial evidence.” *State v. Kreps*, 146 Ariz. 446, 449, 706 P.2d 1213, 1216 (1985); *see State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996); *State v. Lopez*, 158 Ariz. 258, 262, 762 P.2d 545, 549 (1988); *State v. Sellers*, 106 Ariz. 315, 316, 475 P.2d 722, 724 (1970).

As Petitioner notes, the Arizona Supreme Court has since “discouraged” use of the phrase “instantaneous as successive thoughts in the mind” in jury instructions. *State v. Thompson*, 204 Ariz. 471, 479, 65 P.3d 420, 428 (2003). The *Thompson* court, resolving conflicting decisions of the Arizona Court of Appeals, held that the statutory definition of premeditation requires actual reflection and not the mere passage of time. *Id.* at 478, 65 P.3d at 427. However, contrary to Petitioner’s assertion, the Arizona Supreme Court did not find the phrase, “instantaneous as successive thoughts in the mind,” to be constitutionally impermissible. *Id.* at 479, 65 P.3d at 428.

Moreover, review of the instruction given at Petitioner’s trials does not support Petitioner’s claims of a constitutional violation. The instruction does not permit a finding of premeditation based solely on the passage of time. First, it explicitly distinguishes intent as existing before, and as something distinct from, reflection. Second, the exclusion of acts

⁹ In 1998, A.R.S. § 13-1101(1) was amended to include the clause, “Proof of actual reflection is not required.”

1 that are “the instant sudden quarrel or heat of passion” from the definition of premeditation
 2 clarifies that impulsive acts do not satisfy the premeditation requirement. Third, nothing in
 3 the prosecutor’s closing argument or the court’s instructions inaccurately suggested that the
 4 State needed only to prove the time element of reflection in lieu of actual reflection.

5 Moreover, review in the context of the entire trial reinforces the view that Petitioner’s
 6 due process rights were not violated. See *Estelle*, 502 U.S. at 72 (instructions “may not be
 7 considered in artificial isolation” but in the context of the instructions as a whole and the
 8 entire trial record). Here, separate from premeditated murder, Petitioner was also convicted
 9 of felony murder with respect to each of the three killings. (RT 3/24/94 at 2; RT 8/29/94 at
 10 69.) Premeditation is not a factor relevant to felony murder.¹⁰ As a result, any error
 11 regarding the premeditation instruction did not so infect the trials with error that it rendered
 12 his convictions a violation of due process. Thus, Petitioner is not entitled to habeas relief
 13 with respect to this claim.

14 **Claim 13 - The trial court violated Petitioner’s constitutional rights when**
 15 **it instructed the jury that it could consider the lesser included offenses of**
 16 **second-degree murder and reckless manslaughter only if it first**
 17 **unanimously found Petitioner not guilty of the greater offense of first-**

17 ¹⁰ In the Reynolds/Lacey trial, the court gave the following felony murder
 18 instruction:

19 The crime of first degree murder, felony murder, requires proof of the
 20 following two things:

21 First, that the defendant, acting either alone or with another person,
 22 committed or attempted to commit, in the case regarding Linda Reynolds,
 23 sexual assault, kidnapping or armed robbery, or in the case regarding David
 24 Lacey, armed robbery.

25 And second, in the course of and in furtherance of this crime or
 26 immediate flight from this crime, the defendant or another person caused the
 27 death of any person.

(RT 3/23/94 at 81-82.) The court gave essentially the same instruction in the Drury trial.
 (RT 8/29/94 at 58.)

1 **degree murder.**

2 Petitioner argues that in both the Reynolds/Lacey and Drury trials, the court's
3 instructions requiring the jury to first acquit him of first degree murder before it was
4 permitted to consider lesser-included offenses violated his constitutional rights. (Dkt. 59 at
5 121; RT 3/23/94 at 80; RT 8/29/94 at 57.) Petitioner concedes that at the time the instruction
6 was given it was approved by the Arizona Supreme Court pursuant to *State v. Wussler*, 139
7 Ariz. 428, 679 P.2d 74 (1984). In 1996, however, the Arizona Supreme Court adopted a
8 "reasonable efforts" instruction in lieu of *Wussler*'s "acquittal first" requirement. *See State*
9 *v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996).

10 On direct appeal, Petitioner asserted that the *Wussler* instruction given at both trials
11 violated his rights under the Sixth Amendment. The Arizona Supreme Court disagreed:

12 Defendant asks this court to reconsider the instruction approved in *State*
13 *v. Wussler* requiring juries to agree that a defendant was not guilty of the
14 greater charge before considering the lesser included charge. Recently, in
15 *LeBlanc*, this court overruled *Wussler*:

16 It now appears that requiring a jury to do no more than
17 use reasonable efforts to reach a verdict on the charged offense
18 is the better practice and more fully serves the interest of justice
19 and the parties. . . .

20 Our decision in *LeBlanc*, however, having been filed subsequent to the crimes
21 charged here, does not apply to this case:

22 Although today's decision directs trial courts to abandon
23 the *Wussler* rule in favor of a "reasonable efforts" instruction,
24 we remain persuaded that the acquittal-first requirement does
25 not violate the United States or Arizona Constitutions.
26 Moreover, the giving of a *Wussler*-type instruction does not rise
27 to the level of fundamental error.

Finally, because the change we make today is procedural
in nature, adopted for purposes of judicial administration, its
application is prospective only.

Courts commenced using a "reasonable efforts" instruction no later than
January 1, 1997.

Because this case was tried in 1994, we find that the trial court did not
err by giving an "acquittal-first" jury instruction regarding lesser-included
offenses consistent with *Wussler*.

1 *Lee I*, 189 Ariz. at 602, 944 P.2d at 1216 (citations omitted).¹¹

2 Habeas relief cannot be granted if the United States Supreme Court has not “broken
3 sufficient legal ground” on a constitutional principle advanced by a petitioner, even if lower
4 federal courts have decided the issue. *Williams v. Taylor*, 529 U.S. at 381; *Carey v.*
5 *Musladin*, 549 U.S. at 76. Petitioner has cited no case law to support his position that the
6 trial court’s “acquittal-first” instructions violated his federal constitutional rights, and this
7 Court has found none.¹² As a result, this argument cannot support a claim for federal habeas
8 relief.

9 **Claim 14 - The trial court violated Petitioner’s constitutional rights when**
10 **it considered victim impact evidence in sentencing.**

11 During sentencing following the Reynolds/Lacey trial, family members of the victims
12 were allowed to offer their opinions about the appropriate sentences Petitioner should
13 receive. Petitioner asserts this type of testimony was improper and violated his federal
14 constitutional rights, including his right to a fair trial. (Dkt. 59 at 123-24.) The only specific
15 instance of impropriety cited by Petitioner concerns testimony from Linda Reynolds’s
16 mother, Eleanor Barton, who stated he “deserves the death penalty” and urged the judge to
17 “give him the death penalty.” (RT 6/7/94 at 90, 91.)

18 In its special verdict, the sentencing court explained its basis for sentencing Petitioner

19 ¹¹ The Arizona Supreme Court summarily rejected this claim in the Drury appeal,
20 citing its determination in *Lee I*. See *Lee II*, 189 Ariz. at 613, 944 P.2d at 1227.

21 ¹² In fact, as noted by the Arizona Supreme Court, in *United States v. Tsanas*, 572
22 F.2d 340, 346 (2nd Cir. 1978), the Second Circuit Court of Appeals held that a *Wussler*-type
23 instruction was not wrong as a matter of law. In addition, in *United States v. Jackson*, 726
24 F.2d 1466, 1469 (9th Cir. 1984), the Ninth Circuit cited *Tsanas* and held that, it was lawful
25 to give a *Wussler* instruction if the defendant stated no choice, but that it would be error to
26 reject a different instruction if timely offered. See *id.* In this case, Petitioner’s counsel
27 specifically agreed to a *Wussler* instruction while settling instructions. (See RT 3/23/94 at
5.) Subsequently, after the jury was instructed and in deliberation, counsel voiced objections
to the instruction but the court overruled him. (See *id.* at 96-97.) This objection was not
timely and, thus, the giving of the *Wussler* instruction was not contrary to the holding in
Jackson.

1 to death for both the Reynolds and Lacey murders. Specifically, the court determined that
2 the evidence established a finding of several aggravating factors common to both murders,
3 including: (1) having been convicted of another offense for which life imprisonment or death
4 is possible; (2) having been previously convicted of a felony involving the use or threat of
5 violence to another person; and (3) committing the offense as consideration for the receipt
6 or in expectation of the receipt of anything of value. (RT 6/23/94 at 20-23.) In addition, the
7 court found that Linda Reynolds' murder was committed in an especially heinous, cruel, or
8 depraved manner. (*Id.* at 23-26.) Regarding David Lacey's murder, the Court determined
9 that, although the murder could not be deemed cruel, it was depraved.¹³ (*Id.* at 26.)

10 The court weighed the aggravating circumstances against the evidence of mitigation.
11 The court determined that the statutory factor concerning Petitioner's age (19 at the time of
12 the crime) was satisfied. (*Id.* at 28.) The Court then considered non-statutory mitigation,
13 including his lack of a significant prior criminal history, his deprived childhood, his post-
14 arrest conduct, including his cooperation with law enforcement, and "various other factors
15 and circumstances raised by defendant in the memorandum and via testimony and exhibits
16 in the aggravation mitigation hearing." (*Id.* at 30.) The court then weighed all of the
17 mitigating evidence and determined it was "not sufficiently substantial to outweigh the
18 aggravating circumstances proved by the state." (*Id.* at 32-33.)

19 On appeal, Petitioner raised a claim alleging that the sentencing court improperly
20 considered victim impact evidence. The Arizona Supreme Court rejected this argument in
21 cursory fashion citing a state case. *See Lee I*, 189 Ariz. at 607, 944 P.2d at 1221. The court
22 cited no federal case law. This court will nevertheless uphold that determination unless it is
23 contrary to controlling Supreme Court law. *See* 28 U.S.C. § 2254(d).

24 In *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Supreme Court held that the
25 introduction of a victim impact statement during the sentencing phase of a capital case

26
27 ¹³ This finding was reversed by the Arizona Supreme Court on appeal. *Lee I*, 189
Ariz. at 606, 944 P.2d at 1220.

1 violated the Eighth Amendment. In *Payne v. Tennessee*, 501 U.S. 808, 827, 830 (1991), the
2 Supreme Court revisited *Booth* and overruled it in part, holding that the Eighth Amendment
3 does not erect a per se barrier to admission of victim impact evidence but left intact *Booth*'s
4 prohibition on the admissibility of characterizations and opinions from the victim's family
5 about the crime, the defendant, or the appropriate sentence to be imposed. *Id.* at 830 n.2.

6 Under Arizona law at the time of trial, the trial judge, rather than a jury, determined
7 the penalty in a capital case. A.R.S. § 13-703. As the Arizona Supreme Court explained,
8 judges are presumed to know and apply the law. *State v. Gulbrandson*, 184 Ariz. 46, 66, 906
9 P.2d 579, 599 (1995); see *Jeffers v. Lewis*, 38 F.3d 411, 415 (9th Cir. 1994). Therefore, "in
10 the absence of any evidence to the contrary, [the Court] must assume that the trial judge
11 properly applied the law and considered only the evidence he knew to be admissible."
12 *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997).

13 Other than the statement of Eleanor Barton at the sentencing hearing, Petitioner
14 presents no evidence indicating the sentencing court was swayed by anything other than the
15 appropriate criteria required in passing a death sentence. In fact, a review of the special
16 verdict rendered at sentencing supports the conclusion that the state court's sentence of death
17 for the Reynolds/Lacey murders was based solely on its findings that certain statutory
18 aggravating factors had been established based on the evidence presented and that the
19 mitigation evidence offered by Petitioner did not warrant a lesser sentence. (See RT 6/23/94
20 at 20-33.) Nothing in the court's rationale indicated it was swayed at sentencing by Ms.
21 Barton's statements urging that Petitioner be put to death. In the absence of any clear
22 indication that the court improperly considered those statements, this Court assumes the
23 sentencing court followed the Arizona guidelines in passing sentence. See *Gretzler*, 112 F.3d
24 at 1009.

25 Moreover, the Arizona Supreme Court on appeal reweighed the aggravating and
26 mitigating evidence and independently determined that the death sentences given for both
27 the Reynolds and Lacey murders were appropriate. See *Lee I*, 189 Ariz. at 603-07, 944 P.2d

1 at 1217-21. In so doing, that court likewise predicated its determination solely on its
 2 conclusion that certain aggravating circumstances had been established and that the
 3 mitigation presented was not “sufficiently substantial, taken either separately or
 4 cumulatively, to call for leniency.” *Id.* at 607; 944 P.2d at 1221.

5 Because there is no evidence that the state courts misapplied the law and improperly
 6 considered the wishes of family members when it imposed the death sentences, Petitioner is
 7 not entitled to habeas relief with respect to this claim.

8 **Claim 15 - The statutory provisions governing Arizona’s capital**
 9 **punishment scheme are unconstitutional because they merely require the**
 10 **State to prove the defendant’s eligibility for the death penalty, rather than**
 11 **the appropriateness of the death penalty in the defendant’s particular**
 12 **case.**

13 Petitioner argues that the death penalty scheme in Arizona is unconstitutional.
 14 Specifically, he contends a state sentencing court must do more than simply determine that
 15 a defendant is death eligible; rather, it must determine that such a sentence is appropriate.
 16 He asserts the sentencing court did not do this and that this violates his federal constitutional
 17 rights. (Dkt. 59 at 124.) Petitioner advanced this claim only with respect to proceedings in
 18 the Reynolds/Lacey murders. The Arizona Supreme Court summarily rejected this claim on
 19 direct appeal, citing *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled in part on other*
 20 *grounds by Ring v. Arizona*, 536 U.S. 584 (2002). *Lee I*, 189 Ariz. at 607, 944 P.2d at 1221.
 21 Petitioner acknowledges that *Walton* upheld Arizona’s death penalty statute and procedures
 22 but argues it was wrongly decided and should be overruled. It is not within the province of
 23 this Court to do so.

24 In *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court held
 25 the death penalty statutes of Georgia and Texas to be unconstitutional because they allowed
 26 arbitrary and unguided imposition of capital punishment. *Furman* caused many states to
 27 enact new capital statutes. A number of these statutes survived the Court’s further scrutiny
 in *Gregg v. Georgia*, 428 U.S. 153 (1976). Observing that the death penalty is “unique in
 its severity and irrevocability,” *id.* at 187, the *Gregg* Court concluded that a death sentence

1 may not be imposed unless the sentencing authority focuses attention “on the particularized
2 nature of the crime and the particularized characteristics of the individual defendant.” *Id.* at
3 206. In imposing the death sentence, the sentencer must find the presence of at least one
4 aggravating factor and then weigh that factor against the evidence of mitigating factors. *Id.*
5 The Court refined these general requirements in *Zant v. Stephens*, 462 U.S. 862, 877 (1983),
6 holding that a constitutionally valid capital sentencing scheme must “genuinely narrow the
7 class of persons eligible for the death penalty and must reasonably justify the imposition of
8 a more severe sentence on the defendant compared to others found guilty of murder.” A
9 death penalty scheme must provide an “objective, evenhanded and substantively rational
10 way” for determining whether a defendant is eligible for the death penalty. *Zant*, 462 U.S.
11 at 879.

12 In addition to the requirements of determining eligibility for the death penalty, the
13 Court has imposed a separate requirement for the selection decision, “where the sentencer
14 determines whether a defendant eligible for the death penalty should in fact receive that
15 sentence.” *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). “What is important at the
16 selection stage is an *individualized* determination on the basis of the character of the
17 individual and the circumstances of the crime.” *Zant*, 462 U.S. at 879. Accordingly, a
18 statute that “provides for categorical narrowing at the definition stage, and for individualized
19 determination and appellate review at the selection stage” will ordinarily satisfy Eighth
20 Amendment and Due Process concerns, *id.*, so long as the state ensures “that the process is
21 neutral and principled so as to guard against bias or caprice.” *Tuilaepa*, 512 U.S. at 973.

22 Defining specific “aggravating circumstances” is the accepted “means of genuinely
23 narrowing the class of death-eligible persons and thereby channeling the [sentencing
24 authority’s] discretion.” *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Each defined
25 circumstance must meet two requirements. First, “the [aggravating] circumstance may not
26 apply to every defendant convicted of a murder; it must apply only to a subclass of
27 defendants convicted of a murder.” *Tuilaepa*, 512 U.S. at 972; see *Arave v. Creech*, 507 U.S.

1 463, 474 (1993). Second, “the aggravating circumstance may not be unconstitutionally
2 vague.” *Tuilaepa*, 512 U.S. at 972; see *Arave*, 507 U.S. at 473; *Godfrey v. Georgia*, 446 U.S.
3 420, 428 (1980).

4 Arizona’s death penalty scheme allows only certain, statutorily defined, aggravating
5 circumstances to be considered in determining eligibility for the death penalty. A.R.S. § 13-
6 703(F). “The presence of aggravating circumstances serves the purpose of limiting the class
7 of death-eligible defendants, and the Eighth Amendment does not require that these
8 aggravating circumstances be further refined or weighed by [the sentencer].” *Blystone v.*
9 *Pennsylvania*, 494 U.S. 299, 306-07 (1990). Not only does Arizona’s sentencing scheme
10 generally narrow the class of death-eligible persons, the aggravating factors delineated in
11 § 13-703(F) do so specifically. Rulings of the United States Supreme Court and the Ninth
12 Circuit have upheld Arizona’s death penalty statute against challenges that particular
13 aggravating factors, including § 13-703 (F)(5) (pecuniary gain) and (F)(6) (heinous, cruel and
14 depraved), do not adequately narrow the sentencer’s discretion. See *Lewis v. Jeffers*, 497
15 U.S. 764, 774-77 (1990); *Walton*, 497 U.S. at 649-56; *Woratzek v. Stewart*, 97 F.3d 329,
16 335 (9th Cir. 1996). The Ninth Circuit has explicitly rejected the argument that Arizona’s
17 death penalty statute is unconstitutional because “it does not properly narrow the class of
18 death penalty recipients.” *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998).

19 Regarding the Reynolds/Lacey convictions, the court found multiple aggravating
20 circumstances to be proven and imposed the death sentence with respect to each murder.
21 (See RT 6/23/94 at 20-27.) In addition, the Arizona Supreme Court independently reviewed
22 these findings, and in one instance (whether Lacey’s murder was especially depraved
23 pursuant to A.R.S. § 13-703(F)(6)) reversed the finding of an aggravating factor but
24 otherwise affirmed the sentencing court. See *Lee I*, 189 Ariz. at 603-07, 944 P.2d at 1217-21.
25 Petitioner does not challenge the correctness of these findings; he simply asserts that
26 Arizona’s statutory scheme is unconstitutional. However, he acknowledges that the U.S.
27 Supreme Court determined that the Arizona statutory scheme was constitutional in *Walton*.

1 In particular, the *Walton* Court held that, because the Arizona statutory scheme does not
2 restrict the type of mitigation which may be offered by a defendant, it does not create an
3 unconstitutional presumption that death is the proper sentence. *See* 497 U.S. at 651-52.

4 In addition, Petitioner's assertion that the trial court passed the sentences of death
5 without specifically determining, under the law and the facts that the death sentences were
6 appropriate, is factually erroneous. The sentencing court passed sentence after recounting
7 that numerous statutory aggravating factors had been established by the evidence. The court
8 then recounted in detail the statutory and nonstatutory mitigation presented by Petitioner,
9 weighed that against the proven aggravating factors, and determined that a lesser sentence
10 was not appropriate. (*See* RT 6/23/94 at 20-34.) Only after making these findings did the
11 court sentence Petitioner to death. As noted, the Arizona Supreme Court likewise conducted
12 an independent review of this evidence and upheld the death sentences. *See Lee I*, 189 Ariz.
13 at 603-07, 944 P.2d at 1217-21. For all of these reasons, the Arizona Supreme Court's
14 rejection of this claim was neither contrary to, nor an unreasonable application of, clearly
15 established federal law.

16 **Claim 16 - The death penalty statute under which Petitioner was**
17 **sentenced to death was unconstitutional because: (1) it allowed the**
18 **imposition of a death sentence by the trial judge, rather than requiring a**
19 **jury to conclude that the state had established by proof beyond a**
20 **reasonable doubt all facts essential to the imposition of the death penalty;**
21 **and (2) it failed to require that Petitioner receive notice by indictment of**
22 **all aggravating factors and all facts necessary to make him eligible for the**
23 **death penalty.**

24 In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that aggravating
25 factors that render a defendant eligible for the death penalty must be found by a jury, not a
26 judge, as previously approved in *Walton v. Arizona*. However, in *Schriro v. Summerlin*, 542
27 U.S. 348 (2004), the Court held that *Ring* does not apply retroactively to cases, such as
Petitioner's, that were already final on direct review at the time *Ring* was decided.
Therefore, as a matter of law, Petitioner is not entitled to relief on his claim that the lack of
jury findings as to aggravating factors violated his constitutional rights.

Petitioner also contends his constitutional rights were violated because the State failed

1 to provide notice in the indictment of all aggravating factors and facts necessary to make him
 2 eligible for the death penalty. Although the Due Process Clause guarantees defendants a fair
 3 trial, it does not require the states to observe the Fifth Amendment's provision for
 4 presentment or indictment by a grand jury. *Hurtado v. California*, 110 U.S. 516, 538 (1884);
 5 *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). Moreover, the Arizona Supreme Court
 6 has expressly rejected the argument that *Ring* requires that aggravating factors be alleged in
 7 an indictment and supported by probable cause. *McKaney v. Foreman*, 209 Ariz. 268, 270,
 8 100 P.3d 18, 20 (2004). Petitioner has presented no authority to the contrary. This claim is
 9 without merit.

10 **Claim 17 - Arizona's statutory scheme for the imposition of the death**
 11 **penalty is unconstitutional because the prosecutor's discretion to seek the**
 12 **death penalty is limitless, standardless and arbitrary.**

13 Citing *Furman*, Petitioner asserts:

14 The Eighth Amendment requires that the sentencer be able to meaningfully
 15 distinguish between those few cases where the death penalty is imposed and
 16 the many in which it is not. In Arizona, however, there is simply no way to
 17 distinguish capital cases from non-capital cases. This is because, in each case,
 18 the prosecutor makes a standardless and arbitrary decision as to whether to
 19 seek the death penalty.

20 (Dkt. 59 at 126-27.) Petitioner presented this claim on direct appeal. The Arizona Supreme
 21 Court denied all claims challenging the constitutionality of Arizona capital sentencing
 22 scheme by citing *Walton*. *Lee I*, 189 Ariz. at 607, 944 P.2d at 1221.

23 Petitioner's citation to *Furman* is unpersuasive. As already recounted in addressing
 24 Claim 15, *Furman* and its progeny stand for the proposition that the statutory scheme for
 25 imposing a death sentence may not be unguided and arbitrary. See *Gregg*, 428 U.S. at 206;
 26 *Zant*, 462 U.S. at 477, 479. As long as the system provides safeguards to ensure this, it
 27 passes constitutional muster. As discussed in addressing Claim 15, the Arizona statutory
 scheme meets this test. Petitioner cites no authority to support his contention that a statutory
 scheme is unconstitutional simply because it does not have specified curbs on the discretion
 of a prosecutor in deciding whether to seek a death sentence, particularly in light of the
 requirements placed upon the sentencer in determining whether to impose a death sentence.

1 As a result, this claim cannot form a basis for federal habeas relief. *See Williams*, 529 U.S.
 2 at 381; *Musladin*, 549 U.S. at 76. The decision of the Arizona Supreme Court denying this
 3 claim was neither contrary to, or an unreasonable determination of controlling Supreme
 4 Court law.

5 **Claim 18 - The pecuniary gain aggravating factor is unconstitutional**
 6 **because it fails to narrow the class of defendants eligible for the death**
 7 **penalty.**

8 Petitioner notes he was unanimously convicted of felony murder for each of the three
 9 murders and that the underlying felony common to each murder was armed robbery.¹⁴ He
 10 contends that armed robbery necessarily entails a motive of pecuniary gain and that “using
 11 pecuniary gain as an aggravating factor in a case in which the underlying felony is armed
 12 robbery merely replicates an element of the underlying offense.” (Dkt. 59 at 127.) As a
 13 result, he argues that the pecuniary gain aggravating factor “fails to narrow the class because,
 14 by definition, *all* felony-murder defendants whose crimes are predicated on a theft-related
 15 felony automatically become death eligible.” (*Id.* at 127-28.)

16 Petitioner raised this claim in his appeal of the Drury conviction in *Lee II*.¹⁵ (Dkt. 68,
 17 Ex. D at 54-55.) In rejecting it, the Arizona Supreme Court stated:

18 The legislature may establish a sentencing scheme in which an element of a
 19 crime could also be used for enhancement and aggravation purposes. Further,
 20 this court has stated that pecuniary gain is not synonymous with robbery. In
 21 *Carriger*, this court explained, “To prove robbery, the state must show a *taking*
 22 of property from the victim; to prove pecuniary gain, the state must show the
 23 actor’s *motivation* was the expectation of pecuniary gain.” This court has

21 ¹⁴ Petitioner was also convicted of the predicate felonies of kidnapping, sexual
 22 assault, and theft with respect to Linda Reynolds. (RT 3/24/94 at 2-4.)

23 ¹⁵ Petitioner did not raise this claim in his appeal from the Reynolds/Lacey
 24 murders but did include it in his consolidated PCR petition. (Dkt. 68, Ex. F at 9.) The trial
 25 court denied the claim, finding it precluded because it had been raised on direct appeal. (Dkt.
 26 68, Ex. G at 3.) Both parties acknowledge that the trial court mistakenly determined that this
 27 claim was raised and denied on appeal in *Lee I* when in fact it had not been. Irrespective of
 any question of procedural default in *Lee I*, the claim was exhausted in *Lee II* and will be
 addressed on the merits.

1 rejected the argument that finding pecuniary gain as an aggravating
2 circumstance is unconstitutional where it repeats an element of first degree
felony murder based on an underlying armed robbery.

3 *Lee II*, 189 Ariz. at 620, 944 P.2d at 1234 (citations omitted).

4 As set forth in the Court's discussion of Claim 15, the Ninth Circuit has specifically
5 upheld the pecuniary gain aggravating factor (A.R.S. § 13-703(F)(5)) against constitutional
6 challenges that it does not adequately narrow the class of defendants eligible for the death
7 penalty. *See Woratzeck*, 97 F.3d at 334-35 (applying the principles enunciated in *Lowenfield*,
8 481 U.S. at 244, and specifically rejecting the notion that the (F)(5) pecuniary gain
9 aggravating factor is automatically applicable to someone convicted of robbery felony
10 murder). For that reason, the determination of the Arizona Supreme Court on this issue was
11 not contrary to, or an unreasonable application of, controlling Supreme Court law.

12 **Claim 19 - Arizona's statutory scheme for imposing the death penalty is**
13 **unconstitutional because it does not sufficiently channel the sentencer's**
discretion.

14 Petitioner argues that the Arizona death penalty scheme doesn't sufficiently "channel"
15 the sentencer's discretion. He further argues:

16 Arizona's aggravating circumstances are also exceptionally broad. Any
17 murder that has no apparent motive, or that is motivated by a desire to
eliminate a witness, or that is motivated by hatred or revenge (and is therefore
18 "relished") is a death penalty crime. Any murder in which the killer uses
excessive force, or in which he uses sufficient force, is a death penalty crime.
19 Any murder in which the victim experiences fear or uncertainty as to his fate,
or in which he is conscious and able to feel pain during the killing, is "cruel"
and therefore a death penalty crime.

20 (Dkt. 59 at 130-31.) Respondents contend this claim is procedurally defaulted because it was
21 not raised on appeal but only during PCR proceedings. The Court disagrees. Review of the
22 appellate brief filed in *Lee I*, reveals that Petitioner advanced a claim challenging the
23 constitutionality of Arizona's death penalty statutory scheme predicated on the notion that
24 "it lacks ascertainable guidelines for the sentencer to follow in weighing aggravating and
25 mitigating factors in violation of the U.S. Const. amends. V, XIV." (Dkt. 68, Ex. C at 62.)

26 The Arizona Supreme Court summarily denied the claim. *Lee I*, 189 Ariz. at 607, 944 P.2d
27 at 1221.

1 This claim is another variation of a series of claims raised by Petitioner challenging
 2 the constitutionality of Arizona's statutory death sentencing scheme. In fact, this claim
 3 presents essentially the same question raised in Claim 15. As stated in addressing Claim 15,
 4 Arizona's death penalty scheme allows only certain, statutorily-defined aggravating
 5 circumstances to be considered in determining eligibility for the death penalty. This scheme
 6 has been found constitutionally sufficient. See *Lewis*, 497 U.S. at 774-77; *Walton*, 497 U.S.
 7 at 649-56; *Woratzeck*, 97 F.3d at 334-35; *Smith*, 140 F.3d at 1272. Again, Petitioner does
 8 not challenge any of the particular findings made by the sentencing court. He simply argues
 9 that the Arizona statutory scheme is unconstitutional. This claim is without merit. The
 10 determination of the Arizona Supreme Court rejecting this claim was not contrary to, or an
 11 unreasonable application of, controlling Supreme Court law.

12 **Claim 20 - Petitioner was unconstitutionally denied the right to voir dire**
 13 **the trial judge.**

14 Petitioner contends his constitutional rights were violated when he was denied the
 15 opportunity to voir dire the trial judge "regarding his attitudes about capital punishment to
 16 assure that a capital defendant will not be placed in the constitutionally untenable position
 17 of being before a sentencer who believes that the death penalty is the most appropriate
 18 punishment for first degree murder." (Dkt. 59 at 134.) Petitioner raised this claim in one of
 19 his appeals, and it was summarily denied.¹⁶ *Lee I*, 189 Ariz. at 607, 944 P.2d at 1221.

20 The federal constitution requires only that a defendant receive a fair trial before a fair
 21 and impartial judge with no bias or interest in the outcome. *Bracey v. Gramley*, 520 U.S.
 22 899, 904-05 (1997). Petitioner makes no allegation of bias or interest on behalf of the judge
 23 who presided at his trial or sentencing. Petitioner cites no authority, let alone Supreme
 24

25 ¹⁶ Respondents concede that this claim was raised on appeal in *Lee I*, but argue
 26 that it was not raised in *Lee II*. As a result, they contend the claim was not exhausted and is
 27 procedurally defaulted with respect to Drury. In light of the fact this claim was raised in *Lee I* as part of a series of challenges to the constitutionality of the Arizona death penalty statutory scheme, the Court will address it on the merits.

1 Court authority, to support his assertion that the federal constitution affords him the right to
 2 voir dire the sentencing judge to determine his views on the death penalty. As a result, this
 3 claim cannot form the basis for federal habeas relief. *See Williams*, 529 U.S. at 381;
 4 *Musladin*, 549 U.S. at 76. The decision of the Arizona Supreme Court denying this claim
 5 was neither contrary to nor an unreasonable application of controlling Supreme Court law.

6 **Claim 21 - Petitioner's death sentences are unconstitutional because he**
 7 **was denied the procedural safeguard of a proportionality review of his**
 8 **sentences.**

9 Respondents contend this claim was not properly exhausted in state court and is
 10 procedurally defaulted. (Dkt. 59 at 78.) In fact, Petitioner did present this claim in state
 11 court in his PCR petition, but the claim was found to be precluded by the court pursuant to
 12 Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure because it could have been
 13 presented on direct appeal but was not. (Dkt. 68, Ex. G at 4-5.) Irrespective of any issue of
 14 exhaustion or procedural default, the Court concludes this claim is without merit and will
 15 deny relief on that basis. *See* 28 U.S.C. § 2254(b)(2). The Arizona Supreme Court
 16 abandoned proportionality review prior to Petitioner's appeal, *State v. Salazar*, 173 Ariz.
 17 399, 844 P.2d 566 (1992), and the U. S. Supreme Court has held that there is no federal
 18 constitutional right to proportionality review of a death sentence, *McCleskey v. Kemp*, 481
 19 U.S. 279, 306 (1987) (citing *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984)). Thus, any failure
 20 by the Arizona Supreme Court to conduct such a review cannot form a basis for federal
 21 habeas relief. *Williams*, 529 U.S. at 381; *Musladin*, 549 U.S. at 76.

22 **CERTIFICATE OF APPEALABILITY**

23 In the event Petitioner appeals from this Court's judgment, and in the interests of
 24 conserving scarce resources that otherwise might be consumed drafting an application for a
 25 certificate of appealability to this Court, the Court on its own initiative has evaluated the
 26 claims within the Amended Petition for suitability for the issuance of a certificate of
 27 appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d at 864-65.

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal

1 is taken by a petitioner, the district judge who rendered the judgment “shall” either issue a
 2 certificate of appealability (COA) or state the reasons why such a certificate should not issue.
 3 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner “has made
 4 a substantial showing of the denial of a constitutional right.” With respect to claims rejected
 5 on the merits, a petitioner “must demonstrate that reasonable jurists would find the district
 6 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529
 7 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983)). For
 8 procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the
 9 petition states a valid claim of the denial of a constitutional right and (2) whether the court’s
 10 procedural ruling was correct. *Id.*

11 The Court finds that reasonable jurists could debate its resolution of Claims 4 and 8.
 12 The Court therefore grants a certificate of appealability as to these claims. For the reasons
 13 stated in this order, as well as the Court’s orders of February 4, 2005 (Dkt. 94), March 24,
 14 2006 (Dkt. 106), and November 28, 2006 (Dkt. 125), the Court declines to issue a certificate
 15 of appealability for Petitioner’s remaining claims and procedural issues.

16 CONCLUSION

17 For the reasons set forth above, Petitioner is not entitled to habeas relief. The Court
 18 further finds that evidentiary development is neither warranted nor required.

19 Accordingly,

20 **IT IS HEREBY ORDERED** that Petitioner’s Amended Petition for Writ of Habeas
 21 Corpus (Dkt. 59) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

22 **IT IS FURTHER ORDERED** that the stay of execution entered on November 9,
 23 2001 (Dkt. 4) is **VACATED**.

24 **IT IS FURTHER ORDERED** granting a Certificate of Appealability as to the
 25 following issues:

26 Whether Petitioner’s constitutional rights were violated when the trial court
 27 failed to remove for a cause a juror who did not understand English (Claim 4);
 and

1 Whether Petitioner was denied due process of law when the trial judge failed
2 to suppress inculpatory statements made to police (Claim 8).

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

6 DATED this 6th day of January, 2009.

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Earl H. Carroll
10 United States District Judge
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