

No.

In the Supreme Court of the United States

Darrel Eston Lee, Petitioner,

v.

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

Appendix A: Opinion, <i>Lee v. Thornell</i> , No. 10-99022 (9th Cir. Jul 24, 2024), ECF No. 120-1.	A-1
Appendix B: Order, <i>Lee v. Thornell</i> , No. 10-99022 (9th Cir. Nov 20, 2024), ECF No. 127.	B-1

Appendix A

Court of Appeals Ninth Circuit Opinion, July 24, 2024

State of Arizona v. Darrell Eston Lee

FOR PUBLICATION

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

DARREL ESTON LEE,

Petitioner-Appellant,

v.

RYAN THORNELL,

Respondent-Appellee.

No. 10-99022

D.C. No. 2:04-cv-
00039-JJT

OPINION

Appeal from the United States District Court
for the District of Arizona
John J. Tuchi, District Judge, Presiding

Argued and Submitted September 19, 2023
San Francisco, California

Filed July 24, 2024

Before: William A. Fletcher, Eric D. Miller, and Lawrence
VanDyke, Circuit Judges.

Opinion by Judge Miller

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Darrell Lee's federal habeas petition in which Lee--an Arizona prisoner sentenced to death following his conviction for murder and other offenses--contended that his trial counsel was ineffective in allowing him to testify falsely and in failing to present mitigating evidence.

In support of his claims, Lee sought to introduce evidence that he did not present in state court.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), if an applicant for federal habeas relief "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" can show (A) that the claim relies either on a new rule of constitutional law made retroactive by the Supreme Court or on "a factual predicate that could not have been previously discovered through the exercise of due diligence" and (B) that "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." 28 U.S.C. § 2254(e). A habeas petitioner has "failed to develop the factual basis of a claim," within the meaning of section 2254(e), only if "there is lack of diligence, or some

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

greater fault, attributable to the prisoner or the prisoner's counsel."

In *Shinn v. Ramirez*, 596 U.S. 366 (2022), the Supreme Court clarified that although *Martinez v. Ryan*, 566 U.S. 1 (2012), allows postconviction counsel's ineffectiveness to excuse the procedural default of certain claims of ineffective assistance of trial counsel, it does not permit a habeas petitioner to avoid the requirements of section 2254(e) when presenting new evidence on the merits of such claims; if section 2254(e) applies and the prisoner cannot satisfy its stringent requirements, a federal court may not hold an evidentiary hearing-or otherwise consider new evidence-to assess cause and prejudice under *Martinez*.

The panel held that the state court reasonably rejected Lee's claim that his trial counsel, Stephen Politi, was ineffective because he allowed Lee to testify to an alibi that Politi knew to be false. The factual premise of that argument is flawed because the record does not show that Politi knew the alibi to be false. At a minimum, the state court's rejection of Lee's assertion that he "confessed to the crime of murder to Mr. Politi" was not an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. In any event, even if Lee had told Politi that he was at the crime scene, it would have been reasonable for Politi to discount that statement given Lee's conflicting stories. Under section 2254(e)(2), the district court properly refused to consider a transcript of an interview of Lee's father that Lee first presented in federal court. The transcript is not a factual predicate that could not have been previously discovered through the exercise of due diligence, and does not establish by clear and convincing evidence that but for any constitutional error, no reasonable factfinder would have found Lee guilty. Even if Lee could show Politi's conduct

fell below an objective standard of reasonableness, he cannot show that he was prejudiced by it.

Regarding Lee's claim that Politi was ineffective in failing to investigate and present mitigating evidence to the sentencing court, the panel addressed the threshold issue whether to consider additional evidence that Lee presented for the first time in federal court. Following the Supreme Court's decision in *Ramirez*, Lee argued that section 2254(e) does not bar an evidentiary hearing in federal court because postconviction counsel was diligent and did not fail to develop the evidentiary record in state court. Assuming without deciding that Lee did not forfeit this argument, or alternatively, that this court may excuse his forfeiture, the panel concluded that the argument fails on the merits. Because Lee failed to develop the factual basis of his claim in state court proceedings, he would be entitled to an evidentiary hearing only if he qualified for section 2254(e)(2)'s exceptions. The panel concluded that Lee does not. Lee's claim does not rely on "a new rule of constitutional law." Nor does it rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." To the contrary, the evidence that Lee proffered to the district court is evidence that could have been discovered by his state postconviction counsel or his state investigator.

Without an evidentiary hearing, the panel's review was limited to the record presented to the state court. Based on that record presented to the state court, the panel held that the state court's rejection of Lee's claim that Politi was ineffective in failing to investigate and present mitigating evidence to the sentencing court was not objectively unreasonable. The panel's review of the record found no "powerful" mitigating evidence that was unexplored. The

panel also did not find that Politi was deficient in his presentation of mitigating or evidence, and concluded that Lee could not show prejudice in any event.

COUNSEL

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OPINION

MILLER, Circuit Judge:

Darrel Eston Lee, an Arizona prisoner under sentence of death, appeals the district court's denial of his petition for a writ of habeas corpus. He contends that his trial counsel was ineffective in allowing him to testify falsely and in failing to investigate and present mitigating evidence. In support of his

claims, Lee sought to introduce evidence that he did not present in state court. But with limited exceptions, a federal court may not hold an evidentiary hearing when a habeas petitioner has failed to develop the factual basis for his claims in state court. The district court therefore correctly declined to consider Lee's new evidence and, based on the state-court record, correctly concluded that the state court's rejection of his claims was reasonable. We affirm.

I

On December 5, 1991, Lee and a companion, Karen Thompson, approached John Calvin Anderson in Phoenix and asked him for a ride. Once in the car, Lee pretended to be armed and forced Anderson to drive to an ATM, where Lee and Thompson took Anderson's wallet and used his card to get money for drugs. They then drove toward Tucson. As Anderson pleaded for his life, Lee and Thompson bound his hands and feet and left him in a ditch on the side of the road. Thompson had second thoughts about leaving Anderson, so she and Lee returned and placed him in the trunk of the car. They drove back to Phoenix and then toward California, all the while with Anderson in the trunk.

Lee and Thompson ultimately decided to kill Anderson. Lee decided that they should asphyxiate Anderson with car exhaust by placing one end of a hose in the tailpipe and the other in the trunk. But the attempt failed when Anderson pushed open the trunk and let out the fumes. As Lee and Thompson argued about what to do next, Anderson escaped from the trunk and began to flee. Lee chased Anderson and wrestled with him, and Thompson brought Lee a belt with which to strangle Anderson. When the belt broke, Lee told Thompson to get a rock. As Lee continued to wrestle with Anderson, Thompson struck Anderson on the head with the

rock, killing him. Lee and Thompson put Anderson's body in the trunk and drove to Tucson to buy a shovel, which they used to bury Anderson in a shallow grave outside the city.

An Arizona grand jury indicted Lee and Thompson on one count each of first-degree murder, kidnapping, theft, armed robbery, and credit-card theft. Thompson pleaded guilty to first-degree murder and armed robbery and agreed to testify against Lee. The State offered Lee a plea agreement under which the State would not pursue the death penalty. Lee first accepted the offer, then rejected it and proceeded to trial. At trial, Thompson testified that Lee was with her and assisted with Anderson's kidnapping and murder. Lee, however, testified that he was not present at the scene of the murder and was not with Thompson at the time.

The jury found Lee guilty on all counts. At the time of Lee's trial, Arizona law required the trial judge to make findings relevant to capital punishment and to determine the appropriate sentence. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment requires that a jury determine the existence of facts making a defendant eligible for capital punishment); *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that *Ring* does not apply retroactively to cases already final on direct review). The judge therefore held an aggravation-mitigation hearing.

Before the hearing, the defense requested that Dr. Leonardo García-Buñuel, a forensic psychiatrist, examine Lee. Dr. García-Buñuel did so and prepared a written report. At the hearing, the prosecution presented no witnesses and relied on the evidence presented at trial. The defense also presented no witnesses, but it introduced Dr. García-Buñuel's report, copies of Lee's high-school records, and a letter from Lee's mother in which she asked that his life be

spared. The judge sentenced Lee to death. On direct appeal, the Arizona Supreme Court affirmed. *State v. Lee*, 917 P.2d 692, 703 (Ariz. 1996).

Lee pursued state postconviction relief. As relevant here, he argued that his trial counsel, Stephen Politi, had provided ineffective assistance in two different ways: first, by allowing him to present an alibi defense, and, second, by failing to investigate and present mitigating evidence at sentencing. The state postconviction relief court held a four-day evidentiary hearing. Lee presented testimony from several witnesses, including Politi, Lee's appellate counsel, the prosecutor, the prosecution's lead detective, Lee's mother, a mitigation specialist, an expert on ineffective assistance of counsel, and two psychiatric experts.

Lee asserted that Politi had acted unethically—and therefore performed deficiently—by presenting an alibi that Politi knew to be false. Although Lee did not testify at the postconviction relief hearing, he submitted an affidavit in which he alleged that “[d]uring one of our first in-depth meetings, early on in the case, I told Mr. Politi about my involvement in this case.” Lee claimed that he was prejudiced by Politi's conduct because the false alibi caused the sentencing judge to discount his remorse as a mitigating factor.

For his part, Politi testified that when the prosecution offered a plea agreement, he had “advised [Lee] very strongly to take the deal” because it “was the best that I could do for him.” To persuade Lee to accept the offer, Politi said, he had enlisted the support of his supervisor, Michael Burke, as well as Lee's parents. Lee accepted the deal but then changed his mind, opting to go to trial and pursue an alibi defense. Politi and Burke both testified that Lee hoped such

a defense would end with a full acquittal. As Politi explained, “the only acceptable result as far as [Lee] was concerned was that . . . he would go to trial, be found not guilty on all counts, and then walk away.” Politi also suggested that Lee had not confessed to him.

The state postconviction court denied relief. As to the claim based on the alibi, the court stated that it could not “conclude that Mr. Lee confessed the crime of murder to Mr. Politi or that Mr. Politi acted unethically.” The court also determined that even if Politi had acted unethically, there was no prejudice to Lee because “Lee’s remorse was argued to the judge at sentencing and the judge actually found that as mitigating.” The court further concluded that Politi had not provided ineffective assistance at the aggravation-mitigation hearing. The court explained that Politi “did search for mitigation,” including by talking to Lee about his background, talking to Lee’s family, reviewing Lee’s medical and school records, and hiring a doctor to examine Lee. The court noted that Lee had identified no other evidence “that Politi could have presented.” Ultimately, the court concluded, the lack of mitigating evidence “was due more to the fact that there was none, rather than to Politi’s lassitude or incompetence.” The Arizona Supreme Court summarily denied review.

Lee then petitioned for a writ of habeas corpus in federal court. The district court denied the petition. To support his claim based on the alibi, Lee proffered a 1992 transcript of the prosecutor’s interview of his father, in which the prosecutor recalled Lee’s telling him that he was at the crime scene. The district court declined to consider the transcript because Lee failed to present it in state court, “despite the fact that it was in the defense file and available to [him].” After a review of the state-court record, the district court

concluded that the state court's "findings [were] not unreasonable." The district court noted that it was unclear whether Lee told Politi that he was present during the crime, and that even if he had, "it would have been reasonable for counsel to discount this assertion given [Lee's] conflicting stories." The court also observed that Lee's "own expert testified that counsel's obligations with respect to a client whom an attorney suspects is not truthful are not always clear; thus it was not outside the wide range of professional assistance for Politi to continue his representation after [Lee] insisted on pursuing an alibi defense."

Lee sought an evidentiary hearing and expansion of the record to support his claim that Politi should have gathered additional mitigating evidence. Specifically, he sought to introduce declarations from various family members, social-history records, prison records from an earlier period of incarceration, medical records, and a declaration from his trial investigator.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, if an applicant for federal habeas relief "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" can show (A) that the claim relies either on a new rule of constitutional law made retroactive by the Supreme Court or on "a factual predicate that could not have been previously discovered through the exercise of due diligence" and (B) that "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." 28 U.S.C. § 2254(e). Because the word "failed" suggests "some omission, fault, or negligence on the part of the person who has failed to do

something,” a habeas petitioner has “failed to develop the factual basis of a claim,” within the meaning of section 2254(e), only if “there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” *Williams v. Taylor*, 529 U.S. 420, 431–32 (2000).

Applying that standard, the district court found that Lee’s counsel in the state postconviction proceedings, Matthew Newman, had not acted diligently. The court explained that “omissions by counsel are in fact attributable to a habeas petitioner” and that Newman “was on notice regarding the evidence [Lee] now seeks to introduce,” so “his failure to introduce such evidence in state court triggers § 2254(e).” *See Williams*, 529 U.S. at 432, 437–40. The district court therefore denied an evidentiary hearing.

Reviewing the record presented to the state postconviction relief court, the district court concluded that the state court reasonably determined that Politi was not deficient in his presentation of mitigating evidence. The district court noted that Politi had submitted a memorandum arguing against the State’s alleged aggravators and identifying mitigating circumstances and that he had presented an expert report, school records, and a letter from Lee’s mother. Because Lee’s social history was laid out in a presentence report prepared by the court’s probation department, the district court concluded that Politi’s decision not to present lay social-history witnesses was reasonable. The district court also noted that Lee conceded that he was unable to show prejudice from Politi’s allegedly deficient performance.

Lee appealed. While the appeal was pending, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), which altered the rules governing procedural default. Claims

asserted in federal habeas proceedings are procedurally defaulted—and federal habeas relief is generally unavailable—“when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement.” *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991); *see also Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977). Federal courts may consider the merits of procedurally defaulted claims only if the petitioner “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750. Because there is no constitutional right to counsel in postconviction proceedings, ineffective assistance of counsel in those proceedings does not establish cause for the procedural default of a claim. *Id.* at 752–53. In *Martinez*, however, the Supreme Court announced a narrow exception to the general rule: If a State requires that a claim of ineffective assistance of trial counsel be raised in a collateral-review proceeding rather than on direct appeal, procedural default will not bar federal habeas relief “if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” 566 U.S. at 17.

In the wake of *Martinez*, we decided *Detrich v. Ryan*, holding that “[f]or procedurally defaulted claims” of ineffective assistance of trial counsel “to which *Martinez* is applicable, the district court should allow discovery and hold an evidentiary hearing where appropriate to determine whether there was ‘cause’ under *Martinez* for the state-court procedural default and to determine, if the default is excused, whether” trial counsel in fact provided ineffective assistance. 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc). We

acknowledged that “a federal habeas court is ordinarily confined to the evidentiary record made in state court.” *Id.* at 1247 (citing *Cullen v. Pinholster*, 563 U.S. 170 (2011)). But we concluded that that rule “does not prevent a district court from holding an evidentiary hearing in a *Martinez* case.” *Detrich*, 740 F.3d at 1247.

Then, in *Dickens v. Ryan*, we held that section 2254(e) “does not bar a hearing before the district court to allow a petitioner to show ‘cause’ under *Martinez*.” 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc). We reasoned that “[a] federal court’s determination of whether a habeas petitioner has demonstrated cause and prejudice (so as to bring his case within *Martinez*’s judicially created exception to the judicially created procedural bar) is not the same as a hearing on a constitutional claim for habeas relief.” *Id.* We therefore concluded that “a petitioner, claiming that [postconviction relief] counsel’s ineffective assistance constituted ‘cause,’ may present evidence to demonstrate this point,” as well as “to demonstrate that there is ‘prejudice,’ that is that petitioner’s claim is ‘substantial’ under *Martinez*.” *Id.*

In response to those decisions, we remanded this case for the district court to reconsider Lee’s claims. The district court again denied relief, and Lee again appealed. After the appeal was fully briefed, new case law again intervened when the Supreme Court decided *Shinn v. Ramirez*, 596 U.S. 366 (2022). In that case, the Court clarified that although *Martinez* allows postconviction counsel’s ineffectiveness to excuse the procedural default of certain claims of ineffective assistance of trial counsel, it does not permit a habeas petitioner to avoid the requirements of section 2254(e) when presenting new evidence on the merits of such claims. *Ramirez*, 596 U.S. at 371. Rejecting the reasoning of our post-*Martinez* decisions, the *Ramirez* Court held that if

section 2254(e) applies and “the prisoner cannot satisfy its ‘stringent requirements,’ a federal court may not hold an evidentiary hearing—or otherwise consider new evidence—to assess cause and prejudice under *Martinez*.” *Id.* at 389 (citation omitted) (quoting *Williams*, 529 U.S. at 433). At Lee’s request, we ordered the parties to file new briefs addressing *Ramirez*.

II

Both of the claims before us are based on the alleged ineffective assistance of trial counsel. In *Strickland v. Washington*, the Supreme Court prescribed a two-part test for evaluating such claims. 466 U.S. 668 (1984). First, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. Our evaluation of counsel’s performance “must be highly deferential,” to “eliminate the distorting effects of hindsight.” *Id.* at 689; *see also Bell v. Cone*, 535 U.S. 685, 702 (2002). We must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. Second, a defendant must show that counsel’s deficiency was prejudicial, meaning that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

“Surmounting *Strickland*’s high bar is never an easy task,” and “[e]ven under *de novo* review, the standard for judging counsel’s representation is a most deferential one.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). It is especially difficult in habeas proceedings because AEDPA provides that when a claim has been “adjudicated on the

merits in State court,” a federal court may grant relief only if the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). Under that standard, obtaining relief requires a petitioner to “show far more than that the state court’s decision was ‘merely wrong’ or ‘even clear error.’” *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam) (quoting *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam)). Instead, the petitioner must show “that the state court’s decision [was] so obviously wrong that its error lies ‘beyond any possibility for fairminded disagreement.’” *Id.* (quoting *Richter*, 562 U.S. at 103); *see also Gibbs v. Covello*, 996 F.3d 596, 603 (9th Cir. 2021).

When both the *Strickland* and the AEDPA standards “apply in tandem,” *Richter*, 562 U.S. at 105, our review becomes “doubly deferential,” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam). In particular, we “must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d).” *Richter*, 562 U.S. at 105. To evaluate deficiency in a case governed by AEDPA, we ask “whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.* And even if we determine that counsel performed deficiently, we cannot say the defendant was prejudiced unless the state court’s contrary view would be erroneous “beyond any possibility for fairminded disagreement.” *Id.* at 103.

Applying those principles, we review the district court's decision de novo. *Oliver v. Davis*, 25 F.4th 1228, 1233 (9th Cir. 2022).

III

A

We begin by considering Lee's claim that Politi was ineffective because he allowed Lee to testify to an alibi that Politi knew to be false. The state postconviction review court rejected that claim, and Lee has not shown that its decision was unreasonable.

Although the parties refer to Lee's testimony as an "alibi defense," Lee offered an alibi only in the most limited sense. At trial, Lee said that he was not with Thompson at the time of the murder, but he revealed where he was only in the vaguest of terms. Although one could infer from his account of the day of the murder that he claimed to be at a trailer park in Phoenix where he and Thompson had originally met, he did not elaborate on his whereabouts. Thus, Lee's present objection to Politi's decision to let him present an alibi defense is really an objection to Politi's decision to let him deny involvement in Anderson's murder.

It was Lee, not Politi, who was opposed to accepting a plea agreement or presenting any defense other than one denying all involvement. Politi explained that he and Burke did everything they could to convince Lee to accept the plea agreement, or failing that, to present a diminished-capacity defense. Lee refused. Politi testified that at one point Lee stated that "he would rather have the gas chamber" than accept any plea agreement. Lee does not argue that his choice was uninformed or challenge the adequacy of Politi's

efforts to ensure that he understood the consequences of his decision.

Because a defendant does “not surrender control entirely to counsel,” Politi could not have admitted Lee’s guilt over his objections without violating Lee’s Sixth Amendment rights. *McCoy v. Louisiana*, 584 U.S. 414, 421 (2018). Rather, “a defendant has the right to insist that counsel refrain from admitting guilt, even when . . . confessing guilt offers the defendant the best chance to avoid the death penalty.” *Id.* at 417; *see also Strickland*, 466 U.S. at 691 (“The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.”). Similarly, Lee errs in suggesting that Politi should somehow have prevented him from taking the stand. A defendant has a constitutional right to testify, and the choice of whether to exercise that right belongs to the defendant, not to counsel. *See Rock v. Arkansas*, 483 U.S. 44, 53 (1987); *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

The thrust of Lee’s argument is that Politi behaved unethically in allowing Lee to testify that he was not involved in the murder because Lee had confessed his involvement to Politi, and therefore Politi knew that Lee’s testimony was false. The factual premise of that argument is flawed because the record does not show that Politi knew the alibi to be false. At a minimum, the state court’s rejection of Lee’s assertion that he “confessed the crime of murder to Mr. Politi” was not an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). Significantly, Politi attempted to track down individuals who could corroborate Lee’s story, and he directed investigators to pursue alibi-

related leads that Lee provided—actions that would have made no sense had Politi known that the alibi was false.

Lee points to a set of notes from the prosecution’s investigator describing a plea-negotiation meeting attended by Politi, Lee, and the prosecutor. The notes stated that Lee “claims Anderson was murdered by [Thompson] but admits he was present.” But the investigator testified that he was not present during the meeting, and the prosecutor testified that he had no specific recollection of the meeting. Politi himself testified that he did not remember what Lee said at the meeting.

Lee also points to an entry in Politi’s trial diary in which Politi wrote that he “told [Lee] of my conversation with his father this afternoon and the inevitable ethical dilemma I face as regards to the alibi defense” and that he “[d]iscussed [the] problem with Mike Burke, and the likely necessity of filing a motion to withdraw based upon an irreconcilable conflict of interest.” Politi testified, however, that he could not recall what prompted him to write that entry. And Burke testified that Lee never confessed his involvement in the crime to him, and that the “ethical dilemma” described in the diary may have referred to information provided by Lee’s father that led Politi to question Lee’s alibi. Nothing in the notes or the diary entry proves that Lee confessed.

In any event, as the district court noted, even if Lee had, at some point before trial, told Politi that he was at the crime scene, it would have been reasonable for Politi to discount that statement “given [Lee]’s conflicting stories.” At most, Politi had reason to doubt the veracity of Lee’s denial of involvement in the murder. As Lee’s own expert explained, “it’s a very difficult question for a defense attorney to really ascertain when . . . the [client] is actually lying.” Of course,

an attorney should attempt to dissuade a client from committing perjury, and if the client “informs counsel that he will perjure himself on the stand,” it is appropriate for the attorney to withdraw from the representation. *Nix v. Whiteside*, 475 U.S. 157, 166, 170–71 (1986). But Lee has identified no rule that would have *required* Politi’s withdrawal in the circumstances of this case. Rather, as the commentary to the Arizona Rules of Professional Conduct explained at the time, the duty of “an advocate for a criminally accused” to disclose potentially perjurious testimony “has been intensely debated,” and “[w]hile it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer’s duty when that persuasion fails.” Ariz. R. Prof. Conduct 3.3 cmt. (1992). It follows that, as the district court reasoned, “it was not outside the wide range of professional assistance for Politi to continue his representation” despite Lee’s insistence on denying involvement in the murder. And at a minimum, the state court’s conclusion to that effect was not an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(1).

Before the district court, Lee claimed that a 1992 transcript of an interview of Lee’s father by the prosecutor proved that Lee had confessed his participation in the murder during plea negotiations at which Politi was present. That claim suffers from the same flaw we have already discussed: Even if Lee did confess, Politi might reasonably have believed Lee’s statements denying involvement and disbelieved his confession. More importantly, Lee first presented the evidence in federal court, even though it was in the defense file and available to Lee during state court proceedings. The transcript is therefore not “a factual predicate that could not have been previously discovered

through the exercise of due diligence.” 28 U.S.C. § 2254(e)(2)(A)(ii). Nor does it “establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found [Lee] guilty of the underlying offense.” *Id.* § 2254(e)(2)(B). Because the requirements of section 2254(e) are not met, “a federal court cannot . . . consider [the] evidence on the merits.” *Ramirez*, 596 U.S. at 389. The district court therefore properly refused to consider the transcript.

Finally, even if Lee could show that Politi’s conduct “fell below an objective standard of reasonableness,” *Strickland*, 466 U.S. at 688, he cannot show that he was prejudiced by it. Lee contends that he suffered prejudice at sentencing because his trial testimony impaired his ability to demonstrate remorse, which would have been a basis for mitigation. But Lee did plead remorse to the sentencing court, and that court found it to be mitigating. To the extent the sentencing court declined to give greater weight to evidence of Lee’s remorse, it explained that it did so because Lee’s “first reported demonstration of remorse [came] long after the killing.” No change in trial strategy could have altered that fact. Notably, the expressions of remorse that Lee now cites as examples of his contrition all came *after* sentencing. The state postconviction relief court therefore reasonably determined that Lee did not establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

B

We now turn to Lee’s claim that Politi was ineffective in failing to investigate and present mitigating evidence to the sentencing court. In evaluating that claim, a threshold issue

is whether to consider additional evidence that Lee presented for the first time in federal court. As we have already explained, section 2254(e) provides that with limited exceptions, “[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.” 28 U.S.C. § 2254(e)(2).

Before the district court, Lee argued that Newman, his postconviction counsel, “was ineffective in not investigating and presenting the mitigating evidence which existed,” and that the State had “appointed incompetent counsel to represent him at his postconviction proceedings.” Advancing that argument was a reasonable strategy under our decisions in *Detrich* and *Dickens* because the ineffectiveness of postconviction counsel would have been a basis for obtaining an evidentiary hearing to develop Lee’s underlying claims of ineffective assistance of trial counsel.

Under *Ramirez*, however, it is now clear that the ineffectiveness of postconviction counsel does not allow a petitioner to escape the requirements of section 2254(e). *See* 596 U.S. at 371. So, before this court, Lee has done an about-face. He now argues that Newman *was* diligent, that he did not “fail[]” to develop the evidentiary record in state court, and that section 2254(e) thus does not bar an evidentiary hearing in federal court. The State argues that this new argument is forfeited. We assume without deciding that Lee did not forfeit the argument, or, alternatively, that we may excuse his forfeiture. We conclude that the argument fails on the merits.

In the state postconviction proceedings, Newman sought and was granted an evidentiary hearing. But the evidence he presented at that hearing was limited by the failure of his

mitigation specialist, Mary Durand, to conduct an effective investigation. In an effort to show diligence, Lee points out that Newman requested continuances of the hearing and the appointment of an additional investigator. When Newman's motion to continue the hearing was denied, he asked the Arizona Supreme Court for special action to grant the continuance, which it did. And after the postconviction relief court refused to appoint another investigator to help Durand, Newman sought reconsideration of that ruling.

By themselves, however, those actions are not sufficient to demonstrate diligence. In denying reconsideration of the order denying an additional investigator, the court explained that Newman had "supplie[d] no more specifics than he did in the original motion—who, where, when, how much it will cost the state, how it is relevant." Diligence would have entailed providing the information necessary to verify the need for an additional investigator. *See Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000) (explaining that "[m]ere requests for evidentiary hearings will not suffice" to demonstrate diligence when a petitioner fails to present affidavits he could easily have obtained).

For her part, Durand ultimately failed to complete her mitigation investigation before the postconviction evidentiary hearing. It is true that Durand was seriously ill and had many other cases to manage. But what matters is that Durand failed to complete her work, despite the 18-month period during which she investigated and attempted to gather evidence for the hearing. As a result, the defense postconviction psychiatrist, Dr. Barry Morenz, never received Durand's social history of Lee. And Newman himself acknowledged that Dr. Morenz needed Lee's social history to "complete his final meeting and evaluation." All

that Durand ultimately sent to Dr. Morenz were inscrutable handwritten notes.

Lee insists that Durand's lack of diligence "in no way detract[ed] from" Newman's diligence. But even if Durand acted diligently and was prevented from completing her investigation by medical problems beyond her control, Newman had a duty to supervise her and take corrective action in response to her failures. Newman acknowledged this on the first day of the evidentiary hearing before the postconviction relief court, when he stated that the failure to investigate was "my fault. I accept responsibility, too. I should have stayed on top of Mary Durand better, and I didn't." In a declaration filed in the subsequent federal habeas proceedings, Newman admitted that he later became aware of the mitigating evidence that Lee's federal habeas counsel went on to develop. That evidence, he explained, was "precisely the type of evidence I hoped to acquire with Ms. Durand's assistance. At a minimum, I owed Mr. Lee a duty to perform an investigation that would have uncovered that evidence." And he again (correctly) took responsibility for Durand's failures. He also stated that he had promised Dr. Morenz a social history, "but I never delivered on that promise."

"Attorney error that does not violate the Constitution"—including attorney error in postconviction proceedings, where there is no constitutional right to counsel—"is attributed to the prisoner under 'well-settled principles of agency law.'" *Davila v. Davis*, 582 U.S. 521, 528 (2017) (quoting *Coleman*, 501 U.S. at 754); *see also Coleman*, 501 U.S. at 753–54 (explaining that an attorney's lack of diligence is attributable to a petitioner because the "attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation" and that the petitioner therefore

“bear[s] the risk of attorney error” (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986))). Newman was responsible for Durand’s failures, so her errors were his errors. Thus, Newman’s failure to properly oversee Durand is attributable to Lee.

We draw the same conclusion as the district court: Lee was not diligent in developing the factual basis of his claim before the state court. Because Lee “failed to develop the factual basis of [his] claim in State court proceedings,” he would be entitled to an evidentiary hearing only if he qualified for section 2254(e)(2)’s exceptions. 28 U.S.C. § 2254(e)(2). He does not. His claim does not rely on “a new rule of constitutional law.” *Id.* § 2254(e)(2)(A)(i). Nor does it rely on “a factual predicate that could not have been previously discovered through the exercise of due diligence.” *Id.* § 2254(e)(2)(A)(ii). To the contrary, the evidence that Lee proffered to the district court is evidence that could have been discovered by his state counsel or his state investigator.

Without an evidentiary hearing, we are limited to the record presented to the state court. Based on that record, the state court’s rejection of Lee’s *Strickland* claim was not objectively unreasonable.

The state court found that Politi conducted a reasonable mitigation investigation and that the scope of his investigation was appropriate. The record developed at the postconviction relief hearing supports that finding. Politi ensured that Lee’s mental health was evaluated, that an investigator was appointed, that information was gathered from family members, and that social history records were collected. Politi also obtained Lee’s school, medical, and incarceration records. He even searched for any history of

Lee's exposure to toxic chemicals. It is true that there were additional family members, friends, and acquaintances whom Politi could have interviewed, but Lee did not establish at the postconviction hearing that those interviews would have uncovered new information. Indeed, "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam). We thus agree with the district court that "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face." *Id.* Rather, the "decision not to seek more" mitigating evidence was a decision that was "well within the range of professionally reasonable judgments." *Id.* at 11–12 (quoting *Strickland*, 466 U.S. at 699). Our own review of the record reveals no "powerful" mitigating evidence that Politi left unexplored. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

We also do not find that Politi was deficient in his presentation of mitigating evidence. Politi did, after all, submit a memorandum arguing against the State's alleged aggravators, and he presented an expert medical report, school records, and a letter from Lee's mother. The presentence report also set forth Lee's social history and highlighted many relevant aspects of Lee's life, such as his educational, employment, and health histories. It was thus reasonable to not call lay social-history witnesses. And at the postconviction relief hearing, Politi explained his tactical decision not to call Lee's parents (who had frequently and unhelpfully intervened in Politi's investigation by insisting that he interview witnesses from the trailer park), or Dr. García-Buñuel (who had himself told Politi that it would be unwise to call him). These are precisely the kinds of decisions that fall within the wide range of acceptable

conduct for counsel. *See, e.g., Strickland*, 466 U.S. at 689; *Cox v. Del Papa*, 542 F.3d 669, 683–84 (9th Cir. 2008).

Nor could Lee show prejudice in any event. The prejudice analysis “requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors.” *Thornell v. Jones*, 144 S. Ct. 1302, 1314 (2024). But the postconviction relief court explained that Lee showed the court no additional evidence that “Politi could have presented.” Ultimately, the court concluded, the absence of additional mitigating evidence “was due more to the fact that there was none, rather than to Politi’s lassitude or incompetence.” That conclusion was objectively reasonable.

AFFIRMED.

Appendix B

Court of Appeals Ninth Circuit Order Denying Petition of Hearing, November 20, 2024

State of Arizona v. Darrell Eston Lee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 20 2024

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

DARREL ESTON LEE,

Petitioner-Appellant,

v.

RYAN THORNELL,

Respondent-Appellee.

No. 10-99022

D.C. No. 2:04-cv-00039-JJT
District of Arizona,
Phoenix

ORDER

Before: W. FLETCHER, MILLER, and VANDYKE, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Miller and Judge VanDyke have voted to deny the petition for rehearing en banc, and Judge Fletcher so recommends.

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 petitions for rehearing and rehearing en banc are DENIED.

1 **WO**

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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**
9

10 Darrel Eston Lee,

11 Petitioner,

12 vs.

13 Charles L. Ryan, et al.,

14 Respondents.
15
16

) No. CV-04-39-PHX-MHM

) DEATH PENALTY CASE

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

17 Petitioner Darrel Eston Lee is a state prisoner under sentence of death. He has filed an
18 Amended Petition for Writ of Habeas Corpus alleging, pursuant to 28 U.S.C. § 2254, that he
19 is imprisoned and sentenced in violation of the United States Constitution. (Doc. 52.)¹ In a
20 previous order, the Court denied Petitioner's motions for discovery, evidentiary hearing, and
21 expansion of the record, and further denied a number of claims. (Doc. 87.) This order
22 addresses Petitioner's remaining claims and concludes that he is not entitled to federal habeas
23 relief.
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27

28 ¹ "Doc." refers to the documents in this Court's file.

FACTUAL AND PROCEDURAL BACKGROUND

The Arizona Supreme Court summarized the facts surrounding the crime and Petitioner's arrest, trial, and conviction as follows:

On December 5, 1991, defendant Darrel E. Lee and a companion, Karen Thompson, approached 57-year-old John Anderson as he was leaving a Phoenix medical clinic and asked him for a ride. When Anderson agreed, they got into his car. Although unarmed, Lee announced that he had a gun and directed Anderson to drive south on the freeway. When they arrived in Chandler, Thompson demanded Anderson's wallet, which contained a small amount of cash, some credit cards, and an automatic teller machine (ATM) card. Thompson, accompanied by defendant, used the ATM and credit cards repeatedly throughout the next five days, both before and after Anderson's murder.

At some point, defendant suggested that they tie up Anderson and dump him alongside the road. After binding his hands and feet and placing him in a ditch, however, the couple decided not to leave him there. Instead, they put him in the trunk of the car. During most of this time, Anderson was pleading for his life.

Defendant and Thompson drove back to Phoenix and then toward California, stopping frequently to use cocaine and alcohol. They eventually decided to kill Anderson to avoid apprehension. Defendant stated that he would asphyxiate Anderson with the car's exhaust fumes and obtained a hose for this purpose. The couple discussed the anticipated killing as they continued their journey. Approximately eight hours after placing Anderson in the trunk, defendant and Thompson turned back toward Phoenix.

Anderson somehow managed to get untied and pry open the trunk of the car. He found a windshield sun screen reading "NEED HELP; CALL POLICE," and held it out of the vehicle. Two men in another car saw the sign and the frightened victim and called the police at the first available telephone. At approximately 11:45 p.m., two officers responded to the call. Because of darkness and rugged terrain in the area, however, they were able to conduct only a rudimentary search.

Meanwhile, defendant had exited the interstate highway and stopped the car at about 10:30 p.m. He and Thompson attempted to suffocate Anderson with car fumes by running the hose from the exhaust pipe into the trunk, but were unsuccessful because Anderson kept pushing up the trunk lid. During a pause in which the couple used more cocaine and discussed the situation, the victim escaped from the trunk and attempted to flee. Defendant chased Anderson and wrestled him to the ground. Thompson then brought defendant a belt, with which he attempted to strangle Anderson. The belt broke, and defendant yelled for Thompson to get a rock. As defendant choked Anderson with his hands, Thompson hit the victim in the head with the rock, fracturing his skull.

Defendant and Thompson placed the body in the trunk of the car. After driving to California, and then back to Phoenix, the couple eventually went to Tucson. There, they purchased a shovel and buried Anderson in a shallow grave outside the city.

The foregoing facts are taken primarily from Thompson's testimony.

1 Defendant initially denied all participation in the crimes, later admitted some
2 involvement with the car and the credit card spending in California, and finally
3 confessed to a defense-requested psychiatrist that he was present during the
4 murder and was holding Anderson down when Thompson struck him. Evidence
5 found at the scene of the crime included the sun shield, pieces of a belt containing
6 blood spatters, defendant's prescription sunglasses, and a rock bearing blood and
7 hair. Anderson's trifocals were found in the trunk of the automobile, along with
8 blood stains matching his type. Information given by Thompson after she entered
9 into a plea agreement in April 1992 led to the discovery of the victim's remains.

6 On January 28, 1992, a La Paz County grand jury indicted defendant and
7 Thompson on one count each of first-degree murder, kidnapping, theft, armed
8 robbery, and credit card theft. Defendant pleaded not guilty to all charges.
9 Thompson entered a plea of guilty to first-degree murder and armed robbery. A
condition of her plea agreement was that she testify against defendant. On
November 18, 1992, following a jury trial, defendant was convicted on all counts.

10 *State v. Lee*, 185 Ariz. 549, 552-53, 917 P.2d 692, 695-96 (1996).

11 La Paz County Superior Court Judge Michael Irwin sentenced Petitioner to death for
12 the murder and to terms of imprisonment for the other counts.² On direct appeal, the Arizona
13 Supreme Court affirmed. *Id.* at 559, 917 P.2d at 702. Petitioner did not seek certiorari.

14 Petitioner filed a petition for post-conviction relief ("PCR") pursuant to Rule 32 of the
15 Arizona Rules of Criminal Procedure in June 1999. Following an evidentiary hearing, PCR
16 Judge William Schafer denied relief in May 2003. Subsequently, the Arizona Supreme Court
17 summarily denied a petition for review.

18 Petitioner then commenced these proceedings and filed an amended habeas petition on
19 November 29, 2004. (Doc. 52.) Petitioner moved for discovery, an evidentiary hearing, and
20 expansion of the record on a number of claims. (Doc. 78.) On September 29, 2006, the
21 Court denied Petitioner's consolidated motion and dismissed Claims 1 (in part), 2, 4 (in part),
22 5-B, 6, and 9-C as either procedurally defaulted or meritless. (Doc. 87.) The Court now
23 addresses Petitioner's remaining claims.

24 ² At the time of Petitioner's trial, Arizona law required trial judges to make all
25 factual findings relevant to capital punishment and to determine sentence. Following the
26 Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a jury
27 must determine the existence of facts rendering a defendant eligible for capital punishment,
28 Arizona's sentencing scheme was amended to provide for jury determination of eligibility
factors, mitigating circumstances, and sentence.

1 **PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT**

2 A writ of habeas corpus may not be granted unless it appears that a petitioner has
3 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*
4 *Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must “fairly
5 present” the operative facts and the federal legal theory of his claims to the state’s highest
6 court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848
7 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78
8 (1971).

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

17 A habeas petitioner’s claims may be precluded from federal review in two ways. First,
18 a claim may be procedurally defaulted in federal court if it was actually raised in state court
19 but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at
20 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present it
21 in state court and “the court to which the petitioner would be required to present his claims
22 in order to meet the exhaustion requirement would now find the claims procedurally barred.”
23 *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998)
24 (stating that the district court must consider whether the claim could be pursued by any
25 presently available state remedy). If no remedies are currently available pursuant to Rule 32,
26 the claim is “technically” exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732,
27 735 n.1; *see also Gray*, 518 U.S. at 161-62.

1 Because the doctrine of procedural default is based on comity, not jurisdiction, federal
 2 courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*,
 3 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of a
 4 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure
 5 to properly exhaust the claim in state court and prejudice from the alleged constitutional
 6 violation, or shows that a fundamental miscarriage of justice would result if the claim were
 7 not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

8 AEDPA STANDARD FOR RELIEF

9 Petitioner filed his petition after the effective date of the Antiterrorism and Effective
 10 Death Penalty Act of 1996 (“AEDPA”). Under the AEDPA, a petitioner is not entitled to
 11 habeas relief on any claim “adjudicated on the merits” by the state court unless that
 12 adjudication:

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

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

17 28 U.S.C. § 2254(d).

18 Under § 2254(d)(1), a state court decision is “contrary to” the Supreme Court’s clearly
 19 established precedents if the decision applies a rule that contradicts the governing law set
 20 forth in those precedents, thereby reaching a conclusion opposite to that reached by the Court
 21 on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a
 22 decision of the Supreme Court but reaches a different result. *Williams v. Taylor*, 529 U.S.
 23 362, 405-06 (2000). A state court decision is based on an “unreasonable application” of
 24 federal law if the court “identifies the correct governing legal rule . . . but unreasonably
 25 applies it to the facts of the particular . . . case” or “unreasonably extends a legal principle
 26 from [Supreme Court] precedent to a new context where it should not apply or unreasonably
 27 refuses to extend that principle to a new context where it should apply.” *Id.* at 407.

1 Under § 2254(d)(2), a state court decision “based on a factual determination will not be
2 overturned on factual grounds unless objectively unreasonable in light of the evidence
3 presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322, 340 (2003). In
4 considering a challenge under § 2254(d)(2), state court factual determinations are presumed
5 to be correct, and a petitioner bears the “burden of rebutting this presumption by clear and
6 convincing evidence.” 28 U.S.C. § 2254(e)(1).

7 DISCUSSION

8 Fifth Amendment Due Process Claims

9 In numerous claims, Petitioner alleges a violation of his right to due process under the
10 Fifth Amendment. However, it is the Fourteenth Amendment, not the Fifth, that protects a
11 person against deprivations of due process by a state. *See* U.S. Const. amend. XIV, § 1 (“nor
12 shall any state deprive any person of life, liberty, or property without due process of law”);
13 *Castillo v. McFadden*, 399 F.3d 993, 1002 n.5 (9th Cir. 2005). Because the Fifth
14 Amendment’s Due Process Clause does not provide a cognizable ground for relief from
15 Petitioner’s state court conviction, these allegations are summarily denied.

16 Eighth Amendment Claims

17 Petitioner also alleges Eighth Amendment violations with respect to some of his
18 conviction-related claims. However, the right to be free of cruel and unusual punishment,
19 by definition, is a protection related to the imposition or carrying out of a sentence. *See*
20 *Ingraham v. Wright*, 430 U.S. 651, 664, 667, 671 n.40 (1977) (explaining that Eighth
21 Amendment circumscribes only the type of punishment imposable on those convicted); *Bell*
22 *v. Wolfish*, 441 U.S. 520, 536 n.16 (1979) (noting that the Eighth Amendment has no
23 application to pretrial detainees). Because the Eighth Amendment does not provide a
24 cognizable ground of relief for claims relating solely to Petitioner’s conviction, these
25 allegations are summarily denied.

1 **Claim 1**

2 Petitioner contends that the trial court violated his Sixth and Fourteenth Amendment
3 rights when it denied his motion for a change of venue due to prejudicial pretrial publicity.
4 (Doc. 52 at 39-42.) A criminal defendant is entitled to a fair trial by “a panel of impartial,
5 ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Therefore, “if pretrial
6 publicity makes it impossible to seat an impartial jury, then the trial judge must grant the
7 defendant’s motion for a change of venue.” *Casey v. Moore*, 386 F.3d 896, 906 (9th Cir.
8 2004) (citing *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988)).

9 **Background**

10 Seven months before trial, on April 16, 1992, Petitioner wrote a letter to the trial judge
11 stating his dissatisfaction with defense counsel. (ROA 10.)³ Petitioner complained that “the
12 only thing [trial counsel] has told me to do is take a plea bargain of 25 years to life, he feels
13 he has no chance of winning at trial.” (*Id.*) On April 30, 1992, an article published in *The*
14 *Gem*, a La Paz County newspaper, discussed Petitioner’s letter to the court, including his
15 comment about plea bargain negotiations and counsel’s dismal view of his case. (ROA 35,
16 Ex. B.) Petitioner then sought a change of venue, citing the letter, its publication in the
17 newspaper, the effect that publicity concerning the plea negotiations would have on the
18 public, and his right to a fair trial. (ROA 35.) The court denied the motion without prejudice
19 to renewal during *voir dire* if it became apparent that a significant number of jurors had read
20 and remembered that particular article. (RT 10/19/92 at 8.)

21
22
23 ³ “ROA” and “ME” refer to the four volumes of pleadings and one volume of minute
24 entries from trial and sentencing prepared for Petitioner’s direct appeal to the Arizona
25 Supreme Court (Case No. CR-93-0111-AP & CR-93-0323-T/AP). “RT” refers to the
26 reporter’s transcripts of Petitioner’s trial, sentencing, and post-conviction evidentiary hearing
27 proceedings. “ROA-PCR” and “ROA-PCR-ME” refer to the six volumes of pleadings and
28 one volume of minute entries from post-conviction proceedings prepared for Petitioner’s
petition for review to the Arizona Supreme Court (Case No. CR-03-0197-PC). The original
reporter’s transcripts and certified copies of the trial, appeal, and post-conviction records
were provided to this Court by the Arizona Supreme Court. (Doc. 74.)

1 Following the conclusion of *voir dire*, Petitioner renewed his motion for change of
 2 venue, arguing that 28 of the 34 prospective jurors selected from the venire and nine of the
 3 14 petit jurors had read articles about his case. (RT 11/10/92 at 141-43.) In ruling on the
 4 motion, the court observed:

5 That one article with regard to the plea bargain, Mr Politi, concerned me a
 6 little bit. That's why we had that specific question on the questionnaire about
 7 people reading The Gem, but I'm not sure why you didn't delve into that. Perhaps
 it's because nobody remembered – those few people who read newspaper articles,
 most indicated they didn't now remember the facts that they had read; . . .

8 (*Id.* at 142-43.) The court concluded there was neither extensive pretrial publicity nor the
 9 type of publicity that was so prejudicial that Petitioner was entitled to a change of venue as
 10 a matter of law. (*Id.* at 143.)

11 On appeal, Petitioner argued that the *Gem* article was tantamount to a public admission
 12 of guilt and thus prejudice should be presumed. The court disagreed:

13 The argument is unpersuasive. The burden to show presumptive prejudice
 14 resulting from pretrial publicity “rests with the defendant and is extremely heavy.”
 15 *Bible*, 175 Ariz. at 564, 858 P.2d at 1167. To grant relief, we would have to find
 16 that “the publicity was so unfair, so prejudicial, and so pervasive that we cannot
 17 give any credibility to the jurors’ answers during voir dire affirming their ability
 18 to decide the case fairly.” *Id.* at 565, 858 P.2d at 1168. The article here is a
 19 universe away from the type of publicity that “utterly corrupt[s]” a trial, *Murphy*
v. Florida, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975), and
 prejudice cannot be presumed. Instead of appearing as an admission of guilt, the
 story plainly implied that defendant disliked his attorney because the latter was
 ready to give up on the case. Defendant’s request for a lawyer who would
 adequately defend him can hardly be viewed as a concession of culpability.

20 *Lee*, 185 Ariz. at 555, 917 P.2d at 698. The court also rejected the argument that actual
 21 prejudice had been established:

22 When a motion for change of venue is based on actual prejudice, the
 23 defendant must show that he or she will probably be deprived of a fair trial. *See*
 24 Rule 10.3(b), Ariz.R.Crim.P.; *see also State v. Stanley*, 167 Ariz. 519, 527, 809
 25 P.2d 944, 952, *cert. denied*, 502 U.S. 1014, 112 S.Ct. 660, 116 L.Ed.2d 751
 26 (1991). We review the trial court’s ruling for an abuse of discretion, *see State v.*
Salazar, 173 Ariz. 399, 406, 844 P.2d 566, 573 (1992), *cert. denied*, 509 U.S. 912,
 113 S.Ct. 3017, 125 L.Ed.2d 707 (1993), and find none. Defense counsel had
 ample opportunity during voir dire to ask questions about pretrial publicity. After
 determining which prospective jurors had read stories about the case, he failed to
 establish that any of them had seen the article complained of here. Moreover, all
 those who expressed any doubt regarding their ability to be fair and impartial were
 excused.

1 *Lee*, 185 Ariz. at 555, 917 P.2d at 698.

2 Discussion

3 In addressing pretrial publicity, the Supreme Court has discussed two types of
4 prejudice: presumed prejudice, where the setting of the trial is inherently prejudicial, and
5 actual prejudice, where *voir dire* is inadequate to offset extensive and biased media coverage.
6 *See Murphy v. Florida*, 421 U.S. 794, 798 (1975). Petitioner does not attempt to prove actual
7 prejudice by showing that any of jurors read the article at issue. (*See* Doc. 52 at 39-42.)
8 Rather, citing *Rideau v. Louisiana*, 373 U.S. 723 (1963), Petitioner argues that the article
9 reporting his plea negotiations was sufficient in a small county to establish an inflamed
10 community atmosphere such that his trial was inherently prejudicial. (*Id.*)

11 A court presumes prejudice only in the face of a “trial atmosphere that had been utterly
12 corrupted by press coverage,” *Dobbert v. Florida*, 432 U.S. 282, 303 (1977), or a “barrage
13 of inflammatory publicity immediately prior to trial amounting to a huge wave of public
14 passion” that would make a fair trial unlikely. *Patton v. Yount*, 467 U.S. 1025, 1033 (1984).
15 Another factor is whether the media accounts contained inflammatory, prejudicial
16 information that was not admissible at trial. *See Sheppard v. Maxwell*, 384 U.S. 333, 360-61
17 (1966). The presumption of prejudice is “rarely applicable and is reserved for an ‘extreme
18 situation.’” *Harris*, 885 F.2d at 1361 (internal citations omitted).

19 The Supreme Court found presumed prejudice in *Rideau*. In that case, the defendant’s
20 detailed 20-minute confession was broadcast on television three times. 373 U.S. at 724. In
21 a community of 150,000, nearly 100,000 people saw or heard the broadcast. *Id.* “What the
22 people of Calcasieu Parish saw on their television sets was Rideau, in jail, flanked by the
23 sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping,
24 and murder, in response to leading questions by the sheriff.” *Id.* at 725. As the Supreme
25 Court explained, the televised confession “was Rideau’s trial,” and “[a]ny subsequent court
26 proceedings in a community so pervasively exposed to such a spectacle could be but a hollow
27 formality.” *Id.* at 726 (emphasis added).
28

In Petitioner's case, the Arizona Supreme Court concluded that the pretrial publicity did not establish an inflamed community atmosphere, stating that the "article here is a universe away from the type of publicity that utterly corrupts a trial." *Lee*, 185 Ariz. at 555, 917 P.2d at 698 (further citation and quotation omitted). The court further explained that "[d]efendant's request for a lawyer who would adequately defend him can hardly be viewed as a concession of culpability." *Id.* This Court agrees. The publicity in this case is in stark contrast to the media excesses which presumptively deprived the defendant of a fair trial in *Rideau*. There was no confession, let alone a televised one. The publicity at issue was neither sensational nor inflammatory. *See Casey*, 386 F.3d at 908-09; *Leavitt v. Arave*, 383 F.3d 809, 826 (9th Cir. 2004). The Court concludes that the Arizona Supreme Court's rejection of this claim was not contrary to or based on an unreasonable application of clearly established federal law; nor was it based on an unreasonable determination of the facts.

Claim 3

Petitioner contends that he was denied his constitutional rights when the trial court improperly "death qualified" the jurors. (Doc. 52 at 50-53.) However, Petitioner also concedes that he failed to present this claim in state court. (*Id.* at 52.) Respondents assert that the claim is now technically exhausted but procedurally defaulted because Petitioner has no remaining state court remedy. (Doc. 68 at 53.)

When a petitioner has failed to fairly present a claim, it is the role of the federal court to determine if he has any available remaining remedies in state court. *See Ortiz*, 149 F.3d at 931. In making that decision, the court must assess the likelihood that a state court will allow a determination on the merits of his claim. *See Phillips v. Woodford*, 267 F.3d 966, 974 (9th Cir. 2001).

This Court concludes that if Petitioner were to return to state court now and attempt to litigate Claim 3, it would be found waived and untimely under Rules 32.2(a)(3)⁴ and 32.4(a)

⁴ To the extent the Court concludes throughout this Order that Petitioner does not have an available remedy in state court, because claims or portions of claims would be

of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, Claim 3 is “technically” exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *See Coleman*, 501 U.S. at 732, 735 n.1; *Smith v. Baldwin*, 510 F.3d 1127, 1138 (9th Cir. 2007) (en banc). Claim 3 will not be considered on the merits absent a showing of cause and prejudice or fundamental miscarriage of justice.

As cause to excuse the procedural default, Petitioner alleges that trial counsel was ineffective for failing to present this claim in state court. (Doc. 73 at 22-24.) Before a claim of ineffective assistance of counsel (“IAC”) may be used as cause to excuse a procedural default, it must first be exhausted in state court as an independent claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000); *Murray v. Carrier*, 477 U.S. 478, 489-90 (1986); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988). During PCR proceedings, Petitioner did not present this ineffectiveness allegation as an independent claim. (*See* ROA-

precluded as waived and untimely pursuant to Rules 32.2(a)(3) and 32.4(a), Petitioner does not assert that any exceptions to preclusion are applicable. *See Beaty v. Stewart*, 303 F.3d 975, 987 & n.5 (9th Cir. 2002) (finding no available state court remedies and noting that petitioner did not attempt to raise any exceptions to Rule 32.2(a)). First, Petitioner does not assert the application of any of the preclusion exceptions enumerated in Rule 32.2(b)(2), and the Court finds that none apply. *See* Ariz. R. Crim. P. 32.2(b)(2); 32.1(d)-(h). Second, Petitioner does not argue that any of the claims are of the type that cannot be waived absent a personal knowing, voluntary, and intelligent waiver. *See, e.g., Cassett v. Stewart*, 406 F.3d 614, 622-23 (9th Cir. 2005).

The Court concludes, as to all of the claims in this Order for which the Court determines there is no available remedy in state court, that none of those claims fall within the limited framework of claims requiring a knowing, voluntary, and intelligent waiver. *See* Ariz. R. Crim. P. 32.2(a)(3) cmt. (West 2004) (noting that most claims of trial error do not require a personal waiver); *Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002) (identifying the right to counsel, right to a jury trial, and right to a 12-person jury under the Arizona Constitution as the type of claims that require personal waiver); *see also State v. Espinosa*, 200 Ariz. 503, 505, 29 P.3d 278, 280 (App. 2001) (withdrawal of plea offer in violation of due process not a claim requiring personal waiver); *but cf. Cassett*, 406 F.3d at 622-23 (finding claim not defaulted because unclear whether personal waiver would be required under state law).

1 PCR 3.) Therefore, Petitioner did not exhaust this claim, and it cannot establish cause.

2 Petitioner also alleges that IAC of PCR counsel provides cause to excuse the default.
3 (Doc. 73 at 22-24.) Petitioner contends that PCR counsel failed to present Claim 3 due to
4 a conflict of interest because counsel's brother was a Deputy Sheriff for the La Paz County
5 Sheriff's Department and had some involvement in the county's investigative proceedings
6 against Petitioner, and because counsel's wife was the Clerk of the La Paz County Superior
7 Court during the relevant time period. (See Doc. 73 at 23.) This Court has already discussed
8 and rejected this allegation, explaining that IAC can represent sufficient cause only when it
9 rises to the level of an independent constitutional violation; that when a petitioner has no
10 constitutional right to counsel, there can be no constitutional violation arising out of
11 ineffectiveness of counsel; that there is no constitutional right to counsel in state PCR
12 proceedings; and that the Ninth Circuit has considered and rejected the argument that cause
13 exists to overcome a procedural default where PCR counsel, due to an alleged conflict of
14 interest, failed to assert a claim during PCR proceedings. (Doc. 87 at 9-10.) For the same
15 reasons, these IAC contentions do not establish cause to excuse the procedural default.
16 Because Petitioner has failed to establish cause, there is no need to address prejudice. See
17 *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

18 Petitioner next argues that a fundamental miscarriage of justice will occur if Claim 3
19 is not reviewed on the merits because he is actually innocent. (Doc. 73 at 23-24.) The Court
20 also previously rejected this assertion, explaining that Petitioner has failed to provide reliable
21 new evidence that he is factually innocent of first-degree murder. (Doc. 87 at 11-12.)
22 Petitioner having failed to establish grounds to excuse his procedural default, Claim 3 is
23 procedurally barred.

24 **Claim 4-A**

25 Petitioner contends that he was denied the right to a fundamentally fair trial when the
26 prosecutor vouched for two prosecution witnesses during closing argument. This claim was
27 exhausted on direct appeal and thus entitled to review on the merits.
28

1 Background

2 During closing argument, the prosecutor commented on Karen Thompson's testimony
3 while discussing the evidence linking Petitioner to the crime scene:

4 The sheriff's office found the glasses out at the scene, all the things described
5 out here [sic] the shoe was found at the scene; the pool of blood next to the belt.
6 The blood's analyzed, found to be of a type consistent with Mr. Anderson; the
7 drag marks; the other section of the belt just as it was described by Karen; and
8 everything that Karen said about what happened as she talked about getting off the
9 exit is consistent again with what Hornback and Wagner saw, but getting off on
10 that exit, going across the overpass, and she said initially they went on past there
11 about a quarter of a mile and they stopped.

12 *Now, she's been, I think, honest when she says she wasn't even aware that*
13 *Hornback and Wagner had seen her and made these observations.*

14 (RT 11/18/92 at 51-52 (emphasis added).) During rebuttal argument, the prosecutor further
15 stated:

16 Karen gave us some testimony that he was wearing those glasses that night,
17 but my recollection of the testimony was never that he actually had those things
18 on his face as he attacked Mr. Anderson out there. Maybe he – maybe he did.
19 Maybe he had them in his pocket, you know. Maybe he had them who knows
20 where.

21

22 Is it critical to the State's case that he had those glasses on his face as he ran
23 over Mr. Anderson? No, it's not, but he had them on his person somewhere
24 because he left them there, and we know he left them there. There's no other
25 evidence. *There's no other reasonable alternative, I believe, of how the glasses*
26 *got there.*

27 (Id. at 108-10 (emphasis added).)

28 Regarding Gene Vernoy, the convenience store clerk who saw a man with Thompson
shortly after the murder, the prosecutor argued:

So now all of a sudden, Gene Vernoy is being put on the spot, well if the guy
that was with this woman was actually taller and he goes along with that and says,
"yeah, he was taller," but I think there's a couple things about Gene Vernoy that
you have to keep in mind.

First of all, other than they see thousands of people over time and the man
could easily make an honest mistake in perception and memory about the man that
was with Karen Thompson and to demonstrate that, maybe his memory was a little
fuzzy in that regard.

If you recall, he thought the car they were in was a – was a yellow Toyota;
thought the car was a yellow Toyota. No. That's not right; and again, this is not

1 the fault of Mr. Vernoy. *I think he was an honest man, certainly an honest man,*
 2 *but I think he made a honest mistake* and that was demonstrated best, I think, in
 3 – when – Mr. Lee, Darrel’s father, talked to him on the phone there and Mr.
 Vernoy said that he thought that he, Gene Vernoy, was taller than Karen, so this
 is how his perception of height operates here.

4 (*Id.* at 56-57 (emphasis added).)

5 Defense counsel did not object to any of these comments at trial. Accordingly, the
 6 Arizona Supreme Court on appeal reviewed Petitioner’s vouching contentions only for
 7 fundamental error:

8 It is impermissible for a prosecutor to place the prestige of the government
 9 behind his witness or suggest that information not presented to the jury supports
 a witness’s testimony. That did not occur here. The prosecutor essentially
 10 conceded that Thompson and Vernoy had been mistaken in parts of their
 testimony (regarding the presence of another car in the area, and the size of the
 11 man seen with the woman). Moreover, the remark pertaining to defendant’s
 glasses was more about the physical evidence at the scene than about Thompson’s
 12 testimony. Defendant had maintained that the glasses were found in a position
 that would be unexpected if they had fallen off while being worn. The
 13 prosecutor’s argument, read in context, was that even though Thompson might
 have been wrong when she said defendant had his glasses on during the struggle,
 14 the fact that they were found at the location made it immaterial whether they fell
 off his face or out of his pocket.

15 . . . The evidence supporting Karen Thompson’s story was compelling. The
 16 prosecution corroborated different parts of it with at least five independent
 witnesses. Moreover, Thompson was willing to implicate herself as the more
 17 active participant in the events that took place.

18 Even apart from Thompson’s testimony, however, there was evidence that
 defendant was with her a few days before the killing, a few minutes before the
 19 victim disappeared from the medical center, and a few hours after his death; that
 Thompson was accompanied by a man less than an hour after the murder and by
 20 someone in the car with her minutes before it; that defendant had possession of the
 victim’s car days later; and that defendant’s prescription glasses, which he claimed
 21 to have lost on or about December 2, were seen on his face December 5, minutes
 before the victim disappeared, and were found by police at the scene of the
 22 homicide.

23 Vernoy’s testimony was relatively tangential and served only to place
 Thompson with a man, perhaps taller than she, possibly mustached, and maybe
 24 Hispanic, in California shortly after the murder. The prosecutor’s comments about
 it were insignificant.

25 *Lee*, 185 Ariz. at 554, 917 P.2d at 697 (citation omitted).

26 Discussion

27 Federal habeas review for a claim of prosecutorial misconduct is “the narrow one of due
 28

1 process, and not the broad exercise of supervisory power.” *Darden v. Wainwright*, 477 U.S.
2 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. at 642). In order to obtain
3 relief, Petitioner must prove not only that the prosecutor’s remarks and other conduct were
4 improper but that they “so infected the trial with unfairness as to make the resulting
5 conviction a denial of due process.” *Id.*; see also *Johnson v. Sublett*, 63 F.3d 926, 930 (9th
6 Cir. 1995) (habeas relief is limited to cases in which the petitioner can establish that
7 prosecutorial misconduct resulted in actual prejudice); *Smith v. Phillips*, 455 U.S. 209, 219
8 (1982) (“The touchstone of due process analysis in cases of alleged prosecutorial misconduct
9 is the fairness of the trial, not the culpability of the prosecutor.”).

10 In determining if a defendant’s due process rights were violated by a prosecutor’s
11 remarks during closing argument, a reviewing court “must consider the probable effect [of]
12 the prosecutor’s [comments] on the jury’s ability to judge the evidence fairly.” *United States*
13 *v. Young*, 470 U.S. 1, 12 (1985). To make such an assessment, it is necessary to place the
14 prosecutor’s remarks in context. See *Boyde v. California*, 494 U.S. 370, 385 (1990); *United*
15 *States v. Robinson*, 485 U.S. 25, 33-34 (1988); *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir.
16 1998). In *Darden*, for example, the Court assessed the fairness of the trial by considering,
17 among other circumstances, whether the prosecutor’s comments manipulated or misstated
18 the evidence; whether the trial court gave a curative instruction; and the weight of the
19 evidence against the accused. 477 U.S. at 181-82.

20 As a general rule, a prosecutor may not vouch for the credibility of a witness. See
21 *Young*, 470 U.S. at 18-19; *Lawn v. United States*, 355 U.S. 339, 359-60 n.15 (1958); *Berger*
22 *v. United States*, 295 U.S. 78, 86-88 (1935). “Vouching consists of placing the prestige of
23 the government behind a witness through personal assurances of the witness’s veracity, or
24 suggesting that information not presented to the jury supports the witness’s testimony.”
25 *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) (citing *United States v.*
26 *Roberts*, 618 F.2d 530, 533 (9th Cir. 1980)). Vouching constitutes misconduct because it
27 may lead the jury to convict on the basis of evidence not presented; it also carries the
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1 imprimatur of the government, which may induce the jury to adopt the government's
2 judgment rather than its own. *See Young*, 470 U.S. at 18.

3 Based on an assessment of the relevant factors considered in *Darden*, the Court
4 concludes that the prosecutor's comments taken together did not so infect the trial as to
5 render it fundamentally unfair. First, the comments did not manipulate or misstate the
6 evidence presented at trial. Thompson testified that due to the amount of cocaine she had
7 used that night she didn't recall seeing another vehicle approach as they exited the freeway.
8 The prosecutor's comment did not vouch for Thompson's testimony, but explained that, in
9 light of her intoxicated state, it was a distinct possibility she did not see the other vehicle.
10 Nor did the prosecutor vouch when stating that he "believed" Thompson's testimony about
11 Petitioner's prescription sunglasses. Rather, he referred to the lack of any other explanation
12 for how the glasses could have been found at the scene. The prosecutor's comment about
13 Vernoy being an honest man who may have made an honest mistake also did not constitute
14 vouching, but suggested an explanation as to how the witness may have made a mistake
15 regarding the height of the man he saw with Thompson, just as he had made a mistake about
16 the type of car the individuals were driving. Overall, none of these comments misstated or
17 manipulated the evidence presented at trial. Instead, the prosecutor "argue[d] reasonable
18 inferences based on the evidence[.]" *Necoechea*, 986 F.2d at 1276.

19 Second, the lack of a curative instruction did not infect the trial because Petitioner failed
20 to object or request such an instruction. The trial court instructed the jurors that what the
21 lawyers said in argument was not evidence and that the jurors had to determine the facts only
22 from the evidence. (RT 11/18/92 at 11-12; *see also id.* at 25.) The jury is presumed to
23 follow the court's instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Cook v.*
24 *LaMarque*, 593 F.3d 810, 828 (9th Cir. 2010).

25 Third, Petitioner had an opportunity to rebut the prosecutor's comments. (RT 11/18/92
26 at 65-96.) Defense counsel argued that Thompson's testimony lacked credibility and that the
27 man with Thompson was taller than Petitioner. (*Id.* at 65-72, 87-90.)
28

1 Finally, the evidence of Petitioner's guilt was substantial. Petitioner admitted being
2 with Thompson on the day of the crimes when they attempted to gain entrance to the home
3 of an individual named Leza McCurty, who lived near the location where the kidnapping
4 took place. (RT 11/17/92 at 132-34, 166.) McCurty said this occurred around noon,
5 positively identified Thompson, and said the man accompanying her wore sunglasses. (RT
6 11/13/92 at 134-36.) Thompson testified that around noon that same day she and Petitioner
7 were looking for someone to rob and that the victim agreed to give them a ride. (RT
8 11/17/92 at 23-24; RT 11/13/92 at 35-36.) Thompson also testified that after the victim
9 attempted to escape, Petitioner chased him down, tried to strangle him with a belt, and then
10 held him down while Thompson killed him with a rock. (*Id.*) Subsequently, Petitioner's
11 prescription sunglasses were found at the crime scene. (RT 11/12/92 at 179; RT 11/17/92
12 at 167-68.) Petitioner also admitted that he was with Thompson as they traveled throughout
13 Southern California using the victim's credit cards. (RT 11/17/92 at 138-42.) Thus, the
14 strength of the evidence against Petitioner supports a determination that he was not
15 prejudiced by the prosecutor's remarks.

16 Petitioner has not established prosecutorial misconduct. The Arizona Supreme Court's
17 rejection of this claim was not contrary to or based on an unreasonable application of clearly
18 established federal law, nor was it based on an unreasonable determination of the facts.

19 **Claim 5-A**

20 At the presentencing aggravation/mitigation hearing, the prosecutor submitted evidence
21 and argument in support of several alleged aggravating factors. (*See* RT 2/10/93.) One
22 month later, at the sentencing hearing, the prosecutor asserted that although the evidence
23 supported his alleged aggravating factors, it was his personal opinion that Petitioner should
24 be imprisoned for life and not given the death penalty. (RT 3/8/93 at 13-15.) He also
25 acknowledged that under the law the sentencing decision was in the judge's hands. (*Id.* at
26 12.) After a recess, the court determined that the prosecutor's recommendation constituted
27 a mitigating factor but that the proven mitigation nonetheless was insufficient to outweigh
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1 the aggravation. (*Id.* at 22, 31.)

2 Petitioner contends that pursuant to *Lankford v. Idaho*, 500 U.S. 110 (1991), his due
3 process rights were violated when the court imposed a capital sentence after the prosecutor
4 essentially withdrew his intent to seek the death penalty. (Doc. 52 at 59-65.) He raised the
5 claim on appeal, and the Arizona Supreme Court ruled as follows:

6 The court properly considered the state's recommendation for life as a
7 mitigating factor, but we cannot say it erred in nevertheless imposing the death
8 sentence. Although prosecutorial discretion to seek the death penalty extends into
9 the sentencing phase, it "ends in a capital case with the prosecutor's decision to
10 present or ignore evidence of aggravation." *State v. Brewer*, 170 Ariz. 486, 499,
11 826 P.2d 783, 796, *cert. denied*, 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147
12 (1992). In *Brewer*, we held that the prosecutor was bound by his presentation of
aggravating evidence after recommending a life sentence, even though he later
asserted that he did so only because he believed it was required under law. *Id.* at
500, 826 P.2d at 797. Here, not only did the prosecutor present evidence in
aggravation, he reasserted that those factors were present even while making his
recommendation for leniency. Moreover, as the prosecutor conceded, the trial
judge still had the ultimate responsibility to decide the sentence.

13 *Lee*, 185 Ariz. at 556-57, 917 P.2d at 699-700.

14 In *Lankford*, the prosecutor notified the defense after the guilty verdict that it would not
15 pursue the death penalty and in fact did not present argument in support of death at the
16 sentencing hearing. 500 U.S. at 111, 116. Consequently, defense counsel made no argument
17 in opposition to the death penalty, and the defendant ultimately was sentenced to death. *Id.*
18 at 116. In reversing, the Supreme Court reiterated that a trial judge's power to impose a
19 sentence authorized by statute is not limited by what a prosecutor recommends, but found
20 that a due process violation occurred because Lankford had insufficient notice that the trial
21 court still considered the death penalty to be a viable sentencing option. *Id.* at 119, 127.

22 In Petitioner's case, there was no such lack of notice. Prior to trial, the prosecutor filed
23 a notice of intent to seek the death penalty. (ROA 17.) After the guilty verdict, the
24 prosecutor did not withdraw its intention to seek death, as in *Lankford*; rather, he presented
25 evidence and argument in support of the alleged statutory aggravating circumstances. (ROA
26 95; RT 2/10/93.) Because Petitioner had continuing notice of the prosecution's intent to seek
27 the death penalty, at the aggravation/mitigation hearing the defense presented evidence of
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1 mitigation and argued against imposition of the death penalty. (Doc. 90-2 at 9-23; RT
2 2/10/93.) At the subsequent sentencing hearing, the prosecutor recommended leniency but
3 acknowledged that it was within the court's discretion to sentence Petitioner to death.
4 Because Petitioner had sufficient notice of the possibility of the death penalty, the Arizona
5 Supreme Court's denial of this claim was neither contrary to nor an unreasonable application
6 of *Lankford*, and was not based on an unreasonable determination of the facts.

7 **Claim 5-C**

8 Petitioner challenges the constitutionality and application of A.R.S. §13-703(F)(5),
9 which provides that it is an aggravating factor when "[t]he defendant committed the offense
10 as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary
11 value." Petitioner argues that this factor is vague, overbroad, and arbitrarily applied. (Doc.
12 52 at 68-71.) He further contends that no reasonable fact finder would have concluded that
13 the factor was established by the evidence presented at trial. (*Id.*)

14 On direct appeal, Petitioner only challenged the application of the pecuniary gain
15 aggravating circumstance to the facts of his case; he did not raise a facial challenge. (*See*
16 Appellant's Opening Br. at 52-53.) The Court concludes that if Petitioner were to return to
17 state court now and attempt to litigate a facial challenge, the claim would be found waived
18 and untimely under Rules 32.2(a)(3) and 32.4(a) because it does not fall within an exception
19 to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, this aspect of Claim 5-C
20 is "technically" exhausted but procedurally defaulted because Petitioner no longer has an
21 available state remedy. *See Smith*, 510 F.3d at 1138. Petitioner fails to present any cause and
22 prejudice or fundamental miscarriage arguments to excuse the default. Therefore, this aspect
23 of Claim 5-C is procedurally barred.

24 The remainder of the claim consists of Petitioner's challenge to the application of the
25 pecuniary gain aggravating circumstance. This challenge fails.

26 Whether a state court correctly applied an aggravating factor to the facts is a question
27 of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Federal habeas review is
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1 limited to determining whether the state court's finding was so arbitrary or capricious as to
2 constitute an independent due process or Eighth Amendment violation. *Id.* A state court's
3 finding of an aggravating factor is arbitrary or capricious only if no reasonable sentencer
4 could have reached the same conclusion. *Id.* at 783. In reviewing the sufficiency of the
5 evidence under this "rational factfinder" standard, the question is "whether after viewing the
6 evidence in the light most favorable to the prosecution, any rational trier of fact" could have
7 made the finding beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).
8 A habeas court faced with a record of historical facts which supports conflicting inferences
9 must presume (even if it does not appear in the record) that the trier of fact resolved any such
10 conflicts in favor of the prosecution. *Id.* at 326.

11 At sentencing, the trial court concluded that sufficient evidence had been submitted to
12 establish the pecuniary gain factor beyond a reasonable doubt. The trial court found that the
13 victim had been kidnapped to obtain money for the purchase of drugs, that robbery and thefts
14 were committed against the victim after the kidnapping, that the victim was murdered in
15 furtherance of the robbery and thefts, and that he was killed to facilitate Petitioner's escape
16 and to hinder detection and apprehension. (RT 3/8/93 at 25.) The state supreme court
17 agreed, concluding that the "murder was committed to hinder detection so that Petitioner and
18 Thompson could continue their use of the car and credit cards." *Lee*, 185 Ariz. at 558, 917
19 P.2d at 701.

20 "[A] finding that a murder was motivated by pecuniary gain for purposes of § 13-
21 703(F)(5) must be supported by evidence that the pecuniary gain was the impetus of the
22 murder, not merely the result of the murder." *Moormann v. Schriro*, 426 F.3d 1044, 1054
23 (9th 2005). "[K]illing the victim and sole witness of a robbery is powerful circumstantial
24 evidence of an intent to facilitate escape or hinder detection and thus advance the underlying
25 pecuniary gain objective." *State v. Canez*, 202 Ariz. 133, 159, 42 P.3d 564, 590 (2002); *see*
26 *also State v. Hoskins*, 199 Ariz. 127, 147, 14 P.3d 997, 1017 (2000) ("When a robbery victim
27 is executed to facilitate the killer's escape and hinder detection for the purpose of
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1 successfully procuring something of value, the pecuniary gain motive is present.”).

2 Based upon the facts proven at trial, this Court easily concludes that a rational factfinder
3 could have determined that the offense was motivated by the desire for pecuniary gain, that
4 the objective was to rob the victim, and that the killing occurred in furtherance of the
5 robbery, to facilitate escape, and to hinder detection. *See Correll v. Stewart*, 137 F.3d 1404,
6 1420 (9th Cir. 1998); *Woratzek v. Stewart*, 97 F.3d 329, 336 (9th Cir. 1996); *State v.*
7 *LaGrand*, 153 Ariz. 21, 35, 734 P.2d 563, 577 (1987) (“When the defendant comes to rob,
8 the defendant expects pecuniary gain and this desire infects all other conduct of the
9 defendant.”). The Arizona Supreme Court’s rejection of this claim was not contrary to or
10 based on an unreasonable application of clearly established federal law; nor was it based on
11 an unreasonable determination of the facts.

12 **Claim 5-D**

13 Petitioner contends that the trial court erred in concluding that certain mitigation
14 evidence, both statutory and non-statutory, had not been established by a preponderance of
15 the evidence at sentencing. (Doc. 52 at 71-79.) As a result, according to Petitioner, the court
16 failed to properly consider his proffered mitigation evidence in violation of *Lockett v. Ohio*,
17 438 U.S. 586 (1978). Respondents concede that Petitioner exhausted this issue on direct
18 appeal. (Doc. 68 at 71.)

19 In a capital sentencing proceeding, the sentencer must not be precluded, whether by
20 statute, case law, or any other legal barrier, from considering constitutionally relevant
21 mitigating evidence. *See Lockett*, 438 U.S. at 604; *see also Eddings v. Oklahoma*, 455 U.S.
22 104, 113-14 (1982). Constitutionally relevant mitigating evidence consists of “any aspect
23 of a defendant’s character or record and any of the circumstances of the offense that the
24 defendant proffers as a basis for a sentence less than death.” *Lockett*, 438 U.S. at 604.
25 However, while the sentencer must not be foreclosed from considering relevant mitigating
26 information, the Constitution does not require that a capital sentencer be instructed in how
27 to weigh any particular fact in the capital sentencing decision. *See Tuilaepa v. California*,

1 512 U.S. 967, 979 (1994).

2 Even though a claim that the trial court failed to consider relevant mitigation evidence
3 implicates federal constitutional concerns, a claim that the trial court wrongly determined that
4 mitigation has not been proven presents a question of state law. *See Walton v. Arizona*, 497
5 U.S. 639, 649 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002)
6 (“it does not follow from *Lockett* and its progeny that a State is precluded from specifying
7 how mitigating circumstances are to be proved”); *cf. Lewis v. Jeffers*, 497 U.S. at 780. In
8 *Walton*, the Court rejected the argument that A.R.S. § 13-703(C) is unconstitutional because
9 it requires a defendant to prove mitigating circumstances by a preponderance of the evidence.
10 497 U.S. at 650; *see also Delo v. Lashley*, 507 U.S. 272, 275-76 (1993) (referring to *Walton*
11 and stating that the Court had “made clear that a State may require the defendant to bear the
12 risk of nonpersuasion as to the existence of mitigating circumstances”) (internal quotation
13 and citation omitted).

14 On habeas review, a federal court does not evaluate the substance of each piece of
15 evidence submitted as mitigation; rather, it reviews the state court record to ensure that the
16 state court allowed the presentation of and considered all relevant mitigating information.
17 *See Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990) (the requirement of individualized
18 sentencing in capital cases is satisfied by allowing the sentencer to consider all relevant
19 mitigating evidence); *Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (en banc). “[T]he
20 trial court need not exhaustively analyze each mitigating factor ‘as long as a reviewing
21 federal court can discern from the record that the state court did indeed consider all
22 mitigating evidence offered by the defendant.’” *Moormann*, 426 F.3d at 1055 (quoting *Clark*
23 *v. Ricketts*, 958 F.2d 851, 858 (9th Cir. 1991)); *see also Parker v. Dugger*, 498 U.S. 308,
24 314-15, 318 (1991) (sentencing court properly considered all mitigation, including
25 nonstatutory mitigation, where the court stated that it considered all the evidence and found
26 no mitigating circumstances that outweighed the aggravating circumstances); *Lopez v.*
27 *Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007) (rejecting a claim that the sentencing court
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1 failed to consider proffered mitigation where the court did not prevent the defendant from
 2 presenting any evidence in mitigation, did not affirmatively indicate there was any evidence
 3 it would not consider, and expressly stated it had considered all mitigation evidence proffered
 4 by the defendant); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1044 (9th Cir. 1997). The
 5 determination of what the trial judge found as a mitigating circumstance is an issue of
 6 historical fact. *Parker*, 498 U.S. at 320; *Lopez*, 491 F.3d at 1038.

7 In Arizona, sentencing courts have been instructed that if relevant mitigating
 8 information does not rise to the level of a statutory mitigating circumstance, it must
 9 nonetheless be considered as nonstatutory mitigation in order to determine whether the
 10 defendant should be treated with leniency. *See State v. McMurtrey*, 136 Ariz. 93, 102, 664
 11 P.2d 637, 646 (1983).

12 Petitioner asserts that the trial court erred in concluding that he had failed to establish
 13 statutory mitigation under A.R.S. §§ 13-703(G)(1), (G)(3), (G)(4)⁵ and the nonstatutory
 14 mitigating circumstances of organic brain syndrome, amenability to rehabilitation, and the
 15 giving of a felony murder instruction. (Doc. 52 at 71-79.) Regarding the (G)(1) factor,
 16

17 ⁵ In 1991, A.R.S. § 13-703(G), provided, in relevant part, that mitigating factors
 18 include the following:

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

22 3. The defendant was legally accountable for the conduct of another under the
 23 provisions of § 13-303, but his participation was relatively minor, although not
 24 so minor as to constitute a defense to prosecution.

25 4. The defendant could not reasonably have foreseen that his conduct in the
 26 course of the commission of the offense for which the defendant was convicted
 would cause, or would create a grave risk of causing, death to another person.

27 A.R.S. § 13-703(G) (West 1991).

1 Petitioner contends that his cocaine and alcohol intoxication at the time of the crime
2 combined with his pre-existing organic brain syndrome rendered him unable to conform his
3 conduct to the requirements of law. (Doc. 52 at 72-73.) At sentencing, he submitted the
4 report of a psychiatrist, Dr. Leonardo Garcia-Buñuel, whose findings Petitioner contends
5 were uncontroverted. (RT 2/10/93; Doc. 90-2 at 28-35.) For (G)(3), Petitioner argues that
6 the trial court erred in failing to conclude he was a minor participant because it was
7 Thompson who killed the victim and was the major player in the underlying felonies while
8 he was only an accomplice. (Doc. 52 at 73-74.) Regarding (G)(4), Petitioner contends that
9 the judge erred in concluding that he could reasonably foresee that his conduct would cause,
10 or create a grave risk of causing, death to another person. (*Id.* at 74-75.) Petitioner relies on
11 the report of Dr. Garcia-Buñuel to prove that he did not reasonably foresee or intend the
12 victim's death. Finally, as to nonstatutory mitigation, Petitioner contends that the trial court
13 erred in rejecting his evidence of organic brain syndrome, amenability to rehabilitation, and
14 the giving of a felony murder instruction. (Doc. 52 at 75-76.) Petitioner again relies on Dr.
15 Garcia-Buñuel's report to establish proof of these factors.

16 Review of the sentencing record shows that the trial court considered all of Petitioner's
17 mitigation evidence. The trial court concluded that Dr. Garcia-Buñuel's report was
18 insufficient to establish the (G)(1) circumstance because Petitioner's actions

19 indicate he was able to appreciate the wrongfulness of his conduct and had the
20 ability to conform his conduct to the law. Just prior to the killing the defendant
21 attempted unsuccessfully to poison the victim with automobile exhaust. The
22 defendant took quick action to thwart the victim's escape. The defendant returned
the victim's body to the trunk in order to remove it from the scene and hinder
detection.

23 (ROA 99 at 5.) The court also discounted the report because it was not corroborated by any
24 psychological testing and was based entirely on Petitioner's self-report. (*Id.* at 5-6.) The
25 Arizona Supreme Court also considered Dr. Garcia-Buñuel's report and upheld the trial
26 court's conclusion that the (G)(1) circumstance had not been proven. *Lee*, 185 Ariz. at 560,
27 917 P.2d at 701.

1 Regarding the (G)(3) and (G)(4) factors, the trial court considered the evidence
2 submitted by Petitioner but concluded that neither statutory circumstance had been
3 established. The court found that Petitioner's conduct was not minor and that it was
4 foreseeable his conduct would result in the victim's death. (ROA 99 at 6.) The court
5 reasoned that it was Petitioner's threats of harm to the victim that caused the victim to submit
6 to the kidnapping, robbery, and thefts. (*Id.*) The court also found:

7 The defendant attempted unsuccessfully to kill the victim with exhaust fumes.
8 The defendant recaptured the victim when he tried to escape, attempted to strangle
9 the victim with a belt, held the victim while Karen Thompson struck the fatal blow
and attempted to strangle the victim with his hands after the blow was struck. The
defendant intended to kill the victim.

10 (*Id.*) The Arizona Supreme Court agreed, concluding that overwhelming evidence showed
11 that Petitioner was not a minor participant and had not established lack of foreseeability of
12 the victim's death. *Lee*, 185 Ariz. at 560, 917 P.2d at 701.

13 Regarding nonstatutory mitigation, the trial court considered but rejected Petitioner's
14 evidence of a behavior disorder based on Dr. Garcia-Buñuel's opinion regarding organic
15 brain syndrome. (ROA 99 at 7.) The court also considered but rejected Dr. Garcia-Buñuel's
16 opinion that Petitioner might be rehabilitated in prison. (*Id.*) The court concluded that
17 Petitioner's "past history of substance abuse and criminal activities make it likely that he
18 would commit further criminal acts if allowed." (*Id.*)

19 The state supreme court considered Petitioner's proffered nonstatutory mitigating
20 circumstances but rejected them as not having been proven by a preponderance of the
21 evidence. *Lee*, 185 Ariz. at 560, 917 P.2d at 701. Regarding the trial court's alleged failure
22 to sufficiently consider the felony-murder instruction as mitigation, the court held that
23 "[s]uch an instruction may be considered mitigating only when there is some doubt as to
24 whether the defendant intended to kill the victim. There is no reasonable doubt here that
25 defendant intended Anderson's death. He planned it, discussed it and participated in its
26 execution." *Id.* (citation omitted).

27 Applying the rule of *Lockett* and its progeny, it is clear that the sentencing court
28

1 considered and evaluated all of the evidence proffered in mitigation but found it wanting as
2 a matter of fact, not as a matter of law. *See Eddings*, 455 U.S. at 113; *Blystone*, 494 U.S. at
3 307 (sentencer is not required to find proffered evidence mitigating). The trial court was not
4 precluded from considering, and did in fact consider, the evidence submitted by Petitioner
5 in support of the statutory and nonstatutory mitigating circumstances. Thus, the evidence
6 was not placed “beyond the effective reach of the sentencer.” *Graham v. Collins*, 506 U.S.
7 461, 475 (1993). The Arizona Supreme Court’s rejection of this claim was neither contrary
8 to nor an unreasonable application of controlling federal law.

9 **Claim 5-E**

10 Pursuant to *Enmund v. Florida*, 458 U.S. 782, 797 (1982), and *Tison v. Arizona*, 481
11 U.S. 137, 158 (1987), Petitioner contends that his death sentence for felony murder violates
12 the Eighth Amendment because the trial court did not make a sufficient *Enmund/Tison*
13 finding and because the Arizona Supreme Court unreasonably determined the facts in
14 reviewing this issue. (Doc. 52 at 79-93.)

15 A defendant convicted of felony murder can be sentenced to death only if he actually
16 killed, attempted to kill, or intended to kill, or if he was a major participant in the underlying
17 felony and acted with reckless indifference to human life. *Tison*, 481 U.S. at 157-58;
18 *Enmund*, 458 U.S. at 797. In Arizona, first-degree murder is a single crime, whether it
19 occurs as a premeditated murder or a felony murder. *See Schad v. Arizona*, 501 U.S. 624,
20 644-45 (1991) (concluding that Arizona’s definition of first-degree murder was not
21 unconstitutional). Petitioner’s jury returned a general verdict on his first-degree murder
22 charge. (ROA 74.) Because it is possible that Petitioner’s jury only found him guilty of
23 felony murder, an *Enmund/Tison* finding at sentencing was necessary.

24 An *Enmund/Tison* finding may be made either at the trial level or at the appellate level.
25 *See Cabana v. Bullock*, 474 U.S. 376, 387-88 (1986), *overruled in part on other grounds*,
26 *Pope v. Illinois*, 481 U.S. 497, 503 n.7 (1987) (“The court must examine the entire course of
27 the state court proceedings against the defendant in order to determine whether, at some point
28

in the process, the requisite factual finding as to the defendant's culpability has been made."'). A state court's finding that *Enmund/Tison* is satisfied is sufficient if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact" could have made the finding beyond a reasonable doubt. See *Jackson*, 443 U.S. at 319. On habeas review, the provisions of the AEDPA demand an additional level of deference for state court findings. See 28 U.S.C. § 2254(e)(1) (petitioner bears the burden of overcoming by "clear and convincing evidence" the presumption of correctness applicable to a state court's factual determinations). A state court's findings regarding *Enmund/Tison* are factual determinations that are presumed correct and for which Petitioner "bear[s] the heavy burden of overcoming." *Cabana*, 474 U.S. at 377-78.

In its special verdict, the trial court explained its conclusion that Petitioner intended to kill the victim:

The defendant's threats of harm to the victim caused the victim to submit to the kidnap, robbery, and thefts. The defendant attempted unsuccessfully to kill the victim with exhaust fumes. The defendant recaptured the victim when he tried to escape, attempted to strangle the victim with a belt, held the victim while Thompson struck the fatal blow and attempted to strangle the victim with his hands after the blow was struck. The defendant intended to kill the victim.

(ROA 99 at 6.) On direct appeal, the Arizona Supreme Court ruled:

In the same vein, defendant argues that the trial court erred in failing to make a specific finding pursuant to *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378-79, 73 L.Ed.2d 1140 (1982), that he killed, intended to kill, or attempted to kill the victim. The jury returned a general form of first degree murder verdict, without indicating whether it found premeditated murder, felony-murder, or accomplice liability. However, the trial court specifically found, in that part of its special verdict concerning statutory mitigating circumstances, that "[t]he defendant intended to kill the victim." Although the court did not state that this finding was made beyond a reasonable doubt, the record clearly supports such a conclusion.

When a jury is instructed on felony-murder and finds the defendant guilty of first degree murder, the trial court must make an *Enmund* finding of the requisite degree of culpability beyond a reasonable doubt. *State v. McDaniel*, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983). However, we have accepted *Enmund* findings that were not specifically labeled as having been made "beyond a reasonable doubt." See *State v. McCall*, 160 Ariz. 119, 126, 770 P.2d 1165, 1172 (1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3289, 111 L.Ed.2d 798 (1990) (finding of intent to kill sufficient when made in the context of rejecting a proffered mitigating factor); *Martinez-Villareal*, 145 Ariz. at 450, 702 P.2d at 679 (finding of intent to

1 kill in sentencing met required degree of proof where independent review of
2 record supported a finding of beyond a reasonable doubt). Form will not be
3 permitted to triumph over substance. There is no magic in the words used so long
as it is apparent that the trial court has applied a correct standard.

4 Here, the court cited defendant's admission of involvement in the killing to
5 a defense expert retained for mitigation purposes, the evidence of his attempts to
6 kill the victim by asphyxiation and manual strangulation, the fact that he held the
7 victim down for Karen Thompson's fatal blow, and his admission to the
psychiatrist that he could have stopped Thompson from killing the victim but did
not. This evidence, coupled with all of the testimony about the planning of the
crime, supports a finding beyond a reasonable doubt that defendant intended to kill
the victim.

8 *Lee*, 185 Ariz. at 559, 917 P.2d at 702.

9 Petitioner first claims that the trial court failed to make a sufficient *Enmund/Tison*
10 factual finding. (Doc. 52 at 79-85.) Although Petitioner acknowledges the trial court's
11 conclusion that he intended the death of the victim, he argues that intent was not found
12 beyond a reasonable doubt as required. (*Id.*) He further argues lack of intent due to his
13 alcohol/cocaine intoxication on the night of the crime, as well as his alleged organic brain
14 syndrome. (*Id.*) Finally, Petitioner argues that the *Tison* factors were not established because
15 he was a minor participant who only aided and abetted Thompson in the underlying
16 kidnapping and robbery. (*Id.*)

17 A reviewing court does not reweigh the evidence; rather, the inquiry is whether any
18 rational trier-of-fact could have found, beyond a reasonable doubt, that the *Enmund/Tison*
19 prerequisite was met. *See Jackson*, 443 U.S. at 319. Based on the evidence submitted at trial
20 and Petitioner's concession at sentencing that he aided and abetted the murder (Doc. 90-2 at
21 28-35), any rational trier of fact could have found that Petitioner intended the victim's death
22 because he participated in trying to kill the victim with exhaust fumes, subsequently tackled
23 him, tried to strangle him with a belt, and held him down when Thompson killed him with
24 a rock. *See Tison*, 481 U.S. at 150 ("Traditionally, 'one intends certain consequences when
25 he desires that his acts cause those consequences or knows that those consequences are
26 substantially certain to result from his acts.'") (quoting W. LaFare & A. Scott, *Criminal Law*
27 § 28, p. 196 (1972)). Furthermore, regarding alcohol and cocaine impairment, Petitioner
28

1 specifically told Dr. Garcia-Buñuel that he had a good recollection of the events leading up
2 to and including the murder, acknowledging that he tackled the victim and held him down
3 while Thompson killed him with a rock. (Doc. 90-2 at 28-35.) Such a concession clearly
4 satisfies the *Tison* factors of being a major participant in the murder and having a reckless
5 disregard for human life. See *Paradis v. Arave*, 20 F.3d 950, 959-60 (9th Cir. 1994)
6 (confession to aiding and abetting murder satisfies the *Tison* standard of culpability).

7 Petitioner also argues that the state supreme court unreasonably determined the facts
8 in support of its *Enmund/Tison* finding. However, that court's citation of the factual record
9 clearly supports its conclusion that Petitioner intended to kill the victim, was a major
10 participant in the murder and underlying felonies, and exhibited a reckless disregard for
11 human life. See *Lee*, 185 Ariz. at 559, 917 P.2d at 702. Although Petitioner advances a
12 contrary view of the evidence, this Court reviews the evidence in the light most favorable to
13 the prosecution. See *Jackson*, 443 U.S. at 319. The Arizona Supreme Court's rejection of
14 this claim was not contrary to or based on an unreasonable application of clearly established
15 federal law or based on an unreasonable determination of the facts.

16 **Claim 7**

17 Petitioner alleges that he was denied his constitutional right to a fair trial and sentencing
18 hearing before an impartial trial judge because the judge was biased against him. (Doc. 52
19 at 95-98.) Petitioner concedes that he failed to present this claim in state court. (*Id.* at 97.)
20 However, he contends, without explanation or argument, that a claim of judicial bias is
21 excused from the exhaustion requirement because judicial bias constitutes structural error.
22 (Doc. 73 at 28.) The Court disagrees.

23 In *Smith v. Baldwin* the Ninth Circuit held that the petitioner's excuses for failing to
24 exhaust a claim were irrelevant, stating that "Smith needs no excuse from the exhaustion
25 requirement because he has technically exhausted his state remedies through his procedural
26 default. . . . [T]he relevant question becomes whether Smith's procedural default can be
27 excused, not whether Smith's failure to exhaust can be excused." 510 F.3d at 1139.
28

Moreover, the AEDPA specifically provides that a writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. *See* 28 U.S.C. § 2254(b)(1)(A); *see also Rhines v. Weber*, 544 U.S. 269, 276 (2005) (stating that claims must first be exhausted in state court); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (“It has been settled for nearly a century that a state prisoner must normally exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts.”). Petitioner had the opportunity to raise Claim 7 on direct appeal but failed to do so. Petitioner does not assert cause and prejudice or allege a fundamental miscarriage of justice to excuse the default. Therefore, Claim 7 is procedurally barred.

Claim 8-A

Petitioner contends that Arizona’s death penalty statute violates the Equal Protection Clause of the Fourteenth Amendment because if the evidence in mitigation and aggravation is equally balanced, a defendant receives the aggravated sentence of death under the first-degree murder statute but only the presumptive, not aggravated, sentence under other criminal statutes such as second-degree murder. (Doc. 52 at 98-100.) He also argues that he is entitled to “strict scrutiny” review of these legislative classifications because “life” is a fundamental right. (*Id.*)

Although Respondents contest exhaustion (Doc. 68 at 81), Petitioner fairly presented this issue on direct appeal (Appellant’s Opening Br. at 69-72). The Arizona Supreme Court “saw no need to address this argument” because it disagreed that the aggravating and mitigating evidence in this case was “in balance.” *Lee*, 185 Ariz. at 553, 917 P.2d at 696.

“The threshold question under AEDPA [is] whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final[.]” *Williams v. Taylor*, 529 U.S. at 390. Habeas relief cannot be granted if the Supreme Court has not “broken sufficient legal ground” on a constitutional principle advanced by a petitioner. *Williams*, 529 U.S. at 381; *see Carey v. Musladin*, 549 U.S. 70, 77 (2006). Thus, Petitioner must establish that the state court’s decision is contrary to controlling Supreme

1 Court precedent. *See Musladin*, 549 U.S. at 74; *see also Plumlee v. Masto*, 512 F.3d 1204,
2 1211 (9th Cir. 2008) (en banc) (requiring petitioner to carry burden of citing applicable
3 Supreme Court precedent in support of claim).

4 Here, Petitioner cites no Supreme Court case supporting his equal protection argument,
5 and the Court has found none. Nor does he assert that the Arizona Supreme Court
6 unreasonably found that the aggravating and mitigating evidence in this case was not equally
7 balanced. Accordingly, the Court cannot find that the Arizona Supreme Court's rejection of
8 this claim was either contrary to or an unreasonable application of controlling federal law,
9 or that it was based on an objectively unreasonable determination of the facts.

10 **Claim 8-B**

11 Petitioner contends that certain statutory aggravating circumstances established at his
12 sentencing – A.R.S. §§ 13-703(F)(2) (prior crime of violence) and (F)(6) (especially cruel,
13 heinous and depraved murder) – are unconstitutionally vague and their application to him
14 violates the Eighth and Fourteenth Amendments. (Doc. 52 at 100-07.) The Court previously
15 considered and denied on the merits the (F)(2) challenge in its September 2006 order (Doc.
16 87 at 23-28) and addresses here only the (F)(6) claim.

17 The (F)(6) aggravating factor may be established by either a finding of especial cruelty
18 or a finding that the murder was committed in an especially heinous or depraved manner.
19 *See State v. Beaty*, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988). The Arizona Supreme
20 Court has construed the cruelty and heinous/depraved prongs under limiting definitions found
21 constitutional by the United States Supreme Court. (Doc. 52 at 103.) Petitioner contends,
22 however, that the Arizona courts have subsequently construed both the cruelty and
23 heinous/depraved prongs too broadly and thus the factors no longer constitutionally narrow
24 the class of persons eligible for the death penalty. (Doc. 52 at 103-07.)

25 The Arizona Supreme Court has clarified that especial cruelty is established when the
26 victim consciously suffers physical pain or emotional distress. *State v. Bible*, 175 Ariz. 549,
27 604, 858 P.2d 1152, 1207 (1993). To establish that a murder was committed in a "heinous
28

1 or depraved” manner, the sentencer considers several factors, including: (1) whether the
2 defendant relished the murder, (2) whether the defendant inflicted gratuitous violence on the
3 victim, (3) whether the defendant mutilated the victim, (4) the senselessness of the crime, and
4 (5) the helplessness of the victim. *State v. Gretzler*, 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983).
5 As Petitioner acknowledges, these limiting constructions were upheld in *Walton*, 497 U.S.
6 at 654. *See also Jeffers*, 497 U.S. at 777-78 (stating that “*Walton* therefore squarely
7 forecloses any argument that Arizona’s subsection (F)(6) aggravating circumstance, as
8 construed by the Arizona Supreme Court, fails to channel the sentencer’s discretion by clear
9 and objective standards that provide specific and detailed guidance and that make rationally
10 reviewable the process for imposing a sentence of death”) (internal quotation and citation
11 omitted). Further, the *Walton* Court concluded that Arizona trial judges and the Arizona
12 Supreme Court presumptively apply the limiting definitions of the (F)(6) aggravating
13 circumstance to the facts of a capital case at trial and during appellate review. *Walton*, 497
14 U.S. at 653-54.

15 Here, the (F)(6) finding was based solely on cruelty. Petitioner’s argument
16 notwithstanding, the Arizona courts applied the constitutionally appropriate limiting
17 definition. The trial court found that cruelty was established based on the mental anguish,
18 pain, and suffering experienced by the victim for more than eight hours prior to being
19 murdered. (RT 3/8/93 at 25-26.) The Arizona Supreme Court agreed with the trial court’s
20 finding and summarily rejected Petitioner’s facial vagueness challenge. *See Lee*, 185 Ariz.
21 at 558, 917 P.2d at 701. This decision was not based on an unreasonable application of law
22 or determination of fact. *See Jeffers*, 497 U.S. at 779 (“[I]f a State has adopted a
23 constitutionally narrow construction of a facially vague aggravating circumstance and if the
24 State has applied that construction to the facts of the particular case, then the fundamental
25 constitutional requirement of channeling and limiting the sentencer’s discretion in imposing
26 the death penalty has been satisfied”) (internal quotation and citation omitted); *see also Arave*
27 *v. Creech*, 507 U.S. 463, 477 (1993) (“our decisions do not authorize review of state court
28

1 cases to determine whether a limiting construction has been applied consistently.”).

2 **Claim 8-C**

3 Petitioner contends that Arizona’s capital statutory scheme violates the Eighth
4 Amendment because it requires a capital defendant seeking leniency to prove that the
5 mitigating circumstances substantially outweigh the aggravating factors. (Doc. 52 at 107-
6 08.) This claim was squarely rejected in *Walton*, 497 U.S. at 651-52; *see also Kansas v.*
7 *Marsh*, 548 U.S. 163, 172-73 (2006). The Arizona Supreme Court’s summary dismissal of
8 this issue, *see Lee*, 185 Ariz. at 553, 917 P.2d at 696, was neither contrary to nor an
9 unreasonable application of controlling federal law.

10 **Claim 8-D**

11 Petitioner contends that Arizona’s death penalty statute unconstitutionally restricts the
12 ability of the sentencing court to consider mitigating evidence because it requires that
13 mitigation evidence be established by a preponderance of the evidence. (Doc. 52 at 108-09.)
14 Again, this issue is foreclosed by *Walton*, 497 U.S. at 651, which held that Arizona’s
15 allocation of the burdens of proof in a capital sentencing proceeding does not violate the
16 Constitution. *Id*; *see also Delo*, 507 U.S. at 275-76. Therefore, the Arizona Supreme Court’s
17 ruling denying this claim was neither contrary to nor an unreasonable application of
18 controlling federal law.

19 **Claims 9-A and 9-B**

20 In Claims 9-A and 9-B, Petitioner asserts that counsel’s investigation of relevant
21 defenses was deficient and that counsel unreasonably selected and presented an alibi defense,
22 both to his prejudice. (Doc. 52 at 109-45.) Respondents concede that Petitioner raised these
23 allegations in his PCR petition, where he argued that counsel was ineffective for not pursuing
24 intoxication as a defense and for unreasonably selecting an alibi defense despite Petitioner’s
25 statement to counsel that he was at the scene of the crime. (*See* ROA-PCR 3 at 14-18.)

26 To prevail on a claim of ineffective assistance of counsel, a petitioner must show that
27 counsel’s performance was deficient and that counsel’s deficient performance prejudiced his
28

1 defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry asks
2 whether counsel's assistance was reasonable considering all the circumstances. *Id.* at 688-89
3 (referring to prevailing norms of practice regarding how best to represent a criminal
4 defendant). "[A] court must indulge a strong presumption that counsel's conduct falls within
5 the wide range of reasonable professional assistance; that is, the defendant must overcome
6 the presumption that, under the circumstances, the challenged action might be considered
7 sound trial strategy." *Id.* at 689 (internal quotation and citation omitted).

8 While trial counsel has "a duty to make reasonable investigations or to make a
9 reasonable decision that makes particular investigations unnecessary[,] . . . a particular
10 decision not to investigate must be directly assessed for reasonableness in all the
11 circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691.
12 In making this assessment, the court must "conduct[] an objective review of [counsel's]
13 performance, measured for reasonableness under prevailing professional norms, including
14 a context-dependent consideration of the challenged conduct as seen from counsel's
15 perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (internal quotation and
16 citation omitted). The Supreme Court has instructed that "[i]n judging the defense's
17 investigation, as in applying *Strickland* generally, hindsight is discounted by pegging
18 adequacy to 'counsel's perspective at the time' investigative decisions are made" and by
19 applying deference to counsel's judgments. *Rompilla v. Beard*, 545 U.S. 374, 381 (2005)
20 (quoting *Strickland*, 466 U.S. at 689).

21 A petitioner must affirmatively prove prejudice by "show[ing] that there is a reasonable
22 probability that, but for counsel's unprofessional errors, the result of the proceeding would
23 have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to
24 undermine confidence in the outcome." *Id.* "The assessment of prejudice should proceed
25 on the assumption that the decision-maker is reasonably, conscientiously, and impartially
26 applying the standards that govern the decision." *Id.* at 695. If the prosecution's case is
27 weak, there is a greater likelihood that the outcome of the trial would have been different.
28

1 See *Johnson v. Baldwin*, 114 F.3d 835, 839-40 (9th Cir. 1997).

2 Under the AEDPA, this Court's review of the state court's decision is subject to another
3 level of deference. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002); see *Knowles v. Mirzayance*,
4 129 S. Ct. 1411, 1420 (2009) (noting that a "doubly deferential" standard applies to
5 *Strickland* claims under the AEDPA). Therefore, to prevail on an IAC claim, Petitioner must
6 make the additional showing that the state court, in ruling that counsel was not ineffective,
7 applied *Strickland* in an objectively unreasonable manner. 28 U.S.C. § 2254(d)(1).

8 Finally, a court need not address both components of the inquiry, or follow any
9 particular order in assessing deficiency and prejudice. *Strickland*, 466 U.S. at 697. If it is
10 easier to dispose of a claim on just one of the components, then that course should be taken.
11 *Id.*

12 Background

13 The PCR court conducted a four-day evidentiary hearing on Petitioner's IAC claims.
14 The court heard testimony from defense counsel, Assistant La Paz County Public Defender
15 Steven Politi; Politi's supervisor, former La Paz County Public Defender (now La Paz
16 County Superior Judge) Michael Burke; La Paz County Attorney Steven Suskin; an IAC
17 defense expert, Michael Kimerer; and the prosecution's investigator, Terry Stewart.

18 Trial counsel Politi testified that he met with Petitioner approximately 76 times to
19 discuss the case. (RT 4/16/02 at 31; Doc. 90-1 at 20-40.) Politi spent a considerable amount
20 of time focused on a plea offer, in which the prosecution promised not to pursue the death
21 penalty in exchange for a guilty plea. (RT 4/16/02 at 29-30.) Based on the strong evidence
22 against Petitioner, counsel encouraged him on numerous occasions to accept the plea. (See
23 *id.* at 31, 41-42, 50-51, 64; see also Doc. 90-1 at 22-32.) According to Politi's PCR
24 testimony and his detailed work log, Petitioner finally agreed to accept the deal in August
25 1992 and signed a plea agreement; a change of plea hearing was scheduled. (Doc. 90-1 at
26 32; RT 4/16/02 at 83-84.) However, prior to the hearing, Petitioner changed his mind and
27 refused to plead guilty. Instead, he opted to go to trial to pursue an alibi defense.
28

1 Politi's testimony at the PCR hearing further established that Petitioner wanted to
2 pursue an alibi defense in the hope of being fully acquitted of the murder charge:

3 Q. And is it your memory now that you did not recommend or advise
4 Darrel Lee to pursue this alibi theory at trial?

5 A. I told Darrel that I thought alibi would be the wrong thing to do.

6 Q. And short of taking the plea agreement, what theory of the case did you
7 think would have fared [sic] better had Mr. Lee agreed?

8 A. It wasn't so much a matter of what I thought would have fared [sic]
9 better. I was 100 percent absolutely convinced that an alibi would go nowhere.
10 I didn't have a lot of room to play as far as a defense goes, but I felt as though
11 Karen Thompson was the – I felt that she was running the show, and I – in my
12 mind, I felt like the best I might be able to do at trial is to bring that out and
13 maybe, in combination with her running the show and Darrel's extreme level of
14 intoxication, maybe the jury would have come back on something less than first
15 degree.

16

17 Q. For that theory you just described to have worked, would you agree that
18 you would have had to have Darrel Lee cooperate in presenting that defense?

19 A. Yeah. Yeah.

20 Q. So if he wouldn't cooperate in presenting that defense, is it fair to say
21 you would have abandoned the theory?

22 A. Yeah. Well, I never would have given up trying to do that, but I –
23 obviously, without Darrel's cooperation, I couldn't do that. I don't think I ever
24 stopped trying to get Darrel to – to cooperate with anything other than alibi.

25 Q. And it was – was it your feeling then that – that he continued to insist
26 on this – presenting this alibi defense despite your advice to the contrary?

27 A. Yes. The alibi What Darrel made clear to me was – was that the
28 only acceptable result as far as he was concerned was that if he would go to trial,
be found not guilty on all counts, and then walk away.

Q. And that was the result he wanted you to obtain?

A. He told me that – that was the only acceptable outcome as far as he was
concerned.

(RT 4/16/02 at 60-62.)

In preparation for sentencing, when Petitioner disclosed to his mental health expert that
he was involved in the murder, Dr. Garcia-Buñuel questioned Petitioner about his refusal to

1 accept the plea agreement:

2 I asked him why he did not accept the plea offer which would have saved
3 him from a likely death penalty. He said he had not killed Mr. Anderson, nor had
4 he intended for him to die. He further said that he had caused enough misery to
5 his parents, “who always stuck with me,” that, if he accepted the plea it would
6 amount to telling them that he had, in fact, committed murder. He did not want
7 to do that.

8 (Doc. 90-2 at 33.)

9 Petitioner insisted that counsel present an alibi defense, contending that a man named
10 “Chivo” was with Thompson at the time of the murder. (RT 4/16/02 at 39, 41, 56-60, 70, 76,
11 135-36.) Politi testified that he attempted to secure support for Petitioner’s alibi, but
12 discovered no corroborating evidence. (*Id.* at 57-60, 75-76, 78-79.) Investigators Austin
13 Cooper and Rick Paterson tried to locate witnesses who could verify that Petitioner was not
14 with Thompson on the day of the crime. (*Id.* at 48, 56-59, 74-76, 78.) At counsel’s direction,
15 the investigators also pursued other alibi-related leads provided by Petitioner. (Doc. 90-2 at
16 71; *see also* RT 4/18/02 at 269.)

17 Counsel also began an investigation into a possible mental state defense. (RT 4/16/02
18 at 65-70, 96-99.) He sought and was granted authorization to secure the appointment of a
19 mental health expert. (ROA 24; RT 6/29/92; RT 8/3/92; ME 8/3/92.) He asked Dr. Anthony
20 Munoz to evaluate Petitioner, explaining that he was investigating a defense based on
21 Petitioner’s cocaine and alcohol intoxication at the time of the murder. (ROA-PCR 3, Ex.
22 6.) Counsel testified that he wanted to use Petitioner’s state of intoxication, in conjunction
23 with Karen Thompson’s leading role in the criminal activity, to secure a conviction on a
24 lesser count than first-degree murder. (RT 4/16/02 at 61, 71-73.) Ultimately, Dr. Munoz
25 refused to travel to Parker, Arizona, to conduct the evaluation, and counsel did not seek a
26 new expert because by that time an intoxication defense was inconsistent with the alibi
27 defense insisted on by Petitioner. (*Id.* at 98-99.)

28 Despite Petitioner’s insistence on an alibi defense, counsel continued to advise
Petitioner to accept the plea agreement up until trial commenced in November 1992. (*Id.* at

64; Doc. 90-1 at 35.) He also enlisted the aid of others, including Petitioner's parents, to convince Petitioner to accept the plea. (RT 4/16/02 at 82-83; Doc. 90-1 at 32.) Politi's supervisor, Michael Burke, also attempted to persuade Petitioner to abandon the alibi defense and to testify in support of a voluntary intoxication defense as a means of negating specific intent and avoiding a conviction for first-degree murder. (Doc. 90-1 at 29; RT 4/18/02 at 258-60, 265.) Burke confirmed that Petitioner refused to cooperate with an intoxication defense, believing his alibi defense would result in acquittal because a convenience store clerk was going to testify that the man with Thompson shortly after the murder did not fit his description:

Q. So was it your opinion that Steve Politi also tried to urge Darrel Lee to pursue a diminished capacity or second degree murder defense?

A. Yes it was.

Q. And that would have – short of accepting a plea – that would have been what you and he had recommended as a trial strategy?

A. Yes.

....

Q. Do you recall Mr. Politi sending an investigator or doing an investigation on the alibi defense?

A. Yes.

Q. And specifically, do you recall Mr. Politi's retaining an investigator and asking him to try to find a person named Chivo?

A. Yes.

Q. Can you tell us who was Chivo?

A. Chivo was the person that Darrel said hooked up with Karen Thompson in Phoenix sometime between – or sometime after this time they were together at the motel and the time that Mr. Anderson was abducted. He was a drug user that hung around this trailer park down on Washington Street where I think Darrel either lived or frequented and met up with Karen and these other people. So it was Darrel's position that Chivo was the one that had gone with Karen Thompson and abducted Mr. Anderson. There was a witness from I believe a Texaco Station, Quick Check Convenience Store place – I believe it was in Blythe – that had given information to the police and I think maybe even testified at trial that he remembered Karen Thompson being there; and a person in proximity to her was a Mexican person, I think tall, thin with a mustache. I can't remember exactly, but

1 it certainly wasn't a description of Darrel at the time. And, in fact, Darrel – Darrel
2 was – his words were I'm hanging my hat on that for reasonable doubt in a
3 conversation I had with him about going with the diminished capacity. He said
no. This witness is gonna testify that this guy was in this convenience store, he
said, that's the spitting image of Chivo.

4

5 Q. And is it your memory that you and Steve had advised Mr. Lee against
6 advancing [the Chivo alibi defense] theory at trial?

7 A. I did, yes. I'm sure Steve did, too, because we discussed it together in
8 a conversation at the jail. Slated [sic] out to Darrel what my thoughts were on the
alibi defense.

9 Q. And you said you specifically had talked to Darrel Lee about the
10 diminished capacity or second degree murder defense; correct?

11 A. Correct.

12 Q. And would you agree – let me ask you this: did Darrel refuse to
cooperate in that defense?

13 A. He said that – he wasn't going to go with that. He said he was – he
14 wasn't there. He had a witness that he was gonna present, this Chivo description
and, in his words, were – he said that's – I think that's enough reasonable doubt
for a not guilty verdict.

15 (RT 4/18/02 at 267-70.)

16 Petitioner did not testify at the PCR evidentiary hearing. He did submit an affidavit,
17 which claimed that “[d]uring one of our first in-depth meetings, early on in the case, I told
18 Mr. Politi about my involvement in this case.” (POA-PCR 3, Ex. 1.) The prosecutor’s
19 investigator, Terry Stewart, testified about a note in his file indicating that a plea meeting
20 between Politi, Petitioner, and prosecutor Suskin took place on April 6, 1992, and that
21 “Suskin advises that Darrel claims Anderson was murdered by Karen but admits he was
22 present.” (RT 4/17/02 at 173.) To support his claim that Politi should have withdrawn as
23 counsel rather than present a “false” alibi defense, Petitioner proffered the following note
24 from Politi’s work log:

25 9/3[/92] JAIL VISIT - Told [Petitioner] re my conversation with his father this
26 afternoon and the inevitable ethical dilemma I face as regards the alibi defense.
27 Discussed problem with Mike Burke, and the likely necessity of filing a motion
to withdraw based upon an inevitable conflict of interest.

(Doc. 90-1 at 32.) Petitioner also elicited testimony from an experienced criminal defense attorney concerning the difficult ethical issues associated with a client who confesses guilt to counsel but insists on an alibi defense. (RT 4/17/02 at 179-82.)

Following the hearing, the state PCR court denied relief:

As to claim #3 counsel argues that Mr. Politi, Lee's trial counsel, acted unethically when, after Lee confessed the murder to him or at least told him about his involvement in it, he allowed Lee to take the stand and present a false alibi defense. On the basis of what I heard, I cannot conclude that Mr. Lee confessed the crime of murder to Mr. Politi or that Mr. Politi acted unethically. But even if he did, I find that there was no reasonable probability that, but for Politi's performance, the result of the trial or the sentencing would have been different.

(ROA-PCR-ME 34 at 2.)

Discussion

Petitioner alleges that counsel failed to fully investigate a voluntary intoxication defense, unreasonably chose alibi over intoxication as a defense, and unethically presented a false alibi defense. Although claims of ineffective assistance of counsel are generally governed by *Strickland*, Petitioner first argues that counsel's selection of an alibi defense was so unreasonable that he is entitled to presumptive relief under *United States v. Cronin*, 466 U.S. 648 (1984). (Doc. 52 at 129-33.)

Application of Cronin

In *Florida v. Nixon*, 543 U.S. 175, 190 (2004), the Court described *Cronin* as a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. *Cronin* instructed that a presumption of prejudice would be in order in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."

Id. (quoting *Cronin*, 466 U.S. at 658). The *Cronin* Court indicated that the application of presumptive prejudice is appropriate when "there [is] a breakdown in the adversarial process," such that "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronin*, 466 U.S. at 659, 662. However, the Court made clear that the *Cronin* exception is very narrow, stating "[w]hen we spoke in *Cronin* of the possibility of

1 presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated
2 that the attorney's failure must be complete." *Bell*, 535 U.S. at 696-97.

3 Petitioner contends that *Cronic* applies here because counsel's unreasonable selection
4 of an alibi defense led him to agree to evidentiary stipulations that eased the prosecutor's
5 burden of proof at trial but did not benefit him. (Doc. 52 at 129-33.) Petitioner contends that
6 counsel, by entering into the stipulations, did not put the prosecution to the task of proving
7 the charges against him.⁶ (*Id.* at 130-31.) Petitioner further argues that counsel's presentation
8 of an alibi defense was used as an excuse not to challenge the State's evidence, including
9 gruesome photographs of the victim and complimentary comments about the victim made
10 by the prosecutor during opening statement. (Doc. 52 at 132.)

11 The Court concludes that *Cronic* is inapplicable. Counsel presented an alibi defense
12 at trial, which was supported by Petitioner's testimony. (RT 11/17/92 at 113-191.) In the
13 context of this defense, counsel did not fail to test the prosecutor's case. Rather, he presented
14 the defense in a strategic manner by providing opening and closing remarks, cross-examining
15 prosecution witnesses, and presenting defense witnesses.

16 Even if counsel could have objected to certain evidence and his agreement to
17 evidentiary stipulations eased the prosecution's job at trial, such alleged failings do not
18 implicate *Cronic* with its narrow exception for cases in which counsel's performance
19 constituted the abandonment of all meaningful adversarial testing of the prosecution's case.
20 *See United States v. Thomas*, 417 F.3d 1053, 1059 (9th Cir. 2005). As the Court reiterated
21 in *Bell*, the attorney's failure to test the prosecutor's case must be complete. *Bell*, 535 U.S.
22 at 696-97.

23
24 ⁶ Those stipulations included: the victim's dental records, without a witness to
25 authenticate and identify them; credit card and ATM records showing Karen Thompson's use
26 of the victim's credit cards; Detective Masino's testimony about the activities of the Phoenix
27 Police Department without hearsay or foundational objections; and the blood types of
28 Petitioner, Thompson, and the victim without the foundational witnesses. (Doc. 52 at 115
n.22 (citing RT 11/10/92 at 155-56).)

1 *Application of Strickland*

2 Counsel have a duty to make a reasonable investigation or to make a reasonable
3 decision that makes particular investigations unnecessary. *See Strickland*, 466 U.S. at 691.
4 Counsel must conduct more than a cursory investigation. *See Rios v. Rocha*, 299 F.3d 796,
5 805-06 (9th Cir. 2002) (counsel must interview more than one witness before abandoning a
6 particular defense). For mental state defenses, counsel cannot ignore abundant signs of
7 mental illness or rest on a preliminary examination. *See Mickey v. Ayers*, 606 F.3d 1223,
8 1237 (9th Cir. 2010). However, counsel need not investigate interminably. *Id.* After
9 investigating relevant defenses, counsel must reasonably select and present a defense at trial.
10 *Phillips v. Woodford*, 267 F.3d 966, 980 (9th Cir. 2001). Finally, although counsel may have
11 properly investigated the relevant defenses, he may still act unreasonably in his selection of
12 the defense to present at trial. *See Mickey*, 606 F.3d at 1236.

13 Petitioner argues that counsel was aware that he and Thompson had used cocaine and
14 alcohol at the time of the crimes and thus should have fully investigated and presented a
15 voluntary intoxication defense. Petitioner also faults counsel for not seeking a replacement
16 expert for Dr. Munoz. The Court concludes that these aspects of counsel's performance do
17 not entitle Petitioner to relief under *Strickland*.

18 First, "Arizona does not allow evidence of a defendant's mental disorder short of
19 insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *State*
20 *v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997). A defendant cannot present
21 evidence of mental disease or defect to show that he was *incapable* of forming a requisite
22 mental state for a charged offense. *Id.* at 540, 931 P.2d at 1050; *see Clark v. Arizona*, 548
23 U.S. 735 (2006) (upholding the constitutionality of the *Mott* rule and finding that the
24 exclusion of expert testimony regarding diminished capacity does not violate due process).

25 Although voluntary intoxication is not a defense to a crime in Arizona, at the time of
26 Petitioner's offense the fact that a defendant was intoxicated could be taken into
27 consideration when determining his culpable mental state if the offense required the mental
28

1 state of “intentionally” or “with the intent to.” See A.R.S. § 13-503 (1991). However, it was
2 also the law that an expert could not give an opinion on the ultimate question of whether
3 Petitioner had acted with specific intent when he committed the crimes. See *Gretzler v.*
4 *Stewart*, 112 F.3d 992, 1003 (9th Cir. 1997) (citing *State v. Christensen*, 129 Ariz. 32, 35-36,
5 628 P.2d 580, 583-84 (1981)). Aside from counsel’s failure to replace Dr. Munoz, Petitioner
6 does not allege that counsel failed to investigate other avenues to support an intoxication
7 defense. Although there was minimal evidence of intoxication from Thompson (and perhaps
8 Petitioner if he had chosen to testify in this regard), “[t]he law does not require counsel to
9 raise every available nonfrivolous defense.” *Knowles v. Mirzayance*, 129 S. Ct. at 1422. In
10 addition, while voluntary intoxication could have been considered by the jury to negate the
11 specific intent required for the felonies underlying the felony-murder charge, there was
12 strong evidence that Petitioner intended to kidnap and rob the victim. Also, as discussed
13 more fully in Claim 10-A, evidence of intoxication was inadmissible with regard to the
14 premeditated murder charge.

15 Second, and most significantly, counsel testified at the PCR hearing that it was
16 Petitioner who, after rejecting the plea offer, insisted on testifying and presenting an alibi
17 defense and refused to cooperate with any other defense that put him at the scene of the
18 murder. (RT 4/16/02 at 55, 61-62, 121.) Because an alibi defense was inconsistent with
19 admitting being at the scene in an intoxicated condition, it was not unreasonable for counsel
20 to discontinue investigating an intoxication defense. See *Bean v. Calderon*, 163 F.3d 1073,
21 1082 (9th Cir. 1998) (concluding that once counsel reasonably chose to present an alibi
22 defense, his duty to continue investigating a diminished capacity mental health defense was
23 at an end); *Turk v. White*, 116 F.3d 1264, 1267 (9th Cir. 1997) (justifying counsel’s decision
24 to discontinue investigating mental incompetency defense after reasonably deciding to pursue
25 self-defense).

26 Moreover, both counsel and his supervisor attempted to dissuade Petitioner from
27 presenting an alibi defense, endeavoring to convince him of the strength of the State’s case
28

1 and the weakness of his alibi. (RT 4/16/02 at 72-73; RT 4/18/02 at 258-60, 265.) Their
2 efforts failed. At trial, Petitioner took the stand and testified that he was not at the scene of
3 the murder. (RT 4/16/02 at 37, 135-36.) In addition, counsel testified at the PCR hearing
4 that he did not believe he could prevent Petitioner from presenting his alibi defense. (*Id.* at
5 37.) Petitioner did not testify at this hearing or present any other evidence to rebut counsel's
6 assertion that Petitioner was the one who had insisted on the alibi defense.

7 It is well settled that a defendant's own statements or actions influence the evaluation
8 of reasonableness of counsel's actions. *Strickland*, 466 U.S. at 691. Furthermore, the
9 decision whether to exercise the constitutional right to testify belongs to the defendant. *See*
10 *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987)
11 (defendant has a constitutional right to testify on his own behalf). Counsel cannot be faulted
12 for failing to prevent Petitioner from exercising his right to take the stand and testify that he
13 was not at the murder scene. *See Faretta v. California*, 422 U.S. 806, 820 (1975) (stating
14 that trial counsel, while held to a standard of reasonable effectiveness, is still only an
15 assistant to the defendant and not the master of the defense); *Mulligan v. Kemp*, 771 F.2d
16 1436, 1441 (11th Cir. 1985) (same). Rather, if the client insists on a certain defense, and
17 counsel competently explains the potential problems with that defense, then counsel's
18 ultimate decision to follow the client's will may not be disturbed. *See Bean*, 163 F.3d at
19 1081-82 (holding that counsel reasonably chose to present alibi defense after client told
20 counsel he was not at the scene and refused to present an alternative mental health
21 diminished capacity defense). Counsel's performance cannot be challenged under the
22 premise that a reasonably competent attorney would have dissuaded Petitioner from insisting
23 on an alibi defense. *See id.*; *see also Moore v. Johnson*, 194 F.3d 586, 605-06 (5th Cir. 1999)
24 (rejecting the argument that counsel was ineffective for being unable to persuade the client
25 to abandon alibi defense).

26 The cases Petitioner cites in support are inapposite. In *Jennings v. Woodford*, 290 F.3d
27 1006 (9th Cir. 2002), the Ninth Circuit found ineffectiveness where counsel did not
28

1 reasonably investigate the defendant's mental health and drug abuse before selecting an alibi
2 defense. However, the defendant in *Jennings* did not affirmatively direct counsel to pursue
3 an alibi defense or insist on testifying. In *Phillips v. Woodward*, 267 F.3d at 979-80, counsel
4 failed to confront the defendant about the factual difficulties of his alibi defense despite
5 credible evidence suggesting Phillips was in fact the shooter. Here, in contrast, counsel
6 confronted Petitioner about the weakness of his alibi and attempted to change his mind, but
7 Petitioner refused to cooperate with any other defense and testified at trial that he was not at
8 the scene of the crime.

9 Petitioner also alleges that counsel knew an alibi defense would be perjurious and thus
10 performed deficiently in presenting a false alibi rather than moving to withdraw as counsel
11 based on an ethical conflict. (Doc. 52 at 133-34.) In support, Petitioner cites *State v. Billy*
12 *Don Lee*, 142 Ariz. 210, 689 P.2d 153 (1984),⁷ and Ethical Rule 3.3 of the Rules of the
13 Supreme Court of Arizona.⁸ In denying relief on this claim, the PCR court concluded that
14 counsel did not commit an ethical violation, inferentially determining that counsel did not
15 violate either ER 3.3 or *State v. Lee*. (ROA-PCR-ME 34 at 2.) The PCR court further found
16

17 ⁷ *Lee* involved an attorney who unethically acquiesced to his client's demands
18 that he present testimony by two witnesses that counsel believed would perjure themselves.
19 *Id.* at 212, 689 P.2d at 155. After presenting the testimony, counsel moved to waive closing
20 arguments because he could not "get up in front of the jury and make an argument based on
21 what [he was] positive . . . was perjured testimony." *Id.* at 213, 689 P.2d at 156. The court
22 found counsel deficient for presenting false testimony and waiving closing argument. *Id.* at
23 221, 689 P.2d at 164. However, the *Lee* court did not address the issue here – a defendant
exercising his right to testify and present his defense at trial. *Id.* at 214 n.2, 689 P.2d at 158
n.2. In addition, as discussed below, there is no evidence that counsel in this case believed
Petitioner would intentionally perjure himself.

24 ⁸ Arizona's Ethical Rule 3.3 provides that, "A lawyer shall not knowingly . . .
25 fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a
26 criminal or fraudulent act by a client . . .[or] . . . offer evidence that the lawyer knows to be
27 false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer
shall take reasonable remedial measures." Ariz. R. Sup. Ct. 42, ER 3.3 (West 1991).

1 that Petitioner did not confess his role in the abduction and murder to defense counsel before
2 trial. (*Id.*)

3 After careful review of the record, this Court concludes that the PCR court's findings
4 are not unreasonable given the evidence presented at the state hearing. Politi's supervisor
5 testified that the facts of Petitioner's case did not warrant withdrawal on ethical grounds:

6 Q. And would you agree that as far as having an ethical duty to withdraw,
7 that there's a difference between an attorney faced with a situation where his
8 client has sat down and confessed his participation in a murder versus a situation
9 where the client or the attorney has knowledge or believes that the defendant is
10 guilty based on the evidence and the investigation he has done?

11 A. Yes.

12

13 Q. . . . Let me ask you this: If Mr. Politi had filed a motion to withdraw in
14 La Paz County at that time with two attorneys on staff at the public defender's
15 office, what would be your opinion of the likelihood of success?

16 A. I – I don't know. It would depend, I think on – if it were the latter
17 situation, which I seem to recall it being, it probably wouldn't get granted. . .
18 When you're in that kind of situation, the latter situation where the evidence is
19 strong against your client, I mean, extremely strong, your client still denies that
20 he was involved – he or she was involved in that, I mean, that happens. That's
21 almost like 80 percent of the cases you have, you know, strong evidence against
22 your client. Your client still wants to go – in the beginning anyway, profess their
23 innocence. And in those kind of cases, if you go to the court and ask for a motion
24 to withdraw based on those grounds, you're basically telling the court I think my
25 client's guilty; and I think in those situations, you almost have an ethical duty not
26 to file a motion to withdraw . . .

27 (RT 4/18/02 at 271-72.) Rather, it appears Burke believed Politi had an ethical duty *not* to
28 withdraw. *See, e.g., Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) (stating that counsel's
motion to withdraw after defendant testified to what counsel believed was perjury prejudiced
defendant before the trier of fact and entitled defendant to a new trial); *see also State v.*
Jefferson, 126 Ariz. 341, 615 P.2d 638 (1980) (same). Regarding the "ethical dilemma"
noted in counsel's work log, Burke believed this referred to information about the victim's
car that Politi received from Petitioner's father, which led Politi to question Petitioner's alibi
story. (RT 4/18/02 at 261-62, 265-66.) However, the fact that counsel questions or doubts
his client's story does not mandate withdrawal.

1 Burke also testified that Petitioner never confessed his participation in the murder to
2 him and that it was his best recollection that Petitioner did not confess his full involvement
3 to Politi until after trial. (RT 4/18/02 at 260, 265.) Politi testified that he did not specifically
4 recall whether Petitioner told him about his involvement in the kidnapping and murder before
5 trial. (RT 4/16/02 at 31-32.) Petitioner did not testify, and his affidavit did not specifically
6 detail what facts he allegedly relayed to Politi; rather, he indicated only that he discussed
7 with counsel his “involvement in the case.” (ROA-PCR 3, Ex. 1.) The only credible
8 evidence that Politi was aware prior to trial that Petitioner was at the scene came from the
9 prosecution investigator’s notes of a plea negotiation meeting between Politi, Petitioner, and
10 the prosecutor. However, the investigator testified that he was not actually at the meeting
11 and did not hear Petitioner make any statements about his involvement in the crime, and the
12 prosecutor testified that he had no specific recollection of the meeting.⁹ (RT 4/17/02 at 175;
13 RT 4/18/02 at 79.) Politi also testified that he did not remember whether Petitioner admitted
14 being at the scene during this plea negotiation. (RT 4/16/02 at 34-35.)

15 Based on this record, the Court concludes that the state court’s determination that no
16 ethical violation occurred was not unreasonable. Indeed, Petitioner’s own expert testified
17 that counsel’s obligations with respect to a client whom an attorney suspects is not truthful
18 are not always clear; thus it was not outside the wide range of professional assistance for
19 Politi to continue his representation after Petitioner insisted on pursuing an alibi defense.
20 Even if at some point before trial Petitioner told counsel he was at the scene, it would have
21

22 ⁹ In these proceedings, Petitioner has proffered a transcribed interview from
23 1992 between Petitioner’s father and the prosecutor wherein the latter recalls Petitioner
24 telling him he was at the scene of the crime. (Doc. 53, Ex. R.) However, this information
25 was never presented in state court, despite the fact that it was in the defense file and available
26 to Petitioner. (Doc. 52 at 111, n.20.) In its September 2006 order, this Court denied
27 Petitioner’s request for an evidentiary hearing and expansion of the record because Petitioner
28 was not diligent in developing this evidence during the PCR proceedings. (Doc. 87 at 28-
31.) Thus, this Court is prohibited from considering the exhibit. See 28 U.S.C. § 2254(e)(2);
Holland v. Jackson, 542 U.S. 649, 653 (2004).

1 been reasonable for counsel to discount this assertion given Petitioner's conflicting stories.
 2 As observed by Politi's supervisor, this is not a case where the defendant informed counsel
 3 he was guilty but intended to lie on the stand, and the record does not support a finding that
 4 counsel was aware Petitioner intended to perjure himself.

5 In sum, the Court concludes that the state court's decision denying Petitioner's
 6 allegations of IAC at trial was neither contrary to nor an objectively unreasonable application
 7 of *Strickland* and was not based on an unreasonable determination of the facts.

8 **Claim 9-D**

9 Petitioner asserts that trial counsel was ineffective for failing to investigate and present
 10 available and relevant mitigating evidence at sentencing. (Doc. 52 at 160-84.) The right to
 11 effective assistance of counsel applies not just to the guilt phase but "with equal force at the
 12 penalty phase of a bifurcated capital trial." *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir.
 13 2002) (quoting *Clabourne v. Lewis*, 64 F.3d, 1373, 1378 (9th Cir. 1995)).

14 **Sentencing Proceedings**

15 Following his conviction, the parties stipulated that Petitioner be examined by a mental
 16 health expert pursuant to Rule 26.5 of the Arizona Rules of Criminal Procedure.¹⁰ (RT
 17 1/11/93; RT 1/25/93.) The court referred Petitioner to Michael B. Bayless, Ph.D., and, at
 18 defense counsel's request, to Dr. Leonardo Garcia-Buñuel, a forensic psychiatrist. (ROA
 19 85.) After receiving their reports, the court indicated it would not consider them absent a
 20 specific request to do so from one of the parties. (RT 2/10/93 at 3.)

21 Defense counsel Politi then filed a 15-page presentencing memorandum, relying in
 22 substantial part on Dr. Garcia-Buñuel's report to establish mitigation. (Doc. 90-2 at 9-23.)
 23 As discussed above in Claim 5-D, counsel asserted that Petitioner's ability to know right
 24

25 ¹⁰ Rule 26.5 provided: "At any time before sentence is pronounced, the court
 26 may order the defendant to undergo mental health examination or diagnostic evaluation.
 27 Reports under this section shall be due at the same time as the pre-sentence report unless the
 28 court orders otherwise." Ariz. R. Crim. P. 26.5 (West 1991).

1 from wrong and to control his conduct was significantly impaired, that he was a minor
2 participant, and that he did not foresee that his conduct would create a grave risk of death.
3 See A.R.S. § 13-703(G)(1), (3) & (4). He also urged that the following non-statutory
4 mitigating factors were present: organic brain syndrome, secondary to chronic polysubstance
5 abuse; potential for rehabilitation; remorse; admission of guilt; low intelligence; close family
6 ties and parental support; being a follower in the crime; and the fact his more culpable co-
7 defendant received a life sentence. (Doc. 90-2 at 21-23.)

8 The sentencing court held an aggravation/mitigation hearing on February 10, 1993. The
9 State indicated that it intended to call no witnesses and would instead rely on the testimony
10 at trial to establish the “pecuniary gain” and “heinous, cruel, or depraved” aggravating
11 factors. It also proffered evidence to establish Petitioner’s prior robbery conviction as an
12 aggravating factor. Politi similarly declined to present any live witnesses, stating that the
13 “bulk of [his] case” was contained in his presentencing memorandum. (RT 2/10/93 at 8.)
14 He asked the court to consider Dr. Garcia-Buñuel’s report in support of the alleged mitigating
15 factors. (*Id.* at 22.) He also submitted copies of Petitioner’s high school records to establish
16 low intelligence and lack of education and introduced a typewritten letter from Petitioner’s
17 mother pleading that her son’s life be spared and stating that Petitioner was loved by his
18 family, despite being “some how mentally disturbed.” (*Id.* at 21; Doc. 90-2 at 26.)

19 Politi further argued that Petitioner’s prior conviction did not qualify as a crime of
20 violence for the purpose of establishing the (F)(2) aggravating factor, that the (F)(5)
21 pecuniary gain factor was inapplicable due to lack of notice, and that the anguish of the
22 victim was insufficient to prove cruelty under (F)(6). (RT 2/10/93 at 33-37.) He also
23 challenged the “heinous or depraved” aspect of the (F)(6) factor and the lack of evidence to
24 establish whether the victim died as a result of being strangled by Petitioner or struck in the
25 head by Thompson. (*Id.* at 38-43.) Counsel further asserted that the jury’s general first-
26 degree murder verdict foreclosed any finding that he killed, attempted to kill, or intended to
27 kill under *Enmund v. Florida*. (*Id.* at 46-47.) Finally, he urged the court to find the
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1 mitigating factors alleged in his memorandum, including the fact that Petitioner and
2 Thompson had been using cocaine intravenously for at least four days before the offense.
3 (*Id.* at 44-46.)

4 At the conclusion of the hearing, the court directed its probation department to prepare
5 a presentence report (“PSR”) with the caveat that it should not make a sentencing
6 recommendation. (*Id.* at 55.) The court ordered the PSR because it might “contain
7 information of a mitigating nature.” (*Id.* at 8.) To the PSR writer, Petitioner continued to
8 maintain his innocence and declined to discuss the offense but was otherwise cooperative and
9 provided his social history. (Doc. 92, Ex. C at 5.) He described his upbringing as “alcohol
10 tolerant, Pentecostal church oriented and lenient discipline.” (*Id.* at 8.) His father was an
11 alcoholic, who abused Petitioner’s mother. At some point his father started going to church
12 and became a “new person.” (*Id.*) Petitioner dropped out of high school in his sophomore
13 year and moved away from home at age 19. Around age 22, he married Valerie Nelson; they
14 divorced seven years later “due to his alcohol consumption, abuse, and infidelity.” (*Id.*) That
15 same year he married Robin Rawcowski, whom he divorced after two years for similar
16 reasons – alcohol abuse and infidelity.

17 Petitioner also told the PSR writer that at age 25 he admitted himself to St. Luke’s
18 Alcohol Rehabilitation, but left after three days. (*Id.* at 10.) At some point, he also joined
19 Alcoholics Anonymous. Petitioner denied ever taking drugs prior to going to prison for the
20 first time in 1987, but while there used cocaine, heroin, and methamphetamine, which he
21 bought with workers’ compensation funds he received monthly as the result of a job-related
22 injury. (*Id.* at 10, 12.) He continued using drugs after his release from prison in 1990. By
23 the time of the offense in December 1991, “everything in his life was directed to Cocaine and
24 his habitual consumption of it.” (*Id.*) The PSR writer concluded that Petitioner’s past
25 substance abuse was probably greater than he had divulged and that several DUI convictions
26 between 1983 and 1990 confirmed his problems with alcohol. He also observed that
27 although Petitioner claimed innocence, in a letter attached to the PSR “he has expressed
28

1 remorse for the deceased victim and for having any involvement in this crime.” (*Id.* at 11;
2 *see also* Doc. 92, Ex. B.)

3 Petitioner’s sentencing took place on March 8, 1993. As an initial matter, the judge
4 remarked that he had not read Dr. Bayless’s report because no one had requested it, but that
5 he had reviewed Dr. Garcia-Buñuel’s.¹¹ (RT 3/8/93 at 2-3.) That report stated that Garcia-
6 Buñuel met with Petitioner, interviewed Petitioner’s mother, consulted with Politi, and
7 reviewed police department reports. (Doc. 90-2 at 28.) Mrs. Lee described Petitioner as a
8 high-strung child, who did not get along well with others but was not violent. She also
9 relayed that Petitioner’s grandfather was an alcoholic. (*Id.* at 29.)

10 Petitioner told Garcia-Buñuel about dropping out of school, but said it was because he
11 was regularly high on marijuana and LSD and could not concentrate. He also reported that
12 his older brother had been shot and killed during a burglary when Petitioner was only 15
13 years old.¹² “This was a devastating blow to him and his family” and led Petitioner to
14 recklessly abuse drugs for the next 20 years. (*Id.*) Dr. Garcia-Buñuel opined that this event
15 may explain why Petitioner’s parents have tended to overprotect him despite his irresponsible
16 and criminal actions. (*Id.*) Petitioner also repeated the story to Garcia-Buñuel regarding his
17 introduction to cocaine and his escalated use following release from prison. However, unlike
18 his statement to the PSR writer, Petitioner confessed to Garcia-Buñuel his involvement in the
19 crime.

22 ¹¹ To Dr. Bayless, Petitioner had denied his involvement in the crime, insisting
23 that he was not at the scene of the murder. (Doc. 90-2 at 39.) Dr. Bayless diagnosed
24 Petitioner with polysubstance dependence and antisocial personality disorder. (*Id.* at 41.)
25 He further concluded that Petitioner had the ability to know right from wrong and to control
his conduct. (*Id.*) Dr. Bayless met with Politi after the examination and told counsel he saw
no mitigating factors. (RT 4/16/02 at 116.)

26 ¹² It appears from new evidence proffered in these proceedings that Dr. Garcia-
27 Buñuel misunderstood this aspect of Petitioner’s history. It was Petitioner’s brother who was
28 15 in 1981 when he was killed; Petitioner was 25. (See Doc. 88-1 at 10.)

1 Petitioner said he had a good recollection of what happened that night. (*Id.* at 30.) He
2 and Thompson pulled off the highway and intravenously used more cocaine. Thompson said
3 she was not going to allow the victim to testify against her and send her back to prison. They
4 got out of the car and saw that the trunk was open and Anderson was gone. They then drove
5 around looking for him. After they saw him, Petitioner ran, tackled him, and held him down
6 as Anderson struggled to get free. Thompson said he must be killed and hit him in the face
7 with a large rock, killing him. (*Id.*) Petitioner repeatedly claimed that he did not intend for
8 the victim to die and that he could and should have prevented Thompson from killing him.
9 (*Id.* at 32.)

10 Dr. Garcia-Buñuel concluded that at the time of the crime Petitioner's alcohol and
11 cocaine intoxication complicated a preexisting organic brain syndrome that was secondary
12 to chronic polysubstance abuse. (*Id.* at 33.) Consequently, he opined that Petitioner's
13 capacity to conform his conduct to the law's requirements "would have been impaired to a
14 very severe degree." (*Id.*) In support of the "organic brain syndrome" diagnosis, Dr. Garcia-
15 Buñuel noted that "[a] combination of 'deja vue' [sic] premonitions and olphactory
16 hallucinations is strongly suggestive of brain damage of some sort." (*Id.* at 32.) However,
17 he did not recommend that Petitioner undergo psychological testing, an EEG, or brain
18 mapping because "his account of what happened did not suggest that such possible damage
19 would have so affected his behavior or actions at the time that it could have constituted a
20 defense against prosecution." (*Id.*) Petitioner also "did not seem interested in delaying his
21 sentencing by having to go through any additional examination or testing." (*Id.*)

22 In addition to Garcia-Buñuel's report, the court reviewed the PSR and heard the
23 attorneys' final argument on sentencing. (RT 3/8/93 at 4.) Politi urged the court to consider
24 that the purpose of Arizona's capital sentencing structure is to separate the exceptional
25 defendant, that proportionality review ensures that death is imposed only for the most
26 deserving, and that the court should resolve any doubt in Petitioner's favor. (*Id.* at 4-11.)
27 The prosecutor expressed his opinion that Petitioner should not be sentenced to death. *See*
28

1 *supra* discussion in Claim 5-A. He observed that it was Petitioner's "own resistance and
2 maybe even his own stupidity [that] ultimately led to him being . . . subject to the death
3 penalty, and Karen Thompson is sitting in prison and will be for a life sentence but possibly
4 out in 25 years or some date after that." (*Id.* at 14-15.)

5 Following a recess to consider the prosecutor's position, the court pronounced sentence.
6 It first found that both Petitioner and Thompson were under the influence of cocaine at the
7 time of the killing and that Thompson's testimony at trial was more credible than Petitioner's
8 version of events as relayed to Dr. Garcia-Buñuel. (RT 3/8/93 at 23; *see also* ROA 99 at 2.)
9 It then found the existence of the three aggravating factors alleged by the prosecution. *See*
10 A.R.S. § 13-703(F)(1), (2) & (6). Finally, the court determined

11 that the following mitigation existed but was not substantial enough to call for
12 leniency: that defendant was remorseful (but only long after the killing); that he
13 admitted his guilt (but only after being convicted); that he lacked education and
14 had a low level of intelligence (but not significantly low); that he had strong
15 family support (but which apparently had not favorably influenced his behavior
16 in the past); that he was a "follower" by nature (but rather than being under
Thompson's control was a full and willing participant in the murder); that
Thompson received a life sentence (but only pursuant to a plea agreement that
defendant had also been offered and had rejected); and that the prosecutor had
recommended against the death penalty.

17 *Lee*, 185 Ariz. at 553, 917 P.2d at 696. In finding that Petitioner was not significantly
18 impaired by organic brain syndrome, the court noted that Dr. Garcia-Buñuel's conclusion
19 was based solely on symptoms reported by Petitioner, that no psychological or neurological
20 testing was done, and that there was no evidence to suggest that brain damage caused
21 Petitioner to be violent. (RT 3/8/93 at 27.)

22 On appeal, the Arizona Supreme Court conducted an independent review and agreed
23 with the trial court's findings as to the alleged aggravating and mitigating circumstances. *Id.*
24 at 559, 917 P.2d at 702. It further found that the death penalty was an appropriate sentence
25 because

26 [t]he victim, a good samaritan who agreed to give two people a ride, undoubtedly
27 spent many terrified hours leading up to and including his brutal killing. His
28 mental and physical anguish cannot be ignored. This, coupled with the pecuniary
gain motive and defendant's prior conviction, causes us to conclude that the

1 proffered mitigation was not sufficiently substantial to call for leniency.

2 *Id.*

3 Post-conviction Proceedings

4 In his state PCR petition, Petitioner asserted that counsel was ineffective for failing to
5 fully investigate potential mitigation and for not calling any witnesses at the
6 aggravation/mitigation hearing. (ROA-PCR 3 at 18-20.) He also argued in a separate claim
7 that counsel was ineffective for failing to obtain a meaningful psychiatric evaluation by a
8 defense expert, as opposed to an expert appointed by the court to conduct a Rule 26.5
9 evaluation.¹³ (*Id.* at 20-28.) In support of these arguments, he presented declarations from
10 his parents and reports from Dr. Geoffrey Ahern, a neurologist, and Dr. Anne Herring, a
11 neuropsychologist. After deciding that an evidentiary hearing was necessary, the court
12 authorized Petitioner to retain Dr. Barry Morenz to prepare a comprehensive psychiatric
13 evaluation, and the State enlisted its own neuropsychologist, Dr. James Youngjohn.

14 Petitioner also moved for the appointment of Roseann Schaye as a mitigation specialist.
15 (ROA-PCR 13.) Because Schaye resided in Tucson, the court asked counsel to contact Mary
16 Durand and Lisa Christianson, mitigation specialists working in the Phoenix area where
17 Petitioner grew up. (Doc. 43, RT 7/20/00 at 2-5.) On September 28, 2000, the court held a
18 hearing to assess the availability of Durand as a mitigation specialist. (Doc. 44, RT 9/28/00.)
19 PCR counsel acknowledged that she was the logical choice because she worked in Phoenix.
20 (*Id.* at 6.) The court then appointed Durand, authorizing 400 hours at \$75 an hour, plus
21 necessary in-state travel and office expenses. (ROA-PCR 36.) However, although Durand
22 was provided more than 18 months to investigate, gather, and present mitigation evidence
23 for the evidentiary hearing, she failed to prepare a written report or submit mitigation
24 evidence for the court's consideration. (RT 4/17/02 at 210-11; RT 9/28/01 at 3-6.)

26 ¹³ Petitioner has not asserted in his federal habeas petition that counsel was
27 ineffective with regard to investigating Petitioner's mental state for mitigation. *See infra*
28 Claim 9-E.

1 At the evidentiary hearing, Politi testified about the scope of his mitigation
2 investigation. Eight months before trial, he consulted with Hal Sheets, an experienced
3 attorney at the Arizona Capital Representation Project, whose mission at the time was to
4 assist defense lawyers in both the guilt and penalty phases of a capital trial. (RT 4/17/02 at
5 223.) Politi and Sheets “were in close touch.” (RT 4/16/02 at 47.) They spoke by phone
6 frequently, Politi visited him at his office repeatedly, and Sheets went to Parker on more than
7 one occasion to assist the defense. (*Id.*) Just before trial, Politi sent him mitigation materials
8 the defense had gathered, and Sheets had them reviewed by a mitigation specialist in his
9 office. (RT 4/16/02 at 92; Doc. 90-1 at 34; Doc. 90-2 at 130.)

10 In anticipation of a probable sentencing phase, Politi met with Petitioner regularly and,
11 more than six months before trial, starting asking him about his social history, including his
12 family, criminal history, drug use, and relationship with his parents. (*Id.* at 47-48, 52.)
13 Around this same time, he spoke with Petitioner’s mother and brother, both of whom agreed
14 to help develop a “paper trail” of Petitioner’s life, starting from birth through his arrest for
15 Anderson’s murder. (*Id.* at 52-54.) Counsel also interviewed Petitioner’s ex-wife, Valerie
16 Nelson, but she provided no useful information. (*Id.*) Just before the start of trial, counsel
17 told Petitioner’s parents that an investigator would be meeting with them to inquire about
18 school records, babysitters, and the possibility that Petitioner had been exposed to toxic
19 materials such as pesticides, herbicides, or fertilizers. (*Id.* at 89.) Politi’s detailed work log
20 supported this testimony. (See Doc. 90-1 at 21, 23, 34.)

21 Four months before trial, Politi directed Rick Paterson, the defense investigator, to
22 contact Petitioner’s parents “to begin the search for his vital records.” (Doc. 90-2 at 60.)
23 Paterson met with Petitioner’s parents and got information about his schools, dwellings
24 (apparently to assess for lead), and any toxic exposure at jobs. (RT 4/16/02 at 89-90; Doc.
25 90-1 at 34; Doc. 90-2 at 47.) Paterson also interviewed Valerie Nelson, to discover whether
26 she had any helpful information concerning Petitioner’s substance abuse problems. (Doc.
27 90-2 at 55.) Nelson said they divorced in 1985 and so she had little knowledge of his life
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1 since then. (*Id.*) She characterized Petitioner as “the nicest person in the world” when sober
2 but “a completely different person” when drunk and said he often experienced alcoholic
3 blackouts. (*Id.*) Nelson elaborated that Petitioner’s drinking worsened after his brother’s
4 death, which was a “great source of depression” for Petitioner. (*Id.*)

5 Paterson also sent out numerous requests for information and about a month before trial
6 received records from the Arizona Department of Corrections (“ADOC”), ADOC’s Health
7 Services Section, the John C. Lincoln Hospital, the Maricopa Medical Center, and the
8 Maricopa County Probation Department. (Doc. 90-2 at 48, 56-57.) Pursuant to Politi’s
9 instruction, Paterson reviewed these records “for additional, potential witnesses and/or any
10 other information that may prove useful to the case.” (*Id.* at 56.) The only observations he
11 made based on this review were that Petitioner had been medicated for depression while
12 incarcerated at the ADOC and that the probation officers who had dealt with Petitioner were
13 not available for interview. (*Id.* at 57.) Paterson also sought Petitioner’s school records and
14 made significant efforts to obtain Petitioner’s birth records and interview the doctor who had
15 delivered Petitioner, but discovered that the hospital records were no longer available and the
16 doctor did not return his calls. (*Id.* at 43-45, 48-53, 57-58.)

17 Politi testified that his primary goal at sentencing was to present Petitioner’s drug use
18 and intoxication to a mental health expert for evaluation as statutory mitigation under
19 A.R.S. § 13-703(G)(1). (RT 4/16/02 at 95, 99.) Counsel initially sought Dr. Munoz’s
20 assistance, but he was not willing to travel to Parker. (*Id.* at 97-98.) Politi then consulted
21 with Dr. Barry Morenz in Tucson and sent him copies of the police reports. (Doc. 90-1 at
22 37-38.) For reasons not apparent in the record, one week later counsel contacted Dr. Garcia-
23 Buñuel. (*Id.* at 38.) Politi testified that he chose Garcia-Buñuel based on his expertise as a
24 forensic psychiatrist and familiarity with “cases like this.” (RT 4/16/02 at 99.) He met and
25 discussed the case with Garcia-Buñuel both before and after the doctor’s evaluation of
26 Petitioner. (Doc. 90-1 at 38; Doc. 90-2 at 28.) At the time, counsel consulted frequently
27 with Petitioner and Hal Sheets about the consequences of a confession at sentencing given
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1 Petitioner's trial testimony and eventually convinced Petitioner it was in his best interest "to
2 just level with the doctor." (Doc. 90-1 at 37-38.) Although Petitioner relayed his
3 involvement in the crime to Dr. Garcia-Buñuel, he maintained his innocence during the
4 subsequent meeting with Dr. Bayless.

5 Politi further testified that he made a strategic decision not to have Dr. Garcia-Buñuel
6 testify at the aggravation/mitigation hearing because Garcia-Buñuel told him it would not be
7 a "good idea" to call him as a witness. (RT 4/16/02 at 100.) In addition, counsel did not
8 want to subject him to cross-examination. (*Id.* at 100, 114-15.) Politi explained that he and
9 Dr. Garcia-Buñuel had discussed administering tests to detect brain damage, but that the
10 doctor did not believe such evidence would be helpful at sentencing because he could not
11 connect any brain damage to what happened at the time of the killing. (*Id.* at 114.) "In other
12 words, [he could not] say what significance it has or doesn't have and why." (*Id.*) Counsel
13 was concerned that this lack of "causal connection" would be elicited on cross-examination.
14 (*Id.* at 114-15.)

15 Counsel also testified that he made a strategic decision not to call Petitioner's parents
16 as witnesses. (RT 4/16/02 at 123; *see also* Doc. 90-2 at 6 (listing Petitioner's parents as
17 possible witnesses at aggravation/mitigation hearing).) He determined that they would not
18 be credible because they had unwittingly helped Petitioner dispose of the victim's car and
19 then reported Petitioner to the police after learning on the news that the owner of the car was
20 missing. (RT 4/16/02 at 124; *see also* RT 11/12/92 at 144-45; RT 11/13/93 at 104; RT
21 11/13/92 at 149-51.) In addition, his parents had taken it upon themselves to conduct their
22 own investigation and spoke to numerous individuals in an attempt to bolster their son's alibi
23 defense; Politi had to tell them to stop harassing witnesses. (RT 4/16/02 at 57-58, 88, 124;
24 *see also* Doc. 90-2 at 66-70; RT 11/13/92 at 152-53.) Overall, Politi felt that Petitioner's
25 parents "were not able to deal with what was going on well enough to be able to assist me
26 at the sentencing." (RT 4/16/02 at 125.)

27 Petitioner's mother also testified at the PCR hearing. (RT 4/17/02 at 149-65.) She
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1 denied writing the typewritten letter admitted at sentencing requesting leniency, saying that
2 although it was her signature she did not type. (*Id.* at 148-50; Doc. 90-2 at 25-26; ROA 94.)
3 Mrs. Lee testified that she would have gone to the sentencing hearing if requested and would
4 have provided information about Petitioner's life, his drug and alcohol abuse, his two
5 marriages, and the fact that Petitioner went steadily downhill after his brother had been
6 killed. (*Id.* at 151-54.) Mrs. Lee further testified that Petitioner had always maintained his
7 innocence to her, never admitting any involvement in the murder. (*Id.* at 155.)

8 Petitioner did not call Drs. Ahern and Herring as witnesses at the PCR hearing, but Dr.
9 Morenz summarized their findings in his testimony. Dr. Ahern administered an EEG and
10 MRI to determine whether Petitioner had any gross abnormalities or structural defects in his
11 brain. (RT 5/21/02 at 6, 23.) The EEG test results were normal in both awake and sleep
12 states, and the MRI was normal with no structural abnormalities identified. (*Id.*; *see also*
13 Doc. 90-1 at 4.) Dr. Herring administered a series of neuropsychological tests. She found
14 some weaknesses in Petitioner's executive functioning but determined they were not
15 dramatic deficits. (RT 5/21/02 at 7-10.) She opined that Petitioner "may have difficulty
16 modulating his responses" and that his "poor impulse control, insecurity, and distrust of
17 others likely contribute to his lack of effectiveness in personal relationships and may make
18 him more susceptible to exercise of poor judgment and perhaps, violence." (Doc. 90-1 at 9.)

19 Dr. Morenz made a provisional Axis I diagnosis of cognitive disorder not otherwise
20 specified, based on the weakness in cognitive functioning documented by Dr. Herring. (RT
21 5/21/02 at 17; *see also* Doc 90-1 at 18.) On cross-examination, he agreed that all of the
22 criteria needed to satisfy this diagnosis were not present. (RT 5/21/02 at 25.) He further
23 testified that his and Dr. Garcia-Buñuel's conclusions and diagnoses were similar. (*Id.* at 35-
24 36.)

25 Dr. Morenz also made an Axis II diagnosis of personality disorder not otherwise
26 specified. Counsel for the State pressed him to agree that Petitioner could be diagnosed with
27 antisocial personality disorder:
28

1 Q. Would you agree with me that the evidence to support a personality
2 disorder, whether it be not otherwise specified or antisocial, that evidence is much
stronger than the evidence to support some type of cognitive disorder?

3 A. Oh, absolutely. I don't think there would be – there would be any
4 credible psychologist or psychiatrist who wouldn't agree that this man warrants
5 a personality disorder diagnosis. There may be some debate on whether he should
6 be antisocial, antisocial and borderline, personality disorder not otherwise
specified; but everybody is gonna agree that he warrants a personality disorder
diagnosis, and it generally falls in – you know, has strong antisocial traits.

7 (*Id.* at 32-33.) Finally, Dr. Morenz concluded that Petitioner's impairment at the time of the
8 crime satisfied the (G)(1) mitigating factor. (*Id.* at 18.)

9 In rebuttal, Respondents submitted the report of Dr. Youngjohn, who testified at the
10 PCR hearing. (*See* Doc. 90-2 at 73-88.) Dr. Youngjohn disagreed with Dr. Morenz's
11 diagnosis of cognitive disorder not otherwise specified, because there was no objective
12 evidence of brain injury or neurologic disease. (RT 5/21/02 at 72-73.) He testified that Dr.
13 Morenz based his cognitive disorder diagnosis on the test results of Dr. Herring, who found
14 that Petitioner had some cognitive weakness. (*Id.* at 74-75.) However, Dr. Youngjohn
15 disagreed with Dr. Herring's interpretation of her test results. (*Id.* at 75.) According to Dr.
16 Youngjohn, the tests administered by Dr. Herring placed Petitioner mostly in the normal
17 range and low-average on some tests. (*Id.* at 76-77.) He attributed the low test scores, not
18 to any type of brain dysfunction, but to depression and psychological and emotional distress.
19 (*Id.* at 77-78.) Under Dr. Youngjohn's interpretation, Petitioner's performance was normal
20 both on the tests he administered and those given by Dr. Herring. Petitioner had no brain
21 damage or significant neurological impairment. (*Id.* at 79, 82.) Dr. Youngjohn agreed with
22 the diagnoses of polysubstance abuse and antisocial personality disorder. (*Id.* at 80-81.)

23 Following the conclusion of testimony, counsel submitted final arguments. (ROA-PCR
24 93, 98.) The PCR court then ruled, as follows:

25 [C]ounsel argues two things: that Politi did no investigation to see if there was
26 mitigation and he presented no mitigation at the sentencing. I, however, found
27 ample evidence that Mr. Politi did search for mitigation – for instance, he talked
28 to Lee about his background, his parents, his drug use; he spoke to Lee's parents,
his ex-wife, and his brothers and sisters about his background, he instructed his
investigator to search through Lee's medical records and school records, he had

1 some things reviewed by a mitigation expert, and he hired a doctor to examine Lee
 2 so that he could present the results at sentencing (although, for tactical reasons, he
 3 decided to present only the doctor's report and not his body). The fact that Mr.
 4 Politi found no, or very little, mitigation does not render his efforts ineffective.
 From this, I can find no evidence of *Strickland* prejudice to Mr. Lee. And defense
 counsel agrees for on page 7 of "Petitioner's Final Arguments" filed on June 18,
 2002, he states, "The second prong of *Strickland* (prejudice) has not been met."

5 Although Lee's counsel takes Mr. Politi to task for not presenting any
 6 evidence of mitigation at the sentencing hearing, present counsel showed me
 7 nothing at the Rule 32 hearing that Politi should have presented. This is due, he
 8 says to the fact that his investigator was not given the time or the money to search.
 I disagree; his investigator was on the case for over 18 months and produced
 9 nothing and could point to nothing that was worth the court's money. I find from
 the evidence I heard that any lack of mitigation was due more to the fact that there
 was none, rather than to Politi's lassitude or incompetence.

10 (ROA-PCR-ME 34 at 2.) The Arizona Supreme Court summarily denied review.

11 Discussion

12 Petitioner contends that counsel failed to investigate his background and present this
 13 information to the mental health experts or the sentencing judge. (Doc. 52 at 160.) He
 14 asserts that counsel should have conducted more exhaustive interviews with himself and his
 15 immediate family; interviewed other family members, friends, and associates; and obtained
 16 additional life history records. (*Id.* at 160-65.) Petitioner further asserts that counsel was
 17 ineffective for failing to call any witnesses at the aggravation/mitigation hearing to humanize
 18 him or establish that he would pose no danger if sentenced to life imprisonment. (*Id.* at 162,
 19 171.)

20 Petitioner argues that reasonably competent counsel would have uncovered significant
 21 evidence demonstrating that he had a difficult childhood, suffered from alcoholism, was in
 22 a drug-induced psychosis at the time of the offense, did not actually kill the victim, and
 23 would adjust well to life in prison. (*Id.* at 183.) Specifically, he alleges that a more thorough
 24 investigation would have revealed the following information about his background:

- 25 • He suffered from Attention Deficit Hyperactivity Disorder, depression, and
 26 alcoholism.
- 27 • He grew up in poverty.
- 28 • His father and grandfather were alcoholics, and his father was prone to violence.

- He suffered from depression throughout his life, which was never treated.
- He was a poor student and began drinking and using drugs at a young age.
- His parents are co-dependant and enabling.
- After commitment to a juvenile facility following a number of alcohol-related burglaries and thefts, he married his high school sweetheart and obtained a job but, after his younger brother was killed while attempting to burglarize the home of a drug dealer, Petitioner's alcoholism and drug use reemerged.
- While intoxicated, he pretended to have a weapon and committed a robbery.
- He adjusted well to life in prison, except for his drug addiction.
- After release from prison, he received a large worker's compensation settlement and spent all of it on drugs within eight months.
- In 1987, at age 30, he was diagnosed with alcoholic liver disease.
- Six months before the murder, he cracked the windshield of a car with his head following a high speed, alcohol-related accident.
- Weeks before the murder Petitioner was treated at an alcohol addiction center and was in a methamphetamine psychosis.
- During pretrial incarceration, Petitioner had no behavioral problems and was medicated with Xanax, an anti-anxiety drug.

(*Id.* at 161-62.)

In support of his claim, Petitioner has proffered declarations from his mother, sister, and brother-in-law; a social history report prepared by a mitigation specialist; prison records from his robbery conviction; and medical records. (Doc. 53, Exs. D, H–K; Doc. 88, Exs. E–G.) On September 29, 2006, this Court denied Petitioner's consolidated motion for discovery, an evidentiary hearing, and expansion of the record. (Dkt 87.) In doing so, the Court rejected Petitioner's contentions that the failure to develop these facts should be attributed to PCR counsel, not to him. (*Id.* at 30.) There is little question that PCR counsel could have obtained and presented to the state court the newly-proffered declarations and records; thus, Petitioner was not diligent in developing these facts in state court. *See* 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 437-40 (2000) (finding no diligence where state habeas counsel failed to investigate). In his amended petition, Petitioner also appears

1 to argue that the failure to present a social history report in state court should be attributed
2 to the State because the PCR court “foisted upon him” an incompetent mitigation specialist.
3 (Doc. 52 at 182.) However, this Court can discern no distinction between a state court’s
4 appointment of a post-conviction attorney and an investigator; the actions of each are
5 attributable to the petitioner for the purpose of determining diligence under 28 U.S.C. §
6 2254(e)(2). Because Petitioner was not diligent, the Court may not consider his new
7 evidence. Even if it did, the Court concludes that the PCR court’s findings and conclusions
8 were not objectively unreasonable.

9 *Scope of Investigation*

10 In assessing whether counsel’s performance was deficient under *Strickland*, the test is
11 whether counsel’s actions were objectively reasonable at the time of the decision. *Strickland*,
12 466 U.S. at 689-90. A reasonable mitigation investigation involves not only the search for
13 good character evidence but also evidence that may demonstrate that the criminal act was
14 “attributable to a disadvantaged background, or to emotional and mental problems[.]” See
15 *Boyde v. California*, 494 U.S. 370, 382 (1990). In *Wiggins*, 539 U.S. at 524, the Court
16 discussed the reasonableness of a mitigation investigation by evaluating it against the
17 appropriate ABA Guidelines for the Appointment and Performance of Counsel in Death
18 Penalty Cases. The 1989 Guidelines provide that mitigation investigations “should comprise
19 efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any
20 aggravating evidence that may be introduced by the prosecutor.” ABA Guidelines for the
21 Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) at 93 (1989)
22 (emphasis added). Among the topics counsel should consider investigating are medical
23 history, educational history, employment and training history, family and social history, prior
24 adult and juvenile correctional experience, and religious and cultural influences. *Wiggins*,
25 539 U.S. at 524. The Court has also instructed, however, that the ABA Guidelines are
26 evidence of what reasonably diligent attorneys would do, not inexorable commands with
27 which all capital defense counsel must fully comply. *Bobby v. Van Hook*, 130 S. Ct. 13, 17
28

1 (2009) (per curiam); see *Strickland*, 466 U.S. at 688 (noting that ABA Guidelines are guides
2 to reasonableness, not its definition).

3 In this case, the PCR court determined that Politi conducted a reasonable mitigation
4 investigation. Petitioner argues that this finding was “incorrect” because Politi was not
5 qualified to try a capital case, worked without co-counsel, failed to present “significant
6 events” in Petitioner’s life, and failed to conduct a social history. (Doc. 52 at 177-78.) He
7 further asserts there is no evidence to support the PCR court’s finding that Politi spoke to
8 Petitioner as well as his parents, ex-wife, and siblings about his background and drug use;
9 that counsel’s investigator searched for medical and school records; that counsel had some
10 things reviewed by a mitigation specialist; or that counsel hired a doctor to examine
11 Petitioner for sentencing. (*Id.* at 178-81.) The Court disagrees.

12 The record developed at the PCR hearing clearly supports the PCR court’s
13 determination that Politi conducted an adequate mitigation investigation. Politi focused on
14 obtaining information from Petitioner and his family, gathering social history records, and
15 evaluating Petitioner’s mental health. Well before trial began, counsel met with Petitioner
16 on several occasions to discuss his background, and either counsel or his investigator
17 interviewed Petitioner’s parents, his brother, and one of Petitioner’s ex-wives. *Cf. Williams*
18 *v. Taylor*, 529 U.S. at 395-96 (finding deficient performance where counsel waited “until a
19 week before trial” to prepare for the sentencing phase and failed to discover “records
20 graphically describing Williams’ nightmarish childhood” and fact he was “borderline
21 mentally retarded”). The defense team obtained available birth, school, medical,
22 incarceration, and probation records. Politi also had Petitioner examined by a psychiatrist
23 to look for potential mitigating circumstances, including whether Petitioner’s alcohol and
24 drug intoxication at the time of the crime affected his ability to control his conduct.

25 Through these efforts, counsel learned that Petitioner was a high-school dropout who
26 drank and took drugs excessively, that he was a long-time alcoholic whose abuse of drugs
27 escalated prior to the crime, that his grandfather was an alcoholic, that the death of his
28

1 brother had a devastating impact on his life, that his parents were overprotective, that his
2 drinking occasionally led to alcoholic blackouts, and that he was treated for depression while
3 incarcerated for robbery. Although additional family members and friends were available
4 to be interviewed, Petitioner did not establish at the PCR hearing that such efforts would
5 have uncovered significant information about Petitioner's life that was not already known
6 to counsel, either from Politi's own interviews, his investigator's efforts, or the social history
7 documented by Dr. Garcia-Buñuel. *See Bobby v. Van Hook*, 130 S. Ct. at 19 ("[T]here
8 comes a point at which evidence from more distant relatives can reasonably be expected to
9 be only cumulative."). Petitioner's mitigation specialist during the PCR hearing testified
10 that, due to an alleged lack of resources, she had not conducted any interviews or gathered
11 any records and, consequently, was unable to demonstrate what Politi could have uncovered
12 had he conducted more thorough interviews of family members; spoken to Petitioner's
13 friends, teachers, co-workers, and employers; or gathered more records. (RT 4/17/02 at 210-
14 15.)

15 In these proceedings, Petitioner enlisted the assistance of a new mitigation specialist,
16 who opines that Politi's investigation "was cursory at best, and in no way represents the kind
17 of meticulous, detailed investigation" required in a capital sentencing proceeding. (Doc. 53,
18 Ex. H, Attach. at ¶ 5.) She acknowledges that counsel obtained some records, but insists he
19 should have collected "all" of them. (*Id.* at ¶ 10.) She also states that most records have
20 since been destroyed and that relevant witnesses such as teachers and employers are no
21 longer available. (*Id.* at ¶¶ 10-11, 33.) From the records she was able to gather and through
22 more extensive interviews of Petitioner's family, the mitigation specialist has prepared a
23 lengthy and detailed narrative of Petitioner's life. (*See* Doc. 53, Ex. H.)

24 After reviewing this social history report, the Court discerns only the following items
25 that Politi may not have learned from his own investigation: that Petitioner suffered from
26 Attention Deficit Hyperactivity Disorder; that before joining a Pentecostal church,
27 Petitioner's father was a violent alcoholic who abused his wife during Petitioner's preteen
28

1 years; that Petitioner had a history of depression that began in childhood; and that Petitioner
2 made several attempts to get help for his alcoholism.¹⁴ (*Id.* at 6; *see also* Doc. 53, Ex. H at
3 1-3.) This information is far less “powerful” than that uncovered in cases in which counsel’s
4 investigation was found to be constitutionally deficient.

5 In *Wiggins*, for example, counsel failed to discover that the defendant suffered
6 consistent abuse during the first six years of his life, was the victim of “physical torment,
7 sexual molestation, and repeated rape during his subsequent years in foster care,” was
8 homeless for portions of his life, and had diminished mental capacities. 539 U.S. at 528-29,
9 535. In *Rompilla v. Beard*, counsel failed to review a prior conviction file that would have
10 revealed that Rompilla had been beaten by his father with fists, straps, belts, and sticks; that
11 his father locked him and his brother in a dog pen filled with excrement; and that he grew up
12 in a home with no indoor plumbing and was not given proper clothing. 545 U.S. 374, 383-
13 84, 392 (2005). In *Porter v. McCollum*, counsel collected no records, conducted no
14 interviews, and had only one short meeting with his client concerning the penalty phase; a
15 reasonable investigation would have revealed that the defendant was abused as a child,
16 served heroically in the Korean War but experienced trauma therefrom, had a long-term
17 substance abuse problem, and had impaired mental health and mental capacity. 130 S. Ct.
18 447, 449, 453 (2009). Similarly, there is no evidence to suggest that any of the records Politi
19 collected or that Petitioner has proffered in these proceedings would have served to alert
20 counsel to the type of information at issue in *Williams v. Taylor*, 529 U.S. at 395, where the
21 defendant was borderline mentally retarded and had suffered maltreatment and abuse from
22 parents who had been jailed for criminal neglect.

23
24 ¹⁴ The record does not actually establish whether Politi was aware of these
25 aspects of Petitioner’s history; he was not asked during the PCR hearing about the substance
26 of his conversations with Petitioner concerning Petitioner’s background. In addition, the
27 mitigation specialist’s report states simply that family members “believe” Petitioner suffered
28 from Attention Deficit Hyperactivity Disorder; there is no evidence that this disorder was
diagnosed by a medical profession. (Doc. 53, Ex. H at 11.)

Petitioner also complains that counsel neglected to provide Dr. Garcia-Buñuel with the records he had collected. However, both the doctor's report and counsel's work log reflect that Politi met with Garcia-Buñuel both before and after the doctor met with Petitioner. Though the question was not specifically addressed during the PCR hearing, it is likely that counsel shared his knowledge of Petitioner's background during one or both of these meetings. In addition, Politi's work log reveals that he provided Garcia-Buñuel with hospital records from incidents on July 26, 1984, and April 10, 1991.¹⁵ (Doc. 90-1 at 39.) In any event, Petitioner does not allege that Dr. Garcia-Buñuel's diagnostic conclusions would have differed in any way had he been provided the type of detailed narrative of Petitioner's life developed in this habeas proceeding.

In sum, even considering the new social history report that was not developed or presented in state court, this Court concludes that this

is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, *cf. Wiggins*, 539 U.S. at 525, or would have been apparent from documents any reasonable attorney would have obtained, *cf. Rompilla v. Beard*, 545 U.S. [at] 389-93. It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments." 466 U.S. at 699.

Van Hook, 130 S. Ct. at 19.

Presentation of Mitigation Evidence

Petitioner also argues that counsel's representation at sentencing was deficient because Politi failed to present any live witnesses to humanize Petitioner and present his social history to the sentencing judge. Petitioner does not cite any case law suggesting that the failure to present evidence at sentencing through live witnesses is *per se* deficient. In at least

¹⁵ In the social history report proffered in these proceedings, the mitigation specialist explains that Petitioner went to a hospital on July 22, 1984, following a fight with his brother, and four days later returned to the emergency room complaining of dizziness and nausea. (Doc. 53, Ex. H at 29-30.) On April 10, 1991, Petitioner was found unconscious at a fast food restaurant; he smelled strongly of alcohol and was taken to a hospital where his stomach was pumped. (*Id.* at 33.)

one case, the Ninth Circuit found deficient performance where counsel waived the presentation of evidence at a presentence hearing by presenting neither live testimony nor any documentary evidence. *Correll v. Ryan*, 539 F.3d 938, 946-47 (9th Cir. 2008). Here, however, Politi conducted an adequate investigation into Petitioner's background, submitted a detailed memorandum arguing against each of the State's alleged aggravators and urging numerous statutory and nonstatutory mitigating circumstances, and presented an expert report, school records, and a letter from Petitioner's mother at a presentence hearing. In addition, the court's probation department prepared a PSR that set forth a fairly extensive social history, including the fact that Petitioner's father used to be an alcoholic who abused his wife, that Petitioner had been married and divorced twice due to his alcohol problems, and that he had tried to get help for his addiction. Thus, this information was already known to the sentencing judge, and the failure to present lay social history witnesses was not unreasonable. At the PCR evidentiary hearing, counsel explained that he did not call Petitioner's parents because they were having trouble coping with what had happened and because they were the ones that first reported Petitioner to the police. In addition, Petitioner continued to maintain his innocence to his parents. Thus, the prosecution could have elicited testimony that would have undermined Politi's arguments that Petitioner's admission of guilt and remorse constituted mitigating circumstances. In addition, the prosecution could have emphasized the fact that Petitioner repeatedly got into trouble despite the strong support provided by his family, thus countering the assertion that he was amenable to rehabilitation.¹⁶ In lieu of her testimony, counsel proffered a heartfelt letter from Petitioner's mother, pleading that her son's life be spared. On this record, Politi's decision not to call Petitioner's parents fell within counsel's wide latitude in making tactical decisions. *See Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (stating that counsel knew about evidence but

¹⁶ Moreover, Petitioner's new social history report indicates that he stole from his parents and brother to feed his drug addiction. (Doc. 53, Ex. H at 36.) This undoubtedly would have come out during any cross-examination of Petitioner's family members.

1 chose as a tactical matter not to use it); *see also Cox v. Del Papa*, 542 F.3d 669, 683 (9th Cir.
2 2008) (finding reasonable counsel's decision not to present live testimony from defendant's
3 wife, who was separated from defendant and had not seen him in three years, given risk of
4 cross-examination).

5 Nor was it unreasonable to rely on Dr. Garcia-Buñuel's report rather than have him
6 testify. The doctor advised Politi against calling him as a witness because the prosecution
7 could elicit on cross-examination that any brain damage Petitioner might suffer would not
8 explain why he participated in the crime. Similarly, the prosecution could have emphasized
9 Petitioner's detailed recollection of the offense to Dr. Garcia Buñuel, thus calling into
10 question his conclusion that Petitioner's ability to control his conduct was impaired by
11 cocaine intoxication. In addition, calling Dr. Garcia-Buñuel may have spurred the
12 prosecution to either elicit testimony from Dr. Bayless or to ask the court to consider
13 Bayless's report as rebuttal evidence. *See Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir.
14 1990) (observing that it is "acceptable trial strategy to choose not to call psychiatrists to
15 testify when they can be subjected to cross-examination based on equally persuasive
16 psychiatric opinions that reach a different conclusion"). Both Petitioner's denial of his role
17 in the crime to Dr. Bayless and the doctor's conclusion that Petitioner suffered from an anti-
18 social personality disorder would have undermined Petitioner's alleged mitigating
19 circumstances.

20 Admittedly, counsel could have asked Petitioner's family members or ex-wives to
21 testify concerning Petitioner's history of drug and alcohol addiction as well as his efforts at
22 rehabilitation. However, this Court's inquiry is not on what "defense counsel could have
23 presented, [but] whether counsel's actions were reasonable." *Turner v. Calderon*, 281 F.3d
24 851, 877 (9th Cir. 2002). The fact that Petitioner was addicted to alcohol and cocaine was
25 established by both Dr. Garcia-Buñuel and the PSR. In addition, the sentencing judge
26 expressly found that Petitioner was under the influence of cocaine at the time of the crime,
27 noting that he had injected cocaine numerous times on December 5, 1991, from
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1 approximately 2:00 p.m. through immediately before the killing. (RT 3/8/93 at 26.)
2 Additional evidence dwelling on Petitioner's addictions and failed attempts at rehabilitation
3 could have hurt as much as helped his mitigation case. Courts have repeatedly observed that
4 evidence of drug and alcohol abuse is often a "double-edged sword" because it is equally
5 possible a sentencer will fault a defendant for his repeated failures to effectively address an
6 addiction problem or construe him as a continuing threat to society. *Wackerly v. Workman*,
7 580 F.3d 1171, 1178 (10th Cir. 2009); *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir.
8 1999). Indeed, the sentencing judge here found that Petitioner's "past history of substance
9 abuse and criminal activities make it likely that he would commit further criminal acts if
10 allowed." (RT 3/8/93 at 29.) Politi's failure to present lay testimony concerning Petitioner's
11 long-standing addiction problems was not unreasonable.

12 *Prejudice*

13 Even assuming it was unreasonable for counsel not to further investigate Petitioner's
14 background or to present witnesses to testify concerning Petitioner's social history, the Court
15 concludes that Petitioner was not prejudiced. In assessing prejudice at sentencing, "the
16 question is whether there is a reasonable probability that, absent the errors, the sentencer . . .
17 would have concluded that the balance of aggravating and mitigating circumstances did not
18 warrant death." 466 U.S. at 695. In *Wiggins*, the Court further noted that "[i]n assessing
19 prejudice, we reweigh the evidence in aggravation against the totality of available mitigating
20 evidence." 539 U.S. at 534. The totality of the available evidence includes "both that
21 adduced at trial, and the evidence adduced in the habeas proceeding." *Id.* at 536 (quoting
22 *Williams v. Taylor*, 529 U.S. at 397-98).

23 In a post-hearing brief during the state PCR proceeding, Petitioner conceded that he was
24 unable to meet *Strickland*'s prejudice prong because in his opinion the mitigation specialist
25 had not been given sufficient time or money to carry out an investigation. (ROA-PCR 93 at
26 7.) The PCR court disagreed, finding that the "investigator was on the case for over 18
27 months and produced nothing and could point to nothing that was worth the court's money."
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1 (ROA-PCR-ME 34 at 2.) The court further concluded that “any lack of mitigation was due
2 more to the fact that there was none, rather than to Politi’s lassitude or incompetence.” (*Id.*)
3 On the record as developed in state court, Petitioner does not assert, and this Court does not
4 find, that the PCR court’s ruling was objectively unreasonable. Instead, Petitioner argues
5 that the PCR court’s ruling was “incorrect as illustrated by the mitigation produced by
6 [mitigation specialist] Janet Dowling in this habeas proceeding.” (Doc. 52 at 182.)

7 The Court has already determined that the failure of Petitioner’s PCR investigator to
8 develop evidence in support of this claim is not attributable to the State but rather
9 demonstrates Petitioner’s lack of diligence in state court. Accordingly, this Court may not
10 consider Petitioner’s new evidence because he failed to develop the factual basis of the claim
11 in state court and has not satisfied the requirements of 28 U.S.C. § 2254(e)(2). However,
12 even considering the new social history report, the Court concludes that Petitioner has not
13 demonstrated prejudice.

14 The sentencing judge was aware, through Dr. Garcia-Buñuel’s report, Petitioner’s high
15 school records, Mrs. Lee’s letter, and the PSR that Petitioner was a high-strung, low
16 intelligence child who dropped out of high school, that he was loved and supported by his
17 family, that his father was at one time an alcoholic who beat his wife before starting to attend
18 church and becoming a “new person,” that his grandfather was an alcoholic, that at some
19 point a brother had died and this was a devastating loss for Petitioner, that he was an
20 alcoholic who tried to get sober by joining Alcoholics Anonymous and checking himself into
21 a rehabilitation facility, that he had two failed marriages due to his alcohol abuse and
22 infidelity, that he had started using drugs at a young age, that at the time of the offense his
23 life was directed to the habitual consumption of cocaine and he was under the influence of
24 the drug during the crime, and that he was remorseful. The court expressly found that
25 Petitioner had proven by a preponderance of the evidence the following mitigating factors:
26 remorse, admission of guilt, lack of education, low intelligence, strong family support, the
27 fact that the defendant was a follower, Thompson’s life sentence, and the prosecution’s
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1 recommendation of a life sentence.

2 Unquestionably, Dowling's social history report paints a more detailed picture of
3 Petitioner's family, upbringing, and struggle with drugs and alcohol. It does not, however,
4 add any significant new information that was not before the sentencing judge. *See Van Hook*,
5 130 S. Ct. at 19 (finding no prejudice where "nothing of value" contained in new witness
6 affidavits); *Wong v. Belmontes*, 130 S. Ct. 383, 388 (2009) (per curiam) (finding no prejudice
7 where new "humanizing evidence" was mostly cumulative of that presented at sentencing).
8 Moreover, Petitioner has not proffered any evidence to substantiate his claim that he suffers
9 from Attention Deficit Hyperactivity Disorder and, with the exception of his history of
10 depression, the "highlights" identified in Petitioner's amended petition (Doc. 52 at 161-62)
11 were contained in the materials considered by the sentencing court. The new information
12 does not present a significantly different picture of Petitioner, and therefore "would barely
13 have altered the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S.
14 at 700. *See Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir.2005) ("to establish prejudice, the
15 new evidence that a habeas petitioner presents must differ in a substantial way – in strength
16 and subject matter – from the evidence actually presented at sentencing"); *Babbitt v.*
17 *Calderon*, 151 F.3d 1170, 1176 (9th Cir. 1998) (finding no prejudice where evidence omitted
18 at sentencing was "largely cumulative of the evidence actually presented"); *Woratzeck*, 97
19 F.3d at 336-37 (finding no prejudice from counsel's failure to investigate or call additional
20 witnesses at mitigation phase because all of the information the witnesses would have
21 presented was contained in the presentence report).

22 *Conclusion*

23 After carefully reviewing the state court record, as well as the evidence Petitioner
24 neglected to develop in state court, this Court concludes that counsel's representation at
25 sentencing was neither deficient nor prejudicial as those terms are defined in *Strickland*.
26 Applying the "doubly deferential" standard required by the AEDPA, *see Mirzayance*, 129
27 S. Ct. at 1420, the Court readily concludes that the state court's denial of relief was not based
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1 on an unreasonable application of law or determination of fact.

2 **Claim 9-E**

3 In his amended petition, the heading of Claim 9-E reads: “Trial Counsel Failed to Get
4 and Present a Meaningful Psychiatric Evaluation of the Petitioner.” (Doc. 52 at 184.)
5 However, in the accompanying argument Petitioner alleges that he was tried, convicted, and
6 sentenced while mentally incompetent in violation of *Godinez v. Moran*, 509 U.S. 389
7 (1993), and *Dusky v. United States*, 362 U.S. 402 (1962). (*Id.* at 187.) He also argues that
8 counsel was ineffective for not challenging his competency for trial. (*Id.* at 188.)
9 Respondents contend that neither of these claims were raised in state court. (Doc. 68 at 82,
10 90-91.) The Court agrees.

11 Petitioner did not fairly present any competency-related allegations on direct appeal or
12 during PCR proceedings. The Court concludes that if Petitioner were to return to state court
13 now and attempt to litigate these claims, they would be found waived and untimely under
14 Rules 32.2(a)(3) and 32.4(a) because they do not fall within an exception to preclusion. *See*
15 *Ariz. R. Crim. P.* 32.2(b); 32.1(d)-(h); *see also Martinez-Villareal v. Lewis*, 80 F.3d 1301,
16 1306-07 (9th Cir.1996) (holding that a claim alleging actual incompetence to stand trial is
17 subject to the same state procedural default rules as other claims). Therefore, Petitioner’s
18 incompetency claim and the accompanying IAC claim are “technically” exhausted but
19 procedurally defaulted because Petitioner no longer has an available state remedy. *See Smith*,
20 510 F.3d at 1137-38. Petitioner presents no cause and prejudice or fundamental miscarriage
21 of justice arguments. (Doc. 73 at 37.) Therefore, Claim 9-E is procedurally barred.

22 **Claim 10-A**

23 Petitioner contends that appellate counsel was ineffective for failing to raise the issue
24 of trial counsel’s ineffective assistance in not requesting a second-degree murder instruction.
25 (Doc. 52 at 189.) Petitioner acknowledges, however, that trial counsel did in fact request a
26 second-degree murder instruction. (*Id.* at 189-90.) In addition, this claim was never
27 presented in state court and is now procedurally barred.
28

1 Petitioner also argues that appellate counsel was ineffective for failing to argue that the
2 trial court erred in denying his request for a second-degree murder instruction. (*Id.*)
3 Petitioner presented this argument during PCR proceedings and thus the claim was properly
4 exhausted in state court. (ROA-PCR 3.) However, it is without merit.

5 Petitioner was charged on two theories of first-degree murder: premeditated murder and
6 felony murder. (ROA 2.) At the end of trial, the court indicated that it was only going to
7 provide a jury instruction on first-degree murder. (RT 11/17/92 at 228.) Counsel requested
8 an instruction for second-degree murder, arguing that Thompson's testimony provided
9 sufficient evidence that she and Petitioner were under the heavy influence of cocaine and
10 alcohol and acted without premeditation or deliberation. (*Id.* at 228-30.) The court
11 disagreed, concluding, based on Petitioner's presentation of an alibi defense, that there was
12 insufficient evidence to support a lesser-included second-degree murder charge, and that
13 there was insufficient evidence upon which a jury could find that Petitioner participated in
14 the murder without premeditation. (*Id.*) Petitioner filed a motion for a new trial, which was
15 denied. (ROA 79; ME 12/14/92.) During PCR proceedings, the court denied Claim 10-A
16 as not colorable. (ROA-PCR-ME 12.)

17 In *Beck v. Alabama*, 447 U.S. 625, 627 (1980), the Court held that the death penalty
18 may not be imposed if the jury was not permitted to consider a lesser-included non-capital
19 offense. However, due process requires that a lesser-included-offense instruction be given
20 only when the evidence warrants such an instruction. *Id.*; see *Hopper v. Evans*, 456 U.S.
21 605, 611 (1982); *Clabourne v. Lewis*, 64 F.3d 1373, 1380 (9th Cir. 1995) (noting that it is
22 plain error for the court to fail to give a lesser-included instruction on second-degree murder
23 in a capital case "where the evidence would permit a jury rationally to find [the defendant]
24 guilty of the lesser offense and acquit him of the greater").

25 Under Arizona law, there are no lesser-included homicide offenses for felony murder.
26 *State v. Lopez*, 163 Ariz. 108, 112, 786 P.2d 959, 963 (1990) (citing *State v. Celaya*, 135
27 Ariz. 248, 255, 660 P.2d 849, 856 (1983)). Thus, with respect to the felony murder charge,
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Petitioner's assertion that the evidence of intoxication presented at trial required the trial court to instruct on second-degree murder as a lesser-included offense necessarily fails.

Second-degree murder is a lesser-included offense of premeditated first-degree murder and is distinguished from the latter only by the element of premeditation. *See State v. Marvin*, 124 Ariz. 555, 557, 606 P.2d 406, 408 (1980); *Vickers v. Ricketts*, 798 F.2d 369, 371 (9th Cir. 1986). "Premeditation" means that a person acts with either "the intention or the knowledge" that he or she will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. A.R.S. § 13-1101(1). In this case, the prosecution urged both mental states and the jury was instructed that to convict Petitioner of premeditated first-degree murder, they must find that:

1. The defendant caused the death of another person; and,
2. The defendant *intended* or *knew* that he would cause the death of another person; and
3. The defendant acted with premeditation.

"Premeditation means that the defendant's *intention* or *knowledge* existed before the killing long enough to permit reflection. However, the reflection differs from the *intent* or *knowledge* that conduct will cause death. . . .

(ROA 71 (emphasis added).)

At the time of Petitioner's trial, A.R.S. § 13-503 provided that a jury could consider voluntary intoxication in determining culpable mental state only when the state of "intentionally or with the intent to" was a necessary element of the offense. However, when the State alleges both the "intentional" and "knowing" mental states for premeditated first-degree murder, Arizona law precludes the giving of a voluntary intoxication instruction. *See State v. Schurz*, 176 Ariz. 46, 55, 859 P.2d 156, 165 (1993) (holding that "knowing" is less culpable mental state than intent and thus the "intentional" component of first-degree murder becomes superfluous if both "knowing" and "intentional" are charged); *see also State v. Neal*, 143 Ariz. 93, 98, 692 P.2d 272, 277 (1984) (observing that voluntary intoxication negates only the "intentional" mens rea for first-degree murder).

1 Here, the jury was instructed on both the “intentional” and “knowing” mental states for
2 premeditated murder; thus, evidence of voluntary intoxication would not have been
3 admissible to negate premeditation (and establish second-degree murder). Absent evidence
4 to negate premeditation, the giving of a lesser-included second-degree murder instruction
5 was not warranted. *See Spaziano v. Florida*, 468 U.S. 447, 455 (1984) (*Beck* does not
6 require lesser-included instruction where no lesser-included offense exists). Appellate
7 counsel’s failure to raise a meritless argument does not constitute ineffective assistance. *See*
8 *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel not ineffective for
9 failing to raise issues that are without merit); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir.
10 1985) (same).

11 **Claim 10-B**

12 Petitioner alleges IAC of appellate counsel for failure to file a petition for writ of
13 certiorari to the United States Supreme Court. (Doc. 52 at 194-99.) Respondents assert and
14 the Court finds that Petitioner did not fairly present this claim in state court. (Doc. 68 at 102-
15 03.) The Court further finds that if Petitioner were to return to state court now and attempt
16 to litigate Claim 10-B, it would be found waived and untimely under Rules 32.2(a)(3) and
17 32.4(a) because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P.
18 32.2(b); 32.1(d)-(h). Therefore, this claim is “technically” exhausted but procedurally
19 defaulted because Petitioner no longer has an available state remedy. *See Coleman*, 501 U.S.
20 at 732, 735 n.1; *Smith*, 510 F.3d at 1138. Petitioner raises the same cause, prejudice, and
21 fundamental miscarriage arguments already rejected by the Court in its discussion of Claim
22 3. (Doc. 73 at 38.) Therefore, Claim 10-B is denied as procedurally barred.

23 **Claim 11**

24 Petitioner contends that he was deprived of the effective assistance of counsel during
25 his PCR proceedings in violation of the Sixth and Fourteenth Amendments. (Doc. 79 at 96-
26 114.) Regardless of exhaustion, the Court will dismiss this claim as non-cognizable. *See* 28
27 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

1 Section 2254(i) provides that “[t]he ineffectiveness or incompetence of counsel during
2 Federal or State collateral proceedings shall not be a ground of relief in a proceeding arising
3 under section 2254.” Moreover, Petitioner is not entitled to relief under Claim 11 because
4 only violations “of the Constitution or laws or treaties of the United States” may be litigated
5 in the context of a petition for writ of habeas corpus. 28 U.S.C. § 2254(a). Petitioner’s
6 allegations regarding the effectiveness of PCR counsel are not cognizable on federal habeas
7 review because there is no constitutional right to the effective assistance of such counsel. *See*
8 *Pennsylvania v. Finley*, 481 U.S. at 555; *Murray*, 492 U.S. at 7-12 (noting that the
9 Constitution does not require states to provide counsel in PCR proceedings even when the
10 putative petitioners are facing the death penalty); *Bonin*, 999 F.2d at 429-30 (refusing to
11 extend the right of effective assistance of counsel to state collateral proceedings); *Harris*, 949
12 F.2d at 1513-14.

13 **Claim 12**

14 Petitioner alleges that execution after an extended period of incarceration on death row
15 fails to serve any legitimate penological purpose and violates his Eighth Amendment right
16 to be free from cruel and unusual punishment. (Doc. 52 at 204-09.) Regardless of
17 exhaustion, the Court will deny Claim 12 as plainly meritless. *See* 28 U.S.C. § 2254(b)(2);
18 *Rhines*, 544 U.S. at 277.

19 The Supreme Court has not held that lengthy incarceration prior to execution constitutes
20 cruel and unusual punishment. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Stevens,
21 J. & Breyer, J., discussing denial of certiorari and noting the claim has not been addressed).
22 Circuit courts, including the Ninth Circuit, have held that prolonged incarceration under a
23 sentence of death does not offend the Eighth Amendment. *See McKenzie v. Day*, 57 F.3d
24 1493, 1493-94 (9th Cir. 1995) (en banc); *White v. Johnson*, 79 F.3d 432, 438 (5th Cir. 1996)
25 (delay of 17 years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (delay of 15
26 years). Accordingly, Petitioner cannot establish a right to federal habeas relief. *See Allen*
27 *v. Ornoski*, 435 F.3d 946, 958-60 (9th Cir. 2006).
28

1 **Claim 13**

2 Petitioner contends that his constitutional rights were violated by the cumulative effect
 3 of the constitutional errors alleged in his amended petition. (Doc. 52 at 209.) Respondents
 4 assert and the Court finds that Petitioner failed to present this claim to the state courts. (Doc.
 5 68 at 106.) The Court further finds that Petitioner has no available state remedies. *See* Ariz.
 6 R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, the claim is “technically” exhausted but
 7 procedurally defaulted. *See Coleman*, 501 U.S. at 732, 735 n.1; *Smith*, 510 F.3d at 1138.
 8 Petitioner raises the same cause, prejudice, and fundamental miscarriage arguments already
 9 rejected by the Court in its discussion of Claim 3. Claim 13 is denied as procedurally barred.

10 **CONCLUSION**

11 The Court concludes that Petitioner is not entitled to habeas relief on any of his claims.
 12 The Court further finds that an evidentiary hearing in this matter is neither warranted nor
 13 required.¹⁷ Therefore, Petitioner’s Amended Petition for Writ of Habeas Corpus is denied
 14 and judgment shall be entered accordingly.

15 **CERTIFICATE OF APPEALABILITY**

16 Rule 22(b) of the Federal Rules of Appellate Procedure provides that an applicant
 17 cannot take an appeal unless a certificate of appealability has been issued by an appropriate
 18 judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases provides that the
 19 district judge must either issue or deny a certificate of appealability when it enters a final
 20 order adverse to the applicant. If a certificate is issued, the court must state the specific issue
 21 or issues that satisfy 28 U.S.C. § 2253(c)(2). Pursuant to 28 U.S.C. § 2253(c)(2), a COA
 22 may issue only when the petitioner “has made a substantial showing of the denial of a
 23 constitutional right.” This showing can be established by demonstrating that “reasonable
 24 jurists could debate whether (or, for that matter, agree that) the petition should have been
 25

26 ¹⁷ The Court previously denied Petitioner’s request for evidentiary development
 27 as to specific claims (Doc. 87), but has now conducted an independent review as to all of
 28 Petitioner’s claims as required by Rule 8 of the Rules Governing Section 2254 Cases.

1 resolved in a different manner” or that the issues were “adequate to deserve encouragement
2 to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*,
3 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if
4 reasonable jurists could debate (1) whether the petition states a valid claim of the denial of
5 a constitutional right and (2) whether the court’s procedural ruling was correct. *Id.* The
6 Court finds that reasonable jurists could debate its resolution of Claim 9-A, Whether trial
7 counsel’s presentation of a “false” alibi defense constituted ineffective assistance of counsel;
8 Claim 9-B, Whether trial counsel’s failure to fully investigate a voluntary intoxication
9 defense constituted ineffective assistance of counsel; and Claim 9-D, Whether trial counsel’s
10 investigation and presentation of relevant mitigating evidence at sentencing constituted
11 ineffective assistance of counsel.

12 For the reasons stated in this order and its September 29, 2006 order (Doc. 87), the
13 Court declines to issue a COA with respect to any other claims.

14 Based on the foregoing,

15 **IT IS HEREBY ORDERED** that Petitioner’s Amended Petition for Writ of Habeas
16 Corpus (Doc. 52) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter
17 judgment accordingly.

18 **IT IS FURTHER ORDERED** that the stay of execution entered on January 14, 2004
19 (Doc. 3) is **VACATED**.

20 **IT IS FURTHER ORDERED** that a Certificate of Appealability is **GRANTED** as to
21 the following issues:

22 Claim 9-A: Whether trial counsel’s presentation of a “false” alibi defense
23 constituted ineffective assistance of counsel.

24 Claim 9-B: Whether trial counsel’s failure to fully investigate a voluntary
25 intoxication defense constituted ineffective assistance of counsel.

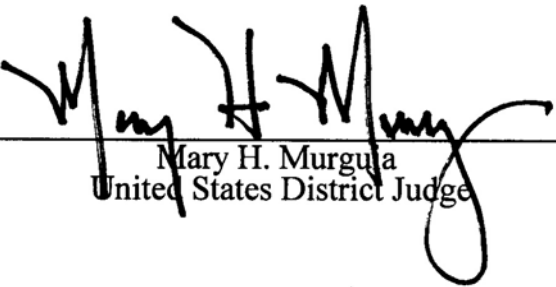
26 Claim 9-D: Whether trial counsel’s investigation and presentation of relevant
27 mitigating evidence at sentencing constituted ineffective assistance of counsel.

28 **IT IS FURTHER ORDERED** that the Clerk of Court send a courtesy copy of this

1 Order to Rachelle M. Resnick, Clerk of the Arizona Supreme Court, 1501 W. Washington,
2 Phoenix, Arizona 85007-3329.

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4 DATED this 30th day of September, 2010.

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Mary H. Murgula
United States District Judge

1 **WO**

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Darrel Easton Lee,

10 Petitioner,

11 v.

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

13 Respondents.
14

No. CV-04-0039-PHX-JTT

DEATH PENALTY CASE

ORDER

15 This case is before the Court on limited remand from the Ninth Circuit Court of
16 Appeals. (Doc. 109.) The Court is directed to reconsider, in the light of intervening law,
17 Claim 2 of Lee's habeas petition and to address whether reconsideration of Claims 9(A)
18 and (D) is warranted. (*Id.*)

19 The issues have been briefed. (Docs. 120, 124, 128.) For the reasons set forth below,
20 the Court finds that Lee is not entitled to relief on the remanded issues.

21 **BACKGROUND**

22 Lee was tried, convicted, and sentenced to death for the 1991 murder of John
23 Anderson. On December 5, 1991, Lee and co-defendant Karen Thompson approached
24 Anderson as he was leaving a clinic in Phoenix and asked him for a ride. They planned to
25 kidnap and rob him in order to get money to buy drugs. Lee, who pretended to be armed,
26 told Anderson to drive south on the freeway. When they arrived in Chandler, Lee and
27 Thompson took Anderson's wallet. They used Anderson's ATM cards and credit cards
28 over the next five days, both before and after killing him.

1 Lee and Thompson bound Anderson's hands and feet and left him in a ditch alongside
2 the road. They came back for him, however, and placed him in the trunk of the car.

3 Lee and Thompson drove toward California, stopping frequently to use cocaine and
4 alcohol. They decided to kill Anderson to avoid apprehension. Lee stated he would
5 asphyxiate Anderson with the car's exhaust and obtained a hose for that purpose.

6 After about eight hours, Lee and Thompson stopped the car and attempted to
7 suffocate Anderson with car fumes by running the hose from the exhaust pipe into the
8 trunk. Their efforts failed because Anderson kept pushing up the trunk lid. While the couple
9 paused to use more cocaine, Anderson escaped from the trunk and attempted to flee. Lee
10 chased Anderson and wrestled him to the ground. Thompson then brought Lee a belt, which
11 he used to strangle Anderson. The belt broke, and Lee yelled for Thompson to get a rock.
12 As Lee choked Anderson with his hands, Thompson hit Anderson in the head with the
13 rock, fracturing his skull.

14 Lee and Thompson placed the body in the trunk of the car. After driving to
15 California and then back to Phoenix, the couple eventually went to Tucson, where they
16 purchased a shovel and buried Anderson in a shallow grave outside the city.

17 A La Paz County grand jury indicted Lee and Thompson on one count each of first-
18 degree murder, kidnapping, theft, armed robbery, and credit card theft. Thompson entered
19 a plea of guilty to first-degree murder and armed robbery and testified against Lee.

20 Lee first accepted, then rejected, a plea offer in which the State agreed not to pursue
21 the death penalty. At trial he presented an alibi defense. He was convicted on all counts.

22 After an aggravation/mitigation hearing, the trial judge sentenced Lee to death for
23 first-degree murder. He found the following aggravating factors: that Lee had a prior felony
24 conviction involving the use or threat of violence pursuant to A.R.S. § 13-703(F)(2); that
25 he had participated in the killing for pecuniary gain, A.R.S. § 13-703(F)(5); and that the
26 murder was perpetrated in an especially cruel manner, A.R.S. § 13-703(F)(6).¹ The judge
27

28 ¹ At the time of Lee's offense, Arizona's capital sentencing scheme was set forth in
A.R.S. §§ 13-703 and 13-703.01 to -703.04. It is presently set forth in A.R.S. §§ 13-751

1 also determined that the following mitigation existed but was not substantial enough to call
 2 for leniency: Lee was remorseful; he admitted his guilt; he lacked education and had a low
 3 level of intelligence; he had strong family ties; he was a “follower” by nature; co-defendant
 4 Thompson received a life sentence; and the prosecutor had recommended against the death
 5 penalty.

6 On direct appeal, the Arizona Supreme Court affirmed Lee’s convictions and
 7 sentences. *State v. Lee*, 185 Ariz. 549, 917 P.2d 692 (1996). After unsuccessfully pursuing
 8 postconviction relief (“PCR”), Lee commenced proceedings in this Court, filing an
 9 amended petition for writ of habeas corpus on November 29, 2004. (Doc. 52.)

10 In a 2006 order, the Court denied a number of Lee’s claims, including Claim 2,
 11 alleging that trial counsel performed ineffectively by failing to request a competency
 12 hearing, which the Court found procedurally barred. (Doc. 87.) In a subsequent order and
 13 judgment dated September 30, 2010, the Court denied Lee’s remaining claims, including
 14 Claims 9(A) and (D), alleging ineffective assistance of counsel during the guilt and penalty
 15 phases, which the Court found meritless. (Doc. 93.)

16 The Ninth Circuit’s remand order directs the Court to consider with respect to these
 17 claims the effects of intervening law, including *Martinez v. Ryan*, 566 U.S. 1 (2012);
 18 *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc); *Detrich v. Ryan*, 740 F.3d 1237
 19 (9th Cir. 2013) (en banc); and *Woods v. Sinclair*, 764 F.3d 1109 (9th Cir. 2014).

20 APPLICABLE LAW

21 Federal review is generally not available for a state prisoner’s claims when those
 22 claims have been denied pursuant to an independent and adequate state procedural rule.
 23 *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In such situations, review is barred unless
 24 the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice.
 25 *Id. Coleman* held that ineffective assistance of counsel in post-conviction proceedings does
 26 not establish cause for the procedural default of a claim. *Id.*

27
 28 _____
 to –759. The Court refers throughout this order to the statutes in effect at the time Lee
 committed the crime.

1 In *Martinez*, however, the Court announced a new, “narrow exception” to the rule
2 set out in *Coleman*. The Court explained that:

3 Where, under state law, claims of ineffective assistance of trial counsel must
4 be raised in an initial-review collateral proceeding, a procedural default will
5 not bar a federal habeas court from hearing a substantial claim of ineffective
6 assistance at trial if, in the initial-review collateral proceeding, there was no
counsel or counsel in that proceeding was ineffective.

7 566 U.S. at 17; *see also Trevino v. Thaler*, 569 U.S. 413, 418 (2013).

8 Accordingly, under *Martinez* an Arizona petitioner may establish cause and
9 prejudice for the procedural default of an ineffective assistance of trial counsel claim by
10 demonstrating that (1) PCR counsel was ineffective and (2) the underlying ineffective
11 assistance claim has some merit. *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting
12 *Martinez*, 566 U.S. at 14); *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014),
13 *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 818 (9th Cir. 2015) (en
14 banc).

15 To demonstrate that PCR counsel was ineffective, a petitioner must “establish that
16 both (a) post-conviction counsel’s performance was deficient, and (b) there was a
17 reasonable probability that, absent the deficient performance, the result of the post-
18 conviction proceedings would have been different.” *Clabourne*, 745 F.3d at 377 (citing
19 *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). Determining whether there was
20 a reasonable probability of a different outcome “is necessarily connected to the strength of
21 the argument that trial counsel’s assistance was ineffective.” *Id.* at 377–78. “PCR counsel
22 would not be ineffective for failure to raise an ineffective assistance of counsel claim with
23 respect to trial counsel who was not constitutionally ineffective.” *Sexton v. Cozner*, 679
24 F.3d 1150, 1157 (9th Cir. 2012).

25 For claims that were adjudicated on the merits in state court, federal habeas review
26 “is limited to the record that was before the state court.” *Cullen v. Pinholster*, 563 U.S.
27 170, 181 (2011). In *Dickens*, the Ninth Circuit ruled that *Pinholster* does not apply to a
28 claim that has been “fundamentally altered” by new evidence because such a claim was

1 not adjudicated on the merits in state court. 740 F.3d at 1320. The claim is therefore
 2 unexhausted and subject to analysis under *Martinez*. *Id.* at 1318.

3 According to *Dickens*, a claim has not been exhausted in state court if new evidence
 4 produced during federal habeas proceedings fundamentally alters the legal claim
 5 considered by the state court or places the case in a significantly different and stronger
 6 evidentiary posture than it was when the state court considered it. *Id.* at 1318–19.

7 ANALYSIS

8 The Court has discussed in detail the factual and procedural background of the three
 9 remanded claims. (Docs. 87, 93.) This information will be repeated only as necessary for
 10 the Court’s analysis.

11 **1. Claim 2:**

12 In Claim 2 of his amended habeas petition, Lee alleged that he was tried while
 13 mentally incompetent and that trial counsel performed ineffectively by failing to request a
 14 competency hearing. (See Doc. 52 at 45–50.) Lee did not exhaust this claim in state court
 15 and the Court denied the claim as procedurally defaulted and barred from review. (Doc. 87
 16 at 12–13.) On remand, Lee argues that his default of the claim is excused under *Martinez*
 17 by the ineffective performance of PCR counsel. The Court finds that PCR counsel did not
 18 perform ineffectively by failing to raise this meritless claim.

19 The standard for competency requires that a defendant have (1) “‘a rational as well
 20 as factual understanding of the proceedings against him,’ and (2) ‘sufficient present ability
 21 to consult with his lawyer with a reasonable degree of rational understanding.’” *Stanley v.*
 22 *Cullen*, 633 F.3d 852, 860 (9th Cir. 2011) (quoting *Dusky v. United States*, 362 U.S. 402,
 23 402 (1960) (per curiam)). The assessment of whether a defendant is capable of
 24 understanding the proceedings and assisting counsel takes into account evidence of the
 25 defendant’s irrational behavior, his demeanor in court, and any prior medical opinions on
 26 his competence. *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

27 “A claim that counsel was deficient for failing to move for a competency hearing
 28 will succeed only when there are sufficient indicia of incompetence to give objectively

1 reasonable counsel reason to doubt defendant's competency, and there is a reasonable
2 probability that the defendant would have been found incompetent to stand trial had the
3 issue been raised and fully considered." *Hibbler v. Benedetti*, 693 F.3d 1140, 1149–50 (9th
4 Cir. 2012) (internal quotation marks omitted). Lee can make neither showing.

5 First, there were not sufficient indicia of incompetence to give Lee's counsel, Steven
6 Politi, reason to doubt Lee's competence. The fact that Lee suffered from, and was being
7 medicated for, chronic depression was not in itself sufficient to show that he was
8 incompetent. *See Boyde v. Brown*, 404 F.3d 1159, 1166–67 (9th Cir. 2005) (finding
9 inmate's "major depression" and "paranoid delusions" did not raise a doubt regarding his
10 competence to stand trial); *see also United States v. Garza*, 751 F.3d 1130, 1135–37 (9th
11 Cir. 2014) (finding no need for competency hearing where defendant was diagnosed with
12 anxiety and dementia but his behavior, in and out of court, was not erratic and there was
13 no clear connection between any mental disease and a failure on defendant's part to
14 understand the proceedings or assist in his own defense); *Hoffman v. Arave*, 455 F.3d 926,
15 938 (9th Cir. 2006) ("We have held that those with mental deficiencies are not necessarily
16 incompetent to stand trial."), *vacated on other grounds by Arave v. Hoffman*, 552 U.S. 117,
17 117–19 (2008) (per curiam)).

18 Lee notes that Politi testified in 2002 that he felt Lee "had some mental problems" and
19 that the prosecutor, Steve Suskin, in a 2015 declaration stated that Lee "did not seem very
20 intelligent" or "rational" in his decision not to accept a plea agreement. (Doc. 120 at 74.)

21 Lee also quotes a psychiatric evaluation by Dr. Barry Morenz dated August 24,
22 2015. Dr. Morenz diagnosed Lee with chronic depression, severe alcohol dependence, and
23 a severe cocaine disorder. (Doc. 120-1, Ex. 5 at 10.) Dr. Morenz added:

24 There is a reasonable probability that some of the legal choices [Lee] made,
25 including his rejection of a plea offer, that would have spared his life, and his
26 decision to testify to a false alibi, and the assistance he provided his attorney
27 reflected his shame and a belief that he deserved whatever he received. Thus,
28 it is difficult to understand why his then-counsel did not seek a determination
of whether he was competent to stand trial at the time of his litigation.

(*Id.*)

1 As Respondents note, this opinion does not address the standard for competence,
2 which consists of an understanding of the proceedings and the ability to communicate
3 rationally with counsel.

4 The cases cited by Lee are readily distinguishable. For example, in *Burt v. Uchtman*,
5 422 F.3d 557, 569 (7th Cir. 2005), counsel performed ineffectively by not litigating the
6 defendant's competence when they knew he "was heavily medicated, reported fearing
7 imaginary snakes in his cell, had difficulty staying awake during trial, and told his attorneys
8 that he wanted to plead guilty so he could return to state prison to smoke." He was also
9 "frequently violent and threatened to hurt others in the courtroom." *Id.* This is a far different
10 scenario from that faced by Lee's counsel, whose client suffered from depression but
11 displayed no bizarre or disruptive behavior.

12 Moreover, Lee's insistence on denying his guilt and pursuing an alibi defense is not
13 suggestive of incompetence. "Criminal defendants often insist on asserting defenses with
14 little basis in the law, particularly where, as here, there is substantial evidence of their
15 guilt," but "adherence to bizarre legal theories" does not imply incompetence. *United*
16 *States v. Jonassen*, 759 F.3d 653, 660 (7th Cir. 2014) (noting defendant's "persistent
17 assertion of a sovereign-citizen defense"); see *United States v. Kerr*, 752 F.3d 206, 217–
18 18 (2d Cir.), *as amended* (June 18, 2014) ("Kerr's obsession with his defensive theories,
19 his distrust of his attorneys, and his belligerent attitude were also not so bizarre as to require
20 the district court to question his competency for a second time."). "[P]ersons of
21 unquestioned competence have espoused ludicrous legal positions," *United States v.*
22 *James*, 328 F.3d 953, 955 (7th Cir. 2003), "but the articulation of unusual legal beliefs is a
23 far cry from incompetence," *United States v. Alden*, 527 F.3d 653, 659–60 (7th Cir. 2008)
24 (explaining that defendant's "obsession with irrelevant issues and his paranoia and distrust
25 of the criminal justice system" did not imply mental shortcomings requiring a competency
26 hearing).

27 The claim that trial counsel performed ineffectively by failing to move for a
28 competency determination is without merit. PCR counsel did not perform ineffectively by

1 failing to raise it. The claim therefore remains procedurally defaulted and barred from
2 federal review.

3 **2. Claim 9(A):**

4 In Claim 9(A), Lee alleged that trial counsel performed ineffectively by presenting
5 an alibi defense he knew was false. The Court denied the claim on the merits. (Doc. 93 at
6 33–48.) Lee contends that new evidence renders the claim fundamentally altered and
7 therefore unexhausted and subject to the application of *Martinez*. (Doc. 120 at 16.) The
8 Court disagrees.

9 On remand Lee contends that evidence this Court did not previously consider, a
10 transcript of an interview between prosecutor Suskin and Lee’s father, demonstrates that
11 Lee told Politi he was present when the crimes were committed. Lee also offers 2015
12 declarations from Suskin and PCR counsel, Matthew Newman, addressing the impact of
13 that transcript.

14 In the interview transcript, Suskin indicated that Lee had informed him during plea
15 negotiations that “he was there, and... and... you know... [the co-defendant] did most of
16 the stuff. He blames most of it on her, but—a... and she doesn’t deny it.” (Doc. 120-1, Ex.
17 1 at 32–33.) Politi was not present at the interview.

18 In his declaration, Suskin states that has no independent recollection of Lee telling
19 him and Politi that he was present when the co-defendant killed the victim but in light of
20 the interview transcript, “it is more likely than not that Darrel Lee informed me and Mr.
21 Politi that he was present when the homicide was committed.” (*Id.*, Ex. 3 at 2.)

22 In his declaration, PCR counsel states that he should have used the transcript at the
23 PCR evidentiary hearing and had no strategic basis for failing to do so. (*Id.*, Ex. 3 at 2–3.)

24 The transcript provides additional evidentiary support for Lee’s allegation that trial
25 counsel knew that Lee’s alibi defense was false but it does not alter the claim under the
26 standard in *Dickens*. Generally, a petitioner may add factual materials supportive of those
27 already in the record without fundamentally altering his claim and rendering it
28 unexhausted. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) (statistical analyses of facts

1 already in record do not render claim unexhausted); *see also Weaver v. Thompson*, 197
 2 F.3d 359, 364–65 (9th Cir. 1999) (whether bailiff’s instruction was coercive because it
 3 required jury to continue deliberating, as alleged in state court, or because it required
 4 verdict on all counts, as habeas court found, claim was exhausted because the factual basis
 5 was rooted in same incident); *Chacon v. Wood*, 36 F.3d 1459, 1468–69 (9th Cir. 1994)
 6 (factual basis of claim that interpreter mistranslated guilty plea proceedings was fairly
 7 presented where the state court understood accuracy of translation to be at issue).

8 The petitioner in *Dickens* raised only general allegations in the state court
 9 proceedings that “sentencing counsel did not effectively evaluate whether Dickens
 10 ‘suffer[ed] from any medical or mental impairment.’” 740 F.3d at 1319. In his federal
 11 habeas petition, however, he “changed his claim to include extensive factual allegations
 12 suggesting Dickens suffered from FAS [Fetal Alcohol Syndrome] and organic brain
 13 damage.” *Id.* at 1317.

14 The court found that Dickens’s “new evidence creates a mitigation case that bears
 15 little resemblance to the naked *Strickland* claim raised before the state courts.” *Id.* at 1319.
 16 It further noted that the claim urged in state court only “generally alleged that sentencing
 17 counsel did not effectively evaluate whether Dickens ‘suffer[ed] from any medical
 18 or mental impairment’” and that specific conditions like FAS and organic brain damage
 19 placed the claim in a “significantly different” and “substantially improved” evidentiary
 20 posture. *Id.*

21 In Lee’s case, the interview transcription simply provides additional circumstantial
 22 support for his allegation that he told Politi of his involvement in the crimes. The allegation
 23 itself, while somewhat stronger, is not altered at all, nor is its posture significantly different.
 24 It remains the same claim the Court already denied on the merits.

25 Therefore, the Court will not reconsider its denial of Claim 9(A).

26 **3. Claim 9(D):**

27 In Claim 9(D), Lee alleged that counsel performed ineffectively at sentencing by
 28 failing to investigate and present available mitigating evidence, including Lee’s social

1 history, and by failing to offer expert evidence to prove the (G)(1) statutory mitigating
2 factor and rebut the aggravating factors alleged by the State.² (See Doc. 120 at 8.) Lee
3 contends that the social history evidence would have shown the following: Lee was
4 physically and emotionally abused by his alcoholic father; he was exposed to and
5 traumatized by the severe physical abuse inflicted by his father on his mother when he was
6 a child; he performed good deeds, had a good character, and his family loved him; he and
7 his siblings grew up in poverty; and he had suffered from depression his entire adult life
8 stemming from his abusive childhood and the shooting death of his 15-year-old younger
9 brother. (*Id.* at 12–13.)

10 Lee further contends that trial counsel failed to present evidence that that Lee was
11 suffering from alcohol toxicity when he committed the 1987 robbery that was used to prove
12 the (F)(2) aggravating factor. (*Id.* at 8–9.) He also argues that counsel erred in not
13 presenting evidence that Lee was suffering from cocaine withdrawal syndrome, as opposed
14 to cocaine intoxication, when he and Thompson kidnapped Anderson. (*Id.* at 9–11.)

15 As noted, the Court rejected this claim on the merits. (Doc. 93 at 48–72.) To render
16 the claim unexhausted and subject to review under *Martinez*, the new evidence Lee
17 presents must fundamentally alter the claim. *Dickens*, 740 F.3d at 1318–19. It does not. In
18 fact, evidence regarding all of these issues was before the state courts.

19 Evidence that Lee was abused by his alcoholic father was present in the presentence
20 report (“PSR”) prepared for sentencing (Doc. 92, Ex. C at 8) and in Dr. Anne Herring’s
21 report prepared for the PCR proceedings (Doc. 90-1, Ex. C at 2). The PSR also contained
22 evidence that Lee was exposed to his father’s physical abuse of his mother. (Doc. 92, Ex.
23 C at 8.)

24 The state court records contained evidence that Lee grew up in poverty. (Doc. 92,
25 Ex. C at 8.) Evidence that Lee was made fun of by his school mates and that one Christmas

26
27 ² A.R.S. § 13–703(G)(1) provides that a mitigating circumstance exists where, “The
28 defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his
conduct to the requirements of law was significantly impaired, but not so impaired as to
constitute a defense to prosecution.”

1 his gifts had to be returned because his father could not pay for them (*see* Doc. 120 at 52)
2 does not fundamentally alter the claim.

3 Evidence of close family ties and strong family support was before the trial court at
4 sentencing in counsel's sentencing memo (Doc. 90-2, Ex. 4 at 14) and a letter from Lee's
5 mother (Doc. 90-2, Ex. 7). *See Lee*, 185 Ariz. at 553, 917 P.2d at 696. Evidence that Lee
6 did favors for his family, such as building additions to his parents' house (*see* Doc. 120 at
7 54), does not fundamentally alter the claim.

8 Evidence that Lee suffered from depression was before the PCR court in the reports
9 of Dr. Geoffrey Ahern and Dr. Herring. Dr. Ahern reported that Lee had taken Elavil for
10 eight or nine years to treat depression. (Doc. 90-1, Ex. B at 2.) Dr. Herring reported Lee's
11 statement that he had been depressed all of his life and that he was prescribed Elavil and
12 other depression medications. (Doc. 90-1, Ex. C at 2.) Dr. James Youngjohn testified at the
13 PCR evidentiary hearing that Lee's depression scale on the MMPI-2 was elevated. (RT
14 5/21/02 at 68–69.) Lee's mother testified at the PCR evidentiary hearing that the shooting
15 death of Lee's younger brother caused Lee to go into a downward spiral. (RT 4/17/02 at
16 152–53.) With respect to Lee's diagnosis of depression, Lee offers no new evidence that
17 was not available to the state court.

18 Evidence that Lee was highly intoxicated when he committed the 1987 robbery was
19 presented at sentencing in Dr. Garcia-Bunuel's report (Doc. 90-2, Ex. 8 at 2) and was
20 discussed in subsequent expert reports.

21 In these federal habeas proceedings, Lee has presented a report by Dr. Murray
22 Smith, a physician specializing in addiction medicine. (Doc. 102-1, Ex. 4.) Dr. Smith
23 explains the effects of Cocaine Withdrawal Syndrome, which Lee alleges he was suffering
24 from when he and Thompson decided to kidnap Anderson.³ (*Id.* at 4.) This information is
25 not new. The trial produced evidence that the kidnapping took place at a time when Lee
26 and Thompson were seeking money to buy cocaine, and Dr. Morenz testified during the

27
28 ³ Dr. Garcia-Bunuel opined that Lee, "at the time of the commission of the crimes
of which he has been convicted, was suffering from a combined cocaine/alcohol
intoxication, complicating a pre-existing organic brain syndrome." (Doc. 90-2, Ex. 8 at 6.)

1 PCR evidentiary hearing that “the original purpose of the kidnapping was to obtain money
2 for more cocaine; and prior to kidnapping him, they had tried some other strategies to get
3 money.” (RT 5/21/02 at 13.)

4 Given the information that was before the state court, additional expert evidence
5 that Lee was suffering from cocaine withdrawal, instead of cocaine intoxication, at the
6 outset of the events leading to Anderson’s murder does not fundamentally alter the claim
7 considered by the PCR court.

8 By the time the PCR court ruled on this claim of ineffective assistance of counsel at
9 sentencing, Lee had been examined by six mental health professionals: Drs. Garcia-
10 Bunuel, Bayless, Ahern, Herring, Morenz, and Youngjohn. Their reports thoroughly and
11 specifically documented Lee’s psychological and neuropsychological conditions.⁴ The
12 reports and testimony also provided social history information about Lee’s deprived and
13 abusive childhood, his struggles with substance abuse, and the resulting encounters with
14 the criminal justice system. Additional social history information was provided in letters
15 from Lee’s parents and in the PSR.

16 The evidence developed since the conclusion of Lee’s state court proceedings is
17 either cumulative or consistent with the information before the PCR court when it denied
18 this claim. The new evidence supports but does not fundamentally alter the claim of
19 ineffective assistance of counsel ruled on by the PCR court. *See Escamilla v. Stephens*, 749
20 F.3d 380, 395 (5th Cir. 2014) (finding *Martinez* inapplicable where new petitioner’s
21 mitigating evidence “did not ‘fundamentally alter’ his claim, . . . but merely provided
22 additional evidentiary support for his claim that was already presented and adjudicated in
23 the state court proceedings.”).

24
25 ⁴ Dr. Ahern administered an EEG and MRI. (RT 5/21/02 at 6, 23.) The EEG test
26 results were normal and the MRI was normal with no structural abnormalities identified.
27 (*Id.*; see also Doc. 90-1 at 4.) Dr. Herring administered a series of neuropsychological tests.
28 She found some weaknesses in Lee’s executive functioning but determined they were not
dramatic deficits. (RT 5/21/02 at 7–10.) She opined that Lee has poor judgment and poor
impulse control. (Doc. 90-1, Ex. C at 9.) Dr. Morenz made a provisional Axis I diagnosis
of cognitive disorder not otherwise specified. (RT 5/21/02 at 17; see also Doc 90-1 at 18.)

As noted above, in *Dickens*, “new evidence of specific conditions (like FAS and organic brain damage) clearly place[d] Dickens’s *Strickland* claim in a ‘significantly different’ and substantially improved’ evidentiary posture.” 740 F.3d at 1319. As a result, “the new evidence create[d] a mitigation case that [bore] little resemblance to the naked *Strickland* claim raised before the state courts.” *Id.* Here, by contrast, Lee’s claim of ineffective assistance of counsel at sentencing was supported in state court by evidence of numerous and specific mental health conditions and information about Lee’s troubled background. It was never a “naked *Strickland* claim.”

The claim has not been rendered unexhausted by the new evidence produced during these habeas proceedings. Accordingly, the Court will not reconsider its denial of Claim 9(D).

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, an applicant cannot take an appeal unless a certificate of appealability has been issued. Rule 11(a) of the Rules Governing Section 2254 Cases provides that the district judge must either issue or deny a certificate of appealability when it enters a final order adverse to the applicant. If a certificate is issued, the court must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2).

Under § 2253(c)(2), a certificate of appealability may issue only when the petitioner “has made a substantial showing of the denial of a constitutional right.” This showing can be established by demonstrating that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner” or that the issues were “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Court finds that reasonable jurists could debate its resolution of remanded Claims 9(A) and 9(D).

....

....

CONCLUSION

Based on the foregoing,

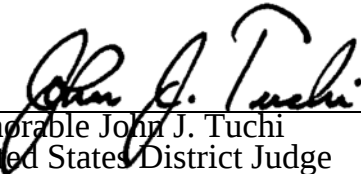
IT IS ORDERED that Claim 2 remains procedurally barred and is **DENIED**.

IT IS FURTHER ORDERED Lee's request to reconsider Claims 9(A) and 9(D) is **DENIED**.

IT IS FURTHER ORDERED that Lee's request to expand the record is **GRANTED** with respect to the exhibits attached to his supplemental *Martinez* brief (Doc. 120).

IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED** as to remanded Claims 9(A) and 9(D).

Dated this 5th day of April, 2019.



Honorable John J. Tuchi
United States District Judge