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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Eugene Allen Doerr,

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No. CV-02-582-PHX-PGR

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Petitioner,

)

DEATH PENALTY CASE

12

vs.

)

**MEMORANDUM OF DECISION
AND ORDER**

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Charles L. Ryan, et al.,¹

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Respondents.

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Petitioner Eugene Allen Doerr is a state prisoner under sentence of death. Pursuant to the Court’s general procedures governing resolution of capital habeas proceedings, the parties have completed briefing of both the procedural status and the merits of Petitioner’s habeas claims. Before the Court is Petitioner’s First Amended Petition, which raises thirty-five claims for habeas relief. (Dkt. 82.)² In a previous Order, the Court denied Petitioner’s motions for discovery, evidentiary hearing, and expansion of the record, and further denied a number of claims. (See Dkt. 132.) This Order resolves Petitioner’s remaining claims and concludes that Petitioner is not entitled to relief.

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¹ Charles L. Ryan is substituted for Dora B. Schriro, as Director, Arizona Department of Corrections. Fed. R. Civ. P. 25(d)(1).

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² “Dkt.” refers to the documents in this Court’s file.

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 The Arizona Supreme Court summarized the facts surrounding the crime and
3 Petitioner’s arrest and conviction as follows:

4 At approximately 10:00 a.m. on September 24, 1994, two Phoenix police
5 officers responded to a “check welfare” dispatch following a 911 call. Upon
6 arriving at a bungalow-style apartment, they found the front door ajar and a
disheveled Eugene Doerr sitting on the coffee table in the living room. He wore
only shorts and was covered with blood.

7 When asked what had occurred, Doerr replied: “I don’t know. I woke up
8 with this — with a dead body back there.” In a bedroom doorway, Officer Wirth
9 found a naked woman lying in a pool of blood. Detecting no pulse, he instructed
10 his partner to radio the fire department. Doerr responded, “[Y]ou don’t need fire
because she’s dead.” He told the officers that he had awakened, gone to the
bathroom, and found the body on the floor. He denied knowing the victim’s
identity.

11 The four-room apartment showed signs of a violent struggle, with blood in
12 every room. At trial, the medical examiner testified that the victim, 39-year-old
13 Karen Bohl, died of multiple blunt force trauma. She suffered numerous injuries
14 to the head, including a fractured nose, abrasions, cuts, bruises, and a two-inch
laceration that exposed her skull. Her left hand was swollen and red. Her right
15 hand was clenched in a fist holding hairs consistent with her own. Her left nipple
and areola had been cut off, and above her right nipple were small lacerations.
The body was covered in blood and fecal matter. Blood also formed a V-shaped
pattern down her back from saturated hair.

16 The victim had been assaulted vaginally and rectally with an instrument of
17 some kind. The doctor testified that the wall between her rectum and cervix had
18 been destroyed. A bloody pipe, apparently part of a broken lampstand, and a
19 bloody broom handle were found nearby – objects that the medical examiner said
20 could have produced the injuries. Because of significant blood loss, swelling, and
bruising, the doctor concluded that the injuries likely occurred prior to or during
the victim’s death. There were twenty-six other areas of injury to her body. Her
blood alcohol level tested at .25, but no other drugs were detected. Tests for semen
were negative.

21 Defendant Doerr was also injured. His right hand was swollen, and he had
22 minor cuts on his forearm, above his wrist, and on his left foot. His chest,
stomach, pubic area, and hands were smeared and caked with blood.

23 Investigators performed enzyme tests on the blood collected at the scene.
24 The state’s criminalist testified that Karen Bohl’s PGM subtype was 1+2+ and
Eugene Doerr’s was 1+1+. He found blood consistent with only those two
25 subtypes on numerous objects throughout the apartment. The pipe was saturated
in blood of both subtypes, and the broom handle showed 1+1+ on the base and
26 1+2+ at the other end. The victim’s bloody footprint was found on a bathtub.
Bloody fingerprints belonging to both Bohl and Doerr were recovered from
27 various locations around the apartment.

1 Defendant, a construction worker, had dined with his boss the evening before
2 the murder. Around 8:30 p.m., he left in a company truck to purchase supplies for
3 the next day's job. A receipt showed that he paid for the materials, including
4 thirty-six bags of Redimix cement, at 9:05 p.m. He told the investigating officers
5 that he then went to a bar and later stopped at the house of someone named Jeff.
6 Finally, he went home. The next morning he awoke to find Bohl's body in his
7 apartment and called 911 from the truck's mobile phone.

8 Defendant first claimed that he had no idea how the woman got there. Later,
9 as officers waited for a search warrant, he told them that he thought her purse and
10 ID were in the bathroom "because I remember seeing a purse and I don't own a
11 purse." He also said the white car parked out front belonged to the victim. "That
12 is her car she said . . . I think." One of the officers testified that Doerr hesitated
13 before adding the "I think."

14 Doerr voluntarily went to the police station. During questioning, he asked
15 one of the officers if he thought a judge would give him life for the murder. He
16 also said, "[S]he must have really made me mad for me to do something to her like
17 this." The police did not test Doerr for drugs or alcohol until about 3:00 p.m., five
18 hours after the 911 call. The tests were negative.

19 Tina Allgeir last saw her sister, Karen Bohl, at about 4:30 p.m. on the
20 previous day, when Karen dropped off her 7-year-old daughter before going to
21 work. Bohl had just started a new job as a manager trainee at a fast food
22 restaurant. Her supervisor reported that she had called to say she would be late.
23 However, she never arrived at work. When she later failed to pick up her
24 daughter, Allgeir and other family members went to Bohl's apartment. They
25 found her work uniform there, and food was still on the stove. Police investigators
26 were unable to determine where or when Bohl and the defendant met on the day
27 of the murder. They also did not find any indication that the two had been
28 previously acquainted.

While in custody, the defendant initially told his cellmate, Victor Rosales,
that he did not remember anything about the incident. However, a few weeks later
he recalled picking up Bohl, going on a "partying binge," and arguing with her.
Rosales testified that Doerr "flew off the handle" because descriptions contained
in police reports were not "the way it happened." For instance, the defendant told
Rosales that he struck the victim with a pipe when she started screaming, and not
with a lamp as a police report indicated.

According to Rosales, Doerr wanted to have sex with Bohl, but she refused.
Defendant reportedly stated, "[U]sually when you go pick out a woman, pick up
a broad at a bar and take her partying, she knows what is expected." Rosales
further testified that Doerr said "he should have buried the bitch in the back yard"
with the cement he had purchased. Rosales claimed that he distanced himself
from Doerr after the latter described the sensation he experienced from playing
with the victim's blood.

At trial, defense counsel suggested that a third party could have entered the
apartment, murdered the victim, and injured the defendant. Investigators,
however, testified that the apartment windows were locked. Some, in fact, were
painted shut. The front door was open when police arrived, but the back door was
locked. No blood was found outside the apartment, except for a smear on the
driver's side of the defendant's truck. Its location was consistent with the

1 defendant's account of using the truck's mobile phone to call 911.

2 A jury convicted Doerr of premeditated first degree murder, felony murder,
3 sexual assault, and kidnapping. Following a presentence hearing, the trial judge
4 found the heinous, cruel, or depraved aggravator, A.R.S. § 13-703(F)(6), and
5 insufficient mitigation to warrant leniency. He sentenced the defendant to death.

6 *State v. Doerr*, 193 Ariz. 56, 59-61, 969 P.2d 1168, 1171-73 (1998). On direct appeal, the
7 Arizona Supreme Court affirmed, *id.* at 72, 969 P.2d at 1184, and the United States Supreme
8 Court denied a petition for writ of certiorari, *Doerr v. Arizona*, 526 U.S. 1073 (1999).

9 In March 2000, the Arizona Supreme Court issued the mandate in Petitioner's case and
10 appointed post-conviction relief ("PCR") counsel for Petitioner. (ROA-PCR 1-4.)³ Counsel
11 filed a PCR petition. (*Id.* 7.) The trial court denied relief without holding an evidentiary
12 hearing, and the Arizona Supreme Court denied a discretionary petition for review. (*Id.* 18;
13 Dkt. 100, Ex. R.) Petitioner then commenced these habeas proceedings.

14 Petitioner prepared and submitted an amended habeas petition. (Dkt. 82.) The parties
15 briefed the procedural status and merits of the claims, and Petitioner moved for discovery,
16 an evidentiary hearing, and expansion of the record on a number of claims. (Dkts. 113, 115.)
17 The Court denied Petitioner's motions and dismissed Claims 1 (in part), 8, 13, 28, 29, and
18 33-35. (Dkt. 132.) The Court now addresses Petitioner's remaining claims.

19 **PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT**

20 A writ of habeas corpus may not be granted unless it appears that a petitioner has
21 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*
22 *Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must "fairly
23 present" the operative facts and the federal legal theory of his claims to the state's highest

24 ³ "ROA" refers to the three-volume record on appeal from trial and sentencing
25 prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-96-
26 0679-AP). "RT" refers to the reporter's transcripts of Petitioner's trial and sentencing
27 proceedings. "ME" refers to the minute entries of the trial court. "ROA-PCR" refers to the
28 three-volume record on appeal from post-conviction proceedings prepared for Petitioner's
petition for review to the Arizona Supreme Court (Case No. CR-01-0308-PC). A certified
copy of the state court record was provided to this Court by the Arizona Supreme Court on
June 28, 2005. (*See* Dkt. 131.)

1 court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848
2 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78
3 (1971). If a habeas claim includes new factual allegations not presented to the state court,
4 it may be considered unexhausted if the new facts “fundamentally alter” the legal claim
5 presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

6 Exhaustion requires that a petitioner clearly alert the state court that he is alleging a
7 specific federal constitutional violation. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir.
8 2004); *see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (general appeal to due process
9 not sufficient to present substance of federal claim); *Lyons v. Crawford*, 232 F.3d 666, 669-
10 70 (2000), *as amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency
11 of evidence, right to be tried by impartial jury, and ineffective assistance of counsel lacked
12 specificity and explicitness required); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999)
13 (“The mere similarity between a claim of state and federal error is insufficient to establish
14 exhaustion.”). A petitioner must make the federal basis of a claim explicit either by citing
15 specific provisions of federal law or case law, *Lyons*, 232 F.3d at 670, or by citing state cases
16 that plainly analyze the federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153,
17 1158 (9th Cir. 2003) (en banc).

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

26 A habeas petitioner’s claims may be precluded from federal review in two ways. First,
27 a claim may be procedurally defaulted in federal court if it was actually raised in state court
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1 but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at
2 729-30. The procedural bar relied on by the state court must be independent of federal law
3 and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262
4 (1989). A state ruling of procedural default is not independent if, for example, it depends
5 upon a federal constitutional ruling. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per
6 curiam). A state procedural bar is not adequate unless it was firmly established and regularly
7 followed at the time of the purported default. *See Ford v. Georgia*, 498 U.S. 411, 423-24
8 (1991).

9 Second, a claim may be procedurally defaulted if the petitioner failed to present it in
10 state court and “the court to which the petitioner would be required to present his claims in
11 order to meet the exhaustion requirement would now find the claims procedurally barred.”
12 *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998)
13 (stating that the district court must consider whether the claim could be pursued by any
14 presently available state remedy). If no remedies are currently available pursuant to Rule 32,
15 the claim is “technically” exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732,
16 735 n.1; *see also Gray*, 518 U.S. at 161-62.

17 Because the doctrine of procedural default is based on comity, not jurisdiction, federal
18 courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*,
19 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of a
20 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure
21 to properly exhaust the claim in state court and prejudice from the alleged constitutional
22 violation, or shows that a fundamental miscarriage of justice would result if the claim were
23 not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

24 **AEDPA STANDARD FOR RELIEF**

25 Petitioner filed his petition after the effective date of the Antiterrorism and Effective
26 Death Penalty Act of 1996 (“AEDPA”). The AEDPA established a “substantially higher
27 threshold for habeas relief” with the “acknowledged purpose of ‘reducing delays in the
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1 execution of state and federal criminal sentences.” *Schriro v. Landrigan*, 550 U.S. 465, 127
2 S. Ct. 1933, 1939-40 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The
3 AEDPA’s “‘highly deferential standard for evaluating state-court rulings’ . . . demands that
4 state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19,
5 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

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

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

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

12 28 U.S.C. § 2254(d).

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

19 “The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule
20 of law that was clearly established at the time his state-court conviction became final.”
21 *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection
22 (d)(1), the Court must first identify the “clearly established Federal law,” if any, that governs
23 the sufficiency of the claims on habeas review. “Clearly established” federal law consists
24 of the holdings of the Supreme Court at the time the petitioner’s state court conviction
25 became final. *Williams*, 529 U.S. at 365; see *Carey v. Musladin*, 549 U.S. 70, 74 (2006);
26 *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if
27 the Supreme Court has not “broken sufficient legal ground” on a constitutional principle
28 advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529

1 U.S. at 381; *see Musladin*, 549 U.S. at 77; *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir.
2 2004). Nevertheless, while only Supreme Court authority is binding, circuit court precedent
3 may be “persuasive” in determining what law is clearly established and whether a state court
4 applied that law unreasonably. *Clark*, 331 F.3d at 1069.

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

16 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas court may
17 grant relief where a state court “identifies the correct governing legal rule from [the
18 Supreme] Court’s cases but unreasonably applies it to the facts of the particular . . . case” or
19 “unreasonably extends a legal principle from [Supreme Court] precedent to a new context
20 where it should not apply or unreasonably refuses to extend that principle to a new context
21 where it should apply.” *Williams*, 529 U.S. at 407. For a federal court to find a state court’s
22 application of Supreme Court precedent “unreasonable” under § 2254(d)(1), the petitioner
23 must show that the state court’s decision was not merely incorrect or erroneous, but
24 “objectively unreasonable.” *Id.* at 409; *see Landrigan*, 127 S. Ct. at 1939; *Visciotti*, 537 U.S.
25 at 25.

26 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state
27 court decision was based upon an unreasonable determination of the facts. *Miller-El v.*
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1 *Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision “based on a factual
2 determination will not be overturned on factual grounds unless objectively unreasonable in
3 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322, 340
4 (2003) (*Miller-El I*); see *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In
5 considering a challenge under § 2254(d)(2), state court factual determinations are presumed
6 to be correct, and a petitioner bears the “burden of rebutting this presumption by clear and
7 convincing evidence.” 28 U.S.C. § 2254(e)(1); *Landrigan*, 127 S. Ct. at 1939-40; *Miller-El*
8 *II*, 545 U.S. at 240. However, it is only the state court’s factual findings, not its ultimate
9 decision, that are subject to 2254(e)(1)’s presumption of correctness. *Miller-El I*, 537 U.S.
10 at 341-42 (“The clear and convincing evidence standard is found in § 2254(e)(1), but that
11 subsection pertains only to state-court determinations of factual issues, rather than
12 decisions.”).

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

1 DISCUSSION

2 Claim 1

3 Petitioner alleges that the trial court violated his federal constitutional rights when it
4 allowed a police officer to testify that Petitioner was being untruthful while undergoing
5 investigative questioning regarding the murder. (Dkt. 82 at 42-47.) The Court previously
6 determined that Petitioner exhausted the Sixth and Fourteenth Amendment aspects of this
7 claim. (Dkt. 132 at 8-9.)

8 Background

9 At trial, Officer Charles Gregory testified that Petitioner informed him during an
10 investigative interview that he did not know how the murder occurred, that his bloody
11 condition was the result of defensive injuries, and that a third person entered his apartment
12 and killed the victim. (RT 4/11/96 (P.M.) at 65-84.) The defense cross-examined Officer
13 Gregory about his assertion that Petitioner was not being truthful when he denied knowing
14 what had happened:

15 Q. He basically said, "Her purse is in there, and I think her ID is in there
16 because I remember seeing a purse and I don't own a purse."

17 A. Yes sir.

18 Q. Basically he assumed it was hers because he doesn't own a purse.

19 A. Correct.

20 Q. Correct. And he did say on the video, "That is her car she said, I think,"
right?

21 A. Yeah. But I think there was a hesitation between "I think" and "she
22 said."

23 Q. Okay. But immediately following that, he said, "That is the only person
I think it could be."

24 A. Yes.

25 Q. Because there is a strange car parked right out in front of the front door,
26 right?

27 A. Yes.

28 Q. And then, detective, you basically told Mr. Doerr, that you simply did

1 not believe him, right?

2 A. Yes.

3 (*Id.* at 97-98.) On redirect, the trial court overruled a defense objection and allowed the
4 officer to explain why he believed Petitioner had been untruthful about not knowing how the
5 murder occurred:

6 Q. You stated on cross-examination that you felt that the defendant was
7 being untruthful with you. Can you tell us why you believe that?

8 [DEFENSE COUNSEL]: Objection. Relevance, speculation.

9 [PROSECUTOR]: I believe the door was opened, Judge.

10 [COURT]: Overruled.

11

12 [WITNESS]: The injuries that he had. When he slipped and told me that
13 she said it was her car, and then changed it around real quick. The comments he
14 made to me in the basement about whether or not he thought the judge would give
15 him life in prison, and that she must have made him made [sic] for him to do what
16 happened to her.

17 (*Id.* at 109-10.)

18 In denying this claim on the merits, the Arizona Supreme Court stated:

19 Lay witnesses may give opinion testimony, even as to the ultimate issue,
20 when it is “rationally based on the perception of the witness and . . . helpful to a
21 clear understanding of the witness’ testimony or the determination of a fact in
22 issue.” Ariz. R. Evid. 701; *see also State v. Koch*, 138 Ariz. 99, 102, 673 P.2d
23 297, 300 (1983); *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App.
24 1994). One witness may not, however, state an opinion as to the credibility of
25 another. *See State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986); *State*
26 *v. Moran*, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986); *State v. Reimer*, 189
27 Ariz. 239, 241, 941 P.2d 912, 914 (App. 1997); *State v. Schroeder*, 167 Ariz. 47,
28 50-51, 804 P.2d 776, 779-80 (App. 1990). Here, Officer Gregory’s opinion was
not intended as a comment on the defendant’s credibility as a witness. Indeed,
Doerr did not testify at the trial. Moreover, the detective was not speaking as an
expert witness on truthfulness. He was merely stating his reasons for not
believing the defendant’s story.

29 In any event, the defense opened the door to this testimony. One cannot
30 “complain about a result he caused.” Morris K. Udall et al., *Law of Evidence* § 11,
31 at 11 (3d ed. 1991). The rule of invited error applies when a party elicits evidence
32 or comments that “make otherwise irrelevant evidence highly relevant or require
33 some response or rebuttal.” *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d
34 261, 266 (1984); *see also State v. Wilson*, 185 Ariz. 254, 259, 914 P.2d 1346,
35 1351 (App. 1996) (observing that the response must be “pertinent”).

1 Here, the overall tone of the cross-examination suggested that Officer
2 Gregory had deliberately expressed disbelief regarding the defendant's story as a
3 ploy to induce, by intimidation or otherwise, a confession or a material
4 inconsistency. The cross-examination also implied that the police had improperly
5 failed to look for an assailant other than the defendant. Officer Gregory's
6 testimony on redirect explained why the police did not believe the defendant and
7 did not do more to pursue another perpetrator. Under the circumstances, these
8 reasons became relevant, and the state was entitled to explore them.

9 *Doerr*, 193 Ariz. at 63, 969 P.2d at 1175.

10 Analysis

11 Petitioner contends that the officer's testimony about his credibility was tantamount to
12 expert testimony on the issue of his guilt or innocence and its admission violated his rights
13 under the Sixth and Fourteenth Amendments. (Dkt. 82 at 46.)

14 It is not the province of a federal habeas court to reexamine the trial court's ruling on
15 a state law evidentiary matter. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). This is
16 true even if the state evidentiary ruling is incorrect. *Id.* at 71-72. A state court's evidentiary
17 ruling may be grounds for relief only if it renders the state proceeding so fundamentally
18 unfair as to violate due process. *Estelle*, 502 U.S. at 70; *Bueno v. Hallahan*, 988 F.2d 86, 87
19 (9th Cir. 1993) (trial court's admission of police officer testimony not so central to the
20 state's proof that it rendered petitioner's trial fundamentally unfair). In *Estelle*, the Supreme
21 Court held that the admission of evidence did not violate due process because the evidence
22 was relevant to the charges filed against the defendant. *Estelle*, 502 U.S. at 68-69. Here, the
23 officer's testimony about Petitioner's statements was clearly relevant, both to the charge of
24 first degree murder and to Petitioner's defense that a third party committed the crime.
25 Therefore, its admission did not render Petitioner's trial fundamentally unfair. *See id.*

26 Petitioner also argues that, by commenting on Petitioner's credibility, Officer Gregory
27 encroached upon the province of the jury to determine guilt or innocence. (Dkt. 82 at 44.)
28 Petitioner relies on the following statement in *Baldwin v. New York*, 399 U.S. 66, 72 (1970):
"[T]he jury interposes between the accused and his accuser the judgment of laymen who are
less tutored perhaps than a judge or panel of judges, but who at the same time are less likely
to function or appear as but another arm of the Government that has proceeded against him."

1 (*Id.*) Petitioner also cites *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), for the proposition
2 that he was denied the opportunity of an impartial jury to serve as a necessary hedge against
3 the allegedly biased response of the judge. (Dkt. 82 at 46-47.) Neither case supports
4 Petitioner’s argument. The *Baldwin* Court determined the circumstances under which a
5 defendant is entitled to trial by a jury, not a judge. 399 U.S. at 70-72. The *Taylor* Court
6 determined that women were systematically excluded from jury service, in violation of the
7 defendant’s right to a jury comprised of a fair cross-section of the community. 419 U.S. at
8 531-32.

9 Petitioner does not rely on any other Supreme Court precedent to establish that Officer
10 Gregory’s testimony encroached upon the province of the jury. (Dkt. 82 at 42-47; Dkt. 105
11 at 38-42.) Therefore, he has failed to satisfy the requirements of 28 U.S.C. § 2254(d)(1). *See*
12 *Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) (en banc) (conducting review under
13 the AEDPA and concluding that petitioner failed to establish a violation under controlling
14 Supreme Court precedent). Moreover, the officer’s testimony did not invade the province
15 of the jury because he did not express a direct opinion about Petitioner’s guilt or innocence.
16 *See United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990). The jury was left to
17 determine on its own whether Petitioner murdered the victim. *Id.* For all of these reasons,
18 Petitioner is not entitled to relief on Claim 1.

19 **Claim 2**

20 On his own motion and over defense objection, the trial judge excused for cause five
21 teachers from Petitioner’s prospective juror panel, explaining that a week-long absence from
22 the classroom would cause a substantial hardship. (RT 4/9/96 at 3-7.) On appeal, the
23 Arizona Supreme Court affirmed:

24 The Sixth Amendment guarantees a fair and impartial jury, but not one
25 having a specific makeup. *See State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554
26 (1978); *see also Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 702, 42
27 L.Ed.2d 690 (1975) (“Defendants are not entitled to a jury of any particular
28 composition.”). Arizona law permits a discharge from jury service for “[a]ny
person whose absence from his regular place of employment would, in the
judgment of the court, tend materially and adversely to affect the public safety,
health, welfare or interest,” and anyone who would suffer “undue hardship.”

1 A.R.S. § 21-202. We have noted that a trial judge may issue a blanket excuse to
2 teachers and students for hardship reasons. *See State v. Ortiz*, 131 Ariz. 195, 200,
3 639 P.2d 1020, 1025 (1981), *overruled on other grounds by State v. Gretzler*, 135
4 Ariz. 42, 659 P.2d 1 (1983); *see also United States v. Ross*, 468 F.2d 1213, 1219
5 (9th Cir.1972); *Rawlins v. Georgia*, 201 U.S. 638, 640, 26 S. Ct. 560, 561, 50
6 L.Ed. 899 (1906) (Fourteenth Amendment does not prevent excluding certain
7 classes from jury duty for the good of the community). In this case, the trial judge
8 substantiated a finding of hardship through his questioning of prospective jurors.
9 We see no merit in the defendant’s argument. *See Arnett*, 119 Ariz. at 50, 579
10 P.2d at 554 (excusing jurors falls within “sound discretion” of trial judge).

11 *Doerr*, 193 Ariz. at 65, 969 P.2d at 1177.

12 In his amended petition, Petitioner alleges that the trial court’s action denied him the
13 opportunity to draw a petit jury from a fair cross-section of his community. (Dkt. 82 at 47-
14 57.) He further alleges that the teachers were erroneously dismissed because *voir dire* did
15 not establish that serving on the jury would constitute an undue hardship.⁴ (*Id.*) Respondents
16 concede that Claim 2 is properly exhausted. (Dkt. 99 at 28.)

17 Fair Cross-Section

18 ⁴ Petitioner also alleges violations of the Fifth Amendment Due Process Clause
19 and his right under the Eighth Amendment not to be subject to cruel and unusual punishment.
20 (Dkt. 82 at 56-57.)

21 It is the Fourteenth Amendment, not the Fifth Amendment, that protects a person
22 against deprivations of due process by a state. *See* U.S. Const. amend. XIV, § 1 (“nor shall
23 any state deprive any person of life, liberty, or property without due process of law”);
24 *Castillo v. McFadden*, 399 F.3d 993, 1002 n.5 (9th Cir. 2005) (“The Fifth Amendment
25 prohibits the federal government from depriving persons of due process, while the Fourteenth
26 Amendment explicitly prohibits deprivations without due process by the several States.”).
27 Because the Fifth Amendment Due Process Clause does not provide a cognizable ground for
28 relief regarding Petitioner’s state court conviction, such allegations are dismissed and will
not be further discussed with respect to Petitioner’s individual claims.

Under the Eighth Amendment, the right to be free of cruel and unusual punishment,
by definition, is a protection related to the imposition or carrying out of a sentence. In other
words, the protection afforded by the Eighth Amendment does not attach until a person is
convicted and subject to punishment by the state. *See Ingraham v. Wright*, 430 U.S. 651,
664, 667, 671 n.40 (1977) (Eighth Amendment circumscribes only the type of punishment
imposable on those convicted, punishment grossly disproportionate to the crime and what can
be criminalized and punished); *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979) (Eighth
Amendment has no application to pretrial detainees). Because the Eighth Amendment does
not provide a cognizable ground for claims relating to Petitioner’s trial, such allegations are
dismissed and will not be further discussed with respect to Petitioner’s individual claims.

1 “The selection of a petit jury from a representative cross-section of the community is
2 an essential component of the Sixth Amendment right to a jury trial.” *Taylor*, 419 U.S. at
3 528. However, a violation of the fair cross-section requirement cannot be premised on proof
4 of under-representation in a single jury. *See United States v. Mitchell*, 502 F.3d 931, 950
5 (9th Cir. 2007). Although the jury venire must be drawn from a source that fairly represents
6 the community, *see Taylor*, 419 U.S. at 533, the ultimate composition of the petit jury need
7 not mirror that of the community, *Mitchell*, 502 F.3d at 950. Because Petitioner’s argument
8 rests on the court’s use of for-cause challenges to prospective jurors on his petit jury, it
9 necessarily fails to establish a Sixth Amendment violation. *See Holland v. Illinois*, 493 U.S.
10 474, 482-83 (1990) (“We have never invoked the fair-cross-section principle to invalidate
11 the use of either for-cause or peremptory challenges to prospective jurors, or to require petit
12 juries, as opposed to jury panels or venires, to reflect the composition of the community at
13 large.”) (quoting *Lockhart v. McCree*, 476 U.S. 162, 173 (1986)).

14 To the extent Petitioner is asserting a Sixth Amendment violation premised on the
15 composition of the venire panel generally (as opposed to the petit jury drawn for his case),
16 Petitioner’s claim also fails. To establish a *prima facie* violation of the fair cross-section
17 requirement, a petitioner must show that (1) the group alleged to be excluded is a
18 “distinctive” group in the community; (2) the representation of this group in venires from
19 which juries are selected is not fair and reasonable in relation to the number of such persons
20 in the community; and (3) this under-representation is due to systematic exclusion of the
21 group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Petitioner
22 has made no effort to establish any of these prerequisites. *See United States v. Goodlow*, 597
23 F.2d 159, 162 (9th Cir. 1979) (burden is on challenger to offer evidence demonstrating fair
24 cross-section violation under *Duren*); *see also Sweet v. United States*, 449 A.2d 315 (D.C.
25 App. 1982) (attorneys, teachers, clergy, physicians, dentists, and nurses are not cognizable
26 groups); *State v. Machia*, 449 A.2d 1043 (Conn. 1979) (automatic exclusion of teachers,
27 clergy, and students did not violate fair cross-section requirement). The Arizona Supreme
28

1 Court's rejection of Petitioner's fair cross-section argument was not contrary to or an
2 unreasonable application of controlling Supreme Court law.

3 Due Process

4 It is not the province of a federal habeas court to reexamine a state court's ruling on
5 state law issues. *See Estelle*, 502 U.S. 67-68. A state court's ruling may be grounds for relief
6 only if it renders the state proceeding so fundamentally unfair as to violate due process.
7 *Estelle*, 502 U.S. at 70. Construing A.R.S. § 21-202 (West 1996), the Arizona Supreme
8 Court held that teachers and students are granted a blanket exclusion from jury service for
9 hardship reasons. *See Doerr*, 193 Ariz. at 65, 969 P.2d at 1177 (citing *State v. Ortiz*, 131
10 Ariz. 195, 200, 639 P.2d 1020, 1025 (1981), *overruled on other grounds*, *State v. Gretzler*,
11 135 Ariz. 42, 659 P.2d 1 (1983)).

12 The Supreme Court in *Rawlins v. Georgia*, 201 U.S. 638, 640 (1906), specifically held
13 that the Due Process Clause of the Fourteenth Amendment does not prevent States from
14 excluding certain classes from jury duty for the good of the community. *See also Taylor*, 419
15 U.S. at 534 ("States are free to grant exemptions from jury service to individuals in case of
16 special hardship or incapacity and to those engaged in particular occupations the
17 uninterrupted performance of which is critical to the community's welfare."). Petitioner does
18 not cite any controlling federal law to the contrary. (Dkt. 82 at 47-57; Dkt. 105 at 42-44.)
19 Thus, the Arizona Supreme Court's decision upholding the trial court's exclusion of teachers
20 on the ground of undue hardship is neither contrary to nor an unreasonable application of
21 Supreme Court precedent.

22 Claim 3

23 Petitioner contends that remarks by two prospective jurors during *voir dire* biased the
24 entire jury panel against him in violation of his right to an impartial jury. (Dkt. 82 at 57; *see*
25 *also* RT 4/8/96 at 43, 56-57.) As explained by the Arizona Supreme Court:

26 The first, Joe Collier, had once directed the Phoenix Crime Lab. Collier
27 indicated that he could not be fair and impartial because he knew several of the
28 state's witnesses. He identified by name Detective Dennis Olson, who was seated
at the prosecutor's table and had been previously introduced to the jury panel.

1 When asked by the court about his ability to sit as a juror, Collier said: “I don’t
2 think it would be fair to the defense, Your Honor, because of – I am aware of the
integrity and I highly respect a number of the people that would be witnesses.”

3 The second prospective juror, Jose Martinez, was a prison guard in the
4 federal system. He volunteered that during his four and one half years on the job,
he had encountered only three inmates who were not guilty. The judge excused
5 both Collier and Martinez for cause.

6 *Doerr* 193 Ariz. at 61, 969 P.2d at 1173. The following day, defense counsel moved for a
7 mistrial, arguing that these remarks tainted the entire panel. (RT 4/9/96 at 8-12.) The trial
8 court disagreed:

9 The motion for mistrial is denied. As to Mr. Martinez, just for the record, I
10 felt that his demeanor in answering the questions was questionable, and I don’t
11 think that other jurors would have much stock into the manner in which he made
the statement, and I don’t think that it prejudices the panel for them to have heard
12 what he said.

13 As to Mr. Collier, while he gave gratuitous comments regarding the Phoenix
14 Police Department and Detective Olson, the Court will be instructing the jury on
expert witness’ testimony as well as the credibility of witnesses in general, that the
15 jurors are only to consider the evidence that is presented at trial.

16 Do counsel want me to do an admonition to the jurors that are ultimately
selected, prior to beginning of testimony regarding Mr. Collier’s testimony? I
17 would do so upon request, unless you feel that is going to remind the jury about
what the statements were before, but based on all of that, it is ordered denying the
18 motion for mistrial.

19 (*Id.* at 12-13.) Petitioner elected not to have the jurors admonished. (*Id.* at 13.)

20 After the completion of *voir dire*, Petitioner’s counsel passed the final panel without
21 objection for cause. (*Id.* at 61-69.) Peremptory challenges were then exercised, and the jury
was seated. (*Id.* at 69-71.) As part of its preliminary instructions, the court admonished the
22 jurors not to allow bias to influence their determination of the facts:

23 As far as your job of determining the facts is concerned, you must do this
24 only from the evidence that is produced here in court. You are not to guess about
any fact. You are not allowed to let sympathy or bias enter into your
25 determination of the facts. If you think that I have some opinion about the facts,
what the facts are, you should disregard it because you are the sole judges of the
26 facts in this case.

27 The evidence in this trial consists of the testimony of witnesses and of
28 exhibits, which are tangible objects which may be received in evidence, and you
will see some of those in this case. You will see some pictures. You will see
other items of physical evidence.

1 (*Id.* at 74-75.) After presentation of the evidence, the court again reminded the jurors that
2 facts must be determined based on the evidence produced in court:

3 I am now going to tell you the rules you should follow to decide this case.
4 It is your duty to follow these instructions. It is also your duty to determine the
5 facts. “Facts” mean what actually happened. You determine the facts only from
6 the evidence produced in court.

7 You should not guess about any fact. You must not be influenced by
8 sympathy or prejudice. You must not be concerned with any opinion you may feel
9 I have about the facts. You are the sole judges of what happened.

10 (RT 4/15/96 at 22-23.)

11 On direct appeal, the Arizona Supreme Court upheld the trial court’s refusal to grant
12 Petitioner’s motion for mistrial:

13 The issue before us, then, is whether the court should have granted the formal
14 mistrial motion because the remarks of these two panelists tainted the remaining
15 jurors. Defendant merely speculates that this contamination occurred. We will
16 not, however, indulge in such guesswork.

17

18 . . . A review of the voir dire transcript reveals nothing suggesting that others
19 were prejudiced. Collier merely acknowledged his own bias. His statements
20 cannot reasonably be considered inflammatory, and he did not comment on the
21 defendant’s guilt or innocence.

22 Although Collier identified Detective Olson by name, nothing indicates that
23 the jurors permitted his remark to affect their deliberations in any way. The same
24 may be said of Martinez’ statements, which clearly exhibited a personal and
25 biased viewpoint.

26

27 . . . Collier’s comments were brief and isolated in a lengthy voir dire
28 involving seventy-five individuals over two days. The judge was in the best
position to assess their impact on the jurors. We see no error in his refusal to
declare a mistrial and replace the entire panel.

Doerr, 193 Ariz. at 61-62, 969 P.2d at 1173-74 (internal citations omitted). Respondents
concede that this claim is properly exhausted. (Dkt. 99 at 38-39.)

Analysis

A criminal defendant is entitled to a fair trial by “a panel of impartial, ‘indifferent’
jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A claim that a jury was not impartial,
based on remarks made by potential jurors during *voir dire*, must focus on the jurors who

1 ultimately sat on the trial jury, not the jury panel. *See Ross v. Oklahoma*, 487 U.S. 81, 86
2 (1988). “The Constitution presupposes that a jury selected from a cross-section of the
3 community is impartial . . . so long as the jurors can conscientiously and properly carry out
4 their sworn duty to apply the law to the facts of the particular case.” *Lockhart*, 476 U.S. at
5 184.

6 To be qualified, a juror does not need to be totally ignorant of the facts and issues
7 involved in the case. *See Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). The
8 presumption of impartiality is not rebutted by a juror holding a preconceived notion of the
9 guilt or innocence of the accused. *Id.* “It is sufficient if the juror can lay aside his impression
10 or opinion and render a verdict based on the evidence presented in court.” *Id.* at 800 (internal
11 quotation omitted). Petitioner has the burden of rebutting the presumption of impartiality.
12 *Id.* Further, jurors are presumed to follow the trial court’s instructions. *See Penry v.*
13 *Johnson*, 532 U.S. 782, 799 (2001).

14 Petitioner argues that the statements made by Collier and Martinez during *voir dire*
15 were inherently prejudicial and constituted structural error. (Dkt. 82 at 57-58.) As support
16 for application of a structural error standard, Petitioner relies on the Ninth Circuit’s decision
17 in *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998). (Dkt. 82 at 58.) In that pre-AEDPA case,
18 the petitioner was convicted in state court of sexual abuse of a minor. During *voir dire*, a
19 prospective juror stated that, during her career as a social worker, she had never been
20 involved in a case in which a child had lied about being sexually assaulted. She repeated this
21 assertion on four different occasions before being removed for cause. Following her
22 removal, the trial court did not question the remaining jurors to determine the impact of her
23 remarks. On federal habeas review, the Ninth Circuit noted that the case rested on the
24 believability of the child’s testimony and thus the potential juror’s statements had to have had
25 an impact on the jury’s verdict. 137 F.3d at 634. Although opining that the error was likely
26 structural, the court declined to reach this issue because reversal was required under the
27 harmless-error standard. *Id.*

1 As necessitated by 28 U.S.C. § 2254(d)(1), the only Supreme Court authority identified
2 by Petitioner is *Irvin v. Dowd*, 366 U.S. 717 (1961), and *Smith v. Phillips*, 455 U.S. 209
3 (1982), both referenced by the court in *Mach*. (*Id.* at 58.) However, Petitioner does not
4 explain how either case is relevant to his structural error argument. In *Irvin*, the Court
5 addressed actual bias based on adverse pretrial publicity. 366 U.S. at 727-28. In *Smith*, the
6 Court reiterated that allegations of juror partiality warrant a hearing to establish actual bias.
7 455 U.S. at 215-17. Neither case stands for the proposition that remarks by venirepersons
8 during the *voir dire* process may so bias an entire panel that prejudice to the remaining jurors
9 must be presumed.

10 If the Supreme Court has not “broken sufficient legal ground” on a constitutional
11 principle advanced by a petitioner, relief is not available. *See Williams*, 529 U.S. at 381;
12 *Casey*, 386 F.3d at 907 (“Although lower federal court and state court precedent may be
13 relevant when that precedent illuminates the application of clearly established federal law as
14 determined by the United States Supreme Court, if it does not do so, it is of no moment.”);
15 *see also Albern v. McDaniel*, 458 F.3d 860, 864 (9th Cir. 2006) (circuit precedent derived
16 from an extension of a Supreme Court decision is not clearly established law). The Supreme
17 Court has only presumed prejudice relating to a jury panel in the context of pretrial publicity,
18 where the setting of the trial was inherently prejudicial. *See Daubert v. Florida*, 432 U.S.
19 282, 303 (1977) (stating that a court presumes prejudice only in the face of a “trial
20 atmosphere utterly corrupted by press coverage”); *Harris v. Pulley*, 885 F.2d 1354, 1362 (9th
21 Cir. 1989) (discussing presumed prejudice cases). The Supreme Court has not extended the
22 presumed prejudice principle to the context sought by Petitioner in this claim. Therefore,
23 Petitioner’s claim is not supported by “clearly established” law. *See Yarborough v.*
24 *Alvarado*, 541 U.S. 652, 666 (2004) (“Section 2254(d)(1) would be undermined if habeas
25 courts introduced rules not clearly established under the guise of extensions to existing
26 law.”). The Arizona Supreme Court’s failure to find structural error based on the comments
27 by Collier and Martinez was neither contrary to nor an unreasonable application of
28

1 controlling federal law.

2 As already noted, the trial judge determined that the trial jurors were not biased. (RT
3 4/9/96 at 12-13, 61-69.) The Arizona Supreme Court agreed, acknowledging that the trial
4 court was in the best position to assess the impact of the remarks upon the jury panel and
5 whether there was actual bias against Petitioner. *Doerr*, 193 Ariz. at 62, 969 P.2d at 1174.
6 The state court's finding as to lack of bias is a finding of fact entitled to a presumption of
7 correctness. *See* 28 U.S.C. § 2254(e)(1); *Patton v. Yount*, 467 U.S. 1025, 1038 (1984);
8 *Casey*, 386 F.3d at 910. Petitioner has not attempted to rebut the presumption by
9 demonstrating that one of the trial jurors was actually biased against him. *See* 28 U.S.C. §
10 2254(e)(1).

11 In affirming the trial's finding that no jurors were biased by the remarks, the state
12 supreme court observed that Collier merely acknowledged his own personal bias, that he
13 acknowledged knowing Detective Olson from his previous work with the Phoenix Police
14 Department, and that he did not expressly or impliedly comment on the defendant's guilt or
15 innocence. *Id.* The court further noted that Collier's statements were not inflammatory. *Id.*
16 Regarding Martinez, the supreme court found that, given his demeanor during *voir dire*, the
17 jury panel would not have put much stock in his opinions regarding prisoners. *Id.* Moreover,
18 Collier's and Martinez's remarks were brief and isolated in a lengthy *voir dire* involving
19 seventy-five individuals over two days. *Id.*

20 After extensive review of the record, this Court agrees with the findings of the state
21 courts that the comments did not result in a jury panel that was actually biased against
22 Petitioner. Simply put, this is not a case where the potential juror's remarks were so
23 presumptively prejudicial towards the guilt of the defendant that they had the effect of
24 actually biasing the jurors. *See, e.g., Irvin*, 366 U.S. at 727-28 (petitioner established that as
25 a result of pretrial publicity, two-thirds of his trial jury were actually biased because they had
26 formed an opinion that he was guilty and that they acknowledged familiarity with the
27 material facts and circumstances of the case); *see also Daniels v. Woodford*, 428 F.3d 1181,
28

1 1211 (9th Cir. 2005) (stating that to demonstrate actual bias, petitioner must show that the
2 trial jurors demonstrated actual partiality or hostility that could not be laid aside).

3 Finally, Petitioner contends that Collier's remarks constituted prosecutorial vouching.
4 (Dkt. 82 at 60-61.) Vouching occurs when the prosecutor places the prestige of the
5 government behind a witness through personal assurances of the witness's veracity or
6 suggests that information not presented to the jury supports the witness's testimony. *See*
7 *United States v. Young*, 470 U.S. 1, 18-19 (1985). Mr. Collier was not a prosecutor and there
8 are no Supreme Court cases extending the doctrine of prosecutorial vouching to potential
9 jurors. The Arizona Supreme Court held that Collier's remarks did not constitute
10 impermissible vouching because he was neither a prosecutor nor a witness. *Doerr*, 193 Ariz.
11 at 62, 969 P.2d at 1174. This decision was neither contrary to nor an unreasonable
12 application of controlling Supreme Court precedent. Petitioner is not entitled to relief on
13 Claim 3.

14 **Claim 4**

15 Petitioner argues that the trial court committed reversible error by admitting gruesome
16 photographs, a diagram, and an enlarged photograph of the victim taken before the crime.
17 (Dkt. 82 at 65.) Respondents contend that Petitioner did not fairly present the federal
18 constitutional basis of Claim 4 in state court. (Dkt. 99 at 45-46.) Petitioner acknowledges
19 lack of fair presentation, but nevertheless argues that the Arizona Supreme Court, as part of
20 its independent review, exhausted Claim 4. (Dkt. 105 at 47.)

21 Exhaustion requires a petitioner to clearly alert the state court that he is alleging a
22 specific federal constitutional violation. *See Casey*, 386 F.3d at 913. The United States
23 Supreme Court has emphasized that:

24 If state courts are to be given the opportunity to correct alleged violations of
25 prisoners' federal rights, they must surely be alerted to the fact that the prisoners
26 are asserting claims under the United States Constitution. If a habeas petitioner
27 wishes to claim that an evidentiary ruling at a state court trial denied him the due
28 process of law guaranteed by the Fourteenth Amendment, he must say so, not only
in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995).

1 On direct appeal, Petitioner asserted that the trial court abused its discretion in admitting
2 the evidence; however, he did not further assert that this amounted to a federal due process
3 violation. (See Opening Br. at 23-28.) Consequently, the Arizona Supreme Court only
4 addressed whether the trial court had properly admitted the evidence under state law. See
5 *Doerr*, 193 Ariz. at 63-64, 65-66, 969 P.2d 1175-76, 1177-78. They did not consider
6 whether admission of the evidence denied Petitioner due process of law under the Fourteenth
7 Amendment. *Id.* On independent review, *id.* at 67-72, 969 P.2d 1179-84, the Arizona
8 Supreme Court considered only whether the death penalty was properly imposed based on
9 a review of the aggravating and mitigating circumstances; it did not consider whether the
10 admission of the evidence described in Claim 4 violated federal due process. See *Moormann*
11 *v. Schriro*, 426 F.3d 1044, 1057-58 (9th Cir. 2005).

12 The Court concludes that Claim 4 is technically exhausted but procedurally defaulted
13 because it does not allege facts or law which would exempt it from preclusion and
14 untimeliness pursuant to Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal
15 Procedure were Petitioner to return to state court now. See Ariz. R. Crim. P. 32.2(b),
16 32.1(d)-(h); *Coleman*, 501 U.S. at 732, 735 n.1. Because Petitioner does not allege cause and
17 prejudice or a miscarriage of justice, Claim 4 is procedurally barred.

18 **Claims 5 and 7**

19 In Claim 5, Petitioner alleges that the trial court violated his constitutional rights by
20 refusing to give a “mere presence” jury instruction. (Dkt. 82 at 71-76.) In Claim 7, he
21 alleges that the trial court violated his rights by refusing to instruct the jury that it could take
22 into consideration his cooperation with police. (*Id.* at 87-89.) Respondents concede that
23 these claims are properly exhausted. (Dkt. 99 at 55, 67.)

24 Petitioner’s defense at trial was that a third person entered his apartment and murdered
25 the victim. Petitioner requested that the trial court provide the following instruction:

26 Guilt cannot be established by the defendant’s mere presence at a crime scene or
27 mere association with another person at a crime scene. The fact the defendant
28 may have been present does not, in and of itself, make the defendant guilty of the
crime charged.

1 (ROA 95, 96.) He further requested that the court instruct the jury to take into consideration
2 his absence of flight from the crime scene: “Remaining at a crime scene and calling the
3 police does not in itself prove innocence. You may consider any evidence of the defendant’s
4 remaining at the crime scene and calling police together with all the other evidence.” (*Id.*
5 97.)

6 The trial court refused the requested instructions. (RT 4/15/96 at 9-10.) On appeal, the
7 Arizona Supreme Court affirmed, concluding that there was insufficient evidence to give
8 Petitioner’s “mere presence” instruction because

9 [b]lood matching the defendant’s type and a hair similar to his were found on the
10 victim’s body. Moreover, Bohl’s blood type was found in the defendant’s pubic
11 area. This and other physical evidence plainly indicated that the defendant was
12 more than a passive observer of this crime. At the same time, nothing in the
13 record supports the presence of another person at the scene. In fact, the
14 overwhelming weight of the evidence is to the contrary.

15 *Doerr*, 193 Ariz. at 65, 969 P.2d at 1177. With regard to the “absence of flight” instruction,
16 the court held:

17 Counsel claimed that if Doerr had fled, the state would have requested a “flight
18 or concealment of evidence” instruction, but because he remained at the scene and
19 called the police, the jury should be instructed on “just the opposite.” We are
20 unpersuaded by this reasoning. The instructions, as a whole, were sufficient.

21 *Id.* at 67, 969 P.2d at 1179.

22 Analysis

23 “The Constitution guarantees criminal defendants a meaningful opportunity to present
24 a complete defense.” *Gilmore v. Taylor*, 508 U.S. 333, 343 (1993) (internal quotation
25 omitted). The opportunity to present a complete defense may be violated either by excluding
26 defense evidence or by excluding the testimony of defense witnesses. *Id.* A defendant is
27 also entitled to a jury instruction for any recognized defense for which there exists evidence
28 sufficient for a reasonable jury to find in his favor. *See Matthews v. United States*, 485 U.S.
58, 63 (1988); *see also Beardslee v. Woodford*, 358 F.3d 560, 577 (9th Cir. 2004). Because
an omitted or incomplete instruction is less likely to be prejudicial than a misstatement of the
law, Petitioner’s burden is weighty. *See Henderson v. Kibbe*, 431 U.S. 145, 155 (1977);

1 *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006). The significance of an omitted
2 instruction is evaluated by comparison with the instructions that were given. *See Kibbe*, 431
3 U.S. at 156; *see also United States v. Govan*, 152 F.3d 1088, 1093 (9th Cir. 1988) (proposed
4 “innocent explanation” instruction was properly rejected where other instructions adequately
5 covered defense theory).

6 The Court concludes that the jury instructions as a whole adequately covered
7 Petitioner’s defense theory. The instructions requested by Petitioner and rejected by the trial
8 court amounted to nothing more than the unremarkable assertion that Petitioner is presumed
9 innocent until proven guilty beyond a reasonable doubt. The jury instructions provided by
10 the trial court required the prosecution to prove beyond a reasonable doubt that Petitioner
11 committed each of the elements of the charged offenses, and the jury was properly advised
12 that Petitioner was presumed innocent. (RT 4/15/96 at 22-33.) Moreover, as noted by the
13 Arizona Supreme Court, the evidence did not support Petitioner’s “mere presence” theory
14 or establish the presence of a third person in his apartment. *Doerr*, 193 Ariz. at 67, 969 P.2d
15 at 1179. The court’s failure to provide the requested instructions did not render Petitioner’s
16 trial fundamentally unfair, and the Arizona Supreme Court’s rejection of Claims 5 and 7 was
17 neither contrary to nor an unreasonable application of controlling Supreme Court law.

18 **Claim 6**

19 Petitioner contends that the trial court violated his Sixth Amendment right to
20 confrontation by refusing to allow discovery of professional complaints filed against the
21 prosecution’s mental health expert. (Dkt. 82 at 77-87.) Respondents concede that this claim
22 is properly exhausted. (Dkt. 99 at 62.)

23 At sentencing, Petitioner obtained experts to evaluate and opine about his mental health.
24 (ROA 118, 130, 134.) Based on these evaluations, Petitioner then sought to establish the
25 “diminished capacity” statutory mitigating factor set forth in A.R.S. § 13-703(G)(1).⁵ In

27 ⁵ A.R.S. § 13-703(G)(1) (West 1996) (transferred and renumbered as A.R.S. §
28 13-751 in 2009) provides:

1 response, the prosecution obtained its own mental health expert, Dr. James Youngjohn. Prior
2 to the aggravation/mitigation presentence hearing, two of Petitioner's mental health experts,
3 Drs. Daniel Blackwood and Marc Walter registered professional complaints against Dr.
4 Youngjohn. (*See* RT 11/21/96.) The trial court inspected the complaints *in camera*, allowed
5 cross-examination regarding them, but denied disclosure of the actual documents after
6 concluding they were irrelevant to the sentencing proceedings. (RT 11/18/96 at 3, 25-26;
7 ME 11/18/96; *see also* Dkt. 136 (sealed copies of the complaints filed with this Court).) On
8 appeal, the Arizona Supreme Court held that the trial court did not deprive Petitioner of his
9 ability to impeach Dr. Youngjohn's credibility as an expert witness:

10 Defendant contends that efforts to establish [A.R.S. § 13-703(G)(1)] were
11 irreparably harmed by the court's refusal to permit his examination of professional
12 complaints filed against the state's expert witness, Dr. Youngjohn. The record
13 reflects, however, that after inspecting those complaints *in camera*, the judge
14 allowed defense counsel to question Dr. Youngjohn freely about the number and
15 nature of them. The defense elicited that (1) nine complaints had been filed with
16 the state licensing board against Dr. Youngjohn; (2) the complaints were
17 registered before Dr. Youngjohn's participation in this case; (3) defense experts
18 Dr. Blackwood and Dr. Walter were two of the complainants; (4) a common
19 component of these complaints was Dr. Youngjohn's frequent findings of
20 malingering; (5) no hearings had yet been conducted and the matters were still
21 pending; and (6) investigation could lead to an outright dismissal of the
22 complaints or the loss of Dr. Youngjohn's professional license. Thus, it does not
23 appear that the defendant was deprived in any significant way of an opportunity
24 to attack Dr. Youngjohn's credibility as an expert witness.

18 *Doerr*, 193 Ariz. at 68-69, 969 P.2d at 1180-81.

19 Analysis

20 The Confrontation Clause of the Sixth and Fourteenth Amendment guarantees the right

21
22 G. Mitigating circumstances shall be any factors proffered by the defendant or
23 the state which are relevant in determining whether to impose a sentence less
24 than death, including any aspect of the defendant's character, propensities or
25 record and any of the circumstances of the offense, including but not limited
26 to the following:

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

1 of a criminal defendant “to be confronted with the witnesses against him.” Claims raised
2 pursuant to the Confrontation Clause generally fall into two categories: those involving the
3 admission of out-of-court statements and those involving restrictions on the scope of cross-
4 examination. *See Delaware v. Fensterer*, 474 U.S. 15, 18 (1985). The instant claim falls into
5 the second category, which reflects the recognition that “[t]he main and essential purpose
6 of confrontation is to secure for the opponent the opportunity of cross-examination.” *Davis*
7 *v. Alaska*, 415 U.S. 308, 315-316 (1974) (quoting 5 J. Wigmore, *Evidence* § 1395, p. 123 (3d
8 ed. 1940)).

9 Impeachment of a witness’s credibility and exposure of witness bias and possible
10 motive in testifying are two purposes served by the right of cross-examination. *See Olden*
11 *v. Kentucky*, 488 U.S. 227, 231 (1988) (per curiam); *Delaware v. Van Arsdall*, 475 U.S. 673,
12 678-79 (1986); *Davis*, 415 U.S. at 316. However, “[t]he Confrontation Clause guarantees
13 an opportunity for effective cross-examination, not cross-examination that is effective in
14 whatever way, and to whatever extent, the defense might wish.” *Fensterer*, 474 U.S. at 20.
15 “[J]udges retain wide latitude insofar as the Confrontation Clause is concerned” and may
16 impose limitations on cross-examination that are “reasonable” and are not “arbitrary or
17 disproportionate to the purposes they are designed to serve.” *Van Arsdall*, 475 U.S. at 679.
18 Consequently, a Confrontation Clause violation occurs only when the defendant is prevented
19 from investigating “a prototypical form of bias” and “[a] reasonable jury might have received
20 a significantly different impression of [the witness’s] credibility had respondent’s counsel
21 been permitted to pursue his proposed line of cross-examination.” *Id.* at 680; *see United*
22 *States v. Jenkins*, 884 F.2d 433, 436 (9th Cir. 1989) (Sixth Amendment violation will
23 normally be found only if the jury was “denied sufficient information to appraise the biases
24 and motivations of the witness”).

25
26 Citing *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), Petitioner argues
27 that his confrontation rights were violated because he was denied access to and therefore
28

1 could not introduce extrinsic evidence related to Dr. Youngjohn's bias as a witness. (Dkt.
2 105 at 55.) In *Lindstrom*, the trial judge limited questioning of the government's chief
3 witness and denied the defense access to medical records which suggested that the
4 government's witness suffered from psychiatric illnesses, including delusions. *Id.* at 1159-60
5 (observing that "a psychotic's veracity may be impaired by lack of capacity to observe,
6 correlate or recollect actual events").

7 The facts in *Lindstrom* are easily distinguishable. First, although it is technically
8 accurate that Petitioner was restricted from introducing the actual complaints at sentencing,
9 he had access to two of the complainants and learned through them the basis of the
10 complaints. Second, in contrast to *Lindstrom*, there was no limitation placed on counsel's
11 questioning of the witness. Indeed, Petitioner's counsel questioned Dr. Youngjohn about
12 receiving notice from his licensing board of nine complaints filed against him, elicited that
13 the complaints involved numerous findings he had made concerning patient malingering, and
14 asked him to explain the complaint investigative process, including the fact he could lose his
15 professional license as a result of the pending inquiry. (RT 11/18/96 at 34-35.) Thus,
16 Petitioner had a full and fair opportunity to question Dr. Youngjohn about any possible bias
17 or improper motive for his testimony despite the restriction on disclosure. *See Bright v.*
18 *Shimoda*, 819 F.2d 227, 229 (9th Cir.1987) (finding no constitutional violation where
19 defendant allowed to cross examine a witness at length and examination restricted solely as
20 to a collateral matter). The Arizona Supreme Court's failure to find a Confrontation Clause
21 violation was neither contrary to nor an unreasonable application of clearly established
22 federal law.

23 **Claims 9-12**

24 These claims involve allegations concerning the trial court's consideration of
25 Petitioner's proffered mitigating evidence. Claim 9 alleges that the trial court erred in
26 rejecting lack of criminal history as a non-statutory mitigating circumstance. (Dkt. 82 at 92-
27 94.) Claim 10 alleges that the trial court erred by requiring a causal connection between
28

1 Petitioner’s abusive family history and his criminal actions as a factor in assessing the
2 mitigating weight of the abuse. (*Id.* at 95-99.) Claim 11 alleges that the trial court erred by
3 not giving enough mitigating weight to Petitioner’s alcoholism and not finding that Petitioner
4 was intoxicated at the time of the crime. (*Id.* at 100-03.) Claim 12 alleges that the trial court
5 erred by requiring a causal connection between Petitioner’s low IQ and his criminal actions.
6 Respondents concede that Petitioner exhausted these allegations of trial court error on direct
7 appeal. (Dkt. 99 at 72-74, 77, 80.)

8 In a capital sentencing proceeding, the sentencer must not be precluded, whether by
9 statute, case law, or any other legal barrier, from considering constitutionally relevant
10 mitigating evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Eddings v.*
11 *Oklahoma*, 455 U.S. 104, 113-14 (1982). Constitutionally relevant mitigating evidence
12 consists of “any aspect of a defendant’s character or record and any of the circumstances of
13 the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett*, 438
14 U.S. at 604. However, while the sentencer must not be foreclosed from considering relevant
15 mitigating information, the Constitution does not require that a capital sentencer be instructed
16 in how to weigh any particular fact in the capital sentencing decision. *See Tuilaepa v.*
17 *California*, 512 U.S. 967, 979 (1994). Nor does the Constitution require that a specific
18 weight be given to any particular mitigating factor. *See Harris v. Alabama*, 513 U.S. 504,
19 512 (1995); *Eddings*, 455 at 114-15 (“The sentencer . . . may determine the weight to be
20 given relevant mitigating evidence”); *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998)
21 (stating that the sentencer is free to assess how much weight to assign mitigating evidence).
22 Once a defendant is found eligible for the death penalty, it is not unconstitutional to give the
23 sentencer unbridled discretion to determine whether the death penalty should be imposed.
24 *Tuilaepa*, 512 U.S. at 980.

25 In *LaGrand v. Stewart*, 133 F.3d 1253, 1263 (9th Cir. 1998), the Ninth Circuit discussed
26 the role of the habeas court in addressing whether the state court properly weighed mitigation
27 evidence at sentencing:
28

1 [F]ederal courts do not review the imposition of the sentence *de novo*. Here, as
2 in the state courts' finding of the existence of an aggravating factor, we must use
3 the rational fact-finder test of *Lewis v. Jeffers*, [497 U.S. 764, 780-82 (1990)].
That is, considering the aggravating and mitigating circumstances, could a rational
fact-finder have imposed the death penalty?

4 *Id.* Thus, this Court reviews the sentencing record to ensure that the state court allowed the
5 presentation of and considered all relevant mitigation. *See Jeffers v. Lewis*, 38 F.3d 411, 418
6 (9th Cir. 1994) (en banc). "The trial court need not exhaustively analyze each mitigating
7 factor 'as long as a reviewing federal court can discern from the record that the state court
8 did indeed consider all mitigating evidence offered by the defendant.'" *Moormann*, 426 F.3d
9 at 1055 (quoting *Clark v. Ricketts*, 958 F.2d 851, 858 (9th Cir. 1991)); *see also Parker v.*
10 *Dugger*, 498 U.S. 308, 314-15, 318 (1991) (sentencing court properly considered all
11 mitigation, including nonstatutory mitigation, where the court stated that it considered all the
12 evidence and found no mitigating circumstances that outweighed the aggravating
13 circumstances); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1044 (9th Cir. 1997) (same).

14 Claim 9

15 Petitioner does not assert that the trial court failed to *consider* proffered mitigating
16 evidence at sentencing. Rather, the core of his complaint is that it failed to find his lack of
17 a criminal record to be *proven* as a mitigating factor. The trial judge considered whether
18 Petitioner had established lack of criminal history as a non-statutory mitigating circumstance.
19 (ROA 147 at 9-10.) In his special verdict, the judge found that Petitioner had failed to
20 establish this mitigating factor by a preponderance of the evidence due to a previous felony
21 theft conviction and numerous misdemeanor convictions, including thefts, DUIs, criminal
22 damage, assault, and disorderly intoxication. (*Id.*)

23 As stated above, a sentencer is not required to find proffered evidence mitigating, nor
24 must the sentencer accord the evidence the weight which a defendant believes is appropriate.
25 Applying the rule of *Lockett* and its progeny to the case at bar, it is clear that the sentencing
26 court evaluated the evidence proffered in mitigation but found it wanting as a matter of fact,
27 not as a matter of law. *See Eddings*, 455 U.S. at 113. The trial court was in no way
28

1 precluded from considering the proffered evidence of petitioner's non-violent past; thus, this
2 evidence was not placed "beyond the effective reach of the sentencer." *Graham v. Collins*,
3 506 U.S. 461, 475 (1993). Petitioner is not entitled to relief on Claim 9.

4 Claim 10

5 Petitioner asserts that the trial court refused to give his abusive family history proper
6 mitigating weight because it found no causal connection between his abusive family history
7 and the crime. (Dkt. 82 at 95.) Citing *Williams v. Taylor*, 529 U.S. 362 (2000), and *Eddings*
8 *v. Oklahoma*, Petitioner argues that the minimal mitigating weight given this evidence due
9 to the lack of a causal connection between this mitigation and the crime has no basis in
10 clearly established Supreme Court jurisprudence. (*Id.* at 96-98.)

11 In Arizona, although an abusive family history is generally afforded some weight as
12 mitigation, it is entitled to *significant* mitigating weight only when there is a showing that it
13 affected a defendant's ability to perceive, comprehend, or control his actions. *See State v.*
14 *Hurles*, 185 Ariz. 199, 207, 914 P.2d 1291, 1299 (1996). In its special verdict, the
15 sentencing judge stated:

16 Despite his parents' denials, the court finds defendant came from a seriously
17 dysfunctional unloving family and had a very abusive father. Defendant was
18 clearly an abused child, but he left home in his early teens when he went to live
19 in the Soldiers and Sailors Home. Therefore, defendant had virtually no contact
20 with his parents for over twenty years. While a mitigating circumstance, the court
gives it little weight, since there has been no causal connection or nexus shown
between defendant's family history and the murder of Karen Bohl. Over twenty
years elapsed between the defendant's abuse and neglect from his father and the
murder.

21 (ROA 147 at 10.)

22 Citing *Tennard v. Dretke*, 542 U.S. 274 (2004), Petitioner argues that the trial court's
23 application of a causal connection requirement was unconstitutional. (Dkt. 105 at 64-70.)
24 In *Tennard*, the Supreme Court rejected the notion that mitigation evidence must pass
25 through a threshold screening test before it may be *considered* as mitigation at sentencing.
26 542 U.S. at 283-84. The Court specifically held it is improper to screen out mitigating
27 evidence on the basis that it did not have a causal connection with the crime. *Id.* at 287.

28

1 Following *Lockett* and *Eddings*, the *Tennard* Court focused on the requirement that courts
2 must consider relevant mitigation evidence at sentencing. *Id.* at 286-87. Thus, even if the
3 mitigation presented at sentencing does not have a causal connection to the crime, it still
4 must be considered as mitigation. *Id.* However, the *Tennard* Court did not prescribe a
5 certain *weight* that states must give to mitigating evidence. *See Harris*, 513 U.S. at 512
6 (holding that the Constitution does not require that a specific weight be given to any
7 particular mitigating factor). Thus, under *Tennard*, the sentencer is not prohibited from
8 determining the weight it will assign to mitigating evidence so long as the sentencer
9 considers and gives effect to the mitigating evidence.

10 Under Arizona law, while mitigating evidence must be considered regardless of whether
11 there is a “nexus” between the mitigating factor and the crime, the lack of a causal
12 (explanatory) connection may be taken into account when assessing the weight of the
13 evidence. *State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006); *see, e.g., State v.*
14 *Hampton*, 213 Ariz. 167, 185, 140 P.3d 950, 968 (2006) (finding horrendous childhood less
15 weighty and not sufficiently substantial to call for leniency, in part, because not tied to the
16 offense). The Ninth Circuit recently held that “the use of [a] nexus test in this manner is not
17 unconstitutional because state courts are free to assess the weight to be given to particular
18 mitigating evidence.” *Schad v. Ryan*, No. 07-99005, 2009 WL 2902084 at *16 (9th Cir.
19 Sept. 11, 2009) (citing *Eddings*, 455 U.S. at 114-15.)

20 It is clear from this record that the trial judge did not improperly exclude from its
21 consideration or refuse to consider the evidence of Petitioner’s childhood abuse; rather, the
22 record shows that the judge considered the evidence but gave it little weight. (ROA 147 at
23 10.) The Constitution requires nothing more. *Harris*, 513 U.S. at 512; *Tuilaepa*, 512 U.S.
24 at 980; *see also Schad*, 2009 WL 2902084 at *16 (finding no constitutional error where
25 sentencing judge considered evidence of childhood abuse but found it was not “a persuasive
26 mitigating circumstance in this case”). Petitioner is not entitled to relief on Claim 10.

27 Claim 11

1 Petitioner asserts that the trial court refused to give proper mitigating weight to his
2 history of alcoholism and intoxication at the time of the crime. (Dkt. 82 at 100-03.)

3 In Arizona, alcohol impairment at the time of the crime may constitute a non-statutory
4 mitigating circumstance when considered together with a history of alcohol abuse. *See State*
5 *v. Murray*, 184 Ariz. 9, 45, 906 P.2d 542, 578 (1995); *State v. Stokley*, 182 Ariz. 505, 523,
6 892 P.2d 454, 472 (1995). At sentencing, the court found that Petitioner had proven by a
7 preponderance of the evidence that he was an alcoholic but found it not mitigating under the
8 circumstances of the case in light of the fact that when he drank, “he usually just passed out
9 according to his employer and friend.” (ROA 147 at 10.) Alternatively, the sentencing court
10 further found,

11 In fact, even if this court were to consider [this evidence as a non-statutory
12 mitigating circumstance], when balanced against the especially cruel, heinous, or
13 depraved manner in which defendant murdered Karen Bohl, [this mitigating
evidence], given minimal weight, would not be sufficiently substantial to call for
leniency.

14 (*Id.* at 12.)

15 The court also considered Petitioner’s claim that he was intoxicated at the time of the
16 crime, but gave it little mitigating weight because Petitioner “was able to make conscious
17 decisions during the violent attack on Karen Bohl.” (*Id.* at 10.) In addition, the court noted
18 that the claim of alcohol impairment was based solely on Petitioner’s self-report; there was
19 no objective evidence to establish that he had been impaired by alcohol at the time of the
20 crime.⁶ (*Id.* at 10-11.)

21 The record here shows that the trial court complied with its federal constitutional duties
22 by considering in a thorough manner Petitioner’s alcohol-related mitigating evidence.

23
24 ⁶ Under the AEDPA, 28 U.S.C. § 2254(e)(1), a presumption of correctness
25 applies to the credibility determinations made by state courts. The trial court rejected
26 Petitioner’s self-report of intoxication because there was no corroboration of Petitioner
27 drinking the night before the crime, his blood alcohol level tested at zero hours after being
28 taken into custody, and every police officer who interacted with Petitioner at the crime scene
and at the police station reported that he was coherent and did not smell of alcohol. (RT
11/27/96 at 9.)

1 *Eddings*, 455 U.S. at 113. The court specifically stated that it gave some mitigating weight
2 to Petitioner’s claim that he was impaired by alcohol at the time of the crime. That it found
3 the Petitioner’s history of alcoholism evidence lacking is not problematic in light of the
4 settled principle that a sentencer is not required to find proffered evidence mitigating, nor
5 must it accord the evidence the weight which a defendant believes is appropriate. *Harris*,
6 513 U.S. at 512. Moreover, the trial court ruled alternatively that even if it were to give some
7 mitigating weight to Petitioner’s history of alcoholism, it nonetheless found such mitigation
8 insufficient to call for leniency. *See Tuilaepa*, 512 U.S. at 980. Petitioner is not entitled to
9 relief on Claim 11.

10 Claim 12

11 Petitioner contends that the trial court improperly rejected his low intelligence as a non-
12 statutory mitigating factor because it found no causal connection between his low
13 intelligence and the crime. (Dkt. 82 at 103.)

14 In Arizona, low intelligence may be considered a non-statutory mitigating circumstance.
15 *See State v. Bishop*, 127 Ariz. 531, 535, 622 P.2d 478, 482 (1981). The sentencing court
16 acknowledged Petitioner’s low intelligence but found it not mitigating in light of the lack of
17 a causal connection to the crime and the fact that Petitioner “was a functioning member of
18 society who held a decent job and worked hard.” (ROA 147 at 11.) As previously noted, in
19 determining sentence, the court alternatively stated that “even if this court were to consider
20 every one of the factors proposed by defendant as a mitigating circumstances [sic], when
21 balanced against the especially cruel, heinous, or depraved manner in which defendant
22 murdered Karen Bohl, those mitigating circumstances, given minimal weight, would not be
23 sufficiently substantial to call for leniency.” (*Id.* at 12.)

24 The record here shows that the sentencing court did not improperly exclude from its
25 consideration or refuse to consider the evidence of Petitioner’s low intelligence as a matter
26 of law. *Eddings*, 455 U.S. at 113. Rather, it found that the evidence was simply not
27 mitigating in this case. Absent a clear indication in the record that the state court applied the
28

1 wrong standard, Petitioner is not entitled to relief. *Schad v. Ryan*, 2009 WL 2902084 at *16.
2 Moreover, the trial court here ruled alternatively that even if it were to give some mitigating
3 weight to all of Petitioner’s proffered mitigating factors, it nonetheless found the mitigation
4 insufficient to call for leniency. *See Tuilaepa*, 512 U.S. at 980. Claim 12 is denied.

5 **Claim 14**

6 Petitioner asserts that the trial court erred in determining that the murder was especially
7 cruel under A.R.S. § 13-703(F)(6). (Dkt. 82 at 115-118.) Respondents concede that this
8 claim is properly exhausted. (Dkt. 99 at 86.)

9 Whether a state court correctly applied an aggravating factor to the facts in a specific
10 case is a question of state law. *See Lewis*, 497 U.S. at 780. Therefore, federal habeas review
11 is limited to determining whether the state court’s finding was so arbitrary or capricious as
12 to constitute an independent due process or Eighth Amendment violation. *Id.* A state court’s
13 finding of an aggravating factor is arbitrary or capricious only if no reasonable sentencer
14 could have concluded that the factor existed. *Id.* at 783. The “rational factfinder” standard
15 is used to determine whether there is sufficient evidence to support a state court’s finding of
16 an aggravating factor. *Id.* at 781-83. The question is “whether, after viewing the evidence
17 in the light most favorable to the prosecution, any rational trier of fact” could have made the
18 finding beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A habeas
19 court faced with a record of historical facts which supports conflicting inferences must
20 presume (even if it does not appear in the record) that the trier of fact resolved any such
21 conflicts in favor of the prosecution. *Id.* at 326.

22 In this case, the (F)(6) aggravating circumstance is satisfied by a finding either that the
23 murder was committed in an especially cruel manner or that it was committed in an
24 especially heinous and depraved manner. The trial court and the Arizona Supreme Court
25 each concluded that the murder was both especially cruel and especially heinous and
26 depraved. *See Doerr*, 193 Ariz. at 67-68, 969 P.2d at 1179-80. A finding of cruelty requires
27 conclusive evidence that the victim was conscious during the infliction of violence. *See State*
28

1 v. *Towery*, 186 Ariz. 168, 188, 920 P.2d 290, 310 (1996). In finding cruelty, the state court
2 relied on the following:

3 While the medical examiners could neither pinpoint the sequence of Karen Bohl's
4 injuries nor determine precisely when she lost consciousness, the physical
5 evidence indicated that she experienced pain and extreme mental anguish. The
6 doctors found bruising and swelling on her hands and arms consistent with
7 defensive actions, and hair was clenched in her fist. Her nasal bones were
fractured. She had cuts under her lip. Extensive bleeding from the vaginal and
rectal wounds indicated that they occurred prior to or during death. In addition,
she had twenty-six other injuries to various parts of her body. These must have
been inflicted over a period of time.

8 Even more persuasive is the crime scene evidence. Bohl's bloody footprint
9 was found on the bathtub, and bloody hair swipes consistent with her PGM
10 subtype were found on walls and other surfaces. Similar findings throughout the
11 apartment suggested a pursuit and struggle. A neighbor testified that she heard
12 "blood-curdling" screams of "No, no!" from a female at about 3:30 that morning,
but did not call the police. Bohl's body was found in the hallway, sprawled
partially through the opening into a bedroom. Such evidence of a violent, moving
confrontation leaves little doubt that the victim feared for her life during the
attack. Sufficient proof exists to conclude, beyond a reasonable doubt, that she
suffered pain and extreme mental anguish. The trial court properly found cruelty.

13 *Doerr*, 193 Ariz. at 67, 969 P.2d at 1179.

14 The terms heinous and depraved focus on a defendant's state of mind at the time of the
15 murder as reflected by his words or his actions. *Beaty*, 158 Ariz at 242, 762 P.2d at 529. The
16 Arizona Supreme Court evaluates five factors to determine whether a defendant's state of
17 mind was heinous or depraved at the time of the murder: relishing of the murder; infliction
18 of gratuitous violence upon the victim; mutilation of the victim's body; senselessness of the
19 crime; and helplessness of the victim. *Id.* at 242-43, 762 P.2d at 529-30. Both the trial judge
20 and the Arizona Supreme Court found conclusive evidence of three factors in support of its
21 heinous/depravity finding: (1) relishing, (2) mutilation, and (3) gratuitous violence. *Doerr*,
22 193 Ariz. at 67-68, 969 P.2d at 1179-80.

23 Relishing requires "that the defendant say or do something, other than the
24 commission of the crime itself, to show he savored the murder," thus evidencing
25 debasement or perversion. *State v. Roscoe*, 184 Ariz. 484, 500, 910 P.2d 635, 651
26 (1996), *cert. denied*, 519 U.S. 854, 117 S.Ct. 150, 136 L.Ed.2d 96 (1996). Victor
Rosales, the defendant's cellmate, testified at trial that Doerr described "playing
with [Bohl's] blood." This testimony is sufficient to support a finding of relishing.

27 Mutilation is an act distinct from the killing itself that includes the purposeful
28 severing of body parts. *See State v. Richmond*, 180 Ariz. 573, 580, 886 P.2d 1329,

1 1336 (1994). Karen Bohl’s left nipple was cut off with a sharp-edged instrument,
2 and marks above the right nipple suggested an attempt to amputate it as well.
Mutilation is present here.

3 Gratuitous violence exceeds that which is necessary to kill. . . .

4 In this case, medical examiner Dr. Owl-Smith testified that Karen Bohl died
5 of multiple blunt force trauma. Evidence indicated that she was sodomized with
6 both a metal pipe and a broom handle found at the scene. Her rectal and vaginal
7 cavities were ruptured by the force of these objects, causing massive blood loss.
8 Her nose was fractured by blows to the face. The resulting swelling and
lacerations so altered facial features that her family could not identify her. One
laceration was deep enough to expose her skull. She had knife slashes to her
breasts and numerous bruises and injuries to many parts of her body. We uphold
the gratuitous violence finding.

9 *Doerr*, 193 Ariz. at 67-68, 969 P.2d at 1179-80.

10 Based upon the record and the facts as discussed by the Arizona Supreme Court, the
11 Court concludes that there was sufficient evidence to support a finding that the murders were
12 especially cruel as well as especially heinous or depraved. In light of such evidence, the
13 Arizona Supreme Court’s determination that the evidence was sufficient to support the (F)(6)
14 aggravating circumstance was not contrary to or an unreasonable application of clearly
15 established federal law.

16 **Claims 15-27**

17 Petitioner raises numerous constitutional challenges to Arizona’s capital sentencing
18 scheme. (Dkt. 82 at 118-61.) Each was exhausted and summarily denied by the Arizona
19 Supreme Court on direct appeal. *Doerr*, 193 Ariz. at 71-72, 969 P.2d at 1183-84. As set
20 forth below, the Court concludes that the state court’s rejection of these claims was neither
21 contrary to nor an unreasonable application of controlling Supreme Court law.

22 In Claim 15, Petitioner argues that Arizona’s death penalty statutory scheme constitutes
23 *per se* cruel and unusual punishment. Clearly established federal law holds otherwise. *See*
24 *Gregg v Georgia*, 428 U.S. 153, 169 (1976); *see also Roper v. Simmons*, 543 U.S. 551, 568-
25 69 (2005) (noting that the death penalty is constitutional when applied to a narrow category
26 of crimes and offenders). In *Walton v. Arizona*, 497 U.S. 639, 647-56 (1990), *overruled on*
27 *other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court considered
28

1 Arizona's death penalty statute and did not find it in violation of the Eighth Amendment.

2 In Claim 16, Petitioner contends that Arizona's capital statutory scheme is
3 impermissibly mandatory and establishes a presumption of death because it provides that the
4 death penalty "shall" be imposed if one or more aggravating factors are found and mitigating
5 circumstances are insufficient to call for leniency. The Court rejected this claim in *Walton*,
6 497 U.S. at 651-52. See also *Kansas v. Marsh*, 548 U.S. 163, 172-73 (2006) (relying on
7 *Walton* to uphold Kansas's death penalty statute, which directs imposition of the death
8 penalty when the state has proved that mitigating factors do not outweigh aggravators); *Smith*
9 *v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998) (summarily rejecting challenges to the
10 mandatory nature of Arizona's death penalty statute).

11 In Claim 17, Petitioner argues that he had a right to voir dire the sentencing judge
12 regarding his views on the death penalty. Petitioner cites no authority in support. Although
13 the Constitution requires that a defendant receive a fair trial before a fair and impartial judge
14 with no bias or interest in the outcome, see *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997),
15 trial judges, like other public officials, operate under a presumption that they properly
16 discharge their official duties. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996);
17 see also *State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984) (trial judge is
18 presumed to be free of bias and prejudice). The presumption of regularity applies to trial
19 judges, absent clear evidence to the contrary. See *Armstrong*, 517 U.S. at 464; see also *State*
20 *v. Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223, 1226 (1987) (mere possibility of bias or
21 prejudice does not entitle a criminal defendant to voir dire the trial judge at sentencing).
22 Petitioner made no allegation of bias or prejudice when he raised this issue before the
23 Arizona Supreme Court. (See Opening Br. at 47.)

24 In Claim 18, Petitioner asserts that Arizona's sentencing scheme fails to provide
25 appropriate guidance to the sentencing court, and in Claim 21, he argues that it does not
26 sufficiently narrow those eligible for the death penalty or properly channel the sentencer's
27 discretion. Arizona's capital sentencing statute allows only certain statutorily-defined
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1 aggravating circumstances to be considered in determining eligibility for the death penalty.
2 A.R.S. § 13-703(F) (transferred and renumbered as A.R.S. § 13-751 in 2009). “The presence
3 of aggravating circumstances serves the purpose of limiting the class of death-eligible
4 defendants, and the Eighth Amendment does not require that these aggravating circumstances
5 be further refined or weighed by [the sentencer].” *Blystone*, 494 U.S. at 306-07. Not only
6 does Arizona’s sentencing scheme generally narrow the class of death-eligible persons, the
7 aggravating factors delineated in § 13-703(F) do so specifically. Rulings of the United States
8 Supreme Court and the Ninth Circuit have upheld Arizona’s death penalty statute against
9 challenges that particular aggravating factors do not adequately narrow the sentencer’s
10 discretion. *See Lewis*, 497 U.S. at 774-77; *Walton*, 497 U.S. at 655-56; *Woratzek v. Stewart*,
11 97 F.3d 329, 335 (9th Cir. 1996). The Ninth Circuit has explicitly rejected the argument that
12 Arizona’s death penalty statute is unconstitutional because “it does not properly narrow the
13 class of death penalty recipients.” *Smith*, 140 F.3d at 1272.

14 In addition to narrowing the class of death-eligible defendants, the Supreme Court has
15 imposed a separate requirement for the selection decision, “where the sentencer determines
16 whether a defendant eligible for the death penalty should in fact receive that sentence.”
17 *Tuilaepa*, 512 U.S. at 972. “What is important at the selection stage is an *individualized*
18 determination on the basis of the character of the individual and the circumstances of the
19 crime.” *Zant v. Stephens*, 462 U.S. 862, 879 (1983). Accordingly, a statute that “provides
20 for categorical narrowing at the definition stage, and for individualized determination and
21 appellate review at the selection stage” will ordinarily satisfy Eighth Amendment and Due
22 Process concerns, *id.*, so long as the state ensures “that the process is neutral and principled
23 so as to guard against bias or caprice.” *Tuilaepa*, 512 U.S. at 973. Furthermore, the
24 Constitution does not require that a capital sentencer be instructed in how to weigh any
25 particular fact in the capital sentencing decision. *Id.* at 979. Rather, the state sentencer has
26 broad discretion to determine whether death is appropriate once a defendant is found eligible
27 for the death penalty. *Id.* Thus, Arizona’s death penalty statute need not enunciate specific
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1 standards to guide the sentencer’s consideration of aggravating and mitigating circumstances.
2 *See id.*; *see also Smith*, 140 F.3d at 1272 (summarily rejecting the challenge that the statute
3 does not give the sentencer appropriate guidance).

4 In Claim 19, Petitioner contends that the statute impermissibly requires defendants to
5 establish that their lives should be spared. In *Walton*, 497 U.S. at 651, the Court indicated
6 that Arizona’s allocation of the burdens of proof in a capital sentencing proceeding does not
7 violate the Constitution. *See also Delo v. Lashley*, 507 U.S. 272, 275-76 (1993) (referring
8 to *Walton* and stating that the Court had “made clear that a State may require the defendant
9 ‘to bear the risk of nonpersuasion as to the existence of mitigating circumstances’”).

10 In Claim 20, Petitioner alleges that Arizona’s sentencing scheme fails to require that
11 multiple mitigating factors be considered on a cumulative basis. Petitioner’s factual
12 contention that the sentencing judge did not properly consider or cumulatively weigh his
13 mitigation is refuted by the record. *See supra* Claims 9-12. The sentencing judge stated that
14 it considered “nonstatutory mitigating circumstances, including ‘any aspect of the
15 Defendant’s character, propensities or record and any of the circumstances of the offense.’”
16 (RT 11/27/96 at 12.) Subsequently, the judge stated that he assessed the mitigation both
17 individually *and* collectively in determining whether it was sufficiently substantial to call for
18 leniency. (*Id.* at 8-17.)

19 Second, there is no law to support Petitioner’s request for relief based on how the trial
20 court weighed the aggravation and mitigation. The Supreme Court holds that once a court
21 determines that a person is eligible for the death penalty, the sentencer must then consider
22 relevant mitigating evidence, allowing for “an *individualized* determination on the basis of
23 the character of the individual and the circumstances of the crime.” *Tuilaepa*, 512 U.S. at
24 972. If these two criteria are met – i.e., there is a rational criteria for eligibility and no
25 limitation on consideration of relevant circumstances that could mitigate against a death
26 sentence – “the States enjoy their traditional latitude to prescribe the method by which those
27 who commit murder shall be punished.” *Romano v. Oklahoma*, 512 U.S. 1, 7 (2004)

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1 (quoting *Blystone*, 494 U.S. at 309). Once eligibility for the death penalty is determined, the
2 sentencer “may be given ‘unbridled discretion in determining whether the death penalty
3 should be imposed.’” *Tuilaepa*, 512 U.S. at 979 (quoting *Zant*, 462 U.S. at 875). In sum,
4 giving a sentencer “discretion to evaluate and weigh the circumstances relevant to the
5 particular defendant and the crime he committed” is not unconstitutional. *Id.* (quoting
6 *McCleskey v. Kemp*, 481 U.S. 279, 315 n.37 (1987)).

7 In Claim 22, Petitioner argues that Arizona’s capital sentencing statute fails to require
8 the prosecution to prove that death is appropriate. As already indicated, the Supreme Court
9 in *Walton* held that

10 so long as a State’s method of allocating the burdens of proof does not lessen the
11 State’s burden to prove every element of the offense charged, or in this case to
12 prove the existence of aggravating circumstances, a defendant’s constitutional
rights are not violated by placing on him the burden of proving mitigating
circumstances sufficiently substantial to call for leniency.

13 *Walton*, 497 U.S. at 650. Ultimately, it is up to the sentencer to determine whether a death
14 sentence is appropriate. See *Tuilaepa*, 512 U.S. at 979 (stating that the sentencer has
15 unbridled discretion in determining whether the death penalty should be imposed). Thus,
16 Arizona’s death penalty statute is not constitutionally defective because it fails to require that
17 the prosecution prove that death is the appropriate sentence.

18 In Claim 23, Petitioner alleges that the cruel, heinous, or depraved aggravating
19 circumstance is unconstitutionally vague. In *Walton*, the Supreme Court rejected the
20 argument that the (F)(6) aggravating factor, as applied by Arizona courts, is
21 unconstitutionally vague. 497 U.S. at 654 (1990) (Arizona Supreme Court has given
22 substance to the operative terms in the statute and its construction meets constitutional
23 requirements).

24 In Claim 24, Petitioner contends that Arizona’s statute unconstitutionally restricts the
25 ability of the sentencing court to consider mitigating evidence. The Supreme Court has
26 specifically rejected Petitioner’s argument that States may not constitutionally require
27 defendants to prove the existence of mitigating evidence by a preponderance of the evidence.
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1 In *Walton*, 497 U.S. at 651, the Court held that Arizona’s allocation of the burdens of proof
2 in a capital sentencing proceeding does not violate the Constitution. *See also Delo*, 507 U.S.
3 at 275-76.

4 As to Petitioner’s other argument– that the statute unlawfully restricts consideration of
5 mitigation because Arizona courts first evaluate whether evidence established at sentencing
6 is mitigating – the Court rejected this argument in *Lockett v. Ohio*, 438 U.S. 586 (1978). In
7 *Lockett*, the Court held that in capital sentencing proceedings, the sentencer must not be
8 precluded from considering, and may not refuse to consider, any constitutionally relevant
9 mitigation evidence. *See* 438 U.S. at 604. However, the *Lockett* Court went on to explain:

10 Nothing in this opinion limits the traditional authority of a court to exclude,
11 as irrelevant, evidence not bearing on the defendant’s character, prior record, or
circumstances of the offense.

12 438 U.S. at 604 n.2.

13 In Claim 25, Petitioner asserts that Arizona’s capital sentencing statute impermissibly
14 allows the prosecutor unfettered discretion in determining whether to seek the death penalty.
15 Prosecutors have wide discretion in making the decision whether to seek the death penalty.
16 *See McCleskey*, 481 U.S. at 296-97; *Gregg*, 428 U.S. at 199 (pre-sentencing decisions by
17 actors in the criminal justice system that may remove an accused from consideration for the
18 death penalty are not unconstitutional). In *Smith*, the Ninth Circuit rejected the argument that
19 Arizona’s death penalty statute is constitutionally infirm because “the prosecutor can decide
20 whether to seek the death penalty.” 140 F.3d at 1272.

21 In Claim 26, Petitioner alleges that at the time of his sentencing, the death penalty
22 statute was applied in a way that discriminated against poor male defendants in violation of
23 the Fourteenth Amendment. Clearly established federal law holds that “a defendant who
24 alleges an equal protection violation has the burden of proving ‘the existence of purposeful
25 discrimination’” and must demonstrate that the purposeful discrimination “had a
26 discriminatory effect” on him. *McCleskey*, 481 U.S. at 292 (quoting *Whitus v. Georgia*, 385
27 U.S. 545, 550 (1967)). Therefore, to prevail under the Equal Protection Clause, Petitioner
28

1 “must prove that the decisionmakers in *his* case acted with discriminatory purpose.” *Id.*
2 Petitioner does not attempt to meet this burden. This claim fails because he offers no
3 evidence specific to his case that would support an inference that his gender or economic
4 status impacted his sentence. *See Jeffers*, 38 F.3d at 419 (finding no evidence that race or
5 gender creates a “constitutionally significant risk of impermissible bias” in Arizona capital
6 sentencing).

7 In Claim 27, Petitioner argues that the death penalty statute is arbitrary and capricious
8 because the state court did not conduct a proportionality review of his sentence. There is no
9 federal constitutional right to proportionality review of a death sentence, *McCleskey*, 481
10 U.S. at 306 (citing *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984)), and Arizona discontinued
11 the practice in 1992. *State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992). The
12 Ninth Circuit has explained that the interest implicated by proportionality review – the
13 “substantive right to be free from a disproportionate sentence” – is protected by the
14 application of “adequately narrowed aggravating circumstance[s].” *Ceja v. Stewart*, 97 F.3d
15 1246, 1252 (9th Cir. 1996).

16 **Claim 30**

17 Petitioner was convicted of both premeditated and felony first degree murder. The
18 felony murder count was based upon sexual assault and kidnapping as the predicate felonies.
19 *See* A.R.S. § 13-1105 (first degree murder); § 13-1406 (sexual assault); § 13-1304
20 (kidnapping). Petitioner alleges that trial and appellate counsel performed deficiently by
21 failing to challenge the sufficiency of the evidence in support of felony murder and the
22 underlying predicate felonies. (Dkt. 82 at 195-96.)

23 Petitioner raised these claims in his PCR petition. (ROA-PCR 7 at 23-31.) In denying
24 relief, the PCR court found that any challenge to the sufficiency of evidence for sexual
25 assault and kidnapping would have failed:

26 [Even if trial counsel had so moved] it would have been denied, as there was
27 substantial, in fact, overwhelming evidence of both crimes. Even the defendant
28 admits that the state proved sexual assault beyond a reasonable doubt.
(Defendant’s petition at page 24, lines 12-14.) There was more than substantial

1 evidence for the jury to have believed that Karen Bohl's murder was in
2 furtherance of the defendant's sexual assault on her. In fact, the evidence was
overwhelming.

3 As to the kidnapping charge, the evidence of a violent struggle as well as the
4 defendant's own admissions to his cellmate, Victor Rosales, was clearly enough
5 to overcome a directed verdict as to the kidnapping count or as to kidnapping as
a predicate to the homicide. The evidence was overwhelming that the defendant's
intent in restraining the victim was to sexually assault her.

6 (ROA-PCR 18 at 2-3.) In these proceedings, Petitioner again concedes that the prosecution
7 proved beyond a reasonable doubt that he sexually assaulted the victim. (Dkt. 82 at 197-98.)
8 Thus, his claim rests on trial and appellate counsel's failure to challenge sufficiency of the
9 evidence for kidnapping and felony murder. (*Id.* at 195-203.)

10 Analysis

11 Ineffective assistance of counsel claims are governed by *Strickland v. Washington*, 466
12 U.S. 668 (1984). To prevail under *Strickland*, a petitioner must show that counsel's
13 representation fell below an objective standard of reasonableness and that the deficiency
14 prejudiced the defense. *Id.* at 687-88. A reviewing court need not determine whether
15 counsel's performance was deficient before examining the prejudice suffered by the
16 defendant as a result of the alleged deficiencies. *Id.* at 697 ("if it is easier to dispose of an
17 ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be
18 followed").

19 At the outset, the Court notes that because Petitioner concedes there was sufficient
20 evidence to establish his sexual assault conviction, it is difficult to conceive that he could be
21 prejudiced by counsel's failure to challenge the sufficiency of evidence concerning
22 kidnapping. The sexual assault alone was sufficient to serve as the predicate felony for
23 Petitioner's felony murder conviction. Similarly, all of the allegations contained in this claim
24 involve counsel's conduct with respect to the felony murder count; however, Petitioner was
25 separately convicted by a unanimous jury of premeditated murder. (*See* ROA 105.) Thus,
26 the Court again questions how, even if counsel's performance was deficient with respect to
27 the felony murder count, Petitioner could establish prejudice. In the interest of completeness,
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1 the Court will also address the specific allegations presented in Claim 30.

2 Petitioner argues that the prosecution never proved that he actually restrained the
3 victim. (Dkt. 82 at 201.) Under A.R.S. § 13-1304 (West 1996), “a person commits
4 kidnapping by knowingly restraining another person with the intent to . . . (3) inflict death,
5 physical injury or a sexual offense on the victim.” Under A.R.S. § 13-1301 (West 1996),
6 “restrain means to restrict a person’s movements without consent, without legal authority,
7 and in a manner which interferes substantially with such person’s liberty . . . by confining
8 such person.”

9 At trial, Victor Rosales testified that Petitioner had told him, while both men were
10 incarcerated at the county jail, that the victim had upset Petitioner because she refused sex
11 and wanted to leave his apartment. (RT 4/11/96 (A.M.) at 60.) Evidence at trial further
12 established that there had been a violent struggle; blood was in every room of the apartment.
13 (See RT 4/10/96 at 18-54, 103-05, 163-65; RT 4/11/96 (P.M.), at 19-20, 35-40, 47-48.) This
14 evidence was clearly enough to overcome a directed verdict on the kidnapping count.
15 Therefore, trial and appellate counsel’s failure to challenge the sufficiency of evidence on
16 the kidnapping count was not ineffective.

17 Petitioner also contends that there was insufficient evidence to support his felony
18 murder conviction because the predicate felonies – sexual assault and kidnapping – were not
19 accomplished in the course of and in furtherance of the victim’s death. (Dkt. 82 at 195-203.)
20 Arizona’s felony murder statute provides in relevant part: “A person commits first degree
21 murder if . . . such person commits . . . sexual assault under § 13-1406 . . . kidnapping under
22 § 13-1304 . . . and in the course of and in furtherance of such offense . . . such person . . .
23 causes the death of any person.” A.R.S. § 13-1105(A)(2) (West 1996). A death is in
24 furtherance of an underlying felony if the death resulted from an action taken to facilitate
25 accomplishment of the felony. *State v. Jones*, 188 Ariz. 388, 397-98, 937 P.2d 310, 319-20
26 (1997).

27 In *Jones*, the court considered whether the victim’s death was in furtherance of a sexual
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1 assault. *Id.* The court found that the victim’s defensive struggle – to shield herself from the
2 blows that caused her death – occurred at the proximate time as the sexual assault. *Id.* at 398,
3 937 P.2d at 320. The court concluded that substantial evidence supported the defendant’s
4 felony murder conviction based upon the underlying sexual assault. *Id.*

5 Here, the medical examiner similarly concluded that the injuries the victim sustained
6 during the sexual assault (e.g., Petitioner forcefully pushing a pipe into the victim’s vagina),
7 occurred before or during her death. (RT 4/11/96 (P.M.) at 35-37.) Thus, there was
8 sufficient evidence from which the jury could conclude that the murder occurred in the
9 course of and in furtherance of the sexual assault, and counsel were not ineffective for failing
10 to raise this argument at trial or on appeal.

11 Petitioner further argues that the kidnapping and premeditated murder convictions
12 merged and therefore kidnapping could not support a felony murder conviction. (Dkt. 82 at
13 201.) The Court disagrees. Under Arizona law, kidnapping and felony murder are separate
14 counts that do not necessarily merge. *See State v. Salazar*, 177 Ariz. 399, 410, 844 P.2d 566,
15 577 (1992) (stating that kidnapping and premeditated murder are not conceptually identical;
16 it is possible to commit murder without kidnapping); *State v. Lewis*, 169 Ariz. 4, 6, 816 P.2d
17 263, 265 (App. 1991) (although defendant’s infliction of physical injury would not itself
18 support a felony murder, one who knowingly restrains a victim with intent to inflict such
19 injury commits kidnapping, an offense supporting felony murder); *see also State v.*
20 *Villafuerte*, 142 Ariz. 323, 327, 690 P.2d 42, 46 (1984) (when victim was restrained with the
21 intent to commit sexual assault and victim died as a result, court held that “[w]ith substantial
22 evidence as to the kidnapping charge, a finding of guilt on the felony murder charge could
23 directly follow.”)

24 As already noted, there was sufficient evidence to support the kidnapping count. In
25 addition to that evidence, the medical examiner further testified that the victim suffered head,
26 neck, nose, and mouth injuries, some of which had already started showing a bruising
27 coloration, before she suffered fatal head and vaginal/rectal injuries. (RT 4/11/96 (P.M.) at
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1 31, 33, 41-42, 45, 47-48.) Such testimony further supports the separate kidnapping charge;
2 it did not merge with the premeditated murder charge.

3 Furthermore, the victim's death resulted from Petitioner's restraining actions, including
4 the wounds he inflicted on the crown of her head and forehead, which were so deep that the
5 victim's skull bone was exposed. *See Jones*, 188 Ariz. at 397-98, 937 P.2d at 319-20; (RT
6 4/11/96 (P.M.) at 30-33, 41-42.) The medical examiner testified that these were fatal
7 wounds. (*Id.* at 47-48.) This was sufficient to establish that the victim's death occurred in
8 the course of and in furtherance of the kidnapping, and counsel were not ineffective for
9 failing to raise this argument at trial or on appeal.

10 In sum, the PCR court's ruling denying Petitioner's trial and appellate ineffectiveness
11 claims based on counsels' failure to challenge sufficiency of the evidence for felony murder
12 was neither contrary to nor an unreasonable application of *Strickland*. Petitioner is not
13 entitled to relief on Claim 30.

14 **Claim 31**

15 Petitioner alleges that Arizona's statutory death penalty scheme is unconstitutional
16 because it allowed a judge, not a jury, to find the aggravating circumstances that rendered
17 him death-eligible, and because it failed to require the state to provide notice of aggravating
18 circumstances in his indictment. (Dkt. 82 at 203-05.) Respondents contend that this claim
19 is unexhausted. (Dkt. 99 at 130.) Regardless of exhaustion, the Court will address the claim
20 because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277.

21 Claim 31 is premised primarily upon *Ring v. Arizona*, 536 U.S. 584, 609 (2002), which
22 found that Arizona's aggravating factors are an element of the offense of capital murder and
23 therefore must be found by a jury. However, subsequently, in *Schriro v. Summerlin*, 542
24 U.S. 348 (2004), the Court held that *Ring* does not apply retroactively to cases already final
25 on direct review. Because direct review of Petitioner's case was final prior to *Ring*, he is not
26 entitled to federal habeas relief premised on that ruling.

27 With regard to his indictment claim, the Supreme Court has held that facts constituting
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1 the elements of an offense rather than just a sentencing enhancement must be charged in a
2 *federal* indictment. *See Jones v. United States*, 526 U.S. 227, 252 (1999). However, the
3 Fifth Amendment Due Process Clause does not incorporate the same requirements upon state
4 criminal prosecutions by virtue of the Fourteenth Amendment. *See Hurtado v. California*,
5 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). Therefore,
6 states are not required by the Constitution to empanel grand juries for purposes of indictment.
7 *Id.* Based on these same principles, Petitioner’s argument was rejected by the Arizona
8 Supreme Court, which held that the federal constitution does not require that aggravating
9 factors be alleged in an indictment and supported by probable cause. *See McKaney v.*
10 *Foreman*, 209 Ariz. 268, 270, 100 P.3d 18, 20 (2004). This Court agrees. Claim 31 is
11 without merit.

12 **Claim 32**

13 Petitioner contends that death by lethal injection constitutes cruel and unusual
14 punishment under the Eighth and Fourteenth Amendment. (Dkt. 82 at 205.) Respondents
15 concede that Petitioner exhausted this argument on direct appeal. (Dkt. 99 at 132.)

16 Petitioner cites no Supreme Court precedent to support his assertion that execution by
17 lethal injection is inherently cruel and unusual punishment, or that the lethal injection method
18 practiced in Arizona violates the United States Constitution. In *LaGrand v. Stewart*, 133
19 F.3d 1253, 1265 (9th Cir. 1998), the Ninth Circuit rejected a claim that Arizona’s method of
20 lethal injection was unconstitutional. More recently, under 42 U.S.C. § 1983, in *Baze v.*
21 *Rees*, ___ U.S. ___, 128 S. Ct. 1520 (2008), the Supreme Court upheld the constitutionality
22 of lethal injection and Kentucky’s method of execution by lethal injection.⁷ The decision by

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24 ⁷ This Court is aware that under 42 U.S.C. § 1983, several Arizona death row
25 prisoners challenged Arizona’s method of execution by lethal injection in federal court and
26 that the same issue is also being litigated in state court in *State v. Landrigan*, Maricopa
27 County Superior Court, No. CR-90-00066. The court in *Dickens v. Brewer*, No. CV-07-
28 1770-PHX-NVW, 2009 WL 1904294, at *25 (D. Ariz. July 1, 2009), concluded that
Arizona’s lethal injection protocol was not unconstitutional, and the matter is presently on
appeal.

1 the Arizona Supreme Court rejecting this claim was neither contrary to nor an unreasonable
2 application of clearly established federal law.

3 **CONCLUSION**

4 The Court concludes that Petitioner is not entitled to habeas relief on any of his claims.
5 The Court further finds that an evidentiary hearing in this matter is neither warranted nor
6 required.⁸ Therefore, Petitioner’s First Amended Petition for Writ of Habeas Corpus must
7 be denied and judgment entered accordingly.

8 **CERTIFICATE OF APPEALABILITY**

9 In the event Petitioner appeals from this Court’s judgment, and in the interests of
10 conserving scarce resources that might be consumed drafting and reviewing an application
11 for a certificate of appealability (COA) to this Court, the Court on its own initiative has
12 evaluated the claims within the petition for suitability for the issuance of a certificate of
13 appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d at 864-65.

14 Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal
15 is taken by a petitioner, the district judge who rendered the judgment “shall” either issue a
16 certificate of appealability (“COA”) or state the reasons why such a certificate should not
17 issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner “has
18 made a substantial showing of the denial of a constitutional right.” This showing can be
19 established by demonstrating that “reasonable jurists could debate whether (or, for that
20 matter, agree that) the petition should have been resolved in a different manner” or that the
21 issues were “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529
22 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For
23 procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the
24 petition states a valid claim of the denial of a constitutional right, and (2) whether the court’s
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26 ⁸ The Court previously denied Petitioner’s request for evidentiary development
27 as to specific claims (Dkt. 132), 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 procedural ruling was correct. *Id.*

2 The Court finds that reasonable jurists could debate its resolution of Claim 3.
3 Therefore, the Court issues a COA as to this claim. For the remaining claims and procedural
4 issues, the Court declines to issue a COA for the reasons set forth in the instant order and the
5 Court's order of September 30, 2005. (Dkt. 132.)

6 Based on the foregoing,

7 **IT IS HEREBY ORDERED** that Petitioner's First Amended Petition for Writ of
8 Habeas Corpus (Dkt. 82) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter
9 judgment accordingly.

10 **IT IS FURTHER ORDERED** the stay of execution entered on April 4, 2002 (Dkt. 2)
11 is **VACATED**.

12 **IT IS FURTHER ORDERED** that a Certificate of Appealability is **GRANTED** as to
13 the following issue:

14 Whether Petitioner is entitled to relief on Claim 3, alleging that remarks by two
15 prospective jurors at *voir dire* irreparably tainted the entire jury panel in violation
of his right to an impartial jury.

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

19 DATED this 28th day of September, 2009.

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Paul G. Rosenblatt
United States District Judge