

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Ray White,)	No. CV-08-08139-PCT-SPL
)	
Petitioner,)	ORDER
)	(Death Penalty Case)
vs.)	
Charles L. Ryan, et al.,)	
)	
Respondents.)	

Before the Court are Petitioner’s Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 273) and Motion for Evidentiary Development (Doc. 277), which are fully briefed. For the reasons that follow, the Court concludes that Petitioner is not entitled to relief, and will deny his petition.

I. Background

A. State Proceedings

In 1988, a jury convicted Petitioner of first-degree murder and conspiracy to commit first-degree murder. The trial court sentenced him to life without possibility of parole for 25 years for the conspiracy and imposed the death penalty for the first-degree murder. The Arizona Supreme Court affirmed. *State v. White (White I)*, 168 Ariz. 500, 815 P.2d 869 (1991).

In 1992, Petitioner filed a petition for post-conviction relief (“PCR”). He filed an amended petition in 1995. The trial court granted Petitioner a new sentencing on grounds of ineffective assistance of counsel during the initial sentencing proceedings. On

1 resentencing, Petitioner again received a life sentence without possibility of parole for 25
2 years for the conspiracy and a death sentence for the murder. The Arizona Supreme Court
3 again affirmed. *State v. White (White II)*, 194 Ariz. 344, 347–49, 982 P.2d 819, 822–
4 24 (1999). Except where otherwise indicated, the following factual summary is taken
5 from *White II*.

6 At approximately 11 p.m. on December 12, 1987, neighbors of David and Susan
7 Johnson (David and Susan) heard gunshots at the Johnson residence in Bagdad, Arizona.
8 Neighbors saw a man run from the residence, enter a green car, and speed away. David
9 walked to a neighbor’s home and collapsed. He had been shot in the chin and in the back
10 with a .357 magnum revolver. Before dying, David identified the shooter as a man
11 wearing a mask.

12 The police investigation soon focused on Petitioner and Susan. Police learned that
13 Petitioner met Susan in January 1987, when the two worked at a nursing home in
14 Prescott, Arizona. In April 1987, the couple went to Michigan. Susan returned to Prescott
15 the following October and married David. Petitioner also returned and resumed his affair
16 with Susan.

17 On November 25, 1987, Susan obtained a \$65,000 life insurance policy on David.
18 Susan was the named beneficiary. There was also a change of beneficiary in David’s
19 existing employee group life insurance. Susan obtained the change form on December 7,
20 1987, and returned it fully executed on December 10, two days before the murder. The
21 form added Susan and her children as beneficiaries.

22 Petitioner told several people that Susan had asked him to kill David. He also told
23 his ex-wife that he was soon going to receive \$100,000.

24 The police learned that Petitioner made a down payment on a revolver at a
25 Prescott pawn shop on November 19, 1987. He later made another payment and picked
26 up the gun. After David was shot, Petitioner sold the revolver to a Phoenix pawn shop. It
27 was later recovered and identified as the weapon used to kill David. Petitioner’s car was
28 also identified as the green vehicle driven from the murder scene.

1 Petitioner was arrested in Phoenix on December 19, 1987. Police searched the car
2 and found a box of .38 caliber bullets, a ski mask, and a bag of potatoes. At the time of
3 the shooting, the killer had placed a potato over the barrel of the revolver to act as a
4 silencer. Pieces of dried potato were found at the crime scene, and potato starch was
5 found on the gun barrel.

6 Petitioner's trial was severed from Susan's. Petitioner was represented by attorney
7 Chester Lockwood.

8 The jury convicted Petitioner on both the conspiracy and murder counts. At the
9 presentencing hearing, the State argued that the crime was motivated by Petitioner's
10 intent to benefit from the insurance proceeds on the victim's life. Petitioner contended
11 that the evidence did not establish that his involvement in the killing was for financial
12 gain. The court disagreed and found that the State had proved the pecuniary gain
13 aggravating factor.

14 Petitioner presented no evidence of mitigation but argued that the absence of a
15 prior criminal record was a mitigating circumstance. The trial court also considered the
16 following facts in mitigation: Petitioner's natural father left home when Petitioner was 18
17 months old, his first stepfather was an alcoholic, and he was raised by his mother;
18 Petitioner had dependent personality traits and admitted to past heroin, cocaine, and
19 amphetamine use and addiction; Petitioner was unable to form and maintain close
20 personal relationships; although he generally had difficulty acting responsibly, Petitioner
21 did well in his nursing home employment and had been a productive person during
22 various periods of his life; he had no prior record of abuse or violent behavior; and he
23 expressed sorrow for David's death. The court found these circumstances insufficient to
24 call for leniency and sentenced Petitioner to death for David's murder. (SER 24.)¹ The
25 Arizona Supreme Court affirmed on direct appeal. *White I*, 168 Ariz. 500, 815 P.2d 869.

26 Susan Johnson was subsequently convicted of conspiracy to commit first-degree
27

28 ¹ "SER" stands for Supplemental Excerpts of Record, attached to Respondents' Answer. (See Doc. 275, Attachments 1 and 2.)

1 murder and first-degree murder. She received consecutive life sentences.²

2 Petitioner returned to the trial court for PCR proceedings. He was represented by
3 Douglas McVay, who filed a PCR petition alleging numerous grounds of ineffectiveness
4 of counsel at trial and sentencing. The court granted the petition on the sentencing claims
5 and ordered a new mitigation hearing and sentencing proceeding. McVay also
6 represented Petitioner at resentencing and on direct appeal from the resentencing.

7 At the resentencing hearing in August 1996, the prosecution offered no new
8 evidence of aggravation. McVay presented evidence that the prosecutors at Petitioner's
9 first trial and sentencing believed the State should not have sought the death penalty. (RT
10 8/27/96.)³

11 McVay proffered other mitigating circumstances. He argued that Petitioner was
12 capable of being rehabilitated; that he was an involved parent to his daughter; that co-
13 defendant Susan Johnson was the "mastermind" behind the crimes and therefore
14 Petitioner's death sentence was unfair and disproportionate to Johnson's sentence; and
15 the murder represented "aberrant behavior" for Petitioner. (SER 122-32.)

16 The trial court again found the pecuniary gain aggravating factor had been proven.
17 (SER 138.) The court considered the mitigating factors urged by Petitioner but found
18 them insufficient to call for leniency. (SER 139-45.)

19 On direct appeal the Arizona Supreme Court again affirmed:

20 Based on our independent review of the sentence imposed on
21 the defendant we conclude that the state has proved beyond a
22 reasonable doubt the aggravating circumstance that Michael
23 Ray White murdered David Johnson in anticipation of
24 substantial pecuniary gain. We further conclude, in view of
25 the calculated scheme which resulted in Johnson's death, that
26 the mitigating factors raised by the defendant and discussed in
this opinion, whether viewed individually or cumulatively,
are insufficient to warrant a mitigation of sentence. They
neither outweigh nor are they equal to the statutory
aggravating circumstance present in this case. Defendant's
capital sentence is therefore affirmed.

27 ² Judge James Hancock, of the Yavapai County Superior Court, presided over
28 Petitioner's trial, sentencing, and resentencing, and PCR proceedings. He also presided
over Susan Johnson's trial.

³ "RT" refers to the court reporter's transcript.

1 *White II*, 194 Ariz. at 356, 982 P.2d at 831.

2 Petitioner, represented by new counsel, returned to the trial court for another round
3 of PCR proceedings, this time alleging that McVay had performed ineffectively at
4 resentencing by failing to adequately investigate Petitioner’s mental health issues. (*See*
5 SER 247.) Petitioner filed an amended PCR petition on May 2, 2005. (PR doc. 7, Ex. F.)⁴

6 The court held an evidentiary hearing on November 5, 2007. Petitioner was
7 represented by attorney Kerrie Droban. Two witnesses testified on Petitioner’s behalf,
8 counsel McVay and Keith Rohman, a mitigation specialist. (RT 11/5/07.) McVay
9 acknowledged that he did not attempt to secure Petitioner’s medical or psychological
10 records. (*Id.* at 29, 50–51.) Rohman testified about Petitioner’s physical and mental
11 illnesses and other information gained in his mitigation investigation. (*Id.* at 92–93, 146.)

12 The court denied relief. (SER 271.) The court found that McVay did not perform
13 deficiently at resentencing under prevailing professional norms and that Petitioner was
14 not prejudiced. (*Id.*)

15 Droban filed a petition for review in the Arizona Supreme Court raising two
16 issues: that McVay failed to contest the pecuniary gain aggravating factor and failed to
17 conduct a mitigation investigation concerning Petitioner’s “mental health, social history,
18 and atrocious childhood.” (SER 273–74.) The Supreme Court denied the petition without
19 comment on October 28, 2008, and issued a warrant for Petitioner’s execution. (SER
20 293.)

21 **B. Federal Proceedings**

22 Petitioner filed a motion for stay of execution, a motion for appointment of federal
23 habeas counsel, and a statement of intent to file a federal habeas petition in this Court.
24 (Docs. 1–5.) On October 29, 2008, the Court issued a stay of execution and appointed the
25 Federal Public Defender’s Office to represent Petitioner in his federal habeas
26 proceedings, with Droban serving as co-counsel. (Docs. 7, 8.)

27 _____
28 ⁴ “PR doc.” refers to documents filed with the Arizona Supreme Court in
connection with Petitioner’s petition for review from the denial of post-conviction relief
in his second PCR proceedings (Case No. CR-08-0103-PC).

1 The initial petition for writ of habeas corpus was filed on December 22, 2008.
2 (Doc. 23.) The Court ordered Petitioner to submit an amended petition no later than July
3 17, 2009. (Doc. 35.) Petitioner’s counsel sought additional time to file the amended
4 petition, raising concerns about Petitioner’s competency pursuant to *Rohan ex rel. Gates*
5 *v. Woodford*, 334 F.3d 803 (9th Cir. 2003).⁵ (Doc. 42.) On September 23, 2009, counsel
6 filed a motion to determine competency and to stay the habeas proceedings, which the
7 Court granted. (Docs. 66, 68.)

8 Petitioner was evaluated by a court-appointed expert and experts for the parties.
9 On September 28, 2010, the parties stipulated that Petitioner was incompetent, and the
10 Court ordered the parties to file a joint report regarding restoration. (Doc. 186.) The
11 parties filed their joint report (Doc. 187), and upon order of the Court Petitioner was
12 transferred to the Arizona State Hospital (“ASH”) for determination of a restoration plan.
13 (Docs. 190, 196).

14 The parties then briefed issues related to forcibly medicating Petitioner and
15 whether *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), affected Petitioner’s competency
16 litigation. (Docs. 211, 212, 215, 220, 224, 225.) After being informed of a conflict
17 between ASH and the Arizona Department of Corrections about responsibility for
18 Petitioner’s treatment, the Court issued an order vacating its previously set hearing
19 regarding forcible medication and ordered Respondents to file monthly status updates.
20 (Doc. 226.)

21 In January 2013, the Supreme Court issued its opinion in *Ryan v. Gonzales*, 133 S.
22 Ct. 696 (2013), abrogating *Rohan*. This Court lifted the stay and ordered Petitioner to file
23 an amended petition. The amended petition was filed July 19, 2013. (Doc. 273.)

24 **II. Standard of Review**

25 Federal habeas claims are analyzed under the framework of the Antiterrorism and
26 Effective Death Penalty Act (“AEDPA”). Pursuant to 28 U.S.C. § 2254(d), a petitioner is

27 ⁵ In *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), *abrogated by*
28 *Ryan v. Gonzales*, 133 S. Ct. 696 (2013), the Ninth Circuit held that a state prisoner
sentenced to death had a statutory right to competence during his federal habeas
proceedings.

1 not entitled to habeas relief on any claim adjudicated on the merits in state court unless
2 the state court’s adjudication:

- 3 (1) resulted in a decision that was contrary to, or involved an
4 unreasonable application of, clearly established Federal law,
as determined by the Supreme Court of the United States; or
5 (2) resulted in a decision that was based on an unreasonable
6 determination of the facts in light of the evidence presented in
the State court proceeding.

7
8 The Supreme Court has emphasized that “an *unreasonable* application of federal
9 law is different from an *incorrect* application of federal law.” *Williams v. Taylor*, 529
10 U.S. 362, 410 (2000). In *Harrington v. Richter*, 562 U.S. 86 (2011), the Supreme Court
11 clarified that under § 2254(d), “[a] state court’s determination that a claim lacks merit
12 precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the
13 correctness of the state court’s decision.” *Id.* at 101. Accordingly, to obtain habeas relief
14 from this Court, Petitioner “must show that the state court’s ruling on the claim being
15 presented in federal court was so lacking in justification that there was an error well
16 understood and comprehended in existing law beyond any possibility for fairminded
17 disagreement.” *Id.* at 103; *see Frost v. Pryor*, 749 F.3d 1212, 1225 -1226 (10th Cir. 2014)
18 (“[I]f all fairminded jurists would agree the state court decision was incorrect, then it was
19 unreasonable . . . If, however, some fairminded jurists could possibly agree with the state
20 court decision, then it was not unreasonable and the writ should be denied.”).

21 With respect to § 2254(d)(2), a state court decision “based on a factual
22 determination will not be overturned on factual grounds unless objectively unreasonable
23 in light of the evidence presented in the state-court proceeding.” *Miller–El v. Cockrell*,
24 537 U.S. 322, 340 (2003). A “state-court factual determination is not unreasonable
25 merely because the federal habeas court would have reached a different conclusion in the
26 first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010). Even if “[r]easonable minds
27 reviewing the record might disagree” about the finding in question, “on habeas review
28 that does not suffice to supersede the trial court’s . . . determination.” *Rice v. Collins*, 546

1 U.S. 333, 341–342 (2006); *see Hurler v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014)
2 (explaining that on habeas review a court cannot find the state court made an
3 unreasonable determination of the facts simply because it would reverse in similar
4 circumstances if the case came before it on direct appeal).

5 As the Ninth Circuit has explained, to find that a factual determination is
6 unreasonable under § 2254(d)(2), the court must be “convinced that an appellate panel,
7 applying the normal standards of appellate review, could not reasonably conclude that the
8 finding is supported by the record.” *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.
9 2004). “This is a daunting standard—one that will be satisfied in relatively few cases.”
10 *Id.*

11 Significantly, “review under § 2254(d)(1) is limited to the record that was before
12 the state court that adjudicated the claim on the merits.” *Pinholster*, 131 S. Ct. at 1398
13 (holding that “the record under review is limited to the record in existence at that same
14 time, *i.e.* the record before the state court”); *see Murray v. Schriro*, 745 F.3d 984,
15 998 (9th Cir. 2014) (“Along with the significant deference AEDPA requires us to afford
16 state courts’ decisions, AEDPA also restricts the scope of the evidence that we can rely
17 on in the normal course of discharging our responsibilities under § 2254(d)(1).”). The
18 Ninth Circuit has observed that “*Pinholster* and the statutory text make clear that this
19 evidentiary limitation is applicable to § 2254(d)(2) claims as well.” *Gulbrandson v. Ryan*,
20 738 F.3d 976, 993 n.6 (2013) (citing § 2254(d)(2) and *Pinholster*, 131 S. Ct. at 1400 n.7).
21 Therefore, as the court explained in *Gulbrandson*:

22 for claims that were adjudicated on the merits in state court,
23 petitioners can rely only on the record before the state court in
24 order to satisfy the requirements of § 2254(d). This
25 effectively precludes federal evidentiary hearings for such
26 claims because the evidence adduced during habeas
proceedings in federal court could not be considered in
evaluating whether the claim meets the requirements of §
2254(d).

27 *Id.* at 993–94.

28 The relevant state court decision is the last reasoned state decision regarding a

1 claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v.*
2 *Nunnemaker*, 501 U.S. 797, 803–04 (1991)).

3 **III. Discussion**

4 The amended habeas petition raises 28 claims,⁶ along with numerous subclaims.
5 (Doc. 273.) In his motion for evidentiary development Petitioner seeks expansion of the
6 record, discovery, and an evidentiary hearing on two of the claims: Claim 1, alleging
7 ineffective assistance of counsel at resentencing, and Claim 15, alleging ineffective
8 assistance of trial counsel. (Doc. 277.)

9 **A. Claim 1**

10 Petitioner alleges that McVay performed at a constitutionally ineffective level
11 during resentencing. (Doc. 273 at 40.) He alleges that McVay performed ineffectively by
12 failing to challenge the pecuniary gain aggravating factor (*id.* at 42–50) and by failing to
13 investigate and present mitigation evidence at Petitioner’s resentencing hearing. (*Id.* at
14 50–82.) Petitioner raised these allegations in his second PCR petition, and the court
15 rejected them. Petitioner contends that the state court’s decision constituted an
16 unreasonable application of clearly established federal law and was based on an
17 unreasonable determination of the facts under 28 U.S.C. § 2254(d)(1) and (2). (*See id.* at
18 42, 50.)

19 In support of this claim, Petitioner seeks expansion of the record and an
20 evidentiary hearing. (Doc. 277 at 20–29.) The evidence Petitioner now seeks to present
21 includes the opinions of several mental health experts, which Petitioner contends should
22 have been presented by McVay at resentencing. (*Id.*) Respondents argue that evidentiary
23 development is foreclosed under *Pinholster* because the state court addressed the claim
24 on the merits. (Doc. 278 at 4–7.)

25 Petitioner counters that *Pinholster* does not limit the Court’s ability to allow
26 evidentiary development of claims that were not fully developed in state court despite his

27 ⁶ Petitioner has withdrawn twenty-three of the claims raised in his initial petition.
28 (*See* Doc. 273 at 44-45.) For consistency’s sake, the Court refers to the claims as
numbered by Petitioner in the amended petition.

1 diligence. (Doc. 277 at 2.) He argues that “*Pinholster* cannot be interpreted to prevent
2 evidentiary development of claims made by diligent petitioners whose attempts at factual
3 development in state court were thwarted by the state court itself.” (Doc. 279 at 3.) In
4 arguing that he was denied an opportunity to “fully develop” his claims, Petitioner cites
5 the state court’s denial of his motion seeking the appointment of mental health experts
6 during the second PCR proceedings. Petitioner’s argument is not supported by *Pinholster*
7 or subsequent cases.

8 “While allowing a petitioner to supplement an otherwise sparse trial court record
9 may be appealing, especially where he diligently sought to do so in state court, the plain
10 language of *Pinholster* and *Harrington [v. Richter]* precludes it.” *Ballinger v. Prelesnik*,
11 709 F.3d 558, 562 (6th Cir. 2013); *see Atkins v. Clarke*, 642 F.3d 47, 49 (1st Cir. 2011)
12 (rejecting argument that a state court did not adjudicate claim on the merits unless
13 petitioner was afforded a “full and fair evidentiary hearing”); *see also Donaldson v.*
14 *Booker*, 505 Fed.Appx. 488, 493 (6th Cir. 2012) (rejecting argument that *Pinholster* does
15 not apply in cases where “petitioner requested an evidentiary hearing in state court and
16 was thereby not at fault for failure to develop the factual record in state court”); *Taylor v.*
17 *Simpson*, No. 06-CV-181-JBC, 2012 WL 404929, at *3 (E.D. Ky. February 6, 2012)
18 (rejecting argument that “*Pinholster* addressed only a fully developed claim, adjudicated
19 on the merits in state court”); *Lewis v. Ayers*, No. 02-13-KJM-GGH-DP, 2011 WL
20 2260784, at *5-6 (E.D.Cal. June 7, 2011) (“Nor will an assertion—that because the state
21 record was incomplete, there was no adjudication on the merits—operate to avoid the
22 [*Pinholster*] holding. An adjudication on the merits is just that regardless of one’s view
23 on the completeness of the record on which the ruling was made.”).

24 Petitioner further contends that *Pinholster* does not preclude the consideration of
25 new evidence because the claim “satisfies” § 2254(d). (Doc. 279 at 2, 4–5.) Petitioner is
26 correct that *Pinholster* does not bar evidentiary development where the court has
27 determined, based solely on the state court record, that the petitioner “has cleared the §
28 2254(d) hurdle.” *Madison v. Commissioner, Alabama Dept. of Corrections*, 761 F.3d

1 1240, 1249–50 (11th Cir. 2014); *see Pinholster*, 131 S. Ct. at 1400–01; *Henry v. Ryan*,
2 720 F.3d 1073, 1093 n.15 (9th Cir. 2013) (explaining that *Pinholster* bars evidentiary
3 hearing unless petitioner satisfies § 2254(d)).

4 Claims of ineffective assistance of counsel are governed by the principles set forth
5 in *Strickland v. Washington*, 466 U.S. 668, 674 (1984). To prevail under *Strickland*, a
6 petitioner must show that counsel’s representation fell below an objective standard of
7 reasonableness and that the deficiency prejudiced the defense. *Id.* at 687–88.

8 The inquiry under *Strickland* is highly deferential, and “every effort [must] be
9 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
10 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at
11 the time.” *Id.* at 689; *see Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Bobby v.*
12 *Van Hook*, 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir.
13 2010). To satisfy *Strickland*’s first prong, a defendant must overcome “the presumption
14 that, under the circumstances, the challenged action might be considered sound trial
15 strategy.” *Id.*

16 With respect to *Strickland*’s second prong, a defendant must affirmatively prove
17 prejudice by “show[ing] that there is a reasonable probability that, but for counsel’s
18 unprofessional errors, the result of the proceeding would have been different. A
19 reasonable probability is a probability sufficient to undermine confidence in the
20 outcome.” *Id.* at 694.

21 “Surmounting *Strickland*’s high bar is never an easy task,” *Padilla v. Kentucky*,
22 559 U.S. 356, 371 (2010), and “[e]stablishing that a state court’s application of *Strickland*
23 was unreasonable under § 2254(d) is all the more difficult.” *Richter*, 131 S. Ct. 788. As
24 the Court explained in *Richter*:

25 Even under *de novo* review, the standard for judging
26 counsel’s representation is a most deferential one. Unlike a
27 later reviewing court, the attorney observed the relevant
28 proceedings, knew of materials outside the record, and
interacted with the client, with opposing counsel, and with the
judge. It is “all too tempting” to “second-guess counsel’s
assistance after conviction or adverse sentence.” [*Strickland*,
466 U.S.] at 689. The question is whether an attorney’s

1 representation amounted to incompetence under “prevailing
2 professional norms,” not whether it deviated from best
practices or most common custom. [*Id.*] at 690.

3 Establishing that a state court’s application of *Strickland* was
4 unreasonable under § 2254(d) is all the more difficult. The
5 standards created by *Strickland* and § 2254(d) are both
6 “highly deferential,” and when the two apply in tandem,
7 review is “doubly” so. The *Strickland* standard is a general
8 one, so the range of reasonable applications is substantial.
9 Federal habeas courts must guard against the danger of
equating unreasonableness under *Strickland* with
unreasonableness under § 2254(d). When § 2254(d) applies,
the question is not whether counsel’s actions were reasonable.
The question is whether there is any reasonable argument that
counsel satisfied *Strickland*’s deferential standard.

10 131 S. Ct. at 788 (additional citations omitted).

11 **1. Claim 1(A)**

12 Petitioner alleges that McVay performed ineffectively at resentencing by failing to
13 challenge the sole aggravating factor, pecuniary gain. (Doc. 273 at 42.) Petitioner raised
14 this claim in his second PCR proceedings, and the court denied it. (SER 256–57.)
15 Petitioner contends that the court’s decision was an unreasonable application of clearly
16 established federal law and based on an unreasonable determination of the facts. (Doc.
17 273 at 43–44.)

18 The PCR court found that McVay’s performance was not deficient and that
19 Petitioner was not prejudiced. (SER 257.) The court noted that the pecuniary gain factor
20 was proven at trial and upheld on independent review by the Arizona Supreme Court in
21 *White I*. (SER 256.) The court further noted McVay’s testimony at the evidentiary
22 hearing that *White I* influenced his decision not to challenge the factor at resentencing.
23 (*Id.*; see RT 11/5/07 at 65.) The court concluded that McVay “acted as a reasonable
24 lawyer under the circumstances” and his decision not to challenge the aggravating factor
25 was “based on sound trial strategy.” (*Id.*) The court also found “[t]here was no reasonable
26 probability that this Court would not have found the aggravator proven had McVay
27 challenged it.”⁷ (SER 256.)

28 ⁷ In the PCR court’s order, counsel’s name is spelled “McVey.” This Court will use
the correct spelling when quoting from the order.

1 In reaching these conclusions the court took into account the evidence Petitioner
2 contends should have been presented at resentencing. (SER 255.) This evidence included
3 statements Susan made in a police interview suggesting that Petitioner did not expect to
4 receive a portion of the insurance proceeds and that Petitioner killed David Johnson
5 because David had abused Susan. (*Id.*) The evidence also included statements other
6 witnesses made to the police indicating that the insurance policy was not yet in effect or
7 that only Johnson’s children were its beneficiaries. (*Id.*)

8 The court also explained that pecuniary gain did not have to be the sole motivation
9 for the murder in order for the factor to be satisfied. (SER 256.) Finally, the court
10 concluded that the new evidence presented by PCR counsel would not have changed his
11 decision about the aggravating factor. (*Id.*)

12 The PCR court did not unreasonably apply *Strickland* or make an unreasonable
13 determination of the facts. In finding that McVay acted reasonably under the
14 circumstances of the case, the court cited *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th
15 Cir. 1998), *overruled on other grounds*, 525 U.S. 141 (1998). In *Coleman* the Ninth
16 Circuit reiterated that the review of counsel’s performance is “extremely limited”:

17 The test has nothing to do with what the best lawyers would
18 have done. Nor is the test even what most good lawyers
19 would have done. We ask only whether some reasonable
20 lawyer at the trial could have acted, in the circumstances, as
21 defense counsel acted at trial.

22 150 F.3d at 1113 (additional citations omitted).

23 A reasonable lawyer could have acted as McVay did. Prior to the resentencing
24 proceedings the Arizona Supreme Court had upheld the pecuniary gain aggravating
25 factor. Moreover, the PCR court granted relief on the PCR petition only “for a mitigation
26 hearing and new sentencing.” (SER 121.) Under these circumstances, “some reasonable
27 lawyer” could decide, as McVay did, not to challenge the pecuniary gain factor but to
28 focus instead on mitigation. (*See* RT 11/5/07 at 65.)

Petitioner contends that the PCR court made an unreasonable determination of the

1 facts when it assessed the evidence relating to the pecuniary gain factor. The PCR court
2 found that Susan Johnson’s statements to the police were “contradicted” by her
3 subsequent trial testimony, which indicated that Petitioner was aware of the insurance
4 policies, repeatedly questioned Susan about them, and assumed that Susan would receive
5 the proceeds and share them with him. (SER 256.) Petitioner asserts that this factual
6 determination is unreasonable because the PCR court “made no findings . . . about how it
7 chose which statements made by Susan it considered credible.” (Doc. 273 at 46.)

8 This criticism of the PCR court’s analysis fall far short of satisfying § 2254 (d)(2).
9 “[S]tate courts are not required to address every jot and tittle of proof suggested to them,
10 nor need they ‘make detailed findings addressing all the evidence before [them].’”
11 *Taylor*, 366 F.3d at 1001 (quoting *Miller–El*, 537 U.S. at 347). The PCR court did not
12 ignore or overlook any highly probative evidence. *Id.* The fact that Petitioner disagrees
13 with the PCR court’s assessment of the evidence does not render the court’s decision
14 unreasonable. *Rice v. Collins*, 546 U.S. at 341–42.

15 The PCR court’s finding that Petitioner was not prejudiced is also reasonable. The
16 most significant proffered evidence in support of this claim are the statements contained
17 in Susan Johnson’s police interview. That report was admitted into evidence during the
18 suppression hearing before Petitioner’s trial (SER 13), and therefore was before the court
19 at Petitioner’s sentencing and resentencing. McVay’s failure to proffer them at
20 resentencing did not prejudice Petitioner.

21 In addition, the judge in the PCR proceedings, Judge James Hancock, also
22 presided over Petitioner’s trial and sentencing. His familiarity with the record provides
23 the Court an additional reason to extend deference to his ruling. *See Smith v. Stewart*, 140
24 F.3d 1263, 1271 (9th Cir. 1998). As the Ninth Circuit explained in *Smith*, when the judge
25 who presided at the post-conviction proceeding was also the trial and sentencing judge,
26 the reviewing court is considerably less inclined to order relief because doing so “might
27 at least approach ‘a looking-glass exercise in folly.’” *Id.* (quoting *Gerlaugh v. Stewart*,
28 129 F.3d 1027, 1036 (9th Cir. 1997)); *see Schurz v. Ryan*, 730 F.3d 812, 816 (9th Cir.

1 2013) (“We are particularly confident in so concluding [that Schurz was not prejudiced
2 by counsel’s performance at sentencing] in light of the fact that the judge who sentenced
3 Schurz already reviewed much of the ‘new’ evidence through the state post-conviction
4 process, and found it insufficient to change the sentence from death.”).

5 **2. Claim 1(B)**

6 Petitioner alleges that McVay was ineffective at resentencing because he failed to
7 investigate and present substantial and readily-available mitigation evidence. (Doc. 273 at
8 40.) Petitioner raised this claim during the PCR proceedings following resentencing, and
9 the PCR court denied it. Petitioner contends that the PCR court’s denial of the claim was
10 based on an unreasonable determination of the facts and constituted an unreasonable
11 application of Strickland. (Doc. 273 at 50.) The Court disagrees.

12 **(a) Facts**

13 At the resentencing hearing McVay presented the testimony of Marc Hammond,
14 the attorney who prosecuted Petitioner in the first trial and sentencing. Hammond
15 testified that he believed the State should not have sought the death penalty because the
16 case was a “run of the mill” murder and did not belong in the same category as other
17 capital murders. (RT 8/27/96 at 15.) Hammond’s co-counsel, Jill Lynch, agreed. (*Id.* at
18 18.) In arguing for the death penalty at trial, Hammond was following the policy of his
19 office. (*Id.* at 15.) Hammond also testified that he believed Susan Johnson was the
20 instigator of the plot and convinced Petitioner to go through with the murder. (*Id.* at 17.)

21 McVay submitted a sentencing memorandum that proffered other mitigating
22 circumstances. (SER 122.) He emphasized that Petitioner was capable of being
23 rehabilitated, based on his lack of a prior record of violence, his periods of productive
24 employment, and his performance as a “model inmate.” (SER 126–28.) McVay noted
25 that Petitioner had been in contact with some of his children and was able to provide
26 parental advice and guidance. (SER 129.) He contended that co-defendant Susan Johnson
27 was the “mastermind” behind the crimes and pushed Petitioner into committing the
28 murder, and that Petitioner’s death sentence was unfair and disproportionate to Johnson’s

1 sentence given their respective roles in the crimes. (SER 128–31.) Finally, McVay argued
2 that the murder represented “aberrant behavior” for Petitioner given the absence of
3 violent or abusive conduct in his record. (SER 131–32.)

4 Petitioner filed a *pro se* sentencing memorandum alleging that he was being
5 tortured by personnel from the Department of Corrections who had inserted
6 “biotelemetry implants” into his brain. (PR doc. 7, Ex. C.) Petitioner also stated that he
7 suffered from Graves’ disease, which reduced his life expectancy. (*Id.*)

8 The trial court again sentenced Petitioner to death, and the Arizona Supreme Court
9 affirmed. Petitioner then returned to the trial court for a second round of PCR
10 proceedings, this time alleging that McVay performed ineffectively at resentencing. (*See*
11 SER 247.) In 2001, the PCR court appointed an investigator and a mitigation expert,
12 Mary Durand. (*Id.*) Durand withdrew and was replaced by Keith Rohman in 2003. (*Id.*)
13 The court denied PCR counsel’s request for the appointment of a neuropsychologist and
14 other experts. However, the court granted Petitioner’s motion for an expert to determine
15 if Petitioner was mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002). The
16 court appointed Dr. Anne Herring, who scored Petitioner with a full scale IQ of 91 and
17 concluded that he was of average general intelligence. (SER 162–64.)

18 Petitioner filed an amended PCR petition on May 2, 2005. (PR doc. 7, Ex. F.) He
19 argued that McVay performed ineffectively by failing to investigate and present evidence
20 of Petitioner’s mental health problems. He also identified a number of other alleged
21 deficiencies, arguing that McVay failed to adequately investigate and present evidence
22 that Petitioner suffered from Graves’ disease/hyperthyroidism; had borderline intellectual
23 functioning and low intelligence; was the product of a multi-generational history of
24 violence and criminality, alcoholism, and substance abuse; experienced an abusive
25 childhood and unstable home-life; suffered serious head injuries and childhood seizures;
26 suffered from Attention Deficit Hyperactivity Disorder and anxiety disorder during
27 childhood and at the time of the crime; lived in poverty and was unable to support
28 himself; was emotionally and psychologically unable to maintain relationships; and was a

1 model prisoner who adjusted to prison life and could be rehabilitated.

2 Attached to the PCR petition was a declaration from mitigation specialist Rohman,
3 which included a 70-page “psycho-social history” of Petitioner and a 70-page “social
4 history chronology.” (PR doc. 3.) Rohman explained that he believed Petitioner displayed
5 “strong indications of mental and physical illnesses,” but acknowledged that he was not
6 qualified to make such diagnoses. (*Id.* at 3.) Rohman stated that a complete picture of
7 Petitioner’s psychological and social makeup was impossible to construct without the
8 assistance of relevant experts. (*Id.*)

9 The court held an evidentiary hearing on November 5, 2007. Petitioner presented
10 two witnesses, counsel McVay and mitigation specialist Rohman. (RT 11/5/07.) McVay
11 testified that during the resentencing proceedings he had retained an investigator to
12 compile mitigation evidence. (*Id.* at 61–62.) He acknowledged, however, that he did not
13 attempt to secure Petitioner’s prison medical or psychological records. (*Id.* at 29, 50–51.)
14 McVay denied that he was “on notice” of Petitioner’s mental health issues, despite
15 having received letters from Petitioner complaining of brain implants. (*Id.* at 28.) McVay
16 testified that from his conversations with Petitioner, he did not “believe there was a
17 founded basis” for requesting Petitioner’s records from the Arizona Department of
18 Corrections. (*Id.* at 29.) He testified that he was skeptical, based on his face-to-face
19 meetings with Petitioner during which Petitioner “seemed mostly rational,” that
20 Petitioner “genuinely believe[d] that he had implants inserted in his body” as described in
21 his letters. (*Id.* at 64.)

22 Petitioner’s medical records showed he had been diagnosed with Graves’ disease
23 and exhibited mental impairments such as paranoia and hallucinations, possibly related to
24 the disease. (*Id.* at 32–33.) McVay conceded that he did not have a strategic basis for
25 failing to review the records, and that if he had known of their contents he would have
26 pursued the issue of Petitioner’s mental health. (*Id.* at 42, 51.)

27 McVay testified that the choices he made in representing Petitioner were based on
28 his conversations with Petitioner, his familiarity with the facts of the case, and

1 information he received from his investigator. (*Id.* at 58.) McVay testified that in his
2 judgment the “most compelling” mitigating information was the prosecutors’ opinion that
3 the death penalty should not have been sought in Petitioner’s case. (*Id.* at 66.) He felt this
4 circumstance “was very compelling because it was so unusual.” (*Id.*)

5 Rohman testified about his mitigation investigation. He explained that in the
6 course of his investigation he interviewed Petitioner’s relatives and secured school
7 records and records from the Department of Corrections. (*Id.* at 81, 121.) The records
8 showed that Petitioner was diagnosed with hyperthyroidism and Graves’ disease in 1988
9 and diagnosed with schizophrenia in 1999, and he reportedly experienced visual and
10 auditory hallucinations and paranoia dating from 1988. (*Id.* at 83, 119.) Rohman testified
11 that the medical literature he reviewed identified a link between Graves’ disease and
12 mental illness. (*Id.* at 92.) Rohman also testified that Petitioner’s school records showed
13 he suffered from symptoms consistent with ADHD. (*Id.* at 121.) Petitioner coped with
14 these conditions by using marijuana on nearly a daily basis from the age of 18. (*Id.* at
15 121.) The records also showed an IQ test from Petitioner’s childhood on which he scored
16 a 74. (*Id.* at 102.)

17 Rohman admitted that he was not qualified to offer an opinion on whether
18 Petitioner suffered from any of these conditions at the time of the crimes. (*Id.* at 92–93,
19 146.) He stated that a competent attorney would have retained a psychologist and a
20 medical doctor to examine Petitioner during resentencing. (*Id.* at 96.)

21 Following the hearing the PCR court denied relief in a 30-page order. (SER 241–
22 71.) Judge Hancock found that McVay did not perform deficiently under prevailing
23 professional standards and that Petitioner was not prejudiced. (*Id.*)

24 **(b) Analysis**

25 Petitioner contends that the PCR court’s denial of the claim was based on an
26 unreasonable determination of the facts and constituted an unreasonable application of
27 *Strickland*. (Doc. 273 at 50.) The Court agrees.

1 **i. Determination of Facts**

2 Petitioner makes several arguments in support of his allegation that the PCR
3 court's denial of this claim was based on an unreasonable application of the facts, thereby
4 satisfying § 2254(d)(2). First, citing *Taylor v. Maddox*, 366 F.3d 992, Petitioner contends
5 that the PCR court's denial of funding for a neuropsychologist and other experts led to a
6 defective fact-finding process and thus rendered the court's decision unreasonable. (Doc.
7 273 at 64–65; Doc. 275 at 15.)

8 In *Taylor*, the Ninth Circuit identified a number of procedural flaws which
9 presumptively result in unreasonable factual determinations in state court, including
10 when “the fact-finding process itself is defective,” such as when a state court “makes
11 evidentiary findings without holding a hearing,” misapprehends or misstates a material
12 fact, or ignores evidence that supports the petitioner's claim. 366 F.3d at 1001. The Ninth
13 Circuit has cautioned, however, that “[t]o find the state court's fact finding process
14 defective in a material way, or, perhaps, completely lacking, ‘we must more than merely
15 doubt whether the process operated properly. Rather, we must be satisfied that any
16 appellate court to whom the defect is pointed out would be unreasonable in holding that
17 the state court's fact-finding process was adequate.’” *Hurles*, 752 F.3d at 778 (quoting
18 *Taylor*, 366 F.3d at 1000).

19 Neither the PCR court's factual findings nor its fact-finding process were
20 unreasonable or defective to a degree that would satisfy § 2254(d)(2). The court
21 appointed an investigator and a mitigation expert. The latter compiled records,
22 interviewed witnesses, and prepared a comprehensive report documenting Petitioner's
23 social history and mental health issues. The court also granted Petitioner's motion for the
24 appointment of an expert to determine whether Petitioner was mentally retarded. Finally,
25 the court held an evidentiary hearing. After the hearing Judge Hancock issued detailed
26 findings of fact addressing Petitioner's allegation that McVay performed ineffectively at
27 sentencing.

28 The court's failure to appoint a neuropsychologist did not constitute a defect so

1 material that no reviewing court could hold that the fact-finding process was adequate.
2 The court found that Petitioner “did not make the showing necessary to obtain a
3 neuropsychologist.” The court cited *Ake v. Oklahoma*, 470 U.S. 68, 82–83 (1985), which
4 holds that a defendant is constitutionally entitled to a mental health expert upon a
5 “threshold showing . . . that his sanity is likely to be a significant factor in his defense.”
6 Noting the calculated nature of the crimes, the court found that Petitioner “failed to show
7 that any impairment would carry significant weight in mitigation and failed to show that
8 impairment as alleged would play a significant role in his defense against the death
9 penalty.” (SER 251.) The court’s application of *Ake* to deny funding for a
10 neuropsychologist did not render the fact-finding process defective. The court granted an
11 evidentiary hearing on Petitioner’s ineffective assistance of counsel claim and appointed
12 a mitigation specialist who gathered evidence of Petitioner’s mental health issues.⁸

13 Petitioner also argues that the court’s factual findings were unreasonable with
14 respect to the various categories of mitigating evidence proffered by PCR counsel
15 because the court “ignored compelling evidence that went to the heart of [the] claim.”
16 (*See, e.g.*, Doc. 273 at 68, 69.)

17 The court found that Petitioner’s hyperthyroidism, mental illness, and borderline
18 IQ did not contribute to the crime and were inconsistent with the rational and calculating
19 way the conspiracy and murder were carried out. With respect to hyperthyroidism, the
20 court found:

21 Assuming McVay could have established that White suffered
22 from hyperthyroidism when he murdered Johnson and that

23 ⁸ It is not clear that the appointment of a neuropsychologist would have led to
24 significant new mitigating information about Petitioner’s condition at the time of the
25 crimes. In 2009, during these habeas proceedings, Petitioner was evaluated by a
26 neuropsychologist, Dr. Kenneth Benedict. Dr. Benedict opined that it was “highly likely”
27 Petitioner “manifested the symptoms of a primary attention disorder as a young child.”
28 (Doc. 277-2, Ex. 3 at 1.) With respect to Petitioner’s schizophrenia, Dr. Benedict, while
noting that “determining the onset of psychosis is speculative at best in Mr. White’s
case,” opined that Petitioner “was quite likely showing at least intermittent and
prodromal signs of psychosis prior to the crime.” (*Id.* at 3.) Finally, Dr. Benedict found
evidence of brain dysfunction and neuropsychological deficits which led him to diagnose
Petitioner with Cognitive Disorder, Not Otherwise Specified. (*Id.*, Ex. 4 at 8.) Dr.
Benedict further noted a “remote history of head trauma, although the relevance of this
history is not clear.” (*Id.*)

1 such condition produced symptoms of anxiety, delusions, or
2 paranoia, this Court would have concluded that such
3 symptoms did not contribute to his conduct. This Court would
4 have considered hyperthyroidism in mitigation but would
5 have afforded it little weight and still would have imposed the
6 death penalty.

7 (SER 259.)

8 The court reached similar conclusions with respect to evidence of Petitioner's
9 mental illness. The court found the following facts:

10 White corresponded with McVay discussing torture at the
11 hands of DOC personnel, the use of "biotelemetry implants,"
12 and other unusual matters.

13

14 McVay questioned whether White truly believed the
15 accusations he made in correspondence.

16 White behaved normally and rationally during face-to-face
17 meetings with McVay . . . and did not mention the topics
18 about which he wrote and did not show any outward
19 symptoms of mental illness.

20 (SER 259–60.) Based on these facts the court made the following conclusions of law:

21 McVay was not required under *Strickland* to request White's
22 mental health records absent some suggestion that they might
23 contain information with mitigating value.

24 McVay acted reasonably in deciding to concentrate on other
25 areas of mitigation.

26 White has failed to show prejudice under *Strickland* because
27 had McVay presented evidence of mental illness, this Court
28 would have considered the same; however, such mental
illness would have been afforded little weight by this Court—
White's conduct was rational and calculating and he was
clearly aware of his conduct and the wrongfulness thereof.
White's mental illness, if any, would not have been
sufficiently substantial to call for leniency.

(SER 260–61.)

Petitioner asserts that the court's findings were unreasonable because the court overlooked or discounted evidence that psychological manifestations of his mental and

1 physical conditions—including insomnia, disorganized thinking, paranoia, erratic
2 behavior, mood swings, anxiety, grandiose illusions, delusional thoughts, and irrational
3 judgment—likely affected his behavior during the crime. (*See* Doc. 273 at 68–69.)

4 The argument that the court ignored this evidence is unpersuasive. Judge Hancock
5 specifically stated that even if the effects of the conditions had been proved, he would not
6 have attached significant mitigating weight to them because the facts of the crime
7 demonstrated that Petitioner behaved in a rational and calculated manner in carrying out
8 the conspiracy to murder Johnson.

9 The court likewise considered Petitioner’s arguments concerning McVay’s failure
10 to present evidence of Petitioner’s alleged intellectual impairment, drug use, family
11 violence, poverty, ADHD, and head injuries/seizures. (SER 261–63, 264–70.) The court
12 also addressed the allegation that McVay performed ineffectively by failing to argue that
13 Susan Johnson had the greater relative culpability in the crimes and that Petitioner was a
14 model inmate. (SER 263–64, 270.) With respect to each of these mitigating
15 circumstances, the court found that Petitioner could show neither deficient performance
16 nor prejudice.

17 Petitioner has not established that the PCR court unreasonably determined the
18 facts under § 2254(d)(2). The court’s findings were not objectively unreasonable and the
19 fact-finding process was not objectively inadequate.

20 **ii. Application of *Strickland***

21 Petitioner alleges that the PCR court unreasonably applied *Strickland* in
22 determining that McVay’s performance was not deficient. He argues that the court
23 unreasonably held that McVay’s failure to gather records or interview witnesses was
24 “reasonable” or “sound trial strategy” and that McVay did not have a duty to investigate
25 potential evidence absent a suggestion that such evidence would be mitigating. (Doc. 273
26 at 51–54.) Petitioner asserts that McVay’s duty to conduct a reasonable investigation
27 required him to interview relevant witnesses and collect Petitioner’s mental health
28 records, school records, and medical records from jail and prison. (*Id.* at 53–54.) He also

1 argues that McVay’s failure to investigate and present evidence of mental illness as a
2 mitigating factor was particularly unreasonable because he was on notice of Petitioner’s
3 mental health issues. (*Id.* at 54–55.)

4 The PCR court found that “McVay acted reasonably in his belief that the opinions
5 of the prosecutors that White should not have received the death penalty was [sic] the
6 most compelling mitigation available.” (SER 258.) The court further found that “McVay
7 was not required under *Strickland* to request White’s mental health records absent some
8 suggestion that they might contain information with mitigating value.” (SER 260.)

9 The PCR court concluded that McVay acted within prevailing professional
10 standards by retaining an investigator to gather mitigating evidence and by focusing his
11 argument on the prosecutors’ view that this should not have been a death penalty case.
12 This Court, applying the doubly deferential standard required by *Strickland* and the
13 AEDPA, finds that the PCR court’s decision was not an unreasonable application of
14 clearly established federal law under § 2254(d)(1).

15 Petitioner asserts that the PCR court’s application of *Strickland* was unreasonable
16 because “[a]ny decision McVay made not to conduct a mitigation investigation was per
17 se unreasonable.” (Doc. 273 at 51–52.) As Respondents note, this argument misconstrues
18 *Strickland*. In *Strickland* the Court explained:

19 strategic choices made after less than complete investigation
20 are reasonable precisely to the extent that reasonable
21 professional judgments support the limitations on
22 investigation. In other words, counsel has a duty to make
reasonable investigations or to make a reasonable decision
that makes particular investigations unnecessary.

23 466 U.S. at 690–91. The Court did not prescribe a set of rules applicable to every capital
24 sentencing.⁹

25 Under *Strickland*, a court deciding an ineffectiveness claim “must judge the

26 ⁹ In *Strickland*, defense counsel did not conduct an investigation, speak to character
27 witnesses, seek a psychiatric evaluation of his client, or present any mitigating evidence
28 at sentencing. 466 U.S. at 672–73. Counsel instead focused on the defendant’s emotional
distress at the time of the crime and his acceptance of responsibility. *Id.* at 699. The
Supreme Court concluded that this was “a strategy choice . . . well within the range of
professionally reasonable judgment.” *Id.*

1 reasonably of counsel’s challenged conduct on the facts of the particular case, viewed
2 as of the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690. Here, McVay
3 represented Petitioner at resentencing before the same judge who had presided over
4 Petitioner’s trial and initial sentencing, and who had denied Petitioner’s request for a
5 Rule 11 competency examination. The judge had already considered, and found
6 insufficiently mitigating, evidence of Petitioner’s social history, including his difficult
7 family background, past substance abuse, and inability to form relationships. The Arizona
8 Supreme Court had independently reviewed these circumstances and reached the same
9 conclusion. *White I*, 168 Ariz. at 512, 815 P.2d at 881.

10 There is a “reasonable argument” that McVay “satisfied *Strickland*’s deferential
11 standard.” *Richter*, 562 U.S. at 105. A fairminded jurist could agree with the PCR court
12 that McVay performed competently under prevailing professional norms and under the
13 circumstances of the case.

14 Even if this Court were to find that the PCR court unreasonably applied *Strickland*
15 in its analysis of the deficiency prong, Petitioner would not be entitled to relief because
16 the PCR court’s prejudice analysis was not objectively unreasonable. A fairminded jurist
17 could agree with Judge Hancock that there was not a reasonable probability of a different
18 sentence if McVay had presented the omitted mitigating evidence.

19 Petitioner contends that the court’s prejudice analysis was unreasonable because it
20 did not cumulatively weigh the mitigating circumstances and because it applied the
21 wrong standard under *Strickland*. (Doc. 273 at 55–57.) These arguments are
22 unpersuasive.

23 In his order denying the PCR petition, Judge Hancock considered and rejected
24 each of Petitioner’s allegations that McVay performed ineffectively at resentencing.
25 Having found neither deficient performance nor prejudice with respect to any of the
26 omitted mitigating evidence, the PCR court did not unreasonably apply clearly
27 established federal law by failing to undertake a separate cumulative prejudice analysis.
28 *Compare Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir. 2004) (finding no cumulative

1 error where petitioner had “not demonstrated prejudice as to the individual claims” of
2 ineffective assistance of counsel) *with Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir.
3 1995) (finding cumulative prejudice based on 11 instances of deficient performance).

4 Petitioner argues that the PCR court applied the wrong standard for assessing
5 prejudice. Petitioner cites the court’s statements that Petitioner “failed to establish
6 prejudice under *Strickland* by showing a reasonable probability that this Court would
7 have imposed a life sentence” if McVay had presented the omitted mitigating evidence.
8 Petitioner contends that this standard is improperly “outcome determinative.” (Doc. 273
9 at 56–57.)

10 The PCR court applied the proper standard. In *Strickland* the Court rejected the
11 “outcome-determinative standard,” which would require a showing that “counsel’s
12 deficient conduct more likely than not altered the outcome in the case.” 466 U.S. at 693.
13 The Court instead defined prejudice as “a reasonable probability that, but for counsel’s
14 unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.
15 That is the standard the PCR court used when it found there was not a “reasonable
16 probability” that it would have imposed a life sentence if McVay had presented the
17 mitigating evidence.

18 Judge Hancock considered all of the evidence presented by Petitioner during the
19 PCR proceedings. This included the information gathered by Rohman documenting
20 Petitioner’s Graves’ disease and schizophrenia, as well as the other categories of
21 mitigating evidence omitted during resentencing. While Rohman was not qualified to
22 opine whether Petitioner suffered from the symptoms of mental illness at the time of the
23 crimes, Judge Hancock ruled that even if the circumstances had been proved he would
24 not have found them sufficiently substantial to call for leniency.

25 Petitioner’s new mitigating evidence isn’t “reasonably likely” to have made an
26 impact at sentencing, nor does its omission undermine confidence in the outcome of the
27 sentencing. *Strickland*, 466 U.S. at 694. Judge Hancock, who sentenced and resentenced
28 Petitioner, reviewed the additional mitigating evidence, including the information about

1 Petitioner’s mental illness and Grave’s disease, and “found it insufficient to change the
2 sentence from death.” *Schurz*, 730 F.3d at 816; *see Smith*, 140 F.3d at 1271; *Gerlaugh*,
3 129 F.3d at 1036. Under these circumstances, to find that Petitioner was prejudiced by
4 resentencing counsel’s performance, this Court would simply be substituting its judgment
5 for that of the sentencer.

6 **3. Conclusion**

7 Applying the doubly deferential standard of *Strickland* and the AEDPA, the Court
8 finds there is a reasonable argument that McVay’s performance satisfied *Strickland*’s
9 deferential standard. Petitioner has not shown the PCR court’s ruling was “so lacking in
10 justification that there was an error . . . beyond any possibility for fairminded
11 disagreement.” *Richter*, 562 U.S. at 103.

12 **4. Evidentiary Development**

13 Petitioner seeks evidentiary development of Claim 1, including expansion of the
14 record and an evidentiary hearing. (Doc. 273.) However, because the state court ruled on
15 the merits of this claim, and because § 2254(d) precludes relief, Petitioner is not entitled
16 to evidentiary development. *Pinholster*, 131 S. Ct. at 1411.

17 **B. Claim 4**

18 Petitioner alleges that the trial court denied his constitutional rights by improperly
19 admitting prejudicial hearsay statements. (Doc. 273 at 82.) Citing *Chambers v.*
20 *Mississippi*, 410 U.S. 284, 298 (1973), Petitioner alleges that the state court’s evidentiary
21 rulings rendered his “trial fundamentally unfair and deprived him of due process of law.”
22 (*Id.* at 82.) He asserts that the Arizona Supreme Court’s “adjudication of these claims was
23 unreasonable in light of Supreme Court precedent.” (*Id.*)

24 Claim 4 consist of several subclaims. Petitioner alleges that the court violated his
25 due process and confrontation rights by admitting co-conspirator statements without
26 providing Petitioner’s proposed instruction on the jury’s role in determining the
27 admissibility of the statements. (*Id.* at 83–87.) He also alleges that his due process rights
28 were violated when the court allowed testimony that Petitioner was a bigamist. (*Id.* at

1 88.) Finally, he alleges that the cumulative effect of the evidentiary errors violated his
2 Fifth and Fourteenth amendment rights to a fair trial. (*Id.* at 89–90.)

3 Respondents contend that the claims were not properly exhausted on direct appeal
4 because Petitioner did not allege violations of federal constitutional law. (Doc. 275 at 38–
5 45.) The Court agrees.

6 To exhaust state remedies, a petitioner must “fairly present” his claims to the
7 state’s highest court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526
8 U.S. 838, 848 (1999). A claim is “fairly presented” if the petitioner describes the
9 operative facts and the federal legal theory on which his claim is based. *Anderson v.*
10 *Harless*, 459 U.S. 4, 63 (1982). A state prisoner does not fairly present a federal claim in
11 state court unless he specifically indicates that the claim was based on federal law. *See,*
12 *e.g., Lyons v. Crawford*, 232 F.3d 666, 669–70 (2000), *as amended by* 247 F.3d 904 (9th
13 Cir. 2001) (explaining that a general reference to insufficiency of evidence, right to be
14 tried by impartial jury and ineffective assistance of counsel lacked the specificity and
15 explicitness required to present federal claim); *Shumway v. Payne*, 223 F.3d 982, 987–88
16 (9th Cir. 2000) (finding “naked reference” to due process insufficient to present federal
17 claim). A petitioner must make the federal basis of a claim explicit by citing specific
18 provisions of federal statutory or case law, *Gatlin v. Madding*, 189 F.3d 882, 888 (9th
19 Cir. 1999), or by citing state cases that explicitly analyze the same federal constitutional
20 claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). As the
21 Supreme Court stated in *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) (per curiam), “If
22 a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied
23 him the due process of law guaranteed by the Fourteenth Amendment, he must say so,
24 not only in federal court, but in state court.”

25 On direct appeal, Petitioner alleged only that the trial court erred in admitting the
26 statements and testimony under Arizona Rules of Evidence 801(d)(2)(E) and 404(b).
27 (SER 64–70.) He did not allege violations of federal law. (*Id.*) He did not cite federal
28 statutory or case law, or make even a “naked reference” to a violation of his federal

1 constitutional rights. (*Id.*) Therefore, the claims are procedurally defaulted. *Coleman v.*
2 *Thompson*, 501 U.S. 722, 732 (1991).

3 Petitioner does not attempt to show cause and prejudice for the default, or a
4 fundamental miscarriage of justice. (*See* Doc 276 at 29.) Therefore, Claim 4 is barred
5 from federal review. *See Coleman*, 501 U.S. at 750 (“[F]ederal habeas review of the
6 claims is barred unless the prisoner can demonstrate cause for the default and actual
7 prejudice as a result of the alleged violation of federal law, or demonstrate that failure to
8 consider the claims will result in a fundamental miscarriage of justice.”).

9 **C. Claim 5**

10 Petitioner alleges that his sentences violated the Double Jeopardy Clause. (Doc.
11 273 at 90.) The trial court sentenced Petitioner to life without possibility of parole for 25
12 years on the conspiracy conviction and imposed the death sentence for the first-degree
13 murder conviction. The court ordered that if Petitioner’s death sentence were reduced to
14 life imprisonment, the sentences would be served consecutively. (SER 26.)

15 Petitioner argues that because the trial court instructed the jury on aiding and
16 abetting, the definition of which “overlaps” with that of conspiracy, he was “subjected to
17 multiple punishments (life and death) for the same offense—conspiracy to commit first-
18 degree murder and first-degree murder under accomplice-liability theory.” (Doc. 276 at
19 30.)

20 Petitioner raised this claim on direct appeal. (SER 70–71.) The Arizona Supreme
21 Court rejected it, explaining:

22 There is only a problem if the defendant is punished twice for
23 the same offense. Because we have upheld the death penalty
24 in this case, that is defendant’s sole punishment. If we had
25 reduced the punishment from death to life, we might have had
26 a problem of two statutes, conspiracy and aiding and abetting,
27 being used to punish one crime twice. That is not the case
28 here and we need not answer the question.

27 *White I*, 168 Ariz. at 509, 815 P.2d at 878.

28 Petitioner contends that this decision was contrary to or an unreasonable

1 application of clearly established federal law and based on an unreasonable determination
2 of the facts. (Doc. 273 at 90.)

3 Respondents, citing *Blockburger v. United States*, 284 U.S. 299 (1932), argue that
4 the convictions and sentences do not violate double jeopardy because conspiracy to
5 commit murder and first-degree murder each require proof of an additional fact that the
6 other does not. (Doc. 275 at 46.) In *Blockburger* the Court held that “[t]he applicable rule
7 is that, where the same act or transaction constitutes a violation of two distinct statutory
8 provisions, the test to be applied to determine whether there are two offenses or only one,
9 is whether each provision requires proof of a fact which the other does not.” 284 U.S. at
10 304; see *United States v. Arlt*, 252 F.3d 1032, 1039 (9th Cir. 2001) (“What is
11 determinative under the Court’s double jeopardy doctrine is simply whether the statutes
12 involved require satisfaction of the same statutory elements, or whether each statute
13 requires proof of an element that the other does not.”).

14 The elements of first-degree murder and conspiracy to commit first-degree murder
15 do not overlap. First-degree murder requires a killing; conspiracy does not. Conspiracy
16 requires an agreement; first-degree murder does not. Moreover, contrary to Petitioner’s
17 argument, conspiracy and aiding and abetting are not identical offenses. Again,
18 conspiracy requires proof of an agreement. Aiding and abetting does not require an
19 agreement. See *Evanchyk v. Stewart*, 202 Ariz. 476, 480, 47 P.3d 1114, 1118 (2002)
20 (“We have held that responsibility as a conspirator is different from accomplice
21 liability.”) (citing *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 500, 844 P.2d 1147, 1150
22 (1992).

23 There was no double jeopardy violation, and the Arizona Supreme Court’s denial
24 of the claim was neither contrary to nor an unreasonable application of clearly established
25 federal law.

26 Petitioner also contends that the Arizona Supreme Court’s decision was based on
27 an unreasonable determination of the facts because the court erroneously stated that the
28 death sentence was Petitioner’s “sole punishment.” (Doc. 273 at 19; Doc. 276 at 31.) The

1 court's statement was not an error entitling Petitioner to relief. Because the death
2 sentence was upheld, the two sentences were not to be served consecutively, and
3 Petitioner was not punished twice for the same offense.

4 Claim 5 is denied.

5 **D. Claim 6**

6 Petitioner alleges that his due process rights were violated when the Arizona
7 Supreme Court refused to provide funding for a mental health evaluation. (Doc. 273 at
8 93.) Petitioner raised this claim on direct appeal and the Arizona Supreme Court rejected
9 it.

10 Prior to filing his opening brief, Petitioner moved the Arizona Supreme Court to
11 remand the case to the trial court for a determination of whether Petitioner was competent
12 to assist counsel in preparing the direct appeal. The court denied the motion.

13 Appellate counsel addressed this issue again in his opening brief. (SER 72–73.) He
14 asserted that Petitioner “was denied due process of law” when the court denied his
15 motion for a competency evaluation. (*Id.* at 72.) The Arizona Supreme Court rejected the
16 claim. *White I*, 168 Ariz. at 509, 815 P.2d at 878. The court first noted that Petitioner
17 conceded that his appeal should proceed even if he were found incompetent and that
18 Petitioner “appears to raise the issue only to establish the groundwork for possible post-
19 conviction relief.” *Id.*

20 Next, the court reasoned that “[s]uspending the appeal would preclude this court
21 from considering even the most clearly reversible or prejudicial error until the defendant
22 regained competency.” *Id.* The court quoted the *ABA Criminal Justice Mental Health*
23 *Standards* (1989), *Standard 7–5.4(c)*, which provides that: “Mental incompetence of the
24 defendant *during the time of appeal* shall be considered adequate cause, upon a showing
25 of prejudice, to permit the defendant to voice, *in a later appeal or action for*
26 *postconviction relief*, any matter not raised on the initial appeal because of the
27 defendant’s incompetence.” *Id.* (emphasis added in opinion). The court also noted that
28 convicted defendants typically do not participate in appellate proceedings so their

1 competence does not affect the fairness of the decision. *Id.*

2 Petitioner alleges that the Arizona Supreme Court’s ruling was contrary to and an
3 unreasonable application of clearly established federal law and based on an unreasonable
4 determination of the facts. (Doc. 273 at 93.) Respondents counter that the claim is
5 procedurally defaulted and barred because Petitioner failed to cite a federal basis for the
6 claim in state court. (Doc. 275 at 47.) Respondents also argue that the claims fails on the
7 merits because there is no clearly established federal law holding that there is a
8 constitutional right to competence during direct appeal. (*Id.* at 47–48.) Both arguments
9 are well taken.

10 First, Petitioner’s appellate brief contained only a “naked reference” to a denial of
11 due process of law. *Shumway*, 223 F.3d at 987. This was insufficient to present a federal
12 claim to the Arizona Supreme Court. *Id.* Therefore the claim is procedurally defaulted
13 and barred from federal review. The claim is also meritless, because there is no United
14 States Supreme Court law holding that a defendant’s due process rights are violated if his
15 direct appeal proceeds while he is incompetent.

16 Citing *Procunier v. Martinez*, 416 U.S. 396 (1974), Petitioner asserts that his
17 inability to communicate rationally with appellate counsel constituted a denial of access
18 to the courts. (Doc. 273 at 95–96.) *Martinez* held that under the Due Process Clause,
19 “[r]egulations and practices that unjustifiably obstruct the availability of professional
20 representation or other aspects of the right of access to the courts are invalid.” 416 U.S. at
21 419 (holding that prison may not bar law students and paralegals employed by lawyers
22 from visiting prisoner clients); see *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding
23 that “the fundamental constitutional right of access to the courts requires prison
24 authorities to assist inmates in the preparation and filing of meaningful legal papers by
25 providing prisoners with adequate law libraries or adequate assistance from persons
26 trained in the law”). Petitioner cites no support for the proposition that these right-of-
27 access cases extend to a right to competence on appeal.

28 In *Rohan*, 334 F.3d at 809, abrogated by *Gonzales*, 133 S. Ct. 696, the Ninth

1 Circuit observed that while the “capacity to communicate remains a cornerstone of due
2 process at trial,” the “constitutional scope” of the “right to competence *after* trial . . .
3 remains unsettled.” *Rohan* held that death row prisoners pursuing habeas relief had a
4 *statutory* right to competence, arising from their statutory right to federally-funded
5 counsel. *Id.* at 813. In *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009), the court extended
6 that right to habeas appeals. The Supreme Court, however, held that there was no such
7 statutory right. *Gonzales*, 133 S. Ct. 696. The Court found no support for a right to
8 competence in the text of the statute or in the Court’s constitutional precedents
9 interpreting the Sixth Amendment. *Id.* at 702–03. The Court also noted that “[g]iven the
10 backward-looking, record-based nature of most federal habeas proceedings, counsel can
11 generally provide effective representation to a habeas petitioner regardless of the
12 petitioner’s competence.” *Id.* at 704.

13 In *Hill v. Mitchell*, No. 1:98-cv-452, 2013 WL 1345831, at *74 (S.D. Ohio March
14 29, 2013), the district court discussed *Rohan* and *Nash* (prior to their abrogation in
15 *Gonzales*) when considering a habeas petitioner’s claim that he was incompetent during
16 his direct appeals. After noting that a criminal defendant has a due process right to be
17 competent for his trial under *Pate v. Robinson*, 383 U.S. 375, 378 (1966), and *Dusky v.*
18 *United States*, 362 U.S. 402 (1960), the court addressed “the issue of whether a criminal
19 defendant enjoys a constitutional right to be competent during direct appeal.” *Id.* at *75.
20 The court concluded that the case law “militates against a finding that criminal
21 defendants enjoy a right to competency during direct appeal.” *Id.* at *76. The court
22 explained:

23 The same reasoning that implies a right to competence from a
24 right to counsel during trial and even on collateral attack does
25 not support a right to competence during direct appeal. What
26 distinguishes a trial and collateral attack from a direct appeal,
27 with respect to a need for the accused to be competent, is the
28 nature and extent of participation by the accused that is
required. To be clear, at the heart of the right to competency
is the need for an accused to be able to communicate with his
or her counsel and assist with his or her defense. Because
information vital to an accused’s defense often resides
exclusively in his or her mind, it is essential to his
fundamental right to a fair trial that he or she be able to

1 communicate and interact with his or her counsel. A direct
2 appeal, by contrast, is confined to the record and as such,
3 would logically not require any information unknown to
4 anyone but the defendant.

4 *Id.*¹⁰

5 State courts have reached the same conclusion. In *People v. Kelly*, 1 Cal.4th 495,
6 545, 822 P.2d 385, 413, 3 Cal.Rptr.2d 677, 705 (1992), the California Supreme Court,
7 citing *White I*, rejected the defendant’s argument that “his right to ‘meaningful appellate
8 review’ and right to the effective assistance of counsel under the state and federal
9 Constitutions preclude proceeding with the appeal if he is incompetent.” The court
10 explained: “The issues on appeal are limited to the appellate record. An appeal involves
11 only legal issues based on that record. Attorneys do not need to rely on the defendant
12 himself to decide what issues are worthy of pursuit.” *Id.* (citations omitted).

13 The decision of the Arizona Supreme Court was neither contrary to nor an
14 unreasonable application of clearly established federal law because there is no Supreme
15 Court precedent setting forth a right to competence during a criminal defendant’s direct
16 appeal. Claim 6 is denied as procedurally barred and meritless.

17 **E. Claim 7**

18 Petitioner alleges that he was denied his right to an impartial jury by the improper
19 death-qualification of the jurors during *voir dire*. (Doc. 273 at 97.) Petitioner raised this
20 claim on direct appeal, arguing “that the practice is illegal and unnecessary because the
21 court decides punishment in Arizona.” *White I*, 168 Ariz. at 509, 815 P.2d at 878. The
22 Arizona Supreme Court denied the claim:

23 We have held that “jury questioning regarding capital
24 punishment is permissible where the questioning determines
25 bias of a nature which would prevent a juror from performing
26 his duty.” In Arizona death penalty cases, the jury determines
27 guilt or innocence, while the death sentence is solely the trial
28 judge’s responsibility. The focus of the capital punishment
voir dire is on the juror’s ability to impartially determine guilt

10 The court also cited *Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007). There, the
Seventh Circuit assumed without deciding the existence of a right to competency during
direct appeal while also noting that “[n]o cases address the issue” of what standard of
competence is required on appeal.

1 or innocence “in accordance with the court’s instructions and
2 the juror’s oath.” Only when the juror’s views about capital
3 punishment “would prevent or substantially impair
4 performance of the juror’s duties” will there be error. Because
5 no juror was so disqualified, we find no error.

6 *White I*, 168 Ariz. at 509–10, 815 P.2d at 878–79 (citations omitted).

7 Petitioner alleges that this ruling was contrary to or an unreasonable application of
8 clearly established federal law and based on an unreasonable determination of the facts.
9 (Doc. 273 at 97–98.) The Court disagrees.

10 First, clearly established federal law holds that the death-qualification process in a
11 capital case does not violate a defendant’s right to a fair and impartial jury. *See Lockhart*
12 *v. McCree*, 476 U.S. 162, 178 (1986); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985);
13 *Adams v. Texas*, 448 U.S. 38, 45 (1980); *see also Ceja v. Stewart*, 97 F.3d 1246, 1253
14 (9th Cir. 1996) (upholding that death qualification of Arizona jurors not inappropriate);
15 *Bible v. Schriro*, 497 F.Supp.2d 991, 1046 (D. Ariz. 2007).

16 Petitioner contends that the Arizona Supreme Court’s decision was an
17 unreasonable determination of the facts because it found that no juror was improperly
18 disqualified. *White I*, 815 P.2d at 878. Petitioner notes that juror Huffman, who stated
19 that she opposed the death penalty but believed she could be impartial (RT 6/29/88 at
20 125–26), was struck by the State, and asserts that her removal violated *Witherspoon v.*
21 *Illinois*, 391 U.S. 510, 521–22 (1968).

22 The Arizona Supreme Court did not err in stating that *Witherspoon* prohibits only
23 the “for cause” exclusion of jurors who express scruples against the death penalty.
24 *Witherspoon*, 391 U.S. at 522; *see e.g., Bowles v. Secretary for Dept. of Corrections*, 608
25 F.3d 1313, 1316 (11th Cir. 2010); *Dennis v. Mitchell*, 354 F.3d 511, 525–26 (6th Cir.
26 2003). The State used a peremptory strike to remove Huffman. (*See* RT 12/15/95 at 17.)
27 Because she was not removed for cause, there was no *Witherspoon* violation.

28 Claim 7 is denied.

F. Claims 8–10

Petitioner alleges that the failure of counsel and the trial court to ensure that all

1 bench conferences were recorded violated his right to a public trial, Claim 8, and
2 hindered his right to appeal, Claim 10. (Doc. 273 at 99, 103.) In Claim 9, Petitioner
3 alleges that his right to be present during his trial was violated by the court’s failure to
4 ensure his presence at bench conferences and *in camera* proceedings. (*Id.* at 101.)

5 Petitioner raised these claims in his first PCR proceeding. (SER 92–96.) The court
6 denied them without explanation. (SER 121.) Although they were denied summarily, it is
7 presumed that the state court denied the claims on the merits. *Richter*, 562 U.S. at 99
8 (“When a federal claim has been presented to a state court and the state court has denied
9 relief, it may be presumed that the state court adjudicated the claim on the merits in the
10 absence of any indication or state-law procedural principles to the contrary.”). When a
11 state court denies a claim without explanation, a federal court applying § 2254 “must
12 determine what arguments or theories supported or, as here, could have supported” it, and
13 then “must ask whether it is possible fairminded jurists could disagree that those
14 arguments or theories are inconsistent with the holding in a prior decision of this Court.”
15 *Id.* at 102.

16 For the reasons set forth below, the Court will deny these claims.

17 **1. Claims 8 and 10**

18 In Claim 8, Petitioner states that during his trial more than 25 bench conferences
19 were unrecorded. (Doc. 273 at 100.) He alleges that these omissions from the record
20 violated his Sixth Amendment right to a public trial. (*Id.*) In Claim 10, he alleges that the
21 failure to record the conferences deprived him of “a meaningful appeal because it was
22 impossible for the Arizona Supreme Court to conduct its independent review” and that
23 “the review of his death sentence and now his habeas petition is incomplete.” (Doc. 273
24 at 104.)

25 Petitioner cites *Waller v. Georgia*, 467 U.S. 39 (1984), in support of his claim that
26 he was deprived of a public trial. *Waller* does not suggest that Petitioner’s right to an
27 open trial was violated by the court’s failure to record the bench conferences.

28 In *Waller* the Supreme Court held that the Sixth Amendment right to a public trial

1 extended to a suppression hearing. The Court explained that “the explicit Sixth
2 Amendment right of the accused is no less protective of a public trial than the implicit
3 First Amendment right of the press and public. The central aim of a criminal proceeding
4 must be to try the accused fairly.” *Id.* at 46. A public trial facilitates fairness for a
5 defendant by “ensuring that judge and prosecutor carry out their duties responsibly.” *Id.*;
6 *see Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (explaining that a public trial
7 benefits the accused because “the public may see he is fairly dealt with and not unjustly
8 condemned, and . . . the presence of interested spectators may keep his triers keenly alive
9 to a sense of their responsibility and to the importance of their functions”) (quotations
10 omitted). A public trial also “encourages witnesses to come forward and discourages
11 perjury.” *Waller*, 467 U.S. at 46.

12 *Waller* held that these objectives are frustrated if a suppression hearing is closed to
13 the public. *Id.* at 47. The Court explained that the outcome of the suppression hearing
14 may determine the outcome of the trial and noted that “a suppression hearing often
15 resembles a bench trial: witnesses are sworn and testify, and of course counsel argue their
16 positions. The outcome frequently depends on a resolution of factual matters.” *Id.*
17 Moreover, “[t]he accused in a suppression hearing also routinely attacks the conduct of
18 the police and the prosecutor, which should be subject to public scrutiny.” *United States*
19 *v. Norris*, 780 F.2d 1207, 1210 (5th Cir. 1986).

20 The concerns addressed in *Waller* are not implicated by the failure to record the
21 bench conferences in Petitioner’s trial. Non-public exchanges between the court and
22 counsel on legal or administrative matters “do not hinder the objectives which the Court
23 in *Waller* observed were fostered by public trials.” *Id.*; *see Rovinsky v. McKaskle*, 722
24 F.2d 197, 201 (5th Cir. 1984) (“Sidebar conferences in which the defendant’s counsel
25 participates without objection do not violate the right to a public trial.”). In contrast to a
26 hearing on a suppression motion, a bench conference serves no fact-finding purpose. *Id.*
27 “A routine evidentiary ruling is rarely determinative of the accused’s guilt or innocence.
28 Also, such evidentiary rulings ordinarily pose no threat of judicial, prosecutorial or public

1 abuse that a public trial is designed to protect against.” *Id.* at 1210–11.

2 There was no violation of Petitioner’s right to a public trial. The PCR court’s
3 denial of this claim was not “so lacking in justification that there was an error well
4 understood and comprehended in existing law beyond any possibility for fairminded
5 disagreement.” *Richter*, 562 U.S. at 103. Claim 8 is denied.

6 In Claim 10, Petitioner contends that his right to appeal was hindered by the trial
7 court’s failure to record bench conferences. When a state chooses to provide for appellate
8 review, the state must provide a defendant with “a record of sufficient completeness to
9 permit proper consideration of [his] claims” in order to satisfy the constitutional
10 guarantees of due process and equal protection. *Mayer v. City of Chicago*, 404 U.S. 189,
11 193–94 (1971) (citation and internal quotations omitted); *see Britt v. North Carolina*, 404
12 U.S. 226, 227 (1971) (“there can be no doubt that the State must provide an indigent
13 defendant with a transcript of prior proceedings when that transcript is needed for an
14 effective defense or appeal”) (citations omitted). A record of sufficient completeness
15 “does not translate automatically into a complete verbatim transcript.” *Mayer*, 404 U.S.
16 at 194. Whether a transcript is needed for an effective defense or appeal depends on: “(1)
17 the value of the transcript to the defendant in connection with the appeal or trial for which
18 it is sought, and (2) the availability of alternative devices that would fulfill the same
19 functions as a transcript.” *Britt*, 404 U.S. at 433–34.

20 The Ninth Circuit, while noting that “[t]here is no Supreme Court or Ninth Circuit
21 authority on the due process implications of a state court’s failure to record portions of a
22 criminal trial,” has held that the *Britt* criteria apply in evaluating a habeas petitioner’s
23 claim that the reconstruction of unrecorded portions of state trial court proceedings was
24 inadequate for him to make an effective appeal. *Madera v. Risley*, 885 F.2d 646, 648 (9th
25 Cir. 1989).

26 “Petitioner has the burden of establishing prejudice from the lack of a complete
27 transcript in light of the alleged value of the transcript and the availability of alternatives
28 that would fulfill the same functions.” *Id.* at 648–49; *see Scott v. Elo*, 302 F.3d 598, 604

1 (6th Cir. 2002) (explaining that “federal habeas relief based on a missing transcript will
2 only be granted where the petitioner can show prejudice”); *White v. State of Florida,*
3 *Department of Corrections*, 939 F.2d 912, 914 (11th Cir. 1991) (“[I]n a federal habeas
4 corpus case brought by a state prisoner, the absence of a perfect transcript does not
5 violate due process absent a showing of specific prejudice”).

6 Beyond the conclusory statement that he was deprived of a meaningful appeal,
7 Petitioner does allege that he was prejudiced by the absence of a transcript of the bench
8 conferences. He highlights the “omission from the record of any transcript involving the
9 exercise of all twenty peremptory challenges” (Doc. 273 at 104), but offers no suggestion
10 as to why the omitted transcript is prejudicial. He has not met his burden of showing
11 prejudice from the incomplete trial transcript. *See Madera*, 885 F.2d at 648 (indicating a
12 petitioner must identify a “tenable theory” as to the appealable error that would be found
13 in the missing transcript); *Scott*, 302 F.3d at 605 (finding no prejudice where petitioner
14 offered only “gross speculation of error in the missing portion of the transcript”).

15 The PCR court’s denial of this claim was not “so lacking in justification that there
16 was an error well understood and comprehended in existing law beyond any possibility
17 for fairminded disagreement.” *Richter*, 562 U.S. at 103. Claim 10 is denied.

18 **2. Claim 9**

19 Petitioner states that he was excluded from more than 40 conferences at the bench
20 and in chambers, and at only one of these conferences is there a record of counsel
21 waiving Petitioner’s presence. (Doc. 273 at 101.) He alleges that his absence from these
22 conferences violated his Confrontation Clause and due process rights. (*Id.*)

23 A criminal defendant’s constitutional right to be present at all stages of his trial
24 derives from the Confrontation Clause of the Sixth Amendment and is protected by the
25 Due Process Clause where the defendant does not actually confront the witness against
26 him. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (citing *Illinois v. Allen*, 397 U.S.
27 337 (1970)). A defendant has a due process right to be present at a proceeding when his
28 presence has a reasonably substantial relation to his opportunity to present a defense. *Id.*

1 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934), *overruled in part on other*
2 *grounds by Malloy v. Hogan*, 378 U.S. 1 (1964)); *see Kentucky v. Stincer*, 482 U.S. 730,
3 745 (1987). The Court has emphasized that the “privilege of presence is not guaranteed
4 ‘when presence would be useless, or the benefit but a shadow.’” *Stincer*, 482 U.S. at 745
5 (quoting *Snyder*, 291 U.S. at 106–07). Rather, a defendant has the right to be present only
6 “to the extent that a fair and just hearing would be thwarted by his absence.” *Id.*
7 Violations of the right to be present are subject to harmless error analysis. *Rushen v.*
8 *Spain*, 464 U.S. 114, 119 n.2 (1983); *see Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir.
9 2005) (en banc).

10 The majority of instances cited by Petitioner consist of bench conferences attended
11 by his counsel to discuss evidentiary issues such as relevance and foundation. (*See* RT
12 7/1/88 at 542–43; RT 7/7/88 at 830.) Petitioner does not indicate how his presence at
13 these conferences would have been beneficial or how his absence thwarted the fairness of
14 his trial. *See Gagnon*, 470 U.S. at 527 (explaining respondents “could have done nothing
15 had they been at the conference, nor would they have gained anything by attending”); *see*
16 *also United States v. Vasquez*, 732 F.2d 846, 848–49 (11th Cir. 1984) (finding that bench
17 conference attended by defense counsel to discuss evidentiary matter was not critical
18 stage of trial proceedings at which defendant had a right to be present).

19 The other incident Petitioner cites involved defense counsel’s renewed request to
20 excuse a juror. (*See* RT 7/11/88 at 1264–65.) On the second day of trial, the juror
21 expressed concern that she might recognize Petitioner. In the presence of counsel the
22 court discussed the matter with the juror. She stated she could not be sure she recognized
23 Petitioner; she thought it was unlikely, but if she did recognize him it was not on a
24 “personal basis.” (RT 6/30/88 at 325.) She also stated that she believed she could be fair
25 even if she had seen Petitioner before the trial. (*Id.* at 325–26.) The court denied
26 counsel’s motion to remove the juror. (*Id.* at 329.)

27 During an *in camera* meeting at the close of the State’s case, defense counsel
28 again requested that the juror be excused and the court again denied the motion. (RT

1 7/11/88 at 1264–65.) Petitioner asserts that his “presence would have been important to
2 support the factual basis of the motion on how the juror knew [him].” (Doc. 273 at 102.)
3 This argument fails because there is no indication that the juror actually knew Petitioner.
4 Moreover, if the two were acquainted Petitioner could have informed counsel of that fact
5 at any point during his trial. Petitioner’s attendance at the *in camera* meeting was not
6 required for counsel to support his renewed motion to excuse the juror. *See Stincer*, 482
7 U.S. at 747 (finding no due process violation when the trial court conducted *in camera*
8 hearing, in the absence of the defendant but in the presence of his attorney, to determine
9 whether the children he was accused of molesting were competent to testify at trial);
10 *Gagnon*, 470 U.S. at 527 (finding no violation when the court held conference,
11 unattended by the defendants and most of their attorneys, to question juror).

12 Because Petitioner’s presence at any of the conferences identified in his petition
13 would not have been useful in ensuring a more reliable determination of any of the
14 matters at issue in his trial, *Stincer*, 482 U.S. at 745, the PCR court’s denial of this claim
15 was not “so lacking in justification that there was an error well understood and
16 comprehended in existing law beyond any possibility for fairminded disagreement.”
17 *Richter*, 562 U.S. at 103.

18 **G. Claims 13 and 14**

19 In Claim 13, Petitioner alleges that the trial court violated his Eighth Amendment
20 and due process rights by improperly considering victim impact statements. (Doc. 273 at
21 105.) In Claim 14, he alleges that his due process rights and right to a fair sentencing
22 were violated when the presentence officer noted that the crime was committed in an
23 especially heinous manner. (Doc. 273 at 107.) Petitioner raised the claims during his first
24 PCR proceedings, and they were summarily denied. Petitioner is not entitled to relief.

25 **1. Claim 13**

26 Petitioner alleges that his rights were violated because the trial court, both at the
27 initial sentencing and at resentencing, received information indicating that the victim’s
28

1 family and friends recommended Petitioner be sentenced to death.¹¹

2 In *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Supreme Court held that the
3 introduction of a victim impact statement to a capital sentencing jury violated the Eighth
4 Amendment. In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the Supreme Court
5 revisited *Booth* and overruled it in part, holding that the Eighth Amendment does not
6 erect a per se barrier to the admission of victim impact evidence but leaving intact
7 *Booth's* prohibition on the admission of characterizations and opinions from the victim's
8 family about the crime, the defendant, or the appropriate sentence. *Id.* at 830 n.2.

9 Under Arizona law at the time of Petitioner's trial, however, the trial judge, rather than a
10 jury, determined the penalty in a capital case. In *Gulbrandson v. Ryan*, 738 F.3d 976,
11 995–96 (9th Cir. 2013), the Ninth Circuit rejected the petitioner's *Booth* claim, finding
12 that there was no clearly established federal law directly addressing the question of
13 whether a judge, as opposed to jury, is prohibited from considering victim impact
14 evidence. The court explained:

15 We previously recognized this distinction in *Rhoades v.*
16 *Henry*, 638 F.3d 1027 (9th Cir. 2011), where we held that
17 *Booth's* concern that victim impact statements would
18 “inflare the jury” is “not the same when . . . a judge does the
19 sentencing.” *Id.* at 1055. As we have explained, courts “must
20 assume that the trial judge properly applied the law and
21 considered only the evidence he knew to be admissible.”
22 *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997);
23 *Rhoades*, 638 F.3d at 1055.

24 Accordingly, because there is no Supreme Court case
25 “squarely address[ing] the issue” whether a judge is barred
26 from consideration of such victim impact evidence, it cannot
27 be said that the Arizona Supreme Court unreasonably applied
28 clearly established federal law when it denied Gulbrandson's
Eighth Amendment claim.

29 *Id.* at 966.

30 Moreover, there is no evidence that the trial court, at the initial sentencing or
31 resentencing, disobeyed or misapplied the law by improperly considering the opinions of
32 the victim's family when determining Petitioner's sentence. Nor is there evidence that the

33 ¹¹ The information was contained in the presentence report and in letters from the
34 victim's family and friends. (SER 41, 136–37; RT 12/9/96 at 13–14.)

1 Arizona Supreme Court in its independent review of Petitioner’s sentence improperly
2 considered the victim impact evidence.

3 The PCR court’s denial of this claim was not “so lacking in justification that there
4 was an error well understood and comprehended in existing law beyond any possibility
5 for fairminded disagreement.” *Richter*, 562 U.S. at 103. Claim 13 is denied.

6 **2. Claim 14**

7 Petitioner’s 1988 presentence report listed as a sentencing factor the “[e]specially
8 heinous manner in which the offense was committed.” (SER 45.) Petitioner contends that
9 this information was improper and the trial court’s consideration of the evidence
10 “infected the sentencing proceeding with unfairness,” denying Petitioner’s right to due
11 process. (Doc. 273 at 107–08.)

12 This claim is denied for the reasons set forth above with respect to Claim 13.
13 There is no clearly established federal law governing the claim, judges are presumed to
14 know how to apply the law, and there is no evidence suggesting that the trial court and
15 the Arizona Supreme Court improperly considered the information in reaching their
16 sentencing decisions.

17 **H. Claim 15**

18 Petitioner alleges that counsel Lockwood performed ineffectively at the guilt
19 phase of trial. (Doc. 273 at 108–24.) The claim consists of eight subclaims, four of which
20 (A, B, E, and F) were raised in state court during the first PCR proceedings.¹² With
21 respect to the remaining subclaims (G, H, J, and K), Petitioner contends that their default
22 in state court is excused by PCR counsel’s ineffective performance. Petitioner seeks
23 discovery, expansion of the record, and an evidentiary hearing in support of the claim.
24 (Doc. 277.)

25 **1. Claims 15(A), (B), (E), and (F)**

26 For the reasons explained above, because subclaims A, B, E, and F were raised in
27 Petitioner’s first PCR and denied on the merits, under *Pinholster* Petitioner is not entitled

28 ¹² In his amended petition, Petitioner withdrew Claims 15(C), (D), and (I). (Doc. 273
at 114, 118.)

1 to evidentiary development. Relief is precluded under § 2254(d) because the state court's
2 denial of these claims was neither contrary to nor an unreasonable application of clearly
3 established federal law.

4 Petitioner alleges that trial counsel performed ineffectively by failing to ensure
5 Petitioner's presence at all stages of the proceedings and failing to obtain Petitioner's
6 consent for the absences, Claim 15(A); failing to ensure that all necessary proceedings
7 were recorded, Claim 15(B); failing to object to the presentence report on the grounds
8 that it contained improper victim-impact evidence, Claim 15(E); and failing to object to
9 the presentence report on the grounds that it contained improper information regarding
10 the existence of an aggravating factor not presented by the State, Claim 15(F). (Doc. 273
11 at 108–15.)

12 Petitioner raised these claims during his first PCR proceeding, and the court
13 denied them summarily. (SER 118, 121.) The denial was a ruling on the merits and is
14 entitled to deference under § 2254(d). *Richter*, 562 U.S. at 99.

15 Fairminded jurists could disagree on the correctness of the state court's denial of
16 these claims. *Id.* at 101. For the reasons discussed in the Court's analysis of Claims 8, 9,
17 10, 13, and 14, Petitioner was not prejudiced by counsel's allegedly deficient
18 performance. There is no reasonable probability that the result of the trial or sentencing
19 would have been different if counsel had ensured Petitioner's presence at all bench
20 conferences and in camera proceedings, ensured that such conferences were recorded,
21 and objected to the contents of the pre-sentence report.

22 **2. Claims 15(G), (H), (J), and (K)**

23 As described next, Petitioner is not entitled to evidentiary development on Claims
24 15(G), (H), (J), and (K). The claims are not "substantial" under *Martinez v. Ryan*, 132 S.
25 Ct. 1309 (2012), so their default is not excused. They remain barred from federal review.

26 Federal review is generally not available for a state prisoner's claims when those
27 claims have been denied pursuant to an independent and adequate state procedural rule.
28 *Coleman*, 501 U.S. at 750 (1991). In such situations, federal habeas review is barred

1 unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of
2 justice. *Id.* *Coleman* further held that ineffective assistance of counsel in post-conviction
3 proceedings does not establish cause for the procedural default of a claim. *Id.*

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

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

13 132 S. Ct. at 1320; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (noting that
14 *Martinez* may apply to a procedurally defaulted trial-phase ineffective assistance of
15 counsel claim if “the claim . . . was a ‘substantial’ claim [and] the ‘cause’ consisted of
16 there being ‘no counsel’ or only ‘ineffective’ counsel during the state collateral review
17 proceeding” (quoting *Martinez*, 132 S. Ct. at 1320)).

18 Accordingly, under *Martinez* a petitioner may establish cause for the procedural
19 default of an ineffective assistance claim “where the state (like Arizona) required the
20 petitioner to raise that claim in collateral proceedings, by demonstrating two things: (1)
21 ‘counsel in the initial-review collateral proceeding, where the claim should have been
22 raised, was ineffective under the standards of *Strickland* . . .’ and (2) ‘the underlying
23 ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the
24 prisoner must demonstrate that the claim has some merit.’” *Cook v. Ryan*, 688 F.3d 598,
25 607 (9th Cir. 2012) (quoting *Martinez*, 132 S. Ct. at 1318); *see Clabourne v. Ryan*, 745
26 F.3d 362, 377 (9th Cir. 2014); *Dickens v. Ryan*, 740 F.3d 1302, 1319–20 (9th Cir. 2014)
27 (en banc); *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc).

28 In a series of cases, the Ninth Circuit has provided guidelines for applying
Martinez. The most recent case, *Clabourne*, summarizes the court’s *Martinez* analysis.
To demonstrate cause and prejudice sufficient to excuse the procedural default, a

1 petitioner must make two showings. “First, to establish ‘cause,’ he must establish that his
2 counsel in the state postconviction proceeding was ineffective under the standards of
3 *Strickland*. *Strickland*, in turn, requires him to establish that both (a) post-conviction
4 counsel’s performance was deficient, and (b) there was a reasonable probability that,
5 absent the deficient performance, the result of the post-conviction proceedings would
6 have been different.” *Clabourne*, 745 F.3d at 377 (citations omitted). Determining
7 whether there was a reasonable probability of a different outcome “is necessarily
8 connected to the strength of the argument that trial counsel’s assistance was ineffective.”
9 *Id.* at 377–78. Second, “to establish ‘prejudice,’ the petitioner must establish that his
10 “underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to
11 say that the prisoner must demonstrate that the claim has some merit.” *Id.*

12 Under *Martinez*, a claim is substantial if it meets the standard for issuing a
13 certificate of appealability. *Martinez*, 132 S. Ct. 1318–19 (citing *Miller-El*, 537 U.S. at
14 322). According to that standard, “a petitioner must show that reasonable jurists could
15 debate whether (or, for that matter, agree that) the petition should have been resolved in a
16 different manner or that the issues presented were adequate to deserve encouragement to
17 proceed further.” *Detrich*, 740 F.3d at 1245 (quoting *Miller-El*, 537 U.S. at 336).

18 **(a) Claim 15(G)**

19 Petitioner alleges that Lockwood was ineffective for failing to object to the death
20 qualification of the jury. This claim is clearly without merit. Counsel did not perform
21 ineffectively because a challenge to death qualification of the jury would have been
22 rejected.

23 On direct appeal Petitioner argued that “he was denied his right to an impartial
24 jury because the jurors were ‘death qualified’ during *voir dire*” and that the practice of
25 death qualification “is illegal and unnecessary because the court decides punishment in
26 Arizona.” *White I*, 168 Ariz. at 509, 815 P.2d at 878. As discussed above, the Arizona
27 Supreme Court denied the claim.

28 Because there was no support for the proposition that death qualifying a jury for

1 the guilt phase of trial violated a defendant's rights, and because the Arizona Supreme
2 Court rejected just such a claim, it would have been futile for trial counsel to have
3 challenged the death qualification process. "[C]ounsel's failure to make a futile motion
4 does not constitute ineffective assistance of counsel." *James v. Borg*, 24 F.3d 20, 27 (9th
5 Cir. 1994); *see Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (explaining that "the
6 failure to take a futile action can never be deficient performance"); *Boag v. Raines*, 769
7 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not
8 constitute ineffective assistance.").

9 The claim is not substantial under *Martinez*. Therefore, Petitioner fails to meet the
10 prejudice prong of the cause and prejudice analysis, *see Clabourne*, 745 F.3d at 377, and
11 default of the claim is not excused. Because the claim is defaulted and procedurally
12 barred, Petitioner is not entitled to evidentiary development.

13 **(b) Claim 15(H)**

14 Petitioner alleges that trial counsel was ineffective for failing to *voir dire* the jury
15 panel. (Doc. 273 at 118.)

16 At the time of Petitioner's trial, Rule 18.5(d) of the Arizona Rules of Criminal
17 Procedure provided: "The court shall conduct the *voir dire* examination, putting to the
18 jurors all appropriate questions requested by counsel. The court may in its discretion
19 examine one or more jurors apart from the other jurors. If good cause appears, the court
20 may permit counsel to examine an individual juror."

21 Petitioner contends that there was "good cause" for Lockwood to question the jury
22 because it was a capital case and "counsel could have argued that once the judge began
23 asking death-related questions, he had shown good cause for being able to ask follow-up
24 questions to uncover potential bias." (Doc. 273 at 118.) According to Petitioner,
25 counsel's failure to ask questions "fell below the prevailing performance standards." (*Id.*)

26 Even assuming that counsel's failure to *voir dire* potential jurors constituted
27 deficient performance under *Strickland*, Petitioner does not allege, let alone show, that he
28 was prejudiced by this aspect of counsel's performance. Prejudice exists if counsel fails

1 to question a juror during *voir dire* or move to strike a juror and that juror is found to be
2 biased, because this evinces “a reasonable probability that, but for counsel’s
3 unprofessional errors, the result of the proceeding would have been different.” *Fields v.*
4 *Brown*, 503 F.3d 755, 776 (9th Cir. 2007) (en banc) (quoting *Strickland*, 466 U.S. at
5 694); see *Ruderman v. Ryan*, 484 Fed.Appx. 144, 145 (9th Cir. 2012). Petitioner does not
6 argue that any biased jurors were empaneled.

7 The claim is not substantial under *Martinez*. Therefore, Petitioner fails to meet the
8 prejudice prong of the cause and prejudice analysis, see *Clabourne*, 745 F.3d at 377, and
9 default of the claim is not excused. Because the claim is defaulted and procedurally
10 barred, Petitioner is not entitled to evidentiary development.

11 **(c) Claim 15(J)**

12 Petitioner alleges that Lockwood performed ineffectively by failing to retain and
13 present testimony from a crime-scene expert. (Doc. 273 at 119–23.)

14 The State’s theory of the case was that Petitioner and Susan conspired to kill
15 Susan’s husband, and that Petitioner was the actual shooter. (See RT 7/13/88 at 1444–45,
16 1468.) The lead detective, Gordon Diffendaffer, testified that in his opinion the assailant
17 first shot David from the driveway, closer to the street and away from the carport door.
18 (RT 7/8/88 at 1066.) The State’s theory of the shooter’s position was based on the
19 location of the potato pieces and the trajectory of the shots. (See RT 7/13/88 at 1467–69.)

20 The defense theory was that Petitioner was present at the scene but did not shoot
21 David. (See RT 7/12/88 at 1274.) Petitioner, the only witness Lockwood presented,
22 testified that he exited the back door of the house that led to the carport and saw Susan
23 pointing a gun at David. (*Id.* at 1392–93.) Petitioner testified that he pushed Susan’s arms
24 down in an effort to prevent her from shooting David. (*Id.* at 1394–96.) The gun went off,
25 striking David in the chin. (*Id.* at 1396.)

26 Petitioner alleges that Lockwood was ineffective for failing to call an expert at
27 trial to rebut the opinions of the State’s witnesses and support Petitioner’s version of the
28 shooting. (Doc. 273 at 122.) According to Petitioner, an expert could have explained the

1 shortcomings of the crime-scene investigation, including the fact that the scene was not
2 properly secured, that the photographs taken were not consistent with standard practice,
3 that the crime scene diagram was not drawn to scale, and that evidence was not gathered
4 in accordance with standard practice. (*Id.*) The expert also could have testified that the
5 ballistics, potato residue, and blood spatter evidence showed the shooter was not coming
6 from the street but instead from the rear of the carport near the carport doorway. (*Id.*)
7 According to Petitioner, this testimony would have supported his version of the crime and
8 discredited the State’s witnesses.¹³

9 Respondents counter that Petitioner was not prejudiced by counsel’s performance,
10 because “[e]ven if Lockwood had requested a crime scene expert and the trial court
11 authorized it, there is no reasonable probability that an expert’s opinion would overcome
12 other evidence in the case.” (Doc. 275 at 61–62.) The Court agrees.

13 The evidence at trial was consistent with Petitioner’s role as the shooter. Petitioner
14 bought the murder weapon a month before the killing and sold it two days after the
15 murder. Following Petitioner’s arrest, police searched his vehicle and found a box of .38
16 caliber bullets and a bag of potatoes.

17 Moreover, the victim himself described the shooter as a “man with a mask on”
18 (RT 6/30/88 at 369), and three witnesses saw a male figure running away from the crime
19 scene. (RT 6/29/88 at 179, 181, 193, 210; RT 6/30/88 at 256–57, 302, 398, 413, 486; RT
20 7/7/88 at 880–82, 909.) Based on this evidence, a defense theory identifying Susan as the
21 shooter was not plausible, and Petitioner was not prejudiced by counsel’s failure to
22 advance such a theory through the use of a crime scene expert.

23 The claim is not substantial under *Martinez*. Therefore, Petitioner fails to meet the
24 prejudice prong of the cause and prejudice analysis, *see Clabourne*, 745 F.3d at 377, and
25 default of the claim is not excused. Because the claim is defaulted and procedurally
26 barred, Petitioner is not entitled to evidentiary development.

27 _____
28 ¹³ Petitioner seeks to expand the record with the declaration of crime-scene expert
Lawrence Renner, whose opinion concerning the location of the shooter supports
Petitioner’s trial testimony. (Doc. 277-1, Ex. 9.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(d) Claim 15(K)

Petitioner alleges that the cumulative prejudicial impact of Lockwood’s deficient performance denied his rights under the Sixth and Fourteenth Amendments.

“When an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice.” *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998) (citing *Harris v. Wood*, 64 F.3d 1432, 1438–39 (9th Cir. 1995)); *see Davis*, 384 F.3d at 654 (“It is true that, although individual errors may not rise to the level of a constitutional violation, a collection of errors might violate a defendant’s constitutional rights.”).

Petitioner’s claim of cumulative prejudice is not substantial, however, because, as already discussed, he has not demonstrated prejudice with respect to any of counsel’s alleged deficiencies. *Davis*, 384 F.3d at 654. Counsel’s performance at trial “did not render [Petitioner’s] trial fundamentally unfair.” *Id.*; *see Woods v. Sinclair*, 764 F.3d 1109, 1139 (9th Cir. 2014). Given the overall strength of the State’s case and the overwhelming evidence of Petitioner’s guilt, there was no prejudice from the cumulative effect of Lockwood’s alleged deficiencies. *See Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007).

The claim is not substantial under *Martinez*. Therefore, Petitioner fails to meet the prejudice prong of the cause and prejudice analysis, *see Clabourne*, 745 F.3d at 377, and default of the claim is not excused. Because the claim is defaulted and procedurally barred, Petitioner is not entitled to evidentiary development.

I. Claims 17- 22

Petitioner alleges that the state courts violated his right to a fair sentencing and due process by “failing to consider” several forms of mitigating evidence and by finding that the mitigating circumstances were not sufficiently substantial to call for leniency. The Arizona Supreme Court, on appeal from resentencing, rejected these claims. *White II*, 194 Ariz. at 351–53, 982 P.2d at 826–28.

1 **1. Claim 17**

2 Petitioner alleges that the state courts “failed to consider mitigating evidence from
3 the prosecutor that the co-defendant was the mastermind and failed to give consideration
4 to the disparity between the two sentences.” (Doc. 273 at 130.)

5 On appeal from Petitioner’s first trial and sentencing, the Arizona Supreme Court
6 considered and rejected the disparate sentencing claim:

7 [T]he record establishes a rational basis for the different
8 penalties in this case. The trial judge found that defendant
9 committed the actual killing of David. He also found no
10 mitigating factors sufficient to warrant leniency for
11 defendant. The court, however, did find mitigating factors
12 sufficient to warrant leniency for Susan (no prior criminal
13 record, kind and caring mother, death sentence would be
14 devastating to her six-year-old daughter, potential for
15 violence was minimal, difficult childhood, difficult marriage
16 to Clifford Minter followed by a difficult dissolution).
17 Moreover, the jury foreman wrote to the trial judge following
18 the trial advising him that all twelve jurors recommended
19 leniency for Susan.

20 *White I*, 168 Ariz. at 513–14, 815 P.2d at 882–83.

21 In resentencing Petitioner to death, Judge Hancock directly addressed the issue of
22 disparate sentences as follows: “Mr. White conveniently forgets that he was the
23 triggerman and that he planned, plotted, and executed this killing. . . . I have again
24 considered whether the sentence of your codefendant and your sentence was [sic]
25 fundamentally unfair, inappropriately disparate and a denial of equal protection.” (SER
26 142, 143.)

27 Judge Hancock also stated that he “reviewed the mitigating circumstances in this
28 case” and “considered all relevant facts in determining whether any mitigating
circumstances are present which are sufficiently substantial to call for leniency.” (SER
139–140.) He reiterated that he “reviewed all of the facts of this case to find mitigating
circumstances” and “considered each and every fact raised by [Petitioner].” (SER 143.)

 On appeal from resentencing, the Arizona Supreme Court again rejected
Petitioner’s disparate sentencing claim:

1 Unexplained disparity between the sentences of a defendant
2 and codefendant may be a mitigating factor in a capital case.
3 Where the defendant commits the killing, i.e., actually pulls
4 the trigger, the disparity in sentences as between
5 coconspirators is explained.

6

7 White argues that several common factors militate against
8 disparate sentencing: both he and Susan planned the killing;
9 neither had a prior felony record; imposition of capital
10 punishment would be devastating to children of both; neither
11 has a record of violence; both had a difficult childhood; there
12 is no difference as to culpability; the same aggravator
13 (pecuniary gain) applies to both; and the mitigators are
14 similar. Further, White asserts that the trial court failed to
15 explain the disparity in sentences and took no account of the
16 argument that Susan was the mastermind behind the killing.

17 Little has changed since our decision in *White I*. The nucleus
18 of the new evidence is Hammond's testimony that Susan
19 Johnson was the mastermind. While there are similarities in
20 the evidence as between the defendant and Susan, we agree
21 with Judge Hancock's consideration of the disparate sentence
22 issue.

23

24 Judge Hancock found defendant's disparate treatment
25 argument insufficient as mitigation, as do we. In *State v.*
26 *Jackson*, we held that if disparity in sentences is justified by
27 relative culpability, it receives little, if any weight. 186 Ariz.
28 20, 32, 918 P.2d 1038, 1050 (1996). We find that to be true
here as well.

Accordingly, we conclude that defendant has presented
nothing new that would justify a different posture by the court
on the matter of disparate sentencing. Indeed, nothing of
substance has changed.

White II, 194 Ariz. at 352–53, 982 P.2d 827–28 (citations omitted). The court also gave
“independent consideration to the mitigating factors,” including Susan Johnson's
disparate sentence. *Id.* at 354, 982 P.2d at 829.

Petitioner contends that Arizona Supreme Court's denial of this claim was based
on both an unreasonable determination of the facts and an unreasonable application of
clearly established federal law because the court failed to take into account the
prosecutor's opinion that Susan Johnson was the instigator of the murder and the “brains

1 behind” the plot to kill her husband. (Doc. 273 at 130.) Petitioner asserts that the court
2 failed to consider this evidence in violation of *Tennard v. Dretke*, 542 U.S. 274 (2004),
3 *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978).
4 The Court disagrees.

5 Once a determination is made that a person is eligible for the death penalty, the
6 sentencer must consider relevant mitigating evidence, allowing for “an individualized
7 determination on the basis of the character of the individual and the circumstances of the
8 crime.” *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Therefore, the sentencer in a
9 capital case is required to consider any mitigating information offered by a defendant,
10 including non-statutory mitigation. *See Lockett*, 438 U.S. at 604 (holding that the right to
11 individualized sentencing in capital cases was violated by an Ohio statute that permitted
12 consideration of only three mitigating factors); *Eddings*, 455 U.S. at 113–15 (holding that
13 *Lockett* was violated where state courts refused as a matter of law to consider mitigating
14 evidence that did not excuse the crime). The sentencer must be allowed to consider, and
15 may not refuse to consider, “any aspect of a defendant’s character or record and any of
16 the circumstances of the offense that the defendant proffers as a basis for a sentence less
17 than death.” *Lockett*, 438 U.S. at 604.

18 In *Tennard*, the Supreme Court reiterated that it is not enough simply to allow a
19 defendant to present mitigating evidence; rather, the sentencer must be able to consider
20 and give effect to that evidence. 542 U.S. at 285. Based on that principle, the Court
21 invalidated a “screening test” applied by the Fifth Circuit that required the defendant to
22 prove a “nexus” between mitigating evidence and the offense in order for the evidence to
23 be considered by the sentencer. *Id.*

24 However, while the sentencer must not be foreclosed from considering relevant
25 mitigation, “it is free to assess how much weight to assign such evidence.” *Ortiz v.*
26 *Stewart*, 149 F.3d 923, 943 (9th Cir. 1998). There is no set formula for weighing
27 mitigating evidence, and the sentencer may be given “unbridled discretion in determining
28 whether the death penalty should be imposed after it has found that the defendant is a

1 member of the class made eligible for that penalty.” *Zant v. Stephens*, 462 U.S. 862, 875
2 (1983); see *Kansas v. Marsh*, 548 U.S. 163, 175 (2006) (“[O]ur precedents confer upon
3 defendants the right to present sentencers with information relevant to the sentencing
4 decision and oblige sentencers to consider that information in determining the appropriate
5 sentence. The thrust of our mitigation jurisprudence ends here.”); *Harris v. Alabama*, 513
6 U.S. 504, 512 (1995) (explaining that the Constitution does not require a specific weight
7 to be given to any particular mitigating factor).

8 Petitioner’s sentencing did not violate these principles. Both the trial judge and the
9 Arizona Supreme Court considered Petitioner’s disparate sentencing argument, including
10 his contention that Susan Johnson was the “mastermind” behind the crimes. Because the
11 state courts considered all of the mitigating evidence, there was no constitutional
12 violation.

13 First, Judge Hancock expressly stated that he had “considered” all of Petitioner’s
14 proffered mitigating factors, including Petitioner’s disparate sentencing argument. (SER
15 139–40, 141–42.) This statement is dispositive of Petitioner’s claim. See *Parker v.*
16 *Dugger*, 498 U.S. 308, 314–15 (1991) (“We must assume that the trial court considered
17 all [mitigating] evidence before passing sentence. For one thing, he said he did.”);
18 *(George) Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007) (explaining that “a court
19 is usually deemed to have considered all mitigating evidence where the court so states”);
20 *Moormann v. Schriro*, 426 F.3d 1044, 1055 (9th Cir. 2005) (“This court may not engage
21 in speculation as to whether the trial court actually considered all the mitigating evidence;
22 we must rely on its statement that it did so.”).

23 Next, the Arizona Supreme Court in its independent review did not exclude
24 Petitioner’s mitigating evidence from consideration. Instead, the court explicitly gave
25 “independent consideration to the mitigating factors,” including Susan Johnson’s
26 disparate sentence. *White II*, 194 Ariz. at 354, 982 P.2d at 829. The fact that the courts
27 found that the disparate sentences were warranted by Petitioner’s role as the triggerman
28 does not violate *Lockett*, *Eddings*, or *Tennard*. Again, there is no constitutional

1 requirement that the sentencer assign proffered mitigating evidence any particular weight.
2 *See Harris*, 513 U.S. at 512; *Marsh*, 548 U.S. at 175; *Williams v. Stewart*, 441 F.3d 1030,
3 1057 (9th Cir. 2006) (“We have recognized a distinction between a failure to consider
4 relevant evidence and a conclusion that such evidence was not mitigating.”).

5 Moreover, contrary to Petitioner’s argument, the decisions of the state courts were
6 not based on an unreasonable determination of the facts. There was sufficient evidence
7 for the courts to conclude it was Petitioner who shot and killed David Johnson.

8 **2. Claim 18**

9 Petitioner alleges that the state courts failed to consider his possible rehabilitation
10 as a mitigating circumstance. (Doc. 273 at 133.)

11 Again, the record clearly shows that the trial court and the Arizona Supreme Court
12 considered rehabilitation as a mitigating circumstance. At resentencing, Petitioner argued
13 that the court should consider his potential for rehabilitation as a mitigating circumstance,
14 and at the mitigation hearing Petitioner testified that he had no problems while
15 incarcerated and was not involved in any gang activity. (RT 8/27/96 at 32–33.) In his
16 special verdict, Judge Hancock noted that Petitioner “has had no difficulties since his
17 confinement at the state prison—he has tried to be a model inmate.” (SER 141.) The
18 judge also specifically considered “the defendant’s belief that he can be rehabilitated.”
19 (*Id.*) He concluded, however, that the “mitigating circumstances are insufficient to
20 warrant leniency.” (SER 144.)

21 The Arizona Supreme Court also considered the rehabilitation mitigating factor,
22 but found that it had not been proved:

23 We agree that Arizona recognizes the potential for
24 rehabilitation as a mitigating factor. There appears no clear
25 test under Arizona law as to how a defendant might
26 demonstrate ability to be rehabilitated. In cases in which this
27 court has substantively discussed the rehabilitation factor,
28 defendants have offered evidence of potential for
rehabilitation in the form of expert testimony. None was
offered here. Defendant’s own testimony is not sufficient.
Judge Hancock considered defendant’s testimony on the
potential for rehabilitation and found it to be insufficient to
carry the burden of proof. We, too, have considered the
defendant’s testimony and find no reason to disturb Judge

1 Hancock's finding. The defendant thus fails to establish the
2 factor by a preponderance of the evidence.

3 *White II*, 194 Ariz. at 351, 982 P.2d at 826 (citations omitted).

4 Petitioner contends that the Arizona Supreme Court mischaracterized the trial
5 court's ruling and erred by finding that Petitioner did not prove the rehabilitation factor.
6 The fact that Judge Hancock did not state that Petitioner failed to meet his burden of
7 proof on the factor does not render the Arizona Supreme Court's rejection of the claim
8 contrary to or an unreasonable application of clearly established federal law. As
9 discussed above, the clearly established federal law governing this claim includes *Lockett*
10 and *Eddings*, which require a sentencer to consider and give effect to all proffered
11 mitigation but do not direct a sentencer to consider the evidence in specific manner or
12 assign it a specific weight. Because the state courts did consider Petitioner's
13 rehabilitation argument, § 2254(d) precludes relief.

14 3. Claim 19

15 Petitioner alleges that the state courts violated his right to equal protection of the
16 law by imposing a harsher sentence on him than on Susan Johnson when the only
17 significant difference between the defendants was their gender. (Doc. 273 at 135.) The
18 Arizona Supreme Court rejected this claim on direct appeal from resentencing. *White*
19 *II*, 194 Ariz. at 354, 982 P.2d at 829.

20 Clearly established federal law holds that "a defendant who alleges an equal
21 protection violation has the burden of proving 'the existence of purposeful
22 discrimination'" and must demonstrate that the purposeful discrimination "had a
23 discriminatory effect" on him. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (quoting
24 *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). Therefore, to prevail on his equal
25 protection argument, Petitioner "must prove that the decisionmakers in *his* case acted
26 with discriminatory purpose." *Id.* Petitioner does not meet this burden because he and
27 Susan Johnson were not similarly situated.

28 The Arizona Supreme Court ruled that "[e]vidence justifying disparate treatment,

1 for reasons other than gender, is clear on this record.” *White II*, 194 Ariz. at 354, 982
2 P.2d at 829. Specifically, the court noted that “the defendant and Susan were not
3 similarly situated for the clear reason that White alone pulled the trigger that resulted in
4 David Johnson’s death.” *Id.* at 353, 982 P.2d at 828.

5 In addition, Judge Hancock and the Arizona Supreme Court both rejected
6 Petitioner’s argument that he and Susan Johnson were similarly situated because they
7 were both caring parents. As the Arizona Supreme Court explained:

8
9 Judge Hancock’s review of the evidence did not lead to a finding
10 that White is a “caring father.” Arizona law offers no clear test establishing
11 the requirements of a “caring father” (or “caring mother”). Renewing
12 contact and helping his daughter from prison is not the equivalent of
13 “caring father.” His own testimony demonstrates that of his six children he
14 had no contact or association with the three youngest and of the other three
15 he had very limited contact.

16 *Id.* at 353–54, 982 P.2d at 828–29.

17 Petitioner contends that the court “unreasonably discounted” this mitigating
18 evidence on the basis of his gender. (Doc. 273 at 137.) However, he offers no support for
19 this allegation.

20 Finally, in a further distinction between the defendants, all 12 jurors in Susan
21 White’s case recommended leniency. *White I*, 168 Ariz. at 514, 883 P.2d at 883.

22 Petitioner and Susan Johnson were not similarly situated. The Arizona Supreme
23 Court considered Petitioner’s equal protection argument and the supporting evidence and
24 rejected the claim. This decision was neither contrary to nor an unreasonable application
25 of clearly established federal law. Claim 19 is denied.

26 **4. Claim 20**

27 Petitioner alleges that the courts failed to consider the mitigating circumstance that
28 the crime was “aberrant behavior.” (Doc. 273 at 139.)

At resentencing, Petitioner asked the trial court to find, as a mitigating
circumstance, that the killing of David Johnson represented aberrant behavior on

1 Petitioner’s part. (SER 131–32.) In support of this argument, Petitioner pointed to his
2 lack of a prior felony record or any record of abusive or violent behavior. (*Id.*) Judge
3 Hancock acknowledged this aspect of Petitioner’s record, along with his good behavior
4 as an inmate, but rejected the aberrant behavior argument as “nonsensical.” (SER 143.)
5 The Arizona Supreme Court, noting that the concept was created by the Ninth Circuit in
6 response to what it viewed as overly-rigid federal sentencing guidelines, held that
7 “[t]here is no Arizona authority for ‘aberrant behavior’ as a mitigating factor, and we
8 decline to adopt the doctrine on the facts of this case.” *White II*, 194 Ariz. at 352, 982
9 P.2d at 827. The court also explained that under federal caselaw interpreting the doctrine,
10 “even were we to accept [aberrant behavior] as a mitigator, defendant’s behavior in the
11 instant case would not qualify as ‘aberrant behavior’ for purposes of nonstatutory
12 mitigation.” *Id.* at 351, 982 P.2d at 826. The lack of a prior record is not synonymous
13 with a criminal act being “aberrant behavior,” and in Petitioner’s case the murder was
14 planned out and motivated by financial gain. *Id.* at 352, 982 P.2d at 826 (citing *United*
15 *States v. Green*, 105 F.3d 1321, 1323 (9th Cir. 1997)).

16 The Arizona Supreme Court’s decision was not contrary to or an unreasonable
17 application of clearly established federal law. By declining to apply the concept of
18 “aberrant behavior,” the state courts did not, as Petitioner contends, fail to consider
19 relevant mitigating evidence. To the contrary, Judge Hancock and the Arizona Supreme
20 Court considered all of the factors that formed the basis of Petitioner’s aberrant behavior
21 claim, including the fact that Petitioner had experienced no difficulties since his
22 confinement and attempted to be a model prisoner, had re-established contact with his
23 children and assisted one of his daughters, and had accepted that he would spend the rest
24 of his life in prison. *White II*, 194 Ariz. at 351, 982 P.2d at 826.

25 Claim 20 is denied.

26 **5. Claim 21**

27 Petitioner alleges that he was denied his right to a fair sentencing when the
28 Arizona Supreme Court found that the prosecutors’ opinion that Petitioner should not

1 have been sentenced to death was insufficient as a mitigating circumstance to outweigh
2 the sole aggravating factor. (Doc. 273 at 140.) In his special verdict Judge Hancock stated
3 that the “opinion of Marc Hammond is irrelevant, carries no weight and is not a fact in
4 this case supporting a mitigating circumstance. The opinion of Jill Lynch is equally
5 irrelevant.” (SER 142.) The Arizona Supreme Court held that Judge Hancock erred in
6 finding the prosecutors’ recommendations irrelevant but nonetheless upheld the death
7 sentence:

8 The defendant is correct that Judge Hancock’s statement is
9 inconsistent with prevailing authority. The prosecutor’s
10 opinion is relevant and should have been considered by the
11 trial judge. But the opinions of Hammond and Lynch were
12 merely opinions. We have independently weighed these
13 statements as factors of mitigation, both separately and
14 cumulatively, and conclude they are easily outdistanced by
15 White’s and Susan Johnson’s premeditated scheme to murder
16 David Johnson and thereby reap the benefits of his life
17 insurance. This is an expectation of pecuniary gain in the
18 most classic sense. It is akin to murder for hire.

19 We reaffirm the principle that a recommendation for leniency
20 given by authorities intimately connected with the case
21 should be considered by the sentencer as a nonstatutory
22 mitigating factor, and we are mindful of the argument by our
23 dissenting colleagues on this point, but in our view the
24 financial gain factor on this record is so abundantly clear and
25 forceful that the opinion of the prosecutor is grossly
26 insufficient to warrant a change in sentence under A.R.S. §
27 13-703.01.

28 *White II*, 194 Ariz. at 350–51, 982 P.2d at 825–26 (citations omitted).

 Petitioner contends that the Arizona Supreme Court, by describing the pecuniary
gain aggravating factor as “so abundantly clear and forceful,” assigned the factor more
weight than it was entitled to. (Doc. 273 at 142.) He argues that the court’s “heightened
treatment of the pecuniary gain aggravator had a detrimental impact on its consideration
of all other mitigating circumstances,” including the opinion of the prosecutor. (*Id.*)
Petitioner contends, “If the prosecutor’s opinion were given appropriate weight and
considered jointly with the other mitigation evidence, it should certainly have been
sufficient to call for leniency when compared to the sole, weak aggravating factor.” (*Id.*)

1 The manner in which the Arizona Supreme Court balanced the aggravating factor
2 against the mitigating evidence does not entitle Petitioner to habeas relief. Petitioner’s
3 interpretation of the court’s analysis is unconvincing. In characterizing pecuniary gain as
4 a “clear” and “forceful” aggravating factor, the Arizona Supreme Court simply described
5 the weight it assigned the factor in comparison to the prosecutor’s opinion. *White II*, 194
6 Ariz. at 350–51, 982 P.2d at 825–26. Petitioner disagrees with the court’s assessment of
7 the factor, but that assessment did not prevent the court from considering and giving
8 effect to any of the mitigation evidence. As described above, the sentencer may be given
9 “unbridled discretion in determining whether the death penalty should be imposed after it
10 has found that the defendant is a member of the class made eligible for that penalty.”
11 *Zant*, 462 U.S. at 875; *see Marsh*, 548 U.S. at 175; *Harris*, 513 U.S. at 512.

12 Claim 21 is denied.

13 **6. Claim 22**

14 Petitioner alleges that the Arizona Supreme Court deprived him of a fair
15 sentencing and due process when it affirmed his death sentence on independent review.
16 (Doc. 273 at 143.) Respondents contend that the court reasonably applied clearly
17 established federal law. (Doc. 275 at 77.)

18 Petitioner argues that in his first appeal the Arizona Supreme Court applied an
19 unconstitutional causal connection test to his mitigation evidence, including evidence of
20 his troubled childhood and history of substance abuse. In *White I*, the court
21 acknowledged that Petitioner “did not know his natural father, that his first stepfather was
22 an alcoholic, and that he was raised by his mother,” but found that Petitioner’s family
23 background was not a mitigating circumstance because Petitioner “failed to show that his
24 family background had anything to do with the murder he committed.” 168 Ariz. at 512–
25 13, 815 P.2d at 881–82. The court noted that Petitioner “stated that he felt he had a
26 normal childhood and enjoyed growing up with his mother and stepbrother.” *Id.* at 513,
27 815 P.2d at 882.

28 The court also found that Petitioner’s “past heroin, cocaine and amphetamine use

1 and addiction is not a mitigating circumstance. Use of drugs is a mitigating circumstance
2 only if the evidence shows that the drugs significantly impaired [Petitioner's] capacity to
3 appreciate the wrongfulness of his conduct or to conform his conduct to the requirements
4 of the law at the time of the offense." *Id.* (citation omitted). The court noted that
5 Petitioner "admitted that he has not used these drugs within the last ten years and that
6 drugs were not a factor in the current offense." *Id.*

7 At resentencing the trial court "considered the following facts in mitigation . . . the
8 defendant's natural father left home when defendant was 18 months old and defendant's
9 first stepfather was an alcoholic; the defendant has dependent personality traits and
10 admits to past heroin, cocaine and amphetamine abuse and addiction." (SER 141.)

11 In his opening brief in his second direct appeal, Petitioner specifically asked the
12 Arizona Supreme Court to consider as mitigating circumstances his difficult family
13 background and the other factors raised in his first direct appeal. (ROA 5 at 36.)¹⁴ The
14 Arizona Supreme Court in *White II* did not specifically address these circumstances.
15 Therefore, according to Petitioner, the Arizona Supreme Court implicitly relied on the
16 findings and conclusions from *White I* and failed to consider the evidence of a troubled
17 childhood and substance abuse as mitigating circumstances. (Doc. 273 at 145; Doc. 276
18 at 55.) The Court disagrees.

19 As the Arizona Supreme Court explained, in reviewing Petitioner's sentence it
20 "must . . . consider nonstatutory mitigators, including any aspect of the defendant's
21 character or any circumstance of the offense relevant to determining whether a capital
22 sentence is too severe." *White II*, 194 Ariz. at 349, 982 P.2d at 824 (citing A.R.S. § 13-
23 703(G) and *Lockett*, 438 U.S. at 604).¹⁵ The fact that the court did not expressly cite
24 Petitioner's family background or drug use does not indicate that its decision violated

25 ¹⁴ "ROA" refers to the record on appeal from resentencing (Case No. CR-96-716-
26 AP).

27 ¹⁵ Section 13-703(G) provides: "Mitigating circumstances shall be any factors
28 proffered by the defendant or the state which are relevant in determining whether to
impose a sentence less than death, including any aspect of the defendant's character,
propensities or record and any of the circumstances of the offense, including but not
limited to the following [enumerated statutory mitigating factors]."

1 *Lockett* or *Eddings*. A sentencer “is not required to ‘itemize and discuss every piece of
2 evidence offered in mitigation.”” *Williams*, 441 F.3d at 1057 (quoting *Jeffers v. Lewis*, 38
3 F.3d 411, 418 (9th Cir. 1994) (en banc). “It is sufficient that a sentencing court state that
4 it found no mitigating circumstances that outweigh the aggravating circumstances.”
5 *Poland v. Stewart*, 117 F.3d 1094, 1101 (9th Cir. 1997) (citing *Parker v. Dugger*, 498
6 U.S. 308, 318 (1991)).

7 In *Allen v. Buss*, 558 F.3d 657, 667 (7th Cir. 2009), the Seventh Circuit held that
8 the state supreme court did not clearly err in finding that the trial court properly
9 considered evidence concerning the defendant’s childhood. The trial court’s sentencing
10 order discussed a number of mitigating circumstances but omitted any discussion of
11 Allen’s traumatic childhood. *Id.* The order concluded that the court “finds no other
12 circumstances appropriate for consideration as a mitigating factor.” *Id.* Allen argued that
13 trial court “did not consider (and therefore excluded) his traumatic childhood as an
14 appropriate circumstance for consideration,” in violation of *Eddings*. *Id.* The Seventh
15 Circuit denied habeas relief, explaining that although “the sentencing order is somewhat
16 cryptic, there is no statement in the sentencing order that expressly indicates that the
17 sentencing court ignored Allen’s childhood. Without that, it is plausible that the trial
18 court’s statement—that it found no other circumstances appropriate for consideration as a
19 mitigating factor—means the trial court did not find Allen’s childhood to be a
20 ‘mitigating’ circumstance.” *Id.*

21 In Petitioner’s case, the trial court at resentencing explicitly considered the
22 proffered mitigation evidence of a traumatic childhood and drug abuse. (SER 141.) The
23 Arizona Supreme Court, citing *Lockett*, stated that it had considered “any aspect of the
24 defendant’s character or any circumstance of the offense relevant to determining whether
25 a capital sentence is too severe.” *White II*, 194 Ariz. at 349, 982 P.2d at 824. Nowhere in
26 its opinion does the court state that it refused to consider any mitigating evidence.
27 Because it was sufficient for the Arizona Supreme Court to say that it found no
28 mitigating circumstances that outweighed the aggravating circumstances, Petitioner’s

1 claim of a *Lockett/Eddings* violation is without merit. *Poland*, 117 F.3d at 1101.

2 Petitioner also argues that the Arizona Supreme Court’s independent review of his
3 death sentence was unreasonable because the court failed to weigh all of the mitigating
4 evidence, including evidence of Petitioner’s childhood and his history of substance abuse.
5 (Doc. 273 at 145.) He contends that the court did not perform a cumulative analysis of
6 mitigating circumstances, which also would have included Petitioner’s good behavior and
7 acceptance of life in prison. (*Id.* at 146.)

8 Petitioner’s argument is belied by the Arizona Supreme Court’s opinion, which
9 clearly states that the court weighed the mitigating circumstances cumulatively. The court
10 first explained the process by which it considers mitigating evidence: “If more than one
11 mitigating factor is found, such factors are weighed both separately *and cumulatively*
12 against the evidence of aggravation.” *White II*, 194 Ariz. at 350, 982 P.2d at 825
13 (emphasis added). The court then summarized its analysis in Petitioner’s case:

14 Based on our independent review of the sentence imposed on
15 the defendant we conclude that the state has proved beyond a
16 reasonable doubt the aggravating circumstance that Michael
17 Ray White murdered David Johnson in anticipation of
18 substantial pecuniary gain. We further conclude, in view of
19 the calculated scheme which resulted in Johnson’s death, that
20 the mitigating factors raised by the defendant and discussed in
21 this opinion, whether viewed individually *or cumulatively*, are
22 insufficient to warrant a mitigation of sentence. They neither
23 outweigh nor are they equal to the statutory aggravating
24 circumstance present in this case. Defendant’s capital
25 sentence is therefore affirmed.

26 *Id.* at 356, 982 P.2d at 831 (emphasis added).

27 The decision of the Arizona Supreme Court affirming Petitioner’s death sentence
28 was neither contrary to nor an unreasonable application of clearly established federal law.
Claim 22 is denied.

J. Claim 23

Petitioner alleges that his rights under the Eighth and Fourteenth Amendments
were violated by the policy of the Yavapai County Attorney’s Office to pursue the death

1 penalty in every case where at least one aggravating circumstance may exist. (Doc. 273 at
2 147.)

3 Petitioner raised this constitutional challenge to the policy for the first time on
4 appeal after resentencing. The Arizona Court denied the claim. *White II*, 194 Ariz. at 354,
5 982 P.2d at 829. The court found the claim was waived because Petitioner failed to raise
6 it at his sentencing or during his PCR proceedings. The court also found the claim
7 meritless:

8 It would be inappropriate for this court to encroach on
9 reasonable prosecutorial discretion, absent a clear indication
10 of misconduct. Any one or more aggravating factors may
11 warrant the death penalty as a matter of law. The actual
12 sentencing decision, of course, resides with the court as part
13 of the judicial process, and though the prosecutor may request
14 the death penalty, the court is constitutionally required to
weigh the evidence independently and to disagree with
counsel whenever appropriate. The judicial process, whereby
the aggravators and mitigators are analyzed and evaluated,
normally provides ample protection against overreaching
counsel.

15 *Id.*

16 Respondents contend that this claim is defaulted as waived. (Doc. 275 at 78.)
17 Procedural status aside, the claim is clearly without merit.

18 The decision of the Arizona Supreme Court denying this claim was neither
19 contrary to nor an unreasonable application of clearly established federal law. Prosecutors
20 have wide discretion in making the decision whether to seek the death penalty, see
21 *McCleskey*, 481 U.S. at 296–97, and the Ninth Circuit has rejected the argument that
22 Arizona’s death penalty statute is constitutionally infirm because “the prosecutor can
23 decide whether to seek the death penalty.” *Smith*, 140 F.3d at 1272.

24 Petitioner’s reliance on *Zant v. Stephens and Lowenfield v. Phelps*, 484 U.S. 231,
25 244 (1988), is misplaced. In *Lowenfield* the Court reiterated that “a capital sentencing
26 scheme must ‘genuinely narrow the class of persons eligible for the death penalty and
27 compared to others found guilty of murder.’” 484 U.S. at 244 (quoting *Zant*, 462 U.S. at
28 877). Such a scheme must also provide an “objective, evenhanded, and substantively

1 rational way” for determining whether a defendant is eligible for the death penalty. *Zant*,
2 462 U.S. at 879. Arizona’s sentencing scheme meets these criteria by allowing only
3 specifically enumerated aggravating factors to be considered in determining eligibility for
4 the death penalty. *See Lowenfield*, 484 U.S. at 244 (explaining that the use of specific
5 “aggravating circumstances” is the accepted “means of genuinely narrowing the class of
6 death-eligible persons and thereby channeling the [sentencer’s] discretion”); *Blystone v.*
7 *Pennsylvania*, 494 U.S. 299, 306–07 (1990) (“The presence of aggravating circumstances
8 serves the purpose of limiting the class of death-eligible defendants, and the Eighth
9 Amendment does not require that these aggravating circumstances be further refined or
10 weighed by [the sentencer.]”).

11 The principles announced in these cases do not support Petitioner’s claim. The
12 “concern of the [Supreme] Court has been to limit and channel the discretion of the
13 sentencing body—i.e., the judge or the jury—which actually imposes the sentence in a
14 given case.” *Silagy v. Peters*, 905 F.2d 986, 993 (7th Cir. 1990) (citing *Pulley v. Harris*,
15 465 U.S. 37 (1984)). The prosecutor’s role, by contrast, “is limited to that of initiating the
16 proceedings.” *Id.*

17 Clearly established federal law stands for the proposition that the statutory scheme
18 for imposing a death sentence may not be unguided and arbitrary. Petitioner cites no
19 authority that would extend this principle to limit the discretion of a prosecutor’s office to
20 set policies about when to seek the death penalty. Claim 23 is denied.

21 **K. Claim 24**

22 Petitioner alleges that Arizona’s pecuniary gain aggravating factor violates the
23 Eighth Amendment because it does not genuinely narrow the class of death-eligible
24 offenders. (Doc. 273 at 150.) The Arizona Court rejected the claim. *White II*, 194 Ariz. at
25 355, 982 P.2d at 830. That decision was neither contrary to nor an unreasonable
26 application of federal law. Petitioner relies on the dissent in *White II*, which stated that
27 the “pecuniary gain aggravator covers such a wide range of behavior that it easily lends
28 itself to uneven application.” *Id.* at 356, 982 P.2d at 831 (Zlaket, C.J., dissenting). The

1 Ninth Circuit, however, has rejected the argument that Arizona’s pecuniary gain factor
2 does not genuinely narrow the class of persons eligible for the death penalty. *Williams v.*
3 *Stewart*, 441 F.3d 1030, 1059 (9th Cir. 2006). In *Woratzeck v. Stewart*, 97 F.3d 329, 335
4 (9th Cir. 1996), for example, the Ninth Circuit applied the principles set forth in
5 *Lowenfield*, 484 U.S. at 244, to conclude that Arizona’s pecuniary gain factor
6 “sufficiently channels the sentencer’s discretion.” Claim 24 is denied.

7 **L. Claim 27**

8 Petitioner alleges that “Arizona’s death penalty statute both on its face and as
9 applied is categorically cruel and unusual punishment in violation of the Eighth
10 Amendment.” (Doc. 273 at 152.) He argues that the “Arizona death penalty scheme,
11 taken as a whole, fails to genuinely narrow the class of persons eligible for the death
12 penalty” and that the death penalty “as applied in his case serves neither the goal of
13 retribution nor that of deterrence.” (Id. at 153, 154.)

14 Petitioner raised this claim on appeal from resentencing. (SER 161.) He argued
15 that the “death penalty is cruel and unusual under any circumstances . . . It is also cruel
16 and unusual because it is irrational. It serves no purpose which is not adequately served
17 by life imprisonment.” (Id.) In addressing the claim the Arizona Supreme Court held that
18 Arizona’s death penalty statute “is not cruel and unusual on its face.” 194 Ariz. at 355,
19 982 P.2d at 830. This decision is neither contrary to nor an unreasonable application of
20 clearly established federal law. In *Smith*, 140 F.3d at 1272, the Ninth Circuit rejected the
21 petitioner’s challenges to the constitutionality of Arizona’s death penalty, including
22 allegations that Arizona’s statute “does not properly narrow the class of death penalty
23 recipients.”

24 Petitioner contends that because the Arizona Supreme Court did not address his
25 “as applied” argument, that portion of the claim is entitled to de novo review. (Doc. 273
26 at 152.) Under any standard of review, the claim does not entitle Petitioner to habeas
27 relief. Referring to the social purposes of retribution and deterrence, see *Gregg v.*
28 *Georgia*, 428 U.S. 153, 183 (1976), Petitioner asserts that “[e]mpirical evidence has

1 eroded these two justifications,” and that at the time of Petitioner’s sentencing “neither of
2 these goals were met by the Arizona statute.” (Doc. 273 at 154.) The Supreme Court has
3 not accepted Petitioner’s argument or overruled Gregg. See, e.g., *Hall v. Florida*, 134 S.
4 Ct. 1986, 1992–93 (2014). Claim 27 is denied.

5 **M. Claim 30**

6 Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth
7 Amendment because it does not afford capital defendants an opportunity to voir dire the
8 sentencing authority. (Doc. 273 at 154.) The Arizona Court rejected the claim on direct
9 appeal, ruling that “defendant may not death-qualify the sentencing court.” *White II*, 194
10 Ariz. at 356, 982 P.2d at 831.

11 Petitioner cites “no authority for the proposition that a defendant has a
12 constitutional right to voir dire a judge, let alone to inquire about a judge’s views on the
13 death penalty.” *Atwood v. Schriro*, 489 F.Supp.2d 982, 1059 (D. Ariz. 2007). The rule
14 providing for inquiry into prospective jurors’ views on capital punishment derives from
15 the right to an impartial and unbiased jury under the Sixth and Fourteenth Amendments.
16 See *Morgan v. Illinois*, 504 U.S. 719, 726 (1992). Trial judges are presumed to follow the
17 law. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), overruled on other grounds by *Ring v.*
18 *Arizona*, 536 U.S. 584 (2002); see *State v. Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223,
19 1226 (1987) (explaining that mere possibility of bias or prejudice does not entitle a
20 criminal defendant to voir dire the trial judge at sentencing). Because Petitioner has not
21 shown that he has a constitutional right to voir dire a sentencing judge, the state court’s
22 refusal to recognize such a right is neither contrary to nor an unreasonable application of
23 federal law.

24 **N. Claim 33**

25 Petitioner alleges that Arizona’s capital sentencing statute violates the Eighth
26 Amendment because it does not require the sentencing judge to consider all mitigating
27 evidence cumulatively. (Doc. 273 at 157.) The Arizona Court rejected the claim on direct
28 appeal, explaining that “[w]hile it is true the statute does not require cumulative weighing

1 of mitigators, this court has decreed that such weighing process be conducted.” *White II*,
2 194 Ariz. at 355 n.3, 982 P.2d at 830.

3 In his special verdict Judge Hancock stated, “I have taken into account the
4 aggravating and mitigating circumstances included in this special verdict. . . . I have
5 considered the mitigating circumstances of A.R.S. 13-703(G) and any aspect of Mr.
6 White’s character or record and any and all circumstances of the offense relevant to a
7 determination whether a sentence less than death would be appropriate in this case.”
8 (SER 144.)

9 The Arizona Supreme Court reviewed that decision, noted that the “trial court
10 complied with this court’s mandate with respect to the cumulative effect of the mitigating
11 circumstances,” and found “no reason to disturb the trial court’s findings.” *White II*, 194
12 Ariz. at 355, 982 P.2d at 830. The court also concluded its independent review of the
13 death sentence by finding “the mitigating factors raised by the defendant and discussed in
14 this opinion, whether viewed individually or cumulatively, are insufficient to warrant a
15 mitigation of sentence.” *Id.*

16 Petitioner contends that the Arizona Supreme Court misinterpreted the trial court’s
17 phrase “any and all.” (Doc. 273 at 158.) According to Petitioner, because the phrase
18 applied only to “the circumstances of the offense,” Judge Hancock did not conduct a
19 cumulative analysis of the mitigating circumstances. (*Id.*) This argument fails because
20 Judge Hancock also stated that he had considered “any aspect of Mr. White’s character or
21 record” (SER 144) and because the Arizona Supreme Court undertook an independent
22 cumulative analysis of the mitigating evidence.

23 **O. Claim 46**

24 Petitioner alleges that the State violated his Fifth and Fourteenth Amendment
25 rights pursuant to *Miranda v. Arizona* when officers continued to question him after he
26 asserted his right to an attorney. (Doc. 273 at 159.)

27 Prior to trial Petitioner moved to suppress his statements to law enforcement. After
28 holding a suppression hearing the trial court concluded that proper Miranda warnings

1 were given and that Petitioner “waived his right to an attorney and was not promised any
2 immunity or benefit.” (SER 16.)

3 Petitioner did not raise this claim on direct appeal. Respondents contend that
4 because the claim was not fairly presented in state court, it is procedurally defaulted and
5 barred from federal review. (Doc. 275 at 83.) Petitioner does not contest this argument,
6 and the Court agrees. (Doc. 276 at 69.) Claim 46 is denied as procedurally barred.

7 **P. Claim 50**

8 Petitioner alleges that his due process rights are being violated because the trial
9 court record is incomplete and therefore this Court cannot adequately review the alleged
10 constitutional violations that occurred during his trial and sentencing. (Doc. 273 at 160.)
11 As Respondents note (Doc. 275 at 83), Petitioner did not fairly present this claim on
12 direct appeal in state court, and he does not assert cause and prejudice or a fundamental
13 miscarriage of justice of excuse the default. Claim 50 is procedurally defaulted and
14 barred from federal review.

15 **Q. Claim 51**

16 Petitioner raises for the first time a claim that his right to be free from cruel and
17 unusual punishment would be violated if the State executed him after he spent more than
18 20 years on death row. (Doc. 273 at 162.) The claim is both defaulted and meritless.

19 So-called Lackey claims, named after Justice Stevens’ concurrence in the Supreme
20 Court’s denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J.,
21 respecting denial of certiorari), are not supported by clearly established federal law. “The
22 Supreme Court has never held that execution after a long tenure on death row is cruel and
23 unusual punishment.” *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006). Claim 51 is
24 denied.

25 **R. Claim 53**

26 Petitioner alleges that the errors committed during his trial cumulatively violated
27 his due process rights. (Doc. 273 at 164.) Respondents contend that the cumulative error
28 doctrine is not clearly established federal law. (Doc. 275 at 84.)

1 While there is a circuit split on the question, *see Hooks v. Workman*, 689 F.3d
2 1148, 1194 n.24 (10th Cir. 2012), the Ninth Circuit has held that “the Supreme Court has
3 clearly established that the combined effect of multiple trial errors may give rise to a due
4 process violation if it renders a trial fundamentally unfair, even where each error
5 considered individually would not require reversal.” *Parle*, 505 F.3d at 928. The court
6 explained that “cumulative error warrants habeas relief only where the errors have ‘so
7 infected the trial with unfairness as to make the resulting conviction a denial of due
8 process.’” *Id.* at 927 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see*
9 *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (“Cumulative error applies
10 where, although no single trial error examined in isolation is sufficiently prejudicial to
11 warrant reversal, the cumulative effect of multiple errors may still prejudice a
12 defendant.”).

13 Petitioner is not entitled to relief on this claim. First, the Court has found no
14 individual errors, so there is nothing to accumulate. *See Hayes v. Ayers*, 632 F.3d 500,
15 525 (9th Cir. 2011) (“Because we conclude that no error of constitutional magnitude
16 occurred, no cumulative prejudice is possible.”); *Mancuso*, 292 F.3d at 957 (“Because
17 there is no single constitutional error in this case, there is nothing to accumulate to a level
18 of a constitutional violation.”).

19 In addition, the combined effect of the alleged errors did not have a “substantial
20 and injurious effect or influence on the jury’s verdict” or render Petitioner’s “defense far
21 less persuasive than it might otherwise have been.” *Parle*, 505 F.3d at 927 (quotations
22 omitted); *see Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011). The evidence of
23 Petitioner’s guilt was strong, and any errors were harmless. *See id.* at 928 (“If the
24 evidence of guilt is otherwise overwhelming, the errors are considered ‘harmless’ and the
25 conviction will generally be affirmed.”). Claim 53 is denied.

26 **S. Claim 54**

27 Petitioner alleges that he “is being denied his due process rights and his right to be
28 free from arbitrary punishment by having to litigate his federal habeas proceedings when

1 he is currently incompetent yet restorable.” (Doc. 273 at 165.) Respondents contend, and
2 Petitioner acknowledges, that this is not a cognizable habeas claim because it does not
3 attack Petitioner’s state court judgment as being in violation of the Constitution. (Doc.
4 275 at 85–86; Doc. 276 at 71.) Instead, it is “an equitable claim regarding the
5 fundamental fairness of the instant proceedings and [Petitioner’s] ability to have his
6 conviction and sentence fairly reviewed.” (Doc. 276 at 71.) Petitioner asks the Court to
7 “order the parties to discuss resolving the restoration issue and potential settlement if
8 restoration cannot occur.” (Doc. 273 at 168.)

9 While habeas petitioners do not have a constitutional or statutory right to
10 competence, district courts retain the authority to issue limited competency-based stays.
11 *Gonzales*, 133 S. Ct. at 700, 709. Accordingly:

12 If a district court concludes that the petitioner’s claim could
13 substantially benefit from the petitioner’s assistance, the
14 district court should take into account the likelihood that the
15 petitioner will regain competence in the foreseeable future.
16 Where there is no reasonable hope of competence, a stay is
17 inappropriate and merely frustrates the State’s attempts to
18 defend its presumptively valid judgment.

19 *Id.* at 709.

20 Petitioner contends that his habeas claims could benefit from his assistance. (Doc.
21 273 at 166–67.) The Court disagrees. As previously discussed, under *Pinholster* this
22 Court’s review of claims adjudicated on the merits is limited to the record before the state
23 court. *Pinholster*, 131 S. Ct. at 1398. Petitioner argues that his assistance is necessary for
24 Claims 1 and 15, alleging ineffective assistance of counsel, as well as Claims 8, 10, and
25 50. (Doc. 273 at 167; Doc. 276 at 72.) Each of those claims was adjudicated on the merits
26 in state court. “Any extrarecord evidence that [Petitioner] might have concerning these
27 claims would therefore be inadmissible.” *Gonzales*, 133 S. Ct. at 709.

28 **IV. Certificate of Appealability**

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, an applicant
cannot take an appeal unless a certificate of appealability has been issued by an

1 appropriate judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases
2 provides that the district judge must either issue or deny a certificate of appealability
3 when it enters a final order adverse to the applicant. If a certificate is issued, the court
4 must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2).

5 Under § 2253(c)(2), a certificate of appealability may issue only when the
6 petitioner “has made a substantial showing of the denial of a constitutional right.” This
7 showing can be established by demonstrating that “reasonable jurists could debate
8 whether (or, for that matter, agree that) the petition should have been resolved in a
9 different manner” or that the issues were “adequate to deserve encouragement to proceed
10 further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For procedural rulings, a
11 certificate of appealability will issue only if reasonable jurists could debate whether the
12 petition states a valid claim of the denial of a constitutional right and whether the court’s
13 procedural ruling was correct. *Id.*

14 The Court finds that reasonable jurists could debate its resolution of Claim 1(B).
15 For the reasons stated in this order, the Court finds that reasonable jurists could not
16 debate its resolution of the remaining claims.

17 **V. CONCLUSION**

18 Based on the foregoing,

19 **IT IS ORDERED:**

20 1. That Petitioner’s Motion for Evidentiary Development (Doc. 277) is
21 **DENIED**;

22 2. That Petitioner’s Amended Petition for Writ of Habeas Corpus (Doc. 273)
23 is **DENIED**, and the Clerk of Court shall enter judgment accordingly;

24 3. That the Stay of Execution entered by this Court on October 29, 2008 (Doc.
25 7) is **VACATED**;

26 4. That a Certificate of Appealability is **GRANTED** with respect to Claim
27 1(B), alleging ineffective assistance of counsel at sentencing, and **DENIED** as to the
28 remaining claims; and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. That the Clerk of Court shall forward a courtesy copy of this Order to the Clerk of the Arizona Supreme Court, 1501 West Washington, Phoenix, Arizona 85007-3329.

Dated this 10th day of July, 2015.


Honorable Steven P. Logan
United States District Judge