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

Robert Douglas Smith,)	No. CV-87-234-TUC-JMR
Petitioner,)	<u>DEATH PENALTY CASE</u>
v.)	
Charles L. Ryan, et al.,)	ORDER
Respondents.)	

This case is on limited remand from the Ninth Circuit Court of Appeals, which directed this Court to hold “an evidentiary hearing on the question whether Smith has established cause and prejudice to overcome the procedural default of his sentencing ineffectiveness claim and such other matters as the court may deem appropriate.” *Smith v. Schriro*, No. 96-99025 (9th Cir. Feb. 26, 2009). For the reasons set forth herein, the Court determines that Petitioner has failed to establish cause.

BACKGROUND

The facts of the crimes committed by Petitioner and co-defendant Joe Lambright have been set forth in previous published opinions and will be repeated here only briefly. *See Lambright v. Stewart*, 191 F.3d 1181, 1182-83 (9th Cir. 1999) (en banc); *State v. Lambright*, 138 Ariz. 63, 66-67, 673 P.2d 1, 4-5 (1983).

In early 1980, Petitioner, Lambright, and Kathy Foreman stopped in Arizona on a cross-country trip from Texas to California. Foreman and Lambright were lovers; they

1 frequently engaged in sexual intercourse in Petitioner’s presence. Petitioner complained
2 about not having a woman, and Lambright said he would find someone for Petitioner.
3 Lambright also said he wanted to kill somebody just to see if he could do it.

4 After driving around Tucson looking for hitchhikers, the trio picked up 29-year-old
5 Sandy Kay Owen, who was looking for a ride to a food stamp office. Lambright drove to the
6 office but after arriving jumped into the back seat with Owen and told her to “shut up and be
7 quiet and she wouldn’t get hurt.” (Vol. 3 at 713.)¹ Owen was scared and trembling.
8 Petitioner drove onto a highway toward California. At some point, they stopped to let Owen
9 use the bathroom (after removing her shoes to prevent her from running away in the desert),
10 and Lambright took over driving. According to Foreman, Petitioner then covered the
11 windows and had sex with Owen in the back seat. The group later exited the highway and
12 proceeded on a dirt road to a mountainous area. After parking at the end of the road, they
13 hiked up to a ledge where Lambright and Foreman had sex and Petitioner again had sex with
14 Owen.

15 Afterward, Petitioner began choking Owen. Lambright went over and stabbed her in
16 the chest with Foreman’s knife. Owen collapsed to the ground, and Petitioner and Foreman
17 held down her arms as Lambright continued to stab. Petitioner then grabbed her head and
18 tried to break her neck. That effort having failed, Lambright sawed at Owen’s neck with the
19 knife and then hit her head with a large rock while yelling, “Die, bitch.” (*Id.* at 723.) After
20 covering the body with rocks and driving away, Petitioner asked Foreman to play the song
21 “We are the Champions” by Queen. According to Foreman, Petitioner and Lambright smiled
22 and laughed as they recounted how the victim’s head had bounced when Lambright hit her
23 with the rock.

24 About a year later, law enforcement received a tip about the crime. Petitioner,
25 Lambright, and Foreman were detained and made incriminating statements. Petitioner

26
27 ¹ “Vol.” refers to twelve volumes of sequentially-numbered state court records
28 filed by Respondents. (*See* Dkt. 229.)

1 confessed to abducting Owen and taking her out to the desert to have sex. He claimed Owen
2 said she would do anything with them so long as she was not hurt. He further claimed they
3 talked about knocking Owen out to give them time to get away and that he was going to
4 make her pass out by squeezing her jugular vein. However, Lambright decided “we can’t
5 let her live now.” (Evid. Hr’g Ex. 21 at 2076.)

6 Petitioner and Lambright were tried together but before separate juries; Foreman
7 testified against them in exchange for immunity from prosecution. Both were convicted of
8 first degree murder, kidnapping, and sexual assault, and sentenced to death by Pima County
9 Superior Court Judge Michael J. Brown. Petitioner’s sentence was based on the trial court’s
10 determination that the murder had been committed in an especially cruel, heinous, or
11 depraved manner and that Petitioner had failed to establish mitigating circumstances
12 sufficiently substantial to call for leniency.²

13 At his 1982 trial, Petitioner was represented by Assistant Pima County Public
14 Defender (PCPD) Thomas Hippert. Assistant PCPD Lawrence Fleischman represented
15 Petitioner on appeal. After the Arizona Supreme Court affirmed, *State v. Smith*, 138 Ariz.
16 79, 673 P.2d 17 (1983), Fleischman filed a petition for post-conviction relief (PCR).
17 Pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, this petition was filed with
18 the trial court, which denied relief in 1985. The next year, the Arizona Supreme Court
19 denied a discretionary petition for review.

20 In 1987, Assistant PCPD John Palumbo initiated this federal habeas proceeding. In
21 response to Respondents’ motion to dismiss for failure to exhaust all claims, the Court stayed
22 federal proceedings and Palumbo filed a second state PCR petition on Petitioner’s behalf in
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24 ² At the time of Petitioner’s trial, Arizona law required trial judges to determine
25 the existence of aggravating factors rendering a defendant eligible for capital punishment.
26 The Supreme Court invalidated this aspect of Arizona’s capital sentencing scheme in *Ring*
27 *v. Arizona*, 536 U.S. 584 (2002). However, *Ring* does not apply retroactively to cases such
28 as Petitioner’s that were final at the time it was decided. *Schriro v. Summerlin*, 542 U.S. 348,
358 (2004).

1 1989. The trial court dismissed the petition as procedurally barred, and in 1993 the Arizona
2 Supreme Court summarily denied review. This Court then lifted its stay and directed the
3 filing of an amended petition.

4 In 1994, while briefing on his habeas claims was in progress, Petitioner sent a letter
5 to United States District Court Judge Richard M. Bilby (who at that time presided over this
6 matter) expressing his desire to raise ineffectiveness claims against his PCPD attorneys.
7 (Dkt. 69.) Because the Pima County Public Defender's Office had represented Petitioner
8 throughout his state and federal proceedings, District Judge Bilby concluded this was an
9 issue the Arizona courts should decide and directed Petitioner to return to state court to file
10 a third PCR petition.

11 The state court appointed as counsel Jonathan Young, who filed a petition raising
12 numerous ineffectiveness claims. The court later dismissed the claims as precluded under
13 Rule 32.2(a)(3) because they could have been raised on appeal or in a previous PCR petition,
14 and denied a motion for reconsideration. The Arizona Supreme Court summarily denied
15 review in 1996.

16 Habeas counsel Palumbo then moved in this Court for the appointment of Young as
17 second counsel to supplement the pending federal habeas petition with the newly-exhausted
18 ineffectiveness claims. In his motion, Palumbo stated that he was "legally and ethically
19 prohibited from representing" Petitioner on ineffectiveness allegations against members of
20 his office. District Judge Bilby granted the motion, and Young filed a supplemental habeas
21 petition raising the new claims, the most significant being that trial counsel Hippert had
22 failed to investigate and present at sentencing evidence of Petitioner's mental condition and
23 other mitigating factors.

24 In late 1996, District Judge Bilby denied habeas relief, rejecting Petitioner's claims
25 as either meritless or procedurally barred. (Dkts. 128, 133.) On appeal, the Ninth Circuit
26 reversed as to Petitioner's convictions, finding that the use of dual juries had violated both
27 defendants' constitutional rights. *Lambright v. Stewart*, 167 F.3d 477 (9th Cir. 1999). An
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1 en banc panel of the circuit reversed. *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999)
2 (en banc). On remand, the three-judge panel affirmed Petitioner’s convictions but found that
3 the state court’s procedural bar of his sentencing ineffectiveness claim did not rest on
4 independent state law grounds. *Smith v. Stewart*, 241 F.3d 1191 (9th Cir. 2001). This
5 decision was reversed by the United States Supreme Court in *Stewart v. Smith*, 536 U.S. 856
6 (2002) (per curiam), following the Arizona Supreme Court’s response to a certified question
7 in *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), concerning the operation of Rule
8 32’s preclusion provisions. Although it found Petitioner’s sentencing ineffectiveness claim
9 procedurally defaulted, the United States Supreme Court “voice[d] no opinion on whether
10 [Smith] has provided valid cause to overcome his procedural default in state court.” 536 U.S.
11 at 861.

12 After additional briefing on remand, the Ninth Circuit ordered suspension of
13 Petitioner’s federal habeas appeal and remanded to the state court for a jury trial on whether
14 Petitioner was mentally retarded and therefore ineligible for the death penalty under *Atkins*
15 *v. Virginia*, 536 U.S. 304 (2002). *Smith v. Schriro*, No. 96-99025 (9th Cir. Aug. 10, 2004).
16 On certiorari, the Supreme Court reversed the jury trial requirement, *Schriro v. Smith*, 546
17 U.S. 6 (2005) (per curiam), and the circuit panel entered a new order directing the state court
18 to determine mental retardation by whichever method the state had adopted to make such
19 determinations, *Smith v. Schriro*, No. 96-99025 (9th Cir. Dec. 12, 2005).

20 After extensive discovery and an evidentiary hearing, Pima County Superior Court
21 Judge Jan Kearney ruled in March 2008 that Petitioner had failed to meet his burden of
22 establishing mental retardation under A.R.S. § 13-703.02. The Arizona Court of Appeals
23 affirmed in an unpublished memorandum decision, *Smith v. Kearney*, No. 2CA-SA-2008-
24 0019, 2008 WL 2721155 (Ariz. App. Jul. 11, 2008), and the Arizona Supreme Court
25 summarily denied review. Thereafter, the Ninth Circuit remanded the matter to this Court
26 for an evidentiary hearing on whether Petitioner has cause and prejudice to overcome the
27 procedural default of his sentencing ineffectiveness claim. *Smith v. Schriro*, No. 96-99025
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1 (9th Cir. Feb. 26, 2009.) The parties engaged in discovery and filed supplemental briefs, and
2 the Court held a hearing on May 5, 2010.

3 At the hearing, Petitioner called only one witness with regard to the cause issue: Fred
4 Dardis, the Pima County Public Defender from 1981 to 1986. His testimony is discussed
5 below.

6 With respect to prejudice, Petitioner proffered all of the extensive materials that were
7 developed during the state court *Atkins* proceedings and called as his only live witness Dr.
8 Debra Stibick, a neuropsychologist retained following the conclusion of the *Atkins* litigation,
9 to establish that counsel's investigation and presentation of mitigating evidence was both
10 deficient and prejudicial. Dr. Stibick opined that Petitioner was not mentally retarded but
11 suffers from autism, which "seriously impaired . . . his ability to function independently and
12 make appropriate decisions on his own." (Dkt. 217 at 18.) In her view, Petitioner's
13 understanding of the "situation" with the victim was inaccurate due to his autistic disorder:

14 The reason Mr. Smith had sex with Ms. Owens despite her distress was
15 because he was blind to those non-verbal cues. It has been testified that she
16 agreed to do whatever they wanted as long as they didn't hurt her. He took
17 that as consent, as her having sex willingly. She didn't say "no" . . .

18 When he "choked" Ms. Owens, he used the same technique he had used
19 multiple times as he learned in childhood during the "choking game." He
20 obviously survived when he made himself pass out using the technique taught
21 to him in childhood. Mr. Smith had no intention of choking Ms. Owens to
22 death, but to put her to sleep. His behavioral patterns show he draws upon
23 previous behaviors of others. When Mr. Lambright stabbed Ms. Owens, he
24 did not know what to do and he became overwhelmed and cognitively shut
25 down. He was viewing Ms. Owens as his new girlfriend.

26 (*Id.* at 16-18.)

27 **DISCUSSION**

28 **I. Procedural Default Finding**

Petitioner contends in post-remand briefing that his sentencing ineffectiveness claim
is not procedurally defaulted. (Dkt. 199 at 2-15.) He makes the following arguments: (1)
Arizona law has never required that ineffectiveness claims be raised on direct appeal or be
forever waived; (2) Petitioner did not raise any ineffectiveness claims in his first PCR

1 petition that could have preclusive effect on future such claims;³ (3) Arizona law does not
2 preclude ineffectiveness claims in a successive PCR petition when the petitioner is
3 represented for the first time by different counsel; (4) the pre-1992 version of Rule 32.2(a)(3)
4 required a “knowing, voluntary and intelligent waiver of issues” before claims could be
5 found precluded and there is no evidence Petitioner knowingly, voluntarily, and intelligently
6 waived his sentencing ineffectiveness claim; (5) the post-1992 version of Rule 32.2 requires
7 ineffectiveness claims to be examined for prejudice before being deemed precluded, thereby
8 rendering any preclusion ruling interwoven with federal constitutional law; (6) the Ninth
9 Circuit previously found that the PCR court did not clearly and unambiguously invoke a state
10 procedural bar, and this finding was not part of the certiorari petition granted by the United
11 States Supreme Court; and (7) Arizona lacks an effective state corrective process for
12 ineffectiveness claims because they are limited to a forum (PCR proceedings) in which
13 petitioners are not entitled to effective representation. (*Id.*)

14 **Law of the Case**

15 Under the “law of the case” doctrine, a decision of an appellate court on a legal issue
16 “must be followed in all subsequent proceedings in the same case.” *Jeffries v. Wood*, 114
17 F.3d 1484, 1489 (9th Cir.) (en banc), *overruled on other grounds by Lindh v. Murphy*, 521
18 U.S. 320 (1997). Exceptions to this rule exist where “(1) the decision is clearly erroneous
19 and its enforcement would work a manifest injustice, (2) intervening controlling authority
20 makes reconsideration appropriate, or (3) substantially different evidence was adduced at a
21 subsequent trial.” *Minidoka Irrigation Dist. v. Dep’t of Interior*, 406 F.3d 567, 573 (9th Cir.
22 2005). Petitioner does not address the law of the case doctrine or assert that any of its
23 exceptions are applicable. Nonetheless, the Court has considered his arguments in light of
24 the exceptions and concludes that none apply.

25 In 1996, this Court determined that the PCR court had found Petitioner’s

27 ³ Respondents have not made this contention on remand, and Petitioner
28 acknowledged during closing argument that this argument is no longer relevant.

1 ineffectiveness claims precluded as a matter of state procedural law. (Dkt. 133 at 3.) On
2 appeal, the Ninth Circuit acknowledged that the state court had found the claim defaulted and
3 that Arizona’s procedural default rule is regularly applied, but disagreed that the state court’s
4 ruling was independent of federal law. *Smith*, 241 F.3d at 1195-96 & n.2. On certiorari, the
5 United States Supreme Court also observed that Petitioner’s claim had been procedurally
6 defaulted in state court and further found that this default rested on adequate *and* independent
7 state grounds. *Smith*, 536 U.S. at 857 (stating that claim was waived under Arizona’s Rule
8 32.2(a)(3) because Petitioner had failed to raise it in two previous PCR petitions).

9 Petitioner now raises numerous new arguments challenging the adequacy and
10 independence of the state court’s procedural ruling. However, he does not explain why these
11 arguments were not raised earlier or why they should be heard at this juncture. The Court
12 finds that Petitioner has waived the arguments and that it would work a substantial inequity
13 to allow them to be considered at this late date. *See Martinez v. Ylst*, 951 F.2d 1153, 1157
14 (9th Cir. 1991). Moreover, none of Petitioner’s new arguments establish that the procedural
15 default finding is clearly erroneous, and Petitioner does not cite intervening controlling
16 authority calling into question the adequacy or independence of Rule 32.2(a)(3). *Cf. Sechrest*
17 *v. Ignacio*, 549 F.3d 789, 802-03 (9th Cir. 2008) (revisiting procedural default ruling in light
18 of intervening en banc opinion finding Nevada’s preclusion rule inadequate to bar federal
19 habeas review). Thus, the law of the case precludes this Court from revisiting the
20 determination that Petitioner procedurally defaulted his ineffectiveness claim. Even were the
21 Court to consider Petitioner’s new arguments, none are persuasive.

22 **New Arguments**

23 First, Petitioner argues that Arizona law never required that ineffectiveness claims be
24 raised on direct appeal. The premise of this argument is inaccurate. The trial court’s ruling
25 on Petitioner’s third PCR stated only that the claims were precluded “by failure to bring them
26 previously, in accordance with Rule 32.2(a).” (Evid. Hr’g Ex. 42 at 68.) At the time of the
27 third PCR petition, Rule 32.2(a)(3) provided that relief is precluded on any ground that “has
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1 been waived at trial, on appeal, *or* in any previous collateral proceeding.” Ariz. R. Crim. P.
2 32.2(a)(3) (West Supp. 1995) (emphasis added). Thus, the trial court’s ruling was based on
3 the fact that Petitioner neglected to raise any ineffectiveness claims either on appeal or in his
4 first or second PCR petitions.

5 Second, Petitioner argues that Arizona law does not preclude ineffectiveness claims
6 in a successive PCR petition when the petitioner is represented for the first time by different
7 counsel. In support, he cites *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006). In
8 Bennett’s case, appellate counsel successfully moved to stay the direct appeal and permit the
9 filing of a PCR petition. Thereafter, the appeals court consolidated the direct appeal with a
10 petition for review from the denial of PCR relief. Subsequently, Bennett filed a second PCR
11 petition arguing that her attorney’s representation on appeal had been constitutionally
12 ineffective. The lower courts dismissed, finding the claim precluded. In reversing, the
13 Arizona Supreme Court first acknowledged the general rule that when “ineffective assistance
14 of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief*
15 *proceeding*, subsequent claims of ineffective assistance will be deemed waived and
16 precluded.” *Id.* at 566, 146 P.3d at 67 (quoting with emphasis *State v. Spreitz*, 202 Ariz. 1,
17 2, 39 P.3d 525, 526 (2002)). It then concluded, however, that Bennett’s claim was not
18 precluded because appellate counsel could not have raised his own ineffectiveness in the
19 simultaneously-filed first PCR petition and because the second PCR proceeding (in which
20 she was represented by different counsel) was the first proceeding in which she could raise
21 the appellate ineffectiveness claim. *Id.*

22 The Court acknowledges that *Bennett* appears to announce a new exception to
23 Arizona’s rule of preclusion for ineffectiveness claims, suggesting there is no clear bar to
24 raising such claims in a successive PCR petition if a petitioner was represented by the same
25 attorney (or office) on appeal and in a first PCR petition. However, *Bennett* was decided in
26 2006, more than ten years after the PCR court ruled on the third PCR petition in this case.
27 Petitioner can point to no state rule or law prior to *Bennett* that indicated such an exception
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1 existed. Moreover, *Bennett* involved the unique circumstance of one attorney's
2 representation in *simultaneous* appeal and PCR proceedings. Because the appeal was stayed
3 during the pendency of the first PCR petition, the appellate ineffectiveness ground was not
4 yet cognizable when the first PCR petition was filed. Here, Petitioner's first PCR petition
5 was filed after the conclusion of his direct appeal, and he also filed a second PCR petition
6 before eventually requesting change of counsel to pursue ineffectiveness claims.

7 Third, Petitioner asserts that the state court erroneously applied the post-1992 version
8 of Rule 32.2(a)(3) rather than the pre-1992 version, which required a "knowing, voluntary
9 and intelligent waiver of issues" before claims could be found precluded, and argues there
10 is no evidence he knowingly, voluntarily, and intelligently waived his sentencing
11 ineffectiveness claim. The Court disagrees. First, the 1992 changes to Arizona's Rule 32
12 expressly apply "to all post-conviction relief petitions filed on or after September 30, 1992,
13 except that the time limits of 90 and 30 days imposed by Rule 32.4 shall be inapplicable to
14 a defendant sentenced prior to September 30, 1992 who is filing his first petition for post-
15 conviction relief." 171 Ariz. XLIV (Sep. 24, 1992) (Order Amending *Nunc Pro Tunc* a
16 Previous Order of this Court Amending Rule 32, Arizona Rules of Criminal Procedure).
17 Thus, the state court applied the correct version of Rule 32 then in effect when Petitioner
18 filed his third PCR petition on June 9, 1995. Second, even under the pre-1992 rule, a state
19 court was permitted to infer a knowing, voluntary, and intentional waiver from the "failure
20 to raise any ground then available to him in a previous Rule 32 proceeding in which he was
21 represented by counsel." Ariz. R. Crim. P. 32.2(c) (West 1973). Thus, there was no material
22 change in the rule from the time of Petitioner's conviction to the filing of his third PCR
23 petition – both the pre- and post-1992 rule required that grounds for relief be raised at the
24 earliest available opportunity or risk being found waived.

25 Fourth, Petitioner argues that the state court's preclusion ruling was not "independent"
26 of federal law because a comment to the 1995 version of the rule recognized ineffectiveness
27 claims as an exception to preclusion and required that such claims be examined for prejudice.
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1 Therefore, according to Petitioner, the state court necessarily considered the merits of his
2 claims in determining they were precluded.

3 The comment at issue reads:

4 The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must
5 “knowingly, voluntarily and intelligently” not raise an issue at trial, on appeal,
6 or in a previous collateral proceeding before the issue was precluded. See,
7 *Faye v. Noya* [sic], 372 U.S. 391 (1963). While that is the correct standard of
8 waiver for some constitutional rights, it is not the correct standard for other
9 trial errors. Accordingly, some issues not raised at trial, on appeal, or in a
10 previous collateral proceeding may be deemed waived without considering the
11 defendant’s personal knowledge, unless such knowledge is specifically
12 required to waive the constitutional right involved. If an asserted claim is of
13 sufficient constitutional magnitude, the state must show that the defendant
14 “knowingly, voluntarily and intelligently” waived the claim. For most claims
15 of trial error, the state may simply show that the defendant did not raise the
16 error at trial, on appeal, or in a previous collateral proceeding, and that would
17 be sufficient to show that the defendant has waived the claim. *If defense*
18 *counsel’s failure to raise an issue at trial, on appeal or in a previous collateral*
19 *proceeding[] is so egregious as to result in prejudice as that term has been*
20 *constitutionally defined, such failure may be raised by means of a claim of*
21 *ineffective assistance of counsel.*

22 Ariz. R. Crim. P. 32.2 cmt. (West Supp. 1995) (emphasis added). Petitioner acknowledges
23 that a similar argument with respect to the comment’s “sufficient constitutional magnitude”
24 language was rejected by the United States Supreme Court in his case, but states that his new
25 argument is based on the part of the comment emphasized above. He further asserts that in
26 his third PCR petition he raised a claim that post-conviction counsel had been ineffective for
27 failing to raise a sentencing ineffectiveness claim. Thus, according to Petitioner, when the
28 state court dismissed this allegation, it must have necessarily considered the merits of the
sentencing ineffectiveness claim in determining whether PCR counsel’s failure to raise that
claim was “so egregious as to result in prejudice.” The Court disagrees and declines to
construe the state court’s rejection of Petitioner’s post-conviction ineffectiveness claim as
a ruling on the merits of his sentencing ineffectiveness claim. Such a reading would
undermine the state court’s clear intention to bar merits review of ineffectiveness claims not
raised in accordance with its procedural rules.

Fifth, Petitioner points to the Ninth Circuit’s prior opinion in which it observed that
the PCR court’s ruling on his third petition did not clearly invoke a procedural bar because

1 the state court implied that the record failed to demonstrate that Petitioner had a colorable
2 ineffectiveness claim. *See Smith*, 241 F.3d at 1196-97. Petitioner asserts this finding was
3 left undisturbed by the Supreme Court’s subsequent reversal, and thus there is no adequate
4 procedural bar. He is incorrect. The Supreme Court expressly disapproved this aspect of the
5 circuit court’s opinion, finding that the state court’s reference to “colorable claim” was “only
6 as a rhetorical device for emphasizing the lack of any conflict of interest that might excuse
7 [Petitioner’s] waiver.” *Smith*, 536 U.S. at 861. As the Supreme Court stated, “The Ninth
8 Circuit interpreted the state court’s order rejecting respondent’s ineffective-assistance-of-
9 trial-counsel claim as possibly resting on a ruling on the merits of the claim. The record,
10 however, reveals no such ruling.” *Id.* at 860. Thus, this contention is meritless.

11 Finally, Petitioner cites no relevant authority to support his contention that Arizona
12 lacks an effective state corrective process for ineffectiveness claims as required for
13 exhaustion by 28 U.S.C. § 2252(b)(1)(B).

14 **II. Cause to Excuse Default**

15 A federal court generally will not review the merits of a procedurally defaulted claim
16 unless the petitioner demonstrates legitimate cause for the failure to properly exhaust the
17 claim in state court and prejudice from the alleged constitutional violation. *Coleman v.*
18 *Thompson*, 501 U.S. 722, 750 (1991). Ordinarily “cause” to excuse a default exists if a
19 petitioner can demonstrate that “some objective factor external to the defense impeded
20 counsel’s efforts to comply with the State’s procedural rule.” *Id.* at 753. Objective factors
21 constituting cause include interference by officials which makes compliance with the state’s
22 procedural rule impracticable, a showing that the factual or legal basis for a claim was not
23 reasonably available to counsel, and constitutionally ineffective assistance of counsel.
24 *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *King v. Lamarque*, 455 F.3d 1040, 1045 (9th
25 Cir. 2006).

26 Ineffective assistance of counsel can establish cause to excuse a procedural default
27 only when it rises to the level of an independent constitutional violation. *Coleman*, 501 U.S.
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1 at 755. Because there is no constitutional right to the effective assistance of counsel in state
2 postconviction proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray*
3 *v. Giarratano*, 492 U.S. 1, 7-12 (1989), a claim of ineffectiveness by PCR counsel cannot
4 establish cause for a procedural default. *See Cook v. Schriro*, 538 F.3d 1000, 1027-28 (9th
5 Cir. 2008). Notwithstanding Petitioner’s arguments to the contrary, this is true even if the
6 state PCR proceeding is a petitioner’s only opportunity to assert claims of ineffective
7 assistance of counsel. *See Ellis v. Armenakis*, 222 F.3d 627, 633 (9th Cir. 2000); *Jeffers v.*
8 *Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (en banc) (plurality) (ruling an Arizona petitioner
9 had “no Sixth Amendment right to counsel during his state habeas proceedings even if that
10 was the first forum in which he could challenge constitutional effectiveness on the part of
11 trial counsel”); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993) (*Bonin I*).

12 In his 1996 habeas petition supplement, Petitioner asserted that deputies of the Pima
13 County Public Defender were unable to raise ineffectiveness claims against their own office
14 and that this conflict of interest constituted cause to excuse the default of his ineffectiveness
15 claims. (Dkt. 124 at 20-21.) He first made this argument in state court in support of his third
16 PCR petition, to which he appended an affidavit from then-habeas counsel Palumbo avowing
17 that he was “of the legal opinion that I was prohibited under Arizona law from raising any
18 ineffective assistance claims on Smith’s behalf, since Smith has been continuously
19 represented by a Public Defender attorney, and counsel cannot raise his own ineffectiveness,
20 or the ineffectiveness of any member of his office.” (Evid. Hr’g Ex. 42 at 65.)

21 The PCR court rejected this assertion:

22 The suggestion that Lawrence Fleischman (now Judge Fleischman) or
23 John Palumbo of the Public Defender’s office failed to consider the issue of
24 ineffective assistance of counsel or considered it, thought counsel was
ineffective and failed to allege same to avoid embarrassing a professional
colleague in violation of their ethical duties is outrageous.

25 (*Id.* at 67-68.) The PCR court elaborated in an order denying reconsideration:

26 Counsel’s assertion on page 4, lines 3 through 6 of his Motion for
27 Rehearing, that “each of the deputies of the Public Defender’s Office have
28 been appointed . . . to ‘conduct the affairs’ of the Pima County Public
Defender’s Office rather than to independently represent Mr. Smith” is either

1 outrageous or ridiculous, whichever adjective is most appropriate. Deputies
2 in the Public Defender's Office do not represent the Public Defender's Office.
3 They are attorneys for and have an attorney-client relationship with the actual
4 defendant charged with the crime. It may, indeed, be correct that it would be
5 inappropriate for a public defender to allege a different public defender was
6 ineffective at trial (although it has been done by this Public Defender's Office
7 in the past). However, this does not absolve an attorney representing a client
8 in an appellate matter from examining in detail whether or not there is a
9 colorable claim for ineffective assistance of counsel. That is an absolute and
10 undelegable duty. Failure to do so is at the very best malpractice and
11 malfeasance. An attorney who discovers a colorable claim of ineffective
12 assistance of counsel must immediately withdraw, notify the Court that there
13 is such a claim, and allow the Court to appoint an attorney who has no conflict
14 in representing that client. To suggest that one could wait for ten years, from
15 1985 to the present, and never even examine the case to see if the client had
16 such a claim is an admission of the grossest malpractice.

17 (*Id.* at 69-70 (alteration in original).)

18 In his supplemental brief following remand from the Ninth Circuit, Petitioner again
19 argues that the public defender's serial representation constitutes cause. (Dkt. 199 at 15.)
20 He asserts that the PCPD's Office "was conscientiously avoiding raising an IAC claim
21 against itself in the appellate and Rule 32 proceedings" and that this policy was an objective
22 external factor that interfered with his ability to properly exhaust the claim. (*Id.* at 16.)

23 In its order remanding the case for an evidentiary hearing on cause and prejudice, the
24 Ninth Circuit directed this Court to determine "whether an official policy prevented the
25 public defender from challenging the conduct of a staff member." *Smith v. Schriro*, No. 96-
26 99025 (9th Cir. Feb. 26, 2009). At the hearing, Fred Dardis, the Pima County Public
27 Defender at the time of Petitioner's trial, appeal, and first PCR proceeding testified that there
28 was no official office policy governing the raising of ineffectiveness claims against deputy
public defenders. Rather, it was expected that an attorney would move to withdraw if the
client or any assigned attorney had concerns about the effectiveness of representation
provided by a member of the office. Petitioner presented no further evidence on this issue.
Petitioner himself was present at the hearing but did not testify, and Petitioner did not call
either Fleischman or Palumbo as witnesses. Thus, there is no evidence that Petitioner asked
Fleischman or Palumbo to raise ineffectiveness claims in his first or second PCR petitions
or was told by these attorneys that he had colorable ineffectiveness claims that could not be

1 raised because of an office policy or conflict of interest.

2 After consideration of the evidence, the PCR court's ruling, and the controlling state
3 law at the time, this Court concludes that the mere fact the same public defender's office
4 represented Petitioner at trial, on appeal, and in his first two PCR proceedings does not
5 establish cause for the default of his sentencing ineffectiveness claim. This conclusion is
6 mandated by several Ninth Circuit cases in which the court found no cause for the default of
7 ineffectiveness claims where the same allegedly ineffective attorney represented the
8 petitioner in post-conviction proceedings.

9 In *Bonin v. Calderon*, the court determined that an appellate ineffectiveness claim was
10 defaulted for not being raised in the petitioner's first habeas proceeding, even though the
11 same lawyer had represented Bonin in both proceedings, because there was no constitutional
12 right to counsel in the habeas proceeding, even if that was the first opportunity to raise the
13 claim. 77 F.3d 1155, 1159 (9th Cir. 1996) (*Bonin III*). "[C]ounsel's failure to raise the issue
14 of his own ineffectiveness on appeal did not violate Bonin's rights under the Sixth
15 Amendment." *Id.*

16 This holding was reaffirmed in *Moran v. McDaniel*, 80 F.3d 1261 (9th Cir. 1996).
17 There, the petitioner was represented by the same attorney for direct appeal and his initial
18 state and federal post-conviction proceedings. As cause to excuse the default of an appellate
19 ineffectiveness claim, the petitioner argued that a conflict of interest existed which precluded
20 counsel from asserting in the first PCR proceeding his own ineffectiveness on direct appeal.
21 *Id.* at 1271. The court disagreed:

22 In essence, Moran is arguing that he was deprived of effective
23 assistance of counsel during his habeas proceedings because his counsel was
24 not able to litigate his own alleged ineffectiveness. A petitioner is entitled to
25 due process during the habeas proceedings. *Bonin I*, 999 F.2d at 428-29.
26 However, the "absence or ineffectiveness of counsel does not in and of itself
27 constitute a due process violation." *Id.* at 429. Moran may not avoid our
28 holding that a petitioner is not entitled to effective assistance of counsel during
habeas proceedings by alleging a due process, rather than a Sixth Amendment,
violation. *Id.* Accordingly, we reject this argument.

80 F.3d at 1271.

1 In *Nevius v. Sumner*, 105 F.3d 453 (9th Cir. 1996), the petitioner argued that the
2 district court had authority to consider a second federal habeas petition because the first one
3 had been filed by attorneys who “were incapable of acting as his agents by reason of the
4 conflict that precluded them from asserting their own ineffectiveness at trial and on appeal.”
5 *Id.* at 459. He further argued that his attorneys were without authority to default any of his
6 substantive claims, “particularly in light of their conflict of interest.” Again, the Ninth
7 Circuit disagreed:

8 Nevius’ first proposition – that an attorney is not authorized to default
9 a client’s claim – is refuted by *Coleman v. Thompson*. *Coleman* held that an
10 attorney’s failure to appeal a state trial court’s ruling, in collateral proceedings,
11 rejecting an ineffective assistance claim defaulted that claim for purposes of
12 federal review. The attorney’s error was not “cause” to excuse the default,
because it occurred in proceedings in which the defendant had no
constitutional right of counsel. Nevius’ counsel also defaulted in collateral
proceedings in which there is no constitutional right to counsel.

13 *Id.* (citations omitted). The court further observed that although Nevius was represented at
14 trial and in his first state and federal collateral proceedings by the same attorney, who was
15 ethically incapable of raising his own ineffectiveness, the decisions in *Bonin III* and *Moran*
16 foreclosed relief.

17 Finally, in *Ortiz v. Stewart*, a capital case from Arizona, the court rejected the same
18 conflict-of-interest-as-cause argument raised here:

19 The district court did not review the merits of Ortiz’s claim of
20 ineffective assistance of counsel on appeal because the state court found that
21 the claim was procedurally barred by Arizona Rule of Criminal Procedure
22 32.2(a)(3). Ortiz argues that because the same attorney represented him on
23 appeal and during his first state post-conviction proceeding his procedural
24 default with respect to the ineffective assistance on appeal claim should be
excused for cause. *See Bonin*, 77 F.3d at 1158 (procedural bar is lifted if
petitioner can show cause and actual prejudice). Ortiz insists that his attorney
was prevented from raising his own ineffectiveness due to a clear conflict of
interest. This precise argument has been repeatedly rejected by this circuit.
See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996); *Bonin*, 77 F.3d at
1159.

25 149 F.3d 923, 933 (9th Cir. 1998).

26 Despite the striking similarity of these cases to his own, Petitioner argues they are not
27 controlling and that his case is more akin to *Manning v. Foster*, 224 F.3d 1129 (9th Cir.
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1 2000). The Court disagrees.

2 In *Manning*, the petitioner’s trial attorney missed the direct appeal filing deadline and
3 then misled the petitioner as to his post-conviction-relief options. As a result of counsel’s
4 actions, Manning never filed a state PCR petition in which he could have challenged
5 counsel’s appellate ineffectiveness. The Ninth Circuit distinguished *Bonin III*, *Moran*, and
6 *Nevius* as based on ineffective assistance of PCR counsel and concluded that a conflict of
7 interest independent of an ineffectiveness claim could constitute cause if the conflict “caused
8 the attorney to interfere with the petitioner’s right to pursue his habeas claim.” *Id.* at 1134.
9 The court further observed that “there was a clear conflict between Manning’s interest in
10 presenting and prevailing in his ineffective assistance claim and [trial counsel’s] interest in
11 protecting himself from the damage such an outcome would do to his professional reputation
12 and from exposure to potential malpractice liability or bar discipline.” *Id.* It therefore
13 remanded for a hearing to determine whether counsel’s actions had “effectively prevented
14 Manning from learning of and vindicating his right to petition for state post-conviction
15 relief.” *Id.* at 1135.

16 Here, in contrast, Petitioner was not precluded from filing a PCR petition. Indeed,
17 attorneys from the Pima County Public Defender’s Office filed two. Nor has Petitioner
18 presented any evidence, such as an affidavit from Fleischman, indicating that Petitioner was
19 affirmatively misled about his PCR options or that counsel intentionally interfered with his
20 access to post-conviction relief in order to protect fellow public defender Hippert from any
21 damage that might result from a successful ineffectiveness claim.

22 At the time of Petitioner’s first PCR petition, Arizona law required that “[i]f counsel
23 honestly believes he was ineffective at trial or that such issue exists, he should so advise his
24 client, seek leave to withdraw and have new counsel appointed to raise the issue on appeal,
25 or pursue the matter under Rule 32, Arizona Rules of Criminal Procedure.” *State v. Suarez*,
26 137 Ariz. 368, 380, 670 P.2d 1192, 1204 (1983). In his testimony before this Court, former
27 PCPD Dardis confirmed that this was the unwritten “policy” concerning ineffectiveness
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1 claims. The PCR court made the same observation, stating that “[a]n attorney who discovers
2 a colorable claim of ineffective assistance of counsel must immediately withdraw, notify the
3 Court that there is such a claim, and allow the Court to appoint an attorney who has no
4 conflict in representing that client.” (Dkt. 125.) Thus, it was counsel’s duty to consider
5 whether his client had a colorable ineffectiveness claim and, if so, to withdraw to permit
6 appointment of non-conflicted counsel.

7 Given this duty, and the absence of any contrary evidence, the Court presumes that
8 Fleischman did not identify any ineffectiveness by trial counsel Hippert. If he had, he would
9 have sought to withdraw from the representation as required by both Arizona case law and
10 his ethical obligations. Therefore, the Court finds that Petitioner’s failure to properly exhaust
11 a challenge to Hippert’s performance at sentencing was not due to a conflict of interest
12 arising from Fleischman’s employment in the same public defender office but instead by
13 Fleischman’s failure to recognize a viable constitutional issue. However, “the mere fact that
14 counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim
15 despite recognizing it, does not constitute cause for a procedural default.” *Poland v. Stewart*,
16 169 F.3d 573, 587 (9th Cir. 1999) (citing *Murray*, 477 U.S. at 486).

17 During closing argument, Petitioner proffered a new cause argument. He asserted that
18 Fleischman was blocked from discovering the factual basis of the sentencing ineffectiveness
19 claim because the state court had denied counsel’s post-conviction request for expert funding.
20 This argument is waived because it could and should have been raised in reply to
21 Respondents’ assertion of procedural default fourteen years ago during the original briefing
22 of Petitioner’s claims. In any event, it lacks merit. First, Petitioner had no difficulty
23 identifying and raising his sentencing ineffectiveness claim in his third PCR petition without
24 the assistance of expert funding. Second, Fleischman’s funding request related solely to the
25 question of future dangerousness to counter the trial judge’s finding at sentencing that
26 Petitioner posed a danger to society. (Evid. Hr’g Ex. 42 at 12-13.) In addition, counsel in
27 fact consulted with an expert, who reviewed materials from Petitioner’s case and opined in
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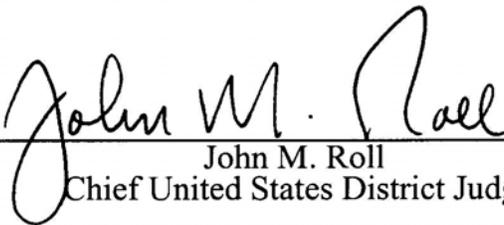
1 a lengthy letter to counsel that “there are enough mitigating circumstances to, at worst, give
2 him a life sentence.” (*Id.* at 22.) The record provided sufficient information from which
3 Fleischman could have identified a claim concerning Hippert’s representation at sentencing.

4 In sum, the Court finds that Petitioner has not established cause to excuse his failure
5 to properly exhaust the sentencing ineffectiveness claim. Because Petitioner has not shown
6 cause, the Court declines to reach the question of prejudice. *See Engle v. Isaac*, 456 U.S.
7 107, 134 n.43 (1982).

8 **IT IS SO ORDERED.**

9 **IT IS FURTHER ORDERED** that the Clerk of Court forward a copy of this Order
10 to the Ninth Circuit Court of Appeals forthwith.

11 DATED this 11th day of May, 2010.

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16 John M. Roll
17 Chief United States District Judge
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