

1 man. He also had been charged with sexually assaulting his wife, an
2 accusation he denied. Defendant was out of work. He had no place to stay,
3 having just moved from his parents' house following an argument. In an effort
to help him, the victim drove defendant to the Holiday Inn so he could rent a
room.

4 They talked for awhile in the room. Defendant claimed he became
5 upset thinking about his wife and began confusing the victim with her. He
6 pulled a gun out and asked if she would have sex with him. She refused, so he
forced her to comply at gunpoint.

7 The two remained in the room for several hours. When the victim
8 appeared to be sleeping, defendant struck her on the neck with the gun butt,
allegedly to knock her out. The blow, however, did not render her
unconscious. Instead, she awoke and began screaming. Defendant then
strangled her.

9 Petitioner drove to the home of his pastor, who accompanied him to his mother's house.
10 After he told his mother what had happened, he turned himself in to the police. The victim
11 was found at the Holiday Inn dead from strangulation and with a sock stuffed in her mouth.
12

13 Pima County Superior Court Judge Michael J. Brown sentenced Petitioner to death
14 for the murder and to a term of years for the other counts. The Arizona Supreme Court
15 affirmed the convictions for all three crimes and the sentences for sexual assault and
16 kidnapping. *State v. Schackart*, 175 Ariz. 494, 858 P.2d 639 (1993) ("*Schackart I*"). The
17 court vacated the death sentence and remanded for a new sentencing hearing because the
18 transcript was inadequate for review. *Id.* at 499, 858 P.2d at 644. On December 7, 1993,
19 Petitioner was again sentenced to death for the first degree murder conviction. That sentence
20 was affirmed by the Arizona Supreme Court. *State v. Schackart*, 190 Ariz. 238, 947 P.2d
21 315 (1997) ("*Schackart II*"). Petitioner filed a petition for post-conviction relief (PCR) with
22 the trial court and a subsequent addendum to the PCR petition. (ROA 166, 167.)³ The PCR

23
24 ³ "ROA" refers to the seven-volume record on appeal from post-conviction
25 proceedings prepared for Petitioner's petition for review to the Arizona Supreme Court (Case
26 No. CR-02-0344-PC). "PR Doc." refers to the Arizona Supreme Court's docket for
27 Petitioner's petition for review in that case. "RT" refers to reporter's transcript. The original
28 reporter's transcripts and certified copies of the trial and post-conviction records were
provided to this Court by the Arizona Supreme Court on November 18, 2004. (Dkts. 66, 67.)

1 petition was denied without a hearing. (*Id.* at 185.) The Arizona Supreme Court summarily
2 denied Petitioner’s petition for review on May 28, 2003. (PR Doc. 26.)

3 **PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT**

4 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a writ of
5 habeas corpus cannot be granted unless it appears that the petitioner has exhausted all
6 available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501
7 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982). To exhaust state remedies, a
8 petitioner must “fairly present” the operative facts and the federal legal theory of his claims
9 to the state’s highest court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526
10 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S.
11 270, 277-78 (1971). If a habeas claim includes new factual allegations not presented to the
12 state court, it may be considered unexhausted if the new facts “fundamentally alter” the legal
13 claim presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

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

23 A habeas petitioner’s claims may be precluded from federal review in two ways.
24 First, a claim may be procedurally defaulted in federal court if it was actually raised in state
25 court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S.
26 at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present
27 it in state court and “the court to which the petitioner would be required to present his claims
28

1 in order to meet the exhaustion requirement would now find the claims procedurally barred.”
2 *Id.* at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the
3 district court must consider whether the claim could be pursued by any presently available
4 state remedy). If no remedies are currently available pursuant to Rule 32, the claim is
5 “technically” exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see*
6 *also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

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

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

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

22 The AEDPA established a “substantially higher threshold for habeas relief” with the
23 “acknowledged purpose of ‘reducing delays in the execution of state and federal criminal
24 sentences.’” *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007) (quoting *Woodford v.*
25 *Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA’s “‘highly deferential standard for
26 evaluating state-court rulings’ . . . demands that state-court decisions be given the benefit of
27 the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v.*
28

1 *Murphy*, 521 U.S. 320, 333 n.7 (1997)).

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

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

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

9 28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision
10 regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v.*
11 *Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664
12 (9th Cir. 2005).

13 “The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule
14 of law that was clearly established at the time his state-court conviction became final.”
15 *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection
16 (d)(1), the Court must first identify the “clearly established Federal law,” if any, that governs
17 the sufficiency of the claims on habeas review. “Clearly established” federal law consists
18 of the holdings of the Supreme Court at the time the petitioner’s state court conviction
19 became final. *Williams*, 529 U.S. at 365; see *Carey v. Musladin*, 549 U.S. 70, 74 (2006);
20 *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if
21 the Supreme Court has not “broken sufficient legal ground” on a constitutional principle
22 advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529
23 U.S. at 381; see *Musladin*, 549 U.S. at 77; *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir.
24 2004). Nevertheless, while only Supreme Court authority is binding, circuit court precedent
25 may be “persuasive” in determining what law is clearly established and whether a state court
26 applied that law unreasonably. *Clark*, 331 F.3d at 1069.

27 The Supreme Court has provided guidance in applying each prong of § 2254(d)(1).
28 The Court has explained that a state court decision is “contrary to” the Supreme Court’s

1 clearly established precedents if the decision applies a rule that contradicts the governing law
2 set forth in those precedents, thereby reaching a conclusion opposite to that reached by the
3 Supreme Court on a matter of law, or if it confronts a set of facts that is materially
4 indistinguishable from a decision of the Supreme Court but reaches a different result.
5 *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In
6 characterizing the claims subject to analysis under the “contrary to” prong, the Court has
7 observed that “a run-of-the-mill state-court decision applying the correct legal rule to the
8 facts of the prisoner’s case would not fit comfortably within § 2254(d)(1)’s ‘contrary to’
9 clause.” *Williams*, 529 U.S. at 406; *see Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir.
10 2004).

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

21 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state
22 court decision was based upon an unreasonable determination of the facts. *Miller-El v.*
23 *Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision “based on a factual
24 determination will not be overturned on factual grounds unless objectively unreasonable in
25 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322, 340
26 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In
27 considering a challenge under § 2254(d)(2), state court factual determinations are presumed
28

1 to be correct, and a petitioner bears the “burden of rebutting this presumption by clear and
2 convincing evidence.” 28 U.S.C. § 2254(e)(1); *Landrigan*, 127 S. Ct. at 1939-40; *Miller-El*
3 *II*, 545 U.S. at 240.

4 DISCUSSION

5 Claim 1

6 Petitioner alleges that his constitutional rights were violated by the court’s inadequate
7 voir dire of jurors regarding the death penalty. Specifically, Petitioner contends that the court
8 failed to follow the principles of *Witherspoon* and improperly excused two jurors based on
9 their opposition to the death penalty.

10 This claim was raised in Petitioner’s PCR petition (ROA 166 at 4-5) and found
11 precluded pursuant to Rule 32.2(a)(3) due to Petitioner’s failure to raise the claim on appeal
12 (ROA 185 at 7). The Arizona Supreme Court summarily denied the Petition for Review.
13 (PR Doc. 26.) Therefore, this claim is procedurally defaulted.⁴

14 Petitioner alleges ineffectiveness of appellate counsel as cause to excuse the default.⁵
15 To establish ineffective assistance of counsel (IAC) on appeal, Petitioner must show that his
16 counsel’s performance was deficient and that the deficient performance caused him
17 prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Evitts v. Lucey*, 469 U.S.
18 387, 396 (1985) (recognizing the right to effective assistance of counsel for a first appeal as
19 of right). To establish prejudice, a petitioner must show that there is a “reasonable
20 probability” that, absent counsel’s errors, the result of the appeal would have been different.

21
22 ⁴ Petitioner’s argument, that the state court’s procedural bar language is ambiguous,
23 is unfounded. The PCR court clearly stated the claim had been waived on appeal and relied
24 upon Rule 32.2(a)(3) in finding it barred. (ROA 185 at 7.) A procedural bar in Arizona state
25 court based on Rule 32.2(a)(3) is an independent, *see Stewart v. Smith*, 536 U.S. 856, 860
26 (2002), and adequate bar to federal review of a claim, *see Ortiz*, 149 F.3d at 932; *Poland v.*
27 *Stewart*, 117 F.3d 1094, 1106 (9th Cir. 1997).

28 ⁵ The claim of ineffectiveness of appellate counsel was raised and denied on the
merits during Petitioner’s PCR proceeding. (ROA 185 at 5-7.)

1 *Strickland*, 466 U.S. at 694. Thus, the Court will assess the merits of Claim 1 to determine
2 whether, if it had been raised on appeal, there is a reasonable probability it would have been
3 successful.

4 The following exchange regarding the death penalty took place during voir dire:

5 THE COURT: First degree murder, ladies and gentlemen, is a Class 1
6 felony. It's punishable by either death or by imprisonment. The decision as
7 to which of those sentences shall be imposed is made by the trial judge after
8 a separate sentencing hearing. It's not made by the jury. Is there anything
9 about that fact that would prevent you from being a fair and impartial juror in
10 this case?

11 (No response)

12 THE COURT: Do any of you – yes, Mr. Soto?

13 MR. SOTO: I don't believe in capital punishment, okay?

14 THE COURT: Is there anything – what I need to know is whether or
15 not – you obviously have an opinion or believe about capital punishment.
16 Aside from the fact that you don't believe in that, Mr. Soto, the question that
17 I have for you is: Is your opinion or belief so strong that it would either
18 prevent you or substantially impair your ability to perform your sworn duty as
19 a juror in this case to well and truly try the issues in the case according to the
20 law and the evidence?

21 MR. SOTO: Yeah, it would, really.

22 THE COURT: Okay. In other words, what you're telling me, Mr.
23 Soto, is that because of your opinion you believe that you would be unable to
24 sit as a judge in this case of the facts and try the guilt or innocence of the
25 defendant?

26 MR. SOTO: Yeah.

27 THE COURT: I'm sorry. You have to speak up because the gentleman
28 is taking down the answers. You believe – I just want to know if you believe
that your opinion is so strong that you couldn't sit as a trial juror in the case?

MR. SOTO: Yes. Yeah, I –

THE COURT: All right. I'll excuse you, Mr. Soto, because of that
answer.

(RT 3/12/85 at 34-35.) The Court denied the defense request for additional questioning of
Mr. Soto regarding whether he could decide guilt without considering the consequences. (*Id.*
at 36.) The court proceeded to question the other juror who had responded affirmatively to

1 the court's initial question:

2 THE COURT: Mr. Westerfield? All I want to know is whether you
3 have an opinion.

4 MR. WESTERFIELD: Yes, I do.

5 THE COURT: Okay. The question I have, Mr. Westerfield, is whether
6 that opinion, whatever it is, would affect your ability to sit as a fair and
impartial juror in the case. In other words, could you not sit and judge the
guilt or innocence of the defendant based on the evidence in this case?

7 MR. WESTERFIELD: I'm afraid I could not.

8 THE COURT: All right. I appreciate your candor and I will, in fact,
9 excuse you based on the fact that you have an opinion concerning capital
10 punishment that would either prevent or substantially impair your ability to sit
as a trial juror in the case and follow your oath as a juror to justly decide the
evidence.

11 MR. WESTERFIELD: Yes, it is.

12 THE COURT: All right. You are then excused. . . .

13 (*Id.* at 37.) Defense counsel again objected to the dismissal. (*Id.*)

14 After finding this claim procedurally barred, the PCR Court alternatively denied the
15 claim on the merits, concluding that the "prospective jurors in this case stated unequivocally
16 that their beliefs would prevent them from being able to act impartially." (ROA 185 at 7.)

17 Clearly established Supreme Court law provides that, when selecting a jury in a
18 capital case, jurors cannot be struck for cause "because they voiced general objections to the
19 death penalty or expressed conscientious or religious scruples against its infliction."
20 *Witherspoon v. Illinois*, 391 U.S. 510, 522 & n.21 (1968) (noting that exclusion for cause is
21 appropriate if views on the death penalty would "prevent them from making an impartial
22 decision as to the defendant's guilt"). In other words, "[a] juror may not be challenged for
23 cause based on his views about capital punishment unless those views would prevent or
24 substantially impair the performance of his duties as a juror in accordance with his
25 instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980); *see Wainwright v. Witt*,
26 469 U.S. 412, 424 (1985).

27 A trial judge's exclusion of a juror for cause based on bias is a finding of fact entitled
28

1 to deference under 28 U.S.C. § 2254(e)(1). *See Witt*, 469 U.S. at 428-29 (applying an earlier
2 version of statutory deference to state court fact finding); *see also State v. Trostle*, 191 Ariz.
3 4, 12, 951 P.2d 866, 877 (1997) (deferring under Arizona law to trial court findings of bias
4 absent an abuse of discretion). Petitioner bears the burden of rebutting the presumption with
5 clear and convincing evidence under 28 U.S.C. § 2254(e)(1). He does not attempt to meet
6 this burden and did not seek evidentiary development with respect to this claim. Therefore,
7 the Court must defer to the trial court’s finding that the two jurors were biased due to their
8 views on the death penalty. Further, the Court’s review of the transcript reveals that the trial
9 court struck the two jurors because they attested that their views regarding capital
10 punishment would prevent or substantially impair their ability to sit as a juror in the guilt-
11 phase of Petitioner’s case. (RT 3/12/85 at 34-35, 37.) Accordingly, the trial court’s finding
12 of bias is not unreasonable in light of the state court record.⁶ *See* 28 U.S.C. § 2254(d)(2).
13 Because the jurors’ views on the death penalty prevented them from impartially judging
14 Petitioner’s guilt, they were properly excluded pursuant to *Witherspoon*.

15 Petitioner’s primary argument is that the voir dire was too cursory and that simply
16 asking a juror the ultimate question – whether his views would prevent or substantially
17 impair the performance of his duties as a juror – was insufficient. Petitioner cites Supreme
18 Court law noting that voir dire and findings of juror bias are more than “question-and-answer
19 sessions which obtain results in the manner of a catechism.” *Witt*, 469 U.S. at 424. The
20 Supreme Court has not held that voir dire must be extensive and cannot be direct and focused
21 on the ultimate question; rather, the Court allows that less direct inquires can be sufficient
22 when examined in totality. *See Darden v. Wainwright*, 477 U.S. 168, 175-77 (1986) (looking
23 to entirety of voir dire to determine if juror’s performance would have been substantially
24

25 ⁶ The Court rejects Petitioner’s argument that he can rebut the state court fact finding
26 because it was not supported by the record as a whole. Further, that contention was based
27 on a pre-AEDPA version of the federal habeas statute; the governing statute requires rebuttal
28 by clear and convincing evidence.

1 impaired because court did not ask the ultimate question); *Witt*, 469 U.S. at 432-34 (looking
2 to entirety of juror's responses because precise language of standard not used). In so
3 holding, the Court recognizes that there is no formula applicable to voir dire because "many
4 veniremen simply cannot be asked enough questions to reach the point where their bias has
5 been made 'unmistakably clear.'" *Id.* at 424-25. However, in Petitioner's case, the
6 questioning was direct and the jurors answered unambiguously that they could not be
7 impartial; that is all that is required. The PCR court's denial of this claim was not an
8 unreasonable application of governing Supreme Court law.

9 Even if the two jurors had been inappropriately struck based on their views regarding
10 the death penalty, the Supreme Court has held: "We simply cannot conclude, either on the
11 basis of the record before us or as a matter of judicial notice, that the exclusion of jurors
12 opposed to capital punishment results in an unrepresentative jury on the issue of guilt or
13 substantially increases the risk of conviction." *Witherspoon*, 391 U.S. at 518, 523 n.21
14 (stating explicitly that its reversal of the death sentence did not affect the conviction). In a
15 subsequent reversal of a death sentence, based on counsel not being allowed to ask jurors
16 whether they would automatically impose a sentence of death upon a finding of guilt, the
17 Court specifically noted that "[o]ur decision today has no bearing on the validity of
18 petitioner's conviction." *Morgan v. Illinois*, 504 U.S. 719, 728 (1992) (citing *Witherspoon*,
19 391 U.S. at 523 n.21); *see also Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996) (death
20 qualification of Arizona jurors not inappropriate).

21 This claim fails on the merits. Because the claim is not meritorious, there is not a
22 reasonable probability that it would have changed the outcome of the appeal if raised by
23 counsel. *See Jones v. Smith*, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (no prejudice from
24 appellate counsel's failure to raise issue on direct appeal when claim would not have
25 provided grounds for reversal); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (failing
26 to raise meritless argument not ineffective). Therefore, Petitioner cannot establish cause and
27 prejudice to overcome the default of this claim. Claim 1 is dismissed as procedurally
28

1 defaulted and, in the alternative, on the merits.

2 **Claims 9 and 10**

3 In Claim 9, Petitioner alleges that his Eighth and Fourteenth Amendment rights to due
4 process and a reliable capital case factual determination were violated because he was
5 sentenced by a biased judge. In Claim 10, Petitioner alleges that his Eighth and Fourteenth
6 Amendment rights were violated by the sentencing judge's consideration and weighing of
7 non-statutory aggravating factors with respect to his capital sentence. Although these claims
8 are disparate, they rely primarily on the same occurrences at sentencing; therefore, the Court
9 sets forth a comprehensive factual background as to both claims.

10 *Factual Background*

11 With respect solely to Claim 9, Petitioner relies upon statements that occurred during
12 his failed attempt to plead guilty. Against the express advice of counsel, Petitioner decided
13 to plead guilty prior to the beginning of the presentation of evidence at trial. (RT 3/13/85 at
14 2-34.) However, Petitioner declined to set forth in open court the factual basis for his guilty
15 plea. (*Id.* at 16-17.) Instead, he agreed the court could use his March 8, 1994 statement to
16 the police as the factual basis. (*Id.* at 17.) Petitioner told the court that the statement might
17 not be entirely true but that he still wanted to base his guilty plea upon it. (*Id.* at 17-18.) The
18 court directed Petitioner to review his statement, after which he identified the portions he
19 considered inaccurate. (*Id.* at 18-19, 22-34.) During that discussion, the following exchange
20 took place:

21 THE COURT: All right. Before we go all the way through the
22 statement, Mr. Schackart, I'm not sure what changes you have made or what
23 you disavow in the statements, but I might save a whole lot of time if you're
going to tell me that you did actually commit these offenses.

24 THE DEFENDANT: No, I'm not going to – to incriminate myself
more.

25 THE COURT: If you would tell me either by this statement or in some
26 other fashion, orally or otherwise, that you did, in fact, do what you have pled
guilty to –

27 THE DEFENDANT: Well, if you have been sworn in and pled guilty
28

1 to something, then obviously you must be guilty of it, right?

2 THE COURT: Mr. Schackart, I'm not going to play word games with
3 you.

4 THE DEFENDANT: It is not a word game, Judge. I don't feel that I
5 have to go through and incriminate myself any more than I already have.

6 THE COURT: Well, unless there is a factual basis that you are willing
7 to acknowledge that you did, in fact, commit these crimes that you have been
8 charged with in the indictment, then I am not going to accept the plea. Do you
9 understand that?

10 THE DEFENDANT: I guess so. So I guess you can then not accept it
11 because of the numerous statements which I have written down that I have to
12 disavow.

13 (*Id.* at 23-24.) The court responded, "I am willing to take your plea," and proceeded to
14 engage Petitioner in a series of questions and a further review of his statement. (*Id.* at 24-
15 34.) After Petitioner disavowed many portions of his statement, the court rejected his plea.
16 (*Id.*)

17 Petitioner's counsel expressed concern that jurors would be exposed to media
18 coverage of Petitioner's attempt to plead guilty. (*Id.* at 38.) The judge responded:

19 I'm not going to assume that they are going to disobey the admonishment of
20 the Court, and, so, we are just going to proceed, you know.

21 I'm not convinced that Mr. Schackart was unaware of the outcome of,
22 the probable outcome of this charade this morning before he started it, and I
23 know that he was not unaware of the fact that it would be heavily covered by
24 the media.

25 So, in any event, I'm going to have the jury in and admonish them once
26 again that, as I did yesterday, about listening to the media or reading the media
27 or watching the media accounts of the trial, and we're going to do that right
28 now.

(*Id.*)

29 The remaining statements by the judge occurred during sentencing and are relevant
30 to Claims 9 and 10. The following three statements upon which Petitioner relies were part
31 of the court's discussion of the sentences for kidnapping and sexual assault:

32 The Court has further considered that you have steadfastly refused to
33 acknowledge your sexual assault of the victim while at the same time relying
34 on your own statements concerning that sexual assault to Detective Reuter and

1 to Dr. Bendheim as forming a part of the basis upon which you elicited
2 testimony from Dr. Bendheim for purposes of mitigating the sentencing in this
action.

3 The Court further finds as an aggravating factor that you have
4 specifically lied to the Court with respect to your depiction of when you
stuffed the knee sock into the victim's mouth.

5

6 . . . [I]t is not probable that you will ever be rehabilitated

7 (RT 12/7/93 at 18-21.)

8 Next, Petitioner challenges the following statement:

9 You acknowledged that it was your custom to terminate marital
10 arguments unilaterally, and in the event Miss Pajkos, your wife, attempted to
11 continue them past your deadline you would then end the argument by
slapping or hitting her. You acknowledge forcing yourself upon her in
December of 1983 while using a knife to threaten her to comply.

12 The Court finds that the fact that you chose and continue to make her
13 the sine qua non of your depraved behavior instead of postulating that *your use*
14 *of her as punching bag and your treatment of her as if she was chattel* may
have had some significant influence on her actions is unsatisfactory at best and
is hardly a mitigating factor.

15 (*Id.* at 23 (emphasis added)⁷.)

16 Petitioner challenges several statements the court made during its discussion of the
17 (F)(6) aggravating factor, that the crime was cruel, heinous, or depraved:

18 Your entire manner and demeanor before, during and since this trial,
19 your treatment of this process as *merely some new intellectual game* leads this
20 Court to the conclusion that your *only familiarity with remorse is the spelling*
21 *and pronunciation of the word*. You wrote to me, "the knowledge that Charlie
is forever gone from this plane of existence is made especially painful by the
fact that her life literally passed through my hands."

22 You *may think that to have been a clever turn of phrase; I find that it*
23 *is a snide word game describing a foul murder perpetrated by you*. It speaks
24 volumes not of remorse or of respect for Ms. Regan, but of a *mind so*
supercillious [sic] and full of self that it believes it is permissible to be cute
about this crime. It says that you committed these crimes with a depraved
mind and a malignant heart.

25
26 ⁷ For the sake of clarity and accuracy the Court has repeated the entirety of these two
27 paragraphs, rather than the limited quotation cited by Petitioner. The italicized language is
28 that upon which Petitioner relies.

1 (*Id.* at 26-27 (emphasis added)⁸.) After the court completed its review of the aggravating and
2 mitigating factors and concluded that there was no mitigation sufficiently substantial to call
3 for leniency, it expounded upon the basis for capital punishment in society, including
4 deterrence, stating “while we can only hope that capital punishment will deter others, we
5 know it will deter you.” (*Id.* at 29-30.)

6 *Claim 9 Analysis*

7 Respondents concede this claim of judicial bias is properly exhausted to the extent it
8 is premised on the resentencing hearing. (Dkt. 47 at 62.) Petitioner’s complaint is limited
9 to a violation of his rights at resentencing; he does not assert a violation relating to trial.
10 Although Petitioner relies on examples from trial to demonstrate the judge’s bias, he did so
11 in state court as well. (Appellant’s Revised Opening Br. (CR-93-0535-AP) at 39-44.) The
12 Arizona Supreme Court did not find these allegations clearly barred to the extent they were
13 tied to the resentencing, *Schackart II*, 190 Ariz. at 256, 947 P.2d at 333; therefore, the Court
14 considers them. The Arizona Supreme Court denied this claim finding that the incidents
15 upon which Petitioner relied did not demonstrate “bias nor any deep-seated favoritism.” *Id.*
16 at 256-57, 947 P.2d at 333-34.

17 Petitioner appears to argue that his judge was actually biased against him, which
18 would render his sentence fundamentally unfair in clear violation of due process. *See Bracy*
19 *v. Gramley*, 520 U.S. 899, 905 (1997) (due process requires that a defendant receive a “fair
20 trial in a fair tribunal.”); *Arizona v. Fulminante*, 499 U.S. 279, 308-10 (1991) (the presence
21 of an impartial judge is so basic to a fair trial that its violation is never subject to harmless
22 error review); *In re Murchison*, 349 U.S. 133, 136 (1955). However, the only Supreme Court
23 case Petitioner cites, *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 59-62 (1972),
24 involved not actual bias but the type of situation the Court subsequently characterized as one
25 “in which experience teaches that the probability of actual bias” is too high to be

26
27 ⁸ *See supra* note 7.

1 constitutional. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (finding rule necessary to prevent
2 the “probability of unfairness”). In *Withrow*, the Court further explained that “[a]mong these
3 cases are those in which the adjudicator has a pecuniary interest in the outcome and in which
4 he has been the target of personal abuse or criticism from the party before him.” *Id.*; *see also*
5 *Taylor v. Hayes*, 418 U.S. 488, 501-03 (1974) (when there are “marked personal feelings .
6 . . present on both sides” arising from the underlying litigation, it violates due process for a
7 judge to hear a subsequent contempt case because he has become embroiled with the litigant
8 and his behavior); *Tumey v. State of Ohio*, 273 U.S. 510, 523, 535 (1927) (finding due
9 process violation because judge, who was also the mayor, had direct pecuniary interest in a
10 conviction as well as motive to increase fine to benefit the town coffers).

11 The Supreme Court has also expressed this rule more generally as “every procedure
12 which would offer a possible temptation to the average man as a judge . . . not to hold the
13 balance nice, clear and true between the State and the accused denies the latter due process
14 of law.” *In re Murchison*, 349 U.S. at 136 (quoting *Tumey*, 273 U.S. at 532). Despite the
15 seeming breadth of this principle, in application, the Supreme Court has extended the
16 protections of due process beyond actual bias only in the two limited circumstances identified
17 in *Withrow*: where the judge has an interest in the outcome, or where he has been personally
18 impugned by the litigant leading to a finding of contempt. Petitioner has not alleged, and the
19 record refutes, that either of these circumstances apply with respect to Petitioner’s sentencing
20 by Judge Brown. Thus, it was not contrary to nor an unreasonable application of clearly
21 established Supreme Court law for the state court not to presume bias.

22 Petitioner contends that a due process violation is established if there was “a pervasive
23 climate of partiality or unfairness.” (Dkt. 52 at 56.) In support of this rule, Petitioner cites
24 two circuit court cases. However, those cases categorize the above-quoted rule as applicable
25 to cases on direct review rather than as a standard for a due process violation. *See Duckett*
26 *v. Godinez*, 67 F.3d 734, 740-41 (9th Cir. 1995) (finding that conduct which might require
27 reversal upon direct review did not rise to the level of fundamental unfairness implicating
28

1 due process); *United States v. DeLucca*, 692 F.2d 1277, 1282 (9th Cir. 1982). Further, as
2 discussed below, the Court’s review of the record did not reveal pervasive partiality.

3 Petitioner’s burden to demonstrate actual bias is extremely high because there is a
4 presumption that judicial officials have “properly discharged their official duties.” *Bracy*,
5 520 U.S. at 909 (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).
6 Additionally, the Supreme Court has held that “only in the most extreme cases would
7 disqualification [for bias or prejudice] be constitutionally required.” *Aetna Life Ins. Co. v.*
8 *Lavoie*, 475 U.S. 813, 821 (1986). That holding is premised on the ground that “the law will
9 not suppose a possibility of bias or favor in a judge, who is already sworn to administer
10 impartial justice, and whose authority greatly depends upon that presumption and idea.” *Id.*
11 at 820 (quoting 3 W. Blackstone, Commentaries *361). Further, judges “are assumed to be
12 men of conscience and intellectual discipline, capable of judging a particular controversy
13 fairly on the basis of its own circumstances.” *United States v. Morgan*, 313 U.S. 409, 421
14 (1941). This principle is particularly salient in this case because none of the instances cited
15 by Petitioner took place in front of the jury, nor was the jury involved in sentencing. *See*
16 *DeLucca*, 692 F.2d at 1282 (considering that many of the instances cited to support claim of
17 partiality took place outside the jury’s presence); *see also Rowsey v. Lee*, 327 F.3d 335, 341-
18 342 (4th Cir. 2003).

19 The Supreme Court has explained that “[j]udicial remarks during the course of a trial
20 that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases,
21 ordinarily do not support a bias or partiality challenge.” *Liteky v. United States*, 510 U.S.
22 540, 555 (1994) (upholding the denial of a recusal motion, which has a lower threshold than
23 a due process violation for bias). Further, “expressions of impatience, dissatisfaction,
24 annoyance, and even anger” do not alone signal partiality. *Id.* at 555-56. The factual
25 instances upon which Petitioner relies amount to comments by the sentencing judge that he
26 disbelieved the defendant, did not find him credible, disliked his attitude or behavior, and
27 found him deserving of the punishment imposed. Such observations do not implicate bias
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1 rising to the level of a due process violation. Rather, “[t]he judge who presides at trial may,
2 upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has
3 been shown to be a thoroughly reprehensible person”; however, that knowledge and opinion
4 may be “necessary to completion of the judge’s task” and the decisions he must render. *Id.*
5 at 550-51 (citing bench trials as an example of such necessity). While some of the judge’s
6 commentary may have been superfluous, much of it was relevant to the aggravating and
7 mitigating factors presented to the court. *See infra* discussion Claim 10. Moreover,
8 conclusions regarding a defendant’s credibility and character are squarely within the
9 province of the sentencing judge.

10 The Arizona Supreme Court’s finding that the judge was not biased is entitled to
11 deference. *See* 28 U.S.C. § 2254(e)(1); *Villafuerte v. Stewart*, 111 F.3d 616, 632 (9th Cir.
12 1997). More importantly, the cited occurrences and the record as a whole indicate that
13 Petitioner’s sentencing was not fundamentally unfair in violation of due process.⁹ Claim 9
14 is denied.

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17 ⁹ In addition to the facts set forth in the above factual background, Petitioner cites fact
18 paragraph sixty-four of the amended petition. (Dkt. 39 at ¶ 114.) That paragraph recites
19 mitigation testimony by Petitioner’s expert, Dr. Bendheim, which appears unrelated to this
20 claim. (*Id.* at ¶ 64.) The following paragraph, however, addresses the sentencing judge’s
21 questioning of Dr. Bendheim, comparing it to “a prosecution cross-examination.” (*Id.* at
22 ¶ 65.) To the extent Petitioner intended to rely on these facts, they do not impact the court’s
23 analysis set forth in the body of the Order. The court’s questioning of Dr. Bendheim was
24 allowed by court rule, Ariz. R. Evid. 614(b), comprised only ten pages of the seventy-page
25 testimony, and was reasonable. (*See* RT 5/3/85 at 51-120.) The judge explained to counsel
26 that as the finder of fact he felt it necessary to gather additional information to assist in
27 making the sentencing determination. (*Id.* at 119-20.) Further, “[q]uestions by a court
28 indicating skepticism are not improper when the witnesses are permitted to respond ‘to the
district court’s expressed concerns to the test [sic] of their ability.’” *Shad v. Dean Witter
Reynolds, Inc.*, 799 F.2d 525, 531 (9th Cir. 1986) (focusing on the impact of judge’s behavior
on a jury) (quoting *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1383 (9th Cir. 1984)).
The witness was allowed to fully respond to the court’s questions (RT 5/3/85 at 104-14), and
the court allowed the defense to conduct additional redirect (*id.* at 114-17).

1 *Claim 10 Analysis*

2 Respondents contend that this claim – alleging the judge relied upon non-statutory
3 aggravating factors in imposing a death sentence – was not properly exhausted and is
4 procedurally defaulted. Regardless of its procedural status,¹⁰ the Court will dismiss this
5 claim because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of
6 unexhausted claims on the merits); *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (holding that
7 a stay is inappropriate in federal court to allow claims to be raised in state court if they are
8 subject to dismissal under (b)(2) as “plainly meritless”).

9 To the extent Petitioner relies upon the court’s statements when sentencing him for
10 kidnapping and sexual assault (RT 12/7/93 at 18-21), these statements were clearly limited
11 to the discussion of non-capital offenses. Thus, there is no factual basis for Petitioner’s
12 argument that the court relied on them as non-statutory aggravation for Petitioner’s death
13 sentence.

14 The court’s reference to Petitioner treating his wife as a punching bag and as chattel
15 (RT 12/7/93 at 23) occurred during discussion of a statutory aggravating factor – that
16 Petitioner had previously been convicted of a felony involving the use or threat of violence
17 (A.R.S. § 13-703(F)(2)). The prior felony was Petitioner’s assault of his then-wife. (RT
18 12/7/93 at 21-22.) The court discussed Petitioner’s evidence regarding his ex-wife’s
19 character, which focus on her alleged infidelity and lack of veracity and was proffered to
20 mitigate this aggravating factor. (*Id.* at 22-23.) The court’s comments occurred in its
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22 ¹⁰ Petitioner argues that the Arizona Supreme Court “brushed over” the specific
23 statements by the sentencing judge that are at issue in this claim. (Dkt. 52 at 58.) As noted
24 by Respondents, Petitioner did not rely on these examples in his appellate brief; rather, he
25 focused on the court’s statements about capital punishment as an expression of society’s
26 moral outrage. (Appellant’s Revised Opening Br. (CR93-0535-AP) at 14-15 (citing RT
27 12/7/93 at 29-30).) The supreme court reviewed the entirety of the capital sentencing
28 proceeding but focused on the language emphasized by Petitioner in reaching its conclusion
that the sentencing judge did not rely on nonstatutory aggravators. *Schackart II*, 190 Ariz.
at 250, 947 P.2d at 327.

1 concluding remark rejecting Petitioner’s mitigation related to the statutory aggravating factor.
2 (*Id.* at 23-24.) Thus, the court did not use this characterization about Petitioner as an
3 aggravating factor; rather, it rejected the arguments Petitioner offered to mitigate a statutory
4 aggravator. Similarly, the other challenged comments were products of the judge’s analysis
5 in support of his finding that Petitioner acted with a depraved mind (RT 12/7/93 at 24-27),
6 which is one prong of the (F)(6) statutory aggravating factor.

7 Finally, the court’s statement that capital punishment would act as a deterrent with
8 respect to Petitioner was made after the court completed its review of the statutory
9 aggravating factors and all of the mitigation and determined that there was no mitigation
10 sufficiently substantial to call for leniency. (*Id.* at 29-30.) Thus, the Court already had
11 concluded that Petitioner would be sentenced to death. There is nothing to suggest the court
12 used deterrence as an aggravating factor.

13 “Non-statutory” aggravation evidence is not recognized in Arizona; the only
14 aggravating circumstances allowed to support a death sentence are enumerated in the
15 governing statute, A.R.S. § 13-703(F), and the sentencing court may only consider evidence
16 in aggravation that tends to establish a statutory aggravating factor. *State v. Gulbrandson*,
17 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995); *State v. Atwood*, 171 Ariz. 576, 673, 832 P.2d
18 593, 656 (1992), *overturned on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d
19 717 (2001). Absent evidence to the contrary, a judge is presumed to focus only on relevant
20 sentencing factors. *State v. Beaty*, 158 Ariz. 232, 244, 762 P.2d 519, 531 (1988); *Walton v.*
21 *Arizona*, 497 U.S. 639, 653 (1990) (“Trial judges are presumed to know the law and to apply
22 it in making their decisions.”), *overturned on other grounds by Ring v. Arizona*, 536 U.S. 584
23 (2002). The incidents cited by Petitioner fail to rebut the presumption that the sentencing
24 judge did not consider evidence in aggravation that was not relevant to a statutory factor.

25 Additionally, the Arizona Supreme Court conducted a separate, independent review
26 of the aggravating and mitigating factors and determined that Petitioner’s death sentence was
27 appropriate. *Schackart II*, 190 Ariz. at 246, 947 P.2d at 323. Even if the trial court had
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1 committed constitutional error at sentencing, a proper and independent review of the
2 mitigation and aggravation by the state supreme court cured any such defect. *See Clemons*
3 *v. Mississippi*, 494 U.S. 738, 750, 754 (1990) (holding that appellate courts are able to fully
4 consider mitigating evidence and are constitutionally permitted to affirm a death sentence
5 based on independent re-weighing despite any error at sentencing). In Petitioner’s case, the
6 supreme court rejected the (F)(2) factor and the heinous/depraved prong of the (F)(6) factor
7 (the findings during which the judge made the allegedly objectionable statements), reweighed
8 the remaining aggravation and mitigation, and found a death sentence appropriate. *Schackart*
9 *II*, 190 Ariz. at 251, 261, 947 P.2d at 328, 338.

10 As a final matter, Petitioner relies on *Lankford v. Idaho*, 500 U.S. 110 (1991), in
11 support of his related argument that he did not receive sufficient notice of the non-statutory
12 aggravation upon which the judge relied. As discussed above, the record is clear that the
13 judge did not rely on non-statutory aggravation regarding the capital sentence. Petitioner
14 does not allege that he received insufficient notice of the statutory aggravating factors alleged
15 by the prosecution and found by the court.

16 Petitioner is not entitled to relief on Claim 10 and it is denied.

17 **Claim 11**

18 Petitioner alleges that his Eighth Amendment right to be free of cruel and unusual
19 punishment was violated by the sentencing court’s reliance on the (F)(6) aggravating factor,
20 which he contends is vague and overbroad. Regardless of exhaustion, the Court will dismiss
21 this claim because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at
22 277. Petitioner concedes, although he disagrees with the resolution, that the Supreme Court
23 decided this issue against him prior to his resentencing (Dkt. 52 at 59). *See Walton*, 497 U.S.
24 at 655 (upholding Arizona’s (F)(6) factor as providing sufficient guidance to the sentencer).
25 Claim 11 is dismissed.

26 **Claim 12**

27 Petitioner alleges that it is cruel and unusual punishment to carry out an execution
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1 more than twenty years after the sentence was imposed. Respondents concede this claim is
2 properly exhausted. (Dkt. 47 at 68.) The Arizona Supreme Court rejected the claim during
3 Petitioner's second appeal, *Schackart II*, 190 Ariz. at 259, 947 P.2d at 336; it was further
4 discussed and rejected during Petitioner's PCR proceeding (ROA 167 at 45-49; ROA 185
5 at 20-21).

6 Because the Supreme Court has never held that prolonged incarceration prior to
7 execution violates the Eighth Amendment, *see Lackey v. Texas*, 514 U.S. 1045 (1995)
8 (mem.) (Stevens, J. & Breyer, J., discussing denial of certiorari and noting the claim has not
9 been addressed), Petitioner cannot establish a right to federal habeas relief under 28 U.S.C.
10 § 2254(d), *see Allen v. Ornoski*, 435 F.3d 946, 958-60 (9th Cir. 2006). Additionally,
11 numerous circuit courts, including the Ninth Circuit Court of Appeals, have held that
12 prolonged incarceration under a sentence of death does not offend the Eighth Amendment.
13 *See McKenzie v. Day*, 57 F.3d 1493, 1493-94 (9th Cir.) (en banc) (delay of 20 years), *cert.*
14 *denied*, 514 U.S. 1104 (1995); *White v. Johnson*, 79 F.3d 432, 438 (5th Cir.) (delay of 17
15 years), *cert. denied*, 519 U.S. 911 (1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir.)
16 (delay of 15 years), *cert. denied*, 515 U.S. 1173 (1995). The above-cited circuit court
17 opinions counter Petitioner's argument, based on *Trop v. Dulles*, 356 U.S. 86, 101 (1958),
18 that evolving standards of decency support his argument. *See Allen*, 435 F.3d at 959.
19 Finally, Petitioner's reliance on international law does not alter the above Eighth Amendment
20 analysis. *See Buell v. Mitchell*, 274 F.3d 337, 370-76 (6th Cir. 2001).

21 Claim 12 is denied.

22 **Claim 14**

23 Petitioner alleges that his rights under the Eighth Amendment and international law
24 were violated by Arizona's death penalty statute and the imposition of a death sentence under
25 the circumstances of his crime, which he contends do not set it apart from the norm of first-
26 degree murder cases. Respondents contend this claim is exhausted to the extent it alleges an
27 Eighth Amendment violation, but procedurally defaulted to the extent it is premised on
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1 international law. (Dkt. 47 at 71-72.) The Court agrees.

2 Petitioner alleges generally a violation of international law but cites to his PCR
3 petition addendum for the specifics of the law at issue. (Dkt. 39 at 36 (citing ROA 167).)
4 The only PCR claim based on international law alleged that subjecting Petitioner to the
5 conditions of death row prior to execution was inhumane (ROA 166, 167; ROA 185 at 21);
6 that is the subject of Claim 12, not Claim 14. Because Petitioner never argued before the
7 Arizona courts that Arizona’s death penalty statute in general and his death sentence in
8 particular violate international law, that portion of the claim was not fairly presented. If
9 Petitioner were to return to state court now to litigate these international law issues, the claim
10 would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona
11 Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See*
12 *Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h)*. Therefore, these portions of the claim are technically
13 exhausted but procedurally defaulted. Petitioner has not alleged cause and prejudice or a
14 fundamental miscarriage of justice to excuse the default. Moreover, because Petitioner never
15 identified in this Court how or what international law was violated, the allegations
16 necessarily fail.

17 This claim was raised as an Eighth Amendment violation based on *Furman v. Georgia*
18 in Petitioner’s second direct appeal (Appellant’s Revised Opening Br. (CR-93-0535-AP) at
19 56); therefore, as conceded by Respondents, that portion of the claim is exhausted. In
20 *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court held the death penalty statutes
21 of Georgia and Texas to be unconstitutional because they allowed arbitrary and unguided
22 imposition of capital punishment. Many states subsequently enacted new capital statutes, a
23 number of which survived the Court’s further scrutiny in *Gregg v. Georgia*, 428 U.S. 153
24 (1976). Observing that the death penalty is “unique in its severity and irrevocability,” *id.* at
25 187, the *Gregg* Court concluded that a death sentence may not be imposed unless the
26 sentencing authority focuses attention “on the particularized nature of the crime and the
27 particularized characteristics of the individual defendant.” *Id.* at 206. In imposing the death
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1 sentence, the sentencer must find the presence of at least one aggravating factor and then
2 weigh that factor against the evidence of mitigating factors. *Id.* The Court refined these
3 general requirements in *Zant v. Stephens*, 462 U.S. 862, 877 (1983), holding that a
4 constitutionally valid capital sentencing scheme must “genuinely narrow the class of persons
5 eligible for the death penalty and must reasonably justify the imposition of a more severe
6 sentence on the defendant compared to others found guilty of murder.” A death penalty
7 scheme must provide an “objective, evenhanded and substantively rational way” for
8 determining whether a defendant is eligible for the death penalty. *Id.* at 879.

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

19 Defining specific “aggravating circumstances” is the accepted “means of genuinely
20 narrowing the class of death-eligible persons and thereby channeling the [sentencing
21 authority’s] discretion.” *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Each defined
22 circumstance must meet two requirements. First, “the [aggravating] circumstance may not
23 apply to every defendant convicted of a murder; it must apply only to a subclass of
24 defendants convicted of a murder.” *Tuilaepa*, 512 U.S. at 972; *see Arave v. Creech*, 507 U.S.
25 463, 474 (1993). Second, “the aggravating circumstance may not be unconstitutionally
26 vague.” *Tuilaepa*, 512 U.S. at 972; *see Arave*, 507 U.S. at 473; *Godfrey v. Georgia*, 446 U.S.
27 420, 428 (1980).

1 Arizona's death penalty scheme allows only certain, statutorily defined, aggravating
2 circumstances to be considered in determining eligibility for the death penalty. A.R.S. § 13-
3 703(F). "The presence of aggravating circumstances serves the purpose of limiting the class
4 of death-eligible defendants, and the Eighth Amendment does not require that these
5 aggravating circumstances be further refined or weighed by [the sentencer]." *Blystone v.*
6 *Pennsylvania*, 494 U.S. 299, 306-07 (1990). Not only does Arizona's sentencing scheme
7 generally narrow the class of death-eligible persons, the aggravating factors delineated in
8 § 13-703(F) do so specifically. Rulings of the United States Supreme Court and the Ninth
9 Circuit have upheld Arizona's death penalty statute against challenges that particular
10 aggravating factors, including § 13-703(F)(6) (heinous, cruel and depraved), do not
11 adequately narrow the sentencer's discretion. *See Lewis v. Jeffers*, 497 U.S. 764, 774-77
12 (1990); *Walton*, 497 U.S. at 655-56; *Woratzek v. Stewart*, 97 F.3d 329, 335 (9th Cir. 1996).
13 The Ninth Circuit has explicitly rejected the argument that Arizona's death penalty statute
14 is unconstitutional because "it does not properly narrow the class of death penalty
15 recipients." *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998).

16 There is no federal constitutional right to proportionality review of a death sentence,
17 *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987) (citing *Pulley v. Harris*, 465 U.S. 37, 43-44
18 (1984)), and the Arizona Supreme Court discontinued the practice in 1992, *State v. Salazar*,
19 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992). The Ninth Circuit has explained that the
20 interest implicated by proportionality review – the "substantive right to be free from a
21 disproportionate sentence" – is protected by the application of "adequately narrowed
22 aggravating circumstance[s]." *Ceja*, 97 F.3d at 1252.

23 Finally, clearly established federal law holds that the death penalty does not constitute
24 cruel and unusual punishment. *Gregg*, 428 U.S. at 169; *see also Roper v. Simmons*, 543 U.S.
25 551, 568-69 (2005) (noting that the death penalty is constitutional when applied to a narrow
26 category of crimes and offenders).

27 Both the trial court and the Arizona Supreme Court decided that a death sentence was
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1 appropriate after reviewing the evidence in support of the asserted statutory aggravating
2 factor(s), recounting the proven statutory and nonstatutory mitigating factors presented by
3 Petitioner, and weighing them against one another (RT 12/7/93 at 21-29). *Schackart II*, 190
4 Ariz. at 246-254, 260-61, 947 P.2d at 323-331, 337-38. For all of these reasons, Claim 14
5 is denied.

6 **Claim 15**

7 Petitioner alleges that his Eighth and Fourteenth Amendment rights were violated by
8 the denial of a jury determination of all the facts necessary for the imposition of a death
9 sentence. Although Respondents contest exhaustion, the Court will dismiss the claim
10 because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277.

11 This claim is premised on *Ring v. Arizona*, 536 U.S. 584, 609 (2002), which found
12 that Arizona’s aggravating factors are an element of the offense of capital murder and must
13 be found by a jury. However, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme
14 Court held that *Ring* did not apply retroactively to cases already final on direct review.
15 Petitioner contends his case was not final because he was pursuing relief under Arizona Rule
16 of Criminal Procedure 32. The Supreme Court has made clear that, for purposes of
17 retroactivity, a case is “final” after conviction, exhaustion of direct appeal availability, and
18 elapse of the time for a petition for certiorari. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6
19 (1987). The Arizona Supreme Court has adopted that analysis, holding that capital cases in
20 which the direct appeal mandate has issued, even if pending in a Rule 32 proceeding, are
21 final and not entitled to relief premised on *Ring*. *State v. Towery*, 204 Ariz. 386, 389-90,
22 394, 64 P.3d 828, 831-32, 836 (2003). Because Petitioner’s direct appellate review was final
23 prior to *Ring*, he is not entitled to relief premised on that ruling. Claim 15 is dismissed on
24 the merits.

25 **Claim 16**

26 Petitioner alleges his right to equal protection was violated by the failure to have a
27 jury make all necessary factual determinations for a sentence of death because non-capital
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1 defendants are afforded that right. Respondents concede this claim was properly exhausted.
2 (Dkt. 47 at 77.) The Arizona Supreme Court summarily rejected this claim citing *Jeffers v.*
3 *Lewis*, 38 F.3d 411, 419 (9th Cir. 1994). *Schackart II*, 190 Ariz. at 260, 947 P.2d at 338.

4 In support of this claim, Petitioner cites a dissenting opinion in *Harris v. Alabama*,
5 513 U.S. 504, 515 (1995) (Stevens, J., dissenting). As Respondents note, *Harris* was not an
6 equal protection case; rather, it was an Eighth Amendment case in which the majority found
7 that judge-imposed capital sentences were constitutional. *Harris*, 513 U.S. at 515. Petitioner
8 fails to cite, and the Court is not aware of, any clearly established Supreme Court law in
9 support of his position; therefore, he cannot obtain relief on this claim. *See Musladin*, 549
10 U.S. at 77. In addition, the Ninth Circuit has explicitly rejected the claim. *Jeffers*, 38 F.3d
11 at 419 (noting that judicial sentencing is rational as it is potentially more consistent than jury
12 sentencing) (quoting *Proffitt v. Florida*, 428 U.S. 242, 252 (1976)).

13 Claim 16 is dismissed.

14 **CERTIFICATE OF APPEALABILITY**

15 In the event Petitioner appeals from this Court’s judgment, and in the interests of
16 conserving scarce resources that might be consumed drafting and reviewing a request for a
17 certificate of appealability (COA) to this Court, the Court on its own initiative has evaluated
18 the claims within the petition for suitability for the issuance of a certificate of appealability.
19 *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

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

4 In a prior order, the Court determined that reasonable jurists could debate its
5 resolution of Claims 5 and 6(a) (Dkt. 101 at 18); therefore, those claims will be included in
6 the COA. The Court finds that reasonable jurists, applying the deferential standard of review
7 set forth in the AEDPA, which requires this Court to evaluate state court decisions in light
8 of clearly established federal law as determined by the United States Supreme Court, could
9 not debate its resolution of Petitioner's claims as set forth in this Order or its order of
10 September 14, 2005 (Dkt. 75).

11 Accordingly,

12 **IT IS ORDERED** that Petitioner's Amended Petition for Writ of Habeas Corpus
13 (Dkt. 39) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

14 **IT IS FURTHER ORDERED** that the stay of execution entered on June 6, 2003
15 (Dkt. 3) is **VACATED**.

16 **IT IS FURTHER ORDERED GRANTING** a Certificate of Appealability as to the
17 following issues:


18 Whether Claim 5 – alleging that Petitioner's right to a fair and impartial
19 jury was violated – fails on the merits.

20 Whether Claim 6(a) – alleging ineffective assistance of counsel for
21 failing to develop a proper factual record regarding the partiality of the jury –
22 fails on the merits.

23 **IT IS FURTHER ORDERED** that the Clerk of Court forward a copy of this Order
24 to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

25 DATED this 13th day of March, 2009.

26 *copy to Clerk, Arizona Supreme Court 3/16/09 by cjs*

27 
28 David C. Bury
United States District Judge