

1 WO

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9 Charles Monte Reese,

No. CV-11-00843-TUC-CRP

10

Petitioner,

ORDER

11

v.

12

Charles L. Ryan, et al.,

13

Respondents.

14

Petitioner Charles Monte Reese, through counsel, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Before this Court are the Petition and accompanying Appendix¹ (Doc. 1), Respondents' Answer with accompanying Exhibits² (Doc. 9), and Petitioner's Reply (Doc. 12). The parties consented to exercise of jurisdiction by a Magistrate Judge, pursuant to 28 U.S.C. § 636(c)(1). (Doc. 13.) The Court finds that the Petition should be denied and dismissed with prejudice.

20

I. Factual and Procedural Background

21

Petitioner Charles Reese was driving his car while under the influence of alcohol in the early morning of March 2005 and struck the victim, who was riding a motorcycle. App. 2 at 1-2.³ Petitioner's blood alcohol concentration was .205 percent. *Id.* The victim

24

25

¹ All appendices cited in this Order refer to the Appendix ("App.") attached to the Petition.

26

27

² All exhibits cited in this Order refer to the Exhibits ("Exs.") attached to the Answer.

28

³ These facts are drawn from the Arizona Court of Appeals memorandum decision. The Court presumes the correctness of the Arizona court's findings unless

1 died the next day. *Id.* Petitioner was arrested and charged with second degree murder,
2 criminal damage, driving while under the influence of liquor, driving with an alcohol
3 concentration of .08 or more, and driving while under the extreme influence of
4 intoxicating liquor. App. 1, Indictment. On February 16, 2006, Petitioner entered a plea
5 to manslaughter, a class two felony and dangerous-nature offense. Ex. A; App 1, Minute
6 Entry 2/16/06. After a sentencing hearing at which the victim's family and friends spoke,
7 the trial court sentenced Petitioner to a partially-aggravated term of 16 years'
8 imprisonment. App. 1 at 8-11; App. 4. The trial court identified Petitioner's lack of a
9 felony criminal history; remorse; involvement in counseling and alcohol abuse treatment
10 since the accident; compliance with conditions of release; and family and community
11 support as mitigating factors. App. 1, at 9. As aggravating factors the court identified the
12 emotional and financial harm to the victim's survivors; the danger Petitioner posed and
13 continues to pose to the community; Petitioner's blood alcohol level of .20 percent at the
14 time of the accident; Petitioner's prior DUI conviction; and Petitioner's acknowledgment
15 of an alcohol problem while continuing to drink and drive. *Id.*

16 On September 10, 2008, Petitioner filed an amended notice of post-conviction
17 relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. Ex. B. Petitioner had
18 apparently filed an earlier notice, on June 5, 2007, which had not been acted upon by the
19 trial court. *See id.* On April 1, 2010, Petitioner, through counsel, filed a petition for post-
20 conviction relief (PCR), claiming that the trial court violated his due process rights at
21 sentencing, his trial counsel was ineffective for failing to investigate the victim's use of a
22 helmet, counsel was ineffective at sentencing, and newly discovered evidence. App. 1-A.
23 The trial court summarily denied the PCR. App. 1-C.

24 Petitioner sought review of the trial court's denial of post-conviction relief by the
25 Arizona Court of Appeals. Ex. D. The appellate court granted review but denied relief in
26 a memorandum decision filed on March 30, 2011. App. 2. Petitioner sought review of
27

28 rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). *See also Dickens v. Ryan*, 740 F.3d 1302, 1306 n.2 (9th Cir. 2014).

1 that decision by the Arizona Supreme Court. Ex. E. On September 6, 2011, that court
2 denied review. Ex. F.

3 Petitioner filed the instant Petition on December 28, 2011. Petitioner raises five
4 issues: (1) ineffective assistance of counsel (“IAC”) for failing to investigate; (2)
5 ineffective assistance of counsel for failing to provide a risk/benefit analysis concerning
6 Petitioner’s plea offer; (3) ineffective assistance of counsel failing to present mitigating
7 evidence at sentencing; (4) a violation of Petitioner’s constitutional rights of due process
8 and confrontation through the unsworn testimony of witnesses at sentencing; and (5) the
9 trial court’s violation of Petitioner’s due process rights by imposition of an aggravated
10 sentence. Petition at 6.

11 **II. Discussion**

12 **A. Standard of Review**

13 Because Reese filed his petition after April 24, 1996, this case is governed by the
14 Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (“AEDPA”).
15 *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997) (holding that AEDPA governs federal
16 habeas petitions filed after the date of its enactment, April 24, 1996).

17 **B. Timeliness**

18 Under the AEDPA, a state prisoner must generally file a petition for writ of habeas
19 corpus within one year from “the date on which the judgment became final by the
20 conclusion of direct review or the expiration of time for seeking such review[.]” 28
21 U.S.C. § 2244(d)(1)(A). “The time during which a properly filed application for state
22 post-conviction or other collateral review with respect to the pertinent judgment or claim
23 is pending shall not be counted toward any period of limitation[.]” 28 U.S.C. §
24 2244(d)(2).

25 Petitioner had until one year after his conviction and sentence became final to file
26 his federal petition. Respondents do not contest the timeliness of the Petition. Upon
27 review of the state-court record, the Court finds that, pursuant to the AEDPA, the Petition
28

1 is timely.⁴

2 C. Procedural Default

3 Respondents assert that Ground Two of the Petition, an IAC claim asserting trial
4 counsel failed to advise Petitioner of the risks and benefits of accepting the State’s plea
5 offer, is procedurally defaulted because Petitioner did not fairly present the claim to the
6 state courts. Answer at 10. Petitioner responds that the issue was raised in Petitioner’s
7 petition for review to the Arizona Court of Appeals as a component of Petitioner’s IAC
8 claim. Reply, at 2, citing Ex. D, at 15-17.

9 A writ of habeas corpus may not be granted unless it appears that a petitioner has
10 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*
11 *Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must “fairly
12 present” the operative facts and the federal legal theory of his claims to the state’s highest
13 court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848
14 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277–

15
16 ⁴ Though not raised by the State, Petitioner’s conviction arguably became final
17 ninety-days after his sentencing when he failed to timely commence a post-conviction
18 relief proceeding by filing a notice of post-conviction relief. *See* Rule 32.1, Arizona
19 Rules of Criminal Procedure (person who pleads guilty shall have the right to file a post-
20 conviction relief proceeding, known as a “Rule 32 of-right proceeding.”); Rule 32.4,
21 Arizona Rules of Criminal Procedure (notice of PCR must be filed within ninety days
22 after the entry of judgment and sentence). Thus, the limitations period would have
23 commenced running on May 17, 2006, and the time for filing a federal petition would
24 have expired, absent tolling, on May 17, 2007. *See* 28 U.S.C. § 2244(d)(1)(A). If,
25 however, a state court grants a defendant the right to file an out-of-time direct appeal,
26 “before the defendant has first sought federal habeas relief, his judgment is not yet ‘final’
27 for purposes of § 2244(d)(1)(A).” *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009) (out-
28 of-time appeal granted during state collateral review process). In such a case, the
limitations period is essentially reset, as finality occurs at “the conclusion of the out-of-
time direct appeal, or the expiration of the time for seeking review of that appeal.” *Id.* In
Arizona, an “of-right” petition for post-conviction relief from a pleading defendant is
“the counterpart of a direct appeal.” *See State v. Pruett*, 185 Ariz. 128, 130-131 (App.
1995); *State v. Petty*, 225 Ariz. 369, 372 (App. 2010). Thus, by granting review of the
petition for post-conviction relief, Petitioner’s conviction was “again capable of
modification” through further review. *See Jimenez*, 555 U.S. at 120. Accordingly, the
Court finds, as Respondents suggest, that Reese’s conviction did not become final until
ninety days following the conclusion of his “of-right” PCR proceedings, or on December
5, 2011. *Cf. Thompson v. Lea*, 681 F.3d 1093, 1094 (9th Cir. 2012). (Petitioner’s
conviction remains nonfinal during the pendency of reopened appeal and becomes final
ninety days after the California Supreme Court dismissed review on the merits.) Because
Petitioner filed the instant Petition on December 28, 2011, it is timely.

1 78 (1971).

2 “To exhaust one’s state court remedies in Arizona, a petitioner must first raise the
3 claim in a direct appeal or collaterally attack his conviction in a petition for post-
4 conviction relief pursuant to Rule 32.” *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir.
5 1994). The failure to exhaust subjects the petitioner to dismissal. *Gutierrez v. Griggs*, 695
6 F.2d 1195 (9th Cir. 1983).

7 A habeas petitioner's claims may be precluded from federal review in two ways.
8 First, a claim may be procedurally defaulted in federal court if it was actually raised in
9 state court but found by that court to be defaulted on state procedural grounds. *Coleman*,
10 501 U.S. at 729–30. Second, a claim may be procedurally defaulted if the petitioner failed
11 to present it in state court and “the court to which the petitioner would be required to
12 present his claims in order to meet the exhaustion requirement would now find the claims
13 procedurally barred.” *Coleman*, 501 U.S. at 735 n. 1; *see also Ortiz v. Stewart*, 149 F.3d
14 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim
15 could be pursued by any presently available state remedy). If no remedies are currently
16 available pursuant to Rule 32, the claim is “technically” exhausted but procedurally
17 defaulted. *Coleman*, 501 U.S. at 732, 735 n. 1; *see also Gray v. Netherland*, 518 U.S.
18 152, 161-62 (1996).

19 In Arizona, claims not previously presented to the state courts on either direct
20 appeal or collateral review are generally barred from federal review because any attempt
21 to return to state court to present them would be futile unless the claims fit into a narrow
22 range of exceptions. *See Ariz.R.Crim.P.* 32.1(d)-(h), 32.2(a) (precluding claims not raised
23 on direct appeal or in prior post-conviction relief petitions), 32.4(a) (time bar), 32.9(c)
24 (petition for review must be filed within thirty days of trial court’s decision). Because
25 these rules have been found to be consistently and regularly followed, and because they
26 are independent of federal law, either their specific application to a claim by an Arizona
27 court, or their operation to preclude a return to state court to exhaust a claim, will
28 procedurally bar subsequent review of the merits of such a claim by a federal habeas
court. *Stewart v. Smith*, 536 U.S. 856, 860 (2002); *Ortiz*, 149 F.3d at 931–32 (finding

1 Rule 32.2(a)(3) regularly followed and adequate).

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

9 Cause is defined as a "legitimate excuse for the default," and prejudice is defined
10 as "actual harm resulting from the alleged constitutional violation." *Thomas v. Lewis*, 945
11 F.2d 1119, 1123 (9th Cir. 1991); *see Murray v. Carrier*, 477 U.S. 478, 488 (1986) (a
12 showing of cause requires a petitioner to show that "some objective factor external to the
13 defense impeded counsel's efforts to comply with the State's procedural rule"). Prejudice
14 need not be addressed if a petitioner fails to show cause. *Thomas*, 945 F.2d at 1123 n.10.
15 To bring himself within the narrow class of cases that implicate a fundamental
16 miscarriage of justice, a petitioner "must come forward with sufficient proof of his actual
17 innocence" *Sistrunk v. Armenakis*, 292 F.3d 669, 672-73 (9th Cir. 2002) (internal
18 quotation marks and citations omitted), which can be shown when "a petitioner 'presents
19 evidence of innocence so strong that a court cannot have confidence in the outcome of
20 the trial unless the court is also satisfied that the trial was free of nonharmless
21 constitutional error.'" *Id.* at 673 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

22 Petitioner correctly asserts that he raised the issue of counsel failing to advise him
23 on the risks and benefits of the plea offer in his petition for review from the trial court's
24 denial of his PCR. *See Ex. D*, at 15-17. The risk and benefit issue, however, was not
25 plainly raised to the trial court as an IAC claim. Petitioner did not argue that counsel
26 failed to advise him of the risks and benefits of the plea offer in his PCR, though he did
27 raise the issue that counsel was ineffective for failing to investigate the fact that the
28 victim was under the influence of alcohol at the time of the accident and the victim's
failure to wear a helmet. *See App 1-A*, at 19. Petitioner asserted that this undiscovered

1 information was necessary “so that a reasonable determination of whether to proceed to
2 trial or enter a plea was warranted.” *Id.* at 19, 22-23. Petitioner now asserts that Ground
3 Two is exhausted because he properly argued the voluntary and intelligent nature of his
4 plea by showing counsel’s deficient advice detrimentally affected Petitioner’s decision.
5 *See Reply*, at 3. Asserting that Petitioner was not reasonably informed of the facts
6 necessary, upon reasonable investigation, to make a knowing and voluntary plea is not
7 the factual or legal equivalent of an assertion that Petitioner was never advised by counsel
8 of the risks and benefits, or in other words, the adverse and favorable consequences, of
9 entering into the plea agreement. The latter assertion was not raised in Petitioner’s PCR.⁵

10 Importantly, exhaustion requires properly raising and fairly presenting a claim at
11 every appropriate state court level. *See Casey v. Moore*, 386 F.3d 896, 915–16 (9th Cir.
12 2004). In Arizona, a PCR petition must present every known ground for relief. Ariz.
13 R.Crim. P. 32.5. Further, a petition for review from denial of a PCR petition in Arizona is
14 a forum to request relief from the PCR court's actions, not to raise new claims. Ariz.
15 R.Crim. P. 32.9(c). Therefore, raising claims for the first time to the appellate court was
16 insufficient to fairly present any claims to the Arizona state courts.

17 Ground Two was not fairly presented to the Arizona state courts. If Petitioner were
18 to return to state court now to litigate these claims, they would be found waived and
19 untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure
20 because they do not fall within an exception to preclusion. Ariz. R.Crim. P. 32.2(b);
21 32.1(d)-(h). Therefore, Ground Two is technically exhausted but procedurally defaulted.
22 Petitioner has not alleged cause and prejudice or a fundamental miscarriage of justice to
23 overcome these defaults. *See Coleman*, 501 U.S. at 750. Accordingly, the Court dismisses

24
25 ⁵ Petitioner did assert in his reply to the state’s response to his PCR that he was
26 unable to properly conduct a risk-benefit analysis of the plea offer because he was never
27 informed that he was realistically facing the same amount of time in prison as if he had
28 gone to trial. *See App 1-B*, at 6. However, an issue or claim raised for the first time in a
reply brief is deemed waived under Arizona law. *See, e.g., State v. Pena*, 209 Ariz. 504,
506 (App. 2005); *Westin Tucson Hotel Co. v. Ariz. Dep’t of Revenue*, 188 Ariz. 360, 364
(App. 1987). The superior court never accepted or addressed the waived claim nor did the
Arizona Court of Appeals. Petitioner cannot be said to have “fairly presented” a federal
constitutional claim to the state courts in his reply brief.

1 this claim.

2 D. Merits

3 The AEDPA established a “substantially higher threshold for habeas relief” with
4 the “acknowledged purpose of ‘reduc[ing] delays in the execution of state and federal
5 criminal sentences.’” *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007) (quoting
6 *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA’s “ ‘highly deferential
7 standard for evaluating state-court rulings’ . . . demands that state-court decisions be
8 given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per*
9 *curiam*) (quoting *Lindh*, 521 U.S. at 333 n. 7).

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

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

17 28 U.S.C. § 2254(d). The last relevant state court decision is the last reasoned state
18 decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005).
19 Where the last reasoned state court decision adopted or substantially incorporated the
20 reasoning from a previous decision, it is permissible to look at both decisions to fully
21 ascertain the reasoning of the last decision. *Barker*, 423 F.3d at 1093; *see also Weaver v.*
22 *Palmateer*, 455 F.3d 958, 963 n.5 (9th Cir. 2006); *Lewis v. Lewis*, 321 F.3d 824, 829 (9th
23 Cir. 2003). Here, the Arizona Court of Appeals substantially incorporated the reasoning
24 from the trial court’s ruling on the claims in Petitioner’s PCR. *See Ex. D*, at 2-3.
25 Accordingly, the Court looks to the trial court’s ruling (App. 1-C) to ascertain whether
26 the decision was contrary to, or involved an unreasonable application of, clearly
27 established Federal law, or resulted in a decision that was based on an unreasonable
28 determination of the facts in light of the evidence presented in the State court proceeding.

1 Where “no state-court decision furnishes a basis for the state court's underlying
2 reasoning,” the Court must “engage in an ‘independent review of the record’ and
3 ascertain whether the state court's decision was ‘objectively unreasonable,’ ” *Murray* ,
4 745 F.3d at 996–97 (quoting *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013)).

5 “The threshold question under AEDPA is whether [the petitioner] seeks to apply a
6 rule of law that was clearly established at the time his state-court conviction became
7 final.” *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under
8 subsection (d)(1), the Court must first identify the “clearly established Federal law,” if
9 any, that governs the sufficiency of the claims on habeas review. “Clearly established”
10 federal law consists of the holdings of the Supreme Court at the time of the relevant state-
11 court decision. *Williams*, 529 U.S. at 365; see *Carey v. Musladin*, 549 U.S. 70, 74 (2006).
12 Habeas relief cannot be granted if the Supreme Court has not “broken sufficient legal
13 ground” on a constitutional principle advanced by a petitioner, even if lower federal
14 courts have decided the issue. *Williams*, 529 U.S. at 381; see *Musladin*, 549 U.S. at 76-
15 77; *Casey*, 386 F.3d at 907. Nevertheless, while only Supreme Court authority is binding,
16 circuit court precedent may be “persuasive” in determining what law is clearly
17 established and whether a state court applied that law unreasonably. *Clark v. Murphy*,
18 331 F.3d 1062, 1069 (9th Cir. 2003).

19 The Supreme Court has provided guidance in applying each prong of §
20 2254(d)(1). The Court has explained that a state court decision is “contrary to” the
21 Supreme Court’s clearly established precedents if the decision applies a rule that
22 contradicts the governing law set forth in those precedents, thereby reaching a conclusion
23 opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set
24 of facts that is materially indistinguishable from a decision of the Supreme Court but
25 reaches a different result. *Williams*, 529 U.S. at 405-06; see *Early v. Packer*, 537 U.S. 3,
26 8 (2002) (*per curiam*). In characterizing the claims subject to analysis under the “contrary
27 to” prong, the Court has observed that “a run-of-the-mill state-court decision applying the
28 correct legal rule to the facts of the prisoner’s case would not fit comfortably within §
2254(d)(1)’s ‘contrary to’ clause.” *Williams*, 529 U.S. at 406; see *Lambert v. Blodgett*,

1 393 F.3d 943, 974 (9th Cir. 2004).

2 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas
3 court may grant relief where a state court “identifies the correct governing legal rule from
4 [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular . . .
5 case” or “unreasonably extends a legal principle from [Supreme Court] precedent to a
6 new context where it should not apply or unreasonably refuses to extend that principle to
7 a new context where it should apply.” *Williams*, 529 U.S. at 407. For a federal court to
8 find a state court’s application of Supreme Court precedent “unreasonable,” the petitioner
9 must show that the state court’s decision was not merely incorrect or erroneous, but
10 “objectively unreasonable.” *Id.* at 409; *Landrigan*, 550 U.S. at 473; *Visciotti*, 537 U.S. at
11 25. “A state court’s determination that a claim lacks merit precludes federal habeas relief
12 so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s
13 decision.” *Harrington v. Richter*, 562 U.S. 86, —, 131 S. Ct. 770, 786 (2011) (quoting
14 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In conducting review under §
15 2254(d)(1), this Court “is limited to the record that was before the state court that
16 adjudicated the claim on the merits.” *Cullen v. Pinholster*, —U.S. —, 131 S.Ct. 1388,
17 1398–99 (2011).

18 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the
19 state court decision was based on an unreasonable determination of the facts. *Miller-El v.*
20 *Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision “based on a
21 factual determination will not be overturned on factual grounds unless objectively
22 unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El*,
23 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.
24 2004), *limited on other grounds by Murray v. Schriro*, 745 F.3d 984 (9th Cir. 2014). In
25 considering a challenge under § 2254(d)(2), state court factual determinations are
26 presumed to be correct, and a petitioner bears the “burden of rebutting this presumption
27 by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *Landrigan*, 550 U.S. at 473-
28 74; *Miller-El II*, 545 U.S. at 240.

1 1. *Ineffective Assistance of Counsel Claims*

2 To prevail on a claim of ineffective assistance of counsel, Petitioner must satisfy
3 two separate requirements: he must (1) show that counsel’s performance fell below
4 objective standards of reasonableness and “outside the wide range of professionally
5 competent assistance”, and (2) establish that counsel’s performance prejudiced Petitioner
6 by creating “a reasonable probability that, absent the errors, the factfinder would have
7 had a reasonable doubt respecting guilt.” *Strickland v. Washington*, 466 U.S. 668, 687–94
8 (1984); *see also Williams*, 529 U.S. at 390; *Kimmelman v. Morrison*, 477 U.S. 365, 375
9 (1986). *Strickland* is the clearly established law for ineffective assistance of counsel
10 claims. *See Richter*, 556 U.S. at —, 131 S.Ct. at 780.

11 The inquiry under *Strickland* is highly deferential, and “every effort [must] be
12 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
13 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at
14 the time.” *Strickland*, 466 U.S. at 689. Thus, to satisfy *Strickland*’s first prong, deficient
15 performance, a defendant must overcome “the presumption that, under the circumstances,
16 the challenged action might be considered sound trial strategy.” *Id.*

17 Because an IAC claim must satisfy both prongs of *Strickland*, the reviewing court
18 “need not first determine whether counsel’s performance was deficient before examining
19 the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Id.* at 697
20 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient
21 prejudice, that course should be followed”). A petitioner must affirmatively prove
22 prejudice. *Id.* at 693. To demonstrate prejudice, he must “show that there is a reasonable
23 probability that, but for counsel’s unprofessional errors, the result of the proceeding
24 would have been different. A reasonable probability is a probability sufficient to
25 undermine confidence in the outcome.” *Id.* at 694. Petitioner “must show that the [state
26 court] applied *Strickland* to the facts of his case in an objectively unreasonable manner.”
27 *Bell v. Cone*, 535 U.S. 685, 698-99 (2002).

1 Petitioner now asserts that the trial court erred in resolving this issue by failing to
2 refer to the affidavits from him⁶ and his parents that were attached to the PCR. Petition at
3 8. In its ruling, however, the trial court accepted as true, for purposes of the court’s
4 *Strickland* analysis, the assertions contained in the affidavits from Petitioner’s parents
5 and Mr. Lansdale that Mr. Abrams conducted no “meaningful investigation” into the
6 case. *See* App. 1-C at 6; App. 1-AA, Ex. 1, Affidavit of Jack L. Lansdale, Jr., ¶ 2; App. 1-
7 AA, Ex. 2, Affidavit of Monte K. Reese and Tammy S. Reese, ¶ 3. Nonetheless, the trial
8 court found counsel’s decision to forego further investigation “tactical,” and, upon review
9 of the report from the accident reconstructionist, concluded that the failure to investigate
10 did not prejudice Petitioner.

11 In the context of guilty pleas, the prejudice requirement “focuses on whether
12 counsel’s constitutionally ineffective performance affected the outcome of the plea

13
14 ⁶ There was no affidavit from Petitioner attached to the PCR. *See* App. 1-AB.
15 Petitioner did attach an affidavit to his reply. *See* App. 1-B, Ex. 1. Petitioner’s assertion
16 in his affidavit regarding counsel’s performance that “Ivan Abrams failed to fully
investigate the nature of the accident which included the back tail light of the motorcycle
ridden by the victim/deceased” is substantially similar to the statements contained in the
affidavits obtained from Petitioner’s parents and Mr. Lansdale.

17 Although Petitioner asserts that he “clearly argued” that “counsel incorrectly
18 advised Petitioner that if he accepted the plea offer, he would not be sentenced to more
than seven years” (*see* Reply, at 5), Petitioner did not present this argument in his PCR,
19 but only alluded to these facts in his affidavit attached to his reply. *See* App. 1B, Ex. 1.
20 Thus, this issue was not properly presented to the state courts and has been procedurally
21 defaulted. Nonetheless, this claim fails on the merits as well, because Petitioner does not
22 assert that Mr. Lansdale did not inform him of the sentencing range he was facing if he
accepted the plea, or that at the time he entered the plea he did not understand the range
23 of sentence he was exposed to as a result of accepting the plea agreement, which
Petitioner signed and which clearly set forth the sentencing range (*see* Ex. A); thus he has
failed to demonstrate how he was prejudiced as a result of the information provided to
him by his former counsel, Mr. Abrams. *See id.*, ¶ 8 (avowing that “at the outset of the
case” Petitioner was told that he “would do” approximately seven years).

24 Petitioner additionally argues in the Reply that he has avowed that Mr. Lansdale
25 told him the court indicated that Petitioner would not be sentenced to more than twelve
years in prison, citing again Petitioner’s affidavit attached to his reply in the PCR
26 proceedings (App. 1B, Ex. 1). Petitioner, however, did not properly present this claim to
the state courts, and this Court will not address new grounds for relief raised for the first
27 time in a reply brief. *Delgadillo v. Woodford*, 527 F.3d 919, n. 4 (9th Cir.2008)
28 (“Arguments raised for the first time in petitioner's reply brief are deemed waived.”)
(citing *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 n. 3 (9th Cir.
2007)). Moreover, such claim raised for the first time in Petitioner’s reply brief would be
untimely.

1 process.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A defendant may satisfy the prejudice
2 prong by showing that there is a reasonable probability that, but for counsel’s errors, he
3 would not have pleaded guilty and would have insisted on going to trial. *Id.*, at 52, 58.
4 Whether a petitioner can prevail on a claim of ineffective assistance of counsel for failure
5 to investigate a potential defense depends in large part on whether the potential defense
6 “likely would have succeeded at trial.” *Id.* at 59; *see Lambert*, 393 F.3d at 982 (“Where
7 the alleged error is counsel’s failure to investigate a potential defense, the salient inquiry
8 is whether discovery of the evidence would have led counsel to change his
9 recommendation as to the plea. In turn, the result of this inquiry may depend on whether
10 the defense would have likely succeeded at trial.”)(internal quotation marks, brackets and
11 citation omitted). As Respondents correctly assert, Petitioner fails to identify any
12 information that would have been uncovered with additional pretrial investigation, much
13 less explain how any such information would have impacted his case. *See generally*
14 *Petition* at 8–10. Petitioner apparently concludes that if he had possessed other
15 unidentified information, he would have rejected the State’s plea offer and proceeded to
16 trial; however, without identifying any evidence or information that was allegedly
17 available but undiscovered by trial counsel, Petitioner’s conclusion is speculation. *See,*
18 *e.g., United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989) (“A defendant who
19 alleges a failure to investigate on the part of his counsel must allege with specificity what
20 the investigation would have revealed and how it would have altered the outcome of the
21 trial.”) Because Petitioner has failed to identify any information that could have been
22 uncovered, Petitioner necessarily cannot discharge his “heavy burden” of proving
23 prejudice, *i.e.* that the outcome of his case would have been any different. *Green*, 882
24 F.2d at 1003. Accordingly, Petitioner has failed to demonstrate a *Strickland* violation.
25 *Strickland*, 466 U.S. at 690–95. Because Petitioner has failed to demonstrate prejudice,
26 there is no need to inquire into counsel’s performance. *Id.* Petitioner’s conclusory
27 allegations fail to substantiate his claim of ineffective assistance of counsel during the
28 plea proceedings. The state court’s decision was neither contrary to, nor an unreasonable
application of *Strickland*. Nor was the state court’s decision based on an unreasonable

1 determination of the facts in light of the evidence presented in the state court proceeding.
2 Habeas relief on Ground One is denied.

3 **b. Ground Three**

4 Petitioner argues that trial counsel was ineffective for failing to present mitigating
5 evidence at sentencing. Petition at 12-18. The Ninth Circuit has held that the Supreme
6 Court has “not delineated a standard which should apply to ineffective assistance of
7 counsel claims in noncapital sentencing cases[,] [and] [t]herefore, [...] there is no clearly
8 established federal law as determined by the Supreme Court in this context.” *Davis v.*
9 *Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006) (citing *Cooper-Smith v. Palmateer*, 397 F.3d
10 1236, 1244 (9th Cir. 2005)). The *Strickland* Court “expressly declined to ‘consider the
11 role of counsel in an ordinary sentencing, which ... may require a different approach to
12 the definition of constitutionally effective assistance.’ ” *Cooper-Smith*, 397 F.3d at 1244
13 (quoting *Strickland*, 466 U.S. at 686)).

14 Contrary to the conclusion reached by the Ninth Circuit in *Davis* and *Cooper-*
15 *Smith*, it appears that the Supreme Court has applied the *Strickland* standard to noncapital
16 sentencing proceedings. In a recent decision, the Supreme Court stated that *Strickland*
17 prejudice can occur at sentencing. *See Lafler v. Cooper*, —U.S. —, 132 S.Ct. 1376,
18 1385-86 (2012) (“[t]he precedents ... establish that there exists a right to counsel during
19 sentencing in both noncapital ... and capital cases....”)(citing, *inter alia*, *Glover v. United*
20 *States*, 531 U.S. 198, 203–04 (2001); *see also Gonzalez v. Knowles*, 515 F.3d 1006,
21 1014–16 (9th Cir. 2008) (applying *Strickland* and concluding that counsel was not
22 ineffective for failing to investigate mitigating evidence of mental illness and for not
23 calling family members to testify on his behalf at sentencing). This Court, however, is
24 bound by *Davis* and *Cooper-Smith* until they are reversed *en banc* or by the Supreme
25 Court. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Because there is no
26 clearly established federal law in this context, Petitioner is not entitled to habeas relief
27 under 28 U.S.C. § 2254(d)(1) with respect to these claims. *See Cooper-Smith*, 397 F.3d at
28 1244.

Moreover, even assuming that the *Strickland* standard governs claims that counsel

1 was ineffective in the context of a noncapital sentencing proceeding, Petitioner cannot
2 prevail on his claim. In resolving Petitioner's claims, the state court applied *Strickland*.
3 The Ninth Circuit has stated that “even though the *Strickland* standard does not by
4 necessity apply to the noncapital sentencing context, the [state] courts were nonetheless
5 free to adopt that standard for use in this context.” *Davis*, 443 F.3d at 1158. The state
6 court's ruling was not an unreasonable application of *Strickland*, nor was the state court's
7 decision based on an unreasonable determination of the facts in light of the evidence
8 presented in the state court proceeding.

9 In his PCR, Petitioner submitted an affidavit from his sentencing counsel which
10 stated that counsel acknowledged that he should have requested a continuation of the
11 sentencing proceeding because the nature of the proceeding was very prejudicial to
12 Petitioner and with a continuance he “could have prepared mitigation to present to the
13 court by having a mitigation specialist work with my client and his family, and [] would
14 have presented exhibits and live testimony to show the court the type of person that Mr.
15 Reese really is.” App. 1-AB, Lansdale Affidavit, ¶ 6. The state court concluded that
16 counsel’s performance did not constitute deficient performance, noting that counsel was
17 effective in regards to submitting written letters, a sentencing memorandum, and the pre-
18 sentence report to attempt to mitigate Petitioner’s sentence, remarking that the court
19 found a number of mitigating factors including Petitioner’s family and community
20 support. App. 1-C, at 6. Additionally, the state court concluded that Petitioner had not
21 shown that his sentence would have been different if counsel had presented the mitigating
22 factors orally in court. *Id.*

23 At the outset, the trial court’s ruling suggests that the court erroneously applied the
24 prejudice prong of the *Strickland* standard in determining whether any error by counsel
25 prejudiced Petitioner. To establish prejudice, a prisoner must demonstrate a “reasonable
26 probability that, but for counsel’s unprofessional errors, the result of the proceeding
27 would have been different.” *Strickland*, 466 U.S. at 694. A “reasonable probability” is “a
28 probability sufficient to undermine confidence in the outcome.” *Id.* “[T]he question is not
whether a court can be certain counsel's performance had no effect on the outcome.”

1 *Richter*, 562 U.S. at —, 131 S. Ct. at 791. Thus the state post-conviction court wrongly
2 held Petitioner to a higher standard by apparently requiring Petitioner to demonstrate that
3 counsel’s deficient performance “would have” changed his sentence, rather than a
4 “reasonable probability” that the sentence would have been different absent error by
5 counsel. *See Strickland*, 466 U.S. at 694.

6 Regarding the performance prong, a reviewing court engages a strong presumption
7 that counsel rendered adequate assistance, and exercised reasonable professional
8 judgment in making decisions. *See id.* at 690. “A fair assessment of attorney performance
9 requires that every effort be made to eliminate the distorting effects of hindsight, to
10 reconstruct the circumstances of counsel's challenged conduct, and to evaluate the
11 conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689. Moreover,
12 review of counsel's performance under *Strickland* is “extremely limited”: “The test has
13 nothing to do with what the best lawyers would have done. Nor is the test even what most
14 good lawyers would have done. We ask only whether some reasonable lawyer at the trial
15 could have acted, in the circumstances, as defense counsel acted at trial.” *Coleman v.*
16 *Calderon*, 150 F.3d 1105, 1113 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998).
17 Thus, a court “must judge the reasonableness of counsel's challenged conduct on the facts
18 of the particular case, viewed as of the time of counsel's conduct.” *Strickland*, 466 U.S. at
19 690.

20 First, the Court reviews the state courts' factual finding that trial counsel made a
21 strategic decision and assesses whether that finding was objectively unreasonable. *See*
22 *Wood v. Allen*, 558 U.S. 290, 301 (2010) (citing 28 U.S.C. § 2254(d)(2)). Petitioner
23 asserts that the affidavit submitted by Mr. Lansdale to the trial court demonstrates that the
24 decision not to call witnesses was not a tactical one, that it was a mistake. Reply at 12.
25 But Mr. Lansdale’s affidavit does not demonstrate that his decision was based on
26 oversight, neglect or mistake, that he was uncertain about the law that applied to
27 sentencing proceedings or whether he could call witnesses or request a continuance in
28 order to present additional witnesses or evidence in mitigation, but rather a choice that
counsel made, *i.e.*, a tactical decision, which in the 20-20 vision of hindsight, might have

1 been made differently. There is no evidence to the contrary. Mr. Lansdale affirmed that
2 he “knew there were mitigating factors in Mr. Reese’s favor, but [he] only prepared to
3 address the court without presenting mitigation evidence.” App 1-AB, Ex. 1, Lansdale
4 Affidavit, ¶ 4. The evidence in the state-court record can fairly be read to support the trial
5 court's factual determination that counsel made a strategic decision about the decision to
6 submit to sentencing on the record before the court, including written letters, a sentencing
7 memorandum, and the pre-sentence report.

8 Next, the Court must review the objective reasonableness of the state courts' ruling
9 that counsel's strategic decision fell within reasonable professional judgment under
10 *Strickland*. See *Wood*, 558 U.S. at 302–03 & n. 3. Counsel prepared and presented
11 mitigating evidence that the court took into consideration in determining Petitioner’s
12 sentence. Petitioner has presented no evidence and no opinion from another attorney or
13 prevailing norms from attorney guidelines that counsel's decision to present mitigating
14 evidence in this fashion was unreasonable, and thus Petitioner has failed to demonstrate
15 that the trial court’s ruling that counsel’s performance did not constitute deficient
16 performance was objectively unreasonable. See *Matylinsky v. Budge*, 577 F.3d 1083,
17 1092 (9th Cir. 2009) (finding that defendant presented no evidence of unreasonableness
18 that could satisfy “heavy burden” of proving that trial strategy was deficient). Because
19 Petitioner fails to satisfy both components of the *Strickland* test, his claim fails.

20 2. *Due Process and Right to Confrontation*⁷

21 a. **Grounds Four and Five**

22 Petitioner asserts in Ground Four that the unsworn testimony by numerous
23 “victim” witnesses at sentencing violated Petitioner’s rights to due process and
24 confrontation. Petitioner argues that Arizona law mandating that the court “shall”
25 consider victim impact evidence is in conflict with Supreme Court precedent limiting the
26 relevancy of retribution as a factor in noncapital sentencing, and thus violates Petitioner’s
27 Fourteenth Amendment Due Process rights.

28 ⁷ Because the arguments and assertions presented in Grounds Four and Five overlap considerably, the Court addresses both grounds for relief together.

1 In Ground Five, Petitioner asserts that the trial court relied on an improper
2 aggravating factor based on the unconstitutionality of victim impact evidence; the people
3 that spoke at sentencing were not actually “victims”; the aggravating factors were not
4 noticed; and the aggravating factors were not proven by any burden. (Petition, at 20 &
5 n.6.)

6 Arizona Rule of Criminal Procedure 39 provides that a victim has the “right to be
7 heard” at sentencing and can exercise this right “by appearing personally” at or where
8 legally permissible and in the discretion of the court, by submitting a written statement,
9 an audiotape or videotape.” Ariz.R.Crim.P. 39(a), (b)(7). The Arizona Constitution
10 provides that “[t]o preserve and protect victims' rights to justice and due process, a victim
11 of crime has a right ... [t]o be heard at any proceeding involving a post-arrest release
12 decision, a negotiated plea, and sentencing.” Ariz. Const. § 2.1(A)(4). Moreover, in any
13 proceeding in which the victim has the right to be heard, “the victim’s right to be heard is
14 exercised not as a witness, the victim’s statement is not subject to disclosure to the state
15 or the defendant or submission to the court and the victim is not subject to cross-
16 examination.” A.R.S. § 13-4426.01. The defendant shall, however, “be afforded the
17 opportunity to explain, support or deny the victim’s statement.” *Id.*

18 The trial court's consideration of victim impact statements pursuant to Arizona
19 Rule of Criminal Procedure 39 and the Arizona Constitution was a matter of state law.
20 Petitioner’s allegation that the trial court erred in allowing, under the relevant state law,
21 statements from people who did not fit the statutory definition of “victims” (*see* Petition
22 20 n.6) and failed to give proper notice of these statements as aggravating factors,
23 pursuant to state law (*see id.* at 20), are claims that are not cognizable on federal habeas
24 corpus review. *See* 28 U.S.C. § 2254; *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991);
25 *Jackson v. Ylst*, 921 F.2d 882 (9th Cir. 1990) (federal court has no authority to review
26 state application of state law); *Miller v. Vasquez*, 868 F.2d 1116, 1118–19 (9th Cir. 1989)
27 (refusing to consider alleged errors in violation of state sentencing law).

28 As to Petitioner’s claims that the sentencing proceeding violated due process and
was in violation of Petitioner’s right to confrontation, these claims are not supported by

1 clearly established federal law and thus Petitioner is not entitled to habeas relief. To the
2 extent Petitioner is asserting that the victims' statements violated the Confrontation
3 Clause of the Sixth Amendment, Petitioner's claim lacks merit. A state court's decision is
4 not contrary to or an unreasonable application of Supreme Court precedent unless that
5 precedent "squarely addresses the issue" or gives a "clear answer to the question
6 presented" in the case before the state court. *Wright v. Van Patten*, 552 U.S. 120, 125–26
7 (2008); *see also Carey v. Musladin*, 549 U.S. 70, 77 (2006); *John–Charles v. California*,
8 646 F.3d 1243, 1248 (9th Cir. 2011) (explaining that the allegedly contravened Supreme
9 Court precedent must be "closely on point"). In other words, "when a state court may
10 draw a principled distinction between the case before it and Supreme Court caselaw, the
11 law is not clearly established for the state-court case." *Murdoch v. Castro*, 609 F.3d 983,
12 991 (9th Cir. 2010) (en banc).

13 The Sixth Amendment protects the right of the accused "to be confronted with the
14 witnesses against him" "[i]n all criminal prosecutions." U.S. Const. Amend. VI. The
15 Supreme Court has held that the government cannot introduce out-of-court testimonial
16 evidence against a defendant in a criminal trial unless the declarant is unavailable at trial
17 and the defendant had a prior opportunity for cross-examination. *Crawford v.*
18 *Washington*, 541 U.S. 36 (2004). In discussing pre-trial rights, the Supreme Court has
19 stated that "the right to confrontation is a trial right." *Pennsylvania v. Ritchie*, 480 U.S.
20 39, 52 (1987). The Confrontation Clause does not apply to sentencing proceedings. *See*
21 *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir.), *amended by* 992 F.2d 1015 (9th Cir.
22 1993); *see also United States v. Williams*, 41 F.3d 496, 499-500 (9th cir.1994) ("A
23 sentencing judge may consider hearsay evidence without running afoul of the
24 Confrontation Clause"). Petitioner does not cite, and this Court has not found, any
25 clearly established law holding that the right to confront witnesses under the Sixth
26 Amendment is a sentencing right. Thus, the sentencing court's consideration of the
27 victims' statements during the sentencing proceeding does not raise a confrontation rights
28 issue. There is no indication, moreover, that Petitioner actually requested, and was denied
the opportunity to cross-examine any of the victims who were heard at sentencing.

1 Because Petitioner did not have a Sixth Amendment right to cross-examine the victims
2 during the sentencing proceeding, the State court's rejection of Petitioner's Confrontation
3 Clause claim was not contrary to, or an unreasonable application of, clearly established
4 federal law. 28 U.S.C. § 2254; *Williams*, 529 U.S. at 412–13.

5 Next, Petitioner asserts that the use of victim impact statements violates a
6 defendant's Fourteenth Amendment Due Process rights. Petitioner relies on *Payne v.*
7 *Tennessee*, 501 U.S. 808 (1991). In *Payne*, the Supreme Court found that the introduction
8 of victim impact statements in capital sentencing proceedings does not *per se* violate the
9 Constitution. *Id.* at 827. The Court in *Payne* overruled to some extent its earlier decision
10 in *Booth v. Maryland*, 482 U.S. 496 (1987), which found the admission of victim impact
11 testimony at a capital sentencing constituted a *per se* Eighth Amendment violation, but
12 left in place the prohibition on opinions from family members about the crime, the
13 defendant, and the appropriate sentence. *Payne*, 501 U.S. at 830 n.2. These cases
14 specifically address the admissibility of victim impact evidence at a capital sentencing,
15 prohibiting certain information on the grounds that it would lead a jury to impose the
16 death sentence in an arbitrary and capricious manner. *Booth*, 482 at 502–03. The holdings
17 in *Payne* and *Booth* have no bearing on the issue presented here, which concerns the
18 receipt of victim impact information in the context of a noncapital sentencing proceeding.
19 *Accord United States v. Santana*, 908 F.2d 506 (1990) (noting *Booth* decision limited to
20 capital sentencings and allowing use of victim impact statement at sentencing in
21 noncapital federal criminal sentencing).

22 In a capital case, the Ninth Circuit recently recognized another “principled
23 distinction” between *Payne* and *Booth*, which involved the jury’s consideration of victim
24 impact evidence, and the issue presented in this case, the presentation of victim impact
25 evidence to a judge⁸, and confirmed the conclusions reached in a previous case that the
26 concern expressed in *Booth*, that victim impact statements would “inflame the jury” is

27 ⁸ Pursuant to Arizona law at the time, the judge held presentencing and sentencing
28 hearings to determine whether a death sentence was supported by an aggravating
circumstance and whether there were mitigating circumstances sufficiently substantial to
justify leniency. *Gulbrandson*, 738 F.3d at 983.

1 “not the same when ... a judge does the sentencing.” *Gulbrandson v. Ryan*, 738 F.3d 976,
2 996 (9th Cir. 2013) (citing *Rhoades v. Henry*, 638 F.3d 1027 (9th Cir. 2011)). The Ninth
3 Circuit concluded that it cannot be said that the Arizona Supreme Court unreasonably
4 applied clearly established federal law in denying Gulbrandson’s Eighth Amendment
5 claim because there is no Supreme Court case squarely addressing the issue whether a
6 judge is barred from consideration of such victim impact evidence. *Id.*

7 Moreover, there is no evidence that the state courts misapplied the law and
8 improperly considered the wishes of victims when it imposed sentence. Petitioner was
9 sentenced by a judge, not a jury, and “[t]rial judges are presumed to know the law and to
10 apply it in making their decisions.” *Walton v. Arizona*, 497 U.S. 639, 653 (1990),
11 *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). Thus, although
12 Arizona law requires the court to consider the evidence and opinions of the victim’s
13 immediate family in an aggravation or mitigation proceeding, A.R.S. § 13-701(G), it does
14 not override the judge’s obligation not to consider inadmissible evidence. When victim
15 statements include improper evidence or argument, “in the absence of any evidence to the
16 contrary, [the Court] must assume that the trial judge properly applied the law and
17 considered only the evidence he knew to be admissible.” *Gretzler v. Stewart*, 112 F.3d
18 992, 1009 (9th Cir. 1997) (citing *Walton*, 497 U.S. at 653).

19 The sentencing court, over Petitioner’s objection to the number of people that
20 were going to testify on the victim’s behalf, permitted the people who had been noticed to
21 speak, specifically stating that “I can assure you that it’s not going to change my mind
22 one way or the other, what sentence I impose. I understand that they’re all very upset. I
23 made up my mind what I’m going to do, but I think it is important for them to be able to
24 speak.” App. 4A at 8. Following the presentation of the victims’ statements, counsel for
25 Petitioner requested that the Court consider the victim impact evidence “as it should be
26 considered, as an aggravating factor under 13-702[(C)].” App. 4A at 33. This is precisely
27 what that sentencing court did. In stating its findings, the sentencing court did not find
28 any impermissible aggravating factor based on the victims’ statement, rather finding as
an aggravating factor the emotional and financial harm to the decedent’s survivors,

1 factors to which Petitioner did not object. *Id.* at 37; *see also* A.R.S. 13-702(C) (exception
2 for court finding of aggravating factors under A.R.S. § 13-701(D)) and A.R.S. § 13-
3 701(D)(9)(the court shall consider as an aggravating circumstance the suffering of
4 physical, emotional or financial harm of the victim’s immediate family if the victim has
5 died as a result of the conduct of the defendant). Petitioner has not rebutted the
6 presumption that the sentencing court considered only appropriate factors in sentencing
7 Petitioner. *See Gretzler*, 112 F.3d at 1009. Because Petitioner does not show that the
8 State courts unreasonably applied any clearly established Supreme Court authority in
9 denying his claims, it must fail on federal habeas review. 28 U.S.C. § 2254(d); *Williams*,
10 529 U.S. at 412–13.

11 **III. Certificate of Appealability**

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

18 Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an
19 appeal is taken by a petitioner, the district judge who rendered the judgment “shall” either
20 issue a certificate of appealability (“COA”) or state the reasons why such a certificate
21 should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the
22 petitioner “has made a substantial showing of the denial of a constitutional right.” With
23 respect to claims rejected on the merits, a petitioner “must demonstrate that reasonable
24 jurists would find the district court's assessment of the constitutional claims debatable or
25 wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For procedural rulings, a COA
26 will issue only if reasonable jurists could debate (1) whether the petition states a valid
27 claim of the denial of a constitutional right and (2) whether the court's procedural ruling
28 was correct. *Id.*

