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

David Martinez Ramirez,	)	No. CV-97-1331-PHX-JAT
Petitioner,	)	<u>DEATH PENALTY CASE</u>
vs.	)	
Charles L. Ryan, et al.,	)	<b>ORDER</b>
Respondents.	)	

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In a prior Order, the Court concluded that Petitioner’s remaining claim, Claim 34, had been procedurally defaulted in state court based on an independent and adequate procedural bar. (Doc. 207.)<sup>1</sup> However, because the parties still needed an opportunity to fully brief the claim, the Court was not in a position to consider whether Petitioner had legitimate cause and prejudice to excuse the default or whether a fundamental miscarriage of justice would occur if Claim 34 was not reviewed on the merits. Following briefing on these issues, the Court concludes that Petitioner has demonstrated neither cause and prejudice nor a fundamental miscarriage of justice to excuse his procedural default of Claim 34.

Background Summary<sup>2</sup>

In Petitioner’s briefing in support of cause and prejudice, he alleges that certain pretrial,

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<sup>1</sup> “Doc.” refers to the documents in this Court’s case file.

<sup>2</sup> This factual summary provides the background related to Petitioner’s cause and prejudice arguments. A more complete procedural history may be found in prior Orders. (See, e.g., Doc. 190.)

1 trial, and sentencing events prevented his post-conviction counsel from raising Claim 34 in  
2 a timely manner. In pretrial proceedings, on September 28, 1989, Petitioner filed a motion  
3 for appointment of experts, requesting an independent psychiatric evaluation, a child  
4 psychologist, a mitigation specialist, a fingerprint examiner, a jury consultant, a serologist,  
5 and a pathologist. (ROA-PCR 39.)<sup>3</sup> In the motion, Petitioner cited *Ake v. Oklahoma*, 470  
6 U.S. 68 (1985), and requested, without explanation, that an independent psychiatrist be  
7 appointed to assess his sanity at the time of the crime. (*Id.* at 2.) He summarily requested  
8 the appointment of the other experts. (*Id.* at 3.) Subsequently, the court appointed an  
9 investigator to assist Petitioner, who at that point was representing himself with advisory  
10 counsel. (RT 10/6/89 at 13; ROA-PCR 43.) The following week, the court denied the  
11 remainder of the expert requests without prejudice, allowing for reconsideration after  
12 Petitioner had an opportunity to consult with his investigator. (RT 10/11/89 at 5-6; ROA-  
13 PCR-ME 45.) At an ex parte proceeding, Petitioner’s investigator asserted that a child  
14 psychologist was important to help determine Petitioner’s social upbringing and to  
15 collaborate with a mitigation specialist. (RT 12/12/89 at 10.) A mitigation specialist was  
16 needed to work with the investigator, Petitioner, and mental health professionals in order to  
17 prepare a complete mitigation presentation. (*Id.* at 10-12.) Advisory counsel explained that  
18 the mental health experts were requested for mitigation purposes in the event Petitioner was  
19 found guilty, not to evaluate his competency to stand trial. (*Id.* at 13.) The court denied the  
20 request for a mitigation specialist but indicated that it would be reconsidered if Petitioner was  
21 convicted. (*Id.* at 17.) It appears the Court appointed a serologist. (RT 12/12/89 at 16; ROA-  
22 PCR-ME 140.)

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25 <sup>3</sup> “ROA-PCR” refers to documents in the four-volume record on appeal from  
26 post-conviction proceedings prepared for Petitioner’s first petition for review to the Arizona  
27 Supreme Court (Case No. CR-96-0464-PC). “ROA-PCR-ME” refers to the one volume of  
28 minute entries issued by the trial court. “RT” refers to the reporter’s transcript from  
Petitioner’s trial and sentencing in state court proceedings. This record was provided to the  
Court by the Arizona Supreme Court on July 30, 2001. (Doc. 53.)

1 Subsequently, prior to trial, there was a change of judge ordered, with Maricopa County  
2 Superior Court Judge Thomas W. O'Toole, presiding over the case. After jury selection,  
3 Petitioner requested that advisory counsel be appointed to represent him going forward, and  
4 the court granted the request. (RT 7/11/90 at 96-97; ROA-PCR-ME 108.) After the jury  
5 found Petitioner guilty on both murder counts, Petitioner's counsel informed the court that  
6 previously she had requested a mitigation specialist; when the judge asked if she was  
7 referring to Arizona Rule of Criminal Procedure 26.5, which provides for presentence mental  
8 health examinations, counsel answered, "Well, so to speak." (RT 7/27/90 at 6-7.) The court  
9 appointed the mental health expert proposed by Petitioner, Dr. McMahon, "to test and  
10 evaluate the defendant's current mental health and, if such is deemed appropriate, conduct  
11 further diagnostic testing and evaluation." (*Id.* at 7; ROA-PCR-ME 125.) The court  
12 authorized compensation in the amount of \$500, but that additional fees and expenses could  
13 be obtained with "prior written approval of the court." (ROA-PCR-ME 125.) Petitioner  
14 made no other requests for the appointment of experts prior to sentencing.

15 In his sentencing memorandum, Petitioner's counsel relied on Dr. McMahon's August  
16 18, 1990, evaluation to support assertion of A.R.S. § 13-703 (G)(1) statutory mitigating  
17 circumstance—that his ability to appreciate the wrongfulness of his conduct or conform his  
18 conduct to the law was significantly diminished. (ROA-PCR 149 at 18-19.) Dr. McMahon  
19 concluded that Petitioner's capacity to appreciate the wrongfulness of his conduct or conform  
20 his conduct to the requirement of law was significantly diminished due to his psychological  
21 condition and his drug and alcohol intoxication on the night of the crimes. (ROA-PCR 160  
22 at 8.) Dr. McMahon's psychological evaluation also measured Petitioner's intelligence  
23 quotient ("IQ"), utilizing the Peabody Picture Vocabulary Test ("PPVT"). Dr. McMahon  
24 reported: "The defendant obtained a PPVT IQ of 94, which is well within the average range  
25 of intelligence and in no way indicative of any form of mental retardation." (ROA-PCR 160  
26 at 6.)

27 At sentencing, the judge found three aggravating circumstances: Petitioner had two  
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1 prior violent felony convictions (A.R.S. § 13-703(F)(2)); Petitioner committed the murders  
2 in an especially cruel, heinous, or depraved manner (A.R.S. § 13-703 (F)(6)); and Petitioner  
3 committed multiple homicides during the same episode (A.R.S. § 13-703(F)(8)). The judge  
4 found one statutory mitigating circumstance and seven non-statutory circumstances, but  
5 determined they were not sufficiently substantial to warrant leniency, and sentenced  
6 Petitioner to death on both murder counts. (ROA-PCR 169.) The Arizona Supreme Court  
7 affirmed Petitioner’s convictions and sentences on direct appeal. *State v. Ramirez*, 178 Ariz.  
8 116, 871 P.2d 237 (1994).

9 Prior to filing his post-conviction relief (“PCR”) petition, Petitioner did not request any  
10 investigative or expert resources. (*See* ROA-PCR 177-190.) In his PCR petition, Petitioner  
11 raised a claim of ineffective assistance of counsel (“IAC”), alleging that counsel did not have  
12 a cohesive defense strategy at trial or with regard to mitigation. (ROA-PCR 190 at 7-8.)  
13 With respect to IAC at sentencing, Petitioner alleged that counsel did not have a clear  
14 strategy, which was evidenced by counsel’s attempt to use Petitioner’s alleged gang  
15 membership in mitigation. (*Id.* at 8.) The PCR court ruled that Petitioner failed to raise a  
16 colorable claim of ineffective assistance and denied relief. (ROA-PCR-ME 192.) The  
17 Arizona Supreme Court denied review.

18 Petitioner initiated federal habeas proceedings, raising both conviction and sentencing  
19 claims. (Docs. 1, 2, 18, 40, 55, 76.) Subsequently, the Court stayed Petitioner’s sentencing  
20 claims so that he could file a successive PCR petition in state court asserting that he is  
21 mentally retarded and ineligible for capital punishment pursuant to *Atkins v. Virginia*, 536  
22 U.S. 304 (2002) (recognizing that the Eighth Amendment prohibits a state from sentencing  
23 to death or executing a mentally retarded person). (Doc. 119.) In state court, the Court  
24 limited Petitioner’s counsel, the Federal Public Defender (“FPD”), to the *Atkins* litigation.  
25 (*Id.*) In April 2005, Petitioner initiated an *Atkins* claim in successive PCR proceedings.  
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1 (Doc. 228 at 1-13.)<sup>4</sup>

2 Subsequently, also in April 2005, a private attorney “conducted an initial *pro bono*  
3 review” of Petitioner’s case and filed a separate successive state PCR notice attempting to  
4 litigate five non-*Atkins* claims, including Claim 34, an allegation of ineffective assistance of  
5 counsel for failing to conduct a complete mitigation investigation, obtain, and present  
6 available mitigation evidence at sentencing. (Doc. 145, Ex. A at 3.) The PCR court  
7 summarily dismissed this action as unexceptional, rendering it subject to timeliness rules that  
8 required all PCR claims be filed during a petitioner’s initial PCR proceeding. (Doc. 145, Ex.  
9 B; *see* Ariz. R. Crim. P. 32.4(a), 32.2(b), 32.5 (West 2005)). Based on the PCR court’s  
10 ruling, for Claim 34 to be timely and considered on the merits, Petitioner was required to  
11 have raised it during his initial PCR proceeding. Petitioner did not raise Claim 34 during his  
12 initial PCR proceeding. This Court has concluded that Claim 34 was procedurally defaulted  
13 according to an adequate and independent state procedural rule and will not be considered  
14 on the merits apart from a showing of cause and prejudice or a fundamental miscarriage of  
15 justice. (Doc. 207.)<sup>5</sup>

#### 16 Cause and Prejudice

17 In *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), the Court made explicit that if a  
18 state prisoner has procedurally defaulted a federal claim in state court pursuant to an  
19 independent and adequate procedural rule, “federal habeas review of the claim[] is barred

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21 <sup>4</sup> In response to this Court’s Order, Respondents provided a complete copy of  
22 the state court record of Petitioner’s *Atkins* litigation to the Court for its review. (*See* Doc.  
23 228, 1-8873.)

24 <sup>5</sup> Due to his alleged mental retardation, Petitioner contends that the Court should  
25 relax the procedural rules regarding cause and prejudice and fundamental miscarriage of  
26 justice. (Doc. 215 at 2-5.) In *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988), the  
27 court considered and concluded that the petitioner’s mental condition did not constitute  
28 cause. Furthermore, the Court further notes that Petitioner had counsel during all of his post-  
conviction proceedings. *See id.* The Court addresses *infra* Petitioner’s argument regarding  
allegations of mental retardation and whether they constitute an excuse in the context of a  
fundamental miscarriage of justice.

1 unless the prisoner can demonstrate cause for the default and actual prejudice as a result of  
2 the alleged violation of federal law[.]” Ordinarily “cause” to excuse a default exists if a  
3 petitioner can demonstrate that “some objective factor external to the defense impeded  
4 counsel’s efforts to comply with the State’s procedural rule.” *Id.* at 753. Objective factors  
5 constituting cause include interference by officials which makes compliance with the state’s  
6 procedural rule impracticable, a showing that the factual or legal basis for a claim was not  
7 reasonably available to counsel, and constitutionally ineffective assistance of counsel.  
8 *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Amadeo v. Zant*, 486 U.S. 214, 222  
9 (1988) (cause is established if unavailable evidence was the reason for the default).  
10 “Prejudice” is actual harm resulting from the alleged constitutional error or violation. *Magby*  
11 *v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice resulting from a  
12 procedural default, a habeas petitioner bears the burden of showing not merely that the errors  
13 at his trial or sentencing constituted a possibility of prejudice, but that they worked to his  
14 actual and substantial disadvantage, infecting the entire proceeding with errors of  
15 constitutional dimension. *United States v. Frady*, 456 U.S. 152, 170 (1982).

#### 16 Discussion

17 Petitioner asserts that he has cause and prejudice to excuse his failure to present the  
18 claim because the trial court, thru interrelated failures, prevented PCR counsel from timely  
19 presenting it. Specifically, the trial court failed to authorize funding for a mitigation  
20 specialist, failed to fund a mental health expert until sentencing proceedings, and then  
21 inadequately funded the court-appointed mental health expert, Dr. Mickey McMahon, Ph.D.  
22 (Doc. 215 at 9-10.) These failures also prevented sentencing counsel from obtaining an  
23 adequate social history of Petitioner to provide to Dr. McMahon, which caused Dr.  
24 McMahon to conclude that Petitioner was not mentally retarded. (*Id.* at 10-11.) Dr.  
25 McMahon’s allegedly inaccurate mental retardation conclusion caused PCR counsel not to  
26 actively investigate Petitioner’s mental health and present Claim 34 during his initial PCR  
27 proceeding. *See id.* at 11 (citing *Forman v. Smith*, 633 F.2d 634, 641 (2d Cir.1980)

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1 (observing in *dicta* that an official’s intentional or inadvertent misleading statement “that  
2 obscures the opportunity to develop a federal constitutional violation” may constitute cause  
3 to excuse a procedural default)).

4 *State Official Interference*

5 Cause may be established by demonstrating interference by state officials that made  
6 compliance with the state procedural rule impracticable. *Coleman*, 501 U.S. at 753. The  
7 external impediment, whether it be government interference or the reasonable unavailability  
8 of the factual basis for the claim, must have prevented petitioner from constructing or raising  
9 the claim. *See Murray*, 477 U.S. at 492.

10 In this case, nothing prevented Petitioner from presenting Claim 34 during his initial  
11 PCR proceeding. Even though Petitioner argues that the trial court’s interrelated failures  
12 made compliance with the state procedural rule impracticable, the sentencing record shows  
13 otherwise. Counsel submitted a sentencing memorandum specifically discussing that at the  
14 age of 9 and 12, Petitioner’s IQ was tested, and that he recorded low IQ scores of 70 and 77  
15 respectively. (ROA-PCR 149 at 7.) Counsel presented Petitioner’s scores in the context of  
16 possible mental retardation and borderline intellectual functioning. (*Id.*) Counsel’s  
17 sentencing memorandum chronicled Petitioner’s major difficulties progressing thru different  
18 grades in school, and that at age 14, when he took the California Achievement Grade Point  
19 Test, he scored 3-4 grade levels below his schoolmates. (*Id.* at 7-8.) Petitioner’s presentence  
20 report also described him as below average intelligence and socially immature. (ROA-PCR  
21 171.)

22 Based on this sentencing record, the trial court’s actions did not keep Petitioner’s low  
23 intelligence from being discovered, documented and further investigated as a mental health  
24 issue. Rather, counsel presented it as mitigation at sentencing. (ROA-PCR 149 at 5-8.)  
25 Counsel’s presentation of Petitioner’s low intelligence and possible mental retardation at  
26 sentencing put PCR counsel on notice that his mental health was at issue and warranted  
27 further investigation. PCR counsel was also on notice that Arizona required that all  
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1 allegations of ineffective assistance be brought during the initial PCR proceeding. Ariz. R.  
2 Crim. P. 32.5. Where the petitioner had access to the information necessary to state the  
3 claim, the failure to develop and present the claim will not constitute cause. *See Murray*, 477  
4 U.S. at 486 (citing *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982) (“the mere fact that counsel  
5 failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite  
6 recognizing it, does not constitute cause for a procedural default”). On this record, the trial  
7 court’s alleged failures did not impede or prevent PCR counsel from complying with the state  
8 procedural rule.

9 Next, Petitioner alleges that Dr. McMahon’s official interference establishes cause.  
10 Petitioner contends that Dr. McMahon was a state actor and that his inaccurate testing and  
11 reporting of Petitioner’s IQ impeded PCR counsel from asserting Claim 34 at his initial PCR  
12 proceeding. (Doc. 215 at 10-12, 17-18.) Petitioner argues that because Dr. McMahon was  
13 authorized by the court, paid by the State to evaluate his mental health, and provide a report  
14 to the court, his actions are attributable to the state and constitute “official interference” if  
15 adverse to Petitioner. (*Id.* at 10.) The Court disagrees.

16 The Court need not decide whether Dr. McMahon was a state actor under these  
17 circumstances because there is no constitutional right implicated even if the State did provide  
18 an ineffective psychologist at sentencing for purposes of presenting mitigation. *See Harris*  
19 *v. Vasquez*, 949 F.2d 1497, 1517-18 (9th Cir. 1991) (rejecting the argument that petitioner  
20 had a constitutional right to a competent mental health expert at trial or sentencing); *see also*  
21 *Coleman*, 501 U.S. at 753 (stating that only when counsel is constitutionally required may  
22 attorney error constitute cause and be imputed to the State) Thus, any alleged misdiagnosis  
23 by Dr. McMahon regarding Petitioner cannot constitute cause.

24 Furthermore, Dr. McMahon’s alleged failures did not impede or prevent PCR counsel  
25 from complying with the state procedural rule. As the Court has already discussed, the  
26 sentencing record gave PCR counsel notice that Petitioner’s mental health was at issue and  
27 warranted additional investigation. Where the petitioner had access to the information  
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1 necessary to state the claim, the failure to develop and present the claim will not constitute  
2 cause. *See Murray*, 477 U.S. at 486.

3       Petitioner relies on *Parkus v. Delo*, 33 F.3d 933 (8th Cir. 1994), to argue that state  
4 officials prevented PCR counsel from raising Claim 34. (Doc. 215 at 11.) In *Parkus*, the  
5 habeas petitioner had an extensive history as a mentally disturbed man who had been raised  
6 in state institutions since the age of four. *Id.* at 934. Trial counsel made a request for his  
7 childhood mental health records, but was told by the records custodian that the records had  
8 been destroyed. *Id.* at 936. As a result, Parkus's mental health expert was unable to testify  
9 at trial or at sentencing that Parkus suffered from a mental disease or defect. *Id.* He was  
10 convicted of first-degree murder and received the death penalty. Parkus failed to raise an  
11 IAC claim during post-conviction proceedings. *Id.* at 937. During habeas proceedings,  
12 however, Parkus obtained his childhood mental health records (which had not, in fact, been  
13 destroyed) and, based on those records, his mental health expert submitted an affidavit  
14 attesting that Parkus suffered from a mental disease or defect. *Id.* at 936. Due to the missing  
15 mental health records, the court concluded that Parkus did not have notice of his trial  
16 counsel's ineffectiveness and therefore had adequate cause not to present the claim. *Id.* at  
17 938. The Eighth Circuit decided that there was "some" official interference which made  
18 compliance with the procedural rule impracticable and ordered an evidentiary hearing. *Id.*  
19 at 938-39.

20       The lack of notice counsel had in *Parkus* is distinguishable from the facts at issue here.  
21 Unlike *Parkus*, in this case, there are no missing records. Based on the sentencing record,  
22 PCR counsel was on notice that Petitioner had two IQ tests documenting low intelligence and  
23 another test demonstrating he was behind his peers in educational development. PCR  
24 counsel was also on notice that the presentence report indicated that Petitioner displayed low  
25 intelligence and emotional immaturity. Even though Dr. McMahon reported that Petitioner  
26 was not mentally retarded, PCR counsel was still on notice of the contrast between Dr.  
27 McMahon's report and the low IQ scores being reported, as well as the mental health  
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1 deficiencies counsel presented as mitigation at sentencing. PCR counsel was also on notice  
2 of his need to investigate mental health because in Arizona a “slow, dull and brain-damaged”  
3 mental impairment may have a significant mitigating effect as it may evidence an inability  
4 of the defendant to control his conduct. *See, e.g., Walton v. Arizona*, 159 Ariz. 571, 588, 769  
5 P.2d 1017, 1034 (1989). Thus, unlike in *Parkus*, there was no official interference  
6 preventing PCR counsel from obtaining the factual basis for an IAC sentencing claim for  
7 presentation during the PCR proceeding.

8 Petitioner also argues that *Perkins v. LeCureux*, 58 F.3d 214, 218 (6th Cir. 1995)  
9 supports his contention that PCR counsel did not have the factual basis to raise Claim 34 due  
10 to Dr. McMahon’s report. (Doc. 215 at 12.) In *Perkins*, a pre-AEDPA case, the court held  
11 that petitioner had cause to bring a new habeas claim in a successive petition because the  
12 facts underlying his new claim did not arise until years after his initial habeas proceeding had  
13 been concluded. *Perkins*, 58 F.3d at 218. Petitioner compares his case to *Perkins*, arguing  
14 that due to Dr. McMahon’s misdiagnosis, the factual basis of Petitioner’s mental retardation  
15 was unavailable to PCR counsel. (Doc. 215 at 12.) The Court disagrees.

16 The availability of the factual basis of Claim 34 was established by the sentencing  
17 record. The sentencing record contained multiple records of low intelligence and possible  
18 mental retardation. These records put PCR counsel on notice that Petitioner’s mental health  
19 warranted further investigation for possible IAC allegations during PCR proceedings. *See*  
20 *Williams v. Taylor*, 529 U.S. 420, 438-39, 444 (2000) (discussing the availability of a  
21 potential *Brady* claim since state habeas counsel was on notice of a psychiatric report, its  
22 possible materiality and the need for further investigation). *Perkins* is inapposite.

23 The Court concludes that neither the trial court’s actions nor Dr. McMahon’s report  
24 prevented PCR counsel from investigating and timely presenting Claim 34 during his initial  
25 PCR proceeding.

26 *Ineffective Assistance of Sentencing Counsel*

27 Next, Petitioner contends sentencing counsel’s ineffectiveness constitutes cause to  
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1 excuse the procedural default. (Doc. 215 at 7, 10-11.) Petitioner alleges that counsel was  
2 ineffective due to his failure to properly provide background information to Dr. McMahon  
3 prior to his psychological evaluation, which resulted in Dr. McMahon improperly concluding  
4 that Petitioner was not mentally retarded. (*Id.* at 11.) Specifically, counsel should have  
5 provided Dr. McMahon with Petitioner's educational, vocational, and medical records prior  
6 to his evaluation. (*Id.* at 13.)

7 Before ineffective assistance of counsel may be utilized as cause to excuse a procedural  
8 default, the particular ineffective assistance allegation must first be submitted and exhausted  
9 before the state courts as an independent claim. *See Murray*, 477 U.S. at 489-90; *Tacho*, 862  
10 F.2d at 1381. A petitioner is not entitled to bring an ineffective assistance claim as cause to  
11 excuse a procedural default when that particular ineffective assistance allegation itself is  
12 defaulted. *See Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000). Here, PCR counsel did  
13 not fairly present this particular IAC allegation in state court. Therefore, it cannot serve as  
14 cause to excuse the procedural default of Claim 34.

15 *Inadequacy of Arizona's Post-Conviction Process/IAC of PCR Counsel*

16 Alternatively, Petitioner argues cause to excuse his default because Arizona's post-  
17 conviction process was inadequate to protect his rights due to its failure to ensure he was  
18 appointed competent counsel and because PCR counsel performed ineffectively. (Doc. 215  
19 at 18-22.)

20 Although Petitioner contends that Arizona's PCR process failed to ensure he was  
21 appointed competent counsel, Petitioner cites no case, and the Court has found none which  
22 holds that a state is required by the federal constitution to provide counsel in PCR  
23 proceedings. The fact that a state may, "as a matter of legislative choice," *Ross v. Moffitt*,  
24 417 U.S. 600, 618 (1974), provide for counsel in discretionary appeals following a first  
25 appeal of right does not extend the Sixth Amendment's guarantee of effective counsel to  
26 discretionary appeals. *See Evitts v. Lucey*, 469 U.S. 387, 394, 397 n.7 (1985); *Pennsylvania*  
27 *v. Finley*, 481 U.S. 551, 559 (1987) (where a state provides a lawyer in a state  
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1 post-conviction proceeding, it is not “the Federal Constitution [that] dictates the exact form  
2 such assistance must assume,” rather, it is in a state’s discretion to determine what  
3 protections to provide). Further, the Ninth Circuit has held explicitly that “ineffective  
4 assistance of counsel in [state] habeas corpus proceedings does not present an independent  
5 violation of the Sixth Amendment enforceable against the states through the Due Process  
6 Clause of the Fourteenth Amendment.” *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir.  
7 1996). Since Petitioner’s PCR proceeding took place after his appeal of right, it was a  
8 discretionary proceeding that did not confer a constitutional right to the effective assistance  
9 of counsel. Thus, even assuming that PCR counsel’s performance did not conform to  
10 minimum standards, it did not violate the federal constitution and cannot excuse the  
11 procedural default.

12 As to Petitioner’s argument that PCR counsel’s ineffectiveness establishes cause, IAC  
13 can represent sufficient cause only when it rises to the level of an independent constitutional  
14 violation. *Coleman*, 501 U.S. at 755. When a petitioner has no constitutional right to  
15 counsel, there can be no constitutional violation arising out of ineffectiveness of counsel. *Id.*  
16 at 752. There is no constitutional right to counsel in state PCR proceedings. *See Finley*, 481  
17 U.S. at 555; *Murray v. Giarratano*, 492 U.S. 1, 7-12 (1989) (the Constitution does not  
18 require states to provide counsel in PCR proceedings even when the putative petitioners are  
19 facing the death penalty); *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993) (refusing  
20 to extend the right of effective assistance of counsel to state collateral proceedings).

21 In the context of IAC of PCR counsel, the Ninth Circuit has considered and rejected the  
22 argument that cause exists to excuse a procedural default where PCR counsel failed to assert  
23 a claim during PCR proceedings. *See Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998);  
24 *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996); *Moran v. McDaniel*, 80 F.3d 1261,  
25 1271 (9th Cir. 1996); *Bonin*, 77 F.3d at 1158-59.<sup>6</sup> Therefore, PCR counsel’s alleged  
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27 <sup>6</sup> *Manning v. Foster*, 224 F.3d 1129 (9th Cir. 2000) is not to the contrary. In  
28 *Manning*, the Ninth Circuit reiterated that the actions or omissions of PCR counsel cannot

1 ineffectiveness does not constitute cause.

2 The Court has denied all of Petitioner's argument regarding cause. Because Petitioner  
3 has not established cause to excuse the procedural default, the Court need not analyze  
4 prejudice. *See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir.1998).

5 *Discovery*

6 Petitioner contends that he has produced enough colorable evidence of cause to warrant  
7 discovery or an evidentiary hearing. (*See, e.g.*, Doc. 215 at 6-7.) Specifically, Petitioner  
8 requests discovery in support of his cause arguments: that sentencing counsel failed to obtain  
9 and provide his necessary social history records to Dr. McMahon, the failure of the trial court  
10 to properly fund and timely appoint an independent mental health expert or mitigation  
11 specialist, Dr. McMahon's misleading diagnosis, the inadequacies of Arizona's post-  
12 conviction relief system, including funding limitations and the appointment of post-  
13 conviction counsel. (*Id.*) Petitioner also contends that he is entitled to conduct discovery  
14 regarding deceased PCR counsel, including his bar records, depositions of those who worked  
15 with him, and expert testimony on the duties of post-conviction counsel. (Doc. 215 at 12,  
16 n.8, 20-22.)

17 The Court first notes that Petitioner is not requesting discovery in the context of an  
18 exhausted claim. *See, e.g., Bracy v. Gramley*, 520 U.S. 899 (1997) (discussing good cause  
19 for discovery in the context of an exhausted claim). Rather, discovery is sought to support  
20 Petitioner's various contentions of cause to excuse the procedural default of Claim 34.  
21 However, to demonstrate cause, the petitioner must demonstrate some external factor  
22 external to the defense impeded his efforts to comply with the state procedural rule. *See*

23 \_\_\_\_\_  
24 constitute cause to overcome a procedural default. *Id.* at 1133 (stating that "any  
25 ineffectiveness of Manning's attorney in the post-conviction process is not considered cause  
26 for the purposes of excusing the procedural default at that stage"). In *Manning*, rather, the  
27 court held that where direct appeal counsel actually interfered with the petitioner's ability to  
28 initiate post-conviction proceedings, such conduct by constitutionally-entitled counsel may  
constitute cause to excuse a procedural default.

1 *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004) (internal citation and quotation  
2 omitted). The Court has already considered and concluded that none of Petitioner’s  
3 contentions constituted an external impediment that excused his failure to raise Claim 34 in  
4 a timely manner. Hence, Petitioner cannot justify his discovery requests as his cause  
5 contentions have been rejected. *See Campbell v. Blodgett*, 997 F.2d 512, 524 (9th Cir. 1992)  
6 (stating that an evidentiary hearing is not necessary to allow a petitioner to show cause and  
7 prejudice if the court determines as a matter of law that he cannot satisfy the standard).  
8 Therefore, Petitioner’s requests for discovery are denied.

9 Fundamental Miscarriage of Justice

10 If a petitioner cannot meet the cause and prejudice standard, the Court still may hear the  
11 merits of procedurally defaulted claims if the failure to hear the claims would constitute a  
12 “fundamental miscarriage of justice.” *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). The  
13 fundamental miscarriage of justice exception is also known as the “actual innocence”  
14 exception. “[A] claim of actual innocence is not itself a constitutional claim, but instead a  
15 gateway through which a habeas petitioner must pass to have his otherwise barred  
16 constitutional claim considered on the merits.” *Herrera v. Collins*, 506 U.S. 390, 404 (1993).  
17 There are two types of claims recognized under this exception: 1) that a petitioner is  
18 “innocent of the death sentence,” or, in other words, that the death sentence was erroneously  
19 imposed; and 2) that a petitioner is actually innocent of the capital crime. *See Calderon v.*  
20 *Thompson*, 523 U.S. 538, 559-60 (1998). To be innocent of the crime itself, the petitioner  
21 must show that “a constitutional violation has probably resulted in the conviction of one who  
22 is actually innocent[.]” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). The requisite probability  
23 requires a showing “that it is more likely than not that no reasonable juror would have found  
24 petitioner guilty beyond a reasonable doubt.” *Id.* To be innocent of a death sentence, the  
25 petitioner must show by clear and convincing evidence that, but for a constitutional error, no  
26 reasonable juror would have found the existence of an aggravating circumstance or some  
27 other condition of eligibility for the death sentence under the applicable state law. *Sawyer*,

28

1 505 U.S. at 336, 345. Under this standard, a showing of actual innocence refers to those  
2 state-law requirements that must be satisfied to impose the death penalty. *Id.* at 348.

3 In *Atkins*, 536 U.S. 304, the Supreme Court altered the death penalty landscape by  
4 prohibiting states from sentencing to death or executing a mentally retarded person. The  
5 *Atkins* Court specifically reserved to the states how mental retardation would be defined and  
6 proven. 536 U.S. at 317; *State v. Grell*, 212 Ariz. 516, 521, 135 P.3d 696, 701 (2006). In  
7 the context of a fundamental miscarriage of justice challenge, clear and convincing proof that  
8 the petitioner is mentally retarded under state law forecloses a condition of eligibility for  
9 imposition or continued imposition of a death sentence. *See Sasser v. Norris*, 553 F.3d 1121,  
10 1126 n.4 (8th Cir. 2009) (applying Arkansas law and stating that a petitioner is “actually  
11 innocent” and thus ineligible for the death penalty where he demonstrates that he is mentally  
12 retarded).

### 13 Actual Innocence of the Death Penalty

14 Petitioner contends that his mental retardation renders him ineligible and actually  
15 innocent of the death penalty. (Doc. 215 at 24.) Because fundamental miscarriage of justice  
16 is a federal issue, Petitioner contends that this Court is not bound by the fact finding or the  
17 disposition of his *Atkins* hearing in state court that he is not mentally retarded. (*Id.* at 25.)  
18 On the other hand, Petitioner concedes that determining actual innocence of the death penalty  
19 is determined by reference to Arizona law. (Doc 219 at 5.)

20 Both state and federal law are involved in this Court’s fundamental miscarriage of  
21 justice analysis. Under *Sawyer*, innocence of the death penalty requires a proper showing by  
22 petitioner that he does not meet some condition of eligibility for the death penalty under state  
23 law. *Sawyer*, 505 U.S. at 345. Under *Atkins*, it is up to the states to develop “appropriate  
24 ways to enforce the constitutional restriction” upon the execution of the mentally retarded.  
25 *Atkins*, 536 U.S. at 317. Thus, both *Sawyer* and *Atkins* point this Court to state law to  
26 determine as a condition for eligibility of the death penalty whether Petitioner is mentally  
27 retarded. Yet, it is under *Sawyer* that this Court evaluates, based on the state court record,  
28

1 whether Petitioner has demonstrated that he is mentally retarded. *See Sawyer*, 505 U.S. at  
2 348; *Winston v. Kelly*, 600 F.Supp.2d 717, 735-36 (W.D. Va. 2009), *vacated and remanded*  
3 *on other grounds*, 592 F.3d 535 (4th Cir. 2010) (evaluating whether petitioner demonstrated  
4 that was actually innocent of the death penalty due to mental retardation in the context of the  
5 fundamental miscarriage of justice exception). Under *Sawyer*, the Court is not undertaking  
6 a *de novo* review of Petitioner's *Atkins* hearing; rather, the Court is undertaking a limited  
7 review of the record to assess whether Petitioner demonstrated by clear and convincing  
8 evidence that no reasonable factfinder would have determined that he is not mentally  
9 retarded.

#### 10 *Arizona's Mental Retardation Statute*

11 In Arizona, similar to *Sawyer's* burden of proof, the statutory scheme requires that the  
12 petitioner prove mental retardation to the trial court by clear and convincing evidence. *Grell*,  
13 212 Ariz. at 524, 135 P.3d at 704 (concluding that Arizona's burden of proof is not  
14 unconstitutional); A.R.S. § 13-703.02(G) (West 2005).<sup>7</sup> Under Arizona law, a petitioner  
15 establishes mental retardation by proving that he meets the statutory definition, which is "a  
16 mental deficit that involves significantly subaverage general intellectual functioning, existing  
17 concurrently with significant impairment in adaptive behavior, where the onset of the  
18 foregoing conditions occurred before the [petitioner] reached the age of eighteen." A.R.S. §  
19 13-703.02(K)(2). To establish mental retardation, a petitioner must prove all three elements,  
20 the intellectual functioning prong, the adaptive behavior prong, and onset before the age of  
21 eighteen. *See State v. Roque*, 213 Ariz. 193, 227-28, 141 P.3d 368, 402-03 (2006).

22 Under the intellectual functioning prong, "[s]ignificantly subaverage general  
23 intellectual functioning' means a full scale intelligence quotient of seventy or lower."  
24 A.R.S. § 13-703.02(K)(4). The court is further directed to "take into account the margin of  
25 error for the test administered." *Id.* In *Roque*, the Arizona Supreme Court reiterated that the

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26  
27 <sup>7</sup> Arizona's current statute for mental evaluations for capital defendants is  
28 codified at A.R.S. § 13-753.



1 statute does not refer to individual IQ sub-tests, but rather employs a single intelligence  
2 quotient, the full scale IQ score. *Roque*, 213 Ariz. at 228, 141 P.3d at 403. Because mental  
3 retardation is generally a static mental condition, full scale IQ testing is relevant both before  
4 and after the age of eighteen. *State v. Arellano*, 213 Ariz. 474, 479-80, 143 P.3d 1015, 1020-  
5 21 (2006).

6 The standard error of measurement means that an IQ score can overestimate or  
7 underestimate a person's true level of intellectual functioning. *See Ledford v. Head*, No. 02-  
8 CV-1515, 2008 WL 754486 at \*8 (N.D. Ga. March 19, 2008). However, it may be  
9 speculative to conclude that IQ scores receive either a downward adjustment or an upward  
10 adjustment. *See Walton v. Johnson*, 440 F.3d 160, 178 (4th Cir. 2006) (noting that petitioner  
11 could only speculate that the standard error of measurement would lower his IQ score).  
12 Moreover, measurement error is more of a factor when only one IQ test is given. *See*  
13 *Ledford*, 2008 WL 754486 at \*8. When more than one IQ test is given and the scores  
14 corroborate each other, the possibility of measurement error is substantially reduced. *Id.*

15 Under the adaptive behavior prong, the statute requires an overall assessment of the  
16 petitioner's ability to meet society's expectations of him; it does not require a finding of  
17 mental retardation based solely on proof of specific deficits in only a couple of areas. *Grell*,  
18 212 Ariz. at 529, 135 P.3d at 709. The statute defines adaptive behavior as "the effectiveness  
19 or degree to which the defendant meets the standards of personal independence and social  
20 responsibility expected of the defendant's age and cultural group." A.R.S. § 13-  
21 703.02(K)(1). In *Arellano*, 213 Ariz. at 478-80, 143 P.3d at 1019-21, the Arizona Supreme  
22 Court clarified that behavior after age eighteen is relevant to the adaptive behavior inquiry,  
23 even if the behavior under review comes from within a prison context. In *Arellano*, the court  
24 reversed a trial court ruling precluding Arizona Department of Correction officials from  
25 testifying at a mental retardation hearing regarding the petitioner's present adaptive behavior  
26 in prison. *Id.* at 480, 143 P.3d at 1021. In *Grell*, the court reiterated that the statute requires  
27 a showing of current impairment in adaptive ability and that an assessment based on recent  
28

1 interviews is persuasive. *Grell*, 212 Ariz. at 527-28, 135 P.3d at 707-08. Finally, the statute  
2 requires the onset of mental retardation to occur before the age of eighteen. A.R.S. § 13-  
3 703.02(K)(2).

4 Petitioner's Atkins Proceeding

5 In support of his claim of innocence of the death penalty, Petitioner filed numerous  
6 exhibits from his 2005 *Atkins* proceeding where he sought post-conviction relief. (Doc. 215,  
7 Ex. 1-84.)

8 In 2005, Petitioner filed a successive PCR petition alleging that he is mentally retarded.  
9 (Doc. 228 at 210-244.) He supported his petition with scores from two full scale IQ tests  
10 given to him at school, where his IQ was reported at 70 and 77. (*Id.*) Petitioner also attached  
11 to his petition a declaration from Dr. Ricardo Weinstein, Ph.D., a psychologist who opined  
12 that he was mentally retarded. (*Id.* at 246-300.)

13 Under the statute, if a petitioner's IQ is tested at 75 or less, the court appoints additional  
14 experts to evaluate the petitioner and will hold a subsequent hearing to determine whether  
15 petitioner is mentally retarded. *See* A.R.S. § 13-703.02(D), (G); *State ex rel Thomas v.*  
16 *Duncan*, 222 Ariz. 448, 451, 216 P.3d 1194, 1197 (App. 2009). In a post-trial evaluation of  
17 mental retardation, each party selects one psychological expert to evaluate and report to the  
18 court their findings on whether the petitioner is mentally retarded. *See* A.R.S. § 13-  
19 703.02(D); *State v. Cañez*, 205 Ariz. 620, 626, 74 P.3d 932, 938 (2003) (because the  
20 statutory procedures focus on a pre-trial mental retardation evaluation, in a post-trial setting,  
21 courts utilize the statutory procedures as applicable). In addition, the statute allows  
22 appointment of a third psychologist, appointed on behalf of the court, not the state or the  
23 petitioner. *See id.* The PCR court appointed Dr. Ricardo Weinstein for Petitioner, Dr. Sergio  
24 Martinez for the State and Dr. John Toma, on behalf of the court. (Doc. 228 at 504.)

25 On November 25, 2005, Dr. Toma submitted his report to the court. (*Id.* at 1875-1884.)  
26 Regarding intellectual functioning, Dr. Toma administered the Wechsler Adult Intelligence  
27 Scales-Third Edition ("WAIS III") to Petitioner on November 9, 2005. Petitioner's full scale  
28

1 IQ for the test was 77. (*Id.* at 1878.) Regarding adaptive behavior, Dr. Toma used the  
2 Adaptive Behavior Scale–Residential and Community: Second Edition (“ABS-RC:2”). (*Id.*  
3 at 1880.) Dr. Toma reviewed all of Petitioner’s childhood records but also focused on  
4 Petitioner’s current level of functioning and concluded that he showed no significant deficits  
5 in adaptive functioning. (*Id.* at 1880-84.) Dr. Toma concluded that Petitioner did not meet  
6 the statutory definition for mental retardation. (*Id.* at 1884.)

7 On January 20, 2006, Dr. Martinez submitted his report to the court. (*Id.* at 2396-2412.)  
8 Regarding intellectual functioning, Dr. Martinez administered WAIS III to Petitioner on  
9 January 11, 2006, reporting a full scale IQ score of 87. (*Id.* at 2404.) Dr. Martinez also  
10 administered the Reynolds Intellectual Assessment Scales (“RIAS”) to Petitioner, with a  
11 score of 91. (*Id.* at 2403.) Regarding adaptive behavior, Dr. Martinez utilized the Adaptive  
12 Behavior Assessment System-II (“ABAS-II”). (*Id.* at 2405.) Based on Petitioner’s self-  
13 report and an extensive review of background materials, Dr. Martinez concluded that  
14 Petitioner demonstrated low average scores, not significant impairment scores in adaptive  
15 functioning testing. (*Id.* at 2408-09.) Dr. Martinez concluded that Petitioner did not meet the  
16 statutory definition of mental retardation. (*Id.* at 2411.)

17 On February 14, 2006, Dr. Weinstein submitted his report to the court. (*Id.* at 1103-  
18 1135.) Regarding intellectual functioning, Dr. Weinstein administered the WAIS III to  
19 Petitioner on July 29, 2004, with a full scale IQ score of 70. (*Id.* at 1111.) On November 11,  
20 2004, Dr. Weinstein administered the Woodcock-Johnson Intelligence Test-Third Edition  
21 (W-J III) to Petitioner, with a full scale IQ score of 71. (*Id.* at 1112.) Dr. Weinstein also  
22 reported that Petitioner’s two school-age IQ tests utilized the Wechsler Intelligence Scale for  
23 Children (“WISC”), scoring a 70 in 1967 and a 77 in 1969. (*Id.* at 1122.) Dr. Weinstein also  
24 utilized the ABAS-II to evaluate adaptive behavior. (*Id.* at 1125-27.) Dr. Weinstein had  
25 Richard Garcia, Petitioner’s step-father, rate Petitioner’s adaptive behavior utilizing the  
26 ABAS-II. Dr. Weinstein identified a number of childhood adaptive behavior deficits based  
27 upon other interviews and declarations from Petitioner’s family and friends regarding his  
28

1 formative years. (*Id.* at 1123-1125.) Dr. Weinstein identified deficits in conceptual, social,  
2 and practical adaptive behavior skills. (*Id.*) Additionally, he found deficits in Petitioner  
3 performing major activities for daily living. (*Id.*) Dr. Weinstein concluded that Petitioner  
4 met the statutory definition of mental retardation. (*Id.* at 1127.)

5 Although not appointed by the court, on February 24, 2006, Dr. Marc Tasse, a  
6 recognized mental retardation expert, submitted a report on behalf of Petitioner. (*Id.* at 2425-  
7 2445.) Dr. Tasse did not administer an IQ test to Petitioner, but reviewed the intelligence  
8 testing that had been done. (*Id.* at 2432.) Dr. Tasse opined that the RIAS test utilized by Dr.  
9 Martinez was unreliable, that there would be a significant practice effect on the last WAIS  
10 III test administered by Dr. Martinez due to the short eight week duration between the last  
11 time that Petitioner had taken the same test, and that when all scores are adjusted for the  
12 “Flynn Effect,”<sup>8</sup> Petitioner meets the statutory definition of significant subaverage  
13 intellectual functioning. (*Id.* at 2434-36.) Dr. Tasse utilized the ABAS II to administer an  
14 adaptive behavior test to Petitioner. (*Id.* at 2436.) Dr. Tasse concluded that Petitioner was  
15 significantly impaired in adaptive functioning, with onset before the age of eighteen. (*Id.* at  
16 2443.) Finally, Dr. Tasse concluded that Petitioner was mentally retarded under the statutory  
17 definition. (*Id.* at 2445.)

18 The PCR court conducted an eight-day evidentiary hearing. Dr. Weinstein and Dr.  
19 Tasse testified on behalf of Petitioner. Dr. Martinez testified for the State, and Dr. Toma  
20 testified on behalf of the court. The following persons also testified, Petitioner’s Aunt,  
21 Eloise Arce, and Phoenix School District Psychologists Sidney Wilson and Gloria  
22 McConkey. Petitioner formally waived his right to be present at the hearing before the PCR

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23  
24 <sup>8</sup> According to the Flynn Effect theory, the passage of time inflates full scale IQ  
25 test scores by approximately one-third to two-thirds of a point per year since the  
26 normalization of the particular test in question. The premise of the Flynn Effect theory is that  
27 IQ tests that are not renormed to take rising IQ scores into account will overstate a test  
28 taker’s score. Once calculated, these amounts are subtracted from the full scale IQ score  
before applying the standard margin of error. *See, e.g., In Re Salazar*, 443 F.3d 430, 433 (5th  
Cir. 2006).

1 court.

2 *Intellectual Functioning*

3 At the hearing, the experts testified that the WAIS III was the most widely used IQ test.  
4 (*See, e.g.*, Doc. 228 at 4797.) The third edition of the test is a 1997 revision of the second  
5 edition. (*Id.* at 5070.) It is an individually administered test designed to assess the  
6 intelligence of individuals ranging in age from 16 to 89 years. (*Id.*) Three experts tested  
7 Petitioner utilizing the WAIS III. (*Id.* at 8728.) Dr. Tasse testified that it was appropriate  
8 to adjust the WAIS III administered by Dr. Martinez by five points downward due to practice  
9 effect because he administered the test to Petitioner within one year of the previous time that  
10 WAIS III was administered. (*Id.* at 5251-52, 5255, 5265.) Dr. Martinez alternatively  
11 administered the RAIS, but Dr. Tasse discounted its use because it is a fairly new test and  
12 not as comprehensive as WAIS III. (*Id.* at 2434-36.) Dr. Tasse testified that the following  
13 full scale IQ scores were valid: 70, 77, 70, 71, 77 and 82 (after receiving the five point  
14 reduction for practice effect). (*Id.* at 5250-51.)

15 The PCR court thoroughly reviewed and discussed the evidence regarding the intellectual  
16 functioning prong, as follows:

17 Full Scale I.Q. Testing

18 The Defendant has failed to establish by clear and convincing evidence or by  
19 a preponderance of the evidence that he suffers from “significantly sub average  
20 general intellectual functioning” which means a “full scale intelligence quotient  
(IQ) of seventy or lower.” A.R.S. § 13-703.02(G), (K)(2) & (4).

21 Beginning in February of 1967, when he was 9 years of age, through January  
22 of 2006, when he was 38 years of age, the Defendant has been given six full-scale  
23 IQ tests, as well as several less thorough IQ tests. The six tests included two  
24 WISC tests, a Woodcock-Johnson, 3<sup>rd</sup> edition test (W-J III) and three WAIS III  
25 tests. In each test, except for the WAIS-III test administered by Dr. Martinez on  
26 January 11, 2006, where the practice effect skewed and raised the score to 87, the  
27 Defendant’s IQ was determined to be 70, 77, 70, 71 and 77. . . . Applying the  
28 accepted “margin of error for the tests administered,” it is 95 percent certain that  
the Defendant’s full scale IQ is within the range of 63 to 82. This consistency in  
IQ test scores over [more than a] 38 year period of time, especially on the “gold  
standard” WISC and WAIS III tests,<sup>FN1</sup> compels the conclusion that the Defendant  
has failed to establish by clear and convincing evidence or by a preponderance of  
the evidence that his IQ is 70 or lower.

FN 1. The court agrees with Dr. Marc Tasse that these tests were

1 properly administered and scored.

2 Flynn Effect:

3 Though it has considered the “Flynn Effect” in determining the defendant’s  
 4 IQ, the Court is not persuaded that it is required to apply it to adjust downward  
 5 each of the six full scale test IQ scores for alleged test obsolescence. See exhibits  
 6 223 and 210, where the Flynn Effect is and is not applied to the various IQ test  
 7 scores. As shown by Exhibit 223, the defendant’s expert, Dr. Marc Tasse, applies  
 8 the Flynn Effect, as well as the practice effect to the January 11, 2006 test, in  
 9 finding that the Defendant’s IQ is 70 or lower (these Flynn Effect adjusted scores  
 10 are 64, 70, 69, 74 and 78 respectively). Although the 2005 AAMR User’s Guide,  
 11 Exhibit 59, directs that the Flynn Effect, standard error of measurement and  
 12 practice effect, all be used when scoring the WAIS-III test to determine a person’s  
 13 IQ, the Court concludes that use of the Flynn Effect is not mandated by the statute  
 14 and is not part of the “current community, nationally, and culturally accepted . .  
 15 . psychological and intelligence testing procedures” that must be used when  
 16 scoring all full scale IQ tests. A.R.S. § 13-703.02(E)<sup>FN2</sup>

17 FN 2. Although the Flynn Effect was widely known when A.R.S. §  
 18 13-703.02 was enacted in 2001, and when *Atkins* was decided in 2002,  
 19 it was not adopted or discussed by either. Recently, some appellate  
 20 courts have directed that the trial court consider it when determining a  
 21 person’s IQ, *Green v. Johnson*, [No. CIVA 2:05CV340, 2006 WL  
 22 3746138 (E.D. Va. Dec. 15, 2006)]; *Walton v. Johnson*, 440 F.3d 160,  
 23 176-178 (4<sup>th</sup> Cir. 2006) and *Walker v. True*, 399 F.3d [3]15, 322-328  
 24 (4<sup>th</sup> Cir. 2005), while other courts have rejected its application absent  
 25 statutory authorization. See *Bowling v. Kentucky*, 163 S.W.3d 361, 375  
 26 (2005) and cases cited therein.

27 In fact, Dr. Weinstein, a defense expert, did not adjust the full-scale IQ score  
 28 for the Flynn Effect in his 2004 Declaration and in his 2006 report to the court.  
 In addition, Dr. Toma, the court-appointed expert, did not use the Flynn Effect in  
 scoring his testing of the defendant and testified that such was not required for  
 those tests.

In addition, the Flynn Effect is not part of the “margin of error . . .”  
 calculation that A.R.S. § 13-703.02(K)(4) and the current WAIS Scoring Manual  
 require to be used in scoring the WAIS-III tests administered in 2004, 2005 and  
 2006, and was not used when the WISC tests were given to the Defendant as a  
 child in 1967 and 1969. Instead the manual merely directs that a standard error  
 of measurement of  $\pm 7$  be applied in scoring the 1967 and 1969 WISC tests, and  
 that a standard error of measurement of  $\pm 5$  be applied for W[AIS]-III tests given  
 in 2004, 2005 and 2006.

In sum, the defendant has failed to show by clear and convincing evidence  
 or a preponderance of evidence that he possesses “significant sub average general  
 intellectual functioning,” as defined and required by A.R.S. § 13-703.02(G) &  
 (K)(2) & (4).<sup>FN3</sup>

FN 3. If the Flynn Effect was required to be used in scoring these  
 tests, the court finds that the defendant has proved by a preponderance  
 of the evidence that his full scale IQ is 70 or lower.

1 (*Id.* at 3828-30.)

2 *Intellectual Functioning Discussion*

3 Under *Sawyer*, the Court's limited review is to assess whether Petitioner demonstrated  
 4 by clear and convincing evidence that no reasonable fact finder would have determined that  
 5 he is not mentally retarded. According to Dr. Tasse's testimony at the evidentiary hearing,  
 6 there were six valid full scale IQ scores posted for Petitioner, 70, 77, 70, 71, 77 and 82. (*Id.*  
 7 at 5250-51.) These full scale IQ scores are represented in the following chart.<sup>9</sup>

Date of Administration	IQ Test and Administrator	Results Obtained	Standard Margin of Error
2/14/1967	WISC (Wilson)	FSIQ = 70	63 to 77
10/6/1969	WISC (McConkey)	FSIQ = 77	70 to 84
7/29/2004	WAIS-III (Weinstein)	FSIQ = 70	65 to 75
11/11/2004	W-J III (Weinstein)	GIA = 71	67 to 75
11/9/2005	WAIS-III (Toma)	FSIQ = 77	72 to 82
1/11/2006	WAIS-III (Martinez)	FSIQ = 82 (after 5 point deduction)	77 to 87

15 Based on the evidence, Petitioner had two full scale IQ scores that met the statutory  
 16 requirement for mental retardation and four scores that did not meet the statutory  
 17 requirement. A reasonable factfinder could easily find Petitioner's four IQ scores over 70  
 18 more persuasive than his two scores of 70 or below. *See Winston*, 600 F. Supp.2d at 736  
 19 (concluding that the petitioner failed to establish mental retardation in the context of a  
 20 fundamental miscarriage of justice inquiry because his three scores over 70 were more  
 21 persuasive than his one score below 70).

22 When accounting for margin of error, as this Court has already noted, it is necessarily  
 23 speculative to conclude that Petitioner's IQ scores should receive either a downward

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25 <sup>9</sup> The PCR court utilized the following margin of error calculations for the IQ  
 26 tests—a standard error of measurement of  $\pm 7$  for scoring the 1967 and 1969 WISC tests, and  
 27 a standard error of measurement of  $\pm 5$  for scoring the WAIS III tests. (*Id.* at 3830.)  
 28 Excluding any correction for the alleged Flynn Effect, Dr. Tasse testified that the margin of  
 error range for the WJ-III test was 67 to 75. (*Id.* at 5270.)

1 adjustment or an upward adjustment. *See Walton*, 440 F.3d at 178 (stating that petitioner  
2 could only speculate that the standard error of measurement would lower his IQ score); *see*  
3 *also Winston*, 600 F. Supp.2d at 729 (“there is no basis in practice for using [standard error  
4 of measurement] to find that an individual’s true IQ falls in the range below the earned score  
5 on a given IQ test because it was equally likely that the test-taker’s true IQ could fall in the  
6 range above the earned score.”). In review of Dr. Tasse’s testimony he made the same point  
7 at the evidentiary hearing. During cross-examination about Petitioner’s IQ score on WJ-III,  
8 Dr. Tasse reiterated his contention that Petitioner’s full scale IQ score of 71 should be  
9 adjusted downward for the Flynn Effect to 69. (Doc. 228 at 5261-62.) Dr. Tasse was then  
10 questioned about margin of error and its effect on Petitioner’s IQ score.

11 **State’s Attorney:** This test doesn’t establish that his IQ falls below 70?

12 **Dr. Tasse:** Yes, it does, in my opinion. . . . The Woodcock-Johnson III, it  
13 established his IQ is below 70.

14 **State’s Attorney:** The range is 65 to 74; correct?

15 **Dr. Tasse:** Yes.

16 **State’s Attorney:** Okay. Explain your position?

17 **Dr. Tasse:** The GIA is 69; that is below 70.

18 (Doc. 228 at 5263.) Based on the testimony of Petitioner’s own expert, Dr. Tasse agreed  
19 with what this Court previously recognized—that the most important number in the range is  
20 the earned full scale IQ score. A reasonable factfinder could reject the factual assertion that  
21 Petitioner’s full scale IQ scores should be adjusted downward based on standard margin of  
22 error. *See Winston*, 600 F. Supp.2d at 736.

23 Petitioner contends, however, that the Court should disregard the state court’s  
24 conclusion regarding the Flynn Effect, utilize it to adjust downward his full scale IQ scores,  
25 and conclude that he has adequately proven mental retardation. (Doc. 215 at 24.)

26 Dr. Tasse indicated that there were six valid full scale IQ scores posted for Petitioner,  
27 70, 77, 70, 71, 77 and 82. (*Id.* at 5250-51.) According to Dr. Tasse, the full scale IQ scores  
28 should be further reduced for the Flynn Effect, recommending the six scores be reduced to,



1 64, 70, 69, 67, 74 and 78. (*Id.* at 8801.) Drs. Toma and Martinez disagreed with Dr. Tasse's  
2 testimony regarding whether the Flynn Effect should be applied to reduce individual full  
3 scale IQ scores. (*Id.* at 5509-10; 5568-69.) Drs. Toma and Martinez both testified that it is  
4 not their clinical practice to reduce full scale IQ scores for the Flynn Effect. (*Id.*)

5 For a number of reasons, the Court concludes that there is fair support in the record not  
6 to factor in the Flynn Effect to reduce Petitioner's full scale IQ scores. First, Arizona's  
7 mental retardation statute does not indicate that the Flynn Effect should be applied to full  
8 scale IQ scores. Second, there is no Arizona precedent indicating that the Flynn Effect  
9 should be applied. Third, in Dr. Tasse's testimony, he conceded that the WAIS III  
10 administrative manual does not recommend deducting points from an IQ test to factor in for  
11 the Flynn Effect. (Doc. 228 at 5357-59.) Fourth, the experts at the hearing did not all agree  
12 that individual IQ scores should be adjusted downward for the Flynn Effect. (*Id.* at 5250-51.)  
13 Finally, other courts have arrived at the same conclusion that the Flynn Effect need not be  
14 factored in to reduce a full scale IQ score. *See, e.g., Winston*, 600 F. Supp.2d at 736 (stating  
15 that a reasonable factfinder could reject the factual assertion that full scale IQ scores should  
16 be adjusted downward for the Flynn Effect).

17 Under *Sawyer*, Petitioner has failed to establish by clear and convincing evidence that  
18 no reasonable factfinder would have determined that his full scale IQ is not 70 or lower.  
19 Therefore, he has failed to establish the significant subaverage general intellectual  
20 functioning prong of the mental retardation statute. *See* A.R.S. § 13-703.02(K)(2). Even  
21 though Petitioner must establish all three prongs of the statute in order to be found mentally  
22 retarded, the Court will proceed to discuss the adaptive behavior prong and onset before age  
23 18.

#### 24 *Adaptive Behavior*

25 In Petitioner's fundamental miscarriage of justice arguments, although he generally  
26 alleged that his mental retardation renders him actually innocent of the death penalty, his  
27 only specific argument regarding adaptive behavior was that neither Dr. Toma nor Dr.  
28

1 Martinez utilized established diagnostic methods to assess adaptive behavior. (Doc. 215 at  
2 24-25.)

3 The PCR court thoroughly reviewed and discussed the evidence regarding Petitioner's  
4 adaptive behavior, as follows.

5 The court further finds that the Defendant has proved by a preponderance of  
6 the evidence, but not by clear and convincing evidence, that throughout his  
7 childhood and adult life he has suffered from significant impairment in adaptive  
8 behavior in meeting the standards of personal independence and social  
9 responsibility expected of a person of his age and cultural group. A.R.S.  
10 13-703.02(K)(1). All experts agreed that the AAMR [American Association on  
11 Mental Retardation] Users Guide, 2002 edition, provides the "current community,  
12 nationally, and culturally accepted...procedure" for evaluating a person's adaptive  
13 behavior, as required by A.R.S. 13-703.02(E). In essence, this requires that the  
14 experts investigate and determine a defendant's conceptual, social and practical  
15 adaptive behavior and skills in the context of his or her behavior in the  
16 community. However, the court can also consider a defendant's institutional  
17 behavior in determining whether he has significant adaptive behavior deficits. *See*  
18 *State v. Arellano (Appelt)* [sic], 213 Ariz. 474, ¶¶ 14-23 (2006), where the court  
19 held that, pursuant to A.R.S. 13-703.02(K), the trial court has the discretion to  
20 consider defendant's adult institutional behavior, including his communication,  
21 social and interpersonal skills, and work, leisure and health habits, in determining  
22 the existence of adaptive behavior deficits. This behavior is especially relevant in  
23 this case, where the defendant has spent nearly his entire his adult life in prison  
24 before and after he committed these murders in 1989. Finally, the experts agree  
25 that the Adaptive Behavior Assessment System, 2d edition, (ABAS-II) test is the  
26 most appropriate and accepted formal assessment tool for determining whether the  
27 Defendant has significant adaptive behavior deficits.

17 Viewed in this context, the Court agrees in part with the findings of Drs.  
18 Weinstein and Tasse, that the Defendant has significant adaptive behavior deficits  
19 as defined by A.R.S. 13-703.02(K)(1), particularly in the area of conceptual,  
20 social, and practical skills. As detailed in their reports and testimony, both experts  
21 investigated all aspects of the defendant's life before and after turning 18 years of  
22 age, including his institutional behavior. In addition to reviewing the testimony of  
23 the mitigation witnesses at the 1990 aggravation and mitigation hearing, they also  
24 interviewed several family members who were close to the Defendant in his  
25 formative years when he grew up in Phoenix and in southern California. They also  
26 considered sworn declarations from individuals who were familiar with the  
27 Defendant's behavior in non-institutional and institutional settings. The defendant  
28 also presented the testimony of Eloise Arce, an aunt who cared for him for  
about 18 months until age three and who also observed him in his youth, about his  
maladaptive conduct during his childhood years in Phoenix. This information  
confirmed, as detailed in the testimony and reports of Drs. Weinstein and Tasse,  
that although the Defendant as a young boy was a good care giver to his younger  
siblings in the absence of their alcoholic mother, he showed many symptoms of  
very slow and delayed development of conceptual, social and practical skills.  
Finally, Dr. Tasse, unlike Drs. Toma and Martinez, correctly administered the  
ABAS-II test, the most appropriate adaptive behavior test, to the Defendant and  
Richard Garcia, his stepfather from approximately 1966 to 1973. This test,  
together with the independent evidence of the defendant's non-institutional

1 behavior, establishes probable cause to believe that since childhood the Defendant  
2 has displayed significant adaptive behavior impairments in conceptual, social and  
practical skills.

3 The Court is unable to conclude, however, that there is clear and convincing  
4 evidence that the defendant has significant adaptive behavior deficits. A more  
5 complete picture of his conduct in his formative years as a child and teenager, as  
6 well as his conduct in prison over nearly all of the last twenty-six years, shows  
7 that the defendant has regularly shown adequate personal independence and social  
8 responsibility expected of a person of his age and cultural group, including proper  
9 conceptual, social and practical skills. In contrast to numerous hearsay  
10 declarations of Richard Garcia and others,<sup>FN6</sup> and the somewhat conflicting and  
11 unreliable testimony of Eloise Arce about certain adaptive behavior deficits of the  
12 defendant, the testimony at the October 19, 1990 and November 30, 1990  
13 sentencing mitigation hearing of Erlinda Martinez, his aunt and the sister of the  
14 defendant's mother, and of two of the defendant's immediately younger sisters,  
15 shows that when the defendant grew up in Phoenix he exercised personal  
independence and proper conceptual, social and practical skills for a person of his  
age and cultural group. Before he became a teenager, and in the frequent absence  
of his alcoholic mother, he was described as the "man of the family," who did  
most of the cooking, cleaning and caring for his younger siblings. In addition, they  
attributed his poor school performance and being "kept back" in school to his  
frequently missing school and constantly changing schools due to his mother  
being regularly on the move around Phoenix. This nomadic existence is  
corroborated by the school records and Joint Chronology timeline submitted by  
the parties, which shows that over a seven-year time frame from September of  
1963 to September of 1970, the defendant attended at least ten different schools,  
was regularly absent and was twice held back.

16 FN 6. Most of the critical fact witnesses relied on by the  
17 defendant's experts were not called to testify and thus not subjected to  
cross-examination.

18 In 1971, at approximately the age 14, the defendant moved to El Monte,  
19 California with his mother and her husband, Richard Garcia. Three years later the  
20 defendant and his mother returned to Arizona without Richard. The defendant then  
married and fathered two sons, and was gainfully employed as a cook and  
dishwasher at various locations before being sent to prison for the first time in  
April of 1979.

21 The defendant's conduct in prison, where he has been since April of 1979  
22 except for only two short periods of release, further compels the conclusion that  
23 the defendant has failed to show by clearing [sic] and convincing evidence that he  
24 has significant adaptive behavior deficits. Department of Corrections officers who  
25 supervised the defendant from 1987 to 1989 at Florence, testified that the  
defendant worked as a porter in the officers dining room and prepared and served  
food to DOC officers. His supervisors described him as a self-starter, who was  
polite, acted with responsibility, and was trusted and skilled. At one point, he was  
promoted and put in charge of running the morning shift at the dining room.

26 In concluding that the defendant has failed to show by clear and convincing  
27 evidence that he has significant adaptive behavior deficits, the court agrees with  
28 Dr. Toma's opinion that the defendant does not suffer from significant adaptive  
behavior deficits and that as an adult the defendant has consistently displayed the

1 ability to engage in independent and self-directed thinking, planning and conduct.  
2 Although Dr. Toma did not fully administer the ABAS-II test to formally  
3 determine if the defendant had significant impairment in adaptive behavior, his  
4 opinion is credible because it is based on numerous contacts with the defendant  
during interviews and I.Q. testing, and his evaluation of the defendant's well  
documented conduct during nearly 26 years in prison from 1979 to 1989 and then  
from 1991 to 2006.<sup>FN8</sup>

5 FN 8 This conduct is portrayed in the voluminous prison and  
6 inmate records he reviewed, exhibits 138-209 not in evidence.

7 In sum, although the conflicting evidence shows by a preponderance of the  
8 evidence that the defendant has significant adaptive behavior deficits, the court is  
unable to conclude that the evidence of these deficits is clear and convincing.

9 (Doc. 228 at 3830-3833 (footnote 7 omitted.)

10 *Adaptive Behavior Discussion*

11 The Court's limited *Sawyer* review evaluates whether Petitioner established by clear  
12 and convincing evidence that no reasonable factfinder would have determined that he lacks  
13 significant adaptive behavior deficits. In *Apelt*, 213 Ariz. at 478-80, 143 P.3d at 1019-21,  
14 the Arizona Supreme Court clarified that it is proper to consider a petitioner's institutional  
15 behavior in determining whether he has significant adaptive behavior deficits. Further, the  
16 controlling statute defines mental retardation as including current impairment in adaptive  
17 ability. See A.R.S. § 13-703.02(K); *Grell*, 212 Ariz. at 527, 135 P.3d at 707.

18 Dr. Toma concluded, based on his interview with Petitioner, and his review of  
19 Petitioner's institutional records as well as childhood records, that Petitioner does not have  
20 significant adaptive behavior deficits. (Doc. 228 at 1884.) Dr. Toma further concluded that  
21 as an adult Petitioner had consistently displayed the ability to engage in independent, self  
22 directed thinking, citing his ability to utilize the prison library, maintaining correspondence  
23 with pen pals, defending his rights in prison based on prison regulations, dealing with monies  
24 in his prison account, and other various correspondence with the prison. (*Id.* at 5519-24;  
25 1881-84.) Dr. Martinez concluded, based on a current interview and assessment of  
26 Petitioner's adaptive behavior, that Petitioner did not have significant adaptive behavior  
27 deficits. (*Id.* at 2408-09.) In contrast, both Dr. Tasse and Dr. Weinstein focused on  
28 Petitioner formative and early teen-age years in concluding that he did have significant

1 adaptive behavior deficits. (*Id.* at 1123-25, 2443.)

2 The PCR court reviewed all of the evidence taken from the *Atkins* hearing and from  
3 Petitioner's mitigation hearing prior to sentencing and concluded that Petitioner did not have  
4 significant adaptive behavior deficits. (*Id.* at 3830-33.) Based on this evidence, a reasonable  
5 fact finder could conclude that Petitioner does not currently have significant adaptive  
6 behavior deficits. *See Winston*, 600 F. Supp.2d at 736 (concluding that Petitioner failed to  
7 establish adaptive behavior deficits due in part to differing expert testimony).

8 Petitioner's main argument against this conclusion is that neither Dr. Toma nor Dr.  
9 Martinez utilized established diagnostic methods to assess his adaptive behavior. (Doc. 215  
10 at 24-25.) Petitioner is referring to Dr. Toma utilizing an adaptive behavior scale that was  
11 not specifically designed to assess mental retardation and Dr. Martinez, although properly  
12 utilizing the ABAS-II, only relying on Petitioner's self report of his adaptive behavior, and  
13 not conducting independent interviews dating back to Petitioner's non-institutional behavior.

14 The PCR court reviewed this contention and discounted the opinions of Drs. Toma and  
15 Martinez regarding Petitioner's pre-institutional adaptive behavior. (Doc. 228 at 3831.)  
16 Citing agreement with the reports of Drs. Weinstein and Tasse, the court found that  
17 Petitioner, in his formative years as a child and teenager displayed significant adaptive  
18 behavior deficits. (*Id.*) However, under the statute, adaptive behavior is measured by an  
19 overall assessment of the Petitioner's abilities; it is not based only on administration of  
20 adaptive behavior scales. *See Grell*, 212 Ariz. at 529, 135 P.3d at 709. The *Grell* court also  
21 emphasized that the statute defines mental retardation as including current impairment in  
22 adaptive ability. *Id.* at 527, 135 P.3d at 707 (stating that assessments based on recent  
23 interviews of the petitioner are persuasive).

24 After reviewing all of the adaptive behavior evidence, both pre-institutional and  
25 institutional behavior, Dr. Toma and Dr. Martinez concluded that Petitioner did not currently  
26 have significant adaptive behavior deficits. (Doc. 228 at 5519-24; 1881-84 (Toma); 2408-09  
27 (Martinez).) Concurring, the court concluded that "as an adult the [petitioner] has  
28

1 consistently displayed the ability to engage in independent and self-directed thinking,  
2 planning, and conduct.” (*Id.* at 3833.) After reviewing all of this evidence, under *Sawyer*,  
3 Petitioner has failed to establish by clear and convincing evidence that no reasonable fact  
4 finder would have determined that he lacks significant adaptive behavior deficits.<sup>10</sup>

5 *Conclusion*

6 Under *Sawyer*, Petitioner cannot demonstrate that no reasonable juror would have found  
7 him ineligible for the death penalty due to his mental retardation. Accordingly, his claim of  
8 actual innocence of the death penalty cannot excuse the procedural default of Claim 34.

9 Actual Innocence of the Capital Crime

10 Petitioner argues that a fundamental miscarriage of justice will occur if Claim 34 is not  
11 resolved on the merits because he is actually innocent of the capital crime due to new  
12 evidence of brain damage demonstrating that he would be unable to premeditate, an essential  
13 element of his first degree murder charge. (Doc. 215 at 25; 219 at 7-8.)

14 In *Schlup*, the Court discussed the fundamental miscarriage of justice exception in the  
15 context of a claim of actual innocence of the capital crime. 513 U.S. at 324-27. In *Schlup*,  
16 the petitioner accompanied his actual innocence evidence with an assertion of constitutional  
17 error at trial. *Id.* at 315. The *Schlup* Court ruled that if a petitioner “presents evidence of  
18 innocence so strong that a court cannot have confidence in the outcome of the trial unless the  
19 court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner  
20 should be allowed to pass through the gateway and argue the merits of his underlying  
21 claims.” *Id.* at 316. To establish the requisite probability, the petitioner must prove with  
22 “new reliable evidence” that “it is more likely than not that no reasonable juror would have  
23 found petitioner guilty beyond a reasonable doubt.” *Id.* at 324, 327.

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24  
25 <sup>10</sup> Petitioner raised no argument regarding the statutory requirement that onset of  
26 adaptive behavior deficits occur before the age of eighteen. The PCR court concluded that  
27 Petitioner established by a preponderance of the evidence that onset of adaptive behavior  
28 deficits occurred before he reached the age of eighteen, citing A.R.S. § 13-703.02(K)(2).  
(Doc. 228 at 3833.)

1           However, even if Petitioner does have new evidence indicative of brain damage,  
2 “Arizona does not allow evidence of a defendant’s mental disorder short of insanity either  
3 as an affirmative defense or to negate the *mens rea* element of a crime.” *State v. Mott*, 187  
4 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997). A defendant cannot present evidence of mental  
5 disease or defect to show that he was *incapable* of forming a requisite mental state for a  
6 charged offense. *Id.* at 540, 931 P.2d at 1050; *see Clark v. Arizona*, 548 U.S. 735 (2006)  
7 (upholding the constitutionality of the *Mott* rule and finding that the exclusion of expert  
8 testimony regarding diminished capacity does not violate due process); *see also Cook v.*  
9 *Schriro*, 538 F.3d 1000, 1029 (9th Cir. 2008) (holding that in the context of a fundamental  
10 miscarriage of justice challenge, evidence of voluntary intoxication cannot negate  
11 premeditation under Arizona law). Thus, because Petitioner’s new evidence of brain damage  
12 would not negate premeditation, Petitioner’s actual innocence of the capital crime claim fails;  
13 it is not more likely than not that no reasonable juror would have convicted him of the crime  
14 in light of the new evidence.

15           Finally, Petitioner argues that all of the new mitigation evidence that he obtained at his  
16 *Atkins* hearing should be considered to determine whether on the basis of the additional  
17 mitigation, he has established the fundamental miscarriage of justice exception. (Doc. 215  
18 at 24; 219 at 5-6.) This argument was specifically rejected in *Sawyer*. The *Sawyer* Court  
19 rejected the argument that the fundamental miscarriage of justice exception should be  
20 extended beyond the elements of eligibility for a capital sentence to the existence of  
21 additional mitigating evidence. 505 U.S. at 345. The Court reasoned:

22           A federal district judge confronted with a claim of actual innocence may with  
23 relative ease determine whether a submission, for example, that a killing was not  
24 intentional, consists of credible, noncumulative, and admissible evidence negating  
25 the element of intent. But it is a far more difficult task to assess how jurors would  
26 have reacted to additional showings of mitigating factors, particularly considering  
27 the breadth of those factors that a jury under our decisions must be allowed to  
28 consider. . . . the “actual innocence” requirement must focus on those elements  
that render a defendant eligible for the death penalty, and not on additional  
mitigating evidence that was prevented from being introduced as a result of a  
claimed constitutional error.

*Sawyer*, 505 U.S. at 345-46, 347.

1 **PENDING MOTION**

2 Respondents have asked the Court to strike the exhibits that Petitioner filed in support  
3 of his arguments regarding cause and prejudice and fundamental miscarriage of justice.  
4 (Doc. 220.) Respondents' motion will be summarily denied; the exhibits Petitioner filed in  
5 support of his memorandum regarding cause and prejudice and fundamental miscarriage of  
6 justice are certainly relevant to this Court's consideration of his arguments.

7 **CERTIFICATE OF APPEALABILITY**

8 In the event Petitioner appeals from this Court's judgment, the Court has evaluated the  
9 claims within the petition for suitability for the issuance of a certificate of appealability. *See*  
10 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1); Rule 11(a), 28 U.S.C. foll. § 2254.

11 Rule 22(b) of the Federal Rules of Appellate Procedure provides that an applicant  
12 cannot take an appeal unless a certificate of appealability has been issued by an appropriate  
13 judicial officer. Rule 11(a), 28 U.S.C. foll. § 2254, provides that the district judge must  
14 either issue or deny a certificate of appealability when it enters a final order adverse to the  
15 applicant. If a certificate is issued, the court must state the specific issue or issues that satisfy  
16 28 U.S.C. § 2253(c)(2). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when  
17 the petitioner "has made a substantial showing of the denial of a constitutional right." This  
18 showing can be established by demonstrating that "reasonable jurists could debate whether  
19 (or, for that matter, agree that) the petition should have been resolved in a different manner"  
20 or that the issues were "adequate to deserve encouragement to proceed further." *Slack v.*  
21 *McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4  
22 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1)  
23 whether the petition states a valid claim of the denial of a constitutional right and (2) whether  
24 the court's procedural ruling was correct. *Id.* The Court finds that reasonable jurists could  
25 debate its resolution of Claims 12 and 34.

26 Based on the foregoing,

27 **IT IS HEREBY ORDERED** that Petitioner's second amended petition for writ of  
28



1 habeas corpus (Doc. 162) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter  
2 judgment accordingly.

3 **IT IS FURTHER ORDERED** concluding that Claim 34 is procedurally barred.  
4 Petitioner has not established cause and prejudice or that a fundamental miscarriage of justice  
5 will occur if Claim 34 is not reviewed on the merits. (Doc. 215.)

6 **IT IS FURTHER ORDERED** that a Certificate of Appealability is **GRANTED** as to  
7 the following issues:


8 Claim 12: Whether the trial court violated his due process right to independent  
9 mental health experts in preparation for his defense at trial and sentencing in  
violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985)

10 Claim 34: Whether this Court properly found Claim 34 procedurally defaulted  
11 according to an adequate and independent state procedural rule and whether this  
12 Court properly concluded that the procedural default of Claim 34 was not excused  
by cause and prejudice or a fundamental miscarriage of justice.

13 **IT IS FURTHER ORDERED** denying Respondents motion to strike cause and  
14 prejudice exhibits. (Doc. 220.)

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

18 DATED this 28<sup>th</sup> day of September, 2010.

19  
20  
21   
James A. Teilborg  
United States District Judge