UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 28 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GETTUS LEROY MINTZ, Petitioner-Appellant, v. CHARLES L. RYAN, Warden and ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 18-16883 D.C. No. 2:13-cv-01543-SLG District of Arizona, Phoenix ORDER

Before: TROTT and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 5 & 6) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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U.S. COURT OF APPEALS

GETTUS LEROY MINTZ,

Petitioner-Appellant,

v.

CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Respondents-Appellees.

No. 18-16883

D.C. No. 2:13-cv-01543-SLG
District of Arizona,
Phoenix

ORDER

Before: O'SCANNLAIN and GOULD, Circuit Judges.

Appellant's petition for rehearing en banc is construed as a motion for reconsideration en banc (Docket Entry No. 8) and is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gettus Leroy Mintz,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

Case No. 2:13-cv-1543-SLG

ORDER RE § 2254 PETITION

Before the Court at Docket 1 is Petitioner Gettus Leroy Mintz's Petition for Writ of Habeas Corpus ("Habeas Petition"). The petition has been fully briefed.[1] Oral argument was not requested and was not necessary to the Court's determination.

BACKGROUND

On February 19, 2009, a Maricopa County Superior Court ("Superior Court") grand jury indicted Mr. Mintz on one count of second-degree murder and one count of aggravated assault.[2] On February 1, 2010, a jury found Mr. Mintz guilty on both counts.[3] He was sentenced to 22 years for the second-degree murder offense and 20 years for the aggravated assault offense, to be served consecutively.[4] Mr. Mintz appealed to the

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[1] *See infra* at 3–4.

[2] *See* Docket 9-1 (Indictment) at 8–10.

[3] *See* Docket 9-1 (Verdict) at 12–13; Docket 38-6 (Trial Transcript) at 73–76.

[4] *See* Docket 9-1 (Sentencing Minute Entry) at 37–39.

Arizona Court of Appeals ("Court of Appeals"). In September 2010, Mr. Mintz's attorney filed an *Anders* brief, which stated that "[c]ounsel has found no arguable question of law that is not frivolous."[5] That same month, the Court of Appeals granted the opportunity for Mr. Mintz "to file a supplemental brief in propia persona,"[6] which he did not do.[7] On November 30, 2010, the Court of Appeals affirmed Mr. Mintz's convictions and sentences.[8]

On December 22, 2010, Mr. Mintz filed in the Superior Court his first Notice of Post-Conviction Relief ("PCR petition" or "Rule 32 Petition") under Arizona Rule of Criminal Procedure 32 ("Rule 32").[9] On June 20, 2011, his post-conviction counsel filed a notice of completion, stating that, "having reviewed the entire file, [he] is unable to raise any viable issues under Rule 32 . . . ."[10] On June 24, 2011, the Superior Court issued an order, which gave Mr. Mintz until early August "to file a *Pro Per* Petition for Post-Conviction Relief."[11] Mr. Mintz maintains that he wrote a letter to the Superior Court on

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[5] Docket 9-1 (*Anders* Brief) at 55, 42–57; *see also Anders v. California*, 386 U.S. 738, 744 (1967) ("Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal."); *State v. Leon*, 451 P.2d 878, 880 (Ariz. 1969) (overruling Arizona authorities inconsistent with *Anders*).

[6] Docket 9-1 (Court of Appeals Order) (emphasis omitted) at 59–60.

[7] *See* Docket 9-1 (Court of Appeals Memorandum Decision) at 3.

[8] *See* Docket 9-1 (Court of Appeals Memorandum Decision) at 2–6.

[9] *See* Docket 9-1 (First Notice of Post-Conviction Relief) at 62–64; *see also* Ariz. R. Crim. P. 32.

[10] Docket 9-1 (Notice of Completion) at 66.

[11] Docket 9-1 (Order Re Notice of Completion) at 71–72.

July 12, 2011 requesting an extension of time to file his petition.[12] The Superior Court did not acknowledge the alleged letter, nor did it grant Mr. Mintz an extension. On October 24, 2011, the Superior Court dismissed Mr. Mintz's first PCR petition because the "deadline has passed and the defendant has not filed any petition."[13] Mr. Mintz submitted a letter dated October 25, 2011 to the Superior Court in which he argued that he had good cause for failing to file his first PCR petition.[14] The court treated this letter as a motion for reconsideration, which it denied with leave to file a successive PCR petition.[15] Mr. Mintz did not appeal the dismissal of his first PCR or the denial of the motion to reconsider.[16]

On November 15, 2011, Mr. Mintz filed his second PCR petition.[17] On December 8, 2011, Mr. Mintz filed his third PCR petition.[18] The Superior Court denied Mr. Mintz's second and third PCR petitions on March 20, 2012.[19] Mr. Mintz petitioned the Court of

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[12] *See* Docket 43 (Letter Dated July 12, 2011) at 19; *see also* discussion *infra* at 13–19.

[13] Docket 9-1 (First PCR Dismissal) at 74.

[14] *See* Docket 9-1 (Reconsideration Denial) at 76; Docket 9-2 (Letter Dated October 25, 2011) at 35. The Superior Court noted that the letter was "filed on November 10, 2011." Docket 9-1 (Reconsideration Denial) at 76.

[15] *See* Docket 9-1 (Reconsideration Denial) at 76–77.

[16] *See* Docket 1 at 19.

[17] *See* Docket 9-2 (Second PCR Petition) at 2–37.

[18] *See* Docket 9-2 (Third PCR Petition) at 41–65.

[19] *See* Docket 9-2 (Denial of Second and Third PCR Petitions) at 67–70.

Appeals to review the denial of his second and third PCR petitions;[20] the Court of Appeals denied review on July 17, 2013.[21]

On July 29, 2013, Mr. Mintz filed this Habeas Petition.[22] Respondents filed a limited answer at Docket 9. Mr. Mintz filed a reply at Docket 10. The Magistrate Judge filed a Report and Recommendation that the Habeas Petition be dismissed with prejudice at Docket 22. The Court adopted the Report and Recommendation, but granted a Certificate of Appealability on a statute of limitations issue at Docket 25. Mr. Mintz filed a notice of appeal at Docket 27. Pursuant to the parties' joint motion for remand, the Ninth Circuit issued a mandate vacating the Court's decision and remanding at Docket 32. Mr. Mintz's counsel filed a Notice of Intent Not to File Further Briefing on Procedural Default Issues at Docket 39. Respondents filed a supplemental answer at Docket 41. Mr. Mintz filed a memorandum on procedural default issues at Docket 43, and a supplement in support of his memorandum at Docket 44.[23]

The Court has jurisdiction pursuant to 28 U.S.C. § 2254(a), which provides that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

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[20] *See* Docket 9-2 (Petition for Review) at 72–89.

[21] *See* Docket 9-2 (Order Re: Petition for Review) at 91.

[22] In 2012, Mr. Mintz filed a previous Habeas Petition, which the Court dismissed without prejudice. *See Mintz v. Ryan*, 2:12-cv-1868-SLG (Docket 5: Judgment) (Oct. 15, 2012).

[23] In accordance with Fed. R. Evid. 201, the Court grants Mr. Mintz's "request that this Court grant a Judicial Notice for the admission of DNA evidence . . . ." Docket 44 at 1.

LEGAL STANDARDS

1. Cognizability of Claims

"District courts adjudicating habeas petitions under § 2254 are instructed to summarily dismiss claims that are clearly not cognizable."[24] "A petition may not be cognizable, for example, where the petitioner fails to allege a federal claim."[25]

2. Procedural Default

The U.S. Supreme Court has long declined to "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."[26] In the district court, "[t]he [independent and adequate state ground] doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement."[27] Both the Ninth Circuit and the U.S. Supreme Court have found Arizona Rule of Criminal Procedure 32.2(a)(3) to be adequate and independent.[28]

3. Cause and Prejudice

"[A]n adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show 'cause' for the

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[24] *Clayton v. Biter*, 868 F.3d 840, 845 (9th Cir. 2017).

[25] *Id.* (citing *Park v. California*, 202 F.3d 1146, 1149–50 (9th Cir. 2000)).

[26] *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *overruled in part on other grounds by Martinez v. Ryan*, 566 U.S. 1 (2012).

[27] *Id. at* 729–30.

[28] *See Murray v. Schriro*, 745 F.3d 984, 1015–16 (9th Cir. 2014); *Stewart v. Smith*, 536 U.S. 856, 860–61 (2002).

default and 'prejudice attributable thereto,' or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage of justice.'"[29] "To demonstrate cause, the petitioner must show the existence of 'some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule.'"[30] "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[31] "To show 'prejudice' under the usual rule, the 'habeas petitioner must show not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'"[32] Imprisoned persons' pro per status does not excuse them from the cause and prejudice requirements.[33]

4. Miscarriage of Justice

"[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[34] "The

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[29] *Harris v. Reed*, 489 U.S. 255, 262 (1989) (quoting *Murray v. Carrier*, 477 U.S. 478, 485, 495 (1986)).

[30] *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996) (quoting *Murray*, 477 U.S. at 488).

[31] *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

[32] *Detrich v. Ryan*, 740 F.3d 1237, 1244 (9th Cir. 2013) (emphasis in original) (internal citation and quotation marks omitted) (quoting *Murray*, 477 U.S. at 494).

[33] *Schneider v. McDaniel*, 674 F.3d 1144, 1153–54 (9th Cir. 2012) (citing *Hughes v. Idaho State Board of Corrections*, 800 F.2d 905, 908 (9th Cir. 1986)).

[34] *Murray*, 477 U.S. at 496.

miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty, guaranteeing that the ends of justice will be served in full."[35] "In order for [a petitioner] to overcome the procedural bar by means of the miscarriage of justice exception, he must supplement his claim with a 'colorable showing of factual innocence;'"[36] in other words, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[37]

DISCUSSION

Mr. Mintz raises four claims in his petition. Ground One is his claim of "Ineffective Assistance of trial counsel in Violation of [the] 6th Amendment to the United States Constitution."[38] Ground Two asserts a violation of the "Sixth Amendment Right to Effective Assistance of [Mr. Mintz's] First Tier 'Rule-32 of right' counsel . . . in representing [Mr. Mintz] on his First Initial Rule-32 'of-right' P.C.R. Proceeding."[39] Ground Three is an allegation that Mr. Mintz's "attorneys were ineffective for not presenting exculpatory evidence to the court at trial, in direct appeal, or in Petition for Post-Conviction Relief, when the State offered false evidence to the jury at trial and prejudiced the jury."[40] And

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[35] *McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (internal citations and quotation marks omitted).

[36] *Thomas v. Goldsmith*, 979 F.2d 746, 749 (9th Cir. 1992) (quoting *McCleskey*, 499 U.S. at 495).

[37] *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

[38] Docket 1 (Habeas Petition) at 21.

[39] Docket 1 at 24.

[40] Docket 1 at 29.

Ground Four alleges that "[t]he State allowed false testimony to go uncorrected at trial and at the Grand Jury hearing, prejudicing the jury against the Petitioner and denying him a fair trial."[41]

Respondents make two arguments in response. First, they maintain that Grounds Two and Four "must be dismissed because they do not present cognizable federal constitutional claims."[42] Respondents also assert that all four grounds "are procedurally defaulted"[43] and that Mr. Mintz "has no excuse for his procedural default."[44]

1. Cognizability of Claims

a. Ineffective assistance of PCR counsel

Ground Two sets forth Mr. Mintz's claim of ineffective assistance of counsel in his first Rule 32 proceeding;[45] Mr. Mintz repeats his allegation of ineffective PCR counsel in Ground Three.[46] Mr. Mintz asserts that his counsel in his first Rule 32 proceeding "only conducted a rudiment[ary] review of the transcripts and records on appeal," and "notif[ied] the Court 'falsely' that after reviewing the records on appeal, that he . . . could find no viable issue's within the permissible parameter's for relief . . . ."[47] Mr. Mintz alleges that

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[41] Docket 1 at 34.

[42] Docket 41 (Respondents' Supplemental Answer) at 7.

[43] Docket 41 at 13.

[44] Docket 41 at 14.

[45] *See* Docket 1 at 24. Ground Two also includes an allegation of ineffective assistance of trial counsel. *See* Docket 1.

[46] *See* Docket 1 at 29.

[47] Docket 1 at 25.

this ineffective assistance followed his "sending [his first Rule 32] counsel . . . a multi-page letter describing all of his concerns as to the D.N.A. testimony and trial counsel['s] . . . failure to object to the [perjurious] false testimony . . . by" Detective David Hickman and Criminalist Courtney Collums.[48] Mr. Mintz repeats this allegation in his supplemental briefing in the context of his cause-and-prejudice argument, asserting that he has established cause for the procedural default of his first PCR because "post-conviction relief counsel was ineffective."[49] Mr. Mintz maintains that his PCR counsel was ineffective "because trial counsel failed to object to perjury by state witness, Detective Hickman . . . . [T]rial counsel did not argue prosecutorial misconduct due to the perjury, and Rule 32 counsel did not raise prosecutorial misconduct on the same issue."[50] Mr. Mintz asserts that his defense was prejudiced by the alleged perjured testimony at trial because it caused the jury to believe that "there was blood all over Mr. Mintz and the floorboard of his vehicle."[51]

"There is no general constitutional right to counsel . . . in collateral postconviction review proceedings."[52] Although the U.S. Supreme Court held in *Martinez v. Ryan*[53] that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish

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[48] Docket 1 at 24.

[49] Docket 43 (Petitioner's Memorandum on Procedural Default Issues) at 5.

[50] Docket 43 at 6.

[51] Docket 43 at 7.

[52] *Graves v. McEwen*, 731 F.3d 876, 878 (9th Cir. 2013) (citing *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996)).

[53] 566 U.S. 1 (2012).

cause for a prisoner's procedural default of a claim of ineffective assistance at trial,"[54] the *Martinez* Court distinguished cause for a procedural default from a ground for relief.[55] Mr. Mintz has no cognizable federal claim for ineffective assistance of his post-conviction attorney; these claims will be dismissed.

b. Fraudulent testimony before the grand jury

Ground Four includes the allegation that "Detective Hickman testified before the Grand Jury, stating that there was a visible blood stain on the left shoulder (see Exhibit I, attached). He also stated that there was blood on the black jacket. However, the criminalist conducted tests that concluded there was no blood on the black jacket (see Exhibits E and F). Hickman did not see blood on the clothing because the lab tests prove that there was not blood where he claims to have seen blood (see Exhibits A and B) and the results of Item #28."[56]

"Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury."[57] Furthermore, "the petit jury's subsequent guilty

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[54] *Martinez*, 566 U.S. at 9.

[55] *See Martinez*, 566 U.S. at 17.

[56] Docket 1 at 35. *See also* Docket 1 at 30 ("Third, Detective Hickman claimed under oath that there was blood on the left shoulder of the Petitioner's clothing (see Exhibit I attached), however, when that clothing was tested, no results were obtained at all (see Exhibit C attached). Fourth, Detective Hickman stated, under oath, that the Petitioner had a clearly recent injury on the palm of his right hand (see Exhibit I attached).").

[57] *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *see also Starkey v. Hill*, 302 F. App'x 709, 710–11 (9th Cir. 2008) (citing *Vasquez v. Hillery,* 474 U.S. 254, 262 (1986), *Ballard v. United States,* 329 U.S. 187, 189-90 (1946)) ("The [U.S. Supreme] Court has found structural error in grand jury proceedings only in two situations, where jurors are excluded because of race, or because of gender").

verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt."[58] Consequently, "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt."[59] Based on the foregoing, Mr. Mintz's claim of false testimony before the grand jury is not cognizable and will be dismissed.

2. Cause

The Superior Court, in dismissing Mr. Mintz's second and third Rule 32 petitions, stated the proposition that, "in general, claims of ineffective assistance of counsel that were raised or could have been raised in an initial post-conviction proceeding are regarded as waived and precluded if raised in a successive petition[.]"[60] The court also noted that a petitioner could overcome preclusion only if "the nature of the right allegedly affected by counsel's ineffective performance . . . . is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver . . . ."[61]

Applying those legal principles to Mr. Mintz's claims in his second and third PCR petitions, the Superior Court reasoned that "[a]s defendant's November 15, 2011 petition

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[58] *United States v. Mechanik*, 475 U.S. 66, 70 (1986).

[59] *Id.*

[60] Docket 9-2 (Denial of Second and Third PCR Petitions) at 69 (citing *State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002)).

[61] Docket 9-2 (Denial of Second and Third PCR Petitions) at 69 (citing *Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002)).

is a successive petition, the only claims he may raise pursuant to Rule 32.1, are contained in" subsections (d)–(h), none of which includes ineffective assistance of counsel or perjured testimony.[62] The court found that Mr. Mintz's "claims do not implicate constitutional rights of sufficient magnitude that they require a knowing, voluntary, and intelligent waiver before preclusion applies. Decisions concerning trial strategy and tactics, including what witnesses to call, motions to file, and objections to make, are entrusted to trial counsel."[63] Thus, "[b]y failing to timely file his Pro Per Petition in his first Rule 32 proceeding, [Mr. Mintz] waived his claims of ineffective assistance of trial counsel and he is now procedurally precluded from raising them in these second and third Rule 32 proceedings pursuant to Rule 32.2(a)(3)."[64] The court also found that Mr. Mintz's "claim that the State secured his conviction by perjured testimony does not fall within any exception. It is not newly discovered evidence because the defendant knew about the alleged perjury at the time of trial."[65] The Court of Appeals subsequently denied review of the Superior Court's ruling.[66]

Mr. Mintz clearly did not file a petition in his first PCR proceeding asserting the claims he seeks to raise here. Mr. Mintz argues that he can establish cause "in at least

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[62] Docket 9-2 (Denial of Second and Third PCR Petitions) at 68 (citing Ariz. R. Crim. P. 32.1(d)–(h)).

[63] Docket 9-2 (Denial of Second and Third PCR Petitions) at 69 (citing *State v. Lee*, 142 Ariz. 210, 689 P.2d 153 (1984)).

[64] Docket 9-2 (Denial of Second and Third PCR Petitions) at 69.

[65] Docket 9-2 (Denial of Second and Third PCR Petitions) at 69.

[66] *See* Docket 9-2 (Order Re: Petition for Review) at 91.

three areas" to overcome his procedural default.[67] First, Mr. Mintz argues that the ADOC prevented him from accessing legal research materials. Second, Mr. Mintz claims that he lacked access to his case file. Third, Mr. Mintz asserts he had good cause for his procedural default in his first PCR proceeding because his "Rule 32 counsel [was ineffective because he] failed to present an ineffective assistance of trial counsel claim . . . ."[68]

With regard to Mr. Mintz's claims that he lacked access to a law library and to his own case file, the Court addresses chronologically the following documents in the record: A student investigator at the Arizona Innocence Project wrote Mr. Mintz a letter dated April 22, 2011 "request[ing copies of] . . . materials pertaining to [Mr. Mintz's] wrongful conviction."[69] On June 20, 2011, Mr. Mintz's post-conviction counsel filed a notice of

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[67] Docket 43 at 4. Mr. Mintz also challenges the adequacy of "Rule 32.2(A) . . . and [Ariz. Rev. Stat.] § 13-4232(a) . . . because Rule 32.5 and [Ariz. Rev. Stat.] § 13-4235 did not provide Mr. Mintz with a fair opportunity to assert his Stated Created rights under Rule 32 . . . and [Ariz. Rev. Stat.] § 13-4231 et seq." Docket 43 at 2. According to Mr. Mintz, these rules "mandate[] that any incomplete petition be returned to the defendant if it does not contain a certified statement that he is including all the known issues and support those claims with evidence and memoranda of points and authorities." Docket 43 at 2–3. He argues that he was "prevented" from following these mandates because the Arizona Department of Corrections ("ADOC") "does not: Allow prisoners to have access to a law library, case citations or state post conviction treatises; allow inmate's to have the help of persons trained in the law; [or] allow inmates to have case citations mailed to them . . . ." Docket 43 at 3.

Both the Ninth Circuit and the U.S. Supreme Court have found Arizona Rule of Criminal Procedure 32.2(a)(3) to be an independent and adequate state ground that bars federal habeas review of constitutional claims. *See Murray*, 745 F.3d at 1015–16; *Stewart*, 536 U.S. at 860–61. Accordingly, Mr. Mintz's challenge to the adequacy of Rule 32 fails. The Court considers Mr. Mintz's ADOC regulations and case file-access allegations in the context of his cause argument, where he reasserts them. *See infra* at 12–19.

[68] *See* Docket 43 at 4–6.

[69] Docket 43 at 18.

completion stating that counsel did "not believe that there is any new evidence, trial errors, or ineffective assistance of counsel that would warrant grounds for reversal."[70] Four days later, on June 24, 2011, the Superior Court issued an order, which gave Mr. Mintz until early August "to file a *Pro Per* Petition for Post-Conviction Relief."[71]

On or about July 12, 2011, Mr. Mintz allegedly sent a letter addressed to the state court judge that had issued the June 24, 2011 order.[72] In this letter, which does not contain a case file number, Mr. Mintz "ask[s] for an extension of time to file my petition . . . because first I don't have any of my files on this case. The Arizona Innocence Project has them and I am trying to get them back . . . ."[73] The letter also states that Mr. Mintz lacks "access to a law library or law books and there is no one here in the prison to help me. Prison officials also won't allow case law to be mailed in, because they say it contains prohibited conduct and inmate names, and we can't have them."[74] Also in January 2018, Mr. Mintz filed in this case what purports to be an outgoing prison mail log that appears

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[70] Docket 9-1 (Notice of Completion) at 68, 66–69.

[71] Docket 9-1 (Order Re Notice of Completion) at 71–72.

[72] *See* Docket 43 (Letter Dated July 12, 2011) at 19. This letter requesting an extension was not filed with this Court until early 2018. The extension request was not referenced in Mr. Mintz's letter dated October 25, 2011, or in Mr. Mintz's second or third PCR petitions, or in Mr. Mintz's first Habeas Petition in this Court. *See* Docket 9-2 (Letter Dated October 25, 2011) at 35; Docket 9-2 (Second PCR Petition) at 2–39; Docket 9-2 (Third PCR Petition) at 41–65; *see generally Mintz v. Ryan*, 2:12-cv-1868-SLG (Docket 1: Habeas Petition) (Sept. 4, 2012).

[73] Docket 43 (Letter Dated July 12, 2011) at 19.

[74] Docket 43 (Letter Dated July 12, 2011) at 19. Mr. Mintz reasserts in his January 2, 2018 declaration that "The Law library here has no law books to help me, nor are there any persons trained in the law to help me." Docket 43 (Declaration of Gettus L. Mintz Dated Jan. 2, 2018) at 17. The briefing to which that declaration is attached contains extensive citations and thorough legal analysis. *See generally* Docket 43.

to show that on July 12, 2011 Mr. Mintz sent letters to the state court judge that issued the June 24, 2011 order and two deputy county attorneys.[75] The Superior Court docket for Mr. Mintz's case reflects the filing of a letter there on September 27, 2011, the contents of which are not in this record.[76] An October 20, 2011 prison contraband receipt shows the withholding from Mr. Mintz of compact disks ("CDs") that "came in legal mail box."[77] The contents of those CDs are not in this record. On October 24, 2011, the Superior Court denied Mr. Mintz's first PCR petition, citing his failure to file a petition by the August 2011 deadline.[78] That order makes no reference to Mr. Mintz's purported July 12, 2011 letter requesting an extension.[79]

Also in the Court's file is Mr. Mintz's letter dated October 25, 2011 to the Superior Court[80] in which Mr. Mintz argues that he has good cause for failing to timely file his first Rule 32 petition; Mr. Mintz alleges that "trial transcripts were confiscated by officials at

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[75] Docket 43 (Mail Log) at 11.

[76] *See* Case History, *State of Arizona v. Mintz*, CR2009-005503-001, MARICOPA CTY. SUPER. CT., http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2009-005503 (last accessed Sept. 30, 2018). According to this docket, the letter was sent by the Government, rather than by Mr. Mintz. It is possible that this docket entry reflects the Government's filing with the Superior Court of a copy of the letter dated July 12, 2011 that it may have received from Mr. Mintz. However, an Arizona Supreme Court case activity webpage indicates that the letter was sent by Mr. Mintz. *See* Case Activity, *State of Arizona v. Mintz*, CR2009-005503-001, ARIZ. SUP. CT., https://apps.supremecourt.az.gov/publicaccess/caselookup.aspx (last accessed Sept. 30, 2018).

[77] Docket 43 (Contraband Receipt) at 13.

[78] *See* Docket 9-1 (First PCR Dismissal) at 74.

[79] *See* Docket 9-1 (First PCR Dismissal) at 74.

[80] *See* Docket 9-2 (Letter Dated October 25, 2011) at 35.

the new prison I've been transferred to. I have been pleading with the administration to release my legal documents to me. As of this writing, my grievance has reached the Deputy Warden."[81] Although this letter evidently included as attachments the Arizona Innocence Project student investigator's letter and the prison contraband receipt, the letter made no reference to Mr. Mintz's purported July 12, 2011 letter.[82] In November 2011, the Superior Court denied Mr. Mintz's October 25, 2011 request to reopen the first PCR ruling, stating that Mr. Mintz "did not pursue his post-conviction relief rights diligently enough to warrant Court action vacating its previous dismissal of the defendant's Rule 32 proceeding. [Mr. Mintz] did not correspond with the Court for four months following counsel's filing of a notice of completion."[83] This order made no reference to Mr. Mintz's purported July 12, 2011 letter.[84] Apart from the statements in the letter dated July 2011, Mr. Mintz made no other reference to a lack of access to legal research materials in any court proceedings until the letter dated July 12, 2011 was filed with this Court earlier this year, in January 2018.[85]

ADOC regulations do not restrict inmates' right to basic legal research materials. To the contrary, ADOC Department Order 902 "ensures all inmates have direct access to

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[81] Docket 9-2 (Letter Dated October 25, 2011) at 35.

[82] *See* Docket 9-2 (Letter Dated October 25, 2011) at 35–37.

[83] Docket 9-1 (Reconsideration Denial) at 76–77.

[84] *See* Docket 9-1 (Reconsideration Denial) at 76–77.

[85] *See* Docket 43 (Declaration of Gettus L. Mintz Dated Jan. 2, 2018) at 17; *cf.* Docket 9-2 (Letter Dated October 25, 2011) at 35; Docket 9-2 (Second PCR Petition) at 2–39; Docket 9-2 (Third PCR Petition) at 41–65; *see generally Mintz v. Ryan*, 2:12-cv-1868-SLG (Docket 1: Habeas Petition) (Sept. 4, 2012); Docket 1.

the courts in all legal claims involving . . . habeas petitions . . . . The Department facilitates this access by making forms and specific legal assistance available to the inmate population."[86] Despite Mr. Mintz's allegations that ADOC regulations bar him from accessing a law library or obtaining case citations, Mr. Mintz cites eight cases in the procedural default section of his most recent brief.[87] And although Mr. Mintz's letter dated July 12, 2011 does reference his lack of access to legal research materials,[88] his letter dated October 25, 2011 that seeks to explain his failure to file a petition makes no such allegation.[89] Furthermore, the Superior Court's June 24, 2011 order regarding the notice of completion ordered Mr. Mintz's post-conviction counsel to "remain in an advisory capacity for [Mr. Mintz] until a final determination is made by the trial court regarding any post-conviction relief proceeding . . . ."[90] In short, Mr. Mintz's conclusory claim that he lacked access to legal research materials in the summer of 2011 is not sufficient to establish cause for his procedural default. Conclusory allegations cannot sustain a habeas claim.[91] Mr. Mintz has not shown that he had a lack of access to legal research

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[86] ADOC ORDER MANUAL 902, "Purpose."

[87] *See* Docket 43 at 2–4. Mr. Mintz stated under penalty of perjury that he lacked access to legal research materials on January 2, 2018, the same day he filed his supplemental legal brief. *See* Docket 43 (Declaration of Gettus L. Mintz Dated Jan. 2, 2018) at 17; *see generally* Docket 43.

[88] *See* Docket 43 (Letter Dated July 12, 2011) at 19

[89] *See* Docket 9-2 (Letter Dated October 25, 2011) at 35.

[90] Docket 9-1 (Order Re Notice of Completion) at 71.

[91] *See Ashby v. Payne*, 317 F. App'x 641, at **1 (9th Cir. 2008) (citing *McQueary v. Blodgett*, 924 F.2d 829, 834–35 (9th Cir. 1991)) (rejecting habeas petitioner's argument "because his allegations are conclusory and he has not provided sufficient facts to support them").

materials in the summer of 2011 that was the cause of his procedural default.

Turning to the lack of access to the case file, and viewing the documents in the record in the light most favorable to Mr. Mintz, the following may have occurred: Mr. Mintz sent his only copy of his case files to the Arizona Innocence Project. After Mr. Mintz's post-conviction counsel filed his notice of completion, Mr. Mintz lacked access to his case file. Mr. Mintz wrote a letter on or about July 12, 2011 to the Superior Court requesting an extension of time to file his pro per petition in light of his inability to access his case file. This letter either never reached the Superior Court or was overlooked by the Superior Court. The Superior Court set an early August 2018 deadline for Mr. Mintz to file his pro per petition. Mr. Mintz lacked access to his case file in early August, making it impossible for him to timely file his pro per petition. Mr. Mintz's case file existed in CD format. Although someone (perhaps the Arizona Innocence Project; perhaps Mr. Mintz's post-conviction counsel) attempted to mail Mr. Mintz these CDs, the prison withheld the CDs from him on October 20, 2011. Mr. Mintz then explained his lack of case file access in his letter dated October 25, 2011 to the Superior Court. The Superior Court, without considering Mr. Mintz's letter dated July 12, 2011, misperceived Mr. Mintz as having neglected to contact the court regarding his case file from the time of the Superior Court's June order regarding the notice of completion until it received his letter dated October 25, 2011 on November 10, 2011, over two months *after* the early August 2011 deadline had passed.

The Court hesitates to give credence to Mr. Mintz's case file-access allegation in light of Mr. Mintz's willingness to mischaracterize the sources he cites, as discussed

elsewhere in this order.[92] However, if Mr. Mintz lacked access to his case file due to circumstances outside his control, and unsuccessfully attempted to communicate that problem with the court, that might constitute sufficient cause to overcome a procedural default.[93] Without deciding whether Mr. Mintz has established cause sufficient to overcome his procedural default on this basis,[94] the Court considers whether Mr. Mintz can meet the other prong necessary to overcome his procedural default; *i.e.*, that Mr. Mintz's "entire trial [was infected] with error of constitutional dimensions."[95] A court "need not address" cause if prejudice has not been established.[96]

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[92] *See, e.g.*, *infra* at 31 (purporting to quote Detective Hickman despite the absence of such a quote in the record).

[93] *See Williams v. Crawford*, No. 2:05-CV-00879-PMP-(CWH), 2012 WL 3317034, at *3 (D. Nev. 2012), *rev'd on other grounds*, 669 F. App'x 846 (9th Cir. 2016) (holding that "petitioner can demonstrate cause for the procedural default because he was unable to obtain his case file from his attorney"); *see also Lott v. Mueller*, 304 F.3d 918, 922–25 (9th Cir. 2002) (noting that lack of access to case files could constitute "extraordinary circumstances" to justify equitable tolling of the filing deadline for a habeas petition); *but see Keller v. Baca*, No. 3:15-CV-00563-MMD-VPC, 2018 WL 894614, at *6 (D. Nev. Feb. 13, 2018) (holding that petitioner's lack of access to case files did not establish cause because "[a]ll of petitioner's claims appear to arise from his firsthand knowledge and there is thus no obvious reason petitioner should have needed his case file to assert those claims. Moreover, petitioner filed a supplemental petition through counsel and there is no allegation that counsel lacked petitioner's case file.").

[94] The Court declines to directly address Mr. Mintz's third asserted basis to excuse his procedural default, which alleges that his "Rule 32 counsel [was ineffective because he] failed to present an ineffective assistance of trial counsel claim . . . ." Docket 43 at 5–6.

[95] *Detrich*, 740 F.3d at 1244 (internal citations and quotation marks omitted).

[96] *See Manzano v. Montgomery*, 669 F. App'x 864, 865 (9th Cir. 2016), cert. denied,197 L. Ed. 2d 470 (2017) (citing *Rogovich v. Ryan*, 694 F.3d 1094, 1105 (9th Cir. 2012) ("We need not look at both deficiency and prejudice [in an ineffective assistance claim] if the habeas petitioner cannot establish one or the other.").

3. Prejudice

a. Ineffective Assistance of Trial Counsel

Grounds One, Two, and Three contain Mr. Mintz's potentially cognizable ineffective assistance claims. In Ground One, Mr. Mintz alleges that his trial counsel was deficient because he "failed to investigate 'at all' the Peoria Police Dept. Crime Scene and Arrest Reports" and he "failed to Investigate the Results of Crime Laboratory Scientific Examination Reports in comparison to the Listing of Swabs and Forensic Evidence collected versus the relevance of the results to the Crime and Arrest scenes."[97] Mr. Mintz's supplemental pages to this first ground relate to allegedly false DNA-related testimony by Detective Hickman, the investigative officer at the scene of the crime, and Ms. Collums, the state crime lab witness who testified regarding the DNA and blood testing results.[98]

In Ground Two, Mr. Mintz states that trial counsel "also failed to investigate the D.N.A. evidence or motion the trial court for a D.N.A. Expert Witness to testify [on Mr. Mintz's] behalf as to the validity and application of the D.N.A. evidence to the case in chief."[99]

In Ground Three, Mr. Mintz claims that "none of the attorneys representing Mr. Mintz presented" certain exculpatory evidence.[100] Most of the alleged exculpatory

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[97] Docket 1 at 21.

[98] *See* Docket 1 at 22–23.

[99] Docket 1 at 24.

[100] Docket 1 at 29.

evidence relates to the blood testing at the crime scene, the DNA testing results, and the alleged perjury of Detective Hickman and Ms. Collums during their trial testimony on those topics.[101] Mr. Mintz also asserts that his trial "attorney failed to call . . . 19 alibi witnesses" and "fail[ed] to subpoena the telephone records that [Mr. Mintz] had requested."[102] Lastly, Mr. Mintz maintains that his attorneys failed to "bring . . . forth" evidence of a restraining order that would have implicated another person in the crime.[103]

Mr. Mintz's arguments are focused primarily on the blood testing and DNA results, with added references to supposed alibi witnesses, telephone records, and a restraining order. However, a review of the evidence at trial demonstrates that the State had extensive and powerful evidence to support its case. The most compelling evidence at the trial was the testimony of Arlene Whitaker, the aggravated battery victim and mother of the murder victim, Phyllis Tucker.[104] Ms. Whitaker's testimony can be summarized as follows: On the day of the alleged attack, she heard Mr. Mintz put "the key in the door" of her and her daughter's home, after which Mr. Mintz "came in the door, went in the back of the house, and . . . slipped right back out the front door."[105] At that time, Mr. Mintz had a key to Ms. Whitaker's and Ms. Tucker's home and was supposed to be moving out.[106]

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[101] *See* Docket 1 at 29–31.

[102] Docket 1 at 31–32.

[103] Docket 1 at 32–33.

[104] *See* Docket 38-6 (Trial Transcript) at 6–28.

[105] Docket 38-6 at 8. Certain of these quotes are Ms. Whitaker's. Others are statements with which Ms. Whitaker explicitly agreed during her testimony.

[106] *See* Docket 38-6 at 9.

Later that night, while Ms. Whitaker was in her bedroom, she "hear[d] someone using the keys to get in the door again."[107] She saw that the entering person "was Gettus."[108] She heard her daughter say "Gettus, get whatever you need."[109] When Ms. Whitaker's daughter came to partially close Ms. Whitaker's bedroom door, Ms. Whitaker saw Mr. Mintz.[110]

After some time, Ms. Whitaker "heard [her daughter] scream." Ms. Whitaker heard her daughter say, "Mom, Gettus is trying to kill me."[111] After Ms. Whitaker tried to get the phone to call 911, "Next thing I know he's knocking the phone out of my hand . . . and I'm being slam dunked on the floor." Mr. Mintz then "started punching me with his fist, my head, back and forth, back and forth."[112] Mr. Mintz was then "just standing there looking at me. And I'm still laying on the floor." Ms. Whitaker's daughter then walked into the hallway, "bleeding really bad" and "barely [able to] walk;" she repeated, "Mom, Gettus is trying to kill me." Ms. Whitaker's daughter then walked out the front door; "Gettus turns around and he's looking at her when she's going by."[113] Then Mr. Mintz left, "and when he passed by, he's holding a butcher knife." Ms. Whitaker again heard her daughter, now

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[107] Docket 38-6 at 10.

[108] Docket 38-6 at 10.

[109] Docket 38-6 at 11.

[110] *See* Docket 38-6 at 13.

[111] Docket 38-6 at 13.

[112] Docket 38-6 at 14.

[113] Docket 38-6 at 15.

outside, say, "Somebody help me. Gettus is trying to kill me."[114] Ms. Whitaker testified that Mr. Mintz "had on a purple-looking, silky-looking suit," and she agreed with the prosecutor's description of it as "the velour kind of velvety material."[115] She noted that the sweatshirt that Mr. Mintz wore at the time of his arrest differed from the sweatshirt that he wore on the night of the attack.[116]

Jazz Moralez, a neighbor of Ms. Whitaker and Ms. Tucker, also testified. "I hear, 'I'm stabbed. I'm bleeding. I'm hurt. Somebody help. Somebody call the police.' . . . . And so I kept hearing a woman screaming, like, you know, 'Help me, help me.'" Jazz testified to seeing "a red, like, boxy car. And that was going off down the street to the right."[117] Jazz could not tell how many doors it had, and Jazz noted that "it was just a boxy kind of -- just a generic kind of car. Not anything fancy." Jazz stated that the car "looked familiar, because there really aren't anybody who has red cars on our street. Everybody else has black and white."[118] There was evidence introduced at trial that Mr. Mintz drove a "small four-door" red car.[119]

Other witnesses testified that Ms. Whitaker had bruising and puncture wounds soon after the incident and showed photographs of her with these injuries to the jury.[120]

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[114] Docket 38-6 at 16.

[115] Docket 38-6 at 18.

[116] *See* Docket 38-6 at 18; Docket 38-4 (Trial Transcript) at 109, 123.

[117] Docket 38-4 at 8.

[118] Docket 38-4 at 9.

[119] *See* Docket 38-4 at 51–52.

[120] *See* Docket 38-5 (Trial Transcript) at 6–12.

Ms. Tucker's autopsy revealed bruising and nine stab wounds.[121] The medical examiner testified that Ms. Tucker was likely stabbed with a single-edged knife, with wounds ranging in size from roughly one half-inch to more than one inch.[122] There was also evidence at trial that, at the time of Mr. Mintz's arrest two days after the stabbing, he had an injury to one of his fingers that was consistent with the use of a small knife.[123]

The stabbings occurred on February 9, 2009.[124] Mr. Mintz was arrested on February 11, 2009.[125] Detective Hickman appears to have processed Mr. Mintz's vehicle shortly after Mr. Mintz's arrest, at which time he tested for the presence of blood by spraying Blue Star throughout the vehicle.[126] Blue Star is a chemical reagent that "turns a blue fluorescent color if there's the presence of blood."[127] Detective Hickman, after completing the Blue Star testing, sent evidence to the Department of Public Safety for testing.[128] Linda Powell, a criminalist who conducted preliminary blood tests but who

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[121] *See* Docket 38-5 at 14–88.

[122] *See* Docket 38-5 at 14–88.

[123] *See* Docket 38-4 at 111–114, 120.

[124] *See, e.g.*, Docket 38-4 at 15.

[125] *See* Docket 38-4 at 23–24.

[126] *See* Docket 38-4 at 101–02 ("At the arrest of Mr. Mintz, his car was seized by Detective Lopez and Detective Laing and transported back to the Peoria Police Department. I wrote a warrant for the vehicle, and along with the crime scene tech, processed the vehicle at the Peoria Police Department.").

[127] Docket 38-4 at 103.

[128] *See* Docket 38-4 at 106.

never testified, issued her report on May 13, 2009.[129] Courtney Collums, a criminalist who conducted later DNA lab tests and who did testify at trial, issued her report on July 29, 2009.[130]

The prosecution, in its opening statement to the jury, deemphasized the importance of DNA evidence to the case.[131] Instead, the prosecution told the jury that Ms. "Whitaker heard or saw most of the murder of her daughter. And the little bits that she can't tell you, the forensics can."[132] In its closing argument, the prosecution only briefly referenced the DNA evidence, and in so doing again minimized its importance to the case.[133] The prosecution again minimized the importance of DNA evidence in its

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[129] *See* Docket 1-1 (Criminalist Linda Powell's Scientific Examination Report) at 13, 15.

[130] *See* Docket 1-1 (Criminalist Courtney Collums' Scientific Examination Report) at 3, 5, 9.

[131] *See* Docket 38-3 (Trial Transcript) at 6–7 ("Now, I know that you guys have all heard about DNA evidence and how it seems like it's the Holy Grail of criminal investigations. And on a stone cold who-dunnit kind of case, it can be very helpful. It can give the police an avenue to look at when they have no suspects whatsoever.

But we don't have that here. [Ms. Whitaker] was able to immediately identify the person who had attacked her and her daughter because she knew him well. He lived with them, and she recognized him when he attacked her.

But the police did DNA anyway. And what it will tell you is that the defendant's DNA was found at the scene. However, this is going to be a case about what DNA will tell you and what it won't tell you. Because the DNA analyst will tell you it's not really a surprise that his DNA is at the scene since he lived there. And unless it's cleaned up, DNA can exist for quite a while.

However, you'll also hear that when he was apprehended by police a few days after, the defendant only had a very small cut on his pinky. Now, whether the defendant's DNA was left during the attacks, we can't say, but you'll also hear that the DNA results provide no conclusive indication that there was anyone else there. It may not be able to refute [Ms. Whitaker's] story, can't confirm it either, but it does agree with what [Ms. Whitaker] will tell you.").

[132] Docket 38-3 at 6.

[133] *See* Docket 38-6 at 33–41 ("Now, given the relative severity of the injuries that [the victims] had compared to the tiny incision that the defendant had when he was found a few days later, it's not really surprising that we don't find a lot of DNA evidence here that will point us directly to

rebuttal to defense counsel's closing argument.[134]

Mr. Mintz argues that his trial counsel failed to present "exculpatory" DNA evidence.[135] He alleges that trial counsel should have stressed that "the only DNA on the knife [used to murder Ms. Tucker and attack Ms. Whitaker] was that of the victim and one other person. [Mr. Mintz's] DNA was not on the murder weapon. No male DNA."[136] But the record does not support Mr. Mintz's claim. Criminalist Courtney Collums' DNA report shows that the minor components of the swabs from the broken knife handle are "inconclusive."[137] In fact, contrary to Mr. Mintz's allegation that male DNA was absent from the knife swabs, Ms. Collums testified that one of the knife swabs revealed male DNA.[138] Mr. Mintz's trial counsel was not ineffective in his cross examination regarding

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the perpetrator. We know that he lived there, so in any case we would expect his DNA to have been found at the scene.

It doesn't tell us anything that his DNA was showing up weekly in any of the tests, but what's more telling here is that there's no indication of any other perpetrator. There is none. And we know we have the weapon that was used to stab [the victims] because both of them, their DNA was found in that blood that was on the blade.

On this case we're asking that you use your reason and your common sense. Follow the trail of evidence here, follow the police testimony, the testimony of Jazz Moralez, the medical examiner, the DNA expert. And follow what Arlene told you happened, and those will lead you to convictions for aggravated assault and for murder.").

[134] *See* Docket 38-6 at 52–57.

[135] Docket 1 at 29.

[136] Docket 1 at 30 (internal citations omitted).

[137] Docket 1-1 (Criminalist Courtney Collums' Scientific Examination Report) at 3, 5.

[138] *See* Docket 38-4 at 81:

> **Counsel**: You can tell that there was a male, because there was a Y chromosome, but you can't tell us anything else about that male, can you?
>
> **Ms. Collums**: There are some peaks there that are consistent with Mintz.

DNA on the knife; the DNA evidence was not particularly inculpatory or exculpatory in this particular case. Nor has Mr. Mintz established that trial counsel's alleged failure to call alibi witnesses, research telephone records, or seek to introduce a restraining order infected the entire trial "with error of constitutional dimensions."[139] In light of the strong evidence the state presented against Mr. Mintz, particularly of the two eyewitnesses, Arlene Whitaker and Jazz Moralez, the Court finds Mr. Mintz has failed to demonstrate that he was prejudiced at trial by any alleged ineffectiveness of his trial counsel. Consequently, Mr. Mintz's first PCR counsel was not ineffective in filing an *Anders* brief in the first PCR proceeding.

b. False Testimony

In Ground Four, Mr. Mintz alleges that "the prosecutor was allowed to introduce perjured testimony and false evidence at trial."[140] This allegedly perjured testimony is that of Detective David Hickman and Criminalist Courtney Collums, and it includes statements regarding "DNA and blood found on Mr. Mintz's clothes and in his vehicle, when the lab tests proved there was no blood there. There was exculpatory DNA evidence pointing to a male other than Mr. Mintz."[141] Although Mr. Mintz presents his

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> However, they -- they are not all there. I don't have all the information. And it could be him, it could not be him.

See *also* Docket 38-4 at 79–83. Ms. Collums did testify that another swab showed "no indication of any male DNA." Docket 38-4 at 83.

[139] *Detrich v. Ryan*, 740 F.3d at 1244 (emphasis, internal citations, and quotation marks omitted).

[140] Docket 1 at 34.

[141] Docket 1 at 34, 34–38.

false testimony allegation in Ground Four, Mr. Mintz makes false testimony allegations throughout the Habeas Petition. This section addresses Mr. Mintz's false testimony allegations in the order in which they appear in his petition. The Court considers (i) the falsity of the testimony, (ii) whether the prosecutor knew or should have known of the allegedly false testimony, and (iii) the materiality of the allegedly false testimony.[142] To establish prejudice sufficient to excuse his procedural default, Mr. Mintz must show that materially false testimony was knowingly introduced at his trial to such a degree that it infected the entire trial "with error of constitutional dimensions."[143]

i. Falsity of Testimony

I. The Floorboard

Mr. Mintz alleges the following in Ground One: "[The prosecutor] allowed Detective Hickman to testify to petitioner's jury 'that blood was located on the front floorboard of petitioner's [car] . . . ."[144] Detective Hickman testified that he "tested . . . the floorboards

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[142] *See Sanders v. Cullen*, 873 F.3d 778 794 (9th Cir. 2017) (quoting *Reis–Campos v. Biter*, 832 F.3d 968, 976 (9th Cir. 2016), *cert. denied*, ___ U.S. ___, 137 S. Ct. 1447 (2017)).

[143] *Detrich v. Ryan*, 740 F.3d at 1244 (emphasis, internal citations, and quotation marks omitted).

[144] Docket 1 at 22. Mr. Mintz repeats this allegation in Ground Three of his petition: "Detective Hickman gave sworn testimony that there was blood on the floorboard of Mr. Mintz' car. However, according to the DNA test conducted by the State's own criminologist, there was no blood detected on the sample listed as Sample #35D. This sample, 35D, comes as evidence in the form of the swab taken from the vehicle floorboard." Docket 1 at 29–30 (citing Docket 38-4 at 102–08; Docket 1-1 (Exhibits E and F) at 12–15). "Even after the State's criminalist's report showed that there was no blood on the floorboard of the Petitioner's vehicle, the prosecutor still told the jury that blood was there." Docket 1 at 31 (citing Docket 38-4 at 102–108).

Mr. Mintz makes the same assertion in Ground Four: "The State knowingly presented and argued perjured testimony at Mr. Mintz's trial. This testimony led to the conviction of Mr. Mintz. It is clear that during the trial, the State presented to the jury, evidence and even the testimony of Detective David Hickman. Hickman testified that there was blood on the front floorboard of

[for blood]"[145] using Blue Star. "Blue Star is a chemical reagent that . . . gives us the indication of blood . . . . [T]he liquid turns a blue fluorescent color if there's the presence of blood."[146] At trial, Detective Hickman testified that "[t]he Blue Star flashed on -- in the area that we're seeing here, I believe in the floorboard . . . ."[147] Mr. Mintz fails to provide evidence that no Blue Star reaction occurred on the floorboard. To the contrary, it appears that Detective Hickman was pointing out to the jury visible Blue Star reactions on photographs of the vehicle as he testified at trial.[148]

Mr. Mintz's vehicle. However, the Scientific Examination Report completed by criminalist Linda Powell indicates that there was no blood on Item #35D, which was the swab taken from the floorboard. Detective Hickman also admitted that sometimes samples and swabs are submitted for testing and are later determined to have not been blood. Detective Hickman further stated in trial that Mr. Mintz's sweatshirt was stained visibly with blood." Docket 1 at 34–35 (citing Docket 38-4 at 104–05, 119, 125; Docket 1-1 (Exhibits E and F) at 12–15).

Mr. Mintz again repeats this claim in his supplemental briefing: "Detective Hickman and Ms. Collums testimony of blood being on the vehicle floorboards . . . was actually false." Docket 43 at 7–8.

[145] Docket 38-4 at 102.

[146] Docket 38-4 at 102–03.

[147] Docket 38-4 at 104–05.

[148] *See, e.g.*, Docket 38-4 at 102–06:

> **Counsel**: Okay. And then I'm going to show you Exhibit 131. Can you tell us what we're looking at there.
>
> **Detective Hickman**: That is the front driver's seat or driving compartment of the vehicle.
>
> **Counsel**: Okay. And what, if anything, did you find there?
>
> **Detective Hickman**: The Blue Star flashed on -- in the area that we're seeing here, I believe in the floorboard, the steering wheel, the front driver's seat, and the gear shift.

Docket 38-4 at 104–05.

Mr. Mintz alleges that Detective Hickman provided false testimony because "Chemical Testing Results conducted by Dept. Public Safety Criminalist 'Linda Powell' conclusively concluded that the Swab collected from 'Front Driver Floorboard' (# 35-D) was Negative for blood."[149] Blue Star testing is a chemical reagent performed in the field that "turns a blue fluorescent color if there is the presence of blood."[150] Here, Detective Hickman's Blue Star testing occurred months prior to Ms. Powell's preliminary blood testing of the swabs taken from the vehicle at that time by Detective Hickman.[151] Detective Hickman appears to have "processed" the vehicle soon after its seizure.[152] Detective Hickman testified that stains from the car "were swabbed, and then forwarded to the Department of Public Safety,"[153] which later conducted the testing. Ms. Powell's preliminary blood testing report, on which Mr. Mintz relies, did not issue until months later, in May 2009.[154] Detective Hickman testified at trial that he "actually never received the results" of that blood testing.[155] There is no evidence to suggest that, when he testified

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[149] Docket 1 at 22 (citing Docket 1-1 (Criminalist Linda Powell's Scientific Examination Report) at 13, 15).

[150] Docket 38-4 at 103.

[151] *See* Docket 38-4 at 101–03.

[152] Docket 38-4 at 101 ("At the arrest of Mr. Mintz, his car was seized by Detective Lopez and Detective Laing and transported back to the Peoria Police Department. I wrote a warrant for the vehicle, and along with the crime scene tech, processed the vehicle at the Peoria Police Department.").

[153] Docket 38-4 at 106.

[154] *See* Docket 1-1 (Criminalist Linda Powell's Scientific Examination Report) at 13, 15.

[155] Docket 38-4 at 106.

Docket 38-4 at 119–120.

at trial, Detective Hickman knew that the blood testing results showed no blood on the floorboard. In short, Detective Hickman did not testify as to the lab's blood testing results. He therefore provided no false testimony as to such blood testing results.

II. Detective Hickman's Testimony Regarding the Black Jacket

Mr. Mintz alleges that "Detective Hickman further testified to the Jury that 'there was a [visible] Blood Stain on the Left Shoulder of the Black Jacket worn by petitioner upon his arrest.'"[156] Although Mr. Mintz uses quotation marks to describe Detective Hickman's testimony, that alleged quote does not appear in the trial transcript.[157] It is true that Mr. Mintz was wearing the black jacket when he was arrested.[158] However, Mr. Mintz was also wearing a blue velour sweat suit ("velour") when he was arrested.[159] And it is that blue velour to which Detective Hickman repeatedly refers regarding the apparent blood stain. In describing his Blue Star analysis of the velour, Detective Hickman says, "in the left shoulder area, you can see that it flashed again for the presence of blood."[160] The jury asked the question succinctly: "Was the sweatshirt that was tested stained visually with blood? Could you see it? This is the sweatshirt that you provided the Blue Star procedure on."[161] Detective Hickman replied, "Yes, on the left shoulder, there was

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[156] Docket 1 at 22.

[157] *See generally* Docket 38.

[158] *See* Docket 38-4 at 43.

[159] *See* Docket 38-4 at 43.

[160] Docket 38-4 at 109.

[161] Docket 38-4 at 125.

an obvious dark purple or blood-colored stain on the shirt."[162]

Other testimony bears out Detective Hickman's perception. Detective Balson, who was present for Mr. Mintz's arrest, testified that Mr. Mintz was wearing "a black long-sleeved jacket. And he was wearing -- I've heard it as velour. I don't know if it was really velour, but it's a matching shirt and pants that was almost like a royal blue, dark royal blue in color."[163] Detective Balson added, "I noticed a dark stain on his shoulder."[164]

Mr. Mintz alleges that Detective Hickman's testimony was "'false on it's face' where also the Swab collected from petitioner's Black Jacket upon his arrest 'tested Negative for blood' (item #36-B) as indicated by the Results of the Scientific Examination Report written by Dept. Public Safety Criminalist Linda Powell."[165] However, Ms. Powell's preliminary blood test indicated the presence of blood on the left shoulder of the sweatshirt.[166] Likewise, Ms. Collums testified that "a blue velour sweatshirt" belonging to Mr. Mintz "tested positive" for Mr. Mintz's blood.[167] As Detective Hickman did not testify

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[162] Docket 38-4 at 125.

[163] Docket 38-4 at 43.

[164] Docket 38-4 at 43.

[165] Docket 1 at 22–23. Mr. Mintz again repeats this claim in his supplemental briefing: "Detective Hickman and Ms. Collums testimony of blood being on . . . his long sleeve sweatshirt was actually false." Docket 43 at 7–8.

[166] *See* Docket 1-1 (Criminalist Linda Powell's Scientific Examination Report) at 13, 15.

[167] Docket 38-4 at 67–68. Ms. Collums testified that multiple rounds of testing of the clothing took place, with different results each time. One swab from the sweatshirt, "as opposed to a cutting from the sweatshirt," revealed "inconclusive or no results . . . ." A second swab from the sweatshirt gave "a partial profile. And the -- the alleles or the locations that I did get matched [Mr.] Mintz. And the other ones were inconclusive." The inconclusive results had "just nothing there. Or it was below our threshold. But these same swabs from the sweatshirts were what I had previously -- I tested a different part in the previous part." When asked if "the other ones we're discussing was an actual cutting from each of those shirts?," Collums replied, "Right.

as to blood on the left shoulder of the black jacket or as to the lab's blood testing results, he provided no false testimony on these topics.

III. The Hand Injury and Blood Trail

Mr. Mintz alleges in Ground Three that the hand injury that "would result from committing the crime would certainly leave a blood trail. However, there was no blood trail in the Petitioner's vehicle. In fact, there was no blood on the '[shift] stick,' where the right hand would be used."[168]

Detective Hickman testified that "[t]he Blue Star flashed on -- in the area that we're seeing here, I believe in the floorboard, the steering wheel, the front driver's seat, and the gear shift."[169] On the driver's side door panel, Detective Hickman said of a photograph, "the blue that you can see there is where the Blue Star flashed for the presence of blood."[170] Detective Hickman testified as to his Blue Star flashes, not the results of blood testing at the crime lab. His testimony was not false.

Ms. Collums did DNA testing later at the crime lab. She testified that "[t]he steering wheel I believe also tested positive for blood. The major component of the mixture was Mintz, and -- at almost all of the locations except for one. At one location it was inconclusive. There wasn't enough information."[171] The center console "also was tested

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Apparently, they were -- collected swabs and sent those in, which I tested first. And those didn't work, so I collected -- I got the clothes and tested those." Docket 38-4 at 71–72. *See also* Docket 1-1 (Criminalist Courtney Collums' Scientific Examination Report) at 3, 5.

[168] Docket 1 at 30 (citing Docket 1-1 (Exhibit F) at 14–15).

[169] Docket 38-4 at 104–05.

[170] Docket 38-4 at 105–06.

[171] Docket 38-4 at 69. However, she noted on cross examination that the Mintz profile was "just below our calling threshold [of 100 out of 10,000]. Therefore, I can't say that he matches there.

for blood . . . . But that was a mixture of at least three individuals. And the major component was [Mr.] Mintz."[172] Ms. Collums added that "Phyllis Tucker and Arlene Whitaker could have been contributors to the minor component."[173] Ms. Collums did not testify that blood was found on the shift stick.[174] Mr. Mintz has made no showing that Ms. Collums' testimony regarding the results of her DNA testing of the vehicle samples was false.

IV. The Untested Swab

Mr. Mintz alleges that, "[o]f the nine swabs of fluid (blood) taken from the crime scene, there was one swab (Item #15A) that was never analyzed for DNA."[175] Mr. Mintz characterizes the decision not to test this swab as "very strange" and asks, "What possible reason would there be to not analyze Item #15A? What if Item #15A consists of the DNA of a male who is not Mr. Mintz?"[176] Item 15A is described as a "control swab – Received, not analyzed."[177] This untested swab may constitute the "exculpatory DNA evidence" that Mr. Mintz references in his introduction to Ground Four.[178]

But he's there." Docket 38-4 at 83. *See also* Docket 1-1 at 3, 5.

[172] Docket 38-4 at 70–71; *see also* Docket 1-1 at 3, 5.

[173] Docket 38-4 at 71.

[174] *See* Docket 38-4 at 55–96.

[175] Docket 1 at 36.

[176] Docket 1 at 36.

[177] Docket 1-1 (Criminalist Linda Powell's Scientific Examination Report) at 11. Item 37A carries an identical description. Docket 1-1 (Criminalist Linda Powell's Scientific Examination Report) at 15.

[178] Docket 1 at 34.

Mr. Mintz makes no claim that this swab was addressed at trial. Therefore, no false testimony claim is available to him regarding this evidence.

V. Ms. Collums' Testimony Regarding the Black Jacket

Mr. Mintz asserts that "[w]hen criminalist Courtney Collums testified at trial, she testified the blood on all the clothing was Mr. Mintz's blood. She said that all the clothing tested positive for blood. But clearly in her reports she states there was no blood on [the black jacket]."[179]

Mr. Mintz mischaracterizes Ms. Collums' trial testimony. Ms. Collums testified that she tested cuttings from Mr. Mintz's "blue velour sweatshirt, . . . dark gray shirt . . . . [and] . . . pants[.]"[180] She noted that these items "all tested positive [for blood]," and that when she tested that blood, "[t]he blood on the -- all the clothing was his -- [Mr.] Mintz's blood."[181] This testimony is consistent with her report.[182] On cross-examination, defense counsel asked, "[a]nd you didn't find any blood on [the black jacket from the police that was identified as being clothing worn by Mr. Mintz]; is that right?," to which she responded, "that is correct."[183] Ms. Collums' trial testimony regarding blood on clothing was not false.

ii. The prosecution's knowledge of falsity

Mr. Mintz alleges that "Prosecutor Stephanie Low knew, or should have known,

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[179] Docket 1 at 37–38 (citing Docket 38-4 at 67–68, Docket 1-1 (Exhibit B) at 4–5).

[180] Docket 38-4 at 67.

[181] Docket 38-4 at 67–68.

[182] *See* Docket 1-1 at 3, 5.

[183] Docket 38-4 at 94.

that the testimony of both Det. David Hickman and Criminalist Courtney Collums was perjured. Still, the prosecutor introduced this testimony at trial on January 27, 2010, and did not correct the perjury."[184] Had Ms. Collums or Detective Hickman given testimony that directly contradicted their own reports, Mr. Mintz may have had a strong argument that the prosecutor knew or should have known that such testimony may have been false. But as Mr. Mintz has failed to establish the falsity of the testimony of these witnesses, he has no claim regarding the prosecution's knowledge of falsity.

iii. Materiality

Mr. Mintz states that the allegedly false testimony "is not concerning some mundane issue, but it deals with key issues regarding the evidence at hand, and the fact that had it not been for the perjury, there would be no evidence against Mr. Mintz."[185] Based upon the Court's review of the relevant trial testimony, even if Mr. Mintz could have established both falsity and the prosecutor's knowledge of falsity, the allegedly false testimony that he discusses in his petition would almost certainly have had no effect on his convictions, given the other compelling evidence introduced by the State at trial.

For the foregoing reasons, Mr. Mintz has not established that he was prejudiced at his trial by the introduction of any false testimony.

4. Miscarriage of Justice

Mr. Mintz argues that a fundamental miscarriage of justice occurred because he is actually innocent. He argues that "the D.N.A. evidence from the murder weapon indicated

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[184] Docket 1 at 34 (citing Docket 38).

[185] Docket 1 at 34.

that Mr. Mintz' DNA was not on there, but [the victims' DNA] was. Incidentally, this also demonstrates that the weapon was not cleaned after the violent stabbing of the victims."[186] He adds, "the blood and DNA evidence demonstrated that the blood of the victims was not found on him and Mr. Mintz' phone records indicated he was at home when the crimes occurred."[187] Finally, Mr. Mintz makes note of "numerous witnesses available that would testify Mr. Mintz was at home when the crimes were committed."[188] As discussed above, Mr. Mintz's knife-blade DNA allegations fail.[189] Mr. Mintz has provided no evidence aside from his own allegations that there are witnesses who would testify to his being home when the crimes occurred. In fact, one of the alleged witnesses, Jazz Moralez,[190] is likely the same Jazz Moralez who testified at trial and who gave no indication that Mr. Mintz was at home during the attack.[191] In light of the strong evidence of his guilt that the State introduced at trial against him, Mr. Mintz fails to make a "'colorable showing of factual innocence[.]'"[192] Given the record before the trial court, Mr. Mintz has failed to show "it is more likely than not that no reasonable juror would have

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[186] Docket 43 at 8.

[187] Docket 43 at 8.

[188] Docket 43 at 8–9.

[189] *See supra* at 26–27.

[190] *See* Docket 1-2 at 3.

[191] *See* Docket 38-4 at 6–14.

[192] *Thomas*, 979 F.2d at 749 (quoting *McCleskey*, 499 U.S. at 495).

found petitioner guilty beyond a reasonable doubt."[193] As a result, his miscarriage of justice claim will be dismissed.

CONCLUSION

In light of the foregoing, IT IS ORDERED that Plaintiff's Petition for Writ of Habeas Corpus at Docket 1 is hereby DISMISSED WITH PREJUDICE.

The Court further finds that Mr. Mintz has not made the requisite substantial showing of the denial of a constitutional right, and therefore a certificate of appealability will not be issued by this Court.[194] Mr. Mintz may request a certificate of appealability from the Ninth Circuit Court of Appeals.

The Clerk of Court is directed to enter a final judgment accordingly.

DATED this 30th day of September, 2018.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE

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[193] *Schlup*, 513 U.S. at 327.

[194] *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (certificate of appealability may be granted only if applicant made "substantial showing of the denial of a constitutional right," *i.e.*, showing that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further" (internal quotations and citations omitted)).