FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNESTO SALGADO MARTINEZ, *Petitioner-Appellant*, v. CHARLES L. RYAN, *Respondent-Appellee.*	No. 08-99009 D.C. No. 2:05-cv-01561-EHC OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted March 27, 2019
San Francisco, California

Filed June 18, 2019

Before: M. MARGARET McKEOWN, WILLIAM A. FLETCHER, and MILAN D. SMITH, JR., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of a writ of habeas corpus as to Ernesto Martinez's claims relating to his first-degree murder conviction and death sentence, dismissed for lack of jurisdiction Martinez's claim appealing the district court's denial of his request to consider a Fed. R. Civ. P. 60(b) motion, declined to expand the certificate of appealability, and denied Martinez's motion to stay the appeal and remand for consideration of another claim under *Brady v. Maryland*.

The panel held that Rule 32.2(a) of the Arizona Rules of Criminal Procedure, pursuant to which the Arizona post-conviction review court imposed a procedural default as to Martinez's judicial bias claim, is independent of federal law and adequate to warrant preclusion of federal review; and that Martinez failed to demonstrate cause to overcome the procedural default of that claim.

The panel held that because Martinez's judicial bias claim is based on unfounded speculation, (1) his trial counsel did not perform deficiently by not moving for the trial judge's recusal, and (2) his appellate counsel was not ineffective for failing to raise on direct appeal the claim that trial counsel was ineffective for failing to move to disqualify the trial judge.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that Martinez did not establish cause and prejudice to overcome his procedural default of his claim that the prosecution violated *Brady v. Maryland* by failing to disclose impeachment evidence about a prosecution witness.

The panel dismissed for lack of jurisdiction Martinez's claim appealing the district court's procedural ruling declining to consider Martinez's Rule 60(b) motion to alter or amend the judgment.

The panel denied Martinez's claims relating to the jury instruction on pre-meditation. The panel wrote that the instruction properly conveyed to the jury that Martinez could not be found guilty of first-degree murder if it believed he acted impulsively. The panel held that even if the instruction was somehow erroneous, Martinez did not show that the instruction so infected the entire trial that the resulting conviction violated due process. Considering the totality of the circumstances, the panel held that an oral hiccup by the trial court likewise did not cause the conviction to violate due process.

The panel held that trial counsel's failure to retain an independent pathologist to impeach a prosecution expert's testimony did not prejudice Martinez; that Martinez therefore cannot establish under *Martinez v. Ryan* that his post-conviction-review counsel was ineffective for failing to raise the claim that trial counsel's failure to retain a pathologist amounted to ineffective assistance; and that, as a result, Martinez failed to overcome the procedural default on that claim.

Because of the overwhelming evidence introduced at sentencing that Martinez could appreciate the wrongfulness of his conduct, the panel concluded that Martinez did not

establish prejudice, and thus cannot overcome the procedural default of his claim that trial counsel was ineffective by failing to recall an expert at sentencing to rebut testimony by another expert retained by the prosecution.

The panel held that under *Eddings v. Oklahoma*, the Arizona Supreme Court applied an unconstitutional causal nexus test in concluding that Martinez's family history is not entitled to weight as a mitigating factor at sentencing. The panel determined that Martinez was not prejudiced by the Arizona Supreme Court's constitutional error.

The panel declined to expand the COA to include a *Brady* claim that relates to evidence of premeditation.

Because Martinez cannot establish materiality, the panel denied Martinez's motion to stay the appeal and to remand for the district court to consider a weekly planner belonging to a prosecution witness.

COUNSEL

Timothy M. Gabrielson (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Tucson, Arizona; for Petitioner-Appellant.

Julie Ann Done (argued), Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

OPINION

M. SMITH, Circuit Judge:

After being pulled over for speeding in Payson, Arizona, Ernesto Martinez fatally shot Arizona Department of Public Safety Officer Robert Martin. A jury convicted Martinez of, among other crimes, first-degree murder. He was sentenced to death.

Martinez appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We affirm. We also deny Martinez's motion to stay the appeal and decline to remand the case for consideration of another *Brady* claim.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Murder of Officer Martin

In August 1995, Martinez stole a blue Monte Carlo and used it to drive from California to Arizona. Martinez met with his friend, Oscar Fryer, in Globe, Arizona "shortly before the [murder] of" Officer Martin.[1]

Fryer and Martinez spoke in Martinez's car for about thirty minutes. Fryer asked Martinez where he had been; Martinez responded that he had been in California. Fryer asked Martinez if he was still on probation; Martinez responded that he was, and that he had a warrant out for his

[1] Oscar Fryer did not remember exactly when he met with Martinez. The sentencing court stated that Martinez met with Fryer "three days before the murder," but nothing in the record supports that claim.

arrest. Martinez told Fryer that he had come to Arizona to visit friends and family.

While in the car with Fryer, Martinez removed a .38 caliber handgun with black tape wrapped around the handle from underneath his shirt and showed it to Fryer. Fryer asked Martinez why he had the gun; Martinez responded that it was "[f]or protection and if shit happens."

As Martinez was showing the gun to Fryer, they spotted a police officer in the area. Fryer asked Martinez what he would do if he was stopped by the police. Martinez responded that "he wasn't going back to jail."

Following that conversation, Martinez drove from Globe to Payson on a stretch of State Route 87—better known as the Beeline Highway. Several witnesses testified to having seen Martinez and his car around Payson that morning.

Susan and Steve Ball were among those witnesses. Martinez tailgated them on the Beeline Highway "for a long time" before passing their car "very quickly on the left-hand side." Shortly after that, the Balls saw Martinez's car pulled over to the side of the road, with a police car stopped behind him and a police officer standing outside the driver's side door. As they drove by, they said to each other that it was "good" that the driver "got the speeding ticket."

But shortly after the Balls saw Martinez's car pulled over, "the same blue car passe[d] [them] on the left-hand side going very quickly." The couple found it "very strange" because "there was no time [for the driver] to have gotten a speeding ticket." When Martinez's car ran a red light, the Balls knew that "[s]omething [was] going on."

The Balls were suspicious for good reason. After being pulled over for speeding by Officer Martin, and after the Balls had passed Martinez's car, Martinez shot Officer Martin four times with a .38 caliber handgun—the same gun he had shown Fryer days earlier. The bullets struck Officer Martin's right hand, neck, back, and head. The back and head wounds were fatal.

After shooting Officer Martin, Martinez stole Officer Martin's .9mm Sig Sauer service weapon and continued driving down the Beeline Highway. The Balls wrote down Martinez's license plate number when they spotted his car again.[2]

Martinez was arrested in Indio, California the day after the murder of Officer Martin. Hours after his arrest, Martinez called Mario Hernandez, a friend. After Hernandez passed the phone to his brother, Eric Moreno, Martinez laughingly told Moreno that "he got busted for blasting a jura"—a slang term in Spanish for a police officer.

II. Conviction

Martinez was charged with one count of first-degree murder, two counts of theft, and two counts of misconduct involving weapons. Judge Jeffrey Hotham of the Superior Court in Maricopa County, Arizona presided over the guilt phase of Martinez's trial. The jury returned a verdict of guilty on all accounts.

[2] Hours after murdering Officer Martin, Martinez robbed a convenience store in Blythe, California, and fatally shot the store clerk. Martinez's convictions and sentences for that robbery and murder, however, are not before us.

III. Sentencing and Direct Appeal

Before sentencing, Martinez filed a motion for change of judge for cause. Another judge—Judge Ronald Reinstein, the presiding judge of the Criminal Division—heard the motion. Martinez argued that recusal was warranted because Judge Hotham's bailiff was friends with Officer Martin's widow.

Judge Reinstein granted the motion. He stated that Martinez had demonstrated no prejudice resulting from Judge Hotham presiding over his case. Because "death is different," however, Judge Reinstein concluded that "the better course to follow for all concerned is to assign another judge to the sentencing."

Judge Christopher Skelly, the sentencing judge, imposed a sentence of death. Martinez's convictions and sentence were affirmed by the Arizona Supreme Court on direct appeal.

IV. State Postconviction Review

Martinez filed a post-conviction review (PCR) petition challenging his conviction and sentence. Judge Hotham, who had been assigned the PCR petition, denied it. The Arizona Supreme Court denied discretionary review.

V. Federal Habeas Corpus Proceedings

Martinez filed a federal habeas petition in the district court. The district court denied the petition. The court also denied Martinez's motion to alter or amend judgment and to expand the certificate of appealability (COA). Martinez filed a notice of appeal.

After completion of appellate briefing, Martinez filed several motions, requesting that we: (1) stay the appeal and remand to the district court on three claims based on our decision in *Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010); (2) stay the appeal and remand to the district court pursuant to *Townsend v. Sain*, 372 U.S. 293 (1963), and *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010); (3) stay the appeal and remand to the district court based on *Martinez v. Ryan*, 566 U.S. 1 (2012); and (4) grant leave to supplement his *Townsend*/*Quezada* motion.

We granted Martinez's motion to remand pursuant to *Martinez v. Ryan*. We also granted Martinez's motion to remand pursuant to *Townsend*/*Quezada*, construing it as "a motion for leave to file in the district court a renewed request for indication whether the district court would consider a rule 60(b) motion for reconsideration of Claim 4 and for consideration of a possible *Brady-Napue* claim in light of newly discovered evidence." Accordingly, we stayed appellate proceedings.

On remand, the district court declined Martinez's invitation to entertain a Rule 60(b) motion. The court also denied his Confrontation Clause and ineffective assistance of counsel (IAC) claims, and denied a COA as to those claims.

Martinez filed a motion requesting that we expand the COA. We granted a COA as to all claims we had remanded and ordered the parties to file replacement briefs.

On appeal, Martinez raises eight certified claims and requests that we issue a COA for another *Brady* claim. Martinez also moves to stay the appeal and remand his case for the district court to consider another *Brady* claim.

JURISDICTION AND STANDARD OF REVIEW

Because Martinez filed his petition for habeas corpus after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, we have jurisdiction over the certified claims pursuant to 28 U.S.C. § 2253.

We review de novo a district court's decision to deny a habeas petition under 28 U.S.C. § 2254. *Bean v. Calderon*, 163 F.3d 1073, 1077 (9th Cir. 1998). Under AEDPA, we may not grant habeas relief unless the state's adjudication of Martinez's claim (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court," (2) "involved an unreasonable application of" such law, or (3) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"In making this determination, we look to the last reasoned state court decision to address the claim." *White v. Ryan*, 895 F.3d 641, 665 (9th Cir. 2018) (citing *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)). The PCR court's decision is the last reasoned state court decision addressing Martinez's judicial bias claim, his IAC claim for his counsel's failure to raise the judicial bias claim in state court, and his claim that the court's jury instructions were erroneous.

ANALYSIS

I. Judicial Bias

Martinez's judicial bias claim stems from the relationship between Ron Mills, Judge Hotham's bailiff, and Sandy Martin, Officer Martin's widow. When the parties

learned of that relationship before trial, Martinez asked the court to replace Mills. The court held a hearing to consider that motion.

At the hearing, Mills testified that he had been Judge Hotham's bailiff for five years. He said that he had known Sandy Martin for over thirty years—from high school—and kept "close contact" with her and her late husband since then. Mills testified that he considered the Martins good friends, but that he had not attended Officer Martin's funeral.

Mills said that, at a pretrial hearing, he had gone up to Sandy Martin and "asked her how she was doing and put [his] arm around her, and . . . just expressed some pleasantries." Mills also testified, however, that he could "complete [his] duties as a bailiff and not influence the jury in any way" in Officer Martin's case. He said he had taken an oath "[t]o take care of the jury and not to divulge the deliberations or the verdict." He also testified that he would have no contact with the victims in the view of the jury and would "not [] in any fashion influence the jurors by way of [his] personal feelings about a case."

The court denied Martinez's motion to replace Mills. Judge Hotham reasoned that he had "the greatest confidence in my bailiff, Mr. Mills," that he had "specifically already admonished him about his responsibilities," and that he was "confident that [Mills] is going to be able to [abide by them]."

During the trial, the court excluded Mills from the courtroom during a portion of an expert's testimony. At a recess (during which the jury was not present), Judge Hotham explained to the parties that "due to defense counsel's concerns about my bailiff . . . I requested [him] not to be present during the autopsy report of [the expert] so that

no one could ever later question that my bailiff reacted to the gory photographs in any inappropriate manner and that that would have some effect on the jury."

Martinez argues that the PCR court erred in holding that his judicial bias claim was procedurally defaulted. He contends, in the alternative, that even if his judicial bias claim is procedurally defaulted, he has demonstrated cause and prejudice to overcome that default.

A. Independent and Adequate State Ground

Federal courts generally cannot review a habeas petitioner's claim if the "state court declined to address a prisoner's federal claim[] because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). The procedural bar on which the state court relies must be independent of federal law and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989).

The PCR court "explicitly impose[d] a procedural default," *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), by stating that Martinez "waived [his judicial bias claim] by failing to appeal [it]" and citing Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure. Martinez does not dispute that Arizona's preclusion rule is independent of federal law. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam). Nor does he dispute that Arizona's preclusion rule is an adequate bar to federal review of a claim. *See Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998), *overruled on other grounds by Martinez v. Ryan*, 566 U.S. 1 (2012); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir. 1997).

Instead, Martinez argues that Rule 32.2(a) was not adequate because the PCR court misinterpreted the scope of

the rule. He contends that "Arizona's preclusion rules simply do not apply where there were insufficient facts on the record to have raised the claim on direct appeal." Because "Martinez's substantive judicial bias claim depended on facts [outside] the record," he argues that Rule 32.2(a) did not require him to raise that claim on direct appeal.

We lack jurisdiction to address that contention. *See Poland*, 169 F.3d 573, 584 (9th Cir. 1999) ("Federal habeas courts lack jurisdiction . . . to review state court applications of state procedural rules."); *accord Johnson v. Foster*, 786 F.3d 501, 508 (7th Cir. 2015) ("[A] federal habeas court is not the proper body to adjudicate whether a state court correctly interpreted its own procedural rules, even if they are the basis for a procedural default."). And even if we did have jurisdiction, Martinez's argument fails because he was aware of the facts underlying his judicial bias claim before filing his direct appeal. Martinez conceded at oral argument that he learned of the relationship between Mills and Sandy Martin before trial. Indeed, Martinez cited that relationship as the reason Judge Hotham could not be "completely free of any improper emotion or bias" when he moved for a change of judge before sentencing—which was before he filed his direct appeal. Martinez was present during trial when Judge Hotham told the parties that he had asked his bailiff to remain outside the courtroom during Dr. Keen's testimony. These facts belie the suggestion that Martinez could not have raised his judicial bias claim on direct appeal.

Rule 32.2(a) is independent of federal law and adequate to warrant preclusion of federal review. Accordingly, we may not review Martinez's judicial bias claim unless he establishes cause and prejudice.

B. Cause and Prejudice

There is a narrow exception to the general rule outlined above if the habeas petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Martinez presents four arguments to establish cause for why he did not raise his judicial bias claim on direct appeal. We reject all of them.

Martinez's first argument is part and parcel of an argument we have already addressed: He contends that he can establish cause because "Judge Hotham's ongoing failure to comply with his ethical dut[ies] . . . constituted facts not reasonably available with which to ask for the judge's recusal at trial or to raise the claim on direct appeal." That argument falls short because, as we explain above, Martinez knew of, and objected to, Judge Hotham's alleged biased conduct before he filed his direct appeal. He cannot now claim ignorance.

Second, Martinez relies on a non-binding case, *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995), for the proposition that "a judge's [breach] of the canons governing judicial conduct constitutes 'cause' to excuse a procedural default of a judicial bias claim in state court." *Porter*, however, does not support the weight that Martinez hoists on it. There, the clerk of court submitted a declaration over a decade after the defendant's trial stating that "before or during [the] trial," the trial judge had said that "he would send [the defendant] to the chair." *Porter*, 49 F.3d at 1487 (quoting declaration). The court held that the defendant had established cause because he could not reasonably have been expected to discover the judge's statements to the clerk of

court before he filed his direct appeal. *Id.* at 1489. Here, by contrast, Martinez could have discovered—and did discover—the evidence that underlies his judicial bias claim before he filed his direct appeal. Unlike in *Porter*, Martinez has identified no evidence, such as "specific [statements] that the judge had a fixed predisposition to sentence this particular defendant to death if he were convicted by the jury," *id.*, that demonstrate Judge Hotham's alleged bias or impropriety. For these reasons, *Porter*'s reasoning does not support Martinez's argument for cause.

Third, Martinez argues that the ineffective assistance of his PCR counsel establishes cause. That argument lacks merit, however, because ineffective assistance of PCR counsel can constitute cause only to overcome procedurally defaulted claims of ineffective assistance of trial counsel. *See Martinez*, 566 U.S. at 9; *see also Trevino v. Thaler*, 569 U.S. 413, 429 (2013). We have rejected, and reject again, the argument that ineffective assistance of PCR counsel can establish cause to overcome procedurally defaulted claims of judicial bias. *See Pizzuto v. Ramirez*, 783 F.3d 1171, 1176–77 (9th Cir. 2015) ("[O]nly the Supreme Court could expand the application of *Martinez* to other areas.").

Martinez's fourth and final argument leapfrogs over the cause and prejudice analysis to reach the merits of his judicial bias claim. He contends that Judge Hotham's bias constituted structural error that automatically entitles him to habeas relief. But that argument misses the mark because we cannot reach the merits of Martinez's judicial bias claim unless he demonstrates cause and prejudice to overcome the procedural default of that claim. Because Martinez has failed to do so, we do not address the merits of his claim.

Martinez fails to demonstrate cause to overcome the procedural default of his judicial bias claim, so we need not address prejudice. We affirm the district court's denial of Martinez's judicial bias claim.

II. Ineffective Assistance of Counsel (Judicial Bias)

Martinez argues that the PCR court unreasonably applied clearly established federal law when it denied his IAC claim based on trial counsel's failure to move to disqualify Judge Hotham for judicial bias. He also contends that his appellate counsel was ineffective for failing to raise the IAC claim on direct appeal. We reject both arguments.

To prevail on an IAC claim, the defendant must show both that counsel's performance was deficient, and that he suffered prejudice due to counsel's deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On federal habeas review, "the question is not whether counsel's actions were reasonable[,]" but "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). The Supreme Court has described this standard of review as "doubly" deferential. *Harrington*, 562 U.S. at 105.

Martinez's trial counsel did not perform ineffectively by not moving for Judge Hotham's recusal. Martinez's claim that Judge Hotham was biased lacks merit, and the "[f]ailure to raise a meritless argument does not constitute ineffective assistance." *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985).

A judicial bias claim requires facts sufficient to create actual impropriety or an appearance of impropriety. *Greenway v. Schriro*, 653 F.3d 790, 806 (9th Cir. 2011). Martinez does not point to anything in the record that

demonstrates actual impropriety by Judge Hotham. He contends that Judge Hotham's bailiff's relationship with Officer Martin's widow created an appearance of impropriety, but that argument is not supported by precedent. When asked at oral argument for a case in which a bailiff's relationship to the victim's family was found to have created an appearance of impropriety, Martinez could not provide an answer. The Supreme Court, for its part, has recognized an appearance of impropriety in only a few cases in which the judge had a direct pecuniary interest in the case, was involved in a controversy with a litigant, or was part of the accusatory process. *See, e.g.*, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971) (judge whom the defendant had insulted presided over contempt proceedings); *In re Murchison*, 349 U.S. 133, 137 (1955) (judge acted as both the grand jury and the trier of the accused); *Tumey v. Ohio*, 273 U.S. 510, 532–34 (1927) (judge profited from every defendant he convicted). None of those circumstances existed here.

At bottom, Martinez's judicial bias claim is based on unfounded speculation. He contends that Judge Hotham's decision to remove his bailiff from the courtroom during an expert witness's testimony "was merely the first public manifestation as to how deep his bailiff's feelings ran and the judge's sympathy for his bailiff and his concern that the bailiff's feelings might spill over inappropriately." But Martinez's fanciful theory of bias cannot "overcome [the] presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). As Judge Hotham explained to the parties during trial, he asked Mills to remain outside the courtroom during an expert's testimony solely to prevent any later complaint that Mills "reacted to the gory photographs in any inappropriate manner."

Because Martinez's judicial bias claim lacks merit, his trial counsel did not perform deficiently by not moving for Judge Hotham's recusal. *See Boag*, 769 F.2d at 1344. Martinez's claim that his appellate counsel deficiently performed likewise fails, for "appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal." *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001). We therefore affirm the district court's denial of Martinez's IAC claim.

III. Oscar Fryer *Brady* Claim

Before the district court, Martinez argued for the first time that the prosecution violated *Brady v. Maryland* by failing to disclose impeachment evidence about Fryer, a witness for the prosecution. 373 U.S. 83 (1963). The district court denied the claim because Martinez did not establish cause and prejudice to overcome the procedural default of his *Brady* claim. We agree.

Martinez argues that the prosecution violated its *Brady* obligations in two ways. First, he argues that the prosecution failed to disclose that Fryer was using drugs when he testified at Martinez's trial. Second, he argues that the prosecution withheld evidence of benefits they bestowed on Fryer in exchange for his testimony against Martinez. He contends that the withheld evidence establishes cause and prejudice to overcome the procedural default of his *Brady* claim.

Cause and prejudice necessary to overcome the default of a *Brady* claim parallel the second and third elements of a *Brady* violation. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004). Those elements are "[(2)] that evidence must have been suppressed by the State, either willfully or

inadvertently; and [(3)] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 282 (1999). Thus, a petitioner establishes cause when the reason for his failure to bring a timely *Brady* claim is the government's suppression of the relevant evidence, and establishes prejudice when the suppressed evidence is material for *Brady* purposes. *Banks*, 540 U.S. at 691. Evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 470 (2009).

A. Fryer's Illegal Drug Use

Martinez's first argument—that the government improperly withheld evidence of Fryer's drug use—relies on his allegation that Fryer was under the influence of methamphetamine on the day he testified against Martinez. That allegation stems from the following facts. On February 5, 1998, Fryer was charged with illegal drug use in Gila County, Arizona. On February 23, 1998, Fryer pleaded guilty to using amphetamine or methamphetamine between August 18–20 and between November 14–17, 1997. In a presentence report update filed on March 13, 1998, a probation officer wrote that Fryer "stated that he ha[d] been addicted to methamphetamine for at least the past 6 months. He got to where he was using up to 4 grams of methamphetamine a day." That statement, Martinez argues, demonstrates that Fryer was using methamphetamine on September 9, 1997—when Fryer testified against Martinez.

We acknowledge that evidence that a witness—especially one as critical to the prosecution's case as was Fryer—"was using drugs during the trial would reflect on his competence and credibility as a witness." *Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002). But Martinez's *Brady* claim fails because he does not demonstrate that the

prosecution knew, or had a duty to know, of Fryer's drug use or his drug convictions before the end of Martinez's trial.

Brady claims apply in situations that "involve[] the discovery, after trial of information which *had been known* to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). If the prosecution does not discover, or does not have a duty to discover, certain evidence until after the trial ends, then there can be no *Brady* claim against it even if exculpatory evidence later surfaces. Several circuits have adopted this commonsense conclusion. *See, e.g.*, *United States v. Barroso*, 719 F. App'x 936, 941 (11th Cir. 2018) (no *Brady* violation when "there is no evidence the government possessed that information prior to trial, much less suppressed it"); *United States v. Edwards*, No. 97-5113, 1998 WL 172617, at *2 (10th Cir. Apr. 14, 1998) ("The government's obligation under *Brady* cannot apply to evidence not in existence at the time of the criminal proceeding."); *United States v. Dimas*, 3 F.3d 1015, 1019 n.3 (7th Cir. 1993) ("[L]ater developments in the investigation, if any, are irrelevant because the question is whether the result would have changed if the prosecutors disclosed the evidence at the time [of trial], not whether the outcome would differ if the case were tried today.").

We agree. Martinez's trial ended on September 26, 1997, and Fryer was not charged with drug use until February 5, 1998. Even assuming Maricopa County prosecutors had a duty to discover the charges brought against Fryer by Gila County, that duty did not arise until after Martinez's trial. Martinez identifies nothing else in the record that suggests the prosecution knew of Fryer's alleged drug use before the end of Martinez's trial. Because the prosecution does not have an obligation under *Brady* to

disclose exculpatory evidence it discovers after trial, Martinez fails to establish cause.

B. Benefits Bestowed on Fryer

Martinez also alleges that the prosecution "withheld evidence concerning benefits conferred on Fryer." He argues that, because Fryer testified against Martinez, he was not charged for several crimes, including making a false report to law enforcement, a domestic violence incident, and possessing drug paraphernalia. Martinez also argues that Fryer's testimony caused the prosecution not to seek several sentencing enhancements against Fryer.

Martinez's contentions, however, are wholly speculative. He does not identify any evidence that shows Fryer was not charged with crimes or that he was otherwise treated favorably because of his testimony. Instead, Martinez's argument relies on the baseless theory that "[k]eeping Fryer happy prior to Martinez's capital sentencing hearing was necessary to prevent any possibility Fryer might recant his trial testimony." We require more to establish a *Brady* violation. *See, e.g.*, *Benn*, 283 F.3d at 1057–58 (evidence that the prosecution's key witness was released from jail during the defendant's trial when he called the prosecutor); *Singh v. Prunty*, 142 F.3d 1157, 1162 (9th Cir. 1998) (evidence of an agreement to provide benefits to witness).

The only evidence of an agreement that Martinez identifies is Fryer's 1997 plea agreement, which required him "to cooperate with [the] [Maricopa] county attorney's office in the prosecution of [Martinez's] case." That plea agreement, however, was disclosed to Martinez and introduced at his trial. Indeed, Martinez cross-examined Fryer about the plea agreement and used it to impeach his

testimony. That evidence, therefore, cannot support a *Brady* violation.

Because Martinez has failed to demonstrate that the prosecution withheld any evidence of benefits conferred on Fryer in exchange for his testimony against Martinez, he fails to establish cause to overcome the procedural default of his *Brady* claim. Accordingly, we affirm the district court's denial of that claim.

IV. Rule 60(b) Motion

After the district court denied Martinez's habeas petition and his motion to alter or amend the judgment, but before Martinez filed his opening brief in this court, Martinez filed a motion styled "request for indication whether [the] district court would consider a rule 60(b) motion." The district court denied that motion. After we later remanded the case, Martinez filed a renewed request for indication of whether the district court would consider a Rule 60(b) motion for reconsideration. The court denied that motion, and Martinez appeals.

We lack jurisdiction to review the district court's denial of Martinez's motion. Our decision in *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000), is controlling. There, we stated:

> While this appeal was pending Defenders filed a motion under Federal Rule of Civil Procedure 60(b) . . . . On September 23, 1998, the district court issued an order declining to entertain or grant the Rule 60(b) Motion. A district court order declining to entertain or grant a Rule 60(b) Motion is a procedural ruling and not a final

> determination on the merits. Because there is no final judgment on the merits, the underlying issues raised by the 60(b) Motion are not reviewable on appeal.

Bernal, 204 F.3d at 930 (citation omitted).

That is precisely what happened here. The district court declined to consider Martinez's Rule 60(b) motion. Because that order was a procedural ruling, it is not reviewable on appeal. *See Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984) ("[I]f the district court's order is construed as a denial of Scott's request to 'entertain' the motion to vacate, that denial is interlocutory in nature and not appealable."). As a result, we dismiss Martinez's claim appealing the denial of his request to consider a Rule 60(b) motion.

V. Jury Instruction on Premeditation

Martinez contends that the court erred in instructing the jury about what the government needed to establish to demonstrate that Martinez committed first-degree murder. In reading the instructions, the court stated, in relevant part:

> The crime of first degree murder requires proof of the following[:] . . . number three, the defendant acted with premeditation. "Premeditation" means that the defendant's intention or knowledge existed before the killing long enough to permit reflection; however, the reflection differs from the intent or knowledge that conduct will cause death. It may be as instantaneous as successive thoughts in the mind, but it must be actual reflection, and it may be actual reflection, and it may be proved by direct or [circumstantial]

> evidence. It is this period of reflection regardless of its length which distinguishes first degree murder from intentional or knowing second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

Martinez contends that the instruction was flawed in two ways. First, he argues that the instruction was erroneous under Arizona law because it did not require the jury to find that Martinez actually reflected before murdering Officer Martin. Second, he argues that the court's oral instruction that premeditation "must be actual reflection, and it may be actual reflection" was an "ambivalent statement [that] permitted Martinez's jury to find the element of premeditation on less than proof beyond a reasonable doubt." We reject both arguments.

When a challenge to jury instructions comes before us in a habeas petition, "[t]he only question . . . is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). "[T]he instruction . . . must be considered in the context of the instructions as a whole and the trial record." *Id.* "If the charge as a whole is ambiguous, the question is whether there is a 'reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.'" *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (per curiam) (quoting *Estelle*, 502 U.S. at 72). A "reasonable likelihood" is lower than "more likely than not" but higher than a mere "possibility." *See Boyde v. California*, 494 U.S. 370, 380 (1990).

Martinez relies heavily on *State v. Ramirez* to support his first argument, but the facts in that case are distinct. 945 P.2d 376 (Ariz. Ct. App. 1997). There, the premeditation instruction stated: "[T]he time for reflection must be longer than the time required merely to form the knowledge that conduct will cause death. It may be as instantaneous as successive thoughts in the mind, and it may be proven by circumstantial evidence." *Id.* at 378. The court held that the instruction erred in two ways. First, it "fail[ed] to be clear that premeditation requires actual reflection." *Id.* Second, the instruction stated that the time for reflection can be "'instantaneous as successive thoughts in the mind' but provided no balancing language to the effect that an act cannot be both impulsive and premeditated." *Id.*

Neither of those errors was present in the jury instructions in this case. Unlike in *Ramirez*, the court specifically instructed that premeditation requires "actual reflection." And whereas the instruction in *Ramirez* did not provide balancing language stating that an act cannot be impulsive and premeditated, the instruction here did provide such language: It stated that "[a]n act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion." That statement conveyed to the jury that Martinez could not be found guilty of first-degree murder if they believed he acted impulsively. Even if we assume that the jury instructions were somehow erroneous, Martinez is not entitled to relief, for he has not shown that the premeditation instruction "so infected the entire trial that the resulting conviction violate[d] due process." *Cupp*, 414 U.S. at 147.

Martinez's second argument also falls short. He relies on the fact that the court erroneously stated that the reflection required for a finding of premeditation "may be actual

reflection" after saying that it "must be actual reflection" when reading the instructions to the jury. Such an oral hiccup, however, did not violate Martinez's due process rights. Before the court read the instructions, the bailiff distributed copies of the jury instructions to each juror, and the court told them that they could "read along." The written instructions correctly stated that the jury *had* to find that Martinez reflected before murdering Officer Martin. Considering the totality of the circumstances—the jury possessed copies of the instructions, the court correctly read the phrase in the instructions (before misreading it), and the prosecution twice stated during closing arguments that premeditation requires actual reflection—we conclude that the court's oral misstatement did not cause Martinez's conviction to violate due process. *See Estelle*, 502 U.S. at 72. We deny Martinez's claim challenging the jury instructions.

VI. Ineffective Assistance of Counsel (Failure to Retain Pathologist)

In his federal habeas petition, Martinez argued for the first time that his trial counsel was constitutionally deficient by failing to retain an independent pathologist to impeach a prosecution expert's testimony. The district court denied his claim because it was procedurally defaulted and Martinez had not established prejudice to overcome the default.

At trial, Dr. Phillip Keen, the Maricopa County Chief Medical Examiner, testified about the results of an autopsy on Officer Martin. He told the jury that, of the shots to Officer Martin's hand, back, neck, and head, the shot to his head was fired last and may have occurred when Officer Martin was already lying on the ground.

Martinez argues that, had his counsel retained an independent pathologist to impeach Dr. Keen's testimony about the sequence of shots, the prosecution's theory of premeditation would be undermined. Martinez concedes that his IAC claim is procedurally defaulted, but contends that he can overcome that procedural default under *Martinez v. Ryan*.

In *Martinez*, the Supreme Court held that where a petitioner fails to raise an IAC claim in state court, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial" if (1) "state law requires prisoners to raise claims of ineffective assistance of trial counsel 'in an initial-review collateral proceeding,'" and (2) "the default results from the ineffective assistance of the prisoner's counsel in the collateral proceeding." *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (quoting *Martinez*, 566 U.S. at 16–17). To show that his claims are "substantial," a petitioner must demonstrate that they have "some merit." *Martinez*, 566 U.S. at 14. The parties do not dispute that Arizona law required Martinez to raise his IAC claim in a collateral proceeding, so our analysis focuses on whether Martinez's PCR counsel was ineffective. *Id.* at 4. That necessarily requires us to evaluate the strength of Martinez's underlying IAC claim. *See Atwood v. Ryan*, 870 F.3d 1033, 1060 (9th Cir. 2017).

Martinez's trial counsel was not ineffective because, even if the retention of an expert would have undermined the prosecution's theory of premeditation, Martinez was not prejudiced. There is not a reasonable probability that the jury would have reached a different verdict had Martinez's counsel retained an independent pathologist. There was

significant evidence in the record supporting a finding that Martinez acted with premeditation.

Fryer testified that, before the shooting, Martinez told him he had a warrant out for his arrest. When Martinez revealed a handgun from underneath his shirt, Fryer asked Martinez what it was for, to which Martinez responded "for protection and if shit happens." When Fryer saw a police car and asked Martinez what he would do if he was stopped by the police, Martinez responded that "he wasn't going back to jail." When he was pulled over by Officer Martin, Martinez was driving a stolen vehicle—a fact which he did not dispute during trial. These facts all support the prosecution's argument that Martinez planned to murder Officer Martin before he shot him.

Moreover, Dr. Keen's testimony was relatively weak evidence of premeditation. The prosecution argued that his testimony supported a finding that Martinez shot Officer Martin "when he was down" as a "coup de grace." But the only portion of Dr. Keen's testimony supporting that assertion was his testimony that he believed Officer Martin's "head wound was last." Dr. Keen qualified that testimony by stating that it relied on hypothetical possibilities and assumptions based on the evidence. The jury considered those qualifications when assessing the reliability of Dr. Keen's testimony.

Martinez's impeachment of Dr. Keen also underscores our conclusion that Martinez did not suffer prejudice. Upon questioning by Martinez, Dr. Keen conceded that the opinions he expressed at trial conflicted with what he had said during a pretrial interview, in which he stated that "the head, hand, and neck could have been [shot] at any sequence with the back being the last shot." Dr. Keen also admitted that he had previously concluded that Officer Martin was

standing when he was shot. Even without the testimony of an opposing expert, therefore, the veracity and reliability of Dr. Keen's testimony was undermined.

Because of the limited value of Dr. Keen's testimony in the prosecution's case for premeditation, and because of the significant other evidence presented at trial supporting premeditation, Martinez's trial counsel's failure to retain an independent expert did not prejudice Martinez. Martinez therefore cannot establish that his PCR counsel was ineffective for failing to raise the IAC claim. Because Martinez fails to overcome the procedural default of his IAC claim, we affirm the district court's denial of that claim.

VII. Ineffective Assistance of Counsel (Failure to Rebut the Prosecution's Expert During Sentencing)

Martinez also argued, again for the first time in his habeas petition, that his trial counsel was deficient for a different reason: He failed to recall an expert at sentencing to rebut testimony by another expert retained by the prosecution. He argues that he can establish cause and prejudice under *Martinez v. Ryan* to overcome the procedural default of this claim.

At sentencing, Dr. Susan Parrish, an expert psychologist retained by Martinez, testified that Martinez's shooting of Officer Martin resulted from Martinez's post-traumatic stress disorder (PTSD). Dr. Parrish testified that Martinez demonstrated characteristics commonly "associated with someone who comes from an environment where there was a prolonged exposure to violence," "[i]mpulsivity or failure to plan," "[i]rritability and aggressiveness," and "[r]eckless disregard for [the] safety of self and others." Based on her diagnosis, Dr. Parrish testified that she believed Martinez's

actions on the day of the shooting were "really more reactive." She testified that Martinez "felt he had no choice" but to shoot Officer Martin.

In rebuttal, the prosecution presented testimony by Dr. Michael Bayless, another expert psychologist. Dr. Bayless disagreed with Dr. Parrish's diagnosis of PTSD. He testified that Martinez suffered from antisocial personality disorder, and thus "understands the rules and regulations. He just chooses not to abide by them." Dr. Bayless testified that Martinez killed Officer Martin "because he didn't want to go back to prison."

Martinez argues that, had his counsel recalled Dr. Parrish to rebut Dr. Bayless's testimony, Dr. Parrish could have established that Martinez was unable to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. That evidence would create "a reasonable probability the Arizona Supreme Court would have found [a] statutory mitigating factor [pursuant to A.R.S. § 13-703(G)(1)] and imposed a life sentence," rather than affirm Martinez's death sentence.

Because of the overwhelming evidence introduced at sentencing that Martinez could appreciate the wrongfulness of his conduct, we conclude that Martinez does not establish prejudice, and thus that he cannot overcome the procedural default of his IAC claim. Even if Martinez's trial counsel had recalled Dr. Parrish to refute Dr. Bayless's testimony, the sentencing court likely would have concluded that Martinez had not established the statutory mitigating circumstance in § 13-703(G)(1).

When sentencing Martinez, the court recognized the inconsistency between the testimony of Dr. Parrish and Dr. Bayless. The court determined, however, that "[Martinez]

killed Officer Martin because he did not want to return to prison as a result of a probation violation warrant." The court recounted several pieces of evidence that supported such a finding: Martinez told Fryer that he had a warrant out for his arrest and would not go back to prison; Martinez told Fryer he had a gun in case something happened; Martinez took Officer Martin's service weapon after murdering him; and Martinez committed another murder shortly after murdering Officer Martin. As the court explained, "[t]hese choices belie the notion that the homicide of Officer Martin was the result of being in a dissociative state or a mere impulsive reaction."

Moreover, Dr. Parrish's rebuttal testimony would not necessarily have established the statutory mitigating circumstance, and thus would not have entitled Martinez to relief. Dr. Parrish's testimony focused on why Martinez's murder of Officer Martin resulted from PTSD. But in Arizona, "a mere character or personality disorder alone is insufficient to constitute a mitigating circumstance." *State v. Brewer*, 826 P.2d 783, 802 (Ariz. 1992); *see also State v. Clabourne*, 983 P.2d 748, 754 (Ariz. 1999) ("In every case in which we have found the (G)(1) factor, the mental illness was 'not only a substantial mitigating factor . . . but a *major contributing cause* of [the defendant's] conduct that was "sufficiently substantial" to outweigh the aggravating factors present.'" (alterations in original) (quoting *State v. Jimenez*, 799 P.2d 785, 800 (Ariz. 1990))). Accordingly, the other evidence in the record was sufficient to support the sentencing court's conclusion that Martinez failed to establish the statutory mitigating circumstance in § 13-703(G)(1).

Because of the significant evidence introduced at sentencing establishing that Martinez could appreciate the

wrongfulness of his conduct and conform his conduct to the requirements of the law, Martinez was not prejudiced by his counsel's failure to recall an expert to rebut the prosecution's witness. Martinez's PCR counsel was therefore not ineffective for failing to raise that claim. Because Martinez cannot overcome the procedural default of his IAC claim, we affirm the district court's denial of that claim.

VIII. Application of the Causal Nexus Test During Sentencing

Martinez next argues that the Arizona State Court applied a "causal nexus" test, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), under which a circumstance is not mitigating unless causally connected to the commission of the crime. He contends that the court's failure to consider his family history as a mitigating circumstance was an unreasonable application of clearly established federal law.

The Supreme Court has held that "a State [cannot], consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Eddings*, 455 U.S. at 113; *Lockett v. Ohio*, 438 U.S. 586, 606–08 (1978). "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry*, 492 U.S. at 319.

As a result, a sentencing court may not treat mitigating evidence of a defendant's background or character as

"irrelevant or nonmitigating as a matter of law" just because it lacks a causal connection to the crime. *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir. 2012), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). The sentencer may, however, consider "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011), *overruled on other grounds by McKinney*, 813 F.3d 798. "[T]he use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence." *Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2011), *overruled on other grounds by McKinney*, 813 F.3d 798. As the Court explained in *Eddings*:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

455 U.S. at 113–15.

These principles bear on Martinez's case. In *McKinney*, we held that "[f]or a little over fifteen years [beginning in the late 1980s], the Arizona Supreme Court routinely articulated

and insisted on [an] unconstitutional causal nexus test."[3] 813 F.3d at 815. Under this test, "[a]s a matter of law, a difficult family background or mental condition did not qualify as a nonstatutory mitigating factor unless it had a causal effect on the defendant's behavior in committing the crime at issue." *Id.* at 816. The Arizona Supreme Court "finally abandoned its unconstitutional causal nexus test for nonstatutory mitigation" in the mid-2000s. *Id.* at 817. *McKinney* included a string cite of cases in which the Arizona Supreme Court had applied its unconstitutional causal nexus test, which included Martinez's case. *Id.* at 816.

Here, the Arizona Supreme Court stated:

> The trial court found that Martinez'[s] family background qualified as a non-statutory mitigating factor, but did not give it substantial weight . . .
>
> Although Dr. Parrish testified that Martinez adopted a "survival" state of mind due to his violent upbringing, this did not affect his conduct on August 15, 1995. There is simply no nexus between Martinez'[s] family history and his actions on the Beeline Highway. His family history, though regrettable, is not entitled to weight as a non-statutory mitigating factor.

[3] "We did not say, however, that [the Arizona Supreme Court] always applied it." *Greenway v. Ryan*, 866 F.3d 1094, 1095 (9th Cir. 2017) (per curiam).

The court's analysis demonstrates that it applied an unconstitutional causal nexus test to Martinez's family history. Because it concluded that there was "no nexus between Martinez'[s] family history and his actions on the Beeline Highway," it granted it no weight. Under *Eddings*, that is erroneous. *See Penry*, 492 U.S. at 318.

Having concluded that AEDPA is satisfied, we review Martinez's claim de novo. *See Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc). Martinez has established a Constitutional violation, so our analysis focuses on whether Martinez was prejudiced. *See Poyson v. Ryan*, 879 F.3d 875, 891 (9th Cir. 2018).

Martinez can establish prejudice if the court's error "had [a] substantial and injurious effect or influence" on the challenged decision. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). He is not entitled to relief, however, unless he can establish that the error "resulted in 'actual prejudice.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht*, 507 U.S. at 637); *see also McKinney*, 813 F.3d at 822.

We determine that Martinez was not prejudiced by the court's constitutional error. Several considerations lead us to that conclusion.

First, the Arizona Supreme Court considered Martinez's family history in its analysis of another mitigating factor: impaired capacity. In that section of its opinion, the court recounted Martinez's "violent childhood," which included "Martinez and his sister, Julia, both suffer[ing] physical abuse at the hands of their father. . . . To protect himself, Martinez began sleeping with a knife." The court also recounted Dr. Parrish's testimony that, on the day he was

stopped by Officer Martin, "Martinez probably thought, 'I'm not going back to prison. This man intends to put me in prison. It's me or him [sic].'" Accordingly, the court appears to have considered the family history evidence Martinez argues they should have considered—albeit in the context of a different mitigating circumstance—and decided not to assign that family history great weight. Such a conclusion did not violate the Constitution. *See Hedlund v. Ryan*, 854 F.3d 557, 587 n.23 (9th Cir. 2017) (stating that, under *Eddings*, "a court is free to assign less weight to mitigating factors that did not influence a defendant's conduct at the time of the crime"); *Styers v. Ryan*, 811 F.3d 292, 298–99 (9th Cir. 2015) (holding that the Arizona Supreme Court did not violate *Eddings* in assigning little weight to the petitioner's PTSD when it lacked a causal connection to the crime).

Second, although we review the Arizona Supreme Court's decision, the sentencing court's analysis is instructive.[4] There, the court "considered family history," but concluded that it should "not [be] given substantial weight." The sentencing court reasoned that "the domestic violence and parental drug abuse ended 7 or 8 years before the murder when [Martinez's] father became very religious . . . . [Martinez's] mother testified that the parental drug

[4] The last reasoned state court decision addressing Martinez's causal nexus claim is the Arizona Supreme Court's decision affirming Martinez's death sentence on direct appeal. *See Crittenden v. Ayers*, 624 F.3d 943, 950 (9th Cir. 2010). "We look to the decision of the sentencing judge only to the degree it was adopted or substantially incorporated by the Arizona Supreme Court." *McKinney*, 813 F.3d at 819. Because the Arizona Supreme Court reviewed Martinez's sentence de novo and does not appear to have adopted the sentencing judge's reasoning, we review only the Arizona Supreme Court's decision.

abuse was kept from the children and that it ended when they moved to Globe." This analysis illustrates how an objective factfinder would have ruled had the Arizona Supreme Court not committed an *Eddings* error. *See Kayer v. Ryan*, 923 F.3d 692, 724 (9th Cir. 2019). Because Martinez's violent family history was far removed from the murder, we conclude that the court would have accorded it little weight as a mitigating circumstance.

Third, this case is distinct from other cases in which we have found prejudice. In *Poyson v. Ryan*, for example, the Arizona Supreme Court "improperly disregarded evidence concern[ing] the defendant's traumatic childhood and mental health issues." 879 F.3d at 892. We found that evidence—that the defendant had "suffered a number of physical and developmental problems as a child," was "involuntarily intoxicated as a young child," was "lured to the home of a childhood friend and violently raped," and had survived the suicide of "the one true father figure" he had—"particularly compelling." *Id.* at 892–93. The evidence of Martinez's family history, although unfortunate, is not so grim. Martinez does not claim to have suffered from mental health issues and endured significantly less frequent and severe physical abuse as a child.

Our decision in *Spreitz v. Ryan* is also distinct. 916 F.3d 1262 (9th Cir. 2019). There, we found prejudice when the court disregarded "evidence regarding [the defendant's] history of alcohol and substance abuse—spanning nearly half his life by the time when he committed the crime at the age twenty-two." *Id.* at 1279. Critically, we stated that the mitigating evidence was "linked to his emotional immaturity, another nonstatutory mitigating circumstance recognized by the Arizona Supreme Court but described as not 'significant.'" *Id.* at 1280 (quoting *State v. Spreitz*,

945 P.2d 1260, 1281 (Ariz. 1997)). The court's erroneous application of the unconstitutional nexus standard therefore "minimized the value of other mitigating evidence as well." *Id.* at 1281.

Not so here. As we have already noted, the court recounted and considered Martinez's family when considering other mitigating factors. Martinez's family history bore no connection to his age, the other statutory mitigating factor considered by the Arizona Supreme Court. Unlike *Spreitz*, therefore, the Arizona Supreme Court was not "left with a critical void in [Martinez's] narrative" because of its nexus rule; it considered Martinez's family history in other contexts and granted it little weight. *Id.* at 1281.

We also note that this case involves an aggravating factor absent from cases in which we have found *Eddings* error: The murder of an on-duty peace officer. *See* A.R.S. § 13-703(F)(10). That factor, as the sentencing court noted, "carries significant weight. The unprovoked murder of a peace officer, so the defendant can avoid his obligation under the law, is really no less than a personal declaration of war against a civilized society." The substantial weight of that aggravating factor leads us to believe that Martinez's family history, had it been considered a mitigating factor, would not have affected his death sentence.

Because Martinez cannot demonstrate that the *Eddings* error had a substantial and injurious effect on his sentence, he cannot establish prejudice. Accordingly, Martinez is not entitled to relief.

IX. Expansion of the Certificate of Appealability

Martinez asks us to issue a COA as to one *Brady* claim that the district court declined to certify. We may not issue a COA unless the applicant "make[s] a substantial showing of the denial of a constitutional right, a demonstration that . . . includes 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.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Because Martinez's *Brady* claim relates to evidence of premeditation, and because we conclude that overwhelming evidence supported the prosecution's theory of premeditation, we decline to issue a COA.

X. Motion to Stay Appeal and Remand for Consideration of *Brady* Claim

Having concluded that Martinez is not entitled to habeas relief, we turn to his motion to remand. Martinez argues that remand is warranted so the district court can consider "a red [w]eekly [p]lanner belonging to, and annotated by, Mario Hernandez, a prosecution witness at Martinez's . . . trial." He contends that the planner, which Martinez discovered after it was introduced into evidence during his separate murder trial in California, demonstrates "that Hernandez learned of Martinez's arrest for the homicide of Officer Martin from watching television news at 2:30 a.m. on August 17, 1995 . . . rather than from a phone call Hernandez purportedly answered from Martinez earlier that morning." Martinez argues that the planner would have impeached Hernandez's testimony that he answered a call from Martinez earlier that morning in which Hernandez said he "got busted for blasting a jura." He concedes that "there was

little question at the Arizona trial as to whether Martinez was responsible for the officer's death," and argues only that the planner would have proven a lack of premeditation.

We decline to remand because, even if the prosecution failed to disclose the planner to Martinez, the withheld evidence did not prejudice Martinez. As we have concluded, overwhelming evidence supported the prosecution's argument that Martinez acted with premeditation.

Other considerations also support our decision to deny Martinez's motion to remand. Martinez argues that introduction of the planner would have demonstrated that he did not call Hernandez after the murder, but Martinez introduced other evidence at trial to support that same argument. Martinez summarized that evidence during his closing argument: "[T]here is a problem with what [Hernandez and Moreno] claim[] to have heard Mr. Martinez say in a telephone call." Martinez told the jury that, although he allegedly called Hernandez around 1:00 a.m., "[w]e know from several witnesses that at 1:00 o'clock Mr. Martinez is still at the Indio County jail, and he's in an interview room there somewhere." He asked the jury "if [it] makes any sense at all that [the police] would give [] Martinez a telephone without any supervision at all . . . . isn't it a reasonable inference . . . that some officer would have overheard what was being said?" Martinez also argued that Moreno, who testified about the call during Martinez's trial, had "a motive to lie" and "a motive to want to hurt [] Martinez." Admission of the journal may have helped Martinez further undermine the evidence of his phone call, but it wouldn't have added much.

That is so because the journal is weak impeachment evidence of the testimony that Martinez called Hernandez after Officer Martin's murder. Even if Hernandez's journal

entry is accurate and he learned of Martinez's arrest on the television news at 2:30 a.m., that doesn't necessarily mean Martinez didn't call him in the early morning hours after the murder. Perhaps Hernandez was simply mistaken about the time of the call—indeed, during trial, Hernandez testified that he referred to Martinez's arrest on television while speaking to Martinez, suggesting that he found out about Hernandez's arrest from television. Or perhaps the journal entry demonstrates that Hernandez saw Martinez's arrest on television after speaking to Martinez by phone. In short, the value of the journal as impeachment evidence isn't nearly as probative as Martinez makes it out to be.

For these reasons, Martinez cannot establish that the planner was material evidence. We decline to remand.

CONCLUSION

We **AFFIRM** the district court's denial of a writ of habeas corpus as to Martinez's claims relating to his first-degree murder conviction and death sentence and **DISMISS** for lack of jurisdiction Martinez's claim that the court erred in denying his request to consider a Rule 60(b) motion. We **DECLINE** to expand the COA. We also **DENY** Martinez's motion to stay the appeal and remand for consideration of another *Brady* claim.

FILED

SEP 10 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNESTO SALGADO MARTINEZ, Petitioner-Appellant, v. CHARLES L. RYAN, Respondent-Appellee.	No. 08-99009 D.C. No. 2:05-cv-01561-EHC District of Arizona, Phoenix ORDER

Before: McKEOWN, W. FLETCHER, and M. SMITH, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Ernesto Salgado Martinez, Petitioner, vs. Dora Schriro, et al., Respondents.	No. CV-05-1561-PHX-EHC DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Petitioner Ernesto Salgado Martinez, a state prisoner under sentence of death, has filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced in violation of the United States Constitution. (*See* Dkt. 30.)[1] Pursuant to the Court's general procedures governing resolution of capital habeas proceedings, the parties have completed briefing of both the procedural status and the merits of Petitioner's claims. (Dkts. 50, 57.) Petitioner has also filed several motions for evidentiary development as to numerous claims. (Dkts. 62, 74, 80, 85.) This order addresses each of Petitioner's pending claims and determines that he is not entitled to federal habeas relief.

[1] "Dkt." refers to the documents in this Court's case file.

FACTUAL AND PROCEDURAL BACKGROUND

In 1997, a jury convicted Petitioner of theft, weapons-related charges, and first-degree murder for the killing of Robert Martin, a Department of Public Safety Officer who had stopped Petitioner on the Beeline Highway between Mesa and Payson, Arizona. Following an aggravation/mitigation hearing, the sentencing judge found that the State had proven two aggravating circumstances: that Petitioner was previously convicted of a serious offense, pursuant to A.R.S. § 13-703(F)(2); and that the victim was an on-duty peace officer who was killed in the course of performing his official duties, under A.R.S. § 13-703(F)(10). The judge found insufficient mitigation to warrant leniency and sentenced Petitioner to death for the murder and to terms of imprisonment on the other counts. The Arizona Supreme Court affirmed on direct appeal, and the United States Supreme Court denied certiorari. *State v. Martinez*, 196 Ariz. 451, 999 P.2d 795, *cert. denied*, 531 U.S. 934 (2000).

The Arizona Supreme Court provided the following description of the events surrounding the offense:

> Martinez drove from California to Globe, Arizona in a stolen blue Monte Carlo to visit friends and family. After learning that his parents had moved to Payson, Arizona, Martinez met his friend Oscar Fryer. Fryer asked Martinez where he had been. Martinez told Fryer that he had been in California. Fryer then asked Martinez if he was still on probation. Martinez responded that he was on probation for eight years and had a warrant out for his arrest. Martinez then pulled a .38 caliber handgun with black tape on the handle from under his shirt and showed it to Fryer. Fryer asked Martinez why he had the gun, to which Martinez responded, "[f]or protection and if shit happens." Tr. Sept. 9, 1997 at 83. Fryer then asked Martinez what he would do if he was stopped by the police. Martinez told Fryer, "he wasn't going back to jail." *Id.* at 85.
>
> Sometime after his conversation with Fryer, Martinez left Globe and drove to Payson. On August 15, 1995, at approximately 11:30 a.m., Martinez was seen at a Circle K in Payson. He bought ten dollars worth of gas and proceeded south down the Beeline Highway toward Phoenix. Martinez was driving extremely fast and passed several motorists, including a car driven by Steve and Susan Ball. Officer Martin was patrolling the Beeline Highway that morning and pulled Martinez over at Milepost 195. Steve and Susan Ball saw Officer Martin's patrol car stopped behind Martinez' Monte Carlo and commented, "Oh, good, he got the speeding ticket." Tr. Sept. 10, 1997 at 32. As they passed by, Susan Ball noticed Officer Martin standing at the driver's side door of the Monte Carlo while Martinez looked in the backseat.
>
> Shortly after Steve and Susan Ball passed, Martinez shot Officer Martin four times with the .38 caliber handgun. One shot entered the back of Officer

Martin's right hand and left through his palm. Another shot passed through Officer Martin's neck near his collar bone. A third shot entered Officer Martin's back, proceeded through his kidney, through the right lobe of his liver, through his diaphragm, and lodged in his back. A fourth shot entered his right cheek, passed through his skull, and was recovered inside Officer Martin's head. The hand and neck wounds were not fatal. The back and head wounds were.

After murdering Officer Martin, Martinez took Officer Martin's .9mm Sig Sauer service weapon and continued down the Beeline Highway at speeds over 100 mph. Martinez again passed Steve and Susan Ball, which they found strange. They began discussing how not enough time had passed for Martinez to have received a speeding ticket because it had only been a couple of minutes since they had seen him pulled over. They stayed behind Martinez for some time and watched him go through a red light at the Fort McDowell turnoff. Steve Ball commented, "Yeah, he just ran that red light. Something is up here. Something is going on." Tr. Sept. 10, 1997 at 69. Steve and Susan Ball continued down the Beeline Highway and lost sight of Martinez until they reached Gilbert Road. At the red light on Gilbert Road, they caught up to him and took down his license plate.

Martinez passed through Phoenix and arrived in Blythe, California at around 4:00 p.m. where he called his aunt for money. At 6:00 p.m., Martinez called his aunt again because she failed to wire the money he requested. Growing impatient, at approximately 8:00 p.m., Martinez entered a Mini-Mart in Blythe and, at gunpoint, stole all of the $10 and $20 bills from the register. Martinez killed the clerk with a single shot during the robbery.[FN1] A .9mm shell casing was recovered at the Mini-Mart the following day. Ballistics reports determined that this shell casing was consistent with the ammunition used in Officer Martin's .9mm Sig Sauer.

FN1: The trial court excluded evidence of the murder under Rule 403, Ariz. R. Evid.

Later that night, Martinez drove to his cousin's house in Coachella, California, near Indio. Around 12:00 p.m. the next day, August 16, 1995, Martinez took David Martinez, his cousin, and Anna Martinez, David's wife, to a restaurant in Indio. After leaving the restaurant, Martinez noticed that a police car was following him. David asked Martinez if the car was stolen to which Martinez responded, "I think so." Tr. Sept. 15, 1997 at 146-47. Martinez turned onto a dirt road and instructed David and Anna to get out of the car. They left the car and went to a nearby trailer compound to call Anna's aunt to come and get them.

Tommy Acuna,[FN2] who lived in his grandmother's house at the compound, was swimming when David and Anna appeared at the fence surrounding the compound. David and Anna asked Tommy if they could use his phone but Tommy refused. Tommy did permit Anna to use the bathroom. Anna went into the bathroom and came out a couple of minutes later. After showing David and Anna out, Tommy went back to the bathroom "to see if they left anything in there because she wasn't in there that long." Tr. Sept. 16, 1997 at 48. He found a towel on the floor with the .38 caliber handgun wrapped inside. Tommy took the gun, hid it in his pants, and walked outside. He testified that he hid the gun because it was his grandmother's house. By the time Tommy walked outside, the police had surrounded the compound. An

> officer monitoring the perimeter called out to Tommy and told him that he was going to search him. Tommy walked over to the officer and exclaimed, "I have got the murder weapon." Tr. Sept. 15, 1997 at 192. The officer searched Tommy and found the .38 caliber handgun. This gun was later identified as the weapon that fired the bullets which killed Officer Martin.
>
> FN2: Tommy's brother Johnny Acuna was a friend of Martinez.
>
> After David and Anna got out of the Monte Carlo, Martinez turned around on the dirt road. Another police car appeared on the scene and headed towards Martinez. Martinez saw this second police car, left the Monte Carlo, ran toward the trailer compound, and jumped the fence. He then ran into Johnny Acuna's trailer.
>
> The SWAT team evacuated the area and tried to communicate with Martinez. After those attempts failed, the SWAT team negotiator threatened to use tear gas. Martinez responded, "I am not coming out; you will have to come in and shoot me." Tr. Sept. 17, 1999 at 23. After further negotiations, however, Martinez agreed to come out and was taken into custody.
>
> While in custody, Martinez called his friend, Eric Moreno, and laughingly told Moreno that "he got busted for blasting a jura."[FN3] Tr. Sept. 15, 1997 at 13. Martinez also told Moreno that a woman on the highway might have seen what had happened. They talked about the guns and Martinez told Moreno that one of the guns had been "stashed." *Id.* at 21. After obtaining a warrant, the police searched Johnny Acuna's trailer and found Officer Martin's .9mm Sig Sauer under a mattress.
>
> FN3: "Jura" is slang for police officer. Tr. Sept. 15, 1997 at 13.

Martinez, 196 Ariz. at 453-55, 999 P.2d at 797-99.

In 2002, Petitioner initiated state post-conviction relief ("PCR") proceedings pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. An amended petition was filed in June 2003. In August 2004, the trial court denied PCR relief. On May 24, 2005, the Arizona Supreme Court summarily denied a petition for review.

Petitioner filed an initial petition for habeas corpus relief with this Court on May 25, 2005, and an amended petition on May 23, 2006. (Dkts. 1, 30.) The amended petition raised twenty-five claims for relief. After Respondents filed an Answer, Petitioner filed a Traverse that withdrew Claims 3, 14, 18, 19, 20, 21 (in part), and 25. Petitioner thereafter filed a motion for evidentiary development of Claims 1, 2, 4, 9, 11, 12, 16, 17, and 21. (Dkt. 62.) Subsequently, Petitioner filed two supplemental motions relating to evidentiary development of Claim 4, as well as a motion to file additional evidence in support of his request for discovery relating to Claim 1. (Dkts. 74, 80, 85.)

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). If a habeas claim includes new factual allegations not presented to the state court, it may be considered unexhausted if the new facts "fundamentally alter" the legal claim presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Exhaustion requires that a petitioner clearly alert the state court that he is alleging a specific federal constitutional violation. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004); *see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (general appeal to due process not sufficient to present substance of federal claim); *Lyons v. Crawford*, 232 F.3d 666, 669-70 (2000), *as amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence, right to be tried by impartial jury, and ineffective assistance of counsel lacked specificity and explicitness required); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion."). A petitioner must make the federal basis of a claim explicit either by citing specific provisions of federal law or case law, *Lyons*, 232 F.3d at 670, or by citing state cases that plainly analyze the federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc); *cf. Fields v. Washington*, 401 F.3d 1018, 1022 (9th Cir. 2005) (mere citation to a state case that conducts both a state and federal law analysis does not, by itself, satisfy exhaustion).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and post-conviction relief (PCR) proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been

raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. The procedural bar relied on by the state court must be independent of federal law and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). A state procedural default is not independent if, for example, it depends upon a federal constitutional ruling. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam). A state bar is not adequate unless it was firmly established and regularly followed at the time of the purported default. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available pursuant to Rule 32, the claim is "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray*, 518 U.S. at 161-62.

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

not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id*. at 753. Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available, and constitutionally ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish prejudice, a habeas petitioner bears the burden of demonstrating "not merely that the errors at his trial constituted a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982).

There are two types of claims recognized under the fundamental miscarriage of justice exception to procedural default: (1) that a petitioner is "innocent of the death sentence," – in other words, that the death sentence was erroneously imposed; and (2) that a petitioner is innocent of the capital crime. In the first instance, the petitioner must show by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 336, 345 (1992). In the second instance, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). To establish the requisite probability, the petitioner must show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id*. The Supreme Court has characterized the exacting nature of an actual innocence claim as follows:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. . . . To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Id. at 324; *see also House v. Bell*, 126 S. Ct. 2064, 2077 (2006).

AEDPA STANDARD FOR RELIEF

Petitioner's habeas claims are governed by the applicable provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh*, 521 U.S. at 333 n.7).

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

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

28 U.S.C. § 2254(d).

The phrase "adjudicated on the merits" refers to a decision resolving a party's claim which is based on the substance of the claim rather than on a procedural or other non-substantive ground. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs

the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 127 S. Ct. 649, 653 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381; *see Musladin*, 127 S. Ct. at 654; *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004). Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark*, 331 F.3d at 1069.

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

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner

must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Landrigan*, 127 S. Ct. at 1939; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Landrigan*, 127 S. Ct. at 1939-40; *Miller-El II*, 545 U.S. at 240. However, it is only the state court's factual findings, not its ultimate decision, that are subject to 2254(e)(1)'s presumption of correctness. *Miller-El I*, 537 U.S. at 341-42 ("The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.").

As the Ninth Circuit has noted, application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. *Pirtle*, 313 F.3d at 1167 (citing *Delgado*, 223 F.3d at 981-82); *see also Himes*, 336 F.3d at 853. Only when a state court did not decide the merits of a properly raised claim will the claim be reviewed de novo, because in that circumstance "there is no state court decision on [the] issue to which to

accord deference." *Pirtle*, 313 F.3d at 1167; *see also Menendez v. Terhune*, 422 F.3d 1012, 1025-26 (9th Cir. 2005); *Nulph v. Cook*, 333 F.3d 1052, 1056-57 (9th Cir. 2003).

DISCUSSION

Claim 1

Claim 1 has several different aspects. First, Petitioner alleges that the trial judge was biased against him because the judge's bailiff was a friend of the victim and the victim's wife. (Dkt. 30 at 7-15.)[2] Second, Petitioner alleges ineffective assistance of counsel ("IAC") at trial and on direct appeal because neither trial counsel nor appellate counsel properly raised the judicial bias claim. (*Id.*) Third, Petitioner alleges that he was denied a fundamentally fair PCR proceeding because even though the trial judge was removed from the case prior to sentencing, that judge later presided at his PCR proceeding. (*Id.*) Finally, Petitioner asserts IAC of PCR counsel for failing to challenge the trial judge for presiding over his PCR proceeding despite having been removed prior to sentencing. (*Id.* at 15.)

Relevant Background

Maricopa Superior Court Judge Jeffrey A. Hotham presided over Petitioner's trial, and Ron Mills was the judge's bailiff. Mr. Mills had a personal relationship with the victim and his widow that spanned almost thirty years. (RT 9/2/97 at 45-56.)[3] During pretrial proceedings, this relationship came to light when defense counsel observed the victim's widow and Mr. Mills exchanging an embrace as they greeted one another. (*Id.* at 43-44.) Prior to jury selection, defense counsel moved to have the bailiff temporarily reassigned for

---

[2] The Court's pinpoint citation to page numbers for documents filed in this civil action refer to the page number of the pleading itself, not the automated page number generated by the District's electronic case filing system.

[3] "RT" refers to the state court reporter's transcript. "ME" refers to the minute entries of the trial court. "ROA" refers to the state court record on appeal filed in Arizona Supreme Court Case No. CR-98-0393-AP. "ROA-PCR" refers to the state court record filed in Arizona Supreme Court Case No. CR-04-0432-PC. Certified copies of the appeal and post-conviction records, along with the original reporter transcripts and appellate briefs, were provided to this Court by the Arizona Supreme Court. (*See* Dkt. 67.)

the duration of the trial, and Judge Hotham held a hearing at which Mr. Mills testified about his relationship with the victim and his wife. (*Id.* at 45-56.) The judge denied the motion, expressing confidence that his bailiff could do his assigned job. (RT 9/3/97 at 4-5; ME 9/3/97.) However, the judge did impose certain conditions on the bailiff with respect to the trial: that he refrain from mentioning his law enforcement background to the jurors and that "he not officially greet or say hello or show any emotion or any kind of sympathy during trial." (*Id.* at 4.)

During trial, following testimony regarding an autopsy of the victim, Judge Hotham informed counsel outside the presence of the jury that he had ordered Mr. Mills not to attend trial that day "so that no one could ever question that my bailiff reacted to the gory photographs in any inappropriate manner and that that would have some effect on the jury." (RT 9/23/97 at 150; ROA 157.) After the close of the evidence, Mr. Mills escorted the jurors to their deliberation room. (RT 9/25/97 at 106.)

After the jury returned guilty verdicts, the bailiff was seen crying in the courtroom and in the hallway outside the courtroom where he was consoled by the victim's widow and family. (ME 12/2/97 at 2.) Although Judge Hotham did not witness Mr. Mills's emotional reaction, defense counsel filed a motion for change of judge for cause. (*Id.*) The presiding criminal judge heard the motion and found no evidence that Judge Hotham could not be fair and impartial. (*Id.*; ROA 161.) Nonetheless, concerned that it might appear Judge Hotham had an interest in the sentencing outcome in light of his bailiff's relationship to the victim's family and noting that "death is different," the presiding judge ruled that the better course was to assign another judge to conduct the sentencing proceedings. (*Id.* at 3-4.) Consequently, Maricopa County Superior Court Judge Christopher Skelley presided at sentencing. However, after Petitioner filed a PCR petition following conclusion of direct appeal proceedings, the matter was reassigned to Judge Hotham, who presided over the PCR proceedings and ultimately ruled on the PCR petition.

IAC Allegations

In his PCR petition Petitioner asserted trial and appellate IAC for failing to argue

judicial bias, and the PCR court denied the claims on the merits. (ROA-PCR 11; ME 8/24/04 at 5.) Although properly exhausted, the Court concludes that the claims are meritless on their face and, therefore, Petitioner's requested evidentiary development is not warranted.

IAC Standard

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry asks whether counsel's assistance was reasonable considering all the circumstances. *Id.* at 688-89. A court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 689.

A petitioner must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To establish prejudice with regard to appellate counsel's representation, there must be a reasonable probability that, but for counsel's failure to raise the claim, Petitioner would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285-86 (2000).

A court need not address both components of the *Strickland* test, or follow any particular order in assessing deficiency and prejudice. *Strickland*, 466 U.S. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice, without evaluating counsel's performance, then that course should be taken. *Id.*

Under the AEDPA, in addition to satisfying both prongs of the *Strickland* standard, Petitioner must make the additional showing that the state court's denial of his IAC claim was contrary to or an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

Discussion

Petitioner argues that trial counsel was ineffective for not filing a motion to recuse Judge Hotham until the penalty phase and that appellate counsel was ineffective for not raising a claim of judicial bias on direct appeal. (Dkt. 30 at 9-15.) In the PCR proceedings, Judge Hotham rejected these allegations:

> The Petitioner has failed to produce evidence that indicates the trial judge's relationship with the bailiff created a situation that was so inherently prejudicial that prejudice to the Petitioner can be presumed, nor has he shown that there was actual prejudice. The Petitioner claims that the Petitioner was not protected from prejudice during the trial by later having a different judge handle the sentencing, but he does not produce evidence of actual prejudice. Without evidence that the trial judge's relationship with the bailiff was such that prejudice can be presumed and without evidence of actual prejudice to the Petitioner, the Petitioner has failed to show that his counsel's representation fell below an objective standard of reasonableness under current professional norms.

(ME 8/24/04 at 5.) This Court concludes that the PCR court's ruling is neither contrary to nor an unreasonable application of *Strickland*.

A defendant is entitled to a fair trial, free from judicial bias. *In re Murchison*, 349 U.S. 133, 136 (1955). A judge must disqualify himself from any proceeding if his impartiality might be reasonably questioned or if he has a personal bias or prejudice concerning a party. *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1387 (1989); *see also* Ariz. R. Crim. P. 10.1(a) ("In any criminal case prior to the commencement of a hearing or trial the state or any defendant shall be entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge."). "Bias or prejudice means a hostile feeling, ill will, undue friendship, or favoritism towards one of the litigants." *Carver*, 160 Ariz. at 172, 771 P.2d at 1387. There is a presumption that judges are unbiased, honest, and have integrity. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). A petitioner may show judicial bias in one of two ways – by demonstrating the judge's actual bias or by showing that the judge had an incentive to be biased sufficiently strong to overcome the presumption of judicial integrity (i.e., a substantial likelihood of bias). *Paradis v. Arave*, 20 F.3d 950, 958 (9th Cir. 1994); *Fero v. Kerby*, 39 F.3d 1462, 1478-79 (10th Cir. 1994).

Other than the fact of the bailiff's relationship with the victim, nothing in the record indicates that the judge was actually biased or had an incentive to be biased. Nor does the record reflect that the bailiff violated Judge Hotham's admonitions to not interact with the victim's family, relay his law enforcement background to the jurors, or have any emotional reaction during trial. The presiding criminal judge considered Petitioner's post-verdict motion to recuse Judge Hotham and found that there was no evidence of actual prejudice or interest. (ME 12/2/97 at 4; ROA 161.) Judge Hotham's removal from the case for sentencing was made out of an abundance of caution because there was an appearance of *potential* interest in the outcome, not because the defendant had established bias or a substantial likelihood of bias. An appearance of interest or prejudice sufficient to support a claim of judicial bias is more than speculation; "[i]t occurs when the judge abandons his judicial role and acts in favor of one party or the other." *Carver*, 160 Ariz. at 173, 771 P.2d at 1388. Because the record did not support such a finding against Judge Hotham, counsel's failure to move for the judge's recusal before trial or to raise this claim on appeal was not deficient. *See U.S. v. Garfield*, 987 F.2d 1424, 1427 (9th Cir. 1993) (finding no deficient performance for not seeking judge's recusal where record revealed no improper bias); *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) ("A failure to raise untenable issues on appeal does not fall below the *Strickland* standard.").

On this record, the Court cannot say that the PCR court's resolution of Petitioner's trial and appellate IAC claims was contrary to or an unreasonable application of controlling Supreme Court law. Accordingly, Petitioner is not entitled to habeas relief on these IAC claims.

Judicial Bias

In his PCR petition, Petitioner argued that Judge Hotham should have recused himself due to the relationship of his bailiff with the victim and the victim's wife. (ROA-PCR 11.) However, the PCR court concluded that Petitioner had waived the claim, pursuant to Ariz. R. Crim. P. 32.2(a)(3), by failing to include it in his direct appeal. (ME 8/24/04 at 4.) This preclusion ruling rests on an independent and adequate state procedural bar. *See Smith*, 536

U.S. at 860 (holding that Arizona's Rule 32.2(a) is independent of federal law); *Ortiz*, 149 F.3d at 931-32 (holding that Arizona's Rule 32.2(a)(3) is an adequate procedural bar). Consequently, federal habeas review of Petitioner's judicial bias claim is barred unless Petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice to excuse the default.[4]

Cause and Prejudice

Petitioner asserts that IAC by his direct appeal counsel provides cause to excuse the procedural default of his judicial bias claim. (Dkt. 57 at 4, 11.) As just discussed, the Court has concluded that this IAC allegation is meritless. Therefore, appellate IAC does not excuse the default of Petitioner's judicial bias claim. *See Murray v. Carrier*, 477 U.S. at 488.

Citing *Banks v. Dretke*, 540 U.S. 668 (2004), Petitioner also argues as cause that Judge Hotham suppressed information necessary for appellate counsel to prosecute this claim. (Dkt. 57 at 5, 8-11.) Specifically, he asserts that the judge failed to disclose whether he had prior knowledge of the bailiff's relationship with the victim, the quantity and substance of conversations he had with the bailiff prior to the defense motion to reassign the bailiff, what he learned from the bailiff after the hearing on the reassignment motion, and why he removed the bailiff during the medical examiner's testimony. (*Id.*) It also appears that Petitioner bases his cause argument on the fact that Judge Hotham presided over his PCR proceeding when he had been removed from the case prior to sentencing by the presiding judge. (*Id.*)

The Court finds neither argument persuasive in explaining why Petitioner did not present this claim on direct appeal. Both the pretrial reassignment hearing and the post-verdict motion to remove Judge Hotham for cause provided a sufficient factual basis from which appellate counsel could assess whether to include a claim of judicial bias in the direct

---

[4] Petitioner also argues that his judicial bias claim was fairly presented to the Arizona Supreme Court on direct appeal because that court should have *sua sponte* reviewed the record for fundamental error and discovered the bias issue. (Dkt. 57 at 7-8.) The Court summarily rejects this baseless argument.

appeal. Accordingly, the Court finds that Petitioner has not established cause to excuse the procedural default. Absent cause, there is no need to discuss prejudice. Petitioner does not argue that a fundamental miscarriage will occur if his judicial bias claim is not addressed on the merits. Accordingly, this aspect of Claim 1 is procedurally barred, and Petitioner's requests for evidentiary development on the merits of his bias allegation are denied. (Dkt. 62 at 7-19; Dkt. 85.)

PCR-Related Issues

Petitioner also complains that his federal constitutional rights were violated when Judge Hotham presided at his PCR proceeding and when PCR counsel failed to move to have Judge Hotham removed from the PCR proceeding. (*Id.* at 15.) These allegations were never presented in state court and would be found precluded if Petitioner tried to raise them now. *See* Ariz. R. Crim. P. 32.2. Thus, they are procedurally defaulted. In addition, the Court finds that these allegations are not cognizable grounds for habeas relief. A claim that a PCR judge was biased does not attack the constitutionality of a prisoner's detention; rather, it represents an attack upon a proceeding collateral to the detention. *See Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989); *see also Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997). In addition, federal statute expressly prohibits habeas relief based on an allegation of PCR counsel's ineffectiveness. *See* 28 U.S.C. § 2254(i) (stating that "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief"); *see also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Harris v. Vasquez*, 949 F.2d 1497, 1513-14 (9th Cir. 1990) (no Sixth Amendment right to counsel in post-conviction proceedings). Therefore, the PCR-related aspects of Claim 1 are dismissed as procedurally barred and not cognizable.

Summary of Findings

With respect to Claim 1, the Court finds that Petitioner's trial and appellate IAC allegations relating to the failure to urge Judge Hotham's recusal before trial are meritless. The claim that Judge Hotham was biased during trial is procedurally barred. Petitioner's

contention that Judge Hotham was biased during PCR proceedings is both defaulted and not cognizable in a habeas petition. Finally, the claim that PCR counsel was ineffective is procedurally barred, prohibited by 28 U.S.C. § 2254(i), and not cognizable in these proceedings.

Claim 2

Petitioner alleges that he was convicted in violation of the Fourteenth Amendment due to *Batson* violations occurring during pre-trial jury selection. (Dkt. 30 at 15-28.)

Background

During a break in the voir dire proceedings, Petitioner's girlfriend, Yadara Salaiz, congregated and conversed with potential jurors and then yelled her affection down the hall to Petitioner. (RT 9/4/97 at 111-24.) She first spoke with juror #37, Burrell, and then with Eric Veitch as well as juror #94, Myers. Juror Burrell heard Ms. Salaiz ask Veitch about a drug treatment and rehabilitation facility that his wife operated and Mr. Veitch's explanation of the program. (*Id.*) The court held an in-chambers discussion about the incident and brought in juror Burrell to report what had happened. (*Id.*) The discussion also extended to Burrell's opposition to the death penalty and her view that she could not be an impartial juror. (*Id.*) Burrell was excused for cause in part due to the taint she received from her interactions with Ms. Salaiz. (*Id.* at 119, 164.)

In exercising its peremptory strikes, the State removed the only black members of the jury panel, Linda Preston and Eric Veitch. Defense counsel objected to the strikes pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). (RT 9/8/97 at 161-65.) The trial court required the prosecutor to articulate a legitimate non-discriminatory reason for the strikes. Regarding Linda Preston, the prosecutor indicated:

> PROSECUTOR: The strike in terms of Linda Preston was made because of her views on the death penalty, Your Honor, and are racially and genderly neutral. Her feelings are very strong in that she states that some people that are innocent may accidentally lose their lives. Regardless of what they say in response to questions like that, that's still an opinion they hold into the jury room, and I think I am entitled not to take a chance that that may sway their verdicts.
>
> THE COURT: Other circumstances, or was there anything else that

came out during voir dire that you thought significant that led to this decision.?

> PROSECUTOR: I noticed that her brother was shot, and I don't know that he hasn't left some residual feelings with her. But in terms of that, its basically her very, very strong beliefs of the death penalty issue, and her very strong opinions on that, because she also says that she would, in her response to, if you were charged with a similar offense, would you like people with your frame of mind? And she says: I hope they would have an opinion. And this is a very opinionated woman, and I feel that in terms of the death penalty issue, that it may sway her thinking.

(*Id.* at 162-63.)

After hearing the prosecutor's explanations and defense counsel's further argument, the court denied Petitioner's *Batson* motion regarding Preston, as follows:

> THE COURT: All right. Thank you. The Court finds that the State has shown sufficient objective race and gender neutral reasons for the strike, so the strike will be allowed.

(*Id.* at 163.)

With respect to Mr. Veitch, the prosecutor explained:

> PROSECUTOR: Mr. Veitch is, of course, a pastor. He's strongly opposed to the death penalty. This is, in and of itself, I believe, a racially neutral reason for the strike.
>
> He also, I might add, had a conversation with the girlfriend of the defendant, as did some other jurors. And although he may not have known or claims not to have known at the time that this was the girlfriend of the defendant, he did have an extensive conversation with her and counseled her and must have known during the jury selection process that this is inappropriate to be speaking to people in the hallway.
>
> . . . .
>
> . . . Regardless of his race, he is a pastor, and pastors are forgiving, Your Honor, and we are entitled to a juror that is not going to allow their feelings to enter into this in any fashion. And I feel that those are all racially neutral reasons.

(*Id.* at 163-64.) Based upon the prosecutor's explanations, the court made its ruling regarding Veitch:

> THE COURT: Yes, If the State intends to use one of its strikes on Mr. Veitch, . . . the [Court] does find that the State's reasons are race neutral, objective and sufficient. So, any *Batson* request is denied.

(*Id.* at 165.)

On direct review, the Arizona Supreme Court determined that Petitioner had not carried his burden of proving intentional discrimination. The court concluded that Mr.

Veitch's opposition to the death penalty, his conversation with Petitioner's girlfriend, and his possible sympathy for Petitioner due to his occupation as a pastor. *Martinez*, 196 Ariz. at 456, 999 P.2d at 800. With regard to Ms. Preston, the court concluded that the State had provided three legitimate non-discriminatory reasons for her strike: "(1) her strong opposition to the death penalty; (2) her strong opinions in general; and (3) her possible residual feelings about her brother's shooting." *Id.* at 457, 999 P.2d at 801. The court also distinguished four white jurors that Petitioner had argued were similarly situated. *Id.* at 456-57, 999 P.2d at 800-01.

Analysis

In *Batson*, the United States Supreme Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race. 476 U.S. at 89. *See Powers v. Ohio*, 499 U.S. 400, 409 (1991) (*Batson* applies where defendant and excluded juror are of different races). Under *Batson* and its progeny, a defendant's challenge to a peremptory strike requires a three-step analysis. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory strike on the basis of race. *See Rice v. Collins*, 546 U.S. 333, 338 (2006). If the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for the strike. *Id.* The trial court then must determine whether the defendant has carried his burden of proving intentional discrimination. *Id.*

With respect to *Batson*'s second step, while the prosecutor must offer a "comprehensible reason" for the strike, *id.*, the reason need not be "persuasive, or even plausible," *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). "So long as the reason is not inherently discriminatory, it suffices." *Rice*, 546 U.S. at 338; *see Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion) ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

Under the third *Batson* step, after the prosecution puts forward a race-neutral reason, the court is required to evaluate the persuasiveness of the justification to determine whether the prosecutor engaged in intentional discrimination. *Purkett*, 514 U.S. at 768. To accept

a prosecutor's stated nonracial reasons, the court need not agree with them. The question is not whether the stated reason represents a sound strategic judgment, but whether counsel's race-neutral explanation for a peremptory challenge should be believed. *See Hernandez*, 500 U.S. at 365. However, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. at 768. "In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93 (internal quotations omitted); *see Mitleider v. Hall*, 391 F.3d 1039, 1050 (9th Cir. 2004) (concluding that the prosecutor's explanations for striking the jurors were supported by the trial record). Both the United States Supreme Court and the Ninth Circuit have also utilized comparative juror analyzes to assess whether a prosecutor's race-neutral explanation for a strike was in fact a pretext for a discriminatory strike. *Miller-El II*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination at *Batson*'s third step."); *see Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006); *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006) (en banc).

Upon habeas review, a petitioner is entitled to relief on a *Batson* claim if the state court's denial of the claim constituted "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see Rice*, 546 U.S. at 338. Thus, this Court can grant relief "if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge." *Id.* In addition, under § 2254(e)(1), "[s]tate-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.* at 338-39. Therefore, although "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility, . . . on habeas review that does not suffice to supersede the trial court's credibility determination." *Id.* at 341-42.

In this case, one of the reasons for striking both jurors was their opposition to the death penalty. This is a race-neutral reason for a peremptory challenge. Both Preston and

Veitch communicated their opposition to the death penalty on their juror questionnaires. (*See* Dkt. 72.) Striking a juror who states an opposition to the death penalty in a capital trial is a race-neutral reason for a peremptory challenge. *See, e.g., Hicks v. Collins*, 384 F.3d 204, 224 (6th Cir. 2004) (reservation about the death penalty is a plausible reason for striking a juror); *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830, 842 (1995) (listing cases). The prosecutor's other reasons for striking Veitch (the forgiving nature of a pastor and his conversation with Petitioner's girlfriend) and Preston (strong opinionated personality and possible residual feeling about brother's shooting) were clearly race-neutral under *Batson*; they were not implausible or fantastic. *Purkett*, 514 U.S. at 768.

Because the prosecutor satisfied the second step of *Batson* by providing race-neutral reasons for striking the black jurors, the remaining issue is whether the state courts were unreasonable in crediting these explanations. *See Rice*, 546 U.S. at 338.

Eric Veitch

Petitioner contends that a comparative juror analysis with the white panelists who were chosen to sit on the jury supports his contention that the strike of Veitch was discriminatory and the prosecutor's explanations pretextual. (Dkt. 30 at 18.) When the entire voir dire proceedings are considered, Petitioner contends that the empaneled white jurors also expressed reservations about the death penalty, yet were not struck. (*Id.*) Petitioner also cites Veitch's voir dire examination that if selected to be a juror, he would impartially follow the law and do his civic duty. (RT 9/8/97 at 61.) Regarding the prosecution's additional reasons, Petitioner contends that the prosecutor exaggerated the conversation Veitch had with Ms. Salaiz reasoning that being polite cannot be a legitimate reason for a peremptory challenge. (Dkt. 30 at 20-21.) Regarding Veitch being a forgiving person because he was a pastor, Petitioner argues that there was another pastor and a social worker on the voir dire panel who were not questioned on this basis. (*Id.* at 22.)

The Arizona Supreme Court, after reviewing the voir dire proceedings of the white jurors on the panel – (#48) Dillon, (#27) Lester, (#4) Campbell, and (#58) Reith – concluded that the jurors were not similarly situated to Veitch because each of these jurors indicated on

their juror questionnaire that they favored the death penalty (*see* Dkt. 72). *Martinez*, 196 Ariz. at 456-57, 999 P.2d at 800-01. The court noted that Veitch held the opposite view, indicating that life in prison would work better. *Id.* Comparatively, the court noted that none of the empaneled jurors were involved in the incident with Ms. Salaiz. *Id.* at 456, 999 P.2d at 800. Finally, the appellate court rejected Petitioner's arguments that Veitch's strike was pretextual because other jurors with a forgiving nature were not struck. *Id.* None of the empaneled jurors were pastors or social workers. (*See* RT 9/8/97 at 171.) The Court further notes that the prosecution struck a juror who was a social worker based on the view that she had a forgiving nature and would give others a second chance. (*Id.* at 166-67.)

After carefully reviewing the record, the Court concludes that it was not unreasonable for the trial judge to find the prosecutor's explanation for striking Mr. Veitch to be credible. The record supports the state court's findings, and Petitioner has failed to prove that the prosecutor's reasons were pretextual or that he engaged in purposeful racial discrimination.

Linda Preston

Petitioner argues that despite Preston's opposition to the death penalty, she is similarly situated to white jury panelists who also voiced a concern that the result of the death penalty may be that innocent people die. (Dkt. 30 at 25.) Regarding possible residual feelings from her brother being shot, Petitioner argues that the prosecution is exaggerating this event because Preston told the prosecutor that she was living in Las Vegas when this occurred and that she did not know too much about it. (*Id.* at 26.) Finally, regarding Preston being opinionated, Petitioner argues that the prosecution's explanation was invalid. (*Id.* at 24-25.)

During individual voir dire, the prosecution questioned Preston about her juror questionnaire, which indicated opposition to the death penalty because she believed some innocent people may lose their lives. (*See* Dkt. 72.) When questioned, Preston's answers as to whether she could be impartial were ambiguous. (RT 9/8/97 at 101-02.) First, she indicated that the strength of her views regarding the death penalty would make it difficult for her to make a determination of guilt or innocence based solely on the evidence presented. (RT 9/8/97 at 101-02.) However, she then indicated that she could be a fair and impartial

juror. (*Id.* at 102.) The prosecution did not move to strike her for cause. (*Id.*) The Arizona Supreme Court noted the ambiguity of Preston's answers regarding whether she could be fair and impartial juror. *Martinez*, 196 Ariz. at 457, 999 P.2d at 801. Based upon her voir dire responses and her juror questionnaire, the court found that the prosecution's justification that Preston was opposed to the death penalty supported by the record. *Id.* The court also found that Preston was not similarly situated to white panel members who all indicated support for the death penalty. *Id.* Based on this record, the court concluded that this particular justification was not pretextual. *Id.* Regarding residual feelings due to her brother being shot, Petitioner acknowledged and the supreme court found that this rationale was supported in the record. (Opening Br. at 36; *Martinez*, 196 Ariz. at 457, 999 P.2d at 801.) Finally, regarding Preston being opinionated, the court made no formal finding.

As with Mr. Veitch, this Court concludes that the trial judge was not unreasonable in crediting the prosecutor's explanations for his strike of Preston. *See Rice*, 546 U.S. at 338. The Court's review of both explanations – her opposition to the death penalty and residual feeling for her brother – were supported by the record. Similarly, comparative analysis of Preston with the empaneled jurors does not demonstrate a pretext for racial discrimination. Consequently, Petitioner has not demonstrated that the prosecution engaged in purposeful racial discrimination.

Conclusion

The prosecutor offered race-neutral explanations for striking Veitch and Preston. The burden thereafter shifted to Petitioner to prove that those reasons were pretextual and that the strikes were discriminatory. Applying *Batson*, the trial court and the Arizona Supreme Court accepted the prosecutor's race-neutral explanations and concluded that Petitioner had failed to meet his burden of proving discriminatory intent. As previously noted, on habeas review, "[a] state court's finding of the absence of discriminatory intent is a 'pure issue of fact' accorded significant deference." *Miller-El I*, 537 U.S. at 339 (explaining that the trial judge can measure the credibility of a prosecutor's race-neutral explanations by reference to several factors, including its personal observations of the juror and of "the prosecutor's demeanor;

by how reasonable, or how improbable the explanations are, and by whether the proffered rationale has some basis in accepted trial strategy"). Petitioner has not rebutted this presumption with clear and convincing evidence.

Because the state court decision was not an unreasonable application of *Batson*, and because it was not based on an unreasonable determination of the facts in light of the evidence presented, Petitioner is not entitled to relief on Claim 2. The Court further notes that because analysis of this claim is necessarily limited to the record that was before the trial court, none of the evidentiary development sought by Petitioner is relevant. (Dkt. 62 at 19-27.) Therefore, his request for evidentiary development of Claim 2 is denied.

Claim 4

Petitioner alleges that the trial court denied his federal constitutional right of confrontation by allowing the prosecution to introduce testimonial hearsay to prove charged offenses at trial, namely that the vehicle driven by him at the time of the crime was stolen and that the license plate on the vehicle was also stolen. (Dkt. 30 at 34-40.) Respondents contend that the claim is procedurally defaulted because it was not raised on direct appeal. (Dkt. 50 at 45.)

Petitioner did not fairly present this claim on direct appeal. Nor did he pursue the claim during state PCR proceedings after the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). Petitioner argues, based on then-existing Ninth Circuit law, that *Crawford* applies retroactively. (Dkt. 157 at 31.) However, the Ninth Circuit was reversed by the Supreme Court in *Whorton v. Bockting*, 127 S. Ct. 1173 (2007), which holds that *Crawford* does not apply retroactively in federal habeas corpus proceedings. And in any event, retroactivity of *Crawford* does not excuse Petitioner's failure to assert a violation of his Sixth Amendment right of confrontation either on appeal or in his PCR petition.

Petitioner does not assert cause for his failure to exhaust Claim 4 in state court, but does argue that a fundamental miscarriage of justice will occur if the claim is not heard on the merits because "the exclusion of the purported theft of the Monte Carlo greatly weakens the prosecution's case for motive and premeditation." (Dkt. 157 at 31.) In his motion for

evidentiary development, Petitioner seeks discovery to "test the veracity" of a detective who testified that the vehicle's ignition switch was missing and that a screwdriver could have been used to start the car. (Dkt. 62 at 29.) In a supplemental motion, Petitioner's federal habeas counsel avow that their investigator, during a recent inspection of the vehicle, discovered the ignition switch in two pieces under the passenger seat. (Dkt. 74 at 5.) Citing the fact that the ignition parts were not listed in the vehicle inventory, counsel theorize that, if allowed additional discovery, they can establish that the ignition was intact at the time the vehicle was impounded, thus establishing the *Schlup* actual innocence gateway. (*Id.* at 7.) Petitioner asks the Court to consider not only this "new" evidence but also that proffered in support of Claims 9, 16, and 17.

The Court has considered all of Petitioner's evidence and concludes that he has failed to establish that no reasonable juror would have found him guilty of premeditated first degree murder. Petitioner's theory of innocence rests on "excluding" the following: evidence that he was driving a stolen car; testimony from Oscar Fryer that he was on the run from an arrest warrant, had a gun in case "shit happens," and had no intention of going back to jail (see Claim 9); testimony from Eric Moreno that Petitioner called him the night of his arrest and laughed about blasting a police officer (see Claim 16); and testimony from the medical examiner that the shot to Officer Martin's head was likely the last shot fired (see Claim 17). However, as Petitioner acknowledges, when evaluating a claim of actual innocence, the Court must consider all of the evidence, without regard to its admissibility under the rules of evidence at trial. *House v. Bell*, 126 S. Ct. at 2077. Thus, the Court does not exclude these facts from its consideration; rather, it considers Petitioner's new evidence and assesses whether, combined, all of the evidence demonstrates that no reasonable juror would have convicted Petitioner.

Petitioner's "new" evidence does not establish actual innocence. First, whether the ignition was intact at the time Petitioner was arrested does not negate the fact that the owner had reported it stolen. Second, Petitioner has not demonstrated that Fryer and Moreno testified falsely. Rather, as discussed with respect to Claims 9 and 16, he offers only

additional impeachment evidence that does not significantly discredit their testimony. Finally, Petitioner proffers a declaration from an expert that disagrees with the medical examiner's conclusion about the sequence of shots, but this is nothing more than a second opinion. The Court finds that Petitioner has not made the requisite showing of actual innocence and that the failure to consider Claim 4 on the merits will not result in a fundamental miscarriage of justice. Accordingly, Claim 4 is procedurally barred, and Petitioner's request for evidentiary development on the merits of Claim 4 is denied.

Claim 5

Petitioner argues that the admission of evidence relating to, and the failure to sever counts based on, the subsequent convenience store robbery and shooting violated his federal right to due process. (Dkt. 30 at 40.) He further argues that his rights were violated by the admission of improper character evidence of the victim. (*Id.* at 42.)

Procedural Default

A review of Petitioner's appellate brief and PCR petition reveals that he only exhausted a claim based on the trial court's admission of other act evidence. (Appellant's Opening Br. at 53.) He did not raise any claims alleging federal constitutional error in failing to sever counts or admitting evidence of the victim's character. If Petitioner were to return to state court now and attempt to litigate these claims, they would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because they do not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, allegations based on the failure to sever and to prohibit evidence of the victim's character are "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. They will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice.

Petitioner asserts as cause appellate counsel's failure to raise these claims on direct appeal. (Dkt. 57 at 36-38.) Before ineffective assistance of appellate counsel may be utilized as cause to excuse a procedural default, the particular IAC allegation must first be exhausted

before the state courts as an independent claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000); *Murray v. Carrier*, 477 U.S. at 489-90; *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988). During PCR proceedings, Petitioner did not present any appellate IAC claims based on counsel's failure to raise these allegations on appeal. Therefore, appellate IAC cannot constitute cause. Because Petitioner has failed to establish cause, there is no need to address prejudice.

Petitioner also asserts that a fundamental miscarriage of justice will occur if his claims regarding the failure to sever counts and the admission of evidence of the victim's character are not considered on the merits. (Dkt. 57 at 37-38.) However, Petitioner points to no new reliable evidence not presented at trial that would demonstrate that he is actually innocent. *Schlup v. Delo*, 513 U.S. at 327. These aspects of Claim 5 are procedurally barred.

Merits

Petitioner asserts that the trial court's admission of his armed robbery of a convenience store hours after shooting Officer Martinez violated his due process rights under the Fourteenth Amendment. (Dkt. 30 at 47.)

On direct appeal, the Arizona Supreme Court rejected this claim:

> The trial court also limited the State's evidence on the Mini-Mart robbery to the taking of cash from the store, the discharge of Officer Martin's .9mm Sig Sauer, and the underlying ballistics evidence. *Id.* at 2-3. The trial court precluded all references to the clerk's "murder, homicide, death or autopsy." *Id.* Martinez conceded that this evidence was relevant to establish identity and motive under Rule 404(b). *See* Defendant's Response to State's Motion to Admit Evidence Pursuant to Rule 404(b) at 9. He agreed that it linked Officer Martin's gun with Martinez' arrest in Indio. *Id.* He also acknowledged that the Mini-Mart robbery showed consciousness of guilt under *State v. Kemp,* 185 Ariz. 52, 59, 912 P.2d 1281, 1288 (1996). *Id.*
>
> By his earlier concessions, Martinez agreed that the evidence about the Mini-Mart robbery was entitled to substantial probative weight. But on appeal, he attempts to retract his concessions, and asserts that engaging in a California convenience store robbery does not show consciousness of guilt as to the Arizona homicide. To the extent that we understand this argument, flight from Arizona demonstrates consciousness of guilt as much as flight within Arizona. The .9mm shell casing recovered at the Mini-Mart on August 16, 1995 provided the final link to Officer Martin's murder. Officer Martin's .9mm Sig Sauer was missing and the shell casing found at the Mini-Mart traced Martinez' flight from the Beeline Highway, through Phoenix, to Blythe, California. The trial court precluded the State from introducing evidence of the clerk's murder to prevent unfair prejudice. That was protection enough.

> The other evidence was extremely relevant. There was no error in the trial court's Rule 403 balancing.

Martinez, 196 Ariz. at 459-60, 999 P.2d at 803-04.

In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (internal quotation omitted). Thus, this Court is prohibited from reviewing whether "other crimes" evidence was properly admitted by the state trial court pursuant to Arizona Rule of Evidence 404(b), which is simply a matter of state evidentiary law. Instead, the admission of evidence at a state trial will form the basis for federal habeas relief only when the evidentiary ruling renders a trial unfair in violation of a petitioner's due process rights. *See Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

The United States Supreme Court has "very narrowly" defined the category of infractions that violate the due process test of fundamental fairness. *Dowling v. United States*, 493 U.S. 342, 352 (1990). Pursuant to this narrow definition, the Court has declined to hold that evidence of other crimes or bad acts is so extremely unfair that its admission violates fundamental conceptions of justice. *Estelle v. McGuire*, 502 U.S. at 75 & n.5 (stating that Supreme Court was expressing no opinion as to whether a state law would violate due process if it permitted the use of prior crimes evidence to show propensity to commit a charged crime); *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (rejecting the argument that due process requires the exclusion of prejudicial evidence). Thus, there is no clearly established Supreme Court precedent which holds that a state violates due process by admitting propensity evidence in the form of other acts evidence. *See, e.g.*, *Bugh v. Mitchell*, 329 F.3d 496, 512-13 (6th Cir. 2003) (state court decision allowing admission of evidence pertaining to petitioner's alleged prior, uncharged acts of child molestation was not contrary to clearly established Supreme Court precedent because there was no such precedent holding that state violated due process by permitting propensity evidence in the form of other bad acts evidence).

Moreover, although "clearly established Federal law" under the AEDPA refers only to holdings of the United States Supreme Court, this Court notes that even under Ninth Circuit precedent Petitioner would not be entitled to relief. The Ninth Circuit has held that the admission of "other acts" evidence violates due process only when "there are *no* permissible inferences the jury may draw from the evidence." *Jammal*, 926 F.2d at 920; *see Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005). Therefore, whether or not the admission of evidence is contrary to a state rule of evidence, a trial court's ruling does not violate due process unless the evidence is "of such quality as necessarily prevents a fair trial." *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986).

As the Arizona Supreme Court explained, the evidence detailing Petitioner's subsequent armed robbery allowed several permissible inferences, including identity and consciousness of guilt. Therefore, admission of the evidence did not render Petitioner's trial fundamentally unfair in violation of his due process rights, and Petitioner is not entitled to relief on Claim 5.

Claim 6

Petitioner asserts that the prosecution improperly vouched for its witness, Oscar Fryer, and improperly elicited a prior consistent statement from him. (Dkt. 30 at 50.) Petitioner concedes he never properly exhausted these allegations in state court and argues that appellate counsel's ineffectiveness constitutes cause. (Dkt. 57 at 41, 43.) However, he did not exhaust in his state PCR proceedings any appellate IAC claims based on the failure to raise the allegations contained in Claim 6 on direct appeal. Accordingly, appellate IAC cannot constitute cause. *Edwards v. Carpenter*, 529 U.S. at 451-53. Because Petitioner has failed to establish cause, there is no need to address prejudice.

Petitioner also asserts that a fundamental miscarriage of justice will occur if Claim 6's allegations are not considered on the merits. (Dkt. 57 at 41.) However, Petitioner fails to point to any new reliable evidence not presented at trial that would demonstrate that he is actually innocent. *Schlup v. Delo*, 513 U.S. at 327. Claim 6 is procedurally barred.

Claim 7

Petitioner alleges that the trial court's jury instruction regarding premeditation violated his federal right to due process. (Dkt. 30 at 53.) Petitioner contends that the instruction reduced the state's burden of proof by improperly focusing on the length of time necessary for premeditation instead of requiring actual reflection. (Dkt. 57 at 44-45.) In denying relief on this claim, the PCR court ruled that, read as a whole, the instructions were not erroneous. (ME 8/24/04 at 7.)

An allegedly improper jury instruction will merit habeas relief only if "the instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. at 72; *see Jeffries v. Blodgett*, 5 F.3d 1180, 1195 (9th Cir. 1993). The instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). It is not sufficient for a petitioner to show that the instruction is erroneous; instead, he must establish that there is a reasonable likelihood that the jury applied the instruction in a manner that violated a constitutional right. *Id.*; *Carriger v. Lewis*, 971 F.2d 329, 334 (9th Cir. 1992) (en banc). "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). Petitioner cannot make this showing.

The instruction provided by the trial court was not erroneous under state law. At trial, the court provided the following instruction with respect to premeditation:

> "Premeditation" means that the defendant's intention or knowledge existed before the killing long enough to permit reflection; however, the reflection differs from the intent or knowledge that conduct will cause death. It may be as instantaneous as successive thoughts in the mind, but it must be actual reflection, and it may be actual reflection, and it may be proved by direct or circumstancial [sic] evidence. It is this period of reflection regardless of its length which distinguishes first degree murder from intentional or knowing second degree murder. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

(RT 9/25/97 at 97-98.) This instruction, with its statement that premeditation requires a "period of reflection," accurately described state law regarding premeditation. At the time

of Petitioner's trial, A.R.S. § 13-1101(1) defined premeditation as follows:

> "Premeditation" means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.[5]

A.R.S. § 13-1101(1) (1997). Arizona courts had further explained: "The necessary premeditation, however, may be as instantaneous as successive thoughts of the mind, and may be proven by either direct or circumstantial evidence." *State v. Kreps*, 146 Ariz. 446, 449, 706 P.2d 1213, 1216 (1985); *see State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996); *State v. Lopez*, 158 Ariz. 258, 262, 762 P.2d 545, 549 (1988); *State v. Sellers*, 106 Ariz. 315, 316, 475 P.2d 722, 724 (1970).

The Court finds that, on its face, the challenged jury instruction does not permit a finding of premeditation based solely on the passage of time. First, it explicitly distinguishes intent as existing before, and as something distinct from, reflection. Second, the exclusion of acts that are the "instant effect of a sudden quarrel or heat of passion" from a finding of premeditation clarifies that impulsive acts do not satisfy the premeditation requirement. Third, nothing in the prosecutor's closing argument or the court's instructions inaccurately suggested that the State needed only to prove the time element of reflection in lieu of actual reflection.

As Petitioner notes, the Arizona Supreme Court has since "discouraged" use of the phrase "instantaneous as successive thoughts in the mind" in jury instructions. *State v. Thompson*, 204 Ariz. 471, 479, 65 P.3d 420, 428 (2003). The *Thompson* court, resolving conflicting decisions of the Arizona Court of Appeals, held that the statutory definition of premeditation requires actual reflection and not the mere passage of time. *Id.* at 478, 65 P.3d at 427. However, contrary to Petitioner's assertion, the Arizona Supreme Court did not find the phrase, "instantaneous as successive thoughts in the mind," to be constitutionally impermissible. *Id.* at 479, 65 P.3d at 428.

---

[5] In 1998, A.R.S. § 13-1101(1) was amended to include the clause, "Proof of actual reflection is not required."

Even if the instruction was erroneous, review in the context of the entire trial reveals that Petitioner's due process rights were not violated. *See Cupp v. Naughten*, 414 U.S. at 146 (use of an "undesirable, erroneous, or even 'universally condemned'" instruction does not equate to a constitutional violation). First, there was significant evidence that the crime was premeditated. Petitioner was driving a stolen car with a stolen license plate and was armed with a gun. He told his friend, Oscar Fryer, that he was on probation, that there was an outstanding warrant for his arrest, and that he was not going back to prison if stopped by the police. Petitioner shot Officer Martin not once, but four times, including in the head. After his arrest, Petitioner called his friend, Eric Moreno, and laughingly bragged to blasting a "jura" (slang for policeman). Petitioner also stole Officer Martin's firearm and used that weapon in a robbery only hours after the shooting.

Second, although defense counsel argued lack of premeditation as an alternative defense in his closing, Petitioner's primary defense throughout trial was mistaken identity. "The premeditation instruction therefore neither removed a right from [Petitioner] nor hindered his ability to raise total innocence or mistaken identity as his defense. If the trial court erred, the error did not take from defendant a right essential to his defense." *State v. Adams*, 194 Ariz. 408, 415, 984 P.2d 16, 23 (1999).

Because the instruction on premeditation did not inaccurately describe the element of premeditation, and viewing the instruction in the context of the evidence adduced at trial and the nature of the defense theory, the Court concludes that Petitioner has failed to meet his burden of showing that the instruction rendered his trial fundamentally unfair. Therefore, the PCR court's denial of this claim was neither contrary to nor an unreasonable application of clearly established federal law. Petitioner is not entitled to relief on Claim 7.

Claim 8

Petitioner asserts that the court's deletion of a paragraph from his second degree murder instruction violated his federal right to due process. (Dkt. 30 at 58.) The omitted paragraph read: "If you determine that the defendant is guilty of either first degree murder or second degree murder and you have a reasonable doubt as to which it was, you must find

the defendant guilty of second degree murder." (ROA 155.) In place of the omitted paragraph, the trial court gave the following instruction:

> You are to first consider the offense of first degree murder.
>
> If you cannot agree on a verdict on that charge after reasonable efforts, then you may consider whether the State has proven beyond a reasonable doubt that the defendant is guilty of the less serious offense of second degree murder.

(RT 9/25/97 at 98.)

Petitioner raised this claim on direct appeal. (Appellant's Opening Br. at 61-62.) In denying relief, the Arizona Supreme Court first noted that the trial court's refusal of Petitioner's proffered instruction was based on the court's decision in *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996), in which the court abandoned the "acquittal first" procedure for lesser-included offenses in favor of the "reasonable efforts" procedure. *Id.* at 440, 924 P.2d at 444. In *LeBlanc*, the court decided to require jurors to use "reasonable efforts" in reaching a verdict on the charged offense before considering lesser-included offenses so that jurors do not have to acquit the defendant on the charged offense before considering lesser-included offenses. *Id.*

In this case, the Arizona Supreme Court held that the trial court's instruction was not improper:

> It did not fail to instruct the jury on the procedure when reasonable doubt exists on the degree of homicide. Rather, it expressly stated, "[y]ou are to first consider the offense of first degree murder." *Id.* If the jury could not agree that Martinez was guilty of first degree murder after reasonable efforts, then it was instructed to consider whether the State had proven, beyond a reasonable doubt, that Martinez was guilty of second degree murder. From the court's instruction, the jury could return a verdict of first degree murder only if the State proved Martinez' guilt beyond a reasonable doubt. If it had any doubts, the "reasonable efforts" instruction allowed the jury to consider the lesser-included offense of second degree murder. There was no error.

Martinez, 196 Ariz. at 460-61, 999 P.2d at 804-05.

Petitioner argues that the Arizona Supreme Court unreasonably applied *Beck v. Alabama*, 447 U.S. 625, 627 (1980), in denying relief on this claim. *Beck* held that in a capital murder trial, failure to give an instruction on a lesser-included non-capital offense which is supported by the evidence violates the defendant's due process rights by placing the

jury in the position of either acquitting the defendant or finding him guilty of a capital crime. Therefore, "the goal of the *Beck* rule is . . . to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Villafuerte v. Stewart*, 111 F.3d 616, 623 (9th Cir. 1997) (quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984)). *Beck* is satisfied so long as the jury had the option of at least one lesser-included offense, even if there are other lesser-included offenses also supported by the evidence. *See Schad v. Arizona*, 501 U.S. 624, 645-46 (1991).

There is no dispute that the trial court instructed the jury on second degree murder as a lesser-included offense. Therefore, the Arizona Supreme Court's denial of this claim was not contrary to or an unreasonable application of *Beck*. Petitioner is not entitled to relief on Claim 8.

Claim 9

Petitioner contends that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose impeachment evidence regarding Oscar Fryer, a prosecution witness whose testimony supported that Petitioner committed the murder with premeditation. (Dkt. 30 at 61-76.) Petitioner further argues that trial counsel ineffectively prepared for Fryer's trial testimony. (*Id.*)

Petitioner concedes that he did not fairly present either aspect of Claim 9 in state court. (Dkt. 57 at 61, 67; Dkt. 62 at 36, 38.) He contends that the prosecution's withholding of material impeachment evidence constitutes cause and prejudice to excuse the default of his *Brady* claim and that actual innocence excuses his failure to exhaust the IAC aspect of Claim 9 in state court. The Court disagrees.

Undisclosed Impeachment Evidence

Oscar Fryer testified at trial that he was with Petitioner in Globe, Arizona, on three occasions shortly prior to Officer Martin's murder. (RT 9/9/97 at 78-86.) Fryer's contacts with Petitioner were corroborated by Fryer's girlfriend, Stephanie Campos. (*Id.* at 58-66.) Fryer testified that Petitioner was driving a blue Monte Carlo with a white top and that Petitioner showed him a .38-caliber handgun with black tape around the handle. (*Id.* at 78-

86.) Fryer further testified that Petitioner told him there was an outstanding warrant for his arrest, he was on the run, and he was not going back to jail if stopped by the police. (*Id.*)

During cross-examination, Fryer was impeached with two prior felony convictions. (*Id.* at 88-89.) Defense counsel also brought out from Fryer that prior to trial he had violated his probation, that he was on the run, and that he would not agree to cooperate or turn himself into authorities until he had negotiated and had in his possession a written plea agreement dealing with charges of assault on a police officer, domestic violence, resisting arrest, and escape. (*Id.* at 88-93.) Defense counsel introduced Fryer's plea agreement into evidence, which provided that if Fryer cooperated and testified for the prosecution, his three felony charges would be reduced to one misdemeanor assault charge and he would be sentenced to probation. (*Id.*)

In Claim 9, Petitioner asserts that the prosecution failed to disclose that Fryer received other benefits in exchange for his testimony and that he was using drugs at the time of the trial. Specifically, Petitioner asserts that prior to trial, Fryer was on probation and tested positive for drugs on multiple occasions. (*See* Dkt. 57 at 56-57; Dkt. 62, Ex. 6.) Despite Fryer's drug abuse, the prosecution did not move to revoke his probation. (*Id.*) Fryer indicated to his probation officer that he regularly abused methamphetamine, which included the time frame of Petitioner's trial. (*Id.*) In addition, Fryer lied to a police officer about a suspect's location on January 29, 1996, yet was not charged with making a false report to law enforcement. (*Id.*) After trial but prior to sentencing, Fryer again tested positive for drugs and pled guilty to theft of $900 from a restaurant. (*Id.*)

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The duty to disclose includes impeachment as well as exculpatory material. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In order to prevail on a *Brady* claim, a defendant must demonstrate that: (1) the evidence at issue is favorable, either because it is exculpatory or because it is impeaching; (2) such evidence was

suppressed by the State, either willfully or inadvertently; and (3) prejudice resulted. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *see also Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Establishing the second and third factors also establishes cause and prejudice for any failure to develop a *Brady* claim in state court. *Banks*, 540 U.S. at 691.

Evidence is material for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (quoting *Bagley*, 473 U.S. at 682); *see Banks*, 540 U.S. at 699; *Strickler*, 527 U.S. at 280. The Supreme Court has explained that materiality does not require a showing that the defendant would have been acquitted had the suppressed evidence been disclosed. *Id.* at 434-35. Instead, a *Brady* violation occurs if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

The Court concludes that the withheld impeachment information in this case was not material; therefore, Petitioner cannot establish cause and prejudice for the default of Claim 9. First, Fryer was thoroughly impeached at trial. His plea agreement was introduced, he was cross-examined about all of the favorable treatment he obtained as a result of the agreement, and was impeached with the factual basis of his prior felony convictions. The fact that he tested positive for drugs two weeks prior to his testimony would not likely have affected the jury's verdict. Similarly, the fact that Fryer continued to engage in criminal activity even after working out a plea to testify against Petitioner does not put his credibility in a whole new light given all of the other impeaching evidence brought out at trial.

Second, the additional impeachment evidence would have had little effect on Fryer's already impeached credibility because his testimony was corroborated by other evidence. Consistent with Fryer's testimony, Petitioner was driving a blue Monte Carlo with a white top, had a warrant out for his arrest, had violated his probation and was on the run from authorities, and had possession of a .38-caliber revolver with black tape around the handle of the gun. Moreover, his fingerprint was found on the tape, and it was this revolver that was

later identified as the murder weapon (RT 9/22/97 at 114). *See Martinez*, 196 Ariz. at 453-55, 999 P.2d 797-99.

Finally, Fryer's testimony was not the linchpin evidence of premeditation portrayed by Petitioner. Fryer relayed a conversation with Petitioner that took place *prior* to the shooting. Although damaging, it was less relevant than the fact that Petitioner was driving a stolen car when pulled over, that he had absconded from law enforcement and there was an outstanding warrant for his arrest, and that he shot Officer Martin not once, but four times. In addition, after his arrest Petitioner bragged about "blasting" a police officer. (RT 9/15/97 at 13.) This was more than enough evidence from which the jury could find that Petitioner acted with premeditation.

Petitioner's reliance on *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), is misplaced. There, a jailhouse informant claimed that the defendant had confessed to murder and insurance fraud. *Id.* at 1045-46. His testimony provided the only evidence of the fraud, which in turn provided the motive for the murders. *Id.* Despite interviewing the informant over a year before trial, the prosecution did not disclose his identity until the day before trial. *Id.* at 1048. In addition, the prosecution failed to disclose the informant's long history of persistent misconduct during his fifteen years as an informant, the fact that the informant had lied to police a week before trial about having evidence implicating the defendant in an unrelated murder, numerous benefits the informant received with regard to other criminal activities, and the fact that he had acted as an informant in a previous murder case. *Id.* at 1054-58.

Here, Fryer was not a jailhouse informant, but Petitioner's close friend. Fryer did not claim that Petitioner confessed to the crime, only that if stopped by police "he wasn't going back to jail." (RT 9/25/97 at 85.) Although the prosecution did not disclose that Fryer was accused of lying to police more than a year before trial, this one incident pales in comparison to the multiple deceptive acts by the professional informant in *Benn*. In sum, the Court concludes that *Benn* is easily distinguishable and that the undisclosed impeachment evidence regarding Fryer did not put the whole case in such a different light as to undermine

confidence in the verdict.[6]

Actual Innocence

Petitioner contends that a fundamental miscarriage of justice will occur if the *Brady* and IAC aspects of Claim 9 are not considered on the merits. (Dkt. 57 at 67-71.) In addition to the undisclosed impeachment evidence, Petitioner identifies other impeachment evidence known to defense counsel but not utilized at trial and argues that had all of this impeachment evidence been presented no reasonable juror would have voted to convict him because the prosecution would not have been able to meet its burden of proving premeditation. (*Id.*)

The additional evidence Petitioner argues was known to defense counsel include the quality and quantity of benefits bestowed upon Fryer as a result of his 1997 plea agreement, such as the prosecution foregoing sentence enhancements, consecutive sentences, and probation revocation. (Dkt. 30 at 68.) Further, during an interview with defense counsel, when counsel had trouble following Fryer's statements, Fryer responded "whatever you want me to say, I will say it." (Dkt. 62, Ex. 10 at 24.)[7] Petitioner also notes alleged inconsistencies

---

[6] In assessing whether Petitioner established cause for the default of Claim 9, the Court has considered the evidence proffered by Petitioner in his motion for evidentiary development in support of the alleged *Brady* violation. (Dkt. 62, Exs. 4-10.)

[7] The full quote reads: "Whatever you guys want me to say, I'll say it. The truth is the truth. Everything that's written down here, I'll say it. You know. I've got – I have to say it." (Dkt. 62, Ex. 10 at 24.) In context, this is not significant impeachment. Indeed, immediately following this statement, defense counsel asked Fryer to slow down and tell them what Petitioner said to him at the car wash:

> FRYER: "I'm going to start all over again, right. I got to the carwash. I was sitting there, he came over, pulled in. I got out of the car, went to him. He came to me. We hugged each other and said what's up. Got in the car because he said that he was wanted. I noticed the gun — the bulge in his pants. I said "what you got there" and he showed me the gun. I opened it up and I looked at the slug. I said what you gonna do, are you ready to kill [some one] and his words were if anybody gets in my way, I will, okay. It's not I think he said that or anything like that, that's what he said. If anybody gets in his way, that's what he was gonna do. Cause I asked I said "what [] are you going to do if you get pulled over by a cop." I told him "are you going to run or what?" He said "[] no, I'm gonna shoot out for those [people]." There, is

in Fryer's pretrial statements to the police and to defense counsel about his conversation with Petitioner at the car wash, including Petitioner's clothing, whether Petitioner's weapon fired five or six shots, the type of bullets Petitioner was using for the handgun, and whether Fryer was under the influence of drugs and/or alcohol at the carwash. (Dkt. 57 at 74-75.) After trial but prior to sentencing, Fryer again tested positive for drugs and pled guilty to theft of $900 from a restaurant. (*Id.*)

As already discussed, Fryer's testimony relaying Petitioner's statement that he had the gun in case "shit happens" and that he was not going back to jail was not the only evidence of motive and premeditation presented at trial. Petitioner shot Officer Martin multiple times; he was on the run and there was a warrant out for his arrest; he was driving a stolen car with a stolen license plate; and he bragged after being arrested that he had blasted a police officer. This was sufficient evidence from which a reasonable juror could conclude that Petitioner acted with premeditation in killing Officer Martin. Moreover, the additional impeachment evidence of Fryer is mainly cumulative, and his credibility was reinforced by the fact that he accurately described the murder weapon and the car Petitioner was driving. Considering both the undisclosed and unused impeachment evidence collectively, the Court finds that Petitioner has failed to show that "it is more likely than not that no reasonable juror would

---

> that what you guys wanted to hear? That's exactly what he told me, alright.
>
> DEFENSE COUNSEL: All we want to hear is what he told you.
>
> FRYER: That's what he told me.
>
> DEFENSE COUNSEL: There's nothing here that we want to hear other than the truth. And let's deal with that.
>
> FRYER: He said he wasn't gonna run, he wasn't gonna [] go on a hot pursuit chase or anything like that, he was gonna blast. He showed me the gun and he said "I'm gonna blast." That's what he intended to do. He did it. And when I [] heard that he did it, I was like [], that [guy] wasn't [kidding], he did what he said he was gonna do, alright.

(*Id.* at 25-26.) This evidence does not support a claim of actual innocence.

have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. at 327. Claim 9 is procedurally barred, and Petitioner's request for evidentiary development on the merits of Claim 9 is denied.

Claim 10

Petitioner argues that his two 1996 convictions for dangerous assault by a prisoner under A.R.S. § 13-1206 did not qualify as "serious offenses" for purposes of the A.R.S. § 13-703(F)(2) aggravating factor; therefore, his death sentence was imposed in violation of federal due process. (Dkt. 30 at 76.)

In 1993, the Arizona legislature amended A.R.S. § 13-703(F)(2) to provide as a capital-eligible aggravating factor that the "defendant has been or was previously convicted of a serious offense, whether preparatory or completed." In defining "serious offense," the legislature included a separate list of offenses, which were not enumerated by any specific statutory code. The list includes "aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument." A.R.S. § 13-703(H)(4).[8]

In this case, the sentencing judge based its (F)(2) finding on Petitioner's conviction in 1993 on one count of Aggravated Assault under A.R.S. §§ 13-1203 and 13-1204 and his conviction in 1996 on two counts of Dangerous or Deadly Assault by a Prisoner under A.R.S. § 13-1206. On appeal, Petitioner argued that his federal constitutional rights were violated when the sentencing judge found that the 1996 convictions qualified as "serious offenses" because assault by a prisoner is not listed in § 13-703(H)(4) and because a person may, theoretically, commit assault recklessly. (Appellant's Opening Br. at 74-81.) The Arizona Supreme Court disagreed and held:

> Pursuant to A.R.S. § 13-703(H)(1)(d), a "serious offense" includes "[a]ggravated assault resulting in serious physical injury or committed by the

---

[8] At the time of Petitioner's direct appeal, § 13-703(H)(4) had been recodified as § 13-703(H)(1)(d), and the Arizona Supreme Court's discussion of Petitioner's claim references the latter enumeration. Presently, this part of the statute is codified at A.R.S. § 13-703(I)(4).

> use, threatened use or exhibition of a deadly weapon or dangerous instrument." This offense can be committed under A.R.S. § 13-1204(A)(2) and A.R.S. § 13-1206. A.R.S. § 13-703(H)(1)(d) provides a broad definition for aggravated assault which encompasses all aggravated assaults "resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument." Neither section is specifically listed, but both sections fully satisfy the statutory definition. A.R.S. § 13-1206 is simply aggravated assault for prisoners. As a class 2 felony, it is a more serious offense than A.R.S. § 13-1204, a class 3 felony. A conviction under it satisfies A.R.S. § 13-703(F)(2).[FN8]
>
> > FN8. The sentencing judge noted in his Special Verdict that even if he based his finding of the (F)(2) aggravating factor solely on Martinez' 1993 conviction, he would have found that "the mitigating circumstances in this case, individually and cumulatively, are just not sufficiently substantial to outweigh the (F)(2) [1993 conviction] and (F)(10) aggravating circumstances." Special Verdict at 23.
>
> Martinez' argument regarding the theoretical possibility of committing reckless assault is based upon the erroneous assumption that the old (F)(2) concepts, *see State v. McKinney*, 185 Ariz. 567, 581, 917 P.2d 1214, 1228 (1996) (finding that the (F)(2) aggravating factor does not apply to offenses which can be committed recklessly), carry over to the new (F)(2). But in 1993, the legislature abandoned the (F)(2) language "use or threat of violence" and replaced it with "serious offense." In so doing, the legislature provided a list of "serious offenses" described at A.R.S. § 13-703(H)(1)(a) through (k). This list contains several crimes that can be committed recklessly. Manslaughter is included in the A.R.S. § 13-703(H)(1) list. By definition, a person can commit manslaughter by "[r]ecklessly causing the death of another person." A.R.S. § 13-1103(A)(1). A person can also commit aggravated assault recklessly. A.R.S. §§ 13-1203(A)(1) & 13-1204.

Martinez, 196 Ariz. at 461-62, 999 P.2d at 805-06.

Petitioner argues that the (F)(2) factor was too vague to give him notice that it would apply to his conduct in committing murder and that retroactive application of the Arizona Supreme Court's enlargement of A.R.S. § 13-703(H)(4) violated his right to due process under *Bouie v. Columbia*, 378 U.S. 347 (1964). The Court disagrees.

In *Bouie*, the Court held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids." *Id.* at 353-54. In determining that Petitioner's convictions under A.R.S. § 13-1206 qualified as aggravated assaults under A.R.S. § 13-703(H)(4), the Arizona Supreme Court simply applied the plain language of the statute, which does not tie "aggravated assault" to any specific provision of the criminal code. The court's reading of

§ 13-703(H)(4) to include aggravated assault by a prisoner "was not unforeseeable, nor an enlargement of the usual and ordinary meaning of the statute." *Poland v. Stewart*, 117 F.3d 1094, 1100 (9th Cir. 1997). Therefore, there was no due process violation, and the Arizona Supreme Court's decision was neither contrary to nor an unreasonable application of established Supreme Court precedent. Claim 10 is denied.

Claim 11

Petitioner alleges IAC at sentencing for counsel's failure to investigate and present evidence to rebut the "serious offense" aggravating factor. (Dkt. 30 at 86-91.) The Court agrees with Respondents that Petitioner failed to present this claim in state court. (Dkt. 50 at 66.) If Petitioner were to return to state court now and attempt to litigate this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, Claim 11 is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 11 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice.

Petitioner argues as cause that Respondents failed to disclose the police reports underlying his 1993 Gila County conviction for aggravated assault, which was one of three prior felony convictions used to established the (F)(2) aggravating factor. (Dkt. 57 at 74-77.) These reports, he argues, would have mitigated the weight of the aggravating factor by showing that although a witness said Petitioner had a gun in his hand, there was no allegation that he discharged or pointed it at anyone. (*Id.* at 77.) The Court finds this insufficient to establish cause for Petitioner's failure to pursue Claim 11 in his state PCR proceedings.

At the time of Petitioner's PCR proceeding, he was aware that the 1993 Gila County conviction was one of three convictions found by the trial judge to satisfy the (F)(2) aggravating factor. In addition, as federal habeas counsel now avow, he should have been aware that the police reports relating to this conviction were not in trial counsel's files. (*Id.* at 75.) Petitioner points to no external obstacle preventing his PCR counsel from obtaining

these reports, just as habeas counsel has done in these proceedings. The failure of the prosecution to disclose the reports does not negate that the factual basis of the claim existed at the time of the PCR proceeding – i.e., a review of the record and trial counsel's file would have revealed that although a prior conviction was used to aggravate his sentence, it did not appear that sentencing counsel had investigated the facts underlying the conviction. Consequently, Petitioner should have pursued this claim in state PCR proceedings, and his failure to do so cannot be attributed to the State's alleged failure to disclose the police reports underlying the conviction.

Even if Petitioner was not at fault for failing to investigate and pursue Claim 11 in state court, the alleged *Brady* violation fails to establish cause. The police reports underlying Petitioner's 1993 aggravated assault conviction fall far short of being favorable to the defense. They consist of two witnesses statements, each of which note that Petitioner had a gun. For example, witness Saul Salas states:

> We stopped at the stoplight by Checkers Auto. It was me, my girfriend Martha Rentria, and Willie Garcia. That's when Ernie Martinez started yelling out my name. He was in back of us with some other guys. Ernie sat on the door calling my name. They pulled up besides us and Ernie said me [sic], "I heard you were talking shit." When he was saying that he had a gun in his hand.

(Dkt. 62-4 at 59.) Petitioner pled guilty to aggravated assault, which under Arizona law included "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury" and using "a deadly weapon or dangerous instrument" in doing so. A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2). That Petitioner did not point the gun at the victims or discharge it, as he now asserts, hardly mitigates the fact that he was convicted of aggravated assault and says nothing of the two 1996 prior offenses for dangerous or deadly assault by a prisoner that were also found by the Court to satisfy the (F)(2) aggravating factor. The 1993 witness statements were not material, and the prosecution's failure to disclose them to defense counsel does not serve as cause of the default of Claim 11.

Petitioner has not established cause and prejudice and does not argue that a fundamental miscarriage will occur if Claim 11 is not addressed on the merits. Accordingly, Claim 11 is procedurally barred, and Petitioner's request for evidentiary development on the

merits of Claim 11 is denied.

Claims 12 and 13

In Claim 12, Petitioner asserts the trial court erred in concluding that he did not establish the A.R.S. § 13-703(G)(1) mitigating circumstance and in failing to consider other non-statutory mitigation, including genetics, cultural failures, and institutional failures. (Dkt. 30 at 92-105.) Petitioner also argues that sentencing counsel was constitutionally ineffective for failing to rebut the testimony of the state's mental health expert through presentation of his own mental health evidence and that there was prosecutorial misconduct at sentencing because the prosecution allowed gross IAC to occur, thereby preventing Petitioner from receiving a fair sentencing hearing. (*Id.*) In Claim 13, Petitioner contends that the sentencing court failed to give sufficient weight to his proffered mitigation. (Dkt. 30 at 105-06.)

Procedural Default

Except for the allegation regarding the (G)(1) mitigating factor, Claim 12 was not fairly presented in state court. If Petitioner were to return to state court now and attempt to litigate the unexhausted aspects of Claim 12, they would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because they do not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, these allegations are "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. The non-statutory mitigation, sentencing IAC, and prosecutorial misconduct aspects of Claim 12 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice.

As cause, Petitioner argues that direct appeal counsel should have raised these issues. (Dkt. 57 at 79.) However, he did not exhaust in his state PCR proceedings any appellate IAC claims based on the failure to raise these claims on appeal. Accordingly, appellate IAC cannot constitute cause. *Edwards v. Carpenter*, 529 U.S. at 451-53. Because Petitioner has failed to establish cause, there is no need to address prejudice. Petitioner does not argue that

a fundamental miscarriage will occur if the defaulted aspects of Claim 12 are not addressed on the merits. Accordingly, the non-statutory mitigation, sentencing IAC, and prosecutorial misconduct aspects of Claim 12 are procedurally barred.

Merits

Petitioner exhausted on direct appeal the argument that the trial court's rejection of the A.R.S. § 13-703(G)(1) mitigating circumstance violated his federal constitutional rights. (Appellant's Opening Br. at 82-95.) He also exhausted Claim 13 – that the state court failed to give sufficient weight to his age, his personality disorder, and his traumatic family history as mitigating factors. (*Id.* at 96-100.) Although properly exhausted, the Court concludes Petitioner's allegations are meritless.

In capital sentencing proceedings, the sentencer must not be precluded, whether by statute, case law, or any other legal barrier, and may not refuse to consider any constitutionally relevant mitigating evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982). Constitutionally relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. The Constitution and the clearly established law require that the sentencing court hear and consider all constitutionally relevant mitigating evidence; however, it is the sentencer that determines the *weight* to accord such evidence. *See Eddings*, 455 U.S. at 114-15 (emphasis added); *see also Harris v. Alabama*, 513 U.S. 504, 512 (1995) (stating that the Constitution does not require that a specific weight be given to any particular mitigating factor). "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994).

At sentencing, Petitioner sought to establish that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-703(G)(1). Both Petitioner and Respondents presented testimony from mental health experts who opined about his mental condition. (RT 7/22/98; RT 7/31/98.) Both experts

evaluated Petitioner and concluded that his intelligence was in the superior range. (RT 7/22/98 at 12; RT 7/31/98 at 12.) Due to Petitioner's traumatic upbringing, which included chronic violence inside the home by his father battering his mother, Petitioner's mental health expert opined that he suffers from post-traumatic stress disorder and other personality disorders. (RT 7/22/98 at 16, 30.) The state's mental health expert opined that Petitioner does not suffer from a mental disease or defect but suffers from an antisocial personality disorder. (RT 7/31/98 at 16.) The sentencing court concluded that Petitioner did not establish that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired at the time of the crime. (ROA 204.) Further, the sentencing court rejected a finding of post-traumatic stress disorder, finding instead that Petitioner suffers from a predominant anti-social personality disorder with borderline and narcissistic features. (*Id.* at 12.)

In addition to the (G)(1) statutory factor, Petitioner proffered evidence to support other mitigating factors. (ROA 207, 213; RT 7/9/98.) He urged the court to take into account the fact that he was only 19 years old at the time of the crime, a statutory mitigating factor under A.R.S. § 13-703(G)(3). (ROA 207; RT 7/31/98 at 76.) The sentencing judge agreed that (G)(5) had been established, but gave it little weight based on Petitioner's level of intelligence and significant past experience with the criminal justice system. (ROA 204 at 15-16.) The trial court also found that Petitioner's personality disorder and his difficult family history qualified as mitigating factors, but again declined to give them substantial weight because Petitioner had failed to establish a sufficient causal link between this mitigation and his criminal conduct. (*Id.* at 16-23.)

On direct appeal, the Arizona Supreme Court thoroughly considered the mitigating evidence presented at sentencing. *See Martinez*, 196 Ariz. at 462-65, 999 P.2d at 806-09. Petitioner does not deny that the state courts considered his proffered mitigation but argues that they unreasonably applied federal law by requiring that he establish a causal connection between his evidence and the crime before giving it substantial weight. (Dkt. 57 at 83.) Petitioner is in error. In conducting its independent review of a death sentence, the Arizona

Supreme Court has confirmed that its consideration of mitigating information does not require the establishment of a nexus between the mitigating factor and the crime. *See State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) ("We do not require a nexus between the mitigating factors and the crime to be established before we consider the mitigation evidence."). However, as occurred here, the failure to link the mitigating factor and the crime may be considered in assessing the quality and strength of the mitigation evidence. *Id.*; *see also Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998) (the sentencing court is "free to assess how much weight to assign to such evidence"). The state court did not unreasonably apply federal law.

Finally, Petitioner argues that the state court unreasonably found the facts in rejecting his mental health expert in favor of the state's expert. (Dkt. 57 at 80-81.) However, as previously discussed, in compliance with *Lockett* and *Eddings*, the state courts thoroughly considered Petitioner's mental health mitigation evidence; it was up to the state court to determine the weight to which this evidence was entitled. *See Harris*, 513 U.S. at 512. Petitioner is not entitled to relief.[9]

Claim 16

Petitioner alleges that counsel was ineffective at trial and sentencing for failing to properly investigate and prepare for the testimony of Eric Moreno and Patricia Baker. (Dkt. 30 at 133-38.) At trial, Moreno testified that Petitioner, following his arrest and questioning by police, called him at his home in Indio, California, and said he had "blasted" a police officer. (RT 9/15/97 at 13.) Baker, Moreno's mother, testified that Petitioner called to talk to Moreno on the day of Petitioner's arrest. (*Id.* at 75-83.)

Respondents argue that Claim 16 is procedurally defaulted. (Dkt 50 at 79-80.) Petitioner disagrees, contending that the claim was fairly presented to the Arizona Supreme

---

[9] In his motion for evidentiary development, Petitioner seeks leave to expand the record, conduct discovery, and present testimony at an evidentiary hearing to establish that the trial court was incorrect in finding Dr. Bayless's testimony to be credible and to establish ineffective assistance of sentencing counsel. (Dkt. 62 at 46-49.) Neither is relevant to the legal issues presented in Claims 12 and 13. Accordingly, the requests are denied.

Court as a part of their independent sentencing review. However, this is not the type of claim exhausted by the supreme court's independent sentencing review. *See Moormann v. Schriro*, 426 F.3d 1044, 1057-58 (9th Cir. 2005) (discussing the scope of claims exhausted by the supreme court's independent sentencing review). Petitioner failed to present Claim 16 in state court. If Petitioner were to return to state court now and attempt to litigate this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, Claim 16 is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 16 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice.

As cause, Petitioner contends summarily that evidence "favorable to the defense and discoverable under *Brady* likely was withheld." (Dkt. 57 at 90; *see also* Dkt. 62 at 51.) As discussed with respect to Claim 11, any alleged prosecutorial disclosure violation fails to explain why Petitioner did not pursue this IAC claim in the PCR proceedings. Moreover, Petitioner's allegations of *Brady* misconduct fail to identify the allegedly suppressed material, let alone explain how such suppression impeded his development of an ineffectiveness claim based on counsel's cross-examination of Moreno and Baker. Speculation that the phone call was a fabrication is insufficient to establish cause. Absent cause, there is no need to discuss prejudice.

Petitioner also asserts that a fundamental miscarriage of justice will occur if Claim 11 is not considered on the merits. (Dkt. 57 at 87.) In support, Petitioner points to impeachment evidence of Moreno and Baker that was available but not used at trial. A report from Baker's second police interview states that Baker said she had had no contact with Petitioner following his arrest. (Dkt. 62-5, Ex. 19 at 7.) Baker also indicated that she had suffered a coma from a car accident and had trouble remembering dates and times. (Dkt. 57 at 90; Dkt. 62 at 53.) Specifically, she thought she saw Petitioner in Indio in the days preceding his arrest, when other prosecution witnesses placed Petitioner in Arizona at that time. (*Id.*) In

addition, Moreno acknowledged to police that he had used drugs, alcohol, and hallucinogens during the time leading up to Petitioner's arrest in Indio and had talked with Johnny Acuna about Petitioner's arrest prior to the phone conversation that he had with Petitioner. (*Id.*) The Court finds that Petitioner's proffered proof of innocence is well short of that needed to establish that no reasonable juror would have convicted him.

Read in context, Baker's statement to police that she had not had contact with Petitioner following his arrest clearly meant *after* the first night of his arrest. (Dkt. 62-5 at 1-8.) As is evident from the police report, the entire interview was based on Baker's recollection of the phone call Petitioner made to her home on the night he was arrested. Furthermore, Moreno's younger brother, Mario Hernandez, corroborated the testimony of Moreno and Baker by testifying that he answered the phone when Petitioner called. (RT 9/15/97 at 66.) The evidence at trial further corroborated their testimony because it was undisputed that Petitioner had been living with the Baker household off and on for a number of months leading up to his trip to Arizona. (*Id.* at 68-78.) The additional impeachment would not have aided Petitioner and certainly is not demonstrative of actual innocence. Therefore, Claim 16 is procedurally barred, and Petitioner's request for evidentiary development on the merits of Claim 16 is denied.

Claim 17

Petitioner asserts that trial counsel was ineffective for failing to obtain an independent pathologist, effectively impeach the testimony of the prosecution's pathologist, and move for relief after the prosecution presented undisclosed expert testimony at trial. (Dkt. 30 at 138.) Respondents contend that Claim 17 is procedurally defaulted because Petitioner failed to present it during state PCR proceedings. (Dkt. 50 at 82.) Petitioner concedes that he failed to raise these allegations in state court. (Dkt. 57 at 89.) If Petitioner were to return to state court now and attempt to litigate Claim 17, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, Claim 17 is "technically" exhausted but procedurally defaulted because Petitioner no longer

has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 17 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice.

As cause, Petitioner contends that the prosecution suppressed information in violation of *Brady*. (*Id.* at 94.) Specifically, he asserts that defense counsel was not told before trial that the medical examiner's opinion about the shot sequence had changed. (Dkt. 57 at 92.) Prior to trial, Dr. Phillip Keen opined that the shot to the victim's back was likely the last shot fired. (Dkt. 62-4, Ex. 14 at 28.) At trial, Dr. Keen testified that the fatal shot to the victim's head was the last shot fired. (RT 9/23/97 at 56, 59.) Petitioner speculates that the prosecution was aware of the change in the medical examiner's testimony and suppressed that information from the defense. (*Id.*) Had the defense been aware of the change, they could have obtained an independent pathologist to provide their own expert opinion. (*Id.*)

Petitioner's speculation that Respondents withheld *Brady* information regarding Claim 17 is insufficient and does not establish cause. (Dkt. 57 at 92-94.) Moreover, the alleged *Brady* violation does not explain why Claim 17 was not developed and presented in Petitioner's state PCR proceeding. The factual basis for the claim was evident from a review of the record and trial counsel's pretrial interview with Dr. Keen. Absent cause, there is no need to discuss prejudice.

Petitioner contends that a fundamental miscarriage of justice will occur if Claim 17 is not addressed on the merits. In support, he has submitted an affidavit from a pathologist, Dr. Eric Peters. (Dkt. 62-4, Ex. 14.) Dr. Peters disagrees with the trial testimony of Dr. Keen regarding the sequence of shots. (*Id.*) In his view, the neck and head shots occurred at the same time, and the back shot occurred last. (*Id.*) This, Petitioner contends, undermines the State's theory that the head shot was fired after Officer Martin was already prone on the ground. (Dkt. 57 at 94-95.) Petitioner's proffer falls short of establishing "new reliable evidence" to support his claim of actual innocence. *Schlup v. Delo*, 513 U.S. at 324. The best that Dr. Peters' affidavit does is to make it a closer factual question whether the head or the back shot was last. Given all of the evidence admitted at trial and the new evidence

considered during these habeas proceedings, Petitioner has not established that a fundamental miscarriage of justice will occur if Claim 17 is not considered on the merits. Thus, Claim 17 is procedurally barred, and Petitioner's request for evidentiary development on the merits of Claim 17 is denied.

Claim 21

Claim 21 is comprised of numerous sub-claims. (Dkt. 30 at 169-91.) In his Traverse, Petitioner states that he has withdrawn sub-claims A, B-3, B-4, C, D, F, and G. (Dkt. 57 at 1.) The remaining allegations are:

B-1 The trial judge made improper comments to the jury;

B-2 The trial judge failed to reassign his bailiff; and

E The sentencing judge improperly considered victim statements.

Petitioner raised these claims in his PCR petition, however, the court ruled they were waived pursuant to Ariz. R. Crim. P. 32.2(a)(3) because Petitioner could have raised them on direct appeal. (ME 8/24/04 at 4, 8.) This preclusion ruling rests on an independent and adequate state procedural bar. *See Smith*, 536 U.S. at 860 (holding that Arizona's Rule 32.2(a) is independent of federal law); *Ortiz*, 149 F.3d at 931-32 (holding that Arizona's Rule 32.2(a)(3) is an adequate procedural bar). Consequently, federal habeas review of Claim 21 is barred unless Petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice to excuse the default.

As cause, Petitioner contends that appellate counsel rendered ineffective assistance by failing to raise these issues on direct appeal. (Dkt. 57 at 97, 102.) Although Petitioner properly exhausted in his PCR petition appellate IAC claims based on the failure to raise sub-claims B-1 and B-2 on direct appeal, he did not exhaust an appellate IAC claim based on the failure to raise sub-claim E on appeal. Accordingly, appellate IAC cannot constitute cause for the failure to properly exhaust sub-claim E. *Edwards v. Carpenter*, 529 U.S. at 451-53. Because Petitioner has failed to establish cause, there is no need to address prejudice. Petitioner does not argue that a fundamental miscarriage will occur if sub-claim E is not addressed on the merits. Accordingly, sub-claim E of Claim 21 is procedurally barred.

Petitioner properly exhausted IAC allegations based on appellate counsel's failure to raise sub-claims B-1 and B-2 on appeal, which the PCR court denied on the merits. (ME 8/24/04 at 4-5.) The Court therefore considers whether appellate counsel's failure to raise sub-claims B-1 and B-2 was constitutionally ineffective and thus serves as cause to excuse Petitioner's procedural default.

Sub-claim B-1

Petitioner asserts that during voir dire, the judge told the jury it had heard only one side of the evidence in the media, implying that the jury should wait to hear Petitioner's side of the story. (Dkt. 57 at 97-98.) Petitioner claims that such comments to the jury impermissibly bolstered the truthfulness of the prosecution's case and the media account of the case and violated his Fifth Amendment right to remain silent. (*Id.*) The court also contrasted this case with the O.J. Simpson trial, stating that in this case there would be no lawyer misconduct, no lying or disrespect, and no hiding of the evidence. (*Id.*) Petitioner asserts that such comments violated his right to an impartial judge. (*Id.*)

The trial record shows that Petitioner's co-counsel at trial, Todd Coolidge, recommended that the O.J. Simpson case be addressed in jury questionnaires. (RT 9/2/97 at 79-81.) The prosecutor objected to the proposed questions about the Simpson case. (*Id.*) The trial judge inquired of defense counsel, as follows:

> THE COURT: Mr. Coolidge, speak to 37 and 38 and 39. Why do we want to even raise the ugly specter of the O.J. Simpson case?
>
> MR. COOLIDGE: Well, starting with question 37, I think more – I mean, increasingly more and more we are seeing in the news just crimes about, I mean, stories about crime, and I think it is very important especially with a questionnaire rather than to go through individual jurors, we can hear what their idea is right now of crime in society and whether they think it is too prevalent. Whether they think that, oh, it is not a problem. I think that is very important. The questions that then follow regarding the O.J. Simpson case is that's the most recent and probably the most publicized criminal trial gives – there has been so much follow-up from that we are given the idea from that what people – what their views are of attorneys, judges, the criminal system itself, and crime in general.
>
> . . . .
>
> MR. COOLIDGE: My feeling is this: This questionnaire is just to give us an idea of who these people are without spending a lot of time talking to

them individually, and I think most of these questions are appropriate.

THE COURT: So you are anticipating an answer, yeah, the O.J. case really stunk. I am so upset with this whole process that I will find everybody guilty just to get even, or some sort of weird, bizarre answer like that. Is that what you are saying?

MR. COOLIDGE: I am not ever going to believe a criminal defense attorney's words that they state in a courtroom. I think statements such as this.

THE COURT: All right. I will leave in 37, 38, 39 and 40.

(*Id.* at 80-81.)

During voir dire, the trial judge, based on responses to the jury questionnaires, addressed the issue of pretrial publicity and the O.J. Simpson trial, as follows:

Many of you folks indicated in your questionnaires that you had formed an opinion about this case based upon the pretrial publicity. Let me talk to you a little bit about that. It is very important that you set aside and ignore what you may have seen on TV or heard on radios or saw in the newspaper print. You have actually only heard one side of the story. I have no idea what it is that you may have heard. And what you heard was presented in a highly sensationalized fashion. And, as we know, media people are just like any other human being and they make mistakes and they say things that may not be accurate. So what we are asking you to do is to completely set aside and ignore anything that you may have heard by way of pretrial publicity. This case must be decided only, solely upon the cold, hard facts in evidence that is produced here in the courtroom. That's the only thing that you can consider as a juror is what is presented here in the courtroom.

. . . .

Now, also some of you indicated that since the defendant has been charged with crimes, he is likely to be guilty, and some folks may be of that thought. People who are not schooled in the law may think that, but I wanted to give you some legal instructions about that. Let me remind you that charges are not evidence against the defendant. It is just part of a process, and simply because someone is charged does not have anything to do with your function as jurors in determining whether or not the State can prove Mr. Martinez guilty beyond a reasonable doubt. The defendant has several important constitutional rights that I am going to review with you right now. The law requires that the State must prove the defendant guilty beyond a reasonable doubt. The defendant is presumed by the law to be innocent. That means that as you glance over to Mr. Martinez during this jury selection process, the lawyers and the judge sometimes refer to a cloak of innocence, instead of having his shirt there, he is cloaked or clothed with the presumption of innocence, and that stays in place unless and until the State convinces you beyond a reasonable doubt that he is guilty. So at this point all of you must be of that frame of mind that he is presumed to be innocent. The charges, the fact that he is charged, as I told you, is not evidence and is not used against him. This presumption of innocence means that the defendant is not required to prove his innocence. He is not required to produce any evidence. He is not required to testify. If, in fact, [Petitioner] chooses to testify, that decision is something

> that he and his lawyers will review. And if that decision is made, that cannot be used against him in any fashion. I will repeat that. If the defendant chooses not to testify, that cannot be used in your decision in any fashion.
>
> . . . .
>
> Also, from your questionnaires, some of you folks raised concerns about the criminal justice system because of the O.J. Simpson criminal trial. No matter what your thoughts are about that trial in Los Angeles, California, let me assure you that the criminal justice system is alive and well here in Phoenix, Arizona. There will be no media circus in this case. No reporters stumbling over each other trying to get a story. Our Arizona media people are more professional and responsible. There will be no lawyer misconduct in this case. No backstabbing. No grandstanding. No hiding evidence. No lying or disrespect to the Court. All four of our lawyers are ethical and professional. In fact, I have known Emmet Ronan and Bob Shutts, the lead lawyers for each side, I have known both these gentlemen for more than 20 years, and these gentlemen are good examples of what criminal lawyers are supposed to be like. Also, with all due modesty, let me tell you that Arizona courts are nationally recognized for their excellence. We lead the nation in jury reform. We encourage jurors to take notes, and we allow jurors to ask questions. So in summary, I expect this trial to be exactly what it is supposed to be: A fair and impartial search for the truth, and I fully expect that justice will prevail in this case.

(RT 9/4/97 at 18-23.)

To establish cause, Petitioner must show that counsel's appellate advocacy fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's deficient performance, Petitioner would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. at 285-86. Not presenting weaker issues on appeal is one of the hallmarks of effective appellate advocacy. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

In *Griffin v. California*, 380 U.S. 611(1965), the Court reviewed jury instructions that allowed the jury to draw a negative inference upon a defendant's decision not to testify about matters within his knowledge that he could be reasonably expected to deny or explain. The Court held that the trial court's instructions regarding a defendant's decision not to testify violated his Fifth Amendment right against self-incrimination. *Id.* at 613. In this matter, the trial judge's comments to the jury do not similarly tread upon Petitioner's Fifth Amendment rights. Rather, the trial judge instructed the jury not to prejudge the defendant. (RT 9/4/97 at 18.) The judge specifically indicated that the defendant was not required to testify and that

if he chose not to testify, such a decision could not be used against him in any fashion. (RT 9/4/97 at 20-21.) Appellate counsel's failure to include this meritless issue on appeal was not constitutionally ineffective.

Regarding alleged judicial partiality, as already discussed, a defendant is entitled to a fair trial, free from judicial bias, and there is a presumption that judges are unbiased, honest, and have integrity. *See Schweiker v. McClure*, 456 U.S. at 195; *Withrow v. Larkin*, 421 U.S. at 47. The trial judge's response to the widespread pretrial publicity did not demonstrate actual bias. The trial judge specifically instructed the jury that it was to regard Petitioner as being clothed with a presumption of innocence and that such a presumption could not be overcome unless the state proved its case beyond a reasonable doubt. (RT 9/4/97 at 20.) Further, the court admonished the jurors to disregard media coverage and to consider only the evidence admitted at trial. (*Id.* at 18.) The court's comment about Arizona media being more responsible had nothing to do with the accuracy of reporting, which the court had already instructed the jurors to disregard, but referred to their professional behavior in not stumbling over one another in an effort to cover a story during the trial. (*Id.* at 22-23.) The reference to hiding evidence and lying was in the context of the trial judge assuring that there would not be lawyer misconduct and was not a comment on the truthfulness of the State's evidence. (*Id.*) The trial court's comment that justice would prevail followed the comment that the court expected the trial to be what it ought to be – a fair and impartial search for the truth. (*Id.* at 23.) Appellate counsel was not ineffective for failing to raise this meritless claim on appeal. *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).

Sub-claim B-2

Petitioner also argues that appellate counsel was ineffective for failing to assert error on appeal based on the trial judge's refusal to remove his bailiff from the case. As discussed with respect to Claim 2, there is nothing in the record to indicate that the bailiff violated Judge Hotham's admonitions to not interact with the victim's family, relay his law enforcement background to the jurors, or have any emotional reaction during trial. Nor is there any evidence that the bailiff was unable to carry out his official responsibilities.

Appellate counsel was not ineffective for failing to raise this meritless issue on appeal.

Conclusion

Petitioner has failed to establish cause and prejudice for the default of sub-claims B-1 and B-2, and he does not assert that a fundamental miscarriage of justice will occur if the claims are not heard on the merits. Therefore, sub-claims B-1 and B-2 are procedurally barred, and Petitioner's request for evidentiary development on the merits of Claim 21 is denied.

Claim 22

Petitioner argues that the Eighth Amendment prohibits execution of a person who, based on "mental age," lacks sufficient moral culpability. (Dkt. 30 at 191.) Petitioner acknowledges that he did not exhaust this claim in state court and asserts that appellate counsel's constitutional ineffectiveness serves as cause for the default. (Dkt. 57 at 101.) However, he did not exhaust in his state PCR proceedings any appellate IAC claims based on the failure to raise Claim 22 on direct appeal. Accordingly, appellate IAC cannot constitute cause. *Edwards v. Carpenter*, 529 U.S. at 451-53. Because Petitioner has failed to establish cause, there is no need to address prejudice. Petitioner does not assert that a fundamental miscarriage of justice will occur if Claim 22 is not addressed on the merits. Accordingly, Claim 22 is procedurally barred.

Claim 23

Petitioner argues that Arizona's death penalty discriminates against poor, male defendants. (Dkt. 30 at 194.) Petitioner acknowledges that Claim 23 was not exhausted in state court and asserts that he has raised the claim solely to preserve the issues raised therein should the Supreme Court's jurisprudence on the constitutionality of Arizona's death penalty statute change in the future. (Dkt. 57 at 101.) Claim 23 is procedurally barred.

Claim 24

Petitioner alleges that he was entitled to a jury determination on the aggravating factors that rendered him eligible for a death sentence. (Dkt. 30 at 211.) In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court ruled that Arizona's aggravating factors are an

element of the offense of capital murder and must be found by a jury. However, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme Court held that *Ring* does not apply retroactively to cases already final on direct review. Because Petitioner's direct review was final prior to *Ring*, he is not entitled to relief premised on that ruling.

CERTIFICATE OF APPEALABILITY

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a certificate of appealability ("COA") or state the reasons why such a certificate should not issue. Therefore, in the event that Petitioner appeals, this Court on its own initiative has evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For procedural rulings, a COA will issue only if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of the following issues:

1. Whether the Court erred in determining that part of Claim 1, alleging trial and appellate counsel ineffectiveness for failing to challenge Judge Hotham for cause, lacked merit;
2. Whether the Court erred in determining that Petitioner failed to establish cause to overcome the default of the judicial bias allegation in Claim 1;
3. Whether the Court erred in determining that Claim 7, alleging an unconstitutional premeditation instruction, lacked merit; and
4. Whether the Court erred in determining that Petitioner failed to establish cause

to overcome the default of the *Brady* allegation in Claim 9.

Therefore, the Court issues a COA as to these issues. For the remaining claims, the Court declines to issue a COA for the reasons set forth in the instant Order.

Based on the foregoing,

IT IS ORDERED that Petitioner's Motion for Discovery, to Expand the Record and for Evidentiary Hearing (Dkt. 62) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's supplemental motion for evidentiary development (Dkt. 74), Petitioner's motion to produce trial exhibit 21 (Dkt. 80), and Petitioner's motion for leave to file additional evidence in support of his motion for evidentiary development (Dkt. 85) are **DENIED**.

IT IS FURTHER ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 30) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on May 25, 2005, is **VACATED**.

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

1. Whether the Court erred in determining that part of Claim 1, alleging trial and appellate counsel ineffectiveness for failing to challenge Judge Hotham for cause, lacked merit;
2. Whether the Court erred in determining that Petitioner failed to establish cause to overcome the default of the judicial bias allegation in Claim 1;
3. Whether the Court erred in determining that Claim 7, alleging an unconstitutional premeditation instruction, lacked merit; and
4. Whether the Court erred in determining that Petitioner failed to establish cause to overcome the default of the *Brady* allegation in Claim 9.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Rachelle M. Resnick, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix,

AZ 85007-3329.

DATED this 20th day of March, 2008.

Earl H. Carroll
United States District Judge

Notice of Appeal: 5 15 08

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ernesto Salgado Martinez, Petitioner, vs. Dora Schriro, et al., Respondents.	No. CV-05-1561-PHX-EHC DEATH PENALTY CASE **ORDER**

Before the Court is Petitioner's motion to alter or amend judgment. (Dkt. 90.) The motion is brought in response to the Court's Order denying Petitioner's amended habeas corpus petition. (Dkts. 88, 89.) Petitioner requests reconsideration of the Court's ruling and an expanded certificate of appealability.

Rule 59

A motion to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure is essentially a motion for reconsideration. Rule 59(e) offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). The Ninth Circuit has consistently held that a motion brought pursuant to Rule 59(e) should only be granted in "highly unusual circumstances." *Id.*; *see also 389 Orange Street Partners v.*

Arnold, 179 F.3d 656, 665 (9th Cir. 1999). Reconsideration is appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam); *see also School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs, *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-926 (9th Cir. 1988), nor is it the time to ask the court to "rethink what it has already thought through," *United States v. Rezzonico*, 32 F. Supp.2d 1112, 1116 (D. Ariz. 1998) (quotation omitted).

Claim 2

Petitioner requests reconsideration regarding this claim in response to a new U.S. Supreme Court case, *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008). On the basis of *Snyder*, Petitioner contends that this Court should further evaluate the sincerity and credibility of the prosecutor in using his peremptory challenges to strike the two remaining blacks from the jury. (Dkt. 90 at 3.) Petitioner argues that the prosecutor's reasons for the peremptory strikes were exaggerated and pretextual because the same grounds were not employed to exclude non-blacks from the jury. (*Id.*)

In *Snyder*, the Supreme Court determined that the Louisiana Supreme Court clearly erred in determining that the prosecutor's reasons for striking a black juror did not amount to purposeful discrimination. 128 S. Ct. at 1206. The Court explained that the best evidence for evaluating discriminatory intent is the demeanor of the prosecutor exercising the strikes and the demeanor of the juror who is stricken. Due to the subjectiveness of such an

evaluation, the *Snyder* Court reemphasized that determinations of credibility and demeanor lie peculiarly within a trial court's province. *Id.* at 1208. Searching the trial record, the Court found that the trial court had not made a specific factual determination regarding the demeanor of the stricken juror, even though the prosecutor listed it as one of the reasons for the strike. *Id.* at 1209. Instead, the trial court relied on the second basis for the strike, hardship regarding the juror's student-teaching obligations. *Id.* at 1209-11. In evaluating this reason, the Court found that the record did not support that the juror's student-teaching obligation would have prevented him from serving. *Id.* Because the prosecutor accepted white jurors with similar conflicting obligations, the Court found the prosecutor's justification a pretext for racial discrimination. *Id.* at 1211-12.

In *Snyder*, the Supreme Court found that the Louisiana Supreme Court clearly erred because the factual record did not support the prosecution's reasons for the strikes and because similarly situated white jurors were treated in a disparate manner. Such is not the case here. The factual reasons given by the prosecutor for the peremptory challenges of the jurors in this case are supported by the trial record. (Dkt. 88 at 18-20, 22-24.) Furthermore, similarly situated white jurors were not treated in a disparate manner. (*Id.* at 22-24.) Therefore, the state court decision was not an unreasonable application of *Batson* and it was not an unreasonable determination of the facts in light of the evidence presented. The Court will not reconsider its ruling regarding Claim 2 and will not expand its certificate of appealability.

Claims 4, 13 and 17

In Claims 4, 13 and 17, Petitioner reargues the same matters that this Court has

already considered. A motion for reconsideration is not the time to ask the court to "rethink what it has already thought through." *See Rezzonico*, 32 F. Supp.2d at 1116. Additionally, Petitioner requests that the Court expand its certificate of appealability to include these claims. However, the Court has already considered this issue; the Court declines to issue a certificate of appealability as to these claims.

Based on the foregoing,

IT IS HEREBY ORDERED denying Petitioner's motion for reconsideration. (Dkt. 90.)

DATED this 15th day of April, 2008.

Earl H. Carroll
United States District Judge

FILED

JUL 07 2014

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNESTO SALGADO MARTINEZ, Petitioner - Appellant, v. CHARLES L. RYAN, Respondent - Appellee.	No. 08-99009 D.C. No. 2:05-cv-01561-EHC District of Arizona, Phoenix ORDER

Before: KOZINSKI, Chief Judge, HAWKINS, and WARDLAW, Circuit Judges

1. *Martinez v. Ryan* Remand Motion

The Appellate Commissioner's referral of the *Martinez v. Ryan* remand motion for decision to the merits panel is vacated.

Petitioner's opposed motion for a limited remand for reconsideration of procedurally defaulted claims in light of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) is granted as follows. On limited remand, the district court shall reconsider Claims 11, 12, 16, and 17. *See Martinez v. Ryan*, 132 S.Ct. at 1309; *Trevino v. Thaler*, 133 S.Ct. 1911 (2013); *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc); *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013).

On limited remand, the district court also shall address whether Claim 4 falls within the *Martinez v. Ryan* exception for procedurally defaulted claims because Petitioner referred in his first amended petition to ineffective assistance of trial counsel as to Claim 4. *See* 5/23/06 Amended Petition at 157-58; *cf. Hunton v. Sinclair*, 732 F.3d 1124 (9th Cir. 2013). If the district court determines Claim 4 falls within the *Martinez v. Ryan* exception, the district court shall also reconsider Claim 4 on limited remand.

We express no opinion as to whether evidentiary development or an evidentiary hearing is necessary as to any claim. Within 14 days after the district court enters its final order on the *Martinez v. Ryan* limited remand, the parties shall file simultaneous status reports in this Court or move, consistently with the rules, for other appropriate relief.

2. *Townsend - Quezada* Remand Motion

The Appellate Commissioner's referral of the *Townsend - Quezada* remand motion for decision to the merits panel is vacated.

We construe Petitioner's opposed *Townsend - Quezada* remand motion as a motion for leave to file in the district court a renewed Request For Indication Whether District Court Would Consider A Rule 60(b) Motion for reconsideration

of Claim 4 and for consideration of a possible *Brady - Napue* claim in light of newly discovered evidence. So construed, the motion is granted.

Should the district court decline a renewed request, the district court shall explain its decision in a reasoned order. Should the district court decide to accept a renewed request, the district court may entertain a Rule 60(b) motion without further order from this Court. We express no opinion on the merits of Petitioner's contentions or on whether an evidentiary hearing is necessary.

Within 14 days after the district court enters its final order on the renewed request for Rule 60(b) consideration, the parties shall file simultaneous status reports in this Court or move, consistently with the rules, for other appropriate relief.

Proceedings in this Court are stayed pending further order.

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ernesto Salgado Martinez, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-05-01561-PHX-ROS DEATH PENALTY CASE **ORDER**

This matter is before the Court on limited remand from the Court of Appeals for the Ninth Circuit for reconsideration of five procedurally defaulted claims—Claims 4, 11, 12, 16, and 17 of Petitioner's amended habeas petition—in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) ("*Martinez*"). (Doc. 104.) The Ninth Circuit also granted Petitioner's motion for leave to file a renewed request for indication whether the District Court would consider a Rule 60(b) motion for reconsideration of Claim 4 and for consideration of a possible claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), in light of newly discovered evidence. (*Id.*) Petitioner has now filed one brief comprising both his renewed request and his supplemental *Martinez* brief, and seeking evidentiary development and an evidentiary hearing with respect to both issues. (Doc. 115.) Respondents filed a response, and Petitioner filed a reply. (Docs. 121, 126.) For reasons set forth below, the Court declines Petitioner's invitation to entertain a motion under Rule 60(b), and finds that Petitioner has failed to overcome the procedural default of Claims 4, 11, 12, 16, and 17, and is not entitled to evidentiary development or hearing.

I. BACKGROUND

In 1997, a jury convicted Petitioner of theft, weapons-related charges, and first-degree murder for the killing of Robert Martin, a Department of Public Safety Officer who had stopped Petitioner on the Beeline Highway between Mesa and Payson, Arizona. The trial court sentenced Petitioner to death for the murder conviction and to terms of imprisonment on the other counts. The following facts concerning the crime are derived from the Arizona Supreme Court's opinion affirming Petitioner's convictions and sentences.

> Martinez drove from California to Globe, Arizona in a stolen blue Monte Carlo to visit friends and family. After learning that his parents had moved to Payson, Arizona, Martinez met his friend Oscar Fryer. Fryer asked Martinez where he had been. Martinez told Fryer that he had been in California. Fryer then asked Martinez if he was still on probation. Martinez responded that he was on probation for eight years and had a warrant out for his arrest. Martinez then pulled a .38 caliber handgun with black tape on the handle from under his shirt and showed it to Fryer. Fryer asked Martinez why he had the gun, to which Martinez responded, "[f]or protection and if shit happens." Tr. Sept. 9, 1997 at 83. Fryer then asked Martinez what he would do if he was stopped by the police. Martinez told Fryer, "he wasn't going back to jail." *Id.* at 85.
>
> Sometime after his conversation with Fryer, Martinez left Globe and drove to Payson. On August 15, 1995, at approximately 11:30 a.m., Martinez was seen at a Circle K in Payson. He bought ten dollars worth of gas and proceeded south down the Beeline Highway toward Phoenix. Martinez was driving extremely fast and passed several motorists, including a car driven by Steve and Susan Ball. Officer Martin was patrolling the Beeline Highway that morning and pulled Martinez over at Milepost 195. Steve and Susan Ball saw Officer Martin's patrol car stopped behind Martinez' Monte Carlo and commented, "Oh, good, he got the speeding ticket." Tr. Sept. 10, 1997 at 32. As they passed by, Susan Ball noticed Officer Martin standing at the driver's side door of the Monte Carlo while Martinez looked in the backseat.
>
> Shortly after Steve and Susan Ball passed, Martinez shot Officer Martin four times with the .38 caliber handgun. One shot entered the back of Officer Martin's right hand and left through his palm. Another shot passed through Officer Martin's neck near his collar bone. A third shot entered Officer Martin's back, proceeded through his kidney, through the

right lobe of his liver, through his diaphragm, and lodged in his back. A fourth shot entered his right cheek, passed through his skull, and was recovered inside Officer Martin's head. The hand and neck wounds were not fatal. The back and head wounds were.

After murdering Officer Martin, Martinez took Officer Martin's .9mm Sig Sauer service weapon and continued down the Beeline Highway at speeds over 100 mph. Martinez again passed Steve and Susan Ball, which they found strange. They began discussing how not enough time had passed for Martinez to have received a speeding ticket because it had only been a couple of minutes since they had seen him pulled over. They stayed behind Martinez for some time and watched him go through a red light at the Fort McDowell turnoff. Steve Ball commented, "Yeah, he just ran that red light. Something is up here. Something is going on." Tr. Sept. 10, 1997 at 69. Steve and Susan Ball continued down the Beeline Highway and lost sight of Martinez until they reached Gilbert Road. At the red light on Gilbert Road, they caught up to him and took down his license plate.

Martinez passed through Phoenix and arrived in Blythe, California at around 4:00 p.m. where he called his aunt for money. At 6:00 p.m., Martinez called his aunt again because she failed to wire the money he requested. Growing impatient, at approximately 8:00 p.m., Martinez entered a Mini–Mart in Blythe and, at gunpoint, stole all of the $10 and $20 bills from the register. Martinez killed the clerk with a single shot during the robbery.[FN1] A .9mm shell casing was recovered at the Mini–Mart the following day. Ballistics reports determined that this shell casing was consistent with the ammunition used in Officer Martin's .9mm Sig Sauer.

FN1: The trial court excluded evidence of the murder under Rule 403, Ariz. R. Evid.

Later that night, Martinez drove to his cousin's house in Coachella, California, near Indio. Around 12:00 p.m. the next day, August 16, 1995, Martinez took David Martinez, his cousin, and Anna Martinez, David's wife, to a restaurant in Indio. After leaving the restaurant, Martinez noticed that a police car was following him. David asked Martinez if the car was stolen to which Martinez responded, "I think so." Tr. Sept. 15, 1997 at 146–47. Martinez turned onto a dirt road and instructed David and Anna to get out of the car. They left the car and went to a nearby trailer compound to call Anna's aunt to come and get them.

Tommy Acuna,[FN2] who lived in his grandmother's house at the compound, was swimming when David and Anna appeared at the fence

surrounding the compound. David and Anna asked Tommy if they could use his phone but Tommy refused. Tommy did permit Anna to use the bathroom. Anna went into the bathroom and came out a couple of minutes later. After showing David and Anna out, Tommy went back to the bathroom "to see if they left anything in there because she wasn't in there that long." Tr. Sept. 16, 1997 at 48. He found a towel on the floor with the .38 caliber handgun wrapped inside. Tommy took the gun, hid it in his pants, and walked outside. He testified that he hid the gun because it was his grandmother's house. By the time Tommy walked outside, the police had surrounded the compound. An officer monitoring the perimeter called out to Tommy and told him that he was going to search him. Tommy walked over to the officer and exclaimed, "I have got the murder weapon." Tr. Sept. 15, 1997 at 192. The officer searched Tommy and found the .38 caliber handgun. This gun was later identified as the weapon that fired the bullets which killed Officer Martin.

> FN2: Tommy's brother Johnny Acuna was a friend of Martinez.

After David and Anna got out of the Monte Carlo, Martinez turned around on the dirt road. Another police car appeared on the scene and headed towards Martinez. Martinez saw this second police car, left the Monte Carlo, ran toward the trailer compound, and jumped the fence. He then ran into Johnny Acuna's trailer.

The SWAT team evacuated the area and tried to communicate with Martinez. After those attempts failed, the SWAT team negotiator threatened to use tear gas. Martinez responded, "I am not coming out; you will have to come in and shoot me." Tr. Sept. 17, 1999 at 23. After further negotiations, however, Martinez agreed to come out and was taken into custody.

While in custody, Martinez called his friend, Eric Moreno, and laughingly told Moreno that "he got busted for blasting a jura." [FN3] Tr. Sept. 15, 1997 at 13. Martinez also told Moreno that a woman on the highway might have seen what had happened. They talked about the guns and Martinez told Moreno that one of the guns had been "stashed." *Id.* at 21. After obtaining a warrant, the police searched Johnny Acuna's trailer and found Officer Martin's .9mm Sig Sauer under a mattress.

> FN3: "Jura" is slang for police officer. Tr. Sept. 15, 1997 at 13.

State v. Martinez, 196 Ariz. 451, 453–55, 999 P.2d 795, 797–99, *cert. denied,* 531 U.S.

934 (2000) ("*State v. Martinez*").

In 2002, Petitioner initiated state post-conviction relief ("PCR") proceedings pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. The trial court denied PCR relief, and the Arizona Supreme Court denied a petition for review.

Petitioner filed a petition for writ of habeas corpus with this Court on May 25, 2005, and an amended petition on May 23, 2006. Petitioner asserted the following claims in the amended petition which are relevant to this motion and supplemental brief:

> Claim 4: the trial court violated Petitioner's right of confrontation by allowing testimonial hearsay of reports of a stolen vehicle and license plates to prove the charged offense of vehicle theft, and as evidence supporting a finding that Officer Martin's murder was premeditated.
>
> Claim 11: trial counsel was ineffective for failing to ameliorate Petitioner's 1993 prior conviction for aggravated assault.
>
> Claim 12: (in part) trial counsel was ineffective for failing to rebut the State expert's diagnosis of anti-social personality disorder and substantiate the defense expert's diagnosis of post-traumatic stress disorder.
>
> Claim 16: trial counsel was ineffective for failing to adequately investigate and confront witnesses Eric Moreno and Patricia Baker.
>
> Claim 17: trial counsel was ineffective for failing to secure an independent pathologist, properly impeach the state's pathologist, and move for corrective action after presentation of undisclosed testimony.

(Doc. 30 at 34–40, 86–92, 101–05, 133–43.)

This Court denied the amended petition, finding Claims 4, 11, 12, 16, and 17 procedurally defaulted because Petitioner failed to present them in state court and no remedies remained available to exhaust the claims, denied further evidentiary development of these claims, and granted a certificate of appealability ("COA") on three other claims. (Doc. 88 at 27, 44–48, 50, 52, 58–59.) Subsequently, the Court denied

Petitioner's motion to alter or amend the judgment and to expand the COA. (Doc. 91.)

Petitioner filed a notice of appeal, and, while the appeal was pending, filed a request for an indication whether the District Court would consider a Rule 60(b) motion. (Docs. 92, 95.) The Court summarily denied the motion. (Doc. 101.)

While the appeal was pending, the Supreme Court decided *Martinez v. Ryan*, holding that where ineffective assistance of counsel ("IAC") claims must be raised in an initial PCR proceeding, failure of counsel in that proceeding to raise a substantial trial IAC claim may provide cause to excuse the procedural default of that claim. 132 S. Ct. at 1320. Petitioner moved the Ninth Circuit to stay his appeal and remand the case in light of *Martinez*. Petitioner also moved to stay the proceedings and remand based on newly-discovered evidence supporting a *Brady–Napue* claim.[1] The Ninth Circuit granted Petitioner's motions and remanded for reconsideration of procedurally defaulted Claims 4, 11, 12, 16, and 17 in light of *Martinez*, and for leave to file a renewed request for indication whether the district court would consider a Rule 60(b) motion for reconsideration of Claim 4 and for consideration of a possible *Brady–Napue* claim in light of newly discovered evidence. (Doc. 121.)

II. DISCUSSION

Petitioner moves this Court to indicate that it will consider a motion for relief from judgment under Rule 60(b)(6) on the basis that "such action is appropriate to accomplish justice." (Doc. 115 at 2) (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988)). Petitioner also seeks reconsideration based on *Martinez* for three trial-level IAC claims. (Doc. 115 at 8-9.) Petitioner seeks evidentiary development and an evidentiary hearing with respect to both the renewed Rule 60(b) request and the *Martinez* claims. (*Id.* at 45–48, 79.)

[1] The Ninth Circuit construed Petitioner's motion for remand pursuant to *Townsend v. Sain*, 372 U.S. 293 (1963), and *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010), as a motion for leave to file in the district court a renewed request for indication whether the District Court would consider a Rule 60(b) motion for reconsideration of Claim 4 and for consideration of a possible *Brady – Napue* claim in light of newly discovered evidence. (Doc. 121.)

A. Renewed Request for Indication Whether This Court Would Consider a Rule 60(b) Motion

Petitioner seeks an indication that the Court will consider a motion for relief from judgment under Rule 60(b)(6) based on the suppression of material exculpatory evidence at trial by the Maricopa County Attorney, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Arizona Attorney General's subsequent failure, in this federal habeas proceeding, to inspect the Maricopa County Attorney's files for *Brady* material. Additionally, Petitioner seeks authorization to conduct further evidentiary development in support of a related claim that the Maricopa County Attorney knowingly elicited false or misleading testimony from Detective Douglas Beatty, or failed to correct such testimony, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959).

According to Petitioner, a Rule 60(b) motion is the appropriate vehicle for vindicating the rights he alleges were violated under *Brady* and *Napue* because the new evidence demonstrates that the earlier federal habeas proceedings lacked integrity.

Respondents contend that the Court should deny Petitioner's renewed request because Petitioner's Rule 60(b) motion is really a second or successive petition, which is barred under 28 U.S.C. § 2244(b)(1). Respondents also assert that Petitioner cannot show extraordinary circumstances warranting reopening of the habeas proceeding because no *Brady* or *Napue* violation occurred.

For the reasons discussed, the Court finds that Petitioner's motion does not establish a defect in the integrity of these proceedings, but rather, seeks to raise new substantive claims. Accordingly, this Court lacks jurisdiction to consider the claims absent authorization from the Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3).

1. Applicable Law

a. Rule 60(b)

Federal Rule of Civil Procedure 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013) (quoting *Gonzalez v. Crosby*, 545 U.S. 524,

528 (2005)). Generally, the filing of a notice of appeal divests the district court of jurisdiction to consider a motion for relief from judgment. *See Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d 769, 772 (9th Cir. 1986). In such a case, it is appropriate for a petitioner to ask the district court whether it wishes to entertain a Rule 60(b) motion, and, if the request is granted, to then move in the appellate court for remand of the case. *See Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

A claim for relief under Rule 60(b)(6), the "catch-all" provision of the rule on which Petitioner relies, must be brought "within a reasonable time," Fed.R.Civ.P. 60(c)(1), and requires a showing of "extraordinary circumstances" that justify reopening a judgment. *See Gonzalez*, 545 U.S. at 535–36 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). "Such circumstances 'rarely occur in the habeas context.'" *Jones*, 733 F.3d at 833 (quoting *Gonzalez*, 545 U.S. at 535).

For habeas petitioners, a Rule 60(b) motion may not be used to "make an end-run around the requirements of AEDPA or to otherwise circumvent that statute's restrictions on second or successive habeas corpus petitions" set forth in 28 U.S.C. § 2244(b). *Jones*, 733 F.3d at 833 (quoting *Calderon v. Thompson*, 523 U.S. 538 (1998)) (internal quotation marks omitted). This statute has three relevant provisions: First, § 2244(b)(1) requires dismissal of any claim that has already been adjudicated in a previous habeas petition. Second, § 2244(b)(2) requires dismissal of any claim not previously adjudicated unless the claim relies on either a new and retroactive rule of constitutional law or on new facts demonstrating actual innocence of the underlying offense. Third, § 2244(b)(3) requires prior authorization from the court of appeals before a district court may entertain a second or successive petition under § 2244(b)(2). Absent such authorization, a district court lacks jurisdiction to consider the merits of a second or successive petition. *United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011); *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001).

There is no "bright-line rule for distinguishing between a bona fide Rule 60(b) motion and a disguised second or successive [§ 2254] motion." *Jones*, 733 F.3d at 834

(quoting *Washington*, 653 F.3d at 1060). In *Gonzalez*, the Court held that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim *on the merits*." 545 U.S. at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 532 n. 4. A legitimate Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532; *accord United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011) (observing that a defect in the integrity of a habeas proceeding requires a showing that something happened during that proceeding "that rendered its outcome suspect"). For example, a Rule 60(b) motion does *not* constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar"—or contends that the habeas proceeding was flawed due to fraud on the court. *Id.* at 532 nn. 4–5; *see, e.g.*, *Butz v. Mendoza–Powers*, 474 F.3d 1193 (9th Cir. 2007) (holding that "where the district court dismisses a petition for failure to pay the filing fee or to comply with the court's orders, the district court does not thereby reach the "merits" of the claims presented in the petition and a Rule 60(b) motion challenging the dismissal is not treated as a second or successive petition"). The Court reasoned that if "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction," there is no basis for treating it like a habeas application. *Gonzalez*, 545 U.S. at 533.

On the other hand, if a Rule 60(b) motion "presents a 'claim,' i.e., 'an asserted federal basis for relief from a . . . judgment of conviction,' then it is, in substance, a new request for relief on the merits and should be treated as a disguised" habeas application. *Washington*, 653 F.3d at 1063 (quoting *Gonzalez*, 545 U.S. at 530). Interpreting *Gonzalez*, the court in *Washington* identified numerous examples of such "claims,"

including:

> a motion asserting that owing to excusable neglect, the movant's habeas petition had omitted a claim of constitutional error; a motion to present newly discovered evidence in support of a claim previously denied; a contention that a subsequent change in substantive law is a reason justifying relief from the previous denial of a claim; a motion that seeks to add a new ground for relief; a motion that attacks the federal court's previous resolution of a claim on the merits; a motion that otherwise challenges the federal court's determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief; and finally, an attack based on the movant's own conduct, or his habeas counsel's omissions.

Id. (internal quotations and citations omitted). If a Rule 60(b) motion includes such claims, it is not a challenge "to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n. 5.

b. **Brady *and* Napue**

Due process requires a prosecutor to disclose material exculpatory evidence to the defendant before trial. *Brady*, 373 U.S. at 87. This duty extends to evidence "that could be used to impeach one of the prosecution's witnesses or undermine the prosecution's case," *Milke v. Ryan*, 711 F.3d 998, 1003 (9th Cir. 2013), and arises regardless of whether the defendant makes a request for the evidence. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion); *see also Kyles v. Whitley*, 514 U.S. 419, 433 (1995) ("[R]egardless of request, favorable evidence is material."). Moreover, a prosecutor has an affirmative duty to learn of and disclose exculpatory or impeachment evidence known to other government agents, including any agents involved in the investigation. *See Kyles*, 514 U.S. at 437.

Evidence is "material" if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. *Bagley*, 473 U.S. at 682. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* at 678. When assessing materiality, the court must take into account the cumulative effect of the suppressed evidence in light of other evidence, not merely the probative value of the suppressed evidence standing alone. *See Kyles*, 514 U.S. at 436

(explaining that materiality under *Bagley* is evaluated in distinct, cumulative analysis in which "suppressed evidence [is] considered collectively").

Thus, to establish a *Brady* violation, a defendant must prove: 1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching, 2) the evidence was suppressed either willfully or inadvertently, and 3) prejudice resulted, meaning there is a reasonable probability that disclosing the evidence to the defense would have changed the result. *Andrews v. Davis*, 798 F.3d 759, 793 (9th Cir. 2015) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *Bagley*, 473 U.S. at 682).

A *Napue* violation occurs when prosecutors "knowingly use false evidence, including false testimony" or "allow[ ] it to go uncorrected when it appears." *Napue*, 360 U.S. at 269. To prevail on a *Napue* claim, a petitioner must show that (1) the testimony or evidence was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material. *United States v. Zuno–Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (citing *Napue*, 360 U.S. at 269–71).

2. Relevant facts

Petitioner asserts that the Maricopa County Attorney has suppressed material exculpatory evidence, in violation of *Brady*. The Court considers the new evidence Petitioner proffers in support of his Rule 60(b) motion and *Brady* and *Napue* claims for purposes of making this determination. *See e.g.*, *Poyson v. Ryan*, 743 F.3d 1185, 1203 (9th Cir. 2013), *overruled on other grounds by McKinney v. Ryan*, —— F.3d ——, 2015 WL 9466506, (9th Cir. 2015) (en banc); *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc). The new evidence consists of, primarily, a photograph of an intact ignition in the 1975 Chevrolet Monte Carlo ("Monte Carlo") driven by Petitioner before his arrest, and disclosed to Petitioner in 2012 as part of court-ordered discovery in his prosecution in California for the murder of a convenience store clerk in Blythe, California. (Doc. 115, Ex. 1.) Petitioner submits this photograph cannot be reconciled with Detective Beatty's testimony during his trial, and, had it been disclosed at trial,

would have undermined proof of premeditation, an element of first-degree murder (the "Beatty *Brady* claim").

Petitioner also asserts that Respondents suppressed a report by California Department of Justice Senior Criminalist Ricci Cooksey, identifying other matters of evidentiary significance with respect to the Monte Carlo, but failing to note a missing ignition, which, Petitioner contends, implies that the ignition was intact. (Doc. 115, Ex. 2.) The report also indicates that Cooksey attempted telephonic contact with Detective Beatty and the prosecutor prior to trial, which Petitioner contends demonstrates a possible *Napue* violation because it implies that Cooksey informed Detective Beatty and the prosecutor that the ignition was intact when he inspected the vehicle.

To place Petitioner's argument and new evidence into context, the Court will summarize the evidence offered during the guilt phase of Petitioner's trial relevant to the determination that the Monte Carlo driven by Petitioner was stolen and that Officer Martin's murder was premeditated, and the new evidence proffered in this habeas proceeding.

a. Guilt Phase Evidence

i. Officers Rochelle Carlton and Owen Krings

Rochelle Carlton, a community service officer for the Indio Police Department, testified that she took a call on July 29, 1995, from Herman Hines, who reported his California license plate, number 1 CUK 259, stolen. (Doc 121, App. C at 87–91.) Officer Owen Krings, with the Cathedral City Police Department, testified that he took a stolen car report on July 29, 1995, from Sonia Tison. (Doc. 121, App. D at 149–50.) Tison described the car as a 1975, white over blue Chevy Monte Carlo, and provided the vehicle identification number for the vehicle. (*Id.* at 151.) It was later determined that the VIN number matched the number of the Monte Carlo being driven by Petitioner. (Doc. 115, App. 12 at 100–101.)

In Claim 4 of his amended habeas petition, Petitioner argued that the trial court denied his federal constitutional right of confrontation by allowing the prosecution to

introduce testimonial hearsay through the officers' testimony to prove the vehicle driven by Petitioner at the time of the crime, and the license plate on the vehicle, were stolen. (Doc. 30 at 34–40.) Because the claim was procedurally defaulted, the Court considered Petitioner's argument that a fundamental miscarriage of justice would occur if the claim was not heard on the merits because "the exclusion of the purported theft of the Monte Carlo greatly weakens the prosecution's case for motive and premeditation." (Doc 50 at 31.) Based on habeas counsels' discovery that the ignition switch was in two pieces under the passenger seat, and the parts were not listed in the vehicle inventory, Petitioner's counsel sought additional discovery to establish that the ignition was intact at the time the vehicle was impounded. The Court considered the evidence and concluded that Petitioner had failed to establish that no reasonable juror would have found him guilty of premeditated first-degree murder, declined to review the claim on the merits, and denied further evidentiary development.

ii. Oscar Fryer

Oscar Fryer testified he saw Petitioner in Globe, Arizona, in the days before Officer Martin's murder. (Doc. 115, App. 8 at 75.) Fryer testified Petitioner was driving a blue Monte Carlo with a white top, and that Petitioner showed him a .38-caliber handgun with black tape around the handle, which he had for protection and if "shit happens." (*Id.* at 78-86.) Fryer further testified that Petitioner told him he was on probation and indicated that he had a warrant for his arrest, that he was on the run, and that he was not going back to jail if stopped by the police. (*Id.*)

Defense counsel impeached Fryer at trial with two prior felony convictions. (*Id.* at 88.) Defense counsel also elicited from Fryer that prior to trial he had violated his probation, that he was on the run, and that he would not agree to cooperate or turn himself into authorities until he had negotiated and had in his possession a written plea agreement dealing with charges of assault on a police officer, domestic violence, resisting arrest, and escape. (*Id.* at 88-93.) Defense counsel introduced Fryer's plea agreement into evidence, which provided that if Fryer cooperated and testified for the prosecution, his

three felony charges would be reduced to one misdemeanor assault charge and he would be sentenced to probation. (*Id.*)

In Claim 9 of his amended federal habeas petition, Petitioner argued that the prosecution violated *Brady* by failing to disclose that Fryer would receive other benefits in exchange for his testimony, that he was using drugs at the time of trial but the prosecution did not move to revoke his probation, and that the prosecution did not charge Fryer with making a false report to law enforcement when he lied to a police officer about a suspect's location (the "Fryer *Brady* claim"). Because the claim had been procedurally defaulted, the Court considered whether the prosecution's withholding of material exculpatory evidence established cause for the default. The Court considered the evidence proffered by Petitioner in his motion for evidentiary development in support of the alleged *Brady* violation and denied the Fryer *Brady* claim, concluding the withheld impeachment information was not material, and that "Fryer's testimony was not the linchpin evidence of premeditation portrayed by Petitioner." (Doc. 88 at 37–38.)

iii. Elizabeth Martin

Elizabeth Martin testified that she knew Petitioner and had seen him in Globe, Arizona, driving a white and blue Monte Carlo with California license plates, two or three days before Officer Martin was shot on the Beeline Highway. (Doc. 115, App. 8, at 44–47.) After Elizabeth Martin informed Petitioner that his parents were living in Payson, Arizona, Petitioner indicated he would go to Payson to visit them. (*Id.* at 50.) On the day Officer Martin was shot, Elizabeth spoke by phone with Petitioner's mother, who indicated that her son was returning to Indio, California. (*Id.* at 54.) After hearing about the shooting, Elizabeth provided the police department with information about Petitioner, the car he was driving, and where she thought he would be going. (*Id.* at 52–54.)

iv. Detective Beatty

Detective Beatty, with the Maricopa County Sheriff's Office, was the case agent assigned to Officer Martin's homicide. (Doc. 115, App. 1 at 4, 8–9.) In the course of his investigation, Detective Beatty received information that a California license plate, 1

CUK 259, on a blue and white Monte Carlo had been reported lost or stolen. (Doc. 115, App. 1 at 23.) Detective Beatty testified that when he was a uniform patrol officer investigating car thefts, thieves would commonly change the plate on a stolen car to make it more difficult to determine that it was stolen. (*Id.* at 5–6.) Detective Beatty also received information that Petitioner had been in Globe driving a blue and white Monte Carlo with California license plates. (*Id.*) Detective Beatty determined that an arrest warrant for Petitioner for a felony violation had been issued on April 13, 1995, from the Superior Court in Globe, Arizona. (*Id.* at 24, 33.)

Detective Beatty was present at the execution of the search warrant on the Monte Carlo on August 17, 1995. (Doc. 115, App. 1 at 23, 65.) Detective Beatty identified Exhibit 198 as a photo of the Monte Carlo taken where it was abandoned just before Martinez' arrest. (*Id.* at 48–49; Doc. 115 Ex. 14.) The photograph shows an intact trunk lock.

After the state rested, the trial court granted the state's motion to reopen to allow the prosecution to question Detective Beatty regarding the condition of the ignition on the Monte Carlo. Detective Beatty gave the following testimony which Petitioner now argues cannot be reconciled with the recently discovered evidence that the ignition was intact:

> Q. Now, with regard to the Monte Carlo with the license plates 1 CUK 259, at some point in this investigation did you try to determine if there were any keys found in that Monte Carlo?
>
> A. Yes, sir. After we left the search warrant, the trailer -- after I went to the Riverside County District Attorney's Office I went to the location where the search warrant was still being served on the Monte Carlo, and there were some keys found in the Monte Carlo during the search warrant.
>
> Q. Where were keys found, if you know?
>
> A. The keys were found in the glove compartment, I believe.
>
> Q. At a later time did you try to determine if those keys accessed the ignition on that car?
>
> A. Yes, sir, I did.
>
> Q. And what did you determine?
>
> A. Well, I took the keys out of evidence out of our property room and I

> went to the Monte Carlo, and actually there was really no need because the ignition switch to the Monte Carlo was missing. It is a hollow cavity in there, and then you can stick some sort of instrument in there, and then turn what would have been the ignition without a key.
>
> Q. Okay. Would a screwdriver be able to turn that?
>
> A. Yes, sir.

(Pet. App. 1 at 64–65.)

v. Anna Martinez

Anna Martinez testified that she was riding in Petitioner's car, the blue Monte Carlo, on August 16, 1995, with her husband, her son, and Petitioner. (Doc. 121, App. C at 140–41.) Anna saw a police car driving behind them, and her husband asked if the car was stolen. (*Id.* at 142–45.) Petitioner smiled and said, "I think so" and told Anna to "[g]et out of the car." (*Id.* at 148.)

vi. Officer Robert Whitney

City of Blythe Police Officer Robert Whitney interviewed Petitioner after his arrest. (Doc. 115, App. 12 at 104, Doc. 121, App. B at 119–20.) When asked if the car was stolen, Petitioner indicated to Officer Whitney that "he found it parked in the barrio in Indio and took it there to Arizona and back." (Doc. 121, App. B at 120.)

b. New Evidence

Petitioner's counsel in these habeas proceedings, the Federal Public Defender ("FPD"), received permission to inspect the Monte Carlo at the Maricopa County Sheriff's impound lot in Phoenix in June 2007. (*See* Doc. 74, Ex. 29.) FPD investigator John Castro inspected the Monte Carlo and discovered a chrome bezel and ignition cylinder on the vehicle's passenger front floor, but was not allowed to test keys that had been seized from Petitioner when he was arrested and from the Monte Carlo when it was impounded. (*Id.*) Petitioner argued in his supplemental motion for evidentiary development that the two ignition parts were not listed on three separate inventories of the Monte Carlo's contents, supporting an inference that the ignition was still intact at the time of Petitioner's arrest, but was later punched out by law enforcement. (*See* Doc. 74,

at 7.) Petitioner sought discovery of documents concerning the Monte Carlo's chain of custody, the depositions of Detectives Beatty and Colbert, and production of three sets of keys seized as well as permission to test the keys in the ignition cylinder. (*Id.* at 9–10.) Petitioner also sought to expand the record to include the three inventories, photographs of the ignition bezel and cylinder, and the declarations of two witnesses who drove or rode in the Monte Carlo in Globe, Arizona, before the shooting of Officer Martin. (*Id.* at 10.) The witnesses recalled that the keys were in the ignition, the ignition was intact, and no screwdriver or ice pick was needed to start the car. (*Id.* at 10–11.)

The Court considered the new evidence proffered by Petitioner in his motion for evidentiary development in the context of a claim of actual innocence sufficient to overcome the procedural default of Claim 4 of the amended petition—a claim that the trial court denied Petitioner's federal constitutional right to confrontation by allowing the prosecution to introduce testimonial hearsay to prove that the vehicle and the license plate were stolen. (Doc. 88 at 25–26.) The Court determined that Petitioner had not made the requisite showing of actual innocence, finding that "whether the ignition was intact at the time Petitioner was arrested does not negate the fact that the owner had reported it stolen." (*Id.* at 26–27.) The Court denied evidentiary development and habeas relief on this claim. (*Id.* at 27, 59.)

In Petitioner's first motion requesting an indication that the Court would consider a Rule 60(b) motion, Petitioner asserted that he had uncovered new evidence supporting his motion for evidentiary development, the denial of which affected the integrity of the federal habeas corpus proceeding by depriving the Court of all evidence necessary to determine the merits of Claim 4 and a potential related *Brady* claim. (Doc. 95.) According to Petitioner, the new evidence, and that for which evidentiary development was sought with respect to Claims 4, 9, and 17, undercuts "motive" and calls into question the finding of "premeditation," an element of first-degree murder the prosecution was required to prove beyond a reasonable doubt. (*Id.*) The Court denied the motion. (Doc. 101.)

In July 27, 2010, Petitioner was ordered extradited to Riverside County, California, to stand trial on charges arising from the shooting death of a convenience store clerk in Blythe. Petitioner asserts that, as a result of discovery ordered by the Superior Court of Riverside County, two critical pieces of *Brady* evidence have now been unearthed: the investigative notes of criminalist Cooksey (Doc. 115, Ex. 2) and the photograph of the intact ignition (Doc. 115, Ex. 1).

Petitioner asserts that this recent disclosure of Cooksey's notes included 13 pages (*see* Ex. 2, Bates numbers 1854, 1857–68) that were not disclosed to Petitioner until so ordered by the Riverside County Superior Court. Petitioner asserts that these notes are quite detailed with respect to the contents and condition of the Monte Carlo, but fail to note anything unusual with respect to the ignition switch. Petitioner also submits the declaration of Randall Hecht, Petitioner's court appointed California investigator. (Doc. 115, Ex. 29.) Hecht declares Cooksey told him that although he did not recall the investigation, he would normally record information about the condition of the vehicle's ignition switch, but needed to review his notes before he could answer any questions about his investigation. (*Id.* at ¶¶ 5, 6.) Hecht asserts that, after reviewing his notes, Cooksey stated that he would have noted it in his report if the vehicle ignition switch had been removed from the steering column and had been lying on the floor of the vehicle, and also stated conclusively that the vehicle's ignition switch had not been removed and was not missing from the steering column at the time he processed the vehicle. (*Id.* at ¶¶ 10, 11.) Cooksey later signed a declaration disavowing that he made those statements to Hecht. (Doc. 115, Ex. 20.)

Petitioner asserts that other critical facts are evident from Cooksey's disclosure. First, Cooksey's notes include the names and phone numbers of "Doug Beatty" of the "Maricopa County Sheriff" and "Bob Shutz (sic) D.A."—the prosecutor at Petitioner's trial—and that Cooksey attempted to call Shutts and left a message more than six months prior to the start of the jury selection in Petitioner's Maricopa County trial. (Doc. 115, Ex. 2 at 1867) Cooksey's notes also contain a hand-drawn diagram of the driver front

door of the Monte Carlo, showing "exceptional detail" and including matters thought to be of evidentiary value, including the mirror, keyhole, handle, trim, and paint scrapings with notations that there may be paint transfer on the door. (*Id.* at 1863.)

Petitioner also cites the newly disclosed report of Riverside County District Attorney Investigator Thomas Gleeson, who transferred the Monte Carlo to officers of the Maricopa County Sheriff's Office. The report, dated October 24, 1995, indicates that the trunk lock was "missing" and had been "punched out." (Doc. 115, Ex. 13 at 1776, 1778.) A photo of the trunk lid taken at the time of Petitioner's arrest shows the trunk lock intact. (Doc. 115, Ex. 14.)

Petitioner's trial counsel have executed sworn declarations that, to the best of their recollections, the photograph of the intact ignition was not produced at trial. (Doc. 115, Ex. 17 ¶ 10; Ex. 18, ¶ 10.) Petitioner's PCR counsel has also executed a declaration stating that he has no memory of seeing the photo in prior counsel's files. (Doc. 115, Ex. 10, ¶ 8.) An FPD records custodian has also executed a declaration that the trial files of prior counsel do not contain the photograph. (Doc. 115, Ex. 19, ¶ 4.)

In September, 2012, Deputy District Attorney Haringsma traveled to Phoenix and took photocopies of all of the pictures and documents that were used at trial. (Doc. 115, Ex. 30 at 386.) Petitioner moved for disclosure of the photographs taken of the Monte Carlo by technician Tom Fisher, "at the time it was taken into custody," which included photos of the "steering column." (*Id.* at 399–400.) Petitioner received more than 900 photographs as part of the disclosure, including the photograph of the intact ignition. (Doc. 115, Ex. 1, Ex. 31 at 404.) On October 17, 2012, Petitioner's investigator emailed a copy of the photo to habeas counsel. (Doc. 115, Ex. 1.)

3. Analysis

Petitioner argues that both the *Brady* and *Napue* violations require that the writ issue in this habeas proceeding, and that he is entitled to seek evidentiary development in support of the claims. (*See* Doc. 115 at 37-45.) Applying the analysis in *Gonzalez*, the Court concludes that Petitioner's Beatty *Brady* and possible *Napue* claims are properly

characterized as second or successive claims because Petitioner is asserting new bases for relief from the underlying convictions. *See Gonzalez*, 545 U.S. at 532 (motion seeking to add a new ground for relief qualifies in substance as a successive habeas petition); *In re Pickard*, 681 F.3d 1201, 1205 (10th Cir. 2012) (claims that prosecution violated its *Brady/Giglio* duties at trial are certainly second-or-successive claims because they assert a basis for relief from the underlying convictions). Absent a certification by the Ninth Circuit Court of Appeals, this Court cannot consider these claims for relief from the underlying conviction. *See* 28 U.S.C. § 2244(a). Petitioner recognizes this limitation to consideration of his claims, but asserts that he is not foreclosed from seeking relief pursuant to Rule 60(b) because he is attacking the integrity of the earlier proceedings.

Petitioner raises three challenges to the integrity of the earlier proceedings: (1) the suppression of the Beatty *Brady* material by the Maricopa County Attorney and the Arizona Attorney General thwarted Petitioner's ability to file a petition including all known claims; (2) without the suppressed material, the Court could not properly assess the Fryer *Brady* claim in the aggregate; and (3) had Petitioner been aware of a possible *Napue* violation, he would have moved to amend his federal petition. (Doc. 115 at 25–26.) In assessing whether Petitioner has established that the integrity of these proceedings has been undermined by the alleged *Brady* and *Napue* violations, the Court has considered the evidence proffered by Petitioner in his Rule 60(b) motion, (Doc. 115, Exs. 1–38). The Court concludes that Petitioner has failed to establish a defect in the integrity of these proceedings "that rendered its outcome suspect." *See Buenrostro*, 638 F.3d at 722.

Assuming for purposes of this analysis that the evidence proffered by Petitioner establishes conclusively that the Maricopa County Attorney suppressed evidence which would have established that the ignition switch was intact at the time of Petitioner's arrest, Petitioner cannot establish that this undermined the Court's ability to properly assess the Fryer *Brady* claim. When this Court considered the allegation that the prosecution withheld evidence that would have impeached Fryer's testimony, it found:

> Fryer was thoroughly impeached at trial. His plea agreement was introduced, he was cross-examined about all of the favorable treatment he obtained as a result of the agreement, and was impeached with the factual basis of his prior felony convictions. The fact that he tested positive for drugs two weeks prior to his testimony would not likely have affected the jury's verdict. Similarly, the fact that Fryer continued to engage in criminal activity even after working out a plea to testify against Petitioner does not put his credibility in a whole new light given all of the other impeaching evidence brought out at trial.
>
> Second, the additional impeachment evidence would have had little effect on Fryer's already impeached credibility because his testimony was corroborated by other evidence. Consistent with Fryer's testimony, Petitioner was driving a blue Monte Carlo with a white top, had a warrant out for his arrest, had violated his probation and was on the run from authorities, and had possession of a .38-caliber revolver with black tape around the handle of the gun. Moreover, his fingerprint was found on the tape, and it was this revolver that was later identified as the murder weapon (RT 9/22/97 at 114). *See [State v.] Martinez*, 196 Ariz. at 453–55, 999 P.2d at 797-99.
>
> Finally, Fryer's testimony was not the linchpin evidence of premeditation portrayed by Petitioner. Fryer relayed a conversation with Petitioner that took place *prior* to the shooting. *Although damaging, it was less relevant than the fact that Petitioner was driving a stolen car when pulled over, that he had absconded from law enforcement and there was an outstanding warrant for his arrest, and that he shot Officer Martin not once, but four times.*
>
> In addition, after his arrest Petitioner bragged about "blasting" a police officer. (RT 9/15/97 at 13.) This was more than enough evidence from which the jury could find that Petitioner acted with premeditation.

(Doc. 88 at 37-38) (*emphasis added*).

Thus, even assuming Petitioner could conclusively establish that the ignition switch was punched out after Petitioner's arrest or that the keys in Petitioner's possession would have started the car, this additional evidence, considered together with the Fryer *Brady* material[2], does not call into question the integrity of the habeas proceedings

[2] Including Petitioner's claim raised for the first time in the supplemental brief, that Fryer recanted his statement and admitted he was using methamphetamine both when questioned by police and when he testified at trial. (*See* Doc. 115, Ex. 22, ¶ 20)

because it does not change the pivotal fact relied on by the Court that Petitioner was driving a stolen car when pulled over. The new evidence also does not call into question any of the critical facts the Court relied on in reaching a conclusion that Fryer's testimony was not the "linchpin evidence of premeditation"—Petitioner was driving a stolen car, had absconded from law enforcement, had an outstanding warrant for his arrest, shot Officer Martin four times, and bragged about the murder. (*Id.* at 38.)

Petitioner's assertion that suppression of the Beatty *Brady* and *Napue* evidence prevented him from complying with the Court's order that he file a petition containing all of his claims, or from amending his petition to include those claims, is not a proper basis for attacking the integrity of the proceedings. "Rule 60(b) is properly applied when there is some problem going to the integrity of the court process on the claims that were previously asserted." *Jones*, 733 F.3d at 836. In *Jones*, the Ninth Circuit rejected the petitioner's attempts to circumvent the limitations on second or successive petitions by alleging that he did not have a "fair shot" at raising three IAC claims in his first habeas corpus proceedings because his habeas corpus counsel, who was also his state PCR counsel, operated under a *per se* conflict of interest. 733 F.3d at 835–36. The Court explained that "the rule announced in *Gonzalez*, that a valid Rule 60(b) motion 'attacks . . . some defect in the integrity of the federal habeas proceedings,' . . . must be understood in the context generally to mean the integrity of the prior proceeding with regard to the claims that were actually asserted in this proceeding." *Jones*, 733 F.3d at 836 (internal citation omitted). Rule 60(b) does not permit a petitioner to assert entirely new claims for relief by contending those claims "were required to ensure those proceedings' integrity." *Id.* Thus, because Petitioner is not challenging the integrity of the process on a claim previously asserted, he cannot utilize Rule 60(b) to bring these new claims before the Court. *See id.*

To the extent Petitioner asserts that a defect in the integrity of these proceedings is established by Respondents' failure to discover and disclose the alleged exculpatory material during these federal habeas proceedings, Respondents were under no duty to

disclose the alleged exculpatory material. *See Jones*, 733 F.3d at 837 ("[T]he *Brady* right of pretrial disclosure available to defendants at trial does not extend to habeas corpus petitioners seeking post-conviction relief.") (citing *Dist. Atttorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68-69 (2009)). Because there was no duty of disclosure in these proceedings, any failure by Respondents to comply with *Brady* did not undermine the integrity of the proceedings.

Petitioner points to the holdings in *Pickard*, 681 F.3d at 1206-06, and *Douglas v. Workman*, 560 F.3d 1156, 1192 (10th Cir. 2009), to support his claim that Respondents are not entitled to rely on the restrictions in filing a second or successive habeas petition because they have continued to suppress *Brady* material in these habeas proceedings. (*See* Doc. 126 at 7.) Petitioner's reliance on *Pickard* and *Douglas* is misplaced.

In *Pickard*, the Tenth Circuit held that claims of prosecutorial misconduct during trial, based on the prosecution's denial that agencies other than the DEA were involved in the investigation, were properly considered a second or successive claim, but petitioner's claim that the prosecution committed fraud in habeas proceedings by falsely denying other agencies were involved, was a proper Rule 60(b) claim. *In re Pickard*, 681 F.3d at 1204. Similarly, in *Douglas*, the Tenth Circuit permitted Douglas to supplement his habeas petition with an untimely *Brady* claim after it found the prosecutor took affirmative actions to conceal his tacit agreement with the state's key witness until it was too late to bring a *Brady* claim in his first habeas petition. 560 F.3d at 1190-91. The Ninth Circuit has explained that "[f]raud on the court must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Buenrostro*, 638 F.3d at 722 (quoting *Abatti v. Comm'r*, 859 F.2d 115, 118 (9th Cir. 1988)).

In this case Petitioner points to two arguments made by Respondents in opposing discovery related to Claim 4 that he asserts demonstrate a defect in the integrity of these habeas proceedings. Respondents objected to discovery of evidence "which may not even exist to refute '[t]he implication . . . that the car [Martinez was driving] was stolen and that [he] would have feared being arrested for the theft when stopped on the Beeline

Highway'" (Doc. 66 at 31), and asserted that "[t]here is no evidence that the State knew about the broken ignition switch lodged under the passenger seat" (Doc. 77 at 6).

First, Petitioner has not demonstrated that Respondents' assertions in opposing discovery are false, nor are the assertions evidence of "an unconscionable plan or scheme . . . designed to improperly influence the court in its decision." *See Buenrostro*, 638 at 722. Even if Petitioner could demonstrate the assertions were false and part of such a scheme, he cannot demonstrate a defect in the integrity of the proceedings because the assertions had no effect on the outcome of the proceedings. The Court found Claim 4 procedurally barred and denied further evidentiary development of Petitioner's theory that the ignition was intact at the time the vehicle was impounded. The Court considered the evidence proffered in support of Claims 9, 16, and 17, and assumed that Petitioner's new evidence would demonstrate that "the ignition was intact at the time Petitioner was arrested," but nonetheless concluded that Petitioner failed to establish that no reasonable juror would have found him guilty of premeditated first degree murder because "*whether the ignition was intact at the time Petitioner was arrested does not negate the fact that the owner had reported it stolen*." (Doc. 88 at 26-27) (emphasis added).

The Court agrees with Respondents' contention that this finding demonstrates that the Court has in essence already concluded that Petitioner failed to show that any evidence regarding the alleged intact ignition undermines the integrity of these proceedings relevant to the claims raised in the petition. The Court has already determined that evidence of an intact ignition would not change its procedural or evidentiary rulings on Claim 4, and would not call into question the jury's finding of premeditation. The Court's decision was not based on the strength of Petitioner's evidence—in reaching its decision the Court assumed Petitioner's evidence was conclusive. Consequently, additional or stronger evidence in support of Petitioner's allegation that the ignition was intact does not change this Court's previous analysis. Because the Court's procedural and evidentiary rulings are not rendered "suspect" as a result of Respondents' allegations, regardless of the veracity of the assertions, Petitioner

cannot demonstrate a defect in the integrity of the habeas proceedings. *See Buenrostro*, 638 F.3d at 722.

In sum, Petitioner has not demonstrated any defect in the integrity of these habeas proceedings, but instead seeks to raise new substantive claims that his rights under *Brady* and *Napue* were violated. It is therefore a second or successive petition, and this Court lacks jurisdiction to consider the *Brady* and *Napue* claims absent authorization from the court of appeals pursuant to 28 U.S.C. § 2244(b)(3).

4. Motion for Evidentiary Development

In his request for evidentiary development, Petitioner seeks discovery and an evidentiary hearing in support of his Rule 60(b) motion and his request for relief based on *Brady* and *Napue* violations. As determined above, however, Petitioner's motions for Rule 60(b) relief and for consideration of a possible *Brady* or *Napue* claim are denied as a second or successive petition filed without authorization. Therefore, the Court finds no basis for evidentiary development or an evidentiary hearing and denies Petitioner's request.

B. Supplemental *Martinez* Brief

The Ninth Circuit remanded this case for the reconsideration of five claims that this Court previously found procedurally defaulted because Petitioner failed to present them in state court and no remedies remained available to exhaust the claims. Petitioner now seeks reconsideration based on *Martinez* for three claims alleging counsel ineffectiveness in the guilt phase for failing to retain an independent pathologist when the State's expert pathologist changed his opinion as to the sequence of shots that struck Officer Martin (Claim 17); and in the sentencing phase proceedings for failing to mitigate a 1993 conviction admitted as a statutory aggravating factor at sentencing (Claim 11) and for failing to rebut testimony that Petitioner suffered from antisocial personality disorder ("APD") (Claim 12). (Doc. 115 at 8–9.)

1. Evidentiary Development & *Martinez v. Ryan*

Petitioner seeks to expand the record, under Rule 7 of the Rules Governing

Section 2254 Cases, to include all of the Exhibits (Exs. 1–38) cited in his supplemental *Martinez* brief in support of Claims 11, 12, and 17. (Doc. 115 at 79.) Petitioner also requests that the Court grant an evidentiary hearing to resolve any factual disputes regarding the evidence submitted in support of his *Martinez* claims. Respondents object to expansion of the record to determine if Petitioner is entitled to habeas relief, but do not object to the Court considering the evidence, with one exception,[3] for the limited purpose of evaluating cause and prejudice. (Doc. 121 at 68–69.) Respondents object to Petitioner's request for an evidentiary hearing. (*Id.* at 68.)

The evidentiary limitations described in *Cullen v. Pinholster,* 563 U.S. 170 (2011),[4] do not apply to Petitioner's procedurally defaulted ineffective assistance claims because they were not previously adjudicated on the merits by the state courts. *See Dickens*, 740 F.3d at 1320–21. Furthermore, the Court is not restricted, under 28 U.S.C. § 2254(e)(2)[5], from holding an evidentiary hearing for Petitioner to show cause and prejudice under *Martinez* because Petitioner is not asserting a constitutional "claim" for relief. *See Dickens*, 740 F.3d at 1320–21. Accordingly, the Court considers the new evidence Petitioner proffers in support of his *Martinez* claims for the limited purpose of evaluating Petitioner's cause and prejudice arguments.

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). As a general matter, habeas review of a defaulted

---

[3] Respondents object to expansion of the record to include Attorney Gregory J. Kuykendall's opinion (Doc. 115, Ex. 38) on the standard of care, even for the limited purpose of evaluating cause and prejudice. Respondents assert the opinion is irrelevant to the ineffectiveness inquiry. Because the Court resolves the ineffectiveness claims strictly on the basis of Petitioner's failure to demonstrate prejudice, without addressing the quality of counsel's performance, Respondents objection is moot.

[4] Limiting a federal court's consideration of evidence in support of a claim to the evidence that was before the state court that adjudicated the claim on the merits. 563 U.S. at 180–81.

[5] Limiting the court's discretion to hold an evidentiary hearing on a claim for relief where the petitioner "failed to develop the factual basis of a claim in State court proceedings."

claim is barred unless a petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Ordinarily, "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id*. at 753. In *Coleman*, the Court held that ineffective assistance of counsel in post-conviction proceedings does not establish cause for the procedural default of a claim. *Id.*

In *Martinez*, however, the Court established a "narrow exception" to the rule announced in *Coleman*. The Court explained:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

132 S. Ct. at 1320; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (noting that *Martinez* may apply to a procedurally defaulted trial-phase ineffective assistance of counsel claim if "the claim . . . was a 'substantial' claim [and] the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding" (quoting *Martinez*, 132 S. Ct. at 1320).

Accordingly, under *Martinez*, a petitioner may establish cause for the procedural default of an ineffective assistance claim, "where the state (like Arizona) required the petitioner to raise that claim in collateral proceedings, by demonstrating two things: (1) 'counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 . . . (1984),' and (2) 'the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.' " *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting *Martinez*, 132 S. Ct. at 1318); *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) *overruled on other grounds by McKinney*, — F.3d —, 2015 WL 9466506; *Dickens*, 740 F.3d at 1319–

20; *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc).

In a series of recent cases, the Ninth Circuit has provided guidance for applying *Martinez.* The most recent case, *Clabourne*, summarizes the court's *Martinez* analysis. To demonstrate cause and prejudice sufficient to excuse the procedural default, a petitioner must make two showings. "First, to establish 'cause,' he must establish that his counsel in the state post-conviction proceeding was ineffective under the standards of *Strickland. Strickland*, in turn, requires him to establish that both (a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Clabourne*, 745 F.3d at 377 (citations omitted). Determining whether there was a reasonable probability of a different outcome "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective." *Id.* at 377–78. Second, "to establish 'prejudice,' the petitioner must establish that his "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.*

Under *Martinez*, a claim is substantial if it meets the standard for issuing a certificate of appealability. *Martinez*, 132 S. Ct. at 1318–19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). According to that standard, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Detrich*, 740 F.3d at 1245 (quoting *Miller-El*, 537 U.S. at 336).

Claims of ineffective assistance of counsel are governed by the principles set forth in *Strickland*, 466 U.S. at 674. To prevail under *Strickland*, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. *Id.* at 687–88.

The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of

counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see Wong v. Belmontes,* 558 U.S. 15 (2009) (per curiam); *Bobby v. Van Hook,* 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010). To satisfy *Strickland*'s first prong, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Id.* at 687–88.

With respect to *Strickland*'s second prong, a petitioner must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

As discussed below, the Court has determined that Petitioner was not prejudiced by trial counsel's performance. Accordingly, Petitioner's attempt to excuse the default of these claims under *Martinez* fails because the underlying ineffectiveness claims are not substantial, and thus PCR counsel was not ineffective for failing to raise them. Because the claims are both defaulted and meritless, expansion of the record will be denied.

For the same reason, Petitioner is not entitled to an evidentiary hearing. Having reviewed the entire record, including the evidence presented by Petitioner in his supplemental *Martinez* brief, the Court concludes that an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."); Rule 8(a) of the Rules Governing Section 2254 Cases. Whether Petitioner's allegations of ineffective assistance of trial counsel are "substantial" under *Martinez* is resolvable on the record. *Cf. Dickens*, 740 F.3d at 1321 (explaining that "a district court may take evidence to the extent necessary to determine

whether the petitioner's claim of ineffective assistance of trial counsel is substantial under *Martinez*") (emphasis added).

2. Claim 4

The Ninth Circuit ordered this court, on remand, to address whether Claim 4 falls within the *Martinez* exception for procedurally defaulted claims because Petitioner referred in his first amended petition to ineffective assistance of trial counsel as to Claim 4. (Doc. 104 at 2.) Respondents contend that *Martinez* does not apply to Claim 4 and, moreover, that Petitioner abandoned the claim by failing address it in the supplemental brief, thus waiving any argument that *Martinez* excuses the procedural default. (Doc. 121 at 50.) The Court agrees.

In Claim 4 of his amended habeas petition, Petitioner argued that the trial court violated his constitutional right of confrontation by allowing testimonial hearsay to prove the Monte Carlo and the license plate were stolen. (Doc. 30 at 34.) While the Ninth Circuit Court of Appeals has expanded *Martinez*'s scope to include procedurally defaulted claims of ineffective appellate counsel, *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1294–96 (9th Cir. 2013), it has also recognized that only the Supreme Court could expand the application of *Martinez* outside the context of ineffective assistance claims, and has declined to extend *Martinez* to claims of trial error. *See Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9th Cir. 2015) (declining to extend *Martinez* to cover claims of trial error); *Hunton v. Sinclair*, 732 F.3d 1124, 1126–27 (9th Cir. 2013) (acknowledging that only the Supreme Court may extend the scope of *Martinez*). Because Petitioner's claim that the trial court erred in allowing the introduction of testimonial hearsay is not an ineffective assistance of counsel claim, it does not fall within the *Martinez* exception, and PCR counsel's deficient performance may not serve as cause to excuse the procedural default. *See Pizzuto*, 783 F.3d at 1176–77.

Respondents assert that, to the extent Claim 18 of the amended petition raised an ineffective assistance of trial counsel claim related to Claim 4, Petitioner withdrew this claim in the traverse. In Claim 18 of his amended habeas petition, Petitioner argued that

PCR counsel's performance was deficient, in violation of Petitioner's constitutional right to due process and effective representation, because Petitioner failed, among other things, to raise an argument that trial and appellate counsel failed to adequately litigate his confrontation claim or assert error regarding the admission of hearsay to prove that the Monte Carlo was stolen. (Doc. 30 at 143–152, 157.) Subsequently, however, Petitioner withdrew Claim 18 from his amended petition. (*See* Doc. 57 at 1, 92.) Thus, Petitioner has abandoned any claim of ineffective assistance of counsel as to Claim 4.

Finally, by failing to address Claim 4 in his supplemental *Martinez* brief, Petitioner has further abandoned the claim. *See Cook v. Schriro*, 538 F.3d 1000, 1014, n. 5 (9th Cir. 2008) (citing *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991) (noting failure to raise or brief an issue in a timely fashion may constitute waiver on appeal)).

In conclusion, the Court finds that *Martinez* does not apply to Claim 4. Furthermore, to the extent Petitioner argued ineffective assistance of trial counsel related to Claim 4, he abandoned this argument by withdrawing the claim, and waived any argument that *Martinez* excuses his procedural default of Claim 4 by failing to raise it in his supplemental *Martinez* brief.

3. Claim 11

In Claim 11 of Petitioner's amended habeas petition, Petitioner argues that trial counsel was ineffective for failing to mitigate Petitioner's 1993 Gila County aggravated assault conviction which was admitted during the penalty phase of Petitioner's trial as a statutory aggravating factor. To excuse the default of Claim 11, Petitioner argues PCR counsel rendered ineffective assistance for failing to investigate and present this trial IAC claim in state proceedings. Because this trial-level IAC claim lacks merit, Petitioner has failed to establish a reasonable probability of a different result had PCR counsel raised it in the state PCR petition. Therefore, he has failed to establish cause under *Martinez* to excuse the procedural default of Claim 11.

a. Facts

In the penalty phase of trial, the prosecution moved to admit a minute entry of

Petitioner's conviction in Gila County for aggravated assault in 1993, and a minute entry from Maricopa County sentencing Petitioner on two counts of dangerous or deadly assault by a prisoner in 1996. (Doc. 115, App. 18 at 53–54.) Without objection, the trial court admitted both minute entries. (*Id.*) The trial court found that Petitioner conceded that the 1993 conviction qualified as a previous conviction for a "serious offense," a statutory aggravating factor under A.R.S. § 13-703(F)(2) ("(F)(2)"). *See State v. Martinez*, 196 Ariz. at 461, 999 P.2d at 805. Petitioner argued that the 1996 convictions did not qualify as "serious offenses" under (F)(2), but the trial court rejected this argument, finding they constituted a previous conviction of a serious offense under (F)(2) and had been proved beyond a reasonable doubt. *See id*. The Arizona Supreme Court agreed with the trial court. (*Id.* at 461–62, 999 P.2d 805–06.) The trial court also found that Officer Martin was an on duty police officer killed in the course of performing his duties, thus satisfying the A.R.S. 13-702 (F)(10) ("(F)(10)") statutory aggravating factor. (Doc. 121, Ex. G at 9.) This finding was not challenged on appeal. *See Martinez*, 196 at 462, 999 P.2d at 806.

During sentencing, the court made the following observation regarding the (F)(2) aggravating circumstance:

> The (F)(2) aggravating circumstance here is strong not only because of the number of serious offenses, but because the later serious offenses cast doubt on whether defendant could be imprisoned for many years without endangering the safety of others in the prison system. The (F)(10) aggravating circumstance also carries significant weight. The unprovoked murder of a peace officer, so the defendant can avoid his obligation under the law, is really no less than a personal declaration of war against a civilized society. In sum, the aggravating circumstances are strong. The mitigating circumstances are not.

(Doc. 115, App. 19 at 30.)

Because Petitioner had raised a challenge to the 1996 convictions, for purposes of appellate review, the sentencing court went on to address whether the aggravating circumstances would still outweigh the mitigating circumstances if the (F)(2) aggravating factor were based solely on the 1993 conviction, and found "that the mitigating

circumstances in this case, individually and cumulatively, are just not sufficiently substantial to outweigh the (F)(2) and (F)(10) circumstances." (*Id.*)

b. Analysis

In Claim 11 of his amended habeas petition, Petitioner alleges IAC at sentencing for counsel's failure to investigate and present evidence to rebut the "serious offense" aggravating factor. (Doc. 30 at 86-91.) Petitioner asserts that trial counsel ignored police reports regarding the 1993 conviction that indicated that Petitioner may have been guilty of no crime at all, and suggested that it appeared trial counsel did not know they could challenge this factor. (*Id.* at 87-88.)

The charging instrument in the 1993 assault alleged that there were two victims, Saul Salas and Guillermo Garcia, that Petitioner intentionally placed each in reasonable apprehension of imminent physical injury, and that he committed the offense while using a deadly weapon—a "hand gun." (Doc. 115, Ex. 3.) The police reports underlying Petitioner's 1993 aggravated assault consist of statements from two witnesses, one of whom noted he saw Petitioner had a gun during the assault. (Doc. 115, Exs. 4, 5.) Petitioner pleaded guilty to the offense. (Doc. 115, Ex. 6.)

Petitioner argues he cannot be put to death since his prior conduct, as described by the witnesses, is insufficient to establish the aggravating factor. (Doc. 30. at 89.) Petitioner also argues that even if the facts support the aggravated assault conviction, the presentation of the mitigating evidence alone could reasonably have been expected to result in a sentence of life. (*Id.* at 90–91)

This Court previously found the claim was procedurally defaulted, and would not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice. Petitioner argued as cause that Respondents failed to disclose the police reports underlying his 1993 Gila County conviction. (Doc. 57 at 74–77.) These reports, he argued, would have mitigated the weight of the aggravating factor by showing that although a witness said Petitioner had a gun in his hand, there was no allegation that he discharged or pointed it at anyone. (*Id.* at 77.) The Court found this insufficient to

establish cause for Petitioner's failure to pursue Claim 11 in his state PCR proceedings because Petitioner's assertion that he did not point the gun at the victims or discharge it "hardly mitigates the fact that he was convicted of aggravated assault and says nothing of the two 1996 prior offenses for dangerous or deadly assault by a prisoner that were also found by the Court to satisfy the (F)(2) aggravating factor." (Doc. 88 at 43–44.) The Court found that the police reports, consisting of the witness statements from both victims, were not necessarily mitigating and were not material because they "fall far short of being favorable to the defense." (*Id.*)

Petitioner now asserts that PCR counsel rendered ineffective assistance for failing to investigate and present the trial IAC claim and he was prejudiced by the failure because the sentencing court placed tremendous significance on the admission of the Gila County aggravated assault conviction. (Doc. 115 at 53, 61.) However, there is no reasonable probability that the mitigating evidence would have negated a finding of the (F)(2) aggravating circumstance. There is also no reasonable probability that the evidence related to the 1993 convictions would have affected the sentencing outcome had it been presented at trial because the evidence was not necessarily mitigating, and the sentencing court unquestionably found the 1996 convictions carried more weight than the 1993 conviction. Accordingly, the Court finds no reasonable probability that Petitioner would have obtained post-conviction relief had PCR counsel raised Claim 11 in the PCR petition. Petitioner has failed to establish cause under *Martinez*, and Claim 11 remains procedurally barred.

Clearly established federal law establishes that, in preparing for the sentencing phase of a capital trial, a defendant's attorney is "bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Rompilla v. Beard*, 545 U.S. 374, 377 (2005).

In this case, Petitioner asserts that trial counsel admitted they were not aware that statutory aggravators admitted at capital sentencing could be mitigated, and that PCR

counsel had no reason for failing to raise the IAC claim. (Doc. 115 at 58; Ex. 8 ¶ 6; Ex. 9, ¶ 6.) The Court need not address counsel's performance, however, because even if counsel performed deficiently, Petitioner has failed to establish prejudice. *See Strickland*, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

In *Rompilla*, the Supreme Court found counsel deficient in failing to examine the court file on Rompilla's prior conviction. 545 U.S. at 383. In addressing the prejudice prong of *Strickland*, the Court found that if counsel had examined the file, they would have found a range of mitigation leads that no other source had opened up including evidence pointing to organic brain damage, fetal alcohol syndrome, a traumatic childhood, and intellectual disability. *Id.* at 391–93. The mitigating evidence "'might well have influenced the jury's appraisal' of [Rompilla's] culpability . . . and the likelihood of a different result . . . [is] 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Id.* at 393 (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Strickland* 466 U.S. at 694).

Unlike the mitigating evidence discovered in *Rompilla*, the mitigating evidence Petitioner asserts counsel should have uncovered here—that Petitioner was "not guilty of any crime" with regard to one witness, and "it is highly questionable that [Petitioner] was guilty of the aggravated assault" of the other—is not sufficient to undermine confidence in the outcome reached at sentencing.

First, as Respondents note, the 1993 conviction was only one of three convictions used to establish the (F)(2) aggravating factor. Each of the two 1996 convictions were also found to establish the (F)(2) factor, and though challenged, were not found invalid. *See State v. Martinez*, 196 Ariz. at 462, 999 P.2d at 806. Thus, there is no reasonable probability that even if the 1993 conviction had been challenged in state court and found

to be legally insufficient to establish the (F)(2) circumstance,[6] the trial court would not have found the (F)(2) factor established based on the 1996 convictions.

Additionally, Petitioner's attempt to portray the 1993 conviction as crucial to the trial court's decision to impose the death penalty is simply not supported by the record. The trial court found that it was proven beyond a reasonable doubt that Officer Martin was an on duty police officer killed in the course of performing his duties, thus establishing the (F)(10) factor. While the trial court placed great weight on the 1993 conviction, the trial court placed even greater weight on the (F)(10) factor and the later serious offenses committed while Petitioner was in custody because they cast doubt on whether Petitioner could be imprisoned without endangering the safety of others and indicated that Petitioner had "declare[d] war against a civilized society." (Doc. 115, App. 9 at 30.) Thus, even if the evidence established that the 1993 conviction was insufficient by itself to establish the (F)(2) factor, given the substantial weight of the remaining aggravating factors there is no reasonable probability that the trial court would have imposed a life sentence.

Finally, this Court previously found, and reiterates here, that the facts underlying Petitioner's claim fall far short of being favorable to the defense. Even if Petitioner did not point the gun at the victims, or discharge the weapon, the facts still clearly establish that Petitioner assaulted the victims with a weapon in his hand. There is no reasonable probability that the evidence related to the 1993 convictions would have affected the sentencing outcome had it been presented at trial. Because the trial-level IAC claim has no merit it is not a substantial claim under *Martinez* and PCR counsel was not ineffective

---

[6] The 1993 conviction is conclusively valid and Petitioner has not demonstrated circumstances that would demonstrate he could have overcome the conviction's validity if he had raised the issue during trial. *See Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394 (2001) (holding that "once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid"). The exceptions to that rule, for prior convictions "obtained where there was a failure to appoint counsel in violation of the Sixth Amendment," *id.* at 404, or where equitable tolling or actual innocence would avoid the bar to the consideration of the earlier conviction, *id.* at 405, do not apply here.

for failing to raise it. *See Clabourne*, 745 F.3d at 377. Thus, Petitioner has failed to establish cause under *Martinez*, and Claim 11 remains procedurally barred.

4. Claim 12

In Claim 12 of Petitioner's amended habeas petition, Petition argues that trial counsel was ineffective for failing to recall the defense psychologist, Dr. Susan Parrish, to rebut the sentencing hearing testimony of the prosecution's psychologist, Dr. Michael Bayless. To excuse the default of Claim 12, Petitioner argues PCR counsel rendered ineffective assistance for failing to investigate and present this trial IAC claim in state proceedings. Because this trial-level IAC claim lacks merit, Petitioner has failed to establish a reasonable probability of a different result had PCR counsel raised it in the state PCR petition. Therefore, he has failed to establish cause under *Martinez* to excuse the procedural default of Claim 12.

a. Facts

In the penalty phase of trial, Petitioner sought to establish that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-703(G)(1) ("(G)(1)"). Both Petitioner and Respondents presented testimony from mental health experts who opined about his mental condition. (Doc. 115, Apps. 5, 6.)

Psychologist Susan Parrish, Ph.D., specializing in Posttraumatic Stress Disorder ("PTSD") and neuropsychology, testified on behalf of Petitioner during his mitigation hearing. (Doc. 115, App. 6 at 5–8.) Due to Petitioner's traumatic upbringing, which included chronic violence inside the home by his father battering his mother, Dr. Parrish opined that Petitioner suffers from PTSD. (Doc. 115, App. 6. at 16, 30.) Dr. Parrish described PTSD as an anxiety disorder, a response to trauma; specifically in Petitioner's case, a response to "a prolonged situation that's ongoing, such as . . . exposure to an environment in which there was physical abuse, an unsafe environment." (*Id.* at 17.) She testified that Petitioner met the diagnostic criteria of PTSD as set out in the Diagnostic

and Statistical Manual of Mental Disorders, 4th Edition ("DSM-IV"). (Doc. 115, App. 6 at 18-24.) Dr. Parrish also diagnosed a personality disorder not otherwise specified (Doc. 115, App. 7 at 12),[7] and explained that Petitioner exhibited characteristics of antisocial personality disorder, borderline personality disorder, and narcissistic personality disorder. (Doc. 115, App. 6 at 30–34.) She also noted that characteristics of those personality disorders occur with frequency in people who suffered trauma as children. (*Id.* at 31–34.)

Dr. Parrish explained that, according to the DSM-IV, APD is a pervasive pattern of disregard for, and violation of, the rights of others after the age of 15, and opined that Petitioner displayed characteristics of APD, including impulsivity or failure to plan, irritability and aggressiveness, and reckless disregard for safety of self and others. (Doc. 115, App. 6 at 30–31.) She stated that these characteristics are also not unusual in someone suffering from PTSD "who comes from an environment where there was a prolonged exposure to violence." (*Id.*) Dr. Parrish described Petitioner as "a product of his environment and his nature. . . . [G]iven the environment that he had . . . the decision that . . . is the most salient is that he's going to survive." (*Id.* at 51.) Dr. Parrish explained that survival is the first thing that anyone with PTSD considers. A stressful event becomes a "life-and-death situation." (*Id.*) She testified that when Officer Martin stopped Petitioner on the Beeline Highway, Petitioner "saw that as a survival situation in which it was Officer Martin or himself. There was going to be one person who survived that." (*Id.* at 73.) Dr. Parrish believed Petitioner's response was reactive: "I'm not going back to prison. This man intends to put me in prison. It's me or him." (*Id.* at 75). Dr. Parrish concluded in her report that "if [Petitioner] shot Officer Martin, he was in a dissociative state." (Doc. 115, App. 7 at 14.)

The state's mental health expert, psychologist Michael Bayless, Ph.D., opined that Petitioner does not suffer from a mental disease or defect but does suffer from an antisocial personality disorder. (Doc. 115, App. 5 at 5–6, 16.) Dr. Bayless, who

[7] Dr. Parrish's report submitted with Petitioner's supplemental *Martinez* brief is missing page 12. The complete report can be found attached to Petitioner's amended habeas corpus petition (Doc. 30) at Ex. E-4.

conducted his own clinical evaluation of Petitioner and reviewed the results of the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2") administered by Dr. Parrish, opined that the results very clearly indicated a classic anti-social personality profile. (*Id.* at 9–11, 18.) Dr. Bayless described Petitioner as a young man with a "basic absence of anxiety and guilt" and a lack of remorse and empathy. (*Id.* at 16-17.) Dr. Bayless disagreed with Dr. Parrish's diagnosis of PTSD for several reasons, explaining that there was an absence of expected PTSD symptoms in the historical and clinical data from Dr. MacDonald and others, there was an absence of anxiety regarding Petitioner's recall of the traumatic events from his childhood, and Dr. MacDonald predicted Petitioner was moving towards a full-blown anti-social personality disorder. (*Id.* at 19-21.) Dr. Bayless also opined that Petitioner's actions in calling Eric Moreno, and explaining to him what had happened, was the type of behavior you would see in somebody who understood the nature and quality of his acts. (*Id.* at 33.)

The sentencing court considered all of the mental health evidence presented and concluded that Petitioner did not establish that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired at the time of the crime by his personality disorder, the traumatic effect of his exposure to domestic violence, and any PTSD-like symptoms he might have. (Doc 121, App. G at 13–14.) The sentencing court rejected a diagnosis of post-traumatic stress disorder, finding instead that Petitioner suffers from a personality disorder with predominantly anti-social features and also with borderline and narcissistic features. (*Id.* at 12.) The court found ample support for this finding within the evidence that showed: Petitioner killed Officer Martin because he did not want to return to prison; three days before the murder he told Fryer he had a warrant for his arrest and he was on the run; he told Fryer he had a gun in case something happened; he took Officer Martin's service weapon after the murder; and other choices he made after the murder, including the robbery and shooting in Blythe, as well as decisions he made at the time he was apprehended. (*Id.* at 12–13.) These choices, the sentencing court found, "belie the notion

that the homicide of Officer Martin was the result of being in a dissociative state or a mere impulsive reaction" (*id.* at 13), and demonstrate Petitioner's "ability to reflect, to calculate and to make choices." (*Id.* at 13, n.1.) The trial court acknowledged that Petitioner's personality disorder and other conditions "undoubtedly affect his conduct and behavior," but, significant to this analysis, that he "has not proved by a preponderance of the evidence that his capacity to inform his conduct to the requirements of law was significantly impaired." (*Id.* at 14) (emphasis in original).

In addressing a related claim, the Arizona Supreme Court, disregarding Fryer's testimony, disagreed with Petitioner's argument that taking Officer Martin's gun, robbing the Mini-Mart and shooting the clerk are consistent with the "it's me or him" line of thought:

> [W]e think Martinez' actions speak louder than Fryer's words. Even if we were to disregard Fryer's testimony, Martinez still emptied his .38 caliber handgun into Officer Martin. Using his "superior" intellect and after recognizing that he had just murdered an Arizona police officer, Martinez stole Officer Martin's .9mm Sig Sauer and drove to Blythe, California where he robbed a Mini–Mart and shot the clerk. Although Martinez alleges that the clerk "threatened" him with a chair or weapon, this does not support Dr. Parrish's PTSD diagnosis. Martinez could not have reasonably felt that it was "me or him." In fact, any threat Martinez may have feared was self-induced. He drove to Blythe and ran out of gas. He then called his aunt for money. After she failed to send the needed funds, he called her again. Losing his patience, he eventually robbed the Mini–Mart with Officer Martin's service weapon. The record does not suggest that the clerk randomly came up to Martinez in the parking lot, noticed the stolen car and threatened to call the police. Rather, Martinez' robbery and subsequent murder created any threat he may have felt.[9]
>
> > FN9: Martinez also created the threat of being caught by Officer Martin when he excessively sped down the Beeline Highway.
>
> Martinez' actions in Indio also demonstrate his systematic thought processes and "superior" intelligence. At the first sight of the Indio police, Martinez didn't simply open fire even though he had two guns in his possession. Rather, he tried to flee after leaving the .38 caliber handgun with David and Anna. Once Martinez reached Johnny Acuna's trailer and the police surrounded the compound, Martinez did not "come out shooting." He still had Officer Martin's .9mm Sig Sauer. This conflicts

with Dr. Parrish's diagnosis. This was the ultimate "me or him" situation.

> The trial court's finding that Martinez did not suffer from PTSD is supported by the evidence. His actions are not consistent with Dr. Parrish's diagnosis. He knew right from wrong. His IQ was well-above average. He consciously decided that "he wasn't going back to jail" and carried the .38 caliber handgun "[f]or protection and if shit happens." Tr. Sept. 9, 1997 at 83, 85. Without more, we believe that Martinez' personality disorder does not qualify as a statutory mitigating circumstance.

Martinez, 196 Ariz. at 464, 999 P.2d at 808.

b. Analysis

In Claim 12 of the amended habeas petition (Doc. 30 at 101–104), restated with more specificity in Petitioner's supplemental *Martinez* brief (Doc. 115 at 66), Petitioner asserts that sentencing counsel was ineffective for failing to rebut the erroneous testimony of the state's mental health expert through presentation of his own mental health evidence. Petitioner asserts that there is a reasonable probability that, had Dr. Parrish observed or been informed of Dr. Bayless' testimony, and been called to rebut it at sentencing, the court would have found the (G)(1) mitigating factor proven, or that there was, otherwise, sufficient mitigating evidence to call for leniency. (Doc. 115 at 69.)

Petitioner relies on an affidavit from Dr. Parrish (Doc. 30, Ex. E-6), which has been resubmitted in support of his supplemental *Martinez* brief. (Doc. 115, Ex. 11.) Dr. Parrish criticizes Dr. Bayless' work, including his failure to generate a report, failure to take into account the warning in the DSM-IV that an APD diagnosis may be misapplied when antisocial behavior is part of a protective survival strategy, failure to consider Petitioner's upbringing, extended family or culture in making a diagnosis, failure to conduct objective testing to assess the appropriateness of an APD diagnosis, reliance on Dr. MacDonald's report, and reliance on subjectively graded testing instruments when objective ones were available. (*Id.* at ¶ 17-23.) Dr. Parrish also notes that Dr. Bayless was inaccurate in reporting an absence of evidence of anxiety when Dr. MacDonald noted that Petitioner had substantial and considerable anxiety. (*Id.* at ¶ 24; *see* Doc. 115, App. 21 at 4.) Dr. Parrish states that had she been consulted regarding the merits of Dr. Bayless

testimony and opinion, she "could have provided a clear means of challenging/rebutting the reliability of his work," observing that "a much fuller and deeper review of his evaluation (e.g. access to all inquiries and responses) may bring to light equal and or greater reasons to disregard his opinions." (Doc. 115, Ex. 11 at ¶ 34.)

The Court did not address Dr. Parrish's affidavit in its earlier order because the IAC claim was found to be procedurally defaulted. (Doc. 88 at 45.) Petitioner argued as cause for the default that direct appellate counsel should have raised the issue. (Doc. 57 at 79.) Because Petitioner did not exhaust the claim that appellate counsel was ineffective for failing to raise the issue, the Court found that Petitioner failed to establish cause and found the claim procedurally barred. (Doc. 88 at 45–46.)

Petitioner now asserts that PCR counsel rendered ineffective assistance for failing to investigate and present the trial IAC claim and that he was prejudiced by the failure because had trial counsel called Dr. Parrish to rebut Dr. Bayless' testimony, the sentencing court would have found the (G)(1) statutory mitigating factor proven or found sufficient mitigating evidence to call for leniency. (Doc. 115 at 53, 61.) *See Wiggins*, 539 U.S. at 524 ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor' " (quoting 1989 ABA Guideline 11.4.1.C; emphasis in original)). As discussed above in Claim 11, the Court need not address counsels' performance because, even if counsel performed deficiently, Petitioner has failed to establish prejudice. *See Strickland*, 466 U.S. at 697.

To establish prejudice for counsel's failure to present mitigating evidence, Petitioner must show a "reasonable probability that the [sentencer] would have rejected a capital sentence after it weighed the entire body of mitigating evidence . . . against the entire body of aggravating evidence." *Wong*, 558 U.S. at 20. Petitioner cannot meet this burden. There is no reasonable probability that if Petitioner had submitted the evidence he now contends should have been offered in rebuttal at sentencing, it would have

changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances. Accordingly, the Court finds no reasonable probability that Petitioner would have obtained post-conviction relief had PCR counsel raised Claim 11 in the PCR petition. Petitioner has failed to establish cause under *Martinez*, and Claim 11 remains procedurally barred.

In these proceedings, Petitioner has submitted a declaration expanding on Dr. Parrish's 1998 report and 2006 affidavit, and addressing how her substantial criticisms of Dr. Bayless' methodology and diagnoses would be affected by the promulgation of the DSM-V in 2013. (Doc. 115, Ex. 12.) Dr. Parrish states that, had she been asked to rebut Dr. Bayless's testimony, she "would have pointed out that he did not explain how he dismissed the notion that, in general, Mr. Martinez's behavior constituted an adaptation to a violent environment." (*Id.* ¶ 47.)

There is no reasonable probability that such testimony would have had any effect on the outcome of sentencing. In the penalty phase, Dr. Parrish explained how Petitioner met the DSM-IV diagnostic criteria for establishing a PTSD diagnosis, and how he also exhibited characteristics of antisocial personality disorder, borderline personality disorder, and narcissistic personality disorder—characteristics which are not uncommon in people who suffer trauma as a child. Although the trial court rejected a PTSD diagnosis, the court accepted that Petitioner exhibited PTSD-like symptoms, and concluded that Petitioner's personality disorder was related to the chaotic and violent family life during his formative years, and that his "personality disorder and other conditions undoubtedly affect his conduct and behavior." (Doc. 115 App. 19 at 20; Doc. 121, App. G at 12.) Nonetheless the court rejected both Dr. Parrish's conclusion that Petitioner was in a dissociative state or acted impulsively at the time he killed Officer Martin, and Petitioner's assertion that his capacity to conform his conduct to the requirements of law was significantly impaired. In rejecting the assertion that Petitioner had PTSD or that his capacity to conform his conduct to the requirements of law was significantly impaired by his personality disorder, the court relied heavily on the evidence

of actions Petitioner took shortly before and after the murder. (Doc. 115, App. 19 at 18-20.) The trial court further noted that while Dr. Parrish's opinions were based on her clinical interview with Petitioner, she had not discussed either the murder or events occurring shortly thereafter with Petitioner. (*Id.* at 16). The court found that Petitioner's actions surrounding the murder demonstrated "abundant evidence of [Petitioner's] ability to plan, to think rationally and to make choices even when 'threatened' as he would have been when he was confronted and subsequently apprehended by law enforcement officers after the murder." (*Id.* at 18.)

In affirming the trial court's decision rejecting the impaired capacity statutory mitigating factor and finding Petitioner's personality disorder insufficient to warrant substantial weight as a non-statutory mitigating factor, the Arizona Supreme Court also relied heavily on the evidence of Petitioner's conduct in shooting Officer Martin to "further his goal" of not going back to jail. *Martinez*, 196 Ariz. at 463–65, 999 P.2d at 807-09. Petitioner's actions were simply "not consistent with Dr. Parrish's diagnosis." *Id.* at 464, 999 P.2d at 808. Thus, even if Petitioner had been able to effectively rebut Dr. Bayless's testimony, and establish that Dr. Parrish's PTSD diagnosis was correct, this is not a critical determination. In light of the aggravating evidence and the evidence demonstrating that at the time Petitioner shot Officer Martin he was not acting impulsively or reflexively, but rather had the ability to reflect, calculate and make choices to further his goals, there is no reasonable likelihood that the sentencing court would have imposed a life sentence. Because the trial-level IAC claim has no merit it is not a substantial claim under *Martinez* and PCR counsel was not ineffective for failing to raise it. *See Clabourne*, 745 F.3d at 377. Thus, Petitioner has failed to establish cause under *Martinez*, and Claim 12 remains procedurally barred.

5. Claim 16

In Claim 16 of his amended habeas petition, Petitioner argues that counsel was ineffective at trial and sentencing for failing to properly investigate and prepare for the testimony of Eric Moreno and Patricia Baker. (Doc. 30 at 133–38.) Petitioner did not

allege, in his amended petition or traverse, that PCR counsel's failure to raise this claim should excuse the procedural default. Petitioner also failed to address Claim 16 in these supplemental proceedings. Therefore, he has waived any claim that he can establish cause and prejudice, under *Martinez*, to excuse the procedural default of this claim. *See Cook*, 538 F.3d at 1014, n. 5 (citing *Martinez v. Ylst*, 951 F.2d at 1157).

6. Claim 17

In Claim 17 of Petitioner's amended habeas petition, he argues that trial counsel was ineffective for failing to take corrective action and to retain an independent pathologist to refute the testimony of Dr. Phillip Keen regarding the sequence of shots that struck and killed Officer Martin. To excuse the default of Claim 17, Petitioner argues PCR counsel rendered ineffective assistance for failing to investigate and present the trial-level IAC claim. Because this IAC claim lacks merit, Petitioner has failed to establish a reasonable probability of a different result had PCR counsel raised it in the state PCR petition. Therefore, he has failed to establish cause under *Martinez* to excuse the procedural default of Claim 17.

a. Facts

Dr. Phillip Keen, the Maricopa County Chief Medical Examiner, testified at trial that the autopsy of Officer Martin revealed four gunshot wounds to his right hand, neck, back, and head. (Doc. 115, App. 4 at 44, 47–49.) Two of the wounds, to the back and head, were fatal injuries. (*Id.* at 53–54.) Dr. Keen opined, based on his review of another medical examiner's evaluation of the body, the wounds, the scene, and the photographs, that the head shot was the last among the four shots, and may have been inflicted while Officer Martin was lying on the pavement. (*Id.* at 56, 59.) Dr. Keen based this opinion on evidence of a "pivot mark" found on Officer Martin's left boot. (*Id.* at 56–57.) Because Dr. Keen determined that the mark on the boot was a result of a deliberate spinning move, and since the shot to the head would have caused immediate unconsciousness, he opined that the head wound would necessarily have occurred last. (*Id.*) Dr. Keen also testified there was evidence Officer Martin was lying on his left side when he was shot in

the head based on the blood stain pattern from the cheek, streaming in both directions. (*Id.* at 59.)

Dr. Keen agreed on cross-examination that the opinion he gave in his testimony conflicted with the one he gave in a pretrial interview in which he said he could not determine the sequence in which Officer Martin was struck with four bullets but the shot to the back was the last shot fired. (*Id.* at 63–65; *see also* Doc. 115, Ex. 34 at 28.) Dr. Keen attributed his change of opinion to his further reflection on the immediate consequences of the head injury, i.e., immediate paralysis. (Doc. 115, App. 4 at 64.)

During closing argument, the prosecution argued that the number and sequence of shots supported a finding of premeditation:

> Four times he pulled this trigger, and four times he struck Bob Martin each time in the location designed to murder this police officer. In the neck, in the hand area, and then as the police officer spun, as he gets to the back of his car and perhaps to safety he shot him in the back. And then when he was down -- and we have scuff marks on both of Bob Martin's knees -- when he was down he pulled that trigger again. That's four, four times he shot this man. Premeditation each time he pulls that trigger he's thinking what I am doing to this man in the uniform? I am trying to kill him so I can get out of here. Four times. And then after he was dead or shortly before he died, he shot at him twice more and missed. Six times.
>
> . . .
>
> [W]e know that when he fell on his left side there was no possible way for any of those other shots to impacted [sic] his body other than the one in the head.

(Doc. 115, App. 2 at 18–19.)

The prosecution addressed the issue of premeditation again in the rebuttal closing:

> So in this particular case, regardless of the sequence of the shots, what ended up happening is that Mr. Martinez took this handgun and took a total of 60 pounds for him to empty the gun into Officer Martin. That's exactly what happened in this case. And what's important about it, too, is if you look at it, we don't have to tell you which one of these holes. And, again, they were talking about conjecture and about how you don't have to guess at anything. We don't have to prove this case for you to perfection. We don't have to tell you which one of these little holes the bullet was in that killed him. . . .
>
> . . .

> And what's important about this to show that this was premeditation is that he didn't stop at the first shot. And we don't know the sequence as to any of the shots other than the one that killed him was the one to the forehead, and that's the last shot. It had to be the last shot based on everything we know about this case. So we do know about that. But in terms of premeditation, again, he's got the gun. Could have let him go after the first shot, but he didn't let him do that, did he? He could have let him go after the second shot. And, again, that's where the premeditation, the thought process comes in. We are not saying he hit him in the hand first, not saying he hit him in the back first or in the throat first. We really don't know. But what we are saying is we do know that the shot to the face, to the near the right eye which is what Bob Martin saw, the last thing he saw was the muzzle of this gun, the last shot. This last shot was to the face, and that means that this defendant thought about it. Thought about it as this officer was on the ground. Why? He could have already left. Why did he have to go over there and shoot him? And that goes to premeditation. He had already wounded him in the arm. He had already wounded him in the throat. He had already shot him in the back. Why did he have to shoot the coup de grace? Why did he have to go up to him when he was down? Or even if he was standing. He didn't. So the premeditation in this case is right here in the gun.
>
> . . .
>
> The other aspect that we have is the actual distance. It wasn't -- it wasn't like he shot him right there and that was the end of it. Because of the scuff marks on the boots, it is clear that the officer moved away. It is clear at that point that he was not a danger. It is not that he ever was, but at that point it was clear that the encounter was over that he was going to let him go by the defendant and, again, we can't go into his mind, perform a lobotomy and look inside, but we know from the surrounding circumstances that he then thought, hey, he is going away. He is not dead yet. I better stop him. How do I do that? Well, I shoot him and I shoot him, and then I have some more bullets. That's the coup de grace right to the face, and that takes care of it. Everybody knows it's coming down now if you shoot somebody in the head they are going to die, especially if they are out in the middle of nowhere, and that's exactly what he did in this case.

(Doc. 115, App. 3 at 72–74, 77.)

b. Analysis

Petitioner asserts that trial counsel was ineffective for failing to obtain an independent pathologist, effectively impeach the testimony of the prosecution's

pathologist, and move for relief after the prosecution presented undisclosed expert testimony at trial. (Doc. 30 at 138; Doc. 115 at 73–79.) Petitioner asserts that Dr. Keen's testimony allowed the prosecution to argue premeditation from the sequence of shots, thus portraying Petitioner's actions in a more incriminating light. (Doc. 30 at 139-140, Doc. 115 at 73.) Petitioner supports this claim with the Affidavit of Dr. Eric Peters, M.D., a Pima County medical examiner. (Doc. 115, Ex. 35.) Dr. Peters concluded that Dr. Keen had been correct in his pretrial interview that the last shot fired was to Officer Martin's back. (Doc. 115, Ex. 35, ¶ 6(A)–(D).)

The Court found Claim 17 procedurally defaulted, and rejected Petitioner's assertion that the default should be excused because the prosecution violated *Brady* by failing to inform defense counsel before trial that Dr. Keen's opinion regarding the shot sequence had changed. (Doc. 88 at 50–51.) The Court found the factual basis for the claim should have been evident to PCR counsel, but PCR counsel did not present the claim. (*Id.* at 51.) The Court also considered whether a fundamental miscarriage of justice would occur if Claim 17 was not heard on the merits, and concluded that Petitioner's proffer of Dr. Peter's affidavit fell short of establishing reliable new evidence to support his claim of actual innocence: "The best that Dr. Peter's affidavit does is to make it a closer factual question whether the head or the back shot was last." (*Id.* at 51–52.)

Petitioner now asserts that PCR counsel rendered ineffective assistance by failing to investigate and present the trial IAC claim and that he was prejudiced by the failure because had trial counsel retained an independent pathologist to rebut the guilt phase testimony of Dr. Keen, there is a reasonable probability the jury would not have found premeditation. (Doc. 115 at 74, 78.) As discussed above in Claims 11 and 12, the Court need not address counsel's performance because Petitioner has failed to demonstrate he was prejudiced thereby. *See Strickland*, 466 U.S. at 697.

Respondents assert that there is no reasonable probability that failing to present testimony consistent with Dr. Peter's affidavit would have changed Petitioner's conviction for premediated murder because the prosecutor did not argue that the sequence

of shots evidenced premeditation. Although the Court disagrees with Respondents' portrayal of the prosecutor's argument—the prosecutor did in fact suggest the sequence of shots evidenced premeditation—the Court agrees that there is no reasonable probability such testimony would have changed the verdict in the face of the overwhelming evidence of premeditation. *See Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995) (no prejudice established by failure to introduce evidence of diminished capacity, where other evidence of defendant's intent to kill and reflect on his actions was overwhelming); *Wood v. Ryan*, 693 F.3d 1104, 1119 (9th Cir. 2012) (no prejudice demonstrated by counsel's failure to assert a stronger impulsivity defense "in the face of the overwhelming evidence of premeditation").

Assuming, *arguendo*, that Dr. Peter's affidavit conclusively establishes that the back shot was last, and Dr. Keen's opinion on this fact was wrong, Petitioner cannot establish prejudice for failing to present testimony consistent with Dr. Peter's affidavit because considerable evidence of Petitioner's premeditation was introduced at trial. First, as the prosecutor emphasized during closing argument, the number of shots alone supported a finding of premeditation each time Petitioner pulled the trigger—a total of six shots all together. Other substantial evidence of premeditation includes his statements to Fryer which "explained why [Petitioner] acted as he did, and showed [Petitioner's] motive for murdering Officer Martin. He had a warrant out for his arrest and knew that if he were caught, he would be sent back to prison," *Martinez*, 196 Ariz. at 459, 999 P.2d at 803, and the fact that Petitioner waited for the Balls to pass by him on the road before shooting Officer Martin, *id.* at 453–54, 999 P.2d at 797-98. Even if Fryer's testimony were excluded, the Court previously found other evidence of premeditation was more relevant: "Petitioner was driving a stolen car, had absconded from law enforcement, had an outstanding warrant for his arrest, shot Officer Martin four times, and bragged about the murder." (Doc. 88 at 38.) Given this evidence, a reasonable juror could have found him guilty of premeditated murder. Because the trial-level IAC claim has no merit it is not a substantial claim under *Martinez* and PCR counsel was not ineffective for failing to

raise it. *See Clabourne*, 745 F.3d at 377. Thus, Petitioner has failed to establish cause under *Martinez*, and Claim 17 remains procedurally barred.

CONCLUSION

Pursuant to the Ninth Circuit's directive on remand, the Court has reconsidered five claims in light of *Martinez* and Petitioner's Renewed Request for Indication Whether District Court Would Consider a Rule 60(b) Motion. Because Petitioner failed to raise any argument in this brief regarding Claims 4 and 16, the Court finds these claims remain procedurally defaulted. Because Petitioner failed to demonstrate a reasonable probability of a different result had Claims 11, 12, and 17 been raised in state PCR proceedings, the Court finds that he has not demonstrated cause and prejudice under *Martinez* and those claims remain procedurally barred. Because Petitioner's Rule 60(b) motion does not demonstrate any defect in the integrity of these habeas proceedings but instead seeks to raise new substantive claims, it is a second or successive petition, and this Court lacks jurisdiction to consider it absent authorization from the court of appeals pursuant to § 2244(b)(3).

CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability ("COA") may issue only when a petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For procedural rulings, a COA will issue only if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

For the reason stated in this order, the Court finds that reasonable jurists could not debate its application of Rule 60(b) to Petitioner's renewed request for reconsideration, or to the Court's finding that Claims 4, 11, 12, 16 and 17 are procedurally barred.

Accordingly,

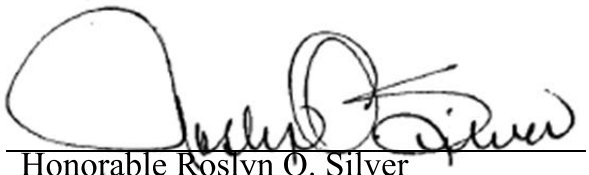
IT IS ORDERED Petitioner's Renewed Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion (Doc. 115) is **DENIED**.

IT IS FURTHER ORDERED Claims 4, 11, 12, 16, and 17 are **DENIED** as procedurally barred.

IT IS FURTHER ORDERED Petitioner's request to expand the record, for evidentiary development, and for an evidentiary hearing is **DENIED** except as to the Court's consideration of the expanded record for the purpose of evaluating cause and prejudice.

IT IS FURTHER ORDERED a Certificate of Appealability is **DENIED**.

Dated this 30th day of March, 2016.



Honorable Roslyn O. Silver
Senior United States District Judge

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ernesto Salgado Martinez, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-05-01561-PHX-ROS DEATH PENALTY CASE **ORDER**

Pending before the Court is Petitioner's motion to alter or amend the Court's order, entered March 31, 2016, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. 128.) Petitioner argues that the Court should amend its order to include the issuance of a certificate of appealability ("COA") with respect to Petitioner's Renewed Request for Indication Whether the Court Would Consider a Rule 60(b) Motion, and also with respect to the Court's finding that Petitioner failed to establish cause and prejudice, in the form of state post-conviction relief ("PCR") ineffectiveness under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to overcome the procedural default of Claims 11, 12 and 17 in Petitioner's § 2254 petition. For the reasons set forth below, the motion will be denied.

DISCUSSION

As an initial matter, Respondents urge this Court to find Petitioner's motion, filed on April 28, 2016, untimely. A motion filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure must be filed "no later than 28 days after the entry of the judgment." Respondents assert that the relevant date of entry of judgment in this case is March 21,

2008, when the Court denied Petitioner's amended petition for writ of habeas corpus, and entered judgment for Respondents. (*See* Docs. 88 and 89.) Respondents further assert that the Court's order, filed on March 31, 2016, did not affect or reopen the judgment entered March 21, 2008. The Court agrees.

Petitioner cannot bring his motion pursuant to Rule 59(e) because this Court's March 31, 2016 order was not a final judgment or an appealable interlocutory order. *See Balla v. Idaho State Bd. of Corrections,* 869 F.2d 461, 466 (9th Cir. 1989) (noting that Rule 59(e) only applies to final judgments and appealable interlocutory orders). While Petitioner asserts that the Ninth Circuit's remand order clearly contemplated that habeas relief could be granted within the context of Rule 60(b) or *Martinez*, the Court declined to reconsider its prior procedural order finding Claims 4, 11, 12, 16 and 17 procedurally barred, and declined a renewed request to entertain a Rule 60(b) motion. Thus, the Court left its previous judgment intact.

Moreover, construed as a nonspecific motion for reconsideration, it is untimely. Local Rule of Civil Procedure 7.2(g)(2) states that "[a]bsent good cause shown, any motion for reconsideration shall be filed no later than fourteen (14) days after the date of the filing of the Order that is the subject of the motion." The order Petitioner challenges was filed on March 31, 2016, and Petitioner's motion was filed on April 28, 2016. The motion, therefore, is untimely under Local Rule 7.2(g)(2), and Petitioner has not proffered any good cause for his untimely filing.

A motion for reconsideration *may* be treated as a Rule 60(b) motion for relief if it is filed past the filing deadline for a Rule 59(e) motion. *See American Ironworks & Erectors, Inc. v. North American Const. Corp.*, 248 F.3d 892, 898–99 (9th Cir. 2001). The moving party under Rule 60(b) is entitled to relief from judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. *See* Fed.R.Civ.P. 60(b).

Only the "catch-all provision," Rule 60(b)(6), might apply to Petitioner's motion. A claim for relief under that provision requires a showing of "extraordinary circumstances" that justify reopening a judgment. *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). "Such circumstances will rarely occur in the habeas context." *Id.* at 535. Petitioner's motion falls short of demonstrating the "extraordinary circumstances" necessary to justify relief under Rule 60(b).

Even if Petitioner's Rule 59(e) motion were timely, Petitioner is not entitled to the relief he requests. As the Ninth Circuit recently reiterated, altering or amending a judgment under Rule 59(e) is "an 'extraordinary remedy' usually available only when (1) the court committed manifest errors of law or fact, (2) the court is presented with newly discovered or previously unavailable evidence, (3) the decision was manifestly unjust, or (4) there is an intervening change in the controlling law." *Rishor v. Ferguson*, --- F.3d ---, 2016 WL 2610176, at *6 (9th Cir. 2016) (citing *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011)). "[A] Rule 59(e) motion may not be used to 'raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation,'" *id.* (citing *Allstate Ins. Co.*, 634 F.3d at 1112), nor is it the time "to ask the court to rethink what it has already thought through—rightly or wrongly," *United States v. Rezzonico*, 32 F. Supp.2d 1112, 1116 (D.Ariz. 1998) (quotation omitted). Furthermore, restating previous arguments does not afford a basis to grant reconsideration. *Rezzonico*, 32 F. Supp.2d at 1116.

Petitioner seeks amendment of this Court's order, entered March 31, 2016, to include the issuance of a COA. (Doc. 128.) Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when a petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For

procedural rulings, a COA will issue only if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

This Court has already rejected many of Petitioner's arguments, and will not reconsider them here. (*See* Doc. 127.) Specifically, Petitioner continues to argue that the Court incorrectly characterized his Rule 60(b) claims as disguised second or successive claims, and that there was a defect in the integrity of the proceedings which constituted an extraordinary circumstance permitting relief from judgment. (*See id.* at 9–13.) These arguments are without merit. They merely reassert arguments already addressed and rejected by this Court. The Court will not reconsider them now.

In addition to reasserting arguments made in the motion below, Petitioner supports his motion with an assertion that the courts of appeal in this circuit and others have granted a COA on similar claims that a Rule 60(b) motion is in fact a disguised successive habeas petition. (Doc. 128 at 4) (citing *Jones v. Ryan*, 733 F.3d 825, 832 & n.3 (9th Cir. 2013), and *Clark v. Stephens*, 627 Fed.Appx. 305, 307 (5th Cir. 2015)). The Court agrees that a COA may be granted on the district court's denial of a Rule 60(b) motion[1], *see Jones*, 733 F.3d at 833. n.3, and that such a claim may implicate "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2). The Court disagrees, however, with Petitioner's assertion that jurists of reason could debate whether the Rule 60(b) motion was a disguised and unauthorized second or successive § 2254 habeas petition. The fact that other courts have found the issue debatable on the facts before them does nothing to inform the issue on the facts presented in this case. Additionally, the fact that "three judges of the Ninth Circuit remanded this matter for

[1] Contrary to Petitioner's assertion, the Ninth Circuit in *Jones* did not address whether a COA could issue for a denial of a *request for indication* whether the district court would consider a Rule 60(b) motion, rather, the Court addressed whether a COA should be granted following a district court's denial of a Rule 60(b) motion filed in district court *in the first instance*. Further, the Court in *Jones* explained that were Jones appealing a valid Rule 60(b) motion, and not a disguised second or successive habeas petition, Jones may have had no need for a COA. *See Jones*, 733 F.3d at 833 n.3. Regardless, for purposes of this motion, the Court assumes a COA could be granted on a denial of a request for indication whether the Court would consider a Rule 60(b) motion.

consideration of the *Brady* and *Napue* claims under Rule 60(b)," is not, contrary to Petitioner's assessment, "a clear indication that reasonable jurists could disagree with respect to this Court's denial of relief on the Rule 60(b) Request." (Doc. 128 at 7) (emphasis deleted). The court specifically noted that it expressed "no opinion on the merits of Petitioner's contentions or on whether an evidentiary hearing is necessary." (Doc. 104 at 3.) This Court will not find that the remanding court expressed an opinion on the merits of the issue where it directly disavowed offering any such opinion.

Next, Petitioner argues that a COA should be granted to address the Ninth Circuit's inconsistency in construing Petitioner's motion to stay the appeal and remand as a motion for leave to file in the district court a renewed request for an indication whether the District Court would consider a Rule 60(b) motion, while remanding two other appeals, *Gallegos v. Ryan*, Ninth Cir. No. 08-99029, Dkt. 72-1 (Apr. 7, 2016), and *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010), for consideration of the merits of the underlying *Brady* claims based on newly-discovered evidence. Respondents correctly assert that this argument does not advance Petitioner's claim because it fails to establish that reasonable jurists could debate whether he made a substantial showing of the denial of a constitutional right, or that this Court was correct in its procedural ruling.

Petitioner also argues that Respondents have failed to explain how the Court's materiality determination of the "Fryer *Brady* Claim" raised in the habeas petition met the threshold for a COA (*see* Doc. 88 at 58-59), but the "Beatty *Brady* Claim" argued in his supplemental brief does not. (Doc. 130 at 6.) This argument, however, ignores the procedural posture of Petitioner's "Beatty *Brady* Claim." The Court's findings regarding Petitioner's renewed request for a Rule 60(b) motion, which addressed whether Petitioner was attempting to bring a second or successive claim, did not rest on the materiality of the Beatty *Brady* Claim, but on whether the alleged exculpatory evidence undermined the integrity of the Court's prior decisions.

Next, Petitioner argues that this Court committed error in determining that Petitioner's ineffective assistance of counsel ("IAC") claims were insubstantial, by

failing to aggregate the prejudice to Petitioner with respect to the allegations raised in Claims 11 and 12. Petitioner cites no support for his assertion that this Court should consider the aggregation of the alleged prejudice for purposes of a *Martinez* analysis. Further, Petitioner did not argue, in either his supplemental brief filed pursuant to *Martinez* or in his reply, that the Court should consider the cumulative prejudice arising from counsel's deficient performance as alleged in Claims 11 and 12. Defendant has a duty to show that counsel's errors had an actual, as opposed to conceivable, effect on the outcome of the jury, *see Strickland v. Washington*, 466 U.S. 668, 693 (1984), and merely alleging multiple instances of deficient performance does not obviate the need to establish that defendant was actually prejudiced by their cumulative effect.

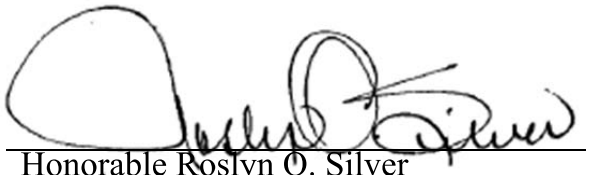
Finally, Respondents assert that, by finding that Petitioner failed to establish cause under *Martinez* to excuse the procedural default of Claims 11, 12, and 17, this Court necessarily already found that Claims 11, 12, and 17 were not "substantial"—meaning that Petitioner failed to establish that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc) (quotation omitted) (acknowledging that *Martinez* incorporated the standard for issuing a COA in its definition of substantiality). Petitioner counters that Respondents' argument turns the objective "reasonable jurist" COA test into a subjective one, and there is no indication, apart from the Court's "conclusory statement in which it denied the COA," that it weighed whether reasonable jurists might debate its determinations of cause and prejudice and the merits of the IAC claims. (Doc. 130 at 7.) The fact remains, however, that the Court did clearly indicate that it had weighed the matter, objectively, and for the same reasons stated in the body of the order, determined that the matter was not debatable by reasonable jurists. (Doc. 127 at 50.) While Petitioner might disagree with the Court's assessment, there is no clear error because it is evident from the Order that the Court applied the reasonable jurist test to Petitioner's claims in denying a COA. Petitioner's

mere disagreement with this Court's ruling, without any showing of newly-discovered evidence, a change in the law, or clear error, is insufficient to establish that a COA should issue on these claims.

Accordingly,

IT IS ORDERED Petitioner's Motion to Alter or Amend Judgment Pursuant to Rule 59(e) (Doc. 128) is DENIED.

Dated this 16th day of June, 2016.



Honorable Roslyn O. Silver
Senior United States District Judge

Office Distribution
Victim Witness Division X
MCSO/AIS X
APO X

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

12/2/97 HONORABLE RONALD S. REINSTEIN S. Hawley
Deputy

№ CR 95-08782

FILED: DEC 04 1997

STATE OF ARIZONA

v.

ERNESTO S. MARTINEZ

County Attorney
By: Robert Shutts

Emmet Ronan

Todd Coolidge

Judge Hotham

Judge Skelly

Defendant's Motion for Change of Judge for Cause has been considered by the Court, together with the State's Response and the arguments of counsel. Neither side sought to present any evidence.

Rule 10.1 of the Rules of Crim. Procedure provides that the defendant must demonstrate an interest or prejudice as to the assigned judge such that a fair and impartial trial or hearing cannot be had. The Rule also provides that the motion must be filed within ten days of discovery of the grounds.

The State contends the motion is untimely in that it should have been filed when the defense first learned of the relationship between the victim and his family and Ron Mills, Judge Hotham's bailiff. However, the defense in fact did raise the issue in a timely manner when the motion to exclude Ron Mills as bailiff during the course of the trial was filed. Judge Hotham denied that motion, but apparently had no reason at the time to know how deeply Mr. Mills might be affected by this case. As soon as the additional grounds were discovered at the time of the verdict, this motion was timely filed.

(161)

As to the State's other arguments, the Court agrees with

the proposition that there is a presumption of impartiality as to the trial court and that it is the defendant's burden to prove interest or prejudice. But as noted by the Arizona Supreme Court in St. ex rel Corbin v. Superior Court, 748 P.2d 1184, 155 Az. 560 (1987), it is not actual impropriety we need to be concerned with, but the appearance of whether the assigned judge's "impartiality might reasonably be questioned."

The facts relative to this motion do not appear to be in dispute. Mr. Mills testified at the hearing to exclude him as bailiff that he was a good friend of Officer Martin's wife. Following pretrial motions on 2/21/97, Mr. Mills hugged Officer Martin's wife and spoke with her during trial. Judge Hotham asked Mr. Mills to remain outside the courtroom when the medical examiner was to testify about the autopsy on the victim and evidently was to demonstrate his testimony with autopsy photographs that might be upsetting to Mr. Mills. On the day the verdict was returned, after trial, Mr. Mills was seen crying in the courtroom and in the hallway outside where he was consoled by Mrs. Martin and others in the family.

First, Mr. Mills' reactions were quite understandable given his friendship with Officer Martin and Mrs. Martin and need no explanation. They were expressions of human emotion over a violent and senseless murder of a friend and colleague.

Second, there is no evidence that despite Mr. Mills' relationship with the victim, Judge Hotham could not be fair and impartial. In fact, by the defense's own motion, Judge Hotham did not witness any of Mr. Mill's reaction in court or in the hallway. But, the analysis doesn't end there.

If a member of a judge's family was close to a victim or the victim's family, there is no question but that the court should recuse itself from the case. The State argues that a bailiff's relationship however with a victim is too tenuous. But a judge's staff is tantamount to his court "family." There are but four members of the staff at most. They work together daily in a

relatively small area.

Therefore, the issue revolves around the "appearance" of impropriety, be it to the public, the defendant, or the victim, in a particular case as spelled out in Canons 2 and 3 of the Code of Judicial Conduct. Rule 81, Rules of Supreme Court.

As the commentary to Canon 2A provides in part: "A judge must avoid all impropriety and appearance of impropriety. . .The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

As both the U.S. and Ariz. Supreme Courts have pointed out in case after case, "death is different." This case involves the potential for the death penalty to be imposed. The State is seeking imposition of the death penalty.

The defendant asks that he be sentenced by a judge who is completely free of any improper emotion or bias which might potentially be there. The law provides that there not be any appearance of impropriety as to the sentencing judge's "interest" in the case. And the victim's family deserves a sentencing free of any unnecessary appellate issues which might cause the case to be returned years later for a traumatic resentencing before another judge.

As both sides agreed at the hearing there was nothing from the trial record that relates to the determination the Court must make pursuant to A.R.S. §13-703. The aggravating factors which the State alleged at that time were uncontroverted. The mitigating factors evidently relate to defendant's background, not the nature and circumstances of the case. Thus a different sentencing judge would not be disadvantaged by not having set through the trial. This date the State has added an allegation that the murder was heinous and depraved, but stated that the new judge would only have to review the testimony of one witness on

that issue.

In State ex rel. Corbin v. Superior Court, supra, the Arizona Supreme noted that there were fifty-two other judges at the time in the Superior Court who could be assigned the case. Today there are seventy other judges in the Superior in Maricopa County who could be assigned to do the sentencing in this case. In that case the relationship of the assigned judge to the case was more removed than the situation in this case. Just as there was no actual prejudice or interest demonstrated in that case there is none here as to Judge Hotham. However, due to the "appearance" of potential interest from both the relationship of Ron Mills to Officer Martin and his family and the witnessed emotional reactions of Mr. Mills, the better course to follow for all concerned is to assign another judge to the sentencing. Based on all the above,

IT IS ORDERED granting the motion.

IT IS ORDERED transferring the matter to the Hon. Christopher Skelly for all further proceedings.

196 Ariz. 451
Supreme Court of Arizona,
En Banc.

STATE of Arizona, Appellee,
v.
Ernesto Salgado MARTINEZ, Appellant.

No. CR–98–0393–AP.
|
May 11, 2000.

Following jury trial before the Superior Court, Maricopa County, No. CR–95–08782, Jeffrey A. Hotham, J., defendant was convicted of first degree murder, other offenses, and sentenced to death. Automatic appeal was taken. The Supreme Court, Martone, J., held that: (1) State met its *Batson* burden of showing race-neutral reasons for striking black prospective jurors; (2) refusal to strike for cause prospective juror who expressed preconceived notions but was willing to set them aside was not error; (3) probative value of defendant's pre-crime statement to friend and post-crime use of murdered police officer's gun in a robbery was not substantially outweighed by any prejudicial effect; (4) convictions of dangerous or deadly assault by prisoner qualified as "serious offense" for purpose of aggravating factor; (5) defendant's age, personality disorder, and violent upbringing were not entitled to substantial weight as non-statutory mitigating factors; and (6) mitigating factors were not sufficiently substantial to warrant leniency in light of aggravators.

Affirmed.

Attorneys and Law Firms

**797 *453 Janet A. Napolitano, Attorney General By Paul J. McMurdie, Chief Counsel, Criminal Appeals Section and Jack Roberts, Assistant Attorney General, Phoenix, Attorneys for the State of Arizona.

Dean W. Trebesch, Maricopa County Public Defender By Lawrence S. Matthew and Louise Stark, Maricopa County Deputy Public Defenders, Phoenix, Attorneys for Ernesto Salgado Martinez.

OPINION

MARTONE, Justice.

¶ 1 Ernesto Salgado Martinez was convicted of first degree murder, other offenses, and sentenced to death. This is his automatic and direct appeal under Rule 31.2(b), Ariz. R.Crim. P. and A.R.S. § 13–4031. We affirm.

I. BACKGROUND

¶ 2 Martinez drove from California to Globe, Arizona in a stolen blue Monte Carlo to visit friends and family. After learning that his parents had moved to Payson, Arizona, Martinez met his friend Oscar Fryer. Fryer asked Martinez where he had been. Martinez told Fryer that he had been in California. Fryer then asked Martinez if he was still on probation. Martinez responded that he was on probation for eight years and had a warrant out for his arrest. Martinez then pulled a .38 caliber handgun with black tape on the handle from under his shirt and showed it to Fryer. Fryer asked Martinez why he had the gun, to which Martinez responded, "[f]or protection and if shit happens." Tr. Sept. 9, 1997 at 83. Fryer then asked Martinez what he would do if he was stopped by the police. Martinez told Fryer, "he wasn't going back to jail." *Id.* at 85.

¶ 3 Sometime after his conversation with Fryer, Martinez left Globe and drove to Payson. On August 15, 1995, at approximately 11:30 a.m., Martinez was seen at a Circle K in Payson. He bought ten dollars worth of gas and proceeded south down the Beeline Highway toward Phoenix. Martinez was driving extremely fast and passed several motorists, including a car driven by Steve and Susan Ball. Officer Martin was patrolling the Beeline Highway that morning and pulled Martinez over at Milepost 195. Steve and Susan Ball saw Officer Martin's patrol car stopped behind Martinez' Monte Carlo and commented, "Oh, good, he got the speeding ticket." Tr. Sept. 10, 1997 at 32. As they passed by, Susan Ball noticed Officer Martin standing at the driver's side door of **798 *454 the Monte Carlo while Martinez looked in the backseat.

¶ 4 Shortly after Steve and Susan Ball passed, Martinez shot Officer Martin four times with the .38 caliber handgun. One shot entered the back of Officer Martin's right hand and left through his palm. Another shot passed through Officer Martin's neck near his collar bone. A third shot entered Officer Martin's back, proceeded through his kidney, through the right lobe of his liver, through his diaphragm, and lodged in his back. A fourth shot entered his right cheek, passed through his skull, and was recovered inside Officer Martin's head. The hand and neck wounds were not fatal. The back and head wounds were.

¶ 5 After murdering Officer Martin, Martinez took Officer Martin's .9mm Sig Sauer service weapon and continued down the Beeline Highway at speeds over 100 mph. Martinez again passed Steve and Susan Ball, which they found strange. They began discussing how not enough time had passed for Martinez to have received a speeding ticket because it had only been a couple of minutes since they had seen him pulled over. They stayed behind Martinez for some time and watched him go through a red light at the Fort McDowell turnoff. Steve Ball commented, "Yeah, he just ran that red light. Something is up here. Something is going on." Tr. Sept. 10, 1997 at 69. Steve and Susan Ball continued down the Beeline Highway and lost sight of Martinez until they reached Gilbert Road. At the red light on Gilbert Road, they caught up to him and took down his license plate.

¶ 6 Martinez passed through Phoenix and arrived in Blythe, California at around 4:00 p.m. where he called his aunt for money. At 6:00 p.m., Martinez called his aunt again because she failed to wire the money he requested. Growing impatient, at approximately 8:00 p.m., Martinez entered a Mini–Mart in Blythe and, at gunpoint, stole all of the $10 and $20 bills from the register. Martinez killed the clerk with a single shot during the robbery. [1] A .9mm shell casing was recovered at the Mini–Mart the following day. Ballistics reports determined that this shell casing was consistent with the ammunition used in Officer Martin's .9mm Sig Sauer.

¶ 7 Later that night, Martinez drove to his cousin's house in Coachella, California, near Indio. Around 12:00 p.m. the next day, August 16, 1995, Martinez took David Martinez, his cousin, and Anna Martinez, David's wife, to a restaurant in Indio. After leaving the restaurant, Martinez noticed that a police car was following him. David asked Martinez if the car was stolen to which Martinez responded, "I think so." Tr. Sept. 15, 1997 at 146–47. Martinez turned onto a dirt road and instructed David and Anna to get out of the car. They left the car and went to a nearby trailer compound to call Anna's aunt to come and get them.

¶ 8 Tommy Acuna, [2] who lived in his grandmother's house at the compound, was swimming when David and Anna appeared at the fence surrounding the compound. David and Anna asked Tommy if they could use his phone but Tommy refused. Tommy did permit Anna to use the bathroom. Anna went into the bathroom and came out a couple of minutes later. After showing David and Anna out, Tommy went back to the bathroom "to see if they left anything in there because she wasn't in there that long." Tr. Sept. 16, 1997 at 48. He found a towel on the floor with the .38 caliber handgun wrapped inside. Tommy took the gun, hid it in his pants, and walked outside. He testified that he hid the gun because it was his grandmother's house. By the time Tommy walked outside, the police had surrounded the compound. An officer monitoring the perimeter called out to Tommy and told him that he was going to search him. Tommy walked over to the officer and exclaimed, "I have got the murder weapon." Tr. Sept. 15, 1997 at 192. The officer searched Tommy and found the .38 caliber handgun. This gun was later identified as the weapon that fired the bullets which killed Officer Martin.

¶ 9 After David and Anna got out of the Monte Carlo, Martinez turned around on the **799 *455 dirt road. Another police car appeared on the scene and headed towards Martinez. Martinez saw this second police car, left the Monte Carlo, ran toward the trailer compound, and jumped the fence. He then ran into Johnny Acuna's trailer.

¶ 10 The SWAT team evacuated the area and tried to communicate with Martinez. After those attempts failed, the SWAT team negotiator threatened to use tear gas. Martinez responded, "I am not coming out; you will have to come in and shoot me." Tr. Sept. 17, 1999 at 23. After further negotiations, however, Martinez agreed to come out and was taken into custody.

¶ 11 While in custody, Martinez called his friend, Eric Moreno, and laughingly told Moreno that "he got busted for blasting a jura." [3] Tr. Sept. 15, 1997 at 13. Martinez also told Moreno that a woman on the highway might

have seen what had happened. They talked about the guns and Martinez told Moreno that one of the guns had been "stashed." *Id.* at 21. After obtaining a warrant, the police searched Johnny Acuna's trailer and found Officer Martin's .9mm Sig Sauer under a mattress.

¶ 12 A jury convicted Martinez of first degree murder, a class 1 dangerous felony; theft, a class 6 felony; theft, a class 5 felony; misconduct involving weapons (prohibited possessor), a class 4 felony; and misconduct involving weapons (serial number defaced), a class 6 felony. The trial court sentenced Martinez to death for the murder conviction, and to terms of imprisonment for the noncapital crimes.

II. ISSUES

Martinez raises the following issues on appeal:

A. *Trial Issues*

1. Did the trial court err when it denied Martinez' *Batson* objection to the removal of venireperson Eric Veitch?

2. Did the removal of Eric Veitch violate article 2, section 12 of the Arizona Constitution?

3. Did the trial court err when it denied Martinez' *Batson* objection to the removal of venireperson Linda Preston?

4. Did the trial court abuse its discretion when it refused to strike venireperson Gail Schroeder for cause?

5. Did the trial court abuse its discretion when it admitted other acts into evidence?

6. Did the trial court abuse its discretion when it refused to instruct the jury on the defense of non-presence?

7. Did the trial court err when it deleted part of Martinez' proposed second degree murder instruction?

B. *Sentencing Issues*

1. *Aggravating Factors*

a. Did the trial court improperly include Martinez' 1996 Dangerous or Deadly Assault by a Prisoner convictions under A.R.S. § 13–703(F)(2)?

2. *Mitigating Factors*

a. Did the trial court err when it found that Martinez failed to prove his ability to conform his conduct to the requirements of law was significantly impaired pursuant to A.R.S. § 13–703(G)(1)?

b. Did the trial court fail to give sufficient weight to the non-statutory mitigating factors?

III. ANALYSIS

A. *Trial Issues*

1. *Batson objection to venireperson Eric Veitch*

¶ 13 The State used one of its peremptory strikes to remove Eric Veitch, a black man, from the jury. Martinez challenged this strike under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court determined that, because Mr. Veitch was in the class protected by *Batson,* the State had the burden of demonstrating a race-neutral reason for the strike. The State explained:

> ****800 *456** Mr. Veitch is, of course, a pastor. He's strongly opposed to the death penalty. This is, in and of itself, I believe, a racially neutral reason for the strike.
>
> He also, I might add, had a conversation with the girlfriend of the defendant, as did some other jurors. And although he may not have known or claims to have not known at the time that this was the girlfriend of the defendant, he did have an extensive conversation with her and counseled her and must have known during the jury selection process that this is inappropriate to be speaking to people in the hallway.

Tr. Sept. 8, 1997 at 163–64. The trial court found that the State's explanation was sufficiently race-neutral and denied Martinez' *Batson* challenge.

¶ 14 On appeal, Martinez now argues that the State improperly struck Mr. Veitch because of his religious affiliation. Martinez alleges that the State struck Mr. Veitch because "he is a pastor, and pastors are forgiving."

Id. at 165. Martinez asks us to extend *Batson* to peremptory strikes based on religion.

¶ 15 We need not reach this issue because Martinez failed to show that the State struck Mr. Veitch based on his religious affiliation. The State did not strike Mr. Veitch because he was Christian. Rather, the State struck Mr. Veitch because of his occupation as a pastor and because "[h]e's strongly opposed to the death penalty," and may have "had a conversation with the girlfriend of the defendant." *Id.* at 163–64. Had Mr. Veitch been a social worker and had the State struck Mr. Veitch because social workers are forgiving, there would have been no question about the validity of the strike.

¶ 16 Martinez alternatively argues that even if *Batson* does not extend to religion, the State violated *Batson* because it struck Mr. Veitch due to his race. We disagree. In *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), the Court established a three-part test for *Batson* objections: (1) the opponent of the strike must establish a *prima facie* case of racial discrimination; (2) the proponent must then provide a race-neutral explanation for the strike; and (3) the trial court must then judge the credibility of the proponent's explanation. *Id.* at 767, 115 S.Ct. at 1770–71. With respect to the second part of this test, the proponent's explanation does not need to be persuasive or even plausible, only "legitimate." *Id.* at 768–69, 115 S.Ct. at 1771 (stating that "a 'legitimate reason' is not a reason that necessarily makes sense, but a reason that does not deny equal protection"). [4]

[1] ¶ 17 The State provided three reasons for striking Mr. Veitch: (1) his opposition to the death penalty; (2) his conversation with Martinez' girlfriend; and (3) his possible sympathy toward Martinez because of his occupation. Mr. Veitch's jury questionnaire clearly stated that he opposed the death penalty and preferred life imprisonment as an option. [5] There was also evidence that Mr. Veitch engaged in a conversation with Martinez' girlfriend during a break. And finally, Mr. Veitch's occupation concerned the State because "pastors are forgiving." Thus, the State provided three race-neutral reasons for striking Mr. Veitch. This more than satisfies *Batson.*

[2] ¶ 18 As his final *Batson* argument for Mr. Veitch, Martinez asserts that the failure to strike four similarly situated Caucasian jurors demonstrates the State's racial motivation for striking Mr. Veitch. But the other jurors were not similarly situated. Although each Caucasian juror showed some doubt about capital punishment, all four indicated on the jury questionnaire that they favored the death penalty. Mr. Veitch, on the other hand, indicated that he opposed the death penalty and suggested that life imprisonment "would work better." Jury Questionnaire # 47, Question 41(b). In addition, none of the Caucasian jurors had engaged in ****801** ***457** a conversation with martinez' girlfriend. there was no *batson* violation.

2. *Article 2, Section 12*

[3] ¶ 19 Martinez next argues that the State violated article 2, section 12 of the Arizona Constitution by striking Mr. Veitch on the basis of his religious affiliation. Article 2, section 12 provides in relevant part: "No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion...." Because Martinez failed to raise this argument below, it is waived absent fundamental error.

[4] ¶ 20 For the reasons stated above, we do not believe the State's use of a strike against Mr. Veitch violated article 2, section 12 of the Arizona Constitution. But even if it did, "a *Batson* issue does not present fundamental error and a failure to raise it cannot be excused on that ground." *State v. Holder,* 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987). Although Martinez' current argument is based upon article 2, section 12 of the Arizona Constitution, and not the Equal Protection clause of the Fourteenth Amendment, the fundamental error analysis is the same.

3. *Batson objection to venireperson Linda Preston*

¶ 21 In addition to striking Mr. Veitch, the State exercised one of its peremptory strikes on Linda Preston, a black woman. After Martinez challenged this strike under *Batson,* the State offered the following reasons for striking Ms. Preston:

> The strike in terms of Linda Preston was made because of her views on the death penalty, Your Honor, and are racially and genderly neutral. Her feelings are very strong in that she states that some people that are

> innocent may accidentally lose their lives. Regardless of what they may say in response to questions like that, that's still an opinion they hold into the jury room, and I think I am entitled not to take a chance that that may sway their verdicts.

Tr. Sept. 8, 1997 at 162. The trial court then asked the State if it had any other concerns about Ms. Preston. The State responded:

> I noticed that her brother was shot, and I don't know that he hasn't left some residual feelings with her. But in terms of that, it's basically her very, very strong beliefs on the death penalty issue, and her very strong opinions on that, because she also says that she would, in her response to, if you were charged with a similar offense, would you like people with your frame of mind? And she says: I hope they would have an opinion. And this is a very opinionated woman, and I feel that in terms of the death penalty issue, that it may sway her thinking.

Id. at 162–63. The trial court permitted the strike.

[5] ¶ 22 On appeal, Martinez makes the same argument he made for Mr. Veitch and, again, fails to demonstrate error. As in the case of Mr. Veitch, the State provided three race-neutral reasons for striking Ms. Preston: (1) her strong opposition to the death penalty; (2) her strong opinions in general; and (3) her possible residual feelings about her brother's shooting. Martinez attacks these reasons and suggests that the record does not demonstrate that Ms. Preston was opinionated or that she was strongly opposed to the death penalty. But on her jury questionnaire, Ms. Preston clearly responded that she opposed the death penalty because "some people that are innocent may lose their lives." Jury Questionnaire # 50, Question 41(b). During voir dire, although the questions were ambiguous, she stated that it would be difficult for her to evaluate the evidence in this case and make a determination of guilt or innocence based only on the evidence due to her preconceived notions regarding the death penalty. *See* Tr. Sept. 8, 1997 at 101–02. Martinez concedes that the State's reason for striking Ms. Preston because of her brother is supported by the record. And, as in the case of Mr. Veitch, the Caucasian jurors were not similarly situated. There was no error.

4. *Refusal to strike venireperson Gail Schroeder for cause*

[6] ¶ 23 Gail Schroeder provided several answers on her jury questionnaire that ****802 *458** suggested her potential inability to act as a fair and impartial juror. For example, in response to Question # 1, which asked if the jurors had any strong feelings about the case which might affect their ability to be fair and impartial, Ms. Schroeder stated, "I've already made up my mind from news reports but could be wrong." Jury Questionnaire # 80, Question 1. Two follow-up questions asked the potential jurors if their pre-existing opinions about the case could be set aside or changed. Ms. Schroeder answered, "No" to both questions. Jury Questionnaire # 80, Question 8. Ms. Schroeder also responded that she favored the death penalty and added that it was "not used enough." Jury Questionnaire # 80, Question 41. Curiously, when asked if she would be satisfied to have twelve people with her background and frame of mind decide her case if she were accused of a similar offense, Ms. Schroeder responded, "Yes. I feel I can be very impartial." Jury Questionnaire # 80, Question 50. On the next question, however, which asked, " In light of the subject matter of this case or the matters related above, or anything else, do you feel you could sit as a fair and impartial juror?", Ms. Schroeder answered, "No." Jury Questionnaire # 80, Question 51.

¶ 24 In light of these inconsistent answers, the trial court questioned Ms. Schroeder in chambers about her ability to serve as a fair and impartial juror. Ms. Schroeder retracted her earlier answers and provided consistent responses assuring the trial court that she could be fair and impartial. To the trial court's question, "[D]o you think that you still are of such an opinion that you can't be fair in this case?", Ms. Schroeder replied, "I think I can be fair." Tr. Sept. 8, 1997 at 141. The trial court then asked, "So whatever opinion that you had before, is it your thought that you can put that aside here?" Ms. Schroeder responded, "Yes." *Id.*

¶ 25 During this in chambers voir dire, Martinez' counsel specifically asked Ms. Schroeder about her response to Question # 51 and Ms. Schroeder responded that she did not know why she answered that she could not sit as a fair and impartial juror. *Id.* at 142. He asked Ms. Schroeder

again if she could be fair and impartial to which Ms. Schroeder answered, "Yes, I could." *Id.* at 143. He then asked Ms. Schroeder if she still had an opinion regarding Martinez' guilt based on the news reports she had heard. Ms. Schroeder replied, "News don't tell you all the facts so—I don't really have an opinion—I don't really have an opinion until I hear all the facts. I know that they don't always put all the facts in the paper or on the news." *Id.* The trial court then asked Ms. Schroeder a follow-up question on the burden of proof. Ms. Schroeder explained that she understood the presumption of innocence and agreed with that concept. After this questioning ended, Martinez' counsel moved to strike Ms. Schroeder for cause. The trial court denied this motion. Martinez then exercised one of his peremptory strikes to remove Ms. Schroeder from the panel.

¶ 26 On appeal, Martinez argues that from her responses to the questions on the jury questionnaire there were reasonable grounds to believe that Ms. Schroeder could not be fair and impartial. Martinez relies on *State v. Huerta,* 175 Ariz. 262, 264, 855 P.2d 776, 778 (1993) (holding that reversal is required if the court abused its discretion by failing to strike a juror for cause, and the defendant is required to use a peremptory strike to remove the challenged juror), to claim he was denied a substantial right because he had to exhaust one of his peremptory strikes on Ms. Schroeder who should have been stricken for cause. [6]

¶ 27 Because it was not error to fail to remove the juror for cause, the predicate for Martinez' argument fails. In *Huerta,* the challenged juror could not be rehabilitated. *Id.* at 262, 855 P.2d at 776. Here, Ms. Schroeder assured the trial court that she could be fair and impartial despite her earlier answers on the jury questionnaire. In response to the trial judge's question asking her whether she could be fair in this case, Ms. Schroeder specifically stated, "I think I ****803** ***459** can be fair." Tr. Sept. 8, 1997 at 141. She qualified her answers regarding the news reports she had heard and acknowledged that, "News don't tell you all the facts so—I don't really have an opinion." *Id.* at 143. She also retracted her answer to Question # 51, and said that she did not know why she answered that she could not sit as a fair and impartial juror.

[7] [8] ¶ 28 A juror's preconceived notions or opinions about a case do not necessarily render that juror incompetent to fairly and impartially sit in a case. *State v. Poland,* 144 Ariz. 388, 398, 698 P.2d 183, 193 (1985), *aff'd,* 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). "If a juror is willing to put aside his opinions and base his decision solely upon the evidence, he may serve." *Id.* The trial court can rehabilitate a challenged juror through follow-up questions to assure the court that he can sit as a fair and impartial juror. *See, e.g., State v. Walden,* 183 Ariz. 595, 609, 905 P.2d 974, 988 (1995); *State v. Chaney,* 141 Ariz. 295, 302–03, 686 P.2d 1265, 1272–73 (1984) (concluding that it was not abuse for the trial court to refuse to excuse the challenged juror for cause because he assured the court that he could render an impartial verdict). Ms. Schroeder provided assurances that she could sit as a fair and impartial juror and decide the case under the presumption of innocence. The trial court was in the best position to observe Ms. Schroeder's demeanor and judge her answers. We find no abuse.

5. Other Acts Evidence

¶ 29 Martinez next argues that the trial court abused its discretion by admitting evidence of: (1) Martinez' statements to Oscar Fryer about Martinez' outstanding warrant; and (2) Martinez' armed-robbery of a Mini–Mart in Blythe. Martinez concedes the relevance of this evidence, but asserts that its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, Ariz. R. Evid.

¶ 30 The trial court found the probative value of Martinez' statements to Fryer that "he had a warrant out for his arrest, that he was on the run, that he didn't want to go back to jail, and that he carried the gun in case something happened," was not substantially outweighed by the danger of unfair prejudice. Minute Entry, Mar. 26, 1997 at 1. The trial court limited the evidence to show only that an arrest warrant had been issued and that Martinez knew about the warrant.

[9] ¶ 31 This evidence was extremely probative and clearly appropriate under Rule 403. These statements explained why Martinez acted as he did, and showed Martinez' motive for murdering Officer Martin. Martinez did not want to return to prison. He had a warrant out for his arrest and knew that if he were caught, he would be sent back to prison. Without his statements to Fryer, a jury could only speculate as to why Martinez shot Officer Martin.

[10] %57 32 The trial court also limited the State's evidence on the Mini–Mart robbery to the taking of cash from the store, the discharge of Officer Martin's .9mm Sig Sauer, and the underlying ballistics evidence. *Id.* at 2–3. The trial court precluded all references to the clerk's "murder, homicide, death or autopsy." *Id.* Martinez conceded that this evidence was relevant to establish identity and motive under Rule 404(b). *See* Defendant's Response to State's Motion to Admit Evidence Pursuant to Rule 404(b) at 9. He agreed that it linked Officer Martin's gun with Martinez' arrest in Indio. *Id.* He also acknowledged that the Mini–Mart robbery showed consciousness of guilt under *State v. Kemp,* 185 Ariz. 52, 59, 912 P.2d 1281, 1288 (1996). *Id.*

¶ 33 By his earlier concessions, Martinez agreed that the evidence about the Mini–Mart robbery was entitled to substantial probative weight. But on appeal, he attempts to retract his concessions, and asserts that engaging in a California convenience store robbery does not show consciousness of guilt as to the Arizona homicide. To the extent that we understand this argument, flight from Arizona demonstrates consciousness of guilt as much as flight within Arizona. The .9mm shell casing recovered at the Mini–Mart on August 16, 1995 provided the final link to Officer Martin's murder. Officer Martin's .9mm Sig Sauer was missing and the shell casing found at the Mini–Mart traced Martinez' **804 *460 flight from the Beeline Highway, through Phoenix, to Blythe, California. The trial court precluded the State from introducing evidence of the clerk's murder to prevent unfair prejudice. That was protection enough. The other evidence was extremely relevant. There was no error in the trial court's Rule 403 balancing.

6. Non–Presence Jury Instruction

[11] ¶ 34 Martinez claims that the trial court abused its discretion when it refused to instruct the jury on the defense of non-presence. He maintains that conflicting eyewitness testimony demonstrated that two similar, yet different, blue cars traveled south down the Beeline Highway on August 15, 1995. This, he contends, entitled him to a jury instruction which suggested that he was not present at the scene of the homicide. [7]

¶ 35 Martinez relies on *State v. Rodriguez,* 192 Ariz. 58, 961 P.2d 1006 (1998), to support this argument. But in *Rodriguez,* the defendant requested an alibi instruction and presented corroborating alibi evidence. *See id.* at 62, 961 P.2d at 1010. Martinez failed to present such evidence here. He never explained his whereabouts on August 15, 1995, nor did he offer an alibi. He actually admitted that he traveled south down the Beeline Highway on the day Officer Martin was murdered. When the trial court asked about this discrepancy, Martinez' counsel had no explanation. *See* Tr. Sept. 24, 1997 at 124.

[12] **[13]** ¶ 36 While a party is entitled to have the court instruct the jury on any theory reasonably supported by the evidence, *see State v. Bolton,* 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995), a party is not entitled to an instruction when it is adequately covered by other instructions. *See Rodriguez,* 192 Ariz. at 61, 961 P.2d at 1009. Martinez' non-presence instruction simply repeated the State's burden of proving his guilt beyond a reasonable doubt. *Rodriguez* does not require redundancy. Nor does *Rodriguez* mandate an alibi instruction when the evidence does not support it. The trial court did not abuse its discretion in refusing Martinez' non-presence jury instruction.

7. Second Degree Murder Instruction

[14] ¶ 37 Martinez asserts that the trial court committed reversible error by deleting a paragraph of his proposed instruction for the lesser-included offense of second degree murder. The omitted paragraph read: "If you determine that the defendant is guilty of either first degree murder or second degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second degree murder." Defendant's Requested Jury Instructions at 40. The trial court refused this instruction based upon *State v. LeBlanc,* 186 Ariz. 437, 924 P.2d 441 (1996), where we abandoned the "acquittal first" procedure for lesser-included offenses in favor of the "reasonable efforts" procedure. *Id.* at 440, 924 P.2d at 444. We decided to require jurors to use "reasonable efforts" in reaching a verdict on the charged offense before considering lesser-included offenses. Thus, jurors do not have to acquit the defendant on the charged offense before considering lesser-included offenses.

¶ 38 In place of the omitted paragraph, the trial court gave the following instruction:

> You are to first consider the offense of first degree murder.

> If you cannot agree on a verdict on that charge after reasonable efforts, then you may consider whether the State has proven beyond a reasonable doubt that the defendant is guilty of the less serious offense of second degree murder.

Tr. Sept. 25, 1997 at 98. This instruction was not, as Martinez argues, improper. It did not fail to instruct the jury on the procedure when reasonable doubt exists on the degree of homicide. Rather, it expressly stated, "[y]ou are to first consider the offense of first degree murder." *Id.* If the jury could not agree that Martinez was guilty of ****805 *461** first degree murder after reasonable efforts, then it was instructed to consider whether the State had proven, beyond a reasonable doubt, that Martinez was guilty of second degree murder. From the court's instruction, the jury could return a verdict of first degree murder only if the State proved Martinez' guilt beyond a reasonable doubt. If it had any doubts, the "reasonable efforts" instruction allowed the jury to consider the lesser-included offense of second degree murder. There was no error.

B. *Sentencing Issues*

1. *Aggravating Factors*

¶ 39 The trial court found the existence of the aggravating factors under A.R.S. § 13–703(F)(2) (defendant previously convicted of serious offense), and (F)(10) (murdered person on duty peace officer).

a. *Serious Offense*

[15] ¶ 40 On January 11, 1993, Martinez was convicted of Aggravated Assault, a class 3 felony in violation of A.R.S. §§ 13–1203(A)(2) and 13–1204(A)(2). On November 11, 1996, Martinez was convicted of two counts of Dangerous or Deadly Assault by a Prisoner, a class 2 felony in violation of A.R.S. §§ 13–1203 and 13–1206. Martinez concedes that his 1993 conviction for Aggravated Assault qualifies as a "serious offense" under A.R.S. § 13–703(F)(2) and (H)(1). But he argues the trial court erroneously found that his two 1996 convictions qualified as "serious offenses." First, he asserts that because Dangerous or Deadly Assault by a Prisoner is not included within the list of "serious offenses" in A.R.S. § 13–703(H), the trial court improperly considered his 1996 convictions. Next, he alleges that because one may, theoretically, commit assault recklessly, his 1996 convictions cannot qualify as serious offenses under A.R.S. § 13–703(F)(2) and (H)(1).

¶ 41 (1) In concluding that Martinez' 1996 convictions were (F)(2) aggravating factors, the trial court reasoned:

> A comparison of the statutes shows that the crime of Dangerous or Deadly Assault by a Prisoner pursuant to A.R.S. § 13–1206 is the same as a section 13–1204(A)(2) aggravated assault committed by the use of a deadly weapon or dangerous instrument, with the additional element that the offense must be committed by a "prisoner." The jury instructions given in CR 96–01528 also bear this out. The offense of Dangerous or Deadly Assault by a Prisoner is deemed more "serious." It is a class 2 felony, rather than a class 3 felony, and unlike a section 13–1204(A)(2) aggravated assault, requires "flat time" and that the sentence be consecutive to any other sentence presently being served.
>
> However, the definition of "serious offense" in section 13–703(H) is a list of described offenses and "Dangerous or Dearly Assault by a Prisoner" is not specifically listed. The current version of the (F)(2) aggravating circumstance was enacted in 1993 in order to remove ambiguities from the prior version's more vague reference to crimes involving "violence." There are no appellate decisions to guide this court in interpreting the current statute with regard to this issue. But there is really only one logical conclusion. The previous convictions were for aggravated assault committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument. That they were committed by a prisoner does not make them anything less or change that. If the offenses listed in A.R.S. § 13–703(H) were identified by statute numbers —if A.R.S. § 13–703(H)(4) [sic] read "aggravated assault pursuant to A.R.S. § 13–1204," for example —these previous convictions would not qualify as previous convictions for serious offenses under A.R.S. § 13–703(F)(2). But section 13–703(H) is not that specific. The convictions here are for aggravated assault committed by the use or threatened use or exhibition of a deadly weapon or dangerous instrument. They involved different victims. They each constitute a previous conviction of a serious offense under section 13–703(F)(2), and the court finds that they have been proved beyond a reasonable doubt.

Special Verdict at 3–4.

¶ 42 We agree. Pursuant to A.R.S. § 13–703(H)(1)(d), a "serious offense" includes **806 *462 "[á]ggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument." This offense can be committed under A.R.S. § 13–1204(A)(2) and A.R.S. § 13–1206. A.R.S. § 13–703(H)(1)(d) provides a broad definition for aggravated assault which encompasses all aggravated assaults "resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument." Neither section is specifically listed, but both sections fully satisfy the statutory definition. A.R.S. § 13–1206 is simply aggravated assault for prisoners. As a class 2 felony, it is a more serious offense than A.R.S. § 13–1204, a class 3 felony. A conviction under it satisfies A.R.S. § 13–703(F)(2).[8]

[16] [17] ¶ 43 (2) Martinez' argument regarding the theoretical possibility of committing reckless assault is based upon the erroneous assumption that the old (F)(2) concepts, *see State v. McKinney,* 185 Ariz. 567, 581, 917 P.2d 1214, 1228 (1996) (finding that the (F)(2) aggravating factor does not apply to offenses which can be committed recklessly), carry over to the new (F)(2). But in 1993, the legislature abandoned the (F)(2) language "use or threat of violence" and replaced it with "serious offense." In so doing, the legislature provided a list of "serious offenses" described at A.R.S. § 13–703(H)(1)(a) through (k). This list contains several crimes that can be committed recklessly. Manslaughter is included in the A.R.S. § 13–703(H)(1) list. By definition, a person can commit manslaughter by "[r]ecklessly causing the death of another person." A.R.S. § 13–1103(A)(1). A person can also commit aggravated assault recklessly. A.R.S. §§ 13–1203(A)(1) & 13–1204.

¶ 44 Martinez erroneously relies on *State v. Ysea,* 191 Ariz. 372, 379, 956 P.2d 499, 506 (1998) to support his *McKinney* argument. But like *McKinney, Ysea* addressed the (F)(2) aggravating factor before the 1993 amendments. We therefore agree with the trial court that Martinez' 1996 convictions qualify as serious offenses under A.R.S. § 13–703(H)(1)(d).

b. *Murdered Person On Duty Peace Officer*

¶ 45 The trial court found beyond any doubt that Officer Martin was an on duty peace officer killed in the course of performing his official duties, and that Martinez knew or should have known that Officer Martin was a peace officer. Officer Martin was in a marked police car and in uniform when he pulled Martinez over on August 15, 1995. Martinez conceded the existence of this aggravating factor under A.R.S. § 13–703(F)(10) at sentencing.

2. *Mitigating Factors: Statutory*

¶ 46 At sentencing, Martinez asserted that the statutory mitigating factors found in A.R.S. § 13–703(G)(1) (significantly impaired capacity) and (G)(5)(age) existed at the time of the crime.

a. *Significantly Impaired Capacity*

[18] ¶ 47 Although the trial court found that Martinez had a personality disorder which undoubtedly affected his conduct and behavior, it concluded that he did not prove by a preponderance of the evidence that his capacity to conform his conduct to the requirements of law was significantly impaired pursuant to A.R.S. § 13–703(G)(1). On appeal, Martinez concedes his ability to appreciate the wrongfulness of his conduct, but maintains that his ability to conform his conduct to the requirements of law was significantly impaired on August 15, 1995. Martinez points to his violent childhood during which his father regularly beat his mother in the presence of the children.

¶ 48 The beatings were not limited to Martinez' mother. Martinez and his sister, Julia, both suffered physical abuse at the hands of their father. Martinez' father **807 *463 would often paddle or whip Martinez with a belt. After the beatings, Martinez would show Julia the "big red welts on his legs and sometimes on his arms." Tr. July 9, 1998 at 150. To protect himself, Martinez began sleeping with a knife. This trauma adversely affected Martinez' development to such a degree that, at the age of fifteen, he was diagnosed as having characteristics of either borderline personality disorder or anti-social personality disorder.

¶ 49 At the aggravation/mitigation hearing, Martinez called Dr. Susan Parrish, Ph.D., to testify about his psychological condition. Dr. Parrish conducted a three hour psychological evaluation. She tested his intelligence and found that his IQ was well-above average (120 on the Wechsler Adult Intelligence Test; 100 is average).

On the Minnesota Multiphasic Personality Inventory, Dr. Parrish diagnosed Martinez as suffering from "Post–Traumatic Stress Disorder [PTSD], and also Personality Disorder NOS, Not Otherwise Specified." Tr. July 22, 1998 at 16. She believed these disorders were due to Martinez' upbringing.

¶ 50 During her examination, Dr. Parrish discovered that Martinez displayed characteristics of impulsivity or failure to plan, irritability and aggressiveness, and reckless disregard for safety of self and others. She stated that these characteristics are commonly "associated with someone who comes from an environment where there was a prolonged exposure to violence." *Id.* at 31. Martinez was "a product of his environment and his nature.... [G]iven the environment that he had ... the decision that ... is the most salient is that he's going to survive." *Id.* at 51. Dr. Parrish explained that survival is the first thing that anyone with PTSD considers. A stressful event becomes a "life-and-death situation." *Id.* She testified that when Officer Martin stopped Martinez on the Beeline Highway, Martinez probably thought, "I'm not going back to prison. This man intends to put me in prison. It's me or him [sic]." *Id.* at 75. This led Dr. Parrish to conclude that Martinez was likely in a dissociative state at the time he shot Officer Martin.

¶ 51 The State retained Dr. Michael B. Bayless, Ph.D., to rebut Dr. Parrish's testimony. Dr. Bayless conducted his own examination of Martinez and found that Martinez scored 127 on the Shipley Institute of Living Scale intelligence test. A score of 127 is in the superior range. Dr. Bayless then reviewed Dr. Parrish's results on the Minnesota Multiphasic Personality Inventory and diagnosed Martinez as having Anti–Social Personality Disorder. He strongly disagreed with Dr. Parrish's diagnosis of PTSD because Martinez' record lacked any evidence of PTSD symptoms. Dr. Bayless suggested that "one would have seen symptoms of PTSD in his historical data and clinical data...." Tr. July 31, 1998 at 19–20. Dr. Bayless explained:

> When you have PTSD, this is pervasive anxiety. Anxiety at such a level that it does interfere with your social and occupational functioning. It is not something that happens and goes away, happens and goes away. It is something that is pervasive....It doesn't get smaller. It doesn't go away instantaneously. There is no evidence in the file, whatsoever, that I could find, to substantiate a diagnosis of PTSD with Martinez.

Id. at 21. This led Dr. Bayless to conclude that Martinez was not in a dissociative state when he murdered Officer Martin.

¶ 52 On appeal, Martinez argues that the trial court erroneously failed to find the existence of the A.R.S. § 13–703(G)(1) mitigating factor because, although "significant impairment" usually requires the existence of a mental disease or defect, *see State v. Stokley,* 182 Ariz. 505, 521–22, 898 P.2d 454, 470–71 (1995), lack of mental disease or defect does not preclude a(G)(1) finding. To support this argument, Martinez cites *State v. Trostle,* 191 Ariz. 4, 951 P.2d 869 (1997).

¶ 53 In *Trostle,* the defendant's mental health expert offered uncontroverted evidence of the defendant's mental impairment. *Id.* at 19, 951 P.2d at 884. But here, Dr. Parrish's findings were directly controverted by Dr. Bayless. Dr. Bayless strongly disagreed with Dr. Parrish's PTSD diagnosis. He believed that the only disorder Martinez may have had was Anti–Social Personality Disorder and that he was not in a dissociative state when he killed Officer Martin. The ****808** ***464** trial court heard both experts testify and chose one over the other. *See State v. Doerr,* 193 Ariz. 56, 69, 969 P.2d 1168, 1181 (1998) (stating that "[t]he trial judge has broad discretion in determining the weight and credibility given to mental health evidence"). We agree with this finding.

¶ 54 Martinez next argues that the trial court gave too much weight to Oscar Fryer's testimony and to Martinez' actions after the homicide. Martinez argues that taking Officer Martin's gun, robbing the Mini–Mart and shooting the clerk are consistent with the "it's me or him" line of thought.

¶ 55 But we think Martinez' actions speak louder than Fryer's words. Even if we were to disregard Fryer's testimony, Martinez still emptied his .38 caliber handgun into Officer Martin. Using his "superior" intellect and after recognizing that he had just murdered an Arizona police officer, Martinez stole Officer Martin's .9mm Sig Sauer and drove to Blythe, California where he robbed a Mini–Mart and shot the clerk. Although Martinez alleges that the clerk "threatened" him with a chair or weapon,

this does not support Dr. Parrish's PTSD diagnosis. Martinez could not have reasonably felt that it was "me or him." In fact, any threat Martinez may have feared was self-induced. He drove to Blythe and ran out of gas. He then called his aunt for money. After she failed to send the needed funds, he called her again. Losing his patience, he eventually robbed the Mini–Mart with Officer Martin's service weapon. The record does not suggest that the clerk randomly came up to Martinez in the parking lot, noticed the stolen car and threatened to call the police. Rather, Martinez' robbery and subsequent murder created any threat he may have felt. [9]

¶ 56 Martinez' actions in Indio also demonstrate his systematic thought processes and "superior" intelligence. At the first sight of the Indio police, Martinez didn't simply open fire even though he had two guns in his possession. Rather, he tried to flee after leaving the .38 caliber handgun with David and Anna. Once Martinez reached Johnny Acuna's trailer and the police surrounded the compound, Martinez did not "come out shooting." He still had Officer Martin's .9mm Sig Sauer. This conflicts with Dr. Parrish's diagnosis. This was the ultimate "me or him" situation.

¶ 57 The trial court's finding that Martinez did not suffer from PTSD is supported by the evidence. His actions are not consistent with Dr. Parrish's diagnosis. He knew right from wrong. His IQ was well-above average. He consciously decided that "he wasn't going back to jail" and carried the .38 caliber handgun "[f]or protection and if shit happens." Tr. Sept. 9, 1997 at 83, 85. Without more, we believe that Martinez' personality disorder does not qualify as a statutory mitigating circumstance. *See State v. Kayer,* 194 Ariz. 423, 437, 984 P.2d 31, 45 (1999) (stating that "personality or character disorders usually are not sufficient to satisfy [the (G)(1)] statutory mitigator"); *State v. Brewer,* 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992) ("Generally, a mere character or personality disorder alone is insufficient to constitute a mitigating circumstance."). But even if it did, there was simply no causal connection between Martinez' personality disorder and his actions on August 15, 1995. *See State v. Clabourne,* 194 Ariz. 379, 385, 983 P.2d 748, 754 (1999) (stating that "[i]n every case in which we have found the (G)(1) factor, the mental illness was 'not only a substantial mitigating factor ... but a *major contributing cause* of [the defendant's] conduct that was 'sufficiently substantial' to outweigh the aggravating factors present ....' ") (quoting *State v. Jimenez,* 165 Ariz. 444, 459, 799 P.2d 785, 800 (1990) (when voices told defendant to kill he could not control what he was doing) (emphasis added)), *cert. denied by, Clabourne v. Arizona,* 529U.S. 1028, 120 S.Ct. 1439, 146 L.Ed.2d 327 (2000); *see also State v. Stuard,* 176 Ariz. 589, 608 n. 12, 863 P.2d 881, 900 n. 12 (1993) ("[E]vidence of causation is required before mental impairment can be considered a significant mitigating factor."). Martinez failed ****809** ***465** to establish the existence of the A.R.S. § 13–703(G)(1) factor by a preponderance of the evidence.

b. *Age*

[19] ¶ 58 Martinez was 19 years and 9 months old at the time of the murder. The trial court found that Martinez' age qualified under A.R.S. § 13–703(G)(5) as a mitigating factor but did not give it substantial weight because of Martinez' level of intelligence, and significant past experience with the criminal justice system. Both Dr. Parrish and Dr. Bayless diagnosed Martinez as having superior intelligence. He had multiple juvenile referrals and convictions, and three felony convictions during his relatively brief time in the adult system before he killed Officer Martin. We agree that Martinez' age was entitled to little or no weight as a mitigating factor. *See State v. Jackson,* 186 Ariz. 20, 30–31, 918 P.2d 1038, 1048–49 (1996) (finding that, in addition to chronological age, we must consider a defendant's: (1) level of intelligence, (2) maturity, (3) participation in the murder, and (4) criminal history and past experience with law enforcement).

3. *Mitigating Factors: Non–Statutory*

¶ 59 The trial court found that Martinez' personality disorder and family history qualified as non-statutory mitigating factors but refused to give them substantial weight.

a. *Personality Disorder*

[20] ¶ 60 The trial court found that Martinez' personality disorder was a non-statutory mitigating factor, but did not give it substantial weight because Martinez failed to establish a sufficient causal link between his personality disorder and his conduct on August 15, 1995. It reasoned that "Dr. Bayless concluded that [Martinez] was not acting in a merely reactionary way, but that he was simply acting in his perceived self-interest." Special Verdict at 17–18. It further supported its decision with

Fryer's testimony and Martinez' "ability to plan, to think rationally and to make choices even when 'threatened' as he would have been when he was confronted and subsequently apprehended by law enforcement officers after the murder." *Id.* at 18. Martinez asserts that this was error in light of Dr. Parrish's testimony.

¶ 61 Although we addressed this argument above, we note again that Martinez' conduct before and after the murder is inconsistent with Dr. Parrish's diagnosis. Martinez may have suffered from a personality disorder at the time he killed Officer Martin. But this personality disorder did not impair his ability to conform his conduct to the requirements of the law. Martinez told Fryer that he had the .38 caliber handgun "[f]or protection and if shit happens." Tr. Sept. 9, 1997 at 83. He also told Fryer that "he wasn't going back to jail." *Id.* at 85. Martinez shot Officer Martin to further his goal. Any personality disorder Martinez may have had did not influence that decision. We therefore agree with the trial court that this factor does not warrant substantial weight. *See State v. Medina,* 193 Ariz. 504, 517, 975 P.2d 94, 107 (1999) (finding that, although the defendant proved his anti-social personality disorder by a preponderance of the evidence, the trial court correctly gave it little or no mitigating weight because his conduct was the result of his voluntary choice).

b. *Family History*

[21] ¶ 62 The trial court found that Martinez' family background qualified as a non-statutory mitigating factor, but did not give it substantial weight because it did not significantly affect his "ability to perceive, to comprehend or to control his actions when Officer Martin pulled him over on the Beeline Highway." Special Verdict at 19. Again, Martinez argues that this was error and relies on Dr. Parrish's opinions.

¶ 63 Although Dr. Parrish testified that Martinez adopted a "survival" state of mind due to his violent upbringing, this did not affect his conduct on August 15, 1995. There is simply no nexus between Martinez' family history and his actions on the Beeline Highway. His family history, though regrettable, is not entitled to weight as a non-statutory mitigating factor.

****810** ***466** 4. *Independent Review*

[22] ¶ 64 Upon independent review, we find that the mitigating circumstances are not sufficiently substantial to warrant leniency in light of the aggravating factors.

IV. DISPOSITION

¶ 65 For the foregoing reasons, we affirm Martinez' convictions and sentences.

CONCURRING: THOMAS A. ZLAKET, Chief Justice, CHARLES E. JONES, Vice Chief Justice, STANLEY G. FELDMAN, Justice, and RUTH V. McGREGOR, Justice.

All Citations

196 Ariz. 451, 999 P.2d 795, 321 Ariz. Adv. Rep. 6

Footnotes

1 The trial court excluded evidence of the murder under Rule 403, Ariz. R. Evid.

2 Tommy's brother Johnny Acuna was a friend of Martinez.

3 "Jura" is slang for police officer. Tr. Sept. 15, 1997 at 13.

4 *But see State v. Cruz,* 175 Ariz. 395, 399, 857 P.2d 1249, 1253 (1993).

5 In *State v. Bolton,* 182 Ariz. 290, 302, 896 P.2d 830, 842 (1995), we held that "*Batson* does not limit the use of peremptory challenges to exclude jurors because of their reservations about capital punishment."

6 *But see United States v. Martinez–Salazar,* ——U.S. ——, ——, 120 S.Ct. 774, 782, 145 L.Ed.2d 792 (2000) (holding that "a defendant's exercise of peremptory challenges ... is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause").

7 Martinez requested the following instruction:

> The State has the burden of proving that the defendant was present at the time and place the alleged crime was committed. If you have reasonable doubt whether the defendant was present at the time and place the alleged crime was committed, you must find the defendant not guilty.

Defendant's Requested Jury Instructions at 13.

8 The sentencing judge noted in his Special Verdict that even if he based his finding of the (F)(2) aggravating factor solely on Martinez' 1993 conviction, he would have found that "the mitigating circumstances in this case, individually and cumulatively, are just not sufficiently substantial to outweigh the (F)(2) [1993 conviction] and (F)(10) aggravating circumstances." Special Verdict at 23.

9 Martinez also created the threat of being caught by Officer Martin when he excessively sped down the Beeline Highway.

End of Document © 2017 Thomson Reuters. No claim to original U.S. Government Works.

'PERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1995-008782 08/24/2004

HONORABLE JEFFREY A. HOTHAM

CLERK OF THE COURT
L. Rubalcaba
Deputy

FILED: 08/30/2004

STATE OF ARIZONA

O E JACK ROBERTS

v.

ERNESTO SALGADO MARTINEZ

DAVID E LIPARTITO

COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-CCC

The petitioner, Ernesto Martinez, was convicted of First Degree Murder with other charges and was sentenced to death. His convictions and sentences were affirmed on Appeal. He has filed a Petition for Post-Conviction Relief. The proceedings were stayed by this Court pending the resolution by the United States Supreme Court of the Ring retroactivity issue. That issue was resolved recently in Schriro V. Summerlin, 124 S. CT. 2519 (U.S. 2004).

Pursuant to Rule 32.6 (C), Arizona Rules of Criminal Procedure,

IT IS ORDERED summarily dismissing Petitioner's Petition for Post-Conviction Relief.

The Court finds and identifies in this ruling certain claims as precluded, further determines that no remaining claim presents a genuine issue of material fact or law, and further finds that no purpose would be served by any further proceedings.

Petitioner's Claims

The Petitioner alleges that: 1. Pretrial publicity made it impossible for him to have a fair trial; 2. conditions at trial violated his rights to a fair trial with an impartial judge and jury—these conditions include comments made by the trial judge, the trial judges failure to recuse himself, failure to reassign bailiff, and the presence of DPS and other uniformed officers in the courtroom, and the combined effect of these conditions; 3. an erroneous jury instruction decreased the State's burden of proof for premeditation; 4. constraints on investigative funds impaired his ability to discover new evidence that would probably have resulted in a different

verdict or sentence; 5. there has been a significant change in the law (*Ring II*) that should be applied retroactively and would require new sentencing; 6. the sentencing judge improperly considered sentencing recommendations; 7. the Petitioner's behavior since convicted and incarcerated provides additional mitigation that should be reviewed; 8. cumulative error; and 9. ineffective assistance of trial and/or appellate counsel. The Petitioner's claims are examined below.

Points and Authorities

1. Pretrial Publicity

The Petitioner waived the change of venue issue when he did not raise it at his trial or in his direct appeal. Ariz. R. Crim. P. 32.2(a) (3); A.R.S. § 13-4232(A) (3). Issues that are not raised in the direct appeal are waived and the petitioner is bound by this waiver. These "waived issues cannot be resurrected in post-conviction proceedings." *State v. Herrera*, 183 Ariz. 642,647, 905 P.2d 1377, 1382 (App. 1995). Because the Petitioner waived the issue of change of venue due to pretrial publicity he is precluded from raising this issue in this post-conviction proceeding.

The Petitioner claims that his trial and appellate counsel was ineffective for failing to move for a change of venue due to pretrial publicity. To prove ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that these errors were so serious that there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 104 S.Ct. 2052, 2064 (1984); *Herrera* at 647; *State v. Rosario*, 195 Ariz. 264, 987 P.2d 226, 230 (1999). Because there is a wide range of conduct that will be considered reasonable professional assistance, the defendant must overcome the presumption that the challenged action was sound trial strategy. *Strickland* at 689 (citing *Michele v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164). The Petitioner fails to meet his burden of proving that the challenged action, the failure to move for a change of venue and the failure to appeal this issue, was not the result of sound strategy decisions by his trial and appellate counsel.

"To obtain a change of venue, a defendant must show 'pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality.'" *State v. Nordstrom*, 200 Ariz. 229, 239, 25 P.3d 717, 727 (2001). (citing *State v. Bible*, 175 Ariz. 549,563, 858 P.2d 1152, 1166 (1993); *State v. Blakely*, 204 Ariz. 429, 434, 65 P.3d 77, 82 (2003); *State v. Smith*, 160 Ariz. 507, 512, 774 P.2d 811, 816 (1989). This high burden is rarely met. *Nordstrom* at 239. The trial court will first examine the evidence to see if prejudice should be presumed. Which occurs only when publicity is so prejudicial, inaccurate, pervasive, and unfair, as well as inaccurate and close to actual trial that the court cannot accept the jurors' voir dire attestations that they can decide fairly. *Id*; *State v. Miles*, 186 Ariz. 10, 16, 918 P.2d 1028 (1996). In this case the evidence submitted by the defense counsel indicates that most of the

publicity took place just after the murder in August and September of 1995, approximately twenty-three months before the trial began. *media reports, Exhibit 17.* Although some of the media reports contained negative language about the Petitioner, information about the impact of the murder on the victim's family and community, and information about other possible crimes that the Petitioner may have committed, much of the reporting was primarily factual. Furthermore, the record indicates that the bulk of the media reports occurred twenty-three months before trial began. The Petitioner has submitted only one article published near the trial. This article was published on the second day of the jury voir dire, September 8, 1997. The record does not indicate the level of media saturation, inflammatory reporting, prejudice, and proximity in time to the trial necessary for a presumption of prejudice to exist. *See Blakely* at 434 (prejudice could not be presumed from 33 articles and ten news clips that contained some inflammatory language but appeared at time of crime and during pretrial stages rather than close to the trial); *Nordstrom* at 727-28 (although publicity included articles which contained some emotional reporting on effect of murders on friends and families of victims, isolated comments on brutality of murders but were primarily factual and appeared fifteen to sixteen months before trial, as well as publicity that took place eight months before trial which discussed defendants' prior criminal records, negative reputation in community, prior drug and alcohol problems, and statements that the defendants resembled police sketches and could have committed the murders, trial judge acted within his desertion in refusing to presume prejudice.); *Bible* at 564 (although some articles are inaccurate, discuss inadmissible evidence, or approach the outrageous standard, articles are primarily factual and came months before trial; therefore, the defendant did not meet his heavy burden of proof to presume prejudice). Because prejudice cannot be presumed, the Petitioner would have to prove actual prejudice. In order to prove actual prejudice he would have to show that the potential jurors had formed preconceived notions of his guilt that they could not set aside; mere knowledge of the case is not enough to prove actual prejudice. *Blakely* at 434; *Nordstrom* at 567; *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036 (1975). The voir dire process may be used to discover whether this prejudice actually exists in the minds of the potential jurors and to determine the effects of the pretrial publicity on the jurors. *Blakely* at 82 (citing *State v. Greenawalt*, 128 Ariz. 150, 163, 624 P.2d 828, 841 (1981)); *State v. Salazar*, 173 Ariz. 399, 406; 944 P.2d 566, 573 (1992). The trial court allowed extensive jury voir including a questionnaire and an individual voir dire to ask certain potential jurors whether they were aware of and affected by any pretrial publicity. The Petitioner has failed to show any evidence of actual prejudice due to pretrial publicity on the part of the jurors.

It is unlikely that the trial or the appellate counsel would have been able to meet the heavy burden necessary to prove prejudice due to pretrial publicity and obtain a change of venue. The Petitioner has failed to show that, rather than being a sound strategic decision, the trial and appellate counsel fell below an objective standard of reasonableness by not addressing this issue. The Petitioner's claim of ineffective assistance of counsel is without merit for this issue.

2. Conditions at trial

The Petitioner claims that his constitutional rights to due process and fair trial under the Sixth Amendment of the United States Constitution and Article 2 §24, which guarantee him the right to a trial by an impartial judge and jury, were violated by the conditions of the trial. The petitioner alleges that these rights were violated by comments made by the trial judge, the trial judge's failure to recuse himself, the failure to reassign the bailiff, and the presence of DPS and other officers in the courtroom. The Petitioner waived these issues by failing to appeal them. Arizona Rules of Crim. P. Rule 32.2(a) (3).

The Petitioner claims that appellate counsel was ineffective for failing to raise these issues on appeal. Petitioner has the burden of proving that his appellate counsel's assistance fell below an objective standard of reasonableness and that these errors were so serious that there is a reasonable probability that the outcome of the trial would have been different. He must overcome the presumption that appellate counsel's decision not to appeal these issues was the result of a sound strategy choice.

Prejudice from trial conditions will be presumed only in extremely limited and outrageous cases where the record shows that the trial was held in a circus-like atmosphere that lacked the solemnity appropriate to judicial proceedings. *Bible*, 175 Ariz. at 567; 858 P.2d at 1170. The proceedings must be so inherently prejudicial that they pose an unacceptable threat to the defendant's right to a fair trial. *Holbrook v. Flynn*, 475 U.S. 560, 572; 106 S.Ct. 1340, 1347 (1986). Failing this, the petitioner must show evidence from the record that indicates that the jury was impermissibly influenced by conditions at the trial. *Bible* 175 Ariz. at 569, 858 P.2d at 1172; *State v. Edwards*, 591 So.2d 748, 753 (La. App. 1991). The Petitioner has not shown that the trial was held in an atmosphere that was so outrageous and circus-like that prejudice can be presumed; nor has he shown actual prejudice based on the record.

A. Trial Judge's comments

The Petitioner fails to show any actual prejudice due to the trial judge's comments and the comments, when evaluated in context, are not such that prejudice can be presumed. The Petitioner claims that the trial judge's comments concerning the O.J. Simpson trial were prejudicial. The Petitioner alleges that the trial judge's comments were prejudicial because the judge, in response to a questionnaire on the jurors' feelings about the Simpson case, assured the potential jurors that the Arizona media was responsible (indicating that any media accounts could be believed), that there would be no hiding of evidence or lying (indicating that the evidence produced by the state should be believed), and stating that justice would prevail (a phrase that the Petitioner claims is associated with conviction of the guilty and in the context of comparing the case to the Simpson trial indicated that the judge believed that the Petitioner was guilty). The Petitioner further claims that the Judge's comment that the jurors should wait to

hear both sides of the story created the risk that the jurors would hear from the Petitioner, thereby impinging on his Fifth Amendment right to remain silent.

Judicial remarks can only be judged for prejudicial effect within the particular circumstances of each case. *City Transfer Co. v. Johnson*, 72 Ariz. 293, 296, 233 P.2d 1078, 1079 (1951) (judge's comments that the purpose of a court of justice is to ascertain the truth, that the cross-examination was extended far beyond what it should be, and that the trial had to be finished sometime were not prejudicial to the defendant when read in the context of the entire proceedings); *Edwards*, 591 So.2d 748. When the particular circumstances of this case are examined it is clear that prejudicial effect cannot be presumed and the Petitioner has produced no evidence of actual prejudice. The Judge's comments were in response to the jurors' responses to the questionnaire about the O.J. Simpson trial. The Judge was reassuring the potential jurors that they could feel confident in the honesty and integrity of the lawyers and the justice system and that they should not be concerned that there would be a media circus in this case. R.T. 9/4/97 at 22-23. The Judge had already admonished the jurors that they were not to pay attention to any media accounts of the case and that they were only to consider the evidence that was admitted in court. R.T. 9/4/97 at 18. Furthermore, the Judge also had informed the potential jurors that the Petitioner was presumed to be innocent and was not required to testify and this could not be used against him. *Id.* at 20-21. In fact the Judge stressed that if the Petitioner chose not to testify this decision could not be used in their decision. *Id.* The circumstances indicate that there is not an inherent danger of prejudice to the Petitioner based on the Judge's remarks and the Petitioner has failed to show any actual prejudice. This claim is without merit and therefore the appellate counsel's choice not to appeal this issue falls within the bounds of a sound strategy choice. The Petitioner's claim that appellate counsel was ineffective for failing to raise this issue is without merit.

B. Trial Judge's failure to recuse himself

The Petitioner has failed to produce evidence that indicates that the trial judge's relationship with the bailiff created a situation that was so inherently prejudicial that prejudice to the Petitioner can be presumed, nor has he shown that there was actual prejudice. The Petitioner claims that the Petitioner was not protected from prejudice during the trial by later having a different judge handle the sentencing, but he does not produce evidence of actual prejudice. Petition for Post-Conviction Relief at 19-20. Without evidence that the trial judge's relationship with the bailiff was such that prejudice can be presumed and without evidence of actual prejudice to the Petitioner, the Petitioner has failed to show that his counsel's representation fell below an objective standard of reasonableness under current professional norms.

C. Failure to reassign bailiff

The Petitioner has not shown that the bailiff's relationship with the victim's wife created a situation that was so inherently prejudicial that prejudice must be presumed, nor has he shown actual prejudice. Furthermore, he waived this issue when it was not raised in his appeal. The Judge held an evidentiary hearing to determine whether the bailiff should be reassigned, R.T. 9/2/97 at 45-50, and denied the Petitioner's motion for a replacement bailiff because the Judge was confident that the bailiff could perform his responsibilities. The Judge admonished the bailiff about his responsibilities and the bailiff took an oath to perform these responsibilities faithfully. The Petitioner has failed to produce any evidence that there was actual prejudice and has not shown that prejudice should be presumed. Therefore this claim is without merit.

D. Police Officer presence at Trial

The presence of uniformed officers is not inherently prejudicial such that prejudice must be presumed, and the Petitioner has failed to show any actual prejudice caused by the officers. The record indicates that one uniformed officer was present on at least one day of jury voir dire, but there is no record in the extent of police presence, uniformed or not, throughout the trial. R.T. 9/4/96 at 3-11. The Judge left the issue of uniformed officers in the courtroom open and the Petitioner did not raise this issue, nor does he now present further evidence of uniformed police presence in the courtroom throughout the trial. *Id.* at 8. The practice of uniformed officers sitting in the courtroom is not inherently prejudicial. *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340 (1986); *State v. Rose*, 112 N.J.454, 548 A.2d 1058 (1988); *Edwards*, 591 So.2d 748. The Petitioner has not produced evidence to show that this presence existed let alone was so extensive that prejudice should be presumed, nor has he shown actual prejudice. This claim is without merit and the Petitioner waived this issue when he failed to appeal it.

E. Combined Effect

The Petitioner has failed to produce evidence that the conditions at trial were inherently prejudicial and he has not shown evidence in support of actual prejudice. The conditions at trial do not indicate that the Petitioner was denied his right to Due Process or an impartial judge and jury.

3. Premeditation Instruction

The Petitioner claims that the jury was given an erroneous instruction that reduced the State's burden of proof of premeditation. The Petitioner claims that a reasonable juror would not understand that actual reflection was required and that the language indicating that the reflection could be "as instantaneous as successive thoughts", Petition for Post-Conviction Relief at 22, has

been discouraged by the Arizona Supreme Court. *State v. Thompson*, 204 Ariz. 471, 479, 65 P.3d 420, 428 (2003). In *Thompson*, the Arizona Supreme Court held that premeditation instructions must state that proof of actual reflection is required and the Court discouraged the use of the language "instantaneous as successive thoughts". *Id.* at 479-480.

The Petitioner's claim is without merit because the jury instructions, as a whole, are free from error. Jury instructions should be considered as a whole and a case will not be reversed because an isolated portion may be misleading. *State v. Eastlack*, 180 Ariz. 243, 259, 883 P.2d 999, 1015 (1994); *State v. Guerra*, 161 Ariz. 289, 294, 778 P.2d 1185, 1190 (1989); *State v. Singleton*, 66 Ariz. 49, 59, 182 P.2d 920, 926 (1947). The Judge did instruct the jury that premeditation must exist before the killing long enough to permit reflection but may be as instantaneous as successive thoughts, but the Judge followed this with the instruction required by *State v. Thompson* that it must be actual reflection. *R.T. 9/25/97* at 97-99. The Petitioner's claim that the jury instructions were erroneous and violated the Petitioner's due process rights is without merit.

4. Constraints on Investigative funds/newly discovered evidence

The Petitioner's claim that he was unable to discover the existence of newly discovered evidence due to constraints on investigative funds is not a cognizable basis for relief under Rule 32. Furthermore, the Petitioner was granted over a year to investigate, over seventeen thousand dollars to perform this investigation, and at least six extensions for the filing deadline of his Petition for Post-Conviction relief—some of which were granted after the deadline had already passed.

The Petitioner does not produce any evidence to substantiate his claim under Rule 32.1(e). Under Rule 32.1(e), the petitioner is entitled to relief if he produces evidence that was in existence at the time of the trial but discovered after the trial and this evidence probably would have affected the verdict, finding, or sentence if known at the time of the trial. *State v. Pac*, 175 Ariz. 189, 192, 854 P.2d 1175, 1178 (App. 1993), *review denied*. The petitioner is entitled to an evidentiary hearing on a petition for post conviction relief if he alleges evidence that appears to meet these requirements. *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989). The Petitioner has not stated a colorable claim under Rule 32.1(e) that would entitle him to relief or an evidentiary hearing because he has not produced any new evidence to support this claim.

5. Ring Retroactivity

The Petitioner's case was final on direct review when *Ring v. Arizona*, 536 U.S. 534, 122 S.Ct. 2428 (2002) (*Ring II*) was decided. Therefore, although *Ring II* announced a new rule for sentencing in capital cases, this rule "does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 124 S.Ct. 2519, 2526 (U.S., 2004) (*Summerlin II*). The United

States Supreme Court held, contrary to the Petitioner's argument, that this rule is procedural rather than substantive. *Id.* at 2523-2524. The Supreme Court further held that this change does not affect the fundamental fairness or accuracy of the proceeding and therefore does not fall within the *Teague* retroactivity exception for procedural changes. *Id.* at 2524-2526. The Petitioner is not entitled to a new sentencing proceeding or having his death sentence vacated because the procedural change announced in *Ring II* does not apply retroactively to his case. The Petitioner's claim that there has been a significant change in the law that would probably overturn his sentence is without merit.

6. Victim Recommendations

The Petitioner is precluded from raising the issue that the sentencing court erred by considering victim statements that included sentencing recommendations because he did not raise this issue on appeal. Ariz. Rules Crim. P. Rule 32.2(a) (3).

However, even if the Petitioner did not waive this issue, his claim is without merit. There is no question that, in death penalty cases, the victims' may only make statements concerning the impact of the defendant's crime and may not make sentencing recommendations. *Lynn v. Reinstein*, 205 Ariz. 186, 68 P.3d 412 (2003) *cert. denied* 1245 S.Ct. 1037 (2004); *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991). The Petitioner has not produced any evidence that the sentencing judge actually considered the sentencing recommendations made by the victims. Without such evidence there is an assumption that the judge will focus only on the relevant sentencing factors and will not consider "the irrelevant, inflammatory, and emotional factors" *State v. Bolton*, 182 Ariz. 290, 316, 896 P.2d 830, 856 (1995); *State v. Soto-Fong*, 187 Ariz. 186, 209, 928 P.2d 610, 633 (1996) (no reversible error where court heard victim's family's recommendations for death sentence when judge indicated that this testimony would not be considered on the capitol counts); *State v. Gulbrandson* 184 Ariz. 46, 65-66, 906 P.2d 579, 598-99 (1995) (judge is presumed to ignore victim's family's statements recommending death penalty in sentencing absent any evidence to the contrary). Here, the sentencing judge stated that he did not consider the victim's family's statements recommended death nor consider the presentence report to determine whether aggravating factors existed or to affect his sentencing decision. R.T. 8/18/98 at 7. The Petitioner has not produced any evidence to rebut the judge's avowal, nor has he produced evidence to overcome the presumption that the judge will not consider this information. The Petitioner's claim is without merit.

7. Additional Mitigation

The Petitioner's claim that he is entitled to a new sentencing where his behavior since his conviction and sentencing should be considered as a mitigating factor is not a cognizable basis for relief and is without merit. There is no vehicle to provide for resentencing in which changed

behavior since conviction and incarceration is to be considered. *State v. Smith (Todd)*, 193 Ariz. 452, 974 P.2d 431 (1999). The Petitioner has no independent basis for resentencing which would open up the issue such that his "changed" behavior could be considered. *Id.* Retribution and deterrence may be two social purposes for the death penalty, but the Petitioner misunderstands the theories behind these goals. *Gregg v. Georgia*, 428 U.S. 153 (1976). Among theories of justification for the death penalty, retribution refers to punishing the individual for the crime which he has committed; his later conduct in prison has no effect on this justification. Furthermore, the death penalty is meant to deter other members of society who may be considering murder; it is not meant to deter the specific individual. Petitioner also fails to produce any evidence that his behavior has changed. Petitioner's changed behavior since conviction and incarceration is not a cognizable basis for relief and is without merit.

8. Cumulative Effect

The Petitioner claims that the cumulative effects of multiple violations entitle him to a new trial. The Petitioner has failed to prove any individual errors. Furthermore, the doctrine of cumulative error is not recognized in Arizona. *State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1141 (App. 1996); *State v. Duzan*, 176 Ariz. 463, 466, 862 P.2d 223, 226 (App. 1993). The Petitioner's claim is without merit.

Conclusion

The Petitioner's claims have been evaluated and are without merit. He has failed to produce evidence to provide support for his claims that his rights guaranteed by the United States and Arizona Constitutions have been violated. He has specifically failed to show ineffective assistance of any prior counsel. The Petitioner has not substantiated his claims such that he is entitled to an evidentiary hearing on any of these issues and is not entitled to relief from his conviction or sentence.