No. 20-1009

In the
Supreme Court of the United States

DAVID SHINN, ET AL.,
Petitioners,

v.

DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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JULY 15, 2021

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 20, 2021
PETITION FOR WRIT OF CERTIORARI GRANTED MAY 17, 2021

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

United States District Court
for the District of Arizona (Tucson Division)

No. 4:01-cv-00592-TMB

Jones v. Stewart, et al.

Date Filed	#	Docket Text
09/27/2004	115	ORDER by Judge Frank R. Zapata denying motion for discovery [90-1], denying motion for evidentiary hearing by petitioner Barry Lee Jones [90-2], denying motion to expand the record under Rule 7 of the Rules Governing Section 2254 cases by petitioner Barry Lee Jones [89-1]; IT IS ORDERED that the following Claims are DISMISSED WITH PREJUDICE: (a) Claims 2,10,11 and 16 for failure to state cognizable grounds for habeas relief; (b) Claims 9 and 17 based on a procedural bar; and (c) Claim 15 on the merits as a matter of law. IT IS FURTHER ORDERED that Claim 14 is DISMISSED WITHOUT PREJUDICE as premature. IT IS FURTHER ORDERED that Petitioner shall file a supplemental brief, not exceeding 20 pages, on the alleged fundamental miscarriage

		of justice and evidentiary development as to Claim 1D, as set forth in this Order, within 20days of the file date of this Order. IT IS FURTHER ORDERED that Respondents shall file a brief in response to Petitioner's supplemental brief, not exceeding 20 pages, within20 days of the file date of Petitioner's supplemental brief. IT IS FURTHER ORDERED that if, pursuant to Local Rule 1.10(p), Petitioner or Respondents file a Motion for Reconsideration or this Order, such motion shall be filed within 15 days of the filing date of this Order. The filing and disposition of such motion shall not toll the time for filing the supplemental briefs discussed above. IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to all counsel of record, Petitioner Barry Lee Jones, and to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ85007-3329. (cc: all counsel) (CAB) (ADI-ICMS,). (Entered: 09/28/2004)
* * *		

12/17/2004	128	SUPPLEMENTAL BRIEF FILED by petitioner Barry Lee Jones regarding Order filed [115-1] regarding fundamental miscarriage of justice and evidentiary development as to Claim 1D (CAB) (Entered: 12/21/2004)
* * *		
01/05/2005	130	RESPONSE by respondents to supplemental brief re fundamental miscarriage of justice and evidentiary development as to Claim 1D (non-appeal) [128-1] (CAB) (Entered:01/07/2005)
* * *		
07/28/2008	135	BRIEF *Supplement to Supplemental Brief Re: Fundamental Miscarriage of Justice and Evidentiary Development as to Claim 1D* by Petitioner Barry Lee Jones. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit)(Lett, Sylvia) (Entered: 07/28/2008)
* * *		
08/14/2008	140	Exhibit 1 by Barry Lee Jones. (JEMB,) (Entered: 08/15/2008)
09/29/2008	141	ORDER denying 58 Petition for Writ of Habeas Corpus, Clerk of

		Court shall enter judgment accordingly & Vacating 3 Order for stay of execution. FURTHER ORDERED GRANTING a Certificate of Appealability as to the issues specified in this Order. FURTHER ORDERED Clerk of Court forward a copy of this Order to Rachelle M. Resnick. Signed by Judge Frank R Zapata on 9/29/08. **SEE ATTACHED PDF FOR COMPLETE INFORMATION** (JEMB,) Modified on 9/29/2008 (JEMB, To correct docket text). (Entered: 09/29/2008)
* * *		
11/25/2008	147	NOTICE OF APPEAL to 9th Circuit, by Barry Lee Jones. (Lett, Sylvia) (Entered: 11/25/2008)
* * *		
08/19/2014	158	ORDER of USCA re: 147 Notice of Appeal filed by Barry Lee Jones. Appellants opposed motion for a limited remand is granted. Within 14 days after the district court enters its final order on limited remand, 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. (See attached PDF for complete information). (BAC) (Entered: 08/19/2014)
* * *		
01/20/2017	185	ORDERED that an evidentiary hearing to determine whether state PCR counsel was ineffective for failing to raise Claim 1D (Guilt Phase) and Claim 1D (Penalty Phase) in Petitioners first PCR proceeding shall take place as soon as is practicable. The Court will issue a separate order setting this matter for a scheduling conference. IT IS FURTHER ORDERED that the Clerk of Court shall substitute Charles L. Ryan, Director of the Arizona Department of Corrections, as Respondent in place of former Director Terry Stewart, pursuant to Fed. R. Civ. P. 25(d)(1). Signed by Judge Timothy M Burgess on1/18/2017. (BAR) (Entered: 01/20/2017)
* * *		

07/31/2018	300	CLERK'S JUDGMENT: IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed 7/31/18, Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 USC § 2254 is GRANTED without reaching the merits of the remaining claim, Claim 1D (Penalty Phase). (BAC) (Entered: 07/31/2018)
* * *		
08/15/2018	302	NOTICE OF APPEAL to 9th Circuit Court of Appeals re: 300 Clerks Judgment by George Herman, Charles L Ryan, Dora B Schriro, Terry Stewart. Filing fee received: $505.00, receipt number 0970-15847689. (Gard, Lacey) (Entered: 08/15/2018)
* * *		
09/12/2018	308	MOTION to Stay Court Order of July 31, 2018 by Charles L Ryan. (Attachments: # 1 Text of Proposed Order Proposed Order) (Braccio, Myles) (Entered: 09/12/2018)
* * *		
09/24/2018	311	*RESPONSE to Motion re: 308 MOTION to Stay Court Order of July 31, 2018 and CROSS-MOTION for Release

		Pursuant to Federal Rule of Appellate Procedure 23(c) filed by Barry Lee Jones. (Attachments: # 1 Text of Proposed Order Proposed Order, # 2 Exhibit Exhibits 1-6) (Sandman, Cary) *Modified to add motion on 10/3/2018 (BAC).(Entered: 09/24/2018)
* * *		
10/05/2018	319	*REPLY to Response to Motion re: 308 MOTION to Stay Court Order of July 31, 2018 ,Response re: 311 Motion for Release Pursuant to Federal Rule of Appellate Procedure23(c) filed by Charles L Ryan, Dora B Schriro, George Herman . (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Gard, Lacey) *Modified to correct event type; modified to reflect correct filers; and modified to correct reference to related documents on 10/9/2018 (MFR). (Entered: 10/05/2018)
* * *		
10/11/2018	321	REPLY to Response to Motion re: 311 MOTION for Release Pursuant to Federal Rule of Appellate Procedure 23(c) filed by Barry Lee Jones. (Sandman, Cary) (Entered:10/11/2018)

* * *		
10/17/2018	328	ORDER: IT IS ORDERED Respondents' 308 Motion to Stay Court Order of 7/31/18 is DENIED, and Petitioner's 311 Cross-Motion for Release Pursuant to Federal of Appellate Procedure 23 (c) is DENIED WITHOUT PREJUDICE. The State must initiate trial proceedings by 10/29/18, and trial in this matter must commence by 3/13/19. In the event the Ninth Circuit does not stay this Court's order, Respondents shall file a status report on10/29/18, stating what steps have been taken to reinitiate proceedings, and a second status report on 1/31/19, indicating the status of Petitioner's retrial proceedings. Signed by Judge Timothy M Burgess on 10/17/18.(BAC) (Entered: 10/17/2018)
* * *		

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Ninth Circuit

No. 18-99006

Barry Jones v. David Shinn, et al.

Date Filed	#	Docket Text
11/14/2018	12	Submitted (ECF) Opening Brief for review. Submitted by Appellants Director, George Herman, Charles L. Ryan and Dora B. Schriro. Date of service: 11/14/2018. [11087188] [18-99006] (Gard, Lacey)[Entered: 11/14/2018 12:18 PM]
11/14/2018	13	Submitted (ECF) excerpts of record. Submitted by Appellants Director, George Herman, Charles L. Ryan and Dora B. Schriro. Date of service: 11/14/2018. [11087461] [18-99006]--[COURT UPDATE: Attached corrected excerpts. 11/20/2018 by LA]--[COURT UPDATE: Attached corrected Vols 9-20, 25,and 35. 11/21/2018 by LA] (Gard, Lacey) [Entered: 11/14/2018 02:01 PM]

* * *

12/19/2018	35	Submitted (ECF) Answering Brief for review. Submitted by Appellee Barry Lee Jones. Date of service:12/19/2018. [11126536] [18-99006] (Sandman, Cary) [Entered: 12/19/2018 02:02 PM]
12/19/2018	36	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee Barry Lee Jones. Date of service: 12/19/2018. [11126543] [18-99006] (Sandman, Cary) [Entered: 12/19/2018 02:03 PM]

* * *

01/16/2019	47	Submitted (ECF) Reply Brief for review. Submitted by Appellants Charles L. Ryan, George Herman, Dora B. Schriro and Director. Date of service: 01/16/2019. [11156028] [18-99006]--[COURT UPDATE: Updated docket text to reflect all filing parties. 01/16/2019 by LA] (Gard, Lacey) [Entered: 01/16/201903:31 PM]
01/16/2019	48	Submitted (ECF) further excerpts of record. Submitted by Appellants Charles L. Ryan, George Herman, Dora B. Schriro and Director. Date of service: 01/16/2019. [11156031] [18-99006]--[COURT UPDATE:

		Updated docket text to reflect all filing parties. 01/16/2019 by LA] (Gard, Lacey) [Entered: 01/16/201903:33 PM]
		* * *
06/20/2019	63	Filed Audio recording of oral argument. Note: Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [11340447] (DO) [Entered: 06/21/2019 11:07 AM]
		* * *
12/13/2019	71	Filed (ECF) Appellants Stephen Morris and David Shinn petition for panel rehearing and petition for rehearing en banc (from 11/29/2019 opinion). Date of service: 12/13/2019. [11532275] [18-99006] (Gard, Lacey) [Entered: 12/13/2019 03:52 PM]
		* * *
12/23/2019	75	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by State of Texas. Date of service: 12/23/2019. [11541528]

[18-99006] (Hawkins, Kyle) [Entered:12/23/2019 09:53 AM]

02/20/2020 86 Filed (ECF) Appellee Barry Lee Jones response to Combo PFR Panel and En Banc (ECF Filing),Combo PFR Panel and En Banc (ECF Filing). Date of service: 02/20/2020. [11603820]. [18-99006](Sandman, Cary) [Entered: 02/20/2020 03:43 PM]

* * *

09/25/2020 89 Filed order (JOHNNIE B. RAWLINSON, RICHARD R. CLIFTON and PAUL J. WATFORD): Respondents-Appellees' motion to stay the mandate pending the filing of a petition for a writ of certiorari is GRANTED. Fed. R. App. P. 41(d). The mandate is stayed for 150 days pending the filing of a petition for a writ of certiorari in the Supreme Court. If the Supreme Court grants an extension of the time for filing a petition for a writ of certiorari, the stay shall continue through the deadline for filing the petition. If a petition for a writ of certiorari is filed before the stay expires, the

stay shall continue until final disposition of the matter by the Supreme Court. While the mandate remains stayed, Respondents shall immediately inform this Court when Respondents have either filed, or decided not to file, a petition for writ of certiorari, or if an extension of the time to file a petition is granted. [11837461] (AF) [Entered:09/25/2020 02:51 PM]

* * *

RELEVANT DOCKET ENTRIES

United States District Court
for the District of Arizona (Phoenix Division)

No. 2:97-cv-01331-JAT

Ramirez, et al. v. Ryan, et al.

Date Filed	#	Docket Text
12/21/2004	106	MOTION to hold proceedings in abeyance by petitioner David Martinez Ramirez [106-1] (SRB) (JMA). (Additional attachment(s) added on 4/14/2021: # 1 attach pdf) (JMA). (Entered: 12/21/2004)
01/04/2005	107	RESPONSE by respondents to motion to hold proceedings in abeyance by petitioner David Martinez Ramirez [106-1] (SRB) (JMA). (Entered: 01/05/2005)
* * *		
01/14/2005	109	REPLY by petitioner David Martinez Ramirez to response to motion to hold proceedings in abeyance by petitioner David Martinez Ramirez [106-1] (SRB) (JMA). (Entered: 01/18/2005)
* * *		
03/11/2005	119	ORDER by Judge James A. Teilborg granting in part the motion to hold proceedings in abeyance by petitioner David

		Martinez [106-1] with respect to petitioner's sentencing related claims and denied in part as to petitioner's conviction-related claims; petitioner's sentencing related claims are stayed pending conclusion of state post-conviction proceedings on Atkins claim; petitioner shall seek post conviction relief on his Atkin Claim in the Maricopa County Superior Court within 30 days of this order; the the court authorizes the FPD to represent petitioner with respect to state court litigation base on Atkins; that within 30 days of the filing date of this order petitioner shall file any requests for further evidentiary development of pending post-conviction related claims, Claims 2,13,14, and 17... (cc: all counsel) (SRB) (ADI-ICMS,). (Entered: 03/11/2005)
* * *		
03/20/2007	158	ORDER granting in part as to Claim 34 and denying in part as to Claims 32, 33, 35, and 36 145 Motion for Leave to File Second Amended Petition. IT IS FURTHER ORDERED that Petitioner shall file a Second

		Amended Petition adding only Claim 34 within 10 DAYS of the file date of this Order. Signed by Judge James A Teilborg on 03/19/07. (DNH) (Entered: 03/20/2007)
* * *		
03/29/2007	162	PETITION re: Second Amended Petition for Writ of Habeas Corpus by Petitioner David Martinez Ramirez. (Harms, Paula) Modified on 3/30/2007 (SAT). INCORRECT EVENT SELECTED. (Entered: 03/29/2007)
* * *		
04/30/2010	215	MEMORANDUM Regarding Cause and Prejudice, and Fundamental Miscarriage of Justice in Regard to Claim 34 by Petitioner David Martinez Ramirez. (Attachments: # 1 Exhibit List, # 2 Exhibits 1-5, # 3 Exhibit 6, # 4 Exhibit 7A, # 5 Exhibit 7B, # 6 Exhibit 7C, # 7 Exhibits 8-19, # 8 Exhibits 20-33, # 9 Exhibits 34-37, # 10 Exhibits 38-40, # 11 Exhibits 41-49, # 12 Exhibit 50A, # 13 Exhibit 50B, # 14 Exhibit 50C, # 15 Exhibit 51A, # 16 Exhibit 51B, # 17 Exhibits 52-53, # 18 Exhibits 54-47, # 19 Exhibit 58A, # 20 Exhibit 58B,

		# 21 Exhibits 59-66, # 22 Exhibit 67, # 23 Exhibit 68, # 24 Exhibits 69-73, # 25 Exhibits 74-75, # 26 Exhibits 76-84)(LAD) (Entered: 04/30/2010)
05/14/2010	216	RESPONSE re 215 Memorandum,, *Regarding Cause and Prejudice, and Fundamental Miscarriage of Justice in Regard to Claim 34* by Respondent Charles L Ryan. (Todd, John) (Entered: 05/14/2010)
* * *		
05/28/2010	219	Reply re 216 Response *to Memorandum Regarding Cause and Prejudice, and Fundamental Miscarriage of Justice in Regard to Claim 34* by Petitioner David Martinez Ramirez. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E)(Harms, Paula) (Entered: 05/28/2010)
* * *		
09/28/2010	242	ORDER - IT IS HEREBY ORDERED that Petitioner's second amended petitionfor writ of habeas corpus (Doc. 162) is DENIED WITH PREJUDICE. The Clerkof Court shall enter judgment accordingly. IT IS

		FURTHER ORDERED concluding that Claim 34 is procedurally barred. Petitioner has not established cause and prejudice or that a fundamental miscarriage of justice will occur if Claim 34 is not reviewed on the merits. (Doc. 215.) IT IS FURTHER ORDERED that a Certificate of Appealability is GRANTED as to the following issues: Claim 12: Whether the trial court violated his due process right to independent mental health experts in preparation for his defense at trial and sentencing in violation of Ake v. Oklahoma, 470 U.S. 68 (1985) Claim 34: Whether this Court properly found Claim 34 procedurally defaulted according to an adequate and independent state procedural rule and whether this Court properly concluded that the procedural default of Claim 34 was not excused by cause and prejudice or a fundamental miscarriage of justice. IT IS FURTHER ORDERED denying Respondents motion to strike cause and prejudice exhibits.(Doc. 220.) IT IS FURTHER ORDERED that

		the Clerk of Court send a courtesy copy of this Order to Rachelle M. Resnick, Clerk of the Arizona Supreme Court,1501 W. Washington, Phoenix, Arizona 85007-3329. (See document for further details). Signed by Judge James A Teilborg on 9/28/10.(LAD) (Entered:09/28/2010)
09/28/2010	243	CLERK'S JUDGMENT: IT IS ORDERED AND ADJUDGED that, per the Court's order entered September 28, 2010, Petitioner's Second Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254 is denied with prejudice. Judgment is entered for respondents and against petitioner. The action is dismissed. (LAD) (Entered: 09/28/2010)
* * *		
12/03/2010	247	NOTICE OF APPEAL to 9th Circuit, as to 242 Order, 243 Clerk's Judgment and 246 Order, by David Martinez Ramirez. (Harms, Paula) Modified on 12/6/2010 (LSP). CORRECTION to document linkage. (Entered: 12/03/2010)
* * *		

12/02/2014	249	ORDER of USCA, The district court on limited remand shall reconsider, in light of intervening law, Claim 34 (ineffective assistance of trial counsel, failure to adequately investigate and present mitigating evidence at sentencing). Within 10days after the district court enters its final order on limited remand, the parties shall file simultaneous status reports in this Court or move, consistently with the rules, for other appropriate relief, as to 9CCA #10-99023 re: 247 Notice of Appeal. (Copies sent by the Ninth Circuit.) (KMG) (Entered: 12/02/2014)
12/12/2014	250	ORDER setting the following briefing schedule: No later than March 6, 2015,Petitioner shall file a supplemental brief addressing whether he is entitled to habeas relief under 28 U.S.C. § 2254. No later than May 8, 2015, Respondents shall file a response to Petitioner's supplemental brief. No later than June 5,2015, Petitioner may file a reply. ORDERED the Clerk of Court shall reopen this case pursuant to the order of the Ninth Circuit remanding this matter for further

		proceedings. Signed by Senior Judge James A Teilborg on 12/12/2014. (See Order for details.) (LFIG) (Entered: 12/12/2014)
* * *		
05/04/2015	256	*SUPPLEMENTAL BRIEF by David Martinez Ramirez Supplemental Brief on Martinez v. Ryan, 132 S. Ct. 1309 (2012). (Attachments: # 1 Exhibits A-P to Supplemental Brief, # 2 Exhibits O-KK to Supplemental Brief) (Harms, Paula)* Modified to correct Brief event on 5/5/2015* (REW). (Entered: 05/04/2015)
07/06/2015	257	*RESPONSE in Opposition re: 256 Supplemental Martinez Brief by Respondent Charles L Ryan. (Attachments: # 1 Exhibit A - J, # 2 Exhibit K - Q)(Todd, John)*Modified to add document number/link on 7/7/2015* (REW). (Entered:07/06/2015)
* * *		
08/11/2015	260	REPLY re: 256 Brief - Opening by Petitioner David Martinez Ramirez. (Attachments: # 1 Exhibit Exhibits 1-3) (Harms, Paula) (Entered: 08/11/2015)
09/15/2016	261	*ORDER re: (CA No 10-99023). IT IS ORDERED that Claim 34 is

		denied as procedurally barred. IT IS FURTHER ORDERED granting a Certificate of Appealability as to Claim 34. (See document for further details). Signed by Senior Judge James A Teilborg on 9/14/16. (LAD) *Modified to correct event and text edited on 10/28/2016* (REW). (Entered: 09/15/2016)
10/14/2016	262	* AMENDED NOTICE OF APPEAL to 9th Circuit Court of Appeals re: 261 Certificate of Appealability Issued by David Martinez Ramirez. (Harms, Paula) *Modified to correct document linkage on 10/14/2016 (LAD). *Modified on10/28/2016; construed as an Amended Notice of Appeal by the Ninth Circuit in10-99023* (REW). (Entered: 10/14/2016)

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Ninth Circuit

No. 10-99023

David Ramirez v. David Shinn

Date Filed	#	Docket Text
		* * *
11/09/2017	30	Submitted (ECF) Opening Brief for review. Submitted by Appellant David Martinez Ramirez. Date of service: 11/09/2017. [10649851] [10-99023] (Harms, Paula) [Entered: 11/09/2017 02:29 PM]
11/09/2017	31	Submitted (ECF) excerpts of record. Submitted by Appellant David Martinez Ramirez. Date of service:11/09/2017. [10649890] [10-99023]--[COURT UPDATE: Attached corrected Vols 2-7. 11/14/2017 by LA](Harms, Paula) [Entered: 11/09/2017 02:41 PM]
		* * *
03/09/2018	37	Submitted (ECF) Answering Brief for review. Submitted by Appellee Barry Lee Jones. Date of

		service:12/19/2018. [11126536] [18-99006] (Sandman, Cary) [Entered: 12/19/2018 02:02 PM]
03/09/2018	38	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee Charles Ryan. Date of service:03/09/2018. [10793125] [10-99023]--[COURT UPDATE: Attached corrected PDF of excerpts. 03/13/2018by RY] (Todd, John) [Entered: 03/09/2018 02:34 PM]
		* * *
05/31/2018	46	Submitted (ECF) Reply Brief for review. Submitted by Appellant David Martinez Ramirez. Date of service:05/31/2018. [10891845] [10-99023] (Harms, Paula) [Entered: 05/31/2018 02:17 PM]
		* * *
01/16/2019	66	Filed Audio recording of oral argument. Note: Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [11157303] (TG) [Entered: 01/17/2019 12:11 PM]

* * *

10/17/2019	79	Filed (ECF) Appellee Charles Ryan petition for panel rehearing and petition for rehearing en banc (from09/11/2019 opinion). Date of service: 10/17/2019. [11467914] [10-99023] (Simon, William) [Entered:10/17/2019 11:30 AM]

* * *

02/03/2020	90	Filed (ECF) Appellant David Martinez Ramirez response to petition for panel rehearing and petition for rehearing en banc. Date of service: 02/03/2020. [11583475]. [10-99023] --[COURT UPDATE: Updated docket text to reflect content of filing. 2/3/2020 by TYL] (Gabrielsen, Timothy) [Entered: 02/03/2020 04:14PM]

* * *

09/25/2020	96	Filed order (SIDNEY R. THOMAS, MARSHA S. BERZON and RICHARD R. CLIFTON): Respondent-Appellee Shinn's motion to stay the mandate pending the filing of a petition for a writ of certiorari is GRANTED. Fed. R. App. P. 41(d). The mandate is stayed for 150 days

pending the filing of a petition for a writ of certiorari in the Supreme Court. If the Supreme Court grants an extension of the time for filing a petition for a writ of certiorari, the stay shall continue through the deadline for filing the petition. If a petition for a writ of certiorari is filed before the stay expires, the stay shall continue until final disposition of the matter by the Supreme Court. While the mandate remains stayed, Respondent shall immediately inform this Court when Respondent has either filed, or decided not to file, a petition for writ of certiorari, or if an extension of the time to file a petition is granted. [11837431] (AF) [Entered: 09/25/2020 02:45 PM]

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WO

No. CV 01-592-TUC-FRZ

[Filed: September 29, 2008]

Barry Lee Jones,	)
	)
Petitioner,	)
	)
vs.	)
	)
Dora Schriro, et al.,	)
	)
Respondents.	)
	)

DEATH PENALTY CASE

MEMORANDUM OF DECISION AND ORDER

Petitioner Barry Lee Jones filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. In this Order, the Court reviews the procedural status and merits of Petitioner's thirteen remaining claims. For the reasons set forth herein, the Court concludes that Petitioner is not entitled to relief.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On April 14, 1995, Petitioner was convicted of one count of sexual abuse, three counts of child abuse, and

felony murder. The convictions were predicated on the physical and sexual injuries inflicted on four-year-old Rachel Gray, and the failure to obtain medical care for her injuries, which led to her death.[1] Pima County Superior Court Judge James C. Carruth sentenced Petitioner to a term of years for the sexual abuse and child abuse counts. After finding two statutory aggravating factors – that the crime was especially cruel and the victim was under the age of fifteen – and no mitigating factors sufficiently substantial to call for leniency, the judge sentenced Petitioner to death for the murder. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Jones*, 188 Ariz. 388, 937 P.2d 310 (1997). Petitioner filed a petition for postconviction relief (PCR) with the trial court; after an evidentiary hearing, the petition was denied in its entirety (ROA-PCR 31).[2] The Arizona Supreme Court

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[1] The facts of the crime are set forth in detail in Claim 1D.

[2] "Dkt." refers to the documents in this Court's case file. "ROA" refers to the consecutively-numbered pages of the five-volume record on appeal from trial and sentencing prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-95-0342-AP). "ROA-PCR" refers to the docket numbers from the one-volume record on appeal from post-conviction proceedings prepared for Petitioner's petition for review to the Arizona Supreme Court (Case No. CR-01-0125-PC); "PR Dkt." refers to the docket numbers of documents filed at the Arizona Supreme Court for that petition for review proceeding. "RT" refers to the reporter's transcripts from Petitioner's state court proceedings. The state court original reporter's transcripts and certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court on December 12, 2001. (Dkt. 16.) The Court received the original trial exhibits from the Pima County Superior Court on October 7, 2004. (Dkt. 122.)

summarily denied Petitioner's Petition for Review. (PR Dkt. 7.)

Petitioner initiated this federal habeas proceeding on November 5, 2001 (Dkt. 1), and filed an amended petition on December 23, 2002, raising twenty-one claims, including the subparts of Claim 1 (Dkt. 58). The parties briefed the claims (Dkts. 69, 79) and motions for evidentiary development (Dkts. 89, 90, 101, 102, 108, 109, 113). The Court denied Petitioner's motions for evidentiary development and dismissed Claims 2, 10, 11, and 16 for failure to state a cognizable claim, Claims 9 and 17 as procedurally barred, Claim 14 as premature, and Claim 15 on the merits. (Dkt. 115.) Additionally, the Court ordered supplemental briefing regarding Petitioner's allegation that it would be a fundamental miscarriage of justice not to review on the merits the entirety of Claim 1D, part of which the Court had found to be procedurally defaulted. (*Id.* at 40.)

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

Under the AEDPA, a writ of habeas corpus cannot be granted unless it appears that the 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); *Rose v. Lundy*, 455 U.S. 509 (1982). 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).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and post-conviction relief 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. 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." *Id.* 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 v. Netherland*, 518 U.S. 152, 161-62 (1996).

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).

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).

LEGAL STANDARD FOR RELIEF UNDER THE AEDPA

The Antiterrorism and Effective Death Penalty Act (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 v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

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 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 v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004).

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," 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.

DISCUSSION

CLAIM 1

Claim 1 is comprised of five subclaims, all alleging ineffective assistance of counsel (IAC) at trial and sentencing. IAC claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). 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. Thus, to satisfy *Strickland*'s first prong, deficient performance, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

Because an IAC claim must satisfy both prongs of *Strickland*, the reviewing 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." *Id.* at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed"). A petitioner must affirmatively prove prejudice. *Id.* at 693. To demonstrate prejudice, he "must show 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. The calculus involved in assessing prejudice "should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* at 695.

Claim 1D[3]

Petitioner was represented at trial and sentencing by Sean Bruner. Petitioner alleges his right to effective assistance of counsel was violated by trial counsel's failure to conduct an adequate investigation, which derived from counsel's failure to consult sufficiently with Petitioner regarding trial strategy. Petitioner alleges specifically that his counsel: conducted insufficient trial investigation; (2) inadequately investigated the police work, medical evidence, and timeline of death versus injury; and (3) failed to conduct sufficient mitigation investigation for sentencing. Respondents conceded, and the Court previously agreed, that a narrow portion of this claim was exhausted to the extent it alleges ineffective assistance based on counsel's failure to meet with Petitioner a sufficient number of times to adequately prepare a defense for trial. (Dkt. 115 at 8.) That portion of the claim will be addressed on the merits below.

The Court further determined that the remainder of the claim was procedurally defaulted and that Petitioner had not established cause and prejudice to excuse the default, nor a fundamental miscarriage of justice based on innocence of the death penalty. (Dkt. 115 at 9-12.) The Court requested and received supplemental briefing on whether Petitioner could establish a fundamental miscarriage of justice based on

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[3] The Court will address Claim 1D first, as it includes an extensive discussion of the facts of the crime, which is helpful to review of the remaining claims.

innocence of the crime. (*Id.* at 12-13, 40; Dkts. 128, 130.)

Fundamental Miscarriage of Justice

To demonstrate a fundamental miscarriage of justice based on factual innocence of the murder, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 513 U.S. at 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*, 547 U.S. 518, 538 (2006).

Factual Background

The main thrust of the prosecution's case against Petitioner was that Rachel was solely in his care on the afternoon of May 1, 1994, when her injuries, including her fatal abdominal injury, were inflicted.[4] The State argued that no other adult had the opportunity to have inflicted the injuries, which the experts deemed non-accidental. Petitioner's defense was that he had no motive to commit the crime, the evidence was all circumstantial, and the State failed to prove beyond a reasonable doubt that he had inflicted the injuries.

Rachel's body was examined by Steven Siefert, an emergency room doctor, by Sergeant Sonya Pesquiera of the Pima County Sheriff's Office, and by the medical examiner, John Howard. Dr. Siefert estimated that Rachel had been dead for two to three hours when she was brought to the hospital at 6:16 a.m.on May 2, 1994. (RT 4/6/95 at 77, 80.) Rachel's body was covered with bruises and abrasions, primarily on the front of her body and across her face and forehead, but also on her back, arms, and legs. (*Id.* at 81.)

Rachel had a large bruise, two-and-a-half to three inches in diameter, on each side of her forehead, as well as intense coloration on the outer edge of her right eye and discoloration below the eyes. (*Id.* at 95-96.) Dr. Howard assessed the purple coloration on Rachel's face as injuries occurring probably one day prior to death, but there was also some green discoloration which

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[4] The victim's mother, Angela Gray, was charged as a co-defendant and separately tried; on March 30, 1995, she was convicted of child abuse for failure to obtain medical care. (*See* Dkt. 58 at 12.)

would have been present for several days. (RT 4/12/95 at 116.) Rachel had a head laceration, above and behind her left ear, which was one inch long and went down to the skull bone; Dr. Howard assessed it as having been inflicted one to two days prior to death. (*Id.* at 117.) Because the edges of the wound were not uniform and were scraped, it was not a cut from a sharp edge but was consistent with impact by a blunt object with a relatively straight edge. (*Id.* at 120-21.) Rachel had bruising around the left side of her face and behind her ear, as well as bleeding into both ear drums, consistent with an impact to the side of the head. (RT 4/6/95 at 90-91; RT 4/12/95 at 140-41.) Rachel also sustained internal bleeding due to blunt force trauma to the back of her neck, as well as diffuse bleeding into the deep layers of her whole scalp. (RT 4/12/95 at 137-38.)

Rachel had four or five small bruises on her right forearm and several on her right hand, as well as six bruises on her left forearm and hand, injuries typically associated with trying to ward off an impact (defensive type wounds). (RT 4/6/95 at 85-87, 88-89; RT 4/12/95 at 39-40, 150-51.) The medical examiner opined that the bruises and abrasions on her hand and arm were inflicted approximately one day prior to death. (RT 4/12/95 at 113-14.) This included swelling in her left middle finger that indicated injury to bone or ligaments; that injury would have been painful and noticeable within an hour of its infliction. (RT 4/6/95 at 89, 104-05; RT 4/12/95 at 114.) The medical examiner identified abrasions and contusions on Rachel's right and left thigh, both knees and her right leg; they varied in appearance from less than a day old to

approximately five days old. (RT 4/12/95 at 113.) He indicated that much of the bruising on Rachel's front side was consistent with having been inflicted by knuckles but he could not identify with any particularity what actually was used to inflict the injuries. (RT 4/12/95 at 126, 160.) Rachel had contusions and abrasions on her back, her buttocks, and on the back of her left thigh, which were inflicted within one to two days prior to her death. (*Id.* at 112; RT 4/6/95 at 93.) On her front torso, Rachel had twenty to thirty bruises (most irregular, but one circular injury and some linear patterns), large areas of abrasions, and a red bruise area under her right arm. (RT 4/6/95 at 93-94; RT 4/12/95 at 115.) Some of these bruises were recent, within the prior day to two days, while others were of a coloration indicating an origin of several days prior to death. (RT 4/12/95 at 115.) There was a linear bruise pattern to the right of her navel; this injury was consistent with the tire iron found underneath the driver's seat of Petitioner's van but could have been caused by many different objects. (RT 4/12/95 at 78, 128, 160.)

Rachel had blunt force injuries to her labia, bruising and scrapes, and her vagina had a half-inch tear extending down from it. (*Id.* at 134.) The medical examiner determined that the injury to Rachel's genitalia occurred about one day prior to her death. (*Id.* at 133.) These injuries were nonaccidental, would have been painful, and were consistent with penetration or attempted penetration. (*Id.* at 134-36.)

Internally, Rachel had sustained blunt force injury to her abdominal organs, causing a tear of the small

bowel, and bruising of the tissues around the small bowel, the wall of the large bowel, and the attachments of the intestine to the back of the abdominal wall. (*Id.* at 141-42.) The rupture of her bowel caused inflamation and irritation of the lining of the abdominal tissues, a condition called peritonitis (*id.* at 145); when this type of damage is not fixed, it causes death over a period of hours to days (RT 4/6/95 at 115). The amount of force required to rupture a healthy bowel is equivalent to a fall from more than two stories, an automobile accident at greater than thirty-five miles per hour, or a forceful directed blow to the abdomen (*id.* at 113-14; RT 4/12/95 at 151, 153-54); Dr. Siefert did not believe enough force for such an injury could be inflicted by a child under the age of six (RT 4/6/95 at 116). Rachel would have experienced pain at the time of the blunt force injury; Dr. Howard indicated she would then have had continual abdominal pain while Dr. Siefert stated that the initial pain could have diminished rather quickly. (*Id.* at 119; RT 4/12/95 at 146.) Over the next several hours, a person with this condition would lose bowel function causing nausea, vomiting, and dehydration. (RT 4/6/95 at 119-20; RT 4/12/95 at 146.) The medical examiner opined that the injury was consistent with having occurred concurrent with many of her other injuries, approximately one day prior to death; he stated that the abdominal laceration could have occurred between 2:00 and 6:00 p.m. on May 1. (RT 4/12/95 at 148-49.)

Dr. Siefert opined that Rachel's bruising would have begun to appear within a few hours of infliction, and he assessed that ninety-five percent of Rachel's injuries had occurred within twelve to twenty-four hours before

her death. (RT 4/6/95 at 121, 128, 103-108, 111, 127; RT 4/12/95 at 94.) Some of the bruises were a few days old, including the bruising beneath Rachel's eyes. (RT 4/6/95 at 103, 105, 111; RT 4/12/95 at 37.) Dr. Siefert thought some of the bruises and the head wound could have been incurred in a fall out of a van, however, he concluded that Rachel had incurred nonaccidental trauma possibly at multiple times by multiple mechanisms. (RT 4/6/95 at 128-29, 135; RT 4/12/95 at 35.) Similarly, the medical examiner explained that the number and multiple locations of the injuries were not consistent with a simple childhood accident, but were consistent with having been beaten. (RT 4/12/95 at 137.) He concluded that the injuries he assessed as being approximately one day old, which was the majority of them, were consistent with having been inflicted between 2:00 and 5:30 p.m. on May 1. (*Id.* at 117.) Dr. Howard determined that Rachel died of blunt abdominal trauma that caused a laceration of the small bowel and that it was a homicide. (*Id.* at 155.)

Petitioner's twelve-year-old daughter, Brandi, testified at trial that on Saturday, April 30, 1994, she had seen a six-year-old boy hit Rachel in the stomach with a metal bar, causing Rachel to cry for a few minutes. (RT 4/13/95 at 8-9, 16-17.) After she stopped crying, she was fine and went back to play with a friend. (*Id.* at 18.)

Joyce Richmond, a former girlfriend of Petitioner's, who described herself as still in love with him at the time of trial, spent Saturday night April 30, with Petitioner until approximately 3:00 a.m. (RT 4/11/95 at 135-36.) She had recently come back to Tucson with the

hope of moving into Petitioner's trailer with him. (*Id.* at 129-31.)

Rebecca Lux, Rachel's ten-year-old sister, testified that she had been living with Rachel, her brother, and her mom (Angela Gray) in Petitioner's trailer for the few months up to and including May 1. Petitioner never hit Rebecca, and she never saw him hurt Rachel or her brother. On Saturday night, April 30, Rachel seemed fine and ate dinner. On Sunday morning, May 1, Rebecca, Rachel, and their brother got up early, watched cartoons, and ate lunch until Petitioner got up around 2:30 or 3:00 p.m. She and her brother then asked if they could ride their bikes; later when she put her bike away to go to a friend's house she saw Rachel and thought she looked fine. During that day she saw Petitioner and Rachel leave in Petitioner's van three times. Petitioner told her the first time they left that they were going to the store to get some things for dinner; Rachel looked fine after the first and second trip with Petitioner. The last time Petitioner and Rachel left, he told Rebecca they were going to his brother's house. When she got back from her friend's house around 6:00 or 7:00 p.m., Rachel was on the couch; she was pale, throwing up, her head was bleeding, and she had bruises on her face, hands, and fingers. Petitioner left for a time and when he returned, Rebecca's mother and Petitioner had an argument outside. At some earlier time while they were living with Petitioner, Rachel had acted scared of Petitioner and did not want to be near him. (RT 4/11/95 at 14-81.)

On May 1, the St. Charles family, who lived in a bus at a transient camp, got a visit from Petitioner around

noon or thereafter; Ron St. Charles thought Petitioner seemed angry. (RT 4/12/95 at 7-9, 17.) That same day, Petitioner's neighbor at the Desert Vista trailer park, Michael Fleming, saw Rachel looking sick between 2:00 and 5:00 p.m.; she was pale with dark circles under her eyes, and she looked wet and like she wanted to vomit, but he did not see any blood. (RT 4/7/95 at 164-66, 168, 171-73.) Petitioner, Angela Gray, and the children were supposed to attend Petitioner's nephew's birthday party on May 1, but they never showed up. (RT 4/11/95 at 119-24.)

On May 1, Norma Lopez sent her children Ray and Laura to the Choice Market on Benson Highway at three or four o'clock in the afternoon. When they returned, they told her they had seen a white man with messy brown hair driving a yellow van and hitting a little blond-haired girl in the face and chest and the girl was crying. The next day on the news Ms. Lopez heard that a man had been arrested in relation to the death of a little girl. When she had the children watch the news they identified that person as the man they had seen in the van. (RT 4/7/95 at 4-62.) Nine-year-old Ray Lopez indicated that he had gone to the Choice Market with his twin sister around 5:00 p.m. On the way home, he testified that he saw a white man with bushy hair driving by in a yellow van, hitting a little white girl in the chest with his fist and elbow. He did not see the driver's face, only his hair from behind, but he identified a picture of Petitioner at trial. However, he stated that a photograph of Petitioner's van was not the van he saw because the windows were different. (*Id.* at 4-32.) Ray's sister, Laura Lopez, recalled going to Choice Market on a Sunday and on the way home

seeing a white man driving a yellow van. She said the guy was ugly with puffy hair and he was hitting a little white girl on the left side of her face with his elbow and the girl was crying. Laura said she saw them through the front window of the van and could see part of the side of each of their faces. She remembered seeing the man from the van on the news that same day. (*Id.* at 32-46.)

Between 3:15 and 5:00 p.m. on May 1, 1994, Petitioner went into a Quik-Mart on Benson Highway. The store clerk testified that Petitioner got ice and that he was with a little girl who sat on a ledge outside the store. Although a lot of Rural Metro personnel regularly came into the Quik-mart, the clerk did not notice an EMT treating the little girl outside the store and believed she would have been aware if that had occurred. (RT 4/7/95 at 142-149). At trial, the State contended that Petitioner lied about having Rachel's head wound examined at the fire station by a paramedic. (RT 4/6/95 at 45-46.) Petitioner's counsel countered that Petitioner never said he went to the fire station but that a Rural Metro EMT who happened to be at the Quik-Mart had examined Rachel's head wound. (*Id.* at 71-72.) In a pretrial deposition, Petitioner's daughter, Brandi, said that her dad had told her his claim of taking Rachel to see a paramedic was a lie; however, at trial, she claimed Richmond was the one that had told her that her dad had never taken Rachel to a paramedic. (RT 4/13/95 at 24-28.)

Other testimony at trial established that when the fire and/or ambulance crew from Rural Metro goes out on a call, it is logged in; if they come across an

emergency while running an errand they call it into dispatch, which would be logged, and their unit is considered out of service. (RT 4/11/95 at 193, 197; RT 4/12/95 at 68-69.) Their log gave no indication, and the on-duty captain had no recollection, of providing treatment to a young girl at the Quik-mart on May 1. (RT 4/11/95 at 199-200.) If treating a head wound, they take spinal precautions and transport the person by ambulance; pursuant to their training, it would not have been appropriate to send a child with head injuries home. (*Id.* at 200-01; RT 4/12/95 at 69, 70.)

On May 1, between 7:00 and 8:00 p.m., Richmond stopped by Petitioner's trailer and saw Rachel on the couch with a bleeding head; she said Rachel did not have bruises on her face or hands. (RT 4/11/95 at 141, 151-53.) Richmond's adult son was at Petitioner's trailer with his mother on the evening of May 1 and saw that Rachel's head was bleeding; he saw no bruising. When he asked, Petitioner stated that he had taken Rachel to the fire department. (*Id.* at 154-65.)

Rebecca woke early in the morning on May 2 and found Rachel in the bedroom doorway; she put her in bed. Rebecca next woke to her mother yelling, and Petitioner and her mother took Rachel to the hospital. (*Id.* at 52-54.) Between 6:00 and 7:00 a.m. that morning, Petitioner knocked at Richmond's door and asked her to come with him; he was upset and told her that something was wrong with Rachel and he was going to find out who hurt her. (*Id.* at 142-44.) They took Rebecca and Brandi to the St. Charles's camp around 7:30 a.m. (*Id.* at 55-56, 143; RT 4/12/95 at 10-11.) Richmond took Petitioner's van to go to the

hospital to meet Angela and Rachel, but on the way there was pulled over by police for driving erratically. (RT 4/11/95 at 142-48.)

Ron St. Charles borrowed a truck, and he and Petitioner drove around and took the girls to Petitioner's brother's house. (RT 4/12/95 at 12-13.) Petitioner was crying and very distraught; Petitioner told St. Charles that he didn't want to go to the hospital because Petitioner thought people would be suspicious that Rachel had suffered abuse. (*Id.* at 22, 18.) Later that morning, when they returned to the camp, Petitioner passed out, and St. Charles and his wife helped Petitioner into a bed. (*Id.* at 14-15; RT 4/11/95 at 179.) Mrs. St. Charles said that Petitioner was crying, moaning, and saying, "Rachel, I'm sorry, I love you." (RT 4/11/95 at 174-83.)

Law enforcement located Petitioner at St. Charles's camp after 8:00 a.m. on May 2, 1994, and transported him to the Sheriff's Department. (RT 4/6/95 at 167,169, 172.) On the way there, Petitioner was upset, said there was something wrong with his little girl, and asked if they would take him to see her. (*Id.* at 173.)

Blood consistent with having come from Rachel was found on four pillowcases, a wash cloth, a comforter, and a bed sheet found in Petitioner's trailer; the fingertip area, the heal of the hand, and on one side of a glove found on the fence in front of Petitioner's trailer; a Circle K bag, carpet samples, and the front passenger seat's upholstery from Petitioner's van; and blue jeans worn by Petitioner at the time of his arrest. (RT 4/7/95 at 85, 87-89, 107, 108-09, 118, 120-21, 126-27; RT 4/11/95 at 102-107, 109.) A substance

consistent with vomit was found on Rachel's pajamas and a sleeping bag. (RT 4/11/95 at 98-99.) There was a trace of blood not further identified on the red T-shirt and boots, but not the denim jacket, worn by Petitioner at the time of his arrest; no blood was found on the tools tested from Petitioner's van. (*Id.* at 95, 100-01; RT 4/12/95 at 61-62.) On the van carpet between the seats, there appeared to be impressions stains (caused by a bleeding wound resting against a surface) where blood had soaked through. On the van's passenger seat and some of the carpet there were spatter stains consistent with a person that has a bleeding injury being struck or shaken causing the blood to spatter out. (RT 4/12/95 at 72-73.)

Analysis of New Evidence

Petitioner's primary argument is that the fatal abdominal injury Rachel suffered was not inflicted on Sunday, May 1; therefore, he contends there are many other possible perpetrators that had access to Rachel in the relevant time period. Further, he argues that Rachel was a chronically abused child, which supports a theory that whoever was responsible for the ongoing abuse is a more likely perpetrator of the fatal injury.

The central piece of evidence on which Petitioner relies is a 2002 declaration and report by Dr. Janice Ophoven, a coroner and consultant with a specialty in pediatric forensic pathology. (Dkt. 89, Ex. 69.) Dr. Ophoven stated Rachel's cause of death as "Dehydration and shock due to blunt force trauma of the abdomen in the context of battered child syndrome." (*Id.*, Ex. 69B at 5.) She explained that a diagnosis of peritonitis can be delayed for days and

that a child can be up and about until the vital functions begin to fail. (*Id.*) Based on Rachel's post-mortem abnormal chemistries and weight, Dr. Ophoven opined that Rachel's bowel laceration had to be present more than twenty-four hours, and possibly longer than forty-eight hours prior to her death. (*Id.* at 6.) Further, she concluded that the abdominal injury was inflicted significantly earlier than Rachel's vaginal injuries, perhaps even days prior. (*Id.*) Finally, she stated that Rachel was subjected to "multiple episodes of inflicted injury." (*Id.)* Dr. Ophoven also opined that Rachel's growth history and multiple bruises were "consistent with a diagnosis of a chronically abused child." (*Id.*)

At the request of Petitioner, Dr. Howard, the medical examiner that testified at trial, submitted a 2004 declaration, in which he indicated that the laceration of Rachel's bowel could have occurred greater than twenty-four hours before her death, perhaps longer than forty-eight hours, as delayed onset of symptoms is possible with this type of injury. (Dkt. 128, Ex. 1 at 1-2.) Further, Dr. Howard stated, "The injuries to Rachel Gray's vaginal area showed characteristics consistent with hours to perhaps days elapsing between the time of her abdominal injury and her vaginal injury." (*Id.* at 3.) Similarly, Dr. Howard attested that the older bruises on Rachel's body "could have been consistent with the blunt force trauma to Rachel Gray's abdomen." (*Id.*)

This new evidence, while significant, does not seriously call into question the jury's verdict. Dr. Howard has not retracted his testimony that the

abdominal injury could have occurred on Sunday afternoon while Rachel was with Petitioner. Dr. Siefert also testified that he believed ninety-five percent of Rachel's external injuries occurred twelve to twenty-four hours prior to her death. Further, Dr. Howard's revision, or clarification, is not entirely reliable. He states in his post-trial declaration that he answered only what was asked at trial and, because no one asked if the damage to Rachel's abdomen could have happened greater than twenty-four hours prior to death, he did not provide that information. (*Id.* at 1.) While technically true that he was not asked that specific question, the following exchange took place at trial:

> Q Based on the appearance of this area of Rachel's body upon autopsy, can you tell us what is most consistent with when this blow would have occurred to Rachel?
>
> A The injury is typical of having occurred about one day prior to death.
>
> Q You say about one day. We're talking about the same age range as the laceration in her head, her genital injuries, and the external bruises you characterized from that time frame?
>
> A Yes.

(RT 4/12/95 at 148.)

While Dr. Howard now states the abdominal injury could have occurred more than twenty-four hours prior to her death, when given an open-ended opportunity to date the injury at trial, he identified the time frame as

within one day of her death. Similarly, in a pretrial interview, Dr. Howard stated that the inflammatory response of Rachel's body indicated the injury had occurred hours to perhaps a day prior to death. (Dkt. 89, Ex. 49 at 29, 35.) Dr. Howard also now states that the abdominal injury and the vaginal injury could have occurred days apart; however, in the exchange quoted above he testified that these injuries were of a similar age. These changes to Dr. Howard's testimony, ten years after the fact, are not highly persuasive.

Dr. Ophoven's as-yet unimpeached testimony amounts to a disagreement with Dr. Howard's trial testimony that Rachel's abdominal injury likely occurred in the twenty-four hours prior to her death. Dr. Ophoven does not call into question the trial testimony regarding the time-frame for Rachel's other non-fatal injuries – within one day of her death. Thus, a reasonable juror could believe that the abdominal injury happened in the twenty-four hours prior to Rachel's death along with many of her other injuries, or that Petitioner was responsible for all of the injuries even if some of them occurred prior to Sunday. Petitioner's alternative theory, that he did not inflict the abdominal injury, is less plausible because a juror would have to believe that at least two days before her death someone inflicted a fatal abdominal injury on Rachel (and she did not tell anyone) and that the following day she received additional serious injuries and extensive diffuse bruising during the time she was with Petitioner. Dr. Ophoven's testimony is not enough to demonstrate that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.

In support of his argument that Rachel's abdominal injury was inflicted prior to May 1, Petitioner cites two other documents. First, in a May 19, 1994 police interview, a neighbor in the trailer park, Isobel Tafe, stated that she saw Rachel on Saturday afternoon, April 30, around 2:00 or 3:00 p.m. and thought she seemed scared and looked a little gray like she might be sick. (Dkt. 89, Ex. 51 at 1-2, 3.) Second, Rachel's older sister Rebecca executed a declaration in 2002 in which she stated, "On the weekend that Rachel died, I remember her being pale as though she were not feeling well on Saturday for a while. She took a nap for a couple of hours and then seemed to feel better." (*Id.*, Ex. 5 at 5.) This more recent declaration is in direct contradiction to an October 1994 defense interview in which Rebecca stated that on Saturday April 30, Rachel was normal and fine all day, and that she did not look sick; Rebecca stated that they were awake watching television from noon until 9:00 p.m. that day. (*Id.*, Ex. 70 at 45-47, 49-51.) Similarly, at trial, Rebecca testified that Saturday evening Rachel was not sick and seemed okay. (RT 4/11/95 at 29.) There is also a contradiction between Rebecca's 1994 statement, in which she said that Rachel watched television at home all day Saturday and Tafe's statement that Rachel came over to play that afternoon.

In sum, Rebecca's new declaration is not persuasive on this point, and the limited statement from Tafe is not directly probative of when the abdominal injury occurred. Further, another neighbor and Rachel's brother indicated that Rachel was riding her bike around on Sunday afternoon and appeared to be fine. (Dkt. 89, Ex. 16(1) at 4, Ex. 24 at 3.) Rebecca also

testified that Rachel was fine Sunday morning and for much of the afternoon. (RT 4/11/95 at 41-42, 70-72.) None of the experts suggested that, once Rachel began to feel the ill effects of the abdominal infection, she could have had periods thereafter of being fine. Although Dr. Howard and Dr. Siefert indicated that after the initial injury Rachel could have functioned, they suggested that, once the irritation and inflammation progressed to a certain point, the symptoms would have been ongoing and severe. (RT 4/6/95 at 119-20; RT 4/12/95 at 148.) Multiple sources indicated that Rachel was fine as of Sunday morning. Additionally, Dr. Howard testified that Rachel would likely have stopped wanting to eat immediately after the injury. (RT 4/12/95 at 148.) There was no evidence suggesting Rachel did not eat after Saturday morning; in fact, there was evidence to the contrary.

In support of a slightly different theory – that Rachel's fatal injury was inflicted by a child and not by a chronic abuser – Petitioner has submitted three documents. The first is a report from a professional tracker, who studied the photographs of Rachel's body and identified what he concluded were three bare footprint impressions on her abdomen, and which he determined were deliberate and came from a child between the ages of four and eight. (Dkt. 135, Ex. 1 at 1-2.) In conjunction with that report, Dr. Ophoven opined that Rachel's abdominal injury was consistent with a child stomping or jumping on her. (*Id.*, Ex. 2.) Petitioner has also provided an additional declaration from the trial investigator, who learned through interviews that Rachel was around other children the day before she died and a forty pound, two-and-a-half

year old was seen hitting Rachel in the stomach with a piece of metal that day. (*Id.*, Ex. 3 at 3-4.)

For this evidence to be of consequence, a juror would first have to determine that Rachel's abdominal injury did not occur on the day of her death, when she was with Petitioner; as discussed above, such a conclusion is not foregone in light of all the evidence. Additionally, the trial testimony indicated that, with a few exceptions, the bruising on Rachel's body had been inflicted within the prior twenty-four hours; there is no testimony that significant portions of the abdominal bruising could have been forty-eight hours old or older. Despite the tracker's opinion, considering all the evidence, a reasonable juror could conclude that the bruising on Rachel's body was not inflicted by a child's bare foot. As Dr. Howard testified at trial, much of the bruising on Rachel's torso was consistent with coming from a person's knuckles, and the linear bruise pattern (which runs through the middle of the left footprint as identified by the tracker) could have been caused by a tire iron. (RT 4/12/95 at 126, 128.) Ultimately, Dr. Howard concluded that there was "nothing particular about those injuries which would allow you to identify with particularity the instrument that was used to inflict them." (RT 4/12/95 at 160.) As a final matter, no evidence has been proffered at trial or since that anyone witnessed a child forcefully stomp on Rachel. Nor is there evidence that she reported such an incident had taken place, and Petitioner has not suggested a plausible reason Rachel would have kept such a significant occurrence secret for two days. Finally, evidence that a child hit Rachel in the stomach with a piece of metal on the Saturday before she died

was already admitted at trial through the testimony of Petitioner's daughter (RT 4/13/95 at 8-9, 16-17); therefore, the investigator's declaration to that effect adds nothing to the analysis.

Petitioner also contests the blood spatter evidence presented at trial. Specifically, he argues that his new blood spatter expert contradicts Sergeant Pesquiera's testimony that Rachel's scalp laceration occurred in Petitioner's van. Sergeant Pesquiera did not testify that the laceration occurred in the van; rather, she testified that Rachel bled in the van, which is uncontested, and that the blood on the van seat could have been caused by her being struck after her head was already bleeding, causing the blood to spatter out. (*Id.* at 73.) This is not significantly different than the statement provided by Petitioner's expert, Stuart James, who determined that the bloodstains on the van seat were "projected," meaning they were produced by rapid movement of a person or object containing wet blood. (Dkt. 89, Ex. 48 at 5.) Sergeant Pesquiera did testify that blood droplets on the right sleeve of the driver of the van would be consistent with the driver hitting Rachel in the passenger seat. (RT 4/12/95 at 75.) James stated that the presence of Rachel's blood on Petitioner's shirt was not indicative of him inflicting the laceration; rather, he states that it means only that Petitioner's clothing came into contact with some of Rachel's blood, which could have occurred by lifting or attending to her. (Dkt. 89, Ex. 48 at 6.) The blood evidence at trial and the statement by James are both inconclusive as to where the laceration occurred or who inflicted it; it established only that Rachel bled in the van and that some of the blood got onto Petitioner's

shirt and was projected onto the seat by a rapid movement of Rachel's head. Thus, Petitioner's "new evidence" is inconsequential.

As a final matter, Petitioner presents two declarations to undermine the testimony of Ray and Laura Lopez – the twin children that testified they saw Petitioner hitting a little girl in his van while driving. The first is from the trailer park manager, who declared that Rachel was too small to be seen when in Petitioner's van. (*Id.*, Ex. 17 at 2.) The second is a new declaration from Rebecca, who states that she could only see Rachel's pony tail when Rachel was sitting in the passenger seat of Petitioner's van. (*Id.*, Ex. 5 at 6.)

Neither is persuasive evidence of actual innocence. First, there are numerous inconsistencies between Rebecca's pre-trial interview, her trial testimony, and her 2002 declaration – one example being her various recollections of how Rachel was feeling and how she spent her time on the Saturday prior to her death, as discussed above. Rebecca was only ten at the time Rachel died, and her declaration nine years later does not seem the kind of "trustworthy eyewitness account" referred to in *Schlup*. 513 U.S. at 324. Similarly, the trailer park manager's 2002 declaration was executed more than eight years after the murder. Second, the Lopezes' testimony was impeached significantly at trial, in that Ray Lopez did not see the face of the van's driver, Laura only saw his face "a little bit," and Ray testified that a picture of Petitioner's van was not the van he saw because the windows were different. (RT 4/7/95 at 25, 29, 36.) The new declarations add slightly to the impeachment of the Lopezes' testimony, but do

not provide any direct exoneration of Petitioner's conviction for inflicting the fatal blow to Rachel's abdomen.

It bears remembering that the fundamental miscarriage of justice standard is "demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327.) This is not such a case. As argued by Petitioner, the critical issue is the timing of Rachel's fatal abdominal injury because it is uncontested that she spent the majority of her time on Sunday with Petitioner. While the new testimony of Dr. Ophoven is compelling and may have been persuasive to some jurors in the first instance, it is not sufficient on collateral review to establish that no reasonable juror would have found Petitioner guilty. Dr. Howard's testimony remains that Rachel's abdominal injury could have occurred on Sunday afternoon while she was with Petitioner. The Court has considered all of the new testimony submitted by Petitioner, as well as all of the evidence presented at trial, and finds that Petitioner has failed to meet the *Schlup* gateway standard of actual innocence. In assessing Petitioner's miscarriage of justice argument the Court assumed the truth of Petitioner's new facts; because Petitioner cannot satisfy the actual innocence standard even when his facts are taken as true, an evidentiary hearing is not warranted. In sum, to the extent any of Petitioner's claims are procedurally barred, he has not satisfied the fundamental miscarriage of justice standard to overcome that default. The defaulted portions of Claim 1D are denied.

Analysis of Exhausted Portion of Claim 1D

The remaining aspect of Claim 1D alleges IAC for failure to meet with Petitioner a sufficient number of times to adequately prepare a defense for trial. More specifically, Petitioner contends Bruner did not establish a trusting attorney/client relationship allowing Petitioner to discuss strategy and possible investigative possibilities.

At the evidentiary hearing during Petitioner's PCR proceedings, Petitioner testified that Bruner came to see him approximately five times prior to his sentencing (RT 9/18/00 at 6-8, 18) and that Leslie Bowman, Bruner's law partner, came to the jail approximately a dozen times (*id.* at 13). Bruner testified that a review of his records indicated one or both of them went to see Petitioner approximately monthly at the jail. (*Id.* at 21-22.) Petitioner testified that Bruner did not discuss with him what witnesses would be called or what the defense would be (*id.* at 8), but that Bowman would inform him of what was going on in the case (*id.* at 14). Bruner testified that he would have discussed with Petitioner the evidence against him, and what Petitioner recalled happening. (*Id.* at 22.)

The PCR court noted that the claim was not factually supported because the testimony established that Bruner met with Petitioner five or six times (ROA-PCR 31 at 4), and that de facto co-counsel Bowman met with him numerous additional times. More importantly, Petitioner failed to explain how he was prejudiced by counsel's allegedly limited contact

with him. (*Id.*) The court concluded that counsel was not deficient and there was no prejudice. (*Id.*)

This claim, as set forth in the Amended Petition, suffers from the same fatal flaw as it did when raised during the PCR proceedings – it does not allege any prejudice related specifically to the allegation that counsel failed to have sufficient pre-trial meetings with Petitioner. (*See* Dkt. 58 at 37-95.) All of Petitioner's assertions regarding prejudice tie to Petitioner's defaulted allegations that his counsel failed to conduct a sufficient investigation. (*Id.*) Additionally, when the Court ordered supplemental briefing regarding this claim, it specifically requested that Petitioner "re-brief the evidentiary motions with respect to the exhausted portion of Claim 1D as if it is an independent claim." (Dkt. 115 at 35.) Despite that direction, Petitioner's supplemental brief did not request any evidentiary development nor a hearing regarding the exhausted portion of the claim. (Dkt. 128.) None of the development requested in the supplemental brief regarding the defaulted portion of the claim, nor in the original evidentiary development motions, appears directly relevant to this portion of the claim. (*Id.*; Dkts. 89, 90.)

Based on the factual development in state court, which established that Petitioner was visited on a regular basis by one or both counsel prior to trial, Petitioner fails to establish that counsel's conduct was deficient. Further, Petitioner has not alleged, much less proven, that he was prejudiced by counsel's alleged failure to hold sufficient pre-trial meetings with him. The PCR court's denial of this claim was not an

objectively unreasonable application of *Strickland*. This part of Claim 1D is denied on the merits.

Claim 1A

Petitioner alleges counsel was ineffective for failing to request a mistrial after Petitioner was seen by jurors in handcuffs and a leg brace. Respondents concede this claim was exhausted during Petitioner's PCR proceeding. (Dkt. 69 at 15.)

Factual Background

At the beginning of the fourth day of trial, the judge addressed the prosecutor, Ms. Mayer, and defense counsel, Mr. Bruner and Ms. Bowman, outside the presence of the jury:

> THE COURT: We have a problem. We need to make a record.
>
> Let the record show the absence of the jury.
>
> My understanding – well, it's now 10:20. About 10 minutes to 10 two deputies were escorting Mr. Jones to the courtroom and apparently three of our jurors – you are sure they are ours?
>
> MR. BRUNER: Yes.
>
> THE COURT: Were able to see Mr. Jones as he was escorted from the prisoner elevator down the hallway, to the hallway that leads to my courtroom, and I think we need to explore that.

First of all, he was obviously in custody, but dressed as he is now in civvies. Was he handcuffed?

DEPUTY LUKER: Yes, sir.

THE COURT: What about his feet?

DEPUTY LUKER: Leg brace.

THE COURT: The one he has on now?

DEPUTY LUKER: Right.

THE COURT: Didn't have the leg shackles?

DEPUTY LUKER: No.

THE COURT: Hands front or back?

DEPUTY LUKER: Front.

THE COURT: Which – can you tell us where he was when the jurors kind of broke through the door?

DEPUTY LUKER: Almost parallel to the door. They pushed it through. They started coming in.

THE COURT: So it was kind of right there, and it was three jurors. The door – for the record, I am going to say how this place is laid out. I am more than a bit frustrated, and I'm going to say the Pima County court has nine floors. Division V, which is my courtroom, is located on the fifth floor. On the fifth floor there are three Superior Court divisions on each side of the building, that is the east side and west side, separated by a

fairly large lobby. In the middle or the north end of the lobby area is a bank of public elevators two on each side. There is on the north side of the lobby an area waiting room for jurors and spectators. On the south side of the fifth floor there is a hallway with a number of jury rooms, I think four, and, of course, the prisoner elevator where in-custody people are brought to the various divisions on this floor.

The people who designed this building causes [sic] us a daily proposition to have to deal with the possibility of jurors comingling or at least being able to observe in custody defendants being transported back and forth, which is a constant source of possible legal principle in any given criminal trial where an in-custody defendant is involved, and why this particular problem couldn't have been foreseen and avoided by simply making some sensible design changes so jurors were congregated on the other side of the building is utterly beyond me. This kind of problem is needless and happens all too frequent. Now, that's one thing.

I guess I should also say that the deputies necessarily to bring people to my courtroom have to transport them from the prisoner elevator located on the south side of the building and just immediately north of the passageway from the lobby area to the hallway then east to the corridor that leads to my courtroom which happens to be in the northeast corner of the fifth floor, and the courtroom – or rather the jury

room where the jurors are located is located in the east portion of the south side of this floor.

So apparently Mr. Jones and the two deputies who were escorting him were about even with the double doorway that leads to the south hallway when the jurors kind of broke through. It is a double doorway. As I understand it, it was locked, which is usually how the deputies do that when people are being escorted from either the holding area, which there is a holding area on the south side of this floor also or from the prisoner elevator to the various courtrooms, but there was nobody standing guard. The door was just locked, and apparently because of the way the doorway and the lock works it's possible to break through it, inadvertently, no doubt, and evidently that's what happened here.

So I think probably we need to find out if we can which three jurors saw Mr. Jones and what they saw and whether they said anything about it and go from there.

Counsel have any advice for me?

MS. MAYER: No.

MR. BRUNER: No, that seems fine.

MS. BOWMAN: I think you are handling it properly.

THE COURT: I don't want to make too much of this. Probably a fairly, you know, vexing – I feel in part has to do with the record we need to

> make. I don't know it's a good idea to bring them all in here and say we got a problem and here's what the problem is. Maybe that three didn't think anything of it, haven't said anything and understand they must presume that Mr. Jones is innocent and all of that.
>
> MR. BRUNER: I think if we just brought the three in and just asked them if they have spoken about it with the other jurors.

(RT 4/11/95 at 3-7.)

The three jurors were identified and brought into the courtroom for the following colloquy:

> THE COURT: Folks, I need to find out whether we have any kind of problem or not associated with anything you folks may have seen when you got here this morning.
>
> Did you observe Mr. Jones on your way to the jury room early this morning?
>
> (Whereupon, all answer affirmatively.)
>
> THE COURT: Tell us what you saw? Were you three together?
>
> (Whereupon, all answer affirmatively.)
>
> THE COURT: First thing I want to find out was if the three of you all at once went through the doorway?
>
> A JUROR: Yes.

THE COURT: Were any of the other jurors with you folks?

A JUROR: No.

THE COURT: Did you say anything to the others about what you saw?

A JUROR: I didn't.

THE COURT: What did you see?

A JUROR: Just the defendant and an officer, and we stopped, and he asked us to go on the other side of the door. We did that.

THE COURT: Is that what you saw, Miss Haro?

A JUROR: Yes.

THE COURT: Miss Young?

A JUROR: Yeah.

THE COURT: Anything at all about what you saw that would in any way interfere with your following the instruction you heard me talk about, and you will hear some more at the end of the case, about presuming Mr. Jones to be innocent?

A JUROR: No, just saw him walking.

THE COURT: I don't think I have really anything more. I don't want – you didn't do anything wrong okay?

Counsel have any further questions for either of these ladies?

MS. MAYER: No.

MR. BRUNER: No.

THE COURT: Can they go back down with the others? Do us a big favor and not mention what you were asked about.

(*Id.* at 10-12.)

After those jurors were dismissed, the court asked how counsel wanted to proceed:

MR. BRUNER: Well, I have just spoken briefly to the defendant. The – I mean, the jury has seen Miss Bowman and I leaving the courtroom alone on several occasions. I think they probably could assume Mr. Jones is in jail. The deputies who are in the courtroom are dressed as deputies and are armed and – all of that.

I don't think that there's any prejudice to the extent I'm going to ask for a mistrial. I don't think this warrants retrying the case. I am satisfied Mr. Jones is satisfied with the responses of the jurors.

THE COURT: I think they're all conscientious people and can do what they need to do. It would be a grave injustice to have to start over. I don't know. What do you think?

MS. MAYER: I concur with Mr. Bruner. We painstakingly made sure the jury is not composed with a bunch of peabrains, and I would be real – given the nature of the charges

> I would be real surprised anybody assumed he was out of custody.
>
> THE COURT: I would not like to call any undue attention to it. My instincts are simply to do nothing. We made the record and keep our eyes and ears pealed, but I think it's okay.

(*Id.* at 12-13.)

The PCR court held an evidentiary hearing on this claim. Petitioner recalled that he and Bruner discussed the jurors seeing him in restraints, and Bruner "thought something ought to be done," but Petitioner did not request any specific relief. (RT 9/18/00 at 11.) Bruner did not have an independent recollection of this issue prior to reviewing the transcripts, but he testified that if he had thought that juror bias was a "serious problem" he would have requested a mistrial. (*Id.* at 26.) Bruner thought they had a favorable jury, as good as they could get, including minorities, and he did not want to lose that by seeking a mistrial. (*Id.* at 32.) He did not recall whether he discussed this issue with Petitioner, but he thought it likely that he did not. (*Id.*)

In denying this claim the PCR court made the following ruling:

> First, the trial court addressed the fact that three jurors saw the Defendant in handcuffs, and the three jurors informed the court that they would not be prejudiced against Defendant. Trial counsel raised the issue with the judge and with his client, and was satisfied that there would be no prejudice to his client. This Court finds that counsel's performance was not

deficient. In the alternative, the Court finds no prejudice.

(ROA-PCR 31 at 3 (citation omitted).)

Analysis

Although brief, the trial court inquired with the jurors about what had occurred and whether it affected them. During that colloquy, the jurors conveyed three critical facts – the essence of what they observed was Petitioner being escorted by officers, the encounter would not interfere with their assessment of the evidence and ability to follow the court's instructions, and they had not informed the other jurors about what they saw. First, Petitioner concedes that, at best, the prejudicial effect of "an inadvertent meeting with a defendant in constraints is not well-settled" (Dkt. 58 at 32); in fact, the courts have indicated that the brief, unintended glimpse of Petitioner in custody is not the kind of incident that is inherently prejudicial. *See Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (noting that the Ninth Circuit has found that a jury's unintentional and brief look at a shackled defendant has not warranted habeas relief); *cf. Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (sitting through the **entirety** of a trial in prison attire or while visibly shackled is inherently prejudicial). Prejudice is not inherent because Petitioner's brief encounter with three jurors did not create an "unacceptable risk" that "impermissible factors" would influence the jury and deny him a fair trial. *See Holbrook*, 475 U.S. at 570. Second, counsel had strategic reasons for not wanting a mistrial because he thought they had a favorable jury. Petitioner did not urge counsel to seek a mistrial,

and Bruner indicated that he and Petitioner were satisfied with the jurors' responses. Additionally, based on the jurors' observations of the movements of Petitioner and his counsel in the prior days, as well as the nature of the charges against Petitioner, counsel reasonably believed that the jury likely assumed Petitioner was in custody. Finally, the trial court was anxious not to draw excessive attention to the issue and counsel concurred with that approach. Petitioner has not indicated what critical additional questioning counsel chose to forego. In light of the circumstances and the assessments by counsel, it was not objectively unreasonable for counsel not to pursue further questioning or to seek a mistrial. Thus, Petitioner fails to satisfy the performance prong of *Strickland*.

Petitioner argues that he was prejudiced by counsel's failure to question the jurors because that prevented counsel from making an informed decision regarding whether the jurors were biased against him. First, as discussed above, the court questioned the jurors and they all agreed that their deliberations would not be affected by what they saw. Petitioner presents no additional information suggesting that the jurors were biased by what they witnessed. Second, he has made no argument suggesting that further questioning would have revealed any probative information or that moving for a mistrial would have been successful. In fact, he does not provide any argument based on the standards for a mistrial in state court, nor does he cite any state law indicating a mistrial was warranted. The circumstances of the situation – a brief chance encounter – are not of the kind with a high likelihood of creating bias. *Cf. Estelle*

v. Williams, 425 U.S. 501, 504-05 (1976) (explaining that the concern related to compelling a defendant to go to trial in prison attire is that it acts as a "constant reminder" of the accused's status and is "so likely to be a continuing influence throughout trial" that it creates an unacceptable risk that impermissible factors will influence the verdict). Petitioner has failed to establish that he was prejudiced by counsel's conduct.

The PCR court's denial of this claim was not an unreasonable application of *Strickland*. Claim 1A is denied.

Claim 1B

Petitioner alleges counsel was ineffective for failing to interview co-defendant Angela Gray. Respondents concede this claim was exhausted in Petitioner's PCR proceeding. (Dkt. 69 at 19.) In a prior order, the Court found that Petitioner had not been diligent in attempting to develop this claim in state court as required by § 2254(e)(2); therefore, evidentiary development in this Court was denied. (Dkt. 115 at 32-34.)

During Petitioner's PCR proceeding, the court held a hearing at which Bruner testified that he asked Gray's counsel for an interview with her and the request was denied; he did not take any further steps to pursue an interview at that time or after she was tried. (RT 9/18/00 at 25, 27.) Bruner recalled that Gray's counsel had recounted what Gray would say if interviewed and that it would not have been favorable to Petitioner. (*Id.* at 26.)

The PCR court denied the claim because it was not supported by an offer of what Gray would have said and how it would have been helpful to Petitioner's case; thus, Petitioner failed to demonstrate actual prejudice. (ROA-PCR 31 at 3.) The court concluded that Petitioner had not demonstrated that counsel's performance was deficient or that he had been prejudiced. (*Id.*)

In this Court, Petitioner alleges that if counsel had interviewed Gray, "crucial information would have surfaced regarding other suspects." (Dkt. 58 at 34.) Petitioner's more specific allegations are based on facts developed since the PCR proceeding, which this Court is prohibited from considering pursuant to 28 U.S.C. § 2254(e)(2). The vague allegations before the Court fall far short of affirmatively proving actual prejudice as required by *Strickland*. 466 U.S. at 693. Petitioner has not alleged any facts, supported by the state court record, demonstrating that if counsel had interviewed Gray there is a reasonable probability he would not have been convicted. The PCR court's ruling to that effect is not objectively unreasonable. Claim 1B is denied.

Claim 1C

Petitioner alleges his appointed counsel, Bruner, was ineffective for failing to pursue appointment of second counsel. The Court found, in a prior order, that this claim was properly exhausted. (Dkt. 115 at 7-8.) In that same order, the Court found that Petitioner had not been diligent in attempting to develop this claim in state court as required by § 2254(e)(2); therefore, evidentiary development in this Court was denied. (Dkt. 115 at 34-35.)

Bruner moved for appointment of his law partner Leslie Bowman as second counsel. (ROA 33-34.) At oral argument on the motion, Bruner urged the court to officially appoint Bowman. In response, the court stated:

> I can't let you do that, but I am not going to tie your hands. I think you would be justified in delegating some of the work that needs to be done to her and asking when it comes time for me to evaluate how much we need to recompensate you telling me about that.

(RT 7/27/94 at 3.) The court then reiterated its preference to allow Bruner to delegate work without formally appointing a second attorney. (*Id.* at 4.)

During the PCR evidentiary hearing, Petitioner testified that Bowman came to see him approximately a dozen times at the jail, and that she was present during trial and sentencing. (RT 9/18/00 at 13.) Bruner referred to Bowman as "second counsel" or "second chair," and said that she helped interview witnesses and investigate the case. (*Id.* at 21.) The PCR court denied this claim because the trial court, while denying official appointment of second counsel, authorized counsel to bill for some amount of assistance from Bowman. (ROA-PCR 31 at 4.) The court found that "[t]rial counsel did in fact have assistance from his law partner at all major phases of the proceedings, from pre-trial to sentencing." (*Id.*) Therefore, the court concluded that counsel's performance was not deficient and Petitioner was not prejudiced. (*Id.*)

As an initial matter, Petitioner appears to be contending, in part, that Bowman was not qualified to be second counsel. In turn, he argues that counsel failed to conduct sufficient investigation, delegated interviews to Bowman, and that Petitioner received what amounted to no assistance of counsel.

This claim is quite different than that framed in state court and appears to be an attempt to shoe-horn in a broad claim of insufficient investigation. As discussed in the Court's prior order addressing exhaustion, the claim exhausted and properly before the Court is only that Petitioner's appointed counsel, Bruner, did not sufficiently pursue or succeed in getting second counsel appointed. (Dkt. 115 at 7.)

In that vein, Petitioner argues that Bruner should have followed up and again asked for appointment of additional counsel. The trial court made clear that it was not going to officially appoint second counsel; therefore, Bruner had no basis to re-urge that request. Similarly, because the court agreed to provide compensation for the use of his partner, Bruner had no reason to seek appellate review of that denial. Bruner's performance in this arena was not objectively unreasonable. Additionally, Petitioner has not demonstrated how he was prejudiced by not having a second chair officially appointed when second counsel actively participated in the case. The quality of how counsel litigated the case and their qualifications to defend a capital case are outside the scope of this narrow claim as exhausted in state court.

The PCR court's finding that counsel was not deficient and that Petitioner was not prejudiced and,

therefore, not entitled to relief under *Strickland*, was not objectively unreasonable. This claim is denied.

Claim 1E

Petitioner alleges his counsel was ineffective for failing to inform him of his right to testify at trial. Respondents concede this claim was exhausted during Petitioner's PCR proceedings. (Dkt. 69 at 31.) The Court previously denied evidentiary development of this claim (Dkt. 115 at 35-36); therefore, the Court's assessment of this claim is limited to the state court record.

At the PCR evidentiary hearing, Petitioner testified that he and Bruner did not discuss whether he would testify; Petitioner never told counsel he wanted to testify, and Bruner informed him he would not be testifying. (RT 9/18/00 at 9-10, 14, 16, 17.) Bruner had no recollection of discussing with Petitioner the possibility of Petitioner testifying, and he did not think he ever contemplated Petitioner testifying. (*Id.* at 23, 29.) Bruner anticipated that the prosecution would introduce Petitioner's videotaped statements, which ultimately it did not do, and that he could use portions of those statements in support of the defense without subjecting Petitioner to cross-examination. (*Id.* at 23, 29.)

The PCR court found Petitioner's assertion that he did not know he had a right to testify not credible. The court denied the claim because it determined there was no support for Petitioner's allegation that he was denied the right to testify. (ROA-PCR 31 at 5.)

As an initial matter, the Ninth Circuit has held that an IAC claim based upon counsel's failure to inform a defendant of his right to testify is foreclosed by the holding in *United States v. Edwards*, 897 F.2d 445, 447 (9th Cir. 1990) – i.e., when a defendant is silent in the face of his counsel's decision not to call him as a witness, he waives his right to testify. *See United States v. Nohara*, 3 F.3d 1239, 1243-44 (9th Cir. 1993).

Counsel's decision not to call Petitioner to testify was reasonable in light of his concerns regarding Petitioner being subjected to cross-examination and the fact that Petitioner never expressed a desire to testify. *See United States v. Eisen*, 974 F.2d 246, 265 (2d Cir. 1992) (upholding counsel's choice not to call defendant to the stand, despite defendant's repeatedly expressed desire to testify, because "[i]t was a reasonable tactical decision to rely exclusively on attacking the Government's witnesses and presenting independent testimony rather than to subject [defendant] to all of the risk attendant on cross-examination"). Further, Petitioner has not alleged sufficient prejudice with respect to this claim. He states generally that he was not given the opportunity to "tell the jury that he had not committed the crime." (Dkt. 58 at 98.) Petitioner did not assert in the PCR hearing, nor does he assert here, that he would have testified if counsel had discussed the option with him. Further, Petitioner does not allege anything specific to which he would have testified, nor does he identify anything helpful he would have said beyond generally denying that he had committed the crime. This falls far short of demonstrating that if informed of his right to testify, he

would have done so, and if he had there is a reasonable probability that he would not have been convicted.

The PCR court's denial of this claim was not an unreasonable application of *Strickland*.

Cumulative Assessment of IAC Allegations

None of Petitioner's claims of IAC warrant habeas relief. In each instance Petitioner has failed to demonstrate that counsel's performance was deficient and/or that he was prejudiced by counsel's alleged shortcomings. The Court finds that counsel's alleged deficiencies, considered cumulatively, do not amount to prejudice rendering the proceedings against him fundamentally unfair. *See Davis v. Woodford,* 384 F.3d 628, 654 (9th Cir. 2004).

CLAIM 3

Petitioner alleges the trial court erred in suppressing evidence that Petitioner's co-defendant, Angela Gray, had physically abused her children. Respondents concede this claim was exhausted on direct appeal. (Dkt. 69 at 35.) The Court previously denied evidentiary development of this claim because it is record-based, Petitioner was not diligent in attempting to develop it in state court, and there is no material factual dispute requiring resolution (Dkt. 115 at 37); therefore, the Court's assessment of this claim is limited to the state court record.

On cross-examination, the following exchange took place while Rebecca, Rachel's older sister, was testifying:

Q Barry never hit you, did he?

A No.

Q He never was mean to you, was he?

A No.

Q Your mom used to hit you, didn't she?

A Yes.

MS. MAYER: Objection, irrelevant.

THE COURT: Sustained.

MR. BRUNER: Can we approach?

(Whereupon, the following bench conference was held out of the hearing of the jury.)

MR. BRUNER: She was the one who got into this whether Barry was hitting the kids. I wanted to establish that Angela used to beat the heck out of this girl until she moved in with Barry, then it stopped.

THE COURT: If it's not during the relevant time period.

MR. BRUNER: It is – it's – I mean, we're talking about 90 days. THE COURT: No. Objection sustained.

(RT 4/11/95 at 65-66.)

At the end of Rebecca's testimony, defense counsel made the following offer of proof regarding the evidence to which the court had sustained the objection:

Q Sorry. Just want to ask you a couple more questions, and – well, did your mom used to spank you?

A Sometimes.

Q Did she used to spank you hard?

A Yes.

Q Did there come a time when she stopped spanking you?

A Sometimes.

Q Well–

A When we did –

Q Go ahead.

A When we moved in with Barry. The middle.

Q The spankings then seemed to stop.

A Yes.

Q Do you know why they stopped?

A No.

Q Okay, but after that she didn't really –

A Hit me that much.

Q How would she discipline you after that?

A Send me to the room.

Q Is that the same discipline that Barry would do?

A Yes.

(*Id.* at 82-83.)

The Arizona Supreme Court denied this claim on appeal:

> Defendant offered evidence of a "hard spanking" by Gray of Rachel's older sister, which allegedly occurred more than ninety days before Rachel's murder. In our view, the evidence does not have an inherent tendency to connect Gray to the commission of the sexual abuse and murder of Rachel. We find that the trial court did not abuse its discretion in precluding the introduction of the evidence.

Jones, 188 Ariz. at 395, 937 P.2d at 317.

The right to due process includes the right to present a defense and to defend against the State's charges. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). On habeas review, the question is whether the court's refusal to admit the evidence rendered Petitioner's trial fundamentally unfair. *Id.* at 302-03. Petitioner argues that evidence that Rachel's mom used to hit and abuse her children was important to show motive or intent on the part of Angela Gray, which made it admissible under Arizona law. However, "the presence or absence of a state law violation is largely beside the point." *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991).

Petioner's claim as briefed relies significantly on new evidence; as noted above, the Court's review of the claim is limited strictly to the state court record. When

paired down to the record evidence and the due process standard, the question is quite narrow – whether exclusion of Rebecca's testimony, that her mother used to spank her hard prior to the family moving in with Petitioner, rendered Petitioner's trial fundamentally unfair. Petitioner's defense was that the prosecution failed to establish beyond a reasonable doubt that he inflicted the injuries on Rachel and it was possible someone else had injured her. The value of the contested testimony to Petitioner's defense was limited as it does little to implicate Gray as the perpetrator of Rachel's murder. Although the excluded testimony might have highlighted Petitioner's non-violent nature, the testimony also indicated that Gray was no longer hitting or using physical discipline on Rebecca in the weeks prior to Rachel's death. In contrast, the court admitted testimony that Gray was seen striking Rachel on the side of her head in the week prior to her death. (RT 4/11/95 at 160-63.) Additionally, Petitioner was allowed to elicit testimony that he had never hit Rebecca, and that she had never seen Petitioner hit her brother or Rachel. (*Id.* at 65, 66, 69.)

The value of the excluded testimony was nominal, particularly as it bore no direct relation to the events immediately preceding or causing Rachel's death. Therefore, the Court finds that the exclusion of this evidence did not render Petitioner's trial fundamentally unfair. Claim 3 is denied.

CLAIM 4

Petitioner alleges the trial court erred in denying his motion to suppress evidence obtained in an unlawful search of his trailer. Respondents concede

this claim was exhausted on direct appeal. (Dkt. 69 at 41.)

Unlawful search and seizure claims are generally not subject to review by this Court. In *Stone v. Powell*, 428 U.S. 465, 494 (1976), the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial." Pursuant to *Stone*, a prerequisite for consideration of Petitioner's Fourth Amendment claim is the denial of the chance to fully and fairly litigate the claim in state court. Petitioner does not allege he was denied such an opportunity. More significantly, the trial court held a hearing on Petitioner's motion to suppress and issued written findings on the denial (RT 12/5/94 at 30-78; RT 1/9/95 at 4-20; ROA 523-24), and the Arizona Supreme Court conducted a detailed analysis of the issue, *Jones*, 188 Ariz. at 395-96, 937 P.2d at 317-18. Therefore, Petitioner cannot obtain habeas relief on this claim, and it is denied.

CLAIM 5

Petitioner alleges prosecutorial misconduct based on references to photographic evidence that the trial court had excluded. The parties agree this claim was fairly presented on direct appeal, although Petitioner failed to object at trial, and the Court finds that it was exhausted. *See State v. Martinez*, 210 Ariz. 578, 580 n.2, 115 P.3d 618, 620 n.2 (2005) (noting that failure to object at trial is not a waiver but claim reviewed only for fundamental error). The Arizona Supreme Court set

forth two paragraphs of facts relevant to this claim and concluded that the prosecutor's actions "did not approach fundamental error." *Jones*, 188 Ariz. at 398, 937 P.2d at 320.

Factual Background

Dr. Howard identified the State's exhibits numbered 136 and 137 as photographs taken during his autopsy showing Rachel's external genitalia, her buttocks and inner thighs. (RT 4/12/95 at 130.) After the doctor testified that the photographs would be helpful to illustrate his testimony regarding Rachel's injuries, the State moved to admit them. (*Id.*) The court then held the following bench conference:

> MR. BRUNER: I strongly object to all of these things. If I remember well, I was told the pictures started people crying in the courtroom, including the prosecutor table last time.
>
> THE COURT: Objection to the other ones were, I believe, we just limited it to one.
>
> MS. MAYER: We did for the last case, but in this case I have a sexual assault charge to prove. Both of those are important because there's evidence of blood which goes to the approximate age of the injury as well as the laceration that you can't see until you open it up, and that's – both of those are essential to prove the age as well as the nature of the penetration.
>
> MR. BRUNER: There is no reason why we can't testify to that and use the diagram to explain that. All those pictures are to inflame the jury.

MS. MAYER: I believe the law is as long as they are relevant and have probative value. Though they maybe upsetting, that isn't a reason to exclude them.

THE COURT: It seems to me you can get by explaining there was some blood, though not set out there. I am going to suggest that you use that one instead of that one, but not both.

(*Id.* at 131-32.)

Testimony continued:

Q We have been asked to utilize State's 136 for our discussion, though there is a difference between 136 and 137, is there not?

A That's correct.

Q Describe the difference between State's 137, which will not be admitted, and State's 136 which will be?

A Both views are of the same part of the body from the same direction. In one view the external genitalia are in their normal relaxed position. Injuries are visible and blood and fluid resulting from the injury are visible in the photograph pooled in the area of the laceration.

In Exhibit 136 the photograph shows two gloved fingers pulling or spreading the genitalia apart so that the injuries are more visible. Also the blood and fluid that had pooled in the area of the injury has been cleaned away, and the wound

> has been dried to allow the tissues themselves to be photographed.
>
> Q Does the presence of the pooled blood that's reflected in State's 137 as well as the appearance of the injury in general give you the ability to approximate the age of this injury?
>
> A They assist in doing that, yes.
>
> Q Based on that, what age approximation did you make for this injury to Rachel's genitalia?
>
> A By both examining the area of injury with the naked eye and by looking at tissue samples from the area of injury microscopically, I would estimate that the injury occurred about one day prior to death.

(*Id.* at 132-33.) At the prosecutor's request, Dr. Howard subsequently provided a detailed discussion of his findings regarding Rachel's genital injuries, using Exhibit 136 for illustration. (*Id.* at 133-35.)

In closing argument, the prosecutor stated:

> State's 136, which is a photograph taken of Rachel at the autopsy of her torn vulva, is irrefutable proof of the severity and force of her rape. Her rapist left blood behind in her little vagina for Dr. Siefert to see, Detective Pesquiera to take note of, and Dr. Howard to have to clean away before he could finally see the extent of her injuries.

(RT 4/13/95 at 81.)

Analysis

Clearly established federal law provides that the appropriate standard of federal habeas review for a claim of prosecutorial misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). Therefore, in order to succeed on this claim, Petitioner must prove not only that the prosecutor's remarks were improper but that they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* In determining if Petitioner's due process rights were violated, the Court "must consider the probable effect of the prosecutor's [comments] on the jury's ability to judge the evidence fairly." *United States v. Young*, 470 U.S. 1, 12 (1985).

Petitioner acknowledges that the court gave permission for the prosecutor to introduce, by way of testimony without using the illustrative photograph, the fact that Rachel had blood pooled in her vagina. (Dkt. 58 at 117.) This was also acknowledged by defense counsel at trial, who argued that the photographs were not necessary to prove the presence of blood or other details of the injury because "[t]here is no reason why we can't testify to that and use the diagram to explain that." (RT 4/12/95 at 131.) Despite these admissions, Petitioner takes issue with the following testimony: the medical examiner noted that the difference between the photographs is that Exhibit 137 shows the genitalia in a relaxed position with injuries visible and blood and fluid pooled around the

laceration; the medical examiner opined on the timing of the injury based on his entire examination of the wound including the pooled blood; and in closing argument the prosecutor noted that Rachel had blood in her vagina. The fallacy in Petitioner's claim is that defense counsel did not request and the court did not exclude all evidence regarding the details of Rachel's genital injury and the presence of blood in her vagina. Rather, the court excluded only the admission of the photograph. The prosecutor did nothing improper by eliciting detailed medical testimony about Rachel's injury, including the presence of blood pooled in her vagina.

Equivalent testimony had already been elicited from other witnesses. Dr. Siefert testified that he had noted some blood coming from Rachel's vaginal region when he examined her body at the emergency room. (RT 4/6/95 at 81, 98.) Similarly, Sergeant Pesquiera testified on direct and on cross-examination that during her examination of Rachel's body she noted "pooled bright red colored blood" on the inside of Rachel's labia. (RT 4/12/95 at 42, 94.) Additionally, Dr. Howard provided detailed, no less potentially inflammatory testimony regarding the genital injuries as reflected in Exhibit 136 – the labia was bruised and scraped, the opening of the vagina had a one-half inch tear extending on to the skin towards the anus, and the injuries were consistent with penetration or attempted penetration. (*Id.* at 134.) Nothing in the testimony elicited from Dr. Howard specific to Exhibit 137, nor the prosecutor's closing argument (which in no way refers to the excluded exhibit), rendered Petitioner's

trial fundamentally unfair in violation of his right to due process. Claim 5 is denied.

CLAIM 6

Petitioner alleges there was insufficient evidence to sustain his sexual assault conviction. Respondents concede this claim was exhausted on direct appeal. (Dkt. 69 at 53.) The Court previously denied evidentiary development because this is a record-based claim. (Dkt. 115 at 37-38.)

The Arizona Supreme Court denied this claim on appeal, finding first that the evidence supported that Rachel had been sexually assaulted by someone, a fact conceded by Petitioner. *Jones*, 188 Ariz. at 318, 937 P.2d at 396. Next, the court conducted a lengthy analysis of the evidence connecting Petitioner to the crime:

> Evidence supports the conclusion that virtually all of Rachel's injuries occurred within a two-hour period. Rachel's sister, Rebecca, testified that Rachel spent the morning with her and their brother watching cartoons. Rachel "seemed fine" when her siblings went out to ride their bikes, about 3:00 p.m. Additionally, Rachel "seemed fine" after the first two times that she returned with defendant. Rachel first accompanied defendant to the market. Rebecca saw Rachel standing at the door when they returned, and she seemed fine. The second time defendant returned with Rachel, Rebecca again saw her standing at the door, and Rachel appeared to be fine. If Rachel had already

suffered genital injuries, she would have been in pain. The examiner testified at the aggravation/mitigation hearing that the genital injuries would have caused pain at basically all times. The third time that defendant went out with Rachel, he told Rebecca that he was going to his brother's house. However, his brother's wife testified that defendant never visited their house on that day. During defendant's third trip with Rachel, two children saw defendant hitting Rachel while he drove. One of the children placed the time at 5:00 p.m. Blood spatter in the van likely was created by defendant hitting Rachel after she had already suffered a head injury. Additionally, blood spatter consistent with Rachel's blood type was found on defendant's jeans, along with traces of blood on defendant's shirt and boots. The next time that Rebecca saw Rachel, at about 6:30 p.m., Rachel was in a lot of pain. Many of the injuries that Rachel now had were consistent with defense against a sexual assault. Thus, substantial evidence was introduced to conclude that Rachel's physical assault and sexual assault all occurred within the two-hour time period during which she was alone with defendant in his van.

The evidence of the time period of Rachel's injuries, the testimony that defendant was seen hitting her, the fact that Rachel was fine before she went out with defendant the third time and was injured when she returned, and the fact that defendant told others that he had taken Rachel to see the paramedics when he had not,

> support the finding that defendant committed the sexual assault along with, and as part of, the overall physical assault. Consequently, we find that sufficient evidence exists to sustain defendant's sexual assault conviction.

Id. at 319, 937 P.2d at 397.

The clearly established Supreme Court law governing this claim is set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), which holds that when assessing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

The Arizona Supreme Court thoroughly set forth the facts relevant to this claim and, looking at them in the light most favorable to the prosecution, its recitation comports with this Court's review of the record. While the evidence against Petitioner is circumstantial and not extensive, it is sufficient for a reasonable juror to find the elements of sexual assault beyond a reasonable doubt. Of critical significance is the testimony that the injury would have been painful, and it obviously bled; within the time frames provided by the experts, one could rationally conclude that the sexual assault had not been present for much of Sunday, but rather occurred later in the day when Rachel was with Petitioner. At a minimum, it was not objectively unreasonable for the Arizona Supreme Court to find there was sufficient evidence to support the sexual assault conviction. Therefore, Petitioner is not entitled to relief on Claim 6, and it is denied.

CLAIM 7

Petitioner alleges that his death sentence is cruel and unusual punishment in violation of *Enmund* and *Tison*. In a prior order, the Court found that this claim was properly exhausted but that evidentiary development was not warranted. (Dkt. 115 at 15, 38.)

The Supreme Court holds that a felony-murder defendant can be sentenced to death only if he actually killed, attempted to kill, or intended to kill, or if the defendant was a major participant in the underlying felony and acted with reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987); *Enmund v. Florida*, 458 U.S. 782, 797 (1982). The Arizona Supreme Court found that because the jury convicted Petitioner of inflicting Rachel's fatal abdominal injury, and he was the sole participant in the physical assault on her, *Enmund*/*Tison* was satisfied. *Jones*, 188 Ariz. at 321, 937 P.2d at 399.

Petitioner's objection to the *Enmund*/*Tison* finding is premised primarily on his assertion that he did not inflict any injury upon Rachel and that there is insufficient evidence to support his convictions. The jury convicted Petitioner of inflicting the injuries on Rachel and no court, including this one, yet has found grounds to overturn those convictions. Those convictions establish that the jury found Petitioner solely responsible for inflicting the fatal injury on Rachel. Therefore, as found by the Arizona Supreme Court, the convictions satisfy the *Enmund*/*Tison* requirements. The supreme court's denial of this claim was not an unreasonable application of Supreme Court law, and Claim 7 is denied.

CLAIM 8

Petitioner alleges the trial court erred in finding the especially cruel aggravating factor. The Court found in a prior order that this claim was properly exhausted but that evidentiary development was not warranted. (Dkt. 115 at 18, 39.)

In determining that the crime was especially cruel, the trial court stated:

> Here is a child in the 49th month of her life who suffered unspeakably for hours, whose suffering only ended when she became unconscious. The mother knew that, and even more, a fortiori, so did Mr. Jones knew that because he knew how badly she had been beaten, so if there was ever such a thing as an especially cruel crime, this was it.

(RT 7/6/95 at 35.) The Arizona Supreme Court made the following findings regarding cruelty based upon its independent review of the record:

> A murder is especially cruel when the murderer inflicts mental or physical pain upon a conscious victim before death. When the suffering is experienced after the infliction of a fatal wound, that suffering must have been "objectively foreseeable" to support a finding of cruelty. The defendant's subjective intent to cause suffering is irrelevant.
>
> Here, the evidence establishes that Rachel suffered from physical pain for many hours after she was assaulted. She was crying and vomiting

> and had bruises on her face, fingers, and hands. The emergency room physician testified that the blow to Rachel's bowel would have caused great pain initially and would have continued to cause pain to a lesser extent thereafter. Rachel also experienced pain from her genital injuries. The defensive wounds on her body show that she was conscious during her beating.
>
> Defendant knew how severely he had beaten Rachel. Her body showed signs of being struck dozens of times by fists, elbows, and perhaps blunt instruments. Rachel was physically sick for the rest of the evening. Additionally, defendant told others that he had taken Rachel to the paramedics even though he had not, which may have prevented others from seeking medical help for her. He deliberately extended her suffering by not taking her to the hospital and by misleading others who might have. It is beyond question that Rachel suffered especial cruelty within the meaning of section 13-703(F)(6) during her terrifying last day of life.

Jones, 188 Ariz. at 321-22, 937 P.2d at 399-400 (internal citations omitted).

On habeas review of a state court's finding of an aggravating factor, a federal court is limited to determining "whether the state court's [application of state law] was so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). In making that determination, the reviewing court must inquire "'whether, after viewing

the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found that the factor had been satisfied.'" *Id.* at 781 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Petitioner first argues that he did not physically or sexually assault Rachel. This argument is meritless as it is contrary to the jury's standing verdict. Second, he argues that there is no evidence he intended Rachel to suffer and that given his use of methamphetamines he could not have reasonably foreseen that Rachel would suffer. As stated in the Arizona Supreme Court's opinion as quoted above, it is sufficient if the victim's suffering is objectively foreseeable; the State is not required to prove that a defendant in fact foresaw or intended the suffering. *See State v. Trostle*, 191 Ariz. 4, 18, 951 P.2d 869, 883 (1997) (the requirement is that defendant knew or "should have known" the victim would suffer). The facts as set forth in the supreme court's opinion and as revealed in this Court's review of the record are more than sufficient to demonstrate that Rachel unquestionably physically suffered and that the suffering was necessarily foreseeable by Petitioner, who was convicted of inflicting the many wounds and witnessed Rachel's physical reaction to her injuries prior to her death.

A rational fact finder could determine that the especially cruel (F)(6) aggravating factor was satisfied. Claim 8 is denied.

CLAIM 12

Petitioner alleges that Arizona's statutory death penalty scheme is unconstitutional because: (1) it

allowed the finding of the aggravating factors and imposition of the sentence to be done by a judge not a jury; (2) it failed to require notice of the aggravating factors by way of the indictment; and (3) it allowed the judge not the jury to make the *Enmund*/*Tison* finding. Respondents concede that subparts (1) and (3) are properly exhausted, but contend that subpart (2) is procedurally defaulted.

Regardless of exhaustion, the Court will dismiss the entirety of this claim because it is plainly meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Claim 12 is premised primarily on *Ring v. Arizona*, 536 U.S. 584, 609 (2002), which held 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*, 524 U.S. 348 (2004), the Supreme Court held that *Ring* did not apply retroactively to cases already final on direct review. Because Petitioner's direct review was final in 1997 prior to *Ring*, he is not entitled to relief premised on that ruling.

With respect to the portion of the claim regarding his indictment, Petitioner relies on two cases, *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), and *Jones v. United States*, 526 U.S. 227 (1999). *Sattazahn* relied on *Ring* for the principle that aggravating factors are an element of the offense. 537 U.S. at 111. As with *Ring*, that case involved the review of a direct appeal; thus, there was no retroactivity bar at issue as there is for Petitioner. *Id.* at 105. In *Jones*, the Supreme Court held that facts that constitute elements of a offense rather than just sentencing enhancement must be

charged in a *federal* indictment. 526 U.S. at 252. However, the Supreme Court has long held that the Fifth Amendment provisions requiring indictment by a grand jury are not part of the due process of law incorporated as to *state* criminal prosecutions by virtue of the Fourteenth Amendment. *See Hurtado v. People of State of Cal.*, 110 U.S. 516, 538 (1884); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972).

With respect to subpart (3), the Supreme Court has held that findings pursuant to *Enmund*/*Tison* may be made by the trial or appellate court; they are not required to be found by a jury. *Cabana v. Bullock*, 474 U.S. 376, 387 (1986), *overruled on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987).

Claim 12 is denied.

CLAIM 13

Petitioner alleges that his incarceration on death row for more than nine years prior to his execution and Arizona's method of execution violates his right against inhumane treatment pursuant to the International Covenant on Civil and Political Rights, customary international law, and *jus cogens*. Respondents argue that this claim is procedurally defaulted. Petitioner contends that, while this claim was never presented in state court, it was exhausted by way of the Arizona Supreme Court's independent sentencing review.

The Arizona Supreme Court has stated that it independently reviews each capital case to determine whether the death sentence is appropriate. In *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983), the court stated that the purpose of independent review is

to assess the presence or absence of aggravating and mitigating circumstances and the weight to give to each. *See also State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (1982). Claim 13 goes far beyond the stated scope of that review, and the Court finds it was not exhausted thereby. *Cf. Moormann v. Schriro*, 426 F.3d 1044, 1057-58 (9th Cir. 2005) (finding that Arizona's independent sentencing review did not exhaust numerous claims including several contesting the constitutionality of Arizona's death penalty statute).

Petitioner is now precluded by Arizona Rules of Criminal Procedure 32.2(a)(3) and 32.4 from obtaining relief on this claim in state court. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Thus, this claim is technically exhausted but procedurally defaulted, absent a showing of cause and prejudice or a fundamental miscarriage of justice.

As cause to overcome a finding of default, Petitioner alleges IAC on appeal. Before any ineffectiveness may be used to establish cause for a procedural default, it must have been presented to the state court as an independent claim. *Murray*, 477 U.S. at 489. While Petitioner alleged other IAC allegations in his PCR proceeding, he did not allege in his PCR petition or petition for review that his appellate counsel was ineffective for failing to raise Claim 13. (ROA-PCR 13; PR Dkt. 1.) Ineffectiveness claims regarding appellate counsel are now foreclosed in state court by Arizona Rule of Criminal Procedure 32.2(a)(3) and 32.4(a). *See Stewart v. Smith*, 202 Ariz. 446, 450, 46 P.3d 1067, 1071 (2002) (holding that if additional IAC allegations

are raised in a successive petition, the claims in the later petition necessarily will be precluded). Because the Arizona Supreme Court has not had a fair opportunity to rule on Petitioner's ineffectiveness claim alleged as cause, and Petitioner may not exhaust this claim now, it is technically exhausted but procedurally defaulted. *See Gray*, 518 U.S. at 161-62; *Coleman*, 501 U.S. at 735 n.1. Therefore, Petitioner's allegations of ineffective appellate counsel cannot constitute cause to excuse the default. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (ineffective counsel as cause can itself be procedurally defaulted). Because Petitioner has not established cause to overcome the default, the Court need not analyze prejudice. *See Thomas v. Lewis*, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991).

Claim 13 is dismissed as procedurally defaulted.

CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. The Court further finds that an evidentiary hearing in this matter is neither warranted nor required.[5]

CERTIFICATE OF APPEALABILITY

In the event Petitioner appeals from this Court's judgment, and in the interests of conserving scarce resources that might be consumed drafting and

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[5] The Court previously denied Petitioner's request for evidentiary development as to specific claims (Dkt. 115), but conducted an independent review as to all claims as required by Rule 8 of the Rules Governing Section 2254 Cases.

reviewing an application for a certificate of appealability (COA) to this Court, the Court on its own initiative has evaluated the claims within the petition for suitability for the issuance of a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

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 COA or state the reasons why such a certificate should not issue. 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." 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) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.* The Court finds that its procedural ruling finding Claim 1D procedurally defaulted in part, as discussed in this Order, is adequate to proceed on appeal.

The Court finds that reasonable jurists, applying the deferential standard of review set forth in the AEDPA, which requires this Court to evaluate state

court decisions in light of clearly established federal law as determined by the United States Supreme Court, could not debate its resolution of the merits of Petitioner's remaining claims as set forth in this Order and its Order of September 28, 2004 (Dkt. 115). Further, for the reasons stated in this Order and the Court's Order regarding Petitioner's motions for evidentiary development filed on September 28, 2004 (*id.*), the Court declines to issue a COA with respect to its rulings regarding evidentiary development or procedural bar.

Accordingly,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 58 is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered on November 8, 2001 (Dkt. 3) is **VACATED**.

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

> Whether Claim 1D of the Amended Petition – alleging ineffective assistance of counsel for failure to conduct an adequate investigation for trial and sentencing – is, in part, procedurally barred.

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 29th day of September, 2008.

s/ Frank R. Zapata
FRANK R. ZAPATA
United States District Judge

Copies Distributed MM 9/29/08
Resnick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WO

No. CV-01-00592-TUC-TMB

[Filed: January 20, 2017]

Barry Lee Jones,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

DEATH PENALTY CASE

ORDER

This matter is before the Court on limited remand from the Ninth Circuit Court of Appeals. (*See* Doc. 158.)[1] The court of appeals has ordered this Court to reconsider, in the light of intervening law, including *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Petitioner's claim of ineffective assistance of counsel ("IAC") in

[1] "Doc." refers to numbered documents in this Court's case file (prior to August 2005) and this Court's electronic case docket docket (beginning August 2005).

failing to conduct an adequate investigation at the guilt and penalty phases of trial ("Claim 1D").[2]

This Court ordered supplemental briefing to address whether cause exists under *Martinez* to excuse the procedural default of Claim 1D, and whether Petitioner is entitled to habeas relief under 28 U.S.C. § 2254 on the claim. (Doc. 161.) The Court also ordered Petitioner to include any requests for evidentiary development with the supplemental briefing (*Id.*)

Petitioner filed a supplemental brief addressing the applicability of *Martinez* to Claim 1D, arguing that post-conviction counsel acted ineffectively in litigating claims against trial counsel in state court, and requesting evidentiary development and an evidentiary hearing on the procedural default of these claims. (Doc. 167.) Respondents filed a response, and Petitioner filed a reply. (Docs. 175, 180.) For the reasons set forth below, the Court finds that an evidentiary hearing is necessary to determine whether Petitioner can establish cause to excuse the procedural default of Claim 1D.

PROCEDURAL BACKGROUND

On April 14, 1995, Petitioner was convicted of one count of sexual abuse, three counts of child abuse, and felony murder. *State v. Jones*, 188 Ariz. 388, 391, 937

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[2] This Court previously addressed a narrow subset of Claim 1D–the allegation of ineffectiveness based solely on counsel's failure to meet with Petitioner a sufficient number of times to prepare an adequate defense–and denied this portion of the claim on the merits. (Doc. 141 at 24.) That portion of Claim 1D is not at issue in this limited remand.

P.2d 310, 313 (1997). The convictions were predicated on the physical and sexual injuries inflicted on four-year-old Rachel Gray, and the failure to obtain medical care for her injuries, which led to her death. The trial judge found the existence of two aggravating factors: that the murder was especially cruel and that the victim was under the age of 15. The judge found no mitigating factors sufficiently substantial to call for leniency, and sentenced Petitioner to death for the murder conviction. The Arizona Supreme Court affirmed Petitioner's convictions and sentences. *Jones*, 188 Ariz. 388, 937 P.2d 310. Petitioner filed a petition for post-conviction relief ("PCR") with the trial court. After an evidentiary hearing, the PCR petition was denied in its entirety. (ROA-PCR 31.)[3] The Arizona Supreme Court summarily denied Petitioner's Petition for Review. (PR 7.)

Petitioner initiated this federal habeas proceeding on November 5, 2001 (Doc. 1), and filed an amended petition on December 23, 2002, raising 21 claims. (Doc. 58). In Claim 1D of the petition, he alleged, in part, that counsel was ineffective for:

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[3] "ROA-PCR" refers to the docket numbers from the one-volume record on appeal from post-conviction proceedings prepared for Petitioner's petition for review to the Arizona Supreme Court (Case No. CR-01-0125-PC); "PR" refers to the docket numbers of documents filed at the Arizona Supreme Court for that petition for review proceeding. "RT" refers to the reporter's transcripts and certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court on December 12, 2001. (Doc. 16.)

> 1) failing to adequately investigate potential other suspects and crucial witnesses; failing to raise legal challenges to eyewitness identifications; and failing to adequately challenge blood-spatter testimony;
>
> 2) failing to hire a forensic pathologist to challenge the State's evidence regarding the nature and timing of the victim's injuries; and
>
> 3) failing to have a qualified mental health expert examine Petitioner before sentencing; failing to adequately explain the effect of Petitioner's drug addiction to the sentencing court; and failing to investigate and present mitigating evidence of Petitioner's social history.

(*Id.* at 37–96.) The parties briefed the claims (Docs. 69, 79) and motions for evidentiary development (Docs. 89, 90, 101, 102, 108, 109, 113). Petitioner asserted PCR counsel's ineffectiveness as cause to excuse the procedurally defaulted portion of Claim 1D. (Doc. 79, at 25, 60–62.) This Court determined, consistent with then-governing Supreme Court precedent, *see Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991), that PCR counsel's purported ineffectiveness did not constitute cause for the procedural default because "there is no constitutional right to counsel in state PCR proceedings." (Doc. 115, at 9–11.) The Court ordered supplemental briefing regarding Petitioner's allegation that it would be a fundamental miscarriage of justice not to review on the merits the entirety of Claim 1D. (*Id.* at 40.) The Court denied relief on September 29, 2008, concluding that Petitioner had not satisfied the

fundamental miscarriage of justice standard to overcome the default of Claim 1D. (Doc. 141 at 23.)

While Petitioner's appeal from this Court's denial of habeas relief was pending, the Supreme Court decided *Martinez v. Ryan*, holding that where 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 the claim. 132 S. Ct. at 1320. Subsequently, Petitioner moved the Ninth Circuit to stay his appeal and grant a limited remand in light of *Martinez*. The Ninth Circuit granted the motion and remanded for reconsideration of Claim 1D, stating that "Claim 1D is for purposes of remand substantial." (Doc. 158) (citing *Martinez*, 132 S. Ct. 1309; *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc); *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc)).

In September 2015, the parties completed supplemental briefing in this Court.

DISCUSSION

Petitioner seeks reconsideration based on *Martinez* for allegations in Claim 1D that trial counsel was ineffective for: (1) failing to investigate and present evidence to test the veracity or reliability of any of the State's evidence, including the medical evidence and the question of the timeline between injury and death;

and (2) failing to conduct a reasonably sufficient mitigation investigation for sentencing.[4]

To establish cause to excuse the default of Claim 1D, Petitioner argues that PCR counsel performed deficiently within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), when he failed to investigate and present a substantial claim that the guilt phase and sentencing phase performance of trial counsel was constitutionally deficient. (Doc. 167 at 141–156.) Respondents assert that Petitioner has not shown that PCR counsel was ineffective in failing to raise Claim 1D because PCR counsel raised multiple IAC claims and attempted to obtain additional resources. Respondents also argue that Claim 1D fails on the merits and therefore Petitioner cannot establish cause under *Martinez* because he was not prejudiced by PCR counsel's performance as there was no "reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." (Doc. 175 at 14) (quoting *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 818 (9th Cir. 2015) (en banc)). After due consideration the Court finds that an evidentiary hearing is necessary to determine whether Petitioner can establish cause to excuse the procedural default of Claim 1D.

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[4] Hereafter, the Court will refer to this portion of Claim 1D alleging trial counsel was ineffective for failing to investigate evidence in the guilt-phase and penalty-phase of trial as two separate sub-claims: "Claim 1D (Guilt Phase)" and "Claim 1D (Penalty Phase)," respectively.

I. Applicable Law

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 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*, 133 S. Ct. at 1918 (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 1318–19, 1320–21).

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* . . . ,' 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*, 745 F.3d at 377; *Dickens*, 740 F.3d at 1319–20; *Detrich*, 740 F.3d at 1245.

In *Clabourne*, the Ninth Circuit summarized its *Martinez* analysis.[5] 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 postconviction proceeding was ineffective under the standards of *Strickland*. *Strickland*, in turn, requires him to establish that both (a) post-conviction

[5] Though Petitioner and Respondents take issue with this methodology, both parties agree it is binding on this Court.

> 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)). The United States Supreme Court has defined "substantial" as a claim that "has some merit." *Martinez*, 132 S. Ct. at 1318. Stated inversely, a claim is "insubstantial" if "it does not have any merit or . . . is wholly without factual support." *Martinez*, 132 S. Ct. at 1319.

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 court "cannot 'second-guess' counsel's decisions or view them under the 'fabled twenty-twenty vision of hindsight.'" *Edwards v. Lamarque*, 475 F.3d 1121, 1127 (9th Cir. 2007) (quoting *LaGrand v. Stewart*, 133 F.3d 1253, 1271 (9th Cir. 1998)). "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." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998).

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.

II. Claim 1D (Guilt Phase)

Petitioner alleges his Sixth Amendment right to effective assistance of counsel was violated by trial counsels' failure to conduct a sufficient trial investigation and for inadequately investigating the police work, medical evidence, and timeline between Rachel's fatal injury and her death. Petitioner further alleges that post-conviction counsel performed deficiently within the meaning of *Strickland* when he failed to investigate and present this substantial IAC claim, thus excusing its procedural default.

A. Relevant Facts

This Court previously summarized the facts relevant to Claim 1D (Guilt Phase) in its Order finding that Petitioner's new evidence was insufficient to demonstrate a fundamental miscarriage of justice to excuse the procedural default of the claim. Therefore, most of the factual background, as well as much of the new evidence, set forth herein repeats what has previously been set out in the Court's September 2008 order addressing Claim 1D. (*See* Doc. 141 at 9–16.)

The main thrust of the prosecution's case against Petitioner had been that Rachel was solely in his care on the afternoon of May 1, 1994, when her injuries, including the fatal abdominal injury, were inflicted. The State argued that no other adult had the opportunity to inflict the injuries, which the experts deemed non-accidental. Petitioner's defense was that he had no motive to commit the crime, the evidence was all circumstantial, and the State failed to prove

beyond a reasonable doubt that he had inflicted the injuries.

Rachel's body was examined by Steven Siefert, an emergency room doctor; by Sergeant Sonya Pesquiera of the Pima County Sheriff's Office; and by the medical examiner, John Howard. Dr. Siefert estimated that Rachel had been dead for two to three hours when she was brought to the hospital at 6:16 a.m. on May 2, 1994. (RT 4/6/95 at 77, 80.) Rachel's body was covered with bruises and abrasions, primarily on the front of her body and across her face and forehead, but also on her back, arms, and legs. (*Id.* at 81.)

Rachel had a large bruise on each side of her forehead, as well as intense coloration on the outer edge of her right eye and discoloration below the eyes. (*Id.* at 95–96.) Dr. Howard assessed the purple coloration on Rachel's face as injuries occurring probably one day prior to death, but there was also some green discoloration which would have been present for several days. (RT 4/12/95 at 116.) Rachel had a head laceration, above and behind her left ear, which was one inch long and went down to the skull bone; Dr. Howard assessed it as having been inflicted one to two days prior to death. (*Id.* at 116–17.) Rachel had bruising around the left side of her face and behind her ear, as well as bleeding into both ear drums, consistent with a slap or blow to the side of the head. (RT 4/6/95 at 90–91; RT 4/12/95 at 140–41.) Rachel also sustained internal bleeding due to blunt force trauma to the back of her neck, as well as diffuse bleeding into the deep layers of her whole scalp. (RT 4/12/95 at 137–38.)

Rachel had four or five small bruises on her right forearm and several on her right hand, as well as six bruises on her left forearm and hand, injuries typically associated with trying to ward off an impact (defensive type wounds). (RT 4/6/95 at 85–87, 88–89; RT 4/12/95 at 39–40, 150–51.) Dr. Howard opined that the bruises and abrasions on her hand and arm were inflicted approximately one day prior to death. (RT 4/12/95 at 113–14.) This included swelling in her left middle finger that indicated injury to bone or ligaments; that injury would have been painful and noticeable within an hour of its infliction. (RT 4/6/95 at 89, 104–05; RT 4/12/95 at 114.) Dr. Howard identified abrasions and contusions on Rachel's right and left thigh, both knees, and her right leg; they varied in appearance from less than a day old to approximately five days old. (RT 4/12/95 at 113.) He indicated that much of the bruising on Rachel's front side was consistent with having been inflicted by knuckles but he could not identify with any particularity what actually was used to inflict the injuries. (RT 4/12/95 at 126, 160.) Rachel had contusions and abrasions on her back, her buttocks, and on the back of her left thigh, which were inflicted within one to two days prior to her death. (*Id.* at 112; RT 4/6/95 at 93.) On her front torso, Rachel had 20 to 30 bruises, large areas of abrasions, and a red bruise area under her right arm. (RT 4/6/95 at 93–94; RT 4/12/95 at 115.) Some of these bruises were recent, within the prior day to two days, while others were of a coloration indicating an origin of several days prior to death. (RT 4/12/95 at 115.) There was a linear bruise pattern to the right of her navel; this injury was consistent with the pry bar found underneath the driver's seat of Petitioner's van but could have been

caused by many different objects. (RT 4/12/95 at 78, 128, 160.)

Rachel had blunt force injuries to her labia, bruising and scrapes, and her vagina had a half-inch tear extending down from it. (*Id.* at 134.) The medical examiner determined that the injury to Rachel's genitalia occurred about one day prior to her death. (*Id.* at 133.) These injuries were non-accidental, would have been painful, and were consistent with penetration or attempted penetration. (*Id.* at 134–36.)

Internally, Rachel had sustained blunt force injury to her abdominal organs, causing a tear of the small bowel, and bruising of the tissues around the small bowel, the wall of the large bowel, and the attachments of the intestine to the back of the abdominal wall. (*Id.* at 141–42.) The rupture of her bowel caused inflammation and irritation of the lining of the abdominal tissues, a condition called peritonitis (*id.* at 145); when this type of damage is not repaired, it causes death over a period of hours to days (RT 4/6/95 at 115). The amount of force required to rupture a healthy bowel is equivalent to a fall from more than two stories, an automobile accident at greater than 35 miles per hour, or a forceful directed blow to the abdomen (*id.* at 113–14; RT 4/12/95 at 151, 153–54); Dr. Siefert did not believe enough force for such an injury could be inflicted by a child under the age of six (RT 4/6/95 at 116). Rachel would have experienced pain at the time of the blunt force injury; Dr. Howard indicated she would then have had continual abdominal pain while Dr. Siefert stated that the pain might decrease initially, but wouldn't go away. (*Id.* at

119; RT 4/12/95 at 146.) Over the next several hours, a person with this condition would lose bowel function causing nausea, vomiting, and dehydration. (RT 4/6/95 at 119–20; RT 4/12/95 at 146.) Dr. Howard opined that the injury was consistent with having occurred concurrent with many of her other injuries, approximately one day prior to death; he stated that the abdominal laceration could have occurred between 2:00 and 6:00 p.m. on May 1. (RT 4/12/95 at 148–49.)

Dr. Siefert opined that Rachel's bruising would have begun to appear within a few hours of infliction, and he assessed that 95 percent of Rachel's injuries had occurred within 12 to 24 hours before her death. (RT 4/6/95 at 121, 128, 103–108, 111, 127; RT 4/12/95 at 94.) Some of the bruises were a few days old, including the bruising beneath Rachel's eyes. (RT 4/6/95 at 103, 105, 111; RT 4/12/95 at 37.) Dr. Siefert thought some of the bruises and the head wound could have been incurred in a fall out of a van, however, he concluded that Rachel had incurred non-accidental trauma possibly at multiple times by multiple mechanisms. (RT 4/6/95 at 128–29, 135; RT 4/12/95 at 35.) Similarly, the medical examiner explained that the number and multiple locations of the injuries were not consistent with a simple childhood accident, but were consistent with having been beaten. (RT 4/12/95 at 137.) He concluded that the injuries he assessed as being approximately one day old were consistent with having been inflicted between 2:00 and 5:30 p.m. on May 1. (*Id.* at 117.) Dr. Howard determined that Rachel died of blunt abdominal trauma that caused a laceration of the small bowel and that it was a homicide. (*Id.* at 155.)

Joyce Richmond, a former girlfriend of Petitioner's, spent Saturday night, April 30, with Petitioner until approximately 3:00 a.m. (RT 4/11/95 at 135–36.)

Rebecca Lux, Rachel's ten-year-old sister, testified that she had been living with Rachel, her brother, and her mom (Angela Gray) in Petitioner's trailer for a few months up to and including May 1. Petitioner never hit Rebecca, and she never saw him hurt Rachel or her brother. On Saturday night, April 30, Rachel seemed fine and ate dinner. On Sunday morning, May 1, Rebecca, Rachel, and their brother got up early, watched cartoons, and ate lunch until Petitioner got up around 2:30 or 3:00 p.m. She and her brother then asked if they could ride their bikes; later when she put her bike away to go to a friend's house she saw Petitioner and Rachel leave in Petitioner's van three times. Petitioner told her the first time they left that they were going to the store to get some things for dinner; Rachel looked fine after the first and second trip with Petitioner. The last time Petitioner and Rachel left, he told Rebecca they were going to his brother's house. When Rebecca got back from her friend's house around 6:00 or 7:00 p.m., Rachel was on the couch; she was pale, throwing up, her head was bleeding, and she had bruises on her face, hands, and fingers. Petitioner left for a time and when he returned, Rebecca's mother and Petitioner had an argument outside. At some earlier time while they were living with Petitioner, Rachel had acted scared of Petitioner and did not want to be near him. (RT 4/11/95 at 14–81.)

On May 1, the St. Charles family, who lived in a bus at a transient camp, got a visit from Petitioner around

noon or thereafter; Ron St. Charles thought Petitioner seemed angry. (RT 4/12/95 at 7–9, 17.) That same day, Petitioner's neighbor at the Desert Vista trailer park, Michael Fleming, saw Rachel looking sick between 2:00 and 5:00 p.m.; she was pale with dark circles under her eyes, and she looked wet and like she wanted to vomit, but he did not see any blood. (RT 4/7/95 at 164–66, 168, 171–73.) Petitioner, Angela Gray, and the children were supposed to attend Petitioner's nephew's birthday party on May 1, but they never showed up. (RT 4/11/95 at 119–24.)

On May 1, Norma Lopez sent her children Ray and Laura to the Choice Market on Benson Highway at three or four o'clock in the afternoon. When they returned, they told her they had seen a white man with messy brown hair driving a yellow van and hitting a little blond-haired girl in the face and chest and the girl was crying. The next day on the news Ms. Lopez heard that a man had been arrested in relation to the death of a little girl. When she had the children watch the news they identified that person as the man they had seen in the van. (RT 4/7/95 at 4–62.) Nine-year-old Ray Lopez indicated that he had gone to the Choice Market with his twin sister around 5:00 p.m. On the way home, he testified that he saw a white man with bushy hair driving by in a yellow van, hitting a little white girl in the chest with his fist and elbow. He did not see the driver's face, only his hair from behind, but he identified a picture of Petitioner at trial. However, he stated that a photograph of Petitioner's van was not the van he saw because the windows were different. (*Id.* at 4–32.) Ray's sister, Laura Lopez, recalled going to Choice Market on a Sunday and on the way home

seeing a white man driving a yellow van. She said the guy was ugly with puffy hair and he was hitting a little white girl on the left side of her face with his elbow and the girl was crying. Laura said she saw them through the front window of the van and could see part of the side of each of their faces. She remembered seeing the man from the van on the news that same day. (*Id.* at 32-46.)

Between 3:15 and 5:00 p.m. on May 1, 1994, Petitioner went into a Quik-Mart on Benson Highway. The store clerk testified that Petitioner got ice and that he was with a little girl who sat on a ledge outside the store. Although a lot of Rural Metro personnel regularly came into the Quik-Mart, the clerk did not notice an EMT treating the little girl outside the store and believed she would have been aware if that had occurred. (RT 4/7/95 at 142-149, 158–59). At trial, the State contended that Petitioner lied about having Rachel's head wound examined at the fire station by a paramedic. (RT 4/6/95 at 45–46.) Petitioner's counsel countered that Petitioner never said he went to the fire station but that a Rural Metro EMT who happened to be at the Quik-Mart had examined Rachel's head wound. (*Id.* at 71–72.)

On May 1, between 7:00 and 8:00 p.m., Richmond stopped by Petitioner's trailer and saw Rachel on the couch with a bleeding head; she said Rachel did not have bruises on her face or hands. (RT 4/11/95 at 141, 151–53.) Richmond's adult son was at Petitioner's trailer with his mother on the evening of May 1 and saw that Rachel's head was bleeding; he saw no

bruising. When he asked, Petitioner stated that he had taken Rachel to the fire department. (*Id.* at 154–65.)

Rebecca woke early in the morning on May 2 and found Rachel in the bedroom doorway; she put her in bed. Rebecca next woke to her mother yelling, and Petitioner and her mother took Rachel to the hospital. (*Id.* at 52-54.) Petitioner took Rebecca and Brandi to the St. Charles's camp around 7:30 a.m. (*Id.* at 55–56, 143; RT 4/12/95 at 10–11.) Law enforcement located Petitioner at St. Charles's camp after 8:00 a.m. on May 2, 1994, and transported him to the Sheriff's Department. (RT 4/6/95 at 167,169, 172.) On the way there, Petitioner was upset, said there was something wrong with his little girl, and asked if they would take him to see her. (*Id.* at 173.)

Blood consistent with having come from Rachel was found on four pillowcases, a wash cloth, a comforter, and a bed sheet found in Petitioner's trailer; the fingertip area, the heal of the hand, and on one side of a glove found on the fence in front of Petitioner's trailer; a Circle K bag, carpet samples, and the front passenger seat's upholstery from Petitioner's van; and blue jeans worn by Petitioner at the time of his arrest. (RT 4/7/95 at 85, 87–89, 107, 108–09, 118, 120–21, 126–27; RT 4/11/95 at 102-107, 109.) A substance consistent with vomit was found on Rachel's pajamas and a sleeping bag. (RT 4/11/95 at 98–99.) There was a trace of blood not further identified on the red T-shirt and boots, but not the denim jacket, worn by Petitioner at the time of his arrest; no blood was found on the tools from Petitioner's van. (*Id.* at 95, 100–01; RT 4/12/95 at 6 1–62.) On the van carpet between the

seats, there appeared to be impression stains (caused by a bleeding wound resting against a surface) where blood had soaked through. On the van's passenger seat and some of the carpet there were spatter stains consistent with a person that has a bleeding injury being struck or shaken causing the blood to spatter out. (RT 4/12/95 at 72-73.)

B. Analysis

Petitioner contends in Claim 1D (Guilt Phase) that counsel was ineffective for failing to conduct a sufficient trial investigation and for inadequately investigating the police work, medical evidence, and timeline between Rachel's fatal injury and her death. (Doc. 58 at 38–66.) Petitioner further contends the procedural default of this claim can be excused by the deficient performance of post-conviction counsel within the meaning of *Strickland* when he failed to investigate and present a substantial claim that the guilt-phase performance of trial counsel was constitutionally deficient. (Doc. 167 at 144–52.)

Because the Ninth Circuit has already found the remanded claims substantial, "prejudice" under *Martinez* has already been established. (*See* Doc. 158.) Thus, whether this Court can consider the merits of the underlying trial IAC claim turns on whether Petitioner has demonstrated "cause" to excuse the procedural default—that is, whether post-conviction counsel's performance was ineffective under *Strickland*. Determining whether the result of the PCR proceedings would have been different requires consideration of the underlying claim of trial counsel IAC, including whether trial counsel performed

deficiently and whether there was a reasonable probability that the result of the trial would have been different. *Clabourne*, 745 F.3d at 382.

For the reasons discussed below, the Court cannot say based on the available record that Claim 1D (Guilt Phase) is plainly meritless or that there is no reasonable probability of a different outcome had PCR counsel presented Petitioner's guilt-phase IAC claim to the state court. Therefore, a hearing is necessary to allow Petitioner an opportunity to demonstrate "cause"—whether PCR counsel was ineffective—under *Martinez*. *See Dickens*, 740 F.3d at 1321. Because 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," *see Clabourne*, 745 F.3d at 377–78, this Court begins its analysis with a look at the strength of Petitioner's guilt-phase IAC claim.

Petitioner's primary argument is that trial counsel failed to conduct any investigation to assess the validity of the State's evidence that Rachel suffered her fatal injury between 2:00 p.m. and 6:00 p.m. on Sunday, May 1, when it is undisputed that Rachel was principally in Petitioner's care. Defense counsel's theory at trial was that the State lacked proof that Petitioner murdered Rachel, and that there was no physical evidence tying Petitioner to the crime. (RT 4/6/95 at 58, 73.) Defense counsel presented no experts of his own, and conducted a weak cross-examination of the State's experts in an attempt to support this argument. Defense counsel was able to establish,

through cross examination of Dr. Siefert, that his examination of Rachel's body was fairly cursory, and that her body did not look like it would have at the time of death. (*Id.* at 122, 126.) Dr. Siefert clarified on cross examination that the trauma that produced the majority of bruises would have occurred 12 to 24 hours before the time of death, but agreed that it could have taken several hours for them to actually appear as bruises, and that the appearance of bruises was dependent on many speculative factors. (*Id.* at 127–128.) Defense counsel also confirmed with Sergeant Pesqueira that the vast majority of bruises were caused within the same period of time. (4/12/95 at 94.) Defense counsel was able to elicit that Dr. Howard could not identify, with particularity, the instrument that inflicted Rachel's injuries. (*Id.* at 160.) Sergeant Pesquiera confirmed that numerous objects could have caused the abdominal injury, not just the pry bar. (*Id.* at 89.) Defense counsel was also able to establish that even though Rachel appeared to have injuries that could have been scratches, no fingernail scrapings were taken from Petitioner. (*Id.* at 91, 160.) Critically, defense counsel did not challenge any of the State's experts' conclusions regarding the timing of Rachel's fatal injuries. Petitioner contends that forensic evidence was vital to proving the State's case against Petitioner, and that it was equally vital for defense counsel to understand that scientific evidence and be prepared to challenge it.

Petitioner contends that counsel was put on notice for the need to further investigate by: (1) their own independently hired investigator, who, after conducting an initial investigation, informed counsel that he

believed Petitioner was innocent and requested additional funds to further the investigation (*see* Doc. 167, Ex. 34 at ¶ 6.); (2) Dr. Howard's pre-trial interview in which he disclosed that he found "microscopic" evidence to put the time of Rachel's scalp injury as "probably two days old" and perhaps "72 hours and older" (*see* Doc. 167, Ex. 11 at 4, 9) and his testimony at Angela Gray's trial which described the autopsy chemistries for both the small bowel and vaginal injuries as most consistent with infliction 24 hours prior to death (*see* Doc. 96, Ex. 9, RT 3/28/95 at 99–101); and (3) pre-trial interviews and testimony from Rebecca that Petitioner had only taken two trips with Rachel in his van, and appeared fine after each trip (*see* Doc. 167, Ex. 17 at 6–7; Ex. 18 at 11–12; Doc. 96, Ex. 9, RT 3/24/95 at 69–71).

Had counsel retained forensics experts and investigated the State's "time of injury" evidence, Petitioner contends he would have uncovered proof that Rachel's injuries could not have been inflicted any time on May 1. Petitioner asserts that there is no reliable scientific evidence to support the conclusion that any of Rachel's injuries were inflicted on the afternoon of May 1, 1994.[6] Petitioner's support for this argument comes

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[6] In addition to failing to investigate and challenge the State's "time of injury" evidence, Petitioner also alleges that trial counsel and PCR counsel failed to investigate and challenge additional evidence and testimony elicited by the State during Petitioner's trial in support of his conviction, such as blood evidence and eyewitnesses statements. Because the Ninth Circuit has already determined that Petitioner's claim is not plainly meritless based on the "time of injury" evidence, the Court does not summarize this additional evidence at this time.

principally from three sources: declarations and reports from Dr. Janice Ophoven, a forensic pathologist, and Dr. Mary Pat McKay, an emergency medicine physician, specializing in trauma care (Doc. 167, Exs. 3, 9), and Dr. Howard's testimony from Angela Gray's trial (Doc. 96, Ex. 9).

Petitioner submits a declaration and three supplemental reports by Dr. Janice Ophoven. (Doc. 167, Exs. 4–7.) Dr. Ophoven reports that Rachel "died from a ruptured duodenum with subsequent severe dehydration, shock and eventually peritonitis." (*Id.*, Ex. 6 at 3.) Dr. Ophoven explains that, although the initial injury is painful, there can be a recovery from this initial pain within a few hours, and a lack of obvious symptoms thereafter. (*Id.*) A child can be "up and around, able to walk, talk and most importantly drink" with waxing and waning symptoms "until the child slips into a coma." (*Id.*) For this reason, the diagnosis may be delayed for four or five days. (*Id.*) Based on Rachel's post-mortem abnormal chemistries, which showed a diagnostic pattern of dehydration, and her significantly decreased weight, Dr. Ophoven opined that Rachel's bowel laceration had to be present more than 24 hours, and possibly longer than 48 hours prior to her death. (*Id.*, Ex. 7 at 1.) Dr. Ophoven concluded that "[t]he evidence shows that the fatal injuries to Rachel Gray could not possibly have been inflicted on the day prior to her death" and that the "veracity of this evidence is as scientifically precise as any forensic determination available in medical science." (*Id.* at 2) (emphasis omitted). Further, she concluded that the abdominal injury was inflicted significantly earlier than Rachel's vaginal injuries, perhaps even days prior.

(*Id.*, Ex. 6 at 3.) More recently, Dr. Ophoven has concluded that the vaginal injury itself did not occur in the few days prior to her death, (*id.*, Ex. 7 at 1), and that "the visual determination of the age of any bruise is scientifically unreliable" (*id.* at 3). Finally, she stated that Rachel was subjected to "multiple episodes of inflicted injury," and opined that Rachel's growth history and multiple bruises were "consistent with a diagnosis of a chronically abused child." (*Id.*, Ex. 6 at 4.)

At the request of Petitioner, Dr. McKay reviewed Rachel's case record and medical reports to provide an opinion on the nature of her injuries and their potential etiology as well as the timeline from injury to the appearance of symptoms to death. (Doc. 167, Ex. 10-B at 1.) Additionally, Dr. McKay performed a review of the literature and identified at least 160 cases of duodenal perforation in children where the timeline was described from injury through diagnosis, treatment, and outcome. (*Id.*) Dr. McKay explained that, following injury, digestive fluids and food enter the duodenum leak into the retroperitoneal space, causing an inflammatory reaction. (*Id.* at 3.) Initially there is pain when the injury occurs, but it may not be significant immediately after that. (*Id.*) As time progresses, adjacent tissues become inflamed, and this continues into peritonitis. (*Id.*) At this time the child's pain will begin to increase and may be quite exquisite, the child will complain and begin to vomit, and ultimately the inflammatory response progresses and becomes systemic and the body begins to shut down. (*Id.*) The child becomes lethargic, then somnolent, and finally breathing slows and the heart stops. (*Id.*) The

progression from injury to death in Rachel's case required a significant amount of time, though the exact timing in Rachel's case is not clear. (*Id.*) Dr. McKay found several cases in her literature review where the diagnosis was delayed as long as four to seven days, but even then, with appropriate treatment, the child survived. (*Id.*) Dr. McKay was unable to find any cases of death from an isolated duodenal laceration where death resulted in less than 48 hours, and found nothing in Rachel's medical history to suggest she was somehow more susceptible to early death from this injury. (*Id.*) Dr. McKay did note that it was likely that Rachel was underfed, but that nothing in the autopsy findings or photos suggests she was severely malnourished. (*Id.* at 4.) In Dr. McKay's opinion, Rachel's duodenal injury occurred no sooner than 36 hours prior to death and likely occurred much earlier. (*Id.* at 5.)

Dr. Howard, the medical examiner who testified at trial, submitted a 2004 declaration, in which he indicated that the laceration of Rachel's bowel could have occurred greater than 24 hours before her death, perhaps longer than 48 hours, as delayed onset of symptoms is possible with this type of injury. (Doc. 167, Ex. 1 at 1–2.) Further, Dr. Howard stated that the "injuries to Rachel Gray's vaginal area showed characteristics consistent with hours to perhaps days elapsing between the time of her abdominal injury and her vaginal injury." (*Id.* at 3.) Similarly, Dr. Howard attested that the older bruises on Rachel's body "could have been consistent with the blunt force trauma to Rachel Gray's abdomen." (*Id.*) Petitioner asserts that the testimony of Dr. Howard at Angela Gray's trial

demonstrates that Dr. Howard intentionally concealed two critical facts at Petitioner's trial. First, Dr. Howard testified in Angela Gray's trial that the least amount of time that it would take from the injury until the time of death was 12 hours. (Doc. 96, Ex. 9 at 100.) Petitioner asserts this testimony calls into question his testimony at Petitioner's trial, that the injury could have been inflicted during the hours between 2:00 and 6:00 pm. Second, Petitioner asserts that Dr. Howard concealed that his findings at autopsy were that the fatal injury was "most consistent" with one that was inflicted at least 24 hours prior to death; which proves that the injury could not have been inflicted during the afternoon of May 1. (*See* Doc. 96, Ex. 9, RT 3/28/95 at 101.)

The Court disagrees with this characterization of Dr. Howard's testimony. As previously noted, Dr. Howard has not retracted his testimony that the abdominal injury could have occurred on Sunday afternoon while Rachel was with Petitioner, or "any time on the 24 hours prior" to May 2. (RT 4/12/95 at 148; *see also* Doc. 141 at 17.) Nonetheless, as discussed below, the reports of Drs. Ophoven and McKay establish a colorable claim of IAC.

This Court previously analyzed much of the same new evidence Petitioner presents in his *Martinez* brief, and found that Petitioner failed to establish a fundamental miscarriage of justice under the "exacting" standard of an actual innocence gateway

claim.[7] (Doc. 141 at 18.) Specifically, this Court found Dr. Ophoven's testimony was "not enough to demonstrate that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt" because it did not "seriously call into question the jury's verdict" (*Id.*) Nonetheless, this Court did state that Dr. Ophoven's testimony was "compelling and may have been persuasive to some jurors in the first instance." (*Id.* at 22.) Moreover, Petitioner has now presented additional evidence that Rachel's vaginal injury was not inflicted on May 1, and that the reliability of dating injuries from bruises—a premise on which Dr. Siefert based his opinion that 95 percent of Rachel's injuries occurred on May 1—is scientifically unreliable. These facts, if true, challenge this Court's previous conclusion that "Dr. Ophoven does not call into question the trial testimony regarding the time-frame for Rachel's other non-fatal injuries—within one day of her death." (*See* Doc. 141 at 18.) These facts also make Petitioner's theory more, not less, plausible because a juror would not have to believe, as this Court previously found, "that at least two days before her death someone inflicted a fatal abdominal injury on Rachel (and she did not tell anyone) and that the following day she received additional serious injuries and extensive diffuse bruising during the time she was with Petitioner" (*Id.*).

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[7] To demonstrate a fundamental miscarriage of justicce based on factual innocence of the murder, 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).

Furthermore, in order to allege a colorable claim entitling Petitioner to an evidentiary hearing on this matter Petitioner must now meet a less demanding standard— he must allege facts that, if proven true, would "show that there was a reasonable probability that . . . the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The Court finds that Petitioner has alleged facts, that, if true, could prove that Rachel's fatal injury could not have been inflicted during the afternoon of May 1, and call into question the evidence that the majority of Rachel's other injuries, including her vaginal injury, occurred on May 1. This significantly discounts a central premise the State relied on in arguing Petitioner's guilt, and establishes a reasonable probability of a different outcome during the guilt phase of Petitioner's trial had this evidence been presented.

Petitioner asserts that PCR counsel was also ineffective because, despite being on notice that trial counsel failed to conduct a reasonable investigation, he also failed to conduct any outside investigation of Petitioner's case, performing only one read through of the file and failing to obtain funds for further investigation because he misunderstood the standards governing application of Arizona's indigent defense investigative assistance statute. Respondents argue that PCR counsel raised several IAC claims in Petitioner's PCR petition, and was granted an evidentiary hearing on several of those claims.

Respondents assert that PCR counsel is not required to raise every non-frivolous issue, but can decide which issues to raise, and this Court should presume counsel reasonably omitted Claim 1D because it is not stronger than the claims PCR counsel presented. (Doc. 175 at 13) (citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Respondents' presumption, however, is not supported by the record. Petitioner has alleged facts that suggest that PCR counsel performed deficiently by failing to conduct any investigation of prior counsels' representation. PCR counsel's billing records provide factual support that PCR counsel only reviewed the record in this case, and conducted no outside investigation, despite being on notice, for the same reasons discussed above in regards to trial counsel, that further investigation may have been necessary to make an informed, strategic choice. (*See* Doc. 167, Ex. 39.) These facts demonstrating the lack of any serious investigation into trial counsel's performance suggest that PCR counsel may not have conducted a strategic "winnowing" of claims, but may have failed to conduct a reasonable investigation in the first instance. *See Strickland*, 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.")

Respondents also assert that because Claim 1D fails on the merits, raising the claim would not have affected the PCR proceeding's outcome. Thus, Respondents conclude, even if PCR counsel performed deficiently, Petitioner has failed to establish cause under *Martinez* because there is "no reasonable probability that, absent

the deficient performance, the result of the post-conviction proceedings would have been different." The Court disagrees. First, as explained above, Petitioner's claim is not plainly meritless. In weighing the strength of Petitioner's trial counsel IAC claim, prejudice to the outcome of the PCR proceedings has been sufficiently alleged so as to mandate a hearing.

In conclusion, Petitioner has alleged a substantial claim of trial counsel ineffectiveness, thereby demonstrating "prejudice" under *Martinez*. Petitioner's claim is not plainly meritless. Because it is unclear from the record whether PCR counsel was ineffective under *Strickland* for failing to raise the claim in state court, a hearing is necessary to determine whether PCR counsel acted deficiently and whether there is a reasonable probability the result of the PCR proceedings would have been different. Assessing the latter will necessarily entail considering the strength of the defaulted IAC claim. *Clabourne*, 745 F.3d at 377–78.

III. Claim 1D – (Penalty Phase)

Petitioner alleges his Sixth Amendment right to effective assistance of counsel was violated by trial counsel's failure to conduct a sufficient mitigation investigation for sentencing. Petitioner further alleges that post-conviction counsel performed deficiently within the meaning of *Strickland* when he failed to investigate and present a substantial claim that the penalty-phase performance of trial counsel was constitutionally deficient, thus excusing the procedural default of this claim.

A. Relevant Facts

Following Petitioner's conviction, the trial court held an aggravation/mitigation hearing. Defense counsel presented testimony from a psychologist and six lay witnesses in an effort to establish both statutory and non-statutory mitigating factors. Dr. Joseph Geffen, a psychologist, conducted a mental health evaluation of Petitioner. (RT 6/13/95 at 75.) In preparation for the evaluation Dr. Geffen reviewed materials from Kino Community Hospital, the Pima County Jail, Vision Quest, and Southern Arizona Mental Health Center ("SAMHC"), and videotaped statements made by Petitioner to the police. (*Id.* at 75–79.) Dr. Geffen first discussed the kind of discipline Petitioner received as a child. Petitioner's mother, who had "involved herself in drinking alcohol" and found it "extremely difficult to discipline" her children, administered "whoopings" to Petitioner. (*Id.* at 80–81.) Dr. Geffen reported Petitioner tended to minimize this experience by stating that it wasn't abuse because he "deserved them." (*Id.*) Dr. Geffen explained that the kind of physical abuse a child receives has an influence on the way that child will relate to other people when they are adults. (*Id.* at 8 1–82.) Dr. Geffen also related that after Petitioner's father died when Petitioner was 11 or 12 years old, he began getting into trouble. (*Id.* at 82.) Dr. Geffen explained that the death of a father at that age would have a serious effect on a child in terms of how that child adjusted to the loss and how the child functions at school, at home, and in relating to other people as an adolescent or as an adult. (*Id.*)

After his father's death, Petitioner was referred to "Vision Quest," a juvenile program, for his incorrigible behavior. (*Id.* at 83.) Dr. Geffen opined that the conclusions he made based on his observations of Petitioner were compatible with those described by a doctor at Vision Quest—Petitioner appeared to have a very low frustration tolerance, was quite impulsive, lacked self-confidence, and had a poor self-image. (*Id.* at 83.) This lack of impulse control, Dr. Geffen concluded, could lead to some "fairly serious problems." (*Id.* at 84.) Dr. Geffen explained that he would expect a youth with Petitioner's problems to display anger and aggressiveness, and to have substance abuse issues. (*Id.* at 84.) Petitioner turned to substance abuse because he had not learned or been taught socially acceptable ways to deal with difficult feelings, emotions, thoughts, and ideas. (*Id.* at 85.)

Next, Dr. Geffen discussed an incident that occurred in 1992, in which Petitioner was referred to SAMHC for treatment after he put a gun to his head and threatened to kill himself and others, was abusing drugs very seriously, particularly cocaine and amphetamines, and had become mentally and emotionally disorganized, confused, depressed, and angry. (RT 6/13/95 at 86–87, 102.) Petitioner was referred to SAMHC for treatment; while there he exhibited similar problems to those documented at Vision Quest, only more severe. (*Id.* at 86.) Petitioner was discharged after a few sessions because he did not want to comply with the recommendation that he participate in a substance abuse program. (*Id.* at 88.)

Petitioner related to Dr. Geffen that he had been using amphetamines heavily in the six months prior to the murder. (*Id.* at 88–89.) Dr. Geffen explained that amphetamine use arouses physical and mental activity—predominantly uncontrollable, agitated, aggressive, and violent behavior. (*Id.* at 89.) Additionally, amphetamine use often corresponds to extended periods of little to no sleep, which contributes to loss of control, confusion, irritability, and overreacting to situations with aggression. (*Id.* at 90.)

Petitioner reported numerous head injuries to Dr. Geffen, including an incident where he lost consciousness after being hit in the head with a brick. (*Id.* at 90–91.) Dr. Geffen explained that head injuries can exacerbate problems a person has, making them more vulnerable to situational stress, drugs, or anything requiring the ability to think, reflect and to inhibit certain behaviors. (*Id.* at 91.) These deficits in so-called "executive" or "higher" brain function can occur with or without demonstrable cognitive impairment. (*Id.* at 92.)

Dr. Geffen noted that while incarcerated, Petitioner was receiving an antipsychotic medication, used primarily in cases where a person is agitated and possibly having psychotic thoughts. (*Id.* at 92–93.) Petitioner received the medication because he was quite agitated, difficult to manage, and was expressing feelings of suicide and homicide. (*Id.* at 95–96.)

Dr. Geffen concluded that Petitioner has "several problems," and one way they manifest themselves is in antisocial behavior. (*Id.* at 96.) Dr. Geffen testified that Petitioner's mental health problems originated at about

the time of the loss of his father. (*Id.* at 97.) Without a very clear adult authority model, he used drugs and sought acceptance and "good feelings" from his peers, the effect of which was "ruinous in terms of his self-esteem in terms of him just plain simply learning adaptive mechanisms to be able to survive in society and be a successful citizen." (*Id.*) Petitioner's prolonged use of substances "generated new problems" in terms of preventing him from learning how to solve problems, cope with difficult situations, and deal with strong emotions properly. (*Id.* at 97–98.) Though he concluded that Petitioner was legally sane, Dr. Geffen believed that Petitioner was unable to apply right and wrong the way a normal person would. (*Id.* at 98.) In other words, "he should not have been expected nor is he capable of functioning normally in conforming to society." (*Id.* at 99.)

Defense counsel presented testimony from Ronny Higgins, a former methamphetamine user and a resident and substance abuse counselor at Amity House, a drug treatment program. (RT 6/13/95 at 127–28, 136.) Higgins spoke with Petitioner in an effort to determine if Petitioner was truly a methamphetamine user. (*Id.* at 129.) After speaking with Petitioner, Higgins concluded that he was a heavy methamphetamine user and addict, to the extent he would go on week-long "runs," where he used methamphetamine for a period of up to six days without sleep. (*Id.* at 130.) Higgins opined that if Petitioner slept for approximately 18 hours just prior to the murder, that indicated he was just coming down off of a run, and had probably used within 26 hours. (*Id.* at 131.) In Higgins' experience, a person coming

down off of a run is very irritable, aggressive and violent. (*Id.* at 132–33.) Higgins believed it was not realistic to expect someone to stop using methamphetamine without support. (*Id.* at 135.)

Counsel presented testimony from Florence Jones, Petitioner's mother. Florence had an older son from a previous marriage, and had three sons, including Petitioner's twin, Larry, with her second husband. (RT 6/13/95 at 47–48, 59.) The marriage had its "ups and downs"; Florence recalled two "pretty bad fights" with her husband in front of the kids and recalled that one time, after her husband came home drunk, she stabbed him in the back with a paring knife. (*Id.* at 158–59.)

Of the twins, Petitioner developed normally and was the "happy-go-lucky" child, while Larry was "a little more serious." (*Id.* at 52-53.) As a young child, Petitioner received average grades, was never tested to see if he had any kind of learning problem, and behaved appropriately at school. (*Id.* at 55–56.) Florence was responsible for disciplining the children, and would use a switch or belt to give spankings or whippings a "[c]ouple of times a month" and smacked the children "occasionally." (*Id.* at 60–61.) When Petitioner was 11 or 12 the family moved from Georgia to Arizona, and at that time Petitioner started getting into trouble at school. (*Id.* at 64, 66.) Florence continued to punish Petitioner by taking away privileges and hitting or whipping him when he needed it. (*Id.* at 66.) Florence did not recall Petitioner ever suffering any kind of head injury or being knocked unconscious. (*Id.* at 70.) The school recommended

mental health services for Petitioner, but his father did not permit him to see anyone. (*Id.*)

When Petitioner's father's health began to decline, Petitioner started doing poorly in school. (RT 6/13/95 at 142.) Florence started receiving reports of serious problems a few months after Petitioner's father died, when Petitioner was about 15 years old. (*Id.* at 141, 143.) She became aware of Petitioner's use of marijuana around the same time. Florence did not recall any indication that Petitioner had any mental problems, but at the time she was drinking excessively. (*Id.* at 146.) Shortly after that he was sent to Vision Quest because he wouldn't mind and was getting into trouble with the police. (*Id.* at 143– 44.)

After Petitioner left Vision Quest, at age 18, he lived on his own and was able to maintain a job "[o]ff and on." (RT 6/15/95 at 150.) In 1986 he married Carol, the father of his two children. (*Id.* at 153.) The couple lived with Florence for a time when Carol was first pregnant, and moved out when his daughter was three years old. (*Id.* at 154.) During the time Petitioner was with Carol, Florence did not notice that he had any problems and heard no complaints of domestic violence. (*Id.* at 154.) Petitioner did use marijuana, but it made him calmer. (*Id.* at 155.) Florence did not recall seeing Petitioner spank or act inappropriately with the children, and had never heard that Petitioner was mistreating anyone in his family. (*Id.* at 163.) At some point, the couple separated because Petitioner was having relations with other women; Carol took the children and Petitioner "more or less went crazy." (*Id.* at 157–58, 161.)

Deborah Wheeler, a detention officer for the Maricopa County Sheriff's Department, was married to Petitioner's older brother Otis and met Petitioner around 1977. (*Id.* at 170–71.) Although most of Wheeler's relationship with Petitioner was before he became a father, Wheeler had an opportunity to observe Petitioner with his children, and described him as a very good father. (*Id.* at 172–73.) Petitioner had a good relationship with Wheeler's children, and was very respectful around Wheeler. (*Id.* at 174.)

Dennis Hatt, a mechanic and former manager at a Chevron station where Petitioner worked for a year and a half, testified that Petitioner was a good, dependable, and respectful employee. (RT 6/13/95 at 15–17.)

Petitioner's girlfriend, Joyce Richmond, and her teenage daughter, lived with Petitioner and his daughter in his trailer on Benson Highway for approximately a year. (*Id.* at 178–81.) She moved out approximately three to four months before he was arrested. (*Id.* at 180.) Petitioner had responsibility for disciplining both girls when they were together. (*Id.* at 181.) The harshest discipline he handed out was to ground them to their rooms for 15 minutes. (*Id.* at 181–82.) Petitioner never hit or treated either girl inappropriately. (*Id.* at 182.) Richmond was aware that Petitioner was using methamphetamine during the time they were together. When he used he would stay up for three or four nights in a row, then sleep all night and most of the day. (*Id.* at 183–84.) When Petitioner was using, Richmond didn't notice any change in his behavior; he had a lot of hobbies and home projects he

would do all night long, but he was never mean. (*Id.* at 185–186.) She saw him using methamphetamine on Saturday night prior to the murder. (*Id.* at 188.) She knew he had methamphetamine on Friday night, but couldn't tell if he was using it because, other than sleeping, he never acted any different when he was using. (*Id.* at 189.)

LeAnne Jones, Petitioner's sister-in-law, met Petitioner when she worked at a Chevron station where Larry worked. (*Id.* at 193–94.) Petitioner and his daughter lived with LeAnne and Larry, and LeAnne's two daughters, ages seven and nine, from approximately late 1992 to early 1994. (*Id.* at 195–96.) When he disciplined any of the children he would yell at them to behave, or talk to them. (*Id.* at 197–98.) He never spanked the children, and they never complained that he was inappropriate with them. (*Id.* at 198.) LeAnne was aware that Petitioner used methamphetamine; when he did he seemed more "antsy, busy. In a hurry." (*Id.* at 202–03.) He would sit and "mess with his keys and locks and stuff" or play Nintendo for three or four days in a row. (*Id.* at 203.) On the Saturday before the murder, Petitioner and Ron St. Charles had stopped by LeAnne's house in the afternoon to use methamphetamine. (*Id.* at 207–08.)

B. Analysis

Petitioner contends in Claim 1D (Penalty Phase) that counsel was ineffective at sentencing for failing to investigate and present reasonably available and compelling mitigation evidence. (Doc. 58 at 66–96.) Petitioner asserts that, but for counsel's failure to investigate Petitioner's mitigation, a substantial body

of mitigating evidence could have been presented to the sentencing court in order to provide a complete picture of Petitioner's troubled childhood, mental impairments, and battle with addiction. (Doc. 167 at 111.) Petitioner further contends that post-conviction counsel performed deficiently within the meaning of *Strickland* when he failed to investigate and present a substantial claim that the penalty-phase performance of trial counsel was constitutionally deficient. (*Id.* at 152–155.)

Because the Ninth Circuit has already found the remanded claims substantial, "prejudice" under *Martinez* has been established. (*See* Doc. 158.) Thus, whether this Court can consider the merits of the underlying trial IAC claim turns on whether Petitioner has demonstrated "cause" to excuse the procedural default—that is, whether post-conviction counsel's performance was ineffective under *Strickland*. The Court concludes that Petitioner's underlying IAC claim does have some factual support, and its proper outcome is sufficiently debatable at this stage to warrant further proceedings. Because the Court cannot say based on the available record that Claim 1D (Penalty Phase) is plainly meritless or that there is no reasonable probability of a different outcome had PCR counsel presented Petitioner's penalty-phase IAC claim to the state court, it determines that a hearing is necessary to allow Petitioner to demonstrate "cause" under *Martinez*. *See Dickens*, 740 F.3d at 1321.

"Counsel have a duty to make a reasonable investigation such that they are able to make informed decisions about how best to represent their clients," *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999),

and are tasked with attempting to discover "'all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p. 93 (1989)); *see also Caro*, 165 F.3d at 1227 ("It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase."). The failure to investigate a defendant's organic brain damage or other mental impairments may constitute ineffective assistance of counsel. *See Caro*, 165 F.3d at 1226. Petitioner asserts that a proper investigation by trial counsel would have revealed a substantial body of mitigating evidence that could have been presented to the sentencing court in order to provide a complete picture of Petitioner's mental impairments, difficult childhood, and drug addiction.

In support of his contention that trial counsel inadequately investigated Petitioner's mental impairments, he proffers new evidence from Dr. Alan Goldberg, a neuropsychologist, and Dr. Pamela Blake, a neurologist. (Doc. 167, Exs. 42–43.) Dr. Goldberg conducted a neuropsychological evaluation of Petitioner and reported abnormalities of frontal lobe brain function and right hemisphere motor and sensory function, evidence of a seizure disorder, and Attention Deficit Disorder. (Doc. 167, at 112, *id.*, Ex. 42.) Dr. Goldberg recommended a full neurological and psychiatric evaluation. (Doc. 167, Exhibit 42 at 8.)

Dr. Blake performed a neurological evaluation of Petitioner. She stated that many of Petitioner's behavioral traits "can be attributed to a certain pattern of neurologic dysfunction." (Doc. 167, Ex. 43 at 10.) Dr. Blake also noted indications of frontal lobe damage. (*Id.* at 11.) She concluded that Petitioner "almost certainly would have fulfilled the diagnostic criteria for Attention Deficit Disorder with Hyperactivity." (*Id.* at 10.) Finally, Dr. Blake noted that Petitioner's history suggests marked impairment in all areas of executive function. (*Id.*) Dr. Blake explained that individuals with impairments in executive function, or frontal lobe function in general, may demonstrate distractibility, impulsivity, lack of guilt or shame, lability of mood, low frustration tolerance, periodic affective disorder such as depression or anxiety, rigidness of thought, concreteness, the inability to change set (perseveration), poor planning, poor concentration and attention, poor language function, difficulty regulating behavior, and the inability to recognize social cues. (*Id.*)

In support of his assertion that counsel failed to investigate and explain the effects of Petitioner's long-term methamphetamine abuse, Petitioner offers the opinion of Dr. Lawson Bernstein, a licensed psychiatrist with a consulting practice in substance abuse. (Doc. 167 at 114.) Dr. Bernstein reviewed records and conducted an evaluation of Petitioner, and concluded that Petitioner had a severe methamphetamine addiction and was suffering from acute amphetamine withdrawal at the time of the offense, which would have depleted his brain of key chemicals involved in the maintenance of normal neurological, cognitive, and emotional states. (*Id.*, Ex.

44 at 1, 5.) Dr. Bernstein opined that Petitioner would have had no ability to control his methamphetamine abuse prior to his incarceration. (*Id.* at 6.) Dr. Bernstein also suggested it was possible that Petitioner's brain damage was due to fetal alcohol exposure, in addition to toxic chemical exposure as an iron worker and mechanic. (*Id.* at 1, 6.)

Finally, Petitioner asserts that, had counsel interviewed family members, they would have realized that the picture painted by Petitioner's mother was "at best gross minimization" but more realistically "an outright falsehood" and that Petitioner grew up in an alcoholic, abusive, and dysfunctional household. (Doc. 167 at 118.)

Petitioner asserts that PCR counsel was also ineffective because, in addition to the deficiency noted above in relation to the guilt-phase portion of the claim, PCR counsel failed to obtain funding for a mitigation expert, failed to recognize the need and seek funds for mental health experts, and failed to interview trial counsel.

Petitioner has alleged a substantial claim of ineffectiveness, thereby demonstrating "prejudice" under *Martinez*. However, because it is unclear from the record whether PCR counsel was ineffective under *Strickland* for failing to raise the claim in state court, a hearing is necessary to determine whether PCR counsel acted deficiently and whether there is a reasonable probability the result of the PCR proceedings would have been different. Assessing the latter will necessarily entail considering the strength

of the defaulted IAC claim. *Clabourne*, 745 F.3d at 377–78.

IV. Evidentiary Development

Petitioner seeks evidentiary development in the form of expansion of the record and authorization of discovery, and also requests that the Court grant an evidentiary hearing to prove the merits of the elements of "cause and prejudice," as well as the merits of the claims against his trial counsel. (Doc. 167 at 156–78.)

Petitioner seeks to expand the record under Rule 7 of the Rules Governing Section 2254 Cases, to include all of the Exhibits (Doc. 167, Exs. 1–82) cited in his supplemental *Martinez* brief in support of Claim 1D. Respondents concede that Petitioner should be allowed to supplement the record with the exhibits supporting his *Martinez* claim, to show that there is "cause" to excuse procedural default of his claims against trial counsel. (Doc. 175 at 66.) The evidentiary limitations described in *Cullen v. Pinholster,* 563 U.S. 170 (2011),[8] 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)[9], from holding an evidentiary hearing for

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[8] 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.

[9] Limiting the court's discretion to hold an evidentiary hearing on

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.

Petitioner also asserts that he is entitled to factual development of his claims not only for purposes of resolving the *Martinez* issue, but also to resolve whether he is entitled to relief on the merits of the claim. Respondents contend that, in the event this Court finds cause and prejudice to excuse the procedural default of Claim 1D, § 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 131 S. Ct. at 1401. For the reasons stated below, the Court finds that, if Petitioner can demonstrate cause and prejudice under *Martinez* to excuse the procedural default of Claim 1D, he is entitled to an evidentiary hearing on the merits to the extent such a hearing is necessary to resolve any disputed issues of material fact.

The Court's discretion to hold an evidentiary hearing to resolve disputed issues of material fact is circumscribed by 18 U.S.C. § 2254(e)(2). *See Baja v. Ducharme*, 187 F.3d 1075, 1077–78 (9th Cir. 1999). Section 2254(e)(2) provides, in pertinent part:

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a claim for relief where the petitioner "failed to develop the factual basis of a claim in State court proceedings."

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence; and . . . the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Thus, if a court determines that a petitioner has not been diligent in establishing the factual basis for his claims in state court, it may not conduct a hearing unless the petitioner satisfies one of § 2254(e)(2)'s narrow exceptions, neither of which are present in this case. If, however, "there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." *Williams v. Taylor*, 529 U.S. 420, 437 (2000). In *Williams*, the Supreme Court found that a lack of diligence, "attributable to the prisoner or the prisoner's counsel," would establish a failure to develop the factual basis of the claim. *William*, 529 U.S. at 432.

Several courts have noted that "the question whether a claim is procedurally defaulted and whether § 2254(e)(2) bars an evidentiary hearing related to that

claim are analytically linked." *Wilson v. Beard*, 426 F.3d 653, 665–66 (3d Cir. 2005); *see also Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) (recognizing that the Supreme Court in *Williams* "linked" the "failure to develop inquiry" with the cause inquiry for procedural default, and holding that if petitioner establishes cause for overcoming the procedural default he has certainly shown that he did not "fail to develop" the record under § 2254(e).) The Supreme Court in *Williams*, however, noted its interpretation of the meaning of "failed" in § 2254(e)(2) was supported by the Court's earlier decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), in which the Court borrowed the cause and prejudice standard applied to procedurally defaulted claims to determine if petitioner was entitled to an evidentiary hearing: "Section 2254(e)(2)'s initial inquiry into whether 'the applicant has failed to develop the factual basis of a claim in State court proceedings' echoes *Keeney's* language regarding 'the state prisoner's failure to develop material facts in state court.'" *Williams*, 529 U.S. at 433. The Supreme Court further concluded that "there is no basis in the text of § 2254(e)(2) to believe Congress used 'fail' in a different sense than the Court did in *Keeney* or otherwise intended the statute's further, more stringent requirements to control the availability of an evidentiary hearing in a broader class of cases than were covered by *Keeney*'s cause and prejudice standard. *Williams*,529 U.S. 433–34.

Prior to the Supreme Court's decision in *Martinez*, this would have made little difference to Petitioner's case. The ineffectiveness of PCR counsel could not provide cause to excuse the procedural default of a

claim because PCR counsel was not constitutionally required and was treated as the agent of the petitioner. *Coleman v. Thompson*, 501 U.S. at 752–54. After *Martinez*, however, PCR counsel's deficient performance, if it amounts to a *Strickland* violation, can establish "cause" to excuse procedural default of a substantial claim of ineffective trial counsel. *Martinez*, 132 S. Ct. at 1316–17. It follows from the line of reasoning in *Williams*, that a petitioner who has shown "cause" to excuse the failure to bring a claim in state court, which amounts to a showing of cause to excuse procedural default, has also by definition shown "cause" to excuse the failure to develop that same claim within the meaning of § 2254(e)(2). Were this Court to find otherwise, then the harm the Supreme Court envisioned in *Martinez*, that "no court will review the prisoner's [trial counsel IAC] claims," would become a certainty. *Martinez*, 132 S. Ct. at 1316.

Thus, this Court concludes, if Petitioner can demonstrate he is not at fault for failing to bring the claim, and his procedural default is excused under *Martinez*, he is by extension not at fault for failing to develop the claim under § 2254(e)(2). *See also Detrich*, 740 F.3d at 1246–47 (plurality opinion) ("[W]ith respect to the underlying trial-counsel IAC 'claim,' given that the reason for the hearing is the alleged ineffectiveness of both trial and PCR counsel, it makes little sense to apply § 2254(e)(2)").

Next, Petitioner submits that there is good cause for discovery in the form of depositions of PCR counsel,[10] Dr. John Howard, Sergeant Pesquiera, Detective Bruce Clark, and former Detective George Ruelas. Petitioner also requests that a subpoena issue requiring Dr. Howard to produce documents related to Rachel's death, the autopsy, or any of his activities related to his pre- and post-trial participation in this case. Respondents object to all of these requests, asserting that the requests are unnecessary as the record is adequate to resolve whether he can establish cause under *Martinez*, and because Petitioner has not shown good cause.

A habeas petitioner is not entitled to discovery "as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Discovery is authorized upon a showing of good cause, but the "party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents." Rule 6(a) and (b), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.

"[A] district court abuse[s] its discretion in not ordering Rule 6(a) discovery when discovery [i]s 'essential' for the habeas petitioner to 'develop fully' his underlying claim." *Dung The Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005) (quoting *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997)). However, courts should not allow a petitioner to "use federal discovery

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[10] Petitioner has withdrawn his request for the deposition of trial counsel at this time.

for fishing expeditions to investigate mere speculation." *Calderon v. United States Dist. Ct. for the N. Dist. of Cal. (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996); *see also Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999) (habeas corpus is not a fishing expedition for petitioners to "explore their case in search of its existence") (quoting *Aubut v. State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970)).

Whether a petitioner has established "good cause" for discovery under Rule 6(a) requires a habeas court to determine the essential elements of the substantive claim and evaluate whether "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908–09 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

In light of Petitioner's assertions that PCR counsel has refused to communicate with Petitioner's habeas counsel, the Court finds that Petitioner has made a threshold showing of good cause because he has shown that the evidence sought would lead to relevant evidence regarding his petition. Accordingly, the Court will authorize the deposition of PCR counsel.

The Court finds, however, that at this time Petitioner has not demonstrated good cause for depositions of the investigating officers. Petitioner asserts Sergeant Pesquiera should be questioned about the absence of reports of interviews of the employees of the Choice Market, whether they were done in the first instance, and whether they have been concealed. Petitioner asserts, on information and belief, that

Detective Ruelas interviewed the employees of the Choice Market, and that the employees saw Rachel in the store on May 1 unharmed, contradicting the prosecution claim that Rachel was beaten and raped during the trip to the Market. Petitioner asserts that Detective Clark and former Detective Ruelas should be questioned about the missing interview records, as the absence of reports of these interviews is relevant to showing the weakness and flaws in the prosecution's case. The Court disagrees. First, Petitioner's assertions are highly speculative. Further, as Respondents point out, the absence of any interviews is irrelevant; Petitioner's claim that such reports would be relevant is based on the mistaken assumption that the State asserted that Petitioner actually went to the Choice Market when the Lopez children saw him hitting Rachel. The prosecution asserted that the evidence showed that Petitioner beat Rachel during their third outing on May 1, 1994; the State never asserted—nor did evidence suggest—that they went into the market on that trip. The prosecutor did not argue that Petitioner was going to the Choice Market, but that the Lopez twins saw Petitioner "as he's driving around in the vicinity of the Choice Market." (R.T. 4/13/95, at 98.) The State never contended that Petitioner sexually assaulted and fatally beat Rachel on a trip to the Choice Market. Petitioner has failed to establish good cause for these depositions. For the same reason, Petitioner is not entitled to the requested files from the county attorney and sheriff's office. Finally, Petitioner asserts that Detective Pesquiera was never cross-examined regarding the deficiencies of her blood interpretation evidence. But even if Detective Pesquiera were to concede that her blood interpretation

was deficient, it would not be relevant to the Court's analysis of whether the outcome of the proceedings would have been different if trial counsel had investigated whether there were innocent explanations for the blood located in Petitioner's van.

Finally, Petitioner asserts that he should be permitted to depose Dr. Howard and require him to produce relevant records from his participation in this case because he was not cross-examined on the relevant subject matter, i.e., with respect to the obvious errors if not "outright falsehoods" in his testimony. But Dr. Howard has already submitted a declaration on Petitioner's behalf. (*See* Doc. 167, Ex. 1.) Neither statements from Dr. Howard's declaration, nor the reports from Drs. Ophoven or McKay, support Petitioner's characterization of Dr. Howard's testimony as "flatly false and misleading" or support a finding that Dr. Howard, encouraged by the prosecutor, "actively misled" the jury, and "concealed [his] actual autopsy findings." (*See* Doc. 167 at 31.) Accordingly, Petitioner's deposition and production request for Dr. Howard is denied.

CONCLUSION

Pursuant to the Ninth Circuit's directive on remand, the Court has reconsidered Claim 1D in light of *Martinez*. The Court finds that an evidentiary hearing is necessary to determine whether Petitioner can establish cause to excuse the procedural default of Claim 1D (Guilt Phase) and Claim 1D (Penalty Phase).

Based on the foregoing,

IT IS ORDERED that an evidentiary hearing to determine whether state PCR counsel was ineffective for failing to raise Claim 1D (Guilt Phase) and Claim 1D (Penalty Phase) in Petitioner's first PCR proceeding shall take place as soon as is practicable. The Court will issue a separate order setting this matter for a scheduling conference.

IT IS FURTHER ORDERED that the Clerk of Court shall substitute Charles L. Ryan, Director of the Arizona Department of Corrections, as Respondent in place of former Director Terry Stewart, pursuant to Fed.R.Civ. P. 25(d)(1).

IT IS SO ORDERED.

Dated this 18th day of January, 2017.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-01-00592-TUC-TMB

[Filed: July 31, 2018]

Barry Lee Jones,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al,	)
Respondents.	)
	)

DEATH PENALTY CASE

MEMORANDUM OF DECISION AND ORDER

TABLE OF CONTENTS

I. INTRODUCTION

Petitioner Barry Lee Jones ("Petitioner") is a state prisoner under sentence of death. In 2001, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition") alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The Court denied the Petition. This matter is now before the Court on limited remand from the Ninth Circuit Court of Appeals. (*See* Doc. 158.)[1] The Court of Appeals has ordered this Court to reconsider Petitioner's claim of ineffective assistance of counsel ("IAC") in failing to conduct an adequate investigation at the guilt and penalty phases of trial ("Claim 1D"),[2] in the light of intervening law, including *Martinez v. Ryan*, 566 U.S. 1 (2012).

Following supplemental briefing (Docs. 167, 175, 180), the Court found that an evidentiary hearing would be necessary to determine whether Petitioner could establish cause to excuse the procedural default of Claim 1D. (Doc. 185.) On October 30, 2017, the Court held a seven-day evidentiary hearing on the guilt-phase portion of the IAC claim. Following the hearing, the parties submitted post-hearing briefs and responses.

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[1] "Doc." refers to numbered documents in this Court's case file (prior to August 2005) and this Court's electronic case docket (beginning August 2005).

[2] This Court previously denied on the merits a narrow subset of Claim 1D—the allegation of ineffectiveness based solely on counsel's failure to meet with Petitioner a sufficient number of times to prepare an adequate defense. (Doc. 141 at 24.) That subset of Claim 1D is not at issue in this limited remand.

(Docs. 288– 291.) After careful consideration of the trial record and the evidence and argument presented in these proceedings, the Court concludes that Petitioner has established cause to excuse the procedural default of his meritorious guilt-phase IAC claim, and grants the Petition.[3] Petitioner will be released from custody unless, within 45 days, the State initiates new trial proceedings against him.

II. FACTUAL AND PROCEDURAL BACKGROUND

In April and early May 1994, Petitioner was sharing his trailer with Angela Gray ("Angela") and her three children, including the four-year-old victim in this case, Rachel Gray ("Rachel"), and her siblings, 11-year-old Rebecca Lux ("Becky") and 14-year-old Jonathon Lux ("Jonathon"). Petitioner's 11-year-old daughter Brandie Jones ("Brandie") also lived in the same trailer. At approximately 6:15 a.m. on Monday, May 2, 1994, Petitioner drove Rachel and Angela to Kino Community Hospital in Tucson, Arizona, dropped them off, and left. Rachel was admitted and pronounced dead on arrival. Her cause of death was determined to be homicide caused by a small bowel laceration due to blunt abdominal trauma. Rachel also had a laceration of her left scalp behind the ear, injuries to her labia and vagina, and multiple internal and external contusions.

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[3] The Court addresses only the guilt-phase portion of this claim because, in light of its disposition, the penalty-phase portion of the claim need not be reviewed. *See Hernandez v. Chappell*, 878 F.3d 843, 865 n.4 (9th Cir. 2017).

Petitioner was arrested that same day and charged with knowingly and intentionally: (1) engaging in an act of sexual intercourse with Rachel, in violation of A.R.S. § 13-1406 (Count One); (2) causing physical injury to Rachel by striking her abdominal area causing a rupture to her small intestine under circumstances likely to produce death or serious physical injury, in violation of A.R.S. §13-3623(B)(1) (Count Two); (3) causing physical injury to Rachel by bruising her face and ear and causing a laceration to her head, in violation of A.R.S §13-3623(C)(1) (Count Three); (4) causing Rachel to be placed in a situation where her health was endangered under circumstances likely to produce death or serious physical injury, in violation of A.R.S. § 13-3623(B)(1) (Count Four); and felony murder, in violation of A.R.S. § 13-1105 (Count Five).[4] Angela was also charged under Counts Four and Five of the indictment, but was tried separately and convicted under Count Four prior to Petitioner's trial. (ROA 2; Doc. 288, Supp. Ex. 1.)[5] Because the jury determined Angela acted recklessly, rather than intentionally or knowingly, in failing to render care she was ineligible for conviction of felony murder and therefore acquitted on Count Five. (Doc. 288, Supp. Ex. 1.)

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[4] Pima County Superior Court Judge James C. Carruth presided over Petitioner's trial and sentencing. Pima County Superior Court Judge John M. Quigley presided over Petitioner's petition for post-conviction relief proceedings.

[5] The Court takes judicial notice of the verdict and judgment against Angela Gray.

Petitioner was tried before a jury in April 1995. The gravamen of the prosecution's case against Petitioner was that Rachel was solely in Petitioner's care on the afternoon of May 1, 1994 when her injuries, including her fatal abdominal injury, were inflicted. The trial judge instructed the jurors that two of the child abuse charges—Count Two, alleging Petitioner struck Rachel in the abdomen rupturing her small intestine, and Count Four, alleging Petitioner endangered Rachel by failing to take her to a hospital—and the sexual assault charge—Count One—could be predicate felonies for the felony murder charge. The trial judge further instructed the jurors that the child abuse charges could only be predicate felonies if Petitioner committed them intentionally or knowingly under circumstances likely to produce death or serious physical injury. *See State v. Jones*, 188 Ariz. 388, 391, 937 P.2d 310, 313 (1997). Petitioner was convicted on all charges. *See Jones*, 188 Ariz. at 391, 937 P.2d at 313. The jurors found that both child abuse charges that qualified as predicate felonies were committed under circumstances likely to cause serious physical injury or death and that Petitioner's mental state was intentional or knowing.

During the penalty phase of trial, Judge Carruth found the existence of two aggravating factors: the murder was especially cruel and the victim was under the age of 15. Judge Carruth found no mitigating factors sufficiently substantial to call for leniency, and sentenced Petitioner to death for the first-degree murder conviction.

The Arizona Supreme Court affirmed the convictions and sentences, finding that evidence

supported the conclusion that virtually all of Rachel's injuries occurred within a two-hour period:

> . . . Rachel's sister, Rebecca, testified that Rachel spent the morning with her and their brother watching cartoons. Rachel "seemed fine" when her siblings went out to ride their bikes, about 3:00 p.m. Additionally, Rachel "seemed fine" after the first two times that she returned with defendant. Rachel first accompanied defendant to the market. Rebecca saw Rachel standing at the door when they returned, and she seemed fine. The second time defendant returned with Rachel, Rebecca again saw her standing at the door, and Rachel appeared to be fine. If Rachel had already suffered genital injuries, she would have been in pain. The examiner testified at the aggravation/mitigation hearing that the genital injuries would have caused pain at basically all times. The third time that defendant went out with Rachel, he told Rebecca that he was going to his brother's house. However, his brother's wife testified that defendant never visited their house on that day. During defendant's third trip with Rachel, two children saw defendant hitting Rachel while he drove. One of the children placed the time at 5:00 p.m. Blood spatter in the van likely was created by defendant hitting Rachel after she had already suffered a head injury. Additionally, blood spatter consistent with Rachel's blood type was found on defendant's jeans, along with traces of blood on defendant's shirt and boots. The next time that Rebecca saw Rachel, at about

> 6:30 p.m., Rachel was in a lot of pain. Many of the injuries that Rachel now had were consistent with defense against a sexual assault. Thus, substantial evidence was introduced to conclude that Rachel's physical assault and sexual assault all occurred within the two-hour time period during which she was alone with defendant in his van.
>
> The evidence of the time period of Rachel's injuries, the testimony that defendant was seen hitting her, the fact that Rachel was fine before she went out with defendant the third time and was injured when she returned, and the fact that defendant told others that he had taken Rachel to see the paramedics when he had not, support the finding that defendant committed the sexual assault along with, and as part of, the overall physical assault.

Jones, 188 Ariz. at 397, 937 P.2d at 319.

Petitioner filed a petition for post-conviction relief ("PCR") with the trial court. After an evidentiary hearing, the PCR petition was denied in its entirety. (ROA-PCR 31.)[6] The Arizona Supreme Court

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[6] "ROA" refers to the 5-volume record on appeal from trial and sentencing. "APP" refers to the record on appeal from direct review to the Arizona Supreme Court. "ROA-PCR" refers to the docket numbers from the one-volume record on appeal from post-conviction proceedings prepared for Petitioner's petition for review to the Arizona Supreme Court (Case No. CR-01-0125-PC). "PR" refers to the docket numbers of documents filed at the Arizona Supreme Court for that petition for review proceeding. "RT" refers to the reporter's transcripts from Petitioner's state court

summarily denied Petitioner's Petition for Review. (PR 7.)

Petitioner initiated this federal habeas proceeding on November 5, 2001 (Doc. 1), and filed an amended petition on December 23, 2002, raising 21 claims (Doc. 58). In Claim 1D of the petition, he alleged, in part, that counsel was ineffective for failing to:

(1) adequately investigate potential other suspects and crucial witnesses;

(2) raise legal challenges to eyewitness identifications;

(3) adequately challenge blood-spatter testimony; and

(4) hire a forensic pathologist to challenge the State's evidence regarding the nature and timing of the victim's injuries.

(*Id.* at 37–66.) The parties briefed the claims (Docs. 69, 79) and motions for evidentiary development (Docs. 89, 90, 101, 102, 108, 109, 113). Petitioner asserted PCR counsel's ineffectiveness as cause to excuse the procedurally defaulted portion of Claim 1D. (Doc. 79 at 25, 60–62.) This Court determined, consistent with

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proceedings. The state court original reporter's transcripts and certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court on December 12, 2001. (Doc. 16.) "EH RT" refers to the reporter's transcripts from Petitioner's evidentiary hearing in his federal habeas proceedings. "EH Ex. at ____" refers to the Bates stamped page number of exhibits admitted during Petitioner's evidentiary hearing in his federal habeas proceedings.

then-governing Supreme Court precedent, *see Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991), that PCR counsel's purported ineffectiveness did not constitute cause for the procedural default because "there is no constitutional right to counsel in state PCR proceedings." (Doc. 115 at 9–11.) The Court ordered supplemental briefing regarding Petitioner's allegation that it would be a fundamental miscarriage of justice not to review the entirety of Claim 1D on the merits. (*Id.* at 40.) The Court denied relief on September 29, 2008, concluding that Petitioner had not satisfied the fundamental miscarriage of justice standard to overcome the default of Claim 1D. (Doc. 141 at 23.)

While Petitioner's appeal from this Court's denial of habeas relief was pending, the Supreme Court decided *Martinez*, holding that where IAC claims must be raised in an initial PCR proceeding under state law, failure of counsel in that proceeding to raise a substantial trial IAC claim may provide cause to excuse the procedural default of the claim. 566 U.S. 1, 17 (2012). Subsequently, Petitioner moved the Ninth Circuit to stay his appeal and grant a limited remand in light of *Martinez*. The Ninth Circuit granted the motion and remanded for reconsideration of Claim 1D, stating that "Claim 1D is for purposes of remand substantial." (Doc. 158) (citing *Martinez*, 566 U.S. 1; *Trevino v. Thaler*, 569 U.S. 413 (2013); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc); *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc)).

In September 2015, the parties completed supplemental briefing in this Court. For purposes of the evidentiary hearing, the Court bifurcated Claim 1D

into guilt-phase and penalty-phase subsections, and, on October 30, 2017, held an evidentiary hearing to determine if Petitioner could establish cause, under *Martinez*, to excuse the procedural default of the guilt-phase subsection.

III. GOVERNING LAW

Federal review is generally not available for a state prisoner's claims when those claims have been denied pursuant to an independent and adequate state procedural rule. *Coleman*, 501 U.S. at 750. In such situations, federal habeas review is barred unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice. *Id.* *Coleman* held that the 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 announced a new, "narrow exception" to the rule set out in *Coleman*. The Court explained that:

> 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.

566 U.S. at 17; *see also Trevino*, 569 U.S. at 423.

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*, 566 U.S. at 14); *see also Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 818 (9th Cir. 2015) (en banc); *Dickens*, 740 F.3d at 1319–20; *Detrich*, 740 F.3d at 1245. A determination that a petitioner has shown cause and prejudice sufficient to overcome a procedural default allows a federal court to consider de novo "the merits of a claim that otherwise would have been procedurally defaulted." *Atwood v. Ryan*, 870 F.3d 1033, 1060 n.22 (9th Cir. 2017) (quoting *Martinez*, 566 U.S. at 1) (internal quotation marks omitted).

In *Clabourne*, the Ninth Circuit summarized its *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 postconviction 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. *See Strickland*, 466 U.S. at 687, 694, 104 S.Ct. 2052. Second, to establish "prejudice," he 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." *Martinez*, 132 S.Ct. at 1318.

Clabourne, 745 F.3d at 377.

The remand order in this case states that "the remanded claims are for purposes of remand substantial." (Doc. 140 at 2.) Because the Ninth Circuit has already found the remanded claim substantial, prejudice under *Martinez* has been established. The issue of cause remains—that is, whether post-conviction counsel's performance was ineffective under *Strickland*. The Court will address cause by assessing PCR counsel's performance and the strength of the underlying ineffective assistance of trial counsel claim. *See Clabourne*, 745 F.3d at 377–78. Determining whether there was a reasonable probability of a different outcome of the PCR proceedings "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective." *Id.* "PCR counsel would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective." *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).

Claims of ineffective assistance of counsel are governed by the principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). 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." 466 U.S. at 689; *see also Wong v. Belmontes*, 558 U.S. 15, 17 (2009) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010). The Court exercises a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (citation and internal quotation marks omitted). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. With respect to *Strickland*'s second prong, when a petitioner challenges a conviction, the court considers "the totality of the evidence" before the jury and "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In other words, contrasting the evidence presented to the jury with that which could have been presented, the Court asks

whether the omitted evidence would have created reasonable doubt in the mind of at least one reasonable juror. *Hernandez v. Chappell*, 878 F.3d 843, 852 (9th Cir. 2017) (quoting *Daniels v. Woodford*, 428 F.3d 1181, 1201 (9th Cir. 2005); *Rios v. Rocha*, 299 F.3d 796, 813 (9th Cir. 2002)).

With respect to the guilt-phase subsection of his claim, Petitioner alleges that his Sixth Amendment right to effective assistance of counsel was violated by his trial counsel's failure to conduct a sufficient trial investigation and adequately investigate the police work, medical evidence, and timeline between Rachel's fatal injury and her death. Petitioner further alleges that post-conviction counsel performed deficiently within the meaning of *Strickland* when he failed to investigate and present this substantial IAC claim, thus excusing the procedural default of the claim under *Martinez*. Respondents assert that Petitioner has not shown that PCR counsel was ineffective in failing to raise the claim because PCR counsel raised multiple IAC claims and attempted to obtain additional resources. Respondents also argue that Claim 1D fails on the merits and that Petitioner therefore cannot establish cause under *Martinez* because he was not prejudiced by PCR counsel's performance as there was no "reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." (Doc. 175 at 14) (quoting *Clabourne*, 745 F.3d at 377).

In section IV below, the Court describes the proceedings and the relevant evidence as discussed at the trial, post-conviction relief, and federal habeas

stages of Petitioner's case. In section V, the Court analyzes these facts in light of the above framework.

IV. RELEVANT FACTS

The following section describes (1) the trial proceedings and evidence presented at trial, (2) the proceedings at the post-conviction relief phase, and (3) the evidence presented during these federal proceedings that Petitioner asserts was available at the time of his trial that either suggested the need for further investigation by trial counsel or could have been presented at trial.

A. Trial Court Proceedings: The Evidence Presented at Trial

Attorney Sean Bruner[7] was appointed to represent Petitioner on May 3, 1994, the day after Petitioner's arrest. Bruner's partner Leslie Bowman, who at that time had been admitted to the bar for a little less than a year, also represented Petitioner as an informal "second-chair" attorney though she was never formally appointed by the trial court. (EH RT 10/30/17 at 44; EH Ex. 9 at 1.) As Petitioner's court-appointed counsel, it was Bruner's sole responsibility to ensure Jones received competent representation.

At trial, the State sought to prove that (1) only an adult was capable of inflicting the fatal small bowel wound; (2) Rachel's fatal injuries were inflicted in the

[7] Bruner was admitted to the bar in 1981 and received a criminal law specialist certification in 1990. (EH Ex. 9 at 1.) Prior to Petitioner's case, Bruner had represented one death-eligible defendant at trial. (*Id.*)

late afternoon on May 1, 1994, sometime after 2:00 p.m. when Petitioner woke up for the day; and (3) Petitioner was the only adult that had care of Rachel at that time and took her on several trips away from the trailer park in his van. The prosecutor summarized the State's theory in closing: "Who is her rapist? Who is her murderer? The answer to that question is simple. Who was with her all day on Sunday, May 1st." (RT 4/13/95 at 92.) In order to support the intentional or knowing infliction of the child abuse charge alleged in Count Four, the prosecutor argued that Petitioner beat Rachel in order to rape her, and when Petitioner failed to take her to the hospital, "[s]he died as a result of that beating because only the defendant knew how badly she was hurt." (*Id.* at 104.)

The State bolstered its theory by presenting the testimony of two neighborhood children who allegedly observed Petitioner abusing Rachel as he took her on one of three trips in his van on the day before her death. The State also presented testimony that the laceration on Rachel's scalp as well as some of the abdominal contusions and abrasions were consistent with having been inflicted between 2:00 p.m. to 5:30 p.m. on May 1, and with being hit with a pry bar found in Petitioner's van. Additionally, the State presented evidence that the blood found in Petitioner's van was Rachel's, and, based on bloodstain analysis, was consistent with an assault on Rachel that took place in the van.

Bruner acknowledged in opening statements that "[e]verything in this case is going to center around

what happened on Sunday, May 1st. Specifically, a couple of disputed hours . . . ." (RT 4/6/95 at 60.) Bruner asserted that on May 1, there was nothing obvious about Rachel that would have caused Petitioner to think he needed to take her to the hospital. He asserted that nobody would testify that Rachel looked as she appears in the autopsy photos, suggesting the bruising on her body in the photos had something to do with lividity, or the pooling of blood after the heart stops beating. (*Id.* at 61.) Bruner further asserted that the testimony of the neighborhood children, if believable, "is strong proof for the State," but "they couldn't possibly have seen what they claim now months later to have seen," then admitted he could not explain, exactly, why that was, suggesting that the jury should just decide for themselves if a "couple small children looking up at that van, whether they could have possibly seen what they now claim to have seen . . . ." (*Id.* at 64–65.)

The following is a summary of the testimony and evidence presented by the State at Petitioner's trial that established when Rachel was injured, who she was with when the injuries occurred, and where the injuries occurred. The State presented numerous witnesses who testified about the medical and physical evidence, as well as the events of the days immediately prior to and following her death. Defense counsel presented no witnesses to challenge the medical timeline from injury to death, and presented only one witness in total, Petitioner's 11-year old daughter Brandie, in support of his case.

1. Rachel's Injuries and Cause and Time of Death

The State presented critical evidence at Petitioner's trial from witnesses that established that most of Rachel's injuries, including the fatal injury, were consistent with infliction between 2:00 p.m. and 5:30 p.m. on May 1, 1994. Rachel's body was examined by Steven Siefert, an emergency room doctor at Kino Community Hospital; by Sergeant Sonia Pesquiera[8] of the Pima County Sheriff's Department ("PCSD"), the lead investigator of Rachel's death; and by Dr. John Howard, a forensic pathologist with the Pima County Medical Examiner's office.

a. Time of Death

Dr. Siefert was the first to examine Rachel, and testified that she was dead upon arrival at the hospital. (RT 4/6/95 at 77.) Based on temperature and the existence of rigor mortis, Dr. Siefert estimated that Rachel died sometime two to three hours before she arrived at the hospital at 6:16 a.m. on May 2, 1994. (*Id.* at 74, 76–77, 80.) This fact is not in dispute.

b. External Bruising and Abrasions

Sergeant Pesquiera examined Rachel's body at the hospital and, based on her training and experience with approximating ages of bruising based upon their color and appearance, testified that Rachel's body was covered with contusions and abrasions which were in

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[8] Sergeant Sonia Pesquiera was known as Sonia Rankin at the time of the investigation.

varying stages of healing; some bruising appeared new, such as along her eyelid, and some appeared to be in the healing stage, such as on the bottom of her eyes. (RT 4/12/95 at 34, 37.) Over defense counsel's objection, Sergeant Pesquiera opined that the injuries were not accidental. (*Id.* at 35.)

Dr. Siefert testified that Rachel's body was covered with bruises and abrasions, primarily on the front of her body and across her face and forehead, but also on her back, arms, and legs. (RT 4/6/95 at 81.) He also observed that Rachel had a large bruise on each side of her forehead, as well as intense coloration on the outer edge of her right eye and discoloration below the eyes. (*Id.* at 95–96.) Dr. Howard assessed the purple coloration on Rachel's face as arising from an injury that probably occurred one day prior to death, but also noted some green discoloration which would have been present for several days. (RT 4/12/95 at 116.)

Dr. Siefert and Dr. Howard observed that Rachel had bruising around the left side of her face and behind her ear, as well as bleeding into both ear drums, consistent with a slap or blow to the side of the head. (RT 4/6/95 at 90–91; RT 4/12/95 at 140–41.) Dr. Howard noted that Rachel also sustained internal bleeding due to blunt force trauma to the back of her neck, as well as diffuse bleeding into the deep layers of her whole scalp. (RT 4/12/95 at 137–38.)

Rachel had four or five small bruises on her right forearm and several on her right hand, as well as six bruises on her left forearm and hand, injuries typically associated with trying to ward off an impact, known as

defensive type wounds. (RT 4/6/95 at 85–87, 88–89; RT 4/12/95 at 39–40, 150–51.)

Dr. Howard opined that the bruises and abrasions on Rachel's hand and arm were inflicted approximately one day prior to death. (RT 4/12/95 at 113–14.) This included swelling in her left middle finger that indicated injury to bone or ligaments; this injury would have been painful and noticeable within an hour of its infliction. (RT 4/6/95 at 89, 104–05; RT 4/12/95 at 114.)

Dr. Howard identified abrasions and contusions on Rachel's right and left thigh, both knees, and her right leg; he opined that they varied in appearance from less than a day old to approximately five days old. (RT 4/12/95 at 113.) He indicated that much of the bruising on Rachel's front side was consistent with having been inflicted by knuckles but he could not identify with any particularity what actually was used to inflict the injuries. (*Id.* at 126, 160.)

Rachel had contusions and abrasions on her back, her buttocks, and on the back of her left thigh, consistent with being dragged across a rough surface or with fingernail scrapes. (*Id.* at 112; RT 4/6/95 at 41, 93.) Based on the colors of the bruising, and the presence or absence of scab formation, Dr. Howard opined that these injuries occurred within one to two days prior to her death. On her front torso, Rachel had 20 to 30 bruises, large areas of abrasions, and a red bruise area under her right arm. (RT 4/6/95 at 93–94; RT 4/12/95 at 115.) Dr. Howard opined that some of these bruises were recent, occurring within the prior day to two days, while others were of a coloration indicating an origin of several days prior to death. (RT

4/12/95 at 115.) There was a linear bruise pattern to the right of her navel; Dr. Howard opined that this injury was consistent with the pry bar found underneath the driver's seat of Petitioner's van but could have been caused by many different objects. (*Id.* at 78, 128, 160.) Sergeant Pesquiera also testified that the linear contusions or bruises on Rachel's abdomen were consistent with the pry bar found in Petitioner's van. (*Id.* at 78.)

Dr. Siefert opined that Rachel's bruising would have begun to appear within a few hours of infliction, and assessed that 95 percent of Rachel's injuries had occurred within 12 to 24 hours before her death. (RT 4/6/95 at 121, 128, 103–108, 111, 127; RT 4/12/95 at 94.) Dr. Siefert noted that some of the bruises were a few days old, including the bruising beneath Rachel's eyes. (RT 4/6/95 at 103, 105, 111; RT 4/12/95 at 37.) Dr. Siefert concluded that Rachel had suffered non-accidental trauma, possibly at multiple times by multiple mechanisms. (RT 4/6/95 at 128–29.) Similarly, Dr. Howard explained that the number and multiple locations of the injuries were not consistent with a simple childhood accident, but rather were consistent with Rachel having been beaten. (RT 4/12/95 at 137.) He concluded that all of the external injuries he documented, which he assessed as having been inflicted within one day of death, were consistent with having been inflicted between the hours of 2:00 p.m. and 5:30 p.m. on the day prior to her death. (*Id.* at 117.)

On cross-examination, defense counsel confirmed with Dr. Siefert that 95 percent of the bruises were

formed within the 12 or 24 hours before death, but that this estimate was dependent on factors—such as the child's metabolism and the amount of force used to inflict the injury—that were unknown to Dr. Siefert. (RT 4/6/95 at 127–28.) Dr. Siefert agreed that some of the bruises, as well as the scalp injury discussed below, could have been caused by Rachel falling out of a van. (*Id.* at 129.) Dr. Siefert admitted on re-direct examination that there was "no way to really know" based on the appearance of the bruises how long each one took to develop after the blunt injury that caused it. (*Id.* at 134.) Dr. Siefert concluded that the totality of Rachel's injuries indicated that the trauma was nonaccidental and perhaps occurred at multiple times or by multiple mechanisms. (*Id.* at 135.)

c. Scalp Injury

Rachel had a head laceration, above and behind her left ear, which was one inch long and went down to the skull bone. Dr. Howard assessed it as consistent with having been caused by a blunt force object with a relatively straight edge, consistent with the pry bar found in Petitioner's van. (RT 4/12/95 at 121, 123.) Based on the injury's external and microscopic appearance, he opined that it was typical of having been inflicted one to two days prior to death but was consistent with occurrence between 2:00 p.m. and 5:30 p.m. on May 1. (*Id.* at 116–17.)

d. Vaginal Injury

Sergeant Pesquiera testified that upon examination of Rachel's body, she observed discoloration on the outside of her labia and pooled, bright red blood on the

inside. (RT 4/12/95 at 42.) Dr. Howard determined that Rachel had blunt force injuries to her labia, bruising and scrapes, and a half-inch tear to her vagina. (*Id.* at 134.) Dr. Howard concluded that the injury to Rachel's genitalia occurred about one day prior to her death, consistent with the time frame of "dozens" of Rachel's other injuries, (*id.* at 133, 136), and that these injuries were non-accidental, painful, and consistent with penetration or attempted penetration. (*Id.* at 134–36).

e. Fatal Small Bowel Injury

Dr. Howard determined that Rachel died of blunt abdominal trauma that caused a laceration of the small bowel and that her death was a homicide. (RT 4/12/95 at 155.) Dr. Howard explained that, internally, Rachel had sustained blunt force injury to her abdominal organs causing a tear of the small bowel and bruising of the tissues around the small bowel, the wall of the large bowel, and the tissues connecting the intestine to the back of the abdominal wall. (*Id.* at 141–42.) The rupture of her bowel caused inflammation and irritation of the lining of the abdominal tissues, a condition called peritonitis. (*Id.* at 145.) When this type of damage is not repaired, Dr. Siefert explained it typically causes death over a period of hours to days, or sometimes weeks. (RT 4/6/95 at 115). The amount of force required to rupture a healthy bowel is equivalent to a fall from more than two stories, an automobile accident at greater than 35 miles per hour, or a forceful directed blow to the abdomen (*id.* at 113–14; RT 4/12/95 at 151, 153–54); Dr. Siefert did not believe enough force for such an injury could be inflicted by a child under the age of six. (RT 4/6/95 at 116.) Rachel

would have experienced pain at the time of the blunt force injury; Dr. Howard indicated she would then have had continual abdominal pain while Dr. Siefert stated that the pain might decrease initially, but would not go away. (*Id.* at 119; RT 4/12/95 at 146.) Over the next several hours, a person with peritonitis would lose bowel function, causing nausea, vomiting, and dehydration. (RT 4/6/95 at 119–20; RT 4/12/95 at 146.) Dr. Howard opined that the "injury is typical of having occurred about one day prior to death," in the same age range as her other injuries, including the scalp, genital, and external injuries. (RT 4/12/95 at 148.) Dr. Howard opined that the fatal injury could have occurred in the 24 hours prior to her death, possibly in the time between the hours of 2:00 p.m. and 5:30 or 6:00 p.m. on May 1. (*Id.* at 148–49.)

Defense counsel cross-examined Dr. Howard and established that Rachel had no broken bones, and that if she had been hit hard enough with the pry bar, it might have resulted in fractures of the skull or ribs, depending on the amount of force used. (*Id.* at 158–59.) Dr. Howard agreed that while the pry bar was consistent with the injuries, any number of objects could also have caused the injuries. (*Id.* at 159–60.) Based on Dr. Howard's testimony, defense counsel argued that if the pry bar had been wielded by an adult, it would break ribs and fracture skulls, and would have done incredible damage to a small child. (*Id.* at 112.)

Defense counsel asked no questions of Dr. Howard regarding the timing of any of Rachel's injuries.

f. Bloodstain Evidence

The State also presented testimony and evidence from Sergeant Pesquiera, Arizona Department of Public Safety Criminalist Edward Lukasik, and PCSD Detective Clark to support the State's theory that Rachel was assaulted in Petitioner's van. Blood consistent with having come from Rachel was found on a Circle K bag, on carpeting and the front passenger seat's upholstery in Petitioner's van, and on blue jeans worn by Petitioner at the time of his arrest. (RT 4/7/95 at 118, 120–21, 126–27; RT 4/11/95 at 106–7, 109; RT 4/12/95 at 55–59.) No blood was found on the tools collected from Petitioner's van, including the pry bar and the blue and metal pipes. (RT 4/11/95 at 100–01; RT 4/12/95 at 85–87.)

Rachel's pajamas and underwear were taken into evidence, and oral and vaginal swabs were also taken during Rachel's autopsy. (RT 4/12/95 at 43–47.) Serological testing revealed no presence of semen or seminal fluids on the vaginal swabs or on Rachel's pajamas or her underwear. (RT 4/11/95 at 90, 111–12.) A substance consistent with vomit was found on Rachel's pajamas and a sleeping bag. (RT 4/11/95 at 98–99; RT 4/12/95 at 45–46.)

Sergeant Pesquiera also collected clothing from Petitioner on the day of his arrest, testifying that she would expect to find blood on the clothing of a driver in the car at the time that Rachel was struck. (4/12/95 at 61, 74–75.) There was a trace of blood not further identified on the red T-shirt and boots, but not the denim jacket, worn by Petitioner at the time of his arrest. (RT 4/11/95 at 95, 108–09; RT 4/12/95 at 61–62.)

Sergeant Pesquiera testified that fingernail scrapings were taken from Rachel but there was nothing detected under her nails. (RT 4/12/95 at 90–91.) Despite some of Rachel's abrasions appearing as if she had been scratched, Sergeant Pesquiera explained that Petitioner's fingernails were not analyzed to determine if any of Rachel's blood or skin was present because there was a lot of oil and other things under his nails. (*Id.* at 90–91.)

Sergeant Pesquiera testified that she was not an expert in the field of bloodstain evidence, but "could appreciate what type of stains they were in relationship to where the victim could have been and the assailant could have been." (RT at 4/12/95 at 28, 63–65.) Sergeant Pesquiera explained that blood spatter is seen when an area of injury has static blood on it and then is struck or shaken in some way like a blow or blunt force trauma causing the blood to spatter out. (RT 4/12/95 at 73.)

Sergeant Pesquiera submitted samples of several items that appeared to be bloodstains taken from multiple locations in Petitioner's van: from carpet between the two front seats and partially behind the passenger seat, from carpet and wood chips located partially behind and underneath the passenger seat, from a cigarette package, from a Circle K bag located behind the driver's seat, and from the right front passenger seat. (RT 4/12/95 at 55–60.) Over defense counsel's objection, Sergeant Pesquiera testified that a bloodstain identified as Item V6 appeared to be "an impression stain or a stain where the blood has actually soaked through and has been in that position

for quite a while to where it soaks down through the carpeting." (*Id.* at 72.) Sergeant Pesquiera distinguished the impression stain on the carpeting from the spatter stains found on the van's passenger seat and another portion of the carpet identified as Item V7, which she testified were consistent with a person already bleeding being struck or shaken causing the blood to spatter out. (*Id.* at 72–73.) Because Dr. Siefert had testified that bleeding stops very quickly after death (RT 4/6/95 at 79), the State argued, based on the impression stain, that Rachel's "head was bleeding as she was laying in the back of that van because she had been beaten and hit with that pry bar as part of that sexual assault, and this is where the sexual assault occurred. . . . on the third trip away from the house." (RT 4/13/95 at 97.) The State also argued—based on the evidence of spatter stains found on the passenger seat, floor of the van, and the right sleeve of Petitioner's shirt—that after the assault, Petitioner put her in the passenger seat of the car and kept hitting her "trying to make her shut up" (*id.* at 97–100), and the blood could not have gotten in the van on the way to the hospital because Rachel was already dead and therefore was not bleeding anymore. (*Id.* at 137.) Defense counsel offered no expert testimony to challenge Sergeant Pesquiera's opinions, but rather argued that Sergeant Pesquiera was not an expert in blood spatter and the State could have presented an expert if they had wanted to. (*Id.* at 113.)

2. Events of April 30–May 2, 1994

The State presented evidence from several witnesses that supported its theory that Rachel was in

the sole care of Petitioner during the afternoon of Saturday, May 1, when the fatal injuries allegedly were inflicted.

Becky testified that she had been living in Petitioner's trailer for a few months with her mother, Angela; her siblings, Jonathon and Rachel; and Petitioner's daughter, Brandie. (RT 4/11/95 at 18–19, 60.) Petitioner never hit Becky, and she never saw him hurt Rachel or her brother. (*Id.* at 65–66.) There was a week, however, when Rachel started "being scared" of Petitioner, and would not go to Petitioner when he called her over or when he asked her to go with him on a ride. (*Id.* at 25–28.) He did sometimes hit Rachel "[f]or play," which sometimes made her cry. (*Id.* at 43.) Becky testified that Rachel seemed fine and ate dinner on Saturday night, April 30, and was not sick or throwing up. (*Id.* at 29.) Becky stated she saw Petitioner leaving with Rachel in the van three times on May 1. (*Id.* at 37–38.)

Becky testified that on Sunday morning, May 1, Becky, Rachel, and Jonathon got up early, watched cartoons, and ate lunch until Petitioner got up around 2:30 or 3:00 p.m. when a friend of his stopped by to see him. (*Id.* at 30–33, 62.) Shortly after Petitioner's friend left, Petitioner gave Becky and her brother permission to ride their bikes. (*Id.* at 36.) After riding their bikes around the trailer court for an hour, Becky saw Petitioner leave in his van on the first trip with Rachel, telling Becky he was going to the store for food. (*Id.* at 37, 64.) He returned an hour and a half later with milk and corn dogs. (*Id.* at 63, 69.) Becky testified that

Rachel seemed okay after this trip, she was not sick or crying. (*Id.* at 70.)

Becky described the first trip when questioned by the prosecutor and the second and third trips when cross-examined by defense counsel. Becky testified that approximately fifteen to twenty minutes after returning home from the store and putting away the groceries, Petitioner left again and was gone for about thirty minutes. (*Id.* at 70.) Becky saw Rachel again after this trip, and testified that she seemed "okay" at that time. (*Id.* at 70–71.)

When asked by defense counsel about the third trip in the van, Becky testified that Petitioner took Rachel to his brother's house. (*Id.* at 79.) Becky had no idea how long they were gone, but stated that they were back before Becky left for her friend's house, around 5:00 or 6:00 p.m. (*Id.* at 71, 79.) The State argued that it was during this third trip that Petitioner assaulted Rachel in the back of the van. (RT 4/13/95 at 93–94.)

Becky testified that when she was putting her bike away before going to her friend's house, she saw that Rachel was at home and that Rachel was standing and looked fine. (*Id.* at 41–43.) Around 6:30 p.m., when Becky returned from her friend's house, Becky testified that Rachel was on the couch; she was pale, her head was bleeding, she was vomiting, and she had bruises on her face, hands, and fingers. (*Id.* at 44–46, 49–50, 72.) This was the first time Becky saw her mother awake that day. (*Id.* at 41.) Petitioner left for a time, and when he returned, Angela took Rachel outside where Petitioner and Angela had an argument. (*Id.* at 48–49.)

The State presented evidence that the St. Charles family, who lived in a bus at a transient camp, got a visit from Petitioner sometime on May 1; Ron St. Charles ("St. Charles") thought Petitioner seemed angry. (RT 4/12/95 at 7–9, 17.) St. Charles testified that he did not know if anyone else was in the van with Petitioner, and that Petitioner did not get out of his van.

Michael Fleming ("Michael"), Petitioner's neighbor at the Desert Vista trailer park, testified that on May 1 he saw Rachel looking sick between 2:00 and 5:00 p.m.; she was pale with dark circles under her eyes, and she looked wet and like she wanted to vomit, but he did not see any blood, bruising, or scrapes. (RT 4/7/95 at 164–66, 168, 171–73.) Michael Fleming saw his wife, Stephanie Fleming ("Stephanie"), pick Rachel up and take her back to Petitioner's trailer. (*Id.* at 165–66.)

Petitioner's sister-in-law testified that Petitioner, Angela, and the children were supposed to attend Petitioner's nephew's birthday party on May 1, but they never showed up. (RT 4/11/95 at 119–24.)

Norma Lopez ("Norma") testified that on May 1 she sent her children—eight-year-old twins Ray and Laura Lopez—to the Choice Market on Benson Highway at 3:00 p.m. or 4:00 p.m. (RT 4/7/95 at 50.) When they returned, Ray told Norma he saw a yellow van with a man inside hitting a little girl. (*Id.* at 51.) The children described the man as a white man with messy brown hair driving a yellow van and the girl as little and blond-haired. (*Id.* at 51–53.) The twins saw him driving with one hand and hitting the girl in the face and chest

with the other, and they could see the girl crying. (*Id.* at 51.) The next day on the news Norma heard that a man had been arrested in relation to the death of a little girl. (*Id.* at 53–54.) When she had the children watch the news, they identified that person as the man they had seen in the van. (RT 4/7/95 at 55.) One or two days later, Norma reported the twins' identification by calling 911. (*Id.* at 56.)

At Petitioner's trial, Ray testified that he had gone to the Choice Market with Laura around 5:00 p.m. on a Sunday. (RT 4/7/95 at 8–9.) He testified that, on his way home, he saw a white man with bushy hair in a yellow van, driving with one hand while hitting a little, four-year-old white girl hard with his right hand and elbow. (*Id.* at 9–11, 14.) He demonstrated how the man hit her with the back of his right fist. (*Id.* at 12–12.) Ray testified that the man hit the girl three times. (*Id.* at 11–13.) He testified he could not see the girl's face, but that she was crying. (*Id.* at 13.) When pressed by the prosecutor, he agreed he did not know whether she was crying or not. (*Id.*) He also admitted that he had previously told the police that he saw her with her mouth open and could see that she was crying. (*Id.* at 13–14.) He did not see the driver's face, only his hair from behind. (*Id.* at 25–26.) He could not identify Petitioner in court, but was able to identify a picture of Petitioner from the day of his arrest. (RT 4/6/95 at 175; RT 4/7/95 at 18.) Ray was also unable to identify a picture of Petitioner's van as the yellow van he saw that day because it did not have windows in the side. (RT 4/7/95 at 29–30.) Bruner established, through cross-examination, that Ray did not see Petitioner's face or any facial hair, only his hair from behind, and

questioned whether he could see up into the van given his height. (*Id.* at 25–27.)

Laura testified that she recalled seeing a white man driving a yellow van on her way home with Ray from the Choice Market. (*Id.* at 34–37.) She said she could see a little bit of the man's face, and he was ugly with puffy hair and was hitting a little, white blonde girl. (*Id.* at 36–38.) She testified she could not see the girl's face, but the man was hitting the girl on the left side of her face with his elbow. (*Id.* at 36–38.) The prosecutor asked Laura if she remembered telling the police she could see that the girl was crying and she could see her face; Laura agreed and remembered that she was crying. (*Id.* at 38.) Bowman established, through cross-examination, that Laura only saw them through the front window of the van and could see just "a little bit" of the side part of both the man and girl's faces. (*Id.* at 43–44.) Laura also admitted that the little girl's face was not higher than the windows. (*Id.* at 44.) She remembered seeing the man from the van on the news that same day. (*Id.* at 40, 45.)

Sara Petrilak, a clerk at the Quik-Mart on Benson Highway, testified that Petitioner went into the store on May 1, 1994 between 3:15 p.m. and 5:00 p.m. (RT 4/7/95 at 142, 144, 159.) She did not know Petitioner's name, but recognized him as a regular at the store. (*Id.* at 145–46, 149.) The store clerk testified that Petitioner got ice and that he was with a little girl who sat on a ledge outside the store. (*Id.* at 147–48.) On cross-examination, Petrilak testified that the girl did not seem to be upset, and she would have heard the girl if she was crying, but she was not. (*Id.* at 150–51.)

Joyce Richmond (a.k.a. Rose Royer and Alice Knight) ("Richmond"), Petitioner's former girlfriend, testified that she spent Saturday night, April 30, at a friend's house with Petitioner until approximately 3:00 a.m. (RT 4/11/95 at 135–36.) Petitioner's daughter Brandie spent the weekend with Richmond from Friday after school until Sunday, May 1, when Brandie returned with Richmond to Petitioner's trailer sometime between 7:00 p.m. and 8:00 p.m. (*Id.* at 137–38, 141.) Richmond saw Rachel on the couch with a bleeding head; she said Rachel did not have bruises on her face or hands. (RT 4/11/95 at 141, 151–53.)

Richmond's adult son, Terry Richmond ("Terry"), was at Petitioner's trailer with his mother on the evening of May 1 and saw that there was blood on the pillow under Rachel's head. (*Id.* at 157.) Terry questioned Petitioner, who told him that he had taken Rachel to the fire department. (*Id.* at 157–58.) Terry testified that he had seen bruises on Rachel's face, but after he was asked if he saw bruises on Rachel's face *that night*, he could not remember whether he had. (*Id.* at 163.) Subsequently, after reviewing a transcript he was shown, he recalled telling defense counsel during an earlier interview that he did not see any bruises or marks on Rachel. (*Id.* at 164.) Terry further testified he had witnessed Angela previously strike Rachel on the side of her head. (*Id.* at 160.) He was not sure when that had occurred, but stated it was probably the week before May 1. (*Id.* at 161.) After reviewing the transcript from his interview with defense counsel, Terry admitted it might have occurred the night before. (*Id.* at 161–63.)

At trial, the State contended that Petitioner lied about having Rachel's head wound examined at the fire station by a paramedic. (RT 4/6/95 at 45–46.) Petitioner's counsel countered that Petitioner never said he went to the fire station but rather said that a Rural Metro EMT who happened to be at the Quik-Mart had examined Rachel's head wound. (*Id.* at 71–72.) Captain Scott Ferguson, with the Rural Metro Fire Department, testified that there are four people, including himself, on duty during each 24-hour shift at the station located close to Petitioner's trailer and about a half block away from the Quik-Mart. (*Id.* at 187, 191.) If a crew member leaves the station to go the Quik-Mart, all four personnel have to go and they have to take the engine. (*Id.* at 191, 196–97.) If they encounter an emergency while they are out, they have to notify dispatch so they are placed out of service for purposes of receiving another emergency call, and it would be logged as well. (*Id.* at 197; RT 4/12/95 at 68–69.) Captain Ferguson testified there were no indications on the call log, and he had no independent recollection of treating a little girl on May 1 for a head laceration. (RT 4/11/95 at 199–200.) Captain Ferguson explained that it would be inappropriate to ever look at a child's head laceration and just send the child home because a spinal injury is always suspected in conjunction with a head injury. (*Id.* at 201; 4/12/95 at 70.) Petrilak testified that a lot of Rural Metro personnel regularly came into the Quik-Mart, but she did not notice an EMT treating the little girl outside the store and believed she would have been aware if that had occurred. (RT 4/7/95 at 148–49, 154, 158–59).

Becky woke early in the morning on May 2 and found Rachel in the bedroom doorway; she put her back in bed. Becky next woke to her mother yelling, and Petitioner took Angela and Rachel to the hospital. (*Id.* at 52-54.) Petitioner came back and took Becky and Brandie to the St. Charles camp around 7:30 a.m. (*Id.* at 55–56, 143; RT 4/12/95 at 10–11.) St. Charles testified that Petitioner was extremely upset, distraught, and crying. (4/12/95 at 22.) St. Charles's wife Rosemary reported Petitioner was unsteady on his feet and she and her husband put him to bed, where she heard him "moaning and saying I am very sorry Rachel, I love you." (RT 4/11/95 at 180–81.) She admitted on cross-examination that Petitioner was also crying with tears coming down his face. (*Id.* at 182.) Law enforcement located Petitioner at the St. Charles camp after 8:00 a.m. on May 2, 1994, and transported him to the Sheriff's Department. (RT 4/6/95 at 167, 169, 172.) On the way there, Petitioner was upset, said there was something wrong with his little girl, and asked if they would take him to see her. (*Id.* at 173.)

Petitioner presented evidence from only one witness: Petitioner's daughter Brandie. (RT 4/13/95 at 6.) Brandie testified that she saw a boy, about six years old, hit Rachel in the stomach with a metal bar. (*Id.* at 8.) She denied ever having told law enforcement that she saw Rachel fall out of the van on May 1, or that afterwards she saw her dad run Rachel over to the paramedics, stating first that she was home but did not see it happen, then later saying she was at Richmond's house and could not have seen it. (*Id.* at 13, 21–23.) The State impeached her testimony, pointing out numerous inconsistencies between her testimony at

trial, interviews she gave to law enforcement, and her testimony at a deposition; Brandie also admitted lying to detectives and defense counsel. (RT 4/13/95 at 11–28.)

B. Post-Conviction Relief Proceedings

On September 22, 1999, following an unsuccessful appeal, the Arizona Supreme Court appointed James Hazel to represent Petitioner in his state PCR proceedings. (EH Ex. 126.) The Arizona Supreme Court waived the requirements, pursuant to A.R.S. § 13-4041 and Rule 6.8(c) of the Arizona Rules of Criminal Procedure, for the appointment of experienced appellate counsel in capital post-conviction proceedings. (*Id.*) The Arizona Supreme Court also ordered counsel to "direct requests for the appointment of investigators and experts to the superior court pursuant to A.R.S. § 13-4013(B) and § 13-4041(J)." (*Id.*)

Despite the order directing counsel to make requests for investigators pursuant to A.R.S. § 13-4013(B), Hazel moved for the appointment of an investigator pursuant to Rule 706(a) of the Arizona Rules of Evidence. (EH Ex. 130.) The PCR court denied the motion without prejudice, stating that the motion failed to recite any specific reason to support the need for such appointment at the present time, or indeed, that counsel had even reviewed the record. (EH Ex. 131.) Hazel filed a motion for reconsideration, again pursuant to Rule 706(a) of the Arizona Rules of Evidence, stating that an investigator was needed to attempt to prove others may have caused the fatal injuries to the victim, including the mother and teenage brother, and to locate additional new defense

evidence. (EH Ex. 132.) The PCR court denied the motion for reconsideration, again stating that nothing in the motion established why the appointment of an investigator was reasonably necessary (EH Ex. 133)—a statutory requirement for the county-funded appointment of investigators, *see* A.R.S. § 13-4013(B).

Hazel filed Petitioner's PCR petition and supporting memorandum on March 28, 2000. (EH Ex. 134.) Hazel argued that Petitioner was entitled to a jury trial on the issue of aggravating factors. Hazel also argued that Bruner was ineffective for failing to: (1) move for a mistrial when jurors viewed Petitioner in shackles during the trial, (2) interview Angela, (3) follow up with the court on his motion for appointment of a second attorney to assist him, and (4) meet with Petitioner a sufficient number of times in order to discuss the case and trial preparation. (*Id.*)

The PCR court held an evidentiary hearing on Petitioner's ineffective assistance claim, at which Petitioner testified on his own behalf and Bruner testified as a witness for the State. (RT 9/18/00.) The PCR court denied the petition and, after being elected Gila County Attorney, a position for which he had campaigned during the course of representing Petitioner, Hazel withdrew from representation and attorney Michael Villareal was substituted as counsel. (EH Exs. 137–38; ROA PCR 31, 33, 40.) Newly-appointed counsel's motion for rehearing was denied. (ROA PCR 46–47.) On October 30, 2001, the Arizona Supreme Court summarily denied Petitioner's petition for review. (PR 7.)

C. Federal Habeas Proceedings

During the evidentiary hearing in these proceedings, the Court heard testimony from Sean Bruner and Leslie Bowman, Petitioner's trial counsel; James Hazel, Petitioner's PCR counsel; Sonia Pesquiera, the lead investigative detective; Dr. Philip Keen, Dr. Janice Ophoven, and Dr. John Howard, all forensic pathologists; Dr. Mary Pat McKay, an emergency medicine and trauma specialist; Paul Gruen, an expert on collision and accident reconstruction; Dr. Patrick Hannon, an expert on biomechanics and functional human anatomy; Dr. Philip Esplin, an expert in psychology and investigative interviews; Stuart James, a crime scene and bloodstain pattern analyst; and attorney Dan Cooper, a standard of care expert.[9] The Court also admitted numerous exhibits proffered by the parties. (Docs. 268–69.)

1. Evidence Suggesting the Need for Further Investigation

In this section the Court reviews the evidence presented during these proceedings about which trial and PCR counsel either were aware as a result of their own investigations, or should have been aware because it was contained in the PCSD investigatory reports, that would have suggested the need for both trial counsel and PCR counsel to conduct further investigation into the medical timeline, blood evidence, and eyewitness testimony.

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[9] The parties stipulated to the expertise of Dr. Ophoven, Dr. McKay, Dr. Hannon, Mr. Gruen, Dr. Esplin, and Mr. James. (*See* Doc. 243 at 5–6.)

a. Timing of Rachel's Injuries

Sergeant Pesquiera decided early on in the investigation that Rachel's injuries occurred on Sunday, May 1. (EH RT 11/6/17 at 64–65.) Dr. Howard, however, had not addressed the timing of Rachel's injuries in his autopsy report, and Sergeant Pesquiera never asked him to share with her his findings on the timing of Rachel's injuries. (*Id.* at 65–66.) Sergeant Pesquiera did not document any inquiry to a medical professional about the timing of Rachel's injuries and Dr. Howard reported to her only that the injuries were caused by a blunt trauma and that it was a homicide. (*Id.* at 68–70.) Sergeant Pesquiera agreed with counsel during the evidentiary hearing in these proceedings that, at the time she was conducting her investigation, she had no reason to believe that Rachel's injuries could have happened more than a day before her death. (*Id.* at 71–73.) If she had more precise medical information that showed the injuries could have happened several days earlier, as Dr. Howard's 2004 Declaration (EH Ex. 45) suggested, she would have expanded her investigation. (EH RT 11/6/17 at 73–74.)

Statements made by Dr. Howard in his pretrial interview and in testimony during Angela's trial suggested a larger window of time during which Rachel's injuries might have been inflicted, including potentially April 30.

(i) External Bruising

During his pretrial interview, conducted before either Angela's or Petitioner's trial, Dr. Howard stated that there were no tests available to determine the

exact age of bruises, but he could provide approximations. (*Id.* at 4, 11–12.) Dr. Howard described the green bruising as having occurred several days before death, and the purple bruising as possibly occurring the same day up to four or five days before death. (*Id.* at 4.) Trial counsel failed to impeach Dr. Howard with these statements regarding the imprecise nature of Dr. Howard's attempt to date Rachel's bruises.

(ii) Scalp Injury

During his pretrial interview, Dr. Howard said that he had microscopically examined tissue samples and determined the injury to Rachel's scalp was "[p]robably two days old . . . ." (EH Ex. 46 at 665.) Elsewhere during the interview, Dr. Howard made reference to the age of the scalp injury as being 72 hours or older. (*Id.* at 650, 657.) During Petitioner's trial, counsel did not impeach Dr. Howard with these earlier statements and testimony regarding the scalp injury.

(iii) Vaginal Injury

In his pretrial interview, Dr. Howard stated that, based on microscopic examination of the cells, the vaginal injury had most likely occurred one or two days before death; he was not asked during this interview to clarify if one day meant 24 hours. (EH Ex. 46 at 668–69.) Dr. Howard testified at Angela's trial that the minimal age of the vaginal injury was 12 hours prior to death, but was more typical of around 24 hours. (EH Ex. 48a at 3472–73.) During Petitioner's trial, counsel failed to challenge Dr. Howard's testimony on the timing of the genital injury, and did not impeach Dr.

Howard with these earlier statements and testimony finding the injury more typical of occurrence prior to the afternoon of May 1.

(iv) Fatal Small Bowel Injury

During his pretrial interview, Dr. Howard was not asked if he could date the small bowel injury but did say it could take hours to a day to develop severe symptoms of the associated peritonitis, and then an unspecified number of hours after that to die. (EH Ex. 46 at 681–82.) Bowman, the least experienced attorney involved in this case, attended Angela's trial in preparation for Petitioner's trial, and obtained an order to have Dr. Howard's testimony from Angela's trial transcribed on the grounds that his testimony in Angela's trial was crucial to Petitioner's defense. (EH RT 10/30/17 at 56–57; EH Ex. 27.) During Angela's trial, Dr. Howard testified that the internal injury was "most consistent" with 24 hours prior to death. (EH Ex. 48a at 101.) Dr. Howard placed the minimum amount of time between injury and death at "many - - several hours. Perhaps 12 hours," and agreed that Rachel's injury could have occurred from 12 hours to 36 hours prior to death. (*Id.* at 101.) At Petitioner's trial, defense counsel failed to challenge or impeach Dr. Howard's testimony with his earlier testimony finding the injury "most consistent" with occurrence on April 30, and did not attempt to show that under Dr. Howard's 12-hour time frame, the injury would have had to be inflicted by 3:00–4:00 p.m., at a time when Rachel showed no signs of having just been beaten and raped.

On July 14, 1994, on defense counsel's motion, Judge Carruth authorized up to $1,000 for a defense

expert to review Rachel's autopsy report or to conduct a second autopsy, if necessary. (EH RT 10/30/2017 at 74; EH Ex. 24D at 23; ROA 46.) Bruner explained to Judge Carruth that he did not necessarily want to have a second autopsy performed, but in the past had been able to get the slides released and then have the report and slides reviewed by somebody else, and he wanted that done. (RT 7/14/94 at 3.) Trial counsel's file contained a scientific article advising of the necessity of having the tissues examined in order to date the injuries. (EH RT 10/30/17 at 98–99; EH Ex. 35.) Bowman testified in these proceedings that, based on her pretrial interview with Dr. Howard, she knew a defense expert would have to examine the tissue slides in order to date the injuries. (EH RT 10/30/17 at 99–100.)

On July 20, 1994, Bowman sent forensic pathologist Dr. Keen a letter acknowledging Dr. Keen's agreement to review Rachel's autopsy report, and posing several questions for Dr. Keen to consider when reviewing the autopsy report, including whether Rachel's injuries could be dated and the amount of force necessary to inflict them. (EH Ex. 58 at 4799–800.) Bowman confirmed in the letter that Dr. Keen had explained that his review of the autopsy "may involve obtaining access to photographs, slides and other physical evidence"; Bowman also confirmed that such access could "be arranged as necessary." (EH Ex. 58 at 4799.) Dr. Keen explained in these proceedings that he could not determine the timing of Rachel's injuries, other than a generic interpretation of "it's recent," just from the autopsy report; rather, he required access to slides to make a reliable determination in terms of hours or

days. (EH RT 10/31/17 at 71, 73; EH Ex. 57 at 4101.) Dr. Keen explained he had no recollection of ever reviewing any photographs, slides, or other physical evidence at that time. (*Id.*) There was no record that he had ever received such evidence; if he had, it would have been recorded in two places: the county sending the evidence (Pima County), and the county receiving the evidence (Maricopa County). (*Id.* at 71–72.) The record would probably also contain a billing for expenses such as copying. (*Id.* at 72.)

Approximately one month later, on August 18, 1994, defense counsel and Dr. Keen spoke by telephone. (EH RT 10/30/2017 at 79–80; EH Ex. 12.) Neither defense counsel nor Dr. Keen can recall what was discussed during that call. (EH RT 10/30/2017 at 80; EH RT 10/31/17 at 74.) Four days later, on August 22, 1994, Rachel's body was released for burial with the consent of defense counsel and without a second autopsy being performed. (EH Ex. 36; EH RT 10/30/2017 at 81.) Dr. Keen did not testify at Petitioner's trial.

(v) Physical Evidence

PCSD Detective Clark obtained and executed a warrant to search Petitioner's trailer on May 2. (EH Ex. 1 at 1673.) Detective Farrier assisted him in the search. (*Id.*) The record contains no report that anyone, neither law enforcement nor defense counsel, attempted to identify and locate the clothing worn by Petitioner or Rachel on May 1, the day Petitioner is alleged to have beaten and sexually assaulted Rachel. (*See* EH RT 11/06/17 at 87–89.) Sergeant Pesquiera could not remember any sexual assault case where there was not a documented effort to identify and

locate the victim's clothing, and could not rule out the possibility that the clothing Rachel and Petitioner were wearing that day might have had exculpatory value. (*Id.* at 88–89, 92.) Sergeant Pesquiera did not ask Angela to help identify the clothes Petitioner and Rachel were wearing on May 1. (*Id.* at 89–90.)

b. Events of April 30–May 2, 1994

At the time of her death, Rachel had been living in Petitioner's small trailer at the Desert Vista trailer park in Tucson, Arizona. Angela and her children had moved into Petitioner's trailer approximately four weeks before Rachel's May 2 death. (EH RT 11/7/17 at 45; EH Ex. 1 at 472; EH Ex. 16[10] at 248, 255.)

Sergeant Pesquiera interviewed Isobel Tafe, a resident in the trailer park, on May 19. (EH Ex. 81 at 5142.) Tafe told Sergeant Pesquiera that she saw Rachel around 2:00 or 3:00 p.m. on Saturday, April 30, and that Rachel looked sick and had a pale grayish color; she was with her sister but was not being supervised by any adult. (EH Ex. 81 at 5142–43.) Sergeant Pesquiera prepared a report stating that Tafe had seen Rachel on Saturday, April 30. (EH Ex. 1 at 1852.)

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[10] Exhibit 16 is an investigative report authored by Petitioner's trial investigator George Barnett, a retired Tucson Police Officer with 21 years of law enforcement experience and 5 years of independent investigative experience. (EH RT 10/31/17 at 17; EH Ex. 15 at 4369.) Defense counsel retained Barnett to assist with the trial investigation. Barnett was deceased at the time of the Court's evidentiary hearing in this matter, but filed two declarations during the course of these federal habeas proceedings. (EH Ex. 14–15, 19.)

During her testimony at the evidentiary hearing, Sergeant Pesquiera confirmed that it had always been her understanding that Becky had consistently reported, in pretrial interviews as well as her testimony at Angela's trial, that Petitioner and Rachel only went on two trips in the van on Sunday, May 1, before Rachel appeared sick. (EH RT 11/6/17 at 57–59.) Her investigation also suggested that Petitioner took a third trip with Rachel to the Quik-Mart after Angela woke up, around 6:30 or 7:00 p.m., after Rachel appeared sick at the Flemings's residence. (*Id.* at 35–36, 57.) When Rachel returned from this third trip, she had a bag of ice on her head. (*Id.* at 37)

Becky was first interviewed by Detective Ferrier on May 2, 1994. (EH Ex. 1 at 1111.) Becky stated that Petitioner first left with Rachel to go to the store in the afternoon, around 1:00 or 2:00 p.m.; "the second place was to his friend's house." (*Id.* at 1116.) After the second trip, Becky saw Rachel "smiling and looking out the door." (*Id.* at 1117.) When Becky left to go to her friend's house at 5:15 p.m., Rachel was watching television and looked "ok," but when she returned, she saw Rachel lying on the couch. (*Id.*)

Detective Downing interviewed Becky on May 9. (EH Exs. 39 (transcript), 43 (videotape).) Becky stated that Petitioner woke up at 2:33 p.m. on Sunday, when his friend stopped by the trailer. (EH Ex. 39 at 1133.) Becky was outside riding her bike when Petitioner told her he was taking Rachel with him to his friend's house and left with her in the yellow van. (*Id.* at 1131–33.) Petitioner returned about 30 minutes later. (*Id.* at 1134.) Becky said Petitioner left again with Rachel,

telling Becky he was going to the store. (*Id.* at 1134.) Rachel did not appear hurt when she left on that trip with Petitioner. (*Id.* at 1134.) After that, when Becky put her bike away to go to her friend's house, she saw Rachel standing in the living room, watching television; Becky did not know if Rachel was hurt, but when Becky left, Rachel was standing on the porch waving to her. (*Id.* at 1130, 1135–36.) When Becky returned, Rachel was lying on the couch and Angela had placed a wash cloth on her head. (*Id.* at 1137.)

During Angela's trial, Becky testified that after Petitioner's friend visited the trailer around 2:30 or 3:00 p.m., Petitioner told Becky he was going to the store and left in the van with Rachel. (EH Ex. 41 at 6449–50.) After the trip to the store, Becky testified that Petitioner left again with Rachel, telling Becky he was going to his friend's house. (*Id.* at 6451–52.) When Petitioner got back, Becky asked permission to go to her friend's house. (*Id.* at 6453.) When Becky returned around 6:30 p.m., Rachel was lying on the couch; she looked sick and her head was bleeding. (*Id.* at 6454–55.) On cross-examination at Angela's trial, Becky was asked if she was "sure they left, they went and came back two separate times?" Becky responded "Yes." (*Id.* at 6493.) Petitioner's trial counsel did not impeach Becky with any of these statements from Angela's trial or from her pretrial interview.

Contrary to the State's theory that the assault occurred during a third trip in the van, witnesses to Rachel's third trip with Petitioner indicated this third trip occurred after Rachel appeared sick. Detective Thomson interviewed Angela shortly after Rachel was

brought to the hospital. (EH Ex. 1 at 414.) Angela stated that she slept all day on May 1, and when she woke up Rachel was taking a nap; Petitioner explained to Angela that Rachel was playing with some little boys and she had fallen out of the van. (*Id.* at 416, 418.) Angela left to make a phone call and to check on Brandie. (*Id.* at 416.) When she got back to the trailer, Petitioner was returning in the van. (*Id.*) He explained that when Rachel woke up there was blood all over her head so he took her to the paramedics who rinsed her head out and told him there was no need to stitch it. (*Id.* at 416.) Rachel told Angela she did not want any dinner because her stomach was upset. (*Id.* at 419.) Angela noticed some bruises on her chest and Rachel explained that "the little boy pushed her out of the van." (*Id.*)

Stephanie Fleming, Petitioner's neighbor, recounted the events she recalled from Sunday, May 1 in an interview with Sergeant Pesquiera. (EH Ex. 72 at 333.) Stephanie remembered seeing Rachel playing on her bike around 3:30 p.m. (*Id.* at 334–35.) She went to Petitioner's trailer at that time because Angela had previously asked her if she wanted to babysit. (*Id.* at 335.) Stephanie saw Petitioner in the kitchen and Angela was wide awake and told Stephanie she no longer needed her to babysit. (*Id.* at 335–36.) Stephanie saw Rachel outside riding her bike at that time, and she did not look sick. (*Id.*) Around 5:15 p.m., Rachel went into Stephanie's camper. Stephanie noticed she was soaking wet, but didn't have any bumps on her head, and no blood, but was "trying to get sick" though she never threw up. (*Id.* at 337–38.) Her face was a greenish color, and she had black under her eyes. (*Id.*

at 338.) She was not wearing a shirt, but Stephanie saw no bruises or scratches on her, except on her arms. (*Id.* at 339, 341.) Stephanie picked her up to take her home and when they ran into Petitioner on his way to check on her, Rachel went willingly to him. (*Id.* at 341–42.) After that, Petitioner, Rachel *and* Angela drove away in the van. (*Id.* at 343–44.) Stephanie did not see the van return, but did see it leave again around 7:30 p.m., and it was gone until close to 9:30 p.m. (*Id.* at 346–47.)

Petitioner was first interviewed Monday morning shortly after he was brought in from the St. Charles camp. (EH Ex. 73 at 686.) Petitioner stated that he saw Rachel was with two little boys her same age when she fell out of his van on Sunday afternoon. (*Id.* at 691–92, 695.) He said that he gave Rachel half of a Tylenol or aspirin and she went back out to play; he pushed her on her bike until she started playing with the boys again. (*Id.* at 691, 696.) Petitioner told the officers that after Rachel had fallen out of his van, he and Rachel went to visit St. Charles and then to the Choice Market to get dinner; Rachel went into the market and helped carry the milk. (*Id.* at 729, 735, 741–42.)

Petitioner said that, sometime after 5:00 p.m., neighbors Stephanie and Julian Duran waved for Petitioner to come over and told him Rachel was getting sick. (EH Ex. 73 at 702.) Petitioner stated he put her down for a nap and it was after that when he first noticed her head start to bleed. (*Id.* at 691, 696.) Around 5:30 p.m., he took Rachel to the Quik-Mart to get some ice for her head. (EH Ex. 73 at 703–06, 718, 749.) He did not stop at the Rural Metro Fire

Department fire station as he later told Angela and others, but stated that he did encounter an EMT at the Quik-Mart who looked at the cut, shined a light in her eyes, commented that they were "reacting equal," and advised Petitioner to "keep the ice pack on it and it'll be okay." (*Id.* at 704–06, 718, 774.) Petitioner thought the EMT was on his way to or from work because there was no emergency vehicle there. (*Id.* at 719.) Petitioner stated he did not take Rachel to the Rural Metro Fire Department because he saw a police vehicle there and he did not have a driver's license. (*Id.* at 704, 774.) During Petitioner's pretrial statement, he never stated that Rachel was examined by a Rural Metro EMT, but maintained that he saw a man in a brown-shirted EMT uniform who was not driving an official vehicle. (EH Ex. 73 at 705–06, 749.) When Petitioner returned to the trailer, Angela, who used to be in nursing, said "head wounds bleed a little bit so no big deal." (EH Ex. 73 at 704.) Petitioner told the officers that he and Angela were up with Rachel much of Sunday night, and that Rachel would throw up anytime she drank something. (EH Ex. 73 at 705, 723.)

Detective Ruelas took a statement from Petrilak, the Quik-Mart clerk, who verified that Petitioner was in the store getting ice in a plastic bag, but did not bring his child in with him, and could not opine on Petitioner's actions outside or if she saw him talking with anyone, stating that she "didn't watch him anymore . . . once outside the store I don't pay attention to them, especially when I have customers in the store." (EH Ex. 1 at 1877; EH Ex. 66 at 5072.) Because Petrilak had testified at trial that she believed she would have been aware of an EMT treating a little girl

outside the store, but did not notice that happening, trial counsel could have impeached this statement with her statement to Detective Ruelas that she did not pay attention to him after he left the store. Despite these prior statements, trial counsel did nothing to impeach Petrilak's statement that she would have noticed Rural Metro personnel arriving in an official vehicle, or would notice any Rural Metro personnel looking at or talking to the little girl. Trial counsel did confirm the time of day Petrilak might expect Rural Metro personnel to be there, and obtained information from Petrilak that Rural Metro always parked in front where they could be seen.

Sergeant Pesquiera acknowledged during the evidentiary hearings in these proceedings that, despite verifying that Petitioner went to the Quik-Mart and to his friend Ron's house, and that he did not go to the Rural Metro Fire Department, there is no "indication anywhere in the sheriff's department record" that anyone attempted to verify and document that Petitioner went into the Choice Market around 4:00 or 4:30 in the afternoon and that Rachel was fine at the time. (EH RT 11/6/17 at 99–101; *see also* EH Ex. 66.)

Sergeant Pesquiera interviewed Rachel's mother Angela on May 2 and again with Detective O'Connor on May 3 after Rachel's autopsy. (EH Ex. 1 at 414–26, 472–517, 518– 616.) Angela said that she slept all day on May 1 and did not wake up until 6:30 p.m. (*Id.* at 416, 418.) Angela said after she woke up and saw Rachel's head was bleeding, Rachel told her that a little boy had pushed her out of the van. (*Id.* at 419, 475.) Petitioner also told her that Rachel had fallen out of

the van earlier while playing with some little boys. (*Id.* at 418.) Angela stated that at 7:00 or 7:30 that evening, after she returned from making a phone call, Petitioner was just returning in his van and told her that when Rachel woke up from a nap her head was bleeding; he took her to the fire station where they rinsed her head out and informed Petitioner she was not in need of stitches. (*Id.* at 416.)

Angela reported that she asked Rachel if she had gone to see the firemen, and Angela reported that Rachel said she had seen a lot of them. (EH Ex. 1 at 506, 530.) Angela also stated during this interview that she and Petitioner discussed taking Rachel to the hospital on the night of May 1 but that she was "scared" that if she did so "they might take her away" because of the cut on her head and the bruises on her stomach. (*Id.* at 557.) She stated that she did not see bruises on Rachel's face until Monday morning. (*Id.* at 419, 476, 592.) Sergeant Pesquirea noted that Angela "was not emotionally upset, and showed very little emotion about her arrest or her child's death" in the May 3 interview. (*Id.* 66 at 5216.)

Angela told officers she put Rachel in bed with her that night because Rachel wanted to sleep between Angela and Petitioner. (EH Ex. 1 at 477.) Rachel, however, was not present in Angela's bed when Angela woke up at approximately 6:00 a.m. (*Id.* at 478.) Angela found Rachel in Rachel's bed and could not wake her up. (*Id.* at 478.) Petitioner transported Angela and Rachel to the hospital in his van while Angela held Rachel and performed CPR. (*Id.* at 482–84, 548–49.) Angela related that once Petitioner dropped her off at

the hospital he was to return home to attend to the other children. (*Id.* at 418, 483, 549.) Angela was not sure, but thought Petitioner was going to return to the hospital, possibly bringing the other children with him or maybe after taking them to school. (*Id.* at 483, 549.) Angela said that Petitioner had never hit the kids. (*Id.* at 425, 576.) Angela advised Sergeant Pesquiera that Petitioner had protected her and was the "first guy that's made (her) feel safe." (*Id.* at 491.)

Richmond was interviewed on May 2 and August 30, 1994. She reported that she was with Petitioner most of the night on Saturday, April 30, into the early morning of Sunday, May 1. She was at Petitioner's trailer on Sunday evening May 1, sometime between 7:00 p.m. and 8:00 p.m., where she saw Rachel lying quietly on a pillow with her head bleeding. (EH Ex. 1 at 1302–03.) Petitioner and Angela told her that some kids playing in Petitioner's van had pushed Rachel out of the van. (*Id.* at 1303–04.) Petitioner told Richmond that he had taken Rachel to the paramedics at the fire station, and they said she would be alright. (*Id.* at 1304.)

Richmond also stated that, on Monday morning, Petitioner, upset and hysterical, arrived at her house with Brandie and Becky. (EH Ex. 1 at 1306–08, 1311, 1327.) Richmond and Petitioner took the girls to his friend Ron St. Charles, and then Petitioner told Richmond to take Petitioner's van to go to the hospital to check on Rachel and Angela because Petitioner did not want to go to the hospital. (*Id.* at 1309–11.) Petitioner left in a truck with St. Charles, and Richmond was stopped by police officers on the way to

the hospital. (*Id.* at 1307–08.) Petitioner was located at the St. Charles camp and transported to the Sheriff's Department.

From May 17 through May 27, Sergeant Pesquiera conducted other interviews of people who resided in or were at the trailer park on May 1, 1994. (EH Ex. 66 at 5218–23.) About two weeks later, a Pima County Sheriff's photographer was dispatched to the Choice Market to photograph the parking lot. (EH Ex. 65a at 4756–63.) Other than taking photographs, no additional investigation was conducted by the Sheriff's Department.

On the morning of May 3, 1994, Norma Lopez reported to PCSD Detective Bruce Clark that her children observed a person in a van striking a child. (EH Ex. 66 at 5083.) Norma told police that her eight-year-old twins walked to Choice Market at about 4:00 p.m. for soda. (EH Ex. 76 at 1050–51.) She reported that when the children returned home from Choice Market ten minutes later, they were "dying to tell her" that they had seen a man who "looks like Alonzo[11] in a yellow van . . . punching a little girl." (*Id.* at 1052.) The children stated he "was driving with one hand. . . . swerving like he was drunk" and was hitting the girl in the chest with his elbow and hitting her face with her fist. (*Id.*) The children also reported they could see and hear the girl crying. (*Id.* at 1052–53.) Norma then told Detective Clark that when she saw Petitioner on the news the following day, she "knew right away" that the

[11] Alonzo was a friend of the family. (EH Ex. 76 at 1051.)

same guy the kids saw in the van was "the same guy that was on the news." (*Id.* at 1052.)

The Lopez children, Ray and Laura, were interviewed in their mother's presence that afternoon by Detective Clark. (EH Exs. 77, 79.) There were several instances during the interview that Detective Clark corrected what he perceived to be incorrect answers, and provided Ray with the correct answer, or suggested the correct answer in the question he posed. For example, when Ray stated he went to the store in the afternoon after school, Detective Clark followed up with these leading questions:

Det. Clark:	. . . What, do you go to school on Sundays?
Ray:	No.
Det. Clark:	. . . [W]hat did you do for the first part of the day? You did, you didn't go to school, what'd you do just playing?
Ray:	Yes
	. . .
Det. Clark:	. . . It was light out right?
Ray:	Uh huh (yes) yeah.
Det. Clerk:	And it was kind of blue skies and sunny?
Ray:	Yeah.

(EH Ex. 77 at 1057.)

Detective Clark also asked how far away the Choice Market is, "just a block away or ten blocks away?" (EH Ex. 77 at 1058.) When Ray responded that it was ten blocks away Detective Clark said: "No, no, no, no. Okay, we gotta, we gotta be real serious about this, okay? . . . So how far do you really think it is from here?" (*Id.* at 1058.) Ray responded with the other choice given by Detective Clark: a "[b]lock away." (*Id.*) Detective Clark continued asking leading questions. (*Id.* at 1058–59.) Ray told Detective Clark that when he went to the Choice Market around 5:00 p.m. on May 1, he saw a man with long, messed up, curly hair, wearing a blue shirt and a blue and white baseball cap hitting a little girl while driving a yellow van with one hand. (*Id.* at 1060–61, 1063.) Ray thought the van was swerving because the man was hitting the girl. (*Id.* at 1063.) Because Ray had stated he could see the man's hands, Detective Clark stated to Ray that "he was pretty close then, you could see his hands?" (*Id.*) Ray agreed he was. (*Id.*) Detective Clark asked if the distance was comparable to the distance between him and a "big football" that was in the room. (*Id.*) Ray agreed. (*Id.*) When Ray said that he could not estimate the man's age, his mother, who had previously viewed Petitioner on the news, suggested that the man was around "Uncle David's" age, or around 30–35 years old, and Ray agreed. (*Id.* at 1060–61.) Ray told Detective Clark that he saw the man hitting the girl with his fist and elbow—twice in the face and once in the stomach with his fist, and in the mouth with his elbow. (*Id.* at 1064.) Later Ray said he saw the man hit the girl once with his elbow in the girl's stomach and hit her face five times with his fist. (*Id.* at 1065.) When confronted with his inconsistent responses, Ray said he could not

picture exactly where the man hit the girl with his elbow. (*Id.* at 1066.) Although Ray said he could not hear anything because the van windows were closed, when Detective Clark asked if the girl looked happy or sad or crying or yelling, Ray said the girl was "kind of yelling" and crying. (*Id.* at 1064.) Clark then asked another leading question confirming that Ray could not hear anything but could see that she was yelling. (*Id.* at 1064.) When Ray said he could not see her bleeding, Detective Clark first responded ". . . you probably just didn't notice that . . ." then acknowledged that maybe it did not happen, but he was not "trying to put words in [Ray's] mouth." (*Id.* at 1067.)

Laura was interviewed after her brother. She told Detective Clark that when she went to the Choice Market with her brother between 3:00 p.m. and 4:00 p.m. on May 1, she saw a man with long, brown, messed up, curly hair driving a yellow van with one hand while hitting a little blonde girl with the elbow of his other arm. (EH Ex. 79 at 1012–16.) Laura was asked how far away she was from the van when she saw it, further than or closer to the football in the room. (*Id.* at 1115.) Laura responded without equivocation that it was further than the football, and was "all the way to the fence . . . ." (*Id.* at 1015.) Both Norma and Detective Clark talked her into agreeing it was the same distance as the football, but when Detective Clark followed up by asking if it was a little further or a little closer, Laura again, consistent with her first response, stated it was "a little further." Detective Clark, seemingly unhappy with the response, suggested maybe she was just unsure about her answer: "A little further, okay. And that's okay, if

you're not sure . . . it's certainly okay for you to say I don't know or I'm not sure." (*Id.* at 1015.)

Laura told Detective Clark that the girl did nothing in response to getting hit; she was not talking and Laura did not hear her say anything. (EH Ex. 79 at 1017.) Detective Clark then posed the question "could you see if the little girl was laughing or crying?" (EH Ex. 79 at 1017–18.) Laura responded this time that the girl was crying. (*Id.* at 1018.) When Laura stated she knew the girl was crying because her face was red and there were tears, Detective Clark disagreed with her: "I'm not sure you could see tears . . ." (*Id.* at 1018.) When Laura protested that she "saw her," Detective Clark responded: "Maybe you just, you know like when you cry, you know there's tears." (*Id.*)

Later in the interview, Detective Clark and Norma talked Laura into changing her initial negative response to an uncertain and then a positive response:

Det. Clark:	. . . did you watch any television?
Laura:	Yeah, but cartoons.
Det. Clark:	Okay. Did you watch the news?
Laura:	No.
Det. Clark:	Okay, did you think your brother watched the news?
Laura:	No.
Det. Clark:	You don't, you don't know?
Laura:	No.

Det. Clark: You don't know, okay. Mom, uh, let me just ask you, did they both watch the news?

Norma: They both watched the news. Did we, yeah we watched the news. Remember I, I told you to come and watch the news?

Laura: Yeah.

(EH Ex. 79 at 1024–25.)

Defense counsel was on notice of the police reports and interviews of Ray, Laura, and Norma Lopez. (EH RT 10/30/17 at 125; EH RT 10/31/17 at 147.) Defense counsel for both Petitioner and Angela, and a Pima County Sherriff's Office investigator, interviewed Ray and Laura in each other's presence, and in the presence of their mother, on January 20, 1995 at the Lopez home. (EH Exs. 78, 80.) During this pretrial interview, Ray admitted to defense counsel that he did not have an independent memory of many of the events of May 1, 1994; his answers in the interview derived from his reading of the transcript of his interview with Detective Clark months earlier. (*Id.* at 1075–76.) Contradicting his statement to Detective Clark that he had witnessed the incident on the way home from the Market (EH Ex. 77 at 1059), Ray stated during his defense interview that on his walk *to* the market he saw a man in a van hitting a little girl. (EH Ex.78 at 1077.) He described the van as a scratched, old, solid yellow van without any windows on the sides.[12] (EH Ex. 78 at 1078–79.)

[12] Petitioner's van had side windows. (EH Ex. 65a at 4874–75.)

Aerial photographs taken by the PCSD show an older model solid yellow van without any windows along the side panel, matching the description given by Ray Lopez, in the Choice Market parking lot. (EH Ex. 94.)

During the pretrial interview, Ray described the man as a white man with black curly hair, which he agreed was as curly as an "afro" (EH Ex. 78 at 1080–81), but did not describe the man as wearing a baseball cap (EH Ex. 77 at 1061). Ray testified the man hit the girl in the stomach and on her face with his hand, and she cried when she got hit, though he also said he did not actually see her cry. (*Id.* at 1082–84.) Ray stated he did not know how many times the man hit the girl. (*Id.* at 1082–83.)

Laura also spoke with defense counsel, but only after first listening to her brother's interview and his answers. (EH Ex. 80 at 1029.) Like her brother, Laura remembered that the van was solid yellow without any windows along the sides. (*Id.* at 1034.) Laura claimed to be able to see the driver of the van all the way down to the waist of his pants, but she was unable to recall what the driver wore or what he looked like. (*Id.* at 1037.) Again, like her brother, Laura described the man as having curly hair "[l]ike a black guy's." (*Id.* at 1038.) She saw the man hit the girl hard with his elbow, twice in the face. (*Id.* at 1041.) Laura told counsel that she only saw the back of the driver's head and she saw only some of the girl's face from the side, but she could tell that the girl was crying because "[h]er face was red" and her "eyes were watery." (*Id.* at 1038–39, 1041.) Initially, Laura stated that she was sure the man she saw on the news was the man she

saw in the van, but after further questioning by defense counsel as to whether she was sure, or just "thought it could be," she responded that it "could be." (EH Ex. 80 at 1045–46.)

At the end of the interview, Bowman had Ray and Laura take the interviewers out to the Choice Market parking lot to identify where they were standing when they observed the van traveling through the dirt lot. (RH Ex. 78 at 1099–1100; *see* RT 4/7/95 at 41.)

Counsel conducted no further investigation until the eve of trial when Petitioner's investigator, George Barnett, was directed to take photographs and measurements of the van. (EH Ex. 17, Ex. 18.) Barnett took photographs of the front and side of the windshield of Petitioner's van, as well as height measurements of the driver and passenger side door windows, attempting to cast doubt on Ray and Laura's ability to see. (EH Ex. 18 at 267–83). Defense counsel noticed Barnett as a witness at trial who would be expected to testify as to the various measurements taken from Petitioner's van. (EH Ex. 26.) Barnett prepared a summary of the results of the investigation on March 31, 1995, and defense counsel received the results a day before Petitioner's trial began. (*See* EH Ex. 17 (facsimile transmittal indicating report sent April 4, 1995). *But see* EH RT 10/30/17 at 120 (report received April 8, 1995); EH Ex. 17 (cover page signature line indicating report sent April 8, 1995).) Ultimately, Barnett did not testify at Petitioner's trial.

c. Evidence of Other Potential Suspects

(i) Angela Gray

In an interview conducted with defense counsel in October 1994, Angela's aunt, Donna Marini, who had been taking care of Becky and Jonathon since Angela's arrest, stated that she believed the two children had been abused by Angela because of what the children said about being slammed up against the wall and thrown down the stairs by Angela. (EH Ex. 32 at 1271.) She was also generally concerned about the possibility of sexual abuse, but not from Petitioner; it had previously been reported to her by other family members that visiting the house in the past they had walked in to see Becky sleeping "with a bunch of drunk men" at the house and "things like that that went on all the time." (*Id.* at 1272–73.)

Petitioner's daughter Brandie told officers she had seen Angela hit both Becky and Jonathon in the time they were living in Petitioner's trailer. (EH Ex. 1 at 886–87, 890–91.) She also saw Angela hit Rachel, hard enough to leave a hand print on Rachel. (*Id.* at 891.) Becky confirmed that Angela spanked Rachel hard enough to leave a hand print on her, and that before they moved in with Petitioner, Angela would kick Becky when she got into trouble. (EH Ex. 40 at 1165, 1171.)

On May 3, 1994, Terry Richmond called PCSD and told Detective Clark that he thought that Angela was the one "hitting on the kids." (EH Ex. 66 at 4946.) He reported seeing Angela spank the kids, "sometimes" in excess, and had also seen Angela smack Rachel in the

face for not doing what Angela said. (EH Ex. 66 at 4946–47.) Petitioner's neighbors also reported that Angela screamed at the children threatening them with physical harm while Petitioner acted appropriately around children. (EH Ex. 16 at 249–50.)

(ii) Other Children in the Trailer Park

In Becky's statement to Detective Ferrier on May 2, she indicated that when she returned from visiting her friend's house, Rachel was lying on the couch and she saw blood on the pillow. (EH Ex. 38 at 1112, 1118.) Becky heard Rachel tell their mother that a boy had pushed her out of the van and hit her with a metal bar in the stomach. (EH Ex. 38 at 1111–12, 1115, 1120.) Julian Duran and Dawn Kopp were at Stephanie Fleming's trailer around 5:00 p.m. on Sunday May 1. Kopp told Sergeant Pesquiera that Stephanie's son Patrick had supposedly told Stephanie that her other son Ryan hit Rachel in the stomach with a stick and that is when she went to the bathroom and tried to throw up. (EH Ex. 66 at 5161.) When Stephanie was interviewed, she acknowledged that her two-year-old son Ryan, still in diapers, was "mean" sometimes, and had struck some of the older children before, but not enough to cause a bruise or injury. (EH Ex. 72 at 340.)

Brandie was interviewed on May 2 and reported that a boy had hit Rachel in the stomach with a metal bar, and she thought the same boy, maybe one of Stephanie's kids, had pushed Rachel out of the van. (EH Ex. 1 at 796, 811.)

Petitioner told officers that, on Sunday when he saw Rachel fall out of the van, she told him one of the boys pushed her out of the van. (EH Ex. 73 at 691, 695.)

(iii) Becky

Angela reported that Becky could be overly rough with Rachel, saying once she pushed her in front of a moving car, and another time Angela was told that Rachel had fallen from a clothesline after Becky had put her up there. (EH Ex 1 at 494–495, 536.)

(iv) Jonathon

Bowman acknowledged in these hearings that evidence acquired during the investigation suggested that there may have been sexual problems between Rachel and her brother Jonathon, that Jonathon had been molesting other children, that Rachel was afraid of Jonathon when he was in the bedroom where Rachel slept, and that Jonathon had to be moved out of the girls' bedroom into separate sleeping quarters due to sexual behavior directed toward Brandie. (EH RT 10/30/17 at 106–09; EH Ex. 1 at 890, 892–95; EH Ex. 30.)

Sergeant Pesquiera could not recall if she or one of her investigators conducted a forensic interview about any improper touching happening among the children in the trailer. (EH RT 11/6/17 at 77.) Sergeant Pesquiera admitted that there was no reason she could think of why she would have ruled out such an investigation. (*Id.* at 78–79.)

(v) Zoly

Prior to moving in with Petitioner, about a month before Rachel's death, Angela and her children lived with her former boyfriend, "Zoly," for several years. (EH RT 11/7/17 at 45–46; EH Ex. 1 at 426, 472, 489.) Zoly was physically abusive toward Angela, and remained in frequent contact with the children, most recently for Rachel's birthday on April 7. (EH Ex 1. at 426, 472–73, 489–90, 576.) An entry in defense counsel's trial notes states: "Zol[y] - problems w/ Johnny & Rachel sexually in past." (EH RT 10/30/17 at 105–06; EH Ex. 30.) Angela provided Zoly's full name, as well as his address to Sergeant Pesquiera (*id.* at 512), but there is no documented report that law enforcement attempted to locate or interview Zoly. (EH Ex. 66; RT 11/7/17 at 54.) Though he was a "person of interest," he was never considered a possible suspect. (RT 11/7/17 at 54–55.) Sergeant Pesquiera testified at the evidentiary hearing that there would have been a note in the investigative record if she had followed up with Zoly.

2. Evidence That Could Have Been Presented at Trial

In this next section the Court reviews the evidence presented during these federal habeas proceedings that Petitioner asserts a reasonable investigation would have uncovered.

a. Medical Evidence

(i) Fatal Small Bowel Injury

During the recent evidentiary hearing before this Court, the Court heard testimony from Dr. Janice Ophoven, Dr. Mary Pat McKay, and Dr. Keen, among other experts. The Court also heard testimony from Dr. Howard. (EH RT 11/7/17 at 63–133.) Dr. Ophoven, Dr. McKay, and Dr. Keen all agree that it is not possible that the injury to Rachel's small bowel occurred on the afternoon of May 1, 1994. (EH RT 10/31/17 at 82, 95, 107; EH RT 11/1/17 at 37–38; EH RT 11/2/17 (a.m.) at 9.) Both Dr. Ophoven and Dr. McKay, experts retained by Petitioner, concluded that the injury to Rachel's small bowel occurred at least 48 hours (and probably many more hours) before her death. (EH RT 11/1/17 at 29, 35–36; EH RT 11/2/17 (a.m.) at 20; EH Ex. 113 at 6634–31; EH Ex. 106 at 4275–76.)

Dr. Ophoven explained that the fatal injury to Rachel's duodenum occurred in the retroperitoneal space, which is just behind, but separated from, the abdominal cavity or peritoneum. (EH RT 11/1/17 at 11–13; EH Ex. 107 (sealed) at 6678–79.) The inflammatory response to an injury in this area is initially restricted to the tissue area of the retroperitoneum. (EH RT 11/1/17 at 14.) Retroperitoneal injuries do not manifest in the same kind of symptoms as an injury inside the peritoneum, such as appendicitis, where the inflammation spreads quite rapidly and symptoms develop quickly. (*Id.* at 11–15.) Individuals may experience discomfort—a bellyache, nausea, or a change in appetite—but would not necessarily look like they were suffering from an

impending catastrophe. (*Id.* at 15.) As a result, the delay between injury and the time of onset of symptoms—let alone diagnosis of injury—in injuries to the duodenum like Rachel's is often three or four or more days. (*Id.*; Ex. 105 at 4272–73.) Individuals commonly do not know they have a serious injury for several days until there is a catastrophic decompensation with the onset of peritonitis and, simultaneously, shock. (EH RT 11/1/17 at 15.)

Dr. Ophoven conducted a pediatric forensic pathology review of the autopsy records and supporting documentation, including photographs and tissue slides taken during Rachel's autopsy. (EH RT 11/1/117 at 10; EH Ex. 103 at 4243.) Based on her review of gross autopsy photos showing the extent of inflammation in Rachel's abdomen, Dr. Ophoven concluded that the development of this degree of peritonitis had taken at least 48 hours. (EH RT 11/1/17 at 27–29; EH Ex. 107 (sealed) at 6675.) Dr. Ophoven's analysis of the microscopic slides also showed evidence of an inflammatory response that would have taken days to develop. (EH RT 11/1/17 at 32, 35–36; EH Ex. 105 at 4272; EH Ex. 107 (sealed) at 6680.)

Addressing the evidence that there were eyewitnesses who saw Rachel being beaten by Petitioner on the afternoon of May 1, Dr. Ophoven rejected the idea that any additional blows to her abdomen on that afternoon could have caused Rachel's death as the inflammatory process would have started much earlier, she had already developed peritonitis, and was already on her way to dying at that time. (EH RT 11/1/17 at 88.) Dr. Ophoven testified that Isobel

Tafe's statement that Rachel looked sick and "grayish" on Saturday was a symptom "specific to this sort of [disease] process." (*Id.* at 78.) Dr. Ophoven testified that based on her review of the physical evidence, including samples of tissue and chemical analysis from Rachel taken at the time of autopsy, "the key findings in this case of abdominal trauma of many days duration were not made clear" during Petitioner's trial. (EH RT 11/1/17 at 37–38; EH Ex. 106 at 4276.) The evidence demonstrates that "the fatal injuries to Rachel Gray could not possibly have been inflicted on the day prior to her death as suggested by the state at [Petitioner's] trial." (*Id.*) Dr. Ophoven concluded that the "veracity of this evidence is as scientifically precise as any forensic determination available in medical science." (*Id.*)

Dr. Mary Pat McKay, a board-certified emergency medicine practitioner specializing in trauma care with additional experience teaching and researching in the field of injury care and trauma, testified regarding her personal experience treating duodenal injuries like Rachel's as well as an extensive literature review she undertook focused on pediatric injuries involving duodenal rupture, perforation, laceration, treatment, and outcomes. (EH RT 11/2/17 (a.m.) at 5–6, 9; EH Ex. 113.) In her review, Dr. McKay identified "more than 200 cases of intestinal injury in children over many decades, including at least 160 cases of duodenal perforation with the timeline described from injury through diagnosis to treatment and outcome." (EH Ex. 113 at 6634–27.) In her review of the literature, Dr. McKay did not find a single reported case in which a duodenal injury resulted in death within 48 hours after

the known time of injury. (EH RT 11/2/17 (a.m.) at 9, 15.)

Dr. McKay suspected Rachel's injury was non-accidental due to the delay in seeking treatment, but could not rule out an accidental injury based on the evidence. (*Id.* at 10.) In her experience, she has seen duodenal injuries caused by bicycle handlebars and even rough play such as wrestling. (*Id.* at 11.) In one case, Dr. McKay treated a 17-year-old who suffered a duodenal tear due to a knee to the solar plexus while wrestling with a friend. Dr. McKay explained that the patient presented to the emergency room "perfectly healthy" with some abdominal pain. (*Id.* at 11.) The patient actually left the emergency room before he was diagnosed with a rupture in his retroperitoneum, and ate a submarine sandwich for lunch before returning for surgery the following day. (*Id.* at 11–12, 19.) Dr. McKay described the teen's delayed diagnosis as consistent with her experience and the medical literature, explaining that the inflammatory response in these types of injuries is a "smoldering process." (*Id.* at 12.) The correct diagnosis and medical treatment are often not undertaken for several days; Dr. McKay's literature review uncovered cases where the correct diagnosis was not reached for up to seven days. (*Id.* at 12.)

Dr. McKay explained that the laceration to Rachel's duodenum would initially cause inflammation within the retroperitoneal space, but not infection. (*Id.* at 12–13.) Eventually, if left untreated the inflammation spreads and infection sets in, resulting in overwhelming sepsis and death. (*Id.* at 13; Ex. 113 at

6634.29.) The progression from the initial injury to increased inflammation and infection, and eventually death, takes a "very long period of time." (*Id.* at 17; Ex. 113 at 6624.29.) In her literature review, Dr. McKay found cases in which individuals suffered duodenal lacerations like Rachel's and survived, even though they did not receive treatment for four to seven days. (*Id.* at 15.)

Dr. McKay concluded that "Rachel's duodenal injury occurred no sooner than 36 hours prior to death and likely occurred much earlier. There is absolutely zero evidence to suggest it could have occurred in less than 24 hours." (EH Ex. 113 at 6634.31; *see also* EH RT 11/2/17 (a.m.) at 20.)

Dr. Ophoven and Dr. McKay agreed that there is nothing in Rachel's medical records that would suggest that her inflammatory response to the injury would deviate from the standard case. (EH RT 11/1/17 at 59; 11/2/17 (a.m.) at 19–20.) Dr. Keen likewise testified that his best estimate is that Rachel's abdominal injury occurred approximately two days prior to her death, but at a minimum not less than a day could have passed between time of injury and death. (EH RT 10/31/17 at 77, 107, 114–15.)

Dr. Howard testified that tissue slides of Rachel's duodenum showed "no sign of healing" and concluded the injury was "acute, could be a few hours, typical of a day or the same day as death." (EH RT 11/7/17 at 85.) On cross-examination, Dr. Howard maintained that the injury was typical of being at least a few hours to 24 or more hours old. (EH RT 11/7/17 at 105.) Dr. Howard agreed, however, that he testified in Angela's trial that

the abdominal injury was most consistent with infliction 24 hours before death but could be as few as 12 hours old. (*Id.* at 106.) Dr. Howard testified that now his opinion was that the injury was most consistent with "being several hours to 24 hours" old, but also could have occurred in as little as 61 minutes prior to death. (EH RT 11/7/17 at 107–08.) Dr. Howard also agreed that he did not testify at Petitioner's trial that the injury was most consistent with 24 hours, but that it was "typical of having occurred about one day prior to death" and agreed that he never disclosed to the jury that the injury was most consistent with having occurred prior to May 1. (EH RT 11/7/17 at 109–10.) Dr. Howard explained that if he had been asked the right questions at Petitioner's trial, he would have testified truthfully that in his judgment the injury was most consistent with having occurred prior to May 1, but admitted that he did not make this finding clear to Petitioner's jury. (*Id.* at 110.)

Dr. Howard also admitted that a description of Rachel looking sick and gray in color prior to May 1 could be compatible with the injury occurring before that date. (EH RT 11/7/17 at 112–13.)

(ii) Vaginal Injury

Dr. Ophoven conducted a microscopic examination of the physical evidence of Rachel's vaginal injury obtained during autopsy. Prior to her 2010 report, she requested a special "trichrome" stain be applied to the anogenital tissues which revealed evidence of "a mature vital reaction" indicated by low cell content material as a result of the body making new tissue to heal; "regeneration" or the replacement of surface

epithelial cells; and "neovascularization" or new blood vessel growth that occurs when tissue is healing and growing. (EH RT 11/1/17 at 41–42; EH Ex. 106 at 4275.) Based upon her review of these slides, Dr. Ophoven concluded that Rachel had a vaginal injury that was weeks old, and possibly predated the time period in which Rachel lived with Petitioner. (EH RT 11/1/17 at 42–43.)

Dr. Keen also reviewed the photo micrographs of Rachel's vaginal injury and identified connective tissue in the trichrome staining, which indicated that the vaginal injury was multiple days, possibly weeks, old, and was older than the abdominal injury. (EH RT 10/31/17 at 92–94, 108.)

Both Dr. Ophoven and Dr. Keen agreed that the evidence of some fresher blood in Rachel's vaginal area indicated a newer injury in combination with the older injury, but did not necessarily indicate recent intentional sexual trauma. Rather, the more recent injury could result from irritation of an older injury, poor hygiene, itching or scratching, or reopening of an older wound during the death process. (*See* EH RT 10/31/17 at 94–95, 109; EH RT 11/1/17 at 43–45, 48, 78–79, 84.)

Dr. Howard concluded in his 2004 declaration that the "injuries to Rachel's vaginal area showed characteristics consistent with hours to perhaps days elapsing between the time of her abdominal injury and her vaginal injury." (EH Ex. 45 at 4379.) However, during direct examination at the evidentiary hearing, Dr. Howard testified that, based upon his review of tissue samples, the vaginal injury was "an acute

injury," consistent with a few hours to a day, and showed none of the characteristics consistent with an injury at least a week old. (EH RT 11/7/17 at 76–77.)

On cross-examination, Dr. Howard admitted that he testified at Angela's trial that Rachel's vaginal injury was more typical of 24 hours old, and that this would put the injuries outside of the 2:00 p.m. to 5:00 p.m. window on Sunday, May 1, the timeframe during which Petitioner allegedly assaulted Rachel. (*Id.* at 100–01.) Dr. Howard further testified that his current opinion is that the vaginal injury is "typical of an injury that predates the afternoon of Sunday, May 1." (*Id.* at 102.) Dr. Howard admitted that his testimony at Petitioner's trial could have left the jury with the misimpression that the vaginal injury was most consistent with infliction between 2:00 and 5:00 on the afternoon of Sunday, May 1, while his findings were that the injury was most consistent with infliction on Saturday, April 30. (*Id.* at 103.) Dr. Howard agreed that even though he held to the belief that the injury was more typical of having occurred the day prior to May 1, he told Petitioner's jury that the injury was consistent with the afternoon of May 1, because "it was a correct response to the question asked" and he could "only answer in court the questions [he was] asked." (*Id.* at 103–04.)

(iii) Bruising

Regarding the dating of bruises, Dr. Ophoven explained that "[i]nterpreting the age of bruises from physical appearance and color is recognized by the forensic community to be very inexact [i.e., inaccurate], and should not be done." (EH Ex. 105 at 4273.) Dr. Howard explained that "the timing of bruises, . . . like

other injuries, is not precise," and agreed that you could not date a bruise, for instance, to 12 hours versus 48 hours. (EH RT 11/7/17 at 112.) Dr. Howard agreed, that, had the attorneys asked him at Petitioner's trial, he would have told them that you cannot really distinguish or date bruises to a specific day. (*Id.*) He further agreed that he could not distinguish between a bruise inflicted on April 29 from a bruise inflicted on May 1. (*Id.*)

Dr. Ophoven testified that some of the marks on Rachel's body, along with some of the wounds that were actively bleeding, could have been caused by metabolic changes at the cellular level that occur when the body is not getting enough oxygen and glucose. (EH RT 11/1/17 at 46–47.) Dr. Ophoven testified that, while many of the marks on Rachel's body were consistent with trauma, many of the marks appear to her to be more consistent with blotchy discolorations of the skin associated with disseminated intravascular coagulation ("DIC"), which is a cellular process the body experiences when in shock. (*Id.* at 47–49; 52–53.) This process, which occurs within a fairly short time after shock, perhaps as little as two or three minutes, renders the body unable to clot, and destabilizes the clots that have already formed, potentially causing bleeding from all orifices—from old wounds, the mouth and nose, the GI tract, and urinary tract—and also can cause marks to appear on the exterior of the body. (*Id.* at 47–49.) Dr. McKay also testified that Rachel could have suffered from DIC during sepsis. (EH RT 11/2/17 (a.m.) at 22–23.) Dr. Ophoven observed that photos from autopsy did not show evidence of bruising or bleeding on the underside of the tissue, which supports

her theory that some of the marks may have appeared as a result of DIC during the death process and not as the result of an inflicted injury. (EH RT 11/1/17 at 49–50.) Dr. Ophoven concluded that while not all the evidence of bruising on Rachel's body was as a result of DIC, the autopsy photos legitimately suggest that all the marks may not be the result of abusive trauma. (*Id.* at 53.) Contrary to Dr. Siefert's opinion that bleeding ceases very shortly after death, both Dr. Ophoven and Dr. McKay agreed that it is possible for wounds to continue to bleed or ooze for a period of time after death. (*Id.* at 54; EH RT 11/2/17 (a.m.) at 24–25, 29.) Dr. Howard, however, disagreed with this assessment of the autopsy photos.

Dr. Ophoven further stated that it is possible that many of the bruises observed on Rachel's body at the time of her death could have been caused by falls or other injuries Rachel sustained while attempting to walk or otherwise move around while suffering from the final stages of sepsis and peritonitis. (EH RT 11/1/17 at 55–57.) Dr. Howard also agreed Rachel could have sustained a bruise if she fell on a table that was just outside of her bedroom. (EH RT 11/7/17 at 115.) Dr. Ophoven and Dr. McKay testified that a circular mark on Rachel's chest was consistent with having been caused by skin slippage due to an electrical monitor being attached and then removed from Rachel's body after death. (EH RT 11/1/17 at 53–54; EH RT 11/2/17 (a.m.) at 23–24.) Dr. Howard also agreed that the round mark on Rachel's chest could have been caused by medical equipment such as a monitor pad. (EH RT 11/7/17 at 71.)

(iv) Scalp Injury

Both Rachel and Petitioner had independently reported to witnesses that Rachel had fallen from Petitioner's van on the afternoon of Sunday, May 1. Dr. Ophoven and Dr. Hannon opined that the scalp injury is consistent with a fall from a van involving the head striking a hard surface. (EH Ex. 106 at 4275; Ex. 119 at 3993.) Dr. Howard also agreed that the scalp injury is consistent with a fall onto a flat surface. (EH Ex. 45 at 4380.)

Dr. Howard testified in these proceedings that, after reviewing biopsies of tissue samples from the scalp, he concluded that the scalp injury was "acute"—showing no evidence of healing—and occurred "hours or a day prior to death." (EH RT 11/7/17 at 75–76.) On cross-examination, Dr. Howard admitted that in his pretrial interview, after reviewing the tissue slides from the scalp injury, he stated that the scalp injury was "probably two days old." (*Id.* at 94–96.) He further admitted that in his July 20, 2017 deposition, after reviewing the slides twice before the deposition, he testified that the scalp injury was, more probably than not, at least two days old. (*Id.* at 96–97.)

Dr. Ophoven reviewed gross photographs of the scalp injury and believed they were consistent with Dr. Howard's opinion given at his pretrial interview, based on his microscopic review of the scalp tissue at that time, that the injury was "probably two days old . . . ." (EH RT 11/1/17 45–46.) Dr. Ophoven explained that when DIC occurs during irreversible shock, the body loses its ability to clot, and an old wound could begin oozing or bleeding again. (*Id.* at 47–48.)

Finally, both Dr. Hannon and Dr. Ophoven concluded that Rachel's scalp injury was not caused by the pry bar. (EH RT 11/1/17 at 57–58; EH RT 11/2/17 (a.m.) at 55–56; EH Ex. 106 at 4275; EH Ex. 119 at 3993–94.) Dr. Hannon and Dr. Ophoven also concluded that the pry bar found in the van was not used to cause the fatal injury to Rachel's bowel. (EH RT 11/1/17 at 57–58; EH RT 11/2/17 (a.m.) at 52–54; EH Ex. 119 at 3992–93.) Dr. Ophoven and Dr. Hannon agree that it is possible that Rachel's fatal abdominal injury could have been inflicted by another child. (EH RT 11/1/17 at 58–59, 82–83; EH RT 11/2/17 (a.m.) at 55.) In Dr. Hannon's opinion, the child would have to be "fairly large" (EH RT 11/2/17 (a.m.) at 55), and in Dr. Ophoven's opinion, the child would have to do something more than simply hit her in the stomach with a fist. (EH RT 11/1/17 at 82–83.)

b. *Bloodstain Evidence*

Petitioner offered the expert testimony of Stuart James, an experienced blood pattern analyst. James described three categories of bloodstain patterns: (1) passive stains that require little energy to produce, such as dripping blood; (2) spatter stains that take more energy to create and result in the blood source being broken up into smaller droplets; and (3) altered stains—stains caused by activities such as clotting or drying that affect the appearance of passive or spatter stains. (EH RT 11/3/17 (a.m.) at 12; EH Ex. 121a.) Spatter stains can be further categorized as: (1) "impact spatter" caused by mechanisms such as a beating or a gunshot; (2) "secondary spatter" caused by blood dripping which results in satellite spatters

around the drip; and (3) "projected spatter" caused by mechanisms such as being "cast-off" of a surface through centrifugal force, for example blood flying off of a swinging hand or bloody hair that is flipped. (EH RT 11/3/17 (a.m.) at 12, 14–15, 22; EH Ex. 121a.) James testified that the principles used in his bloodstain analysis were available in 1994, at the time of Petitioner's trial. (EH RT 11/3/17 (a.m.) at 6–9, 40.)

James testified that bloodstains on the carpet of the van appeared to be the result of the passive dripping of blood. (EH RT 11/3/17 (a.m.) at 17–18; EH Ex. 121 at 4072.) James concluded that the stains indicated Rachel was actively bleeding and moving around while in the van and may have made contact with the carpet at some point in time. (EH RT 11/3/17 (a.m.) at 19–20; EH Ex. 121 at 4072.) James further testified that the bloodstains on the front passenger seat had the appearance of a projected bloodstain pattern, specifically a cast-off pattern consistent with, for example, bloody hair swinging and causing blood to project onto the surface of the seat. (EH RT 11/3/17 (a.m.) at 20–22.) James testified that the bloodstains he observed in the van are consistent with Rachel being carried or moved within the van while she was bleeding from an open wound. (*Id.* at 22–23.)

James concluded that the bloodstains in the van were not typical of those produced during a beating because there was only a single laceration on Rachel's head. A single laceration often just produces blood flow and not impact spatter, because there is no blood already exposed that would spatter when struck by an object. (*Id.* at 25.) Upon further questioning by the

Court, James conceded that his conclusion that the blood projection was from Rachel being carried in the van, and not from impact spatter, was based on the lack of physical evidence such as bruising that might indicate Rachel was struck after the laceration occurred. (*Id.* at 25–26.) James admitted that looking only at the bloodstain he could not distinguish whether it was as a result of Rachel being struck or a result of Rachel's hair swinging because of the movement of the van. (*Id.* at 27.) James did explain that if Rachel had been struck, either by overhead or lateral blows, he would expect to see a cast-off pattern in the underlining of the roof or on the dashboard and nearby surfaces. (*Id.* at 27–28.) James noted that there was no mention of these type of cast-off stains by the investigator who inspected the van, though James did not know if these other surfaces were ever inspected and believed that there were not a sufficient number of photographs taken. (*Id.* at 28–29.)

James further explained that the traces of blood on the clothing that Petitioner was wearing on May 2 (i.e., the red t-shirt, jeans, and work boots) indicated contact and proximity to a source of wet blood and are insufficient to conclude anything about whether or not a beating took place in the van. (EH RT 11/3/17 (a.m.) at 33–35.) James further testified that these stains could have occurred as the result of lifting or otherwise attending to Rachel while she was bleeding. (*Id.* at 35.)

c. Reliability of Eyewitness Testimony/ Accident Reconstruction

Paul Gruen, Petitioner's accident reconstruction expert, concluded in his report that Ray and Laura

"could not have seen inside the van, nor observed any of the activities to which they testified, based on their angles of observation, visual obstructions, speed of the van, and the duration of the event." (EH Ex. 110 at 3929.) Gruen reached this conclusion based on his approximation of several variables used to reconstruct the scene and the viewing ability of the children.

Gruen established the approximate location of the Lopez children when they saw the van based on Ray's indication on a photograph during trial of where he and his sister were when they saw the van. (EH RT 11/1/17 at 99–100; EH Ex. 66 (Trial Exhibit 199).) Gruen estimated the van drove through the parking lot at a speed between 15 to 20 miles per hour based on what he believed was a reasonable speed after personally driving his vehicle through the lot and observing other cars drive through. (EH RT 11/1/17 at 105–06.) Gruen photographed the van by positioning his camera at the height of the children, which he determined to be 49 inches based on Ray's school records. (*Id.* at 107, 140.) Gruen determined the height of the top of Rachel's head in the passenger van based on reference material establishing the sitting height of children. (*Id.* at 108.)

Gruen summarized the factors contributing to the basis for his opinion that the children could not have seen what they reported:

- The children were too short in stature and thus, their viewing angle of the event was too acute to have accurately observed any activity inside the van.

- A lower viewing angle also makes the van's interior appear dark, similar to window tint.
- The van's relative angle to the children was constantly changing. The initial view would have only been through the front windshield. As the van traveled across the lot, view obstructions would have been created by the driver's side A pillar, and by reflections on the windshield and side window glass.
- The van was traveling between 15 and 20 miles per hour as it crossed the lot. The calculated distance of observation was between 70 and 80 feet, depending on when the children's attention was drawn to the van. This speed range would have only afforded the children a 2 to 4 second window of opportunity to see inside the van, had it even been possible to see inside the van.
- Petitioner's body dimensions would not have allowed him to reach across the van's interior compartment to perform any kind of assault and still maintain control of the van.

(EH Ex. 110 at 3933; *see* EH RT 11/1/17 at 127–28.)

On cross-examination, Gruen admitted that he did not have the best information about important data in this case used to conduct the line of sight analysis, including where the children were standing, their distance to the van, the speed of the van, and the distance and direction the van traveled. (EH RT 11/1/17 at 137–47, 151.) Gruen admitted that the measurement he used for one variable—how long the children had to observe the van—contradicted

eyewitness statements. (*Id.* at 153.) Gruen also testified that his analysis did not account for any potential swerving of the van, as described by the Lopez children and as noted as an ongoing problem with the van by Joyce Richmond in her interview with the police. (*Id.* at 148–51.)

Gruen testified that his ultimate opinion would not change if many of the variables—the placement of the children, the speed of the van, the height of the children, and whether Rachel was sitting or standing—were altered because, based on his analysis, it was too dark inside the van to see the driver elbowing the passenger in the seat from further distances away given the darkness of the window. (*Id.* at 106, 113–14, 123.) Gruen explained that the interior of the van would appear darker to a shorter individual. (*Id.* at 128.) Gruen also opined that the fact that the van may have been swerving a little bit would not make that much difference. (*Id.* at 148–51.)

Gruen admitted on cross-examination that, disregarding the lighting conditions, and based only on the line of sight, the Lopez children could see both the passenger and the driver as shown in the computer animation demonstrated during the evidentiary hearing. (*Id.* at 163–64.) Gruen explained, however, that the children would not have been able to see the driver hitting the face or chest of the child. (*Id.* at 177.) Gruen never measured the tint on the van windows, and was not able to confirm that there was any factory tint on the window, but believed there was some factory tinting on at least the side window. (*Id.* at 165–66.)

Patrick Hannon, Petitioner's biomechanics analyst, concluded that Laura and Ray's observations were not accurate, and the physical actions of Petitioner described by the children while he was driving the yellow van are extremely improbable from a functional anatomy/biomechanics perspective. (EH Ex. 119 at 3994; EH RT 11/2/17 (a.m.) at 50.) For his opinion, Hannon relied on some of the approximations produced by Gruen. (EH Ex. 119 at 3988.) For example, Hannon relied upon the speed of the van ("15 to 20 miles per hour") and the time of observation ("two to four seconds") estimations and calculations performed by Gruen, which, as discussed above, are contradicted by witness recollections in the record. (*Id.* at 3989.)

Hannon noted that reflected light contrast and the general lighting environment prevented a clear unambiguous observation by the Lopez children. (*Id.* at 3988–89.) Hannon opined that the children would have had the ability to observe Petitioner's upper torso, head, and neck as well as six inches of Rachel's head, a conclusion supported by the photographs Hannon took showing that the interior of the van was visible to an outside observer. (EH RT 11/2/17 (a.m.) at 40; EH Ex. 119 at 4001–11, 4014–23.) Hannon explained that several other factors such as visual acuity at 70 or 80 feet, perspective error, glare, lack of illumination inside the van, as well as physical obstructions such as the "A pillar" in the van door and Petitioner himself, would make it "questionable" whether the children could "see with any kind of surety or conviction." (EH RT 11/2/17 (a.m.) at 39–41.)

Hannon also simulated, through photographs, the position Petitioner would have been in while leaning over to strike or elbow Rachel from the driver's seat. (EH Ex. 119 at 3996, 4025–28.) Petitioner would have been able to hit the passenger with his elbow, but the steering wheel would move up or down while he was doing so, producing a change in direction, or a "swerve." (EH RT 11/2/17 (a.m.) at 73–74.) This is precisely what Ray Lopez observed—he told his mother that the van was swerving as if the driver were drunk. (EH RT 11/1/17 at 148.) Joyce Richmond also pointed out that she had difficulty keeping the van from swerving while she was driving it, prompting an observer to report her as a drunk driver. (EH Ex. 1 at 1311.)

Regarding Rachel's injuries, Hannon concluded that Rachel did not suffer any injuries consistent with the actions that the Lopez children described. (EH RT 11/2/17 (a.m.) at 50.) Although there was evident bruising, Hannon believed that an elbow or backhand fist to Rachel's face would have fractured her nasal bones. (*Id.* at 50–51.) Hannon also opined that the fatal abdominal injury was not caused by the pry bar, explaining that if Rachel had been hit by the pry bar with enough force to cause the abdominal injury it would also have caused a very deep laceration, which was not present. (*Id.* at 52–53.)

Petitioner also presented evidence from Dr. Esplin, a forensic psychologist with experience in the area of child witness reliability. (EH RT 11/2/17 (p.m.) at 4–6.) Dr. Esplin testified that by the mid-1990s there was a scientific consensus regarding the general principles of investigative interviews that would substantially

reduce the risk of obtaining unreliable information from child witnesses; he conducted trainings, presented scientific papers, and testified in cases on the subject in the early 1990s. (EH RT 11/2/17 (p.m.) at 7–9.)

Dr. Esplin reviewed the Lopez children's pretrial statements and trial testimony and concluded that the information the Lopez children provided was unreliable due to post-event contamination and the use of interview procedures that did not involve scientifically sound methods. (EH RT 11/2/17 (p.m.) at 14–15; EH Ex. 115 at 3828.) Dr. Esplin explained that post-contamination occurred when the children were exposed to television coverage and were interviewed in the presence of each other and their mother. (EH RT 11/2/17 (p.m.) at 15, 23–29) Dr. Esplin further explained that the reliability of the children's interviews was compromised through excessively leading and suggestive interviews containing forced-choice questions. (EH RT 11/2/ 17 (p.m.) at 15–18, 29.) Dr. Esplin opined that the children's statements were inconsistent over time. (EH RT 11/2/17 (p.m.) at 18.)

Dr. Esplin nonetheless believed that the Lopez children saw something happen in the van "that had some emotional significance." Moreover, Dr. Esplin agreed that several aspects of the Lopez children's testimony were reliable and consistent: they saw a yellow van in the Choice Market parking lot, the van was moving, they saw objects and movement in the van, and they saw the van swerve. (EH RT 11/2/17 (p.m.) at 38.)

V. ANALYSIS

A. Ineffective Assistance of Trial Counsel: Deficient Performance

1. Medical Evidence

"Deference to counsel is owed only to strategic decisions made after 'thorough investigation of law and facts relevant to plausible options.'" *Hernandez*, 878 F.3d at 850 (quoting *Strickland*, 466 U.S. at 690). Counsel's strategic decisions made after less than complete investigation may still be reasonable "to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691. "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Harrington v. Richter*, 562 U.S. 86, 108 (2011). *Strickland* "does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Richter*, 562 U.S at 111.

The Court recognizes that the American Bar Association ("ABA") standards are guidelines only, and no set of rules for counsel's conduct can take into account "the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688–89. The Supreme Court has, however, consistently relied upon relevant ABA Guidelines in effect at the time of trial when reviewing attorney conduct and examining reasonableness. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (referencing ABA Guidelines when considering

ineffective assistance of counsel claim); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (referring to ABA Guidelines as "well-defined norms," and "standards to which we long have referred as 'guides to determining what is reasonable'" (quoting *Strickland*, 466 U.S. at 688)); *Williams*, 529 U.S. at 396 (citing ABA Guidelines to find "that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). Under prevailing norms of practice as reflected in the American Bar Association standards, it was unreasonable for counsel to not conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case, and to secure the assistance of experts where necessary or appropriate. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function, Third Edition (1993), Section 4-4.1; ABA Guidelines for the Performance of Counsel in Death Penalty Cases (1989), Section 11.4.1.

A court errs if it relies on the ABA Guidelines without consideration for whether they reflect the prevailing professional practice at the time of trial. *See Van Hook*, 558 U.S. at 7 (finding appellate court erred by relying on ABA guidelines announced 18 years after petitioner's trial). In this case, however, Petitioner established through Cooper's testimony that, at the time of Petitioner's trial, the standards cited above from the ABA Guidelines were well-established under prevailing professional norms, both at the Pima County Defender's Office and by the private sector defense bar in Pima County. In Petitioner's case, under prevailing professional norms, the central focus of the defense

should have been an investigation into when Rachel suffered her injuries.

More importantly, the scope of trial counsel's investigation was also unreasonable in light of what counsel actually knew or should have known. While counsel need not be prepared for "any contingency" and may not be faulted for a reasonable miscalculation or lack of foresight, *see Richter*, 562 U.S. at 110 (quotations omitted), the State's plan to introduce medical evidence to place Petitioner alone with Rachel during the time she was injured was not just a remote possibility. Bowman acknowledged during these proceedings that it would have been reasonable to anticipate that the State would present medical evidence dating Rachel's injuries to the afternoon of May 1. (EH RT 10/30/17 at 86.) Bruner testified that he *did* expect that at some point during the trial the State would present medical evidence tying Rachel's injuries to those couple of disputed hours. (EH RT 10/31/17 at 123–24).

Aside from counsel's admissions during these proceedings, there were several significant red flags that should have objectively and reasonably alerted counsel to the need to investigate the medical evidence regarding the timing of Rachel's injuries. Defense counsel should have been aware of the State's theory of the case, at a minimum, by reviewing the grand jury proceedings from May 13, 1994. The clear implications of Sergeant Pesquiera's testimony during the grand jury proceedings was that Rachel appeared to be fine until she took a trip with Petitioner, alone, to the store on the afternoon of May 1, where she was seen being

beaten in the van by the Lopez twins. (EH Ex. 62.) That Bruner in fact recognized the importance of the State's evidence tying Rachel's injuries to the relevant time period is evident from Bruner's opening statement to the jury acknowledging that the events during "a couple of disputed hours" on the afternoon of May 1 would be central to the case. (RT 4/6/95 at 60.) Knowing the critical importance of the timeline, defense counsel acted unreasonably in failing to conduct his own investigation with respect to the dating of the injuries and in failing to challenge any of the State's evidence that suggested that all of Rachel's injuries were consistent with being inflicted on the afternoon of Sunday, May 1, when Rachel was alone with Petitioner in his van.

Additionally, the evidence implicating Petitioner was largely circumstantial, and Petitioner maintained his claim of innocence throughout the proceedings, giving no reason for counsel "to believe that pursuing certain investigations would be fruitless or even harmful . . . ." *Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Trial counsel also had evidence in his file—primarily from Becky's statements—that Rachel showed no signs of a physical beating and rape during the afternoon of May 1. Later, when Rachel was found sick at the Flemings's house at around 5:15 p.m. on Sunday evening, she was observed to go to Petitioner willingly.[13] (EH Ex. 72 at 342.) This

[13] The record does not support Respondents' argument that Rachel was hiding from Petitioner and clung so tightly to Stephanie that

evidence should have suggested to counsel that perhaps Rachel had not been beaten or assaulted by Petitioner that afternoon.

Rachel also appeared ill to Isobel Tafe, a neighbor, on Saturday April 30. Rachel was out in the trailer park without apparent adult supervision and she looked "sick" and had a pale grayish pallor. Counsel knew that Rachel was observed to have a similar pallor on Sunday afternoon after she was discovered sick at the Flemings's camper. This evidence points to the possibility that Rachel was already suffering from peritonitis on April 30, suggesting the need to investigate the timing of Rachel's injuries more closely.

Dr. Howard made statements during his pretrial interview dating Rachel's scalp injury to April 30 or earlier, and he suggested the vaginal injury and small bowel injury might have been inflicted prior to May 1. This evidence from the State's expert significantly bolstered the need for a defense investigation of the medical timeline between injuries and death.

The possibility that others harmed Rachel also supported the necessity of investigating the medical timeline from injuries to death.[14] Evidence that others

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she had to be "given" to Petitioner and did not "willingly" go back to him. Though Stephanie did describe Rachel as clinging to her and not wanting to let go, so much so that she choked her, when Petitioner arrived and Stephanie "handed Rachel to him, she went . . . willingly." (EH Ex. 72 at 342.)

[14] The Court does not find that counsel was ineffective for failing to investigate other potential suspects; rather, law enforcement's failure to do so combined with evidence that Rachel may have been

may have caused Rachel's injuries further substantiated the need to investigate the medical evidence and its association with the timing of Rachel's injuries. For example, trial counsel had evidence suggesting Jonathon may have been molesting other children and Rachel was afraid of him. Defense counsel's trial notes suggested trial counsel had reason to believe that Angela's former boyfriend "Zoly" may have had problems with Rachel sexually in the past. (EH RT 10/30/17 at 105–06, EH Ex. 30.) All of this evidence heightened the plausibility that Rachel might have experienced sexual trauma before living with Petitioner, or at least before May 1, and, therefore, that the medical timeline between the vaginal injury and death needed to be fully investigated.

Additionally, trial counsel acquired evidence demonstrating that Angela had been physically abusive to her children. After moving into Petitioner's trailer, Angela had struck Rachel so hard that the next day a handprint was seen on Rachel, and Angela was also observed striking Rachel in the head. Angela also was reported to inflict blows on Becky's stomach, and throw her children down stairs and slam them against walls. Petitioner's neighbors also reported that Angela screamed at the children, threatening them with physical harm, while Petitioner acted appropriately around children. (EH Ex. 16 at 249–50.) All of this

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harmed by others contributed to the need for defense counsel to investigate the timing of Rachel's injuries more closely. It appears from the record that Sergeant Pesquiera did not conduct a thorough investigation because she thought Jones was the perpetrator.

evidence strongly suggested that Angela could have caused one or more of Rachel's injuries, including her small bowel injury, and therefore an investigation was needed in order to determine if Rachel's injuries could be dated to sometime prior to that Sunday afternoon. Even if counsel were convinced that the Lopez children in fact witnessed some sort of beating that took place in the van, the evidence suggesting that others could have inflicted the fatal injury and sexual assault furthered counsel's need to further investigate the timeline.

Beyond this, defense counsel knew from Angela that Becky was possibly abusive toward her sister and had on one occasion hung Rachel high above the ground from a clothesline, an activity that could have resulted in injury.

All of these circumstances would have indicated to any reasonable attorney that a medical investigation into the timing of Rachel's injuries was necessary, but counsel in this case failed to conduct a reasonable investigation. The Court therefore finds that the failure to conduct such an investigation with the assistance of a medical expert was objectively unreasonable under prevailing professional norms. This finding, while not dependent on Petitioner's standard of care testimony, is further substantiated by the testimony of Petitioner's expert Dan Cooper regarding the prevailing professional norms at the time of Petitioner's trial.

The Court finds that defense counsel's brief consultation with Dr. Keen did not satisfy counsel's duty to investigate the timing of Rachel's injuries. Although Bowman initially posed a question to Dr. Keen as to whether Rachel's injuries could be dated,

the evidence demonstrates that counsel failed to have Dr. Keen pursue the injury-dating investigation to its completion and that this failure was due to inattention and neglect, not reasoned strategic judgment. The Court finds its conclusion in this respect is supported by substantial evidence.

Dr. Keen needed to be supplied with autopsy tissue slides and photographs in order to reliably assess the age of the injuries. Defense counsel was aware of this but failed to take steps to have the necessary medical investigation completed. Bruner and Bowman's respective testimony that they "thought" or "hoped" they would have supplied the autopsy tissue slides does not reach the critical question. It was not Dr. Keen's responsibility to conduct a thorough investigation; rather, it was counsel's responsibility to ensure Dr. Keen conducted one. Counsel knew the slides were needed to make a reliable timeline assessment but failed to ensure they were provided to Dr. Keen. Thus, due to counsel's failure to follow through with this critical line of inquiry, Dr. Keen never examined the evidence needed to reliably date Rachel's injuries. If he had, it is reasonably likely this critical defense evidence would have been discovered and presented to the jury. The Court finds counsel's failure to have Dr. Keen examine the necessary evidence was objectively unreasonable, the product of inattention and neglect, and not reasoned strategic judgment.

Respondents' suggestion that defense counsel concluded his investigation because Dr. Keen reviewed the autopsy report with the time of injury questions in mind and agreed with the medical conclusions of Dr.

Howard is not supported by the evidence. First, defense counsel's testimony does not support this claim. Although Bruner agreed that if Dr. Keen had reached this conclusion it would probably have ended the medical investigation and he would not have kept shopping for an expert until he found one that disagreed with Dr. Howard, neither Bruner nor Bowman had an independent recollection of discussing the case with Dr. Keen. (EH RT 10/31/17 at 26, 33, 127, 148–50.) Bowman conceded that it is possible that Dr. Keen might have reached this conclusion, but stated that it is also possible that counsel simply "dropped the ball and didn't follow up properly." (*Id.* at 34.) Second, there is no evidence Dr. Keen was ever provided evidence of Dr. Howard's opinions with respect to the timing of Rachel's injuries—Dr. Howard's opinions regarding the injury were not stated in the autopsy report, but rather were provided to counsel in pretrial interviews and in testimony from Angela's trial. There is no evidence that counsel communicated in any way with Dr. Keen after Dr. Howard's timeline opinions became evident to counsel. Third, Dr. Keen's testimony in these proceedings establishes that, if he had been provided evidence of Dr. Howard's opinions with respect to the timing of Rachel's injuries and with the necessary evidence to evaluate these findings—namely, tissue slides and autopsy photographs—Dr. Keen would have disagreed with those opinions, taking into consideration the processes available to evaluate tissue slides microscopically in 1994. (EH RT 10/31/17 at 96–97.) Finally, the lack of documentation in the Pima County Medical Examiner's office indicating the transmission of tissue samples and autopsy photographs supports this conclusion. The Court finds

that there is no evidence supporting Respondents' contention that Dr. Keen advised defense counsel that he agreed with Dr. Howard that Rachel's injuries could be reliably dated to the afternoon of May 1. Although the Court "presume[s]" that counsel "made all significant decisions in the exercise of reasonable professional judgment," the record with respect to Dr. Keen rebuts the presumption of competence. *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 690).

2. Bloodstain Evidence

Because the evidence known to trial counsel rendered it plausible, as discussed above, that Rachel was not assaulted and raped by Petitioner on May 1 during the alleged third trip in the van, it was reasonably necessary to investigate the implications of the blood evidence presented at Petitioner's trial suggesting the rape and assault of Rachel took place in the van. The Court finds that trial counsel's failure to investigate the blood evidence was objectively unreasonable under prevailing professional norms.

Counsel knew before trial that there was going to be evidence presented with respect to the interpretation of blood evidence, but failed to consult with any bloodstain interpretation expert. Becky had reported that Petitioner and Angela took Rachel into the bathroom to do CPR, and then they rushed Rachel to the hospital on the morning of May 2. (EH Ex. 40 at 1234.) Thus, there was reason to believe that the trace amounts of blood on Petitioner's clothing might have been simply transferred from Rachel's bleeding head while Petitioner was attempting to administer aid or

transport Rachel to the hospital. Similarly, counsel were on notice that the small stain of blood on the carpet of the van was located adjacent to the passenger seat, where Rachel was being held in her mother's arms on the way to the hospital on May 2. There was reason to expect that the carpet stain might be the result of blood dripping from Rachel's head during the trip to the hospital on May 2, and not a stain left from Rachel's head lying in the back of the van after her head was bleeding as a result of being beaten and hit during the sexual assault, as the prosecution argued at trial. (EH RT 4/13/95 at 95–96.) Moreover, trial counsel were on notice that that there was no attempt to either identify or recover the clothing worn by Petitioner or Rachel on Sunday, May 1. The State argued, based on the evidence of spatter stains found on the passenger seat, floor of the van, and the right sleeve of Petitioner's shirt, that after the assault, Petitioner put her in the passenger seat of the car and kept hitting her "trying to make her shut up." (*Id.* at 97–100.)

Defense counsel knew that the prosecution was going to present bloodstain interpretation evidence, but counsel failed to conduct any independent investigation of the blood evidence. The only reason counsel could think of for not doing so was that he had never consulted with such an expert previously.

The Court finds based on all of the foregoing that trial counsel's failure to investigate the blood evidence was objectively unreasonable under the prevailing professional norms.

3. Reliability of Eyewitness Testimony/ Accident Reconstruction

The Court finds that trial counsel's investigation into the reliability of the Lopez children's eyewitness accounts was not objectively unreasonable. Bruner believed (1) it was not physically possible for the children to have witnessed what they described, (2) that the children's statements were unreliable and had been influenced by their mother, and (3) that the statements should have been suppressed. With these concerns in mind, the Court nonetheless finds that defense counsel conducted a reasonable investigation into the statements of the Lopez children.

As Bowman stated at the evidentiary hearing, the defense "did conduct an investigation into the Lopez children's account." (EH RT 10/31/17 at 23.) Bowman drove to the Lopez home and interviewed Ray, Laura, and Norma about their observations. Laura and Ray were questioned in depth about their observations and their statements in the police reports. At the end of those interviews, Bowman asked Ray and Laura to go outside and demonstrate where they had been standing in the Choice Market parking lot when they made their observations. After the interviews, defense counsel directed Barnett to take photographs and measurements of Petitioner's van in an attempt to discredit the accounts of Ray and Laura.

Ultimately, defense counsel made a reasonable decision, based on reasonable investigatory efforts, not to pursue further investigations. Counsel believed that, even if the Lopez children could not have seen all they claimed to have, that they at least had seen some

memorable event that left a lasting impression on the children, a belief that was left intact following a reasonable investigation into the children's accounts of the incident as well as Petitioner's admission that he drove through the Choice Market parking lot on May 1 with Rachel in his yellow van. Furthermore, neither the Lopez children nor their mother knew Petitioner or Rachel, and there is no discernible motivation, aside from the impact the event made on them, for the Lopez children to report the incident to their mother. Counsel reasonably chose to challenge the children's accounts and ability to see into the van through cross-examination.

Defense counsel also determined that the Lopez accounts could not be impeached by the defense investigator and also apparently decided not to call Petitioner to testify, even after preparing his script for trial. Counsel knew that it was Petitioner's word against the testimony of the Lopez family, and Petitioner had admitted that he was at the Choice Market that afternoon.[15] (EH Ex. 66 at 5330, 5357.) Moreover, had Petitioner testified, he may have been impeached with his prior felony conviction. (EH Ex. 1 at 2302–03.) Thus, the Court finds that Petitioner has not overcome the presumption that counsel did not call Barnett or Petitioner to testify "for tactical reasons

[15] There is also evidence that was presented in these proceedings suggesting Petitioner saw two children in the Choice Market parking lot on May 1 in the afternoon (*see* EH RT 11/1/17 at 142–43; EH Ex. 212), though it is not clear to the Court if this evidence was available to defense counsel before trial. Accordingly, the Court does not take this fact into account in determining whether counsel's performance was deficient.

rather than through sheer neglect." *Cullen v. Pinholster*, 563 U.S. 170, 191 (2011) (quoting *Strickland*, 466 U.S. at 690).

In sum, trial counsel rendered adequate performance by: (1) reviewing the police interviews of Norma, Ray, and Laura Lopez; (2) interviewing the three before trial; (3) recreating the event in the Choice Market parking lot with the Lopez children; (4) investigating Petitioner's van with the investigator, taking measurements and photographs in an attempt to disprove the observations of the Lopez children; (5) cross-examining Ray, Laura, and Norma at trial about their accounts; and (6) preparing Petitioner to testify in specific rebuttal to Ray and Laura's eyewitness accounts. (EH Exs. 76–80; RT 4/7/95 at 18–28, 41–46, 57–62; EH RT 10/30/17 at 125; EH RT 10/31/17 at 147; EH RT 11/1/17 at 157.)

4. Funding

The Court rejects any suggestion by Respondents that trial counsel's deficient pretrial investigation be excused on the grounds that funding for investigators and experts was lacking or inadequate. Arizona recognizes a statutory and due process right to funding for experts and investigators. *See State v. Apelt (Michael)*, 176 Ariz. 349, 365–66, 861 P.2d 634, 650-51 (1993) (citing *State v. Knapp*, 114 Ariz. 531, 540–41, 562 P.2d 704, 713–14 (1977)). There is no evidence that the trial court denied any of Petitioner's funding requests, or that it would have if a proper request had been made. Bruner and Bowman acknowledged that they believed additional funding for experts would have been granted on a showing of reasonable need. (EH RT

10/31/17 at 16 ("I think if we wanted something and thought it was important, we could have done something about it through the Court."); *id.* at 145 ("[Y]ou'd have to go hat in hand to the judge to get any additional funding for experts . . . . But up to a certain point you never had real trouble getting experts. I don't think Judge Carruth would have denied us funding if . . . it was reasonable.")) Petitioner's standard of care expert Dan Cooper agreed with trial counsel's assessment. (EH RT 11/3/17 (p.m.) at 21–25.)

5. Trial Strategy

The Court considers, as its starting premise, that counsel's failure to investigate the medical timeline "might be considered sound trial strategy" under these circumstances. *See Pinholster*, 563 U.S. 170, 191 (2011) (quoting *Strickland*, 466 U.S. at 689). After a careful review of the state-court record and the evidence presented in these federal habeas proceedings, however, the Court finds that trial counsel's investigative failure was due to inattention and neglect, and not the result of reasoned strategic judgment. Bruner's trial strategy was to challenge the prosecution's evidence. Aside from having his private investigator conduct a handful of interviews, Bruner did not conduct any other independent investigation to advance that strategy. "Counsel cannot justify a failure to investigate simply by invoking strategy. . . . Under *Strickland*, counsel's investigation must determine strategy, not the other way around." *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017). Petitioner's counsel failed "to make reasonable investigations or to make a reasonable decision that

makes particular investigations unnecessary." *Wiggins*, 539 U.S. at 521–22 (citing *Strickland*, 466 U.S. at 690–91.)

There is no evidence that counsel made a strategic decision not to conduct further investigation of the injury timeline. The only explanation Bruner has offered for his limited investigation is from his 2002 declaration where he states he possibly just assumed Petitioner was guilty based on the State's version of the case. (EH Ex. 9 at 4391.) Additionally, Bruner's actions during the trial suggest that this was no strategic choice, but rather an oversight. Bruner agreed during the evidentiary hearing in these proceedings that he missed an important issue with respect to the timing of Rachel's injuries and should have done more to determine the time of injuries. (EH RT 10/31/17 at 131.)

Finally, to the extent he recognized the need to investigate the injury timeline, counsel unreasonably abandoned his efforts to do so. Bruner retained a forensic expert, Dr. Keen, and Bruner's partner Bowman correctly posed a number of significant questions about the timing and nature of Rachel's injuries. Had counsel followed through on this investigation before abandoning further inquiry, his decisions may have been reasonable. As noted above, however, the record indicates that counsel did not make a strategic decision to forego answers to these questions, but simply abandoned efforts to do so.

Even without the aid of experts, however, it is difficult to establish ineffective assistance when counsel actively and capably advocates for a defendant

and conducts a skillful cross-examination that draws attention to weaknesses in the conclusions of the State's experts. *Richter*, 562 U.S. at 111. Thus, counsel in this case could have made a reasonable strategic decision to rely on Dr. Howard's prior statements and testimony to challenge the State's theory that the injuries were inflicted during the afternoon of May 1. *See id.* ("In many instances cross-examination will be sufficient to expose defects in an expert's presentation."). But the possibility that counsel made a reasonable strategic decision to forego investigation of the injury timeline—choosing instead to vigorously challenge the State's evidence through cross-examination—is dispelled by counsel's complete failure to cross-examine the State's witnesses on this issue. It is undisputed that, at Petitioner's trial, Bruner never challenged or disputed the critical injury timeline evidence. Bruner failed to impeach Dr. Howard with his earlier statements and testimony finding Rachel's injuries "most consistent" with infliction prior to May 1. Bruner admitted this failure was due to inattention and the fact that he simply did not recognize the importance of the dating of the injuries. (EH RT 10/31/17 at 132–33.) Bruner also failed to cross-examine Becky with her four prior statements after she offered testimony at trial, for the first time, that Petitioner took Rachel on a third trip in the van, affording the prosecution an opportunity to argue that Petitioner committed the offenses on May 1 during this third trip in the van.

The Court finds that in this instance, invocation of the strategy of challenging the State's evidence does not alter the Court's findings that trial counsel's

investigative failures were objectively unreasonable under prevailing professional norms. An investigation into the medical timeline and bloodstain evidence would not be inconsistent with Bruner's strategy to challenge the State's evidence. Bruner admitted in these proceedings that such an investigation would have been consistent with his chosen strategy.

Judging the reasonableness of counsel's conduct on the facts of this case, viewed as of the time of counsel's conduct, *see Strickland*, 466 U.S. at 690, the Court finds that counsel's decision to forego inquiry into the medical evidence regarding the time of injury was objectively unreasonable in light of the vast body of evidence pointing to the need to investigate the medical timeline between Rachel's injuries and her death.

B. Ineffective Assistance of Trial Counsel: Prejudice

1. Timing of Rachel's Injuries

Prejudice is shown by evidence of 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." *Strickland* 466 U.S. at 694. If the Court determines that the new evidence presented in these proceedings would have created reasonable doubt in the mind of one juror, this Court must grant relief. *See Hernandez*, 878 F.3d at 852. When evaluating whether counsel's error prejudiced the outcome of the trial, "*Strickland* does not permit the court to reimagine the entire trial."

Hardy v. Chappell, 849 F.3d 803, 823 (9th Cir. 2017.) The prosecution's case must be left undisturbed. *Id.*

Contrasting the evidence presented at trial with the evidence that could have been presented at trial by reasonably effective counsel, the Court finds that counsel's failure to conduct his own investigation with respect to the dating of the injuries and to challenge any of the State's evidence which suggested that all of Rachel's injuries were consistent with infliction on the afternoon of Sunday, May 1—when Rachel was alone with Petitioner in his van—resulted in prejudice to Petitioner. The new evidence presented in these proceedings undermines considerably the confidence in the outcome of the trial court proceedings. Had counsel conducted an adequate investigation of the medical, physical, and eyewitness testimony, he could have presented an extremely different evidentiary picture than that shown to the jury at Petitioner's trial. Namely, trial counsel could have cast doubt on whether Rachel's injuries were actually inflicted on the afternoon of May 1, when she was in Petitioner's care.[16]

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[16] Respondents suggest that the evidence presented in these proceedings was the result of the unlimited time and resources of Petitioner's federal habeas counsel, and that, at the time of Petitioner's trial, Petitioner would not have had similar resources available. The Court finds, however, that had counsel simply followed up with the medical timeline investigation by sending the autopsy slides to Dr. Keen, as was clearly contemplated and for which there would have likely been available funds, there is a reasonable probability that one juror would have found Dr. Keen's opinion that Rachel's injuries could not be reliably dated to May 1 convincing and would have had a reasonable doubt as to Petitioner's guilt. This conclusion would only be strengthened if counsel had also conducted an effective cross-examination of Dr.

Instead, counsel admitted to the jury during closing argument that "maybe [Petitioner] did take her out and murder her," but that the State had not shown any motive for him to have done so. (RT 4/13/95 at 130.)

Although Dr. Howard testified on direct examination that all of Rachel's injuries, including her scalp laceration, her abdominal injury, the vaginal injury, and the majority of the bruises on her body, appeared acute and consistent with infliction on the afternoon of Sunday, May 1, 1994 (EH RT. 11/7/17 at 89–90), the Court finds this testimony not credible. As he admitted on cross-examination, Dr. Howard may "potentially" have "different answers" depending on how a question is worded. (EH RT 11/7/17 at 91.) Dr. Howard admitted that, if he had been asked the right questions by the lawyers for Petitioner, he certainly would have testified truthfully that the injury was most consistent with having occurred prior to May 1. Dr. Howard's inconsistent answers are plain in the differing testimony he provided on direct examination, on cross-examination, and during examination by the Court during the evidentiary hearing. The Court finds that counsel's failure to impeach Dr. Howard with his inconsistent statements left the jury unaware that Dr. Howard's "truthful" opinion was that Rachel's small bowel, scalp and vaginal injuries were "most consistent" or "typical" with having occurred prior to May 1. (EH RT 11/7/17 at 111–12.) If trial counsel had impeached Dr. Howard's testimony with his earlier inconsistent statements, as was done at the evidentiary

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Howard with only the materials available to defense counsel before trial.

hearing, the Court finds that the jury would likely have found Dr. Howard's testimony not credible or persuasive. *See Hernandez*, 878 F.3d at 858 (the proper inquiry for a court when considering prejudice is how the court believes the jury would have assessed the credibility of the witnesses); *Earp v. Davis*, 881 F.3d 1135, 1145 (9th Cir. 2018) (district court, as fact-finder in habeas proceedings, is tasked with weighing and making factual findings as to the credibility of witnesses) (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985)). Due to the inconsistent and imprecise nature of Dr. Howard's statements (*see, e.g.*, EH RT 11/7/17 at 105 ("[The abdominal injury is] certainly typical of being at least a few hours old. It could be also typical of what it looks like at 24 or more."); *see also id. at* 106–08, 121–23; 128–29), the Court gives little weight to his testimony in these proceedings that Rachel's abdominal injuries were consistent with having been inflicted within hours of or on the same day as death. (EH RT 11/7/17 at 88–89, 105, 107, 128.)

Similarly, the Court concludes that the statements made by Dr. Howard with respect to Rachel's vaginal injury at Petitioner's trial and on direct examination during the evidentiary hearing are entitled to little weight, as they are contradicted by statements he made in his pretrial interview, during Angela's trial, in his 2004 declaration, and on cross-examination at the recent hearing. The Court concludes that a jury would find more credible the testimony of Dr. Ophoven and Dr. Keen—that Rachel suffered from a vaginal injury that was one or more weeks old.

Additionally, in light of his inconsistent statements, the Court does not find credible Dr. Howard's recent testimony that based upon his more recent review of the slides, he has concluded that Rachel's scalp injury is more typical of having occurred within hours to a day, rather than two days, before Rachel's death. (*See* EH RT 11/7/17 at 95, 120–21.)

Finally, Dr. Ophoven explained in her declaration that "[i]t has been well established that visual determination of the age of any bruise is scientifically unreliable," and that the only reliable method of assessing the age of a bruising injury is to take tissue samples and test them, which Dr. Howard failed to do. (EH Ex. 106 at 4277.) Dr. Howard admitted in his recent testimony that there is no reliable method to precisely date bruises, and that in this case he could not distinguish between a bruise inflicted on April 29 or May 1. (EH RT 11/7/17 at 112.) At trial, Dr. Howard and Dr. Seifert suggested to the jury that many of Rachel's bruises could be linked to the afternoon of May 1. However, this evidence, which went unchallenged at trial, turns out to be scientifically unsupportable and untrue.

Dr. Ophoven could have provided evidence to the jury that "[i]nterpreting the age of bruises from physical appearance and color is recognized by the forensic community to be very inexact [i.e., inaccurate], and should not be done." (EH Ex. 105 at 4273.) The Court concludes that had trial counsel presented evidence that the visual dating of bruises is unreliable, it would have called into question Dr. Siefert's conclusion that the bruising that he established had

been inflicted within one day of death, which included 95% of the bruises, were consistent with having been inflicted between the hours of 2:00 p.m. and 5:30 p.m. on the day prior to Rachel's death, as well as Dr. Howard's suggestion that many of Rachel's bruises occurred within one to two days prior to her death.

Had trial counsel provided evidence to evaluate the potential cause and timing of Rachel's injuries to one or more medical experts at the time of Petitioner's trial, such an expert would have been able to testify that her injuries were not consistent with having been inflicted on the afternoon of Sunday, May 1—thus negating the very grounds on which the State relied to prove that Petitioner inflicted the fatal small bowel injury, vaginal injury, and scalp injury. (*See*, *e.g.*, EH RT 10/31/17 at 96–97; EH RT 11/1/17 at 37–38, 59; EH RT 11/2/17 (a.m.) at 20; *see also* RT 4/13/95 at 92 ("Who is her rapist? Who is her murderer? The answer to that question is simple. Who was with her all day on Sunday, May 1st.").) Moreover, the evidence from the recent hearing casts reasonable doubt on the State's allegation at trial that the pry bar found in Petitioner's van was the implement that caused Rachel's injuries. The Court concludes that, had trial counsel presented medical testimony from an expert such as Dr. Ophoven, Dr. Keen, or Dr. McKay to rebut the State's medical evidence at trial, the jury would have found such evidence credible and relevant to its determination of guilt. Moreover, if trial counsel had impeached Dr. Howard's testimony with his earlier inconsistent statements, as was done at the evidentiary hearing, the Court finds that the jury would likely find Dr. Howard's testimony unpersuasive, and less credible

than testimony offered by Petitioner's medical witnesses. *See Hernandez*, 878 F.3d at 858.

Finally, the evidentiary hearing in this case has demonstrated that the police investigation was colored by a rush to judgment and a lack of due diligence and thorough professional investigation; effective counsel would have brought this to the jury's attention, casting further doubt on the strength of the State's case.

The Court finds that counsel's deficient investigation pervaded the entire evidentiary picture presented at trial, resulting in a "breakdown in the adversary process that renders the result [of Petitioner's trial] unreliable." *Strickland*, 466 U.S. at 687; *see also Hardy*, 849 F.3d at 824 (finding that trial counsel's failure to investigate "altered the entire evidentiary picture"). The Court has considered the totality of the evidence—the evidence before the jury at trial and the evidence admitted in these proceedings—and finds that there is a reasonable probability that, absent counsel's failure to investigate and offer evidence regarding the timeline of Rachel's injuries, at least one reasonable juror would have had a reasonable doubt as to Petitioner's guilt. *See Strickland*, 466 U.S. at 695.

2. Bloodstain Evidence

Petitioner asserts that his convictions were sustained in part based on the interpretation of blood evidence, citing the Arizona Supreme Court's statement that "[b]lood spatter in the van likely was created by [Petitioner] hitting Rachel after she had already suffered a head injury." *Jones*, 188 Ariz. at 397,

937 P.2d at 319. Petitioner now argues that he has presented evidence that demonstrates that there are credible innocent explanations for the blood found on Petitioner's clothing and in the van. The Court considers the claim that Petitioner suffered prejudice from counsel's failure to investigate the bloodstain evidence, and finds that, even if trial counsel's deficiency regarding the failure to investigate the bloodstain evidence alone would not be sufficiently prejudicial, the cumulative effect of counsel's deficiencies in this regard, together with the errors and prejudice addressed above, undermines the Court's confidence in the jury's verdict. *See Silva v. Woodford*, 279 F.3d 825, 834 (9th Cir. 2002) ("[C]umulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding of ineffectiveness of counsel.")

Petitioner's expert reported that the bloodstains on the carpet of the van, including Item V6, described as an "impression stain" by Sergeant Pesquiera, appeared to be the result of passive dripping of blood, indicating that Rachel "may have made contact with the carpet with a bloody area at some point in time." (EH Ex. 121 at 4072; *see also* EH RT 11/3/17 (a.m.) at 19–20.) Thus, while Petitioner's expert might have established that Sergeant Pesquiera mischaracterized this bloodstain, his testimony would not have refuted the prosecution's assertion that Rachel's "head was bleeding as she was laying in the back of that van because she had been beaten and hit with that pry bar as part of that sexual assault." (*See* RT 4/13/95 at 97.) Furthermore, while James concluded that both bloodstains on the carpet (Items V6 and V7) appeared to be the result of the

passive dripping of blood, rather than blood spatter, James opined that both of the carpet stains indicated that Rachel "was actively bleeding and *moving around* while in the van." (EH Ex. 121 at 4072; EH RT 11/3/17 (a.m.) at 19–20 (emphasis added).) Because James agreed that Rachel must have been bleeding and "moving around" in the van, his testimony would have conclusively refuted any argument by Petitioner that the blood was present in the van simply as a result of Petitioner and Angela's efforts to obtain medical care for Rachel on Monday morning while her head was still bleeding from the laceration. (*See* Doc. 288 at 62.)

Furthermore, James admitted that he could not determine whether the bloodstains on the passenger seat were impact spatter as a result of Rachel being struck after blood collected in her hair from the laceration, or were, instead, a projected, "cast-off" bloodstain pattern as a result of her hair simply swinging because of the movement of the van. James conceded that his conclusion that the bloodstains on the passenger seat were not impact spatter was based on his assumption, refuted by the record in this case, that there was no other physical evidence, such as the presence of bruising, that Rachel had been struck after the laceration occurred.

The State's theory of the case, however, did not rest solely, or even primarily, on the bloodstain evidence presented at trial. As this Court has emphasized several times, the State's main theory of the case was that Rachel was solely in Petitioner's care when her fatal injuries were inflicted. In reviewing the evidence on appeal, the Arizona Supreme Court noted several

factors that it relied on in reaching its conclusion that the physical and sexual assault of Rachel occurred within a two-hour time period during which Rachel was alone with Petitioner in the van. *See Jones*, 188 Ariz. at 397, 937 P.2d at 319. The likelihood that the bloodstains were evidence of Petitioner striking Rachel in the van after she had already suffered a head injury was one among several other more substantial factors which James's testimony would not have altered: (1) Becky testified that Rachel spent the morning with her and their brother watching cartoons and "seemed fine" when her siblings went out to ride their bikes, at about 3:00 p.m., (2) Rachel "seemed fine" after the first two times that she returned with Petitioner, (3) if Rachel had already suffered genital injuries, she would have been in pain, (4) the third time that Petitioner went out with Rachel, he told Becky that he was going to his brother's house but his brother's wife testified that Petitioner never visited their house on that day, (5) during Petitioner's third trip with Rachel, two children saw Petitioner at 5:00 p.m., hitting Rachel while he drove, (6) the next time that Becky saw Rachel, at about 6:30 p.m., Rachel was in a lot of pain, and (7), many of the injuries that Rachel now had were consistent with defense against a sexual assault. *Id.* James's testimony would not have altered any of these findings; at best it might have cast doubt on what the children may have actually seen, but would not have called into question the relevant fact that Petitioner was alone with Rachel in his van during the critical two-hour period when her fatal injuries were inflicted.

In sum, a bloodstain expert would not have been able to rule out the possibility that Rachel was struck

while in the van or refute the prosecution's theory of the case. At best, such testimony would have presented an alternative explanation for the presence of some of the bloodstains in the van, but Petitioner has offered no "innocent explanation" for the bloodstains on the carpet behind the passenger seat in the van. Accordingly, the Court finds that there is no reasonable probability of a different outcome had Petitioner presented a bloodstain expert at trial, as, in light of the evidence presented at trial, it alone would not sufficiently raise a reasonable doubt as to Petitioner's guilt. However, considered cumulatively with trial counsel's failure to investigate the medical timeline, the Court finds that the evidence of possible alternative and innocent explanations for some of the bloodstains in the van would strengthen, somewhat, the Court's finding of prejudice based on the failure to investigate the medical timeline alone.

3. Reliability of Eyewitness Testimony/ Accident Reconstruction

Even if defense counsel's investigation of the Lopez children's statements was deficient, Petitioner has not established that it was prejudicial. There is no reasonable probability that a more thorough investigation of the Lopez children's statements would have resulted in a different outcome.

Neither Petitioner's accident reconstructionist nor his biomechanics expert provided reliable evidence that the children could not have seen Petitioner striking Rachel. As Gruen admitted during these habeas proceedings, his line of sight analysis was dependent on multiple variables which were either unknown or were inconsistent with the known evidence. To the

extent his conclusion depended on "ever-changing light conditions," Gruen failed to substantiate this theory with evidence or analysis. (EH RT 11/1/17 at 164.) At most, Petitioner's experts might have been able to establish that it was physically improbable that the children could have observed some of the specific details about which they testified, or that the children's testimony was unreliable, in some part, as a result of post-event contamination or suggestive questioning. But both Gruen and Hannon agreed that the children would have been able to see Petitioner and Rachel in the van.

Dr. Esplin's testimony—concluding that major aspects of the Lopez children's statements were reliable and independently corroborated, as well as his own opinion that the children saw something of "emotional significance"—did not disprove Ray and Laura's account of seeing Petitioner violently assaulting Rachel. Dr. Esplin conceded that significant portions of the Lopez children's testimony were reliable: the Lopez children could see into the yellow van driven by Petitioner, and they obviously saw some "important salient" event. His testimony does not support Petitioner's claim that his trial counsel were ineffective in failing to call such a forensic child psychologist.

Moreover, if Petitioner's trial counsel had presented the evidence from each of these experts, it may have actually been detrimental to his case. Each expert would have damaged Petitioner's defense by agreeing that portions of the Lopez children's account were credible.

Finally, had trial counsel more aggressively challenged the reliability of the testimony of the Lopez children, counsel might have opened the door for the State to present the rebuttal evidence that Petitioner had previously hit his own children with his elbow, similar to the Lopez children's description. (Ex. 1, at 916–37); *see e.g., State v. Woratzeck*, 134 Ariz. 452, 454, 657 P.2d 865, 867 (1982) (objections to admission of testimony may be waived when defendant opens door to further inquiry on a topic by introducing that topic while examining a witness); *State v. Mincey*, 130 Ariz. 389, 405, 636 P.2d 637, 653 (1981) ("We agree with the state that appellant opened the door to this line of questioning during his opening statement . . . ."). Defense counsel had already successfully defeated the State's motion to admit this evidence at trial. (ROA 102, 117, 124).

4. Conclusion

Had Petitioner's counsel adequately investigated and presented medical and other expert testimony to rebut the State's theory that Petitioner beat and sexually assaulted Rachel on the afternoon of May 1, 1994, there is a reasonable probability that the jury would not have unanimously convicted Petitioner of any of the counts with which he was charged. Count One (intentionally or knowingly engaging in an act of sexual intercourse with Rachel, in violation of A.R.S. § 13-1406), Count Two (intentionally or knowingly causing physical injury to Rachel by striking her abdominal area causing a rupture to her small intestine, under circumstances likely to produce death or serious physical injury, in violation of A.R.S. §13-

3623 (B)(1)), and Count Three (intentionally or knowingly causing physical injury to Rachel by bruising her face and ear and causing a laceration to her head, in violation of A.R.S §13-3623) all depend upon the premise that Petitioner physically and sexually assaulted Rachel on May 1, 1994, when she was in his custody. The Court finds that, had defense counsel performed adequately, there is a reasonable probability that at least one juror would have had a reasonable doubt as to whether Petitioner was cause of Rachel's injuries.

Respondents assert, however, that Petitioner is not entitled to habeas relief because his conviction for child abuse on Count Four (intentionally or knowingly endangering Rachel by failing to take her to a hospital, in violation of A.R.S. § 13-3623(B)((1)), which does not depend on the timing of the fatal injury or the identity of the assailant, independently supports his felony murder conviction on Count Five. Respondents further argue that, as a matter of law, the factual and legal findings with respect to the convictions on these two counts are presumed to be correct. Finally, Respondents contend that Petitioner's own experts in these proceedings agree that Petitioner's failure to take Rachel to the hospital either caused or contributed to her death.[17]

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[17] Respondents also argue that Petitioner has presented no evidence that counsel was deficient in failing to investigate and challenge Count Four, asserting counsel aggressively, but unsuccessfully, challenged that count by arguing to the jury and the Arizona courts that Petitioner did not have the requisite "care" or "custody" of Rachel under Arizona's child abuse statute, A.R.S. § 13-3623(B). The Court disagrees with this assessment. Petitioner

The Court agrees with Respondents that the jurors were properly instructed to consider all lesser-included offenses, as well as all mental states, and to return a verdict "uninfluenced by your decision as to the other charges." (EH RT 3/09/18 at 29.) The trial court instructed the jurors that the sexual assault charge in Count One and the charges of child abuse under circumstances likely to cause death or serious physical injury in Counts Two and Four could serve as predicate felonies to support the felony murder charge in Count Five.[18] The trial court instructed the jurors that the child abuse charges could only be considered predicate felonies if they (1) were committed intentionally or knowingly, and (2) if the circumstances were likely to cause death or serious physical injury. (RT 4/13/95 at 148–49.) The jury found Petitioner guilty of Count Five of the Indictment only after finding, with respects to Counts Two and Four, that the crimes were committed under circumstances likely to produce death or serious physical injury and that Petitioner committed these crimes with a knowing and intentional mental state. (ROA 139.) The Court disagrees with Respondents' assertion, however, that "there was no theory by the

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has maintained throughout these habeas proceedings that counsel failed to adequately investigate the medical evidence and the medical timeline of Rachel's injuries as to Petitioner's convictions as a whole. Having already found that counsel was deficient in that regard, the question for the Court, which it answers in the affirmative, is whether this deficiency resulted in prejudice to Petitioner's convictions.

[18] The State withdrew its allegation of premeditation with regard to Count Five prior to submission of the count to the jury; thus, only the felony murder count was presented to the jury.

prosecutor, that [all these counts] were somehow so essentially intertwined that they are interrelated and relied upon each other." (EH RT 3/09/18 at 29–30.) The Court finds that Petitioner's conviction on Count Four, for failure to take Rachel to the hospital, was intertwined with the allegations that Petitioner had inflicted the injuries to Rachel discussed in Counts One, Two, and Three on May 1.

In evaluating prejudice under *Strickland*, the Court "may not invent arguments the prosecution could have made" at trial. *Weeden*, 854 F.3d at 1972 (quoting *Hardy*, 832 F.3d at 1141). In contrast to Respondents' assertions now, at trial the State argued explicitly that the conviction on Count Four depended on the timing of the fatal injury and the identity of the assailant by asserting that Rachel was the victim of a crime of sexual assault, and that "when that sexual assault was committed" she became the victim of other crimes, including Count Four (RT 4/13/95 at 82). The State explained at trial that "Rachel died because she was beaten in order to be raped. *She died as a result of that beating both because the internal injuries killed her and because only the [Petitioner] knew how badly she was hurt, only the [Petitioner] had the means of taking that baby to the hospital, but for obvious reasons he could not, and so he let her die*." (*Id.* at 104–05) (emphasis added). The State acknowledged in closing argument during trial that, of all the other witnesses who testified at trial that they saw Rachel sick in the late afternoon or evening of May 1, only Petitioner knew why and how badly she was hurt, and "to cover his own responsibility for what he had done" failed to take her to the hospital. If Petitioner was not responsible for the

assault, under the State's own theory he would be less likely to have had reason to prevent Rachel from being taken to the hospital.

Moreover, to the extent Respondents assert that the arguments or theories of counsel are not evidence, and the jury was properly instructed to consider each offense separately, the evidence at trial that Petitioner committed the offense knowingly and intentionally was minimal. If Petitioner was not the perpetrator, if he did not cause the injuries, there was little evidence presented at trial that would suggest he was put on notice of the severity of the injuries, and thus could form the requisite intentional and knowing mental state. While there is evidence that Petitioner was concerned about getting Rachel care because he would be perceived as the perpetrator of child abuse, a reasonable juror could find he was concerned about law enforcement making such an assumption because she had been in his care, regardless of whether he had inflicted her injuries.

While Petitioner's own experts in these proceedings do agree that Petitioner's failure to take Rachel to the hospital either caused or contributed to her death, the experts' testimony does not show that Petitioner had the requisite mental state of "intentionally and knowingly" to support a conviction of the class 2 felony child abuse charge, a felony murder predicate, as opposed to a lesser charge of the class 3 felony,

recklessly, or class 4 felony, negligently. *See* A.R.S. § 13-3623(B)(1)–(3).[19]

At a minimum, in light of the evidence presented at trial and in these proceedings, the Court finds that there is a reasonable probability that the jury would not have found that Petitioner acted with a knowing or intentional mental state in Count Four if the defense had put on evidence questioning the medical timeline and suggesting that he was not the actual perpetrator of the assault. For the reasons stated above, the Court finds a reasonable probability that, had counsel not performed deficiently, Petitioner's jury would not have convicted him of any of the predicate felonies and thus concludes that Petitioner has demonstrated prejudice with respect to the capital charge.

C. Ineffective Assistance of PCR Counsel: Deficient Performance

The Ninth Circuit has already determined that Petitioner's claim of ineffective assistance of trial

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[19] Although Respondents now point to Dr. Ophoven's opinion that "it would have been evident to anyone with Rachel that she was in need of immediate medical attention" in support of their argument that Petitioner cannot show prejudice with respect to Count Four, *see* Doc. 289 at 13, the prosecution at trial argued that Petitioner acted "intentionally and knowingly" in failing to obtain medical care based on the theory that he had inflicted and therefore knew the extent of Rachel's injuries. The prosecution did not independently contend that Petitioner had the requisite mental state based only on his observation of Rachel's physical appearance on May 1, and the Court "may not invent arguments the prosecution could have made if it had known its theory of the case would be disproved." *Hardy*, 832 F.3d at 1141.

counsel (Claim ID) is a "substantial" claim, thus satisfying the prejudice prong of *Martinez*'s cause and prejudice inquiry. *See Clabourne*, 745 F.3d at 377. Petitioner must show that PCR counsel's performance was ineffective under the standards of *Strickland* to determine if the procedural default of Claim 1D (Guilt-Phase) can be excused. *Clabourne*, 745 F.3d at 377 (citations omitted). *Strickland*, in turn, requires Petitioner to establish that post-conviction counsel's performance was deficient and 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).

To demonstrate PCR counsel's performance was deficient, Petitioner must show that counsel's failure to raise the underlying IAC claim did not "fall[ ] within the wide range of reasonable professional assistance" and "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (citation and internal quotation marks omitted). The Court concludes that Petitioner has rebutted the presumption of reasonableness, and established that PCR counsel's failure to investigate and present a trial counsel IAC claim on the same grounds presented in this proceeding constitutes deficient performance under the standard of *Strickland*.

Although he lacked the experience to satisfy Arizona's requirements for the appointment of capital post-conviction counsel under A.R.S. § 13-4041 and Rule 6.8(c) of the Arizona Rules of Criminal Procedure,

the Arizona Supreme Court appointed James Hazel to represent Petitioner in his state PCR proceedings. While Hazel's lack of qualifications to represent Petitioner does not, per se, establish ineffective assistance of counsel, the Court finds upon review of the record and the evidence presented in these proceedings that Hazel performed deficiently.

Arizona recognizes a statutory and due process right to funding for experts and investigators. *Apelt*, 176 Ariz. at 365–66, 861 P.2d at 650–51. However, funding requests must articulate grounds of reasonable necessity. *Id.* at 650. "'[U]ndeveloped assertions that the requested assistance would be beneficial' are not enough." *Id.* at 651 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985). As this Court summarized above in the analysis of trial counsel's performance, and as acknowledged by PCR counsel in these proceedings (EH RT 11/3/17 (a.m.) at 74), there was substantial evidence in the record that would have supported a request for appointment of an expert pathologist in pursuit of an investigation into the medical evidence bearing on the timing of Rachel's injuries. Hazel should have known, after reviewing the file in these proceedings, that the timing of Rachel's injuries was a central issue at Petitioner's trial, and that trial counsel's failure to challenge the state's timeline would give rise to a question whether trial counsel had adequately investigated the timing of the injuries. Hazel also should have been aware of the discrepancies in Dr. Howard's testimony at the two trials, as well as Becky's inconsistent testimony. The record also should have raised questions about the adequacy of trial counsel's investigation of the

bloodstain evidence. The Court finds that PCR counsel acted deficiently by failing to request investigatory assistance to develop these claims, or, lacking funding for investigatory resources, failing to attempt to develop these claims himself.

Respondents characterize Petitioner's claim of ineffective assistance of PCR counsel as a claim based solely on the assertion that, if Hazel had written a better-worded motion, the post-conviction court would have provided sufficient funding to re-investigate the case. (Doc. 289 at 7.) The Court disagrees. Petitioner has always maintained that PCR counsel performed deficiently by failing to conduct any outside investigation that would enable the prosecution's evidence to be tested in a meaningful way. To the extent PCR counsel may have reasonably limited his investigation due to a lack of resources, Petitioner maintains that the motion for funding for an investigator was not simply poorly-worded, but legally and factually insufficient and in disregard of the Arizona Supreme Court's directions for requesting resources.

Respondents argue that the record establishes that Hazel did not perform deficiently, noting that he: (1) reviewed the record, (2) spoke with trial and appellate counsel, (3) met with Petitioner, (4) repeatedly requested funding for an investigator, (5) requested a mitigation specialist, (6) interviewed Angela, (7) filed a post-conviction petition, and (8) obtained an evidentiary hearing on a claim of

ineffective assistance of counsel.[20] "One of the purposes of Rule 32 proceedings in Arizona 'is to furnish an evidentiary forum for the establishment of facts underlying a claim for relief when such facts have not previously been established of record.'" *State v. Watton*, 164 Ariz. 323, 328 (1990) (quoting *State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982)). Notably absent from the record is any indication, outside of a single interview of Angela a day *after* he prepared the final Rule 32 petition, that PCR counsel attempted to identify or investigate any potential claim that relied on the establishment of facts outside the record. Counsel spent 100 hours over three months doing little more than reviewing the record in this case. The petition he filed after that review, alleging four claims of ineffective assistance of trial counsel, is almost completely devoid of any assertion of prejudice, and it is apparent from the petition that counsel believed he was not obligated to prove prejudice. (*See* EH Ex. 135 at 13–14 (PCR Petition) (stating Petitioner was required to show he was prejudiced *or* that the result was unfair, and arguing Petitioner was entitled to relief because defense counsel's representation rendered the trial court proceedings fundamentally unfair); *see also* EH Ex. 136 at 4–5 (Reply to Response

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[20] Respondents' argument is generous to PCR counsel. A review of Hazel's billing records indicate Hazel spent less than half an hour speaking with trial counsel just after his appointment, and this discussion related to obtaining the file; Hazel spoke with Petitioner twice during his representation—once approximately three months after his appointment, and once just before he filed the Rule 32 petition. (EH Ex. 128.) Additionally, as discussed below, competent counsel is not demonstrated by the repeated filing of legally and factually insufficient motions for investigatory resources.

to PCR Petition) (disagreeing with the State's position that Petitioner must show he suffered actual prejudice)).[21] "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Significantly, it is difficult to justify Hazel's decision to forego any investigation into the State's strongest evidence of guilt: the medical evidence tying Rachel's injuries to a narrow window of time during the afternoon of May 1 and Petitioner's opportunity to assault Rachel during the alleged third trip in the van. The Court finds that Hazel had more than reasonable grounds to investigate whether there were constitutional deficiencies in trial counsel's investigation of the timing of Rachel's injuries, as well as counsel's investigation of the bloodstain evidence. Having grounds to investigate these issues, he failed to do so.

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[21] In making this argument, Hazel relied on an incorrect interpretation of the Supreme Court's decision in *Lockhart v. Fretwell*, 506 U.S. 363 (1993) (holding that *in addition to demonstrating that the outcome would have been different*, a defendant must also demonstrate that trial counsel's errors rendered the trial unreliable or fundamentally unfair in order to avoid granting windfalls to defendants). To the extent Hazel may have reasonably relied on this interpretation, by the time Hazel filed his reply to the response to the PCR, and well before the evidentiary hearing on Petitioner's PCR petition, the Court had made clear that the decision in *Fretwell* did not supplant the Court's well-established *Strickland* analysis regarding prejudice. *See Williams v. Taylor*, 529 U.S. 362, 391–92 (2000).

Hazel agreed it would have been reasonable to attempt to interview Dr. Howard, but believed "it all starts with the investigator." Hazel also conceded he did not "absolutely" need an investigator, and, in fact, had conducted Angela's interview himself. Despite this acknowledgement, Hazel did not attempt to interview Dr. Howard or investigate Becky's inconsistent statements. Hazel also failed to point out the inconsistencies in Dr. Howard's testimony and his pretrial statements and testimony from Angela's trial. The Court finds that it would have been reasonable to attempt to interview Dr. Howard, or point out the inconsistent statements, and it would not have been necessary to have an investigator to do so.

Hazel's failure to investigate these issues cannot be excused for lack of funding. Hazel reviewed Petitioner's file and stated he "absolutely" questioned whether trial counsel had fully investigated Petitioner's case. (EH RT 11/3/17 (a.m.) at 59.) Despite this acknowledgement, PCR counsel requested no funding for a forensic investigation. Nor did PCR counsel attempt to contact Petitioner's consulting expert at trial, Dr. Keen.

Further, to the extent an investigator might have been necessary to pursue these issues, Hazel failed to file a properly supported request for one. Despite the direction provided by the Arizona Supreme Court to request the appointment of investigators and experts pursuant to A.R.S. § 13-4013(B) and § 13-4041(J), Hazel filed his requests for the appointment of an investigator pursuant to Rule 706(a) of the Arizona Rules of Evidence, a rule that has no application to indigent defense funding in criminal cases. The request

for an investigator was denied because Hazel failed to provide any specific reason to support the need for the appointment of an investigator, a statutory requirement of A.R.S. § 13- 4013(B). Hazel's motion for reconsideration was denied for the same reason. Hazel believed that facial compliance with the statute would not have helped because, in his opinion, his funding requests would have been denied anyway. (EH RT 11/3/17 (a.m.) 61, 65–68, 73–74, 77–78, 80–81.) Hazel never attempted to formulate an application for funding that addressed the PCR court's concerns. Hazel spent approximately 100 hours working on Petitioner's state court petition for post-conviction relief. Nearly 100 percent of counsel's billed time was spent reviewing the file and drafting the petition. Hazel's own attempts at investigation consisted of talking with Petitioner and, after the petition was written, interviewing Angela.

The Court finds that Hazel's claim that his funding requests would have been arbitrarily denied are speculative and against the weight of the evidence. Trial counsel and Petitioner's standard of care expert uniformly agreed that properly grounded funding requests were routinely granted in Pima County. Hazel had before him extensive evidence that if presented in an application for funding would have conveyed to the PCR court that there was a well-founded reasonable need to investigate the central issue in Petitioner's case. Nonetheless, Hazel failed to inform the PCR court of any of the evidence which would have supported the need for funding, and he never requested funding for experts.

In *Hinton v. Alabama*, the Supreme Court found counsel's failure to request additional funding for an expert was unreasonable and constituted deficient performance because it was based, not on a strategic decision, but on counsel's mistaken belief that he would be unable to obtain additional funding combined with his failure to investigate the state's funding statute. 134 S. Ct. 1081, 1089 ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance.") Similarly, Hazel's decision to forego a properly grounded request for an investigator or for experts to assist him with the investigation of the medical time of injury evidence and the bloodstain evidence was based on either ignorance of the requirements of the appropriate funding statute or on counsel's mistaken assumption of the Arizona courts' unwillingness to fund experts, and was not a reasonable strategic decision. *Cf. Hinton,* 134 S. Ct. at 1088.

In conclusion, the Court finds that Hazel's performance and his failures to investigate fell below an objective standard of reasonableness under prevailing professional norms.

D. Ineffective Assistance of PCR Counsel: Prejudice

As explained above in Section IV.A and IV.B, the Court finds Petitioner has already demonstrated trial counsel performed deficiently, and there was a reasonable probability that but for trial counsel's deficient performance the result of the trial proceedings

would have been different. Accordingly, the Court finds that there is a reasonable probability that, absent PCR counsel's deficient performance, the result of the post-conviction proceedings would have been different. *See Clabourne*, 745 F.3d at 377–78 (when PCR counsel has performed deficiently, 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.") Furthermore, as discussed above, the Court finds Petitioner's trial counsel guilt-phase IAC claim meritorious. Accordingly, the Court rejects Respondents' argument that even if PCR counsel's performance was deficient, Petitioner cannot establish prejudice from PCR counsel's failure to raise Claim 1D because the claim has no merit.

VI. CONCLUSION

The Court finds that because Petitioner has met his burden under *Martinez* to establish ineffective assistance of post-conviction counsel as cause for the default of his substantial claim of ineffective assistance of trial counsel for failure to conduct an adequate pre-trial investigation, Petitioner has overcome the procedural default of Claim 1D. The Court further finds that Petitioner has demonstrated that trial counsel performed constitutionally deficiently when he failed to perform an adequate pretrial investigation, leading to his failure to uncover key medical evidence that Rachel's injuries were not sustained on May 1, 1994, as well as his failure to impeach the state's other physical and eyewitness testimony with experts who could support the chosen defense. Petitioner has shown that

had counsel performed constitutionally adequately, there is a reasonable probability that his jury would not have convicted him of *any* of the crimes with which he was charged and previously convicted. Accordingly, Petitioner has demonstrated prejudice due to counsel's failures with respect to all counts in the indictment.

Therefore,

(1) Petitioner's Petition for a Writ of Habeas Corpus is **GRANTED** without reaching the merits of the remaining claim, Claim 1D (Penalty Phase);

(2) the State of Arizona is directed to release Petitioner from custody unless it notifies this Court that (a) it has initiated new trial proceedings within 45 days of the filing date of this Order, and (b) actually commences Petitioner's retrial within 180 days of the filing date of this Order.

(3) the Clerk of Court is directed to enter judgment and close the case. IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Janet Johnson, Clerk of the Arizona Supreme Court, 1501 W. Washington, Suite 402, Phoenix, Arizona, 85007-3329.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 31st day of July, 2018.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-01-00592-TUC-TMB

[Filed: July 31, 2018]

Barry Lee Jones,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al,	)
	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

DEATH PENALTY CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court' Order filed July 31, 2018, Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is GRANTED without reaching the merits of the remaining claim, Claim 1D (Penalty Phase).

Brian D. Karth
District Court Executive/Clerk of Court

July 31, 2018

s/ B Cortez
By Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WO

No. CV-01-00592-TUC-TMB

DEATH PENALTY CASE

[Filed: October 17, 2018]

Barry Lee Jones,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan,[1] et. al,	)
	)
Respondents.	)
	)

ORDER

Pending before the Court are Respondents' Motion to Stay Court Order of July 31, 2018 (Doc. 308),[2] and Petitioner's Cross-Motion for Release Pursuant to Federal Rule of Appellate Procedure 23(c) (Doc. 311). Both motions are fully briefed (Docs. 311, 319, 321).

[1] The Clerk is direct to substitute Charles L. Ryan as the Director of the Arizona Department of Corrections, for Respondent Dora B. Schriro. *See* Fed. R. Civ. P. 25(d).

[2] "Doc." refers to numbered documents in this Court's case file (prior to August 2005) and this Court's electronic case docket (beginning August 2005).

For the reasons that follow, Respondents' motion is DENIED and Petitioner's motion is DENIED without prejudice. The Court intends to enforce its order of July 31, 2018, (Doc. 299 ("Order")), unless Respondents initiate retrial proceeding by October 29, 2018 and actually commence retrial by March 13, 2019.

I. BACKGROUND

Petitioner Barry Lee Jones is a state prisoner under sentence of death. In 2001, Petitioner filed a Petition for Writ of Habeas Corpus ("Petition"). The Court denied the Petition, finding Claim 1D, a guilt and penalty-phase ineffective assistance of counsel ("IAC") claim, procedurally defaulted. The Ninth Circuit Court of Appeals remanded Claim 1D for reconsideration in light of the procedural exception established in *Martinez v. Ryan*, 566 U.S. 1 (2012). (Doc. 158.) On July 31, 2018, following a seven-day evidentiary hearing, the Court concluded that Petitioner had established cause to excuse the procedural default of his meritorious guilt-phase IAC claim and issued a conditional writ directing the State to release or initiate retrial proceedings of Petitioner within 45 days and actually commence retrial in 180 days. (Doc. 299.) Judgment was entered accordingly (Doc. 300), and, on August 15, 2018, Respondents filed a notice of appeal to the Ninth Circuit. (Doc. 302.) Both deadlines in the conditional writ were extended once, by joint request, for 45 days. (Doc. 301.)

On September 12, 2018, Respondents filed a motion to stay the conditional writ. (Doc. 308.) On September 24, 2018, Petitioner filed a motion for his release pending appeal. (Doc. 311.) The Court referred the

matter to the United States Pretrial Services Agency ("Pretrial Services") for an investigation and recommendation as to appropriate conditions for Petitioner's potential release. (Doc. 313.) Pretrial Services submitted a report to the Court and the parties on October 10, 2018. The motions were heard on October 12, 2018, at which time the Court denied the motion for a stay, and denied Petitioner's motion for release without prejudice on the record in court. This written order follows.

II. LEGAL STANDARD

A. Motion for Stay

Courts have broad discretion to condition judgments granting habeas relief as "law and justice require," and thus may delay release for a time to allow the State the opportunity to correct the constitutional violation. *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (quoting 28 U.S.C. § 2243). If the State appeals the final judgment instead of initiating proceedings to correct the constitutional error, it may seek a stay of the petitioner's release by filing an appropriate motion in the district court prior to the deadlines imposed in a conditional writ. *See* Fed. R. Civ. P. 62(c) (court may issue injunction pending appeal); Fed. R. App. P. 8(A)(1)(a) (party ordinarily moves first in the district court for a stay of the judgment); *cf. Hilton*, 481 U.S. at 775 (explaining that the language of Rule 23(c)—governing release of successful habeas petitioners pending appeal—allows broad discretion in considering whether a judgment granting habeas relief should be stayed pending appeal).

The Supreme Court has set forth the following factors a court should consider in determining whether to stay its decision or to release a successful habeas petitioner pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton*, 481 U.S. at 776. The questions whether to stay the decision granting habeas corpus relief and whether to release the prisoner pending appeal are "mirror images" of each other. *Franklin v. Duncan*, 891 F. Supp. 516, 518 (N.D. Cal 1995). The Ninth Circuit has explained that the test "represent[s] the outer reaches of a single continuum." *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1115–16 (9th Cir. 2008) (quoting *Lopez v. Heckler,* 713 F.2d 1432, 1435 (9th Cir. 1983)). "At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury." *Id.* (quoting *Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007)). "At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* at 1116 (quoting *Lopez,* 713 F.2d at 1435). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.* (quoting *Winter,* 502 F.3d at 862). Further, courts "consider 'where the public interest lies' separately

from and in addition to" irreparable injury. *Id.* (quoting *Winter*, 502 F.3d at 863).

B. Motion for Release

In considering a motion for release of a petitioner pending appeal of a successful habeas petition a court should be guided by the language of Rule 23(c) of the Federal Rules of Appellate Procedure, in addition to the traditional stay factors. Rule 23(c) creates a presumption in favor of release of a habeas petitioner who prevails in district court, pending appeal.[1] Fed. R. App. P. 23(c). The Rule 23(c) presumption "may be overcome if the traditional stay factors tip the balance against it." *Hilton*, 481 U.S. at 777. In addition to the traditional standards governing stays of civil judgments, a court may consider other factors such as: (1) the possibility the habeas petitioner will flee if released pending appeal, (2) the risk the petitioner may pose to the public, (3) the state's interest in continuing custody and rehabilitation pending resolution of the appeal, and (4) the petitioner's substantial interest in release pending appeal. *Id.* at 777–78.

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[1] Specifically, Rule 23(c) provides that:

> While a decision ordering release of a prisoner is under review, the prisoner must–unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise–be released on personal recognizance, with or without surety.

Fed. R. App. P. 23(c).

III. MOTION FOR STAY

A. Likelihood of Success on the Merits

Respondents assert they are likely to succeed on the merits of their appeal, highlighting three issues for the Court's review: (1) the Court ordered an evidentiary hearing on Petitioner's claim in conflict with Supreme Court precedent interpreting 28 U.S.C. § 2254(e)(2) in the context of ineffective counsel; (2) the Court misapplied Arizona law by granting relief on Count Four, and (3) the Court erred in its Strickland analysis by failing to apply Strickland deference and the presumption of competence and by engaging in an incorrect prejudice analysis.

1. Evidentiary Hearing

Addressing the first traditional stay factor, Respondents argue that they are likely to succeed on their appeal because the Court erred in resolving a potentially case-dispositive question of law and in making certain factual findings.

First, Respondents argue the Court erroneously found that "if Petitioner can demonstrate cause and prejudice under *Martinez* to excuse the procedural default of Claim 1D, he is entitled to an evidentiary hearing on the merits to the extent such a hearing is necessary to resolve any disputed issues of fact" (Doc. 185 at 32). Respondents acknowledge that Petitioner is allowed, under the Ninth Circuit's ruling in *Dickens v. Ryan*, 740 F.3d 1302, 1321–22 (9th Cir. 2014) (en banc), to develop evidence for the purpose of demonstrating that cause exists to excuse a procedural default, but argue that, unless the Petitioner can also satisfy the

requirements of §2254(e)(2), Petitioner may not support the merits of the underlying IAC claims with new evidence. At its core Respondents' argument is that, under *Martinez*, a petitioner may conduct extensive lengthy and expensive discovery, be permitted a full hearing on the substantiality of an IAC claim, and successfully demonstrate the ineffectiveness of both PCR and trial counsel, only to have the claim itself denied because the Court's discretion to hold an evidentiary hearing to resolve disputed issues of material fact is circumscribed by § 2254(e)(2). The Court disagrees.

Respondents' reliance on *Cullen v. Pinholster*, 563 U.S. 170, 185–86 (2011) to support their position is mistaken. As this Court previously stated, "[t]he evidentiary limitations described in [*Pinholster*], . . . do not apply to Petitioner's procedurally defaulted ineffective assistance claims because they were not previously adjudicated on the merits by the state courts." (Doc. 185 at 31) (citing *Dickens*, 740 F.3d at 1320–21 (rejecting the State's argument that *Pinholster* bars the federal court's ability to consider new evidence where the petitioner successfully shows cause to overcome the procedural default)). Citing *Pinholster*, 563 U.S. at 185–86, Respondents incorrectly state that, because the claim was not resolved on the merits in state court, § 2254(e)(2) requires such evidence to be excluded when examining the merits of a procedurally defaulted claim. This is an incorrect reading of *Pinholster*, which held that "review *under § 2254(d)(1)* is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181 (emphasis added). Unlike the district court in

Pinholster, which was required to conduct a "backward-looking" examination of the state-court decision at the time it was made, this Court has conducted a *de novo* review of Petitioner's claim because it was never raised in state court. *Pinholster* has no application here where there has never been any adjudication of the merits of the claim. Consequently, Respondents' argument in this regard is highly unlikely to succeed.

Next, Respondents next assert that there exists tension between this Court's decision and the Supreme Court's application of § 2254(e)(2) in the pre-*Martinez* decisions in *Holland v. Jackson*, 542 U.S. 649 (2004) (negligence of state post-conviction counsel "is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied") and *Williams v. Taylor*, 529 U.S. 420, 437–40 (2000) (denying evidentiary hearing of *Brady* claim because post-conviction counsel's failure to investigate and locate a psychiatric report showed a lack of diligence and amounted to a failure to develop the facts under § 2254(e)(2)). The Court explained in *Pinholster* that a federal habeas court has discretion to take new evidence in an evidentiary hearing "when deciding claims that were not adjudicated on the merits in state court," and that discretion has limits, it is not, as Respondents, assert prohibited by § 2254(e)(2). *Pinholster*, 563 U.S. at 186. "Provisions like [§ 2254(e)(2)] ensure that 'federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Pinholster*, 563 U.S. at 186 (citing *Williams*, 529 U.S. at 427). To the extent

there is "tension" between these cases and Court's ruling, this case is easily distinguished.

Under § 2254(e)(2), if a court determines that a petitioner has not been diligent in establishing the factual basis for his claims in state court it may not conduct a hearing unless the petitioner satisfies one of § 2254(e)(2)'s narrow exceptions, which are not relevant to this case. If, however, "there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." *Williams*, 529 U.S. at 437. In *Williams*, a pre-*Martinez* decision, the Supreme Court found that a lack of diligence, "attributable to the prisoner or the prisoner's counsel," would establish a failure to develop the factual basis of the claim. *Id.* at 432.

In allowing Petitioner to develop and present new evidence in support of Claim 1D this Court concluded that if Petitioner can demonstrate he is not at fault for failing to bring the claim, and his procedural default is excused under *Martinez*, he is by extension not at fault for failing to develop the claim under § 2254(e)(2). (Doc. 185 at 33.) The Court is not alone in reaching this conclusion. Notably, the plurality in *Detrich v. Ryan*, 740 F.3d 1237, 1247–1248 (9th Cir. 2013) (en banc), suggested that it "makes little sense" to apply § 2254(e)(2) at all to an IAC claim underlying a *Martinez* motion because:

> . . . newly discovered evidence standard is not an apt source from which to draw a prejudice

> standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts the absence of one of the critical assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard should be somewhat lower.

Id. (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

Were this Court to have denied Petitioner an evidentiary hearing on his IAC claim when PCR counsel has been ineffective under the standards of *Strickland*, the harm the Supreme Court envisioned in *Martinez*—that "no court will review the prisoner's [trial counsel' IAC] claims"—would become a certainty. *See Martinez*, 566 U.S. at 11. Further, it is simply illogical, and extraordinarily burdensome to the courts and the litigants, in a post-*Martinez* world, for a court to allow full evidentiary development and hearing on the *Martinez* "claim," but not allow consideration of that very same evidence as to the merits of the underlying trial-counsel IAC claim because his constitutionally ineffective PCR counsel failed to raise that claim. *Williams* and *Holland* are distinguishable in that neither case involved a so-called "*Martinez* claim." The equitable decision in *Martinez* is equally applicable to a showing of cause and prejudice of a defaulted claim as it is to evidentiary development of

the claim itself. And it is not without limitation. Before a court can consider the new evidence on the merits of a procedurally defaulted trial-counsel claim a petitioner must first demonstrate (1) PCR counsel was ineffective under the standards of *Strickland*, and (2) the trial counsel IAC claim is substantial, requiring the court to consider the merits of the claim. These are difficult standards to meet.

At best Respondents' position is arguable. The Court has found no binding precedent clearly explaining the standards for development of new evidence on the merits of a defaulted claim after *Martinez*. Some courts have agreed with this Court's position, while others have at least suggested that evidentiary hearings on those grounds might be denied. *Compare Sasser v. Hobbs*, 735 F.3d 833, 853–54 (8th Cir. 2013) (*Williams* authorizes a district court that finds cause to excuse procedural default based on the ineffectiveness of post-conviction counsel to hold an evidentiary hearing on the claims) (quoting *Williams*, 529 U.S. at 437); *McLaughlin v. Laxalt*, 665 Fed. App'x. 590 (9th Cir. 2016) (unpublished) ("[A]lthough a state habeas lawyer's errors normally are imputed to a habeas petitioner for purposes of determining whether the petitioner has been diligent under § 2254(e)(2), [*Williams*, 529 U.S. at 432,] such imputation makes no sense in the context of a claim rescued from procedural default by *Martinez*."), *with Norman v. Stephens*, 817 F.3d 226, 234–35 (5th Cir. 2016) (stating, in dicta, that it would deny a request for evidentiary hearing, because petitioner's claims brought pursuant to *Martinez*, are "by their very nature . . . premised on the failure of 'the prisoner's counsel' to *develop* the factual

basis of the claims in state court"); *Lopez v. Ryan*, No. CV098-72-PHX-SMM, 2012 WL 1520172, *11, n3 (D. Ariz. April 30, 2012) (noting that the Court is bound by the Supreme Court's directive in *Williams* that a failure to develop the factual basis of a claim is not established unless there is a lack of diligence attributable to the prisoner or the prisoner's counsel, and further noting that, in *Williams*, the Supreme Court found that state post-conviction counsel's failure to investigate constituted a lack of diligence).

The Court finds Respondents have not demonstrated a strong or substantial likelihood of success on the merits of this argument, regardless of how that standard is articulated. *See Leiva-Perez v. Holder*, 640 F.3d 962, 966–68 (9th Cir. 2011) (explaining that an applicant for a stay need "not demonstrate that it is more likely than not that they will win on the merits," but must meet a "minimum quantum of likely success necessary to justify a stay," which may be articulated as "a reasonable probability," a "fair prospect," "a substantial case on the merits," or that "serious legal questions are raised"). Further, the Court finds that Respondents have not demonstrated the "minimum quantum of likely success necessary to justify a stay." *See id.* at 967.

2. Count Four

Respondents also argue that they have a strong likelihood of success on their argument that the Court erred by granting relief on Count Four.

In April and early May 1994, Petitioner was sharing his trailer with Angela Gray and her three children,

including the four-year-old victim in this case, Rachel Gray and her siblings: 11-year-old Rebecca ("Becky") and 14-year-old Jonathon. Petitioner's 11-year-old daughter Brandie Jones also lived in the same trailer. The night before her death, Petitioner, Rachel's mother, and several others observed her bleeding from a head wound, vomiting, and appearing pale and ill. At approximately 6:15 a.m. on Monday, May 2, 1994, Petitioner drove Rachel and Angela to Kino Community Hospital in Tucson, Arizona, dropped them off and left. Rachel was admitted and pronounced dead on arrival. Her cause of death was determined to be homicide caused by a small bowel laceration due to blunt abdominal trauma. Rachel also had a laceration of her left scalp behind the ear, injuries to her labia and vagina, and multiple internal and external contusions.

Petitioner was arrested that same day and charged with five counts: (1) engaging in an act of sexual intercourse with Rachel, in violation of A.R.S. § 13-1406 (Count One); (2) causing physical injury to Rachel by striking her abdominal area causing a rupture to her small intestine under circumstances likely to produce death or serious physical injury, in violation of A.R.S. §13-3623(B)(1) (Count Two); (3) causing physical injury to Rachel by bruising her face and ear and causing a laceration to her head, in violation of A.R.S §13-3623(C)(1) (Count Three); (4) causing Rachel to be placed in a situation where her health was endangered under circumstances likely to produce death or serious physical injury, in violation of A.R.S. § 13-3623(B)(1) (Count Four); and felony murder, in violation of A.R.S. § 13-1105 (Count Five).

Petitioner was tried before a jury in April 1995. The gravamen of the prosecution's case against Petitioner was that Rachel was solely in Petitioner's care on the afternoon of May 1, 1994, when her injuries, including her fatal abdominal injury, were inflicted. The trial judge instructed the jurors that three of the charges were predicate felonies for purposes of the felony murder count (Count Five): Count Two, alleging Petitioner struck Rachel in the abdomen rupturing her small intestine, Count Four, alleging Petitioner endangered Rachel by failing to take her to a hospital, and Count One, alleging Petitioner sexually assaulted Rachel. *See State v. Jones*, 188 Ariz. 388, 391, 937 P.2d 310, 313 (1997). The trial court instructed the jurors that the crime of child abuse under circumstances likely to cause death or serious physical injury required proof of the following three elements.

1. The defendant acted under circumstances likely to cause death or serious physical injury;

2. The defendant caused physical injury to a child, or, having custody or care of the child, the defendant allowed the health of the child to be endangered; and

3 The defendant acted with one of the following mental states: (A) intentionally or knowingly, (B) recklessly, or (C) with criminal negligence.

(RT 4/13/95 at 67–69; ROA 135 at 670.)[3] The jurors were further instructed that the child abuse charges could only be predicate felonies of the felony murder charge if Petitioner committed them intentionally or knowingly under circumstances likely to produce death or serious physical injury. *See Jones*, 188 Ariz at 391, 937 P.2d at 313. Petitioner was convicted on all charges. *See id*. The jurors found that both child abuse charges that qualified as predicate felonies (Counts Two and Four) were committed under circumstances likely to cause serious physical injury or death and that Petitioner's mental state was intentional or knowing. *Id*.; (ROA 684).

In 2014, after unsuccessful review in state court and after this Court denied Petitioner's habeas petition in 2001, finding Claim 1D defaulted, the Ninth Circuit directed this Court to reconsider that claim in light of *Martinez*, finding the defaulted claim "substantial" for purposes of remand. (*See* Doc. 158.) After evidentiary development and an evidentiary hearing, this Court granted the Petition, finding ineffective assistance of counsel as to all of the counts Petitioner was charged with, including Count Four—knowingly and intentionally endangering the victim under circumstances likely to produce death or serious physical injury in violation of A.R.S. § 13-3623(B)(1).

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[3] "RT" refers to the reporter's transcripts from Petitioner's state court proceedings.

"ROA" refers to the 5-volume record on appeal from trial and sentencing.

Respondents first argue that Petitioner did not challenge Petitioner's conviction on Count Four until after the evidentiary hearing in this case. In granting the writ, the Court considered this argument and rejected it: "Petitioner has maintained throughout these habeas proceedings that counsel failed to adequately investigate the medical evidence and the medical timeline of Rachel's injuries as to Petitioner's convictions as a whole." (Doc. 299 at 81–82, n17.)

For the same reasons, the Court finds this argument has no strong or substantial likelihood of success on appeal. Petitioner has consistently maintained that the deficient performance of counsel prejudiced his conviction *in toto*. (*See* Doc. 58, passim); Doc. 167 at 102–03 ("[T]he negative consequences of defense counsel's failure to conduct a minimally adequate investigation results in more than a reasonable probability that at least one juror (and surely all) would have 'had a reasonable doubt respecting guilt' and acquitted [Petitioner] of First Degree Murder.") (quoting *Strickland*, 466 U.S. at 693).) Petitioner also consistently argued that the altered evidentiary picture that could have been presented by competent counsel undermines confidence in the outcome of "the conviction." (Doc. 167 at 120–03.) By explicitly challenging the "conviction" and the first degree murder count, Petitioner necessarily argues that counsel's deficiency resulted in prejudice to all of the predicate felonies, including Count Four. Respondents addressed Claim 1D in the supplemental briefing to the petition as two subclaims—a guilt-phase claim, and a penalty-phase claim—but also referred to the conviction as a whole, not to individual counts.

(Doc. 175, *passim*.) As Respondents previously argued, the felony murder count cannot be overturned if the verdict stands as to Count Four. (*See* Doc. 308 at 6.) It follows then that any challenge to the felony murder count implicates a challenge to all three predicate felonies.

Next, Respondents argue that the Court erred by finding Count Four "intertwined" with the other child abuse and sexual assault charges because the prosecutor supported the intentional or knowing infliction of the child abuse charge alleged in Count Four by arguing: "Rachel died because she was beaten in order to be raped. *She died as a result of that beating both because the internal injuries killed her and because only the [Petitioner] knew how badly she was hurt* . . . ." (RT 4/13/95 at 104 (emphasis added); *See* Doc. 299 at 81–83.) This Court concluded that "[i]f Petitioner was not responsible for the assault, under the State's own theory he would be less likely to have had reasons to prevent Rachel from being taken to the hospital." (Doc. 299 at 83.)

Contrary to Respondents' assertion that the Court, in an "unprecedented" order, set aside two presumptively-valid state-court convictions based only on a prosecutor's comments, the Court explicitly ignored the arguments and theories of counsel and considered each offense separately, finding little evidence that Petitioner committed the offense knowingly and intentionally. The Court did not set aside the convictions based on a prosecutor's comments, but simply reached the same conclusion the prosecutor urged the jury to reach: that the evidence

that Petitioner knew how badly Rachel was hurt was significant in determining whether he endangered Rachel intentionally and knowingly, or, in the absence of such evidence, acted with a lesser mental state. The Court accepted the testimony of the experts that Petitioner's failure to take Rachel to the hospital either caused or contributed to her death, and concluded that, "[a]t a minimum, in light of the evidence presented at trial and in these proceedings, the Court finds that there is a reasonable probability that the jury would not have found that Petitioner acted with a knowing or intentional mental state in Count Four if the defense had put on evidence questioning the medical timeline and suggesting that he was not the perpetrator of the assault. While Respondents are correct that the jury was properly instructed that the arguments of counsel are not evidence, it was also properly instructed that "what the lawyers said . . . may help you to understand the law and the evidence." (RT 4/13/95 at 64.) Assuming that the jurors properly followed instructions, they could infer, as the prosecutor argued, that Petitioner acted knowingly and intentionally in failing to seek aid for Rachel based on the uncontroverted evidence presented at trial that Petitioner inflicted Rachel's injuries. Conversely, the trial judge had also instructed the jury on two lesser included offenses and there is a reasonable probability that, if the jury had been presented with Petitioner's medical timeline evidence presented during these proceedings, at least one juror would have returned a verdict on one of the two lesser charges.

Respondents next argue that, under Arizona law it does not matter whether Jones knew how seriously

Rachel was injured because a defendant's knowledge of how a child came to be injured, or the extent of the child's injuries, are irrelevant to the consideration of the mental state determination of intentionally or knowingly. (*See* Doc. 308 at 7 (citing *State v. Payne*, 233 Ariz. 484, 505–06, 314 P.3d 1239, 1260–61 (2013)).) The Court agrees with Petitioner, however, that what is relevant to the current inquiry is that the State demonstrated Petitioner acted knowingly and intentionally under Count Four by relying on an uncontested timeline that suggested he was the perpetrator of the assaults on Rachel.

In an argument that Respondents raised for the first time in a footnote in a response to Petitioner's closing memorandum, they assert that, under Arizona law, whether circumstances likely to produce death or serious physical injury exists is an objective inquiry, and was affirmatively established by the medical experts' testimony at the evidentiary hearing that Rachel was already dying on Sunday night, May 1, 1994, and Petitioner's failure to take Rachel to the hospital caused her death. (Doc. 308 at 7 (citing *Payne*, 233 Ariz. at 505–06, 314 P.3d at 1260–61).) Respondents also assert that the State is only required to prove that a defendant intentionally or knowingly failed to obtain medical care. (Doc. 308 at 7 (citing *Payne*, 233 Ariz. at 505–06, 314 P.3d at 1260–61.) The Court finds Petitioner's counter-argument persuasive in this regard:

> [T]his does not render the *mens rea* element altogether meaningless. As the Arizona Supreme Court acknowledged in *Payne*, "the statute

> increases the offense level based on the actor's intent." *Id.* at 1261. The *mens rea* "is directed to the defendant's state of mind with regard to the danger to the child. . . . Thus, it is not sufficient that Petitioner intentionally undertook the act. Rather, he must have known or intended that the act would result in the possibility of harm to the child." *Varela v. Ryan*, No. CV-15-1971-JJT (JFM), 2016 WL 8252819 at *14 (Nov. 15, 2016).[] While Respondents focus on the "knowingly" mental state, and argue it is supportable by the evidence (*see* Doc. 319 at 7), they do not acknowledge that a jury could just have reasonably have found one of the lesser included mental states under the statutory definitions and the evidence now presented. For example, to find that Petitioner acted "recklessly," the jury would have had to find that Petitioner was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that Rachel was in risk of danger if he did not seek medical care. *See* A.R.S. §13-105(7)(c) (1994) (now codified at A.R.S. §13-105(10)(c)). Had a juror concluded that the State had failed to prove beyond a reasonable doubt that Petitioner caused Rachel's injuries, there is more than a reasonable probability that juror could decide that Petitioner acted either recklessly or negligently under Count [Four], or even that he was not guilty.

(Doc. 321 at 6–7.)

The Court has no doubt that Petitioner succeeded in demonstrating that, in light of the new evidence, there is a reasonable probability that at least a single juror would have entertained reasonable doubt as to the greater offense. *See Weeden v. Johnson*, 854 F.3d 1063, 1071 (9th Cir. 2017) (stating that reasonable probability is satisfied if only one juror would have struck a different balance). The Court finds Respondents have failed to demonstrate a strong or substantial likelihood of success on the merits of this argument. *See Leiva-Perez*, 640 F.3d at 966–68.

3. *Strickland* Analysis

Respondents next argue that they have a strong likelihood of success on their argument that the Court erred in its application of *Strickland*. Specifically, Respondents assert that the Court failed to apply *Strickland* deference and the presumption of competence and engaged in an incorrect prejudice analysis. The Court begins by addressing Respondents' deficient performance argument first.

a. Deficient Performance

During trial preparations, defense counsel sent forensic pathologist Dr. Keen a letter acknowledging Dr. Keen's agreement to review Rachel's autopsy report, and posing several questions for Dr. Keen to consider when reviewing the autopsy report, including whether Rachel's injuries could be dated and the amount of force necessary to inflict them. (EH Ex. 58 at

4799–800.)[4] Counsel confirmed in the letter that Dr. Keen had explained that his review of the autopsy "may involve obtaining access to photographs, slides and other physical evidence"; Bowman also confirmed that such access could "be arranged as necessary." (EH Ex. 58 at 4799.) Dr. Keen explained in these proceedings that he could not determine the timing of Rachel's injuries, other than a generic interpretation of "it's recent," just from the autopsy report; rather, he required access to slides to make a reliable determination in terms of hours or days. (EH RT 10/31/17 at 71, 73; EH Ex. 57 at 4101.) Dr. Keen explained he had no recollection of ever reviewing any photographs, slides, or other physical evidence at that time. (*Id.*) There was no record that he had ever received such evidence; if he had, it would have been recorded in two places: the county sending the evidence (Pima County), and the county receiving the evidence (Maricopa County). (*Id.* at 71–72.) The record would probably also contain a billing for expenses such as copying. (*Id.* at 72.) Approximately one month later, on August 18, 1994, defense counsel and Dr. Keen spoke by telephone. (EH RT 10/30/2017 at 79–80; EH Ex. 12.) Neither defense counsel nor Dr. Keen can recall what was discussed during that call. (EH RT 10/30/2017 at 80; EH RT 10/31/17 at 74.) Four days later, on August 22, 1994, Rachel's body was released for burial with the consent of defense counsel and without a second

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[4] "EH Ex at ____" refers to the Bates stamped page number of exhibits admitted during Petitioner's evidentiary hearing in his federal habeas proceedings. "EH RT " refers to the reporter's transcripts from the Court's evidentiary hearing in his federal habeas proceedings.

autopsy being performed. (EH Ex. 36; EH RT 10/30/2017 at 81.) Dr. Keen did not testify at Petitioner's trial.

The Court found that defense counsel's brief consultation with Dr. Keen did not satisfy counsel's duty to investigate the timing of Rachel's injuries. (Doc. 299 at 65.) Although defense counsel initially posed a question to Dr. Keen as to whether Rachel's injuries could be dated, the evidence demonstrated that counsel failed to have Dr. Keen pursue the injury-dating investigation to its completion and that this failure was due to defense counsel's inattention and neglect, not reasoned strategic judgment. (*Id.*)

Respondents now argue that, because "[t]he record is silent about counsel's reasons for not providing tissue slides to Dr. Keen, and about the content of the conversation between Dr. Keen and counsel" the Court should have presumed counsel performed reasonably. (Doc. 308 at 9) (citing *Greiner v. Wells*, 417 F.3d 305, 326 (2d Cir. 2005), *Pinholster*, 563 U.S. at 191, *Atwood v. Ryan*, 870 F.3d 1033, 1055 (9th Cir. 2017)). Contrary to Respondents' assertion, the record was not "silent." Specifically, the Court found the following facts supported by the record and evidence presented at the evidentiary hearing: "Dr. Keen needed to be supplied with autopsy tissue slides and photographs in order to reliably assess the age of the injuries." (Doc. 299 at 65; *see also* EH RT 10/31/17 at 71–73; EH Ex. 57 at 4101.) "Counsel knew the slides were needed to make a reliable timeline assessment but failed to ensure they were provided to Dr. Keen." (Doc. 299 at 65; *see also* EH RT 10/20/17 at 99–100; EH Ex. 58; EH Ex. 24.D at

3).) Despite this knowledge, counsel failed to take steps to actually have Dr. Keen review the slides.

There was no reasonable strategic basis for not providing the slides to Dr. Keen. Additionally, in a point Respondents seem to concede in this motion, the Court found the record refuted Respondents' allegations that the investigation into timing of injuries concluded when Dr. Keen reviewed the slides and came to the same conclusion as Respondents' expert, Dr. Howard, finding no proof to support that assertion, and ample evidence in the record to disprove it.

Further, the Court did not engage in speculation by finding that "[e]vidence that others may have caused Rachel's injuries further substantiated the need to investigate the medical evidence and its association with the timing of Rachel's injury." (Doc. 299 at 63.) Counsel need not investigate evidence "in every case, or even the ordinary case" but some "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts." *Harrington v. Richter*, 562 U.S. 86, 106 (2011)). There was little physical evidence in the record directly implicating Petitioner, and, at the same time, there was evidence suggesting someone other than Petitioner may have assaulted Rachel; this was one line of evidence that should have put counsel on notice for the need to fully and completely investigate the timing of Rachel's injuries. Counsel recognized the significance of the timing of the injury when he stated to the jury that everything in the case centered on what happened on Sunday, May 1, "[s]pecifically a couple of disputed hours . . . ." (RT 4/6/95 at 60.) Nonetheless, after

recognizing the importance of the medical timeline, in part due to the real possibility that someone other than Petitioner may have caused Rachel's injuries, counsel failed to follow through on this crucial investigation. If he had, Dr. Keen testified he would have disagreed with the State's expert's opinions with respect to the timing of Rachel's injuries. (EH RT 10/31/17 at 96–97.)

b. Prejudice

Respondents argue that the Court erred in assessing prejudice by failing to consider the impact of Petitioner's new evidence in the context of the trial record and in light of rebuttal the State could have introduced.

First, Respondents incorrectly argue that the Court neglected to consider the damaging evidence in the record that either was or could have been admitted had Petitioner's new experts testified at trial that the timeline of Rachel's injuries excluded Petitioner. (Doc. 308 at 12.) Respondents assert that the Court failed to consider the impact of the testimony of Petitioner's experts at the evidentiary hearing, establishing his guilt on Count Four and, by extension, Count Five (felony murder). The Court however, clearly took this evidence into account, and found it relevant to the consideration of Count Four. The Court considered the expert's opinions in the Order specifically in the context of Count Four, and explained why this would not change the Court's finding of prejudice as to Count Four. (*See* Doc. 299 at 83–84.) The Court has already discussed, in Section III.A.2., above, why the Court believes Respondents have no chance of success on that point, but there can be no argument that the Court

failed to consider it at all. (*See* Doc. 299 at 83 ("Petitioner's own experts in these proceedings do agree that Petitioner's failure to take Rachel to the hospital either caused or contributed to her death.").

The Court acknowledged the new expert's timeline did not exclude Petitioner, rather, it changed the relevant time period to a time where no attempt was ever made to determine if Petitioner had exclusive access to Rachel, or if anyone else did for that matter. Even if, as Respondents suggest, the experts could not provide a definitive medical diagnosis for Rachel's injuries and could not rule out Petitioner as the perpetrator, (*see* Doc. 308 at 12, n1), there is more than a reasonable probability that a jury, applying a presumption of innocence, would not have convicted Petitioner if the most the State could prove was that Petitioner could not be ruled out as the perpetrator of indeterminate injuries.

Finally, Respondents assert that additional evidence could have been presented regarding Petitioner's previous "assault" of Rachel. Respondents state that this included that Petitioner had assaulted Rachel weeks before the fatal beating; Rachel identified Petitioner as the assailant for that prior abuse, and was scared of him for several days afterwards; two children saw Petitioner beating Rachel in the same manner that he previously beat his own children; Petitioner repeatedly lied to others about Rachel's injuries and seeking medical care for her; and Rachel specifically identified Petitioner as her attacker for the fatal injuries while dying. (Doc. 290, at 2–14.) Respondents fail to explain how Petitioner's experts'

testimony would have opened the door to this evidence at trial. Furthermore, Petitioner correctly points out several instances where the record would refute the allegations or be inadmissible. (*See* Doc. 311 at 10 (*citing* EH Ex. 1 at 1187–88 (Becky told Det. Downing that Rachel got the black eyes after a girl hit her with a rake after Rachel tripped over a dog); EH Ex. 66 at 5136–37 (Terry Richmond explains that he saw Rachel with a black eye about a week before she became very ill and was told that Rachel tripped over a dog); *id.* at 5191–92, 5200 (Angela similarly explained that Rachel got black eyes when a girl hit her with a rake after she tripped over the dog); *id.* at 5189–90 (Rachel explained to Angela that a little girl, not Barry, hit her with the rake). Strong evidence that Petitioner lied regarding seeking treatment for Rachel was already before the jury in his original trial and thus is not additional rebuttal evidence. Rachel's alleged statements regarding the "shoe bar" were excluded from Petitioner's trial as inadmissible hearsay, (ROA 106; RT 4/4/95 at 138–50)), and Respondents have not explained how the medical evidence would have opened the door to that hearsay. Finally, the statements of the Lopez children were before the jury, and, as the Court explained in the Order, do not counter the compelling medical evidence. Rather, as Respondents admitted in briefing before the Ninth Circuit, the Lopez children's testimony was "impeached extensively at trial," and thus has limited evidentiary value. *See* Respondents' Response to Motion for Remand in Light of *Martinez v. Ryan* (Doc. 63) at 14–15, *Jones v. Ryan*, No. 08-99033 (9th Cir. Aug. 19, 2014).

The Court finds Respondents have not demonstrated a strong or substantial likelihood of success on the merits of Respondents' *Strickland* argument. *See Leiva-Perez v. Holder*, 640 F.3d at 966–68. Absent a strong showing that Respondents are likely to succeed on appeal, Respondents are not entitled to a stay. "It is not enough that the chance of success on the merits be 'better than negligible.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Sofinet v. I.N.S.*, 188 F.3d 703, 707 (7th Cir. 1999)). "[M]ore than a mere 'possibility' of relief is required." *Id.* (quotation omitted).

Respondents argued during the hearing that even if they have less than a substantial likelihood of success, they may, at the other end of the continuum, demonstrate serious legal issues and that the balance of hardship tips in their favor to obtain a stay. (RT 10/12/18 at 22–23.) Under the traditional test, an applicant for a stay must show: (1) a strong likelihood of success on the merits, or, (2) a combination of probable success on the merits and the possibility or irreparable injury, or (3) that serious questions are raised and the balance of hardships tips sharply in the applicant's favor. *See Winter*, 502 F.3d at 862). Because the Respondents have failed, on the first end of the continuum, to show a strong likelihood of success on the merits, a probable success on the merits, or even that serious questions are raised, the inquiry ends. The Court need not balance the hardships to determine if a stay should be granted. Accordingly, the Court denies Respondents' motion to stay the Order.

IV. MOTION FOR RELEASE

Because the Court denied Respondents' motion for a stay, the Court need not analyze the remaining factors to determine if Petitioner should be released pending appeal. The parties took positions during the hearing that if the Court denies the stay, their mutual preference was for the State to determine release conditions after this Court's conditional writ goes into effect and the State proceeds with a retrial. (RT 10/12/18 at 4, 19.)

V. CONCLUSION

In conclusion, the Court has taken into account the traditional stay factors articulated in *Hilton* and denies Respondents' motion for a stay. The Court finds that Respondents have demonstrated neither a strong showing that they are likely to succeed on appeal nor a substantial case on the merits that would warrant a stay pending appeal. The Court further finds that consideration of the other factors does not tip the scales in Respondents' favor because they have not raised a serious legal question. Accordingly, the Court denies the Respondents' request for a stay. Respondents have indicated that if the stay is denied the State is prepared to initiate pretrial proceedings by October 29, 2018, the date this Court's conditional writ takes effect.

Accordingly,

IT IS HEREBY ORDERED Respondents' Motion to Stay Court Order of July 31, 2018 (Doc. 308) is **DENIED**, and Petitioner's Cross-Motion for Release Pursuant to Federal of Appellate Procedure 23 (c) (Doc. 311) is **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that the State must initiate trial proceedings by October 29, 2018, and that trial in this matter must commence by March 13, 2019.

IT IS FURTHER ORDERED, that in the event the Ninth Circuit does not stay this Court's order, Respondents shall file a status report on October 29, 2018, stating what steps have been taken to reinitiate proceedings, and a second status report on January 31, 2019, indicating the status of Petitioner's retrial proceedings.

IT IS SO ORDERED

Dated this 17th day of October, 2018.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-99006

D.C. No. 4:01-cv-00592-TMB

[Filed: November 29, 2019]

BARRY LEE JONES,	)
Petitioner-Appellee,	)
	)
v.	)
	)
DAVID SHINN, Director;	)
STEPHEN MORRIS, Warden,	)
Arizona State Prison-Eyman	)
Complex,	)
Respondents-Appellants.	)
	)

OPINION

Appeal from the United States District Court
for the District of Arizona
Timothy M. Burgess, Chief District Judge, Presiding

Argued and Submitted June 20, 2019
San Francisco, California
Before: Johnnie B. Rawlinson, Richard R. Clifton,
and Paul J. Watford, Circuit Judges.

Opinion by Judge Clifton

SUMMARY*

Habeas Corpus

The panel affirmed in part and vacated in part the district court's grant of federal habeas relief to Barry Lee Jones, a state prisoner who was sentenced to death following his conviction for one count of sexual assault, three counts of child abuse, and felony murder for the death of four-year-old Rachel Gold.

The panel held that 28 U.S.C. § 2254(e)(2), which precludes evidentiary hearings on claims that were not developed in state court proceedings, did not prohibit the district court from considering the evidence adduced at a hearing pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012) (concerning cause to excuse procedural default), to determine the merits of Jones's underlying ineffective-assistance-of-counsel claim.

The panel also concluded that the district court did not err in determining that (1) the assistance provided by Jones's counsel was constitutionally deficient because he failed to perform an adequate pretrial investigation into whether Rachel's injuries were sustained during the time she was alone with Jones, and (2) Jones has demonstrated prejudice due to counsel's failures.

The panel therefore generally affirmed the order of the district court that granted Jones habeas relief on the guilt-phase portion of his IAC claim and ordered

* 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 State to release him from custody unless it initiated new trial proceedings against him. However, on one of the five counts of conviction, regarding Jones's failure to seek medical care for the victim (Count Four), the panel concluded that the ineffective assistance only affected the jury's classification of Jones's offense as intentional or knowing but not his underlying guilt based on a less culpable mental state, such as recklessness. The panel therefore affirmed the district court's grant of Jones's habeas petition but vacated in part its remedy. The panel instructed the district court on remand to amend its order to require that the state court either retry Jones on Count Four or resentence him on that count for the lesser included offense of reckless misconduct.

COUNSEL

Myles A. Braccio (argued), Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Capital Litigation Section, Office of the Attorney General, Phoenix, Arizona; for Respondents-Appellants.

Cary Sandman (argued) and Karen Smith, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Tucson, Arizona; for Petitioner-Appellee.

OPINION

CLIFTON, Circuit Judge:

A warden and several other employees of the State of Arizona (collectively the "State") appeal the grant of

federal habeas relief to Barry Lee Jones, a state prisoner under sentence of death. Jones was convicted of one count of sexual assault, three counts of child abuse, and felony murder for the death of four-year-old Rachel Gray. *Jones v. Ryan*, 327 F. Supp. 3d 1157, 1163–64 (D. Ariz. 2018) ("*Jones Habeas*"). To determine whether Jones qualified for habeas relief, the district court considered evidence presented at hearings to determine whether Jones could establish cause to excuse the procedural default of a claim of ineffective assistance of counsel ("IAC") pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012) ("*Martinez* hearing"). *Id.* at 1163. It then concluded that Jones had established cause to excuse the procedural default of his meritorious guilt-phase IAC claim that trial counsel failed to sufficiently investigate the police work, medical evidence, and timeline between Rachel's fatal injury and her death (Claim 1D), and it therefore granted his habeas petition. *Id.* at 1163, 1168.

We hold that 28 U.S.C. § 2254(e)(2), which precludes evidentiary hearings on claims that were not developed in state court proceedings, did not prohibit the district court from considering the evidence adduced at the *Martinez* hearing to determine the merits of Jones's underlying IAC claim. When a district court holds an evidentiary hearing to determine whether a petitioner's claim is excused from procedural default under *Martinez*, it may consider that same evidence to grant habeas relief on the underlying claim.

We also conclude that the district court did not err in determining that (1) the assistance provided by Jones's counsel was constitutionally deficient because

he failed to perform an adequate pretrial investigation into whether Rachel's injuries were sustained during the time she was alone with Jones, and (2) Jones has demonstrated prejudice due to counsel's failures. At Jones's trial, the State presented evidence that established that most of Rachel's injuries, including her fatal injury, were consistent with infliction on Sunday, May 1, 1994, between 2:00 p.m. and 5:30 p.m, a few hours before she was pronounced dead the next morning. *Jones Habeas*, 327 F. Supp. 3d at 1169. The State also presented evidence from several witnesses that supported its theory that Rachel was in the sole care of Jones during that time. *Id.* at 1173–74. At the *Martinez* hearing, Jones presented evidence, both from his own experts and from a government expert's prior statements, that Rachel may have in fact been injured earlier. *Id.* at 1179–80. He also presented evidence of other potential suspects who had access to Rachel outside the critical disputed hours, including her mother, other children in the trailer park, her siblings, and her mother's former boyfriend. *Id.* at 1188–89. Although this evidence would not necessarily exonerate Jones, there is a reasonable probability that the jury might have arrived at a different conclusion on the question of whether Jones had inflicted the injuries or knowingly failed to seek care. We generally affirm the order of the district court that granted Jones habeas relief on the guilt-phase portion of his IAC claim and ordered the State to release him from custody unless it initiated new trial proceedings against him.

However, on one of the five counts of conviction, regarding Jones's failure to seek medical care for the victim (Count Four), the ineffective assistance only

affected the jury's classification of Jones's offense as intentional or knowing but not his underlying guilt based on a less culpable mental state, such as recklessness. We therefore affirm the district court's grant of Jones's habeas petition but vacate in part its remedy. The district court should amend its order to require that the state court either retry him on Count Four (as its order currently states, 327 F. Supp. 3d at 1218) or resentence him on that count for the lesser included offense.

I. Background

In April and early May 1994, Jones shared his trailer with his girlfriend Angela Gray, his 11-year-old daughter Brandie Jones, and Angela's three children: four-year-old Rachel Gray, 11-year-old Rebecca Lux ("Becky"), and 14-year-old Jonathon Lux.[1] *Jones Habeas*, 327 F. Supp. 3d at 1163, 1181. At approximately 6:15 a.m. on Monday, May 2, 1994, Jones drove Rachel and Angela to Kino Community Hospital in Tucson, Arizona. *Id.* at 1163. Rachel was admitted and pronounced dead on arrival, caused by a small bowel laceration due to blunt abdominal trauma. *Id.* Rachel also had a laceration to her left scalp, injuries to her labia and vagina, and multiple internal and external contusions. *Id.*

Jones was arrested and charged with:

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[1] Because Angela and Rachel have the same last name, we will refer to them by their first names. We will likewise refer to Rebecca Lux as "Becky," Jonathon Lux as "Jonathon," and Brandie Jones as "Brandie."

> (1) engaging in an act of sexual intercourse with Rachel, in violation of A.R.S. § 13-1406 (Count One); (2) causing physical injury to Rachel by striking her abdominal area causing a rupture to her small intestine under circumstances likely to produce death or serious physical injury, in violation of A.R.S. § 13-3623(B)(1) (Count Two)[2]; (3) causing physical injury to Rachel by bruising her face and ear and causing a laceration to her head, in violation of A.R.S § 13-3623(C)(1) (Count Three); (4) causing Rachel to be placed in a situation where her health was endangered under circumstances likely to produce death or serious physical injury, in violation of A.R.S. § 13-3623(B)(1) (Count Four); and (5) felony murder, in violation of A.R.S. § 13-1105 (Count Five)

Jones Habeas, 327 F. Supp. 3d at 1163.

Under Arizona law, first degree murder can either be (1) premeditated, meaning the defendant intentionally or knowingly caused the death of another with premeditation, or (2) felony murder, if the defendant caused a death during the commission of or in furtherance of enumerated predicate felony offenses. A.R.S. § 13-1105(A) (1994). Those enumerated predicate offenses include sexual assault (as charged in Count One) and child abuse under § 13-3623(B)(1) (as

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[2] Unless otherwise noted, all references to A.R.S. § 13-3623 are to the version of the statute in effect at the time Jones was charged and convicted. The statute was revised in 2000 so the section under which Jones was convicted, § 13-3623(B)(1), is now § 13-3623(A)(1). *See* 2000 Ariz. Legis. Serv. Ch. 50 (H.B. 2395) (West).

charged in Counts Two and Four). *Id.* § 13-1105(A)(2); *State v. Styers*, 865 P.2d 765, 771 (Ariz. 1993) (In Banc); *Jones Habeas*, 327 F. Supp. 3d at 1212. Jones was only charged under a felony murder theory. *Jones Habeas*, 327 F. Supp. 3d at 1163.

In Counts Two and Four, Jones was also charged with the lesser included offenses of child abuse committed recklessly, A.R.S. § 13-3623(B)(2), and child abuse committed with criminal negligence, A.R.S. § 13-3623(B)(3). The trial judge explained that the child abuse charges could only be predicate felonies for felony murder if Jones committed them intentionally or knowingly under circumstances likely to produce death or serious physical injury. *Jones Habeas*, 327 F. Supp. 3d at 1212.

The day after Jones's arrest, May 3, Sean Bruner was appointed to represent Jones. *Id.* at 1168. Bruner's partner Leslie Bowman also represented Jones as an informal "second-chair" attorney, although she was never formally appointed by the trial court. *Id.*

Angela was also charged on Counts Four and Five of the same indictment. *Id.* at 1163. She was tried separately, prior to Jones's trial, and she was convicted on Count Four. *Id.* Because the jury determined she had acted recklessly in failing to render care, rather than intentionally or knowingly, she was ineligible for felony murder and therefore acquitted on Count Five. *Id.* at 1163–64.

Jones was tried before a jury in April 1995. *Id.* at 1164. The trial judge instructed the jurors that the sexual assault charge (Count One) and two of the child

abuse charges (Counts Two and Four) could be predicate felonies for the felony murder charge (Count Five) if Jones committed them intentionally or knowingly under circumstances likely to produce death or serious physical injury. *Id.*

On April 14, 1995, Jones was convicted of one count of sexual assault, three counts of child abuse, and felony murder. *State v. Jones*, 937 P.2d 310, 313 (Ariz. 1997) ("*Jones State*"). The jury did not specify which specific felony or felonies—out of Counts One, Two, and Four—it found as a predicate for felony murder under Count Five. The jurors found that both child abuse charges that qualified as predicate felonies were committed intentionally or knowingly under circumstances likely to cause serious physical injury or death. *Jones Habeas*, 327 F. Supp. 3d at 1164.

After finding two statutory aggravating factors—that the crime was especially cruel, A.R.S. § 13-703(F)(6), and the victim was under the age of fifteen, A.R.S. § 13-703(F)(9)—and no statutory or non-statutory mitigating factors, the trial judge sentenced Jones to death for the murder.[3] *Jones State*, 937 P.2d 310 at 313. The trial court sentenced him to a term of 27 years on Count One, 35 years on Count Two as a class two felony, 3.75 years on Count Three, and life

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[3] Prior to the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), trial judges in Arizona determined mitigating and aggravating circumstances and decided whether a death sentence should be imposed. In *Ring*, the Supreme Court held that this procedure violated the Sixth Amendment. *Id.* However, *Ring* does not apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

imprisonment on Count Four as a dangerous crime against children in the first degree with two prior predicate felony convictions. A.R.S. §§ 13-604.01(F), 13-604.01(J)(1)(h) (1994).

The Arizona Supreme Court affirmed Jones's convictions and sentences. *Jones State*, 937 P.2d at 313. It noted that the following evidence linked Jones to Rachel's injuries: on the day she received her injuries, Jones left his trailer three times with Rachel in his van; two children saw Jones hitting her while he drove; Jones stopped at a Quik-Mart to get ice for Rachel's head injury; and police found traces of Rachel's blood type on his clothing and in his van. *Id.* While visiting Jones's trailer that evening, a friend's son asked Jones about Rachel's condition, and Jones falsely stated that he had taken her to get examined by paramedics at the fire department. *Id.* The court held that the evidence at trial was sufficient to sustain a guilty verdict on the sexual assault charge in part because "substantial evidence was introduced to conclude that Rachel's physical assault and sexual assault all occurred within the two-hour time period during which she was alone with defendant in his van." *Id.* at 318–19.

Jones filed a petition for post-conviction relief ("PCR"), which included IAC claims based on defense counsel's alleged failures to seek mistrial after three jurors saw him in handcuffs, interview Angela, follow-up on his request for a second attorney, meet with Jones enough times to adequately prepare for trial, and explicitly inform Jones of his right to testify in his own defense. After holding an evidentiary hearing, the trial court denied his petition. *Jones Habeas*, 327 F. Supp.

3d at 1165. The Arizona Supreme Court summarily denied his petition for review. *Id.*

Jones initiated federal habeas proceedings on November 5, 2001, and he filed an amended petition on December 23, 2002. *Id.* Claim 1D of his habeas petition alleged in part that counsel was ineffective for failing to conduct sufficient trial investigation; adequately investigate the police work, medical evidence, and timeline of death versus injury; and conduct sufficient mitigation investigation for sentencing. *Jones v. Schriro*, No. CV01-592-TUC-FRZ, 2008 WL 4446619, at *5 (D. Ariz. Sept. 29, 2008).

Under the doctrine of procedural default,

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner 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 v. Thompson, 501 U.S. 722, 750 (1991). The district court determined that the majority of Claim 1D was procedurally defaulted because it had not been raised and exhausted in state court. *Jones v. Schriro*, 2008 WL 4446619, at *2, *5. As cause to excuse the procedural default of Claim 1D, Jones alleged that PCR counsel was ineffective for failing to present this claim in state court. Order, *Jones v. Schriro*, No. CV01-592-

TUC-FRZ, at 9 (D. Ariz. Sept. 27, 2004), Dkt. 115. Following then-governing Supreme Court precedent, the district court determined that PCR counsel's purported ineffectiveness did not constitute cause because "there is no constitutional right to counsel in state PCR proceedings." *Jones v. Schriro*, 2008 WL 4446619, at *5. The court ordered supplemental briefing regarding Jones's allegation that it would be a fundamental miscarriage of justice not to review the entirety of Claim 1D on the merits, and on September 29, 2008, it denied relief after concluding Jones had not demonstrated a fundamental miscarriage of justice. *Jones Habeas*, 327 F. Supp. 3d at 1165. In doing so, it emphasized the demanding nature of the fundamental miscarriage of justice standard, and noted that while Jones's evidence was "compelling and may have been persuasive to some jurors in the first instance, it is not sufficient on collateral review to establish that no reasonable juror would have found Petitioner guilty" as required to meet this standard. *Jones v. Schriro*, 2008 WL 4446619, at *14. The court did, however, issue a certificate of appealability on its procedural ruling that Claim 1D was in part procedurally defaulted. *Id.* at *32.

While Jones's appeal from the denial of habeas relief was pending, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012). *Jones Habeas*, 327 F. Supp. 3d at 1165. In *Martinez*, the Court held that "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." 566 U.S. at 17. On August

19, 2014, we granted Jones's motion for a limited remand to reconsider Claim 1D in light of intervening law, including *Martinez*.

The district court ordered supplemental briefing to address whether cause existed under *Martinez* to excuse the procedural default of Claim 1D, and whether Jones was entitled to habeas relief on the claim. *Jones v. Ryan*, No. CV-01-00592-TUC-TMB, 2017 WL 264500, at *1 (D. Ariz. Jan. 20, 2017) ("*Jones Evidentiary*"). Jones sought review based on *Martinez* for Claim 1D allegations that trial counsel was ineffective for failing to investigate and present evidence to test the reliability of any of the State's evidence, including the timeline between injury and death, and failing to conduct a reasonably sufficient mitigation investigation for sentencing. *Id.* at *2. On January 20, 2017, the district court determined that an evidentiary hearing was necessary to determine whether Jones could establish cause to excuse the procedural default of Claim 1D. *Id.* at *3. On October 30, 2017, it held a seven-day evidentiary hearing on the guilt-phase portion of the IAC claim. *Jones Habeas*, 327 F. Supp. 3d at 1163.

On July 31, 2018, the district court held that Jones had established cause to excuse the procedural default of his meritorious guilt-phase IAC claim that counsel failed to conduct an adequate pre-trial investigation, leading to his failure to uncover key evidence that Rachel's injuries were not sustained on the afternoon of May 1, 1994, when she was alone with Jones. *Id.* at 1200, 1218. It therefore granted his habeas petition, ordering the State to release him unless it initiated

retrial proceedings within 45 days.[4] *Id.* at 1163. The state then filed a notice of appeal.[5] Dkt. No. 1. After the district court denied the State's motion to stay the district court's judgment, we granted the stay and expedited the appeal. *Jones v. Ryan*, No. CV-01-00592-TUC-TMB, 2018 WL 5066494, at *1 (D. Ariz. Oct. 17, 2018).

II. Standard of Review

This court reviews de novo a district court's decision regarding habeas relief, including questions regarding procedural default. *Sexton v. Cozner*, 679 F.3d 1150, 1153 (9th Cir. 2012). Ineffective assistance of counsel claims are mixed questions of law and fact which we also review de novo. *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011). "Factual findings and credibility determinations made by the district court in the context of granting or denying the petition are reviewed for clear error." *Larsen v. Soto*, 742 F.3d 1083, 1091–92 (9th Cir. 2013) (citation and internal quotation marks omitted).

III. Discussion

The State challenges the district court's grant of habeas relief on Jones's guilt-phase IAC claim on three

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[4] Jones also made arguments alleging ineffective assistance of counsel during the penalty phase of his trial, but the district court did not reach the merits of those claims, leaving them for consideration in the future, if necessary. *See Jones Habeas*, 327 F. Supp. 3d at 1218.

[5] "A certificate of appealability is not required when a state or its representative . . . appeals." Fed. R. App. P. 22(b)(3).

grounds. First, it argues that 28 U.S.C. § 2254(e)(2) should have prevented the district court from considering evidence developed to overcome procedural default under *Martinez v. Ryan*, 566 U.S. 1, when resolving the merits of the underlying habeas claim. Second, it argues that the district court erred in granting habeas relief on all of Jones's convictions because counsel consulted with an independent pathologist before trial, the record is silent as to why counsel did not further involve the expert, the newly-proffered medical evidence was imprecise and double-edged, and strong circumstantial evidence showed Jones's guilt. Third, it argues that the district court erred by granting habeas relief on Jones's Count Four and Five convictions, based on Jones's failure to take the victim to the hospital, because these counts did not depend on the timing of the victim's injuries, and the evidence at the *Martinez* hearing did not undermine the trial evidence proving Jones's guilt on these counts.

A. Consideration of "New Evidence" from Martinez Hearing

Federal habeas courts should not review claims by prisoners who have not exhausted available state remedies, including when the state court concludes that the prisoner defaulted his federal claims pursuant to an "independent and adequate state procedural rule." *Coleman*, 501 U.S. at 731, 750. In *Martinez*, the Supreme Court recognized that a "federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." 566 U.S. at 5.

Jones sought review based on *Martinez* for his Claim 1D allegations that trial counsel was ineffective for (1) failing to investigate and present evidence to test the reliability of any of the State's evidence, including the medical evidence and the question of the timeline between injury and death ("guilt phase"); and (2) failing to conduct a reasonably sufficient mitigation investigation for sentencing ("sentencing phase"). *Jones Evidentiary*, 2017 WL 264500, at *2. The district court conducted a seven-day evidentiary hearing to determine whether Jones could establish cause to excuse the procedural default of Claim 1D. *Jones Habeas*, 327 F. Supp. 3d at 1163. That *Martinez* hearing included testimony and exhibits that were not previously considered by a state court, including testimony from trial and PCR counsel, several experts, and additional testimony from witnesses who testified on behalf of the State at trial. *Id*. at 1178. The federal habeas court extensively considered the evidence and argument presented in these proceedings to conclude that (1) Jones had established cause to excuse the procedural default of his IAC claim and (2) the claim was meritorious, warranting habeas relief. *Id.* at 1163.

The State argues that 28 U.S.C. § 2254(e)(2) prevents a district court from considering new evidence developed to overcome a procedural default under *Martinez* when considering the merits of the underlying claim. That section provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the

> applicant shows that . . . the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence; and . . . the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). The State argues that while § 2254(e)(2) does not bar new evidence offered to excuse a procedural default under *Martinez*, it does govern merits review and precludes an evidentiary hearing on a claim not pursued in state court. It argues that the district court therefore erred by considering evidence outside the state-court record to grant relief on Claim 1D.

As we have previously recognized and now explicitly hold, *Martinez*'s procedural-default exception applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court. The Supreme Court explained in *Martinez* that if the prisoner's state court attorney is ineffective, "the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims." 566 U.S. at 11. The Court's concern was with the prisoner's opportunity to "vindicat[e] a substantial ineffective-assistance-of-trial-counsel claim," a claim which "often depend[s] on evidence outside the trial record." *Id.* at 11, 13. The Court held that the federal habeas court may hear a claim of ineffective assistance of trial

counsel where the initial state collateral proceeding "may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 14.

In *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc), which did not produce a majority opinion, a four-judge plurality held that *Martinez* recognized that determining "whether there has been IAC often requires factual development in a collateral proceeding." *Id.* at 1246 (W. Fletcher, J., plurality).[6] Determining whether counsel's performance was deficient often requires asking the attorney to state the strategic or tactical reasons for his actions, and determining prejudice often requires discovery and an evidentiary hearing to assess the effect of the deficient performance. *Id.* at 1246–47. As the district court explained in denying the State's motion to stay,

> [I]t is simply illogical, and extraordinarily burdensome to the courts and the litigants, in a post-*Martinez* world, for a court to allow full evidentiary development and hearing on the *Martinez* "claim," but not allow consideration of that very same evidence as to the merits of the underlying trial-counsel IAC claim because his constitutionally ineffective PCR counsel failed to raise that claim.

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[6] Although this conclusion was not "supported by a majority of the en banc panel," none of the other opinions discussed the issue of whether *Martinez* allowed factual development in a collateral proceeding when considering the underlying claim, so they did not express any opposition to the proposition stated by the plurality opinion. *See Clabourne v. Ryan*, 745 F.3d 362, 375 (9th Cir. 2014).

Jones v. Ryan, 2018 WL 5066494, at *4.

While the Supreme Court held in *Cullen v. Pinholster* that a federal habeas court is ordinarily confined to the evidentiary record from state court, it held that the court was limited to "the record that was before the state court *that adjudicated the claim on the merits*." 563 U.S. 170, 180 (2011) (emphasis added). Because the underlying claim in a *Martinez* case has not been adjudicated on the merits in a state-court proceeding, "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him." *Detrich,* 740 F.3d at 1247. We have explained that "*Martinez* may provide a means to show 'cause' to overcome the default and reach the merits of the new claim." *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014). The Supreme Court in *Martinez* recognized that "[c]laims of ineffective assistance at trial often require investigative work." 566 U.S. at 11. Courts may require expanded records to reach the merits of these claims.

Other courts have reached the same conclusion as our four-judge plurality from *Detrich*. The Eighth Circuit held that *Martinez* provided an exception to § 2254(e)(2) in *Sasser v. Hobbs*, 735 F.3d 833, 853–54 (8th Cir. 2013). The Fifth Circuit has also noted that if the district court found cause and prejudice for the procedural default of any claim, "[i]t should then revisit the merits of any such claim anew," and its cause and prejudice findings "may directly address its merits determination of certain elements of that claim."

Barrientes v. Johnson, 221 F.3d 741, 771, 771 n. 21 (5th Cir. 2000). *See also Woods v. Sinclair*, 764 F.3d 1109, 1138 (9th Cir. 2014) (citing the four-judge plurality from *Detrich* and remanding to the district court to determine whether defendant's IAC claims were substantial and whether PCR counsel was ineffective for failing to raise them, potentially with an evidentiary hearing and an opportunity to expand the record).

We conclude that 28 U.S.C. § 2254(e)(2) does not prevent a district court from considering new evidence, developed to overcome a procedural default under *Martinez v. Ryan*, when adjudicating the underlying claim on de novo review.

B. Merits of Ineffective Assistance Claims

In his habeas petition, Jones claimed that his Sixth Amendment right to effective assistance of counsel was violated by his trial counsel's failure to adequately investigate the police work, medical evidence, and timeline between Rachel's fatal injury and her death. *Jones Habeas*, 327 F. Supp. 3d at 1168. At trial, the State presented evidence that most of Rachel's injuries were inflicted on the afternoon of May 1, and she was in Jones's sole care multiple times that afternoon. *Id.* at 1169, 1174–77.

As the district court correctly noted, *id.* at 1167, claims of ineffective assistance of counsel are governed by the principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate prejudice under *Strickland*, Jones had to show that (1) counsel's performance was deficient so he "was not functioning

as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) "the deficient performance prejudiced the defense" so that he was deprived of "a trial whose result is reliable." *Id.* at 687. As to the prejudice prong, *Strickland* requires a petitioner to "show 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.

The district court concluded that trial counsel acted unreasonably in failing to conduct a medical investigation into the timing of Rachel's injuries. *Jones Habeas*, 327 F. Supp. 3d at 1201. It found there was a reasonable probability that, absent counsel's failures, the jury would have had a reasonable doubt as to Jones's guilt. *Id.* at 1209. The State argues the district court erred by excusing Claim 1D's procedural default and granting relief under *Strickland*.[7]

1. Trial Evidence

Throughout the trial, the parties tried the case on the premise that Rachel sustained her injuries on the afternoon before her death. In opening statements, the prosecutor stated:

> [W]hat we will prove to you is that . . . Barry Jones was the only adult that had care of [Rachel] that day and thus the only adult that

[7] Like the parties, we will discuss Counts Four and Five separately because these depend on Jones's failure to obtain care for Rachel, rather than on any harm he personally caused.

> had the opportunity, in fact, was seen by neighborhood children abusing Rachel, that he is her rapist, and that he is her murderer.

Defense attorney Bruner similarly stated: "Everything in this case is going to center around what happened on Sunday, May 1st. Specifically, a couple of disputed hours . . . ." In Counts One through Three, Jones was charged with and found guilty of inflicting the specific injuries to Rachel's abdomen, scalp, and vagina. *See Jones Habeas*, 327 F. Supp. 3d at 1211–12. In Count Four, he was charged with intentionally or knowingly endangering Rachel by failing to take her to the hospital. *Id.* at 1212. The jury found that Jones committed Count One and Counts Two and Four knowingly and intentionally, so all three could serve as predicate felonies to support the felony murder conviction in Count Five. *Id.*

At trial, the State presented evidence from several witnesses to establish that most of Rachel's injuries—including bruising, her scalp injury, her vaginal injury, and the fatal bowel injury—were consistent with infliction between 2:00 p.m. and 5:30 p.m. on May 1, 1994. *Id.* at 1169. It presented medical testimony by Steven Siefert, an emergency room doctor at Kino Community Hospital; Sergeant Sonia Pesquiera of the Pima County Sheriff's Department ("PCSD"), the lead investigator of Rachel's death; and Dr. John Howard, a forensic pathologist with the Pima County Medical Examiner's office. *Id.* Defense counsel did not present any evidence regarding the timeline. The defense, in fact, presented only one witness of its own, Jones's 11-year-old daughter Brandie. *Id.*

Dr. Siefert estimated that Rachel died between two or three hours before she arrived at the hospital at 6:16 a.m. on May 2, 1994. *Id.* at 1169–70. He and Dr. Howard both observed extensive bruising, including around the left side of her face and behind her ear, consistent with a slap or blow to the side of the head. *Id.* at 1170. Dr. Howard opined that many of the bruises and abrasions were inflicted approximately one day prior to death. *Id.* He explained that the number and multiple locations of injuries was consistent with Rachel having been beaten. *Id.* at 1171. Dr. Siefert also opined that Rachel's bruising would have begun to appear within a few hours of infliction, and assessed that 95 percent of her injuries occurred within 12 to 24 hours before her death. *Id.*

Rachel had an inch-long head laceration, above and behind her left ear, that went down to the skull bone. *Id.* Dr. Howard assessed that the injury was consistent with having been caused by a blunt force object with a relatively straight edge, like a pry bar found in Jones's van. *Id.* He opined that it was consistent with occurrence between 2:00 p.m. and 5:30 p.m. on May 1. *Id.*

Sergeant Pesquiera testified that she observed discoloration on the outside of Rachel's labia and pooled, bright red blood on the inside. *Id.* Dr. Howard determined that she had blunt force injuries to her labia, bruising and scrapes, and a half-inch tear to her vagina. *Id.* He concluded that these genital injuries occurred about one day prior to her death, consistent with the time frame of "dozens" of her other injuries,

and were consistent with penetration or attempted penetration. *Id.*

Dr. Howard determined that Rachel died of blunt abdominal trauma that caused a laceration of the small bowel. *Id.* He explained that she had sustained blunt force injury to her abdominal organs, causing a tear of the small bowel and bruising of the tissues around the small bowel, the wall of the large bowel, and connecting the intestine to the back of the abdominal wall. *Id.* at 1172. The rupture of her bowel required a force equivalent to a fall from more than two stories, an automobile accident at greater than 35 miles per hour, or a forceful directed blow to the abdomen. *Id.* This rupture caused peritonitis, inflammation and irritation of the lining of the abdominal tissues that causes death over a period of hours to days, or sometimes weeks. *Id.* He opined that the "injury is typical of having occurred about one day prior to death," in the same age range as the scalp, genital, and external injuries. *Id.* He opined that it could have occurred in the 24 hours prior to her death, possibly between 2:00 p.m. and 5:30 or 6:00 p.m. on May 1. *Id.* Defense counsel used Dr. Howard's testimony to argue that if the pry bar had been wielded by an adult, it would break ribs, fracture skulls, and do incredible damage to a small child, but he did not ask Dr. Howard any questions about the timing of any of Rachel's injuries. *Id.*

The State also presented testimony by Sergeant Pesquiera, Arizona Department of Public Safety Criminalist Edward Lukasik, and PCSD Detective Clark that blood consistent with having come from Rachel was found in Jones's van and on blue jeans he

wore at the time of his arrest. *Id.* Based on impression stains, the State argued that Rachel's head was bleeding as she lay in the back of the van because that was where she was sexually assaulted, beaten, and hit with the pry bar on the third trip away from the house. *Id.* at 1173. The State also argued based on the evidence of spatter stains found on the passenger seat, floor of the van, and Jones's shirt sleeve that after the assault, Jones put Rachel in the passenger seat and kept hitting her "trying to make her shut up." *Id.*

In support of its theory that Rachel was in Jones's sole care during the afternoon of Saturday, May 1, the State presented the testimony of Rachel's sister Becky; neighborhood children Ray and Laura, who claimed to see Jones hit Rachel; Jones's former girlfriend Joyce Richmond; and her adult son Terry. *Id.* at 1174–77.

Becky testified that there was a week when Rachel started "being scared" of Jones and would not go to him when he called her over. *Id.* at 1174. She testified that on the morning of Sunday, May 1, she, Rachel, and Jonathon got up early, watched cartoons, and ate lunch until Jones got up around 2:30 or 3:00 p.m., when a friend of his stopped by to see him. *Id.* Shortly after his friend left, Jones gave Becky and her brother permission to ride their bikes. *Id.* Becky then saw Jones leave his van on his first of three trips with Rachel that day, to go to the store for food, and he returned an hour and a half later. *Id.* Becky testified that Rachel was not sick or crying and seemed okay. *Id.* She testified that approximately fifteen to twenty minutes after Jones returned from the store, he left again for about thirty minutes, and Rachel seemed

okay again when Becky saw her after this trip. *Id.* Becky further testified that Jones later took Rachel to his brother's house, and they were back before Becky left for her friend's house around 5:00 or 6:00 p.m. *Id.* The State argued that Jones assaulted Rachel in the back of the van on this third trip. *Id.*

Becky testified that around 6:30 p.m., when she returned from her friend's house, she saw Rachel was on the couch, pale, bleeding from her head, vomiting, and with bruises on her face, hands, and fingers. *Id.* That was also the first time Becky saw her mother awake that day. *Id.* Jones left for a time, and when he returned, Angela took Rachel outside where Angela and Jones had an argument. *Id.*

Norma Lopez testified that on May 1, she sent her eight-year-old twins Ray and Laura to the Choice Market on Benson Highway at 3:00 p.m. or 4:00 p.m. *Id.* at 1175. When they returned, Ray told Norma he saw a yellow van with a man inside hitting a little girl. *Id.* The next day Norma heard on the news that a man had been arrested in relation to the death of a little girl, and her children identified that person as the man they had seen in the van. *Id.* She later called 911 to report the twins' identification. *Id.* Ray and Laura also testified at Jones's trial that they had seen a man hitting a little girl while driving, although Ray acknowledged that he could not see the driver's face and Laura admitted she could just see "a little bit" through the front window of the van. *Id.* at 1175–76.

Joyce Richmond, Jones's former girlfriend, testified that she returned Brandie to Jones's trailer sometime between 7:00 p.m. and 8:00 p.m. on May 1. *Id.* at 1176.

Richmond saw Rachel on the couch with a bleeding head, but without bruises on her face or hands. *Id.* She was accompanied at Jones's trailer by her adult son Terry, who testified that he questioned Jones about Rachel's bleeding head. *Id.* He testified that Jones told him he had taken Rachel to the fire department. *Id.*

Becky testified that she woke up early in the morning on May 2, found Rachel in the bedroom doorway, and put her back in bed. *Id.* at 1177. She next woke to her mother yelling, and Jones then took Angela and Rachel to the hospital. *Id.* Jones returned and took Becky and Brandie to a neighboring camp, where law enforcement located Jones and transported him to the Sheriff's Department at 8:00 a.m. on May 2. *Id.* On the way there, Jones was upset, said there was something wrong with his little girl, and asked if they would take him to see her. *Id.*

Jones's only witness, his daughter Brandie, testified that she saw a six-year-old boy hit Rachel in the stomach with a metal bar on April 30. *Jones v. Schriro,* 2008 WL 4446619, at *8. The State pointed out numerous inconsistencies between her testimony at trial, interviews she gave to law enforcement, and her testimony at deposition; Brandie also admitted lying to detectives and defense counsel. *Jones Habeas*, 327 F. Supp. 3d at 1177.

2. *Martinez* Hearing

At the *Martinez* evidentiary hearing, the court heard testimony from defense trial counsel Sean Bruner and Leslie Bowman; defense PCR counsel James Hazel; lead investigative detective Sergeant

Sonia Pesquiera; forensic pathologists Dr. Philip Keen, Dr. Janice Ophoven, and Dr. John Howard; emergency medicine and trauma specialist Dr. Mary Pat McKay; biomechanics and functional human anatomy expert Dr. Patrick Hannon; and crime scene and bloodstain pattern analyst Stuart James, among others. *Id.* at 1178. The court found that the evidence presented during those proceedings about which trial and PCR counsel were aware or should have been aware would have suggested the need for counsel to conduct further investigation into the medical timeline, blood evidence, and eyewitness testimony. *Id.* As discussed further below, the evidence suggested the bruises could not be reliably dated and might have resulted from natural or accidental processes; the scalp, vaginal, and fatal injuries were likely at least two days old; and the bloodstains were not typical of those produced during a beating.

On July 14, 1994, on defense counsel's motion, the trial judge authorized up to $1,000 for a defense expert to review Rachel's autopsy report or to conduct a second autopsy. *Id.* at 1180. On July 20, 1994, Bowman sent forensic pathologist Dr. Keen a letter acknowledging Dr. Keen's agreement to review Rachel's autopsy report, and posing several questions for Dr. Keen to consider when reviewing the report, including whether Rachel's injuries could be dated and the amount of force necessary to inflict them. *Id.* Bowman confirmed in the letter that Dr. Keen had explained that his review of the autopsy "may involve obtaining access to photographs, slides and other physical evidence" and such access could "be arranged as necessary." *Id.*

At the *Martinez* hearing, Bowman acknowledged that it would have been reasonable to anticipate that the State would present medical evidence dating Rachel's injuries to the afternoon of May 1, and Bruner testified that he did expect that at some point the State would present medical evidence tying Rachel's injuries to those couple of disputed hours. *Jones Habeas*, 327 F. Supp. 3d at 1199. Dr. Keen testified that he "would not have speculated about the time of injury" without receiving the tissue slides. He explained that he had no recollection of ever reviewing any photographs, slides, or other physical evidence, and there is no record that he had ever received such evidence. *Jones Habeas*, 327 F. Supp. 3d at 1180. Bowman also testified that she knew that an examination of the tissue slides was necessary in order to date Rachel's injuries, and that it was possible that she and Bruner "dropped the ball and didn't follow up properly."

About a month later, on August 18, 1994, defense counsel and Dr. Keen spoke by phone, but neither can recall what was discussed during that call. *Id.* Four days later, on August 22, 1994, Rachel's body was released for burial with the consent of defense counsel and without a second autopsy. *Id.* Dr. Keen did not testify at Jones's trial. *Id.*

We must consider whether there was evidence presented at the *Martinez* hearing but not at trial that might have created reasonable doubt. *See Daniels v. Woodford*, 428 F.3d 1181, 1201 (9th Cir. 2005) (comparing "the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately").

Sergeant Pesquiera decided early in the investigation that Rachel's injuries occurred on Sunday, May 1, even though she never asked Dr. Howard to share his findings on the timing of the injuries. *Jones Habeas*, 327 F. Supp. 3d at 1178. In his pretrial interview and during Angela's trial, Dr. Howard suggested a larger window of time during which Rachel's injuries might have been inflicted, including potentially April 30. *Id.* at 1179. Sergeant Pesquiera did not document inquiry to any medical professional about the timing of Rachel's injuries, and she agreed at the evidentiary hearing that if she had more precise medical information that showed the injuries could have happened several days earlier, as Dr. Howard's 2004 declaration suggested, she would have expanded her investigation. *Id.* at 1178–79.

During his pretrial interview, Dr. Howard stated there were no tests available to determine the exact age of bruises, but he could provide approximations. *Id.* at 1179. Dr. Ophoven explained that interpreting the age of bruises from physical appearance and color was recognized by the forensic community to be very inaccurate and should not be done. *Id.* at 1193. Dr. Howard agreed that he would have told the attorneys that you cannot really distinguish or date bruises to a specific day had the attorneys asked him about that at Jones's trial. *Id.*

Dr. Ophoven testified that some of the marks on Rachel's body, along with wounds that were actively bleeding, could have been caused by metabolic changes at the cellular level from the body not getting enough oxygen and glucose. *Id.* She further stated that it was

possible many of the bruises observed on Rachel's body at the time of her death could have been caused by falls or other injuries sustained while Rachel attempted to walk or otherwise move around during the final stages of sepsis and peritonitis. *Id.* at 1194.

During his pretrial interview, Dr. Howard stated the injury to Rachel's scalp was "[p]robably two days old," and he elsewhere made reference to the scalp injury as being 72 hours or older. *Id.* at 1179. Dr. Ophoven reviewed gross photographs of the scalp injury and believed they were consistent with Dr. Howard's opinion in his pretrial interview. *Id.* at 1194. Both Dr. Hannon and Dr. Ophoven concluded that the pry bar found in the van did not cause Rachel's scalp injury or the fatal injury to her bowel, and both agreed it was possible the injury could have been inflicted by another child. *Id.*

In his pretrial interview, Dr. Howard stated that the vaginal injury most likely occurred one or two days before death. *Id.* at 1179. At Angela's trial, Dr. Howard testified that the minimal age of the vaginal injury was 12 hours prior to death, but was more typical of around 24 hours. *Id.*

Dr. Ophoven conducted a microscopic examination of the physical evidence of Rachel's vaginal injury obtained during autopsy and concluded that Rachel had a vaginal injury that was weeks old, and possibly predated the time period in which Rachel lived with Jones. *Id.* at 1192. Dr. Keen also reviewed the photo micrographs of Rachel's vaginal injury and identified connective tissue indicating that the vaginal injury was multiple days, possibly weeks, old, and was older than

the abdominal injury. *Id.* Both Dr. Ophoven and Dr. Keen agreed that the evidence of fresher blood in Rachel's vaginal area indicated a newer injury in combination with an older injury, but this did not necessarily indicate recent intentional sexual trauma as opposed to irritation of an older injury, poor hygiene, itching or scratching, or reopening of an older wound during the death process. *Id.* On cross-examination, Dr. Howard admitted that his testimony at Jones's trial could have left the jury with the misimpression that the vaginal injury was most consistent with infliction between 2:00 and 5:00 on the afternoon of Sunday, May 1, while his findings were that the injury was most consistent with infliction on Saturday, April 30. *Id.* at 1193.

During his pretrial interview, Dr. Howard was not asked if he could date the small bowel injury, but he did say it could take hours to a day to develop severe symptoms of the associated peritonitis, and then an unspecific number of hours after that to die. *Id.* at 1179. At Angela's trial, he testified that the internal injury was "most consistent" with 24 hours prior to death. *Id.*

At the *Martinez* hearing, both Dr. Ophoven and Dr. McKay concluded that the injury to Rachel's small bowel occurred at least 48 hours (and probably many more hours) before her death. *Id.* at 1190. Dr. Ophoven arrived at this conclusion based on her review of the autopsy records and supporting documentation, including photographs and tissue slides taken during Rachel's autopsy. *Id.* Dr. McKay testified regarding her personal experience treating duodenal injuries like

Rachel's as well as an extensive literature review she undertook focused on pediatric injuries involving duodenal rupture, perforation, laceration, treatment and outcomes. *Id.* at 1191. In her study of more than 200 cases of intestinal injury in children over many decades, including at least 160 cases of duodenal perforation describing the injury timeline from diagnosis, she did not find a single reported case in which a duodenal injury resulted in death within 48 hours after the known time of injury. *Id.* Dr. Ophoven and Dr. McKay agreed that there was nothing in Rachel's medical records that would suggest that her inflammatory response to the injury would deviate from the standard case. *Id.* Dr. Howard explained that if he had been asked the right questions at Jones's trial, he would have testified truthfully that in his judgment the injury was most consistent with having occurred prior to May 1, but he admitted that he did not make this finding clear to Jones's jury. *Id.* at 1192.

Using bloodstain analysis principles that were available in 1994, blood pattern analyst Stuart James testified that the bloodstains he observed in the van were consistent with Rachel being carried or moved within the van while she was bleeding from an open wound. *Id.* at 1195. He concluded that the bloodstains were not typical of those produced during a beating because there was only a single laceration on Rachel's head, which often just produces blood flow and not impact splatter. *Id.* He further explained that the traces of blood on Jones's May 2 clothing indicated contact and proximity to a source of wet blood but were insufficient to conclude anything about whether a beating took place in the van. *Id.* James testified that

these stains could have occurred as the result of lifting or otherwise attending to Rachel while she was bleeding. *Id.*

3. Counts One, Two, and Three

The district court concluded that the convictions of Jones on Counts One, Two, and Three all depended on the premise that Jones physically and sexually assaulted Rachel on May 1, when she was in his custody, and there was a reasonable probability that the jury would have had a reasonable doubt about that conclusion had defense counsel performed adequately to challenge the premise that the injuries were inflicted at that time. *Id.* at 1212.

a. Deficient Performance

Although the court defers to a lawyer's strategic trial choices, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The State argues the district court departed from *Strickland*'s presumption of reasonableness and effectively presumed that counsel behaved unreasonably.

In particular, the State argues that defense counsel acted reasonably by consulting with independent medical pathologist Dr. Philip Keen before trial, specifically inquiring about the timing of Rachel's injuries. Because neither Dr. Keen nor Jones's attorneys could recall the content of the conversation between Dr. Keen and counsel or the reason Dr. Keen was not involved further in the case, the State contends that the court should have presumed counsel acted

reasonably and strategically. The State argues the court's factual finding that counsel abandoned the medical investigation based on "inattention and neglect, not reasoned strategic judgment" was clearly erroneous because no affirmative evidence established that counsel abandoned their medical investigation for negligent or inattentive reasons.

We agree that the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The State correctly notes that neither Dr. Keen nor counsel could recall the content of their phone conversation, which might otherwise shed light on exactly why no further consultation occurred.

The State does not dispute, however, that both Bruner and Bowman acknowledged that it would have been reasonable to anticipate that the State would present medical evidence dating Rachel's injuries to the afternoon of May 1. *Jones Habeas*, 327 F. Supp. 3d at 1199. The district court concluded defense counsel acted unreasonably in failing to conduct their own investigation on the dating of the injuries and in failing to challenge any of the State's evidence that suggested all of Rachel's injuries were consistent with being inflicted on the afternoon of May 1, when Rachel was alone with Jones in his van. *Id.* at 1200. Defense counsel also never challenged the critical injury timeline evidence, failing to impeach Dr. Howard with his earlier statements and testimony finding Rachel's injuries "most consistent" with infliction prior to May

1. *Id.* at 1206. Bruner admitted his failure was due to inattention. *Id.*

In her prior letter to Dr. Keen, Bowman acknowledged that he had explained that his review of the autopsy "may involve obtaining access to photographs, slides and other physical evidence." *Id.* at 1180. Bowman also testified that she knew that an examination of the tissue slides was necessary in order to date Rachel's injuries, and that it was possible that she and Bruner "dropped the ball and didn't follow up properly." The State on appeal concedes that Dr. Keen did not receive those slides. We conclude that the district court did not clearly err by finding that "[c]ounsel knew the slides were needed to make a reliable timeline assessment but failed to ensure they were provided to Dr. Keen." *Jones Habeas*, 327 F. Supp. 3d at 1202.

Counsel also knew before trial that there was going to be evidence presented with respect to the interpretation of blood evidence, but failed to consult with any bloodstain interpretation expert. *Id.* at 1203. Becky reported that Jones and Angela did CPR on Rachel, then rushed her to the hospital, so there was reason to believe that the trace amounts of blood on Jones's clothing might have been transferred from Rachel's bleeding head while Jones attempted to administer aid or transport Rachel to the hospital. *Id.* The State does not challenge the district court's conclusion that trial counsel's failure to investigate the

blood evidence was objectively unreasonable. *See id.* at 1203.[8]

The State also argues reasonable counsel could have elected not to present medical testimony on any count because that testimony would have shown Jones's guilt on Count Four and, by extension, Count Five, the most serious charge. Dr. Keen and Dr. Ophoven both conceded that Rachel may have suffered a new vaginal injury shortly before her death, which may have been damaging to Jones on Count One, the sexual assault charge, which was also a predicate for the felony murder charge in Count Five. The State does not dispute that counsel did not obtain an opinion from Dr. Keen or any other expert regarding the injury timeline, however, so counsel's decision could not have been made based on the asserted "double-edged" and "imprecise[e]" nature of an expert's opinion. We agree with Jones that trial counsel cannot reasonably choose not to present evidence without undertaking the underlying investigation that would undercover the evidence.

b. Prejudice

The State argues Jones has not shown a reasonable probability of a different result given the medical

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[8] The district court ultimately concluded that the presentation at trial by the defense of a bloodstain expert would not have, by itself, established a reasonable probability of a different verdict. In combination with the evidence discussed above regarding the timing of the injuries, however, the district court concluded that the potential impact of a bloodstain expert strengthened its finding that Jones suffered prejudice from counsel's deficient performance. *Id.* at 1210.

evidence's imprecision and the strong circumstantial evidence of his guilt. It points to testimony by Becky that Rachel was eating and behaving normally on April 30 and the morning of May 1; by two neighborhood children that they saw Jones striking Rachel in the afternoon on May 1; by a neighbor that she saw Rachel markedly ill in the late afternoon, after she had returned from her excursion alone with Jones; and by Richmond, her son, and Becky that Rachel's health declined in the late evening.

At trial, the State presented substantial evidence that all of Rachel's injuries were consistent with infliction on the afternoon of Sunday, May 1, when she was alone with Jones in his van. Defense trial counsel could have questioned this evidence or presented its own investigative findings to cast doubt on this timeline but failed to do so. *Jones Habeas*, 327 F. Supp. 3d at 1206.

At trial, Dr. Howard testified that the abdominal injury occurred as few as twelve hours prior to death. *Id.* at 1171. Drs. Ophoven and Keen both estimated that her abdominal injury occurred two or more days prior to her death. *Id.* at 1190. At Angela Gray's trial, Dr. Howard indicated that the internal injuries occurred about 24 hours prior to her death. *Id.* at 1179. He also agreed that if asked the right questions by defense counsel at Jones's trial, he would have testified truthfully that the injury was most consistent with having occurred prior to May 1. *Id.* at 1192.

Dr. Howard also testified at Jones's trial that Rachel's scalp injury was consistent with having been inflicted between the hours of 2:00 p.m. and 5:30 p.m.

the day prior to her death, and her vaginal injury occurred on a time frame consistent with all her other injuries. *Id.* at 1171. In his pretrial interview, Dr. Howard dated the scalp injury as probably two days old. *Id.* at 1179. Dr. Ophoven provided the same earlier time frame for the scalp injury. *Id.* at 1194. Dr. Keen estimated that the vaginal injury was older than the abdominal injury. *Id.* at 1192. Dr. Ophoven estimated that it began weeks prior and possibly predated when Jones began living with Rachel and her family. *Id.* at 1192. Dr. Howard also testified at the *Martinez* hearing that the injury was most consistent with infliction on Saturday, April 30. *Id.* at 1193.

We agree with the district court that the evidence presented at the *Martinez* hearings "undermines considerably the confidence in the outcome of the trial court proceedings." *Jones Habeas*, 327 F. Supp. 3d at 1206.

4. Count Four

Counts One to Three charged Jones with inflicting affirmative injury to Rachel by sexual assault, causing Rachel's abdominal injury, and lacerating her scalp and bruising her, respectively. In contrast, the charge against Jones in Count Four was instead based on his failure to take Rachel to the hospital after she was injured. Specifically, Count Four charged Jones with child abuse under circumstances likely to cause death or serious physical injury, in violation of A.R.S. § 13-3623(B). The jury instructions required proof that:

> 1. The defendant acted under circumstances likely to cause death or serious physical injury;

> and 2. The defendant caused physical injury to a child, or, having custody or care of a child, the defendant allowed the health of the child to be endangered; and 3. The defendant acted with one of the following mental states: (A) intentionally or knowingly, (B) recklessly, or (C) with criminal negligence.

The third element of the crime, involving the defendant's mental state, distinguishes between different forms of the crime. Violation of section 13-3623 is a class 2 felony "[i]f done intentionally or knowingly," a class 3 felony "[i]f done recklessly," and a class 4 felony "[i]f done with criminal negligence." A.R.S. §§ 13-3623(B). The jury instructions explained that the jury was permitted to find the defendant guilty of the less serious crimes of child abuse committed recklessly or with criminal negligence (as opposed to intentionally or knowingly). In addition, the trial court correctly instructed the jurors that Counts Two and Four could only be considered predicate felonies for felony murder if they were committed intentionally or knowingly, under circumstances likely to produce death or serious injury. *Jones Habeas*, 327. F. Supp. 3d at 1163–64. A finding that Jones had acted recklessly or with criminal negligence in failing to obtain medical assistance for Rachel would not support a conviction for felony murder.

The jurors returned a guilty verdict, finding that Jones committed the crime intentionally or knowingly. *Id.* at 1164. At sentencing, the court described Count Four as "a dangerous crime against children in the first degree with two prior predicate felony convictions" and

"a class two felony." It then sentenced Jones to life imprisonment, his longest term-of-years sentence.

The district court found there was a reasonable probability that the jury would not have found that Jones acted with a knowing or intentional state in Count Four if the defense put on evidence questioning the medical timeline and suggesting he was not the actual perpetrator of the assault. *Id.* at 1213–14.

a. Deficient Performance

The State argues counsel reasonably attempted to challenge Count Four only on the ground that Jones lacked care or custody of Rachel because the Arizona Supreme Court did not pronounce the legal standard on that issue until his case. *See Jones State*, 937 P.2d at 314–16. Although it may have been reasonable for counsel to challenge Count Four on the ground that Jones lacked care or custody, that defense was not incompatible with a defense based on the injury timeline. Defense counsel could have made both arguments. The fact that counsel brought a separate, non-antagonistic defense should not affect the relevant *Strickland* inquiry of whether counsel's performance was deficient and prejudicial in failing to adequately investigate the medical evidence and medical timeline of Rachel's injuries. *See Jones Habeas*, 327 F. Supp. 3d at 1212 n.17.

The State also argues the medical testimony Jones presented at his habeas proceeding was double-edged, so reasonable counsel could have elected to omit it, precluding a finding of deficient performance. As noted above, however, counsel's decision could not have been

made based on the doubled-edged nature of experts' opinions because counsel did not obtain an expert's opinion on the injury timeline. Counsel could not have decided not to present evidence because it was double-edged if he was never aware of that evidence in the first place.

b. Prejudice

To prove Jones acted knowingly, the State had to prove he was "aware or believe[d]" Rachel's health was endangered and she needed medical treatment. A.R.S. 13-105(9)(a)–(b).

The State argues Jones's expert witnesses at the *Martinez* hearing conceded facts sufficient to prove Jones's guilt. It argues Count Four is "established if Jones intentionally or knowingly *permitted Rachel's health to be endangered*," so it does not matter whether he lacked knowledge of the extent of Rachel's injuries. (emphasis in original). In support of this proposition, it cites to *State v. Payne*, 314 P.3d 1239 (Ariz. 2013); *State v. Mahaney*, 975 P.2d 156 (Ariz. App. 1999); and *Varela v. Ryan*, No. CV-15-1971-PHX-JJT (JFM), 2016 WL 8252819 (D. Ariz. Nov. 15, 2016). The State argues the evidence, including concessions by Drs. Ophoven and McKay, establish that Jones was aware Rachel's condition was declining and her health was endangered, yet he did nothing to help her.

As the State itself acknowledges, though, state law requires evidence that Jones intentionally or knowingly permitted that Rachel's health be *endangered*. A.R.S. § 13-105(9)(a)–(b). The Arizona Court of Appeals has defined this term as "expose to potential harm," which

"requires more than the ordinary danger to which children are exposed on a daily basis." *Mahaney*, 975 P.2d at 159, 159 n.4. While the Arizona Supreme Court has affirmed that the trial court need not allow the defendant to argue that the State must prove the child was abused under circumstances that the defendant intended or knew were likely to cause death or serious physical injury, it did so because "the mens rea refers to the act that the defendant 'does.'" *Payne*, 314 P.3d at 1260–61. An Arizona district court has also concluded that "the danger must result from the defendant's actions; pre-existing danger from someone else's actions does not suffice." *Varela*, 2016 WL 8252819, at *13. We agree with the district court in this case that "[i]f Petitioner was not the perpetrator, if he did not cause the injuries, there was little evidence presented at trial that would suggest he was put on notice of the severity of the injuries, and thus could form the requisite intentional and knowing mental state." *Jones Habeas*, 327 F. Supp. 3d at 1213.

At the habeas hearing, Dr. Ophoven described the likely symptoms of Rachel's cause of death, a ruptured duodenum with dehydration, shock, and eventually peritonitis. She described how "they wouldn't feel good, but they would not necessarily look like they were suffering from an impending catastrophe." She described cases of children, as well as adults, not appearing to need medical attention "until there's actually a catastrophic decompensation like happened in this case," which could be "as short as two or three hours." She described how in children, "the period before irreversible shock can be very short," so until that moment, "you may or may not appreciate that a

catastrophic event is about to take place." She also testified that the symptoms of small intestine injury could be missed, as the symptoms frequently are not interpreted as serious until the catastrophe manifests itself.

Dr. McKay testified that the symptoms of discomfort and pain would vary by person. She explained that children in the victim's age group might not have the ability to explain that the symptoms were different or worse than normal stomach ache. She also testified that in her personal experience, she had seen delay in severe symptoms and in diagnosis of duodenal injuries.

Dr. Ophoven and Dr. McKay both testified that the seriousness of an injury like Rachel's could readily be missed until the final stages. At the hearing on November 1, 2017, Dr. Ophoven testified that there could be a significant delay of symptoms that looked really bad from duodenum injury. We conclude that there is a reasonable probability that the jury would not have found that Jones intentionally or knowingly exposed Rachel to "more than the ordinary danger to which children are exposed on a daily basis." *See Mahaney*, 975 P.2d at 159 n.4.

Furthermore, both Jones and Rachel's mother Angela had care or custody of Rachel in the hours leading up to her death. Angela was charged with and convicted of endangering Rachel by failing to obtain medical assistance in Count Four, but she was found by the jury in her trial to have acted only recklessly, not intentionally or knowingly. We note that Angela told police that she and Jones discussed taking Rachel to

the hospital on the night of May 1, but she was "scared" that if she did so "they might take her away" because of the cut on her head and the bruises on her stomach. *Jones Habeas*,327 F. Supp. 3d at 1184. Nonetheless, her jury determined she had acted only "recklessly." *Id.* at 1163. As a result, she was only convicted of the lesser included class 3 felony, for which she was sentenced to a term of 8.75 years.

We conclude that it was reasonably probable that a similar verdict would have been reached on Count Four for Jones, if the defense had presented evidence that Rachel's injuries had been inflicted earlier in time, meaning before the State had established that Rachel was in Jones's sole custody. Although the jury could reasonably have convicted Jones of intentional or knowing action even including the evidence counsel should have presented, we conclude that Jones has shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694.

We acknowledge that this is a close question. There was ample evidence that could have supported a verdict that Jones's action in failing to obtain medical assistance was intentional or at least knowing. Dr. Ophoven acknowledged that she was "not backing down from [her] opinion that a caretaker of the child should have known that she needed immediate medical attention." She had previously stated her opinion that in the hours before Rachel, Angela, and Jones went to bed, "it would have been evident to anyone with Rachel that she was in need of immediate medical attention,"

so "the decision to withhold medical care is consistent with fatal neglect."

The night before her death, multiple people noticed Rachel's condition and pointed it out to Jones. Joyce Richmond reported that she was at Jones's trailer the night of May 1, and Rachel was lying quietly on a pillow with her head bleeding. *Jones Habeas*, 327 F. Supp. 3d at 1184. Jones and Angela told her that some kids had pushed Rachel out of the van. *Id.* Shortly after his arrest, Jones himself told police that he and Angela were up with Rachel much of Sunday night, and Rachel would throw up anytime she drank anything. *Id.* at 1183.

Jones also told multiple individuals that he had taken Rachel to get medical attention. Angela told police during questioning that Jones told her he had taken Rachel to the fire station where they rinsed her head out and informed him she was not in need of stitches. *Id.* at 1184. Joyce Richmond told police that Jones told her he had taken Rachel to the fire station, and they said she would be all right. *Id.* Terry Richmond testified that he questioned Jones about Rachel's bleeding head, and Jones told him he had taken Rachel to the fire department. *Id.* at 1176. When he was interviewed by police shortly after he was arrested, Jones stated that he did not take Rachel to the Rural Metro Fire Department, as he had told Angela and others, because he saw a police vehicle there and did not have a driver's license. *Id.* at 1183. He told police that he did encounter an EMT at the Quik-Mart who looked at the cut, shined a light in the eyes, and advised Jones to "keep the ice pack on it and

it'll be okay." *Id.* The captain of the Rural Metro Fire Department testified that all emergency encounters were logged, but there were no records of Jones or Rachel in the call log. *Id.* at 1176.

All of that evidence could support a factual finding by the jury that the failure of Jones to seek medical assistance for Rachel was deliberate because he did not want to call attention to his own misconduct. That result was not certain, however. Most of this evidence applied to support the case against Angela, as well. She was Rachel's mother, likely to have been held most responsible for observing her daughter's condition, but the jury in her trial declined to find that she had acted intentionally or knowingly. It appears to us, as it did to the district court, that there was a reasonable probability that, if presented with evidence that Rachel's injuries had not been inflicted when she was in Jones's sole custody, the jury in Jones's case would similarly have had a reasonable doubt on the question of whether Jones's failure to obtain medical care for her was the result of intentional or knowing misconduct instead of recklessness.

Jones also challenges his conviction on Count Four by arguing that the State was required to show that the delay in seeking treatment created or increased a likelihood of death or seriously physical injury. He argues Dr. Ophoven and Dr. McKay each cast doubt on whether any actions by Jones after Rachel appeared ill would have had any impact. *Id.* As a result, he contends that he could not be convicted on Count Four under any mental state, including recklessness, because Rachel would have died anyway.

Dr. Ophoven testified that once a person entered irreversible shock, the system of blood circulation had broken down and the person could not be recovered even in the hospital. However, on cross-examination, she clarified that if Rachel had gone to the doctor before irreversible shock set in, this would have been a potentially survivable injury. She later confirmed that these injuries were "very treatable." Jones's experts at the *Martinez* hearings also agree that his "failure to take Rachel to the hospital either caused or contributed to her death." *See Jones Habeas*, 327 F. Supp. 3d at 1213. The evidence does not support the argument that nothing that Jones did or did not do would have mattered. We also agree with the district court that "there is evidence that Petitioner was concerned about getting Rachel care because he would be perceived as the perpetrator of child abuse," so he has not demonstrated that he lacked any criminal mental state. *Id.*

c. Remedy

Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). "Thus, a remedy must 'neutralize the taint' of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (citations omitted).

With respect to Count Four, this is not a situation where "resentencing alone will not be full redress for

the constitutional injury." *See Johnson v. Uribe*, 700 F.3d 413, 426 (9th Cir. 2012) (quoting *Lafler*, 566 U.S. at 171). Jones has demonstrated prejudice as to his specific offense of conviction but not as to his overall guilt on Count Four. He has not established a reasonable probability that he would not have been convicted at all on that charge, particularly of the lesser included offense of having acted recklessly in failing to assist Rachel. The district court also concluded that "Petitioner's own experts in these proceedings do agree that Petitioner's failure to take Rachel to the hospital either caused or contributed to her death" but concluded that their testimony did not "show that Petitioner had the requisite mental state of 'intentionally and knowingly' to support a conviction of the class 2 felony child abuse charge, a felony murder predicate, as opposed to a lesser charge of the class 3 felony, recklessly, or class 4 felony, negligently." *Jones Habeas*, 327 F. Supp. 3d at 1213. Our own de novo review leads us to conclude that a conviction on Count Four for reckless conduct was a reasonable possibility, but that a complete acquittal on Count Four or a conviction for the lesser crime of having acted with criminal negligence were not reasonable possibilities. We therefore conclude that "a new trial would [not] be tailored to such constitutional violations and would improperly grant [Jones] a windfall." *See Loher v. Thomas*, 825 F.3d 1103, 1122 (9th Cir. 2016). The appropriate remedy for this error is resentencing based on the lesser included offense, for reckless rather than intentional or knowing conduct. Alternatively, because the evidence could have supported a conviction on Count Four based on intentional or knowing

misconduct by Jones, the State may elect to retry him on that charge.

5. Count Five

Count Five charged Jones with felony murder for either sexual assault of a minor under fifteen (Count One) or child abuse committed intentionally or knowingly under circumstances likely to cause death or serious physical injury (Counts Two and Four). *Jones Habeas*, 327 F. Supp. 3d at 1212. The jury found Jones guilty of Count Five after finding that he had committed Counts Two and Four under circumstances likely to produce death or serious physical injury with a knowing or intentional mental state. *Id.* The habeas court concluded that Jones had demonstrated prejudice with respect to the capital charge because there was a reasonable probability that the jury would not have convicted Jones of any of the predicate felonies. *Id.* at 1214.

As discussed above, the State argues that Jones failed to prove deficient performance or prejudice on Count Five largely because the evidence at the *Martinez* hearing did not call into question his guilt on Count Four, and by extension Count Five. Because we conclude Jones has demonstrated deficient performance and prejudice with respect to Counts One, Two, and Four, he has also demonstrated ineffective assistance on Count Five.

IV. Conclusion

We hold that the district court properly considered evidence adduced at the *Martinez* hearing to determine whether Jones's IAC claim was excused from

procedural default when determining the merits of Jones's underlying IAC claim even though this evidence was not before the state court. Jones has demonstrated that counsel rendered deficient performance in failing to adequately investigate whether Rachel's injuries were sustained during the time she was alone with Jones, and that he was prejudiced by these failures. As to Count Four, however, this failure only affected the jury's determination that Jones had acted intentionally or knowingly, but not his underlying guilt on the lesser included offense of reckless misconduct. Accordingly, we affirm the district court's grant of Jones's habeas petition but vacate in part the district court's remedy. The district court is directed to amend its order accordingly. The State may elect to seek resentencing on Count Four or to retry him for the more serious version for that offense. Otherwise, the district court's order that the State release Jones from custody unless it initiates new trial proceedings is affirmed.

AFFIRMED IN PART; VACATED IN PART; REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-99006

D.C. No. 4:01-cv-00592-TMB

[Filed: August 24, 2020]

BARRY LEE JONES, *Petitioner-Appellee*,	)
&	)
DAVID SHINN, Director, Arizona Department of Corrections; STEPHEN MORRIS, Warden, Arizona State Prison-Eyman Complex, *Respondents-Appellants.*	)

ORDER

Before: Johnnie B. Rawlinson, Richard C. Clifton, and Paul J. Watford, Circuit Judges.

Order;
Dissent by Judge Collins

SUMMARY*

Habeas Corpus

The panel denied a petition for rehearing and denied on behalf of the court a petition for rehearing en banc.

Dissenting from the denial of rehearing en banc, Judge Collins, joined by Judges Callahan, Ikuta, R. Nelson, Lee, Bress, Bumatay, and VanDyke, wrote that the panel's decision disregards controlling Supreme Court precedent by creating a new judge-made exception to the restrictions imposed by the Antiterrorism and Effective Death Penalty Act on the use of new evidence in habeas corpus proceedings.

COUNSEL

Myles A. Braccio (argued), Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Capital Litigation Section, Office of the Attorney General, Tucson, Arizona; for Respondents-Appellants.

Cary Sandman (argued) and Karen Smith, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Tucson, Arizona; for Petitioner-Appellee.

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

Ken Paxton, Attorney General; Jeffrey C. Mateer, First Assistant Attorney General; Kyle D. Hawkins, Solicitor General; Matthew H. Frederick, Deputy Solicitor General; Jason R. LaFond, Assistant Solicitor General; Office of the Attorney General, Austin, Texas; for Amicus Curiae State of Texas.

ORDER

The panel has unanimously voted to deny Respondent-Appellant's petition for rehearing. Judge Rawlinson and Judge Watford have voted to deny the petition for rehearing en banc, and Judge Clifton so recommends.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc (Docket Entry No. 71) are **DENIED**. No future petitions for rehearing or rehearing en banc will be entertained.

COLLINS, Circuit Judge, with whom CALLAHAN, IKUTA, R. NELSON, LEE, BRESS, BUMATAY, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel decisions in *Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019), and *Jones v. Shinn*, 943 F.3d 1211

(9th Cir. 2019), disregard controlling Supreme Court precedent by creating a new judge-made exception to the restrictions imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") on the use of new evidence in habeas corpus proceedings. *See* 28 U.S.C. § 2254(e)(2). I respectfully dissent from our failure to rehear these cases en banc.[1]

As the Supreme Court has explained, the negligence of "postconviction counsel" in developing the evidentiary record in state court is "chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied." *Holland v. Jackson*, 542 U.S. 649, 653 (2004). Specifically, § 2254(e)(2) bars "relief based on new evidence," with or without a hearing, unless one of its exceptions is applicable. *Id.* In both *Jones* and *Ramirez*, state postconviction counsel failed to develop the record to support the current claims of ineffective assistance of trial counsel that both petitioners wish to present in federal habeas corpus proceedings. Although there is (and can be) no contention that any of § 2254(e)(2)'s exceptions apply in either case, the panels in both cases nonetheless held that the strictures of § 2254(e)(2) did *not* apply to the new evidence that the petitioners wished to present in support of the merits of those claims.

The panels' reasoning was that, because the Supreme Court has held that ineffective assistance of postconviction counsel may establish "cause to excuse" the *separate* "procedural default" of failing to raise an

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[1] In light of the common issue raised in the two cases, I am filing an identical combined dissent in both cases.

ineffective-assistance-of-trial-counsel claim in state court, *see Martinez v. Ryan*, 566 U.S. 1, 13 (2012), a similar exception should also be recognized to excuse the separate prohibition on new evidence set forth in § 2254(e)(2). But *Martinez* relied on "the Court's discretion" to alter *judge-made* rules of procedural default, *id.*, and that power to recognize "judge-made exceptions" to judge-made doctrines does not extend to *statutory* provisions, *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). "There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Id.* And Congress has been clear in § 2254(e)(2) that it does not want any such new exceptions. Indeed, prior to the enactment of § 2254(e)(2), both distinct types of failure (*i.e.*, failure to raise a claim at all and failure to develop the factual record) were governed by the same "cause and prejudice" standard that *Martinez* later modified. *See Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992). But in § 2254(e)(2), Congress explicitly abrogated *Keeney*'s "cause and prejudice" standard and replaced it with a much more demanding standard that is concededly not met in either *Jones* or *Ramirez*. Given that Congress has eliminated in the evidentiary-development context the very predicate on which *Martinez* is based, we have no authority to rewrite the statute and to engraft a judge-made *Martinez* exception onto it.

The *Ramirez* decision presents a particularly stark violation of § 2254(e)(2). *Jones* only went so far as to contend that the *same* evidence used to established cause and prejudice under *Martinez* could then be used, notwithstanding § 2254(e)(2), to establish the merits of

the underlying ineffective-assistance-of-trial-counsel claim. While I believe that even this result contravenes Supreme Court authority, it at least has the virtue of making its new judge-made exception to § 2254(e)(2) coextensive with the *Martinez* exception. But in *Ramirez*, the panel held that, even after the *Martinez* exception had been established with new evidence, the petitioner was entitled to keep going and to develop even *more* evidence as if § 2254(e)(2) did not exist at all. Nothing supports *Ramirez*'s egregious disregard of the clear strictures of § 2254(e)(2).

I

A

David Ramirez was convicted by an Arizona jury of the first-degree murders of his girlfriend and her daughter, and he was sentenced to death by a judge. *Ramirez*, 937 F.3d at 1234. Ramirez's trial attorney, Mara Siegel, was a Maricopa County public defender, and Ramirez's case was her first capital assignment. *Id.* at 1235. After his conviction and sentence were affirmed on direct appeal, Ramirez filed a petition for postconviction relief in state court, but he did not raise a claim that his trial counsel had been ineffective in the particular respects that he now asserts. *Id.* at 1238. The state petition was denied. *Id.*

Ramirez then filed a federal habeas petition, the operative version of which raised the claim that trial counsel was ineffective in her presentation of mitigation evidence during the penalty phase. 937 F.3d at 1238. The federal district court initially denied the claim as procedurally defaulted, because Ramirez had

failed to raise the claim during his initial state postconviction-relief proceeding. *See Martinez Ramirez v. Ryan*, 2010 WL 3854792 (D. Ariz. Sept. 28, 2010). While Ramirez's appeal from that decision was pending in this court, the Supreme Court issued its decision in *Martinez*, in which the Court held that a petitioner may establish "cause" to excuse a procedural default if the petitioner can show (1) that the petitioner's postconviction counsel was ineffective in failing to raise an ineffective-assistance-of-trial-counsel claim, and (2) that the underlying ineffective-assistance-of-trial-counsel claim is "substantial," that is, "has some merit." 566 U.S. at 14. A panel of this court remanded for reconsideration of Ramirez's ineffective-assistance-of-trial-counsel claim "in light of intervening law."

On remand, Ramirez asked for an evidentiary hearing to develop evidence regarding whether his *postconviction-relief* counsel was ineffective, in order to establish "cause" for the default under *Martinez*. Ramirez acknowledged that 28 U.S.C. § 2254(e)(2) bars factual development of claims not developed in state court, but relying on our precedent in *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc), he argued that the cause-and-prejudice question under *Martinez* is not a "claim" for purposes of § 2254(e)(2) and that evidence could be received to see whether the default could be excused under *Martinez*.

Ramirez also submitted declarations from various family members describing the truly deplorable conditions of his upbringing. *Ramirez*, 937 F.3d at 1238–39. Compared to the testimony that Siegel elicited during the original sentencing hearing, the new

declarations paint a darker picture of the abuse and neglect that Ramirez's mother inflicted on her children. Ramirez also submitted a declaration from Siegel herself, in which she admitted that the mitigation evidence that she presented was "very limited." *Id.* at 1240. Finally, Ramirez submitted a declaration from Dr. McMahon, a psychologist whom the state trial court had appointed to evaluate Ramirez's mental health during the penalty phase of his criminal trial. *Id.* Dr. McMahon stated that Siegel failed to give him Ramirez's IQ scores or school reports and that, had she done so, he likely would have expanded his evaluation, and he would not have found that Ramirez was not intellectually disabled. *Id.*

The district court noted that, "for different reasons," both sides agreed that the court should consider the merits of Ramirez's ineffective-assistance-of-trial-counsel claim. As the court explained, the State argued that the lack of merit to that claim showed that postconviction counsel "did not perform ineffectively in failing to raise the claim in state court" and that the *Martinez* standard therefore could not be met. Ramirez, by contrast, argued that postconviction counsel was ineffective in failing to raise the claim and that the merits of that claim therefore had to be considered de novo. The court denied Ramirez's request for an evidentiary hearing, concluding that such a hearing was "not warranted" in light of the existing evidence, but the court accepted his newly submitted exhibits into the record. After comparing the evidence on mitigation presented at the penalty phase of Ramirez's trial to the information in the newly submitted exhibits, the court resolved the merits of the

underlying claim, concluding that Siegel's performance was not deficient and that any deficiency did not prejudice Ramirez.

Ramirez again appealed to this court. The panel reversed, finding that the district court should not have "collapsed what should have been a two-step process": first evaluating whether the performance of Ramirez's postconviction counsel constituted ineffective assistance that excused the procedural default under *Martinez*, and only then addressing the merits of the underlying ineffective-assistance-of-trial-counsel claim, "after allowing a chance for any necessary record or evidentiary development." *Ramirez*, 937 F.3d at 1242 n.7. The panel then proceeded to address the merits of the *Martinez* analysis, concluding that Ramirez's postconviction counsel did render ineffective assistance and that Ramirez's underlying claim was "substantial," thus excusing his procedural default under *Martinez*. *Id.* at 1243–48. Finally, the panel concluded that "the district court erred in denying Ramirez evidentiary development of his ineffective assistance of counsel claim" and remanded for further evidentiary development on that underlying claim. *Id.* at 1248.

B

Barry Lee Jones was convicted by an Arizona jury of sexual assault, child abuse, and felony murder of his girlfriend's four-year-old daughter, Rachel Gray. *Jones*, 943 F.3d at 1215. A judge sentenced him to death. *Id.* at 1217. Jones filed a petition for postconviction relief in state court, in which he claimed ineffective assistance of trial counsel regarding certain aspects of

his attorney's representation. *Id.* at 1218. The petition was denied. *Id.*

Jones then filed a federal habeas petition, the operative version of which raised several new claims that his trial attorney was ineffective at both the guilt and penalty phases of Jones' case. 943 F.3d at 1218. The district court denied most of the claims as procedurally defaulted. *Jones v. Schriro*, 2008 WL 4446619, at *5 (D. Ariz. Sept. 29, 2008). While the case was on appeal in this court, the Supreme Court issued its decision in *Martinez*. This court remanded the case to the district court for reconsideration of Jones's claim. This court's remand order determined that Jones's claims were "substantial" and that one prong of the *Martinez* analysis was therefore already satisfied. (Recall that *Martinez* requires a petitioner to show that postconviction counsel was ineffective *and* that the underlying ineffective-assistance- of-trial-counsel claim is "substantial." *See* 566 U.S. at 14.)

On remand, the district court ordered the parties to brief the other prong of *Martinez*—whether Jones's postconviction counsel was ineffective for failing to raise the underlying ineffective-assistance-of-trial-counsel claim—as well as the merits of that underlying claim itself. Jones contended that trial counsel was ineffective during both the guilt and penalty phases of the trial. Based on new exhibits submitted by Jones, the district court found enough initial merit to Jones's arguments that postconviction counsel had been ineffective that the court granted Jones's request for a full evidentiary hearing on whether Jones's default of his underlying claims could be excused under *Martinez*.

In granting that request, the court concluded that 28 U.S.C. § 2254(e)(2) did not apply to new evidence used to establish cause under *Martinez*. The district court went a step further, however, and also granted Jones's request for an evidentiary hearing to develop his underlying ineffective-assistance-of-trial-counsel claim.

After a seven-day evidentiary hearing, the district court issued a decision granting Jones's habeas petition. *Jones v. Ryan*, 327 F. Supp. 3d 1157 (D. Ariz. 2018). The court concluded that Jones's trial counsel had performed a deficient investigation into medical evidence of the timeline of Rachel's injuries and that, had a proper investigation been performed, counsel could have cast doubt on the state's theory that Rachel's injuries occurred while she was in Jones's care. *Id.* at 1198–1202, 1206–09. The court then concluded that Jones's postconviction-relief counsel rendered ineffective assistance in failing to raise that claim, thereby excusing Jones's procedural default under *Martinez*. *Id.* at 1214–17.

The state appealed, arguing that, although 28 U.S.C. § 2254(e)(2) did not bar the district court from holding an evidentiary hearing on Jones's efforts to establish cause for default under *Martinez*, the statute *did* bar the district court from considering any of the evidence from the *Martinez* hearing when analyzing the merits of the underlying claim. The panel rejected the state's argument, concluding that a district court is not barred from considering evidence developed to overcome a procedural default under *Martinez* when analyzing the underlying claim. *Jones*, 943 F.3d at 1220–22.

II

We should have granted rehearing en banc because, in contravention of controlling Supreme Court authority, the panels' decisions in *Jones* and *Ramirez* create a new judge-made exception to 28 U.S.C. § 2254(e)(2)'s strict limitations on expansion of the evidentiary record in habeas corpus cases.

A

The petitioners in *Jones* and *Ramirez* confronted two distinct obstacles to presenting their ineffective-assistance-of-trial-counsel claims in federal habeas corpus proceedings. First, the claims they sought to assert had not been presented in their state postconviction proceedings, and the resulting procedural default required them to show cause and prejudice to excuse that default. Second, the petitioners had failed to develop in the state court record the facts that they needed to establish their claims, and this presented a *separate* obstacle that would require them to make an appropriate showing before a federal habeas court could consider any additional evidence. *See* 28 U.S.C. § 2254(e)(2). In order to set the panels' decisions in context, it is helpful to summarize the applicable state of the law concerning these two distinct procedural hurdles.

1

The general rule against consideration of procedurally defaulted claims in federal habeas corpus is a judge-made doctrine that has long been recognized by the Supreme Court. The Court's rule is "grounded in principles of comity," because "a habeas petitioner who

has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 731–32. Because Arizona requires that ineffective-assistance-of-trial-counsel claims be presented in the first state postconviction petition, *see Martinez*, 566 U.S. at 6–7, the petitioners' failure to present their claims in Arizona state court constitutes a procedural default, *see Coleman*, 501 U.S. at 735 n.1 (where claim was not exhausted in state court and state court "would now find the claims procedurally barred," there "is a procedural default for purposes of federal habeas"); *see also Trevino v. Thaler*, 569 U.S. 413, 421 (2013) (failure to raise a claim in state court "at the time or in the place that state law requires" qualifies as procedural default). But the Supreme Court has recognized exceptions to this judge-made rule: procedurally defaulted claims may be considered if the petitioner can (1) show "cause" for the default and "actual prejudice" from the state's alleged violation of federal law or (2) demonstrate that application of the rule would "result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

In *Coleman*, the Court held that attorney error generally does *not* constitute "cause" to excuse a procedural default because "cause" must be something "*external* to the petitioner," and error by a petitioner's attorney is not "external" because "the attorney is the petitioner's agent when acting, or failing to act." 501 U.S. at 753. But *Coleman* observed that attorney error *can* constitute "cause" when the error qualifies as ineffective assistance of counsel, in violation of the

Sixth Amendment. *Id.* at 753–54. The reason for this exception is "not because . . . the error is so bad that the lawyer ceases to be an agent of the petitioner"; such an argument, the Court explained, "would be contrary to well-settled principles of agency law," under which even an agent's negligence is imputed to the principal. *Id.* at 754. Rather, the reason for the exception is that, when effective assistance of counsel is constitutionally guaranteed, "'the Sixth Amendment itself requires that responsibility for the default be imputed to the State.'" *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). And because "[t]here is no constitutional right to an attorney in state post-conviction proceedings," *Coleman* reasoned, an error by postconviction counsel is not imputed to the state and cannot constitute "cause." *Id.* at 752.

In *Martinez v. Ryan*, however, the Court created a "narrow exception" to *Coleman*'s holding that negligence by postconviction counsel can never constitute cause to excuse default. 566 U.S. at 9. The Court expressed special concern about applying *Coleman*'s strict rule in the context of claims that trial counsel was ineffective, because such claims often can be brought only in postconviction proceedings—where effective representation is not constitutionally guaranteed— and, further, because such claims "often require investigative work and an understanding of trial strategy." *Id.* at 11. The *Martinez* Court pointedly *declined* to rest its exception to *Coleman* on the premise that there is a constitutional right to effective assistance of postconviction counsel in the presentation of an ineffective-assistance-of-trial-counsel claim. *Id.* at 9. Instead, recognizing that "[t]he rules for when a

prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion," *id.* at 13, the Court held that, "as an equitable matter," ineffective assistance of postconviction counsel (or lack of postconviction counsel) can constitute "cause" to excuse procedural default of an ineffective-assistance-of-trial-counsel claim, but only if the claim is "substantial," *id.* at 14.

2

The second distinct obstacle that the petitioners face here was their failure to adequately develop in state court the factual evidence needed to establish the ineffective-assistance- of-trial-counsel claims that they now wish to present. Again relying upon judge-made rules governing the writ of habeas corpus, the Supreme Court previously had treated such a failure as comparable to a procedural default, and the Court therefore generally required a showing of cause and prejudice to excuse the failure. *See*, *e.g.*, *Keeney*, 504 U.S. at 8–10. The rationale for this additional federal habeas rule was likewise grounded in federalism: "encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance." *Id.* at 9. Under *Keeney*, a failure to develop the record occurs even when the petitioner's *counsel* is responsible, *id.* at 4 (requiring cause and prejudice even though the failure was "apparently due to the negligence of postconviction counsel"), and the requisite cause cannot be shown "where the cause asserted is

attorney error," *id.* at 10 n.5 (citing *Coleman*, 501 U.S. 722).

However, in enacting AEDPA, Congress partially abrogated *Keeney* and replaced it with a different and more demanding set of standards. The relevant provision is contained in 28 U.S.C. § 2254(e)(2), which provides as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. The Supreme Court has made two important rulings concerning the meaning of § 2254(e)(2), and those decisions establish the governing law concerning this separate procedural obstacle to the presentation of a claim in federal habeas corpus.

First, in *Williams v. Taylor* (*Michael Williams*),[2] 529 U.S. 420 (2000), the Court held that Congress's use of the word "failed" in the opening clause of § 2254(e)(2) was "intended to preserve" *Keeney*'s definition of what counts as the sort of state-court failure that triggers the rule. *Id.* at 433. As the Court explained, *Keeney*'s cause-and-prejudice requirement applied—and therefore § 2254(e)(2)'s replacement for that cause-and-prejudice standard now applies—when "there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Id.* at 432 (emphasis added). Thus, § 2254(e)(2) preserves the rule that attorney failure to develop the record triggers the need to make a further showing to excuse that failure. But Congress dramatically changed the circumstances under which such attorney failure can be *excused*, by replacing the cause-and-prejudice and fundamental-miscarriage-of-justice tests with the stricter exceptions in § 2254(e)(2). *Id.* at 433. Notably, ineffective assistance of postconviction counsel is *not* included in the statute as a ground for excusing the failure to develop the factual basis of a claim in state court. Thus, it is not sufficient to show that counsel's lack of diligence failed to uncover the new evidence; rather, it must be shown that the "factual predicate . . . *could not* have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii) (emphasis added).

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[2] The Supreme Court coincidentally decided another AEDPA case named *Williams v. Taylor* (involving Terry Williams) on the very same day. *See* 529 U.S. 362 (2000).

Second, the Supreme Court held in *Holland v. Jackson* that § 2254(e)(2)'s strictures are applicable whenever the petitioner attempts to rely on evidence that was not presented in state court, and not merely when the petitioner seeks a formal evidentiary hearing. 542 U.S. at 653. In *Holland*, habeas petitioner Jackson had been convicted of murder in state court, primarily on the testimony of a single eyewitness. *Id.* at 650. Seven years later, Jackson attempted to reopen his state postconviction case because he claimed that a new witness would contradict the primary witness's testimony. *Id.* at 650–51. The state court denied the motion, finding "no satisfactory reason given for the defendant's failure to locate this witness." *Id.* at 651. The Supreme Court reversed the Sixth Circuit's subsequent grant of habeas relief, holding in relevant part that consideration of the new witness's testimony was barred under § 2254(e)(2). Reaffirming that "[a]ttorney negligence" in developing the state court record "is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied," *id.* at 653 (citing *Michael Williams*, 529 U.S. at 439–40; *Coleman*, 501 U.S. at 753–54), the Court held that Jackson's failure to present the testimony of the new witness to the state court was subject to the strictures of § 2254(e)(2). Moreover, the Court made clear that, despite the fact that § 2254(e)(2)'s limitations applied to the holding of an "evidentiary hearing," "[t]hose same restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing." *Id.*

Thus, under *Michael Williams* and *Holland*, where the petitioner's attorney in state postconviction

proceedings negligently fails to develop the record on a claim, a federal habeas court may not consider new evidence in support of that claim unless the strictures of § 2254(e)(2) have been met.

B

Against this backdrop, the panel decisions in *Jones* and *Ramirez* are directly contrary to controlling Supreme Court authority.

1

Jones held that, notwithstanding § 2254(e)(2), "*Martinez*'s procedural-default exception applies to *merits review*, allowing federal habeas courts to consider evidence not previously presented to the state court." *Jones*, 943 F.3d at 1221 (emphasis added). *Jones* erred by engrafting *Martinez*'s judge-made exception to a judge-made rule onto the separate *statutory* rule set forth in § 2254(e)(2). *Jones* made no effort to reconcile its holding with *Holland* or *Michael Williams*; indeed, *Jones* did not mention either decision. Its holding is directly contrary to those decisions, which (as explained earlier) bar consideration of new evidence to evaluate the merits of a claim in federal habeas proceedings—even when that evidence was not previously discovered due to the negligence of postconviction counsel—unless one of the narrow exceptions set forth in § 2254(e)(2) is satisfied. *Jones* did not suggest that any of those exceptions are applicable here. Instead, *Jones* relied on two arguments to justify its holding, but neither has merit.

a

Jones relied primarily on policy-based arguments for extending *Martinez*'s exception to § 2254(e)(2). This court has previously held that, because a claim of ineffective assistance of *postconviction* counsel "is not a constitutional claim" but only a predicate for showing "cause" to excuse a failure to present a claim (namely, ineffective assistance of trial counsel), a petitioner seeking to show such cause "is not asserting a 'claim' for relief as that term is used in § 2254(e)(2)." *Dickens*, 740 F.3d at 1321. Section 2254(e)(2) thus does not bar a hearing to develop the facts necessary *to establish cause* under *Martinez*. *See id*. Because in *Jones* the district court had already conducted a lengthy hearing for that purpose, the panel held that it would be "'simply illogical, and extraordinarily burdensome to the courts and the litigants,'" to hear evidence concerning cause under *Martinez* but then to disregard that very same evidence when addressing the merits of the underlying claim. *Jones*, 943 F.3d at 1221 (quoting the district court decision). Additionally, the panel endorsed the plurality view in *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc), that if § 2254(e)(2) could stymie factual development for claims rescued from procedural default by *Martinez*, then "'*Martinez* would be a dead letter.'" 943 F.3d at 1222 (quoting *Detrich*, 740 F.3d at 1247 (four-judge plurality)); *see also Ramirez*, 937 F.3d at 1248 (likewise relying upon the *Detrich* plurality).

As an initial matter, the *Jones* panel and the *Detrich* plurality overstate the extent of the inconsistency between *Martinez* and § 2254(e)(2), as

noted by the amicus brief filed by the State of Texas in support of rehearing en banc in the *Jones* case. *Martinez* excuses the procedural default of failing to raise a claim of ineffective assistance of trial counsel in a state postconviction petition when the default is attributable to the ineffective assistance of state postconviction counsel. Section 2254(e)(2) separately bars the development of new evidence in support of a habeas claim in federal court. Thus, § 2254(e)(2) poses no obstacle to review where the state court record (either at trial or in subsequent proceedings) is *already* sufficient to establish trial counsel's mistakes—e.g., "claims based on a failure to object to inadmissible evidence, requesting an incorrect jury instruction, or per se ineffective assistance of counsel." Brief for the State of Texas as Amicus Curiae at 12–13, *Jones v. Shinn*, No. 18-99006 (9th Cir. Dec. 23, 2019) (ECF No. 75). To the extent that such mistakes nonetheless were not *raised* on state postconviction review due to the ineffectiveness of postconviction counsel, *Martinez* paves the way to federal habeas relief.

But even if most *Martinez* claims would be barred by § 2254(e)(2), that would not give us a license to contravene the settled law governing that statute. Nothing in the text of § 2254(e)(2) says that its prohibition on consideration of new evidence does not apply when postconviction counsel was ineffective or where "cause" has been shown to excuse some *separate* procedural default. On the contrary, AEDPA amended § 2254(e)(2) to abolish *precisely* the same "cause and prejudice" standard that *Martinez* invoked (and modified) and replaced it with a much more demanding standard (which both panels agree is not met in these

cases). *See Michael Williams*, 529 U.S. at 433 ("Congress raised the bar *Keeney* imposed on prisoners."). Section 2254(e)(2) therefore eliminated any basis for extending *Martinez* to excuse a failure to develop the record. That is, because the predicate for *Martinez*'s holding is the cause-and-prejudice standard, and because § 2254(e)(2) expressly eliminated that standard in the context of a failure to develop the record, the entire predicate for applying *Martinez* is simply absent in that context.

Where, as here, Congress has specifically modified and limited pre-existing equitable doctrines that otherwise would have applied, we have no authority to ignore those limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 395–96 (2013) (noting that § 2254(e)(2) specifically modified the previously recognized "miscarriage of justice exception"). Accordingly, this is not a situation in which Congress left undisturbed a long-settled background presumption concerning the scope of equitable authority in federal habeas corpus proceedings. *See id*. at 397 (concluding that, outside of contexts such as § 2254(e)(2), Congress presumably intended to leave "intact and unrestricted" the long-recognized equitably based "miscarriage of justice exception"). The *Jones* panel and the *Ramirez* panel thus lacked the authority to engraft a judge-made exception onto § 2254(e)(2)—particularly when it is contrary to the construction of that statute under *Michael Williams* and *Holland*. As the Supreme Court explained in a separate context in *Ross v. Blake*, although "judge-made exhaustion doctrines . . . remain amenable to judge-made exceptions, . . . a statutory exhaustion provision stands on a different footing.

There, Congress sets the rules—*and courts have a role in creating exceptions only if Congress wants them to*." 136 S. Ct. at 1857 (emphasis added). Under *Ross*, we have no role in creating exceptions to § 2254(e)(2).[3]

Moreover, the *Jones* panel's reasoning (like the plurality's reasoning in *Detrich*) rests largely on a bootstrap argument. *Dickens* held that establishing "cause" under *Martinez* is not a "claim," and so a federal court does not violate § 2254(e)(2) by receiving new evidence to consider whether such cause has been established. 740 F.3d at 1321. But by saying that such evidence should then be considered on the merits of the "claim," the panel erases the distinction that *Dickens* drew and thereby endorses the very violation of § 2254(e)(2) that *Dickens* purported to avoid. To the extent that the resulting scenario seems illogical or wasteful, that is only because the district court in *Jones* failed to consider up front *both* of the *separate* obstacles that Jones faced. There is no point in conducting a *Martinez* hearing to discover "cause" to excuse a procedural default if the defaulted claim will

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[3] Even if the *Jones* panel were correct in perceiving some tension between *Martinez* and the construction of § 2254(e)(2) adopted in *Michael Williams* and *Holland*, that would not justify the panel's disregard of the latter decisions. As the Supreme Court has made clear, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Because *Martinez* says literally nothing whatsoever about § 2254(e)(2), it cannot provide any basis for disregarding the directly applicable caselaw construing that provision.

inevitably fail on the merits because (due to the *other* procedural obstacle) evidence outside the state record cannot be considered in any event. Given the insuperable obstacle presented by § 2254(e)(2), whether the distinct obstacle presented by *Coleman*/*Martinez* could or could not be excused made no difference.

To the extent that it seems unfair that a potentially meritorious claim might escape federal habeas review, that feature is inherent in the restrictions that AEDPA imposes on the grant of federal habeas relief. For purposes of § 2254(e)(2), the evidence developed at the *Martinez* cause-and-prejudice hearing stands on no different footing than the new evidence presented to the court in *Holland*, and *Holland* squarely holds that such new evidence may not be considered unless the restrictions of § 2254(e)(2) have been met. 542 U.S. at 653. The resulting disparate treatment of procedural default under *Martinez* and failure to develop the factual basis for a claim under § 2254(e)(2) is the unmistakable consequence of Congress's asymmetrical intervention in this area of the law, in which Congress eliminated the cause-and-prejudice standard only in the *Keeney* context, and not in the *Coleman* context. Absent a constitutional objection—and the *Jones* panel did not suggest that its conclusion was required by the Constitution—we lack the authority to improve upon Congress's policy judgment by judicially rewriting § 2254(e)(2).

b

The *Jones* panel hinted at a second ground for its holding, but it is equally untenable. Specifically, the panel stated that its conclusion was consistent with the

decisions of the Eighth and Fifth Circuits in *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013), and *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000). *See Jones*, 943 F.3d at 1222. Those decisions, in turn, rested on the premise that, if counsel was ineffective in failing to develop the record or there is otherwise cause and prejudice to excuse that failure, then there was no "fail[ure] to develop the factual basis of a claim in State court proceedings" within the meaning of § 2254(e)(2). *See Sasser*, 735 F.3d at 853–54; *Barrientes*, 221 F.3d at 771 & n.21. This rationale is based on a clear misreading of *Michael Williams*.

Michael Williams unambiguously states that § 2254(e)(2) preserved *Keeney*'s understanding of what counted as a "failure" to develop the record, thereby triggering the need to excuse that failure. *See* 529 U.S. at 433–34. *Michael Williams* further states that such a failure is shown when "there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*," *id.* at 432 (emphasis added); *see also Holland*, 542 U.S. at 653 ("Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied."). Moreover, in holding that ineffective assistance of state postconviction counsel may provide cause and prejudice for failure to raise a claim of ineffective assistance of trial counsel, the Supreme Court in *Martinez* did not retreat from *Coleman*'s and *Michael Williams*'s holding that, in determining whether a procedural failure or default *has occurred*, habeas petitioners are bound by the action (or inaction) of their lawyers under "well-settled principles of agency law." *Coleman*, 501 U.S. at 754; *see also Michael Williams*, 529 U.S. at 432; *cf.*

Maples v. Thomas, 565 U.S. 266, 282–83 (2012) (noting, even post-*Martinez*, "the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client" and holding that, "under agency principles," attorney error is not chargeable to the client only in the latter situation). Under *Martinez*, the question of ineffective assistance thus goes, not to the underlying question of whether there was a procedural default or other failure, but rather to the question of whether that default or failure *is excused*. 566 U.S. at 13–14.

Accordingly, the suggestion that the existence of cause and prejudice means that there was *no failure* to develop the record for purposes of § 2254(e)(2), *see Sasser*, 735 F.3d at 853–54; *Barrientes*, 221 F.3d at 771, is plainly incorrect. Not only does this mix up the issue of procedural failure with the distinct issue of whether that failure is excused, but this reasoning would effectively restore the *Keeney* cause-and-prejudice standard that § 2254(e)(2) expressly abrogated. *See Michael Williams*, 529 U.S. at 433. If the existence of cause and prejudice means that there was no failure to develop the record sufficient to trigger § 2254(e)(2), then the remainder of § 2254(e)(2) would be a dead letter, and the operative standard would be the cause-and-prejudice test.

Because there was a failure to develop the state court record in both *Jones* and *Ramirez*, § 2254(e)(2) is triggered and that failure can be excused *only* if a petitioner meets one of the strict statutory exceptions in § 2254(e)(2). Because § 2254(e)(2) abolishes *Keeney*'s cause-and-prejudice test, the fact that *Martinez* allows

postconviction ineffective assistance to establish cause and prejudice to excuse a failure to raise a claim does not mean that such ineffective assistance meets the more demanding excusal standards established in § 2254(e)(2) to excuse a failure to develop the record in state court. Neither the *Jones* panel nor the *Ramirez* panel claimed that the exceptions in § 2254(e)(2) were met, and the prohibition of that section therefore applies. Under *Holland*, that means the new evidence in each case may not be received in considering the merits of the underlying claim of ineffective assistance of trial counsel.

2

As explained above, the *Jones* panel held only that the evidence developed at the *Martinez* cause-and-prejudice hearing in that case could be considered on the merits of the underlying ineffective-assistance-of-trial-counsel claim. The *Ramirez* panel went one step further and held that, *after* cause and prejudice have been established under *Martinez* (as the *Ramirez* panel found in that case), the strictures of § 2254(e)(2) do not apply at all and the petitioner is "entitled to evidentiary development to litigate the merits of his ineffective assistance of trial counsel claim." *Ramirez*, 937 F.3d at 1248. The only authority cited for this proposition is the *Detrich* plurality, but that opinion (like *Jones*) only supports the view that, "[i]f the district court holds an evidentiary hearing *before* ruling on the *Martinez* motion, evidence received at that hearing is not subject to the usual habeas restrictions on newly developed evidence." 740 F.3d at 1247 (emphasis added); *see also id.* ("even with respect to the

underlying trial-counsel IAC [ineffective-assistance- of-counsel] 'claim,' given that the reason for the hearing is the alleged ineffectiveness of both trial and PCR [postconviction-relief] counsel, it makes little sense to apply § 2254(e)(2)"). That view is wrong for all of the reasons explained earlier, but nothing in that rationale justifies taking the additional step of completely dispensing with the strictures of § 2254(e)(2) and allowing *further* evidentiary development *after* the *Martinez* standard has already been satisfied.[4]

* * *

I respectfully dissent from the denial of rehearing en banc.

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[4] Ramirez's argument that Arizona waived any objection based on § 2254(e)(2) by failing to raise the issue may have some force to the extent that *Ramirez* also presents the *Jones* issue (*i.e.*, the use of the *same* evidence for the dual purposes of satisfying *Martinez* and addressing the merits), but not as to the *Ramirez* panel's additional step of ordering further evidentiary development *after* the *Martinez* standard had been met. Ramirez's appeal did not specifically ask for the further relief that the panel ultimately provided on that score. Arizona therefore had no occasion to object under § 2254(e)(2) to *additional* evidentiary development beyond what was needed to satisfy *Martinez*. The panel's decision presented that § 2254(e)(2) issue for the first time, and Arizona properly raised the issue in its Petition for Rehearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-97-1331-PHX-JAT

[Filed: September 28, 2010]

David Martinez Ramirez,	)
	)
Petitioner,	)
	)
vs.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

DEATH PENALTY CASE

ORDER

In a prior Order, the Court concluded that Petitioner's remaining claim, Claim 34, had been procedurally defaulted in state court based on an independent and adequate procedural bar. (Doc. 207.)[1] However, because the parties still needed an opportunity to fully brief the claim, the Court was not in a position to consider whether Petitioner had legitimate cause and prejudice to excuse the default or whether a fundamental miscarriage of justice would occur if Claim 34 was not reviewed on the merits. Following briefing on these issues, the Court concludes that Petitioner has demonstrated neither cause and

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

prejudice nor a fundamental miscarriage of justice to excuse his procedural default of Claim 34.

Background Summary[2]

In Petitioner's briefing in support of cause and prejudice, he alleges that certain pretrial, trial, and sentencing events prevented his post-conviction counsel from raising Claim 34 in a timely manner. In pretrial proceedings, on September 28, 1989, Petitioner filed a motion for appointment of experts, requesting an independent psychiatric evaluation, a child psychologist, a mitigation specialist, a fingerprint examiner, a jury consultant, a serologist, and a pathologist. (ROA-PCR 39.)[3] In the motion, Petitioner cited *Ake v. Oklahoma*, 470 U.S. 68 (1985), and requested, without explanation, that an independent psychiatrist be appointed to assess his sanity at the time of the crime. (*Id.* at 2.) He summarily requested the appointment of the other experts. (*Id.* at 3.) Subsequently, the court appointed an investigator to assist Petitioner, who at that point was representing

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[2] This factual summary provides the background related to Petitioner's cause and prejudice arguments. A more complete procedural history may be found in prior Orders. (*See, e.g.,* Doc. 190.)

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

himself with advisory counsel. (RT 10/6/89 at 13; ROA-PCR 43.) The following week, the court denied the remainder of the expert requests without prejudice, allowing for reconsideration after Petitioner had an opportunity to consult with his investigator. (RT 10/11/89 at 5-6; ROA-PCR-ME 45.) At an ex parte proceeding, Petitioner's investigator asserted that a child psychologist was important to help determine Petitioner's social upbringing and to collaborate with a mitigation specialist. (RT 12/12/89 at 10.) A mitigation specialist was needed to work with the investigator, Petitioner, and mental health professionals in order to prepare a complete mitigation presentation. (*Id.* at 10-12.) Advisory counsel explained that the mental health experts were requested for mitigation purposes in the event Petitioner was found guilty, not to evaluate his competency to stand trial. (*Id.* at 13.) The court denied the request for a mitigation specialist but indicated that it would be reconsidered if Petitioner was convicted. (*Id.* at 17.) It appears the Court appointed a serologist. (RT 12/12/89 at 16; ROA-PCR-ME 140.)

Subsequently, prior to trial, there was a change of judge ordered, with Maricopa County Superior Court Judge Thomas W. O'Toole, presiding over the case. After jury selection, Petitioner requested that advisory counsel be appointed to represent him going forward, and the court granted the request. (RT 7/11/90 at 96-97; ROA-PCR-ME 108.) After the jury found Petitioner guilty on both murder counts, Petitioner's counsel informed the court that previously she had requested a mitigation specialist; when the judge asked if she was referring to Arizona Rule of Criminal Procedure 26.5, which provides for presentence mental health

examinations, counsel answered, "Well, so to speak." (RT 7/27/90 at 6-7.) The court appointed the mental health expert proposed by Petitioner, Dr. McMahon, "to test and evaluate the defendant's current mental health and, if such is deemed appropriate, conduct further diagnostic testing and evaluation." (*Id.* at 7; ROA-PCR-ME 125.) The court authorized compensation in the amount of $500, but that additional fees and expenses could be obtained with "prior written approval of the court." (ROA-PCR-ME 125.) Petitioner made no other requests for the appointment of experts prior to sentencing.

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

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

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

Petitioner initiated federal habeas proceedings, raising both conviction and sentencing claims. (Docs. 1, 2, 18, 40, 55, 76.) Subsequently, the Court stayed

Petitioner's sentencing claims so that he could file a successive PCR petition in state court asserting that he is mentally retarded and ineligible for capital punishment pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002) (recognizing that the Eighth Amendment prohibits a state from sentencing to death or executing a mentally retarded person). (Doc. 119.) In state court, the Court limited Petitioner's counsel, the Federal Public Defender ("FPD"), to the *Atkins* litigation. (*Id.*) In April 2005, Petitioner initiated an *Atkins* claim in successive PCR proceedings. (Doc. 228 at 1-13.)[4]

Subsequently, also in April 2005, a private attorney "conducted an initial *pro bono* review" of Petitioner's case and filed a separate successive state PCR notice attempting to litigate five non-*Atkins* claims, including Claim 34, an allegation of ineffective assistance of counsel for failing to conduct a complete mitigation investigation, obtain, and present available mitigation evidence at sentencing. (Doc. 145, Ex. A at 3.) The PCR court summarily dismissed this action as unexceptional, rendering it subject to timeliness rules that required all PCR claims be filed during a petitioner's initial PCR proceeding. (Doc. 145, Ex. B; *see* Ariz. R. Crim. P. 32.4(a), 32.2(b), 32.5 (West 2005)). Based on the PCR court's ruling, for Claim 34 to be timely and considered on the merits, Petitioner was required to have raised it during his initial PCR proceeding. Petitioner did not raise Claim 34 during his initial PCR proceeding. This Court has concluded that

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[4] In response to this Court's Order, Respondents provided a complete copy of the state court record of Petitioner's *Atkins* litigation to the Court for its review. (*See* Doc. 228, 1-8873.)

Claim 34 was procedurally defaulted according to an adequate and independent state procedural rule and will not be considered on the merits apart from a showing of cause and prejudice or a fundamental miscarriage of justice. (Doc. 207.)[5]

Cause and Prejudice

In *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), the Court made explicit that if a state prisoner has procedurally defaulted a federal claim in state court pursuant to an independent and adequate procedural rule, "federal habeas review of the claim[] is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law[.]" 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 constituting 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 to counsel, and

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

constitutionally ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (cause is established if unavailable evidence was the reason for the default). "Prejudice" is actual harm resulting from the alleged constitutional error or violation. *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice resulting from a procedural default, a habeas petitioner bears the burden of showing not merely that the errors at his trial or sentencing constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting the entire proceeding with errors of constitutional dimension. *United States v. Frady*, 456 U.S. 152, 170 (1982).

Discussion

Petitioner asserts that he has cause and prejudice to excuse his failure to present the claim because the trial court, thru interrelated failures, prevented PCR counsel from timely presenting it. Specifically, the trial court failed to authorize funding for a mitigation specialist, failed to fund a mental health expert until sentencing proceedings, and then inadequately funded the court-appointed mental health expert, Dr. Mickey McMahon, Ph.D. (Doc. 215 at 9-10.) These failures also prevented sentencing counsel from obtaining an adequate social history of Petitioner to provide to Dr. McMahon, which caused Dr. McMahon to conclude that Petitioner was not mentally retarded. (*Id.* at 10-11.) Dr. McMahon's allegedly inaccurate mental retardation conclusion caused PCR counsel not to actively investigate Petitioner's mental health and present

Claim 34 during his initial PCR proceeding. *See id.* at 11 (citing *Forman v. Smith*, 633 F.2d 634, 641 (2d Cir.1980) (observing in *dicta* that an official's intentional or inadvertent misleading statement "that obscures the opportunity to develop a federal constitutional violation" may constitute cause to excuse a procedural default)).

State Official Interference

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

In this case, nothing prevented Petitioner from presenting Claim 34 during his initial PCR proceeding. Even though Petitioner argues that the trial court's interrelated failures made compliance with the state procedural rule impracticable, the sentencing record shows otherwise. Counsel submitted a sentencing memorandum specifically discussing that at the age of 9 and 12, Petitioner's IQ was tested, and that he recorded low IQ scores of 70 and 77 respectively. (ROA-PCR 149 at 7.) Counsel presented Petitioner's scores in the context of possible mental retardation and borderline intellectual functioning. (*Id.*) Counsel's sentencing memorandum chronicled Petitioner's major difficulties progressing thru different grades in school, and that at age 14, when he took the California Achievement Grade Point Test, he scored 3-4 grade

levels below his schoolmates. (*Id.* at 7-8.) Petitioner's presentence report also described him as below average intelligence and socially immature. (ROA-PCR 171.)

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

Next, Petitioner alleges that Dr. McMahon's official interference establishes cause. Petitioner contends that Dr. McMahon was a state actor and that his inaccurate testing and reporting of Petitioner's IQ impeded PCR counsel from asserting Claim 34 at his initial PCR proceeding. (Doc. 215 at 10-12, 17-18.) Petitioner argues that because Dr. McMahon was authorized by

the court, paid by the State to evaluate his mental health, and provide a report to the court, his actions are attributable to the state and constitute "official interference" if adverse to Petitioner. (*Id.* at 10.) The Court disagrees.

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

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

Petitioner relies on *Parkus v. Delo*, 33 F.3d 933 (8th Cir. 1994), to argue that state officials prevented PCR counsel from raising Claim 34. (Doc. 215 at 11.) In

Parkus, the habeas petitioner had an extensive history as a mentally disturbed man who had been raised in state institutions since the age of four. *Id.* at 934. Trial counsel made a request for his childhood mental health records, but was told by the records custodian that the records had been destroyed. *Id.* at 936. As a result, Parkus's mental health expert was unable to testify at trial or at sentencing that Parkus suffered from a mental disease or defect. *Id.* He was convicted of first-degree murder and received the death penalty. Parkus failed to raise an IAC claim during post-conviction proceedings. *Id.* at 937. During habeas proceedings, however, Parkus obtained his childhood mental health records (which had not, in fact, been destroyed) and, based on those records, his mental health expert submitted an affidavit attesting that Parkus suffered from a mental disease or defect. *Id.* at 936. Due to the missing mental health records, the court concluded that Parkus did not have notice of his trial counsel's ineffectiveness and therefore had adequate cause not to present the claim. *Id.* at 938. The Eighth Circuit decided that there was "some" official interference which made compliance with the procedural rule impracticable and ordered an evidentiary hearing. *Id.* at 938-39.

The lack of notice counsel had in *Parkus* is distinguishable from the facts at issue here. Unlike *Parkus*, in this case, there are no missing records. Based on the sentencing record, PCR counsel was on notice that Petitioner had two IQ tests documenting low intelligence and another test demonstrating he was behind his peers in educational development. PCR counsel was also on notice that the presentence report

indicated that Petitioner displayed low intelligence and emotional immaturity. Even though Dr. McMahon reported that Petitioner was not mentally retarded, PCR counsel was still on notice of the contrast between Dr. McMahon's report and the low IQ scores being reported, as well as the mental health deficiencies counsel presented as mitigation at sentencing. PCR counsel was also on notice of his need to investigate mental health because in Arizona a "slow, dull and brain-damaged" mental impairment may have a significant mitigating effect as it may evidence an inability of the defendant to control his conduct. *See, e.g., Walton v. Arizona*, 159 Ariz. 571, 588, 769 P.2d 1017, 1034 (1989). Thus, unlike in *Parkus*, there was no official interference preventing PCR counsel from obtaining the factual basis for an IAC sentencing claim for presentation during the PCR proceeding.

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

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

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

Ineffective Assistance of Sentencing Counsel

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

Before ineffective assistance of counsel may be utilized as cause to excuse a procedural default, the particular ineffective assistance allegation must first

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

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

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

Although Petitioner contends that Arizona's PCR process failed to ensure he was appointed competent counsel, Petitioner cites no case, and the Court has found none which holds that a state is required by the federal constitution to provide counsel in PCR proceedings. The fact that a state may, "as a matter of legislative choice," *Ross v. Moffitt*, 417 U.S. 600, 618 (1974), provide for counsel in discretionary appeals following a first appeal of right does not extend the Sixth Amendment's guarantee of effective counsel to discretionary appeals. *See Evitts v. Lucey*, 469 U.S. 387, 394, 397 n.7 (1985); *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987) (where a state provides a lawyer in a state post-conviction proceeding, it is not "the Federal

Constitution [that] dictates the exact form such assistance must assume," rather, it is in a state's discretion to determine what protections to provide). Further, the Ninth Circuit has held explicitly that "ineffective assistance of counsel in [state] habeas corpus proceedings does not present an independent violation of the Sixth Amendment enforceable against the states through the Due Process Clause of the Fourteenth Amendment." *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996). Since Petitioner's PCR proceeding took place after his appeal of right, it was a discretionary proceeding that did not confer a constitutional right to the effective assistance of counsel. Thus, even assuming that PCR counsel's performance did not conform to minimum standards, it did not violate the federal constitution and cannot excuse the procedural default.

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

In the context of IAC of PCR counsel, the Ninth Circuit has considered and rejected the argument that cause exists to excuse a procedural default where PCR counsel failed to assert a claim during PCR proceedings. *See Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998); *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996); *Moran v. McDaniel*, 80 F.3d 1261, 1271 (9th Cir. 1996); *Bonin*, 77 F.3d at 1158-59.[6] Therefore, PCR counsel's alleged ineffectiveness does not constitute cause.

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

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[6] *Manning v. Foster*, 224 F.3d 1129 (9th Cir. 2000) is not to the contrary. In *Manning*, the Ninth Circuit reiterated that the actions or omissions of PCR counsel cannot constitute cause to overcome a procedural default. *Id.* at 1133 (stating that "any ineffectiveness of Manning's attorney in the post-conviction process is not considered cause for the purposes of excusing the procedural default at that stage"). In *Manning*, rather, the court held that where direct appeal counsel actually interfered with the petitioner's ability to initiate post-conviction proceedings, such conduct by constitutionally-entitled counsel may constitute cause to excuse a procedural default.

Discovery

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

The Court first notes that Petitioner is not requesting discovery in the context of an exhausted claim. *See, e.g., Bracy v. Gramley*, 520 U.S. 899 (1997) (discussing good cause for discovery in the context of an exhausted claim). Rather, discovery is sought to support Petitioner's various contentions of cause to excuse the procedural default of Claim 34. However, to demonstrate cause, the petitioner must demonstrate some external factor external to the defense impeded his efforts to comply with the state procedural rule. *See Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004) (internal citation and quotation omitted). The Court has already considered and concluded that none

of Petitioner's contentions constituted an external impediment that excused his failure to raise Claim 34 in a timely manner. Hence, Petitioner cannot justify his discovery requests as his cause contentions have been rejected. *See Campbell v. Blodgett*, 997 F.2d 512, 524 (9th Cir. 1992) (stating that an evidentiary hearing is not necessary to allow a petitioner to show cause and prejudice if the court determines as a matter of law that he cannot satisfy the standard). Therefore, Petitioner's requests for discovery are denied.

Fundamental Miscarriage of Justice

If a petitioner cannot meet the cause and prejudice standard, the Court still may hear the merits of procedurally defaulted claims if the failure to hear the claims would constitute a "fundamental miscarriage of justice." *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). The fundamental miscarriage of justice exception is also known as the "actual innocence" exception. "[A] claim of actual innocence is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). There are two types of claims recognized under this exception: 1) that a petitioner is "innocent of the death sentence," or, in other words, that the death sentence was erroneously imposed; and 2) that a petitioner is actually innocent of the capital crime. *See Calderon v. Thompson*, 523 U.S. 538, 559-60 (1998). To be innocent of the crime itself, 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). The requisite probability requires a showing "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* To be innocent of a death sentence, the petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the existence of an aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. *Sawyer*, 505 U.S. at 336, 345. Under this standard, a showing of actual innocence refers to those state-law requirements that must be satisfied to impose the death penalty. *Id.* at 348.

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

Actual Innocence of the Death Penalty

Petitioner contends that his mental retardation renders him ineligible and actually innocent of the

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

Both state and federal law are involved in this Court's fundamental miscarriage of justice analysis. Under *Sawyer*, innocence of the death penalty requires a proper showing by petitioner that he does not meet some condition of eligibility for the death penalty under state law. *Sawyer*, 505 U.S. at 345. Under *Atkins*, it is up to the states to develop "appropriate ways to enforce the constitutional restriction" upon the execution of the mentally retarded. *Atkins*, 536 U.S. at 317. Thus, both *Sawyer* and *Atkins* point this Court to state law to determine as a condition for eligibility of the death penalty whether Petitioner is mentally retarded. Yet, it is under *Sawyer* that this Court evaluates, based on the state court record, whether Petitioner has demonstrated that he is mentally retarded. *See Sawyer*, 505 U.S. at 348; *Winston v. Kelly*, 600 F.Supp.2d 717, 735-36 (W.D. Va. 2009), *vacated and remanded on other grounds*, 592 F.3d 535 (4th Cir. 2010) (evaluating whether petitioner demonstrated that was actually innocent of the death penalty due to mental retardation in the context of the fundamental miscarriage of justice exception). Under *Sawyer*, the Court is not undertaking a *de novo* review of Petitioner's *Atkins* hearing; rather, the Court is undertaking a limited review of the record to assess whether Petitioner demonstrated by clear and

convincing evidence that no reasonable factfinder would have determined that he is not mentally retarded.

Arizona's Mental Retardation Statute

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

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

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[7] Arizona's current statute for mental evaluations for capital defendants is codified at A.R.S. § 13-753.

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

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

Under the adaptive behavior prong, the statute requires an overall assessment of the petitioner's ability to meet society's expectations of him; it does not require a finding of mental retardation based solely on proof of specific deficits in only a couple of areas. *Grell*, 212 Ariz. at 529, 135 P.3d at 709. The statute defines adaptive behavior as "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the

defendant's age and cultural group." A.R.S. § 13-703.02(K)(1). In *Arellano*, 213 Ariz. at 478-80, 143 P.3d at 1019-21, the Arizona Supreme Court clarified that behavior after age eighteen is relevant to the adaptive behavior inquiry, even if the behavior under review comes from within a prison context. In *Arellano*, the court reversed a trial court ruling precluding Arizona Department of Correction officials from testifying at a mental retardation hearing regarding the petitioner's present adaptive behavior in prison. *Id.* at 480, 143 P.3d at 1021. In *Grell*, the court reiterated that the statute requires a showing of current impairment in adaptive ability and that an assessment based on recent interviews is persuasive. *Grell*, 212 Ariz. at 527-28, 135 P.3d at 707-08. Finally, the statute requires the onset of mental retardation to occur before the age of eighteen. A.R.S. § 13-703.02(K)(2).

Petitioner's Atkins Proceeding

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

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

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

On November 25, 2005, Dr. Toma submitted his report to the court. (*Id.* at 1875-1884.) Regarding intellectual functioning, Dr. Toma administered the Wechsler Adult Intelligence Scales-Third Edition ("WAIS III") to Petitioner on November 9, 2005. Petitioner's full scale IQ for the test was 77. (*Id.* at 1878.) Regarding adaptive behavior, Dr. Toma used the Adaptive Behavior Scale–Residential and Community: Second Edition ("ABS-RC:2"). (*Id.* at 1880.) Dr. Toma reviewed all of Petitioner's childhood records but also focused on Petitioner's current level of functioning and concluded that he showed no significant deficits in

adaptive functioning. (*Id.* at 1880-84.) Dr. Toma concluded that Petitioner did not meet the statutory definition for mental retardation. (*Id.* at 1884.)

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

On February 14, 2006, Dr. Weinstein submitted his report to the court. (*Id.* at 1103-1135.) Regarding intellectual functioning, Dr. Weinstein administered the WAIS III to Petitioner on July 29, 2004, with a full scale IQ score of 70. (*Id.* at 1111.) On November 11, 2004, Dr. Weinstein administered the Woodcock-Johnson Intelligence Test-Third Edition (W-J III) to Petitioner, with a full scale IQ score of 71. (*Id.* at 1112.) Dr. Weinstein also reported that Petitioner's two school-age IQ tests utilized the Wechsler Intelligence Scale for Children ("WISC"), scoring a 70 in 1967 and a 77 in 1969. (*Id.* at 1122.) Dr. Weinstein also utilized

the ABAS-II to evaluate adaptive behavior. (*Id.* at 1125-27.) Dr. Weinstein had Richard Garcia, Petitioner's step-father, rate Petitioner's adaptive behavior utilizing the ABAS-II. Dr. Weinstein identified a number of childhood adaptive behavior deficits based upon other interviews and declarations from Petitioner's family and friends regarding his formative years. (*Id.* at 1123-1125.) Dr. Weinstein identified deficits in conceptual, social, and practical adaptive behavior skills. (*Id.*) Additionally, he found deficits in Petitioner performing major activities for daily living. (*Id.*) Dr. Weinstein concluded that Petitioner met the statutory definition of mental retardation. (*Id.* at 1127.)

Although not appointed by the court, on February 24, 2006, Dr. Marc Tasse, a recognized mental retardation expert, submitted a report on behalf of Petitioner. (*Id.* at 2425-2445.) Dr. Tasse did not administer an IQ test to Petitioner, but reviewed the intelligence testing that had been done. (*Id.* at 2432.) Dr. Tasse opined that the RIAS test utilized by Dr. Martinez was unreliable, that there would be a significant practice effect on the last WAIS III test administered by Dr. Martinez due to the short eight week duration between the last time that Petitioner had taken the same test, and that when all scores are adjusted for the "Flynn Effect,"[8] Petitioner meets the

[8] According to the Flynn Effect theory, the passage of time inflates full scale IQ test scores by approximately one-third to two-thirds of a point per year since the normalization of the particular test in question. The premise of the Flynn Effect theory is that IQ tests that are not renormed to take rising IQ scores into account will

statutory definition of significant subaverage intellectual functioning. (*Id.* at 2434-36.) Dr. Tasse utilized the ABAS II to administer an adaptive behavior test to Petitioner. (*Id.* at 2436.) Dr. Tasse concluded that Petitioner was significantly impaired in adaptive functioning, with onset before the age of eighteen. (*Id.* at 2443.) Finally, Dr. Tasse concluded that Petitioner was mentally retarded under the statutory definition. (*Id.* at 2445.)

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

Intellectual Functioning

At the hearing, the experts testified that the WAIS III was the most widely used IQ test. (*See, e.g.,* Doc. 228 at 4797.) The third edition of the test is a 1997 revision of the second edition. (*Id.* at 5070.) It is an individually administered test designed to assess the intelligence of individuals ranging in age from 16 to 89 years. (*Id.*) Three experts tested Petitioner utilizing the WAIS III. (*Id.* at 8728.) Dr. Tasse testified that it was

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overstate a test taker's score. Once calculated, these amounts are subtracted from the full scale IQ score before applying the standard margin of error. *See, e.g., In Re Salazar*, 443 F.3d 430, 433 (5th Cir. 2006).

appropriate to adjust the WAIS III administered by Dr. Martinez by five points downward due to practice effect because he administered the test to Petitioner within one year of the previous time that WAIS III was administered. (*Id.* at 5251-52, 5255, 5265.) Dr. Martinez alternatively administered the RAIS, but Dr. Tasse discounted its use because it is a fairly new test and not as comprehensive as WAIS III. (*Id.* at 2434-36.) Dr. Tasse testified that the following full scale IQ scores were valid: 70, 77, 70, 71, 77 and 82 (after receiving the five point reduction for practice effect). (*Id.* at 5250-51.)

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

> Full Scale I.Q. Testing
>
> The Defendant has failed to establish by clear and convincing evidence or by a preponderance of the evidence that he suffers from "significantly sub average general intellectual functioning" which means a "full scale intelligence quotient (IQ) of seventy or lower." A.R.S. § 13-703.02(G), (K)(2) & (4).
>
> Beginning in February of 1967, when he was 9 years of age, through January of 2006, when he was 38 years of age, the Defendant has been given six full-scale IQ tests, as well as several less thorough IQ tests. The six tests included two WISC tests, a Woodcock-Johnson, 3rd edition test (W-J III) and three WAIS III tests. In each test, except for the WAIS-III test administered

by Dr. Martinez on January 11, 2006, where the practice effect skewed and raised the score to 87, the Defendant's IQ was determined to be 70, 77, 70, 71 and 77. . . . Applying the accepted "margin of error for the tests administered," it is 95 percent certain that the Defendant's full scale IQ is within the range of 63 to 82. This consistency in IQ test scores over [more than a] 38 year period of time, especially on the "gold standard" WISC and WAIS III tests,[FN1] compels the conclusion that the Defendant has failed to establish by clear and convincing evidence or by a preponderance of the evidence that his IQ is 70 or lower.

FN 1. The court agrees with Dr. Marc Tasse that these tests were properly administered and scored.

Flynn Effect:

Though it has considered the "Flynn Effect" in determining the defendant's IQ, the Court is not persuaded that it is required to apply it to adjust downward each of the six full scale test IQ scores for alleged test obsolescence. See exhibits 223 and 210, where the Flynn Effect is and is not applied to the various IQ test scores. As shown by Exhibit 223, the defendant's expert, Dr. Marc Tasse, applies the Flynn Effect, as well as the practice effect to the January 11, 2006 test, in finding that the Defendant's IQ is 70 or lower (these Flynn Effect adjusted scores are 64, 70, 69, 74 and 78 respectively). Although the 2005 AAMR User's Guide, Exhibit 59, directs

that the Flynn Effect, standard error of measurement and practice effect, all be used when scoring the WAIS-III test to determine a person's IQ, the Court concludes that use of the Flynn Effect is not mandated by the statute and is not part of the "current community, nationally, and culturally accepted . . . psychological and intelligence testing procedures" that must be used when scoring all full scale IQ tests. A.R.S. § 13-703.02(E)[FN2]

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

In fact, Dr. Weinstein, a defense expert, did not adjust the full-scale IQ score for the Flynn Effect in his 2004 Declaration and in his 2006 report to the court. In addition, Dr. Toma, the court-appointed expert, did not use the Flynn

> Effect in scoring his testing of the defendant and testified that such was not required for those tests.
>
> In addition, the Flynn Effect is not part of the "margin of error . . ." calculation that A.R.S. § 13-703.02(K)(4) and the current WAIS Scoring Manual require to be used in scoring the WAIS-III tests administered in 2004, 2005 and 2006, and was not used when the WISC tests were given to the Defendant as a child in 1967 and 1969. Instead the manual merely directs that a standard error of measurement of ± 7 be applied in scoring the 1967 and 1969 WISC tests, and that a standard error of measurement of ± 5 be applied for W[AIS]-III tests given in 2004, 2005 and 2006.
>
> In sum, the defendant has failed to show by clear and convincing evidence or a preponderance of evidence that he possesses "significant sub average general intellectual functioning," as defined and required by A.R.S. § 13-703.02(G) & (K)(2) & (4).[FN3]
>
> > FN 3. If the Flynn Effect was required to be used in scoring these tests, the court finds that the defendant has proved by a preponderance of the evidence that his full scale IQ is 70 or lower.

(*Id.* at 3828-30.)

Intellectual Functioning Discussion

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

Date of Administration	**IQ Test and Administrator**	**Results Obtained**	**Standard Margin of Error**
2/14/1967	WISC (Wilson)	FSIQ = 70	63 to 77
10/6/1969	WISC (McConkey)	FSIQ = 77	70 to 84
7/29/2004	WAIS-III (Weinstein)	FSIQ = 70	65 to 75
11/11/2004	W-J III (Weinstein)	GIA = 71	67 to 75

[9] The PCR court utilized the following margin of error calculations for the IQ tests–a standard error of measurement of ± 7 for scoring the 1967 and 1969 WISC tests, and a standard error of measurement of ± 5 for scoring the WAIS III tests. (*Id.* at 3830.) Excluding any correction for the alleged Flynn Effect, Dr. Tasse testified that the margin of error range for the WJ-III test was 67 to 75. (*Id.* at 5270.)

11/9/2005	WAIS-III (Toma)	FSIA = 77	72 to 82
1/11/2006	WAIS-III (Martinez)	FSIQ = 82 (after 5 point deduction)	77 to 87

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

When accounting for margin of error, as this Court has already noted, it is necessarily speculative to conclude that Petitioner's IQ scores should receive either a downward adjustment or an upward adjustment. *See Walton*, 440 F.3d at 178 (stating that petitioner could only speculate that the standard error of measurement would lower his IQ score); *see also Winston*, 600 F. Supp.2d at 729 ("there is no basis in practice for using [standard error of measurement] to find that an individual's true IQ falls in the range below the earned score on a given IQ test because it was equally likely that the test-taker's true IQ could fall in the range above the earned score."). In review of Dr. Tasse's testimony he made the same point at the

evidentiary hearing. During cross-examination about Petitioner's IQ score on WJ-III, Dr. Tasse reiterated his contention that Petitioner's full scale IQ score of 71 should be adjusted downward for the Flynn Effect to 69. (Doc. 228 at 5261-62.) Dr. Tasse was then questioned about margin of error and its effect on Petitioner's IQ score.

> **State's Attorney**: This test doesn't establish that his IQ falls below 70?
>
> **Dr Tasse**: Yes, it does, in my opinion. . . . The Woodcock-Johnson III, it established his IQ is below 70.
>
> **State's Attorney**: The range is 65 to 74; correct?
>
> **Dr. Tasse**: Yes.
>
> **State's Attorney**: Okay. Explain your position?
>
> **Dr. Tasse**: The GIA is 69; that is below 70.

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

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

Dr. Tasse indicated that there were six valid full scale IQ scores posted for Petitioner, 70, 77, 70, 71, 77 and 82. (*Id.* at 5250-51.) According to Dr. Tasse, the full scale IQ scores should be further reduced for the Flynn Effect, recommending the six scores be reduced to, 64, 70, 69, 67, 74 and 78. (*Id.* at 8801.) Drs. Toma and Martinez disagreed with Dr. Tasse's testimony regarding whether the Flynn Effect should be applied to reduce individual full scale IQ scores. (*Id.* at 5509-10; 5568-69.) Drs. Toma and Martinez both testified that it is not their clinical practice to reduce full scale IQ scores for the Flynn Effect. (*Id.*)

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

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

Adaptive Behavior

In Petitioner's fundamental miscarriage of justice arguments, although he generally alleged that his mental retardation renders him actually innocent of the death penalty, his only specific argument regarding adaptive behavior was that neither Dr. Toma nor Dr. Martinez utilized established diagnostic methods to assess adaptive behavior. (Doc. 215 at 24-25.)

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

> The court further finds that the Defendant has proved by a preponderance of the evidence, but not by clear and convincing evidence, that throughout his childhood and adult life he has suffered from significant impairment in adaptive behavior in meeting the standards of personal independence and social responsibility expected of a person of his age and cultural group. A.R.S. 13-703.02(K)(1). All experts agreed that the

AAMR [American Association on Mental Retardation] Users Guide, 2002 edition, provides the "current community, nationally, and culturally accepted…procedure"for evaluating a person's adaptive behavior, as required by A.R.S. 13-703.02(E). In essence, this requires that the experts investigate and determine a defendant's conceptual, social and practical adaptive behavior and skills in the context of his or her behavior in the community. However, the court can also consider a defendant's institutional behavior in determining whether he has significant adaptive behavior deficits. *See State v. Arellano (Appelt)* [sic], 213 Ariz. 474, ¶¶ 14-23 (2006), where the court held that, pursuant to A.R.S. 13-703.02(K), the trial court has the discretion to consider defendant's adult institutional behavior, including his communication, social and interpersonal skills, and work, leisure and health habits, in determining the existence of adaptive behavior deficits. This behavior is especially relevant in this case, where the defendant has spent nearly his entire his adult life in prison before and after he committed these murders in1989. Finally, the experts agree that the Adaptive Behavior Assessment System, 2d edition, (ABAS-II) test is the most appropriate and accepted formal assessment tool for determining whether the Defendant has significant adaptive behavior deficits.

Viewed in this context, the Court agrees in part with the findings of Drs. Weinstein and

Tasse, that the Defendant has significant adaptive behavior deficits as defined by A.R.S. 13-703.02(K)(1), particularly in the area of conceptual, social, and practical skills. As detailed in their reports and testimony, both experts investigated all aspects of the defendant's life before and after turning 18 years of age, including his institutional behavior. In addition to reviewing the testimony of the mitigation witnesses at the 1990 aggravation and mitigation hearing, they also interviewed several family members who were close to the Defendant in his formative years when he grew up in Phoenix and in southern California. They also considered sworn declarations from individuals who were familiar with the Defendant's behavior in non-institutional and institutional settings. The defendant also presented the testimony of Eloise Arce, an aunt who cared for him for about18 months until age three and who also observed him in his youth, about his maladaptive conduct during his childhood years in Phoenix. This information confirmed, as detailed in the testimony and reports of Drs. Weinstein and Tasse, that although the Defendant as a young boy was a good care giver to his younger siblings in the absence of their alcoholic mother, he showed many symptoms of very slow and delayed development of conceptual, social and practical skills. Finally, Dr. Tasse, unlike Drs. Toma and Martinez, correctly administered the ABAS-II test, the most appropriate adaptive behavior test, to the Defendant and Richard Garcia, his

stepfather from approximately 1966 to 1973. This test, together with the independent evidence of the defendant's non-institutional behavior, establishes probable cause to believe that since childhood the Defendant has displayed significant adaptive behavior impairments in conceptual, social and practical skills.

The Court is unable to conclude, however, that there is clear and convincing evidence that the defendant has significant adaptive behavior deficits. A more complete picture of his conduct in his formative years as a child and teenager, as well as his conduct in prison over nearly all of the last twenty-six years, shows that the defendant has regularly shown adequate personal independence and social responsibility expected of a person of his age and cultural group, including proper conceptual, social and practical skills. In contrast to numerous hearsay declarations of Richard Garcia and others,[FN6] and the somewhat conflicting and unreliable testimony of Eloise Arce about certain adaptive behavior deficits of the defendant, the testimony at the October 19, 1990 and November 30, 1990 sentencing mitigation hearing of Erlinda Martinez, his aunt and the sister of the defendant's mother, and of two of the defendant's immediately younger sisters, shows that when the defendant grew up in Phoenix he exercised personal independence and proper conceptual, social and practical skills for a person of his age and cultural group. Before he

became a teenager, and in the frequent absence of his alcoholic mother, he was described as the "man of the family," who did most of the cooking, cleaning and caring for his younger siblings. In addition, they attributed his poor school performance and being "kept back" in school to his frequently missing school and constantly changing schools due to his mother being regularly on the move around Phoenix. This nomadic existence is corroborated by the school records and Joint Chronology timeline submitted by the parties, which shows that over a seven-year time frame from September of 1963 to September of 1970, the defendant attended at least ten different schools, was regularly absent and was twice held back.

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

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

The defendant's conduct in prison, where he has been since April of 1979 except for only two short periods of release, further compels the

conclusion that the defendant has failed to show by clearing [sic] and convincing evidence that he has significant adaptive behavior deficits. Department of Corrections officers who supervised the defendant from 1987 to 1989 at Florence, testified that the defendant worked as a porter in the officers dining room and prepared and served food to DOC officers. His supervisors described him as a self-starter, who was polite, acted with responsibility, and was trusted and skilled. At one point, he was promoted and put in charge of running the morning shift at the dining room.

In concluding that the defendant has failed to show by clear and convincing evidence that he has significant adaptive behavior deficits, the court agrees with Dr. Toma's opinion that the defendant does not suffer from significant adaptive behavior deficits and that as an adult the defendant has consistently displayed the ability to engage in independent and self-directed thinking, planning and conduct. Although Dr. Toma did not fully administer the ABAS-II test to formally determine if the defendant had significant impairment in adaptive behavior, his opinion is credible because it is based on numerous contacts with the defendant during interviews and I.Q. testing, and his evaluation of the defendant's well documented conduct during nearly 26 years in prison from 1979 to 1989 and then from 1991 to 2006.[FN8]

> FN 8 This conduct is portrayed in the voluminous prison and inmate records he reviewed, exhibits 138-209 not in evidence.
>
> In sum, although the conflicting evidence shows by a preponderance of the evidence that the defendant has significant adaptive behavior deficits, the court is unable to conclude that the evidence of these deficits is clear and convincing.

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

Adaptive Behavior Discussion

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

Dr. Toma concluded, based on his interview with Petitioner, and his review of Petitioner's institutional records as well as childhood records, that Petitioner does not have significant adaptive behavior deficits. (Doc. 228 at 1884.) Dr. Toma further concluded that as an adult Petitioner had consistently displayed the ability to engage in independent, self directed thinking, citing his ability to utilize the prison library,

maintaining correspondence with pen pals, defending his rights in prison based on prison regulations, dealing with monies in his prison account, and other various correspondence with the prison. (*Id.* at 5519-24; 1881-84.) Dr. Martinez concluded, based on a current interview and assessment of Petitioner's adaptive behavior, that Petitioner did not have significant adaptive behavior deficits. (*Id.* at 2408-09.) In contrast, both Dr. Tasse and Dr. Weinstein focused on Petitioner formative and early teen-age years in concluding that he did have significant adaptive behavior deficits. (*Id.* at 1123-25, 2443.)

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

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

interviews dating back to Petitioner's non-institutional behavior.

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

After reviewing all of the adaptive behavior evidence, both pre-institutional and institutional behavior, Dr. Toma and Dr. Martinez concluded that Petitioner did not currently have significant adaptive behavior deficits. (Doc. 228 at 5519-24; 1881-84 (Toma); 2408-09 (Martinez).) Concurring, the court concluded that "as an adult the [petitioner] has consistently displayed the ability to engage in independent and self-directed thinking, planning, and conduct." (*Id.* at 3833.) After reviewing all of this evidence, under *Sawyer*, Petitioner has failed to establish by clear and convincing evidence that no reasonable fact finder

would have determined that he lacks significant adaptive behavior deficits.[10]

Conclusion

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

Actual Innocence of the Capital Crime

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

In *Schlup*, the Court discussed the fundamental miscarriage of justice exception in the context of a claim of actual innocence of the capital crime. 513 U.S. at 324-27. In *Schlup*, the petitioner accompanied his actual innocence evidence with an assertion of constitutional error at trial. *Id.* at 315. The *Schlup* Court ruled that if a petitioner "presents evidence of

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

innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id.* at 316. To establish the requisite probability, the petitioner must prove with "new reliable evidence" that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 324, 327.

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

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

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

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

PENDING MOTION

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

CERTIFICATE OF APPEALABILITY

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

Rule 22(b) of the Federal Rules of Appellate Procedure provides that an applicant cannot take an appeal unless a certificate of appealability has been issued by an appropriate judicial officer. Rule 11(a), 28 U.S.C. foll. § 2254, provides that the district judge must either issue or deny a certificate of appealability when it enters a final order adverse to the applicant. If a certificate is issued, the court must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2). 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." 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) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.* The Court finds that reasonable jurists could debate its resolution of Claims 12 and 34.

Based on the foregoing,

IT IS HEREBY ORDERED that Petitioner's second amended petition for writ of habeas corpus (Doc. 162) is **DENIED WITH PREJUDICE.** The Clerk of Court shall enter judgment accordingly.

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

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

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

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

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

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

DATED this 28th day of September, 2010.

/s/ James A. Teilborg
James A. Teilborg
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CV-97-1331-PHX-JAT

[Filed: September 28, 2010]

David Martinez Ramirez,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, per the Court's order entered September 28, 2010, Petitioner's Second Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is denied with prejudice. Judgment is entered for respondents and against petitioner. The action is dismissed.

September 28, 2010

RICHARD H. WEARE
District Court
Executive/Clerk

s/L. Dixon
By: Deputy Clerk

cc: (all counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-97-1331-PHX-JAT

[Filed: November 4, 2010]

David Martinez Ramirez,	)
	)
Petitioner,	)
	)
vs.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

DEATH PENALTY CASE

ORDER

Pursuant to FED.R.CIV.P. 52(b) and 59(e), Petitioner moves the Court to expand his state court record to include corrected reporter's transcripts from his mental retardation proceedings conducted in Maricopa County Superior Court in 2005-06. (Doc. 244.) Respondents do not oppose Petitioner's motion so long as the filing of corrected transcripts complies with the state court's previously issued order (*see* Doc. 228 at 4551, ordering the preparation of corrected transcripts based on the corrections listed at 4422-4453). (Doc. 244 at 3.) Petitioner further requests the Court stay these habeas proceedings until all of the corrected transcripts have been filed. (Doc. 244 at 3.)

A stay is unnecessary. As agreed to by Respondents, Petitioner may file the corrected transcripts as they become available from the state court reporter and they will be substituted for the transcripts previously filed.

Accordingly,

IT IS HEREBY ORDERED granting, in part, and denying, in part, Petitioner's motion. (Doc. 244.) The Court grants Petitioner's motion to expand his state court record with corrected transcripts. The Court expands Petitioner's state court record to include the corrected transcripts attached to this motion, Exhibits A and B. (Doc. 244.)

IT IS FURTHER ORDERED that, as they become available, Petitioner shall file the corrected transcripts ordered by the state court (*see* Doc. 228 at 4551), and the Court expands Petitioner's state court record to include these corrected transcripts.

IT IS FURTHER ORDERED that Petitioner's request to stay these proceedings until all corrected transcripts have been filed is **DENIED**. (Doc. 244.)

DATED this 4th day of November, 2010.

/s/ James A. Teilborg
James A. Teilborg
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 10-99023

D.C. No. 2:97-cv-01331-JAT
District of Arizona,
Phoenix

[Filed: December 1, 2014]

DAVID MARTINEZ RAMIREZ,	)
	)
Petitioner - Appellant,	)
	)
v.	)
	)
CHARLES RYAN,	)
	)
Respondent - Appellee.	)
	)

ORDER

Before: RAWLINSON and IKUTA, Circuit Judges

Appellant's opposed motion for a limited remand is granted. The district court on limited remand shall reconsider, in light of intervening law, Claim 34 (ineffective assistance of trial counsel, failure to adequately investigate and present mitigating evidence at sentencing). *See* District Court's March 30, 2010 Order (ruling Claim 34 is procedurally defaulted); *see also* District Court's September 28, 2010 Order (ruling Claim 34 is procedurally barred); *cf. Martinez v. Ryan*,

132 S.Ct. 1309 (2012); *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc); *see also Woods v. Sinclair*, 764 F.3d 1109, 1138 n.16 (9th Cir. 2014).

Within 10 days after the district court enters its final order on limited remand, 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.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-97-01331-PHX-JAT

[Filed: September 15, 2016]

David Martinez Ramirez,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

On December 2, 2014, the Ninth Circuit Court of Appeals remanded this case for reconsideration of Claim 34 in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (Doc. 249.) Claim 34 alleges ineffective assistance of counsel at sentencing. *Martinez* holds that the ineffective assistance of post-conviction counsel can serve as cause for the procedural default of claims of ineffective assistance of trial counsel. This Court previously found Claim 34 defaulted and barred from federal review.

Ramirez filed his supplemental *Martinez* brief on March 4, 2015. (Doc. 256.) Respondents filed a response in opposition and Ramirez filed a reply. (Docs. 257, 260.) For the reasons set forth below, Claim 34 remains

procedurally barred. Ramirez's request for evidentiary development is denied.

I. BACKGROUND

In 1990, Ramirez was convicted of two counts of premeditated first-degree murder for the deaths of Mary Ann Gortarez and her 15-year-old daughter Candie. *See State v. Ramirez*, 178 Ariz. 116, 119–21, 871 P.2d 237, 240–42 (1994) (describing facts of the crimes).

In the early morning hours of May 25, 1989, neighbors heard noise coming from the Gortarez apartment and called 911. Officers arrived and entered the apartment. They saw Mary Ann's body on the living room floor. Ramirez, shirtless and covered in blood, approached the officers. He appeared to be intoxicated.

Candie's body was found naked in one of the bedrooms. There was blood throughout the apartment. A knife blade was found in the front hall, a cake knife was found near Mary Ann's arm, part of the cake knife handle and a handle matching the blade found in the hall were in her hair, a pair of bloody scissors was found in the bathroom, and in a rear hallway there was a blood-soaked box cutter.

Mary Ann had been stabbed 18 times in the neck, and in the back and knee. She had defensive wounds on her hand and forearms. Her daughter had been stabbed 15 times in the neck. Vaginal swabs taken from Candie tested positive for semen; Petitioner could not be excluded as the donor of the semen.

At sentencing, the judge found three aggravating circumstances: Ramirez had two prior violent felony convictions, under A.R.S. § 13-703(F)(2); Ramirez committed the murders in an especially cruel, heinous, or depraved manner, A.R.S. § 13-703 (F)(6); and Ramirez committed multiple homicides during the same episode, A.R.S. § 13-703(F)(8). (Doc 257-2, Ex. N.) The judge found one statutory mitigating circumstance and seven non-statutory circumstances, but determined that they were not sufficiently substantial to warrant leniency. (*Id.*)

The court sentenced Ramirez to death on both murder counts. The Arizona Supreme Court affirmed Ramirez's convictions and sentences on direct appeal. *Ramirez*, 178 Ariz. 116, 871 P.2d 237. Ramirez filed a Petition for Post-conviction Relief (PCR), which the trial court denied in its entirety. The Arizona Supreme Court summarily denied review.

On June 26, 1997, Ramirez filed his initial habeas petition in this Court. (Doc. 1.) After briefing, the Court issued a ruling on the procedural status of the twelve claims raised in Ramirez's amended petition, dismissing all except portions of Claims 1 and 2. (Doc. 26.) On July 6, 2004, Ramirez filed a supplemental petition alleging additional claims. (Doc. 84.)

The parties briefed the remaining claims. (Docs. 90, 97, 103, 110.) The Court subsequently granted a stay of the sentencing claims, to allow Petitioner to seek relief from his death sentence in state court based on a claim of mental retardation pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). (Doc. 119.) During the stay, the Court issued a ruling denying evidentiary development

and dismissing Ramirez's conviction claims. (Doc. 140.) The state court found that Ramirez was not mentally retarded under Arizona law. (Doc. 232-6.)

Ramirez filed a notice of PCR petition in state court regarding the *Atkins* claim and a separate successive PCR notice raising five additional claims. When those five claims had been exhausted in state court, Ramirez sought to amend the petition to include them in this Court. (Doc. 145.) The Court granted amendment only as to Claim 34 (Doc. 158), and Ramirez filed a second amended petition incorporating that claim (Doc. 162).

The Court initially concluded that Claim 34 had been procedurally defaulted in state court based on an independent and adequate procedural bar. (Doc. 207.) After further briefing, the Court concluded that Ramirez had demonstrated neither cause and prejudice nor a fundamental miscarriage of justice to excuse default of the claim. (Doc. 242.)

II. APPLICABLE LAW

Federal review is generally not available for a state prisoner's claims when those claims have been denied pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In such situations, federal habeas review is barred unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice. *Id.* *Coleman* 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 announced a new, "narrow exception" to the rule set out in *Coleman*. The Court explained that:

> 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).

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* . . .' 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 v. Ryan*, 813 F.3d 798, 818 (9th Cir. 2015) (en banc); *Dickens v. Ryan*, 740 F.3d 1302, 1319–20 (9th Cir. 2014) (en banc); *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc).

In *Clabourne*, the Ninth Circuit summarized its *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 postconviction 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. "PCR counsel would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective." *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).

To establish prejudice, the petitioner must demonstrate that his underlying ineffective assistance of counsel claim is substantial, or "has some merit." *Id.* A claim is substantial if it meets the standard for issuing a certificate of appealability. *Martinez*, 132 S. Ct. 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 v. Washington*, 466 U.S. 668 (1984). 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.*

With respect to *Strickland*'s second prong, a defendant 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. "In assessing prejudice, we reweigh the evidence in aggravation

against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced" in subsequent proceedings. *Id.* at 536 (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)).

III. DISCUSSION

In Claim 34, Ramirez alleges that he received ineffective assistance of counsel at sentencing. (Doc. 162 at 105.) The parties agree, though for different reasons, that the Court should reach the merits of this claim. . (*See* Doc. 257 at 1.) Respondents contend that review of the merits shows that PCR counsel did not perform ineffectively in failing to raise the claim in state court. (*Id.*) Ramirez argues that default of the claim is excused by PCR counsel's ineffective performance and therefore the claim must be reviewed *de novo*.[1] (Doc. 256 at 2–3.) As Respondents note, the parties' arguments lead to the same place: an analysis of Claim 34.

Ramirez alleges that counsel was ineffective for failing to discover and present significant mitigating evidence. (Doc. 162 at 105.) Respondents argue that counsel's performance at sentencing was not deficient

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[1] Ramirez contends that this Court has already determined that PCR counsel performed deficiently in presenting the claim of ineffective assistance of counsel at sentencing. (Doc. 256 at 2–3.) The Court disagrees. The Court outlined the facts concerning PCR counsel's performance while discussing cause and prejudice in a pre-*Martinez* context. (*See* Doc. 242 at 4–13.) The Court did not consider the question of whether PCR counsel's performance was both deficient and prejudicial under *Strickland*.

and that Ramirez was not prejudiced because the new information he offers is "*de minimis*, without significant probative value, and cumulative" to the evidence presented at sentencing. (Doc. 257 at 42–55.)

As discussed next, the Court, after reviewing the parities' arguments and the new evidence submitted by Ramirez, finds that trial counsel did not perform at a constitutionally ineffective level during Ramirez's sentencing.

A. Additional facts

Ramirez originally chose to represent himself. After jury selection, he requested that advisory counsel, Mara Siegel, be appointed to represent him going forward. The court granted the request and Siegel represented Ramirez at trial and sentencing.

Following the guilty verdicts, the trial judge, Maricopa County Superior Court Judge Thomas O'Toole, appointed Dr. Mickey McMahon "to test and evaluate the defendant's current mental health and, if such is deemed appropriate, conduct further diagnostic testing and evaluation."[2] (Doc. 257-1, Ex. E.)

Judge O'Toole originally set the sentencing for September 21, 1990, within 60 days of the verdicts. (*Id.*, Ex. D.) At Siegel's request, he continued the sentencing to October 19, 1990. (*Id.*, Ex. F.) Subsequently the court denied Ramirez's request to

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[2] The appointment was made pursuant to Rule 26.5 of the Arizona Rules of Criminal Procedure, which allows the trial court to order a defendant to undergo mental health examination or diagnostic evaluation at any time prior to sentencing. Ariz. R. Crim. P. 26.5.

continue the Aggravation/Mitigation Hearing beyond the October 19 date, but agreed to schedule the imposition of sentence for a subsequent date. (*Id.*, Ex. G.) On October 19, the trial court permitted Ramirez to continue part of the mitigation presentation to November 30. (*Id.*, Ex. J at 112–13.)

1. Dr. McMahon's Report

Dr. McMahon met with Ramirez on three occasions. (*Id.*, Ex. I at 2.) He interviewed Ramirez, performed psychological tests, reviewed materials documenting Ramirez's criminal history, and prepared a report.

The report first recounts Ramirez's version of the crimes. Ramirez had been out of prison for approximately three months before the murders. (*Id.* at 1.) He began drinking and using cocaine around 9:30 p.m. that evening; he injected cocaine once and initially had two glasses of beer. (*Id.*) He had two more beers and two mixed drinks at a bar and then "shot up with cocaine a second time that evening." (*Id.* at 1–2.) He "went back to his girlfriend's apartment around 10:45 pm and shot up with cocaine 4 more times and had approximately 6 more beers before the murder took place." (*Id.* at 2.)

Ramirez told Dr. McMahon he had sex with the 15-year-old daughter the night of the murders and had had sex with her on four previous occasions. (*Id.*) Ramirez claimed the murders were committed by two black men but stated "he didn't care if he was executed for the crime." (*Id.*)

Ramirez "denied that his stepfather ever hit him, his seven siblings, or their mother." (*Id.* at 3.)

According to Ramirez, his mother devoted "her time as a traditional Mexican-American mother whose responsibility revolve[d] around the home and her children. She was always there for the client when he needed her as he was growing up." (*Id*.)

Dr. McMahon noted that Ramirez was "generally quite protective of family members and [would] not tolerate any probing into potentially negative aspects of their lives, insisting that our conversation be tinged with 'respect,' and only then would he be willing to talk, not otherwise." (*Id*.) Dr. McMahon reported that Ramirez "was quite protective of his family and not willing to include them in any way he thought would place them in a negative light." (*Id*. at 7.)

Ramirez said he was involved in serious car accidents but denied ever sustaining a head injury or being knocked unconscious. (*Id*. at 4.)

Ramirez told Dr. McMahon that he had sexual intercourse with his aunt when he was 10 years old and that his cousin took advantage of him sexually about 20 times. (*Id*.)

Ramirez finished ninth grade but left school in tenth grade when he joined a gang. (*Id*. at 6.)

Dr. McMahon administered the Peabody Picture Vocabulary IQ Test ("PPVT"), which resulted in an IQ score of 94. Accordingly, Dr. McMahon opined that Ramirez was "well within the average range of intelligence and in no way indiative [sic] of any form of mental retardation." (*Id*.)

Dr. McMahon discussed the results of other psychological tests. (*Id*. at 6–7.) Although Ramirez fit the profile of one who withdraws into fantasy under extreme stress, Dr. McMahon found no evidence that Ramirez suffered from schizophrenia, paranoid type. (*Id*. at 6.) He found that Ramirez's alcoholism scale was high given his history of alcohol abuse. (*Id*.) Ramirez scored high on the psychomotor acceleration test. (*Id*. at 7.) Dr. McMahon opined that Ramirez's "manic-like behavior [was] due to more than just the cocaine abuse." (*Id*. at 7.)

In summary, Dr. McMahon wrote, "The above results indicate that most likely the primary factor related to the murder was the abuse of alcohol and cocaine." (*Id*.) He concluded, "I can state with reasonable psychological certainty that the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was significantly diminished." (*Id*. at 8.)

2. Sentencing Memorandum

Prior to the mitigation hearing, Siegel filed a 29-page sentencing memorandum with supporting attachments, including school records, jail records, and pre-sentence reports. (Doc. 257-1, Ex. H.) In arguing for a life sentence, the main themes of the memorandum were Ramirez's chaotic childhood and school years, his ability to adapt to the structured life of prison, his history of drug and alcohol abuse, and his impaired state of mind at the time of the murders.

Siegel described Ramirez's family background as characterized by "poverty, uncertainty, chaos." (*Id*. at

4.) Ramirez, the oldest of eight siblings, was born to a 16-year-old mother. (*Id*.) He never knew his own father. (*Id*.) His mother, an alcoholic, died of ethyl alcohol hepatitis. (*Id.* at 12.)

To prepare the memorandum, Siegel "requested all of David Ramirez's school records from kindergarten through high school." (*Id*.) She discovered, however, that "nearly all of David's school records were destroyed by the early 1970's." (*Id*. at 5.) She was able to obtain from the Phoenix Elementary School District his school identification card and his IQ test results from 1967 and 1969. (*Id*.) These records showed that Ramirez changed schools 10 times before he had completed the seventh grade and did not complete high school. (*Id*.)

Siegel detailed Ramirez's poor attendance at the various schools. (*Id*. at 5–7.) She discussed the results of IQ tests administered when Ramirez was a student. These included a score of 70 on the Stanford Binet test in 1967, and a 1969 test, which measured Ramirez's IQ as 77. (*Id*. at 7.) Siegel noted that this score indicated "borderline intellectual functioning," explaining that "D.S.M.–III-R states that a person is mildly retarded if he/she has an I.Q. of 50 to 55, to approximately 70 (D.S.M.-III-R)." (*Id*.) Siegel reported that a defense investigator contacted the individuals who administered the tests but neither remembered Ramirez. (*Id*.)

Siegel discussed Ramirez's move to El Monte, California, and his poor high school grades. (*Id*. at 7–8.) She learned that, five years after a student's graduation, all of his psychological testing records are

destroyed. (*Id*. at 8.) However, she did attach Ramirez's 1971 California Achievement Grade Point Test, with test scores revealing he was "3–4 grade levels below his schoolmates." (*Id*.)

Siegel wrote about the sexual abuse Ramirez experienced as a child. At age 10, his 15-year-old aunt forced him to have intercourse, and at age 10 and 11 he was molested by an older female cousin. (*Id*. at 8.)

Siegel noted that in California Ramirez joined a gang in part due to family problems caused by his mother's alcoholism. (*Id*. at 9.)

Siegel discussed Ramirez's early involvement with the criminal justice system. She cited records indicating that Ramirez had become "institutionalized," so that he was able to function productively within the structured prison environment. (*Id*. at 9–12.) Siegel noted that Ramirez's IQ score 94 of as measured by Dr. McMahon was "now well within the average range of intelligence." (*Id*. at 22.) She argued "[t]his increase in basic intelligence may be due to the structured environment of prison where David completed his G.E.D." (*Id*. at 22.)

Siegel detailed Ramirez's history of drug and alcohol abuse, noting that he began using drugs as a young teenager. (*Id*. at 21.) She explained that on the night of the killings, "he had intravenously injected heroin 5 to 6 times within 4 to 5 hour period prior to the homicides. He had also drank a substantial amount of beer." (*Id*.)

Citing Dr. McMahon's report, Siegel argued that Ramirez's "capacity to appreciate the wrongfulness of

his conduct or conform his conduct to the requirements of the law was significantly diminished," a statutory mitigating fact under A.R.S. § 13–751(G)(1). She cited Dr. McMahon's opinion that a "combination of David's psychological makeup coupled with the indigestion [sic] of alcohol and cocaine for a period of 2 months prior to and including May 25, 1989," significantly impaired his capacity at the time of the murders. (*Id.* at 18–20.)

Siegel also expressed concern about Ramirez's mental outlook and his attitude toward his sentencing:

> David Ramirez has wanted to be sentenced to death if convicted by a jury since June of 1989. *The defendant has been either reluctant or refused to cooperate with any efforts to collect background material on him, contact his family members, doctors, etc., since shortly after this counsel was appointed to represent Mr. Ramirez in June, 1989.*
>
> . . . .
>
> Throughout the preparation for a mitigation hearing, David has evidenced an inappropriate affect in his behavior, particularly when discussing the seriousness of the punishment to be imposed, if convicted. If it was not so readily apparent as a defense mechanism, David has evidenced an almost flippant attitude toward being put to death.

(*Id.* at 20–21) (emphasis added).

3. Mitigation Hearing

At the mitigation hearing, Siegel presented testimony from Ramirez's aunt, Erlinda Martinez, and two of Ramirez's sisters, Mary Castillo and Cynthia Orozco. His aunt, who was about the same age as Ramirez, testified that Ramirez's mother was about 16 when Ramirez was born. She was "always drinking" and often intoxicated. (Ex. J at 31–32, 42–43.) When she was pregnant with Ramirez, she would stay out all night drinking beer; sometimes she would be gone for days. (*Id.* at 33.) His mother died of alcohol-related problems. (*Id.* at 64.)

Ramirez's mother had a lot of male friends. (*Id.* at 33.) She used Ramirez as a housekeeper and babysitter for her other children. (*Id.* at 34.) At one point, Ramirez lived with his grandmother for about three years, but his mother wanted him back because she had no one else to take care of the children. (*Id.* at 35.)

Ramirez's biological father was not around and none of Ramirez's siblings had the same father as Ramirez; four different men fathered the children in his family. (*Id.* at 36–37.)

His aunt did not recall Ramirez having problems in school. (*Id.* at 39.) Because his mother moved frequently, Ramirez attended more than seven grammar schools. (*Id.* at 65.) His aunt could not remember if Ramirez had been kept back in school. (*Id.* at 68.) She believed that while growing up Ramirez and his family had adequate food and clothing. (*Id.* at 57–58.)

As a teenager Ramirez had a number of problems with his stepfather and ran away often. (*Id*. at 40–41, 43–44.) Ramirez had belt marks on his body; his aunt believed he was beaten by his stepfather. (*Id*. at 41.) Once he had a "busted lip." (*Id*.) His mother and stepfather had numerous fights. (*Id*. at 43.)

Although Ramirez had two sons with his first wife, he still helped raise his younger sisters. (*Id*. at 45.) Ramirez was working as a dishwasher and janitor at the time. (*Id*. at 59, 68.) His sons and ex-wife attended the mitigation hearing. (*Id*. at 45, 88.)

His aunt testified that Ramirez often wrote to her daughter. (*Id*.) She felt she could confide in him. (*Id*. at 49.)

When Ramirez found out that the defense investigator had subpoenaed his aunt to testify, he called to tell her he felt bad about involving her and her daughter in the case. (*Id*. at 51–52.) She learned that Ramirez had specifically told family members not to come to the trial or sentencing. (*Id*. at 52.)

Ramirez's aunt also testified about his positive traits, characterizing him as "a beautiful person," "very sentimental," "caring," "a good guy," "level-headed," "fairly intelligent," and "a responsible worker." (*Id*. at 48, 61, 55, 69.) She couldn't believe he committed the crimes he was accused of. (*Id*. at 50.) She didn't believe Ramirez should get the death penalty. (*Id*.)

Ramirez's younger sister Mary Castillo also testified that as a child he helped with household chores and made sure his sisters were clothed and fed. (*Id*. at 73–74.) Castillo did not recall her mother having a

terrible drinking problem, but later in life she drank heavily and died of her alcohol abuse. (*Id*. at 74.) Ramirez was "the man around the house" until his stepfather joined the family (*Id*. at 76.)

Castillo testified that she considered the stepfather strict, but not unreasonably so; that Ramirez followed the stepfather's orders; and that she did not recall Ramirez having any problems with his stepfather. (*Id*.)

While incarcerated, Ramirez had written letters to Castillo's daughters. (*Id*. at 77.) Ramirez did not want Castillo to testify because he did not want her involved in his case. (*Id*. at 78–79.) Castillo did not think death was an appropriate sentence. (*Id*. at 50.) She loved her brother and felt that a death sentence would hurt the entire family. (*Id*. at 80–81.) Castillo also had positive views of Ramirez's character. She described him as "a very good brother," who had "been there for" the family and was kind, sensitive, and affectionate. (*Id*. at 83–84.)

Cynthia Orozco, another of Ramirez's sisters, also testified. (*Id*. at 89.) She had lived with Ramirez and his wife when he was working as a dishwasher and cook. (*Id*. at 93.) His wife did not work. (*Id*. at 94.) According to Orozco, Ramirez would come home from work, eat dinner, and then go back to work. (*Id*.) She was about 15 the first time Ramirez went to prison. (*Id*. at 95.) They wrote one another while he was in prison. (*Id*. at 96–97.)

When Ramirez got out of prison in 1989, he came to live with her and her family. (*Id*. at 97.) He was working at a furniture store and bought her a TV

stand. (*Id*. at 97–98.) He cleaned the house, cooked, and gave her money every week. (*Id*. at 98, 100.) Ramirez always took time to listen to her; she felt closer to Ramirez than to her other brother. (*Id*. at 101.)

Ramirez told her not to come to the aggravation/ mitigation hearing, but she was subpoenaed. (*Id*. at 106.) She stated that it would affect her "[r]eal bad" if the court sentenced Ramirez to death. (*Id*. at 108.)

At the continuation of the mitigation hearing, Siegel presented two additional witnesses, employees of the Department of Corrections, food service supervisors who testified that Ramirez was hardworking, responsible, and cooperative. (Ex. L at 7–10, 19–21.) Both witnesses would assign Ramirez the top rating as an employee. (*Id*. at 10, 24.)

As noted, following the sentencing hearing, the court found three aggravating factors: that Ramirez had two prior violent felony convictions; that he committed the murders in an especially cruel, heinous, or depraved manner; and that he committed multiple homicides during the same episode. (Doc 257-2, Ex. N.)

In mitigation, the court found that Ramirez was impaired under § 13–703(G)(1). The court also found seven non-statutory mitigating circumstances: (1) Ramirez's unstable family background, (2) his poor educational experience, (3) that he was the victim of sexual abuse when he was young, (4) his gang affiliation, (5) his chronic substance abuse, (6) his psychological history, and (7) his love of family. (*Id*.) The court determined that none of the mitigating

circumstances, taken individually or collectively, warranted leniency. (*Id.*)

B. Analysis

Ramirez alleges that Siegel performed ineffectively under *Strickland* by failing to present mitigating evidence of Ramirez's mental retardation, brain damage, impaired intellectual functioning, childhood poverty, childhood neglect and abuse, *in utero* exposure to pesticides and alcohol, and the fact that he was the product of the rape of his 15-year-old mother by his uncle. He also contends that Siegel performed ineffectively in failing to provide Dr. McMahon with additional information concerning Ramirez's low IQ scores and poor grades.

In support of this claim, Ramirez submits new evidence about counsel's sentencing stage performance. In a declaration from 2010, 20 years after Ramirez's trial, Siegel states that she does not think she was prepared to handle a capital trial as sole counsel and that if she had discovered the new information obtained by habeas counsel, she would have presented it at sentencing. (Doc. 256-2, Ex. Q at 1, 2.) In her declaration, also from 2010, Nora Shaw, the defense investigator, stated that this additional mitigating information should have been investigated and presented at sentencing. (*Id.*, Ex. R.) Dr. McMahon attested in a 2004 declaration that he was not provided information about Ramirez's social history, or school, vocational, or medical records. (Doc. 256-1, Ex. P.) If he had been provided with the records showing Ramirez's previous IQ scores, he would have investigated whether Ramirez was mentally retarded. (*Id.*)

Ramirez's family members testified at the *Atkins* hearing in 2004 and have provided declarations describing the circumstances of Ramirez's birth and childhood. (Doc. 256-1, Ex's D–N.) According to this information, Ramirez was conceived when his 15-year-old mother was raped. She drank during her pregnancy and tried on several occasions to abort the fetus. When Ramirez was a toddler his mother fed him beer in a bottle. Ramirez's family were migrant workers, and he was exposed to pesticides *in utero* and as a child working in the fields. Ramirez appeared slow, and was late in reaching his developmental milestones.

Ramirez grew in extreme poverty. He was thin and malnourished, and stole food or relied on charity or handouts from neighbors. The living conditions were filthy due to his mother's neglect.

His mother would leave the children at home while she went out drinking. Ramirez and the other children were exposed to sex and violence when their mother brought men home from the bars. She physically abused Ramirez with slaps and kicks.

Drs. Ricardo Weinstein and Mark Tasse prepared reports in connection with the *Atkins* litigation in state court. (Doc. 256-1, Ex's A, B.) They both concluded that Ramirez met the definition of mentally retarded. Dr. Weinstein performed neurological testing and a Quantitative Electroencephalogram, which revealed that Ramirez suffered from "extensive and diffuse brain dysfunction with particular involvement of the frontal lobes." (Doc. 245-1, Ex. A at 29.)

1. Siegel's performance was not deficient under *Strickland*

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." *Strickland*, 466 U.S. at 689. Thus, to satisfy the deficient performance prong, Ramirez must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* The court "cannot 'second-guess' counsel's decisions or view them under the 'fabled twenty-twenty vision of hindsight.'" *Edwards v. Lamarque*, 475 F.3d 1121, 1127 (9th Cir. 2007) (quoting *LaGrand v. Stewart*, 133 F.3d 1253, 1271 (9th Cir. 1998)). "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." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998).

Ramirez has not shown that Siegel's performance at sentencing fell below an objective standard of reasonableness. The fact that she represented Ramirez on her own without previous capital experience does not establish deficient performance. *Woods v. Sinclair*, 764 F.3d 1109, 1132 (9th Cir. 2014) *cert. denied sub nom. Holbrook v. Woods*, 135 S. Ct. 2311 (2015); *see Ortiz v. Stewart*, 149 F.3d 923, 933 (9th Cir. 1998) ("It is well established that an ineffective assistance claim

cannot be based solely on counsel's inexperience."); *LaGrand*, 133 F.3d at 1275 ("In considering a claim of ineffective assistance of counsel, it is not the experience of the attorney that is evaluated, but rather, his performance.").

The most notable factor in assessing the quality of Siegel's performance is that it led the trial judge to find that one statutory and seven nonstatutory mitigating circumstances had been proved. The nonstatutory circumstances included Ramirez's unstable family background, poor educational experience, sexual abuse, substance abuse, and psychological history.

Next, the Court must take into account the circumstances of Siegel's representation. *See Strickland*, 466 U.S. at 691. These include Ramirez's reluctance to involve his family in the proceedings. Despite this reluctance, counsel called three family members to testify on his behalf at the mitigation hearing.

Although Siegel was able to collect Ramirez's Arizona and California school records, they were not provided to Dr. McMahon prior to his evaluation of Ramirez. Dr. McMahon, after examining Ramirez and administering the PPVT, found no evidence of retardation. It was reasonable for Siegel to rely on Dr. McMahon's findings and not pursue the issue of mental retardation. *See Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) ("In general, an attorney is entitled to rely on the opinions of mental health experts in deciding whether to pursue an insanity or diminished capacity defense."); *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is certainly within

the 'wide range of professionally competent assistance' for an attorney to rely on properly selected experts.") (quotation omitted); *see also West v. Ryan*, 608 F.3d 477, 487–89 (9th Cir. 2010) (holding counsel was not deficient for failing to unearth additional mental health evidence where the doctor's report contained no red flags).

This is not a case where counsel completely failed to investigate or present mitigating evidence. *See Porter v. McCollum*, 558 U.S. 30, 39–40 (2009) (finding deficient performance where counsel collected no records, conducted no interviews, and had only one short meeting with his client concerning the penalty phase); *Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2002) (finding deficient performance where counsel "conducted no investigation whatsoever into Silva's past and also failed to even minimally assist in the preparation of possible mental defenses"); *Bean v. Calderon*, 163 F.3d 1073, 1078 (9th Cir. 1998) (finding deficient performance where counsel "engaged in no preparation" and "conducted no investigation of penalty-phase issues"); *Clabourne v. Lewis*, 64 F.3d 1373, 1386–87 (9th Cir. 1995) (holding that counsel provided ineffective assistance when he "gave up" and failed to present mitigating evidence at the sentencing hearing).

Instead, this case more closely resembles *Schurz v. Ryan*, 730 F.3d 812, 815 (9th Cir. 2013), where the Ninth Circuit held that counsel's failure to present mitigating evidence at sentencing did not constitute deficient performance. The court found that the unpresented mitigating evidence about the petitioner's

drug abuse and dysfunctional family life was cumulative to the information counsel provided in his sentencing memorandum and attached psychological evaluation. *Id.* The court also noted that the new evidence that was not cumulative, including allegations of childhood sexual abuse, cerebral dysfunction, and fetal alcohol syndrome, was either "speculative" or minimally "relevant." *Id.*

In Ramirez's case, Siegel prepared a detailed sentencing memorandum and attached exhibits, including school records, IQ test scores, and Dr. McMahon's report. Siegel argued Ramirez was impaired at the time of the crimes and that his background contained a number of mitigating circumstances. The court found that these circumstances were proved. Siegel's performance was not deficient. *See Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (rejecting ineffective assistance "arguments predicated upon showing what defense counsel could have presented, rather than upon whether counsel's actions were reasonable").

2. Ramirez was not prejudiced by Siegel's performance

Even if Siegel's performance were deficient, Ramirez cannot show prejudice. First, much of the evidence Ramirez claims should have been offered was, in fact, presented to the sentencing court. The court was aware of Ramirez's difficulties as a student, his poor grades and his low IQ test scores. The court was aware that Ramirez's mother was an alcoholic who drank while she was pregnant with Ramirez. The court knew that Ramirez's home life was chaotic, with an

absent father, an abusive stepfather, and a neglectful mother, and that he was obliged to care for his younger siblings. This profile of Ramirez's background is not significantly altered by the new evidence. *See Strickland*, 466 U.S. at 699–700 (finding no prejudice where omitted evidence "would barely have altered the sentencing profile presented to the sentencing judge."); *see also Woratzeck v. Stewart*, 97 F.3d 329, 336–37 (9th Cir. 1996) (finding no prejudice from counsel's failure to investigate or call additional witnesses at mitigation phase because all of the information the witnesses would have presented was contained in the presentence report); *Babbitt*, 151 F.3d at 1176 (finding no prejudice where evidence omitted at sentencing was "largely cumulative of the evidence actually presented").

Ramirez contends that the new "evidence paints an entirely different picture of Ramirez's moral culpability than was presented at sentencing." (Doc. 256 at 38.) The Court disagrees. Ramirez cites mental retardation as one of the categories of mitigating evidence omitted by Siegel. As noted, at the time of sentencing, Siegel relied on Dr. McMahon's opinion that Ramirez's IQ was in the average range. (Doc. 257-1, Ex. I at 6; *id.*, Ex. H at 22.) She did, however, present Ramirez's prior IQ scores of 70 and 77. Moreover, the trial court, again presided over by Judge O'Toole, determined at the conclusion of the *Atkins* litigation that Ramirez had failed to prove he met the statutory definition of mentally retarded.

In support of his claim of mental retardation, Ramirez cites statements of family members that he was exposed to pesticides *in utero* and as a young child

working in the fields. Dr. Weinstein also cited his findings of brain dysfunction as "consistent with and confirmatory of mental retardation." (Doc. 256-1, Ex. B at 29.) While this evidence was not presented at sentencing, its omission has little prejudicial effect given the court's conclusion that Ramirez was not mentally retarded.

Other new evidence cited by Ramirez includes information that he was the product of the rape of his teenage mother by his uncle, and that his mother attempted to terminate the pregnancy. On their own, these circumstances have little mitigating value as they do not bear on Ramirez's "character or record" or the "circumstances of the offence." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). To the extent the information is relevant to Ramirez's intellectual capacity, as just discussed that issue was before the court at sentencing and during the PCR proceedings.

In *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007), the Supreme Court held the petitioner was not prejudiced by counsel's failure to present mitigating evidence indicating that the petitioner suffered from fetal alcohol syndrome with attendant cognitive and behavioral defects, was abandoned by his birth mother, was raised by an alcoholic adoptive mother, began abusing alcohol and drugs at an early age, and had a genetic predisposition to violence. The Court described the evidence as "poor quality," and therefore not supportive of a colorable claim of ineffective assistance of counsel. *Id.*; *see Rhoades v. Henry*, 638 F.3d 1027, 1052 (9th Cir. 2010) (holding "that [petitioner's] newly proffered facts . . . add too little, and the aggravating

circumstances are too strong, to make it reasonably probable that the sentencing decision would have been different but for counsel's performance"); *Heishman v. Ayers*, 621 F.3d 1030, 1038 (9th Cir. 2010) ("[E]ven if Heishman had offered the additional evidence of his difficult upbringing, he has not shown a reasonable probability that the jury would have imposed a sentence of life without parole.").

In determining prejudice the court weighs the totality of the mitigating evidence against the aggravating factors. In this case there were three aggravating factors. First, Ramirez was previously convicted of two violent felonies, aggravated assault and robbery. A.R.S. § 13-703(F)(2). Next, Ramirez committed multiple murders, killing both Mrs. Gortarez and her teenage daughter. A.R.S. § 13-703(F)(8). The multiple murders aggravating factor "is entitled to 'extraordinary weight.'" *State v. Garza*, 216 Ariz. 56, 72, 163 P.3d 1006, 1022 (2007) (quoting *State v. Hampton*, 213 Ariz. 167, 185, 140 P.3d 950, 968 (2006). Finally, the murders were especially heinous, cruel, or depraved. A.R.S. § 13-703(F)(6). The Arizona Supreme Court, in its independent review of the (F)(6) factor, described the supporting facts:

> The victims in this case endured great pain and suffering over a prolonged period of time. The neighbors testified to the banging, screaming, cries for help, and running noises that alerted them to the homicides and that continued for 20 to 30 minutes. When the police arrived, they found evidence of great violence; they discovered blood and murder weapons throughout the

> apartment. Expert testimony as well as the physical evidence established that both victims were conscious during the time that defendant repeatedly stabbed each of them 15–20 times. Each was obviously aware of the other's suffering. Both sustained numerous other cuts and bruises. Mrs. G suffered defensive wounds while fighting unsuccessfully to save her life. The victims' sufferings were inescapably foreseeable to defendant.

Ramirez, 178 Ariz. at 129, 871 P.2d at 250.

Given the strength of these aggravating factors, there is not a reasonable probability that the additional evidence cited by Ramirez would have resulted in a different verdict. *See Samayoa v. Ayers*, 649 F.3d 919, 929 (9th Cir. 2011) (finding no prejudice from failure to present additional mitigation where the crimes, the murder of a mother and child, were "brutal and horrific"); *Leavitt v. Arave*, 646 F.3d 605, 616 (9th Cir. 2011) ("Given the exceptional depravity of this murder, it is unlikely that additional evidence of a brain abnormality would have made a difference."); *Bible v. Ryan*, 571 F.3d 860, 872 (9th Cir. 2009) (finding no prejudice for failure to present evidence of brain injury where the "significant amount of aggravating circumstances" consisted of the especially cruel murder of a nine-year-old child). Ramirez was not prejudiced by Siegel's performance at sentencing.

IV. EVIDENTIARY DEVELOPMENT

Ramirez seeks an evidentiary hearing, discovery, and expansion of the record. (Doc. 256 at 39–45.) Having reviewed the entire record, including the evidence presented by Ramirez in his supplemental *Martinez* brief, the Court concludes that an evidentiary hearing is not warranted. *See Landrigan*, 550 U.S. at 474 ("[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. There are no contested facts concerning Siegel's performance at sentencing. Whether Petitioner's allegations of ineffective assistance of trial counsel are "substantial" under *Martinez* is resolvable on the record. *See Sexton*, 679 F.3d at 1161 (finding record "sufficiently complete" with respect to underlying ineffective assistance of trial counsel claim); *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). However, the Court will expand the record to include the exhibits attached to Ramirez's supplemental brief, as both parties have relied on the information contained therein.

V. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability 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 certificate 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 the conclusion that Claim 34 is procedurally barred.

VI. CONCLUSION

Siegel's performance at sentencing was neither deficient nor prejudicial. Claim 34 is without merit. If PCR counsel had raised the claim, there is no reasonable probability that the result of the post-conviction proceedings would have been different. *Clabourne*, 745 F.3d at 377; *see Sexton*, 679 F.3d at 1157.

The default of Claim 34 is not excused under *Martinez*. The claims remains defaulted and barred from federal review.

IT IS ORDERED that Claim 34 is denied as procedurally barred

IT IS FURTHER ORDERED granting a Certificate of Appealability as to Claim 34.

Dated this 14th day of September, 2016.

/s/ James A. Teilborg
James A. Teilborg
Senior United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-99023

D.C. No. 2:97-cv-01331-JAT

[Filed: September 11, 2019]

DAVID MARTINEZ RAMIREZ, *Petitioner-Appellant*,	)
v.	)
CHARLES RYAN, *Respondent-Appellee*.	)

OPINION

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted January 16, 2019
San Francisco, California

Before: Sidney R. Thomas, Chief Judge, and Marsha S. Berzon and Richard R. Clifton, Circuit Judges.

Opinion by Chief Judge Thomas;
Partial Concurrence and Partial Dissent by Judge Berzon

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed in part and reversed in part the district court's denial of David Ramirez's habeas corpus petition challenging his Arizona conviction and death sentence for the murders of his girlfriend and her daughter, and remanded.

The panel explained that the district court—on remand for reconsideration of whether post-conviction counsel's ineffectiveness constituted cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), to overcome the procedural default of Ramirez's claim of trial counsel's ineffectiveness—erred by conducting a full merits review of the underlying ineffective assistance of counsel claim on an undeveloped record, rather than addressing whether the claim was "substantial." The panel held that the underlying claim of ineffective assistance of trial counsel was substantial, thus constituting "prejudice" under *Martinez*, because trial counsel failed to present or pursue evidence of Ramirez's intellectual disability, failed to provide relevant and potentially mitigating evidence to the psychologist who evaluated Ramirez, and subsequently relied on the psychologist's report, despite possessing contrary facts. The panel held that Ramirez established cause under *Martinez* because had post-conviction counsel raised the substantial claim of ineffective assistance of trial counsel, there is a

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

reasonable probability that the result of the post-conviction proceedings would have been different.

The panel held that the district court erred in denying Ramirez evidentiary development of his ineffective assistance of counsel claim, and that on remand he is entitled to evidentiary development to litigate the merits of his ineffective assistance of trial counsel claim.

The panel held that the district court correctly concluded that Ramirez's due process rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985), were not violated, as Ramirez received the assistance of an independent psychologist, and there was no impermissible waiver of self-representation.

The panel held that the Arizona state courts did not unconstitutionally apply a causal nexus requirement to Ramirez's mitigating evidence in violation of *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015).

The panel declined to expand the certificate of appealability to include three uncertified issues.

Dissenting in part, Judge Berzon would grant a certificate of appealability with regard to Ramirez's claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of intellectually disabled persons); hold that the claim relates back to Ramirez's ineffective assistance of counsel claim; and remand to the district court for further proceedings.

COUNSEL

Paula K. Harms (argued) and Timothy M. Gabrielsen, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

John P. Todd (argued), Special Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

OPINION

THOMAS, Chief Judge:

David Ramirez was convicted by a jury and sentenced to death by a judge for the 1989 murders of his girlfriend, Mary Ann Gortarez and her daughter, Candie. Ramirez appeals the district court's denial of his petition for writ of habeas corpus, raising three certified claims and three uncertified claims. Because Ramirez demonstrated cause and prejudice to overcome the procedural default of his ineffective assistance of trial counsel claim, we reverse the judgment of the district court and remand for the district court to allow evidentiary development of Ramirez's ineffective assistance of trial counsel claim.

We affirm the district court's conclusion that Ramirez's right to due process under *Ake v. Oklahoma*, 470 U.S. 68 (1985), was not violated. We also agree that the Arizona state courts did not improperly exclude

mitigating evidence that lacked a causal connection to his crime. *See McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015).[1] We decline to expand the certificate of appealability to include the three uncertified issues raised by Ramirez.

I

The central question in this appeal is whether the procedural default of Ramirez's claim of ineffective assistance of trial counsel is excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). Because post conviction counsel, whom Arizona concedes performed deficiently, failed to raise a substantial claim of ineffective assistance of trial counsel in Ramirez's initial state collateral proceeding, we conclude that the procedural default is excused. Ramirez has an ineffective assistance of counsel claim "that has some merit" under *Martinez*, 566 U.S. at 14–16, because trial counsel failed to present or pursue evidence of Ramirez's intellectual disability, failed to provide relevant and potentially mitigating evidence to the psychologist who evaluated Ramirez, and subsequently relied on the psychologist's report, despite possessing contrary facts.

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[1] After briefing and oral argument of this appeal, the United States Supreme Court granted certiorari in *McKinney v. Arizona*, No. 18-1109, ___ U.S. ___ , 2019 WL 936074 (June 10, 2019), to address resentencing after a capital sentence is vacated due to a causal nexus error. Ramirez filed a motion for a stay pending the outcome of that case. Ramirez's motion is **DENIED**. Because we conclude that the Arizona state courts did not apply an unconstitutional causal nexus requirement to Ramirez's mitigating evidence, no resentencing is required.

A

In the early morning hours of May 25, 1989, neighbors alerted the police after hearing screams and thuds coming from the Gortarez apartment.[2] Officers arrived and observed Ramirez, who appeared to be intoxicated, covered in blood. *Ramirez v. Ryan*, No. CV-97-01331-PHX-JAT, 2016 WL 4920284, at *1 (D. Ariz. Sept. 15, 2016). Officers found Candie's naked body in a bedroom, and Mary Ann's body on the living room floor. *Id.* Both women had been stabbed multiple times. *Id.* Ramirez was charged with two counts of first degree murder. *Id.*

Ramirez was initially represented by counsel, Mara Siegel, a Maricopa County public defender.[3] This case was Siegel's first capital assignment, and, as she admitted, she was unprepared to represent someone "as mentally disturbed" as Ramirez. Ramirez, through counsel, filed a pretrial motion for appointment of experts, including psychologists and a mitigation expert, among others. In the motion, Ramirez cited *Ake* and requested the court pay for an independent psychiatric evaluation, a child psychologist, and a

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[2] Facts regarding the underlying murders are extensively discussed in the Arizona Supreme Court case affirming Ramirez's convictions on direct appeal. *State v. Ramirez*, 871 P.2d 237 (Ariz. 1994) (en banc).

[3] On October 6, 1989, Ramirez requested to represent himself by presenting an illegible motion to the court. Ramirez represented himself for a time, with Siegel as advisory counsel, until he requested she resume representation after jury selection. Siegel represented Ramirez through trial and sentencing. *Ramirez v. Ryan*, 2016 WL 4920284, at *4.

mitigation expert to assess his sanity at the time of the alleged offense.

The trial court denied Ramirez's requests for experts but appointed an investigator to assist Ramirez. During a subsequent pre-trial motions hearing, the investigator explained why a psychologist was important to help determine Ramirez's social upbringing and to collaborate with a mitigation specialist. The trial court expressed disbelief and confusion at the request for a mitigation specialist ("I have never heard of that in a quarter century") and psychiatrist ("I don't believe I have ever appointed a psychiatrist in my life"), noting that "I don't think that the defendant in this case deserves any favors from this Court because he represents himself. He's pulling this Court's leg, and I'm not impressed by that at all." Ultimately, the court agreed to appoint a fingerprint expert and serologist to assist Ramirez during the guilt phase. No psychologist was appointed for the merits trial. The case was transferred to a different judge for trial.

At trial, only one witness was called on behalf of the defense. Ramirez did not testify and the jury found him guilty of two counts of first-degree murder. *State v. Ramirez*, 871 P.2d at 239, 242.

B

After the jury returned the guilty verdicts, the trial court appointed a psychologist proposed by Ramirez, Dr. McMahon, "to test and evaluate the defendant's current mental health and, if such is deemed appropriate, conduct further diagnostic testing and

evaluation." *Ramirez v. Ryan*, 2016 WL 4920284, at *4. Dr. McMahon met with Ramirez three times for a total of five hours and reviewed the documents trial counsel provided. Trial counsel provided Dr. McMahon with police reports, plea agreements from prior charges, the public defender's notes from an interview with Ramirez, and sentencing orders from two other convictions of burglary and theft. However, trial counsel did not provide Dr. McMahon with Ramirez's school records or IQ scores. Ultimately, trial counsel's case for mitigation consisted of a sentencing memorandum with attachments, and testimony from three of Ramirez's family members and two Arizona Department of Corrections employees who previously supervised Ramirez. *Id.* at *5–8.

1

The sentencing memorandum highlighted Ramirez's ability to adapt in the structured life of prison. *Id.* at *5–6. The sentencing memorandum also discussed Ramirez's chaotic childhood, school attendance, history of substance abuse and sexual abuse, gang affiliation, and impaired state of mind at the time of the murders. *Id.* It also discussed Ramirez's life in prison and early involvement with the criminal justice system. Dr. McMahon's report, which was attached to the sentencing memorandum, detailed Ramirez's prior aggravated assault conviction and his work and prison history.

The sentencing memorandum asserted that Ramirez's ability to appreciate the wrongfulness of his conduct was substantially impaired, a statutory mitigating circumstance. Ramirez reported to Dr.

McMahon that he had consumed approximately twelve drinks and shot up with cocaine multiple times on the evening of the murder, which led Dr. McMahon to conclude that Ramirez's ability to appreciate the wrongfulness of his conduct or conform his conduct to the law was significantly diminished due to his psychological condition and drug and alcohol intoxication on the night of the crimes. *Id.* at *4–5.

The sentencing memorandum indicated that Ramirez's mother, Maria, was an alcoholic. However, Dr. McMahon's report provided the following contradictory observation: that Maria "never worked, devoting her time as a traditional Mexican-American mother whose responsibility revolves around the home and her children." The report observed that Ramirez's mother "was always there for [Ramirez] when he needed her as he was growing up." Ramirez told Dr. McMahon that several family members had sexually abused him, but explained that he did not tell his mother about it because he "was fearful she would become extremely upset and angry." In completing his report, Dr. McMahon did not interview Ramirez's family members and relied solely on Ramirez's self-reporting and the records trial counsel provided.

Although the sentencing memorandum noted Ramirez's low IQ scores—70 and 77—trial counsel relied on Dr. McMahon's report to conclude that Ramirez was "now well within the average range of intelligence." Dr. McMahon measured Ramirez's IQ score using the Peabody Picture Vocabulary Test (PPVT), reporting that Ramirez scored 94, which is "in no way indicative of any form of mental retardation."

The sentencing memorandum also noted that Ramirez changed schools ten times before seventh grade and did not complete high school.[4]

2

During the mitigation hearing, trial counsel subpoenaed three of Ramirez's family members to testify on his behalf: his aunt and two younger sisters. Ramirez's aunt, Erlinda Martinez, who was approximately the same age as Ramirez, testified that Maria was about sixteen when she gave birth to Ramirez. Ramirez's biological father was not around. Erlinda testified that she heard Maria drank while she was pregnant. Erlinda stated that Maria would stay out partying all night and would disappear for days. Maria was involved with "a lot of men." She also testified that Maria would make Ramirez cook for his siblings and clean the house because Maria "wasn't home watching over the kids, the way a mother should." Ramirez's grandmother raised Ramirez for a couple of years. Erlinda also stated that Ramirez had behavioral problems as a child.

Mary Castillo, Ramirez's younger sister, testified that Ramirez was very affectionate, and helped to keep his siblings clothed and fed, but that Maria "was there for us too."[5] Mary testified that Maria did not have a

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[4] According to trial counsel, she contacted Ramirez's schools but many of Ramirez's school and psychological records were destroyed per state policy, so she was unable to provide additional records.

[5] Declarations from Ramirez's family members later revealed that Mary Castillo was "also very slow" and could not read or write.

drinking problem until later in life. She could not recall where Ramirez went to school or whether he changed schools frequently.

Cynthia Orozco, another of Ramirez's younger sisters, testified that Ramirez was a good brother who supported his wife and son. Ramirez was older than Cynthia, and Cynthia testified that they were "hardly together" when they were younger. She testified she did not have many memories before she was nine years old (when Ramirez would have been about fifteen years old). In the year before the crime, Ramirez lived with her, helped her out with chores, and gave her money every week.

Two Department of Corrections employees who had supervised Ramirez in the prison kitchen testified about Ramirez's job duties in prison and said that Ramirez was a good worker.

3

The sentencing judge found three aggravating circumstances: Ramirez had two prior violent felony convictions; the murders were committed in an especially cruel, heinous, or depraved manner; and he committed multiple murders at the same time. *State v. Ramirez*, 871 P.2d at 242.

The judge found the following statutory mitigating circumstance, that Ramirez's "capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was significantly impaired." *Id.* The judge also found the following non-statutory mitigating circumstances:

(1) his unstable family background,

(2) his poor educational experience,

(3) that he was a victim of sexual abuse while he was young,

(4) his gang affiliation,

(5) his chronic substance abuse,

(6) his psychological history, and,

(7) his love of family.

Id.

The judge sentenced Ramirez to death on both counts. *Id.* at 239. On direct appeal, the Arizona Supreme Court affirmed Ramirez's convictions and sentence. *Id.* at 239. The Arizona Supreme Court independently reviewed Ramirez's death sentence, affirming the trial court's assessment of aggravating and mitigating circumstances and imposition of the death sentence. The United States Supreme Court denied certiorari. *Ramirez v. Arizona*, 513 U.S. 968 (1994).

C

Ramirez filed his initial petition for post-conviction relief in state court, which was denied in its entirety in 1996. The Arizona Supreme Court summarily denied Ramirez's petition for review. Ramirez's post-conviction counsel did not raise the ineffective assistance of trial counsel claim before us now in the initial petition. Arizona concedes that post-conviction counsel in the

initial collateral review proceeding performed deficiently.

In 1997, Ramirez filed a petition for habeas relief with the federal district court. The district court later substituted the Federal Public Defender (FPD) for the previous habeas counsel, "due to concerns regarding the quality of representation." Because of the substitution and its reason, the district court allowed Ramirez to amend his petition. The district court initially allowed Ramirez to add the current ineffective assistance of trial counsel claim, finding it related back to the original petition. But the court ultimately concluded that the claim had been procedurally defaulted by an independent and adequate state bar, and that the procedural default was not excused.[6] *Martinez Ramirez v. Ryan*, No. CV-97-1331-PHX-JAT, 2010 WL 3854792 (D. Ariz. Sept. 28, 2010) (pre-*Martinez* procedural default not excused); *Martinez Ramirez v. Schriro*, No. CV 97-1331-PHX-JAT, 2007 WL 864415, *11 (D. Ariz. March 20, 2007) (order granting leave to amend).

While Ramirez's appeal was pending in this court, the Supreme Court decided *Martinez*, which held: "a

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[6] The current ineffective assistance of counsel claim was initially raised by private pro bono counsel in a successive state habeas petition because the FPD's appointment was for the limited purpose of litigating Ramirez's claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (categorically prohibiting the execution of persons with an intellectual disability). The current ineffective assistance of trial counsel claim was summarily denied because Arizona law requires that ineffective assistance of counsel be raised at the initial collateral review proceeding.

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." 566 U.S. 1at 17.

In light of *Martinez*, we remanded for reconsideration of whether post-conviction counsel's ineffectiveness constituted cause to overcome the procedural default of Ramirez's claim of trial counsel's ineffectiveness. *Ramirez v. Ryan*, 2016 WL 4920284, at *1. The district court ordered supplemental briefing, and Ramirez submitted evidence, including declarations not submitted earlier, to support his request to excuse the procedural default. *Id.* at *4, 8.

The new declarations submitted by Ramirez's family members, who were not contacted by trial counsel, reveal the extent of abuse, poverty, and neglect that Ramirez suffered as a child. Ramirez's step-father, three of Ramirez's maternal aunts, an aunt's ex-husband, and two of Ramirez's uncles submitted declarations. The information in these declarations contrasted with the information revealed at sentencing. Several of the new declarations were from family members who had first hand knowledge of the abuse and neglect Ramirez suffered, and several actually lived with or cared for Ramirez. Ramirez lived with his step-father for seven years. Ramirez's maternal aunt, Eloise Arce, and her husband, William Laubner, Jr., cared for Ramirez for over a year.

In contrast, the testimony presented by two of Ramirez's younger sisters during the mitigation hearing relayed no information about Ramirez's early

years, although they both testified to Ramirez's good nature. Mary Castillo, who has a learning disability herself, contradicted the report that her mother had a drinking problem early in her life. Cynthia Orozco testified that she and Ramirez were "hardly together" when they were younger and that she did not have many memories before she was nine years old (when Ramirez would have been fifteen). Ramirez's aunt, Erlinda, did testify to red flags, including hearing that Maria drank while pregnant and had "many male friends." However, the testimony of Ramirez's younger sisters seemed to conflict with her account.

In the new declarations, Ramirez's family members stated they would have been willing to testify but were never contacted by trial counsel. The declarations reveal that Ramirez was born to a poor migrant worker family. Family members noted their continual exposure to pesticides in the fields where they worked. His mother, Maria, became pregnant with Ramirez after her brother-in-law raped her. Maria was an alcoholic and drug user who drank during her pregnancy, and she attempted to abort the fetus by ingesting herbs and jumping off of the counter.

Things did not improve after Ramirez was born. Maria did not nurture or show love to Ramirez, and Ramirez was often "shuttled around," between various family members, even as an infant, because "[n]obody wanted him." Eloise, who cared for Ramirez for over a year when he was an infant, concluded that "no mother/child bond was ever formed between [Ramirez and Maria]." Maria told a family member that she would put beer in Ramirez's bottle "when he was just

a few years old." Family members recalled that Ramirez and his siblings went hungry, not eating for days while Maria was out drinking and partying. Ramirez was forced to steal food to feed himself. Maria and her children moved frequently, finding whatever "shack" she could, and the homes were always "filthy," with animal feces on the floor. Ramirez and his siblings would eat on the floor, where they also slept on dirty mattresses.

Family members also recalled seeing Maria physically abuse Ramirez, hitting him with "anything she could get her hands on, including electrical cords and shoes." Family members testified that Maria solicited men for sex in bars and allowed men to have sex with her daughter to support her drug and alcohol habit. Maria had an infant who died from exposure after being left in the house without heat in the winter at night while Maria went out partying; Ramirez was in the house asleep at the time.

In addition to the physical abuse and neglect, family members testified to Ramirez's apparent developmental delays, which included delayed walking, potty training, and speech; not being able to read; and "slow" or odd behavior. Family members recalled Ramirez could not take care of himself at a basic level: he had poor hygiene, did not know how to comb his hair, and he ate with his hands because he could not use utensils properly.

During post-conviction proceedings, trial counsel also submitted a declaration, acknowledging that Ramirez's trial was her first capital case and that she had no previous capital experience. She also

represented Ramirez by herself. In her declaration, she noted she was not prepared to handle "the representation of someone as mentally disturbed as David Ramirez," and she also acknowledged that she "did not fully understand his limitations," which prevented her from "explain[ing] David's situation to him on a level that he could fully comprehend." She noted that "[t]he mitigating information that we did present was very limited," and remarked that had she had the information later presented by Ramirez's family members with first hand knowledge of his childhood, it "would have changed the way I handled both David's guilt phase and his sentencing phase." He also stated she "had no strategic reason for not presenting all the mitigation information available."

Dr. McMahon also submitted a declaration, indicating that he did not receive Ramirez's IQ scores or school reports. According to Dr. McMahon, had he been provided with Ramirez's school records and IQ scores, he "would have insisted on obtaining information about Mr. Ramirez's adaptive behavior." He also stated that he would not have administered the PPVT IQ test, which is not a comprehensive IQ test, but rather "would have given Mr. Ramirez a comprehensive IQ test." In addition, Dr. McMahon would not have concluded that Ramirez was not intellectually disabled, because the scores of 70 and 77 on the "more comprehensive WISC IQ test[,] . . . would have indicated to me that Mr. Ramirez may be retarded and it would have greatly expanded the nature of the evaluation I did conduct."

Again, the district court determined that Ramirez's claim of ineffective assistance of trial counsel was procedurally barred and denied Ramirez's request for evidentiary development. The district court did not, however, analyze whether Ramirez had demonstrated cause and prejudice under *Martinez*, but instead based its decision on whether Ramirez's underlying ineffective assistance of counsel claim would ultimately succeed on the merits. *Ramirez v. Ryan*, 2016 WL 4920284, at *4. The district court concluded that "Ramirez ha[d] not shown that Siegel's performance at sentencing fell below an objective standard of reasonableness." *Id.* at *9. The district court also found that "[e]ven if [trial counsel's] performance was deficient, Ramirez cannot show prejudice." *Id.* at *11.

The district court issued a certificate of appealability for the procedural default of Ramirez's ineffective assistance of trial claim, concluding that "reasonable jurists could debate the conclusion that [the ineffective assistance of counsel claim] is procedurally barred." *Id.* at *13.

On appeal, Ramirez raises three certified claims: that (1) the procedural bar of his ineffective trial counsel claim is excused under *Martinez*, (2) his due process rights under *Ake* were violated when the trial court denied his request for mental health experts, and (3) the Arizona state courts applied an unconstitutional causal nexus requirement to exclude his mitigation evidence.

II

We review the denial of habeas relief de novo. *Lopez v. Schriro*, 491 F.3d 1029, 1036 (9th Cir. 2007). Ramirez's certified claims are not subject to the deferential review of 28 U.S.C. § 2254(d) because the state court did not address these claims on the merits. *Ramirez v. Schriro*, No. CV 97-1331-PXH-JAT, 2008 WL 5220936, at *14 n.10 (D. Ariz. Dec. 12, 2008); *see* 28 U.S.C. § 2254(d).

A federal court is precluded from reviewing a claim that has been barred by an independent state procedural rule. *Martinez*, 566 U.S. at 9. When a petitioner has procedurally defaulted a claim, "federal habeas review of the claims is barred unless the prisoner 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). Generally, post-conviction counsel's ineffectiveness does not qualify as cause to excuse a procedural default. *Id.* at 754–55. However, in *Martinez*, the Supreme Court announced a narrow set of circumstances under which a petitioner can establish cause. 566 U.S. at 17. Under *Martinez*, the procedural default of a substantial claim of ineffective assistance of trial counsel is excused if state law requires that all claims be brought in the initial collateral review proceeding, as Arizona law does, and if in that proceeding there was no counsel or counsel was ineffective. *Id.*

Thus, to establish "cause" under *Martinez*—the first part of establishing "cause and prejudice" to excuse a procedural default—Ramirez must demonstrate that

post-conviction counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney*, 813 F.3d at 819. In turn, *Strickland* requires demonstrating "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." *Id.* (citation omitted). Determining whether there was a reasonable probability that the result of the post-conviction proceedings would be different "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective." *Id.*

To establish "prejudice" under *Martinez*'s second prong of the "cause and prejudice" analysis, Ramirez must demonstrate that his underlying ineffective assistance of trial counsel claim is "substantial." *Id.* In *Martinez*, the Supreme Court defined substantial to be a "claim that has some merit," and explained the procedural default of a claim will not be excused if the ineffective assistance of counsel claim "is insubstantial, *i.e.*, it does not have any merit or [ ] it is wholly without factual support." *Martinez*, 566 U.S. at 14–16.

The Supreme Court provided no further definition of substantial, but cited the standard for issuing a certificate of appealability as analogous support for whether a claim is substantial. *Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). Using the standard for issuing a certificate of appealability, for a claim to be substantial a petitioner must show "that reasonable jurists could debate

whether the issue should have been resolved in a different manner or that the claim was adequate to deserve encouragement." *Apelt v. Ryan*, 878 F.3d 800, 828 (9th Cir. 2017) (quotations omitted). "A court should conduct a 'general assessment of the[ ] merits,' but should not decline to issue a certificate 'merely because it believes the applicant will not demonstrate an entitlement to relief.'" *Cook v. Ryan*, 688 F.3d 598, 610 n.13 (9th Cir. 2012) (alteration in original) (quoting *Miller-El*, 537 U.S. at 336–37)).

The analysis of whether both cause and prejudice are established under *Martinez* will necessarily overlap, "since each considers the strength and validity of the underlying ineffective assistance claim." *Djerf v. Ryan*, No. 08-99027, ___ F.3d ___, 2019 WL 3311147, at *6 (9th Cir. July 24, 2019). However, the requirements remain distinct. *Clabourne*, 745 F.3d at 377 (a finding of "'prejudice' for purposes of the 'cause and prejudice' analysis which requires only a showing that the trial-level ineffective assistance of counsel claim was 'substantial'—does not diminish the requirement. . . that petitioner satisfy the 'prejudice' prong under *Strickland* in establishing ineffective assistance by post-conviction counsel").

Thus, to establish cause and prejudice in order to excuse the procedural default of his ineffective assistance of trial counsel claim, Ramirez must demonstrate the following: (1) post-conviction counsel performed deficiently; (2) "there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different," *Id.*; and (3) 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." *Martinez*, 566 U.S. at 14.

III

Ramirez has demonstrated both cause and prejudice under *Martinez* to excuse the procedural default of his ineffective assistance of trial counsel claim. We do not draw a conclusion regarding the ultimate success of his ineffective assistance of trial counsel claim. Rather, we remand for Ramirez to pursue evidentiary development of that claim in the district court.

Whether post-conviction counsel's performance was deficient turns on the strength and substantiality of Ramirez's trial counsel ineffective assistance of counsel claim. We therefore first address whether Ramirez's underlying ineffective assistance of trial counsel claim is substantial, i.e., whether Ramirez can establish prejudice under *Martinez*. Then we evaluate post-conviction counsel's performance under *Strickland* to determine whether Ramirez has established cause under *Martinez*.

A

The district court erred by conducting a full merits review of Ramirez's underlying ineffective assistance of trial counsel claim on an undeveloped record. The district court skipped to a conclusion on the merits of the ineffective assistance of trial counsel claim, thereby holding Ramirez to a higher burden than required in

the *Martinez* procedural default context.[7] The district court concluded that "Ramirez has not shown that Siegel's performance at sentencing fell below an objective standard of reasonableness." *Ramirez v. Ryan*, 2016 WL 4920284, at *9. The district court also concluded that "even if Siegel's performance were deficient, Ramirez cannot show prejudice." *Id.* at *11. Ramirez was not, however, required to demonstrate the ultimate *success* of his underlying ineffective assistance of counsel claim, but rather whether he had established cause and prejudice under *Martinez*.

Indeed, the district court did not address whether the claim was "substantial" at all and failed to evaluate post-conviction counsel's performance under *Strickland* except to refute, in a footnote, Ramirez's contention that the court had already determined that post-conviction counsel performed deficiently. *Id.* at *3 n.1.

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[7] The district court collapsed what should have been a two-step process: first, decide whether the procedural default is excused, and if so, then address the claim squarely, after allowing a chance for any necessary record or evidentiary development. Had the district court found the procedural default excused, even implicitly, then reached the merits of the claim on a properly developed record, this case may have been different. *See Apelt v. Ryan*, 878 F.3d 800, 824 (9th Cir. 2017) (concluding "that the district court implicitly determined that Apelt met the cause and prejudice standard set forth in *Coleman v. Thompson*, and thus could address the merits of Apelt's IAC claims" (internal citation omitted)). However, the district court explicitly held that the procedural default was not excused based on its conclusion that Ramirez's ineffective assistance of trial counsel claim failed on the merits.

The district court issued a certificate of appealability for the procedural default of Ramirez's ineffective assistance of counsel claim, finding that "reasonable jurists could debate the conclusion that [the ineffective assistance of counsel claim] is procedurally barred." *Id.* at *13.

B

We now turn to a de novo review of whether Ramirez has demonstrated that his claim of ineffective assistance of trial counsel is substantial, thus constituting "prejudice" under *Martinez*. Ramirez asserts that his claim of ineffective assistance of trial counsel is substantial because trial counsel failed to present evidence of intellectual disability, brain damage, and "the myriad mitigating circumstances in his background." We agree.

1

To conduct a "general assessment of the merits" of Ramirez's underlying ineffective assistance of trial counsel claim, we must examine the *Strickland* standard. *See Cook*, 688 F.3d at 610 & n.13. Under *Strickland*, a petitioner must prove that counsel's performance fell below an objective standard of reasonableness and that the deficiency prejudiced the petitioner. 466 U.S. at 689. An objective standard of reasonableness is measured by the "prevailing professional norms" at the time of representation. *Id.* at 688. The inquiry of counsel's performance under *Strickland* is "highly deferential," the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance," and "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (quotations omitted).

The professional norms when Ramirez was sentenced placed an affirmative duty on counsel "to investigate, develop, and present mitigation evidence during penalty phase proceedings." *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (en banc) (discussing prevailing professional norms during the 1980s). During capital penalty proceedings, "[t]he duty to investigate is critically important." *Id.* "Although we must defer to a lawyer's strategic trial choices, those choices must have been made after counsel has conducted reasonable investigations or made a reasonable decision that makes particular investigations unnecessary." *Id.* (internal quotations and citation omitted).

There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." *Boyde v. California*, 494 U.S. 370, 382 (1990) (quotations omitted; emphasis in original). Because of this shared belief, "it is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Summerlin*, 427 F.3d at 630 (alterations and quotations omitted). An investigation should include "inquiries into social background and evidence of family abuse." *Id.* Counsel must also probe for evidence of mental impairment and "examine the

defendant's physical health history, particularly for evidence of potential organic brain damage and other disorders." *Id.*

2

We first assess trial counsel's performance under the first prong of *Strickland* to determine whether Ramirez's claim is substantial. Ramirez has presented a substantial claim that trial counsel performed deficiently because she failed to pursue or present evidence that Ramirez was intellectually disabled; failed to provide potentially powerful mitigating evidence to Dr. McMahon; and subsequently relied on Dr. McMahon's report, despite possessing conflicting facts. We recognize that this is not a case where counsel failed to present any mitigating evidence. However, her failure to present or pursue evidence that, if considered, could have made a difference in the outcome of Ramirez's trial, is substantial, particularly given that our review is de novo and unconstrained by the strictures of 28 U.S.C. § 2254(d). Thus, Ramirez's ineffective assistance of trial counsel claim was at least a substantial one within the meaning of *Martinez*.

For example, trial counsel had evidence demonstrating that Ramirez may have been intellectually disabled. She knew he scored 70 and 77 on IQ scores in school, was three to four grades behind his peers, switched schools ten times before completing seventh grade, and never graduated from high school. *Ramirez v. Ryan*, 2016 WL 4929284, at *5. As she later revealed, her own interactions with Ramirez raised concerns about his intellectual functioning and ability to understand his situation. Trial counsel had no

capital experience and had not even observed a capital trial or sentencing. She admitted she was unprepared to represent "someone as mentally disturbed as David Ramirez, especially in a capital case."

Despite possessing these facts, trial counsel failed to investigate further or present a claim of mental impairment, and instead relied on Dr. McMahon's conclusion that Ramirez was "well within the average range of intelligence."

"We have repeatedly held that counsel may render ineffective assistance if he is on notice that his client may be mentally impaired, yet fails to investigate his client's mental condition as a mitigating factor in a penalty phase hearing." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (quotations omitted). Here, inexplicably, trial counsel did not provide Ramirez's IQ scores or the school records she did have to Dr. McMahon. While it is generally reasonable to rely on an expert opinion, particularly where Ramirez requested the expert, it is not reasonable to fail to provide that expert with the critical information that would inform the tenor and type of evaluation administered. *Id.* ("[C]ounsel's failure to investigate and provide appropriate experts with the information necessary to evaluate Caro's neurological system for mitigation constituted deficient performance under *Strickland*."). Dr. McMahon's conclusion that Ramirez was "well within the average range of intelligence" could well have been different had he had knowledge of Ramirez's poor school records and attendance, his low IQ scores, his exposure to alcohol, and trial counsel's

interactions with Ramirez, as Dr. McMahon's later declaration attests.

Trial counsel provided Dr. McMahon with police reports, plea agreements, notes from an interview, and sentencing orders. The fact that she presented Dr. McMahon with certain information, but failed to provide the records that could lead to potentially powerful mitigating evidence, is unreasonable and supports a substantial claim of deficient performance. *See Clabourne*, 745 F.3d at 383 (concluding that petitioner's counsel was ineffective during capital sentencing based on three grounds, including for "fail[ing] to provide any mental health expert with health records sufficient to develop an accurate psychological profile of [petitioner].").

Trial counsel also possessed facts regarding Ramirez's upbringing that contradicted the conclusions and observations in Dr. McMahon's report. The report concluded that Maria "devot[ed] her time as a traditional Mexican-American mother whose responsibility revolved around the home and her children," and that Maria "was always there" for Ramirez "as he was growing up." As additional mitigating testimony from family members who lived with and cared for Ramirez later revealed, Dr. McMahon's description of Maria's relationship with Ramirez could not be farther from the truth. Maria physically abused Ramirez, who was repeatedly shuttled around family members' homes because he was not wanted. Ramirez and his siblings were neglected and left alone for days on end, living in "filthy" conditions. They were often hungry. Ramirez

witnessed significant violence at home. Ramirez evidenced significant developmental delays and attended school sporadically, not finishing high school.

Despite counsel's affirmative duty to "conduct sufficient investigation and engage in sufficient preparation to be able to present and explain the significance of all the available mitigating evidence," the misleading conclusions and observations in Dr. McMahon's report were left unchallenged and unexplained. *See Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) (quotations and alterations omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 399 (2000)).

Trial counsel had a duty to investigate and pursue mitigating evidence, especially where "tantalizing indications in the record suggest[ed] that certain mitigating evidence may be available." *Lambright v. Schriro*, 490 F.3d 1103, 1117 (9th Cir. 2007) (quotations omitted). Given trial counsel's knowledge of Ramirez's poor school records and attendance, his low IQ scores, her own interactions with Ramirez, his exposure to alcohol, and the red flags in his family's testimony, trial counsel was under an affirmative "duty to investigate and present mitigating evidence of mental impairment as well as evidence of family abuse." *Id.* at 1117. Ramirez has made out a substantial claim that trial counsel performed deficiently.

3

Given the deficient performance, we next analyze whether Ramirez has demonstrated a substantial claim

of prejudice as a result of trial counsel's deficient performance. Under *Strickland*, "[t]o establish 'prejudice,' a petitioner 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Sexton v. Cozner*, 679 F.3d 1150, 1159–60 (9th Cir. 2012). "To assess that probability, we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quotations and alterations omitted).

First, we address the effect of counsel's failure to provide Dr. McMahon with Ramirez's IQ scores. Trial counsel's failure to provide accurate and complete records to Dr. McMahon support a substantial claim of prejudice to Ramirez because the failure led to the presentation of an inaccurate and flawed report at sentencing. Although Ramirez was sentenced to death before *Atkins*,[8] as the district court noted, "in Arizona

[8] The government argues that the determination that Ramirez was not intellectually disabled in the context of his *Atkins* claim hearings is binding here. We disagree. Finding that Ramirez is intellectually disabled and thus cannot be executed under *Atkins* is different than presenting mitigating evidence of an intellectual disability. *See Doe v. Ayers*, 782 F.3d 425, 441 (9th Cir. 2015). ("[A]ll potentially mitigating evidence is relevant at the sentencing phase of a death case, so a troubled childhood and mental problems may help even if they don't rise to a specific, technically-defined level."). Nevertheless, we note that two experts did diagnose Ramirez with an intellectual disability in connection with the *Atkins* claim.

a 'slow, dull and brain-damaged' mental impairment may have a significant mitigating effect as it may evidence an inability of the defendant to control his conduct." *Martinez Ramirez v. Ryan*, 2010 WL 3854792, at *5. In his declaration, Dr. McMahon remarked that he would not have concluded that Ramirez's score on the PPVT test was "in no way indicative of any form of mental retardation" had he seen Ramirez's school record and IQ scores, as "[t]hese scores would have indicated to me that Mr. Ramirez may be retarded and it would have greatly expanded the nature of the evaluation I did conduct." It also would have changed the type of testing that Dr. McMahon administered. Dr. McMahon indicated in his declaration that he would not have administered the PPVT test, but "would have given Mr. Ramirez a comprehensive IQ test[, because] [t]he PPVT is not a comprehensive IQ test." The IQ tests that resulted in Ramirez's lower scores of 70 and 77 were "the more comprehensive WISC IQ tests."

Second, the mitigating evidence introduced during post-conviction proceedings was not all cumulative. We disagree that the new mitigating evidence "would barely have altered the sentencing profile presented to the sentencing judge." *See Strickland*, 466 U.S. at 699–700. Viewing the record of mitigating evidence available as a whole to the sentencing judge and the record of mitigating evidence available now, we are persuaded that Ramirez's claim of prejudice is not "wholly without factual support." *See Martinez*, 566 U.S. at 16.

The mitigation evidence presented during sentencing did not consistently or accurately describe

the circumstances of Ramirez's life. Dr. McMahon's report concluded that Ramirez was "well within the average range of intelligence," and indicated Maria was a loving mother who was there for the children and Ramirez as he was growing up. During the mitigation hearing, Ramirez's family members generally testified about Ramirez's good qualities. The testimony of Ramirez's younger sisters was largely unhelpful: Cynthia did not live with Ramirez for much of their childhood and could not recall any details of their childhood. Mary testified to a relatively normal childhood, although it was later revealed that Mary herself faced intellectual challenges.

Overall, the picture of mitigation presented at sentencing is relatively innocuous compared to the details that later emerged about Ramirez's life. The sentencing memorandum used by trial counsel highlighted and discussed Ramirez's criminal history, school attendance, substance abuse, and ability to adapt in prison. Had the sentencing memorandum instead highlighted that Ramirez's childhood was "filled with abuse and privation, or the reality that he was 'borderline mentally retarded,'" there is "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." *See Williams*, 529 U.S. at 398–99 (quotations omitted). The judge did find several mitigating factors, and only three aggravating factors. Had the evidence of a mental impairment been introduced, as well as the evidence of the level of abuse Ramirez suffered, there is a substantial claim that the

judge "would have struck a different balance." *See Porter*, 558 U.S. at 42 (quotations omitted).

The mitigating evidence Ramirez has presented is not too speculative, irrelevant, or weak to disregard. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 481 (2007). Neither is it a situation where the petitioner is pointing to some unknown and yet to be discovered mitigating evidence. *Djerf*, 2019 WL 3311147, at *7 ("Djerf has failed to identify any evidence related to his childhood that counsel should have, but did not, uncover."). Here, two psychologists diagnosed Ramirez as intellectually disabled, with one finding evidence of brain dysfunction. Subsequent declarations revealed the extent of the physical abuse and extreme neglect that Ramirez suffered, corroborated by multiple family members who were not contacted by trial counsel.

In sum, Ramirez has established a substantial claim that he was prejudiced by trial counsel's deficient performance under *Strickland*. Based on the foregoing, and without Ramirez receiving the benefit of full evidentiary development, we cannot conclude that Ramirez's ineffective assistance of trial counsel claim overall "is insubstantial, *i.e.*, it does not have any merit or [ ] it is wholly without factual support." *Martinez*, 566 U.S. at 16. Therefore, Ramirez has established prejudice under *Martinez*.

C

We now turn to whether Ramirez has established cause under *Martinez*. We conclude that he has. The government concedes that post-conviction counsel's performance was constitutionally deficient, but argues

that because trial counsel's performance was not deficient, post-conviction counsel's "failure to raise a successful ineffective assistance of trial counsel claim was not prejudicial." ("[T]here is little question that his performance was constitutionally deficient under *Strickland*.").

As the foregoing discussion indicates, we conclude that Ramirez's ineffective assistance of trial counsel claim is "substantial." The underlying ineffective assistance of counsel claim is strong enough to support a conclusion that, had post-conviction counsel performed effectively and raised the claim, "there [is] a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *See Clabourne*, 745 F.3d at 377.

The district court clearly saw problems with post-conviction counsel's performance and potential prejudice as a result. Although the district court did not conclude that post-conviction counsel was deficient under *Strickland*, the court made the following observations while assessing post-conviction counsel's performance in a pre-*Martinez* context:

> Based on the sentencing record, [post-conviction relief ("PCR")] counsel was on notice that Petitioner had two IQ tests documenting low intelligence and another test demonstrating he was behind his peers in educational development. PCR counsel was also on notice that the presentence report indicated that Petitioner displayed low intelligence and emotional immaturity. Even though Dr.

> McMahon reported that Petitioner was not mentally retarded, PCR counsel was still on notice of the contrast between Dr. McMahon's report and the low IQ scores being reported, as well as the mental health deficiencies counsel presented as mitigation at sentencing. PCR counsel was also on notice of his need to investigate mental health because in Arizona a "slow, dull and brain-damaged" mental impairment may have a significant mitigating effect as it may evidence an inability of the defendant to control his conduct.

Martinez Ramirez v. Ryan, 2010 WL 3854792, at *5 (internal citations omitted).

Post-conviction counsel possessed evidence that indicated that Ramirez could have an intellectual disability, and knew that trial counsel failed to present or pursue evidence of an intellectual disability. Had post-conviction counsel performed effectively, by reviewing the record, trial counsel's failure to present evidence of Ramirez's intellectual disability would have readily revealed itself. Also, had post-conviction counsel conducted a reasonable investigation into Ramirez's upbringing, taking into account the "red flags" raised at the penalty phase hearing, the record of physical abuse and neglect Ramirez suffered as a child could have been presented in support of the ineffective assistance of trial counsel claim. Had post-conviction counsel raised the substantial claim of ineffective assistance of trial counsel, for failure to pursue and present mitigating evidence of an intellectual disability, there is a reasonable probability

that the result of the post-conviction proceedings would have been different. We therefore conclude that Ramirez has established cause under *Martinez*.

D

Finally, the district court erred in denying Ramirez evidentiary development of his ineffective assistance of counsel claim. Ramirez asserts he should have been given the opportunity to present testimony from mental health experts, sentencing counsel, prior investigators, a capital mitigation expert, and lay witnesses in order to prove his ineffective assistance of counsel claim. We agree. *Martinez*, 566 U.S. at 13 ("Ineffective-assistance claims often depend on evidence outside the trial record."). Because we now hold that Ramirez has established both cause and prejudice to excuse the procedural default of his claim, he no longer requires evidentiary development to support establishing cause and prejudice under *Martinez*. However, he is entitled to evidentiary development to litigate the merits of his ineffective assistance of trial counsel claim, as he was precluded from such development because of his post-conviction counsel's ineffective representation. *See Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc).

IV

The district court correctly concluded that Ramirez's rights under *Ake v. Oklahoma* were not violated. 470 U.S. 68 (1985). Ramirez asserts that because the record demonstrated that his mental health would be an issue during sentencing, due process required the

appointment of a mental health expert.[9] Ramirez also asserts that the district court's interpretation of *Ake* was erroneous and that the trial court forced Ramirez to waive self-representation to obtain a mental health expert.

Under *Ake*, a defendant is entitled to an independent psychological examination to assist in his defense during "a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness." 470 U.S. at 83. Under our precedent, the right to a mental health expert is not limited to when the state presents evidence of future dangerousness. *Williams* v. *Ryan*, 623 F.3d 1258, 1268–69 (9th Cir. 2010) ("[O]ther circuits have interpreted *Ake* to require a state to provide a defendant expert psychiatric assistance at sentencing only where the state also planned to rely on psychiatric testimony. Yet, we have never read *Ake* so narrowly."). Indeed, "[w]here the mental health of an accused person is genuinely in issue, due process requires the opportunity to have an independent mental health expert to assist the defense." *Williams v. Stewart*, 441 F.3d 1030, 1049 (9th Cir. 2006).

The district court rejected Ramirez's *Ake* claim, noting that *Ake* does not require the appointment of a mitigation specialist. Further, the district court found that even under a broad reading of *Ake*, according to the district court, Ramirez had not made a showing

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[9] Ramirez argued in the district court that he was denied mental health experts during the guilt phase of his proceeding; however, he does not pursue that claim on appeal.

that his mental health would be a significant issue in sentencing. Finally, the district court noted that the trial court did appoint a psychologist, Dr. McMahon, whose report Ramirez and the trial court relied on to find a statutory mitigating circumstance. *Ramirez v. Schriro*, 2008 WL 5220936, at *16.

The district court correctly rejected Ramirez's *Ake* claim. Due process under *Ake* does not require the appointment of a mitigation specialist, so we assess whether Ramirez was denied access to an independent psychological evaluation. We agree with the district court that even under a broad reading of *Ake*, Ramirez's claim fails because he *did* receive the assistance of an independent psychologist. Similarly, despite the court's initial incredulity at appointing a psychologist and a mitigation specialist, it ultimately appointed several experts, so there was no impermissible waiver of self-representation.[10]

Ramirez asserts that the "subsequent appointment of a neutral psychologist is irrelevant." We disagree. To the extent Ramirez is relying on *Smith v. McCormick*, that case is easily distinguishable. 914 F.2d 1153 (9th Cir. 1990). In *Smith*, due process was violated because the court ordered a psychiatrist to report directly to the court, so the psychiatrist never met with Smith's counsel and "in no sense assisted in the evaluation or preparation of the defense." *Id.* at 1157–58.

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[10] In addition, the trial judge who expressed incredulity over Ramirez's pre-trial requests for experts did not preside over Ramirez's sentencing because the case was transferred before trial.

Here, the trial court appointed Dr. McMahon, a psychologist suggested by Ramirez. Although the court appointed Dr. McMahon on its own motion and to help the court make a decision, ultimately Ramirez, not the state or the court, relied on Dr. McMahon's report. Ramirez did not request the appointment of an additional psychologist to rebut anything in Dr. McMahon's report. Additionally, the trial court relied on Dr. McMahon's report to find one statutory mitigating factor: that Ramirez lacked the "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Ramirez's due process rights under *Ake* were not violated.

V

Although we sua sponte expanded the certificate of appealability to include the issue of whether the Arizona state courts improperly excluded Ramirez's mitigating evidence because it was not causally connected to his crime in violation of *McKinney*, we conclude that the Arizona courts did not unconstitutionally apply a causal nexus requirement to Ramirez's mitigating evidence.

Under *Lockett v. Ohio*, during capital sentencing, the sentencing judge should "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978). In *McKinney*, 813 F.3d at 816, 819, we held that the Arizona Supreme Court was improperly excluding nonstatutory mitigating evidence as a matter of law,

requiring defendants to prove a causal connection between the mitigating evidence and the commission of the crime, during its review of death sentences in violation of *Lockett* and *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

This unconstitutional causal nexus requirement was articulated by the Arizona Supreme Court in capital cases from the late 1980s until 2005. *See State v. Anderson*, 111 P.3d 369, 391 (Ariz. 2005) (holding that mitigating evidence in a capital case cannot be rejected because it lacks a causal nexus to the crime); *see also McKinney*, 813 F.3d at 809. During that time period, the Arizona Supreme Court case law "forbade as a matter of law giving weight to [nonstatutory] mitigating evidence, such as family background or mental condition, unless the background or mental condition was causally connected to the crime." Two specific cases that enunciated these rules were *State v. Wallace*, 773 P.2d 983 (Ariz. 1989) and *State v. Ross*, 886 P.2d 1354 (Ariz. 1994). *Id.* at 802.

In *McKinney*, defendant's proffered mitigating evidence was explicitly rejected by both the Arizona trial court and the Arizona Supreme Court: "A difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions." *State v. McKinney*, 917 P.2d 1214, 1227 (Ariz. 1996). The Arizona Supreme Court cited *Ross*, 886 P.2d at 1363, to support its disregard of the mitigating evidence. *Id.*

In *Apelt*, we identified the critical factors that indicated whether the Arizona courts during the pertinent time period did not apply the unconstitutional causal nexus requirement by disregarding mitigating evidence otherwise generally used during that period. 878 F.3d at 839–40. In *Apelt*, we noted the following factors: (1) the trial court did not state a factual conclusion regarding a causal nexus between the mitigation evidence and the defendant's conduct; (2) the Arizona Supreme Court did not state a factual conclusion that any proffered mitigation would have "influenced [the defendant] not to commit the crime;" and (3) the Arizona Supreme Court did not cite either *Ross* or *Wallace* when reviewing the mitigating evidence. *Id.*

Though the Arizona Supreme Court reviewed Ramirez's convictions in 1994, during the period that the Arizona Supreme Court was applying a causal nexus requirement, the record here indicates that mitigating evidence was not rejected as a matter of law. In fact, the record compels the opposite conclusion. Importantly, the trial court found nonstatutory mitigating factors including: "his unstable family background," "his poor educational experience," "that he was a victim of sexual abuse while he was young," "his chronic substance abuse," "his psychological history," and "his love of family." At a hearing before Ramirez was sentenced, the judge stated, "I have difficulty placing substantial significance on the lifestyle that this Defendant experienced, *although I, obviously, am giving it some weight*."

The Arizona Supreme Court affirmed all of the mitigating circumstances found by the trial court, and neither of the state courts excluded any mitigating evidence because it was not causally connected to the crime. Ramirez argues that had the judge truly considered the mitigating factors, he would not have been sentenced to death. What the trial court would have decided had it considered all the mitigating evidence actually presented at trial–as opposed to the evidence that could have been presented had trial counsel not been ineffective–is not at all self-evident; it is certainly not proof that, despite express attestation to the contrary, no weight was given to the mitigating evidence in question.

Here, as in *Apelt*, there is no statement from either state court that indicates that the state courts refused to consider mitigating evidence as a matter of law because it was unrelated to the crime. Additionally, the sentencing judge expressly indicated that he *would* give some weight to the relevant mitigating factors. Further, neither of the state courts cited to *Ross* or *Wallace* in reviewing Ramirez's mitigating evidence. We are not prepared to find error where the Arizona courts did not articulate an unconstitutional causal nexus test to mitigating evidence, did not cite *Ross* or *Wallace*, found several non-statutory mitigating factors, and stated that the non-statutory factors would be given some weight.

VI

In sum, we reverse the judgment of district court as to the procedural default of the ineffective assistance of counsel claim, and remand for an evidentiary hearing

on that issue. We affirm the district court's denial of Ramirez's *Ake* claim and reject Ramirez's *McKinney* claim. We do not reach the remaining uncertified issues.[11] *See* 28 U.S.C. § 2253(c)(2).

AFFIRMED in part, REVERSED in part, and REMANDED.

BERZON, Circuit Judge, dissenting in part:

I concur in the opinion except in one respect: I would grant a certificate of appealability with regard to Ramirez's claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of intellectually disabled persons), *see* Opinion at 40 n.11, hold that the claim does relate back to Ramirez's ineffective assistance of counsel claim, and remand to the district court for further proceedings.

We may grant a certificate of appealability if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner makes this substantial showing "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims." *Cain v. Chappell*, 870 F.3d 1003, 1015 (9th Cir. 2017). But the district court did not consider the merits of Ramirez's *Atkins* constitutional claim because it concluded that the claim was not timely filed and did

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[11] One of these uncertified issues that we decline to address is Ramirez's claim under *Atkins v. Virginia*, 536 U.S. 304. Ramirez is, of course, not precluded from asserting an independent *Atkins* claim when an execution date is set based on his alleged intellectual disability at that time.

not relate back to a timely filed habeas claim under Federal Rule of Civil Procedure 15. In this circumstance, our inquiry has two parts:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). Applying this standard, a certificate of appealability should issue on the relation back issue.

First, jurists of reason would find it debatable whether Ramirez has a valid claim under *Atkins*. Ramirez is likely not entitled to relief under 28 U.S.C. § 2254(d)(1), as the state court decision is probably not contrary to federal law clearly established at the time. *See Shoop v. Hill*, 139 S. Ct. 504 (2019). But Ramirez could possibly prevail on his claim under section 2254(d)(2) that the state court unreasonably determined the facts in concluding that Ramirez was not intellectually disabled. *Cf. Brumsfeld v. Cain*, 135 S. Ct. 2269, 2278 (2015) (concluding that under section 2254(d)(2) the state court unreasonably determined the facts regarding petitioner's *Atkins* claim).

Ramirez contends that the state court unreasonably determined the facts by, *inter alia*, relying on certain

experts it acknowledged did not have the requisite credentials and did not administer the proper tests; refusing to take the Flynn effect[1] into account; and refusing to follow *community* intelligence standards by placing significant weight on Ramirez's adaptive strengths while in prison rather than outside a structured environment. Ramirez has raised a colorable argument that, by failing to follow the established science on intellectual disability, the state court unreasonably determined that he was not intellectually disabled.

Second, I believe it more than debatable that the district court erred in its procedural ruling, and that Ramirez's *Atkins* claim *does* relate back to his timely filed ineffective assistance of counsel claim. A claim relates back under Rule 15(c) if there is "a common core of operative facts uniting the original and newly asserted claims." *Mayle v. Felix*, 545 U.S. 644, 659 (2005). A claim will not relate back "when the new claims depend upon events separate in 'both time and type'" from the original relief requested. *Id.* at 657. This "time and type" language "refers not to the claims, or grounds for relief. Rather, it refers to *the facts that support those grounds*." *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013) *abrogated on other grounds by Davila v. Davis*, 137 S. Ct. 2058 (2017).

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[1] "The basic premise of the Flynn effect is that because average IQ scores increase over time, a person who takes an IQ test that has not recently been normed against a representative sample of the population will receive an artificially inflated IQ score." *Smith*, 813 F.3d at 1184.

The *Atkins* claim and the ineffective assistance of trial counsel claim we are remanding for consideration on the merits share a "common core of operative facts" similar in "time and type." *See Mayle*, 545 U.S. 657, 59. The core of Ramirez's ineffective assistance claim is the failure of his attorney and the psychological expert to investigate and appreciate the facts indicating the severity of Ramirez's mental impairments, principally his intellectual disability. Litigating the ineffective assistance of trial counsel claim on its merits requires presenting the evidence trial counsel should have introduced regarding Ramirez's mental disability. Ramirez's *Atkins* claim depends on the same facts—what a properly developed record shows concerning Ramirez's cognitive abilities and adaptive behavior.

The district court held that "[w]hile proof that Petitioner is mentally retarded could have been offered as mitigation at sentencing and, therefore, is reasonably part of his IAC-at-sentencing claim, the *Atkins* claim is not based on attorney error." This difference indicates that the two are different *types of claims*. But as *Ha Van Nyguen* clarified, that is not the relevant inquiry under *Mayle*. *See* 736 F.3d at 1297. (The district court's decision in 2008 was made without the benefit of *Ha Van Nyguen*, a decision published in 2013.) "*[F]acts that support those grounds*" for relief in each claim—Ramirez's actual intellectual disability—*are* similar—indeed, largely identical—in time and type. *See id*.

Respondents rely on *Schneider v. McDaniel*, 674 F.3d 1144 (9th Cir. 2012), to argue that Ramirez's

Atkins claim does not relate back. *Schneider* is inapposite. In *Schneider*, the petitioner argued that his new ineffective assistance of counsel claim related back to a previous, different ineffective assistance claim because of the common fact of counsel's ineffectiveness. *Id.* at 1151. The substantive part of the two claims—that is, what counsel did not do and so was ineffective—was entirely different. *See id.* It was this kind of partial overlap that *Schneider* rejected, because it "would stand the Supreme Court's decision in *Mayle* on its head." *Id.* Here, in contrast, the new claim that relates back is a merits claim, not one of ineffective assistance of counsel. As to that merits claim, the overlap with the merits aspect of the Ramirez's ineffective assistance of counsel claim is near complete.

This case is also distinct from one arguing that an ineffective assistance of counsel claim relates back to a connected merits claim. In *United States v. Ciampi*, 419 F.3d 20 (1st Cir.2005), for example, petitioner's ineffective assistance of counsel claim was based on his counsel's failure to inform petitioner of his rights before the plea. *Ciampi* held that ineffective assistance claim did not relate back to his initial petition alleging a due process violation based on the *court's* failure to advise the petitioner of the same consequences. *Id.* at 24. As the facts of *Ciampi* illustrate, ineffective assistance claims often incorporate both facts contained in the trial record and supplemental facts regarding the actions (and inactions) of counsel. An ineffective assistance claim will factually overlap in some respects with a related merits claim, but, as in *Ciampi*, critical facts outside the trial record may not overlap. If those supplemental facts are core operative facts of an

ineffective assistance claim, the claim may not relate back to the underlying merits claim. I note that some ineffective assistance claims *do* relate back to the incorporated merits issue. *Ha Van Nyguen*, 736 F.3d at 1297, so held, concluding that an ineffective assistance of appellate counsel claim for failing to raise a double jeopardy claim *did* relate back because it shared a common core of facts with petitioner's timely filed cruel and unusual punishment claim.

What we have here is the reverse situation from *Nyguen*: the ineffective assistance of trial counsel claim required establishing what an effective trial counsel would have done regarding the underlying claim—here the penalty phase mitigation presentation as it related to Ramirez's mental disability—and whether it was likely to have succeeded; the merits claim that is sought to be added to the habeas petition—the *Atkins* claim—concerns the same issue—Ramirez's mental disability. In that circumstance, the relevant core facts of the merits claim are *necessarily* incorporated in the ineffective assistance claim, so relation back is appropriate. That is the scenario currently before us.

The central concern of the relation back doctrine as applied in *Mayle* and *Nyguen* is whether the newly articulated claim will require substantial additional factual development. Now that the merits portions of the ineffective assistance of trial counsel claim concerning the failure to present available evidence of Ramirez's mental disability at the penalty phase is going forward, the *Aktins* claim will not require substantially different factual development. Both claims turn essentially on whether Ramirez was

intellectually disabled at the time of trial, and if so, to what degree. The district court on remand already must allow evidentiary development regarding the merits of Ramirez's ineffective assistance of trial counsel claim with regard to penalty phase mitigating evidence for purposes of determining whether trial counsel was ineffective. In all likelihood, the evidence presented to show what trial counsel should have presented but did not will include the very same expert evidence introduced in state court in support of the *Atkins* claim.

In sum, Ramirez has shown "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" under *Atkins*. *See Slack*, 529 U.S. at 484. Because jurists of reason would also disagree with the district court's relation back holding, Ramirez is entitled to a certificate of appealability on his *Atkins* claim. *See id.*

Once a certificate of appealability is granted, we review the district court's denial of Ramirez's proposed amendment for abuse of discretion. *Hebner v. McGrath*, 543 F.3d 1133, 1136 (9th Cir. 2008). Because the *Atkins* claim does share a "common core of operative facts" with his ineffective assistance claim as discussed above, and because the district court misapplied the "time and type" language in *Mayle*, *see Ha Van Nguyen*, 736 F.3d at 1297, I would conclude that Ramirez's *Atkins* claim does relate back to the timely filed habeas petition, and that the district court abused its discretion in holding otherwise.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-99023

D.C. No. 2:97-cv-01331-JAT

[Filed: August 24, 2020]

DAVID MARTINEZ RAMIREZ, *Petitioner-Appellant*,	)
v.	)
DAVID SHINN,* Director, Arizona Department of Corrections, *Respondent-Appellee*.	)

ORDER

Before: Sidney R. Thomas, Chief Judge, and Marsha S. Berzon, and Richard R. Clifton, Circuit Judges.

Order;
Dissent by Judge Collins

SUMMARY**

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* David Shinn has been substituted for his predecessor, Charles L. Ryan, as Director, Arizona Department of Corrections, under Fed. R. App. P. 43(c)(2).

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

Habeas Corpus

The panel denied a petition for rehearing and denied on behalf of the court a petition for rehearing en banc.

Dissenting from the denial of rehearing en banc, Judge Collins, joined by Judges Callahan, Ikuta, R. Nelson, Lee, Bress, Bumatay, and VanDyke, wrote that the panel's decision disregards controlling Supreme Court precedent by creating a new judge-made exception to the restrictions imposed by the Antiterrorism and Effective Death Penalty Act on the use of new evidence in habeas corpus proceedings.

COUNSEL

Paula K. Harms (argued) and Timothy M. Gabrielsen, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Tucson, Arizona; for Petitioner-Appellant.

John P. Todd (argued), Special Assistant Attorney General; W. Scott Simon, Assistant Attorney General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

ORDER

The panel has voted to deny the Respondent-Appellee's petition for rehearing. Chief Judge Thomas and Judge Berzon voted, and Judge Clifton recommended, to deny Respondent-Appellee's petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**. No future petitions for rehearing or rehearing en banc will be entertained.

COLLINS, Circuit Judge, with whom CALLAHAN, IKUTA, R. NELSON, LEE, BRESS, BUMATAY, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel decisions in *Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019), and *Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019), disregard controlling Supreme Court precedent by creating a new judge-made exception to the restrictions imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") on the use of new evidence in habeas corpus proceedings. *See* 28

U.S.C. § 2254(e)(2). I respectfully dissent from our failure to rehear these cases en banc.[1]

As the Supreme Court has explained, the negligence of "postconviction counsel" in developing the evidentiary record in state court is "chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied." *Holland v. Jackson*, 542 U.S. 649, 653 (2004). Specifically, § 2254(e)(2) bars "relief based on new evidence," with or without a hearing, unless one of its exceptions is applicable. *Id.* In both *Jones* and *Ramirez*, state postconviction counsel failed to develop the record to support the current claims of ineffective assistance of trial counsel that both petitioners wish to present in federal habeas corpus proceedings. Although there is (and can be) no contention that any of § 2254(e)(2)'s exceptions apply in either case, the panels in both cases nonetheless held that the strictures of § 2254(e)(2) did *not* apply to the new evidence that the petitioners wished to present in support of the merits of those claims.

The panels' reasoning was that, because the Supreme Court has held that ineffective assistance of postconviction counsel may establish "cause to excuse" the *separate* "procedural default" of failing to raise an ineffective-assistance-of-trial-counsel claim in state court, *see Martinez v. Ryan*, 566 U.S. 1, 13 (2012), a similar exception should also be recognized to excuse the separate prohibition on new evidence set forth in § 2254(e)(2). But *Martinez* relied on "the Court's

[1] In light of the common issue raised in the two cases, I am filing an identical combined dissent in both cases.

discretion" to alter *judge-made* rules of procedural default, *id.*, and that power to recognize "judge-made exceptions" to judge-made doctrines does not extend to *statutory* provisions, *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). "There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Id.* And Congress has been clear in § 2254(e)(2) that it does not want any such new exceptions. Indeed, prior to the enactment of § 2254(e)(2), both distinct types of failure (*i.e.*, failure to raise a claim at all and failure to develop the factual record) were governed by the same "cause and prejudice" standard that *Martinez* later modified. *See Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992). But in § 2254(e)(2), Congress explicitly abrogated *Keeney*'s "cause and prejudice" standard and replaced it with a much more demanding standard that is concededly not met in either *Jones* or *Ramirez*. Given that Congress has eliminated in the evidentiary-development context the very predicate on which *Martinez* is based, we have no authority to rewrite the statute and to engraft a judge-made *Martinez* exception onto it.

The *Ramirez* decision presents a particularly stark violation of § 2254(e)(2). *Jones* only went so far as to contend that the *same* evidence used to established cause and prejudice under *Martinez* could then be used, notwithstanding § 2254(e)(2), to establish the merits of the underlying ineffective-assistance-of-trial-counsel claim. While I believe that even this result contravenes Supreme Court authority, it at least has the virtue of making its new judge-made exception to § 2254(e)(2) coextensive with the *Martinez* exception. But in

Ramirez, the panel held that, even after the *Martinez* exception had been established with new evidence, the petitioner was entitled to keep going and to develop even *more* evidence as if § 2254(e)(2) did not exist at all. Nothing supports *Ramirez*'s egregious disregard of the clear strictures of § 2254(e)(2).

I

A

David Ramirez was convicted by an Arizona jury of the first-degree murders of his girlfriend and her daughter, and he was sentenced to death by a judge. *Ramirez*, 937 F.3d at 1234. Ramirez's trial attorney, Mara Siegel, was a Maricopa County public defender, and Ramirez's case was her first capital assignment. *Id.* at 1235. After his conviction and sentence were affirmed on direct appeal, Ramirez filed a petition for postconviction relief in state court, but he did not raise a claim that his trial counsel had been ineffective in the particular respects that he now asserts. *Id.* at 1238. The state petition was denied. *Id.*

Ramirez then filed a federal habeas petition, the operative version of which raised the claim that trial counsel was ineffective in her presentation of mitigation evidence during the penalty phase. 937 F.3d at 1238. The federal district court initially denied the claim as procedurally defaulted, because Ramirez had failed to raise the claim during his initial state postconviction-relief proceeding. *See Martinez Ramirez v. Ryan*, 2010 WL 3854792 (D. Ariz. Sept. 28, 2010). While Ramirez's appeal from that decision was pending in this court, the Supreme Court issued its decision in

Martinez, in which the Court held that a petitioner may establish "cause" to excuse a procedural default if the petitioner can show (1) that the petitioner's postconviction counsel was ineffective in failing to raise an ineffective-assistance-of-trial-counsel claim, and (2) that the underlying ineffective-assistance-of-trial-counsel claim is "substantial," that is, "has some merit." 566 U.S. at 14. A panel of this court remanded for reconsideration of Ramirez's ineffective-assistance-of-trial-counsel claim "in light of intervening law."

On remand, Ramirez asked for an evidentiary hearing to develop evidence regarding whether his *postconviction-relief* counsel was ineffective, in order to establish "cause" for the default under *Martinez*. Ramirez acknowledged that 28 U.S.C. § 2254(e)(2) bars factual development of claims not developed in state court, but relying on our precedent in *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc), he argued that the cause-and-prejudice question under *Martinez* is not a "claim" for purposes of § 2254(e)(2) and that evidence could be received to see whether the default could be excused under *Martinez*.

Ramirez also submitted declarations from various family members describing the truly deplorable conditions of his upbringing. *Ramirez*, 937 F.3d at 1238–39. Compared to the testimony that Siegel elicited during the original sentencing hearing, the new declarations paint a darker picture of the abuse and neglect that Ramirez's mother inflicted on her children. Ramirez also submitted a declaration from Siegel herself, in which she admitted that the mitigation evidence that she presented was "very limited." *Id.* at

1240. Finally, Ramirez submitted a declaration from Dr. McMahon, a psychologist whom the state trial court had appointed to evaluate Ramirez's mental health during the penalty phase of his criminal trial. *Id.* Dr. McMahon stated that Siegel failed to give him Ramirez's IQ scores or school reports and that, had she done so, he likely would have expanded his evaluation, and he would not have found that Ramirez was not intellectually disabled. *Id.*

The district court noted that, "for different reasons," both sides agreed that the court should consider the merits of Ramirez's ineffective-assistance-of-trial-counsel claim. As the court explained, the State argued that the lack of merit to that claim showed that postconviction counsel "did not perform ineffectively in failing to raise the claim in state court" and that the *Martinez* standard therefore could not be met. Ramirez, by contrast, argued that postconviction counsel was ineffective in failing to raise the claim and that the merits of that claim therefore had to be considered de novo. The court denied Ramirez's request for an evidentiary hearing, concluding that such a hearing was "not warranted" in light of the existing evidence, but the court accepted his newly submitted exhibits into the record. After comparing the evidence on mitigation presented at the penalty phase of Ramirez's trial to the information in the newly submitted exhibits, the court resolved the merits of the underlying claim, concluding that Siegel's performance was not deficient and that any deficiency did not prejudice Ramirez.

Ramirez again appealed to this court. The panel reversed, finding that the district court should not have "collapsed what should have been a two-step process": first evaluating whether the performance of Ramirez's postconviction counsel constituted ineffective assistance that excused the procedural default under *Martinez*, and only then addressing the merits of the underlying ineffective-assistance-of-trial-counsel claim, "after allowing a chance for any necessary record or evidentiary development." *Ramirez*, 937 F.3d at 1242 n.7. The panel then proceeded to address the merits of the *Martinez* analysis, concluding that Ramirez's postconviction counsel did render ineffective assistance and that Ramirez's underlying claim was "substantial," thus excusing his procedural default under *Martinez*. *Id.* at 1243–48. Finally, the panel concluded that "the district court erred in denying Ramirez evidentiary development of his ineffective assistance of counsel claim" and remanded for further evidentiary development on that underlying claim. *Id.* at 1248.

B

Barry Lee Jones was convicted by an Arizona jury of sexual assault, child abuse, and felony murder of his girlfriend's four-year-old daughter, Rachel Gray. *Jones*, 943 F.3d at 1215. A judge sentenced him to death. *Id.* at 1217. Jones filed a petition for postconviction relief in state court, in which he claimed ineffective assistance of trial counsel regarding certain aspects of his attorney's representation. *Id.* at 1218. The petition was denied. *Id.*

Jones then filed a federal habeas petition, the operative version of which raised several new claims

that his trial attorney was ineffective at both the guilt and penalty phases of Jones' case. 943 F.3d at 1218. The district court denied most of the claims as procedurally defaulted. *Jones v. Schriro*, 2008 WL 4446619, at *5 (D. Ariz. Sept. 29, 2008). While the case was on appeal in this court, the Supreme Court issued its decision in *Martinez*. This court remanded the case to the district court for reconsideration of Jones's claim. This court's remand order determined that Jones's claims were "substantial" and that one prong of the *Martinez* analysis was therefore already satisfied. (Recall that *Martinez* requires a petitioner to show that postconviction counsel was ineffective *and* that the underlying ineffective-assistance- of-trial-counsel claim is "substantial." *See* 566 U.S. at 14.)

On remand, the district court ordered the parties to brief the other prong of *Martinez*—whether Jones's postconviction counsel was ineffective for failing to raise the underlying ineffective-assistance-of-trial-counsel claim—as well as the merits of that underlying claim itself. Jones contended that trial counsel was ineffective during both the guilt and penalty phases of the trial. Based on new exhibits submitted by Jones, the district court found enough initial merit to Jones's arguments that postconviction counsel had been ineffective that the court granted Jones's request for a full evidentiary hearing on whether Jones's default of his underlying claims could be excused under *Martinez*. In granting that request, the court concluded that 28 U.S.C. § 2254(e)(2) did not apply to new evidence used to establish cause under *Martinez*. The district court went a step further, however, and also granted Jones's

request for an evidentiary hearing to develop his underlying ineffective-assistance-of-trial-counsel claim.

After a seven-day evidentiary hearing, the district court issued a decision granting Jones's habeas petition. *Jones v. Ryan*, 327 F. Supp. 3d 1157 (D. Ariz. 2018). The court concluded that Jones's trial counsel had performed a deficient investigation into medical evidence of the timeline of Rachel's injuries and that, had a proper investigation been performed, counsel could have cast doubt on the state's theory that Rachel's injuries occurred while she was in Jones's care. *Id.* at 1198–1202, 1206–09. The court then concluded that Jones's postconviction-relief counsel rendered ineffective assistance in failing to raise that claim, thereby excusing Jones's procedural default under *Martinez*. *Id.* at 1214–17.

The state appealed, arguing that, although 28 U.S.C. § 2254(e)(2) did not bar the district court from holding an evidentiary hearing on Jones's efforts to establish cause for default under *Martinez*, the statute *did* bar the district court from considering any of the evidence from the *Martinez* hearing when analyzing the merits of the underlying claim. The panel rejected the state's argument, concluding that a district court is not barred from considering evidence developed to overcome a procedural default under *Martinez* when analyzing the underlying claim. *Jones*, 943 F.3d at 1220–22.

II

We should have granted rehearing en banc because, in contravention of controlling Supreme Court

authority, the panels' decisions in *Jones* and *Ramirez* create a new judge-made exception to 28 U.S.C. § 2254(e)(2)'s strict limitations on expansion of the evidentiary record in habeas corpus cases.

A

The petitioners in *Jones* and *Ramirez* confronted two distinct obstacles to presenting their ineffective-assistance-of-trial-counsel claims in federal habeas corpus proceedings. First, the claims they sought to assert had not been presented in their state postconviction proceedings, and the resulting procedural default required them to show cause and prejudice to excuse that default. Second, the petitioners had failed to develop in the state court record the facts that they needed to establish their claims, and this presented a *separate* obstacle that would require them to make an appropriate showing before a federal habeas court could consider any additional evidence. *See* 28 U.S.C. § 2254(e)(2). In order to set the panels' decisions in context, it is helpful to summarize the applicable state of the law concerning these two distinct procedural hurdles.

1

The general rule against consideration of procedurally defaulted claims in federal habeas corpus is a judge-made doctrine that has long been recognized by the Supreme Court. The Court's rule is "grounded in principles of comity," because "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the

first instance." *Coleman*, 501 U.S. at 731–32. Because Arizona requires that ineffective-assistance-of-trial-counsel claims be presented in the first state postconviction petition, *see Martinez*, 566 U.S. at 6–7, the petitioners' failure to present their claims in Arizona state court constitutes a procedural default, *see Coleman*, 501 U.S. at 735 n.1 (where claim was not exhausted in state court and state court "would now find the claims procedurally barred," there "is a procedural default for purposes of federal habeas"); *see also Trevino v. Thaler*, 569 U.S. 413, 421 (2013) (failure to raise a claim in state court "at the time or in the place that state law requires" qualifies as procedural default). But the Supreme Court has recognized exceptions to this judge-made rule: procedurally defaulted claims may be considered if the petitioner can (1) show "cause" for the default and "actual prejudice" from the state's alleged violation of federal law or (2) demonstrate that application of the rule would "result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

In *Coleman*, the Court held that attorney error generally does *not* constitute "cause" to excuse a procedural default because "cause" must be something "*external* to the petitioner," and error by a petitioner's attorney is not "external" because "the attorney is the petitioner's agent when acting, or failing to act." 501 U.S. at 753. But *Coleman* observed that attorney error *can* constitute "cause" when the error qualifies as ineffective assistance of counsel, in violation of the Sixth Amendment. *Id.* at 753–54. The reason for this exception is "not because . . . the error is so bad that the lawyer ceases to be an agent of the petitioner"; such

an argument, the Court explained, "would be contrary to well-settled principles of agency law," under which even an agent's negligence is imputed to the principal. *Id.* at 754. Rather, the reason for the exception is that, when effective assistance of counsel is constitutionally guaranteed, "'the Sixth Amendment itself requires that responsibility for the default be imputed to the State.'" *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). And because "[t]here is no constitutional right to an attorney in state post-conviction proceedings," *Coleman* reasoned, an error by postconviction counsel is not imputed to the state and cannot constitute "cause." *Id.* at 752.

In *Martinez v. Ryan*, however, the Court created a "narrow exception" to *Coleman*'s holding that negligence by postconviction counsel can never constitute cause to excuse default. 566 U.S. at 9. The Court expressed special concern about applying *Coleman*'s strict rule in the context of claims that trial counsel was ineffective, because such claims often can be brought only in postconviction proceedings—where effective representation is not constitutionally guaranteed—and, further, because such claims "often require investigative work and an understanding of trial strategy." *Id.* at 11. The *Martinez* Court pointedly *declined* to rest its exception to *Coleman* on the premise that there is a constitutional right to effective assistance of postconviction counsel in the presentation of an ineffective-assistance-of-trial-counsel claim. *Id.* at 9. Instead, recognizing that "[t]he rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion," *id.* at 13, the Court held that, "as

an equitable matter," ineffective assistance of postconviction counsel (or lack of postconviction counsel) can constitute "cause" to excuse procedural default of an ineffective-assistance-of-trial-counsel claim, but only if the claim is "substantial," *id.* at 14.

2

The second distinct obstacle that the petitioners face here was their failure to adequately develop in state court the factual evidence needed to establish the ineffective-assistance-of-trial-counsel claims that they now wish to present. Again relying upon judge-made rules governing the writ of habeas corpus, the Supreme Court previously had treated such a failure as comparable to a procedural default, and the Court therefore generally required a showing of cause and prejudice to excuse the failure. *See*, *e.g.*, *Keeney*, 504 U.S. at 8–10. The rationale for this additional federal habeas rule was likewise grounded in federalism: "encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance." *Id.* at 9. Under *Keeney*, a failure to develop the record occurs even when the petitioner's *counsel* is responsible, *id.* at 4 (requiring cause and prejudice even though the failure was "apparently due to the negligence of postconviction counsel"), and the requisite cause cannot be shown "where the cause asserted is attorney error," *id.* at 10 n.5 (citing *Coleman*, 501 U.S. 722).

However, in enacting AEDPA, Congress partially abrogated *Keeney* and replaced it with a different and

more demanding set of standards. The relevant provision is contained in 28 U.S.C. § 2254(e)(2), which provides as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. The Supreme Court has made two important rulings concerning the meaning of § 2254(e)(2), and those decisions establish the governing law concerning this separate procedural obstacle to the presentation of a claim in federal habeas corpus.

First, in *Williams v. Taylor* (*Michael Williams*),[2] 529 U.S. 420 (2000), the Court held that Congress's use of the word "failed" in the opening clause of § 2254(e)(2) was "intended to preserve" *Keeney*'s definition of what counts as the sort of state-court failure that triggers the rule. *Id.* at 433. As the Court explained, *Keeney*'s cause-and-prejudice requirement applied—and therefore § 2254(e)(2)'s replacement for that cause-and-prejudice standard now applies—when "there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Id.* at 432 (emphasis added). Thus, § 2254(e)(2) preserves the rule that attorney failure to develop the record triggers the need to make a further showing to excuse that failure. But Congress dramatically changed the circumstances under which such attorney failure can be *excused*, by replacing the cause-and-prejudice and fundamental-miscarriage-of-justice tests with the stricter exceptions in § 2254(e)(2). *Id.* at 433. Notably, ineffective assistance of postconviction counsel is *not* included in the statute as a ground for excusing the failure to develop the factual basis of a claim in state court. Thus, it is not sufficient to show that counsel's lack of diligence failed to uncover the new evidence; rather, it must be shown that the "factual predicate . . . *could not* have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii) (emphasis added).

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[2] The Supreme Court coincidentally decided another AEDPA case named *Williams v. Taylor* (involving Terry Williams) on the very same day. *See* 529 U.S. 362 (2000).

Second, the Supreme Court held in *Holland v. Jackson* that § 2254(e)(2)'s strictures are applicable whenever the petitioner attempts to rely on evidence that was not presented in state court, and not merely when the petitioner seeks a formal evidentiary hearing. 542 U.S. at 653. In *Holland*, habeas petitioner Jackson had been convicted of murder in state court, primarily on the testimony of a single eyewitness. *Id.* at 650. Seven years later, Jackson attempted to reopen his state postconviction case because he claimed that a new witness would contradict the primary witness's testimony. *Id.* at 650–51. The state court denied the motion, finding "no satisfactory reason given for the defendant's failure to locate this witness." *Id.* at 651. The Supreme Court reversed the Sixth Circuit's subsequent grant of habeas relief, holding in relevant part that consideration of the new witness's testimony was barred under § 2254(e)(2). Reaffirming that "[a]ttorney negligence" in developing the state court record "is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied," *id.* at 653 (citing *Michael Williams*, 529 U.S. at 439–40; *Coleman*, 501 U.S. at 753–54), the Court held that Jackson's failure to present the testimony of the new witness to the state court was subject to the strictures of § 2254(e)(2). Moreover, the Court made clear that, despite the fact that § 2254(e)(2)'s limitations applied to the holding of an "evidentiary hearing," "[t]hose same restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing." *Id.*

Thus, under *Michael Williams* and *Holland*, where the petitioner's attorney in state postconviction

proceedings negligently fails to develop the record on a claim, a federal habeas court may not consider new evidence in support of that claim unless the strictures of § 2254(e)(2) have been met.

B

Against this backdrop, the panel decisions in *Jones* and *Ramirez* are directly contrary to controlling Supreme Court authority.

1

Jones held that, notwithstanding § 2254(e)(2), "*Martinez*'s procedural-default exception applies to *merits review*, allowing federal habeas courts to consider evidence not previously presented to the state court." *Jones*, 943 F.3d at 1221 (emphasis added). *Jones* erred by engrafting *Martinez*'s judge-made exception to a judge-made rule onto the separate *statutory* rule set forth in § 2254(e)(2). *Jones* made no effort to reconcile its holding with *Holland* or *Michael Williams*; indeed, *Jones* did not mention either decision. Its holding is directly contrary to those decisions, which (as explained earlier) bar consideration of new evidence to evaluate the merits of a claim in federal habeas proceedings—even when that evidence was not previously discovered due to the negligence of postconviction counsel—unless one of the narrow exceptions set forth in § 2254(e)(2) is satisfied. *Jones* did not suggest that any of those exceptions are applicable here. Instead, *Jones* relied on two arguments to justify its holding, but neither has merit.

a

Jones relied primarily on policy-based arguments for extending *Martinez*'s exception to § 2254(e)(2). This court has previously held that, because a claim of ineffective assistance of *postconviction* counsel "is not a constitutional claim" but only a predicate for showing "cause" to excuse a failure to present a claim (namely, ineffective assistance of trial counsel), a petitioner seeking to show such cause "is not asserting a 'claim' for relief as that term is used in § 2254(e)(2)." *Dickens*, 740 F.3d at 1321. Section 2254(e)(2) thus does not bar a hearing to develop the facts necessary *to establish cause* under *Martinez*. *See id*. Because in *Jones* the district court had already conducted a lengthy hearing for that purpose, the panel held that it would be "'simply illogical, and extraordinarily burdensome to the courts and the litigants,'" to hear evidence concerning cause under *Martinez* but then to disregard that very same evidence when addressing the merits of the underlying claim. *Jones*, 943 F.3d at 1221 (quoting the district court decision). Additionally, the panel endorsed the plurality view in *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc), that if § 2254(e)(2) could stymie factual development for claims rescued from procedural default by *Martinez*, then "'*Martinez* would be a dead letter.'" 943 F.3d at 1222 (quoting *Detrich*, 740 F.3d at 1247 (four-judge plurality)); *see also Ramirez*, 937 F.3d at 1248 (likewise relying upon the *Detrich* plurality).

As an initial matter, the *Jones* panel and the *Detrich* plurality overstate the extent of the inconsistency between *Martinez* and § 2254(e)(2), as

noted by the amicus brief filed by the State of Texas in support of rehearing en banc in the *Jones* case. *Martinez* excuses the procedural default of failing to raise a claim of ineffective assistance of trial counsel in a state postconviction petition when the default is attributable to the ineffective assistance of state postconviction counsel. Section 2254(e)(2) separately bars the development of new evidence in support of a habeas claim in federal court. Thus, § 2254(e)(2) poses no obstacle to review where the state court record (either at trial or in subsequent proceedings) is *already* sufficient to establish trial counsel's mistakes—e.g., "claims based on a failure to object to inadmissible evidence, requesting an incorrect jury instruction, or per se ineffective assistance of counsel." Brief for the State of Texas as Amicus Curiae at 12–13, *Jones v. Shinn*, No. 18-99006 (9th Cir. Dec. 23, 2019) (ECF No. 75). To the extent that such mistakes nonetheless were not *raised* on state postconviction review due to the ineffectiveness of postconviction counsel, *Martinez* paves the way to federal habeas relief.

But even if most *Martinez* claims would be barred by § 2254(e)(2), that would not give us a license to contravene the settled law governing that statute. Nothing in the text of § 2254(e)(2) says that its prohibition on consideration of new evidence does not apply when postconviction counsel was ineffective or where "cause" has been shown to excuse some *separate* procedural default. On the contrary, AEDPA amended § 2254(e)(2) to abolish *precisely* the same "cause and prejudice" standard that *Martinez* invoked (and modified) and replaced it with a much more demanding standard (which both panels agree is not met in these

cases). *See Michael Williams*, 529 U.S. at 433 ("Congress raised the bar *Keeney* imposed on prisoners."). Section 2254(e)(2) therefore eliminated any basis for extending *Martinez* to excuse a failure to develop the record. That is, because the predicate for *Martinez*'s holding is the cause-and-prejudice standard, and because § 2254(e)(2) expressly eliminated that standard in the context of a failure to develop the record, the entire predicate for applying *Martinez* is simply absent in that context.

Where, as here, Congress has specifically modified and limited pre-existing equitable doctrines that otherwise would have applied, we have no authority to ignore those limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 395–96 (2013) (noting that § 2254(e)(2) specifically modified the previously recognized "miscarriage of justice exception"). Accordingly, this is not a situation in which Congress left undisturbed a long-settled background presumption concerning the scope of equitable authority in federal habeas corpus proceedings. *See id*. at 397 (concluding that, outside of contexts such as § 2254(e)(2), Congress presumably intended to leave "intact and unrestricted" the long-recognized equitably based "miscarriage of justice exception"). The *Jones* panel and the *Ramirez* panel thus lacked the authority to engraft a judge-made exception onto § 2254(e)(2)—particularly when it is contrary to the construction of that statute under *Michael Williams* and *Holland*. As the Supreme Court explained in a separate context in *Ross v. Blake*, although "judge-made exhaustion doctrines . . . remain amenable to judge-made exceptions, . . . a statutory exhaustion provision stands on a different footing.

There, Congress sets the rules—*and courts have a role in creating exceptions only if Congress wants them to*." 136 S. Ct. at 1857 (emphasis added). Under *Ross*, we have no role in creating exceptions to § 2254(e)(2).[3]

Moreover, the *Jones* panel's reasoning (like the plurality's reasoning in *Detrich*) rests largely on a bootstrap argument. *Dickens* held that establishing "cause" under *Martinez* is not a "claim," and so a federal court does not violate § 2254(e)(2) by receiving new evidence to consider whether such cause has been established. 740 F.3d at 1321. But by saying that such evidence should then be considered on the merits of the "claim," the panel erases the distinction that *Dickens* drew and thereby endorses the very violation of § 2254(e)(2) that *Dickens* purported to avoid. To the extent that the resulting scenario seems illogical or wasteful, that is only because the district court in *Jones* failed to consider up front *both* of the *separate* obstacles that Jones faced. There is no point in conducting a *Martinez* hearing to discover "cause" to excuse a procedural default if the defaulted claim will

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[3] Even if the *Jones* panel were correct in perceiving some tension between *Martinez* and the construction of § 2254(e)(2) adopted in *Michael Williams* and *Holland*, that would not justify the panel's disregard of the latter decisions. As the Supreme Court has made clear, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Because *Martinez* says literally nothing whatsoever about § 2254(e)(2), it cannot provide any basis for disregarding the directly applicable caselaw construing that provision.

inevitably fail on the merits because (due to the *other* procedural obstacle) evidence outside the state record cannot be considered in any event. Given the insuperable obstacle presented by § 2254(e)(2), whether the distinct obstacle presented by *Coleman*/*Martinez* could or could not be excused made no difference.

To the extent that it seems unfair that a potentially meritorious claim might escape federal habeas review, that feature is inherent in the restrictions that AEDPA imposes on the grant of federal habeas relief. For purposes of § 2254(e)(2), the evidence developed at the *Martinez* cause-and-prejudice hearing stands on no different footing than the new evidence presented to the court in *Holland*, and *Holland* squarely holds that such new evidence may not be considered unless the restrictions of § 2254(e)(2) have been met. 542 U.S. at 653. The resulting disparate treatment of procedural default under *Martinez* and failure to develop the factual basis for a claim under § 2254(e)(2) is the unmistakable consequence of Congress's asymmetrical intervention in this area of the law, in which Congress eliminated the cause-and-prejudice standard only in the *Keeney* context, and not in the *Coleman* context. Absent a constitutional objection—and the *Jones* panel did not suggest that its conclusion was required by the Constitution—we lack the authority to improve upon Congress's policy judgment by judicially rewriting § 2254(e)(2).

b

The *Jones* panel hinted at a second ground for its holding, but it is equally untenable. Specifically, the panel stated that its conclusion was consistent with the

decisions of the Eighth and Fifth Circuits in *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013), and *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000). *See Jones*, 943 F.3d at 1222. Those decisions, in turn, rested on the premise that, if counsel was ineffective in failing to develop the record or there is otherwise cause and prejudice to excuse that failure, then there was no "fail[ure] to develop the factual basis of a claim in State court proceedings" within the meaning of § 2254(e)(2). *See Sasser*, 735 F.3d at 853–54; *Barrientes*, 221 F.3d at 771 & n.21. This rationale is based on a clear misreading of *Michael Williams*.

Michael Williams unambiguously states that § 2254(e)(2) preserved *Keeney*'s understanding of what counted as a "failure" to develop the record, thereby triggering the need to excuse that failure. *See* 529 U.S. at 433–34. *Michael Williams* further states that such a failure is shown when "there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*," *id.* at 432 (emphasis added); *see also Holland*, 542 U.S. at 653 ("Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied."). Moreover, in holding that ineffective assistance of state postconviction counsel may provide cause and prejudice for failure to raise a claim of ineffective assistance of trial counsel, the Supreme Court in *Martinez* did not retreat from *Coleman*'s and *Michael Williams*'s holding that, in determining whether a procedural failure or default *has occurred*, habeas petitioners are bound by the action (or inaction) of their lawyers under "well-settled principles of agency law." *Coleman*, 501 U.S. at 754; *see also Michael Williams*, 529 U.S. at 432; *cf.*

Maples v. Thomas, 565 U.S. 266, 282–83 (2012) (noting, even post-*Martinez*, "the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client" and holding that, "under agency principles," attorney error is not chargeable to the client only in the latter situation). Under *Martinez*, the question of ineffective assistance thus goes, not to the underlying question of whether there was a procedural default or other failure, but rather to the question of whether that default or failure *is excused*. 566 U.S. at 13–14.

Accordingly, the suggestion that the existence of cause and prejudice means that there was *no failure* to develop the record for purposes of § 2254(e)(2), *see Sasser*, 735 F.3d at 853–54; *Barrientes*, 221 F.3d at 771, is plainly incorrect. Not only does this mix up the issue of procedural failure with the distinct issue of whether that failure is excused, but this reasoning would effectively restore the *Keeney* cause-and-prejudice standard that § 2254(e)(2) expressly abrogated. *See Michael Williams*, 529 U.S. at 433. If the existence of cause and prejudice means that there was no failure to develop the record sufficient to trigger § 2254(e)(2), then the remainder of § 2254(e)(2) would be a dead letter, and the operative standard would be the cause-and-prejudice test.

Because there was a failure to develop the state court record in both *Jones* and *Ramirez*, § 2254(e)(2) is triggered and that failure can be excused *only* if a petitioner meets one of the strict statutory exceptions in § 2254(e)(2). Because § 2254(e)(2) abolishes *Keeney*'s cause-and-prejudice test, the fact that *Martinez* allows

postconviction ineffective assistance to establish cause and prejudice to excuse a failure to raise a claim does not mean that such ineffective assistance meets the more demanding excusal standards established in § 2254(e)(2) to excuse a failure to develop the record in state court. Neither the *Jones* panel nor the *Ramirez* panel claimed that the exceptions in § 2254(e)(2) were met, and the prohibition of that section therefore applies. Under *Holland*, that means the new evidence in each case may not be received in considering the merits of the underlying claim of ineffective assistance of trial counsel.

2

As explained above, the *Jones* panel held only that the evidence developed at the *Martinez* cause-and-prejudice hearing in that case could be considered on the merits of the underlying ineffective-assistance-of-trial-counsel claim. The *Ramirez* panel went one step further and held that, *after* cause and prejudice have been established under *Martinez* (as the *Ramirez* panel found in that case), the strictures of § 2254(e)(2) do not apply at all and the petitioner is "entitled to evidentiary development to litigate the merits of his ineffective assistance of trial counsel claim." *Ramirez*, 937 F.3d at 1248. The only authority cited for this proposition is the *Detrich* plurality, but that opinion (like *Jones*) only supports the view that, "[i]f the district court holds an evidentiary hearing *before* ruling on the *Martinez* motion, evidence received at that hearing is not subject to the usual habeas restrictions on newly developed evidence." 740 F.3d at 1247 (emphasis added); *see also id.* ("even with respect to the

underlying trial-counsel IAC [ineffective-assistance-of-counsel] 'claim,' given that the reason for the hearing is the alleged ineffectiveness of both trial and PCR [postconviction-relief] counsel, it makes little sense to apply § 2254(e)(2)"). That view is wrong for all of the reasons explained earlier, but nothing in that rationale justifies taking the additional step of completely dispensing with the strictures of § 2254(e)(2) and allowing *further* evidentiary development *after* the *Martinez* standard has already been satisfied.[4]

* * *

I respectfully dissent from the denial of rehearing en banc.

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[4] Ramirez's argument that Arizona waived any objection based on § 2254(e)(2) by failing to raise the issue may have some force to the extent that *Ramirez* also presents the *Jones* issue (*i.e.*, the use of the *same* evidence for the dual purposes of satisfying *Martinez* and addressing the merits), but not as to the *Ramirez* panel's additional step of ordering further evidentiary development *after* the *Martinez* standard had been met. Ramirez's appeal did not specifically ask for the further relief that the panel ultimately provided on that score. Arizona therefore had no occasion to object under § 2254(e)(2) to *additional* evidentiary development beyond what was needed to satisfy *Martinez*. The panel's decision presented that § 2254(e)(2) issue for the first time, and Arizona properly raised the issue in its Petition for Rehearing.