APPENDIX- A

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY S. DAVIS, Petitioner-Appellant, v. DORA B. SCHRIRO, Warden; TERRY L. GODDARD, Respondents-Appellees.	No. 19-15900 D.C. No. 4:04-cv-00583-RCC MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Submitted September 14, 2020**
San Francisco, California

Before: SCHROEDER, W. FLETCHER, and VANDYKE, Circuit Judges.

Jeffrey S. Davis files an appeal from the district court's denial of the Rule 60(b) Motion for Relief from Judgment in which Davis raised claims pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix- A

Davis was convicted of first-degree murder in February 1998.[1] After an unsuccessful direct appeal and multiple habeas petitions in state court, he filed a 28 U.S.C. § 2254 habeas petition in federal district court. In September 2007, the district court denied the writ of habeas corpus, and in doing so, rejected Davis's argument that his post-conviction relief ("PCR") counsel was ineffective because he was not allowed to challenge as ineffective his PCR counsel under *Coleman v. Thompson*, 501 U.S. 722 (1991) and *Johnson v. Avery*, 393 U.S. 483 (1969). Both the district court and this court declined to issue a certificate of appealability.

In 2012, however, the Supreme Court handed down *Martinez*, which under certain circumstances permits a petitioner to bring an ineffective assistance of counsel claim against his PCR attorney in an attempt to "establish cause for a [petitioner's] procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. In April 2014, Davis filed a Rule 60(b) motion in federal district court seeking relief from a final judgment pursuant to *Martinez*. Analyzing the motion under the six-factor framework set forth in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), the district court initially concluded that Davis "demonstrate[d] extraordinary circumstances necessary to grant relief under Rule 60(b)(6)," and ordered the State to file an answer to Davis's *Martinez* claim. Importantly, the court noted that only certain claims would be reviewable under Davis's Rule 60(b) motion

[1] Because the parties are familiar with the facts, we will not recite them here except as necessary.

because he "only seek[s] to reopen his case as it applies to the [ineffective assistance of counsel] claims of trial and PCR counsel."

Four years later, after the parties briefed the issues, the district court reversed its previous ruling granting Rule 60(b) relief. According to the court, Davis had misled the court by "suggesting he was diligently pursuing relief as soon as he found out about *Martinez*," when, in fact, Davis "did not pursue any means of relief until his Rule 60(b) Motion, which was filed more than six years after [the district court's] judgment and over two years after *Martinez*." The district court accordingly ruled that Davis's 60(b) motion "was not filed within a reasonable time" and he did "not present[] extraordinary circumstances warranting relief."

But that was not all. The court went on to rule in the alternative, comprehensively addressing Davis's claims on the merits in its 24-page decision, concluding that, even if Davis's Rule 60(b) were timely, his *Martinez* claims all failed. The court determined that Davis could not show that trial counsel was ineffective or that Davis was prejudiced by his trial counsel's strategy. The court also addressed the remaining miscellaneous claims and concluded that they were not substantial, plaintiff did not demonstrate prejudice, and the state courts' determinations were "not contrary to federal law or an unreasonable application of facts."

After the district court ruled against him on these two alternative grounds,

Davis sought and was granted a certificate of appealability ("COA") from the district court certifying issues for appeal: that (1) "Petitioner's 60(b) Motion was untimely and did not present extraordinary circumstances warranting review;" and (2) "regardless of timeliness, Petitioner's claims did not excuse his procedural default."

Notwithstanding the breadth of the district court's certified issues—which were broad enough that the COA essentially covered the entirety of the district court's decision—Davis on appeal to this court filed an opening brief that did not squarely address either the certified issues or the district court's lengthy decision. Instead, the opening brief contains a long overview of applicable law, a detailed procedural history, and an argument section filled with conclusory and general statements that fail to address any specific conclusions from the district court. Davis's brief states, for example, that he "was not accorded appellate review," "[t]he state courts' disposition of Davis'[s] claims on collateral review was contrary to or an unreasonable application of federal law," "state procedures were not adequate to vindicate constitutional rights," and "[t]he appellate court's accounting of the evidence it deemed sufficient to sustain the conviction is patently insufficient to establish the elements of premeditated murder …." But nowhere does Davis's opening brief directly and specifically address *any* of the district court's grounds for its long and detailed decision. For example, the opening brief never mentions the district court's conclusion that Davis misled the district court about pursuing relief

post-*Martinez*. This was the central reason that the district court reversed its decision that the Rule 60(b) motion was timely. Nor does Davis address the reasons the district court gave for rejecting his ineffective assistance of counsel claim, precluding his new claims, or rejecting the claims Davis previously raised in the state court.

In response to Davis's opening brief, the State gave notice pursuant to Ninth Circuit Rule 22–1(f) that no answering brief would be filed because Davis failed to brief any of the certified issues.[2] The State is correct. Davis did not address the certified issues, and therefore waived them. *See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) ("We 'will not ordinarily consider matters on appeal that are not *specifically and distinctly* argued in appellant's opening brief.'" (emphasis added; alteration and citation omitted)).[3]

AFFIRMED.

[2] The State explained it would file a brief responding to the opening brief if ordered by the court.

[3] Davis's Motion for Submission of Rule 60(b) Appeal for Decision, ECF No. 24, is denied as moot. The State's Motion for Clarification, ECF No. 28, is also denied as moot.

APPENDIX-B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jeffrey Davis,

Petitioner,

v.

Dora B Schriro, et al.,

Respondents.

No. CV-04-00583-TUC-RCC

ORDER

On March 3, 2015, the Court stated it would reconsider Petitioner's claims against his post-conviction relief ("PCR") counsel for failing to raise several claims that trial counsel rendered ineffective assistance of counsel ("IAC"). (Doc. 58 at 9-10.)[1] The Court determined that given the circumstances and the change in the law under *Martinez v. Ryan*, 566 U.S. 1 (2012), Petitioner had raised the extraordinary circumstances necessary to reopen argument limited to his ineffective assistance of PCR counsel claims. *Id.* The Court ordered additional briefing on whether Petitioner was entitled to relief. (Docs. 48-49, 56-57, 61, 66.) Upon consideration of the record, the Court denies Petitioner's Motion for Relief from Judgment ("Rule 60(b) Motion"). (Doc. 48.)

I. RULE 60(B) MOTION: TIMELINESS AND "EXTRAORDINARY CIRCUMSTANCES"

A motion for relief from judgment must be raised within a reasonable time, Fed.R.Civ.P. 60(c)(1), and there must be "extraordinary circumstances" warranting

[1] All docket citations refer to the page numbers generated by the Court's Electronic Case Filing System (ECF). Non-ECF filings refer to pages indicated in document.

Appendix-B

reconsideration. *Phelps v. Alameida*, 569 F.3d 1120, 1134-39 (9th Cir. 2009). This is a fact specific determination for which the Court considers factors such as (1) a change in the law; (2) the petitioner's diligence in pursuing relief; (3) the parties' interest in finality; (4) the amount of delay between judgment and Rule 60(b)(6) motion; (5) the close connection between the Court's decision and a change in law; and (6) the issue of comity. *Id.*

Petitioner filed his Rule 60(b) Motion on April 15, 2014, asking the Court to reconsider its September 21, 2007 judgment denying his § 2254 Petition in light of the Supreme Court Decision in *Martinez v. Ryan*. (Doc. 58.) *Martinez* held that in certain instances "[i]nadequate assistance of counsel at initial–review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. *Martinez* was decided on March 20, 2012, over two years before Petitioner filed his Rule 60(b) Motion. (Doc. 48.) Respondents opposed the Rule 60(b) Motion, arguing it was untimely under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"); moreover, Petitioner had not shown extraordinary circumstances justifying the reconsideration of his judgment. (Doc. 56 at 10.)

In its May 11, 2015 Order, the Court considered whether there were extraordinary circumstances warranting review, using the factors illustrated in *Phelps*. (Doc. 58.) First, the parties and the Court agreed that *Martinez* constituted a change in law. *Id.* at 7. The Court determined that Petitioner's diligence, the delay between the judgment and the Rule 60(b) Motion, and the issue of comity weighed in his favor. *Id.* at 7, 9. However, the Court was proceeding under an assumption that upon further examination was false–that Petitioner was diligent.

The Court's extraordinary circumstances and timeliness determination relied heavily upon Petitioner's assertion that his Rule 60(b) Motion was filed over two years after *Martinez* because he had initially filed a state court appeal. He alleged that he erroneously believed he needed to file an appeal in state court before challenging the judgment in federal court. (Doc. 48 at 4.) He claimed that he only realized he needed to file his 60(b) Motion in federal court after the Arizona Court of Appeals decided *State v.*

Escarano-Meraz, 307 P.3d 1013 (Ariz. App. 2013) on August 21, 2013. *Escarano-Meraz* explained that *Martinez* did not alter the state court's preclusion of IAC claims against PCR counsel in successive PCR proceedings. But, Petitioner never filed an appeal in the seventeen months between *Martinez* and *Escarano-Meraz*.

On February 19, 2019, the Court ordered Respondents to submit a copy of Petitioner's state court petition that raised his IAC claims under *Martinez*. (Doc. 73.) Respondents filed a notice stating the state court had no record of such appeal. (Doc. 74.) Petitioner then admitted he had not filed in state court. (Doc. 76.)

Petitioner misled the Court, suggesting he was diligently pursuing relief as soon as he found out about *Martinez*. (Doc. 48 at 4.) In fact, Petitioner did not pursue any means of relief until his Rule 60(b) Motion, which was filed more than six years after this Court's judgment and over two years after *Martinez*. This is not within a reasonable time and weighs heavily against being an extraordinary circumstance requiring reassessment of a final judgment. *See Wood v. Ryan*, No. CV-98-0053-TUC-JGZ, 2014 WL 3573622, at *5 (D. Ariz. Jul. 20, 2014) ("Petitioner filed his Rule 60(b)(6) motion more than six years after the Court's order denying habeas relief, more than two years after the decision in *Martinez*. . . . The Court is skeptical that this meets the benchmark of filing 'within a reasonable time.'") (citing *Kingdom v. Lamerque*, 392 F. App'x. 520, 2010 WL 3096376, at *1 (9th Cir. 2010) (finding two-year interval unacceptable); *Ramsey v. Walker*, 304 F. App'x. 827, 829, 2008 WL 5351670, at *3 (11th Cir. 2008) (not reasonable time when petitioner "filed the motion more than six years after the denial of his § 2254 petition and two years after the cases on which he relied were decided"); *cf. Lopez v. Ryan*, No. CV-98-72-PXH-SMM, 2012 WL 1520172 (D. Ariz. Apr. 30, 2012) (three weeks between *Martinez* and the Rule 60(b) motion weighed in petitioner's favor, but other factors weighed against extraordinary circumstances).

Had the Court been privy to this information at the time of its original decision, it would have determined that the factors of diligence, finality, delay, and comity weighed against Petitioner. Upon reconsideration, this Court denies Petitioner's Rule 60(b) Motion

because it was not filed within a reasonable time and Petitioner has not presented extraordinary circumstances warranting relief.

Nevertheless, even if the Court found Petitioner's Rule 60(b) Motion timely and suitable for review, as explained below, Petitioner's claims do not excuse his procedural default under *Martinez* because they are not substantial, fail to demonstrate PCR counsel was ineffective under the two-prong test of *Strickland*, and the state court's determinations of the merits of Petitioner's claims were not contrary to federal law or an unreasonable application of facts.

II. STANDARD OF REVIEW

The district court may grant relief for a claim that has been adjudicated on the merits in state court if the state court's decision is contrary to or an unreasonable application of federal law, or an unreasonable determination of facts in light of the evidence presented. 28 U.S.C. §§ 2254(d)(1)-(2). Furthermore, the district court shall not consider a claim that has been procedurally defaulted in the state court under an "adequate" and "independent" state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

However, the district court may excuse a procedurally defaulted claim and consider the merits in limited circumstances. To do so, the petitioner must demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law," or that failing to consider the claim would constitute a "fundamental miscarriage of justice." *Dretke v. Haley,* 541 U.S. 386, 393 (2004). In general, cause for the default must be some factor outside of petitioner's hands, and ineffective PCR counsel does not suffice. *Coleman*, 501 U.S. at 752-54; *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Further, prejudice requires a petitioner demonstrate "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray*, 477 U.S. at 494 (emphasis in original).

Martinez provides a limited gateway for establishing cause for a procedural default. Under *Martinez*, a petitioner may show cause for a procedurally defaulted claim when the

petitioner can demonstrate that (1) the claim is specifically based on the ineffectiveness of PCR counsel to raise trial counsel's ineffective assistance in an initial PCR proceeding; (2) the ineffective assistance of trial counsel claim is "substantial"; (3) the petitioner had "no counsel or only ineffective counsel during the state collateral review proceeding"; and (4) state law requires that ineffective assistance of trial counsel may only be first raised upon post-conviction relief. *Runningeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2016).

Therefore, to excuse a procedural default, a petitioner must make two showings of ineffective assistance. First, a petitioner must demonstrate that the IAC claim against trial counsel is substantial; in other words, it has "some merit." *Martinez*, 566 U.S. at 14. Second, a petitioner must show that initial PCR counsel's failure to raise the trial counsel IAC claim was ineffective using the two-prong test illustrated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Rodney v. Filson*, No. 17-15438, 2019 WL 985885, at *9 (9th Cir. Mar. 1, 2019) (slip copy); *Runningeagle*, 825 F3d at 982 (9th Cir. 2016). *Strickland* requires a petitioner to show that (1) PCR counsel's actions fell below an objective standard of reasonableness, and (2) but for counsel's actions, there was a reasonable probability that the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 687. If a petitioner fails to demonstrate either prong, the court need not address the other. *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002). The court gives great deference to counsel's actions. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). Under this deferential review, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, (1984) (internal quotations omitted). "[T]he question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel [was effective]." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

After determining that a claimant has presented cause for the procedurally defaulted claim under *Martinez*, the court may proceed to the merits of a petitioner's ineffective

assistance of PCR counsel claims. *Dietrich v. Trevino*, 569 U.S. 413, 429 (2013). Often, however, to determine whether PCR counsel was ineffective, the Court must look through the PCR proceedings to trial counsel's actions. *Runningeagle*, 825 F.3d at 982. If trial counsel's representation was competent, it follows that PCR counsel's failure to raise an IAC claim against trial counsel was not deficient. *Id.*

III. PROCEDURAL HISTORY

a. Trial

After a four-day trial, a jury convicted Petitioner of the first-degree premeditated murder of Fred Conklin. (Doc. 2, Ex. 1.) The Arizona Court of Appeals summarized the facts of the trial proceedings as follows: [2]

> Davis' friend, Ernie Mendoza, testified in exchange for leniency in an unrelated charge that he and Davis had been in the business of buying, transporting, and selling illegal drugs with two other friends, Dean Wamsley and the victim, C. On one occasion, C. had been transporting four hundred pounds of marijuana when he was arrested, convicted, and incarcerated for two years in another state. According to Mendoza, a few months after C. was released and he returned to Tucson, Davis, C., and Mendoza were sitting in the living room of Davis's trailer on a summer evening in 1993. Sometime after midnight, C. stood up and began to walk toward the bathroom. Mendoza testified that, without warning, Davis had picked up a gun from the living room table and shot C. in the back, killing him. According to Wamsley, who also testified in exchange for leniency on an unrelated charge, Mendoza had called him shortly after the murder and asked for his help. Wamsley drove to Davis's trailer in his pickup truck, and the three men loaded C.'s body into Wamsley's truck, drove to a remote location, and buried C's body, which has never been found.
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> . . . .
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> The state presented both direct and circumstantial evidence at Davis's 1998 trial that C. was dead and that Davis had killed him in the summer of 1993. Mendoza testified that he had been present when Davis shot C., that he had helped transport C.'s dead body, and that he had watched Davis and Wamsley bury the body. Wamsley testified that C. was not breathing when Wamsley had arrived at Davis's trailer and that he had helped Davis bury

[2] Factual findings by the state court are given the presumption of being correct absent clear and convincing evidence to the contrary. *See* 28 U.S.C. §2254(e)(1); *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *cf. Rose v. Ludy*, 455 U.S. 509, 519 (1982).

> C.'s body. Two other witnesses [Dennis Segatto and Rick Bentley] testified that Davis had later confessed to shooting C. in the back and burying him. In addition, C.'s parents both testified that they had neither seen nor heard from C. since the summer of 1993. The mother of C.'s ten-year-old son testified that, after C. had returned to Arizona when he was released from prison, he had established regular contact with their son and made plans for regular visitation in the future. However, neither the mother nor C.'s son had seen or heard from C. since July 1993.
>
> . . . .
>
> Several witnesses testified that Davis and C. had been arguing before the murder. C. had threatened to give the police information about Davis's involvement in a prior drug transaction unless Davis paid him a sum of money. C. had further threatened that, after having Davis arrested, he planned to "be with [Davis's] old lady."

(Doc. 2, Ex. 5 at ¶¶ 2, 5, 10 (alteration in original).) Additionally, Wamsley testified that he had melted the gun used in the murder at Davis' request. (Doc. 15-4 at 97.)

After conviction, the trial court sentenced Petitioner to life in prison with the possibility of parole after 25 years. ~~(Doc. 2,~~ Ex. 2.)

b. Initial Petition for PCR

On July 26, 1999, Petitioner filed, through counsel, a Petition for Post-Conviction Relief ("Initial PCR"). (Doc. 61-1, Ex. A.) Petitioner claimed he had obtained newly discovered evidence that would have undermined the conviction; specifically, the testimony of Danelle Campbell and Scott Wright.[3] *Id.* at 5-9. Trial counsel was also ineffective for failing to use a ballistics expert and a doctor to testify that a bullet shot at close range would have caused significant bleeding. *Id.* at 10. In addition, PCR counsel claimed that trial counsel was ineffective for not investigating Timothy Guilfoyle. *Id.* at 10-11. PCR counsel argued there was "no strategic reason not to at least investigate these things." *Id.* at 11. Attached to the PCR Petition was a summary of Danelle Campbell's polygraph examination, the sworn statement of Scott Wright, and Tim Guilfoyle's interview transcript. *Id.* at 13-41.

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[3] The Court has excluded claims about the testimony of witnesses not presented in Petitioner's Rule 60(b) Motion.

The trial court denied the Initial PCR, stating that Petitioner had not raised a colorable claim of newly discovered evidence because such evidence may not simply be cumulative or for impeachment purposes. (Doc. 2, Ex. 3 at 2-3.) First, the trial court stated that contrary to Petitioner's assertions that Campbell's testimony was crucial, in fact it was merely impeachment evidence, "was neither particularly credible or reliable," and was cumulative. *Id.* at 3-4. In addition, Mr. Wright's claims were unsupported by an affidavit, and were "less reliable than those of Ms. Campbell, while of a similar cumulative nature." *Id.* at 4. As to Petitioner's ineffective assistance claims, the trial court evaluated them under the *Strickland* standard, and dismissed the testimony of a ballistics expert and doctor as mere speculation, without any affidavit supplying how either expert would have testified given the facts of this case. *Id.* at 6. Finally, the trial court concluded that failing to call Mr. Guilfoyle constituted trial strategy. *Id.* For each claim, the state court determined that Petitioner had not demonstrated prejudice. *Id.*

Petitioner did not appeal this decision to the Arizona Court of Appeals.

c. Second Petition for PCR

Petitioner's second PCR Petition ("Successive PCR") raised twenty claims, both of trial counsel and PCR counsel's ineffectiveness. Relevant to the instant proceeding are Petitioner's arguments of ineffectiveness because of trial counsel's failure to: investigate and call certain witnesses (*i.e.*, Kristina Bourguet, Shawn Lopez, Scott Wright, and Tim Guilfoyle); visit the burial site, utilize a cadaver dog, and hire an archeologist; unearth a conspiracy against Petitioner; proceed to trial sooner instead of waiving Petitioner's Speedy Trial rights; and present testimony of a ballistics expert and medical examiner. (Doc. 11, Ex. H.)

The trial court denied the PCR IAC claims, noting that they were precluded because Petitioner had no right to effective PCR representation. (Doc. 2, Ex. 4 at 4.) In addition, the trial court dismissed the claim of trial counsel's IAC for continuing the trial date because it could have been raised in the Initial PCR, and nevertheless state precedent prevented him from successfully raising this argument. *Id.* at 6. It also dismissed Petitioner's claims about investigating the burial site and employing an archeologist as

precluded because they could have been raised in the Initial PCR. *Id.* at 11. But, the court also indicated that trial counsel's decision not to use an investigator, a cadaver dog, or an archeologist was a matter of trial strategy since no body was recovered. *Id.* at 11-12. The assertion that trial counsel should have employed a ballistics expert and investigated Tim Guilfoyle was also denied because it was raised in the Initial PCR and precluded. *Id.* at 12.

The trial court found that Bourget's statements were not newly discovered, were merely impeaching, and were not likely to change the outcome of trial. *Id.* at 9. Additionally, Wright's statements were raised in the initial petition, and Petitioner had not explained how the statements were any different than those denied in the Initial PCR for being incredible and cumulative, or how Initial PCR counsel ineffectively presented it. *Id.* at 9-10. Likewise, Lopez's statements were precluded because they had not been raised previously, were merely impeachment, and were not newly discovered. *Id.* at 9.

Petitioner's direct appeal was consolidated with the petition for review of his Successive PCR. (Doc. 2, Ex. 5 at ¶ 1.) The Arizona Court of Appeals denied both on May 1, 2003, explaining that Petitioner was not permitted to raise an IAC of his first PCR counsel because he had no right to effective counsel. (Doc. 1, Ex. 5.) The Arizona Supreme Court denied his Petition for Review on December 4, 2003. (Doc. 11, Ex. J.)

d. Section 2254 Habeas Petition

Petitioner filed his § 2254 Petition in Arizona District Court in October of 2004. (Doc. 1.) He alleged trial counsel rendered IAC because of his failure to investigate, prepare, and interview witnesses (including Wright, Bourget, Lopez, Guilfoyle, and Campbell); and his failure to present expert testimony (including a ballistics expert and medical examiner). (Doc. 1 at 57). Petitioner argued that these IAC claims were not procedurally defaulted because the state court had sua sponte addressed the merits of his claims. *Id.* at 22-23, 25, 28-30. Had trial counsel adequately investigated the case, Petitioner argued he could have presented testimony from uninterested parties and expert testimony that would have caused reasonable doubt as to his guilt. *Id.* at 20. Although not clearly articulated, the § 2254 alleged four grounds for relief: (1) there was insufficient evidence for a conviction; (2) trial counsel's investigative failures constituted IAC; (3)

ineffective assistance of PCR counsel for failing to obtain the appropriate records; and (4) denial of due process because PCR counsel did not adequately present newly discovered evidence and he was actually innocent. (Doc. 1.)

Petitioner claimed that his state PCR counsel ineffectively presented the newly discovered evidence of the testimony of witnesses Campbell, Wright, a ballistics expert, and a medical examiner. *Id.* at 60-61. The § 2254 stated that Successive PCR counsel had expanded on the Initial PCR's newly discovered evidence claims, and added more claims of newly discovered evidence that were unavailable previously. *Id.* at 61. Although the witnesses would only be used for impeachment, the § 2254 Petition argued that since the state presented mostly circumstantial evidence, the impeachment evidence should be considered when determining if there was sufficient evidence for conviction. *Id.* at 61-62. The § 2254 Petition also claimed that the trial court should have determined that a newly discovered evidence claim may be appropriately raised in a successive PCR, and in failing to do so the court erred. *Id.* at 63.

This Court denied Petitioner's § 2254 Petition stating that Petitioner's sufficiency of the evidence claim was not exhausted, because he raised only state law and did not argue due process violations until before this court. Furthermore, his trial counsel IAC claims were procedurally defaulted on adequate and independent state grounds. (Doc. 30 at 3.) The Court found that Petitioner's newly discovered evidence was neither newly discovered nor prejudicial. *Id.* at 3. Finally, his claims of IAC of PCR counsel were precluded because he had no right to counsel in collateral proceedings. *Id.* at 5. The Court denied Petitioner's Motion for Reconsideration of its judgment (Doc. 34.) and the Ninth Circuit dismissed his appeal (Doc. 47.)

e. Petitioner's Rule 60(b) Motion

Petitioner's Rule 60(b) Motion raises eight claims that PCR counsel was ineffective because he failed to raise issues of trial counsel's ineffectiveness. Petitioner claims that PCR counsel failed to adequately assert that:

1. Trial counsel did not properly investigate and failed to expose collusion between

the state's witnesses, thus rendering IAC;

2. Trial counsel's no crime defense was ineffective because it precluded a third-party culpability defense;
3. Trial counsel's defense–that no crime occurred, and the victim was not dead–was deficient because there was "strong evidence to the contrary;"
4. Trial counsel was ineffective for failing to interview and present the testimony of nine potential witnesses (Danelle Campbell, Kristina Bourguet, Shawn Lopez, Scott Wright, Tim Guilfoyle, ~~Jon Leonard~~, Kevin ~~Davis~~, Nadine ~~Leonard~~, and Jerry ~~D~~avis);
5. Trial counsel forced Petitioner not to testify, therefore denying him a constitutional right;
6. Trial counsel coerced Petitioner to waive his speedy trial rights;
7. Trial counsel failed to properly investigate the alleged burial sites or present the testimony of an archeologist; and
8. Trial counsel failed to provide expert testimony and documentation: specifically, that of a ballistics expert and medical examiner.

(Doc. 48.) In his reply, Petitioner also adds ninth claim, arguing that trial counsel's actions constituted cumulative error. (Doc. 66 at 23.)

IV. ANALYSIS

a. IAC for Failure to Raise Collusion and Third-Party Culpability Defense

In the Rule 60(b) Motion, Petitioner alleges that "Trial Counsel rendered ineffective assistance by pursuing a 'No Defense' defense and promoting the theory that no crime happened because 'Fred is not dead,' in the face of strong evidence to the contrary." (Doc. 48 at 14 (emphasis in original).) He claims the evidence that the victim was dead was overwhelming, it made trial counsel's strategic defense that no murder occurred the equivalent of no defense at all. *Id.* at 14. Respondent argues that this theory is vastly different from that presented in the original § 2254 Petition, which asserted that there was insufficient evidence for a conviction. (Doc. 1 at 34-50.) Petitioner then clarifies in his

Reply that it was not necessarily trial counsel's presentation of a "no crime occurred" defense that was problematic; however, had trial counsel been adequately prepared, he could have presented two concurrent defenses: he could have argued that Conklin was not dead, but even if he was dead, the Petitioner did not commit the murder. (Doc. 66 at 19-20.) To be prepared, trial counsel needed to: (1) learn facts demonstrating the state's witnesses were liars, (2) present these facts to the jury; and (3) explain the significance of those facts in opening and closing arguments. *Id.* at 19. Because arguably Petitioner attempted to raise an IAC claim due to trial counsel's lack of preparation in the original § 2254 Petition, the Court will address it. But, as illustrated below, trial counsel did present the elements Petitioner claims were necessary for effective representation, and trial counsel was not ineffective because trial strategy permits an attorney to choose one defense over other alternatives.

When a defense attorney has two possible defenses, the attorney's choice to pursue one avenue of defense to the exclusion another is not ineffective assistance of counsel if the choice is reasonable or petitioner cannot show he suffered prejudice. *See Woods v. Sinclair*, 764 F.3d 1109, 1133 (9th Cir. 2014); *Hoffman v. Arave*, 455 F.3d 926, 937 (9th Cir. 2006); *Turk v. White*, 105 F.3d 478, 481 (9th Cir. 1997), *as amended by* 116 F.3d 1264, 1266-67 (9th Cir. 1997). Indeed, "[a] fair assessment of attorney performance requires that every effort 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Carrera v. Ayers*, 670 F.3d 938, 943 (9th Cir. 2011) (quoting *Strickland*, 466 U.S. at 689).

Strickland directly addresses how the Court will determine the reasonableness of counsel's investigative actions:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and *strategic choices made after less than complete investigation are reasonable precisely*

> *to the extent that reasonable professional judgments support the limitations on investigation*. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690–91 (emphasis added).

Counsel's strategy was to demonstrate that "Fred is not dead." (Doc. 15-4 at 44.) To this end, trial counsel showed that there was no physical evidence, plenty of motive, and a variety of reasons for Conklin to disappear voluntarily. Moreover, trial counsel demonstrated that many of the witnesses discussed what happened to Conklin, sharing various theories–one of which was that Petitioner shot Conklin. This defense theory was reasonable. The arguments provided in Petitioner's Rule 60(b) Motion do not diminish the reasonableness of limiting the investigation to support his defense theory.

First, counsel asserted that Conklin had likely disappeared of his own volition. To achieve this, Conklin's ex-girlfriend confirmed that Conklin had not financially supported his son since he was released from prison. (Doc. 15-2 at 102-03.) In addition, Conklin's dad testified that Conklin wanted to stay in the drug trade and had no intention of giving it up *Id.* at 74-75. Moreover, Mendoza testified that Conklin had lost 400 pounds of Mendoza's marijuana. (Doc. 15-3 at 86-87). Trial counsel also called Henry Stanislawski, who testified that Segatto told him the victim had obtained a false identification and social security card from Segatto's dad, a mafioso in Colorado. (Doc. 15-5 at 87-88.) Conklin's dad also testified that his son was a mean-spirited man, the family had disowned him, and he was not surprised that Conklin had not contacted him because he had been known to disappear for long periods of time. (Doc. 15-2 at 75-78.)

Trial counsel's drew attention to the fact that the state's witnesses were all drug dealers and liars, and only provided the "truth" when offered significant benefits. The witnesses testified that most had received plea deals, had charges dropped, or were granted full immunity for Conklin's murder in exchange for their testimony. (*E.g.*, Doc. 15-4 at 14,

23-24 (Mendoza received full immunity for homicide); Doc. 15-2 at 33 (Wamsley faced kidnapping and domestic violence charges until he provided information); Doc. 15-3 at 77-78 (Segatto talked to Bentley about other people receiving immunity for testimony).)

Furthermore, counsel focused on the witnesses' financial motivations for testifying against Petitioner. For instance, Mendoza admitted that he was upset with the Petitioner and Conklin because he lost significant income from the marijuana, seized when Conklin was arrested. (Doc. 15-3 at 86-88.) Further, Bentley conceded that Petitioner owed him a large amount of money–approximately $40,000–and the two were also in a financial dispute over a car. (Doc. 15-5 at 126.) In addition, Segatto and Matthew Freemont were angry at Petitioner for mismanaging the bar they ran with Petitioner. (Doc. 15-3 at 25-26; Doc. 15-4 at 53-54.) Segatto even admitted that he felt Petitioner had ruined his life, that Petitioner owed him thousands of dollars (Doc. 15-5 at 43-44), and that Petitioner and Segatto had alternated stealing each other's property (*Id.* at 31). He was so upset with petitioner that on cross-examination Segatto admitted that he refused to testify originally, but told the detective that if he needed testimony "to convict his ass then I will if it comes down to that." *Id.* at 30.

Trial counsel's strategy also highlighted the inconsistent and vague statements of the state's witnesses, nd suggested that the witnesses had discussed Conklin's disappearance extensively. Mendoza and Wamsley, the two witnesses allegedly present at the murder, gave varying accounts of what happened. In fact, Mendoza's story changed multiple times–the last just days before trial. (Doc. 15-4 at 9.) Mendoza's testimony was painstakingly vague, he could not even pinpoint time of day the incident occurred. (Doc. 15-3 at 90, 102.) After multiple visits, neither Mendoza nor Wamsley could locate the burial site despite their familiarity with the area and the use of cadaver dogs and ten investigators. (Doc. 15-4 at 87-93; Doc. 15-5 at 72-73.) In addition, Mendoza and Wamsley admitted that they were drinking and using cocaine on the night of the alleged murder, making their testimony even more unreliable. (Doc. 15-3 at 90-91.) Furthermore, Wamsely said Conklin's body was in the bedroom when he arrived, and they duct taped a sheet

around the body. (Doc. 15-4 at 73-74, 77) However, Mendoza never mentioned moving the body from the living room or the duct tape. Mendoza claimed they laid plywood on top of the body in Wamsley's truck (Doc. 15-3 at 98), but Wamsley stated it was screening and mining equipment, including shovels and piks (Doc. 15-4 at 78). Segatto also admitted that many people had talked about wrapping the body in a sheet, but could not recall who or when these conversations occurred. (Doc. 15-3 at 72-73.) These inconsistencies were all before the jury.

Trial counsel's theme in closing arguments illustrated that Petitioner was being accused of murder by "convicted felons and liars and drug dealers." (Doc. 61-8, Ex. D at 21.) Counsel explained how each witness had his own motivation to lie. *Id.* at 26; (Bentley's, 27-32); (Segatto's, 32-37); (Mendoza's 38-42); (Wamsley's 42-46). "These people would eat their own to save themselves," counsel stated, and claimed it was convenient for them to blame a murder on Petitioner because "[t]here is no body, and the reason there is no body is because there never was a murder. There is not a weapon because none was ever used. There is no crime scene because no crime was ever committed." *Id.* at 22-23. Trial counsel pointed out the witnesses' confusion, lack of articulable facts, selfish motivations to lie, and contradicting accounts of events.

Introducing further testimony of potential witnesses showing collusion was not ineffective given the vague testimony, the witnesses' motives, and the lack of physical evidence. Pursuing a trial strategy that there was no victim was reasonable because of the state's lack of physical evidence and the dubiety of the witnesses' statements. Trial counsel elicited inconsistent testimony supporting this defense directly from the state's witnesses. Trial counsel had the right to provide a singular defense at the expulsion of another, less desirable defense, and did so. Therefore, Petitioner has not presented a substantial claim of ineffectiveness of trial counsel.

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b. Precluded Claims

Alternate IAC theories and additional evidence not presented in an original § 2254 petition represent new allegations of ineffectiveness which must be construed by the court as presenting a successive § 2254 petition. *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005); *see Johnson v. Phelps*, 2013 U.S. Dist. LEXIS 106923, *4–5 (D. Del. 2013) (Asking court to reopen case under *Martinez* to raise new IAC claims not raised in § 2254 constitutes a successive petition, which without permission from appellate precludes judicial review). Using Rule 60(b) to raise new claims for relief or "new evidence in support of a claim already litigated" is an impermissible circumvention of the limitations on second or successive § 2254 petitions. *Gonzalez*, 545 U.S. at 531-32. Before a movant may file a second or successive motion under § 2255, he must obtain "an order from the appropriate court of appeals authorizing the district court to consider the petition." 28 U.S.C. §§ 2244(B)(3)-(4); Rule 9 of the Rules Governing § 2254 Cases in the United States District Courts. The pending Rule 60(b) Motion has not been certified by the court of appeals. In addition, even if Petitioner had obtained permission, these claims are now precluded because they are time barred. *See* 28 U.S.C. § 2244(d)(1) (claimant has one year to file federal habeas from "the date on which the factual predicate of the claim or claims could have been discovered through due diligence").

In its Order permitting consideration of the Rule 60(b) Motion, the Court noted that Petitioner was aware that "he [was] limited to the IAC claim presented in the habeas petition" (Doc. 58 at 5 (citing Doc. 57).) The Court finds that some of Petitioner's claims and evidence in the Rule 60(b) Motion were not previously presented to this Court. These include trial counsel's ineffectiveness due to (1) failing to interview and examine Jon Leonard, Kevin Davis, Nadine Leonard, and Jerry Davis; (2) coercing Petitioner not to testify; (3) forcing Petitioner to waive his speedy trial rights; and (4) trial counsel's cumulative error. In essence, these claims ask the Court to allow Petitioner to proceed under Rule 60(b) where he could not under a successive § 2254. The Court has no jurisdiction over these matters.

i. John Leonard, Nadine Leonard, Kevin Davis, and Jerry Davis

Petitioner admits he never argued in any prior proceeding that trial counsel should have presented these witnesses. (Doc. 66 at 18.) Nonetheless, he asserts that the Court should evaluate the testimony of the witnesses because they are "important to Petitioner's case," and show trial counsel's negligence. *Id.* at 18-19. These are insufficient reasons for failing bring these persons to the Court's attention in the original § 2254 Petition. The Court will not consider them.

ii. Advising Petitioner Not to Testify

Petitioner further concedes he never previously argued that advising petitioner not to testify constituted IAC. *Id.* at 22. This presents a new theory which is appropriately raised in a successive § 2254 petition.

iii. Coercing Petitioner to Waive Speedy Trial Rights

Petitioner did not allege that trial council forced him to waive his rights under the Speedy Trial Act in his original § 2254 Petition. This too is a new theory and precluded. Moreover, the trial court ruled on the merits of trial counsel's waiver and found Petitioner had not stated a colorable claim. (Doc. 48-3 at 10-11 (citing *State v. Vasko*, 971 P.2d 189 (Ariz. App. 1998) ("[I]t is not sufficient for a defendant to contend that the state may not have made its case had the trial proceeded without a continuance.").) Petitioner has not shown that this determination was either contrary to federal law or a misapplication of the law to the evidence, or that Petitioner likely suffered prejudice.

iv. Cumulative Error

Petitioner now claims that he suffered prejudice from cumulative error. (Doc. 66 at 23.) Insofar as Petitioner is alleging his PCR counsel was ineffective for failing to raise trial counsel's cumulative error in his post-conviction proceedings, this fails for two reasons. First, it was not raised in his original § 2255 Petition. Second, Arizona does not recognize the cumulative error doctrine, *see e.g., State v. Ellison*, 140 P.3d 899, 916 (Ariz. 2006), and not pursuing a futile course of action is not ineffective, *see Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) ("A lawyer's zeal on behalf of his client does not require him

to file a motion which he knows to be meritless on the facts and the law."). If, instead, Petitioner is attempting to raise a constitutional challenge of cumulative error, as explained in this Order, Petitioner has not raised a substantial claim of IAC of trial or PCR counsel, and without individual error, he could not be prejudiced by cumulative error. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.")

c. Claims Raised in the State Court

i. Danelle Campbell

The first PCR Petition alleged that there was newly discovered evidence from Danelle Campbell, Dean Wamsley's former girlfriend, in which she alleged she overheard Segatto and Wamsley conspiring about what to tell the authorities about Conklin's murder. (Doc. 61-1 at 4-41.) The issue was raised in the Initial PCR as a newly discovered evidence claim, and included a copy of Campbell's affidavit. (Doc. 11 Ex. G.) The trial court dismissed this claim, and as this Court previously noted, "[t]he trial court . . . concluded that Campbell's affidavit was 'neither particularly credible nor reliable' and was cumulative to evidence offered at trial" and determined that Petitioner had not demonstrated prejudice through failure to present this testimony. (Doc. 30 at 5.) This Court agreed that the statements did not have changed the verdict. *Id.* at 4-5.

Petitioner's Rule 60(b) motion essentially regurgitates the same argument, and the Court's conclusion is the same. First, as noted in the previous section addressing collusion and third-party culpability, trial counsel did not need to present evidence under the theory that the witnesses conspired to frame Petitioner to present an effective defense. Second, Petitioner has not demonstrated PCR counsel's presentation of the testimony likely caused prejudice. Petitioner has not demonstrated his IAC claims are substantial or that PCR counsel was ineffective under *Strickland*.

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ii. Kristina Bourguet

Petitioner next argues that trial counsel was ineffective for failing to interview his ex-wife Kristina Bourguet. (Doc. 48 at 6-7.) He claims Bourget would have stated that she lived with Petitioner during the summer of 1993 and "on that evening" she spent the night at Ernie Mendoza's house with his wife. *Id.* at 2-3. She stated Mendoza, the Petitioner, and Conklin went partying and when Mendoza returned he told her that Conklin was asked to leave the trailer and left by taxi. *Id.* at 2. When he returned, Mendoza did not appear as if he had been burying a body, nor did he appear disturbed. *Id.* In addition, she never noticed any missing sheets or notice anything unusual in the trailer. (Doc. 1-13, Ex. 13.) Petitioner claims that this would have discredited the only eyewitness in this case and undermined the conviction. (Doc. 48 at 6-7.)

Respondent states that Bourguet's affidavit aids the state's case because Mendoza stated that he was with Petitioner on the night of the murder and it supported the witnesses' contention that there was no blood. (Doc. 61 at 10.) Also, any statements Mendoza made to Bourget were hearsay, and would have been precluded because they would have been offered only for the truth of the matter asserted. *Id.* at 10. Petitioner claims it would have been admissible as a prior inconsistent statement. (Doc. 66 at 11.)

The trial court dismissed this claim in the Successive PCR as precluded for failing to raise it in the Initial PCR, but also addressed the merits stating that trial counsel was not ineffective because the testimony was merely impeaching and unlikely to change the verdict. (Doc. 48-3 at 14.) This conclusion was neither contrary to federal law nor an unreasonable determination of the facts. Petitioner has not raised a substantial claim and cannot show Initial PCR counsel's failure to raise this claim prejudiced him.

iii. Shawn Lopez

Petitioner alleges that trial counsel should have interviewed and presented the testimony of Shawn Lopez–Dean Wamsley's former wife. (Doc. 48 at 7-8.) His § 2254 Petition–submitted through counsel–includes only a statement from an investigator about the alleged statements of Lopez.

Without an affidavit of Lopez, there is insufficient evidence to determine that she would have testified an accordance with the investigator's statements; therefore, Petitioner has not demonstrated prejudice. *See United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (there must be evidence in the record that shows witness would have testified if called); *see also Dows v. Wood*, 211 F.3d 480, 486-87 (9th Cir. 2000) (self-serving affidavit about possible testimony of another cannot demonstrate IAC). The Court also agrees with the trial court, the statement offers little to support Petitioner's innocence; it merely asserts that in 2000, Lopez does not remember Wamsley leaving in the middle of the night sometime during 1993. (Doc. 16-3 at 6-7.) She neither knew the victim, nor spoke to Wamsley about the incident, nor knew anything about the incident until Wamsley's subsequent legal proceedings. *Id.*

iv. Scott Wright

Initial PCR counsel raised trial counsel's ineffectiveness for failing to obtain Scott Wright's testimony. Allegedly, Bentley told Wright he had fabricated the allegations against Petitioner to get back at him for not paying him back. (Doc. 48 at 8.) Initially, the trial court dismissed Wright's testimony as unreliable and cumulative. (Doc. 2, Ex. 3 at 4.) In the successive PCR proceedings, the trial court indicated that Petitioner had not explained how his new claim was any more developed than in the initial PCR Petition. (Doc. 48-3 at 15.) Petitioner's Rule 60(b) Motion argues Initial PCR counsel should have obtained Wright's affidavit and presented this claim in the Initial PCR Petition. But, Bentley's motivation for lying about the incident was before the jury. Second, Petitioner has not shown that had PCR counsel raised the issue, the outcome would have been different. Wright's testimony, a cellmate of Bentley's, was not reliable. The trial court's determination that Wright's testimony was not credible and cumulative was reasonable, and was not contrary to federal law or an unreasonable application of facts.

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v. Tim Guilfoyle

Petitioner claims that trial counsel should have interviewed the subsequent owner of the trailer where the murder allegedly occurred, who could have testified that he found no evidence of blood. (Doc. 48 at 8-9.) However, as Respondent notes, Petitioner was not indicted in this case until years after the event and after the trailer had been relocated, so any signs of a murder could have been removed and the passage of time decreased the likelihood of discovering any relevant evidence. Moreover, no one testified that there would be blood at the crime scene, but noted the surprising lack of blood. Had trial counsel pursued this avenue, he would have either reaffirmed every witnesses' testimony or possibly damaged his defense if, by chance, Guilfoyle had discovered blood. Pursuing this avenue would reveal cumulative evidence at best, and incriminating evidence at worst, and did nothing to advance counsel's defense that no crime occurred. The Court agrees with the state PCR court's determination that this was a trial strategy, not a lack of it. (Doc. 48-5 at 5.) Therefore, Petitioner has not presented a substantial claim of IAC.

vi. Investigation of Burial Site and Archeologist

Petitioner alleges trial counsel should have hired an archeologist to show that the excavation sites had never been dug up before to counter the state's theory that the victim's body had been moved. (Doc. 48 at 26-28.)

The trial court addressed aspects of the investigation of the burial site and presentation of an archeologist in its denial. The trial court found that not taking a cadaver dog to the alleged burial sites was not ineffective because there were cadaver dogs at the site, and nothing was discovered. (Doc. 48-3 at 16.) It stated, "Given that no body was found, [trial counsel's] decision not to utilize a cadaver dog is an understandable strategic decision." *Id.* at 16. As for the use of an archeologist, the trial court explained "While the use of such experts may appear marginally reasonable in hindsight, it does not raise a colorable claim of ineffective assistance of counsel. No body was found. [Trial counsel's] decision to merely point out this failure of evidence in the state's case, as opposed to accompanying investigators to the sites, using a cadaver dog or employing archaeologists

is clearly a matter of strategy by trial counsel. These claims do not raise a colorable claim of ineffective assistance of counsel." *Id.* at 17.

Discovering whether a site had been previously excavated would have aided trial counsel's defense that there was no body because the victim was still alive. However, trial counsel demonstrated that despite the state's eleven investigators and cadaver dogs (who did not alert to a body), multiple visits to various alleged burial sites recovered nothing. Not retracing areas already covered and not using an archeologist at all the empty "burial sites" just to show that no digging had occurred was not substandard. Petitioner cannot demonstrate that if the issue had been raised adequately in his Initial PCR that the trial court would have granted relief. Furthermore, Petitioner does not contend that the trial court's determination was contrary to federal law or an unreasonable application of facts.

vii. Ballistics Expert

Petitioner claims that trial counsel should have called a ballistics expert to show that had the victim been shot with a Black Talon bullet at close range it would have caused so much damage to the body that it would have to leave physical evidence at the scene. (Doc. 48 at 10-11.) The trial court found the testimony of a ballistics expert was merely speculative and PCR counsel had provided no affidavit as to what testimony a ballistics expert could provide. (Doc. 2, Ex. 3 at 5.) In the Successive PCR, the trial court dismissed this claim because it was raised in the original PCR Petition. (Doc. 2, Ex. 4 at 12.)

In his § 2254 Petition and Rule 60(b) Motion, Petitioner attaches as an exhibit what appears to be general information on Black Talon bullets from Tactical Firearms Institute. (Doc. 48-21.) There is no additional affidavit or apparent testimony that could be provided applying the facts of this case. Because this is general information, the Court cannot afford it any weight as to how a ballistics expert would likely testify about the effects of a bullet on a body. Therefore, Petitioner has not shown prejudice or raised a substantial claim. Nor has Petitioner shown that had PCR counsel raised this issue adequately in the Initial PCR, the outcome would have been different.

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viii. Medical Examiner

Petitioner claimed that trial counsel should have brought a medical examiner to testify that being shot with a bullet would cause blood splatter at the crime scene. (Doc. 48 at 11-12.) Initial PCR counsel raised a similar argument, but did not attach an affidavit in support. (Doc. 2, Ex. 3 at 5.) The trial court found that the testimony was speculative, and did not allege how a medical doctor would testify given the facts of this case. *Id.* In the Rule 60(b) Motion, Petitioner attached a medical examiner's affidavit, however, this statement says only that "with proper and adequate information as to the type of bullet, the area of the entrance wound, the position of the body subsequent to the bullet entering the body, the handling of the body afterward and information regarding environmental factors, I would be able to render an opinion regarding rigor, lividity and blood flow." (Doc. 48-20 at 3.) Because the gun and the body were never retrieved, the medical examiner cannot determine the type of bullet or the area of the entrance wound. Because of the differing accounts about the location and transport of the body after the shooting existed, the medical examiner cannot hypothesize about blood loss. Thus, Petitioner cannot show that the Medical Examiner could make an approximation about the blood splatter. He has therefore not stated a substantial claim, and has failed to show prejudice.

V. CONCLUSION

Petitioner's arguments do not show incompetence, but suggest that Petitioner wishes that trial counsel had predicted that the state's witnesses would turn on him at the last moment, included alternative strategy for defending him, and elicited expert and witness testimony merely to further persuade a jury to facts the attorney had already exposed–the adverse witnesses had numerous motives to lie and there was an absolute lack of physical evidence. In sum, he wanted a *better* lawyer. But, under the *Strickland* standard, "a defendant is not entitled to representation by a modern-day Clarence Darrow—mere competence will suffice." *Oyague v. Artuz*, 393 F.3d 99, 107 (2d Cir. 2004) (internal quotation marks omitted). Trial counsel reasonably pursued a valid and plausible defense; argued there was no physical evidence of a murder, demonstrated there was a high

likelihood that the victim had fled the arms of justice, and revealed that the state's witnesses had ulterior motives for falsely recounting the events. Petitioner was provided a competent defense, and neither his trial nor his PCR counsel rendered ineffective assistance.

IT IS ORDERED Petitioner's Motion for Relief from Judgment Pursuant to *Martinez v. Ryan* (Doc. 48) is DENIED.

Dated this 5th day of March, 2019.

Honorable Raner C. Collins
United States District Judge

APPENDIX-C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY S. DAVIS, Petitioner-Appellant, v. DORA B. SCHRIRO, Warden; TERRY L. GODDARD, Respondents-Appellees.	No. 19-15900 D.C. No. 4:04-cv-00583-RCC District of Arizona, Tucson ORDER

Before: SCHROEDER, W. FLETCHER, and VANDYKE, Circuit Judges.

Judge Schroeder recommended that the panel deny Appellant's Petition for Rehearing En Banc (ECF No. 37), and Judges Fletcher and VanDyke voted to deny the petition.

The full court has been advised of the petition, and no judge has requested a vote on whether to rehear the matter en banc.

Accordingly, the petition is DENIED.

Appendix - C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 16 2020

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

JEFFREY S. DAVIS,

Petitioner - Appellant,

v.

DORA B. SCHRIRO, Warden and TERRY L. GODDARD,

Respondents - Appellees.

No. 19-15900

D.C. No. 4:04-cv-00583-RCC
U.S. District Court for Arizona, Tucson

MANDATE

The judgment of this Court, entered September 25, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX-D

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee/Respondent, v. JEFFREY SEAN DAVIS, Appellant/Petitioner.	2 CA-CR 1998-0136 2 CA-CR 2001-0422-PR (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL AND PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-56610

Honorable Edgar B. Acuña, Judge

AFFIRMED
PETITION FOR REVIEW GRANTED; RELIEF DENIED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kerri L. Chamberlin
Tucson
Attorneys for Appellee

Emily Danies
Tucson
Attorney for Appellant

Law Offices of Eric A. Larsen
By Eric A. Larsen
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Attorney for Petitioner

F L Ó R E Z, Judge.

¶1 After a jury found appellant Jeffrey Sean Davis guilty of first-degree murder, the trial court sentenced him to a term of life in prison. On appeal, Davis contends the trial court erred in denying his two motions for judgment of acquittal, both of which he made after the close

Appendix - D

of the state's evidence. In his petition for review, which we have consolidated with the appeal, Davis challenges the trial court's order summarily denying relief on his petition for post-conviction relief, in which he had raised claims of newly discovered evidence and ineffective assistance of counsel. We affirm Davis's conviction and deny relief on his petition for review.

Background

¶2 We view the evidence in the light most favorable to sustaining the verdict. *State v. Sullivan*, 187 Ariz. 599, 931 P.2d 1109 (App. 1996). Davis's friend, Ernie Mendoza, testified in exchange for leniency in an unrelated charge that he and Davis had been in the business of buying, transporting, and selling illegal drugs with two other friends, Dean Wamsley and the victim, C. On one occasion, C. had been transporting four hundred pounds of marijuana when he was arrested, convicted, and incarcerated for two years in another state. According to Mendoza, a few months after C. was released and he returned to Tucson, Davis, C., and Mendoza were sitting in the living room of Davis's trailer on a summer evening in 1993. Sometime after midnight, C. stood up and began to walk toward the bathroom. Mendoza testified that, without warning, Davis had picked up a gun from the living room table and shot C. in the back, killing him. According to Wamsley, who also testified in exchange for leniency on an unrelated charge, Mendoza had called him shortly after the murder and asked for his help. Wamsley drove to Davis's trailer in his pickup truck, and the three men loaded C.'s body into Wamsley's truck, drove to a remote location, and buried C.'s body, which has never been found.

Appeal

¶3 Davis first contends that, because C.'s body has not been found and because the state did not produce reliable witnesses, there was insufficient evidence that a crime had been committed; thus, he argues, the trial court erred in denying his motion for judgment of acquittal,

made pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S. Davis claims that, by failing to require sufficient evidence that a crime had been committed, the trial court improperly placed the jury in the position of having to "speculate" about the crime. We review a trial court's denial of a Rule 20 motion for an abuse of discretion. *Sullivan.*

¶4 A trial court must "enter a judgment of acquittal . . . after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). When faced with a motion brought under Rule 20, a trial court must submit the case to the jury if reasonable minds could differ on the inferences to be drawn from the evidence, whether that evidence is direct or circumstantial. *State v. Landrigan*, 176 Ariz. 1, 859 P.2d 111 (1993).

¶5 The state presented both direct and circumstantial evidence at Davis's 1998 trial that C. was dead and that Davis had killed him in the summer of 1993. Mendoza testified that he had been present when Davis shot C., that he had helped transport C.'s dead body, and that he had watched Davis and Wamsley bury the body. Wamsley testified that C. was not breathing when Wamsley had arrived at Davis's trailer and that he had helped Davis bury C.'s body. Two other witnesses testified that Davis had later confessed to shooting C. in the back and burying him. In addition, C.'s parents both testified that they had neither seen nor heard from C. since the summer of 1993. The mother of C.'s ten-year-old son testified that, after C. had returned to Arizona when he was released from prison, he had established regular contact with their son and had made plans

for regular visitation in the future. However, neither the mother nor C.'s son had seen or heard from C. since July 1993.

¶6 This evidence that C. was dead and that Davis had killed him was more than a mere scintilla, *see Mathers*, and was such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *Jones*, 125 Ariz. at 419, 610 P.2d at 53. Because we conclude that the state produced "substantial evidence to warrant a conviction," Rule 20(a), Ariz. R. Crim. P., the trial court did not err in denying Davis's first motion for judgment of acquittal.

¶7 Davis also contends the trial court erred in denying his second Rule 20 motion, which focused on the definition of premeditation in A.R.S. § 13-1101(1). Davis argues that the court should have submitted the matter to the jury only on second-degree, "non-premeditated killing . . . [because] there had been no evidence that any 'reflection' had taken place prior to the alleged murder." Unless the state has failed to present "substantial evidence" to warrant a conviction, a trial court must deny a defendant's motion for judgment of acquittal. Ariz. R. Crim. P. 20(a).

¶8 In disputing the trial court's determination that there was "substantial evidence for the jury to conclude that premeditation existed in this case," Davis contends that "the statutory definition of premeditation pursuant to A.R.S. § 13-1101(1) as amended in 1998 is vague and unconstitutional [and] requir[es] a new trial." Davis committed the murder in 1993, however, several years before the legislature amended § 13-1101(1). His crime was therefore subject to the statutory definition of premeditation in effect in 1993, not the amendment enacted in 1998. *See* A.R.S. § 1-246 ("When the penalty for an offense is prescribed by one law and altered by a subsequent law, . . . the offender shall be punished under the law in force when the offense was

committed."); *see also State v. Newton*, 200 Ariz. 1, 21 P.3d 387 (2001). Accordingly, we do not address Davis's argument that the current definition is vague and unconstitutional.[1]

¶9 At the time Davis committed his offense in 1993, § 13-1101(1) provided:

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

1978 Ariz. Sess. Laws, ch. 201, § 125. Division One of this court later interpreted that definition as meaning the state must present evidence of "actual reflection" by a defendant rather than merely showing the passage of an amount of time. *State v. Ramirez*, 190 Ariz. 65, 70, 945 P.2d 376, 381 (App. 1997).[2]

¶10 The state presented evidence here that, under the premeditation definition in effect at the time, Davis had actually reflected before he killed C. Several witnesses testified that Davis and C. had been arguing before the murder. C. had threatened to give the police information about Davis's involvement in a prior drug transaction unless Davis paid him a sum of money. C. had further threatened that, after having Davis arrested, he planned to "be with [Davis's] old lady." Because this circumstantial evidence of premeditation presented a factual question on which reasonable minds could differ, the trial court correctly denied Davis's motion for judgment of acquittal and submitted the issue to the jury. *See Landrigan; see also Ramirez.*

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[1]We note, however, that our supreme court recently found the amendment constitutional. *State v. Thompson*, ___ Ariz. ___, 65 P.3d 420 (2003).

[2]In *Thompson*, our supreme court also eliminated any confusion created after the legislature enacted the 1998 amendment in response to *Ramirez*.

¶11 After filing a notice of appeal, Davis asked us to stay the appeal because he had filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., in which he asserted claims of newly discovered evidence and ineffective assistance of trial counsel. After the trial court summarily denied relief, Davis did not ask us to review that decision but, instead, filed a second petition for post-conviction relief asserting claims of ineffective assistance of both his trial counsel and Rule 32 counsel and of newly discovered evidence. He now requests review of the trial court's denial of his second Rule 32 petition. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 719 P.2d 1049 (1986).

¶12 In his petition for review, Davis contends the trial court erred in summarily dismissing his claim of ineffective assistance of counsel. He also contends the court erred in finding that his second Rule 32 attorney was precluded from raising claims of newly discovered evidence even though Davis had alleged that the first Rule 32 attorney had failed to uncover the evidence. Although Davis asserted in the introduction to his second Rule 32 petition that newly discovered material facts existed, in his argument, he failed to develop that assertion. Instead, he merely argued that his trial counsel and his first Rule 32 counsel had been ineffective in failing to interview several people who had come forward with information and in failing to adequately investigate the case to obtain information with which to impeach the state's witnesses. Consequently, Davis abandoned his claim of newly discovered evidence, and we do not address it. *See* Ariz. R. Crim. P. 32.5 (petition for post-conviction relief "shall include every ground known to" defendant and shall include supporting facts and memorandum of points and authorities).

¶13 And, although the trial court addressed Davis's claims of ineffective assistance of trial counsel in ruling on Davis's second petition, Davis was nevertheless precluded from raising those claims in his second petition for post-conviction relief. Under Rule 32.2(a)(3), a defendant is precluded from obtaining relief based upon any ground "[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding." Having failed to raise these additional claims of ineffective assistance of trial counsel in his previous petition for post-conviction relief, Davis was precluded from raising them in his second petition. *See State v. Conner*, 163 Ariz. 97, 786 P.2d 948 (1990).

¶14 Nor is Davis entitled to relief on his claim that his first Rule 32 counsel was ineffective. The trial court correctly held that, because Davis was tried by a jury, he only has a constitutional right to the effective assistance of counsel on his appeal and "does not have a right to assert a claim of ineffective assistance of Rule 32 counsel in a subsequent petition for post-conviction relief." *State v. Mata*, 185 Ariz. 319, 916 P.2d 1035 (1996). The trial court did not err in dismissing Davis's second petition for post-conviction relief.

Conclusion

¶15 Finding no error, we affirm Davis's conviction and deny relief on his petition for review.

M. JAN FLOREZ, Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Presiding Judge

JOSEPH W. HOWARD, Judge

APPENDIX-E

Supreme Court
STATE OF ARIZONA

NOËL K. DESSAINT
CLERK OF THE COURT

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 542-9396

KATHLEEN E. KEMP
CHIEF DEPUTY CLER

December 5, 2003

RE: STATE OF ARIZONA v JEFFREY SEAN DAVIS
Arizona Supreme Court No. CR-03-0225-PR
Court of Appeals Division Two Nos. 2 CA-CR 98-0136 &
2 CA-CR 01-0422 PRPC
Pima County Superior Court No. CR-56610

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 4, 2003, in regard to the above-referenced cause:

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED.

Record from Court of Appeals, Division Two, was an electronic link.

Noel K Dessaint, Clerk

TO:
Hon Terry Goddard, Arizona Attorney General
Attn: Randall M Howe, Esq
Kerri L Chamberlin, Assistant Arizona Attorney General, Tucson Office
Emily L Danies, Esq
Eric A Larsen, Esq
Jeffrey Sean Davis, ADOC #134652, Arizona State Prison, Tucson - Winchester Unit
West Publishing Company
Lexis-Nexis
Jeffrey P Handler, Clerk, Court of Appeals, Division Two, Tucson
kab

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APPENDIX-F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jeffrey Davis,

Petitioner,

v.

Dora B. Schriro, et al.,

Respondents.

No. CV-04-00583-TUC-RCC

ORDER

Pending before the Court is Petitioner Jeff S. Davis' Motion for Certificate of Appealability. (Doc. 83.) The Court will grant the Certificate of Appealability because it finds that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotations omitted). Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the issues that satisfy this showing include the Court's determination that Petitioner's 60(b) Motion was untimely and did not present extraordinary circumstances warranting review; and that regardless of timeliness, Petitioner's claims did not excuse his procedural default.

Accordingly, IT IS ORDERED Petitioner's Motion for Certificate of Appealability is GRANTED. (Doc. 83.)

Dated this 24th day of April, 2019.

Honorable Raner C. Collins
Senior United States District Judge

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APPENDIX-G

UNITED STATES COURT OF APPEALS

FILED

JUN 28 2019

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

FOR THE NINTH CIRCUIT

JEFFREY S. DAVIS, Petitioner-Appellant, v. DORA B. SCHRIRO, Warden; TERRY L. GODDARD, Respondents-Appellees.	No. 19-15900 D.C. No. 4:04-cv-00583-RCC District of Arizona, Tucson ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The submission of the Form CJA-23 is construed as a motion for leave to proceed in forma pauperis and, so construed, is granted. Accordingly, appellant has demonstrated financial eligibility for appointment of counsel.

Appellant's motion for appointment of counsel (Docket Entry No. 3) in this appeal from the denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus is granted. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Counsel will be appointed by separate order.

The Clerk shall electronically serve this order on the appointing authority for the District of Arizona, who will locate appointed counsel. The appointing authority shall send notification of the name, address, and telephone number of

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appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The Clerk shall strike the pro se opening brief received on June 19, 2019 (Docket Entry No. 4). The Clerk shall serve a copy of the stricken pro se brief on the appointing authority, who shall provide the brief to new appointed counsel. Appointed counsel shall confer with the appellant about the issues addressed in the pro se brief.

The opening brief and excerpts of record are due September 23, 2019; the answering brief is due October 23, 2019; and the optional reply brief is due within 21 days after service of the answering brief.

APPENDIX - H

NO. 19-15900

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFERY SEAN DAVIS
Petitioner-Appellant

-vs-

DAVID SHINN DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, MARK BRNOVICH, ARIZONA ATTORNEY GENERAL
Respondents-Appellees

On Appeal from the United States District Court
for the District of Arizona (Tucson)
Cause No. 4:04-cv-00583-RCC

Opening Brief of Petitioner-Appellant

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STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 2254 wherein this appeal arises from a motion to reopen habeas corpus proceedings.

B. Appellate Court Jurisdiction

This Court has jurisdiction under 28 U.S.C. §§ 1291 and –2253. The district court denied the Rule 60(b) motion on the merits and the denial of a Rule 60(b) motion is a final, appealable order under Rules 54(a) and 58 of the Federal Rules of Civil Procedure.

C. Timeliness of Appeal

Following the entry of the order denying Petitioner's motion for reconsideration to reopen habeas corpus proceedings on March 26, 2019, Petitioner filed a notice of appeal on April 22, 2019. (CR 79, Order; ER 1, Notice of Appeal.)[1] The notice was timely pursuant to Fed. R. App. P. 4(A)(vi). On April 24, 2019, the district court granted a certificate of appealability. (ER 2, Certificate of Appealability.)

[1] Brief citations shall be to the Excerpts of Record ("ER") accompanying the Opening Brief. "CR" references shall be to the District Court Clerk's Record, followed by the document number and the title of the document.

BAIL / CUSTODY STATUS OF PETITIONER-APPELLANT

Petitioner, a state prisoner, is presently incarcerated in a state penitentiary located in Tucson, Arizona. Petitioner is serving a life sentence and no release date is projected by the Arizona Department of Corrections.

ISSUES PRESENTED FOR REVIEW

1. Jeffery Davis has been denied access to the courts and due process of law where the appellate review Arizona has accorded to date is inadequate to vindicate the constitutional protections due to a defendant after criminal conviction.

2 The state courts' disposition of Davis' claims on collateral review was contrary to federal law or an unreasonable application of clearly established federal law.

INTRODUCTION

In *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993), the Supreme Court summarized the constitutional rights due to a person charged with a crime: (1) the presumption of innocence; (2) the right to confront adverse witnesses; (3) the right to compulsory process; (4) the right to effective assistance of counsel; (5) proof of guilt beyond a reasonable doubt; (6) the right to jury trial; (7) the disclosure of exculpatory evidence; (8) the right to assistance of counsel; and (9) the right to "fair trial in a fair tribunal". Once convicted, a person has a right to appellate review. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

In February 1998, Jeffery Sean Davis ("Davis") was convicted of first-degree murder on the basis of immunized testimony—without the Pima County Attorney Office ever producing a body or a murder weapon. Shortly afterwards, the appellate defense team initiated post-conviction proceedings to develop newly-discovered evidence coming to light from a community member expressing their disbelief at Davis' conviction. For his part, Davis—who acknowledges that he, the decedent, and the prosecution main witnesses who received immunity to tie him to the disappearance of the decedent, all dealt drugs in the Tucson area in the years before Davis was charged with murder—knew that he was being wrongfully accused of a crime but was powerless to do anything about it. Davis' trial attorney did not conduct an

investigation or subject the government's case to meaningful adversarial testing despite Davis' revelations to trial counsel. Since his conviction, Davis has not obtained meaningful review of his conviction because the act of initiating post-conviction relief proceedings *before* concluding direct appeal proceedings has resulted in state courts invoking procedural rules that have precluded vindication of constitutional protections due to a criminal defendant.

OVERVIEW OF APPLICABLE LAW

To provide context to the procedural posture of this case, Davis provides the Court with an in-depth summary of applicable federal law as well as Arizona's post-conviction review procedures and their modification by judicial opinion and practices at the time appellate counsel attempted to comply with state procedures to obtain collateral review of Davis' conviction in the forum designated by Arizona. The Rules of Criminal Procedure governing post-conviction relief proceedings in effect in 1999 are provided to the Court as an excerpt. (See ER 8, Governing Procedural Rules (eff. 1999).)

I. Overview of Requirement of Procedural Mode to Vindicate Constitutional Rights

The Fourteenth Amendment requires state governments to provide due process before depriving a person of life, liberty, or property. U.S. Const. amend. XIV, § 1; see also U.S. Const. amend. V.; *Gideon v. Wainwright*, 372

U.S. 335, 342-43 (1963). In the context of criminal prosecutions, an individual is accorded due process and equal protection of the laws through the exercise of the right to appeal after conviction. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Douglas v. California,* 372 U.S. 353, 355 (1963).

The Arizona Constitution expressly guarantees defendants appellate review. Ariz. Const. art. 2 § 24; *see generally*, *Wilson v. Ellis*, 859 P.2d 744, 746 (1993) (noting that Arizona provides PCR review in lieu of direct review to pleading defendants to permit the exercise of constitutional right to appellate review).

Giving effect to the federal constitutional mandate of due process, the Supreme Court has directed States to provide a mode by which federal constitutional rights are to be adjudicated after conviction, *Carter v. Illinois*, 329 U.S. 173, 175–76 (1946), and rules of procedure instruct litigants to "present their contentions to the right tribunal at the right time." *Massaro v. United States*, 538 U.S. 500, 504 (2003) (quoting *Guinan v. United States*, 6 F. 3d 468 (7th Cir. 1993)).

Simply stated, direct appeal proceedings give petitioners the opportunity to challenge the merits of a judgment and allege errors of law or fact while post-conviction review gives convicted persons the opportunity to inquire into the validity of a conviction and sentence. *Graham v. Borgen*, 483 F3d 475, 479 (7th

Cir. 2007); *see also Fay v. Noia*, 372 U.S. 391, 430 (1963) (on direct appellate review of a state court judgment, the Supreme Court "is concerned only with the judgments or decrees of state courts.").

Procedurally, most states—and the federal government—bifurcate criminal appeals into two proceedings. See e.g. 28 U.S.C. § 1291 (conferring appellate jurisdiction to review judgments of convictions in federal cases as final orders); 18 U.S.C. § 3742(a) (conferring appellate jurisdiction to review criminal sentences in federal cases); 28 U.S.C. § 2255(d)(2) (providing remedies for collateral attack of convictions on constitutional grounds).

Arizona likewise bifurcates appeals from criminal convictions into direct appeal and post-conviction relief proceedings. A.R.S. § 13-4033(A)(1) ("Appeal by defendant"); A.R.S. § 13-4231(1) ("Scope of post-conviction relief"); *State v. Mata*, 916 P.2d 1035, 1048 (Ariz. 1996); *accord*, *Montgomery v. Sheldon*, 889 P.2d 614 (Ariz. 1995) ("Although procedurally distinct, Rule 32 proceedings and direct appeal are both devices for ensuring that every defendant receives due process of law.").

The Arizona Supreme Court has stated that Rule 32 "outline[s] the process by which a convicted defendant may obtain post-conviction relief," *Canion v. Cole*, 115 P.3d 1261, 1262 ¶ 5 (Ariz. 2005) and further that Rule 32 allows a defendant to raise issues unknown or unavailable at trial. *State v. Watton*, 793

P.2d 80, 85 (Ariz. 1990). In addition, "[o]ne of the purposes of a Rule 32 proceeding '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.' " *Watton*, 793 P.2d at 85 (quoting *State v. Scrivner*, 643 P.2d 1022, 1024 (Ariz. App. 1982)).

II. Historical Overview of Arizona State Courts' Interpretation and Application of Rule 32 Governing Post-conviction Review and Legislative Enactments

Unlike the procedural scheme the Arizona Supreme Court has implemented for according petitioners direct review, the procedural scheme for post-conviction review has proven particularly problematic for the state courts of Arizona. Justice Blackman's categorization of federal habeas corpus in *Coleman v. Thompson*, 501 U.S. 722, 758-759 (1991), as "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights" is equally applicable to Arizona courts' interpretation, revision, and application of its rule providing collateral review.

In *Ramirez v. Ryan*, Judge Teilborg succinctly provided a historical overview of Rule 32 in Arizona:

> The Arizona Constitution vests the power to make procedural rules exclusively in the Arizona Supreme Court. See ARIZ. CONST., art. VI, § 5 ("The Supreme Court shall have: . . . Power to make rules relative to all procedural matters in any court."). "The Arizona Constitution divides the powers of government into three separate departments and directs that 'no one of such departments shall

> exercise the powers properly belonging to either of the others.'" *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342, 982 P.2d 815, 817 (1999) (quoting ARIZ. CONST., art III.). Pursuant to this separation of powers, the Arizona legislature lacks authority to enact a statute if it conflicts with or tends to engulf the Arizona Supreme Court's constitutionally-vested rulemaking authority. *See id; see also Spears v. Stewart*, 283 F.3d 992, 1014 (9th Cir. 2002) (construing Arizona law and stating that "although the legislature may, by statute, regulate the practice of law, a court rule governing the practice of law trumps statutory law").
>
> In 1984, the Arizona Legislature enacted A.R.S. §§ 13-4231-4240, as a statutory parallel to Rule 32 of the Arizona Rules of Criminal Procedure, but added a time limitation for the filing of PCR petitions. 1984 Ariz. Sess. Laws ch. 303, § 1. Arizona courts determined that the time limitation and other sections of the statute were inconsistent with Rule 32 and thus unconstitutional. *See State v. Bejarano*, 158 Ariz. 253, 762 P.2d 540 (1988); *State v. Fowler*, 156 Ariz. 408, 752 P.2d 497 (App. 1987). Consequently, the offending provisions of the statute were severed from the remaining constitutional portions of the statute. *Id.*

(ER 9 at 148, *Ramirez v. Ryan*, CV-97-1331-PHX-JAT, Doc. 207 Pages 1-8, at 6 n. 6 (Arizona District Court, Mar. 30, 2010).)

Nonetheless, in 1992, the Arizona Legislature folded numerous collateral proceedings into a unitary post-conviction relief proceeding and imposed time limits for commencing non-capital post-conviction relief proceedings. A.R.S. § 13-4231(1) ("Scope of post-conviction relief"); A.R.S. § 13-4234(C) (90-day statute of limitations to commence collateral proceedings). The judiciary

committee was careful to note, however, that the consolidation was not intended to limit a defendant's ability to challenge constitutional error.[2]

At around the same time, the Arizona Supreme Court amended its corresponding rule of procedure and imposed time limits on non-capital defendants seeking collateral review. Ariz. R. Crim. P. 32.4(a) (1992); *see State v. Shrum*, 203 P.3d 1175, 1177-78 ¶¶ 10-14 (2009) (discussing the practices that led to streamlining post-conviction review).

In relevant part to these proceedings, the procedural rules at the time Davis sought to exercise his rights to appellate review required that *all* claims for post-conviction relief be consolidated in *one* petition. See Ariz. R. Crim. P. 32.5 (1998) (requiring PCR petition to "include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed on him or her"); *see generally State v. Vasquez*, 690 P.2d 1240, 1243 (Ariz. App. 1984) ("One of the clear purposes of Rule 32.5(b) is to provide for appointment of counsel so that all grounds for relief may be included in one petition.").

---

[2] *See* 1992 Ariz. Sess. Laws Chps. 184 § 1, 358 §§ 1-9; HB 2534, 40th Leg., 2d Reg. Sess. (Ariz. 1992); House Bill Summary for HB 2534, 40th Leg., 2d Reg. Sess. (Ariz. Mar. 4, 1992); Minutes of House Comm. on Judiciary, 40th Leg., 2d Reg. Sess., at 2 (Ariz. Mar. 9, 1992) (comments setting forth different procedures for obtaining post-conviction relief and explaining that unitary post-conviction relief procedure would simply remove repetitiveness from process but not limit a defendant's ability to challenge constitutional error).

The "One PCR Petition" rule proved unworkable and in 2013, the Arizona Supreme Court amended the Rules of Criminal Procedure to delete the restriction. (ER 10, Arizona Supreme Court Administrative Order No. R-13-0009 Amending Rules 32.5 and 41, Form 25, Arizona Rules of Criminal Procedure.)

In 2000, the Arizona Supreme Court added "actual innocence" as a PCR ground of relief that could be raised in a successive petition. See Ariz. R. Crim. P. 32.1(h), 32.2(b), & 32.4(a) (West 2001). In 2020, the Arizona Supreme Court is again substantively overhauling its rules governing post-conviction review. (See Rules of Criminal Procedure Arizona Supreme Court Order Number R-19-0012, dated 08/29/2019, effective January 1, 2020, abrogating current Rule 32 of the Arizona Rules of Criminal Procedure and adopting new Rule 32 and Rule 33 and related provisions.)[3]

Pursuant to former Rule 32.6(c)—renumbered 32.6(d)—a court may summarily dismiss PCR proceedings if the court determines that "no material issue of fact or law exists" which would entitle the petitioner to relief. *See also State v. Carriger*, 645 P.2d 816, 820 (Ariz. 1982). However, the Arizona Supreme Court provided for an evidentiary hearing to determine issues of

[3] Available at https://www.azcourts.gov/rules/Recent-Amendments/Rules-of-Criminal-Procedure (last visited on October 30, 2019).

material fact to give effect to *Townsend v. Sain*, 372 U.S. 293 (1963), requiring a full factual determination if a petition for post-conviction relief presented a colorable claim. *State v. Adamson*, 665 P.2d 972, 987 (Ariz. 1983) (citing *State v. Richmond*, 560 P.2d 41, 49 (Ariz. 1976)).

A colorable claim is variously described as an allegation, if true might/would have changed the outcome of the contested proceedings. *Watton*, 793 P.2d at 85 ("might"); *see also State v. Amaral*, 368 P.3d 925, 927-28 ¶ 10 (Ariz. 2016) ("would"); *State v. Spreitz*, 39 P.3d 525, 526 ¶ 5 (2002) ("might"); *State v. Schrock*, 719 P.2d 1049, 1057 (1986) ("might"); *State v. Richmond*, 560 P.2d 41, 49 (1976) ("would").

In an opinion issued in 1989 that is particularly relevant to these proceedings, the Arizona Supreme Court directed petitioners to raise ineffective assistance of counsel claims in Rule 32 petitions during the pendency of direct appeals and *thereafter to move to stay* the direct appeal. *State v. Valdez*, 770 P.2d 313, 319 (Ariz. 1989).

State procedural rules permit petitioners to simultaneously contest convictions on direct and collateral review as noted above, but in 1995, the Arizona Supreme Court abandoned the practice of staying direct appeals

pending resolution of Rule 32 proceedings in capital cases.[4] *Krone v. Hotham*, 890 P.2d 1149, 1151-52 (Ariz. 1995). The Arizona Supreme Court explained that the practice of staying appeals pending resolution of Rule 32 proceedings had proven unsuccessful and that it would no longer issue such stays barring the most exceptional circumstances. *Id.*

The Arizona Supreme Court recognized that its new practice was inconsistent with its prior directives but did not require uniformity of state procedural practices:

> We are aware that our present practice may appear to conflict with the practice suggested by cases starting with *State v. Valdez*, 160 Ariz. 9, 770 P.2d 313 (1989). In *Valdez*, we said:
>
> > As a general matter, we recommend that when a defendant wishes to raise the question of ineffective assistance during the pendency of his appeal, he should file the proper petition under Rule 32 ... in the trial court and seek an order from the appellate court suspending the appeal.
>
> 160 Ariz. at 15, 770 P.2d at 319; *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). We continue to commend the Rule 32 process to resolve claims of ineffective assistance of counsel. *See State v. Atwood*, 171 Ariz. 576, 599, 832 P.2d 593, 616 (1992) [...].

Krone, 890 P.2d at 1151 (parenthetical citation omitted).

[4] The year before, in another capital case, the Arizona Supreme Court had opined that it would no longer "resolve an ineffective assistance of counsel claim on direct appeal unless the record clearly indicates that the claim is meritless." *State v. Maturana*, 882 P.2d 933, 940 (Ariz. 1994).

Despite permitting petitioners to simultaneously litigate their convictions on direct and collateral review, the Arizona Supreme Court stated that the rules of preclusion apply to preclude review of a claim that could have been raised in a prior post-conviction relief proceeding or on direct appeal. *Krone*, 890 P.2d at 1151.

In 1998, this Court had cause to certify Rule 32 interpretive questions to the Arizona Supreme Court. *See Moreno v. Gonzalez*, 962 P.2d 205 (Ariz. 1998). One certified question asked the Arizona Supreme Court to evaluate whether a petitioner was barred from presenting his claims to state courts at a particular point in time. *Id.* at 206 ¶¶ 2-3. The second certified question asked the Arizona Supreme Court to determine whether a different petitioner could still present two of his claims to state courts. *Id.* at 206-07 ¶¶ 4-6.

The response of the Arizona Supreme Court was not a model of clarity for the experienced practitioner—much less the layperson—as evidenced by the passages below:

> Applying our holding to these facts, we answer question number one in Moreno as follows. Moreno may not raise his claim pursuant to Rule 32.1(f) because neither a petition for review to this court from the decision of the court of appeals nor a Rule 32 petition are appeals within the meaning of Rule 32.1(f).
>
> We answer question number one in Binford as follows. Binford may not raise his ineffective assistance of trial counsel and unintelligent plea claims under Rule 32.1(f) because a petition for review to the court of appeals from the denial of a petition for

> postconviction relief in the trial court is not an appeal within the meaning of Rule 32.1(f). Although he was a pleading defendant, he was so at a time when he had a right to direct appeal, and he exercised that right. And he further exercised his right to file a petition for post-conviction relief.

962 P.2d at 208 ¶¶ 19-20.

In 2002, the Supreme Court of the United States likewise certified a Rule 32 interpretive question to the Arizona Supreme Court:

> At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), see Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), depend upon the merits of the particular claim, see *State v. French*, 198 Ariz. 119, 121-122, 7 P.3d 128, 130-131([App. Div. II] 2000); *State v. Curtis*, 185 Ariz. 112, 115, 912 P.2d 1341, 1344 ([App. Div. I] 1995), or merely upon the particular right alleged to have been violated, see *State v. Espinosa*, 200 Ariz. 503, 505, 29 P.3d 278, 280 ([App. Div. II] 2001)?

Stewart v. Smith, 46 P. 3d 1067, 1068 ¶ 1 (Ariz. 2002) (brackets added). The Arizona Supreme Court explained that the determinative inquiry depended on the particular right alleged to have been violated and not on the merits of a particular claim.[5] 46 P. at 1068 ¶ 3.

[5] Barry French of *State v. French*, Robert Smith of *Stewart v. Smith*, and Davis in the present case, were all prosecuted in Pima County and in each case the procedural rulings of the PCR court and the Second Division of the Arizona Court of Appeals on collateral review foreclosed review of federal claims for relief that could only be considered if raised on collateral review.

Categorizing its Rule 32 jurisprudence as "murky," the Arizona Supreme Court decreed in 2002 that ineffective assistance of counsel claims would no longer be considered on direct appeal and that all such claims must be raised in Rule 32 proceedings. *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002).

In 2006, the Arizona Supreme Court had cause to hold that an attorney cannot allege her own ineffectiveness and therefore the rule of preclusion does not bar a petitioner from filing a *successive* Rule 32 petition contesting the ineffective of counsel who represented her on both direct appeal *and* collateral review. *State v. Bennett*, 146 P.3d 63, 67 ¶¶ 14-15 (Ariz. 2006). In a footnote the Arizona Supreme Court made the following observation:[6]

> We note that as long as the courts appoint the same attorney to represent a defendant in both his or her direct appeal and post-conviction relief petition and suspend the appeal to permit the court to consider it with the petition, the defendant will never be able to raise ineffective assistance of appellate counsel claims in the original post-conviction relief petition.

146 P.3d at 67 ¶ 15.

(... continued)
Judge Jan Flores authored *State v. French* on June 15, 2000, and authored the decision in Davis' case on May 1, 2003. (See *French*, 198 Ariz. at 119; ER 12 at 170, Memorandum Decision at 1.)

[6] In the context of habeas review, the Supreme Court had admonished against interpreting procedural prescriptions to "trap the unwary pro se prisoner." *Slack v. McDaniel*, 529 U. S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U. S. 509, 520 (1982)).

Bennett was litigated in Division II of the Arizona Court of Appeals where the intermediate appellate court had consolidated the direct appeal and the petition for review of the denial of post-conviction relief and disposed of the case by affirming the convictions and denying relief on the claims raised in the PCR. 146 P.3d at 66 ¶ 9.

In 2009, the Arizona Supreme Court again reviewed its jurisprudence to clarify what constitutes "a significant change in the law" under Rule 32.1(g). *Shrum*, 203 P.3d 1175, 1177-78 ¶¶ 10-14. The Arizona Supreme Court held that the overruling of previously binding case law can constitute a "significant change in the law" under Rule 32.1(g). *Id.* at 1179 ¶ 16. Likewise, a statutory or constitutional amendment representing a definite break from prior law can constitute a "significant change in the law" under the Rule. *Id.* at 1179 ¶ 17.

In 2012, the Supreme Court of the United States held that where state collateral review is the first place a prisoner can present a constitutional challenge to a conviction, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if there was no counsel or counsel in that proceeding was ineffective. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). Accordingly, an equity-based right to counsel is warranted where a petitioner is impeded or obstructed in complying with established state procedural rules. *Id.* at 13. *Martinez* originated out of the Second Division of

the Arizona Court of Appeals. (See *Martinez v. Ryan*, CV-08-00785-PHX-JAT, Doc. 1 Pages 1-4, at 4 (Arizona District Court, Apr. 24, 2008).)

Post-*Martinez*, Division II of Arizona's intermediate courts of appeal restrictively interpreted *Martinez* and concluded that where the Supreme Court did not ground its decision in a constitutional right, the decision did "not alter established Arizona law," and therefore did not constitute a significant change in the law under Rule 32.1(g). *State v. Escareno-Meraz*, 307 P.3d 1013, 1014 ¶ 6 (Ariz. App. 2013). As of the date of briefing in this case, the intermediate appellate courts in Arizona have invoked *Escareno-Meraz* 114 times to bar review of ineffective assistance of counsel claims in a successive PCR petition. (Cite check performed on October 23, 2019.)

STATEMENT OF PROCEDURAL FACTS

At the outset, Davis notes that the procedural posture of his case is summarized with great specificity in this pleading. At issue are matters related to adequacy of state procedures, attempted compliance with state procedural rules, exhaustion, procedural default, due diligence, and application of clearly established federal law. Procedural history is probative, relevant, and necessarily at issue when the Court tests whether the action or inaction on the part of a criminal defendant should be construed as a decision to surrender the assertion of rights secured by the Constitution. *Panetti v. Quarterman*, 551 U.S.

930, 939 (2007); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues."); *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003) (grounds for equitable tolling under § 2244(d) are highly fact-dependent).

1. 1998 Trial Proceedings

On April 4, 1997, the State charged Davis with first-degree murder in the death of Fred William Conklin occurring on or about July 1993 and August 1993. (ER 24, Indictment.) On February 13, 1998, a jury found Davis guilty as charged. (ER 23, Verdict.) On March 16, 1998, the state court imposed a sentence of life imprisonment. (ER 22, Sentencing Minute Entry.)

2. Commencement of Appellate Proceedings

On March 18, 1998, trial counsel filed a timely notice of appeal from the judgment and sentence. On August 28, 1998, direct appeal counsel (Lori Lefferts) filed a motion to stay the direct appeal. (ER 27 at 377, Arizona Court of Appeals 2004 Docket "Direct Appeal Docket" at 5.)[7] [8] On September 3,

[7] Some pleadings are presently not available to the defense. Davis cites to the entries in state court dockets subject to the disclaimer of the court itself that the entries on its docket may not be accurate although court personnel have made every effort to ensure that the information provided on its web site is accurate and timely. (See ER 27 at 380, Direct Appeal Docket at 8.) Davis further notes that the entries in the direct appeal docket are not sequentially numbered. Davis added page numbers to the document and cites to those page numbers and the date of the proceeding in question.

1998, the intermediate appellate court entered an order staying the direct appeal. (ER 27 at 377, Direct Appeal Docket at 5.) Ultimately, the appellate court stayed direct appeal proceedings until November 5, 2001. (Id. at 378, Direct Appeal Docket at 6.)

3. 1999 Post-Conviction Proceedings

In 1999, the Arizona Criminal Rules of Procedure provided that a petitioner "shall be entitled to a hearing to determine issues of material fact." Ariz. R. Crim. P. 32.8 (1998); *Schrock*, 719 P.2d at 1057. Rule 32.6(c) provides that the trial court may summarily dispose of a petition for postconviction relief if, upon reviewing the pleadings, "it determines that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings." Ariz. R. Crim. P. 32.8 (1998).

On July 26, 1999, PCR counsel (Kevin S. Finn) filed a PCR petition in the trial court. (ER 21, 1999 PCR Petition, Respondents 2015 Objections Exhibit

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(... continued)

[8] Davis notes that the defense motion is not presently available. In the habeas corpus petition, habeas counsel stated that the defense requested the stay because someone contacted direct appeal counsel immediately after the verdict expressing their disbelief at Davis conviction. (ER 6 at 75, PWHC at 22.)

A.)[9] PCR counsel indicated that he sought to "present three distinct pieces of newly discovered evidence" from three witnesses:

> (1) Newly discovered evidence that would have changed the verdict under [former] Rule 32.1(e) of the Arizona Rules of Criminal Procedure [consisting of evidence from Daniel Campbell, Scott Wright, and Teddy/Tom Leddy.]
>
> (2) Trial counsel ineffectively represented Petitioner during trial.

(ER 21, at 320, 1999 PCR Petition at 4) (brackets added).

On September 3, 1999, PCR counsel filed an amendment to the petition wherein he made a number of corrections to the names of individuals and submitted a statement from prospective witness Scott Wright. (ER 20 at 315, Amendment to PCR Petition at 2.)

On September 8, 1999, the state filed a responsive pleading. (ER 25 at 363, Pima County Superior Court Docket Entry at 3.)

On November 19, 1999, the trial court summarily denied Davis relief and dismissed post-conviction relief proceedings on the pleadings. (ER 19, 1999 Minute Entry Order.) The trial court ruled that Davis had failed to present a colorable claim finding that the proffered evidence: (1) would not have altered

[9] Davis notes that the 1999 PCR Petition was resubmitted to the Court in 2015. (ER 21, 1999 PCR Petition.) As per the State averments, the exhibit it had originally provided to the district court in 2005—subsequently docketed under CR 11—was incomplete. (See CR 61 at 4, Respondents Objections to Rule 60(b) Motion.)

the verdict (2) was not credible or reliable; and (3) the affidavits were not supported by "other evidence."[10] (ER 19 at 311-12, 1999 Minute Entry Order at 3-4.) The trial court held that the claims of failure to investigate, consult with experts, and subjecting the prosecution's case to meaningful adversarial testing were either speculative or consisted sound trial strategy. (ER 19 at 312-13, 1999 Minute Entry Order at 4-5.)

4. 2000 Post-Conviction Relief Proceedings

On December 7, 2000, successive PCR counsel Eric Larsen filed a petition for post-conviction relief. (ER 18, 2000 Successive PCR Petition.) In the 2000 petition, successive PCR counsel alleged that newly discovered material facts existed and that those facts would have changed the verdict. (Id.) Further successive PCR counsel argued that trial and PCR counsel were ineffective. (Id.)

On February 15, 2001, the state filed a responsive pleading. (ER 25 at 363, Pima County Superior Court Docket Entry at 3.)

[10] The 1999 PCR petition had been accompanied by a June 1999 polygraph report for Danelle Campbell (Exhibit A); a June 1999 Letter from Scott Wright (Exhibit B); an August 1996 Police Report Interview of Scott Wright (Exhibit C); and a June 1997 Police Report Interview of Timothy Guilfoyle in the company of his attorney Eric Larsen (Exhibit D). (ER 21 at 327-53, 1999 PCR Petition at 12-38.)

On July 25, 2001, the trial court dismissed the successive petition for post-conviction relief. (ER 17, 2001 Minute Entry Order.) In relevant part, the trial court denied the claims alleging that the first PCR counsel did not provide effective representation during PCR proceedings. (Id. at 278, 2001 Minute Entry Order at 4.) The ruling of the trial court follows:

> The Arizona Supreme Court has held that a nonpleading defendant does not have a right to assert a claim of ineffective assistance of Rule 32 counsel in a subsequent petition for post-conviction relief. *See, State v. Mata*, 185 Ariz. 319, 916 P.2d 1035 (1996).

(ER 17 at 278, 2001 Minute Entry Order at 4.)

With regards to newly identified instances of ineffective assistance of trial counsel, the trial court ruled that review was precluded and alternatively ruled that the claims were not colorable:

> This claim could have been raised along with the claims of ineffective assistance of trial counsel which were raised by Finn in petitioner's first Rule 32 petition. It is therefore precluded. *State v. Conner*, 163 Ariz. 97, 786 P.2d 948 (1990); *see also, State v. French*, 198 Ariz. 119, 120, 7 P.3d 128 (Div. 2 App. 2000); *State v. Curtis*, 185 Ariz. 112, 912 P.2d 1341 (Div. 1 App. 1995). Even if not precluded, the claim does not raise a colorable claim of ineffective assistance of counsel.

(ER 17 at 279, 2001 Minute Entry Order at 5.)

Months later, the Supreme Court of the United States, citing *French* and *Curtis*, would certify a Rule 32 interpretive question to the Arizona Supreme Court. *See Smith*, 46 P. 3d at 1068 ¶ 1. The Supreme Court sought to determine

whether "sufficient constitutional magnitude" was determined by requirement of a knowing, voluntary and intelligent waiver or by reference to the particular right alleged to have been violated. Responding to the inquiry, the Arizona Supreme Court expressly disapproved of the holdings of *French* and *Curtis* and held that the "sufficient constitutional magnitude" turns on the particular right alleged to have been violated. *Id.* at ¶ 10.

(A) Motion for Reconsideration

On August 6, 2001, successive PCR counsel filed a motion for reconsideration arguing that a non-pleading defendant was *not* categorically precluded from raising a claim of ineffective assistance of Rule 32 counsel in a subsequent PCR petition. (ER 16 at 264, Motion for Reconsideration at 2.) Successive PCR counsel relied on the appellate analysis in *State v. French*, 7 P.3d 128 (2000). (Id.)

Successive PCR counsel further argued that the errors alleged were of significant constitutional magnitude and were not subject to the waiver principle. (ER 16 at 264-65, Motion for Reconsideration at 2-3.) Successive PCR counsel also contended that newly discovered evidence could be presented to courts upon discovery in a subsequent petition so long as the evidence was not repetitive and further that petitioners were not limited to raising all newly

discovered evidence in *one* single petition. (ER 16 at 267-68, Motion for Reconsideration at 5-6.)

On September 5, 2001, the trial court denied the motion for reconsideration. (ER 15, 2001 Minute Entry Order.) The trial court expressly ruled that the asserted errors were not of constitutional magnitude. (Id.) The trial court also noted that it had found a number of the claims of ineffective assistance both precluded and not colorable. (Id.) Last, the trial court held that Davis had failed to present the court with newly discovered evidence which did more than create a mere possibility that the outcome of his trial would have been different had the evidence been presented. (ER 15 at 262, 2001 Minute Entry Order at 2.)

5. 2002 Post-Conviction Relief Proceedings

On February 27, 2002, PCR counsel Larsen filed a third petition for post-conviction relief. Successive PCR counsel argued that *State v. Thompson*, 359 Ariz. Adv. Rep. 5 (2001) was a significant change in the law that, as applied to Davis' case would probably overturn his conviction or sentence whereas the Arizona Supreme Court had ruled that the premeditated murder statute was unconstitutionally vague. (Id.) As set forth in the next section, it appears that successive PCR counsel did not present this claim to the intermediate appellate

court as only one petition for review was filed and it was filed on October 4, 2001.

6. Consolidated Direct Appeal and PCR Proceedings

On October 4, 2001, successive PCR counsel filed a petition for review from PCR proceedings concluding on September 5, 2001. (ER 14, Petition for Review from PCR.) On November 5, 2001, the court of appeals vacated the stay it had granted in the direct appeal, vested jurisdiction in itself again, and consolidated the direct appeal and the petition for review from post-conviction relief proceedings. (ER 27 at 378, Direct Appeal Docket at 6.) A docket entry indicates that Lori Lefferts who had represented Davis on direct appeal while PCR proceedings were ongoing moved to withdraw after the appellate court lifted the stay. (Id.) The appellate court relieved the Pima County Public Defender from representing Davis and appointed Emily Danies as appellate counsel. (Id.) The appellate court docketed that a response to the PCR petition for review was due from the county prosecutor (Rick Unklesbay) on or about November 7, 2001. (Id.) The appellate court docket does not reflect that the trial/PCR prosecutor filed a responsive answer to the petition for review. (Id.) The docket indicates that newly appointed direct appeal counsel filed a motion to revest jurisdiction in the trial court but the motion to stay the direct appeal was denied. (Id.) That defense motion is not presently available.

On May 28, 2002, direct appeal counsel filed an opening brief. (ER 13, Opening Brief.) Direct appeal counsel raised the following claims:

> (1) The court erred in denying Appellant's Rule 20 motion for directed verdict of acquittal as the state failed to present substantial evidence supporting the fact that a murder had actually been committed.
>
> (2) The Court erred in denying Appellant's Rule 20 motion directing a verdict as to premeditated first degree murder and sending the matter to the jury on the issue of second degree murder only, as no evidence of premeditation was presented and the statutory definition of premeditation pursuant to A.R.S. § 13-1101(1) as amended in 1998 is vague and unconstitutional, requiring a new trial.

(Id.)

(A) Intermediate appellate court disposition of the direct appeal

On May 3 2003, the appellate court affirmed Davis' conviction and denied relief on the petition for review. (ER 12, Memorandum Decision.) The appellate court ruled that the trial court properly submitted the case to the jury if reasonable minds could differ on the inferences to be drawn from the evidence, whether the evidence was direct or circumstantial. (ER 12 at 172, Memorandum Decision at 3.) The appellate court declined to address Davis' argument that the First Degree Murder statute was vague and unconstitutional but noted that the Arizona Supreme Court had recently found the amended statute constitutional. (ER 12 at 173, Memorandum Decision at 4.)

(B) Intermediate appellate court disposition of PCR proceedings

As noted above, the appellate court docket notes that a responsive pleading to the petition for review from post-conviction review was due from the county prosecutor but the docket does not reflect that the county prosecutor filed a responsive answer. (ER 27 at 378, Direct Appeal Docket at 6.)

The appellate court denied the petition to review on procedural grounds. (ER 12 at 175-76, Memorandum Decision at 6-7.) First, the appellate court held that the claims litigated in the first PCR had not been presented to it for review. (ER 12 at 175, Memorandum Decision at 6; but see ER 14, PCR Petition for Review.) Second, the appellate court ruled that Davis had abandoned his claim of newly discovered evidence because he had not developed that assertion in his petition for review. (ER 12 at 176, Memorandum Decision at 7.)

With regards to the claims of ineffective assistance of counsel, the appellate court ruled that the rule of preclusion barred review:

> And, although the trial court addressed Davis's claims of ineffective assistance of trial counsel in ruling on Davis's second petition, Davis was nevertheless precluded from raising those claims in his second petition for post-conviction relief. Under Rule 32.2(a)(3), a defendant is precluded from obtaining relief based upon any ground "[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding." Having failed to raise these additional claims of ineffective assistance of trial counsel in his previous petition for post-conviction relief, Davis was precluded from raising them in his second petition. *See State v. Conner*, 163 Ariz. 97, 786 P.2d 948 (1990).

(ER 12 at 176, Memorandum Decision at 7.)

Last, the appellate court held that Davis was not entitled to relief on his claim that his first Rule 32 counsel was ineffective:

> The trial court correctly held that, because Davis was tried by a jury, he only has a constitutional right to the effective assistance of counsel on his appeal and "does not have a right" to assert a claim of ineffective assistance of Rule 32 counsel in a subsequent petition for postconviction relief." *State v. Mata*, 185 Ariz. 319, 916 P.2d 1035 (1996).

(ER 12 at 176, Memorandum Decision at 7.)

(C) Petition for review to state's highest court

On June 30, 2003, direct appeal counsel and successive PCR counsel filed a joint petition for review to the Arizona Supreme Court. (ER 11, Joint Petition for Review.) The following issues were presented to the Arizona Supreme Court:

(a) Appellate Issues

(I) The trial court erred in denying Appellant's Rule 20 motion as the state failed to present substantial evidence that a murder had actually been committed.

(II) The trial court erred in denying Appellant's Rule 20 motion as to premeditated first degree murder and sending the matter to the jury on the issue of second degree murder as no evidence of premeditation was presented.

(b) Rule 32 Issues

(I) Did the trial court err in summarily dismissing Petitioner's claim as to ineffective assistance of counsel?

(II) Did the trial court err in finding that only Mr. Finn, the first Rule 32 counsel could raise a newly discovered claim and if he failed to discover such evidence, a second attorney was precluded from discovering and raising it?

(ER 11 at 157, Petition for Review at 3.) On December 5, 2003, the Arizona Supreme Court denied review without comment.

7. 2004 Federal Habeas Corpus Proceedings

(A) Petition for Writ of Habeas Corpus

State court proceedings became final on direct review 90 days after the Arizona Supreme Court denied review on December 5, 2003, and on October 26, 2004, Davis filed a timely petition for writ of habeas corpus in district court. (ER 6, Petition for Writ of Habeas Corpus "PWHC".) Habeas counsel raised the following claims on Davis' behalf:

A. The evidence was insufficient to convict Mr. Davis of first degree premeditated murder.

B. Ineffective assistance of counsel.

C. Mr. Davis was denied due process and received a sentence that is cruel and unusual punishment, both of these issues are independent federal constitutional grounds for relief based on newly discovered evidence and the failure to provide competent counsel during post-conviction proceedings

because the new evidence would probably produce an acquittal on retrial because Mr. Davis is innocent.

1. Newly discovered evidence.

2. The failure to provide competent counsel in state post conviction violates the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution and the ICCPR. Due process rights and the prohibition against cruel and unusual punishment are affected by failing to provide competent counsel.

3. Mr. Davis is innocent.

(ER 6 at 52-53, PWHC at 6-7.)

Habeas counsel requested that federal courts grant an evidentiary hearing warranted by state courts' summary disposal of post-conviction relief proceedings without providing Davis an opportunity to develop the facts that entitled him to relief on collateral review. (ER 6 at 121-23, PWHC at 68-70.)

Habeas counsel also requested that the district court order the state to produce the state court record in its entirety. (ER 6 at 125-26, PWHC at 72-73.)

Habeas counsel filed a motion for fact development asserting her inability to obtain records and documents from the prosecuting agency. (CR 19 at 2-3, Motion for Fact Development.)

(B) District Court order denying relief

On September 21, 2007, the district court denied relief. (ER 5, 2007 Order.) The district court held that Davis had failed to exhaust the claims raised in federal proceedings. (ER 5 at 42, 2007 Order at 2.)

The district court held that Davis had not contested the sufficiency of the evidence claim on federal due process grounds in state courts.[11] (ER 5 at 42, 2007 Order at 2.) The district court denied relief on the ineffective assistance of counsel claim ruling that Davis had: (1) failed to exercise one full round of appellate review with regards to the claims raised in the first PCR (by not raising them in the 2001 PCR petition for review) and (2) procedurally defaulted the

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[11] Contrary to the district court finding however, direct appeal counsel had grounded the sufficiency of the evidence on federal constitutional grounds:

> The fact that the jury subsequently reached a guilty verdict does not "cure the erroneous denial of an acquittal motion" Mathers, 165 Ariz. at 67, 796 P.2d at 869. As the United States Supreme Court has noted, "a properly instructed jury may convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt ... " *Jackson* [*v. Virginia*], 443 U.S. [307] at 317, 99 S.Ct. at 2788, 61 L.Ed.2d at 573 [1979].
>
> Moreover, it is fundamental error to convict a person of a crime when the evidence does not support a conviction. *State v Roberts*, 138 Ariz. 230, 673 P.2d 974 (1983) A conviction that is not supported by substantial evidence must be reversed and the case dismissed. *Jackson*, supra.

(ER 13 at 227-28, Opening Brief at 14-15) (brackets added).

claims raised in the second PCR because state courts invoked preclusion to bar review.

The ruling of the district court follows:

> The second claim is a challenge to the effectiveness of trial counsel. Respondent argues that all of Petitioner's ineffectiveness claims are unexhausted and procedurally precluded from federal habeas review because he failed to appeal the denial of his first post-conviction petition, and the ineffective assistance of counsel claims in his second petition were precluded under independent and adequate state grounds. *Coleman*, 501 U.S. at 730. In Petitioner's first petition, he asserted claims of newly discovered evidence and ineffective assistance of trial counsel. The state court of appeals rejected petitioner's ineffectiveness arguments on independent and adequate state procedural grounds, finding Petitioner's claims waived and precluded. The Court agrees. Because Petitioner did not "fairly present" his claims in a procedural appropriate manner, he did not properly exhaust his state remedies. *Castille*, 489 U.S. at 351.

(ER 5 at 42-43, 2007 Order at 2-3.)

The district court also held that Davis was not entitled to competent post-conviction counsel. The ruling of the district court is reproduced below:

> Constitutional effectiveness claims may arise only out of proceedings where there is a constitutional right to counsel. That right does not extend to state or federal collateral proceedings. *Coleman*, 501 U.S. at 752 (no right to counsel beyond first appeal as a matter of right); *Johnson v. Avery*, 393 U.S. 483, 488, 89 S. Ct. 747, 750 (1969) (no right to counsel in state collateral proceedings).

(ER 5 at 45, 2007 Order at 5.)

The district court and this Court denied Davis a certificate of appealability. (CR 43, Order; CR 47 Ninth Circuit Order.) On September 11,

2008, the district court entered judgment in favor of the state. (CR 46, Judgment.)

8. 2014 Rule 60(b) Motion to Reopen Habeas Corpus Proceedings

(A) Rule 60(b) Motion

In March 2012, the Supreme Court issued *Martinez v. Ryan* and held that petitioners have a limited right to assistance of counsel in post-conviction relief proceedings that extends only to initial-review post-conviction proceedings wherein petitioners have the first meaningful opportunity to raise claims of ineffective assistance of trial counsel.

On April 15, 2014, Davis filed a Rule 60(b) motion in district court. (CR 48, Motion for Relief of Judgment Pursuant to *Martinez v. Ryan*.) Davis outlined that the representation provided by trial counsel fell below a reasonable standard of reasonableness and was deficient. (CR 48, at 4-30.) Davis also outlined that the representation provided by both the attorneys who represented him in PCR proceedings was likewise inadequate. (Id. at 30-31.)

(B) Interim Ruling

In an interim ruling issued on March 3, 2015, the district court found that Davis had presented extraordinary circumstances necessary for Rule 60(b)(6) relief and ordered the state to respond to Davis' request for relief on the merits. (ER 4 at 40, 2015 Order at 10.)

(C) State Responsive Pleading on the Merits

In relevant part, Respondents argued that the district court was correct under then existing-law when it held in 2007 that Davis was not entitled to effective PCR counsel. (CR 61 at 6, Supplemental Objection.) Substantially, Respondents argued that the trial counsel IAC claim did not require relief under *Martinez* because the allegations of failure to investigate or interview witnesses were "insubstantial—that is, they 'do[] not have any merit' or are 'wholly without factual support.' " (Id. at 8) (quoting *Martinez* 132 S. Ct. at 1319.))

With regards to the claim that trial counsel failed to retain a ballistics expert and ballistics documentation, Respondents contended that where a factual record supports conflicting inferences a federal court must presume that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. (CR 61 at 14.)

Respondents argued that the failure to retain a medical examiner was not ineffective assistance because such medical expert's testimony would have been speculative, limited to gross generalities, and undermined counsel's defense strategy that no crime had occurred because C. was not dead. (CR 61 at 15.)

(D) District Court Order Denying Relief

On March 6, 2019, the district court denied Davis' Rule 60(b)(6) motion for relief from judgment. (ER 3 at 30, 2019 Order at 24.) The district court

noted that it would have denied Davis' motion to reopen habeas corpus proceedings had it known that Davis' had not sought redress in state courts after the Supreme Court decided *Martinez.* (ER 3 at 9-10, 2019 Order at 3-4.)

Nonetheless, the district court reached the merits of the claims but denied Davis relief ruling that Davis' claims did not excuse his procedural default under *Martinez* because the claims were not substantial, that Davis failed to demonstrate that PCR counsel was ineffective under the two-prong test of *Strickland*, and that the state court's determination of the merits of Davis' claims were not contrary to federal law or an unreasonable application of facts. (ER 3 at 10, 2019 Order at 4.) The district court ruled that alternate IAC theories and additional evidence not presented in the original § 2254 petition represented new allegations of ineffectiveness which it construed as a successive § 2254 petition and therefore precluded. (ER 3 at 22, 2019 Order at 16.)

(E) Issuance of Certificate of Appealability

Davis requested that a certificate of appealability issue and the district court granted it on the following open-ended grounds:

> The Court will grant the Certificate of Appealability because it finds that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotations omitted). Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the issues that satisfy this showing include the Court's determination that

> Petitioner's 60(b) Motion was untimely and did not present extraordinary circumstances warranting review; and that regardless of timeliness, Petitioner's claims did not excuse his procedural default.

(ER 1, Certificate of Appealability.)

SUMMARY OF ARGUMENT

The district court granted Davis a certificate of appealability on the premise 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."

Davis contends that Arizona's procedural scheme for collateral review and related judicial practices at the time he attempted to vindicate his constitutional rights denied him fair process and therefore the federal petition should have been resolved in a different manner. Davis further contends that the issues presented to the district court were adequate to deserve encouragement to proceed to an evidentiary hearing or to vacatur of his conviction.

Direct appeal proceedings give petitioners the opportunity to challenge the merits of a judgment and allege errors of law or fact; while post-conviction review gives convicted persons the opportunity to inquire into the validity of a conviction and sentence. *Graham v. Borgen*, 483 F3d 475, 479 (7th Cir. 2007).

During the time frame at issue, the Arizona Supreme Court directed petitioners such as Davis to litigate *all* ineffective assistance of trial counsel

claims in collateral proceedings *before* proceeding to direct appeal. The express procedural rules were contradictorily permissive. However, the Second Division of the intermediate appellate court systematically applied the Rule of Preclusion to bar petitioners such as Davis from obtaining review of federal claims in the designated forum. The PCR court and the intermediate appellate court either summarily dismissed the federal claims Davis raised in PCR proceedings or invoked the preclusion doctrine to bar review of substantial claims of ineffective assistance of trial counsel.

Permissive procedural rules, and contradictory judicial directives and practices are "not without consequences for [Arizona's] ability to assert a procedural default in later proceedings." *Martinez v. Ryan*, 566 U. S. 1, 13 (2012). The appellate review Arizona has accorded Davis to date is inadequate to vindicate the constitutional protections due to Davis in criminal proceedings. Either an evidentiary hearing is warranted or vacatur of Davis' conviction on the charge of First Degree Murder and sentence of life imprisonment given the paucity of evidence in the appellate record sustaining his conviction.

ARGUMENT

I

Jeffery Davis has been denied access to the courts and due process of law where the appellate review Arizona has accorded to date is inadequate to vindicate the constitutional protections due to a defendant after criminal conviction.

It is often stated that the Arizona Rules of Criminal Procedure regarding timeliness, waiver, and the preclusion of claims are consistently applied and well-established. *See e.g. Stewart v. Smith*, 536 U.S. 856, 860 (2002); *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014). That may well be true in capital cases where a few criminal appeals are litigated in the highest court of the state every year—after being granted years to develop the appellate record on collateral review under special rules of procedure. See e.g. Ariz. R. Crim. P. 32.4 (1998) (provided under Governing Procedural Rules in the Excerpts of Record) (directing the clerk of the state supreme court to file a notice of post-conviction relief with the trial court once direct appeal proceedings are concluded); Ariz. R. Crim. P. 6.8 (2019) (setting forth standards for appointment and performance of counsel in capital cases).

The presumption of consistent measured application of state procedural rules is not imputable to the intermediate courts of appeal where the vast majority of criminal appeals are litigated. At the time Davis pursued appellate review in state courts, state procedures were inconsistent, contradictory, and in

Division II of the Arizona Court of Appeals (encompassing cases prosecuted in the counties of Cochise, Gila, Graham, Greenlee, Pima, Pinal, and Santa Cruz), court practices systematically deprived petitioners of appellate review.

In the instant case, Davis was not accorded appellate review as constitutionally mandated by due process of law and under the auspices of the Arizona Rules of Criminal Procedure. As set forth under the applicable law section, the appellate courts steered petitioners to collateral review to litigate IAC claims *before* proceedings to direct appeal. *Valdez*, 770 P.2d at 319. The Rules permitted—and still permit—petitioners to suspend a direct appeal to pursue collateral review. Ariz. R. Crim. P. 31.3 (2018). The Rules also provided for an evidentiary hearing to determine issues of material fact. Ariz. R. Crim. P. 32.6(c) (1998); Ariz. R. Crim. P. 32.8 (1998). Yet state procedures required that all claims for post-conviction relief be consolidated in *one* petition. Ariz. R. Crim. P. 32.5 (1998). At the same time Division II rigidly enforced a rule of procedure that precluded review of any ground that was subject to being waived at trial, on appeal, or in any previous collateral proceeding. See, Ariz. R. Crim. P. 32.2(a)(3) (1998).

Davis—who maintained that he had not committed the offense alleged—sought to develop the appellate record to establish that trial counsel had not conducted an adequate investigation, consulted with experts, or

subjected the prosecution's case to meaningful adversarial testing. (ER 21, 1999 PCR Petition.) PCR counsel submitted a PCR petition supported by affidavit. (Id.)

Facially then, Davis had presented a substantial claim of ineffective assistance at trial that required factual development. See, Ariz. R. Crim. P. 32.5 (1998).

The trial court did not grant Davis an opportunity to investigate and develop the evidence. (ER 19, 1999 Minute Entry Order.) However, Davis' assertions were supposed to be taken as true during the preliminary stage of collateral review because the averments would have changed the outcome of the proceedings. See, Ariz. R. Crim. P. 32.6(c) (1998); Ariz. R. Crim. P. 32.8(a) (1998).

Davis' right to an appellate inquiry was further limited by the consolidation of the direct appeal and the review from collateral review proceedings—a practice that the Arizona Supreme Court has pointed out is problematic. (ER 27 at 378, 2004 Direct Appeal Docket Entry at 6); *Bennett*, 146 P.3d at 67 ¶ 15. In point of fact, Davis has not had the opportunity to contest the representation provided by direct appeal counsel who failed to allege deprivation of basic constitutional protections.

The appellate review scheme in place at the time Davis attempted to exercise the right to appeal was external to defense efforts to comply with state procedural rules. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (cause for a procedural default ordinarily turns on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule). In fact, successive PCR counsel moved for reconsideration on that very basis: he argued that Davis could not be categorically precluded from raising an IAC claim in a subsequent PCR petition. (ER 16 at 264, Motion for Reconsideration at 2.) Nor could Davis be limited to *one* petition when newly discovered evidence comes to light at different times. (Id.)

The procedural scheme effectively prevented defendants from having an opportunity to raise, investigate, and litigate claims in state courts. The PCR trial court cited the cases of similarly situated defendants in its order summarily dismissing Davis' successive PCR petition:

> This claim could have been raised along with the claims of ineffective assistance of trial counsel which were raised by Finn in petitioner's first Rule 32 petition. It is therefore precluded. *State v. Conner*, 163 Ariz. 97, 786 P.2d 948 (1990); *see also, State v. French*, 198 Ariz. 119, 120, 7 P.3d 128 (Div. 2 App. 2000); *State v. Curtis*, 185 Ariz. 112, 912 P.2d 1341 (Div. 1 App. 1995).

(ER 17 at 279, 2001 Minute Entry Order at 5.)

Despite the fact that the trial court had *at least* conducted a cursory review of the PCR petition, the intermediate appellate court applied the rule of preclusion thereby abrogating its function of determining whether the lower court had correctly applied the law. *See Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (setting forth the necessity of independent review to satisfy the protections due under the Bill of Rights).

The procedural framework within which this case proceeded "is not without consequences for [Arizona's] ability to assert a procedural default in later proceedings." *Martinez*, 566 U. S. at 13. Where state procedures impede or obstruct a petitioner's attempt to comply with established procedures to challenge a criminal conviction, state procedures are inadequate to vindicate constitutional rights. *See Coleman*, 501 U.S. at 750 (a state prisoner must, as a general matter, properly exhaust his federal claims in state court to avoid having his claim defaulted on procedural grounds). Davis could not properly present his claims through one "complete round of the State's established appellate review process" as required by *Picard v. Connor*, 404 U.S. 270, 275 (1971) or *O'Sullivan v. Boerckel*, 526 U. S. 838, 845 (1999). As a result Davis has been denied access to the courts and has not been accorded due process of law where state courts failed to comport with its procedures in depriving him of liberty. U.S. Const. art. IV § 2; U.S. Const. amend. XIV, § 1.

II

The state courts' disposition of Davis' claims on collateral review was contrary to or an unreasonable application of federal law.

The district court granted Davis' Rule 60(b) Motion for Relief from Judgment, denied relief, but granted Davis a certificate of appealability. (ER 4 at 40, 2015 Order at 10; ER 3 at 40, 2019 Order at 24; ER 1, Certificate of Appealability Order.) The district court granted the certificate of appealability on the following grounds:

> The Court will grant the Certificate of Appealability because it finds that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotations omitted). Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the issues that satisfy this showing include the Court's determination that Petitioner's 60(b) Motion was untimely and did not present extraordinary circumstances warranting review; and that regardless of timeliness, Petitioner's claims did not excuse his procedural default.

(ER 1, Certificate of Appealability Order.)

Standards of Review

Rule 60(b) motions are addressed to the sound discretion of the district court. *Phelps v. Alameida*, 569 F.3d 1120, 1131 (9th Cir. 2009). However, the district court necessarily abused its discretion if its denial "rested upon an

erroneous view of the law." *Id.* (quoting *Faile v. Upjohn Co.*, 988 F.2d 985, 986-87 (9th Cir. 1993)).

In light of the fact that the district court ordered the state to respond to the merits of the claims raised in the Rule 60(b) motion and thereafter considered the claims on their merits, this Court will review the district court's denial of Davis' petition for writ of habeas corpus de novo. *Clabourne v. Ryan*, 745 F.3d 362, 370 (9th Cir. 2014); *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). The Court reviews for clear error the district court's findings of fact. *Runningeagle v. Ryan*, 686 F.3d 758, 766 (9th Cir. 2012).

Mootness of review on finding of extraordinary circumstances

Issues related to whether Davis presented extraordinary circumstances warranting review are moot. Relief under Rule 60(b)(6) requires a showing of extraordinary circumstances and diligence to justify the reopening of a final judgment. *Gonzalez v. Crosby*, 545 U.S. 524, 535-36 (2005). The district court ordered the state to respond on the merits and thereafter addressed the merits of the claims. The extraordinary circumstances cannot be relitigated where the district court has already granted Davis relief.

To the extent that the district court concluded that Davis was not diligent, Davis submits that that finding is not supported by the appellate record. In March 2012, the Supreme Court issued *Martinez v. Ryan* and on April 15, 2014,

Davis filed a Rule 60(b) motion to reopen habeas corpus proceedings. (CR 48, Rule 60(b) Motion.) Addressing diligence, Davis explained that once he became aware of *Martinez* he attempted to ascertain the different avenues for appellate review available to him:

> Petitioner is not a lawyer and became aware of the United States Supreme Court's ruling in *Martinez* several months after *Martinez* was published. Petitioner at first thought he had to do a new Rule 32 in the State court. Then the Arizona Court of Appeals, Division 2, ruled in *Escareno-Meraz* that that was not possible. Petitioner started this Rule 60(b) motion as quickly as he could obtain examples to follow and case law from the 9th circuit for guidance. Petitioner has been diligent under the circumstances: his lack of legal training, his lack of counsel, and his incarceration.

(CR 48 at 4.)

Grounds for the exercise of equity are highly fact dependent and if the explanation Davis provided was lacking in specificity, further development of the record was warranted. *Lott v. Mueller*, 304 F.3d 918, 925-26 (9th Cir. 2002). The explanation Petitioner provided was plausible in light of the vicissitudes of prison life, the unavailability of a law library, or legal representation. This is not a case where clear statutory provisions provide petitioners with constructive knowledge. *See e.g. Allen v. Yukins*, 366 F.3d 396, 402-03 (6th Cir. 2004) (notice by means of a statute is adequate notice of the federal habeas corpus filing requirements). Nor is it a case where ignorance of the law can be held against Petitioner. *See e.g. Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.

2006). The Supreme Court itself has granted review and relief on a Rule 60(b)(6) motion filed eight years after the initial denial of a habeas petition. *See Buck v. Davis*, 137 S. Ct. 759, 785 (2017) (J. Thomas dissenting). Two years is eminently reasonable where Davis explained *how* he attempted to seek redress once he learned of *Martinez*.

Habeas Deference Standards

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) habeas relief can be granted only if the state court proceeding adjudicating the claim on the merits "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," 28 U.S.C. § 2254(d)(1), or "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)(2).

"[A] decision by a state court is 'contrary to' [the Supreme Court's] clearly established law if it 'applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent.'" *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). "[A] state-court decision involves an unreasonable application

of th[e Supreme] Court's precedent if the state court identifies the correct governing legal rule from th[e Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407. To satisfy this requirement, the record "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The question "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410).

In regards to the § 2254(d)(2) exception, this Court has held that it may hold that a state court's decision was based on an unreasonable determination of the facts if the Court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.'" *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014).

Merits Analysis

1. Presumption of correctness accorded under § 2254(e)(1) is inapplicable.

Davis submits that the state court's merits ruling cannot be accorded deference under 28 U.S.C. § 2254(e)(1). *See Wood v. Allen*, 558 U.S. 290, 300

(2010) (reviewing the reasonableness of the state court's factual determination under § 2254(d)(2) and not under § 2254(e)(1).) As set forth above in Issue I, state procedures were not adequate to vindicate constitutional rights. Judicial directives were contradictory and court practices systematically deprived petitioners of appellate review. Davis was not accorded the opportunity to develop or investigate his claims. And although the Rules in effect at the time Davis sought appellate review provided for an evidentiary hearing to determine issues of material fact with the right to be present and to subpoena witnesses, Davis was not accorded an evidentiary hearing. Ariz. R. Crim. P. 32.8(a) (1998).

2. Newly-discovered evidence claim

With regards to the "newly discovered evidence" claim presented to state courts in the 1999 PCR petition, the district court affirmed the finding of the trial court and ruled that the evidence consisting of prospective witness was neither credible or reliable and was cumulative to evidence offered at trial. (ER 3 at 24, 2019 Order at 18 citing 2007 Order.) The district court held that the determinations of the trial court was reasonable, and was not contrary to federal law or an unreasonable application of facts.

(A) The state court decision was contrary to federal law, an unreasonable application of federal law and unreasonably determined the facts in light of the evidence presented in the state court proceeding.

In *Herrera*, 506 U.S. at 398-99, the Supreme Court summarized the constitutional rights due to a person charged with a crime: (1) the presumption of innocence; (2) the right to confront adverse witnesses; (3) the right to compulsory process; (4) the right to effective assistance of counsel; (5) proof of guilt beyond a reasonable doubt; (6) the right to jury trial; (7) the disclosure of exculpatory evidence; (8) the right to assistance of counsel; and (9) the right to "fair trial in a fair tribunal". Appellate review is also mandated. *Griffin*, 351 U.S. at 18.

Commensurate with those constitutional protections, the "newly discovered evidence" at issue stated a ground for federal habeas relief because Davis asserted that trial counsel was ineffective by failing to investigate and exercise his right to compulsory process and to subject the prosecution's case to meaningful adversarial testing. *Herrera*, 506 U.S. at 399; *Townsend v. Sain*, 372 U.S. 293, 317 (1963). There was no reasonable basis for the state court to deny relief on the newly-discovered evidence claims raised in the 1999 PCR petition. The decision of the state court was either contrary to, or an unreasonable application of clearly established precedents of the Supreme Court, or was based upon an unreasonable determination of the facts.

First, the trial court deviated markedly from the analytical standard provided in Rule 32.1(e) and applied a standard extrapolated from *State v. Cooper*, 800 P.2d 992 (Ariz. App. 1990). (See ER 19 at 310-12, 1999 Minute Entry at 2-4 (quoting Rule 32.1(e) but citing and applying the *Cooper* factors.) The state court placed procedural roadblocks to review and relief that are not provided by state procedural rules. Accordingly, the decision of the state court is "contrary to" clearly established law because the state court applied a rule that contradicted governing procedural rules. In failing to comply with procedural rules in denying Davis of his liberty interest, the state court denied Davis due process of law. U.S. Const. art. IV § 2; U.S. Const. amend. XIV, § 1.

Second, state courts are tasked with ensuring "that federal constitutional errors do not result in the incarceration of innocent persons" and given the first opportunity to correct any constitutional violations in the first instance. *Herrera*, 506 U.S. at 404; *O'Sullivan*, 526 U.S. at 844. The PCR petition and the affidavits advanced Davis' Sixth Amendment claims of failure to exercise the right to compulsory process, subject the prosecution's case to meaningful adversarial testing, and effective assistance of counsel. *See generally Cullen v. Pinholster*, 563 U.S. 170, 216 (2011) (J. Sotomayor dissenting) ("New evidence does not usually give rise to a new claim; it merely provides additional proof of a claim already adjudicated on the merits.")

In summarily dismissing PCR proceedings by finding that the proffered evidence: (1) would not have altered the verdict (2) was not credible or reliable; and (3) the affidavits were not supported by "other evidence"[12] the state court did not give Davis an opportunity to establish that, "in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *accord*, *McQuiggin v. Perkins*, 569 U.S. 383, 394-95 (2013) (The miscarriage of justice exception, applies to cases in which new evidence shows "it is more likely than not that no reasonable juror would have convicted [the petitioner]."). As repeatedly protested to state courts, Davis is serving a life sentence for reportedly executing a friend based on the testimony of severely compromised witnesses where the prosecution could not substantiate its claim with the body of the decedent or a murder weapon. (ER 7, Jeffery Davis 2014 Affidavit; ER 6 at 62-75, PWHC at 9-22; ER 21 at 319-20, 1999 PCR Petition at 3-4; CR 48, Rule 60(b) Motion.) Accordingly, the state's court's adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, and 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)(2); *see also Williams*, 529 U.S. at 399.

[12] (ER 19 at 311-12, 1999 Minute Entry Order at 3-4.)

3. Ineffective assistance of counsel claim

The district court reviewed and summarized the trial transcripts and ruled that Davis had not presented a substantial claim of ineffectiveness of trial counsel. (ER 3 at 17-21, 2019 Order at 11-15.)

This determination was plain error. Where Davis asserts that trial counsel failed to investigate/prepare, retain experts, or subject the state's case to meaningful adversarial testing, reviewing trial transcripts does not constitute vindication of the constitutional protections due to Davis in criminal proceedings.

The district court ruled that the representation provided by trial counsel was reasonable in light of the defense trial counsel presented:

> Introducing further testimony of potential witnesses showing collusion was not ineffective given the vague testimony, the witnesses' motives, and the lack of physical evidence. Pursuing a trial strategy that there was no victim was reasonable because of the state's lack of physical evidence and the dubiety of the witnesses' statements. Trial counsel elicited inconsistent testimony supporting this defense directly from the state's witnesses. Trial counsel had the right to provide a singular defense at the expulsion of another, less desirable defense, and did so. Therefore, Petitioner has not presented a substantial claim of ineffectiveness of trial counsel.

(ER 3 at PDF 21, 2019 Order at 15.)

The reasonableness of what trial counsel *did* is at odds with what he assured Davis he was *going to do*:

> Trial counsel assured Petitioner that the following four matters 1) the marijuana bust that was caused by Mendoza's uncle John Crampton, 2) Conklin's prison time as a result of Crampton's assistance to Connecticut law enforcement, 3) Conklin's demand for money from Mendoza to settle the score, and 4) the resulting blood feud between Conklin and Mendoza would all be introduced in Court in order to show that Mendoza was the person who had motive to murder Conklin.
>
> However, Trial Counsel failed to follow through on every single matter.

(CR 48 at 16, Rule 60(b) Motion; see also ER 7, Jeffery Davis 2014 Affidavit.)

For its part, the trial court faulted Davis for not substantiating his claim of failure to investigate/prepare in the preliminary phase of collateral review:

> Petitioner has offered nothing more than speculation about the issues a ballistics expert or doctor might have addressed in this case. Nothing before the Court indicates that any expert has been consulted. No affidavit has been provided. Petitioner has failed even to specify what such experts might have concluded and how such testimony would have been helpful. Accordingly, petitioner has failed to establish any prejudice stemming from a strategic decision by trial counsel.

(ER 19 at 313, 1999 Minute Entry Order at 5.)

The representation trial counsel provided was violative of *Strickland v. Washington*, 466 U.S. 668, 687 (1984) in the first instance and the state court's application of *Strickland* was objectively unreasonable. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). The representation was deficient precisely because of the "vague testimony, the witnesses' motives, and the lack of physical evidence."

The outcome of the proceedings would have been different had counsel prepared for trial and subjected the state's case to meaningful adversarial testing.

4. Sufficiency of evidence claim

In 2007, the district court ruled that Davis had failed to exhaust his sufficiency of the evidence claim in state courts. (ER 5 at 42, 2007 Order at 2.) However, direct appeal counsel had grounded the sufficiency of the evidence claim on federal constitutional grounds. (ER 13 at 195-96, Opening Brief at 14-15.) The appellate court did not address the federal constitutional basis of this claim for relief on direct appeal. (ER 12 at 171-73, Memorandum Decision at 2-4.)

As a result this claim is exhausted and an evidentiary hearing warranted to ascertain whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and whether the state-court decision rejecting a sufficiency challenge was 'objectively unreasonable.' " *Parker v. Matthews*, 567 U.S. 37, 43 (2012); *see also Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) ("Federal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law.").

The appellate court's accounting of the evidence it deemed sufficient to sustain the conviction is patently *insufficient* to establish the elements of premeditated murder consisting as it does of immunized testimony from unreliable witnesses. Compare ER 12 at 172-73, Memorandum Decision at 3-4 with ER 7, Jeffery Davis 2014 Affidavit. When the evidence presented is considered in conjunction with allegations of *failure* to investigate, it becomes clear that upon the evidence adduced at the trial that no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

5. Precluded claims

The district court found a number of the allegations Davis raised in his Rule 60(b) motion precluded. (ER 3 at PDF 22, 2019 Order at 16.) However, as Davis conceded in his reply brief and the district court accepted as true, Davis merely "amplified" the claims made in the initial habeas petition but recognized that he is limited to the claims presented in the habeas petition. (ER 4 at 35, 2015 Order at 5 citing CR 57 Reply Brief.)

CONCLUSION

In *Townsend v. Sain*, the Supreme Court stated that "state prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." 372 U.S. at 312. Davis has met this burden. He

was not accorded basic constitutional protections due to a defendant after criminal conviction. Relief is warranted. Based on the foregoing authorities and arguments, Davis respectfully requests that the Court vacate the decision of the district court, remand with orders to grant Davis an evidentiary hearing or alternatively vacate Davis' conviction and sentence with orders to release Davis, grant him a new trial, or constitutionally compliant appellate review.

Respectfully submitted,
on the 14th day of November, 2019

s/ *Katia Méhu*
CJA Attorney for Petitioner-Appellant

Additional material from this filing is available in the Clerk's Office.