UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

In re: ANTHONY SHARIF GAY.	No. 21-70007
ANTHONY SHARIF GAY, Petitioner, v. CHARLES L. RYAN, Respondent.	ORDER

Before: CANBY, GRABER, and FRIEDLAND, Circuit Judges.

Petitioner's request for injunctive relief is denied.

In response to petitioner's letter filed on January 21, 2021, we clarify that no docket fee is due, because petitioner does not seek mandamus relief.

No further filings will be accepted in this closed case.

DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Anthony Sharif Gay, Petitioner, vs. Charles L. Ryan, Director; et al, Respondents.	No. CV 12-0544-TUC-CRP **ORDER**

Petitioner, proceeding pro se, has filed an Amended Petition Under 28 U.S.C. § 2254 For A Writ of Habeas Corpus By A Person In State Custody (Non-Death Penalty). (Doc. 5, Am. Pet.). Respondents have filed an Answer and Petitioner has filed a Reply. (Doc. 12, Answer; Doc. 15, Reply). Pursuant to the Court's Order (Doc. 19, Aug. 11, 2015 Order), Respondents have filed a Supplemental Memorandum (Doc. 24). Petitioner has not filed a Supplemental Response, although permitted to do so. (*See* Doc. 28). This case is before the Court based on the parties' consent to Magistrate Judge jurisdiction. (Doc. 16). After considering the briefing, exhibits and relevant law, the Court has determined that the amended habeas petition should be denied and dismissed with prejudice.

I. FACTUAL AND PROCEDURAL HISTORY

On April 30, 2004, a jury returned its verdict finding Petitioner guilty of first degree murder and first degree burglary based on a theory of felony murder with burglary as the predicate crime. (Ex. A, *State v. Gay*, 2 CA-CR 2010-0355-(PR) Mar. 3, 2011 Mem. Decision at ¶ 2; Ex. G, *State v. Gay*, Case No. CR20011542, Sept. 30, 2009 Order at 1; Ex. AAA at Ex. 1 Jury Verdict).[1] The charges stemmed from the stabbing death of the female victim at her Tucson apartment on or about April 9-10, 2001. (Ex. G at 1-2). The trial court sentenced Petitioner to natural life in prison on the murder conviction and to a 10.5 year presumptive concurrent term on the burglary conviction. (Ex. A at ¶ 2).

The Arizona Court of Appeals affirmed Petitioner's conviction and sentence on direct appeal. *See State v. Gay*, 214 Ariz. 214, 150 P.3d 787 (Ariz. App. 2007). On January 8, 2008, the Arizona Supreme Court denied Petitioner's petition for review. (Ex. D, Jan. 8, 2009 Min. Letter Denying Review).

On February 28, 2008, Petitioner filed a Notice of Post-Conviction relief ("PCR Notice"). (Ex. E, PCR Notice). On January 2, 2009, Petitioner, represented by counsel, filed a Petition for Post-Conviction Relief ("PCR Petition"). (Ex. F, PCR Pet.). On September 30, 2009, the state trial court denied the PCR Petition following an evidentiary hearing. (Ex. G, Sept. 30, 2009 Order; Ex. H, Apr. 5, 2010 Order; Ex. Q, Feb. 1, 2010 Evidentiary Hr'g Tr). Petitioner, represented by counsel, petitioned for review in the Arizona Court of Appeals. (Ex. I, Pet. for Review). The State Court of Appeals granted review but denied relief. (Ex.A, Mem. Decision). On August 8, 2011, the Arizona Supreme Court denied Petitioner's petition for review. (Ex. J, Aug. 8, 2011 Min. Letter Denying Review).

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[1] Relevant portions of the state court record are attached to: Respondents' Answer as Exhibits A through Q (Docs. 12-14), Respondents' Notice of filing additional portions of the state court record as Exhibits R through YY (Doc. 23); and Respondents' Supplemental Memorandum as Exhibits ZZ through CCC (Doc. 24). Unless otherwise noted, the Court cites to the state court record by exhibit number without the corresponding docket number.

Petitioner placed his federal habeas petition in the prison mailing system on July 17, 2012. (Doc. 1, Pet. at 11). Respondents do not contest the timeliness of Petitioner's habeas petition. Petitioner subsequently amended his federal habeas petition (Doc. 5, Am. Pet.), which is at issue here.

II. PETITIONER'S GROUNDS ASSERTED IN HIS AMENDED § 2254 HABEAS PETITION

Petitioner asserts the following grounds in his amended habeas petition:

Ground One: The prosecution impermissibly struck two Black jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986) (Am. Pet. at 6);

Ground Two: Defense counsel provided ineffective assistance at trial in failing to investigate blood pattern evidence that allegedly showed that Petitioner did not come into contact with the victim until after she died (*Id.* at 7);

Ground Three: Defense counsel provided ineffective assistance at trial in failing to investigate and uncover exculpatory evidence that showed that someone else (Maksim Popenko) committed the murder (*Id.* at 8);

Ground Four: Defense counsel provided ineffective assistance at trial in failing to effectively cross-examine hostile witness Maksim Popenko (*Id.* at 9);

Ground Five: The evidence was insufficient to convict Petitioner of the crimes of first degree burglary based on theft and felony murder based on burglary and theft (*Id.* at 12);

Ground Six: The trial court violated Petitioner's due process rights under *Beck v. Alabama*, 447 U.S. 625 (1980), when it failed to instruct the jury on the lesser included offense of theft (*Id.* at 13);

Ground Seven: The trial court violated Petitioner's due process rights when it improperly excluded expert testimony on the effects of crack cocaine and withdrawal from crack cocaine (*Id.* at 14);

Ground Eight: Petitioner's waiver of rights was not knowing, intelligent, or voluntary in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Doody v. Ryan*, 649 F.3d 986,

1003-007 (9th Cir. 2011)(en banc), because the detective's explanation was unclear, confusing and misleading (*Id.* at 15) ;

Ground Nine: The trial court violated Petitioner's due process rights when it precluded evidence of third-party culpability (*Id.* at 16);

Ground Ten: Defense counsel provided ineffective assistance at trial by failing to have DNA testing performed on key evidence (the victim's fingernail scrapings and nightgown) (*Id.* at 17); and

Ground Eleven: Defense counsel provided ineffective assistance at trial by failing to object to the prosecutor's alleged reference to Petitioner's invocation of his right to counsel (*Id.* at 18).

Respondents argue in their Answer that Petitioner did not assert Grounds Six and Ten in the state court proceedings and, therefore, these grounds are procedurally defaulted and not subject to federal habeas review. (Answer at 4-6) Respondents contend that Petitioner's remaining Grounds One through Five, Seven through Nine, and Eleven should be denied on the merits. (*Id.* at 6-13).

III. ANALYSIS

A. The Trial Evidence.

The trial evidence showed that on or about April 9, 2001, Petitioner's live-in girlfriend, Veronica Fresby, observed Petitioner smoking "crack" around 11:30 p.m. at their apartment. (Ex. M at 96-97, 101). They argued and Ms. Fresby asked Petitioner to leave. (*Id.* at 100). Petitioner left the apartment shortly after 12:00 a.m., taking what was left of a 12-pack of Natural Light beer, and he did not return until approximately 1:00 a.m. (*Id.* at 97-101). When Petitioner returned, Ms. Fresby observed that Petitioner appeared visibly intoxicated and was wearing a different shirt from when he had left, that is, he returned wearing a blue t-shirt that Ms. Fresby noticed was "really small" and did not look like a "man's shirt." (*Id.* 102-05, 111). Petitioner told Ms. Fresby that he had obtained the shirt "from the house he had broken into." (*Id.* at 104-05). The next morning, Ms. Fresby noticed

that Petitioner had cut his right index finger. (*Id.* at 105-06, 109). Petitioner first told her that he had cut his finger while performing his landscaping job, but later told her he had cut his finger while breaking a window to get into the house. (*Id.* at 107-09).

On the morning of April 10, 2001, the police found the victim's body, lying on the floor in a "pool of blood," in the bedroom of her apartment. The victim had sustained 23 stab wounds, one of which severed her jugular. (Ex. K at 41-49; Ex. P at 80-96). The victim had been stabbed in the neck and breast area. (Ex. P at 80-96). She was wearing only a white nightgown which was pulled up exposing one of her breasts and leaving her naked from the waist down. (Ex. K at 48-49). Petitioner's fingerprints were found on the victim's bedroom telephone. (Ex. L at 59-62). Petitioner's blood was found throughout the victim's apartment, including on the window sill, window blinds, the front door, along the outside railings and on a chair. (Ex. C at ¶ 7; Ex. L at 40-45; Ex. N at 10-21, 52-53; Ex. P at 175-76, 194). Petitioner's semen was found on the victim's vagina, and his semen and blood were found on the nightgown she was wearing. (Ex. C at ¶ 7; Ex. N at 44-52; Ex. O at 23-39). The shirt Petitioner was seen wearing the night he left his apartment was found underneath the victim and a pair of black jeans found in Petitioner's apartment were stained with his and the victim's blood. (Ex. C at ¶ 7; Ex. L at 36; Ex. M at 214-16; Ex. N at 23-26; Ex. O at 172-75). The blue t-shirt Petitioner was wearing when he returned to his apartment was identified as belonging to the victim. (Ex. JJ at 77-81, 117; Ex. M at 214-16). Petitioner's fingerprints were found on a "Natural Light" beer can in the victim's kitchen. (Ex. L at 41, 168-69).

The day after the murder, Petitioner pawned videotapes and CDs that had belonged to the victim and tried to give his girlfriend a ring that belonged to the victim. (Ex. C at ¶ 7; Ex. L at 119-25, 170-74, 204-08; Ex. P at 32). There was evidence that Petitioner had a deep cut on his finger. (Ex. C at ¶ 6; Ex. M at 106-09). Detectives learned that Petitioner had lived next door to the victim at the same apartment complex for four months and had moved out of that apartment only two weeks before the murder. (Ex. K at 94, 99; Ex. M at 84-86). Ms. Fresby testified that she and Petitioner had "financial difficulties," that for a

period she had been the only source of income, and that Petitioner was spending money on crack cocaine which he used daily. (Ex. M at 87-88).

Petitioner was arrested at his apartment on April 17, 2001. (Ex. M at 124-28). After he was arrested and during a telephone call, Ms. Fresby asked Petitioner why he did not tell her he had "killed that girl," and Petitioner answered that he "was strung out on crack and was really crazy and wanted more." (*Id.* at 189, 197). In another conversation, Petitioner told Ms. Fresby that he did not kill the victim, but had gone into her apartment, found her dead, and cradled her bloody body in his arms. (*Id.* at 131). Petitioner told Ms. Fresby that his shirt was bloodied, so he took his shirt off and put on a shirt belonging to the victim and left his shirt at her apartment. (*Id.* at 134). The police obtained Petitioner's tape recorded statement after his arrest and advisement of his *Miranda* warnings. (Ex. B at 7; Ex. O at 166-79). The jury heard the tape played at trial. (Ex. O at 169-71). As part of its verdict, the jury determined that Petitioner did not commit the murder for pecuniary gain, but that he did commit murder in an especially cruel manner. (Ex. TT at 12-13).

During the penalty phase, the jury could not unanimously agree to impose the death penalty and the trial court declared a mistrial. (Ex. XX at 15, 27). The State subsequently withdrew its notice to seek the death penalty and Petitioner was sentenced on August 30, 2004. (Ex. C at ¶ 8).

B. Grounds One Through Five, Seven through Nine and Eleven: Merits Analysis

1. General Legal Standards

To be eligible for federal habeas corpus relief, a state prisoner must establish that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). This Court's analysis of the merits of Petitioner's claims is constrained by the applicable standard of review. A state prisoner "whose claim was adjudicated on the merits in state court is not entitled to relief in federal court unless he meets the requirements of 28 U.S.C. § 2254(d)." *Price v. Vincent,* 538 U.S. 634, 638 (2003). The Antiterrorism and

Effective Death Penalty Act of 1996 ("AEDPA") imposes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997), and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Under AEDPA, this Court cannot grant habeas relief unless the state court decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or was (2) "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)(1), (2).

Under § 2254(d)(1), a federal habeas court may not issue a writ, unless the state court decision was either: (1) "*contrary to* ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* ... clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000) (emphasis in original). A state court decision will be contrary to clearly established federal law if the state court applied the wrong legal rule or applies the correct precedent but on facts indistinguishable from a Supreme Court case reaches a different result. *Id.* at 405-06, 412. A state court decision is an unreasonable application of clearly established federal law when that decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08, 412. For a federal court to find a state court's application of Supreme Court precedent "unreasonable," the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *Visciotti*, 537 U.S. at 25.

Under § 2254(d)(2), the federal court reviews purely factual questions that were resolved by the state court. *Lambert v. Blodgett*, 393 F.3d 943, 978 (9th Cir. 2004). "[T]he question on review is whether an appellate panel, applying the normal standards of appellate review, could reasonably conclude that the finding is supported by the record." *Id.* Subsection (d)(2) "applies most readily to situations where petitioner challenges the state

court's findings based entirely on the state record. Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence, ... that the process employed by the state court is defective ... or that no finding was made by the state court at all." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (internal citation omitted), *abrogated on other grounds by Murray v. Schriro,* 745 F.3d 984, 999-1000 (9th Cir. 2014). Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based on an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor*, 366 F.3d at 999. In considering a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e) (1); *Landrigan*, 550 U.S. at 473-74; *Miller-El II*, 545 U.S. at 240.

When applying AEDPA's standards, the federal court reviews the "'last reasoned decision' by a state court addressing the issue at hand." *Miles v. Ryan,* 713 F.3d 477, 486 (9th Cir. 2012) (citation omitted). The Court considers, Petitioner's claims in view of these standards.

2. Ineffective Assistance of Counsel

The United States Supreme Court held in *Strickland v. Washington,* 466 U.S. 668 (1984), that to establish ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and that he was prejudiced by counsel's deficient performance. *Id.*, 466 U.S. at 687-88. An ineffective assistance claim must satisfy both prongs of *Strickland. Id.*, 466 U.S. at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed"). A petitioner must affirmatively prove prejudice. *Id.* at 693. To demonstrate prejudice, the petitioner "must show that there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Petitioner bears the burden of showing the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *See Bell v. Cone,* 535 U.S. 685, 698-99 (2002).

3. Discussion

(a) Grounds Two Through Four and Eleven: Petitioners' Ineffective Assistance of Trial Counsel Claims

Ground Two: Alleged Failure to Investigate Blood Pattern Evidence

Petitioner asserts that trial counsel was ineffective for not investigating "blood pattern" evidence that he contends "showed ... [he] did not come in contact with [the victim's] blood until after she died." (Am. Pet. at 7). Petitioner contends there was no spatter pattern on his t-shirt as would be expected if the killer was wearing it while stabbing the victim. (*Id.*). Petitioner refers to the testimony of his purported expert on blood patterns, Michael Sweedo, who testified at the post-conviction evidentiary hearing regarding the blood on Petitioner's jeans that the blood was on the carpet a period of time before Petitioner knelt into it. (*Id.*). Petitioner contends that "Sweedo concluded that 'the blood patter[n] evidence does not support Mr. Gay being the perpetrator in this matter.'" (*Id.*). Petitioner contends that there was blood spatter evidence that was not analyzed. (*Id.*).

Respondents argue that Petitioner's clothes bore large amounts of the victim's blood and Sweedo testified "that (1) micro-droplet spattering is not inevitable in stabbing cases, and (2) the 'pooled' blood found on Petitioner's jeans [was] consistent with Petitioner kneeling into the victim's blood pool while removing her jewelry after killing her, which the evidence at trial indicated he did." (Answer at 7-8). Respondents contend that the Arizona courts acted reasonably in rejecting this claim. (*Id.* at 8).

Petitioner states in his Reply with respect to Ground Ten that he submitted Sweedo's expert report as an exhibit "to [his] PCR brief." (Reply at 8-9). Respondents point out in

their Supplemental Memorandum that Sweedo's report was not attached as an exhibit to Petitioner's PCR petition or to his "PCR brief." (Doc. 24 at 6). Respondents have attached the report as an exhibit to their Supplemental Memorandum. (Doc. 24, Ex. 15, Case Review of Latent Print Examiner dated Dec. 29, 2008). Sweedo opined in the report that "[t]he blood spatter evidence does not support Mr. Gay being the perpetrator in this matter." (*Id.*).

Petitioner raised the ineffectiveness issue regarding blood pattern evidence in his PCR Petition filed in the state trial court (Ex. F at 33-34) and an evidentiary hearing was held on the merits. (Ex. Q). Petitioner's counsel argued that the t-shirt found at the scene had the victim's blood on it but there was no spattering pattern as would be expected if the shirt had been worn by the assailant when stabbing the victim. (Ex. F at 33-34). Counsel argued that the jeans found at Petitioner's apartment were soaked at the knees with the victim's blood as could possibly have occurred if he had found the victim's body and leaned next to her to determine if she was still alive. (*Id.* at 34).

During the evidentiary hearing, Michael Sweedo, a criminal investigator for the Pima County Legal Defender's Office, testified about the t-shirt and jeans based on photographs of the evidence and reports. (Ex. Q at 8, 15-22). Sweedo testified that there was no aspirated blood spatter on the t-shirt, explaining that "[i]n the process of stabbing somebody, [he] would expect to have found blood stain spatter patterns on the front of the shirt." (*Id.* at 16-20). He described blood spatter as "small round type drops or oval type drops, like on the front of the shirt if it came from the surface that impacted on the shirt." (*Id.* at 21). He described "aspirated blood" as being airborne from a person's breath that would land on the shirt and create a series of small dots. (*Id.*). The blood patterns Sweedo found on the t-shirt were "swipes, wipes and what's called compression transfer." (*Id.* at 55).

Sweedo testified that the blood on the knees of the jeans was "solid in nature," that is, "there's a spot of blood where the knee came down into a pool of blood" which was consistent with kneeling into or onto the stain. (*Id.* at 22, 25). Sweedo opined that the blood was on the carpet before Petitioner put his knees into the blood and that there would not have

been blood on the carpet before or when the victim was stabbed. (*Id.* at 26-28). Sweedo described the blood transfers on the jeans as "[t]ransfers with some swipes like in the pocket area like someone put their hands inside the pockets." (*Id.* at 55).

On cross-examination by the State, Sweedo acknowledged that blood spatter may not always be present when a person is stabbed. (*Id.* at 32). He testified that the crime scene photographs he examined did not show any significant blood spatter and that it was not unusual not to see blood spatter on the t-shirt. (*Id.* at 32-34). Sweedo testified that blood spatter is dependent on the angle of the knife and that any marks on the t-shirt could have been the result of swiping the knife. (*Id.* at 34-35). He testified that the blood on Petitioner's jeans was consistent with Petitioner having knelt into the victim's blood pool while removing her jewelry after she was deceased. (*Id.* at 30). Sweedo agreed that the fact that there was no spatter on the t-shirt, only with the blood stains on the jeans, did not mean that Petitioner was not the killer. (*Id.* at 42-43). When questioned by the trial court as to whether the marks on the t-shirt occurred when the shirt was on or off the person, Sweedo answered that he "saw nothing to indicate either way." (*Id.* at 57-58).

The State trial court rejected Petitioner's claim of counsel's alleged ineffectiveness for lack of investigation by applying the two-pronged *Strickland* analysis and based on its review of the trial evidence and evidentiary hearing testimony. (Ex. H at 1, 3). The court noted Sweedo's testimony that expirated blood is not always seen and "[f]or blood aspirate to be present on an item, the item must be directly in front of the person whose mouth is expirating blood." (*Id.* at 3). The court observed that "[e]xpirated blood was found on the telephone" and it was unknown "what position the shirt was in or if it was even on the assailant at the time of the stabbing," with Sweedo "assuming that the murderer was wearing the shirt." (*Id.*). The trial court noted that defense counsel had "vigorously cross-examined Mark [sic] Taylor and Norman Reeves regarding the blood evidence at the scene and on clothing seized from the Defendant." (*Id.*). In finding that Petitioner had failed to meet his

burden of proving ineffective assistance of counsel based on the blood spatter issue, the court stated:

> **THE COURT FINDS** that Petitioner has failed to prove that actions of trial counsel in presenting testimony proffered by Mr. Swedo [sic] was unreasonable and fell below an objective standard of reasonableness for trial counsel. Trial counsel consulted with many experts and undertook copious analysis in the case over a three year period of time.
>
> Thus, the Petitioner failed to meet the burden of prong one. Even if he could meet the prong one burden, the Petitioner has failed to show that the outcome of the trial would have been different. As the Court noted the evidence presented as to the Petitioner's guilt was strong, including DNA evidence, blood evidence, various witnesses, evidence of the victim's stolen property having been pawned or given to others, and contradictions in the Petitioner's statement.

(*Id.*).

Petitioner raised the issue of counsel's failure to properly investigate blood spatter evidence in seeking review before the Arizona Court of Appeals. (Ex. I at 17-18). The State appellate court granted review but denied relief without discussing the issue (Ex. A), therefore leaving the trial court's ruling the last reasoned decision on the matter.

It is the general duty of a defense attorney to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary. *See Strickland*, 466 U.S. at 691; *Cullen v. Pinholster*, 563 U.S. 170, 195-96 (2011). "[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 judgment." *Strickland*, 466 U.S. at 691. "In assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Defense counsel was not deficient for failing to more thoroughly investigate blood spatter evidence. Mr. Sweedo's testimony regarding the lack of blood spatter on the t-shirt and jeans was inconclusive and not exculpatory. Sweedo acknowledged that blood spatter may not always be present when a person is stabbed, that the photographs of the crime scene

he examined did not show any blood spatter, that it was not unusual to not see blood spatter on the t-shirt, and that blood spatter is dependent on the angle of the knife.

The prosecutor noted at the evidentiary hearing that "[t]his was not a blood spatter case. The victim bled out primarily about her head and neck." (Ex. Q at 62). During trial, State's witness Norman Reeves, a forensic consultant who specializes in blood stain pattern analysis, testified about the various blood patterns observed at the scene based on photographs, physical evidence, and laboratory and police reports. (Ex. P at 148- 95). Mr. Reeves testified that the victim's stab wounds about the neck area showed passively flowing blood. (Ex. P at 160-63, 182). He described blood patterns as passively flowing blood which is the result of gravity; medium velocity impact spatter as generally akin to beatings; and high velocity impact spatter as generally the result of a gunshot. (*Id.* at 155). Reeves testified about a "relatively small spatter" of blood, but said it was unknown what caused the spatter, noting that "one of the things you don't get in a stabbing, and that is spatter." (*Id.* at 178-81). Reeves clarified that "unless the hand is so close to the body when it strikes with a knife it's already bloody, they'll be some spatter." (*Id.* at 181).

Defense counsel presented the trial testimony of Marc Taylor, a forensic scientist and blood spatter analyst who testified about the blood stains on the t shirt and pants. (Ex. MM 47-64; Ex. OO at 5-113). He testified about the blood stains on the t-shirt and pants coming in contact with a bloody object. (Ex. OO at 11-15, 76-79). Mr. Taylor was not questioned about blood spatter at the scene. Mr. Taylor testified in response to a juror question that blood pattern analysis is not an exact science. (Ex. OO at 111-12). He answered "no" when asked if pictures can provide an exact representation, explaining that "it is possible in a picture to have something that looks like blood that isn't actually blood." (*Id.* at 112). In contrast, Mr. Sweedo's testimony at the evidentiary hearing was based on his review of photographs of the crime scene and reports.

A defense counsel is not required to pursue an investigation that would be fruitless or might be harmful to the defense. *See Harrington v. Richter*, 562 U.S. 86, 106-08 (2011).

Petitioner has not established that counsel's failure to more thoroughly investigate blood pattern evidence was an omission that fell below an objective standard of reasonableness or that the outcome of trial would have been different based on Sweedo's testimony. The state court's ruling denying Petitioner's ineffective assistance of counsel claim on this issue is not contrary to, or an unreasonable application of, clearly-established federal law as determined by the Supreme Court. Ground Two is denied.

Grounds Three and Four: Issues Related to Defense Witness Popenko

Ground Three: Petitioner asserts in Ground Three that trial counsel ineffectively failed "to investigate and uncover exculpatory evidence showing that Maksim Popenko [the victim's ex-boyfriend] was the actual killer." (Am. Pet. at 8). Petitioner claims that counsel's further investigation would have disclosed that Brandon Barnes, "Popenko's 'best friend'... who had dated [the victim] after [Popenko]", stated in an interview that he suspected Popenko because he had noticed the day after the murder that Popenko possessed a photograph that Barnes had tried to retrieve from the victim, and that Barnes did not believe Popenko's explanation about how he had obtained the photograph. (*Id.*). Petitioner contends that after Barnes' death, the PCR investigator interviewed Barnes' fiancee, Shannon Moon, who said that Barnes believed Popenko killed the victim, that Barnes had seen Popenko beat up other women, and that Popenko and Barnes were both members of the eastside Bloods. (*Id.*).

Respondents argue that Petitioner's claim is vague and mere speculation by Barnes while Petitioner's guilt was established by the trial evidence, including fingerprint, semen and blood evidence, and the items Petitioner took from the victim. (Answer at 8). Respondents contend that any investigation regarding Popenko would have been futile. (*Id.*).

Ground Four: Petitioner asserts in Ground Four that counsel was ineffective for failing to effectively cross-examine Popenko, a hostile witness and the purported actual killer. (Am. Pet. at 9). Petitioner contends that shortly after the murder, Popenko was arrested in California in possession of a gun and machete in his car and pleaded guilty. The

trial court allowed defense counsel to impeach Popenko about the conviction without reference to the weapons, but counsel failed to do so. (*Id.*). Petitioner also faults counsel for not impeaching Popenko about wearing red pants at the time of his arrest despite testimony from a trial witness that she saw a person wearing red pants or shorts who resembled Popenko standing outside the victim's apartment in the early hours after the murder. (*Id.*). Popenko allegedly denied owning or wearing red pants or shorts even though he allegedly was wearing red pants when arrested in California. (*Id.*).

Respondents argue that impeaching Popenko about a matter as tangential as a prior weapons conviction would not have changed the result of trial, given the voluminous evidence presented against Petitioner. (Answer at 8). Respondents contend that Petitioner has not shown resulting prejudice as the Arizona courts reasonably found. (*Id.*).

Discussion: In his PCR Petition, Petitioner asserted that defense counsel was ineffective for "failure to investigate." (Ex. F at 30). After noting that Petitioner's "secondary defense" at trial "was a third-party culpability defense that focused on Maksim Popenko as the guilty party," Petitioner argued that Brandon Barnes had said in an interview that he suspected Popenko killed the victim, but Barnes died in 2006 without defense counsel investigating the matter. (*Id.* at 31). Petitioner contended that Barnes would have said he went to the victim's apartment the day before the murder to pick up a photograph, the two argued, and Barnes left without the photograph. (*Id.* at 31-32). Barnes also would have stated that the day after the victim's death, he saw the photograph while talking to Popenko who was in or at his car, and asked Popenko where he got the photograph but did not believe his explanation. (*Id.* at 32). Barnes allegedly observed that Popenko's car was full of chocolate wrappers of a kind of chocolate the victim favored and kept in her home. (*Id.*). Petitioner argued that these circumstances, and that Popenko (a former boyfriend) was not over the victim, made Barnes suspicious. (*Id.*) PCR counsel also asserted in the PCR Petition filed in the trial court that defense counsel was ineffective for not impeaching Popenko with his prior California conviction for possession of a firearm even though the trial

court allowed the questioning on the condition of no mention of the weapons. (Ex. F at 26-27). PCR counsel asserted that Popenko testified at trial that he did not own or wear red pants when Popenko had been arrested in California and was wearing enough red for the police to suspect that he was a gang member. (*Id.* at 32-33).

The state trial court found that counsel's "not adequately investigating Popenko as the culpable third party" and the impeachment issue should be considered at the evidentiary hearing. (Ex. G at 8; Ex. Q at 4-5). Prior to the February 1, 2010 evidentiary hearing, the trial court ruled at a hearing on December 9, 2009 that Ms. Moon's testimony regarding Barnes' statements to her was precluded at the evidentiary hearing. (Ex. BBB, internal ex. 8 at 2-8 Dec. 9, 2009 Tr.).

During the evidentiary hearing, PCR counsel argued that Popenko admitted he was present at the victim's apartment on the night of the murder, that defense counsel "could have presented more evidence that would have supported his third party culpability theory defense," and that a resident of the apartment complex where the murder occurred testified "about the guy in the red pants that was there in front of [the victim's] door that morning." (Ex. Q at 59-60). PCR counsel emphasized that Popenko had been "less than forthright on the stand about his history with [the victim], denying the order of protection and the threats that he made on the phone, even though they had the voice mails and stuff that clearly showed that he had been calling her and threatening her." (*Id.* at 60-61). PCR counsel described Popenko as "a jealous ex-boyfriend" who "clearly had a motive" and that defense counsel's failure to impeach Popenko with these items of evidence could not be dismissed as harmless. (*Id.*).

The State prosecutor argued that the evidence showed that Popenko had visited the apartment earlier on the night of the murder, "everything was consistent with what he indicated had happened in that he went and picked up or delivered a CD from [the victim],"

and Popenko's semen or blood was not found at the scene (*Id.* at 64).[2] The prosecutor argued that Petitioner could not show prejudice from defense counsel's alleged errors when considered against the strong trial evidence of Petitioner's guilt and Petitioner's inconsistent statements to authorities. (*Id.* at 63-66).

The trial court ruled that Petitioner had "failed to show" that defense counsel's failure to cross-examine Popenko about his prior felony conviction "was anything more than a strategic or tactical decision" and that "given the strong weight of all of the evidence against Petitioner, had Mr. Popenko's felony conviction been brought to light, it would have had no effect on the outcome. [Petitioner] would have undoubtedly been convicted." (Ex. H at 2). The trial court found that defense counsel had "vigorously cross-examined Mr. Popenko ... he called Brandon Barnes to offer testimony to discredit Mr. Popenko and to implicate Mr. Popenko in the homicide." (*Id.*).

In his Petition for Review filed before the Arizona Court of Appeals, Petitioner asserted that trial counsel was ineffective in cross-examining Popenko and in conducting the crime scene investigation. (Ex. I at 11). Petitioner cited defense counsel's failure to impeach Popenko with his prior felony conviction. (*Id.* at 11-13). Petitioner did not assert any issue about Popenko's alleged red clothing. As part of the failure to investigate claim, Petitioner reiterated the circumstances of the post-conviction investigation about Barnes' suspicion of Popenko as the murderer and Barnes' statements to Shawna Moon. (Ex. I at 14-15). Petitioner contended that he had filed the appropriate motion in the state trial court under the residual exception to the hearsay rule seeking the admission of these facts through Ms. Moon but the trial court ruled the evidence inadmissible. (*Id.*). Petitioner argued that Barnes' statements should have been considered trustworthy, that Barnes was not considered a suspect, and that there was no other way to procure the evidence except through Moon's

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[2] Stephanie Lozano testified that on the evening of the victim's death, the victim left for ten minutes to give a CD to Popenko. (Ex. K at 77-79). Detective Jimenez testified that when he interviewed Popenko at approximately 1:15 a.m. on April 11, 2001, he did not see any injuries on his hands, face or body. (Ex. L at 227-29).

testimony. (*Id.* at 16). Petitioner contended that the evidence was essential to his constitutional right to present a defense under the Fifth and Sixth Amendments, citing Supreme Court cases. (*Id.* at 16-17).

The Arizona Court of Appeals noted in its Memorandum Decision granting review but denying relief that Petitioner had raised in the state trial court his claim that his trial attorneys were ineffective in pursuing a third-party culpability defense in part because they "did not fully investigate evidence related to the possible culpability of a third party, P., ... and failed to impeach P.'s testimony with his previous conviction." (Ex. A at ¶ 3). The State appellate court ruled that the trial court had "correctly rejected" Petitioner's claim of ineffective assistance of trial counsel "in thorough and well-reasoned minute entries" and that "[n]o purpose would be served by restating the court's analysis here." (*Id.* ¶ 5). The appellate court discussed in a footnote Petitioner's claim that counsel was ineffective for failing to investigate evidence relating to his third-party culpability defense, indicating that the issue raised in the trial court was not the same as the issue raised in the petition for review:

> Gay's petition for review contains a section heading that reads 'Failure to investigate.' But the majority of his argument in that section does not discuss his trial counsels' purported failure to investigate evidence relating to his third-party culpability defense. Instead, his argument appears to assert the trial court had erred in excluding testimony related to his third-party culpability defense, a claim that, even if not precluded, see Ariz. R. Crim. P. 32.2(a), was not raised below. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); see also Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain 'issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review').

(Ex. A ¶ 5, n. 1).

The state court record shows that the trial court ruled pretrial that testimony concerning a machete in Popenko's car or that he was wearing "'gang'" colors when arrested in California was precluded. (Ex. AAA, internal ex. 9 June 24, 2002 Min. Entry at 4). Defense counsel called Popenko as a witness and Popenko admitted that he had had a relationship with the victim, that they had broken up in 1999, and that he had falsely told

authorities when initially interviewed at around 1:25 a.m, on April 11, 2001 that he had not been present at her apartment on the night of her death. (Ex. LL at 43-45, 67-77, 120). Popenko testified that he, in fact, had been to the victim's apartment on the night of the murder (April 9, 2001) until midnight or 1:00 a.m. to get a CD. (*Id.* at 75-77, 121). Defense counsel elicited from Popenko that in April 2001 he possibly "owned several guns" and that he told the police in April 2001 that he carried a knife. (*Id.* at 177-78). When questioned by the State, Popenko described the knife as a machete. (*Id.* at 179). Also when questioned by the State, Popenko testified that had gotten upset with the victim over her keeping a lock of his hair and that he may have left some "nasty messages" on her answering machine around August 2000. (*Id.* at 183-87). When questioned by defense counsel, Popenko said he did not recall leaving threatening messages on the victim's answering machine in August 2000. (*Id.* at 51-52).

Defense counsel called Brandon Barnes as a witness who testified that he told the police when interviewed on April 11, 2001 at 2:04 a.m. that Popenko had been present at the victim's apartment on April 9, 2001. (Ex. LL at 215-19). Barnes also testified that after being interviewed by the police, he called Popenko and told him the officer was going back to speak with Popenko and that he (Barnes) was not "going to hide anything that you want me to." (*Id.* at 220-21).

With respect to the "red clothing" issue, defense counsel called at trial a woman who lived in the same apartment complex as the victim, who testified that around 7:00 or 7:30 a.m., on April 10, 2001, she saw standing in front of the victim's apartment door a man described as tall, slender, dark hair with white complexion wearing red "sports pants." The witness did not see the man from the front and did not see his face. (Ex. LL at 96-107, 112). The woman testified that when shown a photograph of Popenko by an investigator in October 2002, she had stated that Popenko's haircut was not the same as the haircut of the man she saw. (*Id.* at 108-10). She acknowledged that the police report indicated she was unsure whether she saw the man on April 10, 2001 or the previous morning but that she believed it

was April 10th. (*Id.* at 106-07, 112-13). When questioned by defense counsel at trial, Popenko acknowledged that a photograph of him taken by the police when he was interviewed on April 11, 2001 showed he was wearing a red jersey. (*Id.* at 115-117). He testified that he owned a lot of red clothing. (*Id.*). Popenko denied owning any red pants, but said he might have owned such pants "at the time." (*Id.* at 117). He agreed that he previously told defense counsel during the interview that he was wearing "red DKY" shorts. (*Id.* at 118-19). Popenko testified when questioned by the State, "I have had several pair of red pants." (*Id.* at 132).

Regarding Ground Four, the state trial court's ruling that defense counsel was not ineffective in cross-examining Popenko, the last reasoned decision on the issue, is not contrary to Supreme Court precedent. Petitioner has not shown prejudice from any omission by counsel. Counsel effectively brought before the jury Popenko's testimony that he had been present at the victim's apartment on the night of the murder, his inconsistent statements to the authorities, his inconsistent statements regarding the telephone messages left with the victim related to the lock of hair incident, the fact that Popenko possessed a machete, and the fact that he owned and wore red clothing at the time of the murder. Counsel's further impeachment of Popenko with his California felony conviction would not have added to the jury's assessment of Popenko's credibility or shown that Popenko was the actual murderer. The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. To satisfy *Strickland's* first prong, deficient performance, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

With respect to Ground Three, Barnes' alleged statement to his girlfriend that he suspected Popenko as the murderer was vague and speculative. It is not the type of alleged exculpatory evidence that would lead a reasonable attorney to investigate further in light of

the other evidence known by defense counsel. *Wiggins*, 539 U.S. at 527. Barnes' testimony that he told the authorities that Popenko had been present at the victim's apartment on the night of the murder and that he would not hide anything from the authorities about Popenko cast Popenko as the possible assailant in light of all the evidence, including defense counsel's questioning of Popenko at trial. Moreover, as the Arizona Court of Appeals found in rejecting this claim, Petitioner raised the issue as a claim of defense counsel's failure to investigate in the state trial court but then changed the theory to an evidentiary issue in his petition for review. "Evidentiary rulings based on state law cannot form an independent basis for habeas relief." *Jammal v. Van De Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). Petitioner's Grounds Three and Four are denied.

Ground Eleven: Petitioner's Alleged Invocation of his Right to Counsel

Petitioner contends that trial counsel ineffectively failed to object to the prosecutor's comments during closing argument that allegedly referred to Petitioner's invocation of his right to counsel. (Am. Pet. at 18). Petitioner cites the following comments by the prosecutor during closing argument:

> And, ladies and gentlemen, when Anthony Gay did request an attorney at the end of that statement, you saw what the police did. They immediately heard the request, they stopped asking any and all questions immediately upon his request for an attorney.

(*Id.*; *See* Ex. PP at 96). Petitioner contends that the prosecutor's comments "caused the jury to infer that [he] was guilty because [he] wished to stop answering questions and talk to a lawyer." (Am. Pet. at 18). Respondent contends that, as the state trial court found, the prosecutor's "isolated and glancing reference" to Petitioner's invocation was "wholly harmless" in light of the evidence of Petitioner's guilt. (Answer at 9).

Petitioner raised this issue in his PCR Petition filed in the state trial court. (Ex. F at 27-30). The trial court rejected the claim, finding first that the proper standard of review was a showing of "fundamental error" because Petitioner failed to object during the trial proceedings, citing *State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005). (Ex. G at 6-7). The trial court further found that Petitioner "'must show that the error complained of goes to the

foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial'" based on *Henderson*. (*Id.* at 7). The trial court set forth its rationale for denying the claim as follows:

> In the instant case, the jury did not need to rely on the credibility of the arresting officer. As described throughout this ruling, the evidence presented to the jury to prove the [Petitioner's] guilt was substantial. The [Petitioner's] conversation with police *before* he invoked his right to counsel was admissible and was significant evidence showing he was at the scene of the murder. This evidence was heard by the jury before closing arguments and thus the State's statement about the [Petitioner] invoking his right to counsel was at that point in the trial a harmless error. In fact, the entire statement to the police was admitted and defense counsel argued that the statement was involuntary because the police led the [Petitioner] to believe that if he requested counsel, he would go to jail. The record does not support the assertion that the State had a deliberate trial strategy to expose the [Petitioner's] request for counsel in an effort to prejudice him having invoked a constitutional right. Due to the ample evidence against the [Petitioner], the State's mention in closing argument of the [Petitioner's] request for counsel is not fundamental error and would not have altered the outcome of trial. Thus, counsel's failure to object to the State's comment in closing argument was not ineffective assistance of trial counsel.

(Ex. G at 7-8).

Petitioner's assertion of the claim in seeking review by the Arizona Court of Appeals was rejected based on the trial court's "thorough and well-reasoned minute entries" without further discussion. (Ex. A at 3-4). The trial court's ruling therefore is the last reasoned decision on the issue.

A prosecutor's alleged improper argument does not per se violate a defendant's constitutional rights. *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993). "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The question is whether the "prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

During opening statement at trial, defense counsel told the jury that Petitioner was arrested and "driven down to the police station where he was pulled into a room to be questioned by two detectives," that Petitioner "asked for an attorney," and that his "request was ignored by the police detectives. He was told if he wanted to speak to an attorney he

would be charged with first degree murder and he would go to jail." (Ex. K at 32). Petitioner's tape recorded statement to the police was played for the jury. (Ex. HH at 168-71). The State elicited at trial through Tucson Police Detective Lorraine Thompson that when making a statement, Petitioner had asked when he was going to get an attorney. (Ex. HH at 175). Detective Thompson testified that when Petitioner requested an attorney, the questioning ended. (*Id.* at 178-79).

During closing argument, the prosecutor made only a brief reference to Petitioner's request for an attorney in an effort to make the point that police officers ceased questioning him and thereby preserved his rights. Petitioner's contention that the jury inferred from the comment that he was guilty because he desired an attorney is speculation. Defense counsel commented in closing argument that Petitioner asked Detective Olivas "when can I have an attorney appointed" and was "informed if he wants to speak to an attorney, doesn't want to speak to the police officer right then, that he is going to be arrested for first degree murder, he's going to be taken to jail and he, maybe 7 or 10 days after that ... he'll get to talk to an attorney." (Ex. PP at 145). Defense counsel made the point in closing argument that "the detectives repeatedly lie[d] to [Petitioner]." (*Id.*).

Under these circumstances, and in the context of the evidence establishing Petitioner's guilt, Petitioner has not shown that he was denied a fair trial based on the prosecutor's comment during closing argument and defense counsel's failure to object to those remarks. Petitioner's allegation is not sufficient to overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

The trial court instructed the jury that what the attorneys said in opening statement and closing argument is not evidence. (Ex. PP at 25). The jury is presumed to follow the court's instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Petitioner has not established that the state trial court's ruling denying his claim of ineffective assistance of counsel is contrary to Supreme Court precedent. Ground Eleven is denied.

(b) Grounds Five and Nine: Ineffective Assistance of Appellate Counsel

Petitioner's two grounds that appellate counsel provided ineffective assistance are evaluated under the *Strickland* standard discussed above. *See Williams*, 529 U.S. at 390-91.

Ground Five: Failure to Raise Sufficiency of the Evidence on Appeal

In Ground Five, Petitioner faults appellate counsel for failing to argue that the evidence was not sufficient to convict him of first degree burglary, and felony murder on the basis of burglary and theft. (Am. Pet. at 12). Petitioner cites as significant that all jurors rejected felony murder for burglary, with sexual assault as the basis for the burglary; and that the jury unanimously rejected the aggravating factor of pecuniary gain. (*Id.*). He also asserts that the State "conceded that his entry into the apartment was lawful" and that "there was no evidence from which a reasonable juror could infer" that he took items from the victim during his "unlawful presence." Petitioner argues that the "only reasonable inference that a jury could draw" was that Petitioner took items "as an afterthought" and that his "intent to steal would have been formed after the alleged homicide." (*Id.*). Petitioner contends that his trial lawyer raised these issues in a motion for new trial[3] and that PCR counsel argued that his appellate lawyer was ineffective for not raising the issues on direct appeal. (*Id.*). Respondents argue that the trial evidence established not only that Petitioner murdered the victim but also stole her jewelry and other possessions, and that any insufficient evidence claim raised on direct appeal would have failed. (Answer at 9-10).

Petitioner did not raise insufficiency of the evidence on direct appeal. PCR counsel asserted in the PCR Petition that appellate counsel was ineffective for this omission. (Ex. F at 12- 19). The state trial court rejected the claim, ruling as follows:

> Since the nature and degree of the evidence presented at trial supports a claim of sufficient evidence for a felony murder conviction, with the predicate felony being burglary, appellate counsel was not erroneous in not finding or not making such a claim. Simply because the jury did not unanimously find that pecuniary gain was an aggravating factor during the penalty phase of the trial is of no import. For burglary to be a basis for felony murder, the jury must

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[3] Petitioner's motion for new trial was considered and denied at a hearing on June 28, 2004. (Ex. AAA, Motion for New Trial filed May 10, 2004 & June 28, 2004 Tr.).

> only find that the death occurred during the course of or in furtherance of the burglary. There was substantial evidence the victim's death occurred during the course of or in furtherance of the burglary. Therefore, the [Petitioner's] claim of ineffective assistance of appellate counsel for not raising a claim of ineffective assistance of trial counsel in this regard is without basis and must fail.

(Ex. G at 6).

The appellate court rejected the claim as raised in the Petition for Review:

> Gay asserts the trial court erred by rejecting his claim that appellate counsel had been ineffective for failing to argue the evidence of felony-murder was insufficient. He contends the jury's finding of burglary 'must have been based on his intent to commit a theft, which was formed after the homicide.' Thus, he reasons, because the murder therefore did not occur 'in furtherance of' the burglary, burglary 'could not provide the basis for a felony-murder conviction.' *See* A.R.S. § 13-1105(A)(2) (person commits first degree murder by causing death of another 'in the course of and in furtherance of' enumerated offenses). But Gay does not support his assertion that his intent to commit theft was formed after the homicide had been committed; he provides no citation to the record or to the documents contained in the appendix to his petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain 'specific references to the record' supporting claims). Nor does he provide references to supporting evidence in his petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.5 (record citations required in petition for post-conviction relief). Absent such support, he has failed to demonstrate his appellate counsel was ineffective in failing to raise this claim on appeal, and the court did not err in summarily dismissing this claim. [footnote omitted]. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prevail on ineffective assistance of counsel claim, defendant must show counsel's performance deficient under prevailing professional norms and deficient performance prejudiced defense).

(Ex. A at 4-5). The appellate court observed in a footnote that the state trial court had misstated the showing for felony-murder, noting that A.R.S. § 13-1105(A)(2) reads "during the course of and in furtherance of the burglary," not "during the course of or in furtherance of the burglary." (*Id.*, at 5, n.2). It was further noted "that the jury was correctly instructed at trial that the victim's death had to be caused 'in the course of and in furtherance of' the burglary" and that it was "presumed the jury followed those instructions." (*Id.*). Despite this "incorrect recitation of the relevant law," the Court of Appeals found no error in the rejection of this claim "[i]n light of Gay's failure to support his sufficiency of the evidence argument with references to the facts of his case." (*Id.*). The appellate court's opinion is the last reasoned ruling on the issue.

Petitioner's grounds asserted in his amended habeas petition do not cite any factual evidence as showing that an insufficiency of the evidence argument would have been successful on appeal regarding the legal issues he has identified. Petitioner's assertions are too "vague and conclusory" to warrant habeas relief on a claim of insufficient appellate counsel. *Moore v. Chrones*, 687 F. Supp. 2d 1005, 1035 (C.D. Cal. 2010).

The record shows that Petitioner was charged with first degree murder and burglary in the first degree. (Ex. B at 2; Ex. PP at 31). The trial court instructed the jury that a person can be found guilty of first degree murder based on one or both of two separate theories, that is, the theory of premeditation and the theory of felony murder, and that Petitioner had been charged based upon both theories. (*Id.*). The jury was instructed that the crime of first degree murder by felony murder required proof of the following two things: "One; the defendant committed a burglary or sexual assault; two, in the course of and in furtherance of either of these crimes or immediate flight from either of these crimes, the defendant or another person caused the death of another person." (*Id.* at 32). The jury was further instructed as to the elements of first degree burglary, second degree burglary, theft, and sexual assault. (*Id.* at 33-35). Petitioner was found guilty of first degree burglary and first degree murder. (Ex. A at 2). His murder conviction was based on a theory of felony murder with burglary as the predicate crime. (*Id.*).

In Arizona, a person commits burglary in the first degree by "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein" while knowingly possessing a deadly weapon. A.R.S. §§ 13-1508(A); 13-1507(A). While a person may enter another's premises lawfully and with consent, "his presence can become unauthorized, unlicensed, or unprivileged if he remains there with the intent to commit a felony." *State v. Altamirano*, 803 P.2d 425, 428 (Ariz. App. 1990). "'When a person's intent in remaining on premises is for the purpose of committing "a theft or some felony therein," such individual is no more welcome than one who initially entered with such intent.'" *Id.* (quoting *State v. Embree*, 633 P.2d 1057, 1059 (Ariz. App. 1981), *abrogated on*

other grounds by amendment to A.R.S. § 13-1501(2)). A person, therefore, may be found guilty of felony murder if, acting either alone or with one or more other persons, the person commits burglary and, in the course of and in furtherance of the offense, the person or another person causes the death of any person. A.R.S. § 13-1105(A)(2).

Generally, for challenges to the sufficiency of the evidence supporting a criminal conviction, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Even if there are conflicting inferences in the evidence, a habeas court "must presume - - even if it does not affirmatively appear in the record - - that the trier of fact resolved any such conflicts in favor of the prosecution and must defer to that resolution." *Id.* at 326; *see also Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) (per curiam). Additionally, when evaluating a *Jackson* claim on federal habeas review, the court must apply 28 U.S.C. § 2254(d)(1)'s "additional layer of deference" by analyzing whether the state's highest court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. *Juan H. v. Allen*, 408 F.3d 1262, 1274–75 (9th Cir.2005).

The trial evidence showed that Petitioner was present at the victim's apartment on the night of the murder, his semen and blood were found on the victim, his blood and fingerprints were found throughout the apartment, his bloody t-shirt was found under the victim, and he was in possession of items belonging to the victim the day after the murder. Petitioner was wearing the victim's t-shirt when he returned to his apartment in the early morning hours of April 10, 2001 and his girlfriend testified that Petitioner said he obtained the shirt from the house he had broken into. Defense counsel argued in closing argument to the jury that Petitioner engaged in consensual sex with the victim, that he left to get cigarettes, found the victim and cradled her bloody body next to his, and that he took items from her apartment as an afterthought, leaving more expensive items behind . (Ex PP at 118-

36). Defense counsel argued that Maksim Popenko was the possible murderer and that crime was committed in a jealous rage. (*Id.* at 136-43). The jury rejected Petitioner's theory of defense and found him guilty.

It is permissible for appellate counsel to make tactical choices to raise certain claims and not others on direct review. *Smith v. Murray*, 477 U.S. 527, 536 (2000); *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). Counsel's tactical choices are entitled to a strong presumption of correctness. *Strickland*, 466 U.S. at 690. Petitioner has not shown either deficient performance from appellate counsel's omission or resulting prejudice. *Strickland*, 466 U.S. at 689, 694. The Arizona Court of Appeals rejection of his ineffective assistance of appellate counsel claim was not objectively unreasonable in light of Supreme Court precedent and Ground Five is denied.

Ground Nine: Third Party Culpability

In Ground Nine Petitioner contends that the state trial court violated his due process rights by precluding evidence of third party culpability, that is, evidence of semen from unknown persons found in the victim's underwear and bed sheets, and evidence that the victim and a female friend had consensual sex with her neighbors in her apartment on the night of her death. (Am. Pet. at 16). Respondents argue this ground as contending that appellate counsel was ineffective for not raising the issue on direct appeal. (Answer at 9, 10). Respondent contends that such evidence only generally pointed to third parties and was properly excluded, the probative value of the evidence was substantially outweighed by the danger it would cause jurors to focus on the victim's prior sexual activity rather than the trial issues, and evidence on this topic would have been futile given the trial evidence that established Petitioner's guilt. (*Id.* at 10).

The issue of the victim's prior sexual activity was not raised on direst appeal but was raised as a claim of ineffective assistance of appellate counsel in the PCR petition filed in the state trial court and in the Petition for Review filed in the Arizona Court of Appeals. (Ex. F at 19-24; Ex. I at 10-11). The state trial court ruled the issue was precluded because it had

not been raised on direct appeal. (Ex. G at 15). The state appellate court determined that the trial court had erred in finding the claim precluded because it had overlooked that Petitioner raised the issue as a claim of ineffective assistance of appellate counsel. (Ex. A at 3, 5). The Arizona Court of Appeals found that Petitioner was not entitled to relief because the evidence had been correctly ruled inadmissible at trial "in part because it pointed only generally to a third party or parties." (Ex. A at 5). The appellate court went on to find that even if that ruling was error, Petitioner had not addressed the trial court's alternative basis for excluding the evidence, to wit, "that its probative value was substantially outweighed by its prejudicial effect because it would improperly 'allow [Petitioner] to focus on the victim's prior sexual contacts without any connection to the events on [the] date in question," citing Ariz. R. Evid. 403. (Ex. A at 6). This is the last reasoned decision on the issue.

The state court record shows the trial court in a pretrial ruling precluded testimony regarding condoms found in the victim's apartment and regarding the victim's consensual activity with Ryan A. (Ex. T at 110-35; Ex. AAA, internal ex. 9 June 24, 2002 Min. Entry). At a hearing on February 24, 2003, defense counsel remarked that the prosecutor had brought a motion to preclude evidence of the victim's consensual sexual activity. (Ex. X at 76; *see also* Ex. X at 27-28). In another pretrial ruling, the trial court noted that the defense sought to admit specimens of semen samples found on the bedding in the victim's bedroom, on a pair of panties found on the floor of the victim's bedroom, and on the condoms to "'rebut the State's theory of sexual assault'" and to demonstrate that someone else could have committed the murder. (Ex. AAA, internal ex. 8 Mar. 17, 2004 Min. Entry). The court ruled the semen sample evidence found on the bedding and panties was not admissible because there was no evidence tying a particular donor to the scene who may have had a motive and/or opportunity to commit the crime. (*Id.*). The court further ruled that even if relevant, the danger of undue prejudice outweighed any relevance because "[i]t is clearly inflammatory and unfairly prejudicial to allow the defendant to focus on the victim's prior sexual contacts without any connection to the events on [the] date in question." (*Id.*). However, the court ruled evidence

regarding the condoms was admissible on the issue of third party culpability. (*Id.*; *see also* Ex. Y at 9).

During trial, State's witness, Stephanie Lozano, the victim's neighbor, testified that on the evening of April 9, 2001, she, the victim, David Vander Meyer, and Resendo Espinoza went to the victim's apartment. All but the victim left by 10 or 10:30 that night. (Ex. K at 72-82, 116-17). Resendo Espinoza, called as a defense witness, testified that on the evening of April 9, 2001, he, Stephanie, the victim and "possibly Ryan" went to the victim's apartment, then clarified that he could not recall if Ryan was there that night. (Ex. KK at 114-17). When confronted with his statement to defense counsel, Espinoza admitted that he had said that he, Stephanie, the victim and Ryan had gone to the victim's apartment. (*Id.*, at 121-23). He testified that he and Stephanie stayed in the living room and the victim and Ryan went into the victim's bedroom. (*Id.* at123). Ryan Aubuchon, called as a defense witness, testified that on or about the time of the victim's death, he had known her about two to three weeks, had started a relationship with her, and that a couple of days before the murder, he, Espinoza, and Stephanie Lozano went to the victim's apartment. (Ex. LL at 10-11, 18, 20-22). Mr. Aubuchon denied going to the victim's apartment on April 9, 2001 but acknowledged that he had been intimate with her three or four days before her death and had used two condoms which he threw in the trash. (*Id.* at 25-26). When confronted with his statement to the police, Mr. Aubuchon acknowledged he had been intimate with the victim on Sunday (April 8, 2001) and their sexual encounter had occurred on the victim's bed. (*Id.* at 30-33).

During the defense case, defense counsel argued that the semen samples on the bed and panties should be admitted because the State had tried to show through Stephanie Lozano that the victim did not have a sexual relationship with Petitioner and because Detective Jimenez had testified that the position of the panties found in the bedroom was indicative of sexual assault. (Ex. MM at 3-19). After noting that defense expert Marc Taylor had analyzed the stains on the sheets and panties, defense counsel made an offer of proof through

Taylor who testified that the stains on the sheets had been deposited since the last time the sheets had been laundered. (*Id.* at 19-20). The trial court denied Petitioner's motion for reconsideration. (*Id.* at 21).

Petitioner's forensic expert, Marc Taylor, testified at trial that two condoms were retrieved from the trash on the apartment porch and that cellular material from the condoms yielded a DNA profile consistent with Aubuchon and possibly the victim but no sperm or semen. (Ex. OO at 25-29). At the conclusion of Mr. Taylor's testimony, defense counsel's renewed motion to present the results of analysis of the victim's sheets and panties was denied. (Ex. OO at 105).

A defendant's right to present evidence is not unlimited, but instead may give way to the forum state's evidentiary and procedural rules. *Clark v. Arizona*, 548 U.S. 735, 770 (2006). In Arizona, evidence of third-party culpability is relevant if it tends "to create a reasonable doubt as to the defendant's guilt," but such evidence should not be admitted if it amounts to "mere suspicion or speculation." *State v. Gibson*, 44 P.3d 1001, 1004 (Ariz. 2002); *State v. Dann*, 74 P.3d 231, 243 (Ariz. 2003). Here, Petitioner presented evidence in his defense that the victim had a sexual encounter with Aubuchon a few days prior to the murder and that she was with a male companion at her apartment on the evening of her death. There was conflicting evidence for the jury's determination regarding the identity of the male companion. Evidence regarding the semen stains on the bedding and underwear was speculative as there was no evidence regarding the date that the semen had been deposited or as to the identity of the donor. Petitioner has not demonstrated how his due process rights were violated by the trial court's exclusion of this latter evidence. Neither has Petitioner established how he was prejudiced by counsel's decision to not raise the exclusion of third-party culpability evidence on appeal. Appellate counsel meets the objective standard of competence and does not cause prejudice when counsel does not raise a "weak issue." *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). Ground Nine is denied.

(c) Grounds One, Seven and Eight: Merits Analysis

Petitioner's Grounds One, Seven and Eight concern issues raised on direct appeal that were rejected by the Arizona Court of Appeals.

Ground One - Petitioner's *Batson* challenge

Petitioner, who notes that he is a Black man who was on trial for the alleged murder of a white woman, contends in Ground One that two Black female jurors were removed based on the impermissible reason of race. (Am. Pet. at 6). Petitioner's allegations are essentially the same argument made by counsel in his direct appeal. (Ex. B at 25-48). Respondents contend that the record shows that the Arizona Court of Appeals carefully evaluated Petitioner's *Batson* claim before rejecting it. (Answer at 10-11).

Batson v. Kentucky, 476 U.S. 79 (1986), established a three-step process for evaluating a defendant's objection to a peremptory challenge. A defendant must make a prima facie showing that a challenge was based on race. If a defendant makes this showing, the prosecution must then offer a race-neutral basis for the challenge. The prosecutor's explanation need not be persuasive or even plausible. Finally, the court must determine whether the defendant has shown "purposeful discrimination." *Batson*, 476 U.S. at 97-98; *Rice v. Collins*, 546 U.S. 333, 338 (2006). The ultimate burden of persuasion remains with the opponent of the strike. *Rice*, 546 U.S. at 338. "[A] federal habeas court can only grant [the] petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge." *Id.* at 338-39. State-court factual findings are presumed correct. 28 U.S.C. § 2254(e)(1). On federal review of a habeas petition, "AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (quoting *Renico v. Lett*, 130 S.Ct. 1855, 1862 (2010)).

The last reasoned decision on the issue is by the Arizona Court of Appeals. *Gay*, 150 P.3d at 793-96. The record shows that the prosecutor struck one juror (Barnard) for the stated reason that the juror was visibly displeased with how the police had handled her

nephew's murder, appeared "stern looking" and "angry" with a "glare," and who refused to make eye contact with the prosecutor. *Gay*, 150 P.3d at 793. As for the other juror (Parker), the prosecutor stated as reasons for removal that the juror disliked the death penalty, had "problems with graphic details and gruesome photos," was "sympathetic according to [the state's] drug user question; and "would be distracted by upcoming medical tests." *Id.* The court of appeals determined that the trial court did not err by finding the state's explanations facially race-neutral. *Id.* at 793-94. *See Williams v. Rhoades*, 354 F.3d 1101, 1109 (9th Cir. 2004) (citing *Burks v. Borg*, 27 F.3d 1424, 1429 & n.3 (9th Cir. 1994) ("prosecutor's evaluation of a juror's demeanor, tone, and facial expressions may lead to a 'hunch' or 'suspicion' that the juror might be biased, and that a peremptory challenge based on this reason would be legitimate")); *Felkner*, 562 U.S. at 598 (trial court's determination of racial motivation or lack thereof is entitled to great weight in evaluating a *Batson* claim).

Petitioner contends that there were several non-black jurors who were crime victims or had family members who were crime victims but the prosecutor did not question them. (Am. Pet. at 6). As discussed by the State Court of Appeals, the record shows that one of the jurors (Barnard) was the only juror who expressed a negative attitude about law enforcement. *Gay*, 150 P.3d at 794-95. The appellate court considered this issue in its decision and noted that two jurors stated that the perpetrators of the crimes they discussed had been arrested and convicted and the other juror, whose assailant had not been prosecuted, said nothing suggesting that she had a negative attitude toward law enforcement. *Id.*, at 795 ("Thus, the prosecutor may not have felt she needed to explore the attitudes of these three toward law enforcement."). *See Mitleider v. Hall*, 391 F.3d 1039, 1048 (9th Cir. 2004) (previous negative experience with law enforcement constitutes acceptable race-neutral explanation for striking a potential juror).

Petitioner contends that juror Parker was struck because of reservations about the death penalty while "[t]wo other non-black jurors (Bernard and Kinsella) were as equivocal

about the death penalty, agreed to follow the law, and were not struck." (Am. Pet. at 6). This issue was considered and rejected by the Arizona Court of Appeals:

> Although there is some similarity among the answers of Parker, Bernard, and Kinsella, we note that it was only Parker who was personally affected by the death sentence. Additionally, the trial court was in a better position than we are to evaluate both the sincerity of the jurors' responses and the prosecutor's explanations. . . . We defer to those determinations.

Gay, 150 P.3d at 795. Petitioner has not argued any reasons supported by facts in the record regarding why this decision is incorrect.

Petitioner complains that "[t]he percentage of Blacks struck was twice as high (33%) than the percentage of Blacks on the venire (17%)." (Am. Pet. at 6). The Arizona Court of Appeals considered this issue and determined that "the fact that four African-Americans served as either jurors or alternates is "'indicative of a nondiscriminatory motive'" and that "the statistical disparity alone does not suggest the trial court erred." *Gay*, 150 P.3d at 794. The presence of other minority jurors is indicative of a nondiscriminatory motive. *Gonzalez v. Brown,* 585 F.3d 1202, 1210 (9th Cir. 2009) (internal quotation marks and citation omitted).

The Arizona Court of Appeals decision was not contrary to, or an unreasonable application of, the holdings of then-existing Supreme Court precedent. Ground One is denied and dismissed.

Ground Seven: Exclusion of Defense Expert Testimony Regarding Post-Arrest Statements

Petitioner asserts that the trial court violated his due process rights when it ruled inadmissible testimony from an expert that Petitioner's post-arrest statements were unreliable because Petitioner was in severe cocaine withdrawal at the time he made the statements. (Am. Pet. at 14). He contends that his expert's testimony was also proposed for a suppression hearing as tending to show that his statements were not voluntary. (*Id.*). Respondent asserts that Petitioner sought to introduce this evidence only at his pretrial voluntariness hearing, not during trial. (Answer at 11). Respondent argues that the evidence

was irrelevant to the voluntariness determination because it did not relate to the presence or absence of official police coercion which is the linchpin for a finding of involuntariness. (*Id.* at 11-12).

Petitioner's ground in his amended habeas petition is essentially the same as the issue he raised on direct appeal. Petitioner sought to introduce at the pretrial suppression hearing the testimony of Dr. Jacquelyn St. Germaine, a psychologist, regarding the effects of crack cocaine or withdrawal of crack cocaine on his state of mind during the police interview. *Gay*, 150 P.3d at 797. The trial court granted the State's objection to the testimony, finding that there was "no evidence of police coercion during the taping of the defendant's statements" and that the psychologist's testimony would not assist the court in determining voluntariness. *Gay*, 150 P.3d at 797. Petitioner filed a motion for reconsideration in the trial court, arguing that the expert's testimony could be relevant to a determination that his statement was unreliable. (Ex. T at 72-87). The trial court denied Petitioner's motion for reconsideration. *Gay*, 150 P.3d at 798. Petitioner raised these issues on direct appeal. The appellate court's opinion is the last reasoned ruling for consideration on habeas review.

With respect to relevance to voluntariness, the Court of Appeals determined that the record supported the trial court's finding that there was no evidence of police coercion in this case. *Gay*, 150 P.3d at 798. Relying on *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), the appellate court held that "[w]ithout evidence of police coercion, St. Germaine's testimony could not have aided the court in determining voluntariness." *Gay*,. 150 P.3d at 798. With respect to reliability, the appellate court observed that Petitioner's reliance on *Crane v. Kentucky*, 476 U.S. 683 (1986), was misplaced, as "the issue in *Crane* was the admissibility at trial of testimony regarding the reliability of a confession." *Gay*, 150 P.3d at 798. The appellate court reasoned that "'the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts.'" *Gay*, 150 P.3d at 798 (quoting *Lego v. Twomey*, 404 U.S. 477, 486 (1972)). It additionally noted that the State had not objected to the use of St. Germaine's testimony at trial but that "[Petitioner] did

not attempt to introduce her testimony at trial and does not allege any trial error regarding the reliability of his statements to police." *Gay*, 150 P.3d at 798. Finally, the State appellate court considered Petitioner's argument that St. Germaine would not have testified about his mental state during questioning, but would have testified about "'the general effects of crack cocaine and withdrawal from crack and that [Gay's] statements were consistent with those of a person who is addicted to crack and 'crashing.'" *Gay*, 150 P.3d at 798. In rejecting this argument, the appellate court opined that to the extent St. Germaine would have testified about the general effects of crack cocaine or withdrawal from crack cocaine on the human body, the testimony was irrelevant to the voluntariness determination. 150 P.3d at 798. In addition, St. Germaine's "report was insufficient to establish that [Petitioner's] statements were 'so unreliable that they [should have] be[en] excluded under the evidentiary laws of the forum.'" 150 P.3d at 798. The appellate court ultimately concluded that the trial court had not erred in its decision to preclude St. Germaine's testimony. *Id.*

Petitioner has not asserted in the amended habeas petition the violation of a constitutional right based on any factual or legal error by the Arizona Court of Appeals. The substance of Petitioner's post-arrest statements was not relevant to the voluntariness determination which concerned the presence or absence of official law enforcement coercion. *See Connelly*, 479 U.S. at 167 (police coercion is a necessary predicate to involuntariness; defendant's state of mind cannot prove involuntariness by itself without police coercion). Petitioner argues that the evidence should have been admitted based on *Crane*, 476 U.S. 683. *Crane* dealt with the admission of evidence at trial bearing on the reliability of a confession. 476 U.S. at 684. The issue in *Crane* concerned the defendant's ability to present a full defense to the crimes charged. Petitioner never sought to admit the expert testimony at trial. The Arizona Court of Appeals reasonably concluded that *Crane* did not apply and thus did not misapply Supreme Court precedent. Ground Seven is denied.

Ground Eight: Denial of Motion to Suppress

Petitioner contends that his waiver of his *Miranda* rights was not knowing, intelligent, or voluntary because the detective's explanation was unclear, confusing and misleading in violation of Supreme Court precedent, citing *Doody v. Ryan*, 649 F.3d 986, 1003-07 (9th Cir. 2011). (Am. Pet. at 15). Petitioner contends that after the detective advised him of his rights, Petitioner asked "when is it possible to have an attorney appointed to me?" (*Id.*). The detective responded that Petitioner would be arraigned the next day and an attorney would be appointed after that, which Petitioner contends, contradicted the detective's prior statement that he could have an attorney present prior to and during questioning. (*Id.*). Respondents contend in their Answer that Petitioner made only vague inquiries about when an attorney would be appointed, did not unambiguously request counsel, and that his questions did not communicate that he was actually requesting counsel but were mere inquiries about the availability of counsel. (Answer at 12-13).

Petitioner filed a motion to suppress statements which the trial court denied after an evidentiary hearing. (Ex. B at 56-57; Ex. C at 64-66). Petitioner raised the issue on direct appeal and the Arizona Court of Appeals found no *Miranda* violation based on its extensive review of the record and case law. *Gay*, 150 P.3d at 796-97. The appellate court's ruling is the last reasoned decision on the issue.

The state appellate court set out as follows the relevant discussion between Petitioner and police officers when regarding Petitioner's statement:

> After arresting Gay, Detectives Olivas and Thompson took a statement from him. After Olivas informed Gay of his *Miranda* rights,[4] Gay asked: 'Well, when is it possible to have an, an attorney appointed to me?" The following exchange then occurred:
>
> [Olivas]: If, if you want an attorney, at this point, I'm not gonna ask you any questions at all. What's gonna happen is you're gonna go to the jail, tomorrow you're gonna have arraignment, and then an attorney will be appointed for you. If you can't afford, if you cannot afford one.
> [Gay]: But would I get an attorney anyway? I mean ...?
> [Olivas]: Yes.

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[4] *See* Ex. C at 64.

> [Gay]: Oh, okay.
> [Olivas]: Do you understand that?
> [Gay]: Yeah, I, I guess.
> [Olivas]: Well, there can't be no [sic] guessing. I need to, either you don't understand them, or you do. If you wanna talk to us, everything you say can be used against you in a court of law. If you don't wannna talk to us, you don't have to talk to us, basically is [sic] what's gonna go, happen is, I'm gonna, I will ask you information on a booking form, nothing about the case and then you're going to jail. At the jail, within the next few days or, or a week or so, you, you'll, they'll appoint you a lawyer if you cannot afford one.
> [Thompson]: Actually, they'll appoint him the, the attorney at his initial appearance, which will be tomorrow at two.
> [Olivas]: They'll tell you who your attorney is.
> [Thompson]: Right.
> [Olivas]: You may not have a chance to talk to him, but you'll have an attorney.
> [Gay]: Okay. That's even, when, if we do talk?
> [Olivas]: Right
> [Gay]: Okay.
> [Olivas]: Okay?
> [Gay]: Yeah.
> [Olivas]: You understand that?
> [Gay]: Mmm hmm [positive response].
> [Olivas]: Are you willing to talk with me?
> [Gay]: Yeah.

Gay, 150 P.3d at 796.

The Arizona Court of Appeals noted that, "For an invocation of the *Miranda* right to counsel to be effective, the accused 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" 150 P.3d at 796 (citing and quoting *State v. Eastlack*, 883 P.2d 999, 1006 (1994) (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). Based on this authority, the appellate court determined that "[a] 'reasonable police officer in the circumstances' would not have understood Gay's question as a request for an attorney, especially because Olivas prefaced his reading of Gay's *Miranda* rights by saying: 'If you have any questions at all, I want you to ask them and if you don't understand [the *Miranda* rights], I want you to tell me. Okay?'" 150 P.3d at 797.

Based on prevailing Supreme Court precedent at the time of the state appellate court's decision, for Petitioner to validly request counsel, he was required to articulate his desire sufficiently clear so that "a reasonable police officer in the circumstances would understand

[his] statement to be a request for an attorney." *Davis*, 512 U.S. at 459. If the suspect indicates a request for counsel, "the interrogation must cease until an attorney is present." *Edwards v. Arizona*, 451 U.S. 477 (1981). Petitioner's question, "but would I get an attorney anyway," did not sufficiently articulate a request for an attorney. *See Clark v. Murphy*, 331 F.3d 1062, (9th Cir. 2003) (holding that the state court's ruling that the statement "I think I would like to talk to a lawyer" was ambiguous was not an unreasonable application of clearly established federal law so as to warrant federal habeas relief), *overruled on other grounds by Lockyer v. Andrade,* 538 U.S. 63 (2003). Petitioner has not shown in his amended habeas petition how the state appellate court's ruling was factually incorrect or in contravention of Supreme Court precedent.

In response to Petitioner's other argument that, even if his question was ambiguous, the officers failed to clarify sufficiently whether he was in fact requesting counsel and thus he failed to understand the scope of his *Miranda* rights, the Arizona Court of Appeals reasoned as follows:

> In Arizona, when a request for counsel is ambiguous, police must limit any further questioning to clarify defendant's request. *See State v. Finehout*, 136 Ariz. 226, 229, 665 P.2d 570, 573 (Ariz. 1983); *see also* [*State v.*] *Inman*, 151 Ariz. [413] at 416, 728 P.2d [283] at 286 [(Ariz. App. 1986)]. Here, following Gay's ambiguous assertion, Olivas limited his questioning to explaining what would happen to Gay if he requested an attorney and when he would be able to access that attorney. Although Olivas and Thompson had some difficulty explaining exactly when Gay's attorney would be appointed, they did make clear that if he asked for an attorney, they would cease questioning and an attorney would be appointed for him. Because Olivas and Thompson limited this further questioning to clarifying Gay's statement, there was no *Miranda* violation.

150 P.3d at 797.

Petitioner contends in his amended habeas petition that he was confused because Detective Olivas first told him that he could have an attorney present prior to questioning and then told him that an attorney would not be appointed until the next day or even later. (Am. Pet. at 15). But Petitioner's assertion overlooks that Detective Olivas told him at the outset that if he wanted an attorney "at this point," Olivas would cease questioning him. The detectives also attempted to explain to him when an attorney would be appointed. However,

the Supreme Court has not adopted a rule that requires police officers to respond to ambiguous statements by asking clarifying questions to ascertain whether the suspect wants an attorney. *Berghius v. Thompkins*, 560 U.S. 370 (2010) (under *Davis*, if an accused makes a statement concerning his right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or to ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights). Ground Eight is denied.

C. Grounds Six and Ten: Procedural Default and Dismissal

1. Legal Standards

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *McQueary v. Blodgett*, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). In Arizona, a petitioner just fairly present his claims to the Arizona Court of Appeals or through appropriate post-conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999).

A claim has been fairly presented if the petitioner has described both the operative facts and the federal legal theory on which the claim is based. *Sivak v. Hardison*, 658 F.3d 898, 908 (9th Cir. 2011). "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court." *Johnson v. Zenon,* 88 F.3d 828, 830 (9th Cir. 1996). "[G]eneral appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion." *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

The State retains the burden to prove the adequacy of the bar. Once the State raises procedural default as an affirmative defense, "the burden to place that defense in issue shifts to the petitioner." *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003). "The petitioner

may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.*

Where a prisoner fails to "fairly present" a claim to the state courts in a procedurally appropriate manner, state court remedies may, nonetheless, be "exhausted." This type of exhaustion is often referred to as "procedural default" or "procedural bar." *Ylst v. Nunnemaker*, 501 U.S. 797, 802–05 (1991); *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (explaining district court must consider whether the claim could be pursued by any presently available state remedy). If there are claims that were not raised previously in state court, the court must determine whether the petitioner has state remedies currently available to him pursuant to Rule 32. *See Ortiz*, 149 F.3d at 931. If no remedies are currently available, the petitioner's claims are "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1.

The federal court will not consider procedurally defaulted claims unless the petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995). To establish a "fundamental miscarriage of justice," a state prisoner must establish it is more likely than not that no reasonable juror could find him guilty of the offense. *Id.*, 513 U.S. at 327. A state prisoner demonstrates "cause" by showing that some objective factor external to the prisoner or his counsel impeded efforts to comply with the state's procedural rules.

See Murray v. Carrier, 477 U.S. 478, 488 (1986). To establish prejudice, the prisoner must show that the alleged constitutional violation "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982).

2. Discussion

Petitioner did not raise in the state trial court or before the Arizona Court of Appeals either Ground Six alleging that the trial court failed to give a lesser included instruction on theft[5] or Ground Ten asserting ineffective assistance of trial counsel based on failure to conduct DNA testing. In Arizona, Rule 32.2(a)(1) of the Arizona Rules of Criminal Procedure provides that post-conviction relief is not available on any ground "raisable on direct appeal under [Ariz.R.Crim.P.] 31 or on post-trial motion under Rule 24." Ariz.R.Crim.P. 32.2(a)(1). It therefore does not appear that Petitioner can now return to state court to exhaust these grounds. When issues are procedurally defaulted, federal review of the claim is not barred if the petitioner demonstrates "cause and prejudice" or a "fundamental miscarriage of justice."

As to Grounds Six, Petitioner contends that to the extent that this claim was not "'fairly presented'" in the direct appeal, his appellate lawyer provided ineffective assistance. (Doc. 15, Reply at 7). Petitioner also contends that the ineffective assistance of appellate counsel should have been raised in the state court PCR but was not, and federal habeas review is not precluded based on *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). (*Id.*). Petitioner contends in his Reply that Ground Ten is not precluded also based on *Martinez v. Ryan*. (Reply at 8-9). Petitioner contends that his first opportunity to present the issue that trial counsel was ineffective in failing to have the victim's finger nails tested for DNA was in his initial post-conviction petition but his PCR attorney did not raise the claim. (*Id.* at 9).

In *Martinez v. Ryan*, the Supreme Court held that, in certain circumstances, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish

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[5]*See* Ex. NN at 49, 51, 65-66 (refusal and theft as lesser included instruction).

cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S. Ct. at 1315. The Ninth Circuit Court of Appeals has expanded *Martinez* to apply to an underlying claim of ineffective assistance of appellate counsel. *Ha Van Nguyan v. Curry*, 736 F.3d 1287, 1293-96 (9th Cir. 2013). To satisfy *Martinez*, a habeas petitioner must demonstrate that his underlying ineffective assistance of trial counsel claim is substantial, that he had ineffective counsel during the state collateral proceeding, the state collateral proceeding was the initial review proceeding for the claim, and state law required him to bring the claim in the initial collateral review proceeding. *Trevino v. Thaler*, 133 S.Ct. 1911, 1918 (2013). To show that the underlying ineffective assistance of trial counsel claim is "substantial," the petitioner "must demonstrate that the claim has some merit." *Martinez*, 132 S.Ct. at 1318.

Ground Six. Petitioner states in his Reply as to Ground Six that defense counsel asked the trial court for an instruction on theft. (Reply at 6-7). However, his further contention in his Reply that PCR counsel should have raised the claim based on ineffective assistance of appellate counsel does not establish cause. Ground Six is not a claim of ineffective assistance of trial or appellate counsel but an independent substantive claim. *Martinez*, 132 S.Ct. at 1319 ("an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial"); *Maples v. Thomas*, 132 S.Ct. 912, 922 (2012) ("[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause'").

Arguably, to the extent, if any, that *Martinez* does apply, Petitioner has not shown that his claim of ineffective assistance has "some merit." In *Beck v. Alabama*, 447 U.S. 625, 633-38 (1980), the Supreme Court held that a death sentence cannot be constitutionally imposed after a jury finds a defendant guilty of capital murder when the jury was not instructed to consider lesser-included noncapital offenses that the evidence would have supported. The state trial court here instructed the jury that it could find Petitioner guilty of

the lesser-included offense of second-degree murder. (Ex. PP at 32-33). Importantly, the jury did not sentence Petitioner to death. *Gay*, 150 P.3d at 790. In addition, under Arizona law, theft is not a lesser-included offense of burglary. *State v. Arnold*, 565 P.2d 1282, 1283 (Ariz. 1977). Appellate counsel therefore was not professionally ineffective in not raising the issue on direct appeal. *Morrison v. Estelle*, 981 F.2d 425, 429 (9th Cir. 1992) (appellate counsel not ineffective where argument would not be successful).

Ground Ten. Petitioner asserts in his amended habeas petition that trial counsel "was ineffective for failing to conduct DNA testing on key evidence, including the victim's fingernail scrapings and nightgown." (Am. Pet. at 17). Petitioner contends that Michael Sweedo, who testified at the evidentiary hearing, stated that fingernail evidence is routinely investigated by the medical examiner, noting that a female may have an attacker's skin under her nails when she defends herself and sustains defensive wounds. (Am. Pet. at 17). Petitioner further contends that reasonable doubt would have resulted had the examination results come back negative for his DNA or positive for Popenko's DNA. (*Id.*). As previously discussed with respect to Ground Two, Petitioner did not submit Sweedo's expert report as an exhibit "to [his] PCR brief" but Respondents have provided the report as an attachment to their supplemental memorandum. (Reply at 8-9; Doc. 24 at 6 & Ex. AAA, internal ex.15). Sweedo noted in his report that fingernail scrapings from the victim were not tested and it "remain[ed] unknown whether the collections contain DNA from another individual or not." (Ex. AAA, internal ex. 15, last page).

Petitioner has not demonstrated that his ineffective assistance claim has "some merit." The record shows that Sweedo, a criminal investigator for the Pima County Public Defender's Office, testified at the post-conviction hearing regarding Petitioner's ineffective assistance of counsel claim based on the alleged failure to investigate blood spatter evidence. (Ex. Q, pp. 7-58). Mr. Sweedo did not testify about fingernail evidence at the evidentiary hearing. During trial, Dr. Bruce Parks, Chief Medical Examiner for Pima County, testified that the victim's hands were photographed and covered with scene bags to preserve potential

evidence . (Ex. P at 96, 119). Dr. Parks testified that he performed nail scrapings and clipped the victim's nails after checking her hands for trace evidence. (*Id.* at 121). State's witness Gary Harmor, senior forensic serologist at the Serological Research Institute in Richmond, California, testified at trial on cross-examination by defense counsel that screening fingernail scrapings would include examining them for the presence of biological material but he was not given fingernail scrapings in this case. (Ex. O at 58-59). State witness Nora Rankin, employed as a senior criminalist/forensic scientist for the Tucson Police Department, testified that DNA testing or examination may not be done on fingernail scrapings if the victim's hands are covered in blood. (Ex. JJ at 61-62, 68-72). Detective Jimenez and expert Dr. Reeves, State's witnesses, testified that the victim had blood on her hands. (Ex. M at 42 ("significant amount of blood on the victim's hands"); Ex. JJ at 23-24). Defense witness and expert Marc Taylor testified at trial that the victim's fingernail scrapings could have been tested but it was not requested based on "a number of evaluations that went into that." (Ex. OO at 90-92). Taylor noted that blood on the victim's hands "would have" contaminated the results. (*Id.* at 91).

State's witness Mary Ann Walkinshaw, at the time an employee of the forensic serology DNA section, Tucson Police Crime Lab, testified that DNA collected from the victim's vagina came from Petitioner as the single male source to the exclusion of three other males. (Ex. ZZ at 53-58). All of the tested blood samples from the victim's apartment came from either Petitioner or the victim. (Ex. L at 11, 14-17, 24, 40-45; Ex. N at 35-54; Ex. ZZ at 45, 52).

Finally, contrary to Petitioner's contention, DNA testing was performed on the victim's nightgown and the results came back positive for the presence of Petitioner's blood and semen. (Ex. GG at 49-53; Ex. HH at 31, 37-39). Petitioner's own expert Marc Taylor testified at trial about tests performed on the nightgown and the presence of a post-coital stain. (Ex. OO at 15-25).

The record supports the finding that defense counsel made a strategic decision not to test the victim's fingernail clippings and scrapings. Petitioner has not shown how he was prejudiced by this omission. Petitioner has not shown a prejudicial omission by defense counsel regarding the victim's nightgown because DNA testing was performed on this item of clothing.

With respect to Grounds Six and Ten, Petitioner has not established cause for the procedural default of these grounds. It is not necessary for the Court to further consider whether Petitioner has demonstrated prejudice from the procedural default. *See Thomas v. Lewis*, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991). Petitioner has not asserted with respect to Grounds Six and Ten that he is actually innocent. Grounds Six and Ten are dismissed as procedurally defaulted.

III. Conclusion and Denial of Certificate of Appealability

For the foregoing reasons, Petitioner's Grounds One through Five, Seven through Nine and Eleven, raised in his Amended Petition are without merit and Grounds Six and Ten are procedurally defaulted. The Amended Petition is, therefore, denied and dismissed with prejudice.

Before Petitioner can appeal this Court's judgment, a certificate of appealability ("COA") must issue. See Fed. R. App. P. 22(b)(1) (the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)). The standard for issuing a certificate of appealability is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the "district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court denies a habeas petition on procedural grounds without reaching the petitioner's "underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of

reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Upon review of the record in light of the standards for granting a certificate of appealability, the Court concludes that a certificate shall not issue given that: (1) as for Grounds Six and Ten, addressed on procedural grounds, jurists of reason would not find it debatable whether Court was correct in its procedural ruling; and (2) as for Grounds One through Five, Seven through Nine, and Eleven jurists of reason would not find the Court's assessment debatable or wrong. The Amended Petition does not require further proceedings.

Accordingly,

IT IS ORDERED that Petitioner's Amended Petition Under 28 U.S.C. § 2254 For A Writ of Habeas Corpus By A Person In State Custody (Non-Death Penalty) (Doc. 5) is:

(1) DENIED on the merits with regard to Grounds One through Five, Seven through Nine, and Eleven; and

(2) DISMISSED WITH PREJUDICE as procedurally defaulted with regard to Grounds Six and Ten.

IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED and shall not issue.

The Clerk of Court is directed to enter judgment accordingly and close the file in this matter.

DATED this 30th day of September, 2016.

CHARLES R. PYLE
UNITED STATES MAGISTRATE JUDGE