EXHIBITS

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AND

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 10 2021

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

JESUS MANUEL MORAN,

Petitioner-Appellant,

v.

MARK BRNOVICH, Attorney General, named as Mark Brnnovich, Attorney General of the State of Arizona; DAVID SHINN, Director of the Arizona Department of Corrections,

Respondents-Appellees.

No. 20-16146

D.C. No. 4:15-cv-00193-JR
District of Arizona,
Tucson

ORDER

Before: McKEOWN and BUMATAY, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 13) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

EX. 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 23 2020

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

JESUS MANUEL MORAN, Petitioner-Appellant, v. MARK BRNOVICH, Attorney General, named as Mark Brnnovich, Attorney General of the State of Arizona; DAVID SHINN, Director of the Arizona Department of Corrections, Respondents-Appellees.	No. 20-16146 D.C. No. 4:15-cv-00193-JR District of Arizona, Tucson ORDER

Before: IKUTA and MILLER, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent post-judgment motion. The request for a certificate of appealability (Docket Entry No. 9) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

EX.
3

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CV 15-0193-TUC-JR

ORDER

Petitioner Jesus Manuel Moran ("Moran") is a state prisoner who was proceeding pro se with a petition for writ of habeas corpus pursuant to 28 US.C. § 2254. Judgment was entered and this case was closed on April 27, 2020. (Docs. 71, 72.) Presently before the Court is Moran's motion to vacate or modify the judgment. (Doc. 74.) The motion is denied.

Discussion

In his motion, Moran complains that the lawyer he hired to represent him, Thomas Higgins "targets Mexican National and ensures that petitions he files, are 'shams, out of time frames.'" *Motion*, p. 7. Consistent with allegation, Moran alleges that Higgins did not present his claims in the Arizona courts and, therefore, he was denied his procedural due process rights. *Id.*, pp. 7-8. Moran also contends that the

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AEDPA should not apply to his claims due to Higgins' failure to present the claims in state court and that, as a result of Higgins' failures and the application of the AEDPA, he is being subjected to cruel and unusual punishment in violation of the Eighth Amendment. *Id.*, pp. 10-14.

In the title of his motion, Moran references Federal Rule of Civil Procedure 59(a). Rule 59(a) provides the specific standard for ordering a new trial. Rule 59(e) provides the standard for altering or amending a judgment. Because there was no trial in this case, the Court will address the motion as one to alter or amend the judgment under Rule 59(e).

District courts have "considerable discretion" when addressing motion to amend or alter a judgment under Rule 59(e). *Turner v. Burlington Northern Sant Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003). However, relief under Rule 59(e) "is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Wood v. Ryan*, 759 F.3d 1117, 1121 (9th Cir. 2014) (citation and internal quotation omitted). Reconsideration under Rule 59(e) is "usually available only when (1) the court committed manifest errors of law or fact, (2) the court is presented with newly discovered or previously unavailable evidence, (3) the decision was manifestly unjust, or (4) there is an intervening change in the controlling law." *Richor v. Ferguson*, 822 F.3d 482, 491–92 (9th Cir. 2016) (citing *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (internal citation omitted)). A Rule 59(e) motion to alter or amend judgment is not an opportunity for a party to get a "second bite at the apple," i.e., an opportunity to re-argue an issue

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already presented to the court or to raise new arguments that could have been raised in the original briefs, *see Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001), and is intended to afford relief to parties only in "highly unusual circumstances." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

Moran does not identify any newly discovered evidence or an intervening change in the controlling law. Thus, the Court presumes that he is contending that the Court committed manifest errors of law or fact or that the judgment is manifestly unjust. As for errors of law or fact, Moran has established none. The Court is fully aware of Higgins' treatment of Moran and his case. In fact, the untimeliness of the petition was excused by Higgins' lack of diligence, *see* Doc. 40, pp. 7-9, and the exhaustion of each of Moran's claims was analyzed under the standards enunciated in *Martinez v. Ryan*, 566 U.S. 1 (2012), *see* Doc. 71, pp. 7-13. The latter analysis included an examination of the merits of each of the claims, which in each claim was found lacking.

The Court also finds no support for Moran's contention that the AEDPA does not apply to his case. *See* 28 U.S.C. § 2254 (describing federal court habeas corpus remedies available to persons in custody pursuant to the judgment of a state court). Similarly, the Court finds no support for finding that Moran is being held in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. Because Moran's motion fails to identify a clear error of fact or law by the Court, newly discovered evidence, manifest injustice of the Court's decision, or an intervening

change in controlling law that would warrant reconsideration of the judgment, *Richor*, 822 F.3d at 491–92, it must be denied.

Order

For the foregoing reasons, it is **ORDERED** that Moran's motion to vacate or modify the judgment (Doc. 74.) is **DENIED**.

Dated this 2nd day of June, 2020.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

EX.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-15-00193-TUC-JR

JUDGMENT IN A CIVIL CASE

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

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed April 27, 2020, Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied with prejudice. Petitioner to take nothing and this action is hereby closed.

Debra D. Lucas
Acting District Court Executive/Clerk of Court

April 27, 2020

By s/ B. Cortez
Deputy Clerk

EX.
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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CV 15-0193-TUC-JR

ORDER

Pending before the Court is Jesus Manuel Moran's ("Moran") Amended Petition for Writ of Habeas Corpus (Doc. 51) filed pursuant to 28 U.S.C. § 2254. All parties consented to magistrate judge jurisdiction (Doc. 12). As explained below, the Magistrate Judge orders that the Amended Petition be dismissed with prejudice.

I. Background[1]

On direct appeal, the Arizona Court of Appeals summarized the background of Moran's conviction as follows:

[1] The factual summary of the state court is accorded a presumption of correctness. 28 U.S.C. § 2254(e)(1); *Moses v. Payne*, 555 F.3d 742, 746 n. 1 (9th Cir. 2009) (citing *Hernandez v. Small*, 282 F.3d 1132, 1135 n. 1 (9th Cir. 2002)).

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> In November 2002, Moran was involved in a multiple-vehicle accident near Tucson, which resulted in [an infant] fatality. [Moran] was transported to St. Mary's Hospital, where Arizona Department of Public Safety (DPS) Officer Rede obtained thee blood samples pursuant to a telephonic search warrant. Testing of the samples revealed blood-alcohol levels of 0.156, 0.131, and 0.110.

Ex. H at 1; Ex. N at 1.[2] In 2004, a grand jury charged Moran with manslaughter, criminal damage, and nine counts of endangerment with a substantial risk of imminent death. Ex. A.

On January 21, 2010, following a jury trial, Moran was found guilty of manslaughter, criminal damage and nine counts of endangerment with a substantial risk of imminent death. Ex. B at 8-11. Moran waived his right to a jury determination of aggravating factors. Ex. D at 15. On March 26, 2010, the state trial court determined two aggravating factors and sentenced Moran to enhanced, aggravated, concurrent terms of imprisonment, the longest of which was 28 years. Ex. E at 17-28.

On July 21, 2011, Moran's convictions and sentences were affirmed on direct appeal. Ex. H at 70-79. Moran did not file a motion for reconsideration or petition to review and on October 18, 2011, the Arizona Court of Appeals issued its mandate closing the case. Ex. I at 80.

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[2] Exhibits A through Y are attached to the Respondents' Limited Answer to Petition for Writ of Habeas Corpus. Doc. 9. Exhibits Z through II are attached to the Respondents' Answer to Amended Petition for Writ of Habeas Corpus. Doc. 53.

On March 27, 2012, Moran filed his post-conviction relief (PCR) notice, Ex. J at 2-4, and on November 21, 2013, he filed his PCR petition, Ex. L at 12-24.[3] On March 7, 2014, the state trial court denied Moran's petition. Ex. N at 87-91.

Moran filed a timely motion for an extension of time to file a petition for review of the trial court's denial of his PCR petition and the trial court granted his request, giving him until April 11, 2014 to file his petition. Ex. P at 2. Needing another continuance, Moran filed another request to file his petition late but rather than filing it with the trial court, he asked the Court of Appeals to extend the deadline. Ex. Q at 4. He then filed his petition with the appellate court on April 14, 2014. Ex. R at 7-39. On April 15, 2014, the Arizona Court of Appeals dismissed the petition, finding it untimely. Ex. S at 41. The appellate court did however grant Moran leave to re-file his request for an extension in the trial court. *Id.* Moran did not challenge the appellate court's order or ask the trial court for an additional extension. Ex. T at 44.

Moran filed his original petition in the instant action on May 8, 2015. Doc. 1. The Amended Petition was filed on August 30, 2018. Doc. 51.

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[3] Respondent notes that Moran filed his notice beyond the 90-day deadline imposed by Rule 32.4(a) of the Arizona Rules of Criminal Procedure. Because the delay was not Moran's fault as he had not received the appellate court's ruling, the state trial court treated the notice as timely filed. Ex. J at 5. Respondents too have agreed to treat the notice as timely filed for statute of limitations purposes. Doc. 9 at 5.

II. Timeliness

Based on appointed counsel's affirmative misrepresentation to Moran and his wife about the Arizona court of Appeals' disposition of his petition for review, this Court found Moran was entitled to equitable tolling of the statute of limitations. Doc. 40, pp. 8-9. The Court concluded that Moran's original petition for writ of habeas corpus was timely filed and granted his motion to reopen the habeas proceedings under Rule 60(b) of the Federal Rules of Civil Procedure. *Id.*, pp. 6-9.

III. Exhaustion

A. Legal Standards

A state prisoner must exhaust the available state remedies before a federal court may consider the merits of his habeas corpus petition. *See* 28 U.S.C. § 2254(b)(1)(A); *Nino v. Galaza,* 183 F.3d 1003, 1004 (9th Cir. 1999). "[A] petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (citations omitted).

Exhaustion requires that a habeas petitioner present the substance of his claims to the state courts in order to give them a "fair opportunity to act" upon the claims. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999). "To exhaust one's state court remedies in Arizona, a petitioner must first raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction relief pursuant to

Ex. 12

Rule 32," *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994), and then present his claims to the Arizona Court of Appeals. *See Swoopes v. Sublett,* 196 F.3d 1008, 1010 (9th Cir. 1999).

Additionally, a state prisoner must not only present the claims to the proper court, but must also present them fairly. A claim has been "fairly presented" if the petitioner has described the operative facts and federal legal theories on which the claim is based. *Picard v. Connor*, 404 U.S. 270, 277-78 (1971); *Rice v. Wood*, 44 F.3d 1396, 1403 (9th Cir. 1995). "Our rule is that a state prisoner has not 'fairly presented' (and thus exhausted) his federal claims in state court unless he specifically indicated to that court that those claims were based on federal law." *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended on other grounds*, 247 F.3d 904 (9th Cir. 2001). A petitioner must alert the state court to the specific federal constitutional guaranty upon which his claims are based, *Tamalini v. Stewart*, 249 F.3d 895, 898 (9th Cir. 2001), however, general appeals in state court to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish fair presentation of a federal constitutional claim. *Lyons*, 232 F.3d at 669.

Claims may be procedurally defaulted and barred from federal habeas review in a variety of circumstances. If a state court expressly applied an adequate and independent state procedural bar when the petitioner attempted to raise the claim in state court review of the merits of the claim by a federal habeas court is barred. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). Arizona courts have been consistent

in the application of the state's procedural default rules. *Stewart v. Smith*, 536 U.S. 856, 860 (2002) (holding that Ariz. R. Crim. P. 32.2(a) is an adequate and independent procedural bar).

In Arizona, claims not previously presented to the state courts on either direct appeal or collateral review are generally barred from federal review because any attempt to return to state court to present them would be futile unless the claims fit into a narrow range of exceptions. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(a) (precluding claims not raised on direct appeal or in prior post-conviction relief petitions), 32.4(a) (time bar), 32.9(c) (petition for review must be filed within thirty days of trial court's decision). Because these rules have been found to be consistently and regularly followed, and because they are independent of federal law, either their specific application to a claim by an Arizona court, or their operation to preclude a return to state court to exhaust a claim, will procedurally bar subsequent review of the merits of such a claim by a federal habeas court. *Stewart v. Smith*, 536 U.S. at 860; *Ortiz v. Stewart*, 149 F.3d 923, 931-32 (9th Cir. 1998) (Rule 32, Ariz. R. Crim. P., is strictly followed); *State v. Mata*, 185 Ariz. 319, 334-336 (1996) (waiver and preclusion rules strictly applied in postconviction proceedings).

B. Procedural Status of Moran's claims

1. Ground One

In Ground One of the Amended Petition, Moran asserts that his trial counsel was ineffective because he did not conduct a proper investigation, did not file a motion to dismiss the indictment based on pre-trial delay, did not file a motion to

suppress Moran's statements, did not file motions related to the loss of blood evidence and interview tapes of witnesses, did not interview all the witnesses to the accident, failed to call all witnesses, failed to properly object at trial, failed to file a motion for mistrial after jurors saw Moran in handcuffs, failed to properly advise Moran about potential defenses, failed to file post-trial motions for a new trial, and failed to present all mitigating evidence at the time of sentencing. Moran also contends that his appellate counsel was ineffective because he failed to raise witness issues, including those related to subpoenaing witnesses, the conflicts in the evidence, and Confrontation Clause issues; failed to investigate and call mitigation witnesses at sentencing; failed to raise trial counsel IAC claims; failed to raise a claim challenging the judge's factual findings at sentencing; and failing to raise a claim that that trial counsel was ineffective for failing to file a motion to dismiss based on pre-indictment delay.

In relation to his trial counsel IAC claims, Moran contends that he should be excused from the exhaustion requirement because his Rule 32 counsel failed to file a timely petition for review in the Arizona Court of Appeals following the state trial court's denial of his PCR petition. In *Martinez v. Ryan*, 566 U.S. 1 (2012), the United States Supreme Court created a narrow, equitable rule that allows petitioners to, in some cases, establish cause for a procedural default where their post-conviction counsel rendered ineffective assistance by failing to raise in initial-review collateral proceedings a substantial claim of ineffective assistance of trial counsel. *Id.* at 16-17. However, the holding in *Martinez* "does not concern attorney errors in other kinds of

proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." *Id.* at 16 (citing *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). The rule announced in *Martinez* "does not extend to attorney error in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial . . .." *Martinez*, 566 U.S. at 16. Thus, Moran's PCR counsel's failure to file an appeal of the trial court's denial of relief thus cannot serve as cause to excuse the procedural default of his trial counsel IAC claims.

In addition to a showing of cause, *Martinez* requires that a petitioner, to overcome the default, "also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." *Id.* at 14. As Respondents note, Moran has failed to do that here. In Ground One, Moran merely lists the purported failures of his trial counsel, claiming that each of the shortcomings amounted to IAC, but fails to explain how trial counsel's performance fell below an objective standard of reasonableness. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Moran also fails to show in the Amended Petition how any of the listed alleged failures prejudiced him in a way that would have led to a different result at trial. *See Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (citing *Strickland*, 466 U.S. at 694); *see also Sandgathe v. Maass*, 314 F.3d 371, 379

(9th Cir. 2002) (affirming denial of ineffective assistance of counsel claim when petitioner presented no evidence in support of claim).

Moreover, even if the Court were to excuse Moran's failure to offer support for his trial counsel IAC claims in the Amended Petition, the claims would nevertheless be found meritless. Although it is not the Court's role to construct a petitioner's claims, a better understanding of some of the claims can be cobbled together based on his state court pleadings and his Traverse. Doing so, Moran's claims can be grouped into two general categories: (1) counsel was ineffective for failing to conduct a proper investigation and for failing to identify and call additional witnesses on Moran's behalf; and (2) counsel was ineffective for failing to file various motions. In relation to the first category of IAC allegations, Moran does not identify in the Amended Petition any specific witnesses that his counsel failed to call on his behalf or explain how that testimony might have altered the outcome of the trial. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001) (petitioner's speculation that a witness might have provided helpful information if interviewed is not enough to support ineffective assistance of counsel claim).

In his Traverse, Moran argues that Gabriel Acuna, the driver of the car he initially rear-ended, was actually at fault for the accident. In making this argument, Moran overlooks some important considerations. Paramount among these is that habeas corpus proceedings are designed to review for violations of federal constitutional standards and are not for the purpose of the federal court to retry state

cases de novo. *Milton v. Wainwright*, 407 U.S. 371, 377 (1972). And, even if the Court were authorized to retry the case, Moran has ignored the evidence that supports his conviction. He contends that Gabriel Acuna was drinking on the night of the accident and caused Moran to rear-end his vehicle. However, a witness to the accident, Andrew Noriega, and two officers (both trained in DUI investigation) talked to Gabriel Acuna at the scene and each of them testified that they did not notice any signs that Acuna had consumed alcohol or that he was impaired. *See* Ex. V, pp. 127-128 (witness Andrew Noriega); pp. 182-183 (DPS Officer William Heflin); Ex. W, p. 55 (DPS Officer James Oien). On the other hand, Noriega testified that beer cans were thrown into the desert from Moran's vehicle and that Moran appeared intoxicated, smelled of alcohol, and could not focus. Ex. V, pp. 125-126. DPS Officer Ray Rede testified that Moran admitted to drinking also noted a "strong odor of intoxicating beverage" emanating from Moran. Ex. W, pp. 14, 27. Based on that information, Officer Rede obtained the warrant for the blood draw. Ex. W, p. 18. Retrograde analysis of the three blood samples indicated that Moran's blood alcohol content was in the range of .193 to .269 at the time of the accident. Ex. X. p. 44.

As for how the accident occurred, Gabriel Acuna testified that he noticed in his rearview mirror that Moran's vehicle came up from behind him "with a increasing speed" and was coming "increasingly closer," so he made the decision to "veer off the side of the road because it didn't appear [Moran] was either aware of me or I thought maybe he might have a little road rage and kind of creep up on my bumper, but not necessarily hit me, so I didn't want to take a chance and I veered off

Ex. 18

the side of the road." Ex. V, pp. 72-73. As Acuna veered to the side of the road, Moran's vehicle violently struck his vehicle from behind and Acuna's vehicle "spun off to the side of an embankment." *Id.* pp. 74-75. Although Moran now argues that Acuna had pulled out in front of him and caused the accident, Acuna's testimony is consistent with Moran's statement on the night of the accident. When Officer Rede asked him what he remembered about the accident, Moran said, "I remember that I was in back of – of a car far away and – and, oh, and – and suddenly it happened, it happened really fast, I couldn't tell you." Ex. W, pp. 28-29. Although Moran now contends that Gabriel Acuna was drinking and caused the accident, the evidence does not support that contention and Moran has not identified other evidence or witnesses that his counsel should have presented that would have changed the outcome of the trial. *See Sandgathe*, 314 F.3d at 379.

Moran's second category of complaints of trial counsel IAC revolve around his counsel's purported failure to file various pre-trial, trial, and post-trial motions. Moran has not shown any of these motions as potentially meritorious. He contends that counsel was ineffective because he did not file a motion to dismiss the indictment "for pre-indictment delay and/or Speedy Trial violations." Moran raised this claim in his PCR petition and the trial court rejected it, explaining:

> Trial counsel's decision to refrain from filing a motion to dismiss for pre-indictment delay was reasonable. The State was unable to locate and arrest [Moran] until 2008 because he had provided law enforcement with a false name, address, and social security number. Police reports indicate that prior to his arrest there was evidence that [Moran] had been evading law enforcement's efforts to locate him by living back and forth between Mexico and his residence in Arizona . . ..

ex. -19-

> [Moran] was the cause of the pre-indictment delay. It was not unreasonable for trial counsel to decide not to file a motion for dismissal based on pre-indictment delay.

Ex. N, p. 3. The Court agrees with the trial court's assessment of this claim and Moran has offered nothing that would cause the Court to believe that the claim has any merit whatsoever.

Moran contends that his counsel was ineffective for filing a motion to dismiss or suppress based on the loss of blood evidence. Based on documentation provided by the State, the trial court determined that "the blood evidence in question is still in the custody of the Department of Public Safety Property and Evidence." Ex. N, p. 3. Again, Moran has offered nothing that would cause the Court to question the State court's determination or to believe that the claim has any merit whatsoever.

As for Moran's remaining claims, he has failed to provide information on which the Court could reasonably evaluate the claims. He contends certain of his statements should have been suppressed, but does not identify the statements. He contends he was prejudiced when a juror saw him in handcuffs, but does not identify the juror or the circumstances surrounding the alleged incident. He contends that his counsel should have advised him of other defenses he could have presented, but does not identify what other defenses were potentially available to him. As such, the Court finds that Moran has not shown that there is potential merit to any of his trial counsel IAC claims.

Finally, Moran's unexhausted claims of IAC by appellate counsel also cannot be saved by *Martinez*. In *Davila v. Davis*, 137 S.Ct. 2058 (2017), the Supreme Court

held that *Martinez* does not extend to procedurally defaulted claims of ineffective assistance of appellate counsel. *Id.* at 2065-66. Thus, under *Davila*, Moran's claims of appellate counsel IAC are not viable.

2. Ground Two

Moran argues that the state trial court violated his Sixth and Fourteenth Amendment rights by denying his motion for a new trial based on juror misconduct. The conduct about which Moran complains came to light the day after the jury returned its guilty verdicts when the State gave notice to the trial court that during trial one of the jurors, Juror Eleven, had been in contact with a law student, S.B., who working in the county prosecutor's office. Ex. N, p. 6. The trial court held a hearing on the issue and determined that Juror Eleven and S.B. were good friends, but Juror Eleven did not know that S.B. was working in the county attorney's office. *Id.* During trial, the two met for lunch and, upon learning that Juror Eleven had been selected for a criminal trial, S.B. told her not to discuss or tell her anything about the case. Juror Eleven next contacted S.B. after the jury had returned its verdicts. She asked S.B. "what an aggravators trial was." *Id.* After Juror Eleven told S.B. the trial had ended, S.B. gave her a brief description of what an aggravating factor was. Juror Eleven then told S.B. she had asked because she had just found out the she had to return to court for a "sentencing trial." S.B. immediately contacted her supervisor, who was a prosecutor in Moran's case, who then notified the trial court of the contact between Juror Eleven and S.B. *Id.*

Moran subsequently filed a motion for a new trial pursuant to Rule 24.1(c)(3)(iii), Ariz. R. Crim. P., arguing that Juror Eleven was guilty of misconduct because she "failed to respond fully to th[e] Court's voir dire questions and concealed her close relationship with a law student." *Id.* After a hearing, the trial court denied the motion, finding no violation by Juror Eleven and no prejudice under the facts of the case. *Id.* at 7.

In the Amended Petition, Moran states that this claim was presented on direct appeal. Moran's contention is supported by his brief on direct appeal, where he presented and argued the issue at some length. Ex. G, pp. 23-29. However, as Respondents note, the entirety of Moran's argument on appeal was based on state law. He argued that Juror Eleven was guilty of misconduct under Rule 24.1(iii), Ariz. R. Crim. P., and cited two Arizona cases: *State v. Vasquez*, 130 Ariz. 103, 634 P.2d 391 (1981), and *State v. Ortiz*, 117 Ariz. 264, 571 P.2d 1060 (App. 1977). He made no mention of any federal authority which might have alerted the Arizona Court of Appeals of a federal basis for the claim. Understandably, that court analyzed the claim solely on the basis of state law. Ex. H, pp. 6-9. "To exhaust his claim, [Petitioner] must have presented his federal, constitutional issue before the Arizona Court of Appeals within the four corners of his appellate briefing." *Castillo v. McFadden*, 399 F.3d 993, 1000 (9th Cir. 2005) (citing *Baldwin v. Reese*, 541 U.S. 27, 32 (2004) ("ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a

lower court opinion in a case, that does so.")). Because Moran failed to alert the Arizona court of the federal basis for this claim, it was not properly exhausted.

3. Ground Three

In Ground Three, Moran contends that his trial counsel was ineffective because he failed to properly advise Moran of the terms of the plea agreement offered by the State. Moran raised this claim in the trial court, arguing in his PCR petition that his Sixth Amendment rights were violated. Ex. L, pp. 20-22. Moran's PCR counsel did not appeal the trial court's denial of the claim to the Arizona Court of Appeals. Moran again argues that his failure to exhaust this claim is excused under *Martinez* because his PCR counsel was ineffective in failing to file a timely petition for review. As discussed above, however, the holding in *Martinez* "does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." *Martinez*, 566 U.S. at 16 (citing *Coleman*, 501 U.S. at 754; *Murray*, 477 U.S. at 488). The rule announced in *Martinez* "does not extend to attorney error in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial . . ." *Martinez*, 566 U.S. at 16. Thus, as was the case with the other IAC claims discussed above, Moran's PCR counsel's failure to file an appeal of the trial court's denial of relief thus cannot serve as cause to excuse the procedural default of this IAC claim.

Even if *Martinez* could save this claim, Moran has not demonstrated that the claim is a substantial one by demonstrating that it has some merit. *See Martinez*, 566 U.S. at 14. Addressing the claim in its ruling on Moran's PCR petition, the trial court stated that:

> Transcripts of settlement conferences refute the Defendant's claim that he was not informed of the plea agreement. The transcript of the Settlement Conference on September 28th, 2009 reflects that the Defendant was fully informed of the terms of the plea agreement offered to him. The trial Judge clearly explained the terms of the agreement a second time, just before the trial began on January 12th, 2010. The Judge compared the range sentences provided by the plea compared to the increased sentencing range possible upon conviction. The record reflects that the Defendant expressed that he had been adequately advised by his attorneys and was comfortable with his decision to move forward with the jury trial. The record clearly reflects that the Defendant was informed of the details of the plea agreement and chose to proceed with a trial.

Ex. N, p. 4. The trial court's findings are fully borne-out by the record. As noted by the trial court, Moran was informed of the plea agreement and of the potential sentence he faced if he chose to go to trial on September 28, 2009, and on January 12, 2010, the first day of trial. *See* Ex. EE, pp. 5-18; Ex. GG, pp. 4-9. In light of the extensive record of both the trial court, counsel and even the prosecutor explaining the plea agreement and its implications, Moran cannot present even a colorable claim that his rejection of the plea agreement was not voluntary and intelligent, or that his counsel's advice was outside the range of what competent counsel would provide. *See Hill v. Lockhart*, 474 U.S. at 58-60. Additionally, to satisfy the prejudice prong of the *Strickland* standard in the context of plea negotiations, a petitioner must "show the outcome of the plea process would have been different with competent advice."

Lafler, 566 U.S. at 163. Here, Moran contends that if he "would have known the terms: no prior, non-dangerous, non-repetitive, [he] would of considered signing [the plea agreement]." *Amended Petition*, p. 15. Moran's ambiguous statement about whether he would have accepted the plea agreement even if it had been explained to his satisfaction defeats his claim because it does not even allege, much less establish, that the outcome of the plea process would have been different had he been provided with what he would consider to be competent advice. *See United States v. Ross*, 584 F.App'x 502, 503-04 (9th Cir. 2014) (claim that defense counsel rendered ineffective assistance in advising defendant to reject a pretrial plea agreement "fails because there is no evidence in the record that [defendant] would have considered or accepted any pretrial plea.").

C. Procedural Default

Because Moran's claims were either not fairly presented or not presented at all in the state appellate courts, they are unexhausted. *Castillo*, 399 F.3d at 998 n.3. Because waiver and preclusion rules are strictly applied in postconviction proceedings, any attempt by Moran to return to state court to exhaust this claim would be futile. *See Mata*, 916 P.2d at 1050-52. Without an available remedy in the state court, the claims are technically exhausted and procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991).

D. Cause and Prejudice

A federal court may not consider the merits of a procedurally defaulted claim unless the petitioner can demonstrate cause for his noncompliance and actual prejudice, or establish that a miscarriage of justice would result from the lack of review. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995). To establish cause, a petitioner must point to some objective factor external to the defense impeded his efforts to comply with the state's procedural rules. *Dretke v. Haley*, 541 U.S. 386, 393-94 (2004). "[C]ause is an external impediment such as government interference or reasonable unavailability of a claim's factual basis." *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004) (citations omitted). Ignorance of the state's procedural rules or lack of legal training does not constitute legally cognizable "cause" for a petitioner's failure to fairly present a claim. *Hughes v. Idaho State Board of Corrections*, 800 F.2d 905, 908-10 (9th Cir. 1986); *Schneider v. McDaniel*, 674 F.3d 1144, 1153 (9th Cir. 2012). "Prejudice" is actual harm resulting from the constitutional violation or error. *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984); *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1996).

Moran cannot establish cause for his default of Ground Two. In relation to this ground, Moran points to no objective factor external to the defense that impeded his efforts to present a federal basis for his claim of juror misconduct. *See Dretke*, 541 U.S. at 393-94.

Moran also has not shown that he was prejudiced by the alleged error. As the Arizona Court of Appeals found, Juror Eleven was asked upon voir dire whether she knew anyone who worked in the county attorney's office and if she had any close

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friends or relatives who were lawyers. Ex. N., pp. 7-8. Juror Eleven testified that she did not respond in the affirmative to these questions because S.B. was a law student and not yet an attorney and because she was not aware that S.B. was working at the county attorney's office. *Id.* Based on that record, the appeals court concluded that the trial court had not abused its discretion in finding that Juror Eleven had not willfully misled or concealed information from the court or counsel. *Id.* (citations omitted). The appeals court additionally concluded that Moran had suffered no prejudice because Juror Eleven "did not discuss the facts of the case with S.B,. during the guilt phase of the trial or before the jury reached its verdicts. And there is no evidence the juror's votes were influenced in any way by her relationship with S.B." *Id.*, p. 8.

The court of appeals also concluded that Moran was not prejudiced by Juror Eleven's conversation with S.B. about the "aggravators trial." Although the appeals court did find that it was misconduct for Juror Eleven to inquire about the meaning of "aggravators" prior to the end of trial, violating both the trial court's instructions not to discuss the case with anyone and S.B.'s request that Juror Eleven not discuss the case with her, it found that the conversation did not affect the outcome of the case. This was because after the guilt phase of the trial was completed, "Moran waived his right to have the jury determine the existence of aggravating circumstances, and the parties stipulated that the trial court could make that determination instead," and, therefore, Juror Eleven did not participate in the finding of any aggravating factors.

Id. at 9. As such, the appeals court determined that the trial court had not abused its discretion in denying Moran's motion for a new trial.

In the Amended Petition, Moran offers nothing that undermines the court of appeals' analysis of this claim or the finding that he did not suffer prejudice. His contention is that he was "denied the right to have the court excuse [Juror Eleven] with a peremptory strike" and that Juror Eleven must have been "biased for the state." As to the former contention, Moran points to no actual harm that resulted. As to the latter, he has offered no basis upon which a court could conclude that Juror Eleven was biased against him. *See Magby*, 741 F.2d at 244; *Thomas v. Lewis*, 945 F.2d at 1123. Without any evidence of prejudice, Moran's procedural default of this claim cannot be excused.

In relation to Grounds One and Three of the Amended Petition, even if Moran could invoke his PCR counsel's failure to file an appeal from the trial court's rejection of the claims, he nevertheless cannot show prejudice. As discussed above in relation to the respective claims, Moran's allegations of his trial counsel's ineffectiveness are meritless. As such, he cannot establish that actual harm resulted from any alleged constitutional violation or error. *Magby*, 741 F.2d at 244; *Thomas v. Lewis*, 945 F.2d at 1123. As such, these claims are not subject to review.

IV. Certificate of Appealability

Because Moran has not established any grounds for habeas relief, the Court will deny the petition for writ of habeas corpus with prejudice. Moreover, the Court declines to issue a certificate of appealability. A state prisoner seeking a writ of

habeas corpus has no absolute entitlement to appeal a court's denial of his petition, and an appeal is only allowed in certain circumstances. *Miller–El v. Cockrell*, 537 U.S. 322, 335–336 (2003). Section 2253 controls the determination whether to issue a certificate of appealability and provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253.

If a court denies a petitioner's petition, the court may only issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the

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petitioner must establish that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

The Court finds that Moran has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not debate that Moran's claims were not exhausted and are meritless. The claims are therefore not deserving of further review. Thus, the Court declines to issue a certificate of appealability.

V. Order

For the foregoing reasons, it is **ORDERED** that:

1. Moran's Amended Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (Doc. 51) is **DENIED** with prejudice;

2. The Court **DECLINES** to issue a certificate of appealability;

3. The Clerk of the Court is **DIRECTED** to enter judgment and close the file.

Dated this 24th day of April, 2020.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CV 15-0193-TUC-JR

ORDER

Pending before the Court are a Motion to Amend (Doc. 19), Motion Pursuant to Rule 60 (Doc. 21), Motion for Ruling (Doc. 33), Motion Pursuant to Rule 11(b) (Doc. 37), and Motion to File Supplemental Response (Doc. 38) filed by Petitioner Jesus Manuel Moran ("Moran"). All parties consented to magistrate judge jurisdiction. Doc. 12. The Magistrate Judge orders that the Motion Pursuant to Rule 60 (Doc. 21), Motion for Ruling (Doc. 33) be **granted**, that the Motion to File Supplemental Response (Doc. 38) and Motion Pursuant to Rule 11(b) (Doc. 37) be **denied**, and that Respondents file a response to the Motion to Amend (Doc. 19).

I. Relevant Factual and Procedural Background

On January 21, 2010, following a jury trial, Moran was found guilty of manslaughter, criminal damage and nine counts of endangerment with a substantial risk of imminent death. Ex. B at 8-11.[1] Moran waived his right to a jury determination of aggravating factors. Ex. D at 15. On March 26, 2010, the state trial court determined two aggravating factors and sentenced Moran to enhanced, aggravated, concurrent terms of imprisonment, the longest of which was 28 years. Ex. E at 17-28.

On July 21, 2011, Moran's convictions and sentences were affirmed on direct appeal. Ex. H at 70-79. Moran did not file a motion for reconsideration or petition to review and on October 18, 2011, the Arizona Court of Appeals issued its mandate closing the case. Ex. I at 80.

On March 27, 2012, through his counsel, Thomas Higgins, Moran filed his post-conviction relief (PCR) notice, Ex. J at 2-4, and on November 21, 2013, he filed his PCR petition, Ex. L at 12-24.[2] On March 7, 2014, the state trial court denied Moran's petition. Ex. N at 87-91.

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[1] Unless otherwise indicated, all exhibit references are to the exhibits attached to the Respondents' Limited Answer to Petition for Writ of Habeas Corpus. Doc. 9.

[2] Respondent notes that Moran filed his notice beyond the 90-day deadline imposed by Rule 32.4(a) of the Arizona Rules of Criminal Procedure. Because the delay was not Moran's fault as he had not received the appellate court's ruling, the state trial court treated the notice as timely filed. Ex. J at 5. Respondents too have agreed to treat the notice as timely filed for statute of limitations purposes. Doc. 9 at 5.

Counsel filed a timely motion for an extension of time to file a petition for review of the trial court's denial of his rule 32 petition and the trial court granted his request, giving him until April 11, 2014 to file his petition. Ex. P at 2. Needing another continuance, Moran's counsel filed another request to file the petition late but rather than filing it with the trial court, he asked the Court of Appeals to extend the deadline. Ex. Q at 4. Counsel then filed the petition with the appellate court on April 14, 2014. Ex. R at 7-39. On April 15, 2014, the Arizona Court of Appeals dismissed the petition, finding it untimely. Ex. S at 41. The appellate court did however grant Moran leave to re-file his request for an extension in the trial court. *Id.* Neither Moran nor his counsel challenged the appellate court's order or ask the trial court for an additional extension. Ex. T at 44.

Through the same counsel, Moran filed the present petition in federal court on May 8, 2015. Doc. 1. Respondents filed a Limited Answer contending that the petition was untimely and that the claims were procedurally defaulted. Doc. 9. The parties subsequently consented to magistrate judge jurisdiction. Doc. 12. However, Moran never replied to the Respondents' Limited Answer. As such, on February 13, 2017, the Court dismissed the petition as untimely. Doc. 13.

Subsequent to the Court's dismissal of the petition, Moran's counsel filed a motion for reconsideration (Doc. 15), contending that the Court had miscalculated the filing date for the petition. Finding that the calculations were accurate, the Court, on April 5, 2017, denied reconsideration. Doc. 16.

On September 14, 2017, now acting without counsel, Moran filed a Motion to Correct, citing Rule 60 of the Federal Rules of Civil Procedure and contending that he was entitled to relief for "fraud on the court; surprise; excusable neglect; mistake; [and] enemy in Petitioner's camp . . . ." Doc. 17. Because Moran did not explain the basis or purpose of the motion, the Court denied relief without prejudice. Doc. 18.

Subsequently, Moran filed a Motion to Amend his petition (Doc. 19) and a Motion Pursuant to Rule 60 for Relief (Doc. 21). In the latter motion, Moran explained to the Court for the first time what had occurred during the course of his state court post-conviction relief proceedings. Moran alleges that his counsel failed to request an extension to allow for the late filing of a petition for review of his PCR petition and then misrepresented what had happened. Doc. 21, p. 2. Moran attached an email from his counsel, dated April 16, 2015, in which counsel states:

> The appeal of [Moran's] post-conviction relief petition was denied. When you have post-conviction relief (Rule 32) and it is denied, a Petition for Review is filed. However, the appeals court does not have to hear it. It is called "discretionary review." The Court of Appeals denied it. To go into federal court you must file a petition for habeas corpus, which must be done within one year of the denial of state relief.

Doc. 21, p. 31. Based on counsel's advice, Moran paid counsel to file a habeas petition on his behalf.

In this Court's order finding Moran's petition untimely, the Court noted that, "[b]y order dated April 15, 2014, the court of appeals, finding it did not have jurisdiction, denied the motion to extend the filing deadline [for Moran's PCR petition] and dismissed the petition because it was not timely filed, but granted

Moran leave to file for the extension of time to file in the trial court." The Court then found that the limitations clock began to run upon the dismissal of the petition, but that "Moran likely could have rectified the situation if, as the Court of Appeals recommended, he had sought a filing extension from the trial court . . . ." However, at the time those words were drafted, this Court was unaware that Moran's counsel had misrepresented the status of the petition for review. It was not, as counsel told Moran, denied by the Arizona Court of Appeals, but had been dismissed as untimely. Counsel's email from a year later establishes that this fact was not disclosed to Moran or his wife, who then employed counsel to file a habeas petition. Thus the question facing the Court now is whether to allow equitable tolling for the approximately one year period during which counsel concealed the status of the appeal of the trial court's denial of Moran's PCR petition.

II. Discussion

A. Rule 60

As a threshold matter, Respondents contend that Moran does not qualify for relief because Federal Rules of Civil Procedure Rule 60(b)(3) provides that fraud justifying relief must be committed by "an opposing party." *See Latshaw v. Trainer Wrotham & Co. Inc.*, 452 F.3d 1097, 1102 (9th Cir. 2006); *In re Grantham Bros.*, 922 F.2d 1438, 1442-43 (9th Cir. 1991). While Moran understandably characterizes his counsel as "an enemy in Petitioner's camp," the Court agrees with Respondents that he was not an opposing party as contemplated by Rule 60(b)(3). However, given

the specific and extraordinary circumstances of this case, the Court finds that Moran is entitled to relief under Rule 60(b)(6).

Rule 60(b)(6) permits reopening of a judgment when the movant shows "any . . . reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in Rules 60(b)(1)-(5). *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, n. 11 (1988); *Klapprott v. United States*, 335 U.S. 601, 613 (1949). The Supreme Court has determined the rule to be available to petitioners seeking relief from a previous ruling on the AEDPA statute of limitations. *Gonzalez v. Crosby*, 545 U.S. 524, 535-536 (2005). To qualify for relief, the petitioner must establish "extraordinary circumstances." *Id.* at 536. Here, the evidence presented by Moran establishes that he was never informed by counsel that his petition for review had been dismissed as untimely. He was told that it was denied and only discovered counsel's failure to seek an extension of time and the resulting dismissal of his PCR petition when he reviewed this Court's order dismissing his habeas corpus petition as untimely. That series of events is extraordinary. Moreover, even if the Court were to find that Moran was aware of the dismissal of his PCR petition, it is also extraordinary that Moran's counsel did not reply to the Respondent's contentions that the petition was untimely and that Moran was not entitled to equitable tolling.

As it stands, the Court was deprived of facts which clearly impacted on the evaluation of the timeliness of Moran's petition and any potential entitlement to equitable tolling. "Rule 60(b)(6) should be 'used sparingly as an equitable remedy to

prevent manifest injustice'" and should be used only in "'extraordinary circumstances to prevent or correct an erroneous judgment.'" *In re Int'l Fibercom, Inc.*, 503 F.3d 933, 941 (9th Cir. 2007) (citing *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005)). The Court finds that it is indeed an extraordinary circumstance when counsel withholds vitally important information from a client and the Court. And, as discussed below, the resulting erroneous judgment requires correction.

B. Equitable Tolling

"Equitable tolling of the one-year limitations period in 28 U.S.C. § 2244 is available in our circuit, but only when 'extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time' and 'the extraordinary circumstances were the cause of his untimeliness.'" *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003). A petitioner is entitled to equitable tolling of the limitations period "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lakey v. Hickman*, 633 F.3d 782, 786 (9th Cir. 2011). "The high threshold of extraordinary circumstances is necessary lest the exceptions swallow the rule." *Id.* Respondents contend that Moran can show neither diligence nor extraordinary circumstances as those terms are contemplated under section 2244.

Routine instances of attorney negligence or misconduct are generally insufficient to justify equitable tolling of the AEDPA's one-year statute of limitations. *Holland v. Florida*, 560 U.S. 631, 651-652 (2010) (noting that "a garden

variety claim of excusable neglect," such as a simple miscalculation does not warrant equitable tolling). However, where an attorney abandons a petitioner while pursuing state remedies, equitable tolling may be warranted. *See Gibbs v. Legrand*, 767 F.3d 879, 887 (9th Cir. 2014). In this case, Moran was faced with something worse than mere abandonment— his counsel made misrepresentations indicating that the appeal of his PCR petition had not been dismissed, but that it had been decided. Counsel also accepted payment for the filing of the habeas petition which again indicated to Moran that timing was not an issue. Finally, counsel did abandon Moran when it came time to reply to the Respondents' contention that the habeas petition was untimely. The facts raised by Moran now should have been raised by counsel in a reply so that the Court would have been fully informed of the facts pertinent to the issue of equitable tolling.

Respondents also contend that Moran has not acted diligently. Diligence required for equitable tolling purposes is "reasonable diligence," and not "maximum feasible diligence." *Holland*, 560 U.S. at 652. Here, in his April 16, 2015 email to Moran's wife, Moran's counsel left the misimpression that the Arizona Court of Appeals had denied the PCR petition sometime after the purported April 15, 2014 filing date. It was counsel's affirmative misrepresentation that the court of appeals had decided, rather than dismissed, his case that lead Moran to reasonably believe that the denial came sometime after briefing and review was completed. A prisoner's lack of knowledge that the state courts have reached a final resolution of his case can be grounds for equitable tolling if the prisoner acted diligently to obtain notice. *See*

Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). In Moran's case, even the most expeditious ruling would have come in late May or June of 2014. Thus, when counsel filed Moran's habeas corpus petition on May 8, 2015, there existed no apparent reason for Moran to be concerned about the AEDPA statute of limitations. *See Gibbs*, 767 F.3d at 887 (noting that petitioner had no reason to determine status of petition when counsel was obligated to keep him informed).

Moreover, as soon as Moran discovered his counsel's misrepresentations, he went into action. He filed a successful complaint with the state bar (Doc. 20), and filed several pleadings in this case to make the Court aware of what had happened in the state courts. As such, Moran is entitled to equitable tolling until at least late May of 2014, which was the earliest he reasonably could have expected a decision on his PCR petition from the Arizona Court of Appeals. Tolling until that time renders the May 8, 2015 filing of his habeas corpus petition timely.

C. Other Motions

In his Motion for Ruling (Doc. 33), Moran requests a ruling from the Court. A ruling has now been rendered and the motion is granted.

In his Motion to File Supplemental Response (Doc. 38) Moran offers additional argument which was unnecessary to the ruling on the Rule 60(b) motion and is therefore denied.

Petitioner also seeks sanctions under Rule 11 of the Federal Rules of Civil Procedure. "Rule 11 imposes a duty on attorneys to certify by their signature that (1) they have read the pleadings or motions they file and (2) the pleading or motion is

'well-grounded in fact,' has a colorable basis in law, and is not filed for an improper purpose." *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994). The purpose of Rule 11 is to "deter baseless filings in district court." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). Here, although Moran disagrees, the Respondents' argument in relation to the characterization of his counsel's misconduct was supported by the law. Moran's is the rare case where counsel's actions amounted to more than "garden variety . . . excusable neglect." *See Holland*, 560 U.S. at 652. Counsel for Respondents cited the relevant authority and zealously presented their interpretation of the law as it applied to the facts. By doing so, they fulfilled their obligations to their clients and to the Court and their efforts do not warrant even the consideration of Rule 11 sanctions.

Finally, Moran seeks leave to amend and has submitted a proposed amended petition. Because judgment had been previously entered in this case, Respondents had no reason to respond to the motion to amend. As such, Respondents shall respond to the motion to amend or file a notice indicating they have no objection to amendment within 20 days of the filing date of this order.

III. Order

For the foregoing reasons, it is **ORDERED** that:

1. the Motion Pursuant to Rule 60 (Doc. 21) is **granted** and the Clerk of the Court is **DIRECTED** to reopen this case;

2. the Motion for Ruling (Doc. 33) is **granted**;

3. the Motion to File Supplemental Response (Doc. 38) is **denied**;

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4. the Motion Pursuant to Rule 11(b) (Doc. 37) is **denied**; and

5. Respondents shall respond to the Motion to Amend (Doc. 19) or file a notice indicating they have no objection to amendment within 20 days of the filing date of this order.

Dated this 25th day of June, 2018.

Honorable Jacqueline M. Rateau
United States Magistrate Judge

ex. 41

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CV 15-0193-TUC-JR

ORDER

Pending before the Court is Jesus Manuel Moran's ("Moran") Petition for Writ of Habeas Corpus (Doc. 1) filed pursuant to 28 U.S.C. § 2254. All parties consented to magistrate judge jurisdiction. Doc. 12. As explained below, the Magistrate Judge orders that the Petition be dismissed with prejudice.

I. Background[1]

On January 21, 2010, following a jury trial, Moran was found guilty of manslaughter, criminal damage and nine counts of endangerment with a substantial

[1] The factual summary of the state court is accorded a presumption of correctness. 28 U.S.C. § 2254(e)(1); *Moses v. Payne*, 555 F.3d 742, 746 n. 1 (9th Cir. 2009) (citing *Hernandez v. Small*, 282 F.3d 1132, 1135 n. 1 (9th Cir. 2002)).

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risk of imminent death. Ex. B at 8-11.[2] Moran waived his right to a jury determination of aggravating factors. Ex. D at 15. On March 26, 2010, the state trial court determined two aggravating factors and sentenced Moran to enhanced, aggravated, concurrent terms of imprisonment, the longest of which was 28 years. Ex. E at 17-28.

On July 21, 2011, Moran's convictions and sentences were affirmed on direct appeal. Ex. H at 70-79. Moran did not file a motion for reconsideration or petition to review and on October 18, 2011, the Arizona Court of Appeals issued its mandate closing the case. Ex. I at 80.

On March 27, 2012, Moran filed his post-conviction relief (PCR) notice, Ex. J at 2-4, and on November 21, 2013, he filed his PCR petition, Ex. L at 12-24.[3] On March 7, 2014, the state trial court denied Moran's petition. Ex. N at 87-91.

Moran filed a timely motion for an extension of time to file a petition for review of the trial court's denial of his rule 32 petition and the trial court granted his request, giving him until April 11, 2014 to file his petition. Ex. P at 2. Needing another continuance, Moran filed another request to file his petition late but rather than filing it with the trial court, he asked the Court of Appeals to extend the

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[2] Unless otherwise indicated, all exhibit references are to the exhibits attached to the Respondents' Limited Answer to Petition for Writ of Habeas Corpus. Doc. 9.

[3] Respondent notes that Moran filed his notice beyond the 90-day deadline imposed by Rule 32.4(a) of the Arizona Rules of Criminal Procedure. Because the delay was not Moran's fault as he had not received the appellate court's ruling, the state trial court treated the notice as timely filed. Ex. J at 5. Respondents too have agreed to treat the notice as timely filed for statute of limitations purposes. Doc. 9 at 5.

deadline. Ex. Q at 4. He then filed his petition with the appellate court on April 14, 2014. Ex. R at 7-39. On April 15, 2014, the Arizona Court of Appeals dismissed the petition, finding it untimely. Ex. S at 41. The appellate court did however grant Moran leave to re-file his request for an extension in the trial court. *Id.* Moran did not challenge the appellate court's order nor ask the trial court for an additional extension. Ex. T at 44. He filed the present petition in federal court on May 8, 2015. Doc. 1.

II. Timeliness

A. Moran's Petition is Untimely.

The Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides for a one year statute of limitations to file a petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Petitions filed beyond the one-year limitations period must be dismissed. *Id.* The statute provides in pertinent part that:

> (1) A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d). However, the time during which a properly filed application for State post-conviction relief is not counted when calculating the one year period of limitation. 28 U.S.C. § 2244(d)(2).

The trial court sentenced Moran on March 26, 2010, and he filed a timely notice of appeal on April 2, 2010. Exs. E, F. The Arizona Court of Appeals issued its Memorandum Decision on July 21, 2011, and issued the mandate closing the case on October 18, 2011. Exs. H, I.

Moran filed his PCR notice on March 27, 2012. Ex. J. In Arizona, a PCR petition is deemed "pending" for limitations purposes as soon as the notice of PCR is filed. *Isley v. Ariz. Dep't of Corrections*, 383 F.3d 1054, 1055-56 (9th Cir. 2004) ("The language and the structure of the Arizona postconviction rules demonstrate that the proceedings begin with the filing of the Notice."). Although Moran's notice was filed beyond the 90-day deadline prescribed in Rule 32.4(a), Ariz. R. Crim. P., the delay was not his fault because he had not received the appellate court's ruling. Attachment to Ex. J (letter from counsel). The state court treated the notice as timely filed and appointed the Legal Defender's Office to represent Moran. Ex. K. Thus, as does the State, the Court will treat the notice as timely filed. Doc. 9 at 5.

On March 7, 2014, the trial court denied Moran's PCR petition. Ex. N. Moran, through counsel, requested and was granted an extension of time, until April 11, 2014, to file his petition for review. Exs. O, P. On April 14, 2014, Moran's

counsel filed the petition for review along with a motion to extend the filing deadline to April 14, 2014. Exs. Q, R. By order dated April 15, 2014, the court of appeals, finding it did not have jurisdiction, denied the motion to extend the filing deadline and dismissed the petition because it was not timely filed, but granted Moran leave to file for the extension of time to file in the trial court. Ex. S. Because petitioners do not receive statutory tolling for untimely filings, *see Allen v. Siebert*, 552 U.S. 3, 6 (2007) (holding, that time limits, no matter their form, are filing conditions, and that a state postconviction petition is therefore not properly filed if it was rejected by the state court as untimely) (internal quotations and citation omitted), the limitations clock began to run upon the dismissal of the petition. Moran likely could have rectified the situation if, as the Court of Appeals recommended, he had sought a filing extension from the trial court, but he never did.

"Under *Pace*, if a state court denies a petition as untimely, none of the time before or during the court's consideration of that petition is statutorily tolled." *See Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir. 2005), *as amended* 439 F.3d 993 (9th Cir. 2006). Thus, Moran's PCR petition was pending only until March 7, 2014, the date on which trial court denied Moran's PCR petition. Ex. N. The instant petition was filed more than fourteen months later, on May 8, 2015, and is therefore untimely unless Moran establishes he is entitled to equitable tolling.

B. Moran is not entitled to equitable tolling.

"Equitable tolling of the one-year limitations period in 28 U.S.C. § 2244 is available in our circuit, but only when 'extraordinary circumstances beyond a

Ex. -46-

prisoner's control make it impossible to file a petition on time' and 'the extraordinary circumstances were the cause of his untimeliness.'" *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003). A petitioner is entitled to equitable tolling of the limitations period "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lakey v. Hickman*, 633 F.3d 782, 786 (9th Cir. 2011). "The high threshold of extraordinary circumstances is necessary lest the exceptions swallow the rule." *Id.*

Moran does not argue equitable tolling. Thus, because the Petition is untimely, the Court will not consider Respondents' alternative grounds for denying habeas corpus relief. *See White v. Klitzkie*, 281 F.3d 920, 921-22 (9th Cir. 2002) (whether a petition is barred by the statute of limitations is a threshold issue that must be resolved before considering other procedural issues or the merits of individual claims).

III. Certificate of Appealability

Because Moran has not established any grounds for habeas relief, the Court will deny the petition for writ of habeas corpus with prejudice. Moreover, the Court declines to issue a certificate of appealability. A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a court's denial of his petition, and an appeal is only allowed in certain circumstances. *Miller–El v. Cockrell*, 537 U.S. 322, 335–336 (2003). Section 2253 controls the determination whether to issue a certificate of appealability and provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253.

If a court denies a petitioner's petition, the court may only issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed

further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

The Court finds that Moran has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not debate that Moran's claims were untimely. The claims are therefore not deserving of further review. Thus, the Court declines to issue a certificate of appealability.

IV. Order

For the foregoing reasons, it is **ORDERED** that:

1. Moran's Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) (Doc. 1) is **DENIED** with prejudice;

2. The Court **DECLINES** to issue a certificate of appealability;

3. The Clerk of the Court is **DIRECTED** to enter judgment and close the file.

Dated this 10th day of February, 2017.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

EX. -49-

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 5 2021

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

JESUS MANUEL MORAN, Plaintiff-Appellant, v. THOMAS E. HIGGINS, Attorney, Defendant-Appellee.	No. 19-17503 D.C. No. 4:17-cv-00613-JGZ District of Arizona, Tucson ORDER

Before: WALLACE, CLIFTON, and BRESS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Moran's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 18) are denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

FILED

DEC 9 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS MANUEL MORAN, Plaintiff-Appellant, v. THOMAS E. HIGGINS, Attorney, Defendant-Appellee.	No. 19-17503 D.C. No. 4:17-cv-00613-JGZ MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Jennifer G. Zipps, District Judge, Presiding

Submitted December 2, 2020**

Before: WALLACE, CLIFTON, and BRESS, Circuit Judges.

Jesus Manuel Moran appeals pro se from the district court's summary judgment in his diversity action alleging state law claims against his former attorney. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's decision on cross-motions for summary judgment. *JL Beverage*

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

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

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Co., LLC v. Jim Beam Brands Co., 828 F.3d 1098, 1104 (9th Cir. 2016). We affirm.

The district court properly granted summary judgment for defendant because Moran failed to raise a genuine dispute of material fact as to whether defendant's conduct was the proximate cause of any injury. *See Glaze v. Larsen*, 83 P.3d 26, 29 (Ariz. 2004) (en banc) (elements of a legal malpractice claim); *KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 340 P.3d 405, 412 (Ariz. Ct. App. 2014) (elements of a fraud claim); *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 48 P.3d 485, 491 (Ariz. Ct. App. 2002) (elements of an unjust enrichment claim); *Baines v. Superior Court*, 688 P.2d 1037, 1041 (Ariz. Ct. App. 1984) (elements of a claim under Arizona's racketeering statute); *see also* Ariz. Rev. Stat. § 13-2314.04(A) (permitting private cause of action for racketeering claim).

The district court did not abuse its discretion by refusing to deny defendant's cross motion for summary judgment on the basis of defendant's failure to adhere to the local rules. *See Bias v. Moynihan*, 508 F.3d 1212, 1223 (9th Cir. 2007) (standard of review for district court's compliance with its local rules).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

MGD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Manuel Moran,

Plaintiff,

v.

Thomas E. Higgins,

Defendant.

No. CV 17-00613-TUC-JGZ

ORDER

Plaintiff Jesus Manuel Moran, who is currently confined in the Arizona State Prison Complex-Florence, brought this diversity action against his former attorney, Thomas Higgins, asserting state law claims of legal malpractice, racketeering, and unjust enrichment arising out of Higgins' representation of Plaintiff in his post-conviction proceedings and petition for writ of habeas corpus. (Doc. 1.) On November 8, 2019, the Court denied Plaintiff's Motion for Summary Judgment, granted Defendant's Cross-Motion for Summary Judgment, and terminated this action with prejudice. (Doc. 72.) The Clerk of the Court entered Judgment that same day. (Doc. 73.)

On November 18, 2019, Plaintiff filed a "Motion Pursuant to Rule 59(B)." (Doc. 75.) In his Motion, Plaintiff argues that Defendant's summary judgment briefing violated every provision of Rule 56(c) and Local Rule of Civil Procedure 56.1(a)(6) and that the Court rewarded Defendant for violating the rules. (*Id.* at 1.) Plaintiff further asserts that he submitted objections to Defendant's evidence and that the Court overlooked the

"presumed damages doctrine" in *Memphis Community School District v. Stachura*, 477 U.S. 299, 310-311 (1986). (*Id.* at 2-3.)

Because Plaintiff is seeking reconsideration of an appealable interlocutory Order, the Court will construe Plaintiff's Motion as brought pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. *See Balla v. Idaho State Bd. of Corrs.*, 869 F.2d 461, 466-67 (9th Cir. 1989) (Rule 59(e) applies to appealable interlocutory orders). "A Rule 59(e) motion should not be granted 'unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" *McQuillion v. Duncan*, 342 F.3d 1012, 1014 (9th Cir. 2003) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (en banc)). Such motions are disfavored and are not the place for parties to make new arguments not raised in their original briefs. *See* LRCiv 7.2(g); *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Nor should such motions ask the Court to "rethink what the court has already thought through-rightly or wrongly." *See United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998) (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

Plaintiff has not identified a proper basis for the Court to grant relief or to modify its prior Order. Plaintiff's disagreement with the Court's analysis is not a basis for the Court to reconsider its previous Order, and nothing in Plaintiff's Motion persuades the Court that it erred in its ruling on the Cross-Motions for Summary Judgment.

IT IS ORDERED that Plaintiff's "Motion Pursuant to Rule 59(B)" (Doc. 75) is **denied**.

Dated this 2nd day of December, 2019.

Honorable Jennifer G. Zipps
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Manuel Moran,

Plaintiff,

v.

Thomas E Higgins,

Defendant.

NO. CV-17-00613-TUC-JGZ

JUDGMENT IN A CIVIL CASE

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

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order filed November 8, 2019, which granted Defendant's Cross-Motion for Summary Judgment, judgment is entered in favor of defendant and against plaintiff. Plaintiff to take nothing, and the complaint and action are dismissed with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

November 8, 2019

By s/ BRuiz
Deputy Clerk

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MGD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Manuel Moran,

Plaintiff,

v.

Thomas E. Higgins,

Defendant.

No. CV 17-00613-TUC-JGZ

ORDER

Plaintiff Jesus Manuel Moran, who is currently confined in the Arizona State Prison Complex-Florence, brought this diversity action against his former attorney, Thomas Higgins, asserting state law claims of legal malpractice, RICO, and unjust enrichment arising out of Higgins' representation of Moran in his post-conviction proceedings and petition for writ of habeas corpus. (Doc. 1.) Pending before the Court are Plaintiff's Motion for Partial Summary Judgment on Document 26 (Doc. 46), Defendant's Cross-Motion for Summary Judgment (Doc. 53),[1] and Defendant's Second Motion to Dismiss (Doc. 65). Also pending are the following motions filed by Plaintiff: Request for a Protective Order (Doc. 55); Motion for a Subpoena Duces Tecum (Doc. 61); Motion to Strike Doc. 56 and 57 (Doc. 63); Motion to Modify Doc. 40-1 (Doc. 64); Motion to Extend Time to Comply with Doc. 66 (Doc. 68); and Motion to Refer to U.S. Attorney for Criminal Prosecution and Other Relief (Doc. 71).

[1] The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc), regarding the requirements of a response. (Doc. 54.)

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The Court will deny Plaintiff's Motions and Defendant's Second Motion to Dismiss, grant Defendant's Cross-Motion for Summary Judgment, and terminate this action.

I. Background

In Count One of his Complaint (legal malpractice), Plaintiff alleges that Defendant failed to seek timely review in Plaintiff's state-court petition for post-conviction relief (PCR); failed to file for an extension of time to file a petition for review; affirmatively misrepresented to the Magistrate Judge in his federal habeas action that he had sought review in the state court; concealed from Plaintiff for more than a year that the PCR had been dismissed as untimely rather than denied on the merits; and Defendant collected payment from Plaintiff for his post-conviction representation. (Doc. 1 at 1-2.) In Count Two (fraud upon the court/RICO), Plaintiff alleges that Defendant engaged in fraud and racketeering in violation of Arizona Revised Statutes § 13-2301(d)(4). (*Id.* at 2-3.) In Count Three (fraud/unjust enrichment), Plaintiff alleges that Defendant's misrepresentation was the basis for Plaintiff's payments to Defendant, and that Defendant was unjustly enriched thereby. (*Id.* at 4.) Plaintiff seeks $250,000 in damages and an order barring Defendant from practicing in this Court. (*Id.*)

II. Summary Judgment Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the

governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. Facts

Plaintiff contends that following his conviction in Arizona state court, Defendant "failed to comply with the order by the [Arizona] Court of Appeals that he seek permission of the trial court to file a delayed petition for review" and that the Arizona appellate court dismissed the petition for review "because [Defendant] did not comply with its order and seek permission f[rom] the trial court to file a delayed petition." (Doc. 26-1 at 2 (Pl.'s Statement of Facts) ¶¶ 1-2.) Defendant disputes that he failed to comply with an order from the appellate court and asserts that the appellate court granted leave to seek an extension of time but did not order him to seek an extension. (Doc. 53 at 8.) The actual order from the Arizona Court of Appeals, dated April 15, 2014, states:

> Pursuant to Motion for Leave to File Petition for Review of Court's Denial of Rule 32 Petition [sic] Day Late, and this court not having jurisdiction,
>
> ORDERED: Motion for Leave to File Petition for Review is denied, with leave to file in the trial court.

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> It appearing to the Court that the petition for review was not timely filed within the thirty (30) day time limit in accordance with Ariz. R. Crim. P. 32.9,
>
> FURTHER ORDERED: The above-entitled petition for review is DISMISSED.

(Doc. 26-1 at 6.)

On May 19, 2014, the Arizona Court of Appeals issued its Mandate stating:

> This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its Order and it was filed on April 15, 2014.
>
> No Motion for Reconsideration or Petition for Review was filed and the time for filing such has expired.

(*Id.* at 9.)

On May 8, 2015, Plaintiff, through counsel (Defendant Higgins), filed in federal court a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (*Id.* at 51-59.) The Petition represented that Plaintiff did file a Rule 32 Petition for Post-Conviction Relief on or about March 27, 2012, and that relief was denied. (*Id.* at 53.) The Petition further stated that Plaintiff appealed the action taken on his PCR to the Arizona Court of Appeals and the Arizona Supreme Court. (*Id.* at 54.) According to Plaintiff, Defendant "intentionally misrepresented to this court that he had exhausted the administrative remedies by presenting the claims to the Arizona Appeals Court and that the habeas was timely filed, based upon which false representations the court issued an order to show cause." (*Id.* at 2-3 ¶ 4.) Defendant responds that he "never lied to the [district court] and claimed that he sought an extension on the P[C]R." (Doc. 53 at 8.)

Plaintiff contends that Defendant "failed to provide Plaintiff with honest services and obtained money from Plaintiff by material false pretenses that the Arizona Appeals Court denied the petition on the merits and habeas was timely." (Doc. 26-1 at 3-4 ¶ 11.) Defendant disputes that he ever "affirmatively misrepresent[ed] facts to the Plaintiff, in order to unjustly enrich himself." (Doc. 53 at 8.) Plaintiff filed a complaint against Defendant with the State Bar of Arizona in File No. 17-2712; the Bar notified Plaintiff on

May 29, 2018 that it had reached a consent agreement with Defendant under which Defendant would be sanctioned with a "reprimand with Probation requiring Mr. Higgins to refund $4000.00 and complete three hours of continuing legal education." (Doc. 26-1 at 49.)

In support of his Response/Cross-Motion, Defendant submits affidavits from himself and his paralegal, Kalina Martinez, averring that after the ruling by the State Bar, Defendant paid Plaintiff $4,000 in restitution, which was mailed by certified check to Plaintiff's wife on September 14, 2018. (Doc. 56 ¶ 3, Doc. 57 ¶ 2.)[2]

IV. Discussion

Plaintiff asserts three claims in this action: legal malpractice (Count One), fraud/RICO (Count Two), and unjust enrichment (Count Three). Each claim requires proof of harm or damages.

In a legal malpractice action, the plaintiff "must prove the existence of a duty, breach of duty, that the defendant's negligence was the actual and proximate cause of injury, and the 'nature and extent' of damages." *Glaze v. Larsen*, 83 P.3d 26, 29 (Ariz. 2004) (the plaintiff in a legal malpractice action has the burden of demonstrating by a preponderance of the evidence that "but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit").

To recover under Arizona's racketeering statute (Ariz. Rev. Stat. § 13-2301 et seq.), "the plaintiff must show that he suffered damage or injury as the result of racketeering and that the act which caused the injury was performed for financial gain, was one of the illegal acts enumerated in the statute and was chargeable and punishable in accordance with the requirements of the statute."[3] *Holeman v. Neils*, 803 F. Supp. 237, 245 (D. Ariz. 1992)

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[2] Plaintiff moves to strike Docs. 56 and 57, arguing that these are "random filings" that violate the summary judgment rules. (Doc. 63.) It is apparent to the Court that the affidavits are part of Defendant's summary judgment briefing, and the Court will therefore deny Plaintiff's Motion to Strike.

[3] A.R.S. § 13-2314(A) provides that "[a] person who sustains injury to his person, business or property by racketeering as defined by § 13–2301, subsection D, paragraph 4 or by a violation of § 13–2312 may file an action in superior court for the recovery of treble damages and the costs of the suit, including reasonable attorney's fees . . . ." A.R.S. § 13–

(citing Ariz. Rev. Stat. § 13-2314(A) and *State ex rel. Corbin v. Pickrell,* 667 P.2d 1304, 1311–12 (Ariz. 1983)).

To recover under a theory of unjust enrichment, the plaintiff must establish: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy. *City of Sierra Vista v. Cochise Enters., Inc.*, 697 P.2d 1125, 1131 (Ariz. Ct. App. 1984).

In his Response and Cross-Motion, Defendant asserts that Plaintiff cannot meet his burden of proving harm. (Doc. 53 at 11-12.) This is a position Defendant has asserted from the beginning of this action. Plaintiff fails to provide evidence, in either his Motion or his Reply/Response, that would satisfy the harm element. Instead, Plaintiff emphasizes that his facts "clearly set forth the deficient performance" of Higgins, that the Court of Appeals did not consider his claims, that his "habeas was dismissed due to Higgins' failure," and he has "set[] forth facts constituting fraud and unjust enrichment." (Doc. 60 at 3-4.) While it is undisputed that Defendant failed to timely file a petition for review in state court, this only proves one of the necessary elements of Plaintiff's legal malpractice claim—duty and breach of that duty.[4] It does not prove that Defendant's negligence was the actual and proximate cause of injury or the nature and extent of damages. *Glaze*, 83 P.3d at 29. Nor has Plaintiff submitted evidence of any damages he incurred under Arizona's racketeering statute or that he has suffered an impoverishment to support his claim for unjust enrichment. Indeed, Plaintiff does not dispute that Defendant repaid him $4,000, and Plaintiff has not presented evidence that he paid Defendant anything more than that. Thus, Plaintiff has failed to meet his initial burden, and the Court will deny Plaintiff's

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2301(D)(4)(b) defines "racketeering," in pertinent part, as any act or preparatory act committed for financial gain, chargeable or indictable under the law where the act occurred and punishable by more than a year's imprisonment.

[4] Plaintiff's federal habeas action was reopened on June 26, 2018, with the Magistrate Judge finding that Plaintiff was entitled to equitable tolling. (*See* Doc. 40 in *Moran v. Ryan*, CV 15-00193-TUC-JR.) Plaintiff has now filed an Amended Petition for Writ of Habeas Corpus, Respondents have filed their Response, and Plaintiff's Reply is due by December 31, 2019. (Docs. 51, 53, 63 in *Moran v. Ryan*, CV 15-00193-TUC-JR.)

Motion for Summary Judgment and will grant Defendant's Cross-Motion for Summary Judgment.

V. Remaining Motions

Because the Court will grant summary judgment to Defendant, the Court will deny as moot Defendant's Second Motion to Dismiss (Doc. 65). The Court will also deny as moot Plaintiff's Motion (Doc. 55), docketed as a Motion (Request) for Protective Order, in which Plaintiff asks that certain Admissions be deemed admitted and Defendant "be referred to the state bar for lying." The Court will deny Plaintiff's Motion for a Subpoena Duces Tecum (Doc. 61) and Motion to Modify Doc. 40-1 (Doc. 64) because the discovery Plaintiff seeks from the Arizona State Bar is not relevant to establishing Plaintiff's damages or harm. As noted, the Court will deny Plaintiff's Motion to Strike Doc. 56 and 57 (Doc. 63). The Court will deny as moot Plaintiff's Motion to Extend Time to Comply with Doc. 66 (Doc. 68) because Plaintiff has now filed his response to Defendant's Motion to Dismiss. Finally, the Court declines to refer this matter to the United States Attorney for prosecution and will therefore deny Plaintiff's Motion to Refer to U.S. Attorney for Criminal Prosecution and Other Relief (Doc. 71).

IT IS ORDERED:

(1) Defendant's Cross-Motion for Summary Judgment (Doc. 53) is **granted.**

(2) The following motions are **denied**:

(a) Plaintiff's Motion for Partial Summary Judgment on Document 26 (Doc. 46);

(b) Plaintiff's Motion for a Subpoena Duces Tecum (Doc. 61);

(d) Plaintiff's Motion to Strike Doc. 56 and 57 (Doc. 63);

(d) Plaintiff's Motion to Modify Doc. 40-1 (Doc. 64); and

(e) Plaintiff's Motion to Refer to U.S. Attorney for Criminal Prosecution and Other Relief (Doc. 71);

. . . .

. . . .

(3) The following motions are **denied as moot**:

(a) Plaintiff's Motion, docketed as a Motion (Request) for a Protective Order (Doc. 55);

(b) Defendant's Second Motion to Dismiss (Doc. 65); and

(c) Plaintiff's Motion to Extend Time to Comply with Doc. 66 (Doc. 68).

(4) This action is terminated with prejudice. The Clerk of Court must enter judgment accordingly.

Dated this 7th day of November, 2019.

Honorable Jennifer G. Zipps
United States District Judge

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

M A N D A T E

2 CA-CR 2014-0116-PR
Department A
Pima County
Cause No. CR20040588

RE: STATE OF ARIZONA v. JESUS MANUEL MORAN

To: The Superior Court of Pima County and the Hon. K.C. Stanford, Commissioner, in relation to Cause No. CR20040588.

This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its Order and it was filed on April 15, 2014.

No Motion for Reconsideration or Petition for Review was filed and the time for filing such has expired.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the accompanying Order of this Court.

I, Jeffrey P. Handler, Clerk of the Court of Appeals, Division Two, hereby certify the accompanying Order (see link below) to be a full and accurate copy of the decision filed in this cause on April 15, 2014.

To view the decision, please click on the following link:
http://www.appeals2.az.gov/APL2Docs1/COA/508/2847809.rtf

DATED: May 19, 2014

JEFFREY P. HANDLER
Clerk of the Court

COURT OF APPEALS
DIVISION TWO

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

O R D E R

2 CA-CR 2014-0116-PR
Department A
Pima County
Cause No. CR20040588

RE: STATE OF ARIZONA v. JESUS MANUEL MORAN

Pursuant to **Motion for Leave to File Petition for Review of Court's Denial of Rule 32 Petition[sic] Day Late**, and this court not having jurisdiction,

ORDERED: Motion for Leave to File Petition for Review is denied, with leave to file in the trial court.

It appearing to the Court that the petition for review was not timely filed within the thirty (30) day time limit in accordance with Ariz. R. Crim. P. 32.9,

FURTHER ORDERED: The above-entitled petition for review is DISMISSED.

Judges Miller and Howard concurring.

DATED: April 15, 2014

Garye L. Vasquez
Presiding Judge

Ex.
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Law Offices of
Thomas E. Higgins, P.L.L.C.
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higginsinvail@aol.com

March 6, 2019

Jesus Manuel Moran
107586
FLORENCE-AZ-FLORENCE-ASPC-EAST
EAST UNIT
P.O. BOX 5000
FLORENCE, AZ 85132

Dear Mr. Moran:

This is the letter I promised to send you during the hearing last week before Judge Zipps. I told her I would explain my position to you in a letter and then attach the letter to pleadings so the judge would see that it was simply an explanation and not overreaching on my part.

The problem with your claim is that you must show damages. The numbers you have put in various pleadings, basically, are made up and bear no relation to actual damages. I used an example in court and will lay it out here. Let's say I am driving approaching a red light. I negligently run the red light and you have a green light but we do not collide. Was I negligent? Clearly. But if you sued me you would have to show that my negligence caused you damages. In this case you have no damages since I did not hit you.

Now, let's assume I run the red light and actually collide with your car. Am I negligent? Again, yes. But now you have damages. Damage to your car, lost work, ambulance and hospital bills and pain and suffering. If you sue me the insurance company has bills for all these things and will evaluate how much you have been injured to reach a settlement with you. You have to be injured by my negligence. In this case you are claiming negligence, which happened, but you can show no damages unless you show that "but for" my negligence, you would have won a new trial or had your sentence reduced. In other words, like the first example above, you have me making a mistake but nothing happened.

To show damages in your case against me, you need an expert witness, an experienced criminal defense attorney, to look at the file and come to court and testify that, in his opinion, if I had not missed the filing deadline, you would have won your case and gotten a new trial or a reduced sentence. You have already

www.thomashigginslaw.com higginsinvail@aol.com

EX.
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certified that you do not need an expert witness. Without an expert all you are doing is making up numbers for amounts you would like the jury to award. Again, my negligence has to harm you in some way.

I write this letter to you to allow you some time to get someone to help you out. I also will be sending interrogatories to you soon. Thank you.

Sincerely,

Thomas E. Higgins

EX. 67

STATE BAR OF ARIZONA

Assistant's Line: (602) 340-7272

May 29, 2018

Jesus Manuel Moran #107586
ASPC-Florence East Unit
P.O. Box 5000
Florence, AZ 85132

Re: File No: 17-2712
Respondent: Thomas E. Higgins Jr.

Dear Mr. Moran:

I am pleased to inform you that the State Bar of Arizona and Mr. Higgins have reached a consent agreement regarding the above referenced case. This means that there will not be an evidentiary hearing.

Under the terms of the agreement, Mr. Higgins will be sanctioned as follows: Reprimand with Probation requiring Mr. Higgins to refund $4000.00 and complete three hours of continuing legal education. The agreement remains confidential until filed with the Presiding Disciplinary Judge, which the parties expect to do within the next few weeks.

As a Complainant, you may submit a written objection to my attention within five (5) business days from the date of this letter. Any written objection will be forwarded to the Presiding Disciplinary Judge and to Mr. Higgins.

The Presiding Disciplinary Judge must approve an agreement and sanction before it can take effect and may hold a brief hearing on the consent agreement. If such a hearing is scheduled you will be notified by separate letter. You will not be required to attend, but have the right to do so if you wish. In addition, if the Presiding Disciplinary Judge approves the agreement, the Judge's order will be the final disposition of the case, and you will receive notification of the final disposition.

If you have any questions feel free to contact me.

Sincerely,

Craig D. Henley
Senior Bar Counsel

CDH/nr

Ex.
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17-4845

4201 N. 24th Street • Suite 100 • Phoenix, AZ 85016-6266

STATE BAR OF ARIZONA

Assistant's Line: (602)340-7272

May 7, 2018

Jesus Manuel Moran #107586
ASPC-Florence / East Unit
P.O. Box 5000
Florence, AZ 85132

Re: File No: 17-2712
Respondent: Thomas E. Higgins Jr.

Dear Mr. Moran:

The Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona has entered, in the above-referenced matter, a Probable Cause Order.

The Committee determined that probable cause exists for the filing of a formal complaint against Mr. Higgins. You will be kept informed of the case as it progresses. Please keep us updated as to your contact information if any changes occur.

Thank you for your continued interest in promoting the professional responsibility of the Arizona Bar.

Sincerely,

Craig D. Henley
Senior Bar Counsel

CDH/nr

EX.
-69-

4201 N. 24th Street • Suite 100 • Phoenix, AZ 85016-6266
PH: 602.252.4804 • FAX: 602.271.4930 • WEBSITE: www.azbar.org

STATE BAR OF ARIZONA

Assistant's Line: (602) 340-7272

March 14, 2018

Jesus Manuel Moran #107586
ASPC-Florence / East Unit B-4-5
P.O. Box 629
Florence, AZ 85132

Re: File No: 17-2712
Respondent: Thomas E. Higgins, Jr.

Dear Mr. Moran:

We have completed our investigation into the matter listed above. After our investigation, we have decided to recommend to the Attorney Discipline Probable Cause Committee (the Committee) the following disposition of the matter: Order of Probable Cause.

Please know that we conducted a thorough investigation in this matter which included: Bar Counsel reviewed the State Bar file including, but not limited to, the Complainant, the Respondent and attached documents as well as pleadings, minute entries, rulings and documents in the Pima County Superior Court case of *State v. Moran*, CR20040588, the related Court of Appeals, Division Two case of *State v. Moran*, 2 CA-CR 2014-0116-PR and the related U.S. District Court case of *Moran v. Charles L. Ryan, et.al.*, CV 15-0193-TUC-JR.

If you wish to object to the State Bar's recommendation, you may submit a written statement not to exceed five pages as the Committee may not consider any submission longer than five pages in length. Your objection statement must be addressed to the Members of the Attorney Discipline Probable Cause Committee and can be prepared in letter format. The statement must be mailed or delivered to my attention and received at the State Bar by **March 28, 2018** at **3:00 p.m.** Your objection will be provided to the Committee with other information related to the Bar's investigation into this matter.

No extension of the time period for submitting your written statement can be made unless substantial good cause is shown in writing to me. Thank you for your cooperation.

Sincerely,

Craig D. Henley
Senior Bar Counsel

CDH/nr

EX. 70

17-4845

4201 N. 24th Street • Suite 100 • Phoenix, AZ 85016-6266
PH: 602.252.4804 • FAX: 602.271.4930 • WEBSITE: www.azbar.org

Jesus Manuel Moran #107586
Name and Prisoner/Booking Number

Arizona State Prison Complex: Winslow Unit: Kaibab North
Place of Confinement

2100 South Highway 87
Mailing Address

Winslow Arizona 86047
City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JESUS MANUEL MORAN,
(Full Name of Petitioner)
Petitioner,

vs.

CHARLES L. RYAN,
(Name of the Director of the Department of Corrections, Jailor or authorized person having custody of Petitioner)

Respondent,
and
The Attorney General of the State of Arizona,

Additional Respondent.

CASE NO. _____
(To be supplied by the Clerk)

PETITION UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (NON-DEATH PENALTY)

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Pima County Superior Court 110 West Congress Street
Tucson Arizona 85701-1317

(b) Criminal docket or case number: CR2004-0588

2. Date of judgment of conviction: March 26, 2010 January 21, 2010

3. In this case, were you convicted on more than one count or crime? Yes ☑ No ☐

EX. B

4. Identify all counts and crimes for which you were convicted and sentenced in this case: Count 1 Manslaughter Dangerous Nature
Count 2 through 9 and Count 11 Endangerment Dangerous Nature
Count 10 Criminal Damage

5. Length of sentence for each count or crime for which you were convicted in this case: Count 1 Aggravated Term of 28 years... Counts 2 through 9 and 11 Aggravated Term of 4.5 years... Count 10 Criminal Damage Aggravated Term of Six years All Counts Concurrent.

6. (a) What was your plea?
   Not guilty ☑
   Guilty ☐
   Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or charge, and a not guilty plea to another count or charge, give details: Does not apply

   (c) If you went to trial, what kind of trial did you have? (Check one) Jury ☑ Judge only ☐

7. Did you testify at the trial? Yes ☐ No ☑

8. Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction?
   Yes ☑ No ☐

   If yes, answer the following:

   (a) Date you filed: Appellants Opening Brief Mailed January 31, 2011 NOTICE APRIL 2, 2010

   (b) Docket or case number: 2 CA-CR 2010-0121

   (c) Result: Convictions and Sentences AFFIMED

   (d) Date of result: July 21, 2011

   (e) Grounds raised: The Court Erred In Denying The Motion To Suppress Statements As The Affices Requesting The Search Warrant Was Not Sworn In Pursuant To The Arizona And The United States Constitution

   The Court Erred In Denying A Motion For A New Trial Due To Juror Misconduct

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

9. Did you appeal to the Arizona Supreme Court? Yes ☐ No ☑

If yes, answer the following:

(a) Date you filed: _____

(b) Docket or case number: _____

(c) Result: _____

(d) Date of result: _____

(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

10. Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☑

If yes, answer the following:

(a) Date you filed: _____

(b) Docket or case number: _____

(c) Result: _____

(d) Date of result: _____

(e) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

11. Other than the direct appeals listed above, have you filed any other petitions, applications or motions concerning this judgment of conviction in any state court? Yes ☑ No ☐

If yes, answer the following:

(a) First Petition.

(1) Date you filed: NOTICE OF RULE 32. March 27, 2012 November 22, 2013

(2) Name of court: Superior Court of Arizona Pima County

(3) Nature of the proceeding (Rule 32, special action or habeas corpus): Rule 32

(4) Docket or case number: Case No. CR 2004-0588

(5) Result: DENIED

(6) Date of result: March 7, 2014

(7) Grounds raised: Ineffective Assistance of Trial/Appellate Counsel =
Failing To file Motion To Dismiss for Pre-Indictment Delay =
failing To file Motion To Dismiss Case for Lost Evidence =
failure To Advise Petitioner of Plea Agreement =
failure To fully Investigate Petitioner(s) Case

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

(b) Second Petition.

(1) Date you filed: _____

(2) Name of court: _____

(3) Nature of the proceeding (Rule 32, special action or habeas corpus): _____

(4) Docket or case number: _____

(5) Result: _____

(6) Date of result: _____

(7) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

(c) Third Petition.

(1) Date you filed: _____

(2) Name of court: _____

(3) Nature of the proceeding (Rule 32, special action or habeas corpus): _____

(4) Docket or case number: _____

(5) Result: _____

(6) Date of result: _____

(7) Grounds raised: _____

Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.

(d) Did you appeal the action taken on your petition, application, or motion to the:

	Arizona Court of Appeals:		Arizona Supreme Court:	
(1) First petition:	Yes ☑	No ☑ My lawyer Failed to seek permission of the trial court for delayed filing	Yes ☑	No ☑ My lawyer sought review but the petition was not proper
(2) Second petition:	Yes ☐	No ☐	Yes ☐	No ☐
(3) Third petition	Yes ☐	No ☐	Yes ☐	No ☐

(e) If you did not appeal to the Arizona Court of Appeals, explain why you did not: _____

12. For this petition, **state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States.** Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: The Court Erred In Denying The Motion To Suppress statements As The Offices Requesting The Search Warrant Was Not Sworn In Pursuant To The Arizona And United States Constitution

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

On May 11, 2009, the Defense filed a Motion To Suppress the fruits of a telephonic search warrant issued on or about November 24, 2002, by Pima County Justice of the Piece Jim Green (ROA doc. 31) On August 17, 2009, a Hearing on pending motions, including the Motion To Suppress was held. The Court requested supplemental briefing and took the matter under advisement. On August 25, 2009, the Defense filed a Supplemental Memorandum to the Motion To Suppress. (ROA doc. 54) On August 26, 2009, the Court ruled under advisement; Denying Petitioner(s) Motion To Suppress. (ROA doc. 55)

The original Motion to Suppress included a copy of the transcript of the Affidavit. (ROA doc. 31) The transcript reveals that the Offices requesting the Warrant was not sworn, as required by A.R.S § 13-3913 and 13-3914. Petitioner never seen the authorization of the Peace Offices to sign the Justice of the Peace Jim Greens name on the search warrant nor did Petitioner see the affidavit or any inventory pertaining to the telephonic search warrant - when asked by the judicial offices to swear as to the truth of his testimony, the offices did not do so... he simply began providing information.

At the Suppression Hearing, the Court indicated:

"the issue is one of the technicality of the error or omission of the finalization of the swearing in of the Offices. He either was sworn

(Continue Page 12, 13 and 14)

(b) Did you present the issue raised in Ground One to the Arizona Court of Appeals? Yes ☑ No ☐

(c) If yes, did you present the issue in a:

- Direct appeal ☑
- First petition ☐
- Second petition ☐
- Third petition ☐

(d) If you did not present the issue in Ground One to the Arizona Court of Appeals, explain why: ____

(e) Did you present the issue raised in Ground One to the Arizona Supreme Court? Yes ☐ No ☑

GROUND TWO: The Court Erred In Denying A Motion For New Trial Due To Jury Misconduct: Juror Ambers Rusk's friend Stacey Brady worked for AAA Chalk and PREJUDICE resulting, had Petitioner Known would've struck Ms. Brady from Jury. PRE-PREJUDICED against Petitioner because Ms. Rusk was struck by a drunk driver 12 years ago. This decided my fate and had a lot to do finding Me guilty.

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

On January 22, 2010, the state filed a Notice that "Juror 11 knows and had contact with a non-attorney employee of the County Attorney's Office at the beginning of trial when the Juror asked on January 21, 2010, what an aggravating factor was" (ROA doc. 89). On February 9, 2010, the defense filed a Request for Hearing pursuant to the Juror contact with a member of the Pima County Attorney(s) Office staff. (ROA doc. 97)

On February 23, 2010, a Hearing was held on the Juror Contact. The Court allowed this issue to be included in a Motion for New Trial. (ROA doc. 103). On March 3, 2010, Petitioner filed a Motion for a New Trial. (ROA doc. 105). On March 15, 2010, at the Hearing for the Motion for New Trial, after Listening to the argument, the Court denied the Motion. (ROA doc. 108)

A hearing was held wherein Stacey Brady, third year law student at the University of Arizona College of law testified that she is a law Clerk in the criminal division of the Pima County Attorney(s) Office (RT 02/22/10 p 6) Prosecutor Chalk is Ms. Brady's Supervisor. (Id) Ms. Brady knew one of the Jurors in the instant case, Juror 11 Ambers Rusk. Ms. Brady knew Ms. Rusk was a juror in a criminal trial January 12, 2010 when Ms. Rusk texted Ms. Brady and told Ms. Brady Ms. Rusk was a Juror in a criminal case. Ms. Brady texted Ms. Rusk not to tell Ms. Brady anything about the case. (Id) On January 14, 2010, Ms. Brady text Juror Rusk and asked Ms. Rusk if she wanted to have lunch. They ended up speaking to each other on the telephone and they met in the lobby of

(Continue Page 15, 16, 17 and 18)

(b) Did you present the issue raised in Ground Two to the Arizona Court of Appeals? Yes ☑ No ☐

(c) If yes, did you present the issue in a:

Direct appeal	☑
First petition	☐
Second petition	☐
Third petition	☐

(d) If you did not present the issue in Ground Two to the Arizona Court of Appeals, explain why: ____

(e) Did you present the issue raised in Ground Two to the Arizona Supreme Court? Yes ☐ No ☑

GROUND THREE: Trial Counsel Was Constitutionally Deficient for Failing To Investigate And Present Relevant Facts To The Jury To Construct And Preserve A Meaningful Defense... These Omissions Prejudiced Petitioner

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner was charged with manslaughter, criminal damage and nine counts of endangerment with a substantial risk of imminent death. The Trial Court sentenced Petitioner to enhanced, aggravated, concurrent terms, the longest was 28 years.

Trial Counsel failed to challenge the manslaughter, criminal damage and endangerment counts. Trial Counsel only filed a motion to suppress the blood seized pursuant to a telephonic search warrant challenging the officer who obtained the warrant was not sworn in prior to obtaining the warrant. Petitioner(s) Trial Counsel filed a motion for new trial based on alleged juror misconduct but did not file any other motions challenging any of the other evidence presented during trial and did not fully investigate the facts of the case including the conduct of a third driver at the scene of the accident who was seen disposing of beer cans in the desert just prior to the arrival of the police. Trial Counsel failed to challenge the delay in initiating the indictment of Petitioner. The indictment in this case was not filed for more than two years after the incident. Because of the delay, evidence was lost, blood evidence, recorded tape interviews, which severely biased Petitioner. No challenge was filed regards this issue. Trial Counsel did not implement Petitioner(s) Right of Allocution prior to the imposition of sentence. Trial Counsel did not raise any sentencing issues regards the aggravation of sentencing...

Appellant Counsel did nothing more than reiterate Trial

(Continue Page 19, 20, 21 and 22)

(b) Did you present the issue raised in Ground Three to the Arizona Court of Appeals? Yes ☑ No ☐

(c) If yes, did you present the issue in a:

Direct appeal	☐
First petition	☑
Second petition	☐
Third petition	☐

(d) If you did not present the issue in Ground Three to the Arizona Court of Appeals, explain why: ___

(e) Did you present the issue raised in Ground Three to the Arizona Supreme Court? Yes ☐ No ☑

GROUND FOUR: Trial Counsel Was Constitutionally Deficient for Failing To Submit A Motion To Dismiss Or Suppress Evidence for Pre-Indictment Delay

(a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.):

In this case Petitioner was arrested and charged with manslaughter, criminal damage and endangerment counts but the matter was not presented to the grand jury after more than two years had elapsed from the date of the accident. Within the two years, blood evidence was lost, witness interviews were lost and witnesses were lost. The state had marshalled all evidence necessary to prosecute Petitioner at the inception of this case and delay was not necessary for further investigation. The delay severely prejudiced Petitioner and his ability to present a complete and thorough defense. Petitioner never possessed the grand jury indictment proceeding transcript and was never afforded the opportunity to challenge the proceeding by submitting a motion for a new finding of probable cause. The delayed occasioned by the state was not in furtherance of any legitimate investigative purpose. There was no further investigative leads the state needed to pursue in order to fully proceed with this prosecution. The state had all the evidence necessary to prosecute Petitioner within a few months of the incident. The blood was tested and results obtained fairly quickly. facts in support of the blood draws: One Warrant and 3 Blood draws ?(i) There must be specificity and direction for 3 separate invasions of the body. (ii) Officer Rede said he required 3 separate draws spaced one hour apart (did not request and Judge Green gave no such order/direction). Recklessness or Officer Rede(s) part in preparing affidavit omitted exculpatory explanation (lie) Blood shot

(Continue Page 23, 24 and 25)

grand jury

(b) Did you present the issue raised in Ground Four to the Arizona Court of Appeals? Yes ☑ No ☐

(c) If yes, did you present the issue in a:

- Direct appeal ☐
- First petition ☑
- Second petition ☐
- Third petition ☐

(d) If you did not present the issue in Ground Four to the Arizona Court of Appeals, explain why: _____

(e) Did you present the issue raised in Ground Four to the Arizona Supreme Court? Yes ☐ No ☑

Please answer these additional questions about this petition:

13. Have you previously filed any type of petition, application or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☑

If yes, give the date of filing, the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available: _____

14. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, as to the judgment you are challenging? Yes ☐ No ☑

If yes, give the date of filing, the name and location of the court, the docket or case number, the type of proceeding, and the issues raised: _____

15. Do you have any future sentence to serve after you complete the sentence imposed by the judgment you are challenging? Yes ☐ No ☑

If yes, answer the following:

(a) Name and location of the court that imposed the sentence to be served in the future:

(b) Date that the other sentence was imposed: _____

(c) Length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition challenging the judgment or sentence to be served in the future? Yes ☑ No ☐

16. TIMELINESS OF PETITION: If your judgment of conviction became final more than one year ago, you must explain why the one-year statute of limitations in 28 U.S.C. § 2244(d) does not bar your petition.*

*Section 2244(d) provides in part that:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

17. Petitioner asks that the Court grant the following relief: Vacate Conviction And Sentence
New Trial
Reinstate A Proper Plea Proffer
Pursuant To AEDPA Issue An Evidentiary Hearing
or any other relief to which Petitioner may be entitled. (Money damages are not available in habeas corpus cases.)

I declare under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____(month, day, year).

_____

Signature of Petitioner

_____ _____

Signature of attorney, if any Date

in or he wasn't sworn in, and if he wasn't sworn in, is that a defect sufficient to invalidate the search warrant or is this such a technical defect that it(s) an oversight and doesn't make a difference." (RT 08/19/09 p 18)

The Court opined that this was a constitutional issue in that both the Arizona and United States Constitution requires a Warrant not be given unless by sworn affidavit or something to that effect. (Id p 19), The Court requested arguments from the attorneys.

This [the lack of being sworn in] clearly is a defect, and it goes to the essence of the requirement. (Id p 20) There is no case law directly on point, though there are some cases that indicate an error with an administrative act may not rise to the level where you throw out the evidence, The Defense believed that the error was not harmless, in that not only the Arizona Constitution but the United States Constitution both emphasize the requirements that this [the affidavit] be done under oath, This Constitutional requirement, along with statutory law gives more credence to the conclusion that this is not a simple administrative error, The Motion to Suppression should have been granted (Id, pp 21-22)

The Court opined that there was no issue of either the magistrate or the Officer not acting in good faith. (Id p 22) After the state argued that the exclusionary rule doesn't punish officers who make mistakes, the Court responded by stating that:

"the exclusionary rule is basically a case made rule. Should the exclusionary rule override the Constitution? The Constitution protects our right to be free of illegal search and seizures and tell us how it should be done by affidavit, sworn

affidavit. If they are in conflict, which do you think should be given higher protection, the strictness of the written word of the Constitution or the judge that made rules that came up over years because of case law?" (Id p 24)

The Court stated that the magistrate had the duty to make sure the officer was sworn. "If we let that slide and say we can excuse that, then why have anybody call in and be sworn in at all if it isn't strictly interpreted, I have a real problem." (Id p 25)

The requirement that the basis for a warrant be provided under oath is not a mere formality. The 4th Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."

Under section 28-1321(A)(1) of the Arizona Transportation Code, when an accused does not voluntarily submit to a blood test to determine alcohol content, the statute demands that "no test shall be given . . . except pursuant to search warrant. The Arizona Criminal Code requires that search warrants be "supported by affidavit", A.R.S § 13-3913 (2001) or "in lieu" of the affidavit, "the magistrate may take an oral statement under oath which shall be recorded on tape, wire or other comparable method. A.R.S § 13-3914(C)

On August 29, 2009, the Court in an In Chambers Under Advisement Ruling found that the facts as presented by the parties are undisputed. The officer did not respond when asked whether he swore or affirmed his testimony was the whole truth. (ROA doc 55 p 2) The Court noted no controlling law or point and mentioned Arizona cases wherein failure to record statements invalidated a warrant,

The Court then ruled that "Offices Rede was under oath at the time he gave information to Judge Green in support of the telephonic search warrant, and that the warrant remains valid". The Court finds that Offices Rede was accountable for the statements he made to Judge Green, and that both the Offices and Judge Knew the statements were subjectable to the penalty of perjury. (Id p 3)

Judge Green never considered identifying evidence, the facts, circumstances and grounds in the telephonic search warrant application and the affidavit by Offices Rede. The telephonic conversation was not interpreted as a whole. There was no link between the substance of the telephonic warrant and the charges petitioner was improperly indicted, unjustly prosecuted and wrongly convicted of. Offices Redes telephonic search warrant lacked particularity.

Petitioner argues that contrary to the ruling, Offices Rede was not sworn in under oath, he may have thought he was sworn in, but he did not affirm his oath and was not under oath. The trial court is guess working what the Offices thought. The Court never heard testimony from Offices Rede to verify what he thought at the time of the telephone call to Judge Green. The trial court erred in ruling that Offices Rede was sworn in and that the Motion To Suppress was denied in error.

The trial court committed reversible error by denying Petitioner(s) Motion To Suppress due to the telephonic search warrant not being properly sworn. Petitioner Requests that this Court vacate his conviction and sentence and order a new trial.

Superior Court. (Id p 8). At lunch, Ms. Brady reminded Ms. Rusk not to talk about the case with her. Ms. Brady did ask Ms. Rusk if she had disclosed her name during jury selection. Ms. Brady was told by juror Rusk she had not as she was asked if she knew any lawyers, and Ms. Brady was a law student. (Id p 9). The Juror discussed other issues with Ms. Brady, to wit, that it was hard not watching the news, and that she was getting paid by work for her jury duty and that she didn't understand why people would want to get off a jury. (Id). Ms. Brady has been good friends since High School with Ms. Rusk. (Id p 10). At the close of Lunch Ms. Rusk did not know which trial she was sitting on, but knew she was a juror in a criminal trial in Superior Court. (Id p 11).

The next contact Ms. Brady had was on January 21, when Ms. Rusk texted her and an hour later, Ms. Brady called her. Ms. Rusk said had a quick question and asked "what is an aggravator?" Ms. Rusk said her trial was over and Ms. Brady gave her a description of an aggravator. Then Ms. Rusk told Ms. Brady there was a sentencing trial o February 22, in the case. (Id p 11). After getting off the phone with Ms. Rusk, Ms. Brady called the County Attorneys Office and the next day spoke with Prosecutor Chalk. Ms. Brady called Ms. Rusk back and told her she had spoken to Mr. Chalk about the "aggravator" query, and that Ms. Brady was unable to speak with Ms. Rusk any more until the case was completed. (Id p 12).

Ms. Brady started Clerking in the County Attorneys Office in May 2008. (Id p 16). It is on facebook that she works there, and her friends do know that. (Id), Ms. Brady reiterated when she met Ms. Rusk for lunch she ask her if she had given her name in voir dire. (Id p 18). Ms. Rusk said she hadn't as her friend was not a lawyer

yet. (Id p 19).

Amber Rusk testified that during voir dire she did not say she was friends with Ms. Brady. (Id p 23). Ms. Rusk didn't remember Ms. Brady worked for the County Attorneys Office. (Id p 24). Ms. Rusk thought about saying something but she knew Ms. Brady was not a lawyer yet. (Id). Ms. Rusk didn't recall the question to divulge if you knew anyone in the County Attorneys Office. (Id). The verdict was reached on January 21, and Ms. Rusk called Ms. Brady to ask about an aggravator. (Id p 27).

At no time did Ms. Rusk divulge she was a close friend of a person working at the County Attorneys Office. (Id p 32). It might have entered Ms. Rusks mind that she should have said something after Ms. Brady gave her an admonition not to talk to her about the case. (Id p 33). The Judge asked Ms. Rusks when he asked if anyone has close friends who studied or practiced Law why she didn't give her friends name at that time. Ms. Rusks responded that she heard the question wrong. (Id p 35).

Ms. Kelley discussed with the Court using this issue for a Motion and the Court agreed. (Id p 38). Nevertheless, he told the Court that:

"... clearly, she wanted to be on the jury and she knew if you raise your hand and say something, you might get off the jury. There are a number of opportunities ... if she had just said at the start that she knew a law student and Bruce [Chalk, the prosecutor and Ms. Brady's supervisor] would have said yes, she is a law clerk, she would have been excused, or ... as a peremptory challenge.

Had it come up during the course of the trial, had she had second thoughts about it, like when she met her friend for lunch and she said, did you say you know me? We could have excused her and had one alternate left instead of two. (Id p 38).

Petitioner(s) Motion for New Trial issue indicated that the hearing of February 22, 2010, clearly established that a juror failed to respond fully to the Courts voir dire questions and concealed her close friendship with a law student who clerked at the Pima County Attorney's Office with Ms. Chalk, the prosecutor in the instant case. When Ms. Rusk met for lunch with Ms. Brady and Ms. Brady asked if Ms. Rusk had disclosed her name and relationship, the juror responded that she thought that inquiry was limited to lawyers. The juror clearly knew she did recognize the question and decided against full disclosure. The defense would have certainly struck her as a peremptory strike if she hadn't previously been excused by the Court. The juror had two separate occasions to disclose this information, and indeed, she asked her friend in a text and telephone message what an aggravator was.

Additionally, the juror told her friend she was on the jury, that she didn't understand why people tried to get off the jury, and that she was getting paid from her job as well. (Testimony of Ms. Brady, RT 02/22/10 p 9). On March 16, 2010 at a Hearing on the Motion for New Trial, Rule 24.1 the Court ruled that their was no violation by the juror, the juror did not falsify any answers, and that there was no prejudice to Ms. Moran. (ROA doc. 108)

Petitioner argues that the juror was guilty of misconduct pursuant to Rule 24.1 (iii) perjuring himself or herself or willfully failing to respond to a direct question posed during voir dire. When it is shown juror misconduct is prejudicial to the rights of the defendant will a guilty verdict be disturbed by the Court. In the instant case, the court specifically asked the jurors if anyone has close friends who studied or practiced law. Ms. Rusk, wanting to be on the jury did not

give her friends name at that time, responding at the hearing that she heard the question wrong. (RT 02/22/10 p 35). After Ms. Rusks friend specifically asked her if she had given her name, she said no. Though she said "it might have entered her mind that she should have said something after Ms. Brady gave her an admonition not to talk to her about the case" (Id p 33) she did not divulge the relationship.

This Lack of disclosure was willful, and it did prejudice Petitioner as he was denied the right to have the Court excuse Ms. Rusk with a peremptory strike. Petitioner argues that the nondisclosure deprived him of the right to intelligently exercise his peremptory challenge. There was a willful Lack of disclosure as Ms. Brady indicated to Ms. Rusk that she should not talk to her about the case, and that she ask if Ms. Rusk disclosed her name to the Court for voir dire. The Judge specifically asked if anyone knew people who studied or practiced Law. Clearly her close friend, a Law student who worked for the prosecutor, would fit into this category. Petitioner believes he was prejudiced in that Ms. Rusk, eager to be on a jury willfully did not disclose her relationship with Ms. Brady who worked for the Prosecutor Mr. Chalk. One must suppose that she was biased for the state.

The Trial Court committed reversible error by denying Petitioner(s) Motion for a New Trial Pursuant To Juror Misconduct, Petitioner Request that this Court vacate his Conviction and Sentence and Remand for a New Trial.

Counsels issues and arguments. Nonetheless, Appellant Counsels representation was meaningless.

On November 23, 2002 Petitioner had worked all day and after getting off of work, met his wife for dinner. After dinner, Petitioner left his home driving his wife(s) vehicle in order to leave a saddle at a friends home in the area of Taylor Lane and Ajo Way (Route 86) near Three Points, Arizona. Accompanying petitioner was his 17 year old Nephew, Abraham Moran.

After dropping off the saddle and making a brief stop at another friends house in the area of Ajo Way and Sandario Road, Petitioner began heading home driving east on state route 86 (Ajo Road) when in the area of Old Ajo Way and state route 86, petitioner saw bright lights directly in front of him and he attempted to brake. A collision occured thereafter involving three vehicles. A Nissan Pathfinder driven by petitioner, a Toyota Corolla driven by Gabriel Acuña and a van driven by Anthony Aschuleta.

At the scene of the accident, at the time of the incident a highway patrol officer for the Arizona Department of Public Safety Ray Rede noticed the odor of alcohol on petitioner(s) breath and found empty beer packaging in and around petitioner(s) Pathfinder. Petitioner suffered a broken leg as were passengers injured in the other vehicles with respect with one fatality in the van. Petitioner was transfered to St. Mary's Hospital, where officer Ray Rede obtained three blood samples. Officer Rede telephoned a magistrate to request a search warrant to obtain a blood sample from petitioner. The following recorded conversation took place:

Officer: Judge Green [,] this is Officer Rede, badge number of

6106 of Arizona Department of Public Safety. Will you sweas me in please?

JUDGE: Do you sweas or affirm the testimony you give is the truth, the whole truth and nothing but the truth[,] so help you god[?]

OFFICER: I am calling you on this date, 11/24 of 02 at 1228 in the a.m. with Offices Henry Floras of Arizona DPS badge number 3119 standing by as a witness. I am calling for a telephonic search warrant and have just, probable, and reasonable cause to believe that there is now in the body, or on the body[,] blood/fluids, alcohol and articles of clothing located on or in Guadalupe Bustamonte [aka Jesus Mosan]....

The telephone search warrant did not authorize the taking of these blood samples from Petitioner. The samples were tested revealing blood-alcohol levels of 0.156, 0.131 and 0.110. Nor was there any discussion of an ORDER for obtaining identifying evidence, no proof of affidavit or inventory, no finding by Judge Green stating there is probable cause linking blood samples to the crime of manslaughter, criminal damage and endangerment or whether the blood samples may or **may not** be obtained by Officer Rede, the Police Department or the Criminal Identification Division of the Arizona Department of Public Safety.

Petitioner asserts that Trial Counsel failed to:

- Interview all potential witnesses available to corroborate Petitioner(s) version of the events,
- Did not undertake any investigative work to attack the theory of the states case; petitioner(s) trial counsel made no effort to fully investigate the evidence concerning the drivers of the Toyota Corolla whose passenger had admitted to investigating officers that

they had been drinking immediately prior to the accident. These witnesses indicated that the vehicle was parked on the side of the road and pulled out in front of Petitioner(s) vehicle moments before the accident. This contradicted the states contention that the vehicle pulled out from a side road (Old Ajo Way) and would have corroborated Petitioner(s) contention that the driver of the Toyota Corolla caused the accident. No effort was obtained for this evidence. This would have bolstered Petitioner(s) contention that he did not commit these offenses.

* • failed to properly advise Petitioner of the states plea offer(s). Petitioner was advised that the state may be willing to offer a plea but was advised that his chances of prevailing at trial were about even. Petitioner was never advised that if he proceeded to trial he exposed himself to a possible sentence of 28 years of imprisonment. Had Petitioner been properly advised of the consequences of a possible plea offer, petitioner would have accepted a plea.

* • did not file any motions requesting depositions of the states recalcitrant witnesses or in the alternative motions to preclude their testimony after failing to appear for scheduled depositions.

• failed to object to hearsay testimony from witnesses about what others had told them.

• did not object to trial testimony of state witnesses that was without foundation, improper opinion evidence and/or speculative as some of the evidence was adduced from the states experts that gave such evidence a false impression.

failed to implement Petitioner(s) right of allocution, regards aggravating factors by the trial judge not found by the jury beyond a reasonable doubt at the time of the

imposition of the aggravated term of imprisonment.

- failed to present and preserve grounds four, five and six.
- failed to preserve these issues for appeal.

These are facts of the issues which were not addressed in an effective way by Trial Counsel. Appellate Counsel also failed to explore my case file to preserve these facts and issues for Appellate review.

Watery Eyes? strong Odor of Intoxicant? Emitting strong odor intoxicant from clothing? Blood shot watery eyes can easily be explained away by the broken foot Petitioner sustained. Offices Rede knew that Petitioners pupils were not affecting Petitioners demeanor? slurred Speach? Unusual Actions? All Lacking.

Bees cars and packaging in vehicle this is no more evidence of a DUI: strong Odor of Intoxicants? Easily explained by bees can exploding or impact of two severe collisions.

Offices Rede bolstered his probable cause to Judge Green by omitting these facts. Understandably so he couldn't interview Petitioner as medical was taking care of Petitioner.

Even so it was incumbent on Offices Rede to obtain probable cause before talking to Judge Green not Recklessly bolstering his probable cause by omitting the total facts that could have rendered probable cause worthless.

Pursuant to A.R.S § 13-3914 was inacted by the state Senate in order to permit telephonic search warrants to be issued. They have unambiguously required two element prior to issuance. (1) The statements must be recorded and (2) The statement of the Offices must be made under oath. Both elements is necessary to authorize telephonic warrants, this omission will invalidate a warrant. It is not for a Judge or the Court of Appeals to postulate of the intent or state of mind of Offices Rede when it comes to substantial Constitution of compliance issues when the A.R.S Mandates A.R.S § 13-3915 E when issuing telephonic warrants.

Blood was never tested to SEE IF it was Petitioners
Petitioner never seen the chain of Custody of the blood seized? Even the inventory is lacking, Without chain of custody

There is no foundation laid to claim blood is Petitioner(s).

Claim of Custody ... Officer Diers Report stated 3 separate blood draws with the fourth sample taken by the hospital at about 11:00 sometime (23:45 by E.R Joseph draw. Petitioner never seen no blood draw inventory or chain of custody).

The 3 blood draws took three hours. After the last draw the officers interviewed Petitioner. Then detained. To start into deposit blood evidence. Petitioner(s) point being blood must be immediately refrigerated to prevent coagulation that would then give elevated BAC - false reading. From 1:40 AM to approximately 7:00 AM blood was not secure in refrigerated area. It would have been documented.

Petitioner was not indicted for DUI because the State could not obtain a conviction on tainted blood? These questions were never brought to light by Trial Counsel.

Petitioner(s) theory is the Blood Missing?

11-23-02 Accident - Blood Draw Occurs

11-27-02 Scientific Analysis Returns BAC .156%, .131% and .115%. The state had enough to indict Petitioner then on DUI and current charges.

This case was not indicted for over two years following the collision, even though all evidence in the case was addressed within a few months. No explanation for this delay by the state has been provided, nor has Trial Counsel given an explanation as to why a Motion To Suppress Evidence Or Dismiss was not filed, Trial Counsel Mr. Keller could not recall why the indictment was delayed or why he and co-counsel did not file such a motion.

In this case, significant delay occurred, not only in bringing the indictment, but also in arresting the Petitioner and

bringing the case to trial. The Petitioner was arrested on a warrant at his home on October 17, 2008 by Trial Witness APS Detective Charless Truitt. Petitioner indicated to Detective Truitt that he had been living at the same location since the accident, and the state had no evidence to dispute that. A delay of sever years occurred before the case went to trial, and this delay clearly prejudiced the Petitioner. Therefore, a motion to suppress evidence of Petitioner(s) BAC level and of statements by witness whose investigative interviews had been lost by the state, as to dismiss the indictment altogether, would have been appropriate.

The state argues, because Petitioner gave a wrong name and they couldn't indict because they didn't know the real name, well, they indicted under hostamonte and not moser... answer

GROUND FIVE: Trial Counsel Was Constitutionally Deficient for failing To file A Motion To Dismiss for Lost Evidence

(a) supporting FACTS: Blood is either Lost or cannot stand in Court, four Told: (1) How did the state connect Bustamante and Moran? (2) Is it possible the state illegally collected DNA and RAN II? (3) Petitioner dont remember warrant for Bucal Cells? (4) Petitioner was indicted and convicted despite missing material from Disclosure and missing trial transcript. Petitioner is missing 100012, 13, 20-31, 47-48, 65-77 and 100089-100158-159, This missing material may document vital facts pertaining to Petitioner(s) issues.

(Continue Page 27, 28 and 29)

(b) Did you present the issue raised in ground five to the Arizona Court of Appeals? Yes ☑ No ☐

(c) If yes, did you present the issue in a:

Direct Appeal ☐
first Petition ☑
Second Petition ☐
Third Petition ☐

(d) If you did not present the issue in ground five to the Arizona Court of Appeals, explain why:

(e) Did you present the issue raised in ground five to the Arizona Supreme Court? Yes ☐ No ☑

By the time the case went to trial, the state has lost or misplaced several crucial evidence items, including Petitioner(s) blood sample for his potential use in obtaining an independent blood analysis and the police interview tapes of the Acuña brothers(s) and Charles Lopez, a third occupant of the Acuña Toyota Car, obtained shortly after the accident. No explanation for the loss of either of these items has been provided by the state. No Jury instruction concerning loss of evidence by the state was requested by trial counsel and it is Petitioner(s) opinion that such an instruction was appropriate in Petitioner(s) case and could well have affected the trial outcome.

The loss of blood evidence prevented Petitioner from obtaining an independent analysis of Petitioner(s) blood alcohol level. The loss of the interview tapes prevented the defense from having a clear record of the witness' answers and knowledge of the accident events obtained when their memories were fresh.

At trial, the defense called both Charles Francis Lopez and Anthony Javier Acuña, the driver's younger brother, both occupants of the Acuña car that pulled onto state Route 86 ahead of the Petitioner(s) Nissan vehicle. Suffice it to say that their trial testimony was a "wealth of amnesia". Both witness' repeatedly answered queries about the accident and the events preceding it with "I don't remember" or "I'm unsure". Clearly the seven plus years interval between the events that gave rise to these charges and the trial had dimmed the witness(s) memories to the point of making their critical testimony virtually useless to the defense. This is precisely why the interview tapes taken very shortly after the incident would have been huge to the defense for either impeaching the witness(s) claimed amnesia or in refreshing their recollections of the events through

their nearly contemporaneous statements.

The significance of these witness(s) testimony was critical to the defense in this case, which was that the Acuña vehicle caused the accident and the resulting death of with respect to Elijah Archuleta by unsafely pulling out onto the highway in front of Petitioner(s) vehicle, which had the right of way. There was evidence in the case that occupants of the Acuña vehicle, and presumably driver Gabriel Acuña had been drinking alcohol prior to the collision and all were under age at the time. It is the Petitioner(s) opinion that the interview tapes of these occupants, made by law enforcement officers within a day or two of the accident would have been huge to the defense in establishing that the Acuña car had been driven improperly by an impaired driver, [or at least in raising a doubt in the jurors minds as to whether Petitioner was criminally reckless in causing the collision]

The defense of a Willits instruction tells the jury that if the state has lost or destroyed evidence without an adequate explanation, the jury may infer that the lost evidence would have been unfavorable to the state and would have been favorable to the defendant. The jury could have inferred that the lost blood sample would have shown that the defendant was not impaired by alcohol and Acuña witness's missing statements would have supported the defense claim that the Acuña vehicle was the sole cause of this unfortunate collision, not Petitioner.

It is the Petitioner(s) opinion that the loss of the blood sample and the Acuña/Lopez interview tapes was unexplained, and that these evidence items were important to the defense. The failure to request a Willits instruction would have given rise to an inference that the missing evidence would have helped the defense, was a failure of trial counsel amounting to ineffective assistance. The evidence of an intervening cause

of the accident, being the Acuña vehicle's failure to yield right-of-way to Petitioner(s) vehicle traveling on the primary highway, state Route 86, was compelling evidence which could have affected the outcome of the trial. The Loss of evidence by the state and the Lack of a correcting Willits instruction deprived Petitioner of a fair trial because of ineffective assistance of trial counsel.

GROUND SIX: Trial Counsel Was Constitutionally Deficient for Failing To Advise Petitioner Of Properly Advice Of Plea Agreement

(a) Supporting FACTS: Petitioner clearly indicates that he did not accept the plea offer because trial counsel assured Petitioner that he stood an even chance at being acquitted at trial. ~~Petitioner was unaware that he exposed himself to 28 years in prison if convicted of the manslaughter, criminal damage and endangerments offenses.~~ The state may indicate that trial counsel knew what the terms of the plea were but the point is not what Trial Counsel knew but what he conveyed to Petitioner. There is no reference in the record that Petitioner was explained the range

(Continue Page 31, 32 and 33, 34)

(b) Did you present the issue raised in ground six to the Arizona Court of Appeals? Yes ☑ No ☐

(c) If yes, did you present the issue in a:

Direct Appeal	☐
First Petition	☑
Second Petition	☐
Third Petition	☐

(d) If you did not present the issue in ground six to the Arizona Court of Appeals, explain why:

(e) Did you present the issue raised in ground six to the Arizona Supreme Court? Yes ☐ No ☑

in open court. The only exchange that occurs is whether he had been advised of the plea and had rejected it. There is nothing in the record that indicates that Petitioner was given the terms of any plea offer. Petitioner detailed in his affidavit his attempt to clarify the terms of the plea and that he was not told he could be facing 28 years of imprisonment for the offenses.

Discrepancy(s) pertaining to the plea agreement:

The following discrepancy(s) transpired at the January 12, 2010, Proceedings, informal discussion;

- Trial Counsel nor the Judge never elaborated to Petitioner the purpose of a Donald hearing. Nor did the Court, Trial Counsel [or the Prosecutor explain in depth the facts of the plea agreement correctly to Petitioner].

THE COURT: So he's looking at a Class Two, dangerous nature, with a dangerous prior, which puts it 14 to 28, and the presumptive of 15.75".

This Dangerous and Repetitive offenders definition pertains to two or more historical prior felony conviction for a Class 2 felony Minimum 14 years - Presumptive 15.75 years - Maximum 28 years pursuant to A.R.S § 13-604 Subsection D.

A.R.S § 13-604 Subsection B. A person who has a historical prior felony conviction shall be sentenced for a Class 2 felony Minimum 6 years - Presumptive 9.25 years - Maximum 18.5 years. How may Petitioner base his decision when the facts of the plea agreement is incorrect and never explained to Petitioner.

- Prosecutor Bruce Chalk, brought to light, when asked by the Court the state offered a Class Two, dangerous nature, with one

dangerous prior.

MR. CHALK: yes, sir. Oh No. The Class Two, non-dangerous, no prior, was seven to 21, was the offer.

- The Court asserts that the state has offered seven to 12, with a presumption of 10 and a half... This plea agreement was never discussed or brought to Petitioner(s) attention by Trial Counsel.

- The Courts conclusion was a class two, dangerous, with no prior, the state offered Petitioner a class two with no probation, seven to 21, with a presumptive of 10 and a half.

- How may petitioner make a Knowingly, intelligently and voluntarily decision when Petitioner and Trial Counsels Brief discussion held off the record was from 1:34 p.m. to 1:43 p.m.

As spelled out in the following facts, with the discrepancy(s) at issue, the January 12, 2010, Proceeding was unjust pursuant to Arizona Rules of Criminal Procedure Rule 17 Pleas of guilty and no Contest.

Petitioner was informed that there was a plea, but wasn't informed of the terms of that Plea... Petitioner had an idea that it was from 7 to 21, but didn't know of the Accuracy, terms and conditions. Nobody explained this to Petitioner, nor trial counsel nor the judge, Petitioner is not aware of never been alerted of exhibit A of the Settlement Conference held September 28th, 2009, which asserts petitioner was apprised of the terms of the plea agreement offered to Petitioner.

If Petitioner would have Known the terms; no prior, non-dangerous, non-repetitive, petitioner would of considered signing, petitioner become aware of these terms when he read his pre-sentence report when already here at the prison.

The puspose of the Settlement Conference on Septembes 28, 2009 was for a negotiation of a plea. Petitiones was offesing to plead guilty to Negligent Homicide, non-dangesous and non-sepetitive... this was the puspose of this confesence, to discuss the tesms of the plea petitiones was offesing to plead guilty to. Petitiones was denied. There was no discussion of the tesms of the plea that was on the table (7 to 21).

Petitiones(s) facts pestinent to the January 12, 2010 Proceedings, informal discussion: The Judge may have told Trial Counsel the tesms of the plea in front of the bench, Petitiones couldn't hear the discussion as petitiones was sitting on the opposite side of the court gallesy. When Trial Counsel came and talk to petitiones he neves explained to me nothing about the discussion/tesms. Trial Counsel asked Petitiones if he wanted to sign the Plea because the plea was still there. Petitiones asked Trial Counsel what do you think? should I sign It? What would you advise me to do? Trial Counsel said I don't Know. At that time Petitiones still didn't Know the tesms of the Plea. Petitiones asked Trial Counsel again if we had a chance of winning. Trial Counsel said I don't Know, maybe. Petitiones didn't Know what to do at that time as we proceeded to trial.

This was Trial Counsel Pete Keller talking to Petitiones all the time including when he visited me in jail and in court, Ken goldbesg co-counsel didn't eves mention nothing about a plea agreement... Mr. Goldbesg was just telling me that he was a vesy good trial Lawyes. This is one of the things maybe that influenced me to proceed to trial. Petitiones neves saw the Plea Bargain in writing, trial counsel neves showed it to me.

The United states Supse Court established the Constitutional sight to effective assistance of counsel during

plea negotiations, i.e prejudice by counsels deficient performance in advising petitioner to reject plea offer and go to trial.

Thus an evidentiary hearing is required to determine what Petitioner Knew and what information was conveyed to Petitioner. Petitioner request that your honorable court shall ORDER the state to proffer a proper plea or reinstate the previously offered plea agreement.

GROUND SEVEN: Trial Counsel Was Constitutionally Deficient for failing To fully Investigate Petitioner(s) Case

(a) Supporting FACTS: Petitioner(s) Trial Counsel was aware that Petitioner had advised him of the witness(s) from the other vehicle that had asserted the driver of the Toyota Mr. Gabriel Acuña pulled out in front of Petitioner(s) vehicle after being parked on the side of the roadway. This contradicted the testimony at trial that the Toyota pulled out from a side street and that Petitioner failed to see the Toyota as it entered the highway/roadway. It was clear that the individuals in the Toyota had been drinking and may have attempted

(Continue Page 36)

(b) Did you present the issue raised in ground seven to the Arizona Court of Appeals?

(c) If yes, did you present the issue in a:

Direct Appeal	☐
first Petition	☑
Second Petition	☐
Third Petition	☐

(d) If you did not present the issue in ground seven to the Arizona Court of Appeals, explain why:

(e) Did you present the issue raised in ground seven to the Arizona Supreme Court? Yes ☐ No ☑

to dispose of bees cans into the desert prior to the arrival of emergency personnel including the police. No investigation was ever done on this issue. Trial Counsel never made an assessment of the state witnesses.

supporting facts:

- It is interesting that Officer Dion and Officer Heflin asserted in their report that Gabriel Acuña was evasive and rather vague about bees or anything surrounding bees cans or where he was coming from.

- In Trial; the Passenger Charles F. Lopez admitted being parked on the side of the road. It's inconceivable to know these points were never explored by Trial Counsel or his investigator.

- Tire marks on road, they coincide with Toyota accelerating from side of road? Officer T. Moebes, if petitioner remembers correctly asserted tire marks after part of impact were not evasive/maneuver and likely not related to accident. Also characterized the mark as a drag or deflated tire. The Toyota had two left tires that were deflated, front and back. These facts and the passenger testimony surely would substantiate petitioner's story/version and the very least the huge need for accident Reconstruction?

Trial Counsel failed to investigate or get his investigator to exploit Gabriel Acuña(s) previous evasive answer to why he wish to withdraw the assertion which was pulled out of Old Ajo Way and was abruptly and violently ceased.

Trial Counsel failed To Thoroughly Investigate Petitioner(s) Case.

I hereby certify that an original plus one copy of the foregoing document was mailed this May 4, 2015, to:

U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

Jesus M. Moran
Jesus M. Moran

Jesus M. Moran
Petitioner, Pro Se

B. Ewing exp 9-27-16

B Ewing
Notary Public
Navajo County, Arizona
My Comm. Expires
September 27, 2016