APPENDIX A

Supreme Court of Arizona

November 3, 2021

RE: STATE OF ARIZONA v STEVEN CARROLL DEMOCKER

Arizona Supreme Court No. CR-21-0113-PR

Court of Appeals, Division One No. 1 CA-CR 20-0456 PRPC Yavapai County Superior Court No. P1300CR201001325

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 2, 2021, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Chief Justice Brutinel and Justice Lopez did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

APPENDIX B

IN THE
ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA,

Respondent,

v.

STEVEN CARROLL DEMOCKER,

Petitioner.

No. 1 CA-CR 20-0456 PRPC
FILED 3-16-2021

Petition for Review from the
Superior Court in Yavapai County
No. P1300CR201001325
The Honorable Gary E. Donahoe, Judge
Retired

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Yavapai County Attorney's Office Phoenix By Steven A. Young *For Respondent*	Phillips Black, Inc. Oakland, CA By John R. Mills *For Petitioner*

STATE v. DEMOCKER
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani, Judge Samuel A. Thumma, and Judge Brian Y. Furuya delivered the following decision.

PER CURIAM:

¶1 Petitioner Steven Carroll DeMocker seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is DeMocker's first petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). It is the petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find the petitioner has not established an abuse of discretion.

¶4 We grant review but deny relief.

AMY M. WOOD • Clerk of the Court

APPENDIX C

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

HONORABLE GARY E. DONAHOE

VISITING JUDGE

STATE OF ARIZONA,

Plaintiff,

-vs-

STEVEN DEMOCKER,

Defendant.

Case No. P1300CR201001325

July 22, 2020

RULING ON PETITION FOR POST-CONVICTION RELIEF

Under Advisement Ruling

Pending before the Court is Mr. DeMocker's Petition for Post-Conviction Relief ("PCR"). On June 19, 2020, the Court held a telephonic conference with the parties intending to hear arguments on the State's motion to dismiss the PCR and Petitioner's motion to hold an evidentiary hearing. Because this Court was not clear in what would be argued, the Court agreed to set a non-evidentiary hearing on July 17, 2020 to permit counsel to argue whether any of Petitioner's claims are colorable. The Court agreed to provide counsel with a preliminary ruling in advance of the hearing in order to focus the parties' arguments. That preliminary ruling was provided to the parties on June 26, 2020 to give

counsel sufficient time to review it and prepare for the oral argument. The Court requested that any supplemental citations that either party wished the Court to review be filed by July 15, 2020. Petitioner filed a "Notice of Supplemental Citations" on that date with four additional citations.

Following the non-evidentiary hearing on July 17, 2020, the Court took the matter under advisement. The Court has considered the arguments of counsel, the supplemental citations, the pleadings and hundreds of pages of exhibits to those pleadings. For the reasons stated below, the Court finds and concludes that none of Petitioner's claims are colorable.

Background and Introduction

The abundant circumstantial evidence supporting Petitioner's convictions are summarized in the Court of Appeals' Memorandum

Decision, No. 1 CA-CR 14-0137, ¶s 2–15 and 63–64. The procedural history is summarized in ¶s 16–23 of that decision. The State's Response to Defendant's Petition for Post- Conviction Relief, pp. 1–12, details the evidence on which the jury concluded beyond a reasonable doubt that Petitioner was guilty of the crimes for which he was convicted and sentenced. In addition to those narratives, this Court is of the opinion that it is important to set out this Court's observations about the case and the conduct of Petitioner's defense attorneys.

Petitioner's primary claim is that his trial attorneys, Mr. Craig Williams and Mr. Gregory Parzych, were prejudicially ineffective in representing him. As the trial judge, this Court was in a unique, and perhaps, the best position to observe Mr. Williams and Mr. Parzych and

evaluate their performance over the course of many months during a variety of court proceedings, including a lengthy trial.

The Court's knowledge of Petitioner's first case and trial comes from information learned from reading numerous motions and other pleadings filed in this case and the first case, evidence presented at a number of pretrial hearings and later, from reading the Court of Appeals' decision.

Petitioner's first trial went off the tracks almost immediately. During the defense opening statement, one of Petitioner's attorneys, John Sears, told the jury that the victim's life insurance had been paid to the victim's trust. State's counsel was shocked and surprised by that revelation because the insurance carrier had, on a number of occasions, assured the State that it would not pay out the

insurance money until Petitioner's guilt or innocence was determined. Mr. Sears' revelation about the life insurance being paid out led Sheila Polk, the Yavapai County Attorney, to file a complaint with the State Bar against Petitioner's attorneys alleging criminal conduct. That bar complaint, and a related motion to determine counsel, created a host of issues that had to be dealt with by the trial judge. See "Ruling On Defendant's Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office," ¶s 2–6.

Later in the trial, defense counsel offered an email from an unknown writer who claimed that people other than Petitioner committed the murder. The email contained information that could only have been known by a person involved in the murder. This email became known as the

"anonymous email." The story in the email was similar to the story Petitioner claimed he was told by an unknown person who spoke to Petitioner through the ventilation system in the Yavapai County jail. That story became known as the "voice in the vent" story. Defense counsel later learned that Petitioner had fabricated the email and that Petitioner had his youngest daughter, Charlotte, send the email written by Petitioner from an Internet café in Phoenix. It was reasonable to conclude that Petitioner also fabricated the "voice in the vent" story. Petitioner's attorneys moved to withdraw because they had offered false evidence. The trial judge denied the motion, but the Arizona Supreme Court eventually granted the motion, following which a mistrial was declared because new defense counsel could not be ready to proceed with the trial.

A grand jury returned two additional indictments against Petitioner, which, in addition to the charges in the first case, included charges regarding the looting of the victim's trust, using Charlotte to commit a crime and fabricating evidence (the "anonymous email") that was offered during Petitioner's first trial. See "Ruling On Defendant's Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office," ¶s 10, 11. Charlotte was granted immunity and testified at the second trial about Petitioner's role in fabricating the "anonymous email."

The life insurance proceeds of $750,000.00 were paid to the victim's trust after Petitioner signed a waiver stating that he had relinquished all interest in the money, which, it turns out, was not true. Petitioner's eldest daughter, Katie, became

the trustee of her mother's trust. Petitioner then persuaded Katie to give her 50% share of the insurance money to Petitioner's parents who, in turn, paid the money to Petitioner's attorneys. In violation of the express terms of the trust, Charlotte's share of the trust (the other half of the insurance money) was distributed to her and, like her sister, Charlotte gave the money to Petitioner's parents who then paid the money to Petitioner's attorneys. Katie had wanted to keep some of the money in the trust to pay for Charlotte's college education, but Petitioner convinced her that it was more important to use all the money for his defense. Thus, Petitioner for his benefit, with the assistance of lawyers, looted the trust established for his daughters. When Petitioner's private defense attorneys were allowed to withdraw, Petitioner was declared indigent because all of the insurance

proceeds had been spent on Petitioner's defense.

Craig Williams and Greg Parzych were appointed to represent Petitioner in the second case. The third member of the defense team was Rich Robertson, a private investigator. Two attorneys were appointed to represent Petitioner even though the death penalty had been withdrawn. This Court assumes that two attorneys were deemed necessary because of the massive volume of documents involved in the case.

At the time of their appointments to represent Petitioner, both Mr. Parzych and Mr. Williams were experienced criminal defense attorneys. Since his admission to practice law in Arizona in 1993, Mr. Williams has been a criminal defense attorney. See Williams depo., p. 10. He served as a public defender in Bisbee for five years, then served as a public defender in Yavapai County

for three and one-half years after which he served as the La Paz County Public Defender from 2001 to 2005. **Id**. After that, Mr. Williams went into private practice with his primary focus on criminal defense. **Id**., p. 11. He has had a defense contract with Yavapai County since 2005. **Id**. He has represented "a bunch" of clients in murder cases in Bisbee (Cochise County), La Paz County and Yavapai County, including at least one capital case. **Id**., p. 13.

Mr. Parzych served as second chair and Mr. Williams as first chair on Petitioner's defense team. **See** Parzych depo., p. 10. Mr. Parzych was admitted to practice in Arizona in 1992 and worked as a public defender in Maricopa County until 2001 when he went into private practice focusing on criminal defense. **Id**., pp. 6–7. He maintains a part-time position as a public defender in Maricopa

County. Id., p. 7. He is death penalty qualified and has been involved in eight capital cases since 1995 or 1996. Id., p. 8. He has represented defendants charged with murder in fifty or more cases, thirty of which went to trial. Id., p. 9. He is a member of two professional organizations. Id.

Mr. Williams and Mr. Parzych had a significant advantage going into the second trial—they could gather from the transcripts of the first trial the substance of the State's case about the murder. In other words, Mr. Williams and Mr. Parzych got an in-depth preview of the State's case against Petitioner thereby allowing them to prepare accordingly. However, the defense faced significant challenges. See Ex. 3, State's Response.

This Court held a status conference on December 22, 2011, after being assigned the case on December 6, 2011. On December 8, 2011, this Court

issued a minute entry listing the fourteen motions that were pending. Petitioner and all counsel were present at that first status conference. The purposes of the conference were (1) to determine how to proceed with the pending motions and (2) for the Court to get some idea about the issues in the case. During the conference, the Court learned that the defense was multi-faceted. First, cast doubt on the State's case by emphasizing the lack of any forensic evidence to tie Petitioner to the crime scene. Second, cast doubt on the State's case by questioning the Sheriff's investigation that almost immediately focused on Petitioner to the exclusion of everyone else, including James "Jim" Knapp, who lived in the victim's guesthouse, and arguing that evidence was gathered and viewed in such a way to confirm that initial bias. Couple that with the third prong, which was to create reasonable doubt by

offering up other persons as the killer, primarily Jim Knapp. Fourth, show that the Sheriff botched the investigation by failing to secure the crime scene, by collecting and analyzing evidence in a slapdash manner and mishandling evidence that was collected. At that status conference, the Court opined that a third-party defense was hard to pull off.

However, the Court also thought to itself that a third-party defense was not unreasonable in view of Petitioner's contention that he had absolutely no involvement in the murder of his ex-wife.

The Court eventually held evidentiary hearings on two of the pending motions. The first was Petitioner's motion to preclude evidence gathered during what he claimed was a free-talk with law enforcement about the "anonymous

email" and the "voice in the vent" story. Petitioner claimed that because his statements were made during a free-talk, the statements could not be used against him. The hearing was held on February 8, 2012. This Court heard testimony from three witnesses, including John Sears, one of Petitioner's prior defense attorneys, and Joseph Butner, the prosecutor who had handled the first trial. After the hearing, this Court ruled on February 10, 2012, that the interview with law enforcement was not a free-talk, but a voluntary investigative interview about the "anonymous email" and the "voice in the vent" story, the contents of which could be used at trial. Although Petitioner knew that he had written the email and enlisted Charlotte to send it and likely fabricated the "voice in the vent" story, Petitioner put on quite a performance during the interview, even breaking down in tears at one point

because he was so delighted that the Sheriff might investigate someone other than himself as the victim's murderer.

Another motion pending when this Court was appointed to preside over this case was Petitioner's "Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office." Petitioner claimed that attorneys, paralegals and other staff with the Yavapai County Attorney's Office (the "YCAO") viewed numerous sealed documents disclosing defense strategies and, therefore, the charges should be dismissed, or, if not dismissed, the YCAO should be disqualified from prosecuting the case. This Court initially denied the motion without holding an evidentiary hearing. Petitioner's attorneys challenged that decision by filing a special action. On April 12,

2012, the Court of Appeals reversed and remanded the matter with directions for this Court to hold a hearing. An eleven-day hearing ensued, beginning on December 10, 2012 and ending on February 19, 2013. This Court provided counsel with a draft ruling on March 22, 2103 before counsel argued the matter on April 4, 2013. Following oral argument, this Court issued a 57-page ruling on April 10, 2013. Again, Petitioner challenged the ruling. However, this time the Court of Appeals affirmed this Court's ruling denying Petitioner's motion.

In addition to those two evidentiary hearings, this Court conducted numerous other hearings, both telephonic and in person, on a variety of motions and issues that arose during the pretrial phase of the case. These hearings gave this Court an excellent opportunity to observe and

evaluate the competency of Mr. Williams and Mr. Parzych. At no time did this Court have any concerns about their ability to adequately represent Petitioner. In fact, the Court was impressed with counsel's tenacity, preparedness and thoroughness. Going into the trial, this Court believed that Petitioner was represented by competent attorneys who had devised a reasonable defense strategy that would challenge the State's case on multiple fronts.

This Court conducted the final pretrial conference on July 11, 2013 and dealt with numerous motions and trial issues. Jury selection began on July 16, 2013. Jury selection went smoothly with sixteen people being empaneled. The Court questioned the prospective jurors about the extensive pretrial publicity and determined that the publicity would not prevent the Court from selecting a fair and impartial jury; accordingly, the

Court denied Petitioner's motion for change of venue. Petitioner's attorneys' performance during jury selection did not give this Court any concern. One juror did not show up to court on the day following empanelment claiming that she had suffered a panic attack related to the stress of being chosen as a juror. She was excused and the trial proceeded with a 15-person jury. Unlike the first trial of Petitioner, this Court did not have to deal with any jury issues.[1] The jurors were prompt in arriving to court and, based on this Court's observations throughout the trial, abided by the Court's admonitions and were very attentive to the witnesses and counsel. Final arguments and jury instructions were given to the jury on October 1,

[1] The minute entries the Court reviewed from the first trial indicate that there were a number of issues involving the jury that required the judge to conduct individual interviews of the jurors.

2013. The Court was notified that the jury had reached their verdicts around 4:30 p.m. on October 3, 2103. The Court delayed the return of the verdicts until the next day for two reasons:

(1) the Court was told by the Sheriff's personnel that it would take more than one hour to get Petitioner dressed out and transported from the jail to the courtroom (this Court did not want to make court staff work overtime) and (2) the Court wanted the jurors to have a night to "sleep on" their decisions to make sure that none of them was going to change their mind when each was polled about the verdicts.

On October 4, 2013, the 40th trial day, the jury returned its verdicts finding Petitioner guilty of first-degree murder and all other counts that went to the jury for decision. This Court sentenced

Petitioner on January 14, 2014.[2] The Court of Appeals affirmed the verdicts and sentences in a memorandum decision dated October 11, 2016.

During the trial, defense counsel never missed the opportunity to tell the jury that the police did not find Petitioner's DNA, hair, blood or fingerprints at the scene of the murder. State's counsel never objected to those statements. There was never any claim that Petitioner's bicycle and an attached pump were found at the murder scene. Defense counsel showed that the police found no blood in Petitioner's car, found none on his clothing (although Petitioner took a shower and washed his clothes soon after the murder) and found none in

[2] Sentencing was delayed by six weeks or more because Petitioner claimed that the Sheriff had violated his right to counsel. The hearing on that issue ended abruptly when Petitioner invoked his Fifth Amendment right against self-incrimination and refused to answer questions going to his credibility.

the washer or drain. Defense counsel presented evidence about Dr. Philip Keen's odd handling of the body and sloppy autopsy techniques as well as evidence contradicting Dr. Keen's opinion that a golf club was the murder weapon. The defense called expert witnesses in an effort to show that Petitioner's finances were not as dire as the State portrayed.

Defense counsel excoriated the Sheriff's investigative team for failing to investigate other persons. Defense counsel showed that the Sheriff focused on Petitioner the night of the murder after speaking with Jim Knapp and Petitioner at the scene and never changed course, particularly after Dr. Philip Keen, the Yavapai County Medical Examiner, told detectives at the autopsy that the murder weapon was likely a golf club. In effect, this was evidence of implied and confirmation bias and

was reinforced by Mr. Williams' questions to witnesses and arguments.

Defense counsel showed that the Sheriff was careless in sealing off the crime scene, including showing a picture of a deputy in the hallway outside the room where the murder took place with the victim's small dog trailing behind him. Petitioner presented evidence that the investigators did not properly take photos of the shoe prints and bicycle tire tracks, evidence highly relied on by the State.

Defense counsel attempted to create reasonable doubt by presenting evidence that Jim Knapp was probably the killer. Defense counsel presented evidence that Mr. Knapp had a motive to kill (the victim's refusal to invest in a business venture that he proposed and that the victim had rejected Mr. Knapp's romantic overtures),

opportunity (he lived in the victim's guest house), and that he was, according to the defense, an inveterate liar (he falsely claimed to have life-threatening cancer) with mental health issues. Defense counsel also offered up others as the possible killer, such as Barb O'Non, a colleague and former mistress of Petitioner, who benefitted financially from Petitioner's arrest.

During the trial, this Court never felt that Mr. Parzych or Mr. Williams' performance was ineffective. Yes, this Court did admonish counsel for needless repetition, but the Court never thought that Petitioner's attorneys were not adequately representing him. The Court thought that defense counsel presented a compelling defense which challenged all aspects of the State's case. The jury did what a jury is supposed to do—it sorted through a mass of conflicting facts,

assessed the credibility of the witnesses, both lay and expert, and found against Petitioner. While the jury decided against Petitioner, that does not mean that counsels' performance was constitutionally ineffective, otherwise every defendant convicted at trial would be entitled to Rule 32 relief.

PCR Timeline

Petitioner's Petition for Post-Conviction Relief was filed on August 25, 2017. Ms. Alex Harris entered her appearance as Petitioner's PCR counsel on October 24, 2017, after being selected by the Yavapai County Public Defender to handle the case. John R. Mills entered his appearance as *Knapp* counsel for Petitioner on November 29, 2017. Over the next eleven months, the relationships between Petitioner and Ms. Harris

and Ms. Harris and Mr. Mills deteriorated to the point where, on October 19, 2018, this Court granted Ms. Harris' motion to withdraw as counsel for Petitioner. On that same date, this Court appointed Mr. Mills as PCR counsel with the consent of the Yavapai County Public Defender subject to the Yavapai County Board of Supervisors approving a defense contract for Mr. Mills; that contract was eventually approved. On September 14, 2018, this Court granted Mr. Mills' motion to extend the due date for the PCR to October 1, 2019. The Court set April 17, 2020 as the due date for the State's response and May 29, 2020 as the due date for Petitioner's reply.

Rule 32

Rule 32.1, Arizona Rules of Criminal Procedure, sets forth the grounds for post-

conviction relief.[3]

> **Grounds for Relief.** Grounds for relief are:
>
> **(a)** the Petitioner's conviction was obtained or the sentence was imposed in violation of the United States or Arizona constitutions;
>
> **(b)** the court did not have jurisdiction to render a judgment or to impose a sentence on the Petitioner;
>
> **(c)** the sentence imposed exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
>
> **(d)** the Petitioner continues to be in custody after his or her sentence expired;
>
> **(e)** newly discovered material facts probably exist and those facts probably would have changed the

[3] "Effective January 1, 2020, our supreme court amended the post-conviction relief rules. *See* State v. Botello-Rangel, 248 Ariz. 429, 430, n.1, 461 P.3d 449, 450 n.1 (App. 2020). The amended rules apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice.' Id. Because there were no substantive changes to the respective rules related to this decision," this Court has applied the current versions of Rule 32.1 (a) and (e). *State v. Macias*, _____P.3d___, 2020 WL 345667, footnote 1 (App. 2020)

verdict or sentence.

Newly discovered material facts exist if:

(1) the facts were discovered after the trial or sentencing;

(2) the Petitioner exercised due diligence in discovering these facts; and

(3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of critical significance such that the evidence probably would have changed the verdict or sentence.

(f) the failure to file a notice of post-conviction relief of-right or a notice of appeal within the required time was not the Petitioner's fault;

(g) there has been a significant change in the law that, if applied to the Petitioner's case, would probably overturn the Petitioner's conviction or sentence; or

(h) the Petitioner demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the Petitioner guilty beyond a

> reasonable doubt, or that the death penalty would not have been imposed.

Petitioner seeks relief under paragraphs (a) and (e). Petitioner claims that his attorneys were ineffective and that the natural life sentence imposed is unconstitutional. Petitioner also recasts all of his ineffective assistance of counsel claims as "newly discovered evidence" by asserting that the facts he has provided to support each claim are "newly discovered."

Evidentiary Hearing

In State v. Gutierrez, 229 Ariz. 573, 579, 278 P.3d 1276, 1282 (2012), the Arizona Supreme Court set forth when an evidentiary hearing is required in a Rule 32 proceeding. It wrote:

> ¶ 32 Significantly, § 13-4236(C) requires "a hearing ... on those claims that present a material issue of fact *or law* " (emphasis added),

but § 13-4238(A) and Rule 32.8(a) provide for an evidentiary hearing only "to determine issues of material fact." *See also* Rule 32.6 cmt. ("[I]f the court finds any colorable claim, it is required ... to make a full *factual* determination before deciding it on its merits." (emphasis added)). Thus, when there are no material facts in dispute and the only issue is the legal consequence of undisputed material facts, the superior court need not hold an evidentiary hearing. [Ftnt. 2 omitted.] *See State v. Borbon,* 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) ("Rule 32 does not require the trial court to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims that people exist who would give favorable testimony."). But, under § 13-4240(K), a court faced with favorable DNA test results, but no material issues of fact, must nonetheless hold a non-evidentiary hearing to permit the parties to argue why the petitioner should or should not be entitled to relief as a matter of law. The status conference held here plainly was not such a hearing.

The Court is of the opinion that there are no

material issues of fact that require an evidentiary hearing. There is no dispute that defense counsel did not file motions to preclude Dr. Keen, Mr. Davis and Mr. Priest. There is no dispute that Ms. Spira and an expert on cognitive bias were not called by the defense to testify. No one disputes that the defense pursued a third-party culpability defense, although there is one disputed issue of whether that defense was the only theme of the defense. (The Court has resolved that issue in addressing Petitioner's IAC claim # 3. See pp. 35 – 36 of this ruling.) Lastly, the claim about Kortney Snider's testimony has no basis in fact based on this Court's observation of the entire trial.

The pleadings are supported by hundreds of pages of exhibits, including the depositions of Petitioner's defense attorneys. The parties have not disagreed on any of the facts, only the legal

conclusions to be drawn from those facts. Given all the information provided by the parties, coupled with this Court's first- hand knowledge of the trial, the Court does not believe that any further investigation is needed to resolve Petitioner's claims. In other words, the Court is of the opinion that ample evidence has been submitted for the Court to determine whether any of Petitioner's claims is colorable.

During the hearing on June 19, 2020, Petitioner's attorney stated that at an evidentiary hearing, Petitioner would present witnesses and treatises about the standard of practice for criminal lawyers and scientific principles. Counsel conceded that those witnesses and evidence had not been attached to the PCR or Petitioner's reply and had not been disclosed to the State. Counsel stated that such evidence would be developed for presentation

should the Court set an evidentiary hearing. In the Court's opinion, those are the types of "mere generalizations and unsubstantiated claims that people exist who would give favorable testimony," "mere speculation" and "mere conclusory assertions" that do not require this Court to hold an evidentiary hearing. *Gutierrez*, *supra*, at 32; *State v. Donald*, 198 Ariz. 406, ¶ 21 (App. 2000) ("To mandate an evidentiary hearing, the defendant's challenge must consist of more than conclusory assertions and be supported by more than regret."); **also see** *State v. Rosario*, 195 Ariz. 264, 268, 987 P.2d 226, 230 (Ct. App. 1999) ("The burden is on the petitioner and the showing must be that of a provable reality, not mere speculation. *State v. McDaniel,* 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983).")

As noted above, Petitioner makes a number

of claims under Rule 32.1(e), the "newly discovered evidence" provision. In *State v. Amaral*, 239 Ariz. 217, 219–20, 368 P.3d 925, 927–28 (2016), the Arizona Supreme Court addressed when an evidentiary hearing is required on claims of "newly discovered evidence." It wrote:

> ¶ 10 As a preliminary matter, we clarify the standard for entitlement to a Rule 32.8(a) evidentiary hearing on claims made under Rule 32.1(e). A defendant is entitled to relief if "newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e). Some of our case law, however, has suggested that a defendant presents a colorable claim, and thus is entitled to an evidentiary hearing, if the alleged facts "might" have changed the outcome. For example, with regard to a claim of ineffective assistance of counsel, we have stated that "[a] defendant is entitled to an evidentiary hearing when he presents a colorable claim [—] that is[,] a claim which, if defendant's allegations are true, *might* have

changed the outcome." *State v. Watton,* 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) (citing *State v. Schrock,* 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986)) (emphasis added). The use of "might" originated in *Schrock* as a misstatement of the standard described in a previous case. *Schrock,* 149 Ariz. at 441, 719 P.2d at 1057 (citing *State v. Jeffers,* 135 Ariz. 404, 427, 661 P.2d 1105, 1128 (1983) (stating a colorable claim is one that, if the defendant's allegations are true, *would* change the verdict)).

¶ 11 A standard based on what "might" have changed the sentence or verdict is inconsistent with Rule 32 and most of the case law. *E.g., Gutierrez,* 229 Ariz. at 579 ¶ 31, 278 P.3d at 1282; *State v. Krum,* 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995); *Jeffers,* 135 Ariz. at 427, 661 P.2d at 1128. The relevant inquiry for determining whether the petitioner is entitled to an evidentiary hearing is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence. If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to

summary dismissal. Ariz. R. Crim. P. 32.6(c).

¶ 12 This comports with the purpose of an evidentiary hearing in the post-conviction context. A Rule 32 evidentiary hearing allows "the court to receive evidence, make factual determinations, and resolve material issues of fact." *Gutierrez,* 229 Ariz. at 579 ¶ 31, 278 P.3d at 1282. Such an evidentiary hearing is useful only to the extent relief would be available under Rule 32—that is, the defendant presents a colorable claim. If the alleged facts, assumed to be true, would not provide grounds for relief, the court need not conduct an evidentiary hearing because those facts would not have changed the outcome. *See Jeffers,* 135 Ariz. at 427, 661 P.2d at 1128; *see also Gutierrez,* 229 Ariz. at 579 ¶ 32, 278 P.3d at 1282; Ariz. R.Crim. P. 32.6(c) (recognizing summary dismissal might be appropriate when "no remaining claim presents a material issue of fact or law"). Likewise, "when there are no material facts in dispute and the only issue is the legal consequence of undisputed material facts, the superior court need not hold an evidentiary hearing." *Gutierrez,* 229 Ariz. at 579 ¶ 32, 278

> P.3d at 1282. It may simply determine whether the undisputed facts probably would have changed the verdict or sentence. *See Jeffers,* 135 Ariz. at 427, 661 P.2d at 1128; *State v. Richmond,* 114 Ariz. 186, 194, 560 P.2d 41, 49 (1976) (no evidentiary hearing required on defendant's claim of newly discovered evidence when his allegations, taken as true, would not have changed the verdict), *abrogated on other grounds by State v. Salazar,* 173 Ariz. 399, 416, 844 P.2d 566, 583 (1992).

As detailed below, the Court is of the opinion that none of the evidence supporting Petitioner's IAC claims is "newly discovered" nor would any of the evidence have probably changed the outcome of the trial. Therefore, an evidentiary hearing is not required.

Unconstitutional Sentence

Petitioner claims that his natural life sentence is unconstitutional. His claim reads as follows:

Mr. DeMocker is serving a mandatory sentence of life without the possibility of parole. That is, once convicted of first- degree murder, this Court had no option but to condemn him to a sentence without the option of parole. A.R.S. § 13-706(A).

This mandatory sentence violates the state and federal prohibitions on cruel and unusual punishment because it creates an unacceptable risk that the punishment will be imposed disproportionately. *See Gregg v. Georgia*, 428 U.S. 153, 188-96, 203 (1976). That is, where a court lacks discretion to consider mitigating evidence and to tailor a punishment appropriately, there is an unconstitutional risk that the punishment in question will be disproportionate to the crime and defendant in question. *Miller v. Alabama,* 567 U.S. 460, 474 (2012). [Ftnt omiited]

* * *

Both because the sentence was mandatory and because the sentence is disproportionate for Mr. DeMocker in particular, it must be

set aside.

See PCR, pp. 45 – 46.

In the first case cited by Petitioner, *Gregg v. Georgia, supra*, the U.S. Supreme Court held that imposing the death penalty for murder did not violate the Eighth Amendment and that Georgia's jury sentencing procedure was constitutional. In reaching those holdings, the court wrote:

> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

> *Gregg v. Georgia*, 428 U.S. 153, 175, 96 S. Ct. 2909, 2926, 49 L. Ed. 2d 859 (1976)

In the second case cited by Petitioner, *Miller v. Alabama, supra*, the court "held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." The court wrote:

> The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper,* 543 U.S., at 560, 125 S.Ct. 1183.
>
> That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. *Ibid.* (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). As we noted the last time we considered life-without-parole sentences imposed on juveniles, "[t]he concept of proportionality is

> central to the Eighth Amendment." *Graham,* 560 U.S., at 59, 130 S.Ct., at 2021. And we view that concept less through a historical prism than according to " 'the evolving standards of decency that mark the progress of a maturing society.' " *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)).
>
> 567 U.S. 460, 469-70, 132 S.Ct. 2455, 2463

The sentence of "life with the possibility of parole" after a fixed term of years was changed as of January 1, 1994 to "life with the possibility of release" after a fixed term of years. Petitioner contends that that change rendered Arizona's sentencing scheme under A.R.S. § 13–703.01(A) unconstitutional in that the change resulted in one sentence – natural life because of the low possibility of being granted release and because the change deprived the sentencing judge of the

ability to impose a sentence proportional to the crime.

In Petitioner's "Notice of Supplemental Citations," Petitioner cites three additional cases to support his claim that the natural life sentence is unconstitutional. Petitioner cites *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994), *Lynch v. Arizona*, 136 S.Ct. 1818 (2016) and *State v. Benson, supra*. Those three cases involved defendants who were sentenced to death. On appeal, they each claimed they were entitled to a jury instruction that they were ineligible for parole in order to counter the prosecution's argument that they presented a future danger to society if released from prison. The *Simmons* and *Lynch* courts agreed holding that "[w]here a defendant's future dangerousness is at issue, and state law prohibits his release on parole, due process requires that the

sentencing jury be informed that the defendant is parole ineligible. An individual cannot be executed on the basis of information which he had no opportunity to deny or explain." *Simmons, supra*, at p. 154. In *Lynch*, the Supreme Court held that a "parole ineligible" jury instruction was required even though Arizona's sentencing statute allowed for a sentence of life with the possibility of release after twenty-five years writing that:

> But under state law, the only kind of release for which Lynch would have been eligible – as the State does not contest – is executive clemency. [Citations omitted.] And *Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility.

Lynch, supra, at p. 1819.

However, the Arizona Supreme Court in *Benson* did not agree that such an instruction was

required where the statute provided for sentences of death, natural life or life with the possibility of release after twenty-five years. The court wrote:

> ¶ 54 Benson contends that the trial court erred by denying his motion because § 13–751(A) creates a "right" to parole eligibility, which he can waive as long as his waiver is knowing, intelligent, and voluntary. We have previously rejected this argument in *Dann II,* 220 Ariz. at 372–73 ¶¶ 122–24, 207 P.3d at 625–26, and do so again here. Section 13–751(A) does not confer a "right" to parole eligibility on defendants. Indeed, the statute's plain language leaves the eligibility decision squarely within the trial court's discretion. Although the legislature could have authorized a defendant to waive parole eligibility, it did not do so.
>
> **[31]** ¶ 55 Benson also argues that the trial court deprived him of his rights to "individualized consideration" and to present mitigating evidence that he did not pose a future danger if confined for life in prison. He contends that the court's instruction on parole eligibility invited the jury to

speculate whether he would be released eventually if given a life sentence, thereby undermining mitigation evidence that he posed no threat while confined.

¶ 56 Benson mistakenly relies on *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), which held that

"where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156, 114 S.Ct. 2187. As explained, Arizona law does not make Benson ineligible for parole. A.R.S. § 13–751(A). Consequently, the trial court did not err by refusing to instruct the jury in accordance with *Simmons*. *See State v. Hardy,* 230 Ariz. 281, 293 ¶ 58, 283 P.3d 12, 24 (2012), *cert. denied,* —— U.S. —— –, 133 S.Ct. 935, 184 L.Ed.2d 732 (2013) ("*Simmons* instructions are not required when '[n]o state law ... prohibit[s the defendant's] release on parole.' " (alterations in original)); *Cruz,* 218 Ariz. at 160 ¶ 42, 181 P.3d at 207 (holding defendant not entitled to *Simmons* instruction because "[n]o state law would have prohibited Cruz's

> release on parole after serving twenty-five years, had he been given a life sentence."); *see also State v. Hargrave,* 225 Ariz. 1, 14–15 ¶ 53, 234 P.3d 569, 582– 83 (2010) (noting a *Simmons* instruction is not required even when a defendant is not likely to be released if given a life sentence).
>
> *Benson, supra*, at 232 Ariz. 465 – 466, 307 P.3d 32 – 33.

The *Benson* court cited with approval *State v. Hargrave*, 225 Ariz. 1, 14– 15, 234 P.3d 569, 582–83 (2010) where the court wrote:

> ¶ 53 In contrast, the instructions here correctly reflected the statutory potential for Hargrave's release. *See* A.R.S. § 13–751(A) (providing that a defendant not sentenced to death or natural life may not be released for twenty-five or thirty-five years, depending on the age of the victim). Unlike Simmons, Hargrave was eligible for release after twenty-five years, as the jury instruction correctly stated. *See id.* Hargrave's argument that he is not likely to actually be released does not render the instruction

> legally incorrect. *See State v. Cruz,* 218 Ariz. 149, 160 ¶¶ 41–42, 181 P.3d 196, 207 (2008); *see also State v. Dann,* 220 Ariz. 351, 373 ¶¶ 123–24, 207 P.3d 604, 626 (2009) (upholding similar instructions as properly conveying the jury's sentencing options). The jury instructions correctly stated the law, did not mislead the jurors about Hargrave's possible penalties, or deny Hargrave the benefit of mitigating evidence.

Benson was decided in 2013 and *Lynch* in 2016. This Court doubts that the holdings in *Benson* and *Hargrave* about a capital defendant not being entitled to a "parole ineligibility" jury instruction where the statute provides for the possibility of release after twenty-five years survived the U.S. Supreme Court's decision in *Lynch*. But in *Lynch*, the U.S. Supreme Court did not hold the sentencing statute, A.R.S. § 13-751(A), unconstitutional.

The Court is of the opinion that this is not a colorable claim because the claim is based on an incorrect legal premise that A.R.S. § 13-703 deprived this Court of the discretion to select a sentence that was proportional to the crime after considering mitigating factors individual to Petitioner. Petitioner mistakenly claims that this Court did not have any sentencing option other than natural life. Actually, this Court had two options – natural life or life with the possibility of release after twenty-five years. The murder was committed on July 2, 2008. The Arizona Supreme Court's "Criminal Code Sentencing Provisions" effective between September 19, 2007 and January 1, 2009 set forth the penalties for first-degree murder as follows:

> 1st Degree Murder – Sentence of death or imprisonment for life or natural life, as determined in

> accordance with the procedures provided in A.R.S. §13-703.01. A person who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release, or release from confinement on any basis. If the person is sentenced to life, the person shall not be released on any basis until having served 25 calendar years if the murdered person was 15 or more years of age and 35 calendar years if the murdered person was under 15 years of age, A.R.S. §13-703.

Petitioner was convicted of first-degree murder on October 4, 2013 and sentenced on January 14, 2014. The Arizona Supreme Court "Criminal Code Sentencing Provisions" effective September 13, 2013 set forth the possible punishments for first-degree murder as:

> 1st Degree Murder – Sentence of death or imprisonment for life or natural life, as determined in accordance with the procedures provided in § 13-752. Note, life is only available if the offense is committed by a person under eighteen years of age or the person

> is convicted of felony murder. A person who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release, or release from confinement on any basis. If the person is sentenced to life, the person shall not be released on any basis until having served 25 calendar years if the murdered person was 15 or more years of age and 35 calendar years if the murdered person was under 15 years of age. A.R.S. § 13-751.

Thus, between the date when Petitioner committed the murder and the date of his conviction, the penalty for first-degree murder did change. As of 2012, the only possible sentence for a defendant eighteen years of age or older who was convicted of first-degree murder in a non-capital case was natural life. In other words, the sentence of life with the possibility of release after twenty-five or thirty-five years was eliminated between the date when Petitioner committed the crime and the date of his sentencing. See *State v. Benson*, 232

Ariz. 452, 307 P.3d 19 (2013) footnote 4 ["In 2012, the legislature amended § 13–751 to eliminate a capital defendant's eligibility for a sentence of life imprisonment with the possibility of release. 2012 Ariz. Sess. Laws, ch. 207, § 2 (2d Reg. Sess.)."] However, this Court was obligated to follow the statute in effect at the time the crime was committed. A.R.S. § 1-246 provides:

> When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed.

In *Baker v. Superior Court In & For Cty. of Maricopa*, 190 Ariz. 336, 339, 947 P.2d 910, 913 (Ct. App. 1997) wrote that "[s]ection 1-246 is a clear and unequivocal expression of legislative intent that an offender's punishment is to be determined when he

commits his offense."

The sentencing statute in effect on the date Petitioner murdered the victim was A.R.S. § 13–703.01(A). It provided:

> If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death in accordance with the procedures provided in this section. If the trier of fact determines that a sentence of death is not appropriate, or if the state has not filed a notice of intent to seek the death penalty, and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

No notice of intent to seek the death penalty was filed in this case; therefore, this Court had two sentencing options—natural life or life with the possibility of release after twenty-five years. In fact,

Petitioner may recall that his daughters addressed this Court at the sentencing hearing and implored the Court to impose a sentence of life with the possibility of release after twenty-five years. The Arizona Supreme Court in *State v. Fell*, 210 Ariz. 554, 115 P.3d 594 (2005) held a similar sentencing provision constitutional. For reasons this Court stated on the record at the time of sentencing, this Court exercised the discretion given by the statute and imposed a sentence of natural life. This Court considered the brutality of the murder and the motive as well as the information offered in mitigation, including any residual doubt this Court may have had about Petitioner's guilt, before imposing the natural life sentence. Even if the statute had not been amended to eliminate the sentence of life with the possibility of parole (as opposed to release) after twenty-five years, this

Court would have sentenced Petitioner to natural life because of the factors cited by this Court when the natural life sentence was imposed.

This Court is of the opinion that the argument that a defendant is not likely to actually be released after twenty-five years, does not render the sentencing statute unconstitutional. The potential for release does exist. A.R.S. § 13-703 gave the sentencing judge the discretion to consider mitigation evidence and decide whether it was sufficient enough to impose a sentence less than natural life. By exercising the discretion given to the sentencing judge, the legislature gave the judge the ability to tailor an individual sentence that was not excessive for the crime committed. The *Gregg* court pointed out that the sentencing statute, in this case, A.R.S. § 13-703, is presumed valid and that Petitioner carries a "heavy burden" to

overcome that presumption of validity. This Court is of the opinion that Petitioner has not carried his burden and that the sentence imposed on Petitioner is not unconstitutional under either the Eighth or Fourteenth Amendments. The natural life sentence was not mandatory and it was proportional to the crime committed by Petitioner.

Accordingly, the Court concludes that this claim of Petitioner is not colorable.

Arizona Rule of Evidence 702

In IAC claims # 2 (Peter Davis), # 6 (Dr. Philip Keen) and # 7 (Jonathyn Priest), Petitioner asserts that if defense counsel had filed a motion to exclude each of these expert witnesses, the motions would have been granted. Because this case went to trial in 2013, this Court would have applied the relatively new Arizona Rule of Evidence 702. In 2011, Rule 702 pertaining to the "testimony by

expert witnesses" was amended to conform to the federal rule which followed the standard set out in *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The revised Arizona Rule 702 became effective January 1, 2012. Rule 702 and the comment to the rule read as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied

the principles and methods to the facts of the case.

COMMENT TO 2012 AMENDMENT

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

> A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony. This comment has been derived, in part, from the Committee Notes on Rules--2000 Amendment to Federal Rule of Evidence 702.

Petitioner does not question that each of these expert witnesses had the requisite qualifications to testify in their fields. Petitioner asserts that each expert either applied unreliable principles or they reached their opinions by misapplying reliable principles. The Court will address those contentions as part of its analysis of each of those three IAC claims.

Ineffective Assistance of Counsel ("IAC")

The principle reason for Petitioner's request for a new trial is that his defense attorneys were ineffective. Petitioner claims that his defense attorneys were ineffective for the seven reasons listed below.

> 1. Defense counsel failed to object or otherwise correct the record regarding testimony from Kortney Snider that Petitioner's DNA and blood on his bicycle pump were collected at the scene of the murder.
>
> 2. Defense counsel failed to move to exclude the State's financial expert, Peter Davis.
>
> 3. Defense counsel presented the "James Knapp did it" defense (third-party culpability defense).
>
> 4. Defense counsel failed to present testimony of Laurie Spira about Petitioner's Internet searches.
>
> 5. Defense counsel failed to present expert testimony on the subject of cognitive bias.

> 6. Defense counsel failed to move to exclude Dr. Keen's testimony.
>
> 7. Defense counsel failed to move to exclude the testimony of Jonathyn Priest and/or failed to present evidence challenging Jonathyn Priest's testimony.

The test for evaluating defense counsel's performance has been articulated many times, most recently by the Arizona Supreme Court in *State v. Nunez-Diaz*, 247 Ariz. 1, 444 P.3d 250 (2019):

> The Sixth Amendment guarantees a Petitioner the right to counsel. U.S. Const. amend. VI; *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that "even aliens" are protected by the Fifth and Sixth Amendments). The right to counsel includes the right to effective assistance of counsel. *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To demonstrate that counsel's assistance was so deficient as to require reversal of a conviction, a Petitioner must show both that "counsel's representation fell below

> an objective standard of reasonableness" and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. Even if a Petitioner proves a constitutional violation, however, post-conviction relief will be denied if the state proves "beyond a reasonable doubt that the violation was harmless." Ariz. R. Crim. Proc. 32.8(c). This Court reviews a trial court's ruling on a petition for post-conviction relief for an abuse of discretion. *State v. Miles*, 243 Ariz. 511, 513 ¶ 10 (2018).

Prior to *Nunez-Diaz*, the Arizona Supreme Court addressed a variety of IAC claims in *State v. Pandeli*, 242 Ariz. 175, 394 P.3d 2 (2017). The PCR court upheld the defendant's IAC claims, vacated defendant's sentence and ordered a new sentencing trial. In reversing the PCR court, the Arizona Supreme Court set forth the standard of review and the legal standards a PCR court must apply when

reviewing IAC claims. The Arizona Supreme Court was sharply critical of the PCR court for "second-guessing counsel's strategy decisions" and failing to apply a highly deferential standard of review regarding defense counsel's decisions. The Arizona Supreme Court wrote:

> ¶ 4 Whether Pandeli's lawyers "rendered ineffective assistance is a mixed question of fact and law." *State v. Denz*, 232 Ariz. 441, 444 ¶ 6, 306 P.3d 98, 101 (App. 2013). We review the court's legal conclusions and constitutional issues *de novo*. *Id.*; *see also State v. Newell*, 212 Ariz. 389, 397 ¶ 27, 132 P.3d 833, 841 (2006).
>
> However, we ultimately review a PCR court's ruling on a petition for post-conviction relief for an abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). An abuse of discretion occurs if the PCR court makes an error of law or fails to adequately investigate the facts necessary to support its decision. *State v. Wall*, 212 Ariz. 1, 3 ¶ 12, 126 P.3d 148, 150 (2006); *State v. Douglas*, 87 Ariz. 182, 187, 349 P.2d 622, 625 (1960).

¶ 5 The State contends the PCR court erred in granting relief on Pandeli's IAC claims because it did not properly apply the highly deferential standards for reviewing such claims under the two- pronged test set forth in *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. "Under *Strickland*, we first determine whether counsel's representation 'fell below an objective standard of reasonableness.' " *Hinton v. Alabama*, —— U.S. ——, 134 S.Ct. 1081, 1088, 188 L.Ed.2d 1 (2014) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)). This inquiry focuses on the "practice and expectations of the legal community," and asks, in light of all the circumstances, whether counsel's performance was reasonable under prevailing professional norms. *Id.*

¶ 6 Next, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 1089 (quoting

Strickland, 466 U.S. at 694, 104 S.Ct. 2052). But "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," because then "[v]irtually every act or omission of counsel would meet that test." *Strickland,* 466 U.S. at 693, 104 S.Ct. 2052. Although a defendant must satisfy both prongs of the *Strickland* test, this Court is not required to address both prongs "if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S.Ct. 2052.

¶ 7 Thus, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. 2052 (citation and internal quotation marks omitted). A defendant does so by showing that his counsel's performance fell outside the acceptable "range of competence," and did not meet "an objective standard of reasonableness." *Id.* at 687–88, 104 S.Ct. 2052. In short, reviewing courts must be very cautious in

> deeming trial counsel's assistance ineffective when counsel's challenged acts or omissions might have a reasonable explanation.
>
> ¶ 8 Simply disagreeing with strategy decisions cannot support a determination that representation was inadequate. *Id.* at 689, 104 S.Ct. 2052 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). We proceed to assess each of the PCR court's findings of inadequate assistance in turn.
>
> *State v. Pandeli*, 242 Ariz. 175, 180 – 181, 394 P.3d 2, 7 – 8 (2017)

The Court has read the deposition transcripts of Mr. Williams and Mr. Parzych. From those transcripts, the Court has learned their perspective about the conduct of which Petitioner now complains and the reasons for the strategic decisions made by counsel. The Court has set out in this order the

reasons given by Petitioner's attorneys for the strategic decisions they made.

In addressing each of Petitioner's IAC claims, the Court has attempted to "eliminate the distorting effects of hindsight" and considered the context in which the conduct occurred along with the totality of the evidence presented at the trial.[4]

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[4] In the context of evaluating a defendant's IAC claims, the court in *Mitchell v. State*, 300 Or. App. 504, 516, 454 P.3d 805, noted: *And, in conducting our analysis, we must be aware of the "distorting effect of hindsight," which includes a risk of "confirmation bias," that is, a risk that, "in hindsight, there may be a tendency to view counsel's errors as having had no effect on what may seem to have been an inevitable or 'foreordained outcome.' " Johnson v.*

Premo, 361 Or. 688, 700, 399 P.3d 431 (2017).[7]

Footnote 7: In Johnson, the court explained why, "in the absence of disciplined scrutiny, the distorting lens of hindsight could make a court more likely to view counsel's decisions as inadequate," due to "outcome bias," "but make it less likely to view counsel's errors as having had a tendency to affect the outcome," "due to confirmation bias." 361 Or. at 701, 399 P.3d 431. Similarly, a former chief justice of the

Applying the principles set forth by the United State Supreme Court and Arizona Supreme Court to review an IAC claim, this Court now addresses each of Petitioner's claims.

1. Defense counsel failed to object or otherwise correct the record regarding testimony from Kortney Snider that Petitioner's DNA and blood on his bicycle pump were collected at the scene of the murder.

When asked about this claim, lead attorney Craig Williams testified:

> Q. [As read]: The failure to correct the record and point out that the Defendant's DNA was not

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D.C. Circuit has called it "dangerously seductive" to "conflate the harmlessness inquiry with our own assessment of a defendant's guilt," "for our natural inclination is to view an error as harmless whenever a defendant's conviction appears well justified by the record evidence." Harry T. Edwards, To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?, 70 NYU L. Rev. 1167, 1170 (1995).

> recovered from the scene.
>
> That's referring to the bike pump that had one little drop of blood on it?
>
> A. Yeah. I believe that—they didn't get that drop of blood at the scene of the murder, they got it when they went to his house. That is what I recall.

See Williams, depo., p. 37.

Mr. Williams later testified:

> I like what Courtney Snyder had to say because part of our case was she could not put Steve DeMocker at the scene, nobody could, and so she was just one more piece of the puzzle.
>
> **See. Williams depo.**, p. 83.
>
> He also testified that:
>
> But I don't think the State—my recollection is that I don't believe that the State, either through argument or presentation of testimony, ever said that Steve's blood was at the scene. That's all I have on that.
>
> **See** Williams depo., p. 84
>
> This Court also disagrees with Petitioner's

premise in that there was never any suggestion that the bicycle and pump were collected at the scene of the murder. It was quite clear to this Court and, presumably to the jury, that the bicycle, with the pump attached to it, was seized by the police at Petitioner's home and brought back to the victim's house where it was inspected by Ms. Snider. The State never challenged Petitioner's assertion that no forensic evidence attributable to Petitioner was found at the scene of the murder.

To support this claim, Petitioner has attached three pretrial interviews of Kortney Snider (see PCR Exs. 1, 2, 3) and a brief excerpt of Ms. Snider's trial testimony. See PCR, pp. 5—7. No portions of the pretrial interviews were read to the jury. The one trial excerpt certainly does not support the claim and is taken out of the context of Ms. Snider's entire trial testimony. Petitioner has

not presented any portion of the trial transcript where Ms. Snider or anyone else claimed that the bicycle and pump were located at the victim's house when seized by the investigators.

At no time during the trial did this Court believe that there was a need for defense counsel to clarify where the bike and pump came from. Accordingly, the Court concludes that Petitioner's IAC claim # 1 is not colorable.

2. Defense counsel failed to move to exclude the State's financial expert, Peter Davis.

Craig Williams explained in his deposition his strategy regarding Peter Davis. Mr. Williams testified as follows:

> Q. Let's move on to another point. Failure to preclude or exclude the State's financial expert Peter Davis.
>
> Did it ever occur to you to move to preclude a financial expert,

> namely Peter Davis, prior to trial?
>
> A. My strategy on that was this. I had the boss [Petitioner's boss] and I had Gregg Curry, who I believe Gregg Curry was a very good expert and came across like that he didn't have a horse in the race, that he just gave data and talked about data. And so, I felt that I had two really good witnesses.
>
> And so, to me, why fight Peter Davis when I have better answers? That was my strategy, to put on common sense knowledge that the jury could relate to.

See Williams, depo., p. 39

When asked whether he thought he would have been successful in precluding one of the State's experts, Mr. Williams testified:

> Certainly, in my mind, I did go over whether or not to move to preclude this guy, Peter Davis. But, again, I felt that I had really strong evidence on our side. So let Peter Davis say what is he going to do, do your worst, because I had really good evidence.

> I agree with you. There is no way that he was going to be precluded, that was a waste of time when I had really good evidence. My strategy is forget about wasting my time about some one that is going to plainly testify anyway. We went and met with people. We met with Curry. We met with Steve's boss. That is why I called him, because I felt it was good evidence.
>
> See Williams, depo., p. 40

Mr. Williams added this about his strategy when asked if it would have really done any good to preclude Peter Davis:

> Q. Would you agree that even without Peter Davis testifying, there was ample evidence that the State could point to or argue that the Defendant was in financial distress at the time of Carol's murder?
>
> A. Reviewing the evidence, I believe you are accurate on that, so I wanted to concentrate – my strategy was to concentrate on the good evidence that we had, that

> common sense approach to the jury that they could look at it and go, "Heck, he could have cashed out for this much money," or Curry saying he had this much at his disposal, right?
>
> He went from paying 13,000 to 6,000, so his payments actually went down. I felt that was something the jury could probably relate to. So I don't know that I agree that he was in financial distress.

See Williams depo., p. 41.

> Q. Is it part of your analysis not to move to exclude Peter Davis, that this is a valid expert, so it goes to weight, not admissibility, so it is up to the jury or the trier of fact who you believe?
>
> A. Absolutely.

See Williams, depo., p. 43.

The Court is of the opinion that a motion to preclude Peter Davis would have been denied. Mr. Davis possessed the training and experience to

testify as a forensic accountant. (Mr. Davis' education and experience are summarized in the State's response at page 18.) Mr. Williams felt that he did not have "a basis to move to preclude" Mr. Davis and, even if he did, what "he [Mr. Davis] had to say was so cockeyed, and I had such good evidence on the other side, that that's the strategy I used." See Williams depo., p. 86. The jury was properly instructed that it could accept or reject, in whole or in part, Mr. Davis' opinions. The defense presented Gregg Curry and Petitioner's boss to counter Mr. Davis' opinions.

Petitioner claims that Mr. Davis departed from generally accepted accounting principles based on the opinion of Greg Curry, the defense's forensic accountant, that Mr. Davis had double counted certain of Petitioner's financial obligations. As noted in the Comment to Rule 702,

"[t]he amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise." It was for the jury to decide whose financial analysis was correct. In other words, "it is the province of the jury to determine the weight and credibility of the testimony." See Comment to Rule 702. As also noted in the Comment to Rule 702, "[t]he trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

The Court concludes that the strategy as expressed and implemented by Mr. Williams was reasonable. Accordingly, the Court finds that Petitioner's IAC claim # 2 is not colorable.

3. Defense counsel presented the "James Knapp did it" defense (third- party culpability defense).

Petitioner claims that his attorneys were ineffective because they chose as one prong of the trial strategy to point the finger at Jim Knapp as the potential murderer. This was the "James Knapp did it" defense. Petitioner argues that his defense counsel "forfeited their credibility with the jury" by pursuing the "James Knapp did it" defense as part of the overall defense strategy. Petitioner argues that defense counsel "should have adopted a more constrained approach" regarding Mr. Knapp.

DNA was found under the fingernails of the victim at her autopsy and that DNA became evidence item # 603. The DNA did not belong to Petitioner, but an unknown male. The man from whom the DNA came was not identified prior to the first trial and was referred to by the parties as

coming from Mr. 603. The first defense team planned to use this as evidence that someone other than Petitioner committed the murder. However, before the second trial started, the source of the DNA was identified. It was discovered that the DNA of Mr. 603 came from the person whose autopsy was performed just before the victim's; accordingly, the defense was forced to pivot to point the spotlight at someone other than Mr. 603 as the likely killer. See Parzych depo., p. 12; Williams depo., p. 16. Mr. Parzych thought that evidence about Mr. Knapp "could be one of the links to show that the State couldn't prove beyond a reasonable doubt that Mr. DeMocker was the person who killed Carol Kennedy." See Parzych depo., p. 13.

Mr. Knapp and a man that lived near the victim's house became persons of interest in Mr. William's mind. Mr. Knapp "was a central figure in

the other team's case too." See Williams, depo., p. 56. Mr. Knapp lived in the victim's guesthouse, pointed the Sheriff at Petitioner the night of the murder and, as it turns out, was a bit of an odd duck. Mr. Williams located a witness in Montana, Julie Corwin, who "was doggone clear" when she testified at the trial that Knapp "was unstable." See Williams depo., 57. Petitioner was aware that the defense would point to Mr. Knapp as the killer and did not object to the strategy. See Parzych depo., p. 23; Williams depo., pp. 49-50, 56, 60. Petitioner's "anonymous email" implicated Mr. Knapp. Plus, Mr. Williams believed, and still does believe, that Mr. Knapp committed the murder. See Williams depo., pp. 45,54, 61. Mr. Williams knew that the first defense team had replicated the cell phone location findings of Detective Sy Ray, which placed Mr. Knapp at least three miles away from the

victim's house at the time of the murder. However, Mr. Williams believed that he did a sufficient job to counter Det. Ray's findings by presenting evidence that put in question the timeline regarding both Mr. Knapp's whereabouts on the evening of the murder and the time the murder took place. See Williams depo., pp. 46-47, 59. Plus there were the bizarre circumstances of Mr. Knapp's death. See Williams depo., p. 59.

In *State v. Smith*, 244 Ariz. 482, 484, 422 P.3d 586, 588 (App. 2018), the court wrote:

> ¶ 9 There is "[a] strong presumption" that counsel "provided effective assistance," *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which Smith must overcome by providing evidence that counsel's conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 2d 1377, 1382 (App. 1995). Moreover, tactical or strategic decisions rest with counsel, *State v.*

Lee, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984), and we will presume "that the challenged action was sound trial strategy under the circumstances," *State v. Stone*, 151 Ariz. 455, 461, 728 P.2d 674, 680 (App. 1986). Thus, "[d]isagreements as to trial strategy or errors in trial [tactics] will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984). Whether counsel "rendered ineffective assistance is a mixed question of fact and law." *State v. Pandeli*, 242 Ariz. 175, ¶ 4, 394 P.3d 2, 7 (2017), *quoting Denz*, 232 Ariz. 441, ¶ 6, 306 P.3d at 100–01. Thus, we "defer to the trial court's factual findings but review de novo the ultimate legal conclusion" whether counsel's conduct fell below prevailing professional norms and whether Smith was prejudiced. *Denz*, 232 Ariz. 441, ¶ 6, 306 P.3d at 100–01, *quoting In re MH2010-002637*, 228 Ariz. 74, ¶ 13, 263 P.3d 82, 86 (App. 2011); *see also Pandeli*, 242 Ariz. 175, ¶ 4, 394 P.3d at 7.

This Court is of the opinion that the strategy

to pursue a third-party defense was objectively reasonable. Petitioner was unwavering in his claim of innocence. Mr. Williams believed his client and also believed there was sufficient evidence about Mr. Knapp to create reasonable doubt that Petitioner was the murderer.

It quickly became apparent to this Court from the evidence that Petitioner was a womanizing, manipulative narcissist with lavish spending habits and with little or no credibility. Even though the divorce and the downturn in the financial markets impacted Petitioner's income, he continued his expensive lifestyle, having to borrow thousands of dollars each month from his parents. A reasonable attorney could have easily concluded that Petitioner would have no credibility with the jury. Petitioner's perfidy and willingness to lie in order to manipulate others

was on full display during the investigative interview he submitted to regarding the "anonymous email" and "voice in the vent" story. Petitioner knew that he had written the email, yet he fabricated an elaborate story about the "voice in the vent" and the email in an effort to buttress his claim of innocence and to get the authorities to reopen the murder investigation. His charade even included crying at one time during the interview. Petitioner manipulated his teenage daughter into sending the "anonymous email" from an Internet café in Phoenix. Despite signing a document stating that he was relinquishing all interest and benefit in the insurance money, Petitioner manipulated his daughters into giving away the inheritance that their mother provided for them to Petitioner's first defense attorneys pursuant to a scheme concocted by a group of

attorneys. It was reasonable to assume that many of the jurors would conclude that nothing said by Petitioner could be believed, including his claim of innocence. Therefore, it was necessary for the defense to turn the focus away from Petitioner and his lies and shine the spotlight on someone else, that someone else being Jim Knapp. This strategy allowed the defense to deflect the jury's attention away from Petitioner and also continually to emphasize the implied bias of the investigators in immediately focusing on Petitioner as the prime suspect without, according to Petitioner, doing any investigation into Jim Knapp.[5]

Petitioner urges the Court to set an evidentiary hearing essentially to hear Rich Robertson repeat the information in his affidavit

[5] In reality, the sheriff did investigate Mr. Knapp and eliminated him as a suspect after confirming his alibi his ex-wife and son.

(see PCR Ex. 10) and for Mr. Williams and Mr. Parzych to repeat their deposition testimony on the strategic decision to pursue a third-party culpability defense. In that affidavit, Mr. Robertson stated:

> The differences between the two defense teams were enormous. The First Team's strategy was to vigorously attack the quality of the state's evidence. The Second Team chose to prosecute an alternate suspect, James Knapp.
>
> * * *
>
> The defense case became entirely about whether Mr. Knapp was the real killer, rather than about Mr. DeMocker's innocence, or the state's inability to meet its burden because of failures in its investigation.

See PCR Ex. 10, ¶s 4, 7.

Mr. Robertson felt that the "Knapp did it" defense became the "exclusive focus" of the defense. Id. at ¶ 8.

Mr. Williams testified that he did not agree with Mr. Robertson. See Williams depo., p. 50. He testified that he was "completely shocked" by Mr. Robertson's claim that the second defense team did not vigorously attack the quality of the State's evidence, but focused primarily on the third-party liability defense. Id.

The Court does not believe that anything can be gained by hearing this same testimony at an evidentiary hearing because the Court agrees with Mr. Williams. With all due respect to Mr. Robertson, this Court is not sure that Mr. Robertson was paying attention to the trial. As previously noted, the "James Knapp did it" defense was only one prong of the overall defense strategy in this Court's opinion based on having

presided over the trial. Three other themes of the defense were prominent during the trial: (1) the lack of forensic evidence (blood, DNA, hair or fingerprints) at the crime scene to tie Petitioner to the murder (2) the conclusion-based style of the investigation and (3) the slipshod manner in which evidence was gathered.

The Court is of the opinion that pursuing a third-party culpability defense was reasonable under the circumstances. Petitioner's arguments about "forfeited credibility" and a "more constrained approach" are derived from 20/20 hindsight and second-guessing defense counsel's strategic decision. This strategic decision reinforced Petitioner's claim of innocence, diverted attention from him and gave the jury an alternative theory about the murder to consider in the context of all of the evidence. Therefore, the Court

concludes that Petitioner's IAC claim # 3 is not colorable.

4. Defense counsel failed to present testimony of Laurie Spira about Petitioner's Internet searches.

Petitioner claims that his trial attorneys were ineffective because they failed to call Laurie Spira as a witness. However, at the time of trial, Petitioner agreed with the decision to not call Ms. Spira as a witness because she would have injected more negativity into the trial. **See** Williams depo., p. 71. Petitioner had a nearly two-year romantic relationship with Ms. Spira after he had filed for divorce, but prior to his divorce being finalized. Petitioner now claims that Ms. Spira should have been called to testify in order to rebut the testimony about Petitioner's Internet research about how to

make a murder look like a suicide or an accident.[6] Ms. Spira would have testified that she was a writer and that she and Petitioner had talked about Petitioner's desire to write a novel about a hit man who had a knack for murdering people, but making each murder look like an accident. In her interview with Detective Brown, Ms. Spira described the character Petitioner was talking with her about as follows:

> Laurie Spira: A book (indiscernible). It was a warm day and the sun was shining. But that character is a hit man.
>
> DT. Brown: Okay.
>
> Laurie Spira: And he's an accidental hit man. He doesn't mean to grow up to be a hit man. He just discovers by accident that he's good at it.

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[6] These searches were done using anonymizing software to mask that Petitioner was doing the research. If done for the innocent reason of researching a book, why did Petitioner use anonymizing software?

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> The hit man is kind of bum laden and kind of lame, but what he discovers that he's good at is killing people and having it look like an accident.
>
> See Laurie Spira Interview, pp. 35, 37 contained in PCR Ex. 5.

Craig Williams spoke with Laurie Spira. See Williams depo., p. 33. He also had notes regarding conversations the first defense team, Rich Robertson and Detective Brown had with Laura Spira that contained, in Mr. Williams' opinion, "some really troubling information in that, that [Petitioner] was considering becoming a fugitive," including that Petitioner's book "character was a hit man." See Williams depo., pp. 62–63. One of Mr. Williams' considerations in not calling Ms. Spira was that Petitioner had lied to her about being divorced and not having other

girlfriends during the time Petitioner was seeing Ms. Spira. See Williams depo., pp. 62–63. That would have been additional evidence that Petitioner had no qualms about lying in order to manipulate people. The State also called two former mistresses of Petitioner, Barb O'Non and Renee Girard, and "neither of those went well because by the time they took the stand, they were not big fans of Steve." See Williams depo., pp 64–65. Mr. Williams' answer continued:

> So putting another person on the stand to talk about the exact same thing, because I don't ever underestimate the State's ability to cross-examine somebody, to me, it was serving up this horrible information on a platter and I wasn't going to do it.
>
> Q. You knew that Steve had sex with all three of those women the weekend before Carol was killed?
>
> A. I don't know about the sex part, but I know he had a relationship

with them. So that's an example of if I put her on the stand, then that would have come out.

Q. There's also, I believe, a reflection in that document, Exhibit 3, that Laurie Spira told Detective Brown that Steve told her he had no alibi?

A. Yes.

Q. And that could be one more witness, in addition to Steve's own interview statement, in which he is confiding to another potential witness, "I have got no alibi"?

A. Yes. And then, there's the phone being off and all the other stuff that comes from that. That, to me, was there was no cost benefit analysis for calling her.

If I talk about the writing of the book, we already had a book folder, the State's expert even said there was a book folder, my memory says that, but you guys have read the transcripts calling her up there. The book folder was empty, there was not a book in the book folder, he hadn't written anything. He talked about it, and I believe that the research he did was in support of

the book, but she wasn't – she was a terrible witness in my opinion.

See Williams depo., pp. 65–66.

Q. In your mind, the calculus is that Laurie Spira might hurt more than help?

A. I felt absolutely that she was going to hurt more than help.

See Williams depo., p. 69

Q. So just summarize, I think we've talked about it, Mr. Williams, why didn't you call Laurie Spira at trial?

A. I felt on a scale, that the bad information, the probative value was outweighed by the prejudice.

* * *

So, if I put her on the stand, I put Laurie Spira on the stand, you guys were hounding on that fact he was desperate because of money. So why would I put somebody on the stand to reinforce that point? That was part of the decision. But the other part was I didn't believe that she talked about that book in any kind of positive way.

See Williams depo., pp. 71, 72

A reasonable attorney could have concluded that Ms. Spira's testimony was a double-edged sword, perhaps aiding the State more than helping the Petitioner. While her testimony might have bolstered Petitioner's daughter's testimony that Petitioner had talked about writing a novel, the testimony also could have bolstered the State's case that the murder was premeditated and further shown that Petitioner was a liar, manipulative and wanting to be rid of his $6,000.00 per month spousal maintenance payment because he was in need of money to continue his lifestyle and to support his liaisons with multiple women.

The trial testimony was that the murder scene had been staged. After brutally killing Ms. Kennedy, the murderer rearranged the scene in an

attempt to make it look like Ms. Kennedy fell from a ladder and struck her head on the corner of a desk. If Ms. Spira had testified, the State could have argued that Petitioner had been planning the murder of Ms. Kennedy for months. In other words, Petitioner was his fictional hit man; he carried out the murder in exactly the same way his character would have.

Petitioner argues that this Court should consider possible reasons why Ms. Spira's testimony would have aided the defense. However, that is not the task of this Court. Pursuant to the dictates of the United States and Arizona Supreme Courts, this Court's task is to decide whether defense counsel's reasons for adopting a particular trial strategy were objectively reasonable.

The Court is of the opinion that calling Laura Spira to testify would have been a disaster

for the defense. The Court finds that Mr. Williams' decision to not call Ms. Spira as a witness was reasonable. Therefore, the Court concludes that Petitioner's IAC claim # 4 is not colorable.

5. Defense counsel failed to present expert testimony on the subject of cognitive bias.

Petitioner is either a wrongfully convicted innocent man or, as the jury of twelve people unanimously found, a brutal murderer. Petitioner claims that his convictions were tainted by a skewed police investigation resulting from a psychological phenomenon now known as cognitive or confirmation bias. The State's position is that Petitioner's convictions were the result of a careful analysis by the jury during three days of deliberations of the massive amount of evidence that was presented at trial over a period of almost three months.

Petitioner claims his defense attorneys provided prejudicially inadequate representation by not calling an expert witness on the topic of cognitive bias.

Petitioner claims that the State's case against him and his convictions were a result of confirmation bias.[7] Petitioner claims that once Jim Knapp

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[7] While both sides presented compelling evidence either supporting or attacking the Drug Recognition Protocol, neither presented any evidence on the psychological process called "confirmation bias,"

> which is the tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence. Confirmation bias involves nonconscious information processing rather than deliberate case building. Someone intentionally preparing a one- sided argument, such as a debater preparing for a match, would not be said to display confirmation bias. Rather, it involves unwittingly selecting and interpreting evidence to support a previously held belief.

Barbara O'Brien, *Prime Suspect: An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations,* 15 PSYCHOL. PUB. POL'Y & L. . 315, 316 (2009) (citations omitted).

suggested that Petitioner was a questionable character and Dr. Keen opined that the murder weapon was a golf club, the investigators gathered evidence to confirm those opinions while ignoring other possible suspects. The problem is that Petitioner's cognitive bias theory assumes that both Mr. Knapp's suspicions about Petitioner and Dr. Keen's opinion regarding the murder weapon were

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"Confirmation bias" is a form of tunnel vision, and it can happen in one or more ways. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 WIS. L.REV. 291. People seek out evidence to confirm their hypothesis, *id.* at 308-09, 451 N.W.2d 752; people search their memories in biased ways, preferring information that tends to confirm a presented hypothesis or belief, *id.* at 312, 451 N.W.2d 752; and people also tend to give greater weight to information that supports existing beliefs than to information that runs counter to them; that is to say, people tend to interpret data in ways that support their prior beliefs. *Id.* at 312-13, 451 N.W.2d 752. Empirical research demonstrates that people are "incapable of evaluating the strength of evidence independently of their prior beliefs." *Id.*

Unpublished opinion, *City of Mequon v. Haynor*, 330 Wis.2d 99, 791 N.W.2d 406 (Table), 2010 WL 3489130, 2010 WI App 145, footnote 7 (2010).

wrong. In the Court's opinion, the evidence presented at trial proved beyond a reasonable doubt that both of them were correct.

This is a difficult claim to address because it is easy to claim "confirmation bias" for almost any decision reached by a fact finder or any opinion rendered by an expert witness. Bias, like racism, is an easy accusation to make, but hard for the accused to rebut. To evaluate Petitioner's claim, this Court must look at the totality of the evidence, which Petitioner and his expert, Dr. Deborah Davis, have both ignored.

One relying on cognitive bias as a theory, needs to be careful because it is a two-edged sword. For example, a person reading Dr. Davis' report (PCR Ex. 6) could easily argue that it is a classic example of confirmation bias—hire an expert specializing in cognitive bias who throws out two

postulates and then proceeds to analyze the limited information provided to her (the Court notes that Dr. Davis was not provided the entire trial transcript and, therefore, did not consider all the evidence that the jury and this Court did) in such a way to confirm the hypothesis that benefits the person who hired the expert, in this case, Petitioner. (That's the quagmire this type of evidence creates—almost any decision or expert's opinion can be characterized as the result of implied, cognitive or confirmation bias thus setting off a battle of experts which only results in expanding trials and confusing jurors.) Setting aside that obvious problem, there are a number of other flaws in Petitioner's claim.

The first problem is that Petitioner's claim ignores the fact that Mr. Williams never missed an opportunity during the trial either to illicit testimony

or argue that the investigation was immediately biased against Petitioner. While no expert witness was called on the topic, the defense showed that the Sheriff immediately focused, at least during the initial phases of the investigation, on Petitioner to the exclusion of other potential suspects. On the night of the murder, Jim Knapp described Petitioner in an unflattering way to one of the deputies on the scene. A deputy sheriff saw the scratch marks on Petitioner and the investigators then conducted an extensive interview of Petitioner at the Sheriff's office. The defense argued that everything the Sheriff's investigators did after the night of the murder seemed aimed at gathering evidence to confirm that alleged initial bias. Mr. Williams described Petitioner's claim as follows:

> Q. There's a claim that you were ineffective because you failed to present expert testimony on the

subject of cognitive bias.

> A. I found that interesting because when you read my closing, I say "conclusion-based thinking" over and over again. And I also say that the State was—I don't use—I didn't use the word myopic, but they were myopic. "It was Mr. Plum, in the Study, with a left-landed golf club." I say that over and over again. The State never looked anywhere else because they had Mr. Plum, in the Study, with the left-handed golf club.
>
> So I go over conclusion-based thinking over and over and over. So I didn't call it what they called it but it's the same thing. And did I need an expert to say that, I don't think so.

See Williams depo., p. 72–73.

After testifying about the evidence and cross-examination that he did focusing on the Petitioner, Mr. Williams concluded his thinking on Petitioner's claim as follows:

> Q. Did you think you needed

> an expert to bolster what you presented in an argument?
>
> A. No. I also had Terry Carmody. That kind of bolstered my conclusion-based argument.[8]

See Williams depo., pp. 73–74.

The second problem with the claim is that there is no evidence before this Court that cognitive bias was, at the time this case was being prepared for trial over seven years ago, a main-stream theory in the Arizona criminal defense community.[9] Not only did Mr. Williams believe

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[8] Terry Carmody was the defense expert who criticized the manner in which the Sheriff conducted the investigation. He died before trial, so his report was read to the jury.

[9] The only Arizona case found by the Court using a Westlaw search that mentions "confirmation bias" expert testimony is an unpublished Court of Appeals decision in 2015, *State v. Machado*, 2015 WL 1137642 (App. 2015). Petitioner argues that because Machado's first trial was in 2008, "confirmation bias" was a defense practice norm prior to Petitioner's second trial in 2013. There are two problems with that argument. First, Machado's first conviction from the 2008 trial was reversed by the Arizona Court of Appeals in 2010 and that decision was affirmed by the Arizona Supreme Court. *State v. Machado*, 224 Ariz. 343, 349, 230 P.3d 1158, 1164 (Ct. App. 2010), aff'd, 226 Ariz. 281, 246 P.3d 632 (2011). In the published opinions of the

that an expert witness on cognitive bias was not needed, none of the other experienced attorneys involved in the case thought so either. Gregory Parzych testified that the topic never came up within the second defense team. See Parzych depo., p. 28, ls. 15–19. One of the contentions in Petitioner's "Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office" was that the State had gained confidential information about the experts with whom the first defense team was consulting. In reaching the ruling after the evidentiary hearing on that motion, this Court reviewed multiple disclosure statements about expert

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Court of Appeals and Supreme Court, "cognitive bias" is not mentioned. The unpublished opinion mentioning "confirmation bias" does not indicate when the second trial occurred or whether "confirmation bias" was a part of the first trial, the second trial or both. Second, the "confirmation bias" testimony was used to explain how it could affect a witness' memory, not how it might influence an investigation. See ¶ 54 of the unpublished opinion.

witnesses filed by both the State and Defendant as well as other pleadings and reports in which consultants and expert witnesses were identified. See "Ruling On Defendant's Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office," ¶s 105, 163, 165, 183, 198. The Court also read at least one sealed transcript where the first defense team discussed expert consultants with the initial trial judge. Obviously, Petitioner's second defense team did not disclose or call an expert witness on the subject of cognitive bias. Petitioner's first defense team, composed of three highly experienced and well-regarded criminal defense attorneys, Larry Hammond, John Sears and Ann Chapman, did not request funds to hire a consulting expert on cognitive bias or disclose an expert on that subject. Given that five experienced criminal defense

attorneys who had in-depth knowledge of the facts of the case did not retain an expert in the field of cognitive bias, this Court cannot find that calling such an expert was the standard of practice seven years ago.[10]

The third major flaw in this claim is that, unfortunately for Petitioner, and setting "confirmation and cognitive bias" aside, all of the evidence pointed directly at Petitioner. Five qualified defense lawyers who worked on behalf of Petitioner for at least five years prior to the start of the second trial were unable to present one scintilla of evidence to contradict the following: Of all the people the jury heard about, including Jim Knapp,

[10] As noted above, Petitioner's attorney claimed that such standard of practice evidence could be developed should an evidentiary hearing be set. The Court agrees with the State that such evidence, if it exists, should have been included with the PCR or the reply so that it could have been considered in determining if Petitioner's claim is colorable.

Petitioner was the only one without a verifiable alibi for the time of the murder. No one else had scratches that could have come from moving through the dense brush leading from where the bicycle was stashed to the rear of the victim's house. No one else owned a bicycle and shoes with treads similar to the prints found near the victim's house. No one else was fighting with the victim over money, had the obligation to pay the victim $6,000.00 per month in spousal maintenance, and was the beneficiary of $750,000.00 in life insurance on the victim. No one else had a golf club sans cover go missing without explanation after Petitioner left the club with the victim for a garage sale she was going to hold. No one else had done Internet research with cloaking software on how to make a murder look like a suicide or purchased books on how to live as a fugitive. No one else had stashed a

"to go bag" in a vegetated area on a golf course or purchased and equipped a motorcycle with saddle bags filled with cash and maps of Mexico. No one else drafted a fake email containing details about the murder that only the murderer would have known. No one else fabricated the "voice in the vent" story to divert attention. The jury could have easily found, based on much more evidence than considered by Dr. Davis, that the investigation was not biased against Petitioner, but instead amounted to good police work.

In addition, this Court is not convinced that many of the opinions set forth in Dr. Deborah Davis' report are admissible. (This Court has found no Arizona appellate decision dealing with the admissibility of cognitive bias testimony.) Expert testimony about scientific principles that are unfamiliar to the average juror may be allowed if

the testimony "will help the trier of fact to understand the evidence or to determine a fact in issue." Rule 702(a), Arizona Rules of Evidence. However, if the jury can intelligently determine the issue without the opinion of an expert, such expert testimony is not appropriate. *Adams v. Amore*, 182 Ariz. 253, 255, 895 P.2d 1016, 1018 (App. 1994). And it is never appropriate to allow expert testimony on the credibility of a witness or in resolving any other issue material to the case. *Id.* Lastly, in *Logerquist v. McVey*, 196 Ariz. 470, 487, 1P.3d 113, 130 (2000), the Arizona Supreme Court wrote:

> Our constitution preserves the "right to have the jury pass upon questions of fact by determining the credibility of witnesses and the weight of conflicting evidence." *Burton v. Valentine,* 60 Ariz. 518, 529, 141 P.2d 847, 851 (1943)

Here, there was no need for opinions such as

Dr. Davis'. The jury was presented with an abundance of evidence, including all the evidence the defense presented in conjunction with the "James Knapp did it" defense, on which each juror could determine whether Dr. Keen's opinion about a golf club being the murder weapon was correct and whether the investigators failed to pursue other lines of inquiry which might have exculpated Petitioner. Allowing any expert to opine that the investigation was suspect would have been inappropriate because such opinion would have invaded the province of the jury to determine the weight of conflicting evidence and resolve material issues.

While testimony about the concept of confirmation bias may be admissible, telling the jury the consequences of that alleged bias as to specific witnesses, such as Dr. Keen, certainly is

not. The gist of the expert's testimony would have been that because the investigators focused almost immediately on Petitioner as a murder suspect, the evidence that was gathered and the conclusions drawn from the evidence were suspect and unreliable. In this Court's opinion, such opinion evidence is an improper comment on the weight and credibility to be given to the evidence and investigative conclusions, invades the province of the jury to make credibility determinations and likely would have confused the jury as to its role as fact finder.

Lastly, the Court is of the opinion that most, if not all, of the points made by Dr. Davis were made by defense counsel during the cross-examinations of Dr. Keen and other witnesses for the state and the defense. It was for each juror to make credibility assessments, to evaluate all the evidence and, after

considering the thoughts of all the other jurors during deliberations and the jury instructions, to decide whether the evidence proved beyond a reasonable doubt that Petitioner committed the crimes with which he was charged, not to have an expert witness tell the jurors that the evidence was suspect.

Assuming cognitive bias or confirmation bias opinion testimony had been admitted, what then would have been allowed for the State's rebuttal? Could the State call a professor of philosophy or psychology to educate the jury about Occam's razor, the theory that when there are two competing theories, the simpler one is to be preferred? Would the State have been allowed to have the professor opine that the simpler theory between Jim Knapp and Petitioner being the murderer was that Petitioner was the murderer? This Court is of the

opinion that allowing cognitive bias evidence that focuses on a particular witness or body of evidence would have opened a can of worms that most likely would have confused the jury rather than have assisted the jury with any issue. The jury was perfectly capable of weighing and sorting through the evidence and deciding whether the evidence proved beyond a reasonable doubt that Petitioner committed the murder without the aid of an expert's opinion about how the jury should evaluate the totality of the evidence.

In the event this decision is criticized on the basis of confirmation bias, this Court, unlike Dr. Davis, had the opportunity to observe the demeanor of all the trial witnesses, to consider the totality of the evidence and observe defense counsel over the many months of the Court's involvement in this case. At the conclusion of the case, and after careful

consideration of all the evidence, this Court was firmly convinced both that Petitioner received a fair trial and of Petitioner's guilt.

The Court finds that it was reasonable for the defense team not to retain and call an expert witness on the subject of cognitive bias. Therefore, the Court concludes that Petitioner's IAC claim # 5 is not colorable.

6. Defense counsel failed to move to exclude Dr. Keen's testimony.

In this Court's opinion, a motion to exclude Dr. Philip Keen's testimony would not have been granted. Dr. Keen had the education and experience to testify as a forensic pathologist (medical examiner). His education and experience as of August 2010 are set out in PCR Exhibit 14 at pages 7–10 and in the transcript of his trial

testimony at pages 8–10.[12] Dr. Keen obtained his undergraduate degree in chemistry and his medical degree from the University of New Mexico. Dr. Keen then did a four-year residency in anatomic and clinical pathology at the University of New Mexico followed by a one-year fellowship in forensic pathology with the chief medical examiner for the State of Oklahoma. Dr. Keen is licensed to practice medicine in four states, New Mexico, Arizona, Oklahoma and Ohio. Dr. Keen has been board certified in anatomic, clinical and forensic pathology since 1975. He served as chief medical examiner in Yavapai County for twenty-nine years, chief medical examiner in Maricopa County for

[12] The Court notes that PCR Exhibit 14 consists of transcripts of Dr. Keen's testimony in the first trial, not the trial in question. Obviously, Dr. Keen was not precluded from testifying in the first trial either because no motion to exclude was filed or because the motion was denied. The Court believes the former to be the case. See footnote 14.

fourteen years, associate chief medical examiner in Maricopa County for six years and chief of pathology for Yavapai Regional Medical Center for seventeen years. Dr. Keen has testified numerous times as an expert witness in both state and federal courts.

While well-credentialed as a forensic pathologist, Petitioner asserts that Dr. Keen should have been precluded from offering expert testimony because he used an unreliable method to reach the opinion that the murder weapon could have been a golf club. But what was that method?

Dr. Keen conducted the autopsy on July 3, 2008 at 3:45 p.m., the day following the murder. **See** 8/8/2013 Trial Transcript, p. 10. He observed ten separate injuries to the victim's scalp and skull. **Id.**, p. 12. He concluded that the cause of death was "multiple blunt-force craniocerebral injuries." **Id.**,

pp. 11, 12. He found the manner of death to be a homicide. **Id**., p. 11. He described the nature of the ten injuries to the victim's head. **Id**., pp. 14 – 21. He found "rod- type injuries" to the victim's right arm and elbow area. **Id**., pp. 24 – 25. He thought those injuries were caused by a "rod-like or rounded-shaped object." **Id**. He also observed an "area of bruising of the back of the triceps just above the elbow." **Id**., p. 26. Based on those observations, coupled with his education and extensive experience as a forensic pathologist, the "first object that came to [his] mind [as having caused the injuries] was the head of a golf club." **Id**., p. 26.

So, Dr. Keen's method in forming his opinion that the murder weapon was a golf club was personal observation of the injuries and resulting damage to the victim's scalp, skull and arm which

he then analyzed using his education and extensive experience as a forensic pathologist. The Court is at a loss why that method would be deemed so unreliable as to warrant Dr. Keen's disqualification as an expert witness. With that level of education and experience coupled with his personal observation of the victim's wounds, a motion to preclude Dr. Keen from testifying in the 2013 trial would have been denied. It was for the jury to decide what weight to give to his opinions.[13]

Greg Parzych testified on this topic as follows:

> Q. Was there ever any discussion of moving to preclude Dr.

[13] The Court notes that all the so-called bizarre actions for which Dr. Keen has been criticized occurred after the autopsy where he opined about the golf club. Also, the Court notes that Dr. Fulginiti reached a similar opinion about the possible murder weapon independent of Dr. Keen's input.

Keen prior to trial?

> A. I don't believe so. Not that I remember, no.
>
> Q. Was it your understanding that because of what Dr. Keen did, as part of his autopsy, he may have been a good witness for the Defense, at least from the Defense perspective?
>
> A. Good is a relative term, but I do know there were areas of cross examination that we were looking forward to on Dr. Keen.

See Parzych depo., p. 17.

After testifying that "you can't create a character like Dr. Keen" and describing the unusual things he did, including transporting the victim's body in the bed of his pickup truck from Prescott to the coroner in Phoenix, retrieving the body, then severing the head and returning it to the coroner in Phoenix, and failing to properly clean the autopsy table before performing the

autopsy on the victim resulting in DNA from the body of the prior autopsy subject getting under the victim's fingernail thus giving rise to the whole Mr. 603 mystery, Mr. Williams said, "He was – like I said, I felt he was a gift. I had no intention of moving to preclude that guy because I thought it was more of an example of how the State hadn't done even a competent job of it." See Williams depo., pp. 74–76.

Mr. Williams also felt he needed Dr. Keen to testify about his investigation into the death of Jim Knapp. In another bizarre twist in this case, Jim Knapp died as a result of a gunshot prior to trial. Dr. Keen opined that Mr. Knapp committed suicide, but staged the scene to make it appear he had been murdered. Mr. Williams testified:

> One more thing about Keen. If you will recall, I think he is the one that did the Knapp thing and he

put like dowels in him to demonstrate angles. And so, one of the things about that, when you looked at the picture of Knapp, the gun was way down, like down by his feet. And for him – he's right-handed. For him to have shot himself, he would have had to have done this unbelievable contortion to have shot himself in the chest, and that gun would not have ended up where it was.

And so, I need him [Keen] to talk about that angle because I felt that it was really good evidence that that ain't the way it happened.

Q. So, in your mind, you thought Dr. Keen, although he testified on behalf of the State, was good for the Defense?

A. Absolutely.

Q. You could point to Dr. Keen as one of several mistakes in the investigation?

A. Yes.

Q. That the State's case against Mr. DeMocker was weak because of the errors that Dr. Keen did?

A. Yes, in part.

See Williams depo., pp. 76–77.

In addition, the defense had an expert to counter Dr. Keen's opinion that a golf club was the murder weapon. Terri Haddix, a forensic pathologist, testified that the murder weapon was a collapsible baton or an asp.

In summary, the Court is of the opinion that a motion to preclude Dr. Keen would have failed; therefore, the Court finds that Mr. Williams' decision not to file such a motion had a reasonable basis.[14] Also, the Court finds that it was reasonable

[14] This Court is entitled to take judicial notice of records in other superior court actions, including procedural facts. *See In re Sabino R.*, 198 Ariz. 424, 425, 10 P.3d 1211, 1212 (App. 2000); *State v. Valenzuela*, 109 Ariz. 109, 506 P.2d 240 (1973); *State v. Lynch*, 115 Ariz. 19, 22, 562 P.2d 1386, 1389 (App. 1977); *State v. Rhome*, 235 Ariz. 459, 461, 333 P.3d 786, 788 (App. 2014). The docket for the first case does not reflect any defense "motions in *limine*" or "motions to exclude" any of the State's expert witnesses, except Gregory Cooper.

for defense counsel to believe that Dr. Keen's testimony would buttress the defense argument that the investigation was sloppy as well as aid in the "James Knapp did it" defense. Therefore, the Court concludes that Petitioner's IAC claim # 6 is not colorable.

7. Defense counsel failed to move to exclude the testimony of Jonathyn Priest and/or failed to present evidence challenging Jonathyn Priest's testimony.

When asked about this claim, Mr. Williams answered:

> A. Greg and I went up to Colorado, and I think you [Steve Young] were on the case at that point, and we met with Jonathan Priest, I think, at a motel lobby or in our room or whatever. We met with him, interviewed him, and I felt about him like I did Dr. Keen; it was a gift, especially since he had a live recording of somebody beating somebody to death with a golf club,

> and then he had pictures of it.
>
> And so, it was so totally different than this case that, to me, your average reasonable person would look at it and go, "Yeah. No. It wasn't a golf club."
>
> Q. So you felt you don't want to preclude this guy, he does more help to the Defense than he does for the State?
>
> A. Yes, and he was – my memory of him he was weirdly argumentative on the stand, which is never a good thing for an expert to argue, just give your opinion and that's it, and then he couldn't swing the golf club without hitting the jury box, which you can't buy that kind of testimony.
>
> See Williams depo., pp. 79 – 80.

Contrary to Petitioner's assertion, the defense did challenge Mr. Priest's opinions. The defense presented its own expert, Keith Inman, who contradicted Mr. Priest's opinions, believed the murder scene was not staged and that there could

have been more than one assailant. Mr. Williams believed that Mr. Inman was a good witness who "appropriately undermined Priest in his testimony and conclusions." See Williams depo., p. 80.

The Court has reviewed the declaration of R. Robert Tressel. See PCR Ex. 7. While he criticizes Mr. Priest's opinions, he adds nothing to the analysis that this Court must undertake – whether the reasons for Mr. Williams' strategic decisions regarding Mr. Priest were objectively reasonable.

The Court finds that Mr. Williams' decision not to move to preclude Mr. Priest as a witness had a reasonable basis. Mr. Priest had extensive experience as a police officer and homicide investigator. Mr. Tressel's criticism about an expert's methods does not mean that the method was unreliable. As noted before, the adversarial process is designed to address

"shaky but admissible evidence." In addition, the defense did present its own expert who put into question the legitimacy of Mr. Priest's opinions. Therefore, the Court concludes that Petitioner's IAC claim # 7 is not colorable.

Prejudice

The second prong of an IAC claim is the requirement that Petitioner prove that there is a reasonable probability that the outcome of the trial would have been different if counsel's performance had not been deficient. This Court is of the opinion that Petitioner's attorneys' performance was not deficient. Even assuming that someone who did not have the advantage of seeing defense counsel in action or observing the entire trial concluded that their performance was somehow deficient, this Court is of the opinion that the result would not have been different. In other words, Petitioner

would have been convicted even if counsel had done the things Petitioner in 20/20 hindsight believes they should have done.

Motions to preclude the testimony of Dr. Keen, Mr. Davis and Mr. Priest would have failed, calling Ms. Spira would have been folly and there was no need to clarify Ms. Snider's testimony. So those claimed acts of deficient performance would have had no impact on the outcome of the trial. Pursuing the third-party culpability defense aided Petitioner by emphasizing his claim of innocence, giving the defense a vehicle for arguing that the Sheriff's investigation was myopic and also giving the jury an alternate theory regarding the victim's murder. It is pure speculation that eliminating that defense would have positively impacted the outcome of the trial. Lastly, calling an expert on cognitive bias would have added nothing to Mr. Williams'

arguments.

As outlined in the "Background and Introduction" section, this Court is of the opinion that there was overwhelming circumstantial evidence of Petitioner's guilt. In ruling on Petitioner's motion for a directed verdict at the end of the State's case, this Court summarized that evidence in some detail. In addition, by the end of case, there was evidence that everyone, including Jim Knapp, that the defense argued could have been the murderer, had a verifiable alibi. That is all except Petitioner.

Summary of IAC Claims

All of Petitioner's IAC claims involve strategic decisions made by his attorneys. In *State v. Pandeli*, 242 Ariz. 175, 182, 394 P.3d 2, 9 (2017), the Arizona Supreme Court, in reviewing defense counsel's decision not to

cross- examine an expert witness, wrote:

> "Disagreements as to trial strategy or errors in trial will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984). Counsel clearly had, at a minimum, "some reasoned basis," *State v. Nirschel*, 155 Ariz. 206, 209, 745 P.2d 953, 956 (1987), for forgoing cross-examination of Dr. Bayless. Thus, the PCR court overlooked evidence that the decision not to cross-examine Dr. Bayless was the product of a reasoned (even if mistaken) strategic judgment. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

Petitioner's defense team considered the law (e.g., the low probability of having three of the State's expert witnesses precluded from testifying given their professional credentials), the pros and cons of the facts that the witnesses would give to

the jury, and the options they had in making their strategic decisions, including calling expert witnesses to rebut the opinions of the State's experts. Also, defense counsel consulted with Petitioner about the decisions to mount a third-party culpability defense and whether to call Ms. Spira as a witness. Defense counsel clearly had "some reasoned basis" for all of those strategic decisions that Petitioner now claims were constitutionally deficient. As such, those decisions, even if mistaken, are "virtually unchallengeable".

In finding that none of Petitioner's IAC claims are colorable, this Court has followed the standards dictated by the Arizona Supreme Court and started with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Pandeli*, *supra*, at ¶ 7. The Court has set forth in

some detail the reasons given by defense counsel for the strategic decisions now in question. The Court has considered all the evidence presented at the trial and given considerable deference to the decisions made by Petitioner's attorneys in the context of the circumstances existing nearly seven years ago when this case went to trial. The Court finds and concludes that Petitioner has not "overcome the presumption that the challenged actions might be considered sound trial strategy." *Pandeli*, *supra*, at ¶ 7.

It is obvious to this Court from the nature of Petitioner's counsel's questioning of Mr. Williams and Mr. Parzych during their depositions and the arguments set forth in Petitioner's reply brief that Petitioner's IAC claims are grounded in 20/20 hindsight, second guessing and largely ignore the totality of the

evidence presented at the trial as well as the reasons for the decisions given by defense counsel for the actions they took. For example, the following exchange occurred between Mr. Williams and Mr. Mills when he asked about the failure to call an expert witness to testify about cognitive bias:

> Q. And would you have had any reason not to have presented an expert like this?
>
> A. Well, I like what she has to say, but I said it. I don't know how much clearer it could have been, but I said over and over and over again. Conclusion-based thinking is the way I couched it, but you start with a conclusion, you bend every fact around it. She clearly lays that out on her thesis about, you know, confirmation biased, investigator biased.
>
> I do like the fact that she confirmed what I said earlier today was that that initial autopsy, he just makes this off the cuff – in my opinion, off the cuff reference to a

> golf club and boom, we're off to the races on the golf club.
>
> See Williams depo., pp. 94–95.

Of course, using 20/20 hindsight and a large dose of second-guessing, one might think it was better to call an expert witness on the topic rather than have Mr. Williams relentlessly talk about how the Sheriff's investigators focused immediately on Petitioner as the murder suspect and neglected to investigate others, such as Jim Knapp. But that is not the standard that this Court must apply. Five highly experienced defense attorneys did not feel it necessary to call an expert to talk about cognitive bias, which indicates to this Court that such was not the professional norm at the time. In addition, this Court has serious doubts whether many of the opinions set out in Dr. Davis' report are even admissible.

As noted above, this Court is of the opinion that each of the decisions by defense counsel that are now questioned by Petitioner had a reasonable basis to justify each strategic decision. In other words, this Court cannot conclude that trial counsel's alleged failures "fell below an objective standard of

reasonableness." *State v. Macias*, 2020 WL 3456677, ¶ 21 (App. 2020) citing Strickland, 466 U.S. at 688 [104 S.Ct. 2052]. Given all the twists and turns of this case, coupled with this Court's observation of Mr. Williams and Mr. Parzych during evidentiary hearings and a nearly three-month trial, this Court is of the opinion that Petitioner's attorneys did an admirable and highly competent job in representing him.

Newly Discovered Evidence

Petitioner recasts all of his IAC claims as

separate "newly discovered evidence" claims under Rule 32.1(e), Arizona Rules of Criminal Procedure. In *State v. Amaral*, 239 Ariz. 217, 219, 368 P.3d 935, 937 (2016), the Arizona Supreme Court wrote:

> A defendant is entitled to an evidentiary hearing regarding a claim of newly discovered evidence if he or she presents a "colorable claim." *State v. Bilke,* 162 Ariz. at 52, 781 P.2d at 29. There are five requirements for presenting a colorable claim of newly discovered evidence:
>
> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
>
> (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
>
> (3) the evidence must not simply be cumulative or impeaching;
>
> (4) the evidence must be relevant to the case;
>
> (5) the evidence must be such that it would likely have altered

> the verdict, finding, or sentence if known at the time of trial.

See also *State v. Botello-Rangel*,___Ariz.___,

461 P.3d 449 (App. 2020) in which the court wrote:

> ¶13 A court may vacate a conviction if newly discovered material facts exist. A defendant asserting newly discovered evidence in a post-conviction petition must prove: (1) that the evidence relied on is, in fact, newly discovered; (2) the motion must allege facts from which the court can infer due diligence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) the evidence must be material to the issue involved; and (5) it must be evidence which, if introduced, would probably change the verdict if a new trial were ordered.
>
> *State v. Acuna Valenzuela*, 245 Ariz. 197, 214–15, ¶ 58, 426 P.3d 1176, 1193-94 (2018); *State v. Serna*, 167 Ariz. at 374, 807 P.2d at 1110. "[E]vidence is material if it is relevant and goes to substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case." *State v. Orantez*, 183 Ariz. 218,

> 221–22, 902 P.2d 824, 827-28 (1995).

Also in *Amaral*, *supra*, at ¶ 13, the Arizona Supreme Court wrote:

> We turn to the *Bilke* requirements for a colorable claim under Rule 32.1(e). The first is that "the evidence must appear on its face *to have existed at the time of trial* but be discovered after trial." *Bilke,* 162 Ariz. at 52, 781 P.2d at 29 (emphasis added). Although this requirement is not explicit in the rule's text, we have long recognized that "Rule 32.1(e) has not expanded the law to relieve appellant from the consequences of a sentence because of facts arising after the judgment of conviction and sentencing." *State v. Guthrie,* 111 Ariz. 471, 473, 532 P.2d 862, 864 (1975). This Court has held that evidence arising from events occurring after the trial are not newly discovered material facts. *E.g., id.* (holding that rehabilitation efforts pending appeal were not newly discovered material facts because they arose after the conviction and sentencing).

IAC claim #1 (failure to clarify Kortney Snider's testimony) has no factual basis and, even

it did, all of the facts existed and were known at the time of the trial. IAC claims # 2 (failure to move to preclude Peter Davis), # 6 (failure to move to preclude Dr. Philip Keen) and # 7 (failure to move to preclude Jonathyn Priest) are all based on facts that existed and were known at the time of the trial. IAC claim # 4 (failure to call Laurie Spira as a witness) is based on facts that existed and were known at the time of the trial. Defense counsel thoughtfully considered those facts and made reasonable strategic decisions based on those facts. None of the facts supporting those five claims were discovered after the trial. IAC claim # 3 (the pursuit of a third-party culpability defense) is not supported by any new facts, just arguments based on 20/20 hindsight.

Regarding IAC claim # 5 (the failure to present an expert witness on the subject of

cognitive bias), the Court is of the opinion that expert testimony about cognitive bias does not constitute newly discovered evidence. Firstly, opinions by an expert are not material facts, but are opinions from an expert about a psychological process that impacts the weight to be given to the evidence gathered by the police. Secondly, the opinions are not new given that Mr. Williams talked about the biased investigation from opening statement through closing argument. Thirdly, as noted before, this Court has doubts whether most of the opinions expressed by Dr. Davis would have been admissible at trial because they would have invaded the province of the jury to evaluate the credibility of Dr. Keen and weight to be given to the evidence gathered during the investigation. Lastly, the Court is of the opinion that such evidence would not have changed the

outcome of the trial because of the overwhelming evidence of Petitioner's guilt. Accordingly, the Court concludes that none of these "newly discovered evidence" claims is colorable.

Conclusion

For the reasons set forth above, the Court concludes that none of Petitioner's claims are colorable. Rule 32.11(a), Arizona Rules of Criminal Procedure, provides that "[i]f, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition." The Court concludes that there are no material issues of fact or law that would entitle Petitioner to relief. Therefore,

IT IS HEREBY ORDERED

dismissing Petitioner's Petition for Post-Conviction Relief. Accordingly,

IT IS FURTHER ORDERED denying Petitioner's request for a new trial.

The Court signs this ruling as its appealable order.

Dated this 22nd day of July, 2020.

/s/

Hon Gary E. Donahoe

Judge of the Arizona Superior Court