NOT FOR PUBLICATION

FILED

JAN 20 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCENT ALPHONSO POWELL, Petitioner-Appellant, v. DAVID SHINN, Director; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 19-15375 D.C. No. 4:18-cv-00034-JAS MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted December 10, 2020
San Francisco, California

Before: BOGGS,** M. SMITH, and BENNETT, Circuit Judges.

Petitioner-Appellant Vincent Powell (Powell) appeals the district court's denial of his petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 1291. Because the parties are familiar with the facts, we do not recount

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

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

them here, except as necessary to provide context to our ruling. We **AFFIRM** the decision of the district court.

Procedural Competency Claim

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992). "A defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (internal quotation marks and citation omitted).

"Where the evidence before the trial court raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must conduct a competency hearing." *Maxwell v. Roe*, 606 F.3d 561, 568 (9th Cir. 2010) (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966)). "[A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 181 (1975).

On direct review, the Arizona Court of Appeals affirmed the trial court's finding of competency and decision not to hold a new competency hearing. *See State v. Powell*, 2010 WL 4323570 (Ariz. Ct. App. Oct. 29, 2010); *State v. Powell*,

2011 WL 982441 (Ariz. Ct. App. Mar. 21, 2011). Powell claims that this decision is "contrary to or an unreasonable application of federal law . . . or based on an unreasonable determination of fact . . . or both" under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d).

First, the decision of the state appellate court was not "contrary to . . . . clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1). The Arizona Court of Appeals cited the relevant constitutional standards for a defendant's procedural due process right to a competency hearing. *Compare Powell*, 2010 WL 4323570, at *2, *with Maxwell*, 606 F.3d at 568 (9th Cir. 2010) (citing *Pate*, 383 U.S. at 385).

Second, the decision of the Arizona Court of Appeals was neither "an unreasonable application of[] clearly established Federal law" nor "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2); *see Maxwell*, 606 F.3d at 568, 576 (treating as similar the legal-application and factual-determination paths under AEDPA for a procedural competency claim). That Powell's counsel raised concerns about his competency and that Powell was on new and varying medications at the time of trial are factors that the trial court had to consider in deciding whether Powell was entitled to a new competency hearing. *See Medina*, 505 U.S. at 450; *Maxwell*, 606 F.3d at 570. However, it was not unreasonable for the trial court, and

subsequently the Arizona Court of Appeals, to rely on prior psychiatric evaluations that found Powell to be malingering. A forensic psychologist determined that Powell was "capable of understanding the nature and object of the proceedings and assisting in his own defense" and that the evidence "support[ed] a diagnosis of Malingering," at least in part because of "false or grossly exaggerated symptoms." A "fairminded jurist[]," *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004), could conclude that Powell's disruptive behavior before and at the start of trial was consistent with the previous diagnosis of malingering and thus did not raise a bona fide doubt as to his competency. "Given these [past] psychiatric evaluations . . . , we conclude that the trial judge's decision not to hold a competency hearing," and the appellate court's affirmance of that decision, were "not unreasonable." *Williams v. Woodford*, 384 F.3d 567, 605 (9th Cir. 2004). Under AEDPA's "highly deferential standard for evaluating state-court rulings," *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citation omitted), we affirm the decision of the district court on this claim.

Substantive Competency Claim

In addition to his procedural due process claim, Powell argues that he was actually incompetent at the time of trial. A substantive due process claim has a higher bar than its procedural due process counterpart. *See McGregor v. Gibson*, 248 F.3d 946, 952 (10th Cir. 2001) (en banc). We may consider evidence not

available to the trial judge contemporaneously. *See Williams*, 384 F.3d at 608. However, "we disfavor retrospective determinations of incompetence, and give considerable weight to the lack of contemporaneous evidence of a petitioner's incompetence to stand trial." *Id.*

We conclude that Powell has not proven that the trial court's continued finding of competency, and the decision of the Arizona Court of Appeals to affirm that finding, was unreasonable. Because it was not unreasonable at the time of trial to hold that there was not even a bona fide doubt as to Powell's competency, any decision to grant Powell's petition on his substantive competency claim must necessarily rely on evidence not available to the trial court.

Powell's evidence does not tip the scales in his favor. For example, Powell concedes that one *ex post* mental health evaluation "reached only tepid conclusions" and that the report did not rely heavily on Powell's contemporaneous medical records. Additionally, even if changing medications showed evidence of mental illness, Powell has not met his burden in proving that there was a "causal connection between the [illness] and his inability to understand the proceedings." *United States v. Neal*, 776 F.3d 645, 655–56 (9th Cir. 2015). We again affirm the decision of the district court.

Involuntary Absence Claim

"One of the most basic of the rights guaranteed by the Confrontation Clause

is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970). Powell renews his claim that he "did not validly waive his right to be present at his trials." The trial court's decision to remove Powell from the courtroom was based on what that court saw as his purposeful decision to disrupt the proceedings, a sign of his malingering. Thus, whether Powell was voluntarily or involuntarily absent at his trials is directly tied to his competency claim. *See Powell*, 2010 WL 4323570, at *5 ("Having already rejected Powell's incompetency premise, we necessarily reject" his absence claim). Powell concedes the same. Because the decisions of the Arizona Court of Appeals on Powell's competency claims were not unreasonable, we also affirm the decision of the district court with regard to Powell's trial absence claim.[1]

For the foregoing reasons, we AFFIRM the decision of the district court.

[1] Because we affirm the district court's decision on the absence issue because of its relationship to the competency issues, we need not decide whether Powell procedurally defaulted his absence claim as it relates to his second trial.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCENT ALPHONSO POWELL, Petitioner-Appellant, v. DAVID SHINN, Director; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 19-15375 D.C. No. 4:18-cv-00034-JAS District of Arizona, Tucson ORDER

Before: BOGGS,* M. SMITH, and BENNETT, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. (Dkt. No. 49) Judges M. Smith and Bennett vote to deny the petition for rehearing en banc, and Judge Boggs so recommends. (*Id.*) The full court has been advised of the petition for rehearing en banc (*id.*), and no judge of the court has requested a vote on it. Fed. R. App. P. 35. Accordingly, the petition for panel rehearing and rehearing en banc is DENIED.

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Vincent Alphonso Powell, Petitioner, vs. Charles L. Ryan, Director of the Arizona Department of Corrections, et al. Respondents.	No. CV 18-34-TUC-JAS (LAB) **ORDER**

Pending before the Court is a Report and Recommendation issued by United States Magistrate Judge Bowman that recommends denying Petitioner's habeas petition filed pursuant to 28 U.S.C. §2254. As Petitioner's objections do not undermine the analysis and proper conclusion reached by Magistrate Judge Bowman, Petitioner's objections are rejected and the Report and Recommendation is adopted.[1]

Before Petitioner can appeal this Court's judgment, a certificate of appealability must issue. *See* 28 U.S.C. §2253(c) and Fed. R. App. P. 22(b)(1). The district court that rendered a judgment denying the petition made pursuant to 28 U.S.C. §2254 must either issue a certificate of appealability or state why a certificate should not issue. *See id.* Additionally, 28 U.S.C. §2253(c)(2) provides that a certificate may issue "only if the applicant has made

[1]The Court reviews de novo the objected-to portions of the Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for clear error the unobjected-to portions of the Report and Recommendation. *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *see also Conley v. Crabtree*, 14 F. Supp. 2d 1203, 1204 (D. Or. 1998).

a substantial showing of the denial of a constitutional right." In the certificate, the court must indicate which specific issues satisfy this showing. *See* 28 U.S.C. §2253(c)(3). A substantial showing is made when the resolution of an issue of appeal is debatable among reasonable jurists, if courts could resolve the issues differently, or if the issue deserves further proceedings. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Upon review of the record in light of the standards for granting a certificate of appealability, the Court concludes that a certificate shall not issue as the resolution of the petition is not debatable among reasonable jurists and does not deserve further proceedings.

Accordingly, IT IS HEREBY ORDERED as follows:

(1) The Report and Recommendation (Doc. 28) is accepted and adopted.

(2) Petitioner's §2254 habeas petition is denied and this case is dismissed with prejudice.

(3) A Certificate of Appealability is denied and shall not issue.

(4) The Clerk of the Court shall enter judgment and close the file in this case.

Dated this 5th day of February, 2019.

Honorable James A. Soto
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Vincent Alphonso Powell,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-18-00034-TUC-JAS

JUDGMENT IN A CIVIL CASE

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

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby dismissed with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

February 5, 2019

By s/ Keli Petrilla
Deputy Clerk

IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

VINCENT ALPHONSO POWELL,
Petitioner.

No. 2 CA-CR 2015-0446-PR
Filed May 25, 2016

Petition for Review from the Superior Court in Pima County
Nos. CR20071727 and CR20080296
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Vincent A. Powell, Tucson
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

VÁSQUEZ, Presiding Judge:

¶1 Petitioner Vincent Powell seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Powell has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in absentia, Powell was convicted in CR 2007-1727 of two counts of armed robbery, one count of aggravated assault, and one count each of first- and third-degree burglary. The trial court imposed concurrent terms of imprisonment, the longest of which was a life term without the possibility of parole for twenty-five years. After a separate trial in CR 2008-0296, Powell was convicted of five counts of armed robbery, one count of attempted armed robbery, six counts of aggravated assault with a deadly weapon or dangerous instrument, and one count of assault. The court imposed twelve concurrent life sentences and one sentence of time served, to run consecutively to those imposed in CR 2007-1727. This court affirmed the convictions and sentences in both causes. *State v. Powell*, No. 2 CA-CR 2010-0139 (memorandum decision filed Mar. 21, 2011); *State v. Powell*, No. 2 CA-CR 2009-0350 (memorandum decision filed Oct. 29, 2010).

¶3 Powell thereafter sought post-conviction relief in both proceedings, and the trial court consolidated them in July 2011. Appointed counsel filed a petition for post-conviction relief arguing Powell had received ineffective assistance of appellate counsel based

on counsel's failure to raise a claim related to "a flawed medical opinion" in relation to Powell's competency.

¶4 The trial court denied the petition, and Powell subsequently filed a pro se, "supplemental petition," which the court treated as a motion for rehearing and denied. Counsel filed a notice stating she saw no basis for reconsideration or review in the trial court's ruling on her petition. After receiving that notice, the court initially signed an order allowing Powell to file a "*Pro Se* pleading," indicating that Powell's earlier pro se filing had not been intended as a motion for rehearing, but "an attempt to correct shortcomings he believed existed in counsel's filing." In a pro se document filed the day after the court's order, Powell requested a *Torres*[1] hearing and appointment of new counsel to file "a new untainted petition." The court denied the motion for a hearing, allowed counsel to withdraw, and deemed Powell's earlier pro se petition a supplemental petition. It determined Powell had not raised a colorable claim for relief, and denied that petition as well. Powell again requested new counsel, and the court denied the motion.

¶5 When Powell subsequently asked to withdraw counsel's earlier petition, the trial court denied the motion, but allowed Powell "to file his own Rule 32 Petition" and stated it would "liberally construe Powell's [earlier motion] as a subsequent Rule 32 Notice of Post-Conviction Relief." Powell filed an "Amended Petition for Rule 32 Reconsideration," discussing the county jail's administration of lithium and other medications, a doctor's letter relating to his competency, and stating that his trial counsel had made "inappropriate statements" to him and failed to investigate his medical and mental health history. He argued he had received ineffective assistance of trial counsel on that basis and alleged a conspiracy among the state, his doctors, and his attorneys—trial and Rule 32—to convict him. He also raised claims of error by the trial court in relation to the doctor's letter and prosecutorial misconduct. He then filed a "motion to supplement"

[1]*State v. Torres*, 208 Ariz. 340, 93 P.3d 1056 (2004).

the petition "with newly discovered evidence" regarding a "cover-up" of injustice in his case relating to his Rule 32 counsel. Based on its legal analysis and a detailed review of pertinent court records for the period 2008 into 2014, the court summarily denied relief, and that ruling is the subject of Powell's petition for review.

¶6 On review, to the extent we understand his arguments, Powell raises as issues, inter alia, 1) whether he was "ever legally found competent to stand trial," 2) whether legal proceedings were valid after he was forced to take lithium, 3) whether he voluntarily absented himself from trial, 4) whether a doctor who provided a report on competency was qualified, 5) whether that doctor was "in an attorney-client relationship with the county attorney," 6) whether he had received ineffective assistance of trial counsel, 7) prosecutorial misconduct, 8) conflict of first Rule 32 counsel, and 9) whether the trial court abused its discretion in concluding some of these issues were precluded and in denying an evidentiary hearing.

¶7 We agree with the trial court that the majority of these claims are precluded because they were adjudicated or waived on appeal. *See* Ariz. R. Crim. P. 32.2(a)(2), (3). We also agree with the court that Powell has failed to establish a colorable claim of ineffective assistance of trial counsel.[2] The court correctly and thoroughly addressed Powell's claims of ineffective assistance, and we therefore adopt its ruling as to those claims. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct

[2]Because the trial court deemed Powell's pro se filing a new notice of post-conviction relief, it is arguable that any claim of ineffective assistance of counsel is precluded as well. *See* Ariz. R. Crim. P. 32.2(a). But, because the court ruled on the substance of those claims it is unclear that the court actually intended to initiate a new proceeding rather than to continue the existing proceeding. We therefore likewise treat the petition for review as being taken from a first, timely Rule 32 proceeding.

ruling in a written decision"). Furthermore, any claim of ineffective assistance of Rule 32 counsel, as the trial court concluded, fails because non-pleading defendants like Powell "have no constitutional right to counsel in post-conviction proceedings." *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013).

¶8 On review Powell also contends his claims are based on newly discovered evidence. Although he does not clearly specify what evidence, it appears he relies on evidence relating to the jail's administration of lithium and his mental health diagnosis. He has not, however, presented an argument explaining how this evidence qualifies as newly discovered pursuant to Rule 32.1(e) or how it entitles him to relief under that rule.

¶9 For these reasons, although we grant the petition for review, we deny relief.

Appendix (B)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCENT ALPHONSO POWELL, Petitioner-Appellant, v. CHARLES L. RYAN; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 19-15375 D.C. No. 4:18-cv-00034-JAS District of Arizona, Tucson ORDER

Before: SILVERMAN and OWENS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is granted with respect to the following issues: 1) whether appellant's due process rights were violated by the denial of a competency hearing and being tried while incompetent; and 2) whether appellant validly waived his right to be present at his trials, including whether this claim is procedurally defaulted. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The opening brief is due February 11, 2010; the answering brief is due March 10, 2020; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk shall serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

Appendix (C)

Appendix (D)

Arizona Supreme Court

Criminal Petition for Review-Post Conviction (ASC)

CR-16-0293-PR STATE OF ARIZONA v VINCENT ALPHONSO POWELL

Appellate Case Information

Case Filed: 1-Aug-2016 Archive on: 23-Jan-2018 (planned)

Case Closed: 23-Jan-2017

Dept/Composition

Side 1. STATE OF ARIZONA, Respondent

(Litigant Group) STATE OF ARIZONA

- **State of Arizona**

Attorneys for: Respondent

Barbara LaWall, Esq. (AZ Bar No. 4906)

Jacob R Lines, Esq. (AZ Bar No. 22560)

Side 2. VINCENT ALPHONSO POWELL, Petitioner

(Litigant Group) VINCENT ALPHONSO POWELL

- **Vincent Alphonso Powell, Pro Se** PRO SE

CASE STATUS

Jan 23, 2017.....Case Closed

Jan 23, 2017.....Decision Rendered

PREDECESSOR CASE(S)	Cause/Charge/Class	Judgment/Sentence	Judge, Role <Comments>	Trial	Dispo
2 CA	2 CA-CR 15-0446 PRPC				
PIM	CR20071727		Howard J Fell, Pro Tem Comments: (none)	JURY	
PIM	CR20080296		Howard J Fell, Pro Tem Comments: (none)	JURY	

CASE DECISION

23-Jan-2017 ORDER

ORDERED: Petition for Review = DENIED.

A panel composed of Justice Timmer, and Justice Bolick, and Justice Gould and Justice Lopez participated in the determination of this matter.

Filed: 23-Jan-2017 Mandate:

Decision Disposition
Denied

5 PROCEEDING ENTRIES

1.	1-Aug-2016	FILED: Motion for Extension of Time to File Petition to Ariz. Supreme Court Due to Extraordinary Issues and Good Cause Shown (Petitioner Powell, Pro Se)
2.	2-Aug-2016	A "Motion for Extension of Time to File Petition to Ariz. Supreme Court Due to Extraordinary Issues and Good Cause Shown" (Petitioner Powell, Pro Se) having been filed on August 1, 2016, IT IS ORDERED granting a first extension of time to file the Petition for Review on or before September 1, 2016. No further extensions of time shall be granted absent extraordinary circumstances. This matter is subject to dismissal if the Petition for Review is not filed by September 1, 2016. (Hon. Clint Bolick)
3.	1-Sep-2016	FILED: Petition for Review (Petitioner Powell, Pro Se)
4.	1-Sep-2016	FILED: Record from CofA: Link to Electronic Record
5.	23-Jan-2017	ORDERED: Petition for Review = DENIED. A panel composed of Justice Timmer, and Justice Bolick, and Justice Gould and Justice Lopez participated in the determination of this matter.

Appendix (E)

Appendix (F)

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NOV 20 2015

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CLERK, SUPERIOR COURT
15 NOV 20 AM 11:06
BY: B. ST GERMAINE, DEPUTY

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PRO TEMPORE: HON. HOWARD FELL

CASE NO. ~~CR2007-1727~~
CR2008-0296

COURT REPORTER: NONE

DATE: November 18, 2015

STATE OF ARIZONA

VS.

VINCENT ALPHONSO POWELL

RULING

IN CHAMBERS RULING, RE: PETITION FOR POST-CONVICTION RELIEF

I. Relevant Facts/Procedural History:

In CR20071727, Defendant/Petitioner Vincent Alphonso Powell was charged with Count One: Aggravated Assault, Deadly Weapon/Dangerous Instrument, Count Two-Three: Armed Robbery, Count Four: Burglary in the Third Degree, and Count Five: Burglary in the First Degree for events occurring on April 14 and 28, 2007. In CR20080296, Powell was charged with seven counts of armed robbery, two counts of attempted armed robbery, and eleven counts of aggravated assault for events occurring from December 14 through December 22, 2007.

On February 8, 2008, the Court granted Defendant Powell's request for a Rule 11 examination. On November 8th, the Court found Defendant Powell competent to stand trial, but ordered an additional evaluation regarding Powell's mental state at the time of the offense. Reports later revealed that Powell was competent at the time of the offense. Defense counsel made numerous requests for additional Rule 11 evaluations following these findings. The Court denied the requests. The Court scheduled trial in CR20071727 for July 28, 2009. At trial, Powell felt ill and had swollen feet, a potential side effect of Lithium. The Court found that Powell had not voluntarily absented himself from trial and reset the trial for August 4, 2009.

On August 4th, Defendant Powell was disruptive and refused to conduct himself in an appropriate manner. Powell continually repeated "I don't have to" until the Court removed Powell from the courtroom to make a record of the proceedings. The Court then thoroughly discussed Powell's health and medications, including a letter submitted by Dr. Roger Bishop, the medical director at the Pima County Adult Detention Center. The Court found that that Powell's medications "could have affected Mr. Powell's mood but has no effect on thoughts, voices. In other words, he is stable. Any problems with his behaviors are because Mr. Powell intends to misbehave. He is fully capable of acting appropriately in the courtroom." Trial Transcript (TT) Day 1 at 6:18-23. Like the experts who examined Powell, the Court found that "while he does certainly have issues, [he] is a malingerer; that he is fully aware of the kinds of things that he can do to try to convince others that he

Benjamin Griem
Law Clerk

is incapable of participating in this process." *Id.* at 7:5-9. "[I]t was apparent this morning, compared to Mr. Powell's mood last week when [the Court] spoke to him, that he was calm when he conversed with the Court. And that was after his lithium was discontinued, and he wasn't on any mood elevators. This morning the Court believes that it is because he is afraid. And the Court understands that's why he is, but he has sort of run out of options now to avoid ultimately going to trial. So this morning he, according to the information the Court received, acted out at the jail and indicated to the correctional officers that he wasn't going to cooperate; that he wasn't going to get dressed; that they were going to have to, I think I was told, restrain him, beat him, in order to get him to court." *Id.* at 7:12-8:1. The Court concluded that "Powell is intentionally acting out. It is not because of any thought disorders or any other kind of psychological problem that would cause the Court to find him incompetent." *Id.* at 8:17-20. When the Court had Powell brought back into the courtroom, he continued to misbehave. Accordingly, the Court removed Powell and ultimately found that Powell was voluntarily absenting himself from trial.

The Court reevaluated Powell's absentia status throughout the trial. On August 5th, the Court noted that "[t]he corrections officers called this morning and spoke with my law clerk. Colleen indicated that they inquired of Mr. Powell whether or not he wanted to join us today. He said, thank you, but not, and he is, therefore, still at the jail. We'll ask him again during the lunch hour and see if he has changed his mind, and I'll continue doing this throughout the course of the trial. So the Court finds that Mr. Powell is continuing to voluntarily absent himself from his trial." TT Day 2 at 5:6-16. On August 6th, the Court noted that "[w]e checked again this morning. He is not interested in joining us, so the Court finds that Mr. Powell continues to voluntarily absent himself from his trial." TT Day 3 at 4:6-9.

On August 7th, the jury found Defendant Powell guilty of all charges in CR20071727. On October 9, 2009, the Court found multiple prior convictions in CR66492, CR65262, and CR37502 and sentenced Powell to life in prison on Counts One, Two, and Three, ten years for Count Four, and 11.25 years on Count Five, all sentences to run concurrently with each other. On January 20, 2010, the Court found that Defendant Powell waived his right to be present at trial in CR20080296. The State dismissed some of the counts but the jury found Powell guilty of the remainder (with some charges reduced to the lesser included offense). On April 9, 2010, the Court sentenced Powell to life in prison for Counts One-Six and Eight-Thirteen, all counts to run concurrently with one another but consecutively to the sentences imposed in CR20071727. Defense counsel continually renewed her motion for a Rule 11 evaluation in pretrial hearings and at trial, but the Court denied each request.

Defendant Powell filed a direct appeal on both matters claiming that this Court erred in finding him competent to stand trial and finding that he had voluntarily absented himself from trial. On June 14 2011, Division Two of the Arizona Court of Appeals denied relief and affirmed Powell's convictions and sentences in CR20071727. On August 16, 2011, Division Two denied relief and affirmed Powell's convictions and sentences in CR20080296.

Benjamin Griem
Law Clerk

On May 12, 2014, this Court denied Powell's first Rule 32 petition filed by Rule 32 counsel Barbara Catrillo. The Court denied Powell's Rule 32 supplement and motion to reconsider on June 18 and July 16, 2014 respectively. On December 11, 2014, the Court permitted Powell to file a *pro se* Petition and raise those claims he believed Ms. Catrillo should have raised, but failed to do so. Throughout the Rule 32 process, the Court addressed numerous requests for disclosure, extensions, and other issues.

In his second Rule 32 Petition for Post-Conviction Relief, Petitioner Powell raises numerous issues: 1) conflict of interest, 2) prosecutorial misconduct, 3) this Court abused its discretion, 4) the ineffective assistance of trial counsel, 5) the ineffective assistance of appellate counsel, and 6) the ineffective assistance of Rule 32 counsel.

II. Analysis:

The Court has reviewed the pleadings and exhibits submitted by the parties,[1] as well as the records and transcripts from this case, and finds that the record is sufficient for this Court to dispose of the petition without an evidentiary hearing. *See* Ariz. R. Crim. P. 32.6(c); *State v. Gutierrez*, 229 Ariz. 573, 578, ¶ 25, 278 P.3d 1276, 1281 (2012).

A. Preclusion

"A defendant shall be precluded from relief under this rule based upon any ground: (1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24; (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding; (3) That has been waived at trial, on appeal, or in any previous collateral proceeding." Ariz. R. Crim. P. Rule 32.2(a). However, "Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed." *Id.* at (b).

The Court of Appeals finally adjudicated on the merits Petitioner Powell's claims that this Court erred and/or abused its discretion in finding Powell competent to stand trial and that Powell voluntarily absented himself from trial. *See* Mandate (2007) at ¶¶ 10, 19, 20; Mandate (2008) at ¶¶ 5, 13. Accordingly, the Court

[1] For clarity of the record, the Court notes that it considered the following *pro se* pleadings as Powell's second Rule 32 Notice, Petition, and Reply: Motion to Withdraw From Fraudulent Petition and Coerced Waiver for Reason of Manifest Injustice, Amended Petition for Rule 32 Consideration, Exhibit W, Motion to Supplement Petition for Reconsideration with Newly Discovered Evidence, and Response to State's Reply.

Benjamin Griem
Law Clerk

finds that Powell is precluded from raising those claims here.

B. Conflict of Interest & Prosecutorial Misconduct

Petitioner Powell claims that the Pima County Adult Detention Complex (jail), its staff, the State, trial counsel, and Rule 32 counsel have conspired together to deny Powell due process and shield themselves from civil liability for injuries Powell suffered from his medications administered in jail. Powell's claims against trial counsel, Nicki DiCampli, and Rule 32 counsel, Barbara Catrillo, are based in part on their friendship and prior work experience as prosecutors for the State. Powell additionally claims that the State intentionally or willfully permitted the jail and its staff to improperly treat Powell's medical and psychological conditions, which in turn caused him to be incompetent to stand trial.

First, Ms. DiCampli's and Ms. Catrillo's friendship and prior experience as prosecutors, on its own, does not demonstrate a conflict of interest. Numerous lawyers have practiced as both prosecutors and criminal defense attorneys. Second, while the Court sympathizes with the side effects Powell suffered from the medications administered at jail, as noted above, the Court of Appeals finally adjudicated on the merits Powell's claim that he was not competent to stand trial. The Court of Appeals consistently found that Powell was competent. Accordingly, assuming, *arguendo*, that the jail, its staff, the State, and counsel conspired to hide any errors in Powell's medications and treatment to avoid civil liability, the Court **FINDS** that Powell was not prejudiced because he was competent at the time of trial.

C. Abuse of discretion

Petitioner Powell claims that this Court abused its discretion when it acknowledged that Powell suffered from psychological conditions but concluded that he was malingering, and by permitting Powell to be tried in absentia when the Court stated, off the record, 'Vincent I'm sorry, I made a mistake. I should not have had that trial without you; it should get overturned on appeal.' Amended Petition, Sworn Affidavit at ¶ 33. Powell is incorrect.

"The presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial." Ariz. R. Crim. P. 11.1. A defendant may suffer from one or more psychological conditions and still be competent to stand trial. Powell's psychological evaluations and behavior demonstrated that, despite suffering from several conditions, he was a malingerer.

The Court did not make the statement alleged by Powell at anytime. If the Court believed that it erred when it found that Powell voluntarily absented himself from trial, it would have declared a mistrial and rectified that error without an appeal.

Accordingly, the Court **FINDS** that it did not abuse its discretion and that Powell has failed to establish a colorable claim as to these issues.

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D. Ineffective Assistance of Trial Counsel, Nicki DiCampli

In order for a petitioner to raise a colorable ineffective assistance of counsel claim, he must show that his counsel's performance fell below objectively reasonable standards and that the poor performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (2005); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a petitioner fails to sufficiently establish either element, the reviewing court is not required to determine whether the other element has been established. *Jackson*, 209 Ariz. at 14, ¶ 2, 97 P.3d at 114. "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *Id.*, *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Whether a petitioner has presented a colorable claim for relief is a discretionary decision for the trial court. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

A petitioner is not required to provide the court with detailed evidence in his petition; however, he must "provide specific factual allegations that, if true, would entitle him to relief." *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (2000). "[P]roof of ineffectiveness must be a demonstrable reality and not merely a matter of speculation." *State v. Schultz*, 140 Ariz. 222, 225, 681 P.2d 374, 377 (1984).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. A court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* at 690. Trial counsel is presumed to have acted properly unless a petitioner can show that counsel's decisions were not tactical, "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Defense counsel need only be reasonably competent—perfection is not required. *State v. Ysea*, 191 Ariz. 372, ¶ 14, 956 P.2d 499, 503 (1998).

"At the punishment or sentencing stage, the duty of the attorney is clearer and easier to evaluate. At a minimum, defendant's attorney had the obligation to challenge the admission of aggravating evidence where reasonably possible and to present available pertinent mitigating evidence." *State v. Carriger*, 132 Ariz. 301, 304, 645 P.2d 816, 819 (1982) unrelated holding modified by *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002) (IAC claims are to be filed under Rule 32, not direct appeal).

Petitioner Powell claims that Ms. DiCampli 1) failed to investigate his medical claims, 2) sabotaged his treatment with the Arizona State Hospital (A.S.H.), 3) insulted Powell when he was in a fragile state, 4) failed to obtain a copy of Dr. Bishop's letter, and 5) failed to present mitigating factors at sentencing.

As discussed *supra*, the Court of Appeals finally adjudicated on the merits that Powell was competent at the time of trial and that this Court properly denied Ms. DiCampli's repeated requests to have Powell reevaluated. Accordingly, the Court **FINDS** that Powell was not prejudiced by Ms. DiCampli's alleged failure

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to investigate his medical claims or her alleged sabotage of his A.S.H. treatment.

Powell claims that Ms. DiCampli insulted him while in a fragile state by 1) explaining that he was facing numerous life sentences, 2) stating that he deserved more time because of the multiple victims, 3) scolding Powell about his positive prospects for treatment stating 'That's why everybody thinks you are a faker. People who are really sick don't want help,' and 4) stating 'Why are you talking to them [A.S.H. doctors]? They don't believe you! They're using everything you say to write bad reports about you and call you a liar,' which undermined Powell's trust and respect with those doctors. Amended Petition, Sworn Affidavit at ¶¶ 8-10.

First, Ms. DiCampli's statement that Powell faced numerous life sentences was accurate. "A person who is at least eighteen years of age or who has been tried as an adult and who is convicted of a serious offense ... whether a completed or preparatory offense, and who has previously been convicted of two or more serious offenses not committed on the same occasion *shall be sentenced to life imprisonment.*" A.R.S. §13-706(A) (emphasis added). "Serious offense" includes aggravated assault involving the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument and armed robbery. *Id.* at (F)(1)(d, h). "[A] person who has been convicted of committing or attempting or conspiring to commit any violent or aggravated felony and who has previously been convicted on separate occasions of two or more violent or aggravated felonies not committed on the same occasion *shall be sentenced to imprisonment for life.*" *Id.* at (B) (emphasis added). "Violent or aggravated felony" includes aggravated assault involving the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument and armed robbery. *Id.* at (F)(2)(c, q). Second, Ms. DiCampli's statement that Powell could be sentenced to more time (i.e. consecutive sentences) due to multiple victims was accurate. *State v. Gantt*, 108 Ariz. 92, 94, 492 P.2d 1199, 1201 (1972) ("Even though the two offenses may have occurred at approximately the same time and location, there were two different robbery victims, and two separate crimes."). Third, assuming that Ms. DiCampli made the alleged statements and assuming that such statements caused Ms. DiCampli's performance to fall below objectively reasonable standards, the Court **FINDS** that Powell was not prejudiced because he was competent at the time of trial.

Similarly, the Court **FURTHER FINDS** that Powell was not prejudiced by Ms. DiCampli's failure to obtain a copy of Dr. Bishop's letter. Powell has failed to establish that obtaining a copy of Dr. Bishop's letter would have had any effect on his competency determination, requests for reevaluation, or this Court's findings as to his competency and voluntarily absentia.

The Court **FURTHER FINDS** that Powell was not prejudiced by Ms. DiCampli's alleged failure to present mitigating factors. Powell does not identify what mitigating factors Ms. DiCampli should have raised and argued at sentencing, but failed to do so. More importantly, however, even if Ms. DiCampli did raise mitigating factors, it would not have altered the sentences imposed. As noted *supra*, the Court was required to sentence Powell to life imprisonment on multiple counts. Mitigating factors could not change those sentences.

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E. Ineffective Assistance of Appellate Counsel, Alex Heveri (CR20071727) & Robb Holmes (CR20080296)

Petitioner Powell claims that the "Direct Appeal Attorneys were also ineffective by not questioning the discrepancy in the dates of the medication, the thyroid damage as it related to mental health, or the missing letter from Dr. Bishop." Amended Petition at page 9, ¶ 2. This is a modified version of the claim Ms. Catrillo raised in the Rule 32 petition she filed on Powell's behalf. Because the Court permitted Powell to file a *pro se* Petition and raise those claims he believed Ms. Catrillo should have raised, but failed to do so, *see* December 11, 2014 order, the Court considers this claim timely and will address the merits.

Powell claims that, due to the conflict of interest conspiracy noted above, the Court incorrectly stated on August 4, 2009 that Powell's lithium was discontinued on July 23, 2009, when it was actually stopped on July 27th. Thus, Powell further claims that Dr. Bishop's letter, which stated that Powell's lithium was discontinued on July 23, 2009, was falsified or altered. Neither the Court nor Dr. Bishop could locate a copy of the letter. However, upon request of the Court, Dr. Bishop confirmed that "it does appear to me that most likely the Judge read the entire letter into the record. I certainly remember caring for this patient but do not specifically remember the letter or its contents." *See* Amended Petition, Exhibit O.

Powell relies upon a December 2, 2013 letter from Dr. Barry Morenz, an Associate Professor of Clinical Psychiatry at the University of Arizona, in support of his claim. *See* Exhibit U. The letter provides in pertinent part:

> On July 28, 2009 Mr. Powell had made statements in court such as, "I feel like I can explode at any time" and "I don't want to cuss people out and be bad or anything..." Mr. Powell did maintain his behavior at that time, although he was indicating he was having more difficulty controlling his emotions, which could conceivably be because his Lithium had been discontinued several days before because of the side effects noted above. Lamictal, another mood stabilizing agent, was started at some point in place of the Lithium...Despite the ambiguity about which medications Mr. Powell was getting and when, it does seem clear that the Lithium had been discontinued and the Lamictal had only recently been introduced when Mr. Powell was taken to court on August 4, 2009. It can take several days or weeks for the dosage of Lamictal to be adjusted and for the full benefits of the Lamictal to be manifest, if the Lamictal is going to be beneficial at all. While I agree that discontinuing the Lithium and changing to Lamictal probably would not increase the likelihood that Mr. Powell would become psychotic, the discontinuation of the Lithium and change to Lamictal could have an impact on Mr. Powell's moods and, more importantly, his ability to manage his moods and emotions such that he may have had greater difficulty containing himself in court on August 4, 2009 than he would have if he had been on an effective stable dose of a mood stabilizing medication.

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However, Dr. Morenz acknowledged that he did not review all of the records associated with this case. Dr. Morenz only reviewed a letter written by Rule 32 counsel, a letter from Petitioner Powell, a motion to extend time regarding Rule 32 filings, minute entries from July 30 and August 6, 2009, excerpts of the July 28, 2009 status conference transcript, the August 4, 2009 trial transcript, and Dr. Morenz's own April 8, 2008 and January 21, 2009 Rule 11 evaluations.

The Court, on the other hand, relied upon "the opinions, the testing, the opinions of the various significant number of mental health professionals who have worked with Mr. Powell over the years, including but not limited to Dr. Allender, Dr. Joseph, Dr. Kristensen and a variety of other people, both at the Arizona State Hospital and in the Restoration Competency Program." July 28, 2009 Transcript, 5:7-13. The Court also relied upon the "final competence report dated October 31, 2008, authored by Dr. Joseph at the Restoration Competency Program at the Pima County Jail." *Id.* at 4:21-25. Like Dr. Joseph, the Court believed that Powell "exaggerate[d] his physical and psychological symptoms. He may be motivated by external incentives such as evading criminal prosecution." *Id.* at 6:11-13. Dr. Morenz did not review this report. Although Dr. Morenz authored a report after Dr. Joseph on or about January 21, 2009, that evaluation focused upon Powell's competency at the time of the offense, not his competency to stand trial. Dr. Morenz also did not review numerous other records when preparing his letter, including observations made of Powell while incarcerated in the jail or while housed with A.S.H. *See* TT Day 1, 9:16-21.

As the Court discussed on August 4, 2009:

> The report that I get from the jail is that the medication change, that is the discontinuance of lithium, could have affected Mr. Powell's mood but has no effect on thoughts, voices. In other words, he is stable. Any problems with his behaviors are because Mr. Powell intends to misbehave. He is fully capable of acting appropriately in the courtroom.
>
> The Court's take on this, as is the take of the experts, is that Mr. Powell...while he does certainly have issues, is a malingerer; that he is fully aware of the kinds of things that he can do to try to convince others that he is incapable of participating in this process.
>
> As the Court said to Mr. Powell before he left, I'm not falling for it anymore. The experts don't fall for it anymore. And it was apparent this morning, compared to Mr. Powell's mood last week when I spoke to him, that he was calm when he conversed with the Court. And that was after his lithium was discontinued, and he wasn't on any mood elevators.
>
> This morning the Court believes that it is because he is afraid. And the Court understands that's why he is, but he has sort of run out of options now to avoid ultimately going to trial...There is no reason, in my judgment, that we cannot proceed with trial. In my judgment, Mr. Powell is intentionally acting out. It is not because of any thought disorders or any other

kind of psychological problem that would cause the Court to find him incompetent. He has been found competent, and I will bring Mr. Powell into the courtroom one last time. If he acts out, we will be taken back downstairs where he will remain.

Id. at 6:16-8:23.

Assuming, *arguendo*, that appellate counsel's performance fell below objectively reasonable standards, the Court **FINDS** that Petitioner Powell suffered no prejudice. Dr. Morenz's letter indicates that the medication change *probably would not increase* the likelihood that Mr. Powell would become psychotic, but it *could* have had an impact on Powell's mood such that Powell *may* have had a *greater* difficulty containing himself. At the time of trial on August 4, 2009, the Court was already aware that the discontinuance of lithium "could have affected [his] mood but has no effect on thoughts, voices." And while there is a possibility that Powell may have had a greater difficulty containing himself in court, there is nothing to suggest that Powell was incapable of controlling his actions or speech. To the contrary, the totality of the evidence and Powell's behavior, particularly on July 28, 2009 when Powell had discontinued using lithium and was not on any other mood elevators, suggests "that he [was] fully aware of the kinds of things that he can do to try to convince others that he is incapable of participating in this process." Furthermore, Powell voluntarily absented himself from both day two and three of trial by refusing to be present, not because the Court forcibly removed him for being disruptive.

Accordingly, Powell has failed to establish a colorable claim for relief as to this issue.

F. Ineffective Assistance of Rule 32 Counsel, Barbara Catrillo

"Non-pleading defendants ... have no constitutional right to counsel in post-conviction proceedings; thus, despite the existence of state rules providing counsel, a claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding." *State v. Escareno-Meraz*, 232 Ariz. 586, 587, ¶ 4, 307 P.3d 1013, 1014 (App. 2013), *review denied* (Nov. 26, 2013), *cert. denied*, 134 S. Ct. 1943 (2014); *see also State v. Mata*, 185 Ariz. 319, 336–37, 916 P.2d 1035, 1052–53 (1996); *State v. Krum*, 183 Ariz. 288, 291–92 & n. 5, 903 P.2d 596, 599–600 & n. 5 (1995); *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011); *State v. Armstrong*, 176 Ariz. 470, 474–75, 862 P.2d 230, 234–35 (App. 1993), *overruled on other grounds by State v. Terrazas*, 187 Ariz. 387, 390, 930 P.2d 464, 467 (App. 1996).

Accordingly, Petitioner Powell's ineffective assistance of counsel claim as to Rule 32 counsel is **DENIED**.

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G. CR2008-0296

It does not appear that Petitioner Powell challenged his CR20080296 convictions in his Amended Petition. The State noted the same in its response. In his reply, however, Powell claims 1) a conflict of interest because Ms. DiCampli was an agent for the State, 2) the ineffective of assistance of trial counsel because she a) failed to obtain relevant medical records and b) failed to present mitigating factors at sentencing, and 3) Powell was grossly overmedicated, and thus not competent at trial. Reply at pages 9-10. For the reasons discussed above, the Court **FINDS** that Powell has failed to establish a colorable claim for relief as to these issues.

III. Conclusion:

When a petitioner presents no "material issue of fact or law which would entitle the defendant to relief" and the Court determines that "no purpose would be served by any further proceedings," summary dismissal of a petition for post-conviction relief is appropriate. Ariz. R. Crim. P. 32.6(c). For the reasons discussed above, the Court finds that Defendant/Petitioner Vincent Alphonso Powell has failed to present a material issue of fact or law that would entitle him to an evidentiary hearing and failed to state a colorable claim for relief on any basis. Accordingly, **IT IS ORDERED** that the petition for post-conviction relief is **DENIED**.

Howard Fell
HON. HOWARD FELL

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