UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 23 2020

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

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

Before: IKUTA and MILLER, Circuit Judges.

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

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Any pending motions are denied as moot.

DENIED.

EX.
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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FEB 10 2021

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

JESUS MANUEL MORAN,

Petitioner-Appellant,

v.

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

Respondents-Appellees.

No. 20-16146

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

ORDER

Before: McKEOWN and BUMATAY, Circuit Judges.

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

No further filings will be entertained in this closed case.

EX.
- 1 -

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CV 15-0193-TUC-JR

ORDER

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

Discussion

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

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

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

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

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

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

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

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

Order

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

Dated this 2nd day of June, 2020.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

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ex.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-15-00193-TUC-JR

JUDGMENT IN A CIVIL CASE

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

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

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

April 27, 2020

s/ B. Cortez
By Deputy Clerk

ex.
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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CV 15-0193-TUC-JR

ORDER

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

I. Background[1]

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

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

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Ex.

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

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

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

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

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

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

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

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

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

II. Timeliness

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

III. Exhaustion

A. Legal Standards

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

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

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

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

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

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

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

B. Procedural Status of Moran's claims

1. Ground One

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Ground Two

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

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

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

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

3. Ground Three

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

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

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

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

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

C. Procedural Default

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

D. Cause and Prejudice

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

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

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

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

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

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

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

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

IV. Certificate of Appealability

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

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

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

28 U.S.C. § 2253.

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

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

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

V. Order

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

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

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

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

Dated this 24th day of April, 2020.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CV 15-0193-TUC-JR

ORDER

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

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EX.

I. Relevant Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Discussion

A. Rule 60

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

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

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

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

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

B. Equitable Tolling

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

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

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

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

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

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

C. Other Motions

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

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

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

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

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

III. Order

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

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

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

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

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

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

Dated this 25th day of June, 2018.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

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ex.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jesus Manuel Moran,

Petitioner,

vs.

Charles L. Ryan, et al.,

Respondents.

CV 15-0193-TUC-JR

ORDER

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

I. Background[1]

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

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

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ex.

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

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

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

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

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

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

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

II. Timeliness

A. Moran's Petition is Untimely.

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

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

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

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

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

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

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

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

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

B. Moran is not entitled to equitable tolling.

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

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

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

III. Certificate of Appealability

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

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

28 U.S.C. § 2253.

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

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

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

IV. Order

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

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

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

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

Dated this 10th day of February, 2017.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

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EX.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 5 2021

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

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

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

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

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

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

No further filings will be entertained in this closed case.

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NOT FOR PUBLICATION

FILED

DEC 9 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

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

Submitted December 2, 2020**

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

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

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

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

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

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

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

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

AFFIRMED.

MGD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Manuel Moran,

Plaintiff,

v.

Thomas E. Higgins,

Defendant.

No. CV 17-00613-TUC-JGZ

ORDER

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

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

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

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

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

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

Dated this 2nd day of December, 2019.

Honorable Jennifer G. Zipps
United States District Judge

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ex.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Manuel Moran,

Plaintiff,

v.

Thomas E Higgins,

Defendant.

NO. CV-17-00613-TUC-JGZ

JUDGMENT IN A CIVIL CASE

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

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

Brian D. Karth
District Court Executive/Clerk of Court

November 8, 2019

By s/ BRuiz
Deputy Clerk

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MGD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jesus Manuel Moran,

Plaintiff,

v.

Thomas E. Higgins,

Defendant.

No. CV 17-00613-TUC-JGZ

ORDER

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

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

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

I. Background

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

II. Summary Judgment Standard

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

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

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

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

III. Facts

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

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

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

(Doc. 26-1 at 6.)

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

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

(*Id.* at 9.)

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

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

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

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

IV. Discussion

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

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

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

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

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

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EX.

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

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

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

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

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

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

V. Remaining Motions

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

IT IS ORDERED:

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

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

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

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

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

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

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

. . . .

. . . .

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

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

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

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

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

Dated this 7th day of November, 2019.

Honorable Jennifer G. Zipps
United States District Judge

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