APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZANE DICKINSON, *Petitioner-Appellant*, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, *Respondents-Appellees*.	No. 20-15175 D.C. No. 3:18-cv-08037-MTL OPINION

Appeal from the United States District Court
for the District of Arizona
Michael T. Liburdi, District Judge, Presiding

Argued and Submitted November 19, 2020
Phoenix, Arizona

Filed June 22, 2021

Before: Richard C. Tallman, Jay S. Bybee, and Bridget S. Bade, Circuit Judges.

Opinion by Judge Bade

SUMMARY*

Habeas Corpus

The panel affirmed the district court's denial of Zane Dickinson's habeas corpus petition challenging his Arizona state court conviction for attempted second-degree murder in a case in which the trial court misstated Arizona law in its instructions to the jury by implying that a defendant could be guilty of attempted second-degree murder if he merely intended to cause serious physical injury, not death.

Trial counsel failed to object to the erroneous instruction. With different counsel, Dickinson unsuccessfully challenged the error on direct appeal. He petitioned for state post-conviction relief, but his counsel did not raise any claims related to the instructional error, and the state trial and appellate courts denied relief. The district court denied Dickinson's federal habeas corpus petition, declining to excuse Dickinson's procedural default of these claims.

In this appeal, Dickinson asked this court to excuse his procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012), so that he could seek habeas relief on the basis of constitutionally ineffective assistance of trial counsel (IATC).

Dickinson asserted two theories in an effort to establish prejudice and excuse the procedural default.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

He argued that his trial counsel's failure to object prejudiced him because it deprived him of a more favorable standard of review on direct appeal. Rejecting this theory on a different ground than the district court did, the panel held that as a matter of federal law, Dickinson cannot satisfy *Strickland*'s prejudice requirement for his IATC claim merely by showing that trial counsel's failure to object to a jury instruction deprived him of a more favorable standard of review on direct appeal.

Dickinson also argued that his IATC claim is substantial because his trial counsel's failure to object to the erroneous instruction prejudiced him at trial. The panel noted that the record amply supports the Arizona Court of Appeals' characterization of the trial, and held that Dickinson cannot demonstrate a reasonable probability that the trial would have had a different outcome without the erroneous instruction, where the jury heard overwhelming evidence that Dickinson intended to kill the victim, it heard only a few passing comments that it could have conceivably construed as evidence that Dickinson did not intend to kill the victim, and neither the State nor defense counsel ever suggested that Dickinson intended only to cause serious physical injury.

COUNSEL

Molly A. Karlin (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

Jillian B. Francis (argued) and Jason D. Lewis, Assistant Attorneys General; J.D. Nielsen, Habeas Unit Chief; Mark

Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondents-Appellees.

OPINION

BADE, Circuit Judge:

During Zane Dickinson's trial for attempted second-degree murder, the court misstated Arizona law in its instructions to the jury, and his trial counsel failed to object to the erroneous instruction. With different counsel, Dickinson challenged the error on direct appeal; the Arizona Court of Appeals affirmed his conviction and the Arizona Supreme Court denied review. Dickinson petitioned for state post-conviction relief, but his counsel did not raise any claims related to the instructional error. After the state trial and appellate courts denied relief, Dickinson filed a petition for a writ of habeas corpus in federal district court, pursuant to 28 U.S.C. § 2254, asserting claims based on the erroneous instruction. The district court declined to excuse Dickinson's procedural default of these claims. In this appeal, Dickinson asks us to excuse his procedural default so that he can seek habeas relief on the basis of constitutionally ineffective assistance of trial counsel. We conclude that he has not established a basis to excuse the procedural default of these claims, and we affirm.

I

In 2011, Dickinson was indicted in Mohave County Superior Court on one count of attempted second-degree murder, two counts of aggravated assault, and one count of leaving the scene of an accident. The indictment alleged that the victim was riding his bicycle when Dickinson repeatedly

attempted to run over him with his truck. Dickinson pleaded not guilty to all counts.

At trial, Dickinson's counsel argued that Dickinson was not present when the crime occurred and that he was mistaken for the perpetrator. In his opening statement, Dickinson's counsel described how July 2, 2011 was a "perfectly ordinary day" for Dickinson, who spent the morning attending a swap meet and visiting a friend before returning home. "The next thing he knows, the police show up, he's being accused of a crime, he's being handcuffed behind his back and treated like a criminal, he's being thrown in the back of a cruiser, still not really sure what is going on."

During the State's case-in-chief, the victim testified that he had known Dickinson for over twenty years, that they were friends, and that he had loaned Dickinson "[a] weed eater and some other tools" to do "side jobs for yards and stuff." After the victim learned that Dickinson failed to complete a job despite accepting an advance payment, he decided he wanted his tools back, and the two friends had a falling-out when Dickinson refused to return them. The victim recounted that several weeks before the attack, the two got into a fistfight and Dickinson "pulled a knife on [him]" after the victim knocked Dickinson down.

The victim stated that on July 2, he "was riding [his] bike around" when he spotted Dickinson's truck in front of his friend Brett Altizer's house. The victim got off his bike and "walk[ed] by the truck," and then he saw Dickinson "pull[] out this ax, and he's coming at me," so the victim pulled out

a baseball bat he kept on his bike.[1] He stated that Dickinson was cursing at him and "telling [him] he's going to kill [him]," but Altizer intervened and stopped the fight. The victim "proceeded to put [his] bat away"; "eventually [Dickinson] put the ax away," and the victim "apologized to the guy for bringing problems to his house, . . . got on his bike[,] and rode away."

About ten minutes later, as he rode toward his house, he saw Dickinson driving his truck. He testified:

> I looked up and I seen him, and the last thing in my head is, he smiled. So next thing I know, he revved up his motor and he shot towards me. And I remember what happened. He hit the back of my bike, he had spun me all the way around about ten feet in the dirt. I landed on the dirt. . . .
>
> [Then] this white truck pulls in front and stops him, I get back on my bike and I take off towards my house. . . .
>
> I got on my bike; I just took off riding. . . . I think I lost him, right; and all of a sudden I hear his motor revving up, and I look back and he's no more than maybe a foot from my bumper, and he's laughing, so I realize what's going on.

The victim tried to turn toward a fence, but as he described at trial, "When I go to do that, at the same time he turns his

[1] The victim stated that he regularly carried a bat for protection because "the area was really bad about dogs."

wheel and hit[s] my bike; and that's the last thing I remember, and I wake up in the hospital." The victim also recounted that during the attack, Dickinson "had that look in his face like, you know, he was going to kill me."

Altizer, who broke up the fight between Dickinson and the victim on his property shortly before the attack, testified that "[e]arlier that morning" on the day of the attack, Dickinson "said, 'I'm going to run him over.'" Altizer testified that after the attack Dickinson returned to his house, "tossed [him] the keys, and was saying something about 'he did it.'"

The jury also heard evidence that the victim sustained multiple injuries including a concussion, other head injuries requiring thirteen stitches, and a broken ankle, that his "funny bone was ripped out" from his elbow, and that his biceps and triceps muscles were separated from the bone in one arm.

Defense counsel did not call any witnesses or present any evidence. Instead, he focused on trying to undermine the credibility of the State's witnesses. For example, during his cross-examination of the victim, defense counsel elicited that the victim had a prior felony conviction, that the victim had been taking pain medications ever since the attack, and that the victim had filed a claim against Dickinson's insurance. Defense counsel also questioned the victim about the distance between him and the truck when he saw it during the attack, as well as how long the victim was able to see the driver.

Similarly, defense counsel attempted to discredit Robert Todd, an eyewitness who closely corroborated the victim's account of the attack, by questioning him at length about medications that he took, and casting doubt on whether the

witness got a good enough look at the driver of the truck to conclude it was Dickinson. Similarly, defense counsel extensively questioned the testifying police officers and investigators about their training, and about how they investigated this case.

In his closing argument, defense counsel offered an alternative account:

> What really happened—really happened was [Brett] Altizer, where Zane had left his truck and his keys, takes Zane's truck and is driving down the street they are talking about, and he struck [the victim]. Maybe he got frightened and he left the scene. [The victim] calls, because they are friends, we know they are friends. Brett told you that he was a friend of [the victim], or at least an acquaintance of [the victim]. So why didn't you stop? You hit me driving Zane's truck?
>
> And at that point it sinks in amongst the three of them, because Brett knew Zane had insurance, he told you that; but he had taken that truck without the owner's permission.

He asserted that Altizer and the victim then discussed the accident and decided to blame Dickinson. He also argued that there was "bad blood" between Dickinson and these witnesses, and that the victim's "chances are going to be quite a bit better with the insurance company if [Dickinson] is convicted of attempted murder, felony assault, leaving the scene of the accident by a jury of his peers." He spent the remainder of his argument attempting to undermine the other witnesses' credibility, discussing alleged "inconsistencies in

their stories," arguing that the police investigation was a "comedy of errors" involving "at least 12 substantial things they didn't do" properly, and arguing there was inadequate evidence of the extent of the victim's injuries.

At the conclusion of the three-day trial, the trial court instructed the jury on the second-degree murder charge as follows:

> The crime of attempted second degree murder has three elements. In order to find the defendant guilty of attempted second degree murder, you must find that, number one, the defendant intentionally did some act; and number two, the defendant believed such act was a step in the course of conduct planned to culminate in the commission of the crime of second degree murder; and number three, the defendant did so with the mental state required for the commission of the crime of second degree murder.
>
> It is not necessary that you find that the defendant committed the crime of second degree murder; only that he attempted to commit such crime.
>
> The crime of second degree murder has the following elements: Number one, the defendant caused the death of another person; and number two, the defendant either, A, did so intentionally or, B, knew that his conduct would cause death or serious physical injury.

By implying that a defendant could be guilty of attempted second-degree murder if he merely intended to cause serious physical injury, not death, this instruction contradicted Arizona precedent holding that "[t]he offense of attempted second-degree murder requires proof that the defendant intended or knew that his conduct would cause death." *State v. Ontiveros*, 81 P.3d 330, 333 (Ariz. Ct. App. 2003). However, Dickinson's counsel did not object to the instruction.

The jury returned a general verdict finding Dickinson guilty on all counts. The court imposed concurrent sentences of twelve years' imprisonment on the attempted second-degree murder count, and nine and seven years respectively on the two aggravated assault counts; it also imposed a two-year sentence, to be served consecutively to the other sentences, for leaving the scene of an accident.

On direct appeal, Dickinson was represented by a different attorney, and he challenged the attempted second-degree murder conviction, arguing that the jury instruction was erroneous under *Ontiveros*. Because Dickinson failed to preserve the issue for appeal, the Arizona Court of Appeals applied a "fundamental error" standard of review, placing the burden on Dickinson to "establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. Dickinson*, 314 P.3d 1282, 1285 (Ariz. Ct. App. 2013) (quotation marks and citation omitted). Although the Arizona Court of Appeals agreed that the instruction was erroneous and that the error was fundamental, it held that Dickinson had not carried his burden of showing prejudice. *Id.* at 1285–88. Dickinson and the State both unsuccessfully petitioned the Arizona Supreme Court for review.

Dickinson then filed a petition for state post-conviction relief through counsel, raising two claims that were both unrelated to the instructional error. The trial court denied relief on both claims. Dickinson filed a pro se petition for review with the Arizona Court of Appeals, arguing that his post-conviction counsel had represented him ineffectively. The Arizona Court of Appeals denied the petition, finding that the trial court had correctly denied relief on the two claims counsel raised and that Dickinson had no right to effective assistance of post-conviction counsel under Arizona law.

In February 2018, Dickinson filed a timely pro se petition pursuant to 28 U.S.C. § 2254 in federal district court, seeking a writ of habeas corpus. He raised two grounds for relief: (1) that the erroneous jury instruction violated his Fourteenth Amendment due process rights; and (2) that his trial counsel's failure to object to the jury instruction deprived him of his Sixth Amendment right to the effective assistance of counsel. While the petition was pending, Dickinson filed a motion for the appointment of counsel, which the magistrate judge granted.

After additional briefing, the magistrate judge issued a report and recommendation (R&R) in which she recommended that relief be denied as to Dickinson's due process claim and granted as to his ineffective assistance of counsel claim. She concluded that although both claims were procedurally defaulted, the default was excused as to the ineffective assistance claim under *Martinez v. Ryan*, 566 U.S. 1 (2012).

The district court accepted the magistrate judge's R&R as to Dickinson's due process claim but rejected it as to his ineffective assistance of counsel claim, thus denying relief on both grounds. The district court also disagreed with the

magistrate judge's prejudice analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). The district court held that the relevant question was not whether Dickinson could have prevailed on appeal in obtaining a new trial, but only whether Dickinson would have prevailed at trial but for the error, and that Dickinson had not met *Strickland*'s standard for showing prejudice at trial. Because the district court concluded that Dickinson's ineffective assistance of trial counsel (IATC) claim was not "substantial" under *Martinez*, it denied Dickinson's claim, holding both that his procedural default was not excused and that the claim failed on the merits. However, the district court granted a certificate of appealability on "whether an inquiry into trial counsel's effectiveness under *Strickland* includes an evaluation of whether the direct appeal would have been different, but for trial counsel's missteps," and "whether *Strickland* in this context allows prejudice to be found solely because the court cannot know the legal theory under which the jury convicted the defendant." Dickinson timely appealed.

II

We review "de novo a district court's decision regarding habeas relief, including questions regarding procedural default." *Jones v. Shinn*, 943 F.3d 1211, 1219–20 (9th Cir. 2019). "Ineffective assistance of counsel claims are mixed questions of law and fact which we also review de novo." *Id.* at 1220.

III

We begin with an overview of the relevant legal framework before addressing Dickinson's arguments for excusing his procedural default. In general, "[f]ederal habeas courts reviewing convictions from state courts will not consider claims that a state court refused to hear based

on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017); *see Coleman v. Thompson*, 501 U.S. 722, 747–48 (1991). However, the Supreme Court has recognized "a narrow exception" to this so-called procedural default rule when a petitioner "can establish 'cause' to excuse the procedural default and demonstrate that he suffered actual prejudice from the alleged error." *Davila*, 137 S. Ct. at 2062. The Court explained:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 566 U.S. at 17.[2]

To satisfy *Martinez*'s "cause" prong based on post-conviction counsel's failure to raise a claim, a petitioner must show that post-conviction counsel was ineffective under the standards of *Strickland*. *Martinez*, 566 U.S. at 14. A petitioner cannot satisfy this requirement if the underlying "ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or [] it is wholly without factual support, or [] the attorney in the initial-review collateral proceeding did not perform below constitutional standards." *Id.* at 16; *see Sexton v. Cozner*,

[2] Arizona courts appoint counsel at the defendant's request in any first collateral proceeding. *See* Ariz. R. Crim. P. 32.5(a)(1).

679 F.3d 1150, 1157 (9th Cir. 2012) ("[C]learly we cannot hold counsel ineffective for failing to raise a claim that is meritless."). "Accordingly, [post-conviction] counsel would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective." *Sexton*, 679 F.3d at 1157. Similarly, to satisfy *Martinez*'s "prejudice" prong, a petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14.[3]

In sum, "to establish cause and prejudice in order to excuse the procedural default of his ineffective assistance of trial counsel claim," a petitioner must demonstrate: "(1) post-conviction counsel performed deficiently; (2) 'there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different'; and (3) the 'underlying ineffective-assistance-of-trial-counsel claim is a substantial one.'" *Ramirez v. Ryan*, 937 F.3d 1230, 1242 (9th Cir. 2019) (internal citations omitted), *cert. granted sub nom. Shinn v. Ramirez*, No. 20-1009, 2021 WL 1951793 (U.S. May 17, 2021). Thus, whether Dickinson's procedural default is excused depends on the merits of his underlying IATC claim, and specifically, on whether Dickinson can show that he was prejudiced within the meaning of

[3] Notably, the *Martinez* "cause" and "prejudice" analyses overlap with each other because the determination whether there is a "reasonable probability that the result of the post-conviction proceedings would have been different" had post-conviction counsel raised an issue is "necessarily connected to the strength of the argument that trial counsel's assistance was ineffective." *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 818 (9th Cir. 2015) (en banc).

Strickland by his trial counsel's failure to object to the erroneous jury instruction.

IV

Dickinson asserts two different theories in an effort to establish prejudice and excuse the procedural default of his claims—that he was deprived of a more favorable standard of review on appeal and that he was prejudiced at trial. We reject both arguments and affirm the district court on the ground that Dickinson has not presented a substantial IATC claim.

A

Dickinson argues that his trial counsel's failure to object prejudiced him because it deprived him of a more favorable standard of review on direct appeal. While we affirm the district court's holding that Dickinson failed to show prejudice on this theory, we do so on a different basis than the one the district court articulated.

1

The district court did not decide whether, as a general matter, "an inquiry into trial counsel's effectiveness under *Strickland* includes an evaluation of whether the appeal would have been different, but for trial counsel's missteps." Instead, it held that Dickinson could not have shown prejudice to his direct appeal in his state collateral proceedings because Arizona courts have rejected that approach. *See State v. Speers*, 361 P.3d 952, 960 (Ariz. Ct. App. 2015) (rejecting an IATC petitioner's argument that "framed the issue . . . in the context of counsel's failure to preserve [his] claims for appeal," reasoning that "[h]e is challenging his attorney's conduct at his trial, and must show

that [the attorney's] alleged unprofessional errors and omissions were sufficiently prejudicial that they 'undermine[d] confidence in the outcome' of that proceeding." (last alteration in original) (quoting *Strickland*, 466 U.S. at 694)).

Dickinson argues that this court "does not defer to Arizona law generally as to the interpretation of [federal] constitutional questions," and that Arizona courts' approach to analyzing *Strickland* prejudice is irrelevant to a federal habeas court's evaluation of an IATC claim. Although this is true, in analyzing whether Dickinson's procedural default is excused based on his state post-conviction counsel's failure to raise a ground for relief, it is nevertheless relevant to consider whether prevailing case law disfavored that ground. *See, e.g.*, *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues."); *cf. Smith v. Robbins*, 528 U.S. 259, 288 (2000) (explaining that while it is "possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, . . . it is difficult to demonstrate that counsel was incompetent" for failing to raise the claim).

Further complicating the matter, *Speers* was decided by Division Two of the Arizona Court of Appeals, while Dickinson's post-conviction proceedings took place in Division One. Thus, while *Speers* would have been persuasive "absent a decision by the Arizona Supreme Court compelling a contrary result," it would not have completely foreclosed Dickinson from obtaining state post-conviction relief with his prejudice-on-appeal theory. *Scappaticci v. Sw. Sav. & Loan Ass'n*, 662 P.2d 131, 136 (Ariz. 1983).

Rather than resolve these issues, we affirm the district court on the more general ground that as a matter of federal law, Dickinson cannot satisfy *Strickland*'s prejudice requirement for his IATC claim merely by showing that trial counsel's failure to object to a jury instruction deprived him of a more favorable standard of review on direct appeal.

2

Dickinson argues that under the *Strickland* prejudice analysis, we must consider not only whether his trial counsel's error undermines confidence in the jury's verdict, but also whether it "undermines confidence in the outcome of the direct appeal." To the extent these two inquiries might yield different answers (that is, that there is a reasonable probability that a petitioner may have prevailed on appeal but for counsel's error, but there is no reasonable probability that the jury's verdict would have been different), this approach would be contrary not only to the Supreme Court's prejudice analysis in *Strickland*, but also a steady line of subsequent cases holding that the IATC prejudice analysis focuses on the effect of an alleged error on the *verdict*—that is, on outcome of the trial. *See, e.g.*, *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (noting that *Strickland*'s prejudice inquiry "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair"); *Walker v. Martel*, 709 F.3d 925, 941 (9th Cir. 2013) ("*Strickland* requires an actual finding that it is reasonably probable that, but for the unprofessional errors, the outcome *at trial* would have been different." (emphasis added)).[4]

[4] Thus, the Supreme Court has repeatedly cautioned that "the rules governing ineffective-assistance claims 'must be applied with

If we accepted Dickinson's theory of prejudice based on the loss of a more favorable standard of appellate review, we would be allowing an end run around *Strickland*'s stringent requirement of demonstrating that "but for counsel's unprofessional errors, the *result of the proceeding*"—not merely the defendant's *burden* during a *subsequent* proceeding—"would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). We decline to adopt a theory that would expand prejudice beyond the Court's analysis in *Strickland*.

Dickinson cites *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), to argue that "*Strickland* applies to 'counsel's performance during the course of a legal proceeding, either at trial *or on appeal*.'" In *Flores-Ortega*, after a defendant pleaded guilty to second-degree murder and was sentenced, his court-appointed trial counsel failed to file a timely notice of appeal. *Id.* at 473–74. The defendant subsequently sought federal habeas relief, alleging ineffective assistance of counsel based on his trial counsel's failure to file a notice of appeal. *Id.* at 474. The Supreme Court observed that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think

scrupulous care,'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1912 (2017) (citation omitted), lest "'[a]n ineffective-assistance claim . . . function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial,' thus undermining the finality of jury verdicts," *id.* (first alteration in original) (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)). *See also Premo v. Moore*, 562 U.S. 115, 122 (2011) ("An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial . . . , and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." (quoting *Strickland*, 466 U.S. at 689–90)).

either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. The Court further held that "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484.

The Court explained that although *Strickland*'s prejudice prong ordinarily requires a "defendant to demonstrate that the errors 'actually had an adverse effect on the defense,'" *id.* at 482 (quoting *Strickland*, 466 U.S. at 693), this case was "unusual in that counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself," *id.* at 483. Under these unique circumstances, the Court reasoned, the "denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, . . . demands a presumption of prejudice. Put simply, we cannot accord any presumption of reliability to judicial proceedings that never took place." *Id.* (internal quotation marks and citation omitted).

Flores-Ortega does not support Dickinson's argument that the loss of a more favorable standard of appellate review due to counsel's failure to object to a jury instruction satisfies *Strickland*'s prejudice prong. Counsel's failure to object to a jury instruction did not "deprive[]" Dickinson of "an appeal altogether." *Id.* Instead, ordinary trial errors like this fall under the general rule that the Supreme Court carefully reiterated and distinguished on the facts in *Flores-Ortega*: "We normally apply a strong presumption of reliability to judicial proceedings and require a defendant to overcome that presumption by showing how specific errors

of counsel undermined the reliability of the finding of guilt." *Id.* at 482 (alteration adopted) (internal quotation marks and citations omitted). Indeed, Dickinson does not argue that the failure to object to a jury instruction is an error of such "magnitude" that it calls for "presum[ing] prejudice." *Id.* Instead, he cites *Flores-Ortega* to argue that a defendant can show he was prejudiced by trial counsel's deficient performance based solely on the loss of a more favorable standard of review in appellate proceedings. But nothing in *Flores-Ortega* supports this argument.[5]

However, the Eleventh Circuit's reasoning in *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003) is instructive on the issue of when the outcome of an appeal is relevant to the prejudice inquiry for an IATC claim. In *Davis*, defense counsel objected to the state's repeated peremptory strikes of black jurors during voir dire, but then failed to renew his objection at the conclusion of voir dire as required under Florida law to preserve a *Batson* challenge for appeal. *Id.* at 1314–15. On federal habeas review, the Eleventh Circuit held that trial

[5] Dickinson also cites *Garza v. Idaho*, 139 S. Ct. 738 (2019), to support his theory of prejudice on appeal, but that case is similarly inapposite. In *Garza*, the Court merely extended *Flores-Ortega*'s holding to situations when "the defendant has, in the course of pleading guilty, signed . . . an appeal waiver." *Id.* at 742 (quotation marks and citation omitted). The Court held that "when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued," the "presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver." *Id.* The Court relied on the same reasoning as in *Flores-Ortega*, explaining that when trial counsel's error entirely deprives a defendant of an appellate proceeding, *Strickland* prejudice does not depend "on proof that the defendant's appeal had merit." *Id.* at 748. This holding is unhelpful to Dickinson's argument for the same reasons the holding in *Florez-Ortega* is unhelpful.

counsel had "performed deficiently in failing, as required by [Florida law], to renew [defendant's] *Batson* challenge before accepting the jury." *Id.* at 1314. The court went on to consider whether, under *Strickland*, it should assess prejudice based on the impact the error had on the trial or on the appeal. *Id.* It concluded that the appropriate focus was prejudice on appeal, likening counsel's failure to renew the objection to the attorney's failure to file a notice of appeal in *Flores-Ortega*:

> As in *Flores-Ortega*, the attorney error Davis identifies was, by its nature, unrelated to the outcome of his trial. To now require Davis to show an effect upon his trial is to require the impossible. Under no readily conceivable circumstance will a simple failure to preserve a claim—as opposed to a failure to raise that claim in the first instance—have any bearing on a trial's outcome. Rather, as when defense counsel defaults an appeal entirely by failing to file a timely notice, the only possible impact is on the appeal.
>
> Accordingly, when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved.

Id. at 1315–16. The Eleventh Circuit's distinction between "a simple failure to preserve a claim" and "a failure to raise

that claim in the first instance" aptly illustrates why *Flores-Ortega*'s narrow holding does not apply to Dickinson's IATC claim. *Id.* Dickinson's claim, based on his trial counsel's failure to object to a jury instruction, is not the sort of "unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal." *Id.* at 1316. Unlike the circumstances in either *Flores-Ortega* or *Davis*, it is entirely possible to analyze the prejudice of an unobjected-to jury instruction upon the outcome of the trial itself.

Dickinson also argues that the Second, Third, and Fifth Circuits, along with this circuit in an unpublished memorandum disposition, have held "that prejudice exists where trial counsel's failure to preserve an issue for appeal prejudiced the outcome of the appeal." But, as we explain next, none of the decisions he cites support this proposition.

Dickinson first cites *Parker v. Ercole*, 666 F.3d 830 (2d Cir. 2012) (per curiam), in which a § 2254 petitioner argued that his trial counsel had ineffectively failed to preserve a sufficiency-of-the-evidence objection for appeal after the jury returned a guilty verdict. *Id.* at 832. Because the objection would not have affected the trial itself, and the trial court would have reviewed such an objection using the same standards as the appellate court, the Second Circuit noted without analysis that the prejudice prong depended on whether, "but for his counsel's failure to preserve his sufficiency claim, there is a reasonable probability that the claim would have been considered on appeal and, as a result, his conviction would have been reversed." *Id.* at 834. The Second Circuit did not, however, suggest that the loss of a more favorable standard of appellate review could satisfy *Strickland*'s prejudice requirement.

He also cites *Rogers v. Quarterman*, 555 F.3d 483 (5th Cir. 2009), where the Fifth Circuit considered the argument by a § 2254 petitioner, convicted while still a minor, that "he was prejudiced by defense counsel's mistake" in failing to object to the admission of his confession on voluntariness grounds. *Id.* at 495. Although Texas law did not favor such a challenge, the petitioner nonetheless argued that counsel's failure to object (and thus preserve the issue for appeal) prejudiced him "because his inability to appeal the voluntariness of his confession made it impossible for an appellate court to adopt a new rule requiring parental access during juvenile interrogation," which—if adopted—would have rendered his confession inadmissible. *Id.*

In rejecting this argument, the Fifth Circuit did not address whether a petitioner could show prejudice based on the loss of more favorable appellate review. *See id.* It simply held that the petitioner did not suffer the prejudice he claimed, reasoning that "[t]his court has no reason to speculate that a Texas appellate court would impose additional *per se* requirements to further protect juveniles," and that absent such a rule, "there is no reasonable likelihood that the Fourteenth Court of Appeals, the Texas Court of Criminal Appeals, or the United States Supreme Court would have found the confession to be involuntary or inadmissible had that issue been properly before it." *Id.* The Fifth Circuit's brief discussion of how an objection might have been resolved had it not been waived—in the course of concluding that counsel's failure to object did *not* prejudice the petitioner—does not support Dickinson's argument that the loss of a more favorable standard of review constitutes *Strickland* prejudice.

Dickinson also cites *Government of the Virgin Islands v. Vanterpool*, 767 F.3d 157 (3d Cir. 2014), but this decision

does not address the possibility of trial counsel's error prejudicing a defendant on appeal. Instead, the Third Circuit held that a § 2254 petitioner's trial counsel prejudiced him by failing to assert a First Amendment challenge to a criminal statute because "had [his] attorney raised the issue to the trial court, [the statute] would likely have been found unconstitutional." *Id.* at 168. The Third Circuit did not discuss whether this constitutional challenge would have succeeded at trial or on appeal; it simply concluded that "the First Amendment challenge would have been viable had it been raised during trial." *Id.* at 160. Moreover, because the First Amendment challenge would have invalidated the statute of conviction, the prejudice analysis in *Vanterpool* certainly does not support Dickinson's argument that an error may fall short of undermining confidence in the outcome of the trial, but nevertheless satisfy *Strickland*'s prejudice prong simply by depriving the defendant of a more favorable appellate standard of review.

Finally, Dickinson argues that in *Burdge v. Belleque*, 290 F. App'x 73 (9th Cir. 2008), an unpublished memorandum disposition, the Ninth Circuit granted "habeas relief because trial counsel's failure to preserve what would have been a meritorious issue on appeal was prejudicial." In *Burdge*, a defendant's trial counsel failed to object to the application of a state sentencing provision that the Oregon Court of Appeals subsequently ruled was inapplicable to defendants who, like him, had no felony convictions at the time they committed the relevant offense. *Id.* at 76.

On federal habeas review, a panel of this court held that the Oregon Supreme Court had unreasonably applied *Strickland* in denying the defendant's IATC claim. *Id.* at 77. The panel concluded that counsel's failure to object to the application of the sentencing provision clearly constituted

deficient performance and that the petitioner was prejudiced because, given the state of Oregon law on the sentencing provision, "if counsel had objected to [its] applicability . . . , either the sentencing judge would have agreed with the objection, or the issue would have been preserved for appeal." *Id.* at 79.

Burdge does not support Dickinson's argument.[6] The court in *Burdge* did not analyze whether the loss of a more favorable standard of appellate review satisfies *Strickland*'s prejudice prong for deficient performance by trial counsel. Instead, it simply concluded that if trial counsel had objected to the sentencing error, "either the sentencing judge would have agreed with the objection, or the issue would have been preserved for appeal." *Id.* To be sure, in a certain sense, the forfeiture of an issue for appeal is relevant to analyzing the prejudice of trial counsel's failure to object because we assume that if trial counsel had objected and the trial court erroneously overruled the objection, the error would have been corrected on appeal. But that is simply to say that when assessing whether a defendant was prejudiced by trial counsel's failure to object, we assume axiomatically that the objection, if raised, would have been correctly ruled upon.

This is apparently what the *Burdge* panel meant when it concluded that "either the sentencing judge would have agreed with the objection, or the issue would have been preserved for appeal." *Id.* This also helps clarify why the Second and Third Circuits discussed how an unraised

[6] Moreover, as a memorandum disposition, *Burdge* is "at best, persuasive authority." *Hines v. Youseff*, 914 F.3d 1218, 1230 (9th Cir. 2019). And even assuming the panel in *Burdge* implicitly endorsed Dickinson's position, it did so in passing, without any analysis that could persuasively support Dickinson's argument.

objection might have fared *on appeal*, even though a trial court would have initially ruled on it. *See Vanterpool*, 767 F.3d at 168 ("[H]ad Vanterpool's attorney raised the issue to the trial court, Section 706 would likely have been found unconstitutional. By virtue of his trial counsel's failure to *preserve* a viable First Amendment challenge, Vanterpool has satisfied the second prong of the *Strickland* test." (emphasis added)); *Parker*, 666 F.3d at 834 ("Parker must show that, but for his counsel's failure to preserve his sufficiency claim, there is a reasonable probability that the claim would have been considered *on appeal* and, as a result, his conviction would have been reversed." (emphasis added)). But these cases do not support the argument that the loss of an appellate standard of review can itself constitute prejudice under *Strickland*.

* * *

Given the clear weight of authority against Dickinson's argument, and considering that no court has adopted it, we find his prejudice-on-appeal theory unpersuasive. We hold that Dickinson cannot satisfy *Strickland*'s prejudice requirement for an IATC claim for failure to object to a jury instruction based on the consequent loss of a more favorable standard of appellate review.

B

We next consider Dickinson's argument that his IATC claim is substantial because his trial counsel's failure to object to the erroneous instruction prejudiced him at trial. Specifically, Dickinson asserts that "at least one juror could have relied on the invalid portion of the instruction and convicted him of attempted second-degree murder based on a finding that his intent was only to injure, and not to kill" the victim. We find this argument unpersuasive.

As an initial matter, unlike Dickinson's prejudice-on-appeal theory that we rejected in the preceding section, and which would have implicated Arizona state courts' harmless error standard, this theory of prejudice turns directly on *Strickland*'s standard. *See Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009). To establish prejudice under *Strickland*, Dickinson must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Although Dickinson correctly observes that counsel's error need not be "outcome-determinative" to constitute ineffective assistance, *id.* at 697, "[t]he likelihood of a different result must be substantial, not just conceivable," to satisfy *Strickland*'s prejudice prong, *Harrington*, 562 U.S. at 112 (citation omitted). Thus, when the Supreme Court declined to adopt a more stringent "outcome-determinative test" for prejudice in *Strickland*, it explained that the difference between this standard and the "substantial likelihood" test is so small that it "should alter the merit of an ineffectiveness claim only in the rarest case." *Strickland*, 466 U.S. at 697.[7]

When Dickinson challenged the erroneous jury instruction on direct appeal, the Arizona Court of Appeals held that he failed to "affirmatively prove prejudice" by "show[ing] that a reasonable, properly instructed jury could have reached a different result," as Arizona law required for him to prevail on a forfeited jury instruction challenge. *Dickinson*, 314 P.3d at 1286 (internal quotation marks and

[7] Dickinson argues that the district court erred by requiring him to show "that the outcome of his trial *would* have been different with a properly instructed jury," "not that it *could* have been different." As we explain below, the district court applied the proper test for *Strickland* prejudice.

citations omitted). The Arizona Court of Appeals found that at trial, "[t]he State's theory was that Dickinson intended to kill the victim, not that he intended to cause physical injury or knew that his conduct would cause serious physical injury." *Id.* It also found that Dickinson never asserted a lack-of-intent defense, but instead solely asserted mistaken identity. *Id.* Finally, it found that the jury heard significant evidence that Dickinson intended to kill the victim, and no firsthand evidence that Dickinson intended only to cause serious injury. *Id.* at 1286–87. The court found nothing to "suggest[] that Dickinson intended to cause serious injury to the victim (as opposed to kill him), which is the fundamental error in the jury instructions." *Id.* at 1288.

We must accept the Arizona Court of Appeals' factual findings about Dickinson's trial unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Runningeagle v. Ryan*, 686 F.3d 758, 763 n.1 (9th Cir. 2012).[8] The record amply supports the Arizona Court of Appeals' characterization of the trial, and considering these facts, Dickinson cannot demonstrate a reasonable probability that the trial would have had a different outcome without the erroneous jury instruction. The jury heard overwhelming evidence that Dickinson intended to kill the victim, it heard only a few passing comments that it could

[8] The Arizona Court of Appeals' legal conclusion regarding prejudice was based on state law's "fundamental error" standard, not *Strickland*'s standard for prejudice. No state court ruled on the merits of Dickinson's IATC claim, and thus we do not apply AEDPA deference to any legal conclusion of the state courts regarding prejudice. Nevertheless, we owe deference to the state court's factual findings. *See Kirkpatrick v. Chappell*, 950 F.3d 1118, 1131 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 561 (2020) ("Unlike § 2254(d), § 2254(e)(1)'s application is not limited to claims adjudicated on the merits. Rather, it appears to apply to all factual determinations made by state courts.").

have conceivably construed as evidence that Dickinson did not intend to kill the victim, and neither the State nor defense counsel ever suggested that Dickinson intended only to cause serious physical injury.

First, overwhelming evidence supported the conclusion that Dickinson intended to kill the victim. Both the victim and Altizer described at length how Dickinson had brandished an ax and told the victim that he was "going to kill [him]" minutes before the attack. Describing the attack, the victim stated, "[T]he first time he clipped me . . . he had that look in his face like, you know, he was going to kill me, man, he was going to kill me . . . ." Todd testified that when Dickinson "proceeded to run [the victim] down on his bicycle," the victim "was drug [sic] underneath the truck." The jury also heard testimony from multiple witnesses that after the initial impact between the truck and the victim's bicycle, Dickinson backed up, revved his engine, and accelerated toward the victim.

Second, only a handful of passing remarks by witnesses at trial could have supported the theory that Dickinson had any intent other than to kill. Altizer speculated that when Dickinson said, "I'm going to run him over," he meant it "jokingly." On the occasions when Dickinson pulled a knife and an ax on the victim, he ultimately did not use those weapons. And Altizer's testimony that after the attack Dickinson tossed him the keys and said "[t]hat he done it" could suggest that Dickinson only intended to injure the victim, assuming that Dickinson realized at the time that what "he [had] done" was merely injure, not kill, the victim.[9]

[9] Dickinson also cites several statements from the trial judge outside the presence of the jury to argue that "the trial judge doubted the strength

Significantly, however, even if the defense could have marshalled this scant evidence into an argument that Dickinson lacked the intent to kill, it never did so. Defense counsel never questioned a single witness about whether Dickinson intended to kill the victim, nor did he present any evidence that Dickinson intended to do something other than kill him, such as maim, injure, or scare him. In the same vein, defense counsel's opening and closing arguments never even hinted at the possibility that Dickinson intended only to seriously injure the victim. Instead, they focused almost exclusively on whether the Dickinson was in fact the driver and whether Dickinson's alibi was valid. As defense counsel characterized his closing argument to the jury:

> [I]f my closing had a title, I suppose it would be the mysterious injury of [the victim]. While there's no doubt that [the victim] suffered some kind of injury of some type that day, he went to the hospital, what is in doubt and what the question is, the who, the what, the when, the where, and the how and the why; because it is those questions that creates [sic] uncertainty, and it's that uncertainty that lends the mysteriousness to the title of my closing.

of the evidence that Dickinson intended to either seriously injure *or* kill [the victim]." For example, the trial judge stated during sentencing, "I have seen cases in which I thought serious physical injures [sic] were a whole lot worse than those that were suffered by [the victim], although I would certainly not volunteer to get run over by a vehicle in the manner that he did." But these statements are irrelevant to the question before us: whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

In contrast, the State focused almost exclusively on the theory that Dickinson intended to kill the victim. The State's first words to the jury during its opening statement were, "Good afternoon. The evidence in this case will show you that the defendant, Zane Dickinson, tried to kill [the victim]." It emphasized this theme throughout the trial. The only statement during opening or closing arguments that might have led the jury to consider whether Dickinson intended to cause serious physical injury was an offhand remark by the State, near the beginning of its closing argument, that Dickinson "knew that his conduct would result in death or serious physical injury."[10] Apart from this paraphrase of the erroneous jury instruction, the State exclusively argued that the evidence showed Dickinson intended to kill the victim. It repeatedly emphasized that because an automobile can be a deadly weapon, running somebody over suggests an intent to kill:

- "This could have been much worse; [the victim's] injuries could have been much worse. You get spit through underneath a truck, could have been much worse. But he was trying to kill him."

- "[Y]ou guys, your common experience and life experience, you know, that people get killed when they get ran [sic] over. Backing

[10] The State also made a single brief reference in its opening statement to a recorded jail call in which Dickinson's mother apparently stated that a friend heard Dickinson "was just trying to scare [the victim]." However, the record does not include a transcript of this call, and Dickinson makes no reference to it in his briefing.

> out, someone gets backed over, people get killed at low speeds."
>
> - "The context is clear. The defendant was there. He ran the victim over. And he should have stopped. But again, he was trying to kill him, so why would he stop?"
>
> - "[W]hen you're trying to kill somebody and run them over, I mean it's—what do you expect?"

The State also repeatedly emphasized Dickinson's threats to kill the victim:

> - "Now, what the evidence will show you is that [Dickinson] was trying to kill [the victim]. Told him he was going to kill him up here, with the ax; then he went looking for him in his truck, and he didn't just try once, took him to the second time before he finally got him."
>
> - "[I]n that dispute, the defendant grabbed an ax out of the truck and told the victim that he was going to fucking kill him."
>
> - "Remember he said he was going to fucking kill him . . . ."

Dickinson attempts to discount these statements by asserting that "arguments of counsel cannot substitute for instructions by the court," *Taylor v. Kentucky*, 436 U.S. 478, 488–89 (1978). To be sure, attorneys' remarks during opening and closing argument do not absolve a trial court of its duty to properly instruct the jury. Thus, in *Taylor*, a direct

proceeding in which the defendant argued that his trial was fundamentally unfair because the court refused to instruct the jury on the presumption of innocence, the Supreme Court rejected the state's argument that "no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements." *Id.* at 488.

But *Taylor* addressed only whether "the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment," *id.* at 490, not whether there is a reasonable probability that the jury would have returned a different verdict but for counsel's failure to object to an instruction on the definition of a crime, *see Strickland*, 466 U.S. at 694. We routinely consider the trial record in its entirety to determine whether an attorney's deficient performance prejudiced a defendant, and Dickinson cites no authority holding that it is improper to do so. *See, e.g.*, *Hardy v. Chappell*, 849 F.3d 803, 821 (9th Cir. 2016) (holding that "[u]nder no reasonable reading of the record could it be concluded the jury actually found [petitioner] guilty under an aid-or-abet theory" despite the inclusion of an aid-and-abet instruction, in part because "[w]hen the prosecutor addressed the aid-and-abet theory in his closing argument, he described only [other defendants'] involvement—*not* [petitioner's]"); *Zapata v. Vasquez*, 788 F.3d 1106, 1117 (9th Cir. 2015) ("Here, the totality of the circumstances shows the California Court of Appeal's prejudice determination was unreasonable.").

In sum, the jury heard overwhelming evidence that Dickinson intended to kill the victim, the State argued exclusively (with the exception of reciting the erroneous jury

instruction once at the beginning of its closing argument) that Dickinson intended to kill the victim, and Dickinson's attorney gave the jury no reason to consider the possibility that he intended only to cause serious physical injury.[11] This does not merely show, as Dickinson argues, that the jury "*could* have convicted [him] based on the valid theory" of intent to kill, *Riley v. McDaniel*, 786 F.3d 719, 726 (9th Cir. 2015). Rather, it shows that "we can be reasonably certain . . . that the jury *did* convict [him] based on" that theory. *Id.* (alterations in original). If a juror had voted to convict based on the invalid "serious physical injury" theory, he would have had to entirely disregard Dickinson's actual defense, disbelieve the State's strong argument that Dickinson intended to kill, and form his own idiosyncratic theory of the case, never actually discussed at trial, by picking a handful of stray remarks out of two days of witness testimony. While perhaps conceivable, this scenario is not reasonably probable. *See Strickland*, 466 U.S. at 694.

Dickinson relies on a single Fifth Circuit decision, *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993), to argue that notwithstanding the trial record, he was prejudiced by counsel's failure to object to the erroneous jury instruction. We are not persuaded that we should apply *Gray* to conclude that Dickinson was prejudiced at trial.

In *Gray*, a jury found the defendant guilty of first-degree murder after hearing evidence that he had appeared at a couple's door holding a gun, told the man who answered the door that he was going to "blow [his] brains out," and hit him

[11] In addition, the trial judge gave the jurors the opportunity to submit questions to the witnesses during trial, and nothing in the record suggests that any of the jurors submitted a question to probe whether Dickinson intended to kill or merely to inflict serious physical injury.

on the side of the head with the gun. *Id.* at 267. He then entered their bedroom, struck the woman and the man with his gun, and got into a struggle with the man during which he fired three shots at the man at close range, all of which missed. *Id.* The jury was erroneously instructed that "[a]n essential element of the offense of attempted first degree murder is specific criminal intent to kill or inflict great bodily harm." *Id.* at 269 (alteration in original). Gray's counsel failed to object to this instruction, *id.*, and on federal habeas review, the Fifth Circuit concluded that counsel's failure constituted ineffective assistance, *id.* at 271–72.

Assessing *Strickland*'s prejudice prong, the Fifth Circuit framed its inquiry as "whether there is a reasonable probability that the jury would have had a reasonable doubt respecting Gray's guilt if the phrase 'or inflict great bodily harm' had not been included in the charge." *Id.* at 269–70. The court concluded that there was prejudice, noting that after threatening to "blow" the victim's "brains out," Gray proceeded to strike him on the head with the gun "instead of immediately firing the gun in order to carry out that threat." *Id.* at 270. The court reasoned:

> The jury plausibly could have interpreted this evidence in at least two ways: (1) Gray *intended to kill* James by shooting him with the gun, but did not succeed; or (2) Gray *intended to inflict great bodily harm* on James by striking him and shooting him with the gun. Considering the circumstances, including the fact that Gray did not take advantage of several golden opportunities to kill James if he had intended to do so, we think there is at least a reasonable probability that the jury could have had a reasonable

> doubt about Gray's intent to kill, and that it convicted him instead on the basis of the erroneous instruction, because it found that he had the intent to inflict great bodily harm.

Id.

As an initial matter, contrary to Dickinson's assertion, *Gray* is not "squarely on point." In *Gray*, although the defendant knew both the victims and had previously lived with one of them, *id.* at 267 & nn. 3, 4, there is no indication that the defendant had previously threatened to kill either of the victims or pulled a deadly weapon on them, as Dickinson did. Furthermore, the male victim in *Gray* testified that "he believed that, at that close range, Gray was capable of carrying out the threat" to "blow [his] brains out," even though he did not carry it out. *Id.* at 267. There was no comparable testimony at Dickinson's trial that could have led the jury to infer that Dickinson was fully capable of carrying out his threat to kill, but instead chose to maneuver his truck just so as to maim the victim.

Dickinson argues that, like the defendant in *Gray*, he "did not take advantage of several golden opportunities to kill" the victim—apparently referring to the instances when he pulled a knife and an ax on the victim—and therefore, the jury could have reasonably doubted his intent to kill. *See id.* at 270. He also observes that because he "only hit the back of [the victim's] bike initially," and did not hit the victim a second time until the victim tried to turn off the road, the jury could have found that he did not intend to kill the victim with his truck. While this is perhaps "conceivable," the possibility that an attempted murder could have been carried out more efficiently and brutally does not cast serious doubt on the attacker's intent. *See Hardy*, 849 F.3d at 819 ("A

reasonable probability . . . must be substantial, not just conceivable.").

Indeed, the facts here are more closely analogous to a subsequent Fifth Circuit case, *Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430 (5th Cir. 1998), in which the defendant repeatedly stabbed a victim, ordered her into the trunk of his car, and threatened to "finish [her] off," *id.* at 432. She was eventually rescued and "transported to the hospital with several life-threatening wounds," but she survived after receiving intensive medical care. *Id.* at 433. A jury convicted the defendant of attempted second-degree murder after receiving an instruction similarly erroneous to the one in *Gray*, and the defendant sought federal habeas relief based on his attorney's failure to object to the instruction. *Id.* at 433–34.

The Fifth Circuit distinguished *Gray* and held that the erroneous instruction did not prejudice the defendant, reasoning that while the defendant in *Gray* "failed to take advantage of . . . 'golden opportunities'" to kill the victim "and did not pursue the victim when he ran off," this defendant did take advantage of the opportunity to kill the victim and simply failed: he "inflicted life-threatening stab wounds . . . and basically left her for dead in the trunk of his car. Not only is [his] leaving [the victim] for dead probative of an intent to kill, but [his] deliberate use of a deadly weapon in a manner likely to cause death further supports the inference that he intended to kill [her]." *Id.* at 439. While Dickinson did not injure his victim as severely as the defendant in *Harris* injured his victim, his case is more akin to *Harris* than it is to *Gray* because Dickinson acted on his threat—albeit unsuccessfully—by "deliberate[ly] us[ing] . . . a deadly weapon in a manner likely to cause death" and then leaving his injured victim. *Id.*

More fundamentally, however, we find *Gray* unpersuasive because it appears to have applied the wrong rule in its *Strickland* prejudice analysis. Although the Fifth Circuit initially described its prejudice inquiry as turning on "whether there is a reasonable probability that the jury would have had a reasonable doubt respecting Gray's guilt if the phrase 'or inflict great bodily harm' had not been included in the charge," *Gray*, 6 F.3d at 269–70, it transitioned from this correct formulation of the *Strickland* standard to a different and lower standard, unsupported by *Strickland*: whether the jury "plausibly could have interpreted" the evidence to support Gray's innocence absent the erroneous instruction, *id.* at 270; *see also id.* at 271 ("Under the court's instructions, the jury *could* have convicted Gray for attempted first degree murder on the basis of a finding that he had the intent to inflict great bodily harm, even if it had a reasonable doubt that he had the specific intent to kill James." (emphasis added)).

This circuit and others have explicitly rejected this approach of finding prejudice simply because a jury conceivably *could* have convicted based on an improper instruction. *See, e.g.*, *Hardy*, 849 F.3d at 819 ("A reasonable probability . . . must be substantial, not just conceivable." (quoting *Strickland*, 466 U.S. at 693–94)); *Benge v. Johnson*, 474 F.3d 236, 249 (6th Cir. 2007) ("What Benge *could have* done, however, is irrelevant at this stage in the proceedings. We must be able to say that a reasonable probability exists that a properly instructed jury *would have* concluded that Benge had shown [an affirmative defense] by the preponderance of the evidence.").[12]

[12] Dickinson observes that this circuit cited *Gray*'s prejudice analysis favorably in *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996),

The record leaves no room for "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Therefore, we hold that Dickinson has failed to demonstrate a substantial IATC claim, and accordingly, his procedural default of that claim is not excused under *Martinez*.

V

We **AFFIRM** the district court's denial of Dickinson's petition for a writ of habeas corpus.

but it did so only in passing for the proposition that prejudice can occur "even though both the prosecutor and defense counsel argued the correct law to the jury," *id.* at 1390. In *Span*, the trial court failed to give an excessive force instruction and instead gave another instruction specifically precluding an excessive force defense in a trial for assaulting federal officers. Based on the trial testimony of two witnesses, we concluded it was "highly likely that a properly instructed jury would have found that the Spans were not the first aggressors, but only defending themselves against an excessive and outrageous use of force by the marshals." *Id.*

FILED

AUG 5 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZANE DICKINSON, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-15175 D.C. No. 3:18-cv-08037-MTL District of Arizona, Prescott ORDER

Before: TALLMAN, BYBEE, and BADE, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Bade has voted to deny the petition for rehearing en banc, and Judges Tallman and Bybee so recommend. 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. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Zane Dickinson, Petitioner, v. David Shinn[1], et al., Respondents.	No. CV-18-08037-PCT-MTL **ORDER**

Pending before the Court is Magistrate Judge Deborah M. Fine's Report and Recommendation ("R & R") (Doc. 22), recommending that the Petition for Writ of Habeas Corpus (Doc. 1) be granted as to Ground II. Respondents filed Objections to the R & R (Doc. 25), and Petitioner filed a Response (Doc. 31). After considering the Petition (Doc. 1), Respondents' Limited Answer to the Petition (Doc. 6), Respondents' Supplemental Answer to the Petition[2] (Doc. 16), Petitioner's Reply to Respondents' Supplemental Answer (Doc. 21), the R & R (Doc. 22), the arguments raised in Respondents' Objection to the R & R (Doc. 25), and Petitioner's Response to Respondents' Objection (Doc. 31), the Court will reject the R & R's recommendation that this Court grant the Petition.

[1] David Shinn, Director of the Arizona Department of Corrections, is substituted for Charles L. Ryan, former Director of the Arizona Department of Corrections, pursuant to Fed. R. Civ. P. 25(d).

[2] After considering the Petition and Respondents' Limited Answer, the Magistrate Judge ordered supplemental briefing on the merits of Petitioner's ineffective assistance of trial counsel claim. (Doc. 10.)

I. Background

The Arizona Court of Appeals summarized the facts of this case in a published opinion as follows:

> For years, [Petitioner] and C.H., the victim, had been friends. In June 2011, they had a falling out when [Petitioner] failed to perform yard work he had agreed to do and refused to return tools to the victim. The two argued and [Petitioner] pulled a knife, but the victim fought back and was able to get away.
>
> On July 2, 2011, while riding his bicycle, the victim saw [Petitioner]'s truck at the house of a mutual friend. The victim then approached [Petitioner], again asking for the return of his tools and asking that [Petitioner] refund money to a customer for whom [Petitioner] had failed to perform work. According to the victim, as he walked by the truck, [Petitioner] "pulls out this ax, and he's coming at me." After a scuffle, [Petitioner] told the victim "he's going to kill me, and all this stuff, you know, and he cussed me and called me names. So I was just trying ... I got on my bike and rode away." [Petitioner] then apparently told the mutual friend "I'm going to run him over" and then left.
>
> A short time later, while riding his bicycle near an alley, the victim saw [Petitioner] approaching in "a Ford Ranger, extended cab" truck. At trial, the victim testified:
>
> > I looked up and I seen him, and the last thing in my head is, he smiled. So next thing I know, he revved up his motor and he shot towards me. And I remember what happened. He hit the back of my bike, he had spun me all the way around about ten feet in the dirt. I landed on the dirt.
>
> Still able to ride, the victim got back on his bicycle, "trying to get away." The victim thought he had lost [Petitioner], but "all of a sudden I hear his motor revving up, and I look back and he's no more than maybe a foot from my bumper [of the bike], and he's laughing; so I realize what's going on." The victim again tried to get away, including riding toward a field, but "at the same time [[Petitioner]] turns his wheel and hit[s] my bike; and that's the last thing I remember, and I wake up in the hospital."
>
> According to a witness, [Petitioner] "parked in this field, like he was waiting for [the victim], in his truck, with it running." The witness testified [Petitioner] ran the victim "down on his bicycle. [The victim] went up underneath the truck.... The bike collapsed, and [the victim] was drug underneath the truck." After running over the victim, [Petitioner] sped off. The victim sustained multiple injuries, including a concussion and head injuries resulting in 13 stitches, including across his eye; a broken ankle and

his "funny bone was ripped out" from his elbow. The mutual friend testified that, after the incident, [Petitioner] returned and parked his truck at the friend's house, tossed the keys to the friend and said "that he had did it. That he done it."

State v. Dickinson, 233 Ariz. 527, 528-29, ¶¶ 2-5 (App. 2013).

The Arizona Court of Appeals provided the following procedural history:

> The indictment charged [Petitioner] with attempted second degree murder, a class 2 dangerous felony, and other felony offenses. The State's theory of the case was that [Petitioner] tried to kill the victim. [Petitioner] did not testify and called no witnesses but asserted a defense of mistaken identity and claimed he had no involvement. [Petitioner] argued someone else ran over the victim and that he was being framed in an attempted insurance or prescription drug fraud. At no time did [Petitioner] assert that he hit the victim with his truck but did not intend to or try to kill the victim.
>
> In its opening statement, the State repeatedly maintained that the evidence would show [Petitioner] "tried to kill [the victim]." In closing argument, the State repeatedly argued that [Petitioner] "was trying to kill [the victim]." Focusing on a comment [Petitioner] made in a recorded jail call that "I was defending myself really," the State argued [Petitioner]'s acts were "not self-defense" and asked the jury to "[r]emember [[Petitioner]] said he was going to ... kill him." After referencing the attempted murder jury instruction quoted in the following paragraph, the State told the jury that the victim was lucky, the victim's injuries could have been much worse and [Petitioner] was "trying to kill" the victim.
>
> Without objection, the court gave the following attempted second degree murder jury instruction (the italicized portion of which is at issue here):
>
> > The crime of attempted second degree murder has three elements. In order to find the defendant guilty of attempted second degree murder, you must find that, number one, the defendant intentionally did some act; and number two, the defendant believed such act was a step in the course of conduct planned to culminate in the commission of the crime of second degree murder; and number three, the defendant did so with the mental state required for the commission of the crime of second degree murder.
> >
> > It is not necessary that you find that the defendant committed the crime of second degree murder; only that he attempted to commit such crime.

> The crime of second degree murder has the following elements: Number one, the defendant caused the death of another person; and number two, the defendant either, A, did so intentionally or, B, knew that his conduct would cause death *or serious physical injury.*
>
> After a three-day trial, the jury found [Petitioner] guilty as charged. Finding [Petitioner] had one prior historical felony conviction, the court sentenced him to an aggravated term of 12 years in prison on the attempted second degree murder conviction and to prison terms on the other counts.

Id. at 529-30, ¶¶ 6-8.

As the R & R recounts, following trial, Petitioner appealed his conviction for attempted second degree murder and the resulting sentence. (Doc. 22 at 5.) On direct appeal, Petitioner challenged the portion of the attempted second degree murder jury instruction stating that a jury could return a guilty verdict on a showing that he knew that his conduct would cause serious physical injury but not death. *Dickinson*, 233 Ariz. at 530, ¶ 10. Because Petitioner did not object to the jury instruction at trial, however, the Arizona Court of Appeals' review was limited to fundamental error. *Id*. On direct review, Petitioner therefore bore the burden of establishing that "(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *Id*. (*citing State v. James*, 231 Ariz. 490, 493, ¶ 11 (App. 2013) (citations omitted in original)). To prove prejudice, Petitioner had to show that "a reasonable, properly instructed jury 'could have reached a different result.'" *Id*. at 531, ¶ 13 (*citing James*, 231 Ariz. at 494, ¶ 15).

The Arizona Court of Appeals found that the trial court erred in instructing the jury that it could convict Petitioner of attempted murder on a finding that Petitioner knew his conduct would cause serious physical injury. *Dickinson*, 233 Ariz. at 530, ¶ 11. The Court of Appeals further found that this error was fundamental because the instruction potentially improperly relieved the State of its burden of proving an element of the offense. *Id*. at 531, ¶ 12. After reviewing the particular facts of this case, however—including the State's theory of the case that Petitioner intended to kill the victim, Petitioner's mistaken identity defense, and the evidence and arguments presented—the Arizona Court of Appeals found

that Petitioner failed to prove resulting prejudice from the fundamental error in the jury instruction. *Id*. at 533, ¶ 22. Accordingly, the Arizona Court of Appeals affirmed Petitioner's conviction and sentence for attempted second degree murder. *Id*., ¶ 23.

The Arizona Supreme Court denied cross-petitions for review, and neither party petitioned the United States Supreme Court for certiorari. (Doc. 22 at 6.) On June 12, 2014, Petitioner timely initiated post-conviction relief ("PCR") proceedings, and PCR counsel was appointed to assist him. (*Id*.); (*see also* Doc. 6-5 at 13.) In Petitioner's initial PCR Petition, PCR counsel raised two claims of ineffective assistance of trial counsel, neither of which was related to the incorrect jury instruction. (Doc. 22 at 6.) PCR counsel similarly did not raise a due process claim related to the incorrect jury instruction. (*Id*.) The trial court denied Petitioner's initial PCR Petition, concluding that the claims raised were not colorable. (Doc. 6-5 at 22, 23.)

On August 26, 2015, Petitioner, in his *pro se* capacity, filed a second notice of PCR, alleging that PCR counsel was ineffective for "failing to raise any meritorious claims." (Doc. 6-5 at 29-30.) Petitioner did not identify the purportedly meritorious claims. The trial court denied relief, finding that Petitioner, as a non-pleading defendant, was not entitled to effective assistance of PCR counsel under Arizona law. (Doc. 22 at 6); (Doc. 6-5 at 35.)

Petitioner filed two Petitions for Review in the Arizona Court of Appeals (one for each PCR Petition). (Doc. 22 at 6.) The Court of Appeals granted review of both petitions but denied relief. (*Id*.) Petitioner then timely filed the instant habeas petition in this Court. (*Id*.); (Doc. 6 at 7-9.)

II. Legal Standard

When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254, "it must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (*quoting* 28 U.S.C. § 2254). When reviewing a Magistrate Judge's R & R, this Court reviews *de novo* those portions of the report to which

an objection is made and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). District courts are not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985).

III. Analysis

The Petition raises two grounds for relief.[3] Petitioner alleges (1) that his due process rights were violated by the incorrect jury instruction; and (2) that he received ineffective assistance of trial counsel because his trial counsel failed to object to the erroneous jury instruction. (Doc. 1 at 5-6.) The R & R correctly finds (and the parties do not dispute) that both of Petitioner's claims are procedurally defaulted because Petitioner never presented them in state court, and no state remedies remain available to him. (Doc. 22 at 7.) The R & R concludes, however, that *Martinez v. Ryan*, 566 U.S. 1 (2012), excuses the procedural default on Ground II because Petitioner's PCR counsel was ineffective under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and because the underlying ineffective assistance of trial counsel claim has some merit. (Doc. 22 at 8-9.) Reaching the merits of Petitioner's procedurally defaulted ineffective assistance of trial counsel claim, the R & R finds that Petitioner's trial counsel rendered ineffective assistance of counsel and recommends that the Petition be granted as to Ground II. (Id. at 15.)

The R & R recommends that Ground I be denied because it is procedurally defaulted without excuse. (Id. at 15.) Because Petitioner did not file an objection, the Court will accept and adopt the portion of the R & R recommending that the Petition be **denied** as to Ground I.

A. *Martinez v. Ryan*

A federal habeas court reviewing the constitutionality of a state prisoner's conviction and sentence is "guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez*, 566 U.S. at 9. The doctrine of procedural

[3] Petitioner seeks relief solely from his attempted second degree murder conviction. (Doc. 1 at 5-6.)

default, which prevents a federal court from reviewing the merits of a claim that the state court declined to hear because a prisoner failed to abide by a state procedural rule, is one of those rules. *Id*. at 9-10. A prisoner may obtain federal review of a procedurally defaulted claim, however, by showing cause for the default and prejudice from a violation of federal law. *Id*. at 10 (*citing Coleman*, 501 U.S. at 750).

Where a state, like Arizona, requires a prisoner to raise an ineffective assistance of trial counsel claim in a collateral proceeding, the prisoner may establish cause for default by demonstrating that his counsel in the initial collateral proceeding was ineffective under *Strickland* for failing to raise the ineffective assistance of trial counsel claim. *Martinez*, 566 U.S. at 14. The prisoner must also demonstrate that the underlying ineffective assistance of trial counsel claim is "a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."[4] *Id*.

B. Deficient performance of trial counsel under *Strickland*

The jury instruction given at Petitioner's trial was erroneous because attempted second degree murder can only be committed if the defendant intended to kill the victim or knew that the conduct would cause death. *Dickinson*, 233 Ariz. at 530, ¶ 11. The R & R concludes that because Petitioner's trial counsel failed to object to the erroneous jury instruction, trial counsel's performance "fell below an objective standard of reasonableness" that constitutes deficient performance under the first prong *Strickland*. (Doc. 22 at 11) (*quoting Strickland*, 466 U.S. at 688.) Respondents make two objections to this finding. First, Respondents claim that the R & R impermissibly requires the State to "provide an explanation from trial counsel for their strategic choices before the deferential inquiry [under *Strickland*] can occur . . . ." (Doc. 25 at 2.) Second, Respondents argue that the R & R improperly limits *Strickland*'s deferential review to

[4] The Court notes that *Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019) was decided after the parties' briefs were filed in this case. The Court finds *Ramirez* inapposite, however, because the parties' arguments in this case do not depend on facts outside of the record and neither party requested evidentiary development. (*See* Doc. 22 at 15); *Ramirez*, 937 F.3d at 1248. Because the underlying ineffective assistance of trial counsel claim does not depend on evidence outside the trial record, the Court does not deem factual development necessary to decide cause and prejudice under *Martinez*.

"strategic decisions made after 'thorough investigation of law and facts relevant to plausible options.'" (Doc. 25 at 1) (*quoting* R & R's citation to *Strickland*). The Court overrules both of Respondents' objections and adopts the R & R's conclusion that Petitioner's trial counsel rendered deficient performance.

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (internal citations and quotations omitted). A court deciding a Sixth Amendment ineffectiveness claim must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. A defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Id*. The Court must then determine, in light of all the circumstances, whether the acts or omissions were outside "the wide range of professionally competent assistance." *Id*. In making that determination, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*.

Here, the Court agrees with Respondents that deferential review of trial counsel's performance under *Strickland* is not triggered by the State's provision of an explanation from trial counsel, justifying his or her choices. *See Burt v. Titlow*, 571 U.S. 12, 22-23 (2013) ("absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance") (*quoting Strickland*, 466 U.S. at 689). Nor is deferential review under *Strickland* required solely if the record reflects that trial counsel engaged in a "thorough investigation of law and facts relevant to plausible options." *Cf*. (Doc. 22 at 10); *Strickland*, 466 U.S. at 691 ("[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."). The Court nonetheless agrees with the R & R's conclusion that

trial counsel's failure to object to the erroneous jury instruction in this case cannot be considered the result of reasonable professional judgment. At the time of Petitioner's trial, the law in Arizona was very clear that attempted second degree murder can only be committed if the defendant intended to kill the victim or knew that the conduct would cause death. *Dickinson*, 233 Ariz. at 530, ¶ 11 (App. 2013) (*citing State v. Ontiveros*, 206 Ariz. 539, 542, ¶ 14 (App. 2003)). Therefore, by failing to object to the erroneous jury instruction, trial counsel's performance fell below an objective standard of reasonableness. *See Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430, 440 (5th Cir. 1998) (failure to object to erroneous jury instruction for attempted murder constituted deficient performance under first prong of *Strickland*).

Accordingly, the Court rejects the portion of the R & R which states that deference to trial counsel is only owed to strategic decisions made after "thorough investigation of law and facts relevant to plausible options." (Doc. 22 at 10.) The Court also rejects any inference that the State must provide an explanation from trial counsel before deferential review under *Strickland* is required. (*Id*.) The Court adopts the R & R's conclusion, and remaining reasoning in support thereof, that trial counsel's performance was deficient under the first prong of *Strickland*. (*Id*. at 9-11.)

C. Prejudice under *Strickland*

The R & R concludes that Petitioner demonstrated prejudice from his trial counsel's deficient performance under *Strickland* because the "jury instructions included a correct and an incorrect statement of law" and "there is no ability to discern whether the jury relied on 'a legally inadequate theory' of the case to convict [Petitioner]." (Doc. 22 at 13) (*quoting Griffin v. United States*, 502 U.S. 46, 59 (1991)). Respondents object to this conclusion, asserting that the R & R improperly evaluates prejudice by considering whether the outcome of trial *could* have been different with a proper jury instruction, instead of assessing whether the outcome *would* have been different. (Doc. 25 at 3.) Respondents additionally argue that the R & R improperly applied the harmless error test from *Brecht v. Abrahamson*, 507 U.S. 619 (1993), (Doc. 25 at 3), and that the R & R incorrectly

"focuses on the loss of a more favorable standard of review on appeal rather than the impact of counsel's decisions at trial." (Doc. 25 at 4.) The Court agrees with Respondents and therefore rejects the R & R's conclusion that Petitioner demonstrated prejudice under *Strickland* solely from his trial counsel's failure to object to the erroneous jury instruction.

1. "Could" versus "Would"

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceedings if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Accordingly, under *Strickland*, the defendant must demonstrate that any deficiencies in counsel's performance were prejudicial to the defense. *Id*. at 692. It is not enough for the defendant to show "that the errors had some conceivable effect on the outcome of the proceeding" because "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id*. at 693. To demonstrate prejudice under *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

The Court finds that the R & R correctly states the standard for determining prejudice under *Strickland*. (Doc. 22 at 11) ("[Petitioner] must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would* have been different.'") (emphasis added); (*see also* Doc. 22 at 12) ("Considering the facts presented at trial . . . .") However, the Court agrees with Respondents that the R & R strays from this standard by finding that Petitioner proved prejudice under *Strickland* simply because there is no ability for the court to discern under which legal theory the jury voted to convict Petitioner. (Doc. 22 at 4, 13) ("The jury form did not give the jury an opportunity to explain the basis for finding [Petitioner] guilty . . . . Thus, there is no ability to discern whether the jury relied on 'a legally inadequate theory'. . . .") (*quoting Griffin*, 502 U.S. at 59).

To find prejudice under *Strickland*, Petitioner and the R & R rely heavily on *Gray*

v. Lynn, 6 F.3d 265, 269-70 (5th Cir. 1993), which states that in evaluating whether the outcome of trial would have been different, "[t]he question is whether, from all the evidence, the jury *could* have had a reasonable doubt concerning [Gray's] intent to kill, and could have convicted him of intent to cause [great] bodily [harm]." (Doc. 31 at 2-3) (emphasis supplied by Petitioner); (Doc. 22 at 11-12.) According to Petitioner (Doc. 31 at 2), *Gray* justifies the R & R's inquiry into whether the jury, in fact, convicted Petitioner of intent to cause bodily harm instead of intent to kill.

In *Gray* the defendant appeared at the victim's door with a gun, threatened to "blow [the victim's] brains out," struck the victim twice on the head with the gun, and later fired three shots at the victim at close range (none of which actually struck the victim). 6 F.3d at 270. The jury in *Gray* was erroneously instructed that an essential element of the offense of attempted first degree murder is "specific criminal intent to kill *or* inflict great bodily harm." *Id*. at 269 (emphasis added). Instead of limiting its inquiry under *Strickland* to whether "there [was] a reasonable probability that the jury would have had a reasonable doubt respecting Gray's guilt" if the jury had been properly instructed, the court in *Gray* proceeded to evaluate whether, "[u]nder the court's instructions" it was possible that the jury *could* have convicted Gray under the incorrect legal theory. 6 F.3d at 269, 271 ("*Under the court's instructions*, the jury *could have convicted* Gray for attempted first degree murder on the basis of a finding that he had the intent to inflict great bodily harm, even if it had reasonable doubt that he had the specific intent to kill [the victim]. Therefore, Gray has demonstrated prejudice 'sufficient to undermine confidence in the outcome' of his trial. No more is required.") (emphasis added).

For numerous reasons, the Court finds that *Gray* is of limited value here. First, *Gray*'s prejudice analysis is inconsistent with *Strickland*. While the Fifth Circuit in *Gray* indicated that it analyzed *Strickland*'s prejudice prong by "considering the evidence and the instructions as a whole," 6 F.3d at 271, the court's ultimate conclusion rested on the premise that prejudice exists under *Strickland* where it is impossible to "conclude that the jurors ignored the court's erroneous instructions." *Id*. Because the Supreme Court has on

numerous occasions declined to include erroneous jury instructions like the one in this case among the list of constitutional violations requiring *automatic* reversal on direct appeal, *see Neder v. United States*, 527 U.S. 1, 9-10 (1999) (collecting cases), the Court declines to presume prejudice under *Strickland* where the court cannot ascertain (via a special verdict form or otherwise) the actual legal theory under which each juror voted to convict. *Cf. Gray*, 6 F.3d at 271 ("we cannot conclude that the jurors ignored the court's erroneous instructions . . .").

Second, the Court notes that in *Gray*, the defendant filed his federal habeas application in 1987. Therefore, the deference owed to the state court's determination of factual issues in the instant case, pursuant to § 2254(e)(1), was not an element of the analysis in *Gray*. *See Lindh v. Murphy*, 521 U.S. 320 (1997) (holding that the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") do not apply to cases that were filed before the April 1996 effective date of that act). In any event, in *Gray* the sole issue addressed by the Louisiana Supreme Court on direct appeal was whether the defendant was denied the right to speedy trial. *See Gray*, 6 F.3d at 267 n.7. In contrast here, there is a reasoned opinion from the Arizona Court of Appeals that contains factual findings about the State's theory of the case and the evidence presented during Petitioner's trial.

Third, the Court notes that five years after *Gray*, in *Harris*, 152 F.3d at 434, the Fifth Circuit affirmed the district court's denial of habeas relief where the defendant alleged ineffective assistance of counsel stemming from an erroneous jury instruction. And in *Harris*, the Fifth Circuit declined to presume prejudice under *Strickland* where the court could not ascertain the theory under which the jury convicted, instead finding—based on a review of the evidence and arguments presented at trial—that the outcome of the proceeding would not have been different with a properly instructed jury. *See Harris*, 152 F.3d at 440 n.11.

In sum, the Court agrees with Respondents that the R & R's finding of prejudice under *Strickland* incorrectly focuses on the potential that one juror *could* have convicted

Petitioner based on a showing that he knew his conduct would cause serious physical injury but not death. For this reason, and the additional reasons stated below, the Court rejects the R & R's finding of prejudice under *Strickland*.

2. Harmless error under *Brecht* and structural error under *Weaver*

Respondents object (Doc. 25 at 3) to the R & R, claiming that it improperly applies the *Brecht* standard, 507 U.S. 619, which requires a lower showing of harm than *Strickland*. Petitioner responds that the cases relying on *Brecht* are cited in the R & R with a "*cf.*" citation because they all involved "legally untenable jury instructions," and not because the R & R was presuming prejudice from the erroneous instruction. (Doc. 31 at 3.) Alternatively, Petitioner argues, *citing Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), that because the erroneous legal theory was structural error, Petitioner should be relieved of his burden to satisfy the traditional prejudice test under *Strickland*. (Doc. 31 at 3-4.) The Court agrees with Respondents that the R & R improperly focuses on cases addressing erroneous jury instructions outside of the context of ineffective assistance of counsel. Additionally, for reasons stated below, the Court declines to apply *Weaver* to this case.

In *Brecht v. Abrahamson*, the Supreme Court considered whether the *Chapman*[5] harmless error standard (which places the burden on the State to prove on direct review that the constitutional error was harmless beyond a reasonable doubt where the issue was properly preserved and raised) should apply on federal habeas review. *Brecht*, 507 U.S. at 636. Noting that collateral review is different from direct review—and considering the States' interests in finality and sovereignty over criminal matters—the Supreme Court held in *Brecht* that error requires habeas relief only if the petitioner establishes that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 623 (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "[G]ranting habeas relief merely because there is a 'reasonable possibility' that the error contributed to the verdict . . . is at odds with the historic meaning of habeas corpus—to afford relief to those

[5] In *Chapman v. California*, 386 U.S. 18, 22, 26 (1967), the Supreme Court established the general rule that a constitutional error does not automatically require reversal of a conviction.

whom society has 'grievously wronged.'" 507 U.S. at 637. Where a habeas petition governed by AEDPA alleges ineffective assistance of counsel under *Strickland*, this Court "appl[ies] *Strickland*'s prejudice standard and do[es] not engage in a separate analysis applying the *Brecht* standard." *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009).

While some errors—known as "structural errors"—require reversal on direct review regardless of whether an objection was made below and regardless of the mistake's effect on the proceeding, *see Neder*, 527 U.S. at 8; *Weaver*, 137 S. Ct. at 1907 (*citing Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)), because the Petition raises an ineffective assistance of counsel claim, the Court must review the erroneous jury instruction through the lens of *Strickland*. (Doc. 1 at 6.) Whether an erroneous jury instruction constitutes structural error that requires automatic reversal on direct review—or whether habeas relief should be granted on a non-defaulted due process claim under *Brecht*—are separate questions from whether a defendant can show, based on the evidence and arguments presented during trial, that the outcome of trial *would* have been different with a properly instructed jury. Because *Strickland* requires the latter, the Court agrees with Respondents that the R & R improperly relies on cases that addressed erroneous jury instructions outside of the ineffective assistance of counsel context. (Doc. 22 at 12) (*citing Martinez v. Garcia*, 379 F.3d 1034, 1035 (9th Cir. 2004) (state court's decision was contrary to clearly established federal law because it failed to discuss on direct review the structural error resulting from from erroneous jury instructions)); (Doc. 22 at 12) (*citing Evanchyk v. Stewart*, 340 F.3d 933, 940-41 n.2 (9th Cir. 2003) (noting cases where the Supreme Court found structural error for erroneous jury instructions on direct review)); (Doc. 22 at 13) (*citing Suniga v. Bunnel*, 998 F.2d 664, 669 (9th Cir. 1993), *overruled on other grounds by Evanchyk*, 340 F.3d 933) (reversing district court's denial of habeas corpus because state court's evaluation of structural error on direct review was unreasonable); (Doc. 22 at 13) (*citing Sheppard v. Rees*, 909 F.2d 1234 (9th Cir. 1989) (reversing district court's denial of habeas corpus and finding that the failure to give the defendant adequate notice of the charges against him—where the error was raised during trial and on direct appeal—was

not subject to harmless-error determination)); (Doc. 22 at 13) (*quoting Riley v. McDaniel*, 786 F.3d 719, 726 n.1 (9th Cir. 2015) (evaluating whether instructional error was harmless under *Brecht* and expressly declining to reach the ineffective assistance of counsel claim)).

Petitioner alternatively argues, citing *Weaver*, that it is "far from clear" he needs to satisfy the traditional prejudice test. (Doc. 31 at 3.) In *Weaver*, which reached the Supreme Court on direct review, the Court addressed what showing was necessary where the defendant did not preserve a structural error on direct review but later raised it for the first time in the context of ineffective assistance of counsel. *Weaver*, 137 S. Ct. at 1910. The structural error in *Weaver* (to which the defendant's trial counsel failed to object) was closure of the courtroom during jury selection, and the Supreme Court expressly noted that it granted certiorari "specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Id*. at 1906, 1907. While recognizing that structural errors may require automatic reversal where an error was preserved and raised on direct review, the Supreme Court held that when a structural error is raised for the first time in the context of an ineffective assistance of counsel claim, finality concerns require the defendant to show prejudice under *Strickland* in order to obtain a new trial. *Id*. at 1913. "[W]hen a defendant raises a public-trial violation via an infective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed *for these purposes* . . . to show that *the particular public-trial violation* was so serious as to render his or her trial fundamentally unfair." *Id*. at 1911 (emphasis added).

Because the Supreme Court in *Weaver* expressly limited its holding to structural errors stemming from a public-trial violation, the Court will not evaluate whether the erroneous jury instruction in this case was so serious as to render Petitioner's trial fundamentally unfair. Petitioner must demonstrate that the outcome of his trial would have been different with a properly instructed jury.

3. Loss of a more favorable standard on appeal

Respondents also object to the R & R (Doc. 25 at 4), stating that it improperly "focuses on the loss of a more favorable standard of review on appeal rather than the impact of counsel's decisions at trial." Petitioner responds (Doc. 31 at 4) that numerous courts in this district, other circuits, as well as the Ninth Circuit in an unpublished opinion, have held that the deprivation of an issue on appeal demonstrates prejudice under *Strickland*.

The R & R posits that, had Petitioner's trial counsel objected to the erroneous jury instruction, the court of appeals would have reviewed it for harmless error, placing the burden on State to show that the error was harmless beyond a reasonable doubt. (Doc. 22 at 14-15.) Because Petitioner's trial counsel did not object, however, the Arizona Court of Appeals reviewed the instruction for fundamental error, which placed the burden on Petitioner. (*Id*.) While some courts have adopted the view that an inquiry into trial counsel's effectiveness under *Strickland* includes an evaluation of whether the appeal would have been different, but for trial counsel's missteps—*see May v. Ryan*, 245 F. Supp. 3d 1145, 1168-69 (D. Ariz. 2017) (*vacated in part by May v. Ryan*, 766 Fed.App'x. 505 (9th Cir. 2019)); *Burdge v. Belleque*, 290 Fed. App'x 73, 79 (9th Cir. 2008); *French v. Warden, Wilcox State Prison*, 790 F.3d 1259, 1269 (11th Cir. 2015)—Arizona courts have not. *See State v. Speers*, 238 Ariz. 423, 431, ¶ 31 (App. 2015) (*quoting Strickland*, 466 U.S. at 696) ("ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged"); *see also Kennedy v. Kena*, 666 F.3d 472, 485-86 (11th Cir. 2012) (finding *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which focused on loss of appeal in its entirety, does not require courts to evaluate under *Strickland* whether counsel's failure to preserve issues at trial affected the direct appeal); *Bonney v. Wilson*, 754 F.3d 872, 885 (10th Cir. 2014) (*Flores-Ortega* does not require courts to evaluate trial counsel's performance under *Strickland* by considering whether outcome of appeal would have been different).

Without more, the Court declines to stray from *Strickland*'s pronouncement that the prejudice inquiry should focus on the fairness of the proceeding whose result is being

challenged. *Strickland*, 466 U.S. at 696. Had PCR counsel raised the ineffective assistance of trial counsel claim, the PCR court would have focused on whether the outcome of trial would have been different, not whether the appeal would have been different. The Court therefore rejects the portion of the R & R that addresses the loss of a more favorable standard of review on appeal.[6]

4. Petitioner did not meet his burden under *Strickland*.

The Court finds that, under the standard set forth in *Strickland*, Petitioner did not show that the outcome of his trial would have been different with a properly instructed jury. The Court presumes that the Arizona Court of Appeals' factual findings are correct, and Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e).

The Court rejects certain factual findings contained in the R & R. First, the R & R notes that after Petitioner hit the victim's bike the first time, Petitioner "found C.H. again . . . ." (Doc. 22 at 2.) The Arizona Court of Appeals, however, stated that, according to an eyewitness, after Petitioner hit C.H. on his bike the first time, Petitioner then parked his truck in a field, and left the motor running, like he was lying in wait for the victim. *Dickinson*, 233 Ariz. at 529, ¶ 5; *see also* (Doc. 6-2 at 131) (eyewitness testifying that Petitioner came "ripping out of the field" and "floored" his truck when he went after C.H. the second time.) Next, the R & R omits that the second time Petitioner hit C.H. with his truck, C.H.'s body was drug "up underneath the truck." *Dickinson*, 233 Ariz. at 529, ¶ 5; *see also* (Doc 6-2 at 132-33) (testifying that C.H.'s bike folded up under the truck, that C.H. was drug underneath the truck, and that his body went beneath the whole front suspension of the four-wheel drive and was ejected out the passenger side on the ground underneath Petitioner's truck). Additionally, the R & R minimizes the extent of C.H.'s injuries, stating that "C.H. was knocked unconscious and woke up in the hospital with a broken ankle, his elbow was bleeding, he had a concussion, and 13 stitches over his eye."

[6] The Court is not convinced in any event that Petitioner would have prevailed on direct appeal under harmless error review, given the Court of Appeals' characterization of the record.

(Doc. 22 at 3.) As the Court of Appeals noted, however, C.H.'s elbow was not just "bleeding"—his funny bone was ripped out of his elbow. *Dickinson*, 233 Ariz. at 529, ¶ 5; (*see also* Doc. 6-2 at 63-64) (C.H. additionally testifying that he had to have surgery on his big toe and that his bicep and triceps were ripped from his muscle.)

Further, the R & R states that when Petitioner made the statement that he wanted to kill the victim, the statement was made jokingly. (Doc. 22 at 12.) The record reflects, however, that Petitioner only "jokingly" told the mutual friend that he wanted to "run [C.H.] over." (Doc. 22 at 2); (Doc. 6-2 at 110.) There was no testimony that Petitioner was joking when he raised an ax and told C.H. that he was going to kill him. *Cf.* (Doc. 22 at 12); (Doc. 6-5 at 56.) Further, while the R & R correctly notes (Doc. 22 at 2) that the mutual friend testified Petitioner's statement about wanting to run over C.H. was made "jokingly," (Doc. 6-2 at 110), the R & R omits that after the incident, Petitioner "returned and parked his truck at the friend's house, tossed the keys to the friend and said 'that he had did it. That he done it.'" *Dickinson*, 233 Ariz. at 529, ¶ 5; (Doc. 6-2 at 98.)

The Court also disagrees with the R & R's finding that "the prosecutor argued in closing to the jury that the state did not have the burden to prove [Petitioner] intended to kill C.H. but that intent of serious physical injury was enough." (Doc. 22 at 13.) While the prosecutor certainly reiterated the erroneous jury instruction to the jury during closing statements, the crux of prosecutor's argument was that Petitioner was trying to kill C.H.:

> Now the attempted second degree murder. That requires you—that the defendant did some act intentionally. He ran the victim over. And that he believed such a step was in the course of committing second degree murder. And of course, the judge instructed you, you don't have to—[C.H.] doesn't have to be dead. This is attempted murder.
>
> The step in the course of committing second degree murder is going to run somebody over on their bike, with your vehicle; and when you look at the instruction, it's either he did this intentionally or that he knew that his conduct would result in death or serious physical injury.
>
> Now, [C.H.]'s lucky. This could have been much worse; his injuries could have been much worse. You get spit through underneath a truck, could have been much worse. *But he was trying to kill him.*

(Doc. 6-3 at 156) (emphasis added).

The R & R also cites Doc. 6-3 at 189:25-190:4 to show that the prosecutor argued in closing to the jury that the State did not have the burden to prove that Petitioner intended to kill C.H in order to convict him of second degree murder. (Doc. 22 at 13.) But the prosecutor at that portion of the record stated solely that the State did not have to prove how fast Petitioner was driving when he ran over C.H. (*See* Doc. 6-3 at 189) ("Now, he said there's no testimony as far as speed. Do you have to—you guys, your common experience and life experience, you know, that people get killed when they get [run] over. Backing out, someone gets backed over, people get killed at low speeds. And there was there was no testimony that defendant was going 35 miles an hour. There was no number. There was a lot of testimony about acceleration marks and about the defendant running over [C.H.]. I mean we don't have to prove that. The burden—look at the injury instruction. We don't have to prove that it was at a certain speed, one, that he was injured, one, that defendant did it, and that he did with his car and he broke his foot.")[7]

Most importantly, the Arizona Court of Appeals found, as a factual matter, that the State's theory at trial was that Petitioner intended to kill C.H., not that he intended to cause serious physical injury or knew that his conduct would cause serious physical injury. *Dickinson*, 233 Ariz. at 531, ¶¶ 13-14. The Court of Appeals further found that because Petitioner's defense was mistaken identity, which did not implicate the erroneous portion of the jury instruction, Petitioner's argument that the erroneous jury instruction prejudiced him was undercut. *Id.*, ¶ 15.

Because the Arizona Court of Appeals considered the evidence and found that Petitioner failed to prove that a "reasonable, properly instructed jury '*could* have reached a different result,'" *Dickson*, 233 Ariz. at 531, ¶ 13 (*quoting James*, 231 Ariz. at 494, ¶ 15) (emphasis added), the Court cannot say under *Strickland* that the outcome of trial *would*

[7] Petitioner was also charged with two counts of aggravated assault, which required the State to prove either that Petitioner intentionally, knowingly, or recklessly caused a physical injury to another person, and that he did so using a dangerous instrument (Doc. 6-3 at 143), or that Petitioner intentionally, knowingly, or recklessly caused a physical injury to another by means of force that caused the fracture of any body part (*Id.* at 144). It is more likely that the prosecutor's reference to the "injury instruction" (*Id.* at 189:25-190:4) at this portion of the record pertained to the aggravated assault counts, not the second degree murder count.

have been different with a properly instructed jury. As the Arizona Court of Appeals correctly noted, Petitioner threated C.H. with an ax and told C.H. that he would kill him just minutes before the incident. *Dickinson*, 233 Ariz. at 531, ¶ 16. When C.H. rode away on his bicycle, Petitioner said that he was going to run him over, and then drove after him. *Id*. C.H. testified that just before being run over, Petitioner "had that look in his face like, you know, he was going to kill me, man, he was going to kill me." *Id*. And an eyewitness testified that Petitioner drove over C.H.'s body so that C.H.'s body was drug up underneath it. *Id*. The R & R does not properly defer to the Arizona Court of Appeals finding that the "evidence [was] consistent with the State's theory that [Petitioner] intended to kill the victim, not just cause serious physical injury." *Id*.; *cf*. (Doc. 22 at 12) (R & R finding that very little of the evidence indicated that Petitioner intended or knew that his conduct would cause death).

In sum, Petitioner did not show that the outcome of trial would have been different without the erroneous jury instruction. Accordingly, Petitioner has not shown that his trial counsel rendered constitutionally defective assistance of counsel. Because the underlying ineffective assistance of trial counsel claim lacks merit, Petitioner's PCR counsel was not ineffective for failing to raise it. Therefore, under *Martinez* Petitioner has neither demonstrated cause for the default nor prejudice sufficient to excuse his procedurally defaulted claim.[8] The Court will **deny** the Petition (Doc. 1.)

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[8] The Court has ultimately found that the underlying ineffective assistance of trial counsel claim is not substantial under *Martinez* because the ineffective assistance of trial counsel claim is without merit. *See Sexton v. Cozner*, 679 F.3d 1150, 1159-60 (9th Cir. 2012). However, even if this Court had found that the underlying ineffective assistance of trial counsel claim was substantial under *Martinez*, the result herein would be the same because *Ramirez* does not require evidentiary development in this instance, *see supra* n.4, and because the Court ultimately reached the merits of the underlying ineffective assistance of trial counsel claim, finding it meritless under *Strickland*.

IV. Conclusion

In light of the foregoing,

IT IS ORDERED that the R & R (Doc. 22) is accepted in part and rejected in part. The objections are overruled to the extent indicated above. Upon this Court's *de novo* review of Ground II, the Court finds that Petitioner did not show cause for the default or prejudice sufficient to excuse his procedurally defaulted ineffective assistance of trial counsel claim. Accordingly, the Petition for Habeas Corpus (Doc. 1) is **denied** with prejudice, and the Clerk of the Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that in the event Petitioner files an appeal, the Court **grants** in part the certificate of appealability (part of Doc. 31). Petitioner requested in the alternative that the Court grant a certificate of appealability (part of Doc. 31), and R & R recommended that one be granted if the Court did not accept the R & R's recommendation to grant relief on Ground II (Doc. 22 at 15-16.) Pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To meet the threshold inquiry on debatability, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; *or* that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alteration and emphasis in original). A constitutional claim is debatable if another circuit has issued a conflicting ruling. *See id.* at 1025-26. As to Ground II, the Court finds that the following questions are adequate to deserve encouragement to proceed further: 1) whether an inquiry into trial counsel's effectiveness under *Strickland* includes an evaluation of whether the direct appeal would have been different, but for trial counsel's missteps; 2) whether, under *Weaver*, Petitioner should be relieved of his burden to demonstrate that the outcome of trial would have been different; and 3) whether *Strickland* in this context allows prejudice to be

found solely because the court cannot know the legal theory under which the jury convicted the defendant. *Cf. Gray*, 6 F.3d at 271. The Court denies the certificate of appealability as to the remainder of Ground II and all other grounds.

Dated this 6th day of February, 2020.

Michael T. Liburdi
Michael T. Liburdi
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Zane Dickinson, Petitioner, v. Charles L. Ryan, et al., Respondents.	NO. CV-18-8037-PCT-DJH (DMF) **REPORT AND RECOMMENDATION**

TO THE HONORABLE DIANE J. HUMETEWA, U.S. DISTRICT JUDGE:

Zane Dickinson filed a Petition for Writ of Habeas Corpus ("Petition"), challenging his conviction and sentence in Mohave County Superior Court relating to his attempted second degree murder conviction. (Doc. 1)[1] After a Limited Answer was filed by Respondents (Doc. 6), and reply (Doc. 8), this Court concluded that *Martinez v. Ryan*, 566 U.S. 1 (2012), likely applied here and ordered supplemental briefing on the merits of the Petition's ineffective assistance of trial counsel claim. (Doc. 10) On Petitioner's request, this Court also appointed counsel for Petitioner. (Docs. 11, 12, 13) Supplemental briefing has concluded. (Docs. 16, 21) As detailed below, this Court recommends granting Dickinson's Petition on his ineffective assistance of counsel claim, Ground II, regarding his conviction for attempted second degree murder (Doc. 1 at 6).

[1] Petitioner was convicted of multiple charges, but he only seeks habeas review of his attempted second degree murder conviction. (Doc. 1 at 5, 6)

I. BACKGROUND

Dickinson was indicted in Mohave County Superior Court for attempted second degree murder and other, less serious felonies, based on the following events described at trial. (Doc. 6-4 at 31-34, Ex. G) C.H. and Dickinson had known each other for over 20 years, their families had been neighbors, and they had been "friends." (Doc. 6-2 at 51, Ex. C) By July 2011, they "were associates," and sometimes drove to work together. (Doc. 6-2 at 51-52, Ex. C) Their relationship had become strained because C.H. had loaned Dickinson some work tools and wanted them returned but Dickinson had refused. (Doc. 6-2 at 51. Ex. C)

On July 2, 2011, C.H. and Dickinson had a confrontation at someone's house and Dickinson told C.H. he was "going to kill" him, "and he cussed [at C.H.] and called [him] names." (Doc. 6-2 at 56:11-13, Ex. C) The homeowner thought that "they were both threatening each other" and he broke up the fight. (Doc. 6-2 at 94:12, Ex. C) Later, Dickinson told the homeowner that he was going to run over C.H. (Doc. 6-2 at 98:24, Ex. C) The homeowner testified that the statement was made "jokingly." (Doc. 6-2 at 110:19, Ex. C)

C.H. rode off on his bike and shortly thereafter, he was hit by a truck that he recognized at Dickinson's. (Doc. 6-2 at 56-60, Ex. C) C.H. testified that Dickinson smiled at him and the "next thing I know, he revved up his motor and he shot towards me. And I remember what happened. He hit the back of my bike, he had spun me all the way around about ten feet in the dirt. I landed on the dirt." (Doc. 6-2 at 60:11-14, Ex. C) When the truck hit C.H.'s bike, the bike spun. (Doc. 6-2 at 61:6-8, Ex. C) If the truck had "turned two or three feet," Dickinson "would have totally hit [C.H.]; but he didn't do that." (Doc. 6-2 at 61:9-10, Ex. C)

C.H. got back on his bike and rode towards his house. (Doc. 6-2 at 61:15-16, Ex. C) Dickinson found C.H. again and drove so close that there was "maybe a foot" between Dickinson's truck and his bike. Dickinson was laughing while driving, and then Dickinson turned his wheel, hit the bike, "and that's the last thing [C.H.] remembered" before waking

up in the hospital. (Doc. 6-2 at 62, Ex. C) C.H. "felt threatened, seriously threatened, because—because you know, at first I thought he was going to drive by, you know what I mean; but the first time he clipped me and he had that look in his face like, you know, he was going to kill me, man, he was going to kill me, and I seen that on his face." (Doc. 6-2 at 68-69, Ex. C) C.H. was knocked unconscious and woke up in the hospital with a broken ankle, his elbow was bleeding, he had a concussion, and 13 stitches over his eye. (Doc. 6-2 at 63-64, Ex. C)

Dickinson did not testify, his counsel called no witnesses. (Doc. 6-3 at 121, 137-138, Ex. E) During the discussion about jury instructions, conducted without the jury present, the Superior Court described attempted second degree murder to counsel as "conduct [that] will cause death or serious physical injury." (Doc. 6-3 at 112:11-13, Ex. E) The lawyers did not disagree with the Judge.

In response to Dickinson's motion for a directed verdict, the trial judge told the lawyers, "I wouldn't be shocked if they didn't find [Dickinson guilty of attempted second degree murder]; but I believe there's sufficient evidence to allow the case to go forward on the charge of attempted second degree murder." (Doc. 6-3 at 113:1-4, Ex. D)

Subsequently, the trial judge informed the parties that he had drafted the jury instructions. (Doc. 6-3 at 127-129, Ex. E) During that conversation, the trial judge told counsel that he had drafted an instruction "defining the elements of attempted second degree murder." (Doc. 6-3 at 128, Ex. E) The trial judge cited to the governing case, *State v. Ontiveros*, 81 P.3d 330 (Ariz. App. 2003), but incorrectly read it to stand for the proposition that attempted second degree murder can be based on intent to cause serious physical injury. (Doc. 6-3 at 129, 128-137) *Ontiveros* actually holds that "there is no offense of attempted second-degree murder based on knowing merely that one's conduct will cause serious physical injury. The offense of attempted second-degree murder requires proof that the defendant intended or knew that his conduct would cause death." 81 P.3d at 333, ¶ 14 (emphasis added).

. . .

Dickinson's trial counsel did not object to the proposed, incorrect attempted second degree murder jury instruction (Doc. 6-3 at 127-137, Ex. E), and the trial judge read the following to the jury:

> The crime of attempted second degree murder has three elements. In order to find the defendant guilty of attempted second degree murder, you must find that, number one, the defendant intentionally did some act; and number two, the defendant believed such act was a step in the course of conduct planned to culminate in the commission of the crime of second degree murder; and number three, the defendant did so with the mental state required for the commission of the crime of second degree murder.
>
> It is not necessary that you find that the defendant committed the crime of second degree murder; only that he attempted to commit such crime.
>
> The crime of second degree murder has the following elements: Number one, the defendant caused the death of another person; and number two, the defendant either, A, did so intentionally or, B, knew that his conduct would cause death ***or serious physical injury***.

(emphasis added). (Doc. 6-3 at 144-145, Ex. E)

In closing, the state reiterated to jury that Dickinson should be convicted of attempted second degree murder if he knew that his conduct would result in death or serious physical injury. (Doc. 6-3 at 156:16-19, Ex. E) Dickinson's counsel argued that it was a case of mistaken identity. (Doc. 6-3 at 164-188, Ex. E) Dickinson's counsel also repeatedly argued reasonable doubt, including about the existence and extent of C.H.'s injuries, but never argued that Dickinson intending, or C.H. sustaining, serious physical injury would not be enough to convict Dickinson of attempted second degree murder. (*Id.*)

At the end of the three-day trial in Mohave County Superior Court, a jury found Dickinson guilty of multiple felonies, including attempted second degree murder. (Doc. 6-3 at 211, Ex. E) The jury form did not give the jury an opportunity to explain the basis for finding Dickinson guilty of attempted second degree murder. Subsequently, Dickinson was sentenced to terms of imprisonment totaling 14 years, the longest sentence of which was 12 years for the attempted second degree murder conviction. (Doc. 6-4 at 18-26, 21, Ex. F)[2]

[2] The terms of imprisonment for aggravated assault, Counts 1 and 2, were nine years and seven years, respectively (Doc. 6-4 at 22, Ex. F), to be served concurrently with the attempted second degree murder sentence in Count 4 (Doc. 6-4 at 18, Ex. F). For the

On direct appeal to the Arizona Court of Appeals, Dickinson was represented by counsel who argued only that the attempted second degree murder jury instruction was incorrect as a matter of law and that the proper analytical framework was to review this claim for fundamental error because Dickinson's trial counsel had not objected. (Doc. 6-4 at 76, Ex. L) The court of appeals agreed, and noted that it "is the rare case in which an improper jury instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." (Doc. 6-4 at 149, Ex. O at ¶ 10 (citations omitted)) Under fundamental error analysis, Dickinson had "the burden to establish that "(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." (Doc. 6-4 at 149, Ex. O at ¶ 10)

The Arizona Court of Appeals further wrote that it had previously "stated that instructing a jury on a non-existent theory of criminal liability is fundamental error" and concluded that, "under the facts and circumstances of this case, the error complained of was fundamental because it goes to the foundation of the case." (Doc. 6-4 at 150, Ex. O at ¶ 12) Then, the court turned to the prejudice prong. Under Arizona law, Dickinson had to "affirmatively prove prejudice and [could] not rely upon speculation to carry his burden. To prove prejudice Dickinson [had to] show that a reasonable, properly instructed jury could have reached a different result." (Doc. 6-4 at 150, Ex. O at ¶ 13) After a detailed review of the parties' theories, the evidence received at trial, and the parties' arguments to the jury, the court of appeals concluded that Dickinson had not been prejudiced by the error and, therefore, was not entitled to relief:

> The State's theory was that Dickinson intended to kill the victim; Dickinson's defense was mistaken identity and that he was not involved in the charged conduct in any respect. Neither of these competing views suggests that Dickinson intended to cause serious injury to the victim (as opposed to kill him), which is the fundamental error in the jury instructions. Based on the particular facts of this case—including the State's theory, Dickinson's defense, the evidence and the parties' arguments to the jury—Dickinson has failed to prove resulting prejudice from the fundamental error in the jury instruction. *Henderson,* 210 Ariz. at 568, ¶¶ 23-24, 26, 115 P.3d at 608. Accordingly,

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leaving the scene of the accident conviction, Count 3, Dickinson was sentenced to a consecutive two years of imprisonment. (Doc. 6-4 at 25, Ex. F)

Dickinson's claim of fundamental, prejudicial error fails.

(Doc. 6-4 at 154, Ex. O at ¶ 22). The Arizona Supreme Court denied the cross-petitions for review filed by the state and by Dickinson. (Doc. 6-4 at 155-222, Exs. P, Q, R, S, T) It appears that neither side petitioned the United States Supreme Court for certiorari. (Doc. 1 at 3)

Dickinson timely initiated post-conviction relief and, through counsel ("PCR counsel"), alleged that he had received ineffective assistance of counsel because trial counsel had not called Dickinson to testify on his own behalf and because trial counsel had not addressed statements made by the victim. (Doc. 6-5 at 1-18, Exs. U, V) In other words, PCR counsel did not raise any ineffective assistance of trial counsel claims related to the incorrect attempted second degree murder jury instruction, nor did PCR counsel raise a due process claim related to the incorrect attempted second degree murder jury instruction. The superior court concluded that Dickinson had "not made a colorable claim for relief" on either of these claims and denied relief. (Doc. 6-5 at 22, 23, Ex. W)

Dickinson then filed a second, *pro se* notice of post-conviction relief that alleged PCR counsel was ineffective for "failing to file any meritorious claims" but did not explain what the meritorious claims would have been. (Doc. 6-5 at 29-20, Ex. X) The superior court denied relief concluding that Dickinson "was not entitled under [Arizona] law to effective assistance of counsel on his first Rule 32 proceeding." (Doc. 6-5 at 34, Ex. Y)

Dickinson filed two Petitions for Review with the Arizona Court of Appeals, one for each of his denied notices of post-conviction relief. In both cases, the court of appeals granted review but denied relief. (Doc. 6-5 at 37-69, Exs. Z, AA, BB, CC)

II. HABEAS PETITION

It is undisputed that Dickinson timely initiated habeas relief (Doc. 6 at 7-9). His Petition raises two grounds for relief: (1) his due process rights were violated by the incorrect attempted second degree murder jury instruction and (2) he received ineffective assistance of counsel because trial counsel had not objected to the flawed attempted second degree jury instruction ("IATC claim"). (Doc. 1 at 5, 6) Respondents contend that the

Petition contains only claims that cannot be reviewed because they are unexhausted and subject to a procedural default without exception. (Doc. 6) In his reply, Dickinson explains that he filed his second PCR "in hopes of trying to preserve [the] claim of ineffective trial counsel" under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013). (Doc. 8 at 4)

Following an initial review of this matter, this Court ordered supplemental briefing on the merits of the Petition's IATC claim for trial counsel's failure to object to the incorrect attempted second degree murder jury instruction. (Doc. 10) Dickinson requested and received appointed counsel for the supplemental briefing. (Docs. 11, 12, 13) Respondents filed a supplemental response, Dickinson filed a reply, and this matter is now fully briefed. (Docs. 16, 21)

III. ANALYSIS

A. The Petition's Grounds are procedurally defaulted.

First, as previewed in the Court's earlier Order (Doc. 10), this Court concludes, as Respondents argue, that both of the Petition's grounds are procedurally defaulted. (Doc. 6 at 14) A state prisoner must properly exhaust all state court remedies before this Court can grant an application for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1), (c); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Arizona prisoners properly exhaust state remedies by fairly presenting claims to the Arizona Court of Appeals in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-45 (1999); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). To be fairly presented, a claim must include a statement of the operative facts and the specific federal legal theory. *Baldwin v. Reese*, 541 U.S. 27, 32-33 (2004); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Duncan*, 513 U.S. at 365-66.

An implied procedural bar exists if a claim was not fairly presented in state court and no state remedies remain available to the petitioner. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Rose v. Lundy*, 455 U.S. 509, 519-20 (1982); *Beaty v. Stewart*, 303 F.3d

975, 987 (9th Cir. 2002); *Poland v. Stewart*, 169 F.3d 573, 586 (9th Cir. 1999); *White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989).

The Court's review of Dickinson's post-conviction papers indicates that his PCR counsel never raised the Petition's due process claim (Doc. 1 at 5) or Petitioner's IATC claim, namely that trial counsel should have objected to the attempted second degree murder jury instruction (Doc. 1 at 6). Because these claims were never raised, they were not exhausted. The claims are now subject to an implied procedural bar because they were not fairly presented in state court and no state remedies remain available to Dickinson because he is now precluded or time-barred from raising his claims in a successive and untimely Rule 32 petition under Arizona Rules of Criminal Procedure 32.1(d)-(h), 32.2(a) & (b), or 32.4(a).

B. *Martinez* excuses the procedurally defaulted IATC claim.

Dickinson argues that the Court should review the merits of his IATC claim under *Martinez v. Ryan*, 566 U.S. 1 (2012).[3] (Doc. 8 at 4) As detailed below, this Court agrees.[4]

This Court can review a procedurally defaulted claim if the petitioner can demonstrate either cause for the default and actual prejudice to excuse the default, or a miscarriage of justice. 28 U.S.C. § 2254(c)(2)(B); *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *United States v. Frady*, 456 U.S. 152, 167-68 (1982).

Under the Supreme Court's ruling in *Martinez*, Dickinson could demonstrate cause and prejudice sufficient to excuse his procedurally defaulted IATC claim if he can

[3] The Petition's due process claim in Ground I of the Petition is also subject to a procedural bar but there is no avenue for the Court to review this claim. The *Martinez* exception to procedural default applies only to claims of ineffective assistance of trial counsel; it has not been expanded to other types of claims. *Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9th Cir. 2015) (explaining that the Ninth Circuit has "not allowed petitioners to substantially expand the scope of *Martinez* beyond the circumstances present in *Martinez*"); *Hunton v. Sinclair*, 732 F.3d 1124, 1126-27 (9th Cir. 2013) (noting that only the Supreme Court can expand the application of *Martinez* to other areas); *see Davila v. Davis*, 137 S.Ct. 2058, 2062-63, 2065-66 (2017) (explaining that the *Martinez* exception does not apply to claims of ineffective assistance of appellate counsel).

[4] Respondents argue that the Court is improperly considering granting relief based on "its interpretation of state law." (Doc. 15 at 5: 21) This argument misstates *Strickland* and the Court's role in reviewing trial counsel's performance and any subsequent prejudice.

demonstrate "two things: (1) 'counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984),' and (2) 'the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.'" *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting *Martinez v. Ryan*, 566 U.S. 1, 14 (2012)); *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015). The Ninth Circuit has explained that "PCR counsel would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective." *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).

Like the standard for issuing a certificate of appealability, to establish a "substantial" claim, a petitioner must demonstrate that "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (internal quotations omitted). In other words, a claim is "'insubstantial' if it does not have any merit or is wholly without factual support." *Id.* Determining whether an ineffective assistance of counsel claim is "substantial" requires a court to examine the claim under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).

Here, as explained below the Court concludes that not only has Dickinson shown that his claim is "is substantial" or "has some merit" but Dickinson has also shown that he did, in fact, receive constitutionally deficient representation by trial counsel regarding the failure to object to the jury instruction for attempted second degree murder.

1. Objectively deficient performance of trial counsel

Strickland requires a showing that counsel's performance "fell below an objective standard of reasonableness" at the time of the trial. *Strickland*, 466 U.S. at 688. Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of professional judgment." *Strickland*, 466 U.S. at

690. Although "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at 690-91, "[t]he label of 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges." *U.S. v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996) (internal quotations omitted). Instead, deference to counsel is owed only to strategic decisions made after "thorough investigation of law and facts relevant to plausible options." *Strickland*, 466 U.S.at 690.

It is undisputed that Dickinson's trial counsel never objected to the legally erroneous jury instruction for attempted second degree murder. Because Respondents have not provided any explanation from trial counsel, we must "entertain the range of possible reasons [that] counsel may have had for proceeding as he did." *Leavitt v. Arave*, 646 F.3d 605, 609 (9th Cir. 2011).

Respondents argue that, hypothetically, Dickinson's counsel was silent because the incorrect jury instruction was consistent with his defenses of "alibi, mistaken identity, third party liability, and general denial." (Doc. 6 at 22:17-18) In other words, Respondents argue that trial counsel did not need to object to any instructions because all of the instructions were inconsistent with Dickinson's trial theory of innocence. (Doc. 6 at 24; Doc. 16 at 5:17-19) The Court has found no cases, and Respondents cite to none, that support Respondents' argument that a trial counsel can satisfy a defendant's Sixth Amendment rights by knowingly permitting a legally erroneous jury instruction. Instead, case law has consistently reached the opposite conclusion. As the United States Supreme Court has noted, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (*citing Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)). Indeed, it may have been trial counsel's lack of knowledge of the correct governing law that led to the defense trial strategies employed. In any event, objecting to the erroneous jury instruction would not have impaired any

defense employed at trial. It would have been consistent for defense counsel to argue that, regardless of the identity of the driver, the lack of severity of the injuries did not support a conclusion that the driver intended to kill C.H.

The superior court misstated, on the record, the applicable case law governing the most serious of the charges facing Dickinson. This misstatement, considered fundamental error by the court of appeals, permitted the jury to find Dickinson guilty under a theory of the law that had been explicitly prohibited nine years earlier. This was something trial counsel "could have learned" had he done "even minimal homework" like reading the governing case. *Hernandez v. Chappell*, 878 F.3d 843, 852 (9th Cir. 2017).

The inescapable conclusion is that trial "[c]ounsel's errors with the jury instructions were not a strategic decision to forego one defense in favor of another. They were the result of a misunderstanding of the law." *U.S. v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) (citations omitted). *See also Morris v. California*, 966 F.2d 448, 454–55 (9th Cir. 1992) (trial counsel did not understand the applicable law). Accordingly, the Court concludes that Respondents' hypothetical justification is not a "plausible option[]" that could justify trial counsel's silence in the face of this error. *Strickland*, 466 U.S.at 690.

Because trial counsel apparently failed to understand or learn the law governing the most serious of the charges facing Dickinson, the Court concludes that Dickinson's trial counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

2. Prejudice from trial counsel's deficient performance

Under *Strickland*, Dickinson must also show that he has a meritorious claim that he was prejudiced. To do this, Dickinson must show that trial "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Dickinson must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, the Court must review whether there is a reasonable

probability that the jury would have had reasonable doubt regarding Dickinson's guilt if the phrase "or serious physical injury" had not been included in the instructions. *See Gray v. Lynn*, 6 F.3d 265, 269–70 (5th Cir. 1993).

The Court reviewed all of the trial transcripts and concludes that very little of the received evidence indicated that Dickinson intended or knew that his conduct would cause the victim's death.[5] (Doc. 10) In their supplemental briefing, Respondents and Dickinson both point to the same statements to bolster their differing conclusions. (Docs. 16, 21) Specifically, the testimony at trial was that Dickinson and C.H. were old friends who had driven to work together and fighting and that said he wanted to "kill" C.H. but also that he said it "jokingly." Dickinson then drove his truck into C.H.'s bike twice and knocked him over. After C.H. had been knocked unconscious, Dickinson drove off. C.H.'s injuries were from falling off his bicycle after Dickinson's truck hit the bicycle; there was no testimony that Dickinson's truck hit C.H. directly.

Respondents argue that the trial court's denial of a directed verdict for the defense is indicative of sufficient evidence (Doc. 6 at 8), but the trial court was itself operating on the incorrect standard and elements of attempted second degree murder when it denied the directed verdict. Further, even the trial court commented that it would be no surprise if the jury found Dickinson not guilty of attempted second degree murder charge; that statement was made by the trial court while incorrectly considering intent of serious physical injury as sufficient for guilt of attempted second degree murder.

Considering the facts presented at trial, there is at least "a reasonable probability" that at least one member of the jury could have voted to convict Dickinson of attempted second degree murder under the "serious physical injury" portion of the instruction. *Cf. Martinez v. Garcia*, 379 F.3d 1034, 1035 (9th Cir. 2004) (Defendant's verdict cannot stand when one element of jury instruction was legally untenable); *Evanchyk v. Stewart*, 340 F.3d 933, 941, n. 2 (9th Cir. 2003) (U.S. Supreme Court has repeatedly found structural error in "cases [that] involved jury instructions for crimes based on facially invalid or legally

[5] The jury heard videos that were not transcribed but were subsequently referenced by the state in closing. (Doc. 6-3 at 101:9-14)

impossible theories, or 'non-existent' crimes."); *Suniga v. Bunnell*, 998 F.2d 664, 669 (9th Cir. 1993) (if one juror relied on the legally non-existent instruction, Defendant was improperly convicted); *Sheppard v. Rees*, 909 F.2d 1234, 1237-38 (9th Cir. 1990). It is noteworthy that the prosecutor argued in closing to the jury that the state did not have the burden to prove Dickinson intended to kill C.H. but that intent of serious physical injury was enough. (Doc. 6-3 at 156:16-19; 189:25-190:4)

Respondents have attempted to play out various hypotheticals: what if trial counsel had raised the objection and it had been sustained? What if it had been overruled? (Doc. 16 at 6) "Our precedent makes clear, however, that the relevant question is 'not simply whether we can be reasonably certain that the jury *could* have convicted [Dickinson] based on the valid theory of [attempted second degree] murder,' but whether 'we can be reasonably certain . . . that the jury *did* convict [him] based on the valid [attempted second degree] murder theory." *Riley v. McDaniel*, 786 F.3d 719, 726 (9th Cir. 2015) (quoting *Babb v. Lozowsky*, 719 F.3d 1019, 1035 (9th Cir. 2013)) (emphasis in original). As previously stated, "If it is clear that the jury relied on the correct portion of the jury instruction, namely conduct that would cause death, then the erroneous jury instruction would almost certainly satisfy the harmless error standard." (Doc. 10 at 8:2-4)

Here, the jury instructions included a correct and an incorrect statement of law and there is no evidence that the jury verdict form permitted the jury to indicate whether its decision was based on the correct or incorrect statement. Thus, there is no ability to discern whether the jury relied on "a legally inadequate theory" of the case to convict Dickinson. *Griffin v. U.S.*, 502 U.S. 46, 59 (1991). (Doc 6-3, Ex. E at 82-83) Accordingly, the Court "cannot tell what theory the jury used. In fact, because the jury did not need to be unanimous about the theory it used, [Dickinson] was improperly convicted if even one juror decided that the [incorrect attempted second degree murder] theory would be sufficient." *Suniga v. Bunnell*, 998 F.2d 664, 669 (9th Cir. 1993). This, without more, means Dickinson has demonstrated prejudice.

. . .

3. PCR counsel's performance was deficient and caused prejudice

Because the Court has concluded that Dickinson has established ineffective assistance of trial counsel, the Court will return to the first *Martinez* prong of *Martinez* and evaluate whether Dickinson has established "that both (a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) (citing *Strickland*, 466 U.S. at 694).

Dickinson's post-conviction counsel did not raise a claim for IATC for trial counsel's failure to object to the fundamentally flawed attempted second degree murder jury instruction. Before PCR proceedings, this IATC claim had been flagged by the Arizona Court of Appeals when it noted that trial counsel's failure to object to the jury instructions changed the standard of review which, in turn, changed the burden of persuasion on appeal. *State v. Dickinson*, 314 P.3d 1282, 1285-86, ¶ 10 (Ariz. App. 2013). This was not an inconsequential change. Dickinson lost the opportunity for an appeal where the burden was "on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *State v. Henderson*, 115 P.3d 601, 607, ¶ 18 (Ariz. 2005). Instead, trial counsel did not object and so Dickinson had the burden and he had to establish both fundamental error and resulting prejudice. *Id*. at ¶¶ 19-20.

Respondents argue that PCR counsel was not ineffective because the Court of Appeals had already determined that Dickinson could not demonstrate prejudice under fundamental error version and this prejudice determination was binding. (Doc. 16 at 5) Respondents provide no citation to this argument and do not address the impact of the altered standard of review to make it more difficult to prevail on appeal. If trial counsel had objected, the court of appeals would have reviewed for harmless error which would have meant that the state had the burden "to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *State v. Henderson*, 115 P.3d 601, 607, ¶ 18 (Ariz. 2005). Instead, because trial counsel did not object, the court of appeals

reviewed the jury instruction claim for fundamental error and so the burden shifted to Dickinson to show that error existed, the error was fundamental, and the error caused him prejudice. Accordingly, Respondents' argument is not well taken.

If PCR counsel had raised a claim of ineffective assistance of trial counsel, there is "a reasonable probability" that the Arizona Court of Appeals would have conducted the same analysis as this Court and concluded that Dickinson was entitled to relief for his IATC claim. In other words, Dickinson has demonstrated prejudice because his PCR counsel's actions in not raising the IATC claim changed the outcome of post-conviction proceedings to Dickinson's detriment. *Clabourne*, 745 F.3d at 377.

C. Dickinson's Petition Ground II is meritorious.

Neither party has asked for an evidentiary hearing and, because there are no factual disputes, the Court concludes that none is warranted. 28 U.S.C. § 2254(e)(2); Rule 8 of the Rules Governing Section 2254 Cases. As detailed above, the Court concludes that Dickinson has satisfied *Martinez.* As also detailed above, Dickinson has demonstrated that, regarding his conviction for attempted second degree murder, he received constitutionally objectively deficient representation from his trial counsel, which caused him prejudice. Accordingly, the Court recommends that Dickinson's Petition Ground II pertaining to his attempted second degree murder conviction be granted. (Doc. 1 at 6) Petition Ground I is procedurally defaulted, without excuse, and should be denied. (Doc. 1 at 5)

IT IS THEREFORE RECOMMENDED that Zane Dickinson's Petition for Writ of Habeas Corpus (Doc. 1) be **granted** as to Ground II of his Petition pertaining to his attempted second degree murder conviction, and Ground I, pertaining to the same conviction, be **denied**.

IT IS FURTHER RECOMMENDED that, should the District Court not accept the recommendations herein, a certificate of appealability be **granted** because Petitioner has "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and jurists of reason could find the Court's assessment of Petitioner's

constitutional claims "debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which to file responses to any objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to any factual determination of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 20th day of December, 2018.

Deborah M. Fine

Honorable Deborah M. Fine
United States Magistrate Judge

APPENDIX E

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ZANE SCOTT DICKINSON, *Appellant*.

No. 1 CA-CR12-0479
FILED 12-17-2013

Appeal from the Superior Court in Mohave County
No. S8015CR201100757
The Honorable Steven F. Conn, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Mohave County Appellate Defender's Office, Kingman
By Jill L. Evans

Counsel for Appellant

OPINION

Judge Samuel A. Thumma delivered the opinion of the Court, in which Presiding Judge Randall M. Howe and Judge Diane M. Johnsen joined.

T H U M M A, Judge:

¶1 Defendant Zane Dickinson appeals his conviction and sentence for attempted second degree murder. Dickinson argues fundamental, prejudicial error because a jury instruction allowed the jury to return a guilty verdict upon a showing that he "[k]new that his conduct would cause . . . serious physical injury," rather than death. Concluding Dickinson has not met his burden to show prejudice from this fundamental error, his conviction and resulting sentence are affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 For years, Dickinson and C.H., the victim, had been friends. In June 2011, they had a falling out when Dickinson failed to perform yard work he had agreed to do and refused to return tools to the victim. The two argued and Dickinson pulled a knife, but the victim fought back and was able to get away.

¶3 On July 2, 2011, while riding his bicycle, the victim saw Dickinson's truck at the house of a mutual friend. The victim then approached Dickinson, again asking for the return of his tools and asking that Dickinson refund money to a customer for whom Dickinson had failed to perform work. According to the victim, as he walked by the truck, Dickinson "pulls out this ax, and he's coming at me." After a scuffle, Dickinson told the victim "he's going to kill me, and all this stuff, you know, and he cussed me and called me names. So I was just trying . . . I got on my bike and rode away." Dickinson then apparently told the mutual friend "I'm going to run him over" and then left.

[1] On appeal, this court considers the evidence in the light most favorable to sustaining the conviction and resolves all reasonable inferences against Dickinson. *State v. Karr*, 221 Ariz. 319, 320, ¶ 2, 212 P.3d 11, 12 (App. 2008).

¶4 A short time later, while riding his bicycle near an alley, the victim saw Dickinson approaching in "a Ford Ranger, extended cab" truck. At trial, the victim testified:

> I looked up and I seen him, and the last thing in my head is, he smiled. So next thing I know, he revved up his motor and he shot towards me. And I remember what happened. He hit the back of my bike, he had spun me all the way around about ten feet in the dirt. I landed on the dirt.

Still able to ride, the victim got back on his bicycle, "trying to get away." The victim thought he had lost Dickinson, but "all of a sudden I hear his motor revving up, and I look back and he's no more than maybe a foot from my bumper [of the bike], and he's laughing; so I realize what's going on." The victim again tried to get away, including riding toward a field, but "at the same time [Dickinson] turns his wheel and hit[s] my bike; and that's the last thing I remember, and I wake up in the hospital."

¶5 According to a witness, Dickinson "parked in this field, like he was waiting for [the victim], in his truck, with it running." The witness testified Dickinson ran the victim "down on his bicycle. [The victim] went up underneath the truck. . . . The bike collapsed, and [the victim] was drug underneath the truck." After running over the victim, Dickinson sped off. The victim sustained multiple injuries, including a concussion and head injuries resulting in 13 stitches, including across his eye; a broken ankle and his "funny bone was ripped out" from his elbow. The mutual friend testified that, after the incident, Dickinson returned and parked his truck at the friend's house, tossed the keys to the friend and said "that he had did it. That he done it."

¶6 The indictment charged Dickinson with attempted second degree murder, a class 2 dangerous felony, and other felony offenses. The State's theory of the case was that Dickinson tried to kill the victim. Dickinson did not testify and called no witnesses but asserted a defense of mistaken identity and claimed he had no involvement. Dickinson argued someone else ran over the victim and that he was being framed in an attempted insurance or prescription drug fraud. At no time did Dickinson assert that he hit the victim with his truck but did not intend to or try to kill the victim.

¶7 In its opening statement, the State repeatedly maintained that the evidence would show Dickinson "tried to kill [the victim]." In closing argument, the State repeatedly argued that Dickinson "was trying to kill [the victim]." Focusing on a comment Dickinson made in a recorded jail call that "I was defending myself really," the State argued Dickinson's acts were "not self-defense" and asked the jury to "[r]emember [Dickinson] said he was going to . . . kill him." After referencing the attempted murder jury instruction quoted in the following paragraph, the State told the jury that the victim was lucky, the victim's injuries could have been much worse and Dickinson was "trying to kill" the victim.

¶8 Without objection, the court gave the following attempted second degree murder jury instruction (the italicized portion of which is at issue here):

> The crime of attempted second degree murder has three elements. In order to find the defendant guilty of attempted second degree murder, you must find that, number one, the defendant intentionally did some act; and number two, the defendant believed such act was a step in the course of conduct planned to culminate in the commission of the crime of second degree murder; and number three, the defendant did so with the mental state required for the commission of the crime of second degree murder.
>
> It is not necessary that you find that the defendant committed the crime of second degree murder; only that he attempted to commit such crime.
>
> The crime of second degree murder has the following elements: Number one, the defendant caused the death of another person; and number two, the defendant either, A, did so intentionally or, B, knew that his conduct would cause death *or serious physical injury*.

After a three-day trial, the jury found Dickinson guilty as charged. Finding Dickinson had one prior historical felony conviction, the court sentenced him to an aggravated term of 12 years in prison on the

attempted second degree murder conviction and to prison terms on the other counts.

¶9 Dickinson timely appealed his conviction for attempted second degree murder and the resulting sentence (but not the other convictions and sentences). This court has jurisdiction of Dickinson's appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and -4033(A)(1) (2013).[2]

DISCUSSION

I. Standard Of Review.

¶10 Dickinson challenges that portion of the attempted second degree murder jury instruction stating the jury could return a guilty verdict on an alternative showing that he "[knew] that his conduct would cause . . . serious physical injury" but not death. At trial, Dickinson did not object to the instruction. Accordingly, this court's review on appeal is limited to fundamental error. Ariz. R. Crim. P. 21.3(c); *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "'It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *State v. Zaragoza*, 135 Ariz. 63, 66, 659 P.2d 22, 25 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)); *accord State v. Gomez*, 211 Ariz. 494, 499, ¶ 20, 123 P.3d 1131, 1136 (2005); *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 17, 984 P.2d 16, 23 (1999). "Accordingly, [Dickinson] 'bears the burden to establish that "(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice."'" *State v. James*, 231 Ariz. 490, 493, ¶ 11, 297 P.3d 182, 185 (App. 2013) (citations omitted).

II. Fundamental Error.

¶11 Contrary to the jury instruction given in this case, attempted second degree murder can only be committed if the defendant intended to kill the victim or knew that the conduct would cause death. *State v. Ontiveros*, 206 Ariz. 539, 542, ¶ 14, 81 P.3d 330, 333 (App. 2003) ("[T]here is no offense of attempted second-degree murder based on knowing merely

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[2] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

that one's conduct will cause serious physical injury.").[3] Accordingly, the court erred in instructing the jury that it could convict Dickinson of attempted second degree murder on a finding that Dickinson knew his conduct would cause serious physical injury. *Id.*

¶12 Error is fundamental if a defendant shows "that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608. "This court has stated that instructing a jury on a non-existent theory of criminal liability is fundamental error." *James*, 231 Ariz. at 493, ¶ 13, 297 P.3d at 185 (citing *State v. Zinsmeyer*, 222 Ariz. 612, 623, ¶ 27, 218 P.3d 1069, 1080 (App. 2009), *overruled on other grounds by State v. Bonfiglio*, 231 Ariz. 371, 295 P.3d 948 (2013); *Ontiveros*, 206 Ariz. at 542, ¶ 17, 81 P.3d at 333; *State v. Rutledge*, 197 Ariz. 389, 392 n.7, ¶ 12, 4 P.3d 444, 447 n.7 (App. 2000)). "Given the case-specific nature of the inquiry, however, [Dickinson] must show the error was fundamental in light of the facts and circumstances of this case, recognizing that 'the same error may be fundamental in one case but not in another.'" *James*, 231 Ariz. at 493, ¶ 13, 297 P.3d at 185 (quoting *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993)). Because the instruction potentially "improperly relieved the State of its burden of proving an element of the offense," under the facts and circumstances of this case, the error complained of was fundamental because it goes to the foundation of the case. *State v. Kemper*, 229 Ariz. 105, 107, ¶¶ 5-6, 271 P.3d 484, 486 (App. 2011) (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995) and *Henderson*, 210 Ariz. at 568, ¶ 25, 115 P.3d at 608).

III. Prejudice.

¶13 Fundamental error alone is not sufficient for reversal; Dickinson must show resulting prejudice. *Henderson*, 210 Ariz. at 568, ¶¶ 23-24, 26, 115 P.3d at 608. Prejudice is a fact-intensive inquiry, the outcome of which will "depend[] upon the type of error that occurred and the facts of a particular case." *James*, 231 Ariz. at 494, ¶ 15, 297 P.3d at 186 (quoting *Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608). Dickinson must affirmatively "prove prejudice" and may not rely upon "speculation" to carry his burden. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701,

[3] The State argues *Ontiveros* should be overruled. The jury instruction was error under *Ontiveros*, and this court declines the State's request to revisit the legal issue decided in *Ontiveros*.

705 (App. 2006). To prove prejudice, Dickinson must show that a reasonable, properly instructed jury "could have reached a different result." *James*, 231 Ariz. at 494, ¶ 15, 297 P.3d at 186. In determining whether a defendant has shown prejudice, the court considers the parties' theories, the evidence received at trial and the parties' arguments to the jury. *Id.*

¶14 The State's theory was that Dickinson intended to kill the victim, not that he intended to cause serious physical injury or knew that his conduct would cause serious physical injury. The first two sentences of the State's opening statement made that plain: "Good afternoon. The evidence in this case will show you that [Dickinson] . . . tried to kill" the victim. The State repeated in opening statement that the evidence would show that Dickinson "was trying to kill [the victim]. Told him he was going to kill him up here, with the ax; then he went looking for him in his truck, and he didn't just try once, took him to the second time before he finally got him." These statements contain no suggestion that Dickinson simply was trying to cause the victim serious physical injury. Indeed, Dickinson does not contend that the State's theory was that he tried to cause serious physical injury to the victim.

¶15 Dickinson's defense was mistaken identity. More specifically, Dickinson's theory of the case was that he had nothing to do with the incident, that he was not the driver of the truck that ran over the victim and that he was being framed in an attempted insurance or prescription drug fraud. In pretrial filings, Dickinson disclosed alibi, mistaken identity, third party liability and general denial defenses, but did not assert any lack-of-intent defense. In opening statement, defense counsel stated bluntly: "Zane [Dickinson] didn't do this." The fact that Dickinson's defense did not implicate the erroneous jury instruction undercuts, rather than supports, his assertion that the instruction prejudiced him.

¶16 The trial evidence included testimony that Dickinson threatened the victim with an ax and told the victim he would kill him minutes before the incident. When the victim rode away on his bicycle, Dickinson said he was "going to run him over" and then drove after him in his truck. The victim testified that just before being run over, Dickinson "had that look in his face like, you know, he was going to kill me, man, he was going to kill me." A witness testified that Dickinson "proceeded to run [the victim] down on his bicycle. [The victim] went up underneath the truck. . . . The bike collapsed, and [the victim] was drug underneath the truck." The victim sustained multiple injuries, including head injuries, a

concussion, a broken ankle and an injured elbow. This evidence is consistent with the State's theory that Dickinson intended to kill the victim, not just cause serious physical injury.

¶17 Dickinson points to statements he made in recorded jail calls that were received in evidence at trial, arguing "the jury may have found that [he] intended to cause serious physical injury rather than death." In one call, Dickinson stated "I don't know why I didn't just stop. I have insurance and everything." By itself, and without supporting evidence or argument (and none was provided at trial), this statement does not implicate the erroneous portion of the jury instruction.

¶18 In a separate recorded jail call, a caller said to Dickinson: "I heard from 'Big Mike,' according to him, he [the victim] was taunting you after you went by and you were coming back and you look like you was trying to scare him a little and you swerved off and he jumped right in front of you at the same time. That's what [Big] Mike said." In this statement, the caller (who did not see the incident) was describing a purported statement by Big Mike (who testified at trial he did not see the incident) about what Dickinson may have been "trying" to do. In response to the caller's statement, Dickinson said "I was defending myself really." Dickinson's response undercuts his primary defense of mistaken identity and is incongruous (purportedly defending himself by repeatedly driving a truck to run over the victim who was riding a bicycle). Moreover, at no time did Dickinson claim that he was involved but did not intend to kill the victim or knew that his conduct would cause serious physical injury but not death. In any event, Big Mike's trial testimony made plain that he not witness the incident to begin with and could not have provided a first-hand account about what occurred.

¶19 Turning to closing arguments, Dickinson is correct that the State in its initial argument stated "when you look at the instruction, it's either he did this intentionally or that he knew his conduct would result in death or serious physical injury." Immediately continuing, however, the State argued:

> Now, [the victim]'s lucky. This could have been much worse; his injuries could have been much worse. You get spit through underneath a truck, could have been much worse. But [Dickinson] was trying to kill [the victim].

> Remember when he goes back – after he goes back to [a witness]'s house . . . what does [the witness] say? He says [Dickinson] comes back, throws him the keys, says I did it.

The State also mentioned the jail calls, but did so in arguing Dickinson "didn't have to go after" the victim, asserting "[t]his isn't a case of self-defense."

¶20 In closing, Dickinson's counsel argued that he had no involvement in the incident and the State's witnesses "concocted up and made up this story" given "bad blood" between Dickinson and those involved and attempted "insurance fraud" and prescription drug fraud by some witnesses. Regarding the jail calls, Dickinson's counsel asked, "who in their rational[] right mind," on hearing that the call would be recorded, "would then essentially confess? Because that's what the state's claiming." Dickinson attempted to negate the calls entirely, arguing the recordings "were chopped and spliced and put together" with "big gaps" and "without context of the entire conversation." At no time did this closing implicate Dickinson's mental state or the fundamentally erroneous jury instruction.[4]

¶21 In final closing, the State addressed the jail calls, first asking the jury to reject Dickinson's "context" argument: "The context is clear. The defendant was there. He ran the victim over. And he should have stopped. But then again, he was trying to kill him, so why would he stop?" After playing one of the recorded calls, the State continued to argue that Dickinson's actions were not in self-defense but, rather, were intended to kill the victim:

> This is not self-defense. [The victim] didn't jump out in front of him. Look at the acceleration marks, look at the photographs, consider the testimony of [one witness] with what the victim told you. He missed once. He -- before that, they got in the argument. Remember he said he was going to [expletive

[4] In some post-verdict notes to the superior court (called "kites"), Dickinson continued to assert witnesses were lying and that he had no involvement in the incident.

> deleted] kill him, followed in the same direction. After he missed once, he ran him over again. That's what the evidence shows.

The State added "when you're trying to kill somebody and run them over, I mean it's – what do you expect?" The State never deviated from its consistent theme that Dickinson intended to kill the victim.[5]

¶22 The State's theory was that Dickinson intended to kill the victim; Dickinson's defense was mistaken identity and that he was not involved in the charged conduct in any respect. Neither of these competing views suggests that Dickinson intended to cause serious injury to the victim (as opposed to kill him), which is the fundamental error in the jury instructions. Based on the particular facts of this case -- including the State's theory, Dickinson's defense, the evidence and the parties' arguments to the jury -- Dickinson has failed to prove resulting prejudice from the fundamental error in the jury instruction. *Henderson*, 210 Ariz. at 568, ¶¶ 23-24, 26, 115 P.3d at 608. Accordingly, Dickinson's claim of fundamental, prejudicial error fails.

CONCLUSION

¶23 Dickinson's conviction and sentence for attempted second degree murder are affirmed.

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[5] Dickinson argues that the victim's "injuries were not life threatening" and that this case does not involve "the use of a gun or knife." The injuries resulted in the victim receiving hospital treatment for head wounds, a concussion and a broken ankle after having been run over and dragged underneath a heavy extended cab truck. Had Dickinson's defense been premised on a lack of intent or that he was merely trying to scare the victim, these arguments might have been more persuasive. On this record, given Dickinson's mistaken identity defense, they are not.