
No.

In the
Supreme Court of the United States

SCOTT DRAKE CLABOURNE, Petitioner

v.

ARIZONA, Respondent

On Petition for Writ of Certiorari to the
Arizona Supreme Court

**Appendix to
Petition for Writ of Certiorari
Volume 1 of 3**

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FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 9 2026

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

SCOTT DRAKE CLABOURNE,

Petitioner-Appellant,

v.

RYAN THORNELL, et al.,

Respondents-Appellees.

No. 23-99000

D.C. No. 4:03-cv-00542-RCC
District of Arizona,
Tucson

ORDER

This Court on November 15, 2023 granted Appellant's unopposed motion to stay this appeal pending exhaustion in the state courts of an already filed state post-conviction petition. On May 18, 2026, Appellant filed a status report stating that state court proceedings concluded on May 6, 2026.

The administrative closure of this appeal is lifted. The Clerk shall strike the opening brief filed July 31, 2023 (Docket Entry No. 8). The replacement opening brief is due October 15, 2026. The answering brief is due December 17, 2026. The reply brief is due within 21 days after service of the answering brief.

AS DIRECTED BY THE COURT:

MOLLY C. DWYER
CLERK OF COURT



Supreme Court

STATE OF ARIZONA

ANN A. SCOTT TIMMER
Chief Justice

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AARON C. NASH
Clerk of the Court

May 6, 2026

RE: STATE OF ARIZONA v SCOTT DRAKE CLABOURNE
Arizona Supreme Court No. CR-24-0267-PC
Pima County Superior Court No. CR-06824

GREETINGS:

The following action was taken by the Arizona Supreme Court on May 5, 2026, regarding the above-referenced cause:

ORDERED: Petition for Review = DENIED.

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

Aaron C. Nash, Clerk

TO:

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William Scott Simon

S Jonathan Young

Erin Carrillo

Scott Drake Clabourne, ADCRR 046561,

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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. MICHAEL BUTLER

CASE NO. CR06824

DATE: September 05, 2024

STATE OF ARIZONA
Plaintiff,

vs.

SCOTT DRAKE CLABOURNE
Defendant.

R U L I N G

**IN-CHAMBERS UNDER ADVISEMENT RULING ON
DEFENDANT'S MOTION FOR REHEARING**

The Court has received and reviewed the Motion for Rehearing (the “Motion”) filed by Petitioner Scott Clabourne (“Petitioner”), the state’s Response, and Petitioner’s Reply. The Court also has reviewed all attachments to the pleadings and the applicable law. Petitioner seeks a rehearing because he believes the Court erred in its Under Advisement Ruling dated May 10, 2024 (the “Ruling”).¹

Petitioner first argues the Court erred in finding that his claim of actual innocence under Rule 32.1(h). Ariz. R. Crim. P., is untimely. Petitioner has attached minute entry orders from another division of the Arizona Superior Court in Pima County to support his position that it would be “unjust” to require Petitioner to pursue claims in state court and federal court at the same time. Although the Court agrees that Judge Villareal was an excellent and knowledgeable judge, he was making his ruling based on different facts and circumstances. And Judge Villareal’s ruling was based, in part, upon the fact that the federal case was “dependent upon the finding and rulings of the state case,” which has not been established in this case.²

¹ Petitioner does not cite a procedural rule upon which he bases his request for a rehearing, but he essentially seeks reconsideration of the Court’s ruling.

² Rulings from other divisions of the superior court are not precedent for this Court. And as Judge Villareal noted, there is no legal authority for the notion that ongoing federal litigation provides a meritorious reason for delay.

Kristin Nelson
Judicial Administrative Assistant

R U L I N G

As noted in the Court's Ruling, Petitioner was required to file his claim under Rule 32.1(h) within a reasonable time after discovering the basis of the claim. Petitioner does not dispute that he discovered the basis of the claim many, many years ago; he merely chose to assert it after litigating issues for 20 years in federal court. The Court cannot conclude that a litigation strategy – litigating issues in federal court instead of state court – is a sufficient reason to delay state court proceedings for decades. Unlike a circumstance outside of Petitioner's control, the delay here occurred by Petitioner's choice.

Petitioner next argues that the Court erred in considering his recent Rule 32 Petition a precluded successive petition. Petitioner again argues in the Motion that *State v. Diaz*, 236 Ariz. 361 (2014), requires the Court to consider the petition an original petition. As noted in the Ruling, Petitioner seeks an extension of the holding in *Diaz*. Unlike *Diaz*, petitions indeed were filed by Petitioner in this case. Again, the Court is not inclined to expand existing law.

For the reasons stated herein, the Motion for Rehearing is denied.


HON. MICHAEL J. BUTLER
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cc: Erin M Carrillo, Esq.
S Jonathan Young, Esq.
William S Simon, Esq.
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ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. MICHAEL BUTLER

CASE NO. CR06824-001

DATE: May 10, 2024

STATE OF ARIZONA
Plaintiff,

vs.

SCOTT DRAKE CLABOURNE
Defendant

UNDER ADVISEMENT RULING

**IN-CHAMBERS UNDER ADVISEMENT RULING ON DEFENDANT'S RULE 32 PETITION
FOR POST-CONVICTION RELIEF**

Pending before the Court is Petitioner Scott Drake Clabourne's Rule 32 Petition for Post-Conviction Relief (the "Petition"). Petitioner argues he is entitled to relief under Rule 32.1(a), Ariz. R. Crim. P., because his counsel was ineffective during his resentencing proceedings in 1997. He also argues no reasonable fact finder could have found the aggravating factor of cruelty when considering only appropriately admitted evidence, and he therefore is also entitled to relief under Rule 32.1(h), Ariz. R. Crim. P.

The Court has reviewed and considered the pleadings filed by the parties, the pertinent portions of the appendix and court documents, and the arguments made by counsel during oral argument on March 12, 2024. After careful deliberation, and for the reasons stated below, the Court denies Petitioner the relief he seeks.

BACKGROUND

On November 23, 1982, Petitioner was convicted by a jury of the first-degree murder of Laura Webster, who was murdered on September 18, 1980. The trial court made the subsequent finding that the murder was especially cruel – a finding that was not outweighed by mitigating evidence. Petitioner was sentenced to death on the murder charge.¹

¹ Petitioner also was convicted of three counts of sexual assault and one count of kidnapping. These counts are not relevant to the discussion here.

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UNDER ADVISEMENT RULING

Over the next fifteen years, Petitioner appealed his sentence in federal and state court proceedings. In 1995, the Ninth Circuit granted Petitioner a resentencing in the Arizona Superior Court. The Ninth Circuit concluded Petitioner had not been provided effective assistance of counsel during his first sentencing; counsel did not appropriately investigate and present available mitigating evidence. The resentencing occurred in 1997, and the sentencing court again found the (F)(6) aggravator of cruelty without finding sufficient mitigating evidence to outweigh the aggravator. Petitioner again was sentenced to death. This sentence again was upheld on appeal.

In 2002, Petitioner (through an attorney) filed a petition for post-conviction relief in this court after filing a “preliminary” petition in late 2001 that was returned by the court. The petition did not comply with Rule 32.5, Ariz. R. Crim. P., and the court granted Petitioner additional time to comply with the rule. On June 3, 2002, Petitioner filed a “supplemental” Rule 32 petition, and counsel advised the court that he was awaiting a signature from Petitioner from prison to complete the certification process as required by Rule 32.5. Petitioner filed another “supplemental” Rule 32 petition on September 30, 2002, and although signed by Petitioner, it again did not comply with certification requirements as outlined in the rules.

In December 2002, this court issued an in-chambers ruling denying the various petitions for failing to comply with the certification requirements. The court also addressed the substantive issues presented in the various petitions, and the court ruled on each issue “in the alternative” to its blanket dismissal. Four of the five issues addressed by the court were issues of ineffective assistance of counsel, and the court did not find a basis for relief for any of the claims.

After the Arizona Supreme Court denied review of this court’s denial of Petitioner’s Rule 32 petition, Petitioner filed a petition for writ of habeas corpus in the United States District Court. Petitioner asserted that counsel in the 1997 resentencing was ineffective for failing to seek the suppression of his confession during the resentencing proceedings. Although originally dismissed, the claim of ineffective assistance of resentencing counsel was reconsidered by the Ninth Circuit after the United States Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012). The Ninth Circuit remanded the matter to the district court for further proceedings.

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Judicial Administrative Assistant

UNDER ADVISEMENT RULING

After the matter was returned to the district court to determine whether Petitioner's resentencing counsel was ineffective, but before the court held its *Martinez* hearing and issued its decision, the United States Supreme Court handed down *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). The *Shinn* case prevented the district court from considering any evidence that was not contained in the state court record. The district court ultimately determined that Plaintiff's resentencing counsel was not ineffective.

After the district court's ruling, Petitioner filed the Petition. Petitioner argues he is entitled to relief under Rule 32.1(a), Ariz. R. Crim. P., because resentencing counsel was ineffective, and Petitioner was prejudiced by the ineffective counsel. Specifically, Petitioner argues counsel erroneously failed to object to the prosecutor presenting Petitioner's *Edwards*-inadmissible confession to the sentencing judge through an exhibit. Petitioner contends the judge would not have found the (F)(6) aggravator that Ms. Webster's murder was especially cruel if he had not considered the confession because all other properly admitted evidence was insufficient to make such a finding. For similar reasons, Petitioner argues he is entitled to relief under Rule 32.1(h) because he is actually innocent of the death penalty. Petitioner contends that, without the information contained in his confession, no reasonable fact finder could have found that Ms. Webster's murder was especially cruel. In response, the state argues that both of Petitioner's claims are untimely, and in all events his Rule 32.1(a) claim is precluded. Additionally, the state argues Petitioner has not proven his claims on their merits.

ANALYSIS

Ineffective Assistance of Counsel, Rule 32.1(a)

Through counsel, Petitioner filed various petitions for post-conviction relief at the end of 2001 and the beginning of 2002. As a general matter, Petitioner therefore would be precluded from making additional ineffective assistance of counsel claims in later petitions for post-conviction relief. *See* 32.2(a)(3), Ariz. R. Crim. P. However, Petitioner asserts the Petition must be viewed as his first petition in accordance with the holding in *State v. Diaz*, 236 Ariz. 361 (2014). The state argues *State v. Diaz* is inapplicable. The Court agrees with the state.

Kristin Nelson

Judicial Administrative Assistant

UNDER ADVISEMENT RULING

In *State v. Diaz*, the court found that claims contained in a petition for post-conviction relief were not waived when a defendant's attorney had filed notices of petitions for post-conviction relief but had never actually filed petitions after filing those notices. As the court noted, "because former counsel failed to file any petition in Diaz' previous PCR proceedings and those failures were not Diaz' fault, he did not waive his IAC claim." *Id.* at 363. The court's ruling was based upon its reasoning that "through no fault on Diaz's part, the trial court did not adjudicate the merits of the IAC claim in a previous PCR proceeding and the merits could not have been adjudicated absent a petition" *Id.*

Here, Petitioner's prior counsel filed petitions, albeit without sufficient certifications. The arguments in those petitions were sufficiently developed to allow the court to issue rulings "in the alternative" that were based upon the merits of the claims. The circumstances here are therefore different than those in *Diaz*. The Court is not inclined to expand the holding in *Diaz* to include instances where petitions are indeed filed, yet they may be deficient in some way.

Having found that *Diaz* does not apply, the Court notes that preclusion here is required. *See State v. Traverso*, 256 Ariz. 247 (App. 2023). In relying on *Diaz* exclusively for his position that the Petition must be viewed as his first petition, Petitioner has not argued (nor does the Court find) that preclusion should be excused. For these reasons, Petitioner's ineffective assistance of counsel claim under Rule 32.1(a) is hereby dismissed as precluded.

Actual Innocence, Rule 32.1(h)

The Court next addresses Petitioner's claim that he is actually innocent because no reasonable fact finder would find the (F)(6) aggravating factor applies to this case. In addition to challenging the merits, the state argues Petitioner's Rule 32.1(h) claim is untimely. The Court agrees that the claim is untimely.

Rule 32.4(b)(3)(B), Ariz. R. Crim. P., requires a petitioner to file notice for a claim under Rule 32.1(h) "within a reasonable time after discovering the basis of the claim."² As noted by the state, and in accordance with the rules, Petitioner's current Rule 32 claim would have been timely if filed within a reasonable time from October 2003. This claim was asserted almost twenty years later. However,

² Rule 32.4(b)(3)(C) specifically addresses capital cases and provides that the notice must be filed "expeditiously" after the issuance of a mandate affirming a defendant's conviction and sentence after a direct appeal. Whether Rule 32.4(b)(3)(B) or Rule 32.4(b)(3)(C) applies, any notice should have been filed approximately 20 years ago.

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Rule 32.2(b) allows a defendant to assert a claim in a “successive or untimely” petition if the defendant explains the reasons for not raising the claim in an earlier notice or petition, or for not raising the claim in a timely manner. If sufficient reasons are not forwarded to the court, the court may summarily dismiss the notice.

Petitioner did not squarely address the timeliness of the notice and Petition in his original pleadings. Presumably, Petitioner believes that the Petition is not a successive petition due to *State v. Diaz*, 236 Ariz. 361 (2014), thereby negating any issues of timeliness. However, having found that *Diaz* does not support Petitioner’s conclusion that the Petition must be considered the first petition, Petitioner was required to explain the untimeliness of the filing.³ He did not do so in the Petition.

In his Reply, Petitioner discusses the timing of the filing of the Petition. Petitioner again asserts that the Petition must be viewed as his first petition instead of a successive petition. Petitioner also suggests that the issuance of *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), necessitated the filing of the Petition when it may not have been necessary otherwise. Absent from Petitioner’s pleadings are any reasons that the Petition could not have been filed in the twenty years after the Arizona Supreme Court denied review of his earlier post-conviction proceedings.

The Court finds Petitioner’s claim under Rule 32.1(h) is untimely. All facts upon which Petitioner’s claim is based were available, even in 2003.⁴ Petitioner’s explanation that he was instead pursuing his claims in federal court is not a sufficient reason for waiting twenty years to pursue claims here. Petitioner’s explanation establishes he made a litigation strategy to pursue his rights in federal court (which he certainly had a right to do), but Petitioner provides no legal basis for the assertion that available state court claims must wait in abeyance pending the outcome of federal proceedings.⁵ And

³ Rule 32.2(b) requires a defendant to explain the reasons for not raising a claim for either a “successive or untimely” notice. Here, because the notice was filed some twenty years after it could have been filed, Petitioner should have explained the reasons for the late filing in all events.

⁴ At that time, Petitioner knew that his *Edwards*-inadmissible confession should not have been considered by the resentencing judge. In addition, the medical basis for Petitioner’s argument that Ms. Webster’s murder was not cruel is contained in the Third Edition of Dr. Spitz’s treatise, and that edition was published in 1993. Although Dr. Spitz did not provide a written opinion relating to this particular case until 2018, Petitioner provides no reason that it could not have been obtained earlier.

⁵ Indeed, the proceedings in this case refute any such notion. Petitioner presumably is pursuing his appeal of the district court’s ruling in the Ninth Circuit while he is pursuing his claims in the Petition. There seems to be no impediment to proceeding in both courts simultaneously.

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UNDER ADVISEMENT RULING

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Date: May 10, 2024

Case No.: CR06824-001

the Court cannot imagine any time frame that would be considered unreasonable if twenty years is a reasonable time in which to present extant claims.

CONCLUSION

For the reasons stated above, the Court finds that Petitioner's claim of ineffective assistance of counsel under Rule 32.1(a) is precluded, and his claim of actual innocence under Rule 32.1(h) is untimely. The claims are therefore DISMISSED. The Court having found that the claims are precluded and/or untimely, Petitioner has not asserted colorable claims that would warrant an evidentiary hearing.


HON. MICHAEL J. BUTLER
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 15 2023

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

SCOTT DRAKE CLABOURNE,

Petitioner-Appellant,

v.

RYAN THORNELL, et al.,

Respondents-Appellees.

No. 23-99000

D.C. No. 4:03-cv-00542-RCC
District of Arizona,
Tucson

ORDER

Before: BERZON, CLIFTON, and IKUTA, Circuit Judges.

Petitioner-Appellant's unopposed motion to stay and abey federal habeas proceedings pending state court exhaustion (Dkt. No. 21) is GRANTED, with modification.

Although the motion asked that the parties be permitted to move to reactive the federal proceedings "should it be necessary" to do so, because the motion is to stay the federal proceedings, the federal proceedings will remain active in the meantime, though held in abeyance. The parties are ordered to advise this court and the District Court within ten days of the conclusion of the state court proceedings and the substance of that conclusion.

By this order, this appeal is administratively closed. The Clerk will advise the district court of the entry of this order.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Scott Drake Clabourne,
10 Petitioner,
11 v.
12 Ryan Thornell, et al.,¹
13 Respondents.
14

No. CV-03-00542-TUC-RCC
DEATH PENALTY CASE
ORDER

15 Before the Court is Petitioner Scott Clabourne's Motion to Alter or Amend the
16 Judgment Pursuant to Rule 59(e). (Doc. 94.) The motion is fully briefed. (Docs. 97, 98.)
17 For the following reasons, Clabourne's motion is denied.

18 **Background**

19 The Court denied Clabourne's Amended Petition for Writ of Habeas Corpus on
20 September 09, 2009. (Doc. 41.)² In doing so, the Court dismissed Claim 1 as procedurally
21 defaulted. (*Id.* at 17.) Claim 1 alleges counsel was ineffective for not seeking to suppress
22 Clabourne's confession at his resentencing. Under then-governing law, the Court rejected
23 Clabourne's argument that the ineffective assistance of post-conviction relief (PCR)
24

25 ¹ Pursuant to Rule 25(d), Federal Rules of Civil Procedure, Ryan Thornell, the
26 Director of the Arizona Department of Corrections, Rehabilitation and Reentry, is
substituted for the former Director, David Shinn.

27 ² "Doc." refers to numbered documents in this Court's electronic case docket.
28

1 counsel established cause and prejudice to excuse the default. (*Id.* at 15–16.)

2 On appeal, the Ninth Circuit vacated the denial of Claim 1 and remanded the claim
3 to this Court for further proceedings in light of *Martinez v. Ryan*, 566 U.S. 1 (2012).
4 *Clabourne v. Ryan (Clabourne IV)*, 745 F.3d 362, 383 (2014), *overruled on other grounds*
5 *by McKinney v. Ryan*, 813 F.3d 798 (2015). *Martinez* held that the ineffective assistance
6 of PCR counsel can excuse the default of a claim of trial level ineffective assistance of
7 counsel (IAC).

8 Upon remand, the Court found Clabourne had failed to demonstrate cause and
9 prejudice under *Martinez* to excuse the default of Claim 1 and entered judgment denying
10 the claim as procedurally defaulted and barred from federal review. (Docs. 92, 93.)
11 Clabourne asserts that in doing so, the Court “misapprehended the law in two significant
12 respects.” (Doc. 94 at 4.)

13 **Applicable Law**

14 A motion to alter or amend judgment under Rule 59(e) is in essence a motion for
15 reconsideration. Rule 59(e) offers an “extraordinary remedy, to be used sparingly in the
16 interests of finality and conservation of judicial resources.” *Kona Enter., Inc. v. Est. of*
17 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000); *see also Rishor v. Ferguson*, 822 F.3d 482, 491–
18 92 (9th Cir. 2016). The Ninth Circuit has consistently held that a motion brought pursuant
19 to Rule 59(e) should only be granted in “highly unusual circumstances.” *Id.*; *see also 389*
20 *Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

21 Reconsideration is appropriate only if the court is presented with newly discovered
22 evidence, if there is an intervening change in controlling law, or if the court committed
23 clear error. *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam); *see*
24 *School Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.
25 1993).

26 A motion for reconsideration is not a forum for the moving party to make new
27 arguments not raised in its original briefs, *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*,
28 841 F.2d 918, 925–26 (9th Cir. 1988); *see also Zimmerman v. City of Oakland*, 255 F.3d

734, 740 (9th Cir. 2001) (holding district court did not abuse its discretion by disregarding legal arguments and facts previously available but raised for the first time under Rule 59(e)), nor is it the time to ask the court to “rethink what the court ha[s] already thought through,” *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D. Ariz. 1998). The fact that a petitioner disagrees with the court’s conclusion is also an insufficient basis to seek reconsideration under Rule 59(e). *United States v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001) (“A party seeking reconsideration must show more than a disagreement with the Court’s decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party’s burden.”) (quotations omitted).

Discussion

A. Admissibility of Clabourne’s confession.

Clabourne first asserts the Court misapprehended the law of limited admissibility set forth in Federal and State Rules of Evidence 703 and 705. Clabourne argues that the Court failed to consider these rules, which would have permitted the resentencing court to consider the contents of the inadmissible confession in evaluating the expert testimony without rendering the confession itself admissible.

1. Additional background

The procedural and factual background of this case is discussed in greater detail in this Court’s order finding Claim 1 procedurally defaulted without excuse. (*See* Doc. 92 at 2–14.) Briefly, on the evening of September 18, 1980, Laura Webster entered the Green Dolphin Bar with a friend. The next day, Webster’s body was found near the Santa Cruz River, naked and wrapped in a bloody sheet with a blue and white bandana tied tightly around her neck. An autopsy revealed that she had been strangled and then stabbed in the chest. There was also evidence of oral, anal, and vaginal intercourse just prior to death.

Clabourne was incarcerated on burglary charges unrelated to the murder of Webster and had invoked his right to counsel when he was interviewed by Tucson Police Detective Luis Bustamante and confessed his involvement in Webster’s death. Clabourne confessed

1 that he, along with co-defendants Larry Langston and Ed Carrico, convinced her to leave
2 the bar with them to go to a party. While driving to a residential home, Langston stopped
3 the car, pulled Webster out, and beat her. After he threw her back into the car Webster
4 pleaded with Clabourne to protect her.

5 At the house, Langston beat Webster again and forced her to strip and serve the men
6 drinks. Over a period of six hours, Langston and Carrico repeatedly beat and raped
7 Webster. During this time, Clabourne also had sex with Webster but claimed it was
8 consensual. At several points during the ordeal, Webster again pleaded with Clabourne to
9 protect her from the others.

10 At the end of the evening, Langston told Clabourne to kill Webster. Clabourne
11 maintained that he was in fear of his own life and wanted to let her escape but was scared
12 Langston would kill him. He strangled her with a bandana that he carried with him. He
13 then stated that Langston handed him a knife; Clabourne stabbed Webster twice and the
14 three men wrapped her in a sheet and threw her in the riverbed.

15 The trial court allowed this confession to be admitted into evidence in Clabourne's
16 trial and considered factors derived solely from the confession during sentencing.

17 The prosecution introduced evidence of other incriminating statements Clabourne
18 made. Clabourne's girlfriend testified that Clabourne had admitted committing the crime
19 on several occasions and that the bandana around the victims' neck was similar to one that
20 belonged to Clabourne. Another acquaintance testified that Clabourne had confessed to
21 killing a girl. A corrections officer testified that Clabourne told him, spontaneously, about
22 the crime approximately a month before giving his taped confession. Clabourne told him
23 he and another man picked a girl up from a bar and, while driving to a friend's house, the
24 girl begged Clabourne not to let the other man hurt her, that she was afraid he might kill
25 her. At the house, they continued to "party, drink and carry on" and Clabourne indicated
26 he and the other man had sex with the girl. Clabourne confessed to then strangling her. He
27 also stated the other man gave him a knife and told him to kill her, though he did not say
28 anything about stabbing the victim. (Appx. 321.) A second corrections officer testified that

1 he overheard Clabourne tell another inmate, “Yeah, I raped her. She didn’t want it but I
2 know she liked it.”

3 Subsequently, the Supreme Court in *Arizona v. Roberson*, 486 U.S. 675 (1988), held
4 that such a subject who had invoked his right to counsel could not be questioned about
5 other crimes, making Clabourne’s confession prospectively inadmissible. *Clabourne IV*,
6 745 F.3d at 379 (citing *Roberson*, 486 U.S. at 684–85). Nonetheless, counsel did not move
7 to suppress the prosecutor’s use of the confession during resentencing in 1997. The
8 prosecutor attached the confession to his sentencing memorandum and referred to facts
9 from the confession throughout the aggravation/mitigation hearing.

10 The trial court resentenced Clabourne to death. Although the court found cruelty
11 alone sufficient to establish death eligibility under A.R.S. § 13-701(F)(6), it also found that
12 the murder had been committed in an especially heinous and depraved manner, the other
13 component of the (F)(6) aggravator.³ Though this finding was based in part on Clabourne’s
14 statements to Detective Bustamante, the court also found that Clabourne witnessed the
15 repeated beatings and sexual assaults by other co-defendants and displayed a callous
16 indifference to Webster’s life, thus “demonstrating a heinous and depraved state of mind.”
17 (RT 08/14/97 at 8.) The Arizona Supreme Court affirmed the death sentence and Clabourne
18 initiated habeas proceedings in 2003.

19 On habeas review, Clabourne asserted his resentencing counsel was ineffective for
20 failing to seek suppression of his confession and that he was prejudiced because, without
21 the confession, there was insufficient evidence to establish cruelty under A.R. S. § 13-

22
23 ³ “Because the elements of the (F)(6) factor—‘heinous, cruel, or depraved’—are
24 stated in the disjunctive, a finding of cruelty alone is sufficient to support an (F)(6)
25 aggravating circumstance.” *State v. Clabourne (Clabourne III)*, 194 Ariz. 379, 384, 983
26 P.2d 748, 753 (1999) (citing *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983)).
27 Under Arizona law, a murder is committed in an especially cruel manner if “the victim
28 consciously experienced physical or mental pain prior to death.” *State v. Sansing*, 206 Ariz.
232, 235, 77 P.3d 30, 33 (2003) (quoting *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869, 883
(1997)). The victim need not be conscious, however, when “each and every wound” is
inflicted. *Sansing*, 206 Ariz. at 235, 77 P.3d at 33 (quoting *Trostle*, 191 Ariz. at 4, 951 P.2d
at 883).

1 703(F)(6). As noted above, the Court dismissed the claim as procedurally defaulted,
2 rejecting Clabourne's argument that the ineffectiveness of PCR counsel excused the
3 default. (*See* Doc. 41 at 16.)

4 On appeal, following the Supreme Court's decision in *Martinez*, the Ninth Circuit
5 remanded the confession-related IAC claim, concluding that there was "no dispute in this
6 case about the deficient performance of Clabourne's post-conviction counsel, as the State
7 concede[d] that his representation was deficient." *Clabourne IV*, 745 F.3d at 378. The
8 Ninth Circuit, however, stopped short of finding that counsel's failure to object to use of
9 the confession constituted ineffective assistance. *See id.* at 380. ("That there was a basis to
10 object to the use of Clabourne's statement at resentencing (or to move to suppress it) does
11 not by itself establish that Clabourne suffered from ineffective assistance through
12 resentencing counsel's failure to make that objection.") In his supplemental *Martinez* brief,
13 Clabourne argued that in the absence of his confession, the balance of the prosecution's
14 evidence fails to meet the burden of proof necessary to establish the (F)(6) factor. (*See* Doc.
15 71 at 23.)

16 The Court found that the record supported "a finding that counsel were aware of the
17 confession, its prospective inadmissibility, and the State's intent to rely on it to establish
18 the sole statutory aggravating factor 'especially heinous, cruel, or depraved' under A.R.S.
19 § 13-703(F)(6)." (Doc. 92 at 24.) The Court also found that Clabourne failed to overcome
20 the presumption that defense counsel's actions were reasonable and strategic. (*Id.* at 37)
21 Thus, the Court concluded that the default of Claim 1 could not be excused under *Martinez*,
22 and again denied the claim as procedurally defaulted. (*Id.* at 40.)

23 The Court noted Clabourne had a duty to rebut the presumption that counsel acted
24 competently by demonstrating that "his attorney's representation was unreasonable under
25 prevailing professional norms and that the challenged action was not sound strategy." (*Id.*
26 at 27) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).) The Court noted its
27 responsibility to "affirmatively entertain" the range of possible reasons counsel proceeded
28 as they did. (*Id.*) (citing *Miles v. Ryan*, 713 F.3d 477, 486 (9th Cir. 2013).)

1 Upon review of the record, the Court determined that it is “at least arguable” that a
 2 reasonable attorney could decide to forego challenging the resentencing court’s use of
 3 Clabourne’s confession in the circumstances present here. (*Id.*) (citing *Harrington v.*
 4 *Richter*, 562 U.S. 86, 106 (2011)). The Court found that at the time counsel returned to
 5 state court for the resentencing it would have been reasonable for counsel to believe that,
 6 even if they succeeded in suppressing the confession during resentencing, the (F)(6)
 7 aggravating factor would again be found by the resentencing court.⁴ (*Id.* at 31.) The Court
 8 explained:

9 There is no doubt that the murder was particularly senseless, and the victim
 10 was totally helpless at the hands of her captors, as the State pointed out on
 11 appeal and as evidenced by the victim’s pleas for help As the
 12 resentencing court noted, Clabourne “was also a witness to the repeated
 13 beating and sexual assaults by other co-defendants. At the very least this
 Defendant displayed a callous indifference to Laura Webster’s life,
 demonstrating a heinous and depraved state of mind.” . . .

14 Given the overwhelming likelihood the State would again establish the (F)(6)
 15 aggravating factor, with or without the confession, it was objectively
 16 reasonable for defense counsel to focus their efforts on establishing the
 17 strongest available case in mitigation, and the record demonstrates this is
 18 what counsel did. In pursuing this strategy, they provided their experts “with
 19 a more complete history of Clabourne and more information about the crime
 than they had received before trial,” *Clabourne III*, 194 Ariz. at 383, 983
 P.2d at 752, and *relied on Clabourne’s confession in support of their*
mitigation theory.

20 (*Id.* at 32) (citations omitted) (emphasis added). The Court further explained:

21 [C]ounsel . . . at the sentencing phase, faced with a client convicted of first-
 22 degree murder, three counts of sexual assault (oral, anal, and vaginal

23
 24 ⁴ In the first order denying the claim as procedurally defaulted in 2009, the Court
 25 considered the impact of the confession and found that, “first and foremost, other evidence
 26 supported the cruelty finding.” (Doc. 41 at 16.) “[E]ven without Petitioner’s confession,
 27 there was sufficient evidence from which a trier of fact could conclude that the victim
 28 feared for her life and suffered greatly before being killed.” (*Id.* at 17.) Clabourne therefore
 failed to demonstrate that “no reasonable factfinder would have found, even without
 consideration of his confession, the existence of the cruelty prong of the (F)(6) factor.”
 (*Id.*)

intercourse), and kidnapping, all unassailable findings during the sentencing proceeding, made a reasonable strategic decision to pursue a mitigation theory of duress that was *consistent with Clabourne's confession* and with the opinion of his expert. *Clabourne's confession provided evidence of duress* that his experts placed within the context of Clabourne's mental illness. Clabourne's experts explained that, due to Clabourne's mental illness and paranoia, he feared Langston and thus it was more likely he was manipulated by Langston into committing the murder.

...

Counsel's strategy to rely on the confession to support a claim of mental illness and duress was reasonable, comprehensible, and logically consistent with the guilt-phase presentation, and, in the words of his own expert, "a terribly important dynamic to present to the sentencing judge."

(*Id.* at 36–37) (emphasis added).

2. Analysis

Clabourne now contends that the Court "misapprehended the law" by failing to apply the law of limited admissibility set forth in Federal Rules of Evidence 703 and 705 and the Arizona Rules of Evidence 703 and 705. (Doc. 94 at 4.)

The Federal and State Rules of Evidence are identical and provide for the limited admissibility of facts underlying the opinions of defense experts. *See* Fed. R. Evid. 703, 705; Ariz. R. Evid. 703, 705. Under these rules, Clabourne argues, resentencing counsel could have admitted the expert testimony in support of his mitigation theory while not admitting the confession itself. The Court erred, Clabourne asserts, by "suppos[ing] that resentencing counsel strategically needed for Clabourne's *Edwards*-inadmissible confession to be substantively admitted because it underlaid the expert testimony that had been submitted on Clabourne's behalf," a flaw "immediately apparent" to anyone versed in the Rules of Federal Evidence. (Doc. 94 at 3.) "Resentencing counsel did not need for [the prosecutor] to substantively admit Clabourne's *Edwards*-inadmissible confession simply because it underlaid their experts' opinions." (*Id.*)

Clabourne misunderstands the Court's ruling. The Court previously held that, absent the confession, there was "sufficient evidence from which a trier of fact could conclude that the victim feared for her life and suffered greatly before being killed." (Doc. 92 at at

1 31) (citing Doc. 41 at 16–17.) Thus, in denying Clabourne’s *Martinez* claim, the Court
2 found that “at the time counsel returned to state court for the resentencing, it would have
3 been reasonable for counsel to believe that, even if they succeeded in suppressing the
4 confession during resentencing, the (F)(6) aggravating factor based on cruelty would still
5 be found.” (Doc. 92 at 31); *see also Clabourne IV*, 745 F.3d at 381 (“Other facts identified
6 in the Arizona Supreme Court’s discussion of the aggravating circumstances were
7 supported by other evidence in the record. Multiple witnesses testified concerning
8 incriminating statements made by Clabourne, including that the victim had been raped and
9 that she had begged for help. Based on the autopsy she performed on the victim, the medical
10 examiner testified at trial about the beating and sexual activity that the victim suffered
11 before her death, as well as the strangling and stabbing.”)

12 Additionally, the trial court had found there was “sufficient evidence of gratuitous
13 violence to support a finding of depravity and heinousness. The victim was near death after
14 the strangulation and the stabbing was unnecessary to accomplish the murder. Still
15 defendant stabbed her twice, once through the heart.” *Clabourne I*, 142 Ariz. at 348, 690
16 P.2d at 67. Clabourne did not challenge this finding on appeal.

17 Thus, this Court concluded, based on counsel’s perspective at the time of
18 resentencing, it was reasonable for counsel to believe that, even if they had successfully
19 suppressed the confession, the (F)(6) factor would be established regardless. Based on this
20 conclusion, the Court found that, rather than focus their efforts on challenging the
21 admissibility of the confession, it was objectively reasonable for counsel to pursue their
22 strongest case in mitigation. Counsel did so, conceding what was no doubt going to be
23 proven with respect to the question of the (F)(6) aggravator that, “[w]ithout question, . . .
24 this was a truly horrible case.” (RT 8/8/97 at 26). Counsel thus attempted to establish,
25 through the testimony of experts and through Clabourne’s own words, that Clabourne
26 believed he would have been killed if he had refused to kill Webster. (*See id.* at 38.) This
27 mitigation theory had the added benefit of being consistent with the guilt phase testimony,
28 during which the confession had been properly admitted under the controlling law at the

1 time. *See* ABA Guidelines § 10.10.1 (2003) (“Counsel should seek a theory that will be
2 effective in connection with both guilt and penalty, and should seek to minimize any
3 inconsistencies.”)

4 In affirming the death sentence after resentencing, the Arizona Supreme Court
5 found beyond a reasonable doubt that the murder was especially cruel:

6 [Here,] [Webster] suffered both mentally and physically. She was beaten and
7 forced to undress and serve [Clabourne] and his friends drinks. In addition,
8 she was raped over the course of a six hour period. She was obviously in
9 great fear [for] her life as she begged [Clabourne] to protect her. The medical
10 examiner testified that [Webster] had put up a tremendous struggle while
being strangled, indicating a good deal of suffering. This evidence was
sufficient to establish cruelty.

11 *Clabourne III*, 194 Ariz. at 384, 298 P.2d at 753 (citing *State v. Clabourne*, 142 Ariz. 335,
12 347-48, 690 P.2d 54, 66-67 (1984)).

13 Subtract the confession from this calculus, and the factors that remain still support
14 a finding of the (F)(6) aggravator. The victim was beaten, raped, pled for her life, and put
15 up a tremendous struggle. Add to this the trial court’s finding, unchallenged by Clabourne,
16 that the murder was heinous and depraved because there was “sufficient evidence of
17 gratuitous violence to support a finding of depravity and heinousness. The victim was near
18 death after the strangulation and the stabbing was unnecessary to accomplish the murder.
19 Still defendant stabbed her twice, once through the heart.” *Id.* at 348, 690 P.2d at 67. Thus,
20 counsel could reasonably assume that any attempt to prevent the trial court from again
21 finding the (F)(6) aggravating factor would have been futile.

22 Clabourne asserts that counsel could have pursued his case in mitigation by simply
23 presenting the experts’ opinions without admitting the confession. Counsel could, he
24 argues, have presented evidence that Clabourne was not the mastermind, but a follower,
25 based on only his expert’s testimony. But the admission of Clabourne’s own words,
26 contemporaneous with his arrest and not based solely on expert testimony, declarations or
27 allocutions provided 15 years after he was convicted, provided stronger support for
28 counsel’s theory of mitigation. If it was not clear from the order, the Court now clarifies

1 that the Court did not, as Clabourne now contends, suggest counsel's actions in admitting
2 the confession were reasonable and strategic on the grounds that Clabourne's experts relied
3 on the confession and mistakenly believed the confession needed to be admitted, but rather
4 the Court found the confession itself was strong evidence in support of counsel's mitigation
5 theory.

6 Clabourne argues counsel have "more and better ways" of presenting the content of
7 the statement without "relying on the mere accident of the prosecutor attaching an
8 otherwise inadmissible confession to his sentencing memorandum." (Doc. 94 at 5.)
9 Clabourne suggests the statement could have been admitted via "a client's letter to the
10 court, a probation interview, a psychological interview, Clabourne's allocution, his sworn
11 testimony, his sentencing memoranda, sentencing letters from others, and statements by
12 counsel." But these methods would not have overcome the difficulty pointed out by the
13 prosecutor during sentencing, that, despite new evidence establishing Clabourne may have
14 been schizophrenic or psychotic, no expert testified as to Clabourne's state of mind at the
15 time of the offense. (*See* RT 8/8/97 at 54.) At the time of Clabourne's resentencing, it
16 would have been reasonable, even imperative for counsel to attempt to establish a causal
17 connection between the experts' mitigating evidence and the crime. At Clabourne's first
18 sentencing, the sentencing court noted that Clabourne had not shown that his capacity to
19 appreciate the wrongfulness of his conduct or to conform his conduct to the requirements
20 of the law was a factor in the commission of the offense. (Doc. 81-6, Ex. F at 17-18); *see*
21 *also McKinney*, 813 F.3d 798 (noting that, during a time period that encompassed
22 Clabourne's resentencing, evidence of a mental disorder "was relevant for nonstatutory
23 mitigation only if it had a causal effect on the defendant's behavior in the commission of
24 the crime at issue.") In this case, counsel acknowledged the need to establish a causal
25 connection, and established that connection by presenting Clabourne's confession. (*See* RT
26 8/8/97 at 65.) Given the state of the law at the time, this was at least an arguably reasonable
27 thing to do, and thus Clabourne has not established that the Court erred in finding his
28 counsel's performance was not deficient.

1 A. Dr. Rao's testimony

2 Next, Clabourne asserts the Court relied on the trial testimony of Valerie Rao, M.D.,
3 the medical examiner, despite its demonstrable inconsistency with Dr. Rao's autopsy
4 report. (Doc. 94 at 9–10.) Clabourne contends that the “Court erred in relying on the
5 testimony that was admitted at trial and sentencing, and, significantly, at resentencing, all
6 in violation of *Napue* [v. *Illinois*, 360 U.S. 264 (1959)].”⁵ (*Id.* at 13.)

7 **1. Additional background**

8 Dr. Rao testified that the victim had several bruises on her body: “on her hand, on
9 her arms, on her legs, ... surrounding the stab wound[,] and she had them on her neck, too.”
10 (RT 11/17/82 at 256.) Among these bruises, ones on the victim's thumbs indicated to Dr.
11 Rao that “she was struggling, and she sustained [them] probably in the struggle to get away
12 from the inevitable, what happened to her.” (*Id.* at 258.) Dr. Rao characterized these bruises
13 as “defensive-type injuries.” (*Id.*)

14 Clabourne asserted, in his supplemental *Martinez* brief, that Dr. Rao's testimony
15 was incorrect as a matter of medical science and did not support a finding of physical pain
16 or mental anguish. (Doc. 71 at 23–26.) Clabourne relied on that assertion, in part, to bolster
17 his claim that he was prejudiced by the admission of the confession because without it the
18 balance of the prosecutor's evidence failed to prove beyond a reasonable doubt that the
19 murder was cruel. (Doc. 71 at 23, 26.) The Court rejected Clabourne's assertion as
20 irrelevant to the Court's denial of the remanded claim because the Court decided the claim
21 on the performance factor and did not consider the prejudice factor. (Doc. 92 at 29, n.13.)

22
23 ⁵ To the extent Clabourne is attempting to raise a new *Napue* claim (*see* Doc. 94 at
24 13) (asking the court to “order the parties to brief how the evidence admitted in violation
25 of *Napue* should be treated by the Court . . .”), the Court again notes that a motion for
26 reconsideration is not a forum for the moving party to make new arguments not raised in
27 its original briefs. *See Nw. Acceptance Corp.*, 841 F.2d at 925–26. Additionally, this
28 argument—a new claim—falls outside the scope of the Ninth Circuit's remand to this
Court. Moreover, Clabourne has not been permitted by this Court to amend his petition to
include such a claim, nor has he been authorized by the Ninth Circuit to file a second or
successive petition alleging such a claim. *See* 28 U.S.C. § 2244(b)(2).

1 The Court did not erroneously fail to consider this evidence because it was not relevant to
 2 the performance factor on which its ruling rested.

3 **2. Analysis**

4 Clabourne now asks the Court to put “procedural wrangling aside” and address the
 5 inconsistencies in Dr. Rao’s testimony and the Court’s erroneous reliance on that testimony
 6 in violation of *Napue*. (See Doc. 94 at 10, 13.) The Court, however, is not persuaded that
 7 Dr. Rao’s testimony is inconsistent with her autopsy report.

8 In determining that counsel’s performance was not unreasonable, the Court
 9 considered whether the (F)(6) cruelty finding was supported by evidence apart from the
 10 confession. In doing so, the Court implicitly relied on the presumption of correctness to
 11 which a state court’s factual findings are entitled on federal habeas review. Clabourne bears
 12 the “burden of rebutting this presumption by clear and convincing evidence.” 28 U.S.C. §
 13 2254(e) (1); *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007); *Miller-El v. Dretke*, 545
 14 U.S. 231, 240 (2005). Nothing in the state court record, including Dr. Rao’s testimony,
 15 undermines the presumption of correctness that attaches to the state court’s finding that the
 16 victim suffered defensive wounds.

17 Dr. Rao’s statement in her autopsy report, that “[t]here are no defense type wounds
 18 noted,” is under the section reporting Dr. Rao’s observations of the “incised wounds” on
 19 the victim’s “left chest.” (Doc. 74-7, Ex. 1 at Ex. p. 40.)⁶ Thus, the indication of no
 20 defensive-type wounds in this section of the report suggests the victim did not attempt to
 21 fight off the stabbing. Presumably, had she attempted to do so, the autopsy report would
 22 have indicated that there were cuts on the victim’s arms, hands, or elsewhere besides the
 23 two major wounds through her lung and heart.

24 In a separate section of the autopsy report describing the blunt force injuries
 25 observed by Dr. Rao, there was no statement indicating whether the bruises could be

26
 27 ⁶ The Court refers to the evidence appended to his supplemental *Martinez* brief and
 28 designated by both an exhibit number and a sequentially numbered exhibit page number as
 “Ex. [1–15] at Ex. p. [1–172].”

1 interpreted as defensive wounds. (*Id.*, Ex. 1 at Ex. p. 39.) Her testimony, therefore,
2 describing the bruises on the victim's thumbs as defensive-type wounds, was not
3 inconsistent with her autopsy report in this regard.

4 Finally, to the extent the Court relied on the fact that the victim struggled to bolster
5 its finding that counsel did not act unreasonably by predicting that the resentencing court
6 would again find the (F)(6) factor on resentencing, the Court notes that there was other
7 evidence of cruelty, including other evidence of a struggle, apart from Dr. Rao's testimony
8 that the discoloration on the victim's thumbs indicated defensive wounds. Specifically, Dr.
9 Rao testified that the "tremendous hemorrhag[ing]" in the victim's face and eyes indicate
10 she put up a "tremendous struggle" against the strangulation. (RT 11/17/82 at 248, 255.)

11 The Arizona Supreme Court noted this as a factor in determining that the evidence
12 indicated a good deal of suffering and was sufficient to establish cruelty. *Clabourne III*,
13 194 Ariz. at 384, 983 P.2d at 753.

14 Evidence independent of Dr. Rao's testimony about defensive-type wounds
15 established that the victim struggled. Clabourne therefore fails to demonstrate how, even
16 if the Court disregards Dr. Rao's observations concerning defensive wounds, it would have
17 impacted the Court's consideration of Clabourne's *Martinez* claim and its finding that he
18 failed to rebut the presumption that counsel performed deficiently.

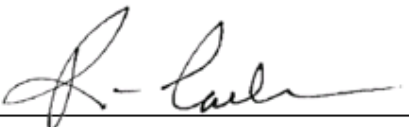
19 **Conclusion**

20 Clabourne has failed to establish the "highly unusual circumstances" that would
21 necessitate granting a motion under Rule 59(e), such as newly discovered evidence, an
22 intervening change in the law, or manifest error by the Court. The motion is therefore
23 denied. *See McDowell*, 197 F.3d at 1255.

24 Accordingly,

25 **IT IS HEREBY ORDERED** Clabourne's motion to alter or amend the judgment
26 pursuant to Rule 59(e) (Doc. 94) is **DENIED**.

27 Dated this 13th day of February, 2023.

28


Honorable Raner C. Collins
Senior United States District Judge

1 **WO**

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Scott Drake Clabourne,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.
14

No. CV-03-00542-TUC-RCC

DEATH PENALTY CASE

ORDER

15 Petitioner Scott Drake Clabourne is an Arizona death row prisoner. The Court
16 denied his Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on
17 September 09, 2009. (Doc. 41.)¹ In denying habeas relief, the Court dismissed Claim 1 of
18 the Amended Petition—alleging counsel was ineffective at Clabourne’s resentencing for
19 not seeking to suppress his confession—as procedurally defaulted. (*Id.* at 17.) Under
20 then-governing law, the Court rejected Clabourne’s argument that the ineffective
21 assistance of post-conviction relief (PCR) counsel established cause and prejudice to
22 excuse the default. (*Id.* at 15–16.)

23 While Clabourne’s appeal from the Court’s decision was pending before the Ninth
24 Circuit, the United States Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012).
25 The Court held in *Martinez* that a state PCR counsel’s ineffectiveness in failing to raise a
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27 ¹ “Doc.” refers to numbered documents in this Court’s electronic case docket.
28

1 claim of ineffective assistance of trial counsel can excuse a procedural default of that
 2 claim. *Id.* at 17. Thus, the Ninth Circuit vacated the denial of Claim 1, and remanded the
 3 claim to this Court for further proceedings in light of *Martinez. Clabourne v. Ryan*
 4 (*Clabourne IV*), 745 F.3d 362, 383 (2014) *overruled on other grounds by McKinney v.*
 5 *Ryan*, 813 F.3d 798 (9th Cir. 2015).

6 This Court ordered Clabourne to file a supplemental brief “addressing whether
 7 cause exists under *Martinez* to excuse the procedural default of Claim 1, and whether
 8 Petitioner is entitled to habeas relief under 28 U.S.C. § 2254 on the Claim[.]” (Doc. 52 at
 9 2.) The Court also directed Clabourne to include any request for evidentiary development
 10 with his supplemental brief. (*Id.*)

11 Briefing is complete on the *Martinez* issue. (Docs. 71, 81, 86, 91.) After fully
 12 considering the briefs and arguments, the Court finds that Clabourne has failed to
 13 demonstrate cause and prejudice to excuse the procedural default of the remanded claim
 14 and is not entitled to relief on Claim 1.

15 I. BACKGROUND²

16 On the evening of September 18, 1980, Laura Webster, a 22-year-old student at
 17 the University of Arizona, entered the Green Dolphin Bar with a friend. The next day,
 18 Webster’s body was found near the Santa Cruz River, naked and wrapped in a bloody
 19 sheet with a blue and white bandana tied tightly around her neck. An autopsy revealed
 20 that she had been strangled and then stabbed in the chest. There was also evidence of
 21 oral, anal, and vaginal intercourse just prior to death.

22
 23 ² The background is based on the Court’s review of the record, the Arizona
 24 Supreme Court’s opinions upholding Clabourne’s conviction, *State v. Clabourne*
 25 (*Clabourne I*), 142 Ariz. 335, 690 P.2d 54 (1984), and death sentence following
 26 resentencing, *State v. Clabourne (Clabourne III)*, 194 Ariz. 379, 983 P.2d 748 (1999),
 27 and the Ninth Circuit’s opinions on appeal from this Court’s decisions in Clabourne’s
 28 habeas petitions, *Clabourne v. Lewis (Clabourne II)*, 64 F.3d 1373 (9th Cir. 1995)
 (appeal of habeas denial after first sentencing in CV 91-465-RMB) and *Clabourne IV*,
 745 F.3d 362 (9th Cir. 2014) (appeal from habeas denial following resentencing in CV
 03-542-RCC)).

1 No arrests were made for over a year. In August 1981, Clabourne's girlfriend,
2 Shirley Martin, contacted Tucson Police Detective Luis Bustamante and informed him
3 that Clabourne had told her that he had killed a woman he had met in a bar. Clabourne
4 told Martin that he had gone to the bar with two friends. The friends allegedly forced
5 Clabourne to ingest some drugs which caused him to lose control so that he was unable to
6 resist their command to kill the victim.

7 **A. Clabourne's Confession**

8 On October 12, 1981, Detective Bustamante interviewed Clabourne at the Pima
9 County Jail, where Clabourne was incarcerated on unrelated burglary charges. He was
10 represented by counsel on the burglary charges and had filed a written invocation of his
11 right to remain silent or have an attorney present for questioning. After receiving his
12 *Miranda*³ warnings, Clabourne agreed to discuss the murder. He told Bustamante that on
13 the evening of September 18, 1980, he was asleep at the Salvation Army halfway house
14 where he had been staying. Larry Langston and a man that Clabourne knew as Bob, later
15 identified as Ed Carrico, woke him up and the three of them drove to the Green Dolphin
16 Bar. There they met Webster and convinced her to go to a party with them. After they all
17 left and began driving around, Langston stopped the car, pulled Webster out and beat her.
18 He threw her back into the car, and they drove to where Langston had been staying.
19 During this time Webster pleaded with Clabourne to protect her.

20 After arriving at the house, Langston beat Webster again and forced her to strip
21 and serve the men drinks. Over a period of six hours, Langston and Carrico repeatedly
22 beat and raped Webster. During this time, Clabourne also had sex with Webster but
23 claimed it was consensual. At several points during the ordeal, Webster again pleaded
24 with Clabourne to protect her from the others, but he told her he couldn't do anything
25 because he was outnumbered.

26 At the end of the evening, Langston told Clabourne to kill Webster. Clabourne
27

28 ³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 maintained that he was in fear of his own life and wanted to let her escape but was scared
2 Langston would kill him. He strangled her with a bandana that he carried with him. He
3 then stated that Langston handed him a knife; Clabourne stabbed Webster twice and the
4 three men wrapped her in a sheet and threw her in the riverbed.

5 Prior to trial, Clabourne filed a motion to suppress his confession. He gave two
6 reasons for the request. First, he alleged that he had made an involuntary waiver of his
7 Fifth and Sixth Amendment Constitutional rights. Second, he argued that because he was
8 represented by counsel on another matter, the detectives should neither have questioned
9 him nor accepted his waiver without his attorney present. The trial court rejected both
10 arguments and allowed the confession to be admitted into evidence in the guilt phase of
11 Clabourne's trial through the testimony of Detective Bustamante.

12 The Arizona Supreme Court affirmed the trial court's decision, rejecting
13 Clabourne's argument that once a defendant has received an attorney on an unrelated
14 charge he cannot be questioned or waive the assistance of counsel without that attorney
15 being present. *Clabourne I*, 142 Ariz. at 341, 690 P.2d at 60. The court further found
16 "sufficient evidence to indicate that defendant's waiver of his rights was intelligently,
17 knowingly, and voluntarily made, and the court did not abuse its discretion in denying
18 defendant's motion to suppress." *Id.* at 61, 690 P.2d at 342.

19 **B. Trial and Sentencing**

20 Clabourne was charged with first degree murder, three counts of sexual assault,
21 and kidnapping. He was tried alone after Langston and Carrico both negotiated plea
22 agreements with the state.⁴ Clabourne was found competent to stand trial by court-
23 appointed psychiatrists, Drs. John LaWall and Edward S. Gelardin.

24 The tape recording of Clabourne's confession was played at trial and the jurors
25 were provided written copies of the transcript when listening to the recording. (*See Appx.*
26
27

28 ⁴ Langston was sentenced to life in prison; Carrico got probation.

1 243–44.)⁵

2 The prosecution relied primarily on Clabourne’s taped confession, but also
 3 introduced evidence of other incriminating statements Clabourne made after the murder.
 4 Martin testified that Clabourne had admitted committing the crime on several occasions
 5 (although his accounts were not consistent). Barbara Bailon, who worked at the Salvation
 6 Army halfway house, testified that Clabourne had confessed to killing a girl. Scott
 7 Simmons, a Pima County Jail Corrections officer, testified that Clabourne told him,
 8 spontaneously, about the crime approximately a month before giving his taped
 9 confession. Clabourne told him he and another man picked a girl up from a bar and, while
 10 driving to a friend’s house, the girl begged Clabourne not to let the other man hurt her,
 11 that she was afraid he might kill her. At the house, they continued to “party, drink and
 12 carry on” and Clabourne indicated he and the other man had sex with the girl. (Appx.
 13 319.) Clabourne confessed to then strangling her. He also stated the other man gave him a
 14 knife and told him to kill her, though he did not say anything about stabbing the victim.
 15 (Appx. 321.) A second corrections officer, Dale Stevenson, testified that he overheard
 16 Clabourne tell another inmate, “Yeah, I raped her. She didn’t want it but I know she liked
 17 it.” (Appx. 347.)

18 The State introduced other testimony to corroborate Clabourne’s confession.
 19 Martin testified that the blue and white bandana found tied around Webster’s neck was

21 ⁵ Clabourne supports his supplemental brief with an appendix consisting of
 22 records from the state and federal proceedings. Each page of the record is assigned an
 23 appendix number, which the Court refers to as “Appx [1–1486].” Clabourne’s new
 24 evidence is appended to his brief and designated by both an exhibit number and a
 25 sequentially numbered exhibit page number, which the Court refers to as “Ex. [1–15] at
 26 Ex. p. [1–172].” The assigned numbers of the sequentially numbered appendix attached
 27 to Clabourne’s reply overlap with the numbers assigned to the appendix attached to his
 28 supplemental brief and are referred to by the Court as “Reply Appx [1380–1474].”
 Respondents support their response with exhibit letters assigned to separate documents
 that the Court refers to as “Resp. Ex. [A–X] at [exhibit page number].” “RT” refers to the
 reporter’s transcripts from Clabourne’s state court proceedings and the evidentiary
 hearing in federal court.

1 similar to one that belonged to Clabourne. The owner of the house where the rape and
 2 murder occurred was an acquaintance of Langston's and had allowed Langston to
 3 housesit while she was away at the time of the murder. She identified the sheet in which
 4 Webster's body had been found and testified that the mattress on one of her beds had
 5 been turned over to conceal large stains, which were later determined to be bloodstains.
 6 (Appx. 147–48, 151.) Webster's friend Rick Diaz identified Clabourne as one of the men
 7 who had left the Green Dolphin with Webster.

8 Conceding that the offense was an “atrocity” (Appx. 33) and that “[Clabourne]
 9 definitely was involved and committed this wrong over Laura Webster” (Appx. 552),
 10 counsel offered only an insanity defense (*see* Appx. 24). Because Clabourne advanced an
 11 insanity defense, Drs. LaWall and Gelardin examined his mental state. Both testified at
 12 trial that he was legally sane at the time of the offense. Dr. LaWall opined that Clabourne
 13 had an antisocial personality disorder, which he explained was a learned pattern of
 14 behavior and not a psychotic illness. Clabourne called Dr. Sanford Berlin, a psychiatrist
 15 who had treated him in 1975 for mental problems. Dr. Berlin said he was unable to
 16 determine what Clabourne's state of mind had been when he committed the crimes.

17 Rejecting Clabourne's insanity defense, the jury convicted Clabourne of all
 18 counts. A sentencing hearing was held before Pima County Superior Court Judge Richard
 19 N. Royston, who had presided at trial.⁶ The trial court found that Clabourne had
 20 committed the offense in an especially heinous, cruel, and depraved manner under A.R.S.
 21 § 13-703(F)(6).⁷ (Resp. Ex. F at 17.) Though counsel “suggested possible grounds for
 22

23 ⁶ At the time of Clabourne's trial and his resentencing, Arizona law required trial
 24 judges to make all factual findings relevant to the death penalty and to determine the
 25 sentence. Following the United States Supreme Court's decision in *Ring v. Arizona*, 536
 26 U.S. 584 (2002), which held that a jury must determine the existence of facts rendering a
 27 defendant eligible for the death penalty, Arizona's sentencing scheme was amended to
 provide for jury determination of eligibility factors, mitigating circumstances, and
 sentence.

28 ⁷ At the time of Clabourne's offense, Arizona's capital sentencing scheme was set
 forth in A.R.S. §§ 13–703 and 13–703.01 to –703.04. It is presently set forth in A.R.S.

1 mitigation” he “gave the court no reasons to find them.” *Clabourne III*, 194 Ariz. at 382,
 2 983 P.2d at 751. Clabourne was sentenced to death, and his capital sentence was affirmed
 3 by the Arizona Supreme Court. He sought but failed to obtain state postconviction relief.

4 Clabourne then sought federal habeas relief.⁸ The Court appointed attorneys
 5 Michael Bloom and Carla Ryan to represent Clabourne. In September 1993, the Court
 6 held an evidentiary hearing to allow Clabourne to present evidence in support of his
 7 claim that he received ineffective assistance of counsel at his initial trial and sentencing.
 8 At the hearing, Drs. LaWall, Gelardin, and Berlin again testified, this time after
 9 reviewing new documents compiled during the habeas investigation that provided a more
 10 complete picture of Clabourne’s medical history. Based on this additional information,
 11 Drs. Gelardin and Berlin opined that Clabourne probably suffered from schizophrenia.
 12 (Appx. 691, 737–38.) They testified that this condition rendered Clabourne susceptible to
 13 impulsive behavior and easy manipulation by Langston, whom they characterized as the
 14 mastermind in Webster’s murder. (Appx. 696–700, 741, 748–49.) Dr. LaWall believed it
 15 was more likely that Langston, whom he had also interviewed, manipulated Clabourne,
 16 than the other way around. (Appx. 628–29.) Dr. LaWall, however, reiterated his belief
 17 that Clabourne was sane at the time of the offense. (*Id.* at 645.)

18 Detective Bustamante also testified at the federal habeas evidentiary hearing. He
 19 described Langston as a manipulative individual whom Bustamante believed had “killed
 20 before or would have killed again” because it was his fantasy to do so. Bustamante
 21 opined that Langston manipulated others to do what he wanted them to do, and in
 22 Bustamante’s opinion was probably a “psychopath.” (Appx. 772–73.) Bustamante
 23 described Clabourne as a “follower” who was used by Langston to advance Langston’s
 24 fantasies. (Appx. 773, 776.) According to Bustamante, Langston was the “major” in
 25 planning the murder and Clabourne was the “minor.” (Appx. 777.) However, Bustamante

26
 27 §§ 13–751 to –759. The Court refers throughout this order to the statutes in effect at the
 28 time Clabourne committed the murder.

⁸ *Clabourne v. Lewis*, CV 91-465-RMB.

1 agreed that Clabourne “went along” with the murder of his own volition. (*Id.*)

2 A statement by George Breshears, a Pima County Jail inmate, was admitted at
3 resentencing. The admissibility of the statement had been limited in federal court to the
4 effect it had on Dr. LaWall’s testimony. (Appx. 627.) Breshears related to law
5 enforcement purported details of a statement Langston made to him in the jail concerning
6 the murder. Breshears stated that Langston called both Clabourne and Carrico “morons”
7 who could be manipulated by Langston. (Appx. 973.)

8 The Court granted Clabourne habeas relief on the grounds that Clabourne received
9 ineffective assistance of counsel at sentencing. The Court found that trial counsel was
10 ineffective because he failed to obtain medical records that supported Clabourne’s claims
11 that he suffered from mental illness and because he failed to properly prepare the expert
12 witnesses in support of mitigation. The Ninth Circuit affirmed that such “total absence of
13 advocacy” “amount[ed] in every respect to no representation at all.” *Clabourne II*, 64
14 F.3d at 1387 (quotations omitted).

15 Clabourne was resentenced in 1997. In lieu of live testimony, counsel submitted
16 the records and the transcript from the evidentiary hearing before the district court. (*See*
17 Appx. 601–02, 981–82, 1324.) At oral argument before Judge Roberto Montiel,⁹
18 Clabourne’s counsel urged several points in mitigation. Counsel prefaced his argument
19 by summarizing the “reality” of the case, that Clabourne, with a “hulking body and the
20 mind of a seven or eight year old child,” was “not the most responsible person” for the
21 “horrible, horrible crime.” (Appx. 1387–88).

22 Counsel focused chiefly on the experts’ diagnosis of Clabourne’s mental
23 deficiencies and schizophrenia. (Appx. 1387–98, 1401–06.) Counsel also cited duress and
24 Clabourne’s age as additional statutory mitigators and urged Clabourne’s mental
25 problems—their impact on his tendency toward passiveness, impulsiveness, and easy
26 manipulation by others—as nonstatutory mitigation. (Appx. 1397–98, 1401–02.) Counsel

27
28 ⁹ After several Pima County Superior Court judges recused, Clabourne’s
resentencing was assigned to Santa Cruz County Superior Court Judge Roberto Montiel.

1 further asserted as mitigating information Clabourne's dysfunctional family life,
2 including his treatment for mental health problems from an early age and the fact that he
3 was raised in a military family that had to move frequently, inhibiting his ability to form
4 lasting relationships. (*Id.*) Counsel also argued that the sentencing disparity between co-
5 defendants was a mitigating circumstance. (Appx. 1402–03.)

6 The State presented no new evidence in support of the (F)(6) aggravating factor or
7 any other aggravating circumstance. *See Clabourne III*, 194 Ariz. at 384, 983 P.2d at 753.

8 The trial court resentenced Clabourne on August 14, 1997. Judge Montiel stated
9 that he had considered the record “in its totality,” including the record of the habeas
10 corpus evidentiary hearing, the trial record, the presentence reports, and the other
11 documents proffered by Clabourne. (Appx. 1433.) The trial court found that the State had
12 shown beyond a reasonable doubt that the murder of Webster was especially cruel and
13 demonstrated a heinous and depraved state of mind in satisfaction of A.R.S. § 13-
14 703(F)(6). (Appx. 1434.)

15 With respect to cruelty, the court stated:

16 The offense was committed in a cruel manner, because the victim
17 consciously suffered physical and mental pain, the suffering of the victim
18 was beyond the norm experienced by other victims of first-degree murder,
19 and the defendant knew or should have known the effect his actions would
20 have on that victim.

21 The victim suffered physical and mental pain because she was
22 beaten, raped, and humiliated by being forced to run naked among three
23 men during a period of approximately six hours.

24 The autopsy report indicated many bruises and contusions on the
25 body, indicating a great deal of self-defense struggle on the part of the
26 victim and extensive beatings during the course of six hours.

27 There was further evidence of conscious suffering because a forensic
28 expert testified that Laura Webster was still alive when stabbed by the
29 defendant.

The foregoing evidence of conscious suffering of mental and
physical pain also supports a finding that such suffering was beyond the
suffering experienced by other victims of first-degree murder.

The evidence also establishes that the [defendant] was aware of the

1 effect of his actions upon the victim because the victim asked for help and
 2 protection from the defendant, which pleas were not heeded by the
 3 defendant.

4 The evidence is clear that the victim was conscious for most, if not
 5 all, of the six-hour period.

6 (Appx. 1435–36.) Although the court found cruelty alone sufficient to establish the (F)(6)
 7 aggravator, it also found that the murder had been committed in an especially heinous
 8 and depraved manner. (Appx. 1436.) Though this finding was based in part on
 9 Clabourne’s statements to Detective Bustamante, the Court also found that Clabourne
 10 “was also a witness to the repeated beatings and sexual assaults by other co-defendants”
 11 and “[a]t the very least, this defendant displayed a callous indifference to Laura Wedster’s
 12 [sic] life, demonstrating a heinous and depraved state of mind.” (Appx. 1437.)

13 With regard to mitigation, the court found that Clabourne’s age at the time of the
 14 offense (20) was a statutory mitigating factor under A.R.S. § 13-703(G)(5). (Appx.
 15 1438.) However, it rejected Clabourne’s other alleged statutory factors:

16 [T]he Court finds that, despite the evidence of the defendant’s mental
 17 illness and use of [T]horazine for periods prior to and after the murder, the
 18 defendant has not met the burden of proving by a preponderance of the
 19 evidence that at the time of the murder the defendant’s capacity to
 20 appreciate the wrongfulness of his conduct or to conform his conduct to the
 21 requirements of the law were significantly impaired, as expressed in A.R.S.
 22 13-703(G)(1). Dr. Gelardin testified that the defendant was not suffering
 23 from a psychotic condition or episode at the time of the criminal offense.

24 That, despite the evidence that Mr. Clabourne killed the victim at the urging
 25 of the co-defendant Larry Lynn Langston, the defendant has failed to prove
 26 by a preponderance of the evidence that he was under unusual or substantial
 27 duress, as expressed in 13-703(G)(2). His sheer size and previous behavior
 28 indicates that he could be manipulated but only when he wanted to be
 29 manipulated.

30 (Appx. 1437–38.)

31 The court also considered the nonstatutory mitigation urged by Clabourne and
 32 found the following proven by a preponderance of the evidence: that Clabourne has a
 33 passive personality, is impulsive, and is easily manipulated by others, and that life

1 imprisonment would be less costly than capital punishment. (Appx. 1438–1440.) It held,
 2 however, that the mitigating evidence did not outweigh the aggravating circumstances
 3 and again sentenced Clabourne to death. (Appx. 1440.)

4 On appeal, the Arizona Supreme Court independently reviewed the trial court’s
 5 findings of aggravation and mitigation and the propriety of the death sentence, and
 6 affirmed Clabourne’s death sentence. *Clabourne III*, 194 Ariz. at 390, 983 P.2d at 759.
 7 The court upheld the cruelty finding, describing the circumstances of the murder as
 8 follows:

9 [C]ruelty involves pain and distress visited upon the victim. This distress
 10 includes mental anguish.... [Here,] [Webster] suffered both mentally and
 11 physically. She was beaten and forced to undress and serve [Clabourne] and
 12 his friends drinks. In addition, she was raped over the course of a six hour
 13 period. She was obviously in great fear [for] her life as she begged
 14 [Clabourne] to protect her. The medical examiner testified that [Webster]
 15 had put up a tremendous struggle while being strangled, indicating a good
 16 deal of suffering. This evidence was sufficient to establish cruelty.

17 *Clabourne III*, 194 Ariz. 384, 983 P.2d at 753 (citing *Clabourne I*, 142 Ariz. at 347–48,
 18 690 P.2d at 66–67). Affirming the death sentence on the cruelty prong alone, the court
 19 did not address new arguments as to the heinousness and depravity of the murders raised
 20 by the State for the first time on appeal. *Id.*

21 The court next addressed the statutory mitigation urged by Clabourne, including:
 22 (1) whether Clabourne’s mental problems significantly impaired his capacity to
 23 appreciate the wrongfulness of his conduct or to conform his conduct to the requirements
 24 of the law under A.R.S. § 13-703(G)(1); (2) whether he was under “unusual or substantial
 25 duress” at the time of the murder under § 13-703(G)(2); and (3) his age under § 13-
 26 703(G)(5). *Id.* at 384–87, 983 P.2d at 753–56.

27 With respect to the diminished capacity mitigator, the court determined that
 28 Clabourne had not established that his mental deficiencies rendered him unable to
 appreciate the wrongfulness of his conduct or to conform his conduct to the requirements
 of the law. The court noted that, although Drs. Gelardin and Berlin believed Clabourne

1 was schizophrenic, none of the experts could say he was “psychotic” at the time of the
 2 killing. *Id.* at 385, 983 P.2d at 754. The court found indicative of his ability to appreciate
 3 the wrongfulness of his conduct the fact that he tried to conceal the crime by hiding the
 4 victim’s body and his statement to police that he had wanted to help Webster escape. *Id.*
 5 The court further found that Clabourne had failed to demonstrate any impairment to his
 6 ability to control his conduct. *Id.*

7 Regarding duress, the court determined that Clabourne had not established he was
 8 under unusual or substantial duress when he killed Webster. Although conceding that
 9 Langston may have been the mastermind in the murder, the court noted that Clabourne’s
 10 own confession “shows he was a willing and active participant and was neither induced
 11 nor coerced to act contrary to his free will.” *Id.* at 386, 983 P.2d at 755. The court also
 12 noted that Clabourne’s age was mitigating but accorded it little weight considering his
 13 “average level of intelligence, [] criminal history and [the fact] he was a major participant
 14 in the crime.” *Id.*

15 Regarding nonstatutory mitigating factors, the Arizona Supreme Court first
 16 addressed Clabourne’s mental problems, according “some” weight to his schizophrenia
 17 and personality traits of being passive, impulsive, and easily manipulated. *Id.* at 387, 983
 18 P.2d at 756. However, the court found such mitigation “negligible” when weighed
 19 against evidence of Clabourne’s “active participation throughout the six-hour ordeal and
 20 the fact that he personally strangled and stabbed Webster.” *Id.* The court also accorded
 21 Clabourne’s intoxication claim little weight, noting that his “detailed recollection of the
 22 events of the evening of Webster’s murder, as told to Detective Bustamante more than a
 23 year after the murder occurred, belies his claim that he was impaired.” *Id.* The court
 24 declined to find Clabourne’s dysfunctional family history as a mitigating factor, noting
 25 that he had failed to establish how this background affected his behavior. *Id.* Likewise,
 26 the court found no mitigating value relevant to his co-defendants’ sentences, noting that
 27 “only an unexplained disparity . . . may be a mitigating circumstance. . . . Here the
 28 disparity is explained: Carrico was not charged with murder and Langston pled guilty.”

1 *Id.* at 388, 983 P.2d at 757 (internal citation omitted). Finally, the court declined to find
 2 as mitigation the economic cost of the death penalty because it “is unrelated to
 3 Clabourne, his character or record, or the circumstances of his offense.” *Id.*

4 Weighing all the evidence in mitigation against the (F)(6) aggravating factor, the
 5 Arizona Supreme Court concluded that the mitigation was “insufficiently substantial to
 6 warrant leniency.” *Id.*

7 Clabourne was appointed new counsel for state post-conviction proceedings. Post-
 8 conviction counsel filed several petitions that did not comply with Arizona’s procedural
 9 requirements. The Arizona trial court dismissed all claims with prejudice after giving
 10 Clabourne’s newly appointed counsel several opportunities to cure the deficiencies.
 11 Counsel had asserted many claims in the deficient petitions, but he raised only one issue
 12 on appeal from the final dismissal of the petition: the constitutionality of Clabourne’s
 13 judge-imposed capital sentence in light of *Ring v. Arizona*, 536 U.S. 584 (2002). The
 14 Arizona Supreme Court denied discretionary review.

15 Clabourne initiated the current federal habeas proceeding in this Court on October
 16 29, 2003. (Doc. 1.) Among other claims, Clabourne asserted his resentencing counsel was
 17 ineffective for failing to seek suppression of his confession. This Court dismissed the
 18 claim, noting that it was procedurally defaulted because it had not been presented to the
 19 state courts on appeal or during PCR proceedings following the resentencing and, under
 20 then-governing law, rejected Clabourne’s argument that the ineffectiveness of his state
 21 PCR counsel excused the procedural default of the claims. (*See* Doc. 41 at 16.)

22 The Ninth Circuit remanded the claim, ruling that the Supreme Court’s intervening
 23 decision in *Martinez* permits Clabourne to establish cause and prejudice to excuse the
 24 procedural default if he can establish that PCR counsel, in failing to raise the confession-
 25 related ineffective assistance claim (“IAC”), was ineffective under *Strickland*, 466 U.S.
 26 668 (1984). *Clabourne IV*, 745 F.3d at 382–83.

27 In remanding the case, the Ninth Circuit explained there was “no dispute . . . about
 28 the deficient performance of Clabourne’s post-conviction counsel, as the State concedes

1 that his representation was deficient.” *Id.* at 378. This Court, therefore, is tasked on
 2 remand with considering “whether Clabourne can establish that he was prejudiced by
 3 post-conviction counsel’s failure to exhaust” his confession-based claim of “ineffective
 4 assistance of counsel at resentencing.” *Id.*

5 II. DISCUSSION

6 Clabourne contends that counsel was ineffective at his 1997 resentencing for not
 7 seeking to suppress his confession, which he alleges was obtained in violation of his Fifth
 8 Amendment right to counsel. (Doc. 27 at 11–15.) He argues that without the confession
 9 there was insufficient evidence to establish cruelty under A.R.S. § 13-703(F)(6), the sole
 10 aggravating factor relied upon by the Arizona Supreme Court in affirming his death
 11 sentence. (*Id.*) On remand, Clabourne submits he has presented cause to excuse the
 12 procedural default of Claim 1 and is further entitled to relief on this claim. (Doc. 71
 13 (Supplemental Brief).)

14 Respondents argue that the default of Claim 1 cannot be excused under *Martinez*
 15 because Clabourne has not established that post-conviction counsel was ineffective or
 16 that the underlying IAC claim is substantial.

17 A. **Applicable law**

18 I. *Martinez v. Ryan*

19 Federal review is generally unavailable for a claim that has been procedurally
 20 defaulted. In such situations, review is barred unless the petitioner can demonstrate cause
 21 and prejudice or a fundamental miscarriage of justice that excuses the default. *Coleman v.*
 22 *Thompson*, 501 U.S. 722, 750 (1991). *Coleman* held that ineffective assistance of counsel
 23 in post-conviction proceedings cannot establish cause for a claim’s procedural default. *Id.*

24 In *Martinez*, the Supreme Court announced a new, “narrow exception” to that rule.
 25 The Court explained that:

26 Where, under state law, claims of ineffective assistance of trial counsel
 27 must be raised in an initial-review collateral proceeding, a procedural
 28 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.

566 U.S. at 17; *see also Shinn v. Ramirez*, 142 S. Ct. 1718, 1733 (2022).

Accordingly, under *Martinez*, an Arizona habeas petitioner may establish cause and prejudice for the procedural default of a claim of ineffective assistance of trial counsel by demonstrating that (1) PCR counsel was ineffective and (2) the underlying ineffective assistance claim has some merit. *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (citing *Martinez*, 566 U.S. at 14); *Atwood v. Ryan*, 870 F.3d, 1033, 1059–60 (9th Cir. 2017).¹⁰

¹⁰ As Respondents acknowledge, the Court is bound by *Martinez*. (See Doc. 81 at 22 n.9.) The Court, however, is compelled to address Respondents’ unsupported but oft-repeated suggestion that *Martinez* was wrongly decided because PCR counsel strategically ignore meritorious IAC claims, in this case for instance by filing four procedurally deficient PCR petitions resulting in dismissal of *all* of Clabourne’s PCR claims, for a chance at federal review in order to place their clients “in better positions than inmates who follow appropriate procedures,” thereby “frustrat[ing] AEDPA’s goals of funneling claims to state court and thereby promoting comity, finality, and federalism. (Doc. 81 at 22 n.9) (citations omitted). Though Justice Thomas writes in *Ramirez* that “broadly available habeas relief encourages prisoners to sandbag state courts in this manner,” *see Ramirez*, 142 S. Ct. at 1739, habeas relief as a constitutional corrective process is far from “broadly available.” *See Overstreet v. Wilson*, 686 F.3d 404, 410 (7th Cir. 2012) (Wood, J., dissenting) (“No one who has followed the law of federal post-conviction relief for state prisoners since 1996, when the Anti-Terrorism and Effective Death Penalty Act (AEDPA) went into effect, is under the impression that this is a readily available remedy.”)

As Justice Sotomayor noted in her dissent in *Ramirez* such a claim is particularly “odd” in Arizona, because:

It is [the] State’s decision to divert trial-ineffectiveness claims from direct appeal to postconviction review, and then to provide ineffective postconviction counsel, that results in the failure to raise or develop such claims before state courts. No habeas petitioner or postconviction counsel could possibly perceive a strategic benefit from failing to raise a meritorious trial-ineffectiveness claim in an available forum.

Ramirez, 142 S. Ct. at 1749 (Sotomayor, J., dissenting). *See also Morrison*, 477 U.S. at 382 (“[I]t is virtually inconceivable that an attorney would deliberately invite the

1 To establish “cause” under *Martinez*, a petitioner must demonstrate that PCR
 2 counsel was ineffective under *Strickland*. *Clabourne IV*, 745 F.3d at 377. *Strickland*
 3 requires a demonstration “that both (a) post-conviction counsel’s performance was
 4 deficient, and (b) there was a reasonable probability that, absent the deficient
 5 performance, the result of the post-conviction proceedings would have been different.”
 6 *Id.* at 377 (citation omitted).

7 To establish “prejudice” under the second prong of *Martinez*’s “cause and
 8 prejudice” analysis, a petitioner must demonstrate that his underlying ineffective
 9 assistance of trial counsel claim is “substantial.” *Id.* In *Martinez*, the Supreme Court
 10 defined a “substantial” claim as a claim that “has some merit,” noting that the procedural
 11 default of a claim will not be excused if the IAC claim “is insubstantial, i.e., it does not
 12 have any merit or . . . it is wholly without factual support.” *Martinez*, 566 U.S. at 14–16.

13 The standard for finding a claim “substantial” is analogous to the standard for
 14 issuing a certificate of appealability. *Id.* at 14; *see Detrich v. Ryan*, 740 F.3d 1237, 1245
 15 (9th Cir. 2013). Under that standard, a claim is “substantial” if “reasonable jurists could
 16 debate whether . . . the petition should have been resolved in a different manner or that
 17 the issues presented were adequate to deserve encouragement to proceed further.” *Id.*
 18 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

19 A finding of “prejudice” for purposes of the “cause and prejudice” analysis, which
 20

 21 judgment that his performance was constitutionally deficient in order to win federal
 22 collateral review for his client. . . . No reasonable lawyer would forgo competent
 23 litigation of meritorious, possibly decisive claims on the remote chance that his deliberate
 24 dereliction might ultimately result in federal habeas review.”) Rather, as Clabourne noted
 25 in his Amended Habeas Petition, “Arizona has rid itself of IAC claims by putting them
 26 into a special category of claims not entitled to assistance of counsel. It made matters
 27 worse by appointing inexperienced counsel. It further made matters worse by clarifying
 28 that it would not consider the merits of even substantial constitutional claims waived by
 the not necessarily competent counsel it appointed to handle those claims. Arizona cannot
 be heard now to complain that it never got a chance to address the IAC claims before
 they were raised in district court.” (Doc. 25 at 15.)

1 requires only a showing that the underlying claim of ineffective assistance of trial counsel
 2 is substantial, “does not diminish the requirement . . . that petitioner satisfy the
 3 ‘prejudice’ prong under *Strickland* in establishing ineffective assistance by post-
 4 conviction counsel.” *Clabourne*, 745 F.3d at 377.

5 The Ninth Circuit has offered guidance in assessing whether “cause” exists under
 6 *Martinez*. In *Atwood*, for example, the court explained:

7 In evaluating whether the failure to raise a substantial claim of ineffective
 8 assistance of trial counsel in state court resulted from ineffective assistance
 9 of *state habeas* counsel under *Strickland*, we must evaluate the strength of
 10 the prisoner’s underlying ineffective assistance of *trial* counsel claim. If the
 11 ineffective assistance of trial counsel claim lacks merit, then the state
 12 habeas counsel would not have been deficient for failing to raise it. Further,
 13 any deficient performance by state habeas counsel would not have been
 prejudicial, because there would not be a reasonable probability that the
 result of the post-conviction proceedings would have been different if the
 meritless claim had been raised.

14 870 F.3d at 1059–60; *Hooper v. Shinn*, 985 F.3d 594, 627 (9th Cir. 2021); *see Sexton v.*
 15 *Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012) (“PCR counsel would not be ineffective for
 16 failure to raise an ineffective assistance of counsel claim with respect to trial counsel who
 17 was not constitutionally ineffective.”).

18 In *Runnigeagle v. Ryan*, 825 F.3d 970 (9th Cir. 2016), the court addressed the
 19 standard necessary to find PCR counsel’s performance prejudicial. The court explained
 20 that although the prejudice at issue under *Martinez* is that in PCR proceedings, this is a
 21 “recursive standard”:

22 It requires the reviewing court to assess trial counsel’s as well as PCR
 23 counsel’s performance. This is because, for us to find a reasonable
 24 probability that PCR counsel prejudiced a petitioner by failing to raise a
 25 trial-level IAC claim, we must also find a reasonable probability that the
 trial-level IAC claim would have succeeded had it been raised.

26 *Id.* at 982; *see Murray v. Schriro*, 882 F.3d 778, 816 (9th Cir. 2018).

27 Finally, with respect to claims that were not adjudicated on the merits, “a federal
 28 court may not hold an evidentiary hearing—or otherwise consider new evidence,” unless

1 the “stringent requirements” of 28 USC § 2254(e)(2) are met. *Ramirez*, 142 S. Ct. at
2 1739.

3 2. *Ineffective of assistance of counsel*

4 Claims of ineffective assistance of counsel are governed by the principles set out
5 in *Strickland*, 466 U.S. 668. To prevail under *Strickland*, a petitioner must show that
6 counsel’s representation fell below an objective standard of reasonableness and that the
7 deficiency prejudiced the defense. *Id.* at 687–88. The inquiry under *Strickland* is highly
8 deferential. “A fair assessment of attorney performance requires that every effort be made
9 to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
10 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at
11 the time.” *Id.* at 689; see *Wong v. Belmontes*, 558 U.S. 15, 16–17 (2009) (per curiam).
12 The “standard is necessarily a general one,” *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009),
13 because “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take
14 account of the variety of circumstances faced by defense counsel or the range of
15 legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*,
16 466 U.S. at 688–89.

17 Deficient performance “requires showing that counsel made errors so serious that
18 counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth
19 Amendment.” *Strickland*, 466 U.S. at 687. “The question is whether an attorney’s
20 representation amounted to incompetence under ‘prevailing professional norms,’ not
21 whether it deviated from best practices or most common custom.” *Harrington v. Richter*,
22 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). Even under *de novo*
23 review, the standard for judging counsel’s representation is a most deferential one.
24 *Richter*, 562 U.S. at 105.

25 With respect to *Strickland*’s second prong, a petitioner must affirmatively prove
26 prejudice by “show[ing] that there is a reasonable probability that, but for counsel’s
27 unprofessional errors, the result of the proceeding would have been different. A
28 reasonable probability is a probability sufficient to undermine confidence in the

outcome.” 466 U.S. at 694. The petitioner “bears the highly demanding and heavy burden [of] establishing actual prejudice.” *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005) (quoting *Williams (Terry) v. Taylor*, 529 U.S. 362, 394 (2000)). “The likelihood of a different result must be substantial, not just conceivable.” *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693); see *Hooper*, 985 F.3d at 628.

B. Additional background

In Clabourne’s first round of habeas proceedings, he challenged the introduction of his confession, arguing it should have been suppressed because it was obtained in violation of the prophylactic rule in *Edwards v. Arizona*, 451 U.S. 477 (1981). See *Clabourne II*, 64 F.3d at 1378. In *Edwards*, the Supreme Court held that a suspect who has “expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him.” *Id.* at 484–485. However, “*Edwards* left unanswered the question whether a suspect who invoked his right to counsel after being taken into custody for one crime could be questioned about other crimes for which he had not invoked that right. That was the state of the law at the time of Clabourne’s original trial.” *Clabourne IV*, 745 F.3d at 379.

In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Supreme Court addressed that question and held that such a subject could not be questioned about other crimes. See *Clabourne IV*, 745 F.3d at 379 (citing *Roberson*, 486 U.S. at 684–85). Noting that the Supreme Court had held that *Roberson* does not apply on collateral review, *id.* at 379 (citing *Butler v. McKellar*, 494 U.S. 407, 415–16 (1990)), the Ninth Circuit upheld the admission of Clabourne’s confession during the guilt phase because “[u]nder the law as it stood prior to *Roberson*, Clabourne’s confession was not obtained in violation of *Edwards*.” *Clabourne II*, 64 F.3d at 1379.

“That the statement might have been admissible at the time of the original trial in 1982,” however, “did not make it properly admissible at the resentencing trial in 1997.” *Clabourne IV*, 745 F.3d at 379. “By 1997 it was established that the admission of Clabourne’s statement violated his rights under the Fifth Amendment.” *Id.* at 380.

1 Despite an Arizona statute that required the court at the penalty phase to consider all
 2 evidence admitted at the guilt phase of his trial, “[u]nder *Roberson*, Clabourne’s
 3 confession could not properly be used against him at his resentencing in 1997.” *Id.*

4 As the Ninth Circuit noted, it is evident that the state courts relied on Clabourne’s
 5 confession:

6 We note that Clabourne’s statement to the police included a detailed
 7 description about beating the victim, raping, strangling, and then stabbing
 8 her. The Arizona Supreme Court relied, at least in part, on that statement in
 9 its aggravation discussion. The court’s decision specifically noted, for
 10 example, that the victim was forced to undress and serve the men drinks.
 11 [*Clabourne [III]*], 983 P.2d at 753. This fact was found nowhere else in the
 12 record.

13 *Id.* Both the trial court and the Arizona Supreme Court referred to facts that could only be
 14 adduced from the confession and relied on those facts in finding the State had established
 15 the only aggravating factor in the case.

16 The Ninth Circuit, however, stopped short of finding that counsel’s failure to
 17 object to use of the confession constituted ineffective assistance. *See Clabourne IV*, 745
 18 F.3d at 380. (“That there was a basis to object to the use of Clabourne’s statement at
 19 resentencing (or to move to suppress it) does not by itself establish that Clabourne
 20 suffered from ineffective assistance through resentencing counsel’s failure to make that
 21 objection.”) In remanding Claim 1, the Ninth Circuit concluded:

22 There is no dispute in this case about the deficient performance of
 23 Clabourne’s post-conviction counsel, as the State concedes that his
 24 representation was deficient. Clabourne’s post-conviction counsel, who had
 25 no experience with Arizona post-conviction proceedings, filed several
 26 postconviction petitions in state court that failed to comply with Arizona’s
 27 procedural rules. After admonishing the lawyer to comply with the rules
 28 and assert valid claims, the Arizona post-conviction court denied all claims
 with prejudice for his failure to comply. On appeal from that denial by the
 trial level court, post-conviction counsel abandoned almost all claims,
 including the two *Strickland* claims arising from Clabourne’s resentencing.
Strickland’s first prong, as applied to Clabourne’s post-conviction counsel,
 is satisfied.

Clabourne IV, 745 F.3d at 378. Respondents concede that, in light of this finding,

1 “[d]etermining cause and prejudice to excuse the procedural default of Clabourne’s
 2 ineffective assistance of resentencing counsel claim necessarily hinges on ‘the underlying
 3 claim of ineffective assistance by resentencing counsel.’” (Doc. 81 at 25) (quoting
 4 *Clabourne IV*, 745 F.3d at 382). This Court is therefore required to assess “resentencing
 5 counsel’s performance under both prongs of *Strickland*: (a) whether the failure to object
 6 to admission of that confession amounted to deficient performance, and (b) whether there
 7 was a reasonable probability that Clabourne would have received a lesser sentence but for
 8 resentencing counsel’s failure to object to admission of the confession.” *Clabourne IV*,
 9 745 F.3d at 380. The Court will begin its analysis by addressing resentencing counsel’s
 10 failure to object to the use of Clabourne’s confession at the 1997 resentencing.

11 **C. Performance**

12 Clabourne contends that Bloom and Ryan failed in their duty to provide
 13 reasonably competent representation by failing to invoke *Roberson* to protect
 14 Clabourne’s right to counsel under the Fifth and Fourteenth Amendments. (Doc. 71 at
 15 20.) For the reasons discussed below, the Court finds that Clabourne has failed to
 16 overcome the presumption that defense counsel’s actions were reasonable and strategic.

17 Clabourne alleges resentencing counsel’s performance fell below the prevailing
 18 professional norms as stated in the 1989 *ABA Guidelines for the Appointment and*
 19 *Performance of Counsel in Death Penalty Cases* (1989 ABA Guidelines). (Doc 71 at 21.)
 20 Guideline 11.5.1(B)(7)(b) of the 1989 ABA Guidelines directs counsel to consider
 21 available pretrial motions, “including the potential impact of any pretrial motion or ruling
 22 on the strategy for the sentencing phase,” such as the suppression of evidence gathered as
 23 a result of violations of the Fourth, Fifth or Sixth Constitutional Amendments, including
 24 the fruits of illegal searches or seizures. The Guidelines further require counsel “to seek
 25 to ensure that the client is not harmed by improper, inaccurate or misleading information
 26 being considered by the sentencing entity or entities in determining the sentence to be
 27 imposed.” See 1989 ABA Guideline 11.8.2(C).

28 The ABA Guidelines, however, do not constitute “per se” or bright line standards

1 for reasonable performance. “No particular set of detailed rules for counsel’s conduct can
 2 satisfactorily take account of the variety of circumstances faced by defense counsel or the
 3 range of legitimate decisions regarding how best to represent a criminal defendant.”
 4 *Strickland*, 466 U.S. at 688–89; *see also Van Hook*, 558 U.S. at 8 (“*Strickland* stressed . .
 5 . that ‘[ABA] standards and the like’ are ‘only guides’ to what reasonableness means, not
 6 its definition.”); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (noting that the Court has
 7 declined to articulate specific guidelines for appropriate attorney conduct). “Prevailing
 8 norms of practice as reflected in American Bar Association standards and the like . . . are
 9 guides to determining what is reasonable, but they are only guides.” *Id.* at 688.

10 Additionally, the Court agrees with Respondents that Clabourne fails to
 11 demonstrate whether the 1989 ABA Guidelines were generally accepted and followed by
 12 the Pima County criminal defense bar during Clabourne’s resentencing and PCR
 13 proceedings.¹¹

14 The Court, however, does not rely on the ABA Guidelines to reach the conclusion
 15 that, absent a reasonable strategic reason for doing so, counsel’s failure to object to the
 16 resentencing court’s use of Clabourne’s confession fell below an objective standard of
 17 reasonableness. No fairminded jurist could determine that standard practice at the time of
 18 Clabourne’s resentencing was to allow the State to establish the sole aggravating factor in
 19 a death-penalty case through the admission of inadmissible evidence. *See, e.g., Tomlin v.*
 20 *Myers*, 30 F.3d 1235, 1239 (9th Cir. 1994) (“[A]bsent some indication the motion would
 21 have been lacking in merit . . . the failure to bring to the court’s attention a major
 22 constitutional error in the prosecution’s case is not the product of reasonable professional
 23 judgment.”); *Smith v. Dugger*, 911 F.2d 494, 497 (11th Cir. 1990) (“The district court
 24 properly found that counsel’s failure to move to suppress Smith’s confessions—
 25 confessions critical to the state’s case—was unreasonable and outside the wide range of
 26 professionally competent assistance.”); *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d

27
 28 ¹¹ As explained below, the Court may not consider the new evidence presented by
 Clabourne on this issue, specifically Ryan’s declaration (Ex. 2).

1 1086, 1091 (1994) (concluding that counsel’s performance was constitutionally deficient
2 where counsel, during retrial, withdrew a motion to suppress defendant’s statements that
3 the appellate court had previously determined were inadmissible).

4 Clabourne asserts two Supreme Court cases, *Rompilla v. Beard*, 545 U.S. 374,
5 383–84 (2005), and *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986), establish “a duty
6 to investigate the aggravating factors sought to be admitted by the prosecution at
7 resentencing, and, if possible, challenge their admission or lessen their impact at capital
8 sentencing.” (Doc 71 at 21.)

9 In *Rompilla*, defense counsel was on notice that the state would attempt to
10 establish a significant aggravating factor of a history of a prior felony conviction
11 indicating the use or threat of violence. Counsel also knew that the state would attempt to
12 establish this history by providing Rompilla’s prior conviction for rape and assault and by
13 introducing a transcript of the rape victim’s testimony from the prior conviction. 545 U.S.
14 at 383. Counsel failed to review the transcript before the hearing or obtain Rompilla’s file
15 from his prior conviction. *Id.* at 384–85. The Supreme Court found counsel’s failure to
16 look at the file fell below the line of reasonable practice because counsel knew the
17 prosecutor intended to introduce the prior conviction and quote the damaging testimony
18 of the rape victim in that case. *Id.* at 389–90.

19 In *Morrison*, 477 U.S. at 379, 384, the Court affirmed the principle that criminal
20 defendants should be allowed to vindicate through habeas review “their right to effective
21 assistance of counsel where counsel’s primary error is failure to make a timely request for
22 the exclusion of illegally-seized evidence,” which, when not a matter of sound strategy,
23 falls below prevailing professional norms.

24 As Respondents suggest, however, *Rompilla* and *Morrison* are factually
25 distinguishable from this case. In *Rompilla*, for instance, the Court focused on counsel’s
26 failure to obtain or examine the prior conviction despite its ready availability and
27 counsel’s knowledge the prosecutor was going to use it at sentencing. *See Rompilla*, 545
28 U.S. at 385. In *Morrison*, the Court rejected the state’s bid to extend restrictions on

1 federal habeas review of Fourth Amendment claims to IAC claims based principally on
2 defense counsel's incompetent handling of Fourth Amendment issues and found
3 constitutionally deficient performance as a result of counsel's "total failure to conduct
4 pre-trial discovery." *Morrison*, 477 U.S. at 386. Unlike *Rompilla* and *Morrison*, counsel
5 here did not fail to discover or investigate the existence of the confession. They failed to
6 object to its use. Further, as Respondents note, *Morrison* involved the admissibility of
7 evidence under the Fourth Amendment, in contrast to the confession's inadmissibility
8 under the Fifth Amendment.

9 Nonetheless, just as counsel's awareness of the prosecutor's intent to rely on the
10 prior conviction and testimony of the rape victim in *Rompilla* heightened counsel's duty
11 to investigate the prior conviction, Clabourne's counsel were on notice that the
12 confession was inadmissible and that it was going to be introduced by the State in support
13 of the (F)(6) factor. Because the confession was the only evidence the State introduced at
14 the aggravation/mitigation hearing, counsel would have been particularly remiss in
15 failing to investigate the admissibility of the confession.

16 The record supports a finding that counsel were aware of the confession, its
17 prospective inadmissibility, and the State's intent to rely on it to establish the sole
18 statutory aggravating factor—"especially heinous, cruel, or depraved"—under A.R.S. §
19 13-703(F)(6). (*See Appx.* 1371–73, 1344–1360.)

20 Resentencing counsel Bloom and Ryan represented Clabourne in his first federal
21 habeas petition, where they raised the claim that Clabourne's confession should be
22 suppressed. Counsel continued to represent Clabourne when the Ninth Circuit ruled that
23 the confession would not be legally admissible, prospectively. The State then signaled to
24 counsel its intent to rely on the confession by providing them a copy of the sentencing
25 memorandum at a motion's hearing on October 11, 1996 (*see Reply. Appx.* 1385). The
26 prosecutor attached the confession to the State's Sentencing Memorandum as Exhibit 1,
27 served the memorandum and confession on resentencing counsel, and relied extensively
28 on facts that could only have come from the confession in arguing in support of the death

1 penalty at the aggravation/mitigation hearing. (*See* Appx. 1344–60, Reply Appx. 1382.)

2 At the very latest, the prosecutor’s intent to use Clabourne’s confession to
 3 establish the (F)(6) factor would have been apparent to defense counsel from the outset of
 4 the prosecutor’s argument during the aggravation/mitigation hearing on August 8, 1997.
 5 Counsel acknowledged as much during the hearing. (*See* Appx. 1425.) The prosecutor’s
 6 argument before Judge Montiel contained numerous explicit references to Clabourne’s
 7 statement and to facts that could only be established through the admission of
 8 Clabourne’s confession. (*See* Appx. 1371–73, 1376–85, 1413, 1417–23.) After the
 9 prosecutor’s argument, attorney Bloom stated that he “recognize[d] the facts of this case
 10 are horrible. Without question, . . . this was a truly horrible case.” (Appx. 1386.)
 11 Unquestionably, many of the “horrible” facts he was referring to were presented to the
 12 court by the prosecutor through Clabourne’s confession.

13 The resentencing court also signaled to counsel its awareness of, and intent to rely
 14 on, the entire trial court record, which included Clabourne’s statement to Detective
 15 Bustamante. (*See* Reply Appx. 1381 (“I haven’t had an opportunity to read the motions. I
 16 have read everything else in this case, at least I hope I have, everything that was filed in
 17 the court that I am aware of. There were filings, transcripts and things of that nature.”);
 18 Resp. Ex. L at 4 (“I have reviewed the record completely, . . . in its totality, including the
 19 habeas corpus proceeding and the record of the trial and the rest of the documents that
 20 have been filed to date.”). Yet, despite counsel’s familiarity with *Roberson*, having cited
 21 the case in their appellate briefing, and the Ninth Circuit’s decision finding the confession
 22 prospectively inadmissible, *see Clabourne*, 64 F.3d at 1378-79, they failed to object to its
 23 use at resentencing.

24 Respondents’ assert that counsel was not deficient because Clabourne fails to
 25 demonstrate that the court ever received or considered the State’s sentencing
 26 memorandum, noting the document is not included in the Pima County Superior Court
 27 record on appeal. (Doc. 81 at 25–27.) But, even if true, whether the state court considered
 28

1 the State’s sentencing memorandum is irrelevant to the issue before the Court.¹² As the
 2 Ninth Circuit has instructed, the issue before the Court is whether “resentencing counsel
 3 was ineffective in failing to suppress the confession,” *Clabourne IV*, 745 F.3d at 374, not
 4 the sentencing memorandum.

5 Respondents also argue that resentencing counsel’s performance was not deficient
 6 because it was reasonable for counsel to rely on the trial court to discern what evidence it
 7 could and could not consider in making its sentencing determination. (Doc. 81 at 27.)
 8 Respondents suggest that “[a]bsent evidence to the contrary, we have assumed that the
 9 trial judge in a capital case is capable of focusing on the relevant sentencing factors and
 10 setting aside irrelevant, inflammatory, and emotional factors.” (*Id.* at 28) (quoting *State v.*
 11 *Bolton*, 182 Ariz. 290, 316, 896 P.2d 830, 856 (Ariz. 1995)). Therefore, Respondents
 12 assert, “resentencing counsel was not deficient for failing to ask the judge to do
 13 something he presumably already knew he was required to do.” (*Id.* at 28–29.)

14 Respondents’ argument would render a defendant’s Sixth Amendment right to
 15 counsel redundant in a judicial system where the trial court is tasked with *sua sponte*
 16 safeguarding the rights of criminal defendants. Despite a trial court’s best efforts to
 17 safeguard the fairness of the trial, a defendant who cannot afford counsel “cannot be
 18 assured a fair trial unless counsel is provided for him,” *Gideon v. Wainwright*, 372 U.S.
 19 335, 344 (1963), because a fair trial is one in which evidence is subject to the “adversarial
 20 system embodied in the Sixth Amendment” and “counsel plays a crucial role” in that
 21 system, *Strickland*, 466 U.S. at 684.

22 *Bolton* and other similar cases cited by Respondents (*see* Doc. 81 at 27–28) do not
 23 apply to the scenario here. Those cases do not stand for the proposition that effective

24
 25 ¹² Though not dispositive of the issue before the Court, the record disputes
 26 Respondents’ contention. (*See* Appx 1371) (Transcript of Aggravation/Mitigation
 27 Hearing) (prosecutor referring to “all of the memoranda that have been filed” and the
 28 “aggravation . . . that [the memorandum] are suggesting [the court] ought to find”),
 (Reply Appx 1385) (Transcript of Motions Hearing October 11, 1996) (defense counsel
 noting the prosecutor filed the sentencing memo, dated October 11, on that same day, to
 which Clabourne’s confession was attached).)

1 representation is unnecessary because a trial court is presumed capable of safeguarding a
 2 defendant's rights, as Respondents suggest. Rather, they suggest that the trial court is
 3 presumed to be capable of disregarding or setting aside irrelevant, inflammatory, or
 4 otherwise inadmissible or tainted evidence which has come before the court, unlike jurors
 5 faced with the same circumstances. *See, e.g., Bruton v. United States*, 391 U.S. 123, 135
 6 (1968) (“[T]here are some contexts in which the risk that the jury will not, or cannot,
 7 follow instructions is so great, and the consequences of failure so vital to the defendant,
 8 that the practical and human limitations of the jury system cannot be ignored.”).

9 The performance inquiry begins with the premise that “under the circumstances,
 10 the challenged action[s] might be considered sound trial strategy.” *Miles v. Ryan*, 713
 11 F.3d 477, 486 (9th Cir. 2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 191 (2011)).
 12 Under this objective approach, [the Court is] required ‘to affirmatively entertain’ the
 13 range of possible reasons counsel might have proceeded as he or she did.” *Miles*, 713
 14 F.3d at 486 (quoting *Pinholster*, 563 U.S. at 195).

15 While Respondents do not proffer any strategic theory under which defense
 16 counsel might have opted not to challenge the confession, “[c]ounsel’s competence . . . is
 17 presumed, . . . and the defendant must rebut this presumption by proving that his
 18 attorney’s representation was unreasonable under prevailing professional norms and that
 19 the challenged action was not sound strategy.” *Morrison*, 477 U.S. at 384 (citing
 20 *Strickland*, 466 U.S. at 688–89). “Since ‘[t]here are countless ways to provide effective
 21 assistance in any given case,’ . . . unless consideration is given to counsel’s overall
 22 performance, before and at trial, it will be ‘all too easy for a court, examining counsel’s
 23 defense after it has proved unsuccessful, to conclude that a particular act or omission of
 24 counsel was unreasonable.’” *Id.* at 386 (quoting *Strickland*, 466 U.S. at 689.)

25 The Court has carefully reviewed the record in this case and determines that it is
 26 “at least arguable,” *Richter*, 562 U.S. at 106, that a reasonable attorney could decide to
 27 forego challenging the resentencing court’s use of Clabourne’s confession in the
 28 circumstances present here.

1 At Clabourne's first sentencing, the trial court found that he had committed the
2 offense in an especially heinous, cruel or depraved manner under A.R.S. § 13-703(F)(6)
3 and found no mitigating factors. (Appx. 1445, Resp. Ex. F at 17.) Independently
4 reviewing the sentence, the Arizona Supreme Court explained that "cruelty involves pain
5 and distress visited upon the victim" including "mental anguish," while the "terms
6 'heinous and depraved' are concerned with the mental state and attitude of the
7 perpetrator." *Clabourne I*, 142 Ariz. at 347, 690 P.2d at 66 (citing *State v. Gretzler*, 135
8 Ariz. 42, 51, 659 P.2d 1, 10 (1983), *State v. Tison*, 129 Ariz. 526, 543, 633 P.2d 335, 352
9 (1981), *State v. Ceja*, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980)).

10 The court noted that the factors supporting a finding of heinousness or depravity
11 include the apparent relishing of the murder by the killer, needless mutilation of the
12 victim, senselessness of the crime and helplessness of the victim, and infliction of
13 gratuitous violence on the victim. *Id.* (citing *Gretzler*, 135 Ariz. at 52, 659 P.2d at 11).
14 The court cited other cases where the gratuitous violence criterion was found, including
15 *State v. Jeffers*, 135 Ariz. 404, 432, 661 P.2d 1105, 1133 (1983), where an assailant
16 climbed on top of an already dead victim and hit her in the face several times causing
17 additional wounds, and *Ceja*, 126 Ariz. at 39, 612 P.2d at 495, where the defendant
18 continued shooting his victim after it had become apparent that he was already fatally
19 wounded. *Id.* at 358, 690 P.2d at 67 (citing).

20 The court then found that Clabourne committed the killing in a heinous and
21 depraved manner because there was "sufficient evidence of gratuitous violence to support
22 a finding of depravity and heinousness. The victim was near death after the strangulation
23 and the stabbing was unnecessary to accomplish the murder. Still defendant stabbed her
24 twice, once through the heart." *Id.* at 348, 690 P.2d at 67.

25 Cruelty was established because, in addition to factors derived from Clabourne's
26 confession, the court noted that the victim "was obviously in great fear of her life as she
27 begged defendant to protect her" and "[t]he medical examiner testified that the victim had
28 put up a tremendous struggle while being strangled, indicating a good deal of suffering"

1 *Clabourne II*, 142 Ariz. at 348, 690 P.2d at 67.

2 At trial, the State had presented the testimony of Dr. Valerie Rao, the medical
3 examiner who performed an autopsy on the victim's body.¹³ (Resp. Ex. B at 243–44.) Dr.
4 Rao testified that the victim died both from strangulation and from being stabbed in the
5 heart. (Resp. Ex. B, at 245, 246, 251.) When Dr. Rao examined the victim, the bandana
6 used as a ligature was still knotted around her neck. (*Id.* at 246–47.) Under the bandana,
7 Dr. Rao found “a lot of bleeding” and bruises around the victim's neck. (*Id.* at 247.)
8 Based on blood vessel ruptures in the victim's eyes, face, and neck, Dr. Rao concluded
9 that the victim was alive before she was strangled. (*Id.*) The redness in the victim's face
10 as a result was “tremendous,” and Dr. Rao attributed the ruptured blood vessels to the
11 victim's struggling against the ligature and “the tremendous force that is being applied to
12 her neck.” (*Id.* at 248.) These blood vessel ruptures were such that the white of one of the
13 victim's eyes was almost entirely obscured by blood and the victim's eyes were
14 “bulging” from the force of the strangulation. (*Id.* at 250.)

15 As to the stabbing, Dr. Rao testified that the victim had suffered two wounds to
16 the chest. (*Id.* at 252.) The wounds were consistent with having been inflicted with a
17 knife. (*Id.* at 252–53.) One of the wounds entered the victim's body and “went through
18 her lung.” (*Id.* at 253.) This wound was not lethal. (*Id.* at 269.) The other wound went
19 into the victim's heart, and Dr. Rao opined that the victim had been stabbed in the heart
20 twice without the knife being fully removed from her body. (*Id.* at 253.) In Dr. Rao's
21

22 ¹³ Clabourne asserts that Dr. Rao's trial testimony was incorrect as a matter of
23 medical science. In support, he has submitted additional medical evidence, primarily in
24 the form of an opinion from Dr. Werner U. Spitz, a forensic pathologist and toxicologist,
25 and excerpts from several medical texts. (*See* Ex. 1 at Ex. p. 1–147.) The Court does not
26 consider this evidence for three reasons. First, as stated in greater detail below, the Court
27 may not consider new evidence in this proceeding because Clabourne has not met the
28 “stringent requirements” of 28 U.S.C. § 2254(e)(2). *See Ramirez*, 142 S. Ct. at 1739.
Second, consideration of counsel's failure to investigate these facts falls outside the scope
of the instant remand. Third, the evidence goes to prejudice, which this Court does not
consider in this Order, and is irrelevant to “counsel's perspective at the time” they chose
to forego challenging the use of the confession. *See Strickland*, 466 U.S. at 689.

1 opinion, the stab wounds to the victim's heart were fatal, as one of them "went through
2 and through the heart and ended up near her spine." (*Id.* at 254.) It was clear to Dr. Rao
3 that the stabbings occurred before the victim died but after the strangulation, as there was
4 a contusion surrounding the stab wound and bleeding in the chest cavity but it "was very
5 little" and occurred "probably ... [when] she had just a few heart beats left." (*Id.* at 254–
6 55.) Death after the stabbing through the heart, however, would not have been immediate,
7 though it is likely the victim was unconscious at the time she was stabbed. (*Id.* at 268,
8 271.)

9 Dr. Rao testified that the victim had several bruises on her body: "on her hand, on
10 her arms, on her legs, ... surrounding the stab wound[,] and she had them on her neck,
11 too." (*Id.* at 255.) Among these bruises, ones on the victim's thumbs indicated to Dr. Rao
12 that "she was struggling, and she sustained [them] probably in the struggle to get away
13 from the inevitable, what happened to her." (*Id.* at 258.) Dr. Rao characterized these
14 bruises as "defensive-type injuries." (*Id.*) When asked to approximate the timing of these
15 injuries, Dr. Rao estimated that they were sustained, at most, 24 hours prior to death, but,
16 based on their coloration, they could have been sustained immediately prior to death. (*Id.*
17 at 262–63.) In terms of apparent injuries, Dr. Rao later related that the victim had a bruise
18 on her face with "tremendous discoloration" along with a cut on the inside of her lip. (*Id.*
19 at 262.) Dr. Rao opined that the bruise was "sustained by a blunt force, consistent with a
20 fist" and that these injuries indicated a "beating." (*Id.* at 262–63.) Dr. Rao did not believe
21 the injuries could have been sustained as a result of the victim's fall on to the riverbed
22 after she was already deceased because the other injuries "have vital reaction" indicating
23 that they were sustained when she was alive. (*Id.* at 266.) In contrast, Dr. Rao explained
24 that the victim had two fractures demonstrating very little bleeding, which indicated that
25 they were sustained after the victim was already dead. (*Id.* at 266–67.)

26 Dr. Rao also found evidence of "sexual activity in the mouth, in the rectum and in
27 the vagina," (*id.* at 264–65), though she had no opinion whether the sexual activity was
28 consensual or not (*id.* at 273, 280). Dr. Rao explained that most victims of rape do not

1 present with injuries or trauma. (*Id.* at 280–81.) There were no indications of alcohol or
 2 drugs in the victim’s blood. (*Id.* at 266.)

3 Given the nature of this testimony, it would have been objectively reasonable for
 4 defense counsel to predict that even disregarding Clabourne’s confession, the
 5 resentencing court would again find that the medical evidence and other evidence
 6 introduced at the trial supported the (F)(6) aggravating factor. *Cf., Premo v. Moore*, 562
 7 U.S 115, 127 (2011) (finding counsel’s strategy reasonable despite counsel’s failure to
 8 seek suppression of petitioner’s confession to police where there were two witnesses able
 9 to relate another confession).

10 Furthermore, this Court had previously considered Clabourne’s procedural
 11 argument that no reasonable factfinder would have found him eligible for the death
 12 penalty without consideration of the confession and found:

13 First and foremost, other evidence supported the cruelty finding. At trial,
 14 Shirley Martin testified that Petitioner told her the victim had begged not to
 15 be killed. (RT 11/18/82 at 332, 333.) The medical examiner testified that
 16 Webster was alive and conscious while being strangled and that she put up
 17 a “tremendous” struggle. (RT 11/17/82 at 248, 255.) Webster also sustained
 18 numerous bruises and contusions over her body, likely inflicted prior to
 death. (*Id.* at 255–62.) Thus, even without Petitioner’s confession, there
 was sufficient evidence from which a trier of fact could conclude that the
 victim feared for her life and suffered greatly before being killed.

19 (Doc. 41 at 16–17.) The Court reaffirms this finding here. The import of that finding in
 20 this proceeding is that at the time counsel returned to state court for the resentencing, it
 21 would have been reasonable for counsel to believe that, even if they succeeded in
 22 suppressing the confession during resentencing, the (F)(6) aggravating factor based on
 23 cruelty would still be found.

24 As the Ninth Circuit explained in remanding this case:

25 Other facts identified in the Arizona Supreme Court’s discussion of the
 26 aggravating circumstances were supported by other evidence in the record.
 27 Multiple witnesses testified concerning incriminating statements made by
 28 Clabourne, including that the victim had been raped and that she had
 begged for help. Based on the autopsy she performed on the victim, the
 medical examiner testified at trial about the beating and sexual activity that

1 the victim suffered before her death, as well as the strangling and stabbing.
 2 *Clabourne IV*, 745 F.3d at 381.

3 There is no doubt that the murder was particularly senseless, and the victim was
 4 totally helpless at the hands of her captors, as the State pointed out on appeal and as
 5 evidenced by the victim's pleas for help. (Reply Appx. 1411.) As the resentencing court
 6 noted, Clabourne "was also a witness to the repeated beating and sexual assaults by other
 7 co-defendants. At the very least this Defendant displayed a callous indifference to Laura
 8 Webster's life, demonstrating a heinous and depraved state of mind." (Appx. 1437)

9 Given the overwhelming likelihood the State would again establish the (F)(6)
 10 aggravating factor, with or without the confession, it was objectively reasonable for
 11 defense counsel to focus their efforts on establishing the strongest available case in
 12 mitigation, and the record demonstrates this is what counsel did. In pursuing this strategy,
 13 they provided their experts "with a more complete history of Clabourne and more
 14 information about the crime than they had received before trial," *Clabourne III*, 194 Ariz.
 15 at 383, 983 P.2d at 752, and relied on Clabourne's confession in support of their
 16 mitigation theory.

17 Attorney Bloom foreshadowed this theory during the federal evidentiary hearing
 18 while justifying to the Court his line of questioning of Dr. LaWall:

19 Mr. Clabourne advanced in his confession a statement that he said, "I was
 20 afraid Langston was going to kill me, so I killed her." I think that . . .
 21 because of the paranoia that [Dr. LaWall] saw in Mr. Clabourne, a very
 22 unusual symptom, because of the way he reacted in stress, Mr. Clabourne
 23 may very well have had that fear and been acting in conformance with that
 24 fear at the time that he killed her.

25 . . .

26 I should clearly think that . . . someone deciding whether or not this man
 27 should get life or death should know that in this man's own idiosyncratic
 28 and, perhaps, mentally ill mind, he could have thought he was in physical
 danger and had to kill this person for his own safety."

(Appx. 630–39.)

At the aggravation/mitigation hearing, Clabourne's confession set the stage for

1 counsel's mitigation theory establishing that Langston was the "mastermind" and
 2 Clabourne was the "follower." This theory tied together the testimony of Detective
 3 Bustamante and the mental health experts who had testified at the federal evidentiary
 4 hearing to describe what counsel referred to as "the reality of this case," explaining that
 5 "it's as if Scott Clabourne, despite his hulking size" and menacing appearance, "it's as if
 6 . . . inside this hulking body is the mind of a seven or eight year old child." (Appx. 1387.)
 7 "Mr. Clabourne . . . was confronted with a situation that . . . in his mind, given the child
 8 like way that he relates to the world, given the forceful personality of . . . Mr. Langston
 9 . . . given what he was confronted with, in his mind he felt he was under duress." (Appx.
 10 1399–1400.) Counsel urged the court to consider the testimony from the mental health
 11 experts who had testified at the federal evidentiary hearing, asserting the experts
 12 established that Clabourne "suffered from schizophrenia, which is a regression into a
 13 child like thought process." (Appx. 1390.) Counsel summarized:

14 I think that's the testimony before the court, both in terms of the capacity of
 15 Mr. Clabourne to appreciate the wrongfulness of his conduct and the
 16 character traits which set the stage for his duress, and which also set the
 17 stage for why we believe that it's so unfair to impose the death sentence on
 18 Mr. Clabourne, when Mr. Langston is the person most responsible for that
 19 life.

18 (Appx. 1400.)

19 The expert witnesses who testified at the evidentiary hearing in federal court
 20 relied, at least to some extent, on Clabourne's confession or Detective Bustamante's
 21 testimony regarding the confession. Counsel's theory of the case, as evidenced by the
 22 testimony they sought to develop, was that a more complete picture of Clabourne's
 23 mental health history lent credence to Clabourne's confession in the sense he felt helpless
 24 to assist Webster and scared and pressured to act by Langston.

25 Dr. LaWall testified that, based on what he knew of Clabourne's own account of
 26 the events, he believed it unlikely that Clabourne planned the murder for days or weeks in
 27 advance. (Appx. 629, 647.) Dr. LaWall also testified that he thought it was "more
 28 probable than not" that Clabourne really was in physical fear from Langston at the time

1 of the murder as Clabourne had stated in his confession. (Appx. 629–31; *see also* Appx.
2 646.) Dr. LaWall also testified that Clabourne’s statement of how the murder occurred,
3 that “someone just said to him, ‘Let’s go out and meet some women tonight,’ and he,
4 ‘just drifted into this event’ without much forethought,” was consistent with Clabourne’s
5 “whole personality and the entire history” of which Dr. LaWall was aware. (Appx. 632.)

6 Dr. Gelardin opined that it was possible, consistent with Clabourne’s confession,
7 that Clabourne had been manipulated or pressured in some way by Langston to commit
8 the offense. (Appx. 698.) Specifically, Dr. Gelardin stated that “if I were in a situation
9 with someone stashing knives all around [as Clabourne stated in his confession], I might
10 feel pressured.” (Appx. 699.) Dr. Gelardin opined that Clabourne’s statement about
11 Langston “stashing knives” all around may have been true or may have been the result of
12 a paranoid thought process, but that the confession was consistent with Breshears’
13 statement in regard to Langston being the “mastermind.” (Appx. 699–700.)

14 Dr. Berlin testified at the evidentiary hearing that, with the benefit of reviewing
15 additional records provided by counsel, he believed Clabourne suffered from
16 schizophrenia. (Appx. 737.) After reading Clabourne’s confession and several other notes
17 from around the time the murder was committed, Dr. Berlin had serious doubts as to
18 whether Clabourne could function “in a logical, concise, and aware manner.” (Appx.
19 745.) Dr. Berlin opined that, based on Clabourne’s confession, Clabourne was “very”
20 fearful of Langston, and that Clabourne’s mental illness would “certainly aggravate that
21 condition.” (Appx. 750.)

22 Counsel urged the court to consider the disproportionality of Langston’s life
23 sentence, as he was the “controlling force,” or the “major party,” compared to Clabourne,
24 who was a “minor participant.” (Appx. 1407.) Counsel based this conclusion on
25 Detective Bustamante’s testimony which, in turn, was based in part on Clabourne’s
26 confession. (*See* Appx. 773–77).

27 Counsel presented the testimony of Robert Hirsh, a criminal defense attorney who
28 had successfully argued the defense of insanity in several murder cases. (Appx. 829–31.)

1 Hirsch explained why he believed trial counsel had not met minimal competency
 2 standards. (Appx. 839.) Among other reasons was that, “given Clabourne’s statement, . . .
 3 there is a basis for a duress claim.” (Appx. 842.) Additionally, “based on Clabourne’s
 4 statement” there was “a good argument here in that this was not felony murder.” (Appx.
 5 843.)

6 During the aggravation/mitigation hearing, resentencing counsel highlighted
 7 several points made by these witnesses who had relied on Clabourne’s confession in
 8 forming their opinions. While the prosecutor recognized that there was some discrepancy
 9 between attorney Bloom suggesting Clabourne’s statements should not be considered,¹⁴
 10 and attorney Ryan’s reliance on his confession to demonstrate their mitigation theory,
 11 (Appx. 1418), Bloom reiterated in rebuttal, referring to the confession, that Clabourne
 12 had been afraid for his life because Langston was stashing knives everywhere, so when
 13 Langston told him to murder the victim, he had no choice. (Appx. 1425.) This strategy
 14 was consistent with what counsel’s own expert, Hirsh, advised should have been done to
 15 present a duress claim:

16 You’ve got Langston who was carrying out his fantasy and using
 17 Clabourne to do it. You’ve got a very passive man in Clabourne who—he
 18 claims he’s threatened to do it, but certainly there may have been a strong
 19 element of emotional distress. This area was never explored and never
 20 presented to the judge.

21 This is a terribly important dynamic. I don’t know how a judge could

22 ¹⁴ Bloom had successfully moved to preclude the court from considering any
 23 portions of the presentence report that were based on a statement Clabourne made to the
 24 probation officer. (Ex. J at 1.) He also successfully moved at the outset of the
 25 aggravation/mitigation hearing to preclude the court from considering information in the
 26 presentence report that was derived from Clabourne’s statements. (Appx. 1363–67.) The
 27 prosecutor seemingly conflated these two statements in referring to the discrepancy
 28 between Bloom and Ryan’s positions. This discrepancy, however, illustrates counsel’s
 awareness of the legal grounds on which to move to suppress the confession and the
 court’s willingness to grant such a request, but also counsel’s strategic choice not to do
 so. In light of counsel’s motion to preclude Clabourne’s statements in the presentence
 report, it is highly unlikely that the failure to move to suppress the confession was a mere
 oversight.

1 pass a death sentence without having this important dynamic performed.
2 (Appx. 860.)

3 In fact, based on counsel’s theory and the new evidence introduced at the federal
4 evidentiary hearing, counsel were successful in establishing that Clabourne “has a passive
5 personality, is impulsive, and is easily manipulated by others.” (Resp. Ex. L at 8–10),

6 As a matter of strategy, counsel’s choice to not object to the confession was “well
7 within the range of professionally reasonable judgments.” *Strickland*, 466 U.S. at 699. In
8 *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998), for example, counsel made a
9 reasonable strategic choice to introduce the petitioner’s confessions—admitting he
10 committed a murder in a moment of rage—at the sentencing phase of trial despite
11 counsel’s successful suppression of the confessions during the guilt-phase. The Ninth
12 Circuit rejected petitioner’s claim “that his counsel acted ineffectively because counsel
13 changed strategies on whether or not the confessions should be suppressed” because
14 “[t]he confessions revealed a less egregious crime than that presented by the eyewitness
15 testimony.” *Id.* at 1273. “In the absence of the confessions, the sentencer would have no
16 record evidence of [petitioner’s] conduct except that of [the eyewitness].” *Id.* at 1274.
17 Thus, the use of the confessions during sentencing was a sound and reasonable strategic
18 decision by petitioner’s counsel. *Id.*

19 Similarly, counsel here, at the sentencing phase, faced with a client convicted of
20 first-degree murder, three counts of sexual assault (oral, anal, and vaginal intercourse),
21 and kidnapping, all unassailable findings during the sentencing proceeding, made a
22 reasonable strategic decision to pursue a mitigation theory of duress that was consistent
23 with Clabourne’s confession and with the opinion of his expert. Clabourne’s confession
24 provided evidence of duress that his experts placed within the context of Clabourne’s
25 mental illness. Clabourne’s experts explained that, due to Clabourne’s mental illness and
26 paranoia, he feared Langston and thus it was more likely he was manipulated by
27 Langston into committing the murder. The evidence was convincing to at least one jurist;
28 District Judge Richard M. Bilby, who presided over Clabourne’s federal evidentiary

1 hearing, concluded:

2 I think the evidence in this case was overwhelming of guilt. I think it was
3 just as overwhelming that the wrong guy got the death penalty. . . .

4 . . .

5 There certainly were some problems with the—with the confession that he
6 gave, but at the same time he gave confessions to other people that weren't
7 tainted. . . .

8 . . .

9 I'm sure if I were a judge, if I'd been Richard Royston and sat there and
10 listened to what I heard today . . . and then heard what Bustamante had to
11 say, I wouldn't have put this guy to death.

12 (Ex. H at 164–65, 169–70.)

13 Though ultimately the resentencing court concluded Clabourne was easily
14 manipulated “only when he wanted to be manipulated,” and again found the mitigating
15 factors were not sufficiently substantial to call for leniency, (Resp. Ex. L at 8–10), “[t]hat
16 trial counsel’s strategy proved unsuccessful cannot be used as a reason to question the
17 reasonableness of the strategy.” *Thomas v. Lumpkin*, 995 F.3d 432, 455 (5th Cir. 2021);
18 *see also Strickland*, 466 U.S. at 699 (“On these facts, there can be little question, even
19 without application of the presumption of adequate performance, that trial counsel’s
20 defense, though unsuccessful, was the result of reasonable professional judgment.”);
21 *Hansford v. Payne*, 2006 WL 2381902, * 7 (W.D. Wash. 2006) (citing *Riley v. Wyrick*,
22 712 F.2d 382, 385 (8th Cir. 1983)) (“Just because a strategy is unsuccessful does not
23 mean that counsel was ineffective.”). Counsel’s strategy to rely on the confession to
24 support a claim of mental illness and duress was reasonable, comprehensible, and
25 logically consistent with the guilt-phase presentation, and, in the words of his own expert,
26 “a terribly important dynamic to present to the sentencing judge.”

27 Clabourne has not rebutted the presumption that “counsel’s performance fell
28 “within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at
689.

This determination ends the Court’s inquiry, because a court need not address both

1 components of the *Strickland* inquiry or follow any particular order in assessing
 2 deficiency and prejudice. *Strickland*, 466 U.S. at 697. If it is easier to dispose of a claim
 3 on just one of the components, then that course should be taken. *Id.*

4 For the reasons set forth above, although PCR counsel performed deficiently,
 5 Clabourne was not prejudiced by PCR counsel's failure to raise this meritless claim of
 6 ineffective assistance of trial counsel. *See Atwood*, 870 F.3d at 1059–60; *Runnigeagle*,
 7 825 F.3d at 982; *Hooper*, 985 F.3d at 627. The underlying claim of ineffective assistance
 8 fails because resentencing counsel did not perform deficiently under *Strickland* in failing
 9 to move to suppress Clabourne's confession. Therefore, there was not a reasonable
 10 probability that the result of the PCR proceedings would have been different if Claim 1
 11 had been raised. Claim 1 remains procedurally defaulted and barred from federal review.

12 III. EVIDENTIARY DEVELOPMENT

13 Under § 2254(e)(2), a federal court may not hold an evidentiary hearing unless it
 14 first determines that the petitioner exercised diligence in trying to develop the factual
 15 basis of the claim in state court. *See Williams (Michael) v. Taylor*, 529 U.S. 420, 432
 16 (2000). If the failure to develop a claim's factual basis is attributable to the petitioner, the
 17 court may hold a hearing only if the claim relies on (1) "a new rule of constitutional law,
 18 made retroactive to cases on collateral review by the Supreme Court, that was previously
 19 unavailable" or (2) "a factual predicate that could not have been previously discovered
 20 through the exercise of due diligence." 28 U.S.C. § 2254(e)(2). In addition, "the facts
 21 underlying the claim [must] be sufficient to establish by clear and convincing evidence
 22 that but for constitutional error, no reasonable fact finder would have found the
 23 [petitioner] guilty of the underlying offense." *Id.*

24 Section 2254(e)(2) limits a petitioner's ability to present new evidence through a
 25 Rule 7 motion to the same extent that it limits the availability of an evidentiary hearing.
 26 *See Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005), *overruled on other*
 27 *grounds by Daire v. Lattimore*, 812 F.3d 766 (9th Cir. 2016); *Holland v. Jackson*, 542
 28 U.S. 649, 652–53 (2004) (per curiam). Accordingly, a petitioner who seeks to introduce

1 new affidavits and other documents never presented in state court must demonstrate
 2 diligence in developing the factual basis in state court or satisfy the requirements of §
 3 2254(e)(2).

4 The Court ordered Clabourne to include any requests for evidentiary development
 5 in his Supplemental Brief. (Doc. 52 at 2.) However, instead of moving for an expansion
 6 of the record under Rule 7 of the Rules Governing Section 2254 Cases to include the
 7 exhibits attached to his Supplemental Brief, Clabourne deferred complying with the
 8 Order until Respondents indicated whether they contested the facts upon which
 9 Clabourne relied in his Supplemental Brief. (Doc. 71 at 54 n.11.)

10 Respondents, on the other hand, did not object to any of the new evidence
 11 submitted with the brief, apart from Dr. Rao's autopsy report. Though Respondents may
 12 have waived any argument that 2254(e)(2) precludes the Court's consideration of this
 13 evidence, it is equally likely that Clabourne waived any argument that the evidence
 14 should be considered by waiting to address the new evidence in his reply.

15 Regardless, to the extent Clabourne relies on the Ninth Circuit's holding in
 16 *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc), to support his assertion
 17 that a petitioner is entitled to present new evidence to prove PCR counsel's
 18 ineffectiveness (*see* Doc. 71 at 17), the Supreme Court has since held that, "under §
 19 2254(e)(2), a federal habeas court may not . . . consider evidence beyond the state-court
 20 record based on ineffective assistance of state postconviction counsel." *Ramirez*, 142 S.
 21 Ct. at 1734. The Court further stated that, "if [§2254(e)(2)] applies and the prisoner
 22 cannot satisfy its 'stringent requirements,' . . . a federal court may not . . . consider new
 23 evidence[] to assess cause and prejudice under *Martinez*." *Id.* at 1740 (quoting *Williams*
 24 (*Michael*), 529 U.S. at 433).

25 Clabourne does not attempt to meet those standards. The claim for which he seeks
 26 evidentiary development does not rely on a new, retroactive rule of constitutional law.
 27 Nor does it rely on a factual predicate that could not have been discovered previously
 28 through due diligence. Clabourne is not entitled to evidentiary development.

1 IV. CERTIFICATE OF APPEALABILITY

2 Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, a petitioner
3 cannot take an appeal unless a certificate of appealability has been issued by an
4 appropriate judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases
5 provides that the district judge must either issue or deny a certificate of appealability
6 when it enters a final order adverse to the applicant. If a certificate is issued, the court
7 must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2).

8 Under § 2253(c)(2), a certificate of appealability may issue only when the
9 petitioner “has made a substantial showing of the denial of a constitutional right.” This
10 showing can be established by demonstrating that “reasonable jurists could debate
11 whether (or, for that matter, agree that) the petition should have been resolved in a
12 different manner” or that the issues were “adequate to deserve encouragement to proceed
13 further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and internal quotation
14 marks omitted). For procedural rulings, a certificate of appealability will issue only if
15 reasonable jurists could debate whether the petition states a valid claim of the denial of a
16 constitutional right and whether the court’s procedural ruling was correct. *Id.*

17 The Court finds that reasonable jurists could debate its application of *Martinez* in
18 Claim 1, alleging ineffective assistance of counsel at sentencing.

19 V. CONCLUSION

20 For the reasons stated above, the default of Claim 1 is not excused under *Martinez*.
21 The claim remains defaulted and barred from federal review.

22 Accordingly,

23 **IT IS ORDERED denying** Claim 1 as procedurally defaulted and barred from
24 federal review.

25 **IT IS FURTHER ORDERED denying** Clabourne’s request, so construed, to
26 expand the record and all other requests for discovery, evidentiary development, or an
27 evidentiary hearing.

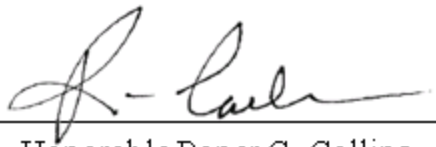
28 **IT IS FURTHER ORDERED granting** a Certificate of Appealability as to

1 Claim 1.

2 **IT IS FURTHER ORDERED** that the Clerk of Court shall enter Judgment
3 accordingly.

4 **IT IS FURTHER ORDERED** that the Clerk of Court forward a courtesy copy of
5 this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ
6 85007-3329.

7 Dated this 19th day of October, 2022.

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12 _____
13 Honorable Raner C. Collins
14 Senior United States District Judge
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