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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ernest Valencia Gonzales,
Petitioner,
v.
Charles L. Ryan, et al.,
Respondents.

No. CV-99-2016-PHX-SMM

ORDER
DEATH PENALTY CASE

Before the Court is Petitioner’s First Amended Habeas Petition. (Doc. 28.)
Petitioner filed a memorandum addressing the merits of his claims and requesting
evidentiary development. (Doc. 214.) Respondents filed a response to the memorandum
and Petitioner filed a reply. (Docs. 217, 220.) For the reasons set forth herein, Petitioner
is entitled to neither habeas relief nor evidentiary development.

BACKGROUND

In 1991, Petitioner was convicted by an Arizona jury of felony murder, armed
robbery, aggravated assault, first-degree burglary, and theft. The trial court sentenced
Petitioner to death on the murder charge and to various prison terms for the other crimes.
The Arizona Supreme Court summarized the facts of the crimes as follows:

1 Shortly before 7:00 p.m. on February 20, 1990, Roger Daughtry
2 returned home from work and noticed that his porch light was on. He went
3 inside and saw that someone had disassembled his stereo and moved his
4 speakers. Suddenly, a man appeared from behind the speakers, looked at
5 Daughtry, and ran out of the house. Daughtry later identified that man as
6 Ernest Gonzales.

7 Minutes later, Jeri Sheer, Daughtry's neighbor, took out her trash
8 with her dog, which ran toward a man holding what looked like a tire iron.
9 Sheer looked at the man, grabbed her dog, and went back into her house.
10 When she looked out the window, she noticed the man heading west, the
11 direction of Darrel and Deborah Wagner's townhouse. Sheer later identified
12 the man as Gonzales.

13 About 7:10 p.m., Darrel Wagner, his wife Deborah, and Deborah's
14 seven-year-old son arrived home from dinner. As they walked into the
15 small courtyard of their townhouse, they noticed that their front door was
16 ajar. Darrel went to investigate while Deborah and her son waited at the
17 gate. As Darrel pushed open the front door, both he and Deborah saw
18 Gonzales standing on the stairway holding their VCR under his arm.
19 Deborah immediately told her son to run to the neighbor's house and call
20 911. When she turned back toward her home, she saw Gonzales shove her
21 husband out the front door. Darrel lost his balance and fell backward.
22 Gonzales began to stab him repeatedly (seven times in all).

23 Deborah pleaded with Gonzales to leave. When he did not, Deborah
24 jumped on Gonzales's back and wrapped her arms around him to keep him
25 from stabbing Darrel. Gonzales then swung at Deborah and stabbed her
26 twice. He also apparently wounded himself as he was flailing at Deborah.
27 When Deborah fell off his back, Gonzales left with her purse. A few
28 minutes later, Darrel helped his wife up and both went inside to call 911.
Darrel collapsed on the floor during the call and died later that night.
Deborah spent five days in intensive care.

 Gonzales went from the Wagner residence to his girlfriend [Gloria
Alvarez's] house. She helped clean his wound. Her daughters, Catherine
and Martha Trinidad, were there and testified at trial about comments
Gonzales made the night of the murder, his clothing, and the "bag" he had
with him containing a woman's driver's license and pictures of a boy with
red hair—the color of Deborah's son's hair.

State v. Gonzales, 181 Ariz. 502, 506, 892 P.2d 838, 842 (1995).

1 Petitioner was represented at trial by appointed counsel. Following a mistrial,
2 Petitioner requested, and the Court granted, his motion to represent himself. Petitioner
3 subsequently withdrew his *pro per* request and original trial counsel was reappointed to
4 represent Petitioner during the second trial that led to his conviction.
5

6 Thereafter, Petitioner’s counsel filed a motion for a new trial. (ROA 131.)¹ In
7 response, Petitioner filed a new motion to proceed *pro per* and a motion to strike
8 counsel’s motion for a new trial, both of which were granted. (*Id.* 134, 135; ROA-ME
9 68.) Petitioner also filed a supplemental motion for a new trial, which included numerous
10 claims of ineffective assistance of trial counsel. (ROA 138.) The trial court held a three-
11 day hearing, at which Petitioner’s ineffective assistance allegations were considered and
12 denied.
13

14 Petitioner filed a petition for post-conviction relief (PCR) and a supplemental
15 petition. (ROA-PCR 441, 499, 500.) The trial court denied the petitions and denied a
16 motion for rehearing. (ROA-PCR 518, Ex’s. D, E.) Petitioner filed a petition for review,
17 which the Arizona Supreme Court denied in October 1999. (*See* ROA-PCR 517).
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19 On November 15, 1999, Petitioner commenced these proceedings by filing a *pro*
20 *forma* petition for a writ of habeas corpus. (Doc. 1.) The Court appointed the Federal
21 Public Defender’s Office as counsel. (Doc. 8.) On December 27, 1999, the Court issued a
22 case management order setting a deadline for the filing of an amended petition. (Doc.
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26 ¹ “ROA” refers to the four-volume record on appeal from trial and sentencing,
27 including minute entries (ME) prepared for Petitioner’s direct appeal to the Arizona
28 Supreme Court (Case No. CR-92-0154-AP). “ROA-PCR” refers to the 11-volume record
on appeal from post-conviction proceedings prepared for Petitioner’s petition for review
to the Arizona Supreme Court (Case No. CR-98-0422-PC).

1 17.) The order required the amended petition to “include every known constitutional error
2 or deprivation entitling Petitioner to habeas relief” and to provide a “Statement of
3 Exhaustion” noting where each claim for relief was raised in state court. (*Id.* at 2.)
4

5 On July 17, 2000, Petitioner filed a 237-page amended petition raising 60 claims
6 for relief. (Doc. 28.) He failed, however, to file the required Statement of Exhaustion.
7 The Court directed Petitioner to comply with its case management order. (Doc. 34.) On
8 September 14, 2000, Petitioner notified the Court that he had filed a petition for writ of
9 mandamus in the Ninth Circuit Court of Appeals. (Doc. 35.) The Court denied
10 Petitioner’s request for a stay of the proceedings and for additional time to file the
11 Statement of Exhaustion. (Doc. 40.)
12

13 On October 6, 2000, Petitioner filed the Statement of Exhaustion. (Doc. 42.) He
14 simultaneously filed a notice of withdrawal of claims, voluntarily withdrawing 13
15 unexhausted habeas claims, including claims alleging ineffective assistance of counsel.
16 (Doc. 43.) The notice indicated that Petitioner had initiated a PCR proceeding in state
17 court to exhaust the withdrawn claims, but did not request a stay of the federal
18 proceedings. (*Id.* at 2.) On October 16, 2000, the Ninth Circuit denied the mandamus
19 petition as moot.
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22 In February 2001, Petitioner requested that his PCR counsel be removed and that
23 he be permitted to represent himself in his successive PCR proceeding. (Doc. 102-1 at 3–
24 5.) The state court ordered a mental health examination to determine whether Petitioner
25 was competent to waive counsel. (*Id.* at 6–7.) A court-appointed expert determined that
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1 Petitioner was paranoid and delusional. (*Id.* at 10.) In August 2001, the state court found
2 Petitioner incompetent to waive counsel and represent himself. (*Id.* at 26.)

3
4 In December 2001, on the day Petitioner's successive PCR petition was due,
5 counsel filed a motion to hold the case in abeyance pending restoration of Petitioner's
6 competency. (Doc. 102-1 at 30–36.) The motion asserted that Petitioner's inability to
7 rationally communicate with counsel precluded counsel from developing a claim of
8 incompetency at the time of trial and sentencing. (*Id.*) The state court denied the motion.
9 (*Id.* at 45.)

10
11 In February 2002, state counsel filed a successive PCR petition asserting four
12 claims, including claims that Petitioner had a right to be competent to assist counsel in a
13 second PCR proceeding, that he was entitled to an evidentiary hearing to determine his
14 current competency, and that he was incompetent at the time of trial and sentencing.
15 (Doc. 108-1 at 3–24.) PCR counsel did not raise any of the claims withdrawn from the
16 amended federal habeas petition. (*Id.*) The state court denied the petition, and the Arizona
17 Supreme Court denied a petition for review. (*Id.* at 40; Doc. 108-2 at 6.)

18
19 Following Petitioner's withdrawal of the 13 unexhausted claims in October 2000,
20 the parties briefed the procedural status of Petitioner's remaining habeas claims. Briefing
21 concluded in February 2001. (Doc. 59.) The procedural status of Petitioner's claims
22 remained under advisement until September 2002, when the Court stayed Petitioner's
23 sentencing-related claims pending exhaustion in state court of a claim based on the
24 United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). (Doc.
25 75.) Petitioner initiated another state PCR proceeding. The state court consolidated it with
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1 the already-pending PCR petition. The Arizona Supreme Court denied review in October
2 2003. (Doc. 81.) In July 2004, following the United States Supreme Court's decision in
3 *Schriro v. Summerlin*, 542 U.S. 348 (2004), this Court lifted the stay.
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5 Over the next 18 months, while the matter was under advisement, Petitioner did
6 not seek amendment to reincorporate the 13 withdrawn claims or to add the claims
7 litigated in the second PCR petition.
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9 On January 12, 2006, the Court entered its order regarding the procedural status of
10 Petitioner's habeas claims. (Doc. 97.) The Court dismissed some of the claims on
11 procedural grounds or as plainly meritless, and established a deadline for Petitioner to
12 submit briefing on the merits of the remaining claims. (*Id.*)
13

14 On the eve of the deadline for filing his merits brief, Petitioner's counsel instead
15 moved to stay this action pursuant to *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th
16 Cir. 2003), *abrogated by Ryan v. Gonzales*, 133 S. Ct. 696 (2013), contending that
17 Petitioner was incapable of rationally communicating with or assisting habeas counsel.
18 (Doc. 102.)
19

20 After two years of litigation regarding Petitioner's competency, the Court entered
21 an order on April 23, 2008, denying Petitioner's motions for a competency hearing and a
22 stay of these proceedings.² (Doc. 187.) The Court determined that Petitioner's remaining
23 claims were record-based or involved purely legal issues and therefore would not benefit
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27 ² During this period the Court granted Petitioner's motion that he be transferred to
28 the Arizona State Hospital for an extended mental health assessment. (*See* Doc. 187 at 3–
4.) Petitioner was prescribed an anti-psychotic medication which improved capacity for
rational thought. (*Id.* at 4.) However, Petitioner voluntarily discontinued treatment,
complaining of back pain. (*Id.*)

1 from Petitioner's ability to communicate rationally with counsel. (*Id.*) Petitioner filed an
2 emergency petition for writ of mandamus with the Ninth Circuit, which issued a stay on
3 June 19, 2008. (Doc. 199.) The Ninth Circuit subsequently granted mandamus. *In re*
4 *Gonzales*, 623 F.3d 1242 (9th Cir. 2010). On January 8, 2013, the United States Supreme
5 Court reversed. *Gonzales*, 133 S. Ct. at 696. The case was returned to this Court on June
6 6, 2013. (Doc. 206.)
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9 The Court ordered Petitioner to file his merits brief no later than September 20,
10 2013. (Doc. 208.) Instead, Petitioner filed a motion for recusal/reassignment, which the
11 Court denied. (Docs. 210, 211.) Petitioner then filed an emergency motion with the Ninth
12 Circuit panel to stay the proceedings, as well as a petition for a writ of mandamus and a
13 motion for reassignment of the case. On September 30, 2013, the Ninth Circuit panel
14 denied the mandamus petition and denied the stay. (Doc. 216.)
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17 Petitioner filed his merits memorandum on September 20, 2013. (Doc. 212; *see*
18 Docs. 213, 214, 215.) Briefing was completed on November 22, 2013. (Doc. 220.)

19
20 In February 2014, Petitioner filed a motion to amend, seeking to add eight claims
21 of ineffective assistance of counsel, including ineffective assistance at sentencing. (Doc.
22 228.) The Court denied the motion (Doc. 234) and now addresses the remainder of
23 Petitioner's claims.

24 **APPLICABLE LAW**

25
26 Federal habeas claims are analyzed under the framework of the Antiterrorism and
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1 Effective Death Penalty Act (“AEDPA”).³ Pursuant to 28 U.S.C. § 2254(d), a petitioner
2 is not entitled to habeas relief on any claim adjudicated on the merits in state court unless
3 the state court’s adjudication:
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5 (1) resulted in a decision that was contrary to, or involved an unreasonable
6 application of, clearly established Federal law, as determined by the
7 Supreme Court of the United States; or

8 (2) resulted in a decision that was based on an unreasonable determination
9 of the facts in light of the evidence presented in the State court proceeding.

10 The Supreme Court has emphasized that “an *unreasonable* application of federal
11 law is different from an *incorrect* application of federal law.” *Williams v. Taylor*, 529
12 U.S. 362, 410 (2000). In *Harrington v. Richter*, 562 U.S. 86 (2011), the Court clarified
13 that under § 2254(d), “[a] state court’s determination that a claim lacks merit precludes
14 federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of
15 the state court’s decision.” *Id.* at 101. Accordingly, to obtain habeas relief from this
16 Court, Petitioner “must show that the state court’s ruling on the claim being presented in
17 federal court was so lacking in justification that there was an error well understood and
18 comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at
19 103; *see Frost v. Pryor*, 749 F.3d 1212, 1225–26 (10th Cir. 2014) (“[I]f all fairminded
20 jurists would agree the state court decision was incorrect, then it was unreasonable . . . If,
21 however, some fairminded jurists could possibly agree with the state court decision, then
22 it was not unreasonable and the writ should be denied.”).

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28 ³ Petitioner’s challenge to the constitutionality of the AEDPA is meritless. *See Crater v. Galaza*, 491 F.3d 1119, 1125–26 (9th Cir. 2007) (holding that AEDPA violates neither the Suspension Clause nor separation of powers).

1 With respect to § 2254(d)(2), a state court decision “based on a factual
2 determination will not be overturned on factual grounds unless objectively unreasonable
3 in light of the evidence presented in the state-court proceeding.” *Miller–El v. Cockrell*,
4 537 U.S. 322, 340 (2003). A “state-court factual determination is not unreasonable
5 merely because the federal habeas court would have reached a different conclusion in the
6 first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010). Even if “[r]easonable minds
7 reviewing the record might disagree” about the finding in question, “on habeas review
8 that does not suffice to supersede the trial court’s . . . determination.” *Rice v. Collins*, 546
9 U.S. 333, 341–42 (2006); *see Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014)
10 (explaining that on habeas review a court “cannot find that the state court made an
11 unreasonable determination of the facts . . . simply because we would reverse in similar
12 circumstances if this case came before us on direct appeal”).

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17 To find that a factual determination is unreasonable under § 2254(d)(2), the court
18 must be “convinced that an appellate panel, applying the normal standards of appellate
19 review, could not reasonably conclude that the finding is supported by the record.”
20 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). “This is a daunting standard—one
21 that will be satisfied in relatively few cases.” *Id.*

22
23 Significantly, “review under § 2254(d)(1) is limited to the record that was before
24 the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 131 S. Ct.
25 1388, 1398 (2011) (holding that “the record under review is limited to the record in
26 existence at that same time, *i.e.*, the record before the state court”); *see Murray v.*
27 *Schriro*, 745 F.3d 984, 998 (9th Cir. 2014) (“Along with the significant deference
28

1 AEDPA requires us to afford state courts’ decisions, AEDPA also restricts the scope of
2 the evidence that we can rely on in the normal course of discharging our responsibilities
3 under § 2254(d)(1).”). The Ninth Circuit has observed that “*Pinholster* and the statutory
4 text make clear that this evidentiary limitation is applicable to § 2254(d)(2) claims as
5 well.” *Gulbrandson v. Ryan*, 738 F.3d 976, 993 n.6 (2013) (citing § 2254(d)(2) and
6 *Pinholster*, 131 S. Ct. at 1400 n.7). Therefore, as the court explained in *Gulbrandson*:

9 for claims that were adjudicated on the merits in state court, petitioners can
10 rely only on the record before the state court in order to satisfy the
11 requirements of § 2254(d). This effectively precludes federal evidentiary
12 hearings for such claims because the evidence adduced during habeas
13 proceedings in federal court could not be considered in evaluating whether
14 the claim meets the requirements of § 2254(d).

15 *Id.* at 993–94.

16 ANALYSIS

17 Twenty-five claims remain from the first amended petition. Petitioner seeks
18 evidentiary development on each. However, because the claims were denied on the merits
19 in state court, this Court’s review is limited to the state court record and Petitioner is
20 entitled to evidentiary development only if a claim satisfies § 2254(d).⁴ *Pinholster*, 131 S.
21 Ct. at 1398, 1400–01; *see, e.g., Henry v. Ryan*, 720 F.3d 1073, 1093 n.15 (9th Cir. 2013)
22 (explaining that *Pinholster* bars evidentiary hearing unless petitioner satisfies § 2254(d)).
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26 ⁴ Claims 45, 47, and 48, alleging ineffective assistance of counsel, were not
27 considered on the merits in state court. However, the existing record is sufficient to
28 resolve the claims and evidentiary development is unnecessary. *See Schriro v. Landrigan*,
550 U.S. 465, 474 (2007) (explaining that an evidentiary hearing is unnecessary when the
state-court record “precludes habeas relief” under § 2254(d) limitations).

1 As discussed next, relief on each of the claims is precluded by § 2254(d), so Petitioner’s
2 requests for evidentiary development must be denied.⁵
3

4 **Claim 4**

5 Petitioner alleges that the photographic lineup shown to witnesses Roger Daughtry
6 and Jeri Scheer was impermissibly suggestive and unreliable, and therefore their
7 testimony identifying Petitioner should not have been admitted at trial.⁶ (Doc. 214 at 42–
8 48.)
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10 Before trial, Petitioner moved to suppress the identifications. The court conducted
11 a “*Dessureault* hearing”⁷ and concluded that there was “no evidence at all of undue
12 suggestion.” (ME 132.) The identifications were admitted at trial. On direct appeal, the
13 Arizona Supreme Court agreed that the identifications were admissible. *Gonzales*, 181
14 Ariz. at 509–10, 892 P.2d at 845–46.
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16 A pretrial identification violates due process where (1) the police-arranged
17 identification procedure is impermissibly suggestive, and (2) the suggestive procedure
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20 ⁵ Throughout his memorandum on the merits, Petitioner asserts that his
21 incompetence prevents him from further developing his claims. (*See, e.g.*, Doc. 212 at 1,
22 40, 48.) For the reasons discussed in previous orders (Docs. 187, 235), and because
23 Petitioner is not entitled to evidentiary development under *Pinholster*, his competence is
24 not at issue in the resolution of his claims for habeas relief. While it is unnecessary at this
point in the proceedings to address questions concerning Petitioner’s competency, the
Court recognizes that the issue may arise if and when the State obtains a warrant of
execution.

25 ⁶ Daughtry, when shown the lineup three days after witnessing the burglary, chose
26 Petitioner’s photo as the “most likely” or “most like the person.” (RT 1/17/90 at 9–10.)
27 Scheer picked out Petitioner’s photo when she was shown the lineup a week after the
incident. (*Id.* at 25–28.) She was 80 percent certain the photo showed the person she had
28 seen outside her home. (*Id.* at 28.) Deborah Wagner was unable to identify her attacker in
the photo lineup. (*See* RT 1/22/91 at 24–27; RT 5/28/91 at 108–111.)

⁷ *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951 (1969), directs trial courts
to hold an evidentiary hearing when a proposed in-court identification is challenged.

1 gives rise to a very substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S.
2 188, 197 (1972); *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). “[D]ue process
3 concerns arise only when law enforcement officers use an identification procedure that is
4 both suggestive and unnecessary.” *Perry v. New Hampshire*, 132 S. Ct. 716, 718 (2012)
5 (citing *Braithwaite*, 432 U.S. at 107). Factors to be considered in assessing the reliability
6 of the identification include the opportunity of the witness to view the suspect at the time
7 of the crime, the witness’s degree of attention, the accuracy of the witness’s description,
8 the level of certainty, and the lapse of time between the crime and the identification.
9 *Biggers*, 409 U.S. at 199–200.

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13 Petitioner contends that the photographic lineup shown to Daughtry and Scheer
14 was improperly suggestive because Petitioner’s photo, one of five in the lineup, has a
15 lighter background than the other photos and because the other men pictured “have
16 normal facial expressions while Mr. Gonzales has his eyes squinted and effectuates a
17 hostile glare.” (Doc. 214 at 42–43.) The Arizona Supreme Court addressed this argument
18 and concluded that the line-up was not unduly suggestive:
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21 To establish a due process violation, Gonzales must first establish
22 that the circumstances surrounding the pretrial identification “were so
23 impermissibly suggestive as to give rise to a very substantial likelihood of
24 irreparable misidentification,” *Simmons v. United States*, 390 U.S. 377, 384
25 (1968), and that the “state bore sufficient responsibility for the suggestive
26 pretrial identification.” *See State v. Williams*, 166 Ariz. 132, 137, 800 P.2d
27 1240, 1245 (1987). Gonzales argues that the line-up was suggestive
28 because (1) the background in his photo was lighter than the others, (2) he
had a “hostile glare” that gave him a more “criminal look,” (3) only three of
the men in the line-up had “bushy” mustaches while the others had only
thin mustaches, and (4) both Sheer and Daughtry knew that a suspect had
been arrested before they viewed the photos.

1 After reviewing the photographic line-up shown to Sheer and
2 Daughtry, we conclude that the trial court did not err in holding that it was
3 not impermissibly suggestive. While upon close examination, the lighting
4 or flash may be brighter in Gonzales’s picture, the difference is almost
5 imperceptible. All the persons shown stood against a solid white
6 background. The facial expression Gonzales chose while being
7 photographed was not a function of police conduct. Nor will different facial
8 expressions or hair thickness render a line-up impermissibly suggestive.
9 There is no requirement that the accused be surrounded by nearly identical
10 persons.

11 *Gonzales*, 181 Ariz. at 509–10, 892 P.2d at 845–46 (additional citations omitted).

12 The Arizona Supreme Court’s decision was not based on an unreasonable
13 application of clearly established federal law or an unreasonable determination of the
14 facts. “When a witness identifies the defendant in a police-organized photo lineup . . . ,
15 the identification should be suppressed only where ‘the photographic identification
16 procedure was so [unnecessarily] suggestive as to give rise to a very substantial
17 likelihood of irreparable misidentification.’” *Perry*, 132 S. Ct. at 724 (quoting *Simmons v.*
18 *United States*, 390 U.S. 377, 384–85 (1968)). That is not the case here. The photo lineup
19 shows five young Hispanic males with dark hair and mustaches. *See United States v.*
20 *Beck*, 418 F.3d 1008, 1012 (9th Cir. 2005) (finding no impermissible suggestion where
21 the photospread showed six pictures of clean-shaven “Caucasian males in the same age
22 range with similar skin, eye, and hair coloring”); *United States v. Carabajal*, 956 F.2d
23 924, 929 (9th Cir. 1992) (finding no impermissible suggestion where the photospread
24 showed six pictures of “Hispanic males in the same age range, with similar skin, eye, and
25 hair coloring” as well as similar hair length and facial hair).

26 The Ninth Circuit has explained that “insubstantial differences between the
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1 defendant's photograph and the others do not in themselves create an impermissible
2 suggestion." *United States v. Burdeau*, 168 F.3d 352, 357 (9th Cir. 1999). In *Burdeau*, the
3 court held that a photo array was not suggestive even though the defendant's picture was
4 placed in the center of the array, was "darker than the rest," and was the only one
5 showing a person with closed eyes. *Id.*; see *United States v. Johnson*, 820 F.2d 1065,
6 1073 (9th Cir. 1987) (finding photographic array was not impermissibly suggestive when
7 defendant's photograph was hazier than others); *United States v. Sambrano*, 505 F.2d
8 284, 286 (9th Cir. 1974) (finding photographic array in which defendant's photograph
9 was darker and clearer was not impermissibly suggestive).

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13 Neither Petitioner's facial expression nor the fact that his photo was slightly
14 lighter than the others is a substantial difference that renders the lineup impermissibly
15 suggestive. The Arizona Supreme Court's denial of this claim was not contrary to or an
16 unreasonable application of clearly established federal law and was not based on an
17 unreasonable determination of the facts. Claim 4 is denied.

18
19 **Claim 5**

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21 Petitioner alleges that his confrontation and due process rights were violated by
22 the trial court's failure to appoint various experts. (Doc. 214 at 48–54.)

23
24 Before the second trial, Petitioner moved for the appointment of experts in
25 serology, fingerprinting, and identification. (ROA 171.) The trial court denied the motion,
26 explaining, "I don't see the change in the trial warranting the appointment of new experts
27 and changing the dynamic at all. It's just another trial. That jury hung up, and, as I said
28 when I mistried it before, we'll just try it again. And in view of that, there's nothing

1 new.” (RT 3/25/91 at 6.)

2 On appeal, Petitioner argued that that the trial court’s refusal to appoint the experts
3 denied him due process under *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Arizona
4 Supreme Court held that Petitioner had failed to make a threshold showing of “reasonable
5 necessity” as required under *Ake* and the state statute governing the appointment of
6 experts. *Gonzales*, 181 Ariz. at 511, 892 P.2d at 847. The court found that Petitioner “did
7 not explain how a fingerprint expert would be helpful, let alone necessary, to his defense.
8 The state did not offer fingerprint evidence against him.” *Id.* The court also noted that
9 Petitioner “made only general references to the credibility of Deborah’s identification
10 testimony to support his request for a serologist and an identification expert.” *Id.* Finally,
11 the court explained that “it does not appear that the identification expert testimony would
12 have been admissible under [state law].” *Id.* at n.4.

13 The Arizona Supreme Court did not unreasonably apply clearly established federal
14 law. In *Ake*, the United States Supreme Court held that a defendant has a constitutional
15 right to the appointment of a psychiatrist when his sanity is a “significant factor at trial.”
16 470 U.S. at 83. However, the Supreme Court has declined to consider whether the
17 holding in *Ake* extends beyond psychiatrists to other expert witnesses and investigators.
18 *See Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (“We therefore have no need to
19 determine as a matter of federal constitutional law what if any showing would have
20 entitled a defendant to [a criminal investigator, a fingerprint expert, or a ballistics
21 expert].”). The Ninth Circuit has limited the *Ake* holding to psychiatrists and specifically
22 held that *Ake* does not extend to eyewitness identification experts. *Jackson v. Ylst*, 921

1 F.2d 882, 886 (9th Cir. 1990). Therefore, Petitioner’s claim fails because the Supreme
2 Court has not clearly established a constitutional right to the appointment of forensic
3 experts. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) (“Given the lack of holdings from
4 [the Supreme] Court regarding [the petitioner’s claim], it cannot be said that the state
5 court unreasonably applied clearly established Federal law.”) (internal quotation marks
6 and brackets omitted).⁸

7
8
9 Claim 5 is denied.

10 **Claim 7**

11 Petitioner alleges that his right to testify and his right to due process were violated
12 when the trial court ruled that the prosecution could use his statements to the police for
13 impeachment purposes if he chose to testify. (Doc. 214 at 57.) Petitioner contends that
14 the statements, made while he was being treated in the hospital for an injury he received
15 during his arrest, were involuntary and therefore inadmissible for all purposes.
16
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18 Background

19 The trial court held a voluntariness hearing before Petitioner’s first trial. Phoenix
20 Detectives Michael Chambers and Billy Butler testified. Petitioner did not.
21

22 Petitioner was arrested in the early morning hours of February 23, 1990. He was
23 fleeing on foot from a traffic stop when an officer struck him in the head with a
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26 ⁸ Even if *Ake* extended to the type of experts sought by Petitioner, the Arizona
27 Supreme Court reasonably determined that Petitioner failed to show there was a necessity
28 for their appointment in his case. The State did not use fingerprint evidence against
Petitioner, Petitioner offered no specific support for his request for a serology expert (*see*
ROA 171), and under Arizona law the general rule is that “the trier of facts needs no
assistance from expert testimony on the question of reliability of identification.” *State v.*
Chapple, 135 Ariz. 281, 296, 660 P.2d 1208, 1223 (1983).

1 flashlight, knocking him to the ground. (RT 6/3/91 at 91.) Petitioner sustained an injury
2 above his right eye. (*Id.* at 92–93.) Before Petitioner was transported to the county
3 medical center at 6:47 a.m., Detective Butler advised him of his *Miranda* rights.⁹ (RT
4 1/16/91 at 61–62.) Petitioner indicated that he understood his rights. (*Id.* at 62.) When
5 asked if he would like to give his side of the story, Petitioner responded that he had
6 nothing to say. (*Id.*)
7

8
9 Later that morning, when Detective Chambers arrived at the homicide office, his
10 supervisor asked him to relieve one of the two uniformed officers who were guarding
11 Petitioner at the medical center. (*Id.* at 66–67.) When Chambers arrived at the hospital
12 about 9:00 a.m., Petitioner was on a hospital bed while a physician was cleaning soil out
13 of a deep laceration on Petitioner’s forehead. (*Id.* at 68–69, 76.) Petitioner complained
14 about pain, but also said that pain was good because it kept his head clear. (*Id.* at 78.)
15

16
17 Detective Chambers again asked Petitioner whether he understood his rights, but
18 he did not re-administer the *Miranda* warnings. (*Id.* at 70.) Petitioner indicated that he
19 understood his rights and stated that he did not want to talk about his arrest until he had
20 spoken with an attorney. (*Id.*) Detective Chambers offered to place a call, but Petitioner
21 did not provide the name of an attorney. (*Id.*)
22

23 Chambers continued speaking with Petitioner. Noting that Petitioner had a record
24 as a burglar, not a violent criminal, Detective Chambers suggested a scenario in which
25 Petitioner did not intend to harm anyone but only attacked Mr. Wagner because Wagner
26 confronted him during the burglary and attempted to prevent his escape. (*Id.* at 71, 75.)
27

28

⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 Petitioner acknowledged that Detective Chambers' description of the incident was
2 correct. (*Id.* at 71–72.) He also indicated that he had been struck in the head during the
3 confrontation and that he did not intend to harm the woman. (*Id.* at 72, 75.)
4

5 The trial court found that the statements were taken in violation of Petitioner's
6 rights under *Miranda* and precluded their use in the State's case-in-chief. However, the
7 court ruled that the statements would be admissible for impeachment purposes if
8 Petitioner were to testify. (RT 1/16/91 at 82–83.) Citing *Harris v. New York*, 401 U.S.
9 222 (1971), the court explained that “[a] statement plainly taken without giving *Miranda*
10 rights nevertheless becomes admissible to impeach if it is fundamentally competent. And
11 here, the issue of the competence of the defendant, based on his injury and so forth,
12 would go to the weight, not the admissibility. So to that extent suppression is denied.”
13 (*Id.* at 82.)
14

15
16 On appeal, Petitioner argued that under *Mincey v. Arizona*, 437 U.S. 385, 398
17 (1978), the statements should have been excluded for all purposes because his medical
18 condition at the time rendered the statements involuntary. He also contended that the trial
19 court's ruling prevented him from taking the stand in his own defense.
20
21

22 The Arizona Supreme Court denied the claim, holding that Petitioner's statements
23 were voluntary:

24 Our inquiry is whether the confession was the product of “a rational
25 intellect and a free will.” *Mincey*, 437 U.S. at 398. Gonzales was in the
26 hospital having his wound cleaned. He was not strapped down, sedated, or
27 incoherent. In fact, he stated that the pain from his wound “kept his head
28 clear.” Gonzales understood and responded to the questions and even asked
questions about statements he believed his girlfriend had made. Gonzales's
will was not overborne. This case is not like *Mincey* where the defendant

1 was in intensive care, confined to bed, in extreme pain, heavily sedated,
2 confused, incoherent, and eventually unconscious. Gonzales’s statements
3 were not coerced. The trial court did not err in ruling them admissible to
impeach.

4 *Gonzales*, 181 Ariz. at 512–13, 892 P.2d at 848–49 (additional citations omitted).¹⁰ This
5 decision was neither contrary to nor an unreasonable application of clearly established
6 federal law, nor was it based on an unreasonable determination of the facts.
7

8 Analysis

9 While a statement taken in violation of defendant’s *Miranda* rights may not be
10 used in the prosecution’s case in chief, it is admissible for impeachment so long as “the
11 trustworthiness of the evidence satisfies legal standards.” *Harris*, 401 U.S. at 224. Any
12 use of a defendant’s involuntary statement is a denial of due process. *Mincey*, 437 U.S. at
13 398.
14

15
16 To determine whether a statement was voluntary, a court considers whether, under
17 “the totality of the circumstances, the government obtained the statement by physical or
18 psychological coercion or by improper inducement so that the suspect’s will was
19 overborne.” *United States v. Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988). A statement
20 is involuntary if it is “extracted by any sort of threats or violence, [or] obtained by any
21 direct or implied promises, however slight, [or] by the exertion of any improper
22 influence.” *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (quoting *Bram v. United States*, 168
23 U.S. 532, 542–43 (1897)).
24
25
26

27
28 ¹⁰ The Arizona Supreme Court also found that Petitioner had waived the claim by
failing to testify, *Gonzales*, 181 Ariz. at 512, 892 P.2d at 848, but this Court held that the
procedural ruling was not adequate to bar habeas review. (Doc. 97 at 13.)

1 There is no evidence that Petitioner’s statements were extracted by threats,
2 violence, promises, or the exertion of improper influence. He was not subjected to
3 violence, promised leniency in exchange for making a statement, or lied to.
4

5 As the Arizona Supreme Court observed, the circumstances in which he made his
6 statements bear little resemblance to those in *Mincey*, where “[t]he statements at issue
7 were . . . the result of virtually continuous questioning of a seriously and painfully
8 wounded man on the edge of consciousness.” *Mincey*, 437 U.S. at 400.
9

10 Mincey had been seriously injured in a shootout with police, sustaining a wound in
11 his hip, which resulted in damage to the sciatic nerve and partial paralysis of his right
12 leg.¹¹ 437 U.S. at 396. When he arrived at the hospital, he was “depressed almost to the
13 point of coma.” *Id.* at 398. Tubes were inserted into his throat and through his nose into
14 his stomach, and a catheter was inserted into his bladder. *Id.* at 396. He was unable to
15 speak, and had to write out his answers to the detective’s questions. *Id.*
16
17

18 While Mincey was in the intensive care unit, in a “debilitated and helpless
19 condition,” a detective arrived and, after administering the *Miranda* advisory, proceeded
20 to interrogate Mincey over the course of four hours. *Id.* The United States Supreme Court
21 described the interrogation:
22

23 As soon as [Detective] Hust’s questions turned to the details of the
24 afternoon’s events, Mincey wrote: “This is all I can say without a lawyer.”
25 Hust nonetheless continued to question him, and a nurse who was present
26 suggested it would be best if Mincey answered. Mincey gave unresponsive
27 or uninformative answers to several more questions, and then said again
28 that he did not want to talk without a lawyer. Hust ignored that request and
another made immediately thereafter. Indeed, throughout the interrogation

¹¹ Mincey remained hospitalized for almost a month. 437 U.S. at 398 n.14.

1 Mincey vainly asked Hust to desist. Moreover, he complained several times
2 that he was confused or unable to think clearly, or that he could answer
3 more accurately the next day. But despite Mincey's entreaties to be let
4 alone, Hust ceased the interrogation only during intervals when Mincey lost
5 consciousness or received medical treatment, and after each such
6 interruption returned relentlessly to his task.

7 *Id.* at 399–401 (footnotes omitted). The Court concluded that “[i]t is hard to imagine a
8 situation less conducive to the exercise of ‘a rational intellect and a free will’ than
9 Mincey’s.” *Id.* at 398 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960)).

10 Petitioner, unlike Mincey, was not in a debilitated condition, physically or
11 mentally, when he made his statements to Detective Chambers. While Petitioner was in
12 pain and being treated for a laceration on his forehead, he was, by his own account, able
13 to think clearly. He was not confused, passing into and out of consciousness, or offering
14 incoherent statements to his interrogator.

15
16 Detective Chambers’ conduct was not coercive or overbearing. Although
17 Petitioner was in pain as his laceration was being treated, “it was not so severe as to
18 render him unable to make a voluntary statement or unduly susceptible to manipulation
19 by his interrogator[.]” *Campaneria v. Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989)
20 (upholding district court’s voluntariness finding where defendant was in intensive care
21 with knife wound but was “alert and awake despite his pain”); *see United States v. Khalil*,
22 214 F.3d 111, 115, 121–22 (2d Cir. 2000) (finding statement voluntary where defendant
23 was in hospital, suffering from a gunshot wound and awaiting surgery). Under the totality
24 of the circumstances, Petitioner’s inculpatory statements were not the product of
25 unconstitutional coercion, and his will was not overborne. Claim 7 is denied.
26
27
28

1 **Claim 9**

2 Petitioner alleges that his Sixth and Fourteenth Amendment rights were violated
3 because the trial judge was openly hostile toward Petitioner and refused to recuse
4 himself. (Doc. 214 at 64.)

5
6 Background

7 Petitioner's first trial ended in a hung jury. Before his second trial, Petitioner,
8 acting *pro per*, moved to disqualify the trial judge, Judge Joseph Howe, arguing that he
9 was biased and prejudiced against Petitioner. (ROA 104, 105.) Petitioner cited adverse
10 rulings issued by Judge Howe, particularly the denial of expert assistance on the issue of
11 eyewitness identification, and on-the-record comments made by the judge to Petitioner.
12 (ROA 105.)

13
14
15 Judge Howe initially denied the motions (RT 3/25/91 at 7, 9) but subsequently
16 vacated his ruling (ME 3/25/91). The matter was then assigned to Judge Rufus Coulter,
17 who held a hearing at which Petitioner explained his position:

18
19 [Judge Howe] is prejudicing me in a lot of motions that I bring forward. He
20 just keeps denying all my motions. And I just feel there is going to be a big
21 effect in this next trial because he was present, and he made a lot of
22 decisions in my last trial. And there was a lot of prejudicial remarks that he
23 has stated to me in court on previous hearings on my motions, and he just—
24 he just keeps determining to just take me to trial in front of him. He has
25 stated this to me, that he will not let me go to no other judge, just in front of
26 him. And I've made many attempts to get a change of judge, but he just
27 calls me a fool. He don't want to listen to me, whatever I have to present to
28 him. He says I'm just a stubborn brat. And I'm just being prejudiced. There
ain't no way I'm going to get a fair trial with Judge Howe anymore.

(RT 5/15/91 at 3.)

The prosecutor acknowledged that “there is some type of attitude problem

1 between Judge Howe and the defendant. I'm not sure why it started, how it started or
2 what effect it has had on this trial. Every time we appear in court, they snap and snarl at
3 each other. And I have no position, nor do I have any indication as to whether or not that
4 behavior will deprive the defendant of a fair trial.” (*Id.* at 4.) Judge Coulter denied the
5 motion, explaining, “I snap and snarl at a lot of attorneys, but I simply don’t—it doesn’t
6 mean it’s prejudice. Based on what has been presented, it will be ordered denying the
7 disqualification of Judge Howe.” (*Id.*)

10 After his conviction in the second trial but prior to sentencing, Petitioner filed
11 another *pro se* motion seeking to disqualify Judge Howe. (ROA 150.) Petitioner again
12 cited adverse rulings and the judge’s disparaging courtroom comments. In addition to
13 these criticisms, Petitioner noted that he had filed a complaint against Judge Howe with
14 the Judicial Conduct Commission. (ROA 150.) Judge Ronald Reinstein denied the
15 motion, finding that the previous allegations of bias had been ruled on and that the filing
16 of a complaint against a judge is not a basis for removal. (ME 10/1/91.)

19 On direct appeal, Petitioner’s appellate counsel raised the issue of judicial bias,
20 alleging that “[t]hroughout the proceedings in this matter, the trial judge’s impartiality
21 [sic] and bias were apparent” and citing a number of contentious exchanges between
22 Judge Howe and Petitioner. (Opening Br. at 56.) The Arizona Supreme Court rejected
23 Petitioner’s claim, finding that the reported exchanges between Petitioner and Judge
24 Howe did not indicate bias:

27 Gonzales points to several exchanges that he claims demonstrate the
28 judge’s animosity toward him, and argues that he was denied a fair trial and
sentencing. But Gonzales was a difficult litigant, and while the judge

1 understandably became impatient with him, particularly while he was
2 acting *pro per*, none of the exchanges would support Gonzales’s claim of
3 bias. Nor did any of the exchanges take place in front of the jury. Other
4 than pointing to the motions the judge denied and the sentence he imposed,
5 Gonzales has not shown how he was prejudiced.

6 *Gonzales*, 181 Ariz. at 511–12, 892 P.2d at 847–48. Citing *Liteky v. United States*, 510
7 U.S. 540, 555 (1994), the court concluded “that Judge Coulter properly denied
8 Gonzales’s motion for disqualification of Judge Howe.” *Id.* at 512, 892 P.2d at 848.

9 Analysis

10 The Due Process Clause guarantees a criminal defendant the right to a fair and
11 impartial judge. *See In re Murchison*, 349 U.S. 133, 136 (1955); *Rhoades v. Henry*, 598
12 F.3d 511, 519 (9th Cir. 2010) (“Due process requires that trials be conducted free of
13 actual bias as well as the appearance of bias.”). Judicial bias reaching the level of a due
14 process violation, and therefore requiring recusal, is presumed in cases “in which the
15 adjudicator has a pecuniary interest in the outcome and in which he has been the target of
16 personal abuse or criticism from the party before him.” *Withrow v. Larkin*, 421 U.S. 35,
17 47 (1975). Due process also requires recusal “if the judge acts as ‘part of the accusatory
18 process.’” *Crater v. Galaza*, 491 F.3d 1119, 1132 (9th Cir. 2007) (quoting *Murchison*,
19 349 U.S. at 137). “To succeed on a judicial bias claim, however, the petitioner must
20 overcome a presumption of honesty and integrity in those serving as adjudicators.”
21 *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) (quoting *Withrow*, 421 U.S. at
22 47).

23 In *Liteky*, the Supreme Court explained that a judge’s conduct at trial may be
24 “characterized as bias or prejudice” only if “it is so extreme as to display clear inability to
25

1 render fair judgment” or “display[s] a deep-seated favoritism or antagonism that would
2 make fair judgment impossible.” 510 U.S. at 551, 555. “[J]udicial remarks during the
3 course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties,
4 or their cases” do not establish bias unless “they reveal such a high degree of favoritism
5 or antagonism as to make fair judgment impossible.” *Id.* at 555. The Court elaborated:
6

7
8 *Not* establishing bias or partiality, however, are expressions of
9 impatience, dissatisfaction, annoyance, and even anger, that are within the
10 bounds of what imperfect men and women, even after having been
11 confirmed as federal judges, sometimes display. A judge’s ordinary efforts
12 at courtroom administration—even a stern and short-tempered judge’s
13 ordinary efforts at courtroom administration—remain immune.

14
15 *Id.* at 555–56; *see Larson*, 515 F.3d at 1067 (“In the absence of any evidence of some
16 extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are
17 generally sufficient to overcome the presumption of judicial integrity.”).

18
19 The Ninth Circuit has “repeatedly concluded that a ‘state court’s finding that the
20 trial judge was impartial . . . is a finding of historical fact that is entitled to a presumption
21 of correctness’ under 28 U.S.C. § 2254(d).” *Sivak v. Hardison*, 658 F.3d 898, 924 (9th
22 Cir. 2011) (quoting *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997)); *see also*
23 *Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998).

24
25 This Court, applying the “twin presumptions,” *Sivak*, 658 F.3d at 924, of
26 deference to the state courts’ determination that Judge Howe was not biased and the
27 presumption of judicial integrity, concludes that Petitioner’s judicial bias claim is
28 meritless.

Petitioner’s claim of bias is based on what he characterizes as a hostile

1 relationship between himself and Judge Howe. As evidence of bias, Petitioner cites a
2 handful of testy comments by Judge Howe in courtroom proceedings outside the presence
3 of the jury. (*See, e.g.*, RT 8/6/90 at 5; RT 4/18/91 at 21–22; RT 5/25/91 at 7–9.)
4 However, the record as a whole discloses nothing more than the “rare flareup” and “show
5 of evanescent irritation—a modicum of quick temper that must be allowed even judges.”
6 *Offutt v. United States*, 348 U.S. 11, 17 (1954); *see Larson*, 515 F.3d at 1067 (“Because
7 Larson has provided no evidence of the trial court’s alleged bias outside of these rulings
8 and remarks—which themselves revealed little more than the occasional mild frustration
9 with Larson’s pro se lawyering skills—his claim that he was denied a fair trial also
10 fails.”); *Jones v. Luebbers*, 359 F.3d 1005, 1014–15 (8th Cir. 2004) (finding that trial
11 judge’s expressions of anger and annoyance towards defense counsel did not rise to the
12 level of judicial bias where there was no showing that the judge was biased against
13 defendant or the merits of the case, or that judge’s demonstration of anger or annoyance
14 infected jurors).

15
16
17
18
19 While Petitioner was by his own admission a “difficult litigant” (Doc. 220 at 17),
20 on a number of occasions Judge Howe showed patience and forbearance. For example,
21 when Petitioner represented himself during a hearing on his motion for a new trial, Judge
22 Howe offered guidance on how to proceed (RT 12/16/91 at 75–76, 140), interacted with
23 Petitioner in a collegial manner (*id.* at 163), and even complimented Petitioner on his
24 performance (RT 12/17/91 at 128). Judge Howe’s occasional flareups when dealing with
25 Petitioner did not “reveal such a high degree of favoritism or antagonism as to make fair
26 judgment impossible.” *Liteky*, 510 at 555; *cf. Crater*, 491 F.3d at 1132 (finding recusal
27
28

1 not required where judge’s comments advising defendant to accept plea deal were
2 “founded upon his legitimate knowledge of the proceedings and outcome in [the] case”
3 and offer[ed] no evidence to overcome the ‘presumption of honesty and integrity’ that we
4 accord to the determinations of a judge”) (quoting *Withrow*, 421 U.S. at 47).

6 Finally, Petitioner asserts that “Judge Howe’s partiality was apparent” in his legal
7 rulings, most of which were adverse to Petitioner. (Doc. 214 at 69.) In *Liteky*, however,
8 the Court emphasized that “judicial rulings alone almost never constitute [a] valid basis
9 for a bias or partiality recusal motion.” 510 U.S. at 555. Moreover, Judge Howe also
10 made key rulings that favored Petitioner, including his decision to suppress Petitioner’s
11 confession and the recording of Ms. Wagner’s 911 call.

14 In sum, Petitioners allegations of judicial bias, based solely on Judge Howe’s legal
15 rulings and in-court comments, are insufficient to overcome the presumption of judicial
16 integrity and support a due process violation. The Arizona Supreme Court’s denial of this
17 claim was not contrary to or based on an unreasonable application of clearly established
18 federal law or an unreasonable determination of the facts. Claim 9 is denied.

20 **Claim 13**

21
22 Petitioner alleges that his rights under the Sixth and Fourteenth Amendments were
23 violated when the trial court permitted Deborah Wagner to remain in the courtroom
24 during jury selection and after her testimony. (Doc. 214 at 71.)

26 At Petitioner’s second trial, Ms. Wagner was present for *voir dire*, seated in the
27 back of the courtroom. (*See* RT 5/28/91 at 8.) Subsequently, after the jury had been
28 selected, defense counsel asked the court to ask the jurors if they had been tainted by

1 their exposure to Ms. Wagner’s presence. (*Id.*) The court declined, explaining that asking
2 such questions would “do more damage” than good and finding that there was no
3 evidence of misconduct and that Ms. Wagner had a right to be present under the Arizona
4 Constitution. (*Id.* at 8, 11.) The prosecutor indicated that, with respect to the remainder of
5 the proceedings, Ms. Wagner, who would be the State’s first witness, intended to be
6 present only for the opening statements and her own testimony. (*Id.* at 10.) Over the
7 prosecutor’s objection, the court barred Ms. Wagner from the courtroom during opening
8 statements but ruled that she could be present after her testimony. (*Id.* at 13.)

11 Petitioner raised this claim on direct appeal. (Opening Br. at 54.) The claim was
12 based upon the assumption that Ms. Wagner was present in the courtroom after her
13 testimony—an assumption that, Petitioner conceded, was supported by nothing in the
14 record. (*Id.* at n.19.) The Arizona Supreme Court rejected the claim, finding that Ms.
15 Wagner had a right to be present as a crime victim under the Arizona Constitution.
16 *Gonzales*, 181 Ariz. at 512, 892 P.2d at 848. The court then stated:

19 Deborah, on her own initiative, attended jury selection. She sat in the back
20 row of the courtroom, and neither the court nor counsel knew she was there
21 until several days later. Nor is there any evidence that prospective jurors
22 noticed Deborah or knew who she was during jury selection. *Gonzales* has
23 not shown that Deborah’s presence during jury selection was prejudicial.
24 There is no evidence that Deborah intended to or did remain in the
25 courtroom after she testified, and therefore we consider the matter no
26 further.

27 *Id.*

28 Petitioner is not entitled to relief on Claim 13 because the Arizona Supreme
Court’s rejection of the claim was not contrary to or based on an unreasonable application
of clearly established federal law. As the Sixth Circuit has noted, citing *Carey v.*

1 *Musladin*, 549 U.S. 70, 77 (2006), there is no clearly established federal law holding “the
2 mere presence of a murder victim’s family members in the courtroom can result in
3 inherent prejudice to the defendant’s right to a fair trial.” *United States v. Lawrence*, 735
4 F.3d 385, 441 (6th Cir. 2013).

6 In *Carey*, the Supreme Court observed that some “government-sponsored
7 practices” have been held inherently prejudicial, but noted that it has never held that
8 “private-actor courtroom conduct was so inherently prejudicial that it deprived a
9 defendant of a fair trial.” 549 U.S. at 76. The Court therefore vacated the Ninth Circuit’s
10 grant of habeas relief where the trial court had allowed a murder victim’s family
11 members to wear buttons displaying the victim’s photograph during trial. *Id.* at 77.

14 Petitioner also contends that the Arizona Supreme Court’s denial of this claim was
15 based on an unreasonable determination of the facts. The Arizona Supreme Court stated
16 that counsel did not know Ms. Wagner was present during jury selection “until several
17 days later,” but both defense counsel and the prosecutor told the judge they had been
18 aware of Ms. Wagner’s presence during *voir dire*. (RT 5/29/91 at 8, 11.) *Gonzales*, 181
19 Ariz. at 512, 892 P.2d at 848. The Court finds that this erroneous observation is
20 insufficient to satisfy § 2254(d)(2) because it was not relevant to the supreme court’s
21 analysis and was not the basis of the court’s conclusion that “Gonzales has not shown
22 that Deborah’s presence during jury selection was prejudicial.” *Id.*

26 Claim 13 is denied.

1 **Claims 14/15**¹²

2 Petitioner alleges that his rights under the Sixth and Fourteenth Amendments were
3 violated when the trial court determined that witness Martha Trinidad was unavailable
4 and allowed her previous testimony to be read into the record at his retrial. (Doc. 214 at
5 76.) He contends that the State failed to show that it had made a good faith effort to
6 secure Martha's presence and that the Arizona Supreme Court's denial of the claim on
7 appeal was contrary to and an unreasonable application of clearly established federal law
8 and based on an unreasonable determination of the facts. (*Id.* at 78–82.)

11 Facts

12 Martha Trinidad, the 14-year-old daughter of Petitioner's girlfriend Gloria
13 Alvarez, testified and was cross-examined at Petitioner's first trial. (RT 6/28/91 at 39–
14 78.) Before the second trial, the prosecutor personally served subpoenas on both Martha
15 and Ms. Alvarez on Martha's behalf. During Petitioner's second trial, Ms. Alvarez
16 testified that Martha was supposed to be living with her but had run away from home.
17 (RT 5/30/91 at 151.) Ms. Alvarez did not know where Martha could be found. (*Id.*) She
18 had run away twice before. (*Id.* at 152.) On one occasion, Ms. Alvarez's brother was able
19 to locate Martha, but after being returned home, she ran away again. (*Id.*)

23 Four days after Ms. Alvarez's testimony, the parties met with the trial court. The
24 prosecutor informed the court that he had spoken with Ms. Alvarez during a break and
25 she informed him that Martha had not returned home. (RT 3/3/91 at 100.) He also told the
26 court that the previous week he had requested Detective Butler to drive by the areas

28 _____
¹² Petitioner merged Claims 14 and 15 into a single claim. (Doc. 215 at 76 n.41.)

1 Martha was known to frequent, but the detective was unable to locate her.¹³ (RT 6/3/91 at
2 100, 104.) Petitioner’s counsel, while acknowledging that the prosecutor had been “real
3 up front” about Martha’s runaway episodes, questioned whether she was “unavailable”
4 under the rules and objected to the admission of her previous testimony. (*Id.* at 101.) The
5 court found Martha was “unavailable” and ruled her prior testimony admissible. (*Id.* at
6 102.) It was read into the record the next day. (RT 6/4/91 at 25–64.)

9 On appeal, Petitioner alleged that the State failed to make a good-faith effort to
10 secure Martha’s presence at retrial. *Gonzales*, 181 Ariz. at 508, 892 P.2d at 844. The
11 Arizona Supreme Court denied the claim:

13 Gonzales first argues that the state failed to make a good-faith effort
14 to secure Martha Trinidad’s presence at trial, and thus Martha was not
15 “unavailable” under Rule 804(a)(5), Ariz.R.Evid. Gonzales claims that the
16 state knew that Martha had a history of running away and should have tried
17 to hold her in some manner. He argues that, at the very least, the state
18 should have done more than simply drive by places where Martha “hung
19 out.”

20 Most “good-faith efforts” challenges involve unserved witnesses
21 who cannot be located. But here, Martha and her mother were personally
22 served. While nothing in Rule 804 suggests that service of a subpoena is a
23 *per se* showing of good-faith efforts, we have said that “the true issue is
24 whether the state made a good-faith effort to *locate* the witness so that he or
25 she could be put under subpoena.” *State v. Edwards*, 136 Ariz. 177, 182,
26 665 P.2d 59, 64 (1983) (citing *State v. Pereda*, 111 Ariz. 344, 345, 529
27 P.2d 695, 696 (1974) (“If a witness cannot be served by subpoena, it then
28 becomes a matter within the sound discretion of the trial court to determine
whether a sufficient effort has been made to place the witness under
subpoena.”). Service of process and the efforts made to locate Martha upon
learning that she was missing satisfy the unavailability requirement of the
rule.

¹³ At the hearing on Petitioner’s motion for a new trial, defense counsel testified that he had also unsuccessfully searched for Martha at one of the locations provided by her mother. (RT 12/16/91 at 46.)

1
2 *Id.* at 508–09, 892 P.2d at 844–45.

3 Analysis

4 The Confrontation Clause bars “admission of testimonial statements of a witness
5 who did not appear at trial unless he was unavailable to testify, and the defendant had . . .
6 a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53–54
7 (2004). The unavailability requirement is not met unless the government made a good-
8 faith effort to obtain the witness’s presence at trial. *Ohio v. Roberts*, 448 U.S. 56, 74
9 (1980), *abrogated on other grounds by Crawford*, 541 U.S. 36; *see Barber v. Page*, 390
10 U.S. 719, 725 (1968). While the prosecution need not take every conceivable measure to
11 secure a witness, it must demonstrate that it took reasonable steps to do so. *See Roberts*,
12 448 U.S. at 74–77.
13
14
15

16 In *Hardy v. Cross*, 132 S. Ct. 490, 495 (2011) (per curiam), the Supreme Court,
17 citing *Roberts*, reiterated that “when a witness disappears before trial, it is always
18 possible to think of additional steps that the prosecution might have taken to secure the
19 witness’ presence, but the Sixth Amendment does not require the prosecution to exhaust
20 every avenue of inquiry, no matter how unpromising.” The Court further noted that on
21 habeas review:
22

23 the deferential standard of review set out in 28 U.S.C. § 2254(d) does not
24 permit a federal court to overturn a state court’s decision on the question of
25 unavailability merely because the federal court identifies additional steps
26 that might have been taken. Under AEDPA, if the state-court decision was
27 reasonable, it cannot be disturbed.

28 *Id.*

1 The Arizona Supreme Court’s decision was reasonable. In *Roberts*, the
2 prosecution attempted to locate the witness by contacting her mother and family, who
3 reported that they did not know of her whereabouts, and by issuing a subpoena at her
4 parents’ home on five separate occasions over the course of four months. 448 U.S. at 74–
5 77. The Supreme Court, on direct review, found these good faith efforts sufficient to
6 show that the witness was unavailable. *Id.*; see *Jackson v. Brown*, 513 F.3d 1057, 1083
7 (9th Cir. 2008) (finding that the state made reasonable efforts where it served the witness
8 while she was in custody, checked a database of aliases, and visited the street corner
9 where she worked as a prostitute).

10 In this case, the prosecution actually served Martha with a subpoena, and served
11 Mrs. Alvarez on behalf of Martha. When Martha ran away from home again and her
12 mother testified that she did not know where Martha was, the prosecutor directed a
13 detective to search the areas she was known to frequent. Under these circumstances, the
14 Arizona Supreme Court’s decision upholding the trial court’s unavailability
15 determination was not “so lacking in justification that there was an error well understood
16 and comprehended in existing law beyond any possibility for fairminded disagreement.”
17 *Richter*, 562 U.S. at 103. This claim is denied.

18 **Claim 17**

19 Petitioner alleges that his rights were violated when the trial court improperly
20 admitted Ms. Wagner’s in-court identification, which was unreliable and tainted by her
21 exposure to Petitioner during the first trial. (Doc. 214 at 83.)

22 Prior to trial, following the *Dessureault* hearing, the court determined that Ms.

1 Wagner’s in-court identification of Petitioner would be admissible. The court found that
2 exposure to a newspaper photograph of Petitioner was insufficient to taint her in-court
3 identification of Petitioner. (RT 1/15/91 at 22–27.) The court explained that Ms. Wagner
4 “was present at the assault upon herself and had a considerable amount of time in which
5 to observe firsthand the assailant. There was absolutely nothing in police conduct and
6 nothing in the newspaper that would in any way taint her testimony.” (*Id.* at 27.)
7
8

9 At Petitioner’s first trial, Ms. Wagner, when asked on direct examination whether
10 the person who attacked her was in the courtroom, replied “Yes, I think he is” and
11 pointed to Petitioner. (RT 1/21/91 at 61.) On cross-examination, however, she suggested
12 that her identification of Petitioner had become more certain, explaining, “I didn’t get any
13 kind of feelings until I come into this courtroom yesterday and looked at the man you’re
14 trying to defend.” (RT 1/22/91 at 23.) On redirect examination, Ms. Wagner did not
15 hesitate when asked how certain she was that Petitioner was the attacker: “That man is
16 the man that was in our house and killed us [sic].” (*Id.* at 28.) The first trial ended in a
17 hung jury. Prior to the second trial, defense counsel moved to dismiss the charges, citing
18 the change in the strength of Ms. Wagner’s identification of Petitioner during the first
19 trial and his concern that she was “obviously going to identify [Petitioner] as the
20 perpetrator” at the next trial. (RT 3/25/91 at 3–4.) The court denied the motion. (*Id.* at 8.)
21 During her testimony at Petitioner’s retrial, Ms. Wagner identified Petitioner without
22 hesitation. (RT 5/28/91 at 59.)
23
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27 On direct appeal, Petitioner claimed that the trial court erred by admitting Ms.
28 Wagner’s identification testimony because it “was tainted by her inability to identify him

1 at the first trial and her identification did not have sufficient indications of reliability.”
2 (Opening Br. at 25.) He argued that the “suggestive position of Mr. Gonzales during the
3 first trial, seated next to defense counsel,” allowed her to make a positive in-court
4 identification during the second trial. (*Id.*) Petitioner also contended that the identification
5 was unreliable under the *Biggers* factors. (*Id.* at 26–28.) The Arizona Supreme Court held
6 that the claim was waived because Petitioner did not object prior to trial. *Gonzales*, 181
7 Ariz. at 510, 892 P.2d at 846. The court also found, in the alternative, that “merely sitting
8 at the defense table during trial where the defendant is neither shackled nor dressed in
9 prison garb is not unduly suggestive.” *Id.* Petitioner alleges that this decision was
10 contrary to and an unreasonable application of clearly established federal law, and based
11 on an unreasonable determination of the facts. (Doc. 214 at 84.)

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15 The Court disagrees. Petitioner does not cite, and this court has not found, a
16 Supreme Court case that extends the protections of *Biggers* and its progeny to cases
17 where the eyewitness first identifies a defendant at trial. *See United States v. Domina*,
18 784 F.2d 1361, 1368 (9th Cir. 1986) (“None of these cases has set any guidelines for in-
19 court identification procedures nor indicated that in-court identification must be made in
20 a way that is not suggestive.”); *see also Perry*, 132 S. Ct. at 720–21 (“We have not
21 extended pretrial screening for reliability to cases in which the suggestive circumstances
22 were not arranged by law enforcement officers.”). As a result, the Court cannot conclude
23 that the state courts’ resolution of Petitioner’s claim was contrary to, or an unreasonable
24 application of, Supreme Court precedent. *See Carey*, 549 U.S. at 74, 77.

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28 In addition, the mere fact that Ms. Wagner definitively identified Petitioner for the

1 first time at trial does not establish a constitutional violation. In *Johnson v. Sublett*, 63
2 F.3d 926, 928 (9th Cir. 1995), the victim-witness, Jones, identified the defendant,
3 Johnson, at trial. Johnson challenged the in-court identification. *Id.* He noted that Jones
4 had been unable to pick Johnson’s photo from a photographic lineup. *Id.* He also argued
5 that his presence at a suppression hearing, where he was identified by Jones, was unduly
6 suggestive and “this pretrial exposure to the victim rendered inadmissible the victim’s in-
7 court identification of Johnson before the jury.” *Id.*

8
9
10 On habeas review, the Ninth Circuit rejected these arguments. The court explained
11 that “the photo spread had no significance. If anything, Jones’ failure to pick Johnson out
12 of the photo spread was a benefit to the defense.” *Id.* at 929. Likewise, Ms. Wagner’s
13 inability to identify Petitioner in a photo lineup benefited the defense when she was
14 cross-examined at Petitioner’s second trial. (*See* RT 5/28/91 at 108–111.)

15
16
17 With respect to Jones’s exposure to Johnson at the suppression hearing, the Ninth
18 Circuit explained that “[t]he bare fact that a confrontation was suggestive does not alone
19 establish constitutional error. The confrontation must be impermissibly or unduly
20 suggestive under the totality of the circumstances.” *Johnson*, 63 F.3d at 929 (citing
21 *Biggers*, 409 U.S. at 196). While in-court identifications may be subject to some
22 suggestion, “the suggestive character of courtroom logistics [is] not *unnecessarily*
23 suggestive.” *Id.* (citing *Baker v. Hocker*, 496 F.2d 615, 617 (9th Cir. 1974)). Petitioner
24 does not suggest how his presence at the first trial was impermissibly or unduly
25 suggestive.
26
27

28 Moreover, any possible prejudice from Ms. Wagner’s in-court identification of

1 Petitioner during his retrial was mitigated by counsel’s cross-examination. *See id.* Ms.
2 Wagner conceded that she had “been in court several times and [had] looked at this
3 person sitting next to [defense counsel].” (RT 5/28/91 at 97.) Counsel also questioned
4 Ms. Wagner about her tentative identification of Petitioner during the first trial and her
5 inability to identify him from the photo lineup. (*Id.* at 97–99, 108–11.) This was
6 sufficient to test the reliability of the in-court identification. *See Perry*, 132 S. Ct. at 721.
7
8

9 Petitioner is not entitled to relief on Claim 17.

10 **Claim 19**

11 Petitioner alleges that the trial court violated his Fourteenth Amendment rights
12 when it failed to call a mistrial or strike the testimony of two prosecution witnesses after
13 they failed to obey an order of exclusion. (Doc. 214 at 87.)
14

15 At the start of Petitioner’s second trial, the court granted defense counsel’s request
16 under Rule 9.3 of the Arizona Rules of Criminal of Procedure to exclude Ms. Wagner
17 from the courtroom until after her testimony. (RT 5/28/91 at 12.) The court also stated
18 that its ruling on the sequestration of witnesses remained in place from the first trial. (*Id.*
19 at 12–13.)
20

21
22 Ms. Wagner was the prosecution’s first witness. Roger Daughtry testified directly
23 after her. At the end of his cross examination, he admitted that he had spoken with Ms.
24 Wagner outside the courtroom the day before. (RT 5/29/91 at 43.) On redirect
25 examination, Daughtry testified that the “general subject matter” of their conversation
26 was that “basically we were positive in our minds it’s the right man and we have no
27 doubt about it.” (*Id.* at 44.) Petitioner raised this claim on direct appeal, arguing that the
28

1 witnesses violated the court’s order and their encounter bolstered Ms. Wagner’s
2 confidence in her identification of Petitioner. (Opening Brief at 37–38.)
3

4 The Arizona Supreme Court found the issue waived and held there was no
5 fundamental error:

6 Gonzales was notified well in advance of the second trial and [sic] this
7 conversation that Deborah would identify Gonzales without hesitation.
8 Gonzales made no objection at trial. The court did not commit fundamental
9 error by failing to declare a mistrial *sua sponte*.

10 *Gonzales*, 181 Ariz. at 508, 892 P.2d at 844.

11 Petitioner contends that the court’s ruling was an unreasonable application of
12 clearly established federal law because the court “failed to identify the controlling
13 constitutional authority” and “fundamentally failed to recognize the impact of the legal
14 principles made relevant by the facts of this case.” (Doc. 214 at 91.) The Court disagrees.
15

16 First, the United States Supreme Court has explained that to withstand analysis
17 under 2254(d)(1), a state court decision “does not require citation of our cases—indeed, it
18 does not even require *awareness* of our cases, so long as neither the reasoning nor the
19 result of the state-court decision contradicts them.” *Early v. Packer*, 537 U.S. 3, 8 (2002)
20 (per curiam).
21

22 More significantly, there is no clearly established law holding that the failure to
23 exclude or sequester witnesses violates due process.¹⁴ In *Larson v. Palmateer*, 515 F.3d
24

25
26 ¹⁴ As clearly established federal law governing this claim, Petitioner cites *Geders*
27 *v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989). *Geders*
28 and *Perry* address the Sixth Amendment right to counsel in the specific context of
defendants who were prohibited by a judge from conferring with their attorney during a
recess from their testimony. The cases discuss the general principle that judges have the
authority to sequester witnesses and order them not to discuss their testimony in order to

1 at 1065, the Ninth Circuit observed that “[n]either this court nor the Supreme Court has
2 ever held that the failure to exclude witnesses can violate due process.” *Id.* at 1065. The
3 trial court has the *discretion* to exclude the testimony of a witness who disobeyed an
4 exclusion order. *See Holder v. United States*, 150 U.S. 91, 92 (1893). However, “[s]ince
5 the purpose of the order is to gain assurance of credibility and its violation is a legitimate
6 subject of comment in this respect, it seems proper that unless the violation has somehow
7 so discredited the witness as to render his testimony incredible as a matter of law he
8 should not be disqualified from testifying.” *Taylor v. United States*, 388 F.2d 786, 788
9 (9th Cir. 1967).

10
11
12
13 For purposes of habeas review, the question is whether the contact between
14 Daughtry and Ms. Wagner “rendered the trial so fundamentally unfair as to violate due
15 process.” *Larson*, 515 F.3d at 1064 (citing *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th
16 Cir. 1998)). It did not. Ms. Wagner did not “tailor” her testimony to fit Daughtry’s. Her
17 testimony preceded his. They each repeated their description of Petitioner’s appearance,
18 including his clothing, from the first trial. Daughtry again testified that the man
19 burglarizing his home wore a plaid shirt or jacket, beige with big red squares, with some
20 gray or green mixed in, jeans, white tennis shoes, and a baseball cap. (RT 5/59/91 at 16;
21 *see* RT 1/17/91 at 45, 55, 73.) Ms. Wagner again testified that her assailant wore “all dark
22 clothing” with light colored tennis shoes and a hat without a brim, like a “stocking cap.”
23 (RT 5/28/91 at 69–70; *see* RT 1/21/91 at 60, RT 1/22/91 at 4, 11–13.)

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“to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections.” *Perry*, 488 U.S. at 281–82.

1 While Petitioner asserts that the conversation between Daughtry and Ms. Wagner
2 bolstered the confidence with which Ms. Wagner identified Petitioner during the second
3 trial, the record shows that she had become positive in her identification of Petitioner by
4 the time she was cross-examined in the first trial. When defense counsel asked about her
5 failure to pick Petitioner from the photographic lineup, Ms. Wagner stated “I didn’t get
6 any kind of feeling until I came into this courtroom yesterday and looked at the man
7 you’re trying to defend.” (RT 1/22/91 at 23.)
8

9
10 In *U. S. ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976), the Seventh Circuit on
11 habeas review considered the petitioner’s claim that he was deprived of a fair trial when
12 prosecutors held a pretrial meeting with their major witnesses in violation of the trial
13 court’s sequestration order. At the meeting, the witnesses “discussed their general
14 impressions of the petitioner,” including the fact that he was younger than the age
15 reported by one of the witnesses. *Id.* at 757. “However, discrepancies were not ironed
16 out, nor did the witnesses have a general discussion of their prospective testimony among
17 themselves.” *Id.* at 757. The petitioner’s trial counsel used the meeting to impeach the
18 witnesses, but made no objection to the meeting during trial and did not raise the issue on
19 appeal. *Id.* The Seventh Circuit held that the petitioner was not entitled to habeas relief,
20 explaining:
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24 That the witnesses in this case did meet together, and did discuss some
25 aspects of their testimony was a proper subject for impeachment on cross-
26 examination and for comment during closing argument. However, the
27 violation here is not so extreme as to render the witnesses’ testimony
28 incredible as a matter of law, nor is it so extreme as to deny the petitioner
fundamental fairness in his trial.

1 *Id.* at 758.

2 Here, the meeting between Daughtry and Ms. Wagner did not render Petitioner's
3 trial fundamentally unfair. The discrepancies in their testimony concerning Petitioner's
4 appearance remained, and any increase in the certainty with which Ms. Wagner identified
5 Petitioner at the second trial was not attributable to her discussion with Daughtry.
6

7 The Arizona Supreme Court's denial of this claim was neither contrary to nor an
8 unreasonable application of Supreme Court law. Accordingly, Claim 19 is denied.
9

10 **Claim 20**

11 Petitioner alleges the trial court denied his right to counsel by discussing a jury
12 note without summoning counsel. (Doc. 214 at 92.)
13

14 During an afternoon break on the second day of Petitioner's retrial, one of the
15 jurors submitted a note to the bailiff. (ME 5/29/91.) The note, which was unsigned and
16 marked 3:06 p.m., asked if any hair samples were found in the cap in the Wagners'
17 courtyard and whether any fingerprints were found on the lighter at Daughtry's home.
18 (ROA 110.) The judge showed the note to counsel. (RT 5/29/91 at 119.) At 3:28 p.m., the
19 court went back on the record to discuss the note with counsel and Petitioner, outside the
20 presence of the jury. (RT 5/29/91 at 118; ME 5/29/91.) Defense counsel expressed
21 concern that the letter indicated the jurors were already discussing the case. (*Id.* at 118–
22 19.) The judge told the parties that the note “came from one juror. I talked to them about
23 it.” (*Id.* at 119.) Counsel again expressed concern that the jurors were disobeying the
24 court's admonition. (*Id.*) The judge responded, “I'll find out.” (*Id.*)
25
26
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After the jurors returned to the courtroom, the judge addressed them as follows:

1 Welcome back, jurors. One of you handed me a written question. May I
2 inquire whether that was just from one juror [sic] talked to each other
3 before I got a no [sic] from question writer. It's okay if you write down a
4 question and give it to me. What I did in this case was show it to counsel.
Remember, you haven't heard the whole case.

5 (*Id.* at 119–20.) The judge then cautioned the jurors to be patient and to keep an open
6 mind while the evidence came in. (*Id.* at 120.)

7
8 On direct appeal, the Arizona Supreme Court found the issue waived and held
9 there was no fundamental error:

10 Gonzales argues that he was denied his right to counsel when the court
11 discussed a juror note with the jury outside the presence of counsel. It
12 appears from the record that the judge simply inquired about the source of
13 the note and did not discuss its contents. Thereafter, he discussed the note
14 with the lawyers, and all agreed that the judge should simply admonish the
15 jury not to form any opinions until all the evidence was in and instruct them
on the proper procedure for juror notes. Gonzales made no objection at
trial. There was no error, let alone fundamental error.

16 *Gonzales*, 181 Ariz. at 508, 892 P.2d at 844.

17 Petitioner contends that the court's statement that the trial judge "simply inquired
18 about the source of the note and did not discuss its contents" is an unreasonable
19 determination of the facts under 28 U.S.C. § 2254(d)(2). (Doc. 214 at 94.) He also asserts
20 that the court's conclusion that there was no error was contrary to and an unreasonable
21 application of clearly-established federal law "regarding the right to have counsel present
22 at all critical stages of the proceedings." (*Id.*)

23
24
25 Neither of these arguments is convincing. First, the record is ambiguous with
26 respect to the substance of the judge's discussion with the jurors. Textual ambiguity does
27 not render the Arizona Supreme Court's factual determination objectively unreasonable.
28

1 *See Rice v. Collins*, 546 U.S. at 341–42 (explaining that the fact that “[r]easonable minds
2 reviewing the record might disagree” about the finding in question is not sufficient on
3 habeas review to supersede the state court’s determination). Contrary to Petitioner’s
4 argument, it is not implausible that the judge spoke with the jurors to determine who
5 wrote the unsigned note without discussing its contents and subsequently addressed the
6 jurors to “find out” if they had discussed the note among themselves.
7
8

9 The Arizona Supreme Court’s finding of “no error” was not contrary to or an
10 unreasonable application of clearly established federal law. Petitioner’s reliance on
11 *Rushen v. Spain*, 464 U.S. 114 (1983) is misplaced. In *Rushen*, the Supreme Court
12 vacated the granting of a writ of habeas corpus by lower federal courts, and
13 “emphatically disagree[ed]” with the lower courts’ view that unrecorded *ex parte*
14 communications between a trial judge and juror can never be harmless error. *Id.* at 117.
15 The Court noted that few trials occur “in which one or more jurors do not have occasion
16 to speak to the trial judge about something, whether it relates to a matter of personal
17 comfort or to some aspect of the trial.” *Id.* at 118.
18
19

20 Accordingly, *ex parte* contacts are subject to the rule of harmless error. *Id.* at 120.
21 In order to grant relief, the error must have “had a substantial and injurious effect or
22 influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623
23 (1993); *see Smith v. Curry*, 580 F.3d 1071, 1085 (9th Cir. 2009).
24
25

26 In *Rushen*, the Court instructed that “[w]hen an *ex parte* communication relates to
27 some aspect of the trial, the trial judge generally should disclose the communication to
28 counsel for all parties.” *Id.* at 119. That is what happened here. The judge disclosed the

1 communication immediately after it occurred. Defense counsel did not object to the *ex*
2 *parte* communication. He was concerned not with the subject matter of the
3 communication but with the possibility that the jurors had improperly begun discussing
4 the case. The court questioned the jurors and determined that they had not done so.

5
6 On this record, even assuming the trial court erred in having the *ex parte*
7 communication, such error was harmless given the absence of any evidence that the
8 substance of the communication had an effect on the jury's impartiality. *Rushen*, 464
9 U.S. at 120. Claim 20 is denied.

10
11 **Claim 26**

12
13 Petitioner alleges that the trial court committed fundamental error by not properly
14 defining reasonable doubt in the jury instructions. (Doc. 214 at 95.)

15 At the conclusion of the trial, the court provided the following instructions:

16
17 The defendant has pled not guilty. The defendant's plea of not guilty
18 means that the State must prove every part of the charge beyond a
reasonable doubt.

19
20 The law does not require a defendant to prove his innocence. He is
21 presumed by law to be innocent. This means the State must prove all of its
case against the defendant.

22
23 The State must prove the defendant guilty beyond a reasonable
doubt.

24
25 The State must prove all of its case against the defendant with its
own evidence.

26 (RT 6/6/91 at 44.)

27
28 According to Petitioner, because the court failed to define the phrase "reasonable
doubt," "the jury was unable to accurately apply the state's burden to the facts presented

1 in this case.” (Doc. 214 at 96.) Petitioner raised the claim on direct appeal. The Arizona
2 Supreme Court’s rejection of the claim, *Gonzales*, 181 Ariz. at 508, 892 P.2d at 844, was
3 neither contrary to nor an unreasonable application of clearly established federal law.
4 “The beyond a reasonable doubt standard is a requirement of due process, but the
5 Constitution neither prohibits trial courts from defining reasonable doubt nor requires
6 them to do so as a matter of course.” *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Claim 26
7 is denied.
8

9
10 **Claim 27**

11 Petitioner alleges that he was denied his right to counsel during the proceedings on
12 his motion for a new trial. (Doc. 214 at 98.)
13

14 On direct appeal, Petitioner argued that he did not knowingly and intelligently
15 waive his right to counsel, and, even if he did, he withdrew the waiver and was thereafter
16 denied appointed counsel at the start of the hearing on his motion. The Arizona Supreme
17 Court denied the claim. *Gonzales*, 181 Ariz. at 510, 892 P.2d at 846. Petitioner contends
18 that the decision was based on an unreasonable determination of the facts and was
19 contrary to and an unreasonable application of clearly established federal law. The Court
20 disagrees.
21

22
23 Background

24 Petitioner was represented at trial by Morton Rivkind. Following the first trial,
25 Petitioner waived counsel and Rivkind moved to withdraw. (ROA 94, 96; RT 4/18/91.)
26 The court found Petitioner competent to represent himself, granted the motion to
27 withdraw, and appointed Rivkind as advisory counsel. (RT 4/18/91 at 8; ME 4/18/91.)
28

1 Petitioner subsequently withdrew his request to proceed *pro per*, and Rivkind was
2 reappointed prior to the second trial. (*See* ROA 106.)
3

4 Following Petitioner's conviction, Rivkind filed a motion for new trial. (ROA
5 131.) Petitioner then filed a motion to proceed *pro per*, a motion for a new trial, and a
6 motion alleging ineffective assistance of counsel. (ROA 134, 135, 138.) Rivkind filed a
7 motion to withdraw as counsel. (ROA 139.) At a status conference on August 6, 1991,
8 the court addressed Petitioner to be sure he understood the proceedings and to determine
9 if he was competent to represent himself. (RT 8/6/91 at 3–11.) The court found that
10 Petitioner understood the risks and difficulties of proceeding *pro per* and again
11 determined that he was competent to represent himself. (*Id.* at 11–13.) The court
12 appointed Gene Stratford as advisory counsel. (ME 8/6/91.) Stratford was subsequently
13 replaced by Jeffrey Ross.
14
15

16 The hearing on Petitioner's motion for a new trial was held on December 9, 1991.
17 At the outset of the hearing the court considered Ross's motion to withdraw. (ME
18 12/9/91.) Citing attorney-client privilege, Ross indicated that he was unable to disclose
19 the basis of his need to withdraw. (RT 12/9/91 at 3–4.) Petitioner stated that Ross had
20 told him he was too busy with other cases to competently assist Petitioner. (*Id.* at 4–5.)
21 To support this contention, Petitioner explained that he had secretly recorded his
22 conversation with Ross. (*Id.* at 6.) After the trial court listened to the tape, Ross indicated
23 that his motion to withdraw was unrelated to his time commitments. (*Id.* at 10.) The court
24 again explained the difference to Petitioner between an advisory attorney and one that
25 represented the defendant. (*Id.* at 11–12.) The court then admonished Petitioner, noting
26
27
28

1 that Ross was “just trying to give you honest advice, and here you are secretly recording
2 him, which is a way to destroy relationship between you and a lawyer.” (*Id.* at 15.) The
3 court continued:
4

5 You had the public defender, and for reasons they didn’t express, they
6 moved to withdraw.

7 You had Mr. Rivkind, you fired him twice.

8 Mr. Stratford was on the case for a while, and then he withdrew.

9 Now Mr. Ross moves to withdraw.

10
11 The common element is you don’t get along with any lawyer, it appears, on
12 the record that I have.

13 (*Id.* at 15.)

14 The trial court granted Ross’s motion to withdraw. (*Id.* at 16.) The court told
15 Petitioner to proceed with his motion for a new trial. (*Id.* at 20.) Petitioner repeated that
16 he needed “counsel.” (*Id.* at 20–21.)
17

18 The hearing continued a week later. On the third day of the hearing, Petitioner
19 requested “advisory” counsel, which the court again denied. (RT 12/17/91 at 2, 4–5, 6.)
20 Following the hearing, the court denied Petitioner’s motion for new trial. (*Id.* at 121.)
21

22 Analysis

23 In denying this claim on direct appeal, the Arizona Supreme Court found that
24 Petitioner did not withdraw his waiver of the right to counsel:
25

26 The record is clear that the judge made the appropriate inquiries and
27 admonitions and properly found Gonzales’s waiver to be knowing and
28 intelligent.

Even if his waiver of counsel were knowing and intelligent,

1 Gonzales claims that he withdrew his waiver. He relies primarily on Rule
2 6.1(e), Ariz.R.Crim.P., which states that a defendant may withdraw his
3 waiver of the right to counsel at any time. But Gonzales asked for advisory
4 counsel, which is discretionary under Rule 6.1(c), Ariz.R.Crim.P.^{FN3} He did
5 not ask to have counsel appointed. He thus did not withdraw his waiver of
6 counsel. The court did not abuse its discretion by failing to continue the
7 hearing and by refusing to appoint new advisory counsel. The right to
8 represent oneself is a constitutional right. *Faretta v. California*, 422 U.S.
9 806, 819–20, 95 S. Ct. 2525, 2533, 45 L.Ed.2d 562 (1975). A court may not
10 interfere with that choice without an unequivocal revocation of the
11 defendant’s waiver of counsel. *State v. Rickman*, 148 Ariz. 499, 503, 715
12 P.2d 752, 756 (1986). “Once a defendant has waived his right to counsel,
13 that waiver continues until he ‘clearly’ indicates a change of mind.” *Id.*
14 After reviewing the record, we find that Gonzales never withdrew his
15 waiver of counsel.

11 FN3. The record clearly indicates that Gonzales was seeking *advisory*
12 counsel only. (R.T. of Dec. 9, 1991, at 17–22; R.T. of Dec. 17, 1991, at 2,
13 4).

14 *Gonzales*, 181 Ariz. at 510, 892 P.2d at 846.

15 Petitioner contends that the Arizona Supreme Court’s denial of the claim was
16 based on its unreasonable determination that Petitioner did not withdraw his waiver but
17 only requested advisory counsel.
18

19 At the December 9 hearing, after Ross had withdrawn as advisory counsel,
20 Petitioner insisted that he needed counsel in order to proceed with the hearing on his
21 motion for a new trial. In context, it is clear that Petitioner was referring to advisory
22 counsel. As Respondents note, he never stated that he wished to give up his *pro per*
23 status, as evidenced in his statements to the court that “I need counsel to advise me” and
24 “that’s why I need advisory counsel.” (RT 12/9/91 at 18, 21.) Later, on the third day of
25 the hearing, the court addressed a motion for reconsideration filed by Petitioner. When
26 asked, “What is your motion?” Petitioner replied, “For counsel just to like advise me,
27
28

1 because I'm not understanding all these statutes that they're talking about . . ." (RT
2 12/17/91 at 2; *see id.* at 5.) The court explained that it had twice granted Petitioner's
3 motion to proceed *pro per*, each time appointing advisory counsel to assist Petitioner. (*Id.*
4 at 5–6.) Petitioner asked, "So that was your own doing, putting in advisory counsel?" The
5 court responded, "It sure was. You didn't ask for it," to which Petitioner replied, "That's
6 what I'm asking for." (*Id.* at 6.)
7
8

9 Based on this record, the Arizona Supreme Court's factual determination that
10 Petitioner did not withdraw his waiver is not objectively unreasonable. *See Rice v.*
11 *Collins*, 546 U.S. at 341–42. Relief is precluded under § 2254(d)(2).
12

13 Petitioner also contends that the Arizona Supreme Court's denial of the claim was
14 contrary to and an unreasonable application of clearly established federal law. Because
15 Petitioner did not withdraw his waiver of counsel, and instead only requested the
16 appointment of advisory counsel, the Arizona Supreme Court's ruling was not contrary to
17 or an unreasonable application of clearly established federal law. The trial court's refusal
18 to appoint new advisory counsel did not violate Petitioner's constitutional rights, because
19 "a defendant who waives his right to counsel does not have a right to advisory counsel."
20 *United States v. Moreland*, 622 F.3d 1147, 1155 (9th Cir. 2010); *see United States v.*
21 *Mendez-Sanchez*, 563 F.3d 935, 947 (9th Cir. 2009) (noting that "under our established
22 precedent there is no right to the assistance of standby counsel"); *see also McKaskle v.*
23 *Wiggins*, 465 U.S. 168, 183 (1984) ("*Faretta* does not require a trial judge to permit
24 'hybrid' representation.>").
25
26
27
28

Even if Petitioner had withdrawn his waiver of counsel, § 2254(d)(1) would

1 preclude relief. There is no clearly established federal law requiring the appointment of
2 counsel after a defendant has validly waived counsel.

3
4 In *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (per curiam), the defendant waived
5 his right to counsel on three occasions. After he was convicted, he requested the
6 appointment of counsel to file a motion for a new trial. *Id.* at 1448. The trial court,
7 exercising its discretion under California law, denied the motion. *Id.* The state appellate
8 court affirmed. *Id.* On habeas review the Ninth Circuit Court of Appeals reversed the
9 district court’s denial of habeas relief, holding that the “Sixth Amendment right to
10 counsel was violated when the trial court denied his timely request for representation for
11 a new trial motion.” *Rodgers v. Marshall*, 678 F.3d 1149, 1163 (9th Cir. 2012). In
12 reversing the Ninth Circuit, the Court “assumed, without so holding,” that “after a
13 defendant’s valid waiver of his right to trial counsel under *Faretta*, a post-trial, preappeal
14 motion for a new trial is a critical stage of the prosecution.” *Marshall*, 133 S. Ct. at 1449.
15 The Court noted, however, that it has not announced a “specific legal rule” regarding
16 “postwaiver requests of appointment of counsel.” *Id.* at 1450. Therefore, the conclusion
17 of the California state courts that there was no Sixth Amendment violation was neither
18 contrary to nor an unreasonable application of clearly established federal law. *Id.* at 1451.

19
20
21
22
23 The Arizona Supreme Court’s denial of this claim was not “so lacking in
24 justification that there was an error well understood and comprehended in existing law
25 beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.
26 Accordingly, Petitioner is not entitled to relief on Claim 27.

27
28 **Claims 29 and 30**

1
2 The trial court sentenced Petitioner to death based on two aggravating factors: that
3 Petitioner knowingly created a grave risk of death to another person in addition to the
4 victim of the offense, under A.R.S. § 13–703(F)(3), and that the murder was committed
5 for pecuniary gain, under § 13–703(F)(5).¹⁵ The Arizona Supreme Court affirmed.
6 *Gonzales*, 181 Ariz. at 513–14, 892 P.2d at 849–50. Petitioner challenges the state courts’
7 application of these factors. (Doc. 214 at 106–15.)
8

9
10 Whether a state court correctly applied an aggravating factor is a question of state
11 law, and federal habeas review is limited to determining whether the state court’s finding
12 was so arbitrary or capricious as to constitute an independent due process or Eighth
13 Amendment violation. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). A state court’s finding
14 of an aggravating factor is arbitrary or capricious only if it is a finding no reasonable
15 sentencer could have made. *Id.* at 783. The question is “whether, after viewing the
16 evidence in the light most favorable to the prosecution, *any* rational trier of fact” could
17 have found the factor beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319
18 (1979). A habeas court faced with a record of historical facts which supports conflicting
19 inferences must presume that the trier of fact resolved any such conflicts in favor of the
20 prosecution. *Id.* at 326.
21
22

23
24 Applying these principles, the Court concludes that Petitioner is not entitled to
25 relief on Claims 29 and 30.
26

27 Claim 29

28

¹⁵ Arizona has since renumbered this statute. The current corresponding sections are 13–751(F)(3) and (5).

1 Petitioner alleges that the state courts applied Arizona law in an arbitrary and
2 capricious way by finding that Petitioner knowingly created a grave risk of harm to Ms.
3 Wagner. (Doc. 214 at 106.) Petitioner also contends that the courts’ factual findings were
4 unreasonable and violated the principle that aggravating factors must sufficiently narrow
5 the class of defendants eligible for the death penalty. (*Id.*)
6

7 The grave risk of death aggravating factor provides that, in determining whether to
8 impose a death sentence, a trier of fact shall consider whether “[i]n the commission of the
9 offense the defendant knowingly created a grave risk of death to another person or
10 persons in addition to the person murdered during the commission of the offense.” A.R.S.
11 § 13-703(F)(3).
12

13 The trial court found that the factor had been proved. The court determined that
14 “Deborah Wagner was not an intended victim of the murder of Darrel Wagner, but was,
15 to the Defendant’s personal knowledge, within the zone of danger during the time the
16 Defendant was stabbing Darrel Wagner, and quite aside from that time in which
17 Defendant was deliberately and independently stabbing Deborah Wagner.” (RT 4/27/92
18 at 59.)
19

20 On direct appeal, the Arizona Supreme agreed that Petitioner “knowingly placed
21 Deborah in grave risk of death even before turning his weapon on her.” *Gonzales*, 181
22 Ariz. at 514, 892 P.2d at 850. The court explained that its “inquiry is whether, during the
23 course of the killing, the defendant knowingly engaged in conduct that created a real and
24 substantial likelihood that a specific third person might suffer fatal injuries.” *Id.*
25 (quotation omitted). The court then reasoned:
26
27
28

1 Deborah was confined in a small (10' x 10') courtyard with Gonzales as he
2 repeatedly stabbed her husband. Moreover, Deborah was not just a
3 bystander. She attempted to rescue her husband by jumping on Gonzales's
4 back as he was stabbing Darrel. Whether she could have instead retreated is
5 irrelevant. One who murders knowing others are present can expect that
6 someone may attempt to interfere, particularly when that person is the
7 victim's spouse. Gonzales's actions created a "zone of danger" for Deborah
8 in which there was a realistic possibility that she may have suffered fatal
9 injuries. Indeed, she almost died. This grave risk occurred, as the statute
10 requires, during the commission of the offense against Darrel.

11 We reject Gonzales's argument that § 13-703(F)(3) does not apply
12 because Deborah was an "intended victim" of the offense. For Deborah to
13 have been an intended victim, as contemplated by our cases, Gonzales must
14 have acted with the intent to kill her. Moreover, the intent to kill must have
15 been formed *before* Deborah was placed in grave risk of death. Gonzales
16 argues that Deborah became an intended victim the moment she jumped on
17 his back. But Deborah was placed in grave risk *before* she jumped on his
18 back. Thus, even if Gonzales stabbed Deborah with the intent to kill her,
19 the "intended victim" argument fails because that intent was not formed
20 before Deborah was placed in grave risk. Additionally, there was no
21 evidence that Gonzales intended to kill Deborah, and the state did not
22 charge him with her attempted murder. Gonzales's only intended murder
23 victim was Darrel. When Deborah jumped on Gonzales's back, his intent
24 was to get her off. He did this by using his body and his weapon, seriously
25 injuring her in the process. Once he threw her off his back, he fled the
26 scene. Gonzales's reliance on the "intended victim" cases is thus misplaced.
27 We find that § 13-703(F)(3) is satisfied.

28 *Id.* (citations omitted).

29 Petitioner contends that the Arizona Supreme Court unreasonably found that Ms.
30 Wagner was not an intended victim. According to Petitioner, "it is impossible for a court
31 to find that Gonzales attacked Mr. Wagner with a knife with the intent of killing him
32 while simultaneously finding that Gonzales did not intend to kill Ms. Wagner when he
33 attacked her with the same knife moments later." (Doc. 214 at 109.) The Court disagrees.

34 In arguing that the Arizona courts "failed to apply a consistent and coherent

1 definition of intent” (Doc. 217 at 56), Petitioner conflates the legal element of intent
2 required to prove the underlying offense in a felony murder charge with the assessment
3 necessary to determine whether Ms. Wagner, like her husband, was an intended murder
4 victim. There is nothing unreasonable about the Arizona Supreme Court drawing a
5 distinction between Petitioner’s intent in attacking Mr. Wagner and his intent in attacking
6 Ms. Wagner. Furthermore, a reasonable sentencer could have found, for the reasons set
7 forth by the Arizona Supreme Court, that Ms. Wagner was in the zone of danger created
8 by Petitioner’s attack on Mr. Wagner, and that if Petitioner ever intended to kill her, it
9 was only after she jumped on his back in order to stop the ongoing attack on her husband.
10 Petitioner’s intent in attacking Ms. Wagner was to free himself. When he accomplished
11 that by knocking her from his back, he fled the scene.
12

13
14
15 Petitioner argues that the (F)(3) factor fails to narrow the class of death-eligible
16 defendants. As Petitioner acknowledges, the Arizona Supreme Court has held that the
17 factor is not overbroad or arbitrary. *See, e.g., State v. Roque*, 213 Ariz. 193, 218, 141
18 P.3d 368, 393 (2006) (“The (F)(3) factor still requires a defendant to have put a third
19 party at grave risk of death in the commission of a murder, and, by distinguishing that act
20 from murders in which no third parties are endangered, the (F)(3) factor adequately
21 narrows the class of defendants eligible for the death penalty.”). Petitioner argues,
22 however, that in his case the Arizona Supreme Court construed the factor “in an arbitrary,
23 vague and overbroad way when it concluded that ‘[o]ne who murders knowing others are
24 present can expect that someone may attempt to interfere, particularly when that person is
25 the victim’s spouse.’” (Doc. 214 at 112.)
26
27
28

1 Again, Petitioner mischaracterizes the court’s ruling. The court did not, as
2 Petitioner asserts, find that “committing a murder in front of another person immediately
3 qualifies that person as having placed another in a grave risk of harm.” (*Id.*) Instead, in
4 finding that Petitioner created a “zone of danger,” the court took into account a variety of
5 factors, including the small space in which the attacks occurred and the fact that Ms.
6 Wagner was not simply a bystander but the victim’s wife and therefore especially likely
7 to intervene. *Gonzales*, 181 Ariz. at 514, 892 P.2d at 850. The court’s ruling did not
8 impermissibly expand the category of death-eligible defendants.
9
10

11 In sum, a “rational factfinder” could have determined, as the trial court and the
12 Arizona Supreme Court found, that the intended victim of the murder was Mr. Wagner,
13 and that Petitioner, as he attacked Mr. Wagner and stabbed him to death, knowingly
14 placed Ms. Wagner at a grave risk of death. Petitioner is not entitled to habeas relief on
15 Claim 29.
16
17

18 Claim 30

19 Petitioner alleges that the state courts improperly found that the pecuniary gain
20 aggravating factor had been proven. (Doc. 214 at 113.) The Arizona Supreme Court
21 rejected this claim on direct appeal:
22

23 Gonzales argues that the evidence does not support a finding that he
24 committed the murder in expectation of pecuniary gain. He claims that the
25 robbery ended when he was confronted by Darrel Wagner and that the
26 subsequent murder was “unexpected and accidental.” We do not agree.

27 To prove the A.R.S. § 13–703(F)(5) aggravating factor, the state
28 must show that a motivation for the murder was the expectation of
pecuniary gain. We have held that when the defendant kills to facilitate his
escape and to permit him to take and keep stolen items, he furthers his

1 pecuniary gain motive. The Wagners interrupted Gonzales during the
2 burglary of their home. Gonzales was there to steal from them.

3 The trial court found beyond a reasonable doubt that Gonzales
4 intended to kill Darrel. His murder was not “accidental.” This is plainly
5 evident from the number of stab wounds. Gonzales’s primary motivation
6 was to steal the Wagner’s property. Darrel’s murder was directly connected
7 to that goal. We agree with the trial court that the murder of Darrel Wagner
8 was committed for pecuniary gain.

9 *Gonzales*, 181 Ariz. at 513, 892 P.2d at 849 (citations omitted).

10 Petitioner argues that there was insufficient evidence to support a finding that the
11 murder was committed in the expectation of pecuniary gain. He also contends that the
12 pecuniary gain aggravating factor is unconstitutionally vague and overbroad. Neither
13 argument is persuasive.

14 First, viewing the evidence in the light most favorable to the prosecution, a
15 rational trier of fact could have found that Petitioner, who was burglarizing the Wagners’
16 home, committed the murder to facilitate his escape and keep the stolen items. *See, e.g.*,
17 *Williams v. Stewart*, 441 F.3d 1030, 1060 (9th Cir. 2006); *Correll v. Stewart*, 137 F.3d
18 1404, 1420 (9th Cir. 1998); *State v. Runningeagle*, 176 Ariz. 59, 65, 859 P.2d 169, 175
19 (1993).

20 Petitioner contends that the murder was “unexpected and accidental.” (Doc. 214 at
21 113.) However, because “[t]he defendant does not have to intend to kill beforehand to
22 satisfy the statute,” *State v. Fierro*, 166 Ariz. 539, 551, 804 P.2d 72, 84 (1990), the fact
23 that Petitioner did not “set out to murder anyone” (Doc. 219 at 57) does not prevent
24 application of the pecuniary gain factor. Moreover, the argument that the murder was
25 accidental is not supported by the record. When he was discovered burglarizing the
26 accidental is not supported by the record. When he was discovered burglarizing the
27 accidental is not supported by the record. When he was discovered burglarizing the
28 accidental is not supported by the record. When he was discovered burglarizing the

1 Wagners' home, Petitioner attacked Mr. Wagner, pushing him out the front door and onto
2 the ground and then stabbing him seven times. *Gonzales*, 181 Ariz. at 506, 892 P.2d at
3 842.
4

5 Second, regarding his vagueness facial challenge to (F)(3), the Ninth Circuit has
6 consistently rejected the argument that the pecuniary gain factor fails to narrow the class
7 of death-eligible defendants. *See Williams*, 441 F.3d at 1059; *Woratzek v. Stewart*, 97
8 F.3d 329, 335 (9th Cir. 1996).
9

10 Claim 30 is denied.

11 **Claim 33**

12
13 Prior to sentencing Petitioner, the trial court reviewed a presentence report that
14 contained letters from Ms. Wagner and family friends recommending that Petitioner
15 receive the death sentence. (ROA 380; *see* RT 4/27/92 at 43, 57.) Petitioner alleges that
16 the court's review of these materials violated his Eighth Amendment rights. (Doc. 214 at
17 115.) The Arizona Supreme Court rejected this claim on direct appeal. *Gonzales*, 181
18 Ariz. at 516, 892 P.2d at 852. The claim is without merit.
19

20
21 In *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Supreme Court held that the
22 introduction of a victim impact statement to a capital sentencing jury violated the Eighth
23 Amendment. In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the Supreme Court
24 revisited *Booth* and overruled it in part, holding that the Eighth Amendment does not
25 erect a *per se* barrier to the admission of victim impact evidence but leaving intact
26 *Booth's* prohibition on the admission of characterizations and opinions from the victim's
27 family about the crime, the defendant, or the appropriate sentence. *Id.* at 830 n.2.
28

1 Under Arizona law at the time of Petitioner’s trial, however, the trial judge, rather
2 than a jury, determined the penalty in capital cases. In *Gulbrandson v. Ryan*, 738 F.3d
3 976, 995–96 (9th Cir. 2013), the Ninth Circuit rejected the petitioner’s *Booth* claim,
4 finding that there was no clearly established federal law directly addressing the question
5 of whether a judge, as opposed to a jury, is prohibited from considering victim impact
6 evidence. The court explained:
7

8
9 We previously recognized this distinction in *Rhoades v. Henry*, 638
10 F.3d 1027 (9th Cir. 2011), where we held that *Booth*’s concern that victim
11 impact statements would “inflame the jury” is “not the same when . . . a
12 judge does the sentencing.” *Id.* at 1055. As we have explained, courts “must
13 assume that the trial judge properly applied the law and considered only the
14 evidence he knew to be admissible.” *Gretzler v. Stewart*, 112 F.3d 992,
15 1009 (9th Cir. 1997); *Rhoades*, 638 F.3d at 1055.

16 Accordingly, because there is no Supreme Court case “squarely
17 address[ing] the issue” whether a judge is barred from consideration of
18 such victim impact evidence, it cannot be said that the Arizona Supreme
19 Court unreasonably applied clearly established federal law when it denied
20 *Gulbrandson*’s Eighth Amendment claim.

21 *Id.* at 966.

22 Moreover, there is no evidence that the trial court disobeyed or misapplied the law
23 by improperly considering the opinions of the victim’s family when determining
24 Petitioner’s sentence. Nor is there evidence that the Arizona Supreme Court in its
25 independent review of Petitioner’s sentence improperly considered the victim impact
26 evidence. Claim 33 is denied.

27 **Claim 34**

28 Petitioner alleges that Arizona’s death penalty statute precludes the sentencer from
considering all relevant mitigation, in violation of the Sixth, Eighth and Fourteenth

1 Amendments. (Doc. 214 at 118.)

2 At the time of Petitioner’s sentencing, Arizona’s capital sentencing statute
3 provided:
4

5 Mitigating circumstances shall be any factors proffered by the defendant or
6 the state which are relevant in determining whether to impose a sentence
7 less than death, including any aspect of the defendant’s character,
8 propensities or record and any of the circumstances of the offense,
including but not limited to the following [enumerated circumstances]:

9 A.R.S. § 13–703(G).

10 Petitioner contends that the statute “limit[s] the trial court in its consideration of
11 mitigating circumstances to only those which are proffered by either the state or the
12 defendant.” (Doc. 214 at 118–19.) The Arizona Supreme Court’s denial of this claim,
13 *Gonzales*, 181 Ariz. at 507, 892 P.2d at 843, was neither contrary to nor an unreasonable
14 application of clearly established federal law.
15

16 In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Supreme Court held that “the
17 Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of
18 capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a
19 defendant’s character or record and any of the circumstances of the offense that the
20 defendant proffers as a basis for a sentence less than death.” The definition of mitigating
21 circumstances set out in A.R.S. § 13–703(G) is consistent with this principle. The
22 reference to “factors proffered by the defendant or the state” cannot reasonably be read as
23 prohibiting a sentencer from considering any form of relevant mitigating evidence.
24
25
26

27 **Claim 36**

28 Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth and

1 Fourteenth Amendments because it requires a death sentence to be imposed whenever an
2 aggravating circumstance and no mitigating circumstances are found. (Doc. 214 at 119.)

3
4 The Supreme Court has rejected the claim that Arizona’s death penalty statute is
5 impermissibly mandatory and creates a presumption in favor of the death penalty. *Walton*
6 *v. Arizona*, 497 U.S. 639, 651–52 (1990), *overruled on other grounds by Ring*, 536 U.S.
7 584; *see also Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006). Accordingly, Claim 36 is
8 denied.

9
10 **Claim 39**

11 Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth and
12 Fourteenth Amendments because it requires a defendant to affirmatively prove that the
13 court should spare his life. (Doc. 214 at 120.) The Supreme Court has rejected the
14 argument that “Arizona’s allocation of the burdens of proof in a capital sentencing
15 proceeding violates the Constitution.” *Walton*, 497 U.S. at 651. Claim 39 is denied.

16
17
18 **Claim 40**

19 Petitioner alleges that Arizona’s death penalty statute is unconstitutional because it
20 lacks ascertainable guidelines for the sentencer to follow in weighing aggravating and
21 mitigating factors, in violation of Petitioner’s rights under the Fifth, Sixth, Eighth, and
22 Fourteenth Amendments. (Doc. 214 at 121.)

23
24 Arizona’s death penalty scheme allows only certain, statutorily-defined
25 aggravating circumstances to be considered in determining eligibility for the death
26 penalty. This scheme has been found constitutionally sufficient. *See Lewis*, 497 U.S. at
27 774–77; *Walton*, 497 U.S. at 649–56; *Woratzek*, 97 F.3d at 334–35; *Smith*, 140 F.3d at
28

1 1272.

2 There is no Supreme Court authority which constitutionally requires that a jury be
3 instructed on a burden of proof in the sentence selection phase in a capital case; nor is
4 there any Supreme Court authority which would require a burden of proof or persuasion
5 be assigned to any of the jury's penalty phase determinations. On the contrary, the
6 Supreme Court has held that a "capital sentencer need not be instructed how to weigh any
7 particular fact in the capital sentencing decision." *Tuilaepa v. California*, 512 U.S. 967,
8 979 (1994); *cf. Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) ("[W]e have never held
9 that a specific method for balancing mitigating and aggravating factors in a capital
10 sentencing proceeding is constitutionally required."). Claim 40 is denied.

11
12
13
14 **Claim 41**

15 Petitioner alleges that Arizona's capital sentencing scheme violates the Eighth
16 Amendment because it does not afford capital defendants an opportunity to *voir dire* the
17 sentencing judge. (Doc. 214 at 122.) This claim is meritless.

18
19 Petitioner cites "no authority for the proposition that a defendant has a
20 constitutional right to voir dire a judge, let alone to inquire about a judge's views on the
21 death penalty." *Atwood v. Schriro*, 489 F.Supp.2d 982, 1059 (D.Ariz. 2007). The rule
22 providing for inquiry into prospective jurors' views on capital punishment derives from
23 the right to an impartial and unbiased jury under the Sixth and Fourteenth Amendments.
24 *See Morgan v. Illinois*, 504 U.S. 719, 726 (1992). Trial judges are presumed to follow the
25 law. *Walton*, 497 U.S. at 653; *see State v. Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223, 1226
26 (1987) (explaining that mere possibility of bias or prejudice does not entitle a criminal
27
28

1 defendant to *voir dire* the trial judge at sentencing). Because Petitioner has not shown
2 that he has a constitutional right to *voir dire* a sentencing judge, the state court’s refusal
3 to recognize such a right is neither contrary to nor an unreasonable application of federal
4 law.

5
6 **Claim 42**

7
8 Petitioner alleges that Arizona’s capital sentencing scheme violates the Eighth and
9 Fourteenth Amendments because it affords the prosecutor unbridled discretion to seek the
10 death penalty. (Doc. 214 at 124.) The claim is meritless. Prosecutors have wide discretion
11 in deciding whether to seek the death penalty. *See McCleskey v. Kemp*, 481 U.S. 279,
12 296–97 (1987); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (explaining that pre-
13 sentencing decisions by actors in the criminal justice system that may remove an accused
14 from consideration for the death penalty are not unconstitutional). The Ninth Circuit has
15 rejected the argument that Arizona’s death penalty statute is constitutionally infirm
16 because “the prosecutor can decide whether to seek the death penalty.” *Smith*, 140 F.3d at
17 1272.

18
19
20 **Claims 45, 47, 48, and 50¹⁶**

21
22 Petitioner raises several claims of ineffective assistance of trial counsel. He raised
23 these claims in his first PCR proceeding. The state court found the allegations in Claims
24 45, 47, and 48 precluded because Petitioner could have raised them on direct appeal. (ME
25 4/21/98.) However, this Court found the claims were not defaulted because the state court
26

27
28

¹⁶ In his memorandum on the merits, Petitioner states that he “dropped” Claim 46.
(Doc. 215 at 128.) The Court will not consider the claim.

1 did not apply an adequate procedural bar. (Doc. 97 at 30.) Because the state court did not
2 reach the merits of Claims 45, 47, and 48, this Court’s review is *de novo*. See *Pirtle v.*
3
4 *Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

5 The state court addressed the allegations in Claim 50 on the merits and denied the
6 claim. (ME 4/21/98; see Doc. 97 at 30.) Therefore, the Court will review Claim 50 under
7 the standards of 28 U.S.C. § 2254(d)(1).
8

9 Claims of ineffective assistance of counsel are governed by the principles set forth
10 in *Strickland v. Washington*, 466 U.S. 668 674 (1984). To prevail under *Strickland*, a
11 petitioner must show that counsel’s representation fell below an objective standard of
12 reasonableness and that the deficiency prejudiced the defense. *Id.* at 687–88.
13

14 The inquiry under *Strickland* is highly deferential, and “every effort [must] be
15 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
16 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at
17 the time.” *Id.* at 689; see *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Bobby v.*
18 *Van Hook*, 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir.
19 2010). To satisfy *Strickland*’s first prong, a defendant must overcome “the presumption
20 that, under the circumstances, the challenged action might be considered sound trial
21 strategy.” *Id.*
22
23

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

1 outcome.” *Id.* at 694.

2 “Surmounting *Strickland*’s high bar is never an easy task,” *Padilla v. Kentucky*,
3 559 U.S. 356, 371 (2010), and “[e]stablishing that a state court’s application of *Strickland*
4 was unreasonable under § 2254(d) is all the more difficult.” *Richter*, 131 S. Ct. 788. As
5 the Court explained in *Richter*:

6
7 Even under *de novo* review, the standard for judging counsel’s
8 representation is a most deferential one. Unlike a later reviewing court, the
9 attorney observed the relevant proceedings, knew of materials outside the
10 record, and interacted with the client, with opposing counsel, and with the
11 judge. It is “all too tempting” to “second-guess counsel’s assistance after
12 conviction or adverse sentence.” [*Strickland*, 466 U.S.] at 689. The
13 question is whether an attorney’s representation amounted to incompetence
under “prevailing professional norms,” not whether it deviated from best
practices or most common custom. [*Id.*] at 690.

14 *Id.*

15 Claim 45

16
17 Petitioner alleges that trial counsel performed at a constitutionally ineffective level
18 by failing to raise an objection or move for a mistrial when he discovered that Deborah
19 Wagner and Roger Daughtry had a conversation prior to Daughtry’s testimony in the
20 second trial. (Doc. 214 at 124.) This claim satisfies neither prong of *Strickland*. As
21 discussed above, the record does not suggest that the conversation between Ms. Wagner
22 and Daughtry affected either’s testimony. During his cross-examination of Daughtry,
23 counsel brought out the fact that Daughtry had discussed the case with Ms. Wagner.
24 Under these circumstances, counsel did not perform deficiently failing to object or move
25 for a mistrial, and there was a not a reasonable probability of a different verdict if he had.

26
27 Claim 47

1 Petitioner alleges that trial counsel performed at a constitutionally ineffective level
2 when he failed to object or move for a mistrial in response to the hearsay testimony of a
3 police detective regarding Cathy Trinidad’s previous statements. (Doc. 214 at 128.)
4

5 Cathy Trinidad, then 11 years old, testified in the second trial. (RT 6/3/91 at 18-
6 46.) During her testimony, the prosecutor asked, “when you talked to the police
7 detectives, did you tell those detectives that Mr. Gonzales said that a man stabbed him
8 while a woman tried to tie his legs together with the strap on her purse?” (*Id.* at 29.)
9 Cathy responded “Yes.” (*Id.*) She testified that Petitioner said he was stabbed because
10 “he was breaking in their house.” (*Id.* at 30.) She also testified that when he came to the
11 apartment, Petitioner had a brownish colored purse. (*Id.*) Inside the purse, she saw a
12 “cigarette thing with the lighter in it and just bank cards and stuff.” (*Id.* at 31.) She denied
13 telling the police that Petitioner had a knife. (*Id.* at 31, 34.) She also denied telling the
14 police that Petitioner had a hat when he left the apartment. (*Id.* at 25, 35–36.)
15
16
17

18 In his cross-examination, defense counsel used Cathy’s previous testimony to
19 bring out inconsistencies with the State’s theory of the case, including the time at which
20 Petitioner left the apartment, what he was wearing, his explanation for why he was
21 bleeding when he returned, and Cathy’s statement that a sketch shown on the television
22 news did not look like Petitioner. (*Id.* at 38–42.) Counsel also impeached Cathy’s
23 testimony about what Petitioner said about being in the house. (*Id.* at 42.) He asked, “Do
24 you remember you [sic] giving this answer: He didn’t say nothing about that. I heard on
25 the news that someone broke in someone’s house.” (*Id.*) Cathy agreed that she had said
26 that. (*Id.*)
27
28

1 The following day, the prosecution recalled Detective Charles Hodges to testify
2 about his interview with Cathy. (RT 6/4/91 at 114–18.) Hodges testified that Cathy told
3 him that Petitioner said he had been in the house “to get some money.” (*Id.* at 116.) When
4 asked, “Did she tell you anything happened while Mr. Gonzales was in that home?”
5 Hodges testified that Cathy told him that Petitioner said “he had had to stab a man and a
6 woman because she tried to tie him up.” (*Id.*) The following exchange then occurred:
7

8
9 Q: Did she tell you—did you ask her any questions about why Mr.
10 Gonzales had to stab stab [sic] these people?

11 A. Yes. I asked her why—

12 [Defense Counsel]: I object. I don’t believe it’s proper.

13 THE COURT: The objection is overruled. I think basis of my ruling [sic].

14 THE WITNESS: She told me the reason was because they had tried to tie
15 him up.

16
17 (*Id.* at 117.)

18 Petitioner argues that counsel performed ineffectively by making only a “general
19 objection” that was “[p]redictably” overruled. (Doc. 214 at 129.) He contends that
20 “reasonably effective counsel” would have raised a hearsay objection. (Doc. 220 at 83.)

21
22 Petitioner does not meet his burden of showing that counsel’s performance here
23 was deficient or prejudicial. Counsel raised an objection, which the court overruled.
24 Specifying that the objection was based on hearsay would not have changed the court’s
25 ruling, particularly since Cathy’s testimony about why Petitioner was stabbed was
26 inconsistent with her statement to Detective Hodges and therefore was likely
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28

1 admissible.¹⁷ Also, as Respondents note, competent counsel could have determined that
2 pursuing the matter would simply have highlighted Cathy's damaging testimony.

3
4 Counsel's performance was not deficient and did not prejudice Petitioner. Claim
5 47 is denied.

6 Claim 48

7
8 Petitioner alleges that trial counsel performed at a constitutionally ineffective level
9 when he failed to object to the hearsay testimony of a police officer regarding Gloria
10 Alvarez's statements to the police. (Doc. 214 at 133.) The claim is without merit.

11 In the second trial, Gloria Alvarez testified that when Petitioner came back to the
12 apartment on February 20, 1990, she thought he was wearing a long white shirt with
13 stripes and a short sleeved t-shirt underneath. (RT 5/30/91 at 130.) The prosecutor
14 questioned her about her interview with the police:

15
16
17 Q. Did you tell Detective Butler the defendant was wearing a white shirt
18 with vertical stripes on it?

19 A. When they were asking those questions I wasn't too sure what he was
20 wearing. They kept insisting I knew what he was wearing that night. I was
21 tired so, you know, I kept telling them what I thought he was wearing. They
22 kept saying he was wearing this, they kept insisting I was lying.

23 (Id. at 143.)

24 On cross-examination, defense counsel asked Alvarez about the circumstances of
25 her police interrogation. She testified that she was handcuffed to a table inside a small
26 room for four hours. (Id. at 153-54.) She felt like the detectives were threatening to

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¹⁷ Arizona Rule of Evidence 801(d)(1) allows the admission of a statement that is
inconsistent with the declarant's testimony.

1 charge her. (*Id.* at 155.) According to her testimony, the detectives kept insisting that she
2 was lying about what Petitioner wore on the night of the crimes: “I would mention the
3 color of [sic] shirt he was wearing, the design, and they said that I was lying, they knew I
4 was lying.” (*Id.* at 156.) She originally told them that it was a vertical striped shirt. (*Id.*)
5 Later in the interview, the detectives suggested that it was a checked shirt. (*Id.*) When
6 asked by defense counsel if she “recall[ed] today what kind of shirt it was?” Alvarez
7 answered, “It was white with stripes on it.” (*Id.*) She testified that the detectives told her
8 she would not be free to leave until she told them what they wanted to hear. (*Id.* at 157–
9 58.)

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13 On re-direct, the prosecutor asked:

14 Q: Did you tell Detective Butler Mr. Gonzales was wearing Levi’s,
15 checkered flannel shirt, red with blue and black in it, white tennis shoes
16 along with a dark cap when he left?

17 A: I had mentioned what I thought he was wearing that night. After that
18 they told me what they thought he was wearing and I agreed to it, because
19 at that time they kept telling me I was not going out. I had been there for
20 hours and I was not going to leave until they heard what they wanted to
21 hear.

22 (*Id.* at 166.)

23 Detective Butler testified later in the trial. During the prosecutor’s direct
24 examination, the following exchange occurred:

25 Q: During the course of your interview with Miss Alvarez did you ask her
26 what clothes Mr. Gonzales was wearing the night of February 20, 1990.

27 [Defense Counsel:] I don’t know where it was going. I don’t think his [sic]
28 in [sic] impeachable area.

THE COURT: Let’s take the afternoon recess.

1
2 (RT 6/4/91 at 132.)

3 During the recess, defense counsel explained the basis of his objection. (*Id.* at
4 133–35.) He argued that the fact Alvarez had changed her testimony from what she said
5 at the police station was already before the jury and it would be improper impeachment to
6 allow Detective Butler to testify about her earlier statements. (*Id.* at 133.) The court
7 overruled the objection. (*Id.* at 135.) It found there was a “material difference” between
8 Alvarez’s trial testimony about what Petitioner was wearing and the statements she gave
9 to the detectives. (*Id.*) The court also noted that Alvarez’s “testimony was in my view
10 evasive as much as she could make it” and concluded that the testimony was inconsistent
11 enough to be allowed under Rule 801. (*Id.* at 135.)
12
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15 Detective Butler then testified that during his interview of Alvarez, she had
16 “responded that Ernest was wearing a blue baseball cap, white tennis shoes, Levis, a
17 flannel shirt and red, black or blue squares in it.” (*Id.* at 136.) Detective Butler also
18 acknowledged that Alvarez had originally told him that Petitioner was wearing “a white
19 shirt with vertical stripes in it.” (*Id.*)
20

21 Petitioner contends that counsel’s objection was “clumsy” (Doc. 214 at 134) and
22 that counsel did an inadequate job explaining the legal basis for the objection when the
23 parties met with the judge during the recess. (Doc. 220 at 75.) Notwithstanding
24 Petitioner’s characterization of the objection, it is clear that counsel was challenging the
25 State’s position that the testimony was admissible as a prior inconsistent statement. It is
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1 also clear, as the trial court found, that Alvarez’s trial testimony about Petitioner’s clothes
2 was both evasive and inconsistent with her statement to the detectives.

3
4 A trial court “has considerable discretion in determining whether a witness's
5 evasive answers or lack of recollection may be considered inconsistent with that witness's
6 prior out-of-court statements.” *State v. Salazar*, 216 Ariz. 316, 319, 166 P.3d 107, 110
7 (App. 2007); *State v. Hines*, 130 Ariz. 68, 71, 633 P.2d 1384, 1387 (1981) (explaining
8 that “inconsistency is to be determined, not by individual words or phrases alone, but by
9 the whole impression or effect of what has been said or done”). The trial court reasonably
10 determined that Detective Butler’s testimony was admissible, and it is speculation to
11 assert that a more detailed objection would have persuaded the court otherwise. Such
12 speculation is insufficient to meet Petitioner’s burden under *Strickland*.

13
14 Counsel’s performance was not deficient and did not prejudice Petitioner. Claim
15
16 49 is denied.

17
18 Claim 50

19
20 Petitioner alleges that trial counsel performed at a constitutionally ineffective level
21 by failing to request the appointment of a second lawyer as recommended by ABA
22 Standards. (Doc. 214 at 138.)

23
24 The PCR court denied this claim, explaining that “no authority other than ABA
25 recommendation is cited; and, although the Arizona Supreme Court has amended the
26 criminal rule on the point, effective Jan. 1, 1998, the law on the matter remains against
27 defendant.” (ME 4/21/98.) The court cited *State v. Lee*, 189 Ariz. 590, 601, 944 P.2d
28 1204, 1214 (1997), which noted that Rule 6.2 of the Arizona Rules of Criminal

1 Procedure, requiring the presiding judge to appoint two counsel in capital cases, became
2 effective on January 1, 1998. At the time of Petitioner’s trial, however, Arizona law did
3 not require the appointment of two attorneys.
4

5 Petitioner focuses his argument on the ABA guidelines. However, as the Seventh
6 Circuit has noted when addressing a similar argument based on the guidelines, “[t]he key
7 word here is ‘recommended.’ Trial counsel cannot be said to be constitutionally
8 ineffective for deciding not to bring in co-counsel, unless there is some reason . . . why
9 the first lawyer is unable to provide adequate representation.” *Pitsonbarger v. Gramley*,
10 141 F.3d 728, 738 (7th Cir. 1998).
11
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13 Thus, failure to seek the appointment of second counsel can give rise to habeas
14 relief only if this Court first determines that the absence of co-counsel prejudiced the
15 defense. *Cf. Allen v. Woodford*, 395 F.3d 979, 998 (9th Cir. 2005) (explaining there can
16 be no deficient performance unless the record shows that counsel was unable to try the
17 case alone); *Riley v. Taylor*, 277 F.3d 261, 306 (3d Cir. 2001) (“The Constitution does
18 not specify the number of lawyers who must be appointed. If a single attorney provides
19 reasonably effective assistance, the Constitution is satisfied, and if a whole team of
20 lawyers fails to provide such assistance, the Constitution is violated.”).
21
22

23 The record does not show, and Petitioner does not argue, that counsel was unable
24 to try this case alone. The PCR court’s denial of this claim was neither contrary to nor an
25 unreasonable application of clearly established federal law. Claim 50 is denied.
26

27 **CERTIFICATE OF APPEALABILITY**

28 Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, an applicant

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

7
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). For procedural rulings, a
14 certificate of appealability will issue only if reasonable jurists could debate whether the
15 petition states a valid claim of the denial of a constitutional right and whether the court’s
16 procedural ruling was correct. *Id.*
17

18
19 The Court finds that reasonable jurists could debate its resolution of Claims 9,
20 14/15, and 27. For the reasons stated in this order, the Court finds that reasonable jurists
21 could not debate its resolution of the remaining claims.
22

23 CONCLUSION

24 Based on the foregoing,

25
26 **IT IS HEREBY ORDERED** that Petitioner’s Amended Petition for Writ of
27 Habeas Corpus (Doc. 28) is **DENIED**. The Clerk of Court shall enter judgment
28 accordingly.

