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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Richard Dean Hurles, Petitioner, v. Dora B. Schriro, et al., Respondents.	No. CV-00-0118-PHX-RCB DEATH PENALTY CASE **ORDER**

Before the Court is Petitioner's Motion to Alter or Amend Judgment filed pursuant to Rules 59(e) and 52(b) of the Federal Rules of Civil Procedure. (Dkt. 107.) On September 30, 2008, the Court denied Petitioner's amended habeas corpus petition and entered judgment. (Dkts. 99, 100.) The Court simultaneously issued a COA with respect to Claims 2, 6 (in part), and 7 (in part). (Dkt. 99 at 46.) In the present motion, Petitioner challenges the Court's resolution of Claims 2 and 6 and requests that the Court issue a COA as to Claim 10 and an additional aspect of Claim 6.

A motion to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure is in essence a motion for reconsideration. Motions for reconsideration are disfavored and appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam); *see School Dist.*

No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

1. Judicial Bias Claim

Petitioner seeks reconsideration of the Court's denial of his claim that his federal due process rights were violated when the state trial judge continued to preside at his trial and sentencing after becoming a party in a Special Action proceeding filed by Petitioner (Claim 2). He also challenges the Court's denial of his requests for discovery and an evidentiary hearing on this claim.

A motion for reconsideration should not be used to ask a court "to rethink what the court had already thought through – rightly or wrongly." *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E. D. Va. 1983)). Such arguments should be directed to the court of appeals. *Sullivan v. Faras-RLS Group, Ltd.*, 795 F. Supp. 305, 309 (D. Ariz. 1992). Petitioner essentially reurges the same arguments already considered by the Court; therefore, his request for reconsideration is denied.

2. Procedural Bar of Ineffective Assistance of Counsel (IAC) Claims

Petitioner seeks reconsideration of that part of the Court's September 2008 order that addressed the procedural default of parts of Claims 6 and 7, alleging IAC at trial and on appeal. In his merits brief, Petitioner presented new arguments as a basis for reconsideration of the Court's denial of his motion for reconsideration following the Court's July 2006 order addressing the procedural status of his claims. The Court expressly addressed these arguments in its September 2008 order. (Dkt. 99 at 29-31.) In the instant motion, Petitioner reurges the same arguments already presented in his merits brief and considered by the Court. The Court declines to consider these arguments a second time.

3. IAC on Appeal

In Claim 6, Petitioner argued that appellate counsel's representation was constitutionally deficient because he failed to raise on appeal a claim alleging that the sentencing court had failed to consider the "cumulative weight" of his proffered mitigation, in particular evidence of his mental and learning disabilities and his use of alcohol and drugs at the time of the murder. Petitioner seeks reconsideration of the Court's conclusion that the

Arizona Supreme Court's independent reweighing of Petitioner's proffered mitigation evidence cured any harm Petitioner may have suffered from appellate counsel's allegedly deficient representation. (*See* Dkt. 99 at 38-39.) Petitioner argues that this Court's ruling is erroneous because the Arizona Supreme Court applied an improper "nexus" test – by requiring a causal relationship between his impairments and actions at the time of the crime – and therefore did not consider all of his proffered mitigation. (Dkt. 107 at 15-16.) The record, as described in the Court's September 2008 order, belies Petitioner's argument.

Nothing in the ruling of the Arizona Supreme Court indicates it refused to consider any of Petitioner's mitigating evidence, either individually or cumulatively, in conducting its independent review of his sentence. *See State v. Hurles*, 185 Ariz. 199, 207, 914 P.2d 1291, 1299 (1996). The court expressly stated:

> A difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted a defendant's ability to perceive, to comprehend, or to control his actions. No such evidence was offered, and the trial judge did not err in concluding that Hurles' family background was not sufficiently mitigating to require a life sentence.
>
> The judge also found that Hurles had good behavior while incarcerated prior to committing the murder. Taken either by itself or in combination with Hurles' family background, we do not believe this sufficiently mitigates the quality of the aggravating circumstance. A life sentence would not be more appropriate.

Id.. at 207-08, 914 P.2d at 1299-1300 (citation omitted). Although the court focused on the trial judge's findings, which primarily addressed mitigation relating to Petitioner's family background and his good conduct while previously incarcerated, this does not establish that the supreme court failed to carry out its responsibility to independently consider all of Petitioner's proffered mitigation. *See Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 1227 (2008) (rejecting a claim that the sentencing court failed to consider proffered mitigation where the court did not prevent the defendant from presenting any evidence in mitigation, did not affirmatively indicate there was any evidence it would not consider, and expressly stated it had considered all mitigation evidence proffered by the defendant); *see also Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (holding that

when it is evident that all mitigating evidence was considered, the trial court is not required to discuss each piece of such evidence); *Moormann v. Schriro*, 426 F.3d 1044, 1055 (9th Cir. 2005) (noting that "the trial court need not exhaustively analyze each mitigating factor 'as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant'") (quoting *Clark v. Ricketts*, 958 F.2d 851, 858 (9th Cir. 1991)). Moreover, it is evident from the court's own words that it did not refuse to consider Petitioner's evidence because of a lack of a causal connection; rather, it expressly stated that absence of a nexus affected only whether the evidence was entitled to "substantial mitigating weight." *Hurles*, 185 Ariz. at 207, 914 P.2d at 1299; *see Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) ("The sentencer . . . may determine the weight to be given the relevant mitigating evidence."). Reconsideration is denied.

Petitioner also asks the Court to expand the COA to include this claim. Upon further consideration, the Court will grant a COA on this aspect of Claim 6, alleging appellate IAC for failing to raise on appeal a claim alleging that the sentencing court had failed to consider the "cumulative weight" of his proffered mitigation.

4. COA for Claim 10

Petitioner asks the Court to amend the COA to include his claim that the trial court committed constitutional error when it admitted "inflammatory hearsay" at trial (Claim 10). (Dkt. 107 at 19-20.) Specifically, Petitioner contends that the admission of "statements concerning Dale Hurles's fear that Petitioner would rape his close relatives were not only inadmissible hearsay evidence, but also highly prejudicial" and argues the Court should certify this issue because it is debatable among jurists of reason and another court could resolve the issue differently. (*Id*.) The Court disagrees and declines to grant a COA on this claim.

Based on the foregoing,

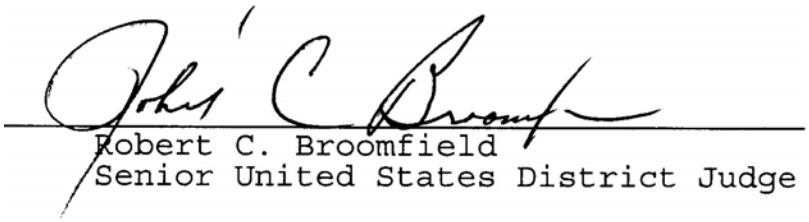
IT IS HEREBY ORDERED that Petitioner's Motion to Alter or Amend Judgment (Dkt. 107) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's request to amend the Certificate of

Appealability is **GRANTED IN PART**. The Certificate of Appealability is amended to include the following issue:

> Whether the Court erred in determining that Petitioner was not denied effective assistance of counsel on appeal when counsel failed to raise on appeal a claim asserting that the sentencing court had failed to consider the "cumulative weight" of his proffered mitigation.

DATED this 15th day of November, 2008.



Robert C. Broomfield
Senior United States District Judge