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

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9 Richard Kenneth Djerf,  
10 Petitioner,  
11 v.  
12 Charles L. Ryan, et al.,  
13 Respondents.

No. CV-02-00358-PHX-JAT  
DEATH PENALTY CASE

**ORDER**

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15 Before the Court is Petitioner's Motion for Leave to Issue Subpoena. (Doc. 117.)  
16 Petitioner seeks access to "sealed psychological reports" concerning his now-deceased  
17 post-conviction counsel. (*Id.*) Respondents oppose the motion. (Do. 120.)

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19 On remand from the Ninth Circuit Court of Appeals, this Court must reconsider, in  
20 light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Petitioner's claims of ineffective  
21 assistance of trial and appellate counsel. Petitioner asserts that access to the confidential  
22 psychological reports is necessary to "support his assertion that [post-conviction counsel]  
23 suffered a psychotic break while representing him and that, as a result, she was unable to  
24 provide minimally competent representation to him in his capital state post-conviction  
25 proceedings." (Doc. 117 at 4.)  
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1 Habeas petitioners are not entitled to discovery as a matter of ordinary course.  
2 *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Instead, a petitioner must demonstrate  
3 “good cause” for the discovery under Rule 6, foll. 28 U.S.C. § 2254. Good cause exists  
4 “where specific allegations before the court show reason to believe that the petitioner  
5 “where specific allegations before the court show reason to believe that the petitioner  
6 may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to  
7 relief.” *Id.* at 908–09. Petitioner cannot make such a showing with respect to post-  
8 conviction counsel’s sealed psychological records.

10 In *Martinez*, the Supreme Court held that “[i]nadequate assistance of counsel at  
11 initial-review collateral proceedings may establish cause for a prisoner’s procedural  
12 default of a claim of ineffective assistance at trial.” 132 S. Ct. at 1315. Under *Martinez*, a  
13 federal habeas court may consider a prisoner’s procedurally defaulted ineffective  
14 assistance of trial counsel claim if he establishes (1) that his state post-conviction counsel  
15 was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), in  
16 failing to raise the ineffective assistance of trial counsel claim in state court, and (2) that  
17 the unraised claim is substantial. *Id.* at 1318. *Martinez* does not establish a stand-alone  
18 right to effective assistance of post-conviction counsel.

22 Applying *Strickland* to post-conviction counsel’s performance “calls for an  
23 inquiry into the objective reasonableness of counsel’s performance, not counsel’s  
24 subjective state of mind.” *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011); *see*  
25 *Strickland*, 466 U.S. at 688 (proving deficient performance requires a showing “that  
26 counsel’s representation fell below an objective standard of reasonableness”). The  
27 information contained in post-conviction counsel’s sealed psychological records is not  
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1 relevant to an objective assessment of her performance. The question is not counsel's  
2 mental state, but whether the choices she made in representing Petitioner were  
3 objectively reasonable. *See, e.g., Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir.  
4 1998).

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6 Petitioner has not established good cause for the requested discovery.

7 Accordingly,

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9 **IT IS ORDERED** denying Petitioner's Motion for Leave to Issue Subpoena.

10 (Doc. 117.)

11 Dated this 12th day of February, 2015.

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17 James A. Teilborg  
18 Senior United States District Judge  
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