Djerf v. Ryan, et al Doc. 128

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Richard Kenneth Djerf,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-02-00358-PHX-JAT

DEATH PENALTY CASE

ORDER

This matter is before the Court on limited remand from the Ninth Circuit Court of Appeals (the "Ninth Circuit"). (*See* Doc. 112). The Ninth Circuit has ordered this Court to consider, in light of intervening law, including *Martinez v. Ryan*, 566 U.S. 1 (2012), Claim 3, alleging ineffective assistance of counsel ("IAC") during the 15 months preceding Petitioner Richard Djerf's guilty pleas, and Claim 5(2), alleging IAC by appellate counsel in failing to raise the claim that Petitioner's guilty pleas were invalid because the trial court failed to advise him of the right to effective counsel at trial. (*Id.* at 1). Additionally, in light of the state court's subsequent ruling that the claim was raised on direct appeal, the Ninth Circuit ordered reconsideration of Claim 2, alleging that Petitioner's guilty pleas were invalid because the trial court failed to adequately advise him of the right to effective assistance of counsel at trial. (*Id.* at 2).

The Court ordered supplemental briefing to address whether cause exists under *Martinez* to excuse the procedural default under Claims 3 and 5(2), and whether Petitioner is entitled to habeas relief under 28 U.S.C. § 2254 on Claims 2, 3, or 5(2).

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(Doc. 113 at 2). The Court also ordered Petitioner to include any requests for evidentiary development with the supplemental briefing. (*Id.*).

Petitioner filed a supplemental brief addressing the applicability of *Martinez* to Claim 3, arguing that post-conviction relief ("PCR") counsel acted ineffectively in litigating the claim in state court and requesting evidentiary development on the procedural default of these claims.[1] (Doc. 124). Petitioner's supplemental brief also argued that Petitioner was entitled to habeas relief on Claim 2. (*Id.* at 37–40). Respondents filed a response, (Doc. 125), and Petitioner filed a reply, (Doc. 127).

I. PROCEDURAL BACKGROUND[2]

In September 1993, a Maricopa County Grand Jury indicted Petitioner for four murders, burglary, kidnapping, sexual assault, aggravated assault, attempted arson, theft, and misconduct involving weapons. The trial court appointed two attorneys to represent Petitioner, Michael Vaughn and Alan Simpson. On February 15, 1995, Petitioner filed a *pro se* motion for change of counsel, asking the court to allow him to proceed *pro se* for all future proceedings. At a previously scheduled hearing for pretrial motions, the trial judge declined to rule on the motion, determined that Petitioner should think about his decision for a few days, and scheduled a hearing on Petitioner's motion for the following week.

At the hearing on Petitioner's motion, Petitioner informed the court that he had "very thoroughly" discussed the matter with counsel. (RT 2/23/95 at 4). The court then inquired why Petitioner wanted to remove Mr. Vaughn and Mr. Simpson from his case and represent himself. (*Id.* at 11). Petitioner advised the court that he was unhappy with

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[1] The Ninth Circuit also remanded this case for reconsideration of Claim 5(2) in light of *Martinez*. (Doc. 112 at 1). However, both parties agree that the trial court's order, finding that Petitioner's appellate counsel raised the issue underlying Claim 2 on direct appeal, renders Claim 5(2) moot. (Docs. 124 at 7–8 n.2; 125 at 27 n.7).

[2] This Court relies partly on the facts as stated by the Arizona Supreme Court decision. *See State v. Djerf*, 959 P.2d 1274 (1998). Notwithstanding Petitioner's objection to the Court giving deference to this statement of the facts, (Doc. 127 at 2–3), Petitioner fails to identify any fact stated by the Arizona Supreme Court that Petitioner disagrees with, or where in the record the Court may find any hypothetical inaccuracy.

his representation because counsel had not been keeping him advised of what was happening in his case and that "I just assume that I can do this myself." (*Id.*). The trial court strongly disagreed that Mr. Vaughn and Mr. Simpson were not representing him well, noting their interviews with many witnesses,[3] their work on the consolidated DNA hearing, and their handling of other experts in fingerprints and handwriting analysis. (*Id.* at 11–12). Petitioner indicated that he understood all the work his counsel had put into his case. (*Id.*). Other than the alleged lack of communication, Petitioner did not express any other examples of ineffectiveness. (RT 2/27/95; 2/23/95). The court held that Petitioner voluntarily, knowingly, and intelligently waived his right to counsel.

The prosecution filed a motion to determine Petitioner's competence to waive counsel and conduct his own defense. Petitioner consented to such an evaluation to "remove any doubt as to . . . competence." The trial court ordered a prescreening evaluation to determine whether a complete competency examination was warranted. Dr. Jack Potts evaluated Petitioner and pronounced him competent. The trial court reaffirmed its finding that Petitioner be allowed to proceed *pro se*.

Petitioner decided to enter into a plea agreement with the State, pleading guilty to four counts of first degree murder. The agreement expressly stated that no limits would be placed on sentencing, and Petitioner could be sentenced to death for any or all of the murder counts. In exchange, the State agreed to dismiss the remaining criminal counts. At the plea hearing, the trial court informed Petitioner of certain constitutional rights being relinquished under the plea agreement, acknowledged Dr. Potts's prescreening report, reaffirmed the finding of competency, and concluded that Petitioner's guilty pleas were made knowingly, intelligently, and voluntarily.

Petitioner subsequently withdrew his waiver of counsel and accepted representation for the remainder of the sentencing proceedings. Petitioner requested and received the appointment of three mental health experts, a psychologist, a

[3] At a subsequent status conference, a record of witness interviews was made indicating that counsel for Petitioner personally interviewed more than 50 witnesses, with some witness interviews lasting multiple days. (RT 9/8/95 at 13–14).

neuropsychologist, and a neurologist. Ultimately, Petitioner chose not to submit any reports from his mental health experts. The trial court conducted aggravation and mitigation hearings and imposed the death sentence on Petitioner on each of the four counts. On direct appeal, the Arizona Supreme Court affirmed, *see Djerf*, 959 P.2d 1274, and the U.S. Supreme Court denied a petition for writ of certiorari, *Djerf v. Arizona*, 525 U.S. 1024 (1998).

In 2000, the Arizona Supreme Court issued the mandate in Petitioner's case and appointed PCR counsel, Jamie McAlister. (Doc. 95 at 6). PCR counsel filed an initial petition. (*Id.*). Counsel requested, and the court granted, the appointment of a mental health expert. (*Id.*). Counsel filed an amended PCR petition. (*Id.*). Counsel chose not to include any mental health report in support of the amended petition. (*Id.*). After the amended petition was filed, Petitioner's mental health expert conducted additional testing, but the results of such testing were not submitted to the court. (*Id.*). The trial court summarily denied PCR relief. (*Id.*). The Arizona Supreme Court denied a petition for review. (*Id.*).

Petitioner filed a preliminary Petition for Writ of Habeas Corpus in this Court on February 27, 2002, (Doc. 1), and an amended petition on July 29, 2003, (Doc. 55). In two subsequent orders, filed in 2005 and 2008, the Court ruled that three claims—relevant to the instant remand—were technically exhausted but procedurally defaulted because Petitioner no longer had an available state remedy: (1) Claim 3, alleging IAC of Petitioner's trial counsel during the approximately fifteen months they represented him during pre-trial proceedings, (Doc. 94 at 5–8); (2) Claim 2, alleging that Petitioner's guilty plea was not knowing, intelligent, and voluntary because the trial court did not adequately inform him that by pleading guilty, he was forfeiting his right to proceed to trial represented by competent counsel, (Doc. 95 at 20); and (3) Claim 5(2), alleging that Petitioner's appellate counsel performed ineffectively by failing to raise that the trial court inadequately advised Petitioner that he had the constitutional right to proceed to trial with competent counsel, (*id.* at 28). Thus, the Court did not consider Claims 3, 2, or

5(2) on the merits.

On March 17, 2009, Petitioner filed a successive notice of PCR, which the state court dismissed on April 6, 2009. (Doc. 124-1 at 4). The trial court held that Claim 2 was raised on direct appeal to the Arizona Supreme Court, in contrast to this Court's earlier order. (*Compare id.* at 4, *with* Doc. 95 at 20). The Arizona Supreme Court denied review on September 23, 2009. (Doc. 125 at 7).

While Petitioner's appeal from this Court's denial of habeas relief was pending, the U.S. Supreme Court decided *Martinez v. Ryan*, holding that, where a Petitioner must raise IAC claims in an initial PCR proceeding, failure of counsel in that proceeding to raise a substantial trial IAC claim may provide cause to excuse the procedural default of that claim. 566 U.S. at 17. Petitioner subsequently filed a motion seeking a partial remand of his appeal in light of *Martinez*. (Doc. 124 at 2). The Ninth Circuit granted Petitioner's motion and remanded this case for reconsideration of Claim 3 in light of *Martinez*, as well as Claim 2 in light of the state court's subsequent ruling. (Doc. 112).

II. CLAIM 3

In Claim 3, Petitioner contends that both trial counsel rendered IAC during the approximately fifteen months they represented him during pre-trial proceedings. Petitioner argues that the Court should excuse Claim 3's procedural default because there is a reasonable probability that PCR would have been granted had PCR counsel not performed deficiently. (Doc. 124 at 7–40). Respondent rejoins that Petitioner has failed to show that PCR counsel was ineffective for failing to raise a meritless claim. (Doc. 125 at 15–27).

A. Exhaustion of State Remedies Legal Standard

A state prisoner is generally not entitled to habeas relief in federal court unless he has first exhausted all available state law remedies either on direct appeal or through collateral proceedings. 28 U.S.C. § 2254(b) (2012). To exhaust a claim, a petitioner must "fairly present" it to the state courts, "thereby alerting [the state courts] to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). Failure to exhaust federal

claims in state court results in procedural default of those claims for habeas purposes if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 772, 735 n.2 (1991).

However, because the doctrine of procedural default is based on comity—versus jurisdiction—federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). Habeas review of a defaulted claim is generally barred unless a petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman*, 501 U.S. at 750. Ordinarily, "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 753 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). In *Coleman*, the Supreme Court held that IAC in PCR proceedings does not establish cause for the procedural default of a claim. *Id.*

In *Martinez v. Ryan*, however, the Court established a "narrow exception" to the rule announced in *Coleman*. The Court explained:

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

566 U.S. at 17; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (noting that *Martinez* allows a federal habeas court to find "cause" if "the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim [and] the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state [PCR] proceeding" (quoting *Martinez*, 566 U.S. at 17)).

To demonstrate cause and prejudice sufficient to excuse the procedural default, a petitioner must make two showings:

> First, to establish "cause," he must establish that his counsel in the state [PCR] proceeding was ineffective under the

> standards of *Strickland*. *Strickland*, in turn, requires him to establish that both (a) [PCR] counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the [PCR] proceedings would have been different.

Clabourne v. Ryan, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 818 (9th Cir. 2015) (en banc) (quotation marks and citations omitted); *see also Pizzuto v. Ramirez*, 783 F.3d 1171, 1178 (9th Cir. 2015); *Runningeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2016). Determining whether there exists a reasonable probability of a different outcome "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective." *Clabourne*, 745 F.3d at 377–78. Second, to establish "prejudice," the petitioner must establish that his "underlying ineffective-assistance-of-trial-counsel [("IATC")] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.*; *see also Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*")).

IAC claims are governed by the principles set forth in *Strickland v. Washington*. 466 U.S. 668, 674 (1984). The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010). In *Strickland*, the Supreme Court held that there are two components to an IAC claim: "deficient performance" and "prejudice." 466 U.S. at 687.

"Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. *Id.* at 688–89. To satisfy this prong, a petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 694. Further, the petitioner "must identify acts or omissions of counsel that are alleged not to have been the result of reasonable

professional judgment." *Id.* The court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.* In its analysis, the court "cannot 'second-guess' counsel's decisions or view them under the 'fabled twenty-twenty vision of hindsight.'" *Edwards v. Lamarque*, 475 F.3d 1121, 1127 (9th Cir. 2007) (quoting *LaGrand v. Stewart*, 133 F.3d 1253, 1271 (9th Cir. 1998)). "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998).

To meet his burden of showing *Strickland* "prejudice," the petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (noting that the "prejudice" component "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair").

B. Scope of Remand

In remanding this case, the Ninth Circuit concluded, for purposes of remand, that the claims were "substantial." (Doc. 112 at 2). Thus, this Court is to assume that there is "some merit" to the contention that both trial counsel performed deficiently and that this caused prejudice—from the *Coleman* cause-and-prejudice standard. *See Miller-El I*, 537 U.S. at 335–38. In *Runningeagle v. Ryan*, the Ninth Circuit set forth the framework for reviewing claims that are assumed substantial. 825 F.3d at 983. First, the court determines whether PCR counsel was deficient under the *Strickland* standard. *Id.* at 983–84. Second, the court determines whether PCR counsel's deficiency was prejudicial, which requires the underlying IATC claim to be prejudicial under *Strickland*. *Id.* at 984–

88 (assuming both PCR and trial counsel's performances were deficient to analyze whether PCR counsel's deficiency was prejudicial). If the court determines either that PCR counsel was not deficient or—assuming PCR counsel was deficient—PCR counsel's deficiency was not prejudicial, Petitioner has failed to show cause for the defaulted claim. *Id.* at 984, 988.

Petitioner disagrees with this framework and argues that because the Ninth Circuit required this Court to assume substantiality, his only burden on remand is to show that PCR counsel was ineffective. (Doc. 124 at 7). Petitioner continues that this does not require analysis of the merits of Petitioner's underlying IATC claim. (*Id.* at 5–7). In disagreeing with the *Runningeagle* framework, Petitioner relies on the plurality opinion in *Detrich v. Ryan*. *See* 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc) ("But if a prisoner were required to show that the defaulted trial-counsel IAC claims fully satisfied *Strickland* in order to satisfy the second *Martinez* requirement [of *Coleman* prejudice], this would render superfluous the first *Martinez* requirement of showing that the underlying *Strickland* claims were 'substantial.'"). The Ninth Circuit has addressed Petitioner's argument multiple times, holding that *Detrich* concludes that "'prejudice' for purposes of the 'cause and prejudice' analysis requires only a showing that the trial-level [IAC] claim was 'substantial' . . . [but] does not diminish the requirement . . . that petitioner satisfy the 'prejudice' prong under *Strickland* in establishing ineffective assistance by [PCR] counsel." *Clabourne*, 745 F.3d at 377; *see also Runningeagle*, 825 F.3d at 982 n.13; *Pizzuto*, 783 F.3d at 1178–80.

Additionally, the *Detrich* court stated that "[a] prisoner need not show actual prejudice resulting from his PCR counsel's deficient performance, over and above his *required showing* that the [IATC] claim be 'substantial' under the first *Martinez* requirement." 740 F.3d at 1245–46 (emphasis added). While the Ninth Circuit's remand order stated that the Court was to assume 'substantiality,' it made no mention that Petitioner had already shown substantiality. Indeed, neither this Court nor the Ninth Circuit has determined that Petitioner has made any "required showing" of substantiality.

Thus, while this Court is assuming substantiality for purposes of *Martinez*'s substantiality requirement, because substantiality has not actually been shown, this Court must, for the first time, consider the prejudice requirement for PCR counsel's performance that would have been met if substantiality had actually been shown. Accordingly, the portion of *Detrich* cited by Petitioner is inapplicable to the posture of this case.

Finally, the Ninth Circuit has often examined the merits of an underlying IATC claim when analyzing whether appellate or PCR counsel's performance was deficient under *Strickland*, rather than under the *Strickland* prejudice analysis. *See, e.g.*, *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) ("A failure to raise untenable issues on appeal does not fall below the *Strickland* standard." (citing *Featherstone v. Estelle*, 948 F.2d 1497, 1507 (9th Cir. 1991))); *Pollard v. White*, 119 F.3d 1430, 1437 (9th Cir. 1997) ("We conclude that [the petitioner's] counsel was not deficient for not arguing" a meritless claim.); *Miller v. Keeney*, 882 F.2d 1428, 1435 (9th Cir. 1989) ("Because [the petitioner] had only a remote chance of obtaining reversal based upon the admission of evidence of the hand wiping incident, he cannot satisfy either of the *Strickland* prongs: Appellate counsel was not ineffective for failing to raise the issue and [the petitioner] suffered no prejudice on account of counsel's performance."). Even if *Detrich*'s framework applied to this remand, it would still require analysis of the underlying IATC claim's merits to determine whether PCR counsel was deficient under *Strickland*. Thus, under the Ninth Circuit's remand order, the Court must still examine the merits of the underlying IATC claim before excusing any procedural default. *See Runningeagle*, 825 F.3d at 982 n.13 ("[T]here is no meaningful difference between finding a claim in default and reviving it but denying it on its merits.").

C. Analysis

1. Deficiency and Prejudice of PCR Counsel's Performance

Petitioner argues that Ms. McAlister's performance was ineffective because she lacked proper qualifications, was mentally ill during representation, failed to include Claim 3 in the PCR petition, and committed other errors in preparing the PCR petition.

(Doc. 124 at 10–19).

a. State Qualifications

Petitioner first argues that Ms. McAlister performed deficiently because she did not meet some of the criteria listed in Arizona Rule of Criminal Procedure 6.8 when the Arizona Supreme Court first appointed her as lead counsel in an unrelated 1998 capital PCR proceeding. (Doc. 124 at 10–12). Thus, Petitioner continues, any decision made by Ms. McAlister during Petitioner's PCR proceedings was inherently unreasonable. (*Id.*). As a result, Petitioner appears to argue that any decision made by Ms. McAlister during Petitioner's PCR proceeding was inherently unreasonable. (*See id.* at 15). Respondent rejoins that this argument is irrelevant to Ms. McAlister's performance in Petitioner's PCR proceedings. (Doc. 125 at 16).

Arizona Rule of Criminal Procedure 6.8 sets forth eligibility criteria for the appointment of counsel in a capital case. In 1998, Rule 6.8 required PCR counsel to have: (1) "practiced in the area of state criminal litigation for three years immediately preceding the appointment"; (2) "demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases"; and (3) "attended and successfully completed, within one year of appointment, at least twelve hours of relevant training or educational programs in the area of capital defense," among other requirements. *See* Ariz. R. Crim. P. 6.8(a), (c) (1998). Rule 6.8 also included a bypass from these formal requirements "providing that the attorney's experience, stature and record enable the [Arizona Supreme Court] to conclude that the attorney's ability significantly exceeds the standards set forth in this rule." *Id.* 6.8(d).

In 1998, the Indigent Defense Standards Committee, which provided recommendations to the Arizona Supreme Court as to counsel eligibility with Rule 6.8, declined to recommend Ms. McAlister because she failed to meet the requirements of Rule 6.8(c). (Docs. 124 at 12; 124-1 at 11–15). Nonetheless, the state court appointed Ms. McAlister as lead counsel in a capital PCR proceeding, (Doc. 124 at 12), presumably recognizing that Ms. McAlister met the requirements set forth in 6.8(d). In 2000, the state

court appointed Ms. McAlister as lead counsel in Petitioner's PCR proceedings. (*Id.*).

Petitioner does not argue that Ms. McAlister was unqualified under Rule 6.8 in Petitioner's PCR proceedings. Rather, Petitioner argues that Ms. McAlister was unqualified in an unrelated proceeding that took place over a year before she was appointed to Petitioner's case. It is unclear how Ms. McAlister's failure to meet the Rule 6.8(c) criteria over a year before the Arizona Supreme Court appointed her to Petitioner's case is of any relevance to her performance in Petitioner's PCR proceedings. Further, Petitioner does not argue, or provide any evidence, that Ms. McAlister did not meet Rule 6.8(c) when she was appointed as counsel for Petitioner's PCR proceedings or that Ms. McAlister acted deficiently in any way related to the Rule 6.8(c) criteria. However, even if Ms. McAlister lacked Rule 6.8(c) qualifications when she was appointed to Petitioner's case, the Arizona Supreme Court apparently found that Ms. McAlister's "ability significantly exceed[ed] the standards set forth in [Rule 6.8(c)]." Ariz. R. Crim. P. 6.8(d).

b. Mental State during Representation

Petitioner next argues that Ms. McAlister performed deficiently because she was "seriously mentally ill during her representation of Petitioner." (Doc. 124 at 12). Thus, Petitioner continues, any decision made by Ms. McAlister during Petitioner's PCR proceedings was inherently unreasonable. (*Id.* at 15). Petitioner bases this argument on psychologist records that were allegedly part of the record in the Arizona Supreme Court's disciplinary proceedings involving Ms. McAlister's representation of clients unrelated to Petitioner's case. (*Id.* at 13–14). The Court previously denied Petitioner's motion to obtain sealed psychological reports involving Ms. McAlister because the Court held that the *Strickland* inquiry involves "an objective assessment of [an attorney's] *performance*"—not a subjective inquiry into an attorney's mental state. (Doc. 123 (emphasis added)). Petitioner's proffered evidence reaffirms the Court's ruling that Ms. McAlister's mental state is irrelevant to the Court's inquiry.

The psychological report describes Ms. McAlister's long history of depression, bipolar disorder, and alcoholism, among other ailments. (Doc. 124-1 at 64–65). Around

1998, Ms. McAlister suffered from a "flair [*sic*] up of her chronic, fibromyalgia condition." (*Id.* at 66). Apart from Ms. McAlister's financial indiscretions—which formed the basis of the disciplinary proceedings—the report does not indicate that Ms. McAlister's work product suffered from her mental condition. The only circumstantial signs that Ms. McAlister's work product potentially suffered were her trouble sleeping and elevated stress levels. (*Id.*). While the report notes that, in September 2000, a physician diagnosed Ms. McAlister as suffering from a "psychotic break," it does not describe the meaning of that term as it relates to Ms. McAlister. (*Id.*). The report similarly does not disclose the timing of the "psychotic break." (*Id.*). Petitioner also cites to a court filing by one of Ms. McAlister's former clients, who was unrelated to Petitioner's case. (Doc. 124 at 14–15). While the former client's filing includes numerous complaints and disagreements with Ms. McAlister's performance, it does not reveal any information about Ms. McAlister's mental state at the time she represented Petitioner. (*Id.*).

Petitioner argues that this evidence shows Ms. McAlister's decisions while representing Petitioner were inherently unreasonable. (*Id.* at 12–15). For support, Petitioner cites to Justice Stevens's dissent in *Bell v. Cone*, which recognizes that the mental health of an attorney *may* be relevant in determining whether an attorney performed deficiently. 535 U.S. 685, 715–16 (2002); (*see* Doc. 127 at 4–5).[4] In particular, Justice Stevens stated that evidence from the trial attorney's medical records undercut the attorney's explanations for various trial strategies, such as presenting "no mitigation case in the penalty phase" and offering "no closing argument in the face of the prosecution's request for death." *Bell*, 535 U.S. at 715–16. Justice Stevens classified these trial decisions as "nothing short of incredible." *Id.* at 715. Thus, Justice Stevens did not believe that the attorney's mental health rendered decisions by the attorney as *per se*

[4] As Petitioner notes, the majority opinion disagreed with Justice Stevens's factual inferences because "respondent did not present *any* evidence regarding his counsel's mental health in the state-court proceedings." *Bell*, 535 U.S. at 697 n.4. The majority opinion does not elaborate whether the presentation of such evidence would have influenced the holding. *Id.*

deficient; rather, Justice Stevens used inferences from the mental health records to undercut the attorney's proffered explanations for pursuing the "incredible" decisions. *Id.* at 715–16.

To the extent that Petitioner argues that Ms. McAlister provided a deficient performance in the PCR proceedings simply because she suffered from depression or other mental health disorders, Petitioner has failed to cite any supporting authority. *See, e.g.*, *Bonin v. Calderon*, 59 F.3d 815, 828–29 (9th Cir. 1995) ("[I]t is clear that a habeas petitioner should not be allowed to transform what should be an inquiry into the reasonableness of counsel's performance at his trial into [a] general inquisition of defense counsel's record and reputation."); *Johnson v. Thurmer*, 624 F.3d 786, 792 (7th Cir. 2010) (rejecting a claim that "counsel's depression tainted his guidance at trial" because the petitioner "pointed to no specific acts to establish that counsel's problems led to deficient performance, and we can find none"). Further, as the Court notes below, *see infra* Section II(C)(1)(c), Petitioner fails to show that any decision by PCR counsel was "nothing short of incredible," such that mental health evidence would be useful in discounting the presumed reasonableness (or explanations) of the attorney's decisions.

c. Failure to Include Claim 3

Petitioner also argues that Ms. McAlister's failure to include Claim 3 in Petitioner's state PCR petition was deficient. (Docs. 124 at 18–19; 127 at 5–7). Respondent first argues that Ms. McAlister's decision was reasonable because, by pleading guilty, Petitioner "waived any claim that counsel was ineffective in matters not directly connected to the guilty plea." (Doc. 125 at 17–18). Alternatively, Respondent argues that Petitioner failed to show that Claim 3 was clearly stronger than the claims Ms. McAlister raised in the PCR proceedings. (*Id.* at 18).

Contrary to Respondent's first argument, Petitioner's guilty plea did not bar Ms. McAlister from raising Claim 3 in the PCR proceedings. Under both federal and Arizona law, only a "knowing and voluntary plea of guilty with benefit of competent counsel" waives IAC claims. *See State v. Lerner*, 551 P.2d 553, 554 (Ariz. 1976); *see also Mabry*

v. Johnson, 467 U.S. 504, 508 (1984), *overruled in part on other grounds by Puckett v. United States*, 556 U.S. 129 (2009) (recognizing that a "voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked"). Thus, because the IATC claims would have called into question the competency of counsel and voluntariness of Petitioner's plea, Ms. McAlister could have reasonably raised Claim 3 in Petitioner's PCR proceedings.

However, Petitioner fails to show that Claim 3 would have been "clearly stronger" than the other claims raised by Ms. McAlister. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986))). The Supreme Court has held that, to meet the first prong of *Strickland* when counsel fails to present a nonfrivolous issue, Petitioner must show that the nonfrivolous issue was "clearly stronger" than issues that counsel did present. *Id.* (reiterating that "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal" (citing *Jones v. Barnes*, 463 U.S. 745 (1983)))[5].

Here, Petitioner fails to argue what makes this claim "clearly stronger" than the claims Ms. McAlister did present in the PCR proceedings. At most, Petitioner seems to argue that because Ms. McAlister presented a claim that relates to trial counsel's deficiency, there is no reason why Ms. McAlister should not have *also* raised Claim 3. (Doc. 124 at 18–19). However, this argument relies on an erroneous presumption that PCR counsel must raise every nonfrivolous claim. Furthermore, as the Court discusses below, Claim 3 lacks merit. *See infra* Section II(C)(2); *see also Sexton v. Cozner*,

[5] In examining PCR counsel's performance, the Court looks to analogous law applying *Strickland* to appellate counsel, "because like direct appeal counsel, PCR counsel is charged with raising and pursuing claims arising from a criminal trial." *Sampson v. Palmer*, No. 3:11-CV-00019-LRH-WGC, 2014 WL 1308628, at *7 (D. Nev. Mar. 31, 2014), *rev'd on other grounds*, 628 F. App'x 477 (9th Cir. 2015). Petitioner appears to argue that the Court should distinguish the roles of PCR counsel and appellate counsel, (Doc. 127 at 4), but Petitioner provides no basis for this distinction.

679 F.3d 1150, 1157 (9th Cir. 2012) ("Counsel is not necessarily ineffective for failing to raise even a nonfrivolous claim . . . so clearly we cannot hold counsel ineffective for failing to raise a claim that is meritless." (citing *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009))).

d. Other Alleged Errors

Petitioner finally argues that Ms. McAlister committed other errors—such as failing to obtain trial transcripts and failing to interview either trial counsel—during her representation that would render her representation presumptively deficient. (Doc. 124 at 16–18). On January 26, 2000, Ms. McAlister sent letters to Petitioner's appellate attorney, Lisa Martin, and Petitioner's trial and sentencing attorneys, Mr. Vaughn and Mr. Simpson, seeking a review of files maintained over the course of representation. (Doc. 124-1 at 81–83). Petitioner informed Ms. McAlister that the Federal Public Defender's (the "FPD's") office had taken possession of his records. (*Id.* at 87; *see also id.* at 85 (indicating the FPD's office received Petitioner's "materials" around August 1998)). Petitioner claims that Ms. McAlister never obtained the records held by the FPD's office.[6] (Doc. 124 at 17). Additionally, after she concluded her representation of Petitioner and provided her files to the FPD's office, Ms. McAlister did not include trial-level transcripts. (Doc. 124-1 at 93). When asked about the transcripts by an FPD paralegal, Ms. McAlister responded "there should've been transcripts from the change of plea, agg/mit hearing, and sentencing" but she gave the FPD's office "everything [she] had." (*Id.*). From this circumstantial evidence, Petitioner concludes that Ms. McAlister "[a]pparently . . . never obtained any pleadings or transcripts from Petitioner's trial proceedings." (Doc. 124 at 15).

The Court notes that Petitioner's conclusion is not fully supported by the record. First, there is no evidence or argument indicating that appellate counsel's case file was the only source for trial-level transcripts, which were available in the public record. Further, Ms. McAlister's billing records reveal that she reviewed trial counsel's files and

[6] The Court notes that Petitioner does not cite any evidence for this assertion.

sentencing transcripts, among other trial-level documents. (Doc. 124-1 at 96–98). Finally, Ms. McAlister stated, when asked whether she had the transcripts at some point, that they "should have been" in the file. (*Id.* at 93). Thus, Petitioner asks the Court to second-guess direct evidence in the record reflecting Ms. McAlister's review of trial-level transcripts and pleadings because of a hodgepodge of admittedly inconclusive and circumstantial evidence.[7] Petitioner has failed to meet his burden under *Strickland*. *See United States v. Taylor*, 802 F.2d 1108, 1119 (9th Cir. 1986) (holding that a petitioner's "vague and speculative assertions" failed to satisfy his burden under *Strickland*).

Petitioner also claims that Ms. McAlister was deficient for failing to meet with trial counsel about their preparation in Petitioner's case. Petitioner cites no authority that indicates a reasonable PCR counsel would interview trial counsel before preparing a PCR petition. Instead, Petitioner relies on Ms. McAlister's letters to trial counsel, which included requests for meetings, to argue that such interviews were necessary. (*See* Doc. 124 at 17). Petitioner ignores that Ms. McAlister both met with Petitioner multiple times and reviewed trial counsel's files. (Doc. 124-1 at 95–98). Thus, the Court concludes that Ms. McAlister might have reasonably concluded that, based on her other preparation, meetings with either trial counsel were unnecessary.

Notwithstanding the above analysis, the Court concludes that, even if the Court were to assume Ms. McAlister was deficient, Petitioner has failed to show prejudice. In particular, because, as the Court noted above, Claim 3 is without merit, *see infra* Section II(C)(2), Petitioner has failed to show prejudice from PCR counsel's alleged deficiencies.

2. Deficiency and Prejudice of Trial Counsel's Performance

Petitioner claims that his trial counsel "failed to act as minimally competent capital defense attorneys" because they failed to effectively communicate with Petitioner, conduct a thorough investigation of guilt-phase issues in Petitioner's case, and properly

[7] Despite the direct involvement by the FPD's office in the communication underlying this circumstantial evidence, the Court is puzzled why the FPD's office did not directly ask Ms. McAlister whether she reviewed the trial-level documents.

review discovery. (Doc. 124 at 25–34).

a. Communication with Petitioner

Petitioner argues that both trial counsel performed "so little work" on his case and "had such minimal communication" with him that they were deficient. (*Id.* at 21). Petitioner cites to various illnesses, vacations, and unrelated cases that allegedly monopolized both trial counsel's time in arguing that trial counsel deprived Petitioner of adequate pretrial representation. (*See id.* at 26). In support, Petitioner refers to the Supreme Court case *Powell v. Alabama*. 287 U.S. 45 (1932). In *Powell*, on the first day of a capital murder trial, a trial court had appointed an out-of-state lawyer, who had no opportunity to prepare the case or familiarize himself with local procedure, to represent the criminal defendants. *Id.* at 56. The Supreme Court held that "such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." *Id.* at 53. Instead of examining the actual performance of counsel at trial, the Court concluded that, under the circumstances, there was a remote likelihood that counsel could provide effective assistance so the trial was inherently unfair. *Id.*

Here, unlike the attorney in *Powell*, both trial counsel performed substantial work on Petitioner's case. For example, trial counsel interviewed "more than 50 witnesses," with some interviews occurring "over multiple days." (Doc. 125 at 24). Trial counsel also attended a nearly daylong review of evidence, filed multiple motions, and "tried to negotiate" on behalf of Petitioner. (*Id.*). Petitioner did not dispute the work trial counsel performed. (*Id.* at 25). Further, the trial judge repeatedly recognized the significant amount of work trial counsel performed. (*See, e.g.*, *id.* at 20, 23–24). Thus, the performance of both trial counsel stands in stark contrast to the performance of counsel in *Powell*.

Petitioner also cites to the Ninth Circuit case *Crandell v. Bunnell*. 25 F.3d 754 (9th Cir. 1994) (per curiam). In *Crandell*, a public defender was appointed to represent the petitioner. *Id.* at 754. Despite numerous attempts to contact his attorney, the petitioner

was moved to the "pro per" section of the jail because he was told he did not have an attorney. *Id.* at 755. After months of the attorney failing to perform work on his case, the petitioner sought to represent himself during his capital proceedings. *Id.* at 754–55. The Ninth Circuit held that the petitioner stated a viable claim of ineffective assistance of counsel. *Id.* at 755.

Here, unlike the petitioner in *Crandell*, Petitioner stated that he both knew of and understood that his attorneys had done a considerable amount of work on his case. (Doc. 125 at 20, 22). Yet, despite this understanding, Petitioner insisted upon representing himself because his counsel were not sufficiently communicating with him. (*Id.* at 20). Further, Petitioner's contention that his trial counsel failed to consult with him "about *any* aspect of the case" is overstated and contradicted by the record. (Doc. 124 at 29 (emphasis added)). For example, Petitioner states that "[b]etween July 1994 and February 1995 . . . lead counsel [Mr.] Vaughn failed to . . . inform [Petitioner] of the progress of his case." (*Id.* at 25). Yet, in Petitioner's February 1995 letter to the trial court, he stated that, since July 1994, he had spoken with Mr. Vaughn multiple times "over the phone and at court." (*See id.* at 21).

Although Mr. Vaughn did not make frequent personal visits to Petitioner, Petitioner fails to cite any case law that would render a lack of face-to-face meetings to be constitutionally deficient. *See, e.g.*, *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991) (holding that, standing alone, an attorney's failure to meet with his client more than four short meetings did not constitute constitutionally deficient performance); *see also Morris v. Slappy*, 461 U.S. 1, 13–14 (1983) (holding that the Sixth Amendment requires only competent representation and does not guarantee a meaningful relationship between the defendant and counsel); *United States v. Cronic*, 466 U.S. 648, 657 (1984) (emphasizing that the appropriate inquiry is on the adversarial process, not on the defendant's relationship with his lawyer). Furthermore, Petitioner has not shown that a total lack of communication or a complete breakdown of the attorney/client relationship occurred. *See Schell v. Witek*, 218 F.3d 1017, 1026–27 (9th Cir. 2000) (en banc)

(recognizing that "a total lack of communication" may result in the "constructive denial of assistance of counsel" in violation of a petitioner's Sixth Amendment rights); *see also Crandell*, 25 F.3d at 754–55.

b. Investigation of Guilt Phase Issues

Petitioner next argues that his trial counsel were deficient for failing to commence interviews of witnesses until nine months into their representation of Petitioner. (Doc. 124 at 29–30). However, Petitioner fails to cite *any* authority supporting that the delay caused trial counsel's performance to fall below the "objective standard of reasonableness . . . under prevailing professional norms." *Strickland*, 466 U.S. at 688. Further, despite any initial delay in interviewing, trial counsel interviewed over 50 witnesses during their representation of Petitioner. (Doc. 125 at 24). Thus, Petitioner has failed to carry his burden. *See Harrington v. Richter*, 562 U.S. 86, 104 (2011) ("To establish deficient performance, a person challenging a conviction *must show* that counsel's representation fell below an objective standard of reasonableness." (quotation marks omitted) (emphasis added)).

c. Review of Discovery

Petitioner finally argues that his trial counsel were deficient in their review of discovery. (Doc. 124 at 30–34). Petitioner bases this argument on the number of continuances requested by trial counsel. In particular, trial counsel requested over six continuances in the span of one year. (*See id.* at 30–32).

Petitioner cites to relevant ABA Guidelines that indicate the speed with which attorneys must begin and pursue investigation of their cases. (*See id.* at 32–33). However, the record does not reflect that trial counsel acted inconsistently with these obligations. In requesting each continuance, trial counsel indicated the volume of discovery involved in this case were the reason for the requests, not that trial counsel had not yet *begun* discovery. As a result, Petitioner has failed to cite any objective standard indicating that both trial counsel were deficient in requesting multiple continuances.

3. Prejudice from Trial Counsel's Performance

Even if the Court were to assume that trial counsel were deficient for any or all of the above-discussed reasons, Petitioner has failed to show that he was prejudiced by any such deficiency. *See Richter*, 562 U.S. at 104 ("With respect to prejudice, a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (quotation marks omitted)). Petitioner argues that he was prejudiced by trial counsel's deficiency for two reasons: (1) Petitioner would not have proceeded *pro se* and, thus, would not have pleaded guilty, (Doc. 124 at 34–36); and (2) trial counsel would have discovered evidence of Petitioner's mental and neurological health that would have provided a defense against Petitioner's first-degree murder charges, (*id.* at 36–37).

Petitioner's first claims that had trial counsel provided adequate assistance, Petitioner would not have proceeded *pro se*. (*Id.* at 35). Moreover, Petitioner claims that had he not proceeded *pro se*, he would have refused the prosecution's plea agreement. (*Id.*).

With regard to trial counsel's failure to thoroughly investigate and review guilt phase issues and discovery, Petitioner has not shown that a reasonable probability exists that he would not have proceeded *pro se*. Petitioner stated multiple times that he understood the significant and complex work trial counsel had completed on his case. (*See* Doc. 125 at 20–22). Petitioner also provided lack of communication—in particular, personal visits—from trial counsel as the only reason for wanting to proceed *pro se*. (*See, e.g.*, *id.* at 20 ("I haven't been happy with the way I have been represented because, you know, [trial counsel] haven't been coming down there, and they haven't been, you know, keeping me advised of everything that's going on. So I just assume I can do this myself.")). Thus, even accepting Petitioner's argument of insufficient investigation, if trial counsel had sufficiently investigated and reviewed guilty phase issues and discovery, Petitioner would still have been upset by the lack of visitation from trial counsel and proceeded *pro se*.

With regard to trial counsel's failure to communicate competently with Petitioner, Petitioner has not shown that a reasonable probability exists that he would not have pleaded guilty. After Petitioner proceeded *pro se*, the prosecution offered Petitioner a plea in which Petitioner "would agree to plead guilty to four counts of first-degree murder without any agreement as to sentence in return for the prosecution's dismissal of the non-murder counts." (Doc. 124 at 35). Petitioner then met twice with Mr. Vaughn, in his role as advisory counsel, to review the plea agreement. (*Id.* at 34–35). After Petitioner changed his plea, he wrote a letter to Mr. Vaughn expressing anger for Mr. Vaughn's participation in media interviews. (*See* Doc. 124-1 at 121, 125). During these interviews, Mr. Vaughn apparently expressed disagreement with Petitioner's decision regarding the plea agreement. (*See id.*). Petitioner relies on this letter to argue that a reasonable probability existed that, had Mr. Vaughn still represented Petitioner, he would not have pleaded guilty. (Doc. 124 at 35–36). However, this letter never expresses regret for entering into the plea agreement. Instead, the letter expresses anger for Mr. Vaughn providing his opinions to the media rather than to Petitioner. Petitioner's letter concludes:

> The reason that I am confronting you with this is because I am considering withdrawing my waiver of [counsel] so that my sentencing may be conducted properly, but there is no way that I will do this unless I can be assured that problems like those mentioned throughout this letter will not continue. I will not put up with problems like this any longer, we need to resolve this matter.

(Doc. 124-1 at 127). Thus, Petitioner explicitly indicated that the purpose for writing the letter was to determine whether to withdraw his waiver of counsel for the sentencing phase of the case—not question his decision to enter into the plea agreement. Further, Petitioner independently justified his reason for entering into the plea agreement to a reporter, noting that "if he had a jury hearing all of the things that had happened at the [victims'] house, that it would inflame them, and it would be harder on him than if he just went before a judge." *Djerf*, 959 P.2d at 1285 n.6. Thus, the Court finds no indication that Petitioner would have rejected the plea agreement had Mr. Vaughn continued to represent him.

Petitioner next claims that, had trial counsel properly investigated the guilt phase issues of Petitioner's case, trial counsel would have discovered evidence of Petitioner's "mental and neurological health that could have been used to develop a defense to the first-degree murder charges against" Petitioner. (Doc. 124 at 36). The Ninth Circuit has "repeatedly held that defense counsel in a murder trial was ineffective where there was some evidence of the defendant's mental illness in the record but counsel failed to investigate it as a basis for a mental defense to first degree murder." *Daniels v. Woodford*, 428 F.3d 1181, 1206–07 (9th Cir. 2005) (citations omitted). For example, in *Jennings v. Woodford*, the Ninth Circuit held that the petitioner was prejudiced by trial counsel's failure to investigate the petitioner's mental health and drug abuse problems. 290 F.3d 1006, 1014–19 (9th Cir. 2002). The *Jennings* court noted that considerable drug and mental health evidence was in the record, including the petitioner's methamphetamine use, schizophrenia diagnosis, statements to the police, history of self-inflicted injuries, and involuntary commitment to a psychiatric evaluation, among other evidence. *Id.* at 1016. Because trial counsel ignored this evidence, the court found counsel's deficient performance to be prejudicial. *Id.* at 1019; *see also, e.g.*, *Seidel v. Merkle*, 146 F.3d 750, 755 (9th Cir. 1998) (holding that trial counsel was prejudicially ineffective for failing to conduct a reasonable investigation of guilt phase mental defenses despite "abundant signs in the record that [the petitioner] suffered from mental illness"); *Bloom v. Calderon*, 132 F.3d 1267, 1272 (9th Cir. 1997) (holding that trial counsel was prejudicially ineffective for failing to conduct a reasonable investigation of guilt phase mental defenses despite considerable evidence in the record, including family history of mental illness, child abuse, spousal abuse, exposure to prescription drugs with psychiatric side effects, and significant findings from a psychologist and psychiatrists).

Here, Petitioner makes the conclusory statement that "evidence exists that Petitioner suffered from significant mental illness at the time of the offenses." (Doc. 124 at 36). However, Petitioner fails to cite any such evidence from the record. Rather, Petitioner relies solely on a 2004 neuropsychological evaluation that concludes

that Petitioner "*may* qualify for a DSM-IV diagnosis of schizophrenia." (Doc. 124-1 at 131 (emphasis added)). Even if the Court were to assume that Petitioner would have retained trial counsel had they conducted additional investigations into Petitioner's mental health,[8] and even if the Court were then to assume that Petitioner would not have still pleaded guilty due to his fears of inflaming a jury, this post-hoc neuropsychological evaluation does not show prejudicial ineffectiveness. Petitioner's citation to a mental health report conducted nine years after Petitioner pleaded guilty is insufficient to show prejudice. *See Harris v. Vasquez*, 949 F.2d 1497, 1515–16 (9th Cir. 1990) ("Because psychiatrists disagree widely and frequently on what constitutes mental illness, . . . the mere presentation of new psychological evaluations . . . does not constitute a colorable showing of actual innocence." (quotation marks and citations omitted)); *see also Boyde v. Brown*, 404 F.3d 1159, 1168–69 (9th Cir. 2005).

4. Conclusion

The Court finds that Petitioner has failed to show PCR counsel was deficient. Petitioner has also failed to show PCR counsel was prejudicially ineffective because Claim 3, which alleges that Petitioner's trial counsel were prejudicially ineffective, is meritless. Thus, the default of Claim 3 is not excused under *Martinez*, and the claim remains defaulted and barred from federal review.

D. Evidentiary Development

Petitioner seeks evidentiary development in the form of discovery, expansion of the record, and an evidentiary hearing. (Doc. 124 at 40–47). Respondent argues that the Antiterrorism and Effective Death Penalty Act (the "AEDPA") prohibits the evidentiary development sought by Petitioner. (Doc. 125 at 26). However, the restrictions of 28 U.S.C. §§ 2254(d)(1), (e)(2) "do not bar a hearing before the district court to allow a petitioner to show 'cause' under *Martinez*." *Dickens*, 740 F.3d at 1321. Accordingly,

[8] This assumption is even a stretch because, as the Court previously noted, Petitioner's only stated reason for proceeding *pro se* was the lack of *communication*—unrelated to the work performed on the case—by trial counsel.

> a petitioner, claiming that PCR counsel's ineffective assistance constituted "cause," may present evidence to demonstrate this point. The petitioner is also entitled to present evidence to demonstrate that there is "prejudice," that is that petitioner's claim is "substantial" under *Martinez*. Therefore, a district court may take evidence to the extent necessary to determine whether the petitioner's claim of ineffective assistance of trial counsel is substantial under *Martinez*.

Id.

1. Discovery

Petitioner requests this Court to allow discovery to depose Alan Simpson, one of Petitioner's trial counsel. (Doc. 124 at 46).[9] Petitioner also "renews his request for leave to issue a subpoena duces tecum to the Director of the Certification and Licensing Division of the Supreme Court of the State of Arizona to obtain the two sealed psychological reports submitted to the State Bar" in reference to Ms. McAlister. (*Id.*).

A habeas petitioner is not entitled to discovery "as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). However, *Martinez* contemplates discovery procedures. *See Detrich*, 740 F.3d at 1246–47 (recognizing that "it is often necessary to authorize discovery" in the *Martinez* context). Rule 6 of the Rules Governing Section 2254 Cases provides that:

> A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. . . . A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

R. 6(a), (b), Rules Governing Sec. 2254 Cases in the U.S. Dist. Cts. (2010).

"[A] district court abuse[s] its discretion in not ordering Rule 6(a) discovery when discovery [i]s 'essential' for the habeas petitioner to 'develop fully' his underlying claim." *Dung The Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005) (quoting *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997)). However, courts should not allow a

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[9] Petitioner cannot depose PCR counsel or other trial counsel as they are both deceased.

petitioner to "use federal discovery for fishing expeditions to investigate mere speculation." *Calderon v. U.S. Dist. Ct. for the N. Dist. of Cal. (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996); *see also Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999) (recognizing that habeas corpus "was never meant to be a fishing expedition for habeas petitioners to 'explore their case in search of its existence.'" (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970)).

Whether a petitioner has established "good cause" for discovery under Rule 6(a) requires a court to determine the essential elements of the petitioner's substantive claim and evaluate whether "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908–09 (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

Here, Petitioner fails to show good cause for the requested discovery. Petitioner's request to depose Mr. Simpson lacks the specificity required by Rule 6. Notably, Petitioner does not allege specific, relevant facts that might be found in the requested deposition. Thus, the discovery request constitutes the type of "fishing expedition" Rule 6 does not sanction. *See Kemp v. Ryan*, 638 F.3d 1245, 1260 (9th Cir. 2011) ("[T]he desire to engage in [an improper fishing] expedition cannot supply 'good cause' sufficient to justify discovery."); *see also Teti v. Bender*, 507 F.3d 50, 60 (1st Cir. 2007) (denying a discovery request because the petitioner "did not comply with the specific requirements of Rule (6)(b); his request for discovery is generalized and does not indicate exactly what information he seeks to obtain"). Petitioner's generalized statements regarding the potential existence of discoverable material does not constitute "good cause."

Petitioner's request for access to sealed psychological reports concerning Ms. McAlister fails for the same reasons the Court noted in its earlier Order. (*See* Doc. 123). Even if the Court assumes that PCR counsel's mental state during representation is relevant to an objective assessment of her performance, Petitioner has not stated that these sealed reports would likely contain any relevant mental health information different

from what the Court has already considered in this Order. *See supra* Section II(C)(1)(b). Thus, Petitioner has again failed to show "good cause" sufficient to justify his requested discovery.

2. Evidentiary Hearing and Record Expansion

Petitioner also states that he is "entitled" to an evidentiary hearing to develop Claim 3 further. (Doc. 124 at 37, 46). Petitioner also requests that the Court allow expansion of the record to include exhibits Petitioner submitted alongside his brief. (Doc. 124-1).

There are situations where an evidentiary hearing under *Martinez* is appropriate to determine if there is a basis to excuse a procedural default. *Detrich*, 740 F.3d at 1247. Where, however, documentary evidence provides a sufficient basis to decide a petition, a district court is within its discretion to deny a full hearing. *Runningeagle*, 825 F.3d at 990 (citing *Phillips v. Ornoski*, 673 F.3d 1168, 1179 (9th Cir. 2012)).

Having reviewed the entire record, including the evidence presented by Petitioner in his supplemental *Martinez* brief, the Court concludes that an evidentiary hearing is not warranted. R. 8(a), Rules Governing Sec. 2254 Cases in the U.S. Dist. Cts. There are no contested facts concerning Petitioner's counsel, and Petitioner has failed to indicate what evidence he seeks to develop. *See Duncan v. Ryan*, No. CV-11-08067-PCT-JAT, 2016 WL 316882, at *20 (D. Ariz. Jan. 27, 2016) ("As this Court has previously held, an evidentiary hearing cannot be used as a fishing expedition to determine if any witnesses are in existence who may have relevant testimony." (citing *United States v. Fuentes*, No. CV 08-348-PHX-JAT, 2009 WL 4730733, at *5 (D. Ariz. Dec. 7, 2009), *aff'd*, 457 F. App'x 687 (9th Cir. 2011))). Further, the Court has found Petitioner's claim is not even colorable on the facts alleged. *See Sexton*, 679 F.3d at 1161 (finding the record "sufficiently complete" with respect to underlying ineffective assistance of trial counsel claim); *cf. Dickens*, 740 F.3d at 1321 (explaining that "a district court *may take evidence to the extent necessary*" (emphasis added)). Thus, the Court denies Petitioner's request to hold an evidentiary hearing. However, the Court will expand the record to include the

exhibits attached to Petitioner's supplemental brief, as both parties have relied on the information contained therein.

III. CLAIM 2

In Claim 2, Petitioner alleges that his guilty pleas were not knowing, intelligent, and voluntary because the trial judge failed to inform him that, by pleading guilty, he was forfeiting his right to proceed to trial represented by competent counsel. (*See* Doc. 124 at 37). Petitioner's appellate counsel raised this claim on direct appeal. (*See* Doc. 124-1 at 4).

A. Legal Standard

Petitioner's habeas claims are governed by the applicable provisions of the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reduc[ing] delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh*, 521 U.S. at 333 n.7).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication was either (1) "contrary to" clearly established federal law as determined by the Supreme Court, (2) "'involved an unreasonable application of' such law," or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Richter*, 562 U.S. at 100 (quoting 28 U.S.C. § 2254(d)). "State-court decisions are measured against [the Supreme Court's] precedents as of 'the time the state court renders its decision.'" *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003)). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that

governs the sufficiency of the claims on habeas review. Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams v. Taylor*, 529 U.S. 362, 381 (2000). Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003), *overruled on other grounds by Andrade*, 538 U.S. 63.

The Supreme Court has provided guidance in applying each prong of Section 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405–06; *see also Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406; *see also Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004).

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent "unreasonable," the petitioner must show that the state court decision was not merely

incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Landrigan*, 550 U.S. at 473; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("*Miller-El II*"). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El I*, 537 U.S. at 340; *see also Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Landrigan*, 550 U.S. at 473–74; *Miller-El II*, 545 U.S. at 240.

B. Analysis

Petitioner contends that he did not make a knowing, intelligent, and voluntarily waiver of his right to counsel because the trial court failed to advise Petitioner that he had a right to seek counsel other than Vaughn and Simpson. (Doc. 124 at 37–40). Respondent rejoins that the Arizona Supreme Court's decision "was neither contrary to, nor involved an unreasonable application of, clearly established United States Supreme Court case law, nor was it an unreasonable determination of the facts in light of the record before the state court." (Doc. 125 at 31).

A defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 836 (1975). However, before a defendant may waive counsel, the court must ensure that his waiver is made knowingly, intelligently, and voluntarily. *See Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

The Arizona Supreme Court rejected Petitioner's claim that his guilty pleas were not knowing, intelligent, and voluntary. *Djerf*, 959 P.2d at 1285. The Court reviewed the record and determined that "the trial judge fully satisfied each requirement" required by federal law, including that Petitioner understood: "(1) the nature of the charges, (2) the

nature and range of possible sentences, including any special conditions, (3) the constitutional rights waived by pleading guilty, (4) the right to plead not guilty, and (5) that the right to appeal is also waived if the defendant is not sentenced to death." *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

Petitioner contends that the state court failed to follow clearly established federal law because it did not specifically consider Petitioner's difficulties with his trial counsel. (Doc. 127 at 9–10). Petitioner cites the U.S. Supreme Court cases *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Iowa v. Tovar*, 541 U.S. 77 (2004) as establishing the federal law he relies upon. (Doc. 124 at 39). In *Zerbst*, the Court recognized that "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." 304 U.S. at 464. In *Tovar*, the Court also elaborated that "[t]he information a defendant must possess in order to make an intelligent election depends on a range of case-specific factors, including his education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." 541 U.S. at 88.

Petitioner does not attack the state court's overall analysis of the record but, instead, argues that the state court failed to conduct a contextual analysis because it did not explicitly consider Petitioner's history with trial counsel. (Doc. 124 at 39). This argument runs counter to the cases Petitioner cites. *See, e.g.*, *Arrendondo v. Neven*, 763 F.3d 1122, 1130 (9th Cir. 2014) ("No clearly established Supreme Court case law requires trial courts to apprise defendants in any particular form of the risks of proceeding to trial pro se."). It is clear that the state court performed a contextualized review of the record and, thus, did not rely on an unreasonable application of federal law.

Petitioner also argues that the state court reached a decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." (Doc. 124 at 38–39). "A federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines

that the state court was not merely wrong, but actually unreasonable." *Taylor*, 366 F.3d at 999. Here, the Court does not find the state court's decision unreasonable based on the state-court record. First, Petitioner exaggerates the state of his relationship with advisory counsel when he pleaded guilty. Petitioner's characterization that communications had "irreparably broken down," (Doc. 124 at 40), ignores that Petitioner subsequently withdrew his waiver of counsel and accepted representation for his sentencing proceedings. Second, the Court's above analysis undermines Petitioner's assertion that his trial counsel were "grossly deficient." (*Id.* at 39). Thus, Petitioner has failed to present any evidence to show that the state court's decision regarding the knowing, intelligent, and voluntary nature of his guilty plea was based on an unreasonable determination of the facts.

Even if the Court were to assume that the state court failed to follow clearly established federal law or based its decision on an unreasonable determination of the facts, the trial judge's underlying error would be harmless. The harmless-error standard on habeas review provides that "relief must be granted" if the error "had a substantial and injurious effect or influence" on the proceedings. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Flynn*, 316 F. App'x 658 (9th Cir. 2009) (applying *Brecht* in a federal habeas plea colloquy error situation); *Guzman v. Lamarque*, No. CIV S-04-0700 FCD GGH P, 2009 WL 900729, at *19 (E.D. Cal. Mar. 31, 2009) (same). Here, Petitioner stated that he pleaded guilty because "if he had a jury hearing all of the things that had happened at the [victims'] house, that it would inflame them, and it would be harder on him than if he just went before a judge." *Djerf*, 959 P.2d at 1285 n.6. Thus, as the Court noted earlier, Petitioner has not shown a reasonable probability that he would have declined to enter a guilty plea had the judge indicated he could request new counsel.[10]

[10] The Court also notes that Petitioner has failed to cite any case that would require the trial judge to appoint new counsel at Petitioner's request when communications had not irreparably broken down.

IV. CERTIFICATE OF APPEALABILITY

A judge may issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standards for granting a COA are the same for petitions under Sections 2254 and 2255. *See United States v. Martin*, 226 F.3d 1042, 1046 n.4 (9th Cir. 2000). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy [Section] 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

The Court may address either element of the two-pronged COA test to determine the appealability of a district court's procedural ruling in any order if disposing one element resolves the issue. *See id.* at 485 ("Each component of the [Section] 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.").

The rule for issuing a COA amounts to but a "modest standard" and the Ninth Circuit has cautioned "'we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus.'" *Silva v. Woodford*, 279 F.3d 825, 832 (9th Cir. 2002) (quoting *Lambright v. Stewart*, 220 F.3d 1022, 1024, 1025 (9th Cir. 2000)). Finally, "any doubts" about granting a movant's request for a COA "must be resolved in his favor" and a court should issue a COA unless the claims are "utterly without merit." *Id.* at 833 (quotation marks omitted).

However, "[a] prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El I*, 537 U.S. at 338 (quotation marks omitted).

Here, neither party addresses whether the Court should grant or deny a COA on any claim. First, the Court finds that reasonable jurists could not dispute that the state trial court's order—finding that Petitioner's appellate counsel raised Claim 2 on appeal—renders Claim 5(2) moot. Next, the Court finds that reasonable jurists could not debate the conclusion that Claim 3 is procedurally barred. Finally, the Court determines that reasonable jurists would not find the Court's assessment of the constitutional claims to be debatable or wrong. Accordingly, the Court denies a COA as to Claims 2, 3, and 5(2).

V. CONCLUSION

Based on the foregoing,

IT IS ORDERED that Claim 3 is **DENIED** as procedurally barred.

IT IS FURTHER ORDERED that Claim 5(2) is **DENIED** as moot.

IT IS FURTHER ORDERED that Claim 2 is **DENIED**.

IT IS FURTHER ORDERED DENYING a certificate of appealability as to Claims 2, 3, and 5(2).

Dated this 4th day of April, 2017.