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

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George Russell Kayer,

) No. CV-07-2120-PHX-DGC

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Petitioner,

) DEATH PENALTY CASE

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vs.

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Dora Schriro, et al.,

) **ORDER**

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Respondents.

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Before the Court are Petitioner’s Motion for Reconsideration of Denial of Certificate of Appealability, Dkt. 57, and Rule 52(b) Motion to Amend Findings and Rule 59(e) Motion to Alter or Amend the Judgment, Dkt. 58. On September 19, 2009, the Court denied Petitioner’s amended habeas corpus petition, granted a certificate of appealability (“COA”) with respect to two claims, and entered judgment. Dkts. 55, 56. In the present motions, Petitioner asks the Court to reconsider its denial of a COA with respect to Claims 8, 10, and 11, and to alter or amend the judgment with respect to Claims 4, 15, and 16.

DISCUSSION

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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, committed clear error, or if there is an intervening change in the controlling law.” *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam) (quoting *389 Orange St.*

1 *Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)); *see School Dist. No. 1J, Multnomah*
2 *County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

3 Petitioner argues that he is entitled to reconsideration because this Court committed
4 clear error in denying the following claims on the merits or denying a COA. The Court
5 disagrees.

6 **Claim 4**

7 Petitioner alleged that he “was denied a trial by an impartial and representative jury
8 in violation of the Sixth and Fourteenth Amendments to the United States Constitution when
9 the trial court death qualified his jury,” arguing that, “This line of questioning was not only
10 unconstitutional, but given that Petitioner’s jury played no role in determining his sentence,
11 it was also entirely unnecessary.” Dkt. 35 at 69, 72. In the pending motion, Petitioner
12 emphasizes that the voir dire questions asked by the trial judge were “impermissible” under
13 *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985).
14 Dkt. 58 at 5. This argument is unpersuasive.

15 In *Witherspoon*, the Supreme Court held that prospective jurors cannot be excused for
16 cause “simply because they voiced general objections to the death penalty.” 391 U.S. at 522.
17 In *Witt*, the Court explained that the test for excusing a venire member is “whether the juror’s
18 views would prevent or substantially impair the performance of his duties as a juror in
19 accordance with his instructions and his oath.” 469 U.S. at 424. Nothing in *Witherspoon* or
20 *Witt* mandates a specific set of questions or proscribes the questions asked by the trial judge
21 in Petitioner’s case. *See Witt*, 469 U.S. at 424 (“determinations of juror bias cannot be
22 reduced to question-and-answer sessions which obtain results in the manner of a catechism”).
23 Moreover, with one exception, none of the prospective jurors were excused for cause based
24 on their answers to the judge’s questions.¹

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26 ¹ As described in the Court’s order denying the habeas petition, venire member
27 DeMar was excused based on his answers to the court’s death-qualification questions.
28 Dkt. 55 at 42-47.

1 In support of his motion, Petitioner contends that the Court erred in its depiction of
2 the questions asked by the trial judge and failed to address Petitioner’s argument that he is
3 entitled to relief under 28 U.S.C. § 2254(d)(2) because the Arizona Supreme Court, in
4 denying this claim, made an unreasonable factual determination concerning the voir dire
5 questions. *Id.* The Court disagrees with Petitioner’s characterization, but in any event,
6 because the questions asked by the trial judge were not constitutionally impermissible and
7 did not result in the improper exclusion of jurors, Petitioner’s argument fails.

8 In sum, the Arizona Supreme Court’s rejection of this claim was not objectively
9 unreasonable and this Court will not alter or amend its judgment denying habeas relief on
10 Claim 4.

11 **Claims 8 and 10**

12 In Claim 8, Petitioner alleged that the trial court violated his rights under the Eighth
13 and Fourteenth Amendments when it failed to find or consider mitigating circumstances
14 established by the record. Dkt. 35 at 80. In Claim 10, he alleged that the trial court and the
15 Arizona Supreme Court violated his right to the consideration of all relevant mitigation
16 evidence when they refused to consider mitigating factors that did not have a “causal nexus”
17 to the crime. *Id.* at 85. The state post-conviction court found the claims precluded as waived
18 pursuant to Rule 32.2(a)(3) because they could have been raised on appeal. This Court found
19 the claims procedurally barred and rejected Petitioner’s argument that the default of the
20 claims was caused by ineffective assistance of appellate counsel. Dkt. 55 at 51-52.

21 Petitioner requests the Court to reconsider its denial of a COA with respect to these
22 claims. A COA may issue when the petitioner “has made a substantial showing of the denial
23 of a constitutional right.” 28 U.S.C. § 2253(c)(2). This showing can be established by
24 demonstrating that “reasonable jurists could debate whether (or, for that matter, agree that)
25 the petition should have been resolved in a different manner” or that the issues are “adequate
26 to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
27 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA
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1 Finally, Petitioner, relying on the arguments set forth in his habeas petition, contends
2 that a COA is required with respect to the substance of Claims 8 and 10 because reasonable
3 jurists could disagree with the Court’s conclusion that the claims are without merit. Dkt. 57
4 at 7-8. Again, the Court disagrees. Under United State Supreme Court precedent, the
5 sentencer in a capital case must consider all relevant mitigating information; that is, the
6 sentencer may not “refuse to consider, *as a matter of law*, any relevant mitigating evidence”
7 or otherwise exclude such evidence from its consideration. *Eddings v. Oklahoma*, 455 U.S.
8 104, 114-15 (1982); *see Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Having heard and
9 considered the relevant mitigating information, however, it is within the sentencer’s
10 discretion to “determine the weight to be given” to the evidence. *Eddings*, 455 U.S. at 115.
11 As explained in the order denying the habeas petition, Dkt. 55 at 53-56, the record amply
12 demonstrates that the trial court and the Arizona Supreme Court fulfilled their constitutional
13 obligation by hearing and considering all of the mitigating evidence offered at sentencing.
14 The courts were not barred from considering, and did not refuse to consider, such evidence.
15 Therefore, because Claims 8 and 10 are without merit, appellate counsel’s failure to raise
16 them does not constitute cause for their default.

17 The Court will not revisit its denial of a COA with respect to Claims 8 and 10.

18 **Claim 11**

19 Petitioner alleged that he was denied a jury finding beyond a reasonable doubt on the
20 facts that increased his sentence beyond the maximum imposable in violation of the Sixth,
21 Eighth, and Fourteenth Amendments. Dkt. 35 at 94. Petitioner asks the Court to reconsider
22 its denial of a COA with respect to this claim.

23 In support of this request, Petitioner repeats the arguments offered in his habeas
24 petition – that his conviction was not final when *Apprendi v. New Jersey*, 530 U.S. 466
25 (2000), was decided and that the holding in *Apprendi* entitles him to relief. For the reasons
26 already explained, the Court reiterates that Petitioner’s conviction was final at the time of
27 *Apprendi*. Moreover, *Apprendi* did not overrule *Walton v. Arizona*, 496 U.S. 639 (1990), on
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1 the issue of capital sentencing, *Apprendi*, 530 U.S. at 496-97, and Petitioner’s conviction was
2 indisputably final when *Ring v. Arizona*, 536 U.S. 584 (2002), announced that only juries can
3 determine the existence of aggravating factors necessary for imposition of the death penalty.
4 These are not conclusions about which reasonable jurists could debate. Therefore, the Court
5 will not issue a COA with respect to Claim 11.

6 **Claim 15**

7 Petitioner alleged that the trial court denied his rights under the Fifth, Sixth, Eighth,
8 and Fourteenth Amendments when it refused to provide adequate funding for experts.
9 Dkt. 35 at 107. The state post-conviction court found the claim precluded under Rule
10 32.2(a)(3), and this Court found the claim procedurally barred. Dkt. 55 at 12.

11 Petitioner now argues that Respondents failed to prove that “Arizona courts strictly
12 and regularly hold that a failure to raise a ‘denial of funding’ claim on direct appeal
13 constitutes waiver of that claim.” Dkt. 58 at 7-8. Petitioner is incorrect. The Ninth Circuit
14 has established that Rule 32.2(a)(3) is strictly and regularly followed by Arizona courts.
15 *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998). This determination shifts the burden to
16 Petitioner to “demonstrat[e] subsequent inconsistent application” of the rule. *King v.*
17 *Lamarque*, 464 F.3d 963, 967 (9th Cir. 2006). Petitioner has failed to meet that burden by
18 citing any cases that demonstrate a lack of consistent and regular application of Rule
19 32.2(a)(3) to claims regarding inadequate funding. Therefore, the Court will not alter or
20 amend its judgment denying habeas relief on Claim 15.

21 **Claim 16**

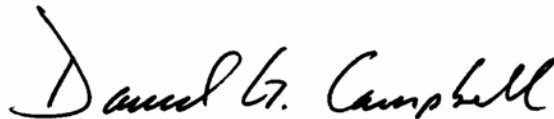
22 Petitioner alleged that the trial court denied his rights under the Fifth, Sixth, and
23 Fourteenth Amendments when it forced him to choose between “intrusions on his
24 confidential communications with his attorney by courtroom deputies” or wearing a leg brace
25 as a security measure. Dkt. 35 at 108. The state post-conviction court found the claim
26 precluded and this Court found the claim procedurally barred. Dkt. 55 at 12. As cause for
27 his default of the claim, Petitioner cited ineffective assistance of appellate counsel, an
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1 allegation which the Court found meritless under *Strickland v. Washington*, 466 U.S. 668
2 (1984). Dkt. 55 at 62.

3 Petitioner offers nothing to convince the Court that this determination was erroneous.
4 Because Petitioner opted not to wear restraints, and because there was no evidence that the
5 presence of courtroom deputies interfered with his ability to communicate with his trial
6 attorneys, appellate counsel was not constitutionally ineffective for failing to raise the claim.
7 There is no reasonable probability that doing so would have changed the result of the appeal.
8 *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). The Court will not alter or amend its
9 judgment denying habeas relief on Claim 16. Based on these same considerations, the Court
10 will not reconsider its denial of an evidentiary hearing on the claim.

11 **IT IS HEREBY ORDERED** that Petitioner’s Motion for Reconsideration of Denial
12 of Certificate of Appealability, Dkt. 57, and Rule 52(b) Motion to Amend Findings and Rule
13 59(e) Motion to Alter or Amend the Judgment, Dkt. 58, are **DENIED**.

14 DATED this 9th day of November, 2009.

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19 David G. Campbell
20 United States District Judge
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