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

Tracy Allen Hampton,

 Petitioner,

v.
Joe Profiri¹, et al.,

 Respondents.

No. CV-14-02504-PHX-ROS
DEATH PENALTY CASE
ORDER

Before the Court is Petitioner Tracy Allen Hampton’s motion to alter or amend the judgment. (Doc. 108.) Respondents filed a response and Petitioner filed a reply. (Docs. 118, 119.) For the following reasons, Petitioner’s motion is denied.

I. Applicable Law

A party may move a court to alter or amend a judgment within 28 days after the entry of the judgment. Fed. R. Civ. 59(e). “[T]here are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.” Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011).

¹ Joe Profiri, Interim Director of the Arizona Department of Corrections, is substituted for Charles L. Ryan, Director of the Arizona Department of Corrections, pursuant to Fed. R. Civ. P. 25(d)(1).

1 “[A]mending a judgment after its entry remains ‘an extraordinary remedy which should be
2 used sparingly.’” Id.

3 **II. Discussion**

4 Petitioner asserts that this Court “committed manifest errors of law and fact” related
5 to its denial of Claims 2, 3, and 4. The Court disagrees.

6 **A. Claim 2**

7 In Claim 2, Petitioner alleged that his constitutional rights were violated when the
8 trial court admitted the testimony of George Ridley, a jailhouse informant. Specifically,
9 he alleged that the state’s failure to timely disclose Ridley’s presentence report violated
10 *Brady v. Maryland*, 373 U.S. 83 (1963), and that the state’s failure to correct inaccurate
11 testimony by Ridley violated *Napue v. Illinois*, 360 U.S. 264 (1959). (Doc. 40 at 55–65.)²
12 This Court concluded that Petitioner was not prejudiced by any alleged *Brady* error, and
13 that any violation of *Napue* was not material. (Doc. 103 at 14–17.)

14 Petitioner asserts that when the Court denied Petitioner’s *Brady* claim, it failed to
15 consider the content of Ridley’s presentence report, which included the opinions of
16 Ridley’s former wife and probation officer “that Ridley was being untruthful with regard
17 to Hampton” and otherwise had a reputation for untruthfulness. (Doc. 108 at 9.) He asserts
18 that this potential evidence was not cumulative to the impeachment offered during trial.
19 Petitioner made these arguments in his reply in support of his petition (Doc. 68 at 30–33;
20 see also Doc 40 at 60–61), and they remain unpersuasive.

21 “[W]hen defense counsel sufficiently impeaches a government witness in cross-
22 examination and closing argument, the defendant cannot later claim a *Brady*[] violation on
23 account of additional undisclosed evidence supporting the impeachment.” *United States*
24 *v. Kohring*, 637 F.3d 895, 908 (9th Cir. 2011); see also *Barker v. Fleming*, 423 F.3d 1085,
25 1100 (9th Cir. 2005) (finding no materiality where undisclosed impeachment evidence
26 “was not the glue holding together the prosecution’s case” and “heaped-on impeachment
27 evidence” would not have altered the witness’s “already shattered credibility”). Ridley

28 ² These citations refer to the document and page numbers generated by the Court’s Case Management/Electronic Case Filing system.

1 was cross examined regarding the truthfulness of his testimony, the basis for his testimony,
2 and his motives to lie. This impeachment occurred during the guilt phase of trial (RT
3 4/30/02 at 73–75, 97, 105–19) as well as the penalty phase of trial (RT 1/16/03 at 29–38).
4 The content of Ridley’s presentence report reiterated that Ridley’s incarceration gave him
5 a motive to lie about Hampton’s case—it did not provide any “new and different ground
6 of impeachment.” *Barker*, 423 F.3d at 1097.

7 Petitioner emphasizes that although trial counsel presented evidence that Ridley had
8 been arrested for stalking and adamantly wanted to avoid incarceration, counsel allegedly
9 failed to establish that Ridley wanted to avoid incarceration for the specific purpose of
10 pursuing his “obsess[ion] with stalking his ex-wife.” (Doc. 108 at 10.) This is not a new
11 or different ground on which to impeach Ridley. Ridley testified extensively about the
12 charges against him, the possibility that he would be incarcerated for a significant period
13 of time, and his plea agreement with the state, and he ultimately conceded that he was
14 willing “to testify and say whatever it took” to avoid incarceration. (RT 4/30/02 at 105–
15 12, 114–20; see also RT 1/16/03 at 29–38.) Additional testimony regarding the precise
16 reasons Ridley wanted to avoid incarceration would have been cumulative to the extensive
17 testimony regarding Ridley’s plea agreement and his admission that he was willing to lie
18 in court. Petitioner did not establish that there is any probability that the additional
19 information contained in Ridley’s presentence report regarding his stalking habits would
20 have had any impact on the jury’s verdict. See *Browning v. Baker*, 875 F.3d 444, 464 (9th
21 Cir. 2017) (“Under Brady, evidence is material ‘if there is a reasonable probability that,
22 had the evidence been disclosed to the defense, the result of the proceeding would have
23 been different.’”).

24 Petitioner next asserts that the Court erred in concluding that any *Napue* violation
25 was not material because the standard for materiality under *Napue* is low (Doc. 108 at 13–
26 14), and Ridley’s credibility was not as thoroughly impeached during the penalty phase as
27 it had been during the guilt phase (*id.* at 14–15). The Court again disagrees that the alleged
28 *Napue* error could have had any effect on the penalty-phase verdict.

1 Petitioner agrees (Doc. 108 at 13) that the standard for materiality under Napue is
2 whether “there is ‘any reasonable likelihood that the false testimony could have affected
3 the judgment of the jury.’” *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) (quoting
4 *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005)). Here, it is not reasonably likely that
5 the state’s failure to correct Ridley’s misleading testimony could have affected the jury’s
6 judgment.

7 During the penalty phase, Ridley was asked: “[D]id you ever commit any violence
8 against your ex-wife,” and Ridley answered “No.” (RT 1/16/03 at 38–39.) This answer
9 was potentially misleading because Ridley had acted in a physically aggressive manner
10 toward his wife in the past. However, the jury was already aware that Ridley’s credibility
11 was in question. Ridley testified about his motive and willingness to lie, including by
12 admitting on cross-examination that he “want[ed] to do everything [he] could to minimize
13 [his] stay in prison” and was willing “to say whatever it took to have [himself] found not
14 guilty.” (Id. at 33.) “A witness may be ‘so thoroughly impeached’ that even evidence of
15 perjury at trial is ‘merely cumulative.’” *Heishman v. Ayers*, 621 F.3d 1030, 1035 (9th Cir.
16 2010) (quoting *United States v. Polizzi*, 801 F.2d 1543, 1551 (9th Cir. 1986)); see also
17 *Morris v. Ylst*, 447 F.3d 735, 746 (9th Cir. 2006) (rejecting a Napue claim where “the jury
18 already was shown that [the witness] was completely inconsistent and dishonest, that is,
19 that she was a liar in at least some respects”). Evidence that Ridley arguably perjured
20 himself when he testified that he did not “ever commit violence toward his wife” was
21 cumulative in light of the substantial impeachment offered during the penalty phase.
22 Because it is not reasonably likely that correcting Ridley’s brief testimony regarding his
23 propensity for violence toward his ex-wife could have affected the jury’s penalty-phase
24 verdict, this Court did not commit manifest error in concluding that the alleged violation
25 of Napue was not material.

26 Petitioner further asserts that the Court failed to consider the overall strengths and
27 weaknesses of the state’s case against him when considering his Brady and Napue claims.
28 For example, Petitioner again emphasizes that the state’s primary witness, Misty Ross,

1 gave inconsistent testimony regarding details such as the precise location of a victim's
2 body, and that another individual, Tim Wallace, confessed to the crimes. This information
3 was before the Court when it rejected Claim 2, and Petitioner's assertion that the Court
4 failed to appreciate the strength of the state's case is without merit.

5 Petitioner next alleges that the Court erred in not considering whether the potential
6 cumulative impact of the alleged Brady and Napue violations was sufficient to warrant
7 relief. Petitioner did not establish that his allegations under Napue and Brady, when
8 considered together, deprived him of "a verdict worthy of confidence." Jackson, 513 F.3d
9 at 1076 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). Counsel made it known to
10 both the guilt- and penalty-phase jurors that Ridley had a history of saying anything
11 necessary to avoid the consequences of his actions. There is no likelihood that the verdicts
12 could have been affected had the state both provided counsel with Ridley's presentence
13 report and corrected Ridley's testimony regarding whether he ever acted violently toward
14 his wife.

15 Finally, as a part of Claim 2, Petitioner had alleged that his counsel was ineffective
16 for failing to adequately investigate Ridley, including by failing to obtain his presentence
17 report. (Docs. 40 at 64–65; 68 at 50–54.) The Court denied this claim on its merits. (Doc.
18 103 at 17.) See *United States v. Olsen*, 704 F.3d 1172, 1187 (9th Cir. 2013) ("If the
19 withheld information does not constitute a Brady violation for lack of materiality, its
20 absence likewise will not support an ineffective assistance of counsel claim."). Petitioner
21 now argues that the Court erred in denying this subclaim because it did not consider the
22 cumulative prejudice resulting from all of trial counsel's alleged ineffective assistance.
23 The Court, however, did not conclude that counsel was ineffective during the guilt (Claim
24 3) or penalty (Claim 4) phases of Petitioner's trial, and therefore there is no resulting
25 prejudice that the Court could evaluate cumulatively with respect to the effect of the
26 counsel's alleged failure to adequately investigate Ridley.

27 Petitioner has not established that the Court committed manifest error with regard
28 to Claim 2.

1 **B. Claim 3**

2 In Claim 3, Petitioner alleged that his trial counsel was ineffective during the guilt-
3 phase of his trial for “failing to call necessary witnesses and present relevant evidence.”
4 (Doc. 40 at 66.) This Court concluded that Petitioner raised this claim in state court, and
5 additional evidence supporting this claim did not render it fundamentally altered and
6 unexhausted. (Doc. 103 at 18.) The Court then denied Claim 3 under § 2254(d). (Id. at
7 21.)

8 Petitioner asserts that the Court erred in concluding that Claim 3 was not
9 fundamentally altered because “adding the allegation that counsel were deficient by failing
10 to acquire the Ridley impeachment evidence” put this claim in a “significantly different
11 and stronger evidentiary posture.” (Doc. 108 at 17.)

12 Petitioner did not make this allegation as a part of Claim 3 in his petition.³ (See
13 Doc. 40 at 66–78.) Rather, as discussed above, Petitioner raised this allegation as a part of
14 Claim 2 (Docs. 40 at 64; 68 at 50–54), and the Court rejected that claim on its merits (Doc.
15 103 at 17). But even assuming Petitioner added his allegation regarding the investigation
16 and impeachment of Ridley as a part of Claim 3 (see Doc. 68 at 75–76), adding a meritless
17 allegation could not “fundamentally alter” Claim 3 by placing it in a stronger evidentiary
18 position. This Court did not commit manifest error when it concluded that Claim 3 was
19 adequately raised before the state courts.

20 Petitioner next argues that the state PCR court was unreasonable in its application
21 of Strickland when it denied Claim 3. (Doc. 108 at 18–24.) Specifically, Petitioner alleges
22 that the state court was not permitted to consider the possible reasons that counsel acted as
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24 ³ In support of his assertion that he raised this allegation as a part of Claim 3, Petitioner
25 cites page 66 of his petition, which does not contain allegations that counsel was deficient
26 for failing to obtain Ridley’s presentence report. (See Doc. 40 at 73.) He then cites pages
27 69 and 70 of his reply in support of his petition, in which he argues that his post-conviction
28 counsel’s failure to argue that his trial counsel was ineffective for failing to obtain Ridley’s
presentence report establishes cause and prejudice to overcome the alleged default of Claim
3. (See Doc. 69 at 78–79.) In contrast, both his petition and reply in support of his petition
include the allegation that his constitutional right to counsel was violated by his trial
counsel’s failure to obtain Ridley’s presentence report as a part of Claim 2. (Docs. 40 at
64–65; 68 at 50–54.)

1 they did and could not have found counsel’s conduct reasonable based on the stated
2 division of labor between the two trial attorneys.

3 The PCR court was not unreasonable for concluding that counsel’s representation
4 did not violate Strickland. Lead counsel knew of the evidence Petitioner now alleges
5 should have been presented to the jury, but did not present that evidence, either directly or
6 through co-counsel. Lead counsel did not recall why he did not present the evidence in
7 question. The PCR court reasoned, however, that “the decision to call or to refrain from
8 calling certain witnesses and present evidence related to the third-party defense were
9 tactical decisions, and . . . counsel was not ineffective for failing to call the identified
10 witnesses.” (Doc. 54-3 at 183.)

11 Petitioner, without citing supporting authority, alleges that the PCR court’s decision
12 was unreasonable because a court may only consider the possible reasons for counsel’s
13 actions when § 2254(d) deference applies. (Doc. 108 at 19–20.) The Court disagrees. A
14 court’s obligation to consider the possible bases for counsel’s actions is required by
15 Strickland itself. See *Gulbrandson v. Ryan*, 738 F.3d 976, 988 (9th Cir. 2013) (explaining
16 that the “strong presumption that counsel’s conduct falls within the wide range of
17 reasonable professional assistance” under Strickland “means that not only do [courts] ‘give
18 the attorneys the benefit of the doubt,’ [but] must also ‘affirmatively entertain the range of
19 possible reasons [defense] counsel may have had for proceeding as they did’”).

20 Furthermore, such an inquiry is not the type of ad hoc rationalization of counsel’s
21 conduct the Court examined in *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003). In *Wiggins*,
22 the petitioner’s attorneys conducted an inadequate investigation before performing an
23 insufficient mitigation presentation. *Id.* at 523–27. The Court concluded that counsel had
24 acted unreasonably. *Id.* at 526–27 (“[C]ounsel chose to abandon their investigation at an
25 unreasonable juncture, making a fully informed decision with respect to sentencing
26 strategy impossible.”). The Court then faulted the state courts for rationalizing counsel’s
27 conduct, post hoc, as “strategic” when it was clear from the record that counsel could not
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1 have made an objectively reasonable strategic decision without first conducting an
2 adequate investigation. *Id.*

3 Here, in contrast, lead counsel had obtained the information Petitioner argues should
4 have been used during the guilt phase of trial but did not seek to have it admitted during
5 trial. The PCR court examined the objective reasonableness of lead counsel’s conduct and
6 concluded that he was not unreasonable for failing to introduce this information because it
7 was either subject to “considerable impeachment” or would not have been admitted into
8 evidence. (Doc. 54-3 at 182–84.) This was not a post hoc rationale to excuse counsel’s
9 conduct—it was an analysis of what a reasonable attorney would have done under the
10 circumstances, as required under Strickland.

11 The PCR court’s conclusion was not unreasonable, and this Court did not commit
12 manifest error in denying Claim 3.

13 **C. Claim 4**

14 Petitioner next alleges that this Court did not address his procedural arguments with
15 respect to Claim 4A. (Doc. 108 at 24.) Claim 4 alleged that Petitioner’s counsel was
16 ineffective with respect to the investigation and presentation of mitigating evidence. (Doc.
17 40 at 79; Doc. 68 at 89.) Petitioner notes that this claim had two parts: Claim 4B
18 challenged the state PCR court’s rejection of his claim that his trial counsel was ineffective
19 during the penalty phase and Claim 4A again claimed that his trial counsel was ineffective
20 during the penalty phase, but included additional evidentiary support that had not been
21 presented in state court, including evidence of a fetal alcohol spectrum disorder and post-
22 traumatic stress disorder.

23 Petitioner claimed, in his reply in support of his petition, that this additional
24 evidence rendered Claim 4A a “substantially improved” and “significantly different,” and
25 therefore unexhausted, version of Claim 4B. (Doc. 68 at 123–24.) Petitioner then asserted
26 the procedural default of Claim 4A could be excused because of the ineffective assistance
27 of state post-conviction counsel. Petitioner now argues that the Court erred by failing to
28 consider whether he had demonstrated cause to excuse the procedural default of Claim 4A.

1 Alternatively, Petitioner asserts that Claim 4, considered in its entirety as a single claim, is
2 fundamentally altered from the claim presented to the state courts and thus unexhausted
3 and procedurally defaulted. Both arguments fail.

4 In state court, Petitioner offered, and the PCR court evaluated, mitigating evidence
5 that Petitioner’s trial counsel allegedly failed to present, including evidence of prenatal
6 alcohol exposure and a “range[]” of potential mental health disorders. (Doc. 51-2 at 18–
7 20; Doc. 54-3 at 187–94.) The additional evidence Petitioner offered in this Court to
8 support Claim 4 did not create a new claim that “bears little resemblance” to the penalty-
9 phase Strickland claim Petitioner brought in state court. See *Dickens v. Ryan*, 740 F.3d
10 1302, 1319 (9th Cir. 2014). To the contrary, Petitioner’s PCR petition contained detailed
11 allegations that his trial counsel failed to adequately explore his potential mental disorders
12 and cognitive defects, including the effects of prenatal alcohol exposure, and failed to
13 explain to the jury how Petitioner’s cognitive defects related to the crime. (Docs. 51-2 at
14 6, 19–21; 53-2 at 29–31, 34–35; 54-3 at 187, 192–94.) The additional evidence offered in
15 this Court—evidence that Petitioner could have a partial fetal alcohol spectrum disorder
16 and suffered from PTSD—supports the claim Petitioner raised in state court without
17 substantially strengthening or altering it. See *Weaver v. Thompson*, 197 F.3d 359, 364–65
18 (9th Cir. 1999) (new evidence offered to support a previously raised legal claim does not
19 render the claim “fundamentally altered” in federal court); see also *Vasquez v. Hillery*, 474
20 U.S. 254, 260 (1986). As Claim 4 is the same claim Petitioner raised in state court, this
21 Court did not err in failing to consider whether Petitioner established cause to excuse the
22 default of Claim 4.

23 Petitioner further asserts that this Court erred in finding that the state PCR court’s
24 adjudication of Claim 4 was not unreasonable. Petitioner raises the same arguments and
25 emphasizes the same evidence as in his habeas petition, which this Court rejected for
26 reasons explained in its previous order. (Doc. 103 at 25–27.)

27 Petitioner has not established that this Court committed manifest error when it
28 denied Claim 4.

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D. Certificates of Appealability

Finally, Petitioner argues that the Court should grant a certificate of appealability “for each of the[] issues” discussed above. (Doc. 108 at 29.) As stated in this Court’s prior order, a certificate of appealability may issue only when the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). With respect to claims rejected on the merits, a 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, 484 (2000). For procedural rulings, a certificate of appealability will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court’s procedural ruling was correct. *Id.*

As this Court previously concluded, reasonable jurists could not dispute the viability of the above claims. The arguments Petitioner offers in his motion do not alter this conclusion.

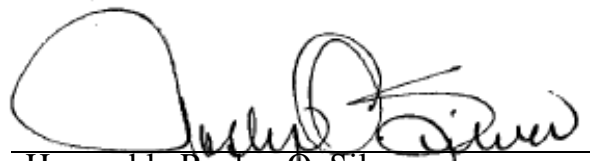
III. Conclusion

Petitioner has not met the requirements of Rule 59(e). Accordingly,

IT IS ORDERED denying the motion (Doc. 108).

IT IS FURTHER ORDERED that the Clerk of the Court shall, pursuant to Fed. R. Civ. P. 25(d), substitute, as a Respondent, Joe Profiri for Charles L. Ryan as Interim Director of the Arizona Department of Corrections. The Clerk shall update the title of this case to reflect this substitution.

Dated this 16th day of October, 2019.


Honorable Roslyn O. Silver
Senior United States District Judge