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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Sean Patrick Ward,

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No. CV 07-606-PCT-MHM

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Petitioner,

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ORDER

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vs.

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Charles L. Ryan, Director, Arizona
Department of Corrections; and Terry
Goddard, Attorney General,

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Respondents.

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The Court is in receipt of Petitioner Sean Patrick Ward’s Request for Status Regarding
Petition for Writ of Habeas Corpus by Person in State Custody Pursuant to 28 U.S.C. § 2254.
(Doc. 42). Petitioner’s Writ of Habeas Corpus is currently under review by this Court and
an Order shall be issued in the near future.

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Additionally, this Court previously ordered the Parties to submit additional briefing
concerning whether 28 U.S.C. § 2254(e)(2) prohibits this Court from holding an evidentiary
hearing on Petitioner’s ineffective assistance of counsel (“IAC”) claim (specifically, to call
Petitioner’s trial counsel, Eric Engan, to testify) based on the fact that Petitioner’s trial
counsel was not called as a witness at the state court evidentiary hearing on Petitioner’s
Petition for Post-Conviction Relief. (Doc. 37).¹ The Parties submitted their respective briefs

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¹Neither Party has requested an evidentiary hearing in this matter.

1 on July 24, 2010. (Docs. 40 & 41).

2 Having considered the Parties' submissions and the applicable law, the Court finds
3 that § 2254(e)(2) of the Antiterrorism and Effective Death Penalty Act of 1996
4 ("AEDPA") prohibits it from holding an evidentiary hearing on Petitioner's Petition for
5 Post-Conviction Relief. Under AEDPA, if "the applicant has failed to develop the
6 factual basis of a claim in State court proceedings, the court shall not hold an evidentiary
7 hearing." 28 U.S.C. § 2254(e)(2). The Supreme Court has explained that the phrase
8 "failed to develop" denotes a lack of diligence, and "[d]iligence for purposes of [28
9 U.S.C. § 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in
10 light of the information available at the time, to investigate and pursue claims in state
11 court; it does not depend ... upon whether those efforts could have been successful."
12 Williams v. Taylor, 529 U.S. 420, 436 (2000). "[T]his rule serve[s] the AEDPA's goal
13 of furthering comity in that 'federal courts sitting in habeas are not an alternative forum
14 for trying facts and issues which a petitioner made insufficient effort to pursue in state
15 court proceedings.'" Schad v. Schriro, 454 F.Supp.2d 897, 943 (D. Ariz. 2006) (quoting
16 Williams, 529 U.S. at 437).

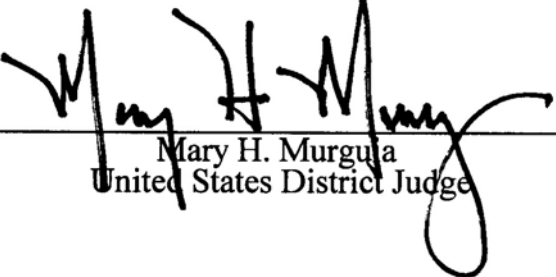
17 The record shows that the state trial court held an evidentiary hearing on April 23,
18 2004, to permit Petitioner to present evidence on his numerous IAC claims. (Doc No. 13:
19 Answer, Ex. A). Petitioner called numerous witnesses, but elected not to call his trial
20 attorney, Mr. Engan, despite having communicated with and interviewed him as part of
21 its preparation for the evidentiary hearing. (Doc. 41, p.4). Since it appears that
22 Petitioner had an opportunity to take Mr. Engan's testimony, but failed to do so, any
23 deficiencies in the factual basis of Petitioner's IAC claims owing to the fact that Mr.
24 Engan did not testify are of Petitioner's own creation. Consequently, the Court finds that
25 Petitioner, with respect to developing the factual basis of claims for which the testimony
26 of Mr. Engan is necessary, did not exercise the requisite diligence. Section 2254(e)(2),
27 therefore, prohibits this Court from holding an evidentiary hearing on Petitioner's Petition
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1 for Post-Conviction Relief.²

2 **Accordingly,**

3 **IT IS HEREBY ORDERED** granting Petitioner's Request for Status Regarding
4 Petition for Writ of Habeas Corpus by Person in State Custody Pursuant to 28 U.S.C. §
5 2254. (Doc. 42). The Court expects to issue an Order concerning Petitioner's Writ of
6 Habeas Corpus in the near future. Additionally, finding that doing so is prohibited by 28
7 U.S.C. § 2254(e)(2) of AEDPA, the Court will not hold an evidentiary hearing on
8 Petitioner's Petition for Post-Conviction Relief.

9 DATED this 13th day of August, 2010.

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Mary H. Murgula
United States District Judge

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²In reaching this conclusion, the Court notes that it is not making any decision with respect to the merits of Petitioner's IAC claims. Additionally, it declines at this time to adopt the position advocated by Respondents that the absence of Mr. Engan's testimony prevents Petitioner from being able to prove the deficient performance element of his IAC claims.