



1 of counsel (“IAC”). (Doc. 57 at 10-92.) On June 5, 2006, the PCR court denied relief. (Doc.  
2 34, Ex. I.) The Arizona Court of Appeals granted Petitioner’s request for review but denied  
3 relief. (Doc. 57 at 104-23; Doc. 34, Ex. J.)

4 **II. Discussion<sup>1</sup>**

5 Petitioner alleges in Claim One that: (a) trial counsel was ineffective because he  
6 presented an implausible defense that impeded James’s right to testify; (b) the trial court  
7 should have held a hearing regarding evidence suppressed by the prosecution; (c) the  
8 prosecution suppressed evidence in violation of *Brady v. Maryland*; and (d) the prosecution  
9 presented perjured testimony by witness Detective Paul Montano. In Claim Two, Petitioner  
10 alleges: (a) trial counsel was ineffective for failing to object to admission of his coerced  
11 confession; and (b) the trial court violated his right to due process in admitting the  
12 confession. In Claim Three, Petitioner alleges appellate counsel was ineffective for failing  
13 to raise a claim: (a) challenging the admission of Detective Montano’s interrogation of  
14 Petitioner, which was hearsay, violated the Confrontation Clause and amounted to improper  
15 vouching for another witness; (b) challenging the trial court’s refusal to accept a  
16 manslaughter verdict; (c) alleging trial court error for not instructing on reckless  
17 manslaughter;<sup>2</sup> and (d) alleging an *Apprendi-Blakely* violation. Additionally, Petitioner  
18 argues the trial court violated his rights under the Confrontation Clause by admitting  
19 Detective Montano’s testimony, Claim 3(e). Claim Four alleges Petitioner’s sentencing was  
20 defective because the court failed to make *Faretta* findings regarding his self-representation.

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23 <sup>1</sup> Petitioner’s claim numbering is not clear and fails to break out subparts of certain  
24 claims. Respondents failed to fully clear-up the confusion in their Response. The Court has  
25 followed Petitioner’s numbering as possible, but has added or changed the numbering as  
26 necessary for clarity.

27 <sup>2</sup> To the extent Petitioner is attempting to raise an independent claim that the trial court  
28 erred in failing to instruct on reckless manslaughter, Petitioner presents this solely as a state-  
law claim, which is not cognizable before this Court.

1 Finally, Petitioner alleges in Claim Five that the cumulative errors arising from all these  
2 claims warrants relief.

3 **A. Exhaustion and Procedural Default**

4 Respondents argue that Petitioner failed to properly exhaust Claims 1(b), 1(c), 1(d),  
5 2(b), and 3(c). The Court also evaluates the procedural status of Claim 3(e).

6 **1. Principles of Exhaustion and Procedural Default**

7 A writ of habeas corpus may not be granted unless it appears that a petitioner has  
8 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*  
9 *Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must “fairly  
10 present” the operative facts and the federal legal theory of his claims to the state’s highest  
11 court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848  
12 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78  
13 (1971). If a habeas claim includes new factual allegations not presented to the state court,  
14 it may be considered unexhausted if the new facts “fundamentally alter” the legal claim  
15 presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

16 Exhaustion requires that a petitioner clearly alert the state court that he is alleging a  
17 specific federal constitutional violation. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir.  
18 2004); *see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (general appeal to due process  
19 not sufficient to present substance of federal claim); *Lyons v. Crawford*, 232 F.3d 666, 669-  
20 70 (2000), *as amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency  
21 of evidence, right to be tried by impartial jury, and ineffective assistance of counsel lacked  
22 specificity and explicitness required); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999)  
23 (“The mere similarity between a claim of state and federal error is insufficient to establish  
24 exhaustion.”). A petitioner must make the federal basis of a claim explicit either by citing  
25 specific provisions of federal law or case law, *Lyons*, 232 F.3d at 670, or by citing state cases  
26 that plainly analyze the federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153,  
27 1158 (9th Cir. 2003) (en banc); *cf. Fields v. Washington*, 401 F.3d 1018, 1022 (9th Cir. 2005)  
28 (mere citation to a state case that conducts both a state and federal law analysis does not, by

1 itself, satisfy exhaustion).

2 In Arizona, there are two primary procedurally appropriate avenues for petitioners to  
3 exhaust federal constitutional claims: direct appeal and PCR proceedings. Rule 32 of the  
4 Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner  
5 is precluded from relief on any claim that could have been raised on appeal or in a prior PCR  
6 petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided  
7 only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and  
8 the petitioner can justify why the claim was omitted from a prior petition or not presented in  
9 a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

10 A habeas petitioner's claims may be precluded from federal review in two ways.  
11 First, a claim may be procedurally defaulted in federal court if it was actually raised in state  
12 court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S.  
13 at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present  
14 it in state court and "the court to which the petitioner would be required to present his claims  
15 in order to meet the exhaustion requirement would now find the claims procedurally barred."  
16 *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998)  
17 (stating that the district court must consider whether the claim could be pursued by any  
18 presently available state remedy). If no remedies are currently available pursuant to Rule 32,  
19 the claim is "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732,  
20 735 n.1; *see also Gray*, 518 U.S. at 161-62.

21 Because the doctrine of procedural default is based on comity, not jurisdiction, federal  
22 courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*,  
23 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a procedurally  
24 defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly  
25 exhaust the claim in state court and prejudice from the alleged constitutional violation, or  
26 shows that a fundamental miscarriage of justice would result if the claim were not heard on  
27 the merits in federal court. *Coleman*, 501 U.S. at 750.

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1                                   **2. Procedural Default Analysis**

2                                   **a. Claims 1(b), 1(c)**

3                                   These two claims are premised on *Brady v. Maryland*, although the exact claims are  
4 not entirely clear. The Court summarizes them as alleging that (b) the trial court should have  
5 held a hearing regarding evidence suppressed by the prosecution; and (c) the prosecution  
6 suppressed evidence. Regardless of the exact characterization of the claims, Petitioner did  
7 not raise any *Brady* claims in state court. (*See* Doc. 34, Exs. B, E, F.)

8                                   Petitioner argues that he “raised those concerns stemming from a Brady request in the  
9 Superior Court prior to filing supplement PCR,” raised it in a footnote of his PCR petition  
10 (Doc. 45 at 13), and in numerous places in special actions, on appeal and in the PCR  
11 proceeding (*Id.* at 15). The footnote merely mentions a related factual allegation in the  
12 context of a different claim, it does not mention *Brady* or any federal claim. (Doc. 34, Ex.  
13 E at 3 n.3.) Further, review of the materials cited by Petitioner indicates that he repeatedly  
14 sought disclosure, what he refers to as *Brady* material, to support an IAC claim. He does not  
15 allege and the record demonstrates that he did not properly raise a claim in his PCR petition  
16 or supplement based on *Brady*.

17                                   If Petitioner were to return to state court now to litigate these claims, they would be  
18 found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of  
19 Criminal Procedure because they do not fall within an exception to preclusion. Ariz. R. Crim.  
20 P. 32.2(b); 32.1(d)-(h). Therefore, these claims are technically exhausted but procedurally  
21 defaulted. Petitioner has not alleged cause and prejudice or that a fundamental miscarriage  
22 of justice will result if these issues are not reviewed on the merits. Claims 1(b) and 1(c) are  
23 procedurally defaulted.

24                                   **b. Claim 1(d)**

25                                   Petitioner alleges that his due process rights were violated by the admission of  
26 perjured testimony by witness Detective Paul Montano. Petitioner presented this claim in his  
27 PCR petition but then withdrew it. (Doc. 34, Ex. E at 14-16, Ex. G at 2.) Promptly thereafter,  
28 he filed a Notice of Errata, alerting the PCR court that he did not intend to withdraw the

1 claim. (Doc. 47-4 at 124.) The PCR court did not acknowledge the errata and did not address  
2 the claim on the merits.

3 However, Petitioner did not fairly present this claim in his petition for review to the  
4 appellate court. (Doc. 57 at 104-23.) For a petitioner to exhaust a claim in state court, the  
5 petitioner must bring the same federal claim before both the trial (PCR) court and the court  
6 of appeals. *See O'Sullivan*, 526 U.S. at 848. Here, Petitioner did not raise the issue at all in  
7 his petition for review. Thus, Petitioner did not fairly and properly present the same claim  
8 in the state courts and has not properly exhausted Claim 1(d). *See id.* at 845.

9 If Petitioner were to return to state court now to litigate this claim, it would be found  
10 waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal  
11 Procedure because it does not fall within an exception to preclusion. Ariz. R. Crim. P.  
12 32.2(b); 32.1(d)-(h). Therefore, this claim is technically exhausted but procedurally  
13 defaulted. Petitioner has not alleged cause and prejudice or that a fundamental miscarriage  
14 of justice will result if this claim is not reviewed on the merits. Claim 1(d) is procedurally  
15 defaulted.

16 **c. Claims 2(b) and 3(e)**

17 In Claim 2(b), Petitioner alleges the court violated his right to due process by  
18 admitting his confession. In Claim 3(e), Petitioner alleges the trial court violated his rights  
19 under the Confrontation Clause by admitting Detective Montano's testimony.<sup>3</sup> The PCR  
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23 <sup>3</sup> Respondents did not acknowledge Claim 3(e) and did not, therefore, argue that the  
24 claim is defaulted. However, in his Amended Petition, Petitioner acknowledged that the PCR  
25 court found the claim precluded and he argued cause and prejudice to overcome the default;  
26 therefore, the Court finds it proper to address procedural default. *See Vang v. Nevada*, 329  
27 F.3d 1069, 1073 (9th Cir. 2003) (finding district court can raise procedural default sua sponte  
28 under appropriate circumstances); *cf. Day v. McDonough*, 547 U.S. 198, 209 (2006) (holding  
that district courts may sua sponte consider the timeliness of a habeas petition, just as circuit  
courts have held can be done for other affirmative defenses such as procedural default).

1 court found both of these claims precluded for failure to raise them on appeal.<sup>4</sup> (Doc. 34, Ex.  
2 I at 5-6.) Therefore, these claims are procedurally defaulted.

3 Petitioner argues the default of Claim 3(e) is overcome by IAC on appeal. He does not  
4 make such an argument regarding Claim 2(b). Even if he did, this cannot operate as cause  
5 to excuse the defaults of either claim because IAC for failure to raise these claims on appeal  
6 was not exhausted as an independent claim in Petitioner's PCR proceeding. Such claims also  
7 are technically exhausted but procedurally defaulted. *See Murray v. Carrier*, 477 U.S. 478,  
8 489 (1986); *Gray*, 518 U.S. at 161-62; *Coleman*, 501 U.S. at 735 n.1; *Edwards v. Carpenter*,  
9 529 U.S. 446, 453 (2000) (ineffective counsel as cause can itself be procedurally defaulted).

10 **d. Claim 3(c)**

11 Petitioner alleges appellate counsel was ineffective for not raising a claim of trial court  
12 error in failing to instruct on reckless manslaughter. Petitioner is accurate that he raised this  
13 claim in a supplemental motion for rehearing before the PCR court and in his Petition for  
14 Review. However, under Arizona's rules, fair presentation requires including the ground in  
15 the PCR petition, Ariz. R. Crim. P. 32.5, which he did not do (Doc. 34, Ex. E); mentioning  
16 it for the first time in a motion for rehearing is not fair presentation, Ariz. R. Crim. P. 32.9  
17 (motions for rehearing are solely to raise error in the court's ruling).

18 If Petitioner were to return to state court now to litigate this claim, it would be found  
19 waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal  
20 Procedure because it does not fall within an exception to preclusion. Ariz. R. Crim. P.  
21 32.2(b); 32.1(d)-(h). Therefore, this claim is technically exhausted but procedurally

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23 <sup>4</sup> The PCR court cited Arizona Rule of Criminal Procedure 32.2(a)(1), which states that  
24 a claim is precluded if it is "[r]aisable on direct appeal." The comment to the rule clarifies  
25 that this provision applies to grounds that may still be raised before an appellate court on  
26 direct appeal. The PCR court, however, was clear in its discussion of both these claims that  
27 Petitioner had completed his appeal without raising these claims. (Doc. 34, Ex. I at 5, 6.)  
28 Therefore, it is unambiguous that the judge precluded the claims because they were waived  
on appeal, which falls within a separate preclusion subpart, Rule 32.2(a)(3). Because the  
PCR court's intent is clear, and Petitioner does not challenge the erroneous citation, the Court  
relies upon the preclusion.

1 defaulted. Petitioner has not alleged cause and prejudice or that a fundamental miscarriage  
2 of justice will result if this claim is not reviewed on the merits. Claim 3(c) is procedurally  
3 defaulted.

4 **B. Merits**

5 The Court reviews the merits of Claims 1(a), 2(a), 3(a), 3(b), 3(d), 4 and 5.

6 **1. Legal Standard for Relief Under the AEDPA**

7 The Antiterrorism and Effective Death Penalty Act (AEDPA) established a  
8 “substantially higher threshold for habeas relief” with the “acknowledged purpose of  
9 ‘reducing delays in the execution of state and federal criminal sentences.’” *Schriro v.*  
10 *Landrigan*, 550 U.S. 465, 473-74 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206  
11 (2003)). The AEDPA’s “‘highly deferential standard for evaluating state-court rulings’ . . .  
12 demands that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*,  
13 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7  
14 (1997)).

15 Under the AEDPA, a petitioner is not entitled to habeas relief on any claim  
16 “adjudicated on the merits” by the state court unless that adjudication:

17 (1) resulted in a decision that was contrary to, or involved an unreasonable  
18 application of, clearly established Federal law, as determined by the Supreme  
Court of the United States; or

19 (2) resulted in a decision that was based on an unreasonable determination of  
20 the facts in light of the evidence presented in the State court proceeding.

21 28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned state decision  
22 regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v.*  
23 *Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664  
24 (9th Cir. 2005).

25 “The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule  
26 of law that was clearly established at the time his state-court conviction became final.”  
27 *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection  
28 (d)(1), the Court must first identify the “clearly established Federal law,” if any, that governs

1 the sufficiency of the claims on habeas review. “Clearly established” federal law consists  
2 of the holdings of the Supreme Court at the time the petitioner’s state court conviction  
3 became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 549 U.S. 70, 74 (2006).

4 The Supreme Court has provided guidance in applying each prong of § 2254(d)(1).  
5 The Court has explained that a state court decision is “contrary to” the Supreme Court’s  
6 clearly established precedents if the decision applies a rule that contradicts the governing law  
7 set forth in those precedents, thereby reaching a conclusion opposite to that reached by the  
8 Supreme Court on a matter of law, or if it confronts a set of facts that is materially  
9 indistinguishable from a decision of the Supreme Court but reaches a different result.  
10 *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In  
11 characterizing the claims subject to analysis under the “contrary to” prong, the Court has  
12 observed that “a run-of-the-mill state-court decision applying the correct legal rule to the  
13 facts of the prisoner’s case would not fit comfortably within § 2254(d)(1)’s ‘contrary to’  
14 clause.” *Williams*, 529 U.S. at 406; *see Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir.  
15 2004).

16 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas court  
17 may grant relief where a state court “identifies the correct governing legal rule from [the  
18 Supreme] Court’s cases but unreasonably applies it to the facts of the particular . . . case” or  
19 “unreasonably extends a legal principle from [Supreme Court] precedent to a new context  
20 where it should not apply or unreasonably refuses to extend that principle to a new context  
21 where it should apply.” *Williams*, 529 U.S. at 407. For a federal court to find a state court’s  
22 application of Supreme Court precedent “unreasonable,” the petitioner must show that the  
23 state court’s decision was not merely incorrect or erroneous, but “objectively unreasonable.”  
24 *Id.* at 409; *Landrigan*, 550 U.S. at 473; *Visciotti*, 537 U.S. at 25.

25 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state  
26 court decision was based upon an unreasonable determination of the facts. *Miller-El v.*  
27 *Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision “based on a factual  
28 determination will not be overturned on factual grounds unless objectively unreasonable in

1 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322, 340  
2 (2003) (*Miller-El I*); see *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering  
3 a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct,  
4 and a petitioner bears the “burden of rebutting this presumption by clear and convincing  
5 evidence.” 28 U.S.C. § 2254(e)(1); *Landrigan*, 550 U.S. at 473-74; *Miller-El II*, 545 U.S.  
6 at 240.

## 7                   **2. Merits Analysis**

### 8                   **a. Standard for Ineffective Assistance of Counsel**

9           Claims 1(a), 2(a), 3(a), 3(b) and 3(d) allege ineffective assistance of counsel. IAC  
10 claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under  
11 *Strickland*, a petitioner must show that counsel’s representation fell below an objective  
12 standard of reasonableness and that the deficiency prejudiced the defense. 466 U.S. at 687-  
13 88.

14           The inquiry under *Strickland* is highly deferential, and “every effort [must] be made  
15 to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s  
16 challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.*  
17 at 689. Thus, to satisfy *Strickland*’s first prong, deficient performance, a defendant must  
18 overcome “the presumption that, under the circumstances, the challenged action might be  
19 considered sound trial strategy.” *Id.*

20           Because an IAC claim must satisfy both prongs of *Strickland*, the reviewing court  
21 “need not determine whether counsel’s performance was deficient before examining the  
22 prejudice suffered by the defendant as a result of the alleged deficiencies.” *Id.* at 697 (“if it  
23 is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice  
24 . . . that course should be followed”). A petitioner must affirmatively prove prejudice. *Id.* at  
25 693. To demonstrate prejudice, he “must show that there is a reasonable probability that, but  
26 for counsel’s unprofessional errors, the result of the proceeding would have been different.  
27 A reasonable probability is a probability sufficient to undermine confidence in the outcome.”  
28 *Id.* at 694. The calculus involved in assessing prejudice “should proceed on the assumption

1 that the decision-maker is reasonably, conscientiously, and impartially applying the standards  
2 that govern the decision.” *Id.* at 695.

3 **b. Claim 1(a)**

4 Claim 1(a) was raised in this Court, and before the PCR court, as two intertwined  
5 issues: trial counsel failed to raise a plausible defense, which impeded Petitioner’s right to  
6 testify. Petitioner argues that he wanted counsel to present self-defense but counsel chose  
7 to argue that Petitioner’s wife killed the victim, which he believes was not supported by the  
8 evidence. Further, Petitioner contends that he could not testify because the defense counsel  
9 chose was in contradiction to his statements to the police and would have required him to lie.

10 The PCR court held an evidentiary hearing on this claim and made the following fact  
11 findings and ruling:

12 Petitioner testified at the evidentiary hearing on January 9, 2006, that he  
13 wanted to make a self-defense claim, that he wanted to testify and that he had  
14 fired other attorneys who did not agree to this. According to Petitioner, counsel  
15 Dan Cooper did not believe Petitioner’s self-defense theory. Petitioner  
16 conceded his statements were “messed up” and “stupid” because he was drunk.  
17 Petitioner said that he “bugged” Mr. Cooper throughout the trial about  
18 testifying and was ignored. In fact, Petitioner said that all of his attorneys told  
19 him he could not testify.

20 According to Petitioner, Mr. Cooper told him that he, not Petitioner,  
21 would decide on the defense. Petitioner claimed that, at the time of the hearing,  
22 Mr. Cooper lied to Petitioner and told him that he would present the self-  
23 defense theory, thus averting “firing” by Petitioner.

24 Petitioner agreed that the problems with his statements were that: first,  
25 he said that a masked intruder, either “Tattoo Bob” or “Biker Bob,” was the  
26 murderer; second, he said a guy named Adam might have done it; third, he said  
27 that Sonny possibly had stabbed the victim; and, finally, Petitioner said that he  
28 had stabbed the victim but in self defense.

29 Petitioner’s trial counsel, Dan Cooper, testified at the same hearing that  
30 he selected the defense theory that Petitioner’s wife killed the victim and he  
31 hired a blood expert to bolster that theory. Counsel rejected a self-defense  
32 theory because of the physical evidence, particularly the blood spatter  
33 evidence, and problems with Petitioner’s credibility due to his various  
34 statements.

35 The physical evidence revealed that the victim had been stabbed in the  
36 back and the victim’s throat had been cut. The lack of defensive wounds on  
37 Petitioner suggested there had been no struggle and the evidence suggested an  
38 ambush instead. The court has reviewed the color copies of photographs  
submitted by Petitioner purporting to illustrate defensive wounds. Four photos  
show some redness on the scalp but no laceration or swelling; one shows a

1 bruise but no laceration or swelling on the left knee. None of the photos  
2 support Petitioner's claim that he was involved in a struggle.

3 In addition, because Petitioner had given so many different statements,  
4 trial counsel believed Petitioner would have little or no credibility. Trial  
5 counsel said that when Petitioner gave his statements to the police, he was a  
6 "cold stone liar," was belligerent and appeared to be a "real jerk." Trial  
7 counsel also believed, from his own experiences with Petitioner, that he lacked  
8 the ability to control his temper and would be an "absolute horrible witness."  
9 Trial counsel said a self-defense theory was a "really, really poor defense" in  
10 view of the physical evidence. In electing to pursue the defense that  
11 Petitioner's wife killed the victim, trial counsel chose what he thought was the  
12 better of two bad defenses.

13 All of counsel's conclusions were reasonable under prevailing standards  
14 and the court does not reach the issue of prejudice. Further, if the evidence did  
15 not support a credible self-defense theory, it was not unreasonable for counsel  
16 to refuse to advance a self-defense theory, even if it ultimately precluded  
17 counsel from arguing for a lesser-included offense.

18 With respect to Petitioner's right to testify, trial counsel was unequivocal.  
19 Had Petitioner insisted on testifying, Mr. Cooper would not have stood in his  
20 way. Instead, he would have made a record that Petitioner's testimony was  
21 over his objection and Petitioner would have testified. The court has  
22 considered the credibility of both witnesses and finds that Mr. Cooper did not  
23 prevent Petitioner from testifying.

24 Trial counsel has been a criminal defense attorney for most of his twenty-  
25 nine years of practice. He has represented approximately 120 persons charged  
26 with murder. In this case, he hired an investigator, an expert, and a child  
27 psychologist and personally interviewed all of the State's witnesses. He  
28 investigated the victim's background, learned that the victim had little, if any  
record and was a docile person. The Court finds that trial counsel's  
representation was reasonable under all the facts and circumstances of this  
case. Petitioner has failed to show ineffective assistance of trial counsel.

19 (Doc. 34, Ex. I at 3-5.)

20 Petitioner disputes several of the PCR court's fact findings. First, he notes that the  
21 PCR court interpreted his lack of defensive wounds as an indication that he was not attacked  
22 by the victim. Petitioner claims to have been hit from behind, therefore, he argues that typical  
23 defensive wounds would not be found. The Court's finding regarding the lack of struggle  
24 was based on both the lack of typical defense wounds **and** review of the alleged atypical  
25 injuries asserted by Petitioner, i.e., his knee and scalp injuries. The Court found neither  
26 sufficient. Petitioner has not demonstrated this finding to be incorrect by clear and  
27 convincing evidence. Second, Petitioner argues the PCR court found his scalp wound  
28 irrelevant. That is not an accurate reflection of the court's findings. The PCR court stated that

1 the photos indicate only some redness of the scalp and a bruise on the knee. (Doc. 34, Ex. I  
2 at 4.) The court did not find a scalp wound irrelevant, merely that any injury was nominal and  
3 did not evidence a struggle. (*Id.*)

4 Third, Petitioner contends the PCR court's credibility finding regarding counsel was  
5 flawed because counsel Dan Cooper testified that Petitioner did not agree to the defense  
6 presented, but in response to a state bar complaint Cooper stated that Petitioner did agree.  
7 Cooper testified that, although they disputed the best defense up to trial and Petitioner was  
8 not happy with his choice of defense, Petitioner understood that Cooper thought it was their  
9 only chance. (Doc. 57, RT 1/6/06 at 72.) Petitioner has not identified an inconsistency. Nor  
10 has he undermined the overall credibility finding by clear and convincing evidence.

11 Now the Court must review the objective reasonableness of the state courts' ruling  
12 that counsel's decision fell within reasonable professional judgment under *Strickland*. *See*  
13 *Wood v. Allen*, 130 S.Ct. 841, 849 at 850-51 & n.3 (2010); *Matylinsky v. Budge*, 577 F.3d  
14 1083, 1091-92 (9th Cir. 2009) (counsel's choice of defense is one of strategy entitled to  
15 deference unless below professional norms). Petitioner contends counsel's decision to reject  
16 a self-defense theory was unreasonable because self-defense was the only plausible theory.  
17 Counsel's testimony, which the PCR court found credible, demonstrated that self-defense  
18 was not the only plausible theory. To the contrary, counsel was convinced that the physical  
19 evidence undermined self-defense and he hired a blood spatter expert to support his theory.  
20 The victim was stabbed in the back and his throat was cut. Additionally, Petitioner did not  
21 have wounds evidencing a struggle nor did the victim have any defensive wounds. Finally,  
22 counsel reasonably concluded that Petitioner was not credible and would be a terrible  
23 witness, which made self-defense a less viable defense. In light of those facts, it was not  
24 unreasonable for counsel to argue that the other person present at the scene, Petitioner's wife,  
25 had killed the victim.

26 Petitioner relies on the case of *Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001), in  
27 which the Ninth Circuit found that Phillips had put forth a colorable claim that his counsel's  
28 performance was deficient. *Phillips* is distinguishable for several reasons. In *Phillips*, the

1 court looked only at the defendant's allegations to assess whether there was a colorable  
2 claim. Here, the Court is assessing not the allegations but whether Petitioner satisfied the  
3 *Strickland* standard based on the evidence presented. More importantly, in *Phillips*, counsel  
4 was alleged not to have investigated the facts of the case beyond asking his client what  
5 happened, including not reviewing relevant evidence in his possession. *Id.* at 976, 977. The  
6 evidence is undisputed in this case that Cooper thoroughly investigated the case by  
7 examining the physical evidence, hiring experts and interviewing all of the State's witnesses.  
8 Further, counsel in *Phillips* averred that he thought his client's alibi defense was meritless  
9 from the beginning but he relied upon that false information in failing to investigate another  
10 defense. *Id.* at 978. Petitioner's counsel thoroughly investigated the facts of the case and  
11 selected what he thought was the best defense in light of all the information he possessed.

12 Finally, Petitioner contends that counsel precluded him from testifying because of the  
13 defense he chose. The thrust of this argument is primarily a restatement of Petitioner's  
14 objection to the defense counsel presented. To the extent it is an independent subclaim it has  
15 no merit. Although counsel chose not to present self-defense, as Petitioner desired, he did not  
16 foreclose Petitioner from testifying. Counsel stated at the evidentiary hearing that if  
17 Petitioner had insisted on testifying, he would have made a record of his objection and  
18 allowed him to testify.

19 As counsel testified, this was a difficult case and he chose the best of two bad options  
20 for a defense. The state court's conclusion that his decisions were within prevailing  
21 professional norms was not unreasonable under *Strickland*.

22 **c. Claim 2(a)**

23 Petitioner alleges his trial counsel was ineffective for failing to object to his coerced  
24 confession. Specifically, he argues that his confession was coerced by the playing of a  
25 recording of his daughter's interview and by threatening him with the loss of his child.

26 The PCR court interpreted this claim as alleging appellate IAC for failing to raise a  
27 claim objecting to the admission of his coerced confession. Therefore, although this claim  
28 was fairly presented, there is no merits ruling on the trial IAC claim and the Court evaluates

1 it *de novo*. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). However, there are  
2 relevant state court factual determinations, which this Court must presume correct. 28 U.S.C.  
3 § 2254(e)(1).

4 To ensure the voluntariness of a statement, the court must consider the effect that the  
5 totality of the circumstances had upon the will of the defendant. *See Schneckloth v.*  
6 *Bustamonte*, 412 U.S. 218, 226-27 (1973). “The question is ‘whether the defendant’s will  
7 was overborne at the time he confessed.’” *Clark v. Murphy*, 331 F.3d 1062, 1072 (9th Cir.  
8 2003) (quoting *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963)). Absent police  
9 misconduct causally related to the confession, there is no basis for concluding that a  
10 confession was involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (“coercive  
11 police activity is a necessary predicate to the finding that a confession is not ‘voluntary’  
12 within the meaning of the Due Process Clause of the Fourteenth Amendment”).

13 Utilizing the totality of the circumstances test, both the characteristics of the accused  
14 and the details of the interrogation are considered. *See Dickerson v. United States*, 530 U.S.  
15 428, 434 (2000); *see also Haynes*, 373 U.S. at 513-14. Factors related to the accused include  
16 youth, lack of education, low intelligence, and lack of advice regarding constitutional rights.  
17 *See Schneckloth*, 412 U.S. at 426. Factors related to the interrogation include length of  
18 detention, the location of the interrogation, the repeated or prolonged nature of the  
19 questioning, and the use of physical punishment, including deprivation of food or sleep. *Id.*;  
20 *see also Withrow v. Williams*, 507 U.S. 680, 693-94 (1993). While a confession obtained by  
21 physical violence is *per se* involuntary, a confession obtained by psychological coercion is  
22 not. *United States v. Miller*, 984 F.2d 1028, 1030 (9th Cir. 1993) (citing *Haynes*, 373 U.S.  
23 at 515).

24 The question of whether a suspect’s inculpatory statements were voluntary is typically  
25 a mixed question of law and fact. *See Miller v. Fenton*, 474 U.S. 104, 111-12 (1985). This  
26 Court must defer to the underlying factual determinations. *Lambert v. Blodgett*, 393 F.3d  
27 943, 977-78 (9th Cir. 2004). The PCR court made the following factual findings:

28 [D]etectives confronted Petitioner with statements by his wife and daughter

1 that contradicted Petitioner's statements to police. There was no physical  
2 abuse, promise or benefit or leniency, threats, or use of force . . . . The record  
3 does not support Petitioner's claim that police coerced his statement by  
4 threatening to charge his wife with murder or with the loss of his child.

5 (Doc. 34, Ex. I at 12.) Petitioner has not argued much less provided clear and convincing  
6 evidentiary support to overcome the PCR court's finding that he was not threatened with the  
7 loss of his child. *See Lambert*, 393 F.3d at 976 (state court's finding that the interviewing  
8 officer made no threats or promises in connection with the confession is "essentially a factual  
9 conclusion, which is entitled to deference") (quoting *Rupe v. Wood*, 93 F.3d 1434, 1444 (9th  
10 Cir. 1997)). Because this Court defers to that finding, that portion of Petitioner's claim fails.

11 The PCR court did not make a fact finding regarding Petitioner's other factual  
12 allegation of coercion – the playing of his child's interview. During his interrogation,  
13 Petitioner repeatedly asked what statements his wife was making. (Doc. 55 at 18-20.) The  
14 detectives told him that his wife and daughter were both providing consistent information  
15 that was in contradiction to what he was telling them. (*Id.* at 18.) Petitioner objects  
16 specifically to a portion of his interrogation in which it appears the detectives played a  
17 portion of a recording of his daughter being questioned:

18 Q: This, this detective here spoke to your daughter, what do you think about  
19 this?

20 Q4: Okay, everything you saw tonight and everything about that?

21 A2: And, uh, he then ran in our bed and \_\_\_\_\_. He just died.

22 Q4: He did? Do you know why?

23 A2: He cutted his neck off.

24 Q4: Oh.

25 Q: Your daughter saw more than you're telling me.

26 (*Id.* at 20.) On the next page of the transcript, Petitioner requested that the detectives play the  
27 recording again, which they did, and told them he wanted to know what his daughter had  
28 said. (*Id.* at 21-22.) One of the detectives told him that what his daughter said was irrelevant  
because the detectives knew what had happened and had already processed the scene. (*Id.*  
at 22.) Petitioner's expressed focus of concern was that his wife would get in trouble even

1 though she was not at fault. (*Id.* at 23.) He requested that the detectives turn off the tape  
2 recording so he could talk to them off the record and then he provided inculpatory  
3 information. (*Id.* at 23-24.)

4 The playing of two sentences by Petitioner's daughter does not support Petitioner's  
5 claim that his will was overborne by the detectives. As found by the trial court, there was no  
6 use of physical force, threats or promises made during the interrogation. Further, the state  
7 courts found that Petitioner was properly advised of his *Miranda* rights. (Doc. 34, Ex. C at  
8 4-5.) Petitioner repeatedly sought information from the detectives about what his family  
9 members were saying and asked to hear his daughter's recording for a second time. That was  
10 not coercive. After review of the record, the state court factual findings, and the totality of  
11 the circumstances, this Court finds that Petitioner's statements were not involuntary.

12 **d. Claim 3(a)**

13 Petitioner alleges counsel was ineffective for failing to argue on appeal that Detective  
14 Montano's interrogation of Petitioner should have been excluded as hearsay, improper  
15 vouching and violative of the Confrontation Clause.

16 The disputed statement admitted at trial is one by Detective Montano during his  
17 interrogation of Petitioner:

18 Q: . . . Is, is what you're telling me right now is what happened?

19 A: Well, let's do this, let's go, I wanna find out what's going on with Chris  
20 and then we'll finish up this conversation.

21 Q: Well, Chris is, is, is talking, like I said, uh, they're telling me that, uh,  
22 Chris is, is saying, answering all the questions. She's coming across  
23 truthfully, um, you know, she's basically talking. She's talking to  
24 Detective Amado. She's talked to Detective Amado. Uh, we've talked to  
your daughter, um, what your daughter says, is it matches what your,  
what Chris is saying, and Chris is matching what, uh, uh, Christy is  
saying and basically, um, it doesn't match you, that's why I'm asking  
you, is what you're saying . . .

25 (Doc. 56 at 75.) The trial court ruled that it was not hearsay because there was no substance  
26 to the statement, just a reference comparing conversations; the judge equated it to an  
27 investigative technique. (Doc. 34, RT 11/29/01 at 102-03.) The court went on to note the  
28 context of the statements was that the officer was answering questions by the defendant

1 regarding what his wife had said. (*Id.* at 103-04.)

2 The PCR court provided the following background and analysis of this claim:

3 Trial counsel objected on hearsay grounds. The prosecutor responded that the  
4 police used the statements only as a tactic to obtain Petitioner's statement. The  
5 trial court ruled that references to Petitioner's wife's and daughter's statements  
6 were not hearsay. The trial court explained that its ruling took into account the  
7 context of the officer's conversation with Petitioner in that Petitioner  
8 continued to ask the officer for his wife's specific statements. . . .

9 In its response, the State argues that specific statements by Petitioner's  
10 daughter were not presented to the jury in any form. The court has reviewed  
11 the audiotape which was played for the jury (State's Exhibit 32B) and admitted  
12 into evidence. The audiotape contains the reference by detectives to the wife's  
13 statement that "you guys shouldn't have done it" but contains none of the  
14 specific statements by Petitioner's daughter as set out in section 4.D above.  
15 Thus, the record does not support Petitioner's claims with respect to his  
16 daughter.

17 Petitioner's wife's statement that "you guys shouldn't have done it" was  
18 not offered for the truth of the matter and is so vague that is of minimal value.  
19 The detective's purpose in informing Petitioner of his wife's statement was to  
20 inform him that her statement was consistent with his daughter's statement but  
21 inconsistent with Petitioner's version of events the night of the murder. By  
22 confronting Petitioner with this information, the detective[s] were attempting  
23 to elicit additional statements from Petitioner. Given that the physical evidence  
24 also contradicted Petitioner's early statements, that tactic was reasonable.

25 Finally, trial counsel did not request a curative instruction or move for a  
26 mistrial. On the facts of this case, there was no reason for the trial court to give  
27 a curative instruction or grant a mistrial. Appellate counsel is not required to  
28 raise a non-meritorious issue and Petitioner suffered no prejudice by appellate  
counsel's decision.

(Doc. 34, Ex. I at 13.)

Petitioner had a right under the Confrontation Clause of the Sixth Amendment and the  
Due Process Clause to cross-examine the witnesses against him. *Davis v. Alaska*, 415 U.S.  
308, 315 (1974); *Pointer v. Texas*, 380 U.S. 400, 403-04 (1965). The Confrontation Clause  
precludes admission of testimonial out-of-court statements if the party against whom they  
are offered has not had an opportunity to confront that witness. *Crawford v. Washington*, 541  
U.S. 36, 69 (2004). However, statements that are not hearsay or are non-testimonial do not  
implicate the Confrontation Clause. *Id.* at 59 n.9, 68 (citing *Tennessee v. Street*, 471 U.S.  
409, 414 (1985)).

Under Arizona Rule of Evidence 801(c), hearsay is "a statement, other than one made

1 by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth  
2 of the matter asserted.” In the portion of transcript to which Petitioner objects, Detective  
3 Montano did not recount any statements made by Petitioner’s wife or daughter. As noted by  
4 the trial court, in response to a question posed by Petitioner, the detective told him that his  
5 wife was talking and that her story did not match his but was consistent with what his  
6 daughter had stated. There was no actual statement by his wife or daughter offered. The  
7 detective’s statement was not offered for its truth, as the state court concluded, it was merely  
8 an investigative technique and the interrogation was offered for Petitioner’s statements not  
9 the detective’s. Because the statement was not hearsay, the Confrontation Clause was not  
10 implicated.

11 Because there is no merit to the underlying claim, Petitioner cannot establish that he  
12 was prejudiced by his appellate counsel’s failure to raise the claim. The PCR court’s decision  
13 – that appellate counsel was not ineffective for failing to raise a claim challenging the  
14 admission of Detective Montano’s interrogation – was not an unreasonable application of  
15 *Strickland* to the facts.

16 **e. Claim 3(b)**

17 Petitioner alleges appellate counsel was ineffective for failing to raise a claim  
18 challenging the trial court’s refusal to accept a manslaughter verdict. Petitioner contends that  
19 when the jury informed the court that it was unanimous on second degree murder and  
20 manslaughter, deliberations should have ceased and the court should have accepted the lesser  
21 verdict.

22 In denying this claim on the merits, the PCR court set forth the relevant background:

23 during deliberation, the jury submitted questions which dealt with unanimity  
24 requirements and lesser-included offenses. The jury indicated that all members  
25 were unanimous as to guilt on second degree murder and manslaughter, but  
26 that they were split 8/4 on first degree (8 not guilty; 4 guilty). Two of the four  
apparently questioned whether they were compelled to vote for second degree  
when they believed it was first degree. . . .

27 The court referred the jurors to instructions on the lesser-included  
28 offenses of second degree murder and manslaughter, both lesser offenses  
which could be considered after making reasonable efforts but failing to reach  
a verdict on the greater offense. After further deliberations, the jury returned

1 a verdict of guilty on second degree murder, a lesser-included offense.

2 This record does not support Petitioner's claim that the trial court rejected  
3 the jury's unanimous manslaughter verdict. The jury's revelation of its division  
4 and standing on the lesser-included offenses was not a formal verdict. The  
5 questions were not written or signed by all jurors or by the foreperson, whose  
signature is required on the verdict. Therefore, even if appellate counsel had  
raised this non-meritorious issue, it would not have changed the outcome of  
the appeal.

6 (Doc. 34, Ex. I at 7-8.)

7 As pointed out by the PCR court, the jury question did not satisfy the requirements  
8 for a jury verdict because it was not signed by the foreman nor returned in open court. Ariz.  
9 R. Crim. P. 23.1(a). Further, even if the jurors had rendered a verdict at that time, Petitioner's  
10 argument is flawed. He relies on the premise that the court was obligated to accept the lesser  
11 of the two alleged verdicts, because one was improper or there was doubt as to which of the  
12 two he was found guilty. At the time of the jury question, the jury clearly indicated  
13 unanimous findings on both second degree murder and manslaughter, therefore, there was  
14 no doubt regarding the finding and the court would not have been obligated to accept the  
15 lesser of the two offenses.

16 Because there is no merit to the underlying claim, Petitioner cannot establish that he  
17 was prejudiced by his appellate counsel's failure to raise the claim. The PCR court's decision  
18 – that Petitioner's appellate counsel was not ineffective for failing to raise a claim  
19 challenging the trial court's refusal to accept a manslaughter verdict – was not an  
20 unreasonable application of *Strickland* to the facts.

21 **f. Claim 3(d)**

22 Petitioner alleges his appellate counsel was ineffective for failing to raise a claim  
23 based on *Apprendi-Blakely* that he had a right to a jury trial on aggravating factors.

24 At sentencing the judge imposed an aggravated term based on Petitioner's 1993  
25 Arizona felony conviction, and his long history of involvement in the criminal justice system.  
26 (Doc. 34, Ex. A at 33-34.) The PCR court agreed that the *Blakely* decision applied to  
27 Petitioner because it was issued while Petitioner's direct appeal was pending. (*Id.*, Ex. I at  
28 7.) However, the trial court aggravated Petitioner's sentence based on his criminal history

1 and prior convictions, which are exempt from *Blakely*'s requirement of a jury finding. (*Id.*)  
2 Because Petitioner was not prejudiced by appellate counsel omitting this non-meritorious  
3 issue from the appellate brief, the PCR court rejected this claim. (*Id.*)

4 "Other than the fact of a prior conviction, any fact that increases the penalty for a  
5 crime beyond the prescribed statutory maximum must be submitted to a jury, and proved  
6 beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting  
7 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). "The 'statutory maximum' for *Apprendi*  
8 purposes is the maximum sentence a judge may impose *solely on the basis of the facts*  
9 *reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (citations omitted). Prior  
10 convictions are excepted because they are entered during a proceeding with its own  
11 procedural safeguards. *Apprendi*, 530 U.S. at 488. In assessing how *Blakely* applied to the  
12 Arizona sentencing scheme, the state supreme court held:

13 Under A.R.S. § 13-702, the existence of a single aggravating factor exposes  
14 a defendant to an aggravated sentence. Therefore, once a jury finds or a  
15 defendant admits a single aggravating factor, the Sixth Amendment permits the  
sentencing judge to find and consider additional factors relevant to the  
imposition of a sentence up to the maximum prescribed in that statute.

16 *State v. Martinez*, 210 Ariz. 578, 585, 115 P.3d 618, 625 (2005).

17 Because the sentencing judge relied upon Petitioner's prior conviction as an  
18 aggravating factor, which did not have to be found by a jury, he could consider other factors  
19 in aggravation and impose an aggravated sentence. Petitioner argues that the PCR court erred  
20 in relying on *Blakely* rather than *Apprendi*. Because they were both decided before his appeal  
21 was final, they both apply. More importantly, their decision regarding prior convictions as  
22 a basis for an aggravated sentence is identical. Petitioner also argues that he did not admit  
23 his criminal history. Admission of a fact by the defendant is a separate *Apprendi*-exemption,  
24 but it is irrelevant in this case because the aggravated sentence was based on a prior  
25 conviction. Finally, Petitioner disagrees with the Supreme Court's decision exempting prior  
26 convictions from a jury finding. Habeas relief can only be premised upon clearly established  
27 Supreme Court law, therefore, his argument for a change in the law is fruitless.

28 Because there is no merit to the underlying claim, Petitioner cannot establish that he

1 was prejudiced by his appellate counsel’s failure to raise the claim. The PCR court’s decision  
2 – that Petitioner’s appellate counsel was not ineffective for failing to raise a claim based on  
3 *Apprendi-Blakely* – was not an unreasonable application of *Strickland* to the facts.

4 **g. Claim 4**

5 Petitioner argues his sentencing was defective because the court allowed him to  
6 represent himself without making *Faretta* findings. Petitioner argues that because his counsel  
7 informed the court that he did not believe Petitioner should represent himself, the Court was  
8 required to hold a hearing and make a record of his competency to represent himself.

9 Following his conviction, Petitioner filed a motion to terminate his counsel and allow  
10 him to represent himself. (Doc. 34, Ex. A at 17.) The trial court held a hearing and granted  
11 Petitioner’s request:

12 Defendant states that he wishes to represent himself at sentencing . . . .

13 Mr. Cooper states that, although he wishes to withdraw, he does not  
14 believe the defendant should represent himself.

15 The Court questions the defendant as to his understanding of his right to  
16 counsel, the sentence range in his case, and the possible consequences of his  
proceeding to sentencing without counsel.

17 Defendant again states that he wishes to waive his right to counsel.

18 FILED IN COURT: Waiver of Right to Lawyer.

19 THE COURT FINDS that the defendant has knowingly, intelligently and  
20 voluntarily waived his right to counsel from this point forward, up to and  
including sentencing in this case. This does not preclude defendant from  
retaining counsel at any time.

21 . . . .

22 Defendant is advised that he is still eligible to have counsel appointed by  
23 the Court . . . .

24 (*Id.* at 26.)

25 The appellate court denied this claim:

26 [T]he trial court informed James of the seriousness of his decision to represent  
27 himself and the possible consequences of that decision and that James validly  
waived his right to counsel. The trial court was in the best position to assess  
28 James’s competency. On this record, we have no basis to reverse its decision  
to allow James to represent himself during sentencing.

1 (Doc. 34, Ex. C at 7.)

2 A defendant has a constitutional right to represent himself, however, because that  
3 choice involves relinquishing the right to counsel and related benefits, he must knowingly  
4 and intelligently waive those rights. *Faretta v. California*, 422 U.S. 806, 819-20, 835 (1975).  
5 Such a waiver requires that the defendant is aware of the pitfalls of self-representation and  
6 knowingly assesses his right to defend himself. *Id.* at 835-36.

7 The trial judge documented that he informed Petitioner of the dangers of self-  
8 representation and the sentence he was facing, as well as questioning him regarding his right  
9 to counsel. Petitioner does not question that he possessed the necessary information to make  
10 a knowing waiver. He contends only that his competency was in question in light of his  
11 counsel's opinion that he should not represent himself. The trial judge possessed that  
12 information, along with his observations of Petitioner throughout the pre-trial and trial  
13 period. Counsel did not opine that Petitioner was incompetent. Although the record does not  
14 reveal the basis for his opinion, it is clear from other parts of the record that counsel and  
15 Petitioner did not agree on trial strategy. Thus, he could have believed that Petitioner would  
16 be better served with a counsel's strategy for sentencing. *See, e.g. Faretta*, 422 U.S. at 834  
17 ("It is undeniable that in most criminal prosecutions defendants could better defend with  
18 counsel's guidance than by their own unskilled efforts."). Regardless, the appellate court's  
19 decision – that Petitioner's waiver was knowing and intelligent – was not an unreasonable  
20 application of clearly established Federal law.

21 **h. Claim 5**

22 Petitioner alleges the cumulative prejudicial effect of the errors alleged in his other  
23 claims warrants reversal of his conviction. Respondents did not discuss the exhaustion of this  
24 claim but the Court notes that Petitioner did not raise a cumulative error claim in state court.  
25 Because he would be precluded from raising such a claim now, it is technically exhausted  
26 and procedurally defaulted.

27 Regardless, because the Court has not found merit to any of Petitioner's allegations  
28 of error, there is no prejudicial cumulative effect to analyze and Claim 5 fails on the merits.

1 **III. Conclusion**

2 Claims 1(b)-1(d), 2(b), 3(c), and 3(e) are procedurally defaulted. Claims 1(a), 2(a),  
3 3(a), 3(b), 3(d), 4 and 5 fail on the merits.

4 Rule 11(a) of the Rules Governing Section 2254 Cases, requires that in habeas cases  
5 the “district court must issue or deny a certificate of appealability when it enters a final order  
6 adverse to the applicant.” Such certificates are required in cases concerning detentions  
7 arising “out of process issued by a State court,” or in a proceeding under 28 U.S.C. § 2255  
8 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

9 Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention  
10 pursuant to a state court judgment. This Court must determine, therefore, if a certificate shall  
11 issue. The Court declines to issue a certificate of appealability because Petitioner has not  
12 “made a substantial showing of the denial of a constitutional right,” as required under 28  
13 U.S.C. § 2253(c)(2).

14 Accordingly,

15 **IT IS ORDERED:**

16 (1) Petitioner’s Petition for Writ of Habeas Corpus by a Person in State  
17 Custody Pursuant to 28 U.S.C. § 2254 is **DENIED**, and this action is  
18 **DISMISSED WITH PREJUDICE**. The Clerk of Court is directed to  
19 enter judgment accordingly and close this case.

20 (2) Petitioner is **DENIED** a certificate of appealability in this case.

21 DATED this 27<sup>th</sup> day of September, 2011.

22  
23 

24  
25 A. Wallace Tashima  
26 United States Circuit Judge  
27 Sitting by Designation  
28