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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Robert Joe Moody,

10 Petitioner,

11 v.

12 Charles L. Ryan,

13 Respondent.

No. CV-15-00474-TUC-LCK

ORDER

14
15 Petitioner Robert Joe Moody has filed a Petition for Writ of Habeas Corpus
16 pursuant to 28 U.S.C. § 2254. Before the Court are the Petition (Doc. 1), Respondent's
17 Answer (Doc. 13), and Petitioner's Reply (Doc. 22). Petitioner also filed a Motion for
18 Leave to File Additional Materials. (Doc. 24.) The parties have consented to Magistrate
19 Judge jurisdiction. (Doc. 6.) The Court finds the Petition should be dismissed on the
20 merits.

21 **FACTUAL AND PROCEDURAL BACKGROUND**

22 Petitioner was convicted in the Pima County Superior Court on two counts of first
23 degree murder in 1995 and sentenced to death. (Doc. 13-1 at 3-4.) On appeal, the Arizona
24 Supreme Court reversed Petitioner's convictions based on the trial court's denial of
25 Petitioner's motion for change of counsel. (*Id.* at 6.) Petitioner again was convicted
26 following a second trial and sentenced to death. (*Id.* at 25.)

27 Upon Petitioner's automatic appeal to the Arizona Supreme Court, Petitioner
28 argued, in part, that his retrial was barred on double jeopardy grounds based upon

1 prosecutorial misconduct in the first trial. (*Id.* at 27.) The appellate court found that
2 Petitioner had neither moved for a mistrial based on prosecutorial misconduct during the
3 first trial nor filed a special action seeking review of the trial court’s denial of his motion
4 to dismiss based on double jeopardy before the second trial. (*Id.* at 27-28.) Therefore, the
5 court held the double jeopardy claim was not preserved for appeal and declined to
6 address it. (*Id.* at 28.) However, the court vacated Petitioner’s death sentence. (*Id.* at 53-
7 56 (citing *Ring v. Arizona*, 536 U.S. 584 (2002).) Petitioner was resentenced to
8 consecutive life terms. (Doc. 13-2 at 3.) His subsequent appeal was unsuccessful. (*Id.* at
9 2-24; Doc. 13-3 at 2.)

10 Prior to the conclusion of Petitioner’s resentencing appeal, he filed a timely Post-
11 conviction Relief (PCR) Notice. (Doc. 13-3 at 4-5.) In the PCR Petition, Petitioner
12 argued, in part, that his retrial was barred on double jeopardy grounds based upon
13 prosecutorial misconduct. (*Id.* at 8-16.) The PCR court held the claim was precluded
14 because it previously had been raised and adjudicated on appeal. (*Id.* at 69.) The Court of
15 Appeals granted review but denied relief, agreeing the claim was precluded. (*Id.* at 87-
16 90.)

17 **DISCUSSION**

18 The Petition raises a single two-part claim that double jeopardy was violated by
19 retrial because, in the first trial, there was prosecutorial misconduct and insufficient
20 evidence of guilt. (Doc. 1.) Respondents contend the claim is procedurally defaulted. The
21 Court finds this claim is most expeditiously resolved on the merits. *See* 28 U.S.C.
22 § 2254(b)(2).

23 Merits Analysis

24 Pursuant to the Double Jeopardy Clause of the United States Constitution’s Fifth
25 Amendment, “No person shall be subject for the same offence to be twice put in jeopardy
26 of life or limb.”

1 First, Petitioner alleges his retrial was barred on double jeopardy grounds due to
2 prosecutorial misconduct that occurred in the first trial. The Supreme Court has spoken
3 on this point, holding that retrial is barred by double jeopardy only in “those cases in
4 which the conduct giving rise to the successful motion for a mistrial was intended to
5 provoke the defendant into moving for a mistrial.” *Oregon v. Kennedy*, 456 U.S. 667, 679
6 (1982). Here, regardless of whether Petitioner made several motions for mistrial as he
7 alleges, he cannot find relief under the *Kennedy* holding. Petitioner’s first trial did not end
8 in a mistrial but in a conviction; therefore, Petitioner never obtained the “successful
9 motion for mistrial” upon which the *Kennedy* holding relies.

10 Second, Petitioner argues his retrial was barred because the prosecution presented
11 insufficient evidence of guilt at the first trial. The Supreme Court also has addressed
12 directly whether insufficiency of evidence may be used as a means to bar retrial on
13 double jeopardy grounds. The Court held that the Double Jeopardy Clause “may preclude
14 a second trial once the reviewing court has found the evidence legally insufficient.” *Burks*
15 *v. United States*, 437 U.S. 1, 18 (1978). However, the Court specifically distinguished
16 instances in which the appellate court found that the evidence presented was legally
17 insufficient from instances where trial error provoked a reversal on appeal. *Id.* at 15. The
18 Court held that the Double Jeopardy Clause “does not preclude the Government’s
19 retrying a defendant whose conviction is set aside because of an *error in the proceedings*
20 leading to conviction.” *Id.* at 14 (quoting *United States v. Tateo*, 377 U.S. 463, 465
21 (1964)). Here, no such insufficiency of evidence determination was made on appeal;
22 rather, the Arizona Court of Appeals granted relief solely on an issue relating to
23 appointment of counsel. (Doc. 13-1 at 4 (declining to reach any other issues).) Therefore,
24 Petitioner is not entitled to relief under *Burks*.

25 Petitioner has cited a number of Arizona court cases analyzing prosecutorial
26 misconduct’s effect on retrial in light of the Double Jeopardy Clause. *See Pool v.*
27 *Superior Court*, 677 P.2d 261, 270-72, 139 Ariz. 98, 107-09 (1984); *State v. Jorgenson*,

1 10 P.3d 1177, 198 Ariz. 390 (2000); *State v. Minnitt*, 55 P. 774, 783, 203 Ariz. 431, 440
2 (2002).¹ However, each of these cases was decided based upon Arizona’s Double
3 Jeopardy Clause. In fact, in *Pool*, the Arizona Supreme Court rejected the standard set
4 forth in *Oregon v. Kennedy*. 677 P.2d at 271, 139 Ariz. at 108. These cases, based on the
5 state constitution, provide no support for Petitioner’s federal Petition because this Court
6 may grant relief only under federal law. *See* 28 U.S.C. § 2254(a).

7 Petitioner’s Motion for Leave to File Additional Materials

8 Petitioner has filed a Motion for Leave to File Additional Materials, which
9 consists of four discs. (Docs. 24, 25.) Petitioner asserts this material is relevant to show
10 that during his first trial he moved for mistrial seven times, made a motion for new trial
11 and a motion to vacate judgment, and filed one or more special actions in the Arizona
12 Court of Appeals. Assuming the discs reflect the material identified by Petitioner, it
13 would not alter the factual or legal basis of the Court’s merits analysis. Therefore, the
14 Court denies the motion to expand the state record, but will file the discs into the record
15 of this Court for preservation.

16 **CERTIFICATE OF APPEALABILITY**

17 Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, this Court
18 must issue or deny a certificate of appealability (COA) at the time it issues a final order
19 adverse to the applicant. A COA may issue only when the petitioner “has made a
20 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This
21 showing can be established by demonstrating that “reasonable jurists could debate
22 whether (or, for that matter, agree that) the petition should have been resolved in a
23 different manner” or that the issues were “adequate to deserve encouragement to proceed
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26 ¹ Petitioner also cites *State v. Hughes*, 969 P.2d 1184, 1190-92, 193 Ariz. 72, 78-
27 80 (1998). While that case addressed prosecutorial misconduct, there was no double
28 jeopardy claim at issue. *Id.* at 1192, 193 Ariz. at 80. Additionally, Petitioner relies upon
United States v. Dinitz, 424 U.S. 600 (1976). This Court need not rely upon *Dinitz*
because the Supreme Court narrowed the standard set forth in that case when it decided
Oregon v. Kennedy. 456 U.S. at 673-79.

1 further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
2 U.S. 880, 893 & n.4 (1983)). The Court finds that reasonable jurists would not find this
3 Court’s merits ruling debatable. Therefore, a COA will not issue.

4 Accordingly,

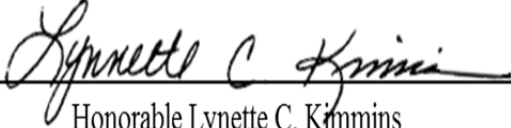
5 **IT IS ORDERED** that Petitioner’s Motion for Leave to File Additional Materials
6 (Doc. 24) is **GRANTED in part**, to the extent it seeks leave to file the material before
7 this Court, but **DENIED in part**, to the extent it seeks to expand the state court record.
8 The Clerk of Court shall file on the record the CDs lodged on the docket (Doc. 25).

9 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus is
10 **DISMISSED**.

11 **IT IS FURTHER ORDERED** that the Clerk of Court should enter judgment and
12 close this case.

13 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
14 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
15 certificate of appealability.

16 Dated this 28th day of August, 2017.

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19 
20 Honorable Lynette C. Kimmins
21 United States Magistrate Judge
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