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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

DAN HAYDEN WILLOUGHBY,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIV 08-02121 PHX GMS (MEA)
	)	
CHARLES L. RYAN and	)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,	)	
	)	
Respondents.	)	
_____	)	

TO THE HONORABLE G. MURRAY SNOW:

On or about November 14, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Petitioner filed an amended petition on March 23, 2009. See Docket No. 9. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Doc. 27) on September 17, 2009. Petitioner filed a reply to the answer to his petition on November 20, 2009. See Docket No. 39.

**I Procedural History**

On December 18, 1991, an indictment was returned charging Petitioner with, *inter alia*, one count of conspiracy to commit first degree murder and one count of first degree murder. See Answer, Exh. B at 136-44. The charges involved the death of Petitioner's wife Patricia ("Trish") in Puerto Penasco (Rocky Point), Mexico, on February 23, 1991. The case initially

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1 proceeded to trial on the charges of murder and conspiracy to  
2 commit murder in 1992. Petitioner was convicted on the charges  
3 of murder and conspiracy to commit murder. See State v.  
4 Willoughby, 181 Ariz. 530, 892 P.2d 1319 (1995). Petitioner  
5 subsequently obtained a new trial in state post-conviction  
6 relief proceedings on the ground that his trial counsel was  
7 constitutionally ineffective. See Answer, Exh. JJ at 3. In  
8 late 2001 Petitioner was retried on the charges of murder and  
9 conspiracy to commit murder. Because Petitioner challenges the  
10 outcome of his second trial and sentencing, the trial  
11 transcripts submitted by Respondents and cited to herein are the  
12 transcripts of Petitioner's second trial. Except as noted  
13 infra, the testimony presented at the first and second trials  
14 was substantially similar.

15           Petitioner and his deceased wife married in 1976.  
16 Petitioner and his wife had one natural child and adopted two  
17 children. Petitioner's children testified that in late 1989 the  
18 relationship between Petitioner and Trish was "hostile,"  
19 "tense," and "strained." Id., Exh. C at 149-50 (Thera  
20 Willoughby), Exh. D at 46 (Haydon Willoughby), Exh. H at 12  
21 (Marsha Willoughby). In October of 1989, Petitioner met Yesenia  
22 Patino, a woman who had gender reassignment surgery in 1982.  
23 Petitioner and Ms. Patino began an affair in November of 1989.  
24 In 1990 Trish became aware of the affair and confronted Ms.  
25 Patino. Id., Exh. H at 22; Exh. J at 150-52; Exh. U at 127-36.

26           On June 28, 1990, Petitioner, Ms. Patino, and Jack  
27 Mielke had dinner and drinks at a restaurant in Cottonwood,

1 Arizona. Id., Exh. P at 110. Mr. Mielke testified that, at  
2 that time, Petitioner said he "just didn't think that there was  
3 any way [Trish] would ever give him a divorce," and that Trish  
4 "had enough information on him that could result in his being  
5 imprisoned." Id., Exh. P at 111. Petitioner stated "I think I  
6 am going to take her on a trip to Mexico and she will not be  
7 returning." Id., Exh. P at 111.

8 In July of 1990 Petitioner lost his job. Id., Exh. J  
9 at 102-03. Ms. Patino testified that in late 1990, Petitioner  
10 began discussing various ways to kill Trish. Id., Exh. S at  
11 58-59. At one time in November of 1990 Petitioner picked Ms.  
12 Patino up and Ms. Patino saw a "steel ball" on the passenger  
13 seat of Petitioner's car. Id., Exh. S at 59. When Ms. Patino  
14 got into the car, Petitioner placed the ball on the passenger  
15 side floorboard, below her feet. Id., Exh. S at 59. Ms. Patino  
16 asked Petitioner what the steel ball was for and Petitioner  
17 replied, "That's what I'm going to use to hit Trish." Id., Exh.  
18 S at 59.

19 Ms. Patino testified Petitioner said that he wanted Ms.  
20 Patino involved in the murder because otherwise Ms. Patino could  
21 "go tell the police department that I actually am the one that  
22 killed Trish. They will put me in prison and you will be happy  
23 with everything and on your own." Id., Exh. S at 61.  
24 Petitioner told Ms. Patino that she had to help him "by making  
25 the murder look like a robbery." Id., Exh. S at 61. Ms. Patino  
26 testified Petitioner said that he wanted to personally "kill  
27 Trish" because she had "been a bitch" and he couldn't "stand her  
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1 any more." Id., Exh. S at 63.

2 In late November of 1990 Petitioner contacted a  
3 property rental agent inquiring about a vacation rental home in  
4 the area of Puerto Penasco ("Rocky Point"), in Mexico. Id.,  
5 Exh. P at 181-85. The rental agent testified Petitioner booked  
6 a house for February 22 and 23, 1991. Id., Exh. P at 181-85.  
7 On Christmas morning in 1990 Petitioner "gave" his family the  
8 gift of a Rocky Point vacation. Id., Exh. C at 155, Exh. H at  
9 29-30. Initially, neither Trish nor Marsha, Petitioner and  
10 Trish's adopted daughter (who was seventeen years of age at that  
11 time), wanted to go to Rocky Point. Exh. C at 156, Exh. H at  
12 29.<sup>1</sup>

13 Petitioner and his family traveled to Rocky Point on  
14 the weekend of February 22, 1991. On the afternoon of February  
15 23, 1991, Petitioner and the three children left Trish alone at  
16 the rental property to go sight-seeing. Id., Exh. D at 59-60,  
17 Exh. H at 43-49. Marsha testified at Petitioner's trial that,  
18 after the children were in the car, Petitioner went back into  
19 the rental house where Trish was alone, and then came back out  
20 to the car. Id., Exh. H at 45-49.

21 Ms. Patino testified at Petitioner's trial that, on the  
22 afternoon of February 23, 1991, she went to the rental house in

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24 <sup>1</sup>Two witnesses testified that Trish had repeatedly stated  
25 she did not like Mexico. Answer, Exh. K at 159; Exh. M at 55.  
26 Additionally, testimony was introduced relating to a possible  
27 financial motive for the crime, including testimony about a successful  
28 business owned by Trish and her mother and various life insurance  
policies purchased by Trish and Petitioner and the business. Id.,  
Exh. M at 41-42; Exh. N at 130-34; Exh. O at 19, 130-31; Exh. P at 26-  
37.

1 Rocky Point, as arranged with Petitioner, and found Trish  
2 "practically dead" on a bed in the house with a bloody towel  
3 wrapped around her head. Id., Exh. T at 39-40. Ms. Patino  
4 testified that she stabbed Trish with a knife from the kitchen  
5 of the rental house. Id., Exh. T at 41, Exh. C at 84, Exh. U at  
6 24. The afternoon of February 23, 1991, when they returned from  
7 their sight-seeing excursion, Trish's children found her lying  
8 on a bed in the rental home with a knife protruding from her  
9 head. Id., Exh. C at 164, Exh. D at 65; Exh. H at 55-56, 57-58.

10 An ambulance arrived at the rental home. An American  
11 physician vacationing in Rocky Point with his family testified  
12 that he saw the ambulance and went to assist. Id., Exh. C at  
13 79-81. The physician testified that he found Trish still  
14 breathing but that she had lost a great deal of blood. Id.,  
15 Exh. C at 83-84, 88-89, 90-91. Petitioner and the children  
16 followed the ambulance carrying Trish to the local hospital,  
17 where Petitioner informed the children that their mother was  
18 dead. Id., Exh. H at 63-64.

19 Petitioner was temporarily detained by the Mexican  
20 police on February 24, 1991. Id., Exh. C at 74, 78-79, 80-81.  
21 United States and Arizona authorities traveled to Puerto Penasco  
22 to investigate Trish's death on March 4, 1991. Id., Exh. F at  
23 16-18, 59, 61-62, 82, 121, Exh. L at 87. Ms. Patino's  
24 fingerprints were found at the crime scene. Id., Exh. G at  
25 72-73, 76.

26 In June 1991, Trish's body was exhumed and the Maricopa  
27 County Medical Examiner ("ME") performed an autopsy. Id., Exh.

1 G at 89. The ME determined that Trish died as the result of  
2 "multiple blunt force injuries to the head" and that the stab  
3 wounds were not fatal. Id., Exh. G at 89, 91-92. At  
4 Petitioner's trial the doctor testified there were at least nine  
5 blows to the head, concentrated on the right side of the head,  
6 and that Trish likely lost consciousness after the first blow.  
7 Id., Exh. G at 99, 110-11, 130. The doctor testified a knife  
8 could not have caused the injuries that caused Trish's death.  
9 Id., Exh. G at 109. The doctor further testified that one of  
10 the blunt force injuries could possibly have been caused by a  
11 "spherical kind of object," and that the other injuries were  
12 "just too linear" to have been caused by a spherical object.  
13 Id., Exh. G at 121-22, 125.

14 Ms. Patino was arrested in Mazatlan, Mexico, on  
15 December 6, 1991, and charged with crimes relating to Trish's  
16 murder by the Mexican authorities. Id., Exh. R at 104-05.  
17 Eventually Ms. Patino entered into an agreement with the Arizona  
18 Attorney General to testify against Petitioner at his criminal  
19 trial for Trish's murder. Id., Exh. S at 10-12. In exchange  
20 for testifying against Petitioner, Ms. Patino was to receive  
21 dismissal of the charges against her in Arizona and a  
22 recommendation by the Arizona Attorney General that she receive  
23 a reduced sentence in Mexico. Id., Exh. R at 115-16, 153; Exh.  
24 U at 178-79. Petitioner was also taken into custody in December  
25 1991. Id., Exh. L at 88.

26 At the conclusion of his first trial in 1992 Petitioner  
27 was convicted on both counts charged. Petitioner was sentenced  
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1 to death pursuant to his conviction for first degree murder and  
2 to a term of life imprisonment pursuant to his conviction for  
3 conspiracy to commit murder. See Arizona v. Willoughby, 181  
4 Ariz. 530, 892 P.2d 1319 (1995).

5 After Petitioner's first trial, Ms. Patino received a  
6 "lengthy prison sentence" in Mexico, despite the State of  
7 Arizona's recommendation for leniency. Id., Exh. U at 179-80,  
8 195-96. Ms. Patino became extremely angry at the State of  
9 Arizona, particularly Assistant Attorney General Steve Mitchell.  
10 Id., Exh. U 178-80, 201. In 1995 Ms. Patino recanted the  
11 testimony given at Petitioner's first trial and claimed that she  
12 alone had killed Trish. Id., Exh. U at 178, 201; Exh. V at  
13 11-12. At Petitioner's second trial in October and November of  
14 2001, Ms. Patino recanted her 1995 recantation. Id., Exh. U at  
15 175-78.

16 As noted supra, after his first trial and sentencing  
17 Petitioner filed a state action for post-conviction relief  
18 pursuant to Rule 32, Arizona Rules of Criminal Procedure,  
19 asserting his counsel was unconstitutionally ineffective. As a  
20 result of this Rule 32 action, Petitioner was granted a new  
21 trial. See Answer, Exh. JJ at 3. The state withdrew its  
22 request for imposition of the death penalty prior to  
23 Petitioner's second trial. At the second trial the testimony  
24 and evidence presented was essentially the same as at the first  
25 trial. However, at Petitioner's second trial his adopted  
26 daughter Marsha testified differently than she had at the first  
27 trial. Id., Exh. H at 88-100.

1           The jury was instructed on November 14, 2001, and  
2 deliberations began that afternoon. Id., Exh. BB. On the  
3 morning of November 16, 2001, the jury returned with a verdict.  
4 Id., Exh. DD. Petitioner was convicted as charged. See id.,  
5 Exh. DD at 3-4. On January 15, 2002, Petitioner was sentenced  
6 to consecutive terms of life imprisonment with no possibility of  
7 release for 25 years on both counts of conviction. See id.,  
8 Exh. FF at 60-61.

9           Petitioner took a direct appeal of his convictions and  
10 sentences upon retrial. See id., Exh. II. In his direct appeal  
11 Petitioner alleged a high percentage of the jury veniremen were  
12 improperly dismissed and that the trial court erred by failing  
13 to strike a particular juror. See id., Exh. II. Petitioner  
14 also alleged the trial court erred in the admission of testimony  
15 and evidence and that the verdicts were improperly "coerced" by  
16 the trial judge. See id., Exh. II. In his direct appeal  
17 Petitioner also maintained the trial court erred by denying a  
18 "Willits" instruction and that the "Portillo Reasonable Doubt  
19 Instruction" unconstitutionally shifted the burden of proof to  
20 the defense. See id., Exh. II. Petitioner further argued that  
21 the imposition of consecutive sentences upon retrial was  
22 improper. See id., Exh. II.

23           The Arizona Court of Appeals affirmed Petitioner's  
24 convictions and sentences in a memorandum decision issued  
25 December 11, 2003. See id., Exh. JJ. Petitioner sought review  
26 by the Arizona Supreme Court, raising four of the eight claims  
27 raised to the Court of Appeals. See id., Exh. KK. The Arizona  
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1 Supreme Court denied relief in a decision issued July 1, 2004.  
2 See id., Exh. LL.

3           Petitioner filed an action for post-conviction relief  
4 pursuant to Rule 32, Arizona Rules of Criminal Procedure in  
5 Maricopa County Superior Court on July 27, 2004. See id., Exh.  
6 MM. Petitioner, through counsel, raised the following claims in  
7 this Rule 32 action: (1) his trial counsel were ineffective  
8 because they failed to call an expert witness regarding the  
9 reliability of "coerced confessions"; (2) his trial counsel were  
10 unconstitutionally ineffective because they advised Petitioner  
11 not testify at his trial; (3) his trial counsel were ineffective  
12 because counsel filed a motion for a new trial which was deemed  
13 untimely; and (4) the sentence imposed for first degree murder  
14 was "illegal or imposed in an illegal manner" because the  
15 sentencing court did not limit its consideration to the  
16 aggravating circumstances in Arizona Revised Statutes Annotated  
17 § 13-703(F). Id., Exh. NN at 4-7.

18           The state trial court conducted an evidentiary hearing  
19 in Petitioner's Rule 32 proceedings on June 2, 2006. See id.,  
20 Exh. GG. On June 5, 2006, the trial court issued a minute entry  
21 denying relief. See id., Exh. OO. The trial court found  
22 Petitioner's illegal sentence claim was procedurally precluded  
23 because it could have been raised on direct appeal but was not  
24 raised in the direct appeal. See id., Exh. OO. The trial court  
25 also rejected Petitioner's ineffective assistance of counsel  
26 claims on the merits. See id., Exh. OO. Petitioner sought  
27 review of this decision by the Arizona Court of Appeals. See

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1 id., Exh. PP. The appellate court denied review on November 30,  
2 2007. See id., Exh. QQ. Petitioner did not seek review of this  
3 decision by the Arizona Supreme Court.

4 In his federal habeas action Petitioner asserts his  
5 sentence was unlawful pursuant to Arizona Revised Statutes §  
6 13-703. Petitioner also maintains that the guilty verdicts were  
7 coerced and the trial judge abused his discretion in not  
8 excusing two jurors. Petitioner further contends the trial  
9 court erred by failing to give a "Willits" instruction and that  
10 the Portillo reasonable doubt instruction unconstitutionally  
11 shifted the burden of proof. Petitioner also contends the trial  
12 court erred by admitting "the exemplar Mace" into evidence.  
13 Petitioner also alleges the state jury commissioner illegally  
14 excused potential jurors. Petitioner argues his sentences  
15 violate Apprendi v. Washington, 530 U.S. 466 (2000) and Blakely  
16 v. Washington, 542 U.S. 296 (2004). Petitioner contends the  
17 trial court erred by precluding the use of prior inconsistent  
18 statements by Ms. Patino, his alleged co-conspirator, to  
19 discredit her testimony.

20 Petitioner also alleges his trial counsel's performance  
21 was unconstitutionally ineffective because counsel failed to  
22 call Petitioner to testify at trial after having "rehearsed"  
23 Petitioner's testimony. Petitioner asserts his trial counsel  
24 was ineffective because there was "a clear Conflict of Interest  
25 existed with trial counsel Alan Simpson, lead counsel."  
26 Petitioner also alleges his trial counsel was ineffective  
27 because he failed to call an expert witness and because counsel

1 failed to timely file a motion for new trial.

2 **II Analysis**

3 **A. Exhaustion and procedural default**

4 The District Court may only grant federal habeas relief  
5 on the merits of a claim which has been exhausted in the state  
6 courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S.  
7 Ct. 1728, 1731 (1999); Coleman v. Thompson, 501 U.S. 722, 729-  
8 30, 111 S. Ct. 2546, 2554-55 (1991). To properly exhaust a  
9 federal habeas claim, the petitioner must afford the state the  
10 opportunity to rule upon the merits of the claim by "fairly  
11 presenting" the claim to the state's "highest" court in a  
12 procedurally correct manner. See, e.g., Baldwin v. Reese, 541  
13 U.S. 27, 29-30, 124 S. Ct. 1347, 1349-50 (2004); Robinson v.  
14 Schriro, 595 F.3d 1096, 1100-01 (9th Cir. 2010), petition for  
15 cert. filed, 79 U.S.L.W. 3054 (U.S. June 30, 2010)(No. 10-34);  
16 Scott v. Schriro, 567 F.3d 573, 582 (9th Cir.), cert. denied,  
17 130 S. Ct. 1014 (2009).

18 The Ninth Circuit Court of Appeals has concluded that,  
19 in cases arising in Arizona in which the sentence imposed is not  
20 a capital sentence, the "highest court" test of the exhaustion  
21 requirement is satisfied if the habeas petitioner presented his  
22 claim to the Arizona Court of Appeals, either on direct appeal  
23 or in a petition for post-conviction relief. See Swoopes v.  
24 Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999). See also Paige v.  
25 Schriro, 648 F. Supp. 2d 1151, 1168-69 (D. Ariz. 2009); Crowell  
26 v. Knowles, 483 F. Supp. 2d 925, 932 (D. Ariz. 2007). At the  
27 conclusion of his second trial and sentencing Petitioner did not  
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1 face a capital sentence. Accordingly, any claim presented to  
2 the Arizona Court of Appeals after Petitioner's second trial in  
3 Petitioner's direct appeal or in his Rule 32 action was properly  
4 exhausted. See Paige, 648 F. Supp. 2d at 1168-69; Date v.  
5 Schriro, 619 F. Supp. 2d 736, 762-63 (D. Ariz. 2006).

6 To satisfy the "fair presentment" prong of the  
7 exhaustion requirement the petitioner must present "both the  
8 operative facts and the legal principles that control each claim  
9 to the state judiciary." Wilson v. Briley, 243 F.3d 325, 327  
10 (7th Cir. 2001). See also Scott, 567 F.3d at 582; Kelly v.  
11 Small, 315 F.3d 1063, 1066 (9th Cir. 2003). The petitioner must  
12 present to the state courts the "substantial equivalent" of the  
13 habeas claim presented in federal court. Picard v. Connor, 404  
14 U.S. 270, 278, 92 S. Ct. 509, 513-14 (1971); Libberton v. Ryan,  
15 583 F.3d 1147, 1164 (9th Cir. 2009), cert. denied, 130 S. Ct.  
16 3412 (2010).

17 In Baldwin v. Reese, the Supreme Court reiterated that  
18 the purpose of exhaustion is to give the states the opportunity  
19 to pass upon and correct alleged constitutional errors. See 541  
20 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004). Therefore, if the  
21 petitioner did not present the federal habeas claim to the state  
22 court as asserting the violation of a specific federal  
23 constitutional right, as opposed to violation of a state law or  
24 a state procedural rule, the federal habeas claim was not  
25 "fairly presented" to the state court. See, e.g., id., 541 U.S.  
26 at 33, 124 S. Ct. at 1351.

1 Full and fair presentation requires a petitioner to  
2 have presented the substance of his federal habeas claim to the  
3 state courts, including a reference to a federal constitutional  
4 guarantee and a statement of facts that entitle the petitioner  
5 to relief. See Scott, 567 F.3d at 582; Lopez v. Schriro, 491  
6 F.3d 1029, 1040 (9th Cir. 2007). Although a habeas petitioner  
7 need not recite "book and verse on the federal constitution" to  
8 fairly present a claim to the state courts, Picard, 404 U.S. at  
9 277-78, 92 S. Ct. at 512-13, they must do more than present the  
10 facts necessary to support the federal claim. See Anderson v.  
11 Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982). General and  
12 conclusory references to "due process" in a state court pleading  
13 do not suffice to exhaust a claim that the petitioner's federal  
14 constitutional rights were violated. See, e.g., Reynoso v.  
15 Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006).

16 A federal habeas petitioner has not exhausted a federal  
17 habeas claim if he still has the right to raise the claim "by  
18 any available procedure" in the state courts. 28 U.S.C. §  
19 2254(c) (1994 & Supp. 2010). Because the exhaustion requirement  
20 refers only to remedies still available to the petitioner at the  
21 time they file their action for federal habeas relief, it is  
22 satisfied if the petitioner is procedurally barred from pursuing  
23 their claim in the state courts. See Woodford v. Ngo, 548 U.S.  
24 81, 92-93, 126 S. Ct. 2378, 2387 (2006); Cook v. Schriro, 538  
25 F.3d 1000, 1025-26 (9th Cir. 2008), cert. denied, 129 S. Ct.  
26 1033 (2009). If it is clear the habeas petitioner's claim is  
27 procedurally barred pursuant to state law, the claim is

1 exhausted by virtue of the petitioner's "procedural default" of  
2 the claim. See, e.g., Woodford, 548 U.S. at 92-93, 126 S. Ct.  
3 at 2387; Cook, 538 F.3d at 1025-26.

4 Procedural default occurs when a petitioner has never  
5 presented a federal habeas claim in state court and is now  
6 barred from doing so by the state's procedural rules, including  
7 rules regarding waiver and the preclusion of claims. See Cook,  
8 538 F.3d at 1025-26; Tacho v. Martinez, 862 F.2d 1376, 1378 (9th  
9 Cir. 1988). Procedural default also occurs when a petitioner  
10 did present a claim to the state courts, but the state courts  
11 did not address the merits of the claim because the petitioner  
12 failed to follow a state procedural rule. See, e.g., Ylst v.  
13 Nunnemaker, 501 U.S. 797, 802, 111 S. Ct. 2590, 2594-95 (1991);  
14 Ellis v. Armenakis, 222 F.3d 627, 632 (9th Cir. 2000); Szabo v.  
15 Walls, 313 F.3d 392, 395 (7th Cir. 2002).

16 The doctrine of procedural default provides  
17 that a federal habeas court may not review  
18 constitutional claims when a state court has  
19 declined to consider their merits on the  
20 basis of an adequate and independent state  
21 procedural rule. A state procedural rule is  
22 adequate if it is regularly or consistently  
23 applied by the state courts and it is  
24 independent if it does not depend on a  
federal constitutional ruling. Where a state  
procedural rule is both adequate and  
independent, it will bar consideration of the  
merits of claims on habeas review unless the  
petitioner demonstrates cause for the default  
and prejudice resulting therefrom or that a  
failure to consider the claims will result in  
a fundamental miscarriage of justice.

25 McNeill v. Polk, 476 F.3d 206, 211 (4th Cir. 2007) (internal  
26 citations and quotations omitted).

1 We recognize two types of procedural bars:  
2 express and implied. An express procedural  
3 bar occurs when the petitioner has presented  
4 his claim to the state courts and the state  
5 courts have relied on a state procedural rule  
6 to deny or dismiss the claim. An implied  
7 procedural bar, on the other hand, occurs  
8 when the petitioner has failed to fairly  
9 present his claims to the highest state court  
10 and would now be barred by a state procedural  
11 rule from doing so.

12 Robinson, 595 F.3d at 1100.

13 Because the Arizona Rules of Criminal Procedure  
14 regarding timeliness, waiver, and the preclusion of claims bar  
15 Petitioner from now returning to the state courts to exhaust any  
16 unexhausted federal habeas claims, Petitioner has exhausted, but  
17 procedurally defaulted, any claim not previously fairly  
18 presented to the Arizona Supreme Court in his direct appeal or  
19 in his state action for post-conviction relief. See  
20 Insyxiengmay v. Morgan, 403 F.3d 657, 665 (9th Cir. 2005); Beaty  
21 v. Stewart, 303 F.3d 975, 987 (9th Cir. 2002). See also Stewart  
22 v. Smith, 536 U.S. 856, 860, 122 S. Ct. 2578, 2581 (2002); Ortiz  
23 v. Stewart, 149 F.3d 923, 931-32 (9th Cir. 1998).

24 **B. Standard of review regarding exhausted claims**

25 The Court may not grant a writ of habeas corpus to a  
26 state prisoner on a claim adjudicated on the merits in state  
27 court proceedings unless the state court reached a decision  
28 contrary to clearly established federal law, or the state court  
decision was an unreasonable application of clearly established  
federal law. See 28 U.S.C. § 2254(d) (1994 & Supp. 2010); Carey  
v. Musladin, 549 U.S. 70, 75, 127 S. Ct. 649, 653 (2006);  
Musladin v. Lamarque, 555 F.3d 834, 838 (9th Cir. 2009).

1 Factual findings of a state court are presumed to be correct and  
2 can be reversed by a federal habeas court only when the federal  
3 court is presented with clear and convincing evidence. See  
4 Miller-El v. Dretke, 545 U.S. 231, 240-41, 125 S. Ct. 2317, 2325  
5 (2005); Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct.  
6 1029, 1041 (2003); Maxwell v. Roe, 606 F.3d 561, 567-68 (9th  
7 Cir. 2010); Stenson v. Lambert, 504 F.3d 873, 881 (9th Cir.  
8 2007), cert. denied, 129 S. Ct. 247 (2008). The "presumption of  
9 correctness is equally applicable when a state appellate court,  
10 as opposed to a state trial court, makes the finding of fact."  
11 Sumner v. Mata, 455 U.S. 591, 593, 102 S. Ct. 1303, 1304-05  
12 (1982). See also Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1  
13 (9th Cir. 2009), cert. denied, 130 S. Ct. 1086 (2010).

14 A state court decision is contrary to federal law if it  
15 applied a rule contradicting the governing law of Supreme Court  
16 opinions, or if it confronts a set of facts that is materially  
17 indistinguishable from a decision of the Supreme Court but  
18 reaches a different result. See Brown v. Payton, 544 U.S. 133,  
19 141, 125 S. Ct. 1432, 1438 (2005); Yarborough v. Alvarado, 541  
20 U.S. 652, 663, 124 S. Ct. 2140, 2149 (2004); Williams v. Taylor,  
21 529 U.S. 362, 405-06, 120 S. Ct. 1495, 1519 (2000). For  
22 example, a state court's decision is considered "contrary to  
23 federal law" if the state court erroneously applied the wrong  
24 standard of review or an incorrect test to a claim. See Knowles  
25 v. Mirzayance, 129 S. Ct. 1411, 1419 (2009); Wright v. Van  
26 Patten, 552 U.S. 120, 124-25, 128 S. Ct. 743, 746-47 (2008).  
27 See also Frantz v. Hazy, 533 F.3d 724, 737 (9th Cir. 2008);



1 Bledsoe v. Bruce, 569 F.3d 1223, 1233 (10th Cir. 2009).

2           The state court's determination of a habeas claim may  
3 be set aside under the unreasonable application prong if, under  
4 clearly established federal law, the state court was  
5 "unreasonable in refusing to extend [a] governing legal  
6 principle to a context in which the principle should have  
7 controlled." Ramdass v. Angelone, 530 U.S. 156, 166, 120 S. Ct.  
8 2113, 2120 (2000). See also Murdoch v. Castro, 609 F.3d 983,  
9 990-91 (9th Cir. 2010) (en banc); Vasquez, 572 F.3d at 1035-38;  
10 Cook, 538 F.3d at 1015. However, the state court's decision is  
11 an unreasonable application of clearly established federal law  
12 only if it can be considered objectively unreasonable.  
13 Williams, 529 U.S. at 409, 120 S. Ct. at 1521; Carey, 549 U.S.  
14 at 74-75, 127 S. Ct. at 653. An unreasonable application of law  
15 is different from an incorrect one. See Bell v. Cone, 535 U.S.  
16 685, 694, 122 S. Ct. 1843, 1850 (2002); Cooks v. Newland, 395  
17 F.3d 1077, 1080 (9th Cir. 2005).

18           Furthermore, only United States Supreme Court holdings,  
19 and not dicta or concurring opinions, at the time of the state  
20 court's decision are the source of "clearly established federal  
21 law" for the purpose of the "unreasonable application" prong of  
22 federal habeas review. Williams, 529 U.S. at 412, 120 S. Ct. at  
23 1523; Carey, 549 U.S. at 74, 127 S. Ct. at 653; Ponce v. Felker,  
24 606 F.3d 596, 599 (9th Cir. 2010), petition for cert. filed No.  
25 10-6113 (Aug. 23, 2010); Plumlee v. Masto, 512 F.3d 1204, 1209-  
26 10 (9th Cir. 2008), cert. denied, 125 S. Ct. 2885 (2009).

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28

1           If the Supreme Court has not addressed a specific issue  
2 in its holdings, the state court's adjudication of the issue  
3 cannot be an unreasonable application of clearly established  
4 federal law. See Stenson, 504 F.3d at 881, citing Kane v.  
5 Garcia Espitia, 546 U.S. 9, 10, 126 S. Ct. 407, 408 (2006).<sup>2</sup>  
6 Stated another way, if the issue raised by the petitioner "is an  
7 open question in the Supreme Court's jurisprudence," the Court  
8 may not issue a writ of habeas corpus on the basis that the  
9 state court unreasonably applied clearly established federal law  
10 by rejecting the precise claim presented by the petitioner.  
11 Cook, 538 F.3d at 1016; Crater v. Galaza, 491 F.3d 1119, 1123  
12 (9th Cir. 2007), cert. denied, 128 S. Ct. 2961 (2008). The  
13 United States Supreme Court "has held on numerous occasions that  
14 it is not an unreasonable application of clearly established  
15 Federal law for a state court to decline to apply a specific  
16 legal rule that has not been squarely established by this  
17 Court." Knowles, 129 S. Ct. at 1419, citing Wright, 552 U.S. at

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20           2

21           The federal appellate courts have split on  
22 whether Faretta, which establishes a Sixth  
23 Amendment right to self-representation, implies  
24 a right of the pro se defendant to have access to  
25 a law library.[]. That question cannot be  
26 resolved here, however, as it is clear that  
27 Faretta says nothing about any specific legal aid  
28 that the State owes a pro se criminal defendant.  
The ... court below therefore erred in holding,  
based on Faretta, that a violation of a law  
library access right is a basis for federal  
habeas relief.

Kane v. Garcia Espitia, 546 U.S. 9, 10-11, 126 S. Ct. 407, 408-09  
(2005).

1 124-25, 128 S. Ct. at 746-47.<sup>3</sup> See also Vasquez, 572 F.3d at  
2 1038.

3 The holdings of the Circuit Courts of Appeal are  
4 relevant to resolution of a petitioner's habeas claims only to  
5 the extent they are useful in deciding whether the law has been  
6 clearly established or that the state court decision is an  
7 "unreasonable application" of United States Supreme Court  
8 precedent, and not with regard to what constitutes a violation  
9 of constitutional rights. See Maxwell, 606 F.3d at 567; Bible  
10 v. Ryan, 571 F.3d 860, 870 (9th Cir. 2009), cert. denied, 130 S.  
11 Ct. 1745 (2010); Ortiz-Sandoval v. Clarke, 323 F.3d 1165, 1172  
12 (9th Cir. 2003). Compare Smith v. Dinwiddie, 510 F.3d 1180,  
13 1186 (10th Cir. 2007).

14 Accordingly, a state court decision may be contrary to  
15 a Ninth Circuit Court of Appeals' holding without being an  
16 unreasonable application of United States Supreme Court  
17 precedent. See Kessee v. Mendoza Powers, 574 F.3d 675, 679 (9th  
18 Cir. 2009). The Ninth Circuit recently held that when a Supreme  
19 Court decision does not "squarely address" the issue presented

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21 3

22 Our cases provide no categorical answer to this  
23 question, and for that matter the several  
24 proceedings in this case hardly point toward one.  
25 The Wisconsin Court of Appeals held counsel's  
26 performance by speaker phone to be  
27 constitutionally effective; neither the  
28 Magistrate Judge, the District Court, nor the  
29 Seventh Circuit disputed this conclusion; and the  
30 Seventh Circuit itself stated that "[u]nder  
Strickland, it seems clear Van Patten would have  
no viable claim." Deppisch, 434 F.3d, at 1042.  
Wright v. Van Patten, 552 U.S. 120, 128 S. Ct. 743, 746-47 (2008).

1 by the habeas petitioner, or if the Supreme Court principle does  
2 not "clearly extend" to the context of the situation presented  
3 by the petitioner, "it cannot be said, under AEDPA, there is  
4 'clearly established' Supreme Court precedent addressing the  
5 issue." Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009).<sup>4</sup>

6 The Court must review the last reasoned state court  
7 opinion on the claims raised in the habeas action. See, e.g.,  
8 Maxwell, 606 F.3d at 568; Vasquez, 572 F.3d at 1035. When there  
9 is no "reasoned" state court decision explaining the state's  
10 denial of a claim presented in a federal habeas petition, the  
11 District Court must perform an independent review of the record  
12 to ascertain whether the state court's decision summarily  
13 denying the claim was objectively reasonable. See Medley v.  
14 Runnels, 506 F.3d 857, 863 & n.3 (9th Cir. 2007), cert. denied,  
15 128 S. Ct. 1878 (2008); Stenson, 504 F.3d at 890; Pham v.  
16 Terhune, 400 F.3d 740, 742 (9th Cir. 2005). If the Court  
17 determines that the state court's decision was an objectively  
18 unreasonable application of clearly established United States  
19 Supreme Court precedent, the Court must review whether  
20 Petitioner's constitutional rights were violated, i.e., the

21  
22 \_\_\_\_\_  
23 4

24 If the Court's decisions do provide a  
25 "controlling legal standard," Panetti, 127 S. Ct.  
26 at 2858, that is applicable to the claims raised  
27 by a habeas petitioner without "tailoring or  
28 modification" of the standard, the question is  
then whether the application of that standard was  
objectively unreasonable, even if the facts of  
the case at issue are not identical to the  
Supreme Court precedent.

Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009).

1 state's ultimate denial of relief, without the deference to the  
2 state court's decision that the Anti-Terrorism and Effective  
3 Death Penalty Act ("AEDPA") otherwise requires. See Panetti v.  
4 Quarterman, 551 U.S. 930, 953-54, 127 S. Ct. 2842, 2858-59  
5 (2007); Butler v. Curry, 528 F.3d 624, 641 (9th Cir. 2008);  
6 Frantz, 533 F.3d at 736-37. See also Jones v. Ryan, 583 F.3d  
7 626, 640 (9th Cir. 2009); Delgado v. Woodford, 527 F.3d 919,  
8 924-25 (9th Cir. 2008).

### 9 C. Petitioner's claims for relief

10 **1. Petitioner contends his sentence was unlawful.**  
11 **Petitioner contends he was sentenced based on aggravating**  
12 **factors that were not included in the governing state statute at**  
13 **the time of his offense.**

14 Petitioner raised this claim in his state action for  
15 post-conviction relief pursuant to Rule 32, Arizona Rules of  
16 Criminal Procedure. The state trial court determined the claim  
17 was precluded, i.e., that Petitioner had waived the claim by  
18 failing to present the claim in his direct appeal. See Answer,  
19 Exh. 00.

20 The Court may not grant relief on the merits of the  
21 claim because it was not properly exhausted in the state courts.  
22 The state court declined to consider the merits of the claim and  
23 found relief on the merits of the claim precluded by  
24 Petitioner's failure to follow the proper procedure when  
25 presenting the claim to the state court.

26 Federal courts "will not review a question of federal  
27 law decided by a state court if the decision of that court rests  
28 on a state law ground that is independent of the federal

1 question and adequate to support the judgment." Coleman, 501  
2 U.S. at 729, 111 S. Ct. at 2553-54 (1991). "This rule applies  
3 whether the state law ground is substantive or procedural." Id.  
4 When a state prisoner has defaulted his federal habeas claims in  
5 the state courts pursuant to an "independent and adequate" state  
6 procedural rule, federal habeas review of the merits of the  
7 claim is barred unless the petitioner can demonstrate cause for  
8 their procedural default of the claim and actual prejudice as a  
9 result of the alleged violation of federal law, or demonstrate  
10 that failure to consider the claims will result in a fundamental  
11 miscarriage of justice. Id., 501 U.S. at 750, 111 S. Ct. at  
12 2565. Accordingly, when a petitioner's federal habeas claim has  
13 been waived or precluded by violation of a state procedural  
14 rule, it is procedurally defaulted unless the prisoner can  
15 demonstrate cause and prejudice. See, e.g., Cook, 538 F.3d at  
16 1025. An Arizona court's preclusion of relief on a claim  
17 pursuant to Arizona Rule of Criminal Procedure 32.2(a)(3),  
18 i.e., based on the failure to present the claim at an earlier  
19 proceeding, is "independent of federal law because [it does] not  
20 depend upon a federal constitutional ruling on the merits."  
21 Stewart, 536 U.S. at 860, 122 S. Ct. at 2581-82.

22           Because the state court declined to consider the merits  
23 of the claim based on an independent and adequate state  
24 procedural rule, the Court may not consider the merits of the  
25 claim absent a showing of cause and prejudice or that the  
26 failure to consider the merits of the claim will result in a  
27 fundamental miscarriage of justice.

1 The procedural bar doctrine is a subcategory  
2 of the independent and adequate state ground  
3 doctrine. See Boyd v. Thompson, 147 F.3d  
4 1124, 1126 (9th Cir. 1998). The purpose of  
5 the doctrine is to protect the state's  
6 interests by giving it the opportunity to  
7 correct its own errors. See Coleman v.  
8 Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546  
9 [] (1991). Under this doctrine, a federal  
10 court ordinarily will not review a state  
11 court ruling if the state court would find  
12 that the claim was barred pursuant to an  
13 independent and adequate state procedural  
14 rule.

15 The federal court, however, will review the  
16 claim if the petitioner can show either cause  
17 and prejudice, see Coleman, 501 U.S. at 750,  
18 111 S.Ct. 2546, or a fundamental miscarriage  
19 of justice, see Murray v. Carrier, 477 U.S.  
20 478, 495, 106 S.Ct. 2639, [] (1986), or if  
21 the government waived the procedural default,  
22 see Franklin v. Johnson, 290 F.3d 1223, 1230,  
23 1233 (9th Cir. 2002).

24 Robinson, 595 F.3d at 1100 & n.10.

25 The state's procedural bar satisfies the exhaustion  
26 requirement and also provides an independent and adequate state-  
27 law basis for upholding a petitioner's convictions and  
28 sentences. See Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th  
Cir. 2002) ("...the procedural default rule barring  
consideration of a federal claim applies only when a state court  
has been presented with the federal claim, but declined to reach  
the issue for procedural reasons"); Correll v. Stewart, 137 F.3d  
1404, 1417 (9th Cir. 1998). Therefore, the Court need not  
review the merits of Petitioner's procedurally defaulted claim  
unless he can demonstrate cause for his failure to follow  
reasonable state procedures for fair presentment of his claims  
and prejudice arising from his procedural default of the claims.  
See Murray v. Carrier, 477 U.S. 478, 485, 106 S. Ct. 2639, 2643

1 (1986).

2 "Cause" is a legitimate excuse for the petitioner's  
3 procedural default and "prejudice" is actual harm resulting from  
4 the alleged constitutional violation. See Thomas v. Lewis, 945  
5 F.2d 1119, 1123 (9th Cir. 1991). To demonstrate cause, a  
6 petitioner must show the existence of some external factor which  
7 impeded his efforts to comply with the state's procedural rules.  
8 See Cook, 538 F.3d at 1027; Smith v. Baldwin, 510 F.3d 1127,  
9 1139 (9th Cir. 2007); Martinez-Villareal v. Lewis, 80 F.3d 1301,  
10 1305 (9th Cir. 1996). The Supreme Court has explained that "a  
11 showing that ... some interference by officials made compliance  
12 impracticable would constitute cause under this standard."  
13 Murray, 477 U.S. at 488, 106 S. Ct. at 2645. See also Cook, 538  
14 F.3d at 1027. To establish prejudice, the petitioner must show  
15 that the alleged error "worked to his actual and substantial  
16 disadvantage, infecting his entire trial with error of  
17 constitutional dimensions." United States v. Frady, 456 U.S.  
18 152, 170, 102 S. Ct. 1584, 1595 (1982). See also Correll, 137  
19 F.3d at 1415-16; Leavitt v. Arave, 383 F.3d 809, 838-39 (9th  
20 Cir. 2004).

21 In his traverse to the response to his habeas petition  
22 Petitioner asserts his right to due process was violated by the  
23 state court's failure to address this claim on the merits.

24 Petitioner has not established cause for his procedural  
25 default of this habeas claim. Compare Maples v. Stegall, 340  
26 F.3d 433, 439 (6th Cir. 2003) (concluding that prisoner had  
27 established cause for his procedural default of a habeas claim

28



1 where prison officials delayed mailing the inmate's state  
2 pleadings for five days), and Ivy v. Caspari, 173 F.3d 1136,  
3 1141 (8th Cir. 1999) ("It is the fact of nondelivery of a  
4 prisoner's timely and properly mailed motion, not the reason for  
5 that nondelivery, that constitutes cause for the procedural  
6 default."), with Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.  
7 1999), and Thomas v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991)  
8 (concluding a petitioner's contention he was denied adequate law  
9 library facilities and access did not excuse his procedural  
10 default of his claims).

11 To establish prejudice, a petitioner must show that the  
12 errors stated in the defaulted claim worked to his actual and  
13 substantial disadvantage and infected his trial with  
14 constitutional error. See Frady, 456 U.S. at 170, 102 S. Ct. at  
15 1595; Correll, 137 F.3d 1415-16. Petitioner must prove that  
16 "but for" the alleged constitutional violation there is a  
17 reasonable probability he would not have been convicted of the  
18 same crimes. See Ivy, 173 F.3d at 1141. Petitioner has not  
19 made this "but for" showing.

20 Review of the merits of procedurally defaulted habeas  
21 claims is also appropriate if the petitioner demonstrates review  
22 of the merits of his claim is necessary to prevent a fundamental  
23 miscarriage of justice. See Schlup v. Delo, 513 U.S. 298, 327,  
24 115 S. Ct. 851, 867 (1995); Murray, 477 U.S. at 485-86, 106 S.  
25 Ct. at 2649. A fundamental miscarriage of justice occurs only  
26 when a constitutional violation has probably resulted in the  
27 conviction of one who is actually innocent. See Murray, 477

1 U.S. at 485-86, 106 S. Ct. at 2649; Thomas v. Goldsmith, 979  
2 F.2d 746, 749 (9th Cir. 1992) (showing of factual innocence is  
3 necessary to trigger manifest injustice relief). To satisfy the  
4 "fundamental miscarriage of justice" standard, Petitioner must  
5 establish by clear and convincing evidence that no reasonable  
6 juror could have found him guilty of the offense. Schlup, 513  
7 U.S. at 327, 115 S. Ct. at 867; Wildman v. Johnson, 261 F.3d  
8 832, 842-43 (9th Cir. 2001).

9           Petitioner has not established that no reasonable juror  
10 could have found him guilty of the offenses of conspiracy to  
11 commit murder and murder absent the alleged error in the state  
12 court's consideration of allegedly improper factors when  
13 sentencing Petitioner. Accordingly, the Court should not  
14 consider the merits of this claim for relief.

15           **2. Petitioner asserts his trial counsel's performance**  
16 **was unconstitutionally ineffective because they failed to call**  
**an expert witness.**

17           Petitioner raised this claim in his state action for  
18 post-conviction relief pursuant to Rule 32, Arizona Rules of  
19 Criminal Procedure. See Answer, Exh. 00. The state court  
20 denied relief on the merits of the claim. That decision was not  
21 clearly contrary to nor an unreasonable application of federal  
22 law.<sup>5</sup>

23           To state a claim for ineffective assistance of counsel,  
24 a petitioner must show that his attorney's performance was  
25 deficient and that the deficiency prejudiced the petitioner's

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26  
27           <sup>5</sup> Petitioner was represented by two attorneys during his  
28 second trial.

1 defense. See Strickland v. Washington, 466 U.S. 668, 687, 104  
2 S. Ct. 2052, 2064 (1984). The petitioner must overcome the  
3 strong presumption that counsel's conduct was within the range  
4 of reasonable professional assistance required of attorneys in  
5 that circumstance. See id., 466 U.S. at 687, 104 S. Ct. at  
6 2064. To establish prejudice, the petitioner must establish  
7 that there is "a reasonable probability that, but for counsel's  
8 unprofessional errors, the result of the proceeding would have  
9 been different." Strickland, 466 U.S. at 694, 104 S. Ct. at  
10 2068. See also, e.g., Martin v. Grosshans, 424 F.3d 588, 592  
11 (7th Cir. 2005). Additionally, prejudice from counsel's  
12 allegedly deficient performance is less likely when the case  
13 against the defendant is strong. See, e.g., Detrich v. Ryan,  
14 \_\_\_ F.3d \_\_\_, 2010 WL 3274500, at \*15-19 (9th Cir.); Avila v.  
15 Galaza, 297 F.3d 911, 924 (9th Cir. 2002) (collecting the cases  
16 so holding).

17 To prevail on the merits of a habeas claim of  
18 ineffective assistance of counsel, it is the habeas applicant's  
19 burden to show that the state court applied Strickland to the  
20 facts of his case in an objectively unreasonable manner. "An  
21 unreasonable application of federal law is different from an  
22 incorrect application of federal law." Woodford, 537 U.S. at  
23 25, 123 S. Ct. at 360 (internal quotations omitted). Vague or  
24 conclusory claims do not establish evidence sufficient to  
25 conclude the state court's decision was clearly contrary to  
26 federal law. See Jones v. Gomez, 66 F.3d 199, 205 (9th Cir.  
27 1995); James v. Borq, 24 F.3d 20, 26 (9th Cir. 1994).

1 Additionally, defense counsel's "strategic choices made after  
2 thorough investigation of law and facts relevant to plausible  
3 options are virtually unchallengeable; and strategic choices  
4 made after less than complete investigation are reasonable  
5 precisely to the extent that reasonable professional judgments  
6 support the limitations on investigation." Strickland, 466 U.S.  
7 at 690-91, 104 S. Ct. at 2066.

8 In denying this claim in Petitioner's Rule 32 action,  
9 the state court concluded:

10 Defendant failed to prove either prong of the  
11 Strickland test. First, this Court cannot  
12 conclude that the first prong-that the  
13 performance was deficient-was outside that  
14 wide range of professionally competent  
15 assistance. The Court finds that a reasonable  
16 and reasoned basis existed for trial  
17 counsel's decision not to call the expert  
18 witness. [] Mr. Simpson testified about the  
19 courtroom drama surrounding Ms. Patino's  
20 testimony. The Court finds that having  
21 achieved getting Ms. Patino to admit to  
22 having killed the victim by herself, it was  
23 reasonable for defense counsel not to call  
24 the expert because defense counsel had  
25 achieved the objective of having evidence to  
26 create and argue reasonable doubt.

19 Exh. 00 at 3.

20 The Arizona state court's decision in Petitioner's Rule  
21 32 proceedings, that Petitioner was not denied his right to the  
22 effective assistance of counsel, was not clearly contrary to nor  
23 an unreasonable application of federal law and Petitioner is not  
24 entitled to federal habeas relief on this claim. Compare Jones  
25 v. Ryan, 583 F.3d 626, 640 (9th Cir. 2009) (holding counsel was  
26 ineffective for (1) failing to secure the appointment of a  
27 mental health expert; (2) failure to timely move for

1 neurological and neuropsychological testing; and (3) failure to  
2 present additional mitigation witnesses and evidence), petition  
3 for cert. filed, 78 U.S.L.W. 3652 (Apr. 26, 2010) (No. 09-1314).

4 **3. Petitioner maintains his trial counsel's performance**  
5 **was unconstitutionally ineffective because counsel failed to**  
6 **file a timely motion for new trial.**

6 Petitioner raised this claim in his state action for  
7 post-conviction relief pursuant to Rule 32, Arizona Rules of  
8 Criminal Procedure. See Answer, Exh. 00. The state court  
9 denied relief on the merits of the claim. The state court  
10 determined there was no showing that any of the claims raised in  
11 the untimely motion had merit and, accordingly, that Petitioner  
12 was not prejudiced by any deficiency in failing to timely file  
13 the motion.

14 The state court applied the correct test to the claim,  
15 i.e., the Strickland standard, and concluded Petitioner had not  
16 been prejudiced by the failure to timely file the motion for a  
17 new trial. The state court's decision was not clearly contrary  
18 to federal law. Accordingly, Petitioner is not entitled to  
19 habeas relief on this claim.

20 **4. Petitioner alleges the guilty verdicts were**  
21 **coerced.**

22 In his direct appeal Petitioner asserted that the  
23 guilty verdicts were coerced by the trial judge. The Arizona  
24 Court of Appeals concluded that Petitioner was not entitled to  
25 relief on the merits of this claim. That decision was not  
26 clearly contrary to nor an unreasonable application of federal  
27 law.

1           At the conclusion of the presentation of evidence,  
2 closing argument, and instruction, the jurors in Petitioner's  
3 second trial began deliberations on the afternoon of November  
4 14, 2001. That afternoon, after the bailiff told the jurors  
5 they could leave for the day, the bailiff informed the trial  
6 judge that there was a problem because Juror Allison did not  
7 want to remain on the jury. After receiving this information,  
8 with counsel present telephonically, the trial judge advised  
9 Juror Allison to come back the next morning so he could confer  
10 with her and counsel. The state trial judge and counsel met  
11 with Juror Allison the next morning.

12           The judge told the juror that he did not want to know  
13 anything about the deliberations, about what anyone said, about  
14 the votes cast, or any juror's view of the evidence. Juror  
15 Allison explained to the court that she had a problem with one  
16 of the other jurors. After speaking with Juror Allison about  
17 her problem with the other juror and after discussion and  
18 argument with counsel, the judge gave the following instruction  
19 to all of the assembled jurors:

20           THE COURT: Folks, just a couple of additional  
21 oral instructions here with regard to  
22 deliberations. I just want to -- I just want  
23 to relate to you some of the law in this  
24 state and that is this: Each juror has a duty  
25 to consult with one another, to deliberate  
26 with a view to reaching an agreement if it  
27 can be done without violence to individual  
28 judgment. No juror should surrender his or  
her honest conviction as to the weight or  
effect of the evidence solely because of the  
opinion of other jurors or for the purpose of  
returning a verdict, but I would ask that you  
return to the jury room. Keep in mind what I  
told you about trying to resolve any

1           disagreement amongst yourselves without doing  
2           violence to your conscience. I'm sure you all  
3           understand the gravity of the situation here.  
4           Each of you has a duty to deliberate with the  
5           other, to discuss, as I said, to consult with  
6           one another, to deliberate with a view to  
7           reaching agreement if it can be done without  
8           violence or -- without violence to individual  
9           judgment. You have a duty to do that and I  
10          would ask you to do so, please, and I would  
11          ask you to go back to the jury room and  
12          continue your deliberations.

13          Answer, Exh. CC at 25-26.

14                 The jury then resumed its deliberations and the jury  
15          did not reach a verdict that day. The following morning the  
16          jury entered guilty verdicts on both counts of the indictment.  
17          Answer, Exh. DD (transcript of November 16, 2001).

18                 In his direct appeal Petitioner argued that the giving  
19          of the above-quoted instruction constituted fundamental error.  
20          The Arizona Court of Appeals determined Petitioner had received  
21          a fair trial at the hands of an independent jury, free from  
22          intimidation or undue pressure, and denied relief on the merits  
23          of the claim. Id., Exh. JJ. The state appellate court  
24          concluded that, as a matter of fact, there was no evidence that  
25          the jury had even conducted a vote, was deadlocked, or was 11-1  
26          at the time of the instruction, as Petitioner had asserted.  
27          Id., Exh. JJ. After analyzing the totality of the  
28          circumstances, including the fact that the trial court had told  
29          the jurors four times they should not "do violence" to their  
30          conscience, the state appellate court concluded there was no  
31          error in giving the instruction. Id., Exh. JJ.

1            "Any criminal defendant, and especially any capital  
2 defendant, being tried by a jury is entitled to the uncoerced  
3 verdict of that body." Lowenfield v. Phelps, 484 U.S. 231, 241,  
4 108 S. Ct. 546, 552-53 (1988). Although the Supreme Court has  
5 not often dealt with the constitutional dividing line between  
6 instructing a jury and coercing it, it is clear that a state  
7 trial judge may not cross the "boundary from appropriate  
8 encouragement to exercise the duty to deliberate in order to  
9 reach a unanimous verdict" and the "forbidden territory of  
10 coercing a particular verdict on the basis of the judge's  
11 selective view of the evidence." Smith v. Curry, 580 F.3d 1071,  
12 1080 (9th Cir. 2009). See Jenkins v. United States, 380 U.S.  
13 445, 446, 85 S. Ct. 1059, 1060 (1965) (holding reversible error  
14 when judge told the jury, "you have got to reach a decision in  
15 this case"); Allen v. United States, 164 U.S. 492, 501, 17 S.  
16 Ct. 154, 155 (1896) (approving an instruction to a deadlocked  
17 jury charging the jurors in the minority to consider the views  
18 of the majority and to ask themselves whether their own views  
19 were reasonable).

20            Whether the comments and conduct of the state trial  
21 judge infringed a defendant's due process right to an impartial  
22 jury and fair trial turns upon whether "the trial judge's  
23 inquiry would be likely to coerce certain jurors into  
24 relinquishing their views in favor of reaching a unanimous  
25 decision." Locks v. Sumner, 703 F.2d 403, 406 (9th Cir. 1983).  
26 The trial court's actions and statements must be evaluated in  
27 the totality of the circumstances. See Jiminez v. Myers, 40



1 F.3d 976, 979-80 (9th Cir. 1993); Marsh v. Cupp, 536 F.2d 1287,  
2 1290 (9th Cir. 1976) (holding the test for jury coercion is  
3 “‘whether in its context and under all the circumstances of this  
4 case the statement was coercive’”).

5 The state court’s decision was not clearly contrary to  
6 nor an unreasonable application of federal law. The challenged  
7 jury instruction encouraged the jurors to consider each other’s  
8 views and to ask themselves whether their own views were  
9 reasonable under the circumstances. Accordingly, the state  
10 court’s decision was not clearly contrary to nor an unreasonable  
11 application of federal law. See Brown v. Bradshaw, 531 F.3d  
12 433, 437 (6th Cir. 2008).

13 **5. Petitioner maintains the trial judge abused his**  
14 **discretion in not excusing two jurors.**

15 In his direct appeal Petitioner argued that the trial  
16 court committed reversible error by failing to excuse two  
17 jurors. Answer, Exh. II. The Arizona Court of Appeals deferred  
18 to the trial court’s decision that the two jurors could be fair  
19 and impartial and denied relief on the merits of the claim.  
20 Id., Exh. JJ. This decision was not clearly contrary to nor an  
21 unreasonable application of federal law.

22 During Petitioner’s second trial a seated juror became  
23 aware that an acquaintance had known Petitioner because the  
24 acquaintance was previously Petitioner’s Spanish teacher. Id.,  
25 Exh. N. The teacher had commented to the juror that Petitioner  
26 was charming and had brought her a present from Mexico. Id.,  
27 Exh. N. The juror car-pooled with two other jurors to whom she

1 relayed the teacher's comment. Id., Exh. N. The juror also  
2 informed the bailiff about this knowledge, who brought it to the  
3 trial court's attention. Id., Exh. N at 12.

4           Upon questioning by the trial court, the juror who  
5 initially heard the Spanish teacher's comment about Petitioner  
6 indicated she would be prejudiced, and she (Juror Lynch) was  
7 excused from the jury. Id., Exh. N at 8-12. Upon questioning  
8 by the trial court, the two other jurors to whom the first juror  
9 had relayed the Spanish teacher's comment indicated they would  
10 not be biased by this knowledge. Id., Exh. N at 12-18, 19-26.  
11 Nonetheless, defense counsel moved to dismiss one of these  
12 jurors, Juror Reid, because the excused juror had told the court  
13 Juror Reid had advised her not to disclose the comment from the  
14 Spanish teacher to the trial court. Id., Exh. N at 34-35. Upon  
15 questioning by the trial court, Juror Reid denied he had so  
16 advised Juror Lynch, and the trial court denied the motion to  
17 have the second juror dismissed. Id., Exh. N at 38-43.

18           To be entitled to relief on his claim that his  
19 constitutional right to an impartial jury was violated by the  
20 trial court's decision to allow Juror Reid to deliberate,  
21 Petitioner must rebut the state courts' presumptively correct  
22 finding that the challenged juror could serve fairly and  
23 impartially. See Greene v. Georgia, 519 U.S. 145, 146, 117 S.  
24 Ct. 578, 579 (1996) (holding the federal habeas courts must  
25 accord a presumption of correctness to state court's findings of  
26 juror bias). Cf. Smith v. Phillips, 455 U.S. 209, 216, 102 S.  
27 Ct. 940, 945 (1982) (holding that the opportunity to show actual

1 bias is a sufficient remedy and "a guarantee of a defendant's  
2 right to an impartial jury." (internal citations omitted)). A  
3 juror's prejudice may not be presumed. Cf. Fields v. Brown, 503  
4 F.3d 755, 773-74 (9th Cir. 2007).

5 Because the contact revealed by the record indicates  
6 that the impartiality of the jury's verdict was not affected by  
7 the contact, the trial court's denial of Petitioner's claim was  
8 neither contrary to nor an unreasonable application of federal  
9 law. See Williams v. Taylor, 529 U.S. 420, 442-44, 120 S. Ct.  
10 1479, 1493-94 (2000) (reiterating that the defendant may  
11 establish at an evidentiary hearing that a prospective juror who  
12 arguably failed to tell the truth on voir dire was not  
13 impartial); Fields v. Brown, 503 F.3d 755, 779-80 (9th Cir.  
14 2007); Sims v. Brown, 425 F.3d 560, 577 (9th Cir. 2005).  
15 Therefore, Petitioner is not entitled to relief on this habeas  
16 claim.

17 **6. Petitioner contends his convictions violate his**  
18 **federal constitutional rights because the trial court did not**  
**give the jury a "Willits" instruction.**

19 In Arizona v. Willits, 96 Ariz. 184, 190-91, 393 P.2d  
20 274, 277-79 (1964), the Arizona Supreme Court held that if the  
21 prosecution has been found to destroy or spoil evidence under  
22 its control, the defendant is entitled to an instruction that  
23 permits the jury to draw an inference against the state. To be  
24 entitled to a jury instruction pursuant to the holding in  
25 Willits a defendant must prove both that the state failed to  
26 preserve exculpatory, material, accessible evidence, and  
27 resulting prejudice. See Arizona v. Fulminante, 193 Ariz. 485,

1 503, 975 P.2d 75, 93 (1999).

2           Petitioner raised this claim for federal habeas relief  
3 in his direct appeal and the claim was denied on the merits.

4 The state court concluded:

5           Defendant requested a Willits instruction  
6 because the State failed to collect and/or  
7 preserve certain evidence at the crime scene,  
8 including photographs of footprints and a  
9 drip mark on the wall. [] The trial court  
10 refused to give the instruction because there  
11 was no showing that the State lost or  
12 destroyed evidence. The court further found  
13 that the evidence did not have a tendency to  
14 exonerate Defendant.

15 Answer, Exh. JJ at 28.

16           The Court's review of the state court's failure to give  
17 a jury instruction is limited to a determination of whether the  
18 failure so infected the entire trial that the defendant was  
19 deprived of his right to a fair trial. See Dunckhurst v. Deeds,  
20 859 F.2d 110, 114 (9th Cir. 1988). Because the omission of an  
21 instruction is less likely to be prejudicial than a misstatement  
22 of the law, a habeas petitioner whose claim involves a failure  
23 to give a particular instruction bears an "especially heavy"  
24 burden. See Henderson v. Kibbe, 431 U.S. 145, 155, 97 S. Ct.  
25 1730, 1737 (1977). The "failure" to give a Willits instruction  
26 did not violate Petitioner's right to a fair trial.

27           The Due Process Clause of the Fourteenth Amendment  
28 imposes a duty on the state to preserve evidence that "might be  
29 expected to play a significant role in the suspect's defense."  
30 California v. Trombetta, 467 U.S. 479, 488, 104 S. Ct. 2528,  
31 2534 (1984). Under the Trombetta standard, "evidence must both

1 possess an exculpatory value that was apparent before the  
2 evidence was destroyed and be of such a nature that the  
3 defendant would be unable to obtain comparable evidence by other  
4 reasonably available means." Id., 467 U.S. at 489, 104 S. Ct. at  
5 2535. To establish a due process violation when the government  
6 fails to preserve evidence that is only potentially exculpatory,  
7 the petitioner must demonstrate that the government acted in bad  
8 faith. Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S. Ct.  
9 333, 337 (1988).

10 Petitioner has not established that any uncollected  
11 evidence was exculpatory or that the government acted in bad  
12 faith. See Villafuerte v. Stewart, 111 F.3d 616, 625-26 (9th  
13 Cir. 1997); Mitchell v. Goldsmith, 878 F.2d 319, 322 (9th Cir.  
14 1989). The Due Process Clause does not impose on the police "an  
15 undifferentiated and absolute duty to retain and to preserve all  
16 material that might be of conceivable evidentiary significance  
17 in a particular prosecution." Youngblood, 488 U.S. at 58, 109  
18 S. Ct. at 337. Petitioner has not met the "heavy burden" of  
19 showing that the omission of a Willits instruction deprived him  
20 of a fair trial. Accordingly, the state court's decision was  
21 not clearly contrary to federal law and Petitioner is not  
22 entitled to habeas relief on this claim.

23 **7. Petitioner asserts the "Portillo" jury instruction**  
24 **regarding reasonable doubt shifted the burden of proof to the**  
25 **defense, in violation of his federal constitutional rights.**

26 Petitioner raised his sixth claim for habeas relief in  
27 his direct appeal. The Arizona Court of Appeals denied the  
28 claim on the merits. In his traverse Petitioner states that he

1 is "withdrawing" the claim.

2           "The Due Process Clause of the Fourteenth Amendment  
3 denies States the power to deprive the accused of liberty unless  
4 the prosecution proves beyond a reasonable doubt every element  
5 of the charged offense." Carella v. California, 491 U.S. 263,  
6 265, 104 S. Ct. 2419, 2420 (1989) (citation omitted). "Jury  
7 instructions relieving States of this burden violate a  
8 defendant's due process rights." Id. (citations omitted).  
9 "Although the Constitution does not require jury instructions to  
10 contain any specific language, the instructions must convey both  
11 that a defendant is presumed innocent until proven guilty and  
12 that he may only be convicted upon a showing of proof beyond a  
13 reasonable doubt." Gibson v. Ortiz, 387 F.3d 812, 821 (9th Cir.  
14 2004), citing Victor v. Nebraska, 511 U.S. 1, 5, 114 S. Ct.  
15 1239, 1242-43 (1994).

16           The Arizona courts' Portillo instruction and the  
17 instruction given in this case are nearly a verbatim copy of the  
18 pattern jury instruction on reasonable doubt adopted by the  
19 Federal Judicial Center. See Arizona v. Van Adams, 194 Ariz.  
20 408, 418, 984 P.2d 16, 26 (1999); Victor, 511 U.S. at 27, 114 S.  
21 Ct. at 1253 (Ginsburg, J., concurring) (citing approvingly  
22 Federal Judicial Center, Pattern Criminal Jury Instructions, at  
23 17-18 (instruction 21)). Accordingly, the state court's  
24 decision denying relief on the merits of this claim was not  
25 clearly contrary to federal law and Petitioner is not entitled  
26 to habeas relief on the merits of this claim. Additionally,  
27 Petitioner has waived any potential error by withdrawing this

28

1 claim.

2 **8. Petitioner contends his trial counsel's performance**  
3 **was unconstitutionally ineffective because counsel did not call**  
4 **Petitioner to testify at trial after having "rehearsed"**  
5 **Petitioner's testimony.**

6 Petitioner raised this claim in his state action for  
7 post-conviction relief pursuant to Rule 32, Arizona Rules of  
8 Criminal Procedure. The state court denied relief on the merits  
9 of the claim. After conducting an evidentiary hearing, the  
10 state court determined:

11 Based on the evidence that the Court finds  
12 credible, the Court finds as follows:

13 1. Defendant never specifically instructed  
14 counsel that he wanted to testify.

15 2. Defendant never expressed a strong desire  
16 to testify either before trial or after Ms.  
17 Patino testified. He told his counsel that he  
18 would follow counsel's advice regarding  
19 whether he should testify.

20 3. Both of Defendant's attorneys recommended  
21 that Defendant not testify. Defendant was  
22 "comfortable" with the defense team's  
23 consensus opinion that he not testify.

24 4. Counsels recommendation that Defendant not  
25 testify had a reasonable and reasoned basis.  
26 Some of those reasons are:

27 If Defendant had testified, he would have  
28 called ten or eleven other witnesses liars.  
Defendant doing that during this hearing had  
an impact on this Court and surely would have  
had a similar, if not more powerful impact on  
the jury. There is an old saying among trial  
lawyers that when one starts throwing mud  
around the courtroom, some of that mud will  
likely land on you. It was not unreasonable  
to limit the mudslinging to avoid the risk of  
blow back onto Defendant as occurred to some  
extent during this hearing.

The defense had evidence to argue reasonable  
doubt without Defendant's testimony-the love  
note in the casket, the improbability of  
arranging the meeting and Ms. Patino's  
in-court confession. Putting Defendant on the  
stand and having his credibility seriously  
challenged would only have diminished the

28

1 usefulness of this other evidence in arguing  
2 reasonable doubt.

3 As noted above, Defendant's lack of  
4 credibility would have been highlighted  
5 during cross-examination. Mr. Simpson  
6 recognized that for Defendant to testify, he  
7 would have had to address many "issues of  
8 deception" that were present" at virtually  
9 every turn" and that Defendant had "no  
10 satisfactory answers to those problems."

11 Putting Defendant on the stand would have  
12 given the State an opportunity to review all  
13 of the adverse testimony given over the prior  
14 six weeks at a time close to when the jury  
15 would retire to deliberate. Avoiding that  
16 opportunity was reasonable from defense  
17 counsels' perspective.

18 ...  
19 8. Defendant was given the choice to testify  
20 and Defendant chose to follow his counsel's  
21 advice not to testify.

22 Based on those findings, the Court finds and  
23 concludes that trial counsel's decision to  
24 recommend that Defendant not testify was not  
25 below the objective standards of  
26 reasonableness.....

27 Exh. 00 at 4-5.

28 The state court's application of Strickland to the  
merits of this claim was not clearly contrary to federal law. In  
Strickland the Supreme Court stated that "strategic choices made  
after thorough investigation of law and facts relevant to  
plausible options are *virtually unchallengeable*...." Id., 466  
U.S. at 690-91, 104 S. Ct. at 2066 (emphasis added). The state  
court found that counsel's challenged decision regarding  
Petitioner taking the stand was not deficient but rather that it  
was a reasoned and reasonable strategic decision.

Because the state court's decision was not contrary to  
clearly established federal law, or one involving an  
unreasonable application of clearly established federal law, or



1 based on an unreasonable determination of the facts in light of  
2 the evidence presented in the state court proceeding, and  
3 Petitioner is not entitled to federal habeas relief on his claim  
4 that he was deprived of the effective assistance of counsel.

5 **9. Petitioner asserts his sentences violate the**  
6 **doctrines stated in Apprendi v. Washington and Blakely v.**  
7 **Washington.**

8 Petitioner did not exhaust an Apprendi claim nor a  
9 Blakely claim in the state courts by presenting a Blakely or  
10 Apprendi claim in his direct appeal or in his Rule 32 action.  
11 In his traverse to the answer to his petition, Petitioner states  
12 he is "withdrawing" this claim from his habeas action.

13 Petitioner has not established cause for his procedural  
14 default of some of his federal habeas claims in the state  
15 courts. Under the "cause and prejudice" test, Petitioner bears  
16 the burden of establishing that some objective factor external  
17 to the defense impeded his compliance with Arizona's procedural  
18 rules. See Moorman v. Schriro, 426 F.3d 1044, 1058 (9th Cir.  
19 2005). To establish prejudice, the petitioner must show that  
20 the alleged error "worked to his actual and substantial  
21 disadvantage, infecting his entire trial with error of  
22 constitutional dimensions." Frady, 456 U.S. at 170, 102 S. Ct.  
23 at 1595. See also Correll, 137 F.3d at 1415-16. Petitioner has  
24 not shown cause and prejudice regarding this procedurally  
25 defaulted claim and, accordingly, the court should not consider  
26 the merits of the claim. Additionally, Petitioner has waived any  
27 potential error by withdrawing this claim.

1           **10. Petitioner maintains the trial judge erred by**  
2 **precluding the use of prior inconsistent statements by Ms.**  
3 **Patino.**

4           Petitioner raised this claim in his direct appeal. The  
5 state appellate court denied relief on the merits of the claim.  
6 The Arizona Court of Appeals determined the claim presented the  
7 question of whether the trial court had applied the correct  
8 state evidentiary rule. The appellate court concluded the trial  
9 court did not abuse its discretion in precluding the testimony  
10 Petitioner asserts should have been admitted. Additionally, the  
11 appellate court determined that any possible error in not  
12 admitting the evidence did not affect the jury's verdicts  
13 because the jury was well-aware that Ms. Patino had offered  
14 inconsistent statements throughout the first and second trial  
15 and prior to and in between the trials.

16           During Petitioner's second trial, the trial court  
17 excluded some impeachment evidence regarding Ms. Patino, but did  
18 allow the introduction of other impeachment evidence. The  
19 evidence that was excluded was excluded because other  
20 inconsistent statements were introduced as impeachment evidence  
21 and because the evidence was not timely disclosed to the  
22 prosecution.<sup>6</sup>

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23           <sup>6</sup>Prior to trial the state moved to compel the disclosure of  
24 both a taped conversation between Ms. Patino's brother and  
25 Petitioner's previous defense counsel, Mr. Ochoa, and a taped  
26 conversation between Petitioner's then defense counsel and Ms. Patino.  
27 The prosecutor indicated that Ms. Patino's inconsistent statements  
28 were hampering the prosecution. All parties and the trial court  
indicated that at that time it was not clear if Ms. Patino would  
testify at all at the second trial or how she might testify. The  
state trial court granted the motion because it found "everybody needs  
to be aware of everything she said to everybody...." and that sorting

1 In his direct appeal Petitioner argued the trial court  
2 abused its discretion in precluding the use of the transcripts  
3 to impeach Ms. Patino's testimony.

4 In denying the claim the state appellate court noted:

5 During cross-examination [at the second  
6 trial], Yesenia partially recanted some of  
7 her testimony at the first trial and her  
8 testimony on direct examination during the  
9 second trial, claiming that she alone killed  
10 Trish. However, she also testified that she  
11 did not kill Trish alone, but merely admitted  
12 that she told defense counsel and an  
13 investigator that she did so during an  
14 interview prior to the second trial. During  
15 redirect examination, she testified that what  
16 she testified to during cross-examination was  
17 what she told defense counsel and others  
18 prior to the second trial and not what  
19 actually happened.

20 Exh. JJ at 16 n.5. The state court determined that because of  
21 the unique posture of the case and the specific disclosure  
22 requirement issued by the trial court, "Because defense counsel  
23 failed to provide the prosecutor with all of Ms. Patino's  
24 statements prior to trial, the trial court was well within its  
25 discretion in precluding the use of some of them at trial."

26 Exh. JJ at 18.

27 A defendant's due process rights are violated by the  
28 exclusion of evidence if the precluded evidence, if introduced,  
would have created "a reasonable doubt that did not exist

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out Ms. Patino's statements was the province of the jury. The state  
trial court found that, given the number of conflicting statements  
made by Ms. Patino, it was impossible to know if the compelled  
statements could be considered "inconsistent." Accordingly, the trial  
court ordered both parties to disclose to the other every prior  
statement made by Ms. Patino within that party's possession. See  
Answer, Exh. JJ at 13-19.

1 without the evidence." Richmond v. Embry, 122 F.3d 866, 872  
2 (10th Cir. 1997) (citing United States v. Valenzuela-Bernal, 458  
3 U.S. 858, 868, 102 S. Ct. 3440, 3447 (1982)); Patton v. Mullin,  
4 425 F.3d 788, 798 (10th Cir. 2005).

5 To be entitled to habeas relief on a claim or erroneous  
6 exclusion of evidence, the petitioner must demonstrate the error  
7 had a substantial and injurious effect in determining the jury's  
8 verdict. See Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S.  
9 Ct. 1710, 1721-22 (1993); Delaware v. Van Arsdall, 475 U.S. 673,  
10 679, 106 S. Ct. 1431, 1435 (1986); Cummings v. Adams, 172 Fed.  
11 App. 188, 190 (9th Cir. 2006); Christian v. Rhode, 41 F.3d 461,  
12 468 (9th Cir. 1994). Petitioner has not demonstrated that the  
13 alleged error had a substantial and injurious effect in the jury  
14 reaching the guilty verdicts and, accordingly, he is not  
15 entitled to federal habeas relief on this claim.

16 **11. Petitioner contends the trial court erred by**  
17 **admitting "the exemplar Mace" into evidence.**

18 Petitioner raised this issue in his direct appeal. The  
19 Arizona appellate court stated:

20 During Yesenia's redirect examination, the  
21 prosecutor showed her three heavy steel balls  
22 with twelve-inch ropes or tethers attached.  
23 These were the same steel balls shown to her  
24 at the first trial. The prosecutor asked  
25 Yesenia to choose the steel ball (sometimes  
26 referred to as a mace) which most closely  
resembled the steel ball that Yesenia  
observed in Defendant's vehicle and which  
Defendant told her was the weapon he would  
use to kill Trish. Yesenia picked out the  
black ball, Exhibit 419, as the one most like  
the one she saw in Defendant's car.

27 Answer, Exh. JJ at 19.

1 Defendant objected to the admission of the  
2 two steel balls that were not similar to the  
3 alleged weapon about which Yesenia testified.  
4 He also objected to Exhibit 479 on the ground  
5 that the rope appeared "significantly  
6 different" than her description of it and  
7 that it was merely duplicitous of her  
8 testimony. The prosecutor advised the court  
9 that the State was offering the steel balls  
10 as demonstrative evidence to provide the jury  
11 with a visual idea of the size of the steel  
12 ball and rope described by Yesenia during her  
13 testimony. The prosecutor then moved to admit  
14 only Exhibit 419. The court overruled  
15 Defendants objection....

16 Dr. Bevel, a forensic consultant, testified  
17 about the nature of the weapon used to kill  
18 Trish. He stated that based upon a number of  
19 factors considered, it was highly improbable  
20 that a mace with a twelve-inch tether was the  
21 murder weapon- Rather, he opined that the  
22 weapon used to kill Trish was a linear  
23 object, such as a tire iron. The medical  
24 examiner, Dr. Philip Keen, testified that,  
25 except for one head injury that could have  
26 been caused by a spherical object, it was  
27 very unlikely that a spherical object such as  
28 a steel ball would have caused the other head  
injuries.

16 Id., Exh. JJ at 20.

17 In his direct appeal Petitioner argued that the  
18 introduction of Exhibit 419 was in error because the exhibit had  
19 no actual connection to the murder and was prejudicial. The  
20 state appellate court determined the trial court did not abuse  
21 its discretion by admitting the exhibit.

22 A federal court is limited in conducting habeas review  
23 to deciding whether a conviction violates the Constitution,  
24 laws, or treaties of the United States. 28 U.S.C. § 2254(a)  
25 (1994 & Supp. 2010); Estelle v. McGuire, 502 U.S. 62, 67-68, 112  
26 S. Ct. 475, 480 (1991). A state court's evidentiary ruling does  
27 not provide a basis for habeas relief unless the ruling  
28

1 infringed upon a specific federal constitutional right or  
2 deprived the petitioner of a fundamentally fair trial as  
3 guaranteed by the right to due process of law. See Pulley v.  
4 Harris, 465 U.S. 37, 41-42, 104 S. Ct. 871, 874-75 (1984);  
5 Briceno v. Scribner, 555 F.3d 1069, 1076-77 (9th Cir. 2009).

6 To be entitled to habeas relief on this type of claim  
7 the petitioner must establish that the admission of the evidence  
8 was so arbitrary or prejudicial that it rendered their trial  
9 fundamentally unfair. See Walters v. Maas, 45 F.3d 1355, 1357  
10 (9th Cir. 1995) (stating this in the context of a claim that the  
11 improper admission of the fact of a prior conviction violated  
12 the petitioner's federal constitutional right to due process of  
13 law). "In essence, the inquiry comes down to the question,  
14 whether absent the constitutionally-forbidden evidence, honest  
15 and fair-minded jurors might very well have brought in  
16 not-guilty verdicts." Burns v. Clusen, 798 F.2d 931, 943 (7th  
17 Cir. 1986). Typically, the federal courts require other  
18 evidence of guilt to be overwhelming before concluding a  
19 constitutional error was harmless. Mauricio v. Duckworth, 840  
20 F.2d 454, 459 (7th Cir. 1988).

21 Petitioner has not established that the admission of  
22 "the exemplar Mace" evidence was so arbitrary or prejudicial  
23 that it rendered his trial fundamentally unfair. The evidence  
24 against Petitioner, in addition to Ms. Patino's testimony, was  
25 overwhelming. Accordingly, the state court decision regarding  
26 admission of the "exemplar Mace" was not clearly contrary to nor  
27 an unreasonable application of federal law and Petitioner is not

1 entitled to habeas relief on the merits of this claim.

2 **11. Petitioner alleges the jury commissioner illegally**  
3 **excused potential jurors.**

4 In his direct appeal after his second trial, Petitioner  
5 asserted the procedure used by the court to choose the jury  
6 venireman was not authorized by rule or statute.<sup>7</sup> The Arizona  
7 Court of Appeals concluded there was no impropriety in the  
8 selection of the jury because Petitioner had shown no deficiency  
9 in the procedure employed and no prejudice arising from the  
10 selection of the jury. In his traverse Petitioner states he is  
11 "withdrawing" this claim from consideration in this habeas  
12 action.

13 Petitioner's right to procedural due process of law  
14 does not encompass a particular procedure to choose a jury.  
15 Petitioner was not denied his constitutional right to a jury  
16 drawn from a fair cross-section of the community. See Walker v.  
17 Goldsmith, 902 F.2d 16, 17 (9th Cir. 1990). Petitioner is not  
18 entitled to a jury of any particular composition provided that  
19 the selection process which produced his jury did not operate to  
20 systematically exclude distinctive groups in the community from  
21 the jury venire. See Duren v. Missouri, 439 U.S. 357, 358-59,  
22 99 S. Ct. 664, 665-66 (1979); Castaneda v. Partida, 430 U.S.

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23  
24 <sup>7</sup> When selecting the jury, the veniremen were informed that  
25 the trial was expected to last six or seven weeks and that jurors for  
26 whom sitting for that long would pose a hardship would be excused.  
27 The potential jurors were provided with forms on which they were  
28 allowed to indicate that serving would provide a hardship and the  
reason for that hardship.

1 482, 494, 97 S. Ct. 1272, 1280 (1977); Taylor v. Louisiana, 419  
2 U.S. 522, 526-31, 95 S. Ct. 692, 695-98 (1975); Government of  
3 Virgin Islands v. Navarro, 513 F.2d 11, 19 (3d Cir. 1975);  
4 Krause v. Chartier, 406 F.2d 898, 901 (1st Cir. 1968) (no  
5 prejudice found to result from venire consisting entirely of  
6 persons with surnames beginning with the letters T through Z).  
7 Accordingly, Petitioner has failed to state a claim cognizable  
8 in an action for federal habeas relief. Additionally,  
9 Petitioner has waived this claim by withdrawing it from his  
10 habeas petition.

11 **12. Petitioner contends his trial counsel had a clear**  
12 **conflict of interest, in violation of Petitioner's right to the**  
13 **effective assistance of trial counsel.**

14 Petitioner states in his traverse to the answer to his  
15 amended petition that he is "withdrawing" this ground for relief  
16 from consideration. Because Petitioner has failed to pursue  
17 this basis for relief, relief on this claim should be denied.

### 17 **III Conclusion**

18 The state courts' decisions with regard to the federal  
19 habeas claims properly exhausted by Petitioner were not clearly  
20 contrary to nor an unreasonable application of federal law.  
21 Additionally, Petitioner has not shown cause for, nor prejudice  
22 arising from his procedural default of some of his federal  
23 habeas claims. Neither has Petitioner established that a  
24 fundamental miscarriage of justice will occur if the Court does  
25 not consider the merits of his procedurally defaulted claims.  
26 Furthermore, Petitioner has indicated in his traverse to the  
27 response to his petition that he is "withdrawing" several of his



1 claims for federal habeas relief.

2  
3 **IT IS THEREFORE RECOMMENDED** that Mr. Willoughby's  
4 Petition for Writ of Habeas Corpus be **denied and dismissed with**  
5 **prejudice.**


6  
7 This recommendation is not an order that is immediately  
8 appealable to the Ninth Circuit Court of Appeals. Any notice of  
9 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate  
10 Procedure, should not be filed until entry of the district  
11 court's judgment.

12 Pursuant to Rule 72(b), Federal Rules of Civil  
13 Procedure, the parties shall have fourteen (14) days from the  
14 date of service of a copy of this recommendation within which to  
15 file specific written objections with the Court. Thereafter,  
16 the parties have fourteen (14) days within which to file a  
17 response to the objections. Pursuant to Rule 7.2, Local Rules  
18 of Civil Procedure for the United States District Court for the  
19 District of Arizona, objections to the Report and Recommendation  
20 may not exceed seventeen (17) pages in length.

21 Failure to timely file objections to any factual or  
22 legal determinations of the Magistrate Judge will be considered  
23 a waiver of a party's right to de novo appellate consideration  
24 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,  
25 1121 (9th Cir. 2003) (en banc). Failure to timely file  
26 objections to any factual or legal determinations of the  
27 Magistrate Judge will constitute a waiver of a party's right to

1 appellate review of the findings of fact and conclusions of law  
2 in an order or judgment entered pursuant to the recommendation  
3 of the Magistrate Judge.

4 DATED this 30<sup>th</sup> day of September, 2010.

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8 Mark E. Aspey  
9 United States Magistrate Judge  
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