"Appendix A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE JESUS RAMIREZ, Petitioner-Appellant, v. CHARLES L. RYAN, Warden and ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 18-15979 D.C. No. 3:16-cv-08224-DLR District of Arizona, Prescott ORDER

Before: GRABER and M. SMITH, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

"Appendix B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jose Jesus Ramirez,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-16-08224-PCT-DLR

ORDER

Before the Court is Petitioner Jose Jesus Ramirez's Motion for Extension of Time to File Objection to Report and Recommendation. (Doc. 25.) For good cause shown,

IT IS ORDERED that Petitioner's motion (Doc. 25) is **GRANTED.** Petitioner shall file his objections to the Report and Recommendation no later than **January 19, 2018**.

Dated this 19th day of December, 2017.

Douglas L. Rayes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jose Jesus Ramirez,

Petitioner,

v.

Charles Ryan, et al.,

Respondents.

No. CV-16-08224-PCT-DLR (ESW)

REPORT AND RECOMMENDATION

TO THE HONORABLE DOUGLAS L. RAYES, UNITED STATES DISTRICT JUDGE:

Pending before the Court is Jose Jesus Ramirez's ("Petitioner") Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (the "Amended Petition") (Doc. 4). Respondents have answered (Doc. 18), and Petitioner has replied (Doc. 23). The matter is deemed ripe for consideration.

The Amended Petition enumerates nine grounds for habeas relief; Ground Eight contains a number of sub-claims that allege the ineffective assistance of counsel. The undersigned finds that Ground Nine is not cognizable in this proceeding. The undersigned further finds that all other claims are procedurally defaulted except for Grounds One, 8(b)(iii), (iv), and (v). As explained herein, the undersigned concludes that Grounds One, 8(b)(iii), (iv), and (v) are without merit. It is therefore recommended that the Court deny and dismiss the Amended Petition with prejudice.

I. BACKGROUND

A. Convictions

In October 2011, a jury sitting in the Superior Court of Arizona in and for Coconino County convicted Petitioner on three counts of aggravated driving under the influence. (Bates No. 769, 774-75).[1] The jury also convicted Petitioner on the lesser-included offenses of driving under the influence. (Bates No. 774-75). After finding that Petitioner had committed three prior felonies, the trial court sentenced Petitioner to three concurrent ten-year prison terms. (Bates No. 796-803, 819). The Arizona Court of Appeals affirmed Petitioner's convictions and sentences. (Bates No. 885-97). The Arizona Supreme Court denied Petitioner's request for further review. (Bates No. 899-906, 909).

On December 4, 2012, Petitioner filed a Notice of Post-Conviction Relief ("PCR"). (Bates No. 910-12). The trial court appointed PCR counsel, who could not find any colorable claims. (Bates No. 916-17). Petitioner filed a pro se PCR Petition, which Petitioner subsequently amended (the "Amended PCR Petition"). (Bates No. 922-48; Doc. 4 at 45-69).[2] The trial court denied PCR relief. (Bates No. 1087-88).

Petitioner petitioned the Arizona Court of Appeals for review of the trial court's dismissal of his Amended PCR Petition. (Bates No. 1107-1214). On December 6, 2016, the Arizona Court of Appeals granted review, but denied relief. (Bates No. 1241-42). Petitioner did not seek review by the Arizona Supreme Court.

Petitioner timely initiated this federal habeas proceeding on October 3, 2016.

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[1] Citations to the state court record submitted with Respondents' Answer (Doc. 18) refer to the Bates-stamp numbers affixed to the lower right corner of each page of the record.

[2] The copy of the Amended PCR Petition submitted with Respondents' Answer is missing pages 15, 16, and 18. Respondents explain that the missing pages do not appear in the official, scanned version in the state court record. (Doc. 18 at 4 n.3). The missing pages are in the copy of the Amended PCR Petition that Petitioner attached to his Amended Petition for Writ of Habeas Corpus (Doc. 4 at 60-61). Citations to the Amended PCR Petition in this Report and Recommendation are to the copy provided by Petitioner.

(Doc. 1). On November 7, 2016, Petitioner filed an Amended Petition, which the Court required Respondents to Answer. (Docs. 4, 7). The Amended Petition enumerates nine grounds for habeas relief. As detailed in the Court's November 21, 2016 Order:

1. Petitioner's Fifth and Fourteenth Amendment rights were violated because the prosecutor engaged in misconduct and the trial court erred "in the decision of a matter of law" regarding Petitioner's prior convictions.

2. Petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated because he was denied his right to consult with an attorney "as he requested during and after his arrest."

3. Petitioner was denied his Sixth Amendment right to a speedy trial.

4. Petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated because the trial court's ruling on a motion to suppress regarding blood evidence was "contrary to the law[]s established by the U.S. Supreme Court and inconsistent with rudimentary demand[s] of fair procedure."

5. Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated because the trial court denied his motion for an evidentiary hearing regarding retrograde-extrapolation analysis.

6. Petitioner's Fifth and Fourteenth Amendment rights were violated because he was convicted and sentenced on multiple counts derived from a "(single offense) same act due to [a] multiplicitous indictment."

7. The Fifth and Fourteenth Amendment prohibition against double jeopardy was violated when the jury found Petitioner guilty of aggravated driving under the influence and the lesser-included offense.

8. Petitioner received ineffective assistance of counsel, in violation of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights, in critical stages of his criminal proceedings, including prior to trial, during trial, and during his appeal.

9. Petitioner's Fifth, Sixth, and Fourteenth Amendment rights are being violated because the Arizona Court of Appeals has

> denied Petitioner his right to adjudicate his petition for post-conviction relief in a timely manner.

(Doc. 7 at 2-3). Respondents have identified, labeled, and separately addressed a number of sub-claims contained in Ground Eight. (Doc. 18 at 7-11, 33-45). This Report and Recommendation addresses all of those sub-claims.

In Section II of the Report and Recommendation, the undersigned explains that Ground Nine does not present a cognizable federal habeas claim. In Section III(B), the undersigned finds that Grounds Three, Four, Five, Six, and Seven are procedurally defaulted as the state courts denied relief on these claims by invoking an adequate and independent state rule. Section III(C)(1) concludes that Grounds Two, 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c) are unexhausted because Petitioner did not fairly present them in his state court proceedings. In Section III(C)(2), the undersigned finds that all of the unexhausted claims are procedurally defaulted because Petitioner would be precluded by the Arizona Rules of Criminal Procedure from returning to state court in an attempt to exhaust them. Section IV explains that the procedural defaults should not be excused under the cause and prejudice and miscarriage of justice exceptions. Finally, Section V reviews Grounds One, 8(b)(iii), (iv), and (v) and explains why they are without merit.

II. GROUND NINE IS NOT A COGNIZABLE FEDERAL HABEAS CLAIM

Federal law "unambiguously provides that a federal court may issue a writ of habeas corpus to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wilson v. Corcoran,* 562 U.S. 1, 5 (2010) (per curiam) (quoting 28 U.S.C. § 2254(a)). The Ninth Circuit has explained that habeas claims pertaining to alleged errors in a state post-conviction proceeding do not attack the constitutionality of a petitioner's detention, but rather represent an attack on a proceeding collateral to the detention. *Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989). Accordingly, such claims are not cognizable in federal habeas corpus actions. *Id.*; *see also Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997) (habeas petitioner's attempt "to elevate alleged errors in Arizona's post-conviction relief

proceedings to federal constitutional status" fails because "errors concerning such a process are not cognizable in federal habeas proceedings").

In Ground Nine of the Amended Petition, Petitioner asserts that the Arizona Court of Appeals denied his federal constitutional rights by not adjudicating his PCR proceeding in a "timely fashion." (Doc. 4 at 105-07). When Petitioner initiated this habeas proceeding in October 2016, the Arizona Court of Appeals had not yet ruled on Petitioner's request for review of the trial court's dismissal of his Amended PCR Petition. In December 2016, the Arizona Court of Appeals granted Petitioner's request for review, but denied relief. (Bates No. 1241-42).

The undersigned finds that Ground Nine concerns only alleged errors that occurred during Petitioner's PCR proceeding. Therefore, Ground Nine is not cognizable in this federal habeas proceeding as it does not attack the constitutionality of Petitioner's sentences and convictions. The undersigned thus recommends that the Court dismiss Ground Nine with prejudice. *See Franzen*, 877 F.2d at 26 (holding that a claim challenging a state court's delay of over a year in deciding a PCR petition is not addressable through a federal habeas proceeding).

III. GROUNDS TWO, THREE, FOUR, FIVE, SIX, SEVEN, 8(a), 8(b)(i), (ii), (vi), (vii), AND 8(c) ARE PROCEDURALLY DEFAULTED

A. Legal Standards Regarding Procedurally Defaulted Habeas Claims

1. Exhaustion-of-State-Remedies Doctrine

It has been settled for over a century that a "state prisoner must normally exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981); *see also Picard v. Connor*, 404 U.S. 270, 275 (1971) ("It has been settled since *Ex parte Royall*, 117 U.S. 241, 6 S. Ct. 734, 29 L.Ed. 868 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus."). The rationale for the doctrine relates to the policy of federal-state comity. *Picard*, 404 U.S. at 275 (1971). The comity policy is designed to give a state the initial opportunity to review and correct alleged federal rights violations of its state prisoners. *Id.* In the U.S.

Supreme Court's words, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950).

The exhaustion doctrine is codified at 28 U.S.C. § 2254. That statute provides that a habeas petition may not be granted unless the petitioner has (i) "exhausted" the available state court remedies; (ii) shown that there is an "absence of available State corrective process"; or (iii) shown that "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

Case law has clarified that in order to "exhaust" state court remedies, a petitioner's federal claims must have been "fully and fairly presented" in state court. *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). To "fully and fairly present" a federal claim, a petitioner must present both (i) the operative facts and (ii) the federal legal theory on which his or her claim is based. This test turns on whether a petitioner "explicitly alerted" a state court that he or she was making a federal constitutional claim. *Galvan v. Alaska Department of Corrections*, 397 F.3d 1198, 1204-05 (9th Cir. 2005).

2. Procedural Default Doctrine

If a claim was presented in state court, and the court expressly invoked a state procedural rule in denying relief, then the claim is procedurally defaulted in a federal habeas proceeding. *See, e.g., Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001). Even if a claim was not presented in state court, a claim may be procedurally defaulted in a federal habeas proceeding if the claim would now be barred in state court under the state's procedural rules. *See, e.g., Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002).

Similar to the rationale of the exhaustion doctrine, the procedural default doctrine is rooted in the general principle that federal courts will not disturb state court judgments based on adequate and independent state grounds. *Dretke v. Haley*, 541 U.S. 386, 392 (2004). A habeas petitioner who has failed to meet the state's procedural requirements for presenting his or her federal claims has deprived the state courts of an opportunity to address those claims in the first instance. *Coleman v. Thompson*, 501 U.S. 722, 731-32

(1991).

As alluded to above, a procedural default determination requires a finding that the relevant state procedural rule is an adequate and independent rule. *See id.* at 729-30. An adequate and independent state rule is clear, consistently applied, and well-established at the time of a petitioner's purported default. *Greenway v. Schriro*, 653 F.3d 790, 797-98 (9th Cir. 2011); *see also Calderon v. U.S. Dist. Court (Hayes)*, 103 F.3d 72, 74-75 (9th Cir. 1996). An independent state rule cannot be interwoven with federal law. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). The ultimate burden of proving the adequacy of a state procedural bar is on the state. *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003). If the state meets its burden, a petitioner may overcome a procedural default by proving one of two exceptions.

In the first exception, the petitioner must show cause for the default and actual prejudice as a result of the alleged violation of federal law. *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014). To demonstrate "cause," a petitioner must show that some objective factor external to the petitioner impeded his or her efforts to comply with the state's procedural rules. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004). To demonstrate "prejudice," the petitioner must show that the alleged constitutional violation "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *see also Carrier*, 477 U.S. at 494 ("Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial.").

In the second exception, a petitioner must show that the failure to consider the federal claim will result in a fundamental miscarriage of justice. *Hurles*, 752 F.3d at 780. This exception is rare and only applied in extraordinary cases. *Wood v. Ryan*, 693 F.3d 1104, 1118 (9th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 321 (1995)). The exception occurs where a "constitutional violation has probably resulted in the conviction of one who is actually innocent of the offense that is the subject of the barred claim."

Wood, 693 F.3d at 1117 (quoting *Schlup*, 513 U.S. at 327).

B. Grounds Three, Four, Five, Six, and Seven Are Procedurally Defaulted as the State Courts Denied Relief on Those Claims Based on an Adequate and Independent State Rule

As mentioned, Grounds Three, Four, Five, Six, and Seven present the following claims:

> 3. Petitioner was denied his Sixth Amendment right to a speedy trial.
>
> 4. Petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated because the trial court's ruling on a motion to suppress regarding blood evidence was "contrary to the law[]s established by the U.S. Supreme Court and inconsistent with rudimentary demand[s] of fair procedure."
>
> 5. Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated because the trial court denied his motion for an evidentiary hearing regarding retrograde-extrapolation analysis.
>
> 6. Petitioner's Fifth and Fourteenth Amendment rights were violated because he was convicted and sentenced on multiple counts derived from a "(single offense) same act due to [a] multiplicitous indictment."
>
> 7. The Fifth and Fourteenth Amendment prohibition against double jeopardy was violated when the jury found Petitioner guilty of aggravated driving under the influence and the lesser-included offense.

(Doc. 7 at 2).

Petitioner presented the above claims in his PCR proceeding.[3] (Doc. 4 at 45-69; Bates No. 1087-88). The last state court decision reviewing those claims is the December 2016 Arizona Court of Appeals' ruling that affirmed the trial court's denial of Petitioner's PCR Petition. (Bates No. 1241-42). In affirming the trial court's ruling, the Arizona Court of Appeals stated as follows:

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[3] Grounds Three, Four, Five, Six, and Seven were presented as "Claim 4," "Claim 6," "Claim 12," "Claim 8," and "Claim 11," respectively. (*Id.* at 52, 53, 65-67).

> ¶3 . . . . The superior court summarily dismissed the petition, finding a majority of the claims Ramirez raised were procedurally precluded and the remainder each failed to state a colorable claim for relief. This petition for review followed.
>
> ¶4 We review the summary dismissal of a petition for postconviction relief for abuse of discretion. *State v. Bennett*, 213 Ariz. 562, 566, ¶ 17 (2006). Ramirez has failed to show in his petition for review that the superior court abused its discretion in finding the majority of his claims for relief were precluded and the remainder failed to state a colorable claim. Thus, the court did not err in summarily dismissing the petition. Ariz. R. Crim. P. 32.6(c).

(Bates No. 1242). Because the Arizona Court of Appeals substantially incorporated the trial court's reasoning into its decision, the U.S. District Court may review the trial court's decision as part of the review of the Arizona Court of Appeals' decision. *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014) (explaining that when the last reasoned decision is a state appellate court decision which adopts or substantially incorporates lower state court decisions, the lower state court decisions may be reviewed as part of the review of the state appellate court's decision).

In denying the Amended PCR Petition, the trial court found that the claims contained in Grounds Three, Four, Five, Six, and Seven could have been raised in Petitioner's direct appeal.[4] (Bates No. 1088). Under Arizona Rule of Criminal Procedure 32.2(a)(3), a defendant is precluded from raising claims that could have been raised and adjudicated on direct appeal or in any previous collateral proceeding. *See also State v. Curtis*, 912 P.2d 1341, 1342 (Ariz. Ct. App. 1995) ("Defendants are precluded from seeking post-conviction relief on grounds that were adjudicated, or could have been raised and adjudicated, in a prior appeal or prior petition for post-conviction relief."); *State v. Berryman*, 875 P.2d 850, 857 (Ariz. Ct. App. 1994) (defendant's claim that his sentence had been improperly enhanced by prior conviction

[4] Consistent with the labels in the Amended PCR Petition, the trial court identified the claims presented in Grounds Three, Four, Five, Six, and Seven as "Claim 4," "Claim 6," "Claim 12," "Claim 8," and "Claim 11," respectively. (Bates No. 1087-88).

was precluded by defendant's failure to raise issue on appeal).

Arizona Rule of Criminal Procedure 32.2(a)(3) constitutes an "adequate and independent" state ground for denying review. *Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam) (preclusion of issues for failure to present them at an earlier proceeding under Arizona Rule of Criminal Procedure 32.2(a)(3) "are independent of federal law because they do not depend upon a federal constitutional ruling on the merits"); *Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012) ("Arizona Rule of Criminal Procedure 32.2(a)(3) is independent of federal law and has been regularly and consistently applied, so it is adequate to bar federal review of a claim."); *Murray v. Schriro*, 745 F.3d 984, 1016 (9th Cir. 2014) ("[A] claim that has been 'waived' under [Ariz. R. Crim. P. 32.2(a)(3)] is procedurally defaulted and therefore barred from federal court consideration, absent a showing of cause and prejudice or fundamental miscarriage of justice.") (quoting *Poland v. Stewart*, 169 F.3d 573, 578 (9th Cir. 1998)). Accordingly, because the Arizona state courts denied the claims contained in Grounds Three, Four, Five, Six, and Seven by invoking an adequate and independent state rule, the undersigned finds that they are procedurally defaulted.[5]

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[5] In denying relief, the trial court also noted that it was "not aware of any legal authority justifying relief" for the claims contained in Grounds Three, Four, Five, Six, and Seven. (Bates No. 1088). This alternative holding does not alter the finding that the claims are procedurally defaulted. *See Zapata v. Vasquez*, 788 F.3d 1106, 1112 (9th Cir. 2015) ("Although the court went on to discuss the merits of the claim, because it separately relied on the procedural bar, the claim is defaulted.") (citing *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000) (holding that when "reliance upon [the state court's] procedural bar rule was an independent and alternative basis for its denial of the petition, review on the merits of the petitioner's federal constitutional claim in federal court is precluded"); *Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.") (emphasis in original).

C. Grounds Two, 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c) are Procedurally Defaulted as the Claims are Unexhausted and Petitioner Would Be Precluded By Adequate and Independent State Rules from Returning to State Court to Exhaust Them

1. Petitioner Did Not Fairly Present Grounds Two, 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c) to the State Courts

A claim is only "fairly presented" to the state courts when a petitioner has "alert[ed] the state courts to the fact that [he] was asserting a claim under the United States Constitution." *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000) (quotations omitted); *see Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) ("If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court."). A "general appeal to a constitutional guarantee," such as due process, is insufficient to achieve fair presentation. *Shumway,*223 F.3d at 987 (quoting *Gray v. Netherland,* 518 U.S. 152, 163 (1996)); *see Castillo v. McFadden,* 399 F.3d 993, 1003 (9th Cir.2005) ("Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory."). Similarly, a federal claim is not exhausted merely because its factual basis was presented to the state courts on state law grounds—a "mere similarity between a claim of state and federal error is insufficient to establish exhaustion." *Shumway,* 223 F.3d at 988 (quotations omitted); *see Picard,* 404 U.S. at 275–77. Even when a claim's federal basis is "self-evident," or the claim would have been decided on the same considerations under state or federal law, a petitioner must still present the federal claim to the state courts explicitly, "either by citing federal law or the decisions of federal courts." *Lyons v. Crawford,* 232 F.3d 666, 668 (9th Cir. 2000) (quotations omitted), *amended by* 247 F.3d 904 (9th Cir. 2001); *see Baldwin v. Reese*, 541 U.S. 27, 32 (2004) (claim not fairly presented when state court "must read beyond a petition or a brief . . . that does not alert it to the presence of a federal claim" to discover implicit federal claim).

i. Ground Two

Ground Two asserts that Petitioner "was denied his rights to consult with an

attorney as he requested during and after his arrest in violation of the 5th, 6th, and 14th Amend. U.S. Const." (Doc. 4 at 77).

Petitioner argued in his Amended PCR Petition that "Flagstaff Police Department Officer(s) denied defendant's repeated request to call his attorney and have an attorney present for questioning and further testing" in violation of Petitioner's state and federal constitutional rights. (Doc. 4 at 55-56). The undersigned will assume arguendo that Petitioner fairly presented Ground Two to the trial court.

In his Petition for Review filed in the Arizona Court of Appeals, Petitioner presented specific claims alleging the ineffective assistance of trial and appellate counsel. (Bates No. 1111-14). In the "Conclusion" section, Petitioner states "Petitioner, by their reference, incorporates all claims made in his PCR Petition, and asks that Court to make a de novo review of the claims set forth therein." (Bates No. 1115). By directing the Arizona Court of Appeals to his Amended PCR Petition instead of writing a substantive discussion on the issues and explaining why the trial court erred in dismissing the Amended PCR Petition, Petitioner failed to comply with Arizona Rule of Criminal Procedure 32.9(c)(1)(iv).[6] This failure "to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *see also Baldwin v. Reese*, 541 U.S. 27, 32 (2004) ("[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so."). The undersigned finds that Petitioner did not fairly present Ground Two to the Arizona Court of Appeals. Accordingly, the undersigned finds that Ground Two has not been exhausted. *Castillo v. McFadden*, 399 F.3d 993, 998 n.3 (9th Cir. 2005) (in noncapital cases, "claims of

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[6] Arizona Rule of Criminal Procedure 32.9(c)(1)(iv) "requires that a petitioner present the issues and material facts supporting a claim in a petition for review and prohibits raising an issue through incorporation of any document by reference, except for appendices." *Wood*, 693 F.3d at 1117 (citing Ariz. R. Crim. P. 32.9(c)(1)(iv)).

Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them") (quoting *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999)); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim."). The undersigned further finds that Ground Two is procedurally defaulted for the reasons explained in Section III(C)(2) below.

ii. Grounds 8(a), 8(b)(i), (ii), (vi), and (vii), 8(c)

Petitioner articulates his eighth ground for habeas relief as follows: "Coconino Public Defender Office 'Steven Harvey, Sarah Erlinder and H. Allen Gerhardt' failed to provide competent counsel in 'critical stages' of appellant's criminal proceedings in violation of 4th, 5th, 6th and 14th Amend. U.S. Const." (Doc. 4 at 96). Respondents have identified the following sub-claims in Ground Eight:

(a) Petitioner's trial counsel, Steven Harvey, was ineffective for:

- (i) failing "to obtain dash cam video, and audio and video of booking and blood draw," (*id.* at 97);
- (ii) failing to "ask the State why it [was] seeking a warrant" on March 2, 2011, (*id.* at 98);
- (iii) failing "to formulate a solid case" in unspecified ways and failing to "acknowledge" unspecified "specific instructions" from Petitioner, (*id.* at 98);
- (iv) "a conflict was created between [Petitioner] and defense counsel, when [Petitioner] wanted counsel to bring up the [unspecified] constitutional violations the State had committed in court," (*id.* at 99);

(b) Petitioner's subsequent counsel, Sarah Erlinder, was ineffective for the following reasons:

- (i) when Petitioner was representing himself and asked for a copy of "the 'Arizona Rules of Court,'" Erlinder instead provided a "Prop 200 reference guide, [a] timeline for initial procedure[]s, information about types of objection[]s and relevant portions of the U.S. and Arizona Constitution[s]", (*id.* at 100);

(ii) failing to point out an unspecified "critical fact" in the suppression motion (*id.* at 100);

(iii) failing to raise a speedy-trial objection, (*id.* at 100–01);

(iv) failing to move to dismiss the charges "based on *Miranda* violations," (*id.* at 101);

(v) failing to call an unidentified "'expert witness' to rebut the State's expert witness," (*id.*);

(vi) "failing to hold the State to its burden to prove every fact and challenge the State's recitation and presentation of the evidence" in unspecified ways, (*id.*);

(vii) failing to object that Petitioner "was denied a fair and impartial jury" because the jury included "only one Hispanic" and "no African Americans," (*id.* at 102);

(c) Petitioner's direct appeal counsel, H. Allen Gerhardt, was ineffective for failing to raise the following "arguable issues":

(i) the alleged violation of Petitioner's *Miranda* rights, (*id.* at 103);

(ii) the admission of alcohol retrograde-extrapolation analysis, (*id.* at 103);

(iii) the alleged denial of Petitioner's speedy trial rights, (*id.*)[.]

(Doc. 18 at 7-8). To the extent Petitioner raises other ineffective assistance of counsel claims in the Amended Petition that are not identified above, the undersigned finds that the claims should be summarily dismissed as the claims are vague and conclusory. *See Shah v. United States*, 878 F.2d 1156, 1161 (9th Cir. 1989) (vague or conclusory claims without supporting factual allegations warrant summary dismissal of § 2255 motion); *see also Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995) ("It is well-settled that '[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.'") (quoting *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994)).

Petitioner raised the ineffective assistance of counsel claims presented in Grounds 8(b)(iii), (iv), and (v) to the trial court and Arizona Court of Appeals in his PCR proceeding. (Doc. 4 at 58-60; Bates No. 1111-13). The undersigned finds that those claims have been exhausted, and they are reviewed on the merits in Section V.

However, "ineffective assistance claims are not fungible, but are instead highly fact-dependent, [requiring] some baseline explication of the facts relating to it[.]" *Hemmerle v. Schriro*, 495 F.3d 1069, 1075 (9th Cir. 2007). "As a general matter, each 'unrelated alleged instance [ ] of counsel's ineffectiveness' is a separate claim for purposes of exhaustion." *Gulbrandson v. Ryan*, 738 F.3d 976, 992 (9th Cir. 2013) (alteration in original); *Moormann v. Schriro*, 426 F.3d at 1056 (9th Cir. 2005) ("[A] petitioner who presented any ineffective assistance of counsel claim below can later add unrelated alleged instances of counsel's ineffectiveness to his claim."); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (holding that an ineffective assistance claim for failure to vigorously cross-examine a witness did not exhaust ineffective assistance claims directed to other independent omissions by counsel); *see also Date v. Schriro*, 619 F.Supp.2d 736, 788 (D. Ariz. 2008) ("Petitioner's assertion of a claim of ineffective assistance of counsel based on one set of facts, does not exhaust other claims of ineffective assistance based on different facts").

The undersigned finds that Petitioner failed to exhaust in his PCR proceeding the claims presented in Grounds 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c).[7] The undersigned further finds that those unexhausted claims are procedurally defaulted for the reasons set forth in the following section.

2. Grounds Two, 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c) are Procedurally Defaulted

As discussed above, Petitioner has not exhausted Grounds Two, 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c). If Petitioner returned to state court and presented those grounds in a second PCR Petition, the Petition would be untimely. *See* Ariz. R. Crim. P. 32.1 and 32.4 (a petition for post-conviction relief must be filed "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is later"). Although Arizona Rule of Criminal Procedure 32.4 does not bar untimely PCR claims that fall within the category

[7] The ineffective assistance of appellate counsel claims contained in Ground 8(c) may alternatively be denied on the merits for the reasons explained in Section IV(A)(1).

of claims specified in Arizona Rule of Criminal Procedure 32.1(d) through (h), Petitioner has not asserted that any of these exceptions apply to him and the undersigned does not find that any of the exceptions would apply. A state post-conviction action is futile where it is time-barred. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002); *Moreno v. Gonzalez*, 116 F.3d 409, 410 (9th Cir. 1997) (recognizing untimeliness under Ariz. R. Crim. P. 32.4(a) as a basis for dismissal of an Arizona petition for post-conviction relief, distinct from preclusion under Rule 32.2(a)).

Further, under Arizona Rule of Criminal Procedure 32.2(a)(1) and (3), a defendant is precluded from raising claims that were adjudicated or could have been raised and adjudicated on direct appeal or in any previous collateral proceeding. *Curtis*, 912 P.2d at 1342; *Berryman*, 875 P.2d at 857. Arizona Rule of Criminal Procedure 32.2(a) would preclude Petitioner from returning to state court to exhaust his unexhausted habeas claims.

For the above reasons, the undersigned finds that Grounds Two, 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c) are procedurally defaulted.[8] *See Beaty*, 303 F.3d at 987 (a claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the requirement would now find the claims procedurally barred") (quoting *Coleman*, 501 U.S. at 735 n.1)).

IV. PETITIONER'S PROCEDURAL DEFAULTS ARE NOT EXCUSED

The merits of a habeas petitioner's procedurally defaulted claims are to be reviewed if the petitioner (i) shows cause for the default and actual prejudice as a result of the alleged violation of federal law or (ii) shows that the failure to consider the federal claim will result in a fundamental miscarriage of justice. *McKinney v. Ryan*, 730 F.3d 903, 913 (9th Cir. 2013). In order to establish cause for a procedurally defaulted claim,

[8] This type of procedural default is often referred to as "technical" exhaustion because although the claim was not actually exhausted in state court, Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no remedies any longer 'available' to him.").

"a petitioner must demonstrate that the default is due to an external objective factor that cannot fairly be attributed to him." *Smith v. Baldwin*, 510 F.3d 1127, 1146 (9th Cir. 2007) (internal quotation marks and citation omitted).

A. Petitioner has Not Established "Cause" for the Procedural Defaults

1. The Alleged Ineffective Assistance of Appellate Counsel Cannot Establish Cause to Excuse the Procedural Defaults of Grounds Two, Three, Four, Five, Six, and Seven, Which Could Have Been Raised on Direct Appeal

The claims contained in Grounds Three, Four, Five, Six, and Seven are procedurally defaulted as the state courts found, based on an adequate and independent state rule, that they were precluded because they could have been raised on direct appeal. The claim contained in Ground Two is unexhausted and procedurally defaulted as it could have been raised on direct appeal. Petitioner asserts that the Court should excuse these procedural defaults by asserting that his appellate counsel was constitutionally ineffective for failing to raise them in Petitioner's direct appeal. (Doc. 23 at 6-7). As discussed below, the failure of Petitioner's appellate counsel to raise those grounds on direct appeal cannot constitute "cause" to excuse the procedural defaults in this case.

Before an ineffective assistance of counsel claim can be considered "cause" to excuse the procedural default of another constitutional claim, a petitioner must have fairly presented the ineffective assistance of counsel claim in state court as an independent claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451-52, (2000) ("In other words, ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim. And we held in *Carrier* that the principles of comity and federalism that underlie our longstanding exhaustion doctrine . . . require *that* constitutional claim, like others, to be first raised in state court.") (emphasis in original); *Dellinger v. Bowen*, 301 F.3d 758, 766 (7th Cir. 2002) ("In other words, the claim of ineffective assistance must be raised in state court before it can suffice on federal habeas relief as 'cause' to excuse the default of another claim (even if that other claim is also ineffective assistance of counsel). If the second claim of ineffective assistance is itself defaulted, the petitioner will be fully

defaulted."); *Oken v. Corcoran*, 220 F.3d 259, 265 (4th Cir. 2000) (ineffectiveness of appellate counsel could not serve as cause for procedurally-defaulted claim because petitioner never raised the ineffectiveness claim in state court).

Here, Petitioner stated the following in the "Issues Presented" section of his Amended PCR Petition:

> Ramirez raises claim of Constitutional ineffective assistance of counsel on direct appeal attorney in state collateral proceedings whereby counsel did not present or raise proper claims in state court due to attorney's [sic] err's [sic] in violation of defendants rights—The Arizona Constitution, Article 2, 14, and 24, and United States Constitution, 5th, 6th, 8th, and 14th, Amendments.

(Doc. 4 at 51).

In the "Appalent Attorney Errs" section, Petitioner stated

> Direct Appeal Attorney did not raise an ineffective assistance claim(s). Wherein defendant had a right to receive effective assistance of counsel. Direct Appeal counsel errored and failed to protect defendants Arizona and Federal Constitutional claims and due diligence to find proper claims throughout this Amended Petition. Pursuant to cite, Martinez v. Ryan 566 U.S. ____ (2012), apply herein." (*Id.* at 60).
>
> Defendant claims that his trial counsel failed repeatedly to challenge the prosecutions [sic] evidence diligently. . . .
>
> Trial counsel was ineffective in his assistance at collateral proceedings review caused defendant procedural default errors due to ineffective assistance. Defendant was denied fair process. Appeal counsel was required to investigate all claims and look at the case "de novo."
>
> Furthermore, the ineffective assistance claims depends on evidence outside of the trial record. Defendant had claims, that even though there was a fax/copier/telephone machine when he was placed in room, the machine had no telephone attached to it. Neither trial counsel nor appalette [sic] attorney investigated such claims . . . .
>
> Furthermore, trial counsel and appellete [sic] counsel failed to state claim or object as to the error in the quantity of drugs

> submitted and tested amounted to tampering of evidence that vanished while in custody. Attorney failed to object or file motion to dismiss charges.
>
> Ineffective claims on direct appeal process harmed the defendant constitutionally protected rights.

(*Id.* at 60-62).

As shown above, Petitioner's Amended PCR Petition raises vague and conclusory claims of ineffective assistance of appellate counsel that are intertwined with vague and conclusory claims of ineffective assistance of trial counsel. The undersigned finds that Petitioner failed to fairly present to the trial court his contention that his appellate attorney was constitutionally ineffective for failing to raise the claims contained in Grounds Two, Three, Four, Five, Six, and Seven on direct appeal.

Petitioner, however, argued in his Petition for Review filed in the Arizona Court of Appeals that his appellate attorney was ineffective for failing to raise on direct appeal the claims contained in Grounds Two, Four, and Five.[9] Yet Arizona Rule of Criminal Procedure 32.9(c) limits the Arizona Court of Appeals' review of claims in a petition for review to those claims that were presented to the trial court. Generally, a petitioner cannot exhaust a habeas claim by circumventing a state's lower courts and going directly to the state's higher courts. *See Casey v. Moore*, 386 F.3d 896, 915-18 (9th Cir. 2004) (habeas claim presented by petitioner to state supreme court was unexhausted because the petitioner did not fairly present the claim to the state's court of appeals); *Castille v. Peoples*, 489 U.S. 346, 351 (1989) ("[W]here the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reasons therefor," . . . . Raising the claim in such a

[9] In his Petition for Review, Petitioner alleged that his appellate counsel was ineffective for failing to raise the following four claims on direct appeal: (i) "Petitioner's denial of counsel by the Flagstaff police after he had repeatedly invoked his right to counsel at the scene of the arrest and at the Flagstaff police station"; (ii) "The trial court's denial of the Motion to Suppress and Dismiss Count I based on the denial of counsel after Petitioner invoked his Miranda rights"; (iii) "The failure of the trial court to grant a Frye hearing regarding the State's use of retrograde extrapolation analysis"; and (iv) "The trial court's failure to conduct a hearing and inquire into the facts surrounding Petitioner's multiple motions to replace trial counsel . . . ." (Bates No. 1113-14).

fashion does not, for the relevant purpose, constitute 'fair presentation.'"); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) ("Submitting a new claim . . . in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation."); *Childers v. State of Arizona*, No. 05–2010–PHX–ROS, 2006 WL 1543986, *5 (D. Ariz. June 2, 2006) (claim not raised in petitioner's PCR Notice but raised in petition for review filed with the Arizona appellate court was not properly exhausted). The undersigned finds that Petitioner has failed to exhaust his claim that his appellate counsel was constitutionally ineffective for failing to raise on direct appeal Grounds Two, Three, Four, Five, Six, and Seven.

Further, even if Petitioner did satisfy the exhaustion requirement, Petitioner has failed to show that his appellate attorney was constitutionally ineffective. *Davila v. Davis*, 137 S.Ct. 2058, 2062 (2017) ("An attorney error does not qualify as 'cause' to excuse a procedural default unless the error amounted to constitutionally ineffective assistance of counsel."). Although constitutionally ineffective assistance of counsel can constitute cause for a procedurally defaulted claim, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Murray*, 477 U.S. at 535. The process of "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith*, 477 U.S. at 536 (citing *Jones v. Barnes,* 463 U.S. 745, 751-752 (1983)).

Claims of ineffective assistance of counsel are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a claim that appellate counsel was ineffective for failing to raise a particular argument on appeal, a petitioner must show that there is a reasonable probability that raising the issue would have led to the reversal of the petitioner's conviction. *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). If the petitioner had only a remote chance of obtaining reversal based upon a specific issue, neither element of *Strickland* is satisfied. *Id.*

Petitioner's appellate counsel raised one issue on direct appeal. (Bates No. 836-48). Counsel challenged the trial court's admission of Petitioner's prior felony convictions for purposes of impeaching Petitioner's testimony.[10] (Bates No. 843-48). The undersigned does not find that appellate counsel's decision to raise this single issue on direct appeal constitutes deficient performance. Petitioner has not shown that there is a reasonable probability that raising other issues on direct appeal would have led to a reversal of his convictions. As explained by the Ninth Circuit:

> Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court. . . . A lawyer who throws in every arguable point—"just in case"—is likely to serve her client less effectively than one who concentrates solely on the strong arguments.

Miller, 882 F.2d at 1434; *see also Davila*, 137 S.Ct. at 2067 ("Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed."). The undersigned finds that Petitioner has not shown that his appellate counsel was constitutionally ineffective for failing to raise Grounds Two, Three, Four, Five, Six, and Seven on appeal.

2. The Alleged Ineffective Assistance of PCR Counsel Cannot Show Cause to Excuse the Procedural Defaults of Grounds 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c), Which Present Ineffective Assistance of Trial Counsel Claims

In procedurally defaulted Grounds 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c), Petitioner argues that he was denied the effective assistance of trial counsel. In *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012), the Supreme Court held that "inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[11] *Martinez* does not apply

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[10] This claim is presented in Ground One, which is reviewed on the merits in Section V below.

[11] As discussed, the trial court appointed Petitioner PCR counsel, who could not find any colorable claims to raise. (Bates No. 916-17).

to habeas claims that do not allege the ineffective assistance of trial counsel. *See Davila*, 137 S.Ct. at 2062-63 (explaining that the narrow exception announced in *Martinez* "treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim—ineffective assistance of trial counsel—in a single context—where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal."). The U.S. Supreme Court has declined to extend *Martinez's* scope to procedurally defaulted claims of ineffective assistance of appellate counsel. *Davila*, 137 S.Ct. 2064-70.

Under *Martinez*, "cause" to excuse a petitioner's procedural default may be found where:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino v. Thaler, 133 S.Ct. 1911, 1918 (2013) (quoting *Martinez*, 132 S.Ct. at 1318-19, 1320–21) (alterations in original).

Here, the ineffective assistance of counsel claims contained in Grounds 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c) are speculative and without factual support. The undersigned finds that Petitioner's ineffective assistance of counsel claims are therefore insubstantial. *See Martinez*, 132 S.Ct. at 1319 (a claim is insubstantial if it "does not have any merit or . . . is wholly without factual support"); *Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011) ("cursory and vague [ineffective assistance of counsel claim] cannot support habeas relief."); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (stating that conclusory allegations with no reference to the record or other evidence do not warrant habeas relief). Accordingly, Petitioner cannot rely on *Martinez* to show cause for his failure to properly present Grounds 8(a), (b)(i), (ii), (vi), (vii), and

8(c) to the state courts.

3. Petitioner's Status as a Pro Se Litigant Does Not Establish Cause to Excuse Petitioner's Procedural Defaults

Petitioner's status as an inmate with limited legal resources cannot constitute cause to excuse his procedural defaults. *See Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (an illiterate *pro se* petitioner's lack of legal assistance did not amount to cause to excuse a procedural default); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988) (petitioner's arguments concerning his mental health and reliance upon jailhouse lawyers did not constitute cause).

Based on the foregoing, the undersigned finds that Petitioner has failed to show cause for his procedural defaults. Where a petitioner fails to establish cause, the Court need not consider whether the petitioner has shown actual prejudice resulting from the alleged constitutional violations. *Smith v. Murray*, 477 U.S. 527, 533 (1986). Accordingly, the undersigned finds that Petitioner has not satisfied the "cause and prejudice" exception to excuse his procedural defaults.

B. The Miscarriage of Justice Exception Does Not Apply

Under *Schlup*, a petitioner seeking federal habeas review under the miscarriage of justice exception must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. A petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013) (quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995)). Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumway,* 223 F.3d at 990 (citing *Calderon v. Thomas,* 523 U.S. 538, 559 (1998)). In addition, "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has

made the requisite showing [of actual innocence]." *McQuiggin*, 133 S.Ct. at 1935.

Petitioner has not presented any new reliable evidence establishing that he is factually innocent of his convictions. The undersigned does not find that the record and pleadings in this case contain "evidence of innocence so strong that [the Court] cannot have confidence in the outcome of the trial." *Id.* at 1936 (quoting *Schlup*, 513 U.S. at 316). Accordingly, the undersigned does not find that the miscarriage of justice exception applies to excuse Petitioner's procedural defaults.

For the above reasons, the undersigned recommends that the Court dismiss Grounds Two, Three, Four, Five, Six, Seven, 8(a), 8(b)(i), (ii), (vi), (vii), and 8(c) as procedurally defaulted.

V. MERITS REVIEW OF GROUNDS ONE, 8(b)(iii), (iv), and (v)

A. Reviewing Habeas Claims on the Merits

In reviewing the merits of a habeas petitioner's claims, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") requires federal courts to defer to the last reasoned state court decision. *Woods v. Sinclair*, 764 F.3d 1109, 1120 (9th Cir. 2014); *Henry v. Ryan*, 720 F.3d 1073, 1078 (9th Cir. 2013). To be entitled to relief, a state prisoner must show that the state court's adjudication of his or her claims either:

> 1. [R]esulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> 2. [R]esulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1), (2); *see also, e.g., Woods*, 764 F.3d at 1120; *Parker v. Matthews*, 132 S. Ct. 2148, 2151 (2010); *Richter*, 562 U.S. at 99.

As to the first entitlement to habeas relief as set forth in 28 U.S.C. § 2254(d)(1) above, "clearly established federal law" refers to the holdings of the U.S. Supreme Court's decisions applicable at the time of the relevant state court decision. *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). A state court decision is "contrary to" such clearly established federal law if the state court (i)

"applies a rule that contradicts the governing law set forth in [U.S. Supreme Court] cases" or (ii) "confronts a set of facts that are materially indistinguishable from a decision of the [U.S. Supreme Court] and nevertheless arrives at a result different from [U.S. Supreme Court] precedent." *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

As to the second entitlement to habeas relief as set forth in 28 U.S.C. § 2254(d)(2) above, factual determinations by state courts are presumed correct unless the petitioner can show by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *see also Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011); *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004). A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of the state court's decision. *Richter*, 562 U.S. at 101; *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

B. Ground One: Admission of Prior Convictions into Evidence for Impeachment Purposes

1. Factual Background

As summarized by the Arizona Court of Appeals, the factual background pertinent to reviewing the merits of Ground One is as follows:

> ¶8 On October 5, 2011, the State filed a "Notice of Authority Re Proof of Priors," "giv[ing] the Court notice of the legal basis for the State's method of proving the Defendant's prior conviction[s] for enhancement purposes[.]" In the motion, the State explained that it intended to "confront Defendant with his prior felony convictions and elicit the dates, cause numbers, and jurisdictions of those offenses," if he chose to testify.
>
> ¶9 On October 10, 2011, the day before trial, defendant filed a motion to preclude the State from impeaching him with his prior felony convictions. Specifically, defendant asserted that "the State has provided no notice of its intent to use [his] prior convictions to impeach him, should he choose to testify."

¶10 The trial court heard argument on defendant's motion the first day of trial. Defense counsel argued that the State's October 5th motion did not provide timely notice of its intent to impeach with prior convictions and, alternatively, that the probative value of defendant's convictions from 1999 did not substantially outweigh their prejudicial effect. Defense counsel also noted that he had not received copies of the certified documents from the December 1999 conviction. In response, the State argued that defendant was given notice of the State's intent to use the priors at trial in the State's Rule 15.1 disclosure statement filed on March 10, 2011. The State acknowledged, however, that it did not possess and had not disclosed certified copies of the December 1999 conviction and therefore "would not use [it] at trial."

¶11 After hearing from both parties, the trial court found that the State provided sufficient notice of its intent to use defendant's prior convictions for impeachment purposes in its Rule 15.1 disclosure statement, but determined the State could not impeach defendant with his convictions from 1999 because the State failed to demonstrate "exceptional circumstances" that would justify using convictions greater than 10 years old. See Ariz. R. Evid. 609(b) (barring the admission of a prior conviction greater than 10 years old "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect"). Ultimately, the trial court ruled that the State could impeach defendant with his 2005 and 2002 felony convictions, but ordered the State to sanitize the nature of the convictions to minimize their prejudicial effect.

. . . .

¶13 After the State rested, defendant testified. At the outset, defense counsel asked defendant "how many" felony convictions he has and defendant answered "two."

. . . .

¶23 In ruling on the admissibility of defendant's priors before trial, the court precluded the State from using defendant's 1999 convictions because more than 10 years had elapsed from the dates of those convictions to the commission of the present offenses. After defendant testified, however, and falsely stated that he had only two prior felony

> convictions and claim that the police officers had fabricated the evidence that he possessed drugs, the trial court modified its previous ruling and permitted the State to utilize the 1999 convictions for impeachment purposes because exceptional circumstances had arisen.

(Bates No. 888-90, 895).

2. Analysis

In Ground One, Petitioner argues that the trial court's ruling allowing the prosecutor to use his prior convictions to impeach his testimony violated his federal constitutional rights. (Doc. 4 at 74). Respondents do not contest Petitioner's assertion that he fairly presented this claim to the Arizona Court of Appeals on direct appeal. (Doc. 18 at 17-20). The last reasoned state court decision addressing Petitioner's claim in Ground One is the July 10, 2012 Arizona Court of Appeals ruling affirming Petitioner's convictions and sentences. (Bates No. 885-97). The Arizona Court of Appeals explained that:

> [D]efendant's trial testimony placed credibility as the central issue of the case. In addition, defendant "opened the door" to this evidence by testifying that he only had two prior felony convictions. "When the defendant [] 'opens the door by denying certain facts which the evidence, previously excluded, would contradict, he may not rely on the previous ruling that such evidence will remain exclused." *State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980). Therefore, we find no abuse of discretion in the trial court's modified ruling permitting the State to impeach defendant with four priors.

(Bates No. 895). The Arizona Court of Appeals' holding that under state law, Petitioner's testimony "opened the door" to cross-examination refuting Petitioner's assertion that he has been convicted of only two felonies is binding on the Court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a court sitting in habeas corpus.").

In addition, "[t]he admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (quoting *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995)). In *Holley*, the Ninth Circuit explained that:

> Under AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by "clearly established Federal law," as laid out by the Supreme Court. 28 U.S .C. § 2254(d). In cases where the Supreme Court has not adequately addressed a claim, this court cannot use its own precedent to find a state court ruling unreasonable. *Musladin*, 549 U.S. at 77, 127 S.Ct. 649, 166 L.Ed.2d 482.

The Supreme Court has explained the "[o]nce a defendant takes the stand, he is subject to cross-examination impeaching his credibility just like any other witness." *See Portuondo v. Agard*, 529 U.S. 61, 70 (2000) (internal quotation marks and citation omitted). The Supreme Court also has held that the admission of a defendant's prior convictions into evidence, for purposes other than to show conduct in conformity therewith, does not violate a defendant's due process rights if the jury is given a limiting instruction "that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried." *Spencer v. Texas*, 385 U.S. 554, 558 (1967); *see also Fritchie v. McCarthy*, 664 F.2d 208, 212 n.1 (9th Cir. 1981) ("The Supreme Court has explicitly held that a state practice of permitting a jury to hear evidence of prior crimes does not violate the due process clause of the Fourteenth Amendment, at least where the trial judge gives a limiting instruction.").

In this case, the trial court provided the following limiting instruction to the jury:

> You have heard evidence that the defendant has previously been convicted of criminal offenses. You may consider that evidence only as it may affect defendant's believability as a witness. You must not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

(Bates No. 716-17). "Jurors are presumed to follow instructions given to them by the

court." *Matylinksy v. Budge*, 577 F.3d 1083, 1096 (9th Cir. 2009) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)); *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) ("Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."). Accordingly, the undersigned finds that the Arizona Court of Appeal's rejection of Petitioner's claim in Ground One was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. *See Portuondo*, 529 U.S. at 69 ("The prosecutor's comments . . . concerned respondent's *credibility as a witness*, and were therefore in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'") (emphasis in original and citation omitted). It is therefore recommended that the Court deny Ground One.

C. Grounds 8(b)(iii), (iv), and (v): Alleged Ineffective Assistance of Counsel

Grounds 8(b)(iii), (iv), and (v) present claims that he received ineffective assistance from Deputy Public Defender Sarah Erlinder during his pretrial and trial proceedings. (Doc. 4 at 96-104).

As mentioned, claims of ineffective assistance of counsel are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner arguing an ineffective assistance of counsel claim must establish that his or her counsel's performance was (i) objectively deficient and (ii) prejudiced the petitioner. *Strickland*, 466 U.S. at 687. This is a deferential standard, and "[s]urmounting *Strickland's* high bar is never an easy task." *Clark v. Arnold*, 769 F.3d 711, 725 (9th Cir. 2014) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

In assessing the performance factor of *Strickland's* two-part test, judicial review "must be highly deferential" and the court must try not "to second-guess counsel's assistance after conviction." *Clark*, 769 F.3d at 725 (internal quotation marks and citation omitted). To be constitutionally deficient, counsel's representation must fall below an objective standard of reasonableness such that it was outside the range of

competence demanded of attorneys in criminal cases. *Id.* A reviewing court considers "whether there is any reasonable argument" that counsel was effective. *Rogovich v. Ryan*, 694 F.3d 1094, 1105 (9th Cir. 2012). To establish the test's performance prong in the context of a guilty plea, a defendant must establish that his or her counsel's advice regarding the guilty plea was outside "the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56-58 (1985).

To establish the prejudice factor of *Strickland's* two-part test, a petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In other words, it must be shown that the "likelihood of a different result [is] substantial, not just conceivable." *Richter*, 562 U.S. at 112. To establish prejudice in the context of a guilty plea, a defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Washington v. Lampert*, 422 F.3d 869, 873 (9th Cir. 2005) (quoting *Hill*, 474 U.S. at 58-59)).

Although the performance factor is listed first in *Strickland's* two-part test, a court may consider the prejudice factor first. In addition, a court need not consider both factors if the court determines that a defendant has failed to meet one factor. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998) (a court need not look at both deficiency and prejudice if the habeas petitioner cannot establish one or the other).

Finally, on federal habeas review, the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 131 S.Ct. at 785. And "it is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curium). "Relief is warranted only if no reasonable jurist could

disagree that the state court erred." *Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014) (internal quotation marks and citation omitted).

1. Ground 8(b)(iii)

In Ground 8(b)(iii), Petitioner argues that Ms. Erlinder was constitutionally ineffective for failing to make a speedy-trial objection. (Doc. 4 at 100-01). Petitioner presented this claim in his PCR proceeding. (*Id.* at 58; Bates No. 1087, 1111). The last reasoned state court decision on this claim is the Arizona Court of Appeals' December 2016 decision, which incorporated the trial court's decision. (Bates No. 1241-42). The trial court found that Petitioner failed to meet both prongs of the *Strickland* test. (Bates No. 1088). As shown below, because Petitioner's asserted speedy trial claim is without merit, Petitioner cannot show that his trial counsel was ineffective for failing to raise it.

"The Sixth Amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy trial." *Doggett v. United States*, 505 U.S. 647, 651 (1992); *Barker v. Wingo*, 407 U.S. 514, 515 (1972); *United States v. Beamon,* 992 F.2d 1009, 1012 (9th Cir. 1993). The Supreme Court has set forth a four-factor balancing test in determining whether there has been a violation of the right to a speedy trial. The first factor of the analysis—the length of the delay—"is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. "If the length of delay is long enough to be considered presumptively prejudicial, an inquiry into the other three factors is triggered." *United States v. Mendoza*, 530 F.3d 758, 762 (9th Cir. 2008). Those factors include (i) the reason for the delay; (ii) whether the defendant asserted the speedy trial right; and (iii) whether the defendant suffered prejudice as a result of the delay. *See Doggett*, 505 U.S. at 651 (citing *Barker,* 407 U.S. at 530). No one factor is necessary or sufficient. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." In other words, the "factors have no talismanic qualities; courts must [] engage in a difficult and sensitive balancing process." *Barker*, 407 U.S. at 533.

In this case, 236 days (approximately 7.5 months) passed between Petitioner's indictment on February 17, 2011 and the start of his October 11, 2011 trial.[12] (Bates No. 8-10, 238-395). Courts have generally found that delays under one year are not unreasonable enough to trigger the *Barker* inquiry. *Doggett,* 505 U.S. at 652 n. 1 ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."). However, "because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Barker*, 407 U.S. at 530-31. The undersigned does not find that peculiar circumstances exist in this case that render the approximate 7.5 month delay unreasonable enough to trigger a *Barker* analysis. As Respondents correctly note, the record reflects that Petitioner waived time on March 28, 2011 in order to make a counteroffer to the State's plea offer. (Bates No. 20). Petitioner also waived time on May 2, 2011 and May 31, 2011. (Bates No. 40, 49). On June 2, 2011, Petitioner's newly appointed counsel requested a continuance as counsel was still in the process of scheduling witness interviews. (Bates No. 65). The State did not object to the

[12] In asserting his speedy trial claim, Petitioner contends that there was a 13.5 month delay in his criminal case. (Doc. 4 at 16). Petitioner asserts that the speedy trial "clock" was triggered on August 23, 2010—the date he was initially arrested and charged in Coconino County Justice Court. (*Id.*). Petitioner was released on August 23, 2010, and the record does not reflect that formal charges were filed at that time. (Bates No. 1068-72, 1190).

The right to a speedy trial under the Sixth Amendment does not arise until after a defendant is indicted or is subject to "the actual restraints imposed by arrest and holding to answer a criminal charge." *United States v. Marion*, 404 U.S. 307, 320 (1971). Because the delay upon which Petitioner bases his claim did not occur while the state was detaining him and was prior to its filing of formal charges against him in the indictment, the delay does not implicate the Sixth Amendment right to a speedy trial. *See United States v. Walker*, 856 F.2d 26, 27 (5th Cir. 1985) (defendants' rights to a speedy trial were not triggered, because their "arrests were not followed by any substantial restraints on liberty or the lodging of formal charges"); *United States v. Lovasco*, 431 U.S. 783, 788 (1977) ("[A]s far as the Speedy Trial Clause of the Sixth Amendment is concerned, [pre-indictment] delay is wholly irrelevant."); *Reep v. Diaz*, No. 2:11–cv–02892 TLN ACP, 2014 WL 3840077, *5 (July 30, 2014) ("The length of delay is measured from the date the district attorney first filed an information and charged petitioner with felony DUI.") (citing *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) ("[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.")).

continuance, but requested that the trial court set a firm trial date. (*Id.*). Absent presumptive prejudice, it is unnecessary to consider the other *Barker* factors in determining whether Ms. Erlinder was constitutionally ineffective for failing to raise a speedy trial claim. *Doggett,* 505 U.S. at 651–652; *United States v. Beamon*, 992 F.2d 1009, 1012 (9th Cir. 1993) ("If this threshold is not met, the court does not proceed with the *Barker* factors.").

Petitioner has not shown that Ms. Erlinder failed to raise a meritorious speedy trial claim. The undersigned thus concludes that it was not contrary to, nor an unreasonable application of, *Strickland* for the Arizona state courts to reject Petitioner's ineffective assistance of counsel claim in Ground 8(b)(iii). *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (an omitted action must be shown to be meritorious to support an ineffective assistance of counsel claim); *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel."); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (failure to take futile action can never be deficient performance); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (the "failure to raise a meritless argument does not constitute ineffective assistance"). It is recommended that the Court deny Ground 8(b)(iii).

2. Ground 8(b)(iv)

In Ground 8(b)(iv), Petitioner asserts that Ms. Erlinder

> failed to file a motion to dismiss the charge's [sic] based on Miranda violations; here, appellant repeatedly invoked his rights to counsel at the scene, during initial seizure by the police, and prior to any blood draw [sic] was done, although counsel finally did file a motion to suppress evidence on August 10, 2011, and a supplemental motion to dismiss Count 1 and suppress evidence September 15, 2011, the motion was filed very late in the process and initially under the doctrine of suppression of evidence.

(Doc. 4 at 101). Petitioner presented the above claim to the trial court and Arizona Court of Appeals in his PCR proceeding. (Doc. 4 at 58; Bates No. 1111). The Arizona

Court of Appeals affirmed the trial court's rejection of the claim as Petitioner failed to satisfy both prongs of the Strickland test. (Bates No. 1088, 1242).

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege against self-incrimination applies to the States through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The privilege against self-incrimination prohibits the government from using any statement against a criminal defendant "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In *Miranda*, the Supreme Court held:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 478–79. A *Miranda* violation creates an irrebuttable presumption of compulsion, requiring the suppression of all statements made in violation of *Miranda* for purposes of the prosecution's case-in-chief. *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985).

The record reflects that Ms. Erlinder filed a Motion to Suppress Evidence and a Supplemental Motion to Dismiss Count 1 and Suppress Evidence. (Bates No. 69-70, 111-19). Counsel moved to dismiss Count 1 of the Indictment and to "suppress the blood evidence in the remaining counts because the State violated his right to consult with an attorney and therefore his due process rights." (Bates No. 111). After holding an evidentiary hearing, the trial court denied the Motion and Supplemental Motion on the merits. (Bates No. 124-25). Although Petitioner challenges counsel's decision not move to dismiss all charges based on the alleged *Miranda* violations, "[s]trategic choices made after thorough investigation of law and facts relevant to

plausible options are virtually unchallengeable." *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010) (quoting *Strickland*, 466 U.S. at 690); *see also Murray*, 746 F.3d at 457 ("A defendant's disagreement with trial counsel's strategy does not constitute deficient performance on the part of trial counsel.").

Further, Petitioner's argument that the alleged *Miranda* violations require outright dismissal of all of the charges is without merit. "While admission of a statement taken in violation of *Miranda* may be grounds for a new trial, it does not merit dismissal of the indictment." *United States v. Alfonso*, No. 08cr2970–BTM, 2009 WL 1491442, at *6 (S.D. Cal. May 27, 2009); *see also United States v. Blue*, 384 U.S. 251, 255 (1966) ("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial . . . . Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether."). "It should be obvious that the failure of an attorney to raise a meritless claim is not prejudicial, *Boag v. Raines,* 769 F.2d 1341, 1344 (9th Cir. 1985), so the PCR court's rejection of [Petitioner's] ineffective assistance of appellate counsel claim is not an unreasonable application of *Strickland* . . . ." *Jones*, 691 F.3d at 1101. It is therefore recommended that the Court deny Ground 8(b)(iv).

3. Ground 8(b)(v)

In Ground 8(b)(v), Petitioner argues that Ms. Erlinder was ineffective for failing to obtain an "'expert witness' to rebut the State's expert witness . . . ." (Doc. 4 at 101). Petitioner presented this claim in his Amended PCR Petition. (*Id.* at 59-60). The last reasoned state court decision on the claim is the December 2016 Arizona Court of Appeals decision affirming the trial court's ruling denying the Amended PCR Petition. (Bates No. 1241-42).

To reiterate, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made

after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. Petitioner does not show the existence of a rebuttal expert who was capable and willing to testify in favor of the defense, nor does he proffer what such expert's testimony would have been. Plaintiff's unsupported speculation is insufficient to state a claim of ineffective assistance for failing to call an expert witness. *Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (rejecting claim of ineffective assistance of counsel for failure to call expert witness where petitioner offered no evidence that an expert would have testified on petitioner's behalf and "merely speculates that such an expert could be found"); *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting claim of ineffective assistance for failure to call witness based upon lack of affidavit from witness regarding substance of testimony).

The undersigned does not find that the Arizona courts' rejection of Petitioner's ineffective assistance of counsel claim contained in Ground 8(b)(iv) was objectively unreasonable. It is therefore recommended that the Court deny Ground 8(b)(iv).

VI. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the Amended Petition (Doc. 4) be **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER RECOMMENDED that a certificate of appealability and leave to proceed in forma pauperis on appeal be denied because the undersigned does not find that jurists of reason would find it debatable that (i) the dismissal of a majority of Petitioner's habeas claims are justified by a plain procedural bar and (ii) Petitioner has not made a substantial showing of the denial of a constitutional right as to the remaining claims for relief.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1)

should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. Failure to file timely objections to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated this 30th day of November, 2017.

Eileen S. Willett
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jose Jesus Ramirez,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-16-08224-PCT-DLR-(ESW)

ORDER
and
DENIAL OF CERTIFICATE OF APPEALABILITY AND IN FORMA PAUPERIS STATUS

Pending before the Court is the Report and Recommendation ("R&R") of Magistrate Judge Eileen S. Willett (Doc. 24) regarding Petitioner Jose Jesus Ramirez's Amended Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 4). The R&R recommends that the Petition be denied and dismissed with prejudice. The Magistrate Judge advised the parties that they had fourteen days to file objections to the R&R. (Doc. 24 at 37 (citing 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6 and 72).) Petitioner filed an objection on March 26, 2018 (Doc. 33), and Respondent filed a response to the objection on April 6, 2018 (Doc. 34).

The Court has considered Petitioner's objections, Respondents' Response and reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that the court must make a de novo determination of those portions of the Report and Recommendation to which specific objections are made). The Court agrees with the Magistrate Judge's determination that Ground 9 is not cognizable in this proceeding and

that all other claims set forth in the Amended Petition are procedurally defaulted except for Grounds 1, 8(b)(iii), (iv), and (v),which are without merit. Petitioner's objections do not identify specific areas of the R&R which should not be accepted. Petitioner's objections are general or merely summarize and reiterate the arguments made in the Amended Petition.

The Court accepts the recommended decision within the meaning of Rule 72(b), Fed. R. Civ. P., and overrules Petitioner's objections. *See* 28 U.S.C. § 636(b)(1) (stating that the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate").

IT IS ORDERED that the Magistrate Judge's R&R (Doc.24) is **ACCEPTED.**

IT IS FURTHER ORDERED that the Clerk of the Court enter judgment denying and dismissing Petitioner's Amended Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 4) with prejudice. The Clerk shall terminate this action.

Having considered the issuance of a Certificate of Appealability from the order denying Petitioner's Petition for a Writ of Habeas Corpus, a Certificate of Appealability and leave to proceed in forma pauperis on appeal are **DENIED** because the dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable, and because Petitioner has not made a substantial showing of the denial of a constitutional right.

Dated this 7th day of May, 2018.

Douglas L. Rayes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jose Jesus Ramirez,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-16-08224-PCT-DLR

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby dismissed with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

May 7, 2018

By s/ S. Quinones
Deputy Clerk