UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYRONE JORDAN, Petitioner-Appellant, v. CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 18-16678 D.C. No. 2:17-cv-02304-SPL District of Arizona, Phoenix ORDER

Before: O'SCANNLAIN and GOULD, Circuit Judges.

Appellant's February 25, 2019, filing in this court (Docket Entry No. 6) is construed as an amended notice of appeal from the district court's January 31, 2019 order. Accordingly, this appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent motion for relief from judgment. 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);

United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 6 2019

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

TYRONE JORDAN, Petitioner-Appellant, v. CHARLES L. RYAN, Warden and ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 18-16678 D.C. No. 2:17-cv-02304-SPL District of Arizona, Phoenix ORDER

On November 8, 2018, this court issued an order remanding this case to the district court for the limited purpose of allowing that court to determine whether appellant's motion for relief from judgment constituted a timely tolling motion. On January 31, 2019, the district court entered an order finding that appellant's motion for relief from judgment, deemed filed on July 16, 2018, constituted a timely tolling motion for purposes of Federal Rule of Appellate Procedure 4(a)(4). Accordingly, this appeal shall proceed as a request for a certificate of appealability ("COA") based on appellant's September 4, 2018, notice of appeal.

This court will rule on the request for a COA and any pending motions in a later order.

DA/Pro Se

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Delaney Andersen
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYRONE JORDAN, Petitioner-Appellant, v. CHARLES L. RYAN, Warden, and ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 18-16678 D.C. No. 2:17-cv-02304-SPL District of Arizona, Phoenix ORDER

Before: NGUYEN and OWENS, Circuit Judges.

The district court entered judgment on June 20, 2018. Appellant filed a motion to amend or alter the judgment under Federal Rule of Civil Procedure 59(e), which the district court received on July 20, 2018. The district court treated the July 20, 2018 motion as a Federal Rule of Civil Procedure 60(b) motion, because it was not received within 28 days after entry of judgment, and the district court denied the motion on August 7, 2018.

Appellant's notice of appeal of the June 20, 2018 judgment and August 7, 2018 post-judgment order was dated August 28, 2018, and was filed in the district court on September 4, 2018. Thus, the notice of appeal was filed within 30 days after entry of the August 7, 2018 post-judgment order, but the notice of appeal was not filed within 30 days after entry of the June 20, 2018 judgment. *See* 28 U.S.C §

2107(a); Fed. R. App. P. 4(a)(1). A review of the record, however, indicates appellant's July 20, 2018 motion may constitute one of the motions listed in Federal Rule of Appellate Procedure 4(a)(4), if it were deemed filed within 28 days after entry of judgment. The July 20, 2018 motion was dated July 16, 2018, but it did not include a proof of service establishing when the motion was delivered to prison officials for forwarding to the court. Accordingly, this appeal is remanded to the district court for the limited purpose of determining whether appellant's July 20, 2018 filing constitutes a timely tolling motion. *See* Fed. R. App. P. 4(c)(1); *Houston v. Lack*, 487 U.S. 266, 270 (1988).

The district court's June 20, 2018 order denying the petition for writ of habeas corpus also denied a certificate of appealability. However, a review of the record reflects that the district court has not issued or declined to issue a certificate of appealability with respect to the August 7, 2018 order denying appellant's post-judgment motion. *See United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (certificate of probable cause to appeal necessary to appeal denial of post-judgment motion for relief under Rule 60(b)). Accordingly, this case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *Asrar*, 116 F.3d at 1270.

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270. Under *Asrar*, if the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the clerk of the district court shall forward to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270.

The Clerk shall send a copy of this order to the district court.

6/23/18 received

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Tyrone Jordan,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-17-02304-PHX-SPL

ORDER

The Court has before it Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.) The Court has also received Respondents' Limited Answer (Doc. 7), Petitioner's Reply (Doc.11), the Report and Recommendation of the Magistrate Judge (Doc. 12), Petitioner's Objections (Doc. 13), and the Response to the Petitioner's Objections. (Doc. 15.)

Petitioner argues multiple claims of ineffective of counsel. (Doc. 1.) Respondents argue the Petitioner's single ground of relief, consisting of multiple requests for relief based on ineffective assistance of counsel, should be denied and dismissed with prejudice. (Doc. 14, at 2-9.) Respondents further argue the claims are procedurally defaulted, without excuse. (*Id.*) The Magistrate Judge concluded the Petitioner failed to establish cause for procedural default and that the Petition should be denied and dismissed with prejudice. (Doc. 12, at 3-12.)

A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b). When a party files

a timely objection to an R&R, the district judge reviews *de novo* those portions of the R&R that have been "properly objected to." Fed. R. Civ. P. 72(b). A proper objection requires specific written objections to the findings and recommendations in the R&R. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. § 636(b)(1). It follows that the Court need not conduct any review of portions to which no specific objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas v. Arn*, 474 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is judicial economy). Further, a party is not entitled as of right to *de novo* review of evidence or arguments which are raised for the first time in an objection to the R&R, and the Court's decision to consider them is discretionary. *United States v. Howell*, 231 F.3d 615, 621-622 (9th Cir. 2000).

The Court has undertaken an extensive review of the sufficiently developed record. The Petitioner's objections to the findings and recommendations have also been carefully considered. The Petitioner argues the Magistrate Judge failed to properly consider the attachment to his habeas petition which provided additional information about his request for relief. This Court disagrees. It is clear from the record that before formulating her conclusions, the Magistrate Judge carefully considered all of the documents that are part of the record.

After conducting a *de novo* review of the issues and objections, the Court reaches the same conclusions reached by Judge Burns. Having carefully reviewed the record, the Petitioner has not shown that he is entitled to habeas relief. The R&R will be adopted in full. Accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation (Doc. 12) is **accepted** and **adopted** by the Court;

2. That the Petitioner's Objections (Doc. 13) are **overruled**;

3. That the Petition for Writ of Habeas Corpus (Doc. 1) is **denied** and this action is **dismissed with prejudice**;

4. That 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

5. That the Clerk of Court shall **terminate** this action.

Dated this 20th day of June, 2018.

Honorable Steven P. Logan
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Tyrone Jordan, Petitioner, vs. Charles Ryan, et al., Respondents.	CIV 17-02304-PHX-SPL (MHB) **REPORT AND RECOMMENDATION**

TO THE HONORABLE STEVEN P. LOGAN, UNITED STATES DISTRICT COURT:

Petitioner Tyrone Jordan, who is confined in the Arizona State Prison Complex, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Respondents filed an Answer (Doc. 7), and Petitioner filed a Reply (Doc. 11).

BACKGROUND

On January 7, 2013, the State charged Petitioner with five counts of possession of drug paraphernalia, three counts of misconduct involving weapons, and one count each of possession for sale of narcotic drugs, possession for sale of marijuana, and using a building for the sale or manufacture of narcotic drugs. (Exh. A.) All of the charged offenses related to the following facts as set forth by the Arizona Court of Appeals:

> ¶2 On the afternoon of August 9, 2012, Phoenix police officers made contact with Defendant and his roommate, Anthony Bellamy, in the driveway of their residence. The officers detained Defendant and searched both his person and the residence.[]
>
> ¶3 The search of Defendant's person revealed a black Samsung cell phone and several items in the pockets of his shorts, including multiple stacks of

> marijuana-scented cash and a small electronic scale with cocaine residue. An officer also observed numerous air fresheners in the vehicle that Defendant and Bellamy had occupied when the police first arrived.
>
> ¶4 In the backyard of the residence, officers encountered two aggressive dogs and relocated them. An officer then searched the backyard and examined a clothes dryer that sat on the patio. Inside the dryer, the officer found a bucket and a backpack. Inside the bucket, the officer found cash, a large quantity of marijuana, several quantities of crack cocaine, and a baked dessert packaged in a black plastic bag. Inside the backpack, the officer found more cash, more marijuana and crack cocaine, several common household items that could be used to ingest marijuana and cocaine, sandwich bags, an iPhone box, and a single round of .45–caliber ammunition.
>
> ¶5 Inside the residence, officers noticed the smell of marijuana. In a hall closet, they found a drawstring bag that contained marijuana and crack cocaine. In the kitchen area, they found a sword. In Bellamy's bedroom, they found a .45–caliber handgun, a shotgun, a spent shotgun shell, a machete, a stack of cash, and a plate with crack cocaine on it. In Defendant's bedroom, they found a tinfoil bag, labeled "Blue Widow," that contained marijuana. They also found an iPhone, several stacks of cash, and multiple black plastic bags, including one that contained a cookie. Defendant, after being informed of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), admitted that there was marijuana in the residence. He claimed that he had a medical marijuana card, but the police never found such a card.

(Exh. G.)

The three counts of misconduct involving weapons were subsequently severed, and Petitioner was convicted of five counts of possession of drug paraphernalia, one count of possession of marijuana for sale, one count of sale of narcotic drugs, and one count of using a building for the sale or manufacture of narcotic drugs. Petitioner was sentenced to a 15.75-year term of imprisonment. (Exh. B.)

Petitioner appealed his convictions and sentences to the Arizona Court of Appeals, raising one issue – "Did the trial court abuse its discretion when it failed to grant a motion for mistrial after the state's witness testified to facts precluded by the trial court?" (Exhs. D-G.) On August 11, 2015, the court of appeals affirmed Petitioner's convictions and sentences. (Exh. G.) Thereafter, Petitioner filed a Petition for Review in the Arizona Supreme Court. The court denied the petition on January 11, 2016. (Exh. I.)

On February 22, 2016, Petitioner filed a Notice of Post-Conviction Relief. (Exh. J.) Counsel filed a Notice of Completed Review, stating that she "did not find an issue to pursue in a petition for post-conviction relief," and requesting an extension of time for Petitioner to

file his own PCR petition. (Exh. K.) Petitioner filed a pro se PCR petition on July 20, 2016, arguing search and seizure and evidentiary issues in grounds one through four, and ineffective assistance of counsel in ground five. (Exhs. L, M, N.) On November 3, 2016, the state court denied relief. (Exh. O.)

Petitioner filed a Petition for Review in the Arizona Court of Appeals on February 9, 2017, alleging a search and seizure issue and ineffective assistance of counsel. (Exh. P.) The State filed a response, and Petitioner filed a Motion for Summary Judgment and "Response to State(s) Motion for Dismissal." (Exhs. Q, R, S.) On April 10, 2017, the court "den[ied] the motions," noting that the State had not filed a motion to dismiss. (Exh. T.) Further, the Court's review of the record in this case reveals that the court of appeals granted review but denied relief of Petitioner's Petition for Review on November 28, 2017. See State v. Jordan, 2017 WL 5709575 (Ariz. Ct. App. November 28, 2017).

In his habeas petition, Petitioner raises one ground for relief alleging that he received ineffective assistance of counsel. Specifically, Petitioner claims that trial counsel was ineffective for "fail[ing] to move to suppress evidence" recovered during the search of Petitioner's home, for allowing Petitioner "to stand trial on an indictment founded upon perjury," and for "fail[ing] to detect [that] the State admitted evidence at trial that was never disclosed to the defense." (Doc. 1.)

DISCUSSION

In their Answer, Respondents contend that Petitioner's ineffective assistance claim is procedurally defaulted. Respondents request that the Court deny and dismiss the habeas petition.

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and (c); Duncan v. Henry, 513 U.S. 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. See O'Sullivan v. Boerckel, 526 U.S. 838, 839-46 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona

Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

Proper exhaustion requires a petitioner to have "fairly presented" to the state courts the exact federal claim he raises on habeas by describing the operative facts and federal legal theory upon which the claim is based. See, e.g., Picard v. Connor, 404 U.S. 270, 275-78 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal 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).

Additionally, a federal habeas court generally may not review a claim if the state court's denial of relief rests upon an independent and adequate state ground. See Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). The United States Supreme Court has explained:

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31. A petitioner who fails to follow a state's procedural requirements for presenting a valid claim deprives the state court of an opportunity to address the claim in much the same manner as a petitioner who fails to exhaust his state remedies. Thus, in order to prevent a petitioner from subverting the exhaustion requirement by failing to follow state procedures, a claim not presented to the state courts in a procedurally correct manner is deemed procedurally defaulted, and is generally barred from habeas relief. See id. at 731-32.

Claims may be procedurally barred from federal habeas review based upon a variety of factual circumstances. If a state court expressly applied a procedural bar when a petitioner attempted to raise the claim in state court, and that state procedural bar is both "independent"[1] and "adequate"[2] – review of the merits of the claim by a federal habeas court is ordinarily barred. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court.") (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977) and Murray v. Carrier, 477 U.S. 478, 485-492 (1986)).

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[1] A state procedural default rule is "independent" if it does not depend upon a federal constitutional ruling on the merits. See Stewart v. Smith, 536 U.S. 856, 860 (2002).

[2] A state procedural default rule is "adequate" if it is "strictly or regularly followed." Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Hathorn v. Lovorn, 457 U.S. 255, 262-53 (1982)).

Moreover, if a state court applies a procedural bar, but goes on to alternatively address the merits of the federal claim, the claim is still barred from federal review. See 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. ... In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.") (citations omitted); Bennett v. Mueller, 322 F.3d 573, 580 (9th Cir. 2003) ("A state court's application of a procedural rule is not undermined where, as here, the state court simultaneously rejects the merits of the claim.") (citing Harris, 489 U.S. at 264 n.10).

A procedural bar may also be applied to unexhausted claims where state procedural rules make a return to state court futile. See Coleman, 501 U.S. at 735 n.1 (claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred"); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir. 2002) ("[T]he 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, or 'if it is clear that the state court would hold the claim procedurally barred.'") (quoting Harris, 489 U.S. at 263 n.9).

Specifically, in Arizona, claims not previously presented to the state courts via either direct appeal or collateral review are generally barred from federal review because an attempt to return to state court to present them is futile unless the claims fit in a narrow category of claims for which a successive petition is permitted. See Ariz.R.Crim.P. 32.1(d)-(h), 32.2(a) (precluding claims not raised on appeal or in prior petitions for post-conviction relief), 32.4(a) (time bar), 32.9(c) (petition for review must be filed within thirty days of trial court's decision). Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not raised on direct appeal or in prior Rule 32 post-conviction proceedings. See, e.g., Stewart, 536 U.S. at 860 (determinations made under Arizona's

procedural default rule are "independent" of federal law); Smith v. Stewart, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001) ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S. 856 (2002); see also Ortiz v. Stewart, 149 F.3d 923, 931-32 (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure); State v. Mata, 185 Ariz. 319, 334-36, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. See Reed v. Ross, 468 U.S. 1, 9 (1984). The federal court will not consider the merits of a procedurally defaulted claim unless a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Coleman, 501 U.S. at 750-51; Murray, 477 U.S. at 495-96. Pursuant to the "cause and prejudice" test, a petitioner must point to some external cause that prevented him from following the procedural rules of the state court and fairly presenting his claim. "A showing of cause must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the prisoner's] efforts to comply with the State's procedural rule. Thus, cause is an external impediment such as government interference or reasonable unavailability of a claim's factual basis." Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir. 2004) (citations and internal quotations omitted). Ignorance of the State's procedural rules or other forms of general inadvertence or lack of legal training and a petitioner's mental condition do not constitute legally cognizable "cause" for a petitioner's failure to fairly present his claim. Regarding the "miscarriage of justice," the Supreme Court has made clear that a fundamental miscarriage of justice exists when a Constitutional violation has resulted in the conviction of one who is actually innocent. See Murray, 477 U.S. at 495-96. Additionally, pursuant to 28 U.S.C. § 2254(b)(2), the court may dismiss plainly meritless claims regardless of whether the claim was properly exhausted in state

court. See Rhines v. Weber, 544 U.S. 269, 277 (2005) (holding that a stay is inappropriate in federal court to allow claims to be raised in state court if they are subject to dismissal under § 2254(b)(2) as "plainly meritless").

In ground five of his PCR petition, Petitioner argued that his counsel was ineffective at sentencing for failing to present in mitigation the fact that the .45 caliber pistol that was attributed to Petitioner "was in fact in an area controlled exclusively by" Bellamy. Additionally, Petitioner alleged that trial counsel failed to "subject the pre-sentence report to any scrutiny" and failed to interview Bellamy. (Exh. L.) The state court found that Petitioner's "arguments are conclusions without identifiable specifics," and concluded that Petitioner "was provided adequate assistance of counsel during all phases of the trial." (Exh. O.)

In his Petition for Review, Petitioner argued that his appellate counsel was ineffective for failing "to fully appeal the suppres[s]ion issue," and "raise the issue of ineffectiveness of the attorney that handled the case prior to him taking it over." (Exh. P.) Again, the court of appeals granted review but denied relief. See State v. Jordan, 2017 WL 5709575 (Ariz. Ct. App. November 28, 2017).

Thus, although Petitioner did assert ineffective assistance of counsel claims in both his PCR petition, as well as, his Petition for Review, he failed to fairly present to the state courts the exact federal claim he raises on habeas. "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) (quoting Moormann v. Schriro, 426 F.3d 1044, 1056 (9th Cir. 2005)) (alterations in original). This means "all operative facts to an ineffective assistance claim must be presented to the state courts in order for a petitioner to exhaust his remedies." Hemmerle v. Schriro, 495 F.3d 1069, 1075 (9th Cir. 2007). This is "[b]ecause ineffective assistance claims are not fungible, but are instead highly fact-dependent, [requiring] some baseline explication of the facts relating to it[.]" Id. As such, "a petitioner who presented any ineffective assistance of counsel claim below can[not] later add unrelated instances of counsel's ineffectiveness to that claim." Id. (citations and

internal quotations omitted); see 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"). Failure to fairly present Ground One has resulted in procedural default because Petitioner is now barred from returning to state courts. See Ariz.R.Crim.P. 32.2(a), 32.4(a).

Although a procedural default may be overcome upon a showing of cause and prejudice or a fundamental miscarriage of justice, see Coleman, 501 U.S. at 750-51, Petitioner has not established or argued that any exception to procedural default applies. Petitioner, however, cites to Martinez v. Ryan, 566 U.S. 1 (2012), stating that he "falls squarely within the equitable exception recognized in Martinez ... ." Further, in his Reply, Petitioner argues that the Court should consider the merits of his claim in light of Martinez.

In Martinez, the Supreme Court created a "narrow exception" to the principle that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." 566 U.S. at 9. The Court held that "[i]nadequate 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." Id.

"Cause" is established under Martinez when:

> (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 review proceeding.

Trevino v. Thaler, ___ U.S. ___, 133 S.Ct. 1911, 1918, 185 L.Ed.2d 1044 (2013) (citing Martinez). In Nguyen v. Curry, 736 F.3d 1287, 1295 (9th Cir. 2013), the Ninth Circuit held that "the *Martinez* standard for cause applies to all Sixth Amendment ineffective-assistance claims, both to trial and appellate, that have been procedurally defaulted by ineffective counsel in the initial-review state-court collateral proceeding."

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The Martinez exception applies only to the ineffectiveness of post-conviction counsel in the initial post-conviction review proceeding. It "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial." 566 U.S. at 16. Rather, Martinez is concerned that, if ineffective assistance of counsel claims were not brought in the collateral proceeding that provided the first occasion to raise such claims, then the claims could not be brought at all. See id. at 9-11. Therefore, a petitioner may not assert "cause" to overcome the procedural bar based on attorney error that occurred in "appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." Id. at 16.

The Court must first address whether Petitioner has shown a "substantial" claim of ineffective assistance of counsel. A "substantial" claim "has some merit." Id. at 14. Like the standard for issuing a certificate of appealability, to establish a "substantial" claim, a petitioner must demonstrate that "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Detrich v. Ryan, 740 F.3d 1237, 1245 (9th Cir. 2013) (internal quotations omitted). In other words, a claim is "'insubstantial' if it does not have any merit or is wholly without factual support." Id. Determining whether an ineffective assistance of counsel claim is "substantial" requires a district court to examine the claim under the standards of Strickland v. Washington, 466 U.S. 668 (1984).

To establish a claim of ineffective assistance of counsel a petitioner must demonstrate that counsel's performance was deficient under prevailing professional standards, and that he suffered prejudice as a result of that deficient performance. See id. at 687-88. To establish deficient performance, a petitioner must show "that counsel's representation fell below an objective standard of reasonableness." Id. at 699. A petitioner's allegations and supporting evidence must withstand the court's "highly deferential" scrutiny of counsel's performance, and overcome the "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90.

A petitioner bears the burden of showing that counsel's assistance was "neither reasonable nor the result of sound trial strategy," Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001), and actions by counsel that "'might be considered sound trial strategy'" do not constitute ineffective assistance. Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

To establish prejudice, a petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Id. Courts should not presume prejudice. See Jackson v. Calderon, 211 F.3d 1148, 1155 (9th Cir. 2000). Rather, a petitioner must affirmatively prove actual prejudice, and the possibility that a petitioner suffered prejudice is insufficient to establish Strickland's prejudice prong. See Cooper v. Calderon, 255 F.3d 1104, 1109 (9th Cir. 2001) ("[A petitioner] must 'affirmatively prove prejudice.' ... This requires showing more than the possibility that he was prejudiced by counsel's errors; he must demonstrate that the errors actually prejudiced him.") (quoting Strickland, 466 U.S. at 693). However, the court need not determine whether counsel's performance was deficient if the court can reject the claim of ineffectiveness based on the lack of prejudice. See Jackson, 211 F.3d at 1155 n.3 (the court may proceed directly to the prejudice prong).

In Ground One, Petitioner recites a narrative of facts apparently related to his claims of ineffective assistance. In so doing, Petitioner offers up only unsupported, conclusory and self-serving statements regarding what he believes was wrong and what counsel should have done in this case. Petitioner never explains his attorney's omissions or why his attorney's performance was deficient. Moreover, Petitioner does not even attempt to establish, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Under these circumstances, Petitioner's allegations, unsupported by specifics, do not establish a substantial claim of ineffective assistance of counsel. See, e.g., Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995) (conclusory allegations of ineffective

assistance do not warrant relief); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (same). Thus, Petitioner fails to establish cause for procedural default of Ground One under Martinez.

CONCLUSION

Having determined that Grounds One is procedurally defaulted, the Court will recommend that Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) 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 dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, 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); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file 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. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will 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 Rule 72, Federal Rules of Civil Procedure.

DATED this 9th day of May, 2018.

Michelle H. Burns
United States Magistrate Judge