UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

CEMALUDIN VESELI II, Petitioner-Appellant, v. CARLA HACKER-AGNEW, Warden; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 19-15845 D.C. No. 3:18-cv-08029-JAT District of Arizona, Prescott ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 3).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

— A —

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CEMALUDIN VESELI II, Petitioner-Appellant, v. CARLA HACKER-AGNEW, Warden; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 19-15845 D.C. No. 3:18-cv-08029-JAT District of Arizona, Prescott ORDER

Before: SILVERMAN and OWENS, 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).

Any pending motions are denied as moot.

DENIED.

— B —

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cemaludin Veseli, II, Petitioner, v. Carla Hacker-Agnew, et al., Respondents.	No. CV-18-08029-PCT-JAT **ORDER**

Pending before the Court is Petitioner's petition for writ of habeas corpus ("Petition"). The Magistrate Judge to whom this case was assigned issued a Report and Recommendation ("R&R") recommending that the Petition be denied. (Doc. 10). Petitioner filed many documents in response to the R&R, including: objections (Doc. 15); a motion to appoint counsel (Doc. 15); a request for a certificate of appealability (Doc. 15); a motion to file an untimely reply to Respondents' response to the objections (Doc. 18); a lodged reply to the response to the objections (Doc. 19); a motion to amend the habeas petition (Doc. 21); and a lodged amended petition (Doc. 22). Respondents replied to the objections (Doc. 16); responded to the motion to file an untimely reply (Doc. 20); responded to the motion to amend (Doc. 23); and filed a supplemental brief at the Court's request (Doc. 26). Petitioner then responded to the supplemental brief. (Doc. 27).

I. Review of R&R

This Court "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)(1). It is "clear that

the district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219, 1226 (D. Ariz. 2003) ("Following *Reyna-Tapia*, this Court concludes that de novo review of factual and legal issues is required if objections are made, 'but not otherwise.'"); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1032 (9th Cir. 2009) (the district court "must review de novo the portions of the [Magistrate Judge's] recommendations to which the parties object."). District courts are not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) ("the court shall make a de novo determination of those portions of the [report and recommendation] to which objection is made."). Accordingly, the Court will review the portions of the R&R to which Petitioner objected de novo.

II. Appointment of Counsel

"There is no constitutional right to counsel on habeas." *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993). Indigent state prisoners applying for habeas corpus relief are not entitled to appointed counsel unless the circumstances indicate that appointed counsel is necessary to prevent due process violations. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1911 (1987); *Kreiling v. Field*, 431 F.2d 638, 640 (9th Cir. 1970); *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966).

The Court has discretion to appoint counsel when a judge "determines that the interests of justice so require." *Terrovona v. Kincheloe*, 912 F.2d 1176, 1181 (9th Cir. 1990) (quoting 18 U.S.C. § 3006A(a)(2)(B)). "In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved." *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

Here, the Court has reviewed the R&R and all of Petitioner's subsequent filings and

finds Petitioner is not likely to succeed on the merits and is capable of articulating his claims pro se. Accordingly, the motion for appointment of counsel is denied.

III. Motion to File Untimely Reply to Objections

Petitioner argues Rule 72 does not bar him from filing a reply to the response to his objections (Doc. 24 at 1). He is mistaken. Rule 72 permits only objections and a response to the objections. Thus, by negative implication no further (indefinite) briefing is permitted. Petitioner further argue that Local Rule Civil 7.2(d) permits him to file a reply. (Doc. 24 at 1). Local Rule Civil 7.2(d) permits replies to motions, but objections are not motions. Thus, this Rule is inapposite. Accordingly, Petitioner's request to file an untimely reply (Doc. 18) is denied.

IV. Motion to Amend

Petitioner, over a year after filing his habeas petition and almost 2 months after the R&R was filed, moved to amend his habeas petition. (Doc. 21). Local Rule Civil 15.1(a) requires that any motion to amend indicate in what respect it differs from the original pleading. This requirement is even more critical at this late stage in this case where an R&R on the merits of the Petition was already briefed. Petitioner failed to comply with this procedural requirement and the motion is denied for this reason.

Alternatively, on the merits, Petitioner summarized what claims he was seeking to add in his motion (Doc. 21). Assuming Petitioner correctly summarized what Petitioner seeks to add (which the Court has not undertaken to verify against the lodged proposed amended petition because Petitioner did not comply with Local Rule Civil 15.1(a)), the Court agrees with Respondents that these additional claims would be futile. (Doc. 23).

Specifically, Petitioner's claim of ineffective assistance of counsel premised on a lack of mental health evidence fails because under *State v. Jacobson*, 244 Ariz. 187, 192–93, ¶¶ 18–20 (App. 2017), any efforts by counsel in this regard would have been futile. (Doc. 23 at 4). Counsel's failure to take action that would have been futile can never be deficient performance. *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996). Thus, *Martinez v. Ryan*, 566 U.S. 1 (2012) would not excuse Petitioner's procedural default of this claim

because the claim is not substantial. (Doc. 23 at 4). Accordingly, alternatively, the Court denies the motion to amend on the merits because any amendment would be futile.

V. Factual and Procedural History

> On September 9, 2013, a jury sitting in the Superior Court of Arizona in and for Coconino County convicted Petitioner of second degree murder, a class one felony. The trial court sentenced Petitioner to sixteen years in prison. The Arizona Court of Appeals affirmed Petitioner's convictions and sentences on January 29, 2015.
>
> In February 2015, Petitioner filed a Notice of Post-Conviction Relief ("PCR"). The trial court appointed PCR counsel, who could not find a colorable claim for relief. The trial court set September 28, 2015 as the deadline for Petitioner to file a pro se PCR Petition. Petitioner did not file a PCR Petition.
>
> On March 27, 2017, Petitioner filed a second PCR Notice. The trial court appointed counsel, who could not find a colorable claim. On July 24, 2017, Petitioner filed a pro se "Opening Brief" that the trial court construed as a PCR Petition. On November 30, 2017, the trial court denied Petitioner's PCR claims. Petitioner did not petition the Arizona Court of Appeals for further review.
>
> On February 15, 2018, Petitioner filed the Petition (Doc. 1) seeking federal habeas relief. Pursuant to the Court's April 18, 2018 Screening Order (Doc. 4), Respondents filed an Answer (Doc. 8), to which Petitioner has replied (Doc. 9).

(Doc. 10 at 1-2) (state court record citations omitted).

VI. Statute of Limitations

In their answer, Respondents argue that the Petition in this case is barred by the statute of limitations.[1] (Doc. 10 at 2). Whether Respondents are correct turns on the question of when, if ever, the state court "concluded" its consideration of Petitioner's first post-conviction relief petition.

With respect to the statute of limitations issue, the R&R states:

> Here, Respondents state that Petitioner's first PCR Notice "tolled AEDPA's 1-year limitation period until the conclusion of the PCR proceeding." [footnote omitted] (Doc. 8 at 6). Respondents correctly recount that Petitioner failed to file a pro se PCR Petition by the September 28, 2015 deadline. (*Id.*). Yet the record does not reflect that the trial court issued an order dismissing the PCR proceeding. Respondents have not cited any state rule or case law providing that a PCR proceeding is automatically concluded if a defendant fails to file a PCR Petition by the applicable deadline.

(Doc. 10 at 3).[2]

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[1] The R&R discussed the law governing the federal statute of limitations. (Doc. 10 at 2-3). Neither party objected to this recounting of the governing law and the Court hereby accepts it.

[2] The R&R ultimately concluded that this Court need not decide the statute of limitations

This Court ordered supplemental briefing on this issue. (Doc. 25). Respondents argue,

> ... the fact that the court did not formally dismiss the proceeding is of no moment because there was simply nothing pending after the deadline expired. Although the court certainly could have issued an order formally dismissing the proceeding, the Arizona Rules of Criminal Procedure do not require this. *See* Ariz. R. Crim. P. 32.1, *et. seq.*

(Doc. 26 at 3).

This Court agrees with Respondents that whether the first post-conviction relief petition remained "pending" after Petitioner failed to timely file his pro se petition is a question of state law. However, this Court has not located, and Respondent has not cited, any state case deciding this issue one way or the other.

What the Court has located are many examples where the state court did in fact formally dismiss the post-conviction relief petition when a petitioner failed to file his pro se petition. *See e.g., Mongeon v. Ryan, No.* CV-14-08024-JAT-JZB, 2015 WL 4275255, at *2 (D. Ariz. June 8, 2015), *report and recommendation adopted*, No. CV-14-08024-PCT-JAT, 2015 WL 4313818 (D. Ariz. July 15, 2015).[3] In those cases, the Court started the statute of limitations running for purposes of filing the federal habeas petition on the date of formal dismissal, not the date a petitioner's deadline to file elapsed. *Id.* The Court assumes Respondent would now argue that calculation was in error.

The Court has located one court in Arizona that has tangentially addressed this issue and seemed to have rejected Respondents' argument.[4] *Morgal v. Ryan*, No. CV-11-2552-

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issue. (Doc. 10 at 3).

[3] *See also Castillo v. Ryan*, No. CV-15-00288-TUC-JGZ-DTF, 2017 WL 2579057, at *1 (D. Ariz. May 4, 2017), *report and recommendation adopted*, No. CV-15-00288-TUC-JGZ, 2017 WL 2573186 (D. Ariz. June 14, 2017) (formally denying the post-conviction relief petition following petitioner's failure to file pro se); *King v. Ryan*, No. CV15-0265-PHX-NVW-ESW, 2016 WL 536654, at *1 (D. Ariz. Jan. 19, 2016), *report and recommendation adopted*, No. CV-15-00265-PHX-NVW-ESW, 2016 WL 524714 (D. Ariz. Feb. 10, 2016) (same); *Pickens v. Schriro*, No. CV-08-1087-PHX-ROS, 2009 WL 2870219, at *1 (D. Ariz. Sept. 3, 2009) (same). As far as the Court can determine, it is common practice for the state court to formally deny the petition for post-conviction relief if no pro se petition is filed. However, that practice does not mean Respondents are wrong that the state court's failure to do so would mean the petition remains pending.

[4] The Court cited this case in the request for supplemental briefing, but neither party addressed it. *See* (Docs. 26 and 27).

PHX-NVW, 2013 WL 655122, at *9 (D. Ariz. Jan. 18, 2013), *report and recommendation adopted,* No. CV-11-02552-PHX-NVW, 2013 WL 645960 (D. Ariz. Feb. 21, 2013). The court in *Morgal* stated,

> Apparently, Respondents are arguing that even if the notice of post-conviction relief tolled the statute of limitations, that tolling expired on the deadline for Petitioner to file his pro se petition. This argument is contrary to the Ninth Circuit case law recognizing that the filing of a notice of post-conviction relief initiates a post-conviction action in Arizona, the postconviction action is "pending" when the notice is filed in conformity with Rule 32.4(a), and statutory tolling begins on that date and continues "'until the application has achieved final resolution through the State's post-conviction procedures.'" *Hemmerle*, 495 F.3d 1074 (quoting *Carey v. Saffold*, 536 U.S. 214, 220 (2002)); *see also Isley*, 383 F.3d at 1055–56 (limitations period was not running while state court petition for relief was before the Arizona Supreme Court).

Id.

Thus, the *Morgal* court implied that a petitioner's failure to file his pro se brief did not cause the case to not be "pending," as Respondents now argue, because the case had not reached final resolution. If this Court accepts this conclusion, Petitioner's first post-conviction relief petition remains pending in state court through today. *See* (Doc. 27 at 1 (noting that the first post-conviction relief petition still has not been formally dismissed)).

On these facts, the Court finds the first post-conviction relief petition remains pending for habeas statute of limitations purposes. In other words, this Court agrees with the court in *Morgal* that because *Isley* holds that the filing of the "notice" (rather than the petition) is what "starts" the process, the petition remains pending until the Court takes action on the notice. Thus, because Petitioner's timely filed, first petition for post-conviction relief remains pending in state court, the habeas petition in this case is not barred by the statute of limitations.

Turning to Petitioner's objections, Petitioner appears to argue that because there was no ruling on his "notice" of post-conviction relief, the State has waived any application of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *See* (Doc. 15; Doc. 27). This objection is overruled for two reasons. First, the law does not support Petitioner's argument. Second, Petitioner's situation is largely of his own making. He failed to timely file his first post-conviction relief petition, and to this date has still never filed. Further,

Petitioner has never returned to state court to seek a ruling on his "notice." Petitioner cannot circumvent the AEDPA by failing to follow state court orders and rules.

VI. Procedural Default

Alternative to their statute of limitations argument, Respondents argue that the two grounds in Petitioner's Petition are procedurally defaulted without excuse; therefore, relief should be denied. (Doc. 26 at 5-6). The R&R reached the same conclusion. (Doc. 10 at 4-11). The R&R recounted the law of exhaustion and procedural default. (Doc. 10 at 4-6). Neither party objected to this statement of the law, and the Court hereby accepts it.[5]

A. Ground One

Ground One is Petitioner's claim of ineffective assistance of counsel. (Doc. 10 at 6). Petitioner presented this claim to the state court in his second post-conviction relief petition. (*Id.*). The state court denied this claim because it was barred by Arizona Rule of Criminal Procedure 32.4(a). (*Id.*). The R&R concluded that this state rule is adequate and independent of federal law. (*Id.* at 6-7). Thus, this claim is procedurally defaulted. (*Id.* at 10).

The R&R also discussed that Petitioner did not establish cause to overcome this default. (*Id.*). Finally, the R&R concluded that the *Schlup* gateway around procedural default does not apply in this case. (*Id.* at 10-11). Thus, the R&R concludes that Ground One is procedurally defaulted without excuse and should be denied on this basis.

In his objections, Petitioner argues that his procedural default of this claim should be excused by his lack of access to legal materials. (Doc. 15 at 2-3). Petitioner has failed to show how his alleged lack of access to legal materials caused him to not timely file his first post-conviction relief petition within the deadline set by the state court. Therefore, Petitioner has not shown that, even assuming he did not have access to materials,[6] such

[5] As discussed above, Petitioner objected to the application of the AEDPA in this case, but the Court has overruled that objection. Petitioner did not object to the R&R's summary of the law under the AEDPA.

[6] As indicated, the Court has assumed for purposes of this Order that Petitioner is factually correct that he did not have access to some materials. However, the Court notes that in the objections, for example, Petitioner claims that he did not have a copy of the Prison Litigation Reform Act. The Court cannot see how this, and other materials referenced

lack of access would be cause to excuse his procedural default. *See generally Tarver v. Washington*, 279 F. App'x 505, 506 (9th Cir. 2008). Accordingly, Petitioner's objection is overruled.[7]

B. Ground Two

In Ground Two Petitioner argues that the trial court gave an improper jury instruction. (Doc. 10 at 7). The R&R notes that Petitioner did not present this claim in state court as an issue of federal law; thus, it is unexhausted. (*Id.* at 7-9). For purposes of his habeas petition, Petitioner re-casts this claim as a due process violation. (*Id.* at 7).

The R&R concludes that under the state court procedural rules, Petitioner could not now return to state court to present this claim under federal law; thus, it is procedurally defaulted. (*Id.* at 9). The R&R also concludes that Petitioner did not establish cause to overcome this default. (*Id.* at 10). Finally, the R&R concludes that the *Schlup* gateway around procedural default does not apply in this case. (*Id.* at 10-11). Thus, the R&R concludes that Ground Two is procedurally defaulted without excuse and should be denied on this basis.

Petitioner objects and re-urges the same objections discussed above; namely: 1) that his convictions fall outside the AEDPA; and 2) that he did not have access to sufficient legal materials to comply with the AEPDA. (Doc. 15 at 3-4). For the reasons stated above, both of these objections are overruled.

(Doc. 15 at 2-3), would be relevant to Petitioner timely bringing his claims in state court, particularly by filing his first pro se petition for post-conviction relief within the time set by the state court. The Court further notes that Petitioner seemed to have no difficulty filing his pro se petition within the time set by the state court on his second post-conviction relief petition.

[7] The Court asked the parties to brief whether, if Petitioner's first post-conviction relief petition was still pending in state court, the habeas petition in this case was a mixed petition. (Doc. 25). Respondent filed a supplemental brief arguing that Ground One is procedurally defaulted because, although it was raised in the second post-conviction relief petition, it was barred by the Arizona rules. (Doc. 26 at5). This Court agrees that because Petitioner actually raised this claim in his second post-conviction relief petition, there would be no opportunity for him to return to state court and attempt to exhaust this claim in his still-pending first post-conviction relief petition. Therefore, because there is no opportunity under the state rules for Petitioner to return to state court to exhaust Ground One, the Court finds this is not a mixed petition.

VII. Conclusion

Based on the foregoing,

IT IS ORDERED that the motion to appoint counsel (part of Doc. 15) is denied.

IT IS FURTHER ORDERED that the Motion for Leave to File Untimely Reply (Doc. 18) is denied. The Reply lodged at Doc. 19 shall not be filed.

IT IS FURTHER ORDERED that the Motion to Amend Petition for Writ of Habeas Corpus (Doc. 21) is denied. The Amended Petition lodged at Doc. 22 shall not be filed.

IT IS FURTHER ORDERED that the R&R (Doc. 10) is accepted and adopted; the objections (Doc. 15) are overruled, the Petition is denied and dismissed with prejudice and the Clerk of the Court shall enter judgment accordingly.

IT IS FINALLY ORDERED that the request for a Certificate of Appealability (part of Doc. 15) is denied because dismissal of the Petition is based on a plain procedural bar and jurists of reason would not find this Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated this 17th day of April, 2019.

James A. Teilborg
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cemaludin Veseli II,

Petitioner,

v.

Carla Agnew-Hacker, et al.,

Respondents.

No. CV-18-08029-PCT-JAT (ESW)

REPORT AND RECOMMENDATION

TO THE HONORABLE JAMES A. TEILBORG, SENIOR UNITED STATES DISTRICT JUDGE:

Pending before the Court is Cemaludin Veseli II's ("Petitioner") "Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus" (the "Petition") (Doc. 1). After reviewing the parties' briefing (Docs. 1, 8, 9), the undersigned recommends that the Court deny and dismiss the Petition with prejudice.

I. BACKGROUND

On September 9, 2013, a jury sitting in the Superior Court of Arizona in and for Coconino County convicted Petitioner of second degree murder, a class one felony. (Bates No. 608).[1] The trial court sentenced Petitioner to sixteen years in prison. (Bates No. 389). The Arizona Court of Appeals affirmed Petitioner's convictions and sentences

[1] Citations to the state court record submitted with Respondents' Answer (Doc. 8) refer to the Bates-stamp numbers affixed to the lower right corner of each page of the record.

on January 29, 2015. (Bates Nos. 457-59).

In February 2015, Petitioner filed a Notice of Post-Conviction Relief ("PCR"). (Bates No. 461-63). The trial court appointed PCR counsel, who could not find a colorable claim for relief. (Bates No. 472). The trial court set September 28, 2015 as the deadline for Petitioner to file a pro se PCR Petition. (Bates No. 474). Petitioner did not file a PCR Petition.

On March 27, 2017, Petitioner filed a second PCR Notice. (Bates Nos. 479-82). The trial court appointed counsel, who could not find a colorable claim. (Bates Nos. 483-84, 489-93). On July 24, 2017, Petitioner filed a pro se "Opening Brief" that the trial court construed as a PCR Petition. (Bates No. 499-553). On November 30, 2017, the trial court denied Petitioner's PCR claims. (Bates Nos. 608-13). Petitioner did not petition the Arizona Court of Appeals for further review.

On February 15, 2018, Petitioner filed the Petition (Doc. 1) seeking federal habeas relief. Pursuant to the Court's April 18, 2018 Screening Order (Doc. 4), Respondents filed an Answer (Doc. 8), to which Petitioner has replied (Doc. 9).

II. DISCUSSION

A. Statute of Limitations

In their Answer (Doc. 8 at 5-9), Respondents assert that the Petition is barred by the one-year statute of limitations set forth in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214. Under AEDPA, a state prisoner must file his or her federal habeas petition within one year of the latest of:

> A. The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> B. The date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the petitioner was prevented from filing by the State action;
>
> C. The date on which the right asserted was initially recognized by the United States Supreme Court, if that right was newly recognized by the Court and made retroactively

> applicable to cases on collateral review; or
> The date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1); *see also Hemmerle v. Schriro*, 495 F.3d 1069, 1073-74 (9th Cir. 2007). The one-year limitations period, however, does not necessarily run for 365 consecutive days as it is subject to tolling. Under AEDPA's statutory tolling provision, the limitations period is tolled during the "time during which a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2) (emphasis added); *Roy v. Lampert*, 465 F.3d 964, 968 (9th Cir. 2006) (limitations period is tolled while the state prisoner is exhausting his or her claims in state court and state post-conviction remedies are pending) (citation omitted). AEDPA's statute of limitations is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010) ("Now, like all 11 Courts of Appeals that have considered the question, we hold that § 2244(d) is subject to equitable tolling in appropriate cases.").

Here, Respondents state that Petitioner's first PCR Notice "tolled AEDPA's 1-year limitation period until the conclusion of the PCR proceeding."[2] (Doc. 8 at 6). Respondents correctly recount that Petitioner failed to file a pro se PCR Petition by the September 28, 2015 deadline. (*Id.*). Yet the record does not reflect that the trial court issued an order dismissing the PCR proceeding. Respondents have not cited any state rule or case law providing that a PCR proceeding is automatically concluded if a defendant fails to file a PCR Petition by the applicable deadline. The issue need not be decided, however, as the following discussion explains that Petitioner's habeas claims are procedurally defaulted without excuse.

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[2] In Arizona, a PCR petition becomes "pending" as soon as the notice of PCR is filed. *Isley v. Ariz. Dep't of Corrections*, 383 F.3d 1054, 1055-56 (9th Cir. 2004) ("The language and structure of the Arizona postconviction rules demonstrate that the proceedings begin with the filing of the Notice."). It remains "pending" until it "has achieved final resolution through the State's post-conviction procedures." *Carey v. Saffold*, 536 U.S. 214, 220 (2002).

B. 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).

C. Ground One

In Ground One, Petitioner argues that his defense attorney was constitutionally ineffective for "failing to perfect jury RAJI instruction and not discovering Brady violations prejudicing the defendant." (Doc. 1 at 6). Petitioner presented this claim in his second PCR proceeding initiated in 2017. (Bates Nos. 499-513). The trial court concluded that the claim was barred pursuant to Arizona Rule of Criminal Procedure 32.4(a), which provides the deadlines for filing a notice of post-conviction relief. (Bates Nos. 608-12).

The trial court's ruling based on Rule 32.4(a) was "independent" of federal law. *See Nitschke v. Belleque*, 680 F.3d 1105, 1110 (9th Cir. 2012) (discussing requirement that state procedural rule must rest on an "independent" state law ground). Additionally, Rule 32.4(a) is "adequate" because Arizona courts regularly dismiss post-conviction proceedings based on a petitioner's failure to file a timely notice or petition for post-conviction relief. *See Simmons v. Schriro*, 187 F. App'x 753, 754 (9th Cir. 2006) (holding that Arizona's procedural rules, including its timeliness rules, are "clear" and "well-established"); *State v. Carriger*, 692 P.2d 991, 995 (Ariz. 1984) (observing that

"[p]etitioners must strictly comply with Rule 32 or be denied relief"); *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003) ("To be deemed adequate the state law ground for decision must be well-established and consistently applied."). Because the trial court applied an independent and adequate state law ground to deny review of Petitioner's claim in Ground One, the claim is procedurally barred from federal habeas review.[3] *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (stating that a claim is procedurally barred when a petitioner raised it in state court, but the court found it barred on adequate and independent state procedural grounds).

D. Ground Two

In Ground Two, Petitioner alleges that his federal constitutional due process rights were violated when the "[t]rial court commited reversable [sic] error in refusing appellants theory of the case instruction harmless error." (Doc. 1 at 7). On direct appeal, Petitioner argued that the trial court improperly refused to provide a "theory of the case" instruction. (Bates Nos. 404-05). However, as Respondents correctly assert, Petitioner failed to present the claim as an issue of federal law. (Doc. 8 at 14-16).

To reiterate, a petitioner's federal claims must have been "fully and fairly

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[3] In denying relief, the trial court also noted that Petitioner's claim in Ground One was without merit. (Bates No. 612). This alternative holding does not alter the finding that the claim is 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); *Towery v. Schriro*, 641 F.3d 300, 312 n.3 (9th Cir. 2010) (federal habeas relief barred where claim subject to "independent and adequate state procedural default rule"; result "is unaffected by the fact that [the state court] also addressed the merits of the claim").

presented" in state court to "exhaust" state court remedies. *Woods*, 764 F.3d at 1129. 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.").

Here, Petitioner cited only Arizona case law in support of his argument that the trial court erred by failing to provide a "theory of the case" jury instruction. (Bates Nos. 404-05). While Petitioner asserted that he "preserved his [jury instruction] request for [] his accident instruction on the basis of claims pursuant to Article 2 Sections 4 and 24 of the Arizona Constitution and the Sixth and Fourteenth Amendments of the Constitution of the United States" (Bates No. 404), 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 also 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).

The undersigned finds that Ground Two is unexhausted. If Petitioner returned to state court and presented those grounds in another 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 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. *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 was precluded by defendant's failure to raise issue on appeal). 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 Ground Two is procedurally defaulted. *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).

E. 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).

1. Petitioner has Not Established "Cause" for the Procedural Default

In order to establish cause for a procedural default, "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). The undersigned does not find that the record presents any evidence that Petitioner's procedural defaults are due to an external factor that cannot fairly be attributed to him. Cause therefore has not been established. 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 procedurally defaulted habeas claims.

2. The *Schlup* Gateway/Miscarriage of Justice Exception Does Not Apply

A petitioner seeking federal habeas review under the *Schlup* gateway/miscarriage of justice exception must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. United States*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). "[T]he miscarriage of justice exception is limited to those *extraordinary* cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt." *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) (emphasis in original); *see also McQuiggin v. Perkins*, 133 S.Ct. 1924, 1933 (2013) ("The miscarriage of justice

exception, we underscore, applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'") (quoting *Schlup*, 513 U.S. at 329). "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. Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumwaye*, 223 F.3d at 990 (quoting *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 does not make an actual innocence/*Schlup* gateway claim. 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." *McQuiggin*, 133 S.Ct. 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. *See Larsen v. Soto*, 742 F.3d 1083, 1096 (9th Cir. 2013) ("[W]e have denied access to the Schlup gateway where a petitioner's evidence of innocence was merely cumulative or speculative or was insufficient to overcome otherwise convincing proof of guilt").

For the above reasons, the undersigned recommends that the Court dismiss Petitioner's habeas claims on the basis that they are procedurally defaulted without excuse.

III. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the Petition (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 dismissal of the Petition is justified by a plain procedural bar.

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. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). 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* Fed. R. Civ. P. 72.

Dated this 13th day of December, 2018.

Eileen S. Willett
United States Magistrate Judge