# APPENDIX

EXHIBIT- A Copy of Motion requesting C.O.A.

EXHIBIT- B Copy of ARIZ. Dep of Corrections Legal material.

EXHIBIT- C Copy of petition for review in the 9Th Cir.

EXHIBIT- D Letter to the clerk of the Court of the 9Th Cir

EXHIBIT- E District court order of civil Action.

EXHIBIT - F Motion requesting! councel.

EXHIBIT - G Juan A. Villa's Affidavit.

EXHIBIT - H Maria A. Galvez Affidavit.

EXHIBIT - I Trial transcripts of 2-28-2005

EXHIBIT - J Minute ENTRY of 6-14-2016 Denying P.C.R.

EXHIBIT - K Sentencing transcripts 5-31-2005

EXHIBIT - L officer Sakalas police report.

EXHIBIT - M Court order denying Habeas Corpus.

EXHIBIT - N Reporters Transcripts of 10-2-2014 Hearing

EXHIBIT - O Motion to reconsider in the 9Th Cir.

EXHIBIT - P court Ruling in the 9Th Cir Denying C.o.A.

EXHIBIT - Q Notice of objection in the District court.

EXHIBIT - T Reply to the magistrate's response.

EXHIBIT - R The magistrate's response to Notice of objection.

EXHIBIT - S Copy of informal complaint to A.D.O.C

EXHIBIT - U court order denying motion to reconsider 9Th Cir.

EXHIBIT - V Report and recomendation by the magistrate.

EXHIBIT - W Trial Transcript 2-23-2005.

EXHIBIT - X officer Bryants police report.

EXHIBIT - Y Jury request for protection of Acuna.

EXHIBIT - Y1 Post Conviction Relief petition

EXHIBIT - Y2 M.E. Denying P.C.R.

EXHIBIT - Y3 Subpoena for Acuna.

EXHIBIT - Y4 copy of State Bar complaint.

EXHIBIT - Y5 AZ Court of Appeals memo Decision.

EXHIBIT - Y6 A.C.C. Sanction to Shane F. Krouser.

FILED

DEC 19 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ANTONIO LOZANO SOLIS,<br><br>Petitioner-Appellant,<br><br>v.<br><br>CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,<br><br>Respondents-Appellees. | No. 19-15858<br><br>D.C. No. 2:18-cv-00988-GMS<br>District of Arizona,<br>Phoenix<br><br>ORDER |

Before: TALLMAN and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 5 &7) 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.**

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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| Antonio Lozano Solis,<br>Petitioner,<br>v.<br>Charles L. Ryan, et al.,<br>Respondents. | No. CV 18-00988-PHX-GMS (JZB)<br><br>**ORDER** |

Pending before the Court is Magistrate Judge John Z. Boyle's Report and Recommendation ("R&R") (Doc. 19), which recommends that Petitioner Antonio Lozano Solis's Petition for the Writ of Habeas Corpus (Doc. 1) be denied.

Also pending before the Court is Petitioner's Motion to Amend his Objections to the R&R (Doc. 27) [1] and his Motion to Appoint Counsel (Doc. 30).

## BACKGROUND

Because no party has objected to the procedural background as set forth in the R&R, the Court adopts the background as an accurate account. (Doc. 19 at 1–5).

## I. Legal Standard

This court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). "[T]he district judge must review the magistrate judge's findings and recommendations de novo *if objection is*

[1] Solis's Motion to Amend is granted, but his request for oral argument is denied because the parties have thoroughly discussed the law and the evidence, and oral argument will not aid the Court's decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

*made*, but not otherwise. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original). 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).

When reviewing habeas claims, a federal court may not grant habeas relief unless the state's adjudication of the claims resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1); *see Robertson v. Pichon*, 849 F.3d 1173, 1182 (9th Cir. 2017). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal citations and quotations omitted). Review of a prior state court decision under § 2254(d)(1) by a federal court is limited to the record "before the state court that adjudicated the claim on the merits." *Id.* "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015).

Procedural default occurs when a petitioner has not exhausted a federal habeas claim by first presenting the claim in state court and is now barred from doing so by the state's procedural rules (including rules regarding waiver and preclusion). *Castille v. Peoples*, 489 U.S. 346, 351 (1989). If a state court properly applies a state procedural bar during post-conviction proceedings that prevents the state court from considering the merits, those claims are also procedurally defaulted. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). In Arizona, for non-capital cases, a petitioner does not exhaust a claim for purposes of federal review unless he has presented it to the Arizona Court of Appeals. *Castillo v. McFadden,* 399 F.3d 993, 998 (9th Cir. 2004).

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In the event of procedural default, habeas review is foreclosed absent a showing of "cause and prejudice." *Reed v. Ross*, 468 U.S. 1, 11 (1984). To demonstrate cause, a petitioner must show that "some objective factor external to the defense" impeded his efforts to raise the claim in state court. *Davila*, 137 S. Ct. at 2065 (internal citations and quotations omitted); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). "Prejudice is actual harm resulting from the alleged constitutional violation." *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1992) (internal quotation omitted).

## II. Analysis

### A. Motion to Appoint Counsel

There is no constitutional right to appointed counsel in habeas proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further"). The Court, however, does have the discretion to appoint counsel in "exceptional circumstances." *See* 28 U.S.C. § 1915(e)(1); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). "A finding of exceptional circumstances requires an evaluation of both 'the likelihood of success on the merits and the ability of the petitioner to articulate his or her claim *pro se* in light of the complexity of the legal issues involved.'" *Wilborn*, 789 F.2d at 1331 (quoting *Weygant v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)); *see Richards v. Harper*, 864 F.2d 85, 87 (9th Cir. 1988). "Neither of these factors is dispositive and both must be viewed together before reaching a decision on request of counsel" under § 1915(e)(1). *Wilborn*, 789 F.2d at 1331.

Having considered both factors, the Court finds that Petitioner has not demonstrated a likelihood of success on the merits or that any difficulty he is experiencing in attempting to litigate his case is due to the complexity of the issues involved. While Plaintiff has pointed to difficulties that he is experiencing with regards to prison resources and personal limitations, such difficulties do not make his case exceptional. Accordingly, this case does not currently present circumstances requiring the appointment of counsel.

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**B. Review of Objections**

Solis objects to several findings of Magistrate Judge Boyle, arguing that (1) his trial counsel's failure to investigate the gang expert constituted ineffective assistance of counsel, (2) that his trial counsel's failure to call additional witnesses to the stand constituted ineffective assistance of counsel, (3) that his conviction was because of prosecutorial misconduct, (4) that judicial bias affected his proceedings, (5) that his conviction was obtained in violation of his right to Due Process, and (6) that the record as a whole establishes his actual innocence. Because Solis does not meaningfully object to the Magistrate Judge's conclusions regarding his other claims, the Court will accept those conclusions without further review.

**1. Ineffective Assistance of Counsel**

Solis bears the burden of demonstrating his trial counsel was ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687–87 (1984). "*Strickland*'s standard . . . is highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). To succeed under *Strickland*, Solis must demonstrate that (1) his counsel's representation fell below an objective standard of reasonableness and (2) that the failure prejudiced him. *Strickland*, 466 U.S. at 687. To establish prejudice, Solis must show that there is a "reasonable probability" that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id.* Courts reviewing decisions of trial counsel are limited by the presumption that decisions of counsel fall within a wide range of reasonable assistance. *Id.* at 689–90. This means that courts must avoid "the distorting effects of hindsight" as much as possible, and "evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. Even if counsel fails to substantially investigate all plausible lines of defense, assistance can still be effective. *Id.* at 681.

For ineffective assistance of counsel claims under *Strickland*, "each unrelated alleged instance of counsel's ineffectiveness is a separate claim for purposes of exhaustion." *Gulbrandson v. Ryan*, 738 F.3d 976, 922 (9th Cir. 2013) (internal quotation

marks omitted). So the Court will evaluate each of Solis's claims that his counsel failed to investigate or call particular witnesses.

**a. Failure to Interview Gang Expert**

Petitioner argues that his counsel's failure to interview the prosecution's gang expert before trial resulted in counsel being unprepared to defend against the expert's testimony. (Doc. 1 at 10–11). On post-conviction review, the trial court determined that Solis's trial counsel was adequately prepared to cross-examine Davis, because he had previously questioned him in an evidentiary hearing. (Doc. 13-3, Ex. R. at 177). Petitioner fails to demonstrate that this decision violated clearly established federal law or involved an unreasonable determination of the facts. *See Lord v. Wood*, 184 F.3d 1083, 1095 n.8 (9th Cir. 1999) ("Counsel is not obligated to interview every witness personally in order to be adjudged to have performed effectively."). Thus, the Court cannot grant relief on this basis.

**b. Failure to Call Witnesses**

Solis additionally argues that his counsel was ineffective because they failed to call two witnesses, Maria Galvez and Robert Franco, to the stand. The PCR trial court found that there was no evidence that Solis requested that his counsel call these witnesses, and more importantly, there was no evidence that Galvez or Franco would have testified to anything that would have been favorable to Solis. Thus, Solis "failed to show either deficient performance or resulting prejudice." (Doc. 13-2, Ex. R. at 177–80). The PCR trial court correctly concluded that this was not ineffective assistance of counsel under *Strickland*, so the Court cannot grant relief here.

**c. Failure to Call Co-Defendant**

Solis further argues that his trial counsel was ineffective because they failed to call his co-defendant, who would have testified that Solis had a beer bottle in his hand, not a gun. (Doc. 1 at 10). The post-conviction relief trial court found that Solis's trial counsel was not ineffective, because his co-defendant's trial had not happened yet and his co-defendant would have claimed the protection of the Fifth Amendment. (Doc. 13-2, Ex. R. at 179–180). Solis again fails to demonstrate that the holding of the PCR trial court violated

clearly established federal law or represented an unreasonable determination of the facts. Solis does not point to any evidence that would suggest that his co-defendant would have testified favorably.

**2. The PCR Trial Court reasonably concluded that the victim's recantation was wholly incredible.**

Pointing to the victim's testimony and letter, Solis argues that there was prosecutorial misconduct in his case and that he is actually innocent. On review, the PCR trial court rejected both claims because it found the victim's recantation to be "totally untruthful," and held that because the victim's testimony was "equivocal at best," Solis "failed to establish grounds for relief." (Doc. 13-5 at 120, 118). The PCR trial court pointed to the fact that Solis contacted the victim first, the victim admitted he did not remember many details of the event, and that the victim testified that he told police at the scene that Solis pointed a weapon at him. (*Id.* at 117).

Solis presents no other evidence from which this Court could conclude that the PCR trial court's findings were an unreasonable determination of the facts. Without more, this Court must accept the trial court's credibility determinations. *See Davis v. Ayala*, 135 S. Ct. 2187, 2201 (2015) ("[E]ven if reasonable minds reviewing the record might disagree about [a person's] credibility, on habeas review that does not suffice to supersede the trial court's credibility determination.") Nor does Solis point to additional evidence that could show that the PCR court's determination that he failed to establish his actual innocence was unreasonable. Thus, Petitioner's claims of prosecutorial misconduct and actual innocence fail.

**3. Judicial Bias**

Solis claims that the PCR trial court exhibited judicial bias in his case by denying various motions in his case. (Doc. 1 at 20). This claim fails. Judicial bias can "almost never" be demonstrated based on a judicial ruling alone. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Because Solis does not point to anything other than the denied motions, this request for relief is denied.

**4. Due Process**

**a. Victim's False Testimony**

Solis argues that his conviction was obtained in violation of the due process clause because the prosecution knowingly used the false testimony of the victim. But because the PCR trial court correctly determined that the victim did not give a credible recantation of his testimony, there is no evidence to support Solis's assertion that the victim's original testimony was false. Thus, this claim lacks merit.

**b. Co-Defendant Severance**

Petitioner's co-defendant severance claim is procedurally defaulted. Solis attempted to raise this in his fourth petition for post-conviction relief. (Doc. 13-6 Ex. XX at 69). Because there was no new evidence to support his claim, the PCR trial court concluded that it was untimely. Solis does not present any grounds to excuse his procedural default, so this claim must also be dismissed.

**CONCLUSION**

Magistrate Judge Boyle correctly determined that Solis's petition lacks merit. Thus, the Court will accept the R&R and deny the petition.

**IT IS HEREBY ORDERED** that Magistrate Judge Boyle's R&R (Doc. 19) is adopted.

**IT IS FURTHER ORDERED** denying and dismissing with prejudice the Petitioner's Petition for the Writ of Habeas Corpus (Doc. 1) and directing the Clerk of Court to terminate this action and enter judgment accordingly.

**IT IS FURTHER ORDERED** that Petitioner Solis's Motion to Amend (Doc. 27) is **GRANTED**

**IT IS FURTHER ORDERED** that petitioner Solis's Motion to Appoint Counsel (Doc. 30) is **DENIED**.

**IT IS FURTHER ORDERED** that the request for a Certificate of Appealability and leave to proceed in forma pauperis on appeal is **DENIED** because dismissal of the

Petition is justified by a plain procedural bar and jurists of reason would not find the ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated this 8th day of April, 2019.

G. Murray Snow
Chief United States District Judge

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

Antonio Lozano Solis,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-18-00988-GMS(JZB)

**REPORT AND RECOMMENDATION**

TO THE HONORABLE G MURRAY SNOW, UNITED STATES DISTRICT JUDGE:

Petitioner Antonio Lozano Solis has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.)

## I. Summary of Conclusion.

Petitioner was convicted by a jury of aggravated assault and escape related to a gang altercation. Petitioner submits twelve grounds for relief in his Petition, alleging due process violations including ineffective assistance of counsel and various trial errors. Many of Petitioner's claims are based on the victim's recantation of his trial testimony, but the trial court reasonably found his recantation to be wholly incredible. Petitioner's claims are unexhausted but procedurally defaulted, barred, or fail on the merits. The Court will recommend the Petition be denied and dismissed with prejudice.

## II. Background.

### A. Facts and Trial Proceedings.

Petitioner and co-defendant Juan Villa were charged with one count of Class 3 Dangerous Aggravated Assault. (Doc. 13-2, Ex. K, at 9.) Petitioner was also charged with one count of Escape. (*Id.*) In a petition for post-conviction relief, Petitioner summarized the facts as follows:

> On May 25, 2004, Jorge Acuna alleged that he was walking near 64th avenue and Clarendon Street when Mr. Lozano-Solis made threatening statements to him. A few moments later, Jorge Acuna claims that Mr. Lozano-Solis pulled out a black revolver and pointed it at him. Jorge Acuna told police that the incident was his second encounter with Mr. Lozano-Solis. In the previous occasion, Jorge Acuna claims that Mr. Lozano-Solis claimed he belonged to the West Side Chicanos gang. In support of their theory that this was a gang related event, the State called Detective Clifton Davis to explain the significance of the incident between Mr. Lozano-Solis and Jorge Acuna. Detective Davis also testified about his prior knowledge of Mr. Lozano-Solis, the activity of the West Side Chicanos, his previous contacts with Mr. Lozano-Solis and other significant events.

(Doc. 13-2, Ex. P, at 82.)

A jury found Petitioner guilty of both counts, and found that Petitioner committed the Aggravated Assault charge in furtherance of a criminal street gang. (*Id.*) After the trial, the court held a bench trial where the prosecution established that Petitioner had a prior felony conviction for misconduct involving a weapon. (Doc. 13-2, Ex. M, at 59.) The court found that the prior felony conviction was an aggravating factor when considering Petitioner's sentence. (*Id.*) On May 31, 2005, the court sentenced Petitioner to 15 years imprisonment for Aggravated Assault, and two years of consecutive imprisonment for Second Degree Escape. (Doc. 13-2, Ex. R, at 175.)

**B. Direct Appeal.**

On May 31, 2005, Petitioner appealed to the Arizona Court of Appeals. (Doc. 13-1, Ex. J, at 537.) Petitioner presented the issue of whether the State failed to provide sufficient evidence to prove beyond a reasonable doubt that he was the individual who committed the prior offense that the court used to aggravate his sentence as a repetitive offender. (Doc. 13-2, Ex. K, at 2.) On February 6, 2007, the court concluded that the State had presented sufficient evidence that Petitioner was the individual who had a prior conviction for misconduct involving a weapon. (Doc. 13-2, Ex. M, at 58.) On May 3, 2007, the Court of

Appeals issued the Order and Mandate. (Doc. 13-2, Ex. N, at 66.)

**C. Petitioner's Post-Conviction Relief Proceedings.**

**1. First Petition for Post-Conviction Relief.**

On March 5, 2007, Petitioner filed his first notice of post-conviction relief (PCR). (Doc. 13-2, Ex. O, at 76.) On September 26, 2008, Petitioner filed the petition for PCR, alleging that counsel (1) failed to interview the prosecution's gang expert, (2) failed to call witnesses at trial, (3) failed to use a photograph of Petitioner's niece (who was wearing red clothing), and (4) admitted in a bar proceeding that he was not prepared for trial. (Doc. 13-2, Ex. P, at 81.) On March 27, 2009, the trial court dismissed the petition, in a nine-page order, finding that Petitioner failed to "establish either (1) that counsel's performance at trial was deficient or (2) that counsel's performance prejudiced the defense at trial." (Doc. 13-2, Ex. R, at 182.)

On October 21, 2009, Petitioner filed a petition for review to the Arizona Court of Appeals. (Doc. 13-3, Ex. S, at 2.) On April 26, 2011, the Court of Appeals denied the petition for review. (Doc. 13-3, Ex. V, at 146.)

**2. Second Petition for Post-Conviction Relief.**

June 25, 2009, Petitioner filed a second petition for PCR in which he intended to raise another claim of ineffective assistance of counsel. (Doc. 13-3, Ex. W, at 148.) On January 4, 2010, Petitioner amended his PCR to include an affidavit from his co-defendant. (Doc. 13-3, Ex. X, at 160.) On March 5, 2010, the trial court summarily dismissed the notice of PCR based on preclusion because Petitioner was required by law to have raised the claim in the first Rule 32 proceeding. (Doc. 13-3, Ex. Y, at 163.)

**3. Third Petition for Post-Conviction Relief.**

On March 25, 2010, Petitioner filed his third notice of PCR, raising a claim of actual innocence because he alleged that the victim recanted his trial testimony. (Doc. 13-3, Ex. Z, at 166.) On March 4, 2011, the trial court summarily dismissed the notice of PCR because Petitioner provided nothing to substantiate his allegation. (Doc. 13-3, Ex. CC, at 188.)

On January 3, 2012, Petitioner filed a petition for review to the Arizona Court of Appeals. (Doc. 13-3, Ex. DD, at 191.) On December 12, 2012, the Court of Appeals reversed the trial court's decision finding that the court abused its discretion when it summarily denied relief based only on the notice of PCR. (Doc. 13-4, Ex. GG, at 13.)

On July 16, 2014, Petitioner's counsel filed a Request for an Evidentiary Hearing to determine whether the victim had recanted his trial testimony. (Doc. 13-4, Ex. LL, at 30.) On August 21, 2014, the trial court granted Petitioner an evidentiary hearing on the recantation claim. (Doc. 13-4, Ex. MM, at 35.) On October 2, 2014, the court held an evidentiary hearing where the victim testified. (Doc. 13-4, Ex. NN, at 38.)

On December 21, 2015, Petitioner filed his third petition for PCR, raising a claim of actual innocence. (Doc. 13-5, Ex. PP, at 2.) On June 14, 2016, the post-conviction court denied Petitioner's third petition, finding that the victim's testimony was insufficient to meet legal standards for actual innocence claims. (Doc. 13-5, Ex. SS, at 118.)

On July 14, 2016, Petitioner filed a petition for review with the Arizona Court of Appeals. (Doc. 13-6, Ex. TT, at 2.) On November 7, 2017, the Court of Appeals granted review and denied relief. (Doc. 13-6, Ex. WW, at 57.) On February 5, 2018, the Court of Appeals issued the Order and Mandate from the denial of Petitioner's third petition. (Doc. 13-6, Ex. XX, at 60.)

**4. Fourth Petition for Post-Conviction Relief.**

On May 19, 2017, Petitioner filed his fourth petition for PCR and alleged numerous claims. (Doc. 13-6, Ex. YY, at 63.) On June 7, 2017, the post-conviction court dismissed Petitioner's Notice because the claims were untimely and precluded. (Doc. 13-6, Ex. ZZ, at 67.)

On July 23, 2017, Petitioner filed a petition for review to the Arizona Court of Appeals from the denial of his fourth petition. (Doc. 13-6, Ex. CCC, at 87.) On March 13, 2018, the Court of Appeals granted review and again denied relief because Petitioner had not shown any abuse of discretion by the post-conviction court. (Doc. 13-6, Ex. DDD, at 119.) On April 30, 2018, the Court of Appeals issued the Order and Mandate. (Doc. 13-6,

Ex. EEE, at 122.)

**III. The Petition.**

On March 29, 2018, Petitioner filed a habeas petition. (Doc. 1.) In his petition, Petitioner alleged twelve grounds for relief. (*Id.*) On June 12, 2018, Respondents filed a Response. (Doc. 13.) On July 16, 2018, Petitioner filed a Reply. (Doc. 16.) On August 13, 2018, Petitioner filed a supplement to the Reply. (Doc. 18.)

The Court concludes the Petition is timely because Petitioner's direct appeal concluded on May 3, 2007 when the Court of Appeals issued the Order and Mandate. (Doc. 13-2, Ex. N, at 66.) Petitioner's first PCR proceedings began on March 5, 2007 (doc. 13-2, Ex. O, at 76) and ended on April 26, 2011 (doc. 13-3, Ex. V, at 146). Petitioner's third PCR proceedings (regarding actual innocence) began on March 25, 2010 (doc. 13-3, Ex. Z, at 166) and ended on February 5, 2018 (doc. 13-6, Ex. XX, at 60).

The writ of habeas corpus affords relief to persons in custody pursuant to the judgment of a state court in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. §§ 2241(c)(3), 2254(a). Petitions for Habeas Corpus are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2244.

**A. Allegations.**

"In Ground 1, Petitioner asserts ineffective counsel when his counsel failed to call witnesses to Petitioner's defense." (Doc. 1 at 10.) "In Ground 2, Petitioner asserts violation of due process for denial of an evidentiary hearing." (*Id.* at 12.) "In Ground 3, Petitioner asserts ineffective counsel when his appellate counsel failed to raise on direct appeal the error the trial court made." (*Id.* at 13.) "In Ground 4, Petitioner asserts violation of due process when the trial court erred in not precluding the State's gang expert testimony." (*Id.* at 14.) "In Ground 5, Petitioner asserts violation of due process when the State used false allegations and failed to correct false testimony." (*Id.* at 16.) "In Ground 6, Petitioner asserts violation of due process when he was denied of a fair hearing." (*Id.* at 17.) "In Ground 7, Petitioner asserts violation of due process when a witness was forced to lie during the trial by the prosecutor and the gang expert." (Id. at 18.) "In Ground 8, Petitioner

asserts *Brady*[1] violation." (*Id.* at 19.) "In Ground 9, Petitioner asserts judicial bias." (*Id.* at 20.) "In Ground 10, Petitioner alleges that his conviction violates due process." (*Id.* at 22.) "In Ground 11, Petitioner asserts violation of due process when the trial court Judge helped convince the prosecutor to offer a plea to a co-defendant in exchange for not testifying on Petitioner's behalf." (*Id.* at 23.) "In Ground 12, Petitioner asserts actual innocence." (*Id.* at 24.)

**B. Legal Standards**

**1. Procedural Default.**

Ordinarily, a federal court may not grant a petition for writ of habeas corpus unless a petitioner has exhausted available state remedies. 28 U.S.C. § 2254(b). To exhaust state remedies, a petitioner must afford the state courts the opportunity to rule upon the merits of his federal claims by "fairly presenting" them to the state's "highest" court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("[t]o 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").

A claim has been fairly presented if the petitioner has described both the operative facts and the federal legal theory on which his claim is based. *See id.* at 33. A "state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or brief . . . 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." *Id.* at 31–32. Thus, "a petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum . . . (2) through the proper vehicle, . . . and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (internal citations omitted).

The requirement that a petitioner exhaust available state court remedies promotes

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

comity by ensuring that the state courts have the first opportunity to address alleged violations of a state prisoner's federal rights. *See Duncan v. Walker*, 533 U.S. 167, 178 (2001); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Principles of comity also require federal courts to respect state procedural bars to review of a habeas petitioner's claims. *See id.* at 731-32. Pursuant to these principles, a habeas petitioner's claims may be precluded from federal review in two situations.

First, a claim may be procedurally defaulted and barred from federal habeas corpus review when a petitioner failed to present his federal claims to the state court, but returning to state court would be "futile" because the state court's procedural rules, such as waiver or preclusion, would bar consideration of the previously unraised claims. *See Teague v. Lane*, 489 U.S. 288, 297–99 (1989); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002). If no state remedies are currently available, a claim is technically exhausted, but procedurally defaulted. *Coleman*, 501 U.S. at 735 n.1.

Second, a claim may be procedurally barred when a petitioner raised a claim in state court, but the state court found the claim barred on state procedural grounds. *See Beard v. Kindler*, 558 U.S. 53, 59 (2009). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claim has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 731-32. In this situation, federal habeas corpus review is precluded if the state court opinion relies "on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed,* 489 U.S. 255, 260 (1989).

A procedurally defaulted claim may not be barred from federal review, however, "if the petitioner can demonstrate either (1) 'cause for the default and actual prejudice as a result of the alleged violation of federal law,' or (2) 'that failure to consider the claims will result in a fundamental miscarriage of justice.'" *Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012) (quoting *Coleman*, 501 U.S. at 750). *See also Boyd v. Thompson*, 147 F.3d 1124, 1126–27 (9th Cir. 1998) (the cause and prejudice standard applies to pro se petitioners as well as to those represented by counsel). To establish "cause," a petitioner must establish

that some objective factor external to the defense impeded his efforts to comply with the state's procedural rules. *Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008) (quoting *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986)). "Prejudice" is actual harm resulting from the constitutional violation or error. *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice, a petitioner must show that the alleged error "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); *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1996). Where a petitioner fails to establish either cause or prejudice, the court need not reach the other requirement. *See Hiivala v. Wood*, 195 F.3d 1098, 1105 n.6 (9th Cir. 1999); *Cook*, 538 F.3d at 1028 n.13.

Lastly, "[t]o qualify for the 'fundamental miscarriage of justice' exception to the procedural default rule" a petitioner "must show that a constitutional violation has 'probably resulted' in the conviction when he was 'actually innocent' of the offense." *Cook*, 538 F.3d at 1028 (quoting *Murray*, 477 U.S. at 496). *See Schlup v. Delo*, 513 U.S. 298, 329 (1995) (petitioner must make a credible showing of "actual innocence" by "persuad[ing] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt"). "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 eye-witness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324.

**2. Ineffective Assistance of Counsel.**

Claims of ineffective assistance of counsel are governed by the principles set forth in *Strickland v. Washington*, 466 U.S. 668, 684 (1984). To prevail under *Strickland*, a petitioner must show that (1) counsel's representation fell below an objective standard of reasonableness, and that (2) the deficiency prejudiced the defense. *Id.* at 687–88. In evaluating claims of prejudice in the context of finding a plea invalid, the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance

affected the outcome of the plea process. In other words, . . . the 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." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A "[r]eview of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation." *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1987). 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).

**C. Ground One (Ineffective Assistance of Trial Counsel).**

In Ground One, Petitioner alleges trial counsel provided ineffective assistance by (1) failing to call, as trial witnesses, Maria Galvez, co-defendant Juan Villa, Robert Franco, Federico Lopez, Oscar Gutierrez, and Georgette Regalado, and (2) failing to interview the prosecution's gang expert, Detective Davis. (Doc. 1 at 10–11.) The Court addresses the witnesses separately to evaluate exhaustion of the claims and because the witnesses are referenced throughout the Petition.

**1. Trial Court Ruling.**

Petitioner raised some of these claims in his first PCR proceeding. (Doc. 13-2, Ex. P, at 84.) Petitioner did not raise a claim regarding witnesses Lopez, Gutierrez, and Regalado. The claims he did raise were denied by the trial court. The court ruled:

> 1. INTERVIEW OF DETECTIVE DAVIS PRIOR TO TRIAL.
>
> . . . Defendant's trial counsel was able to question Detective Davis on February 23, 2005, at an evidentiary hearing prior to opening statements and the start of testimony. Thus, Defendant's trial counsel provided proper representation of Defendant.
>
> As an additional matter, this Court is of the belief that a pretrial interview is not necessarily a mandatory component of effective assistance of counsel. . . . To hold that a defendant's attorney must always conduct pretrial interviews would create either a "checklist" or a "set of detailed rules," which is exactly what the Court stated is not required. . . .

> Further, even assuming that the actions of Defendant's trial counsel could be construed as being deficient, Defendant has failed to establish how that performance prejudiced his defense. Defendant's trial counsel did question Detective Davis under oath prior to the start of testimony presented to the jurors, and was able to cross examine Detective Davis effectively. Defendant's gang membership and gang-related assault was clear from the victim's testimony and Defendant's tattoos, clothing, and social affiliation. Defendant presently has available what Detective Davis said prior to the start of trial and his testimony during trial, but has made no suggestion what trial counsel could have done differently had trial counsel interviewed Detective Davis sooner. Defendant has thus failed to show prejudice. . . .
>
> 2. INTERVIEWING AND LISTING CERTAIN WITNESSES.
>
> Defendant contends his trial counsel provided ineffective assistance of counsel because he did not interview certain named individuals prior to trial, including co-defendant Juan Angel Villa. As discussed above, there is no specific constitutional requirement that trial counsel interview every person suggested by a defendant because to impose such a requirement would create either a "checklist" or a "set of detailed rules," which is what the Court stated is not required. Rather, it is within trial counsel's judgment what persons to interview based on an assessment of what potential evidence they had to offer.
>
> The post-conviction interview of Juan Angel Villa shows that trial counsel's judgment was correct. Villa stated that he was not a member of the Westside Chicanos, and that he could not say one way or the other whether Defendant was a member of a gang. (R.T of Oct. 20, 2005, at 7.) Villa further stated that he did not know any members of the Westside Chicanos, and that he had never seen any of them flashing gang signs or claiming gang territory. (*Id.* At 24.) Because nowhere did Villa state that Defendant was not a gang member, this testimony was not relevant to the issue of Defendant's membership in the gang. Furthermore, Villa would not have been available as a witness at Defendant's trial. When the court ordered the two trial severed, it ordered that Defendant's case would be tried first, to be followed by Villa's trial. (M.E. of Jan. 31, 2005, CR 2005–015263.) Thus, at the time of Defendant's trial, Villa would have claimed the Fifth Amendment and refused to testify. The decision not to interview Villa was therefore within the latitude given to trial counsel, and the information presently available shows Defendant was not prejudiced by trial counsel's not interviewing Villa. Defendant has thus failed to show either deficient performance or resulting prejudice.
>
> The same can be said for the decision not to interview the other persons listed by Defendant. There is no indication what Defendant told this trial counsel about these individuals prior to trial. Defendant makes no claim that these individuals were members of the Westside Chicanos, or that there existed a membership list for the Westside Chicanos, or that any of these individuals had access to any such list, even assuming that it existed. For these individuals, Defendant has presented to this Count no indication what their testimony could have been, so again he has failed to show either deficient performance or resulting prejudice.

(Doc. 13-2, Ex. R, at 177-180.) The Arizona Court of Appeals affirmed the ruling. (Doc. 13-3, Ex. V, at 146.)

**2. Prosecution's Gang Expert, Detective Davis.**

Petitioner argues that his trial counsel failed to interview the prosecution's gang expert, Detective Davis, prior to trial, which resulted in counsel being unprepared to defend against the expert's "false" testimony. (Doc. 1 at 10-11.) The trial court concluded that Petitioner's trial counsel was adequately prepared for cross-examining Davis after questioning him in an evidentiary hearing prior to the trial. (Doc. 13-3, Ex. R, at 177.)

Petitioner fails to demonstrate that the trial court's ruling on this claim violated clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1). Because there is no constitutionally required form of pretrial investigation, the trial court provided adequate reasons for finding that trial counsel's decision not to interview Davis before trial was not deficient. *See Kwak v. Frank*, 400 F. App'x 246 (9th Cir. 2010) ("Counsel is not obligated to interview every witness personally in order to be adjudged to have performed effectively") (quoting *Lord v. Wood*, 184 F.3d 1083, 1095 n. 8 (9th Cir. 1999)). Petitioner also fails to show how his trial counsel's cross-examination would have been more effective had he interviewed Davis before trial, and therefore fails to assert any resulting prejudice. *See Smith v. Baker*, 671 F. App'x 951 (9th Cir. 2016) (finding no resulting prejudice because "[petitioner]'s attorney cross examined witnesses at trial regarding the information [petitioner] faults him for not having investigated, so it is unclear what more the requested investigation would have yielded"). The trial court therefore properly dismissed this ground.

**3. Witnesses Maria Galvez and Robert Franco.**

Petitioner argues that Maria Galvez was a "witness that lived next door to the place of the alleged offense" and "witnessed the Petitioner not do what he was accused of." (Doc. 1 at 10.) Petitioner argues that the victim was "picking on [Franco], that is why Petitioner confronted the alleged victim, and that this was not over gangs." (Doc. 1 at 10.) In the PCR petition, Petitioner argued these two witnesses–along with the victim, and the co-defendant–"could have been interviewed with a competent investigation" and would "also

testify and contradict the incident as told in various accounts by the victim." (Doc. 13-2, Ex. P at 84.) The trial court found that there was no evidence these witnesses were discussed with counsel prior to trial, but more importantly, that the "Defendant has presented to this Court no indication what their testimony could have been, so again he has failed to show either deficient performance or resulting prejudice." (Doc. 13-2, Ex. R, at 177–80.)

Petitioner fails to demonstrate that the trial court's ruling on this claim violated clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1). When Petitioner submitted an affidavit from Galvez in his third petition for review, the trial court rejected his newly-discovered evidence claim, finding that Galvez specifically stated she was not present when Petitioner confronted the victim, and thus she had no personal knowledge about the crimes and could not have testified. (Doc. 13-5, Ex. SS, at 119.) Petitioner's trial counsel reasonably concluded that calling Galvez as a witness would not help Petitioner's case, and Petitioner fails to identify any prejudice resulting from that decision. *See Loveland v. California*, 21 F. App'x 621 (9th Cir. 2001) (finding no ineffective assistance of counsel for failing to interview witnesses who did not witness the entire incident).[2]

**4. Co-defendant Juan Villa.**

Petitioner argues the co-defendant would have testified Petitioner had only "a beer bottle in his hand" instead of a gun, and saw that Petitioner did not attempt to escape from the police car after arrest. (Doc. 1 at 10.) In his PCR proceeding, Petitioner argued that counsel was provided the co-defendant's name as a potential witness. The trial court found that Villa would not testify: "Furthermore, Villa would not have been available as a witness at Defendant's trial. When the court ordered the two trials severed, it ordered that

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[2] Petitioner similarly fails to explain what Franco's testimony would have been, and therefore fails to show resulting prejudice from his trial counsel's decision not to interview him.

Defendant's case would be tried first, to be followed by Villa's trial. (M.E. of Jan. 31, 2005, CR 2005–015263.) Thus, at the time of Defendant's trial, Villa would have claimed the Fifth Amendment and refused to testify." (Doc. 13-2, Ex. R, at 179–180.)

Petitioner fails to demonstrate that the trial court's ruling on this claim violated clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1). Villa never stated that he would be willing to testify on Petitioner's behalf, and Petitioner fails to refute the trial court's finding that Villa would not have done so, or set forth any evidence substantiating how Villa would have testified. Choosing not to interview Petitioner's co-defendant was therefore a reasonable decision on behalf of Petitioner's trial counsel that did not result in any prejudice to Petitioner. *See Blanton v. Barron*, 73 F. App'x 237 (9th Cir. 2003) ("counsel's decision to not pursue the testimony of a co-defendant was within the wide range of reasonable professional assistance") (citing *United States v. Harden*, 846 F.2d 1229, 1231–32 (9th Cir. 1988)).

**5. Witnesses Federico Lopez, Oscar Gutierrez, Georgette Regalado.**

Petitioner argues that witnesses Federico Lopez, Oscar Gutierrez, and Georgette Regalado would have provided testimony to contradict the prosecution's gang expert and establish that Petitioner was not assisting a gang. (Doc. 1 at 10.) Petitioner claims that "Oscar Gutierrez did not live where the expert claimed" and that Petitioner was "never at the house of Federico Lopez with gang members but only there to see Georgette Regalado." (*Id.*)

Petitioner's claim for ineffective assistance for failing to call these witnesses is unexhausted and procedurally defaulted. Petitioner never presented this argument in his PCR proceedings. And while Petitioner did specifically list several other witnesses, he failed to list Lopez, Gutierrez, or Regalado. (Doc. 13-2 at 84.) Defendant does not identify any external factors that precluded him from raising these arguments in his PCR proceedings. Thus, Petitioner's claim against his trial counsel for failing to interview

Lopez, Gutierrez, and Regalado is unexhausted and procedurally defaulted.

**D. Ground Two (Denial of PCR Evidentiary Hearing).**

In Ground Two, Petitioner alleges that the trial court erred when it denied his request for a PCR evidentiary hearing because co-defendant Juan Villa "would have testified if called" as an exculpatory witness. (Doc. 1 at 12.) Petitioner also argues that the witnesses listed in Ground One would have been called at the hearing to prove his innocence. (*Id.*)[3]

Because Petitioner's claim that the trial court erred in denying his request for an evidentiary hearing involves a question of state law, this Court is unable to address this issue on habeas review. Claims alleging procedural errors arising during post-conviction relief proceedings are not cognizable in habeas corpus proceedings under 28 U.S.C. § 2254. "[F]ederal habeas corpus relief does not lie for errors of state law," *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990), and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68, 72 (1991); 28 U.S.C. § 2254(a). "[A] petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings." *Cooper v. Neven*, 641 F.3d 322, 331 (9th Cir. 2011) (citing *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam)). *See also Ochoa v. John Ontiveros*, 2009 WL 1125320, at *19 (D. Ariz. 2009) (finding denial of evidentiary hearing in PCR proceedings was not cognizable on habeas review). This Court is therefore barred from considering the trial court's denial of Petitioner's request for a PCR evidentiary hearing.[4]

**E. Grounds 3 through 5 (Trial Errors).**

In Grounds Three through Five, Petitioner alleges ineffective assistance of appellate

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[3] In a Petition for Review to the Arizona Court of Appeals, Petitioner argued that the trial court "incorrectly dismissed petition for post-conviction relief without providing defendant a[n] evidentiary hearing." (Doc. 13-3, Ex. S, at 5.)

[4] Petitioner also fails to establish how the trial court's denial of an evidentiary hearing was improper because, as discussed herein, the court reasonably concluded that none of the witnesses listed would have exculpated Petitioner. *See Davis v. Woodford*, 384 F.3d 628, 650 (9th Cir. 2004) (holding that trial court's denial of evidentiary hearing was proper because petitioner "failed to allege the specific mitigating evidence the witnesses would have presented").

counsel, judicial error by not precluding the gang expert, and false allegations by the prosecutor, respectfully. (Doc. 1, at 13–16.)

These grounds are procedurally defaulted because Petitioner failed to present these claims to the Arizona courts. In order to "fairly present" one's claims, the prisoner must do so "in each appropriate state court." *See Baldwin*, 541 U.S. at 29. "Generally, a petitioner satisfies the exhaustion requirement if he properly pursues a claim (1) throughout the entire direct appellate process of the state, or (2) throughout one entire judicial post-conviction process available in the state." *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004) (quotation omitted).

Petitioner admits that he did not present Grounds Three through Five in his direct appeal or in a properly-filed petition for review. (Doc. 1 at 13–16.) Thus, Petitioner failed to complete the State's established review process. Grounds Three through Five are therefore unexhausted and procedurally defaulted.

**1. Cause and Prejudice to Excuse Procedural Default.**

Petitioner's lack of effective appellate counsel and knowledge of appellate process do not constitute a cause, and thus fail to excuse the procedural default by a showing of cause and prejudice. Pursuant to the "cause" 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." *See Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004).

In Ground Three, Petitioner asserts that he did not know how to file a petition for review in the appellate court and did not understand the appellate process. (Doc. 1 at 13.) In Ground Four, Petitioner asserts that his appellate and PCR attorneys either failed to raise the claims or refused to do so, and that the trial court dismissed his notice of PCR. (Doc. 1 at 14.) In Ground Five, Petitioner asserts that his appellate counsel refused to raise his

claims and that he did not know the appellate process. (Doc. 1 at 16.) Petitioner's *pro se* status, lack of effective appellate counsel, limited legal resources, and ignorance of the law during his pro se PCR filing period do not constitute a cause justifying equitable tolling. *See Davila v. Davis*, 137 S.Ct. 2058, 2066 (2017) (holding that claims of ineffective assistance of appellate counsel cannot provide cause to excuse procedural default); *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986) (finding that petitioner's illiteracy and lack of legal assistance "although unfortunate, are nevertheless insufficient to meet the cause standard"); *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (finding petitioner's "ignorance of the law and procedural requirements for filing a timely notice of appeal is insufficient to establish cause to excuse his procedural default").

Regarding the "prejudice" test, Petitioner does not establish that the failure to consider his claims will result in a fundamental miscarriage of justice. "To qualify for the 'fundamental miscarriage of justice' exception to the procedural default rule," a petitioner "must show that a constitutional violation has 'probably resulted' in the conviction when he was 'actually innocent' of the offense." *Cook,* 538 F.3d at 1028 (quoting *Murray,* 477 U.S. at 496). *See Schlup,* 513 U.S. at 329 (petitioner must make a credible showing of "actual innocence" by "persuad[ing] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."). "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 eye-witness accounts, or critical physical evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324. Petitioner supplied no new evidence to support a claim of his innocence. Petitioner fails to establish cause excusing procedural default or new evidence of his innocence sufficient to excuse his procedural default.

**F. Ground Six (Ineffective Assistance of PCR Counsel).**

In Ground Six, Petitioner alleges that his PCR counsel provided ineffective assistance by (1) failing to subpoena the trial prosecutor and gang expert for the evidentiary hearing regarding the third PCR petition, (2) failing to bring police reports and trial

transcripts to the hearing to prove a "contradicting version the night of the alleged offense," and (3) failing to subpoena a prison officer to the hearing to impeach a trial witness. (Doc. 1 at 17.)

Petitioner is barred from raising an ineffective assistance of counsel claim against his PCR counsel because he is not constitutionally entitled to PCR counsel. Because there is no constitutional right to an attorney in state postconviction proceedings, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See Coleman*, 501 U.S. at 752 (1991) ("[t]here is no constitutional right to an attorney in state post-conviction proceedings").[5] *See also United States v. Ramirez-Salazar*, 589 F. App'x 368 (9th Cir. 2015) ("With 'no constitutional right to counsel, [petitioner] could not be deprived of the effective assistance of counsel'") (citing *Wainwright v. Torna*, 455 U.S. 586 (1982)). Petitioner's claim of ineffective assistance of postconviction counsel is therefore barred.

**G. Grounds Seven and Eight (*Brady* violations).**

In Ground Seven, Petitioner alleges the prosecutor violated *Brady* by failing to disclose to the judge that the victim told the prosecutor prior to trial that "he was not sure if Petitioner had a gun on the night of the alleged offense," and by pressuring him to lie on the stand. (Doc. 1 at 18.)[6] In Ground Eight, Petitioner alleges that the prosecution's gang expert violated *Brady* by knowingly using the victim's "false" testimony "to present highly

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[5] This Court recognizes the narrow exception to *Coleman* as carved out by the Supreme Court in *Martinez v. Ryan*, that a procedural bar may be excused for PCR counsel's failure to raise ineffective assistance of trial counsel. 566 U.S. 1 (2012). But because Petitioner's claims against his PCR counsel for ineffective assistance are not based on failure to raise ineffective assistance of trial counsel, the exception does not apply.

[6] Petitioner also argues that the prosecutor improperly failed to disclose that the victim was "on probation for not going to school and other unknown reasons" at or near the time of the offense. (Doc. 1 at 18.) Petitioner appears to be referencing the victim's probation at school, and not probation with the law. (*See* Petitioner's Reply, Doc. 16-2 at 23, citing Ex. B-4 at 48-49 (Transcript of victim's October 2, 2014 evidentiary hearing testimony where victim stated that "I was on probation. I was 15 at the time and I stopped going to school. So . . . I forget what it is, that we miss, we miss school . . . they send some papers to your parents because of—"). Petitioner fails to show how not disclosing the victim's school probationary status caused Petitioner any prejudice in the proceedings.

prejudicial gang testimony of street gangs." (Doc. 1 at 19.)

In *Brady*, the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The defendant must prove three elements in order to show a *Brady* violation: First, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Second, the evidence must have been suppressed by the State, either willfully or inadvertently. *See United States v. Agurs*, 427 U.S. 97, 110 (1976). Third, prejudice must result from the failure to disclose the evidence. *See Bagley*, 473 U.S. at 678. For purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record." *Agurs*, 427 U.S. at 112.

Here, the trial court rejected the victim's recantation as "totally incredible" based on the victim's feigning memory and inconsistencies in his statements. (Doc. 13-5, Ex. SS, at 113–17.) In a detailed order, the court found that Acuna was "not a credible witness and that his testimony failed to support Lozano-Solis's claim of actual innocence and newly-discovered evidence." (*Id.* at 113.) The court cited dozens of examples of Acuna's inconsistencies, memory problems, and admissions that Acuna and Petitioner wrote each other while in prison. (*Id.* at 117.) The court noted that Acuna agreed he told the police at the scene that Petitioner pointed a weapon at him. (*Id.*) The court's findings are accorded appropriate deference. *See Marshall v. Longerer*, 459 U.S. 422, 434 (1983) (finding that 28 U.S.C. § 2254(d) "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"); *Mann v. Ryan*, 828 F.3d 1143, 1153 (9th Cir. 2016) ("Our review of the state habeas court's credibility determinations is highly deferential."). Petitioner presents no evidence or persuasive argument to contradict the state court's credibility findings. Thus, Petitioner fails to demonstrate the prosecutor failed to disclose any material statements from the

victim (Acuna).[7]

**H. Ground Nine (Judicial Bias).**

In Ground Nine, Petitioner alleges that his post-conviction judge exhibited judicial bias in his case by denying Petitioner's motions for evidentiary hearings, motions for telephonic conferences, motions for additional pleadings, and motions to reconsider. (Doc. 1 at 20.)

Petitioner's judicial bias claim fails on the merits. Judicial bias can "almost never" be demonstrated solely on the basis of a judicial ruling. *Liteky v. United States*, 510 U.S. 540, 555 (1994). The fact that the trial judge in Petitioner's case denied Petitioner's various motions, without more, is insufficient to show any sort of judicial bias. *See Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) (denying habeas claim of judicial bias because "Larson has provided no evidence of the trial court's alleged bias outside of these rulings and remarks").[8]

**I. Ground Ten (Due Process Violation - Victim's False Testimony).**

In Ground Ten, Petitioner argues a due process violation based on the victim's allegedly false testimony. (Doc. 1 at 22.) Petitioner appears to be asserting an insufficiency of evidence argument: Petitioner claims that, because he was convicted based on victim's testimony, his conviction itself violated his due process rights because it was based on insufficient evidence. (*Id.*)

Petitioner fails to prove a due process violation resulting from the victim's testimony. The due process clause of the Fourteenth Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact

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[7] Because this Court finds the victim's recantation to be incredible, Petitioner's argument that the gang expert improperly relied on the victim's trial testimony similarly fails.

[8] The State argues in its response that this claim is procedurally defaulted because the PCR court rejected it for lack of newly-discovered evidence. (Doc. 13 at 20.) However, the judicial bias claim discussed in the PCR opinion seems to relate solely to the co-severance, whereas this judicial bias claim relates to the various motions denied by the judge. (Doc. 13 Ex. ZZ). The Court therefore addresses this ground separately and on the merits.

necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *accord Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). A federal court faced with a factual record "that supports conflicting inferences must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson v. Virginia*, 443 U.S. 307, 326 (1979). The ultimate question on federal habeas review is not whether the court agrees with the jury's conclusions, but only whether those conclusions are within the spectrum of rational results. *Payne v. Borg*, 982 F.2d 335, 338–39 (9th Cir. 1992).

Petitioner did not raise this claim on direct appeal, so the claim is unexhausted and procedurally defaulted without excuse. Petitioner's claim also fails. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court held that a claim that a petitioner was convicted with insufficient evidence is cognizable under § 2254 because the Due Process Clause of the Fourteenth Amendment "forbids a State from convicting a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228–29 (2001). But, as discussed herein, the trial court reasonably found that the victim's recantation was "totally untruthful." (Doc. 13-5, Ex. SS, at 120.) This Court will credit the victim's initial testimony regarding Petitioner's conduct as true. The ultimate question, then, is whether the conclusion that Petitioner committed the offense is within the spectrum of rational results. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, at 319. This Court finds that it is. The victim's initial testimony—in combination with Petitioner's gang affiliation, flight from police (doc. 13-1, Ex. C, at 218–19), and officers observing Petitioner throw a handgun from the vehicle (*id.* at 225–26))—is sufficient to support the jury's conclusion that Petitioner committed the offense. Petitioner therefore fails to show a due process violation resulting from the trial court's reliance on the victim's incriminating testimony.

**J. Ground Eleven (Due Process Violation - Co-Defendant Severance).**

In Ground Eleven, Petitioner argues that the trial judge convinced the prosecutor to offer a plea to Petitioner's co-defendant in exchange for severing his trial from Petitioner's, resulting in the co-defendant's inability to testify on Petitioner's behalf. (Doc. 1 at 23.) Petitioner therefore argues that, by agreeing to sever the cases, the prosecutor knowingly suppressed the co-defendant's exculpatory testimony. (*Id.*)

Petitioner's co-defendant severance claim is technically exhausted and procedurally defaulted. Petitioner attempted to raise this argument in his fourth petition for post-conviction relief but was precluded on procedural grounds. (Doc. 13-6, Ex. XX, at 69.) The court held that Petitioner failed to assert newly-discovered evidence "because the alleged actions concerning the plea were known to the Court at all relevant times." (*Id.*) The court found that "Defendant has not demonstrated reasonable diligence by waiting some eleven months after June 14, 2016 to seek post-conviction relief." (*Id.*) The PCR court therefore never reached the merits of this claim and instead rejected it on independent procedural grounds. Petitioner fails to set forth any evidence excusing his inability to assert new evidence to support this claim, so this ground is technically exhausted and procedurally defaulted.

**K. Ground Twelve (Actual Innocence).**

In Ground Twelve, Petitioner alleges that the record as a whole establishes his actual innocence. Specifically, Petitioner points to (1) the fact that the police officer's report and testimony show victim's attempt to recant; (2) the fact that no gun was found; (3) Villa and Galvez's affidavits stating that Petitioner had a beer bottle in his hand, not gun, and that he did not attempt to escape; (4) the Petitioner's own statement of innocence; (5) the victim's testimony of perjury; (6) the fact that the prosecutor failed to disclose that the victim was on probation; (7) the fact that the victim claims he was coerced; (8) the fact that the prosecutor was sanctioned for securities violations while serving as a county attorney; (9) the false and perjured testimony of expert witnesses; and (10) evidence showing an agreement between the judge and the prosecutor to offer Petitioner's co-defendant a plea and therefore suppress his testimony for Petitioner's defense. (Doc. 1 at 24.)

Petitioner's claim of actual innocence fails because it does not set forth any new evidence to support the claim. "Petitioner must make a credible showing of 'actual innocence' by 'persuad[ing] the district court that, *in light of the new evidence*, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Schlup,* at 329 (emphasis added). Petitioner does not set forth any new evidence in this petition to support his claim of actual innocence, but rather reiterates all of the claims alleged throughout his postconviction relief proceedings. Petitioner's claim of actual innocence therefore fails.

**VI. Conclusion.**

Petitioner's claims either fail on the merits or are unexhausted but procedurally defaulted. Petitioner fails to demonstrate cause and prejudice to excuse any default.

**IT IS THEREFORE RECOMMENDED** that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2244 (doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE**.

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 judgement. The parties shall have 14 days from the date of service of a copy of this Report and Recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have 14 days within which to file a response to the objections.

Failure to timely 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 to timely 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

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findings of fact in an order of judgement entered pursuant to the Magistrate Judge's Report and Recommendation. *See* Fed. R. Civ. P. 72.

Dated this 24th day of September, 2018.

Honorable John Z. Boyle
United States Magistrate Judge

FILED

FEB 12 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ANTONIO LOZANO SOLIS,<br><br>Petitioner-Appellant,<br><br>v.<br><br>CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,<br><br>Respondents-Appellees. | No. 19-15858<br><br>D.C. No. 2:18-cv-00988-GMS<br>District of Arizona,<br>Phoenix<br><br>ORDER |

Before: LEAVY and MILLER, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 10) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

Additional material from this filing is available in the Clerk's Office.