UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 15 2020

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

MACK CALVIN MARTIN, Petitioner-Appellant, v. DAVID SHINN, Director of the Arizona Department of Corrections, Respondent-Appellee.	No. 20-15859 D.C. No. 2:19-cv-02155-DLR District of Arizona, Phoenix ORDER

Before: RAWLINSON and BRESS, Circuit Judges.

Appellant's motion for relief from judgment (Docket Entry No. 2) is construed as a request for a certificate of appealability. So construed, the request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

April 18, 2017

RE: STATE OF ARIZONA v MACK CALVIN MARTIN
Arizona Supreme Court No. CR-16-0509-PR
Court of Appeals, Division One No. 1 CA-CR 16-0064
Maricopa County Superior Court No. CR2015-112136-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 18, 2017, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Lopez did not participate in the determination of this matter.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Cynthia D Beck
Mack Calvin Martin, ADOC 077274, Arizona State Prison,
Red Rock Correctional Center
Amy M Wood

tel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mack C Martin, Jr.,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-19-02155-PHX-DLR

JUDGMENT IN A CIVIL CASE

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

IT IS ORDERED AND ADJUDGED accepting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and dismissed with prejudice. A certificate of appealability is denied because dismissal is justified by a plain procedural bar and jurists of reason would not find the ruling debatable, and because Petitioner has not made a substantial showing of the denial of a constitutional right.

Debra D. Lucas
Acting District Court Executive/Clerk of Court

May 4, 2020

By s/ W. Poth
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mack C. Martin, Jr.,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-19-02155-PHX-DLR (JZB)

REPORT AND RECOMMENDATION

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

Petitioner Mack C. Martin, Jr. has filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.)

I. Summary of Conclusion.

Petitioner raises two grounds for relief in his Petition. The Court finds that Petitioner's first claim for unlawful search and seizure under the Fourth Amendment is precluded under *Stone v. Powell.* Petitioner's second ground, for ineffective assistance of counsel, levels five claims. Four of these claims are procedurally defaulted and the final claim fails on the merits. Therefore, the Court will recommend that the Petition be denied and dismissed with prejudice.

II. Background.

A. Procedural Background.

The Court of Appeals of Arizona summarized the facts and trial proceedings:

> On March 14, 2015, Detectives Snow and Rosky were on patrol as members of the Gang Enforcement Unit. They were part of the Nighttime Enforcement Squad that evening, conducting proactive patrols and responding to assist other patrol officers. At around 7:30 p.m. they were driving southbound near 6300 South 20th Street, an area with high gang and drug activity. It was completely dark out when they saw Martin riding a bicycle northbound, with no lamp emitting a visible light, as required pursuant to Arizona Revised Statutes ("A.R.S.") § 28–817(A).
>
> Detective Snow, who was driving the unmarked patrol car, approached Martin and, from a few feet away, asked Martin if everything was OK. Martin looked in Detective Snow's direction, but failed to verbally acknowledge him and accelerated away at a faster pace. Believing the behavior to be suspicious and that Martin was committing a traffic violation, the detectives turned their car around and caught up to Martin to conduct a traffic stop. As they pulled alongside Martin, Detective Rosky told Martin to stop. He did not. Instead, he quickly glanced at the detectives and then accelerated away. Detective Snow then pulled the patrol car in front of Martin to cut off his pathway, forcing Martin to stop.
>
> Upon making contact with Martin, Detective Rosky conducted a weapons frisk and found drug paraphernalia on Martin's person. Martin was placed under arrest and, during a search incident to arrest, the detectives found crack cocaine.
>
> Martin was charged with one count of possession or use of narcotic drugs, a class four felony, one count of possession of drug paraphernalia, a class six felony, and tampering with physical evidence, a class six felony. Martin filed a motion to suppress the evidence seized as a result of the traffic satop, arguing that the weapons frisk was unconstitutional.
>
> After an evidentiary hearing on the motion, the trial court denied Martin's motion to suppress, finding there was a "sufficient confluence of circumstances to create a reasonable suspicion that [Martin] might be armed and dangerous." The matter proceeded to trial and the court found Martin guilty of possession of narcotic drugs, possession of drug paraphernalia, and tampering with physical evidence. At sentencing, Martin waived his right to trial on priors and admitted to three prior felony convictions. The court sentenced Martin to concurrent, presumptive prison terms for all three counts, the longest of which is 10 years, with 311 days of presentence incarceration credit. Martin timely appealed.

State v. Martin, 2016 WL 6699305, at *1 (Ariz. Ct. App. Nov. 15, 2016) (footnotes omitted).

Petitioner was sentenced on January 20, 2016. (Doc. 10-1, Ex. H, at 78-82.)

B. Direct Appeal.

Petitioner appealed on January 27, 2016. (Doc. 10-1, Ex. J, at 86-87.) Petitioner argued that the trial court erred when it denied his motion to suppress. (Doc. 10-1, Ex. K, at 89-105.) Petitioner argued the detective did not have reasonable suspicion to believe that

Petitioner was armed and dangerous, and thus, a pat down search was improper. The Court of Appeals affirmed the lower court's decisions on November 15, 2016. (Doc. 10-1, Ex. M, at 134-36.)

On April 18, 2017, the Arizona Supreme Court denied review. (Doc. 10-1, Ex. O, at 151.) On May 23, 2017, the Court of Appeals issued the mandate. (Doc. 10-1, Ex. P, at 153-58.)

C. Post-Conviction Review Proceedings.

On May 4, 2017, Petitioner filed a Notice of Post-Conviction Relief ("PCR"). (Doc. 10-1, Ex. Q, at 160-66.) On May 23, 2018, through his attorney, Petitioner filed his PCR petition. (Doc. 10-1, Ex. R, at 168-84.)

On August 10, 2018, the PCR court issued a minute entry dismissing the petition without a hearing. (Doc. 10-1, Ex. U, at 204-06.) Petitioner appealed the dismissal on September 10, 2018. (Doc. 10-1, Ex. V, at 208-27.) On February 7, 2019, the Court of Appeals issued the mandate attaching a memorandum decision denying PCR. (Doc. 10-1, Ex. X, at 236-38.)

D. Petitioner's Federal Habeas Petition.

On April 1, 2019, Petitioner filed his Petition. (Doc. 1.) Petitioner presents two grounds for relief. In Ground One, Petitioner alleges that he was subject to an unlawful search and seizure in violation of his rights under the Fourth Amendment. In Ground Two, Petitioner alleges his trial counsel was ineffective in failing to present key evidence during the hearing on his motion to suppress.

On August 22, 2019, Respondents filed an answer. (Doc. 10.) On October 31, 2019, Petitioner filed his reply. (Doc. 14.)

III. Standard of Review.

A. Fourth Amendment Claims.

The Fourth Amendment provides: "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. As a result, federal courts developed an

"exclusionary rule" that prohibited evidence obtained through an illegal search or seizure of a defendant from being introduced in a prosecution to incriminate them. *Stone v. Powell*, 429 U.S. 465, 481-87 (1976). In the context of a federal habeas corpus petition, however, the Supreme Court determined that the "contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force." *Id.* at 494-95. Thus, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494.

"The relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." *Newman v. Wengler*, 790 F.3d 876, 880 (9th Cir. 2015) (quoting *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996)). "All *Stone v. Powell* requires is the initial opportunity for a fair hearing. Such an opportunity for a fair hearing forecloses this court's inquiry, upon habeas corpus petition, into the trial court's subsequent course of action, including whether or not the trial court has made express findings of fact." *Id.* at 881 (quoting *Caldwell v. Cupp,* 781 F.2d 714, 714 (9th Cir. 1986)). A mere claim of error is "not enough to support collateral relief based on the exclusionary rule." *Id.* (quoting *Hampton v. Wyant*, 296 F.3d 560, 565 (7th Cir. 2002)).

B. Exhaustion and 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 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 Coleman*, 501 U.S. at 731-32. Under 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 732). *See also Boyd v. Thompson*, 147 F.3d 1124, 1126-27 (9th Cir. 1998) (the cause and prejudice standard applies to pro se petitioners and 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)). "'[P]rejudice' 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.

C. Merits.

The Court may not grant a writ of habeas corpus to a state prisoner on a claim adjudicated on the merits in state court proceedings unless the state court reached a decision which was contrary to clearly established federal law, or the state court decision was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d); *Davis v. Ayala*, 135 S. Ct. 2187, 2198-99 (2015); *Musladin v. Lamarque*, 555 F.3d 834, 838 (9th Cir. 2009). The AEDPA requires that the habeas court review the "last reasoned decision" from the state court, "which means that when the final state court decision contains no

reasoning, we may look to the last decision from the state court that provides a reasoned explanation of the issue." *Murray v. Schriro*, 746 F.3d 418, 441 (9th Cir. 2014) (quoting *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000)).

> Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement.

White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (internal citations and quotations omitted). *See also Arrendondo v. Neven*, 763 F.3d 1122, 1133-34 (9th Cir. 2014).

> Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court. AEDPA requires "a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error . . . beyond any possibility for fair minded disagreement." *Harrington v. Richter*, [] 131 S. Ct. 770, 786-787, [] (2011). "If this standard is difficult to meet"—and it is—" that is because it was meant to be." [] 131 S. Ct. at 786. We will not lightly conclude that a State's criminal justice system has experienced the "extreme malfunctio[n]" for which federal habeas relief is the remedy. *Id.*, at ——, 131 S. Ct. at 786 (internal quotation marks omitted).

Burt v. Titlow, 134 S. Ct. 10, 15-16 (2013).

A state court decision is contrary to federal law if it applied a rule contradicting the governing law as stated in United States Supreme Court opinions, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Brown v. Payton*, 544 U.S. 133, 141 (2005).

A state court decision involves an unreasonable application of clearly established federal law if it correctly identifies a governing rule but applies it to a new set of facts in a way that is objectively unreasonable, or if it extends, or fails to extend, a clearly established legal principle to a new set of facts in a way that is objectively unreasonable. *See McNeal v. Adams*, 623 F.3d 1283, 1287-88 (9th Cir. 2010). The state court's determination of a habeas claim may be set aside under the unreasonable application prong if, under clearly

established federal law, the state court was "unreasonable in refusing to extend [a] governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000). However, the state court's decision is an unreasonable application of clearly established federal law only if it can be considered objectively unreasonable. *See, e.g.*, *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010). An unreasonable application of law is different from an incorrect one. *See id.*; *Cooks v. Newland*, 395 F.3d 1077, 1080 (9th Cir. 2005). "That test is an objective one and does not permit a court to grant relief simply because the state court might have incorrectly applied federal law to the facts of a certain case." *Adamson v. Cathel*, 633 F.3d 248, 255-56 (3d Cir. 2011). *See also Howard v. Clark*, 608 F.3d 563, 567-68 (9th Cir. 2010).

Factual findings of a state court are presumed to be correct and can be reversed by a federal habeas court only when the federal court is presented with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015). The "presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact." *Sumner v. Mata*, 455 U.S. 591, 593 (1982). *See also Phillips v. Ornoski*, 673 F.3d 1168, 1202 n.13 (9th Cir. 2012).

Additionally, the United States Supreme Court has held that, with regard to claims adjudicated on the merits in the state courts, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). *See also Murray*, 745 F.3d at 998. Pursuant to § 2254(d)(2), the "unreasonable determination" clause, "a state-court's factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Clark v. Arnold*, 769 F.3d 711, 724-25 (9th Cir. 2014) (quoting *Burt*, 134 S. Ct. at 15).

If the Court determines that the state court's decision was an objectively unreasonable application of clearly established United States Supreme Court precedent, the Court must review whether Petitioner's constitutional rights were violated, i.e., the state's ultimate denial of relief, without the deference to the state court's decision that the AEDPA

otherwise requires. *See Lafler*, 132 S. Ct. 1389-90; *Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007). Additionally, the petitioner must show the error was not harmless: "For reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Davis*, 135 S. Ct. at 2197.

IV. Ground One – Unlawful Search and Seizure.

Petitioner alleges that the drugs and drug paraphernalia obtained during his traffic stop were obtained by way of an unlawful search and seizure. (Doc. 1 at 6.) The only relevant inquiry under federal habeas corpus review is whether Petitioner was given an initial "full and fair opportunity" to litigate this claim. *Stone*, 429 U.S. at 494-95; *Newman*, 790 F.3d at 880. Once the Court determines the petitioner had the *initial opportunity* to litigate his or her claim, all subsequent events are irrelevant. *Newman*, 790 F.3d at 881. The record shows that Petitioner filed a motion to suppress the evidence, had an evidentiary hearing on the motion, a decision was entered by the trial court, and the Petitioner appealed the decision all the way to the Arizona Supreme Court. (Doc. 10-1, Exs. C, E, F, J, K, M, N, O.) Thus, Petitioner is not entitled to federal habeas corpus review of his Fourth Amendment claim.

V. Ground Two – Ineffective Assistance of Counsel.

Petitioner asserts five claims entitling him to relief from ineffective assistance of counsel. Specifically, Petitioner states that his trial counsel:

(1) failed to appropriately consider a plea offer ("Claim 1");

(2) disregarded Petitioner's request that he interview the police officers involved ("Claim 2");

(3) declined to offer the "allege[d] drugs" at the hearing ("Claim 3");

(4) refused to call Petitioner to testify at his hearing ("Claim 4"); and

(5) ignored the light Petitioner used on his bicycle as evidence during the hearing ("Claim 5"). (Doc. 1, at 6-7.)

All five claims fail.

A. Claims 1-4.

Petitioner did not properly assert these claims in his PCR filings or his appeals thereof. "A petitioner may provide further facts to support a claim in federal district court, so long as those facts do not 'fundamentally alter the legal claim already considered by the state courts.'" *Poyson v. Ryan*, 879 F.3d 875, 894 (9th Cir. 2018) (quoting *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007)). "This does not mean, however, that a petitioner who presented any ineffective assistance of counsel claim below can later add unrelated alleged instances of counsel's ineffectiveness to his claim." *Id.* at 895 (quoting *Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th Cir. 2005)). Petitioner cannot present a "fundamentally new theory of counsel's ineffectiveness—one that the Arizona courts lacked a 'meaningful opportunity to consider.'" *Id.* at 896 (quoting *Vasquez v. Hillary*, 474 U.S. 254, 257 (1986)).

In his PCR petition, Petitioner only raised a claim for ineffective assistance of counsel based on counsel's failure "to present key evidence at the evidentiary hearing and improperly conceding an issue." (Doc. 10-1, Ex. R, at 179). In his appeal of the dismissal, Petitioner argued "not introducing the bicycle light was not a legitimate strategy." (Doc. 10-1, Ex. V, at 222). "As a general matter, each 'unrelated alleged instance [ ] of counsel's ineffectiveness' is a separate claim for purposes of exhaustion." *Gulbrandson v. Ryan*, 738 F.3d 976, 992 (9th Cir. 2013) (quoting *Moormann*, 426 F.3d at 1056)). "In order to 'fairly present' an issue to a state court, a petitioner must 'present the substance of his claim to the state courts, including a reference to a federal constitutional guarantee and a statement of facts that entitle the petitioner to relief.'" *Id.* (quoting *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009). There is no mention of the consideration of a plea offer, the interviews with the police officers, or the presentation of the confiscated drugs in any of the relevant state court documents. (Doc. 10-1, Exs. R, T, V.) Therefore, Claims 1-3 are unexhausted.

With regard to Claim 4, Petitioner briefly mentions his wish to testify at the hearing in the facts of his initial PCR petition and appeal, but he does not provide any legal

arguments or make any claims based on that fact. (Doc. 10-1, Exs. R, V, at 174, 218.) The refusal to allow a defendant to testify is a fundamentally different claim than a failure to offer physical evidence and must be presented as such. *See Moormann*, 426 F.3d at 1056 (holding that the specific claim of refusal to allow the petitioner to testify was not fairly presented by claiming his counsel failed to "investigate and present a viable defense"). A cursory mention of Petitioner's wish to testify does not present the "substance of his claim" for purposes of exhaustion. *See Gulbrandson*, 738 F.3d at 993 ("[T]he mere submission of a relevant affidavit to a state court is not sufficient to place that court on notice of all potential constitutional challenges stemming from that affidavit.").[1]

Petitioner's claims are procedurally defaulted because he is precluded from returning to the state courts to present them. Ariz. R. Crim. P. 32.2(a)(2) ("A defendant is precluded from relief under Rule 32.1(a) based on any ground . . . finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding . . . ."); Ariz. R. Crim. P. 32.4(a)(3)(A) ("A defendant must file the notice for a claim under Rule 32.1(a) within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later."). As Petitioner already received a ruling on the merits of his PCR claims and his appeal, and any additional notice would be time-barred by the state, these claims are defaulted.

Petitioner does not allege any "external factor" that prevented him from complying with the procedural rules of the state courts. *Cook v. Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008). Petitioner has failed to show cause, the Court need not look further, and Petitioner is barred from federal habeas corpus review of these claims. *Id.* at 1028 n.13.

B. Claim 5 - Bicycle light.

The PCR court reasonably concluded that Petitioner failed to make a claim under the *Strickland* standard, and therefore, Petitioner is not entitled to relief. As Claim 5 was

[1] In his reply brief in support of his PCR petition, Petitioner mentions the possibility of his testimony, however, this is in response to the state's argument and is in the context of Claim 5, discussed below. (Doc. 10-1, Ex. T, at 201-02). A "claim itself has not been fairly presented to the court because the facts were used exclusively to support another claim." *Gulbrandson*, 738 F.3d at 993 (citing *Koerner v. Grigas*, 328 F.3d 1039, 1046-48 (9th Cir. 2003)).

adjudicated in the state court proceedings, we must look to the "last reasoned decision" from the state court. 28 U.S.C. § 2254(d). In the Superior Court of Arizona's initial decision denying PCR, the court found that "counsel's decision not to introduce the bicycle light as evidence, and not to elicit further testimony on that subject constituted legitimate strategy, and did not fall below the standard of care required of defense counsel at a suppression hearing." (Doc. 10-1, Ex. U, at 206.) The PCR court went on to find "nothing in defense counsel's performance at the suppression hearing which could even remotely be construed as a breach of his duty to represent" Petitioner. *Id.* The PCR court found that Petitioner's "claim fails to satisfy either prong of the *Strickland* test," and the court could not conclude that counsel was ineffective. *Id.*

"The 'clearly established federal law' for an ineffective assistance of counsel claim under the Sixth Amendment derives from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) . . . ." *Hardy v. Chappell*, 849 F.3d 803, 818 (9th Cir. 2016)). A federal court's review of a *Strickland* claim requires the petitioner show "the state court applied *Strickland* to the facts of his case in an *objectively unreasonable* manner." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (emphasis added). As the PCR court made factual findings that Petitioner did not satisfy the *Strickland* test, the decision may only be overturned by "clear and convincing evidence" that overcomes the presumption the PCR court was correct in its factual findings. 28 U.S.C. § 2254(e)(1); *Sumner v. Mata*, 455 U.S. 591, 593 (1982); *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015).

Under *Strickland v. Washington*, in order to have a claim of ineffective assistance of counsel, a petitioner must show that (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "the deficient performance prejudiced the defendant." 466 U.S. 668, 687 (1984). Under the first prong, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness" and "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 688-89 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). If a petitioner satisfies the

first prong, he or she must also show "a reasonable probability" that "absent the errors the fact finder would have had a reasonable doubt respecting guilt" and it would have been "sufficient to undermine confidence in the outcome." *Id.* at 694. Thus, federal habeas review of a state court ruling on a *Strickland* claim is subject to "double deference" because "the federal court asks whether it was reasonable for the state court to find whether trial counsel's performance fell within the range of reasonable professional assistance." *Hardy*, 849 F.3d at 825 & n.10 (citing *Knowles v. Mirzayance*, 556 U.S. 111 (2009)).

The PCR court appropriately applied this standard. Petitioner presents no evidence to refute the PCR court's finding that counsel was acting reasonably in service of proper litigation strategy. Petitioner's argument relies heavily on the contention that the light he used while riding his bicycle was sufficiently bright to satisfy the state's statutory requirement, and his counsel erred in not investigating and presenting this evidence. (Doc. 10-1, Ex. R, at 180-81.) Petitioner, however, refers to the light as a "flashlight," not an affixed headlamp as required by statute. *Id.* at 7; A.R.S. § 28-817(A) ("A bicycle that is used at nighttime shall have a lamp on the front that emits a white light visible from a distance of at least five hundred feet to the front . . .); *State v. Baggett*, 306 P.3d 81, 84 (Ariz. Ct. App. 2013) (holding that officers possessed a lawful basis to stop defendant for a traffic violation under the statute where defendant "had a flashlight duct-taped to his bicycle" that "only flickered on and off" when defendant attempted to turn it on).

The detective testified that Petitioner had a flashlight or "a penlight or something small in his hand," and it was "definitely not fixed to his bicycle" because the light "was kind of bouncing around various directions." (Doc. 10-1, Ex. E, at 32-33.) Even taking Petitioner's statements regarding the brightness of his self-proclaimed flashlight as true, this does not refute the detective's testimony that Petitioner did not have an affixed headlamp on his bicycle, which was a traffic violation. It is comfortably in the realm of reasonableness for the PCR court to deduce that counsel withheld this evidence in furtherance of his client's interests as part of a sound litigation strategy. Therefore, the PCR

court's determination that Petitioner did not satisfy the *Strickland* elements was not objectively unreasonable, and Petitioner is not entitled to relief.

IT IS THEREFORE RECOMMENDED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE.**

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable, and because Petitioner has not made a substantial showing of the denial of a constitutional right.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have 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 findings of fact in an order of judgment entered pursuant to the Magistrate Judge's Report and Recommendation. *See* Fed. R. Civ. P. 72.

Dated this 13th day of February, 2020.

Honorable John Z. Boyle
United States Magistrate Judge