Cases:

Statutes:

Rules:

State v. Gordon, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989) 22, 23, 24, 25, 26, 27

State v. Price, 218 Ariz. 311, ¶ 16, 183 P.3d 1279, 1283. 23,

A.R.S. § 13-1304(A)(3). 23, 25

State v. Price at ¶ 18-19, 183 P.3d at 1284 24,

State v. Price at ¶ 20, 183 P.3d at 1284. 24

Strickland v. Washington, 466 U.S. 668, 686 104 S. Ct. 2052, 2063 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S. Ct. 1441, 1449, n. 14, 25 L. Ed. 2d 763 (1979)) 28

Id. at 687, 104 S. Ct. 2064; State v. Nash, 143 Ariz 392, 694 P.2d 222 (1984) 28

State v. Lee 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984) (quoting Strickland, 466 U.S. at 688, 104 S. Ct at 2065 28

Id at 688, 104 S ct. 2064; Nash, 143 Ariz. at 397-98, 694 P.2d at 227-28 28

Statement of The Case

¶1. Macho Joe Williams was indicted for Armed Robbery, a class 2 felony, Aggravated Robbery, a class 3 felony, two counts of Aggravated Assault, Deadly Weapon/Dangerous Instrument, a class 3 felony, 2 counts of Kidnaping, a class 2 felony, Aggravated Assault, Temporary/Substantial Disfigurement, a class 4 felony and Possession of a Deadly Weapon by a Prohibited Possessor, a class 4 felony for events stemming from August 24, 2011.[1] CR8.

¶2 The prosecution also alleged that the Armed Robbery, Aggravated Robbery and two Aggravated Assault charges were dangerous nature offenses under A.R.S. 13-704. CR9. Additionally, the prosecution alleged that Williams was previously convicted of five historical prior felony offenses for sentencing enhancement purposes. CR10.

¶3 Williams had two co-defendants, Steven Soto and Juan Valenzuela. Defendant Soto was originally represented by the Pima County Public Defender's Office but after they withdrew due to a conflict of Interest, Attorney Bobbi Berry was appointed on November 28, 2011. CR71, 75, 78 & 84.

¶4 Attorney Berry previously represented Williams in one of his historical prior felony offenses, Pima County Superior Court CR 2007-0131, for an offense that occured on December 28, 2006 and a conviction date of August 10, 2007. On January 8, 2007, Williams was indicted for Burglary in the First Degree, a class 2 felony, Possession of Burglary Tools, a class 6 felony, 3 counts of Aggravated Assault, Deadly Weapon/Dangerous Instrument, a class 3 felony, and Aggravated Assault, Temporary/Substantial Disfigurement, a class 4 felony. At his arraignment on January 16, 2007, attorney Berry was appointed by the court to represent Williams. Attorney Berry

1. "CR" refers to the clerk's Record, followed by the Document number(s). "TT" refers to the Reporter's Trial Transcript, followed by the trial day (1, 2, 3, or 4) and page number(s). "ST" refers to the Reporter's Sentencing Transcript, followed by the page number(s)

represented Williams throughout his case which included a jury trial that lasted four days. Williams was found guilty of a lesser-included offense of criminal trespass, not guilty of possession of burglary tools, not guilty of three counts of Aggravated Assault, Deadly Weapon/Dangerous Instrument and guilty of a lesser included offense of assault.

¶5 On June 1 2012, the State filed a notice alleging aggravating factors. CR 130.

¶6 On August 7, 2012, Williams filed a motion to join in a motion to sever that had been filed by Defendant Valenzuela. CR 137 & 141. It had come to Williams counsel's attention that Defendant Valenzuela intended to exonerate Defendant Soto at trial to the obvious detriment of Williams. CR 251. The State filed a motion in opposition to the severance. CR 140.

¶7 On August 10, 2012, the State filed a motion in limine trying to prohibit testimony regarding victim D— R—'s (hereinafter "DR") convictions for sex abuse and second-degree sex conduct and sex assault. CR 146.

¶8 On August 10, 2012, the Defendants argued their motion to sever and the court took the matter under advisement. CR 151. Later that day, the court issued an under advisement ruling regarding the motion for severance. The court ruled that Williams filed his severance late because it was within 20 days of trial so he had waived his claim. The court further stated that even if the request was timely made they were not entitled to a severance. CR 149.

¶9 The jury trial commenced on August 14, 2012 with jury selection. CR 178. On the 2nd day of trial, the parties argued the State's motion in limine regarding DR's prior felony convictions. CR 234. The court granted the State's motion finding that the jury was only entitled to know that DR had 2 felony convictions and the dates of those convictions. CR 234.

¶10 After opening statements, Defendant Soto renewed the motion to sever based on Williams opening statement which basically highlighted the lack of evidence that

would be heard against Williams and Denied William's involvement in the offense. TT2, p.51-55. Defendant Soto claimed that the defenses were very antagonistic. TT2, P.54. Williams joined in the motion to sever. TT2, p.55. The motion was Denied. TT2, P.55; CR234.

¶11 After opening statements, the following witnesses were called to testify on behalf of the State: Victim M___ S___ (hereinafter "MS"; Victim DR, Christopher Popke, Doctor Gerald Olsen, Sergeant Peter Trusko, and Patricia Escarcega. CR234.

¶12 On the third day of trial, the parties entered into a stipulation regarding the prior conviction of DR and witness Patricia Escarcega which was read to the jury. CR165. The following people testified for the state's: Sergeant Brian Knight, Officer Jeannette Valenzuela, Sergeant Anthony De la Ossa, Officer Mark Molina, Detective Brad Hunt, and Detective Steve Erdman. CR231. The state then rested. CR 231.

¶13 Williams moved for a judgment of acquittal as to the charges which was denied. CR231.

¶14 On the fourth day of trial, Williams renewed his motion to sever and made a statement claiming that he might have testified had severance been granted. CR232 & 251.

¶15 On August 22, 2012, the jury returned verdicts of guilty to all counts: armed robbery and dangerous nature offense proven, aggravated robbery and dangerous nature offense proven, aggravated assault, a deadly weapon - dangerous instrument as to DR and dangerous nature offense proven, aggravated assault, deadly weapon - dangerous instrument as to MS and dangerous offense proven, Kidnaping of DR and dangerous offense proven, Kidnaping of MS and dangerous offense proven, aggravated assault, temporary - substantial disfigurement, and possession of a deadly weapon by a prohibited possessor. CR221-228 & 244.

¶16 Defendant Soto was only convicted of count nine, fleeing from law enforcement. CR201.

¶17 Defendant Valenzuela was convicted of count one, armed robbery, a dangerous offense; count two, aggravated robbery, a dangerous offense; count four, assault

a lesser included offense; count five, kidnaping, a dangerous offense, and count six, kidnaping, a dangerous offense. CR206, 215-220.

¶18 Later that day, the parties began an aggravating circumstances trial. CR191 & 244. The jury returned a verdict that two aggravating circumstances were proven: committed for pecuniary gain, and physical, emotional or financial harm to the victims. CR229 & 244. Williams' priors trial was set for September 24, 2012 CR247 & 250.

¶19 On August 31, 2012, Williams filed a motion for a new trial alleging that the court erred in denying the motion to sever, juror misconduct, and the court lacked impartiality as to Williams. CR251.

¶20 In lieu of a priors trial, Williams admitted that he had two historical prior felony convictions. CR263.

¶21 On January 22, 2013, the Defendant was sentenced as follows: 15.75 years on count one with credit for 515 days time served and having two historical prior felony convictions; 11.25 years on count two with credit for 515 days time served and having two historical prior felony convictions; 11.25 years on count three with credit for 515 days time served and having 2 prior historical felony convictions; 11.25 years on count for with credit for 515 days time served and having 2 prior felony convictions; 15.75 years on count five with 515 days time served and having two historical prior felony convictions; 15.75 years on count six with 515 days time served and having two historical prior felony convictions; 10 years on count seven with credit for 515 days time served and having 2 historical prior felony convictions. Count seven was ordered to run consecutive to the terms of imprisonment imposed as to counts 1, 2, 3, 4, 5 And 6; 10 years on count eight with credit for 515 days time served and having two historical prior felony convictions. Count eight was ordered to be consecutive to the terms of imprisonment imposed as to counts 1, 2, 3, 4, 5, 6, and 7. Williams was ordered to pay restitution to DR in the amount of $1860.00 $400 in attorney fees and $65 in court fees. CR286.

¶22 On February 4, 2013, Williams filed a timely notice of appeal. CR300. This court has

jurisdiction pursuant to A.R.S. 12-120.21, 13-4031 and 13-4033.

¶23 On March 5, 2013, the court signed an order requiring Williams to pay restitution in the amount of $9602.49 to MS. The court noted that there was no objection filed by the Defense. CR 305.

Statement Of Relevant Facts

¶24 MS was a customer at the Regal dry cleaners in Tucson, Arizona. He entered the business to drop off some clothes. As the clerk was writing up the receipt, two people came in behind him and said to get on the ground. He complied. TT2, p. 58.

¶25 He saw one weapon, out of his peripheral vision, but did not get a good look at the two people. He knew there were two people because heard two voices TT2, p. 60. He was unable to recognize either one of them. TT2, p. 69.

¶26 When he was face down, one of them stepped on the back of his head. He was bleeding and in a significant amount of pain. TT2, p. 61. He had a laceration on the left side of his eye that was stitched up and four facial fractures which required surgery. TT2, p. 62. He had vision problems for about a week. TT2, p. 63.

¶27 OR worked at Regal Dry cleaners. TT2, p. 74-75. He noticed an individual, Mexican, pacing outside the place of business but did not pay much attention to him. TT2, p. 75. When MS came in, he asked if the man outside had talked to him. MS replied that the guy didn't even approach him or say anything to him.

¶28 When OR pulled out a ticket and leaned down to write MS's information, a guy wearing a mask came in the store. OR claimed he was unable to identify the man. TT2, p. 77. He recalled that the man had goggles or glasses on because he could not see his eyes. The man had a gun and put it to MS's neck and told them both to get on the floor. TT2, p. 79.

¶29 The individual that he previously saw pacing outside the business was wearing blue pants and went straight for the cash drawer. The man in the mask ordered OR

down to the floor and then went to the back of the store. TT2, p. 79-80. The masked man stomped on MS's face when he was going around the corner. TT2, p. 83.

¶30 When the masked man came back around the wall, he told DR to get up and open the safes. One of the safes were already unlocked so DR opened it. TT2, p. 86. The masked man started going through stuff. TT2, p. 86-87.

¶31 Then the masked man walked out the door and slammed it behind him. He took a metal box that the dry cleaner keeps money in from the safe. TT2, p. 87.

¶32 When the other guy left, DR ran to the window and saw that the guy in the mask had already gotten in the car when the second guy was walking toward the car. The guy in the mask got out of the car and lifted up the backseat so that the other guy could get in. The man in the mask was in the front passenger seat. TT2, p. 91.

¶33 The guy in the mask was described as heavy set but he might have been wearing several layers of clothes. TT2, p. 92. DR testified that he did not remember what the man in the mask was wearing; however, Soto's attorney reminded DR on cross-examination that he told one of the officers that the masked man was wearing a gray shirt. Soto's attorney showed DR a photograph marked as State's 35 that showed Williams wearing a gray shirt. Attorney Berry asked DR if he recognized the person in State's 35 and he replied "no". DR also claimed he remembered a gray shirt, but not the shirt in State's 35. TT2, p. 110-111.

¶34 Williams' attorney confirmed with DR that when he went to do a show-up and looked at the three people who had been arrested, none of them looked heavy-set. TT2, p. 118-119. She also confirmed with DR that originally he told the detective that he did not see anyone getting out of or into the car. TT2, p. 123.

¶35 Christopher Popke worked at the business next door to the Regal Cleaners. He noticed a man pacing outside his business August 26, 2011. TT2, p. 27. Later that same day, the police took him to look at some people who were arrested and he was able to pick out the person he believed was the "pacer." TT2, p. 128. He was

unable to identify this person in the courtroom but claimed he was 90 to 95% certain that the person he picked out on August 26, 2011 was the "pacer". He claimed his identification was based on his clothing. TT2, p.129

¶36 He was shown a photograph marked as state's 34 and claimed to be a man "sitting in the middle over there". TT2, p.129. The record did not reflect which person he was identifying.

¶37 Jerold Olson, M.D. was a facial plastic surgeon in Tucson. TT2, p.134. He treated MS for his injuries which included a laceration and some facial fractures to the left side of his face. TT2, p.134. He repaired MS's bones surgically. TT2, p.135

¶38 Sergeant Peter Trusko is an officer with the Tucson Police Department. TT2, p.137. On August 26, 2011, he was dispatched to a call of an armed robbery at the Regal Cleaners and he responded to the business. TT2, p.137-139. He transported DR to a show-up. TT2, p.138. DR looked at three individuals. The only person he recognized was a man who he later determined was Defendant Valenzuela. TT2, p.139. He also took Popke to view the three defendants. TT2, p.139. Popke also identified Defendant Valenzuela. TT2, p.140.

¶39 Patricia Escarcega also worked at Regal cleaners and was the girlfriend of DR. TT2, p.142-143. She saw the news about the Robbery on the television and the pictures of the suspects. She recognized the photograph of Williams as a person who once was in the dry cleaners with one of their former employees. TT2, p.143

¶40 She recalled that Williams walked out through the side door with her and the former employee on a particular day and she gave him a ride to the bus stop. TT2, p.143. When they walked out the side entrance, they passed the area where the employees cashed out and the safes are contained. TT2, p.144. She was unable to identify Williams in the courtroom. TT2, p.145

¶41 Sergeant Brian Knight testified and identified a video taken from his police car on the date of the robbery while he was attempting to stop a White Mercury

Cougar. TT3, p.9-11. After a lengthy car chase, the vehicle was hit by the police car and stopped. TT3, p. 11-13. The driver got out of the car and ran. Knight saw the front seat passenger climbing out of the driver's door and the backseat passenger trying to crawl over into the front seat. TT3, p.17.

¶42 Sgt. Knight yelled at Williams to get on the ground and show his hands. Williams did not comply so he tried to pull Williams from the vehicle but Williams resisted. TT3, p.18. Knight struck Williams on the top of the head with the bottom of his pistol and was able to pull him out of the vehicle and put him on the ground. TT3, p.19.

¶43 Officer Jeannette Valenzuela was a patrol officer for the Tucson Police Department. TT3, p.50. Her police vehicle recorded the car chase. TT3, p. 51-52. The video was played for the jury. She found money in the area where she chased, and eventually stopped, Defendant Valenzuela. TT3, p. 58-61. She also found dry-cleaning tickets in Valenzuela's pant pockets. TT3, p.62.

¶44 Officer Mark Molina was a patrol officer with the City of Tucson Police Department. Officer Molina assisted in the car chase and the apprehension of the defendants. TT3, p. 86-89. The person Molina took into custody was wearing a gray T-shirt over another white long sleeved T-shirt and a pair of blue jeans. TT3, p. 96.

¶45 Detective Steve Erdman with the Tucson Police Department investigated the robbery by viewing and photographing the dry cleaners and meeting with witnesses. TT3, p 101-102. He also obtained a search warrant for the vehicle and photographed the vehicle. TT3, p. 105-106. During the vehicle search he located a gun and a ski mask which were placed into evidence. TT3, p. 109. He also found a cash box and placed it into evidence. TT3, p. 116. He did not find any gloves in the vehicle and had information that gloves were not used by the assailants. TT3, p. 125.

¶46 Per a stipulation, the jury was told that Williams was convicted of a felony at the time of the offense and his civil rights had not been restored. TT3, p. 130. The state then rested and Williams moved for a directed verdict which was denied by the court. TT3, p. 138-139.

¶47 After conferring with counsel, Williams decided not to testify or present evidence. TT3, p.142-143. Williams's counsel did avowal to the Court that he likely would have testified if the severance had been granted but the presence of the other Defendants and attorney Berry precluded him from being able to testify as he would wish to. As an offer of proof, Williams' counsel claimed that if Williams testified, she believed "Miss Berry would have likely counseled her client more rigorously to testify because I think their testimony would have been antagonistic to each other. And Mr. Soto would have been put in the position of having to refute some of Mr. Williams' testimony. And it was because we expected that would be the likely outcome that Mr. Williams decided not to testify." Williams' counsel agreed that Williams had several felony priors that he might have had to admit to if he testified. TT4, p.27-28

¶48 Defendants Valenzuela and Soto also decided not to testify.

¶49 In closing statements, Valenzuela's attorney asserted that Williams was responsible for planning and committing the robbery and that Valenzuela did not know that Williams had a gun. TT4, p.98-110.

¶50 On closing statements, Soto's attorney offered the following scenario: Well, so, what does Steven[Soto] know? All of a sudden he has Macho[Williams] in his car with a gun, probably screaming get the heck out of Dodge and he's, you know, driving normally, driving normally, and then we now have a situation where police are involved and he's going Oh My God, what do I do. He's driving erratically. He's trying to cause a collision, according to two seasoned police officers. And initially, the biggest point of all, is that he tries to pull over. Somebody stops him from doing that. Otherwise, it would have happened. He's pulling over, he's pulling over. You see several seconds of him trying to get to the side of the road, slowing down, and then continues to go. TT4, p.114-117.

¶50 Soto's attorney further stated: All right. So he's charged with -- Steven is charged with armed robbery and aggravated robbery. He is not part of any robbery. He's not one of

the two men that went in the store. And I don't know what Miss Cirillo [Williams's attorney] is going to say to you in her closing, but I think it's very clear to you all right now he was driving his white Mercury Cougar, had nothing to do with what happened in the Regal Dry cleaning business at all. He wasn't in there. He wasn't armed. He didn't have a mask. He never set foot in that business. All right? Obvious. I have to talk - let me back up. These are more for me, than for you guys, just so I don't forget anything. All right. So you have two men committing the robbery inside of the Regal Dry cleaning. And I have to agree, in part, with Mr. Fullin [Valenzuela's attorney]. So we have [DR's] testimony that [MS], the victim that got injured in this case, was already on the floor at the point that Mr. Valenzuela comes into the business. He's already on the ground at that point. And I hope you all remember, because a lot of you all took notes, that that's what his testimony was. So the robbery, the armed robbery, is already underway at that point that Mr. Valenzuela comes into the business. That's a big deal. It doesn't look like the kind of planned event that Miss Dent [prosecutor] would submit that this was. Okay. So, you know, go back and talk about this. Think about things in terms of your common sense, how an armed robbery is going to go down. It's going to be a little more organized than this. All Right? Yeah, there's such a thing as - we've all seen TV shows about stupid criminals and the dumb stuff that they do. But an armed robbery where one person has a mask and one person has a gun is suggestive of the other person whose involvement is coming in after the fact -- when it's already been underway, unarmed, unmasked -- that something different is going on here. I have an idea of what that was and I'm going to talk about that in a minute as it relates to [DR]. Okay. So of course, you already heard already from Mr. Fullin, Mr. Valenzuela doesn't threaten anybody. It sort of seems to be sort of this afterthought that he starts putting money in his pants essentially, and Mr. Fullin covered that . . . TTH, p. 141-121.

¶51 . . . All right. So let's talk a little bit about Macho Williams. You've heard that this man's girlfriend worked at the dry cleaning business. And both he and -- well, [DR] and

Miss Escarcega have criminal histories that you get to consider for their credibility. So you have [DR] that has a criminal history. You have Miss Escarcega that has a criminal history. Miss Escarcega is the friend of Macho's girlfriend. And [DR] says he doesn't know Mr. Williams even though his coworker's boyfriend has been in that business before. I don't know if this is reality, folks, I'm just suggesting to you how something like this can happen because Macho's the one that knows there are safes back there. And [MS] testifies that he thought that two guys came in at the same time and then he's on the ground. So when did Macho actually go in the business? You have Mr. Valenzuela looking in windows, looking to see you know, these guys are there to pick up Macho Williams; you know, they don't know where he's at. All right? And anytime you have a crime like this where you're going to be the one that wants to keep the money or take the money, you're going to have a fall guy or fall guys and you might end up pointing the finger. I listened to Miss Civil's opening statement and that was the suggestion, folks. And it makes sense because he was the one that was very well prepared. These other two guys have no clue..., TT4, p.124-125.

¶52 Williams' counsel then renewed her motion for severance, due to "codefendants counsel's remarks in their closing statements; also with regard to my previous argument regarding Mr. Williams' inability to take the stand given the presence of the codefendants." The court denied the motion. TT4, p.147.

Argument

1. The Trial court Abused its Discretion By Denying Appellants Motions To Sever.

¶53 A trial court's decision denying a severance will not be overturned absent an abuse of discretion. State v. Cruz, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). To prevail under this standard, Williams must show that, at the time he made his motion to sever, he had proved that his defense would be prejudiced absent severance. State v. Atwood, 171 Ariz. 576, 612, 832 P.2d 593, 629 (1992).

On appeal, he "must demonstrate compelling prejudice against which the trial court was unable to protect." Cruz, 137 Ariz. at 544, 672 P.2d at 473; State v. Murray, 184 Ariz. 9, 906 P.2d 542, 558 (1995).

¶54 The trial court shall sever defendants' trials when it is necessary for a fair determination of the guilt or innocence of any defendant. Murray, 906 P.2d at 558; See, Arizona R. Crim. P. 13.4(a)." Severance will also be granted if the court detects the presence or absence of unusual features of the crime or cases that might prejudice the defendant." Id.; see McGill, 580 P.2d at 1185.

¶55 According to State v. Turner, codefendants should be severed if: (1) severence is necessary to promote fair determination of guilt or innocence of any defendant, or (2) if court detects presence or absence of unusual features of crime or case that might prejudice defendants, such as when competing defenses are so antagonistic that a jury cannot believe both. 141 Ariz. 470, 473-474, 687 P.2d 1225 (1984); See McGill, 580 P.2d at 1185

¶56 Codefendants should be severed if cross-examination of a witness may elicit testimony prejudicial to a codefendant. Cruz, 672 P.2d at 473. The cross-examination of DR by defendant Soto was prejudicial to Williams. DR testified on direct examination that the guy in the mask was heavy set but he might have been wearing several layers of clothes. TT2, p92. DR further stated on direct that he did not remember what the man in the mask was wearing. However, Soto's attorney reminded DR on cross-examination that he told one of the officers that the masked man was wearing a gray shirt. Soto's attorney showed DR a photograph marked as state's 35 that showed Williams wearing a gray shirt. TT2, p. 110-111.

¶57 A defendant is prejudiced when (1) evidence admitted against one defendant is facially incriminating to the other defendant, (2) evidence admitted against one defendant has a harmful rub-off effect on the other defendant,

(3) significant disparity exists in the amount of evidence introduced against the Defendants, or (4) coDefendants present antagonistic, mutually exclusive Defenses or a defense that is harmful to the co-Defendant. Murray, 906 P. 2D at 558 citing State V. Grannis, 183 Ariz. 52, 58-59, 900 P.2D 1, 7-8 (1995).

¶58 Not only were the Defendants Defenses antagonistic, but Mr. Soto's defense prejudiced Williams. There were three people in the Vehicle and two people that went into the dry cleaners. Since Defendant Valenzuela was identified by his pants and the money and dry cleaning tickets in his pockets, the masked man was either Soto or Williams. Therefore, their defenses were clearly antagonistic. One of them went into the dry cleaners and one of them stayed in the car. No fingerprints, physical description, NO DNA and no witnesses identified which person it was who possessed the gun.

¶59 Moreover, Soto's counsel painted a picture on closing statements of Williams forcing Soto to drive at gunpoint and when Soto attempted to stop the car, Williams forcing him to drive onto ongoing traffic. This was tantamount to a duress defense without Defendant Soto actually testifying. Soto's counsel also pointed to Williams' prior felony convictions as reasons not to trust or believe Williams.

¶60 Williams' opening statement was challenged by Soto's counsel and upcoming closing statements challenged and questioned. Williams was forced to defend himself against the State's accusations as well as Soto's and Valenzuela's accusations. Consequently, Williams was prejudiced when he was forced to proceed to trial with Defendants Soto and Valenzuela.

¶61 Williams was unable to present a full defense since his numerous motions to sever were denied. Valenzuela and Soto presented similar Defenses claiming that Williams was the culpable party and they were being manipulated and/or forced to participate by Williams. They both

blamed the crime on Williams thereby exculpating each other and inculpating Williams.

¶62 The jury verdicts as to all the defendants clearly show that Valenzuela's and Soto's strategy benefitted them but prejudiced Williams. The jury was left in position that they could not believe all three defenses. The either had to believe Valenzuela and Soto or they had to believe Williams.

¶63 Williams asserted that he never left the vehicle and lacked knowledge of the robbery. The jury's questions to the trial court during deliberations showed they were not considering each defendant separately as they were instructed.

¶64 The trial court has a continuing duty to assure all defendants are given a fair trial. Assuming for the sake of argument that the grounds for the severance was not clear when the first motion was filed, the grounds became very clear after opening statements and even more clear during cross examination and closing statements. It was very clear throughout the trial that Valenzuela and Soto had a joint defense that was very antagonistic to Williams defense.

¶65 The trial court is obligated to grant a motion for severance at such time as it appears necessary. State v. Lawson, 144 Ariz. 547, 698 P.2d 1246 (1985) Williams asserts that the trial court erred in denying his first motion to sever made prior to the trial when Williams' attorney made the court aware of the joint defense between Soto and Valenzuela as well as Valenzuela's intention to exonerate Soto. The court should have granted the severance after opening statements when it became clear of the antagonistic defenses between all the defendants but particularly Williams and Soto. Lastly, the court should have granted the severance after closing statements made it abundantly clear that the jury could not believe both Soto's defense and Williams' defense and after Soto's attorney painted the picture of Soto being forced to drive at gunpoint by Williams.

¶166 Where the court reserves any doubt as to whether a severance should be granted, that doubt must be resolved in favor of the defendant to preserve their right to a fair and impartial determination of their guilt or innocence. State V. Roper, 140 Ariz 458, 462, 682 P.2d 464, 467 (Az. App. 1984).

2. The Trial court committed Reversible Error when He failed to Discharge Soto's Attorney Due to Her previous Representation of Appellant.

¶167 The trial court committed reversible error when he failed to hold a hearing and make a finding regarding the conflict of interest by Attorney Bobby Berry. Attorney Berry previously represented Williams in 2006 and represented co-defendant Soto in the trial before this court. Williams asserts that this was a conflict of interest or presented at least the appearance of impropriety, thus requiring that he be granted a new trial. See Gomez V. Superior Court, 149 Ariz. 223, 225-26, 717 P.2d 902, 904-05 (1986); State V. Harrison, 165 Ariz. 557, 559-60, 799 P.2d 898, 900-01 (App. 1990).

¶168 ER 1.9, addresses an attorney's duty to former clients. That rule provides in pertinent part that: A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in the which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.... ER 1.9 (a).

¶169 Although this ER May assist the court, Williams' issue is not whether Williams' former counsel violated the ethical rules by her representation of Soto, and against Williams. Rather, Williams' issue involves Williams' right to counsel and the limitations on that right.

¶170 After termination of a client-lawyer relationship, a lawyer has a continuing duty with respect to confidentiality and conflicts of interest.

ER 1.9 cmt. 1.

¶71 The determination of the facts and circumstances is left to the informed judgment of the trial court. Wheat v. United States, 486 U.S. 153, 164 (1988). In deciding whether the conflict, actual or potential, warrants disqualification, a court must determine if the subject matter of the first representation is substantially related to that of the second such that the attorney has divided loyalties. United States V. Ross 33 F.3d 1507, 1523 (11th Cir. 1994)

¶72 If the conflict could cause an attorney to improperly use privileged communications in cross-Examination, then the attorney should be disqualified from representation of the co-defendant. Id. Additionally, if the conflict could deter the attorney from intense questioning on cross-examination in order to protect privileged communications with the former client the attorney should be disqualified. Id.

¶73 The issues in Williams' case is that the trial court did not even attempt to examine whether or not Attorney Berry had a conflict that would potentially hurt her former client being Mr. Williams. When Attorney Berry was first appointed by the Court to represent Soto after the Public Defender's Office withdrew, Attorney Berry informed the court that she previously represented Williams but declared that it would not be a conflict. The court accepted this declaration without any inquiry. Even a potential conflict suffices for disqualification. Wheat, 486 U.S. at 164, 108 S. Ct at 1700.

¶74 The clerk's Record on Appeal does not show that either Williams or Soto executed a written waiver of any potential conflict. However, even if they executed written waivers, the Supreme Court rejected the notion that a written waiver by Williams could cure all problems created by a potential conflict. Wheat, 486 U.S. at 160. Thus even if waivers were executed, the trial court would not be relieved of its "independant duty to ensure that criminal

defendants receive a trial that is fair." Id.

¶75 This case is "substantially related" to the prior representation of Williams. A substantial relationship to the prior representation is not judged solely on the factual relationship between the two cases, but may also be presumed where there is "a reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation." Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980)

¶76 Attorney Berry represented Williams in charges of Burglary in the first Degree, a class 2 felony, Possession of Burglary Tools, a class 6 felony, 3 counts of Aggravated Assault, Deadly Weapon/Dangerous Instrument, a class 3 felony, and Aggravated Assault, Temporary/substantial Disfigurement, a class 4 felony. Attorney Berry represented Williams throughout his case which included a jury trial. Moreover, the prior felony offense Attorney Berry represented him on was used to prove that Williams was a prohibited possessor in the case now before this Court. It was also used to enhance his sentence as a historical prior felony conviction.

¶77 Undermining Williams' version of events was a significant goal for Soto. Attorney Berry, as Soto's counsel, discussed Williams' prior convictions and his lack of credibility because of the convictions in which she represented him. That these events are now public record "does not eliminate the possibility of an unwitting disclosure of confidential communications." United States V. Baker, 10 F.3d 1374, 1399 (9th Cir 1993).

¶78 As discussed above under the denial of Williams' motion to sever, Williams' defense and Soto's defense were antagonistic. Attorney Berry directly attacked Williams' credibility based on his prior felony offense, elicited damaging testimony about Williams during cross-Examination of the state's witnesses and argued on closing that Williams forced Soto, at gun point, to elude police during the car

chase. Williams asserts that this was a direct conflict of interest due to Attorney Berry's prior representation of Williams.

¶79 In the alternative, Attorney Berry's prior representation of Williams presented at least the appearance of impropriety, thus requiring that he be granted a new trial. See Gomez, 149 Ariz. at 225-26, 717 P.2d at 904-05; Harrison, 165 Ariz. 559-60, 799 P.2d at 900-01. Williams was forced to listen to his previous attorney attack his credibility and character at trial before the jury, his present attorney and the court. The case in which she represented Williams was the same felony conviction that she used to attack his credibility and character.

¶80 The trial court committed reversible error when he failed to inquire regarding the potential conflict of interest and make a finding whether or not Williams could get a fair trial and his right to counsel to be protected. The trial court also committed reversible error when he failed to disqualify Attorney Berry from representing Soto or at least severing Williams' case from Soto's case to assure Williams received a fair trial and protect his right to counsel. Thus, Williams' convictions should be reversed.

3. The Trial court Erred in failing to Enter A Judgement of Acquittal and/or Granting Appellant's motion for a New Trial since insufficient evidence was presented.

¶81 When considering claims of insufficient evidence, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." State v. Pena, 209 Ariz. 503, 917, 104 P.3d 873, 875 (App. 2005). A jury should decide the case whenever reasonable minds can differ on inferences to be drawn from the evidence. State v. Landrigan, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶82 The jury weighs the evidence and determines the credibility of witnesses, State

v. Cid, 181 Ariz. 496, 500, 892 P.2d 216, 220 App(1995). "Substantial evidence ... is such that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" State v. DiGiulio, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App.1992).

¶83 MS and DR were unable to identify Williams at the show-up and in the courtroom. DR specifically testified that the shirt worn by Williams in State's Exhibit 35 was not the same grey shirt he recalled the masked man was wearing. DR testified that the masked man was heavy set which did not match Williams' physical description. No physical description given of the masked man matched Williams.

¶84 Escarcega testified that she previously met Williams at Regal Cleaners and gave him a ride; however, she was unable to identify Williams in the courtroom as the person she previously knew.

¶85 The testimony of Sgt. Knight and DR differed regarding where Williams and the masked man were sitting in the vehicle. DR claimed that the masked man was in the front passenger seat. Knight saw the front seat passenger climbing out of the driver's door and the backseat passenger trying to crawl over into the front seat. TT3, p. 17. Sgt Knight claimed that he pulled Williams from the vehicle but Williams resisted. TT3, p. 18 Knight struck Williams on the top of the head with the bottom of his pistol and was able to pull him out of the vehicle and put him on the ground. TT3, p. 19. The testimony showed that defendants Valenzuela and Soto made it out of the vehicle after it stopped and ran. Both were detained by police after a foot chase.

¶86 No forensic evidence was presented tying Williams to the offense. His fingerprints were not found on the gun despite the testimony that the masked man was not wearing gloves. His DNA was not found on the mask located in the vehicle. Thus the trial court erred in failing to grant his Motion for Acquittal and/or Motion for New Trial since insufficient evidence was

presented.

4. Whether the Court in running the sentences for some of the Counts consecutive to others violated the prohibitions of A.R.S. § 13-116 and thus imposed illegal sentences?

¶87 On January 22, 2013, the petitioner was sentenced to presumptive prison terms totaling 51.5 years. R.T. 1/22/13 at 26. The court ran the sentences for counts 1 and 2 concurrent to each other and the sentences for Counts 3, 4, 5, and 6 concurrent to each other. I.D. However, the court ran the sentences for Counts 1 and 2 consecutive to the sentences for counts 3, 4, 5, and 6. I.D. Finally, the Court ran the sentences for Counts 7 and 8 consecutive to each other and to all other Counts. I.D.

¶88 The Petitioner filed a timely notice of appeal. On appeal the Petitioner argued that the trial court had erred in denying the motion to sever, in failing to Discharge co-defendant SOTO's attorney as she had previously represented the Petitioner, and in failing to enter a judgement of acquittal and/or granting a new trial based upon insufficient evidence. The Court of Appeals, however, found no error and affirmed the convictions and sentences. The Petitioner then filed a timely Notice of Post Conviction Relief.

¶89 Illegal Sentences "An act or Omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other then concurrent." A.R.S. § 13-116. In order to determine if two crimes constitute one act, the Arizona Supreme Court has held that: We will judge a defendant's eligibility for consecutive sentences by considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge --- the one that is at the essence of the factual nexus and that will often be the most

serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. §13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. §13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences. State v. Gordon, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989).

¶90 Counts Involving Victim D.R. With regard to the counts involving the first victim, D.R., the committed error in running the sentences for Counts One, and Two consecutive to those for Counts Three and five and for running the sentence for count Eight consecutive to all counts as all of these counts constituted one act.

¶91 Employing the Gordon analysis outlined above, the ultimate crime involving D.R. was Armed Robbery as contained in Count One of the indictment. The first prong of the Gordon analysis requires a determination of the facts of the case necessary to prove the elements of Armed Robbery and whether the remaining facts would support a conviction on the other charges. Id. In this case the facts used to prove the offense of Armed Robbery are that the Petitioner took the property of Regal Dry Cleaners from the immediate presence of D.R., that the taking was against D.R.'s will, that the Petitioner threatened D.R. with force, and that the Petitioner was armed with a weapon. Subtracting these facts from the case, there is insufficient evidence remaining to support the remaining crimes against D.R. With regard to Count Three, Aggravated Assault of D.R., there is no evidence remaining of a deadly weapon or an act that

could have put D.R. in "reasonable apprehension of imminent physical injury." State V. Price, 218 Ariz. 311, ¶16, 183 P.3d 1279, 1283. As to count five, Kidnapping of D.R., the question becomes a little more specific. To commit an act of Kidnapping one must restrain a person with the intent to aid in the commission of a felony. A.R.S. §13-1304(A)(3). "Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner that interferes substantially with such person's liberty... Restraint is without consent if it is accomplished by physical force, intimidation, or deception." R.T. 8/17/12 at 47. Taking away the evidence necessary to prove the Armed Robbery, specifically the threat of force and the use of the gun, there is no evidence remaining to prove that the Petitioner restricted D.R.'s movements without consent as no evidence remains of physical force or deception and the only intimidation was from the threatened use of the gun. Thus, under the first element of the Coerdon analysis the Petitioner would not be eligible for his sentences on Count One and Two to run consecutive for his convictions on Counts Three and Five. Coerdon, 161 Ariz. at 315, 778 P.2d at 1211.

¶792 With regard to count Eight, Possession of a Deadly Weapon by a Prohibited Possessor, the evidence remaining is that the Petitioner was a prohibited possessor and he had the gun prior to entering the store and after leaving the store. This would be sufficient evidence to support a conviction for possession of a Deadly Weapon by a Prohibited Possessor and the first prong of the Coerdon analysis would not prohibit consecutive sentences. I.D. However, the subsequent prongs of the Coerdon analysis would prohibit such sentences. I.D.

¶793 The second prong in the Coerdon analysis is to determine whether under

[1] The Petitioner is not conducting a Coerdon analysis as to Count Two, Aggravated Robbery as the Court ran this count concurrent to the Armed Robbery.

the totality of the circumstances it would have been factually impossible to commit the ultimate crime without committing the lesser crime. I.D. In the case at bar, the Petitioner could not have committed the Armed Robbery without using the gun and threatening D.R. with it, thus, the crime of Armed Robbery of D.R. in this case could not have been committed without also committing the crime of Aggravated Assault as charged in Count Three of the indictment. Furthermore, given the facts of this case, the Petitioner could not have Kidnapped D.R. without the intimidation of the weapon as D.R. testified that he complied with the Petitioner because of the gun. R.T. 8/15/12 at 99. With regard to count Eight, Possession of a Deadly Weapon by a Prohibited Possessor, the crime of Armed Robbery could not have been committed by the Petitioner without also committing the crime of Possession of a Deadly Weapon by a Prohibited Possessor. Accordingly the second prong of the Gordon analysis would prohibit the Court from running the sentences on Counts Three, Five and Eight consecutive to those for Counts One and Two. Gordon at 315, 778 P.2d at 1211.

¶194 The third and final prong of the analysis under Gordon is whether the Petitioner's conduct in committing the lesser offenses exposed D.R. to a different or additional risk of harm above and beyond that suffered as a result of the commission of the Armed Robbery. I.D. In the case at hand, the Petitioner used the gun and the threat of the gun to commit the Armed Robbery, the Aggravated Assault, and the Kidnapping. Nothing in these facts would support a finding that these lesser offenses increased the risk of harm to D.R. See Price at ¶¶18-19, 183 P.3d at 1284. Furthermore the possession of the gun necessary for the commission of the crime of Possession of a Deadly Weapon by a

Prohibited Possessor as alleged in Count Eight of the indictment was no greater or different then the possession needed to commit the crime of Armed Robbery and did not subject D.R. to any increased risk of harm

¶95 Under Gordon and A.R.S. 13-116 the Petitioner's conduct with regard to his crimes against D.R. and the Possession of a Deadly Weapon by a Prohibited Possessor constituted one act and consecutive sentences are prohibited. See Price at ¶20, 183 P.3d at 1284. The courts imposition of consecutive sentences for counts Three, Five, and Eight was error by the Court and constitute an illegal sentence.

¶96 Counts involving M.S. The court ran the Petitioner's sentences on Count's Four and Five involving M.S concurrent to each other but consecutive to Count Seven involving M.S. and Count Eight, the prohibited possessor count. This was error on the Court's part as the crimes arise from one act. A.R.S. § 13-116.

¶97 Turning to a Gordon analysis, the first prong of the test is to determine if, after subtracting the evidence necessary to prove the ultimate crime, there is evidence left to support a conviction on the lesser crimes. Gordon at 315, 778 P.2d at 1211. With regard to M.S., the Kidnapping of M.S. is the ultimate crime.[2] To commit an act of kidnapping one must restrain a person with the intent to aid in the commission of a felony. A.R.S. § - 13-1304 (A)(3). "Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner that interferes substantially with such persons liberty... Restraint is without consent if it is accomplished by physical force, intimidation, or deception." R.T. 8/17/12 at 47. Thus, the evidence needed to support the Kidnapping charge involving M.S. is that the Petitioner used a weapon and physically stepped on M.S. in order to commit an Armed Robbery against D.R.. When you subtract this evidence from that which could be used to support a charge of Aggravated

Assault Temporary/Substantial Disfigurement you are left only with the evidence concerning the injury suffered by M.S.. This is insufficient to support the crime of Aggravated Assault Temporary/Substantial Disfigurement. Thus, consecutive sentences are not supported for these charges.

¶98 With regard to Count Eight, when you subtract this evidence from that necessary to prove the crime of Possession of a Deadly Weapon by a Prohibited Possessor you are left with the fact that the Petitioner was a prohibited possessor and had the gun before entering the business and after leaving the business. Thus, you still have sufficient evidence to support a conviction on Count Eight of the indictment and the first prong of the Gordon analysis would not prohibit consecutive sentences. Gordon at 315, 778 P.2D at 1211. However, the subsequent prongs of the Gordon analysis would prohibit such sentences. I.D.

¶99 The second prong of the Gordon analysis requires one to determine whether the ultimate crime of Kidnapping could have been committed without committing the lesser included offenses of Aggravated Assault Temporary/Substantial Disfigurement and Possession of a Deadly Weapon by a Prohibited Possessor. I.D. In order to commit the Kidnapping the Petitioner had to restrain M.S. without his consent in order to commit the felony of Armed Robbery against D.R.. A.R.S. 13-1304(A)(3). In order to do this the Petitioner brandished a weapon and stepped on M.S. head with his foot. The testimony from M.S. is that the Petitioner and his accomplice were yelling at D.R. to open the safe, to complete the Armed Robbery, and D.R. was refusing saying he did not have the combination. R.T. 8/15/12 at 41. The Petitioner in response to this refusal stepped on the back of M.S. head. I.D. After

[2] The court ran count four, Aggravated Assault Deadly Weapon/Dangerous Instrument, concurrent with Count six and thus, a Gordon analysis of this count is not completed.

seeing this, D.R. then opened the safe. I.D. at 62. Ultimately, if the Petitioner did commit the Aggravated Assault Temporary/Substantial Disfigurement the Petitioner would not have been able to complete the crime of Armed Robbery and by extension the crime of Kidnapping. Furthermore, if the Petitioner did not commit the crime of Possession of a Deadly Weapon by a Prohibited Possessor, the Petitioner would not have been able to commit the crime of Kidnapping as the weapon was one of the means by which the restraint of M.S. was Achieved. Thus, in Kidnapping M.S. the Petitioner necessarily committed the crimes of Possession of a Deadly Weapon by a Prohibited Possessor and the crime of Aggravated Assault Temporary/Substantial Disfigurement. The second prong of the Coerdon analysis would not support consecutive sentences. Coerdon at 315, 778 P.2D at 1211.

¶100 The third and final prong of the Coerdon analysis requires a determination of whether the commission of the Aggravated Assault Temporary/Substantial Disfigurement and Possession of a Deadly Weapon by a Prohibited Possessor subjected M.S. to a risk of harm greater then that encompassed by the crime of Kidnapping. I.D. Given the facts of the instant case the Petitioner's actions in committing the lesser offenses did not subject M.S. to any greater risk of harm then he was subjected to by the Kidnapping. In order to effect the Kidnapping the Petitioner possessed the weapon and stepped on M.S.'s head. Thus, regardless of whether the Petitioner committed the lesser offenses or not M.S. did not suffer any greater risk of harm. The third prong of the Coerdon analysis would not support the imposition of consecutive sentences for counts four, six, seven, and Eight. I.D.

¶101 The courts imposition of consecutive sentences for Counts seven and Eight was error by the Court and constitutes an illegal sentence.

5. Whether trial and appellate counsel were ineffective for failing to object to and raise the issue if sentencing error concerning the imposition of consecutive sentences, and trial counsel's neglecting to have Soto's attorney discharged due to her previous representation of Appellant As well as trial counsel not securing a severance?

¶162 The United States Supreme Court has recognized, "that the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L. Ed. 2d 763 (1979)). In Strickland the Court went on to hold that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S.Ct at 2064. To be successful on a claim of ineffective assistance of counsel, the defendant must first demonstate that, "counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 104 S.Ct 2064; State v. Nash, 143 Ariz 392, 694 P.2d 222 (1984) "when evaluating a claim of ineffective assistance of counsel, the proper standard for attorney performance is that of reasonably effective assistance." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. Thus, a defendant asserting a claim of ineffective assistance of counsel must "show that counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S.Ct. 2064; Nash, 143 Ariz at 397-98, 694 P.2d at 227-28. If a defendant is able to make this showing then, "the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064. That is, the defendant must show that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Lee 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984) (quoting Strickland, 466 U.S. at 688, 104 S. Ct at 2068). "A 'reasonable probability' is less

than 'more likely than not' but more than a mere possibility." Id.
¶103 Deficient Performance. In the case before the Court both trial and appellate counsel acted Deficiently in failing to challenge the consecutive sentences imposed by the court. To be more specific, trial counsel was deficient in failing to attack and challenge conflict of intrest and secure a severence. Both trial and appellate counsel were deficient in failing to attack the fact that with regard to victim D.R. the court ran Petitioner's sentences for Counts One and Two Consecutive to Counts Three, Five, and Eight and the fact that with regard to Victim Stapleton the Court ran Petitioner's sentences for Counts Four and Six Consecutive to the sentences for Counts Seven and Eight.
¶104 Trial counsel's conduct fell below an objective standard of reasonableness when she failed to have Soto's attorney Berry discharged and failed to secure a severance and then failed to object to the court running the sentences for Counts Three, Five, and Eight consecutive to the sentences for Counts One and Two. Trial counsel's failure to object to the Court running the sentences for Counts Seven and Eight Consecutive to counts four and Six was also conduct which fell below an objective standard of reasonableness as the law in this area is clear, consecutive sentences are prohibited. Furthermore, Appellate Counsel's conduct fell below an objective standard of reasonableness when she failed to raise the issue of the illegal sentences on appeal. Both appellate and trial counsel's conduct was deficient in this case concerning the imposition of the illegal sentences. The Petitioner has met his burden with regard to the first prong of the strickland analysis.
¶105 In the case at bar the prejudice suffered by the Petitioner is obvious as he was illegally sentenced to consecutive terms of incarceration and was unable to testify at trial because of Soto's attorney Berry and the conflict because she had represented him previously those convictions were used to enhance

his sentence. And his trial attorney failing to get a severance resulted in the jury being prejudiced against appellant when Berry and Fullin attacked Appellant at trial. creating antagonistic defenses as is aforementioned in the first two questions presented. Appellant also suffered prejudice as he was illegally sentenced to consecutive terms of incarceration. If trial counsel had objected to Soto's attorney Berry being allowed to represent Soto, or at the sentencing to object to the illegal sentences or had appellate counsel raised the sentencing error on appeal the Petitioner's convictions could have been overturned or the trial severed or Soto's attorney Berry being discharged. Or his sentences would have been reduced. The Court or the Apellant Court would have had to overturn the convictions and or had to run the sentences involving D.R. Concurrent with each other and the sentences involving victim M.S. concurrent with each other. The court could have then run the counts involving victim D.R. Consecutive to those involving victim M.S. but would have been required to run Count Eight concurrent to all counts. Ultmately, this would have resulted in the Appellant not being convicted in the first place or resulted in a sentence of 31.5 years, twenty years less then the illegal sentence the Petitioner is currently serving. Serving a sentence twenty years greater then that authorized by law and not being convicted of the eight felonies in the indictment is proof of actual prejudice in this case. The Petitioner has met his burden with regard to the second prong of the Strickland analysis.

Wherefore In conclusion the facts as presented above prove that: 1. The trial court Abused its discretion when He Denied Apellant's motions to sever... 2. The trial court committed reversible Error when He failed to hold a hearing regarding Defendant Soto's Attorney's conflict of intrest and when He failed to Discharge Soto's Attorney due to Her previous Representation of Appellant... 3. The Trial court errored in failing to enter a judgement of Acquittal and/or granting Appellant's Motion for a New Trial since insufficent evidence was presented... 4. The court errored in running the sentences for some

of the counts consecutive to others violated the probibitions of A.R.S. § 13-116 and thus imposed illegal sentences. 5. The trial and appellate counsel were ineffective for failing to object to and raise the issue if sentencing error concerning the imposition of consecutive sentences and trial counsel's neglecting to have Soto's attorney discharged due to hes previous representation of Appellant As well as having the trial severed because of Antagonistic Defenses. The trial court failed to protect Appelants constitutional Rights, The Appeals Court of The State of Arizona failed to protect Appelants constitutional Rights, The Ninth Circuit court failed to protect Appellants constitutional Rights. Trial Counsel and Appelant Counsel failed to defend Appellant. As a result the Petitioner is serving an illegal sentence for convictions that were not proven beyond a reasonable doubt. Appellant prays that the petition for writ of certiorari should be granted. For the foregoing reasons, Mr. Williams "Petitioner" requests that his convictions be reversed and the indictment dismissed. Alternatively, Williams requests a new trial and new sentencing hearing if any of his convictions are upheld. Petitioner respectfully submits this praying that it is what The Court has asked for.

Respectfully Submitted,

Macho Joe Williams

Macho Joe Williams

12-29-2020

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Macho Joe Williams

Date: 12-29-2020

FILED

MAY 7 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MACHO JOE WILLIAMS, Petitioner-Appellant, v. CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 19-17343 D.C. No. 4:18-cv-00349-RM District of Arizona, Tucson ORDER

Before: M. SMITH and LEE, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

FILED

AUG 6 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MACHO JOE WILLIAMS, Petitioner-Appellant, v. CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 19-17343 D.C. No. 4:18-cv-00349-RM District of Arizona, Tucson ORDER

Before: McKEOWN and BADE, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Macho Joe Williams,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-18-00349-TUC-RM

ORDER

On July 15, 2019, Magistrate Judge Leslie A. Bowman issued a Report and Recommendation ("R&R") (Doc. 20), recommending that this Court deny Petitioner Macho Joe Williams's ("Petitioner") Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (Doc. 1). Petitioner filed an Objection to the R&R on July 31, 2019. (Doc. 22.) Respondents did not file a response to Petitioner's Objection.

I. Standard of Review

A district judge "may accept, reject, or modify, in whole or in part," a magistrate judge's proposed findings and recommendations. 28 U.S.C. § 636(b)(1). The district judge must "make a de novo determination of those portions" of a magistrate judge's "report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The advisory committee's notes to Rule 72(b) of the Federal Rules of Civil Procedure state that, "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation" of a magistrate judge. Fed. R. Civ. P. 72(b) advisory committee's note to 1983 addition.

See also Johnson v. Zema Sys. Corp., 170 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error."); *Prior v. Ryan*, CV 10-225-TUC-RCC, 2012 WL 1344286, at *1 (D. Ariz. Apr. 18, 2012) (reviewing for clear error unobjected-to portions of Report and Recommendation).

II. Background

In 2012, Petitioner was sentenced in Pima County Superior Court to an aggregate term of 51.5 years for "three counts of aggravated assault, two counts of kidnapping, and one count each of armed robbery, aggravated robbery, and weapons misconduct" after he, along with two co-defendants, was convicted of robbing a dry cleaner. (Doc. 16-3 at 95.) On direct appeal, he argued that the trial court erred "by denying his motions to sever and by failing to discharge a co-defendant's attorney who had previously represented Williams." (*Id.* at 67–78, 95.) He also argued that the evidence was insufficient to support his convictions. (*Id.*) On December 23, 2013, the Arizona Court of Appeals affirmed Petitioner's convictions and sentences but vacated his criminal restitution order. (*Id.* at 95–105.)

Petitioner filed a petition for post-conviction relief on June 10, 2015. (Doc. 16-3 at 114.) He argued that the trial court erred by running some sentences consecutive to others in violation of A.R.S. § 13-116. (*Id.* at 119.) He also argued that his prior counsel was ineffective "for failing to object to and raise the issue [of] sentencing error…" (*Id.* at 119.) The trial court granted relief in part, finding that the sentence for aggravated assault should run concurrently, not consecutively, to the sentences for armed robbery and aggravated robbery. (Doc. 16-4 at 75.) Defendant was resentenced thereafter. (*Id.* at 78–90.)

Petitioner filed a petition for review of the trial court's post-conviction relief order on October 31, 2016. (Doc. 16-4 at 92.) The Court of Appeals granted review but denied relief on February 8, 2017 (*Id.* at 148–153.) The Arizona Supreme Court denied review on September 12, 2017. (*Id.* at 155.)

In his timely § 2254 petition, filed on July 19, 2018,[1] Petitioner alleges four grounds for relief. (Doc. 1.) First, he claims (a) the trial court violated his constitutional rights by failing to sever his case from his co-defendant's and (b) failing to discharge his co-defendant's counsel on the grounds of a conflict of interest. (Doc. 1 at 6.) Second, Petitioner claims that his trial counsel was ineffective for various reasons, including a) failing to object to a false statement that a detective made to the grand jury, (b) failing to have his case severed from his co-defendant's or have his co-defendant's attorney removed, (c) failing to object to antagonistic defenses, and (d) failing to object to errors in sentencing. (*Id.* at 7.) Third, Petitioner claims that a detective lied to the grand jury that indicted him. (*Id.* at 8.) Fourth, Petitioner argues that there was insufficient evidence to support his convictions and sentences. (*Id.* at 9.)

In the R&R, Magistrate Judge Bowman recommends that this Court deny the § 2254 Petition on the grounds that Petitioner's "claims are procedurally defaulted or not cognizable." (Doc. 20 at 1.) The R&R finds that Claim 1(a)—that the trial court failed to protect Petitioner's constitutional rights by failing to sever his case from his co-defendants' cases—is procedurally defaulted because the Arizona Court of Appeals found it waived on direct appeal. (*Id.* at 5–6.) The R&R finds that Claim 1(b)—that the trial court failed to protect Petitioner's constitutional rights by failing to discharge his co-defendant's attorney on the grounds of a conflict of interest—is procedurally defaulted for the same reason. (*Id.* at 6.) The R&R further finds that these claims are not among those that would fall into the "sufficient constitutional magnitude" exception to the general waiver rule, and that Petitioner has not established cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default of the claims. (*Id.* at 6-7.)

The R&R finds that Claim 2 is procedurally defaulted because Petitioner did not raise the asserted ineffective-assistance-of-counsel arguments to the Arizona Court of Appeals, he cannot now return to state court to raise the claims in a new post-conviction relief petition, and he fails to demonstrate cause and prejudice or a miscarriage of justice.

[1] Respondents concede that Petitioner's § 2254 Petition is timely. (*See* Doc. 16 at 6-8.)

(*Id.* at 8.) The R&R finds that Claim 3—that a detective lied to the grand jury—is not cognizable in a habeas proceeding because Petitioner does not claim that the alleged lie "violated the Constitution or laws or treaties of the United States." (*Id.* at 9.)

Finally, the R&R finds that Claim 4 alleging insufficient evidence is unexhausted because, although Petitioner raised the issue to the Arizona Court of Appeals, he did not notify the court that he was raising a federal constitutional claim. (*Id.*) The R&R further finds that the claim is procedurally defaulted because Petitioner cannot now return to state court to properly present the claim, and that the procedural default cannot be excused because Petitioner fails to demonstrate cause and prejudice or a miscarriage of justice. (*Id.*) The R&R alternatively finds that Claim 4 fails on the merits. (*Id.* at 9–10.)

In his Objection to the R&R, Petitioner argues that: (1) the trial court violated his rights by failing to remove his co-defendant's counsel due to a conflict of interest (Doc. 22 at 2); (2) the trial court should have ordered a severance of his trial (*id.*); (3) his trial counsel was ineffective (*id.* at 3); and (4) his appellate counsel was ineffective (*id.*). He requests that "a complete review of his entire case be made." (*Id.*)

III. Applicable Law

The writ of habeas corpus affords relief to persons in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). If the petitioner is in custody pursuant to the judgment of a state court, the writ will not be granted unless prior adjudication of the claim –

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

28 U.S.C. § 2254(d).

Federal habeas claims are subject to the "exhaustion rule," which requires that the factual and legal basis of a claim be presented first to the state court. 28 U.S.C. § 2254(b)(1)(A); *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). If the petitioner

is in custody as a result of a judgment imposed by the State of Arizona, and the case does not involve a life sentence or the death penalty, he must fairly present his claims to the Arizona Court of Appeals to satisfy the exhaustion requirement. *See Castillo v. McFadden*, 399 F.3d 993, 998–99 (9th Cir. 2005); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). If state remedies have not been properly exhausted, the petition will normally be denied. *See Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991).

A petitioner does not satisfy the exhaustion requirement by merely presenting the state court with the facts necessary to state a claim for relief, or by asserting a general constitutional protection such as due process. *See Gray v. Netherland*, 518 U.S. 152, 163 (1996). And it is not enough that a "somewhat similar" state law claim was raised below. *Duncan v. Henry*, 513 U.S. 364, 366 (1995). Rather, the petitioner must identify the federal nature of the claim to the state court, by citing federal law or precedent, in order to exhaust the claim for purposes of federal habeas review. *See Baldwin v. Reese*, 541 U.S. 27, 32–33 (2004).

A federal habeas court generally may not review a claim that a state court has denied based upon an "independent and adequate" state ground. *See Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). The state ground must be independent of federal law and "well-established and consistently applied." *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003). Arizona's preclusion rule, Ariz. R. Crim. P. 32.2(a), is an independent and adequate state ground and its application, either directly to a claim by an Arizona court or its operation to preclude a return to state court to exhaust a claim, procedurally bars review on the merits by a federal habeas court. *Stewart v. Smith*, 536 U.S. 856, 860, (2002). Additionally, Arizona's time bar under Ariz. R. Crim. P. 32.4 is an independent and adequate state ground that makes return to state court futile and bars federal habeas review. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002); *Moreno v. Gonzalez*, 116 F.3d 409, 410 (9th Cir. 1997).

A claim is "procedurally defaulted" if a state court declines to address the claim on its merits for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230–31 (9th Cir.

2002). Procedural default can be based on either an express or implied procedural bar at the state level. *Robinson v. Schriro*, 595 F.3d 1086, 1100 (9th Cir. 2010). If a state court expressly applied a procedural bar, and that state procedural bar is both independent and adequate, a federal habeas court cannot review the claim on the merits. *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). If a state court applied a procedural bar but then alternatively addressed the merits of the claim, the claim is still barred from federal habeas review. *See Harris v. Reed*, 489 U.S. 155, 264 n. 10 (1989). "Fundamental error review does not prevent subsequent procedural preclusion." *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996). Furthermore, a federal court may apply procedural default to unexhausted claims where state procedural rules bar a return to state court to assert the claim. *Coleman*, 501 U.S. at 735 n.1.

"Procedural default is excused if 'the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'" *Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998). To establish "cause," a petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Coleman*, 501 U.S. at 753. To establish "prejudice," a petitioner must demonstrate actual, not possible, harm resulting from the alleged violation. *Murray v. Carrier*, 477 U.S. 478, 494 (1986). A "fundamental miscarriage of justice" occurs when a petitioner proves by clear and convincing evidence that no reasonable fact-finder would have found him guilty beyond a reasonable doubt, thereby demonstrating factual innocence. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995).

A federal habeas court cannot "reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 63 (1991). "A state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

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IV. Discussion

A. Claim 1

In Claim 1(a), Petitioner argues that the trial court failed to protect his constitutional rights by not severing his case from his co-defendant's case. (Doc. 1 at 6.) This claim was raised on direct appeal, and the Arizona Court of Appeals found that it had been waived. (Doc. 16-3 at 74–75, 98–9.) The Arizona Court of Appeals went on to analyze the claim for fundamental error and found none. (*Id.* at 99–102.) The R&R finds that Claim 1(a) is procedurally defaulted and that the Arizona Court of Appeals' fundamental-error analysis does not nullify the procedural bar. (Doc. 20 at 5–6.) In his Objection to the R&R, Petitioner argues the merits of Claim 1(a), but does not raise any specific arguments concerning the R&R's finding of procedural default. (Doc. 22 at 2.)

In Claim 1(b), Petitioner argues that the trial court failed to protect his constitutional rights by failing to discharge his co-defendant's attorney on the grounds of a conflict of interest. (Doc. 1 at 6.) This claim was raised on direct appeal, and the Arizona Court of Appeals found that it had been waived. (Doc. 16-3 at 75-77, 102.) The Arizona Court of Appeals then analyzed the claim for fundamental error and found none. (*Id.*) The R&R finds that Claim 1(b) is procedurally defaulted. (Doc. 20 at 6.) Petitioner's Objection argues the merits of the claim but does not raise any specific arguments concerning the R&R's finding of procedural default. (Doc. 22 at 2.)

As noted in the R&R, Petitioner argues in his reply brief that waiver does not apply to claims of "sufficient constitutional magnitude." (Doc. 19 at 3-4; *see also* Doc. 20 at 7-8.) In *Cassett v. Stewart*, the Ninth Circuit reversed a finding of procedural default, noting that a claim of "sufficient constitutional magnitude" can only be waived "knowingly, intelligently, and voluntarily," and that the district court had failed to consider this exception. 406 F.3d 614, 620-22 (9th Cir. 2005). However, as the R&R finds, the *Cassett* exception does not apply here because the Arizona Court of Appeals expressly applied waiver to Petitioner's claim and this Court is bound by the state court's ruling. *Bradshaw*, 546 U.S. at 76.

Because Petitioner's Objection does not raise any specific arguments concerning the R&R's finding that Claims 1(a) and 1(b) are procedurally defaulted, clear-error review is appropriate. Even if the Court were to review this portion of the R&R de novo, the Court agrees with the findings and recommendations of Judge Bowman. Claims 1(a) and 1(b) are procedurally defaulted.

B. Claim 2

In Claim 2, Petitioner argues that his trial counsel was ineffective for various reasons. (Doc. 1 at 7.) The R&R finds that none of the asserted ineffective-assistance-of-counsel claims are properly exhausted. (Doc. 20 at 8.) Petitioner states in his petition that he raised his ineffective-assistance-of-counsel claims on direct appeal. However, on direct appeal, Petitioner raised only the issues of severance, conflict of interest, and sufficiency of the evidence. (Doc. 16-3 at 67–78.) In his petition for post-conviction relief, Petitioner argued that trial counsel was ineffective for failing to object to sentencing errors (*id.* at 114-128), but he did not raise that argument in his petition for review with the Arizona Court of Appeals (Doc. 16-4 at 93), and he cannot do so now. *See* Ariz. R. Crim. P. 32.9(c).

Petitioner's Objection to the R&R argues the merits of Claim 2 but does not raise any specific arguments concerning the R&R's procedural default finding. Accordingly, clear-error review of this portion of the R&R is appropriate. Even if the Court were to review this portion of the R&R de novo, the Court agrees with the findings and recommendations of Judge Bowman. Claim 2 is procedurally defaulted.

C. Claim 3

In Claim 3, Petitioner argues that Detective Hunt lied to the Grand Jury about Petitioner admitting to the crimes. (Doc. 1 at 8.) The R&R finds that this claim is not cognizable in a habeas corpus proceeding because Petitioner does not claim that the alleged lie violated the federal Constitution or any federal law or treaty. (Doc. 20 at 9.) Petitioner does not object to this finding. (*See* Doc. 22.) The Court has reviewed this portion of the R&R for clear error and has found none.

. . . .

D. Claim 4

In Claim 4, Petitioner argues that the evidence presented at trial was insufficient to prove that he committed the crimes of which he was convicted. (Doc. 1 at 9.) Specifically, he claims that there was no evidence linking him to the scene of the crime or showing that he possessed the weapon, and that an eyewitness was unable to identify him. (*Id.*) The R&R finds that this claim is unexhausted because Petitioner failed to alert the state courts that he was raising a federal constitutional claim; that the claim is procedurally defaulted because Petitioner cannot now return to state court to properly exhaust the claim; and that Petitioner fails to show cause and prejudice or a miscarriage of justice to excuse the procedural default. (Doc. 20 at 9.) The R&R alternatively finds that the claim fails on the merits. (*Id.* at 9-10.) Petitioner does not object to the R&R's findings regarding this claim. (Doc. 22.) The Court has reviewed this portion of the R&R for clear error and has found none. Claim 4 is procedurally defaulted and, alternatively, can be denied on the merits.

E. Petitioner's objection concerning ineffective assistance of appellate counsel

Petitioner objects that his "appeal attorney failed as well." (Doc. 22 at 3.) This argument was not raised in the § 2254 Petition. (Doc. 1 at 6–9). "Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *see also Greenhow v. Sec'y of Health & Human Servs.*, 863 F.2d 633, 638–9 (9th Cir. 1988), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992). This argument is waived for failure to raise it in the § 2254 Petition.

Accordingly,

IT IS ORDERED that Petitioner's Objection (Doc. 22) is **overruled**. The Report and Recommendation (Doc. 20) is **accepted and adopted in full**.

IT IS FURTHER ORDERED that Petitioner's § 2254 Petition (Doc. 1) is **denied**. The Clerk of Court is directed to enter judgment accordingly and close this case.

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IT IS FURTHER ORDERED that, pursuant to Rule 11 of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability, because reasonable jurists would not find the Court's ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 478, 484 (2000).

Dated this 30th day of September, 2019.

Honorable Rosemary Márquez
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Macho Joe Williams,

Petitioner,

vs.

Charles L. Ryan; et al.,

Respondents.

CV 18-0349-TUC-RM (LAB)

REPORT AND RECOMMENDATION

Pending before the court is a petition for writ of habeas corpus filed in this court on July 19, 2018, by Macho Joe Williams, an inmate currently confined in the Arizona State Prison Complex in Florence, Arizona. (Doc. 1)

Pursuant to the Rules of Practice of this court, the matter was referred to Magistrate Judge Bowman for report and recommendation. LRCiv 72.2(a)(2).

The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order denying the petition. Williams' claims are procedurally defaulted or not cognizable.

Summary of the Case

Williams was convicted after a jury trial of "three counts of aggravated assault, two counts of kidnapping, and one count each of armed robbery, aggravated robbery, and weapons misconduct." (Doc. 16-3, p. 95) "The trial court sentenced him to a combination of consecutive and concurrent, enhanced prison terms totaling 51.5 years." *Id.*

On direct appeal, Williams argued that the trial court erred "by denying his motions to sever and by failing to discharge a co-defendant's attorney who had previously represented

Williams." (Doc. 16-3, p. 95); (Doc. 16-3, pp. 67-78) He further argued that the evidence was insufficient to support his convictions. *Id.* On December 23, 2013, the Arizona Court of Appeals affirmed his convictions and sentences but vacated his criminal restitution order. (Doc. 16-3, pp. 95-105)

Williams filed notice of post-conviction relief on December 30, 2013. (Doc. 16-3, p. 111) He filed his petition on June 10, 2015. (Doc. 16-3, p. 114) He argued that the trial court erred by running some sentences consecutive to others violating A.R.S. § 13-116. (Doc. 16-3, p. 119) He further argued "trial and appellate counsel were ineffective for failing to object to and raise the issue [of] sentencing error concerning the imposition of consecutive sentences . . . ." (Doc. 16-3, p. 119) The trial court granted relief in part explaining that the sentence imposed on Count 3, "AggAsslt," was erroneously imposed consecutive to the robbery charges and ordering a resentencing. (Doc. 16-4, p. 75)

Williams filed a petition for review on October 31, 2016. (Doc. 16-4, p. 92) He argued the trial court "abused its discretion and committed fundamental error in finding that some of the Petitioner's consecutive sentences did not violate the prohibition against double punishment." (Doc. 16-4, p. 93) The Arizona Court of Appeals granted review but denied relief on February 8, 2017. (Doc. 16-4, pp. 148-153) The Arizona Supreme Court denied review on September 12, 2017. (Doc. 16-4, p. 155)

On July 19, 2018, Williams filed in this court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1) He claims (1) the trial court failed to protect his constitutional rights by (a) not severing his case from his co-defendant's and (b) not discharging his co-defendant's attorney who had a conflict of interest because she previously represented Williams; (2) trial counsel was ineffective for (a) failing to object to a false statement that Detective Hunt made to the grand jury, (b) failing to have cases severed or the co-defendant's attorney removed, (c) failing to object to antagonistic defenses, and (d) failing to object to errors in sentencing; (3) Detective Hunt lied to the grand jury saying that Williams had admitted his guilt; and (4) the evidence was insufficient to prove Williams was the robber in the mask. *Id.*

On May 24, 2019, the respondents filed an answer. (Doc. 16) They argue "Williams' claims are either non-cognizable, procedurally defaulted, or without merit." (Doc. 16, pp. 1-2) Williams filed a reply on June 25, 2019. (Doc. 19)

Discussion

The writ of habeas corpus affords relief to persons in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). If the petitioner is in custody pursuant to the judgment of a state court, the writ will not be granted unless prior adjudication of the claim –

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

28 U.S.C. § 2254(d).

"[The] standard is intentionally difficult to meet." *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015). "'[C]learly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of th[e] [Supreme] Court's decisions." *Id.*

A decision is "contrary to" Supreme Court precedent if that Court already confronted "the specific question presented in this case" and reached a different result. *Woods*, 135 S.Ct. at 1377. A decision is an "unreasonable application of" Supreme Court precedent if it is "objectively unreasonable, not merely wrong; even clear error will not suffice." *Id.* at 1376. "To satisfy this high bar, a habeas petitioner is required 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 well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (punctuation modified)

If the highest state court fails to explain its decision, this court looks to the last reasoned state court decision. *See Brown v. Palmateer*, 379 F.3d 1089, 1092 (9th Cir. 2004).

Federal habeas review is limited to those claims for which the petitioner has already sought redress in the state courts. This so-called "exhaustion rule" reads in pertinent part as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State. . . .

28 U.S.C. § 2254(b)(1)(A).

To be properly exhausted, a claim must be "fairly presented" to the state courts. *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). In other words, the state courts must be apprised of the issue and given the first opportunity to rule on the merits. *Id.* "The state courts have been given a sufficient opportunity to hear an issue when the petitioner has presented the state court with the issue's factual and legal basis." *Id.*

In addition, the petitioner must explicitly alert the state court that he is raising a *federal* constitutional claim. *Casey v. Moore*, 386 F.3d 896, 910-11 (9th Cir. 2004), *cert. denied*, 545 U.S. 1146 (2005). The petitioner must make the federal basis of the claim explicit either by citing specific provisions of federal law or federal case law, even if the federal basis of a claim is "self-evident," *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000), or by citing state cases that explicitly analyze the same federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

If the petitioner is in custody pursuant to a judgment imposed by the State of Arizona, he must present his claims to the Arizona Court of Appeals for review. *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2005), *cert. denied*, 546 U.S. 818 (2005); *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999), *cert. denied*, 529 U.S. 1124 (2000). If state remedies have not been properly exhausted, the petition may not be granted and ordinarily should be dismissed without prejudice. *See Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). In the alternative, the court has the authority to deny on the merits rather than dismiss for failure to properly exhaust. 28 U.S.C. § 2254(b)(2).

A claim is "procedurally defaulted" if the state court declined to address the claim on the merits for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). Procedural default also occurs if the claim was not presented to the state court and it is clear the state would raise a procedural bar if it were presented now. *Id.*

The procedural default rule bars consideration of the petitioner's habeas claim if the state procedural rule is "independent and adequate." *Bennett v. Mueller*, 322 F.3d 573, 580-583 (9th Cir. 2003). The rule must be independent of federal law and must be "well-established and consistently applied." *Id.*

Procedural default may be excused if the petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998). "To qualify for the fundamental miscarriage of justice exception to the procedural default rule, however, [the petitioner] must show that a constitutional violation has probably resulted in the conviction when he was actually innocent of the offense." *Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir. 2008).

If a claim is procedurally defaulted and is not excused, the claim should be dismissed with prejudice because the claim was not properly exhausted and "the petitioner has no further recourse in state court." *Franklin*, 290 F.3d at 1231.

Discussion: Severance, Conflict of Interest

In Claim (1)(a), Williams argues that the trial court failed to protect his constitutional rights by not severing his case from his co-defendant's.

Williams raised the issue of severance in his direct appeal. (Doc. 16-3, pp. 74-75) This court will assume, without deciding, that William alerted the Arizona Court of Appeals of the federal nature of this claim.

The Arizona Court of Appeals held that the issue was waived because Williams failed to timely raise his motion to sever before trial and failed to renew the motion during trial "at or before the close of the evidence." (Doc. 16-3, p. 98); *see* 32.2(a)(3) The claim is therefore

procedurally defaulted. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). "Arizona's waiver rules are independent [of federal law] and adequate bases for denying relief." *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014).

This court notes that the Arizona Court of Appeals further analyzed this claim for fundamental error, which can excuse a defendant's waiver under certain circumstance, and found none. That court's fundamental error analysis does not nullify the state court's procedural bar. *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) ("Arizona's fundamental error review does not excuse a petitioner's failure to raise his federal claims with the Arizona Supreme Court."); *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996) ("Under Arizona law, fundamental error review does not prevent subsequent procedural preclusion."); *Lopez v. Ryan*, 2009 WL 3294876, at *11 (D. Ariz. 2009); *Woratzeck v. Lewis*, 863 F. Supp. 1079, 1095 (D. Ariz. 1994), *aff' sub nom. Woratzeck v. Stewart*, 97 F.3d 329 (9th Cir. 1996) ("Brought to its logical conclusion, Petitioner's contention [that fundamental error review is not an independent and adequate ground for default] would eliminate the utility of Arizona's procedural rules and virtually eradicate the doctrine of procedural default in Arizona.").

In Claim (1)(b), Williams argues the trial court failed to protect his constitutional rights by failing to discharge his co-defendant's attorney because she previously represented him.

Williams raised this issue in his direct appeal. (Doc. 16-3, p. 102) The Arizona Court of Appeals, however, found this issue waived. *Id.* Williams failed to raise it before trial, he failed to argue on appeal that the error is fundamental, and the court of appeals could "find no error that can be so characterized." *Id.* In fact, Williams' attorney told the trial court that "she had discussed the issue with Williams and he did not believe there was a conflict of interest." *Id.* This issue is procedurally defaulted. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). Williams does not "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *See Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998).

Williams argues in his reply brief that waiver does not apply to claims of "sufficient constitutional magnitude." (Doc. 19, pp. 3-4), *see* Ariz.R.Crim.P. 32.2 (2015) (comment) But while that may be true of certain claims, Williams' claims are not among those that fall within this exception to the general waiver rule.

It is instructive to examine a case that discusses this exception to the waiver rule, *Cassett v. Stewart*, 406 F.3d 614 (9th Cir. 2005). In that case, the Ninth Circuit reversed a district court decision holding that a petitioner's unexhausted claim was now procedurally defaulted. *Id.* at 620. The district court concluded that if the issue were raised now, the Arizona state courts would find it waived and raise a procedural bar. The Ninth Circuit reversed noting that under Ariz.R.Crim.P. 32.2(a)(3) a claim of "sufficient constitutional magnitude" can only be waived "knowingly, voluntarily, and intelligently," and that the district court did not consider this exception to the waiver rule. *Cassett*, 406 F.3d at 622. The Ninth Circuit unfortunately did not explain how to identify a claim that is of "sufficient constitutional magnitude." *Id.* The court did note however that "Arizona state courts are better suited to make these determinations, which may require both a fact-intensive inquiry, and an application of Arizona's complex case law on waiver." *Id.*

This case is different. Here, waiver was explicitly applied by an Arizona state court – the Arizona Court of Appeals. There is no guessing here about what the state courts would do if they were presented with the issue. They were presented with the issue and found it waived. Claim (1), therefore, does not present a claim "of sufficient constitutional magnitude" that it can only be waived "knowingly, voluntarily, and intelligently." *See Scott v. Ryder*, 2007 WL 505117, at *2 (D. Ariz. 2007) (*Cassett's* waiver exception did not apply where "the [state] trial court expressly held Petitioner's *Apprendi* claim to be precluded under Rule 32.2(a)(3)."), *aff'd*, 327 F. App'x 15 (9th Cir. 2009).

Williams further argues that the Arizona Court of Appeals erred when it concluded that his claims did not constitute errors of "sufficient constitutional magnitude" for the purpose of Rule 32.2(a)(3). This court, however, must accept state court rulings on state court issues. *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 604 (2005) ("[A] state court's

interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.").

Discussion: Ineffective Assistance of Counsel

In Claim (2), Williams argues that trial counsel was ineffective for (a) failing to object to a false statement that Detective Hunt made to the grand jury, (b) failing to have cases severed or his co-defendant's attorney removed, (c) failing to object to antagonistic defenses, and (d) failing to object to errors in sentencing. (Doc. 1, p. 7) Williams asserts that he presented these issues to the Arizona Court of Appeals in his direct appeal. (Doc. 1, p. 7) He did not. In his direct appeal, Williams raised only the issues of severance, conflict of interest, and sufficiency of the evidence. (Doc. 16-3, pp. 67-78) In his post-conviction relief petition, Williams did argue, in accordance with Claim (2)(d), that counsel was ineffective for failing to object to errors in his sentencing. He did not, however, raise this claim in his petition for review with the Arizona Court of Appeals. (Doc. 16-4, p. 93) In that petition, he argued the trial court erred in imposing the sentence, but he did not argue that trial counsel or appellate counsel were ineffective. *Id.*

Williams did not properly exhaust Claim (2). He did not properly exhaust Claim (2)(d) because, although he raised it before the trial court, he failed to raise it before the Arizona Court of Appeals. He cannot do so now. *See* Ariz.R.Crim.P. 32.9(c) (Petition for review must be filed "[n]o later than 30 days after the entry of the trial court's final decision on a petition . . . ."). It is procedurally defaulted. Williams cannot return to state court and raise Claims (2)(a)-(c) in a new post-conviction relief petition. *See* Ariz.R.Crim.P. 32.2(a) (waiver), 32.4 (deadline for filing). They are procedurally defaulted. *Lopez v. Schriro*, 2008 WL 2783282, at *9 (D. Ariz. 2008), *amended in part*, 2008 WL 4219079 (D. Ariz. 2008), and *aff'd sub nom. Lopez v. Ryan*, 630 F.3d 1198 (9th Cir. 2011); *see also Stewart v. Smith*, 202 Ariz. 446, 450, 46 P.3d 1067, 1071 (2002) ("The ground of ineffective assistance of counsel cannot be raised repeatedly."). Williams does not "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims

will result in a fundamental miscarriage of justice." *See Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998).

Discussion: Grand Jury Testimony

In Claim (3), Williams argues that "Detective Hunt lied to the Grand Jury" by falsely saying that Williams admitted to the crimes.

Williams does not claim that this alleged lie violated the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). Accordingly, this claim is not cognizable in a habeas corpus proceeding. *See also Schweder v. Ryan*, 2017 WL 9690341, at *9 (D. Ariz. 2017), report and recommendation adopted, 2018 WL 3145955 (D. Ariz. 2018) ("Because the right to a grand jury has not been applied to the states via the Fourteenth Amendment, Petitioner's challenge to the grand jury proceedings does not raise a question of federal law and is not cognizable on habeas review.").

Discussion: Sufficiency of the Evidence

In Claim (4), Williams argues the evidence was insufficient to prove he was the robber in the mask. *Id.*

Williams raised this issue in his direct appeal, but he did not alert the Arizona Court of Appeals that he was raising a federal constitutional claim. (Doc. 16-3, pp. 77-78) Claim (4) therefore was not fairly presented to the state courts. *Casey v. Moore*, 386 F.3d 896, 910-11 (9th Cir. 2004), *cert. denied*, 545 U.S. 1146 (2005).

Williams cannot return to state court and properly present his claim now. *See* Ariz.R.Crim.P. 32.2(a), 32.9(c). It is procedurally defaulted. Williams does not "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *See Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998). The court finds, in the alternative, that Claim (4) can be denied on the merits.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). On review for sufficiency of the evidence "the 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 v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979) (emphasis in original). Because this issue is raised in a petition for writ of habeas corpus, Williams is entitled to habeas relief only if the state court's decision on this matter was contrary to, or an unreasonable application of the *Jackson* standard. 28 U.S.C. § 2254(d)(1); *Juan H. v. Allen*, 408 F.3d 1262, 1274-75 (9th Cir. 2005).

At trial, the state presented evidence that two men robbed a Tucson dry cleaner in August of 2011. (Doc. 16-3, p. 95) The state offered eyewitness testimony from D.R., one of the employees, and M.S., a customer. *Id.* One of the robbers, a masked man, entered the store suddenly, pulled a gun, and ordered D.R. to open the safes in the back of the store. *Id.* The second robber, Valenzuela, entered the store shortly after the masked robber and "began emptying money from the cash drawer." *Id.* D.R. was able to identify Valenzuela because he had been pacing outside the store for some time before the robbery. *Id.* When the robbers left with the money, D.R. ran to the front of the store and looked out the window. (Doc. 16-3, p. 96) He saw a two-door, white Mercury Cougar. *Id.* Valenzuela got into the back seat and the masked robber got into the front passenger seat. *Id.* Police officers, in the area on unrelated business, began following the car, and a high-speed chase ensued. *Id.* The Cougar was eventually stopped by two patrol cars. *Id.* The driver fled but was apprehended. *Id.* The front seat passenger, later identified as Williams, was also arrested. (Doc. 16-3, pp. 96, 103) *Id.* Valenzuela fled on foot but was "quickly tackled to the ground." (Doc. 16-3, p. 96) "[T]he mask and the gun, both of which were used by the masked man during the robbery, were found on the front passenger seat." (Doc. 16-3, p. 103)

The Arizona Court of Appeals concluded that the evidence presented at trial was sufficient to prove that Williams was the robber in the mask. (Doc. 16-3, p. 103) D.R. testified

that the masked robber was "heavyset" and "the arresting officer described Williams as 'big boned' and 'stocky.'" *Id.* D.R. testified that the masked robber got into the front passenger seat of the Cougar, and that man was later identified as Williams. *Id.* Also, "the mask and gun, both of which were used by the masked man during the robbery, were found on the front passenger seat." *Id.*

Williams argues that the state failed to present fingerprint evidence or DNA evidence linking him to the crime, but as the Arizona Court of Appeals correctly explained, there is no requirement that the state present such forensic evidence. (Doc. 16-3, p. 104); *see also Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) ("Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction."). The decision of the Arizona Court of Appeals denying this claim was not contrary to or an unreasonable application of Supreme Court precedent.

In his Reply brief, Williams argues that even if Claim (3) or Claim (4) was not properly exhausted, this court can still consider granting relief on Claim (1) or Claim (2). (Doc. 19, p. 9) That is true, it can. Williams, however, is not entitled to relief on Claim (1) or Claim (2).

RECOMMENDATION

The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order Denying the petition for writ of habeas corpus. Williams's claims are procedurally defaulted or non-cognizable.

Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within 14 days of being served with a copy of this report and recommendation. If objections are not timely filed, they may be deemed waived. The Local Rules permit a response to an objection. They do not permit a reply to a response without the permission of the District Court.

DATED this 15th day of July, 2019.

Leslie A. Bowman

Leslie A. Bowman
United States Magistrate Judge

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Macho Joe Williams,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-18-00349-TUC-RM

JUDGMENT IN A CIVIL CASE

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

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

Brian D. Karth
District Court Executive/Clerk of Court

September 30, 2019

By s/ Ortiz
Deputy Clerk

Appendix B

United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 08/06/2020 at 2:28:42 PM PDT and filed on 08/06/2020

Case Name: Macho Williams v. Charles Ryan, et al
Case Number: 19-17343
Document(s): Document(s)

Docket Text:
Filed order (M. MARGARET MCKEOWN and BRIDGET S. BADE) Appellant's motion for reconsideration (Docket Entry No. [7]) is denied. See 9th Cir. R. 27-10. No further filings will be entertained in this closed case. [11780103] (WL)

Notice will be electronically mailed to:

AZ Eyman
Librarian: az.eyman.complex@azcorrections.gov, eym.cook.library@azcorrections.gov, eym.meadows.library@azcorrections.gov, eym.rynning.library@azcorrections.gov, eym.browning.library@azcorrections.gov, eym.smu1.library@azcorrections.gov
Honorable Rosemary Marquez, District Judge: rosemary_marquez@azd.uscourts.gov,
Katie_Callahan @azd.uscourts.gov
USDC, Tucson: azddb_tucappeals@azd.uscourts.gov

Case participants listed below will not receive this electronic notice:

Macho Joe Williams
#120182
ASPC - ARIZONA STATE PRISON COMPLEX - EYMAN
Browning Unit/SMU II
P.O. Box 3400
Florence, AZ 85132

The following document(s) are associated with this transaction:
Document Description: Main Document