APPENDIX F

FILED

NOV 23 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP STEVEN MATWYUK, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, ADOC, Respondents-Appellees.	No. 20-16316 D.C. No. 3:18-cv-08299-JAT District of Arizona, Prescott ORDER

Before: IKUTA and MILLER, Circuit Judges.

The court has considered all filings submitted by appellant in support of his request for a certificate of appealability. The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 14 2021

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

PHILIP STEVEN MATWYUK, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, ADOC, Respondents-Appellees.	No. 20-16316 D.C. No. 3:18-cv-08299-JAT District of Arizona, Prescott ORDER

Before: THOMAS, Chief Judge, and BRESS, Circuit Judge.

Appellant's motion for reconsideration (Docket Entry No. 13) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Philip Steven Matwyuk,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-18-08299-PCT-JAT

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 with prejudice.

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

June 5, 2020

By s/ D. Draper
Deputy Clerk

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Philip Steven Matwyuk,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-18-08299-PCT-JAT

ORDER

Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus. The Magistrate Judge to whom this case was assigned issued a Report and Recommendation ("R&R") recommending that the Petition be denied. Petitioner filed objections and Respondents responded to the objections. Petitioner moved to strike Respondents' response to his objections, but since such response is specifically authorized by Local Rule Civil 72(b)(2), the motion to strike will be denied.

I. Review of R&R

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). It is "clear that the district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219, 1226 (D. Ariz. 2003) ("Following Reyna-Tapia, this Court concludes that de novo review of factual and legal issues is required if objections are made, 'but not

otherwise.'"); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1032 (9th Cir. 2009) (the district court "must review de novo the portions of the [Magistrate Judge's] recommendations to which the parties object."). District courts are not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) ("the court shall make a de novo determination of those portions of the [report and recommendation] to which objection is made.").

However, global or general objections are insufficient to cause the Court to engage in a de novo review of an R&R. *See Kenniston v. McDonald*, No. 15-CV-2724-AJB-BGS, 2019 WL 2579965, at *7 (S.D. Cal. June 24, 2019) ("'When a specific objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to a de novo review.' Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C). To be 'specific,' the objection must, with particularity, identify the portions of the proposed findings, recommendations, or report to which it has an objection and the basis for the objection. *See Mario v. P & C Food Markets*, Inc., 313 F.3d 758, 766 (2d Cir. 2002).").

Here, Petitioner has filed both global objections and specific objections. (*See e.g.* Doc. 18 (Petitioner's objections) at 1 ("Petitioner objects to all adverse rulings in the report and recommendation...."); Doc. 23 (Respondents' response to Petitioner's objections) (noting that Petitioner starts each section of his objections by objecting to all conclusions of the Magistrate Judge and responding to only the specific objections)). For the reasons stated above, this Court will not consider the global objections. The specific objections are considered, de novo, below.

II. Review of State Court Decision

The Petition in this case was filed under 28 U.S.C. § 2254 because Petitioner is incarcerated based on a state conviction. With respect to any claims that Petitioner exhausted before the state courts, under 28 U.S.C. §§ 2254(d)(1) and (2) this Court must

deny the Petition on those claims unless "a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law" or was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). Further, this Court must presume the correctness of the state court's factual findings regarding a petitioner's claims. 28 U.S.C. § 2254(e)(1). Additionally, "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2).

III. Factual Background

The R&R recounts the factual and procedural history of this case, as well as the governing law, at pages 2–19. (Doc. 17 at 2-19). Neither party objected to this portion of the R&R and the Court hereby accepts and adopts it.

IV. Claims in the Petition

Petitioner raises 6 grounds for relief in his Petition. Petitioner also mentions "actual innocence" in his objections. (Doc. 18 at 2). However, Petitioner make no factual argument in this regard, and it is unclear whether he is asserting it solely as a basis to overcome his procedural default of ground 1. Regardless, because Petitioner makes no substantive argument regarding actual innocence, this objection is overruled.

A. Ground 1

In his first ground for relief, Petitioner claims his right to self-representation was not honored. (Doc. 17 at 19). The R&R concluded that this claim was procedurally defaulted at the state court, without excuse. (Doc. 17 at 19-21). Additionally, the R&R determined the claim was without merit. (*Id.*). On the merits, the R&R concludes that Petitioner never unequivocally advised the state trial court that he wished to represent himself; and even if he did, he later abandoned that request when he requested new counsel. (*Id.*).

Petitioner objects and argues he requested to represent himself. (Doc. 18 at 3). All

evidence pointed to by Petitioner shows that he requested to see the judge, but not that he requested self-representation. (*Id.*; *see also* Doc. 23 at 2-3). Moreover, the R&R is correct that after those requests to see the judge, Petitioner specifically requested new counsel thereby abandoning any possible request for self-representation. (Doc. 17 at 19-21).

Accordingly, while the Court agrees this claim is procedurally defaulted without excuse, the Court nonetheless denies relief on the merits. *See* 28 U.S.C. § 2254(b)(2) (allowing the Court to deny habeas relief on the merits notwithstanding Petitioner's failure to exhaust the claim). Thus, Petitioner's objections are overruled and the R&R is accepted on Ground 1.

B. Ground 2

Ground 2 centers on Petitioner's belief that the prosecutor elicited testimony that was excluded via a motion in limine. (Doc. 17 at 22-25). Petitioner argues that eliciting this testimony was prosecutorial misconduct, and that his trial attorney was ineffective for not objecting to the testimony and that his appellate attorney was ineffective for not raising this issue on appeal. (*Id.*).

As the R&R recounts, the in limine order precluded the victim from testifying that she believed that *Petitioner* had stolen her purse from inside her residence previously. (*Id.* at 22). The victim testified that she had a chair propped under the door in her residence on the night in question because her purse had previously been stolen. (*Id.*). The prosecutor did not elicit, and the victim did not offer, any testimony that the purse was stolen *by Petitioner*. The state court, in interpreting its own order, held that the testimony did not violate the in limine order. (*Id.*). In his objections, Petitioner persists in arguing that as a matter of fact the in limine order was violated by this testimony. (Doc. 18 at 4-5).

Consistent with the R&R, this Court finds that the state court's determination that its in limine order was not violated was not an unreasonable determination of the facts. (Doc. 17 at 22). The Court also accepts the R&R's conclusion that the law was not clearly established. (Doc. 17 at 24). Finally, the Court accepts the R&R's conclusion that because

the in limine order was not violated, there was no prosecutorial misconduct for eliciting the testimony, nor ineffective assistance of trial or appellate counsel for not objecting to the testimony. (Doc. 17 at 25). Accordingly, Petitioner's objections are overruled and relief on Ground 2 is denied.

C. Ground 3

In Ground 3, Petitioner claims his trial lawyer was ineffective for not investigating Petitioner's allegations that the victims in his case made threats against him on Facebook a week before the incident in question. (Doc. 18 at 7). Petitioner claims such an investigation could have aided his self-defense theory of the case. (*Id.*).

The R&R concludes there was neither deficient performance nor prejudice under *Strickland*, (Doc. 17 at 25-27), and that the state court's determination in this regard was not contrary to or an unreasonable application of clearly established federal law, nor an unreasonable determination of the facts (*Id.* at 27). Regarding deficient performance, as the R&R notes, *Strickland* cannot be satisfied by "vague and conclusory allegations that some unspecified and speculative testimony might have established a defense." (Doc. 17 at 26 (citations omitted)).

Here, Petitioner cannot show deficient performance because he did not testify to establish self-defense. Further, A.R.S. § 13-404(A), the self-defense statute, requires an immediate threat. (Doc. 23 at 5). Thus, even if Petitioner's counsel had investigated a week-old Facebook chat, it would not have been relevant to an "immediate" self-defense claim. Finally, Petitioner cannot show prejudice because four eyewitnesses testified inconsistently with his current self-defense claim. (Doc. 17 at 27).

Thus, the Court agrees with the R&R's conclusions. Petitioner's objections are overruled and relief on Ground 3 is denied.

D. Ground 4

In Ground 4 Petitioner claims he received ineffective assistance of counsel in that his counsel gave him inadequate advice on whether he should take the plea agreement.

Both the state court and R&R concluded that Petitioner did not receive inadequate advice at the plea negotiation stage because, although Petitioner claims he did not understand the range of the plea agreement by claiming that he did not know the plea offered was for 5-15 years, in fact the plea offered was for 15-45 years. (Doc. 17 at 28). Thus, Petitioner's claim that he would have taken a plea of 5-15 years is irrelevant because no plea of 5-15 years was ever offered by the State. Accordingly, his counsel could not be ineffective for failing to advise him of something that never existed. Thus, the state court's decision on this issue was not contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts. (*See* Doc. 17 at 28-29).

In his objections, Petitioner asserts that he was not advised of a plea to a stipulated sentence of 12 years (Doc. 18 at 9); but again, there is no evidence in the record that a 12-year stipulated sentence plea was ever offered by the State. Additionally, in Petitioner's Arizona Rule 11 examinations, Petitioner admitted that he understood that the pending plea offer was for a minimum of 15 years (Doc. 17 at 28), which undercuts any argument he makes now that his counsel did not explain it to him. Thus, Petitioner's objections are overruled on his claim that his counsel did not explain the plea offer to him.

Finally, Petitioner believes he was denied his "right" to a *Donald* hearing. (Doc. 18 at 10).

> A *Donald* hearing is a pre-trial hearing where a defendant is informed of any outstanding plea offer and the consequences of conviction so that a record of the defendant's rejection of the plea offer can be made to guard against any "late, frivolous, or fabricated claims" of ineffective assistance of counsel "after a trial leading to conviction with resulting harsh consequences." *Missouri v. Frye*, 566 U.S. 134, 14 (2012).

State v. Mendoza, 248 Ariz. 6, 455 P.3d 705, 715, ¶ 18 (Ct. App. 2019). The Court of Appeals explained further in an unpublished, non-binding decision:

> The purpose of a *Donald* hearing is to establish whether a defendant has suffered a constitutional injury by losing a favorable plea bargain as a result of ineffective assistance of counsel. *Donald,* 198 Ariz. at 418, ¶ 46, []…. Because there is no evidence that counsel failed to adequately communicate a plea offer or the consequences of a conviction to Defendant, the court did not err[] in failing to hold a *Donald* hearing.

State v. Svanoe, No. 1 CA-CR 08-0942, 2009 WL 5149956, at *5 ¶ 28 (Ariz. Ct. App. Dec. 29, 2009).

If the State of Arizona had created a right to a *Donald* hearing, the failure to hold one for Petitioner would have been an error of state law that is not cognizable as a federal habeas claim. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Moreover, as the foregoing cases illustrate, applying state law, there is no "right" to a *Donald* hearing in every case. Therefore, Petitioner's objection that he was denied his *Donald* hearing is overruled.

Based on all of the foregoing, the Court agrees with the R&R that the state court's decision that Petitioner's counsel was not ineffective for allegedly not communicating the plea agreement to him was not contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts. (*See* Doc. 17 at 28-29). Accordingly, Petitioner's objections on Ground 4 are overruled and relief on this claim is denied.

E. Ground 5

In ground 5, Petitioner claims that even if no one error entitles him to relief, the errors alleged in grounds 2, 3, and 4, cumulatively, should entitle him to relief. (Doc. 18 at 12). Petitioner raised this claim in state court, and the state court concluded that "the cumulative effect of multiple zeros is still zero." (Doc. 17 at 30 quoting Doc. 11-2 at 8). The R&R found that the state court's decision was not contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts. (Doc. 17 at 30). This Court agrees that based on the foregoing, there were no errors; accordingly, there are no errors to cumulate.

Petitioner objects, but again re-argues the same errors in grounds 2, 3, and 4. (Doc. 18 at 12). Based on the foregoing, this objection is overruled. Relief on ground 5 is denied.

F. Ground 6

Finally, Petitioner alleges in ground 6 that the police had a conflict of interest and that their failure to handle that conflict of interest in a particular way was a policy violation.

(Doc. 17 at 31). Additionally, Petitioner argues that his counsel was ineffective for not objecting regarding this alleged conflict. (*Id.*). Specifically, Petitioner argues that one of the investigating officers was a cousin of two of the victims. (*Id.*). The state court rejected this claim for 3 reasons: 1) there was no evidence the officer was actually a cousin to two of the victims; 2) even if the officer was a cousin to two of the victims, there was no evidence that there was a policy that was violated; and 3) even if one and two were true, there was no prejudice because Petitioner's conviction was based on the 4 eyewitnesses' testimony. (Doc. 17 at 31-32). The R&R concluded that all of these reasons were not contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts. (*Id.*).

With regard to reason one, Petitioner objects and argues he has proof that the officer was related to two of the victims. (Doc. 18 at 13). Petitioner cites Doc. 15 at page 70, which is an email from the officer. The officer states, "I have no idea if they are actually cousins of mine or not...[I have] never met or spoken with [victim 1] or [victim 2] prior to the case and was unaware of any familial relationship if there is one." As a matter of fact, the Court overrules Petitioner's objection claiming that this email is proof that the officer was related to the victims. Accordingly, the state court's finding on reason one was not an unreasonable determination of the facts.

With regard to reason two, Petitioner still fails to cite to any policy of the police department that would be implicated in this situation (assume there was a relationship). In his objections, Petitioner argues that the same conflict of interest rules that apply to attorneys should apply to police officers. (Doc. 18 at 14). Regardless of what Petitioner thinks should be true, the attorney conflict of interest rules do not apply to police officers. Therefore, the state court's determination that even if the officer was related to two of the victims, that did not create an error in Petitioner's trial nor was his attorney ineffective for not raising this issue was not contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts.

With regard to reason three, Petitioner makes no objection. The Court finds that the state court's third reason for denying ground six was not contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts.

Based on the foregoing, Petitioner's objections to the R&R on ground 6 are overruled. Relief on this claim is denied.

V. Conclusion

Based on the foregoing,

IT IS ORDERED that the motion to strike (Doc. 26) is denied.

IT IS FURTHER ORDERED that the Report and Recommendation (Doc. 17) is accepted and adopted; the objections (Doc. 18) are overruled; the Clerk of the Court shall enter judgment denying the Petition, with prejudice.

IT IS FINALLY ORDERED that pursuant to Rule 11 of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a certificate of appealability because Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Dated this 5th day of June, 2020.

James A. Teilborg
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Philip Steven Matwyuk,

Petitioner,

v.

David Shinn,[1] Director of the Arizona Department of Corrections, Attorney General of the State of Arizona,

Respondents.

No. CV 18-08299 PCT JAT (CDB)

REPORT AND RECOMMENDATION

TO THE HONORABLE JAMES A. TEILBORG:

Petitioner Philip Matwyuk, proceeding *pro se*, filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondents docketed a Limited Answer to Petition for Writ of Habeas Corpus (ECF No. 7), and Matwyuk filed a reply. (ECF No. 15). Matwyuk contends that he is entitled to habeas relief because of prosecutorial misconduct; ineffective assistance of counsel; he was denied his right to self-representation; and the violation of his rights to due process and equal protection. Respondents assert Matwyuk's claims are unexhausted, vague, or without merit.

[1] Effective October 21, 2019, David Shinn replaced Charles Ryan as Director of the Arizona Department of Corrections. Pursuant to Federal Rule of Civil Procedure 25(d), Shinn is automatically substituted as the party of record.

I. Background

An indictment returned June 7, 2012, charged Matwyuk with two counts of attempted first degree murder, one count of attempted first degree murder by domestic violence, one count of burglary in the first degree, six counts of aggravated assault, and two counts of aggravated assault by domestic violence. *State v. Matwyuk*, 2015 WL 3400939, at *1 (Ariz. Ct. App. 2015) (*See also* ECF No. 8-7 at 3).

Matwyuk was initially represented by the Public Defender's Office, but before his arraignment the case was assigned to Mr. DeRienzo. (ECF No. 11-2 at 2). On January 18, 2013, Matwyuk sought a hearing "to discuss negotiations based upon my inability to effectively communicate with my counsel . . . counter offers for plea negotiations, and myriad other client/attorney difficulties in effective counsel." (ECF No. 9 at 35). Mr. DeRienzo moved to withdraw as counsel in late February of 2013.[2] The state trial court noted the motion to withdraw alleged:

> . . . a complete breakdown in the relationship with the Defendant. Most of the reasons appeared to be based not on things the Defendant had done but on a letter his father had written to the Court and numerous other entities. Up until then the Defendant had never communicated to the Court any concerns about his representation by Mr. DiRienzo.

(ECF No. 11-2 at 2).

Mr. DeRienzo was allowed to withdraw and Mr. Craig was appointed to represent Matwyuk. Shortly before his trial date Matwyuk sent an inmate request to the trial court,

---

[2] The motion to withdraw, dated February 22, 2013, asserts:

> Undersigned counsel has been threatened with a lawsuit. Undersigned has been accused of representing the defendant only for the money. Undersigned counsel has been threatened with not just a bar complaint but to be publically (sic) humiliated with a letter to [the Governor, the Arizona Attorney General, the Mohave County District Attorney, the trial court judge,] CBS 60 Minutes, NBC Date Line, ABC 20/20, Phoenix Republic News and the ACLU.
>
> . . . Undersigned can not effectively represent the defendant. There is a plea offer on the table, however, should I convey it to the defendant, I will be further accused of being financially self-motivated. With these false allegations going to the highest levels of the Arizona government, it is also a set up for a future ineffective assistance of counsel claim.

(ECF No. 11-6 at 25-26).

asking for a new attorney. (ECF No. 11-2 at 3). At a final case management conference and competency hearing conducted January 17, 2014, Mr. Craig moved to withdraw as counsel of record, which motion was denied. (ECF No. 11-6 at 28).

> The Defendant sent to the Court a letter dated January 19, 2014, discussing what he thought were relevant issues to raise at trial in his defense. The Defendant sent to the Court an inmate request form dated January 25, 2014, indicating that he wanted to discuss with the Court the issues he had raised in his letter and indicating that he was being pushed into going to trial where there was a conflict of interest. At a hearing on January 28, 2014, the Court denied the Defendant's request for a new attorney. In none of the above communications to the Court did the Defendant ever indicate that he wanted to represent himself or to waive his right to be represented by an attorney.

(ECF No. 11-2 at 3).

Matwyuk's trial began on February 4, 2014. (ECF No. 12 at 3). The following summary of the evidence presented at Matwyuk's trial is taken from the Arizona Court of Appeals' decision denying relief on appeal:

> A.D. and defendant began a relationship in 2010 and lived at A.D.'s home with her two children from a previous relationship. In May 2012, A.D. and defendant ended their relationship, and defendant moved out of A.D.'s house. After defendant moved out, A.D. had the locks on the house changed and unplugged the garage door opener.
>
> On the morning of June 2, 2012, A.D's next door neighbor saw defendant walking back and forth around A.D's house. The neighbor watched as defendant attempted to open the garage door, tapped on the windows to try to remove the screens, and eventually walked around the side of the house toward the backyard. Because the neighbor was aware defendant no longer lived at the home, she picked up the phone to call the police. Prior to placing the call, however, the neighbor heard screams coming from A.D's house and she immediately dialed 911.
>
> A.D.; her two-year old daughter; her friend (M.H.); her sister (K.G.); K.G.'s two-year old son; and the children's fifteen-year old babysitter (M.J.H.) were asleep in the house. A.D. awoke to a tapping noise, and minutes later, saw defendant enter her bedroom, where M.H. was also sleeping, with a knife in his hands and a bandana wrapped around his face. A.D. began screaming and ran from the room. As she fled, she noticed she had been stabbed and was "covered in blood."
>
> M.H. awoke to discover he had been stabbed, was bleeding profusely, and was having difficulty breathing. M.H. has a prosthetic leg, which caused him to have limited mobility at times. Defendant was standing near him,

pointing a knife at him, and yelling that he would kill M.H. if he did not leave A.D. M.H. stood up, but soon lost consciousness. When M.H. regained consciousness he was lying on the floor of the hallway. M.H. yelled for help and unsuccessfully tried to move from the hallway until he eventually again lost consciousness.

K.G. heard her sister yelling, "He's in here" and ran out of her bedroom. When she saw defendant exiting the master bedroom, she tried to run back into her room. Defendant knocked her down and while on top of her attempted to stab her, stating "[y]ou're going to die. . . ." K.G.'s son was standing approximately a foot away and witnessed the altercation. K.G. broke free from defendant's grasp, and ran to the master bedroom to assist M.H. When defendant approached K.G. again, she managed to knock the knife out of his hands and eventually ran out the front door to get help.

M.J.H. awoke from sleeping on the couch with A.D.'s daughter, and saw A.D. bleeding and defendant trying to stab K.G. M.J.H. grabbed a phone to call 911. When defendant approached M.J.H. with the knife, she threw the phone at his head. Defendant picked up the phone, said "Oh, shit," and ran out the back door of the house. M.J.H. grabbed the young children and ran out of the front of the house to get help.

M.H. was hospitalized for ten days and remained unconscious for two days. He received nine stab wounds to his chest, neck and wrist. K.G. had wounds to both hands, her arm, her back, and her breast. The cuts to her hands and arm required stitches. A.D. had stab wounds to her left arm, under her right arm, her right hand and the back of her head. A.D. also received stitches for her injuries.

During the ensuing police search, defendant called the police from a pay phone at a truck stop. Defendant reported his location, and police took him into custody. Defendant had blood on his jeans and shoes. At the police department, the police advised defendant of his Miranda rights, and defendant agreed to participate in an interview with a detective.

After initially denying that he was at A.D.'s house that morning, the police confronted defendant with the next-door neighbor's eyewitness account placing him at the residence. Defendant then admitted that he went to the house to pick up personal items he had left there. Defendant stated that "he was let in the house" and went to A.D.'s bedroom to try to reconcile with her. When defendant saw M.H. in bed, he became extremely angry and grabbed a knife from the kitchen to scare M.H. and get him to leave the house. Defendant claimed that after A.D. began screaming, M.H. attacked him, and he had to fight M.H., A.D. and K.G. in order to get away. After defendant left the house, he called his father and told him that he thought he stabbed his girlfriend and asked that his father hide him.

Matwyuk, 2015 WL 3400939, at *1-2.

> Detective Brandon DeLong, Kingman Police Department, testified concerning his part in the investigation and his recorded interview of the appellant on June 2, 2012. []. An edited version of the recorded interview of [Matwyuk's] statements was admitted into evidence as Exhibit 19 and played for the jury. []. The trial court addressed the appellant concerning his right to testify or not, and based upon the statements of the defendant contained in Exhibit 19, the trial court advised the appellant that it would instruct the jury on the defense of justification.

Appellant's Br., *Matwyuk v. State*, 2014 WL 5790583, at *4 (Ariz. Ct. App. Oct. 8, 2014). Matwyuk did not testify at his trial. *Id.*[3]

---

[3] Detective DeLong's Case Report Detail states that after receiving his Miranda warnings Matwyuk "denied knowing anything that had happened over at the residence, and it was not until the interview with Philip had gone on for approximately 1 hour and 17 minutes that he began explaining what had happened." (ECF No. 9 at 43). Matwyuk then made the following statements, which were videotaped:

> Philip advised in essence that he had gone to the door and knocked, and that a girl (babysitter) had let him in. . . . Phillip [went to A.D.'s bedroom,] advised that there was a guy in the room. . . He advised that he then "just lost it."
>
> Philip advised that they didn't wake up, and that he went to the kitchen . . . he was thinking "Maybe I can scare this fucking guy out the door." Philip advised that he grabbed a knife from the kitchen . . .
>
> Philip advised he opened the [bedroom] door again . . . the "dude" then woke up. Philip paused to say that his (Philip's) cowboy boots were still on the side of his bed, and this guy is in his bed. Philip then stated "And the guy, when he woke up, freaked the fuck out. Like fucking bad." Philip advised that the guy jumped on top of him.
>
> Philip advised that he had the knife and was trying to get the guy off of him. He advised that Alicia's sister then put him in a head lock, and the girl that let him in started screaming. Philip advised that all he knew is that all these people were on top of him and all he was trying to do was scare somebody. Philip advised that he just "jetted" after everyone was off of him, and that he ran to his truck.
>
> ***
>
> Philip advised that he doesn't remember everything that "went down."
>
> ***
>
> Philip advised "Yea I had a knife with me but I didn't intent to use it." (sic)
>
> ***
>
> Philip advised that he was defending himself while in the residence.
>
> ***
>
> Philip advised that the guy had run over and jumped on him while he was in the door way. Philip described him to have "climbed up the wall" and ran off the bed then jumped on him.

(ECF No. 9 at 43-44).

The jury found Matwyuk guilty of burglary in the first degree (Count 4); attempted second degree murder as to M.H. (Count 2); aggravated assault (causing serious physical injury) as to M.H. (Count 5); aggravated assault (by deadly weapon or dangerous instrument) as to M.H. (Count 6); aggravated assault (causing temporary but substantial disfigurement or substantial loss of impairment of body organ) as to M.H. (Count 12); aggravated assault by domestic violence (by deadly weapon or dangerous instrument) as to A.D. (Count 7); aggravated assault (by deadly weapon or dangerous instrument) as to K.G. (Count 8); disorderly conduct with a weapon as to M.J.H. (Count 9); misdemeanor assault as to A.D (Count 10); and misdemeanor assault as to K.G. (Count 11). *Id.* at *2.

The jury also found three aggravating factors: causing physical, emotional or financial harm to the victim (Counts 2, 4, 5, 6, 7, 8, 9, 12); the use or threatened use of a dangerous instrument during the commission of offense (Counts 2, 4, 5, 6, 7, 8, 12); and the infliction or threatened infliction of serious physical injury (Counts 2, 4, 5, 6, and 12). The court found Matwyuk's lack of prior felony convictions to be a mitigating factor. *Id.*

On March 7, 2014, at the conclusion of a sentencing hearing, Matwyuk was sentenced to a mitigated term of seven years in prison on Count 4, an aggravated term of twelve years on Count 2, the presumptive term of seven and one-half years on Count 5, the presumptive term of seven and one-half years on Count 6, and the presumptive term of six years on Count 12. The court ordered the sentences on Counts 2, 5, 6, and 12 to run consecutively to Count 4, and to be served concurrently. The trial court also sentenced Matwyuk to an aggravated term of eight years in prison on Count 7, to be served consecutively to Count 2; a mitigated term of seven years on Count 8, to be served consecutively to Count 7; and a mitigated term of two years on Count 9, to be served consecutively to Count 8. On Counts 10 and 11, the trial court sentenced Matwyuk to six months in jail, with credit for time served. Accordingly, Matwyuk was sentenced to an aggregate term of 36 years' imprisonment; he was given credit for 643 days of presentence incarceration. Appellant's Br., *Matwyuk v. State*, 2014 WL 5790583, at *6.

Matwyuk filed a timely appeal. (ECF No. 8 at 16-17). His appointed appellate counsel filed an Anders brief, informing the appellate court he could find no meritorious claims to raise on Matwyuk's behalf. (ECF No. 8 at 19-26). Matwyuk did not file a pro se brief on appeal. The Arizona Court of Appeals reviewed the record for reversible error and affirmed Matwyuk's conviction and sentence. The appellate court concluded, *inter alia*, that "based on [its] review of the record . . . substantial evidence supports the jury's verdicts." *Matwyuk*, 2015 WL 3400939, at *3.

Matwyuk filed a timely notice for state post-conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. (ECF No. 8 at 34-36). Matwyuk was initially appointed counsel, but he ultimately chose to represent himself in his Rule 32 action and his request for advisory counsel was denied. (ECF No. 8 at 49-51; ECF No. 8-8). In a pleading filed by his appointed counsel on February 10, 2016, Matwyuk asserted the sentencing court erred by ordering the sentence for burglary to run consecutively to the sentence of attempted second degree murder and each of the sentences for aggravated assault, and also argued Matwyuk was denied the effective assistance of trial and appellate counsel because they failed to object to the ordering of these sentences. (ECF No. 8 at 38-47; ECF No. 8-7 at 4). In a pro per motion to amend his Rule 32 petition, Matwyuk alleged ineffective assistance of trial counsel, his actual innocence, and "also appeared to incorporate the claims for relief made in his attorney's Petition." (ECF No. 8-8 at 3).

Matwyuk filed a pro per amended petition on September 23, 2016, with the approval of the state trial court. (ECF No. 8-8 at 3-4; ECF No. 9 at 4-44; ECF No. 9-1 at 3-43; ECF No. 10 at 3-23; ECF No. 10-1 at 1-22). Matwyuk asserted he was denied his right to self-representation because the trial court ordered his counsel, Mr. Craig, to continue representing him "in spite of [his] numerous requests for dismissal and [counsel's] own motion" to withdraw. (ECF No. 9 at 7). Matwyuk also alleged: the trial court erred by allowing the prosecutor to elicit testimony which was previously excluded; that the elicitation of the testimony constituted prosecutorial misconduct; and he was denied the effective assistance of counsel because Mr. Craig failed to object to this testimony. (ECF

No. 9 at 10). Matwyuk also alleged counsel failed to investigate potentially exculpatory evidence, i.e., that A.D.'s uncle and father "explicitly threatened" him "with violence." (ECF No. 9 at 13-14). Matwyuk further asserted that his trial counsel "misadvis[ed]" Matwyuk of a "plea proposal" and failed to "accurately describe a plea. . . ." (ECF No. 9 at 16). Matwyuk alleged his counsel presented the plea offer "verbally" as a proposal to allow him to plead guilty to three counts of aggravated assault, "fifteen years a piece, for a sentence exposure of 15 years to 45 years in prison." (*Id.*). Matwyuk responded that he would agree to plead guilty or "sign for one count." (*Id.*). In his Rule 32 petition Matwyuk also asserted a claim of cumulative error of counsel. (ECF No. 9 at 17-18). Matwyuk also summarily alleged: "Investigative and police procedures were violated by allowing lead Detective B. Delong [to] investigate the case as he is cousins with [A.D.] and [K.G.]." (ECF No. 9 at 18).

The State responded to Matwyuk's Rule 32 petition. (ECF No. 11-1). Attached to the response were emails from the prosecutor to defense counsel regarding plea offers. An email from the prosecutor to Matwyuk's then-defense counsel dated August 21, 2012, states the prosecutor had "decided against a range option (likely would have been up to 20)," and was offering a plea offer which would require Matwyuk to plead guilty to one reduced charge of attempted second-degree against murder against A.D.; one count of attempted first degree murder against M.H.; one count of aggravated assault with a weapon against K.G.; and a reduced charge of attempted aggravated assault with a weapon against M.J.H.. (ECF No. 11-1 at 12). In return the State would dismiss the remaining counts of the indictment and agree to a stipulated sentence of 15 years' imprisonment. (*Id.*). The prosecutor noted he still planned "to file a motion to add Agg Factors." (*Id.*). An email dated June 10, 2013, from the prosecutor in response to an email from Mr. Craig ("I am going to need time to gain his confidence and persuade him to settle. what is the current offer?"), states: "I attached the original plea offer. At one point before the plea was withdrawn/rejected DeRienzon had me at up to 15 years total or stip to 12 years total. He has over 1 year credit. I will re-open the offer of up to 15 or stip to 12." (ECF No. 11-1 at

11). An email regarding a plea deal offered September 4, 2013, required Matwyuk to plead to one class 3 felony for each victim and admit one aggravating factor, and he would "Receive: 5-15 years DOC total dismiss the rest." (ECF No. 11-1 at 10).

In the State's response to the pro per petition the prosecutor also averred:

> The undersigned recalls that the Defendant was adamant that he had done nothing wrong and was acting in self-defense and wanted to go to trial which is supported by the Defendant's own exhibits offered with his Petition.
>
> The State believes Mr. Craig will testify . . . that he understood the plea offer sent on September 4, 2013, to mean a range up to fifteen years and further that he communicated the same to the Defendant. Additionally, it is the State's belief that Mr. Craig initiated Rule 11 proceedings, mostly, to make sure the Defendant understood what a grave mistake he was making by insisting for Trial. The State's beliefs and arguments are supported by the following:
>
> In Dr. Schiff's pre-Rule 11 Report, dated September 13, 2013, the Defendant is quoted on page 45 of 11, as saying: "they want to give me 15 years."
>
> In Dr. Schiff's Rule 11 Report, dated November 4, 2013, the Defendant, on page 3 of 13, is quoted as saying: "they want to give me 15 years."
>
> In Dr. Linskey's Rule 11 Report, dated November 8, 2013, the Defendant is quoted, on page 2 of 8 as saying: "I was offered a plea bargain for 15 years, and if I go to Court and am found guilty I could go to prison for the rest of my life . . . My lawyer thinks I am crazy to not take the plea but I want the Court to know all the facts in this case."
>
> In Dr. Harman's Rule 11 Report, dated December 17, 2013, the Defendant told the doctor that 'his attorney wants him to accept the Plea Bargain for 15 years' and that "he thinks I am crazy because I want to go to trial instead." The Defendant also told the doctor that '15 years or 50 years would be the same, both would result in the end of his life as he knows it.

(ECF No. 11 at 8-9).

Also attached to its response to Matwyuk's Rule 32 petition was an email from Detective DeLong regarding Matwyuk's claim that the detective was a cousin of two of the victims. (ECF No. 11-1 at 14). The detective stated:

> I have no idea if they are actually cousins of mine or not. It's entirely possible that they could be as I have a rather large family in the Kingman area with several extended cousins. However, I'd never met, or spoken with, Ms.

> Gisewhite or Ms. Dena prior to the case and was unaware of any familial relationship if there is one.

(ECF No. 11-1 at 13).

The state habeas trial court, which was also the convicting court, denied Rule 32 relief. (ECF No. 11-2 at 2- 9). The court concluded:

> The denial of the Defendant's request for a new attorney is a decision that he could have asserted was error on direct appeal. He did not do so on direct appeal, a procedure in which he was represented by an attorney different from his trial attorney. In fact, his attorney on appeal raised no specific issues and instead filed an Anders brief.

(ECF No. 11-2 at 3). Accordingly, the trial court found this claim waived by Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure. (*Id.*). The court further concluded: "The argument that his right to represent himself was denied is precluded because he never made that request." (*Id.*).

With regard to the claim that the "[c]ourt erred in allowing the State to elicit testimony that it had previously precluded," and that trial and appellate counsel were ineffective for failing to assert this claim, the court found:

> The problem with the Defendant's argument is that he misstates or maybe just misunderstands the Court's pretrial ruling and/or the evidence that was elicited at trial. Trial counsel for the Defendant filed a motion in limine to preclude any statement by the victim that she believed the Defendant had stolen her purse from inside her residence on a prior occasion. The State indicated that it did not oppose the motion and it was granted. Exhibit F to the Defendant's Petition reflects that the victim testified that when she went to bed there was a chair propped up against the back door because she had previously had a purse stolen. She did not testify that she believed the Defendant had entered her house and stolen her purse. This testimony did not violate the Court's order granting the Defendant's motion in limine, which apparently only sought preclusion of any testimony by the victim that she believed the Defendant had committed a prior bad act. It was not error for the Court to allow the testimony presented. Since it was not error, trial counsel was not ineffective for failing to object to it and appellate counsel was not ineffective for failing to argue it on appeal.

(ECF No. 11-2 at 4).

The trial court denied Matwyuk's claim that his counsel was ineffective for "failing to investigate potentially exculpatory and vital evidence" that "would have corroborated his story and his defense," noting Matwyuk "did not testify at trial, so there was no story or defense that he presented to be corroborated. . . . it seems somewhat disingenuous to argue that evidence would have corroborated a story that he chose not to tell." (ECF No. 11-2 at 4-5). The court further found it was not "clear the evidence referred to by the Defendant would have even been relevant at trial," because the foregone investigation was only with regard to the "peripheral issues" of the credibility of the victim's "sister, her one-legged male companion, or her teen-aged baby-sitter." (ECF No. 11-2 at 5).

The court construed Matwyuk's claim regarding counsel's misrepresentation of the plea offer as an allegation that he rejected an offer providing for a sentence of 15-45 years' imprisonment, but "learned at a later date that his actual exposure would have been between 5 and 15 years . . ." (ECF No. 11-2 at 5-6). The court found that although Matwyuk asserted "he would have pled to a single count of Aggravated Assault," he did not "even suggest that this is an offer that had ever been made available to him." (ECF No. 11-2 at 6). The court further noted Matwyuk did not "indicate" when he learned that his "actual exposure would have been between 5 and 15 years." (*Id.*). With regard to the emails submitted by the State, the court found: "Every offer appears to have required the Defendant to plead guilty to one felony involving each of the 4 victims, which is not what the Defendant is saying he would have agreed to." (*Id.*). The trial court further noted:

> . . . the State's response also directs the Court's attention to statements made by the Defendant to mental health experts in the process of the Rule 11 proceedings. Those statements made on 4 different occasions to 3 different mental health experts, made it clear that he understood that the pending offer was for 15 years in prison. This would corroborate not only that such an offer was made but that the Defendant knew the offer had been made. He was clearly not saying that there was an offer that had been made under which he could receive 45 years in prison. His position pretrial is probably best characterized in his comment that 15 or 50 years would be the same because his life would be over either way. The fact that he has rethought this position posttrial and has now concluded that 15 years is better than 36 years does not entitle him to relief. . . .

> The Defendant's assertion that he would have accepted [an offer of no more than 15 years] is questionable. . . . the Defendant's communications to the Court prior to trial made it obvious that he felt he had been set up and that he was not guilty . . . it seems obvious that he was not going to plead guilty if it meant that he could get up to 15 years in prison. . . .
>
> The Court determines that the Defendant has failed to raise a colorable claim that he was ever given the option of pleading to a single felony for a cap or even stipulated 15 year sentence, that he would have taken the deal, and that he was misadvised by his trial attorney that the offer was for a cap of 45 years.

(ECF No. 11-2 at 6-7). With regard to Matwyuk's assertion that counsel's cumulative errors deprived him of his Sixth Amendment right to the effective assistance of counsel, the court concluded: "The cumulative effect of multiple zeroes is still zero." (ECF No. 11-2 at 8). The court also concluded there was no evidence that, even if Detective DeLong was related to two of the victims, this "would [] have been a reason to dismiss the charges or preclude his testimony or any evidence he gathered. Presenting this evidence to the jury at trial would not have affected the outcome, which was obviously based on the eyewitness testimony of the 4 victims." (ECF No. 11-2 at 9).

Matwyuk sought review of the trial court's denial of Rule 32 relief. (ECF No. 11-4). Matwyuk argued: "the trial court erred in violating the right to self-representation by denying trial counsel's dismissal;" the prosecuting attorney committed misconduct by intentionally eliciting "prejudicial and previously precluded material;" "trial counsel erred by failing to object to the elicitation of prejudicial and previously precluded material;" appellate counsel erred by "failing to assert counsel's failure to object in his appellate brief;" trial counsel failed to investigate potentially exculpatory and "certainly vital evidence to the defense, culminating in ineffective assistance of counsel;" trial counsel was ineffective for misadvising Matwyuk of the plea proposal; the "cumulative effect" of trial counsel's "multiple deficiencies" deprived Matwyuk of his right to the effective assistance of counsel; and "investigative and police procedures were violated by allowing lead detective [to] investigate the case as he is cousins with [two of the victims]." (ECF No. 11-4 at 4-5).

In a decision entered November 7, 2017, the Arizona Court of Appeals granted review but summarily denied relief. *State v. Matwyuk*, 2017 WL 5147238, at *1 (Ariz. Ct. App. 2017). The appellate court concluded: "We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find that petitioner has not established an abuse of discretion." *Id.* Matwyuk sought discretionary review by the Arizona Supreme Court, which has not yet issued a decision. (ECF No. 11-6).

In his federal habeas petition Matwyuk asserts:

Ground 1:
"The court erred in violating the right to self-representation by denying trial counsel's dismissal in violation of 5th, 6th, 8th and 14th amendments to the United States Constitution." Matwyuk further asserts this claim was raised in his Rule 32 action and found procedurally barred for his failure to raise the claim in his appeal, noting his appellate counsel "overlooked" the issue.

Ground 2:
a. "The prosecuting attorney committed misconduct by intentionally eliciting prejudicial and previously precluded material."
b. "Trial counsel erred by failing to object to the elicitation of prejudicial and previously precluded material."
c. "Appellate counsel erred by failing to assert counsel's failure to object in his appellate brief affecting his 5th, 6th, 8th, 13th and 18th amendment rights."

Ground 3:
a. "Trial counsel failed to investigate potentially exculpatory and certainly vital evidence to the Defense," constituting ineffective assistance of counsel." Matwyuk contends counsel's performance was deficient for failing to investigate threats made against Matwyuk on Facebook, threats made by A.D.'s father and uncle, and a letter written by "Mr. Poss" to the trial judge "stating his involvement and knowledge of the case and how he would make his statement at trial."

Ground 4:
"Trial counsel erred in misadvising defendant of the plea proposal and failure to accurately describe a plea resolution. Resorting in ineffective assistance of counsel. Affecting petitioner's 5th, 6th, 8th, 13th and 14th amendment rights."

Ground 5:
"Trial counsel's multiple deficiencies if not enough separately to overturn-conviction and sentence here, the cumulative effect to rise to the level of ineffectiveness, which would affect his 5th, 6th, 8th, 13th and 14th amendment rights."
Ground 6:
"Investigative and police procedures were violated by allowing lead Detective B. Delong [to] investigate the case as he is cousins with" victims A.D. and K.G., which affected Matwyuk's rights to due process and equal protection.

II. Analysis

A. Governing Law

1. Exhaustion and Procedural Default

Respondent asserts some claims were not properly exhausted in the state courts and/or are too vague to ascertain if the claims were exhausted. Absent specific circumstances the Court may only grant federal habeas relief on a claim which has been properly exhausted in the state courts. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). To properly exhaust a federal habeas claim the petitioner must afford the state courts the opportunity to rule upon the merits of the claim by "fairly presenting" it to the state's "highest" court in a procedurally correct manner. *E.g., Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Rose v. Palmateer*, 395 F.3d 1108, 1110 (9th Cir. 2005). In non-capital cases arising in Arizona, the "highest court" test is satisfied if the habeas petitioner presented his claim to the Arizona Court of Appeals. *See Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Date v. Schriro*, 619 F. Supp. 2d 736, 762-63 (D. Ariz. 2008).

A petitioner has not exhausted a federal habeas claim if he still has the right to raise the claim "by any available procedure" in the state courts. 28 U.S.C. § 2254(c). Accordingly, the exhaustion requirement is satisfied if the petitioner is procedurally barred from pursuing a previously un-presented claim in the state's "highest" court. *See Woodford v. Ngo*, 548 U.S. 81, 92-93 (2006). Procedural default also occurs when a petitioner did present a claim to the Arizona Court of Appeals, but the appellate court did not address the

merits of the claim because it found the claim precluded by a state procedural rule. *See, e.g.*, *Atwood v. Ryan*, 870 F.3d 1033, 1059 (9th Cir. 2017).

Because the Arizona Rules of Criminal Procedure regarding timeliness, waiver, and the preclusion of claims bar Matwyuk from returning to the state courts to exhaust any unexhausted federal habeas claim, he has exhausted but procedurally defaulted any claim not presented to the Arizona Court of Appeals in his Rule 32 action. *See Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002). If a prisoner has procedurally defaulted a federal habeas claim in the state courts he is not entitled to a review of the merits of the claim absent a showing of cause and prejudice. *E.g.*, *Ellis v. Armenakis*, 222 F.3d 627, 632 (9th Cir. 2000). "Cause" is a legitimate excuse for the petitioner's procedural default of the claim, i.e., an objective factor outside of the defense's control, and "prejudice" is actual harm resulting from the alleged constitutional violation. *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011). It is the petitioner's burden to establish both cause and prejudice with regard to their procedural default of a federal habeas claim in the state courts. *Id.*; *Correll v. Stewart*, 137 F.3d 1404, 1415 (9th Cir. 1998). The Court may also consider the merits of a procedurally defaulted claim if the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Atwood*, 870 F.3d at 1059; *Cooper*, 641 F.3d at 327. A petitioner satisfies the "fundamental miscarriage of justice" test only by "establish[ing] that under the probative evidence he has a colorable claim of factual innocence." *Sawyer v. Whitley*, 505 U.S. 333. 339 (1992) (internal quotation marks omitted).

However, although relief may not be *granted* on an unexhausted claim absent a showing of cause and prejudice or a fundamental miscarriage of justice, a claim may be *denied* "on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). *See also Kirkpatrick v. Chappell*, 926 F.3d 1157, 1166 n.2 (9th Cir. 2019); *Runningeagle v. Ryan*, 686 F.3d 758, 769 n.3 (9th Cir. 2012). The Ninth Circuit Court of Appeals has also found that a claim which was defaulted in the state courts pursuant to a state procedural rule may be denied

on the merits. *See Ayala v. Chappell*, 829 F.3d 1081, 1096 (9th Cir. 2016); *Wafer v. Hedgpeth*, 627 F. App'x 586, 587 (9th Cir. 2015), *citing Runningeagle*, 686 F.3d at 777 n.10; *Salvador Montes v. Ryan*, 2019 WL 2011065, at *6 (D. Ariz. Apr. 3, 2019), *report and recommendation adopted*, 2019 WL 2009760 (D. Ariz. May 7, 2019). It appears from the record in this matter that the substance of all of Matwyuk's federal habeas claims were presented to the Arizona Court of Appeals in his Rule 32 action. Accordingly, all of his claims were exhausted in the state courts.

2. AEDPA Standard of Review

Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Court may not grant a writ of habeas corpus to a prisoner on a claim adjudicated on the merits in a state court unless the state court's decision denying the claim was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Harrington v. Richter*, 562 U.S. 86, 98 (2011), *quoting* 28 U.S.C. § 2254(d). *See also Lafler v. Cooper*, 566 U.S. 166, 172-73 (2012). A state court decision is contrary to federal law if it contradicts the governing law established by United States Supreme Court, or if it reached a different result from that of the Supreme Court on a set of materially indistinguishable facts. *See, e.g., Brown v. Payton*, 544 U.S. 133, 141 (2005); *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004). Furthermore, the state court's decision constitutes an unreasonable application of clearly established federal law only if it is objectively unreasonable. *See, e.g., Renico v. Lett*, 559 U.S. 766, 773 (2010); *Runningeagle*, 686 F.3d at 785. An unreasonable application of federal law is different from an incorrect one. *See Harrington*, 562 U.S. at 101. "'A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision.'" *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016), *quoting Harrington*, 562 U.S. at 101. *See also Dixon v. Ryan*, 932 F.3d 789, 801 (9th Cir. 2019).

Additionally, on federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of

rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). *See also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Furthermore, "[u]nlike § 2254(d), § 2254(e)(1)'s application is not limited to claims adjudicated on the merits. Rather, it appears to apply to all factual determinations made by state courts." *Kirkpatrick v. Chappell*, 926 F.3d 1157, 1170 (9th Cir. 2019).

The state habeas trial court determined Matwyuk's *Faretta* claim[4] was procedurally defaulted, and further concluded all of Matwyuk's claims were without merit. The Arizona Court of Appeals summarily affirmed the trial court's denial of relief. Because the appellate court's decision was unexplained, when deciding whether the state courts' denial of relief was clearly contrary to or an unreasonable application of federal law the Court must "look through" the unexplained decision to the last reasoned state-court decision. It must then presume that the unexplained decision "adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *Kayer v. Ryan*, 923 F.3d 692, 714 (9th Cir. 2019).

Because the state court found Matwyuk's *Faretta* claim both procedurally barred and without merit the Court may, absent a showing of cause and prejudice, deny the claim based on the procedural default:

> "[U]nless a [state] court expressly (not implicitly) states that it is relying upon a procedural bar, we must construe an ambiguous state court response as acting on the merits of a claim, if such a construction is plausible." *Chambers v. McDaniel*, 549 F.3d 1191, 1197 (9th Cir. 2008).
>
> Here, the state court expressly invoked a procedural bar in addressing Zapata's prosecutorial misconduct claim . . . Although the court went on to discuss the merits of the claim, because it separately relied on the procedural bar, the claim is defaulted. *See Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000) . . .

Zapata v. Vasquez, 788 F.3d 1106, 1111-12 (9th Cir. 2015). However, as previously noted a procedurally defaulted claim may be denied on the merits notwithstanding any procedural default of the claim in the state courts.

[4] *See Faretta v. California*, 422 U.S. 806, 807 (1975) (holding that a defendant has a right to self-representation in their criminal proceedings).

3. The *Strickland* Doctrine

To prevail on an ineffective assistance of counsel claim a habeas petitioner must demonstrate his attorney's performance was deficient and he was prejudiced by the alleged deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance will be found deficient only if counsel's actions "fell below an objective standard of reasonableness," as measured by "prevailing professional norms." *Id.* at 688. *See also Cheney v. Washington*, 614 F.3d 987, 994 (9th Cir. 2010). When evaluating defense counsel's performance the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . ." *Strickland* 466 U.S. at 689 (internal quotations omitted). To establish prejudice the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

To succeed on a claim of ineffective assistance of appellate counsel,

> the petitioner [must] demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue. [] Second, the petitioner must show prejudice, which in this context means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal.

Moormann v. Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010) (internal citations omitted).

It is the petitioner's burden to demonstrate both prongs of the *Strickland* test. *See Wong v. Belmontes*, 558 U.S. 15, 16-17 (2009); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Vega v. Ryan*, 757 F.3d 960, 969 (9th Cir. 2014). However, if a habeas petitioner cannot meet "the highly demanding and heavy burden of establishing actual prejudice" it is unnecessary to determine whether his counsel's performance was deficient. *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005). *See also Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."); *Rhoades v. Henry*, 611 F.3d 1133, 1141 (9th Cir. 2010); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of

the *Strickland* test obviates the need to consider the other."). Additionally, on federal habeas review an exhausted *Strickland* claim is reviewed under a "highly deferential" or "doubly deferential" standard. *Atwood*, 870 F.3d at 1057; *Visciotti v. Martel*, 862 F.3d 749, 770 (9th Cir. 2016). The "highly deferential" standard of review "'requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Visciotti*, 862 F.3d at 770, *quoting Strickland*, 466 U.S. at 689. The "doubly deferential" standard of review requires the habeas court to determine whether there is a "*reasonable argument* that counsel satisfied *Strickland*'s deferential standard . . ." *Harrington*, 562 U.S. at 788 (emphasis added). Even if the Court could conclude on de novo review that the petitioner might satisfy both prongs of the *Strickland* test, the "AEDPA requires that a federal court find the state court's contrary conclusions . . . *objectively unreasonable* before granting habeas relief." *Woods v. Sinclair*, 764 F.3d 1109, 1132 (9th Cir. 2014) (emphasis added).

B. Merits

Ground 1:
"The court erred in violating the right to self-representation by denying trial counsel's dismissal in violation of 5th, 6th, 8th and 14th amendments to the United States Constitution." Matwyuk further asserts this claim was raised in his Rule 32 action and found procedurally barred for his failure to raise the claim in his appeal, noting his appellate counsel "overlooked" the issue.

(ECF No. 1 at 6).

Matwyuk raised this claim in his Rule 32 action, and the state trial court concluded the claim was procedurally defaulted, i.e., waived pursuant to Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure:

> The denial of the Defendant's request for a new attorney is a decision that he could have asserted was error on direct appeal. He did not do so on direct appeal, a procedure in which he was represented by an attorney different from his trial attorney. In fact, his attorney on appeal raised no specific issues and instead filed an Anders brief.

(ECF No. 11-2 at 3). The court further concluded: "The argument that his right to represent himself was denied is precluded because he never made that request." (*Id.*). However, the state court then continued to address the merits of the claim. Although the state court discussed the merits of the claim, it also expressly invoked a procedural bar; accordingly, the claim is defaulted. *See Apelt v. Ryan*, 878 F.3d 800, 825 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 2716 (2019). Furthermore, because the claim is without merit, Matwyuk is unable to establish any prejudice arising from his procedural default of this claim. *Bradford v. Davis*, 923 F.3d 599, 614 (9th Cir. 2019).[5]

"[T]he invocation of the right of self-representation must be clear, unequivocal, and timely." *McCormick v. Adams*, 621 F.3d 970, 978 (9th Cir. 2010). Courts consider three factors to determine whether a request for self-representation is unequivocal: "the timing of the request, the manner in which the request was made, [and] whether the defendant repeatedly made the request." *Stenson v. Lambert*, 504 F.3d 873, 882 (9th Cir. 2007). In applying these factors, the habeas court gives significant deference to the state court's factual findings. *Id.*, 504 F.3d at 882 (citing 28 U.S.C. § 2254(e)(1) (state court's factual findings "shall be presumed to be correct"). The Ninth Circuit Court of Appeals has affirmed that whether a defendant made a clear and unequivocal assertion of their *Faretta* right is issue of fact. *Woods*, 764 F.3d at 1123; *Marshall v. Taylor*, 395 F.3d 1058, 1062 n.19 (9th Cir. 2005). Furthermore, pursuant to 28 U.S.C. § 2254(d)(2), the petitioner's burden is to demonstrate that the state court's finding that his request was equivocal "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

---

[5] As *Apelt* demonstrated, a federal court first considers whether the petitioner meets the cause and prejudice standard to overcome procedural default, and then undertakes deferential review of the state court's merits determination of the claim. *See id.* at 828-34 (finding ineffective petitioner's trial counsel and sentencing counsel but concluding that the state court's decision to the contrary regarding his trial counsel was not unreasonable). Similarly here, the district court is not precluded from conducting the prejudice inquiry because the California Supreme Court denied Bradford's claims on the merits.
Bradford v. Davis, 923 F.3d 599, 614 (9th Cir. 2019).

The state habeas trial court found, as a matter of fact, that Matwyuk had never made a request to proceed without counsel, a finding of fact which can only be rebutted with clear and convincing evidence, which Matwyuk does not provide. "[A] federal court may not second-guess a state court's fact-finding process unless . . . it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). *See also Hirschfield v. Payne*, 420 F.3d 922, 926 (9th Cir. 2005) (concluding that. when a state court has rejected a *Faretta* claim on the merits, federal habeas relief may be granted only if the state court's application of *Faretta* was objectively unreasonable). The state court's fact-finding process was neither wrong nor unreasonable. A relevant consideration in evaluating the equivocal nature of a purported *Faretta* request is whether the defendant made it "in the context of a substitution motion." *Wafer v. Hedgpeth*, 627 F. App'x 586, 587 (9th Cir. 2015); *Stenson*, 504 F.3d at 883 ("A clear preference for receiving new counsel over representing oneself [may] be an indication that the request, in light of the record as whole, is equivocal."). In Matwyuk's letters to the state trial court he seeks the appointment of different counsel, and never invokes his right to self-representation. Additionally, "the right may be waived through [the] defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982). A defendant may be deemed to have abandoned any invocation of *Faretta* when, as in this matter, the defendant acquiesces to counsel's representation during further proceedings, such as a trial. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); *Sandoval v. Calderon*, 241 F.3d 765, 774-75 (9th Cir. 2000); *Patterson v. Ascuncion*, 727 F. App'x 936, 937 (9th Cir.), *cert. denied*, 139 S. Ct. 174 (2018).

Even if Matwyuk invoked his *Faretta* right at the pretrial hearing, he clearly subsequently abandoned this right. To the extent Matwyuk contends his appellate counsel erred by failing to raise a *Faretta* claim he is unable to establish any prejudice arising from this alleged error because the claim is without merit.

> **Ground 2:**
> **a. "The prosecuting attorney committed misconduct by intentionally eliciting prejudicial and previously precluded material."**
> **b. "Trial counsel erred by failing to object to the elicitation of prejudicial and previously precluded material."**
> **c. "Appellate counsel erred by failing to assert counsel's failure to object in his appellate brief affecting his 5th, 6th, 8th, 13th and 18th amendment rights."**

(ECF No. 1 at 7).

Matwyuk raised these claims in his state habeas action, and relief was denied. With regard to the claim that the "Court erred in allowing the State to elicit testimony that it had previously precluded," the state habeas court found:

> The problem with the Defendant's argument is that he misstates or maybe just misunderstands the Court's pretrial ruling and/or the evidence that was elicited at trial. Trial counsel for the Defendant filed a motion in limine to preclude any statement by the victim that she believed the Defendant had stolen her purse from inside her residence on a prior occasion. The State indicated that it did not oppose the motion and it was granted. Exhibit F to the Defendant's Petition reflects that the victim testified that when she went to bed there was a chair propped up against the back door because she had previously had a purse stolen. She did not testify that she believed the Defendant had entered her house and stolen her purse. This testimony did not violate the Court's order granting the Defendant's motion in limine, which apparently only sought preclusion of any testimony by the victim that she believed the Defendant had committed a prior bad act. It was not error for the Court to allow the testimony presented. Since it was not error, trial counsel was not ineffective for failing to object to it and appellate counsel was not ineffective for failing to argue it on appeal.

(ECF No. 11-2 at 4). The state court's denial of relief was not clearly contrary to or an unreasonable application of federal law, nor was it an unreasonable interpretation of the facts before the state court.

A habeas petition will be granted for prosecutorial misconduct only when the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainright*, 477 U.S. 168, 181 (1986) (internal quotation marks and citation omitted); *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995), *citing*

Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). A determination that the prosecutor's questioning was improper is insufficient in and of itself to warrant reversal of the petitioner's conviction. *See Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). Furthermore, a claim of prosecutorial misconduct is analyzed under the prejudice standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). *See Karis v. Calderon*, 283 F.3d 1117, 1128 (9th Cir. 2002). Specifically, the inquiry is whether the prosecutorial misconduct had a substantial and injurious effect on the jury's verdict. *See Johnson*, 63 F.3d at 930. Accordingly, this alleged error only warrants habeas relief if, in the light of the record as a whole, the error was not harmless.

The motion in limine prohibited the admission of any testimony hinting or asserting Matwyuk had entered the victim's house and taken her purse. The following colloquy occurred just prior to empaneling the jury:

> THE COURT: Okay. So you're agreeing that not only will there not be discussion of the alleged stolen purse . . . but maybe more to the point, the question that "if I could get in this easily, I could return and do something else," you're agreeing that neither the fact that the purse is stolen, nor the statements suggesting that he could come back later and do something, you're agreeing that neither of those will come in?
> [THE PROSECUTOR]: Correct.
> THE COURT: All right, It is ordered granting the defense motion in limine to preclude statements by Alicia Dena to Officer DeLong.

(ECF No. 1-1 at 56). During trial Ms. Dena testified as follows:

> [THE PROSECUTOR]: And do you know if the -- going back to June 1st, when you come back from Carl's Junior and you guys are going to bed, do you know if — if there was a chair propped up against any door?
> A. Yes. The back door.
> Q. And why would there be a chair propped up there?
> A. Prior to that, we put the chairs under the door because I had a purse stolen. My purse was stolen out of there.

(ECF No. 1-1 at 58).

Although this testimony may have been a technical violation of the motion in limine, it is not a constitutional one. Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not. Only if there are no permissible inferences

the jury may draw from the evidence can its admission violate due process. To violate due process the evidence must "be of such quality as necessarily prevents a fair trial." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). "A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation will draw that meaning from the plethora of less damaging interpretations." *Williams v. Borg*, 139 F.3d 737, 744 (9th Cir. 1998). Here, the jury was not required to infer Ms. Dena believed or was testifying that Matwyuk had stolen her purse from the residence. The jury could have just as easily inferred that a random burglar had stolen her purse--the purpose of the testimony was to demonstrate that, on the night in question, Matwyuk could not have entered through the back door because it was blocked by a chair.

The state court's determination that the admission of this testimony did not violate Matwyuk's federal constitutional right to due process of law was not clearly contrary to or an unreasonable application of federal law, particularly given the weight of the evidence in this matter. The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process. The Supreme Court has not yet made a clear ruling that the admission of non-prejudicial testimony which was only arguably in violation of that precluded by a successful motion in limine constitutes a due process violation sufficient to warrant issuance of the writ. Absent such "clearly established Federal law," the Court should not conclude that the state court's ruling was an "unreasonable application" of federal law. *See Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009); *Larson v. Palmateer*, 515 F.3d 1057, 1066 (9th Cir. 2008). A federal habeas court may not disturb, on due process grounds, a state court's admission of even prior bad acts evidence unless "the admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair." *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). Furthermore, given the testimony of the four victims that Matwyuk entered the home, assaulted them with a knife, and then fled the residence, it is simply not plausible that the

admission of the challenged testimony had a substantial and injurious impact on the jury's decision.

Counsel's failure to object to this testimony was not clearly prejudicial. Counsel's failure to object did not infect the trial with prejudicial extraneous evidence so as to deprive Matwyuk of a fair trial. *See Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008) (upholding the denial of an ineffective assistance claim where counsel failed to object to cumulative testimony and the petitioner "fail[ed] to establish that but for the admission of that testimony 'there was a reasonable probability that . . . the result of the proceeding would have been different.'"). Trial counsel's "failure" to object may have been sound trial strategy, i.e., counsel chose not to draw the jury's attention to this testimony by objecting. *See Garrison v. McCarthy*, 653 F.2d 374 (9th Cir. 1981). Furthermore, the state court, interpreting its own order on the motion in limine, concluded the testimony did not violate that order. Accordingly, any objection was not likely to be granted and therefore the "failure" to object and the failure to raise a claim of prosecutorial misconduct on appeal were not prejudicial. *Moorman*, 628 F.3d at 1109-10 ("Failure to raise a meritless argument does not constitute ineffective assistance." (internal quotations omitted)).

> **Ground 3:**
> **"Trial counsel failed to investigate potentially exculpatory and certainly vital evidence to the Defense," constituting ineffective assistance of counsel." Matwyuk contends counsel's performance was deficient for failing to investigate threats made against Matwyuk on Facebook, threats made by A.D.'s father and uncle, and a letter written by "Mr. Poss" to the trial judge "stating his involvement and knowledge of the case and how he would make his statement at trial."**

(ECF No. 1 at 8).

Matwyuk raised this claim in his Rule 32 action. The trial court denied Matwyuk's claim that his counsel was ineffective for "failing to investigate potentially exculpatory and vital evidence" that "would have corroborated his story and his defense," noting Matwyuk "did not testify at trial, so there was no story or defense that he presented to be corroborated. . . . it seems somewhat disingenuous to argue that evidence would have corroborated a

story that he chose not to tell." (ECF No. 11-2 at 4-5). The court further found it was not "clear the evidence referred to by the Defendant would have even been relevant at trial," because the foregone investigation was only with regard to the "peripheral issues" of the credibility of the victim's "sister, her one-legged male companion, or her teen-aged baby-sitter." (ECF No. 11-2 at 5).

A petitioner bears the burden of demonstrating counsel's choices regarding the presentation of his defense constituted deficient performance and were prejudicial. *Matylinsky v. Budge*, 577 F.3d 1083, 1091 (9th Cir. 2009). A habeas petitioner cannot satisfy the *Strickland* test by asserting "vague and conclusory allegations that some unspecified and speculative testimony might have established his defense." *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991). *See also Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011) ("cursory and vague [ineffective assistance of counsel claims] cannot support habeas relief"). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that [they] did so for tactical reasons . . . " *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). A petitioner's speculation that counsel failed to adequately investigate a potential line of defense rarely creates a "reasonable probability" that a different result would have occurred absent the purportedly deficient representation. *Strickland*, 466 U.S. at 694.

Counsel's choice of a sound defense strategy, and any decisions made regarding the implementation of that strategy, are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. *See also Ayala v. Chappell*, 829 F.3d 1081, 1103 (9th Cir. 2016). It is well settled that "counsel's tactical decisions at trial . . . are given great deference and must similarly meet only objectively reasonable standards." *Elmore v. Sinclair*, 799 F.3d 1238, 1250 (9th Cir. 2015). *See also Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) ("trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy"). Specifically, the decision to forgo the use of specific witness testimony is a matter of strategy within trial counsel's discretion. *Matylinsky v. Budge*, 577 F.3d 1083, 1092 (9th Cir. 2009); *Raley v. Ylst*, 470 F.3d 792, 802 (9th Cir. 2006). Counsel "cannot be deemed

ineffective because, with the benefit of hindsight," a federal habeas court later determines "other trial strategies" or witnesses "may have been a better choice." *Turner v. Calderon*, 281 F.3d 851, 876 (9th Cir. 2002), *citing Strickland*, 466 U.S. at 689-90; *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994) ("We will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight."). Counsel is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects for success—for recommending that a weak claim be dropped altogether. *Knowles*, 556 U.S. at 127.

When considering whether a habeas petitioner was prejudiced by his counsel's alleged errors, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. When answering that question the federal habeas court must necessarily consider the strength of the state's case against the petitioner. *Allen v. Woodford*, 395 F.3d 979, 999 (9th Cir. 2005) ("even if counsel's conduct was arguably deficient, in light of the overwhelming evidence of guilt, [the petitioner] cannot establish prejudice"); *Johnson v. Baldwin*, 114 F.3d 835, 839-40 (9th Cir. 1997) (same). Even if Matwyuk could establish that counsel's performance was deficient, as noted by the state trial court the eyewitness testimony of the four victims, i.e., that Matwyuk was the perpetrator of an unprovoked assault, was powerful evidence of his guilt. Given the strength of the State's case in this matter the state habeas judge reasonably concluded that any deficient performance by counsel in failing to pursue the statements of "Mr. Poss," a jail inmate who asserted Ms. Dena was "setting up" Matwyuk, and the Facebook postings by a third-party suggesting that they would assault Matwyuk in retaliation for his assault of Ms. Dena, was harmless under *Strickland*. *See Djerf v. Ryan*, 931 F.3d 870, 883 (9th Cir. 2019).

Ground 4:
Trial counsel erred in misadvising defendant of the plea proposal and failure to accurately describe a plea resolution. Resorting in ineffective assistance of counsel. Affecting petitioner's 5th, 6th, 8th, 13th and 14th amendment rights.

(ECF No. 1 at 9).

Matwyuk raised this claim in his state habeas action. Matwyuk asserted that he rejected an offer providing for a sentence of 15-45 years' imprisonment, but "learned at a later date that his actual exposure would have been between 5 and 15 years . . ." (ECF No. 11-2 at 5-6). The state court concluded Matwyuk had asserted "he would have pled to a single count of Aggravated Assault but does not even suggest that this is an offer that had ever been made available to him." (ECF No. 11-2 at 6). The state court also found Matwyuk's claim based on "his attorney mis-advis[ing] him of a plea offer" was "difficult [] to assess because" Matwyuk did not submit documentation to support his claim. (ECF No. 11-2 at 5). The trial court further noted:

> . . . the State's response also directs the Court's attention to statements made by the Defendant to mental health experts in the process of the Rule 11 proceedings. Those statements made on 4 different occasions to 3 different mental health experts, made it clear that he understood that the pending offer was for 15 years in prison. This would corroborate not only that such an offer was made but that the Defendant knew the offer had been made. . . . .
>
> The Defendant's assertion that he would have accepted [an offer of no more than 15 years] is questionable. . . . the Defendant's communications to the Court prior to trial made it obvious that he felt he had been set up and that he was not guilty . . . it seems obvious that he was not going to plead guilty if it meant that he could get up to 15 years in prison. . . .
>
> The Court determines that the Defendant has failed to raise a colorable claim that he was ever given the option of pleading to a single felony for a cap or even stipulated 15 year sentence, that he would have taken the deal, and that he was misadvised by his trial attorney that the offer was for a cap of 45 years.

(ECF No. 11-2 at 6-7).

The state court concluded, as a matter of fact, that Matwyuk's counsel did not misadvise him as to the terms of the State's plea offer. The state court's factual

determination was not unreasonable in light of the record before the court. Matwyuk has not presented clear and convincing evidence to rebut the presumption of correctness that applies to the state court's determination of the facts regarding whether defense counsel correctly advised Matwyuk of the terms of the plea offer. Additionally, the Court must defer to the state court's credibility determinations. *See Aiken v. Blodgett*, 921 F.2d 214, 217 (9th Cir. 1990) ("Section 2254(d) 'gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court.'"); *Wells v. Ryan*, 2015 WL 9918159, at *19 (D. Ariz. Aug. 13, 2015), *report and recommendation adopted*, 2016 WL 319529 (D. Ariz. Jan. 27, 2016).

The record supports the state habeas court's finding that a fifteen-year plea offer was made and rejected by Matwyuk, and Matwyuk points to no evidence, much less the requisite clear and convincing evidence, that rebuts the presumed correctness of that finding. Accordingly, the Court must defer to the state court's factual finding that a fifteen-year plea offer was made to, and rejected by, Matwyuk.

Furthermore, to establish the prejudice prong of a *Strickland* claim in this context, Matwyuk must establish that but for counsel's alleged error he would have pleaded guilty and not insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Matwyuk's self-serving assertion that he would have taken the plea capping his sentence at 15 years' imprisonment, without more, is insufficient to establish that his counsel misadvised him as to the terms of the State's proffered plea agreement. *Cf. Clark v. Lewis*, 1 F.3d 814, 823 (9th Cir. 1993) ("pure speculation" insufficient to establish prejudice in plea context); *Turner*, 281 F.3d at 881 (finding the defendant's "self-serving statement, made years later," was insufficient to establish the defendant was unaware of the potential outcome if they insisted on going to trial rather than accept a plea offer); *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) ("Given [defendant's] awareness of [ ] plea offer, his after the fact testimony concerning his desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer."). The

record in this matter supports the trial court's finding that Matwyuk insisted on going to trial rather than accept any plea offer.

> **Ground 5:**
> **"Trial counsel's multiple deficiencies if not enough separately to overturn-conviction and sentence here, the cumulative effect to rise to the level of ineffectiveness, which would affect his 5th, 6th, 8th, 13th and 14th amendment rights."**

(ECF No. 1 at 10).

Matwyuk raised this claim in his state habeas action. With regard to Matwyuk's assertion that counsel's cumulative errors deprived him of his Sixth Amendment right to the effective assistance of counsel, the state habeas court concluded: "The cumulative effect of multiple zeroes is still zero." (ECF No. 11-2 at 8). This determination was not an unreasonable application of federal law.

In some cases, although no single error of counsel is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still sufficiently prejudice a defendant to require his conviction be overturned. *Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003). Cumulative error is more likely to be found prejudicial when the state's case against the defendant is weak. *Cf. Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) (discussing cumulative error in the context of allegations of the violation of due process, and concluding: "If the evidence of guilt is otherwise overwhelming, the errors are considered 'harmless' and the conviction will generally be affirmed.").

All of Matwyuk's ineffective assistance of counsel claims are based upon conclusory and unsupported allegations, or are without merit. Matwyuk's arguments focus on counsel's alleged failures, without noting that the cumulative error standard focuses on a showing of prejudice. When there is not even a single constitutional error, there is nothing to accumulate to satisfy the prejudice prong of the *Strickland* test. *Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011); *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002). Accordingly, the state court's decision denying this claim was not an unreasonable application of *Strickland.*

Ground 6:
a. "Investigative and police procedures were violated by allowing" Detective DeLong to investigate the case, "as he is cousins with victims A.D. and K.G.," in violation of Matwyuk's rights to due process and equal protection.
b. Counsel was ineffective for failing to establish that Matwyuk was prejudiced due to the conflict of interest that existed between the officer and defendant.

(ECF No. 1 at 11).

Matwyuk contends that Detective DeLong had a "conflict of interest" which should have precluded him from testifying against Matwyuk, because the detective was related to the victims of Matwyuk's alleged offenses. (*Id.*). He also asserts his trial counsel was ineffective for failing to "establish a record of prejudice" arising from this conflict of interest. (*Id.*).

The state habeas court concluded there was no evidence that, even if Detective DeLong was related to two of the victims, this "would [] have been a reason to dismiss the charges or preclude his testimony or any evidence he gathered. Presenting this evidence to the jury at trial would not have affected the outcome, which was obviously based on the eyewitness testimony of the 4 victims." (ECF No. 11-2 at 9). The state court's factual finding, that there was no evidence Detective DeLong was indeed related to A.D. and K.G., has not been rebutted with clear and convincing evidence. Matwyuk fails to produce or point to any evidence that Detective DeLong is in fact related to two victims in this case; Detective DeLong himself was not aware that he was related to A.D. or K.G. at the time of Matwyuk's trial.

Matwyuk argues that Detective DeLong's investigation was in violation of Kingman Police Department policies and regulations governing conflicts, which in turn violated Matwyuk's right to due process of law. However, even if Detective DeLong is related to two of the victims, Matwyuk does not produce any evidence that the Kingman Police Department has a policy or regulation prohibiting a cousin of a victim from investigating a crime against their cousin. Furthermore, Matwyuk has failed to demonstrate

police misconduct that constituted a violation of his due process rights. The trial court found that, as a matter of state law, "[t]he fact that an officer at the scene was related to 2 of the victims would not have been a reason to dismiss the charges or preclude his testimony or any evidence he gathered." (ECF No. 11-2 at 9). Generally, information about a testifying or investigative witness, which is not helpful to the defense, is immaterial; a criminal defendant is not entitled to disclosure of any information which is immaterial and no violation of due process occurs when non-material evidence is "withheld" from a defendant. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963). Matwyuk has not established that Detective DeLong testified falsely, was biased in his investigation, or that he could have been impeached due to his purported yet unknown relationship to two of the victims. Accordingly, Matwyuk presents no basis to conclude that the state court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established federal law. Matwyuk cites no federal authority that Detective DeLong's participation in his case violated any law, much less his constitutional rights to due process and equal protection. And the violation of a state rule or procedure does not state a claim for violation of the defendant's federal constitutional right to due process of law. *See, e.g., Gilmore v. Taylor*, 508 U.S. 333, 348-49 (1993); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). *Cf. Little v. Crawford*, 449 F.3d 1075, 1083 (9th Cir. 2006) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."); *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997) (holding that a petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process"). Because the claim is without merit, defense counsel's performance was neither deficient nor prejudicial for failing to assert the claim.

III. Conclusion

All of Matwyuk's claims are without merit, and the state courts' denial of the claims was not clearly contrary to or an unreasonable application of federal law.

IT IS THEREFORE RECOMMENDED that Matwyuk's petition seeking a writ of habeas corpus be **denied.**

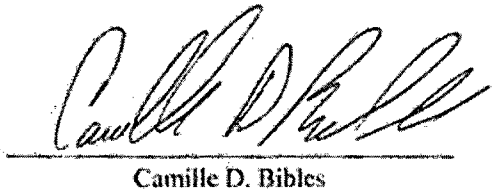
This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the District Court's judgment.

Pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Pursuant to Rule 7.2 of the Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length.

Failure to timely file objections to any factual or legal determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo appellate consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure to file timely objections to any factual or legal determinations of the Magistrate Judge will constitute a waiver of a party's right to appellate review of the findings of fact and conclusions of law in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." The undersigned recommends that, should the Report and Recommendation be adopted and, should Matwyuk seek a certificate of appealability, a certificate of appealability should be denied because he has not made a substantial showing of the denial of a constitutional right.

Dated this 26th day of December, 2019.



Camille D. Bibles
United States Magistrate Judge

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