APPENDIX A CERTIORARI NO. 21-

OPINION and DECISION of the United States Court of Appeals

Pg. 15

on January 15, 2021

NO. 20-16548

D.C. No. 2:19-cv-00827-ROS

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FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILLIP LEE CARSON, Petitioner-Appellant, v. DAVID SHINN, Director; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 20-16548 D.C. No. 2:19-cv-00827-ROS District of Arizona, Phoenix ORDER

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

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

APPENDIX B CERTIORARI NO. 21-

OPINION and Decision of the United States District Court (with "R & R")

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Phillip Lee Carson,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-19-00827-PHX-ROS

ORDER

On March 6, 2020, Magistrate Judge Camille D. Bibles issued a Report and Recommendation ("R&R") recommending the Court deny Petitioner Phillip Lee Carson's petition for writ of habeas. (Doc. 40). According to the R&R, the petition is untimely by over twenty years. Petitioner filed objections but those objections do not establish any error in the R&R's analysis regarding timeliness. Therefore, the R&R will be adopted.

BACKGROUND

The background facts are undisputed. In 1992, Petitioner was convicted of first-degree murder and sentenced to life in prison with the possibility of parole. Petitioner was also sentenced to a total of 7.5 years' imprisonment on other charges, with those sentences to be served consecutive to the sentence for murder. Petitioner filed a direct appeal. On April 18, 1995, the Arizona Court of Appeals corrected a clerical error in one of the sentences but affirmed the convictions and sentence in all other respects. *State v. Carson*, No. 1 CA-CR 15-0691 PRPC, 2017 WL 4171876, at *1 (Ariz. Ct. App. Sept. 21, 2017).

Shortly after his direct appeal was decided, Petitioner filed a petition for post-

conviction relief in the state trial court. That petition was denied on December 13, 1995. There is no record that Petitioner sought review of that denial.

In 2015, Petitioner attended a parole hearing. At that hearing, Petitioner allegedly learned that his victim "had a 'known reputation' for having two guns in the truck he was driving immediately before he exited the vehicle and was confronted and shot by [Petitioner]." *State v. Carson*, No. 1 CA-CR 15-0691 PRPC, 2017 WL 4171876, at *1 (Ariz. Ct. App. Sept. 21, 2017). Petitioner allegedly learned this through testimony by, among others, the victim's son. According to Petitioner, the victim's son testified at Petitioner's trial that his father did not carry weapons. (Doc. 44 at 6). Thus, Petitioner now believes the victim's son, and others, committed "perjury" at the original criminal trial. (Doc. 44 at 5).

Shortly after the parole hearing, Petitioner filed a new petition for post-conviction relief in state court. The state courts concluded that petition was untimely and that it lacked merit. On February 7, 2019, Petitioner filed his federal petition for a writ of habeas corpus. (Doc. 1).

ANALYSIS

In April 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") took effect. AEDPA imposed a one-year statute of limitations on federal habeas petitions by state prisoners. AEDPA provided four possible dates for when this one-year period begins to run: when "direct review becomes final, an unlawful state-created impediment to filing is removed, a new constitutional right is made retroactively available, or the factual predicate of the claim(s) presented could have been discovered with due diligence." *Lee v. Lampert*, 653 F.3d 929, 933 (9th Cir. 2011). The one-year period runs from the latest of these four possibilities. 28 U.S.C. § 2244(d)(1). For individuals, such as Petitioner, "whose conviction became final prior to AEDPA's enactment, the statute of limitations started running the day after AEDPA's effective date and expired on April 24, 1997." *Bryant v. Arizona Atty. Gen.*, 499 F.3d 1056, 1058 (9th Cir. 2007).

Here, it is undisputed that Petitioner's direct review ended in 1995. There is no

dispute, therefore, that, using the first possibility of the statute of limitations beginning when "direct review [became] final," the petition was due long ago. *Lee*, 653 F.3d at 933. Petitioner presents no argument that is direct review did not, in fact, end in 1995. Similarly, on the second and third possibilities for when the statute of limitations might begin, Petitioner does not claim there was a "state-created impediment to filing" earlier nor does he claim some new right has been made retroactively applicable to him. *Id.* Thus, the first three starting points for the statute of limitations are not relevant.

That leaves only the fourth possibility that "the factual predicate" for Petitioner's claims was only recently discovered. *Id.* Petitioner attempts to invoke this possibility by claiming the statute of limitations did not begin until 2015 when he attended his parole hearing. It was at that hearing that he allegedly learned of the "perjury" regarding the victim carrying weapons at the time of the murder. Petitioner initiated post-conviction relief proceedings in state court shortly after his parole hearing and those proceedings were pending until February 2018. Thus, Petitioner believes the one-year statute of limitations began in 2015, was tolled while his state post-conviction relief proceedings were pending, and had not expired when he filed his federal petition in February 2019. Petitioner's calculation is incorrect because it is undisputed that Petitioner was aware of the relevant information long ago. Therefore, the statute of limitations did not begin in 2015.

For purposes of the provision allowing the statute of limitations to begin only when the "factual predicate" of the claims is discovered, that provision requires the petitioner have exercised "due diligence" in trying to discover the claims. 28 U.S.C. § 2244(d)(1)(D). "Due diligence does not require the maximum feasible diligence, but it does require reasonable diligence in the circumstances." *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012). This is an "objective standard" but "a court also considers the petitioner's particular circumstances." *Id.* And the statute of limitations will not begin later if the evidence at trial, or Petitioner's own knowledge, gave "ample reason for a reasonable person . . . to investigate further." *Id.* at 1236.

Here, as best as the Court can discern, Petitioner believes there was false testimony

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offered at his trial that the victim did not carry weapons. Petitioner describes witnesses at his trial as offering such testimony but then contradicting that testimony at the later parole hearing. According to Petitioner, this "perjury" supports claims under *Brady* as well as claims involving "due process, 5th and 14th Const. Amend., . . . fair trial and prosecutorial misconduct." (Doc. 44 at 11). While exceptionally difficult to understand, Petitioner appears to be arguing the "state prosecutor knew or should have known that his key witnesses were committing perjury on the stand." (Doc. 44 at 13). Allowing that perjury and not disclosing that perjury to Petitioner at the time of trial allegedly resulted in Petitioner being convicted of a crime he did not commit. The problem for Petitioner is that he knew of the alleged "perjury" at the time of his trial.

According to Petitioner's own filings in the present case, at the time of his trial in 1992, he "knew from personal observations that [the] victim put a sawed-off shotgun and a pistol in his vehicle every-day [sic] when he went to work." (Doc. 25 at 13). Given that knowledge, it is impossible that Petitioner only learned of the alleged "perjury" as of 2015. Petitioner's own statements prove he knew of the "perjury" at the time of his trial. Petitioner has not offered any explanation why, given his own knowledge, he did not assert claims based on the alleged "perjury" much, much earlier. Instead of exercising due diligence, Petitioner waited over twenty-five years to file his federal petition. Petitioner is not entitled to start the one-year limitations period in 2015 given that Petitioner knew of the alleged new evidence all along.[1] The federal petition must be dismissed as time-barred.

Finally, after filing his objections, Petitioner began filing numerous miscellaneous motions. Many of those motions request the Court "transcribe" certain documents for purposes of the record.[2] While unclear, those motions appear to request certain documents

[1] Petitioner has not established he is entitled to equitable tolling because he was not diligently pursuing his rights nor were there "extraordinary circumstances" preventing him from filing earlier. *Smith v. Davis*, 953 F.3d 582, 588 (9th Cir. 2020). Moreover, while there is an "actual innocence" exception to the one-year statute of limitations, Petitioner has not offered sufficient evidence of such innocence. *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

[2] As of the date of this Order, Petitioner has filed nine motions regarding the "transcribing" of the record. (Doc. 52, 54, 56, 60, 64, 69, 71, 72, 76). And Petitioner has filed three motions using different titles but also attempting to make documents part of the record. (Doc. 58, 59, 67). Respondents moved to strike some of these documents. (Doc. 55).

be made part of the federal record.[3] The documents Petitioner references are not needed to resolve the timeliness of his petition. Therefore, the motions involving "transcribing" will be denied. Petitioner also filed three motions connected to some sort of DNA testing he is seeking in state court. (Doc. 57, 74, 75). Again, those motions do not impact the timeliness of the petition and will be denied. Next, Petitioner filed a motion for an evidentiary hearing. (Doc. 70). No hearing is needed to determine the petition is untimely.[4] And finally, Petitioner filed a motion to stay, requesting a "stay . . . until [the] DNA issue is resolved." (Doc. 61 at 2). There is no basis to believe the "DNA issue" will impact the timeliness of the petition. Thus, that motion will also be denied.

Accordingly,

IT IS ORDERED the Report and Recommendation (Doc. 40) is **ADOPTED**. The Petition for Writ of Habeas Corpus (Doc. 1) is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED a Certificate of Appealability is denied because dismissal of the petition is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable.

IT IS FURTHER ORDERED all pending motions (Doc. 52, 54, 55, 56, 57, 58, 59, 60, 61, 64, 67, 69, 70, 71, 72, 74, 75, 76) are **DENIED**.

IT IS FURTHER ORDERED the Appeal (Doc. 32) is **DENIED**.

Dated this 6th day of August, 2020.

Honorable Roslyn O. Silver
Senior United States District Judge

[3] Petitioner references Federal Rule of Civil Procedure 72(b)(2). That rule discusses "transcribing the record." That language, however, is aimed at transcribing the record from proceedings that occurred in front of the Magistrate Judge, such as hearings conducted by the Magistrate Judge.

[4] Petitioner filed an appeal of an order by the Magistrate Judge denying a previous request for an evidentiary hearing. (Doc. 32). Petitioner is not entitled to a hearing and the appeal will be denied.

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Activity in Case 2:19-cv-00827-ROS Carson #091914 v. Shinn et al Order on Appeal of Magistrate Judge Decision to District Court (Rule 72)

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U.S. District Court

DISTRICT OF ARIZONA

08.07.2020

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Docket Text:
ORDER - IT IS ORDERED the Report and Recommendation (Doc. [40]) is ADOPTED. The Petition for Writ of Habeas Corpus (Doc. [1]) is DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED a Certificate of Appealability is denied because dismissal of the petition is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable. IT IS FURTHER ORDERED all pending motions (Doc. [52], [54], [55], [56], [57], [58], [59], [60], [61], [64], [67], [69], [70], [71], [72], [74], [75], [76]) are DENIED. IT IS FURTHER ORDERED the Appeal (Doc. [32]) is DENIED. (See document for further details). Signed by Senior Judge Roslyn O Silver on 8/6/2020. (LAD)

2:19-cv-00827-ROS Notice has been electronically mailed to:

Eric Karl Knobloch eric.knobloch@azag.gov, CADocket@azag.gov, jonell.adams@azag.gov

Phillip Lee Carson eym_cook_sender@azcorrections.gov

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Phillip Lee Carson, Petitioner, v. David Shinn,[1] Attorney General of the State of Arizona, Respondents.	No. CV 19-00827 PHX ROS (CDB) **REPORT AND RECOMMENDATION**

TO THE HONORABLE ROSLYN O. SILVER:

Petitioner Phillip Carson, proceeding pro se, has 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. 17), and Carson filed a reply. (ECF No. 25).

I. Background

A grand jury indictment returned May 17, 1990, charged Carson with first-degree premeditated murder (Count 1); theft (Count 2); kidnapping (Count 3); five counts of aggravated assault (Count 4 and Counts 6 through 9); and two counts of sexual assault (Counts 5 and 10). (ECF No. 17-1 at 3-6). The following factual basis for the allegations was found by the Arizona Court of Appeals:

> Linda, the kidnapping and assault victim, was [Carson]'s spouse, although they had recently separated. On April 25, 1990, Linda and her ex-husband Michael [Coatney] were in his truck stopped at a traffic light when [Carson] walked up and tried to speak with Linda and give her some jewelry.

[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.

> When the light turned green, Michael drove away. [Carson] got back in his car and pursued until he caught up with Michael's truck and forced it off the road. Both vehicles came to a stop . . . and Michael and [Carson] emerged from their vehicles and confronted one another. [Carson] was armed with a .357 handgun; Michael was not armed. As witnessed by several people, the confrontation ended when [Carson] fired one shot and killed Michael.
>
> [Carson] then got into Michael's truck and drove away with Linda. [Carson] threatened to shoot her if she tried to escape. He drove to . . . South Mountain Park, abandoned the truck and forced Linda to walk up the mountain with him . . . During the next few hours on South Mountain, [Carson] hit Linda numerous times . . . [Carson] forced Linda to perform oral sex on him, and he had vaginal intercourse with her. He put the barrel of the loaded gun in her mouth, into her rectum, into her vagina, then back into her mouth. . . .
>
> After someone reported to police that a truck was parked in the mountain preserve, police checked the license plate and learned that it was Michael's truck. Phoenix and Tempe police quickly converged on the scene, aided by a helicopter and a police dog. Officers found [Carson] behind a boulder, holding Linda at gunpoint and threatening to kill her and the officers. The ensuing standoff lasted about three hours, during which [Carson] admitted shooting Michael and claimed that he had acted in self-defense. [Carson] eventually surrendered without further violence.

(ECF No. 17-1 at 43-44). Carson did not testify at his trial. (ECF No. 17-1 at 81).

Prior to trial, the defense noticed the decedent and Linda's teen-aged son, Michael Coatney, Jr., as a potential witness, and a Rule 11 proceeding was conducted. (ECF No. 17-1 at 8). With regard to Count 1, the jury was given the choice of finding Carson guilty of first-degree murder, second-degree murder, manslaughter, or negligent homicide, or finding him not guilty or not guilty by reason of insanity. (ECF No. 17-1 at 11-20). The jury was also given the choice of finding Carson guilty of lesser-included crimes or not guilty by reason of insanity with regard to the other charges. (*Id.*). The jury found Carson guilty of first-degree murder and guilty on the other counts stated in the indictment. (ECF No. 17-1 at 11-20). On June 12, 1992, at the conclusion of a hearing, Carson was sentenced to life in prison on Count 1, with the possibility of parole after twenty-five years. (ECF No. 17-1 at 22-35). The trial court imposed an aggregate term of 7.5 years' imprisonment on the other counts of conviction, to be served consecutively to the sentence on Count 1. (*Id.*).

Defense counsel moved for a new trial, asserting Carson was incompetent during his trial due to "overmedication." (ECF No. 17-1 at 90). The motion for a new trial was denied. (*Id.*).

Carson took a direct appeal of his convictions, asserting:

1. The trial court erred by admitting statements Carson made during an interrogation, in violation of his Miranda rights;

2. The trial court violated Carson's *Faretta* rights;

3. The trial court erred by finding Carson was competent to waive his right to an attorney during the interrogation but not competent to represent himself at trial;

4. There was insufficient evidence to sustain his conviction on the charges of sexual assault of a spouse without consent;

5. There was insufficient evidence to sustain his conviction on the charge of aggravated assault with a deadly weapon;

6. The trial court erred by finding Carson competent to stand trial;

7. The trial court abused its discretion when it refused to appoint a fourth Rule 11 doctor;

8. Carson's constitutional rights were violated by his forcible medication during trial;

9. The trial court abused its discretion by failing to dismiss the venire panel after a member of the panel stated he knew of Carson because his wife's friend was dating Carson at the time of the offenses;

10. The trial court abused its discretion by denying severance;

11. The trial court abused its discretion by denying a change of venue; and

12. The trial court erred by denying defense counsel's objections to the jury instructions on theft, sexual assault, and the insanity defense.

(ECF No. 1 at 93–94; ECF No. 17-1 at 44-45).

On April 18, 1995, the Arizona Court of Appeals rejected Carson's assignments of error and affirmed his conviction and sentence. (ECF No. 17-1 at 42-68). The appellate court denied a motion for reconsideration on July 24, 1995. (ECF No. 17-1 at 40). Carson did not seek review in the Arizona Supreme Court, nor did he seek a writ of certiorari.

Carson sought a state writ of habeas corpus pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, filing his notice on May 13, 1995. In his Rule 32 action Carson

asserted claims of ineffective assistance of trial counsel and insufficient evidence to sustain his conviction for first-degree murder. (ECF No. 17-1 at 70-71; 77-84).[2] Carson alleged "the most he should have been found guilty of [was] manslaughter," because he was

> . . . mentally and emotionally exhausted, when he unexpectedly found his wife with another man of which Defendant knew to be her paramour. Defendant shot the deceased in such a heat of passion, as to be guilty of at the most voluntary manslaughter where Defendant's wife was having an affair which had extended over a considerable period of time.

(ECF No. 17-1 at 84).

On December 13, 1995, the state trial court denied Rule 32 relief. *See State v. Carson*, 2017 WL 4171876, at *1-2 (Ariz. Ct. App. Sept. 21, 2017). Although Carson asserts he sought review of this decision, (ECF No. 1 at 5), there is no indication in the record that Carson actually did seek review, and the state court docket provided by Carson indicates he did not seek appellate review in his first Rule 32 action. (ECF No. 1 at 88).

> [Approximately twenty years later,] [a]fter his parole hearing in 2015, Carson filed an untimely and successive notice for post-conviction relief, arguing newly discovered evidence obtained at the parole hearing likely would have affected his first-degree murder conviction and resulting life sentence. Specifically, Carson claimed he learned for the first time at the parole hearing that the murder victim had a "known reputation" for having two guns in the truck he was driving immediately before he exited the vehicle and was confronted and shot by Carson. According to Carson, this evidence

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[2] Carson alleged his counsel was ineffective for "direct[ing] the Adult Probation Office not to interview Mr. Carson for the pre-[sentence] report." (ECF No. 17-1 at 80). Attached to this pleading is a letter from Carson's trial counsel to Carson stating:

> Remember, someone will be coming to visit you from the Probation Department. I do not want you to talk to that person, because we will be preparing an appeal on your behalf. I do not want you talking to the Probation Officer, as you have, obviously, given enough statements to last a lifetime in this case. In the event that you talk to the presentence writer, and you testify at your next trial, the State could use anything that you say in the presentence report against you.

(ECF No. 17-1 at 82) (emphasis in original). Defense counsel also instructed the probation officer not to interview Carson for the presentence report. (ECF No. 17-1 at 90). In Carson's Rule 32 action the State allowed that, although counsel erred by telling Carson he should not talk to the probation officer, there was no prejudice because counsel did present mitigation evidence and Carson had not established the sentencing court "failed to consider any evidence that could have been weighed in mitigation." (*Id.*).

> of the victim's guns would have supported his self-defense argument at trial. Carson also argued the State violated his due process rights and its obligations under *Brady* to disclose before trial evidence of the victim's reputation regarding the guns. Finally, Carson alleged that witnesses at the parole hearing provided testimony that differed from their testimony at trial, resulting in his conviction and denial of parole.
>
> The superior court summarily dismissed the notice. . . . the court correctly rejected Carson's assertion that the successive notice was timely based on his pre-September 30, 1992, sentencing. *See Moreno v. Gonzalez*, 192 Ariz. 131, 135 [] (1998) . . . The court also correctly found Carson failed to explain how evidence of the victim's guns was newly discovered because Carson did not explain how the evidence could not have been produced at trial with reasonable diligence. *See State v. Turner*, 92 Ariz. 214, 221 [] (1962) . . . The court additionally, and correctly, determined Carson failed to establish the materiality of the evidence, a prerequisite to establish both a colorable claim of newly discovered evidence and a *Brady* violation. Ariz. R. Crim. P. 32.1(e) (stating newly discovered facts must be material); *State v. Bilke*, 162 Ariz. 51, 52–53, 781 P.2d 28, 29-30 (1989) (providing the requirements for a colorable claim in a newly discovered evidence case); *Brady*, 373 U.S. at 87 . . . Finally, the court correctly dismissed Carson's concern about the variance in witness testimony, finding the alleged discrepancies would not have materially affected the trial's outcome.

Carson, 2017 WL 4171876, at *1-2. *See also* ECF No. 17-1 at 111-14.

Carson appealed the trial court's denial of relief in his second Rule 32 action. (ECF No. 17-1 at 116-32). The Arizona Court of Appeals found and concluded:

> On review, Carson appears to challenge the superior court's findings that Carson failed to establish the materiality of the "newly discovered evidence" . . . Carson speculates that, had the jury considered the evidence of the murder victim's guns, it would have convicted him not of first-degree murder, but a lesser-included offense.
>
> The superior court . . . clearly identified and correctly ruled upon the issues raised. Further, the court did so in a thorough, well-reasoned manner that will allow any future court to understand the court's rulings. Under these circumstances, "No useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision." *State v. Whipple*, 177 Ariz. 272, 274 [] (App. 1993). Therefore, we adopt the superior court's ruling.

Id. at *2. The Arizona Supreme Court denied Carson's petition for review on February 14, 2018. (ECF No. 17-1 at 140-76).

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In his petition for federal habeas relief, filed February 7, 2019, Carson asserts:

1. He was denied due process and equal protection of the law by the state trial court's denial of state habeas relief on the basis that his Rule 32 petition was successive;

2. He was denied due process and equal protection of the law by the state appellate court's denial of habeas relief;

3. He was denied a fair trial because a State's witness committed perjury;

4. A *Brady* claim, based on the State's withholding of evidence that the victim possessed guns;

5. The Arizona Supreme Court violated his right to due process by denying review in his 2015 Rule 32 action;

6. He was denied due process and equal protection by the state courts' refusal to allow him to fully brief his claims for state post-conviction relief.

Respondents assert the petition is not timely and that Carson's claims are also procedurally defaulted and not cognizable. (ECF No. 17 at 2, 9, 15, 20-21).

II. Analysis

A. Statute of limitations

The writ of habeas corpus affords relief to persons in custody pursuant to the judgment of a state court in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. §§ 2241(c)(3), 2254(a). However, the Antiterrorism and Effective Death Penalty Act ("AEDPA") requires state prisoners to file a petition for habeas corpus within one year of the date that the petitioner's conviction became final on direct appeal in state court. *See* 28 U.S.C. § 2244(d)(1). State prisoners whose convictions became final prior to the enactment of the AEDPA, i.e., prior to April 24, 1996, had a one-year "grace period" in which to file a habeas petition, which began April 25, 1996, and ended April 24, 1997. *See Wood v. Milyard*, 566 U.S. 463, 468 (2012); *Bryant v. Arizona Attorney Gen.*, 499 F.3d 1056, 1058 (9th Cir. 2007).

On April 18, 1995, the Arizona Court of Appeals affirmed Carson's convictions and sentences on direct appeal, and a motion for reconsideration was denied July 24, 1995. Accordingly, Carson's conviction became "final" on or about August 8, 1995, when the time for seeking review by the Arizona Supreme Court expired. *See* Ariz. R. Crim. P.

31.21(b)(2)(A) (allowing a defendant fifteen days to seek review from a motion denying reconsideration); 28 U.S.C. § 2244(d)(1)(A) (the 1-year limitations period runs from the date on which judgment became final by the conclusion of direct review or the expiration of the time for seeking such review); *Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012). Because Carson's conviction became final before the enactment of the AEDPA, the statute of limitations with regard to his federal habeas petition began to run the day after the AEDPA became effective, i.e., April 25, 1996, and expired April 24, 1997. *See, e.g., Laws v. Lamarque*, 351 F. 3d 919, 920 (9th Cir. 2003). Therefore, his federal habeas petition, filed November 7, 2019 (pursuant to the prison mailbox rule), was filed 8231 days after the statute of limitations expired.

1. Statutory tolling

The limitations period is tolled during the time a "properly filed" state action for post-conviction relief is pending in the state courts. 28 U.S.C. § 2244(d)(2). However, at no time after the statute of limitations began to run on April 25, 1996, and when it expired on April 24, 1997, did Carson have a properly filed application for state post-conviction relief pending in the Arizona courts. The state trial court denied relief in Carson's first Rule 32 action on December 13, 1995, and the deadline for seeking review of that decision expired January 12, 1996, prior to the effective date of the AEDPA, i.e., April 24, 1996, the first day of the one-year limitations period on Carson's federal habeas action. Carson's second action for Rule 32 relief, filed in 2015 (long after the AEDPA's statute of limitations expired), did not revive or restart the limitations period with regard to his federal habeas petition. *See Larson v. Soto*, 742 F.3d 1082, 1088 (9th Cir. 2013); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Additionally, Carson's second Rule 32 action was not a "properly filed" action for state post-conviction relief. *See Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) (holding that a state petition that is not filed within the state's required time limit is not "properly filed."). *See also Allen v. Siebert*, 552 U.S. 3, 5-7 (2007) (holding that the *Pace* rule applies even

where there are exceptions to the state-court filing deadlines, and reaffirming that a state court's rejection of a petition as untimely is "the end of the matter.").

2. Equitable tolling

The one-year statute of limitations for filing a federal habeas petition may be equitably tolled if extraordinary circumstances beyond the petitioner's control prevented them from filing their petition on time. *See Holland v. Florida*, 560 U.S. 631, 645 (2010); *Gibbs v. Legrand*, 767 F.3d 879, 884-85 (9th Cir. 2014). To be entitled to equitable tolling, the petitioner must establish that he diligently pursued his claims and that "some extraordinary circumstance" beyond his control prevented the timely filing of his habeas petition. *Pace*, 544 U.S. at 418; *Forbess v. Franke*, 749 F.3d 837, 839-40 (9th Cir. 2014); *Chaffer v. Prosper*, 592 F.3d 1046, 1048-49 (9th Cir. 2010). Equitable tolling is also available if the petitioner establishes their actual, factual innocence of the crimes of conviction. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Stewart v. Cate*, 757 F.3d 929, 937-38 (9th Cir. 2014).[3]

Equitable tolling is to be rarely granted. *See, e.g., Yow Ming Yeh v. Martel*, 751 F.3d 1075, 1077 (9th Cir. 2014); *Waldon-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). It is Carson's burden to establish that equitable tolling is warranted in his case. *See, e.g., Porter v. Ollison*, 620 F.3d 952, 959 (9th Cir. 2010); *Waldon-Ramsey*, 556 F.3d at 1011; *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2004). To be entitled to equitable tolling Carson must show "extraordinary circumstances were the *cause* of his untimeliness and that the extraordinary circumstances made it *impossible* to file a petition on time." *Porter*, 620 F.3d at 959 (emphasis added and internal quotations

[3] When an otherwise time-barred habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error," the Court may consider the petition on the merits. *See Schlup v. Delo*, 513 U.S. 298, [] (1995). The Supreme Court has recently cautioned, however, that "tenable actual-innocence gateway pleas are rare." *McQuiggin*, 133 S. Ct. at 1928. "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.*
Stewart v. Cate, 757 F.3d 929, 937-38 (9th Cir. 2014).

omitted). To the extent Carson asserts the State's purported violation of *Brady* entitles him to equitable tolling, this argument fails because by his own admissions Carson knew the victim possessed and/or kept guns in his vehicle prior to the time of his trial and, as a matter of law, this exhibits his lack of "due diligence" in seeking federal habeas relief. *See Ford v. Gonzalez*, 683, 1230, 1237-38 (9th Cir. 2012), *citing Daniels v. Uchtman*, 421 F.3d 490, 492 (7th Cir. 2005) (noting that information supporting the petitioner's *Brady* claim could have been discovered more than one year prior to petitioner's filing of his federal habeas petition). *See also Gallegos v. Ryan*, 2017 WL 3822070, at *3-4 (D. Ariz. July 17, 2017).

3. Section § 2244(d)(1)

With regard to Respondents' contention that his claims are time-barred, Carson asserts the limitations period should be calculated from the date of discovery of the factual predicate of his claim, i.e., the date he acquired "newly discovered material facts [which] probably would have changed the verdict or sentence." (ECF No. 25 at 12). Alternatively to the date the petitioner's conviction becomes final, section 2244 provides the limitations period may begin to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Carson asserts that prior to 2015 he had no knowledge of the "fact" that State's witnesses could testify the victim kept guns in his vehicle, bolstering a claim of self-defense. However, in the attachments to his federal habeas petition, i.e., his pleadings in his state-court actions, Carson allows he knew the victim kept a gun in his truck at the time of his trial and one of the witnesses who spoke to this issue at the parole hearing, i.e., the victim's son, was noticed by the defense as a potential witness at the trial. Furthermore, immediately after the crime Carson asserted he shot the victim in self-defense, and the limited trial transcript supplied to the Court indicates Carson's counsel raised not only the issue of his mental health, but also the defenses of heat of passion and self-defense during counsel's questioning of the State's trial witnesses.

The "fact" that the victim possessed guns and that it was likely the victim had a gun in his truck at the time of the fatal confrontation was known to Carson prior to his trial and,

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accordingly, the fact that others knew of this and so testified at his parole hearing was not new and could have been discovered through due diligence. Carson asserts in his reply:

> . . . his state of mind was not right during the crime due to crime of passion and fear of his wife's paramour, however, the state's witnesses gave oath in their testimony that murder victim never-ever had weapons (guns) nor did he every carry them in his vehicle. . . .
>
> Petitioner discovered material evidence on 5/14/15, at an Arizona State Parole Board Department Hearing, where above state's witnesses gave testimony that murder victim did have guns in his vehicle when Petitioner shot him.
>
> Petitioner diligently filed his "notice" of PCR R. 32.1(e) after discovery of new testimony that *confirmed Petitioner's statements in his interrogation with Tempe Police Detectives on 4/25/90, where Plaintiff confessed he shot victim out of fear, because Petitioner knew from personal observation that victim put a "sawed-off shotgun and a pistol" in his vehicle every day when he went to work. Victim was Petitioner's duplex neighbor for nearly (3) years.*

(ECF No. 25 at 13) (emphasis added).

As noted by the state trial court in Carson's second Rule 32 action, Carson was certainly aware, at the time of the trial, whether or not he himself saw the victim brandish a gun at the time of the shooting. If any gun was in the truck and not brandished by the victim at the time of the shooting, Carson's provocation of the confrontation by running the victim's vehicle off the road and his shooting of an unarmed victim who did not pose a lethal threat was not likely to be found anything less than premeditated murder by the jury.[4] Furthermore, Michael Coatney, Jr., the victim's son, who spoke at Carson's parole

[4] Carson stated during his parole hearing that prior to the crime he knew the victim "always had a shotgun in his truck," and that he had "a 38 shoved in the back of his pants," but he further allowed that, on the date and time of the crime, he did not "ever see a weapon on [the victim's] person or about his body," and that he exited his vehicle with his 357 in his hands and immediately cocked-back the hammer on his gun. (ECF No. 20). "The Arizona Supreme Court has held that a defendant arguing self-defense may introduce specific acts of violence or aggression by a victim that the defendant observed or knew about before the alleged crime to show that the defendant's response was reasonable." *State v. Crandall*, 2014 WL 1260858, at *2 (Ariz. Ct. App. Mar. 27, 2014). Although "specific acts of violence" which are "known to the defendant" may be admissible to "prove the defendant's state of mind," the mere *possession* of a weapon is not a "specific act of violence." *State v. Santanna*, 153 Ariz. 147, 149 (Ariz. 1987). Furthermore, "the privilege of self-defense is not available to one who is at fault in provoking an encounter or difficulty that results in a homicide." *State v. Lujan*, 136 Ariz. 102, 104 (Ariz. 1983).

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hearing, was listed as a trial witness by the defense and was known to have been in the victim's vehicle just prior to the crime. Therefore, with regard to his testimony at the parole hearing that the victim regularly kept a gun in his vehicle, this exact testimony could have been discovered through the exercise of due diligence and elicited at trial.[5]

As noted by the state trial court in rejecting Carson's claim that he had newly discovered evidence:

It is at least arguable that the evidence that Mr. Coatney kept a gun in his truck would not be relevant to a finding of second-degree murder or manslaughter. Second-degree murder requires evidence of malice and excludes circumstances of mitigation, justification, or excuse. *State v. Travis*, 26 Ariz. App. 24, 26 (Ariz. Ct. App. 1976). Malice may be proven by circumstantial evidence, including an inference to be drawn from the use of a deadly weapon. *Id.* To be considered manslaughter, the *victim's* actions must be such that they would deprive a reasonable person of self-control. Manslaughter is defined as "[c]ommitting second degree murder . . . upon a sudden quarrel or heat of passion resulting from adequate provocation by the *victim*." Ariz. Rev. Stat. § 13-1103(A)(2) (emphasis added). Although evidence of an argument may be indicative of a sudden quarrel or heat of passion, under § 13–1103(A)(2) the sudden quarrel or heat of passion must result from adequate provocation by the *victim*. *See State v. Gomez*, 211 Ariz. 494, 501 (2005). It is entirely possible the defense purposefully did not bring-up the issue of Mr. Coatney's possession of a weapon in his truck because, as noted in the parole hearing, Carson had made threats against Mr. Coatney as recently as a week prior to the crime, and Carson had committed prior assaults on Linda Coatney.

[5] Carson asserts Michael Coatney, Jr. and Linda Coatney "lied under oath," "hiding the fact that murder victim had a sawed-off shotgun and a 22 caliber pistol with him at time of shooting," and "gave oath in their testimony that murder victim never-ever had weapons (guns) nor did he ever carry them in his vehicle." (ECF No. 25 at 3, 13. *See also* ECF No. 1 at 13). He further alleges the police "never logged" "these weapons" into evidence." (ECF No. 25 at 5). However, Carson provides no evidence that the police failed to log any weapons found in Mr. Coatney's truck into evidence. It is the petitioner's burden to present support for his claims for habeas relief. *E.g.*, *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004) ("The petitioner carries the burden of proving by a preponderance of the evidence that he is entitled to habeas relief."); *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002); *Pappas v. Miller*, 750 F. App'x 556, 566 (9th Cir. 2018). Although Carson asserts trial transcripts are "unavailable" to him (ECF No. 1 at 13), in his pleadings he quotes from trial transcripts and he produces more than a few pages of transcripts. (ECF No. 1 at 11-13, 193-219). At trial, Carson's counsel focused his claim of self-defense on the fact that Mr. Coatney was angry when he approached Carson after being run off the road, and that as Carson confronted Mr. Coatney with his weapon drawn he told Mr. Coatney, in effect, to "stay back" before he shot him. (ECF No. 1 at 210. *See also* ECF No. 1 at 99 (Carson's appellate brief relaying Linda Coatney's testimony that Carson "jumped from his car with a gun in his hands and told Michael Coatney to, 'Stay away. Stay away from me, motherfucker.'"). Notably, the jury was instructed on self-defense, second-degree murder, and manslaughter, and found Carson guilty of first-degree murder.

> According to the defendant, the prosecutor and a detective suppressed evidence that the driver victim had a "known reputation" for carrying a 22-caliber gun and sawed off shotgun [i.e., that he] "carried handgun and sawed off shotgun on a regular basis," [] and concealed weapons under or behind the truck's front seat. [] The existence of the shotgun came out when the driver victim's brother made statements during the defendant's parole hearing. [] Defendant posits that Rule 32.1(e) applies because this evidence provided the basis for a self defense claim and could have resulted in a second-degree murder conviction. [] The Court disagrees. The defendant never explains why these facts could not have been produced with reasonable diligence at trial or on appeal. He also fails to establish the materiality of the evidence. *The fact that the driver victim had a reputation for carrying weapons is not proof that he had them on the date of the crime. If Defendant was unaware of the alleged weapons, they could not have affected his mental state at the time of the crime. If there were weapons and the defendant was aware of them, then the evidence is not newly discovered and appears to be cumulative.*

(ECF No. 17-1 at 113) (citations to the record omitted and emphasis added).

Because the "factual predicate" of Carson's claim, i.e., that the victim carried a gun in his vehicle and that presumably Mr. Coatney's son, Linda, or the police detective would have testified to this fact, could have been discovered through due diligence prior to or at trial or prior to the expiration of the limitations period, Carson is not entitled to the benefit of § 2244(d)(1)(D) with regard to the statute of limitations on his federal habeas petition.

4. Actual innocence

The Supreme Court announced an equitable exception to the AEDPA's statute of limitations in *McQuiggin*. The Court held that the "actual innocence gateway" to federal habeas review, was applied to procedural bars in *Schlup v. Delo*, 513 U.S. 298, 327 (1995) and *House v. Bell*, 547 U.S. 518 (2006), also extends to petitions that are time-barred under the AEDPA. *See McQuiggin*, 569 U.S. at 386, 392-93; *Stewart*, 757 F.3d at 937-38.

To be entitled to this exception to a finding that his habeas petition is time-barred, a petitioner must establish his *factual* innocence of the crime and not mere legal insufficiency. *See Bousley v. United States*, 523 U.S. 614, 623 (1998); *Morales v. Ornoski*, 439 F.3d 529, 533-34 (9th Cir. 2006); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir.

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2003). "To be credible, such a claim requires the petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324; *see also McQuiggin*, 569 U.S. at 399 (explaining the significance of an "[u]nexplained delay in presenting new evidence"). A petitioner "'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *McQuiggin*, 569 U.S. at 399, *quoting Schlup*, 513 U.S. at 327. *See also Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014). Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumway v. Payne*, 223 F.3d 982, 990 (9th Cir. 2000). *See also Stewart*, 757 F.3d at 938 ("The Supreme Court has recently cautioned, however, that 'tenable actual-innocence gateway pleas are rare.' *McQuiggin*, 133 S. Ct. at 1928.").

Carson fails to establish an actual innocence claim such that he is entitled to tolling of the statute of limitations. The record and pleadings in this case do not contain "evidence of innocence so strong that [the Court] cannot have confidence" in the outcome of the proceedings. *McQuiggin*, 569 U.S. at 401. As noted *supra*, the fact that the victim was known to have carried a gun in his vehicle and/or that he actually had a gun in his vehicle at the time of the shooting does not overcome the evidence of premeditation presented at Carson's trial: Carson pursued the victim in his vehicle, purposefully ran the victim off the road, and approached the victim, who did not have a gun in his hand or "about his body," with a .357 loaded with a hollow-point bullet, and shot the victim dead. Notably, Carson did not assert then and does not assert now that he saw the victim brandish a gun prior to shooting him. Carson's conclusory arguments and speculation that the State "hid" any weapons found in the victim's truck, simply do not satisfy the *Schlup* standard. *See, e.g.*, *Martinez v. Clark*, 2009 WL 1788402 at *5 (C.D. Cal. June 23, 2009) (noting that in the few cases habeas petitioners have been able to meet the *Schlup* standard, the "new evidence" consisted of "credible evidence that the petitioner had a solid alibi for the time of the crime, numerous exonerating eyewitness accounts of the crime, DNA evidence

excluding petitioner and identifying another potential perpetrator, a credible confession by a likely suspect explaining that he had framed the petitioner, and/or evidence contradicting the very premise of the prosecutor's case against the petitioner."). Accordingly, Carson's contention that the jury would have convicted him of less than first-degree murder had they known the victim carried a gun in his vehicle is not persuasive and should not deprive the Court of confidence in the outcome of the trial.

B. Exhaustion and procedural default

Absent specific circumstances, the Court may only grant federal habeas relief on the merits of 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" the claim 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). To fairly present a claim in the state courts, thereby exhausting the claim, the petitioner must present to the state courts the "substantial equivalent" of the claim presented in federal court. *Picard v. Connor*, 404 U.S. 270, 278 (1971); *Libberton v. Ryan*, 583 F.3d 1147, 1164 (9th Cir. 2009). Full and fair presentation requires a petitioner to present the substance of his claim to the state courts, including a reference to the operative federal constitutional guarantee relied on by the petitioner and a statement the facts supporting the claim. *See Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009); *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007).

> [The federal courts] recognize two types of procedural bars: express and implied. An express procedural bar occurs when the petitioner has presented his claim to the state courts and the state courts have relied on a state procedural rule to deny or dismiss the claim. An implied procedural bar, on the other hand, occurs when the petitioner has failed to fairly present his

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> claims to the highest state court and would now be barred by a state procedural rule from doing so.

Robinson v. Schriro, 595 F.3d 1086, 1100 (9th Cir. 2010).

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); *McNeill v. Polk*, 476 F.3d 206, 211 (4th Cir. 2007) ("The doctrine of procedural default provides that a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule.").

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). Because the Arizona Rules of Criminal Procedure regarding timeliness, waiver, and the preclusion of claims bar Carson from returning to the state courts to exhaust any unexhausted federal habeas claim, he has exhausted but procedurally defaulted any claim not previously properly presented to the Arizona Court of Appeals. *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 claim in the state courts he is not entitled to a review of the merits of the claim in a federal habeas action absent a showing of both cause and prejudice. *E.g., Ellis v. Armenakis*, 222 F.3d 627, 632 (9th Cir. 2000). The Court may also consider the merits of a procedurally defaulted claim if the failure to consider the merits of the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Atwood*, 870 F.3d at 1059; *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011). "Cause" is a legitimate excuse for the petitioner's procedural default of the claim, i.e., an objective factor outside of his control, and "prejudice" is actual harm resulting from the alleged constitutional violation. *Cooper*, 641

F.3d at 327. To establish prejudice, the petitioner must show that the alleged error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* 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. *Correll v. Stewart*, 137 F.3d 1404, 1415 (9th Cir. 1998).

As with the *McQuiggin* "gateway," a petitioner meets the "fundamental miscarriage of justice" exception 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). To satisfy the "fundamental miscarriage of justice" standard, a petitioner must establish by clear and convincing evidence that no reasonable fact-finder could have found him guilty of the offenses charged. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004); *Wildman v. Johnson*, 261 F.3d 832, 842-43 (9th Cir. 2001).

C. Carson's claims for federal habeas relief

In his first, second, fifth, and sixth claim for relief Carson asserts his federal constitutional rights to due process and equal protection of the law were violated in his state post-conviction proceedings. Carson did not raise these claims in the state courts and Arizona's rules regarding waiver and the preclusion of claims prohibit him from returning to the state courts to exhaust the claims. Accordingly, the claims are procedurally defaulted. Carson fails to show any cause or prejudice arising from his procedural default of the claims, nor does he assert his factual innocence of the crimes of conviction. Furthermore, claims that the state courts improperly denied a habeas petitioner state post-conviction relief are not cognizable in a § 2254 action. *See Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998) (holding error in post-conviction determinations are not cognizable in a federal habeas action); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997); *Villafuerte v. Stewart*, 111 F.3d 616, 632 n.7 (9th Cir. 1997); *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) ("[A] petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings."); *Ochoa v. Ontiveros*, 2009 WL 1125320, at *8 (D. Ariz. Apr. 27, 2009) ("*Franzen* and the cases it cites are based on

the fact that habeas proceedings are designed to attack the basis for the petitioner's detention, and a petitioner is not detained as a result of post-conviction proceedings. Habeas relief, therefore, is not available to redress errors occurring in post-conviction proceedings."). Carson cannot "transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996).

In his third claim for federal habeas relief Carson asserts he was denied a fair trial because, he asserts, a State's witness committed perjury, i.e., that the witness testified at his parole hearing contrary to the witness's testimony at trial. Carson argues in his fourth claim for relief that the State withheld evidence that the victim possessed guns at the time of the crime, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Carson raised these claims in his second untimely Rule 32 action, and the state trial court denied these claims because they were procedurally precluded; the state court found Carson had not met the threshold for filing an untimely successive petition for Rule 32 relief because his "newly discovered evidence" was not, as that term is defined by state law, "newly discovered." The state court determined the purportedly "newly discovered" evidence was known to Carson at the time of trial and it was not material to the outcome of his trial. Pursuant to this decision Carson's third and fourth claims for federal habeas relief were procedurally defaulted in the state courts because, when raised by Carson, the state court found the claims barred by the operation of an independent and adequate rule of state law. Carson fails to show any cause or prejudice arising from his procedural default of these claims, nor does he assert his factual innocence of the crimes of conviction.

D. *Brady* claim

Carson also fails to show any prejudice arising from his procedural default of his fourth claim because, *inter alia*, his *Brady* claim is without merit.

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). To

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establish materiality, Carson must show that the State's "'nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" *Henry v. Ryan*, 720 F.3d 1073, 1080 (9th Cir. 2013), *quoting Strickler*, 527 U.S. at 281. Additionally, the question of prejudice asks "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 289 (internal quotations omitted). To show cognizable prejudice, Carson must establish "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

Furthermore, the evidence is not "suppressed" if the defense is aware of the evidence notwithstanding that the evidence is also available to the prosecution. *Amado v. Gonzalez*, 758 F.3d 1119, 1137 (9th Cir. 2014); *Cunningham v. Wong*, 704 F.3d 1143, 1154 (9th Cir. 2013) (holding that, because the defendant's attorneys possessed the "salient facts" to access the alleged *Brady* evidence, "[t]here was no suppression of this easily attainable evidence"); *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (holding that, where the defendant was aware of the essential facts regarding his medical records, enabling him to take advantage of any exculpatory evidence, the government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense); *Bonnaudet v. Henry*, 303 F. App'x 375, 376 (9th Cir. 2008) (finding that, because the defendant "took the van to the body shop herself and knew its condition," she was "aware of the essential facts enabling her to take advantage of the exculpatory evidence," i.e., the proposed testimony of body shop employees who cleaned the van (internal quotations and alterations omitted)). This doctrine regarding "suppression" applies where the alleged *Brady* evidence is a witness statement; if the defense is "on notice of the essential facts which would enable [it] to call the witness and thus take advantage of any exculpatory testimony that [the witness] might furnish," *Brady* does not require the government "to make a [witness'] statement known" to the defense. *United States v. Bond*, 552 F.3d 1092, 1096 (9th Cir. 2009). Because Carson's defense counsel knew, by virtue of Carson's communication to them,

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that the victim carried weapons in his vehicle, and knew the victim's son was in the vehicle just prior to the crime, and noticed an intent to call the victim's son as a witness, it cannot be said that the defense was not aware of the purported *Brady* evidence.

In his petition for review to the Arizona Court of Appeals in his second Rule 32 action Carson stated:

> In interview with Tempe police defendant stated on recording that victim who was sleeping with defendants wife had a sawed off shotgun behind his seat and a 38 revolver that he carried behind his back. (which turned out to be a 22 pistol in parole hearing CD on 5-14-15).
>
> (Note: in trial Joe Caneira testified as a United States soldier that he had seen Michael Coatney wearing a revolver behind his back in wastline).
>
> . . .
>
> [The State] lied about weapons being in victims vehicle, in order to make the defendant look like a cold-blooded killer when in fact defendant was scared to death he would be shot by the man trying to take his wife away.

(ECF No. 17-1 at 125).

In his petition for review to the Arizona Supreme Court in his second Rule 32 action Carson asserted that, at the time of his first interview with the police detective, he told the detective

> . . .that the above listed weapons of the murder victim were in murder victim's truck at the time of the argument and murder, yet these weapons were never labeled, evidenced or given description in R. 15 discovery, nor did state admit to weapons being in "truck." (ECF No. 17-1 at 141-42).

(ECF No. 17-1 at 149).

Carson also asserted in his petition for review that he "knew" of the victim's "reputation" and his possession of guns "prior to Petitioner shooting and killing victim," and that he "relayed" this information to his counsel, who "looked into" these allegations and "filed for self-defense rule." ((ECF No. 17-1 at 149, 153). Carson asserted the "police more than probable just gave guns back to family or lost them in some inventory or destroyed them - which denied defendant his right to lay victims guns on table opposite of the Petitioner's guns during trial." (*Id.*).

Carson has failed to show the evidence was "suppressed" or a reasonable probability that, had the testimony presented at the parole hearing regarding the victim's possession of weapons been presented at his trial, the jury would have found him guilty of a lesser charge. Given the evidence of Carson's guilt presented at trial, including the witnesses' testimony and Carson's statements after being placed in custody, there is no "reasonable likelihood" that presenting the actual guns Mr. Coatney allegedly carried in his truck but did not brandish at Carson could have "affected the judgment of the jury," which was presented with the options of finding Carson guilty a lesser-included offense but rejected these options. *Reis-Campos v. Biter*, 832 F.3d 968, 976 (9th Cir. 2016); *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) (finding no prejudice at trial from a *Napue* violation where the defendant's own testimony and physical evidence "pointed to his guilt"). Accordingly, Carson's *Brady* claim is without merit and he is unable to show prejudice arising from his procedural default of this claim.

III. Conclusion

Carson's federal habeas petition was not filed within the applicable statute of limitations, and he has not established he is entitled to equitable tolling of the statute of limitations. Furthermore, Carson procedurally defaulted all of his claims in the state courts by failing to present them to the Arizona Court of Appeals in a procedurally correct fashion. Additionally, Carson's claims that he was denied his rights to due process and equal protection in his state post-conviction proceedings are not cognizable in a federal habeas action and his *Brady* claim may also be denied on the merits.

IT IS THEREFORE RECOMMENDED that Carson's petition seeking a federal writ of habeas corpus (ECF No. 1) 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

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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, 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 timely file 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 Carson 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 5th day of March, 2020.

Camille D. Bibles
United States Magistrate Judge

44

Gmail EYMAN COOK. SENDER - ADC <eym_cook_sender@azadc.gov>

Activity in Case 2:19-cv-00827-ROS Carson #091914 v. Shinn et al Clerks Judgment

1 message

azddb_responses@azd.uscourts.gov <azddb_responses@azd.uscourts.gov> Thu, Aug 6, 2020 at 10:52 AM
To: azddb_nefs@azd.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

DISTRICT OF ARIZONA

08/07/2020

Notice of Electronic Filing

The following transaction was entered on 8/6/2020 at 10:52 AM MST and filed on 8/6/2020
Case Name: Carson #091914 v. Shinn et al
Case Number: 2:19-cv-00827-ROS
Filer:
WARNING: CASE CLOSED on 08/06/2020
Document Number: 78

Docket Text:
CLERK'S JUDGMENT - 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 and this action are hereby dismissed with prejudice. (LAD)

2:19-cv-00827-ROS Notice has been electronically mailed to:

Eric Karl Knobloch eric.knobloch@azag.gov, CADocket@azag.gov, jonell.adams@azag.gov

Phillip Lee Carson eym_cook_sender@azcorrections.gov

2:19-cv-00827-ROS Notice will be sent by other means to those listed below if they are affected by this filing:

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

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1096393563 [Date=8/6/2020] [FileNumber=20933216-0
] [60100124fd164532e5657a1f7b99776ef51a87a8c3fc461a741700f2ce9364fd476
864ce1db48ec890ebe25a85adb8c0042e88279a617f7f6c3bcd4aa5ccc704]]

APPENDIX C CERTIORARI No. 21-

DECISION on REHEARING by the United States Court of Appeals
No. 20-16548
on February 10, 2021

pg. 46

C

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 10 2021

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

PHILLIP LEE CARSON, Petitioner-Appellant, v. DAVID SHINN, Director; MARK BRNOVICH, Attorney General, Respondents-Appellees.	No. 20-16548 D.C. No. 2:19-cv-00827-ROS District of Arizona, Phoenix ORDER

Before: McKEOWN and BUMATAY, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX D CERTIORARI NO. 21-

OPINION and DECISION of the State Court of Appeals
No. 1 CA-CR 15-0691 PRPC ; CR 1990-005235
on September 21, 2017
pgs. 48-53

D

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Respondent,*

v.

PHILIP LEE CARSON, *Petitioner.*

No. 1 CA-CR 15-0691 PRPC
FILED 9-21-2017

Petition for Review from the Superior Court in Maricopa County
No. CR 1990-005235
The Honorable Warren J. Granville, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Philip Lee Carson, Florence
Petitioner

MEMORANDUM DECISION

Judge Maria Elena Cruz delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Peter B. Swann joined.

C R U Z, Judge:

¶1 Philip Lee Carson petitions for review from the dismissal of his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure ("Rule") 32. We have considered the petition for review and, for the reasons stated, grant review and deny relief.

¶2 A jury found Carson guilty of first-degree murder, kidnapping, theft, five counts of aggravated assault, and two counts of sexual assault. On June 12, 1992, the superior court sentenced Carson to life imprisonment for the murder offense, to be followed by concurrent prison terms for the remaining offenses. Carson appealed, and except for correcting a clerical mistake related to the sentence for one of the sexual assault offenses, this Court affirmed in all respects.

¶3 On December 13, 1995, the superior court dismissed Carson's first Rule 32 proceeding, in which Carson raised a claim of ineffective assistance of trial counsel, and he argued in part that, although the trial evidence was sufficient to sustain a manslaughter conviction, it was not sufficient to sustain his conviction for first-degree murder. After his parole hearing in 2015, Carson filed an untimely and successive notice for post-conviction relief, arguing newly discovered evidence obtained at the parole hearing likely would have affected his first-degree murder conviction and resulting life sentence. Specifically, Carson claimed he learned for the first time at the parole hearing that the murder victim had a "known reputation" for having two guns in the truck he was driving immediately before he exited the vehicle and was confronted and shot by Carson. According to Carson, this evidence of the victim's guns would have supported his self-defense argument at trial. Carson also argued the State violated his due process rights and its obligations under *Brady*[1] to disclose before trial evidence of the victim's reputation regarding the guns. Finally, Carson alleged that witnesses at the parole hearing provided testimony that differed from their testimony at trial, resulting in his conviction and denial of parole.

¶4 The superior court summarily dismissed the notice. In doing so, the court correctly rejected Carson's assertion that the successive notice

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1 *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

was timely based on his pre-September 30, 1992, sentencing. *See Moreno v. Gonzalez*, 192 Ariz. 131, 135, ¶ 22, 962 P.2d 205, 209 (1998) (noting the Arizona Supreme Court ordered that the 1992 amendments to Rule 32 were "applicable to all post-conviction relief petitions filed on and after September 30, 1992, except that the time limits of 90 and 30 days imposed by Rule 32.4 shall be inapplicable to a defendant sentenced prior to September 30, 1992, who is filing his first petition for post-conviction relief.") (quoting Supreme Court Order, 171 Ariz. XLIV (1992)). The court also correctly found Carson failed to explain how evidence of the victim's guns was newly discovered because Carson did not explain how the evidence could not have been produced at trial with reasonable diligence. *See State v. Turner*, 92 Ariz. 214, 221, 375 P.2d 567, 571 (1962) (stating that when moving for a new trial on the ground of newly discovered evidence, the accused "must show by affidavit or testimony in court, that due diligence was used to ascertain and produce the evidence in time for use at his trial" and "account for his failure to produce the evidence by stating explicitly the details of his efforts to ascertain and procure it"). The court additionally, and correctly, determined Carson failed to establish the materiality of the evidence, a prerequisite to establish both a colorable claim of newly discovered evidence and a *Brady* violation. Ariz. R. Crim. P. 32.1(e) (stating newly discovered facts must be material); *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989) (providing the requirements for a colorable claim in a newly discovered evidence case); *Brady*, 373 U.S. at 87 (holding "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). Finally, the court correctly dismissed Carson's concern about the variance in witness testimony, finding the alleged discrepancies would not have materially affected the trial's outcome.

¶5 On review, Carson appears to challenge the superior court's findings that Carson failed to establish the materiality of the "newly discovered evidence" and of the discrepancies regarding witnesses' trial testimony and testimony twenty-three years later at the parole hearing. Carson speculates that, had the jury considered the evidence of the murder victim's guns, it would have convicted him not of first-degree murder, but a lesser-included offense.

¶6 The superior court dismissed the notice of post-conviction relief in an order that clearly identified and correctly ruled upon the issues raised. Further, the court did so in a thorough, well-reasoned manner that will allow any future court to understand the court's rulings. Under these circumstances, "No useful purpose would be served by this court rehashing

the trial court's correct ruling in a written decision." *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Therefore, we adopt the superior court's ruling.

¶7 To the extent Carson raises arguments for the first time in his petition for review (i.e., that he should have been tried by a judge, not a jury), we do not address them. A petition for review may not present issues not first presented to the superior court. Ariz. R. Crim. P. 32.9(c)(1)(ii) (requiring that a petition for post-conviction relief contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review"); *State v. Ramirez*, 126 Ariz. 464, 467, 616 P.2d 924, 927 (App. 1980); *see State v. Swoopes*, 216 Ariz. 390, 403, ¶¶ 40-41, 166 P.3d 945, 958 (App. 2007) (holding there is no review for fundamental error in a post-conviction relief proceeding).

¶8 For the foregoing reasons, we grant review but deny relief.

COURT OF APPEALS
STATE OF ARIZONA

AMY M. WOOD • Clerk of the Court
FILED: AA

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AMY M. WOOD
CLERK OF THE COURT

Court of Appeals

STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

Phone: (602) 452-6700
Fax: (602) 452-3226

MICHAEL K. JEANES, CLERK
BY P. Crawford DEP
P. CRAWFORD, FILED
18 MAR 16 AM 8:45

March 16, 2018

Christine Kelly, Acting Clerk
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, Arizona 85003

Dear Ms. Kelly:

RE: 1 CA-CR 15-0691 PRPC

STATE v. CARSON
Maricopa County Superior Court
CR 1990-005235

The following are attached in the above entitled and numbered cause:

Original MANDATE
Copy of MEMORANDUM DECISION

The following items are not available for electronic transmittal and will be physically transmitted to your Court.

Instruments/Minute Entries: 5 Parts/ 1 Part
Exhibits:Hearing Date 06/20/1990 - List # 1 2 in a manila envelope;Hearing Date 06/28/1990 - List # 1 in a manila envelope
Hearing Date 09/10/1991 - List # 1 in a manila envelope
Hearing Date 10/02/1991 - List # 1 in a manila envelope
Hearing Date 06/12/1992 - List # 1 2 3 in a manila envelope
Hearing Date 03/04/1992 - List # 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 57 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 90 91 92 93 98 99 100 101 102 103 104 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 in a brown box
Sealed Items:;Confidential Criminal History Addendum in Sealed Manila EnvelopeFiled 05/22/1991 - Document sealed by Order of the court Filed 07/23/1991 - Medical report of alexander don, m.d dated 04/23/1991; medical report of paul bindeglas, m.d

dated 04/29/1991, medical report of leonardo garcia-bunuel, m.d dated 02/26/1991. Medical report of eugene almer, md dated 06/15/1991,medical report of armando bencomo, oh.d dated 01/30/1991filed 09/04/1991 - minute entry and order dated 09/04/1991filed 09/10/1991 - letter dated 09/06/1991 filed 10/24/1991 - report by paul bindelglas m.d dated 10/16/1991, report by leonardo garcia-bunuel, m.d dated 10/15/1991.Transcripts: 10/1/91, 4/16/92, 7/23/91, 4/8/92, 4/2/92, 4/6/92, 3/26/92, 3/30/92, 4/7/92,4/20/92
Duplicate copies: Instruments/Minute Entries: 5 Parts/ 1 Part all in 3 separate boxes

AMY M. WOOD, CLERK

By_____dtn_____
Deputy Clerk

A copy of the foregoing
was sent to:

Diane Meloche
Philip Lee Carson, ADOC 091914 (mailed)
Hon Warren J Granville
Arizona Department of Public Safety
Arizona Department of Corrections

APPENDIX E CERTIORARI No. 21-

OPINION and DECISION of the State Trial Court

08.27.2015

CR90-005235

pgs. 55-61

E

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/28/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-005235 08/27/2015

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA DIANE M MELOCHE

v.

PHILIP LEE CARSON (A)

PHILIP LEE CARSON
#091914 ASPC EYMAN MEADOWS
P O BOX 3300
FLORENCE AZ 85132

COURT ADMIN-CRIMINAL-PCR

RULE 32 PROCEEDING DISMISSED
RECORD PREPARATION DENIED

Pending before the Court are the following submissions from Defendant:

(1) Notice of Post-Conviction Relief filed on May 22, 2015;
(2) Case Status of Rule 32.4(a) Appointment of counsel, Conformed Copy, Rule 32.1(e) Pre 1992 filed on July 9, 2015; and
(3) Request for Preparation of Post-Conviction Relief Record filed on July 9, 2015.

The Notice of Post-Conviction Relief constitutes Defendant's second request for Rule 32 relief, and it is successive. For the reasons that follow, the Court will dismiss Defendant's Notice of Post-Conviction Relief.

In the spring of 1990, Defendant forced a truck off the road, shot and killed the truck's driver, then kidnapped and sexually assaulted the truck's passenger. (Notice at 5) A jury convicted Defendant of the following offenses: (1) one count of first-degree murder, a class 1 dangerous felony, (2) one count of kidnapping, a class 3 dangerous felony, (3) five counts of aggravated assault, all class 3 dangerous felonies, (4) one count of theft, a class 6 felony, and (5)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-005235 08/27/2015

two counts of sexual assault, both class 6 felonies. On June 12, 1992, the Court entered judgment and sentenced Defendant to life imprisonment for the first-degree murder offense. The Court imposed other sentences on the remaining counts, to run concurrently with each other but consecutive to the life sentence. On direct appeal, Division One of the Arizona Court of Appeals affirmed Defendant's convictions and left his sentences intact, save for one modification to correct a clerical error, and issued the order and mandate on August 17, 1995. Defendant filed his first notice of post-conviction relief and a petition, which this Court summarily dismissed on December 13, 1995.

In his current submission, Defendant correctly notes that prior to September 30, 1992 there was no time constraint upon defendants filing their first petition for post-conviction relief. (Notice at 3) Because Defendant was sentenced on June 12, 1992, the time limits imposed by a later version of Arizona Rule of Criminal Procedure 32.4(a) did not apply to the defendant's first notice and petition of post-conviction relief. *See Moreno v. Gonzalez*, 192 Ariz. 131, 135, ¶¶ 22-23, 962 P.2d 205, 209 (1998). At this stage, however, Defendant already filed his first notice of and petition for post-conviction relief, and a successive notice is at issue.

A. Rule 32.1(a)

The defendant contends that the prosecution violated his due process rights and he is entitled to Rule 32 relief. (Notice at 10). Arizona Rule of Criminal Procedure 32.1(a) provides a remedy for qualifying defendants whose convictions and sentences were obtained in violation of their constitutional rights. Defendant cannot raise this claim, however, because a successive notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). *See* Ariz. R. Crim. P. 32.4(a). The claim Defendant has asserted was required to be raised in a timely Notice of Post-Conviction Relief. *See id.* Further, Defendant's claim is precluded to the extent that he failed to assert it in his prior Rule 32 proceeding (July 2, 1992 Petition at 2). *See* Ariz. R. Crim. P. 32.2(a)(3). To the extent Defendant is raising the same constitutional claim asserted in the prior Rule 32 proceeding, relief is also precluded. *See* Ariz. R. Crim. P. 32.2(a)(2).

B. Rule 32.1(e)

Defendant also contends, however, that new and material evidence concerning the driver victim came to light during a Parole Board hearing on May 14, 2015 and that evidence entitles Defendant to relief under Arizona Rule of Criminal Procedure 32.1(e). (Notice at 3 - 5) To qualify for post-conviction relief based on newly discovered evidence, the defendant must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or on appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence

probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e).

According to the defendant, the prosecutor and a detective suppressed evidence that the driver victim had a "known reputation" for carrying a 22-caliber gun and sawed off shotgun (*id.* at 8, Case Status at 3), "carried handgun and sawed off shotgun on a regular basis," (Notice at 11) and concealed weapons under or behind the truck's front seat. (*Id.* at 4, 5) The existence of the shotgun came out when the driver victim's brother made statements during the defendant's parole hearing. (*Id.* at 5) Defendant posits that Rule 32.1(e) applies because this evidence provided the basis for a self-defense claim and could have resulted in a second-degree murder conviction. (*Id.* at 10, 11) The Court disagrees. The defendant never explains why these facts could not have been produced with reasonable diligence at trial or on appeal. He also fails to establish the materiality of the evidence. The fact that the driver victim had a reputation for carrying weapons is not proof that he had them on the date of the crime. If Defendant was unaware of the alleged weapons, they could not have affected his mental state at the time of the crime. If there were weapons and the defendant was aware of them, then the evidence is not newly discovered and appears to be cumulative.

Defendant additionally complains that the victim passenger and the victim driver's brother made statements during the parole proceeding that conflicted with trial testimony. (*Id.* at 7-8, 9) Defendant attributes the denial of parole to these statements. (*Id.*) Credibility issues are matters for the trial judge and the parole board. Furthermore, the Court does not find that the alleged discrepancies would have materially affected the outcome of this case.

In sum, Defendant fails to state a claim for which relief can be granted in a successive Rule 32 proceeding. Ariz. R. Crim. P. 32.4(a), 32.2(b). The defendant must assert specific claims supported by specific facts and adequately explain the reason for their untimely assertion. Defendant has failed to meet this standard. The Court finds that no purpose would be served by appointment of counsel, preparation of the post-conviction relief record, or further proceedings.

IT IS THEREFORE ORDERED dismissing Defendant's Notice of Post-Conviction Relief pursuant to Arizona Rule of Criminal Procedure 32.2(b). This action moots the issues raised on page 2 of the defendant's Case Status filing.

IT IS FURTHER ORDERED denying Defendant's request for preparation of the post-conviction relief record.

IT IS FURTHER ORDERED granting the defendant's request in the Case Status submission for a copy of the notice of post-conviction relief and ordering the Rule 32 Management Unit to mail a copy to him.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-005235 08/27/2015

IT IS FURTHER ORDERED denying the remaining requests for relief in the Case Status submission.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
09/25/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-005235 09/24/2015

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA

v.

PHILIP LEE CARSON (A)

DIANE M MELOCHE

PHILIP LEE CARSON
#091914 ASPC EYMAN MEADOWS
P O BOX 3300
FLORENCE AZ 85132

COURT ADMIN-CRIMINAL-PCR

MINUTE ENTRY

The Court has reviewed Defendant's *Pro Per* pleading titled "Rehearing R.32.9(a)" filed on September 9, 2015 which is requesting the Court to reconsider the Court's August 27, 2015 order.

IT IS ORDERED denying the Defendant's motion to reconsider.

05-07-90

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IN THE TEMPE JUSTICE COURT
STATE OF ARIZONA — COUNTY OF MARICOPA

STATE OF ARIZONA
vs.
PHILLIP LEE CARSON
Defendant

CR 90-05235

FIRST DEGREE MURDER, CLASS 1 FELONY
KIDNAPPING, CLASS 2 FELONY

No. _____

RELEASE ORDER

IT IS HEREBY ORDERED that the defendant be released as indicated below and comply with the following standard conditions and all other conditions checked below during the pendency of this case.

STANDARD CONDITIONS

(1) Appear for PRELIM on 5-7-90 at 8:30 AM PM

at Tempe Justice Court, 1845 E. Broadway Rd., Ste. 8, Tempe, AZ 85282

(2) Appear to answer and submit to all further orders and processes of the court having jurisdiction of the case;
(3) Refrain from committing any criminal offense; and
(4) Not leave the state without permission of the court.

RELEASE TYPE

☐ **Own Recognizance:** The defendant is released and promises to appear in court as required.
☐ **Supervised Release:** The defendant is released on an own recognizance, subject to the supervision restrictions and conditions of Pretrial Services Agency of the Superior Court. ☐ including drug monitoring
☐ **Third-Party Custody:** The defendant will be placed in the custody of:

Name _____ Telephone _____

Address _____

who agrees (a) to supervise the defendant in accordance with the conditions of this order; (b) to use every effort to assure the appearance of the defendant at all scheduled hearings before the court having the jurisdiction of the case; and (c) to notify the court immediately in the event the defendant violates any condition of this release or disappears.

Signed _____
Third-Party Custodian

☐ **Secured Appearance Bond:** The defendant will deposit with the Clerk of the above court the total sum of $ _____ which includes all applicable surcharges.
☐ **No Bond:** The defendant is held without bond pursuant to Ariz. Const. Art. 2, Section 22.

OTHER CONDITIONS AND RESTRICTIONS

☐ The defendant is not to return to the scene of the alleged crime.
☐ The defendant is not to initiate contact of any nature with the alleged victim(s) and/or witnesses, including arresting officers.
☐ The defendant is not to possess any weapons or any drugs without a valid prescription.
☐ The defendant is not to drink alcoholic beverages and drive, or drive without a valid driver's license.
☐ The defendant is to continue to reside at the present address or provide the court with proof of current local address.
☐ The defendant is to contact the probation/parole officer _____

☐ The defendant is to reside with _____

at _____

ACKNOWLEDGMENT BY DEFENDANT

I understand the standard conditions and all other conditions of my release checked above, and the forfeitures and penalties listed on the **reverse side**, applicable in the event I violate them. I agree to comply fully with each of the conditions imposed on my release and to notify the court promptly in the event I change my place of residence.

Defendant: John L Carson

Dated 4-26-90 Address 1732 Pl.

City & State Tmp AZ. Telephone 954-7898

Judge/Commissioner

White: File Copy Canary: Jail Pink: Defendant

3800-500-90 R2-90

61

06-01-90

DD 3

FE 2

JUDITH [illegible], CLERK DEP.
BY
Copy
FILED
90 JUN -1 PM 4:00

MARA SIEGEL
State Bar No. 011716
Deputy Public Defender
132 South Central Avenue, Suite 6
Phoenix, Arizona 85004
(602) 262-3024
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. PHILIP LEE CARSON,, Defendant.	No. CR-90-05235 NOTICE OF DEFENSES AND REQUEST FOR NOTICE OF REBUTTAL WITNESSES (Assigned to the Honorable Robert A. Hertzberg)

Defendant Philip Carson, by his attorney, Mara Siegel, gives notice that the defenses checked below may be raised at trial.

_____ 1. Alibi	_____15. Invalidity of prior conviction
_____ 2. Insanity	_____16. Good character
__X__ 3. Self-Defense	_____17. Lack of specific intent
_____ 4. Entrapment	_____18. No criminal intent
_____ 5. Consent	_____19. Mistaken identification
_____ 6. Impotency	_____20. Insufficiency of prior conviction
_____ 7. Marriage	_____21. Insufficiency of State's Evidence
_____ 8. Mere Presence	_____22. Justification
_____ 9. Immaturity	_____23. Act of God
_____10. Intoxication	_____24. Suicide
_____11. Diminished Capacity	_____25. Duress
_____12. Coercion	_____26. Defense of Others
_____13. Accident	_____27. Defense of Property
_____14. Illegal Search	_____28. Other _____

In support of each of the above defense, Philip Carson may call the following witnesses:

1. The defendant;

2. Any and all individuals named or referred to in the preliminary hearing transcript and/or grand jury transcript and/or police departmental reports or in any of the State's discovery;

APPENDIX F CERTIORARI NO. 21-

DECISION of STATE SUPREME COURT DENYING REVIEW

No. CR-17-0490-PR on February 14, 2018
pg: 63

1 CA-CR 15-0691 PRPC
CR1990-005235

F

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

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

TELEPHONE: (602) 452-3396

February 14, 2018

RE: STATE OF ARIZONA v PHILIP LEE CARSON
Arizona Supreme Court No. CR-17-0490-PR
Court of Appeals, Division One No. 1 CA-CR 15-0691 PRPC
Maricopa County Superior Court No. CR1990-005235

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 14, 2018, in regard to the above-referenced cause:

ORDERED: Petition for Review from the Arizona Court of Appeals Division One's Review of the Superior Court in Maricopa County R.32.9(c) = DENIED.

A panel composed of Chief Justice Bales, Justice Pelander, Justice Gould and Justice Lopez participated in the determination of this matter.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Diane Meloche
Philip Lee Carson, ADOC 091914, Arizona State Prison, Florence Eyman Complex-Cook Unit
Amy M Wood
kd

Rec 2-18-18