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APPENDIX A
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (NOVEMBER 9, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS CLAYTON STERES,

Petitioner-Appellant,

v.

KEVIN CURRAN, Warden (ASPC-Florence); ARIZONA ATTORNEY GENERAL'S OFFICE,

Respondents-Appellees.

No. 21-15675

D.C. No. 4:18-cv-00161-RM
District of Arizona, Tucson

Before: BERZON and RAWLINSON, Circuit Judges.

ORDER

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

Any pending motions are denied as moot.
DENIED.

APPENDIX B
JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
(MARCH 26, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THOMAS CLAYTON STERES,

Petitioner,

v.

KEVIN CURRAN, ET AL.,

Respondents.

No. CV-18-00161-TUC-RM

JUDGMENT IN A CIVIL CASE

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

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

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

Date: March 26, 2021

By: /s/ Susana Barraza
Deputy Clerk

APPENDIX C
ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (MARCH 26, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THOMAS CLAYTON STERES,

Petitioner,

v.

KEVIN CURRAN, ET AL.,

Respondents.

No. CV-18-00161-TUC-RM

Before: Hon. Rosemary MARQUEZ,
United States District Judge.

ORDER

On September 23, 2020, Magistrate Judge Bruce G. Macdonald issued a Report and Recommendation ("R&R") (Doc. 20), recommending that this Court dismiss Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Petitioner filed a timely Objection (Doc. 21), and Respondents filed a Response to the Objection (Doc. 25). For the following reasons, Petitioner's Objection will be partially sustained and partially overruled, the R&R will be

partially accepted and partially rejected, and the § 2254 Petition will be denied.

I. Standard of Review

A district judge "may accept, reject, or modify, in whole or in part," a magistrate judge's proposed findings and recommendations. 28 U.S.C. § 636(b)(1). A district judge must "make a de novo determination of those portions" of a magistrate judge's "report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The advisory committee's notes to Rule 72(b) of the Federal Rules of Civil Procedure state that, "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation" of a magistrate judge. Fed. R. Civ. P. 72(b) advisory committee's note to 1983 addition. *See also Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error."); *Prior v. Ryan*, CV 10-225-TUC-RCC, 2012 WL 1344286, at *1 (D. Ariz. Apr. 18, 2012) (reviewing for clear error unobjected-to portions of Report and Recommendation).

II. Background

Petitioner was convicted based on a guilty plea in Cochise County Superior Court of attempted premeditated murder. (Doc. 11 at 3-4, 6-10, 44-47)[1] As the factual basis for the plea, Petitioner admitted that he

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[1] All record citations herein refer to the page numbers generated by the Court's electronic filing system.

made plans to kill the victim and then stabbed the victim near the base of the victim's skull. (*Id.* at 35-38.) Petitioner was sentenced to a fifteen-year term of imprisonment. (*Id.* at 46; *see also id.* at 101.)

Petitioner thereafter filed a timely Notice of Post-Conviction Relief ("PCR"). (Doc. 11 at 107-108.) Nearly a year later, Petitioner's retained PCR counsel filed a PCR Petition. (*Id.* at 110-129.) The trial court granted the State's motion to dismiss the PCR Petition as untimely. (Doc. 12 at 13.) Petitioner thereafter filed a Petition for Review (*id.* at 32-52), and the Arizona Court of Appeals granted review but denied relief (*id.* at 56-61). The Arizona Court of Appeals found that the PCR Petition should not have been dismissed as untimely, but that summary dismissal was appropriate based on Petitioner's failure to comply with Arizona Rule of Criminal Procedure 32.5, which at the time required a petitioner to support a PCR petition with a sworn declaration verifying the accuracy of the information contained in the petition. (*Id.* at 58-59.) The Arizona Court of Appeals further found that summary dismissal was appropriate because Petitioner had failed to state a colorable, non-precluded claim for relief. (*Id.* at 58-61.) The Arizona Supreme Court denied review. (Doc. 12 at 61)[2]

After the conclusion of his unsuccessful state PCR proceedings, Petitioner filed the pending § 2254 Petition, asserting two grounds for relief: (1) ineffective assistance of counsel ("IAC") based on trial counsel performing insufficient research and investigation and failing to move to suppress cell phone evidence

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[2] Petitioner's state trial and PCR proceedings are summarized in more detail in the R&R. (*See* Doc. 20 at 1-7.)

before advising Petitioner to plead guilty, and (2) illegal cell phone search. (Doc. 1.) Petition supports his § 2254 Petition with a number of attached exhibits, including police reports, cell phone records, photographs of the victim's injuries, and screenshots of social media postings of his accomplice, Kate Francois. (Doc. 1-4.) Respondents filed an Answer to the § 2254 Petition (Doc. 10), and Petitioner filed a Reply (Doc. 14).

The R&R finds that the § 2254 Petition is timely under the statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") but that Petitioner's claims are procedurally defaulted. (Doc. 20 at 14-16, 25-26.) The R&R further finds that Petitioner cannot show cause and prejudice or a miscarriage of justice to excuse the procedural default of his claims. (*Id.* at 16-17.) In the alternative, the R&R finds that Petitioner's claims fail on the merits. (*Id.* at 17-32.) Petitioner objects to the R&R's procedural default findings and to the R&R's analysis of the merits of his claims. (Doe. 21.)

III. Applicable Law

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

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined

by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This standard requires a federal habeas petitioner to show not merely that the state court's determination was incorrect, but that it "was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was correct but whether that determination was unreasonable—a substantially higher threshold.").

Federal habeas claims are subject to the "exhaustion rule," which requires that the factual and legal basis of a claim be presented first to the state court. 28 U.S.C. § 2254(b)(1)(A); *Weaver v. Thompson*, 197 F.3d 359, 363-64 (9th Cir. 1999). If the petitioner is in custody as a result of a judgment imposed by the State of Arizona, and the case does not involve a life sentence or the death penalty, he must fairly present his claims to the Arizona Court of Appeals in order to satisfy the exhaustion requirement. *See Castillo v. McFadden*, 399 F.3d 993, 998 n.3 (9th Cir. 2005); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). In order to properly exhaust a claim for purposes of federal habeas review, the petitioner must identify the federal nature of the claim to the state court by citing federal law or precedent. *Lyons*

v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000), *as amended by* 247 F.3d 904.

A claim is exhausted but procedurally defaulted if it was presented in state court but the state court rejected it based on an independent and adequate state procedural bar. *Bennett v. Mueller,* 322 F.3d 573, 583 (9th Cir. 2003); *Franklin v. Johnson,* 290 F.3d 1223, 1230-31 (9th Cir. 2002). A claim is also technically exhausted but implicitly procedurally defaulted if the petitioner failed to raise it in state court and a return to state court to exhaust it would be futile considering state procedural rules. *Franklin,* 290 F.3d at 1230-31; *see also O'Sullivan v. Boerckel,* 526 U.S. 838, 848 (1999) (finding claims procedurally defaulted because habeas petitioner was time-barred from presenting his claims in state court); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (noting that claims are barred from habeas review if they were not raised in state court and the state courts "would now find the claims procedurally barred").

A federal habeas court may not review a procedurally defaulted claim unless "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice.'" *Coleman,* 501 U.S. at 750. To establish "cause," a petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Id.* at 753. To establish "prejudice," a petitioner must demonstrate actual, not possible, harm resulting from the alleged violation. *Murray v. Carrier*, 477 U.S. 478, 494 (1986); *see also United States v. Frady*, 456 U.S.

152, 170 (1982) (to show prejudice, a petitioner must demonstrate that the alleged constitutional violation worked to the prisoner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.") To establish a "fundamental miscarriage of justice," a petitioner must "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

IV. Discussion

A. Exhaustion

Respondents concede that Petitioner presented his habeas claims to the state courts in his PCR Petition and in his Petition for Review. (Doc. 10 at 9-10.) The R&R agrees, with the exception of Petitioner's claim that trial counsel rendered ineffective assistance by convincing him to plead guilty based only on information in police reports; the R&R finds that Petitioner raised that claim in his PCR Petition but not in his Petition for Review. (Doc. 20 at 25-26.) Petitioner objects to this portion of the R&R, stating—without citation to the record—that in his Petition for Review he claimed that defense counsel failed to do the necessary investigation and research to properly defend him and instead "relied on the police reports to evaluate his case." (Doe. 21 at 6. n.1.)

Although Petitioner fails to support his objection with an appropriate record citation, this Court has independently reviewed his Petition for Review and finds that Petitioner fairly presented all of his claims to the Arizona Court of Appeals, including his claim

that trial counsel rendered ineffective assistance by advising him to plead guilty based only on information contained in police reports. In the Petition for Review, Petitioner argued that trial counsel failed to perform necessary investigation and research and instead "drew false conclusions based on inaccurate information in the police reports," which led to Petitioner entering a defective plea. (Doc. 12 at 49-50.)

Petitioner's objection to this portion of the R&R will be sustained, and this portion of the R&R will be rejected.

B. Procedural Default

With the exception of the IAC claim addressed above, the R&R finds that Petitioner exhausted his claims by presenting them in his PCR Petition and Petition for Review. (Doc. 20 at 15, 25-26.) Nevertheless, the R&R finds that the claims are procedurally defaulted because the Arizona Court of Appeals rejected them based on Arizona Rule of Criminal Procedure 32.5, which the R&R concludes is an independent and adequate state procedural bar. (*Id.* at 15-16.) Petitioner challenges the R&R's finding that Rule 32.5 is an independent and adequate state ground precluding federal habeas review, arguing that amendments to the Arizona Rules of Criminal Procedure that went into effect on January 1, 2020 should apply to his case, and that the amended rules only require self-represented petitioners to submit sworn declarations. (Doc. 21 at 1-3) According to Petitioner, the amended rules apply because they went into effect when his case was pending and because failing to apply them would cause significant injustice. (*Id.* at 2.)

Respondents assert that Petitioner's argument need not be considered because it was raised for the first time in his Objection, and that the argument fails on the merits because the 2020 amendments to the Arizona Rules of Criminal Procedure do not retroactively apply to Petitioner's PCR proceedings, which were initiated in 2016 and terminated in 2018. (Doc. 25 at 2.) Respondents further argue that, even if this Court does find that the later amendments to the Arizona Rules of Criminal Procedure are applicable, this Court is nevertheless bound by the Arizona Court of Appeals' finding that Petitioner violated former Rule 32.5. (*Id.* at 2-3.)

Currently, Arizona Rule of Criminal Procedure 33.7(d) requires only a self-represented PCR petitioner to file a "declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge or belief." Ariz. R. Crim. P. 33.7(d). The Applicability Provision contained in the Editors' Notes to the rule states that the 2020 amendments to the Arizona Rules of Criminal Procedure "apply to all actions filed on or after January 1, 2020," as well as "all other actions pending on January 1, 2020, except to the extent that the court in an affected action determines that applying the rule or amendment would be infeasible or work an injustice."

Petitioner's PCR Petition was not pending on January 1, 2020; the Arizona Supreme Court denied review on November 30, 2017, and the Arizona Court of Appeals issued its mandate on February 8, 2018. (Doc. 12 at 63, 65.) The 2020 amendments to the Arizona Rules of Criminal Procedure do not apply retroactively to PCR proceedings that concluded before

the amendments took effect. Petitioner's argument that the 2020 amendments should apply to prevent an injustice misconstrues the plain language of the Applicability Provision.

Nevertheless, the Court disagrees with the R&R's finding that Petitioner's claims are procedurally defaulted because the Arizona Court of Appeals applied an independent and adequate state procedural bar. The Arizona Court of Appeals found that summary dismissal of Petitioner's PCR Petition was appropriate because Petitioner failed to file a Rule 32.5 declaration. This is a curious conclusion, because the record reflects that Petitioner did accompany his PCR Petition with a signed and notarized Rule 32.5 declaration averring that the information contained in the Petition and exhibits was true to the best of his knowledge and belief. (Doe. 11 at 129.) It is not the province of this Court to "reexamine state-court determinations on state-law questions" during federal habeas review. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). However, a state court's application of a state procedural bar results in a procedural default on federal habeas review only if the state procedural rule "provide[s] an adequate and independent state law basis on which the state court can deny relief." *Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003) (internal quotation omitted).

A state law ground is "independent" if "the state law basis for the decision" is not "interwoven with federal law." *Bennett*, 322 F.3d at 581. A state law ground is "adequate" if it is "well-established and consistently applied," meaning it was "firmly established and regularly followed at the time it was applied by the state court." *Id.* at 583 (internal quo-

tations omitted). There is no question that former Arizona Rule of Criminal Procedure 32.5's requirement of a sworn declaration is a state ground that is independent of federal law. However, this Court disagrees with the R&R's conclusion that former Rule 32.5 is an adequate ground for disposal of Petitioner's PCR claims. In finding that the rule is both independent and adequate, the R&R relies on *Stewart v. Smith*, 536 U.S. 856 (2002) (per curiam) and *Carriger v. Lewis*, 971 F.2d 329 (9th Cir. 1992) (Doc. 20 at 16), but neither case discusses former Rule 32.5's declaration requirement; they address Arizona's waiver rules. The cases cited by Respondents in support of their argument that Rule 32.5 is an independent and adequate state procedural bar likewise do not specifically address former Rule 32.5 or its declaration requirement. (*See* Doc. 10 at 10.)

This Court has been unable to find any Arizona Court of Appeals case—other than the one from Petitioner's own PCR proceedings—finding that summary dismissal of a PCR Petition for failure to comply with former Rule 32.5's declaration requirement is appropriate where the petitioner was not given an opportunity to amend his petition to include the required declaration. In both *Arizona v. Hargous*, No. 1 CA-CR 15-0454 PRPC, 2017 WL 1739153 (Ariz. App. May 4,2017), and *Arizona v. Baker*, No. 2 CA-CR 2016-0275-PR, 2016 WL 5929621 (Ariz. App. Oct. 12, 2016), the PCR trial courts had given the petitioners an opportunity to amend their PCR petitions in order to comply with Rule 32.5's declaration requirement. Here, there is no indication that the PCR trial court provided Petitioner with such an opportunity—likely because, as the record reflects, Petitioner

had in fact complied with the requirement. (Doc. 11 at 129.)

Because this Court has been unable to locate any case law indicating that former Rule 32.5 was regularly applied by Arizona courts in the manner in which the Arizona Court of Appeals applied it to Petitioner's case, this Court cannot conclude that the declaration requirement is an adequate state procedural bar. Accordingly, the Court rejects the R&R's conclusion that Petitioner's claims are procedurally defaulted.

C. Cause and Prejudice

Petitioner objects to the R&R's cause-and-prejudice findings, arguing that cause and prejudice exists to excuse the procedural default of his claims. (Doc. 21 at 3-4.) Because this Court has found that Petitioner's claims are not procedurally defaulted, it need not analyze whether Petitioner can satisfy the cause-and-prejudice standard for excusing a procedural default.

D. IAC Claims

Both the Arizona Court of Appeals and Magistrate Judge Macdonald alternatively rejected Petitioner's claims—including his IAC claims—on the merits.

In Ground One of his § 2254 Petition, Petitioner asserts that trial counsel rendered ineffective assistance by (A) failing to interview potential witnesses; (B) failing to move to suppress cell phone evidence; (C) failing to present exculpatory evidence to contradict the State's assertion that Petitioner intended or conspired to harm the victim; (D) advising Petitioner to plead guilty; and (E) providing an erroneous factual basis for the plea. (Doc. 1 at 4-9.)

The Arizona Court of Appeals rejected Petitioner's challenge to the factual basis of his plea on the grounds that it was premised on conclusory allegations and it contradicted the sworn statements he made at his change-of-plea hearing. (Doc. 12 at 5960.) With respect to Petitioner's allegation that trial counsel failed to move to suppress cell phone evidence, the Court of Appeals found that Petitioner failed to establish deficient performance because he did not identify what evidence was obtained from his cell phone, much less how its suppression was critical to his defense, "particularly in light of the various admissions he made to police officers investigating the crime." (*Id.* at 60.) The Court of Appeals further found that, by pleading guilty, Petitioner had waived all IAC claims except those relating to the validity of his plea, and that he failed to allege that he would not have pled guilty but for trial counsel's conduct. (*Id.*)

The R&R finds that the Arizona Court of Appeals' rejection of Petitioner's IAC claims was not contrary to clearly established federal law or based on an unreasonable determination of the facts. (Doc. 20 at 18-31.) The R&R notes that Petitioner waived any IAC claims except those relating to the validity of his guilty plea, and further finds that Petitioner failed to establish deficient performance and prejudice under the *Strickland* standard. (*Id.*)

Petitioner objects to the R&R's rejection of his IAC claims, arguing that both the Arizona Court of Appeals and Magistrate Judge Macdonald failed to consider the cumulative impact of the errors of trial counsel. (Doe. 21 at 4.) Petitioner asserts that his § 2254 Petition and its accompanying exhibits set forth in detail the information trial counsel would

have discovered with further investigation, as well as the evidence obtained illegally from Petitioner's cell phone. (*Id.* at 4-5.) Petitioner further argues that, without proper research and investigation, trial counsel could not accurately or properly advise him about his chances at trial versus the benefits of a plea agreement, and that trial counsel's cumulative errors caused Petitioner to plead guilty "when the case could have likely [ ] been dismissed, if a Motion to Suppress had been litigated." (*Id.* at 5-6.) In response, Respondents contend that Petitioner's cumulative error argument need not be considered because it was raised for the first time in Petitioner's Objection to the R&R, and that the argument fails on the merits because Petitioner cannot show prejudice even if trial counsel's cumulative errors constituted deficient performance. (Doc. 25 at 5.)

To establish his claims of ineffective assistance of counsel, Petitioner must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, Petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To show prejudice, Petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Moreover, to obtain relief under AEDPA on his IAC claims, Petitioner must show either that the Arizona Court of Appeals' decision rejecting the claims "was contrary to, or involved an unreasonable applica-

tion" of the *Strickland* standard, or that the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so[.]" *Harrington v. Richter,* 562 U.S. 86 (2011).

"When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" but instead "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was constitutionally inadequate. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). "Counsel's failure to evaluate properly facts giving rise to a constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof." *Id.* at 266-67.

Petitioner cannot meet either the deficient performance or prejudice prong of the *Strickland* standard. Defense counsel did not make professionally unreasonable errors by advising Petitioner to plead guilty without first moving to suppress cell phone evidence and without first obtaining the allegedly exculpatory evidence that Petitioner attaches to his § 2254 Petition.[3] Furthermore, Petitioner cannot show that

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[3] Federal habeas review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181-82; *see also* 28 U.S.C.

there is a reasonable likelihood that he would not have pled guilty and would have insisted on going to trial if not for the alleged errors of defense counsel.

Even without evidence seized from Petitioner's cell phone, the State had strong evidence of Petitioner's guilt: Petitioner confessed to the police that he had stabbed the victim, and he was further implicated in the crime by statements of his accomplice and the victim, as well as recordings of phone calls he made from jail. (*See* Doc. 1-4.) The "exculpatory" evidence that Petitioner alleges defense counsel should have uncovered consists primarily of social media postings that Petitioner uses to attack the character of his accomplice; this evidence does little to undermine the significant evidence of Petitioner's guilt.

Petitioner was charged with conspiracy to commit first-degree murder, two counts of attempted premeditated murder, two counts of aggravated assault, possession of marijuana for sale, and possession of drug paraphernalia. (Doc. 1-4 at 5-7.) By pleading guilty to one count of attempted premediated murder, he obtained the dismissal of the other charges and a stipulated sentencing range of twelve to fifteen years.

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§ 2254(d). Based on the record before this Court, it is not entirely clear whether the exhibits that Petitioner has attached to his § 2254 Petition were presented to the state courts; they are not included in the current record as attachments to his PCR Petition or Petition for Review, although it appears that Petitioner referenced them in the body of those petitions. (*Compare* Doc. 1-4, *with* Doc. 11 at 110-129 *and* Doc. 12 at 32-54.) Because Petitioner's IAC claims fail even when considering the evidence attached to his § 2254 Petition, the Court will assume without deciding that the evidence was presented in state court and may properly be considered on federal habeas review.

(Doc. 11 at 7, 47, 99.)[4] At his change-of-plea hearing, he stated that he was satisfied with his defense counsel and was pleading guilty voluntarily. (Doe. 11 at 19-20, 34.) He also stated that the factual basis for the plea provided by defense counsel was accurate and that he had nothing to add to or detract from that factual basis. (*Id.* at 35-38.)

Petitioner has not met the *Strickland* standard, much less shown that the Arizona Court of Appeals' rejection of his IAC claims was unreasonable under 28 U.S.C. § 2254(d). The Court will overrule Petitioner's objection to the R&R's finding that his IAC claims fail on the merits.

E. Cell Phone Search

In Ground Two, Petitioner alleges that the search of his cell phone was illegal under the Fourth Amendment and *Riley v. California*, 573 U.S. 373 (2014). (Doc. 1 at 11-13.) The Arizona Court of Appeals found that Petitioner waived this claim by pleading guilty. (Doc. 12 at 61.) The R&R likewise finds waiver by operation of Petitioner's guilty plea. (Doc. 20 at 31-32.) In addition, the R&R cites *Stone v. Powell*, 428 U.S. 465 (1976), for the proposition that the exclusionary rule "is a judicially created remedy rather than a personal constitutional right." (*Id.* at 31.) Petitioner objects, arguing that federal habeas review of his Fourth Amendment claim is appropriate under *Stone* because the ineffective assistance of his trial counsel

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[4] The record indicates that this stipulated sentencing range was highly favorable to Petitioner; at sentencing, the trial judge stated: "I don t know that fifteen years is long enough but those are the parameters I have to work with." (Doc. 11 at 101.)

denied him the opportunity to fully and fairly litigate the claim in state court. (Doc. 21 at 6-7.)[5]

As discussed above, a defendant who has pled guilty may not raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of his guilty plea. *Tollett*, 411 U.S. at 267. "[W]hile claims of prior constitutional deprivation may play a part in evaluating" trial counsel's advice to plead guilty, those "claims are not themselves independent grounds for federal collateral relief." *Id.* The R&R correctly determined that Petitioner's Fourth Amendment claim is barred by *Tollett*. Accordingly, there is no need to determine whether the claim is also barred by *Stone*, and Petitioner's objection to this portion of the R&R will be overruled.

IT IS ORDERED that Petitioner's Objection (Doc. 21) is partially sustained and partially overruled, as set forth above.

IT IS FURTHER ORDERED that the Report and Recommendation (Doc. 20) is partially rejected and partially accepted, as set forth above.

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is denied. The Clerk of Court is directed to enter judgment accordingly and close this case.

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[5] Petitioner also states that he raised this claim "for the first time in this petition." (Doc. 21 at 7.) If Petitioner indeed raised the claim for the first time in his § 2254 Petition, it would be procedurally defaulted. However, contrary to Petitioner's statement, the record reveals that Petitioner raised this claim in his PCR Petition as well as in his Petition for Review to the Arizona Court of Appeals. (Doc. 11 at 121-122; Doc. 12 at 46-48.)

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

Dated this 26th day of March, 2021.

/s/ Hon. Rosemary Marquez
United States District Judge

APPENDIX D
REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (SEPTEMBER 23, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THOMAS CLAYTON STERES,

Petitioner,

v.

KEVIN CURRAN, ET AL.,

Respondents.

No. CV-18-0161-TUC-RM (BGM)

Before: Bruce G. MACDONALD,
United States Magistrate Judge.

REPORT AND RECOMMENDATION

Currently pending before the Court is Petitioner Thomas Clayton Steres's Petition Pursuant to 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) ("Petition") (Doc. 1). Respondents have filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Doc. 10), and Petitioner filed a reply (Doc. 14). The Petition is ripe for adjudication.

Pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure,[1] this matter was referred to Magistrate Judge Macdonald for Report and Recommendation. The Magistrate Judge recommends that the District Court deny the Petition (Doc. 1).

I. Factual and Procedural Background

A. Initial Charge and Sentencing

On December 8, 2014, Petitioner pleaded guilty to one count of attempted murder with premeditation. Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Minute Entry: Plea Proceedings 12/08/2014 (Exh. "A") (Doc. 11); Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR-201400108, Plea Agreement (Exh. "B") (Doc. 11). Petitioner admitted that on March 3, 2014, he "stabbed th[e] victim with a knife in the back of his head—his/her head, a second time." Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Hr'g Tr. 12/8/2014 (Exh. "C") (Doc. 11) at 6:6-19, 22:24-23:11. Petitioner also confirmed defense counsel's statement that "there[ ] [was] no question that he—[Defendant] did stab the victim in the back of the neck after [co-Defendant] hit [the victim] with a baseball bat." *Id.*, Exh. "C" (Doc. 11) at 25:14-26:11.

On May 15, 2015, Petitioner was sentenced to a term of fifteen (15) years of imprisonment. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Sentence of Imprisonment 5/15/2015

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[1] Rules of Practice of the United States District Court for the District of Arizona.

(Exh. "D") (Doc. 11) & Hr'g Tr. 5/14/2015 (Exh. "E") (Doc. 11) at 50:10-51:12.

B. Post-Conviction Relief Proceeding

1. Proceedings before the Rule 32 court

On August 4, 2015, Petitioner filed his Notice of Post-Conviction Relief ("PCR"). Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Pet.'s Not. of PCR 8/4/2015 (Exh. "F") (Doc. 11). Petitioner's Notice of PCR was signed by counsel on his behalf. *See id.*, Exh. "F". On July 22, 2016, Petitioner filed his Petition for Post-Conviction Relief. Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Pet.'s Pet. for PCR 7/22/2016 (Exh. "G") (Doc. 11). Petitioner asserted four (4) claims for relief, including (1) ineffective assistance of counsel related to entering a guilty plea, because counsel allegedly gave Petitioner "erroneous advice" causing his plea to not be knowing, intelligent, and voluntary, and because the factual basis was allegedly defective; (2) Detective Williams allegedly violated protocol between the time he seized Petitioner's cellular telephone and its search requiring suppression of any evidence found; (3) Detective Williams allegedly tampered with Petitioner's cellular telephone while it was in his possession prior to issuance of a search warrant; and (4) ineffective assistance of counsel because counsel allegedly failed to file a motion to suppress the cellular telephone evidence or argue that Petitioner did not intend to hurt the victim or properly blame his co-defendant. *Id.*, Exh. "G" (Doc.

25) at 114-27.[2] The State of Arizona filed its motion to dismiss urging Petitioner's Rule 32 petition was untimely, or in the alternative seeking an extension of time to file a response. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, State's Mot. to Dismiss Untimely Pet. for PCR, or in the Alt., Request for Ext. of Time to File Resp. (Exh. "H") (Doc. 11). Petitioner filed a response to the State's motion to dismiss urging that it was untimely and not based on any applicable procedural rule. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Pet.'s Resp. to State's Mot. to Dismiss and Ext. of Time to File Resp. to PCR Pet. (Exh. "I") (Doc. 11). Petitioner further alleged that the length of time to prepare his PCR Petition was not unreasonable. *Id.*, Exh. "I" at 136-37. On September 27, 2016, the Rule 32 court entered its Order Dismissing Untimely Petition for Post-Conviction Relief, or Extending Time for the State's Response, in which it granted the State an additional thirty (30) days to respond to Petitioner's PCR Petition. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Order 9/27/2016 (Exh. "J") (Doc. 11). On October 10, 2016, the State filed its reply regarding the motion to dismiss and response to Petitioner's PCR Petition. Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, State's Reply to Mot. to Dismiss Untimely Pet.; Resp. to Def.'s Pet. for PCR (Exh. "K") (Doc. 12). The State corrected Petitioner's misapprehension regarding the calculation of time for its response, as well as presented its position

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[2] Page citations refer to the CM/ECF page number for ease of reference. Page and line designations within hearing transcripts are the exception to this rule.

regarding application of procedural rules regarding the time for filing of Petitioner's Rule 32 petition. *Id.*, Exh. "K" at 4-6. The State also responded to the allegations in Petitioner's Rule 32 petition, noting that Petitioner acknowledged that "the trial judge conducted a full waiver on the record of Steres' guilty plea"; urging that the factual basis was "established and acknowledged by Defendant during the Change of Plea process as sufficient to convict him"; asserting that there was no evidence to suggest that Detective Williams's actions were "newly discovered" or based on anything more than speculation; and noting that any additional investigation by trial counsel "would never have eliminated those calls [by Petitioner from jail] or prevented their admission, nor would it have reduced the volume of other damning evidence." *Id.*, Exh. "K" at 6-11. On October 24, 2016, the Rule 32 court granted the State's motion to dismiss and dismissed Petitioner's PCR Petition as untimely. Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Order 10/24/2016 (Exh. "L") (Doc. 12). On November 1, 2016, Petitioner filed his reply in support of his PCR petition. Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Pet.'s Reply to State's Resp. to Pet. for PCR (Exh. "M") (Doc. 12).

2. PCR Appeal

On November 17, 2016, Petitioner sought review of the denial of his PCR petition by the Arizona Court of Appeals. *See* Answer (Doc. 10), Court of Appeals, State of Arizona, Case No. 2 CA-CR 2016-00379-PR, Pet.'s Pet. for Review of Denial of Pet. for PCR (Exh. "N") (Doc. 12). Petitioner asserted that the Rule 32 court's dismissal of his petition as untimely was in

error. *Id.,* Exh. "N" at 36-38. Petitioner further asserted that Rule 32.4(c), Arizona Rules of Criminal Procedure, is inapplicable to cases where counsel is retained. *Id.,* Exh. "N" at 36-37. Petitioner also urged that even if his Petition were untimely, his claims "clearly fall under the exceptions for filing a Notice of Post-Conviction Relief." *Id.,* Exh. "N" at 38. Petitioner argued that "newly discovered evidence," as well as "a significant change in the law" warranted consideration of the merits of his petition. *Id.,* Exh. "N" at 38-40. Regarding the merits of his Petition, Petitioner asserted that his plea was not knowing, intelligent, or voluntary because trial counsel told him that "he had no defense" and if found guilty at trial could go to prison "for life." Answer (Doc. 10), Court of Appeals, State of Arizona, Case No. 2 CA-CR 2016-00379-PR, Pet's Pet. for Review of Denial of Pet. for PCR (Exh. "N") (Doc. 12) at 41-42. Petitioner urged that "[c]ounsel failed to discover and pursue a critical defense that could have been pivotal in the case" and failed to file a motion to suppress. *Id.,* Exh. "N" at 41. Petitioner also argued that the factual basis of his guilty plea was defective and was "contradicted by the credible evidence in th[e] case." *Id.*, Exh. "N" at 42-44. Petitioner also alleged that Detective Williams did not follow protocol after he seized Petitioner's cellular telephone, requiring any evidence obtained from the telephone to be suppressed. *Id.,* Exh. "N" at 44-47. Petitioner additionally alleged that Detective Williams performed an illegal search of his cellular telephone. *Id.,* Exh. "N" at 47-48. Finally, Petitioner argued that trial counsel was ineffective because he did not "interview any of the police officers in the case or any other witnesses, and did not investigate the case to discover critical defenses." Answer (Doc. 10), Court of Appeals, State of Arizona, Case

No. 2 CA-CR 2016-00379-PR, Pet's Pet. for Review of Denial of Pet. for PCR (Exh. "N") (Doc. 12) at 49.

On March 30, 2017, the Arizona Court of Appeals granted review, but denied relief. *See* Answer (Doc. 10), Court of Appeals, State of Arizona, Case No. 2 CA-CR 2016-00379-PR, Mem. Decision 3/30/2017 (Exh. "O") (Doc. 12). Regarding the timeliness of Petitioner's petition, the appellate court observed that "[e]ven if [ ] [R]ule [32.4] permitted dismissal on the ground of untimeliness, our supreme court has suggested that, in circumstances such as these, a pleading defendant who has filed a timely notice of post-conviction relief in an of-right proceeding should not have his petition dismissed based solely on his attorney's failure to file a timely petition." *Id.*, Exh. "O" at 58 (citing *State v. Diaz*, 236 Ariz. 361, ¶ 13, 340 P.3d 1069, 1071 (Ariz. 2014)). The appellate court went on to note that "in this case, Steres's petition was also subject to summary dismissal for his failure to comply with Rule 32 procedures and failure to state a colorable claim." *Id.*, Exh. "O" at 58 (citing Ariz. R. Crim. P. 32.5, 32.6(c)). The appellate court determined that denial was proper because "Steres failed to support his petition with his own declaration . . . under penalty of perjury[,]" or "file his own affidavit in support of his allegations[,]" in violation of Rule 32.5, Arizona Rules of Criminal Procedure. *Id.*, Exh. "O" at 59. The appellate court further found that "Steres ha[d] failed to state any colorable, non-precluded claim for relief." *Id.,* Exh. "O" at 59. The court of appeals observed that although Petitioner claimed his guilty plea was "defective," he did "not suggest his admissions fail to support a guilty finding on each element of attempted murder." Answer (Doc. 10), Court of Appeals, State of

Arizona, Case No. 2 CA-CR 2016-00379-PR, Mem. Decision 3/30/2017 (Exh. "O") (Doc. 12) at 59 (citing *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (Ariz. 1994)). The appellate court further noted that [a]fter pleading guilty, 'a defendant may not thereafter question the legal sufficiency of the evidence against him.'" *Id.*, Exh. "O" at 59 (citing *State v. Martinez*, 102 Ariz. 215, 216, 427 P.2d 533, 534 (Ariz. 1967)). The appellate court also observed that [a]lthough Steres maintains his attorney performed deficiently in failing to 'discover or pursue' his post-conviction allegation that evidence was illegally obtained from his cellular telephone, he fails to even identify what that evidence was, much less explain how its suppression was 'critical' to his defense, particularly in light of the various admissions he made to police officers investigating the crime." *Id.*, Exh. "O" at 60. As such, the court held that Petitioner "failed to make a colorable showing that counsel performed deficiently. *Id.*, Exh. "O*"* at 60 (citations omitted). The appellate court further determined that Petitioner's failure to "allege[ ] or aver[ ] that, but for his attorney's conduct, he would not have pleaded guilty and would have insisted on trial[,]" caused this ineffective assistance of counsel claim insufficient and subject to summary dismissal. *Id.,* Exh. "O" at 60 (citing *Hill v. Lockhart,* 474 U.S. 52, 60 (1985)). "Finally, Stere[s]'s independent, substantive claim of a Fourth Amendment violation, related to the seizure and allegedly illegal search of his cellular telephone, was waived by the terms of his plea agreement and by operation of law." *Id.*, Exh. "O" at 61 (citing *State v. Murphy*, 97 Ariz. 14, 15, 396 P.2d 250, 250-51 (1964)).

On November 30, 2017, the Arizona Supreme Court denied review. *See* Answer (Doc. 10), Ariz. Supreme Ct., Case No. CR-17-0180-PR, Memorandum 11/30/2017 (Exh. "P") (Doc. 12). On February 8, 2018, the Arizona Court of Appeals issued its mandate. Answer (Doc. 10), Court of Appeals, State of Arizona, Case No. 2 CA-CR 2016-00379-PR, Mandate 2/8/2018 (Exh. "Q") (Doc. 12).

C. The Instant Habeas Proceeding

On March 26,2018, Petitioner filed his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) (Doc. 1). Petitioner asserts two (2) grounds for relief. First, Petitioner alleges that he received ineffective assistance of counsel. *Id.* at 4-9. As part of this claim, Petitioner alleges that trial counsel "did not interview any of the police officers in the case, or any other potential witnesses"; "did not file a Motion to Suppress cellphone evidence, based on violations of protocol, and the illegal search of Petitioner's cellphone, without a search warrant"; "convinced Petitioner to plead guilty, based on false conclusions they reached, by only considering the information in the police reports"; and informed Petitioner that there were no defenses and if he went to trial "he would be found guilty and could go to prison for life." *Id.* at 5. Petitioner further alleges that trial counsel did not research legal authority and present "evidence to contradict that State's position that Petitioner intended to harm the victim, or conspired to harm him[.]" *Id.* Petitioner also alleges that counsel gave an inaccurate recitation of the factual basis for the plea. *Id.* at 7-9. Second, Petitioner alleges that Detective Williams violated protocol and searched Petitioner's cell phone before a search warrant

was issued." Petition (Doc. 1) at 11. Petitioner alleges that Detective Williams seized Petitioner's cellular telephone and did not turn it over to the "designated 'Collector of Evidence.'" *Id.* at 11. Petitioner further alleges that his cellular telephone was searched by Sierra Vista Police Detective Barron rather than the Department of Public Safety; a text message was sent after the cellular telephone was in the possession of Detective Williams; Detective Barron did not edit the information he provided back to Detective Williams; and Detective Williams did not place Petitioner's cellular telephone into evidence until after he received it back from Detective Barron. *Id.* at 12. Petitioner also alleges that Detective Williams searched Petitioner's cellular telephone prior to obtaining a search warrant in violation of the Fourth Amendment. *Id.* at 12-13.

On July 18, 2018, Respondents filed their Answer (Doc. 10), and on August 28, 2018, Petitioner replied (Doc. 14).

II. Standard of Review

A. In General

The federal courts shall "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Moreover, a petition for habeas corpus by a person in state custody:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of

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

28 U.S.C. § 2254(d); *see also Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). Correcting errors of state law is not the province of federal habeas corpus relief. *Estelle v. McGuire,* 502 U.S. 62, 67, 112 S. Ct. 475, 480, 116 L.Ed.2d 385 (1991). Ultimately, "[t]he statute's design is to 'further the principles of comity, finality, and federalism.'" *Panetti v. Quarterman*, 551 U.S. 930, 945, 127 S. Ct. 2842, 2854, 168 L.Ed.2d 662 (2007) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003)). Furthermore, this standard is difficult to meet and highly deferential "for evaluating state-court rulings, [and] which demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 563 U.S. at 181, 131 S. Ct. at 1398 (citations and internal quotation marks omitted).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, mandates the standards for federal habeas review. *See* 28 U.S.C. § 2254. The "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 19, 134 S. Ct. 10, 16, 187 L.Ed.2d 348 (2013). Federal courts reviewing a petition for habeas corpus must "presume the correctness of state courts' factual findings unless applicants rebut this presumption with

'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473-74, 127 S. Ct. 1933, 1940, 167 L.Ed. 2d 836 (2007) (citing 28 U.S.C. § 2254(e)(1)). Moreover, on habeas review, the federal courts must consider whether the state court's determination was unreasonable, not merely incorrect. *Id.*, 550 U.S. at 473, 127 S. Ct. at 1939; *Gulbrandson v. Ryan*, 738 F.3d 976, 987 (9th Cir. 2013). Such a determination is unreasonable where a state court properly identifies the governing legal principles delineated by the Supreme Court, but when the court applies the principles to the facts before it, arrives at a different result. *See Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011); *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000); *see also Casey v. Moore*, 386 F.3d 896, 905 (9th Cir. 2004). "AEDPA requires 'a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement.'" *Burt*, 134 S. Ct. at 10 (quoting *Harrington,* 562 U.S. at 103, 131 S. Ct. at 786-87) (alterations in original).

B. Exhaustion of State Remedies

Prior to application for a writ of habeas corpus, a person in state custody must exhaust all of the remedies available in the State courts. 28 U.S.C. § 2254(b)(1)(A). This "provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Rose v. Lundy*, 455 U.S. 509, 520, 102 S. Ct. 1198, 1204, 71 L.Ed.2d 379 (1982). As such, the exhaustion doctrine gives the State "the opportunity to pass upon and correct alleged viola-

tions of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 1349, 158 L.Ed.2d 64 (2004) (internal quotations omitted). Moreover, "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518, 102 S. Ct. at 1203 (internal citations omitted). This upholds the doctrine of comity which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Id.* (quoting *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 590, 94 L.Ed. 761 (1950)).

Section 2254(c) provides that claims "shall not be deemed . . . exhausted" so long as the applicant "has the right under the law of the State to raise, by any available procedure the question presented." 28 U.S.C. § 2254(c). "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 512, 30 L.Ed.2d 438 (1971). The fair presentation requirement mandates that a state prisoner must alert the state court "to the presence of a federal claim" in his petition, simply labeling a claim "federal" or expecting the state court to read beyond the four corners of the petition is insufficient. *Baldwin v. Reese*, 541 U.S. 27, 33, 124 S. Ct. 1347, 1351, 158 L.Ed.2d 64 (2004) (rejecting petitioner's assertion that his claim had been "fairly presented" because his brief in the state appeals court did not indicate that "he was complaining about a violation of federal law" and the justices having the opportuni-

ty to read a lower court decision addressing the federal claims was not fair presentation); *Hiivala v. Wood*, 195 F.3d 1098 (9th Cir. 1999) (holding that petitioner failed to exhaust federal due process issue in state court because petitioner presented claim in state court only on state grounds). Furthermore, in order to "fairly present" one's claims, the prisoner must do so "in each appropriate state court." *Baldwin*, 541 U.S. at 29, 124 S. Ct. at 1349. "Generally, a petitioner satisfies the exhaustion requirement if he properly pursues a claim (1) throughout the entire direct appellate process of the state, or (2) throughout one entire judicial postconviction process available in the state." *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004) (quoting Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure*, § 23.3b (9th ed. 1998)).

In Arizona, however, for non-capital cases "review need not be sought before the Arizona Supreme Court in order to exhaust state remedies." *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *see also Crowell v. Knowles,* 483 F.Supp.2d 925 (D. Ariz. 2007); *Moreno v. Gonzalez*, 192 Ariz. 131, 962 P.2d 205 (1998). Additionally, the Supreme Court has further interpreted § 2254(c) to recognize that once the state courts have ruled upon a claim, it is not necessary for an applicant to seek collateral relief for the same issues already decided upon direct review. *Castille v. Peoples*, 489 U.S. 346, 350, 109 S. Ct. 1056, 1060, 103 L.Ed.2d 380 (1989).

C. Procedural Default

"A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies

any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732, 111 S. Ct. 2546, 2555, 115 L.Ed.2d 650 (1991). Moreover, federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Id.* at 729, 111 S. Ct. at 2553. This is true whether the state law basis is substantive or procedural. *Id.* at 729, 111 S. Ct. at 2554 (citations omitted). Such claims are considered procedurally barred from review. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977).

The Ninth Circuit Court of Appeals explained the difference between exhaustion and procedural default as follows:

> The exhaustion doctrine applies when the state court has never been presented with an opportunity to consider a petitioner's claims and that opportunity may still be available to the petitioner under state law. In contrast, the procedural default rule barring consideration of a federal claim applies only when a state court has been presented with the federal claim, but declined to reach the issue for procedural reasons, or if it is clear that the state court would hold the claim procedurally barred. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002) (internal quotation marks and citations omitted). Thus, in some circumstances, a petitioner's failure to exhaust a federal claim in state court may *cause* a procedural default. *See Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002)

> ("A claim is procedurally defaulted 'if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.") (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991)).

Cassett v. Stewart, 406 F.3d 614, 621 n.5 (9th Cir. 2005). Thus, a prisoner's habeas petition may be precluded from federal review due to procedural default in two ways. First, where the petitioner presented his claims to the state court, which denied relief based on independent and adequate state grounds. *Coleman*, 501 U.S. at 729, 111 S. Ct. at 2554. Federal courts are prohibited from review in such cases because they have "no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.* Second, where a "petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1, 111 S. Ct. at 2557 n.1 (citations omitted). Thus, the federal court "must consider whether the claim could be pursued by any presently available state remedy." *Cassett*, 406 F.3d at 621 n.6 (quotations and citations omitted) (emphasis in original).

Where a habeas petitioner's claims have been procedurally defaulted, the federal courts are prohibited from subsequent review unless the petitioner can show

cause and actual prejudice as a result. *Teague v. Lane*, 489 U.S. 288, 298, 109 S. Ct. 1060, 1068, 103 L.Ed.2d 334 (1989) (holding that failure to raise claims in state appellate proceeding barred federal habeas review unless petitioner demonstrated cause and prejudice); *see also Smith v. Murray*, 477 U.S. 527, 534, 106 S. Ct. 2661, 2666, 91 L.Ed.2d 434 (1986) (recognizing "that a federal habeas court must evaluate appellate defaults under the same standards that apply when a defendant fails to preserve a claim at trial."). "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); *see also Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996) (petitioner failed to offer any cause "for procedurally defaulting his claims of ineffective assistance of counsel, [as such] there is no basis on which to address the merits of his claims."). In addition to cause, a habeas petitioner must show actual prejudice, meaning that he "must show not merely that the errors . . . created a possibility of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray*, 477 U.S. at 494, 106 S. Ct. at 2648 (emphasis in original) (internal quotations omitted). Without a showing of both cause and prejudice, a habeas petitioner cannot overcome the procedural default and gain review by the federal courts. *Id.* at 494, 106 S. Ct. at 2649.

The Supreme Court has recognized, however, that "the cause and prejudice standard will be met in

those cases where review of a state prisoner's claim is necessary to correct 'a fundamental miscarriage of justice.'" *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991) (quoting *Engle v. Isaac*, 456 U.S. 107, 135, 102 S. Ct. 1558, 1572-73, 71 L.Ed.2d 783 (1982)). "The fundamental miscarriage of justice exception is available 'only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence.'" *Herrara v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L.Ed.2d 203 (1993) (emphasis in original) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S. Ct. 2616, 2627, 91 L.Ed.2d 364 (1986)). Thus, "'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrara*, 506 U.S. at 404, 113 S. Ct. at 862. Further, in order to demonstrate a fundamental miscarriage of justice, a habeas petitioner must "establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

In Arizona, a petitioner's claim may be procedurally defaulted where he has waived his right to present his claim to the state court "at trial, on appeal or in any previous collateral proceeding." Ariz. R. Crim. P. 32.2(a)(3). "If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant 'knowingly, voluntarily and intelligently' waived the claim." *Id.,* 2002 cmt. Neither Rule 32.2. nor the Arizona Supreme Court has defined claims of "sufficient constitutional magnitude" requiring personal knowledge before waiver. *See id.*; *see also*

Stewart v. Smith, 202 Ariz. 446, 46 P.3d 1067 (2002). The Ninth Circuit Court of Appeals recognized that this assessment "often involves a fact-intensive inquiry" and the "Arizona state courts are better suited to make these determinations." *Cassett*, 406 F.3d at 622.

III. Statute of Limitations

A. Timeliness

As a threshold matter, the Court must consider whether Petitioner's petition is barred by the statute of limitation. *See White v. Klizkie*, 281 F.3d 920, 921-22 (9th Cir. 2002). The AEDPA mandates that a one-year statute of limitations applies to applications for a writ of habeas corpus by a person in state custody. 28 U.S.C. § 2244(d)(1). Section 2244(d)(1) provides that the limitations period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) 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); *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005). "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Respondents do not dispute the timeliness of Steres's petition. The Court has independently reviewed the records and finds that the Petition (Doc. 1) is timely pursuant to 28 U.S.C. § 2244(d)(1)(A).

IV. Analysis

A. Procedural Bar

Respondents acknowledge that Petitioner presented the two grounds for relief sought here to the Arizona state courts. Answer (Doc. 10) at 10. Respondents assert that because the Arizona Court of Appeals applied a state procedural bar to Petitioner's claims, "Steres did not present his claims in a procedurally correct manner to the state courts and his claims are now procedurally defaulted and barred from habeas relief." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2554, 115 L.Ed.2d 650 (1991)). As such, "this Court is procedurally barred from addressing these claims on their merits." *Id.* Petitioner counters that "Rule 32.5 of the Arizona Rules of Criminal Procedure is clear that a declaration is only required from the defendant for 'A petition by a self-represented defendant[.]'" Pet.'s Reply (Doc. 14) at 3. Petitioner further asserts that his claims are not procedurally defaulted "because the Arizona Court of

Appeals judgment rested on an incorrect state procedural bar." *Id.*

Plaintiff filed his PCR petition on July 22, 2016 and filed his appeal on November 17, 2016. The 2016 version of Rule 32.5, Arizona Rules of Criminal Procedure, is entitled "Contents of Petition" and provides in relevant part:

> The petition shall be accompanied by a declaration by the defendant stating under penalty of perjury that the information contained is true to the best of the defendant's knowledge and belief. Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact. Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required."

Ariz. R. Crim. P. 32.5 (West 2016). Petitioner's argument in reply relies on the 2018 version of Rule 32.5, which modified the declaration requirement to apply to self-represented defendants. Ariz. R. Crim. P. 32.5(c) (West 2018) ("A petition by a self represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief."). Because this version of the rule was not in effect at the time of the filing of Petitioner's Rule 32 proceeding, Petitioner's argument is without merit.

The Arizona procedural rule is an independent and adequate state law ground precluding federal habeas review. *Stewart v. Smith*, 536 U.S. 856, 860,

122 S. Ct. 2578, 2581 (recognizing independence of Rule 32 procedural determinations); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (rejecting argument that application of Arizona procedural rules "was so unpredictable and irregular that it does not provide an adequate ground for disposal of [petitioner's] claims."). Moreover, the appellate court was explicit in its reliance on the state procedural bar rule. *Harris v. Reed*, 489 U.S. 255, 264, 109 S. Ct. 1038, 1044, 103 L.Ed.2d 308 (1989). As such, this Court is precluded from habeas review unless Petitioner can show cause and actual prejudice.

B. Cause and prejudice

Petitioner cannot show cause and prejudice. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). In addition to cause, a habeas petitioner must show actual prejudice, meaning that he "must show not merely that the errors . . . created a <u>possibility</u> of prejudice, but that they worked to his <u>actual</u> and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray*, 477 U.S. at 494, 106 S. Ct. at 2648 (emphasis in original) (internal quotations omitted). Without a showing of both cause and prejudice, a habeas petitioner cannot overcome the procedural default and gain review by the federal courts. *Id.* at 494, 106 S. Ct. at 2649.

Here, Petitioner has not shown cause. Petitioner suggests that "[clause would exist for either of the

grounds that the Arizona Court of Appeals cited as a basis for procedural default because: 1) the procedural rules didn't apply to Steres' Petition for Post-Conviction Relief; and 2) the procedural rules lacked such clarity that they cannot fairly be applied to preclude Steres' claims." Pet's Reply (Doc. 14) at 4.[3] As discussed in Section IV.A.1., *supra*, the Arizona Court of Appeals properly relied on the procedural rule in force at the time. Moreover, the appellate court's recognition of a "lack of clarity in Rule 32.4(c)(2)" is irrelevant as the procedural bar occurred through operation of Rule 32.5, Arizona Rules of Civil Procedure. Because Petitioner cannot show cause, he cannot overcome the procedural default and gain review here. *See Murray*, 477 U.S. at 494, 106 S. Ct. at 2649.

Neither has Petitioner demonstrated a fundamental miscarriage of justice. "The fundamental miscarriage of justice exception is available 'only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.'" *Herrara v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L.Ed.2d 203 (1993) (emphasis in original) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S. Ct. 2616, 2627, 91 L.Ed.2d 364 (1986)). The record before this Court is devoid of evidence supporting a showing of factual innocence. As such, the Court finds that Petitioner's claims are procedurally barred and he is not entitled to habeas review.

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[3] Petitioner refers to Rules 32.5 and 32.4(c)(2), Arizona Rules of Civil Procedure. This Court only considered the bar presented via Rule 32.5.

V. Merits Analysis

Although the Court finds that Petitioner's Petition (Doc. 1) is procedurally defaulted, even if review were proper, Petitioner's claims are without merit.

A. Ground One: Ineffective Assistance of Counsel

Petitioner alleges that he received ineffective assistance of counsel. *Id.* at 4-9. In support of this claim, Petitioner alleges that trial counsel 1) failed to interview police officers or witnesses; 2) did not perform sufficient legal research and failed to file a motion to suppress evidence from Petitioner's cellular telephone; 3) convinced Petitioner to plead guilty, relying only on information contained in the police reports; 4) informed Petitioner that he would be found guilty at trial and could face life imprisonment; and 5) presented an inaccurate factual basis for the plea. *Id.* at 5-9.

1. Legal Standards

For cases which have been fairly presented to the State court, the Supreme Court elucidated a two-part test for determining whether a defendant could prevail on a claim of ineffective assistance of counsel sufficient to overturn his conviction. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). First, Petitioner must show that counsel's performance was deficient. *Id.* at 687, 104 S. Ct. at 2064. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, Petitioner must show that this performance prejudiced his defense. *Id.* Prejudice "requires showing that counsel's errors were so

serious as to deprive the defendant of a fair trial whose result is reliable." *Id.* Ultimately, whether or not counsel's performance was effective hinges on its reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065; *see also State v. Carver*, 160 Ariz. 167, 771 P.2d 1382 (1989) (adopting *Strickland* two-part test for ineffective assistance of counsel claims). The Sixth Amendment's guarantee of effective assistance is not meant to "improve the quality of legal representation," rather it is to ensure the fairness of trial. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "Thus, [t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1403, 179 L.Ed.2d 557 (2011) (quoting *Strickland,* 466 at 686) (emphasis and alteration in original).

"The standards created by *Strickland* and § 2254 (d) are both 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so[,]" *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 788, 178 L.Ed.2d 624 (2011) (citations omitted). Judging counsel's performance must be made without the influence of hindsight. *See Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065. As such, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L.Ed. 83 (1955)). Without the requisite showing of either "deficient performance" or "sufficient prejudice," Petitioner cannot prevail on his ineffectiveness claim. *Strickland,* 466

U.S. at 700, 104 S. Ct. at 2071. "[T]he question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Gentry v. Sinclair*, 705 F.3d 884, 899 (9th Cir. 2013) (quoting *Harrington*, 562 U.S. at 105, 131 S. Ct. at 788) (alterations in original). "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Harrington,* 562 U.S. at 104, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052). Accordingly, "[w]e apply the doubly deferential standard to review the state court's 'last reasoned decision.'" *Vega v. Ryan*, 757 F.3d 960, 966 (9th Cir. 2014) (citations omitted). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in 2254(d)(1) and (d)(2)." *Harrington,* 131 U.S. at 98, 131 S. Ct. at 784. As such, Petitioner also bears the burden of showing that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *See Bell v. Cone*, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 1852, 152 L.Ed.2d 914 (2002); *see also* 28 U.S.C. § 2254(d).

2. Interview of police officers or witnesses

Petitioner alleges that his trial counsel failed to "interview any of the police officers in the case, or any other potential witnesses[.]" Petition (Doc. 1) at 5. Petitioner raised this claim in his PCR petition. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Pet.'s Pet. for PCR (Exh. "G") (Doc. 11) at 125. Petitioner also presented this claim to the Arizona Court of Appeals. Answer

(Doc. 10), Ariz. Ct. App., Case No. 2 CA-CR 2016-0379-PR, Pet.' s Pet. for Review of Denial of Pet. for PCR (Exh. "N") (Doc. 12) at 49-50.

The appellate court observed that Petitioner "failed to make a colorable showing that counsel performed deficiently." Answer (Doc. 10), Ariz. Ct. App., Case No. 2 CA-CR 2016-0379-PR, Mem. Decision 3/30/2017 (Exh. "O") (Doc. 12) at 60. The appellate court further observed that "a pleading defendant waives all claims of ineffective assistance of counsel 'except those that relate to the validity of a plea." *Id.,* Exh. "O" at 60 (citing *State v. Banda*, 232 Ariz. 582, ¶ 12, 307 P.3d 1009, 1012 (Ariz. Ct. App. 2013)). Moreover, on appeal, Petitioner "neither alleged nor averred that, but for his attorney's conduct, he would not have pleaded guilty and would have insisted on a trial." *Id.*, Exh. "O" at 60. The appellate court held that "[i]n the absence of such an averment, [Petitioner's] ineffective assistance claim was subject to summary dismissal." *Id.,* Exh. "O" at 60 (citing *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L.Ed.2d 203 (1985)).

As an initial matter, "after a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to federal collateral relief[.]" *Tollett v. Henderson*, 411 U.S. 258, 266, 93 S. Ct. 1602, 1607-08, 36 L.Ed.2d 235 (1973) (considering availability of federal collateral relief to claim of an unconstitutionally selected indicting grand jury). "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States v. Broce*, 488 U.S. 563, 569, 109 S. Ct. 757, 762, 102 L.Ed.2d 927 (1989). "The focus of federal

habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence of such of an antecedent constitutional infirmity." *Tollett*, 411 U.S. at 266, 93 S. Ct. at 1608. "If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Id.* (quoting *McMann v. Richardson,* 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)). The Supreme Court of the United States has explained:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann.

Tollett, 411 US. at 267, 93 S. Ct. at 1608. "That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann*, 397 U.S. at 770, 90 S. Ct. at 1448.

Petitioner reports that defense investigator, Randy Downer, interviewed various individuals in June, 2014, as part of Mr. Downer's investigation in this case. Petition (Doc. 1) at 6. Mr. Downer turned a recording of one of those interviews over to trial counsel. *Id.*, Downer Aff. (Exh. "J"). This demonstrates that trial

counsel committed resources to investigation. Petitioner's claim appears only to suggest that the amount of investigation was insufficient and speculates as to how interviewing police officers would have altered trial counsel's actions. Petitioner urges that the information obtained by Mr. Downer "was never presented to support the conclusion that petitioner never intended to hurt the victim, or conspired to hurt him; and that Kate, because of mental problems, acted in an irrational way when she hit the victim in the head with a knife, for no apparent reason." Petition (Doc. 1) at 6. In Arizona, however, "first degree murder can be committed with either an intentional or knowing state of mind[.]" *State v. Nunez*, 159 Ariz. 594, 595, 769 P.2d 1040, 1041 (Ariz. Ct. App. 1989). Therefore, "attempted first degree murder can be knowingly committed[.]" *Id.* at 597, 769 P.2d at 1043. Petitioner only addresses intent without acknowledging that simply knowing his conduct will cause death is sufficient. Petitioner does not dispute that he and Ms. Francois (Kate) had "a discussion about [sic] prior to the assault of them killing him . . . [a]nd [t]he victim was invited to the house." Petition (Doc. 1) at 7-8 (quoting *State v. Steres*, Case No. CR201400108, COP Hr'g Tr. 12/8/2014 (Exh. "Q")). Moreover, "neither infliction nor threatened infliction of serious physical injury is an essential element of attempted murder[.]" *State v. Cleere*, 213 Ariz. 54, 57, 138 P.3d 1181, 1184 (Ariz. Ct. App. 2006). Thus, it is irrelevant whether Petitioner stabbed the victim once, twice, or not all.

Petitioner's claim does not address how an alleged lack of investigation by trial counsel caused his plea to be unknowing, involuntary, or unintelligent. Furthermore, Petitioner cannot show that counsel's

performance was deficient. The record does not support a finding that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1403, 179 L.Ed.2d 557 (2011) (quoting *Strickland*, 466 at 686) (emphasis and alteration in original). Petitioner has also failed to present any evidence to suggest that the Arizona courts' decisions as to his ineffective assistance claim regarding trial counsel's alleged failure to investigate is contrary to or an unreasonable application of clearly established Supreme Court law or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *see also Bell v. Cone*, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). Accordingly, this Court finds that the Arizona courts did not unreasonably apply clearly established Federal law or unreasonably determine the facts in light of the evidence presented, and Petitioner cannot meet his burden to show prejudice. *See Gulbrandson v. Ryan*, 738 F.3d 976, 991 (9th Cir. 2013). Petitioner's ineffective assistance of counsel claim regarding the alleged failure to "interview any of the police officers in the case, or any other potential witnesses" is without merit.

3. Motion to Suppress

Petitioner alleges that trial counsel failed to "do[ ] minimal research before Petitioner entered his plea, [and if] he [had, counsel] would have discovered the Supreme Court's decision in *Riley v. California*, 134 S. Ct. 2473 (2014), where the Court set out the protocol that had to be followed when seizing a cell phone incident to arrest." Petition (Doc. 1) at 5. Petitioner raised this claim in his PCR petition. *See* Answer

(Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Pet.'s Pet. for PCR (Exh. "G") (Doc. 11) at 115. Petitioner also presented this claim to the Arizona Court of Appeals. Answer (Doc. 10), Ariz. Ct. App., Case No. 2 CA-CR 2016-0379-PR, Pet.'s Pet. for Review of Denial of Pet. for PCR (Exh. "N") (Doc. 12) at 41-42.

The appellate court observed that [a]lthough Steres maintains his attorney performed deficiently in failing to 'discover or pursue' his post-conviction allegation that evidence was illegally obtained from his cellular telephone, he fails to even identify what that evidence was, much less explain how its suppression was 'critical' to his defense, particularly in light of the various admissions he made to police officers investigating the crime." Answer (Doc. 10), Ariz. Ct. App., Case No. 2 CA-CR 2016-0379-PR, Mem. Decision 3/30/2017 (Exh. "O") (Doc. 12) at 60. The appellate court held that Petitioner "ha[d] thus failed to make a colorable showing that counsel performed deficiently." *Id.*, Exh. "O" at 60 (citing *Premo v. Moore*, 562 U.S. 115, 125-26, 131 S. Ct. 733, 741-42 (2011); then citing *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L.Ed.2d 235 (1973)). Moreover, on appeal, Petitioner "neither alleged nor averred that, but for his attorney's conduct, he would not have pleaded guilty and would have insisted on a trial." *Id.*, Exh. "O" at 60. The appellate court held that "[i]n the absence of such an averment, [Petitioner's] ineffective assistance claim was subject to summary dismissal." *Id.,* Exh. "O" at 60 (citing *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L.Ed.2d 203 (1985)).

As discussed in Section V.A.2., *supra*, after a guilty plea, Petitioner's collateral attack is limited to

the knowing and voluntary nature of his plea. Moreover, "[a] guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry." *Tollett*, 411 U.S. at 267, 93 S. Ct. at 1608. The Supreme Court of the United States has observed:

> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of the prosecution . . . or by contesting all guilt . . . A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported.

Id. at 267-268, 93 S. Ct. at 1608. Furthermore, "a plea's validity may not be collaterally attacked merely because

the defendant made what turned out, in retrospect, to be a poor deal." *Bradshaw v. Stumpf*, 545 U.S. 175, 186, 125 S. Ct. 2398, 2407, 162 L.Ed.2d 143 (2005) (citations omitted). "[T]he shortcomings of the deal [Steres] obtained cast doubt on the validity of his plea only if they show either that he made the unfavorable plea on the constitutionally defective advice of counsel . . . or that he could not have understood the terms of the bargain he and [Arizona] agreed to." *Id.* (citations omitted).

Petitioner claims that precluding evidence from his cellular telephone, which he alleges was unconstitutionally searched, was a critical defense that trial counsel did not pursue. Petition (Doc. 1) at 4-6; Pet's Reply (Doc. 14) at 7. Petitioner fails to provide any information regarding what evidence the cellular telephone contained or how its preclusion eviscerates the State's case against him.[4] Petitioner made statements to the police officers, the victim gave statements, there were co-defendants who made statements, and Petitioner made incriminating statements on jailhouse telephone conversations. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Hr'g Tr. 5/14/2015 (Exh. "E") (Doc. 11). As such, Petitioner cannot show that counsel's performance was deficient. The record does not support a finding that "counsel's conduct so undermined the proper

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[4] In his PCR petition to the Rule 32 court, Petitioner mentions that "the text messages between Steres and Kate were damaging"; however, Petitioner offers no explanation regarding how preclusion of the text messages would have altered the other evidence against him. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Def.'s Pet. for PCR 7/22/2016 (EA. "G") (Doc. 11) at 16.

functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1403, 179 L.Ed.2d 557 (2011) (quoting *Strickland,* 466 at 686) (emphasis and alteration in original). Petitioner has also failed to present any evidence to suggest that the Arizona courts' decisions as to his ineffective assistance claim regarding trial counsel's alleged failure to file a motion to suppress is contrary to or an unreasonable application of clearly established Supreme Court law or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *see also Bell v. Cone*, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). Accordingly, this Court finds that the Arizona courts did not unreasonably apply clearly established Federal law or unreasonably determine the facts in light of the evidence presented, and Petitioner cannot meet his burden to show prejudice. *See Gulbrandson v. Ryan*, 738 F.3d 976, 991 (9th Cir. 2013). Petitioner's ineffective assistance of counsel claim regarding the alleged failure to file a motion to suppress regarding the search of his telephone is without merit.

4. Reliance on Police Reports

Petitioner alleges that trial counsel "convinced Petitioner to plead guilty, based on false conclusions they reached, by only considering the information in the police reports[.]" Petition (Doc. 1) at 5.

Here, Petitioner presented this claim to the Rule 32 court, but failed to present it to the Arizona Court of Appeals. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Def.'s Pet. for PCR 7/22/2016 (Exh. "G") (Doc. 11); Answer (Doc.

10), Court of Appeals, State of Arizona, Case No. 2 CA-CR 2016-00379-PR, Pet.'s Pet. for Review of Denial of Pet. for PCR (Exh. "N") (Doc. 12). As discussed in Section ILB., *supra*, prior to bringing a claim to federal court, a habeas petitioner must first present claims to each appropriate state court. *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 1349, 158 L.Ed.2d 64 (2004) (in order to "fairly present" one's claims, the prisoner must do so "in each appropriate state court"). As such, the claim would now be precluded and meet the technical requirements for exhaustion. Ariz. R. Crim. P. 32.2(a)(3) (2018). The Court finds Petitioner's claim is procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 2557 n.1, 115 L.Ed.2d 640 (1991) ("petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred").

Where a habeas petitioner's claims have been procedurally defaulted, the federal courts are prohibited from subsequent review unless the petitioner can show cause and actual prejudice as a result. *Teague v. Lane*, 489 U.S. 288, 298, 109 S. Ct. 1060, 1068, 103 L.Ed.2d 334 (1989) (holding that failure to raise claims in state appellate proceeding barred federal habeas review unless petitioner demonstrated cause and prejudice). Petitioner has not met his burden to show either cause or actual prejudice. *Murray v. Carrier*, 477 U.S. 478, 494, 106 S. Ct. 2639, 2648, 91 L.Ed.2d 397 (1986) (Petitioner "must show not merely that the errors . . . created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional

dimensions") (emphasis in original) (internal quotations omitted); *see also Martinez-Villareal v. Lewis,* 80 F.3d 1301, 1305 (9th Cir. 1996) (petitioner failed to offer any cause "for procedurally defaulting his claims[,] . . . [and as such,] there is no basis on which to address the merits of his claims."). Petitioner has failed to present any facts to suggest that his attorney improperly relied on the police report. Neither has Petitioner "establish[ed] by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). As such, Petitioner has failed to meet the cause and prejudice standard or demonstrate a fundamental miscarriage of justice. *See Coleman,* 501 U.S. at 748, 111 S. Ct. at 2564 (citations and quotations omitted). Accordingly, Petitioner's claim regarding ineffective assistance of counsel for allegedly convincing him to plea based on the police reports is denied.

5. Lack of Defense

Petitioner asserts that trial counsel, as well as two other attorneys, informed him that there were no defenses and if Petitioner went to trial "he would be found guilty and could go to prison for life." Petition (Doc. 1) at 5. Petitioner argues that this advice was "based on false conclusions they reached, by only considering the information in the police reports."[5]

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[5] Before the Rule 32 courts the issue of counsel's improper reliance on the police reports (Section V.A.4.) and counsel informing Petitioner that he lacked a defense (Section V.A.5.) were argued more distinctly; however, on habeas, Petitioner has intertwined his arguments. As such, the Court has considered them separately here.

Id. Petitioner raised this claim in his PCR petition. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Pet.'s Pet. for PCR (Exh. "G") (Doc. 11) at 115. Petitioner also presented this claim to the Arizona Court of Appeals. Answer (Doc. 10), Ariz. Ct. App., Case No. 2 CA-CR 2016-0379-PR, Pet.'s Pet. for Review of Denial of Pet for PCR (Exh. "N") (Doc. 12) at 41.

The appellate court observed that "a pleading defendant waives all claims of ineffective assistance of counsel 'except those that relate to the validity of a plea.' Answer (Doc. 10), Ariz. Ct. App., Case No. 2 CA-CR 2016-0379-PR, Mem. Decision 3/30/2017 (Exh. "O") (Doc. 12) at 60 (citing *State v. Banda*, 232 Ariz. 582, ¶ 12, 307 P.3d 1009, 1012 (Ariz. Ct. App. 2013)). The appellate court recognized that "[a] defendant . . . may obtain post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary." *Id.,* Exh. "O" at 60 (citing *Banda*, 232 Ariz. at ¶ 12, 307 P.3d at 1012). On appeal, Petitioner "neither alleged nor averred that, but for his attorney's conduct, he would not have pleaded guilty and would have insisted on a trial." *Id.,* Exh. "O" at 60. The appellate court held that "kin the absence of such an averment, [Petitioner's] ineffective assistance claim was subject to summary dismissal." *Id.,* Exh. "O" at 60 (citing *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L.Ed.2d 203 (1985)).

As discussed in Sections V.A.2. and V.A.3., *supra*, after a guilty plea, Petitioner's collateral attack is limited to the knowing and voluntary nature of his plea. Moreover, "[a] guilty plea, voluntarily and intelligently

entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry." *Tollett*, 411 U.S. at 267, 93 S. Ct. at 1608. "[A] plea's validity may not be collaterally attacked merely because the defendant made what turned out, in retrospect, to be a poor deal." *Bradshaw v. Stumpf*, 545 U.S. 175, 186, 125 S. Ct. 2398, 2407, 162 L.Ed.2d 143 (2005) (citations omitted). "[T]he shortcomings of the deal [Steres] obtained cast doubt on the validity of his plea only if they show either that he made the unfavorable plea on the constitutionally defective advice of counsel . . . or that he could not have understood the terms of the bargain he and [Arizona] agreed to." *Id.* (citations omitted).

Petitioner pled guilty to one count of attempted murder with premeditation, which carried a sentence of between seven (7) and twenty-one (21) years imprisonment. Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Plea Agreement (Exh. "B") (Doc. 11) at 6. In consideration for his plea, the State dismissed seven (7) counts that were charged in the indictment. *Id.,* Exh. "B" at 7. As noted in Section V.A.3., *supra*, there was substantial evidence aside from the police reports, including jailhouse telephone conversations. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Hr'g Tr. 5/14/2015 (Exh. "E") (Doc. 11). Furthermore, Petitioner admits that he was advised by, not only trial counsel, but two other independent attorneys. Petitioner asserts that he should have been informed about a possible defense arising from the suppression of evidence; how-

ever, he cannot show that such suppression would have altered the trajectory of his case. *See* Section V.A.3., *supra.*

As such, Petitioner cannot show that counsel's performance was deficient. The record does not support a finding that "counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1403, 179 L.Ed.2d 557 (2011) (quoting *Strickland,* 466 at 686) (emphasis and alteration in original). Petitioner has also failed to present any evidence to suggest that the Arizona courts' decisions as to his ineffective assistance claim regarding trial counsel's alleged failure to advise him regarding possible defenses is contrary to or an unreasonable application of clearly established Supreme Court law or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *see also Bell v. Cone*, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). Accordingly, this Court finds that the Arizona courts did not unreasonably apply clearly established Federal law or unreasonably determine the facts in light of the evidence presented, and Petitioner cannot meet his burden to show prejudice. *See Gulbrandson v. Ryan*, 738 F.3d 976, 991 (9th Cir. 2013). Petitioner's ineffective assistance of counsel claim regarding the alleged failure to inform him of possible defenses is without merit.

6. Factual Basis

Petitioner asserts that "[t]he factual basis of the plea is inconsistent with the facts of the case[,]" and as such his "guilty plea was not knowingly or intelli-

gently entered." Petition (Doc. 1) at 8-9. Petitioner raised this claim in his PCR petition. *See* Answer (Doc. 10), Ariz. Superior Ct, Cochise County, Case No. CR201400108, Pet.'s Pet. for PCR (Exh. "G") (Doc. 11) at 116-19. Petitioner also presented this claim to the Arizona Court of Appeals. Answer (Doc. 10), Ariz. Ct. App., Case No. 2 CA-CR 2016-0379-PR, Pet.'s Pet. for Review of Denial of Pet for PCR (Exh. "N") (Doc. 12) at 42-44.

The appellate court observed that "in asserting the factual basis for his guilty plea was 'defective,' Steres does not suggest his admissions fail to support a guilty finding on each element of attempted murder." Answer (Doc. 10), Ariz. Ct. App., Case No. 2 CA-CR 2016-0379-PR, Mem. Decision 3/30/2017 (Exh. "O") (Doc. 12) at 59 (citing *State v. Salinas,* 181 Ariz. 104, 106, 887 P.2d 985, 987 (Ariz. 1994)). The appellate court further observed that "[a]fter pleading guilty, 'a defendant may not thereafter question the legal sufficiency of the evidence against him.'" *Id.*, Exh. "O" at 60 (quoting *State v. Martinez*, 102 Ariz. 215, 216, 427 P.2d 533, 534 (Ariz. 1967)). Moreover, "a defendant's '[s]olemn declarations in open court carry a strong presumption of verity,' and 'constitute a formidable barrier' in a subsequent challenge to the validity of the plea." *Id.*, Exh. "O" at 60 (quoting *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S. Ct. 1621, 1629, 52 L.Ed.2d 136 (1977)). The appellate court held that "[i]n the absence of such an averment, [Petitioner's] ineffective assistance claim was subject to summary dismissal." *Id.*, Exh. "O" at 60 (citing *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L.Ed.2d 203 (1985)).

A factual basis is required under Arizona law. *Rodriguez v. Ricketts*, 777 F.2d 527, 527-28 (9th Cir. 1985) (citing *State v. Norris*, 113 Ariz. 558, 559, 558 P.2d 903, 904 (Ariz. 1976)). "In federal court, the requirement that there be a factual basis for a guilty plea arises from Federal Rule of Criminal Procedure 11(f)[,] . . . [and] the due process clause does not impose on a state court the duty to establish a factual basis for a guilty plea absent special circumstances." *Id.* at 528 (citations omitted).

Here, the trial court conducted an extensive plea colloquy and discussed the rights Petitioner was entitled to and would be giving up, as well as provided him an opportunity to add or subtract from trial counsel's factual summary. *See* Answer (Doc. 10), Ariz. Superior Ct., Cochise County, Case No. CR201400108, Hr'g Tr. 12/8/2014 (Exh. "C") (Doc. 11); Petition (Doc. 1) at 7-8. Petitioner declined the trial court's invitation and agreed with the facts provided by counsel. *Id.*; Petition (Doc. 1) at 8. As such, the Court finds that there are no special circumstances and the record demonstrates that Petitioner's plea was voluntarily and intelligently entered.

Petitioner cannot show that counsel's performance was deficient. The record does not support a finding that "counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1403, 179 L.Ed.2d 557 (2011) (quoting *Strickland,* 466 at 686) (emphasis and alteration in original). Petitioner has also failed to present any evidence to suggest that the Arizona courts' decisions as to his ineffective assistance claim regarding trial counsel's

alleged failure to advise him regarding the factual basis he presented is contrary to or an unreasonable application of clearly established Supreme Court law or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *see also Bell v. Cone*, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). Accordingly, this Court finds that the Arizona courts did not unreasonably apply clearly established Federal law or unreasonably determine the facts in light of the evidence presented, and Petitioner cannot meet his burden to show prejudice. *See Gulbrandson v. Ryan*, 738 F.3d 976, 991 (9th Cir. 2013). Accordingly, Petitioner is not entitled to habeas relief.

B. Ground Two: Violations Regarding Cellular Telephone

Petitioner alleges that Detective Williams violated protocol and searched Petitioner's cell phone before a search warrant was issued." Petition (Doc. 1) at 11. As discussed in Section V.A., *supra*, "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L.Ed.2d 235 (1973). Furthermore, "the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . [which is of] minimal utility . . . when sought to be applied to Fourth Amendment claims in a habeas proceeding." *Stone v. Powell*, 428 U.S. 465, 494 n.37, 96 S. Ct. 3037, 3052, n.37, 49 L.Ed.2d 1067 (1976). The Court has found that Petitioner's plea was knowingly, intelli-

gently, and voluntarily made and counsel was not ineffective. *See* Section V.A., *supra*. As such, Petitioner is not entitled to habeas relief for any alleged violation of his Fourth Amendment rights.

VI. Conclusion

In light of the foregoing, the Court finds that Petitioner's habeas claims are procedurally defaulted and fail on the merits. The Court recommends the Petition (Doc. 1) be denied.

VII. Recommendation

For the reasons delineated above, the Magistrate Judge recommends that the District Judge enter an order DENYING Petitioner's Petition Pursuant to 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) (Doc. 1).

Pursuant to 28 U.S.C. § 636(b) and Rule 72(b)(2), Federal Rules of Civil Procedure, any party may serve and file written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. A party may respond to another party's objections within fourteen (14) days after being served with a copy. Fed. R. Civ. R 72(b)(2). No replies shall be filed unless leave is granted from the District Court. If objections are filed, the parties should use the following case number: CV-18-0161-TUC-RM.

Failure to file timely objections to any factual or legal determination of the Magistrate Judge may result in waiver of the right of review.

Dated this 23rd day of September, 2020.

/s/ Bruce G. Macdonald
United States Magistrate Judge

APPENDIX E
ORDER OF THE
SUPREME COURT OF ARIZONA
(NOVEMBER 30, 2017)

SUPREME COURT STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

Re: *State of Arizona v. Thomas Clayton Steres*
Arizona Supreme Court No. CR-17-0180-PR
Court of Appeals, Division Two
No. 2 CA-CR 16-0379 PRPC
Cochise County Superior Court
No. CR-201400108

Greetings:

The following action was taken by the Supreme Court of the State of Arizona on November 30, 2017, in regard to the above referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Justice Brutinel, and Justice Timmer, and Justice Bolick and Justice Gould participated in the determination of this matter.

Janet Johnson
Clerk

To:

Joseph T. Maziarz
Roger H. Contreras
Anders V. Rosenquist Jr.
Thomas Clayton Steres,
ADOC 301263, Arizona State Prison,
Florence-South/SPU

Jeffrey P. Handler
es

APPENDIX F
MEMORANDUM DECISION OF
THE ARIZONA COURT OF APPEALS
(MARCH 30, 2017)

IN THE ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Respondent,

v.

THOMAS CLAYTON STERES,

Petitioner.

No. 2 CA-CR 2016-0379-PR

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1);
Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior
Court in Cochise County No. CR201400108
The Honorable John F. Kelliher Jr., Judge

Before: HOWARD, Presiding Judge,
ECKERSTROM, Chief Judge, and VASQUEZ, Judge.

MEMORANDUM DECISION

HOWARD, Presiding Judge:

¶ 1. Thomas Steres seeks review of the trial court's order dismissing as untimely his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. K trim. P. For the following reasons, we grant review, but we deny relief.

¶ 2. Pursuant to a plea agreement, Steres was convicted of attempted murder, and the trial court sentenced him to fifteen years' imprisonment. in August 2015, he filed a timely notice of post-conviction relief in which he stated he was represented by counsel, and his retained counsel filed a notice of appearance.

¶ 3. In July 2016, he filed a petition for post-conviction. relief alleging the following claims: (1) the factual basis for his guilty plea was "defective"; (2) a police detective allegedly "did not follow protocol" promulgated in *Riley v. California*, ___ U.S. ___, ___, 134 S. Ct. 2473, 2485-86 (2014), "after seizing Steres' cellphone" and allegedly "tampered with it before obtaining a search warrant"; and (3) his attorney rendered ineffective assistance in advising him to plead guilty without adequate investigation and without pursuing a motion to suppress evidence obtained from his cellphone, which he characterizes as "a critical defense that could have been pivotal" in his case. The trial court granted the state's motion to dismiss Steres's petition as untimely, and this petition for review followed.

¶ 4. On review, Stores argues the trial court "err[edl" in dismissing his petition as untimely, and he reasserts the claims he raised below. We review a trial court's denial of post-conviction relief for an

abuse of discretion, and we will affirm that ruling if it is legally correct for any reason. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). The court did not abuse its discretion in dismissing Steres's petition, because he failed to state a colorable claim for relief.

¶ 5. Steres first argues his petition was not untimely, despite a delay of nearly a year between his notice of post-conviction relief and his petition perfecting it, because the trial court had not issued a briefing schedule upon receiving his notice and because Rule 32.4(c), which provides a sixty-day deadline for the filing of a petition by a pro se defendant or "appointed" counsel, imposes no express deadline for a petition filed by retained counsel. We find it unnecessary to construe the requirements of Rule 32.4 with respect to retained counsel, however.[1] Even if the rule permitted dismissal on the ground of untimeliness, our supreme court has suggested that, in circumstances such as these, a pleading defendant who has filed a timely notice of post-conviction relief in an of-right proceeding should not have his petition dismissed based solely on his attorney's failure to file

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[1] We recognize the lack of clarity in Rule 32.4(c)(2) with respect to petition deadlines when counsel has been retained. On the other hand, construing the rule in the manner Steres suggests would appear to lead to the absurd result that a defendant appearing in propria persona would be required to file a petition within sixty days, while retained counsel would have an unlimited time to do so. *Cf. State v. Jones*, 182 Ariz. 432, 434, 897 P.2d 734, 736 (App. 1995) (suggesting time limits added to Rule 32.4(a) in order to "prevent unwarranted delay"). We encourage trial courts to order specific briefing schedules when a sufficient of-right notice of post-conviction relief has been filed.

a timely petition. *See State v. Diaz*, 236 Ariz. 361, ¶ 13, 340 P.3d 1069, 1071 (2014).

¶ 6. But in this case, Steres's petition was also subject to summary dismissal for his failure to comply with Rule 32 procedures and failure to state a colorable claim. *See* Ariz. R. Crim. P. 32.5, 32.6(c). We affirm the trial court's ruling based on those alternate grounds. *See Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d at 848.

¶ 7. As an initial matter, Steres failed to support his petition with his own declaration "stating under penalty of perjury that the information contained is true to the best of [his] knowledge and belief," as required by Rule 32.5. Nor did he file his own affidavit in support of his allegations. *See id.* (defendant required to attach to his petition [a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition"). As our supreme court has made clear, "Petitioners must strictly comply with Rule 32 or be denied relief." *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984).

¶ 8. In addition, Rule 32.6(c) provides for summary dismissal if a trial court determines, after elimination of all precluded claims, that no remaining claim states a material issue of fact or law that would entitle the defendant to relief. On review of this record, we conclude Steres has failed to state any colorable, non-precluded claim for relief.

¶ 9. For example, in asserting the factual basis for his guilty plea was "defective," Steres does not suggest his admissions fail to support a guilty finding on each element of attempted murder *See State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994)

("the trial court must determine whether a factual basis exists for each element of the crime to which defendant pleads" before entering judgment on guilty plea). Instead, without benefit of a supporting affidavit, he argues his admissions at his change of plea hearing were "false" because he had "t[aken] the blame" for his girlfriend.

¶ 10. After pleading guilty, "a defendant may not thereafter question the legal sufficiency of the evidence against him." *State v. Martinez*, 102 Ariz. 215, 216, 427 P.2d 533, 534 (1967); *cf. State v, Rubiano*, 214 Ariz. 184, ¶ 10, 150 P.3d 271, 273-74 (App. 2007) (corpus delicti rule does not apply to defendant's in-court guilty plea; sworn admissions sufficient without independent corroborating evidence). Thus, a defendant's "[s]olemn declarations in open court carry a strong presumption of verity," and "constitute a formidable barrier" in a subsequent challenge to the validity of the plea. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Accordingly, a defendant's assertion disclaiming his sworn statements at a change of plea hearing is subject to summary dismissal when, as here, it is based on "conclusory allegations unsupported by specifics." *Id.* at 74.

¶ 11. Although Steres maintains his attorney performed deficiently in failing to "discover or pursue" his post-conviction allegation that evidence was illegally obtained from his cellular telephone, he fails to even identify what that evidence was, much less explain how its suppression was "critical" to his defense, particularly in light of the various admissions he made to police officers investigating the crime. He has thus failed to make a colorable showing that counsel performed deficiently. *See Premo v. Moore*, 562 US. 115,

125-26 (2011) ("strict adherence" to deference required by *Strickland* "all the more essential" when reviewing claims of ineffective assistance at plea bargaining that may "lack necessary foundation"; rejecting conclusion that counsel necessarily ineffective in advising defendant to plead guilty before filing motion to suppress); *Tollett v. Henderson*, 411 U.S. 258, 267 (voluntary and intelligent guilty plea "may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry).

¶ 12**.** Similarly, a pleading defendant waives all claims of ineffective assistance of counsel "except those that relate to the validity of a plea." *State v. Banda*, 232 Ariz. 582, ¶ 12, 307 P.3d 1009, 1012 (App. 2013). A defendant, however, may obtain post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary. *Id.* But Steres has neither alleged nor averred that, but for his attorney's conduct, he would not have pleaded guilty and would have insisted on a trial, In the absence of such an averment, his ineffective assistance claim was subject to summary dismissal. *See Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (pleading defendant's failure to allege he would have insisted on trial but for counsel's mis-advice rendered petition's allegations "insufficient" to satisfy prejudice requirement of *Strickland*).

¶ 13. Finally, Stere's independent, substantive claim of a Fourth Amendment violation, related to the seizure and allegedly illegal search of his cellular telephone, was waived by the terms of his plea agree-

ment and by operation of law. *See State v. Murphy*, 97 Ariz. 14, 15, 396 P.2d 250, 250-51 (1964) (defendant's knowing and voluntary guilty plea "constitutes a waiver of all nonjurisdictional defenses" and "foreclose[s] any inquiry into the matter of [an] alleged illegal search and seizure").[2]

¶ 14. Steres has failed to establish the trial court abused its discretion in summarily dismissing his petition for post-conviction relief. Accordingly, although we grant review, we deny relief.

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[2] In his petition for review, Steres encourages this court to consider his claims as constituting newly discovered evidence, *see* Ariz. R. Crim. P. 32.1(e), or as based on a significant change in the law, *see* Ariz. R. Crim. P. 32.1(g). These issues were not presented to the trial court, and we will not consider them on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

APPENDIX G
ORDER OF THE SUPERIOR COURT OF THE STATE OF ARIZONA GRANTING MOTION TO DISMISS (OCTOBER 24, 2016)

SUPERIOR COURT, STATE OF ARIZONA
IN AND FOR COCHISE COUNTY

STATE OF ARIZONA,

Plaintiff,

v.

THOMAS CLAYTON STERES,

Defendant.

No. CR201400108

Before: Hon. John F. KELLIHER JR., Judge.

The Court reviewed the file to include the State's "Motion to Dismiss Untimely Petition for Post-Conviction Relief . . . " files on September 12, 2016, the Petitioner's (Defendant's) "Response to State's Motion to Dismiss . . . " filed on September 23, 2016, and the State's "Reply to Motion to Dismiss . . " Response to Defendant's Petition . . . " filed on October 10, 2016.

The Defendant has not timely compiled with the relevant Rules of Criminal Procedure as argued by the State, therefore.

IT IS ORDERED OF THE COURT GRANTING the State's Motion to Dismiss Untimely Petition for Post-Conviction Relief.

APPENDIX H
STATUTORY TEXT

28 U.S.C. § 2253(c)(2)

A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the fail-

ure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The appli-

cant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an

appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.