No. _____

IN THE

Supreme Court of the United States

ALFREDO CAMARGO,

Petitioner,

v.

DAVID SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS;
ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a certificate of appealability should issue as a matter of course where reasonable jurists—here, the district court and the magistrate judge—have disagreed over whether the petition states a substantial claim, as the Second and Sixth Circuits have held, and contrary to the Ninth Circuit below and the Eleventh Circuit.

II. Whether, under *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), and *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018), a federal court should "look through" the last reasoned procedural decision of a higher state court to the reasoned merits decision of a lower state court in assessing the merits of a federal habeas claim, as the Ninth Circuit ruled below, or whether the "last reasoned decision" may rest on procedural grounds, as the Second, Sixth, and Seventh Circuits have held and as it did in *Ylst*.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

I. The Denial of a COA, Despite Actual Debate Between the Magistrate Judge and the District Court on the Resolution of the Constitutional Question, Furthers a Circuit Split. 7

II. In Ruling that Federal Courts Must "Look Through" the Last Reasoned Procedural Decision to a Lower State Court's Merits Decision, the Ninth Circuit Creates a Circuit Conflict and Disregards This Court's Precedent. 11

III. The Questions Presented Are Recurring and Important, and This Case Is an Excellent Vehicle. 16

CONCLUSION 19

APPENDIX

Appendix A

Order of the United States Court of Appeals for the Ninth Circuit Denying Request for a Certificate of Appealability, *Camargo* v. *Shinn*, No. 20-16574 (Mar. 5, 2021)..... 1a

Appendix B

Order of the United States Court of Appeals for the Ninth Circuit Denying Motion for Reconsideration, *Camargo* v. *Shinn*, No. 20-16574 (May 14, 2021) 3a

Appendix C

Order of the United States District Court for the District of Arizona Denying Petition for a Writ of Habeas Corpus and Denying a Certificate of Appealability, *Camargo* v. *Ryan*, No. 13-2488-cv (Aug. 13, 2020) 4a

Appendix D

Report and Recommendation of the United States Magistrate Judge, *Camargo* v. *Ryan*, No. 13-2488-cv (Aug. 29, 2019)..... 26a

TABLE OF AUTHORITIES

Page(s)

Cases

Alvarez v. *Warden*,
No. 16-16076-G, 2017 WL 4250692 (11th Cir. Feb. 17, 2017) 11

Ayala v. *Chappell*,
829 F.3d 1081 (9th Cir. 2016) 6, 15, 16

Barker v. *Fleming*,
423 F.3d 1085 (9th Cir. 2005) 15

Barton v. *Warden, S. Ohio Corr. Facility*,
786 F.3d 450 (6th Cir. 2015) (per curiam) 13

Blalock v. *Fisher,*
480 F. App'x 39 (2d Cir. 2012) 9

Brown v. *Craven*,
424 F.2d 1166 (9th Cir. 1970) 6

Buck v. *Davis*,
137 S. Ct. 759 (2017) 7

Cadavid-Yepes v. *United States*,
No. 14-02210 (6th Cir. Feb. 5, 2015) (ECF No. 10) 8

Camargo v. *Ryan*,
684 F. App'x 607 (9th Cir. 2017) 3, 4, 5

Carter v. *Davis*,
946 F.3d 489 (9th Cir. 2019) (per curiam) 7

Daniels v. *Woodford*,
428 F.3d 1181 (9th Cir. 2005) 6

Dickens v. *Ryan*,
740 F.3d 1302 (9th Cir. 2014) (en banc) 18

Ford v. *Peery*,
999 F.3d 1214 (9th Cir. 2021) 18

Fox v. *Johnson*,
832 F.3d 978 (9th Cir. 2016) 16

Garrey v. *Kelly*,
No. 1:03-cv-10562-NMG, 2021 WL 1251370 (D. Mass. Apr. 5, 2021) 9

Holley v. *United States*,
718 F. App'x 898 (11th Cir. 2017) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Jones v. *Basinger*,
635 F.3d 1030 (7th Cir. 2011) 10

Jordan v. *Fisher*,
576 U.S. 1071 (2015) 11

Kernan v. *Hinojosa*,
578 U.S. 412 (2016) (per curiam) 17

Liegakos v. *Cooke*,
106 F.3d 1381 (7th Cir. 1997) 14

Mackenzie v. *Hutchens*,
No. LA CV 12-00584-VBF-JCC, 2013 WL 8291424
(C.D. Cal. Nov. 19, 2013) 9

Miller-El v. *Cockrell*,
537 U.S. 322 (2003) 7, 8

Neal v. *Puckett*,
286 F.3d 230 (5th Cir. 2002) 18

Ramsey v. *Yearwood*,
231 F. App'x 623 (9th Cir. May 3, 2007) 6, 15, 16

Renico v. *Lett*,
559 U.S. 766 (2010) 18

Rhoades v. *Davis*,
852 F.3d 422 (5th Cir. 2017) 10

Schell v. *Witek*,
218 F.3d 1017 (9th Cir. 2005) (en banc) 5

Schriro v. *Landrigan*,
550 U.S. 465 (2007) 18

Slack v. *McDaniel*,
529 U.S. 473 (2000) 8, 9

Stenson v. *Lambert*,
504 F.3d 873 (9th Cir. 2007) 6

Thomas v. *Horn*,
570 F.3d 105 (3d Cir. 2009) 13, 14

United States v. *Figueras*,
No. 2:16-cr-00045-MCE-EFB, 2021 WL 3663800
(E.D. Cal. Aug. 18, 2021) 9

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Holley*,
Nos. 5:12-cr-25-MW/CJK & 5:14-cv-34-MW/CJK, 2016 WL 6595129
(N.D. Fla. Nov. 7, 2016) 9

Williams v. *Taylor*,
529 U.S. 362 (2000) 15

Wilson v. *Sellers*,
138 S. Ct. 1188 (2018) ..... i, 12, 13, 15, 16

Wright v. *West*,
505 U.S. 277 (1992) 18

Ylst v. *Nunnemaker*,
501 U.S. 797 (1991) ..... i, 12, 13, 15, 16

Statutes & Rules

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2244(d) 4, 5

28 U.S.C. § 2253(c) 1

28 U.S.C. § 2253(c)(2) 7, 10

28 U.S.C. § 2254 ..... 4, 17

28 U.S.C. § 2254(d) 2, 5, 8, 13, 14, 15, 18

ARIZ. R. CRIM. P. 32.1 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alfredo Camargo respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying him a certificate of appealability ("COA") from the denial of his federal habeas petition.

OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability, App. 1a–2a, is unreported, as is the court of appeals' order denying reconsideration, App. 3a. The order of the district court denying the petition for a writ of habeas corpus and denying a certificate of appealability, App. 4a–25a, and the report and recommendation of the magistrate judge, App. 26a–88a, are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2021. A motion for reconsideration was denied on May 14, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns 28 U.S.C. § 2253(c), which provides, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> ***

> (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.…

This case also involves 28 U.S.C. § 2254(d), which provides:

> 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.

STATEMENT OF THE CASE

This case presents an ideal opportunity for the Court to clarify two questions that arise constantly in federal habeas cases: *First*, could "reasonable jurists" debate the resolution of a constitutional question, thereby requiring the issuance of a COA, where the magistrate judge and the district court have in fact disagreed on that very issue? *Second*, should a court "look through" a higher state court's reasoned procedural decision to the merits decision of a lower state court under AEDPA[1]?

In effectively answering "no" to each of the above questions, the Ninth Circuit fomented a circuit conflict and disregarded this Court's precedent. The need for

[1] "AEDPA" refers to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

clarity on issues of such nationwide importance merits this Court's review or summary reversal—in either instance, for the modest relief of the issuance of a COA.

1. In 2008, Petitioner was convicted in an Arizona court of burglary, two counts of aggravated assault, kidnapping, and misconduct involving weapons. Petitioner speaks only Spanish, while his appointed attorney spoke none. His plea of guilty to the indictment followed two unsuccessful motions for substitute counsel due to counsel's repeated and continuing failure to meet him with an interpreter to discuss the case or to answer his questions about the plea offers—which counsel failed to do despite the trial court's admonishment him to do just that. Had counsel visited Petitioner in jail, and with an interpreter, to explain the plea offers, Petitioner would have accepted the State's final offer, which capped his potential prison term at fifteen years. Instead, he received the much higher sentence of 25 years.

The attorney appointed to represent him in his initial-review post-conviction relief proceeding ("PCR")[2] failed to file a petition. Instead, she filed a cursory "Notice of Completion" stating only that she could find no valid claims for relief. Without conducting an independent review of the record, the court ordered her to "remain in an advisory capacity" to enable Petitioner to seek relief *pro se*.

[2] "This form of proceeding is the only available form of direct appellate review under Arizona law for a defendant who has pleaded guilty." *Camargo* v. *Ryan*, 684 F. App'x 607, 608 (9th Cir. 2017) (citing ARIZ. R. CRIM. P. 32.1)).

Petitioner filed a *pro se* petition raising, inter alia, a claim for the constructive denial/ineffective assistance of trial counsel. The trial court summarily dismissed the petition "[f]or the reasons stated" in the State's response. Petitioner sought review in the Arizona Court of Appeals within the time set by the superior court, but the appellate court erroneously denied his petition as untimely.[3]

Petitioner then filed a second notice of PCR, seeking new counsel to allege ineffective assistance by initial-review counsel. The trial court, misinterpreting the notice, denied the request for counsel and dismissed the notice. The Arizona Court of Appeals and the Arizona Supreme Court denied review.

2. In 2013, Petitioner filed a *pro se* petition, which he later timely amended, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the District of Arizona. In the amended petition, he raised, inter alia, the constructive denial of trial counsel due to "an irreconcilable conflict where there was a complete breakdown in the communication" and where the trial court refused a change of counsel "after conducting a perfunctory inquiry[.]"

The district court implicitly found the "last reasoned decision" of the state courts on that question to be the Arizona Court of Appeals' dismissal of his *pro se* petition for review as untimely. It concluded, in turn, that the state-court proceedings following that decision did not toll the statute of limitations under 28 U.S.C. § 2244(d) and dismissed the habeas petition as untimely. It granted a COA,

[3] The State has since conceded that that petition was, in fact, timely filed; the Arizona Court of Appeals overlooked the extension of the filing deadline granted by the superior court. *Camargo*, 684 F. App'x at 608. There is thus no dispute that the state appellate court's erroneous timeliness ruling poses no bar to federal review.

however, certifying, inter alia, "(1) whether Petitioner's federal habeas petition should be considered timely under 28 U.S.C. § 2244(d);" and "(2) whether Petitioner's Fifth, Sixth, and Fourteenth Amendment rights were violated by the 'constructive denial of the right to counsel'…." The Ninth Circuit appointed counsel, held the petition timely due to equitable tolling, and reversed and remanded for the district court to address the merits. *Camargo* v. *Ryan*, 684 F. App'x 607 (9th Cir. 2017).

3. Through counsel, Petitioner filed a second amended habeas petition raising again the constructive denial of trial counsel due to an irreconcilable conflict and complete breakdown in communication resulting from counsel's failure to communicate the plea offers to him in a language he could understand. For the purpose of merits review, the magistrate judge concluded that the "last reasoned decision" was *not* the state appellate court's dismissal on timeliness grounds but was instead the PCR court's preceding decision denying the petition "[f]or the reasons stated" in the State's response brief. App. 55a–56a. He concluded, however, that "the reasons stated" in the State's brief were—and thus, the basis for the PCR court's decision was—waiver. App. 56a–57a.

Because the state courts had rendered no merits decision, the magistrate judge determined that AEDPA did not apply. App. 57a, 60a. In accordance with Ninth Circuit precedent, *e.g.*, *Schell* v. *Witek*, 218 F.3d 1017 (9th Cir. 2005) (en banc), he found that Petitioner had stated a colorable claim for the denial of a constitutional right. App. 59a–63a, 84a; see *Schell*, 218 F.3d at 1206 ("The ultimate

constitutional question the federal courts must answer is … whether [the trial court's] error actually violated [the defendant's] rights in that the conflict between [the defendant] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment."); see also, *e.g.*, *Stenson* v. *Lambert*, 504 F.3d 873, 886 (9th Cir. 2007); *Daniels* v. *Woodford*, 428 F.3d 1181, 1196–97 (9th Cir. 2005); *Brown* v. *Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970). The magistrate judge thus recommended expansion of the record and an evidentiary hearing. App. 84a.

Over Petitioner's objection, the district court agreed with the magistrate judge that the "last reasoned decision" was the PCR court's decision, rather than the appellate court's subsequent, reasoned decision ruling on timeliness grounds. App. 15a. In support of that conclusion, it cited *Ayala* v. *Chappell*, 829 F.3d 1081 (9th Cir. 2016), in which the Ninth Circuit stated that "AEDPA's standards [are applied] to the state court's last reasoned decision *on the merits* of petitioner's claims." *Id.* (quoting *Ayala*, 829 F.3d at 1094) (emphasis added). It also relied on an earlier, unpublished decision, *Ramsey* v. *Yearwood*, 231 F. App'x 623 (9th Cir. May 3, 2007), where the Ninth Circuit looked through a state appellate court's procedural decision to the lower court's merits decision. *Id.* at 624–25.

Unlike the magistrate judge, however, the district court concluded that the PCR court had ruled on the merits. *Id.* As a result, the district court held that Petitioner's claim demanded AEDPA deference. *Id.* Because this Court has not

clearly established a right to counsel with whom the defendant is not irreconcilably conflicted, it denied the claim on the merits. App. 20a (quoting *Carter* v. *Davis*, 946 F.3d 489, 508 (9th Cir. 2019) (per curiam) ("Even if [the petitioner] were successfully able to demonstrate a complete breakdown in communication or prove that an irreconcilable conflict existed … [his] irreconcilable-conflict claim would still fail. This is because the Supreme Court has never endorsed this line of precedent from our court.")); *see* App. 19a–20a, 24a. In contrast with its grant of a COA on the exact same issue for Petitioner's prior appeal, it denied a COA. App. 24a.

4. Petitioner moved for a COA in the Ninth Circuit, but a two-judge panel denied the motion in a boilerplate order. App. 1a–2a. A different two-judge panel, in a one-line order, then denied reconsideration. App. 3a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Denial of a COA, Despite Actual Debate Between the Magistrate Judge and the District Court on the Resolution of the Constitutional Question, Furthers a Circuit Split.

To obtain a COA, a petitioner must "ma[k]e a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This inquiry "is not coextensive with a merits analysis." *Buck* v. *Davis*, 137 S. Ct. 759, 773 (2017). Rather, it is a "threshold question [that] should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Id.* (citation omitted). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El* v. *Cockrell*, 537 U.S. 322, 342 (2003). A COA should therefore issue where "reasonable jurists would find the

district court's assessment of the constitutional claims debatable or wrong." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000).

Here, reasonable jurists have already disagreed as to the merits: the magistrate judge concluded that AEDPA deference was unwarranted and found the claim substantial on that basis, while the district court applied AEDPA to deny the claim. The Ninth Circuit's denial of a COA nonetheless departs from the holdings of two other Courts of Appeals as well as multiple district courts, which issue COAs as a matter of course in that circumstance, and is inconsistent with *Miller-El*.

1. This Court has explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. The fact that two jurists reviewing the constitutional claim have actually debated with each other and reached opposite conclusions means, by definition, that the issue is debatable among reasonable jurists. In other words, it *exceeds* the threshold articulated in *Miller-El*.

2. The Second and Sixth Circuits agree. In *Cadavid-Yepes* v. *United States*, No. 14-02210 (6th Cir. Feb. 5, 2015) (ECF No. 10), the Sixth Circuit made the obvious point: "In light of the conflicting opinions espoused by the magistrate judge and the district court judge, it is clear that reasonable jurists could debate the district court's ruling on these issues." *Id.* at 4. In *Blalock* v. *Fisher,* 480 F. App'x

39, 40 n.1 (2d Cir. 2012), the Second Circuit similarly expressed its approval of the district court's grant of a COA, noting that "the district court's disagreement with the magistrate judge's recommendation to grant [the petitioner's] habeas petition" demonstrated that "'reasonable jurists could debate (or for that matter, agree that) the petition should have been resolved in a different manner.'" *Id.* (quoting *Blalock* v. *Fisher*, No. 04-cv-2252 (LAP), 2010 WL 2891185, at *6 (S.D.N.Y. July 12, 2010)) (in turn quoting *Slack*, 529 U.S. at 484).

Numerous district courts across the country have held likewise, issuing COAs on that express basis. See, *e.g.*, *United States* v. *Figueras*, No. 2:16-cr-00045-MCE-EFB, 2021 WL 3663800, at *1 (E.D. Cal. Aug. 18, 2021) ("The Court finds it compelling that another reasonable jurist has in fact disagreed with this Court's conclusion in that the magistrate judge initially recommended that Movant's underlying motion be granted."); *Garrey* v. *Kelly*, No. 1:03-cv-10562-NMG, 2021 WL 1251370, at *2 (D. Mass. Apr. 5, 2021) ("the disagreement between judicial officers [the magistrate judge and district court] demonstrates that reasonable jurists can disagree"); *United States* v. *Holley*, Nos. 5:12-cr-25-MW/CJK & 5:14-cv-34-MW/CJK, 2016 WL 6595129, at *34 (N.D. Fla. Nov. 7, 2016) ("Although the undersigned disagrees with the conclusions of the Magistrate Judge, the Magistrate Judge is an eminently reasonable jurist and the issues presented are adequate to proceed further."), *vacated on other grounds sub nom. Holley* v. *United States*, 718 F. App'x 898 (11th Cir. 2017); *Mackenzie* v. *Hutchens*, No. LA CV 12-00584-VBF-JCC, 2013 WL 8291424, at *1 (C.D. Cal. Nov. 19, 2013) ("The very fact that two federal judges

came to different conclusions shows that plaintiff's appeal—which essentially contends that the Magistrate Judge was right and the undersigned was wrong—shows that reasonable jurists could, and *do*, disagree in this matter. Based on this fact alone, plaintiff would meet the standard for a [COA] if a COA were required.").

3. This position finds additional support in the holdings of the Fifth and Seventh Circuits. In the similar context of a division of opinion among state jurists, the Fifth and Seventh Circuits have held that "issuance of a certificate of appealability should ordinarily be routine." *Rhoades* v. *Davis*, 852 F.3d 422, 429 (5th Cir. 2017) (quoting *Jones* v. *Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011)). The Seventh Circuit in *Jones* elaborated: "A district court could deny a certificate of appealability on the issue that divided the state court only in the unlikely event that the views of the dissenting judge(s) are erroneous beyond any reasonable debate[,]" a "prospect … likely rare enough to call for some explanation in the order denying the certificate of appealability, an explanation that was lacking" in that case. 635 F.3d at 1040. Here, as in *Jones*, the district court offered no explanation for its denial of a COA—even though the magistrate judge concluded that the claim was valid, and even though the district court itself had found that Petitioner "made a substantial showing of the denial of a constitutional right," § 2253(c)(2), on the very same claim for Petitioner's prior appeal.

Three justices of this Court, citing *Jones* with approval, have agreed that an actual dispute among jurists "alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution of [the petitioner's] claim."

Jordan v. *Fisher*, 576 U.S. 1071, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, Ginsburg, & Kagan, JJ., dissenting from denial of certiorari). The Ninth Circuit set too high a bar in requiring Petitioner to show that some hypothetical reasonable jurist would find the district court's resolution of the claim debatable or wrong when an actual reasonable jurist already did so.

4. The Ninth Circuit thus stands virtually alone in ruling, in the decision below, that reasonable jurists cannot disagree where the magistrate judge and the district court did exactly that. It is joined only by a single judge of the Eleventh Circuit similarly declining to issue a COA in that circumstance. See *Alvarez* v. *Warden*, No. 16-16076-G, 2017 WL 4250692, at *7 (11th Cir. Feb. 17, 2017) (order of J. Pryor, J.). The division of authority warrants this Court's intervention.

II. In Ruling that Federal Courts Must "Look Through" the Last Reasoned Procedural Decision to a Lower State Court's Merits Decision, the Ninth Circuit Creates a Circuit Conflict and Disregards This Court's Precedent.

Review is also merited by the district court's peculiar holding, accepted by the Ninth Circuit in its boilerplate denial of a COA, that the "last reasoned decision" of the state courts is not, in fact, the last decision that is reasoned but is instead the last reasoned decision *on the merits*—meaning that the court "looks through" the reasoned decision of a higher state court that did not decide a properly-presented constitutional question to the decision of a lower court adjudicating the claim on the merits. That holding creates a conflict with the Third, Sixth, and Eleventh Circuits, cannot be reconciled with this Court's seminal

decisions on the issue, *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), and *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018), and upends the "look through" doctrine entirely.

1. In *Ylst*, the Court confronted the question of how to treat unexplained state court decisions that follow a lower court's imposition of a procedural bar. *Id.* at 799. The California Court of Appeal, in the petitioner's direct appeal, had rejected the claim as procedurally defaulted, and the California Supreme Court denied discretionary review without opinion. *Id.* Rebuffing the Ninth Circuit's view that the unexplained denial constituted a decision on the merits, the Court held that, "[w]here there has been one reasoned state judgment rejecting a federal claim," it can be presumed that "later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.* at 803. "The essence of unexplained orders is that they say nothing[,]" so "a presumption which gives them *no* effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play." *Id.* at 804.

The Court emphasized that, by "unexplained order," it meant "an order whose text or accompanying opinion does not disclose the reason for the judgment[.]" *Id.* at 802. Giving effect to the reasoned order preceding the unexplained order made sense because "silence implies consent" with the decision below. *Id.* at 804. Thus, the Court "looked through" the California Supreme Court's unexplained denial to the California Court of Appeals' decision rejecting the claim as procedurally defaulted. *Id.* at 805. The appellate court's procedural default

decision was "the last reasoned decision"—"the last *explained* state court judgment"—on the petitioner's claim. *Id.* at 804–05.

The Court extended the "look through" doctrine to § 2254(d) in *Wilson*. The question there was whether the summary affirmance of a higher state court on the merits should be presumed to have adopted the reasoning set forth in the last reasoned opinion of the lower court addressing the merits. *Id.* at 1192. In holding that it should, the Court implicitly reaffirmed the axiom that the "last reasoned decision" is the last decision that contains reasoning, such that a federal habeas court only "looks through" *unreasoned* decisions. *See id.* at 1194–95.

2. The Third, Sixth, and Seventh Circuits have faithfully followed this Court's precedent. In *Barton* v. *Warden, S. Ohio Corr. Facility*, 786 F.3d 450 (6th Cir. 2015) (per curiam), Ohio urged the Sixth Circuit to review the Ohio Court of Common Pleas' decision—which it contended rested on the merits—as the "last reasoned decision," rather than the subsequent decision of the Ohio Court of Appeals disposing of the claim on procedural grounds. *Id.* at 462–64. Addressing the question in detail, and relying on *Ylst*, the Sixth Circuit held that, assuming the lower court ruled on the merits, the "last reasoned decision" was that of the appellate court, which expressly declined to reach the merits. *Id.* at 462. Accordingly, it reviewed the petitioner's claim *de novo*. *Id.* at 464.

Likewise, in *Thomas* v. *Horn*, 570 F.3d 105 (3d Cir. 2009), the Third Circuit addressed "whether a claim has been 'adjudicated on the merits in State court proceedings' when a lower state court decided the claim on its merits, but the

reviewing state court resolved the claim entirely on procedural grounds." *Id.* at 114. The lower state court had denied two of Thomas' claims on the merits, but the state supreme court, reviewing that decision, disposed of the case on purely procedural grounds. *Id.* at 115. Reasoning that a decision constitutes an "adjudication on the merits" only if it has preclusive effect, and concluding that the state supreme court's procedural decision "stripped" the lower court's merits decision of such effect, the Third Circuit held that there had been no "adjudication on the merits" within the meaning of § 2254(d). Accordingly, it reviewed the claim without deference. *Id.* at 114–17.

The Seventh Circuit reached the same conclusion in *Liegakos* v. *Cooke*, 106 F.3d 1381 (7th Cir. 1997). There, the state trial court rejected the petitioner's claim on the merits, but the state court of appeals based its ruling on a procedural issue (forfeiture). *Id.* at 1385. Because "the last state court to issue an opinion" was the appellate court, which did not reach the merits, the Seventh Circuit held that AEDPA did not apply. *Id.*

3. In previously dismissing Petitioner's claim on timeliness grounds, the district court accepted that the last reasoned decision on that claim was the Arizona Court of Appeals' decision dismissing the claim as untimely. Only after Petitioner surmounted that procedural hurdle on appeal—resulting in a remand to the district court for review of the constitutional claim on the merits—did the district court, and then the Ninth Circuit in denying a COA in boilerplate language, newly conclude that the "last reasoned decision" for purposes of merits review was not, in fact, the

Arizona Court of Appeals' dismissal but rather the superior court's earlier decision rejecting the claim on the merits.

The decision below thus creates an intolerable scheme of "heads, I win; tails you lose": if the last reasoned decision is procedural and the Petitioner prevails on that issue, then a lower state court decision addressing the merits becomes the "last reasoned decision" for purposes of § 2254(d), thereby enabling deferential review rather than *de novo* review. But *Ylst* and *Wilson* make clear that the "last reasoned decision" for federal review is the same for the purpose of determining the existence of a procedural bar as it is for review on the merits. Unlike an unexplained order, a higher court's reasoned rejection of a claim on explicitly different grounds than the court below it plainly does not imply "consent" with the lower court's reasoning, such that the higher court can be presumed to have adopted it.

4. As of 2005, the Ninth Circuit had correctly acknowledged that this Court "describes AEDPA review as applying to a single state court decision, not to some amalgamation of multiple state court decisions." *Barker* v. *Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005) (citing *Williams* v. *Taylor*, 529 U.S. 362, 405 (2000)). In two subsequent cases, however, it held that "AEDPA's standards [are applied] to the state court's last reasoned decision *on the merits* of a petitioner's claims." *Ayala*, 829 F.3d at 1094 (emphasis added); see *Ramsey*, 231 F. App'x at 624–25 ("Because the California Supreme Court denied Ramsey's petition without comment or citation, and the California Court of Appeal denied his petition on procedural grounds, the California Superior Court's finding that Ramsey's habeas petition

failed to state a prima facie claim is the last reasoned decision on the merits. Therefore, under AEDPA, we are required to defer to the Superior Court's determination.") (alteration and internal quotation marks omitted)).

A mere month after its precedential decision in *Ayala*, the Ninth Circuit again changed course, suggesting without explanation that whether the "look through" doctrine applies to reasoned procedural decisions remains an open question. See *Fox* v. *Johnson*, 832 F.3d 978, 986 (9th Cir. 2016) (declining to decide whether to look through a state supreme court decision resting on timeliness to the state appellate court's decision on the merits). Its similarly unexplained resolution in this case that reasoned, procedurally-based decisions are treated like unexplained orders—i.e., that they are given no effect—and that different state court decisions may constitute the last reasoned decision for different purposes defies *Ylst* and *Wilson*. Indeed, in *Ylst* itself, the "last reasoned decision" rested on procedural default. The Court did not "look through" that reasoned decision to a lower court's merits decision, as the Ninth Circuit did in *Ayala* and *Ramsey*, and again here.

The decision below furthers a conflict with three other Courts of Appeals and creates chaos out of otherwise-settled law. Review is needed.

III. The Questions Presented Are Recurring and Important, and This Case Is an Excellent Vehicle.

The questions presented are important and arise in a vast number of federal habeas cases. The Court should resolve them here.

1. As to the first question presented: in *every* habeas case, an unsuccessful petitioner cannot take an appeal unless a COA issues—and it is not uncommon for the district court to reject the magistrate judge's recommendation as to the merits, as discussed in Part I above. Given the enormous consequence of the denial of a COA—deprivation of an appeal as to a claim of constitutional dimension—the uniform treatment of similarly-situated petitioners across the country is paramount.

2. Likewise with respect to the second question presented. *Every* habeas case requires the district court to ascertain the "last reasoned decision" of the state courts for its review—a critical and often outcome-determinative question, as it was here. Indeed, the ramifications of the Ninth Circuit's decision on federal habeas law cannot be overstated. That is so because the last reasoned decision provides the backdrop for the analysis of a federal habeas claim. If the last reason given by the state courts on a properly-presented constitutional claim was procedural, the petitioner must overcome that hurdle to obtain federal review; if he does, the court reviews the merits *de novo*. See *Kernan* v. *Hinojosa*, 578 U.S. 412, 136 S. Ct. 1603, 1604 (2016) (per curiam). If, by contrast, the last reasoned decision rested on the merits, § 2254(d) restricts relief to claims resolved by the state court in a manner "contrary to, or involv[ing] an unreasonable application of," clearly established Supreme Court precedent or "based on an unreasonable determination of the facts in light of the evidence" presented to the state court—"'a substantially higher

threshold' for obtaining relief than *de novo* review." *Renico* v. *Lett*, 559 U.S. 766, 773 (2010) (quoting *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007)).

Proper identification of the "last reasoned decision" thus has profound implications for the resolution of a federal habeas claim. See, *e.g.*, *Ford* v. *Peery*, 999 F.3d 1214, 1225–26 (9th Cir. 2021) (deferring to the state court's harmlessness finding but noting that it would have found otherwise if review were *de novo*), *reh'g en banc denied*, 9 F.4th 1086 (9th Cir. 2021); *Neal* v. *Puckett*, 286 F.3d 230, 244 (5th Cir. 2002) (holding the state court's determination incorrect but not an unreasonable application of Supreme Court precedent); see also, *e.g.*, *Dickens* v. *Ryan*, 740 F.3d 1302, 1324 (9th Cir. 2014) (en banc) (Watford, J., concurring) (concluding that relief would have been warranted had the court been permitted to perform its own "independent evaluation" of Supreme Court precedent) (quoting *Wright* v. *West*, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring in the judgment)). That is indeed the case here. While the parties disputed whether Petitioner had stated a substantial claim under clearly established Supreme Court precedent, the State did *not* dispute that Petitioner's irreconcilable conflict claim is cognizable under Ninth Circuit law. And whether AEDPA applied was the crux of the disagreement between the magistrate judge and the district court: the magistrate judge, rejecting its application, concluded that Petitioner was entitled to proceed further, while the district court applied § 2254(d) and denied the claim on that basis.

3. This case is an excellent vehicle for consideration of the questions presented. Both questions are straightforward, each divides the Courts of Appeals, and each is independently dispositive of Petitioner's entitlement to a COA. The prevalence of the issues and their importance to the resolution of federal habeas cases across the board warrant this Court's attention.

CONCLUSION

The petition should be granted or the case summarily reversed for the issuance of a COA.

Respectfully submitted,

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October 12, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFREDO CAMARGO, Petitioner-Appellant, v. DAVID SHINN, Director, Arizona Department of Corrections, ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-16574 D.C. No. 2:13-cv-02488-NVW-JFM District of Arizona, Phoenix ORDER

Before: CANBY and VANDYKE, Circuit Judges.

The appellant's motion for leave to file an oversized request for a certificate of appealability (Docket Entry No. 3) is granted. The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 14 2021

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

ALFREDO CAMARGO, Petitioner-Appellant, v. DAVID SHINN, Director, Arizona Department of Corrections, ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-16574 D.C. No. 2:13-cv-02488-NVW-JFM District of Arizona, Phoenix ORDER

Before: PAEZ and CALLAHAN, Circuit Judges.

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

No further filings will be entertained in this closed case.

APPENDIX C

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Alfredo Camargo, Petitioner, v. David Shinn and the Attorney General of the State of Arizona, Respondents.	No. CV-13-02488-PHX-NVW **ORDER**

Before the Court is the Report & Recommendation ("R&R") of Magistrate Judge James F. Metcalf (Doc. 114) regarding Petitioner Alfredo Camargo's ("Camargo") Renewed Second Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Doc. 83) and Renewed Motion for Expansion of the Record and an Evidentiary Hearing (Doc. 107). The R&R recommends that the Court deny relief on all Camargo's claims except that he "has asserted colorable claims in Grounds 1 (irreconcilable conflict [with appointed counsel]) and 2(A) (IAC PCR counsel re Ground 1), and should be permitted to expand the record and an evidentiary hearing to support these claims." (Doc. 114 at 59.) The Magistrate Judge advised the parties that they had fourteen days to file objections to the R&R. (Doc. 114 at 63 (citing Fed. R. Civ. P. 72(b); Rules Governing Section 2254 Cases in the United States District Courts, Rule 8(b)).) Camargo and Respondents David Shinn and the Attorney General of the State of Arizona ("Respondents") each timely filed objections, (Doc. 119; *see* Docs. 120-21, 125-26), and

responses thereto. (Docs. 124, 128.) In addition, Camargo filed a Notice of Supplemental Authority (Doc. 129) on March 10, 2020, to which Respondents responded ten days later. (Doc. 130.)

The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court has considered the objections and responses thereto and reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that a court must make a de novo determination of those portions of a report and recommendation to which specific objections are made).

I. INTRODUCTION

The record shows the Superior Court of Arizona in and for Maricopa County (the "Superior Court") rejected on the merits Camargo's claim of constructive denial of counsel and did not violate settled Supreme Court precedent in so ruling. The Magistrate Judge erred in not according deference to the Superior Court's legal conclusions and findings of fact. There was not and could not have been any ineffective assistance of Camargo's post-conviction relief counsel in not raising that unmeritorious claim. The mistaken recommendation to supplement the record is contrary to the requirement that this federal habeas corpus proceeding be judged based on the record before the Superior Court. The R&R compounds those errors by grounding its recommendations in lower court authorities, not just Supreme Court precedents. By that chain of errors, the Magistrate Judge reached a recommendation plainly contrary to 28 U.S.C. § 2254 and the well-supported findings of the Superior Court.

Therefore, the R&R will be rejected to the extent it does not deny Camargo's claim of constructive denial of counsel and his claim of ineffective assistance of his post-conviction relief counsel on that issue. The R&R will be accepted to the extent it recommends rejection of all Camargo's other claims. Judgment will be entered denying Camargo's Petition.

The R&R's tangled discussion of procedural issues and sub-issues may not be necessary in every detail. This Court prefers to untangle the central matter: Camargo's claim that his Sixth Amendment rights were violated as a result of the Superior Court denying his motions for change of counsel.

II. THE SUPERIOR COURT PROCEEDINGS

Camargo twice moved for new counsel; the Superior Court heard the first motion on November 13, 2007, and the second on March 20, 2008.

A. The First Motion

Camargo first moved for new counsel on November 2, 2007,[1] arguing that his court-appointed attorney, Raymond Kimble, should be dismissed because he: (1) "refuses to hire an investigator to gather exculpatory evidence needed to challenge police officers['] false testimony;" (2) "refuses to provide simple police reports after being asked twice throughout [the] last couple of months;" and (3) "is only interested in bullying [Camargo] into signing a plea instead of allowing [him] to participate as co-counsel, refusing to develop trial strategy, refusing to discuss facts of [the] case, refusing to conduct interviews." (Doc. 83-2 at 125-27.)

On November 13, 2007, the Superior Court held a hearing on the motion. (*Id.* at 107.) The Superior Court judge began by telling Camargo "the law does not permit him to act as co-counsel." (*Id.* at 110.) Then, she addressed the arguments in Camargo's motion. On Camargo's first argument, the judge surmised that "it's up to the defense to determine whether or not investigation is needed and I'm certainly not going to intervene" and that "[t]he issue then is whether or not an investigator would be approved." (*Id.*) Then, she asked Kimble whether he had "requested an investigator or [felt that] one is necessary." (*Id.*) Kimble said he had not requested one and said "I did meet with Mr. Camargo at the

[1] Camargo initially tried to present his motion at a status conference held before a court commissioner on October 23, 2007. (*See id.* at 98, 100.) Commissioner Julie P. Newell forwarded the motion to Superior Court Judge Linda A. Akers. (*See id.* at 102, 105, 215.) In contrast with Federal Rule of Criminal Procedure 11, Arizona criminal procedure does not prohibit judges from participating in plea discussions.

jail with an interpreter prior to our scheduled settlement conference." He and Camargo "didn't even discuss an investigator," and he therefore "never actually refused to hire one." (See *id.* at 111.) He concluded that "[g]iven the facts of this case[,] I don't plan to [hire an investigator] because I don't believe one is necessary" and noted "this case . . . basically involves a couple of civilian witnesses and three or four or five police officers." (*Id.*) Notably, Camargo never said what investigation he wanted or why it was necessary.

Turning to Camargo's second argument, the Superior Court asked Kimble whether he gave Camargo the police reports. He said Camargo "has a copy of the police report." (*Id.*) Camargo then confirmed this. (*Id.*)

The Superior Court next addressed Camargo's third argument.

> THE COURT: . . . There is a plea agreement, where there was a plea offer; is that correct?
>
> MR. KIMBLE: Judge, there was a plea offer that was made. I conveyed that plea offer to Mr. Camargo with an interpreter. I also discussed the facts of the case with Mr. Camargo during that visit. I listened to his version of the incident and frankly I gave him my advice that I thought the plea offer was in his best interest.
>
> THE COURT: But you're willing to try the case if he wants to.
>
> MR. KIMBLE: If he wants a trial, that's fine, Your Honor.

(*Id.* at 111-12.)

The Superior Court then turned to the crux of the matter, asking Kimble whether "there is an irreconcilable difference" between him and Camargo. (*Id.* at 112.) He responded:

> From my perspective, I believe that Mr. Camargo, number one, in his motions or letters to the Court have been less than truthful. During our last status conference he expressed an unwillingness to communicate with me which obviously would make it very difficult to defend him at trial, discuss the facts of the case with him, potential defenses, his version of the incident, things like that. He has expressed a distrust regarding my representation. I do believe that I could competently represent him at trial however at the same time I have had difficulties working with Mr. Camargo and I guess if he wants to express his feelings to the Court. I'd advise him not to make any statements regarding the facts of the case. That's where we stand right now.

> I just—Judge I don't agree with what he has written to the court and I'd like to put that on the record.

(*Id.* at 112-13.)

But this did not end the Superior Court's inquiry, as it next sought Camargo's side of the story. Camargo asserted:

> I don't agree with him because from the very beginning, he went to visit me. He read me the charges and he explained to me the plea agreement. And I didn't see him again until the day that he told me, you have to sign, time's up; if not, you're going to have to . . . go to trial. And in my opinion I think that he as an attorney should have warned me—informed me so that I could have made a decision. I asked him for the police report but he didn't give it to me until the day before the plea agreement was going to expire and the day before I was going to supposedly have to sign it. And the day that he brought me the police report at the jail he asked me if I had any questions, well of course I had questions but how was I going to be able to ask him all of those questions that day without an interpreter when he came. Supposedly, him, as an attorney he should have come with an interpreter. I feel like I'm being pushed, like I'm being pressured to sign. And I read the Police Report and there are a lot of lies. It's clear they are lies. That's why I want an investigator to check into it to show what that it's lies in the police report.

(*Id.* at 113-14.) Camargo did not identify any "lies" in the police report. After the courtroom interpreter said she once went to the jail to interpret for Kimble and Camargo, Kimble provided more information, noting:

> Judge we had a settlement conference on a Thursday afternoon because it ran into 4:30 or so PM—I believe it was a Thursday or Friday but Commissioner Newell continued the settlement conference for a status conference the following week. Ms. Luder [the prosecutor] allowed the plea to remain open for three or four days following the settlement conference. I delivered a copy of the police report to Mr. Camargo the next day. I had mailed a copy to him and not sure why it didn't make it to him, to the jail. But I delivered a copy the next day to him. I didn't have time to arrange a visit for the interpreter but in order to give him a copy of the police report I hand delivered it to him. Obviously I couldn't communicate well with him because I don't speak Spanish. But he had the opportunity to consider the plea offer for some time.

(*Id.* at 114-15.)

The Superior Court then conducted the following analysis:

> Well Defendant doesn't have to take a plea offer if he doesn't want to. He can certainly go to trial. That's what we're in the business of providing. What I have to look at here Mr. Camargo and Counsel, you know as well, is whether there is an irreconcilable conflict between Counsel and accused. It appears to me that the same conflict is going to exist whether or not the Defendant is represented by Mr. Kimble or someone else. Defendant feels that an investigator needs to be appointed. I've examined the facts and I don't know whether or not an investigator would be appropriate based on what the Defendant's thoughts are. I don't want to get into case preparation for strategy here but there is access available to an investigator should one be needed. I have to consider whether new Counsel would be confronted with the same conflicts. I think that Defendant[']s ideas about the case may be in conflict with anyone who represented him. Defendant is not entitled to an attorney of his choice when he receives representation at the cost or expense of the state. And so if Defendant wishes to hire his own attorney he maybe [sic] able to dictate who that would be but not in this case. I have to look at the timing of the motion. The motion is filed about three weeks before trial. We have both a trial management conference and a trial on the same day. That is unusual. I will adjust for that. The trial is set for December the 4th and that is about two weeks out, maybe just a little bit better than that, maybe it's about three weeks out. I have not heard anything about the convenience of witnesses. . . . [The prosecutor then said that "[s]o far as the witnesses go they are available for trial in December." (*Id.* at 116.)] The next one I have to consider is the time elapsed between the alleged offense and the trial; the proclivity of the Defendant to change Counsel. I guess this is the first motion that has been filed, so there is no history there. And the quality of Counsel. And I certainly am aware Mr. Kimble has appeared in this court many times and provided certainly quality representation. So I don't feel that is an issue in this case.

(*Id.* at 115-17.)

After Kimble detailed his progress in his pretrial investigation, Camargo argued "I don't want him [Kimble] to represent me anymore." (*Id.* at 117.) The Superior Court explained that "[w]hen the state provides you with an attorney you don't get to pick and choose which attorney will be your attorney." (*Id.* at 117-18.) The following exchange then occurred:

> THE INTERPRETER:[2] Okay. But if we can't come to an agreement—he's pushing me trying to make me sign.

[2] Camargo spoke through an interpreter at the hearing; dialogue in the transcript is erroneously attributed to "the interpreter."

> THE COURT: You don't have to sign any agreement sir. I can tell you that right now. You can go to trial and you can be tried on the charges and Mr. Kimble has indicated that he will prepare for trial and represent you at that trial.
>
> THE INTERPRETER: No. I don't want him to represent me. We can't reach an agreement, him and I. He doesn't even come to visit me to tell me what's going on so I can make a decision or anything. He's pushing. I can't come to an agreement with him.

(*Id.* at 118.) After Kimble and the prosecutor informed the Superior Court there was no plea offer pending, Camargo acknowledged that fact. (*Id.* at 118-19.) But then he pressed on:

> THE INTERPRETER: Yes, but they only gave me an extension, a two day extension after they told me that. And it was not enough time for me to be able to make a decision.
>
> THE COURT: Well Mr. Camargo, you're not entitled to a plea in any case. The law says that whatever plea is extended is not going to be there forever and you don't have to take it. The State didn't have to offer it in the first place. You had a settlement conference. You were given additional time to discuss it. I think any new attorney is going to be faced with the same problems.
>
> THE INTERPRETER: But I can't even talk to him. He doesn't even come to visit me to tell me what's going on. I don't know anything. He hasn't even investigated about an injury that I had there and about the door, there's fingerprints. If my fingerprints are on the door, they haven't even checked that. I never went in. That's what I'm saying is, with the police report, there are a lot of lies, a lot of things that are not true that needs to be investigated. They are just accusing me.

(*Id.* at 119-20.)

Camargo then went on to discuss the facts of the case, at which point the Superior Court judge cut him off to prevent him from potentially incriminating himself. (*See id.* at 120.) The Superior Court then denied Camargo's motion and "admonish[ed] Mr. Kimble to visit [Camargo] more frequently than he has with the interpreter present so that [Camargo] can go over the facts of the case." (*Id.*)

Camargo then argued his motion one last time, saying "I don't want him [Kimble]" and "he's not doing anything to investigate something that's just lies." (*Id.* at 120.) Then, the Superior Court asked Camargo whether he wished to represent himself, Camargo declined, and the Superior Court reaffirmed that Camargo's motion was denied and Kimble was his appointed counsel. (*Id.* at 121.)

B. The Second Motion

Camargo next moved for new counsel on February 29, 2008, arguing that Kimble should be dismissed because Kimble: (1) told him to "stay quiet" after he "noticed" the prosecutor "lied to the judge" during a settlement conference on February 11, 2008; (2) "failed to look into" his contention that all of the "testimonys [sic]" in the police report "don't match at all;" (3) refused "to hire an investigator to gather exculpatory evidence needed to challenge police officers['] false testimony;" and (4) "is only interested in bullying [him] into signing a plea instead of allowing [him] to participate as co-counsel, refusing to develop trial strategy, refusing to discuss facts of [the] case, refusing to conduct interviews." (*Id.* at 186-87.)

The motion was heard on March 20, 2008. (*Id.* at 213.) The Superior Court began by asking Camargo whether he wished to supplement his motion; he declined. (*Id.* at 217-18.) Next, to "try[] to understand how" Camargo believed there was a "conflict with this attorney [Kimble] that would not exist with another attorney who had the same responsibility to" him, the Superior Court let Camargo argue his motion. (*Id.* at 218.) The following exchange ensued:

> THE COURT: Well, I am giving you an opportunity to explain to me how another attorney could work better with you, given the fact that one of your allegations is that this attorney refuses to allow you to participate as co-counsel, and you can't do that under the law of Arizona. So any other attorney would be faced with the same issue. You'd have the same issue with that attorney.
>
> THE DEFENDANT: This attorney hasn't done his job. He hasn't sent out an investigator, and he hasn't negotiated or argued this case with . . . .

> THE COURT: Negotiated or argued the case with who? There's been no trial, as I've understood it.
>
> THE DEFENDANT: Okay, well, with this lawyer, I mean—all right, on the 29th of February there was a settlement conference.
>
> THE COURT: All right.
>
> THE DEFENDANT: And Ms. Susan spoke certain things that were lies. They're not written in the police report. It changes the victim's statements, and that victim is not here. I found out what she said, and I tried to say something about it, and Mr. Raymond [Kimble] would tell me, you know, hey—he wouldn't let me talk. And if I feel that he's not speaking on my behalf, then I have to . . . . So the report is here, so that you can see it. It's recorded, what she said.
>
> THE COURT: Sir, let me interrupt you right there. A settlement conference is not an opportunity to try the case. You may differ with what the State believes the evidence will be.
>
> THE DEFENDANT: So then you are agreeable to the lady here saying lies?
>
> THE COURT: I'm not saying she lied, one way or the other. The point of the matter is, a settlement conference is not an opportunity to litigate the facts. It's an opportunity to determine if you and the State can reach a determina—an agreement as to how the case would be resolved short of trial.
>
> THE DEFENDANT: Well, since that was not the first time that Mr. Raymond has told me to be quiet when something like that happens, that is the reason why I'm asking for another attorney.
>
> THE COURT: All right. I now understand the basis for your request.

(*Id.* at 218-20.)

The Superior Court then turned to Kimble. While Kimble acknowledged that "[d]uring at least two of the settlement conferences, I did tell Mr. Camargo to be quiet," he noted he did so "only because he was going to discuss certain facts regarding the case that would obviously pose a problem should this case go to trial and Mr. Camargo testify at trial." (*Id.* at 220.) He then explained the case was "based primarily upon the testimony of two victims who have invoked their rights as victims" under Arizona law not to be

interviewed. (*Id.*) He mentioned he was able to interview a police officer, who was "basically the only other essential witness in this case." (*Id.*)

Kimble further explained that he had spoken with Camargo "at least five times at the jail" and he "explained the plea offer to him as well as his sentencing ranges on every single occasion, as well as during the three settlement conferences." (*Id.* at 221.) He also noted he didn't see the need to hire an investigator, as Camargo "didn't mention any defense witnesses whatsoever that needed to be located or interviewed." (*Id.*) When asked by the Superior Court whether his relationship with Camargo was "irreconcilably conflicted," Kimble said:

> Judge, I think there is a problem with my relationship with Mr. Camargo. During the last two visits at the jail, I've been unable to discuss the case with him. His only comments to me were that he didn't want to discuss anything, he wants a new attorney. Obviously, that presents a problem with respect to my representation of him only because I need to discuss the case with him in order to prepare for trial.
>
> In that regard, I think we do have some irreconcilable differences, especially given the amount of time Mr. Camargo faces if he would be convicted at trial.

(*Id.* at 221-222.)

When asked by the Superior Court whether "new counsel would have the very same conflict," Kimble responded that "given the severity of the case and the time he is facing, I think it may be in Mr. Camargo's best interests to have new counsel just take a fresh look and a fresh start with him. I can't say whether or not they'll have the same conflicts." (*Id.* at 222.) The Superior Court inquired further:

> THE COURT: Well, his issue is that you didn't try the case at the settlement conference—
>
> MR. KIMBLE: Right.
>
> THE COURT: —apparently, you haven't hired an investigator, and you've explained that there's really nothing to investigate, and that you're refusing to allow him to act as company counsel, which you cannot do under the law. Wouldn't a new attorney have the very same case conflict?

> MR. KIMBLE: Well, I think a new attorney would probably take the same position I have.

(*Id.* at 222-23.)

A few moments later, the Superior Court denied Camargo's motion, ruling:

> I'm going to deny the request. It's a motion to dismiss Mr. Kimble as counsel. I do find that there may be differences of opinions between the defendant and his attorney. However, Mr. Camargo was under the assumption that he could get a new attorney. He cannot at this point. New counsel would be confronted with the very same conflicts that have been expressed in this motion.
>
> The timing of the motion; this is four days before the trial date. I don't know whether or not witnesses would be inconvenienced one way or another. I have not heard any evidence on that. And the time elapsed between the alleged offense and the trial, obviously, we are at the very last portion of that time period, inasmuch as trial is four days away.
>
> I have no idea whether defendant has a proclivity to file these motions. This is the first one to come before me, and Mr. Kimble is certainly qualified to represent the defendant in a serious matter.

(*Id.* at 223-24.)

Kimble and the prosecutor then noted Camargo's earlier motion, which the Superior Court had denied. (*Id.* at 224-25.) In acknowledging this fact, the Superior Court recalled that the motion involved "the very same allegations, I think, with the exception of the police records," which Camargo had since acquired. (*See id.* at 225.)

III. THE PETITION FOR A WRIT OF HABEAS CORPUS

A. Constructive Denial of Counsel (Ground 1)

Because the Superior Court ruled on the merits of Camargo's motions, the Superior Court's rulings are entitled to deference under 28 U.S.C. § 2254(d). And because those rulings are well-supported by the record and not contrary to clearly established federal law, Camargo's constructive denial of counsel claim is baseless.

1. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for a writ of habeas corpus seeking relief from a state court's judgment "shall

not be granted with respect to any claim that was adjudicated on the merits in State court" unless it (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). A claim "as used in 28 U.S.C. § 2254 [is] 'an asserted federal basis for relief from a state court's judgment of conviction.'" *Kirkpatrick v. Chappell*, 950 F.3d 1118, 1131 (9th Cir. 2020) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005)), *petition for cert. docketed*, 20-5089 (July 16, 2020). An adjudication on the merits is "'a decision finally resolving the parties' claims that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.'" *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004) (internal alteration omitted) (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001)). As the Superior Court's rulings substantively resolved Camargo's claim,[3] they constitute "adjucat[ions] on the merits" and must be afforded deference under 28 U.S.C. § 2254(d). *See Ayala v. Chappell*, 829 F.3d 1081, 1094 (9th Cir. 2016) ("AEDPA's standards [are applied] to the state court's last reasoned decision on the merits of a petitioner's claims." (citing *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc))); *see also Ramsey v. Yearwood*, 231 F. App'x 623, 624-25 (9th Cir. May 3, 2007) ("Because the California Supreme Court denied Ramsey's petition without comment or citation, and the California Court of Appeal denied his petition on procedural grounds, the California Superior Court's finding that Ramsey's habeas petition failed to state a prima facie claim is the last reasoned decision on the merits. Therefore, under AEDPA, we are required to defer to the Superior Court's determination." (internal alteration and quotation marks omitted)).

"Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Indeed,

[3] *See supra*, at section II.

"AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). In light of this principle, "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Id.* Consequently, "28 U.S.C. § 2254(d) requires 'highly deferential' review of state court adjudications, 'demanding that state-court decisions be given the benefit of the doubt.'" *Cook v. Kernan*, 948 F.3d 952, 965 (9th Cir. 2020) (internal alteration omitted) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

"The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) have independent meaning." *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). A state court's ruling is "contrary to" clearly established Supreme Court law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent." *Williams*, 529 U.S. at 405-06.

A state court's ruling is an "unreasonable application" of clearly established Supreme Court law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. "'The unreasonable application clause requires the state court decision to be more than incorrect or erroneous'; it must be 'objectively unreasonable.'" *Cook*, 948 F.3d at 965 (internal quotation marks omitted) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, 562 U.S. at 102 (internal citation omitted). Accordingly, to obtain habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

With regard to claims under § 2254(d)(2), "a state court's factual determination is not 'unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Cook*, 943 F.3d at 965-66 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). "Even if 'reasonable minds reviewing the record might disagree' about a factual finding, 'on habeas review that does not suffice to supersede' the state court's determination." *Id.* at 966 (internal alteration omitted) (quoting *Rice v. Collins*, 546 U.S. 333, 341-42 (2006)).

In summary, AEDPA creates a standard that is "intentionally difficult to meet," *see Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam) (internal quotation marks and citations omitted), as "[s]ection 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment)). Therefore, this Court "will not lightly conclude that [Arizona's] criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy." *See Burt*, 571 U.S. at 20 (internal alteration, quotation marks, and citation omitted).

2. Discussion

First, Camargo's claim of constructive denial of counsel is not supported by the record and accordingly is not colorable. While the record demonstrates there was less communication between Camargo and Kimble than there might have been, this was the result of Camargo refusing to speak with Kimble. (*See* Doc. 83-2 at 112-13 ("During our last status conference he [Camargo] expressed an unwillingness to communicate with me [Kimble] which obviously would make it very difficult to defend him at trial, discuss the facts of the case with him, potential defenses, his version of the incident, things like that. He has expressed a distrust regarding my representation.").) While Kimble was charged with effectively representing Camargo, Camargo was charged with communicating with his lawyer and assisting with his defense. Notwithstanding Camargo's recalcitrance, there

is no evidence Kimble's representation was ineffective. Kimble testified that he "could competently represent [Camargo] at trial." (*Id.* at 112.) Camargo was not entitled to a new lawyer simply because he refused to discuss his case with Kimble and sought replacement counsel. (*See id.* at 221-22 ("During the last two visits at the jail, I've [Kimble] been unable to discuss the case with [Camargo]. His only comments to me were that he didn't want to discuss anything, he wants a new attorney.").) The Magistrate Judge's conclusion that Camargo's claim is colorable disregards the Superior Court record.

Moreover, contrary to the Magistrate Judge's characterization, there was no "breakdown in communications." Indeed, Kimble noted in March 2008 that he had spoken with Camargo "at least five times at the jail" and he "explained the plea offer to him as well as his sentencing ranges on every single occasion, as well as during the three settlement conferences." (*Id.* at 221.) In addition, they "discussed" Camargo's plea offer during the third settlement conference a month prior. (*Id.* at 169, 181.)

The Magistrate Judge also concluded "[t]here seems to have been little inquiry by the trial court." (Doc. 114 at 37.) This is nonsense. The Superior Court held two hearings on Camargo's motions and extensively examined Camargo's claims at each of them. Indeed, both Camargo and Kimble were given ample opportunities to explain their positions, (*see, e.g.*, Doc. 83-2 at 112-14, 218-22), and Judge Akers, at each hearing, explicitly referenced the "several factors designed specifically to balance the rights and interests of the defendant against the public interest in judicial economy, efficiency and fairness" the Arizona Supreme Court has directed courts to evaluate "when considering a motion to substitute counsel." (*See* Doc. 83-2 at 115-17, 223-25.) *See State v. Cromwell*, 211 Ariz. 181, 187 ¶ 31, 119 P.3d 448, 454 (2005) (en banc) (internal citations omitted).[4] There is no evidence the Superior Court's inquiry was anything less than thorough.

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[4] These factors are:

> [W]hether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant

Second, even if Camargo's claim of constructive denial of counsel were supported by the record, it would still fail, as it is not supported by clearly established Supreme Court law. As the Ninth Circuit recently explained:

> Even if [the petitioner] were successfully able to demonstrate a complete breakdown in communication or prove that an irreconcilable conflict existed . . . [his] irreconcilable-conflict claim would still fail. This is because the Supreme Court has never endorsed this line of precedent from our court. It has never held that an irreconcilable conflict with one's attorney constitutes a per se denial of the right to effective counsel. This proves fatal to [the petitioner's] claim because AEDPA conditions habeas relief on a determination that the state-court decision unreasonably applied "clearly established Federal law" as pronounced by the U.S. Supreme Court. 28 U.S.C. § 2254(d)(1); *Williams* [*v. Taylor*], 529 U.S. [362,] [] 365 [2000], 120 S. Ct. 1495. Although we may look to our circuit's precedent to see if we have already held a rule is clearly established, our decisions may not "be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S. Ct. 1446, 185 L.Ed.2d 540 (2013) (per curiam). [The petitioner] does not cite to any Supreme Court case holding that an irreconcilable conflict between a lawyer and his client constitutes a constructive denial of his right to counsel, with no showing of prejudice required.

Carter v. Davis, 946 F.3d 489, 508 (9th Cir. 2019) (per curiam) (internal citation omitted). This explanation tracks the Ninth Circuit's longstanding understanding that Supreme Court precedent does not "stand[] for the proposition that the Sixth Amendment is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust." *See Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) (en banc) ("The Supreme Court has held that a defendant is entitled to counsel who 'function[s] in the active role of an advocate.' [Petitioner] has not demonstrated that his attorneys failed to satisfy this obligation or acted unreasonably in the *Strickland* sense." (quoting *Entsminger v. Iowa*, 386 U.S. 748, 751

> to change counsel; and quality of counsel.
>
> *Id.* (quoting *State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987) (internal citation omitted).

(1967)) (internal citations omitted)); *see also Larson v. Palmateer*, 515 F.3d 1057, 1066-67 (9th Cir. 2008) (holding a petitioner that "complained solely about his counsel's strategic decisions and lack of communication with him," failed to show he was entitled to a new set of counsel under clearly established federal law).

This understanding reflects the Supreme Court's general guidance that while "the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime," *Wheat v. United States*, 486 U.S. 153, 158-69 (1988) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)), the purpose of providing such assistance "is simply to ensure that criminal defendants receive a fair trial." *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). Accordingly, in deciding Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *See United States v. Cronic*, 466 U.S. 648, 657 n.21 (1984). Put differently, the Sixth Amendment does not guarantee an accused a "meaningful attorney-client relationship." *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

For the foregoing reasons, Camargo's claim of constructive denial of counsel—and therefore, Ground 1 of his Petition—fails.

B. Ineffective Assistance of Counsel (Ground 2(A))

Camargo's claim that his post-conviction relief counsel was ineffective because he neglected to raise Camargo's claim of constructive denial of counsel also fails. As explained above, Camargo's constructive denial of counsel claim is meritless; therefore, raising it would have been futile. Because "the failure to take a futile action can never be deficient performance," *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996), this claim shall be rejected. Judge Akers' denial of change of counsel would not have been error, much less reversible error, under usual standards of appellate review, even without the extraordinary deference standard of AEDPA.

IV. THE MOTION FOR EXPANSION OF THE RECORD AND AN EVIDENTIARY HEARING

A. Constructive Denial of Counsel (Ground 1)

With regard to Ground 1, Camargo moves for an evidentiary hearing and to expand the record to include the following: (1) a declaration authored by Camargo; (2) a declaration authored by Kimble; (3) a declaration authored by Dan Cooper, "an expert in the constructive denial of counsel and denial of effective assistance of counsel;" (4) a declaration authored by court interpreter David Svoboda; (5) a declaration authored by court interpreter Sarah Seebeck; (6) the jail visitation log for Camargo from the time of his arrest through the time of his prison transfer following his conviction and sentencing; (7) an e-mail from the prosecutor to Kimble dated August 20, 2007; and (8) an e-mail chain between the prosecutor and Kimble. (Doc. 107 at 7-9.)

Ground 1 is subject to 28 U.S.C. § 2254(d) deference, as explained above. (*See supra*, at section III.A.1.) "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review."[5] *Id.* at 185. "Thus, for claims that were adjudicated on the merits in

[5] Although the central holding of *Pinholster* pertained to § 2254(d)(1), the Supreme Court observed that "§ 2254(d)(2) includes the language 'in light of the evidence presented in the State court proceeding,'" providing "additional clarity" that review under § 2254(d)(2) is also limited to the record before the state court. Therefore, for claims that were adjudicated on the merits in state court, a petitioner can only rely on the record that was before the state court to satisfy the requirements of § 2254(d).

Catlin v. Davis, Case No. 1:07-cv-01466-LJO-SAB, 2019 WL 6885017, at *269 (E.D. Cal. Dec. 17, 2019) (quoting *Pinholster*, 563 U.S. at 185 n.7) (citing *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)); *see also Nasby v. McDaniel*, 853 F.3d 1049, 1054-55 (9th Cir. 2017) ("The text of the statute provides that a petitioner who seeks relief under Section (d)(2)—unreasonable determination of the facts—must show that the state court unreasonably determined the facts 'in light of the evidence presented' to the state court. The Supreme Court has held that review under Section (d)(1)—unreasonable application of law—is similarly 'limited to the record that was before the state court,' even though AEDPA's text imposes no such

state court, petitioners can rely only on the record before the state court in order to satisfy the requirements of § 2254(d)." *Gulbrandson v. Ryan*, 738 F.3d 976, 993 (9th Cir. 2013) (citing *Pinholster*, 563 U.S. at 185 & n.7).

"If . . . considering only the evidence before the state court, the petitioner has satisfied § 2254(d)," the claim is evaluated de novo, and a federal habeas court "may consider evidence properly presented for the first time in federal court." *Crittenden v. Chappell*, 804 F.3d 998, 1010 (9th Cir. 2015) (internal quotation marks and citations omitted). However, if the petitioner has not satisfied § 2254(d), "an evidentiary hearing is pointless." *Sully v. Akers*, 725 F.3d 1057, 1075 (9th Cir. 2013) (internal citations omitted); *see also Pinholster*, 570 U.S. at 203 n.20 ("Because Pinholster has failed to demonstrate that the adjudication of his claim based on the state-court record resulted in a decision 'contrary to' or 'involv[ing] an unreasonable application' of federal law, a writ of habeas corpus 'shall not be granted' and our analysis is at an end." (citing 28 U.S.C. § 2254(d))).

Camargo's claim of constructive denial of counsel does not pass muster under 28 U.S.C. § 2254(d). (*See supra*, at section III.A.2.) An evidentiary hearing thereon would therefore be pointless. For this same reason, expanding the record thereon would be pointless as well. *See Wood v. Ryan*, 693 F.3d 1104, 1122 (9th Cir 2012) ("[Petitioner] is not entitled to an evidentiary hearing or additional discovery in federal court because this ineffective assistance of counsel claim is governed by 28 U.S.C. § 2254(d)(1), as it was adjudicated on the merits in the PCR proceedings.").

B. Ineffective Assistance of Counsel (Ground 2(A))

With regard to Ground 2(A), Camargo moves for an evidentiary hearing and to expand the record to include the same evidence listed with regard to Ground 1. Unlike Ground 1, Ground 2(a) is not subject to 28 U.S.C. § 2254(d) deference, as Camargo's claim of ineffective assistance of post-conviction relief counsel was never adjudicated on the merits. Therefore, *Pinholster* holds no weight here. *Cf. Godoy v. Spearman*, 861 F.3d 956, 966, 970 n.8 (9th Cir. 2017) (finding *Pinholster* did not preclude an evidentiary hearing

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limitation." (quoting *Pinholster*, 563 U.S. at 181)).

because the petitioner's claim was being evaluated de novo since he fulfilled 28 U.S.C. § 2254(d)(1)'s standard).

But this does not mean Camargo's motion is meritorious. Camargo is only entitled to an evidentiary hearing if he can (1) "show that he has not failed to develop the factual basis of the claim in the state courts;" (2) satisfy one of the factors identified by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled on other grounds by Kenney v. Tamayo-Reyes*, 504 U.S. 1 (1992);[6] and (3) "make colorable allegations that, if proved at an evidentiary hearing, would entitle him to habeas relief." *See Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005). Because Camargo's claim in Ground 2(A) is not colorable, he is not entitled to an evidentiary hearing thereon. (*See supra*, at section III.B.)

With respect to Camargo's request to expand the record, "Rule 7 of the Rules Governing Section 2254 Cases authorizes a federal habeas court to expand the record to include additional material relevant to the determination of the merits of a petitioner's claims." *See Williams v. Schriro*, 423 F. Supp. 2d 994, 1002 (D. Ariz. 2006). Because Camargo's claim in Ground 2(A) is not colorable, any further additions to the record would be irrelevant. There is no need to beat a dead horse.

V. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, an applicant may not appeal unless a certificate of appealability has been issued by an appropriate

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[6] Those factors are:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; [and] (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases provides that the district judge must either issue or deny a certificate of appealability when he or she enters a final order adverse to the applicant. If a certificate is issued, the judge must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2).

Under § 2253(c)(2), a certificate of appealability may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). For procedural rulings, a certificate of appealability will issue only if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right and whether the court's procedural ruling was correct. *Id.*

Reasonable jurists could not debate the resolution of Camargo's petition. A certificate of appealability shall accordingly be denied.

IT IS THEREFORE ORDERED that the Report and Recommendation (Doc. 114) is accepted in part and rejected in part as provided in this order.

IT IS FURTHER ORDERED that Petitioner Alfredo Camargo's Renewed Second Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is denied with prejudice.

IT IS FURTHER ORDERED that Petitioner Alfredo Camargo's Renewed Motion for Expansion of the Record and an Evidentiary Hearing (Doc. 107) is denied.

IT IS FURTHER ORDERED that Respondent Attorney General of the State of Arizona, who does not have custody of Petitioner Alfredo Camargo, is dismissed as an improper party in a federal habeas corpus proceeding.

IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Respondent David Shinn and against Petitioner Alfredo Camargo.

IT IS FURTHER ORDERED that the Clerk terminate this case.

IT IS FURTHER ORDERED denying a certificate of appealability.

Dated this 13th day of August, 2020.

Neil V. Wake
Senior United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Alfredo Camargo, Petitioner -vs- Charles L. Ryan, et al., Respondents.	CV-13-2488-PHX-NVW (JFM) **Order and** **Report & Recommendation** **on Second Amended** **Petition for Writ of Habeas Corpus**

I. MATTERS UNDER CONSIDERATION

Petitioner, incarcerated at the commencement of this case in the Arizona State Prison Complex at Tucson, Arizona, after appeal and remand has filed through counsel a Second Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on December 13, 2017 (Doc. 83). On February 12, 2018, Respondents filed their Answer (Docs. 86, 87). Petitioner filed a Reply on July 27, 2018 (Doc. 96).

Petitioner has also filed a Motion for Expansion of the Record and an Evidentiary Hearing on December 28, 2018 (Docs. 107, 109), Respondents filed their Response on March 8, 2019 (Doc. 112), and Petitioner filed a Reply on March 15, 2019 (Doc. 113). Consideration of this motion is intertwined with consideration of the Petition, and thus is addressed herein.

The Petitioner's Petition and Motion are now ripe for consideration. Accordingly, the undersigned makes the following order, proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72, Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

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II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

The Presentence Investigation reflected the following summary from police reports:

> On July 11, 2007, the defendant, armed with a handgun, kidnapped [YM] from inside the garage of her residence. The defendant forced her inside an awaiting vehicle that was being driven by another suspect. The suspects drove in [a] North bound direction and subsequently stopped in the parking lot of a business complex. When they exited the vehicle, [YM] called 9-1-1. [YM] exited the vehicle when she observed a police officer drive by, and she reported what had happened to her. Police chased the suspects, but only apprehended the defendant with the assistance of a K·9 police dog. The handgun used in the kidnapping was recovered near by, which officers observed the defendant throw as he fled on foot. A search of the suspect's vehicle revealed a rifle, a scarf, gloves, tape, and ammunition.
>
> When interviewed, [YM] stated she, her husband [AM}, and her three nieces had just arrived to their home, and they were in the process of closing the garage when the suspect opened the other garage door and stated, "Where is Marquis?" When she stated she did not know a Marquis, the suspected grabbed her by the hand and forced her into a vehicle that was parked in front of her residence. While they were driving, the defendant gave her a cell phone, and the person on the other end asked where Marquis was, and if she was his sister. She indicated she did not know who Marquis was and that she was not related to him. The defendant took the phone back and told the driver to stop in the parking lot where both suspects exited from the vehicle. [YM] stated she feared for her life and believed she might never see her family again.

(Exhibit B, Present. Invest. At 1.)[1]

B. TRIAL COURT

On July 18, 2007, Petitioner was indicted in Maricopa County Superior Court on charges of burglary, aggravated assault (two counts, one for YM and one for YM's husband, AM), kidnapping, and weapons misconduct. (Exhibit A, Indictment.)

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[1] Exhibits to the Answer (Doc. 14) to the First Amended Petition, are labelled alphabetically and are referenced herein as "Exhibit ___." Exhibits to the Second Amended Petition (Doc. 83) are listed numerically and are referenced herein as "Exhibit ___." Exhibits to the Answer (Doc. 86) to the Second Amended Petition, are listed alphabetically and are referenced herein as "Exhibit A2-___." Exhibits to the Reply (Doc. 96) on the Second Amended Petition are listed numerically and are referenced herein as Exhibit R-___."

Counsel was appointed, and the case proceeded through a series of failed settlement conferences and plea negotiations, with Petitioner twice seeking unsuccessfully to have new counsel appointed. (*See* Exhibit C, Mot. Dismiss Counsel; Exhibit D, R.T. 11/13/07; Exhibit CC, R.T. 2/11/08; Exhibit E, Mot. Dismiss Counsel; and Exhibit F, R.T. 3/20/08.)

On April 8, 2008, Petitioner appeared for trial, but asked to change his plea to a plea of guilty to the charges. (Exhibit I, R.T. 4/8/08 at 1-8.) The trial court reviewed the charges and the potential sentences, as well as allegations of prior convictions, and commission while on probation. Petitioner admitted the prior convictions and that he was on probation. (*Id.* at 8-10.) Counsel provided a factual basis, with which Petitioner agreed. (*Id.*at 10-16.) The plea was accepted, and Petitioner was found guilty of the offenses and the matter was set for sentencing. (*Id.* at 16-19.)

On May 30, 2008, Petitioner appeared for sentencing, which was continued to and completed on July 22, 2008. (Exhibit DD, R.T. 5/30/08; Exhibit J, R.T. 7/22/08.) Petitioner was sentenced to 25 years in prison, followed by community supervision. (*Id.* at 25; Exhibit H, Amend. Order Conf.)

C. DIRECT APPEAL

Petitioner did not file a direct appeal. Moreover, as a pleading Arizona defendant, Petitioner had no right to file a direct appeal. *See* Ariz.R.Crim.P. 17.1(e); and *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616 (1995).

D. FIRST POST-CONVICTION RELIEF

On August 16, 2008, Petitioner filed a Notice of Post-Conviction Relief (Exhibit K). Counsel was appointed who ultimately filed a Notice of Completion of Review (Exhibit L), evidencing an inability to find an issue for review, and seeking leave for Plaintiff to proceed *in propria persona*..

On August 11, 2009, Petitioner filed his *pro per* PCR Petition (Exhibit M), arguing that his rights to trial counsel had been denied when his request for new counsel was denied

and because he was required to proceed with counsel under a breakdown in communication, and his right to counsel on appeal was denied when PCR counsel failed to find an issue for review. The state responded (Exhibit N) that any challenge to Petitioner's right to pre-conviction counsel was waived by Petitioner's guilty plea, and that Petitioner had no right to counsel in his PCR Proceeding. The PCR Court summarily dismissed the Petition "[f]or the reasons stated in the Response to the Petition." (Exhibit P, Order 7/7/10.)

On July 26, 2010, Petitioner filed, through counsel, a motion for a 30 day extension of time to seek reconsideration or review. (Exhibit Q, Motion.) On the same date, Petitioner filed a *pro per* Motion to Extend, seeking an extension through September 30, 2010 (Exhibit S). On July 28, 2010, the PCR court summarily granted "*defense counsel's* Request for Extension of Time." (Exhibit R, Order 7/28/10, emphasis added.)

On August 9, 2010, Petitioner submitted a petition for review to the Arizona Supreme Court. That filing was rejected on August 10, 2010 as properly submitted only to the Arizona Court of Appeals. (Exhibit EE, at Notice 8/10/10.)

On August 30, 2010, Petitioner filed a petition for review with the Arizona Court of Appeals. (Exhibit EE.) (*See* Exhibit T, Order 9/3/10 at 1.) The petition was dated August 24, 2010. (Exhibit EE, Petition at 3.) The Ninth Circuit found on appeal:

> On September 3, 2010, the Court of Appeals dismissed the Petition as "untimely," because it "was not filed within 30 days" of the trial court's denial of his petition, failing to take into account the extension granted. The State now concedes that this was error.

(Mem. Dec., Doc. 52 at 3.)

E. SECOND POST-CONVICTION RELIEF

Petitioner then filed a second Notice of Post-Conviction Relief (Exhibit U). On October 25, 2010, the PCR court summarily dismissed the proceeding as untimely. (Exhibit V, Order 10/25/10.) The Ninth Circuit found:

> 4. Camargo filed a second pro se PCR petition in Superior Court on September 24, 2010. This second PCR petition asserted

> ineffective assistance of counsel during Camargo's first round of PCR proceedings. The Superior Court dismissed the petition as untimely under Ariz. R. Crim. P. 32.4(a), interpreting it as only raising a claim of ineffective assistance of trial counsel. The State now concedes that this decision was incorrect and that the Superior Court should have recognized the second PCR petition as timely raising a claim of ineffective assistance of counsel in the first PCR proceeding.

(Mem. Dec., Doc. 52 at 3-4.)

On January 18, 2011, Petitioner filed a Petition for Review with the Arizona Court of Appeals (Exhibit W). On December 4, 2012, the Arizona Court of Appeals summarily denied review. (Exhibit Z, Order 12/4/12.) The Ninth Circuit found:

> 5. Camargo sought review of the denial of his second PCR petition in the Arizona Court of Appeals, arguing that his first and second PCR petitions were timely, and that he properly raised ineffective assistance of post-conviction counsel in his second PCR petition. The State responded that Camargo's second PCR petition was properly dismissed as successive. The state now concedes that its submitted argument was incorrect, because Camargo's second PCR petition was not successive as it properly raised the issue of ineffective assistance of counsel in his first PCR proceeding. The State now also acknowledges that the second PCR petition was timely filed.

(Mem. Dec. Doc. 52 at 4.)

On January 14, 2013, Petitioner filed a Petition for Review with the Arizona Supreme Court (Exhibit AA). On March 27, 2013, the Arizona Supreme Court summarily denied review. (Exhibit BB, Order 3/27/13.)

F. FIRST AMENDED HABEAS PETITION

Petition - Petitioner commenced the current proceeding by filing *pro se* his original Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on December 6, 2013 (Doc. 1). On March 12, 2014, the Court dismissed that Petition with leave to amend as improperly challenging the denial of his second PCR petition, rather than his conviction.

On April 2, 2014, Petitioner filed *pro se* his First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 6). The Court's service order found Petitioner's Petition asserted the following three grounds for relief:

> In Ground One, Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the "constructive

> denial of the right to counsel." Petitioner asserts that the trial court constructively denied him the right to counsel when it denied his motion for change of counsel, in which Petitioner explained that he had an irreconcilable conflict with his defense counsel.
>
> In Ground Two, Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated because Petitioner was denied effective assistance of post-conviction relief counsel. Specifically, Petitioner alleges that his post-conviction relief counsel was ineffective for failing to raise the trial court's constructive denial of Petitioner's right to counsel in a Rule 32 Petition.
>
> In Ground Three, Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the actions of counsel as described in Grounds One and Two.

(Order 5/5/14, Doc. 7 at 2.)

Dismissal – The undersigned issued a Report & Recommendation (Doc. 19) on the First Amended Petition, concluding that the First Amended Petition was untimely and recommending dismissal. The Court overruled the objections, accepted the R&R, dismissed the petition, and granted a certificate of appealability. (Order 3/4/16, Doc. 23.)

Respondents sought to amend the judgment to eliminate the grant of a certificate of appealability. The Court temporarily vacated its Order and the Judgment, and referred the matter to the undersigned for a recommendation on the certificate of appealability. (Order 3/9/15, Doc. 26.) On April 16, 2015, the undersigned issued a Report & Recommendation (Doc. 38) on the issue, recommending the grant of the certificate of appealability. Respondents objected (Doc. 39), but on May 4, 2015 the Court overruled the objections, accepted the R&R on the COA, and again accepted the R&R on the petition, dismissed the petition, and granted a COA. (Order 5/4/15, Doc. 40.)

Appeal – Petitioner then appealed to the Ninth Circuit Court of Appeals. On March 21, 2017, the circuit court appointed counsel, reversed and remanded, finding Petitioner entitled to equitable tolling "from the date he filed his second PCR petition, September 24, 2010, until review of that petition concluded, March 27, 2013." (Mem. Dec. 3/21/17, Doc. 52 at 6-7.) The circuit court observed in a footnote:

> On appeal, the State concedes that Camargo may be entitled to an even later starting date, of October 27, 2010, from which to run the AEDPA one-year statute of limitations, based on his petition for review and his motion for reconsideration filings regarding his first PCR petition. However, we need not reach this issue, because it does not affect the timeliness of his federal petition, given our equitable

tolling determination.

(*Id.* at 7, n. 1.)

G. PRESENT FEDERAL HABEAS PROCEEDINGS

Second Amended Petition – On remand, appointed counsel filed a Renewed Motion to Amend (Doc. 72), which Respondents opposed on grounds of undue delay, prejudice, previous amendments, and futility due to untimeliness and procedural default. (Doc. 77). On December 12, 2017, the Court granted the motion to amend, but declined to resolve prior to briefing on the petition Respondents' futility arguments. (Order 12/12/17, Doc. 82.)

Accordingly, on December 13, 2017, Petitioner filed, through counsel, his Second Amended Petition (Doc. 83), with various exhibits attached. Petitioner's Second Amended Petition asserts the following grounds for relief:

1) **Irreconcilable Conflict with Trial Counsel** - "Mr. Camargo was constructively denied his right to counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments, due to the irreconcilable conflict with his trial counsel and complete breakdown in the communication between them." (Doc. 83 at 50.)
2) **PCR Counsel** – "Mr. Camargo was (A) denied the effective assistance of counsel due to the failure of his of-right Rule 32 counsel to raise Claim One, and (B) constructively denied counsel on direct review of his conviction and sentence, all in violation of the Fifth, Sixth, and Fourteenth Amendments." (*Id.* at 54.)
3) **Other Ineffectiveness** – "Mr. Camargo was constructively denied counsel and/or denied the effective assistance of counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments, due to the following: (A) trial counsel's (i) failure to advise Mr. Camargo adequately with respect to the proffered plea agreements, (ii) failure to advise Mr. Camargo adequately as to his guilty plea, and (iii) stipulation to aggravating factors; (B) post-conviction counsel's failure to raise (i) the claims identified in (A) above, and (ii) a claim that the factual basis for the plea was insufficient" (*id.* at 58), and (C) "the cumulative effect of the constitutional

deprivations alleged in Claims One and Two herein violated Mr. Camargo's Fifth, Sixth, and Fourteenth Amendment rights" (*id.* at 59).[2]

4) **Invalid Guilty Plea** – "Mr. Camargo entered into a guilty plea that was not knowing, voluntary, and intelligent, depriving him of his right to due process of law, in violation of the Fifth and Fourteenth Amendments." (*Id.* at 59.)

5) **Aggravating Factors** – "Mr. Camargo was deprived of right to due process of law and his rights to effective assistance of counsel and to trial by jury, all in violation of the Fifth, Sixth, and Fourteenth Amendments, by (i) trial counsel's stipulation to aggravating factors, and (ii) any or all of the following: (a) trial counsel's failure to advise him that, in pleading guilty, he retained the right to a jury finding of aggravating factors, per *Apprendi*; (b) that his entry into a guilty plea, conditioned on an *Apprendi* waiver, was not knowing, voluntary, and intelligent; and (c) the conditioning of guilty plea on his acquiescence to waive his rights under *Apprendi*." (*Id.* at 62.)

6) **Unsupported *Alford* Plea** – "The trial court's acceptance of Mr. Camargo's plea to all charges without any inquiry into the State's evidence, where Mr. Camargo proclaimed his innocence and the record indicated he did not understand the charges, and without a sufficient factual basis provided for Counts 2, 3, and 4, violated Mr. Camargo's right to due process of law and to trial by jury under the Fifth, Sixth, and the Fourteenth Amendments." (*Id.* at 66.)

Response - On February 12, 2019 Respondents filed their Answer (Doc. 86) to the Second Amended Petition. Respondents argue: (1) Grounds 2(B), 4, 5 and Portions of Claims 3 and 6 are untimely because they do not relate back to the First Amended Petition; (2) Grounds 2(B), 3, 4, 5 and 6 are procedurally defaulted; (3) all of Petitioner's Grounds

[2] Ground 3(C) was not listed in the headings identifying Petitioner's claims, but is clearly identified in the substance of the SAP. (SAP, Doc. 83 at 59.)

are without merit.[3]

Reply - On July 27, 2019, Petitioner filed a Reply (Doc. 96). Petitioner argues that his claims are timely, they either were not procedurally defaulted, or such default should be excused or precluded, and his claims are meritorious.

Motion for Evidentiary Hearing / Expansion - In his Motion to Expand the Record and for Evidentiary Hearing (Doc. 107), Petitioner argues that none of his claims have been resolved on the merits nor afforded a full and fair hearing in the state courts, and his claims are colorable. Petitioner proposes to supplement the record with the following:

1. Declaration of Petitioner (re Grounds 1, 2, 3, 4, 5, 6)
2. Declaration of Raymond Kimble, Trial Counsel (re Grounds 1, 2, 3, 4, 6)
3. Declaration of Dan Cooper, Attorney Expert (re Grounds 1, 2, 3, 4, 5, 6)
4. Declaration of David Svoboda, Court Interpreter (re Grounds 1, 2, 3, 4)
5. Declaration of Sara Seebeck, Court Interpreter (re Grounds 1, 2, 3, 4)
6. SAP Exhibit 5, Jail Visitation Log (re Grounds 1, 2, 3, 4)
7. SAP Exhibit 9, Email 8/20/7 for Prosecutor (re Grounds 1, 2, 3, 4)
8. Exhibit B to Dan Cooper Declaration (re Grounds 1, 2, 3, 4)
9. Exhibit 1, Audio Record of Plea Proceedings (Doc. 109) (re Grounds 3, 4, 6)

Petitioner proposes to call the following witnesses at an evidentiary hearing:

1. Petition (re Grounds 1, 2, 3, 4, 5, 6)
2. Raymond Kimble, Trial Counsel (re Grounds 1, 2, 3, 4, 5, 6)
3. Dan Cooper, Attorney Expert (re Grounds 1, 2, 3, 4, 5, 6)
4. David Svoboda, Court Interpreter (re Grounds 1, 2, 3, 4)
5. Sara Seebeck, Court Interpreter (re Grounds 1, 2, 3, 4)
6. An unnamed Court Interpreter (re Ground 4)

[3] On the same day, Respondents filed a Notice of Errata (Doc. 87) noting an error in e-filing by counsel, linking the Answer (Doc. 86) to the First Amended Petition (Doc. 6) rather than the Second Amended Petition (Doc. 83).

Respondents argue (Doc. 112) that issues addressed on the merits by the trial court, including at trial, are subject to the limitations of 28 U.S.C. § 2254(d) and are limited to the state court record, his claims are not colorable and/or are procedurally defaulted, and the declaration of Court Interpreter Svoboda is at least partially not relevant. In the even the Court grants an expansion or hearing, Respondents request leave to supplement their Answer to address the new evidence.

Petitioner replies (Doc. 113) that for purposes of applying 28 U.S.C. § 2254(d), the last reasoned decision applies, which includes procedural appellate decisions, not earlier decisions, and Respondents fail to support their contention that Petitioner failed to develop the record. Petitioner further argues his claims are colorable, Svoboda's Declaration is relevant to the claims it is urged to support. Petitioner asserts that Respondents should not be permitted to supplement the record or their arguments based on any expansion of the record, citing Rules Governing § 2254 Cases 7(c).

III. TIMELINESS

A. TIMELINESS OF FIRST AMENDED PETITION

Respondents assert that portions of Petitioner's Second Amended Petition are untimely because it was filed after the 1-year statute of limitations under 28 U.S.C. § 2244(d) had expired, and the claims do not relate back to the First Amended Petition.

In the now-vacated-on-appeal Order (Doc. 23) denying the First Amended Petition, this Court concluded that petition related back to the original petition (filed December 6, 2013) was untimely because the limitations period expired on August 29, 2011. On appeal, the Ninth Circuit concluded that because of the state court errors in dismissing various petitions, "the statute of limitations on Camargo's federal habeas petition should have been equitably tolled from the date he filed his second PCR petition, September 24, 2010, until review of that petition concluded, March 27, 2013." (*Id.* at 6.) Adopting this Court's conclusion that the limitations period commenced running after August 27, 2010, the Circuit court concluded "Camargo's federal habeas petition was timely." (*Id.* at 7.)

B. TIMELINESS OF SECOND AMENDED PETITION

1. Timeliness of New Claims

On December 13, 2017 Petitioner filed through counsel a Second Amended Petition (SAP), pursuant to a series of motions to amend first filed on August 16, 2017 (Doc. 61). The undersigned assumes *arguendo* in Petitioner's favor that date is the relevant date for statute of limitations purposes. *See Villanueva v. Liberty Acquisitions Servicing, LLC*, 215 F. Supp. 3d 1045, 1058 (D. Or. 2016).

As previously determined, Petitioner's one year limitations period began running on August 28, 2010. However, the undersigned assumes *arguendo* in Petitioner's favor that the October 27, 2010 date referenced by the Ninth Circuit is the relevant start date. (*See* Mem. Dec. 3/21/17, Doc. 52 at 7, n.1.) The Ninth Circuit has held Petitioner is entitled to equitable tolling from September 24, 2010 through March 27, 2013. Thereafter, petitioner would have had one year, or until March 27, 2014, to file any new claims. Petitioner is not entitled to any statutory tolling for the pendency of his federal proceeding. *See Duncan v. Walker*, 533 U.S. 167 (2001).

Accordingly, absent further equitable tolling, the SAP is over three years delinquent. Petitioner makes no argument that he is entitled to any equitable tolling other than that permitted by the Ninth Circuit. According, any new claims are untimely.

Although untimely claims may be heard upon a showing of actual innocence, *see McQuiggin v. Perkins*, 569 U.S. 383, 398 (2013), Petitioner does not argue his actual innocence in this case, nor offer any reliable evidence of such innocence. At most, he contends that he protested his innocence to the state courts in the course of plea proceedings.

2. Relation Back of Claims to FAP

Petitioner contends that all his claims relate back to his First Amended Petition because they arise from a common core of operative facts. Respondents argue, however, that Grounds 2(B), 4, 5 and portions of Grounds 3 and 6 do not.

Ordinarily, an amended pleading will generally relate back to the date of the original pleading when the claims asserted in the amended pleading "that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading." Fed. R. Civ. Proc. 15(c)(1)(B). Because the Ninth Circuit has concluded that the FAP was timely (as a result of equitable tolling), the claims in the SAP which relate back to the FAP are timely.

In finding relation back, it is not controlling that the new pleading asserts new legal theories, or even new facts not originally asserted so long as they arise out of the same conduct, transaction or occurrence. *Mayle v. Felix*, 545 U.S. 644, 659 (2005). However, in light of the requirement of 2254 Rule 2(c) ("state the facts supporting each ground"), the *Mayle* Court held that a trial, conviction or sentence is not the relevant conduct, transaction or occurrence. *Id*. at 656. Rather, "[s]o long as the original and amended petitions state *claims* that are tied to a common core of operative facts, relation back will be in order." *Id.* at 664 (emphasis added). Conversely, "[a]n amended habeas petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650.

In this instance, the Court is faced with comparing a counsel prepared SAP with a *pro se* FAP. The latter is entitled to a liberal construction, which requires the Court to consider the FAP as a whole. "We must construe pro se habeas filings liberally, and may treat the allegations of a verified complaint or petition as an affidavit." *Laws v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003). The liberal construction mandate requires the Court to not, as a matter of course, place reliance on the petitioner's division of his factual allegations among various claims or grounds for relief, but instead to "look[] to the entire petition." *Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001), as amended (June 5, 2001). The same liberal construction does not apply to the SAP.

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3. COA Rulings Not Binding

Arguments and Background – In arguing the timeliness of various claims, Petitioner relies upon various constructions of the FAP made in the Report and Recommendation on Certificate of Appealability (Doc. 38).[4] The COA R&R opined:

> In Ground Three, Petitioner alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the actions of counsel as described in Grounds One and Two. (Amend. Pet., Doc. 6 at 8; Order 5/5/14, Doc. 7 at 2 (summarizing Ground 3).)
>
> Respondents do not separately address this claim in their Motion (Doc. 25).
>
> Assuming that this ground is not merely repetitive, it is at least cumulative of the claims in Grounds 1 and 2. To the extent that those grounds state facially valid claims, Ground 3 does as well.
>
> Liberally construed, *see Roy v. Lampert*, 465 F.3d 964, 970 (9th Cir. 2006), this claim also alleges in addition to the cumulative claim that there was a breakdown in communications with trial counsel, that trial counsel was ineffective for: (1) failing to adequately advise Petitioner on the proffered plea agreement; (2) failing to adequately advise Petition on his guilty plea; and (3) stipulating to aggravating factors at sentencing. Each of these allegations state valid claims. *See Lafler v. Cooper*, 132 S.Ct. 1376, 1385 (2012) (ineffective assistance leading to rejection of plea offer); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (ineffective assistance leading to guilty plea); *U.S. v. Crowe*, 735 F.3d 1229 (10th Cir. 2013) (evaluating counsel's stipulation under ineffective assistance standards).
>
> Consequently, the allegation that PCR counsel failed to assert these claims also states a facially valid claim.
>
> Accordingly, jurists of reason would find it at least debatable that Petitioner's Ground Three states a facially valid claim.

(COA R&R, Doc. 38 at 13.)

Petitioner points out that the State objected to the COA R&R on the grounds that the R&R mischaracterized the claims (*see* Objection, Doc. 39 at 13-15), and the Court overruled those objections and "accepted" the COA R&R, concluding the "court agrees with the Magistrate Judge's determinations. (Order 5/4/15, Doc. 40 at 1.)

Discretion to Reconsider - Petitioner argues that this Court cannot now reconsider that decision. (Reply, Doc. 96 at 2-3 (quoting *Ramirez v. United States*, No. CV-17-

[4] Petitioner also makes a passing cite to the Court's Order denying his earlier motion to amend. (Reply, Doc. 96 at 2 (citing Doc. 71 at 4).) But that Order simply referenced the same claim-specific ineffectiveness of PCR counsel (based on failures to raise specific claims of ineffectiveness of trial counsel). (*See* Order 10/5/17, Doc. 71 at 4.)

00334-TUC-RCC, 2018 WL 2765949, at *1 (D. Ariz. June 8, 2018) ("Mere disagreement with a previous order is an insufficient basis for reconsideration.")).)

"Although courts are eager to avoid reconsideration of questions once decided in the same proceeding, it is clear that all federal courts retain power to reconsider if they wish." Wright, Miller *et al.*, *Law of the Case*, 18B Fed. Prac. & Proc. Juris. § 4478 (2d ed.). "The law of the case doctrine …is discretionary, not mandatory and is in no way a limit on a court's power." *U.S. v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) (citations, quotations and alterations omitted). *See also* Wright, Miller, *et al.*, *Law of the Case—Trial Courts*, 18B Fed. Prac. & Proc. Juris. § 4478.1 (2d ed.).

The question then is not one of power, but of discretion.

> While courts have some discretion not to apply the doctrine of law of the case, that discretion is limited. Depending on the nature of the case or issue and on the level or levels of the courts or courts involved, a court may have discretion to reopen a previously resolved question under one or more of the following circumstances:
> (1) the first decision was clearly erroneous;
> (2) an intervening change in the law has occurred;
> (3) the evidence on remand is substantially different;
> (4) other changed circumstances exist;
> (5) a manifest injustice would otherwise result

Thomas v. Bible, 983 F.2d 152, 155 (9th Circ. 1993) (citation omitted). *Cf. Perry v. Brown*, 667 F.3d 1078, 1087 (9th Cir. 2012) (court could not revisit sealing order that was a commitment the parties relied upon to their detriment).[5]

Here, the Court can exercise its discretion to deviate from the prior construction of the First Amended Petition because of: (1) the disparate nature of the rulings; (2) the finding of each claim was not necessary to the COA decision; and/or (3) the COA R&R and resulting order were clearly erroneous.

Disparate Standards - The ruling on the Certificate of Appealability was a disparate standard from the instant analysis. *See Graves v. Lioi*, 930 F.3d 307 (4th Cir.

[5] "A trial court may not, however, reconsider a question decided by an appellate court." *Houser*, 804 F.2d at 567. Here, the ruling of the Ninth Circuit was limited to consideration of the equitable tolling issue, and neither addressed nor decided the nature of Petitioner's claims. (*See generally* Memorandum Decision, Doc. 52.)

2019) (law of the case "poses no bar to the assessment of past holdings based on a different procedural posture").

The intensity of review in applying the COA standard is far different from that in applying *Mayle*. The "quick look" required in a COA setting is a sifting of facially meritless claims from potentially meritorious ones, and thus focuses on the legal viability of claims arguably raised, without consideration of defensive arguments. *See Lambright v. Stewart,* 220 F.3d 1022, 1026 (9th Cir. 2000). In contrast, *Mayle* deals with issues of adequate notice to find the statute of limitations satisfied, and requires a definitive determination based on the specific facts alleged. *See S. Oregon Barter Fair v. Jackson Cty., Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004) (law of the case did not apply to decisions on preliminary injunctions which "must often be made hastily and on less than a full record").

Moreover, evaluating the *merits* of habeas petitions, particularly those filed by *pro se* petitioners, commonly requires the courts to evaluate allegations in light of facts outside the face of the petition. Only rarely can all of the facts which set the stage for a habeas claim be stated succinctly. For example, a petitioner will often reference the failure to file (or a denial of) a motion to suppress without laying out all the facts justifying such a motion, which are, of course, necessary to relief on the claim. In such an instance, the habeas court fairly implies the additional facts into claim. That is appropriate when addressing the merits of the claim, as in resolving whether a certificate of appeal should issue. However, when evaluating relation back of an amendment, the pertinent criteria is the notice afforded to the other party by a pleading, and looking outside the original petition is inappropriate.

Unnecessary to Decision - Moreover, the evaluation of Ground 3 of the FAP was not necessary to the conclusions reached in the COA R&R and the order adopting it. To support a certificate of appealability, a party need show only one colorable claim, *i.e.* "a substantial showing of the denial of *a* constitutional right." 28 U.S.C. § 2253(c)(2). The Court also found that Grounds 1 and 2 stated colorable claims. Thus, the Court could have

agreed with Respondents' objections to the COA R&R's characterization of Ground 3 of the FAP, and still have "agree[d] with the Magistrate Judge's determinations" (Order 5/4/15, Doc. 40 at 1) that the FAP asserted a colorable claim and that Petitioner was entitled a certificate of appealability. *See Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 716 (9th Cir. 1990) (law of the case did not govern determination "not necessary" to prior decision); and *Fenster v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 858 (7th Cir. 2002) (reconsideration not precluded where determination was on a "peripheral matter").

Clearly Erroneous – To the extent that the readings of the FAP in the COA R&R and resulting order are not supported by the plain language of the FAP, then the order is clearly erroneous, and may be reconsidered on that basis.

Magistrate Judge Authority - The undersigned, as a magistrate judge hearing a matter on referral, is arguably bound by a determination of the assigned district judge, as a "superior" judge. Accordingly, the recommendation made herein that various claims be deemed untimely despite similar claims being listed in the COA R&R is conditioned upon the district judge concluding that any contrary determination are either not controlling because of the disparate standards or because they were unnecessary to the decision, or were the contrary determination was clearly erroneous and thus properly reconsidered.

C. CONCLUSION RE TIMELINESS

Accordingly, the new claims raised in the SAP which do not relate back to the FAP (and thus the original Petition) are untimely and must be dismissed. The relation back of individual claims will be addressed hereinafter.

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IV. EXHAUSTION, PROCEDURAL DEFAULT AND PROCEDURAL BAR

Respondents argue that Grounds 2(b), 3, 4, and 5 are procedurally defaulted. (Answer, Doc. 86 at 46, *et seq.*)

A. NO PRECLUSION OF PROCEDURAL DEFAULT DEFENSE

1. Waiver

In his Reply, Petitioner argues Respondents have waived their procedural default defense on Ground 3 by failing to support it.[6]

"Procedural default, like the statute of limitations, is an affirmative defense. We therefore …hold that the defense of procedural default should be raised in the first responsive pleading in order to avoid waiver." *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005). *See Franklin v. Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002) (28 U.S.C. § 2254(b)(3)'s requirement for an explicit waiver of exhaustion "has no bearing on procedural default defenses"). The undersigned assumes *arguendo* that failure to offer support of an affirmative defense such as procedural default amounts to a waiver. *But see* Wright & Miller, *Pleading Affirmative Defenses*, 5 Fed. Prac. & Proc. Civ. § 1274, text surrounding notes 7.2-7.12 (3d ed.) (noting opposing views whether, under Federal Rules of Civil Procedure, affirmative defenses must be plead with sufficient facts or simply affirmatively stated). *Cf. Franklin v. Johnson*, 290 F.3d 1223, 1233 (9th Cir. 2002) (waiver found where procedural default not raised); *U.S. v. Barron*, 172 F.3d 1153, 1156 (9th Cir. 1999) (same in § 2255 case).

Nonetheless, Respondents have not failed to support their procedural default defense. To the contrary, Respondents have incorporated by reference (Answer, Doc. 86 at 49) their arguments that: (a) most of Ground 3 is duplicative of the (purportedly) procedurally defaulted Grounds 4, 5 and 6; and (b) the non-duplicative portions of Ground

[6] Exhaustion is not waived by default. "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." 28 U.S.C. § 2254(b)(3). However, Respondents have not asserted a failure to exhaust, but procedural default.

3 are either derivative (*i.e.* the cumulative effect claim in Ground 3(C)), or fail to state a cognizable federal claim for relief "because Camargo does not assert any facts in support of these allegations" (*id.* at 87). (Indeed, if Petitioner fails to adequately support his claim in this court with facts, then any presentation of the same claim to the state courts would be similarly insufficient to fairly present the claim. *See Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005) (petitioner must have presented the state court with both the federal legal theory *and* the operative facts on which his claim is based).

Moreover, the nature of procedural default suggests that little is required to adequately state the defense. It requires: (1) failure to properly exhaust remedies; and (2) foreclosure of once available remedies. Petitioner bears the burden of proof on the former. *Cartwright*, 650 F.2d at 1104. And Respondents explicitly argued the latter. (Answer, Doc. 86 at 50-51.)

2. Law of the Case

Petitioner observes the Ninth Circuit's opinion:

> Mr. Camargo diligently filed all of his state post-conviction filings, pro se, until he exhausted his state remedies. But for the incorrect state court timeliness determinations, Camargo's PCR petitions would have been heard on the merits.

(Mem. Dec., Doc. 52 at 6.) Petitioner argues that, coupled with the COA R&R's formulation of the claims, this decision results in the binding law of the case that Grounds 1, 2 and 3 are all properly exhausted. (Reply, Doc. 96 at 19-20.)

Petitioner's reasoning fails for two reasons. First, the circuit decision made no findings on which claims were fairly presented in the state court proceedings (and thus properly exhausted), only that he prosecuted the proceedings to exhaustion. Exhaustion of state court remedies without fair presentation of claims does not result in proper exhaustion, but a procedural default.

Second, it was not Petitioner's habeas claims that would have been heard on the merits (but for the erroneous timeliness decisions), but his state "PCR petitions."

Thus, contrary to Petitioner's arguments, there is no necessary implication that all

the claims in the FAP (as found by the COA R&R or otherwise) were exhausted.

3. Effect of Mandate

Next, Petitioner argues that the Ninth Circuit remanded the case for "for consideration of the FAP on the merits." (Reply, Doc. 96 at 20.) Petitioner argues that this Court must abide by that mandate "without variance or examination, only execution." (*Id.* (quoting *U.S. v. Garcia-Beltran*, 443 F.3d 1126, 1130 (9th Cir. 2006).)

While the Ninth Circuit requires strict compliance with its mandate, it does not require that the trial court blindly execute on a mandate, and do nothing more. Rather, the trial court is only limited "as to issues actually addressed and explicitly or implicitly decided upon" in the appellate court's decision, and cannot "exceed the boundaries as delineated by [the appellate court's] mandate." *Garcia-Beltran*, 443 F.3d at 1130 (finding nothing improper in ordering defendant to provide new fingerprints for use at trial after a mandate to hold hearing on purposes for fingerprints and to suppress any fingerprints found to have been taken solely for investigative purposes).

> According to the rule of mandate, although lower courts are obliged to execute the terms of a mandate, they are free as to anything not foreclosed by the mandate, and, under certain circumstances, an order issued after remand may deviate from the mandate if it is not counter to the spirit of the circuit court's decision…On remand, courts are often confronted with issues that were never considered by the remanding court. In such cases, broadly speaking, mandates require respect for what the higher court decided, not for what it did not decide.

U.S. v. Kellington, 217 F.3d 1084, 1092–93 (9th Cir. 2000) (citations, quotations and alterations omitted).

Read in context, the circuit court did not mandate a decision on the merits. To the contrary, the court simply "decline[d] to reach the merits of Camargo's federal habeas petition, and remand[ed] for the district court to consider them in the first instance." (Mem. Dec. Doc. 51 at 7.) Fairly read, this did not amount to a restriction on consideration of other procedural defenses (particularly in light of the fact that procedural default was not addressed by the circuit court), just a refusal to try to address the merits for the first

time on appeal.

Moreover, such a mandate could not reasonably be read to amount to a decision on all procedural defenses on all claims, even new ones added by amendment of the Petition. *Cf. Nguyen v. U.S.*, 792 F.2d 1500, 1503 (9th Cir. 1986) (mandate that summary judgment should be entered, which did not explicitly or impliedly preclude amendment, left to the trial court the discretion whether to allow leave to amend).

4. Judicial Estoppel

Finally, Petitioner asserts that in the Arizona Court of Appeals, the State incorrectly argued that Petitioner's second PCR proceeding was properly procedurally barred as successive, and then incorrectly argued to the Arizona Supreme Court that the PCR court had properly barred the proceeding as untimely. Petitioner argues that these misrepresentations were the "direct cause of any federal defaults." Petitioner argues that the State should be judicially estopped from relying on the resulting decisions to now deny him review of his claims in this proceeding.

"The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." *Religious Technology Center, Church of Scientology Intern., Inc. v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989). "Judicial estoppel is not so much a single doctrine as a set of doctrines that have not matured into fully coherent theory." Wright & Miller, *Preclusion of Inconsistent Positions—Judicial Estoppel*, 18B Fed. Prac. & Proc. Juris. § 4477 (2d ed.).

"Judicial estoppel is 'intended to protect against a litigant playing 'fast and loose with the courts.'" *Scott*, 869 F.2d at 1311 (quoting *Rockwell International Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir.1988)). But, the purpose of judicial estopped is not to police sloppy lawyering, or even unethical lawyering. Thus, "[a]bsent success in a prior proceeding, a party's later inconsistent position

introduces no 'risk of inconsistent court determinations,'" *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001), and does not call for judicial estoppel. Nor is the doctrine even intended to rectify past inequities between the parties. Rather, its purpose is to "to protect the integrity of the judicial process," *Scott*, 869 F.2d at 1311, of the matter before the Court being asked to apply it. Thus, it is often appropriate where "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. at 751.

In support of his contention, Petitioner points to a series of habeas cases involving shifting positions by the state on particular claims, which effectively foreclosed any opportunity for the petitioner to exhaust state remedies so as to present them on habeas review. For example, in *Whaley v. Belleque*, 520 F.3d 997 (9th Cir. 2008) the state had convinced the state appellate court to dismiss a state proceeding challenging conditions of parole dismissed by arguing it was moot because the petitioner had been reincarcerated, although he had by then been re-released. On habeas, the state conceded that the proceeding had not been moot, and even admitted that had the facts been as represented state law would not have held the petition moot. The state argued instead the claims were now procedurally defaulted because the petitioner had not appealed the mootness decision to the state supreme court. The Ninth Circuit held the state judicially estopped from arguing the procedural default because had the state not improperly argued mootness, the merits would have been addressed by the state court.

In *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), the state obtained a dismissal of a federal habeas petition by arguing state remedies remained available. After dismissal, the petitioner pursued the state remedies. "Once in state court, the state disregarded its previous representation in federal court and argued the petition was procedurally barred because Russell had raised the same issues on direct appeal." *Id.* at 1037. The state then argued the resulting dismissal as a procedural bar precluding habeas relief. The Ninth Circuit held: "Having persuaded the district court to deny appellant federal review on the ground that he had an 'adequate and available' state remedy, the state cannot now be

permitted to oppose appellant's petition for relief on the theory he was actually procedurally barred in state court." *Id.* at 1038.

Here, unlike the states in *Whaley* and *Russell*, Respondents have not relied upon the courts' actions resulting from their changing positions to try to preclude Petitioner from habeas relief. That would be the case if Respondents were arguing a procedural bar of all claims as a result of the dismissals of the state petitions. To the contrary, Respondents are making the wholly separate argument that, whatever the effect of the state court decisions, Petitioner's purportedly procedurally defaulted claims are defaulted because he simply failed to present them. Indeed, Respondents concede the state proceedings resulted in exhaustion of the claims raised in them. "Here, Camargo raised Claim 1 in the state trial court and raised both Claim 1 and 2(a) in PCR proceedings where they were mistakenly denied on procedural grounds. These claims are therefore exhausted." (Answer, Doc. 86 at 47.)

Put alternatively, even if the State had not argued any procedural defense to the state courts, Petitioner's other claims would still be procedurally defaulted because of his failure to fairly present them to the state appellate court. Thus, there has been no adverse impact on the judicial process of this Court from any switching of positions by the State.

Accordingly, Respondents are not judicially estopped from asserting procedural default of Petitioner's claims not fairly presented to the state courts.

5. Conclusion re Preclusion

Based on the foregoing, the undersigned concludes that Respondents are not precluded from relying on a procedural default defense, whether based on law of the case, the appellate mandate, or judicial estoppel.

B. PROCEDURAL DEFAULT OF CLAIMS NOT PROPERLY EXHAUSTED

Respondents contend that Petitioner has procedurally defaulted his state remedies on any claims not properly exhausted, citing Arizona's time and successive petition/waiver

bars, in Ariz. R. Crim. Proc. 32.4(a) and 32.2(a)(3). Except as discussed hereinafter, Petitioner does not counter that contention. Indeed, claims of Arizona petitioners not fairly presented are routinely found to be procedurally defaulted under these state procedures.

Thus, assuming the adequacy of those bars, Petitioner's claims that were not properly exhausted are now procedurally defaulted.

C. ADEQUACY OF STATE PROCEDURES – AS APPLIED

1. Adequacy Determined "As Applied"

Citing *Lee v. Kemna*, 534 U.S. 362 (2002), Petitioner contends no procedural default can be deemed to have occurred because the state provided no adequate remedy. (Reply, Doc. 96 at 17-19.)

Federal habeas review of a defaulted federal claim is precluded when the state court has disposed of the claim on a procedural ground "that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). Ordinarily, to be deemed "adequate," a procedural requirement must be clear, consistently applied, and well-established at the time of petitioner's purported default. *Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004). The courts have long recognized the adequacy of Arizona's waiver and timeliness bars on which Respondents rely. "There is no dispute that Arizona's procedural bar on successive petitions is an independent and adequate state ground." *Martinez v. Ryan*, 566 U.S. 1, 10 (2012). *See also Poland v. Stewart*, 169 F.3d 573, 585 (9th Cir. 1999) (Rule 32.2 adequate to bar federal court review). Arizona's timeliness bar has also been held adequate. *See* Morgal *v. Ryan*, CV–11–2552–PHX–NVW (BSB), 2013 WL 655122, at *17 (D.Ariz. 2013) (detailing cases).

However, in *Lee*, the Court recognized a long standing principle from *Osborne v. Ohio*, 495 U.S. 103 (1990) that there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376.

In *Osborne*, the defendant had filed a motion to dismiss on the basis that the child pornography charge required evidence of "lewdness," and the government had failed to provide such evidence. The trial court denied the motion, ruling lewdness was not an element. The trial court then issued jury instructions which did not require a finding on lewdness. Counsel did not object. The state appellate court denied the challenge to the jury instruction based on the state's contemporaneous objection rule. The defendant eventually sought habeas relief, and the state argued procedural default based on the rule. The Court found the rule inadequate as applied to the facts of the case, because (in light of the earlier ruling) it would have been an "arid ritual of meaningless form, and would further no perceivable state interest." *Osborne*, 495 U.S. at 124 (quoting *James v. Kentucky*, 466 U.S. 341, 349 (1984) (quotations and alterations omitted)). "[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." *Id.* at 125 (quoting *Douglas v. Alabama*, 380 U.S. 415, 421-422 (1965)).

Lee involved a murder case where the defendant's defense was an alibi. His alibi witnesses (various family members), who had traveled from California to Missouri for the trial and had been in the courthouse earlier in the day, could not be found when called to testify.[7] Counsel made an oral motion for a continuance, which the trial court denied on the unsupported hypothesis the witnesses had abandoned the defendant, and because the judge would be unavailable later. On appeal, the appellate court disposed of the challenge to the ruling by relying on a rule requiring motions to continue to be in writing and supported by an affidavit.

The Supreme Court found *Osborne* applicable, and found the written motion requirement inadequate because: (1) the reasons for denying the oral motion could not

[7] The Court noted that the witnesses subsequently reported they had been told by court officers that their testimony was not needed that day, and they could go. *Lee*, 534 U.S. at 374 n. 6.

have been better countered by a written motion; (2) no case law made clear that the rule would be applied so harshly (e.g. in the midst of trial upon the discovery that subpoenaed witnesses are suddenly absent) and oral motions were permissible with consent of the parties; and (3) describing the vision of requiring counsel to write out longhand in the courtroom a motion and affidavit injected an "Alice–in–Wonderland quality into the proceedings." *Id.* at 383 (quoting *Lee v. Kemna*, 213 F.3d 1037, 1047 (9th Cir. 2000) (Bennett, C.D.J., dissenting)). "Although these three factors were not presented as a 'test' for determining adequacy, we use them as guideposts in 'evaluat[ing] the state interest in a procedural rule against the circumstances of a particular case.'" *Cotto v. Herbert*, 331 F.3d 217, 240 (2nd Cir. 2003).

Thus, the critical factor under both *Osborne* and *Lee* was the legitimacy of the state interest in applying the procedural bar under the facts of the specific case. *See Lee*, 534 U.S. at 386-387 ("It may be questioned, moreover, whether the dissent, put to the test, would fully embrace the unyielding theory that it is never appropriate to evaluate the state interest in a procedural rule against the circumstances of a particular case."). There is no legitimate interest in exorbitant application of rules that effectively deny a petitioner any real opportunity to have his federal claim heard.

2. Adequacy Standard Applies to Anticipated Bars

It is true that in both *Osborne* and *Lee*, the courts were faced with actual applications of state procedural rules by the state courts to deny a federal claim. Here, the procedural bars on which Respondents rely have not been applied by the state courts, but are merely anticipated as being applicable in an attempt at a third PCR proceeding. But the undersigned discerns no reason to refuse to extend the reasoning of these cases to an anticipated procedural default. Both applied procedural bars and anticipated procedural defaults derive from a common doctrine, the independent-and-adequate-state-ground doctrine. *See Gray v. Netherland*, 518 U.S. 152, 162 (1996) (a not-yet-applied, but applicable "procedural bar that gives rise to exhaustion provides an independent and

adequate state-law ground for the conviction and sentence…[and] prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default"); and *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (habeas procedural default rule based on comity, federalism, and enforcement of the exhaustion requirement).

3. Adequacy of Bars to be Applied to Petitioner

Here, Petitioner argues the provided remedies were inadequate because: (a) Petitioner had no adequate means of actually bringing additional claims in a second PCR because he was afforded no counsel as a result of his PCR notice being improperly dismissed; (b) no published Arizona decision directed him to file his claims *pro se* to preserve them; (c) Petitioner substantially complied with all pertinent state requirements, and there was nothing else he could have done to present his claims *pro se*. (Reply, Doc. 96 at 17-19.)

Indeed, Petitioner was also effectively denied counsel on direct review when counsel in the first PCR case simply filed a bare bones notice of no claim (Exhibit L) without filing an *Anders* brief and without subsequent judicial review (or other equally protective measures). *See Pacheco v. Ryan,* No. CV-15-2264-PHX-DGC-JFM, 2016 WL 7423410, at *33 (D. Ariz. Sept. 23, 2016), *report and recommendation adopted*, 2016 WL 7407242 (D. Ariz. Dec. 22, 2016) (*Anders* applies to Arizona's of-right PCR proceedings and is not satisfied by the notice of no claim procedure). This was no ordinary ineffective assistance of counsel, but a systemic failing in Arizona's system of providing counsel on what serves as the only means of appeal for pleading defendants. *See e.g. Wilson v. Ellis,* 859 P.2d 744, 747, 176 Ariz. 121, 124 (Ariz. 1993) ("we are not commanding, nor do we want, trial courts to conduct *Anders*-type reviews in PCRs").

This initial failing was then compounded by the triple errors of: (1) an erroneous dismissal as untimely of his petition for review in his first PCR proceeding; (2) an erroneous dismissal of his second PCR notice as untimely; and (3) an erroneous dismissal

as successive his petition for review in his second PCR proceeding.

The State of Arizona certainly has, in general, legitimate interests in addressing post-conviction claims in a timely manner, and in as few proceedings as possible. Indeed, federal habeas is itself constrained by a statute of limitations and as second-and-successive petitions bar.

But, where a petitioner has repeatedly acted in a timely fashion, and in the appropriate proceedings, to present his claims, and yet has been thwarted by a lack of required counsel and erroneous rulings, there is no legitimate state interest in denying him at least one real opportunity to have his claims heard. As applied in those circumstances, the timeliness and waiver bars do not act to curb abuses or provide for the orderly administration of justice, but simply to prevent any opportunity to assert federal claims. In such instances, they become an exorbitant application of generally sound rules, an arid ritual of meaningless form. Such state grounds are inadequate to stop consideration of a federal question.

Looking to the *Lee* guideposts demonstrates the inadequacy of these procedural bars Respondents seek to apply to Petitioner. First, there is no reason to believe that adherence to the rules by Petitioner would have rendered a different result. Petitioner acted in a timely basis in all of his proceedings, and yet was repeatedly ruled untimely. Petitioner strived to present his claims, without benefit of counsel to which he was entitled (either constitutionally or under state law), and yet was erroneously turned away. Indeed, Respondents fail to suggest the forum in which Petitioner (in the actual circumstances of this case) had a real opportunity to have his claims heard by the Arizona Court of Appeals.

Second, there was no clear direction under state law that would have enabled Petitioner to meet the state's requirements. To be sure Arizona law is rife with warnings on its timeliness and waiver requirements. *See e.g.* Ariz. R. Crim. Proc. 32.2(a) ("A defendant is precluded from relief under Rule 32 based on any ground…waived at trial, on appeal, or in any previous collateral proceeding."); and *State v. Swoopes*, 216 Ariz. 390, 398, 166 P.3d 945, 953 (Ariz.App. 2007); Ariz. R. Crim. Proc. 32.4(a)(2)(A) ("a

defendant must follow the deadlines set forth in this rule"); and *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (Ariz.App. 1995). But the undersigned has found nothing in the state jurisprudence that would advise a defendant how to proceed in the unique circumstances of this case. Indeed, Respondents have suggested only that Petitioner should have raised all of his federal claims in proceedings in which Petitioner constructively lacked the counsel to which he was entitled, on issues on which he had never had counsel, in the face of repeated, plainly-erroneous procedural rulings.

Third, given the realities of those circumstances, Petitioner substantially complied with the state's rules, and was stymied not by his own negligence or even ignorance, but by the repeated procedural failings that must have resembled the Queen of Hearts willy-nilly demanding "Off with their heads!" before hearing the gardener's explanation.[8]

Accordingly, the undersigned concludes that, as applied to Petitioner, the state's procedural default rules would be inadequate to bar habeas relief.

4. Adequacy to Bar Claims Never Raised

If all that had happened here were the erroneous dismissals, the undersigned might be inclined to conclude that the only exorbitant application of the states' bar would be the rejection of claims actually raised by Petitioner in his various *pro per* filings. After all, defendants are routinely held responsible for asserting their claims *pro se*, and erroneous rulings would not explain a failure to raise such claims.

But here, Petitioner was effectively denied any post-trial opportunity for constitutionally adequate counsel in identifying potential claims, and was again denied counsel (solely because of the state courts' erroneous decisions) in his one opportunity to obtain review of that denial.

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[8] *See* Charles Lutwidge Dodgson, *Alice's Adventures in Wonderland*, Chapter 8 ("'May it please your Majesty,' said [gardener] Two, in a very humble tone, going down on one knee as he spoke, `we were trying–' 'I see!' said the Queen, who had meanwhile been examining the roses. `Off with their heads!'.")

5. Cause and Prejudice Not the Appropriate Remedy

The undersigned notes that the dividing line between exorbitant-application-inadequacy and the cause-and-prejudice exception to procedural default is not always clear. *See e.g. Smith v. Oregon Bd. of Parole and Post-Prison Supervision, Superintendent*, 736 F.3d 857, 866 (9th Cir. 2013) (finding cause and prejudice the appropriate rubric to resolve a claim that an unforeseeable change in the law rendered a contemporaneous objection rule inadequate).[9] Here, however, it cannot be said "there is no unfairness, irregularity or injustice" in the application of the state bar. *Smith*, 736 F.3d at 866. Rather, this case is marked with irregularities and resulting unfairness. Thus, these issues are appropriately addressed on the basis of adequacy, rather than on the basis of cause & prejudice.

This approach makes sense. Cause-and-prejudice ordinarily looks to extra-judicial factors to avoid a miscarriage of justice. Adequacy, on the other hand, looks at the judicial process itself, to ensure that the consideration of the federal claims is not being inappropriately foreclosed through unjustifiable adherence to procedure. Here, all of the factors creating the exorbitance in the procedural bar (denial of counsel[10] and erroneous decisions) were not extra-judicial, but were the function of the procedural rulings and judicial failings.

D. CONCLUSION RE PROCEDURAL DEFAULT

The undersigned has concluded that, as applied to Petitioner, Arizona's procedural bars are not adequate to bar federal habeas review. Because the parties do not dispute that

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[9] Indeed, at least one law school professor has suggested replacing procedural default with a resurgent requirement for adequacy. *See* Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 Mich. L. Rev. 75, 100 (October 2017).

[10] PCR counsel was arguably not deficient in failing to comply with *Anders*. He was doing precisely not only what was the accepted practice at the time, but what was directed by the governing state rules and precedents. Thus, normal cause and prejudice standards of ineffective assistance would not easily apply.

Petitioner's state remedies on any claims not properly exhausted are nonetheless no longer available, this Court need not resolve which claims were properly exhausted and those which were not. Because the claims not properly exhausted are not procedurally defaulted, the Court need not resolve whether Petitioner has shown cause and prejudice or actual innocence to avoid a procedural default.

In sum, habeas review of Petitioner's claims is not barred by either lack of exhaustion or procedural default.

V. CONSIDERATION OF CLAIMS

A. GROUND 1 – IRRECONCILABLE CONFLICT

In Ground 1, Petitioner argues he "was constructively denied his right to counsel, in violation of the Fifth, Sixth, and Fourteenth Amendments, due to the irreconcilable conflict with his trial counsel and complete breakdown in the communication between them." (Doc. 83 at 50.) Respondents oppose this ground on the merits, and argue that Petitioner cannot be granted an evidentiary hearing on or be allowed to expand the record on Ground 1.

1. No Merits Determination

If a claim is decided "on the merits," then two important limitations apply under 28 U.S.C. § 2254(d) on the habeas courts' ability to grant relief. First, relief can only be granted if the state court's legal decision was contrary to or unreasonable application of Supreme Court law. Second, relief can only be granted if the state court's factual determinations were unreasonable, which determination "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 (2011). These limitations can affect the merits of a claim in habeas, as well as the Petitioner's ability to expand the record or obtain an evidentiary hearing.

The threshold question, however, is whether Petitioner's claim was adjudicated on the merits.

The last time Petitioner presented his irreconcilable conflict claim to the state

courts was in his in his *pro per* PCR petition in his first PCR proceeding. [11] (Exhibit M, PCR Pet. at 4.) The PCR court dismissed that petition "for the reasons stated in the Response to the Petition filed by the State." (Exhibit P, Order 7/7/10.) That Response argued that Petitioner's irreconcilable conflict claim was waived by Petitioner's guilty plea. (Exhibit N, PCR Response at 4-6.)

"The requirement of an adjudication on the merits does not mandate a hearing or other judicial process beyond rendering a decision; rather it means that the court must finally resolve the rights of the parties on the substance of the claim, rather than on the basis of a procedural or other rule precluding state review of the merits." *Barker v. Fleming*, 423 F.3d 1085, 1092 (9th Cir. 2005). A decision applying a waiver is not a decision on the merits of the claim for relief. Rather, it is a decision on the merits of the waiver.

> If we were to conclude that his waiver was invalid, Kirkpatrick would not be entitled to relief from his state court conviction; rather, he could merely continue litigating the merits of the claims contained within his state habeas exhaustion petition. Additionally, because his withdrawal is a waiver of his right to pursue habeas relief, it is not a decision resolving his claims based on the substance of his habeas petition. Thus, under § 2254(d) alone, we would not be subject to AEDPA's deferential framework

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[11] Because the PCR court was the last court to be presented with the claim in Ground 1, this Court must look to that decision. Respondents argue a different basis for looking to the PCR court's decision: that this Court should not look merely to the appellate court rulings to find merits decisions, but to the trial court, asserting that the "last reasoned decision standard in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) applies only to exhaustion and procedural default, and not the "on the merits" standard under § 2254(d). However, in the context of determining whether a claim was decided on the merits for purposes of § 2254(d), the Ninth Circuit has plainly held: "When more than one state court has adjudicated a claim, we analyze the last reasoned decision." *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005). Moreover, *Barker* rejected the call for the habeas court to consider the decisions of the various state courts "as a collective whole," based on the reference in § 2254(d) to "state court proceedings," concluding "AEDPA generally requires federal courts to review one state decision." *Barker*, 423 F.3d at 1093. *See* Brian R. Means, *The "Merits Adjudication" Requirement*, Federal Habeas Manual § 3:7 (May 2019) ("When more than one state court has adjudicated a claim in a reasoned decision, the federal court turns to the last reasoned decision."). Similarly, the Ninth Circuit has recently held that it is "[f]indings of fact in the last reasoned state court decision" which "are entitled to a presumption of correctness, rebuttable only by clear and convincing evidence. *Hedlund v. Ryan*, 854 F.3d 557, 563 (9th Cir. 2017).

Kirkpatrick v. Chappell, 926 F.3d 1157, 1170 (9th Cir. 2019). "Because resolution of the question as to whether Fahy's waiver was valid will not entitle him to relief on the merits of his habeas petition, the waiver question is not a 'claim.' Therefore, the state court's determination that the waiver was valid is not entitled to deference under § 2254(d)." *Fahy v. Horn*, 516 F.3d 169, 180 (3rd Cir. 2008).

The Court notes that the State's PCR Response also argued in a footnote:

> The non-cognizability of Defendant's claims notwithstanding, the record clearly belies Defendant's recitation of the facts. (See M.E. 11/13/2007 and 3/20/2008; RT 11/13/2007 and 3/20/2008; the court made findings at each hearing that Defendant was merely unhappy with the way his counsel was representing him, not that the representation was deficient or that an irreconcilable conflict existed between Defendant and his counsel.)

(Exhibit N, PCR Response. at 4, n. 1.) Because arguments raised in such a manner are not considered properly asserted by the Arizona courts, the undersigned concludes that this passing reference in a footnote was not the basis for the decision of the Arizona Court of Appeals. *See MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 305, 197 P.3d 758, 766 (Ariz.App. Div. 1 2008) (declining to address arguments raise in a one sentence footnote); and Ariz. R. Crim. Proc. 31.10(a)(7) (requiring an argument on an issue to include "citations of legal authorities" and "the applicable standard of appellate review").

Accordingly, the last reasoned decision on Petitioner irreconcilable conflict claim was not based on the merits, but on a procedural defense of waiver, and the limits of § 2254(d) do not apply.

2. Applicable Standards

a. Standard for Evidentiary Hearing

A habeas petitioner is entitled to an evidentiary hearing if he can (1) show that he has not failed to develop the factual basis of the claim in the state courts, as prescribed by 28 U.S.C. § 2254(e)(2),[12] or meets the exceptions to that rule; (2) meets one of the factors

[12] Respondents have not asserted § 2254(e)(2) applies to any claims other than Grounds 3, 4, 5 and 6. (Resp. to Mot. Doc. 112 at 10-13 (Ground 1), 13 (Ground 2(A)), 14 (Grounds 3, 4, 5, 6).) For other reasons discussed hereinafter, the undersigned does not find an

identified by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); and (3) make colorable allegations that, if proved at an evidentiary hearing, would entitle him to habeas relief. *Williams v. Filson*, 908 F.3d 546, 564–65 (9th Cir. 2018).

The referenced *Townsend* factors are:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend, 372 U.S. at 313.

"Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

b. Standard to Expand the Record

Expansion of the record has never been subject to all the kinds of constraints applicable to evidentiary hearings. As noted by Respondents, Rule 7, Rules Governing § 2254 Cases, simply provides the habeas court with discretion to "direct the parties to expand the record by submitting additional materials relating to the petition," which may include "letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record." The purpose of the rule is: "to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. An expanded record may also be helpful when an evidentiary hearing is ordered." Rule 7, Rules Governing § 2254 Cases (Advisory

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evidentiary hearing or expansion of the record appropriate for such claims, and thus the effect of § 2254(e)(2) need not be analyzed.

Committee Note to 1976 adoption).

The AEDPA, however, has constrained this discretionary approach in two respects.

First, the Ninth Circuit has held that although 28 U.S.C. § 2254(e)(2) references only the court's ability to "hold an evidentiary hearing," it also precludes expansion of the record on a claim when a petitioner has failed to develop the record in the state courts. *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005), *overturned on other grounds* in *Daire v. Lattimore*, 812 F.3d 766, 767 (9th Cir. 2016).

Second, under 28 U.S.C. § 2254(d)(2), a state court's factual determination can only be reviewed based on the state court record if the claim was decided on the merits. *See Wood v. Ryan*, 693 F.3d 1104, 1122 (9th Cir. 2012) ("not entitled to an evidentiary hearing or additional discovery in federal court" when adjudicated on the merits).

Moreover, although there is no "colorable claim" requirement to expand the record, it stands to reason that if the habeas court is convinced that a claim is fully resolved based on the existing record, or that is simply legally unmeritorious, that there is no reason to expand the record. Similarly, information that is simply not helpful, *e.g.* because it is irrelevant, need not be included. *See e.g. Williams v. Schriro*, 423 F.Supp.2d 994, 1003 (D.Ariz.,2006) ("expansion is not warranted under Rule 7 because the exhibits are not relevant").

3. Claim Colorable

Because § 2254(d) does not preclude expansion of the record or an evidentiary hearing, the Court must determine whether the claim is sufficiently colorable that expansion or a hearing should be permitted.[13]

In asserting Ground 1 is not colorable, Respondents incorporate their Answer. They specifically argue that the state court's rejection of this claim is entitled to deference under

[13] Although Respondents argue that Petitioner failed to develop the factual record on Grounds 3, 4, 5 and 6 (and thus is prevented under the limitations under 28 U.S.C. § 2254(e)(2) from expansion or a hearing), they mount no similar argument with respect to Ground 1.

the AEDPA, and there is no clearly established law on irreconcilable conflict. However, as discussed hereinabove, the last reasoned decision on Ground 1 was not a merits decision, but a procedural one. Therefore, the AEDPA deference under 28 U.S.C. § 2254(d) does not apply, including the limitation to "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Respondents also argue that Ground 1 is not colorable in light of the extensive record in which defense counsel was questioned by the court. In so arguing, Respondents rely on the standards under § 2254(d) ("unreasonable determination of fact" and "contrary to or unreasonable application"). But, again, § 2254(d) does not apply to this claim.

That leaves this Court to resolve whether Petitioner's claim can be fully resolved on the existing record.

In *Schell v. Witek*, the Ninth Circuit clarified the constitutional standard for claims arising from denials of motions for new counsel based on irreconcilable conflict. That standard is not focused on the particular procedural regimen applicable in federal cases. Rather, only that "the Sixth Amendment requires on the record an appropriate inquiry into the grounds for such a motion, and that the matter be resolved on the merits before the case goes forward." *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000). Second, the ultimate issue (and necessary to show any prejudice from failure to conduct the required hearing) is whether "the conflict between [the petitioner] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment," *id.*

Petitioner summarizes his allegations as follows:

> Mr. Camargo was charged in July 2007 with burglary, kidnapping, and misconduct involving weapons, and two counts of aggravated assault. His appointed trial attorney visited him once with an interpreter to explain the charges and the plea agreement. But at the settlement conference two weeks later, it was apparent that counsel's explanation had been insufficient: Mr. Camargo did not understand either the terms of the plea or his trial exposure. He still had questions. His attorney could not answer his questions after the conference, however, nor could he answer them when he visited his

> client at the jail two days later, because he did not bring an interpreter to facilitate the communication.
>
> The court rejected Mr. Camargo's plea for a new attorney, even though Mr. Camargo explained that his counsel failed to provide him advice with the use of an interpreter. And, though the prosecution re-offered the plea a number of times in the following months—even sweetening the deal by capping the range at 15 years from 21—Mr. Camargo could not accept it, because his counsel still had not advised him, through an interpreter, why the plea was beneficial, what the charges entailed, the State's evidence, his own lack of a viable defense (and why his own proposed defense was irrelevant), how aggravating and mitigating factors worked and that his sentence was likely to be aggravated, or answer the specific questions he had.
>
> Even once the plea was off the table, counsel did nothing to prepare him for trial. Indeed, it appears that counsel prepared no defense whatsoever. Following jury selection, upon counsel's insistence that he would face an enormous sentence, he entered a coerced, involuntary, unknowing, and unintelligent plea to the indictment.

(SAP, Doc. 83 at 3-4.) On their face, these allegations, if proven, state a colorable claim of an irreconcilable conflict. It is true that Petitioner does not describe the normal open and argumentative conflict, but rather a dearth of effective communication due to counsel's limited contacts and language barriers, and a resulting atmosphere of distrust.

Even trial counsel conceded a breakdown in communications:

> THE COURT: …Do you think there is an irreconcilable difference between you and Mr Carmago [sic]?
>
> MR. KIMBELL: From my perspective, I believe that Mr. Carmago, number one, in his motions or letters to the Court have been less than truthful. During our last status conference he expressed an unwillingness to communicate with me which obviously would make it very difficult to defend him at trial, discuss the facts of the case with him, potential defenses, his version of the incident, things like that. He has expressed a distrust regarding my representation. I do believe that I could competently represent him at trial however at the same time I have had difficulties working with Mr. Carmago and I guess if he wants to express his feelings to the Court. I'd advise him not to make any statements regarding the facts of the case. That's where we stand right now. I just -- Judge I don't agree with what he has written to the court and I'd like to put that on the record.

(Exhibit D, R.T. 11/13/07 at 6-7.)

> MR. KIMBELL: Judge we had a settlement conference on a Thursday afternoon…I delivered a copy of the police report to Mr. Carmago the next day. I had mailed a copy to him and not sure why it didn't make it to him, to the jail. But I delivered a copy the next day to him. I didn't have time to arrange a visit for the interpreter but in order to give him a copy of the police report I hand delivered it to him. Obviously I couldn't communicate well with him because I don't speak Spanish. But he had the opportunity to consider the plea offer

> for some time.

(*Id.* at 8-9).

There also seems to have been little inquiry by the trial court. The entire colloquy on Petitioner's first motion for new counsel consisted of a little over four pages of transcript. (*Id.* at 5-9.) The court asked Petitioner no questions, merely allowing him to respond to counsel's initial response. (*Id.* at 7-8.)

In his second motion to replace counsel, Petitioner argued disputes over objections at a settlement conference, failure to investigate inconsistencies in witness statements, failure to hire an investigator. Petitioner summarized:

> Counsel is only interested in bullying defendant into signing a plea instead of allowing defendant to participate at co-counsel, refusing to develop trial strategy, refusing to discuss facts of the case, refusing to conduct interviews in his attempt to try me upon the states case in order to ensure my conviction.

(Exhibit E, Mot. Dismiss Attorney at 2.)

At the hearing on the second motion, the court reviewed with counsel the contacts with Petitioner, the interviews conducted, the reasons for not using an investigator, and why counsel had attempted to stop Petitioner from talking in a settlement conference. Then, the court asked counsel about the conflict:

> THE COURT: Do you think that your relationship with the defendant is irreconcilably conflicted?
>
> MR. KIMBLE: Judge, I think there is a problem with my relationship with Mr. Camargo. During the last two visits at the jail, I've been unable to discuss the case with him. His only comments to me were that he didn't want to discuss anything, he wants a new attorney. Obviously, that presents a problem with respect to my representation of him only because I need to discuss the case with him in order to prepare for trial. In that regard, I think we do have some irreconcilable differences, especially given the amount of time Mr. Camargo faces if he would be convicted at trial.
>
> THE COURT: Do you think new counsel would have the very same conflict?
>
> MR. KIMBLE: Judge, I -- I think it may be that Mr. -- given the severity of the case and the time he is facing, I think it may be in Mr. Camargo's best interests to have new counsel just take a fresh look and a fresh start with him. I can't say whether or not they'll have the same conflicts. I can't say that nor [sic] sure.

(Exhibit F, R.T. 3/20/08, at 7-8.) The court then appears to have focused on tactical disputes rather than addressing the underlying distrust and conflict.

> THE COURT: Well, I am giving you an opportunity to explain to me how another attorney could work better with you, given the fact that one of your allegations is that this attorney refuses to allow you to participate as co-counsel, and you can't do that under the law of Arizona. So any other attorney would be faced with the same issue. You'd have the same issue with that attorney.

(*Id.* at 4.) The court maintained that focus, and concluded:

> THE COURT: All right. I'm going to deny the request. It's a motion to dismiss Mr. Kimble as counsel. I do find that there may be differences of opinions between the defendant and his attorney. However, Mr. Camargo was under the assumption that he could get a new attorney. He cannot at this point. New counsel would be confronted with the very same conflicts that have been expressed in this motion.

(*Id.* at 9.)

Petitioner now proffers a series of declarations and witnesses focused not on the tactical disputes, but on the lack of visits (particularly while plea negotiations were pending), the inability to communicate due to the absence of an interpreter, counsel's acknowledging relying on the trial court to advice Petitioner on the plea at the settlement conference, the applicable professional standards and Petitioner's assertion that he would have accepted a plea agreement if he had had it explained.

Thus, it is at least arguable that the trial court conducted only a perfunctory inquiry, rather than an appropriate one, and the conflict between Petitioner and trial counsel prevented any meaningful communication between them.

In sum, Petitioner's claim is colorable.

4. Expansion of Record Appropriate

Because Petitioner's claim in Ground 1 is colorable, and expansion of the record is not precluded by the AEDPA, Petitioner's Motion to Expand should be granted as to Ground 1, and the record on this Ground expanded to include with the following:

1. Declaration of Petitioner
2. Declaration of Raymond Kimble, Trial Counsel
3. Declaration of Dan Cooper, Attorney Expert
4. Declaration of David Svoboda, Court Interpreter

5. Declaration of Sara Seebeck, Court Interpreter
6. SAP Exhibit 5, Jail Visitation Log
7. SAP Exhibit 9, Email 8/20/7 for Prosecutor
8. Exhibit B to Dan Cooper Declaration

5. Evidentiary Hearing Appropriate

Because Petitioner's claim in Ground 1 is colorable, and a hearing is not precluded under the AEDPA, the Court may grant an evidentiary hearing if Petitioner meets at least one of the *Townsend* factors. *Townsend*, 372 U.S. at 313. Here, the merits of the factual dispute underlying Ground 1 were not resolved in the state court hearing, because the PCR court ruled the claim waived by virtue of Petitioner's guilty plea. Accordingly, Petitioner qualifies under *Townsend*, leaving this Court with the discretion to grant an evidentiary hearing.

The Ninth Circuit also holds that "the fact that a hearing would be permitted does not mean that it is required. The district court retains discretion whether to hold one." *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000). Thus, *Phillips* held that even where the preconditions are met, "a petition may be dismissed without a hearing [if] it consists solely of conclusory, unsworn statements unsupported by any proof or offer thereof." *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001) (citing *Coleman v. McCormick*, 874 F.2d 1280, 1284 (9th Cir.1989) (*en banc*)). Similarly, "[w]e begin with the rule that no such hearing is required '[i]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief.'" *Hibbler v. Benedetti*, 693 F.3d 1140, 1148 (9th Cir. 2012). Likewise, "an evidentiary hearing is not required if the claim presents a purely legal question and there are no disputed facts." *Beardslee v. Woodford*, 358 F.3d 560, 585 (9th Cir. 2004). Moreover, "[t]he scope of an evidentiary hearing on a motion under 28 U.S.C. § 2254 is committed to the discretion of the district court." *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998).

Here, it appears that resolving this claim will depend upon testimony and related

credibility determinations, particularly with respect to whether substantive advice was given by counsel at the courthouse, using interpreters, before and after scheduled hearings, and the basis for the breakdown in communications between Petitioner and trial counsel.

Accordingly, Petitioner's Motion for Evidentiary Hearing should be granted as to Ground 1, and this matter again referred to the undersigned to conduct an Evidentiary Hearing on Ground 1.

B. GROUND 2(A) – IAC ON PCR RE GROUND 1

In Ground 2(A) Petitioner asserts that PCR counsel was ineffective in failing to raise the claim in Ground 1. Respondents present no independent basis to conclude this claim is not colorable, beyond the arguments on Ground 1. Accordingly, the undersigned concludes Ground 2(A) is colorable, and the same evidence relevant to Ground 1 is relevant to this claim.[14] Moreover, Respondents present no basis to conclude that expansion or a hearing is precluded under the AEDPA.

Accordingly, Petitioner's Motion to Expand should be granted as to Ground 2(A), and the record on this Ground expanded to include the items to be admitted on Ground 1.

Moreover, Petitioner meets the first *Townsend* factor on this claim because the merits of the factual dispute underlying Ground 2(A) were not resolved in the state court hearing, because the PCR court erroneously ruled the 2nd PCR petition untimely, and the Arizona Court of Appeals erroneously ruled it successive. Accordingly, Petitioner qualifies under *Townsend*, leaving this Court with the discretion to grant an evidentiary hearing. The proposed evidence has the same relevance to Ground 2(a) that it has to the underlying claim in Ground 1. Accordingly, Petitioner's Motion for Evidentiary Hearing should be granted as to Ground 2(A), and this matter again referred to the undersigned to conduct an evidentiary hearing on Ground 2(A).

[14] Respondents do not argue that Ground 2(A) was resolved on the merits, or that Petitioner failed to develop the record on this claim. The undersigned concludes neither 28 U.S.C. § 2254(d) nor (e) preclude expansion of the record or an evidentiary hearing.

C. GROUND 2(B) – CONSTRUCTIVE DENIAL OF PCR COUNSEL

In Ground 2(B), of the SAP Petitioner argues he was constructively denied counsel on direct review (in his of-right PCR proceeding) when PCR counsel failed to file a PCR petition and withdrew, without any protections required by *Anders v. California*, 386 U.S. 738 (1967), *e.g.* counsel filing a brief reviewing the case and the PCR court conducting an independent review. [15] (SAP, Doc. 82 at 54.)

Respondents argue this claim is untimely. Respondents acknowledge that the FAP alleged:

> ""despite the fact that there was arguably a claim of constructive denial of the right to counsel," Camargo's initial PCR counsel filed a Notice of Completion because she "was unable to find any claims for relief" ([Doc. 6] at 6–7);

(Answer, Doc. 86 at 41.) Nonetheless, Respondents argue:

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[15] The courts of the District of Arizona have long concluded that Arizona's of-right PCR is functionally a first appeal and defendants have a constitutional right to counsel in such proceedings. *See e.g. Walker v. Ryan*, 2015 WL 10575864, at *5 (D. Ariz. Oct. 21, 2015) *report and recommendation adopted*, CV-15-00072-PHX-ROS(BSB), 2016 WL 1268487 (D. Ariz. Mar. 31, 2016); *Ree v. Ryan*, CV-13-00746-TUC-RM(LAB), 2015 WL 3889360, at *1 (D. Ariz. June 23, 2015); and *White v. Ryan*, CV-15-2482-PHX-JJT(JFM), 2016 WL 4650002, at *14 (D. Ariz. May 2, 2016), *report and recommendation adopted*, CV-15-02482-PHX-JJT, 2016 WL 4592083 (D. Ariz. Sept. 2, 2016). The undersigned has further concluded that Arizona's process for permitting of-right PCR counsel to file a barebones notice of no colorable claims and remain in an advisory capacity (without any judicial review for non-frivolous claims) did not adequately safeguard a defendant's right to appellate counsel. *See Pacheco v. Ryan,* No. CV-15-2264-PHX-DGC-JFM, 2016 WL 7423410, at *33 (D. Ariz. Sept. 23, 2016), *report and recommendation adopted*, 2016 WL 7407242 (D. Ariz. Dec. 22, 2016). The Arizona Attorney General has at least on one occasion conceded these points. *See e.g.* Arizona Attorney General's Amicus Curiae Brief *at 2, State v. Chavez*, 1-CA-CR 15-0482 (Ariz. Ct. App.). So has the Maricopa County Attorney's Office. *See e.g.* Respondent's Supplemental Brief, *State v. Chavez,* 2017 WL 3161352 at 15. Nonetheless, the Arizona Court of Appeals, Division 1, has subsequently rejected both the constitutional right to counsel in Arizona's of-right PCR proceedings and the applicability of *Anders* by relying on Arizona Supreme Court precedent. *See State v. Chavez*, 243 Ariz. 313, 317, 407 P.3d 85, 89 (App. 2017), review denied (July 24, 2018). The Arizona Supreme Court's Task Force on Rule 32 has since proposed modifications to the Arizona Rules of Criminal Procedure which differentiates between post-trial (proposed Rule 32) and post-plea (proposed Rule 33) PCR proceedings, and in both would mandate expansions to counsel's notice of no colorable claim (proposed Rule 32.6(c) and proposed Rule 33.6(c)), but does not appear to require the court to independently review the record for non-frivolous claims, rather only a review of "claims" (proposed Rule 33.11(a)). Petition to Amend Rule 32, Ariz. R. Crim. P., R-19-0012, available at https://www.azcourts.gov/Rules-Forum/aft/949, last accessed 7/24/19.

> Claim 2(b) does not relate back because Camargo never previously claimed his PCR counsel should have filed an *Anders* brief (Dkt. # 83, at 55–58), and instead contradictorily claimed his counsel should have filed a merits brief raising an "arguabl[e]" claim "of constructive denial" of counsel. (Dkt. # 6, at 6–7.)

(Answer, Doc. 86 at 43.)

Petitioner replies that the claim in Ground 2(B) is the same as that recognized in the COA R&R (Doc. 38), and that Claims 2B and 3 in the SAP remain substantively unchanged from those claims as construed by the Court.

Aside from the fact this Court is not bound by the COA R&R, that R&R did not discern any claim based on a failure to comply with the dictates of *Anders*. Instead, the COA R&R found that: (1) Ground 1 asserted a claim alleging a "constructive denial of the right to [trial] counsel" based on an irreconcilable conflict (Doc. 38 at 9-11); (2) Ground 2 asserted a claim that "post-conviction relief counsel was ineffective for failing to raise the trial court's constructive denial of Petitioner's right to [trial] counsel in a Rule 32 Petition" (*id.* at 11-12); and (3) Ground 3 was in part merely cumulative of Grounds 1 and 2, but that it also asserted claims of ineffective assistance of trial counsel based on other failings, and ineffective assistance of PCR counsel based on the failure raise these additional claims.

Thus, the COA R&R did not find an assertion of a denial of counsel in the PCR proceeding under *Anders*, but a denial of PCR counsel based on the failure to raise specific claims. Indeed, the FAP alleged that: "Petitioner's initial-review counsel filed a 'NOC' despite the fact that there was arguably a claim of constructive denial of the right to counsel claim." (FAP, Doc. 6 at 7.) That is far different from the very specific claim that PCR counsel failed to comply with the mandates of *Anders* for appointed appellate counsel unable to find an issue for appeal.

Moreover, rather than simply allowing appointed counsel to functionally abandon the representation (as counsel did in this case), *Anders* requires protections *after* appointed counsel is unable to find an issue on direct review, such as counsel providing a summary of the pertinent parts of the case and addressing any non-frivolous claims, and then

requiring the court to undertake an independent review of the record. *See Penson v. Ohio*, 488 U.S. 75, 81–82 (1988). Moreover, where counsel fails to meet his obligations under *Anders*, the appellate court commits error in permitting counsel to abandon the representation without filing a merits brief, even if the court were to proceed to conduct a review of the record. *Id.* at 81–83.

It is true that the prescription proposed in *Anders* (review brief and independent review by court) is not exclusive. In *Smith v. Robbins*, 528 U.S. 259, 265 (2000), the Supreme Court explained, "[t]he procedure we sketched in *Anders* is a prophylactic one; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel." But, to the extent that Petitioner's SAP contends that solutions alternative to the traditional review-brief/independent-court-review could or should apply, the absence of such alternatives would similarly be an operative fact not included in the FAP, and be different in time and type.

Thus, the claim now urged relates to a different time (after a decision of no claims was made), and a different decision (how to present to the PCR court his inability to file a claim and what was required of the PCR court).

Petitioner argues that the prescriptions of *Anders* are functionally no different than a claim of the constructive denial of counsel. (Reply, Doc. 96 at 3.) But the COA R&R did not find the FAP asserted a claim of the constructive denial of PCR counsel, only of trial counsel.

Finally, Petitioner points to the COA R&R's reliance on *Martinez v. Ryan*, and argues that this is not a basis to distinguish his current claim which is founded upon the right to counsel on direct review, not PCR counsel. (Reply, Doc. 96 at 3 (citing *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Penson v. Ohio*, 488 U.S. 75 (1988).) But, the COA R&R cited *Martinez* solely to recognize that the Supreme Court has not yet resolved whether PCR counsel is ever constitutionally required, but instead has continued to recognize such "a right to PCR counsel may exist in 'initial-review collateral proceedings'." (COA R&R, Doc. 38 at 12.) Again, however, the distinction (if any) is a

legal one, not a factual one, and not relevant to the "common core of operative facts" analysis.

Thus, Petitioner's Ground 2B does not arise from a common core of operative facts with, and therefore does not relate back to, the FAP. Therefore, the claim is untimely and must be dismissed with prejudice.

D. GROUND 3(A)(I)– IAC AT TRIAL RE PLEA OFFERS

Respondents argue Ground 3(A)(i) does not relate back to the FAP and must be dismissed as untimely.

In Ground 3(A)(i) of the SAP, Petitioner asserts *trial* counsel was ineffective in advising him about a series of plea offers. Petitioner summarizes:

> Mr. Camargo was charged in July 2007 with burglary, kidnapping, and misconduct involving weapons, and two counts of aggravated assault. His appointed trial attorney visited him once with an interpreter to explain the charges and the plea agreement. But at the settlement conference two weeks later, it was apparent that counsel's explanation had been insufficient: Mr. Camargo did not understand either the terms of the plea or his trial exposure. He still had questions. His attorney could not answer his questions after the conference, however, nor could he answer them when he visited his client at the jail two days later, because he did not bring an interpreter to facilitate the communication.
>
> The court rejected Mr. Camargo's plea for a new attorney, even though Mr. Camargo explained that his counsel failed to provide him advice with the use of an interpreter. And, though the prosecution re-offered the plea a number of times in the following months—even sweetening the deal by capping the range at 15 years from 21—Mr. Camargo could not accept it, because his counsel still had not advised him, through an interpreter, why the plea was beneficial, what the charges entailed, the State's evidence, his own lack of a viable defense (and why his own proposed defense was irrelevant), how aggravating and mitigating factors worked and that his sentence was likely to be aggravated, or answer the specific questions he had.

(SAP, Doc. 83 at 3-4.)

These underlying facts were not included in the FAP. Indeed, the FAP made no mention at all of plea offers, or trial counsel's advice on them.

It is true that the FAP alleged an "irreconcilable conflict where there was a complete breakdown in the communication between Petitioner and counsel" (FAP, Doc. 6 at 6), and that he was "constructively denied his right to counsel" and that Petitioner "proclaim[ed]

his innocence by stating in open court 'I can't accept the plea because I didn't do it" (*id.* at 8.)

A bald allegation of a breakdown in communications with counsel or of the constructive denial of a right to counsel is not the same as alleging specific instances of failures of counsel in offering advice. The former requires a "a total lack of communication," *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000), "that resulted in the constructive denial of assistance of counsel," and "no further showing of prejudice," *id.* at 1027. The latter requires specific instances of deficient performance, and a showing of prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). (The constructive denial claim is the substance of Ground 1 of the SAP, which Respondents concede relates back and is timely.)

The allegation that Petitioner couldn't accept a plea offer because of his innocence asserts no deficiency in the advice of counsel about such offer. To the contrary, it asserts an entirely different reason for rejecting an offer.

Accordingly, Ground 3(A)(i) of the SAP does not arise from a common core of operative facts, thus does not relate back to the FAP, is therefore untimely and must be dismissed with prejudice.

E. GROUND 3(A)(II) – IAC AT TRIAL RE GUILTY PLEA

Respondents argue Ground 3(A)(ii) does not relate back to the FAP and is untimely.

In Ground 3(A)(ii), Petitioner argues he received deficient advice in entering his guilty plea. Petitioner asserts a general breakdown in communication with counsel, limited discussions regarding plea offers and trial exposure, defenses and sentencing exposure, lack of use of an interpreter, and lack of trial preparation. With regard to the guilty plea, Petitioner asserts that he pled so after being told by counsel he would face an enormous sentence at trial. (SAP, Doc. 83 at 3-4.) Petitioner argues counsel did not explain the difference between pleading pursuant to an agreement and pleading to the indictment, and failed to adequately explain that counsel's recommendation of the lowest

possible sentence might not be accepted by the judge, and that his sentencing exposure could exceed 21 years, and that he could plead guilty but insist on a jury for aggravating factors, or what aggravating factors were, and did not dispute that Petitioner's priors could be used to aggravate his sentence. (*Id.* at 30-31.)

None of these facts were alleged anywhere in the FAP, with the exception of the breakdown in communication with trial counsel. (FAP, Doc. 6 at 6.) But of course, that is the substance of Ground 1, which Respondent concedes is timely.

In the COA R&R the second instance (advice on guilty plea) of ineffectiveness of trial counsel in the FAP was based on a liberal construction of Petitioner's allegations that his guilty plea was made in the face of proclamations of his innocence to counsel and in court. (FAP, Doc. 6 at 8.) But Petitioner makes no argument in the SAP that trial counsel was ineffective for allowing Petitioner to plead guilty in the face of his innocence.

Even as construed by the COA R&R, while both the FAP and the SAP assert claims based on counsel's ineffectiveness in the course of Plaintiff's guilty plea, they do so on very different factual bases. So construed, the FAP claim is based on Plaintiff's insistence on his innocence, and the SAP is based on a laundry list of specific failures in advice leading up to the guilty plea. Thus, the claims are disparate in time and type.

Accordingly, Ground 3(A)(ii) of the SAP does not arise from the same core of operative facts, thus does not relate back to the FAP, is therefore untimely and must be dismissed with prejudice.

F. GROUND 3(A)(III) – IAC AT TRIAL RE AGGRAVATING FACTORS

In Ground 3(A)(iii) of the SAP, Petitioner asserts trial counsel was ineffective in stipulating to aggravating factors at sentencing. (SAP, Doc. 83 at 33, 58.)

Respondents argue Ground 3(A)(iii) does not relate back to the FAP and is untimely.

Petitioner relies on the COA R&R to assert relation back applies. (Reply, Doc. 96 at 2-4.) This Court is not bound by the COA R&R's characterizations, and the underlying

facts were not included in the FAP. Indeed, the FAP made no mention at all of stipulations, aggravating factors, or sentencing. Rather, Petitioner's allegations in the FAP regarding trial counsel were all focused on pre-sentencing events.

Accordingly, Ground 3(A)(iii) of the SAP does not arise from the same core of operative facts, and thus does not relate back to the FAP, is therefore untimely and must be dismissed with prejudice.

G. GROUND 3(B)(I) – IAC ON PCR RE GROUND 3(A)

Ground 3(B)(i) asserts ineffective assistance of PCR counsel, based on failure to raise the assertions of ineffective assistance of trial counsel in Grounds 3(A)(i) through (iii). For the reasons discussed hereinabove, the operative facts of no portion of Ground 3(A) was presented in the FAP. Accordingly, Ground 3(B)(i) of the SAP does not arise from the same core of operative facts asserted in the FAP, thus does not relate back to the FAP, is therefore untimely, and must be dismissed with prejudice.

H. GROUND 3(B)(II) IAC ON PCR RE FACTUAL BASIS FOR PLEA

1. Timeliness

Ground 3(b)(ii) - In Ground 3(B)(ii), the SAP asserts PCR counsel was ineffective for failing to assert a claim that the factual basis for the plea was insufficient. In the FAP, Petitioner argued: "initial-review counsel was ineffective for failing argue…2) That there was a lack of sufficiency of factual basis for the court of have accepted a plea agreement in the case." (FAP, Doc. 6 at 8.)

Respondents concede that this claim relates back and is timely. (Answer, Doc. 86 at 43.)

2. Not A Colorable or Meritorious Claim

Because Petitioner's of-right PCR proceeding was the equivalent of a first, direct appeal, Petitioner was constitutionally entitled to effective assistance of counsel in that proceeding. *See supra* at 41,note 15 (detailing cases finding constitutional right to of-right

PCR counsel).

However, failure to take futile action can never be ineffective assistance. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.1996); *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012). "The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel." *Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1982).

Here, the claim Petitioner asserts PCR counsel should have raised was without merit, whether asserted under federal law or under Arizona law.

Under Federal Law - Generally, "the Constitution does not require state judges to find a factual basis." *Loftis v. Almager*, 704 F.3d 645, 648 (9th Cir. 2012). *See also Rodriguez v. Ricketts*, 777 F.2d 527, 528 (9th Cir. 1985).

However, in *North Carolina v. Alford*, 400 U.S. 25, 38 (1970), the Court recognized long standing precedent that "the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence." 400 U.S. at 36. The Court extended that principle beyond such *nolo contendere* pleas to pleas coupled with express protestations of innocence "when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *Id.* at 37. [16]

"While *Alford* did not explicitly hold that a factual basis was constitutionally necessary, lower federal courts have drawn from the above language the requirement that if a defendant pleads guilty while claiming innocence the trial court must find a factual

[16] In the FAP, Petitioner did not cite to *Alford*. But a habeas petitioner is required to plead facts, not law. In liberally construing a *pro se* petitioner's pleading, the Court is required to "interpret a self-represented litigant's papers to raise the strongest arguments they suggest and to give effect to a pleading in conformity with the general theory that it was intended to follow." Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. Nat'l Ass'n Admin. L. Judiciary 97, 124-125 (2007). *See also Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *Dluhos v. Strasberg*, 321 F.3d 365, 373 (3rd Cir. 2003) ("apply the applicable law, irrespective of whether he has mentioned it by name"); and *Bretz v. Kelman*, 773 F.2d 1026, 1027 (9th Cir. 1985) (liberally construing *pro se* complaint to assert claim under 42 U.S.C. § 1985, even though only § 1983 cited).

basis. This requirement is based on the concern that a defendant who pleads guilty while simultaneously claiming innocence may not be acting freely and voluntarily." *Loftis v. Almager*, 704 F.3d 645, 650 (9th Cir. 2012) (citations omitted).

On the other hand, in the absence of an assertion of innocence, *Alford* is not triggered. "By finding a factual basis, the trial judge resolves the conflict between the waiver of trial and the claim of innocence. When a defendant pleads guilty or no contest without claiming innocence or otherwise making statements calling into question the voluntariness of his plea, however, there is no such conflict for the trial judge to resolve, and the finding of a factual basis is not essential to voluntariness." *Loftis*, 704 F.3d at 650.

Here, Petitioner concedes he did not assert his innocence at the time of his plea, only earlier in the case and subsequently, in the sentencing process. Pre-plea proceeding assertions of innocence have never been held to trigger *Alford*. Indeed, such an expansion would render *Alford* a universal mandate for a factual basis except in rare circumstances where a guilty plea is entered at the time of arraignment.

Similarly, the Sixth Circuit has held that *Alford* is not triggered by a protestation of innocence at post-plea proceedings, *i.e.* at sentencing.

> Alford's requirement that there be a "strong factual basis" for a guilty plea, "enables a court to determine that the defendant's guilty plea is voluntary" and thus constitutional, But the requirement kicks in only if a defendant "protests his innocence" during the plea colloquy. The context in which Alford arose confirms the point. At the plea colloquy, the defendant simultaneously pleaded guilty and asserted his innocence, noting that he pleaded guilty to avoid the risk of a capital charge. That is not this case. Eggers' protestations of innocence, as the state courts permissibly found, occurred after the guilty-plea hearing had ended. Absent a claim of innocence during the plea hearing, "there is no constitutional requirement that a trial judge inquire into the factual basis of a plea." Eggers never claimed he was innocent until after he pleaded guilty and after the district court accepted that plea. Eggers thus never triggered Alford.

Eggers v. Warden, 826 F.3d 873, 876 (6th Cir. 2016) *cert. denied sub nom. Eggers v. Turner*, 137 S. Ct. 1347 (2017) (citations omitted).

Petitioner argues this is in tension with the Ninth Circuit's decision in *United States v. Ray*, 431 F.2d 1177 (9th Cir. 1970). In *Ray,* the trial court set aside a guilty plea to a

lesser included offense where the defendant told a sentencing report write that he believed himself innocent of the charge to which he pled. The trial judge set the matter for hearing and gave the defendant a chance to make an unequivocal guilty plea, supported by the underlying facts. The defendant declined to make any further statement, and the court set aside the plea. The Ninth Circuit upheld the order as a "proper exercise of the Court's discretion" in light of "the duty of the District Court to satisfy itself not only of the voluntariness of a guilty plea but also the factual basis in support of the plea." *Ray*, 431 F.2d at 1178.

Ray is inapposite for three reasons. First, *Ray* was not an *Alford* case, made no reference to *Alford*, having been decided September 28, 1970, two months before the Supreme Court's decision in *Alford* on November 23, 1970. Second, *Ray* was a federal prosecution subject to the mandate of Federal Rules of Criminal Procedure 11 for a factual basis, and there was no corresponding federal duty for Petitioner's court to find a factual basis, apart from *Alford*. Third, *Ray* did not create a duty on the trial court to reject a plea under such circumstances, it only recognized its discretion to do so.

Accordingly, Petitioner having not asserted his innocence at his plea proceeding, federal law required no finding of a factual basis, and PCR counsel was not ineffective in failing to assert such a claim.

Under State Law – On the other hand, Arizona law does generally require a factual basis for pleas. The applicable version of Arizona Rules of Criminal Procedure 17.3 provided:

> Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court and determine that the defendant wishes to forego the constitutional rights of which he or she has been advised, that the plea is voluntary and not the result of force, threats or promises (other than a plea agreement). The trial court may at that time determine that there is a factual basis for the plea or the determination may be deferred to the time for judgment of guilt as provided by Rule 26.2(d).

Ariz. R. Crim. Proc. 17.2 (amended effective June 9, 2003, by R-03-0013). The applicable version of Rule 26.2(d) provided:

> In the event the trial court did not make an affirmative finding of a factual basis for the plea pursuant to Rule 17.3, before the entry of the judgment of guilt the trial court shall make such determination. One or more of the following sources may be considered: statements made by the defendant; police reports; certified transcripts of the proceedings before the grand jury; and other satisfactory information.

Ariz. R. Crim. Proc. 26.2(d) (amended eff. Jan. 1, 2007 by R-05-0037).

But here, a factual basis was provided when trial counsel recited the facts of the offenses and Petitioner admitted to them:

> THE COURT: Okay. We will next hear from Mr. Kimble, your attorney, who will provide a factual basis. And then I will ask you a followup question, Mr. Camargo; okay?
>
> THE DEFENDANT: Yes.
>
> MR. KIMBLE: Your Honor, as to Count 1, on July 10th, 2007, within the City of Goodyear, in Maricopa County, Alfredo Camargo, acting alone or with an accomplice, unlawfully entered a residence in Goodyear, Maricopa County, owned by [AM] and [YM] while Mr. Camargo or an accomplice were armed with a handgun with the intent to commit a felony in the [AM & YM] residence. Do you want me to go on, judge?
>
> THE COURT: Yes.
>
> MR. KIMBLE: As to Count 2, within the City of Goodyear in Maricopa County on July 10th, 2007, Mr. Camargo, ***potentially*** placed [YM] in apprehension of imminent physical injury, specifically when he or an accomplice pointed a handgun at [YM].
>
> As to Count 3 on July 10th, 2007, within the City of Goodyear, within Maricopa County, Mr. Camargo ***potentially*** placed [AM] in reasonable apprehension of imminent physical injury when he or an accomplice pointed a handgun -- and as to Counts 2 and 3, the handgun qualifies as a deadly weapon, a dangerous instrument -- at [AM[.
>
> As to Count 4, on July 10th, 2007, within the City of Goodyear, within Maricopa County, Alfredo Camargo and/or an accomplice knowingly restrained [YM] and placed [AM] in reasonable apprehension of imminent physical injury and to aide in the 15 commission of a felony. And during that incident, Mr. Camargo, or his accomplice, was armed with a handgun.
>
> And as to Count 5, within the City of Goodyear, in Maricopa County, on July 10th, 2007, Mr. Camargo, while being a prohibited possessor, due to his prior felony conviction, was in possession of a handgun which is a dangerous weapon under the criminal code.
>
> And, judge, as to all of those counts, Mr. Camargo had previously been convicted of a prior felony offense that you1ve previously discussed and was on probation at the time.
>
> THE COURT: Mr. Camargo, after listening to everything your attorney just said, do you agree with everything he just said?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. Any additions or corrections from the State?
>
> MS. LUDER: No, your Honor.

(Exhibit I, R.T. 4/08/08 at 13-16 (emphasis added).) Petitioner asserts that this was

insufficient because counsel stated that the placing in apprehension of injury was "potentially," while the statute requires that it be done "intentionally." (SAP, Doc. 83 at 66-67.)

Assuming *arguendo* that the transcript is accurate (which Respondents dispute, and Petitioner seeks to support with audio recordings), this would not render the factual basis insufficient. "The Arizona Supreme Court has held that even when a factual basis is not set forth in the record of the change of plea hearing, such a deficiency in the record is technical not reversible error when the extended record establishes a factual basis for a guilty plea." *State v. Johnson*, 181 Ariz. 346, 349, 890 P.2d 641, 644 (Ariz.App. Div. 1, 1995) (citing *State v. Rodriguez*, 112 Ariz. 193, 194–95, 540 P.2d 665, 666–67 (1975)). "This factual basis may be ascertained from the record including presentence reports, preliminary hearing reports, admissions of the defendant, and from other sources." *State v. Varela*, 120 Ariz. 596, 598, 587 P.2d 1173, 1175 (1978). "[A] court need not ascertain the factual basis for a plea at the time that it is taken but may satisfy itself later, from other sources such as a presentence report, that there is such a basis." *State v. Geiger*, 113 Ariz. 297, 298, 552 P.2d 1191, 1192 (1976). *See also State v. Reynolds*, 25 Ariz.App. 409, 411, n. 1, 544 P.2d 233, 235, n. 1 (Ariz.App. 1976) ("even though the pre-sentence report was not available to the judge who accepted the guilty plea, the factual basis for a guilty plea may be determined any time prior to sentencing").

Here, the Presentence Investigation, summarizing the police report, provided information that after opening the garage door and asking, "where is Marquis?" Petitioner grabbed YM "by the hand and forced her into a vehicle" and continued demanding to know where "Marquis" was. (Doc. 64 at 1.) In her written statement to the Court, the victim YM elaborated that Petitioner had "put the gun to me" while making his demands for information on "Marquis" who owed them money, and "put the gun in my husbands face telling him not to move...he was going to take me, not to do anything stupid, don't call the Police, I don't want to have to kill her." While in the vehicle, Petitioner "kept the gun in my side and began questioning me." (*Id.* at 6.) The victim AM related in his statement

to the Court "this man took my wife and held her at gun point as well as turn the gun on me and threaten to shoot me or my wife if I tried to stop him." (*Id.* at 5.) A reasonable inference from those facts is that Petitioner *intentionally* (not just *potentially*) put the victims in apprehension of injury, to obtain information to find "Marquis" and recover money, and to avoid reports of the crime to police. *See State v. Johnson*, 165 Ariz. 555, 556, 799 P.2d 896, 897 (Ariz.App.,1990) (element established by victim statement included in presentence report); *State v. Rodriguez*, 171 Ariz. 346, 347, 830 P.2d 867, 868 (Ariz.App.,1991) ("circumstantial evidence is sufficient to provide a factual basis to support a guilty plea").

Because PCR counsel was faced with a futile claim, whether under federal or Arizona law, counsel was not ineffective for failing to pursue a claim based on any lack of a factual basis.

Accordingly, Ground 3(b)(ii) is not colorable, and neither expansion of the record nor an evidentiary hearing need be granted. Moreover, the claim is without merit and must be denied.

I. GROUND 3(C) – CUMULATIVE EFFECT RE GROUNDS 1 AND 2

Ground 3(C) of the SAP asserts that the cumulative effect of the claims in Grounds 1 (irreconcilable conflict) and 2 (PCR counsel) resulted in constitutional violations.[17] (SAP, Doc. 83 at 59.)

Although separately discussing only the merits of this claim (Answer, Doc. 86 at 87), Respondents argue that other than specific portions of Ground 3 conceded as timely (*i.e.* Ground 3(B)(ii)) all of Ground 3 is untimely. (*Id.* at 44.)

In arguing the merits of Ground 3 in his Reply, Petitioner appears to abandon any argument of an independent cumulative effect claim, and fails to even mention it in his Reply. (*See* Rely, Doc. 96 at 46-47, and generally.)

[17] It appears that this claim may be part of Petitioner's reliance on the COA R&R's reference to Ground 3 of the FAP being if "not merely repetitive," "at least cumulative of the claims in Grounds 1 and 2." (COA R&R, Doc. 38 at 13.)

Petitioner generally argues the timeliness of Ground 3 solely on the basis of the COA R&R. (Reply, Doc. 96 at 2.) But this Court is not bound by the COA R&R. To the extent that this claim is based on the previously raised claims, *i.e.* Ground 1 (irreconcilable conflict) and 2(A) (IAC of PCR counsel re Ground 1), it arises from a common core of operative facts, and would relate back to the FAP and be timely. To the extent that it is based on the untimely portion of Ground 2, *i.e.* Ground 2(B) (constructive denial of PCR counsel/*Anders*), it is similarly untimely.

However, Petitioner neither argues nor cites any authority for the proposition that the cumulative effect of multiple instances of ineffective assistance (or any other type of violation) constitutes a separate constitutional claim. At most, the Ninth Circuit has recognized that the effects from multiple instances of ineffective assistance or trial errors may be considered cumulatively to determine prejudice. *See Williams v. Filson*, 908 F.3d 546, 570 (9th Cir. 2018) ("*We* have long recognized…that "prejudice resulting from ineffective assistance of counsel must be 'considered collectively, not item by item'"); and *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) ("The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair.").[18]

Thus, any freestanding claim based on cumulative effect is without merit.

To the extent that Ground 3(C) simply argues that in evaluating prejudice from the claims in Grounds 1 and 2(A), this Court must consider the cumulative effect of such instances, the Court should address that argument in addressing Grounds 1 and 2(A) after expansion of the record an evidentiary hearing.

Therefore, Petitioner's Ground 3(C) is untimely (to the extent that it includes Ground 2(B)), and without merit as a freestanding claim.

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[18] There is a division among the circuits and no clear Supreme Court authority on whether the effects of various instances of deficient performance by counsel may be considered cumulatively to find prejudice. *See* Brian R. Means, *Cumulative Error*, Federal Habeas Manual § 13:4 (May 2019 Update). But here, Petitioner's claims have not been decided on the merits by the Arizona courts and thus are not subject to the AEDPA's limitations in § 2254(d) to Supreme Court law.

J. GROUND 4 – INVALID GUILTY PLEA

In Ground 4 of the SAP, Petitioner asserts he entered into a guilty plea that was not knowing, voluntary, and intelligent, depriving him of his right to due process of law, in violation of the Fifth and Fourteenth Amendments. (SAP, Doc. 83 at 59.) Petitioner argues that this is the substantive claim underlying the ineffectiveness claim in Ground 3(A)(ii) (IAC at trial re guilty plea). (*See* SAP, Doc. 83 at 71; and Reply, Doc. 86 at 5 (quoting COA R&R).)

Because the undersigned concludes Ground 3(A)(ii) does not relate back because the facts were not asserted in the FAP, under Petitioner's reasoning, this underlying claim would also not relate back.

Petitioner points to *Martinez v. McGrath*, 391 F. App'x 596, 598 (9th Cir. 2010) (unpublished) for the proposition that a substantive claim (juror misconduct) and a related ineffective assistance claim (failure to investigate juror misconduct) arise from a common core of operative facts, and thus one relates back to the other. *Martinez* is inapposite for three reasons.

First, as noted, Petitioner did not assert the facts of his related ineffectiveness claim.

Second, *Martinez* involved finding assertions of facts of an ineffectiveness claim from a substantive claim, while Petitioner seeks to show assertion of facts of a substantive claim from an ineffectiveness claim.

Third, although the Ninth Circuit's unpublished decision in *Martinez* is short on factual background, the appealed from district court order reflects that all of the facts underling the ineffectiveness claim (including counsel's inaction) had been asserted in the substantive claim ("1) juror 2 went to counsel's office; 2) juror 2 expressed her concern about jury deliberations; 3) rather than investigating or interviewing juror 2, counsel told her to write a letter to the court; 4) when juror 2 returned with the letter, trial counsel copied the letter and told her to file it with the court") it was only "why counsel chose not to interview juror 2 or investigate her claims" that were "not shared by the juror misconduct claim." *McGrath*, 2008 WL 2900437, at *7-8 (E.D. Cal. July 21, 2008), *aff'd*

in part, rev'd in part, 391 F. App'x 596 (9th Cir. 2010). Thus, *Martinez* does not recognize any automatic identity between related ineffectiveness and substantive claims, but was based on the evaluation of the specific facts alleged in the successive petitions. At most, *Martinez* stands for the unremarkable proposition that allegations regarding counsel's potential tactical justifications are not necessary to asserting the facts of an ineffectiveness claim.

Here, as discussed with regard to Ground 3(A)(ii), Petitioner asserts a laundry list of specific deficiencies in communication and advice from counsel. But none of those facts were alleged anywhere in the FAP, with the exception of the breakdown in communication with trial counsel. (FAP, Doc. 6 at 6.) As discussed with regard to Ground 3(A)(i), an allegation of a breakdown in communication is different in time and type from a claim of specific deficiencies in advice.

Accordingly, Ground 4 of the SAP does not arise from a common core of operative facts asserted in, and does not relate back to, the FAP. It is, therefore, untimely.

K. GROUND 5 – AGGRAVATING FACTORS

In Ground 5, Petitioner alleges denials of due process and effective assistance by: (a) trial counsel's stipulation to aggravating factors, trial counsel's failure to advise him that, in pleading guilty, he retained the right to a jury finding of aggravating factors, per *Apprendi*, (b) that his entry into a guilty plea, conditioned on an *Apprendi* waiver, was not knowing, voluntary, and intelligent; and (c) the conditioning of guilty plea on his acquiescence to waive his rights under *Apprendi*. (SAP, Doc. 83 at 62.) Petitioner argues this claim is timely because it "alleges an alternative (or more specific) legal basis for relief based on the same facts concerning trial counsel's ineffective assistance at the guilty plea stage alleged in Claim 3." (*Id.* at 72.) Factually, Petitioner argues:

> The trial court conditioned Mr. Camargo's guilty plea on his waiver of his right to a jury trial as to aggravating factors. Mr. Camargo was not required to waive that right in order to plead guilty, however. But neither his attorney nor the court ever advised him that he had a choice in the matter. His understanding was that he could not plead guilty at all unless he agreed to this unconstitutional condition with

> respect to sentencing…This error might be harmless had Mr. Camargo's three prior felonies been eligible for consideration as aggravating factors…Mr. Kimble stipulated that Mr. Camargo's three prior felonies were qualifying "historical prior felonies," but he was wrong—none did…. In sum, none of these convictions qualified to aggravate Mr. Camargo's sentence.

(SAP, Doc. 83 at 63-65.)

Respondents simply argue that Petitioner "never previously asserted facts regarding his sentencing factors." (Answer, Doc. 86 at 44.)

Petitioner replies by relying on the COA R&R, and asserting that he is "simply expand[ing] upon the facts previously alleged regarding the sentencing factors." (Reply, Doc. 96 at 5.) But this Court is not bound by the COA R&R's determinations, and the FAP alleged no facts regarding sentencing factors.

Accordingly, Ground 5 of the SAP does not arise from a common core of operative facts asserted in, and does not relate back to, the FAP. It is, therefore, untimely.

L. GROUND 6 – *ALFORD* PLEA

1. Nature of Claim

In Ground 6 of the SAP, citing *North Carolina v. Alford*, 400 U.S. 25, 38 (1970), Petitioner asserts various constitutional violations based on the trial court's acceptance of Mr. Camargo's plea to all charges without any inquiry into the State's evidence, in the face of Mr. Camargo proclaimed his innocence and a record which indicated he did not understand the charges, and without a sufficient factual basis provided for 3 of the 5 counts on which he was convicted. (SAP, Doc. 83 at 66.)

In his Reply, Petitioner attempts to distance himself from *Alford* (perhaps because, as discussed in connection with Ground 3(B)(ii), that claim is without merit). He argues that his claim is not limited to an *Alford* claim, but extends to an assertion that his protestations indicate he did not understand the plea and thus could not have validly entered a knowing and intelligent plea.[19]

[19] Admittedly, Petitioner's SAP meanders through discussions of the import of his proclamations of innocence on whether the trial court show have been concerned about whether Petitioner's plea was knowing and voluntary, which is the concern and goal of

The undersigned will denominate the *Alford* claim in Ground 6 as Ground 6(A), and the valid plea portion as Ground 6(B).

2. Ground 6(A) (*Alford*)

Ground 6(A) is the substantive claim underlying the ineffective assistance of PCR counsel in Ground 3(B)(ii) (IAC on PCR re factual basis). The operative facts of the substantive claim (acceptance of an *Alford* plea without a factual a basis) were asserted in the course of raising the ineffectiveness claim based on PCR counsel's failure to argue "there was a lack of sufficiency of factual basis to have accepted a plea agreement in the case….and Petitioner was proclaiming his innocence." (FAP, Doc. 6 at 8.) Accordingly, Ground 6(A) relates back, and is timely.

Respondents argue that Petitioner's "assertions that the trial court failed to 'inquir[e] into the State's evidence' and that Camargo 'did not understand the charges' do not relate back because Camargo never previously asserted those facts." (Answer, Doc. 86 at 44.)

Petitioner replies that Respondents engage in excessive parsing and the objected to allegations are simply additional facts about the same incident, supporting his existing claim that "an insufficient factual basis existed to support the plea in light of his protestations of innocence." (Reply, Doc. 96 at 6.)

Indeed, the allegation that the trial court failed to inquire into the evidence is simply additional factual allegations to support the claim that the court had no basis on which to support a conviction without a confession. The assertion that Plaintiff did not understand the charges is at best an additional fact to show prejudice, but that does not change the

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Alford. But his core argument is that his rights were violated by the trial court "accepting the plea without requiring a 'strong factual basis' from the state." (SAP, Doc. 83 at 68.) His only constitutional authorities cited in his SAP were general standards of proof beyond a reasonable doubt, and *Alford*. (*Id.* at 66.) Ordinarily, the undersigned would not allow Petitioner to use a reply to convert this claim into a freestanding assertion that the plea was not knowing and voluntary. If Petitioner had intended to raise such a claim, he should have done so plainly in his petition. But, because this claim is untimely, the undersigned addresses it.

nature of the *Alford* claim asserted.

However, as discussed hereinabove in connection with Ground 3(B)(ii), because Petitioner did not protest his innocence at the plea proceedings, no factual basis was required. Accordingly, Ground 6(A) is without merit.

3. Ground 6(B) Validity of Plea

To the extent, however, that Petitioner argues that his plea was simply not knowingly and voluntarily entered (as opposed to the simple lack of a factual basis), Petitioner fails to show that any facts alleged to support such a conclusion were alleged in the FAP.

As discussed hereinabove with regard to Ground 3(A)(ii) (IAC at trial re guilty plea) and 4 (invalid guilty plea), the FAP made no allegations that Petitioner's plea was not knowing and voluntary. He made no assertions that he did not understand the charges, the effect of his plea, or his alternatives at trial. At most, he complained about the lack of a factual basis before the trial court and his protestations of innocence. Neither of those amount to factual allegations of an unknowing or involuntary plea.

Accordingly, Ground 6(B) does not arise from a common core of operative facts with, and therefore does not relate back to, the FAP. Therefore, the claim is untimely and must be dismissed with prejudice.

M. SUMMARY

Petitioner has asserted colorable claims in Grounds 1 (irreconcilable conflict) and 2(A) (IAC PCR counsel re Ground 1), and should be permitted to expand the record and an evidentiary hearing to support these claims.

Petitioner's claims in Grounds 2(B) (constructive denial of PCR counsel/*Anders*), 3(A)(i) (IAC at trial re plea offers), 3(A)(ii) (IAC at trial re guilty plea), 3(A)(iii) (IACT at trial re aggravating factor), 3(B)(i) (IAC on PCR re Ground 3A); 3(C) (cumulative effect) to the extent it relies on the allegations of Ground 2(B), 4 (invalid guilty plea), 5

(aggravating factors), and 6(B) (unknowing and involuntary plea) do not relate back to the FAP, and should be dismissed with prejudice as untimely.

Petitioner's claims in Grounds 3(B)(ii) (IAC at PCR re factual basis), 3(C) (cumulative effect), and 6A (*Alford* Plea) are without merit, and must be denied.

VI. SUPPLEMENTS TO BRIEFING AFTER EXPANSON/HEARING

In arguing Ground 2(A) (IAC on PCR re irreconcilable conflict), Respondents request the opportunity to supplement their answer to address any new evidence.

Petitioner argues that Rule 7(c), Rules Governing § 2254 Cases, limits any supplementation after an expansion of the record to admitting or denying the correctness of the supplemental materials. "Accordingly, the Court should limit the State's proposed supplemental answer to the straightforward admission or refutation of the correctness of Mr. Camargo's proposed additional materials and the facts set forth therein." (Reply on Motion, Doc. 113 at 5-6.)

Petitioner reads too much into Rule 7(c). That rule is not a limit upon the discretion of the Court to allow supplemental briefing, but simply a mandate that an opportunity to contest "the correctness" of expanded materials must be provided to "the party against whom the additional materials are offered."

It is the practice of the undersigned that, in addition to meeting the mandate of Rule 7(c), to allow supplemental briefing following any significant expansion of the record and/or evidentiary hearing, to address the effect of such new evidence on the arguments of the parties. The undersigned finds no limit on the discretion to do so here.

VII. CERTIFICATE OF APPEALABILITY

Ruling Required - Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding

under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. The recommendations if accepted will result in Petitioner's Petition being resolved adversely to Petitioner. Accordingly, a decision on a certificate of appealability is required.

Applicable Standards - The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Standard Not Met - Assuming the recommendations herein are followed in the district court's judgment, that decision will be in part on procedural grounds, and in part on the merits. Under the reasoning set forth herein, jurists of reason would not find it debatable whether the district court was correct in its procedural ruling, and jurists of reason would not find the district court's assessment of the constitutional claims debatable or wrong.

Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Petition in any final judgment, a certificate of appealability should be denied.

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VIII. ORDER

IT IS THEREFORE ORDERED that Petitioner's Motion for Expansion of the Record and an Evidentiary Hearing, filed December 28, 2018 (Doc. 107) is **GRANTED**, as to Grounds 1(irreconcilable conflict) and 2(A) (IAC at PCR re irreconcilable conflict).

IX. RECOMMENDATIONS

IT IS THEREFORE RECOMMENDED that:

1. Petitioner's claims in Grounds 2(B) (constructive denial of PCR counsel/*Anders*), 3(A)(i) (IAC at trial re plea offers), 3(A)(ii) (IAC at trial re guilty plea), 3(A)(iii) (IACT at trial re aggravating factor), 3(B)(i) (IAC on PCR re Ground 3A); 3(C) (cumulative effect) to the extent it relies on the allegations of Ground 2(B), 4 (invalid guilty plea), 5 (aggravating factors), and 6(B) (unknowing and involuntary plea) of Petitioner's Second Amended Petition for Writ of Habeas Corpus, filed December 13, 2017 (Doc. 83) be **DISMISSED WITH PREJUDICE**.
2. Petitioner's claims in Grounds 3(B)(ii) (IAC at PCR re factual basis), 3(C) (cumulative effect), and 6A (*Alford* Plea) of Petitioner's Second Amended Petition for Writ of Habeas Corpus, filed December 13, 2017 (Doc. 83) be **DENIED**.
3. That the case be again referred to the undersigned for an evidentiary hearing, and further report and recommendation, on Grounds 1 and 2(a).

IT IS FURTHER RECOMMENDED that, to the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

X. EFFECT OF RECOMMENDATIONS

The recommendations herein are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure,* the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

Dated: August 29, 2019

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James F. Metcalf
United States Magistrate Judge