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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND J. SCOTT, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 21-17072 D.C. No. 2:20-cv-02343-DWL District of Arizona, Phoenix ORDER

Before: BENNETT and FORREST, Circuit Judges.

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

All pending motions are denied as moot.

DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Raymond J Scott,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-20-02343-PHX-DWL

ORDER

On December 2, 2020, Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 (the "Petition"). (Doc. 1.) On September 7, 2021, Magistrate Judge Metcalf issued a Report and Recommendation ("R&R") concluding the Petition should be denied and dismissed with prejudice. (Doc. 12.) Afterward, Petitioner filed objections to the R&R (Doc. 22) and Respondents filed a response (Doc. 23). For the following reasons, the Court overrules Petitioner's objections, adopts the R&R, and terminates this action.

I. Background

The Crime. On December 25, 2013, "[w]hile his ex-wife and three children were visiting him . . . , Petitioner forced his ex-wife into the bedroom, and at gun point and later knife point, attempted to rape [her]. At one point the victim escaped the bedroom, intending to leave with the child still in the apartment, but Petitioner drug her back in and threatened to kill everyone if she did not cooperate. At one point in the struggle, one of the children came into the room, and the ex-wife threw her phone to her and sent her to get help. She did so, taking one of the other children with her." (Doc. 12 at 1.)

Trial Court Proceedings. On December 26, 2013, following his arrest, Petitioner made an initial appearance in Maricopa County Superior Court. (*Id.* at 2.)

On January 2, 2014, Petitioner was indicted on charges of aggravated assault, sexual assault, attempted sexual assault, kidnapping, public sexual indecency to a minor, and threatening and intimidating. (*Id.*)

During trial, the prosecution introduced evidence that Petitioner had sexually assaulted a former girlfriend in 1999. (*Id.*)[1] Additionally, the prosecution amended Count 13 of the indictment (attempted sexual assault) to refer to "penile anal intercourse" rather than "penile vaginal intercourse." (*Id.*)

The jury ultimately convicted Petitioner of three counts of aggravated assault, one count of attempted sexual assault, two counts of kidnapping, one count of public sexual indecency to a minor, and one count of threatening and intimidating. (*Id.*) Petitioner was acquitted of the remaining charges, including the charge in Count 13. (*Id.*) Petitioner was sentenced to 25 years in prison. (*Id.*)

Direct Appeal. During his direct appeal, Petitioner was represented by counsel. (*Id.*) Petitioner's counsel "filed an opening brief arguing [1] the two kidnapping convictions violated double jeopardy, and [2] admission of the prior sexual assault was error. Beyond a parenthetical notation to a state case citation, Petitioner cited no federal authority." (*Id.*) Afterward, Petitioner attempted to file his own "Supplemental Opening Brief," in which he sought to raise additional claims of "error in amendment of the Indictment, introduction of the prior sexual misconduct, and jury determination of aggravation of sentence when not charged in the indictment." (*Id.*) However, "[t]he Arizona Court of Appeals struck the brief as improperly filed given Petitioner's

[1] *See also State v. Scott*, 403 P.3d 595, 597 (Ariz. Ct. App. 2017) ("In 1999, Scott sexually assaulted C.T., a former girlfriend with whom he was living in Pennsylvania. Shortly after C.T. had ended their romantic relationship, Scott forced C.T. into her bedroom in their shared apartment, restrained her with duct tape, and sexually assaulted her. Scott then immediately released C.T., gave her his gun, and threatened to stab her with a scalpel if she did not kill him. After C.T. refused to shoot him, Scott allowed her to get dressed and leave, but threatened to kill himself if she spoke to the police. C.T. left and called the police, who arrested Scott. Scott was found guilty of aggravated indecent assault and sentenced to prison.").

representation, lack of right to a meaningful relationship with counsel, and counsel's lack of obligation to raise every claim requested." (*Id.* at 2-3.)

In a published decision issued on September 12, 2017, the Arizona Court of Appeals affirmed Petitioner's convictions and sentence. *State v. Scott*, 403 P.3d 595 (Ariz. Ct. App. 2017). As for Petitioner's first assignment of error (double jeopardy), the court held as follows:

> [W]hether [Petitioner] was properly convicted of two counts of kidnapping turns entirely on whether he restrained [the victim] continuously throughout the entire ordeal, or released her and restrained her anew. . . . Here, [the victim] briefly escaped [Petitioner] midway through the ordeal, when she ran from the bedroom to the living room . . . . [The victim] was momentarily free, but chose not to run directly out of the residence, instead pausing to grab her daughter. [The victim's] choice of action and freedom of movement during that period showed [Petitioner] did not continue to restrain her, albeit briefly, after he initially forced her into his bedroom. [Petitioner] then committed a second act of kidnapping, separate from the first, when he grabbed [the victim] anew and pulled her back into the bedroom for the purpose of sexual assault. For these reasons, [Petitioner's] convictions for two counts of kidnapping were not multiplicitous.

Id. at 598-99 (citations omitted). As for Petitioner's second assignment of error (admission of the prior conviction), the court held that it was properly admitted under Rule 404(b) of the Arizona Rules of Evidence because, "[b]y raising the defenses of consent and no specific intent, [Petitioner] brought into contention his own intent. [Petitioner's] prior sexual assault, strikingly similar in character to the current crime, was relevant to prove his intent and lack of mistake as to [the victim's] purported consent. In each crime, [Petitioner] assaulted a previous partner, restrained her in a bedroom, menaced her with a weapon, and threatened to kill himself if she called the police. Evidence of the previous similar crime was not a mere inflammatory accusation against [Petitioner]; it was evidence that tended to prove he was not acting under a mistaken understanding that [the victim] consented to his acts." *Id.* at 599-600.

Petitioner did not seek review by the Arizona Supreme Court. (Doc. 12 at 3.)

PCR Proceedings. On October 26, 2017, Petitioner initiated his post-conviction

relief ("PCR") proceeding by filing a timely PCR notice. (*Id.* at 3.) However, Petitioner's court-appointed counsel subsequently filed a notice asserting an inability to find a "colorable" issue for review. (*Id.*)

Afterward, "Petitioner filed his pro per PCR Petition, arguing: (1) constitutional error in the amendment of the indictment and ineffective assistance of trial counsel in objecting; (2) ineffective assistance of appellate counsel in failing to raise the challenge to the amendment; (3) a denial of due process from the prosecution admitting improper or inaccurate evidence; and (4) various constitutional errors in the supervening indictment proceedings. (*Id.*, citations omitted.)

The PCR court denied relief without holding an evidentiary hearing. (*Id.* at 3-4.) As for Petitioner's first, third, and fourth claims, the court concluded they were precluded under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure because Petitioner could have raised them (but failed to raise them) during his direct appeal. (*Id.*) As for the second claim (ineffective assistance of counsel ("IAC")), the court rejected it on the merits "for failing to show deficient performance or prejudice." (*Id.*)

Petitioner sought further review in the Arizona Court of Appeals and Arizona Supreme Court, but both courts rejected Petitioner's requests for relief. (*Id.* at 4.)

The Petition. As noted, Petitioner filed the Petition in December 2020. (Doc. 1.) The Court previously construed it as raising six grounds for relief:

> In Ground One, Petitioner appears to claim that his rights to due process and confrontation were violated when the state was permitted to amend his indictment after the close of evidence. In Ground Two, he claims that he received ineffective assistance of counsel when his appellate attorney failed to raise on appeal the issue identified in Ground One. In Ground Three, Petitioner claims that the state "knowing[ly]" relied on "improper or inaccurate" information to obtain his conviction, in violation of due process. In Ground Four, Petitioner appears to contend that the trial court's probable cause determination violated his rights to due process and to confront witnesses against him. In Ground Five, Petitioner claims that his kidnapping convictions and sentences violate the Fifth Amendment prohibition on double jeopardy and constitute multiple punishments for a single offense. In Ground Six, Petitioner alleges the trial court improperly admitted evidence of a prior sexual assault.

(Doc. 6 at 2.)

The R&R. The detailed, 33-page R&R concludes the Petition should be denied and dismissed with prejudice. (Doc. 12.) First, the R&R concludes that five of the six claims—all but the IAC claim in Ground Two—are procedurally defaulted or procedurally barred on independent and adequate state grounds. (*Id.* at 11-18.) Second, the R&R concludes that Petitioner cannot establish "cause and prejudice" to overcome these procedural bars to Grounds 1 and 2-6. (*Id.* at 18-23.) Third, the R&R concludes that Petitioner cannot invoke the "actual innocence" exception to the applicable exhaustion requirements because he "fails to offer anything to show new reliable evidence that would preclude any reasonable juror from convicting him." (*Id.* at 23-24.) Fourth, the R&R concludes that, putting aside the issue of exhaustion, Petitioner would not be entitled to habeas relief because his claims fail on the merits. (*Id.* at 24-31.) Finally, the R&R concludes that a certificate of appealability ("COA") should be denied. (*Id.* at 32.)

II. Legal Standard

A party may file written objections to an R&R within fourteen days of being served with a copy of it. Rules Governing Section 2254 Cases 8(b) ("Section 2254 Rules"). Those objections must be "specific." *See* Fed. R. Civ. P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations."). "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *See* Fed. R. Civ. P. 72(b)(3).

District courts are not required to review any portion of an R&R to which no specific objection has been made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)

("[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise."). Thus, district judges need not review an objection to an R&R that is general and non-specific. *See, e.g., Warling v. Ryan*, 2013 WL 5276367, *2 (D. Ariz. 2013) ("Because de novo review of an entire R & R would defeat the efficiencies intended by Congress, a general objection 'has the same effect as would a failure to object.'") (citations omitted); *Haley v. Stewart*, 2006 WL 1980649, *2 (D. Ariz. 2006) ("[G]eneral objections to an R & R are tantamount to no objection at all.").[2]

III. Analysis

Petitioner's objections to the R&R lack merit. As Respondents correctly note in their response, "Petitioner's objections largely amount to his repeating the same arguments he raised in his habeas petition and reply." (Doc. 23 at 1.) Indeed, the discussion in the lengthy "Introduction" portion of Petitioner's filing (Doc. 22 at 3-7) does not seem to be tethered to the R&R at all. This approach is impermissible—at this stage of the proceedings, Petitioner must identify specific flaws in the R&R's reasoning, not simply repeat his earlier arguments. For similar reasons, Petitioner's attempt to raise a blanket objection "to all of the recommendations" in the R&R (*id.* at 2) fails because it is insufficiently specific.

To the extent Petitioner seeks to raise more specific objections in the latter portion of his filing, those objections are unavailing. For example, in the assignments of error denoted as No. 3 ("The State Knowingly Relied on Improper or Inaccurate Information to Obtain [Petitioner's] Conviction"), No. 5 ("Petitioner's Protection from Multiple Punishments under the Double Jeopardy Were Violated Because There Was Only One, Continuing Kidnapping, But He Was Convicted of Two Seperate [sic] Charges of Kidnapping"), and No. 6 ("The Trial Court Improperly Admitted Evidence of a Prior Sexual Assault or Other Bad Acts Under Arizona Rules of Evidence 403 and 404"),

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[2] *See generally* S. Gensler, 2 Federal Rules of Civil Procedure, Rules and Commentary, Rule 72, at 457 (2021) ("A party who wishes to object to a magistrate judge's ruling must make specific and direct objections. General objections that do not direct the district court to the issues in controversy are not sufficient. . . . [T]he objecting party must specifically identify each issue for which he seeks district court review . . . .").

Plaintiff does not develop any reasoned argument at all—he merely "objects" to the R&R's analysis for unspecified reasons. (Doc. 22 at 15-16.)

Finally, although Petitioner's arguments concerning the assignments of error denoted (implicitly or explicitly) as No. 1 ("The Unlawful Amendments to Indictment"), No. 2 ("Appellate Counsel Was Ineffective and its Errors or Omissions Was So Egregious As to Amount to Incopetence [sic] or Sixth Amendment Violation"), and No. 4 ("Petitioner's Due Process and Confrontation Rights Were Violated When the Preliminary Hearing Was Set At His Initial Appearance Was Vacated When The Supervening Indictment Was Filed") are more detailed, he has failed to establish any error in the R&R's conclusion that habeas relief is unwarranted. For example, as to assignment of error No. 1, Petitioner's arguments seemed to be premised on the notion that the amendment to the indictment was not limited to Count 13 (as the R&R found) and instead pertained to other counts, too. (Doc. 22 at 10-11.) But as Respondents correctly note, "Petitioner . . . does not specify which additional counts of the indictment were allegedly amended in his objections. And the only portions of the record he cites to come from his PCR petitions. The record, however, only shows that Count 13 of the indictment was amended. Furthermore, as observed in the R&R, Petitioner was acquitted of Count 13." (Doc. 23 at 3.) Additionally, Petitioner's apparent objection to the R&R's finding of procedural default as to the unlawful-amendment claim seems to be premised on the belief that, because he "properly raised [this claim] in a PCR proceeding," it is also properly preserved for habeas review. (Doc. 22 at 9-10.) This ignores the R&R's conclusion that, "[t]o the extent Petitioner did fairly present [this claim] in his PCR proceedings," it was "procedurally barred on the basis of Arizona's waiver bar" because Petitioner failed to raise it during his direct appeal. (Doc. 12 at 11.)

Next, as for assignment of error No. 2, Respondents correctly note that "Petitioner does not actually contest the R&R's conclusion that it was without merit" and limits his objections to the issue of procedural default. (Doc. 23 at 3.)

Finally, as for assignment of error No. 4, Respondents correctly note that

Petitioner's objections lack merit because he "does not address the R&R's conclusion that the claim is procedurally defaulted" and because "to the extent Petitioner is relying on an alleged violation of State law, it does not entitle him to habeas relief." (*Id.* at 4.)

Accordingly, **IT IS ORDERED** that:

(1) Petitioner's objections to the R&R (Doc. 22) are **overruled**.

(2) The R&R (Doc. 12) is **accepted**.

(3) The Petition (Doc. 1) is **denied and dismissed with prejudice**.

(4) A Certificate of Appealability and leave to proceed *in forma pauperis* on appeal are **denied** because dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable and because Petitioner has not made a substantial showing of the denial of a constitutional right.

(5) The Clerk shall enter judgment accordingly and terminate this action.

Dated this 9th day of December, 2021.

Dominic W. Lanza
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Raymond J Scott,

Petitioner,

v.

David Shinn, et al.,

Respondents.

NO. CV-20-02343-PHX-DWL

JUDGMENT IN A CIVIL CASE

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

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

Debra D. Lucas
District Court Executive/Clerk of Court

December 9, 2021

By s/ Rebecca Kobza
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Raymond J. Scott,
Petitioner
-vs-
David Shinn, *et al.*,
Respondents.

CV-20-2343-PHX-DWL (JFM)

Report & Recommendation on Petition for Writ of Habeas Corpus

I. MATTER UNDER CONSIDERATION

Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

While his ex-wife and three children were visiting him on Christmas Day, 2013, Petitioner forced his ex-wife into the bedroom, and at gun point and later knife point, attempted to rape his ex-wife. At one point the victim escaped the bedroom, intending to leave with the child still in the apartment, but Petitioner drug her back in and threatened to kill everyone if she did not cooperate. At one point in the struggle, one of the children came into the room, and the ex-wife threw her phone to her and sent her to get help. She did so, taking one of the other children with her. (Exh. I, Mem. Dec. 9/12/17 at ¶¶ 2-6.)

(Exhibits to the Answer (Doc. 10) are referenced herein as "Exh. ___.")

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B. PROCEEDINGS AT TRIAL

Following his arrest, Petitioner made an initial appearance in Maricopa County Superior Court on December 26, 2013. (Exh. Y, Docket at 11.) A direct complaint was filed on December 27, 2013. (*Id.*) On January 2, 2014, Petitioner was indicted on charges of aggravated assault, sexual assault, attempted sexual assault, kidnapping, public sexual indecency to a minor, and threatening and intimidating. (Exh. A, Indictment.) He proceeded to trial with counsel, where the prosecution introduced evidence that Petitioner had sexually assaulted a former girlfriend in 1999. (Exh. I, Mem Dec. 9/12/17 at ¶ 3.) During trial, the prosecution amended Count 13 (attempted sexual assault) of the indictment to refer to "penile anal intercourse" rather than "penile vaginal intercourse." (Exh. B, M.E. 2/26/16 at 2; Exh. D, Mem. 3/3/16.)

Petitioner was convicted on 3 counts of aggravated assault, attempted sexual assault, 2 counts of kidnapping, public sexual indecency to a minor, and threatening and intimidating. He was acquitted of the remaining charges, including the charge in Count 13. (*Id.*) Petitioner was sentenced to 25 years in prison, comprised of various sentences the longest of which was 17 years for kidnapping, and a successive 8 year sentence on aggravated assault. (Exh. E, Sentence.)

C. PROCEEDINGS ON DIRECT APPEAL

Petitioner filed a direct appeal. Counsel was appointed and filed an opening brief arguing the two kidnapping convictions violated double jeopardy, and admission of the prior sexual assault was error. (Exh. G, Opening Brief.) Beyond a parenthetical notation to a state case citation, Petitioner cited no federal authority. (*Id.* at 8.)

On March 27, 2017 Petitioner filed a Supplemental Opening Brief (Reply, Doc. 11, Exhibits at 15, *et seq.*, Supp. Brief), arguing error in amendment of the Indictment, introduction of the prior sexual misconduct, and jury determination of aggravation of sentence when not charged in the indictment. The Arizona Court of Appeals struck the brief as improperly filed given Petitioner's representation, lack of right to a meaningful

relationship with counsel, and counsel's lack of obligation to raise every claim requested (*id.* at 22, *et seq.*, Order 4/17/17).

The Arizona Court of Appeals found no double jeopardy violation because Petitioner forced the victim into the bedroom twice, once at the outset of the incident and again after the victim escaped the bedroom. (Exh. I, Mem. Dec. 9/12/17 at ¶ 12.) The court found the prior conviction admissible to rebut a claim of mistake as to consent, and no specific intent, and was not unduly prejudicial. (*Id.* at ¶¶ 15-17.) The court affirmed Petitioner's convictions and sentences. (*Id.* at ¶ 18.)

Petitioner did not seek review by the Arizona Supreme. (Petition, Doc. 1 at 3.)

D. PROCEEDINGS ON POST-CONVICTION RELIEF

Petitioner commenced his first post-conviction relief (PCR) proceeding by filing a timely PCR Notice on October 26, 2017 (Exh. J). Counsel was appointed who eventually filed a Notice of Completed Review (Exh. K) asserting an inability to find a "colorable" issue for review. Petitioner filed his *pro per* PCR Petition (Exh. L), arguing: (1) constitutional error in the amendment of the indictment and ineffective assistance of trial counsel in objecting (*id.* at 4, *et seq.*); (2) ineffective assistance of appellate counsel in failing to raise the challenge to the amendment (*id.* at 21, *et seq.*); (3) a denial of due process from the prosecution admitting improper or inaccurate evidence (*id.* at 24, *et seq.*); and (4) various constitutional errors in the supervening indictment proceedings (*id.* at 28, et seq.).

The state responded that, with the exception of the claims of ineffective assistance of trial and appellate counsel, Petitioner's claims were precluded under Ariz. R. Crim. Proc. 32.2(a)(3) because they "could have been raised on direct appeal." (Exh. M, PCR Resp at 7.) The state argued the merits of the ineffective assistance claims.

The PCR court adopted the state's arguments on preclusion of the claims other than ineffective assistance. The court found the claims of ineffective assistance to be without merit for failing to show deficient performance or prejudice. Accordingly, the proceeding

was dismissed without an evidentiary hearing. (Exh. O, M.E. 3/28/219.) Petitioner sought rehearing (Exh. P) which was denied (Exh. Q, M.E. 5/1/19).

Petitioner sought review by the Arizona Court of Appeals. (Exh. R, PFR.) The Arizona Court of Appeals granted review, but summarily denied relief based on absence of an abuse of discretion or error of law. (Exh. U, Mem. Dec. 3/26/20.) In a *sua sponte* Order issued September 1, 2020, the Arizona Court of Appeals amended its decision by changing the determination from "affirmed" to "review granted; relief denied." (Exh. V, Order 9/1/20.)

In the meantime, on May 14, 2020 Petitioner sought review by the Arizona Supreme Court (Exh. W), which summarily denied review on September 8, 2020 (Exh. X).

E. PRESENT FEDERAL HABEAS PROCEEDINGS

Petition - Petitioner, presently incarcerated in the Arizona State Prison Complex at Florence, Arizona, commenced the current case by filing his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on December 2, 2020 (Doc. 1). Petitioner's Petition asserts the following six grounds for relief:

> In Ground One, Petitioner appears to claim that his rights to due process and confrontation were violated when the state was permitted to **amend his indictment** after the close of evidence. In Ground Two, he claims that he received **ineffective assistance** of counsel when his appellate attorney failed to raise on appeal the issue identified in Ground One. In Ground Three, Petitioner claims that the state "knowing[ly]" relied on **"improper or inaccurate" information** to obtain his conviction, in violation of due process. In Ground Four, Petitioner appears to contend that the trial court's **probable cause determination** violated his rights to due process and to confront witnesses against him. In Ground Five, Petitioner claims that his kidnapping convictions and sentences violate the Fifth Amendment prohibition **on double jeopardy** and constitute multiple punishments for a single offense. In Ground Six, Petitioner alleges the trial court **improperly admitted evidence** of a prior sexual assault.

(Order 1/25/21, Doc. 6 at 2 (emphasis added.)

Response - On February 11, 2021, Respondents filed their Answer ("Response") (Doc. 10). Respondents argue: (a) Petitioner has procedurally defaulted his state remedies

on Grounds 1, and 3 through 6; (b) Ground 1 (amendment of indictment) is moot; (c) the related claims in Ground 2 (ineffective assistance) is therefore without merit; (d) Ground 4 (probable cause determinations) is without merit because there is no federal constitutional right to a grand jury indictment, and the claim relies on state law violations not cognizable on habeas review; and (e) Ground 6 relies on state law violations not cognizable on habeas review.

Reply - On March 2, 2021, Petitioner filed a Reply (Doc. 11). Petitioner argues his claims are not procedurally defaulted because he raised them in his PCR proceeding, both directly and as part of his claims of ineffective assistance. He further argues that the ineffective assistance of appellate counsel in failing to raise the claims constitutes cause to excuse his procedural defaults. (*Id.* at 1-3.) He argues the merits of his claim in Ground 1 (amendment to indictment).

III. APPLICATION OF LAW TO FACTS

A. EXHAUSTION, PROCEDURAL DEFAULT AND PROCEDURAL BAR

Respondents argue that most of Petitioner's claims are procedurally defaulted and thus are barred from federal habeas review.

1. Applicable Law

a. Exhaustion Requirement

Generally, a federal court has authority to review a state prisoner's claims only if available state remedies have been exhausted. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*); 28 U.S.C. § 2254(b) and (c). When seeking habeas relief, the burden is on the petitioner to show that he has properly exhausted each claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981).

Ordinarily, to exhaust his state remedies, the petitioner must have fairly presented his federal claims to the state courts. "A petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim:

(1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (citations omitted).

Proper Forum - "In cases not carrying a life sentence or the death penalty, 'claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them.'" *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2005) (quoting *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999)).

Proper Vehicle - Ordinarily, "to exhaust one's state court remedies in Arizona, a petitioner must first raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction relief pursuant to Rule 32." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994).

Factual Basis –A petitioner may not broaden the scope of a constitutional claim in the federal courts by asserting additional *operative* facts that have not yet been fairly presented to the state courts. *Brown v. Easter*, 68 F.3d 1209 (9th Cir. 1995); *see also, Pappageorge v. Sumner*, 688 F.2d 1294 (9th Cir. 1982). Not all new factual allegations render a claim unexhausted, but a petitioner may not "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Legal Basis - Failure to alert the state court to the constitutional nature of the claim will amount to failure to exhaust state remedies. *Duncan v. Henry*, 513 U.S. 364, 366 (1995). While the petitioner need not recite "book and verse on the federal constitution," *Picard v. Connor,* 404 U.S. 270, 277-78 (1971) (quoting *Daugherty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)), it is not enough that all the facts necessary to support the federal claim were before the state courts or that a "somewhat similar state law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (*per curiam*).

In particular, Petitioner makes various arguments that he asserted ineffective assistance claims related to various substantive claims. Even assuming arguendo that these claims of ineffective assistance were fairly raised as federal claims, that would not thereby transform the underlying substantive claim into a federal claim. "While [the ineffective

assistance and underlying substantive claim are] admittedly related, they are distinct claims with separate elements of proof, and each claim should have been separately and specifically presented to the state courts." *Rose v. Palmateer*, 395 F.3d 1108, 1112 (9th Cir. 2005).

b. Procedural Default

Ordinarily, unexhausted claims are dismissed without prejudice. *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). However, where a petitioner has failed to properly exhaust his available administrative or judicial remedies, and those remedies are now no longer available because of some procedural bar, the petitioner has "procedurally defaulted" and is generally barred from seeking habeas relief. Dismissal with prejudice of a procedurally defaulted habeas claim is generally proper absent a "miscarriage of justice" which would excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

Respondents argue that Petitioner may no longer present his unexhausted claims to the state courts. Respondents rely upon Arizona's waiver bar, set out in Ariz. R. Crim. Proc. 32.2(a)(3) and time limit bar, set out in Ariz. R. Crim. P. 32.4. (Answer, Doc. 10 at 10-11.)

Remedies by Direct Appeal - Under Ariz.R.Crim.P. 31.3, the time for filing a direct appeal expires twenty days after entry of the judgment and sentence. Moreover, no provision is made for a successive direct appeal. Accordingly, direct appeal is no longer available for review of Petitioner's unexhausted claims.

Remedies by Post-Conviction Relief – Under Arizona's waiver and timeliness bars, Petitioner can no longer seek review by a subsequent PCR Petition.

Waiver Bar - Under the rules applicable to Arizona's post-conviction process, a claim may not ordinarily be brought in a petition for post-conviction relief that "has been waived at trial, on appeal, or in any previous collateral proceeding." Ariz.R.Crim.P. 32.2(a)(3). Under this rule, some claims may be deemed waived if the State simply shows "that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding." *Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002) (quoting

Ariz.R.Crim.P. 32.2, Comments). *But see State v. Diaz*, 236 Ariz. 361, 340 P.3d 1069 (2014) (failure of PCR counsel, without fault by petitioner, to file timely petition in prior PCR proceedings did not amount to waiver of claims of ineffective assistance of trial counsel).

For others of "sufficient constitutional magnitude," the State "must show that the defendant personally, "knowingly, voluntarily and intelligently' [did] not raise' the ground or denial of a right." *Id.* That requirement is limited to those constitutional rights "that can only be waived by a defendant personally." *State v. Swoopes*, 216 Ariz. 390, 399, 166 P.3d 945, 954 (App.Div. 2, 2007). Indeed, in coming to its prescription in *Stewart v. Smith*, the Arizona Supreme Court identified: (1) waiver of the right to counsel, (2) waiver of the right to a jury trial, and (3) waiver of the right to a twelve-person jury under the Arizona Constitution, as among those rights which require a personal waiver. 202 Ariz. at 450, 46 P.3d at 1071. Claims based upon ineffective assistance of counsel are determined by looking at "the nature of the right allegedly affected by counsel's ineffective performance. *Id.*

Here, none of Petitioner's claims are of the sort requiring a personal waiver, and Petitioner's claims of ineffective assistance similarly have at their core the kinds of claims not within the types identified as requiring a personal waiver.

Timeliness Bar - Even if not barred by preclusion, Petitioner would now be barred from raising his claims by Arizona's time bars. Ariz.R.Crim.P. 32.4 requires that petitions for post-conviction relief (other than those which are "of-right") be filed "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later." *See State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995) (applying 32.4 to successive petition, and noting that first petition of pleading defendant deemed direct appeal for purposes of the rule). That time has long since passed.

Exceptions - Rules 32.2 and 32.4(a) do not bar dilatory claims if they fall within the category of claims specified in Ariz.R.Crim.P. 32.1(d) through (h). See Ariz. R. Crim.

P. 32.2(b) (exceptions to preclusion bar); Ariz. R. Crim. P. 32.4(a) (exceptions to timeliness bar). Petitioner has not asserted that any of these exceptions are applicable to his claims. Nor does it appear that such exceptions would apply. The rule defines the excepted claims as follows:

> d. The person is being held in custody after the sentence imposed has expired;
> e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:
> (1) The newly discovered material facts were discovered after the trial.
> (2) The defendant exercised due diligence in securing the newly discovered material facts.
> (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.
> f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part; or
> g. There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; or
> h. The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

Ariz.R.Crim.P. 32.1.

Paragraph 32.1 (d) (expired sentence) generally has no application to an Arizona prisoner who is simply attacking the validity of his conviction or sentence. Where a claim is based on "newly discovered evidence" that has previously been presented to the state courts, the evidence is no longer "newly discovered" and paragraph (e) has no application. Here, Petitioner has long ago asserted the facts underlying his claims. Paragraph (f) has no application where the petitioner filed a timely notice of post-conviction relief, as Petitioner did. Paragraph (g) has no application because Petitioner has not asserted a change in the law since his last PCR proceeding. Finally, paragraph (h), concerning claims of actual innocence, has no application to the procedural claims Petitioner asserts in this proceeding.

Therefore, none of the exceptions apply, and Arizona's time and waiver bars would prevent Petitioner from returning to state court. Thus, Petitioner's claims that were not fairly presented are all now procedurally defaulted.

c. Procedural Bar on Independent and Adequate State Grounds

Related to the concept of procedural default is the principle of barring claims actually disposed of by the state courts on state grounds. "[A]bsent showings of 'cause' and 'prejudice,' federal habeas relief will be unavailable when (1) 'a state court [has] declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.' " *Walker v. Martin,* 562 U.S. 307, 316 (2011).

In *Bennett v. Mueller*, 322 F.3d 573 (9th Cir.2003), the Ninth Circuit addressed the burden of proving the independence and adequacy of a state procedural bar.

> Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

Id. at 584-585.

Waiver Bar - Petitioner fails to proffer anything to suggest that Rule 32.2(a)(3) is not an independent and adequate state ground, sufficient to bar federal habeas review of claims a defendant could have but did not raise on direct appeal. The federal courts have routinely held that it is. "Arizona's waiver rules are independent and adequate bases for denying relief." *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014).

Timeliness Bar – Similarly, Petitioner fails to proffer anything to suggest that Rule 32.4 is not an independent and adequate state ground, sufficient to bar federal habeas review of claims a defendant could have but did not raise on direct appeal. The Ninth Circuit has held that it is. *Simmons v. Schriro*, 187 Fed. Appx. 753, 754 (9th Cir. 2006) (unpublished decision).

2. Application to Petitioner's Claims

a. Grounds 1 and 3 – Procedurally Barred or Procedurally Defaulted

Respondents argue the claims in Ground 1 (amendment of indictment) and 3 (inaccurate evidence) were procedurally defaulted on direct appeal, and procedurally barred in the PCR court as not colorable. (Answer, Doc. 10 at 12-18.)

Petitioner replies that these claims were raised in his PCR petition (Reply, Doc. 11 at 2), and any failure to raise them on direct appeal was the result of ineffective assistance of appellate counsel.

The undersigned finds that Petitioner failed to raise his claim in Grounds 1 and 3 on direct appeal. To the extent that Petitioner attempted to raise them in his proffered Supplemental Brief on direct appeal, that *pro se* filing was not properly made and thus any claims in it not fairly presented.

Petitioner's arguments in his briefs (federal and state) are prolix and meandering. Because it does not alter the outcome the undersigned does not attempt to differentiate between claims that were actually fairly presented in his PCR proceedings, and those that were not. (The exception is Petitioner's claim of ineffective assistance of appellate counsel is addressed hereinafter.)

To the extent Petitioner **did fairly present** these claims in his PCR proceedings (*see* Exh. L, PCR Pet. at 4-21 (Ground 1-amendment of indictment), and 24-27 (Ground 3-inaccurate info)), the PCR court adopted (Exh. O, M.E. 3/28/19 at 2) the state's argument that these claim were precluded under Arizona's waiver bar, Ariz. R. Crim. Proc. 32.2(a)(3) (Exh. M, PCR Resp. at 6-7). It is true that the PCR court utilized the language of "fails to state a colorable claim." Read in context, and in light of the adopted PCR Response, the court was applying the waiver bar in Rule 32.2(a)(3) and finding no exception established under Rule 32.2(b). This ruling was affirmed on petition for review. (Exh. U, Mem. Dec. 3/26/20.) Therefore, to the extent raised, Petitioner's claims in Grounds 1 and 3 were procedurally barred on the basis of Arizona's waiver bar.

To the extent Petitioner **did not fairly present** the claims in these Grounds because

they are sufficiently different from those raised in his PCR proceedings, they are now procedurally defaulted under Arizona's waiver and timeliness bars for the reasons discussed hereinabove in Section III(A)(2).

b. Ground 2 – Exhausted

Respondents concede that Petitioner properly exhausted his state remedies on Ground 2 (ineffective assistance). (*See* Answer, Doc. 10 at 22.) This Ground is addressed hereinafter on its merits.

c. Ground 4 – Probable Cause Procedures

In Ground 4, Petitioner argues that his due process and confrontation rights were violated when the preliminary hearing (to determine probable cause to prosecute) set at his initial appearance was vacated when the supervening indictment was filed a week later. (Petition, Doc. 1 at 9.) Petitioner argues this claim was properly exhausted in his PCR proceedings.

Indeed, Petitioner raised this same claim in his PCR Petition, citing the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. (Exh. L, PCR Pet. at 28-34.) However, as with the fairly presented portions of Grounds 1 and 3, this claim was procedurally barred based on Arizona's waiver bar, Ariz. R. Crim. Proc. 32.2(a)(3), an independent and adequate state ground.

d. Ground 5 – Procedurally Defaulted

In Ground 5, Petitioner argues that his protection from multiple punishments under the Double Jeopardy Clause were violated because there was only one, continuing kidnapping, but he was convicted of two separate charges of kidnapping.

Respondents argue that although Petitioner raised a double jeopardy claim on direct appeal, he did not fairly present it as a federal claim (rather, as a state law claim), and thus his federal double jeopardy claim in Ground 5 is now procedurally defaulted. (Answer, Doc. 10 at 16, *et seq.*) Petitioner does not address this ground in his Reply. In his Petition, he asserts this claim was raised on direct appeal. (Doc. 1 at "9A" (phys. pg. 11).)

While Petitioner clearly raised the facts of this claim on direct appeal, the

undersigned concludes for the reasons discussed hereinafter that he did not fairly present it as a federal claim. "[T]he petitioner must make the federal basis of the claim explicit either by specifying particular provisions of the federal Constitution or statutes, or by citing to federal case law," *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005), or by "a citation to a state case analyzing [the] federal constitutional issue." *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003).

No Citation to Federal Authority - Petitioner's appellate brief made no reference to federal double jeopardy protections, and cited no federal cases in support of his state law claim.

Petitioner's counsel's failure to directly cite to federal authorities or the Fifth Amendment of the United States Constitution must be understood in light of Arizona's own constitutional prohibition against double jeopardy, which provides: "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." Ariz. Rev. Stat., Const. Art. 2 § 10. Moreover, Petitioner explicitly relied on Arizona's statutory prohibition on double jeopardy, Ariz. Rev. Stat. § 13-111, which was quoted at the outset of his double jeopardy argument. (Exh. G, Open. Brief at 7.)

Parenthetical Citation Not Fair Presentation - It is true that Petitioner's brief included the following:

> The fact that concurrent sentences were imposed for the multiplicitous counts does not negate the error because the defendant still improperly receives multiple convictions for the single crime. Id. at 125, 128, 23 P.3d at 670, 673. *See also State v. Brown*, 217 Ariz. 617, 620, 621 ¶ 13, 177 P.3d 878, 881, 882 (App. 2008). Receiving two convictions for one crime is punishment. *Id.* at 621, 177 P.3d at 882 (***quoting* Ball v. United States**, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)).

(Exh. G, Open. Brief at 8 (bold added).)

However, such a parenthetical reference by counsel is not in the nature of a reliance on the cited authority, but attribution of another case that the cited case has quoted. *See The Bluebook: A Uniform System of Citation*, Rule 10.6.2 (20th ed., 2015) ("When a case

cited as authority itself quotes or cites another case for that point, a 'quoting' or 'citing' parenthetical is appropriate per rule 1.5(b).").

While a different conclusion might be appropriate had the citation been written by Petitioner in a *pro se* brief, this brief was prepared by counsel. "When a document has been written by counsel, a court should be able to attach ordinary legal significance to the words used in that document." *Peterson v. Lampert*, 319 F.3d 1153, 1159 (9th Cir. 2003).

It is true that "a citation to a state case analyzing a federal constitutional issue serves the same purpose as a citation to a federal case analyzing such an issue." *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003). However, Moreover, the state case cited by Petitioner, *Brown*, did not rely on the federal case, *Ball*, as authoritative. Instead, it quoted *Ball*, and noted another Arizona decision "[c]onsistent with this *reasoning*." *Brown*, 177 P.3d at 882, 217 Ariz. at 621 (emphasis added) (citing *State v. Powers*, 200 Ariz. 123, 23 P.3d 668 (App.2001), *aff'd*, 200 Ariz. 363, 26 P.3d 1134 (2001)).

State Case Citations Not Fair Presentation - Petitioner's double jeopardy arguments in his Opening Brief (Exh. G.) cited to: *State v. Powers*, 200 Ariz. 123, 23 P.3d 668, 670 (App. 2001) (*id.*at 8); *State v. Brown*, 217 Ariz. 617, 177 P.3d 878 (App. 2008) (*id.*); *State v. Sowards*, 147 Ariz. 185, 709 P.2d 542 (App. 1984) (*id.* at 9); and *State v. Jones*, 185 Ariz. 403, 916 P.2d 1119 (App. 1995) (*id.* at 10). None of these Arizona cases analyzed the federal double jeopardy guarantee.

Powers and *Jones* referenced several federal double jeopardy cases, as well as various double jeopardy cases from Arizona or other states, but included no indication they were applying the federal Constitution, as opposed to Arizona's double jeopardy guarantee. *Powers*, 23 P.3d at 670, 200 Ariz. at 125; *Jones*, 185 Ariz. 405, 916 P.2d at 1121. *Brown* included only the one reference to *Ball*, and the court made no reference to the U.S. Constitution. *Brown*, 217 Ariz. at 621, 177 P.3d at 882. *Sowards* cited no authority for its "double punishment" analysis, and did not reference any constitutional provisions. *Sowards*, 709 P.2d at 547, 147 Ariz. at 190.

Moreover, a drive-by-citation of a state case applying federal and state law is not

sufficient.

> For a federal issue to be presented by the citation of a state decision dealing with both state and federal issues relevant to the claim, the citation must be accompanied by some clear indication that the case involves federal issues. Where, as here, the citation to the state case has no signal in the text of the brief that the petitioner raises federal claims or relies on state law cases that resolve federal issues, the federal claim is not fairly presented.

Casey v. Moore, 386 F.3d 896, 912 n. 13 (9th Cir. 2004). Petitioner included no such signal that he was citing these cases in support of federal claims.

Similar State Claim Not Fair Presentation – Petitioner clearly raised a state law claim under double jeopardy. However, "raising a state claim that is merely similar to a federal claim does not exhaust state remedies." *Fields v. Waddington*, 401 F.3d 1018, 1022 (9th Cir. 2005). "[W]e cannot assume federal claims were impliedly brought by virtue of the fact that they may be 'essentially the same' as state law claims. If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court." *Casey v. Moore*, 386 F.3d 896, 914 (9th Cir. 2004) (citations omitted).

Respondents argue that even if a state and federal claim are *identical*, raising the former does not fairly present the latter. (Answer, Doc. 10 at 16-17.) But "[t]he United States Supreme Court has left open the question whether the invocation of a state constitutional provision is adequate to raise a federal claim under the corresponding federal constitutional clause when the state courts treat both claims in an identical manner." *Casey*, 386 F.3d at 914. *See Baldwin v. Reese*, 541 U.S. 27, 33-34 (2004) (declining to address the issue because not raised below). The Ninth Circuit has similarly declined thus far to decide the issue. *Id. See also Fields*, 401 F.3d at 1022. The only post-*Casey/Fields* case cited by Respondents is *Cooper v. Neven*, 641 F.3d 322 (9th Cir. 2011). In *Cooper* the court engaged in no analysis of this issue, but simply stated in *dicta* summarizing the general principles of exhaustion: "In order to fairly present a claim, the petitioner must clearly state the federal basis and federal nature of the claim, along with relevant facts." 641 F.3d at 327. *See Compton v. Montgomery*, 2018 WL 6016295, at *4

(C.D. Cal. Sept. 6, 2018), *report and recommendation adopted*, 2018 WL 6167995 (C.D. Cal. Oct. 9, 2018) ("While it appears unsettled in the Ninth Circuit whether presenting a state-law claim that is functionally identical to a federal claim is sufficient to present fairly the federal claim ...district courts have concluded that it is.").

However, assuming raising an identical state claim is sufficient, the habeas petitioner bears the burden of showing an identity between the state and federal claims. *Casey*, 386 F.3d at 914. And the burden of proof of such identity is high. "In the absence of an affirmative statement by the [state supreme court] that it considers a particular state and federal constitutional claim to be identical, rather than analogous ... Petitioner was required to raise his federal claims affirmatively; we will not infer that federal claims have been exhausted." *Fields*, 401 F.3d at 1024.

It is true that the Arizona Supreme Court has held that the double jeopardy clauses of the Arizona and Federal constitutions both "grant the same protection to criminal defendants." *State v. Eagle*, 196 Ariz. 188, 190, 994 P.2d 395, 397 (Ariz. 2000). *But see Hernandez v. Superior Court In and For County of Maricopa*, 179 Ariz. 515, 522, 880 P.2d 735, 742 (Ariz. App. Div. 1,1994) (cited by Eagle) (finding Arizona courts "ordinarily" interpret the state guarantee in conformity with Supreme Court law, but noting "we do not follow federal precedent blindly").

However, even if *Eagle* could be found to be a holding that the constitutional claims are "identical," here Petitioner explicitly and primarily relied upon the Arizona statutory prohibition. (Exh. G, Open. Brief at 7 (quoting Ariz. Rev. Stat. § 13-111).) Thus, at best, the claim raised by counsel was "similar" to a federal double jeopardy claim. Accordingly, the undersigned further finds that Petitioner did not fairly present a federal double jeopardy claim on appeal.

The undersigned further finds that Petitioner did not fairly present such a claim in his PCR proceedings. Accordingly, Petitioner's state remedies on his federal double jeopardy claim are now procedurally defaulted under Arizona's waiver and timeliness bars for the reasons discussed hereinabove in Section III(A)(2).

e. Ground 6 – Procedurally Defaulted

Respondents argue that Ground 6 (inaccurate information) was similarly argued on its facts on direct appeal, but was not fairly presented as a federal claim, and that it is now procedurally defaulted. (Answer, Doc. 10 at 18.)

Respondents further argue that the Petition still raises only a state law claim. But this Court must liberally construe Petitioner's *pro se* federal petition, applying legal theories suggested by the facts alleged and which most strongly support the relief requested. The Court must do so even if Petitioner fails to cite relevant legal authorities. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). (The same standard does not apply in evaluating fair presentation of his state filings.) Thus, the undersigned assumes that Ground 6 asserts *some* federal claim. It is not necessary to identify that federal claim to conclude that it was not fairly presented to the state courts.

Petitioner asserts in his Petition that he raised the claim in Ground 6 on direct appeal. (Petition, Doc. 1 at "9C" (phys. pg. 13).) Petitioner's Reply does not address the exhaustion of this claim. (Reply, Doc. 11 at 2-3.)

As with Ground 5, Petitioner raised the facts underlying this claim on direct appeal. However, he did not explicitly raise it as a federal claim. Rather, he asserted the trial court had erred under Arizona Rules of Evidence 403 and 404. (*See* Exh. G, Opening Brief at 10-14.) Moreover, none of the state cases cited by Petitioner in his Opening Brief analyzed federal law. (*Id.,* citing *State v. Rutledge*, 205 Ariz. 7, 10, ¶ 15, 66 P.3d 50, 53 (2003) (discussing standard of review on evidentiary claim); *State v. Gilfillan*, 196 Ariz. 396, 405, ¶ 29, 998 P.2d 1069, 1078 (App. 2000) (discussing application of rape shield statute and evidentiary rules); *State v. Ives*, 187 Ariz. 102, 106-09, 927 P.2d 762, 766-69 (1996) (discussing application of state severance and evidentiary rules); *State v. Doody*, 187 Ariz. 363, 375, 930 P.2d 440,452 (1996) (applying Ariz. R. Evid. 404(b) and 608(b)); *State v. Webb*, 149 Ariz. 158, 164, 717 P.2d 462,468 (App. 1985) (applying Ariz. R. Evid. 404(b)); *State v. Stuard*, 176 Ariz. 589, 597, 863 P.2d 881,889 (1993) (discussing application of state severance and evidentiary rules); *State v. Buot*, 232 Ariz. 432, 433, 306 P.3d 89, 90

(App. 2013) (applying Ariz. R. Evid. 404(b)); *State v. Gamez*, 144 Ariz. 178, 179, 696 P.2d 1327, 1328 (1985) (applying state evidence law on prior bad acts); *State v. Swinburne*, 116 Ariz. 403, 409, 569 P.2d 833, 839 (1977) (same); *State v. McCall*, 139 Ariz. 147, 152, 677 P.2d 920, 925 (1983) (discussing application of state severance and evidentiary rules); *State v. Salazar*, 181 Ariz. 87, 93, 887 P.2d 617, 623 (App. 1994) (applying Ariz. R. Evid. 403 and 404). The undersigned finds that Petitioner did not fairly present a federal claim based on the other act evidence on appeal.

The undersigned also finds that Petitioner did not fairly present this claim in his PCR proceedings. It is true that part of the underlying facts in Ground 3 (inaccurate information) included references to statements by the victim about the prior conviction. (*See* Exh. L, PCR Pet at 27.) But the nature of those arguments was to challenge the victim's testimony about her knowledge of the prior convictions, not the impropriety of admitting the prior conviction. That was not fair presentation of the claim in Ground 6. Moreover, if it were, this Court would have to conclude (as with Grounds 1 and 3) that the claim was similarly procedurally barred on independent and adequate state grounds.

Accordingly, Petitioner's state remedies on whatever federal claim he asserts in Ground 6 are now procedurally defaulted under Arizona's waiver and timeliness bars for the reasons discussed hereinabove in Section III(A)(2).

f. Summary Re Exhaustion

Based upon the foregoing, the undersigned concludes that: (1) Petitioner properly exhausted his remedies as to Ground 2 (appellate ineffective assistance); and (2) he has either procedurally defaulted, or been procedurally barred on independent and adequate state grounds, on his claims in Grounds 1 (amended indictment), 3 (inaccurate information), 4 (probable cause procedures), 5 (double jeopardy), and 6 (other act evidence).

3. Cause and Prejudice

If the habeas petitioner has procedurally defaulted on a claim, or it has been

procedurally barred on independent and adequate state grounds, he may not obtain federal habeas review of that claim absent a showing of "cause and prejudice" sufficient to excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

"Cause" is the legitimate excuse for the default. *Thomas v. Lewis*, 945 F.2d 1119, 1123 (1991). "Because of the wide variety of contexts in which a procedural default can occur, the Supreme Court 'has not given the term "cause" precise content.'" *Harmon v. Barton*, 894 F.2d 1268, 1274 (11th Cir. 1990) (quoting *Reed*, 468 U.S. at 13). The Supreme Court has suggested, however, that cause should ordinarily turn on some objective factor external to petitioner, for instance:

> ... a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that "some interference by officials", made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted).

In his Reply, Petitioner argues that this Court should find cause to excuse his procedural defaults based on ineffective assistance of appellate counsel. Ineffective assistance of counsel may constitute cause for failing to properly exhaust claims in state courts and excuse procedural default. *Ortiz v. Stewart*, 149 F.3d 923, 932, (9th Cir. 1998). However, "[t]o constitute cause for procedural default of a federal habeas claim, the constitutional claim of ineffective assistance of counsel must first have been presented to the state courts as an independent claim." *Cockett v. Ray*, 333 F.3d 938, 943 (9th Cir. 2003). "[A]n ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

Respondents argue that because the claim in Ground 1 (amend indictment) was without merit and non-prejudicial, Petitioner can show neither deficient performance or prejudice to establish ineffectiveness to excuse his default of that claim. Respondents do not address ineffectiveness of appellate counsel on the other claims.

In his Reply, Petitioner, argues that he raised such ineffectiveness of appellate

counsel in his PCR proceeding. He argues he did so not only with regard to Ground 1 (amend indictment), but also with regard to Ground 3 (inaccurate information) (Doc. 11 at 2 (citing PCR Pet. at 24-25)), and Ground 4 (probable cause) (*id.* (citing PCR Pet. at 28-34).[1] He does not assert he raised a claim of ineffectiveness of appellate counsel as to Grounds 5 or 6. He asserts that his claim with regard to the indictment amendment claim was one of a constructive denial of counsel, not just ineffectiveness. (Reply, Doc. 11 at 2-3.)

a. Ground 1 (Amend Indictment)

Petitioner's PCR Petition asserted a claim of ineffective assistance of appellate counsel, citing *Strickland v. Washington*, 466 U.S. 668 (1984), based on his failure to raise a challenge based on the amendment of the indictment, the factual substance of which relates to his claim in Ground 1. (Exh. L, PCR Pet. at 21-24.) He argued the claim of ineffective assistance again in his Petition for Review. (Exh. R, PCR PFR at 10.) Thus, Petitioner properly exhausted a claim of ineffectiveness of appellate counsel with regard to the claim in Ground 1. This claim of ineffectiveness is the same claim raised in Ground 2.

However, for the reasons discussed hereinafter in Section III(C), this claim of ineffective assistance is without merit. Thus, Plaintiff cannot rely upon it as cause to excuse his procedural default of the claim.

b. Ground 3 (Inaccurate Information)

Petitioner's PCR Petition raised a claim based on the use of "improper or inaccurate" information, at least the factual substance of Ground 3. (Exh. L, PCR Pet. at 24-27.) However, he did not argue appellate counsel was ineffective for failing to raise this claim. Rather, he argued that it was based on "newly discovered evidence," indicating that it would not have been impossible for appellate counsel to raise the claim.

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[1] Petitioner also references a variety of other arguments and claims which he purports to have argued in his PCR proceeding appellate counsel should have raised. (Reply, Doc. 11 at 2.) None of these correlate to his habeas claims.

Ineffective assistance claims are not fungible, but must each be specifically argued. *See Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982) (presentation of "additional facts of attorney incompetence" transformed claim into one not presented to state court); and *Carriger v. Lewis*, 971 F.2d 329, 333-34 (9th Cir. 1992) (rejecting argument that presentation of any claim of ineffectiveness results in fair presentation of all claims of ineffective assistance). Thus, arguing the ineffectiveness claim with regard to Ground 1 did not exhaust claims of ineffectiveness as to Ground 3 or any other substantive claims.

It is true that Petitioner subsequently raised a variety of claims of ineffective assistance of appellate counsel in his PCR Petition for Review. (Exh. R at 13, *et seq.*) Assuming arguendo that this included failings of appellate counsel with respect to the claim in Ground 3, this belated argument was not fair presentation.

Presentation to the Arizona Court of Appeals for the first time is not sufficient to exhaust an Arizona state prisoner's remedies in a PCR proceeding. "Submitting a new claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). In *Casey v. Moore*, 386 F.3d 896 (9th Cir. 2004), the court reiterated that to properly exhaust a claim, "a petitioner must properly raise it on every level of direct review."

> Academic treatment accords: The leading treatise on federal habeas corpus states, "Generally, a petitioner satisfies the exhaustion requirement if he properly pursues a claim (1) throughout the entire direct appellate process of the state, or (2) throughout one entire judicial postconviction process available in the state."

Casey, 386 F.3d at 916 (quoting Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure*, § 23.3b (4th ed. 1998). In Arizona, review of a petition for post-conviction relief by the Arizona Court of Appeals is governed by Rule 32.9, Arizona Rules of Criminal Procedure, which clarifies that review is available for "issues which were decided by the trial court." Ariz. R. Crim. P. 32.9(c)(1)(ii). *See also State v. Ramirez,* 126 Ariz.

464, 468, 616 P.2d 924, 928 (Ariz. App. 1980) (issues first presented in petition for review and not presented to trial court not subject to review).

Accordingly, Petitioner has not properly exhausted a claim of ineffective assistance of appellate counsel with respect to failure to raise the claims in Ground 3, and cannot rely on such ineffectiveness as cause to excuse his procedural default of the claim.

c. Ground 4 (Probable Cause Procedures)

As noted above, Petitioner raised the substance of his claim in Ground 4 in his PCR proceeding. However, he made no argument that counsel was ineffective with regard to that claim. (Exh. L, PCR Pet. at 28-34.) As with Ground 3, even if Petitioner argued this claim in his subsequent Petition for Review, that would not result in proper exhaustion. Accordingly, Petitioner has not properly exhausted a claim of ineffective assistance of appellate counsel with respect to failure to raise the claims in Ground 4, and cannot rely on such ineffectiveness as cause to excuse his procedural default of the claim.

d. Ground 5 (Double Jeopardy)

Petitioner did not argue his double jeopardy claim in his PCR proceeding, nor did he assert a claim of ineffectiveness of appellate counsel with respect to such claim. Accordingly, Petitioner has not properly exhausted a claim of ineffective assistance of appellate counsel with respect to failure to raise the claims in Ground 5, and cannot rely on such ineffectiveness as cause to excuse his procedural default of the claim.

e. Ground 6 (Other Act Evidence)

Finally, Petitioner argued in his PCR Petition about the other act evidence (*i.e.* his prior conviction for sexual assault), but as discussed hereinabove in Section III(A)(2)(e), he did so only as part of his claim related to Ground 3 (inaccurate information). Moreover, as discussed above in Section III(A)(3)(b) regarding Ground 3, Petitioner did not argue ineffectiveness on those facts. Accordingly, Petitioner has not properly exhausted a claim of ineffective assistance of appellate counsel with respect to failure to raise the claims in Ground 6, and cannot rely on such ineffectiveness as cause to excuse his procedural default of the claim.

f. Conclusion re Cause and Prejudice

Based upon the foregoing, the undersigned concludes that Petitioner has failed to establish cause to excuse his procedural defaults.

Both "cause" and "prejudice" must be shown to excuse a procedural default, but a court need not examine the existence of prejudice if the petitioner fails to establish cause. *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 n. 10 (9th Cir.1991). Accordingly, this Court need not examine the merits of Petitioner's claims or the purported "prejudice" to find an absence of cause and prejudice.

4. Actual Innocence

The standard for "cause and prejudice" is one of discretion intended to be flexible and yielding to exceptional circumstances, to avoid a "miscarriage of justice." *Hughes v. Idaho State Board of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986). Accordingly, failure to establish cause may be excused "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (emphasis added). Although not explicitly limited to actual innocence claims, the Supreme Court has not yet recognized a "miscarriage of justice" exception to exhaustion outside of actual innocence. *See* Hertz & Lieberman, *Federal Habeas Corpus Pract. & Proc.* §26.4 at 1229, n. 6 (4th ed. 2002 Cumm. Supp.). The Ninth Circuit has expressly limited it to claims of actual innocence. *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008).

A petitioner asserting his actual innocence of the underlying crime must show "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence" presented in his habeas petition. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). A showing that a reasonable doubt exists in the light of the new evidence is not sufficient. Rather, the petitioner must show that no reasonable juror would have found the defendant guilty. *Id.* at 329. This standard is referred to as the "*Schlup* gateway." *Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002).

Moreover, to pass through the *Schlup* gateway, not just any evidence of innocence will do; the petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324.

Petitioner fails to offer anything to show new reliable evidence that would preclude any reasonable juror from convicting him. Accordingly, his procedurally defaulted and procedurally barred claims must be dismissed with prejudice.

B. GROUND 1 (AMENDMENT OF INDICTMENT) MERITS

1. Claim Moot

Assuming Ground 1 were properly exhausted, Respondents argue Ground 1 was rendered moot by Petitioner's acquittal on the amended Count 13. (Answer, Doc. 10 at 21-22.)

> Article III of the Constitution limits federal-court jurisdiction to "cases" and "controversies." U.S. Const., Art. III, § 2. We have interpreted this requirement to demand that "an actual controversy ... be extant at all stages of review, not merely at the time the complaint is filed." "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." A case becomes moot, however, "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."

Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160–61 (2016) (citations omitted).

Petitioner does not directly respond to this argument.

Although Petitioner does not propose any potential relief related to Count 13, he does argue the defect prejudiced his "litigation strategy, trial preparation, examination of witnesses, or argument." (Reply, Doc. 11 at 12.) However, he proffers no particulars beyond this conclusory allegation to show prejudice to the counts on which he was convicted. That is not sufficient to avoid a finding of mootness. "A 'merely conclusory statement'...fails to demonstrate 'actual prejudice resulting from the claim of error.'" *Nigro v. Sullivan*, 40 F.3d 990, 997 (9th Cir. 1994) (quoting *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir.1993)).

Accordingly, this claim must be dismissed as moot.

2. Claim Without Merit

Even if not moot, the claim in Ground 1 is without merit.

Amendment Authorized - Arizona Rule of Criminal Procedure 13.5(b) provides that the indictment is automatically "deemed amended to conform to the evidence admitted during any court proceeding." Indeed, the trial court agreed to amend the indictment "to conform to the evidence as to Count 13." (Exh. C, R.T. 2/29/16 at 156.) Petitioner offers no explanation how appellate counsel could have avoided the clear application of Rule 13.5(b)

Error Harmless - Even if it were assumed Rule 13.5(b) could have been avoided, in *State v. Freeney*, 219 P.3d 1039, 1043, 223 Ariz. 110, 114 (Ariz.,2009), the Arizona Supreme Court concluded that absent a lack of adequate notice of a charge, error in amending an indictment was subject to harmless error analysis. Similarly, the U.S. Supreme Court has held that to be entitled to relief as a result of deficiencies in the indictment, the defendant must show that the "error 'affect[ed] substantial rights.' This usually means that the error 'must have affected the outcome of the district court proceedings.' " *U.S. v. Cotton*, 535 U.S. 625, 631-632 (2002). Here, Petitioner was acquitted on the amended count of the indictment. Thus, any error in the amendment was harmless at least as to that count, and did not provide a basis for appeal.

As noted above, Petitioner broadly asserts that his litigation strategy, etc. were adversely impacted. But he does so only in conclusory terms.

Notice not Inadequate - Further, the error was harmless because the original indictment was not inadequate notice. The Arizona Supreme Court has held, pursuant to state due process requirements, that a charging document must "fairly indicate[] the crime charged; state[] the essential elements of the alleged crime; and [be] sufficiently definite to apprise the defendant so that he can prepare his defense to the charge." *State v. Marquez,* 127 Ariz. 98, 101, 618 P.2d 592, 595 (1980). The court has also repeatedly held "that an

indictment or information in the language of the statute is sufficient." *State v. Miller*, 100 Ariz. 288, 297, 413 P.2d 757, 763 (Ariz. 1966).

Petitioner cannot show lack of adequate notice because prior notice of the specific manner of completing an offense is not necessary to comport with state or Sixth Amendment notice concerns. In Arizona, sexual assault (the offense charged in Count 13) is committed by engaging in non-consensual "sexual intercourse or oral sexual contact." Ariz. Rev. Stat. § 13-1406(A). Sexual intercourse is defined as "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." Ariz. Rev. Stat. § 13-1401(A)(4). Thus, the Indictment's allegation of non-consensual "sexual intercourse or oral sexual contact" was sufficient to provide adequate notice of the charge. (Exh. A, Indictment at 7.) The addition allegation of a particular type of sexual intercourse was surplusage.

Habeas Harmlessness - Finally, even if somehow otherwise erroneous, Petitioner's failure to show that allowing the amendment was harmful would nonetheless preclude habeas relief. Such claims are not remediable on habeas review unless they "had substantial and injurious effect or influence" in determining the outcome. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). While the harmlessness standard does not apply to "structural errors," Plaintiff fails to show that a structural error occurred.

> [W]e have found an error to be "structural" and thus subject to automatic reversal only in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction)).

Neder v. United States, 527 U.S. 1, 8 (1999). Petitioner points to (and the undersigned has found) no authority finding the type of error here in a state prosecution (for which there is no constitutional guarantee of indictment) to be structural. *Cf. Cotton*, 535 U.S. at 632-633 (declining to decide if an "indictment error" falls within the "limited class" of

"structural errors" even under U.S. Constitution mandate for grand jury in federal prosecutions). *See also United States v. Kisto*, No. CR-18-01264-PHX-DJH, 2021 WL 2792275, at *3 (D. Ariz. Apr. 29, 2021), *report and recommendation adopted,* 2021 WL 2221037 (D. Ariz. June 2, 2021) (discussing cases finding defective indictment was not structural error).

3. Conclusion

Accordingly, even if not dismissible as procedurally defaulted, this claim must either be dismissed as moot, or denied as without merit.

C. GROUND 2 (INEFFECTIVE ASSISTANCE) WITHOUT MERIT

In Ground 2, Petitioner argues appellate counsel was ineffective for failing to bring the claim raised in Ground 1. (Petition, Doc. 1 at 7.) Respondents argue this claim is without merit because the underlying claim in Ground 1 is meritless.

No Ineffectiveness - Generally, claims of ineffective assistance of counsel are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail on such a claim, Petitioner must show: (1) deficient performance - counsel's representation fell below the objective standard for reasonableness; and (2) prejudice - there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88. Although the petitioner must prove both elements, a court may reject his claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. *Id.* at 697.

It is axiomatic that "the failure to take futile action can never be deficient performance or prejudicial. *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).

Moreover, deficient performance is not shown just because the claim, in hindsight,

may have had merit. "In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hall marks of effective appellate advocacy." *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). "The law does not require counsel to raise every available nonfrivolous defense. Counsel also is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects for success—for recommending that a weak claim be dropped altogether." *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009) (citations omitted).

Here, for the reasons discussed hereinabove (*see* Section III(B)) the underlying claim in Ground 1 is without merit. Thus, Movant cannot show either deficient performance or prejudice.

No Constructive Denial of Counsel – In his Reply, Petitioner appears to seek to avoid a need to show prejudice by casting his challenges to appellate counsel as a constructive denial of counsel. (*See* Reply, Doc. 11 at 11-12.) Petitioner's Petition does not raise a claim of constructive denial of counsel, but of ineffectiveness. "The district court need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007).

Even so, the claim is without merit. The Supreme Court has established an exception to the prejudicial performance standard by holding that certain circumstances in a *criminal trial* are so likely to prejudice the accused that no actual showing of prejudice need be made; ineffective assistance is presumed. *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, the Supreme Court identified two circumstances as being presumably prejudicial: the accused being denied criminal counsel at a critical stage of his trial or counsel entirely failing to subject the prosecution's case to meaningful adversarial testing. 466 U.S. at 659. Petitioner relies on the latter. Assuming *arguendo* that the second extends to appellate counsel, Petitioner offers nothing to show such a constructive denial of counsel. Appellate counsel filed a brief and argued claims. Petitioner's complaint is only with the selection of the claims raised. Counsel's deficiencies in certain respects is not

sufficient; rather "the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 697 (2002) (finding that counsel's failure to "mount some case for life" in a death penalty case did not suffice).

No Usurpation of Client's Right - At most, Petitioner asserts that counsel refused to take his direction about raising the claim in Ground 1. But refusal to take such instructions is not a denial of counsel, or even ineffective assistance. Appellate counsel is not an errand boy to be dispatched after any claim upon demand of the client. Rather, "[c]ounsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018) (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). The decisions "reserved for the client" are limited, and include "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* (holding that maintaining innocence at the guilt phase of a capital trial is a decision reserved to the client). Choosing whether to raise on appeal a specific challenge to the conviction is not the type of choice reserved to a defendant such that counsel was obligated to follow Petitioner's instruction.

Limits on Habeas Relief – Even if this Court could now reach different conclusions, that would not entitle Petitioner to relief. Petitioner offers nothing to show that the state court's rejecting of his claims by applying *Strickland* was so factually or legally wrong that it meets the standards for relief under 28 U.S.C. § 2254(d).

Conclusion – Ground 2 is without merit and must be denied.

D. GROUND 5 (DOUBLE JEOPARDY) WITHOUT MERIT

In Ground 5, Petitioner argues that his multiple punishments protections under the Double Jeopardy Clause were violated because there was only one, continuing kidnapping, but he was convicted of two kidnapping charges. If the Court could conclude this claim were not procedurally defaulted because it had been fairly presented on direct appeal, it would have to be denied on the merits.

Assuming the claim had been fairly presented and thus decided by the Arizona Court of Appeals, that decision was on the merits. Accordingly, Petitioner would be entitled to relief only if he can show that the state court decision was "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. §2254(d)(1), or that it was "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)(2). Petitioner fails to make these showings.

The Fifth Amendment to the U.S. Constitution provides that no person shall "be subject to the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This Double Jeopardy Clause incorporates three separate guarantees: "It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 306- 07 (1984) (*citing Illinois v. Vitale,* 447 U.S. 410, 415 (1980)). Petitioner, having been prosecuted only once, necessarily relies on the latter protection.

In *Blockburger v. United States*, the Court established the proper analysis for determining whether a chain of related conduct constituted (for double jeopardy purposes) a single, continuing offense or a series of separate offenses: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. That is the same rule identified by the Arizona Court of Appeals. (Exh. I, Mem. Dec. 9/12/17 at ¶ 9.) Thus, Petitioner fails to show that the state court's decision was contrary to Supreme Court law.

The Arizona Court of Appeals then determined as a matter of state law that the second kidnapping required proof of facts different from the first, namely the release and second restraint. (*Id.* at ¶ 11-12.) This Court has no authority to set aside as wrong a state court's decision of state law. *Bains v. Cambra*, 204 F.3d 964, 971 (9th Cir. 2000) ("federal

court is bound by the state court's interpretations of state law").

The critical factual conclusion was that a release from restraint had concurred when the victim escaped the bedroom. The state court found: "M.N.'s choice of action and freedom of movement during that period showed Scott did not continue to restrain her, albeit briefly, after he initially forced her into his bedroom." (Exh. I, Mem. Dec. 9/12/17 at ¶ 12.) Petitioner proffers nothing to show that this was an unreasonable determination of the facts. To be sure, Petitioner argues that the victim "was never free of Defendant's control." (Petition, Doc. 1 at "9A" (phys. pg. 10).) But he also admits that "at some point she managed to get out of the bedroom" and he was required to "drag her back into the room." (*Id.*) The state court cast the same facts as enough of an escape to amount to a termination of Petitioner's restraint of the victim. That Petitioner sees the facts differently does not establish that the state court's view was unreasonable.

Moreover, Petitioner offers nothing to show that the state court's application of federal law to the unassailable state law conclusions, and the reasonable factual findings, was an unreasonable application of federal law. The undersigned finds it was not.

Accordingly, even if not procedurally defaulted, Petitioner's Ground 5 is without merit and should be denied.

IV. 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.* "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. § 2253(c)(3). *See also* Rules Governing § 2254 Cases, Rule 11(a).

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, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED:

(A) Grounds 1, 3, 4, 5 and 6 of Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be **DISMISSED WITH PREJUDICE**.

(B) Alternatively, Grounds 1 and 5 of Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) be **DENIED**.

(C) The remainder of Petitioner's Petition for Writ of Habeas Corpus (Doc. 1), including Ground 2, be **DENIED**.

(D) To the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED**.

VI. EFFECT OF RECOMMENDATION

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

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: September 7, 2021

James F. Metcalf
United States Magistrate Judge

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FILED

JUL 26 2022

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND J. SCOTT,

Petitioner-Appellant,

v.

DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Respondents-Appellees.

No. 21-17072

D.C. No. 2:20-cv-02343-DWL
District of Arizona,
Phoenix

ORDER

Before: IKUTA and LEE, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 5) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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