UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 2022

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

JIMMY WAYNE GUINARD, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees.	No. 21-16865 D.C. No. 3:19-cv-08155-DGC District of Arizona, Prescott ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 15) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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JIMMY WAYNE GUINARD, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees.	No. 21-16865 D.C. No. 3:19-cv-08155-DGC District of Arizona, Prescott ORDER

Before: IKUTA and LEE, Circuit Judges.

Appellant's request to exceed page limits (Docket Entry No. 12) is granted. The request for a certificate of appealability (Docket Entry No. 13) 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

Jimmy Wayne Guinard,

Petitioner,

v.

David Shinn, Director of the Arizona Department of Corrections; and Attorney General of the State of Arizona,

Respondents.

No. CV-19-08155-PCT-DGC (MHB)

ORDER

Petitioner Jimmy Guinard is confined in Arizona state prison. He commenced this federal action by filing a habeas corpus petition under 28 U.S.C. § 2254. Docs. 1, 6. Magistrate Judge Michelle Burns issued a report recommending that the Court deny the petition ("R&R"). Doc. 38. Guinard objected. Doc. 39.

In an order dated September 30, 2021, the Court accepted the R&R and denied the petition. Doc. 45. Guinard now asks the Court to reconsider that order. Doc. 47. The motion is fully briefed. Docs. 50, 53. The Court will deny the motion.

I. Background.

A. Guinard's State Court Convictions and Sentences.

Guinard challenges his convictions and sentences in two Yavapai County Superior Court cases: No. P1300CR2011-01146 ("2011 case") and No. P1300CR2012-00975 ("2012 case"). In the 2011 case, a jury convicted Guinard of transporting dangerous drugs

for sale and possessing drug paraphernalia. Doc. 12-4 at 44-46; *see State v. Guinard*, No. 1 CA-CR 13-0490, 2014 WL 2548104, at *1 (Ariz. Ct. App. June 3, 2014). He was sentenced to an aggregate 20-year term of imprisonment. *Id.* The Arizona Court of Appeals affirmed the convictions and sentences, and the Arizona Supreme Court denied review. Docs. 1-1 at 24-68, 12-4 at 53-72. Guinard's petitions for post-conviction relief ("PCR") under Arizona Rule of Criminal Procedure 32 were denied. Docs. 1-3 at 2-5, 34-35; 1-4 at 2-14, 22-39; 12-4 at 75-80; 12-5 at 2-8.

In the 2012 case, a jury convicted Guinard of transporting dangerous drugs for sale and possessing methamphetamine paraphernalia. *See State v. Guinard*, No. 1 CA-CR 14-0810, 2015 WL 4747890, at *1 (Ariz. Ct. App. Aug. 11, 2015). The trial court sentenced him to five years on the transportation count and eight months on the paraphernalia count. *See id.*; Doc. 12-8 at 25-26. The convictions and sentences were affirmed on appeal, *see Guinard*, 2015 WL 4747890, at *6, and the PCR petitions were denied, Docs. 1-6 at 18-45, 1-7 at 2-3, 12-8 at 53-62.

B. Guinard's Habeas Petition and Judge Burns's R&R.

Guinard filed his habeas petition in May 2019. Doc. 1. The petition asserts twenty-one grounds for relief, with multiple subclaims alleged in most of the grounds. *Id.* at 8-34. In June 2019, Guinard filed a supplement that asserts additional subclaims. Doc. 6. Grounds one through ten address the convictions or sentences in the 2011 case, and the remaining grounds concern the 2012 case. Doc. 1 at 8-34. Guinard asserts violations of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and specifically alleges insufficient evidence and chain of custody issues; denial of an impartial jury; lowered standard of proof; ineffective assistance of trial, appellate, and PCR counsel; prosecutorial misconduct; judicial bias and malfeasance; entrapment; and compulsory process violations. *Id.*; Doc. 6 at 2-20; *see also* Doc. 38 at 7 & n.2.

In September 2020, Judge Burns recommended that the petition be denied. Doc. 23. Guinard filed an objection contending, among other things, that the claims asserted in his

supplement to the petition had not been addressed. Doc. 26 at 1. The Court referred the matter to Judge Burns to consider those supplemental claims. Doc. 32.

Judge Burns issued an amended R&R in May 2021. Doc. 38. She found that many of Guinard's claims are procedurally defaulted under 28 U.S.C. § 2254 because: (1) Guinard failed to present the claims to the Arizona Court of Appeals on direct review, to the trial court in a PCR petition, or to any state court (*id.* at 18-21); (2) the state courts invoked an independent and adequate state procedural rule in denying the claims – Guinard could have raised the claims on direct review but failed to do so, *see* Ariz. R. Crim. P. 32(a) (*id.* at 21-22); or (3) he failed to fairly present the federal bases for the claims to the state courts (*id.* at 22-23). Judge Burns further found that Guinard established no exception to the procedural default – he did not show the requisite cause and prejudice or a miscarriage of justice. *Id.* at 23-28; *see Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991); *Schlup v. Delo*, 513 U.S. 298, 321 (1995). With respect to Guinard's remaining claims, Judge Burns found them to be conclusory, speculative, not cognizable under federal habeas law, or otherwise without merit. Doc. 38 at 28-54.

II. The Court's September 30 Order and Guinard's Motion for Reconsideration.

The Court found Guinard's general objection to the R&R and his repetitive arguments to be improper because they were not specific to any of Judge Burns's findings or recommendations. Doc. 45 at 7-9. The Court found Guinard's specific objections to be without merit and therefore accepted the R&R and denied the habeas petition. *Id.* at 10-16. Guinard asks the Court to reconsider its order. Doc. 47.

Motions for reconsideration are disfavored and rarely granted. *See Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1988); *Resolution Tr. Corp. v. Aetna Cas. & Sur. Co.*, 873 F. Supp. 1386, 1393 (D. Ariz. 1994). A motion for reconsideration will be denied absent a showing of manifest error or of new facts or legal authority that could not have been brought to the Court's attention earlier with reasonable diligence. LRCiv 7.2(g)(1); *see United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009). The motion may not repeat previously made arguments.

See id.; *Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (reconsideration cannot "be used to ask the Court to rethink what it has already thought through"). Mere disagreement with an order is an insufficient basis for reconsideration. *Ross v. Arpaio*, No. CV 05-4177-PHX-MHM, 2008 WL 1776502, at *2 (D. Ariz. 2008).

A. Guinard's General Objection and De Novo Review.

Rule 72 requires that objections be "specific" to the findings and recommendations of the magistrate judge. Fed. R. Civ. P. 72(b)(2). Because an obvious purpose of this requirement is judicial economy – to permit magistrate judges to resolve matters not objectionable to the parties – the Court was required to make a de novo determination only of "those portions of [Judge Burns's R&R] to which objection is made." 28 U.S.C. § 636(b)(1)(C).

The Court found Guinard's "object[ion] to all adverse rulings in the R&R" (Doc. 39 at 1) to be an improper general objection. Doc. 45 at 7 (noting that de novo review of the entire R&R would defeat the efficiencies intended by Congress in enacting § 636(b)(1)(C)). The Court similarly found Guinard's rehashing of arguments previously made in his habeas briefing to be ineffective because it provided the Court "no guidance as to what portions of the R&R Guinard considers to be incorrect." *Id.* at 8 (citation omitted).

Guinard claims that the Court "has denied [him] de novo review," as shown by the Court's comment that Judge Burns's R&R was thorough and thoughtful. Doc. 47 at 1. But the Court made that accurate observation only by way of background. *See* Doc. 45 at 1. The 56-page R&R was both thorough and thoughtful, but the Court did not deny de novo on that basis. The Court instead carefully reviewed and considered the specific portions of the R&R to which Guinard objected. *See id.* at 9-16; *see also* Doc. 50 at 5 (noting that "the Court appropriately conducted a de novo review with regard to all of the specific exceptions to the R&R Guinard raised in his objection").

As the Court previously explained, Guinard's objection was not easy to follow. *Id.* at 9. He presented several pages of narrative regarding the injustices of his 2011 and 2012

convictions, sometimes referring to matters in his petition, sometimes to the state court cases, and sometimes to Judge Burns's R&R. *See* Doc. 39 at 2-9. It was not easy to determine which of Judge Burns's specific conclusions he was objecting to, or precisely why, other than his continuing list of complaints about the state proceedings.

The objection itself made clear that it addresses only "some of the comments in the R&R." *Id.* at 2. Guinard specifically mentioned Judge Burns's findings on grounds five (a), (c), and (g), and ground eleven. *Id.* at 8-11, 13. The Court "address[ed] these specific objections and, where possible, some of [Guinard's] general concerns" about the alleged injustices of his 2011 and 2012 convictions. Doc. 45 at 9 & n.7.

Section 636(b)(1)(C) "makes it clear that the [Court] must review the magistrate judge's findings and recommendations de novo *if objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (emphasis in original); *see Thomas v. Arn*, 474 U.S. 140, 149 (1985) ("The statute does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection."). The requirement that objections be specific to the R&R is particularly important in this case given that Guinard asserts dozens of claims related to two different cases and the R&R spans more than 50 pages. *See* Doc. 45 at 8. Contrary to Guinard's assertion, the Court has not denied him the de novo review required under § 636(b)(1)(C).

Guinard further claims that Judge Burns erred in finding, for certain claims, that he failed to fairly present the federal basis of the claims to the state courts by either specifying particular provisions of the federal Constitution or statutes or by citing to federal case law. Doc. 47 at 1.[1] Guinard asserts that he raised constitutional violations and cited federal case law "in all of his state court pleadings," and that support for this fact "is located in the attachments to [his petition]." Doc. 47 at 2-4. Guinard made similar assertions in his objection, stating that his "position is set out in a cognizable manner" in his petition and

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[1] Judge Burns made this finding with respect to grounds two, eight (subclaims (a)-(b)), nine (subclaims (b) and (k)), and twenty (subclaim (d)). Doc. 38 at 22-23.

replies, and that he has presented the Court with "factual locations throughout the record" of the alleged federal law violations. Doc. 39 at 2; *see id.* at 7, 13, 15 (citing generally Docs. 21, 22).

As Judge Burns noted, however, Guinard's habeas briefing spans more than 1,300 pages. Doc. 38 at 7; *see* Docs. 1, 6, 21, 22. His general reference to "all his state court pleadings" and "attachments to his petition" is not sufficiently specific. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 (9th Cir. 2010) ("We cannot declare . . . that the district court otherwise exceeded the permissible bounds of its discretion by failing to comb through the voluminous record searching for [evidence]. . . . It behooves litigants, particularly in a case with a record of this magnitude, to resist the temptation to treat judges as if they were pigs sniffing for truffles.").

The Court will deny Guinard's motion for reconsideration with respect to his argument that the Court improperly denied him de novo review of the entire R&R.

B. Guinard's Specific Objections.

As noted, the Court considered and rejected Guinard's specific objections to the R&R – ground five (a) (prosecutorial vouching), ground five (c) (defense counsel's failure to move for a mistrial), ground five (g) (failure to object to a jury instruction), and ground eleven (insufficient evidence for conviction). *See* Doc. 39 at 8-11, 13 (citing Doc. 38 at 30, 36-37, 43); Doc. 45 at 9-15.

1. Ground Five (a) – Vouching.

Ground five (a) alleges that trial counsel in the 2011 case was ineffective for failing to object to prosecutorial vouching. Doc. 1 at 13. Guinard asserted in his objection that Judge Burns erred in addressing only the vouching claim alleged in his first direct appeal, and that he has "provided factual locations to all eleven prosecutorial vouching" incidents. Doc. 39 at 13. The Court found ground five (a) to be without merit because: (1) Guinard failed to show that he exhausted his state court remedies with respect to the alleged

vouching incidents that were not raised in state court; (2) the trial court gave clear instructions that the jury was to assess witness credibility and that arguments of counsel were not evidence; and (3) the Arizona Court of Appeals addressed several alleged instances of vouching in some detail, and the state courts' denial of this claim was not contrary to federal law nor based on an unreasonable determination of the facts, *see* 28 U.S.C. § 2254(d). Doc. 45 at 10-11; *see also* Doc. 38 at 29-35; *Guinard*, 2014 WL 2548104, at *1-5.

Guinard now asserts that he "presented all the vouching incidents in his state PCR[s] and the supplements" (Doc. 47 at 2), but he cites nothing in the record to support that assertion. Moreover, he acknowledges that vouching incidents raised in his state PCR proceedings were deemed "barred because they were not raised on direct appeal." *Id.* Guinard has failed to show that Court erred in finding ground five (a) to be without merit. *See* Doc. 50 at 7 ("[I]n accepting the R&R's recommendation that Ground 5(a) be denied on its merits, this Court found that the ground failed under both a de novo, as well as 28 U.S.C. § 2254(d)(1) review.") (citing Doc. 45 at 10-11).

2. Ground 5 (c) – Counsel's Failure to Move for a Mistrial.

Ground five (c) alleges that trial counsel in the 2011 case was ineffective in failing to request a mistrial for "evidence not matching testimony" and tampered-with evidence. Doc. 1 at 13. Guinard objected to Judge Burns's comment that, to the extent ground five (c) is based on counsel's failure to move for a new trial under Arizona Rule of Criminal Procedure 24.1(c), the "claim is comprised of nothing more than bare conclusory allegations[.]" Doc. 39 at 10 (quoting Doc. 38 at 36). The Court found ground five (c) to be without merit because: (1) Guinard failed to explain how this claim falls within one of the several grounds for relief set forth in Arizona Rule 24.1(c)(1)-(5); (2) the evidence presented at trial was sufficient to support the convictions; and (3) Guinard failed to show ineffective assistance of counsel with respect to a motion for a mistrial or a motion for a new trial. Doc. 45 at 11-12.

Guinard contends that the prejudicial effect of "the tampered-with insufficient evidence" is obvious. Doc. 47 at 2. He claims that, "had the trial judge been made aware that the State used replacement evidence to obtain [the] conviction, there is a high probability that we would not be here today." *Id.* at 2-3.

But as previously explained, while "Guinard may believe the evidence was inconsistent or tampered with, . . . he has not shown that under no circumstances could a jury have found him guilty." Doc. 45 at 12; *see also* Doc. 38 at 37 (explaining that Guinard's "mere allegation that conflicting evidence and inconsistent testimony were insufficient to constitute a verdict goes against the weight of the evidence presented here"). Guinard has not shown that the Court erred in finding ground five (c) to be without merit.

3. Ground Five (g) – Failure to Object to Jury Instruction.

Ground five (g) alleges that trial counsel was ineffective for failing to object to a preliminary jury instruction that mistakenly stated Guinard was charged with a sexual offense. Doc. 1 at 12. Judge Burns found that Guinard had failed to show prejudice under *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Doc. 38 at 37-38.

Guinard asserted in his objection that, "[f]or all we know," the jurors could have thought that he had charges of a sexual nature in the past or that they were the pending charges, and that "we don't know if any of [the jurors] had family members or were sexually assaulted themselves." Doc. 39 at 9. The Court found these arguments to be speculative and denied relief on ground five (g). Doc. 45 at 12-13.

Guinard contends that assuming the erroneous jury instruction was not prejudicial "would be speculation." Doc. 47 at 3. This argument simply illustrates the unsupported nature of Guinard's claim. He cannot demonstrate that he was prejudiced, and speculation in any direction does not warrant habeas corpus relief. *Cooks v. Spalding*, 660 F.2d 738, 740 (9th Cir. 1981); *see McCarty v. Kernan*, No. 2:19-cv-00223-TLN-KJN, 2021 WL 3630378, at *18 (E.D. Cal. Aug. 17, 2021) ("Habeas relief is not warranted where the claim is based on mere speculation."); *Thomas v. United States*, No. CR-12-00523-02-PHX-

DGC, 2021 WL 2105611, at *5 (D. Ariz. May 25, 2021) (noting that "speculation will not sustain an ineffective assistance claim").

What is more, Judge Burns correctly found that Guinard had failed to establish prejudice given that the misreading of the charges was a one-time mistake, the clerk read the correct charges on the same day of trial, the final jury instructions stated the correct charges and repeated the advisement (also given in the preliminary instructions) that the jury should not consider the charges as evidence of guilt, and both the prosecutor and defense counsel argued the correct charges. Doc. 38 at 37-38. Guinard provides no basis for the Court to reconsider its ruling on ground five (g).

C. Ground Four – Eighth Amendment Violation.

Ground four alleges that the sentence to "20 flat years" in the 2011 case was excessive and violates the Eighth Amendment's prohibition of cruel and unusual punishment. Doc. 1 at 11. Judge Burns found ground four to be procedurally defaulted without excuse. Doc. 38 at 18-21. Because Guinard did not specifically object to this finding (*see* Doc. 39), the Court accepted Judge Burns's recommendation that ground four be denied. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C).

Guinard essentially reasserts ground four in the present motion, claiming that his sentence constitutes cruel and unusual punishment. Doc. 47 at 4. But he offers no argument as to why the Court's adoption of the recommendation that ground four be denied as procedurally barred is erroneous. *See* Doc. 50 at 8. The Court will deny the motion in this regard.

D. Conclusion.

Because Guinard has made no showing of manifest error or new facts or legal authority that could not have been brought to the Court's attention earlier with reasonable diligence, his motion for reconsideration will be denied. LRCiv 7.2(g)(1); *see Ekweani v. Ameriprise Fin., Inc.*, 444 F. App'x 968, 969 (9th Cir. 2011) ("The district court did not abuse its discretion in denying Mr. Ekweani's motion for reconsideration of the order granting summary judgment . . . because [he] failed to show grounds warranting

reconsideration.") (citing D. Ariz. LRCiv 7.2(g)); *S.E.C. v. Kuipers*, 399 F. App'x 167, 171 (9th Cir. 2010) (affirming the denial of reconsideration where "[t]he district court did not abuse its discretion in finding an inadequate 'showing of new facts or legal authority'") (citation omitted).

III. Guinard's Motion for Extension of Time to File Notice of Appeal.

Guinard moves the Court to extend the time for him to file a notice appeal. Doc. 48. The motion will be denied as moot.

Guinard filed a notice of appeal on November 1, 2021. Doc. 51. The Ninth Circuit deemed the notice ineffective and stayed appellate proceedings until the Court decided Guinard's motion for reconsideration. Doc. 54. To timely challenge the Court's decision on that motion, which is set forth in this order, Guinard must file an amended notice of appeal within the time set by Federal Rule of Appellate Procedure 4. *Id.* (citing Fed. R. App. P. 4(a)(4)).

IT IS ORDERED:

1. Guinard's motion for reconsideration (Doc. 47) is **denied**.

2. Guinard's motion for extension of time to file notice of appeal (Doc. 48) is **denied** as moot.

Dated this 9th day of December, 2021.

David G. Campbell
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jimmy Wayne Guinard,

Petitioner,

v.

David Shinn, Director of the Arizona Department of Corrections; and Attorney General of the State of Arizona,

Respondents.

No. CV-19-08155-PCT-DGC (MHB)

ORDER

Petitioner Jimmy Guinard is confined in Arizona state prison. He commenced this federal action by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Docs. 1, 6. Magistrate Judge Michelle Burns has issued a thorough and thoughtful report recommending that the Court deny the petition and a certificate of appealability ("R&R"). Doc. 38. Guinard has filed an objection, which is fully briefed. Docs. 39, 40, 41. For reasons stated below, the Court will accept the R&R and deny the petition and a certificate of appealability.

I. Background.

Guinard challenges his convictions and sentences in two Yavapai County Superior Court cases: No. P1300CR2011-01146 ("2011 case") and No. P1300CR2012-00975 ("2012 case"). In the 2011 case, a jury convicted Guinard of transporting dangerous drugs for sale and possessing drug paraphernalia. Doc. 12-4 at 44-46; *see State v. Guinard*, No. 1

CA-CR 13-0490, 2014 WL 2548104, at *1 (Ariz. Ct. App. June 3, 2014). He was sentenced to an aggregate 20-year term of imprisonment. *Id.* The Arizona Court of Appeals affirmed the convictions and sentences, and the Arizona Supreme Court denied review. Docs. 1-1 at 24-68, 12-4 at 53-72. Guinard's petitions for post-conviction relief ("PCR") under Arizona Rule of Criminal Procedure 32 were denied. Docs. 1-3 at 2-5, 34-35; 1-4 at 2-14, 22-39; 12-4 at 75-80; 12-5 at 2-8.

In the 2012 case, a jury convicted Guinard of transporting dangerous drugs for sale and possessing methamphetamine paraphernalia. *See State v. Guinard*, No. 1 CA-CR 14-0810, 2015 WL 4747890, at *1 (Ariz. Ct. App. Aug. 11, 2015). The trial court sentenced Guinard to a five-year term on the transportation count and an eight-month term on the paraphernalia count. *See id.*; Doc. 12-8 at 25-26. The court ordered the sentences to run concurrently to each other and consecutive to the 20-year sentence imposed in the 2011 case. *Id.* The convictions and sentences were affirmed on appeal. *See Guinard*, 2015 WL 4747890, at *6. Guinard's PCR petitions were denied. Docs. 1-6 at 18-45, 1-7 at 2-3, 12-8 at 53-62.

II. Federal Habeas Standards.

A. Exhaustion and Procedural Default.

Federal habeas petitions are governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 et seq. The AEDPA prohibits a federal court from granting habeas relief unless the petitioner has "exhausted the remedies available in the courts of the State[.]" 28 U.S.C. § 2254(b)(1)(A); *see O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Kyzar v. Ryan*, 780 F.3d 940, 946 (9th Cir. 2015). "[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts[.]" *O'Sullivan*, 526 U.S. at 845. To "fairly present" a federal claim in state court, the petitioner must provide the factual and legal basis for the claim. *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009). He 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); *see Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996) ("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.").

An unexhausted claim is procedurally defaulted where state procedural rules make a return to state court futile. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred"). A federal court may not consider the merits of a procedurally defaulted claim unless the petitioner establishes cause for the default and actual prejudice, or shows that a miscarriage of justice would result. *See Coleman*, 501 U.S. at 750-51; *Schlup v. Delo*, 513 U.S. 298, 321 (1995). Under the cause and prejudice test, the petitioner must show that some external cause prevented him from following the procedural rules of the state court and fairly presenting his claim. *See Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004) ("A showing of cause must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the prisoner's] efforts to comply with the State's procedural rule. Thus, cause is an external impediment such as government interference or reasonable unavailability of a claim's factual basis.") (citations omitted). A fundamental miscarriage of justice exists when a constitutional violation has resulted in the conviction of one who is "actually innocent." *Schlup*, 513 U.S. at 327. "Actual innocence," for purposes of *Schlup*, "means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998); *see House v. Bell*, 547 U.S. 518, 538 (2006) (emphasizing that "the *Schlup* standard is demanding and permits review only in the 'extraordinary' case").

Where the petitioner attempts to exhaust a federal claim in state court and the claim is deemed waived for "noncompliance with a state procedural rule, the federal claim is procedurally defaulted[.]" *Smith v. Or. Bd. of Parole & Post-Prison Supervision*, 736 F.3d 857, 862 (9th Cir. 2013) (citing *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977)). This procedural default rule applies where "the state procedural rule . . . provide[s] an adequate

and independent state law basis on which the state court can deny relief." *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014) (quoting *Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003)).[1]

B. Merits.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). A state prisoner, therefore, may not obtain federal habeas relief for errors of state law. *See id.* at 67-68 ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law.") (citations omitted); *Little v. Crawford*, 449 F.3d 1075, 1083 (9th Cir. 2006) ("A violation of state law standing alone is not cognizable in federal court on habeas.") (citations omitted).

With respect to the merits of exhausted and cognizable federal claims, the AEDPA requires federal courts to defer to the last reasoned state court decision. *See Murray v. Schriro*, 882 F.3d 778, 801 (9th Cir. 2018). Habeas relief is not warranted unless the petitioner shows that the state court's decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or (2) based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

This highly deferential standard "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Indeed, the AEDPA "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state

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[1] "Arizona's waiver rules are independent and adequate bases for denying relief." *Id.* (citing *Stewart v. Smith*, 536 U.S. 856, 859-60 (2002) (denials pursuant to Arizona waiver rules are independent of federal law); *Ortiz v. Stewart*, 149 F.3d 923, 931-32 (9th Cir. 1998) (Arizona's waiver rules are consistently and regularly applied)); *see* Ariz. Rs. Crim. P. 32.2(a) (precluding claims not raised on appeal or in prior PCR petitions); 32.4(b)(3) (time limits for filing PCR petitions); 32.16(a)(1) (petitions for direct review must be filed within 30 days of the trial court's decision).

criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). A federal court therefore must "avoid applying [the] AEDPA in a manner that displays 'a lack of deference to the state court's determination and an improper intervention in state criminal processes.'" *John-Charles v. California*, 646 F.3d 1243, 1253 (9th Cir. 2011) (quoting *Harrington*, 562 U.S. at 104); *see also Christian v. Frank*, 595 F.3d 1076, 1081 (9th Cir. 2010) ("A federal court may second-guess a state court decision only if it determines that 'the state court was not merely wrong, but actually unreasonable.'") (quoting *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004)).

In a recent decision, the Supreme Court reaffirmed the deferential habeas standard and explained why the standard is "difficult to meet":

> The term "unreasonable" [in § 2254(d)] refers not to "ordinary error" or even to circumstances where the petitioner offers "a strong case for relief," but rather to "extreme malfunctions in the state criminal justice system." In other words, a federal court may intrude on a State's "sovereign power to punish offenders" only when a decision "was so lacking in justification beyond any possibility for fairminded disagreement."

Mays v. Hines, 141 S. Ct. 1145, 1149 (2021) (quoting *Harrington*, 562 U.S. at 102-03; alterations omitted).

III. Guinard's Habeas Petition and Judge Burns's Amended R&R.

Guinard filed his habeas petition in May 2019. Doc. 1. The petition asserts twenty-one grounds for relief, with multiple subclaims alleged in most of the grounds. *Id.* at 8-34. In June 2019, Guinard filed a supplement to the petition that asserts additional subclaims. Doc. 6. Grounds one through ten address the convictions or sentences in the 2011 case, and the remaining grounds for relief concern the 2012 case. Doc. 1 at 8-34. Guinard asserts violations of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and specifically alleges insufficient evidence and chain of custody issues; denial of an impartial jury; lowered standard of proof; ineffective assistance of trial, appellate, and PCR counsel; prosecutorial misconduct; judicial bias and malfeasance; entrapment; and compulsory process violations. *Id.*; Doc. 6 at 2-20; *see also* Doc. 38 at 7 & n.2.

In September 2020, Judge Burns recommended that the petition be denied. Doc. 23. Guinard filed an objection contending, among other things, that the claims asserted in his supplement to the petition had not been addressed. Doc. 26 at 1. The Court referred the matter to Judge Burns to consider those supplemental claims. Doc. 32.

Judge Burns issued the present amended R&R in May 2021. Doc. 38. The 56-page R&R describes the facts and procedural history for the 2011 and 2012 cases (*id.* at 2-7), identifies all claims asserted in the petition and the supplement (*id.* at 7-12), sets forth the standards for federal habeas relief and relevant state law (*id.* at 13-18), and analyzes each claim based on the material facts and applicable law (*id.* at 18-54). Judge Burns finds that, even when construed liberally in his favor, many of Guinard's claims are procedurally defaulted under the AEDPA because: (1) he failed to present them to the Arizona Court of Appeals on direct review, to the trial court in a PCR petition, or to any state court (*id.* at 18-21);[2] (2) the state courts invoked an independent and adequate state procedural rule in denying the claims – Guinard could have raised the claims on direct review but failed to do so, *see* Ariz. R. Crim. P. 32(a) (*id.* at 21-22);[3] or (3) he failed to fairly present the federal bases for the claims to the state courts (*id.* at 22-23).[4] Judge Burns further finds that Guinard has established no exception to the procedural default – he has not shown cause and prejudice or a fundamental miscarriage of justice. *Id.* at 23-28.[5] With respect to Guinard's remaining claims, Judge Burns finds that they are either conclusory, speculative, not cognizable under federal habeas law, or without merit. *Id.* at 28-54. Specifically, Judge

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[2] Grounds three, four, five (subclaims (d)-(f), (j)-(l), (n)-(p)), six, eight (subclaims (g)-(h)), nine (subclaims (a), (c)-(j), (l)-(r)), twelve through fifteen, seventeen (subclaims (b)-(d)), nineteen (subclaims (a), (g)-(h)), and twenty (subclaims (b)-(c), (f)-(h)). *See id.*

[3] Grounds one, eight (subclaims (c)-(f), (i)), ten, nineteen (subclaims (b) and (g)), and twenty-one. *See id.*

[4] Grounds two, eight (subclaims (a)-(b)), nine (subclaims (b) and (k)), and twenty (subclaim (d)). *See id.*

[5] Judge Burns notes, correctly, that Guinard's status as an inmate, lack of legal knowledge and assistance, and limited legal resources do not establish cause to excuse the procedural default. *Id.* at 24 (citing *Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988)).

Burns concludes that Guinard has failed to establish any ineffective assistance of counsel resulting in actual prejudice, *see Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), that the state court's denial of Guinard's exhausted claims was neither contrary to clearly established federal law nor based on an unreasonable determination of facts, *see* 28 U.S.C. § 2254(d)(1), and that the claims otherwise are without merit. *Id.*

IV. R&R Standard of Review.

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court "must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The Court is not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

V. Guinard's Objection.

Guinard filed his objection to the amended R&R in June 2021. Doc. 39. Respondents argue that Guinard's general objection is ineffective, that merely repeating arguments made in his earlier briefing is insufficient, and that the few specific objections he asserts are without merit. Doc. 40. The Court agrees.

A. Guinard's General Objection.

Guinard "objects to all adverse rulings in the R&R[.]" Doc. 39 at 1. This is an improper objection. Rule 72 requires that objections be "specific" to the findings and recommendations of the magistrate judge. Fed. R. Civ. P. 72(b)(2); *see* 28 U.S.C. § 636(b)(1). An obvious purpose of this requirement is judicial economy – to permit magistrate judges to resolve matters not objectionable to the parties. *See Thomas*, 474 U.S. at 149. Because de novo review of the entire R&R would defeat the efficiencies intended by Congress, Guinard's general objection "has the same effect as would a failure to object." *Warling v. Ryan*, No. CV 12-01396-PHX-DGC, 2013 WL 5276367, at *2 (D. Ariz. Sept. 19, 2013).

B. Guinard's Repetitive Arguments.

Throughout his objection, Guinard repeats arguments previously made in his petition, supplement, and replies to Respondents' answers. *See* Docs. 1, 6, 21, 22, 37. Guinard states that his "position is set out in a cognizable manner" in his petition and replies, and that he has presented the Court with "factual locations throughout the record" of the alleged federal law violations. Doc. 39 at 2; *see id.* at 7, 13, 15 (citing generally Docs. 21, 22). But "merely reasserting the grounds of the petition [and replies] as an objection provides this Court with no guidance as to what portions of the R&R [Guinard] considers to be incorrect." *McDowell v. Richardson*, No. CV-11-0716-PHX-DGC, 2012 WL 393462, at *2 (D. Ariz. Feb. 7, 2012). As noted, Rule 72 requires objections specific to Judge Burns's findings and recommendations. This specificity requirement is particularly important in this case given that Guinard asserts dozens of claims related to two different cases and the R&R spans more than 50 pages. Because "the purpose of the magistrate is to promote efficient use of judicial resources, there is no benefit if the [C]ourt is required to review the entire matter de novo because [Guinard] merely repeats the arguments rejected by [Judge Burns]." *Quigg v. Salmonsen*, No. CV 18-77-H-DLC-JTJ, 2019 WL 1244989, at *1 (D. Mont. Mar. 18, 2019). The Court accordingly declines Guinard's invitation to review the entire record and the R&R de novo. *See* Doc. 39 at 16-17; *Quigg*, 2019 WL 1244989, at *1 ("If the objecting party fails to make a proper objection, this Court follows other courts that have overruled the objections without analysis.") (citations and alterations omitted); *see also Eagleman v. Shinn*, No. CV-18-2708-PHX-RM (DTF), 2019 WL 7019414, at *4 (D. Ariz. Dec. 20, 2019) ("[O]bjections that merely repeat or rehash claims asserted in the Petition, which the magistrate judge has already addressed in the R&R, are not sufficient under [Rule] 72.").

Guinard asserts that he is "unable to address all of his grounds and subclaims due to the 17-page limit" for his objection. Doc. 39 at 2; *see id.* at 16.[6] But instead of reasserting

[6] Objections generally are limited to 10 pages, *see* LRCiv 7.2(e)(3), but Judge Burns allowed Guinard 17 pages for his objection, *see* Doc. 38 at 55.

his claims in the objection, Guinard should have made specific objections to Judge Burns's findings and proposed rulings. *See* Fed. R. Civ. P. 72(b)(2).

Moreover, as Judge Burns noted:

> [The] habeas petition and supplement together form a 210-page document, which includes over 700 pages of exhibits. Petitioner has also submitted a 478-page reply to Respondents' answer containing an additional 70 pages of exhibits. In all, Petitioner alleges close to 100 claims. In the first 28 pages of his habeas petition and in the 17 pages comprising his supplement, Petitioner presents his claims in a listing format. In the remaining pages of his habeas petition, Petitioner attempts to support his claims in a 153-page narrative that is, at best, difficult to follow and unintelligible at times.

Doc. 38 at 7. The Court finds that extending the page limit for the objection beyond 17 pages would not have furthered the purposes of Rule 72 or assisted the Court in its review of the R&R. *See* Doc. 40 at 3 (noting that Respondents have had a difficult time interpreting the Guinard's objection).

C. Guinard's Specific Objections.

Guinard's objection is not easy to follow. He presents several pages of narrative regarding the injustices of his 2011 and 2012 convictions, sometimes referring to matters in his petition, sometimes to the state court cases, and sometimes to Judge Burns's R&R. Doc. 39 at 2-9. It is not easy to determine which of Judge Burns's specific conclusions he is objecting to, or precisely why, other than his continuing list of complaints about the state proceedings. *Id.*

The objection states that it addresses only "some of the comments in the R&R." Doc. 39 at 2. And Guinard does specifically mention Judge Burns's findings on ground five (a) (prosecutorial vouching), ground five (c) (defense counsel's failure to move for a mistrial), ground five (g) (failure to object to a jury instruction), and ground eleven (insufficient evidence for conviction). *Id.* at 8-11, 13 (citing Doc. 38 at 30, 36-37, 43). The Court will address these specific objections and, where possible, some of his general concerns.[7]

[7] For example, Guinard asserts that his counsel's failure to object to vouching and

1. Ground Five (a) – Vouching.

Ground five (a) alleges that trial counsel in the 2011 case was ineffective for failing to object to prosecutorial vouching. Doc. 1 at 13. Judge Burns thoroughly addresses this claim in the amended R&R, finding that the state court's denial of the claim was not contrary to federal law nor based on an unreasonable determination of the facts. Doc. 38 at 29-35.

Guinard asserts that Judge Burns erred in addressing only the vouching claim alleged in his first direct appeal, and that he has "provided factual locations to all eleven prosecutorial vouching" incidents. Doc. 39 at 13. But Guinard has not shown that he exhausted his state court remedies with respect to the alleged vouching incidents that were not raised in state court.

Moreover, Judge Burns correctly notes that the trial court instructed the jurors that, "with respect generally to the witnesses you have heard testify, you must decide [the] accuracy of each witness's testimony. You may accept everything a witness says, or part of it, or none of it." Doc. 38 at 34 n.10 (citing Ex. H at 8). The trial court also instructed the jury that "[w]hat the lawyers say is not evidence, but it may help you understand the law and the evidence." *Id.* (citing Ex. H at 10). The jury is presumed to have followed these instructions. *See id.*; *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (applying "the almost invariable assumption of the law that jurors follow their instructions"); *Fields v. Brown*, 503 F.3d 755, 782 (9th Cir. 2007) ("We presume that jurors follow the instructions.") (citing *Richardson*); *Kipp v. Davis*, 971 F.3d 866, 882 (9th Cir. 2020) (same, citing *Fields*).

To establish a claim of ineffective assistance of counsel, Guinard must show that his counsel's performance was deficient under prevailing professional standards and that he suffered prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish prejudice, a petitioner must show

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failure to seek a mistrial (both discussed below), "[c]ombined with all the other cumulative errors by counsel presented in the subclaims[,] justifies habeas review." Doc. 39 at 10. But this general assertion of a cumulative effect fails to identify any specific error by Judge Burns that the Court can address. *Warling*, 2013 WL 5276367, at *2.

a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Courts will not presume prejudice. *See Jackson v. Calderon*, 211 F.3d 1148, 1155 (9th Cir. 2000). Given the trial court's clear instructions that the jury was to assess witness credibility and that arguments of counsel were not evidence, the Court cannot find a "reasonable probability that, but for counsel's [failure to object to vouching], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The Arizona Court of Appeals addressed several alleged instances of vouching during Guinard's trial in the 2011 case, in some detail. *See State v. Guinard*, No. 1 CA-CR 13-0490, 2014 WL 2548104, at *1-5 (Ariz. Ct. App. June 3, 2014). The Court agrees with Judge Burns that the state courts' denial of this claim was not contrary to federal law nor based on an unreasonable determination of the facts. Doc. 38 at 29-35.

2. Ground Five (c) – Trial Counsel's Failure to Move for a Mistrial.

Ground five (c) alleges that trial counsel in the 2011 case was ineffective in failing to request a mistrial for "evidence not matching testimony," tampered-with evidence, and the informant "violating his contract[.]" Doc. 1 at 13. Judge Burns notes that trial counsel did move for a mistrial, and that Guinard presented similar ineffective assistance claims in his PCR proceedings which the state court denied as not colorable. Doc. 38 at 36.

Guinard objects to Judge Burns's comment that, to the extent ground five (c) is based on counsel's failure to move for a new trial under Arizona Rule of Criminal Procedure 24.1(c), the "claim is comprised of nothing more than bare conclusory allegations[.]" Doc. 39 at 10 (quoting Doc. 38 at 36). But Judge Burns is correct that Guinard fails to explain how this claim falls within one of the several grounds for relief set forth in Arizona Rule 24.1(c)(1)-(5). *See* Doc. 38 at 36.

Judge Burns also finds that ground five (c) fails because counsel could not have been ineffective by failing to file a motion for a new trial where the evidence presented at trial was sufficient to support the convictions. As Judge Burns noted, to set aside a jury verdict for insufficient evidence, it must clearly appear that upon no hypothesis whatsoever

is there sufficient evidence to support the conclusion reached by the jury. *See State v. Arredondo*, 746 P.2d 484, 486 (Ariz. 1987). Guinard's "mere allegation that conflicting evidence and inconsistent testimony were insufficient to constitute a verdict goes against the weight of the evidence presented here." Doc. 38 at 37. Guinard may believe the evidence was inconsistent or tampered with, but he has not shown that under no circumstances could a jury have found him guilty. Nor has he shown a "reasonable probability that, but for counsel's [failure to file a motion for new trial], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[8]

The Court agrees with Judge Burns that Guinard has failed to show ineffective assistance of counsel with respect to a motion for a mistrial or a motion for a new trial. *See* Doc. 38 at 36-37.

3. Ground Five (g) – Failure to Object to Jury Instruction.

Ground five (g) alleges that trial counsel was ineffective for failing to object to a preliminary jury instruction that mistakenly stated Guinard was charged with a sexual offense. Doc. 1 at 12. Judge Burns correctly finds that Guinard has failed to show prejudice under *Strickland* given that the misreading of the charges was a one-time mistake, the clerk read the correct charges on the same day of trial, the final jury instructions stated the correct charges and repeated the advisement (also given in the preliminary instructions) that the jury should not consider the charges as evidence of guilt, and both the prosecutor and defense counsel argued the correct charges. Doc. 38 at 37-38.

In his objection, Guinard asserts that, "[f]or all we know," the jurors could have thought that he had charges of a sexual nature in the past or that they were the pending charges, and that "we don't know if any of [the jurors] had family members or were sexually assaulted themselves." Doc. 39 at 9. But these arguments amount to speculation,

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[8] In response to Judge Burns's note that Guinard's trial counsel did in fact file a Rule 20 motion for a new trial in the 2011 case, Guinard agrees that his counsel filed such a motion based on prior bad act evidence that was admitted at trial (another issue Guinard mentions from time to time throughout his objection), but he asserts that the state trial judge abused her discretion in denying the motion. Doc. 39 at 11. This argument does not show, however, that a motion for new trial based on insufficient evidence in the 2011 case would have had a "reasonable probability" of success. *Strickland*, 466 U.S. at 694.

and federal "[h]abeas relief is not warranted where the claim is based on mere speculation." *McCarty v. Kernan*, No. 2:19-cv-00223-TLN-KJN, 2021 WL 3630378, at *18 (E.D. Cal. Aug. 17, 2021); *see Cooks v. Spalding*, 660 F.2d 738, 740 (9th Cir. 1981) (a claim that "amounts to mere speculation" does not warrant habeas corpus relief); *Thomas v. United States*, No. CR-12-00523-02-PHX-DGC, 2021 WL 2105611, at *5 (D. Ariz. May 25, 2021) ("self-serving speculation will not sustain an ineffective assistance claim") (citing *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991)).

The Court agrees with Judge Burns that ground five (g) is without merit. *See* Doc. 38 at 37-38.

4. Ground Eleven – Insufficient Evidence.

Guinard claims in ground eleven that there was insufficient evidence to sustain his convictions in the 2012 case. Doc. 1 at 24. The Arizona Court of Appeals squarely rejected this claim. *See Guinard*, 2015 WL 4747890, at *1-2. Judge Burns finds that Guinard has failed to show that that the Arizona Court of Appeals' decision is contrary to, or an unreasonable application of, federal law. Doc. 38 at 40-44 (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (a sufficiency-of-the-evidence claim must be rejected unless "no rational trier of fact could have found proof of guilt beyond a reasonable doubt"); *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (a federal court may overturn a state court decision rejecting a sufficiency-of-the-evidence challenge "only if the state court decision was 'objectively unreasonable'"); *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011) (explaining that under *Jackson* and the AEDPA, "there is a double dose of deference that can rarely be surmounted")).

Guinard objects to Judge Burns's comment that his "conclusory allegations claiming that there was insufficient evidence to sustain his conviction goes against the weight of the evidence." Doc. 39 at 11 (quoting Doc. 38 at 43). But Judge Burns also reviewed the evidence against Guinard and noted that "it is the province of the jury to 'resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id.* (quoting *Jackson*, 443 U.S. at 319). As

the Ninth Circuit has explained, "the question is not whether we are personally convinced beyond a reasonable doubt. It is whether rational jurors could reach the conclusion that these jurors reached." *Roehler v. Borg*, 945 F.2d 303, 306 (9th Cir. 1991) (citing *Jackson*, 443 U.S. at 326).

Guinard makes a few specific arguments, asserting that his voice is not on the recording and that the informant was not credible. Doc. 39 at 11-12. But the Arizona Court of Appeals rejected these specific arguments and found sufficient evidence to support the jury's verdict:

> On May 14, 2012, Detective J assisted the informant in setting up a "controlled buy" with Guinard. Detective J recorded the informant's side of a phone call with Guinard, and the informant could be heard saying, "Hey Jimbo" – Guinard's nickname – and asking to buy some "shit" – a slang term for methamphetamine. After the informant and Guinard established a meeting place, Detective J wired the informant, conducted a thorough search of the informant and his Jeep for drugs and money, gave him $40 to buy the methamphetamine, and followed him to the meeting place.
>
> Detective J saw the informant meet Guinard's brother in the parking lot and observed the two walk to a parked truck. Immediately after the controlled buy, the informant handed Detective J a baggie of methamphetamine, which the informant said he had bought from Guinard. The baggie of methamphetamine the informant gave to Detective J looked like "it was worth $40.00." [The state] presented sufficient evidence supporting Guinard's convictions, and the superior court did not abuse its discretion in denying his Rule 20 motion."
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> * * *
>
> [W]hether the informant was credible was an issue for the jury to decide. And indeed, Guinard vigorously attacked the informant's credibility during trial. For example, in his cross-examination of the informant, Guinard highlighted several inconsistencies in the informant's testimony regarding the May 2012 controlled buy. Guinard also established the informant had failed drug tests in July, September, and November 2013, which resulted in a probation violation and 60 days' imprisonment in early 2014. The informant testified his drug test results were positive for methamphetamine because of prescription drugs he was taking, but Guinard presented evidence impeaching that testimony. Further, Detective J and the informant both testified the State had not polygraph or drug tested the informant.

State v. Guinard, No. 1 CA-CR 14-0810, 2015 WL 4747890, at *2 (Ariz. Ct. App. Aug. 11, 2015).[9]

Like Judge Burns, the Court cannot conclude that this decision by the Arizona Court of Appeals is contrary to, or an unreasonable application of, federal law. The Court agrees with Judge Burns that ground eleven is without merit. *See* Doc. 38 at 40-44.[10]

VI. Motions to Strike.

Guinard has filed a reply to Respondents' response to the objection. Doc. 41. Respondents move to strike the reply because it is not permitted under the rules (Doc. 43), and Guinard moves to strike Respondents' motion to strike (Doc. 44). The Court has considered Guinard's reply, and it does not affect the Court's analysis or rulings. Both motions to strike will be denied as moot.

VII. Certificate of Appealability.

Guinard has moved for a certificate of appealability, essentially reasserting arguments made in his petition. Doc. 27. Judge Burns recommends that a certificate of appealability be denied. Doc. 38 at 55. Guinard has made no showing of the denial of a constitutional right, and the Court concludes that no reasonable jurist would find that his claims warrant federal habeas relief. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court accordingly will deny a certificate of appealability.

IT IS ORDERED:

1. Judge Burns's amended R&R (Doc. 38) is **accepted**.

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[9] Guinard similarly devotes portions of his objection to arguing that his 2011 conviction was based on evidence that had been tampered with. Doc. 39 at 3-4. As Judge Burns correctly notes, however, it is the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. Guinard does not show that the evidence related to the 2011 conviction could not have supported a reasonable jury verdict. *See Jackson*, 443 U.S. at 324 (a sufficiency-of-the-evidence claim must be rejected unless "no rational trier of fact could have found proof of guilt beyond a reasonable doubt").

[10] Guinard also argues briefly that his trial counsel should have filed a notice for change of judge when he learned that Guinard had another criminal case before the same state trial judge. Doc. 39 at 16. But he does not show that his trial counsel fell below the standard of care in making this highly strategic decision, nor that he suffered prejudice as a result. *See Strickland*, 466 U.S. at 687-88.

2. Guinard's habeas petition (Docs. 1, 6) is **denied**.

3. Guinard's motion for a certificate of appealability (Doc. 27) is **denied**.

4. The parties' motions to strike (Docs. 43, 44) are **denied**.

5. The Clerk of Court is directed to enter judgment accordingly and terminate this action.

Dated this 30th day of September, 2021.

David G. Campbell

David G. Campbell
Senior United States District Judge