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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY JAMES MERRICK,

Petitioner-Appellant,

v.

CHARLES RYAN, *et al.*,

Respondents-Appellees.

No. 19-17247

D.C. No. 2:19-cv-00172-SPL

AMENDED MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Steven P. Logan, District Judge, Presiding

Argued and Submitted November 18, 2022
Phoenix, Arizona

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.

Anthony Merrick appeals the district court's dismissal of his petition for a writ of habeas corpus challenging, on Double Jeopardy grounds, his convictions for certain offenses in Arizona state court. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

An Arizona jury convicted Merrick of 11 offenses, including one count of fraud in violation of Arizona Revised Statutes § 13-2310 (Count 1); one count of theft of property with a value of at least $4,000 in violation of Arizona Revised

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Statutes § 13-1802 (Count 2); and nine counts of credit-card theft in violation of Arizona Revised Statutes § 13-2102 (Counts 6, 8–11, 14–15, and 23–24). The factual basis for all 11 of Merrick's convictions was his unlawful receipt and retention of 29 gift cards, each valued at $500. *See* ARIZ. REV. STAT. § 13-2101(3)(c) (providing that, for purposes of § 13-2102, "[c]redit card" includes a "stored value card"). The nine credit-card theft charges under § 13-2102 were based on the allegation that, without the consent of the issuers, Merrick "knowingly controlled" one or more of eight specific gift cards on various dates. Counts 1 and 2 were based on Merrick's unlawful receipt and retention of the 29 gift cards generally. Specifically, the fraud charge in Count 1 alleged that, through fraud, Merrick "knowingly obtained a benefit" from the issuers, and the theft charge in Count 2 alleged that, "without lawful authority," Merrick "knowingly controlled" gift cards worth $4,000 or more. At trial, the state argued that Merrick's theft charge involved more than $4,000, because "we have 29 gift cards" and "$500 each equals $14,500." Merrick was given concurrent sentences on all counts.

On appeal, Merrick argued, *inter alia*, that (1) his theft charge in Count 2 was multiplicitous of his nine credit-card theft convictions, in violation of the Double Jeopardy Clause; and (2) some of the nine credit-card theft convictions were multiplicitous of one another to the extent that they relied on the same gift

card. The Arizona Court of Appeals partly agreed with the second argument and vacated Merrick's convictions on Counts 9, 10, 11, and 15. *See State v. Merrick*, 2012 WL 4955425, at *2–3 (Ariz. Ct. App. Oct. 18, 2012). The court's opinion did not address Merrick's other Double Jeopardy argument concerning Count 2, but it expressly affirmed Merrick's convictions on "Counts 1, 2, 6, 8, 14, 23 and 24." *Id.* at *4. Merrick unsuccessfully sought review of the Count 2 Double Jeopardy issue in the Arizona Supreme Court. After the district court denied habeas relief, we granted a certificate of appealability limited to the Count 2 Double Jeopardy issue.

As an initial matter, we reject Merrick's argument that the deferential standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), do not apply to Merrick's Count 2 Double Jeopardy claim. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). This same presumption applies when—as here—"a state-court opinion addresses some but not all of a defendant's claims." *Johnson v. Williams*, 568 U.S. 289, 298 (2013). Merrick has provided no persuasive basis for concluding that this presumption has been

rebutted,[1] and we therefore treat the Arizona Court of Appeals' decision as having rejected the Count 2 Double Jeopardy claim on the merits. Accordingly, under AEDPA, a federal court may not grant habeas relief based on that claim unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "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)(1)–(2). In applying these standards to a state court decision that did not explain why it rejected this claim, we "must determine what arguments or theories . . . *could have* supported[] the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the U.S. Supreme Court. *Richter*, 562 U.S. at 102 (emphasis added).

Applying these standards, we conclude that fairminded jurists could reasonably reject Merrick's Count 2 Double Jeopardy argument. In addressing this issue, we assume arguendo that Merrick is correct in contending that the elements

[1] As we note below, the Arizona Court of Appeals' reasons for explicitly rejecting Merrick's Double Jeopardy challenge to Counts 23 and 24—*viz.*, that the overlap between the two counts was irrelevant—would similarly apply to the Count 2 Double Jeopardy issue. *See infra* at 6. Under these circumstances, the court's failure to explicitly extend such reasoning to that additional Double Jeopardy challenge is insufficient to rebut the presumption.

of a theft charge under § 13-1802 overlap with the elements of a credit-card theft charge under § 13-2102, such that the two statutes do not define separate offenses under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). But just as two bank robberies may be charged under the same statute when a defendant separately robs two banks, so too separate theft and credit-card theft charges may be brought based on the defendant's theft of distinct underlying gift cards. *See, e.g., United States v. Chilaca*, 909 F.3d 289, 291 (9th Cir. 2018) (noting that the inquiry turns on "the allowable unit of prosecution" under the charged statute (citations and internal quotation marks omitted)). On this record, a reasonable jurist could reach such a conclusion here.

As the case was charged in the indictment and presented at trial, only a total of eight specific gift cards were at issue in the various credit-card theft counts. To sustain the charge of theft involving at least $4,000 under Count 2, only eight of the 29 cards at issue in that count were necessary, because each card was worth $500. Accordingly, Merrick's conviction on Count 2 would not be multiplicitous to the extent that it rested on eight of the 21 cards that were *not* at issue in the credit-card theft counts. Given that the state's theory and evidence at trial were that Count 2 was based on Merrick's possession of *all* 29 gift cards, the Arizona Court of Appeals could reasonably have concluded that, in convicting on Count 2, the jury should be understood to have accepted the state's undifferentiated reliance

on all 29 cards. That would mean that the jury concluded that Merrick unlawfully possessed all 29 cards, including the 21 cards that were *not* at issue in the credit-card theft counts. And since only eight cards were necessary to sustain the charge on Count 2, the Arizona Court of Appeals could reasonably have concluded that Count 2 was more than amply supported by non-overlapping cards and that there was therefore no Double Jeopardy violation. *See Merrick*, 2012 WL 4955425, at *3 (similarly rejecting Merrick's Double Jeopardy challenge to Counts 23 and 24, despite the fact that one of the five cards charged in Count 24 overlapped with the single card charged in Count 23).

For substantially the same reasons, we further conclude that Merrick has not shown a federal law error that "resulted in actual prejudice." *Davis v. Ayala*, 576 U.S. 257, 267 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).[2]

AFFIRMED.

[2] We decline to expand the certificate of appealability to include the additional uncertified issues raised by Merrick in his supplemental *pro se* opening brief. *See* NINTH CIR. R. 22-1(e).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Anthony James Merrick, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-19-0172-PHX-SPL (DMF) **REPORT AND RECOMMENDATION**

TO THE HONORABLE STEVEN P. LOGAN, UNITED STATES DISTRICT JUDGE:

This matter is on referral to the undersigned pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation. Anthony James Merrick ("Petitioner") filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition") on January 3, 2019[1]. (Doc. 1 at 7)[2] Respondents filed their Answer on March 4, 2019 (Doc. 14), and Petitioner subsequently filed his Reply on May 13, 2019 (Doc. 41).

Also pending are Petitioner's: (1) Motion for Respondents to Provide Copies of Petitioner's Full Petition for Post-Conviction Relief (Doc. 15); (2) Motion to Expand the

[1] The Petition was docketed by the Clerk of Court on January 9, 2019 (Doc. 1). The Petition contains a certificate of service indicating that Petitioner placed the Petition in the prison mailing system on January 3, 2019 (Doc. 1 at 7). Pursuant to the prison mailbox rule, the undersigned has used January 3, 2019, as the filing date. *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010) ("A petition is considered to be filed on the date a prisoner hands the petition to prison officials for mailing.").

[2] Citations to the record indicate documents as displayed in the official electronic document filing system maintained by the District of Arizona.

Record (Doc. 18); (3) Motion for Meaningful Access to Legal Resources or Motion to Appoint Counsel (Doc. 21); (4) Motion for Evidentiary Hearing (Doc. 23); (5) Request to Include Rule 32 Exhibits for Habeas Corpus Review (Doc. 35); (6) Motion to Strike Response in Opposition to Motion (Doc. 36); and (7) Motion for Leave to File Notice of Removal Under 28 U.S.C. § 1455 (Doc. 45).

As is explained below, the undersigned Magistrate Judge recommends the Petition be denied. The undersigned further recommends that Petitioner's pending motion in Docket 35 be granted, his pending motion in Docket Number 15 be denied as moot, and his pending motions in Docket Numbers 18, 21, 23, 36, and 45 be denied.

I. BACKGROUND

A. Petitioner's trial and sentence

The procedural and factual basis for Petitioner's state convictions underlying the Petition were detailed by the Arizona Court of Appeals in its October 18, 2012, memorandum decision on Petitioner's direct appeal filed on October 18, 2012. (Doc. 14-2 at 177-187) The court of appeals explained that:

> ¶ 2 [Petitioner]'s roommate and co-owner of their tattoo parlor, Dominick Hurley, was also the sales manager/fleet manager at Henry Brown Buick Pontiac GMC. Hurley used the dealership's computer to fraudulently claim that he sold cars to businesses, and had General Motors, as part of a promotion, send gift cards from Lowe's and Best Buy to him, as well as family and friends, including [Petitioner]. [Petitioner] used most of the cards he received to buy supplies and/or furnishings for their tattoo business.
>
> ¶ 3 After the dealership discovered Hurley's defalcation, the police were called, and their investigation led them to [Petitioner]. The police ultimately determined that [Petitioner] had received 29 gift cards totaling $14,500; either in his name, a variant thereof, or a business or post office box traceable to him. [Petitioner] was subsequently charged for his role in the fraudulent scheme.
>
> ¶ 4 Hurley entered into a plea agreement with the State, and testified at [Petitioner]'s trial. [Petitioner]was found guilty as charged, and the jury also found two aggravating factors beyond a reasonable doubt—the offenses involved an accomplice, and the offenses were committed for pecuniary gain.

> Subsequently, after [Petitioner] admitted that he had four prior felony convictions and was on federal release at the time he committed the offenses, he was sentenced to super-aggravated terms of imprisonment of 35 years for fraudulent schemes and artifices (Count 1), 25 years for theft (Count 2), and 7 .5 years on each of the theft of a credit card counts (Counts 6, 8, 9, 10, 11, 14, 15, 23, 24). All of the sentences were to be served concurrently.

(Doc. 14-2 at 177-178)

B. Petitioner's direct appeal

Petitioner filed a notice of appeal on August 2, 2011, and the Arizona Court of Appeals appointed counsel. (Doc. 14-3 at 8) After appointed counsel filed an opening brief in March 2012, Petitioner moved for permission to file a supplemental appellate brief to raise additional issues, or alternatively, that his counsel's brief be stricken and that he be allowed to file a brief *pro per*. (*Id.*) The court of appeals denied the motion, after which Petitioner unsuccessfully moved for reconsideration. (*Id.*) In April 2012, Petitioner filed another motion requesting permission to file a supplemental brief which also was denied. (*Id.*)

In his counseled appellate brief, Petitioner argued that: (1) the double jeopardy protections of the Arizona and United States Constitutions were violated when the state charged and convicted him "of a separate crime for each time he used a gift card – instead of charging him for a single count of theft of the card[]"; and (2) the indictment denied him the constitutional right to a unanimous verdict when it included the names of three separate victims under each theft count. (Doc. 14-2 at 138, 141-144) The court of appeals held that "any convictions based on his "use" of the same gift cards on separate occasions or in separate transactions render[ed] the additional convictions a violation of double jeopardy." (*Id.* at 182) The court concluded the appropriate remedy was to vacate any multiplicitous convictions. (*Id.*) Accordingly, the court of appeals affirmed Petitioner's convictions on Counts 6, 8, and 14 and vacated his convictions and sentences on multiplicitous Counts 9, 10, 11, and 15. (*Id.* at 182-183) The court of appeals rejected Petitioner's argument that all of his convictions should be vacated because each charge identified multiple victims.

(*Id.* at 183-186) The court reasoned that Petitioner had waived this argument by not raising his challenge to the indictment prior to 20 days before trial, and that in any event he could not establish fundamental error and prejudice because the charges were not duplicitous and did not charge him with more than one crime in the same count. (*Id.* at 184-185) Instead, the court determined the indictment had charged Petitioner "with one distinct crime in each count, albeit against several alleged victims." (*Id.* at 185)

In his petition for review of the court of appeals' decision, Petitioner argued to the Arizona Supreme Court that: (1) double jeopardy considerations required setting aside Counts 6, 8, 14, 23, and 24 as multiplicitous of Count 2; (2) the listing of three possible victims in the alternative for each count of theft denied him the constitutional right to a unanimous verdict; and (3) the court of appeals improperly prevented him from raising issues on appeal by denying him the right to represent himself. (*Id.* at 216-223) The Arizona Supreme Court denied review of the first two issues but granted review on the third issue regarding the right to self-representation on appeal. (Doc. 14-3 at 2-5) The supreme court remanded the matter to the court of appeals to consider procedural obstacles to Petitioner's claim and to decide how briefing would proceed assuming no such obstacles existed. (*Id.* at 4-5) On remand, the Arizona Court of Appeals held that Petitioner had waived his right to represent himself on appeal. (*Id.* at 7-12) Petitioner filed a petition for review with the Arizona Supreme Court (*Id.* at 14-19), which the supreme court granted, remanding the matter to the Arizona Court of Appeals for a recommendation in light of *Coleman v. Johnsen*, 330 P.3d 952, 235 Ariz. 195 (2014). (*Id.* at 62) In *Coleman v. Johnsen*, the state high court created a rule requiring that "previously represented defendant must give notice of their request to represent themselves no later than thirty days after filing the notice of appeal." 330 P.3d at 955. Applying *Coleman v. Johnsen* to the facts in Petitioner's case, the court of appeals held that Petitioner's request to represent himself was untimely and that he had waived his right to represent himself on appeal. (*Id.*at 65-67) Upon Petitioner's petition for review, the Arizona Supreme Court summarily denied

relief. (*Id.* at 75) The court of appeals issued its mandate on Petitioner's appeal on May 28, 2015. (*Id.* at 78)

C. Petitioner's Rule 32 post-conviction relief action

1. Initial Post-Conviction Relief petition

Petitioner filed a Notice of Post-Conviction Relief ("PCR") in May 2013. (Doc. 14-3 at 84-87) He was appointed counsel although he did not request representation and had advised the superior court that he wished to proceed *pro per*. (*Id.* at 89) Appointed counsel filed a notice of completion of PCR stating she was not able to identify any colorable claim for relief and moving for an extension to permit Petitioner to file a petition *pro per*. (*Id.* at 92-93). Petitioner filed his *pro per* PCR petition in September 2014, asserting nine grounds for relief. (*Id.* at 62-68)

Petitioner argued five issues of ineffective assistance of counsel ("IAC") by his trial counsel for: (1) failure to call Petitioner to testify, in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; (2) failure to object to the state's evidence he claimed violated his right to counsel and to practice his religion, in violation of the First, Sixth, and Fourteenth Amendments; (3) failure to object to or otherwise challenge instances of prosecutorial misconduct in violation of the Sixth and Fourteenth Amendments; (4) counsel's cumulative errors in violation of the Sixth and Fourteenth Amendments; and (5) continuing to represent him while subject to a conflict of interest in violation of the Sixth and Fourteenth Amendments. (*Id.* at 97, 100-113) Petitioner also alleged a violation of his due process rights under the Sixth and Fourteenth Amendments in connection with his cumulative error argument under the fourth issue. (*Id.* at 97, 105-112) Petitioner further argued prosecutorial misconduct in his sixth issue, alleging the state "knowingly used perjured testimony and evidence known to be false as well as misleading the jury, witness couching and arguing evidence not presented in the trial[,]" thereby violating his Fifth, Sixth, and Fourteenth Amendment rights. (*Id.* at 97, 113-118) His seventh issue was that his Fifth, Sixth, and Fourteenth Amendment protections were violated by the prosecution when it failed to conduct a prompt pre-trial investigation upon

learning that his co-defendant "was tampering with witnesses and conspiring to commit perjury." (*Id.* at 98, 119-121) Petitioner argued in his eighth PCR issue that newly-discovered evidence existed which would have changed his verdict. (*Id.* at 98, 121-122) Petitioner's ninth issue was IAC by appellate counsel for failure to investigate and present colorable claims, in violation of Petitioner's Sixth and Fourteenth Amendment protections. (*Id.* at 98, 122-124) The superior court denied the PCR petition. (*Id.* at 174-181) Petitioner moved the superior court to reconsider its denial of his petition (*Id.* at 183-186), but finding no basis for such reconsideration, the court denied the motion. (*Id.* at 188)

Petitioner filed a *pro per* petition for review of the superior court's ruling in the Arizona Court of Appeals in September 2015. (Doc. 14-4 at 6-21) The court of appeals found no abuse of discretion in the superior court's ruling and denied relief. (*Id.* at 66-67) Petitioner moved the court of appeals to reconsider its decision (*Id.* at 69-76), which the court summarily denied (*Id.* at 78). Petitioner filed a petition for review to the Arizona Supreme Court (Doc. 1-3 at 16-52), which that court denied (*Id.* at 54). Petitioner subsequently filed a petition for writ of certiorari with the United States Supreme Court (*Id.* at 57-106), which was denied. (*Id.* at 3, 80).

2. Petitioner's second PCR proceeding

In July 2018, Petitioner filed a second PCR action in the superior court, indicating the successive petition was proper under Arizona Rule of Criminal Procedure 32.1 because newly-discovered evidence existed that would probably have changed the verdict or sentence and that facts existed that would establish he was actually innocent by clear and convincing evidence. (*Id.* at 83-84) The superior court concluded that Petitioner had failed to raise a colorable claim to overcome the untimeliness of his successive petition and dismissed his notice. (*Id.* at 104-107) Petitioner moved the court to reconsider its order dismissing his notice, which the court denied in September 2018. (*Id.* at 109-113, 114) Petitioner filed a petition for review with the Arizona Court of Appeals and that court granted review but denied relief on January 31, 2019. *State v. Merrick*, No. 1 CA-CR 18-0656 PRPC, 2019 WL 386072 (Ariz. Ct. App. Jan. 31, 2019).

D. Petitioner's habeas claims

Petitioner asserts the following grounds for relief in the Petition:

Ground One: Petitioner's trial counsel was ineffective for refusing to allow him to testify in his own defense (Doc. 1 at 8-52);

Ground Two: Petitioner's trial counsel was ineffective for failing to challenge the state's case and present indisputable proof of factual innocence and an alibi (*Id.* at 53-60);

Ground Three: Petitioner's trial counsel was ineffective for failing to challenge the prosecution's knowing use of materially false testimony that implicated Petitioner (*Id.* at 61-67);

Ground Four: Petitioner's trial counsel was ineffective for failing to challenge the state's use of privileged evidence (*Id.* at 68-69);

Ground Five: Petitioner's appellate counsel was ineffective for failing to argue on appeal that the prosecutor knowingly presented perjured testimony, and Rule 32 counsel was ineffective for not raising the claim (*Id.* at 70-80; Doc. 1-1 at 1-32);

Ground Six: Petitioner's trial counsel had a conflict of interest because Petitioner and counsel had an irreconcilable, fractured relationship that prejudiced Petitioner (Doc. 1-1 at 33-37);

Ground Seven: Petitioner's trial counsel was ineffective for failing to challenge prosecutorial misconduct and argue that Petitioner was denied his due process right to a fair trial (*Id.* at 38-66);

Ground Eight: Petitioner was denied his right to be free from double jeopardy when he was charged, tried, and punished multiple times for the same "possession of gift cards" (*Id.* at 67);

Ground Nine: Petitioner was denied his right to due process when the jury convicted him with a potentially non-unanimous verdict (*Id.* at 68); and

Ground Ten: Petitioner was "arbitrarily" denied his right to represent himself on direct appeal when the Arizona Court of Appeals denied him the opportunity to file a *pro se* brief on appeal, after Petitioner represented himself in the trial court and did not request appellate counsel (*Id.* at 69-71).

E. Pending Motions

Also pending are six motions filed by Petitioner. (Docs. 15, 18, 21, 23, 35, 36, 45) He moves for an order requiring Respondents to file a more complete record of his first PCR action or to allow him to copy and file it. (Doc. 15) Petitioner also moves to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases to include audio/video recording evidence that he experienced intense conflict with his trial counsel during trial when counsel refused to allow him to testify. (Doc. 18) Additionally, Petitioner has filed a motion for "meaningful access to legal resources or in the alternative [for appointment] of counsel." (Doc. 21) Specifically, he alleges he is unable to obtain legal research assistance from paralegals at the prison, he lacks counsel, there are no caselaw reporters or access to them at prison, and Respondents will not allow caselaw to be provided to him, effectively denying him access to the courts. (*Id.* at 6) He also moves to strike Respondents' response to Document No. 21. (Doc. 36) Petitioner further argues the Court should provide him an evidentiary hearing on his claims asserted in Grounds One, Two, and Six, because he claims he was prevented from fully developing evidence in state court. (Doc. 23) Finally, Petitioner moves the Court to file portions of twenty-one exhibits totaling 269 pages from his first PCR action, comprising Exhibits A, E, F, H, I, J, K, L, Q, II, LL, NN, QQ, OO, RR, SS, TT, UU, VV, YY, and FFF. (Doc. 35) Petitioner advises the Court these exhibits are relevant to his habeas grounds but were not provided by Respondents.

II. LEGAL FRAMEWORK

A. Exhaustion of remedies & procedural default

A state prisoner must properly exhaust all state court remedies before this Court may grant an application for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1), (c); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Arizona prisoners properly exhaust state remedies by fairly presenting claims to the Arizona Court of Appeals in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-45 (1999); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999).

Arizona's "established appellate review processes" consist of a direct appeal and a PCR proceeding. *See* Ariz. R. Crim. P. 31, et. seq. and Rule 32, et. seq.; *see also Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) ("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.").

To be fairly presented, a claim must include a statement of the operative facts and the specific federal legal theory. *Baldwin v. Reese*, 541 U.S. 27, 32-33 (2004); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion."). A claim can also be subject to an express or implied procedural bar. *Robinson v. Schriro*, 595 F.3d 1086, 1100 (9th Cir. 2010). An express procedural bar exists if the state court denies or dismisses a claim based on a procedural bar "that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989); *Stewart v. Smith*, 536 U.S. 856, 860 (2002) (Arizona's "Rule 32.2(a)(3) determinations are independent of federal law because they do not depend upon a federal constitutional ruling on the merits"); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) ("adequate" grounds exist when a state strictly or regularly follows its procedural rule). An implied procedural bar exists if a claim was not fairly presented in state court and no state remedies remain available to the petitioner. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Rose v. Lundy*, 455 U.S. 509, 519-20 (1982); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002).

This Court may review a procedurally defaulted claim if the petitioner can demonstrate either: (1) cause for the default and actual prejudice to excuse the default, or (2) a miscarriage of justice/actual innocence. 28 U.S.C. § 2254(c)(2)(B); *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). "Cause" is something that "cannot be fairly attributable" to a petitioner, and a petitioner must show that this "objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753 (citation and

internal quotation marks omitted). To establish prejudice a "habeas petitioner must show 'not merely that the errors at ... trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Murray*, 477 U.S. at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)) (emphasis in original). "Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial." *Id.*

The miscarriage of justice exception to procedural default "is limited to those *extraordinary* cases where the petitioner asserts his [actual] innocence and establishes that the court cannot have confidence in the contrary finding of guilt." *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) (emphasis in original). To pass through the actual innocence/*Schlup* gateway, a petitioner must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). A petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup*, 513 U.S. at 327)). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. *See also Lee v. Lampert*, 653 F.3d 929, 945 (9th Cir. 2011); *McQuiggin*, 569 U.S. at 399 (2013) (explaining the significance of an "[u]nexplained delay in presenting new evidence"). Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumway v. Payne*, 223 F.3d 982, 990 (9th Cir. 2000) (citing *Calderon v. Thomas*, 523 U.S. 538, 559 (1998)).

B. Ineffective assistance of counsel

Under clearly established Federal law on IAC, a petitioner must show that his counsel's performance was both (a) objectively deficient and (b) caused him prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under federal habeas review, this

results in a "doubly deferential" review of counsel's performance. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (explaining that in a 28 U.S.C. § 2254 case, deference is due both to defense counsel's performance and to the state court's ruling). The Court has discretion to determine which *Strickland* prong to apply first. *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998). A habeas court reviewing a claim of ineffective assistance of counsel must determine "whether there is a reasonable argument that counsel satisfied *Strickland*'s deferential standard, such that the state court's rejection of the IAC claim was not an unreasonable application of *Strickland*. Relief is warranted only if no reasonable jurist could disagree that the state court erred." *Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014) (internal citations and quotations omitted).

C. 28 U.S.C. § 2254 – legal standard of review

On habeas review of claims adjudicated on the merits in a state court proceeding, this Court can only grant relief if the petitioner demonstrates prejudice because the adjudication of the claim either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This is a "'highly deferential standard for evaluating state court rulings' which demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)). In making this determination, a federal court "looks to the last reasoned state court decision to address the claim," *White v. Ryan*, 895 F.3d 641, 665 (9th Cir. 2018) (citing *Wilson v. Sellers*, ___U.S.___, 138 S.Ct. 1188, 1192 (2018)).

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context

where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). F or a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409.

To make a determination pursuant to § 2254(d)(1), the Court first identifies the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the United States Supreme Court which existed at the time the petitioner's state court conviction became final. *Id.* at 412. The Supreme Court has emphasized that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Accordingly, to obtain habeas relief from this Court, Petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

With respect to § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). As the Ninth Circuit has explained, to find that a factual determination is unreasonable under § 2254(d)(2), the court must be "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Taylor v. Maddox*, 366 F.3d 992,

1000 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984, 1000 (9th Cir. 2014). "This is a daunting standard—one that will be satisfied in relatively few cases." *Id.*

The prisoner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." § 2254(e)(1). The Supreme Court has not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1), but has clarified "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *See Burt v. Titlow*, 571 U.S. 12, 18 (2013) (citing *Wood*, 558 U.S. at 293, 301).

III. DISCUSSION

As a preliminary matter, Respondents accurately indicate that the Petition includes a recitation of "facts," much of which he did not assert when making his arguments in the state court proceedings. (Doc. 14 at 3-7) Because "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits[,]" *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011), the undersigned has limited review to the record that was before the state courts.

A. Ground Nine is not cognizable in federal habeas review

Petitioner contends under Ground Nine that he "was denied his 14th Amendment right to Due Process in allowing a jury to convict with a non-unanimous verdict in violation of state law." (Doc. 1-1 at 68) Petitioner states that he raised this question of state law on direct appeal and argued that the prosecution's listing of several possible victims in each count created the potential for a non-unanimous verdict in violation of article 2, section 23 of the Arizona Constitution. (*Id.*) The Arizona Court of Appeals first noted that this argument with respect to his indictment was precluded pursuant to Arizona Rules of Criminal Procedure 13.5(e) and 16.1(c) and cited to Arizona case law to support its conclusion that the "indictment adequately conveyed the offenses charged and permitted Merrick to defend against them. The fact that the charges listed multiple victims in the

alternative did not render the indictment duplicitous or make the verdicts non-unanimous." (*Id.* at 183-186)

A federal court may "entertain an application for a writ of habeas corpus [o]n behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Accordingly, "[i]t is axiomatic that habeas relief lies only for violations of the Constitution, laws, or treaties of the United States; errors of state law will not suffice." *Loftis v. Almager*, 704 F.3d 645, 647 (9th Cir. 2012). As Petitioner himself observed in his brief on direct appeal, there is "no federal constitutional right to a unanimous verdict in state court." (Doc. 14-2 at 144 (citing *Apodaca v. Oregon*, 406 U.S. 404, 410-12 (1972) (plurality)) *See also Johnson v. Louisiana*, 406 U.S. 356, 359 (1972) ("this Court has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that '(i)n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict.'"); *Smith v. Swarthout*, 742 F.3d 885, 895 n.4 (9th Cir. 2014) ("The Supreme Court has instructed that the Sixth and Fourteenth Amendments do not require a unanimous verdict in state criminal prosecutions.").

In the absence of a right under federal law to a unanimous jury verdict in state criminal prosecutions, the state courts' rejection of Petitioner's claim cannot be contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. Petitioner cannot obtain habeas relief on this issue under AEDPA.

B. Ground Ten is not cognizable in federal habeas review

In Ground Ten, Petitioner argues he was "denied a state-created right to represent himself on direct appeal under Arizona Constitution Art. 2 §24." (Doc. 1-1 at 69) He asserts this violation occurred "when the court of appeals denied him the opportunity to file a pro se brief on appeal after he represented himself in the trial court and never asked for appellate counsel in violation of state law." (*Id.*) He further alleges the court of appeals forced an appellate attorney on him against his wishes. (*Id.*)

Although Petitioner contends that his right to represent himself on direct appeal pursuant to the Arizona Constitution is "secured by the 5th, 6th, and 14th Amendments to the U.S. Constitution" (Doc. 1-1 at 69), a criminal defendant has no federal constitutional right of self-representation on direct appeal. *Martinez v. Court of Appeal of California,* 528 U.S. 152, 161 (2000). Accordingly, any failure of the Arizona Court of Appeals to allow Petitioner to represent himself on appeal does not violate either the Fifth, Sixth or the Fourteenth Amendments to the United States Constitution. *Id.* at 160-61. *See also Tamalini v. Stewart*, 249 F.3d 895, 900 (9th Cir. 2001). As the Sixth Circuit has explained, "[c]learly, this holding contradicts the petitioner's assertion that there exists a constitutional entitlement to submit a pro se appellate brief on direct appeal in addition to the brief submitted by appointed counsel." *McMeans v. Brigano*, 228 F.3d 674, 684 (6th Cir. 2000). *See also Viola v. Escapule*, No. CV-14-1073-DJH (JZB), 2015 WL 4939952, at *9 (D. Ariz. July 31, 2015) ("There is no constitutional right to self-representation on appeal." (citing *Martinez*, 528 U.S. at 161)). Based on these authorities, Petitioner is not entitled to relief on this claim, which is not cognizable under AEDPA.

C. Ground One

In Ground One, Petitioner alleges his trial counsel provided IAC when he refused Petitioner's repeated requests that he be allowed to testify. (Doc. 1 at 8, 9-52) In his PCR action, Petitioner argued his counsel's refusal to allow him to testify either during trial or at the aggravation phase of his sentencing violated his rights guaranteed under the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment, and further infringed on the Fifth Amendment privilege against self-incrimination. (Doc. 14-3 at 100) He averred that his testimony would have "undermined the state's case and demonstrated he had no knowledge of the scheme to steal gift cards []or of the GM Business Choice gift card program or the fraudulent gift cards prior to his arrest[.]" (*Id.*)

The superior court's ruling on Petitioner's PCR action is the last reasoned state court decision to address this issue. (Doc. 14-3 at 173-181) The court first noted that Petitioner

had not provided record support for his argument and relied only on citations to his own affidavit. (*Id.* at 174) The superior court cited federal case law for its conclusion that a defendant must advise the court during trial that he wishes to testify despite his counsel's advice to the contrary, and that the defendant's "[s]ilence in the face of his attorney's decision not to have a defendant testify is a waiver." (*Id.* at 175, citing *U.S. v. Edwards*, 897 F.2d 445, 446 (9th Cir. 1990))

The superior court declared that:

> In this matter, at no time did Defendant tell the Court that he and his attorney were in disagreement and Defendant wanted to testify but his attorney would not let him. Nor did Defendant ever complain that his attorney was refusing to allow him to testify. What Defendant told the [C]ourt was that he could not testify completely because the Court allowed into evidence calls he had with and letters he wrote to Vicki McFarland, which Defendant considered to be religious communications, despite the Court's ruling to the contrary. *See* Document entitled "Objection/Notice to Court" attached as an exhibit to Defendant's Petition for Post-Conviction Relief at p. 4.

(Doc. 14-3 at 175) In Petitioner's "Objection/Notice to Court" referred to by the superior court, he stated:

> I want to put an objection on the record about my religion and this trial.
>
> I have expressed my desire to testify in this case to clear up issues. However, I feel that because the court has allowed my religious communications into evidence I will be unable to testify completely. I wanted to put on the record that I feel forced to testify to things that I have a constitutional right not to testify about [my religion]. I think ARS §41-1493.01 and U.S. Constitution, Amend. 1, 6 and 14 and Arizona Const. Art. 2, §§ 4, 12, 13, 32 and 33 and Art. XX § 1. I further don't waive any privileges by being forced to testify. I feel that on religious matters any testimony will be without prejudice, UCC 1-207.
>
> I want to put this objection on the record, outside the presence of the jury, so I will not be further prejudiced if I have to claim a privilege while testifying to religious matters, The Court will know why.
>
> Respectfully,
> A. Merrick

(Doc. 41-1 at 3)

The superior court found there was no record support for Petitioner's argument that he wanted to testify but his attorney refused to allow it and held that he had failed to present a colorable claim for relief. (Doc. 14-3 at 175)

Petitioner states that after the superior court read his "Objection/Notice to Court," the court advised his attorney that he could put the contents of the letter on the record if it was a proper objection under procedural rules. (Doc. 1 at 10) The record substantiates this statement. (Doc. 14-3 at 163-164) Petitioner further states that he then told trial counsel to put the contents of the letter in the record and then to call him as a witness after the state rested. (Doc. 1 at 10) Petitioner asserts his attorney told him that he would not do this and would not call him as a witness. (*Id.*) Petitioner further states that he responded in a loud voice, "You better call me." (*Id.*) Petitioner also declares that after the prosecution rested and after the court asked defense counsel if he had any witnesses and his counsel advised the court that the defense also rested, Petitioner "raised his hand, palms upward, shoulder level, and said, "What the hell." (*Id.*) Petitioner explains that the deputy sitting behind him whispered to him that if he said anything more or moved around, he would be tased. (*Id.*) The transcript, however, does not record any discussion in the courtroom between the time Petitioner's counsel indicated the defense was resting its case and the court addressed the jury about final jury instructions. (Doc. 14-3 at 165)

Petitioner argues that the superior court's conclusions "were based on an unreasonable determination of the facts in light of the evidence presented" and were also "contrary to and an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984)." (Doc. 41 at 4) However, as the superior court correctly observed, Petitioner's letter/notice did not inform the court that his counsel refused to allow him to testify when that was Petitioner's desire, but rather only indicated that he wished to testify but did not want to be forced to testify about what Petitioner characterized in his letter as his "religious communications," presumably on cross-examination. Furthermore, the trial transcripts for the day prior to the end of the prosecution's case indicate that the court did not anticipate

that the defense would be calling any witnesses in its case. (Doc. 47-1 at 1090-1091) When the jury was released for lunch the next day, the court confirmed that the prosecution would rest immediately after court resumed following lunch, and that defense counsel had a Rule 20 motion to make and "that will be it for the defense." (*Id.* at 1167-1168) The next day, the prosecution rested its case and defense counsel argued a Rule 20 motion for a directed verdict and an alternative motion to dismiss certain counts for lack of jurisdiction because the alleged crimes occurred in Pinal County. (*Id.* at 1179-1180) The superior court's holding that the record did not support Petitioner's claim of IAC for his counsel's alleged refusal to permit him to testify was neither an unreasonable application of *Strickland* nor an unreasonable determination of the facts based on evidence presented.

D. Ground Two

Petitioner's Ground Two argument is that his trial counsel provided IAC by failing to "challenge the state's case and present indisputable proof of factual innocence because Merrick was in a Federal Correctional facility when [some of the] offenses were committed[,]" which he contends provided an alibi of which the jury was unaware. (Doc. 1 at 53) Petitioner argued in his PCR petition that he had been incarcerated until December 12, 2007, which he stated was after several purchases had been made using one or more fraudulent gift cards. (Doc. 14-3 at 108, 110) Petitioner asserts this fact is critical to establishing that his trial counsel was ineffective for failing to challenge the prosecution's case against him. (Doc. 1 at 53-60)

In addressing this claim, among others, the superior court explained that it had reviewed Petitioner's cross-examination of some of the prosecution's key witnesses against Petitioner and had concluded that Petitioner had "simply failed to establish that his counsel's cross-examination of those witnesses establishes a colorable claim of ineffective assistance of counsel." (Doc. 14-3 at 179) Moreover, the court found determinative that Dominick Hurley had "admitted to starting the gift program scheme before Defendant moved in with him and before Defendant received any gift cards." (*Id.* at 179-180) The court concluded that Hurley had been "significantly impeached in many areas during his

direct and cross examination" and that "[i]n light of overwhelming evidence" of Defendant's guilt, his counsel's failure to pursue additional impeachment of Hurley based on forensic evidence from a computer seized from Hurley's home "would have made no difference in the outcome of the trial." (*Id.*)

As Respondents correctly argue, Petitioner was charged on nine counts of theft of a credit card pursuant to A.R.S. § 13-2102, providing that "[a] person commits theft of a credit card or obtaining a credit card by fraudulent means if the person: . . . [c]ontrols a credit card without the cardholder's or issuer's consent through conduct prescribed in section 13-1802[3] . . . . A.R.S. § 13-2102(A)(1). Accordingly, evidence indicating that fraudulent cards had been obtained and used by others would not absolve Petitioner of culpability for any charge of theft of a credit card so long as he subsequently was shown to have controlled the fraudulent card or cards. The record supports the superior court's decision that Petitioner's counsel was not ineffective for failing to challenge the prosecution's case on the basis of his release date from prison. The superior court's ruling was not an unreasonable application of *Strickland* and did not involve an unreasonable determination of the facts.

E. Grounds Three and Seven

Petitioner's Ground Three argument is that he "was denied his right to the effective assistance of counsel when he failed to challenge the prosecution's knowing use of materially false testimony in the trial that implicated Merrick in the offenses." (Doc. 1 at 61) Among the false testimony alleged by Petitioner was testimony regarding a telephone number used to activate fraudulent gift cards, items purchased with the gift cards, and the identity of persons who had purchased items using the cards. (*Id.* at 62-63) In Ground Seven, Petitioner asserts that he was "denied his right to the effective assistance of counsel under the 6th and 14th Amendments to the U.S. Constitution when counsel failed to challenge and raise the denial of a fair trial under the due process clause of the 14th Amendment for prosecutorial misconduct." (Doc. 1-1 at 38) Petitioner supports his claim

[3] Providing classification and definitions of theft.

by stating that during his trial "the State committed at least 27 acts of misconduct, whether suborning perjury, stating facts not in the record, vouching for their witnesses or misleading the jury." (Doc. 1-1 at 38) There is substantial overlap in Petitioner's arguments and discussion of his prosecution related to these two grounds for relief. (Doc. 1 at 61- 67; Doc. 1-1 at 38-66) The two grounds are accordingly addressed together.

The superior court held that Petitioner was "precluded from raising issues in his PCR that he either did raise or could have raised on appeal. *See* Rule 32.2(a), Ariz. R. Crim. P. Thus, the prosecutorial misconduct claim raised by Defendant in his Petition is precluded herein." (Doc. 14-3 at 180) The court addressed Petitioner's argument addressing IAC and the alleged prosecutorial misconduct as follows:

> With respect to issue (6), [Petitioner]'s position is that the State committed prosecutorial misconduct when it (a) falsely represented that [Petitioner] picked up, activated and used Best Buy gift card 6368 when the State knew this was false; (b) vouched for Dominick Hurley's testimony; (c) asked Dominick Hurley if a certain phone number was his home phone number when the State knew that it was not; (d) allowed Dominick Hurley to provide testimony the State knew was false; and represented that [Petitioner] bought certain items when they knew it was Hurley who bought those items. According to [Petitioner], his counsel was ineffective for not objecting to this prosecutorial misconduct.
>
> Prosecutorial misconduct is not merely "legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial." *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984). To justify reversal, the misconduct "must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Lee*, 189 Ariz. 608, 616 (1997) (citations omitted). Even then, reversal is not required unless the defendant was denied a fair trial. *State v. Bible*, 175 Ariz. 549,600 (1993).
>
> On the basis of the foregoing, [Petitioner]'s counsel's conduct was not deficient under prevailing professional norms when he failed to object to the misconduct alleged above. Moreover, even if it was, [Petitioner] was not prejudiced thereby. Thus issue (6), above, fails to set forth a colorable claim of ineffective assistance of counsel. *See also* State's Response at pp. 18-19; and Memorandum Decision in 1 CA-CR 11-0834 (the witness tampering and conspiracy to commit perjury case) ("[Petitioner] essentially is repackaging

> all of his complaints about the proceeding under the rubric of prosecutorial misconduct. As a result, we do not find that the trial court abused its discretion by denying [Petitioner's] motion for a new trial.").

(Doc. 14-3 at 178-179)

Petitioner cites to the United States Supreme Court opinion in *Napue v. Illinois*, in which the Court instructed that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "To prevail on a claim based on *Mooney-Napue*, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

Petitioner's argument about the prosecution's alleged knowledge of false testimony involving Dominick Hurley's home phone number was directed to Hurley's testimony that "[Petitioner] had activated these fraudulent gift cards." (Doc. 1 at 61, Doc. 14-3 at 113-114) Petitioner also argues the prosecution possessed records indicating that Hurley had purchased items using a fraudulent gift card that he then testified Petitioner had bought. (Doc. 1 at 62, 64; Doc. 1-1 at 39; Doc. 14-3 at 114) Petitioner argues that a police detective gave inconsistent testimony to the grand jury and at trial regarding Petitioner's involvement with "manufacturing and taking of identities." (Doc. 1 at 63; Doc. 1-1 at 48; Doc. 14-3 at 115) Significantly, the allegedly false testimony about which Petitioner complains centers on information related to activating some of the fraudulent gift cards, purchases that Petitioner argues Dominick Hurley made that Hurley testified Petitioner made with some of the cards, and other issues that would be important to establishing Hurley's guilt in the scheme, but were not dispositive on the jury's finding of guilt as to Petitioner's charges. (Doc. 1 at 61-67; Doc. 1-1 at 39-71) Petitioner fails to demonstrate that the testimony he argues his counsel should have challenged was material to the jury's dispositive conclusion

that he had *controlled* the fraudulent gift cards associated with the charges on which he was convicted. Accordingly, Petitioner failed to establish he was prejudiced by his claims of IAC as is required under *Strickland,* 466 U.S. at 694). The superior court arrived at this same conclusion (Doc. 14-3 at 178), which was not unreasonable under 28 U.S.C. § 2254(d).

F. Ground Four

In Ground Four, Petitioner contends his trial counsel was ineffective when he failed to challenge the state's use of privileged evidence consisting of communication between Petitioner and his clergy/counselor. (Doc. 1 at 68) In his PCR action, Petitioner asserted he had made "communications pursuant to his sincere religious beliefs to his clergy and behavioral health counselor, Reverend Vicki McFarland" that the State had seized from McFarland's records and "used them against [him] at trial." (Doc. 14-3 at 101) Petitioner alleged that use of the seized records "had the effect of showing consciousness of guilt of the charged offenses" and allowed the jury to infer that he "had something to hide." (*Id.* at 102) Petitioner complained that he was not able to testify about the contents of the seized records because of his "sincere religious beliefs." (*Id.* at 104) He states that his trial counsel never investigated this circumstance and never challenged the use of the documents. (*Id.*)

Addressing this argument, the superior court explained:

> In support of this claim, [Petitioner] asserts that his counsel failed to: (1) challenge the admissibility of communications he had (both oral and written) with Vicki McFarland which [Petitioner] claims were privileged because Ms. McFarland was his minister; (2) challenge the admissibility of letters McFarland had that were either sent by or addressed to [Petitioner]'s counsel; (3) challenge the fact that [Petitioner] had to choose between his right to testify and his right to practice his religion; (4) establish on cross-examination that the detectives who searched McFarland's house failed to inventory the contents of each piece of mail seized; (5) argue that because of the court's ruling that communications between [Petitioner] and McFarland were not privileged, [Petitioner] lost his right to call McFarland and assert his religious beliefs; (6) challenge the prosecutorial misconduct

that occurred; (7) effectively cross-examine detectives about statements they obtained from Melissa Duckett; (8) effectively cross-examine Eve Ford; (9) effectively cross-examine Dominick Hurley; (10) contest aggravation elements to the jury; (11) argue mitigation; (12) request use immunity for McFarland; (13) request a *Willits* instruction regarding pages missing from a letter seized at McFarland's house; and (14) review the forensic examination reports of the computer seized from Hurley's home, which report is exculpatory. For the reasons set forth below, the Court finds that these assertions, either standing on their own or considered collectively, do not present a colorable claim for post-conviction relief.

Assertions (1), (3) and (5) are based upon [Petitioner]'s mistaken belief that his communications with Vicki McFarland were privileged religious communications. By way of background:

> While awaiting trial [in this case] . . ., [Petitioner], with the help of Vicki McFarland, tried to get two people to fabricate testimony in an attempt to avoid conviction. Specifically, [Petitioner] called McFarland between April 2009 and October 2010 using his jail booking information or the booking numbers belonging to others. McFarland subsequently called the Perryville Prison chaplain and requested a pastoral visit with Eve Ford. When she learned that inmates have to set up the pastoral visits, which would also require a background check, McFarland did not call back.
>
> The police subsequently secured a search warrant and searched Ms. McFarland's home. They discovered letters from [Petitioner] to McFarland that gave her pointers on how to testify; letters discussing the Fundamental Christian Temple Church and pastoral visits; and letters about Eve Ford, Dominick Hurley, and David Harris, and their roles in the gift card matter.
>
> [Petitioner] was subsequently indicted for three counts of conspiracy to commit tampering with a witness, class 6 felonies, conspiracy to commit perjury, a class 4 felony, and obstructing criminal investigations or prosecutions, a class 5 felony. He requested and was allowed to act as his own lawyer. After one count of conspiracy to tamper with a witness was dismissed without prejudice (involving Candice Henry), the case was tried and the jury found him guilty of the remaining charges. *See* Memorandum Decision issued by Div. One of the

Arizona Court of Appeals on May 2, 2014 in 1 CA–CR 11–0834.

In his appeal in CA–CR 11–0834 (the witness tampering and conspiracy to commit perjury case) [Petitioner] argued that the recorded telephone conversations [Petitioner] had with and the letters he sent to Ms. McFarland were privileged religious communications. In rejecting that claim the Court of Appeals held:

> Section 13–4062 provides that a member of the clergy cannot "without consent of the person making the confession" testify about the substance of any confession. Again, assuming for argument that McFarland was an ordained member of the clergy, the State did not ask her to testify. Instead, the State used recorded telephone conversations that [Petitioner] made while jailed; conversations that [Petitioner] knew were being monitored before he made them and were not private.
>
> . . .
>
> Here, the State did not call McFarland to testify. There was no evidentiary hearing, nor did [Petitioner] call her to testify that his telephone calls and letters were privileged religious communications. Moreover, there is information in the record that supported the State's argument to the trial court that, even if McFarland was a clergy member, she was not acting as such when talking with [Petitioner]. In the recorded telephone conversations and letters there was no mention that [Petitioner] was confessing and needed religious or spiritual assistance. In fact, the evidence is to the contrary. His April 17, 2010 letter to McFarland states: "I am going to want to claim The 'Fundamental Christian Temple' as my church and religion. You should check the name availability with the corp. comm. as a non-profit church. Also, the I.R.S. I'm going to want to incorporate the non-profit church and get I.R.S. approval as a 501(c)(3)." The letter demonstrates that the church did not exist before April 2010, McFarland was not then an ordained member of the church and [Petitioner] only wanted to create it to attempt to hide behind religion.
>
> The communications did not evince a "human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Waters*

> *v. O'Connor*, 209 Ariz. 380, 384, ¶ 17, 103 P.3d 292, 296 (App. 2004) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). Accordingly, the trial court did not abuse its discretion by admitting the telephone recordings and the letters seized at McFarland's residence.
>
> As established above, the communications [Petitioner] had with Vicki McFarland (both written and oral) were not privileged religious communications and were admissible at trial. Thus, [Petitioner's] counsel's action or inactions as described in (1), (3) and (5) above were not ineffective as they were not deficient under prevailing norms and [Petitioner] suffered no prejudice.[4]
>
> With respect to assertions (2), (4), and (13) above, these same issues were raised by [Petitioner] in his appeal in 1 CA–CR 11–0834 (the witness tampering and conspiracy to commit perjury case). In affirming [Petitioner]'s convictions the Court of Appeals found that none of these issues warranted a new trial and that the trial court had not erred in admitting the letters sent to McFarland by [Petitioner] that were allegedly addressed to [Petitioner]'s legal counsel or the documents seized from McFarland's parents' house (where McFarland was living) despite the absence of an inventory or the giving of a *Willits* instruction. *See* Memorandum Decision in 1 CA–CR 11–0834. Consequently, the failure of [Petitioner]'s counsel to raise these issues at trial was not deficient under prevailing professional norms and, even if it was, [Petitioner] was not prejudiced thereby.

(Doc. 14-3 at 175-178)[5]

Petitioner fails to show that the superior court's comprehensive decision on this claim resulted in an unreasonable application of *Strickland* to his trial counsel's representation or in an unreasonable determination of the facts considering the evidence presented. In addition to the examples provided by the superior court to establish that Petitioner's communications with Ms. McFarland were not privileged and were thus admissible (including Petitioner's instructions to McFarland on how to establish the church

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[4] In a footnote the court declared that "[i]n this matter (the gift card scheme case) the letters and phone calls were admitted as evidence of consciousness of guilt."

[5] Facts utilized by the Superior Court from the decision of the Arizona Court of Appeals in Petitioner's witness tampering case, 1 CA-CR 11-0834, are presumed to be correct, subject to rebuttal by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

and claim a non-profit status, and direction from Petitioner on what testimony he wanted witnesses to give), Ms. McFarland herself admitted in the factual basis for her plea agreement to two counts of conspiracy to commit tampering with a witness (CR 2010-007633-001) that the church in which she was allegedly a pastor was fictitious. (Doc. 14-4 at 126) Petitioner fails to establish any grounds for relief pursuant to 28 U.S.C. § 2254(d).

G. Ground Five

In Ground Five, Petitioner argues his appellate counsel was ineffective for not arguing claims that the state had knowingly presented false, perjured testimony at trial. (Doc. 1 at 70) Deciding this argument in Petitioner's PCR action, the superior court concluded that Petitioner had:

> failed to identify any intentional misconduct on the part of the prosecutor that was so pronounced and persistent that it permeated the entire atmosphere of the trial so that Defendant's right to a fair trial was denied. In the absence of such a showing, the failure of Defendant's appellate counsel to raise this issue on appeal was not deficient under prevailing professional norms. Nor was Defendant prejudiced in any way by the failure to raise this issue on appeal.

(Doc. 14-3 at 181) As is discussed above with respect to Grounds Three and Seven, Petitioner fails to demonstrate that the testimony he argues his counsel should have challenged was material to whether he had *controlled* the fraudulent gift cards associated with the charges on which he was convicted. Accordingly, the state courts' conclusion that Petitioner's counsel on direct appeal was not ineffective for failing to raise a claim of prosecutorial misconduct was not a decision that was "contrary to ... clearly established federal law, as determined by the Supreme Court," did not involve "an unreasonable application of" such law, and was not "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). For this reason Petitioner's Ground Five claim should be denied.

H. Ground Six

Petitioner's Ground Six claim is that he has the right to "conflict-free counsel." (Doc. 1-1 at 33) He asserts his Sixth and Fourteenth Amendment rights were violated when

he and his trial counsel developed "an irreconcilable, fractured relationship" that prejudiced his case (*Id.*) and that as a consequence he did not receive constitutionally effective representation (*Id.* at 37). In his PCR action, Petitioner similarly argued that he and his counsel had a "completely fractured relationship" that "violated" his right to counsel. (Doc. 14-3 at 112-113) He stated that he and trial counsel were antagonistic toward each other and that at two points during the trial they almost came to blows. (*Id.* at 112) He noted that the trial judge remarked at the aggravation hearing that she had noticed some tension between the two men, and that Petitioner ultimately fired his counsel prior to sentencing. (*Id.*)

The PCR court noted that it had found Petitioner had failed to "establish a single colorable claim of ineffective assistance of counsel. Thus, even if he and his counsel had a 'fractured relationship,' Defendant was not prejudiced thereby to an extent that warrants post-conviction relief." (Doc. 14-3 at 180)

It is apparent that Petitioner does not suggest his trial counsel had a conflict of interest in the sense that counsel was representing conflicting interests. Instead, Petitioner states that his counsel was unprepared and said he was unable to "keep track of everything," refused to follow Petitioner's direction and input involving the questioning of some witnesses, objecting to evidence, and drafting motions. (Doc. 1-1 at 33-34) Additionally, Petitioner complained that his counsel refused to use jail recordings to impeach Dominick Hurley and that at one point he and counsel were yelling at each other in the courtroom during an argument over Petitioner's representation and trial strategy. (*Id.* at 35) Petitioner also described his conflict with counsel over whether counsel would call Petitioner to testify. (*Id.* at 35-36)

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Similarly, "[t]here is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'"

Harrington v. Richter, 562 U.S. 86, 109 (2011) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (*per curiam*)). Moreover,

> [n]ot every difference over trial strategy creates an irreconcilable conflict. *See* [*Schell v. Witek*, 218 F.3d 1017,] 1026 & n. 8 [(9th Cir. 2000)] ("[A] lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval." (quoting *Brookhart v. Janis,* 384 U.S. 1, 8, 86 S.Ct. 1245, 16 L. Ed.2d 314 (1966) (Harlan, J., dissenting in part))).

Lemelle v. Pliler, 215 Fed. App'x 592, 593 (9th Cir. 2006). At most, Petitioner shows that he and trial counsel disagreed about the proper course of his defense. He has not shown that the breakdown between him and counsel reached the degree of breakdown in communication necessary to establish ineffective assistance of counsel. The trial record simply does not support such a conclusion.

Accordingly, the Arizona courts' rejection of Petitioner's argument was not unreasonable pursuant to 28 U.S.C. § 2254(d).

I. Ground Eight

In Ground Eight, Petitioner argues he was denied his right to be free from double jeopardy when he was charged, tried, and punished multiple times for the same "possession of gift cards." (Doc. 1-1 at 67) For the reasons set forth below, the undersigned recommends the Court find Petitioner's argument fails under applicable law.

Petitioner was convicted on: Count 1 of fraudulent schemes for stealing, activating, and using gift cards pursuant to A.R.S. § 13-2310; Count 2 of theft of the same gift cards under A.R.S. § 13-1802; and Counts 6, 8, 9, 10, 11, 14, 15, 23, and 24 of theft of a credit card or obtaining a credit card by fraudulent means ("theft of a credit card") pursuant to A.R.S. § 13-2102. (Doc. 47-1 at 7, 8-10, 12-13; Doc. 14-2 at 85-88, R.T. 6/15/2011)

As noted, on direct appeal the Arizona Court of Appeals held that under the Arizona criminal statute on which he was charged for theft of a credit card, A.R.S. § 2102, "possession" of the fraudulent gift cards and not their "use" was the only basis for Petitioner's convictions, and thus that convictions "based on his 'use' of the same gift cards on separate occasions or in separate transactions renders the additional convictions a

violation of double jeopardy." (*Id.* at 182) The court's discussion of the principle of double jeopardy cited to both the Arizona and United States Constitutions. (*Id.* at 180) Concluding that the appropriate remedy was to vacate multiplicitous convictions, the court of appeals vacated his convictions: (1) under Counts 9 and 10 involving Best Buy gift card number 1792 as multiplicitous to Count 6; (2) under Count 11 involving Best Buy gift card number 1814 as multiplicitous to Count 8; (3) and under Count 15 which involved Best Buy gift card number 6274 as multiplicitous to Count 14. (*Id.* at 182-183) The court of appeals did not hold that Count 24 was multiplicitous to Count 23 notwithstanding that Lowe's gift card number 6596 was possessed in both counts because this gift card was one of five fraudulent gift cards used regarding Count 23 and was the only card involved in Count 24. (*Id.* at 183)

Petitioner argues here that his convictions under Counts 6, 8, 14, 23, and 24, which were not vacated by the court of appeals, are multiplicitous to his conviction for theft under Count 2 because each of these counts share the element of "possession." (Doc. 1-1 at 67) In his direct appeal of his convictions, Petitioner explained he was convicted of eleven charges including Count 1 (fraud), Count 2 (theft, a class 3 felony), and Counts 6, 8-11, 14, 15, 23, and 24 (theft of a credit card, a class 5 felony). (Doc. 14-2 at 139) Petitioner explained the factual bases of these charges as follows:

> Count one, the fraud charge, was based on the appellant working through another man (Hurley) to obtain gift cards offered by General Motors to buyers of their vehicles. Count two, the theft charge, was based on the appellant receiving a gift card.
>
> The rest of the counts were based on [Petitioner] using the cards on different occasions to purchase merchandise. As shown by the judge's instructions, the use of individual gift cards resulted in multiple convictions. Counts 6, 9 and 10 were based on card 1798. Counts 8, 10, and 11 were based on card #1814. Counts 14 and 15 were based on card #6596 (and other cards), but count 24 was based entirely on card #6596.

(Doc. 14-2 at 139 (internal citations to record omitted)) Petitioner argued both that his nine theft of credit card convictions should be vacated "because they should not be charged

separately from the initial fraud and/or theft (count two) charges[,]" and also that the "use of a single card on different occasions should not have resulted in multiple charges – and convictions." (*Id.* at 141) The Arizona Court of Appeals, however, did not address Petitioner's argument that his theft of credit card charges were multiplicitous to his Count 2 theft charge.

In his petition for review in the Arizona Supreme Petitioner again argued that his Count 2 theft conviction and his convictions for theft of a credit card were multiplicitous as based on the same conduct. (*Id.* at 217, 219) As noted, the Arizona Supreme Court granted review only on Petitioner's argument involving his right to self-representation on appeal and remanded the case to the court of appeals to consider "any issues regarding timeliness and waiver of Merrick's request for self-representation." (Doc. 14-3 at 2-5)

Although Petitioner agued the issue he asserts in Ground Eight in the state court proceedings, the state courts did not expressly rule on it. This Court, therefore, will review the issue *de novo*. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167-68 & n. 4 (9th Cir. 2002) (holding that where "there is no state court decision on this issue to which to accord deference ... concerns about comity and federalism that arise when a state court reaches the merits of a petition for post-conviction relief do not exist [and] when it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo.").

Under the statute applicable at the time of Petitioner's conviction, Arizona Revised Statute § 13-1802 (Theft) provided, in relevant part, that:

> A. A person commits theft if, without lawful authority, the person knowingly:
>
> 1. Controls property of another with the intent to deprive the other person of such property; or . . .
>
> 5. Controls property of another knowing or having reason to know that the property was stolen[.]
>
> . . .

E. . . . Theft of property or services with a value of four thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony. . . .

Ariz. R. Crim. P. § 13-1802(A) (2009).

Under the statute applicable at the time of Petitioner's conviction, Arizona Revised Statute § 13-2102 (Theft of a credit card or obtaining a credit card by fraudulent means) provided, in relevant part, that:

A. A person commits theft of a credit card or obtaining a credit card by fraudulent means if the person:

1. Controls a credit card without the cardholder's or issuer's consent through conduct prescribed in section 13-1802 . . . .

B. Theft of a credit card or obtaining a credit card by fraudulent means is a class 5 felony.

A.R.S. § 13-2102 (2004).

Petitioner's indictment charged him under Count 2 of theft, a class 3 felony, as follows:

> [Petitioner and Hurley], on or between the 11th day of October, 2007 and the 30th day of July, 2008, without lawful authority, knowingly controlled BEST BUY AND/OR GENERAL MOTORS AND/OR HENRY BROWN AND/OR LOWES'S GIFT CARDS, of a value of $4,000 or more, but less than $25,000, with the intent to deprive BEST BUY AND/OR GENERAL MOTORS AND/OR HENRY BROWN AND/OR LOWES of such property, in violation of A.R.S. §§ 13-1801, 13-1802, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, 13-702.01, and 13-801.

(Doc. 47-1 at 7) In Counts 6, 8, 14, Petitioner was charged with theft of a credit card, in that:

> on or about the [dates in April/May], 2008, without the consent of GENERAL MOTORS AND/OR HENRY BROWN AND/OR BEST BUY, knowingly controlled the credit card of BEST BUY AND/OR GENERAL MOTORS AND/OR HENRY BROWN, in violation of A.R.S. §§ 13-2102, 13-2101, 13-1802, 13-1804, 13-701, 13-702, 13-702.01, and 13-801.

(*Id.* at 8-10) Count 23 also charged theft of a credit card, alleging that:

> [Petitioner and Hurley], on or about the 9th day of July, 2008, without the consent of GENERAL MOTORS AND/OR HENRY BROWN AND/OR LOWE'S, knowingly controlled the credit card of GENERAL MOTORS AND/OR HENRY BROWN AND/OR LOWES, in violation of A.R.S. §§ 13-2102, 13-2101, 13-1802, 13-1804, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, 13-702.01, and 13-801.

(*Id.* at 12) Additionally, Count 24 charged theft of a credit card, stating that:

> [Petitioner], on or about the 25th day of July, 2008, without the consent of GENERAL MOTORS AND/OR HENRY BROWN AND/OR LOWE'S, knowingly controlled the credit card of GENERAL MOTORS AND/OR HENRY BROWN AND/OR LOWES, in violation of A.R.S. §§ 13-2102, 13-2101, 13-1802, 13-1804, 13-701, 13-702, 13-702.01, and 13-801.

(*Id.* at 13).

In announcing the final jury instructions, the trial court told the jury that "[t]he crime of theft requires [proof] that the defendant without lawful authority knowingly controlled property of another with the intent to deprive the other person of such property." (Doc. 47-1 at 1191) The judge further instructed the jury that the crime of "theft of a credit card or obtaining a credit card by fraudulent means requires proof that the defendant controlled a credit card without the card holder's or issuer's consent by knowingly coming into control of a lost, mislaid, or misdelivered card upon circumstances proving means of inquiry as to the true owner and appropriating that card to the defendant's own or another's use without reasonable efforts to notify the true owner of that card." (*Id.* at 1191-1192)

During final jury instruction, the trial court discussed the verdict form for Count 2, the theft count. (Doc. 47-1 at 1281-1282) The court instructed the jury that there was "one theft[,]" and that if they were to find Petitioner guilty, they would be required to find a dollar value amount associated with that count within a range of "less than 1,000, 1,000 to 2,000, 2,000 but less than 3,000, 3,000 or more but less than 4,000, or 4,000 to 25,000 or more." (*Id.*) In finding Petitioner guilty of Count 2, the jury found the theft to be in the amount of $4,000 to $25,000 or more. (*Id.* at 1294) The prosecution advised the jury in its opening statement that the Count 2 theft charge consisted of theft of the 29 fraudulent

gift cards associated with Petitioner, while the Counts 6, 8, 9, 10, 11, 14, 15, 23, and 24 charges involved the use[6] of eight[7] of those gift cards. (Doc. 47-1 at 62)

"An indictment is multiplicitous when it charges multiple counts for a single offense, producing two penalties for one crime and thus raising double jeopardy questions." *United States v. Stewart*, 420 F.3d 1007, 1012 (9th Cir. 2005); *see also State v. Powers*, 200 Ariz. 123, 125, 23 P.3d 668, 670 (Ct. App. 2001) (same). Multiplicity under federal law is determined by using the test described in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Id.* Under *Blockburger*, a court examines the elements of the crimes, and determines whether each offense "requires proof of an additional fact which the other does not." *See State v. Eagle*, 196 Ariz. 188, 190, 994 P.2d 395, 397 (2000) (quoting *Blockburger*, 284 U.S. at 304). In other words, an indictment is not multiplicitous if each count requires proof of a fact which the others do not. *Blockburger,* 284 U.S. at 304; *United States v. Roberts*, 783 F.2d 767, 769 (9th Cir. 1985). A single act may cause more than one consequence. *United States v. Shaw*, 701 F.2d 367, 396 (5th Cir. 1983). Accordingly, a defendant may constitutionally be convicted of two separate offenses arising from a single act so long as each requires proof of a fact not essential to the other. *Id.* In discerning whether a count requires proof of a fact which another count does not, "[t]he elements of the offense are determinative, even if there is substantial overlap in their proof." *United States v. Solomon*, 753 F.2d 1522, 1527 (9th Cir. 1985).

The elements of theft in Section 13-1801 require the State to prove that the defendant (1) without lawful authority, (2) knowingly controlled (3) the property of another either with the intent to deprive the other person of such property or knowing or having reason to know that the property was stolen[.] A.R.S. § 13-1802. The elements of theft of a credit card or obtaining a credit card by fraudulent means require the State to prove a

[6] As noted, the Arizona Court of Appeals vacated Counts 9, 10, 11, and 15 of the indictment because possession of a credit card and not its use was the basis for his convictions under A.R.S. § 13-2102. (Doc. 14-2 at 181-182)

[7] The verdict forms identified Best Buy gift card numbers 1798, 1814, 1798, and 6274, and Lowe's gift card numbers 6612, 6604, 7711, 1514, and 6596. (Doc. 47-1 at 1282-1283)

defendant (1) controlled a credit card (2) without the cardholder's or issuer's consent (3) through conduct prescribed by section 13-1802. A.R.S. § 13-2102. Accordingly, even though section 13-2102 incorporates the element that prohibited conduct is conduct identified in section 13-1802, it additionally requires the State to find a fact not essential to the theft count: that control of a gift card was without the cardholder's or the issuer's consent. *Id.* As noted, the court of appeals held that multiple uses of Best Buy gift cards 1798, 1814, and 6274 rendered Petitioner's convictions under Counts 9, 10, 11, and 15 multiplicitous in violation of constitutional double jeopardy protections. (*Id.* at 182-183) The remaining convictions on section 13-2102 theft of a credit card as to Counts 6, 8, 14, 23, and 24 are not multiplicitous to Petitioner's conviction of a single charge of theft in Count 2 and do not violate double jeopardy protections because these theft of a credit card counts require proof of an element that is not essential to the theft count.

The prosecution in closing argument discussed evidence related to the theft of a credit card Counts 6, 8, 9, 10, 11, 14, 15, 23, and 24 and specifically addressed gift cards 1798, 1814, 6274, 6612, 6604, 7711, 1514, and 6596. (*Id.* at 1201-1202) The prosecution discussed in detail evidence related to applications for post office boxes using Petitioner's and his businesses' personal details and the delivery of credit cards to these post office boxes opened by Petitioner. (*Id.* at 1204-1208) Next, the prosecution argued the evidence established that issuers did not consent to Petitioner's possession of the credit cards and that Petitioner was aware his possession of the cards was illegal. (*Id.* at 1209-1210)

To establish that Petitioner was guilty of the charge of theft, the prosecution discussed evidence linking Petitioner to all 29 gift cards. To establish the element of absence of lawful authority, the prosecution noted that Petitioner did not meet the qualifications within the GM promotional program for the cards, including the requirement that he be a purchaser of a GM vehicle. (*Id.* at 1212) On the element that Petitioner controlled the gift cards, the prosecution pointed the jury to evidence of Petitioner's information on the gift card claim forms and to the means of delivery of the cards, such as delivery under his name or a sound-alike name to post-office boxes he opened. (*Id.* at

1212-1213) The jury was told that Petitioner knew the 29 gift cards were stolen because he did not purchase a single GM vehicle, let alone 29, and he was aware that the gift cards were part of a promotional program for purchasers of Henry Brown GM vehicles. (*Id.* at 1221)

As noted, the jury was advised that each gift card had a $500 value, and that 29 gift cards were worth $14,500. (*Id.* at 1221) Finally, the prosecution argued evidence that Petitioner intended to deprive the rightful owner of the gift cards when he took delivery of the cards and used them to purchase items for himself and his businesses. (*Id.* at 1222)

Accordingly, Petitioner was charged, prosecuted and convicted on the elements of A.R.S. § 13-1802 and those of § 13-2102, which included the additional required element of control of a gift card without the cardholder's or the issuer's consent. Under these circumstances, the undersigned recommends the Court find Petitioner's charge for theft in Count 2 and surviving charges for theft of a credit card in Counts 6, 8, 14, 23, and 24 are not multiplicitous under the *Blockburger* test.

IV. CONCLUSION

For the reasons set forth above, the undersigned concludes that Petitioner has failed to establish that habeas relief is warranted on his Petition. The undersigned therefore recommends that the Petition be denied and dismissed with prejudice.

V. PENDING MOTIONS

A. Petitioner's motion for copies regarding his PCR action (Doc. 15); Petitioner's request to include Rule 32 exhibits for review (Doc. 35)

Pending is Petitioner's Motion for Respondents to Provide Copies of Petitioner's Full Petition for Post-Conviction Relief or Order Respondents to Allow Petitioner [to] Copy it to Provide it to the Court. (Doc. 15) He moves the court to order Respondents to "provide all attachments and exhibits" to his first PCR petition or to allow Petitioner to copy them and provide them to this Court. (*Id.* at 1) Petitioner cites to Rules 5 and 7 of the Rules Governing Section 2254 Cases. (*Id.* at 2) Respondents urge the Court to deny Petitioner's request for hundreds of pages of exhibits that Rules 5 and 7 do not require, and

which they assert are not relevant to the Petition. (Doc. 24 at 1-3) Respondents offer to file with the Court copies of "specific documents from [Petitioner]'s post-conviction petition that he believes are necessary for this Court's consideration of his claims." (*Id.* at 3) In reply, Petitioner argues in part that the documents he requests involve all ten of his grounds for relief in his Petition. (Doc. 29 at 2)

Subsequently, Petitioner filed his Request to Include Rule 32 Exhibits for Habeas Corpus Review; his request attaches the extra exhibits he desires to become part of the record. (Doc. 35) He informs the Court these exhibits to his first PCR action had not been filed in this action but are relevant to his grounds for relief. (*Id.*) Petitioner explains that these documents include portions of his PCR exhibits A (with attachments), E, F, H, I, J, K, L, Q, II, LL, NN, OO, QQ, RR, SS, TT, UU, VV, YY, and FFF. (*Id.*) It appears these documents are the same ones subject to Petitioner's Doc. 15 motion. The undersigned has in fact reviewed the documents along with the rest of the record to make recommendations.

It is recommended that Petitioner's motion to include copies of his Rule 32 exhibits for habeas corpus review (Doc. 35) be granted as to the exhibits provided by Petitioner and his initial Motion for Respondents to Provide Copies of Petitioner's Full Petition for Post-Conviction Relief or Order Respondents to Allow Petitioner [to] Copy it to Provide it to the Court (Doc. 15) be denied as moot.

B. Petitioner's motion for meaningful access to legal resources (Doc. 21)

Petitioner has filed a Motion for Meaningful Access to Legal Resources or in the Alternative to Appoint Counsel. (Doc. 21) Petitioner contends he is not able to fully respond to Respondents' answer to his Petition because Arizona Department of Corrections' ("ADOC") policies improperly limit his access to case law. (Doc. 21 at 2) He lists the legal resources currently available for inmates at his facility and notes that the list does not include case reporters or annotated statutes. (*Id.* at 4) Petitioner concludes that the materials available to him deny him meaningful access to the courts. (*Id.* at 5) Additionally, Petitioner requests he be appointed counsel if Respondents fail to provide him with meaningful access to relevant case law. (*Id.* at 7) Respondents' counsel for

ADOC specially appeared to file a response. (Doc. 31) Respondents contend that pursuant to *Lewis v. Casey*, 518 U.S. 343, 351 (1996), Petitioner has not shown an actual injury, such as the inability to meet a deadline or to present a claim, and that the duty of the state to provide access to the courts does not extend beyond the pleading stage, citing *Cornett v. Donovan*, 51 F.3d 894, 896 (9th Cir. 1995). (Doc. 31 at 1)

The Supreme Court in *Lewis v. Casey* disclaimed any suggestion in its earlier opinion in *Bounds v. Smith*, 430 U.S. 817 (1977) that states must enable prisoner litigants to "litigate effectively" once they are in court. *Lewis v. Casey*, 518 U.S. 343, 354 (1996). The Court instructed that a state must furnish "'*adequate* law libraries or *adequate* assistance from persons trained in the law'" for purposes of providing inmates the capability "of bringing contemplated challenges to sentences . . . before the courts." *Id.* at 356 (quoting *Bounds*, 430 U.S. at 828). The Supreme Court further declared that the "Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts—a more limited capability that can be produced by a much more limited degree of legal assistance[that is necessary] to file particular claims that they wish to bring before the courts." *Id.* at 360.

Petitioner's complaint regarding meaningful access to the courts is essentially that he cannot litigate his Petition effectively. Petitioner contends that access to case law prevents him from complying with the provisions of 28 U.S.C. § 2254(d) which he argues requires him "to cite to a U.S. Supreme Court case" and that if he does not cite such a case he will have "little or no chance at success." (Doc. 37 at 2, 5)

Section 2254(d)(1) provides that a federal habeas court may grant a petitioner's claim challenging a decision on the merits by the state courts if the decision "was contrary to, or involved 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). Plainly, a petitioner's litigation of a claim might be more "effective" if he were able to cite to Supreme Court cases that support his argument. Nevertheless, regardless of the

effectiveness of a petitioner's argument or of a respondents' argument for that matter, it is the habeas court which "must determine what arguments or theories supported . . . or could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). In any event, § 2254 does not require a petitioner to cite to Supreme Court case law.

Alternatively, Petitioner requests he be appointed counsel. There is no constitutional right to appointed counsel in a civil case. *See Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). The Court, however, does have the discretion to appoint counsel in "exceptional circumstances." *See* 28 U.S.C. § 1915(e)(1); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). "A finding of exceptional circumstances requires an evaluation of both 'the likelihood of success on the merits and the ability of the petitioner to articulate his or her claim *pro se* in light of the complexity of the legal issues involved.'" *Wilborn*, 789 F.2d at 1331(quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)); *see Richards v. Harper*, 864 F.2d 85, 87 (9th Cir. 1988). "Neither of these factors is dispositive and both must be viewed together before reaching a decision on request of counsel" under section 1915(e)(1). *Wilborn*, 789 F.2d at 133.

The undersigned recommends the Court find that Plaintiff has not demonstrated a likelihood of success on the merits or established that any difficulty he is experiencing in attempting to litigate his case is due to the complexity of the issues involved. Accordingly, this case does not present "exceptional circumstances" requiring the appointment of counsel.

Because Petitioner has failed to demonstrate he was denied meaningful access to the courts and has further failed to establish the existence of exceptional circumstances to support appointment of counsel, it is recommended his Motion for Meaningful Access to Legal Resources or in the Alternative to Appoint Counsel (Doc. 21) be denied.

C. Petitioner's motion to strike response (Doc. 36)

In Petitioner's Motion to Strike Response to Petitioner's Motion for Meaningful Access to Legal Resources or in the Alternative to Appoint Counsel (Doc. 36), he complains that Respondents' response to his Doc. 21 motion for meaningful access to legal resources (Doc. 31) was filed by special appearance by attorney Michael Gottfried, who is an Assistant Arizona Attorney General representing the ADOC. Specifically, Petitioner argues that the ADOC is not a party to his action and is not a Respondent and that ADOC did not seek permission from the Court "to allow their intervening/Amicus brief as the rules require." (Doc. 36 at 2) He asks the Court to strike the Doc. 31 response pursuant to Rule 12(f)(2) of the Federal Rules of Civil Procedure. (*Id.*)

Rule 83.3(b)(4) of the Rules of Practice of the U.S. District Court for the District of Arizona explicitly authorizes counsel in a governmental law office to make the "occasional ... filing of a pleading, motion or other document as associate counsel at the request of an attorney of record" without filing a notice of association of counsel. LRCiv 83.3(b)(4). The response filed by Mr. Gottfried was submitted on behalf of the Arizona Attorney General Mark Brnovich as have been all filings submitted by counsel of record Myles Braccio. (Doc. 31 at 3; *see e.g.,* Doc. 12 at 12, Doc. 24 at 3, Doc. 19 at 4) The undersigned concludes that Mr. Gottfried's response was authorized by counsel of record Mr. Braccio and is binding upon Mr. Braccio as if personally signed by him. Rule 12(f)(2) of the Federal Rules of Civil Procedure has no application to this circumstance. The undersigned recommends the Court to deny Petitioner's Doc. 36 motion.

D. Petitioner's motion for an evidentiary hearing (Doc. 23); Petitioner's motion to expand the record (Doc. 18)

In Petitioner's Motion and Request for an Evidentiary Hearing with His Suggestions in Support (Doc. 23), he requests the Court to hold an evidentiary hearing on his claims asserted in Grounds One, Two and Six. (Doc. 23) Each of these claims was decided on the merits by the superior court and are subject to review pursuant to 28 U.S.C. section 2254(d). Review of Section 2254(d) claims "is limited to the record that was before the

state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011). The U.S. Supreme Court has explained that allowing "a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*" would be contrary to the purpose of affording state courts the primary responsibility for considering a petitioner's claims. *Id.* at 182 ("It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court."). Here, the grounds for relief identified by Petitioner as relevant to his motion for an evidentiary hearing, Grounds One, Two, and Six, were adjudicated on the merits in Arizona state court. The undersigned has recommended that each of these three grounds for relief be denied. Where, as here, "the record refutes the [habeas] applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (a hearing is not required if the allegations would not entitle the petitioner to relief under Section 2254(d)); *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) ("[A]n evidentiary hearing is *not* required on issues that can be resolved by reference to the state court record.") (emphasis in original). Accordingly, the undersigned recommends that the Court deny Petitioner's request for an evidentiary hearing.

In Petitioner's Motion to Expand the Record (Doc. 18), he moves the Court pursuant to Rule 7 of the Rules Governing Section 2254 Cases to order Respondents to expand the record to include audio/video recordings of certain points during his trial when: (1) he alleges he wanted to testify and argued with his trial counsel about it in the presence of the judge; (2) he alleges he almost "came to blows" with trial counsel after testimony of witnesses Eve Ford and Dominick Hurley; and (3) he again argued with his counsel on June 14, 2011, after the prosecution and defense rested their cases. (Doc. 18 at 2) Respondents first contend that Petitioner did not attach any such recordings, even if they existed, to his PCR petition and he failed to show this evidence was considered by the state courts. (Doc. 19 at 1)

As noted, review under 2254(d)(1) is restricted to the record that was available for review by the state court that adjudicated the claim on the merits. *Pinholster*, 563 U.S. at 180. Further, Petitioner himself declared in his PCR petition that his motion to obtain "audio and video recordings made in the courtroom to prove the fractured relationship . . . was denied because it was an older courtroom that didn't have those capabilities[,]" indicating the recordings were never made. (Doc. 14-3 at 112) For these reasons, the undersigned recommends that Petitioner's Motion to Expand the Record (Doc. 18) be denied.

E. Petitioner's motion for leave to file notice of removal (Doc. 45)

On June 26, 2019, Petitioner filed his Motion for Leave to File Notice of Removal Under 28 U.S.C. § 1455 (Doc. 45), in which he argues that he recently discovered that the state court never had subject-matter jurisdiction of his criminal case. (*Id.* at 2-3) Petitioner states that "[p]ursuant to 18 U.S.C. § 3231, the U.S. District Court has original and exclusive jurisdiction of offenses involving fraud through the mail, 18 U.S.C. § 1341 and fraud by wire (or internet), 18 U.S.C. § 1343."

Title 18 U.S.C. section 3231 provides that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." 18 U.S.C. § 3231. This statute does not support Petitioner's conclusion that the Arizona courts lacked jurisdiction to prosecute him on the state law charges on which he was convicted. His indictment did not charge or reference any violation of federal statutes. Additionally, Petitioner's criminal prosecution is no longer "pending" in state court as section 1455 requires. 28 U.S.C. § 1455(a). In addition to be wholly without merit, Petitioner's notice of removal is untimely pursuant to section 1455(b)(1). For these reasons, the undersigned recommends the Court deny Petitioner's Doc. 45 motion for leave to file notice of removal.

Accordingly,

IT IS THEREFORE RECOMMENDED that Anthony James Merrick's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be denied.

IT IS FURTHER RECOMMENDED that Petitioner's Motion for Respondents to Provide Copies of Petitioner's Full Petition for Post-Conviction Relief or Order Respondents to Allow Petitioner [to] Copy it to Provide it to the Court (Doc. 15) be denied as moot.

IT IS FURTHER RECOMMENDED that Petitioner's Motion to Expand the Record (Doc. 18) be denied.

IT IS FURTHER RECOMMENDED that Petitioner's Motion for Meaningful Access to Legal Resources or in the Alternative to Appoint Counsel (Doc. 21) be denied.

IT IS FURTHER RECOMMENDED that Petitioner's Motion and Request for an Evidentiary Hearing with His Suggestions in Support (Doc. 23) be denied.

IT IS FURTHER RECOMMENDED that Petitioner's Request to Include Rule 32 Exhibits for Habeas Corpus Review (Doc. 35) be granted as to the exhibits provided by Petitioner.

IT IS FURTHER RECOMMENDED that Petitioner's Motion to Strike Response to Petitioner's Motion for Meaningful Access to Legal Resources or in the Alternative to Appoint Counsel (Doc. 36) be denied.

IT IS FURTHER RECOMMENDED that Petitioner's Motion for Leave to File Notice of Removal Under 28 U.S.C. § 1455 (Doc. 45) be denied.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be denied because Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and jurists of reason would not find the Court's assessment of Petitioner's constitutional claims "debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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) of the Federal Rules of Appellate Procedure should not be filed until entry of the District Court's

judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which to file responses to any objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to any factual determination of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 1st day of August, 2019.

Deborah M. Fine

Honorable Deborah M. Fine
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Anthony James Merrick,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-19-00172-PHX-SPL

ORDER

The Court has before it, Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1), the Answer from the Respondents (Doc. 14), and the Petitioner's Traverse Reply. (Doc. 41) Additionally, the Court is in receipt of the Report and Recommendation of the Magistrate Judge (Doc. 53), Petitioner's Objections (Doc. 60), the Response to the Objections (Doc. 61), and the Petitioner's Appeal to Separate Motions. (Doc. 63)

In the instant Petition, the Petitioner argues six instances where the Petitioner believed the performance of his trial and appellant counsel were ineffective. (Doc. 1 at 1-69) Additionally, the Petitioner argues a trial counsel conflict of interest and that several times his due process rights were violated. (Id. at 33-71)

A district judge "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). When a party files a timely objection to an R&R, the district judge reviews *de novo* those portions of the R&R that have been "properly objected to." Fed. R. Civ. P. 72(b). A proper objection requires

specific written objections to the findings and recommendations in the R&R. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. § 636(b) (1). It follows that the Court need not conduct any review of portions to which no specific objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas v. Arn*, 474 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is judicial economy). Further, a party is not entitled as of right to *de novo* review of evidence or arguments which are raised for the first time in an objection to the R&R, and the Court's decision to consider them is discretionary. *United States v. Howell*, 231 F.3d 615, 621-622 (9th Cir. 2000).

The Court has carefully undertaken an extensive review of the sufficiently developed record. The Petitioner's objections to the findings and recommendations have also been thoroughly considered, although they constitute a recitation of what was previously filed and addressed by Judge Fine.

After conducting a *de novo* review of the issues and objections, the Court reaches the same conclusions reached by Judge Fine. Having carefully reviewed the record, the Petitioner has not shown that he is entitled to habeas relief. The R&R will be adopted in full. Accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation (Doc. 53) is **accepted** and **adopted** by the Court;

2. That the Petitioner's Objections (Doc. 60) are **overruled**;

3. That Petitioner's Motion to Include Rule 32 Exhibits (Doc. 35) is **granted**;

4. That Petitioner's Motion for Respondents to Provide Copies of Petitioner's Full Petition (Doc. 15) is **denied** as moot;

5. That Petitioner's Motion to Expand the record (Doc. 18) is **denied**;

6. That Petitioner's Motion for Meaningful Access to Legal Resources (Doc. 21) is **denied**;

7. That Petitioner's Motion for Evidentiary Hearing (Doc. 23) is **denied**;

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Anthony James Merrick,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-19-00172-PHX-SPL

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.

Brian D. Karth
District Court Executive/Clerk of Court

September 12, 2019

By s/ S. Strong
Deputy Clerk

APPENDIX- B