APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 15 2023

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

MICHAEL EDWARD AGUILAR, Petitioner-Appellant, v. DAVID SHINN; et al., Respondents-Appellees.	No. 22-16707 D.C. No. 4:19-cv-00359-JGZ District of Arizona, Tucson ORDER

Before: O'SCANNLAIN and BENNETT, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent motion for reconsideration. The court has considered all filings submitted by appellant in support of his request for a certificate of appealability. The request for a certificate of appealability (Docket Entry No. 8) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

All pending motions are denied as moot.

DENIED.

OSA127

APPENDIX B

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Edward Aguilar,

Petitioner,

v.

David Shinn, et al.,

Defendants.

No. CV-19-00359-TUC-JGZ

ORDER

Pending before the Court is a Report and Recommendation issued by Magistrate Judge Jaqueline M. Rateau. (Doc. 68.) Magistrate Judge Rateau recommends dismissing Petitioner Michael Aguilar's § 2254 Petition for Writ of Habeas Corpus by a Person in State Custody. (*Id.*) Aguilar filed an Objection, and Defendants responded. (Docs. 75, 76.)

Also pending before the Court is Aguilar's Motion for Leave in Allowing Reply to Response to Petitioner's Objection to Report and Recommendation. (Doc. 77.) Defendants responded to the motion. (Doc. 78.)

Having reviewed the record, the Court will deny Aguilar's request to file a reply and adopt the Report and Recommendation.

STANDARD OF REVIEW

When reviewing a Magistrate Judge's report and recommendation, this Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge." 28 U.S.C. § 636(b)(1). "[T]he district judge must review the

Magistrate Judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original). District courts are not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. 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 report and recommendation, and the Court's decision to consider newly raised arguments is discretionary. *Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 621–22 (9th Cir. 2000).

BACKGROUND

The Court will adopt the Factual and Procedural Background of the Report and Recommendation. (Doc. 68 at 1–4.) The Magistrate Judge cited the Arizona Court of Appeals' summary of the facts as follows:

> In March 2012, S.B. and his girlfriend, J.M., heard a car horn honking repeatedly outside the house in which they were staying. J.M. went outside to investigate the cause of the noise. When S.B. heard a man screaming that he was owed money, he followed J.M. outside. He then saw J.M talking to Aguilar, who was in a car.
>
> S.B. asked Aguilar "what the problem was," and Aguilar replied that J.M owed him money. When S.B. told Aguilar the he didn't have any money, Aguilar displayed what appeared to be a pistol and pointed it at both S.B. and J.M. Aguilar stated, "I'm not leaving until I get my money and I will light this bitch up . . . if I don't."
>
> J.M. retreated into the house and called 9-1-1. She informed the operator that a man outside the house had a gun. When the police arrived, they located Aguilar hiding nearby and found a BB gun in "the middle of the roadway close by. [FN1: The weapon was referred to as both a "BB gun" and a "pellet gun." Any distinction between the two terms is not relevant to the issues in this appeal.] S.B. identified the BB gun as the weapon Aguilar had used.

(*Id.* at 1–2 (quoting *State v. Aguilar*, No. 2 CA-CR 2014-0067, 2014 WL 7344041 (Ariz. App. Dec. 24, 2014))).

//

DISCUSSION

I. Motion for Leave to File a Reply

Federal Rule of Civil Procedure 72(b)(2) does not permit the filing of a reply to a response to an objection, and Aguilar's request for leave to file a reply (Doc. 77) does not present good cause or other legal basis for granting his request. Moreover, Defendants' response does not raise new issues or evidence that would warrant further reply from Aguilar. Accordingly, the Court will deny Aguilar's request. *See ML Liquidating Tr. v. Mayer Hoffman McCann P.C.*, 2011 WL 10451619 (D. Ariz. Mar. 11, 2011) (noting no additional briefing is necessary because the last brief raised "responsive argument[s]" as opposed to "entirely new issues"); *cf. J.G. v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 803 n.14 (9th Cir. 2008) (noting additional briefing is appropriate when new evidence is presented).

II. Objections

Aguilar raises several objections to the Report and Recommendation. (Doc. 75.) The Court will address each argument in turn.

A. Factual and Evidentiary Objections

1. Magistrate Judge's Consideration of the Record (Objection One)

Aguilar argues that the Magistrate Judge "refused" to incorporate the entire record into the Report and Recommendation. (Doc. 75 at 1–2.) He suggests that the Magistrate Judge only considered the pending petition, response, and reply, and did not consider other filings in this federal action or the state record. (*Id.* at 2.)

Aguilar misconstrues the Magistrate Judge's reference to the filings at issue as limiting the Magistrate Judge's consideration of the record. As demonstrated by the R&R, the Magistrate Judge did not limit her review to the petition, response, and reply. The R&R cites to Aguilar's state court filings, the state court record, and state court rulings. (Doc. 68.) Notably, the federal record includes more than 250 pages of the state court record. As to Aguilar's other filings in the pending action, Aguilar fails to demonstrate how any of his previous filings are relevant to the issues addressed in the R&R. Regardless, those

filings are part of the record and available for review by this Court and the Ninth Circuit Court of Appeals.

Aguilar also argues that the habeas petition he filed in case 15-cv-00286-LCK, in 2015, should have been included in the record, and he points to the actual innocence claim raised in that petition. (*Id.*) But Aguilar was required to raise in his pending petition for writ of habeas corpus "all the grounds for relief." Rule 2(c)(1), Rules Governing Section 2254 Cases. The Court dismissed the 2015 petition as premature in November 2016. (15-cv-00286-LCK, Doc. 25 at 2–3.) In a subsequent order, the Court informed Aguilar that when he "complete[d] PCR proceedings in state court, he should file a NEW case with a petition that includes all the habeas claims he wishes to raise in federal court." (15-cv-00286-LCK, Doc. 43 at 3.) In addition, in the present case, the Court issued an Order stating that it would allow Aguilar to file an amended petition presenting "*all* his claims for relief." (Doc. 10 at 3 (emphasis in original).)

Finally, even if Aguilar did not include an actual innocence claim in his petition, the Magistrate Judge nevertheless considered actual innocence in determining whether there was cause to excuse Aguilar's procedural default of his claims. (Doc. 68 at 9–11.)

2. Presumption of Correctness of Facts in State Court Decision (Objection Two)

Aguilar argues that the Magistrate Judge erred in giving the facts, as summarized by the Arizona Court of Appeals in its decision, a presumption of correctness. (*Id.* at 3–4.) Aguilar argues that the presumption of correctness for factual findings applies to Arizona Supreme Court decisions, and not Arizona Court of Appeals decisions. (*Id.* at 3.) Aguilar also argues that he should have been afforded an evidentiary hearing in place of the presumption of correctness. (*Id.*) Aguilar points to conflicting evidence and states "until it is determined on what basis the jury supported their verdict, there exists no presumption of correctness." (*Id.* at 3–4.)

Aguilar is incorrect as to the law. The presumption of correctness applies in habeas relief and it "applies even if the finding was made by the state court of appeals[.]" *Pollard*

v. Galaza, 290 F.3d 1030, 1035 (9th Cir. 2002) (citing 28 U.S.C. § 2254(e)(1)).

Aguilar's challenges to the applicability of the presumption are unpersuasive. A petitioner may rebut the presumption of correctness only "with clear and convincing evidence." *Id.* The Magistrate Judge thoroughly discusses Aguilar's challenges to the evidence. (Doc. 68 at 13–14.) Aguilar's challenges do not establish by clear and convincing evidence that any particular finding by the Arizona Court of Appeals is erroneous. (Doc. 75 at 3–4.) Aguilar's description of the evidence is selective. Viewed as a whole, the record does not support his assertion that "his conviction is predicated solely upon [a witness's statement that] 'I assumed that what was in his hand was a pistol.'" (Doc. 75 at 3.)

3. Denial of Evidentiary Hearing (Objection Three)

Aguilar argues that Magistrate Judge erred in denying him an evidentiary hearing. (Doc. 75 at 4.) Aguilar points to a presentence report in an unrelated case, that states witness S.B had used heroin since he was 22 years old. (*Id.* at 4–6.) Aguilar argues that this information goes to S.B.'s credibility and it could not have been previously discovered with due diligence, because the presentence report was created after his trial. (*Id.* at 6.) Aguilar further argues the presentence report clearly established that S.B. was using heroin the night Aguilar committed the crime and, therefore, Aguilar is innocent.[1] (*Id.*)

Aguilar failed to present this arguments in his Motion for an Evidentiary Hearing. (*See* Doc. 37.) Thus, the Court will not consider it. *See Brown*, 279 F.3d at 744. Moreover, the Court notes that Aguilar's contentions would not entitled him to an evidentiary hearing on this issue. S.B.'s report of heroin addiction would not establish that S.B. was high on the night in question or during his testimony at Aguilar's trial, and Aguilar's counsel impeached S.B. with his prior felony conviction involving the sale of heroin as well as S.B.'s inconsistent statements related to the incident. (Doc. 68 at 19–20.) S.B.'s presentence report does not provide a basis to conclude that no reasonable factfinder would

[1] Aguilar points to two other pieces of evidence he wishes to introduce at an evidentiary hearing. But he only argues that the presentence investigation report entitles him to an evidentiary hearing because it is newly discovered evidence.

have found Aguilar innocent. *Id.* Section 2254(e)(2)(B) (requiring, in addition to new evidence, that the evidence be "clear and convincing" to establish that "no reasonable factfinder would have found the applicant guilty").

B. Objections to Magistrate Judge's Analysis of Grounds for Relief

1. Ground Two (Objection Four)

In Ground Two, Aguilar argues that the admission of the 911 recording into evidence at his trial violated his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial. (Doc. 1 at 12.) On direct appeal, the Arizona Court of Appeals rejected this ground, citing the invited error doctrine. The court reasoned that Aguilar did not object to the State's introduction of the 911 recording into evidence, and Aguilar was the first to request that the recording be played to the jury. (Doc. 1-4 at 8.) In rejecting Ground Two, the Magistrate Judge concluded that Aguilar fairly presented the claim to the state court, but the state court's clear and express rejection of the claim under the invited error doctrine constituted an independent and adequate state law ground that serves as a procedural bar to habeas corpus relief on the claim. (Doc. 68 at 8–9.)

In his Objection, Aguilar does not challenge the state court's finding that he failed to object to admission of the recording in the first instance. He argues that the state court's invited error analysis is misguided because once the 911 recording was admitted, the playing of the recording was inevitable. (Doc. 75 at 6.)

Aguilar's argument is not persuasive. As explained by the Magistrate Judge, the Court of Appeals' conclusion is an independent and adequate state court ground, and "Aguilar failed to meet his burden . . . [to] challeng[e] the independence or adequacy of the invited error doctrine." (Doc. 68 at 9.) "For a state procedural rule to be 'independent,' the state law basis for the decision must not be interwoven with federal law." *Bennett v. Mueller*, 322 F.3d 573, 581 (9th Cir. 2003). "To be deemed adequate, the state law ground for decision must be well-established and consistently applied." *Id.* at 583. Aguilar does not address either prong.[2]

[2] Also in Ground Two, Aguilar asserts a claim of insufficient evidence. (Doc. 1 at 12.) The Magistrate Judge found that Aguilar procedurally defaulted this claim because he

Aguilar objects to the Magistrate Judge's conclusion that he failed to show actual innocence and thus could not overcome the procedural default and procedural bar of his Ground Two claims. (*See* Doc. 68 at 9–10.) He asserts that the Magistrate Judge's analysis is based on irrelevant distractions, record manipulation, and ignoring of Aguilar's proffered facts. (Doc. 75 at 7, 9–10.) Aguilar further argues that he need not explain these contentions as the facts and evidence in Ground Three prove the Magistrate Judge's and PCR state court's evaluations of the claim were unreasonable. (*Id.*)

The Court has reviewed the R&R and the Magistrate Judge's citation of the governing law and application of the law to the facts. The Court discerns no error in that analysis.

2. Ground One (Objection Five)

In Ground One, Aguilar asserts that the BB gun was allowed into evidence without sufficient foundation, depriving him of his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial. (Doc. 1 at 6.) In evaluating this same claim, the Arizona Court of Appeals held that an officer's testimony about the location of the BB gun was hearsay and that the trial court erred in admitting it, but any error was harmless because the fact supported by the inadmissible testimony was "otherwise established" by untainted evidence. (Doc. 68 at 12–14.) The Magistrate Judge concluded that Arizona Court of Appeals applied the correct legal standard—"that the error must be found harmless beyond a reasonable doubt." (*Id.* at 13.) The Magistrate Judge rejected as "not supported by the record" Aguilar's contention that the court of appeals' factual determination was unreasonable because it failed to "refer to where in the record S.B. identified the weapon collected by [RG] as the weapon used." (*Id.*)

Aguilar objects to the Magistrate Judge's conclusion that the Arizona Court of Appeals applied the correct legal standard—"harmless beyond a reasonable doubt." (Doc. 75 at 8.) Aguilar argues that the court applied an "otherwise established" standard, citing

---

failed to fairly present this claim, as a federal claim, to the state court. (Doc. 68 at 7–8.) As the Magistrate Judge noted, Aguilar argued insufficiency based entirely on Rule 20 of the Arizona Rules of Criminal Procedure. (*Id.*)

the court's inclusion of that phrase in its decision. (*Id.*) In addition, Aguilar argues that the court erred in applying the correct standard, because the "otherwise established evidence" amounted to an assumption from a witness who was high on illegal substances. (*Id.*) As to each of his arguments, Aguilar misconstrues the Court of Appeals' decision.

As set forth in the R&R, the Court of Appeals reviewed the evidence presented as to the BB gun and determined that, even without the erroneously admitted testimony, the officer's other testimony established that the gun was present at the scene of the incident: the officer testified that he collected the gun at that location and victim S.B. identified the weapon that was collected as the weapon used in the robbery. (*Id.* at 13.) Because the presence of the gun was "otherwise established" by untainted testimony, admission of the tainted testimony could not have undermined the jury's finding of guilt beyond a reasonable doubt.

3. Ground Three (Objection Six)

In Ground Three, Aguilar asserts a claim of ineffective assistance of counsel. (Doc. 1 at 17.) Aguilar argues that his counsel should have used evidence of communications in his cell phone to impeach S.B.'s testimony that S.B. did not know Aguilar. (*Id.*) The Magistrate Judge concluded that the PCR state court's decision was not unreasonable when it found (1) counsel's performance was not deficient and (2) Aguilar did not suffer prejudice. (Doc. 68 at 14–21.)

As thoroughly explained by the Magistrate Judge and PCR state court, Aguilar's counsel was not ineffective. (*Id.*) Aguilar's conclusory arguments to the contrary do not undermine that conclusion.

4. Ground Four (Objection Seven)

In Ground Four, Aguilar asserts that his trial counsel was ineffective in plea negotiations. (Doc. 1 at 29–30.) Aguilar argues that but for his counsel's conduct, he would have accepted a probation-available plea agreement. (*Id.*) The Magistrate Judge rejected Aguilar's claim and thoroughly explained her reasoning. (Doc. 68 at 21–25.) In particular, the Magistrate Judge found that state court reasonably concluded that a

probation-available plea was not offered and that Aguilar fails to overcome the doubly deferential standard to the state court's decision that Aguilar's counsel was not ineffective. (*Id.* at 24–25.)

Aguilar does not object to the Magistrate Judge's conclusion or reasoning with respect to this claim. (Doc. 75 at 10.) Instead, Aguilar raises an entirely new claim that is not in the petition. He asserts that counsel was ineffective in rejecting a separate "CES plea," not the probation-available plea alleged in the petition. (*Compare* Doc. 1 at 29–30 *with* Doc. 75 at 10.) Because all claims for relief must be in the petition, the Court declines to consider Aguilar's newly raised claim. *See* Rule 2(c)(1), Rules Governing Section 2254 Cases (mandating that all grounds for relief must be in the petition). To the extent Aguilar's Objection is not a newly raised *claim*, the Court declines to consider the new argument. *See Brown*, 279 F.3d at 744. In any event, Aguilar does not show that his counsel was ineffective in stating that Aguilar does want the CES plea, when Aguilar previously rejected the CES plea.

III. Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, this Court must issue or deny a certificate of appealability (COA) at the time it issues a final order adverse to the applicant. *See United States v. Winkles*, 795 F.3d 1134, 1142 (9th Cir. 2015) (requiring a COA to appeal the denial of a Rule 60(b) motion in a § 2255 case); *Payton v. Davis*, 906 F.3d 812, 818 & n.8 (9th Cir. 2018) (applying *Winkles* to a case brought under § 2254). A court may issue a COA only when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a court may issue a COA only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2)

whether the court's procedural ruling was correct. *Id.* The Court finds that reasonable jurists would not find this Court's ruling debatable. Therefore, the Court will not issue a COA.

CONCLUSION

For the foregoing reasons,

IT IS ORDERED that Aguilar's Motion for Leave in Allowing Reply to Response to Petitioner's Objections to Report and Recommendation (Doc. 77) is **DENIED**.

IT IS FURTHER ORDERED that the Report and Recommendation (Doc. 68) is **ADOPTED**.

IT IS FURTHER ORDERED that Aguilar's Petition for Writ of Habeas Corpus (Doc. 1) is **DISMISSED.**

IT IS FURTHER ORDERED that, pursuant to Rule 11 of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court **denies** issuance of a certificate of appealability.

IT IS FURTHER ORDERED that the Clerk of Court must enter judgment accordingly, and close its file in this action.

Dated this 30th day of August, 2022.

Honorable Jennifer G. Zipps
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Michael Edward Aguilar,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV19-00359-TUC-JGZ (JR)

REPORT AND RECOMMENDATION

Petitioner Michael Edward Aguilar, incarcerated at the Arizona State Prison in Buckeye, Arizona, has filed a Petition for Writ of Habeas corpus pursuant to 28 U.S.C. § 2254. Before the Court are the Petition (Doc. 1), the Respondents' Answer (Doc. 21), and Petitioner's Reply (Doc. 42). Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Rateau for Report and Recommendation. Based on the record, the Magistrate Judge recommends the District Court, after its independent review of the record, deny the Petition.

I. Factual and Procedural Background

A. Trial and Sentencing

The Arizona Court of Appeals' decision on direct appeal summarized the circumstances of the Aguilar's crimes as follows:[1]

[1] The Arizona Court of Appeals' recitation of the facts underlying Aguilar's convictions is entitled to a presumption of correctness. *See Runingeagle v. Ryan*, 686 F.3d 758, 763 n. 1 (9th Cir. 2012).

> In March 2012, S.B. and his girlfriend, J.M., heard a car horn honking repeatedly outside the house in which they were staying. J.M. went outside to investigate the cause of the noise. When S.B. heard a man screaming that he was owned money, he followed J.M. outside. He then saw J.M talking to Aguilar, who was in a car.
>
> S.B. asked Aguilar "what the problem was," and Aguilar replied that J.M owed him money. When S.B. told Aguilar the he didn't have any money, Aguilar displayed what appeared to be a pistol and pointed it at both S.B. and J.M. Aguilar stated, "I'm not leaving until I get my money and I will light this bitch up . . . if I don't."
>
> J.M. retreated into the house and called 9-1-1. She informed the operator that a man outside the house had a gun. When the police arrived, they located Aguilar hiding nearby and found a BB gun in "the middle of the roadway close by. [FN1: The weapon was referred to as both a "BB gun" and a "pellet gun." Any distinction between the two terms is not relevant to the issues in this appeal.] S.B. identified the BB gun as the weapon Aguilar had used.

State v. Aguilar, No. 2 CA-CR 2014-0067, 2014 WL 7344041 (Ariz. App. Dec. 24, 2014); Pet. Ex. C, ¶¶ 2-4.[2] After a jury trial, Aguilar was convicted of two counts of attempted armed robbery. He was sentenced to concurrent prison terms of 11.25 years. Res. Exs. A, B; Pet. Ex. C, ¶ 5.

B. Direct Appeal

A timely notice of appeal was filed on February 13, 2014. Res. Ex. C. The appeal was stayed, and jurisdiction was revested in the trial court so that it could address Aguilar's motion to vacate the judgment under Rule 24.2, Arizona Rules of Criminal Procedure. Res. Exs. D, E. The trial court denied the motion on June 19, 2014. Pet. Ex. E. The appellate court then lifted the stay and reinstated the appeal of the judgment and sentence. Res. Ex. F.

Aguilar filed a notice of appeal from the trial court's denial of his Rule 24.2 motion. Res. Ex. G. The two appeals were consolidated, and the court of appeals denied Aguilar's

---

[2] The exhibits attached to the Petition are identified as "Pet. Ex.," and the exhibits attached to the Respondents' Answer are identified as "Res. Ex."

request to sever the appeal of the denial of the Rule 24.2 motion. Res. Ex. H. In his direct appeal, Aguilar raised four claims. He argued the state trial court erred by (1) allowing the introduction of evidence of a BB gun without sufficient foundation in violation of Aguilar's Sixth and Fourteenth Amendment rights; (2) denying Aguilar's motion to preclude one of the victims from testifying as a sanction for a disclosure violation; and (3) by precluding Aguilar from asking one of the victims if he was selling drugs at the time of the incident. Pet. Ex. A. His fourth claim was that there was insufficient evidence to sustain his conviction for attempting to rob victim J.M. and the trial court erred in admitting the 911 recording into evidence. *Id.* The Arizona Court of Appeals found no reversible error and affirmed Aguilar's convictions and sentences. Pet. Ex. C. Aguilar sought and was denied review by the Arizona Supreme Court. Pet. Ex. D; Res. Ex. J.

C. Post-Conviction Relief

On June 24, 2015, Aguilar filed a notice of post-conviction relief (PCR). Res. Ex. K. The trial court appointed counsel and ordered that the petition be filed within 60 days. Res. Ex. L. Aguilar, through counsel, filed his PCR petition on December 27, 2016, alleging that (1) trial counsel rendered ineffective assistance because he failed to use information allegedly contained on Aguilar's cell phone to impeach S.B.; (2) trial counsel was ineffective in failing to object to the admission of the 911 recording; (3) trial counsel was ineffective in telling the court during an informal discussion that Aguilar was 'very unpredictable;" (4) the cumulative effect of trial counsel's ineffectiveness caused prejudice; and (5) appellate counsel was ineffective for failing to raise the issue of prosecutorial misconduct on direct appeal. Pet. Ex. F. The State responded and Aguilar replied. Res. Ex. M; Pet. Ex. G. The trial court ordered an evidentiary hearing on the issues of whether trial counsel was ineffective for failing to use information from Aguilar's cellphone to impeach victim S.B. and ordered supplemental briefing on the issue of whether appellate counsel was ineffective for failing to raise the issue of prosecutorial vouching on direct appeal. Res. Ex. N. The State submitted the ordered supplemental briefing, Res. Ex. O, and the trial court held a three-day evidentiary hearing. Res. Exs. P,

Q, R. On August 30, 2018, the trial court issued its ruling denying relief. Pet. Ex. H. Aguilar filed a petition for review in the court of appeals. Pet. Ex. I. The court of appeals found no abuse of discretion and denied relief on July 1, 2019. Pet. Ex. J. Aguilar did not seek reconsideration or review by the Arizona Supreme Court. Res. Ex. S.

D. Habeas Petition

On July 15, 2019, Aguilar filed his Petition, which he had placed in the prison mailing system on July 11, 2019. Doc. 1. In the Petition, Aguilar alleges four grounds for relief. In Ground One, he contends that the introduction of the BB gun evidence without sufficient foundation constituted fundamental error and violated his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial. *Petition* (Doc. 1), p. 6. In Ground Two, he contends that the evidence was insufficient to support a guilty verdict on the charge of attempted armed robbery of J.M., and that the admission of the 911 recording into evidence at his trial violated his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial. *Petition* (Doc. 1), p. 12. In Ground Three, Aguilar alleges that his trial counsel was ineffective in violation of his Sixth Amendment right to counsel because counsel failed to use evidence from Aguilar's phone to impeach the testimony of S.B. *Petition* (Doc. 1), p. 12. In Ground Four, Aguilar alleges that his trial counsel was ineffective in violation of his Sixth Amendment right to counsel because he stated that Aguilar was "very unpredictable" in response to the trial court's inquiry into whether Aguilar would be interested in a probation-available plea. *Petition* (Doc. 1), p. 24.

II. Exhaustion and Procedural Default

Respondents contend that Aguilar's Ground Two claim that he was denied his rights to confront witnesses and to a fair trial was not exhausted and is procedurally defaulted and not subject to review. In his reply, Aguilar contends that any failure to exhaust is excused by his actual innocence.

///

///

A. Legal Standards

With limited exceptions, a state prisoner must exhaust his available state remedies before a federal court may consider the merits of his habeas corpus petition. *See* 28 U.S.C. § 2254(b)(1), (c); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). To properly exhaust a federal habeas claim a petitioner must afford the state courts the opportunity to rule upon the merits of the claim by "fairly presenting" the claim to the state's "highest court" in a procedurally correct manner. *See, e.g., Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Rose v. Palmateer*, 395 F.3d 1108, 1110 (9th Cir. 2005). For Arizona non-capital cases, the Ninth Circuit has concluded that the "highest court" requirement is satisfied if the petitioner presented his claim to the Arizona Court of Appeals, either in a direct appeal or in a petition for post-conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999).

"[A] petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (citations omitted). 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); *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."). "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court." *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996). A "general appeal to a constitutional guarantee," such as due process, is insufficient to achieve fair presentation. *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000) (quoting *Gray v. Netherland*, 518 U.S. 152, 163 (1996)); *see also Castillo v. McFadden*, 399 F.3d 993, 1003 (9th Cir. 2005) ("Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory.").

A federal habeas court also may not review a claim if the state court's denial of relief rests upon an independent and adequate state ground. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). As the United States Supreme Court explained in *Coleman*:

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31.

The same concerns of comity and federalism apply to claims that have been procedurally defaulted in state court. *Id.* at 731-32. The procedural default doctrine limits a petitioner from proceeding in federal court where his claim is procedurally barred in state court and "has its roots in the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). There are two types of procedural bars, "express and implied." *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"). An implied procedural bar "occurs when the petitioner has failed to fairly present his claims to the highest state court and would not be barred by a state procedural rule from doing so." *Robinson*, 595 F.3d at 1100. Procedural default also occurs when a petitioner did present a claim to the Arizona Court of Appeals, but the appellate court did not address the merits of the claim because it found the claim precluded by a state procedural rule. *See, e.g., Atwood v. Ryan*, 870 F.3d 1033, 1059 (9th Cir. 2017).

///

A procedural bar may also be applied to unexhausted claims where state procedural rules make a return to state court futile. *See Coleman*, 501 U.S. at 735 n.1 (claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred"). In Arizona, claims not previously presented to the state courts via either direct appeal or collateral review are generally barred from federal review because an attempt to return to state court to present them is futile unless the claims fit in a narrow category of claims for which a successive or untimely petition is permitted. *See* Ariz.R.Crim.P. 32.1(b)-(h), 32.2(a), 33.1(b)-(h), 33.2 (precluding claims not raised on appeal or in prior petitions for post-conviction relief), 32.4(b)(3) and 33.4(b)(3) (time bar). Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not raised on direct appeal or in prior Rule 32 post-conviction proceedings. *See, e.g., Stewart*, 536 U.S. at 860 (determinations made under Arizona's procedural default rule are "independent" of federal law); *Smith v. Stewart*, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001) ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), reversed on other grounds, *Stewart*, 536 U.S. 856; *see also Ortiz v. Stewart*, 149 F.3d 923, 931-32 (9th Cir. 1998) (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure); *State v. Mata*, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

B. Application to Ground Two

In Ground Two, Aguilar contends that the evidence was insufficient to support a guilty verdict on the charge of attempted armed robbery of J.M., and that the admission of the 911 recording into evidence at his trial violated his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial. *Petition* (Doc. 1), p. 12. Respondents contend that Aguilar presented his claim of insufficient evidence to the state courts, but only as a claim that the trial court should have granted his motion for judgement of acquittal pursuant to Arizona Rule of Criminal Procedure 20. The Court agrees.

///

In his opening brief on appeal, Aguilar cites both state and federal law in the section addressing the insufficiency and 911 call claims. However, the federal law is cited only in relation to the portion of the claim related to the admission of the 911 recording. Pet. Ex. A, pp. 18-20. In his Petition for Review to the Arizona Supreme Court, he again argued the insufficiency issue based entirely on state law grounds. Pet. Ex. D, pp. 7-9. Thus, that portion of the claim was not fairly presented as a federal claim in the state court. *See Baldwin*, 541 U.S. at 32-33; *see also Hiivala*, 195 F.3d at 1106 ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion."). If he were to now return to state court to litigate his claims, they would be found to be waived and untimely under Rules 32.1(b)-(h), 32.2(a), 33.1(b)-(h), 33.2 of the Arizona Rules of Criminal Procedure because they do not fall within an exception to preclusion, and time barred under Rules 32.4(b)(3) and 33.4(b)(3) (time bar). Aguilar's claims are therefore technically exhausted but procedurally defaulted.

In relation to the portion of Ground Two relating to the admission of the 911 call, Respondents argue that, even though Aguilar fairly presented it in state court as a federal claim, it is nevertheless not reviewable by this Court because it was disposed of based on independent and adequate state law grounds-- i.e., the state's invited error doctrine. The Court has not located in Aguilar's 62-page reply any contention to the contrary.

The 911 recording was admitted into evidence at the State's request during S.B.'s testimony, but it was not played to the jury at that time. R.T. 10/30/13, at p. 23. Aguilar's counsel later played the recording of the call to the jury. R.T. 10/31/13, at p. 23. In addressing the claim that the 911 should not have been admitted at trial, the Arizona Court of Appeals found that Aguilar had "invited the error and cannot complain of it on appeal." Pet. Ex. C, p. 7. Federal courts have recognized that "[t]he invited error doctrine qualifies as a state procedural bar" to federal habeas corpus relief. *Druery v. Thaler*, 647 F.3d 535, 545-546 (5th Cir. 2011) (collecting cases). Likewise, the Ninth Circuit has suggested that the invited error rule is a state procedural bar when it is "clearly and expressly" invoked by a state court, as was the case here. *See Leavitt v. Arave*, 383 F.3d 809, 832-33 (9th Cir.

2004). Relying on *Leavitt*, several courts in this district have found Arizona's invited error doctrine to be an independent and adequate state procedural bar. *See, e.g., Sullivan v. Ryan*, CV 17-1195-PHX-DJH (JFM), 2018 WL 7570375 (D. Ariz. May 8, 2018) (collecting cases finding Arizona's invited error doctrine qualifies as a state procedural bar precluding habeas relief). Aguilar has also failed to meet his burden under *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003), by challenging the independence or adequacy of the invited error doctrine. Accordingly, even though this part of Ground Two was presented as a federal claim, the application of the invited error doctrine by the Arizona Court of Appeals prevents this Court from granting relief.

C. Cause and Prejudice and Actual Innocence

If a habeas petitioner has procedurally defaulted on a claim, or it has been procedurally barred on independent and adequate state grounds, he may not obtain federal habeas review of that claim absent a showing of "cause and prejudice" sufficient to excuse the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984). Alternatively, a petitioner may assert his actual innocence of the underlying crime by showing "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence" presented in his habeas petition. *Schlup v. Delo*, 513 U.S. 298, 321 (1995).

Here, as noted by Respondents, Aguilar argued neither cause and prejudice nor actual innocence in the Petition. In his reply, however, Aguilar does contend he is actually innocent of the underlying crime. To be successful on his claim of actual innocence, Aguilar must do more than show that reasonable doubt exists in light of new evidence. Rather, he must show that no reasonable juror would have found him guilty. *Id.* at 329. This standard is known as the "*Schlup* gateway." *Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002). A successful trip through the *Schlup* gateway requires not just any evidence of innocence, but the presentation of "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324.

///

In his reply, Aguilar agues that he is actually innocent and offers the following argument:

> [Aguilar's] state court record provides clear and convincing evidence he had no idea that a video of text messages in his phone existed until after trial, and that some of the text messages were from a Sarah who [victims] J.M. and S.B. had lied to police on the night in question when they told a detective [Aguilar] had shown up at their home in search of a Sarah. . . . As a pro se litigant, because [Aguilar] had not a clue as to the existence of Sarah's text messages and the video before trial and diligently sought what his cell phone contained, the video and all text messages on the video are "newly discovered evidence" according to *Schlup*.

Reply (Doc. 42), pp. 15-16. Aguilar further contends:

> "that had trial counsel used the same phone to show the jury Sarah's contact information was in it after having the material detective testify both J.M. and S.B. had stated on the night in question [Aguilar] had been in search of Sarah and had counsel placed Sarah on the stand to testify that [Aguilar] had left her at his home prior to traveling to the home of J.M. and S.B. on the night in question; and had trial counsel allowed the jury to view the video with Sarah providing commentary material to her text messages she had sent [Aguilar] on the night in question, "no reasonable juror would have convicted him."

Reply (Doc. 42), pp. 18-19.

As a threshold matter, it is not clear to the Court how information about Aguilar's contacts with "Sarah" contribute to a showing of actual innocence.[3] Additionally, a video of text messages contained on Aguilar's phone does not constitute the new evidence required by *Schlup* to allow consideration of an otherwise defaulted claim. During Aguilar's PCR proceedings, a defense investigator testified that he obtained Aguilar's phone and video-taped his review of text messages contained in the phone. R.T. 4/2/18, p. 6. The investigator was directed to review any text messages between Aguilar and J.M., but was never directed to review the contacts list. R.T. 4/2/18, p. 8. Thus, the phone was clearly available for examination before trial and is not the sort of new evidence that is a

[3] The Court has discovered references to "Sarah" in the transcripts of Aguilar's PCR proceedings, *see* R.T. 2/27/18, pp. 22, 25, but it provides no insight into how her text messages would contribute to Aguilar's claim of actual innocence.

required prerequisite to passing through the *Schlup* gateway.

The substance of Aguilar's actual innocence claim also does not meet the stringent requirements of *Schlup*. Aguilar contends that his actual innocence is supported by the fact that victim S.B. lied about knowing him and that his counsel was ineffective in failing to impeach S.B. by presenting evidence to show the jury that S.B.'s contact information was contained in Aguilar's phone. *Reply* (Doc. 42), p. 18. This is the same argument that Aguilar raises in Ground Three of the petition. As discussed below, Ground Three is meritless and does not satisfy *Schlup's* requirement that Aguilar show that no reasonable juror would have found him guilty.

III. Merits

A. AEDPA Standards

Under the AEDPA, a federal court "shall not" grant habeas relief with respect to "any claim that was adjudicated on the merits in State court proceedings" unless the state decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). *See Williams v. Taylor*, 529 U.S. 362, 384-85 (2000). To justify relief, the state court's ruling on a claim must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

In conducting an analysis under AEDPA, the federal habeas court looks to the last reasoned state court decision. *Castellanos v. Small*, 766 F.3d 1137, 1145 (9th Cir. 2014). Where there is no reasoned decision from the state's highest court, the District Court "looks through" to the last reasoned state court decision and presumes that the unexplained decision relies on the same reasoning. *Ylst v. Nunnemaker*, 501 U.S. 63, 73-74 (1991). Where no state court decision provides a basis for the decision, the district court must undertake an independent review of the record and determine whether the state court's decision was objectively reasonable. *Castellanos*, 766 F.3d at 1145; *see also Harrington*

v. Richter, 562 U.S. 86, 98 (2011). However, a state court need not cite Supreme Court precedent when resolving an issue presented on direct or collateral review. *Early v. Packer*, 537 U.S. 3, 8 (2002). "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court] precedent," the state court decision will not be contrary to" clearly established federal law. *Id.*

B. Discussion

1. Ground One

In Ground One of the Petition, Aguilar contends that the BB gun was allowed into evidence without sufficient foundation, depriving him of his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial. Doc. 1, pp. 6-11. The BB gun was admitted into evidence during victim S.B.'s testimony without objection. R.T. 10/30/13, pp. 84-85. Later in the trial, Tucson Police Department Officer Rueben Guido testified that he was called to the incident scene and was involved in the search for a weapon and that a BB gun "was located by Sergeant Kadous at 207 South – correction, North Arcadia." *Id.* at p. 134. Defense counsel's hearsay objection to Officer Guido's testimony was overruled. *Id.* at pp. 134-36. Officer Guido then testified that he went to the area where Officer Kadous was and "[t]here was a firearm. It was in the middle of the roadway in front of 207 North Arcadia," and that he collected it. *Id.* at pp. 136-37. The officer was shown the firearm in court and asked if he recognized it. *Id.* He responded: "Yes. That's the firearm that was located in the roadway in front of 207 North Arcadia." *Id.* The officer then showed the gun to victim S.B. who identified it as the firearm that was involved in the incident. *Id.* at p. 138.

On direct appeal, Aguilar argued that Officer Guido's testimony "as to where the BB/pellet gun was found" was inadmissible hearsay and deprived him of the opportunity to test the memory of Officer Kadous, the officer who actually found the gun. Pet. Ex. A, pp. 11-12. Addressing the claim, the Arizona Court of Appeals determined that Officer Guido's testimony about the location of the BB gun was hearsay and that the trial court erred in admitting it. Pet. Ex. C, at p. 4. However, relying on *State v. Bass*, 12 P.3d 796,

805 (Ariz. 2000), the court found that any error was harmless because the fact supported by the inadmissible testimony was "otherwise established" by untainted evidence. Pet. Ex. C, at p. 4. The court explained:

> Aguilar contends that without this hearsay statement, there is no firm relationship between the BB gun and himself. But even without the statement that Sergeant K[adous] initially located the gun at 207 North Arcadia, Officer R[ueben] G[uido]'s other testimony establishes that, when he responded to that address, he found K[adous] there and collected a gun in the middle of teh roadway. Immediately after the incident, and again at trial, S.B. identified the weapon collected by R[ueben] G[uido] as the weapon used in the attempted robbery. The relationship between Aguilar and the gun was "otherwise established" by the evidence, and so the error was harmless.[FN2: Aguilar also contends that, because the court essentially admitted Sergeant K[adous]'s statement that the BB gun was found at 207 North Arcadia, and this was a testimonial statement, it violated his Sixth Amendment right to confront witnesses. Because Aguilar did not object on this basis below, our review would be limited to fundamental error. *See State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006). As discussed above, although admission of this statement was error, it was harmless error. Error that is harmless, of course, cannot be fundamental. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

Pet. Ex. C, at p. 4.

Although he goes on at some length in his argument in support of Ground One, Aguilar does not argue that the Arizona Court of Appeals application of the harmless error doctrine was constitutionally defective, nor could he. In finding the error here harmless, the Arizona Court of Appeals, although citing a state case, identified the correct legal standard, that the error must be found harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 23-24 (1967) (identifying standard). Rather, Aguilar's only contention relevant in the habeas context is that the Arizona Court of Appeals factual determination was unreasonable because the court failed to "refer to where in the record S.B. identified the weapon collected by R[ueben] G[uido] as the weapon used because none exists!" Petition (Doc. 1), at p. 10. Aguilar's argument is not supported by the record. As noted above, S.B. identified the weapon at the time of the incident and again at trial. Aguilar attempts to parse the testimony and suggests that it is ambiguous. *See* Petition (Doc. 1), at

pp. 10-11. However, the testimony related to S.B.'s identification of the weapon is quite clear. *See* R.T. R.T. 10/30/13, pp. 84-85 and 138. Thus, Aguilar fails in his effort to establish that the Arizona Court of Appeals factual determination on this point was erroneous, much less unreasonable, under section 2254(d)(2). *See Rice v. Collins*, 546 U.S. 333, 338-39 (2006) ("State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'") (citing 28 U.S.C. § 2254(e)(1)). Aguilar is therefore not entitled to relief based on Ground One.

2. Ground Three

Aguilar's Ground Three claim of ineffective assistance of counsel is that his counsel should have used evidence of communications in his cell phone to impeach S.B.'s testimony that he did not know Aguilar. Doc. 1, pp. 17-23. The legal standard applicable to Aguilar's claim is a familiar one, addressed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The standards enunciated there by the Court are applied unless there is other Supreme Court precedent directly on point. *See Wright v. Van Patten*, 552 U.S. 120, 125 (2008). If the state court has already denied the claim of ineffective assistance of counsel, a federal habeas court may grant relief only if it finds the state court's decision was contrary to, or an unreasonable application of the *Strickland* standards. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). Under *Strickland*, Aguilar must show both deficient performance and prejudice to establish that counsel's representation was ineffective. 466 U.S. at 687. In the context of habeas claims evaluated under § 2254(d)(1) standards, the question "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable–a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Thus, "for claims of ineffective assistance of counsel . . . AEDPA review must be 'doubly deferential' in order to afford 'both the state court and the defense attorney the benefit of the doubt.'" *Woods v. Donald*, 575 U.S. 312, 316–17 (2015) (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

To be deficient, counsel's performance must fall "outside the wide range of professionally competent assistance." *Id.* at 690. When assessing counsel's performance, the court engages a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Thus, review of counsel's performance is "extremely limited." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir. 1998), *rev'd on other grounds*, 525 U.S. 141 (1998). Acts or omissions that "might be considered sound trial strategy" do not constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689.

A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as the result of the alleged deficiencies. *See Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.*; *Williams v. Calderon*, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995) (applauding district court's refusal to consider whether counsel's conduct was deficient after determining that petitioner could not establish prejudice). In undertaking this analysis, courts "consider the relative strength of the prosecution's case in analyzing whether counsel's errors prejudiced [the petitioner]." *Luna v. Cambra*, 306 F.3d 954, 966 (9th Cir. 2002), *amended*, 311 F.3d 928 (9th Cir. 2002); *see Strickland*, 466 U.S. at 696.

Addressing Aguilar's Ground Three contention, the Arizona Court of Appeals found that, "[i]n its thorough, well-reasoned decision, the trial court correctly addressed Aguilar's claims about the victim's cell phone . . .." Pet. Ex. J, p. 3. In the decision referenced by the court of appeals, the trial court first summarized the facts pertinent to the claim:

> At trial, only [victim] S.B. testified. Defendant impeached S.B.'s credibility by establishing that S.B. had been convicted of a felony for attempted possession of heroin for sale and shoplifting. When S.B. denied knowing Defendant prior to the incident, Defendant impeached S.B. with his

> prior statement to police where S.B. admitted that in fact he had seen Defendant before because J.M. got car or taxi rides from him in the past and he was on the porch when Defendant picked J.M. up.

Pet. Ex. H, pp. 1-2 (internal citations omitted). The trial court then summarized the testimony presented at the evidentiary hearing on the issue:

> At the evidentiary hearing, Defendant testified that he told defense counsel that S.B.'s testimony that he did not know Defendant was a lie. Defendant alleges S.B.'s contact information was in Defendant's phone, marked but not admitted as evidence at trial. Defendant alleges that defense counsel rendered ineffective assistance of counsel when she failed to impeach S.B. with S.B.'s contact information found in Defendant's phone. Defendant alleges that a note he created at trial proves that he told defense counsel, S.B.'s contact information was on Defendant's phone because S.B. had called Defendant in the past.
>
> Defense counsel testified at the evidentiary hearing the Defendant did not tell her about S.B.'s contact information being on Defendant's phone before or during the trial. Defense counsel also testified she never saw Defendant's note about S.B.'s contact information during the trial. Defense counsel further testified that Defendant may have added the information about S.B.'s contact information being in Defendant's phone sometime after the trial because she never saw those lines but did recognize other notations in the piece of paper. Defense counsel also testified that even if she had seen Defendant's note about S.B.'s contact information being on his phone, she would not have used it to impeach S.B. She believed it was more effective to impeach S.B. with his own prior statement to police on the night of the incident. In his statement to police, S.B. stated that he had seen Defendant in the past because Defendant gave J.M. rides to and from work.
>
> Defense counsel also testified that Defendant did not tell her anything about S.B.'s contact information before trial. Defendant had defense counsel get the phone because he believed that text messages in the phone between him and J.M. were helpful to his case. When defense counsel reviewed those text messages, she and her investigator videotaped the event. Defense counsel testified that the text messages did not help Defendant's case as Defendant asserted.
>
> Moreover, defense counsel believed that having someone's contact information on one's phone does not necessarily prove one knows the person. Defense counsel believed S.B.'s phone number could be on Defendant's

> contact list, not because they knew each other, but because J.M., S.B.'s girlfriend, called Defendant on S.B.'s phone in the past and Defendant created a contact for S.B. for future use. Defense counsel also testified that Defendant told her that S.B. was a drug dealer and in her experience drug dealers make and get phone calls and create contacts from people who are not their friends. In short, defense counsel did not believe that Defendant having S.B.'s contact information on his phone was stronger impeachment evidence than S.B.'s own prior statement to police where S.B. admitted he had seen Defendant in the past because J.M. got rides from Defendant in the past.
>
> The evidence presented at the evidentiary hearing and through Defendant's supplemental attachments demonstrate that Defendant's phone was released to defense counsel. The evidence also demonstrates that defense counsel does not have proper documentation to show what she did with Defendant's phone after trial. Defense counsel believes that her staff sent the phone to Defendant at either the Pima County jail or the Department of Corrections. Neither the Pima County jail nor the Department of Corrections records show Defendant received the phone into his property.[FN1: The Court finds that any mishandling of the phone by defense counsel is a moot issue given the Court's ultimate ruling in this case.]

Pet. Ex. H, pp. 2-3 (internal citations omitted). Then, after reviewing the law applicable to claims of ineffective assistance of counsel, including *Strickland*, the trial court evaluated counsel performance and any resulting prejudice. Addressing counsel's performance first, the court stated:

> The Court has considered the evidence presented at the evidentiary hearing, evaluated the credibility of the witnesses and reviewed the trial transcripts. The Court finds credible defense counsel's testimony that she was not presented with and/or did not see Defendant's note to her during trial alleging that S.B.'s contact information was in Defendant's phone. Presumably, Defendant made the note as S.B. testified in answer to a jury question asking whether S.B. knew Defendant. Trial counsel firmly denies that she ever saw Defendant's note to her. While Defendant may have tried to get her to consider the note, trial counsel was concentrating on ongoing testimony and may have glanced and failed to consider the note. Trials are often fluid and stressful events where multi-tasking is not always possible. It is also possible that Defendant made the note at trial for his own reference and in good faith believes he showed it to defense counsel, but simply did not do so. [FN2: While defense counsel intimates that Defendant added the note regarding S.B.'s contact information after the trial, the court finds

defense counsel's theory too speculative and not firmly supported by the record. The Court does note that Defendant is a nine-time convicted felon, with at least one forgery conviction. Defendant is serving an 11.25 year sentence. Given this background, he is not a credible witness. In fact, he chose not to testify at trial because of his many prior felony convictions.]

Moreover, Defendant told defense counsel that he wanted to use the phone at trial because he believed the text messages between him and J.M. helped his case. Defense counsel obtained the phone and looked through the text messages and determined they did not help Defendant's case. Defendant did not tell defense counsel before trial that he knew S.B. Defense counsel testified that it appeared to her Defendant did not know S.B. because Defendant did not refer to S.B. by his first or last name when they discussed him. Thus, if during S.B.'s testimony, Defendant tried to alert defense counsel about S.B.'s contact information being on his phone, defense counsel may just have ignored him given her prior experience with Defendant's insistence that the text messages between him and J.M. helped his case.

The Court also finds that Defendant does not mention S.B.'s contact information being on his phone and that defense counsel does not use such information to impeach him in his pro se motion to vacate the judgment, filed April 16, 2014. Defendant, however, discusses at length the text messages between he and J.M. Defendant does allege several times in said motion that defense counsel "provided Defendant incompetent representation" by failing to vigorously cross-examine prosecution witness about where the B.B. gun was located. The Court finds it highly suspicious that Defendant did not allege defense counsel was incompetent for failing to impeach S.B. with the alleged phone contact information in his motion to vacate judgment, soon after the trial, when he clearly alleged incompetent representation based on faulty cross-examination and J.M."s text messages to him. [FN3: At the evidentiary hearing, this Court specifically asked Defendant why he did not include S.B.'s phone contact claim in his motion to vacate judgment when he did make ineffective assistance of defense counsel claims in the motion. Defendant, contrary to his motion to vacate judgment, denied that he had made ineffective assistance of counsel claims because he knew it was a Rule 32 issue.]

Furthermore, the Court agrees with defense counsel's assessment, that even if she had been aware [that] S.B.'s contact information was in was in Defendant's phone, it was not objectively unreasonable for her not to use it as impeachment evidence given that defense counsel had impeached S.B. with his own statement to police clearly demonstrating to the jury that S.B. had seen Defendant in the post because he gave J.M. rides.

> As discussed earlier, the record also established defense counsel impeached S.B.'s credibility by establishing that S.B. had been convicted of a felony for attempted possession of heroin for sale and shoplifting. Defense counsel also impeached S.B. by pointing out to the jury that, contrary to his in-court testimony, S.B. did not tell police important details during interviews on the day of the incident. S.B. admitted that he did not tell police that Defendant pointed the B.B. gun at J.M. or that Defendant said, "I'm not leaving until I get my money and I will light this bitch up . . . if I don't.

Pet. Ex. H, pp. 5-6. Based on this analysis, the trial court concluded that the "alleged impeachment information was cumulative" and that "the record does not demonstrate defense counsel was ineffective when she did not impeach S.B. with Defendant's phone contact information." Pet. Ex. H, p. 6.

The trial court then examined the claim under the prejudice prong of *Strickland*. The court found that even if counsel had been ineffective in her impeachment of S.B., Aguilar was not prejudiced. The court explained that S.B. was impeached with other compelling impeachment evidence "such as his prior felony conviction for attempted possession of heroin for sale, his shoplifting conviction and his several inconsistent statement on key details as to the incident." Pet. Ex. H, p. 7.

When, as here, *Strickland's* "doubly deferential" standard of review applies, the appropriate inquiry is "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86,105 (2011). Aguilar's arguments here do not approach satisfying this standard. In rejecting this claim of ineffective assistance, the Arizona Court of Appeals stated that "Aguilar's argument on review amounts to a request that this court reweigh the evidence, which we will not do." Pet. Ex. J, p. 3 (footnote omitted). Aguilar's pleadings in this case establish that he is quite proficient in his research and analysis of the law. *See, e.g.,* Reply (Doc. 42), pp. 11-14 (analyzing actual innocence standards). However, as he did before the Arizona Court of Appeals, Aguilar again does not focus on the standards applicable to this claim. Rather than explaining how the Arizona Courts' decisions were unreasonable under the standards created by section 2254(d) and *Strickland*, he summarizes his version of the facts, claims

trial counsel perjured herself at the evidentiary hearings, provides a list of "questions which remain unanswered, and concludes his argument with an accusation that his trial counsel "masqueraded the appearance of providing assistance . . . ." *Petition* (Doc. 1), pp. 17-26. What he fatally fails to do, however, is to explain how the PCR courts' evaluation of the claim was unreasonable. Aguilar does not explain why this Court should reject the Arizona courts' determination that defense counsel did not see or reasonably failed to appreciate the note he allegedly wrote to her about S.B.'s contact information during trial. Pet. Ex. H, p. 5. Nor does he challenge the PCR court's determination that he was "not a credible witness." Pet. Ex. H, pp. 5-6 n. 2. He does not address the state courts' finding that his failure to include this claim in his Rule 24.3 motion, when all the supporting facts were available to him, was "highly suspicious." Pet. Ex. H, p. 6. Moreover, as Respondents contend, Aguilar also ignores the trial court's finding that, even if counsel had been aware that S.B.'s contact information was contained in Aguilar's phone, "it was not objectively unreasonable for her not to use it as impeachment evidence" in light of the other evidence she did use to impeach S.B. Pet. Ex. H, p. 6.

Also unaddressed is the Arizona courts' determination that Aguilar was not prejudiced by his counsel's failure to impeach S.B. with the contact information because it was not compelling impeachment evidence in light of the "many plausible explanations" for why S.B.'s contact information would be on Aguilar's phone and because "S.B. was impeached with other compelling impeachment evidence such as his prior felony conviction for attempted possession of heroin for sale, his shoplifting conviction and his several inconsistent statements on key details as to the incident." Pet. Ex. H, p. 7. Without any specific argument that the Arizona courts' finding that Aguilar's counsel's performance was deficient or that he was prejudiced, Aguilar has not overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, and under the "doubly deferential" standard of review under AEDPA, this Court cannot conclude that the state courts' denial of this claim was contrary to, or an unreasonable application of, clearly established federal law, or was

based on an unreasonable determination of fact. Accordingly, Aguilar is not entitled to habeas relief for ineffective assistance of counsel on the ground that the presence of S.B.'s contact information in Aguilar's phone was not used to impeach S.B. at trial.

3. Ground Four

Aguilar's Ground Four claim is that his trial counsel was ineffective in violation of his Sixth Amendment right to counsel when, during a discussion about a potential plea, Aguilar's counsel stated that he was "very unpredictable." Criminal defendants have a Sixth Amendment right to counsel that extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (citations omitted). "During plea negotiations defendants are entitled to the effective assistance of competent counsel." *Id.* (citation and internal quotation marks omitted). The *Strickland* test applies to claims of ineffective assistance of counsel in plea negotiations. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (citing *Strickland*, 466 U.S. 668). Under *Strickland*, Aguilar must show both deficient performance and prejudice to establish that counsel's representation was ineffective. *Strickland*, 466 U.S. at 687. Deficient performance is established by a petitioner's showing that counsel's performance fell below an objective standard of reasonableness. *Hill*, 474 U .S. at 57 (citing *Strickland*, 466 U.S. at 688). In the context of rejecting a plea offer, the question is "not whether 'counsel's advice [was] right or wrong, but . . . whether that advice was within the range of competence demanded of attorneys in criminal cases.'" *Turner v. Calderon*, 281 F.3d 851, 880 (9th Cir.2002) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). "Counsel cannot be required to accurately predict what the jury or court might find, but he can be required to give the defendant the tools he needs to make an intelligent decision." *Id.* at 881.

To establish prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cooper*, 566 U.S. at 163 (citing *Strickland*, 466 U.S. at 694). "In the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice." *Id.* When applying these standards to a claim that ineffective

assistance led to the improvident rejection of a guilty plea, the petitioner must show "that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Cooper*, 566 U.S. at 163-64.

In its ruling denying PCR relief, which was later cited with approval by the Arizona Court of Appeals, the trial court described the background of the claim as follows: "At trial, when it appeared the State was having difficulty with its victim witnesses, the Court suggested that the State should offer Defendant a probation available plea." Pet. Ex. H, p. 9. Out of the hearing of jurors, the following discussion between the Court, the prosecutor and defense counsel then took place:

THE COURT:	You feel comfortable calling [victim S.B.]? Can't you give this guy something, some plea that would resolve both cases given all the problems you are having?
DEFENSE COUNSEL:	I would love that idea, of course, although I don't know what it is.
PROSECUTOR:	I can offer him the original CES plea.
DEFENSE COUNSEL:	He doesn't want it. I don't even know what it is but I was told that from the beginning. I apologize.
THE COURT:	Well, was there a no [sic] probation-available plea?
PROSECUTOR:	No. He has like nine priors.
THE COURT:	What is fleeing from law enforcement? That's not the wors[t] ever. The reason he knows so much about the other guy, they probably used

	together.
PROSECUTOR:	I wouldn't disagree with that even a little bit.
THE COURT:	Can you go back and ask them for some probation-available plea?
PROSECUTOR:	I can ask, but I don't know what's going to happen.
THE COURT:	I mean you may get this case kicked out.
DEFENSE COUNSEL:	If you want to take a few minutes, I'm flexible.
PROSECUTOR:	If you give me a couple of minutes I can figure out what is going on. I would agree with you and I understand.
THE COURT:	Well, I have never done this, but this is—you know, I don't interfere with what you do, but if you want to take a few minutes—if you think it will—and do you think he is interested in that or not?
DEFENSE COUNSEL:	He is very unpredictable.
THE COURT:	I know him. Maybe we should just call the witness then.
PROSECUTOR:	I think we should go ahead and do that, and , you know, I'm comfortable going forward.

R.T. 10/30/13, pp. 66-68. The trial then proceeded with first the voir dire and then examination of S.B. *Id.*, pp. 68-71.

Addressing this claim in Aguilar's PCR proceedings, the trial court, in a decision later endorsed by the Arizona Court of Appeals, summarized and addressed the claim as follows:

> At trial, when it appeared the State was having difficulty with its victim witnesses, the Court suggested that the State should offer Defendant

> a probation available plea. The State answered they could not offer Defendant a probation available plea because he had nine prior convictions. Defense counsel stated that even if a plea was offered, Defendant was very unpredictable. The record shows that the State did not make any formal plea offer right before trial began.
>
> The Court finds that no formal plea offer was made during the above discussions. It is clear a probation available plea was not realistic given Defendant's nine prior convictions. Under these circumstances, defense counsel was not ineffective during plea discussions because no formal plea offer was ever made.
>
> Similarly, the Court also finds that Defendant was not prejudiced by defense counsel's statements to the Court and the prosecutor that Defendant was very unpredictable. No formal plea offer was ever extended. A probation available plea offer for a defendant with nine prior convictions was unrealistic.

Pet. Ex. H, p. 9.

Nothing about the trial court's decision, which was later adopted by the Arizona Court of Appeals, can be characterized as unreasonable. *See Yarborough*, 540 U.S. at 5. In the petition, Aguilar "avows because he threatened S.B. with physical violence, a probation-available plea agreement would have been accepted." *Petition* (Doc. 1), p. 30. However, he does not dispute the trial court's conclusion that a probation eligible plea was not realistically available considering his nine prior convictions. Moreover, he does not dispute the trial court's conclusion that no formal plea offer was extended at the time. The record shows that the trial court raised the idea, it was briefly discussed, and ultimately the prosecutor elected to go forward with the testimony of S.B. Finally, Aguilar does not explain how his trial counsel was ineffective or how he was prejudiced by her characterization of his response to a plea offer as "unpredictable." Defense counsel had already stated that Aguilar had previously rejected the CES plea offer. That she told the trial court, outside the presence of the jury, that his response to a potential plea offers was "unpredictable" did nothing to prejudice Aguilar because no offer was ultimately extended. Thus, Aguilar has again failed to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at

689, and under the "doubly deferential" standard of review under AEDPA, this Court cannot conclude that the state courts' denial of this claim was contrary to, or an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of fact. Accordingly, Aguilar is not entitled to habeas relief for ineffective assistance of counsel on the ground that his counsel characterized his response to any potential plea offer as "unpredictable."

IV. Recommendation

Based on the foregoing, the Magistrate Judge **RECOMMENDS** that the District Court, after its independent review, **dismiss** Aguilar's Petition for Writ of Habeas Corpus (Doc. 1), **direct** the Clerk of Court to enter judgment in favor of Respondents and against Petitioner.

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

However, 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 District Court. *See* 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Replies shall not be filed without first obtaining leave to do so from the District Court. If any objections are filed, this action should be designated case number: **CV 19-0359-TUC-JGZ**. Failure to timely file objections to any factual or legal determination of the Magistrate Judge may be considered a waiver of a party's right to *de novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*).

Dated this 22nd day of July, 2021.

Jacqueline M. Rateau

Honorable Jacqueline M. Rateau
United States Magistrate Judge

APPENDIX D

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Edward Aguilar,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-15-0286-TUC-LCK

ORDER

Petitioner Michael Aguilar has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Before the Court are the Petition (Doc. 1), Respondents' Answer (Doc. 12), and Aguilar's Reply (Doc. 13). The parties have consented to Magistrate Judge jurisdiction.[1] (Doc. 16.) The Court will dismiss the Petition as premature.

FACTUAL AND PROCEDURAL BACKGROUND

Aguilar was convicted in the Pima County Superior Court on two counts of attempted armed robbery, and sentenced to 11.25 years imprisonment. (Doc. 12, Exs. A, B.) Aguilar filed a pro se Motion to Vacate Judgment, which the trial court denied. (*Id.*, Exs. E, L.) He appealed that denial to the Arizona Court of Appeals and, over his objection, the appeal was consolidated with his already-filed notice of appeal. (*Id.*, Exs. N, O, P.) The only brief presented to the court of appeals was that filed by appointed counsel. (*Id.*, Doc. Q.) The Arizona Court of Appeals affirmed his convictions and sentences. (*Id.*, Doc. T at 7.) The Arizona Supreme Court denied review. (*Id.*, Exs. U, V.)

[1] This case was reassigned to the current judge on May 10, 2016. (Doc. 20.)

Aguilar filed a Notice of Post-conviction Relief (PCR) on June 26, 2015. (*Id.*, Ex. W.) Counsel was appointed that day and, after two withdrawals of counsel, current PCR counsel was appointed on June 27, 2015; since appointment, counsel has sought numerous extensions. (*See State v. Aguilar*, No. CR-20121308 (Super. Ct. Pima Cnty.).)[2] On October 31, 2016, the PCR court granted a final two-month extension to file the PCR petition based on counsel's motion stating that she is researching a "vital" piece of evidence she has been unable to locate. (*Id.*, Mtn to Extend Time and Order (Oct. 24 & Oct. 31, 2016).)

Aguilar filed his federal habeas Petition in this Court on July 6, 2016. (Doc.1.)

DISCUSSION

Aguilar raises seven claims in the Petition. Respondents contend all of the claims are procedurally defaulted.

Before the federal court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion in this case requires fair presentation of the claims to the Arizona Court of Appeals. *See Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Castillo v. McFadden*, 399 F.3d 993, 998 & n.3 (9th Cir. 2004).

The Court carefully reviewed the Petition and concluded that none of the seven claims therein were exhausted on direct appeal. (*Compare* Doc. 1 *with* Doc. 12, Ex. Q.) Aguilar contends he raised Claims 1 through 5 by way of his Motion to Vacate Judgment; however, as he acknowledges, they were not included in the Opening Brief filed before the Arizona Court of Appeals on the consolidated appeal. (*See* Doc. 12, Ex. Q.) Aguilar argues that a portion of Claim Four, alleging prosecutorial misconduct for failure to disclose the full criminal history of victim Brady, was raised on appeal. (Doc. 1 at 19.) The Court disagrees. On appeal, Aguilar argued the trial court erred in not precluding

---

[2] These documents have not been filed in this case; however, the Court reviewed them on the superior court website, http://www.agave.cosc.pima.gov/AgavePartners/.

Brady from testifying due to the prosecution's failure accurately to disclose his criminal history; he did not allege prosecutorial misconduct. (Doc. 12, Ex. Q at 13-15.) Aguilar also contends that Claim Six, alleging sufficiency of the evidence, was raised on direct appeal. Again, the Court disagrees. Before this Court, Aguilar alleges there was not sufficient evidence to convict him on either charge of attempted armed robbery. (Doc. 1 at 22.) He then sets forth seven factual statements alleging that the BB gun was planted (and had no fingerprint or DNA connection to him); the testifying victim was on heroin and committed perjury; the victim on the 9-1-1 call initially stated she "thinks" he has a gun but then then later answered, yes, he pulled a gun on me; and exculpatory text messages were not admitted. (*Id.*) In contrast, on appeal, Aguilar alleged that admission of the 9-1-1 call violated his Sixth Amendment right to confrontation (and, absent admission of the call, the trial court should have granted a directed verdict as to one of the victims, Count 2). (Doc. 12, Ex. Q at 18-20.) Aguilar concedes he has never presented Claim 7 to the Arizona Court of Appeals. Thus, the Court concludes none of the claims in the Petition were fairly presented to the Arizona Court of Appeals.

Review of the state court docket reveals that Aguilar has a PCR proceeding pending in state court. A petitioner has not exhausted state court remedies if he has a state PCR petition pending at the time he files a petition for writ of habeas corpus in federal court. *See Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (pending appeal); *Schnepp v. Oregon*, 333 F.2d 288, 288 (9th Cir. 1964) (pending post-conviction proceeding); *Qualls v. Ryan*, No. CV 13-1288-PHX-JAT (DKD), 2013 WL 3833218, at *1-2 (D. Ariz. Jul. 24, 2013) (denying habeas corpus petition as premature where petitioner presently had a Rule 32 petition pending). The pending PCR proceeding could affect Aguilar's convictions and ultimately these proceedings; therefore, it is inappropriate for this Court to rule on Aguilar's claims at this time. *See Sherwood*, 716 F.2d at 634.

The Court's review of the state court proceedings indicates that the one-year statute of limitations applicable to a future petition has not begun to run. The Arizona Supreme Court denied review of Aguilar's direct appeal on June 11, 2015. (Doc. 12, Ex. V.) For purposes of the applicable statute of limitations set forth in 28 U.S.C. § 2244(d)(1)(A), Aguilar's conviction became final on September 9, 2015, when the ninety days to petition for a writ of certiorari from the United States Supreme Court expired, Sup. Ct. R. 13. *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999) (holding that "direct review" includes the period during which a petitioner can petition for writ of certiorari, regardless of whether the petitioner seeks such review); *see also Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009) (finding direct review to include the time up to the expiration of the period to seek review by the Supreme Court). At the time Aguilar's direct review became final, he had already begun his first PCR proceeding by filing a notice on June 24, 2015 (Doc. 12, Ex. W), which immediately tolled the statute of limitations. *Isley v. Ariz. Dep't of Corrections*, 383 F.3d 1054, 1056 (9th Cir. 2004) (finding that tolling period begins with filing of notice pursuant to Arizona Rule of Criminal Procedure 32.4(a)); 28 U.S.C. § 2244(d)(2) (the federal habeas statute of limitations is tolled during the time a properly filed state PCR petition is pending). Therefore, Aguilar will suffer no prejudice as a result of a dismissal without prejudice.[3] *See Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (holding that a petition filed after a prior petition has been dismissed for failure to exhaust before the district court adjudicated any claims is not a second or successive petition).

[3] The Court considered whether a stay of the current petition would be a viable remedy at this time, in accordance with *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) and *Mena v. Long*, 813 F.3d 907 (9th Cir. 2016). The Supreme Court recognizes that petitioners who are "reasonably confused" about timeliness rules may file "protective" petitions in federal court and ask the court to stay and abey the federal habeas corpus proceedings under *Rhines* until the state remedies are exhausted. *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005). By protectively filing a habeas corpus petition, a petitioner may comply with the one-year statute of limitations applicable to federal habeas corpus petitions. *See* 28 U.S.C. 2244(d)(1). Here, the one-year limitations period is tolled by the pending PCR proceeding; therefore, there is no need to hold this proceeding in abeyance to prevent a statute of limitations problem. *See id.* Thus, dismissing the Petition under the circumstances of this case will not prejudice Aguilar.

Because Aguilar has not properly exhausted any claims and a PCR proceeding is pending in state court, dismissal of the Petition as premature is proper.

MOTION FOR CLARIFICATION

On November 4, 2016, Aguilar filed a motion seeking clarification of the status of the case. (Doc. 23.) Aguilar also discussed the evidence in his case and urged his actual innocence. Finally, he asked that the Court proceed promptly to address his petition. Nothing in Aguilar's filing alters this Court's determination that the Petition is premature. However, the Court will grant the motion because this order clarifies the status of his case.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, this Court must issue or deny a certificate of appealability (COA) at the time it issues a final order adverse to the applicant. A COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the court's procedural ruling was correct. *Id.* The Court finds that reasonable jurists would not find this Court's procedural ruling debatable. Therefore, a COA will not issue.

Accordingly,

IT IS ORDERED that Petitioner's Motion for Clarification (Doc. 23) is **GRANTED**.

IT IS FURTHER ORDERED the Petition for Writ of Habeas Corpus is **DISMISSED WITHOUT PREJUDICE as premature**.

IT IS FURTHER ORDERED that the Clerk of Court should enter judgment and close this case.

IT IS FURTHER ORDERED that, pursuant to Rule 11 of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a certificate of appealability.

Dated this 17th day of November, 2016.

Honorable Lynnette C. Kimmins
United States Magistrate Judge

APPENDIX E

YORK v. DUCART (2018)

United States Court of Appeals, Ninth Circuit.

Kenneth Paul YORK, Petitioner-Appellant, v. Clark E. DUCART, Warden, Respondent-Appellee.

No. 16-15060

Decided: June 01, 2018

Before: BERZON and FRIEDLAND, Circuit Judges, and SESSIONS,* District Judge.

Jason Thomas Campbell, Esquire, Attorney, Law Offices of Jason T. Campbell, Esq., San Francisco, CA, for Petitioner-Appellant Amit Kurlekar, AGCA—Office of the California Attorney General, San Francisco, CA, for Respondent-Appellee

MEMORANDUM **

Kenneth York was convicted of first-degree murder for the killing of Michael "Merlin" Fidler during a burglary. He seeks a writ of habeas corpus on the basis of ineffective assistance of counsel (IAC). See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); 28 U.S.C. § 2254(d).

1. The performance of York's trial counsel was deficient. See Strickland, 466 U.S. at 687, 104 S.Ct. 2052. His failure to review the prosecution's evidence, and in turn to introduce cell phone records that would have severely undermined the testimony of the state's key witness, fell "below an objective standard of reasonableness" and "outside the wide range of professionally competent assistance." Id. at 688, 690, 104 S.Ct. 2052. The California Supreme Court's conclusion otherwise was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).[1]

The cell phone records are significantly exculpatory. They contradict the testimony of Junior Perez, the prosecution's main witness linking York to the crime. Perez provided a full before-and-after timeline of York's supposed involvement in the shooting, and was the only witness who provided direct, firsthand testimony of York's actions the night of the crime.[2] The phone records would strongly support a finding that York did not call Perez at 3 a.m. the morning of the crime, as Perez testified.[3] At the same time, they undercut Perez's alibi and raise questions of how he came to be in possession of a duffel bag containing incriminating evidence. Had they been introduced, the records would have bolstered the defense's theory that Perez—not York—was the second intruder, even if York was otherwise involved.[4]

The Pleasant Hill police department subpoenaed York's cell phone records from Sprint Nextel, his service provider. At some point before or during trial, the records were turned over to York's counsel, who either did not look at them, or forgot he had them, until after the jury had retired to deliberate. Even then, it seems he did not review them closely enough to grasp their exculpatory value.

Trial counsel's failure to review the evidence obtained by law enforcement, turned over to him by the prosecution, and later located in his own case file, was deficient performance. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. Counsel's investigation "should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." Rompilla v. Beard, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)).[5] Inherent in "secur[ing]" that evidence is the obligation to review it—that is, to "make some effort to learn the information in the possession of [those] authorities." Id. at 387 n.6, 125 S.Ct. 2456 (emphasis added).

No conceivable strategic judgment could explain counsel's failure to review the records.[6] The state does not articulate one. Counsel's failure to review the exculpatory cell phone records was thus the result of neither "reasonable investigations" nor "a reasonable decision that ma[de] particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052; see Rompilla, 545 U.S. at 387, 125 S.Ct. 2456. "The record . underscores the unreasonableness of counsel's conduct by suggesting that [his] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." Wiggins v. Smith, 539 U.S. 510, 526, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

As counsel's incompetence in failing to locate the phone records in the material disclosed by the prosecution is beyond reasonable dispute, the state court's conclusion that York did not show that counsel's performance was deficient under Strickland was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).[7]

2. York was prejudiced by trial counsel's failure to review the material disclosed by the government and, in turn, to introduce the phone records at trial. See Strickland, 466 U.S. at 692, 104 S.Ct. 2052. Had counsel located and introduced them, the phone records

have "alter[ed] the entire evidentiary picture" before the jury, id. at 696, 104 S.Ct. 2052, resulting in "a reasonable probability that . at least one juror would have harbored a reasonable doubt" as to York's guilt. Buck v. Davis, --- U.S. ----, 137 S.Ct. 759, 776, 197 L.Ed.2d 1 (2017).

The phone records would have shown that a key piece of Perez's testimony—the 3 a.m. phone call—quite likely did not happen. Beyond discrediting Perez's testimony, the records would have bolstered the defense's theory that Perez, not York, was the second intruder (along with Tyson Morehead). If no early-morning phone call occurred, and no subsequent meeting with York, the jury would be left to wonder why Perez (and his wife)[8] invented those events, whether he was actually at home and in bed the night of the crime, and how he came to be in possession of a duffel bag full of potentially incriminating evidence if York did not give it to him that night.

Notably, the significance of potential cell phone records was clear to the jury and the parties. During closing argument, the prosecutor told the jurors, "I wish we had the telephone records to corroborate [Perez's testimony about the phone call.]" The prosecutor also referred to Lackey's testimony, which corroborated Perez's account of the night, as an "alibi" for Perez, and placed special emphasis on the call. One juror sent a note to the judge asking specifically whether "phone records exist which confirm Mr. York called Jr. Perez" on the morning of the crime. In a post-trial motion to the judge, York's lawyer described phone records as "the type of evidence that could push a juror one way or the other."

With Perez's testimony severely undermined by the phone records, the state's case against York would have been "only weakly supported by the record." Hardy v. Chappell, 849 F.3d 803, 823 (9th Cir. 2016) (quoting Strickland, 466 U.S. at 696, 104 S.Ct. 2052). "[N]o physical evidence whatsoever linked [York] to the crime." Id. at 824; see also Cannedy v. Adams, 706 F.3d 1148, 1164 (9th Cir. 2013). And the evidence in the record was equivocal, secondhand, or subject to convincing rebuttal.

The testimony from the four Nevada City witnesses indicated that York was probably involved in covering up the crime, but pointed no more to his direct participation in the home invasion-murder than to Perez's. Lenny Cabrera gave incriminating evidence about York, but Cabrera's statements to detectives regarding his close relationship with Perez, elicited on cross-examination, deprived his testimony of the weight it might otherwise have had. James Connelly's tentative courtroom identification of York was inconsistent with the suspect description he gave to police the night of the crime, which itself much more closely matched Perez than it did York.[9]

Tesse Perez testified that York essentially confessed his role in the crime to her and provided details about the break-in. But a jury would have to balance this specific testimony against her motive to lie to protect her brother, Junior Perez; her complicated romantic history with York; and the other evidence impeaching her presented by York at trial. The jury might well have viewed her testimony quite skeptically had her brother's and sister-in-law's testimony and credibility been undermined by the cell phone records. "The Strickland test is . not a sufficiency of the evidence standard nor is it a substantial evidence standard." Hardy, 849 F.3d at 824 n.9. "[C]onsider[ing] the totality of the evidence before the judge or jury," Strickland, 466 U.S. at 696, 104 S.Ct. 2052, and how the phone records would have changed the evidentiary landscape before them, "there is a reasonable probability that the unpresented evidence would have altered at least one juror's assessment" of York's guilt, Vega v. Ryan, 757 F.3d 960, 974 (9th Cir. 2014) (quoting United States v. Kohring, 637 F.3d 895, 906 (9th Cir. 2011)).

In short, the phone records would have removed the linchpin of the state's case against York. The California Supreme Court's assessment that York was not prejudiced by this lapse was "an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States" in Strickland. 28 U.S.C. § 2254(d)(1). The state's case rested on Junior Perez's testimony; the evidence that trial counsel failed to locate and introduce would have undone that testimony. While there was other testimony in the record supporting York's involvement, all of it was either equivocal or its credibility or reliability was subject to significant challenge. Under those circumstances, no "fairminded jurist could fail to acknowledge at least a reasonable probability of a different outcome." Cannedy, 706 F.3d at 1165.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to grant the writ of habeas corpus.

FOOTNOTES

1. The California Supreme Court denied York's petition for post-conviction relief without opinion, so we look to "what arguments or theories supported or, as here, could have supported," its decision. Harrington v. Richter, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

2. Perez testified that York met and exchanged telephone numbers with Tyson Morehead, who participated in the crime but has never been apprehended, the afternoon before the burglary, after York had discussed robbing a drug dealer; called Perez as he was staking out Fidler's apartment complex several hours later; called Perez over to his house at 3 a.m., told him that "shit went bad," and gave him a duffel bag full of clothing that York later burned; and told him again later in private that "[s]hit went bad and the guy got

3. While not conclusive proof that York did not call Perez at 3 a.m., the records—together with Perez's trial testimony and other statements he made to detectives—are weighty evidence that no such phone call was made. Perez told police that he and York communicated exclusively by cell phone during this time. Perez's testimony that he had missed one or two calls from York before he called him back on the night of the crime, would make no sense unless he received the calls from a number he recognized. So while it is theoretically possible that York called Perez from a different phone, that scenario runs entirely counter to Perez's own statements in the record.

4. The record suggests, and York's brief does not dispute, that both Perez and York were involved in the crime or its cover-up to some extent. Evidence of York's complicity does not, however, foreclose his claim that, but for his counsel's constitutionally significant failure to introduce probative evidence casting doubt upon his guilt, he would not have been convicted of first-degree murder.

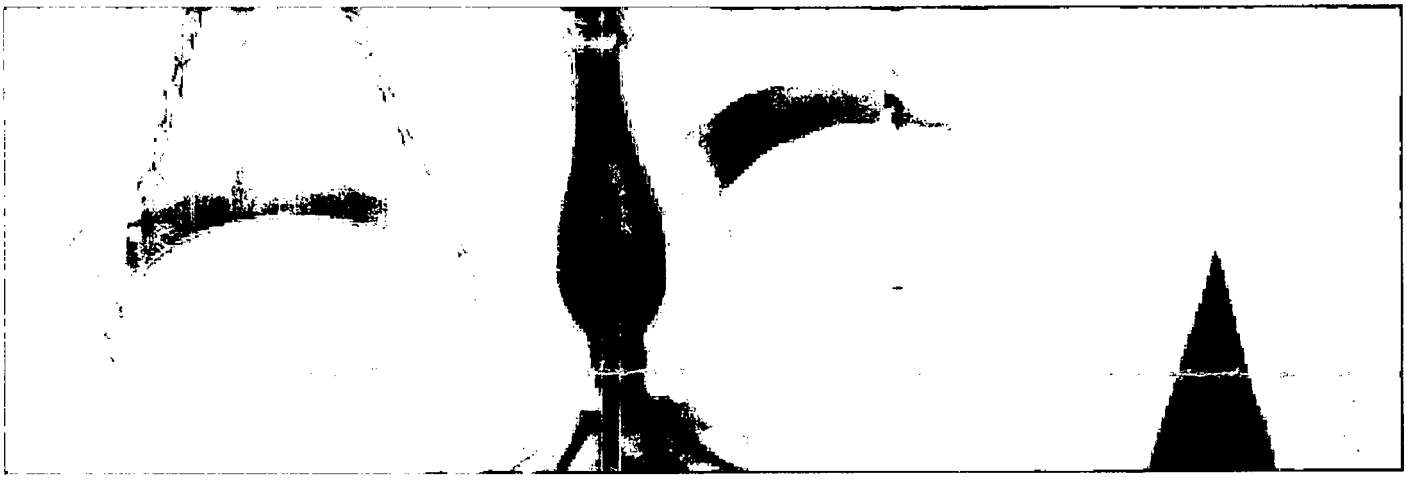
5. "Prevailing norms of practice as reflected in American Bar Association standards and the like . are guides to determining what is reasonable, but they are only guides." Strickland, 466 U.S. at 688, 104 S.Ct. 2052. The standards in place during York's trial are substantively identical to those quoted in Rompilla. See Rompilla, 545 U.S. at 387 n.6, 125 S:Ct. 2456; ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1 (3d ed. 1993).

6. Trial counsel declined to submit an affidavit to habeas counsel explaining his decisions.

7. Because trial counsel's performance with regard to the cell phone records was deficient, we do not address whether his failure to investigate an alibi defense was also deficient.

8. Lauren Lackey—Perez's wife by the time of trial—also testified about the 3 a.m. phone call, so the phone records would have contradicted her testimony as well.

9. The district court credited the sparse testimony given by Penny Morales, but the statements of York's to which she testified were too vague and lacking in context to be significantly probative of York's involvement in the home invasion-murder.



YORK v. DUCART (2018)

Docket No: No. 16-15060