No. 24 - ____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ISIDORO SANCHEZ,

Petitioner,

RYAN THORNELL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS;
KRISTIN K. MAYES, ARIZONA ATTORNEY GENERAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Michael Sanchez, # 290235
Petitioner, Pro-per.
A.S.P.C. Kingman / Huachuca Unit
P.O. Box 6639
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APPENDIX TABLE OF CONTENTS

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ISIDORO SANCHEZ, Petitioner-Appellee, v. DAVID SHINN, Director of the Arizona Department of Corrections; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellants.	No. 21-15632 D.C. No. 4:17-cv-00224-RM MEMORANDUM*

MICHAEL ISIDORO SANCHEZ, Petitioner-Appellant, v. DAVID SHINN, Director, Director of the Arizona Department of Corrections; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 21-16940 D.C. No. 4:17-cv-00224-RM

Appeal from the United States District Court
for the District of Arizona
Rosemary Márquez, District Judge, Presiding

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

Argued and Submitted April 18, 2023
Phoenix, Arizona

Before: OWENS and BADE, Circuit Judges, and BAKER,** International Trade Judge.

In this habeas action, David Shinn, in his capacity as the Director of the Arizona Department of Corrections, timely appeals the district court's order holding that the state's post-conviction relief (PCR) procedures for pleading defendants are unconstitutional under *Anders v. California*, 386 U.S. 738 (1967). Michael Sanchez timely cross-appeals the denial of his motion seeking immediate release. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

In state trial court, Sanchez pleaded guilty to one count of sexual contact with a minor and one count of attempted sexual contact with a minor. The court accepted his plea and sentenced him to prison accordingly. After his guilty plea and conviction, Sanchez filed three separate PCR proceedings under Arizona Rule of Criminal Procedure 32.4. In each of these proceedings, the court appointed separate PCR counsel, and each appointed counsel found that there were no colorable claims for relief and then remained in an advisory capacity only. In the first and second PCR proceedings, Sanchez filed a pro se petition. The state trial and appellate courts rejected his claims. In his third PCR proceeding, rather than

** The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

procedural bar") (cleaned up). Thus, there is no procedural bar to our reaching Sanchez's *Anders* claim.

2. Although the state appellate court did not expressly address Sanchez's *Anders* claim as it applied to his first and second PCR proceedings and instead limited its discussion to his *Anders* challenge to his third PCR proceeding, we "presume that the [former] claim was adjudicated on the merits." *Johnson v. Williams*, 568 U.S. 289, 301 (2013). Although "that presumption can in some limited circumstances be rebutted," *id.*, we do not think it has been rebutted here. Sanchez presented two similar *Anders* claims to the state appellate court, and "[t]he possibility that the [state appellate court] had simply overlooked [Sanchez's other *Anders* claims]" was not raised by either party. *Id.* at 306. Moreover, "the fact that [Sanchez's three *Anders*] claims are so similar makes it unlikely that the [state appellate court] decided one while overlooking the other[s]." *Id.* at 305.

3. The district court erred in concluding that the state appellate court ruled that *Anders* does not apply in PCR proceedings. The state appellate court followed *Chavez I*, which we held "correctly found *Anders* applies to of-right PCR proceedings." *Chavez v. Brnovich*, 42 F.4th 1091, 1099 (9th Cir. 2022) (*Chavez II*).

The district court further erred in not giving the required deference to the state appellate court decision under the Antiterrorism and Effective Death Penalty Act of 1996. *See* 28 U.S.C. § 2254(d)(1) (providing that habeas relief may not be

granted to applicants detained under state law unless the state court's merits determination "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ."). In *Chavez II*, the defendant similarly brought an *Anders* claim after filing a Rule 32 PCR petition. We held that *Chavez I* "did not unreasonably apply clearly established federal law, as it could have reasonably determined that Arizona's of-right PCR procedure satisfied *Anders* and its progeny." 42 F.4th at 1103. Because the state appellate court here followed *Chavez I*, we follow *Chavez II* and hold that the state appellate court could have reasonably determined that "Arizona's of-right PCR procedure satisfied *Anders* and its progeny." *Id.*

For these reasons, we reverse the district court's grant of conditional habeas relief. We also dismiss Sanchez's cross-appeal as moot.[1]

In No. 21-15632, REVERSED. In No. 21-16940, DISMISSED as MOOT.

[1] We grant Sanchez's motion (Dkt. No. 24) to take judicial notice of amendments related to Rule 32, and we deny Shinn's motion (Dkt. No. 34-1) to supplement the record as moot.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Isidoro Sanchez,

Petitioner,

v.

Attorney General of the State of Arizona, et al.,

Respondents.

No. CV-17-00224-TUC-RM

ORDER

Pending before the Court is Magistrate Judge D. Thomas Ferraro's Report and Recommendation ("R&R") (Doc. 65), recommending that this Court dismiss Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner filed an Objection (Doc. 74) and a Supplement to the Objection (Doc. 76); Respondents filed a Response to the Objection and Supplement (Doc. 84); and Petitioner filed a Reply (Doc. 85). For the following reasons, Petitioner's Objection will be partially sustained and partially overruled, the R&R will be partially rejected and partially adopted, and the Amended Petition will be partially granted and partially denied.

I. Standard of Review

A district judge "may accept, reject, or modify, in whole or in part," a magistrate judge's proposed findings and recommendations. 28 U.S.C. § 636(b)(1). The district judge must "make a de novo determination of those portions" of a magistrate judge's

"report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The advisory committee's notes to Rule 72(b) of the Federal Rules of Civil Procedure state that, "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation" of a magistrate judge. Fed. R. Civ. P. 72(b) advisory committee's note to 1983 addition. *See also Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error."); *Prior v. Ryan*, CV 10-225-TUC-RCC, 2012 WL 1344286, at *1 (D. Ariz. Apr. 18, 2012) (reviewing for clear error unobjected-to portions of Report and Recommendation).

Where objections raised "are repetitive of the arguments already made to the magistrate judge, a de novo review is unwarranted." *Vega-Feliciano v. Doctors' Ctr. Hosp., Inc.*, 100 F. Supp. 3d 113, 116 (D.P.R. 2015) (internal citation omitted); *see also Camardo v. Gen. Motors Hourly–Rate Employees Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992) ("It is improper for an objecting party to . . . submit[] papers to a district court which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge. Clearly, parties are not to be afforded a 'second bite at the apple' when they file objections to a R&R.")).

A district court "has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000).

II. Background

In 2014, Petitioner pled guilty in Cochise County Superior Court to one count of sexual conduct with a minor and one count of attempted sexual conduct with a minor. (Doc. 51 at 26-49.) He was sentenced in accordance with the terms of his plea agreement to 25 years of imprisonment followed by a lifetime of probation. (Doc. 51 at 26-32.) Petitioner unsuccessfully sought state post-conviction relief through three rounds of post-conviction review ("PCR") proceedings. (*See* Doc. 65 at 1-4.) The details of Petitioner's

state trial and PCR proceedings are set forth in the R&R and adopted herein.

On May 16, 2017, Petitioner filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254. (Doc. 1.) On June 5, 2019, he filed an Amended Petition, alleging nineteen grounds for relief. (Doc. 41.) Respondents filed a Response to the Amended Petition (Doc. 50; *see also* Docs. 51 to 58) and Petitioner filed a Reply (Doc. 60).

Magistrate Judge Ferraro's R&R finds that the original § 2254 Petition was timely under the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and that the Amended Petition relates back to the original and is thus also timely. (Doc. 65 at 5.) However, the R&R finds that the Amended Petition should be dismissed because the majority of the claims alleged therein are procedurally defaulted, waived, or non-cognizable on federal habeas review, and the remaining claims fail on the merits. (*Id.* at 6-28.)

In his Objection to the R&R, Petitioner raises general challenges to the R&R's procedural default findings and also makes specific arguments pertaining to the R&R's analysis of Grounds One, Two, Three, Four, Eight, Eleven, and Twelve of his Amended Petition. (Doc. 74.)

III. Applicable Law

The writ of habeas corpus affords relief to persons in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). If the petitioner is in custody pursuant to the judgment of a state court, the writ will not be granted "with respect to any claim that was adjudicated on the merits" in state court unless the prior adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision is contrary to federal law "if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on

a question of law or if the state court decides a case differently than [the Supreme Court] on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court decision involves an unreasonable application of federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

Federal habeas claims are subject to the "exhaustion rule," which requires that the factual and legal basis of a claim be presented first to the state court. 28 U.S.C. § 2254(b)(1)(A); *Weaver v. Thompson*, 197 F.3d 359, 363-64 (9th Cir. 1999). If the petitioner is in custody as a result of a judgment imposed by the State of Arizona, and the case does not involve a life sentence or the death penalty, he must fairly present his claims to the Arizona Court of Appeals in order to satisfy the exhaustion requirement. *See Castillo v. McFadden*, 399 F.3d 993, 998 n.3 (9th Cir. 2005); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). In order to properly exhaust a claim for purposes of federal habeas review, the petitioner must identify the federal nature of the claim to the state court by citing federal law or precedent. *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *as amended by* 247 F.3d 904.

A claim is exhausted but procedurally defaulted if it was presented in state court but the state court rejected it based on an independent and adequate state procedural bar. *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003); *Franklin v. Johnson*, 290 F.3d 1223, 1230–31 (9th Cir. 2002). A claim is also technically exhausted but implicitly procedurally defaulted if the petitioner failed to raise it in state court and a return to state court to exhaust it would be futile considering state procedural rules. *Franklin*, 290 F.3d at 1230–31; *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (finding claims procedurally defaulted because habeas petitioner was time-barred from presenting his claims in state court); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (noting that claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred").

A federal habeas court may not review a procedurally defaulted claim unless "the

prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'" *Coleman*, 501 U.S. at 750. To establish "cause," a petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Id.* at 753. To establish "prejudice," a petitioner must demonstrate actual, not possible, harm resulting from the alleged violation. *Murray v. Carrier*, 477 U.S. 478, 494 (1986); *see also United States v. Frady*, 456 U.S. 152, 170 (1982) (to show prejudice, a petitioner must demonstrate that the alleged constitutional violation worked to the prisoner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."). To establish a "fundamental miscarriage of justice," a petitioner must "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

IV. Discussion

The Court will first discuss Petitioner's general objections to the R&R's procedural default findings and then discuss Petitioner's objections to the R&R's analysis of specific claims.[1]

A. Procedural Default

Petitioner argues that Respondents waived their procedural default arguments by not raising them during pre-Answer briefing related to a motion to stay. (Doc. 74 at 3-4.) Magistrate Judge Ferraro considered this argument and rejected it, finding that Respondents were not required to raise their procedural default arguments at that time and that the exhaustion requirement can only be expressly waived. (Doc. 65 at 9-10.)

Because Petitioner merely raises the same arguments considered and rejected by the magistrate judge, de novo review is unnecessary. *See Vega-Feliciano*, 100 F. Supp. 3d at 116. Even applying de novo review, the Court finds that Magistrate Judge Ferraro

[1] The Court has reviewed for clear error all unobjected-to portions of Magistrate Judge Ferraro's R&R, and has found no clear error in those unobjected-to portions.

correctly rejected Petitioner's waiver argument. Respondents appropriately raised their arguments concerning exhaustion and procedural default in their first responsive pleading—their Answer to Petitioner's Amended Petition. *See Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005) ("the defense of procedural default should be raised in the first responsive pleading"); *see also* Fed. R. Civ. P. 7(a) (distinguishing "pleadings" from "motions and other papers"). Furthermore, AEDPA provides that the exhaustion requirement must be expressly waived, 28 U.S.C. § 2254(b)(3), and there is no express waiver here. Petitioner's waiver objection will be overruled.

Petitioner further objects to the R&R's findings that several of his IAC claims are procedurally defaulted because they were rejected in state court as untimely under Arizona Rule of Criminal Procedure 32.4(a). (Doc. 74 at 4-6.) Petitioner argues that the pre-2018 amendment version of Rule 32.4(a),[2] in effect at the time he initiated all three of his PCR proceedings, was not an adequate state procedural ground because it was not firmly established and was insufficiently clear on the procedure for a pleading defendant to assert a claim of ineffective assistance of PCR counsel. (*Id.*) Magistrate Judge Ferraro considered and rejected this argument, finding that Arizona courts regularly follow Rule 32.4(a) and concluding that the rule and case law interpreting it were "sufficiently clear as to what conduct was required to assert an IAC claim of first PCR counsel." (Doc. 65 at 10-12.)

Because Petitioner merely raises the same arguments considered and rejected by the magistrate judge, de novo review is unnecessary, but even applying de novo review, the Court rejects Petitioner's argument. "A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed." *Martinez v. Ryan*, 566 U.S. 1, 9

[2] Rule 32.4(a) provides deadlines for filing timely PCR notices, and before 2018 it stated, "In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding."

(2012). Arizona's procedural bar on successive PCR petitions is an independent and adequate state ground precluding federal habeas review of a claim, as is Arizona's bar on untimely PCR petitions, *Id.* at 10; *see also Beaty v. Stewart*, 303 F.3d 975, 988 (9th Cir. 2002) (finding petitioner failed to show that "Arizona's time bar is not adequate or independent"); *Loya v. Shinn*, No. CV-19-02104-PHX-SRB, 2020 WL 5658976, at *5 (D. Ariz. Sept. 23, 2020). The 2018 amendment referenced by Petitioner did not constitute a material change in Arizona's procedural rules. This Court finds no basis to overrule the R&R on this issue.

B. Ground One

In Petitioner's of-right PCR proceeding, appointed counsel filed a "Notice of No Colorable Claim," stating that he was unable to find any ground for Rule 32 relief. (Doc. 51 at 78, 80-83.) The trial court allowed Petitioner to file a pro se PCR Petition (Doc. 51 at 85; *see also* Doc. 52 at 3-21) and later denied that pro se Petition (Doc. 52 at 111-13), all without conducting an *Anders*[3] review of the record. In Ground One of his Amended § 2254 Petition, Petitioner alleges that his equal protection and due process rights were violated during his of-right PCR proceeding, and he was denied effective assistance of counsel, because *Anders* safeguards were not followed. (Doc. 41 at 10-17.) Petitioner raised this claim to the Arizona Court of Appeals in his Motion to Supplement his Petition for Review of the denial of his third PCR Petition. (*Id.* at 10, 16; *see also* Doc. 41-10 at 30-31.) The Arizona Court of Appeals granted review of the denial of Petitioner's third PCR Petition but denied relief, finding that any claims regarding the ineffectiveness of Petitioner's first PCR counsel should have been raised in a second, timely PCR proceeding. (Doc. 58 at 4 (citing Ariz. R. Crim. P. 32.4(a)(2)(C)).) With respect to Petitioner's *Anders* claim, the Court found—relying on *Arizona v. Chavez*, 407 P.3d 85 (Ariz. App. 2017), that *Anders* review is not required for pleading defendants. (*Id.*)

The R&R finds that Petitioner exhausted Ground One by raising it in his third

[3] *Anders v. California*, 386 U.S. 738 (1967).

PCR proceeding but that the claim is procedurally defaulted because the Arizona Court of Appeals determined it was untimely under Rule 32.4(a)(2)(C) of the Arizona Rules of Criminal Procedure. (Doc. 65 at 8-12.) The R&R also notes that the Arizona Court of Appeals relied on *Chavez* in finding that *Anders* review is not required for pleading defendants. (*Id.* at 8.) Petitioner objects that the R&R's reliance on *Chavez* is contrary to clearly established federal law. (Doc. 74 at 6-7; *see also* Doc. 76 at 1-3.) Petitioner contends that Arizona's procedures governing PCR proceedings and the provision of counsel therein lead to "the constructive denial of counsel altogether" and do not comport with the Fourteenth Amendment. (Doc. 74 at 7.)

A claim is procedurally defaulted when a state court applies an independent and adequate state procedural bar, even if the state court alternatively addresses the claim on the merits. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *see also Zapata v. Vasquez*, 788 F.3d 1106, 1111-12 (9th Cir. 2015). But a procedural default occurs only if the state court "clearly and expressly" states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263 (internal quotation marks omitted). As discussed above, the Arizona Court of Appeals found that Petitioner's ineffective assistance of PCR counsel claims were untimely before addressing his *Anders* claim on the merits. (Doc. 58 at 4.) To the extent that Ground One asserts the ineffective assistance of PCR counsel, this Court agrees with the R&R that the claim is procedurally defaulted. However, the *Anders* claim asserted in Ground One is distinct from a claim alleging only the ineffective assistance of PCR counsel. *Cf. Penson*, 488 U.S. at 88 (noting differences between *Anders* claim and ordinary IAC claim). There is no indication that the Arizona Court of Appeals applied a procedural bar to Petitioner's *Anders* claim; it addressed the claim only on the merits. Accordingly, this Court rejects the R&R's finding that Petitioner's *Anders* claim is procedurally defaulted.

In *Anders v. California*, the United States Supreme Court held that a court-appointed criminal defense attorney who, on appeal of a criminal conviction, finds the appeal meritless or frivolous, may request permission to withdraw but must file "a brief

referring to anything in the record that might arguably support the appeal." 386 U.S. 738, 744 (1967). The court must conduct "a full examination of all the proceedings, to decide whether the case is wholly frivolous," before allowing the withdrawal of counsel. *Id.*; *see also Penson v. Ohio*, 488 U.S. 75, 80 (1988). If the court finds any non-frivolous issues, "it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Anders*, 386 U.S. at 744. *Anders* protections apply to prevent "unconstitutional discrimination against the poor" during proceedings in which a litigant has an "established constitutional right to counsel." *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987). *Anders* safeguards do not apply to ordinary collateral review proceedings because there is no constitutional right to counsel during those proceedings. *Finley*, 481 U.S. at 555-56. However, *Anders* protections are required during a defendant's first appeal as of right. *Finley*, 481 U.S. at 554-55.

In Arizona, a noncapital defendant "may not appeal from a judgment or sentence that is entered into pursuant to a plea agreement." A.R.S. § 13-4033(B). Instead, pleading defendants may file a notice requesting post-conviction relief. Ariz. R. Crim. P. 17.1(e); Ariz. R. Crim. P. 33.1. The initial PCR petition of a pleading defendant is referred to as an "of-right" PCR petition, as it is the functional equivalent of a pleading defendant's first appeal as of right. *See Summers v. Schriro*, 481 F.3d 710, 714-17 (9th Cir. 2007). Because of-right PCR proceedings are the functional equivalent of first appeals as of right, a federal constitutional right to counsel exists during such proceedings, and *Anders* safeguards are required. *Pacheco v. Ryan*, No. CV-15-02264-PHX-DGC, 2016 WL 7407242, at *8-10 (D. Ariz. Dec. 22, 2016); *see also Penson*, 488 U.S. at 79 ("the Fourteenth Amendment guarantees a criminal appellant the right to counsel on a first appeal as of right"). Nevertheless, notwithstanding pleading defendants' constitutional right to counsel in of-right PCR proceedings and in explicit disregard of *Pacheco*, the Arizona Court of Appeals held in *Chavez* that *Anders* record-review is not required in of-right PCR proceedings. 407 P.3d 85.

In the case at hand, the Arizona Court of Appeals' reliance on *Chavez* for the

proposition that *Anders* safeguards were not required during Petitioner's of-right PCR proceeding was an unreasonable application of clearly established federal law, as determined by the United States Supreme Court in *Anders* and *Finley*. *See Chavez v. Ryan*, No. CV-19-05424-PHX-DLR, 2021 WL 734595, at *2-3 (D. Ariz. Feb. 25, 2021); *Pacheco*, 2016 WL 7407242, at *8-10. Accordingly, this Court will grant a conditional writ of habeas corpus as to Ground One of Petitioner's Amended Petition.

C. Ground Two

In Ground Two, Petitioner alleges that the Arizona Court of Appeals violated the ex post facto and due process clauses of the Constitution by holding that his IAC of PCR counsel claims were untimely under Arizona Rule of Criminal Procedure 32.4(a). (Doc. 41 at 18-28.) The R&R finds that Ground Two is not cognizable on federal habeas review because it challenges the state courts' application of a state procedural rule. (Doc. 65 at 12-13.) In his Objection, Petitioner again argues that the state courts' application of Arizona Rule of Criminal Procedure 32.4 violated the ex post facto and due process clauses of the Constitution. (Doc. 74 at 7-8.)

Because Petitioner's Objection merely raises the same arguments that were already considered and rejected by the magistrate judge, de novo review is unnecessary, but even applying de novo review, this Court agrees with Magistrate Judge Ferraro's analysis of Ground Two. A federal habeas court cannot "reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). An alleged error of state law is not a denial of due process and is not cognizable on federal habeas corpus review. *See id.*; *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982)) ("We have long recognized that a mere error of state law is not a denial of due process.") (internal citation and quotation omitted). Petitioner's Ground Two objection will be overruled.

D. Ground Three

In Ground Three, Petitioner alleges prosecutorial misconduct and violation of his Fifth and Fourteenth Amendment due process rights based on "the State[']s unlawful[l]y

induced plea of guilty by way of a sham prosecution." (Doc. 41 at 29-35.) The basis of this claim is Petitioner's allegation that the prosecutor in his case withheld information regarding the military's purported intent to impose a consecutive sentence for offenses Petitioner committed against the same minor victims. (*Id.*) Petitioner alleges that his plea agreement raised the possibility that his military sentence would be concurrent, and that he would not have accepted the plea agreement if he had known of an email indicating the military was planning to impose a consecutive sentence. (*Id.* at 31-32.)[4]

Petitioner presented this claim of prosecutorial misconduct in his first PCR Petition (Doc. 41-3 at 14-19; Doc. 52 at 9-14) and his Petition for Review of the trial court's denial of that Petition (Doc. 41-3 at 32-34), but he did not argue to the Arizona Court of Appeals that he would not have pled guilty but for the alleged prosecutorial misconduct. The Arizona Court of Appeals held that, by pleading guilty, Petitioner "waived all non-jurisdictional defects save those related to the validity of his plea" and that he had failed to explain how any alleged prosecutorial misconduct "influenced his decision to plead guilty." (Doc. 54 at 59-60.) The Court also noted that, to the extent Petitioner had attempted to incorporate by reference his PCR Petition in his Petition for Review, that procedure was not permitted by state rule. (*Id.* at 59.)

The R&R finds that Ground Three is procedurally defaulted because, by attempting to incorporate the claim by reference in his Petition for Review, Petitioner failed to present the claim to the Arizona Court of Appeals in a procedurally appropriate manner. (Doc. 65 at 14.) The R&R further finds that Petitioner waived the due process claim alleged in Ground Three when he pled guilty. (*Id.* at 14-15.) Petitioner objects to the R&R's finding that Petitioner waived this ground by pleading guilty, arguing that the State's "sham prosecution . . . was a breach of the plea." (Doc. 74 at 8.) Petitioner further argues that he has established an exception to the guilty plea waiver as set forth in *Blackledge v. Perry*, 417 U.S. 21 (1974). (Doc. 74 at 8.) In response, Respondents assert

[4] Petitioner's plea agreement specified that his 25-year sentence "may be consecutive or concurrent to the Sentence he will serve pursuant to his General Court-Martial, at the discretion of the United States Army Commanding General." (Doc. 51 at 20.)

that *Blackledge* is inapplicable and that any claim regarding the State breaching the plea agreement is procedurally defaulted because Petitioner did not raise it in his PCR proceedings. (Doc. 84 at 10-11.)

Petitioner's reliance on *Blackledge* is misplaced. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea," but instead "may only attack the voluntary and intelligent character of the guilty plea" itself. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). In *Blackledge*, the Supreme Court found that *Tollett* did not preclude a defendant who had pled guilty to a felony from asserting that the "very initiation" of the felony proceedings—which were based on the same conduct that had given rise to a prior misdemeanor conviction—denied him due process of law. 417 U.S. at 22-23. The "exception" set forth in *Blackledge* is inapplicable here; although Petitioner alleges he faced charges in a military court martial for the same conduct at issue in these proceedings, successive state and federal criminal proceedings do not violate the double jeopardy clause. *See Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) ("Under th[e] 'dual-sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.")

The Court recognizes that an alleged constitutional violation affecting the voluntary and intelligent character of a guilty plea is not waived by that guilty plea, *Tollett*, 411 U.S. at 267, and that Petitioner alleges in his § 2254 Petition that he would not have pled guilty but for the prosecutor's alleged misconduct. But Petitioner did not make that allegation to the Arizona Court of Appeals. The new allegation materially and substantially changes the nature of Ground Three and is unexhausted. *See Dickens v. Ryan*, 740 F.3d 1302, 1318-19 (9th Cir. 2014) ("A claim has not been fairly presented in state court if new factual allegations" fundamentally alter it or place it in a significantly stronger posture). Petitioner's argument that the State breached his plea agreement is also

unexhausted and procedurally defaulted. The Court will adopt the R&R's conclusion that Petitioner is not entitled to relief on Ground Three.

E. Ground Four

In Ground Four, Petitioner alleges that his prosecution by both the State and military violated his right to be free from double jeopardy. (Doc. 41 at 36-45.) Petitioner raised this claim in his first PCR Petition (Doc. 53 at 6-7), and the R&R finds it to be properly exhausted but without merit under *Gamble*, 139 S. Ct. 1960. (Doc. 65 at 15-16, 24-26.) Petitioner objects to the R&R's reliance on *Gamble*, essentially arguing that *Gamble* was incorrectly decided. (Doc. 74 at 9, 14; Doc. 76 at 3-4.)

Habeas relief only lies if a state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA certainly does not require state courts to question the correctness of binding Supreme Court precedent. The Court finds no basis to overrule the R&R on this issue, and Petitioner's Ground Four objection will be overruled.

F. Ground Eight

In Ground Eight, Petitioner alleges that his Fifth and Fourteenth Amendment rights were violated by the State's withholding of medical reports concerning the minor victims. (Doc. 41-1 at 20-30.) Petitioner further alleges that, if not for the withholding of the medical reports, the grand jury would not have indicted him and he would not have pled guilty. (*Id.* at 20, 26.) Petitioner also complains about the state courts' resolution of his Arizona Rule of Criminal Procedure 32.12(f) motion for access to DNA, medical, and forensic evidence/reports. (*Id.* at 22-23, 27-30.)

The R&R interprets Ground Eight as alleging that the state courts erred in ruling on Petitioner's Rule 32.12(f) DNA motion, and finds that the claim is not cognizable on federal habeas review because it merely asserts an error of state law. (Doc. 65 at 17-18.) Petitioner objects to the R&R's conclusion that Claim Eight does not state a claim cognizable on federal habeas review, and he appears to argue that the state courts violated

principles of "fundamental fairness." (Doc. 74 at 14.) To support his Objection, Petitioner cites *District Attorney's Office for the Third Judicial District v. Osborne*—a case in which the United States Supreme Court found that a state's post-conviction proceedings were consistent with principles of fundamental fairness. 557 U.S. 52, 70 (2009).

To the extent that Ground Eight challenges the state courts' resolution of Petitioner's Rule 32.12(f) DNA motion, nothing in *Osborne* or Petitioner's Objection supports Petitioner's position that Ground Eight is cognizable on federal habeas review. To the extent that Ground Eight alleges that the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that claim fails based on this Court's prior finding that the medical records at issue are not exculpatory. (*See* Doc. 71.)[5] Petitioner's Ground Eight objection will be overruled.

G. Ground Eleven

In Ground Eleven, Petitioner alleges that the sentencing court's imposition of sentencing enhancements, without a jury determination of enhancement factors, violated his rights under the Sixth and Fourteenth Amendments. (Doc. 41-2 at 1-7.) The R&R finds that Petitioner waived this claim by pleading guilty, and that the claim is factually inaccurate. (Doc. 65 at 20-21.) Petitioner objects to the R&R's conclusion that Ground Eleven is "factually inaccurate." (Doc. 74 at 15-16.) Petitioner contends that his plea agreement did not state that he would be sentenced under A.R.S. § 13-705, nor was he aware that he was pleading guilty to a Dangerous Crime Against Children ("DCAC") offense. (Doc. 74 at 15-16.) Petitioner thus argues that the sentencing court erred by sentencing him to a DCAC and by applying enhancement factors at his sentencing hearing on April 3, 2014. (*Id.* at 16.)

[5] Petitioner previously sought to expand the record to include the medical records at issue in Ground Eight, and he sought a stay and abeyance based on his filing of a fourth state PCR proceeding related to the medical records. (Docs. 49.) This Court denied Petitioner's Motion to Expand the Record and Motion for Stay and Abeyance. (Doc. 71.) The Court recognized that Petitioner alleges he would not have pled guilty if he had known of the medical records, and that his guilty plea does not preclude him from raising claims attacking the voluntary and intelligent nature of that plea; however, the Court found that a stay and expansion of the record would be futile because the medical records are not exculpatory. (*Id.* at 6-7.)

The Court agrees with the R&R that this claim is belied by the terms of Petitioner's plea agreement and the transcripts of Petitioner's change-of-plea and sentencing hearings. Petitioner's plea agreement specified that Sanchez was pleading guilty to violating A.R.S. § 13-1405 and A.R.S. § 13-705(B). (Doc. 51 at 18.) The agreement specified the sentencing range for a first DCAC offense under § 13–705(B) and stated that Sanchez would be sentenced to 25 years. (*Id.* at 19-20.) Furthermore, Petitioner agreed as part of the plea that the trial court would find any aggravating or mitigating facts for sentencing purposes. (*Id.* at 21-22.) As the factual basis of the plea, Petitioner admitted that he had sexual intercourse with an 11-year-old victim and attempted sexual intercourse with a 7-year-old victim. (*Id.* at 47-48.) The state trial court reviewed the plea agreement with Petitioner, twice stating that he was pleading guilty to a DCAC. (*Id.* at 53-54.) This Court finds no basis to overrule the R&R on this issue, and Petitioner's Ground Eleven objection will be overruled.

H. Ground Twelve

In Ground Twelve, Petitioner alleges that trial counsel rendered ineffective assistance by failing to adequately communicate the terms of his plea agreement to him. (Doc. 41-2 at 8-16.) Petitioner raised this claim in his first PCR Petition (Doc. 52 at 19-21) and in his petition for review of the denial of that Petition (Doc. 53 at 5-6). The Arizona Court of Appeals rejected it because Petitioner failed to "identify what information counsel could have provided him that would have prompted him to reject the state's plea offer," and therefore failed to "demonstrate there was a reasonable probability that he would have rejected the state's plea offer but for his counsel's conduct." (Doc. 54 at 59-60.)

The R&R finds that this claim is properly exhausted but rejects the claim on the merits because the state courts reasonably found that Petitioner failed to demonstrate prejudice under the two-part *Strickland* standard. (Doc. 65 at 21, 27-28.) In reaching this conclusion, the R&R notes that Petitioner admitted his guilt at his change-of-plea hearing and that he concedes he was aware that he would have faced a sentence of up to 200

years' imprisonment if convicted on charges that the State dismissed as part of his plea agreement. (*Id.* at 27-28.)

Petitioner objects, arguing that "his showing of prejudice [stemming from ineffective assistance of counsel] was in the unincorporated portions that the [Arizona Court of Appeals] found to not be permitted by rule." (Doc. 74 at 16.) In other words, Petitioner contests the state courts' application of a state procedural rule forbidding incorporation by reference. (*See* Doc. 84 at 13-14; Doc. 41-2 at 8-16.) However, to properly exhaustion a federal claim, a prisoner must present the claim to the state court in a procedurally appropriate manner. *Cf. Baldwin v. Reese*, 541 U.S. 27, 31-32 (2004) (state courts are not required to "read beyond a petition or a brief"). The Court finds no basis to overrule the R&R on this issue, and Petitioner's Ground Twelve objection will be overruled.

Accordingly,

IT IS ORDERED that Petitioner's Objection (Doc. 74) is **partially sustained and partially overruled**, as set forth above.

IT IS FURTHER ORDERED that the Report and Recommendation (Doc. 65) is **partially rejected and partially accepted**, as set forth above.

IT IS FURTHER ORDERED that the Amended Petition for Writ of Habeas Corpus (Doc. 41) is **conditionally granted as to the *Anders* claim in Ground One, and otherwise denied**. Petitioner shall be released from custody unless, within **ninety (90) days** of this Order, Petitioner is permitted to file a new of-right Rule 33 PCR proceeding, including the filing of either a merits brief by counsel or a substantive brief consistent with *Anders v. California*, 386 U.S. 738 (1967), and an independent review of the record by the court.

IT IS FURTHER ORDERED that the Clerk of Court must enter judgment conditionally granting the Amended Petition (Doc. 41) as to Ground One and close this case.

. . . .

IT IS FURTHER ORDERED that, pursuant to Rule 11 of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability with respect to its denial of relief on all other grounds of the Amended Petition, because reasonable jurists would not find the Court's ruling on those grounds debatable. *See Slack v. McDaniel*, 529 U.S. 473, 478, 484 (2000).

Dated this 29th day of March, 2021.

Honorable Rosemary Márquez
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Isidoro Sanchez,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-17-00224-TUC-RM (DTF)

REPORT AND RECOMMENDATION

Petitioner Michael Isodoro Sanchez (Sanchez or Petitioner), confined in the Arizona State Prison Complex, filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Petition) and later filed an amended petition. (Doc. 1, 41.) Before the Court are the amended petition, Respondents' Answer to Petition for Writ of Habeas Corpus (Answer), Petitioner's reply (Docs. 41, 50, 60.) This matter was referred to United States Magistrate Judge D. Thomas Ferraro for Report and Recommendation. (Doc. 12.)

As more fully set forth below, the Magistrate Judge **recommends** that the district court, after its independent review, **dismiss** the amended petition.

BACKGROUND

Trial Court Proceedings

In June 2013, a grand jury indicated Petitioner on multiple counts of sexual conduct with a minor against two victims, ages 11 and 7. (Doc. 51 at 3-5.) The state alleged all offenses were dangerous crimes against children for sentence enhancement purposes and alleged victim harm as a sentence-aggravating factor. (Doc. 51 at 6-11.) On March 6, 2014,

Petitioner pleaded guilty to sexual conduct with one minor victim and attempted sexual conduct with the other minor victim in exchange for the dismissal of the other charges. *Id.* at 13-16, 18-4. During the change-of-plea hearing, the trial judge reviewed the terms of the plea agreement and the consequences of pleading guilty with Petitioner. *Id.* at 38-49. The trial court specifically advised Petitioner that he was "to be sentenced to a partially aggravated term of 25 years" for count one and that he would be on lifetime probation for the attempt charge. *Id.* at 43. On April 3, 2014, Petitioner was sentenced accordingly. *Id.* at 65-66.

First Post-Conviction Relief Proceedings

On May 21, 2014, Petitioner timely filed a notice of post-conviction relief (PCR) as set forth in Rule 32.4(a) of the Arizona Rules of Criminal Procedure and was appointed counsel. *Id.* at 74-76, 78. Counsel subsequently filed a notice stating that after review he has been "unable to find any ground for Rule 32 relief," and requested that Petitioner be allowed additional time in which to file a *pro se* petition. *Id.* at 80. In his subsequently filed *pro se* petition, Petitioner asserted claims of prosecutorial misconduct, newly discovered evidence, unlawful sentence, and ineffective assistance of counsel (IAC). (Doc. 52 at 9-21.) Petitioner also alleged a violation of his double jeopardy right. *Id.* at 14. On August 18, 2015, the PCR court denied relief. *Id.* at 111-13.

On September 18, 2015, Petitioner sought review in the Arizona Court of Appeals. (Doc. 53 at 3-65; Doc. 54 at 3-55.) On December 22, 2015, the court of appeals issued its memorandum decision granting review but denying relief. (Doc. 54 at 57-60.) The court of appeals determined:

> Sanchez pled guilty to sexual conduct with a minor under the age of fifteen and attempted sexual conduct with a minor under the age of fifteen. Consistent with a stipulation in the plea agreement, the trial court sentenced him to a twenty-five year prison term on the first count to be followed by lifetime probation on the second.
>
> In court-martial proceedings conducted by the United States Department of Defense, Sanchez had additionally been charged with and pled guilty to numerous sexual offenses involving children. The conduct resulting in those admissions occurred on various military bases, including a

> base in Arizona. The plea agreement provided that Sanchez's sentence for sexual conduct with a minor 'may be consecutive or concurrent to the Sentence be will serve pursuant to his General Court-Martial, at the discretion of the United States Army Commanding General' At sentencing, the trial court authorized the Cochise County Sheriff 'to deliver [Sanchez] to the custody of the [Arizona] Department of Corrections,' and authorized that department to 'carry out [Sanchez's] term of imprisonment.'

(Doc. 54 at 58, ¶¶1-2.) On May 24, 2016, the Arizona Supreme Court denied review. *Id.* at 62.

Second PCR Proceedings

On December 7, 2015, Petitioner filed a PCR motion requesting DNA testing pursuant to Rule 32.12 of the Arizona Rules of Criminal Procedure. *Id.* at 68-72. Petitioner was appointed counsel. *Id.* at 74. Counsel subsequently filed a notice stating that she had "reviewed the transcripts and trial file and [could] find no colorable claims" for PCR relief. *Id.* at 76. Petitioner was given additional time to file a *pro se* PCR petition. *Id.* at 81. Petitioner filed a motion asking the PCR court to compel the prosecutor to "provide access to DNA, medical, and forensic evidence/reports." *Id.* at 84-100. Petitioner's motion was denied. (Doc. 55 at 3.)

On October 20, 2016, Petitioner filed a second *pro se* PCR petition in which he again asserted claims of prosecutorial misconduct, IAC and newly discovered evidence. *Id.* at 5-39. On January 10, 2017, the PCR court determined Petitioner's claims were precluded and summarily dismissed his second PCR petition. It also denied his Rule 32.12 motion. *Id.* at 41.

Petitioner filed a motion for rehearing under Rule 32.9(a) of the Arizona Rules of Criminal Procedure. *Id.* at 43-47. The PCR court ordered a response. *Id.* at 49. After a full briefing, the PCR court denied Petitioner's motion for a rehearing. *Id.* at 51-52, 54-93, 95.

On April 17, 2017, Petitioner sought review of the PCR court's denial of his second PCR petition, Rule 32.12 motion and motion for rehearing in the Arizona Court of Appeals. (Doc. 56 at 3-63.) The court of appeals granted review but denied relief. *Id.* at 65-69. The Arizona Supreme Court denied review. *Id.* at 87.

Third PCR Proceedings

On August 10, 2017, Petitioner filed another notice of PCR (his third) wherein he asserted claims against both of his previous PCR attorneys. *Id.* at 92-99. Petitioner was appointed an attorney (his third). Petitioner's counsel subsequently filed a notice stating that she had been "unable to find any colorable claims" for Rule 32 relief and requested additional time for Petitioner to file a *pro se* petition. *Id.* at 101, 103-106. The PCR court granted counsel's request and ordered her to remain as advisory counsel. *Id.* at 108-109.

Petitioner requested new counsel. (Doc. 57 at 3-19.) Petitioner's request was denied, and he was given additional time to file his *pro se* petition. *Id.* at 21. Petitioner sought another extension of time in which to file a *pro se* petition which prompted the PCR court to review Petitioner's PCR notice and case file. *Id.* at 23-24. The PCR court determined that Petitioner "cannot show that his first Rule 32 counsel was ineffective because there is nothing in the record to support his assertion, and the [c]ourt finds that that claim is without merit and that no purpose would be served by any further proceedings[.]" The PCR court dismissed the proceedings. *Id.*

On August 1, 2018, Petitioner sought review of this ruling in the Arizona Court of Appeals. *Id.* at 26-84. On October 12, 2018, the court of appeals granted review but denied relief. (Doc. 58 at 3-5.) Petitioner's subsequent motion for reconsideration was denied. *Id.* at 7-22, 24. On April 22, 2019, the Arizona Supreme Court denied review. *Id.* at 27.

Federal Habeas Corpus Proceedings

On May 16, 2017, Petitioner filed his petition for writ of habeas corpus. (Doc. 1.) The matter was stayed twice pending resolution of Petitioner's state court PCR proceedings. (Docs. 16, 29.) The second stay was lifted on May 17, 2019. (Doc. 38.) On June 5, 2019, Petitioner's motion to file an amended petition was granted, and his amended petition was filed. (Docs. 36, 40, 41.) The amended petition alleges nineteen grounds for relief. (Doc. 41.)

As more fully set forth below, all but two and a portion of one of the claims alleged in the amended petition are either precluded by Petitioner's guilty plea, procedurally defaulted without excuse or non-cognizable on federal habeas review. The exhausted

claims are without merit.

TIMELINESS

Because the petition was filed after April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) governs. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001) (citing *Smith v. Robbins*, 528 U.S. 259, 267 n.3 (2000)). The AEDPA's one-year statute of limitations applies. *See* 28 U.S.C. § 2244(d)(1). *See Furman v. Wood*, 190 F.3d 1002, 1004 (9th Cir. 1999). The limitations period begins to run on the date when "the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

On May 24, 2016, the Arizona Supreme Court denied review of the Arizona Court of Appeals' decision upholding the trial court's dismissal of Petitioner's first PCR petition. (Doc. 54 at 62.) The habeas petition was filed on May 16, 2017. (Doc. 1.) The amended petition was filed on June 5, 2019. (Doc. 41.) The petition was timely filed but the amended petition was filed outside of the one-year limitation period set forth in the AEDPA and is untimely.

An amended habeas petition relates back to the date of the filing of the original petition when the "original and amended petitions state claims that are tied to a common core of operative facts." *Mayle v. Felix*, 545 U.S. 644, 664 (2005). An amended petition "does not relate back [...] when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 661-62.

The district court twice stayed this matter pending the conclusion of Petitioner's state court PCR proceedings. Respondents did not object to Petitioner's amended petition. Petitioner's claims in both the petition and his amended petition relate to his guilty plea, the effectiveness of his several counsel and the state courts' adjudication of his PCR petitions. This Court determines that the petition and the amended petition state claims that are tied to a common core of operative facts.

This Court will treat the amended petition as relating back to the timely filed original petition.

...

EXHAUSTION/PROCEDURAL DEFAULT

A federal court may only consider a petitioner's application for a writ of habeas corpus if "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); *see Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008). Proper exhaustion requires a petitioner to fairly present his federal claims at the trial level and to "invok[e] one complete round of the State's established appellate review process," presenting the same federal claim to each court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Arizona, a prisoner does not exhaust a claim for federal review in a non-capital case unless he has presented it to the Arizona Court of Appeals. *See Castillo v. McFadden*, 399 F.3d 993, 998 & n.3 (9th Cir. 2005) (citing *Swoopes v. Sublett*, 196 F.3d 1008, 1010–11 (9th Cir. 1999)).

A claim is only "fairly present[ed]" when a petitioner "clearly state[s] the federal basis and federal nature of the claim, along with relevant facts." *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011); *see also Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."). "[T]he petitioner must make the federal basis of the claim *explicit* either by citing federal law or the decisions of federal courts, even if the federal basis is 'self-evident,' . . . or the underlying claim would be decided under state law on the same considerations that would control resolution of the claim on federal grounds." *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000) (emphasis added; internal citations omitted), *modified by* 247 F.3d 904 (9th Cir. 2001).

A corollary to the exhaustion requirement, the "procedural default doctrine" - which limits a petitioner from proceeding in federal court where his claim is procedurally barred in state court - "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); *see also Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal

claim, that claim can ordinarily not be reviewed in federal court.").

There are two types of procedural bars, "express and implied." *Robinson v. Schriro*, 595 F.3d 1086, 1100 (9th Cir. 2010). A claim is technically exhausted, but procedurally defaulted, when a petitioner attempted to raise it in state court and the state court expressly applied a procedural bar resting on an independent and adequate state law ground to avoid considering the merits of the claim. *See Nunnemaker*, 501 U.S. at 802–05; *see also Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005) (stating procedural default "applies to bar federal habeas review when the state court has declined to address the petitioner's federal claims because he failed to meet state procedural requirements") (internal quotation omitted). In determining whether the state courts have imposed a procedural bar, the district court reviews the "last reasoned opinion" of the state courts. *Nunnemaker*, 501 U.S. at 803; *Lambright v. Stewart*, 241 F.3d 1201, 1205 (9th Cir. 2001).

A claim is also technically exhausted, but implicitly procedurally defaulted, when a petitioner has not raised it in state court, but a return to state court to exhaust it would be futile considering state procedural rules. *See Boerckel*, 526 U.S. at 848 (finding claims procedurally defaulted because habeas petitioner was time-barred from presenting his claims in state court); *Coleman*, 501 U.S. at 735 n.1 (noting that claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred").

The district court may review a procedurally defaulted claim only if the petitioner alleges and proves cause and prejudice, or a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750; *Cooper*, 641 F.3d at 327. To establish "cause," a petitioner must demonstrate that "some objective factor external to the defense impeded [petitioner]'s efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753 (internal quotation omitted). To show "prejudice," a petitioner must demonstrate that the alleged constitutional violation worked to the prisoner's "*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original); *see also Stokley v. Ryan*, 705 F.3d 401, 403 (9th Cir. 2012); *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989). And, to prove a

"fundamental miscarriage of justice," a prisoner must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 327.

Ground I – Due Process/Equal Protection

Petitioner's claim in Ground I is that his due process and equal protection rights were violated during his of-right PCR proceeding because "no *Anders* or comparable safeguard was followed." (Doc. 41 at 10.) Petitioner contends this denied him the right to effective assistance of counsel. *Id.* Petitioner did not raise this claim until his third PCR petition. *Id.*

The trial court summarily dismissed his successive notice of PCR relief. (Doc. 58 at 3, ¶1.) Petitioner appealed and the Arizona Court of Appeals determined all of Petitioner's IAC claims were precluded as untimely under Rule 32.4(a)(2)(C) of the Arizona Rules of Criminal Procedure. *Id.* at 4, ¶¶6-8. The court of appeals also determined that Petitioner's claim under *Anders v. California*, 386 U.S. 738 (1967), was not cognizable under Arizona state law. *Id.* at ¶7. The court of appeals, relying on *State v. Chavez*, 243 Ariz. 313, ¶1 (App. 2017), held that *Anders* review is "not required for pleading defendants." *Id.*

Petitioner did not present his claim alleged in Ground I until his third PCR proceeding. The Arizona Court of Appeals determined that all of Petitioner's IAC claims were precluded as untimely under Rule 32.4 of the Arizona Rules of Criminal Procedure. Accordingly, this Court determines that Petitioner's claim in Ground I is technically exhausted and procedurally defaulted. *See Coleman*, 501 U.S. at 749-50 (federal habeas review based by state court's dismissal of state collateral appeal based on untimeliness under state procedural rule); *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003) ("[S]tate prisoners cannot subvert the exhaustion requirement by presenting their claims to the state court in a procedurally deficient manner.").

Petitioner argues in reply that Respondents waived the affirmative defense of procedural default. (Doc. 60 at 3.) Petitioner asserts:

Respondents intelligently chose to waive the affirmative defense of

> procedural default in regard to the abrogated Rule 32.4(a), when they chose not to defend the district court's sua sponte invocation of the procedural default defense.

Id. Petitioner contends Respondents should have presented "their position regarding the amended Rule 32.4(a)(2)(C) and the abrogated Rule 32.4(a) when they were ordered by the district court ... to respond to Petitioner's motion for reconsideration." *Id.* at 4. (emphasis omitted.)

Earlier in this habeas proceeding, Petitioner filed a motion for reconsideration of the district court's decision denying Petitioner's request for a stay. (Doc. 26.) As this Court understands Petitioner's argument, Petitioner believes Respondents were required to allege their defense of procedural default when the district court ordered Respondents to file a response to his motion for reconsideration. (Docs. 27, 28.) Since Respondents did not raise their affirmative defenses in their response to the motion for reconsideration, Petitioner claims they have waived those defenses.

"Under the Federal Rules of Civil Procedure, a party, with limited exceptions, is required to raise every defense in its first responsive pleading, and defenses not so raised are deemed waived." *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005) (citations omitted.) "Rule 7(a) defines 'pleadings' as a complaint and answer; a reply to a counterclaim; an answer to a cross-claim; and a third-party complaint and answer." *Id.* Anything else is a motion or paper." *Id. See also*, 28 U.S.C. § 2254(a)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.")

Petitioner's argument that waiver occurred when Respondents failed to raise their affirmative defense of procedural default in their response to his motion for reconsideration is without merit. Respondents were not required to raise any affirmative defenses at that time. *See, Morrison, supra.* Moreover, a waiver of the exhaustion requirement by Respondents must be expressly made. *See*, 28 U.S.C. § 2254(a)(3). This Court rejects Petitioner's argument that Respondents waived their affirmative defense of exhaustion and

procedural default.

Petitioner argues that his claim in Ground I is not procedurally defaulted because "IAC of first Rule 32 counsel was raised to the Arizona Court of Appeals to establish cause for this ground[.]" (Doc. 41 at 6.) While counsel's ineffectiveness in failing to properly preserve a claim for review in the state courts can constitute cause to excuse a procedural default, *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000), "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 489 (1986). It is undisputed that Petitioner failed to timely present his ineffective assistance of counsel claims in the state court. (Doc. 58 at 4, ¶6.) The court of appeals determined:

> But the opportunity for [Petitioner] to raise a claim of ineffective assistance of post-conviction counsel has passed - he was required to raise that claim in a second, timely proceeding. Ariz. R. Crim. P. 32.4(a)(2)(C). And we find no error in the court's decision to dismiss the proceeding when [Petitioner] failed to timely file a petition.

Id.

In reply, Petitioner argues that Rule 32.4(a)(2)(C) of the Arizona Rules of Criminal Procedure is an inadequate state procedural ground because Rule 32.4(a)(2)(C) was not firmly established at the time of Petitioner's default. (Doc. 60 at 7.) Petitioner argues that Rule 32.4(a)(2)(C) was not in effect at the time he was required to file his state court PCR petition alleging IAC but, rather, abrogated Rule 32.4(a) was in effect. *Id.* at 8. Petitioner argues that amended Rule 32.4(a)(2)(C) "is a material change from the abrogated Rule 32.4(a)" and that the abrogated Rule 32.4(a) did not provide him with notice "as to what 'of-right' claim triggered the successive 'of-right' Rule 32 proceeding at the time of the purported time of default." *Id.* at 9. Petitioner contends "[t]he plain language of the abrogated Rule 32.4(a) was vague and ambiguous as to what claim the successive Rule 32 was for." *Id.*

"To qualify as an 'adequate' procedural ground," capable of barring federal habeas review, "a state rule must be 'firmly established and regularly followed.'" *Johnson v. Lee*, 136 S.Ct. 1802, 1805 (2016) (quoting *Walker v. Martin*, 562 U.S. 307, 316 (2011)). "A

State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Johnson*, 136 S.Ct. at 1807 (quoting *Lambrix v. Singletary*, 520 U.S. 447, 525 (1997)).

In *State v. Petty*, 238 P.3d 637 (Ariz. App. 2010), relied upon by Petitioner the court of appeals recognized that:

> [F]or a pleading defendant, Rule 32 is 'the only means available for exercising the [defendant's] constitutional right to appellate review.'" (citing *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614, 616, *supp. op.* 182 Ariz. 118, 893 P.2d 1281 (Ariz. 1995).) "Therefore, a pleading defendant ... is constitutionally entitled to the effective assistance of counsel on his first [of-right] petition for post-conviction relief, the counterpart of a direct appeal." *Id.* (quoting *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357, 1360 (Ariz. App. 1995).) "The pleading defendant 'must be afforded an opportunity to assert a claim regarding the effectiveness of the attorney representing him [in] the first petition for post-conviction relief, ... [and] the obvious method is by means of a second petition.' (citing *Pruett*, 912 P.2d at 1360; *cf. State v. Bennett*, 146 P.3d 63, 67 (2006).)

238 P.3d at 640. As of 2010, the date of the decision in *Petty,* pleading defendants in Arizona were on notice that to assert an IAC claim of Rule 32 counsel, the IAC claim must be raised in a second PCR petition. *See also, Pruitt,* 912 P.2d at 1360 ("A pleading defendant's first petition for post-conviction relief is a 'direct appeal' for purposes of time limits of rule governing filing of motions for post-conviction relief; therefore, a second notice of post-conviction relief for a claim of ineffectiveness of previous post-conviction counsel is timely if filed within 30 days of order and mandate affirming trial court's denial of first petition for post-conviction relief.").

Although in Petitioner's case the court of appeals relied upon Rule 32.4(a)(2)(C) in affirming the trial court's dismissal of his second PCR petition, Rule 32.4(a)(2)(C) was not a newly adopted rule as Petitioner argues. At the time of Petitioner's default, Rule 32.4(a) and case law interpreting Rule 32.4(a) was sufficiently clear as to what conduct was required to assert an IAC claim of first PCR counsel This Court concludes that Rule 32.4(a) adequately alerted Petitioner to the requirement that he raise any claim of IAC of his first

PCR counsel in a timely successive PCR petition. Rule 32(a) was regularly followed by the Arizona courts. *See Pruitt, supra; Perry, supra.* Petitioner's argument that the court of appeals relied upon an inadequate state procedural ground in affirming the trial court's dismissal of his second PCR proceeding is without merit.

This Court rejects Petitioner's argument that he can establish cause to excuse the procedural default of the claim alleged in Ground I.

Petitioner argues that he has established prejudice because his "federal claims are all now subject to procedural default, to include his IAC of first Rule 32 counsel claim." (Doc. 60 at 13.) Petitioner argues, "[t]he inadequacy of the abrogated Rule 32.4(a) has worked to Petitioner's actual and substantial disadvantage infecting the entire proceeding with constitutional error." *Id.* Petitioner's argument is boiler plate language and insufficient to establish prejudice.

Because Petitioner cannot establish both cause and prejudice to excuse his procedural default, this Court determines that the claim alleged in Ground I is procedurally defaulted without excuse and barred from federal habeas review.

Ground II – Due Process and Ex Post Facto Violations

In Ground II, Petitioner alleges violations of his Fourteenth Amendment due process and ex post facto rights based on the Arizona Court of Appeals having allegedly "arbitrarily and retroactively applied a new procedural rule of untimeliness to an of-right post-conviction review proceeding." (Doc. 41 at 18.) Petitioner takes issue with the state courts' application of Rule 32 of the Arizona Rules of Criminal Procedure to his case. *Id.* at 20-28; Doc. 60 at 21-22.

As pointed out by Respondents, federal habeas corpus is available only on behalf of a person in custody in violation of the U.S. Constitution or the law or treaties of the United States. 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 5-6 (2010) (per curiam); *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

Furthermore, alleged errors of state law cannot be repackaged as federal errors simply by citing the due process clause. *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir.

1999). *See also, Swarthout v. Cooke*, 562 U.S. 216, 222 (2001) ("[W]e have long recognized that "a 'mere error of state law' is not a denial of due process." (quoting *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982))). A state court's interpretation of state law "binds a federal court sitting in habeas corpus." *Bradshaw v Richey*, 546 U.S. 74, 76 (2005).

Here, Petitioner has attempted to assert a federal claim by citing the due process clause when Petitioner's claim is that the state courts improperly "invoked the amended Rule 32.4(a)(2)(C)" in denying his successive requests for PCR relief. *See*, Doc. 41 at 24 ("The Az CAP Division Two (*sic*) made an unreasonable determination of fact and law when they applied the amended A.R.Cr.P. 32.4(a)(2)(A) and A.R.Cr.P. 32.4(a)(2)(C) as a procedural bar of untimeliness to deny relief in Petitioner's PFR and excuse the superior courts (*sic*) errors."). *See also*, Doc. 60 at 21. For the reasons stated above, this Court has determined that the Arizona courts relied upon an adequate independent state law ground in denying Petitioner's successive PCR proceedings *See*, pp. 10-12, *supra*. This Court determines that Petitioner's claim in Ground II does not allege a federal claim but rather is a claim based on the Arizona state courts' application of a state procedural rule.

The claim alleged in Ground II does not state a cognizable claim for federal habeas relief.

Ground III - Due Process Violation, Alleged Prosecutorial Misconduct

Petitioner styles his claim in Ground III as a violation of his Fifth and Fourteenth Amendment due process rights "by the State's unlawfully induced plea of guilty by way of a sham prosecution." (Doc. 41 at 29.) Petitioner alleges the prosecutor withheld information regarding the military's purported intent to impose a consecutive sentence for the offenses he committed against the same victims. *Id.* at 34.

Petitioner presented this claim in his first PCR proceeding. *Id.* at 29. In his petition for review filed in the court of appeals, Petitioner argued the prosecutor violated disclosure obligations under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by concealing communication between the prosecutor's office and the military prosecutors. (Doc. 53 at 8-10; Doc. 54 at 59, ¶4.) The court of appeals rejected Petitioner's claim reasoning:

First, to the extent he attempts to incorporate by reference his petition below,

> that procedure is not permitted by our rules. *See State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d26, 238 (App. 1991). And, in any event, we agree with the trial court that summary rejection was proper. By pleading guilty, [Petitioner] waived all non-jurisdictional defects save those related to the validity of his plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 193). Thus, his claims of ineffective assistance of counsel are limited 'to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not 'within the range of competence demanded of attorneys in criminal cases.'' *Blackledge v. Perry*, 417 U.S. 21, 30 (1974), quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

(Doc. 54 at 59, ¶5.)

Regarding the first reason given by the Arizona appellate court, incorporation by reference requires a court to "read beyond a petition or a brief (or a similar document)," which the state courts are not required to do. *Baldwin v. Reese*, 541 U.S. 27, 31-32 (2004). Rule 32.9 of the Arizona Rules of Criminal Procedure prohibits incorporation by reference in PCR proceedings. *See State v. Hess*, 290 P.3d 473, 476-77, ¶13 (Ariz. App. 2012); *State v. Bortz*, 821 P.2d 236, 238 (Ariz. App. 1991). Petitioner's attempt to incorporate by reference his claim renders his claim(s) technically exhausted and procedurally defaulted because Petitioner did not raise the claims in a procedurally appropriate manner under the Arizona Rules of Criminal Procedure. *See Maples v. Thomas*, 545 U.S. 266, 280 (2012); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Casey v. Moore*, 386 F.3d 896, 915-16 (9th Cir. 2004).

As for the second reason provided by the Arizona appellate court, "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* By pleading guilty, a defendant "waives the right to assert on review all non-jurisdictional defenses, including deprivations of constitutional rights." *State v. Chavez*, 407 P.3d 85, 90 ¶14 (Ariz. App. 2017) (citing *Tollett*). Consequently, by operation of law, Petitioner waived his due process claim alleged

in Ground III when he entered into his plea agreement. *See* Doc. 51 at 21-23 (waiver clause in Petitioner's plea agreement).

In reply, Petitioner argues that he was not "sufficiently aware of the relevant circumstances and likely consequences of state[']s plea." (Doc. 60 at 24.) He argues that he was "induced" to plead guilty by the "real possibility of a concurrent sentence" and that an email in possession of the prosecution establishes that he was to receive a consecutive sentence from the military prosecution. *Id.* at 24-25. Petitioner argues that he "raised IAC of first Rule 32 counsel to establish cause and prejudice for a procedural default of this claim." *Id.* at 23.

As set forth above, while counsel's ineffectiveness in failing to properly preserve a claim for review in the state courts can constitute cause to excuse a procedural default, *Edwards*, 529 U.S. at 451, "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 489. *See*, p. 9, *supra*; Doc. 54 at 59, ¶4. It is undisputed that Petitioner failed to timely present his IAC claims in the state court. This Court also rejects Petitioner's argument that the state court's application of Rule 32.4(a)(2)(C) to bar his untimely claims is an inadequate and independent state law ground. *See*, pp. 10-12, *supra*.

This Court determines that the claim alleged in Ground III is precluded from federal habeas review.

Grounds IV, V, VI and VII – Double Jeopardy, Due Process, Privileges and Immunities, Full Faith and Credit and Eight Amendment Violations

The underlying basis for the claims alleged in Grounds IV, V, VI and VII is the state's prosecution of Petitioner for what he claims are identical offenses that he pleaded guilty to in a military tribunal. (Doc. 41 at 36-45; Doc. 41-1 at 1-19.)

Ground IV: In Ground IV, Petitioner claims that his right to be free from double jeopardy was violated when he was prosecuted by the State of Arizona and the United States military for the same offenses. Petitioner also challenges the dual-sovereignty doctrine. (Doc. 41 at 36.) Petitioner raised the claim regarding the Double Jeopardy Clause

in his first PCR petition. *Id.*; Doc. 53 at 6-7. This claim is properly exhausted. *Castillo*, 399 F.2d at 998 n.3; *Swoopes*, 196 F.3d at 1010-11.

This Court addresses the claim alleged in Ground IV on the merits, *infra*.

Grounds V, VI and VII: In Ground V, Petitioner asserts the State of Arizona violated his "right to be free from having a state law enforced against him that will abridge his privilege or immunities" when it prosecuted him for the "same offenses the [m]ilitary had already convicted and acquitted him of in a prior military tribunal." (Doc. 41-1 at 1.) Petitioner's claim in Ground V also involves allegations regarding the dual-sovereignty doctrine and double jeopardy. Since Petitioner raised a double jeopardy claim in his first PCR petition this Court will treat any allegations concerning the Double Jeopardy Clause in Ground V as exhausted. This portion of Ground V will be addressed on the merits along with the merits of the claim alleged in Ground IV.

However, regarding the remainder of Petitioner's claim in Ground V, Petitioner admits in his amended petition that he did not raise the claim in the state court. *Id.* ("First Rule 32 counsel failed to raise this ground on Petitioner's behalf."). Petitioner admits the same with respect to the claims alleged in Grounds VI and VII. *Id.* at 7 ("First Rule 32 counsel failed to raise this ground on Petitioner's behalf."); and 14 (same).

Because the Arizona Court of Appeals was not given the opportunity to rule on the claims alleged in Grounds V (except the Double Jeopardy Clause portion), VI (alleged full faith and credit violation) and VII (Eighth Amendment cruel and unusual punishment claim), these claims are not properly exhausted. *See Baldwin*, 541 U.S at 29. Any attempt by Petitioner to return to state court to exhaust these claims would be futile in light of Rule 32.2 and 32.4(a) of the Arizona Rules of Criminal Procedure. These claims are therefore technically exhausted but procedurally defaulted.

This Court rejects Petitioner's effort to have the district court excuse his procedural default by arguing that "IAC of first Rule 32 counsel was raised to the Arizona Court of Appeals to establish cause for this ground." *See* Doc. 41-1 at 1, 7, and 14. While ineffective assistance of counsel can constitute cause to excuse a procedural default, *Carpenter*, 529 U.S. at 451; *Carrier*, 477 U.S. at 488-89, "a claim of ineffective assistance must be

presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 489.

Here, Petitioner failed to present his IAC claim in the state court in a procedurally appropriate manner as required by Rule 32.4(a)(2)(C). *See* Doc. 58 at 4, ¶¶6-8. This Court has determined that cause and prejudice has not been established to excuse the procedural default of the unexhausted claims alleged in Grounds V, VI and VII as discussed herein. *See*, pp. 10-12, *supra*.

The unexhausted claims alleged in Grounds V, VI and VII are precluded from federal habeas review

Grounds VIII and IX: Due Process Violation, Alleged Prosecutorial Misconduct and Investigation and Grand Jury

Ground VIII: In Ground VIII, Petitioner alleges his Fifth and Fourteenth Amendment due process rights were violated by the state when the prosecution allegedly withheld exculpatory evidence. (Doc. 41-1 at 20.) Petitioner claims:

> [T]he state's withholding of the medical reports deprived him of the opportunity to effectively challenge the validity of the state's Count 1 at all stages of the proceedings.

Id. Petitioner's claim in Ground VIII involves Petitioner's Rule 32.12(f) DNA motion that he filed in the trial court and the state courts' resolution of that motion. *Id.* at 23-30. *See also, Id.* at 27 ("In an abuse of process, the superior court used an erroneous procedural bar to cover its own abuse of discretion and to excuse the states (*sic*) *Brady* violations. Petitioner showed the Az CAP Division Two in his [petition for review] how the superior court failed to hold the state accountable to A.R.Cr.P. 32.12(f) and failed to follow that rule itself, an abuse of discretion.").

Respondents argue that Petitioner's claim in Ground VIII is not truly a federal claim but is a challenge to the state courts' application of Rule 32 of the Arizona Rules of Criminal Procedure to his case and its ruling on his Rule 32.12(f) DNA motion. (Doc. 50 at 15.) In reply, Petitioner argues his discussion of Rule 32.12(f) in his amended petition "is to support the conclusion that the Az CAP Division Two made an unreasonable

determination of fact in adjudicating his federal claims." (Doc. 60 at 55-56.)

Federal habeas is available only on behalf of a person in custody in violation of the U.S. Constitution or the law or treaties of the United States. 28 U.S.C. § 2254(a); *Wilson*, 562 U.S.at, 5-6; *Estelle*, 502 U.S. at 68. "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley*, 465 U.S. at 41. Alleged errors of state law cannot be repackaged as federal errors simply by citing the due process clause. *Poland*, 169 F.3d at 584. *See also, Swarthout*, 562 U.S. at 222 ("[W]e have long recognized that "a 'mere error of state law' is not a denial of due process.") (citation omitted). A state court's interpretation of state law "binds a federal court sitting in habeas corpus." *Bradshaw*, 546 U.S. at 76.

Petitioner alleges in Ground VII that the state courts erred in their ruling on his Rule 32.12(f) motion for DNA filed pursuant to a state rule of criminal procedure. This Court agrees with Respondents that Petitioner's claim in Ground VIII is a claim that the state courts did not correctly decide his Rule 32.12(f) motion for DNA. Accordingly, this Court determines that the claim in Ground VIII does not state a claim for federal habeas relief.

Ground IX: In Ground IX, Petitioner claims his Fourteenth and Fifth Amendment due process rights were violated "by the State's one-sided investigation and false presentation of the facts to the grand jury and omitted information." (Doc. 41-1 at 31.) Respondents argue this claim is non-cognizable on federal habeas review and waived. (Doc. 50 at 16.) Petitioner does not address this claim in his reply. (Doc. 60 at 2.)

The United States Supreme Court has not applied the Fifth Amendment right to an indictment by a grand jury to the states. *See Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). This Court agrees with Respondents that for this reason Petitioner's claim in Ground IX is non-cognizable on federal habeas. Moreover, as mentioned above, "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett*, 411 U.S. at 267. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the

guilty plea." *Id.* By pleading guilty, a defendant "waives the right to assert on review all non-jurisdictional defenses, including deprivations of constitutional rights." *Chavez*, 407 P.3d at 90 ¶14. Consequently, by operation of law, Petitioner waived claim in Ground IX when he pled guilty. (Doc. 51 at 21-23 (plea agreement waiver of rights).)

This Court determines that the claims alleged in Ground VIII and IX are non-cognizable on federal habeas review or have been waived.

Ground X: Due Process Violation, Application of A.R.S. §§ 13-1405, -705

In Ground X, Petitioner alleges a violation of his Fifth and Fourteenth Amendment due process rights arguing that A.R.S. § 13-1405, which defines sexual conduct with a minor, is "unclear as to its application whether A.R.S. [§] 13-705 [governing sentences for dangerous crimes against children] could be applied in a first time felony proceeding." (Doc. 41-1 at 36.)

However, as pointed out by Respondents, a state court's application of a state statute is a state law claim. *See Estelle*, 502 U.S. at 67-68. Accordingly, habeas relief is unavailable to remedy "a perceived error of state law[.]" *Pulley*, 465 U.S. at 41. A state court's interpretation of state law "binds a federal court sitting in habeas corpus." *Bradshaw*, 546 U.S. at 76. *See also, Hendricks v. Zenon*, 993 F.2d 664, 674 (9th Cir. 1993) (state appellate court's refusal to reverse a sentence on state law grounds is not cognizable in federal habeas proceeding).

Additionally, the claim alleged in Ground X was waived when Petitioner pled guilty. As mentioned above, "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett*, 411 U.S. at 267. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* By pleading guilty, a defendant "waives the right to assert on review all non-jurisdictional defenses, including deprivations of constitutional rights." *Chavez*, 407 P.3d at 90, ¶14. In Arizona, a defendant's guilty plea "'waives all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the validity

of [the] plea.'" *State v. Leyva*, 389 P.3d 1266, 1272, ¶18 (Ariz. App. 2017) (quoting *State v. Banda*, 307 P.3d 1009, 1012, ¶12 (Ariz. App. 2013)). By operation of law, Petitioner waived his claim alleged in Ground X when he pled guilty. (Doc. 51 at 21-23 (plea agreement waiver of rights).)

This Court determines that the claim alleged in Ground X is non-cognizable on federal habeas review and has been waived.

Ground XI – Due Process Violation, Sentence Enhancement

In Ground XI, Petitioner alleges that his sentence was enhanced under Arizona's dangerous crimes against children (DACA) statute without a jury determination. Petitioner claims that (1) the first time he was informed that Counts 1 and 2 were both dangerous crimes against children was at sentencing; (2) the trial court "stopped short" of identifying A.R.S. § 13-705 as the DACA enhancement statute; and (3) "any connection between A.R.S. § 13-1405 and A.R.S. § 13-705 remained anonymous in the record." (Doc. 41-2 at 1-7.) Respondents argue that Petitioner's claim is factually inaccurate and was waived. (Doc. 50 at 18.)

This Court agrees with Respondents that Petitioner's claim is factually inaccurate. The plea agreement specified that Petitioner was pleading guilty to violating A.R.S. § 13-1405 and that he would be sentenced under A.R.S. § 13-705. *See* Doc. 51 at 18-19. The plea agreement also specified that the sentencing range was for a first DACA offense under A.R.S. § 13-705(B), and expressly stated that Petitioner would be sentenced to 25 years. *Id.* at 20, ¶6. This Court also notes that Petitioner's indictment refers to both A.R.S. §§ 13-1405 and -705 and the State filed a DCAC notice that pertained to all charged offenses. (Doc. 51 at 3-11.)

The claim alleged in Ground XI was waived when Petitioner entered his guilty plea. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett*, 411 U.S. at 267. By pleading guilty, a defendant "waives the right to assert on review all non-jurisdictional defenses, including deprivations of constitutional rights." *Chavez*, 407 P.3d at 90, ¶14. By operation of law, Petitioner waived the claim in Ground XI when he entered into his plea agreement. *See* Doc. 51 at 23-24

(plea agreement waiver of rights).

Petitioner claims in reply that "the actual waiver occurs during the plea colloquy, which makes the plea hearing transcript the best available record for determining what rights were actually waived." (Doc. 60 at 56-57.) The transcript of the change of plea hearing establishes that the trial court advised Petitioner that by pleading guilty he gives up certain constitutional rights ... "and [specifically the right] to have the jury determine any factors which could aggravate your sentence. If you enter a plea of guilty, the Court, not a jury will decide whether aggravating factors exist." (Doc. 51 at 45.) Petitioner plead guilty. *Id.* at 46-47. At sentencing, the trial court identified emotional and physical harm to the victims as aggravating factors. *Id.* at 64-65. The trial court identified no mitigating factors. *Id.* at 65.

This Court determines that the claim alleged in Ground X is waived, factually inaccurate and precluded from federal habeas review.

Grounds XII – Alleged Ineffective Assistance of Trial Counsel re Plea

In Ground XII, Petitioner claims that his trial counsel rendered ineffective assistance by "failing to effectively communicate the terms of the State's plea offer to him." (Doc. 41-2 at 8-16.) Petitioner raised his claim in his first PCR proceeding and in his petition for review in the Arizona Court of Appeals. (Doc. 53 at 5-6.) This claim is properly exhausted and will be addressed on the merits. *See Castillo*, 399 F.3d at 998 n.3; *Swoopes*, 196 F.3d at 1010-11.

Grounds XIII through XIX –Ineffective Assistance of Trial Counsel, Failure to Raise Claims

In Grounds XIII through XVIII, Petitioner claims his trial counsel rendered ineffective assistance in failing to raise the claims that he alleges in Grounds III, IV, VIII, IX, X and XI of his amended petition. (Doc. 41-2 at 17, 24, 32, 43, 49.) In Ground XIX, Petitioner claims his trial counsel rendered in effective assistance in failing to suppress an allegedly coerced statement he gave to police. *Id.* at 64.

In Petitioner's third PCR petition, filed on August 1, 2018, Petitioner raised the IAC claims alleged in Grounds XIV and XVIII against his first PCR counsel but not his trial

counsel. (Doc. 57 at 41-43; Doc. 58 at 4, ¶¶6-8.) The court of appeals rejected these claims as untimely. (Doc. 58 at 4, ¶¶6-8.) As for the other IAC claims, these claims have not been raised in any prior proceeding. As such, none of the IAC claims alleged in Grounds XIII though XIX have been properly exhausted. *See Baldwin*, 541 U.S. 29, 33. Any attempt to return to state court to exhaust these claims would be futile in light of Rule 32.2 and 32.4(a) of the Arizona Rules of Criminal Procedure. These claims are technically exhausted and procedurally defaulted.

As discussed, this Court rejects Petitioner's argument that "IAC of first Rule 32 counsel was raised to the Arizona Court of Appeals to establish cause..." (Doc. 41-2 at 17, 24, 32, 43, 49, 56.) *See*, p. 9, *supra*. While counsel's ineffectiveness in failing to properly preserve a claim for review in the state courts can constitute cause to excuse a procedural default, *Carpenter*, 529 U.S. at 451; *Carrier*, 477 U.S. at 488-89, a "claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 489. Because Petitioner failed to present these IAC claims in the state courts in a procedurally appropriate manner as required by Rule 32.4(a)(2)(C), these claims are technically exhausted and procedurally defaulted without excuse. *See also*, pp. 10-12, *supra*.

This Court determines that the IAC of counsel claims alleged in Grounds XIII through XIX are precluded from federal habeas review.

Summary

In sum, this Court determines that only the claims alleged in Ground IV, a portion of Ground V and Ground XII are properly exhausted. The balance of the claims alleged in the amended petition are precluded from habeas review as detailed above.

MERITS

As explained below, Petitioner's exhausted claims are without merit.

Standard of Review under the AEDPA

Congress intended AEDPA to foster federal-state comity and further society's interest in the finality of criminal convictions. *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) ("AEPDA's] design is to 'further the principles of comity, finality, and

federalism.'") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)). Congress' very purpose in enacting the AEPDA was "to restrict the availability of habeas corpus relief." *Greenwalt v. Stewart*, 105 F.3d 1268, 1275 (9th Cir. 1997), *abrogated on other grounds recognized by Jackson v. Roe*, 425 F.3d 645, 658-61 (9th Cir. 2005).

In the AEDPA, Congress set forth "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions must be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). (internal punctuation omitted). The district court may grant a writ of habeas corpus, "only on the basis of some transgression of federal law binding on state courts." *Middleton, v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985).

The AEDPA limits the availability of habeas relief for a claim adjudicated on the merits to circumstances where the state court's disposition either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner bears the burden of proving his claims fit one of the criteria in paragraph (d). *Pinholster*, 563 U.S. at 181; *Lambright v. Blodgett*, 393 F.3d 943, 970 n.16 (9th Cir. 2004).

A state court decision is "contrary to" clearly established federal law when the court has applied a rule of law that contradicts the governing law set forth in Supreme Court precedent or has encountered a set of facts that are "materially indistinguishable" from a Supreme Court decision and yet reached a different result than the Supreme Court. *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). Under § 2254's "unreasonable application" clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applies clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). "[E]ven a strong case for relief does not

mean that the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Richter explained:

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-]minded disagreement.

562 U.S. at 101. "If this standard is difficult to meet, that is because it was meant to be." *Id.* Section 2254(d)(1) sets "a daunting standard – one that will be satisfied in relatively few cases." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004).

In determining whether the state courts' resolution of a claim was contrary to, or an unreasonable application of, clearly established federal law, the district court must review the last reasoned state court judgment addressing the claim. *Cook v. Schriro*, 538 F.3d 1000, 1015 (9th Cir. 2008) (citing *Ylst*, 501 U.S. at 803). The reviewing federal court is to be "particularly deferential to [its] state court colleagues." *Maddox*, 366 F.3d at 1000. The federal habeas court presumes the state court's factual determinations are correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Ground IV and part of Ground V – Double Jeopardy/Dual-Sovereignty Doctrine

The underlying basis for the exhausted claims alleged in Grounds IV and V is the State's prosecution of Petitioner for what Petitioner claims are the identical offenses that he pleaded guilty to in a military tribunal. In Ground IV, Petitioner claims that his right to be free from Double Jeopardy has been violated by the State and the military prosecuting him from the same offenses. He takes also issue with the dual-sovereignty doctrine. (Doc. 41 at 36; Doc. 41-1 at 1-6; Doc. 60 at 26-54.) Petitioner argues:

> Had the United States Supreme Court not invent their dual sovereignty doctrine (DSD) rule in the first place, then the State of Arizona would not have been allowed to follow with their prosecution for the same offenses that Petitioner was convicted and acquitted of in his prior military tribunal.

(Doc. 41 at 36.)

Respondents point out that the United States Supreme Court recently rejected an argument just like that made by PetitionerUnit in *Gamble v. United State*s, 139 S.Ct. 1960 (2019). In *Gamble*, the ed States Supreme Court "consider[ed] ... whether to overrule a longstanding interpretation of the Double Jeopardy Clause of the Fifth Amendment." *Id.* at 1963. *Gamble* recognized that the dual-sovereignty doctrine recognizes that, under the Double Jeopardy Clause, which provides that no person may be twice put in jeopardy 'for the same offence,' a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign, and thus, a state may prosecute a defendant under state law even if the federal government has prosecuted him for the same conduct under a federal statue, or the reverse may happen. *Id.* The Court determined that Gamble's evidence in support of his argument "did not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws – much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years." *Id.* at 1969.

Here, in rejecting Petitioner's claim, the trial court determined, "At the time the Defendant entered his plea in the state court proceedings, he was aware that his sentence may run concurrent or consecutive to the sentence that would be served pursuant to the general court martial." (Doc. 52 at 112.) The trial court continued, "[m]oreover, Arizona's double jeopardy statute (A.R.S. Section 13-116) does not apply in the context of successive prosecutions in separate jurisdictions[]; accordingly, the Defendant is not entitled to relief on this claim." *Id.* at 113. (footnote omitted.) The court of appeals rejected Petitioner's Double Jeopardy claim and adopted the trial court's reasoning that the Double Jeopardy Clause does not "apply to prosecutions in separate jurisdictions." (Doc. 54 at 60, ¶7.)

Petitioner has not established that the state courts unreasonably applied federal law in rejecting his Double Jeopardy Clause claim. Petitioner's reply argues:

> The Court in *Gamble* continues to ignore the origin of the U.S. government's ultimate source of authority to undertake criminal prosecutions in their ultimate source of authority test analysis so as to hold that the U.S. and [s]tate

governments are separate sovereigns in the Double Jeopardy context.

(Doc. 60 at 26.) Petitioner's argument is like that of the defendant in *Gamble*. *Compare Gamble*, 139 U.S. at 1969-70 ("Gamble's core claim is that early English cases reflect an established common-law rule barring domestic prosecution for the same act under a different sovereign's laws."); *with,* Doc. 60 at 28 ("There simply are no express writings by the framers nor in the U.S. Constitution itself that warrants or sanctions the idea that the U.S. and [s]tate governments or two [s]tate governments may successively prosecute an individual for the same offense.").

Petitioner has failed to establish that the state court rendered a decision that was contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court on his Double Jeopardy Clause claim. In fact, the state courts correctly applied controlling United States Supreme Court precedent as announced in *Gamble*.

This Court determines that Petitioner is not entitled to habeas relief on the claim alleged in Ground IV and the exhausted portion of the claim alleged in Ground V.

Ground XII - IAC of Trial Counsel

The clearly established federal law governing IAC claims was set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Pinholster*, 563 U.S. at 189. To establish that counsel was constitutionally ineffective under *Strickland*, "a defendant must show both deficient performance by counsel and prejudice." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). Deficient performance is established when counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.

In determining deficiency, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action must be considered sound trial strategy." *Id.* at 689. (Internal quotations omitted.) To establish prejudice, a petitioner must show "a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Richter*, 562 U.S. at 100.

In Ground XII, Petitioner asserts that his trial counsel failed to effectively communicate the terms of the plea agreement to him. (Doc. 41-2 at 8.) Petitioner claims that he did not get an opportunity to speak with his trial counsel in private about the plea during the change of plea hearing. *Id.* at 9-10. Petitioner further claims that trial counsel "coerced him into accepting the plea by telling him that it was the only plea he would be offered and that if he did not accept the plea then he would face sum (*sic*) 200 sum (*sic*) years at trial." *Id.* at 1.

In ruling on this claim the state PCR court held:

> To establish deficient performance during plea negotiations, the Defendant must prove that his attorney either (1) gave erroneous advice or (2) failed to give information necessary to allow the Defendant to make an informed decision whether to accept the plea. *State v. Donald*, 198 Ariz. 406, 413, 10 P.3d 1193 (App. 2000)[.] In his statement attached to the Petition, the Defendant asserts that his attorney pressured him into signing the plea agreement, and "...failed to give information necessary to allow the Defendant to make an informed decision to accept the plea." However, the Defendant's assertions are not supported by the current record before the Court. In sum, the Court finds that the claims are without merit and that no purpose would be served by any further proceedings on these claims.

(Doc. 52 at 112.) In upholding the trial court's decision, the court of appeals determined:

> Although he claims counsel did not adequately explain the plea to him, he does not identify what information counsel could have provided him that would have prompted him to reject the state's plea offer. Nor does he claim he would have rejected the plea had he been given more time to consider it.

(Doc. 54 at 60, ¶6.)

Respondents point out that had Petitioner been convicted on the dismissed state charges he would have faced spending 200 years in prison. Petitioner admits he knew this.

(Doc. 41-2 at 10.) Petitioner admitted his guilt. *See* Doc. 51 at 64 (change of plea hearing at which Petitioner admitted, "And I knew I should have stopped way earlier. I'm just, ashamed of everything I've done."); Doc. 54 at 58, ¶2.) As pointed out by Respondents, even with the two consecutive 25-year prison terms from the state and military sentences, Petitioner reduced his time in prison to 50 years.

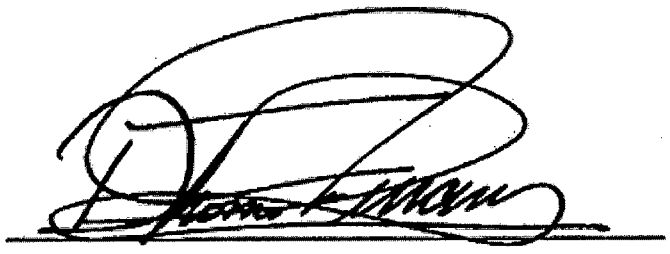
This Court agrees with Respondents that the state courts' determination that Petitioner failed to demonstrate prejudice was not unreasonable. *See Moore*, 562 U.S. at 130-32 (where counsel recommended a plea in lieu of an uncertain trial and risked a much higher penalty, the state PCR courts' disposition was reasonable for both the performance and prejudice prongs).

RECOMMENDATION

The exhausted claims alleged in the amended petition (Ground IV, a portion of Ground V and Ground XII) are without merit. The remainder of Petitioner's claims are either waived, non-cognizable on federal habeas review or procedurally defaulted without excuse. Accordingly, the Magistrate Judge recommends that the district court, after its independent review, **DISMISS** the Petition for Writ of Habeas Corpus.

Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of the Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: **4:17-cv-00224-RM.**

Dated this 21st day of May, 2020.



Honorable D. Thomas Ferraro
United States Magistrate Judge

FILED

OCT 17 2023

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ISIDORO SANCHEZ, Petitioner-Appellee, v. DAVID SHINN, Director of the Arizona Department of Corrections; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellants.	No. 21-15632 D.C. No. 4:17-cv-00224-RM District of Arizona, Tucson ORDER

MICHAEL ISIDORO SANCHEZ, Petitioner-Appellant, v. DAVID SHINN, Director, Director of the Arizona Department of Corrections; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 21-16940 D.C. No. 4:17-cv-00224-RM

BEFORE: OWENS and BADE, Circuit Judges, and BAKER,* International Trade Judge.

Judges Owens and Bade have voted to deny the petition for rehearing en

* The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

banc, and Judge Baker so recommends. The full court has been advised of Petitioner-Appellee/Cross-Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Petitioner-Appellee/Cross-Appellant's petition for rehearing en banc, Docket No. 58, is therefore DENIED.

FILED

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U.S. COURT OF APPEALS

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MICHAEL ISIDORO SANCHEZ, Petitioner-Appellee, v. DAVID SHINN, Director of the Arizona Department of Corrections; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellants.	No. 21-15632 D.C. No. 4:17-cv-00224-RM District of Arizona, Tucson ORDER

MICHAEL ISIDORO SANCHEZ, Petitioner-Appellant, v. DAVID SHINN, Director, Director of the Arizona Department of Corrections; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 21-16940 D.C. No. 4:17-cv-00224-RM

BEFORE: OWENS and BADE, Circuit Judges, and BAKER,* International Trade Judge.

On August 8, 2023, we reversed the district court's grant of conditional

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habeas relief and dismissed Petitioner-Appellee/Cross-Appellant Michael Sanchez's cross-appeal as moot. Through his counsel, Sanchez timely petitioned for rehearing en banc on September 21, 2023, challenging circuit precedent upon which our disposition relied. That petition was duly circulated to the full Court.

On October 17, 2023, we denied the petition for rehearing en banc after no judge called for rehearing. Later that day, the clerk's office received and docketed Sanchez's pro se "motion to recall the mandate, motion to set aside counsel, and motion for leave to file an amended petition for panel rehearing and rehearing en banc" (Dkt. No. 62), to which Sanchez attached the proposed "amended petition."[1]

Sanchez's motion and supporting exhibits explain that on September 11, 2023, he and his counsel discussed the substance of the petition to be filed by the September 21 deadline. According to Sanchez, his counsel agreed to assert certain legal arguments challenging circuit precedent, but those arguments were not contained in the petition that counsel ultimately filed.[2] Sanchez contends that counsel has "betrayed" him and that had he known counsel would not advocate those arguments, Sanchez would instead have filed the pro se petition proffered with his motion.

Although only a criminal defendant can make certain core decisions such as

[1] Sanchez has since moved, pro se, to file supplemental exhibits in support of his motion (Dkt. No. 63).

[2] Sanchez received the petition filed by his counsel on October 6, 2023.

whether to plead guilty, to waive the right to a jury, to appeal, or to seek appellate rehearing, *see, e.g.*, *Taylor v. Illinois*, 484 U.S. 400, 417–18, 418 n.24 (1988) (cataloging examples of "basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client"), once such a defendant agrees to legal representation, "the lawyer has—and must have—full authority to manage the conduct of the trial," *id.*, and, by extension, any ensuing appeal.

It follows, then, that as to many decisions "pertaining to the conduct of the trial," *New York v. Hill*, 528 U.S. 110, 115 (2000), and, by extension, any ensuing appeal, "the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Id.* (internal quotation marks omitted) (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962)). "*Thus, decisions by counsel are generally given effect as to what arguments to pursue*," *id.* (emphasis added) (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)), "what evidentiary objections to raise," *id.* (citing *Henry v. Mississippi*, 379 U.S. 443, 451 (1965)), "and what agreements to conclude regarding the admission of evidence," *id.* (citing *United States v. McGill*, 11 F.3d 223, 226–27 (1st Cir. 1993)). "Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Id.*

Because Sanchez is bound by his counsel's choice of arguments to assert in

his rehearing petition that was previously circulated to the full Court, we deny his motion to file an amended petition. We grant his motion to file exhibits and deny as moot his motions to set aside counsel and recall the mandate.

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