APPENDIX A

NOT FOR PUBLICATION

FILED

FEB 27 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIC WRIGHT, Petitioner-Appellant, v. KRISTIN K. MAYES,* Attorney General for the State of Arizona, et al., Respondents-Appellees.	No. 22-15654 D.C. No. 2:21-cv-01754-SPL MEMORANDUM**

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

Argued and Submitted February 6, 2024
Phoenix, Arizona

Before: MURGUIA, Chief Judge, and HAWKINS and JOHNSTONE, Circuit Judges.

Eric Wright appeals the district court's order denying his habeas corpus petition, which argued that during his trial, the prosecutor improperly used a preemptory challenge in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). We

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Kristin K. Mayes is substituted for her predecessor, Mark Brnovich, as Attorney General for the State of Arizona.

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

have jurisdiction under 28 U.S.C. § 1291 and affirm.

While this court reviews *de novo* the district court's denial of habeas corpus relief, *Hoyos v. Davis*, 51 F.4th 297, 305 (9th Cir. 2022), the standard of review applied by a federal habeas court to a state appellate court's denial of relief depends on whether the claim was "adjudicated on the merits" by the state appellate court. 28 U.S.C. § 2254(d). If a claim was not adjudicated on the merits, the federal habeas court applies *de novo* review. *Cone v. Bell*, 556 U.S. 449, 472 (2009). But if a claim was adjudicated on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a deferential standard of federal review. 28 U.S.C. § 2254(d).

Here, the Arizona Court of Appeals adjudicated Mr. Wright's *Batson* claim on the merits. When a petitioner presents a federal claim "to a state court and the state court has denied relief," we presume that "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). "This presumption applies even when the state court resolves the federal claim in a different manner or context than advanced by the petitioner so long as the state court 'heard and *evaluated* the evidence and the parties' substantive arguments.'" *Patsalis v. Shinn*, 47 F.4th 1092, 1098 (9th Cir. 2022) (quoting *Johnson v. Williams*, 568 U.S. 289, 302 (2013)), *cert. denied*, 144 S. Ct. 107 (2023). Here,

Mr. Wright argues the Arizona Court of Appeals inadvertently failed to address his actual claim. We disagree. The Arizona Court of Appeals issued a reasoned opinion specifically discussing and rejecting the substance of his *Batson* claim. We therefore find that Mr. Wright has not sufficiently rebutted this presumption, and that the claim was adjudicated on the merits.

Because the Arizona Court of Appeals adjudicated Mr. Wright's claim on the merits, AEDPA imposes a deferential standard of review that requires federal courts to deny habeas relief unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d); *see also Sifuentes v. Brazelton*, 825 F.3d 506, 517 (9th Cir. 2016). When the highly deferential AEDPA standard combines with the deference already afforded "to the trial court's determination of the prosecutor's credibility" on direct review, "we end up with a standard of review that is 'doubly deferential.'" *Sifuentes*, 825 F.3d at 518 (quoting *Briggs v. Grounds*, 682 F.3d 1165, 1170 (9th Cir. 2012)). This standard is met when the record "compel[s] the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications" and find a *Batson* violation. *Rice v. Collins*, 546 U.S. 333, 341 (2006); *see also Briggs*, 682 F.3d at 1170 (explaining that federal courts must

uphold the state court decision "unless the state appellate court was objectively unreasonable in concluding that a trial court's credibility determination was supported by substantial evidence").

Here, Mr. Wright argues that the district court's denial of habeas relief on his *Batson* claim was erroneous because it was based on an unreasonable determination of the facts under Section 2254(d)(2). But Mr. Wright cannot overcome AEDPA's high standard. The prosecutor proffered two race-neutral reasons for the strike. The trial court's rejection of the *Batson* objection implicitly recognized that these reasons given by the prosecutor were not pretextual. While Mr. Wright has identified non-Black jurors who were not stricken, the record does not show that the comparator jurors were so similar to the stricken juror as to compel the conclusion that the trial court erred in overruling the *Batson* challenge. *See Jamerson v. Runnels*, 713 F.3d 1218, 1231 (9th Cir. 2013) (finding that the prosecutor's "failure to exercise peremptory strikes against other non-black jurors who shared weak parallels with [the struck] juror . . . ultimately does little to undermine the stated justification"). The Arizona Court of Appeals engaged in a substantive analysis of the issue, and its decision was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2). Therefore, the district court did not err in denying Mr. Wright's habeas corpus petition.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Eric Wright, Petitioner, v. State of Arizona, et al., Respondents.	No. CV 21-01754-PHX-SPL **ORDER**

The Court has before it, Petitioner's First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 4), the Response from the Respondents (Doc. 12), and the Petitioner's Reply. (Doc. 13) Additionally, the Court is in receipt the Report and Recommendation of the Magistrate Judge (Doc. 15), the Petitioner's Objections (Doc. 16), and Respondent's Reply to the Petitioner Objections. (Doc.17)

A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b). When a party files a timely objection to an R&R, the district judge reviews *de novo* those portions of the R&R that have been "properly objected to." Fed. R. Civ. P. 72(b). A proper objection requires specific written objections to the findings and recommendations in the R&R. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); 28 U.S.C. § 636(b) (1). It follows that the Court need not conduct any review of portions to which no specific objection has been made. *See Reyna-Tapia*, 328 F.3d at 1121; *see also Thomas v. Arn*, 474 U.S. 140, 149 (1985) (discussing the inherent purpose of limited review is judicial

economy). Further, a party is not entitled as of right to *de novo* review of evidence or arguments which are raised for the first time in an objection to the R&R, and the Court's decision to consider them is discretionary. *United States v. Howell*, 231 F.3d 615, 621-622 (9th Cir. 2000).

The Court has carefully undertaken an extensive review of the sufficiently developed record. The Petitioner's objections to the findings and recommendations have also been thoroughly considered.

After conducting a *de novo* review of the issues and objections, the Court reaches the same conclusions reached by the magistrate judge. The R&R will be adopted in full. Accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation (Doc. 15) is **accepted** and **adopted** by the Court.

2. That the Petitioner's Objections (Doc. 16) are **overruled**.

3. That the Amended Petition for Writ of Habeas Corpus (Doc. 4) is **denied** and this action is **dismissed with prejudice**.

4. That a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal are **denied** because the dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable; and

5. That the Clerk of Court shall enter judgment according and terminate this action.

Dated this 22nd day of April 2022.

Honorable Steven P. Logan
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Eric Wright,

Petitioner,

v.

State of Arizona, et al.,

Respondents.

No. CV-21-01754-PHX-SPL (ESW)

REPORT AND RECOMMENDATION

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

Pending before the Court is Arizona state prisoner Eric Wright's ("Petitioner") Amended "Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus" (the "Amended Petition") (Doc. 4). For the reasons explained herein, it is recommended that the Court deny habeas relief.

I. BACKGROUND

In May 2015, a jury sitting in the Superior Court of Arizona convicted Petitioner of one count of possession of dangerous drugs for sale. (Doc. 12-3 at 126). The trial court sentenced Petitioner to a ten-year prison term. (*Id.* at 134). The Arizona Court of Appeals affirmed Petitioner's conviction and sentence on direct appeal. (Doc. 12-4 at 95-100). The Arizona Supreme Court denied Petitioner's request for further review. (*Id.* at 127).

On November 1, 2017, Petitioner filed a Notice of Post-Conviction Relief ("PCR"). (*Id.* at 140-42). The trial court appointed counsel, who could not find a colorable claim to raise. (*Id.* at 147-51). On September 10, 2018, Petitioner filed a pro se PCR Petition. (*Id.* at 156-227). The trial court struck the PCR Petition for failing to comply with the Arizona Rules of Criminal Procedure and gave Petitioner leave to file a revised PCR Petition. (Doc. 12-5 at 2-3). Petitioner filed a revised PCR Petition, which Petitioner subsequently amended. (*Id.* at 31-37). The trial court accepted the amended PCR Petition and directed the State to respond. (*Id.* at 39). The trial court granted Petitioner's request to further amend the PCR Petition. (*Id.* at 65-69, 85-86). The trial court denied relief. (*Id.* at 85-86). On October 14, 2020, the Arizona Court of Appeals affirmed the trial court's ruling. (*Id.* at 164-68). Petitioner moved for reconsideration, which the Arizona Court of Appeals denied on November 13, 2020. (Doc. 12-6 at 2). Petitioner did not seek further review by the Arizona Supreme Court. (*Id.* at 4).

Petitioner filed a second PCR Notice on January 14, 2020. (Doc. 12-5 at 130-32). In a minute entry filed on March 5, 2020, the trial court concluded that Petitioner failed to raise a claim for which relief can be granted in a successive PCR proceeding. (*Id.* at 134-35). Petitioner did not seek review of the ruling by the Arizona Court of Appeals.

Following Petitioner's PCR proceedings, Petitioner filed three miscellaneous motions, which were denied by the trial court. (Doc. 12-6 at 44). Petitioner then filed a Petition for Writ of Habeas Corpus in the trial court, which was also denied. (*Id.* at 53). Petitioner did not seek review of the denial by the Arizona Court of Appeals.

In October 2021, Petitioner timely initiated this habeas proceeding. (Doc. 1). The Court screened the four-claim Amended Petition (Doc. 4) and ordered Respondents to file an answer. (Doc. 7). Respondents filed their Answer (Doc. 12) on February 8, 2022. Petitioner filed a Reply (Doc. 13) on February 16, 2022. As discussed below, the undersigned finds that Grounds Two, Three, and Four of the Amended Petition are unexhausted and procedurally defaulted without excuse. The undersigned further finds that Ground One is without merit.

II. GROUNDS TWO, THREE, AND FOUR ARE PROCEDURALLY DEFAULTED

A. Legal Standards

1. Exhaustion-of-State-Remedies Doctrine

It is well-settled that a "state prisoner must normally exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981); *see also Picard v. Connor*, 404 U.S. 270, 275 (1971) ("It has been settled since *Ex parte Royall*, 117 U.S. 241, 6 S. Ct. 734, 29 L.Ed. 868 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus."). The rationale for the doctrine relates to the policy of federal-state comity. *Picard*, 404 U.S. at 275 (1971). The comity policy is designed to give a state the initial opportunity to review and correct alleged federal rights violations of its state prisoners. *Id*. In the U.S. Supreme Court's words, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950); *see also Reed v. Ross*, 468 U.S. 1, 11 (1984) ("[W]e have long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power.") (citations and internal quotation marks omitted).

The exhaustion doctrine is codified at 28 U.S.C. § 2254. That statute provides that a habeas petition may not be granted unless the petitioner has (i) "exhausted" the available state court remedies; (ii) shown that there is an "absence of available State corrective process"; or (iii) shown that "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

Case law has clarified that in order to "exhaust" state court remedies, a petitioner's federal claims must have been "fully and fairly presented" in state court. *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). To "fully and fairly present" a federal

claim, a petitioner must present both (i) the operative facts and (ii) the federal legal theory on which his or her claim is based. This test turns on whether a petitioner "explicitly alerted" a state court that he or she was making a federal constitutional claim. *Galvan v. Alaska Department of Corrections*, 397 F.3d 1198, 1204-05 (9th Cir. 2005). "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citation omitted); *see also Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001) (federal basis of a claim must be "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").

2. Procedural Default Doctrine

If a claim was presented in state court, and the court expressly invoked a state procedural rule in denying relief, then the claim is procedurally defaulted in a federal habeas proceeding. *See, e.g., Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001). Even if a claim was not presented in state court, a claim may be procedurally defaulted in a federal habeas proceeding if the claim would now be barred in state court under the state's procedural rules. *See, e.g., Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002).

Similar to the rationale of the exhaustion doctrine, the procedural default doctrine is rooted in the general principle that federal courts will not disturb state court judgments based on adequate and independent state grounds. *Dretke v. Haley*, 541 U.S. 386, 392 (2004). A habeas petitioner who has failed to meet the state's procedural requirements for presenting his or her federal claims has deprived the state courts of an opportunity to address those claims in the first instance. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991).

As alluded to above, a procedural default determination requires a finding that the relevant state procedural rule is an adequate and independent rule. *See Id*. at 729-30. An adequate and independent state rule is clear, consistently applied, and well-established at

the time of a petitioner's purported default. *Greenway v. Schriro*, 653 F.3d 790, 797-98 (9th Cir. 2011); s*ee also Calderon v. U.S. Dist. Court (Hayes)*, 103 F.3d 72, 74-75 (9th Cir. 1996). An independent state rule cannot be interwoven with federal law. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). The ultimate burden of proving the adequacy of a state procedural bar is on the state. *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003). If the state meets its burden, a petitioner may overcome a procedural default by proving one of two exceptions.

In the first exception, the petitioner must show cause for the default and actual prejudice as a result of the alleged violation of federal law. *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014). To demonstrate "cause," a petitioner must show that some objective factor external to the petitioner impeded his or her efforts to comply with the state's procedural rules. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir. 2004). To demonstrate "prejudice," the petitioner must show that the alleged constitutional violation "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *see also Carrier*, 477 U.S. at 494 ("Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial.").

In the second exception, a petitioner must show that the failure to consider the federal claim will result in a fundamental miscarriage of justice. *Hurles*, 752 F.3d at 780. This exception is rare and only applied in extraordinary cases. *Wood v. Ryan*, 693 F.3d 1104, 1118 (9th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 321 (1995)). The exception occurs where a "constitutional violation has probably resulted in the conviction of one who is actually innocent of the offense that is the subject of the barred claim." *Wood*, 693 F.3d at 1117 (quoting *Schlup*, 513 U.S. at 327).

B. Grounds Two and Three

In Ground Two, Petitioner alleges that his Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated when the "prosecution presented a new supervening

indictment without a grand jury hearing and with no new evidence." (Doc. 4 at 10). Ground Three contends that Petitioner's Sixth Amendment rights were violated when Petitioner's attorney provided ineffective assistance by "fail[ing] to object at time of sentencing- allowing court to imposse [sic] an illegal flat sentence of ten years for a non dangerous non violent conviction." (Doc. 4 at 13).

Liberally construing Petitioner's state court filings, the undersigned finds that Petitioner presented Grounds Two and Three to the trial court in his first PCR proceeding. (Doc. 12-5 at 9, 65-68). However, Petitioner concedes that he did not present Grounds Two and Three to the Arizona Court of Appeals. (Doc. 4 at 10, 13). The undersigned finds that Grounds Two and Three are unexhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, [the Supreme Court has concluded] that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."); *Castillo v. McFadden*, 399 F.3d 993, 998 n.3 (9th Cir. 2005) (PCR claims of "Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them").

Arizona Rules of Criminal Procedure would preclude Petitioner from returning to state court to exhaust Grounds Two and Three. *See* Ariz. R. Crim. P. 32.4(b)(3) (a petition for post-conviction relief must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is later); Ariz. R. Crim. P. 32.2(a) (a defendant is precluded from raising claims that were (i) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding or (ii) waived at trial, on appeal, or in any previous post-conviction proceeding). Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not raised on direct appeal or in prior PCR proceedings. *See, e.g.*, *Stewart v. Smith*, 536 U.S. 856, 860 (2002)

(determinations made under Arizona's procedural default rule are "independent" of federal law); *Smith v. Stewart*, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001) ("[A] state's procedural default rule must also be adequate, which means that it is 'strictly or regularly' followed. . . . We have held that Arizona's procedural default rule is regularly followed in several cases.") (citations omitted), *reversed on other grounds*, *Stewart v. Smith*, 536 U.S. 856 (2002); *State v. Mata*, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

For the above reasons, the undersigned finds that Grounds Two and Three are procedurally defaulted. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) (a claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the requirement would now find the claims procedurally barred") (quoting *Coleman*, 501 U.S. at 735 n.1).

C. Ground Four

In Ground Four, Petitioner alleges violations of Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights. (Doc. 4 at 16). Petitioner contends that his PCR counsel provided ineffective assistance by failing to find any colorable claims for relief to raise in the PCR proceeding. (*Id.*). Petitioner also asserts that under the Sixth Amendment right to trial, a defendant's sentence following trial cannot exceed the stipulated sentence in a plea offer, which Petitioner states was seven years in his case. (*Id.*).

The Amended Petition asserts that Petitioner presented Ground Four to the Arizona Court of Appeals in his direct appeal. (*Id.*). However, on direct appeal, Petitioner only presented a *Batson* challenge and an argument that the trial court provided an erroneous jury instruction. (Doc. 12-4 at 3, 21-37). Respondents correctly assert that Ground Four is unexhausted. (Doc. 12 at 22). The undersigned finds that Ground Four is procedurally defaulted for the same reasons Grounds Two and Three are procedurally defaulted. *See* Ariz. R. Crim. P. 32.4(b)(3) and 32.2(a).

D. Petitioner's Procedural Defaults are Not Excused

The merits of a habeas petitioner's procedurally defaulted claims are to be reviewed if the petitioner (i) shows cause for the default and actual prejudice as a result of the alleged violation of federal law or (ii) shows that the failure to consider the federal claim will result in a fundamental miscarriage of justice. *McKinney v. Ryan*, 730 F.3d 903, 913 (9th Cir. 2013). In order to establish cause for a procedurally defaulted claim, "a petitioner must demonstrate that the default is due to an external objective factor that cannot fairly be attributed to him." *Smith v. Baldwin*, 510 F.3d 1127, 1146 (9th Cir. 2007) (internal quotation marks and citation omitted).

1. Petitioner has Not Satisfied the "Cause and Prejudice" Exception

In explaining why Ground Two was not presented to the Arizona Court of Appeals, Petitioner states "attorney was unawear [sic] of this indictment that was presented by prosecutor May 14th 2015." (Doc. 4 at 10). In explaining why Ground Three was not presented to the Arizona Court of Appeals, Petitioner states "counsel on appeal fail [sic] to raise these issues arising from sentencing." (*Id.* at 13).

Before an ineffective assistance of counsel claim can be considered "cause" to excuse the procedural default of another constitutional claim, a petitioner must have fairly presented the ineffective assistance of counsel claim in state court as an independent claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451-52, (2000) ("In other words, ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim. And we held in *Carrier* that the principles of comity and federalism that underlie our longstanding exhaustion doctrine . . . require that constitutional claim, like others, to be first raised in state court.") (emphasis in original); *Dellinger v. Bowen*, 301 F.3d 758, 766 (7th Cir. 2002) ("In other words, the claim of ineffective assistance must be raised in state court before it can suffice on federal habeas relief as 'cause' to excuse the default of another claim (even if that other claim is also ineffective assistance of counsel). If the second claim of ineffective assistance is itself defaulted, the petitioner will be fully

defaulted."); *Oken v. Corcoran*, 220 F.3d 259, 265 (4th Cir. 2000) (ineffectiveness of appellate counsel could not serve as cause for procedurally-defaulted claim because petitioner never raised the ineffectiveness claim in state court).

Respondents are correct that Petitioner did not exhaust in the state courts independent claims that his counsel provided ineffective assistance by failing to raise the claims in Grounds Two and Three. (Doc. 12 at 25). Therefore, the failure of Petitioner's counsel to raise Grounds Two and Three in Petitioner's state court proceedings cannot constitute "cause" to excuse the procedural defaults in this case.

Moreover, under Ninth Circuit case law, Petitioner's status as an inmate with limited legal resources cannot constitute cause to excuse his procedural defaults. *See Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (an illiterate *pro se* petitioner's lack of legal assistance did not amount to cause to excuse a procedural default); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988) (petitioner's arguments concerning his mental health and reliance upon jailhouse lawyers did not constitute cause). The undersigned finds that Petitioner has failed to establish that his procedural defaults are "due to an external objective factor that cannot fairly be attributed to him." *Smith*, 510 F.3d at 1146 (internal quotation marks and citation omitted). Where a petitioner fails to establish cause, the Court need not consider whether the petitioner has shown actual prejudice resulting from the alleged constitutional violations. *Smith v. Murray*, 477 U.S. 527, 533 (1986). Accordingly, the undersigned concludes that Petitioner has not satisfied the "cause and prejudice" exception to excuse his procedural defaults.

2. The Miscarriage of Justice Exception Does Not Apply

Under *Schlup*, a petitioner seeking federal habeas review under the miscarriage of justice exception must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be

exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. A petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013) (quoting *Schlup*, 513 U.S. at 327). Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumway*, 223 F.3d at 990 (citing *Calderon v. Thomas*, 523 U.S. 538, 559 (1998)).

To the extent that Petitioner may assert the *Schlup* gateway, Petitioner has failed to satisfy his burden of producing "new reliable evidence" of his actual innocence. *See Smith v. Hall*, 466 F. App'x 608, 609 (9th Cir. 2012) (explaining that to pass through the *Schlup* gateway, a petitioner must first satisfy the "threshold requirement of coming forward with 'new reliable evidence'"); *Griffin v. Johnson*, 350 F.3d 956, 961 (9th Cir. 2003) ("To meet [the *Schlup* gateway standard], [petitioner] must first furnish 'new reliable evidence . . . that was not presented at trial.'"). *McQuiggin*, 133 S.Ct. at 1936 (quoting *Schlup*, 513 U.S. at 316). For the above reasons, the undersigned recommends that the Court dismiss Grounds Two, Three, and Four of the Amended Petition as those habeas claims are procedurally defaulted without excuse.

III. MERITS REVIEW OF GROUND ONE

In Ground One, Petitioner states: the "Baston [sic] challeng [sic] was raised on appeal as to Juror 43, was not examined . . . the Petitioner made a prima facie showing of discrimination the prosecutor claimed it was the prospective jurors acquittal verdict from his prior jury service." (Doc. 4 at 7). Liberally construed, the undersigned finds that Ground One presents the same *Batson* challenge raised on direct appeal. (Doc. 12-4 at 17-29). Respondents concede that this claim may be reviewed on the merits. (Doc. 12 at 29).

The Amended Petition is completed on the court-approved form. It is noted that in the preprinted section for Ground One, Petitioner wrote only "Violation of the Sixth Amendment United States Const." (Doc. 4 at 7). In the Supporting Facts section

concerning Ground One, Petitioner wrote "5-06-2014 grand jury indictment was dismissed due to lack of evidence May 14, 2015" and "August 21, 2014- trial court found the attorney client relationship was completly [sic] fractured and granted Wright's request for new attorney." (Doc. 4 at 7). To the extent that Ground One presents claims in addition to the *Batson* challenge, the undersigned finds that the claims are unexhausted and procedurally defaulted as Respondents correctly explain that Petitioner did not present the claims to the Arizona Court of Appeals in his direct appeal or in his Petition for Review of the trial court's denial of his PCR Petition. (Doc. 12 at 19) (citing Doc. 12-4 at 2-40; Doc. 12-5 at 88-108).

A. Reviewing Habeas Claims on the Merits

In reviewing the merits of a habeas petitioner's claims, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") requires federal courts to defer to the last reasoned state court decision. *Woods v. Sinclair*, 764 F.3d 1109, 1120 (9th Cir. 2014); *Henry v. Ryan*, 720 F.3d 1073, 1078 (9th Cir. 2013). To be entitled to relief, a state prisoner must show that the state court's adjudication of his or her claims either:

> 1. [R]esulted 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. [R]esulted 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)(1), (2); *see also, e.g., Woods*, 764 F.3d at 1120; *Parker v. Matthews*, 132 S. Ct. 2148, 2151 (2010); *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

As to the first entitlement to habeas relief as set forth in 28 U.S.C. § 2254(d)(1) above, "clearly established federal law" refers to the holdings of the United States Supreme Court's decisions applicable at the time of the relevant state court decision. *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). A state court decision is "contrary to" such clearly established federal law if the state court (i) "applies a rule that contradicts the governing law set forth in [U.S. Supreme Court] cases" or (ii) "confronts a set of facts that are materially indistinguishable from a decision

of the [U.S. Supreme Court] and nevertheless arrives at a result different from [U.S. Supreme Court] precedent." *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

As to the second entitlement to habeas relief as set forth in 28 U.S.C. § 2254(d)(2) above, factual determinations by state courts are presumed correct unless the petitioner can show by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *see also Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011); *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004). A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of the state court's decision. *Richter*, 562 U.S. at 101; *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

B. Challenges Under *Batson v. Kentucky*, 476 U.S. 79 (1986)

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89. Courts use a three-step burden shifting test to determine whether a potential juror was struck in violation of *Batson*. *Green v. LaMarque*, 532 F.3d 1028, 1029-30 (9th Cir. 2008).

First, "the defendant must make a prima facie showing the challenge was based on an impermissible basis, such as race." *Id.* at 1029 (emphasis omitted) (citing *Batson*, 476 U.S. at 96). "Second, if the trial court finds the defendant has made a prima facie case of discrimination, the burden then shifts to the prosecution to offer a race-neutral reason for the challenge that relates to the case." *Id.* at 1030 (citing *Johnson v. California*, 545 U.S. 162, 168 (2005)). A neutral explanation in the context of our analysis here "means an explanation based on something other than the race of the juror." *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

If the prosecutor offers a neutral explanation, then the trial court proceeds to the

third step of the test and decides "whether the defendant has proved the prosecutor's motive for the strike was purposeful racial discrimination." *Green*, 532 F.3d at 1030 (citing *Johnson*, 545 U.S. at 167). "[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) (citation omitted).

A federal habeas court may grant relief only if it was unreasonable for the state courts "to credit the prosecutor's race-neutral explanations for the *Batson* challenge." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (citing 28 U.S.C. § 2254(d)(2)). Because a trial court's finding on purposeful discrimination rests largely on credibility, the federal habeas court must apply a "doubly deferential" standard. "One level of deference arises from the broad power of a trial court to assess credibility of the prosecutor's statements that were made in open court. Another level of deference arises from the AEDPA context where federal courts defer to state court decisions that are not objectively unreasonable." *Aleman v. Uribe, Jr.*, 723 F.3d 976, 983 (9th Cir. 2013) (citing *Briggs v. Grounds*, 682 F.3d 1165, 1170 (9th Cir. 2012) ("Here our standard is doubly deferential: unless the state appellate court was objectively unreasonable in concluding that a trial court's credibility determination was supported by substantial evidence, we must uphold it.")).

C. Analysis

During voir dire, Petitioner's trial counsel stated: "the defense raises a Batson challenge as to Juror Number 43 . . . he was the only one remaining on the panel that is black. Mr. Wright is a black man." (Doc. 12-2 at 198). The trial court inquired as to the prosecutor's reasoning for striking Juror 43. The prosecutor stated:

> My race neutral reason, Your Honor, one of the most important things I look is at prior jury experience. He noted that he had been on three criminal trials, or three trials, two filed on which were criminal, and he was the only respondent who was still on our panel who had returned a not guilty verdict in a criminal case. Specifically, the way he described the case, it appeared to be a manslaughter case. It was a case

> that involved a death. He specifically said that he was part of a jury that did not convict the motorist that was on trial because he noted that the victim had made a left-hand turn.
>
> Your Honor, the very fact of the acquittal is the first basis or the – his elaboration and his reasoning for the not guilty verdict gave the State further cause to make that strike.

(*Id.* at 199). The trial court overruled defense counsel's objection. (*Id.* at 200). In affirming the trial court's ruling, the Arizona Court of Appeals stated:

> ¶ 7 Defendant first challenges the State's peremptory strike of a juror as a violation of his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986). A discriminatory peremptory strike is a violation of the Equal Protection Clause of the Fourteenth Amendment. *Batson*, 476 U.S. at 85-86. We review Batson challenges for clear error. *State v. Hardy*, 230 Ariz. 281, 285, ¶ 11 (2012).
>
> ¶ 8 A *Batson* challenge proceeds in three stages: (1) a defendant must make a prima facie showing of discrimination, (2) the prosecutor then must offer a race-neutral reason for the strike, and (3) the court determines whether the challenger proved purposeful racial discrimination. *Id.* at 285, ¶ 12 (quoting *State v. Gallardo*, 225 Ariz. 560, 565, ¶ 11 (2010)). Defendant argues both that the prosecutor did not provide a race-neutral reason, and that the superior court did not undertake the analysis required by the third stage of the process.
>
> ¶ 9 Under the second stage of a *Batson* challenge, the prosecutor must only supply a facially valid explanation to satisfy the burden. *See Hernandez v. New York*, 500 U.S. 352, 360 (1991). The explanation does not need to be "persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). When asked at trial, the prosecutor offered:
>
> > [O]ne of the most important things I look is at [sic] prior jury experience. [The stricken juror] noted that he had been on . . . three trials, two of which were criminal, and he was the only respondent who was still on our panel who had returned a not guilty verdict in a criminal case. Specifically, the way he described the case . . . . [H]e was part of a jury that did not convict the

> motorist that was on trial because he noted that the victim had made a left-hand turn.
>
> [T]he very fact of the acquittal is the first basis . . . and his reasoning for the not guilty verdict gave the State further cause to make that strike.

While Defendant argues this explanation was inconsistent with other challenges the prosecutor made to the prospective jury panel, this explanation was facially race-neutral and thus satisfied the prosecutor's burden. *See Purkett*, 514 U.S. at 769 ("[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection.").

¶ 10 Under the third stage, the analysis is fact intensive and turns on the credibility of the prosecutor. *Miller–El v. Cockrell*, 537 U.S. 322, 339–40 (2003). As such, the trial court is in the best position to make a finding and is therefore "due much deference." *State v. Newell*, 212 Ariz. 389, 401, ¶ 54 (2006). After the prosecutor gave his race-neutral reason for the strike, Defendant's attorney argued that other nonminority jurors on the panel with similar qualifications were not stricken by the prosecutor. The court then denied Defendant's challenge and impaneled the jury.

¶ 11 Defendant cites to several cases from other jurisdictions requiring courts to provide, on the record, a basis for their analysis under the third stage of a *Batson* challenge. However, there is no requirement in Arizona that a court make such detailed findings. *Miller–El*, 537 U.S. at 347 ("[A] state court need not make detailed findings addressing all the evidence before it."); *see also State v. Canez*, 202 Ariz. 133, 147, ¶ 28 (2002) ("the trial court ruled against [defendant's] challenge, implicitly finding that he had not carried his burden of proving purposeful discrimination"), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299 (2016). By denying Defendant's challenge the court implicitly found that Defendant failed to establish the State's reason was a pretext for purposeful discrimination. *See Canez*, 202 Ariz. 133, 147, ¶ 28. We find no error.

(Doc. 12-4 at 97-98). As explained below, the undersigned does not find that the Arizona Court of Appeals' decision (i) is contrary to, or an unreasonable application of, *Batson* or (ii) is based on an unreasonable determination of the facts.

"[A] comparative analysis of the struck juror with empaneled jurors is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." *Lewis v. Lewis*, 321 F.3d 824, 830-31 (9th Cir. 2003) (internal quotation marks and citation omitted). "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller–El II*, 545 U.S. at 241. A "side-by-side comparison" is made of the juror who was stricken from the panel with others allowed to serve. *Id.*

During voir dire, Juror 43 recounted that within "the last eight years," he "sat on three juries, two criminal, one civil . . . . The two criminal, one was guilty one was not guilty. The civil we found for the plaintiff." (Doc. 12-2 at 60, 187). Regarding the criminal case in which the defendant was acquitted, Juror 43 stated that "I don't know how you would characterize it. [The defendant] was speeding, ran into a car, someone died." (*Id.* at 187). Juror 43 explained that "the person that was speeding ran into someone making a left-hand turn." (*Id.*).

Two of the empaneled jurors, Juror 1 (a white male) and Juror 27 (a white female), had also previously served on juries. (Doc. 12-2 at 199-200). Although Juror 1 stated that he sat on a jury in which the criminal defendant was found not guilty on a charge for assault and battery, the defendant was found guilty of murder. (*Id.* at 50-51). Juror 27 previously served on two juries: (i) a criminal case in which the defendant was found guilty of theft and robbery and (ii) a medical malpractice case that resulted in a verdict in favor of the defendant. (*Id.* at 56).

Although Jurors 1, 27, and 43 all had prior jury experience, only Juror 43 found a criminal defendant not guilty on all charges. The record does not show that Jurors 1 and 27 were so similar to Juror 43 as to compel the conclusion that the trial court erred in overruling the *Batson* challenge. *See Jamerson v. Runnels*, 713 F.3d 1218, 1231 (9th Cir. 2013) (The prosecutor's "failure to exercise peremptory strikes against other non-black

jurors who shared weak parallels with [the struck] juror . . . ultimately does little to undermine the stated justification."); *Aleman v. Uribe*, 723 F.3d 976, 983 (9th Cir. 2013) ("Although these other jurors bears some similarity to [the struck juror], the record does not show that they were so similar as to compel the conclusion that the state court erred in concluding that the prosecutor did not purposefully discriminate."); *Burks v. Borg*, 27 F.3d 1424, 1429-30 (9th Cir. 1994) (sustaining the state court's decision where the objective evidence of discrimination was "relatively weak").

The undersigned does not find that the state courts were objectively unreasonable in concluding that the prosecution's race-neutral explanation with respect to Juror 43 was credible and that the challenge to Juror 43 was not the product of purposeful discrimination. The record supports the prosecutor's stated reasons for excusing Juror 43 and does not reflect that the reasons were pretextual. It is recommended that the Court deny the *Batson* challenge presented in Ground One.

IV. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the Court **DISMISS WITH PREJUDICE** Grounds Two, Three, and Four of the Amended Petition (Doc. 4) and **DENY** Ground One on the merits.

IT IS FURTHER RECOMMENDED that a certificate of appealability and leave to proceed in forma pauperis on appeal be denied because dismissal of a number of grounds in the Amended Petition (Doc. 4) is justified by a plain procedural bar and Petitioner has not made a substantial showing of the denial of a constitutional right in his remaining claims for relief.

This Report and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this Report and Recommendation within which to file specific written objections with the Court. *See* 28

U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. Failure to file timely objections to any factual determinations of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated this 29th day of March, 2022.

Honorable Eileen S. Willett
United States Magistrate Judge