No. 24-

IN THE

Supreme Court of the United States

JONATHAN LEIGH SOSNOWICZ,

Petitioner,

v.

RYAN THORNELL, Director of the Arizona Department of Corrections, et al.,

Respondents.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONATHAN LEIGH SOSNOWICZ, Petitioner - Appellant, vs. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; RYAN THORNELL, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry, Respondents - Appellees.	No. 22-16019 D.C. No. 2:20-cv-0040-DGC MEMORANDUM[*] (filed Feb. 12, 2024)

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Submitted February 8, 2024[**]
Phoenix, Arizona

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

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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

Jonathan Leigh Sosnowicz appeals the district court's dismissal of his ineffective assistance of counsel claim as procedurally defaulted in its denial of his habeas petition under 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We review "the district court's decision on the habeas petition, including questions of procedural default," de novo. *Leeds v. Russell*, 75 F.4th 1009, 1016 (9th Cir. 2023). We review the district court's denial of an evidentiary hearing for abuse of discretion, and its diligence determination under 28 U.S.C. § 2254(e)(2) de novo. *Ochoa v. Davis*, 50 F.4th 865, 890–91 (9th Cir. 2022). We affirm.

Sosnowicz claims ineffective assistance of his trial counsel in plea negotiations, asserting that counsel failed to inform him he could be convicted of second degree murder merely on a finding he acted recklessly, causing him to reject the State's plea offer. The claim is procedurally defaulted because Sosnowicz did not timely raise it in his first postconviction relief proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3). Thus, we cannot consider it unless he establishes both "cause for the default and prejudice from a violation of federal law." *Martinez v. Ryan*, 566 U.S. 1, 10 (2012).

1. As a threshold matter, we must determine whether the district court abused its discretion in denying Sosnowicz an evidentiary hearing. Under 28 U.S.C. § 2254(e)(2), "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim," except in narrow circumstances inapplicable here. As the Supreme Court recently held, if § 2254(e)(2) "applies and the prisoner cannot satisfy its 'stringent requirements,' a

federal court may not hold an evidentiary hearing—or otherwise consider new evidence—to assess cause and prejudice under *Martinez*." *Shinn v. Ramirez*, 596 U.S. 366, 389 (2022) (quoting *Williams v. Taylor*, 529 U.S. 420, 433 (2000)).

Here, Sosnowicz did not "develop the factual basis" of his claim of ineffective assistance of trial counsel in state court for purposes of § 2254(e)(2). Because there is no constitutional right to counsel in postconviction proceedings, he is responsible for his counsel's alleged negligence in failing to develop the record on the claim. *Ramirez*, 596 U.S. at 383. Sosnowicz's untimely attempt to raise the claim was not in accordance with state procedural rules and is not diligent for purposes of § 2254(e)(2). *See, e.g.*, *Schriro v. Landrigan*, 550 U.S. 465, 479 & n.3 (2007) (holding petitioner was not diligent where he raised a claim for the first time in a motion for rehearing from the denial of his postconviction petition). Nor does he establish that postconviction counsel abandoned him or otherwise thwarted his attempt to raise the defaulted issue. *Compare with Holland v. Florida*, 560 U.S. 631, 636–43 (2010). The district court did not err in denying an evidentiary hearing.

2. On the record as it stands, the district court did not err in finding that Sosnowicz's claim of ineffective assistance of trial counsel was procedurally defaulted. While prejudice under *Martinez* requires a showing only that the underlying claim is "substantial," cause under *Martinez* requires establishing that postconviction counsel was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *Leeds*, 75 F.4th at 1017. Sosnowicz has not carried his burden to show cause.

The record does not establish Sosnowicz's post-conviction counsel pursued a "sandbagging" strategy.

Counsel was aware of Arizona's procedural requirements. Sosnowicz's hearsay description of his conversation with counsel is ambiguous, and equally can be construed as counsel explaining that he would assess and select the strongest claims to raise on postconviction relief to best position them for a federal habeas petition.

Moreover, "there is no reasonable probability that advancing [the trial ineffective assistance of counsel] claim during initial post-conviction proceedings would have altered the result," *Djerf v. Ryan*, 931 F.3d 870, 880 (9th Cir. 2019). Notably, Sosnowicz does not argue he can meet this standard absent an evidentiary hearing to develop the record. The indictment explicitly charged the second degree murder count in the alternative with an intentional, knowing, or reckless mens rea. The plea offer referenced the indictment, requiring him to plead to its charges, and Sosnowicz assured the court he understood the plea discussions "perfectly." His ambiguous statements months later during the evidentiary hearing and "self-serving" statement years later in his declaration are insufficient to establish deficient performance by his trial attorneys, *see Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002), or "a reasonable probability he and the trial court would have accepted the guilty plea," *Lafler v. Cooper*, 566 U.S. 156, 174 (2012).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jonathan Leigh Sosnowicz, Petitioner, vs. David Shinn and Attorney General of the State of Arizona, Respondents.	No. CV-20-00040-PHX-DGC **ORDER**

On June 30, 2021, the Court denied petitioner Jonathan Sosnowicz's petition for habeas corpus with respect to all claims except one ineffective assistance of counsel ("IAC") claim. Doc. 25. The Court withheld ruling on the IAC claim until the record could be further developed through an evidentiary hearing. Doc. 25. On August 11, 2021, the Court granted the government's motion to stay the action pending the Supreme Court's decision in *Shinn v. Ramirez* and directed the parties to file a joint status report within 14 days of the issuance of the decision. Doc. 32. The Supreme Court has now issued its decision, *see Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), and the parties have filed their joint status report (Doc. 36). In light of *Ramirez*, the Court will modify its June 30, 2021 order to vacate its call for an evidentiary hearing, and deny Sosnowicz's remaining IAC claim.

I. Background

In November 2008, Sosnowicz struck and killed J.P. with his vehicle after a physical altercation outside of a

bar. *State v. Sosnowicz*, 270 P.3d 917, 919-21 (Ariz. Ct. App. 2012). He was convicted by a jury in September 2010 of second degree murder and three counts of aggravated assault. *Id.* He was sentenced to 22 years for the murder charge, to run consecutively with three concurrent 8.5-year terms for the assault charges. *Id.* Sosnowicz's convictions and sentences were affirmed on direct appeal by the Arizona Court of Appeals. *Id.* at 918–19. He did not seek review by the Arizona Supreme Court, and the Arizona Court of Appeals issued its mandate in August 2012. Doc. 15-2 at 478.

Sosnowicz filed a petition for postconviction relief ("PCR") in April 2013. *Id.* at 513-22. He was represented by Neal Bassett, who also represented him in his direct appeal. The Arizona Court of Appeals granted review and summarily denied relief. *Id.* at 587. Sosnowicz did not seek review by the Arizona Supreme Court, and the Arizona Court of Appeals issued its mandate in December 2016. *Id.* at 591. In January 2017, Bassett was admonished by the State Bar of Arizona for engaging in a conflict of interest by representing Sosnowicz in both his direct appeal and his first PCR proceeding and for failing to timely communicate with Sosnowicz's new counsel regarding his trial file. Doc. 19-7 at 185-88.

Represented by new counsel, Sosnowicz filed a second, successive PCR petition in March 2017. Doc. 15-3 at 2-21. The PCR court dismissed the petition, finding that some of the claims were precluded under state law and others were not colorable. *Id.* at 136-37, 178. The Arizona Court of Appeals granted review and denied relief in July 2018. Doc. 15-4 at 9. In April 2020, the Arizona Supreme Court denied review. *Id.* at 15.

In January 2020, Sosnowicz filed this petition for writ of habeas corpus in this Court. Doc. 1. He raised five

grounds for relief. The first three alleged that in Sosnowicz's first PCR proceeding Bassett failed to raise (1) certain IAC claims with respect to Sosnowicz's trial counsel, (2) IAC claims with respect to appellate counsel, and (3) an actual innocence claim based on expert testimony. *Id.* at 6-16. Ground four alleged that the trial court violated Sosnowicz's constitutional rights by precluding certain testimony of a medical examiner. *Id.* at 17-19. Ground five alleged IAC by Sosnowicz's trial counsel by calling intoxicated witnesses and failing to object to the government's evidence and arguments. *Id.* at 20-21.

Magistrate Judge Michael Morrissey issued a report in January 2021 recommending the Court deny the habeas petition without an evidentiary hearing or a certificate of appealability ("R&R"). Doc. 20. Sosnowicz objected to Judge Morrisey's conclusions with respect to all grounds except ground five. Doc. 23.

In an order dated June 30, 2021, the Court accepted Judge Morrisey's R&R with the exception of ground one, alleging IAC of trial counsel associated with Sosnowicz's rejection of a favorable plea offer. Doc. 25 at 21. Sosnowicz alleged that his trial counsel did not explain that he could be convicted of second-degree murder if the jury found he acted recklessly, leading him to reject the plea offer. *Id.* at 16. The Court ultimately concluded that it should receive further evidence regarding whether trial counsel informed Sosnowicz of the recklessness standard before he rejected the plea offer and what was said during a recess of a June 2010 hearing. *Id.* at 19.

On July 26, 2021, the government asked the Court to stay this case pending the outcome of *Shinn v. Ramirez*, which was before the Supreme Court. Doc. 28. The Court granted the stay, observing that *Ramirez* was poised to

address whether district courts can conduct these types of evidentiary hearings. Doc. 32 at 3. Given the length of sentence Sosnowicz would have received under the favorable plea he rejected, the Court also noted that any new sentence likely would not expire for several years, so Sosnowicz would suffer no prejudice from a stay of less than one year. *Id.* at 4. The Court ordered the parties to file, within 14 days of the issuance of a decision in *Ramirez*, a joint status report apprising the Court of the decision and its implications for an evidentiary hearing. *Id.*

The Supreme Court issued its decision on May 23, 2022. *See* 142 S. Ct. 1718. The parties submitted their joint status report shortly thereafter. Doc. 36. The Court will now set out the relevant holdings of Ramirez and consider its impact on the June 2021 order.

II. Section 2254(e)(2) and *Shinn v. Ramirez*.

Under § 2254(e)(2), if a habeas applicant has "failed to develop the factual basis of a claim in State court proceedings," a district court cannot hold an evidentiary hearing on the claim unless (1) the claim relies on either a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review or a factual predicate that could not have been previously discovered through due diligence and (2) the facts underlying the claim would establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty. § 2254(e)(2)(A)–(B).

In its recent decision in *Ramirez*, the Supreme Court held "that, under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." 142 S. Ct. at 1734. The Supreme Court acknowledged that

§ 2254(e)(2) applies only when there has been "a *failure* to develop the factual basis of a claim," something that "is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 1735 (emphasis added). The Court reiterated that a prisoner bears the risk for all attorney errors unless counsel provides constitutionally ineffective assistance, but since there is no constitutional right to counsel in a state PCR proceeding, "a prisoner ordinarily must bear responsibility for all attorney errors during [PCR] proceedings." *Id.* (emphasis added). "Among those errors," the Court explained, "a state prisoner is responsible for counsel's negligent failure to develop the state postconviction record." *Id.*

The Court concluded that "under § 2254(e)(2), a prisoner is 'at fault' even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements." *Id.*

In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court held that "ineffective assistance of postconviction counsel can be 'cause' to forgive procedural default of a trial-ineffective-assistance claim if a State forecloses direct review of that claim." 142 S. Ct. at 1735–36. In *Ramirez*, the Supreme Court declined to expand *Martinez* to allow ineffective assistance of PCR counsel to excuse failure to develop the state-court record under § 2254(e)(2), noting that *Martinez* applied equitable discretion to modify a judge-made rule, but that the courts are powerless to modify a statutory rule such as § 2254(e)(2). *Id.* at 1736.

III. Evidentiary Hearing.

Under *Ramirez*, Sosnowicz is entitled to an evidentiary hearing only if he can show that he satisfies

the requirements of § 2254(e)(2) or that it does not apply. *Id.* at 1734. Sosnowicz does not argue that he satisfies the statute, but he does argue that the statute does not apply because he did not "fail" to develop the factual record of his IAC claim in state court. This assertion is based on the fact that Sosnowicz's second PCR counsel argued that the "ethical lapses" of his first PCR counsel "excuse[d] the failure to raise in prior postconviction proceedings the plea-stage ineffective-assistance claim[.]" Doc. 36 at 3. In other words, he argues that the diligence of his second PCR counsel absolves him of responsibility for his first PCR counsel's failure to develop the record in state court.

The Court is not persuaded. Sosnowicz's original PCR counsel plainly failed to bring the IAC claim during the first PCR proceeding. *See State v. Sosnowicz*, No. 2 CACR 2018-0058-PR, 2018 WL 3472027, at *2 (Ariz. Ct. App. July 18, 2018) (observing that "nothing prevented Sosnowicz's initial Rule 32 counsel from asserting claims of ineffective assistance of trial counsel"). And the Supreme Court in *Ramirez* made clear that Sosnowicz "bear[s] responsibility for all attorney errors during [PCR] proceedings," including "counsel's negligent failure to develop the state postconviction record." 142 S. Ct. at 1735 (emphasis added). Sosnowicz thus bears responsibility for his first PCR counsel's failure to bring the IAC claim and has "fail[ed]" to develop the factual basis of the claim, triggering the application of § 2254(e)(2).

The diligence of Sosnowicz's second PCR counsel does not relieve him of responsibility for the failures of his first PCR counsel. As the government points out, accepting this argument would lead to an absurd result: "Any petitioner could circumvent the constraints of [§] 2254(e)(2) merely by presenting an IAC claim in an untimely, successive PCR in state court and subsequently

claim in federal habeas proceedings that" because he acted "diligently" in the second proceeding, § 2254(e)(2) does not preclude an evidentiary hearing. Doc. 36 at 7 n.6.

Sosnowicz also argues that because Arizona Rule of Criminal Procedure 32.2 was amended during the pendency of his second PCR proceeding to include an equitable exception to the procedural bars of untimeliness and waiver, he "diligently sought a hearing" on his claim of IAC by presenting it in his second PCR proceeding. *Id.* at 3-4. He asserts that he sought an evidentiary hearing in the manner now permitted by state law and did not demonstrate the lack of diligence required to trigger § 2254(e)(2). *Id.* at 4. This argument, like his first, would lead to absurd results. A petitioner who clearly failed to develop the factual basis for an IAC claim in his first PCR case could be absolved from that failure and escape the strict requirements of § 2254(e)(2) by seeking to expand the record in an untimely second PCR petition, even if the state court found that the new equitable exception in Rule 32.2 should not apply. That is what happened here. The Arizona Supreme Court did not invoke the exception to permit Sosnowicz to expand the record, even though it has done so in other cases. Doc. 15-4 at 15; *compare, e.g.*, *State v. Botello-Rangel*, CR-20-0114-PR, 2020 WL 8766052, at *1 (Ariz. Dec. 15, 2020) (vacating and remanding PCR case "to examine whether Defendant's claims are viable" under 2020 amendment to Rule 33.1).

The Arizona Court of Appeals' determination that Sosnowicz's IAC claim is time-barred because he failed to raise it during his first PCR proceeding remains in place. Section 2254(e)(2) therefore applies, Sosnowicz does not meet its stringent requirements, and the Court cannot hold an evidentiary hearing. *Ramirez*, 142 S. Ct. at 1734.

IV. Conclusion.

The Court is bound by the Supreme Court's interpretation of Congress's limiting provision in § 2254(e)(2). In light of the recent decision in *Ramirez*, the Court will reverse its prior conclusion that an evidentiary hearing is appropriate in this case. And based on the record before it, the Court cannot conclude that Sosnowicz's trial counsel was ineffective during plea negotiations. The record of an October 2009 settlement conference reflects that Sosnowicz and his counsel discussed the plea deal, which Sosnowicz stated he "understood perfectly," and that Sosnowicz had no questions to discuss with the court or the prosecutor. Doc. 15-1 at 82. He declined the plea offer and chose to exercise his right to a jury trial. *Id.* at 83. Without more, the record does not support Sosnowicz's IAC claim. The claim will be denied.

IT IS ORDERED:

1. The Court's order dated June 30, 2021 (Doc. 25) is modified insofar as it concludes that an evidentiary hearing is warranted in this case.

2. The Court accepts Judge Morrissey's R&R in full, and Sosnowicz's habeas petition (Doc. 1) is denied.

3. A certificate of appealability is denied because Ramirez is clear and Sosnowicz's arguments for why it does not apply would not persuade any reasonable jurist.

4. The Clerk is directed to enter judgment accordingly and terminate this action.

Dated this 12th day of July, 2022.

s/David G. Campbell
David G. Campbell
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jonathan Leigh Sosnowicz, Petitioner, vs. David Shinn, et al., Respondents.	No. CV-20-00040-PHX-DGC **ORDER**

Jonathan Sosnowicz has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 (Doc. 1) and a motion for certificate of appealability (Doc. 24). Magistrate Judge Michael Morrissey has issued a report recommending that the petition be denied ("R&R"). Doc. 20. Sosnowicz objects. Doc. 23. The Court will accept the R&R with respect to grounds two through five and part of ground one, deny the petition and motion with respect to these claims, and hold an evidentiary hearing on the remaining portion of ground one.

I. Background.

In November 2008, Sosnowicz struck and killed the victim, J.P., with his vehicle after a physical altercation outside of a bar. *See State v. Sosnowicz*, 270 P.3d 917, 919–21 (Ariz. Ct. App. 2012). In September 2010, a jury convicted *Sosnowicz* of second-degree murder and three counts of aggravated assault. *See id.* Sosnowicz was sentenced to 22 years in prison for count one and three concurrent 8.5-year prison terms for counts two through

four, all running consecutively to the 22-year term for count one. *Id.*

II. Procedural History.

A. Direct Appeal.

In June 2011, Sosnowicz appealed his convictions and sentences to the Arizona Court of Appeals, which affirmed the convictions and sentences in two concurrently filed decisions. Doc. 15-2 at 397-419, 478-505, 507-08.[1] The Court of Appeals held that: (1) admission of the medical examiner's testimony that the victim's death was a homicide was harmless error, and (2) the trial court did not err in precluding evidence of the victim's blood alcohol level. *Sosnowicz*, 270 P.3d at 918-19; *State v. Sosnowicz*, No. 1 CA-CR 10-0789, 2012 WL 1843716, at *1 (Ariz. Ct. App. Mar. 8, 2012). Sosnowicz did not seek review by the Arizona Supreme Court, and the Arizona Court of Appeals issued its mandate in August 2012. Doc. 15-2 at 478.

B. First Post-Conviction Relief ("PCR") Proceeding.

In April 2013, Sosnowicz filed a PCR petition arguing that his trial counsel rendered ineffective assistance of counsel ("IAC") by: (1) failing to object to comments by the prosecutor that Sosnowicz had two girlfriends and the jury could consider this fact in determining his credibility, and (2) calling witnesses who were drunk at the time of the incident and provided damaging testimony. Doc. 15-2 at 513-22. Neal Bassett, the attorney who handled Sosnowicz's direct appeal, also represented him in the PCR proceeding.

[1] Page citations are to numbers placed at the top of pages by the electronic filing system.

The PCR court summarily dismissed the petition, and Sosnowicz filed a petition for review in the Arizona Court of Appeals in March 2014. *Id.* at 552, 554-69. In April 2016, the Court of Appeals held that the PCR petition was defective for failing to identify the relevant standard for IAC claims or demonstrating that trial counsel's conduct had no reasoned basis. *Id.* at 585-87. And even if counsel's performance was deficient, the court held, Sosnowicz had not shown that different tactics would have produced a different trial result. *Id.* at 587. Sosnowicz did not seek review in the Arizona Supreme Court, and the Court of Appeals issued its mandate in December 2016. Doc. 15-2. at 591.

C. Professional Misconduct by Appellate and PCR Counsel.

In May 2016, Sosnowicz's new counsel, David Goldberg, requested Sosnowicz's trial files from the Maricopa County Public Defender's Office upon discovering that he did not have access to Sosnowicz's entire trial record. See Doc. 19-7 at 10. The Office informed Goldberg that it had released the entire file to Bassett – Sosnowicz's former PCR and appellate counsel – in 2012. *Id.* When Goldberg requested the remaining materials from Bassett, he received no response. *Id.* at 19. In July 2016, the Arizona Supreme Court ordered Bassett to deliver to Goldberg all files in his possession related to Sosnowicz's case. *Id.* In August 2016, Bassett filed a Notice of Compliance, stating that he had provided Sosnowicz and his new counsel with "everything [he] had" and had "nothing left to give them." *Id.* at 22.

In January 2017, the State Bar of Arizona issued an order of admonition to Bassett for violating the Arizona Rules of Professional Conduct by: (1) engaging in a conflict of interest by representing Sosnowicz in both his

direct appeal and his first PCR proceeding, depriving him of the chance of bringing an appellate-counsel IAC claim in the PCR proceeding (Rule 42, ER 1.7); and (2) failing to timely communicate with Sosnowicz's new attorney regarding the trial file (Rule 42, ER 8.4(d)). *Id.* at 43.

D. Second PCR Proceeding.

Sosnowicz filed a second, successive PCR petition through new counsel in March 2017. Docs. 15-2 at 1-132; 15-3 at 593-98. The petition raised trial- and appellate-counsel IAC claims, as well as an actual innocence claim.

First, Sosnowicz argued that his trial counsel had failed to: (1) explain to Sosnowicz that he could be convicted of second-degree murder for reckless conduct, which led him to reject a favorable plea offer; and (2) competently investigate, research, and present a defense of involuntary act and lack of criminal intent due to semi-conscious conduct. Doc. 15-3 at 2 3.

Second, Sosnowicz argued that his appellate counsel, Bassett, was ineffective for failing to argue on direct appeal that: (1) the trial court's preclusion of evidence about his involuntary behavior and lack of criminal intent deprived him of his constitutional right to present a complete defense; and (2) the admission of prior bad act evidence violated his constitutional right to a fair trial. *Id.*

Finally, Sosnowicz made an actual innocence claim, arguing that expert testimony established that he was innocent because he was "semi-conscious and acting involuntarily" when driving his vehicle toward the victim. *Id.*

In May 2017, the PCR court dismissed Sosnowicz's trial-counsel IAC claims as precluded under state law because Sosnowicz did not timely raise them during his first PCR proceeding. Doc. 15-3 at 136-37; Ariz. R. Crim.

P. 32.2(a)(3) (2019) (providing that a defendant is precluded from relief under Rule 32.1 "based on any ground . . . waived at trial, on appeal, or in any previous collateral proceeding").[2] In August 2017, the PCR court dismissed the remaining two claims on the merits, finding that Sosnowicz had made no "colorable" argument with respect to either claim. *Id.* at 178. The Arizona Court of Appeals affirmed in July 2018. Doc. 15-4 at 2-9. The Arizona Supreme Court denied review in April 2020. *Id.* at 15.

E. Petition for Writ of Habeas Corpus.

Sosnowicz filed this habeas petition in January 2020, raising five grounds for relief. Doc. 1. Grounds one through three assert that Bassett failed, in the first PCR proceeding, to raise: (1) certain IAC claims with respect to Sosnowicz's trial counsel; (2) IAC claims with respect to appellate counsel; and (3) an actual innocence claim based on expert testimony. *See id.* at 6-16. Ground four alleges that the trial court erred in admitting, and precluding, certain testimony of a medical examiner in violation of Sosnowicz's constitutional rights. *Id.* at 17.

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[2] Rule 32.1 was amended, effective January 2020, to provide that a defendant is precluded from relief "based on any ground… waived at trial or on appeal, or in any previous post-conviction proceeding, *except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.*" Ariz. R. Crim. P. 32.2(a)(3) (emphasis added). This exception, applicable to all actions filed on or after January 1, 2020, appears to codify longstanding Arizona case law providing that the waiver exception applies only to claims of "sufficient constitutional magnitude" such as waiver of the right to counsel, a jury trial, or a twelve-person jury under the Arizona Constitution. *Stewart v. Smith*, 46 P.3d 1067, 1070 (Ariz. 2002). Because Sosnowicz's second PCR petition was filed in 2017, the new rule does not apply to it, but the waiver exception for claims of sufficient constitutional magnitude still applies, as will be discussed below.

Ground five alleges that trial counsel rendered ineffective assistance by calling intoxicated witnesses and failing to object to the government's evidence and arguments.

Judge Morrissey issued an R&R on January 8, 2021, recommending denial of the habeas petition without an evidentiary hearing or a certificate of appealability. Doc 20 at 21-22. Sosnowicz objects to Judge Morrissey's conclusions with respect to all grounds except ground five. *See* Doc. 23.

III. R&R Standard of Review.

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court "must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The Court is not required to conduct "any review at all… of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Because Sosnowicz does not object to Judge Morrissey's recommendation for ground five, the Court will address only grounds one through four.

Some of Sosnowicz's objections are general in nature, reasserting arguments made in the petition rather than addressing Judge Morrissey's ruling. "[M]erely reasserting the grounds of the petition as an objection provides this Court with no guidance as to what portions of the R&R Petitioner considers to be incorrect." *McDowell v. Richardson*, No. CV-11-0716-PHX-DGC, 2012 WL 393462, at *2 (D. Ariz. Feb. 7, 2012). Rule 72 requires more. The party seeking de novo review must provide "*specific* written objections to the proposed findings and recommendations" of the magistrate judge. Fed. R. Civ. P. 72(b)(2) (emphasis added). The clear

purpose of this requirement is judicial economy – to permit magistrate judges to resolve matters not objectionable to the parties. *See Thomas*, 474 U.S. at 149. Because de novo review of the entire R&R would defeat the efficiencies intended by Congress and Rule 72, a general objection has the same effect as a failure to object. *Warling v. Ryan*, No. CV 12-01396-PHX-DGC, 2013 WL 5276367, at *2 (D. Ariz. Sept. 19, 2013); *Eagleman v. Shinn*, No. CV-18-2708-PHX-RM (DTF), 2019 WL 7019414, at *5 (D. Ariz. Dec. 20, 2019); *Quigg v. Salmonsen*, No. CV 18-77-H-DLC-JTJ, 2019 WL 1244989, at *4 (D. Mont. Mar. 18, 2019). As a result, the Court will accept portions of the R&R to which Sosnowicz makes only general objections.

As discussed below, the Court concludes that grounds two through four are without merit, but that an evidentiary hearing is needed with respect to the ground one claim involving Sosnowicz's decision to reject his plea offer. The Court will address this issue after dispensing with the remaining claims.

IV. Discussion.

A. Ground Two – Ineffective Assistance of Appellate Counsel.

Sosnowicz argues that his appellate counsel was ineffective for failing to argue on direct appeal that: (1) the trial court's preclusion of expert testimony and evidence supporting his involuntary conduct defense deprived him of his constitutional right to present a complete defense; and (2) the admission of remote prior bad act evidence violated his right to a fair trial. Doc. 1 at 12. The second PCR court and Arizona Court of Appeals rejected these claims on their merits, concluding they met neither prong of the *Strickland* IAC test – that counsel's performance was deficient and that Sosnowicz was prejudiced by the

deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); Docs. 15-3 at 178, 15-4 at 2-9, 15.[3]

Because the ground two claims have already been adjudicated on the merits in state court, this Court may not grant habeas relief unless the state courts reached a decision that was contrary to or involved an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254(d); *Carey v. Musladin*, 549 U.S. 70, 75 (2006); *Musladin v. Lamarque*, 555 F.3d 834, 838 (9th Cir. 2009). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011).

Judge Morrissey found that Sosnowicz had not shown that the state courts' dismissal of his claims were contrary to or based on an unreasonable application of *Strickland*. Doc. 20 at 20. Sosnowicz objects by repeating and incorporating by reference the arguments made in his habeas petition and reply brief. Doc. 23 at 23-25. Because this does not constitute a specific objection under Rule 72, the Court will accept the R&R's recommendation that ground two be denied.[4]

The Court also notes that ground two fails on the merits because Sosnowicz has not established that the

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[3] The *Strickland* test was adopted by the Arizona Supreme Court in *State v. Lee*, 689 P.3d 153 (Ariz. 1984).

[4] In his objection, Sosnowicz also argues that his ground two claims fall under the limited exception to procedural default recognized in *Martinez v. Ryan*, 566 U.S. 1 (2012). Doc. 23 at 24. *Martinez* excuses procedural default in certain limited circumstances, but Sosnowicz's ground two claims were not procedurally defaulted. They were adjudicated on the merits by the state courts.

state courts' decisions were based on an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d). Sosnowicz claims that his appellate counsel failed to challenge two decisions of the trial court: its preclusion of evidence supporting his involuntary conduct defense and its admission of evidence that Sosnowicz had, years earlier, driven his car into his girlfriend's car after an argument. Docs. 15-3 at 19, 15-4 at 7, 19-2 at 7; *see also* Ariz. R. Evid. 404(b)(1) ("[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

Under *Strickland*, however, Sosnowicz has not shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. As the Arizona Court of Appeals observed on direct appeal, the evidence of Sosnowicz's guilt was "extremely strong." *Sosnowicz*, 270 P.3d at 925. Multiple witnesses saw Sosnowicz get into a physical altercation with the victim, drive away enraged, then return and drive his Hummer into the victim "as fast as [he] could" with the engine "rev[ved]." *Sosnowicz*, 270 P.3d at 925. Sosnowicz admitted that he saw people in front of him, yet made no attempt to brake before striking and fatally injuring the victim. *Id.* Instead of remaining at the scene or rendering aid, Sosnowicz drove away from the crime scene with his friends, purchased and used cocaine, and returned to his residence. *Id.* Upon arriving home he had the presence of mind to instruct his friend to remove another parked vehicle from the garage so that he could park the Hummer inside. Doc. 15 2 at 481-85. He shut the garage door, called 911, and told the operator that he had been attacked by a group of people. *Id.* He then told police and a paramedic that he had no memory of the incident, though he later stated in a taped jail phone call – played during trial – that he "remembered everything… that happened." *Id.* After

the tape was played for the jury, Sosnowicz admitted that he lied about not remembering the incident. *Id.*

Given this evidence, admission of involuntary conduct evidence and exclusion of the prior bad act evidence would not likely have changed the result of the trial. *See Harden v. Lizarraga*, No. 2:19-CV-00566-PA (SK), 2019 WL 12379550, at *2 (C.D. Cal. Sept. 8, 2019) (given "overwhelming" evidence of petitioner's guilt, failure to obtain limiting instruction regarding testimony about petitioner's prior bad acts "could not have had a substantial and injurious effect on the jury verdict"); *Crecy v. Runnels*, No. C 03-3703 JSW (PR), 2006 WL 2092626, at *10-13 (N.D. Cal. July 27, 2006) (given the strength of the prosecution's case, petitioner failed to establish that the introduction of "highly inflammatory prior bad acts" would have changed the result of the proceedings).

B. Ground Three – Actual Innocence.

Sosnowicz argues that witness testimony at trial, as well as a precluded expert report, establish that he acted involuntarily and lacked the requisite mental state for second-degree murder. See *Alaimalo v. U.S.*, 645 F.3d 1042, 1047 (9th Cir. 2011) ("A petitioner is actually innocent when he was convicted for conduct not prohibited by law."). Judge Morrissey concluded that Sosnowicz's actual innocence claim should be denied as not cognizable on § 2254 habeas review. Doc. 20 at 17. Alternatively, he concluded that the claim should be denied on the merits because Sosnowicz failed to demonstrate that he is actually innocent. *Id.* at 18-19. Sosnowicz makes no specific objection to this conclusion other than to repeat arguments made in his habeas petition and reply brief. Docs. 1 at 15; 19 at 57-76. Because this does not constitute a specific objection under Rule 72,

the Court will accept the R&R's recommendation that ground three be denied.

The Court also notes that Sosnowicz's actual innocence claim fails on the merits. Assuming a freestanding claim of actual innocence is cognizable on habeas review, Sosnowicz must still "affirmatively prove that he is probably innocent." *Carriger*, 132 F.3d at 476.[5] Sosnowicz fails to present evidence of actual innocence other than to repeat arguments already presented to and rejected by the Arizona Court of Appeals on direct appeal. As discussed above, the evidence supporting the jury's verdicts – including his actions at the time of the killing, his admission that he remembered everything about the crimes, and his admission that he lied about not remembering – was substantial. *See Sosnowicz*, 270 P.3d at 925. Sosnowicz fails to present evidence that would affirmatively prove he is probably innocent. The Court will adopt the R&R's recommendation and reject ground three.

C. Ground Four – Trial Court Error.

Sosnowicz argues that the trial court erred by: (1) permitting the medical examiner, Dr. William Stano, to testify that the victim's death was a homicide; and (2) precluding Dr. Stano from testifying as to the victims' blood alcohol level at the time of death. The Arizona Court of Appeals rejected both claims on their merits.

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[5] Whether a freestanding claim of actual innocence is cognizable on habeas review is an "open question." *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 71 (2009). The Ninth Circuit has assumed, without deciding, that such claims are cognizable, and the Court will do the same. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc).

Judge Morrissey correctly concluded that Sosnowicz's ground four claims were unexhausted. A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and (c); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995); *McQueary v. Blodgett*, 924 F.2d 829, 833 (9th Cir. 1991). To exhaust claims in state court, Sosnowicz was required to fairly present his claims to the Arizona Court of Appeals through direct appeal or post-conviction relief. *See Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). A claim is "fairly presented" when a petitioner has "alert[ed] the state courts to the fact that [he] was asserting a claim under the United States Constitution." *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000) (quotations omitted). "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court." *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

Sosnowicz presented his ground four claims to the Arizona Court of Appeals solely as violations of the Arizona Rules of Evidence and Arizona case law. *See* Doc. 15-2 at 397-419. The habeas petition in this Court claims various federal constitutional violations, but Sosnowicz never made those arguments to the Arizona Court of Appeals and thus did not fairly present them in state court. *Shumway*, 223 F.3d at 987.

Judge Morrissey also concluded that Sosnowicz's claims are barred from federal review because Arizona procedural rules would make a return to state court futile. He concluded that ground four was procedurally defaulted under Arizona Rule of Criminal Procedure 32.2(a)(2), which bars litigants from raising in post-conviction relief proceedings any claims that were "finally

adjudicated on the merits in an appeal or in any previous post-conviction proceeding." Doc. 20 at 16. But this rule does not apply here, because the Arizona Court of Appeals never adjudicated Sosnowicz's ground four *federal* arguments on their merits. As noted above, those arguments were never fairly presented to the state courts.

The Court concludes, nonetheless, that Sosnowicz is precluded from returning to state court to litigate his federal constitutional arguments. Arizona law permits petitioners to return to state court to exhaust their claims only in limited instances. *McCray v. Shinn*, No. CV-17-01658-PHX-DJH, 2020 WL 919180, at *4 (D. Ariz. Feb. 26, 2020) ("Under Arizona law, a petitioner generally may not return to state court to exhaust claims unless the claims fall within the category of claims for which a successive PCR petition is permitted."). Rule 32.2(b) identifies several grounds that may be asserted by a returning petitioner – those identified in Rule 32.1(b)-(h). Ariz. R. Crim. P. 32.2(b).[6] But none of these includes claims based on a "violation of the United States or Arizona constitution,"

which is covered by Rule 32.1(a) and is not included in the list of exceptions enumerated in Rule 32.2(b).

Constitutional claims instead are covered by Rule 32.2(a)(3) and are precluded from a successive PCR proceeding unless "the claim raises a violation of a constitutional right that can only be waived knowingly,

[6] The January 2020 revisions to Rule 32.2 broadened the category of exceptions to preclusion. *Compare* Ariz. R. Crim. P. 32.2(b) (2019) (stating that preclusion does not apply to claims under Rule 32.1(d) through (h)) *with* Ariz. R. Crim. P. 32.2(b) (2020) (stating that preclusion does not apply to claims under Rule 32.1(b) through (h)). The Court will assume that the revised version would apply to any renewed effort by Sosnowicz to litigate issues in state court.

voluntarily, and personally by the defendant." Ariz. R. Crim. P. 32.2(a)(3). This language was added to the rule in January 2020, but even under the previous rule, Arizona courts found an exception to preclusion only where "an asserted claim is of *sufficient constitutional magnitude.*" *Stewart,* 46 P.3d at 1070 (emphasis added). Arizona law has not clearly defined this phrase, but the Arizona Supreme Court has stated that examples include the right to counsel and the right to a jury trial. *See id.* Arizona law makes clear that petitioners cannot simply characterize trial errors as serious constitutional violations to avoid preclusion. *See, e.g., State v. Swoopes*, 166 P.3d 945, 954 (Ariz. Ct. App. 2007) (if "any error, including trial error… were sufficient to bring the error under the umbrella of sufficient constitutional magnitude for purposes of Rule 32.2, all error could be so characterized, and arguably, no claim could be precluded without a personal waiver."). Sosnowicz has not shown that the evidentiary errors alleged in ground four amount to violations of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant, or are claims of sufficient constitutional magnitude. Thus, under either version of Rule 32.2(a)(3), he cannot return to state court to litigate his federal arguments and they are procedurally defaulted.

Finally, Judge Morrissey correctly concluded that no exception to the procedural default rule applies because Sosnowicz fails to establish cause and prejudice or point to any miscarriage of justice that would result from the Court's failure to consider the merits of his claims. *Ford v. Ryan*, No. CV-13-02474-PHX-DGC, 2015 WL 3960804, at *13 (D. Ariz. June 30, 2015) ("The federal court will not consider the merits of a procedurally defaulted claim unless a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice.") (citing *Schlup v.*

Delo, 513 U.S. 298, 321 (1995); *Coleman*, 501 U.S. at 750–51; *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986)).

Sosnowicz objects that his appellate counsel, Bassett, was a "scam artist" who failed to "meet procedural rules."[7] Doc. 23 at 22. Although it is not entirely clear, Sosnowicz appears to be making a cause and prejudice argument – namely, that his procedural default should be excused because of Bassett's failure to present his ground four claims as federal claims on direct appeal. *See* Doc. 15-2 at 397-419; *Ford*, 2015 WL 3960804, at *13 ("Pursuant to the cause and prejudice' test, a petitioner must point to some external cause that prevented him from following the procedural rules of the state court and fairly presenting his claim."). The Court has no obligation to address this argument because Sosnowicz never raised it in his habeas petition with respect to ground four. *Williams v. Ryan*, No. CV-18-00349-TUC-RM, 2019 WL 4750235, at *5 (D. Ariz. Sept. 30, 2019) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.") (citation omitted). In addition, the argument fails on its merits because Sosnowicz has not established that, but for his counsel's unreasonable failure to federalize his claims, he "would have prevailed on appeal." *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) (noting that ineffective assistance of appellate counsel claims are subject to the two-prong standard set forth in *Strickland*); *Karban v. Ryan*, No. CV-14-02763-PHX-SRB, 2017 WL 3460837, at *1 (D. Ariz. Aug. 11, 2017) (appellate lawyer's failure to federalize petitioner's state law claims failed to excuse procedural default because it

[7] Sosnowicz claims that Bassett's deficient performance should be excused under *Martinez,* but *Martinez* "applies only to claims of ineffective assistance of *trial* counsel; it has not been expanded to other types of claims." *Garcia v. Ryan*, No. CV-15-00025-PHXDGC, 2018 WL 4679644, at *3 (D. Ariz. Sept. 28, 2018) (emphasis added).

would not have changed the result of the appeal and the claims lacked merit).

First, "[g]iven appellate counsel's wide discretion in exercising professional judgment, the presumption of effective assistance of counsel is overcome 'only when ignored issues are clearly stronger than those presented[.]'" *Saunders v. Almager*, No. 09-0708 L WMC, 2011 WL 2181320, at *23 (S.D. Cal. Apr. 27, 2011) (citations omitted). Sosnowicz fails to establish that the federal arguments his appellate counsel failed to present were stronger than the state law issues raised in the Arizona Court of Appeals.

Second, even if appellate counsel had rendered ineffective assistance, Sosnowicz fails *Strickland's* second prong. The Arizona Court of Appeals rejected his ground four claims because (1) admission of the medical examiner's testimony that the death was a homicide, while erroneous, would not have contributed to or affected the jury verdict; and (2) the trial court was justified in precluding testimony about the blood alcohol content of the victim as irrelevant and potentially misleading to the jury. Doc. 15-2 at 478-505. Sosnowicz has not shown how asserting federal arguments with respect to these issues would allow him to prevail on appeal. The Court will dismiss ground four.

D. Ground One – Ineffective Assistance of Trial Counsel.

Sosnowicz argues that his trial counsel was ineffective for (1) not explaining that he could be convicted if the jury found he acted recklessly, which led him to reject a favorable plea offer; and (2) failing to investigate and present a defense of involuntary act and lack of criminal intent, given that he was knocked out by the victim and assaulted by others prior to the incident. Doc. 1 at 6-11.

The second PCR court rejected these arguments as waived because Sosnowicz failed to timely raise them during his first PCR proceeding. See Doc. 15-3 at 136-37 (citing Ariz. R. Crim. P. 32.2(a)(3)). Judge Morrissey concluded that because Rule 32.2 provides an independent and adequate basis for denying relief, Sosnowicz's claims are procedurally defaulted and therefore barred from this Court's review. *Stewart v. Smith*, 536 U.S. 856, 861 (2002) (holding that denials pursuant to Rule 32.2(a) are "independent of federal law"); *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014) ("Arizona's waiver rules are independent [nonfederal] and adequate bases for denying relief.") (internal citations omitted).

Sosnowicz argues that the procedural default should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), which recognizes a limited exception to procedural default where PCR counsel fails to raise a trial-counsel IAC claim in the initial review. Doc. 23 at 21. He also requests discovery and an evidentiary hearing to further develop his *Martinez* argument. *See id.*

Under *Martinez*, a petitioner may establish cause and prejudice for procedural default "by demonstrating two things: (1) 'counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984),' and (2) 'the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.'" *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting *Martinez*, 566 U.S. at 14). For Sosnowicz's underlying trial-counsel IAC claim to qualify as "substantial" under *Martinez*, he must "demonstrate that reasonable jurists could debate whether… the petition should have been resolved in a different manner or that the issues presented were

adequate to deserve encouragement to proceed further." *Weber v. Sinclair*, No. C08-1676RSL, 2014 WL 1671508, at *6 (W.D. Wash. Apr. 28, 2014) (quoting *Detrich v. Ryan*, 740 F. 3d 1237, 1245 (9th Cir. 2013)) (internal quotation marks and citations omitted). The Ninth Circuit has explained that "PCR counsel would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective." *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).

"For procedurally defaulted claims, to which *Martinez* is applicable, the district court should allow discovery and hold an evidentiary hearing where appropriate to determine whether there was 'cause' under *Martinez* for the state-court procedural default and to determine, if the default is excused, whether there has been trial-counsel IAC." *Detrich*, 740 F.3d at 1246. To show entitlement to an evidentiary hearing, a petitioner must allege "specific factual allegations that, if true, state a claim on which relief could be granted." *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003).

1. Ground One – Involuntary Conduct Defense.

Sosnowicz's contention that trial counsel failed to investigate and present a defense of involuntary conduct lacks merit and cannot trigger the *Martinez* exception. Sosnowicz contends that he was beaten unconscious moments before driving his vehicle into the victim, resulting in a brain injury that rendered him unaware of his subsequent actions. Doc. 1 at 10, 13-16. He claims that his expert witness was precluded from testifying at trial about his cognitive limitations because his trial counsel failed to cite relevant legal authority and make proper evidentiary arguments. *Id.* at 10.

Judge Morrissey correctly concluded, however, that Sosnowicz fails to show his counsel was ineffective, let alone that the result of the trial would have been different if the expert had testified and his counsel had presented an involuntary conduct defense. *Strickland*, 466 U.S. at 695. As discussed above, and as the Arizona Court of Appeals observed on direct appeal, "[t]he evidence that defendant intentionally aimed his vehicle at the group of persons – including [the victim] – with whom he had the altercation, is extremely strong." *Sosnowicz*, 270 P.3d at 925. Sosnowicz's actions – climbing inside his vehicle after the altercation, driving the vehicle out of several witnesses' direct line of sight, returning and driving his car directly at the victim who had assaulted him, revving his engine as he drove toward the victim, driving away after he hit the victim, attempting to conceal his car in his garage, and lying to police and paramedics that he did not recall the events – undermine any claim that he hit the victim involuntarily. *Sosnowicz*, 270 P.3d at 925; *see also Bean v. Calderon*, 163 F.3d 1073, 1082-83 (9th Cir. 1998) (rejecting claim that trial counsel was ineffective for failing to present and investigate a defense theory that lacked support from the record and was in conflict with other evidence). Because the involuntary conduct defense was clearly contradicted by the evidence, Sosnowicz has not established a reasonable probability that the outcome of the trial would have been different had the defense been asserted, nor that his trial counsel was ineffective for failing to pursue the doubtful defense.

Sosnowicz objects that Judge Morrissey and the Court of Appeals reached the wrong conclusion based on the evidence presented at trial. He quotes several trial witnesses who testified that he was unconscious after getting into a physical altercation with the victim. Doc. 23 at 17-18. But these witnesses merely testified that he was "unconscious *for a few seconds*" and looked "kind of out of

it" after the altercation. *Id.* (emphasis added). Given that the jury heard this witness testimony at trial and still found Sosnowicz guilty of second-degree murder, the Court cannot conclude that a more effective presentation of an involuntary defense theory would have changed the result.

Because Sosnowicz has not shown that this IAC claim is a substantial one, he cannot argue under *Martinez* that his PCR counsel was ineffective for failing to raise it. *Sexton*, 679 F.3d at 1157. The Court will adopt Judge Morrissey's conclusion that the involuntary conduct defense in ground one is procedurally defaulted.

2. Ground One – Plea Negotiations.

Ground one also alleges that Sosnowicz's trial counsel was ineffective for not explaining that he could be convicted if the jury found he acted recklessly, which in turn led him to reject a favorable plea offer. In evaluating trial-counsel IAC claims in the context of plea negotiations, the Court looks "not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plea pursuant to the terms earlier proposed." *Missouri v. Frye*, 566 U.S. 134, 142 (2012).[8]

Judge Morrissey concluded that this underlying IAC claim was not substantial because there was no evidence that Sosnowicz would have accepted the favorable plea

[8] In the context of plea negotiations, petitioners making a trial counsel IAC claim must also show that "such a plea would have been acceptable to both the state and the court[.]" *Clark v. Lewis*, 1 F.3d 814, 823 (9th Cir. 1993). These prerequisites appear to be satisfied here because the government extended the plea offer and, for reasons about to be explained, it appears that Sosnowicz may have rejected it at a time when he did not know of the recklessness standard. Doc. 15-1 at 101. More evidence is needed on this point.

offer had he known he could be convicted of second-degree murder for mere recklessness. Sosnowicz objects that the record demonstrates his clear belief, when rejecting the plea offer, that he could be convicted for intentional conduct only. Doc. 23 at 5-16.

The Court has reviewed the record and cannot conclude that it supports Judge Morrissey's conclusion. At an October 2009 settlement conference, the parties reviewed the terms of the government's plea offer and Sosnowicz stated that he wanted to go to trial. Doc. 15-1 at 81-83. Sosnowicz and his counsel confirmed that they had reviewed and discussed the plea deal, including the sentencing range he faced if convicted at trial. *Id.* at 83. Sosnowicz stated that he understood the terms of the plea offer "perfectly," and was making an informed decision to proceed with trial despite the risks involved. *Id.* at 81-83. When asked whether he had any questions for the court or the government, he answered no. *Id.* at 82.

Based on this transcript, Judge Morrissey concluded that Sosnowicz had been fully apprised by his counsel regarding the terms of the offer. Doc. 20 at 11. But as Sosnowicz notes, at no point during the settlement conference was the recklessness component of his second-degree murder charge ever mentioned. Doc. 23 at 7-8. In an affidavit submitted at his second PCR proceeding, Sosnowicz claims that his trial lawyer, Ewa Lockard, never explained that a finding of guilt could be based on reckless conduct, and that Lockard's replacement, George Gaziano, urged him to proceed to trial without explaining that "simply acting recklessly was enough to lead to a murder conviction." See Doc. 15-3 at 26-27, ¶¶ 6, 11. If, as Sosnowicz contends, he was unaware of the recklessness component of second-degree murder, he would have no reason to ask questions of the trial court or government at the October 2009 hearing.

At a June 2, 2010 evidentiary hearing, the judge again raised the subject of a possible plea agreement. Doc. 15-1 at 100-02. The judge noted that the plea offer extended by the state had expired – "[a]t this time there is no offer extended to you" (*id.* at 100) – but said she would ask the state to re-extend the offer if a settlement looked possible (*id.* at 101). After reviewing the previously-offered terms, the principle [*sic*] feature of which was that Sosnowicz's sentences on the various counts would be served concurrently rather that consecutively, the judge asked Sosnowicz if he was interested in further settlement talks. *Id.* at 102. Sosnowicz responded:

> Your honor, I've already made this decision with my counsel. The fact is I didn't do anything intentionally, so I can't sign for what they are asking for. I would be willing to settle, but not for something – I am a man and I understand that an accident happened, but I can't admit to something I didn't do.

Id. at 102-03. This statement seems clearly to reflect an understanding that intentional conduct was required to establish guilt on the murder charge – that Sosnowicz thought he would have to admit intentional conduct as part of the plea deal. It also implies that Sosnowicz would be willing to settle if he did not have to make this admission.

After Sosnowicz made this statement, the prosecutor provided the following clarification:

Judge, just also so that the defendant is clear and the Court is clear, the second-degree murder is charged intentional or knowing or reckless, so a jury has three different options and can find, again, not perhaps what the State believes happened, but the jury could find that his actions were reckless and still come back as a second-degree murder conviction.

Id. at 104 (emphasis added). The judge responded: "thank you, counsel. That's important to know." *Id.*

Sosnowicz's immediate response was to express confusion: "I have a question about reckless. Is it a voluntary recklessness or involuntary recklessness?" *Id.*[9] The judge responded that Sosnowicz's counsel could explain that with the statute book. *Id.*

Sosnowicz then engaged the judge in questions about consecutive versus concurrent sentences and who qualifies as a victim. *Id.* at 105-108. After this exchange, the judge adjourned the hearing and emptied the courtroom so Sosnowicz could speak with his lawyer about what had been said. *Id.* at 108.

Upon returning to the courtroom, the judge stated that defense counsel "indicated to me that his client was open to discussion." *Id.* at 109. The prosecutor then explained that Sosnowicz had expressed "an interest in exploring not necessarily the original offer, but… a more limited offer[.]" *Id.* She then explained: "before we went any further to see if he wanted to go back and reconsider the initial offer, pleading to all charges concurrent, before we went down that road, it was my suggestion that I contact my supervisors." *Id.* She explained that the discussions with her supervisors and the victims' family members resulted in a decision not to extend any plea offer – "we are prepared to go to trial." *Id.* at 110. As a result, discussion of a plea ended and the court proceeded to hear evidentiary issues for trial. *Id.* at 110-11.

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[9] This question suggests Sosnowicz did not understand the concept of recklessness. *See United States v. Begay*, 934 F.3d 1033, 1040 (9th Cir. 2019) ("Reckless conduct, no matter how extreme, is not intentional.").

Judge Morrissey concluded that Sosnowicz's interest in exploring a "more limited offer" suggests that he would not have accepted the original plea deal (Doc. 20 at 13), but the Court cannot reach the same conclusion. After hearing the prosecutor's explanation that the murder charge could be based on recklessness, and talking with his lawyer, Sosnowicz expressed an interest in further settlement talks. Those talks did not occur because the state deferred to the victims' strong preferences and elected not to extend further offers, including the original offer. The prosecutor clearly contemplated further discussion about the original offer – "before we went any further to see if he wanted to go back and reconsider the initial offer, pleading to all charges concurrent, before we went down that road, it was my suggestion that I contact my supervisors" – and yet those discussions never occurred because the state decided not to re-extend the offer. *Id.* at 109.

In sum, recklessness was never mentioned during the October 2009 settlement conference where Sosnowicz rejected the plea deal. It was only at the June 2010 hearing that the government clarified on the record that Sosnowicz could be convicted for reckless conduct. Sosnowicz immediately expressed uncertainty about whether recklessness encompassed both involuntary and voluntary conduct and, after conferring with his counsel, expressed an interest in revisiting plea discussions. Those discussion never occurred, however, because the state decided not to engage in further discussions. These events could support Sosnowicz's claim that he was unaware that a second-degree murder conviction encompassed reckless conduct when he rejected the original offer.

The Court concludes that it should receive further evidence on whether Sosnowicz's trial counsel informed him of the recklessness standard before he rejected the

original plea offer. Further evidence about what was said during the recess in the June 2, 2010 hearing might also be relevant in determining why Sosnowicz rejected the original offer.

3. *Martinez* Prejudice.

Under the second prong of *Martinez*, Sosnowicz must show that he was prejudiced by his PCR counsel's failure to raise his trial-counsel IAC claim during post-conviction proceedings – in other words, that there was "a reasonable probability that the trial-level IAC claim would have succeeded had it been raised." *Hooper v. Shinn*, 985 F.3d 595, 627 (9th Cir. 2021) (internal citations and quotation marks omitted). The Court will address this issue after receiving further evidence.[10]

V. Appointment of Counsel.

Further evidence is required to determine whether Sosnowicz can established cause and prejudice sufficient to excuse his procedural default under *Martinez* on the portion of ground one discussed above. *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) ("[A] district court may

[10] Sosnowicz also objects that his initial PCR proceeding – where he failed to raise his trial-counsel IAC claims – is void because he was represented by Bassett, the attorney whom the Arizona State Bar admonished for also representing Sosnowicz on direct appeal. Doc. 23 at 3-4. He argues that the Court should consider his second PCR proceeding as operative given Bassett's professional misconduct. *Id.* at 4. The Arizona Court of Appeals already rejected this argument in its review of Sosnowicz's second PCR proceeding: "no Arizona authority has held an initial Rule 32 proceeding is 'void'… because a defendant was represented in that matter by the same attorney who represented him on appeal." *State v. Sosnowicz*, No. 2 CA-CR 2018-0058-PR, 2018 WL 3472027, at *2 (Ariz. Ct. App. July 18, 2018). Sosnowicz cites no authority requiring the Court to reach a different conclusion.

take evidence to the extent necessary to determine whether the petitioner's claim of ineffective assistance of trial counsel is substantial under *Martinez*."). The Court will withhold ruling on this ground one claim until the record has been further developed.

The Court will appoint counsel to represent Sosnowicz in the further presentation of evidence. *See* 18 U.S.C. § 3006A(a)(2) (providing the Court with the discretion to appoint counsel when it determines that "the interests of justice so require[.]"); *see also Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986). Within 30 days of the filing date of this order, the selected attorney must file a notice of appearance. The parties should then promptly and jointly contact the Court to schedule a status conference to discuss procedures for the presentation of additional evidence.

VI. Certificate of Appealability.

Judge Morrissey recommended that the Court deny a certificate of appealability. Doc. 20 at 22. Sosnowicz objects by repeating his habeas arguments and asserting that "this case does have merit and should be heard." Doc. 23 at 2. On the same day he filed his objection, Sosnowicz filed a motion for certificate of appealability that restates the arguments made in his habeas petition and objection. Doc. 24. With respect to grounds two through five, and the involuntary conduct defense in ground one, the Court concludes that Sosnowicz has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. §2253(c)(2), and reasonable jurists would not find his constitutional claims debatable or wrong, *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court will accept Judge Morrissey's recommendation that the certificate of appealability be denied as to these claims. The Court will consider whether a certificate of appealability is

appropriate for the remaining ground one claim after it has considered further evidence.

IT IS ORDERED:

1. Judge Morrissey's R&R (Doc. 20) is **accepted** with respect to the involuntary conduct defense in ground one and grounds two through five. Sosnowicz's habeas corpus petition (Doc. 1) and motion for certificate of appealability (Doc. 24) are **denied** with respect to these claims.

2. The Court **withholds ruling** on ground one's claim of ineffective assistance of trial counsel associated with rejection of the original plea offer.

3. The Court's staff will contact the Federal Public Defender and request the designation of counsel to represent Sosnowicz, pursuant to the Criminal Justice Act, in the evidentiary issues related to his ground one *Martinez* claim.

4. Within **30 days** of the filing date of this order, the selected attorney must file a notice of appearance, and the parties must promptly and jointly contact the Court to schedule a status conference.

Dated this 30th day of June, 2021.

s/David G. Campbell
David G. Campbell
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jonathan Leigh Sosnowicz, Petitioner, vs. David Shinn, et al., Respondents.	No. CV-20-00040-PHX-DGC (MTM) **REPORT AND RECOMMENDATION**

TO THE HONORABLE DAVID G. CAMPBELL, SENIOR UNITED STATES DISTRICT JUDGE:

Petitioner Jonathan Leigh Sosnowicz filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2554. (Doc. 1).

I. SUMMARY OF CONCLUSION

In 2010, Petitioner was convicted and sentenced by the Maricopa County Superior Court on one count of second-degree murder and three counts of aggravated assault. He was denied relief by the state courts on direct appeal and in two post-conviction relief proceedings. He then filed this timely Petition asserting five grounds for relief. Grounds One, Four, and Five are procedurally defaulted; Ground Three is not cognizable; and Ground Two lacks merit. Because Petitioner is not entitled to relief on any grounds stated in the Petition, the Court recommends that the Petition be denied and dismissed with prejudice.

II. BACKGROUND

A. Conviction & Sentencing.

On September 10, 2010, following a trial by jury, the Maricopa County Superior Court convicted and sentenced Petitioner on one count of second-degree murder (Count 1) and three counts of aggravated assault (Counts 2–4). (Doc. 15-2, Ex. U at 391–95). The Arizona Court of Appeals set forth the following facts in Petitioner's direct appeal:

> The evidence at trial revealed that at approximately 2:00 a.m. on November 16, 2008, the now deceased victim, J.P., and his friends and family members were exiting a bar when a "white Hummer [ ] pulled in rather quickly, stopped… in a couple handicapped spots at an angle with the windows down, radio blaring." J.P.'s friend, Ryan, said to J.P. that "people that drive a Hummer have a small penis and they are trying to [over]compensate." Defendant's then-girlfriend, Leah T., testified that defendant heard the comment. Defendant was in the driver's seat of the vehicle and he responded, "I will whip it out right here if you want[.]" After more words were exchanged, J.P. said to defendant, "Stay in the vehicle. You don't want to do this. Stay in your car." J.P. positioned himself in front of the driver's side door and as defendant repeatedly attempted to get out of the vehicle, J.P. repeatedly told defendant to "stay in the car and leave." Nevertheless, defendant and the passengers exited the vehicle and defendant "spear tackled" J.P. to the ground. Ryan attempted to "get [defendant] off of [J.P.] and he wouldn't get off, then [Ryan] hit [defendant] in the side of the head." Defendant fell "on his back" and J.P. "hit" defendant in the face. Defendant appeared "dazed" and J.P. stood "up over [defendant and] put[ ] his hand down to help [defendant] up." J.P. pulled

> defendant up and told defendant "it's over" and "get out of here." Defendant appeared "angry" and "frustrated" and got back in the vehicle. Ryan testified that after defendant drove south and away from the area, he then "heard a rev and little bit of a screech, and turned around and saw the [Hummer] headed straight for us." Ryan saw "the Hummer strike [J.P.] going over him" with "[t]he right side tires." Defendant then drove the Hummer out of the parking lot.

State v. Sosnowicz, 270 P.3d 917, 919–21 (Ariz. Ct. App. 2012) (brackets in original).[1] For Count 1, Petitioner was sentenced to 22 years in prison. (*Id.* at 393). For Counts 2–4, Petitioner was sentenced to three concurrent 8.5-year prison terms, consecutive to the 22 year term for Count 1. (*Id.*).

B. Direct Appeal.

On June 13, 2011, Petitioner appealed his convictions and sentences to the Arizona Court of Appeals. (Doc. 15-2, Ex. V at 397–419). On March 8, 2012, the Arizona Court of Appeals affirmed the convictions and sentences in two concurrently filed decisions. *State v. Sosnowicz*, 270 P.3d 917, 926 (Ariz. Ct. App. 2012); No. 1 CA-CR 10-0789, 2012 WL 1843716, at *1 (Ariz. Ct. App. Mar. 8, 2012) (memorandum decision).[2] First, in a published opinion, the Court held that admission of the medical examiner's testimony that the victim's death was a homicide was harmless error. *Sosnowicz*, 270 P.3d at 918–19. Second, in a memorandum decision, it held that the trial court did not

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[1] Under 28 U.S.C. § 2254(e)(1), the Court presumes the state court's recounting of the facts is correct.

[2] These opinions are also in the record. (*See* Doc. 15-2, Ex. Y at 478–505 [published opinion], Ex. Z at 507–08 [memorandum decision]).

err in precluding evidence of the victim's blood alcohol content level. *Sosnowicz*, 2012 WL 1843716, at *1. Petitioner did not seek review by the Arizona Supreme Court, and on August 28, 2012, the Arizona Court of Appeals issued its mandate. (Doc. 15-2, Ex. Y at 478).

C. Post-Conviction Relief ("PCR") Proceedings.

1. First Petition for Post-Conviction Relief.

On September 24, 2012, Petitioner, through the same counsel who prepared his direct appeal, filed a notice of PCR pursuant to Ariz. R. Crim. P. 32[3] with the Maricopa County Superior Court. (Doc. 15-2, Ex. AA at 510–11). On April 12, 2013, Petitioner, through counsel, filed an accompanying PCR petition claiming that his trial counsel rendered ineffective assistance of counsel ("IAC") by: (1) failing to object to comments by the prosecution that Petitioner had two girlfriends and that the jury could consider these facts in determining his credibility and (2) calling witnesses who were drunk at the time of the incident and who only provided damaging testimony. (Doc. 15-2, Ex. BB at 513–22).

[3] The Arizona Supreme Court abrogated the version of Rule 32 in effect at the time of Petitioner's state court proceedings and adopted new Rule 32 and new Rule 33 effective January 1, 2020. *See* Ariz. Sup. Ct. Order No. R–19–0012, *available at* https://www.azcourts.gov/rules/Recent-Amendments/Rules-of-Criminal-Procedure. The substance of former Rule 32 was divided between the two new rules based on whether a defendant was convicted at trial (new Rule 32) or had pleaded guilty or no contest (new Rule 33). *See id.* Because Petitioner's state court actions were filed prior to January 1, 2020, the former Rule 32 applies to Petitioner's case. *See Demaree v. Sanders*, No. CV 18-00394-TUC-EJM, 2020 WL 2084582 *2 n.4 (D. Ariz. Apr. 30, 2020). References to the Arizona Rules of Criminal Procedure in this Report are to the pre-amendment Rules.

On October 21, 2013, the PCR court summarily dismissed the PCR petition. (Doc. 15-2, Ex. EE at 552). On March 13, 2014, Petitioner filed a petition for review in the Arizona Court of Appeals. (Doc. 15-2, Ex. FF at 554–569). On April 13, 2016, in a memorandum decision granting review but denying relief, the Arizona Court of Appeals held that the PCR petition was defective for failing to identify the relevant standard for ineffective assistance of counsel, which "alone warrant[ed] the denial of relief," and that Petitioner also failed to demonstrate that his trial "counsel's conduct had no reasoned basis." (Doc. 15-2, Ex. GG at 585–87). Further, it held that "even assuming counsel's performance had been deficient, [Petitioner] ha[d] not shown the result of the proceeding would have been different." (*Id.* at 587). Petitioner did not seek review by the Arizona Supreme Court, and on December 14, 2016, the Arizona Court of Appeals issued its mandate. (Doc. 15-2, Ex. II at 591).

2. Second Petition for Post-Conviction Relief.

On March 17, 2017, Petitioner, through new counsel, filed a second, successive notice of PCR (doc. 15-2, ex. JJ at 593–98) and accompanying PCR petition, raising three grounds for relief (doc. 15-3, ex. KK at 1–132).

First, Petitioner again claimed that his trial counsel rendered IAC, this time arguing that trial counsel was ineffective for: (1) failing to explain that he could be found guilty if the jury found he acted intentionally, knowingly, or recklessly, which led him to reject a favorable plea offer, and (2) failing to competently investigate, research, and present a defense of involuntary act and lack of criminal intent, due to semi-conscious conduct by him following his being knocked out by the victim. (*Id.* at 2–3).

Second, Petitioner claimed that his appellate counsel also rendered IAC. (*Id.* at 3). Specifically, Petitioner

argued that his appellate counsel was ineffective for failing to litigate on direct appeal: (1) whether the trial court's preclusion of expert testimony and evidence indicating that he suffered from the neurological effects of being knocked unconscious by the victims and thereby acted involuntarily and without criminal intent while driving his vehicle toward the victims deprived him of his right to present a complete defense in violation of the Sixth and Fourteenth Amendments and (2) whether the admission of prior bad act evidence violated his right to a fair trial under the Fourteenth Amendment. (*Id.*).

Third, Petitioner claimed that he was actually innocent based "[u]pon consideration of all available evidence, including expert testimony indicating that [he] was semi-conscious and acting involuntarily at the time he drove his vehicle toward the victims." (*Id.*).

On May 12, 2017, the PCR court dismissed Petitioner's claims of ineffective assistance of trial counsel as precluded under Ariz. R. Crim. P. 32.2(a)(3).[4] (Doc. 15-3, Ex. LL at 136–37). The Court found that Petitioner's claims of ineffective assistance of appellate counsel and actual innocence were not precluded. (*Id.*). Following briefing, the PCR court summarily dismissed those claims on August 14, 2017, holding that Petitioner made no "colorable" claim of ineffective assistance of appellate counsel and had not demonstrated actual innocence. (Doc. 15-3, Ex. OO at 178). On May 22, 2020, Petitioner filed a petition for review in the Arizona Court of Appeals. (Doc. 15-3, Ex. PP at 181–207). On July 18, 2018, the Arizona Court of Appeals granted review but denied relief, affirming the conclusions of the PCR court. (Doc. 15-4, Ex.

[4] Ariz. R. Crim. P. 32.2(a)(3) provides that "[a] defendant is precluded from relief under Rule 32 based on any ground… waived at trial, on appeal, or in any previous collateral proceeding."

SS at 2–9). On April 1, 2020, the Arizona Supreme Court denied review. (Doc. 15-4, Ex. UU at 15).

III. PETITION FOR WRIT OF HABEAS CORPUS

On January 6, 2020, Petitioner filed the instant Petition for a Writ of Habeas Corpus. (Doc. 1). Respondents filed a Limited Answer to the Petition (doc. 15), and Petitioner filed a Reply (doc. 19). As summarized by this Court, Petitioner raises five grounds for relief:

In Ground One, Petitioner alleges that he was denied the effective assistance of counsel

> in his postconviction proceedings where postconviction counsel failed to raise an ineffective assistance of trial counsel claim. In Ground Two Petitioner alleges that he was denied the effective assistance of counsel in his postconviction proceedings where postconviction counsel failed to raise an ineffective assistance of appellate counsel claim. In Ground Three, Petitioner alleges that he was denied the effective assistance of counsel in his postconviction proceedings where the evidence showed that Petitioner's conduct was involuntary and that he was actually innocent. In Ground Four, he alleges the trial court erred in admitting certain testimony of the medical examiner in violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment rights. In Ground Five, he alleges that trial counsel rendered ineffective assistance by failing to object to certain evidence and arguments of the prosecutor and by calling defense witnesses who were intoxicated at the relevant time in violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment rights.
>
> (Doc. 4 at 2).

IV. PROCEDURAL CONSIDERATIONS

A. Timeliness.

1. Legal Standards.

"The federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a 1-year statute of limitations for filing a federal habeas corpus petition." *Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (citing 28 U.S.C. § 2244(d)(1)); *see White v. Klitzkie*, 281 F.3d 920, 922 (9th Cir. 2002). Whether a petition is barred by this 1-year statute of limitations is a threshold issue the Court must resolve before considering other procedural issues or the merits of an individual claim. *See White*, 281 F.3d at 921–22. In general, the limitation period begins on "the date on which the judgment became final by the conclusion of direct review or the expiration of such time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). If a petitioner does not appeal to the state's highest court, the judgment becomes "final" when the time for seeking review with the state's highest court expires. *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). "The time during which a properly filed application for State post-conviction or other collateral review . . . is pending [is] not [] counted toward [the] period of limitation." 28 U.S.C. § 2244(d)(2). A "*properly* filed" application is one which complies with "applicable laws and rules governing filings," including time limits for filing. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (emphasis in original); *see also Pace*, 544 U.S. at 417 (holding that a petition for post-conviction relief held untimely under state law is not "properly filed" and thus

not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2)).

2. The Petition is timely.

Following his conviction, Petitioner timely appealed to the Arizona Court of Appeals, which affirmed his convictions and sentences on March 8, 2012. *Sosnowicz*, 270 P.3d at 926; 2012 WL 1843716, at *1. Under the Arizona Rules of Criminal Procedure, Petitioner had 35 days–*i.e.*, up to and including April 12, 2012–to file a petition for review with the Arizona Supreme Court. *See* Ariz. R. Crim. P. 31.21(b)(2)(A). Petitioner did not file a petition for review and his judgment therefore became "final" for purposes of 28 U.S.C. § 2244(d)(1)(A) on April 13, 2012. *See Gonzales*, 565 U.S. at 150. Thus, absent statutory or equitable tolling, the habeas petition was due by April 14, 2013.

However, prior to April 14, 2013, Petitioner filed his first notice of PCR on September 24, 2012, thereby tolling the statute of limitations. (Doc. 15-2, ex. AA at 509–11). The limitation period was tolled until the first PCR proceedings concluded on December 14, 2016 when the Arizona Court of Appeals issued its mandate. (Doc. 15-2, Ex. II at 590–92). The limitation period began running again on December 15, 2016 and did so until it was again tolled on March 16, 2017 when Petitioner filed a second, successive PCR notice and petition. (Doc. 15-2, Ex. JJ at 593–98; Doc. 15-3, Ex. KK at 1–132). Between December 15, 2016 and March 16, 2017, Petitioner accumulated 92 days of expired time. The limitation period was tolled until the conclusion of the second PCR proceedings on April 1, 2020 when the Arizona Supreme Court denied review. (Doc. 15-4, Ex. UU at 15). At this point, Petitioner had 273 days (365 days minus 92 days of already-expired time)–*i.e.*, until December 30, 2020–to file a timely habeas

petition. Therefore, because Petitioner filed his petition on January 6, 2020, it is timely.

B. Exhaustion & Procedural Default.

1. Legal Standards.

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotation marks and citations omitted). "To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court… thereby alerting that court to the federal nature of the claim." *Id.* (internal citations omitted); *see Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011) ("In order to fairly present a claim, the petitioner must clearly state the federal basis and federal nature of the claim, along with relevant facts."). Claims of Arizona state prisoners not sentenced to life in prison or death "are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them." *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *see Moreno v. Gonzalez*, 962 P.2d 205, 207–08 (Ariz. 1998).

"In addition to the exhaustion requirement, a federal court may not hear a habeas claim if it runs afoul of the procedural bar doctrine." *Cooper*, 641 F.3d at 327. "[C]laims can be procedurally defaulted even if they are not exhausted." *Id.* at 328. Specifically, a federal court may not review a claim "that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). "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." *Id.* A state court may apply a procedural bar in denying or dismissing a claim while also addressing the merits of the claim in the alternative without vitiating the procedural bar ruling. *Comer v. Schriro*, 480 F.3d 960, 964 n.6 (9th Cir. 2007) (internal citation omitted). "A prisoner who fails to comply with state procedures cannot receive federal habeas corpus review of a defaulted claim unless the petitioner can demonstrate either cause for the default and resulting prejudice, or that failure to review the claims would result in a fundamental miscarriage of justice." *Moormann v. Schriro*, 426 F.3d 1044, 1058 (9th Cir. 2005) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

2. Ground One is procedurally defaulted.

In Ground One, Petitioner reasserts the ineffective-assistance-of-trial-counsel claims of his second PCR petition, namely, that his trial counsel was ineffective for: (1) failing to explain to Petitioner that he could be found guilty if the jury found he acted intentionally, knowingly, or recklessly, which led him to reject a favorable plea offer, and (2) failing to competently investigate, research, and present a defense of involuntary act and lack of criminal intent, supported by admissible expert witness testimony, due to semi-conscious conduct by him following his being knocked out by the victim and assaulted by others. (Doc. 1 at 6). Ground One is procedurally defaulted without adequate excuse and consequently barred from this Court's review.

As discussed *supra* in Section II(C)(2), the second PCR court dismissed the claims of Ground One as precluded under Ariz. R. Crim. P. 32.2(a)(3) for Petitioner's failure to timely raise them during the first PCR proceeding. (Doc. 15-3, Ex. LL at 136–37). Because

Ariz. R. Crim. P. 32.2(a)(3) is an independent (nonfederal) and adequate basis for denying relief, the claims of Ground One are procedurally defaulted and therefore barred from this Court's review. *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014) (internal citations omitted) ("Arizona's waiver rules are independent [nonfederal] and adequate bases for denying relief."); *see Stewart v. Smith*, 536 U.S. 856, 861 (2002) (holding that denials pursuant to Arizona's waiver rule, Ariz. R. Crim. P. 32.2(a), are "independent of federal law").

Nonetheless, Petitioner argues that his procedural default should be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012) because his first PCR counsel was allegedly ineffective for failing to timely raise them during the first PCR proceeding. (Doc. 1 at 6). In *Martinez*, the Supreme Court held that the failure of counsel to raise an ineffective-assistance-of-trial-counsel claim "in an initial-review collateral proceeding qualifies as cause for a procedural default." *Id.* at 13. To establish cause, a prisoner must demonstrate: (1) that "counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)" and (2) that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 14; *see Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012).

A defendant has a Sixth Amendment right to effective assistance of counsel. *Strickland*, 466 U.S. at 685; *see Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (the right to effective assistance of counsel applies to the plea bargaining process). To claim a violation of this right, a prisoner must show: (a) "that counsel's representation fell below an objective standard of reasonableness" and (b) "a

reasonable probability that, but for counsel's error the result would have been different" (the "prejudice" element). *Strickland*, 466 U.S. at 687–96. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* at 688. Here, neither of Petitioner's underlying IAC of trial counsel claims are "substantial," and therefore his overarching claim of IAC of first PCR counsel is without merit and does not establish cause under *Martinez* to excuse the procedural default of Ground One.

As to the first IAC of trial counsel claim, the record does not support Petitioner's contention that he would have accepted a favorable plea offer but for the alleged ineffectiveness of trial counsel in failing to explain to him that the jury could convict him if it found he acted recklessly. "At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea." *Frye*, 566 U.S. at 142. In determining whether the prejudice element of *Strickland* has been met in the context of plea negotiations, the Court looks "not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed." *Id.* at 148; *see Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2002) ("[T]o satisfy the 'prejudice' requirement, [a petitioner] must show that, but for counsel's errors, he would have pleaded guilty and would not have insisted on going to trial.").

On October 2, 2009, the trial court held a settlement conference following the exchange of plea offers between

Petitioner and the prosecution. (Doc. 15-1, Ex. G at 73–85). The record demonstrates that Petitioner's decision to proceed to trial, and reject the State's plea offer, was a fully informed decision, and one made by Petitioner himself. In particular, Petitioner did not have any question for the court, or the State, regarding his exposure to a guilty verdict at based on a potential finding by the jury that his conduct had been reckless.

> COURT: So my first question for you is whether there's anything about what I've said or what the prosecutor has said that you don't understand or you want to have cleared up or more information?
>
> PETITIONER: I understand perfectly.
>
> COURT: So you understand what the sentencing range is if you go to trial and are convicted and what the sentencing range is under the plea?
>
> PETITIONER: Yes, your Honor.
>
> COURT: Is there anything else about the case that you want to discuss or ask, either me or the prosecutor at this point in time?
>
> PETITIONER: Not at this time, no.
>
> ***
>
> COUNSEL: I just want to put on the record that I obviously did discuss – as my client's stated, he does understand the sentencing range. He understands the plea and he understands that the plea deadline is today. And he would like to exercise and choose his right to a jury trial.
>
> COURT: Sir, I need to hear from you directly. You understand that the plea offer expires today?
>
> PETITIONER: I do understand, your Honor.

(*Id.* at 81–83). At a subsequent evidentiary hearing on June 2, 2010, Petitioner's colloquy with the Court demonstrates that his decision to reject the State's plea offer had not been based upon ignorance that he could be convicted on a recklessness theory, but rather was based on the Petitioner's view that the plea offer had required an excessive sentence. (Doc. 15-1, Ex. I at 97–131). When asked by the Court whether he wished to reconsider his rejection of a plea offer, Petitioner responded:

> Your Honor, I've already made this decision with my counsel. The fact is I will say it was a terrible tragedy what happened. The fact is I didn't do anything intentionally, *so I can't sign for what they are asking for*. I would be willing to settle, but not for something – I am a man and I understand that an accident happened, but I can't admit to something I didn't do.

(*Id.* at 102–03) (emphasis added). When the prosecutor noted that "the second degree murder is charged intentional or knowing or reckless, so a jury has three different options and can find… that his actions were reckless and still come back as a second degree murder conviction" (*id.* at 104), Petitioner's response demonstrated his previous familiarity with the concept of recklessness. Rather than express surprise at the State's theory, Petitioner responded:

> PETITIONER: I have a question about reckless. Is it a voluntary recklessness or involuntary recklessness?
>
> PROSECUTION: I think your counsel can better explain that with the statute book.

(*Id.* at 104). In response to the Court's offer of a recess, Petitioner raised a question–not about his exposure on a

recklessness theory–but about concurrent versus consecutive sentences:

> COURT: I am happy to take a short recess and give you a statute book so that you can sit with your counsel and see it. If you look at the statute and you think maybe you can make a factual basis for reckless, be it intentional or not intentional if it falls there, concurrent sentences are way better than consecutive sentences.
>
> PETITIONER: Well, I totally agree with you, Your Honor. *I have a question about* – I understand that you said you haven't looked at any of the facts of the case yet. We are just getting started now, but before we get to the meat and potatoes of the case, *you're already saying that I am going to have the charges stacked if I lose. Is that a jury decision or your decision?*

(*Id.* at 104–05)(emphasis added). Upon the Court's explanation of the legal presumption of consecutive sentences, Petitioner responded that while in custody:

> I have seen a lot of trials going on and I seen a lot of things happen. I have seen people who get concurrent sentences for things that, okay, they got found guilty of multiple chares and multiple victims and I sent them stacked certain charges, and I seen them run concurrent on other charges, so I was trying to figure out what do they base that on.

(*Id.* at 106). After Petitioner and the Court engaged in further lengthy colloquy regarding consecutive versus concurrent sentences (*id.* at 106–08), the Court permitted a recess for Petitioner to confer with his counsel. Upon reconvening, the prosecutor informed the Court that Petitioner had expressed "an interest in exploring not necessarily the original offer, but come back with a more limited offer." (*Id.* at 109). Ultimately, the State declined

to revisit plea negotiations, and the evidentiary hearing proceeded.

The record contradicts Petitioner's assertion that inadequate advice from his trial counsel caused him to reject the State's plea offer. Though Petitioner ultimately did not plead guilty, the Court is entitled to credit Petitioner's statements during the plea discussions over representations made in the Petition as to what Petitioner did or did not understand. *Cf. Muth v. Fondren*, 676 F.3d 815, 821 (9th Cir. 2012) ("Petitioner's statements at the plea colloquy carry a strong presumption of truth."). Petitioner has failed to establish the factual predicate of the claim–the record does not support that Petitioner, at the time he rejected the State's plea offer, did not understand, based on inadequate advice, that he could be convicted of second degree murder on a based on reckless conduct. *See Clark v. Chappell*, 936 F.3d 944, 969 (9th Cir. 2019) ("[W]hen a defendant receives the necessary information to make a call, the fact that the ultimate decision is left to him does not render counsel absent or ineffective.") (internal quotation marks and citation omitted). Further, Petitioner's position at the evidentiary hearing–even after the prosecutor emphasizing that the jury could convict him of second degree murder if it found his conduct to be reckless (doc. 15-1, Ex. I at 104)–was that he still would not take the State's plea offer but proposed a different one of his own. (*Id.* at 109). Accordingly, Petitioner has not shown that he suffered any prejudice from counsel's representation, as it is clear that he insisted on a trial rather than accept the State's first and only plea offer. *See Turner*, 281 F.3d at 879 ("[T]o satisfy the 'prejudice' requirement, [a petitioner] must show that,

but for counsel's errors, he would have pleaded guilty and would not have insisted on going to trial.").

The second underlying IAC of trial counsel claim is similarly without merit. In light of the overwhelming evidence of guilt presented during trial, Petitioner fails to show that trial counsel's failure to present a theory of involuntary act and lack of criminal intent would have produced a different result at trial. *See Strickland*, 466 U.S. at 695 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). As noted by the Arizona Court of Appeals:

> Defendant was visibly angry after a physical altercation with J.P. Defendant then got in the vehicle and drove it out of the direct line of sight of the victims and returned shortly thereafter. Multiple witnesses saw defendant drive "as fast as [he] could," with the engine "rev[ved]," hit J.P. from behind, and "[throw] him forward." *Defendant admitted he saw people in front of him, but did not attempt to brake before he struck and fatally injured J.P. with the vehicle*; neither did he remain at the scene and attempt to render aid. Instead, defendant, who testified that he believed he had run over a curb, left the parking lot with his friends and proceeded to purchase and use cocaine before returning to his residence. Although he initially told a paramedic and a police officer that he did not remember what happened that evening after he hit his head on the pavement, *after the jail audiotape of his statement that he "remembered everything ... that happened" was played for the jury, he admitted his initial statements were untruthful.* The evidence that defendant intentionally aimed his vehicle at the group of persons—including J.P.—with whom he had the altercation, is extremely strong.

Sosnowicz, 270 P.3d at 925 (brackets in original) (emphasis added). The Court of Appeals concluded that Petitioner's "explanation that he was still dazed as a result of the fight, when coupled with his subsequent actions, [was] not plausible." *Id.* Similarly here, there is no reasonable probability that the outcome of trial would have been any different had defense counsel presented a theory of involuntary act and lack of criminal intent where that theory was squarely contradicted by the evidence, namely, Petitioner's admissions that he saw people in front of him but did not attempt to brake when he drove his vehicle toward the victims and that he had remembered everything that happened. Counsel is not ineffective for failing to investigate and present a theory that is unsupported or contradicted by evidence. *See Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012) ("Counsel is not necessarily ineffective for failing to raise even a nonfrivolous claim, so clearly we cannot hold counsel ineffective for failing to raise a claim that is meritless.") (internal citation omitted); *Bean v. Calderon*, 163 F.3d 1073, 1082–83 (9th Cir. 1998) (rejecting claim that trial counsel was ineffective for failing to present and investigate a defense theory that lacked support from the record and was in conflict with other evidence); *cf. Strickland*, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."). Accordingly, Petitioner fails to show that his second underlying IAC of trial counsel is substantial.

In sum, because neither of Petitioner's underlying IAC of trial counsel claims are substantial, his overarching IAC of first PCR counsel claim is without merit and therefore insufficient under *Martinez* to establish cause for the procedural default of his claims in

Ground One of his habeas petition. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); *Sexton*, 679 F.3d at 1157 ("PCR counsel would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective."). Accordingly, the claims of Ground One are procedurally defaulted and consequently barred from this Court's review.

3. Ground Four is procedurally defaulted.

In Ground Four, Petitioner reasserts his claims raised on direct appeal to the Arizona Court of Appeals, namely, that the trial erred by: (1) permitting the medical examiner to testify that the victim's death was a homicide and (2) precluding the medical examiner from testifying as to the victim's blood alcohol content level. (Doc. 1 at 17). Ground Four is unexhausted, and procedurally defaulted, and consequently barred from this Court's review.

Petitioner's claims are unexhausted, because when Petitioner presented them to the Arizona Court of Appeals, he presented them exclusively as violations of *state* law (namely, the Arizona Rules of Evidence and relevant case law); he asserted no federal basis for his claims, nor cited any federal law for their support. (*See* Doc. 15-2, Ex. V at 397–419). Although Petitioner asserts in his Petition that the trial court's actions violated his rights under the Fifth, Sixth, and Fourteenth Amendments (doc. 1 at 17), he made no such assertion before the Arizona Court of Appeals. As such, the claims of Ground Four are unexhausted because they were not "fairly presented" to the Arizona Court of Appeals as

violations of federal law. *See Cooper*, 641 F.3d at 327; *Swoopes*, 196 F.3d at 1010.

The claims of Ground Four are also procedurally defaulted. Specifically, a petitioner may not raise in a Rule 32 PCR proceeding a claim that was "finally adjudicated on the merits in an appeal." Ariz. R. Crim. P. 32.2(a)(2); *see State v. Mata*, 916 P.2d 1035, 1048 (Ariz. 1996). Petitioner is procedurally barred under Ariz. R. Crim. P. 32.2(a)(2) from returning to state court to exhaust the claims of Ground Four, because those claims were finally adjudicated on the merits by the Arizona Court of Appeals when it issued its mandate on August 28, 2012. *See Robinson*, 595 F.3d at 1100; *Beaty*, 303 F.3d at 987. Petitioner asserts no cause for the default nor alleges that failure to review the claims would result in a fundamental miscarriage of justice. Accordingly, the Court recommends the dismissal of Ground Four as unexhausted and procedurally defaulted

4. Ground Five is procedurally defaulted.

In Ground Five, Petitioner reasserts the ineffective-assistance-of-trial-counsel claim from his first PCR petition, namely, that his trial counsel was ineffective for: (1) failing to object to the prosecution's evidence and argument that Petitioner had two girlfriends and (2) calling witnesses who were intoxicated at the time of the incident. (Doc. 1 at 20). Ground Five is procedurally defaulted and consequently barred from this Court's review.

As discussed *supra* in Section II(C)(1), the Arizona Court of Appeals affirmed the first PCR court's summary dismissal of the first PCR petition's IAC claim on the grounds that Petitioner had failed to "identify the relevant standard by which [the court] assess[es] a claim of ineffective assistance, much less explain how his claims

meet that standard." (Doc. 15-2, Ex. GG at 587). The Court held that "[t]his deficiency alone warrant[ed] the denial of relief," citing Arizona case law holding that "insufficient argument waives review on review." (*Id.*). Further, the Court noted that "even assuming counsel's performance had been deficient, [Petitioner] ha[d] not shown the result of the proceeding would have been different." (*Id.*).

Ground Five is procedurally defaulted because the Arizona Court of Appeals applied a nonfederal procedural bar that is firmly established and consistently followed. *See Martinez*, 566 U.S. at 9. The fact that the Court also addressed the merits of the IAC claim does not vitiate the procedural bar. *See Comer*, 480 F.3d at 964 n.6. In determining that the claim was procedurally deficient, the Court relied on state waiver rules that are independent of federal law. (*See id.* (citing *State v. Stefanovich*, 302 P.2d 679, 683 (Ariz. Ct. App. 2013)). Petitioner asserts no cause for the default nor alleges that failure to review the claims would result in a fundamental miscarriage of justice.[5] Therefore, the Court recommends the dismissal of Ground Five as procedurally defaulted.

C. Cognizability.

Ground Three is not cognizable. A federal court "shall entertain an application for a writ of habeas corpus… only on the ground that [the applicant] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In Ground Three, Petitioner argues that he is "actually innocent of all offenses," maintaining that he was semi-conscious and therefore

[5] The Court notes that while Petitioner alleged that ineffectiveness of his first PCR counsel was the cause for the "defaults" of Grounds One through Three (doc. 1 at 6, 12, 15), he did not allege the same for Ground Five (*see id.* at 20–21).

acting involuntarily at the time of the incident. (Doc. 1 at 15–16). However, a claim of actual innocence is not cognizable under 28 U.S.C.§ 2254 and therefore not a basis for habeas relief.[6]

While the Supreme Court has held that a "convincing showing" of actual innocence may enable a petitioner to overcome a procedural bar to consideration of the merits of constitutional claims, *see Schlup v. Delo*, 513 U.S. 298, 327 (1995), it has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence," *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). Similarly, the Ninth Circuit has "only *assumed*, but [] not *held*, that petitioners may bring such a freestanding innocence claim." *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (emphasis added). It added that "relief would be available, if at all, only in very narrow circumstances" and that a petitioner "must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Id.* (internal quotation marks and citation omitted); *see Jones*

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[6] In his Reply, Petitioner asserts that he is not asserting a freestanding claim of actual innocence in Ground Three, but rather, is asserting a claim of IAC of his first PCR counsel for failing to raise a claim of IAC of trial counsel on the grounds that trial counsel was ineffective for failing to argue actual innocence at trial. (Doc. 19 at 6–7). However, this assertion is belied by what Petitioner actually alleged in Ground Three–and what he did not. (*See* Doc. 1 at 15–16). Specifically, Petitioner did not even *mention* trial counsel in Ground Three, much less assert that trial counsel was ineffective for failing to argue actual innocence at trial. (*See id.*). Rather, he presented Ground Three exclusively as a claim of actual innocence and argued that the purported ineffectiveness of *first PCR counsel* was "cause" to excuse its "default." (*Id.* at 15). Accordingly, the Court construes it as a freestanding claim of actual innocence. Moreover, as discussed *supra* in Section II(C)(2), this claim was adjudicated and dismissed on the merits by the PCR II court; thus, there is no "default" to excuse.

v. Taylor, 763 F.3d 1242, 1247 (9th Cir. 2014) ("[A] petitioner must demonstrate that in light of new evidence, it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.") (internal quotation marks and citation omitted). Therefore, the Court recommends the dismissal of Ground Three as not cognizable under 28 U.S.C. § 2254, given that neither the Supreme Court nor the Ninth Circuit have expressly held that a petitioner may obtain habeas relief based on a freestanding claim of actual innocence. *See McQuiggin*, 569 U.S. at 392; *Gimenez*, 821 F.3d at 1145.

Alternatively, if a freestanding claim of actual innocence is cognizable, Petitioner fails to demonstrate that he is actually innocent. Given the "extremely strong" evidence of guilt discussed by the Arizona Court of Appeals in his direct appeal,[7] Petitioner fails to

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[7] Specifically, the Arizona Court of Appeals noted that:

> Defendant was visibly angry after a physical altercation with J.P. Defendant then got in the vehicle and drove it out of the direct line of sight of the victims and returned shortly thereafter. Multiple witnesses saw defendant drive "as fast as [he] could," with the engine "rev[ved]," hit J.P. from behind, and "[throw] him forward." Defendant admitted he saw people in front of him, but did not attempt to brake before he struck and fatally injured J.P. with the vehicle; neither did he remain at the scene and attempt to render aid. Instead, defendant, who testified that he believed he had run over a curb, left the parking lot with his friends and proceeded to purchase and use cocaine before returning to his residence. Although he initially told a paramedic and a police officer that he did not remember what happened that evening after he hit his head on the pavement, after the jail audiotape of his statement that he "remembered everything… that happened" was played for the jury, he admitted his initial statements were untruthful. The evidence that defendant intentionally aimed his vehicle at the group of persons—

demonstrate that no "reasonable juror" would have found him guilty beyond a reasonable doubt, *Jones*, 763 F.3d at 1247, or that he is "probably innocent," *Gimenez*, 821 F.3d at 1145. Therefore, in the alternative, the Court recommends the dismissal of Ground Three for Petitioner's failure to make the requisite showing of actual innocence.

V. MERITS

In Ground Two, Petitioner reasserts the ineffective-assistance-of-appellate-counsel claim of his second PCR petition, namely, that his appellate counsel was ineffective under *Strickland v. Washington*, 466 U.S. 671 (1984) for failing to present and litigate on direct appeal: (1) whether the trial court's preclusion of expert testimony and evidence indicating that he suffered from the neurological effects of being knocked unconscious by the victims and thereby acted involuntarily and without criminal intent while driving his vehicle toward the victims deprived him of his right to present a complete defense in violation of the Sixth and Fourteenth Amendments and (2) whether the admission of remote prior bad act evidence violated his rights to a fair trial under the Fourteenth Amendment. (Doc. 1 at 12–14; *see* Doc. 15-3, Ex. KK at 3). As discussed *supra* in Section II(C)(2), Petitioner presented these claims to each level of the state courts during his second PCR proceeding and was denied relief. (*See* Doc. 15-3, Ex. OO at 178 [PCR court]; Doc. 15-4, Ex. SS at 2–9 [Arizona

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including J.P.—with whom he had the altercation, is extremely strong.

Sosnowicz, 270 P.3d at 925 (brackets in original). Notably, the Arizona Court of Appeals squarely rejected Petitioner's theory of actual innocence, finding that his "explanation that he was still dazed as a result of the fight, when coupled with his subsequent actions, [was] not plausible." *Id.*

Court of Appeals], Ex. UU at 15 [Arizona Supreme Court]).

Where a state court has adjudicated a claim on the merits, a federal court may not grant a habeas petition with respect to that claim unless the state court's adjudication of the claim resulted in a decision that "was contrary to, or involved an unreasonable application of clearly established Federal law." 28 U.S.C. § 2554(d)(1). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must [therefore] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. To establish a claim of IAC under *Strickland*, a petitioner must demonstrate that: (1) "counsel's representation fell below an objective standard of reasonableness," with reasonableness being judged under professional norms at the time assistance was rendered, and (2) "there is a reasonable probability that, but for counsel's error the result would have been different." *Strickland*, 466 U.S. at 687–96.

Petitioner is not entitled to relief on Ground Two because he fails to show that the state courts' dismissal of the ineffective-assistance-of-appellate-counsel claims of Ground Two was contrary to or based on an unreasonable application of *Strickland*. In upholding the second PCR court's dismissal of these claims, the Arizona Court of Appeals found "no abuse of discretion in the trial court's determination that [Petitioner] failed to state a colorable

claim of prejudice based on counsel's omission of these issues on appeal." (Doc. 15-4, Ex. SS at 7). The Arizona Court of Appeals stated:

> In our decision on appeal, we concluded admission of the medical examiner's opinion about the manner of death was harmless error, noting the "extremely strong" evidence supporting the jury's verdicts. We also concluded Sosnowicz's "explanation that he was still dazed as a result of the fight, when coupled with his subsequent actions, is not plausible." Sosnowicz has not offered any reason those assessments would be different had appellate counsel raised the arguments he now urges. In particular, we again note the likely effect on the jury of the recorded telephone call in which Sosnowicz stated he "remembered everything… that happened," and his trial admission that he originally lied to the police, and apparently to his neuropsychological examiner, when he claimed to have had no memory of events after the fight until "coming to" at his home. In light of that evidence, there is no reasonable probability that we would have reversed Sosnowicz's convictions on appeal had appellate counsel performed differently.

(*Id.* at 8–9). In light of the above, Petitioner fails to show that the state courts' dismissal of his claims of IAC by appellate counsel "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement." *Harrington*, 562 U.S. at 103. Additionally, ineffective assistance of appellate counsel claims do not lie for reasonably calculated strategic decisions by appellate counsel. *Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts

relevant to plausible options are virtually unchallengeable.")

Considering the body of evidence noted by the Arizona Court of Appeals, in particular, the recorded phone call of Petitioner and the admission at trial that Petitioner lied to police, it was not an unreasonable strategic choice for appellate counsel to argue the trial court erred in admitting the medical examiner's testimony on the victim's cause of death and the refusal to allow the introduction of the victim's blood alcohol content. Petitioner's lack of knowledge claim was directly contradicted by the admitted evidence. *See Sexton*, 679 F.3d at 1157 ("Counsel is not necessarily ineffective for failing to raise even a nonfrivolous claim, so clearly we cannot hold counsel ineffective for failing to raise a claim that is meritless."). Moreover, the effect on the jury the prior bad act evidence Petitioner describes (doc. 1 at 13) was significantly outweighed by the testimony that Petitioner was "visibly angry" after the altercation and "revved the engine" before striking the victim with his vehicle. *See Sosnowicz*, 270 P.3d at 925. Accordingly, the Court recommends the dismissal of Ground Two for lack of merit.

VI. CONCLUSION

The record is sufficiently developed, and the Court does not find that an evidentiary hearing is necessary for resolution of this matter. *See Rhoades v. Henry*, 638 F.3d 1027, 1041 (9th Cir. 2011). Based on the preceding analysis, Grounds One, Four, and Five are procedurally defaulted; Ground Three is not cognizable; and Ground Two lacks merit. Because Petitioner is not entitled to relief on any of the Petition's stated grounds, the Court

recommends that the Petition be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's Application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be **DENIED** because jurists of reason would not find the ruling debatable.

This 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 14 days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. Thereafter, the parties have 14 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. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). 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* Fed. R. Civ. P. 72.

Dated this 8th day of January, 2021.

s/Michael T. Morrissey
Michael T. Morrissey
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONATHAN LEIGH SOSNOWICZ, Petitioner - Appellant, vs. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; RYAN THORNELL, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry, Respondents - Appellees.	No. 22-16019 D.C. No. 2:20-cv-00040-DGC District of Arizona, Phoenix ORDER (filed Jul. 15, 2024)

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

Chief Judge Murguia and Judge Johnstone have voted to deny the petition for rehearing en banc, and Judge Hawkins has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petition for rehearing en banc (Dkt. 36) is DENIED.