APPENDIX A

NOT FOR PUBLICATION

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL MARION COTHAM,

Petitioner - Appellant,

v.

DAVID SHINN, Director, Arizona Department of Corrections, Rehabilitation, and Reentry; ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents - Appellees.

No. 23-2456

D.C. No.
2:21-cv-00138-ROS

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted March 24, 2025
Phoenix, Arizona

Before: BERZON and BENNETT, Circuit Judges, and TUNHEIM, District Judge.**

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

** The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

Petitioner-Appellant Michael Cotham was convicted in Arizona state court on charges of child prostitution. The district court denied Cotham habeas relief. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), and we affirm.

A federal court may only grant habeas relief on a state court judgment for two reasons: (1) if the state court's legal conclusions "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) if the state court's factual conclusions were "unreasonable . . . in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We review a district court's application of § 2254(d) de novo and its findings of fact for clear error. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004).

1. The state trial court's factual determination that Cotham refused transport and thereby violated the court's order was not unreasonable. The state court had ordered Cotham to appear the next morning and specifically warned him that his Sixth Amendment rights were conditional on following the court's orders. The next morning, Cotham was nowhere to be found, so the trial court ordered him transported to the courthouse and held a brief hearing on the matter. Cotham claimed the delay was because of untreated back pain, but the court's deputies stated that Cotham had refused to be transported that morning to the courthouse. Weighing the evidence and its own lengthy experience with Cotham as he navigated various

pretrial conferences with the court, the court determined Cotham's explanation was not credible. The court also determined that, even if the excuses were valid, he had still voluntarily chosen to violate the court's order by refusing transport to the courthouse in a timely manner. Keeping in mind the "substantial deference" accorded state courts' factual findings, *Brumfield v. Cain*, 576 U.S. 305, 314 (2015), we find the state court's factual finding that Cotham voluntarily refused transport in violation of the court's order was not unreasonable.

2. The Arizona Court of Appeals' legal conclusion that Cotham waived his right to self-representation by violating the court's order to appear on time was not contrary to clearly established federal law. The Arizona Court of Appeals rejected Cotham's *Faretta*[1] claim, holding that the trial court had not abused its discretion in revoking Cotham's self-representation rights after Cotham failed to heed the court's "clear, unambiguous and timely warnings" that he would lose those rights if he refused transport. Cotham argues the Arizona Court of Appeals erred in two ways: (1) by failing to evaluate whether Cotham's conduct constituted "serious and obstructionist misconduct," and (2) by considering Cotham's pre-trial conduct. Neither are persuasive.

In *Faretta*, the Supreme Court held in a footnote that

[1] *Faretta v. California*, 422 U.S. 806 (1975).

> [T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . .
>
> The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.

Faretta v. California, 422 U.S. 806, 834 n.46 (1975). Here, in rejecting the *Faretta* claim, the Arizona Court of Appeals did not use the "serious and obstructionist" standard. Instead, it stated that a defendant may only represent himself "so long as the defendant is able and willing to abide by the rules of procedure and courtroom protocol." The court then concluded that,

> Given Cotham's refusal to be transported on the first day of trial, notwithstanding the superior court's clear, unambiguous and timely warnings that Cotham would lose the right to represent himself if he did not follow the court's procedures and refused transport, the superior court did not abuse its discretion in revoking Cotham's right of self-representation.

We have instructed federal courts in the Ninth Circuit to follow the "serious and obstructionist misconduct" standard strictly and have clarified that a mere "failure to comply with . . . rules" will not "result in a revocation of pro se status." *United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989). But Arizona state courts are not bound by our decisions. Interpreting *Faretta* to allow revoking self-representation rights when a defendant fails to appear the morning of trial in direct defiance of a court's order is not clearly contrary to any Supreme Court decision.

Cf. McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) ("[A]n accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol."); *Martinez v. Ct. of Appeal of Cal.*, 528 U.S. 152, 162 (2000) ("[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.").

Nor was the state court's consideration of Cotham's pretrial conduct an unreasonable application of Supreme Court precedent. Indeed, even *Flewitt* itself acknowledged that pretrial activity could be grounds to revoke self-representation rights, provided "it affords a strong indication that the defendants will disrupt the proceedings in the courtroom." 874 F.2d at 674. Tellingly, Cotham points to no Supreme Court case whatsoever to support his position that a state court cannot use a defendant's conduct during pretrial proceedings to inform a *Faretta* analysis.

3. The state court misapplied clearly established federal law when it denied post-conviction relief for ineffective assistance of appellate counsel, but upon de novo review, we find no such ineffective assistance.

The Supreme Court has held that where appellate counsel fails to file a merits brief on the ground that there are no potentially meritorious appellate issues, ineffective assistance of appellate counsel claims follow a modified version of the

Strickland[2] test. Cotham must show (1) "that his counsel was objectively unreasonable in failing to find arguable issues to appeal," and (2) there was "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citation omitted). The state court failed to cite to *Robbins* or to use the test it commands, instead finding only that "appellate counsel had full discretion to raise or not raise the issue of self-representation." That's incorrect. Under *Robbins*, Cotham need only show that "a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief," a threshold that is "easier . . . to satisfy" than if the attorney had discarded the issue in favor of others with a higher likelihood of success. *Id.* at 288.

Reviewing de novo, we hold that Cotham would not have succeeded on *Robbins*'s second prong. Binding Arizona precedent specifically held that a defendant's refusal to follow procedural rules and orders need not rise to the level of "serious and obstructionist misconduct" to trigger revocation of self-representation rights. *State v. Whalen*, 961 P.2d 1051, 1054 (Ariz. Ct. App. 1997). Thus, even armed with counsel, Cotham's *Faretta* claim was doomed to fail in the Arizona Court of Appeals.

AFFIRMED.

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Marion Cotham,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-00138-PHX-ROS

ORDER

Petitioner Michael Marion Cotham was convicted in state court on two counts of child prostitution. After not obtaining post-conviction relief in state court, Petitioner filed a federal petition seeking a writ of habeas corpus. Petitioner argues, among other things, the state court violated his rights under the Sixth Amendment when it did not allow Petitioner to represent himself during trial. Magistrate Judge Michael T. Morrissey issued a Report and Recommendation ("R&R") recommending the Court conclude Petitioner's Sixth Amendment claim, as well as his other claims, either fail on the merits or are procedurally barred. Petitioner filed objections but, having reviewed the necessary portions of the R&R de novo, Petitioner is not entitled to relief. The R&R will be adopted.

BACKGROUND

The R&R sets forth the factual and procedural background and it is adopted as accurate. In brief, Petitioner was charged with four counts of child prostitution. During pretrial proceedings, "the superior court granted several requests by [Petitioner] to change counsel." (Doc. 23 at 1-2). Petitioner eventually "invoked his right to self-representation"

and was representing himself, assisted by advisory counsel, when trial began on October 8, 2013. (Doc. 11-1 at 136).

That first day of trial did not begin with jury selection. Instead, the first day consisting of the trial court reviewing the procedures that would be followed during trial, including how the jury selection set for the following day would occur. (Doc. 11-1 at 12). During the proceeding on October 8, the trial court explained to Petitioner his right to represent himself was "a limited right" and Petitioner had "to follow certain rules." (Doc. 11-1 at 153). One rule the trial court emphasized was that Petitioner had to attend the trial and, if he did not, he might not be allowed to continue to represent himself. Recognizing that Petitioner was in custody pending trial, the court stated:

> If you fail to attend the trial or refuse transport – it has happened – and if you decide to do that and absent yourself from this courtroom, you waive your right to represent yourself. So you need to make sure that you get ready and get here.

(Doc. 11-1 at 157). The court noted trial would start at 11 a.m. each day and Petitioner should "make sure" he was ready to be transported each day so trial could begin on time. (Doc. 11-1 at 158).

After informing Petitioner of his obligation to be on time to trial, the proceeding on October 8 continued with a lengthy discussion regarding motions in limine. Eventually the discussion turned to Petitioner's contention that he was having difficulty preparing for trial. (Doc. 11-1 at 216). Petitioner complained he had no way to access "disks" containing video recordings of witness statements as well as Petitioner's own interview with the police. (Doc. 11-1 at 217). Petitioner stated he could not be prepared for trial without reviewing those disks: "I need the disks, and I need somebody to understand my situation so that I can work through it, and I can be properly prepared." (Doc. 11-1 at 215-216).

The court accepted Petitioner's professed need to review the disks before jury selection. To allow Petitioner time to do so, the court arranged for Petitioner to be transported to the courthouse by 10:30 a.m. the following day. The court directed the prosecutor to make the disks available and for advisory counsel to work with Petitioner to

review the disks in the morning so jury selection could begin in the afternoon on October 9. (Doc. 11-1 at 220-222). The October 8 proceeding ended with a statement by the trial court confirming Petitioner would be transported to the courthouse by 10:30 a.m. to complete the allegedly crucial task of reviewing the disks. (Doc. 11-1 at 243).

The following morning, Petitioner was not ready to be transported to the courthouse and he did not arrive by 10:30 a.m. Petitioner was, however, transported to the courthouse later in the morning or shortly after noon. Once Petitioner was present, the trial court held a hearing to determine why Petitioner had not been transported in the morning. At that hearing Petitioner claimed he had been unable to be transported earlier because of "complications with [his] back." (Doc. 11-1 at 250). Those complications allegedly meant Petitioner was "physically unable to get up from [his] bed to actually walk to do anything physically" when the officers informed him it was time to be transported. (Doc. 11-1 at 253). Petitioner claimed it was not until later in the morning that he regained the ability to get out of bed. At that time, Petitioner was transported to the courthouse.

The court did not believe Petitioner's excuse for why he had been unable to arrive in the morning. The court stated "I'm not going to find that your explanation is merit – has merit at this point." (Doc. 11-1 at 255). Petitioner responded "That's fine."[1] (Doc. 11-1 at 255). The court then ordered Petitioner would not be allowed to represent himself and the court appointed advisory counsel as defense counsel.

Upon being appointed, defense counsel immediately asked for a continuance of the trial. (Doc. 11-1 at 255). The court granted a two-week continuance. The jurors who had been summoned and were waiting for the trial to begin were dismissed due to the continuance. After the brief continuance, the trial proceeded with Petitioner represented by counsel. Petitioner was convicted on two of the four counts of child prostitution.

In his direct appeal Petitioner argued the trial court had abused its discretion in

[1] Petitioner later expressed relief to the court that he would no longer be representing himself: "And I'm kind of glad you did, you know, in a sense take that from me. Me fighting my trial, I don't know enough about it, and I'm pretty premature [sic] about stuff like this. So if that's your decision, that's your decision. . . . Thank you for doing that, I guess, and if that's your decision, thanks for your decision . . . ." (Doc. 11-1 at 265).

revoking his self-representation. The Arizona Court of Appeals disagreed.

> Given [Petitioner's] refusal to be transported on the first day of trial, notwithstanding the superior court's clear, unambiguous and timely warnings that [Petitioner] would lose the right to represent himself if he did not follow the court's procedures and refused transport, the superior court did not abuse its discretion in revoking [Petitioner's] right of self-representation.

State v. Cotham, 2015 WL 1228183, at *3 (Ariz. Ct. App. 2015). Petitioner's convictions were affirmed.

After his direct appeal failed, Petitioner filed a petition for post-conviction relief claiming ineffective assistance of counsel and prosecutorial misconduct. The state trial court denied that petition. (Doc. 1-2 at 129). At that point the post-conviction relief proceedings took a strange turn. Instead of seeking appellate review of the trial court's denial, Petitioner filed a "Motion for Extension of Time to File Response to Court's Ruling" in the trial court. (Doc. 11-1 at 87). That document sought a fifteen-day extension for Petitioner to "complete his response to the court's ruling." (Doc. 11-1 at 87). There is no explanation why Petitioner believed he needed to file a "response" to the trial court's denial of his petition. The trial court denied that request without discussion. (Doc. 11-1 at 91).

After denial of his request for more time, Petitioner filed with the Arizona Court of Appeals a document titled "Motion to Appeal the Decision to Deny the Extension of Time to Respond to the Court's Ruling." (Doc. 11-1 at 96). That document began by arguing the trial court had erred by not granting Petitioner more time to file his "response" to the denial of his petition for post-conviction relief. (Doc. 11-1 at 97). But the document also presented arguments about the revocation of Petitioner's right to represent himself and the need for an order removing the trial court judge from Petitioner's post-conviction relief proceedings. (Doc. 11-1 at 99-100). The appellate court issued an order calling for the record. (Doc. 1-2 at 139). That order prompted Petitioner to file a "Motion for Clarification; Motion for Extension of Time to Properly File Petition for Review." (Doc. 11-1 at 110). That document sought an order allowing Petitioner to seek rehearing in the

trial court or an extension of time for Petitioner to file a formal petition for review with the court of appeals. The court of appeals denied that motion without discussion. (Doc. 11-1 at 122).

In September 2019, the Arizona Court of Appeals construed Petitioner's "Motion to Appeal the Decision to Deny the Extension of Time to Respond to the Court's Ruling" as a petition for review. So construed, review was granted but the appellate court denied all relief. (Doc. 1-2 at 142). Petitioner sought rehearing but rehearing was denied in February 2020. In January 2021, Petitioner filed his federal petition for a writ of habeas corpus. Petitioner's federal petition asserts six claims, including the claim that Petitioner's Sixth Amendment right to represent himself was violated.

ANALYSIS

It is very difficult for state prisoners to obtain relief from their state convictions in federal court. The statute setting forth the conditions for granting federal habeas corpus relief "reflects the view that habeas corpus is a guard against *extreme* malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (emphasis added). To win relief, Petitioner must have raised his claims in state court or, if he failed to do so, he must meet a high bar for the Court to be allowed to reach his claims. *Martinez v. Ryan*, 566 U.S. 1, 10 (2012) ("A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.").

For those claims raised in the state courts, Petitioner can obtain relief only if the state court rulings were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. In other words, the state courts must have "blunder[ed] so badly that every fairminded jurist would disagree" with the state courts' rulings. *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021). Any claims not addressed by the state court are subject to a less-demanding standard, assuming they can be reached at all. *See Atwood v. Ryan*, 870 F.3d 1033, 1060 n.22 (9th Cir. 2017) (noting when a prisoner overcomes

procedural default the claim must be reviewed de novo).

I. Revocation of Self-Representation

Petitioner's first claim is the trial court violated the Sixth Amendment by revoking Petitioner's self-representation. Respondents concede this claim was exhausted in state court such that it should be resolved on the merits. The R&R addresses this claim and concludes Petitioner is not entitled to relief. Under the extremely deferential review this Court must conduct of the state court's ruling, the R&R is correct.

The Sixth Amendment guarantees a competent criminal defendant the right to represent himself in a criminal trial.[2] *Faretta v. California*, 422 U.S. 806, 819 (1975). However, "*Faretta* itself and later cases have made clear that the right of self-representation is not absolute." *Indiana v. Edwards*, 554 U.S. 164, 171 (2008). Thus, a criminal defendant who engages in "serious and obstructionist misconduct" may be denied the right. *Faretta*, 422 U.S. at 834 n.46. In addition, a defendant who "abuse[s] the dignity of the courtroom" or refuses "to comply with relevant rules of procedural and substantive law" may be denied the right. *Id. See also McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) (noting limitations on *Faretta* right).

Since *Faretta*, the Supreme Court has not provided clear guidance on the precise level of misconduct necessary to merit revocation of an individual's right to self-representation. Lower courts have interpreted *Faretta* as requiring significant misconduct.[3] *See United States v. Flewitt*, 874 F.2d 669, 671 (9th Cir. 1989) (concluding refusal to "get ready [for] trial" was insufficient to revoke self-representation). But there is no Supreme Court authority prohibiting revocation of self-representation when a prisoner fails to appear at an ordered time and that failure prevents the trial from proceeding as scheduled.

As noted earlier, federal courts may grant relief to state prisoners only when the

[2] There is an exception for criminal defendants who have "severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Indiana v. Edwards*, 554 U.S. 164, 178 (2008). Neither in state court nor here have Respondents argued this exception might apply to Petitioner.

[3] Only Supreme Court holdings can supply the clearly established law that governs the evaluation of the state courts' decisions. However, "circuit court precedent may be persuasive in determining what law is clearly established and whether a state court applied that law unreasonably." *Murray v. Schriro*, 882 F.3d 778, 801 (9th Cir. 2018).

state courts "blunder[ed] so badly that every fairminded jurist would disagree" with their rulings. *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021). When determining whether the "blunder" is of sufficient magnitude to merit relief, federal courts can only rely on the holdings of Supreme Court cases. In the circumstances of this case, revocation of Petitioner's self-representation rights was not a sufficiently severe "blunder" to merit relief. Petitioner's unexcused failure to arrive on time and prepare for the trial set to begin that day constituted refusal to comply "with basic rules of courtroom protocol and procedure." *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). The R&R's analysis will be adopted and the Sixth Amendment claim will be rejected on the merits.

II. Remaining Claims

The R&R concludes Petitioner's other claims are procedurally defaulted.[4] Petitioner filed objections to some portions of the R&R's analysis. However, reviewing de novo the portions Petitioner objected to, the R&R is correct that the claims are procedurally defaulted.

The procedural default of certain claims can be attributed to Petitioner's actions after the state trial court denied his petition for post-conviction relief. It appears Petitioner was confused how to seek review of the trial court's denial of his post-conviction relief petition. Thus, Petitioner filed documents with the Arizona Court of Appeals, but those documents were not procedurally proper. Petitioner's filings also failed to identify certain claims Petitioner apparently wished to pursue. The R&R's analysis regarding procedural default based on Petitioner's filings in the Arizona Court of Appeals is correct.

The R&R also concludes the procedural default of certain claims involving ineffective assistance of trial counsel cannot be excused because Petitioner cannot satisfy the threshold of "a substantial claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). Nor can Petitioner satisfy any other exception that would excuse

[4] The R&R rejects one claim involving ineffective assistance of appellate counsel on the merits. (Doc. 23 at 28-29. That claim alleges Petitioner received ineffective assistance of appellate counsel based on counsel's failure to raise the *Faretta* issue. Because the *Faretta* issue was raised by Petitioner in his "pro se supplemental brief" and rejected, this claim has no merit.

the procedural default. Construing Petitioner's objections as aimed at these conclusions, upon de novo review the R&R's analysis is correct and will be adopted in full.

Accordingly,

IT IS ORDERED the Report and Recommendation (Doc. 23) is **ADOPTED IN PART**. The petition for writ of habeas corpus (Doc. 12) is **DENIED** and **DISMISSED WITH PREJUDICE** and the Clerk of Court shall enter such a judgment.

IT IS FURTHER ORDERED leave to proceed in forma pauperis and a certificate of appealability are **DENIED** because dismissal of the petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable, and because Petitioner has not made a substantial showing of the denial of a constitutional right.

Dated this 29th day of August, 2023.

Honorable Roslyn O. Silver
Senior United States District Judge

APPENDIX C

2022 WL 20595113
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Michael Marion COTHAM, Petitioner,
v.
David SHINN, et al., Respondents.

No. CV-21-00138-PHX-DJH (MTM)
|
Signed May 2, 2022

Attorneys and Law Firms

Michael Marion Cotham, Florence, AZ, Pro Se.

Jim D. Nielsen, Office of the Attorney General, Phoenix, AZ, for Respondents.

REPORT & RECOMMENDATION AND ORDER

Michael T. Morrissey, United States Magistrate Judge

***1** TO THE HONORABLE DIANE J. HUMETEWA, U.S. DISTRICT JUDGE:
Petitioner has filed a First Amended Petition for a Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. Doc. 12.

I. SUMMARY OF CONCLUSION

Petitioner was convicted at trial of two counts of child prostitution. The Court recommends the Petition be denied, as Petitioner's properly exhausted claim in Ground One lacks merit and his claims in Grounds Two through Six are procedurally defaulted without excuse or lack merit.

II. BACKGROUND

A. Conviction & Sentencing

The Arizona Court of Appeals summarized the facts as follows:[1]

> Cotham was charged with four counts of child prostitution, each a Class 2 felony. Before trial, the superior court granted several requests by Cotham to change counsel. Cotham then invoked his right to self-representation through a voluntary, signed waiver of counsel that was accepted by the court after an appropriate colloquy. After various motions and continuances, Cotham made a filing seeking to invoke his speedy trial rights and asking that trial be held within 90 days. This motion was granted and trial was scheduled for October 2013.
>
> On the morning of the first day of trial, the superior court scheduled time for Cotham to meet with his investigator to go over the evidence before jury selection. However, Cotham (who was in custody) failed to appear in court that morning. After learning that Cotham refused transportation despite a warning that his failure to appear could result in revocation of his right to self-representation, the superior court revoked Cotham's right to self-representation. Cotham's advisory counsel was appointed as counsel and granted a two week continuance to prepare for trial.
>
> At trial, the victim, T.G., testified that she met Cotham when she was 17 years old and staying with a friend after running away from a group home. T.G. testified that Cotham and a man known as "Taxi Tom" talked to T.G. about becoming a prostitute for them. T.G. indicated that she was underage and did not want to become a prostitute but Cotham stated "we're going to do it anyway." According to T.G's testimony, Cotham became controlling and made her feel trapped. T.G. testified to having sex with numerous men while Cotham was prostituting her and stated that Cotham collected the payment, which was either drugs or money.
>
> Police detectives testified that while investigating the matter, they engaged Cotham in conversation and used a fake story to explain their presence at a hotel where Cotham and T.G. were staying. While the detectives and Cotham were talking, T.G. approached Cotham and told him "a date ... was on his way." At Cotham's suggestion, the detectives returned to the hotel later that night to spend time by the pool. While at the pool, T.G. joined the group and eventually spoke to one of the detectives alone. Based on that conversation, the

> detectives later returned to the hotel with other officers, including uniformed officers, to make arrests and execute a search warrant.
> ***2**
> ***
> During [a forensic exam], T.G. indicated that Cotham had sexually assaulted her and had threatened both her and her family. The exam revealed several bruises on T.G. and several swabs were taken from T.G.'s genital area and breasts for DNA analysis. A forensic scientist testified that the DNA profile from one external genital swab was consistent with Cotham and that there was DNA from other unidentified individuals in the samples taken from T.G. The jury found Cotham guilty on two counts of child prostitution and not guilty on the other two counts.

State v. Cotham, No. 1 CA–CR 14-0001, 2015 WL 1228183, at *1–2 (Ariz. App. Mar. 17, 2015). Petitioner was sentenced to consecutive sentences of 21 years' imprisonment. *Id.*

B. Direct Appeal

Appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Doc. 11-1, Ex. J, at 52–60. Petitioner filed *a pro se* supplemental brief claiming: (1) the trial court abused its discretion by revoking *his pro se* status; (2) a Fifth Amendment violation due to presentation of evidence of uncharged offenses; (3) the trial court erred by precluding evidence of the victim's prior sexual acts; (4) a Sixth Amendment violation due to presentation of DNA evidence; (5) the police violated the Fourth Amendment by providing alcohol to a minor to obtain information; (6) a speedy trial violation; (7) the trial court abused its discretion by denying his motion for a new trial; and (8) the trial court abused its discretion by prohibiting the jury from viewing the child prostitution statute. Doc. 12-2 at 1–39.

The Arizona Court of Appeals rejected Petitioner's claims and affirmed his convictions and sentences. Doc. 11-1, Ex. K, at 63–73. On December 1, 2015, the Arizona Supreme Court denied review. *Id.* at 62; Doc. 11-1, Ex. I, at 50.

C. Post-Conviction Relief

Petitioner filed a notice of PCR on December 18, 2015. Doc. 11-1, Ex. L, at 75–77. Appointed counsel found no colorable claim. Doc. 11-1, Ex. N, at 82. Petitioner filed *a pro se* PCR petition asserting ineffective assistance of counsel and prosecutorial misconduct. Doc. 12-3 at 18–45. Petitioner claimed trial counsel was ineffective because counsel failed (1) to make an opening statement; (2) to effectively cross-examine witnesses on inconsistencies between their testimony and statements to police; (3) to offer evidence to prove the inconsistencies, including transcripts of the police interviews and phone records; and (4) call witnesses (Norman Potter, Robert "Robbie" Harris, and "Taxi Tom") to prove the State's witnesses' testimony was false. *Id.* at 19–38. Petitioner claimed the prosecutor failed to disclose changes in witness testimony and failed to correct false testimony. *Id.* at 38–41. Petitioner claimed appellate counsel was ineffective because counsel failed to raise the issues Petitioner raised in his *pro se* supplemental brief in addition to the State's failure to disclose changes in witness testimony. *Id.* at 41–43. The PCR court denied the petition; it found Petitioner's ineffective-assistance claims meritless and all other claims precluded under Ariz. R. Crim. P. 32.2. Doc. 12-4 at 17–21.

***3** After his PCR petition was denied, Petitioner filed a "Motion for Extension of Time to File Response to the Court's Ruling," which the PCR court denied. Doc. 11-1, Ex. P, at 87–89; Doc. 11-1, Ex. Q, at 91. In the Arizona Court of Appeals, Petitioner filed a "Motion to Appeal the Decision to Deny the Extension of Time to Respond to the Court's Ruling" ("Motion to Appeal"). Doc. 11-1, Ex. S, at 96–108. Petitioner asserted that the PCR court erred in denying his motion for time to respond and reasserted his claim that the trial court had abused its discretion in terminating his self-representation. *Id.* at 98–99. The Court of Appeals construed the Motion to Appeal as a Petition for Review of the PCR court's decision denying the PCR petition. Doc. 11-1, Ex. R, at 93. The State responded. Doc. 11-1, Ex. U, at 114–20.[2] The Court of Appeals granted review but denied relief; the mandate issued on March 5, 2020. Doc. 12-4 at 30–31; Doc. 11-1, Ex. R, at 94.

III. PETITION FOR WRIT OF HABEAS CORPUS

Petitioner raises six grounds:

> In Ground One, Petitioner alleges that he was denied his Sixth Amendment right to represent himself after the trial court revoked his right to do so.
>
> In Ground Two, Petitioner alleges his Sixth

> Amendment right to the effective assistance of counsel was violated where trial counsel failed to accurately inform Petitioner of the law in connection with plea negotiations.
>
> In Ground Three, he alleges that trial counsel rendered ineffective assistance in violation of the Sixth Amendment and his Fifth Amendment right to a fair trial.
>
> In Ground Four, Petitioner alleges that the prosecutor knowingly presented perjured testimony in violation of his Fifth Amendment right to a fair trial.
>
> In Ground Five, Petitioner alleges his appellate and PCR counsel were ineffective in violation of the Sixth Amendment and that he "can show 'cause and prejudice' for any issues that might otherwise be procedurally barred."
>
> In Ground Six, Petitioner alleges his Fourteenth Amendment right to due process was violated due to "the cumulative effects of all the errors committed in this case."

Doc. 6 at 2; Docs. 12, 12-1.[3] Respondents filed an Answer and Petitioner replied. Docs. 15, 19.

IV. LEGAL STANDARDS

A. Standard of Review

To obtain a federal writ of habeas corpus, a petitioner must show the state court's adjudication of a claim:

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

28 U.S.C. § 2254(d). A "state court'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) (citation omitted). The state court's "ruling must be 'objectively unreasonable, not merely wrong; even clear error will not suffice.' " *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (citation omitted).

B. Requisites for Review

1. Timeliness

"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). In general, the limitations period runs from the date the judgment became "final." 28 U.S.C. § 2244(d)(1)(A). A judgment is "final" when a petitioner can no longer seek review by the Supreme Court. *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012); *see* Sup. Ct. R. 13 (requiring petition for a writ of certiorari to be filed within 90 days of entry of judgment by state court of last resort). The statute is tolled during the pendency of a "properly filed application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2).

***4** The Petition is timely. Petitioner's judgment became final on February 29, 2016 (90 days after the Arizona Supreme Court denied review on direct review). His 1-year statute of limitations for filing a federal habeas corpus petition, 28 U.S.C. § 2244(d)(1)(A), was tolled by Petitioner's initiation of his state-court PCR proceeding on December 18, 2015, which concluded on March 5, 2020 (when the Arizona Court of Appeals issued its mandate). *See* 28 U.S.C. § 2244(d)(2). Accordingly, Petitioner's habeas filing deadline was March 5, 2021. Petitioner timely filed his original petition on January 6, 2021. Doc. 1. The present Petition relates back to the original petition and is therefore timely. *See* Fed. R. Civ. P. 15(c)(1)(B).

2. Exhaustion of State Remedies

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 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) (cleaned up); *see* 28 U.S.C. § 2254(b)(1). "To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court." *Baldwin*, 541 U.S. at 29 (citations omitted). Fair presentation requires the prisoner to "clearly state the federal basis and federal

nature of the claim, along with relevant facts." *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011).

"To exhaust one's state court remedies in Arizona, a petitioner must first raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction relief." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). A claim is exhausted when it has been fairly presented to the Arizona Court of Appeals. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Date v. Schriro*, 619 F. Supp. 2d 736, 763 (D. Ariz. 2008).

3. Absence of State Procedural Bar

"A federal court may not hear a habeas claim if it runs afoul of the procedural bar doctrine." *Cooper*, 641 F.3d at 327. A claim is barred from federal review "if the state court denied the claim on state procedural grounds" or "if [the] claim is unexhausted but state procedural rules would now bar consideration of the claim." *Id.*; *see Martinez v. Ryan*, 566 U.S. 1, 9 (2012) ("[A] federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule."); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) ("A claim is procedurally defaulted 'if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991))).

To preclude federal review, a state procedural rule must be a "nonfederal ground adequate to support the judgment" and "firmly established and consistently followed." *Martinez*, 566 U.S. at 9. "Arizona's waiver rules are independent and adequate bases for denying relief." *Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014). Under these rules, a defendant is precluded from relief on any constitutional claim "waived 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). A defendant waives a claim by failing to assert it during the appropriate proceeding except where the claim implicates a "right ... of sufficient constitutional magnitude to require personal waiver by the defendant," such as the right to a jury and the right to counsel. *Stewart v. Smith*, 202 Ariz. 446, 449–50 (2002).

***5** To obtain review of a procedurally defaulted claim, a petitioner must show "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). " 'Cause' ... must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Coleman*, 501 U.S. at 753. "An attorney error does not qualify as 'cause' to excuse a procedural default unless the error amounted to constitutionally ineffective assistance of counsel." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). To establish prejudice, the petitioner must show "actual prejudice," which "requires the petitioner to establish 'not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.' " *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986); ellipses in original).

To qualify for the fundamental-miscarriage-of-justice exception, a petitioner must demonstrate actual innocence. *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir. 1997). To establish actual innocence, a petitioner must present "new reliable evidence" and "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995); *see Jones v. Taylor*, 763 F.3d 1242, 1244 (9th Cir. 2014) ("In order to pass through the *Schlup* actual innocence gateway, a petitioner must demonstrate that in light of new evidence, it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt." (cleaned up)).

C. Ineffective Assistance of Counsel

The Sixth Amendment " 'does not guarantee perfect representation, only a reasonably competent attorney." *Richter*, 562 U.S. at 110 (quotation marks and citations omitted). To establish counsel was constitutionally ineffective, a defendant must show (1) counsel's performance "fell below an objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687–90, 694. "The *Strickland* standard is 'highly demanding.' " *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (citation omitted). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The defendant must also show "a substantial, not just conceivable, likelihood of a different

result." *Kayer*, 141 S. Ct. at 523 (quotation marks and citations omitted). "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693). On habeas review, "[t]he question 'is not whether ... the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.' " *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (citation omitted); *see Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly. Rather, it is the habeas applicant's burden to show that the state court applied *Strickland to* the facts of his case in an objectively unreasonable manner." (citations omitted)); *see also Williams v. Taylor*, 529 U.S. 362, 410 (2000) ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law."). Moreover, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles*, 556 U.S. at 123. A court need not "address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

***6** To establish ineffective assistance of appellate counsel, the petitioner must show: (1) " 'that counsel's performance was objectively unreasonable, which in the appellate context requires the petitioner to demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue' " and (2) "that he was prejudiced on account of the deficient performance, 'which in this context means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal.' " *Tamplin v. Muniz*, 894 F.3d 1076, 1090 (9th Cir. 2018) (quoting *Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010)). "Failure to make the required showing of *either* deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700 (emphasis added).

In general, "an attorney's errors in a postconviction proceeding do not qualify as cause for a default." *Martinez*, 566 U.S. at 8 (citing *Coleman*, 501 U.S. at 753–54). However, a narrow exception to this general rule provides that "ineffective assistance by a prisoner's state postconviction counsel [may qualify] as cause to overcome the default of a single claim—ineffective assistance of trial counsel—in a single context—where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal." *Davila*, 137 S. Ct. at 2062–63; *see Martinez*, 566 U.S. at 15 ("*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial."). To obtain review of a procedurally defaulted ineffective-assistance-of-trial-counsel claim pursuant to this exception, a petitioner must show: (1) that PCR counsel's failure to raise the claim constituted ineffectiveness under *Strickland* and (2) that the claim "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14.

V. ANALYSIS

A. The Arizona Court of Appeals was not unreasonable in failing to find a Sixth Amendment violation in the revocation of Petitioner's self-representation.

Ground One is properly exhausted as it was fairly presented to the Arizona Court of Appeals. *See Cooper*, 641 F.3d at 326; Doc. 12-2 at 11–14. Petitioner asserts "the trial court unreasonably and unfairly revoked his self-representation status pre-trial" in violation of the Sixth and Fourteenth Amendments.[4] Doc. 12 at 18.

1. Revocation of Petitioner's Self Representation

In April 2013, Petitioner filed a waiver of counsel. Doc. 11-1, Ex. B, at 20. A colloquy with the court established that Petitioner had "knowingly, intelligently, and voluntarily" waived his right to counsel. Doc. 11-1, Ex. C, at 22–24. The trial court granted Petitioner's request to represent himself and appointed advisory counsel and an investigator to assist him. *Id.* at 23–24.

Petitioner's refusal of transport causes a trial continuance.

Trial began in October 2013, approximately six months after Petitioner had begun representing himself. At trial, prior to jury empanelment, the trial court and Petitioner

discussed jury arrangements, including the process for screening up to 200 prospective jurors. Doc. 11-1, Ex. X, at 136, 140–145, 149–52. The court and Petitioner also discussed Petitioner's obligation's in representing himself, including that Petitioner had "to follow certain rules" because "if you don't follow the rules I can deny the right represent yourself." *Id.* at 153. The court advised Petitioner:

> ***7** I could deny your right to represent yourself if you deliberately engage in serious obstructive behavior, including talking out of turn, raising speaking objections.
>
> For example, this is a trial. It is a very formalized process. It may not be something that you normally do in your day-to-day life as the attorneys are trained to do, but you need to follow the same rules.

Id. at 153–54.

Regarding appearing at his trial, the court specifically advised Petitioner (who was in custody) that "[i]f you fail to attend the trial or refuse transport – it has happened[5] – and if you decide to do that and absent yourself from this courtroom, you waive your right to represent yourself." *Id.* at 157. The court set an 11:00 am start time for trial days, to ensure Petitioner's transport from jail to court would be timely. Petitioner acknowledged his obligation to be ready for transport and to appear in court. *Id.* at 157–58.

Petitioner advised the court that he needed to review certain "disks" containing statements from the victim and other witnesses. *Id.* at 215–16. He asserted that he had not had time to review them with his advisory counsel or his investigator to be "properly prepared" for trial. *Id.* In response, the trial court delayed jury selection, which was set for the next day, from 10:30 am to 1:30 pm, as Petitioner stated he would "go over" the material with his advisory counsel at that meeting. *Id.* at 222–23. In addition to delaying jury selection, the court arranged for Petitioner's use of the courtroom, and ordered that the prosecutor and Petitioner's investigator also be present for the requested meeting. *Id.* at 226–27, 252–53.

Petitioner refused transport the next morning, and missed the meeting. Doc. 11-1, Ex. Y, at 249–50. To ensure Petitioner's presence at 1:30 p.m., the time scheduled for jury selection, the court ordered that he be transported to court "by any means necessary." Doc. 11-1, Ex. D, at 26 (court order); Doc. 11-1, Ex. X, at 219–23, 241–42 (schedule for jury). Having been brought to court, the following colloquy occurred:

> THE COURT: Do you remember me telling you that if you refused transport, failed to appear, that that was something that I could use to decide to no longer represent yourself?
>
> PETITIONER: Yes.
>
> THE COURT: Do you remember me ordering that you would be here at 10:30 this morning to review the information that you said you needed to review?
>
> PETITIONER: Yes, I do.
>
> THE COURT: And you failed to appear this morning, didn't you? Don't explain, just the answer is yes or no.
>
> PETITIONER: Yes, sir.
>
> THE COURT: And my understanding is because you refused to be transported, even though I entered the order specifically to allow you to prepare for yourself here today.
>
> PETITIONER: Yes, sir.
>
> THE COURT: Go ahead and explain.

Doc. 11-1, Ex. Y, at 249–50. Petitioner asserted that he had been unable to get out of bed due to severe back pain when the transport officer came to get him. *Id.* at 250–51.

> ***8** THE COURT: Did you tell them that you would not be transported when they came for you this morning?
>
> PETITIONER: Not at all.
>
> THE COURT: Then – so when the deputies tell me that you refused transport, are they lying?
>
> PETITIONER: I was not able to get out of bed this morning.
>
> THE COURT: So you refused to come?
>
> PETITIONER: I couldn't get out of bed until later. So when I finally got up, I let them know, hey, I'm ready to go. So –
>
> THE COURT: Are you telling me that in other mornings, you're not going to be able to get out of bed, too?
>
> PETITIONER: This just happened today. It's the first time I ever missed a court appearance at all.
>
> THE COURT: My problem is it's on the day of trial. Let me finish. It's on the day after I told you if you

> refused transport, that was going to cost you or could cost you your right because you need to be here to represent yourself. Now, I made special arrangements so that a prosecutor, your attorney, our courtroom, and your investigator would be here with you this morning.
>
> PETITIONER: Uh-huh.
>
> THE COURT: And whatever issue it is you were having with your back, you made a decision not to come here because of it. They didn't refuse to bring you. You refused to come with them. So I'm going to, at this point, find that you're not participating in this action the way you should, and that you refused your transport, even though I told you that if you refused a transport and failed to appear, that you would lose your right to represent yourself. And so I'm – unless you give me a very good reason in one minute – you have 60 seconds on why I should not, based on what I told you yesterday, lose your right to represent yourself, because I can't have the case just stop. I have 50 jurors downstairs.
>
> PETITIONER: Uh-huh.
>
> THE COURT: I, again, had folks here. My courtroom was made available so that whatever else you needed to do was done, and you took action that prevented that from happening.
>
> PETITIONER: All I can say I was physically unable to get up from my bed to actually walk to do anything physically. I had no medication. I'm not prescribed it anymore. Once it ran out, I have no way of getting to a doctor for them to do a completely correct way. I have documentation that would prove that, too.

Id. at 252–54. The trial court rejected Petitioner's explanation:

> THE COURT: Well, you don't get to pick when you get up and get transported.
>
> PETITIONER: I understand that, sir.
>
> THE COURT: That is the reality.
>
> PETITIONER: Uh-huh.
>
> THE COURT: And so, no, I'm not going to find that your explanation is merit – has merit at this point.

Id.[6] The trial court revoked Petitioner's self-representation and appointed advisory counsel as Petitioner's trial counsel. *Id.* at 255. As trial counsel was not prepared to go forward with the scheduled trial, trial did not go forward and the court granted trial counsel's request for a continuance. *Id.* at 255–57.

2. Arizona Court of Appeals

***9** On appeal, Petitioner asserted the trial court denied him "his constitutional right to defend himself." Doc. 12-2 at 11–14. Rejecting the claim, the Arizona Court of Appeals stated:

> "The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and represent himself," *State v. Lamar*, 205 Ariz. 431, 435 ¶ 22, 72 P.3d 831, 835 (2003) (citing cases), "but only so long as the defendant 'is able and willing to abide by the rules of procedure and courtroom protocol,' " *State v. Whalen*, 192 Ariz. 103, 106, 961 P.2d 1051, 1054 (App. 1997) (citation omitted). Here, the superior court clearly informed Cotham of his responsibilities and consequences before it revoked Cotham's right to self-representation. The superior court explicitly stated that "[i]f you [Cotham] fail to attend the trial or refuse transport—it has happened—and if you decide to do that and absent yourself from this courtroom, you waive your right to represent yourself. So you need to make sure that you get ready and get here." The record shows that the next morning, Cotham refused transportation.

Cotham, 2015 WL 1228183, at *2 (brackets in original). The Court of Appeals concluded:

> Given Cotham's refusal to be transported on the first day of trial, notwithstanding the superior court's clear, unambiguous and timely warnings that Cotham would lose the right to represent himself if he did not follow the court's procedures and refused transport, the superior court did not abuse its discretion in revoking Cotham's right of self-representation. *See Whalen*, 192 Ariz. at 107–08, 961 P.2d at 1055–56.

Cotham, 2015 WL 1228183, at *3.

3. Sixth Amendment Right

The Arizona Court of Appeals decision (Doc. 11-1, Ex. K, at 63–73) is the last reasoned state-court decision, as the Arizona Supreme Court did not provide its reasoning in denying the petition for review. *See Curiel v. Miller*, 830 F.3d 864, 870 (9th Cir. 2016) ("When ... the last state court to reject a prisoner's claim issues an order 'whose text or accompanying opinion does not disclose the reason for the judgment,' we 'look through' the mute decision and presume the higher court agreed with and adopted the reasons given by the lower court." (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 802–06 (1991)).

In *Faretta v. California*, the Supreme Court held that a defendant has a Sixth Amendment right to self-representation. 422 U.S. 806, 819 (1975). The Arizona Court of Appeals found that the trial court's revocation of Petitioner's self-representation had not been in violation of the Sixth Amendment because the trial court had not abused its discretion in finding that Petitioner had engaged in serious obstructive behavior in refusing transport for trial. Doc. 11-1, Ex. K, at 64, 66–67. The Court of Appeals decision noted that "[a]fter a delay and the superior court ordering [Petitioner] transported," the colloquy between the trial court and Petitioner established that Petitioner had failed to follow the court's procedures for trial. *Id.* at 67–68. As articulated by the Arizona Court of Appeals, Petitioner's Sixth Amendment to self-representation was subject to Petitioner being able and willing to abide by the rules of procedure and courtroom protocol, and was revoked for his failure to comply with those rules. *Id.*

***10** Petitioner is not entitled to relief on Ground One, because he has not shown that the decision by the Arizona Court of Appeals was an objectively unreasonable application of Supreme Court precedent. *See LeBlanc*, 137 S. Ct. at 1728.

The *Faretta* Court specifically referenced that a defendant's right to self-representation is not absolute, as it may be terminated if a defendant deliberately engages in serious and obstructionist misconduct. 422 U.S. at 834 n.46.; *see also Martinez v. California*, 528 U.S. 152, 162 (2000) ("Even at the trial level, ... the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.").

It is beyond question that Petitioner's conduct in refusing transport to attend his trial constituted obstructionist misconduct. Indeed, as referenced by the Court of Appeals, Petitioner was brought to court for his trial only upon the successful intervention by the trial court ordering Petitioner's transport after Petitioner's refusal of transport. In fact, Petitioner's trial did not proceed, as the very meeting Petitioner stated was necessary for him to be prepared—the 10:30 a.m. meeting on the date of jury selection with his advisory counsel and investigator—was cancelled because Petitioner refused transport. Further, the voir dire jury pool the court had arranged for went unused, as advisory counsel became trial counsel and immediately requested and was granted a trial continuance after the court terminated Petitioner's self-representation. Doc. 11-1, Ex. Y, at 252–57.

In asserting that his Sixth Amendment rights were violated, Petitioner argues in essence that his conduct did not rise to the level of serious and obstructionist misconduct, in part because by refusing transport he was not disruptive *in court*, and that his self-representation was revoked "pre-trial." Doc. 12 at 18, 21. As a factual matter, Petitioner is incorrect his actions were "pre-trial." As the Court of Appeals noted, his refusal to be transported occurred "on the first day of trial." Doc. 11-1, Ex. K, at 67. Petitioner's legal argument, that the Court of Appeals decision was unreasonable because his actions outside the courtroom did not constitute a serious enough disruption of the trial process, fails because the Court of Appeals decision did not contravene clearly established Supreme Court precedent.

As noted above, in both *Faretta* and *Martinez*, the Supreme Court specifically found that a defendant's actions—serious and obstructionist misconduct—are a permissible basis to terminate self-representation if those actions seriously impede the trial process. In reviewing the Court of Appeals decision, this Court cannot find that the Court of Appeals was objectively unreasonable in finding that Petitioner's actions justified the termination of his self-representation. In reaching this conclusion, this Court notes that, given the relative paucity of Supreme Court precedent setting forth the contours of "serious and obstructionist misconduct," *Faretta*, 422 U.S. at 834 n.46, the Court of Appeals decision did not contravene clearly established Supreme Court precedent. *See generally Espinoza v. Lynch*, 2021 WL 6275060, at *6 (C.D. Cal. Oct. 29, 2021) ("The Court, however, has provided little guidance concerning the circumstances that justify a decision to deny a defendant's request to represent himself."); *Diesso v. Knowles*, 2007 WL 43743, at *10 (E.D. Cal. Jan. 8, 2007) ("Supreme Court precedent on the question of when a disruptive defendant's request to represent himself may be revoked or denied is scarce[.]"). Moreover, the absence of Supreme Court precedent defining the contours of serious and obstructionist misconduct compels the conclusion that habeas relief is not merited, because " 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*,

562 U.S. at 101 (citation omitted).

***11** Petitioner's argument that his actions occurred outside the courtroom, and therefore did not disrupt a trial proceeding, fails to establish a Sixth Amendment violation. As the District Court noted in *Espinoza*:

> Although Petitioner faults the trial court for relying on misconduct that occurred outside the courtroom to deny him his right to self-representation, there is no clearly established Supreme Court precedent holding that a trial court is prohibited from considering out-of-court conduct in determining whether to grant a *Faretta* request.

2021 WL 6275060 at *7.

Here, as in *Espinoza,* there was a sufficient nexus between Petitioner's out-of-court conduct and a serious obstruction of the trial process. Indeed, the *Espinoza* Court cited as an example of out-of-court obstructionist misconduct in that case, that defendant had "delayed the start of trial on one occasion by refusing to leave his jail cell, claiming that he preferred to 'sleep in.' " *Id.* In Petitioner's case, his refusal to leave his jail cell did more than delay an ongoing trial—it caused a continuance and a cancellation of a scheduled trial. Accordingly, in the absence of a clearly established right that a court may not consider out-of-court conduct in terminating self-representation, this Court cannot say that the Court of Appeals unreasonably applied clearly established Federal law in rejecting Petitioner's Sixth Amendment claim. The Court, therefore, recommends Ground One be denied for lack of merit.

4. The Ineffective-Assistance Claim

In Ground Five, Petitioner asserts a related ineffective-assistance claim to establish cause for "any issues that might otherwise be procedurally barred." Doc. 12-1 at 37. Specifically, Petitioner claims appellate counsel was ineffective for failing "to raise a compelling *Faretta* claim." *Id.*; *see also* Doc. 19 at 2–12. As discussed above, Petitioner's *Faretta* claim was without merit. Counsel is not ineffective for failing to raise a meritless claim. *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." (citing *Knowles*, 556 U.S. at 127 ("The law does not require counsel to raise every available nonfrivolous defense."))); *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); *Morrison v. Estelle*, 981 F.2d at 425, 429 (9th Cir. 1992) ("Because Morrison's appellate counsel would not have been successful in arguing inadequate notice of a felony-murder charge, Morrison does not sustain his burden of proving [his IAC claim]."). Accordingly, the Court recommends this claim be dismissed for lack of merit. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *Medley v. Ryan*, No. CV-12-762-PHX-GMS (BSB), 2012 WL 6814246, at *5 (D. Ariz. Dec. 10, 2012) (denying habeas petitioner's "plainly meritless" claim on the merits notwithstanding that it was procedurally barred), *adopted by* 2013 WL 105269 (D. Ariz. Jan. 9, 2013).

B. Ground Two is procedurally defaulted.

***12** Petitioner claims he would have accepted a plea offer but for trial counsel's alleged ineffectiveness in failing to "timely and properly inform [him] of the law in relation to the facts of the case, as well as of the win-or-lose prospect of trial based on a reasonable assessment of the applicable law, all the evidence, and the conviction rate in comparable cases, prior to the expiration date of the State's plea offer." Doc. 12 at 26–29. Although Petitioner asserted a number of ineffective-assistance-of-counsel claims in his PCR petition, Ground Two was not among them. *See* Doc. 12-3 at 18–46. The claim is implicitly procedurally defaulted because Ariz. R. Crim. P. 32.2(a)(3) bars Petitioner from asserting it in state court now. *See Hurles*, 752 F.3d at 780; *Beaty*, 303 F.3d at 987. In his Petition and Reply, Petitioner concedes he did not present Ground Two to the Arizona Court of Appeals and does not proffer any explanation for his failure to do so. Doc. 12 at 26; Doc. 19. Accordingly, the Court recommends Ground Two be denied as procedurally defaulted.

C. Ground Three is procedurally defaulted.

Petitioner asserts a number of ineffective-assistance-of-trial-counsel claims. Petitioner claims counsel was ineffective because counsel failed to: (1) "effectively" cross-examine T.G. and Stacy Flynn (Petitioner's co-defendant and girlfriend) on inconsistencies between their testimony and prior statements to police; (2) impeach T.G. and Flynn with evidence of their prior statements, including "police reports and/or video evidence" and a "handwritten note" allegedly authored by T.G. in which she instructed another individual to post an online ad for her; (3) object to alleged prosecutorial misconduct in the form of presentation of "evidence not contained within the discovery"; (4) move for a mistrial due to the State's presentation of allegedly false testimony; and (5) present exculpatory witnesses to discredit T.G. and Flynn. Doc. 12 at 30–49; Doc. 12-1 at 1–25.

As discussed in Section II, *supra*, Petitioner raised a number of these claims in his PCR petition. *See* Doc. 12-3 at 18–45. However, he did not present any of them in his Petition for Review before the Arizona Court of Appeals. *See* Doc. 11-1, Ex. S, at 96–100.[7] In his Petition for Review, Petitioner merely asserted that the PCR court had erred in denying his motion for more time to respond to the PCR court's ruling and reasserted his claim that the trial court abused its discretion in terminating his self-representation. *Id.* Therefore, Ground Three is unexhausted. *See Swoopes*, 196 F.3d at 1010. And because Ariz. R. Crim. P. 32.2(a)(3) bars Petitioner from returning now to state court to properly exhaust the claims in Ground Three, it is procedurally defaulted. *See Hurles*, 752 F.3d at 780; *Beaty*, 303 F.3d at 987.

The issue of whether claims in Ground Three were exhausted by their inclusion in the Motion to Respond is an issue of fair presentation, not construction. While "a claim is exhausted if the State's highest court expressly addresses the claim, whether or not it was fairly presented," *Casey v. Moore*, 386 F.3d 896, 916 n.18 (9th Cir. 2004), that exception to fair presentation is inapplicable here because the Arizona Court of Appeals did not expressly address *any* claim in ruling on Petitioner's Petition for Review, much less any claim raised in the Motion to Respond. *See* Doc. 12-4 at 30–31. "A petitioner fairly and fully presents a claim to the state court ... if he presents the claim: (1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (citations omitted); *see also Castille v. Peoples*, 489 U.S. 346, 351 (1989) (holding a claim raised "for the first and only time in a procedural context in which its merits will not be considered in the absence of "special and important reasons" for doing so is not fairly presented (citation omitted)). As courts in this District have observed, "Arizona follows the prevailing practice that claims not raised in an opening brief are waived, and cannot be raised for the first time in a reply brief." *Callan v. Ryan*, 2018 WL 3543918, CV-17-8077-PHX-DGC (JFM), 2018 WL 3543918, at *15 (D. Ariz. May 17, 2018) (concluding petitioner's presentation of claim in reply brief did not constitute "fair presentation"), *adopted by* 2018 WL 3536729 (D. Ariz. July 23, 2018); *see Curtis v. Ryan*, No. CV-19-04374-PHX-DGC (JZB), 2021 WL 4483174, at *7 (D. Ariz. June 25, 2021) ("In order for a claim to be ruled on by the Arizona Court of Appeals – and therefore exhausted for purposes of habeas review – a petitioner must have raised the claim in an opening brief; arguments raised thereafter, *e.g.*, in a reply brief, are waived and therefore unexhausted."), *adopted by* 2021 WL 4596465 (D. Ariz. Oct. 6, 2021). Thus, the Motion to Respond, which was essentially a motion for leave to file a reply to the State's response to the Petition for Review,[8] was not a "proper vehicle," even if it had been granted,[9] for Petitioner to present his claims; the proper vehicle for purposes of fair presentation was the Petition for Review. *See State v. Fernandez*, 2007 WL 5582235, at *2 (Ariz. App. Oct. 31, 2007); *see also Baldwin*, 541 U.S. at 32 ("[A] state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.").

***13** Therefore, because none of the claims in Ground Three were fairly presented to, or expressly addressed by, the Arizona Court of Appeals, Ground Three is unexhausted. *See Swoopes*, 196 F.3d at 1010. Ground Three is implicitly procedurally defaulted because Ariz. R. Crim. P. 32.2(a)(3) bars Petitioner from now returning to state court to properly exhaust the claims therein. *See Hurles*, 752 F.3d at 780; *Beaty*, 303 F.3d at 987.

Petitioner fails to show cause and prejudice to excuse the default or a fundamental miscarriage of justice. In his reply, Petitioner reasserts that his claims are meritorious. *See* Doc. 19 at 12–34. Later in the Reply and in Ground Five, Petitioner asserts he qualifies for the *Martinez* exception. Doc. 12-1 at 37; Doc. 19 at 62; *see Martinez*, 566 U.S. at 15 ("*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial."). However, Petitioner fails to demonstrate, much less proffer any argument specific to, PCR counsel's alleged ineffectiveness under *Strickland* with respect to any specific claim in Ground Three. Generalized assertions

are insufficient. *See Reed v. Stephens*, 739 F.3d 753, 781 n.20 (9th Cir. 2014) ("We decline [petitioner's] suggestion that his procedurally defaulted claims may be considered under *Martinez*. [Petitioner] has insufficiently briefed this issue, and we consider this argument waived."); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) ("Jones's conclusory suggestions that his trial and state appellate counsel provided ineffective assistance fall far short of stating a valid claim of constitutional violation."); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."). Further, as explained below, Petitioner fails to show that the ineffective-assistance-of-counsel claims in Ground Three that PCR counsel was allegedly ineffective for failing to raise were "substantial," *i.e.*, had "some merit." *Martinez*, 566 U.S. at 14. And even if counsel's performance was deficient, Petitioner must also show "a substantial, not just conceivable, likelihood of a different result." *Kayer*, 141 S. Ct. at 523 (quotation marks and citations omitted). "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693).

Petitioner fails to demonstrate "some merit" under *Martinez* to his claim that trial counsel was ineffective for not objecting to the State's presentation of T.G. and Stacy Flynn's allegedly false testimony because Petitioner fails to show any misconduct by the State on this basis. Petitioner must show: "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

Petitioner claims T.G.'s testimony did not "reflect the facts she related to police during her initial interview, nor [did] it align with real facts known to [Petitioner] and to [other witnesses]." Doc. 12 at 30–31. Petitioner claims the prosecutor used leading questions which "were not objected to" by his counsel and which "prompted T.G. to substantially change the story she [had initially] told police." *Id.* at 32. T.G.'s allegedly false testimony concerned: when and how she met Petitioner and Robert Harris (a friend of Petitioner's whom she lived with for a time), when she had first arrived at the Extended Stay (the hotel where the charged conduct occurred) and who brought her there, and where she was residing around the time it occurred (with Robbie or with Petitioner). *Id.* at 31–47; *see also* Doc. 12-1 at 3 ("T.G. trial testimony is highly inconsistent with her statements to the police as to: 1) how she met Robbie? 2) where was she living? 3) the day she left Mr. Robert (Robbie) Harris's home and went to the Extended Stay Hotel for the first time."). Petitioner claims T.G.'s testimony with respect to these issues was false because it was inconsistent with her own prior statements to police and statements made by other witnesses, including Robert Harris. *See* Doc. 12 at 38 ("These statements are disproved through Mr. Harris' (Robbie's) statements to police and T.G.'s own previous statements."), 46 ("Despite a major hole in T.G.'s testimony regarding the dates and her statement that she was unsure about the dates, and these dates could not be rehabilitated by the prosecutor, defense counsel failed to recognize 1) the indicted dates were for the 13th and 14th of May; and 2) T.G. had just admitted she was unsure as to when the alleged acts occurred."). However, mere inconsistencies between T.G.'s prior statements and trial testimony are insufficient to demonstrate her testimony was false. *See United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) ("The fact that a witness may have made an earlier inconsistent statement, or that other witnesses have conflicting recollections of events, does not establish that the testimony offered at trial was false.").

***14** In addition to failing to show that the trial testimony was false, Petitioner also fails to demonstrate the materiality of the testimony in question, *i.e.*, a "reasonable likelihood that [this] testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). The indictment itself did not provide an exact date for when the offenses allegedly occurred. *See* Doc. 12-4 at 41. The conduct forming the basis of Count 4 was alleged to have occurred "on *or about*" May 13, 2012; the conduct forming the basis of Count 6 was alleged to have occurred "on *or about*" May 14, 2012. *Id.* (emphasis added). The allegedly false testimony had little to no bearing on the narrow issue of whether or not Petitioner prostituted T.G. as charged in the indictment and, therefore, Petitioner fails to show that the presentation of this testimony had any "reasonable" likelihood that it affected the jury's decision to convict him. *See Agurs*, 427 U.S. at 103.

Despite Petitioner's assertion to the contrary, his counsel did in fact move for acquittal based on alleged insufficiency of the evidence. *See* Doc. 11-1, Ex. GG, at 1276.

As to Flynn, Petitioner asserts that Flynn admitted to one of the charged acts in her statement to police; however, the same report also documents that T.G. herself also admitted to that same act. *See* Doc. 12 at 47; Doc. 12-4 at 49 (Flynn's interview: "Stacy said that Mike told her today to give a guy a blow job for a ride to CVS. This is the same story that [T.G.] said that she said."); Doc. 12-5 at 4 (T.G.'s interview: "[T.G.] gave a guy head so that [Petitioner] could get a ride to buy cigarettes."). Again, inconsistencies do not demonstrate falsity. *See Croft*, 124

F.3d at 1119.

Petitioner fails to demonstrate "some merit" under *Martinez* to his claim that trial counsel was ineffective for not effectively cross-examining and impeaching T.G. and Flynn regarding inconsistencies between their testimony and prior statements to police and Detective Kenney about other residents at the hotel and the complainant's statements as to whether T.G. was staying at Robert Harris's house during the relevant time. Doc. 12-1 at 6–21. To the contrary, trial counsel demonstrated reasonable competence in his cross-examination of these witnesses, asking appropriate questions and confirming dates as necessary. Doc. 11-1, Ex. DD, at 928–52 (cross-examination of Flynn); Doc. 11-1, Ex. EE, at 1069–98 (cross-examination of T.G.); Doc. 11-1, Ex. GG. at 1247–64 (cross-examination of Detective Kenney). Further, counsel was not ineffective for failing to attempt to offer the police reports in evidence to impeach their testimony because the police reports did not contain exculpatory information and were more damaging to Petitioner's case than helpful. Flynn disclosed in her interview that she made money prostituting for Petitioner. Doc. 12-4 at 47–50. In T.G.'s interviews, she admitted to having sex with individuals at the behest of Petitioner. Doc. 12-5 at 2–6 (initial interview, 5/16/2012); Doc. 12-5 at 12–13 (interview, 5/18/2012). Other police reports note T.G.'s statement that she made money for Petitioner. Doc. 12-3 at 17.

Petitioner fails to demonstrate "some merit" under *Martinez* to his claim that trial counsel was ineffective for failing to interview or call Norman Potter (who allegedly drove T.G. to the Extended Stay) and Robert Harris as witnesses to dispute T.G.'s timeline of the events. Doc. 12 at 47–50; Doc. 12-1 at 1–5. Indeed, Petitioner, while proceeding *pro se*, had disclosed Potter and Harris as potential witnesses. Doc. 12-6 at 15. Petitioner's investigator spoke to Potter on August 5, 2013. Doc. 12-6 at 31. However, at the scheduled trial on October 8, 2013, the parties discussed the difficulties in contacting Potter. Doc. 11-1, Ex. Y, at 234-5. As to Harris, in May 2012, Harris received a letter from Petitioner in which Petitioner asked for his phone number. Doc. 12-5 at 17. However, when the investigator reached out to Harris on September 9, 2013, Harris stated he would not grant Petitioner an interview and believed Petitioner was "guilty." Doc. 12-6 at 30–31.

***15** Petitioner fails to show a fundamental of miscarriage of justice as he fails to show no reasonable juror would have convicted him. *See Jones*, 763 F.3d at 1244. Indeed, material attached to his Petition actually supports rather than diminishes Petitioner's guilt. *See* Doc. 12-4 at 36 (Index of Exhibits). For instance, a police report states that when undercover detectives asked T.G., "Well, you're making all the money for Michael right," T.G. responded, "Yes." Doc. 12-3 at 17. The complainant who suspected T.G. was underage and reported his suspicion to police—*and who was also a customer of Petitioner's prostitution enterprise*—provided detectives with text messages between him and Petitioner in which Petitioner sent a picture of T.G. and stated the prices for various sexual acts to be performed by her. Doc. 12-4 at 43.

Accordingly, the Court recommends Ground Three be dismissed as procedurally defaulted without excuse.

D. Ground Four is procedurally defaulted.

Petitioner asserts a *Napue* claim[10] alleging he was denied a fair trial because the prosecutor "knowingly presented perjured testimony." Doc. 12-1 at 26–36. Petitioner did not raise this claim on appeal. *See* Doc. 12-2 at 1–39. Petitioner raised it in his PCR petition but the PCR court determined it was precluded under Ariz. R. Crim. P. 32.2. Doc. 12-3 at 38–40; Doc. 12-4 at 18. The Arizona Court of Appeals found no abuse of discretion in that determination. Doc. 12-2 at 31. The claim is therefore expressly procedurally defaulted. *See Hurles*, 752 F.3d at 780.

Petitioner fails to show cause for the default or a fundamental miscarriage of justice. In Ground Five, Petitioner alleges his appellate and PCR counsel were ineffective and "factual and procedural circumstances prevented" him from raising Ground Four "until the postconviction stage." Doc. 12-1 at 37, 39. Petitioner, therefore, argues that "the reasoning applied in Martinez would extend to [Ground Four]." *Id.* at 38. Petitioner fails to set forth any specific allegations in Ground Five to support a claim that appellate and PCR counsel rendered ineffective assistance with respect to Ground Four; therefore, his claim fails at the outset. *See Reed*, 739 F.3d at 781 n.20 ("We decline [petitioner's] suggestion that his procedurally defaulted claims may be considered under *Martinez*. [Petitioner] has insufficiently briefed this issue, and we consider this argument waived."); *Jones*, 66 F.3d at 205 ("Jones's conclusory suggestions that his trial and state appellate counsel provided ineffective assistance fall far short of stating a valid claim of constitutional violation."); *James*, 24 F.3d at 26 ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

In addition, Petitioner's assertion that Ground Four "needed further factual development in the *trial* court,"

Doc. 12-1 at 38 (emphasis added), undercuts any claim that *appellate* counsel was ineffective for failing to raise it; counsel is not ineffective for failing to raise an undeveloped claim. *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." (citing *Knowles*, 556 U.S. at 127 ("The law does not require counsel to raise every available nonfrivolous defense."))); *see also Bean*, 163 F.3d at 1082–83; *Morrison*, 981 F.2d at 429. Finally, with respect to PCR counsel, Petitioner's claim fails as a matter of law. The Supreme Court has made clear that the exception announced in *Martinez* that allows ineffective assistance of PCR counsel to qualify as cause for a procedural default is limited to procedurally defaulted claims of ineffective assistance of trial counsel. *Davila*, 137 S. Ct. at 2062–63 ("In [*Martinez*], this Court announced a narrow exception to *Coleman*'s general rule. That exception treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim—ineffective assistance of trial counsel—in a single context—where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal."). No Supreme Court opinion has extended the *Martinez* exception beyond this narrowly-defined context.

***16** In his Reply, Petitioner disputes the PCR court's finding of preclusion, arguing it did not "expressly state" that Ground Four was precluded, only that " 'most' of [his] claims were precluded, without specifically identifying which ones." Doc. 19 at 36. This argument is unavailing. The PCR court organized the analysis underlying its ruling into three sections: "1. Most Claims Precluded."; "2. No Ineffective Assistance of Trial Counsel."; and "3. No Ineffective Assistance of Appellate Counsel." Doc. 12-4 at 19–20. Because Ground Four was neither a claim of ineffective assistance of trial counsel nor a claim of ineffective assistance of appellate counsel, it could only fall into the first bucket of claims—those which were precluded. The absence of an express and direct reference to the claim does not mean that it was not ruled on. *See Richter*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."). Petitioner fails to otherwise excuse the procedural default of Ground Four.

Accordingly, the Court recommends Ground Four be dismissed as procedurally defaulted without excuse.

E. Ground Five is without merit.

Petitioner claims his appellate counsel and PCR counsel were ineffective. Doc. 12-1 at 37. Petitioner asserts his appellate counsel was ineffective for failing "raise a compelling *Faretta* claim on appeal." *Id.* The Court previously addressed this claim in its analysis of Ground One and found it meritless. *See* Section V(A)(4), *supra.* Petitioner further asserts his appellate counsel and PCR counsel were ineffective for failing to raise Ground Four. The Court previously addressed this claim in its analysis of Ground Four and concluded it failed as a matter of law. *See* Section V(D), *supra.* Although Petitioner broadly asserts in Ground Five that he can establish cause to excuse the default of "*any* issues that might otherwise be procedurally defaulted," Doc. 12-1 at 37 (emphasis added), Petitioner proffers no further argument in Ground Five specific to any procedurally defaulted claim; a general conclusion of law unaccompanied by a specific statement of facts in support of it is insufficient. *See Reed*, 739 F.3d at 781 n.20; *Jones*, 66 F.3d at 205; *James*, 24 F.3d at 26. Accordingly, the Court recommends Ground Five be dismissed for lack of merit. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

F. Ground Six is procedurally defaulted.

In Ground Six, Petitioner claims Fourteenth Amendment due process was violated due to "the cumulative effect of all the errors committed in this case."[11] Doc. 12-1 at 40. Petitioner did not raise this claim on direct review or PCR review. *See* Doc. 12-2 at 1–39; Doc. 12-3 at 18–46. The claim is procedurally defaulted because Ariz. R. Crim. P. 32.2(a)(3) bars Petitioner from asserting it in state court now. *See Hurles*, 752 F.3d at 780; *Beaty*, 303 F.3d at 987; *see also Wooten v. Kirkland*, 540 F.3d 1019, 1025–26 (9th Cir. 2008) (stating a claim of cumulative error must be properly exhausted just as any other constitutional claim).

Petitioner does not show cause for the default or a fundamental miscarriage of justice. In his Petition, Petitioner concedes he did not present Ground Six to the Arizona Court of Appeals. Doc. 12-1 at 40. As cause, Petitioner states: "Both direct appeal counsel and PCR counsel withdrew from my case and left me without legal assistance or access to a law library in order to know the

law in the state court proceedings." *Id.* The Court finds no merit to this assertion. In his *pro se* appellate brief, Petitioner cited at least: five (5) state-court cases, sixteen (16) United States Supreme Court cases, eight (8) Circuit Court cases, and various Arizona rules and statutes. *See* Doc. 12-2 at 4–6. Petitioner's claims, though ultimately denied, were nonetheless well-reasoned and well-supported by applicable law. Petitioner therefore fails to establish cause on this basis.

***17** Petitioner further asserts his default is excused due to ineffective assistance of appellate and PCR counsel. Doc. 12-1 at 40; *see also* Doc. 19 at 47–48. However, Petitioner fails to allege any facts in Ground Six or his reply to support this claim, resting only on this bare conclusion of law, which is insufficient. *See Reed*, 739 F.3d at 781 n.20; *Jones*, 66 F.3d at 205; *James*, 24 F.3d at 26.

Accordingly, the Court recommends Ground Six be dismissed as procedurally defaulted without excuse.

VI. MOTION FOR DISCOVERY AND EVIDENTIARY HEARING

Petitioner requests production of "the physical video disks of the recorded interview conducted by the police and later disclosed by the State, prior to trial," as well as transcripts of those interviews, alleging "they contain relevant information related to grounds 2 and 4 of this petition." Doc. 18 at 1–2. Petitioner also requests an evidentiary hearing "because the PCR court made what appears to be a merits determination without conducting an evidentiary hearing ... in violation of ARS 13-4236 and 13-4238," which, Petitioner argues, renders its merits ruling "objectively unreasonable" under 28 U.S.C. § 2254(d)(2). *Id.* at 2. Finally, Petitioner "submits that he can prove by clear and convincing evidence that no reasonable fact finder would have found him guilty of the underlying offense." *Id.* Respondents responded. Doc. 20. Petitioner replied. Doc. 21.

The Court denies the motion. Further discovery and an evidentiary are not necessary as the Petition can be resolved by reference to the record before the Court. *See Clark v. Chappell*, 936 F.3d 944, 967 (9th Cir. 2019) ("An evidentiary hearing is not required on allegations that are conclusory and wholly devoid of specifics or on issues that can be resolved by reference to the state court record." (cleaned up)). Moreover, as discussed in Section V(C), *supra*, Petitioner fails to demonstrate actual innocence and the evidence he has presented to the Court with his Petition actually supports his convictions. The Court, therefore, finds no good cause to permit additional discovery requested. *See* Rule 6(a), Rules Governing Section 2254 Cases, 28 U.S.C. § 2254 ("A judge may, for good cause, authorize a party to conduct discovery ....").

Petitioner also asserts in Ground Five that he is "entitled to an evidentiary hearing in this court in order to determine the extent of his efforts to bring any defaulted claims to his attorneys' attention by way of handwritten notes, correspondence, and/or verbal communication so that he may establish 'cause' and that this court need only decide if the underlying IAC claims have at least some merit in order for him to establish 'prejudice.' " Doc. 12-1 at 37–38. "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 v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013). For the reasons discussed above and in Section V(C), *supra*, the Court finds no good cause to hold the hearing described above and denies Petitioner's request for one.

VII. CERTIFICATE OF APPEALABILITY

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing Section 2254 Proceedings, 28 U.S.C. § 2254. The Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003). Because Petitioner has not made the requisite showing here, the Court recommends that a certificate of appealability be denied.

VIII. CONCLUSION

***18 IT IS ORDERED** Petitioner's motion for discovery and an evidentiary hearing (Doc. 18) is **denied without prejudice**.

IT IS RECOMMENDED the Petition (Doc. 12) be **denied** and **dismissed with prejudice**.

IT IS FURTHER RECOMMENDED a certificate of appealability be **denied**.

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.

All Citations

Not Reported in Fed. Supp., 2022 WL 20595113

Footnotes

[1] The Court presumes the Arizona Court of Appeals's summary of the facts is correct. 28 U.S.C. § 2254(e)(1); *Purkett v. Elem*, 514 U.S. 765, 769 (1995).

[2] Petitioner's Motion for an extension of time to properly file a petition for review was denied. Doc. 11-1, Ex. T, at 110–12; Doc. 11-1, Ex. V, at 122. Later, Petitioner filed a "Motion to Respond to State's Response to Petition to Review and Correct Gross Error By [the State]" ("Motion to Respond"). Doc. 11-1, Ex. W, at 124–32. However, it appears that this motion was never ruled on. There is no ruling in the Court of Appeals's docket or in its decision ruling on the petition for review. *See* Doc. 11-1, Ex. R, at 93–94; Doc. 12-4 at 30–31.

[3] Petitioner initially raised four grounds (Docs. 1, 6), and amended his petition to add Grounds Five and Six. Doc. 12.

[4] Although Petitioner references the Fourteenth Amendment, the right to self-representation is appropriately sourced in the Sixth Amendment. The Court will therefore consider Ground One with reference to applicable Sixth Amendment jurisprudence. Petitioner's claim in Ground One regarding his appointed counsel (Doc. 12 at 18) is addressed with other ineffective assistance claims in Ground Three, Section V(C), *infra.*

[5] The court's statement was apparently a general observation rather than a reference to a prior refusal of transport by Petitioner, as the record does not indicate that Petitioner had refused transport up to this point in trial.

[6] This Court defers to the trial court's finding that Petitioner's excuse for refusing transport was meritless. *See* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.");

Williams v. Grounds, 2015 WL 5579901, at *6 (C.D. Cal. July 31, 2015) ("A state court's factual determinations in connection with a *Faretta* claim are presumed correct on federal habeas review."). In his Petition, Petitioner claims he "had a valid medical condition requiring a wheelchair which could have been verified through documentation." Doc. 12 at 20. However, Petitioner does not provide this Court with any such documentation nor is there any in the state record. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *Williams*, 529 U.S. at 437 ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings."). Petitioner also asserts he would have been disciplined if he had in fact refused transport. Doc. 12 at 20. However, an absence of evidence is not clear and convincing evidence.

[7] As discussed in Section II(C), *supra*, Petitioner did not file a formal petition for review; the Arizona Court of Appeals deemed his Motion to Appeal his Petition for Review. *See* Doc. 11-1, Ex. R, at 93.

[8] This is evident by its full title: "Motion to Respond to States [*sic*] Response to Petition to Review and Correct Gross Error By [the State]." Doc. 11-1, Ex. W, at 124.

[9] As discussed in n.2, *supra*, it does not appear that the Motion to Respond was ever ruled on.

[10] *See generally Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.").

[11] A claim of cumulative error is cognizable on habeas review. *See Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) ("The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (citing *Chambers v. Mississippi*, 410 U.S. 284, 298, 302–03 (1973)).

APPENDIX D

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MICHAEL MARION COTHAM, *Appellant*.

No. 1 CA-CR 14-0001

FILED 3-17-2015

Appeal from the Superior Court in Maricopa County
No. CR2012-133092-002
The Honorable David B. Gass, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

The Hopkins Law Office, Tucson
By Cedric Martin Hopkins
Counsel for Appellant

Michael Marion Cotham, Florence
Appellant

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Andrew W. Gould joined.

T H U M M A, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for defendant Michael Marion Cotham has advised the court that, after searching the entire record, he has found no arguable question of law and asks this court to conduct an *Anders* review of the record. Cotham was given the opportunity to file a supplemental brief pro se, and has done so. This court has reviewed the record and has found no reversible error. Accordingly, Cotham's convictions and resulting sentences are affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Cotham was charged with four counts of child prostitution, each a Class 2 felony. Before trial, the superior court granted several requests by Cotham to change counsel. Cotham then invoked his right to self-representation through a voluntary, signed waiver of counsel that was accepted by the court after an appropriate colloquy. After various motions and continuances, Cotham made a filing seeking to invoke his speedy trial rights and asking that trial be held within 90 days. This motion was granted and trial was scheduled for October 2013.

¶3 On the morning of the first day of trial, the superior court scheduled time for Cotham to meet with his investigator to go over the evidence before jury selection. However, Cotham (who was in custody) failed to appear in court that morning. After learning that Cotham refused transportation despite a warning that his failure to appear could result in revocation of his right to self-representation, the superior court revoked Cotham's right to self-representation. Cotham's advisory counsel was

[1] This court views the facts "in the light most favorable to sustaining the verdict, and resolve[s] all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588–89, 951 P.2d 454, 463–64 (1997) (citation omitted).

appointed as counsel and granted a two week continuance to prepare for trial.

¶4 At trial, the victim, T.G., testified that she met Cotham when she was 17 years old and staying with a friend after running away from a group home.[2] T.G. testified that Cotham and a man known as "Taxi Tom" talked to T.G. about becoming a prostitute for them. T.G. indicated that she was underage and did not want to become a prostitute but Cotham stated "we're going to do it anyway." According to T.G.'s testimony, Cotham became controlling and made her feel trapped. T.G. testified to having sex with numerous men while Cotham was prostituting her and stated that Cotham collected the payment, which was either drugs or money.

¶5 Police detectives testified that while investigating the matter, they engaged Cotham in conversation and used a fake story to explain their presence at a hotel where Cotham and T.G. were staying. While the detectives and Cotham were talking, T.G. approached Cotham and told him "a date . . . was on his way." At Cotham's suggestion, the detectives returned to the hotel later that night to spend time by the pool. While at the pool, T.G. joined the group and eventually spoke to one of the detectives alone. Based on that conversation, the detectives later returned to the hotel with other officers, including uniformed officers, to make arrests and execute a search warrant. When officers arrived on the floor where T.G. and Cotham were staying, they saw T.G. "walking fast and crying." T.G. told a detective that Cotham had "raised his fist at her because she had a conversation with [a detective] while [Cotham] was not present."

¶6 T.G. underwent a forensic exam. During the exam, T.G. indicated that Cotham had sexually assaulted her and had threatened both her and her family. The exam revealed several bruises on T.G. and several swabs were taken from T.G.'s genital area and breasts for DNA analysis. A forensic scientist testified that the DNA profile from one external genital swab was consistent with Cotham and that there was DNA from other unidentified individuals in the samples taken from T.G.

¶7 The jury found Cotham guilty on two counts of child prostitution and not guilty on the other two counts. On each guilty count, the jury also found three aggravating factors. At sentencing, Cotham's probation imposed for a prior conviction was revoked and, after being

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[2] Initials are used to protect the identity of the victim and witnesses. *See State v. Maldonado*, 206 Ariz. 339, 341 n.1 ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

given credit for time served, Cotham was released on that conviction. The superior court then sentenced Cotham to an aggravated sentence of 21 years for each of the child prostitution convictions to be served consecutively. Cotham properly was given 270 days of presentence incarceration credit on the first term to be served.

¶8 This court has jurisdiction over Cotham's timely appeal pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031, and -4033(A)(1) (2015).[3]

DISCUSSION

¶9 This court has reviewed and considered counsel's brief and appellant's pro se supplemental brief, and has searched the entire record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537 ¶ 30, 2 P.3d 89, 96 (App. 1999). Searching the record and briefs reveals no reversible error. The record shows that Cotham was either represented by counsel at all stages of the proceedings or that Cotham had knowingly, intelligently and voluntarily waived his right to counsel and represented himself. The evidence admitted at trial constitutes substantial evidence supporting Cotham's convictions. From the record, all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The sentences imposed were within the statutory limits and permissible ranges.

¶10 Cotham raises several arguments in his pro se supplemental brief, which this court discusses in turn.

I. The Superior Court Did Not Err In Revoking Cotham's Right To Self-Representation.

¶11 Cotham contends the superior court abused its discretion by revoking his right to self-representation after he failed to appear for a morning meeting with his investigator on the first day of trial. The decision to revoke a defendant's self-representation right is reviewed for an abuse of discretion. *State v. Gomez*, 231 Ariz. 219, 222 ¶ 8, 293 P.3d 495, 498 (2012).

¶12 "The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and represent himself," *State v. Lamar*, 205 Ariz. 431, 435 ¶ 22, 72

[3] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

P.3d 831, 835 (2003) (citing cases), "but only so long as the defendant 'is able and willing to abide by the rules of procedure and courtroom protocol,'" *State v. Whalen*, 192 Ariz. 103, 106, 961 P.2d 1051, 1054 (App. 1997) (citation omitted). Here, the superior court clearly informed Cotham of his responsibilities and consequences before it revoked Cotham's right to self-representation. The superior court explicitly stated that "[i]f you [Cotham] fail to attend the trial or refuse transport – it has happened – and if you decide to do that and absent yourself from this courtroom, you waive your right to represent yourself. So you need to make sure that you get ready and get here." The record shows that the next morning, Cotham refused transportation. After a delay and the superior court successfully ordering Cotham transported, the following exchange took place:

> THE COURT: Do you remember me telling you that if you refused transport, failed to appear, that that was something that I could use to decide to no longer represent yourself?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you remember me ordering that you would be here at 10:30 this morning to review the information that you said you needed to review?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: And you failed to appear this morning, didn't you? Don't explain, just the answer is yes or no.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And my understanding is because you refused to be transported, even though I entered the order specifically to allow you to prepare for yourself here today.
>
> THE DEFENDANT: Yes, sir.

Given Cotham's refusal to be transported on the first day of trial, notwithstanding the superior court's clear, unambiguous and timely warnings that Cotham would lose the right to represent himself if he did not follow the court's procedures and refused transport, the superior court

did not abuse its discretion in revoking Cotham's right of self-representation. *See Whalen*, 192 Ariz. at 107–08, 961 P.2d at 1055–56.

II. The State Did Not Exceed The Scope Of The Indictment.

¶13 Cotham argues that because he was charged with four counts of child prostitution, it was error for the court to allow the State to present evidence of his sexual conduct with T.G. because it was outside the scope of the indictment. Cotham failed to object at trial to the admission of the DNA evidence and forensic exam evidence and thus review on appeal is limited to fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *State v. Henderson*, 210 Ariz. 561, 567–68 ¶¶ 19–20, 115 P.3d 601, 607–08 (2005). "Accordingly, [the defendant] 'bears the burden to establish that "(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice."'" *State v. James*, 231 Ariz. 490, 493 ¶ 11, 297 P.3d 182, 185 (App. 2013) (citations omitted). Cotham has not met his burden here.

¶14 The State used the DNA evidence to show that T.G. had multiple sexual partners because she was being prostituted by Cotham and to corroborate T.G.'s testimony. Other testimony, including testimony about Cotham's conduct with T.G., was admitted to corroborate the State's theory of the case. Even assuming error in admitting such evidence, Cotham has not shown how such an error would be fundamental. There is no indication here that the evidence deprived Cotham of a right essential to his defense or that it deprived him of a fair trial and thus the admission of such evidence does not constitute fundamental error. *See Henderson*, 210 Ariz. at 567 ¶ 19, 115 P.3d at 607.

¶15 Although Cotham alleges that the instruction on sexual conduct with a minor was improper, such an instruction is important in a child prostitution case to explain an element of the charge. Here, the jury acquitted Cotham of two counts of child prostitution and, contrary to Cotham's claim, did not appear confused as to the reason for the inclusion of the instruction. On this record, inclusion of the instruction was not fundamental error.

III. The Superior Court Did Not Err In Precluding Evidence Of The Victim's Sexual Past.

¶16 Cotham argues that the superior court erred in precluding evidence of T.G.'s sexual past to show the "acts of prostitution [] were consensual acts of prostitution that the defendant had no involvement [in] . . . and to directly refute the State's scientific evidence." Commonly referred

to as the "rape-shield law," A.R.S. § 13-1421 precludes evidence of a victim's sexual conduct unless it falls into one of five enumerated categories. The statute also states that such evidence is admissible only if the court finds that the evidence is relevant and material to a fact in issue and that the inflammatory or prejudicial nature of the evidence does not outweigh its probative value. *See* A.R.S. § 13-1421(A). This court reviews the superior court's decision to preclude evidence under A.R.S. § 13-1421 for an abuse of discretion. *See State v. Gilfillan*, 196 Ariz. 396, 405, 998 P.2d 1069, 1078 (App. 2000).

¶17 In response to the State's motion to preclude such evidence, the superior court found the victim's sexual past irrelevant and inadmissible. When pressed by the court for specific instances or evidence Cotham wanted to introduce, Cotham responded by saying "things about her sexual nature as a person" and her prior history of sexual conduct "not for money." Notably, when the court asked "[h]ow is it relevant because the charges against you are whether you engaged in child prostitution," Cotham replied "I don't know. . . They're probably not, but this is the stuff she's bringing up." Although Cotham argued that he could introduce T.G.'s sexual past because it was referenced in the police report, the superior court correctly stated that "[t]here's no exception for [it] just because it was included in the police report."

¶18 Moreover, the State only requested preclusion of T.G.'s sexual past before coming into contact with Cotham. In fact, the State introduced much of the evidence Cotham requested to show its theory that the victim had multiple sexual partners "due to the fact that she was engaging in prostitution." Cotham was free to argue that the sexual encounters were consensual and not for money but, as the superior court properly pointed out, T.G.'s sexual past before meeting Cotham "certainly [is] not relevant."

¶19 Although Cotham argues that T.G.'s sexual past could be introduced to refute DNA evidence taken from T.G., Cotham does not explain how such evidence would refute the State's DNA evidence. The superior court's ruling did not preclude Cotham's defense that T.G. was not paid for alleged prostitution acts nor did it preclude Cotham from arguing that T.G. did not engage in prostitution. Accordingly, on this record, there was no error in precluding evidence of the victim's sexual past.

IV. The DNA Evidence Did Not Violate Cotham's Confrontation Clause Rights.

¶20 Cotham alleges the DNA evidence introduced at trial violated his Sixth Amendment right to confront adverse witnesses because "the DNA evidence provided by the State was not specific" and "[i]ntroduction of [the] DNA evidence in this manner allowed the DNA to, in essence tell a story which would be no different than if the State played a recording of these men stating they had sex with this alleged victim with the defense not able to question the men on this story." Cotham failed to make an objection at trial and thus review on appeal is limited to fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *Henderson*, 210 Ariz. at 567–68 ¶¶ 19–20, 115 P.3d at 607–08.

¶21 Cotham has not shown how the admission of DNA evidence constitutes error, let alone fundamental error. The DNA evidence was introduced through a forensic scientist, who Cotham cross-examined, and was used to corroborate T.G.'s testimony. The fact that the DNA evidence itself, or the source of the DNA that was not Cotham's, could not be cross-examined is not a Sixth Amendment violation. Similarly, Cotham has not shown how his compulsory process rights were violated when the unknown sources of the DNA were not called by the State to testify.

V. Cotham Lacks Standing To Assert A Fourth Amendment Violation.

¶22 Cotham also argues that that his Fourth Amendment rights were violated when the Phoenix police supplied alcohol to the 17-year old victim during the time when T.G. told the police she was being prostituted. There is conflicting evidence as to whether T.G. was supplied with, or consumed, alcohol in the presence of the police officers. Furthermore, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Brown v. United States*, 411 U.S. 223, 230 (1973) (citing cases). Cotham has not shown that he has standing to assert an alleged Fourth Amendment violation on T.G.'s behalf.

VI. Cotham's Speedy Trial Rights Were Not Violated.

¶23 Cotham argues that his speedy trial rights were "violated by the State obtaining continuances for trial conflicts that did not exist" and "by the court allowing an exclusion of time when [the court] took away the

defendant's pro se status." The decision to grant a motion for continuance falls within the sound discretion of the trial judge and will not be reversed absent an abuse of discretion that is demonstrably prejudicial to the defendant. *State v. Jackson*, 112 Ariz. 149, 154, 539 P.2d 906, 911 (1975).

¶24 By rule, a defendant must be tried within a certain number of days from a specified time, typically the arraignment. Ariz. R. Crim. P. 8.2. However, for certain trial continuances, speedy trial time calculations are excludable. *See* Ariz. R. Crim. P. 8.5(b). Here, the superior court found that the unavailability of the assigned prosecutor constituted extraordinary circumstances warranting a continuance and that "delay [was] indispensable to the interests of justice." The record shows that the assigned prosecutor was going to be in trial on another matter that took precedence over Cotham's trial because it was an older, in-custody matter. It cannot be said, on this record, that the granting of the continuance constituted an abuse of discretion. Moreover, Cotham has not shown any prejudice from the continuance. This conclusion is further supported by the fact that after this continuance, Cotham filed a motion for a speedy trial and, at the same hearing, asked for a two week continuance.

¶25 Furthermore, it cannot be said that Cotham was prejudiced by the two weeks of excluded time the court later granted to allow Cotham's counsel to prepare for trial once Cotham's pro per status was revoked. Defense counsel requested the two week continuance. Cotham has not shown error or resulting prejudice, given that the continuance was granted at defense counsel's request so that an adequate defense could be presented for Cotham during trial.

VII. The Superior Court Did Not Err In Denying Cotham's Motion For A New Trial.

¶26 Cotham argues the superior court erred in denying his motion for a new trial based on "abuse of discretion by the trial court judge denying the defendant of his constitutional right to defend himself." This court reviews the denial of a motion for new trial for an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996).

¶27 It appears that the motion for a new trial was not timely, as it was filed more than a month after the verdict. *See* Ariz. R. Crim. P. 24.1(b) (requiring new trial motion to be filed "no later than 10 days after the verdict"). Even if timely, Cotham has not shown how the superior court's revocation of his right to represent himself was error, which was the ground

stated in his motion. *See* Ariz. R. Crim. P. 24.1(c)(4). On this record, the superior court did not abuse its discretion in denying Cotham's motion.

VIII. There Was No Error In Denying The Jury The Use Of The Statute On Child Prostitution.

¶28 Cotham argues the jury's request to view the child prostitution statute "shows the jury had problems determining what the defendant was charged with" and that the court erred in denying the jury's request. Because Cotham failed to object to the superior court's response to the jury's request, he waived the right to raise the issue on appeal absent fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *Henderson*, 210 Ariz. at 567–68 ¶¶ 19–20, 115 P.3d at 607–08. The superior court's response to a jury question is reviewed for abuse of discretion. *See State v. Ramirez*, 178 Ariz. 116, 126, 871 P.2d 237, 247 (1994).

¶29 Cotham has not shown how the superior court's response to the jury's request was error, let alone fundamental error. During deliberations, the jury submitted a note stating "[w]e would like to see a copy of all police reports, the hotel receipts & a copy of the statute of the law for child prostitution." After consultation with both parties, the court responded in writing stating "[p]lease refer to the jury instructions and the evidence presented at trial, including the exhibits that were admitted." Cotham's counsel agreed with the court's response and made no objection. Although Cotham posits what might have prompted the jury to make this request, he does not indicate how the court's response was error. On this record, the court did not abuse its discretion in responding to the jury's inquiry.

CONCLUSION

¶30 This court has read and considered counsel's brief and Cotham's pro se supplemental brief, and has searched the record provided for reversible error and has found none. *State v. Leon*, 104 Ariz. 297, 300, 451 P.2d 878, 881 (1969); *State v. Clark*, 196 Ariz. 530, 537 ¶ 30, 2 P.3d 89, 96 (App. 1999). Accordingly, Cotham's convictions and resulting sentences are affirmed.

¶31 Upon filing of this decision, defense counsel is directed to inform Cotham of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584–85, 684 P.2d 154,

156–57 (1984). Cotham shall have 30 days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review.

Ruth A. Willingham · Clerk of the Court
FILED: ama

APPENDIX E

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-133092-002 DT

12/19/2018

HONORABLE DAVID B. GASS

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

v.

MICHAEL MARION COTHAM (002)

ROBERT E PRATHER

MICHAEL MARION COTHAM
287067 ASPC EYMAN COOK UNIT
PO BOX 3200
FLORENCE AZ 85132
NATALEE SEGAL

COURT ADMIN-CRIMINAL-PCR
JUDGE GASS

RULING
ON
POST-CONVICTION RELIEF

Statement of the Case

Petitioner Michael Marion Cotham seeks post-conviction relief (PCR) following his conviction and sentencing in CR2012-133082-002. The jury convicted Petitioner on two counts of child prostitution and acquitted him on two counts. Petitioner received a 21-year sentence for each conviction. Petitioner must serve the sentences consecutively. The Court of Appeals, Division One, affirmed Petitioner's convictions and sentences in 1-CA-CR 14-0001.

PCR counsel, Natalee Segal, filed a Notice of Completed Review, saying she found no issue on which to pursue PCR. *See* Docket # 267. Petitioner timely filed his own brief in support of relief (Amended Petition). *See* Docket # 343. The State responded. *See* Docket # 344. Petitioner filed his Reply. *See* Docket # 349.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-133092-002 DT 12/19/2018

Principles of Law

An Arizona criminal defendant may be entitled to post-conviction relief. *See* Ariz. R. Crim. P. 32.1. Rule 32 relief is addressed to the discretion of the trial court. *State v. Adamson*, 136 Ariz. 250, 265, 665 P.2d 972, 987 (1983). Post-conviction relief is separate and distinct from the right to appeal; it is not designed to give a criminal defendant a second chance for appeal. *State v. Carriger*, 143 Ariz. 142, 145, 692 P.2d 991, 994 (1984). Post-conviction relief "is designed to accommodate the unusual situation where justice ran its course and yet went awry." *Id.* (citing *State v. McFord*, 132 Ariz. 132, 133, 644 P.2d 286 (App. 1982).

The burden of proving a colorable claim under Rule 32 rests squarely on Petitioner's shoulders. *See Carriger*, 143 Ariz. at 146, 692 P.2d at 995. "To be colorable, a claim has to have the appearance of validity, *i.e.*, if [Petitioner's] allegations are taken as true, would they change the verdict?" *See Adamson*, 136 Ariz. at 265, 665 P.2d at 987. If Petitioner presents no grounds for relief, the petition for post-conviction relief must be denied. *See* Ariz. R. Crim. P. 32.6(c).

Analysis

1. **Most Claims Precluded.**

Rule 32.2 precludes Petitioner from raising any issue in a petition for post-conviction relief that: (1) could have been raised on direct appeal, (2) was finally adjudicated on the merits on appeal or another collateral proceeding, or (3) was waived at trial, appeal, or in any collateral proceeding. *See* Ariz. R. Crim. P. 32.2. Rule 32.2 promotes efficiency, and is "designed . . . to prevent endless or nearly endless reviews of the same case in the same trial court." *Stewart v. Smith*, 202 Ariz. 446, 450, ¶10, 46 P.3d 1067, 1071 (2002). For most issues, the State need only show Petitioner did not raise the issue on direct appeal and need not show Petitioner personally, knowingly, voluntarily, and intelligently waived an issue. *See Smith*, 202 Ariz. at 449, ¶9, 46 P.3d at 1070; Ariz. R. Crim. Proc. 32.2 cmt.

In his Amended Petition, Petitioner raises a number of precluded claims in the form of ineffective assistance of counsel in an effort to avoid preclusion. Petitioner does not support his claims with any facts to warrant further review. Further, because Petitioner could have raised or did raise the claims on appeal, he may not now seek relief. *See* Rule 32.2, Ariz. R. Crim. Pro. None of these precluded claims require a personal waiver, so any failure to raise the issues in his direct appeal bar him from raising them here. *See Stewart,* 202 Ariz. at 449, ¶9, 46 P.3d at 1070.

2. **No Ineffective Assistance of Trial Counsel.**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-133092-002 DT 12/19/2018

Claims for ineffective assistance of trial counsel are governed by the two-pronged *Strickland* test. *See State v. Lee*, 142 Ariz. 210, 213-14, 689 P.2d 153, 156-57 (1984) (formally adopting the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

- First, Petitioner must establish inadequate representation, which means that trial counsel's performance fell well below an objectively reasonable standard dictated by prevailing professional norms based on all of trial counsel's actions in light of the circumstances that existed at the time. *Strickland*, 466 U.S. at 688.

- Second, Petitioner must show that trial counsel's actions prejudiced the defense, *i.e.* that there is a reasonable probability that, but for trial counsel's incompetence, the result would have been different. *Id.* at 694.

Failure of one or both of these prongs is fatal to a claim for ineffective assistance of trial counsel. *Id.* at 700. Strategic or tactical decisions made by trial counsel as to how to defend a case are nearly unassailable in subsequent proceedings. *Id.* at 689. In addition, Petitioner is not entitled to effective assistance of counsel in post-conviction relief proceedings. *See State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995).

Here, giving a broad reading to Petitioner's Amended Petition, he challenges the effectiveness of his trial counsel for several reasons.

Bullshit

[redacted] NOT TRUE I LOCATED Amit motions! for witness 137.

For example, Petitioner says trial counsel should have located and subpoenaed more witnesses to testify on Petitioner's behalf. Petitioner himself experienced the difficulty locating these very witnesses when Petitioner represented himself. Further, trial counsel actually tried to locate the witnesses. The State did too, including "Taxi Tom," because the State viewed "Taxi Tom" as a strong witness against Petitioner and as someone who participated in the criminal activity.

Petitioner says trial counsel was not aggressive enough in cross-examining the State's witnesses, including the victim and the co-defendant. Trial counsel, however, effectively cross-examined the witnesses within the confines of the law and prior evidentiary rulings. Trial counsel scored points with each witness. Trial counsel was sufficiently successful at scoring points in his cross-examination and subsequent arguments that the jury acquitted Petitioner of two of the four counts. Petitioner is mistaken in his belief that the victim's prior behavior would somehow absolve him of this role in trafficking her as a minor. It does not.

Ultimately, Petitioner came forward with mere conclusory statements regarding his claims. He offered no factual support for the claims. Petitioner's contrived timelines and

factually unsupported scenarios do not warrant further review or comment. Indeed, the evidence in the record actually refutes Petitioner's allegations.

In the absence of facts to support Petitioner's claims, Petitioner cannot establish trial counsel's performance fell well below an objectively reasonable standard dictated by prevailing professional norms based on all of trial counsel's actions in light of the circumstances that existed at the time. *See Strickland*, 466 U.S. at 688. In addition, in the absence of any evidence to support Petitioner's allegations, Petitioner cannot establish counsel's failure to pursue any of them prejudiced his defense. *See id.* at 694.

3. No Ineffective Assistance of Appellate Counsel.

A Petitioner may raise an allegation of ineffective assistance of appellate counsel under Rule 32. *State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995). The two-prong *Strickland* test also applies to a claim of ineffective assistance of appellate counsel. *Id.* Determination of what issues are appealable in view of the trial record is a matter of the appellate counsel's judgment. *State v. Stanley*, 123 Ariz. 95, 106, 97 P.2d 998, 1009 (App. 1979). Arizona law does not require appellate counsel raise every issue or even every meritorious issue. *Herrera*, 183 Ariz. at 647, 905 P.2d at 1382.

Far from being ineffective assistance, the selection and winnowing of issues on appeal is the hallmark of effective appellate advocacy. *Id.* Once the issues have been narrowed, an appellate counsel's waiver of any issues binds the petitioner. *Id.* Those issues may not be resuscitated in subsequent Rule 32 proceedings. *Id.* Appellate counsel's assistance is not rendered deficient where appellate counsel did what was possible with facts that offered no meritorious defense. *Id.*

Here, Appellate counsel adequately performed all professional obligations even though appellate counsel did not raise every possible issue. For example, appellate counsel had full discretion to raise or not raise the issue of self-representation. The record showed Petitioner voluntarily absented himself from trial proceedings. At that point, Petitioner forfeited his ability to represent himself. Petitioner's explanation for refusing to come to the proceedings because of back pain were not credible and were rejected. Appellate counsel appropriately left the issue lie where it belonged.

The same is true of Petitioner's other claims of ineffective assistance of appellate counsel. The record either does not support the claims or the claims would not succeed on appeal. For example, trial counsel did cross-examine the State's DNA expert. The case involved no Fourth Amendment violations, and any alleged violations were waived while Petitioner represented himself. The jury instructions were correct and complete. Bald assertions of perjured

testimony, without any evidentiary support, do not support any type of appellate relief or argument in an appellate brief.

One example drives the point home regarding Petitioner's illogical reliance on irrelevant and unsupported factual allegations. Petitioner continues to argue he should not be guilty because the investigating officers did not immediately abandon the investigation and arrest the underage victim when she began to consume alcohol in front of them. The argument is not well grounded in law, fact, or common sense.

As with the ineffective assistance of trial counsel claim, Petitioner's ineffective assistance of appellate counsel claim does not have an appearance of validity sufficient to be a colorable Rule 32 claim under both prongs of the *Strickland* test. Appellate counsel's actions fell well within prevailing professional norms. Even if they did not, Petitioner did not meet his burden of showing the appeal would have turned out differently if appellate counsel had raised the additional issues.

Conclusions of Law

Petitioner raises no colorable basis for post-conviction relief. Petitioner's *Amended Petition for Post-Conviction Relief and Appendix with Exhibits*. *See* Docket # 343.

Order/Ruling

IT IS THEREFORE ORDERED summarily denying Petitioner's *Amended Petition for Post-Conviction Relief and Appendix with Exhibits*. *See* Docket # 343.

APPENDIX F

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

MICHAEL MARION COTHAM, *Petitioner*.

No. 1 CA-CR 19-0091 PRPC
FILED 9-19-2019

Petition for Review from the Maricopa County
No. CR2012-133092-002
The Honorable David B. Gass, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Robert E. Prather
Counsel for Respondent

Michael Marion Cotham, Florence
Petitioner

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie, Chief Judge Peter B. Swann, and Judge Samuel A. Thumma delivered the following decision.

PER CURIAM:

¶1 Petitioner Michael Cotham seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is Cotham's first petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). It is the petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find the petitioner has not established an abuse of discretion.

¶4 We grant review but deny relief.

AMY M. WOOD • Clerk of the Court
FILED: AA