IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jessie Wilder Darrin,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-02196-PHX-DWL (DMF)

REPORT AND RECOMMENDATION

TO THE HONORABLE DOMINIC W. LANZA, UNITED STATES DISTRICT JUDGE:

This matter is on referral to the undersigned for further proceedings and a report and recommendation pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure. (Doc. 11 at 5)[1] On December 23, 2021, Petitioner Jessie Wilder Darrin ("Petitioner"), who was then confined in the Arizona State Prison Complex in Florence, Arizona,[2] filed a *pro*

[1] Citation to the record indicates documents as displayed in the official Court electronic document filing system maintained by the District of Arizona under Case No. CV-21-02196-PHX-DWL (DMF).

[2] At the time of the filing, Petitioner was confined in the Arizona State Prison Complex in Florence, Arizona, regarding the underlying convictions and sentences in this matter. (*See* Docs. 1, 2, 3; *see also* Doc. 23 at 23; Doc. 23-1 at 59) In early July 2022, Petitioner filed a notice of change of address after his release from custody. (Doc. 20; *see also* Doc. 23 at 23; Doc. 23-1 at 59) In late August 2022, Petitioner filed a notice of change of address stating that Petitioner was located at the Arizona Department of Corrections Maricopa Reentry Center through September 8, 2022. (Doc. 24) This placement pertained to supervision on another case, not the convictions and sentences underlying this matter. (*See* Doc. 23 at 23; Doc. 23-1 at 59) In September 2022, Petitioner filed an additional notice of change of address, updating his address to the same address Petitioner had used initially

se Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) ("Petition"). (Doc. 1 at 1, 11) On the same date, Petitioner filed a Supporting Brief (Doc. 2), an Affidavit in support of the Petition (Doc. 3), a Motion for Discovery (Doc. 4), and a Motion for Appointment of Counsel (Doc. 5).

On April 12, 2022, the Court denied Petitioner's Motion for Discovery (Doc. 4) and Motion for Appointment of Counsel (Doc. 5) and ordered Respondents to answer the Petition. (Doc. 11 at 4) On April 27, 2022, Petitioner filed a document titled "Petitioner's Objections to the Magistrates Order (1) Denial to Petitioner's Motion for Discovery (Doc. 4)" despite that there were no orders by any Magistrate Judge at that time. (Doc. 13) The Court construed Petitioner's objection as a motion for reconsideration and denied Petitioner's objection on May 5, 2022. (Doc. 15)

On August 3, 2022, Respondents filed their Limited Answer to the Petition. (Doc. 23) The Limited Answer to the Petition reflects service by mail upon Petitioner at Petitioner's then-current address. (Doc. 23 at 49; Doc. 20)[3] Petitioner did not file a reply, and the time to do so expired in early September 2022.

For the reasons set forth below, it is recommended that these proceedings be dismissed and denied with prejudice, the Clerk of Court be directed to terminate this matter, and a certificate of appealability be denied.

I. BACKGROUND

A. Summary of Events Resulting in Charges Against Petitioner

On July 22, 2016, Petitioner drove his vehicle with "extensive windshield damage" and a flat tire. (Doc. 23-1 at 6, 42, 54)[4] After other drivers called 9-1-1 to report Petitioner's vehicle, officers conducted a traffic stop. (*Id*. at 42, 54) During the traffic stop, officers noticed that Petitioner had signs of impairment. (*Id*. at 6, 42, 54) A blood test revealed that

---

after his release from custody in July 2022. (Doc. 25; Doc. 20)

[3] *See* footnote 2, *supra*.

[4] In Arizona, the factual basis for a guilty plea "may be ascertained from the record including presentence reports, preliminary hearing reports, admissions of the defendant, and from other sources." *State v. Varela*, 120 Ariz. 596, 598 (1978).

Petitioner's blood alcohol content was .175 percent. (*Id*. at 42, 54) Upon a records check, officers discovered that Petitioner's driver's license was suspended for an "Open Admin Per Se Suspension[.]" (*Id*. at 6, 42) Petitioner admitted to officers that he had consumed a twenty-four ounce can of beer and stated that he was a five out of ten on an impairment scale. (*Id*. at 42, 54)

B. Petitioner's Charges, Plea, and Sentences

On November 17, 2016, in Maricopa County Superior Court case CR2016-152809-001, Petitioner was charged by complaint with one count of driving under the influence while his driver's license was suspended and one count of driving with a blood alcohol concentration of .08 or more while his license was suspended. (*Id*. at 3-4) On December 22, 2016, Petitioner's appointed counsel requested a continuance of the preliminary hearing for one week "to consider plea." (*Id*. at 9)[5] On December 27, 2016, Petitioner's case was transferred from the Office of the Public Defender to the Office of the Legal Advocate (*id*. at 11), and Kenneth Countryman was subsequently appointed to represent Petitioner (*id*. at 16).

On December 29, 2016, Petitioner entered a "Waiver of Probable Cause Hearing, Continuance and Order" in which Petitioner acknowledged the charges against him, that he had the right to a preliminary hearing, that the state had extended a plea offer, that Petitioner waived his right to a preliminary hearing, that the state's plea offer could be revoked at any time prior to entry and acceptance by the court, that Petitioner's indictment would be deferred, and that Petitioner would have no other probable cause determination in his case. (*Id*. at 13-14) The superior court accepted Petitioner's waiver of preliminary hearing and deferred Petitioner's arraignment to January 26, 2017. (*Id*. at 14, 18-19)

On January 26, 2017, Petitioner was charged by information with one count of driving under the influence while Petitioner's license was suspended and one count of driving with a blood alcohol concentration of .08 or more while Petitioner's license was suspended. (*Id*. at 21-22) Also on January 26, 2017, Petitioner pleaded not guilty at his

[5] The preliminary hearing was referred to as "PH" in the motion.

arraignment. (*Id*. at 24-26)

At a status conference on April 13, 2017, Petitioner made an oral motion for new counsel. (*Id*. at 28) Following discussion on the record, the superior court denied Petitioner's motion and affirmed the trial date. (*Id*. at 28-29)

On May 26, 2017, the superior court reviewed the parties' plea agreement with Petitioner in open court and advised Petitioner of the sentencing range as well as pertinent constitutional rights and rights of review. (*Id*. at 31) Petitioner agreed to the factual basis put on the record by his appointed trial counsel. (*Id*. at 35-37) Petitioner pleaded guilty to two counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs. (*Id*. at 32, 35-37) Petitioner acknowledged five prior felony convictions. (*Id*. at 32-33, 37) The superior court accepted Petitioner's guilty pleas. (*Id*. at 33)

A presentence report was prepared for Petitioner's July 12, 2017, sentencing. (*Id*. at 39-55) On the day of sentencing, the superior court found that Petitioner had knowingly, intelligently, and voluntarily waived all pertinent constitutional and appellate rights by pleading guilty. (*Id*. at 57) On July 12, 2017, the superior court sentenced Petitioner to a fine and concurrent, seven-year terms of imprisonment on each count of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs. (*Id*. at 58-59) The superior court revoked Petitioner's driver's license and required Petitioner to equip any motor vehicle he operates with an ignition interlock device for at least one year following the conclusion of the revocation of Petitioner's driver's license. (*Id*. at 59-60) The court did not place Petitioner on community supervision because he was subject to community supervision on a different case upon release from confinement. (*Id*. at 59)

C. First and Second Post-Conviction Relief ("PCR") Proceedings

On September 27, 2017, Petitioner filed a timely *pro se* PCR notice and requested appointment of counsel.[6] (*Id*. at 63-65) The superior court appointed the Office of the Legal

[6] The PCR notice was signed by Petitioner and notarized on September 27, 2017 (Doc. 23-1 at 65), but the PCR notice was not filed by the clerk of court until October 10, 2017. (*Id*. at 63) Pursuant to the prison mailbox rule, this Report and Recommendation uses September 27, 2017, as the filing date of Petitioner's PCR notice. *See State v. Rosario*, 195

Advocate ("OLA") to represent Petitioner. (*Id*. at 67) OLA moved to withdraw as Petitioner's counsel due to a conflict of interest. (*Id*. at 70-72) In response to OLA's motion to withdraw, Petitioner alleged that his trial counsel had provided ineffective assistance and stated that he had "no knowledge of any conflict of interest regarding current/previous representation, nor d[id] [he] believe that by a defense attorney who has another case totally seperate [*sic*] from [Petitioner's] should conflict with that of" Petitioner's. (*Id*. at 74-76) In his response, Petitioner stated that he was worried he would have "a repeat of an ineffective assistance of counsel." (*Id*. at 76) On November 29, 2017, the superior court granted OLA's motion to withdraw and appointed Mark Heath II ("first PCR counsel") to represent Petitioner. (*Id*. at 78-79)[7]

First PCR counsel moved for an extension of time to file a PCR petition "due to the amount of leads that [Petitioner] ha[d] requested [first PCR counsel] to investigate." (Doc. 23-2 at 3-4) The superior court granted the motion for extension of time. (*Id*. at 6)

On April 26, 2018, Petitioner's first PCR counsel completed post-conviction review and filed a notice with the superior court that first PCR counsel had found no colorable claim to raise. (*Id*. at 8-11) The superior court thereafter allowed Petitioner the opportunity to file a *pro se* PCR petition and ordered first PCR counsel to remain as Petitioner's advisory counsel during PCR proceedings in superior court. (*Id*. at 13-14)

On May 23, 2018,[8] Petitioner filed a "Motion to Compel Production; and Motion to Extend Time to File Petition for Post-Conviction Relief" in the superior court. (*Id*. at 16-18) In his motion, Petitioner requested that the superior court "compel production of motor vehicle department and the Encanto Justice Court records and reports, any and all TSS (Traffic Survival School), NBD records, and any or all open or admin per se notices regarding DUI charges, failure to appear, failure to meet TSS assignment or otherwise any court orders in disposition of agency case number DPSP715415 after July 2, 2010." (*Id*. at

---

Ariz. 264, 266 (App. 1999) (applying the prison mailbox rule to state court PCR notices).

[7] Mark Heath II of the Heath Law Firm was appointed. (Doc. 23-2 at 3)

[8] *See Rosario*, 195 Ariz. at 266.

16) Petitioner asserted that such records were "critical to supporting and raising any viable issues or colorable claims" in Rule 32 PCR proceedings. (*Id*.) Petitioner argued that he could not prepare an adequate PCR petition without the aforementioned records. (*Id*. at 17)

On July 30, 2018, the superior court denied Petitioner's motion to compel on the basis that such relief could not "be afforded in a post-conviction criminal case." (*Id*. at 20) However, the superior court granted Petitioner's motion for extension to file his *pro se* PCR petition. (*Id*.)

On August 20, 2018,[9] Petitioner filed a "Motion for Reconsideration; and Motion to Expand Record[.]" (*Id*. at 22-26) In his motion, Petitioner argued that trial counsel did not produce Petitioner's entire trial file to Petitioner's first PCR counsel, thereby causing first PCR counsel's notice of completion of review to be inadequate. (*Id*. at 23) Petitioner argued that his first PCR counsel had provided ineffective assistance because "the results of [first PCR counsel's] review of the current trial file amounted to no petition for post-conviction relief to file, possibly waiving all other claims under Rule 32.1 (a-h)." (*Id*.) Petitioner asserted that the records requested were relevant to whether "the court parties provided [Petitioner] inaccurate information" and whether trial counsel provided Petitioner erroneous advice. (*Id*. at 24) Petitioner argued that the deprivation of the requested records violated his "due process right guaranteed by the Fifth, Sixth and Fourteenth Amendment of the United States and Arizona Constitution[.]" (*Id*. at 25)

On September 12, 2018, the superior court interpreted Petitioner's motion as a motion for rehearing under Ariz. R. Crim. P. 32.9(a) and denied Petitioner's motion as untimely and lacking a sufficient factual or legal basis. (*Id*. at 28-29) The superior court provided Petitioner an additional extension of time in which to file a *pro se* PCR petition. (*Id*. at 29)

On October 2, 2018,[10] Petitioner filed his first *pro se* PCR petition. (Doc. 23-3 at 3-45; Doc. 23-4 at 3-55) In his petition, Petitioner argued that "trial counsel's failure to

[9] *See Rosario*, 195 Ariz. at 266.

[10] Petitioner signed his PCR petition on September 26, 2018, but certified that he mailed his PCR petition on October 2, 2018. (Doc. 23-3 at 39) *See Rosario*, 195 Ariz. at 266.

investigate, failure to familiarize himself with all the facts and law relevant to [Petitioner's] charged offenses, and counsel's erroroneous [*sic*] advice to plead guilty rendered [Petitioner's] plea of guilty unknowingly, unintelligently or involuntarily entered." (Doc. 23-2 at 6-27) Petitioner argued that trial counsel's errors caused prejudice through the "imposition of an unlawful or illegal sentence." (*Id*. at 27-38)

The state filed a response to the PCR petition. (Doc. 23-4 at 59-77) On January 7, 2019, Petitioner filed an "Affidavit Supporting Petitioner for Post-Conviction Relief; Affidavit of Injured Party – Requester for Legal Remedy, Exhibits Attatched [*sic*] Hereto and Evidence Supporting I.A.C. Claim Incorporated Herein[.]" (Doc. 23-5 at 3-59; Doc. 23-6 at 3-64; Doc. 23-7 at 3-60; Doc. 23-8 at 3-42; Doc. 23-9 at 3-50; Doc. 23-10 at 3-53) Also on January 7, 2019, Petitioner filed a "Motion to Supplement or Expand the Record on Appeal for Post-Conviction Relief; and Motion for In Camera Review; and Motion to Strike State's Response[.]" (Doc. 23-10 at 55-70) Petitioner requested that the superior court strike the state's response to his PCR petition "due to new discovery material facts and evidence" allegedly withheld during plea proceedings and sentencing. (*Id*. at 55) On January 28, 2019, Petitioner also submitted an affidavit signed by Shannon J. Darrin, who had attempted to request public traffic records for Petitioner. (*Id*. at 72-75)

On February 5, 2019, the superior court denied Petitioner's first PCR petition. (*Id*. at 77-80) The superior court stated that:

> prior rulings have repeated "disagreements in trial strategy will not support a claim of ineffective assistance of counsel, provide the challenged conduct had some reasoned basis." State v. Vickers, 180 Ariz. 521, 526 (1994) quoting State v. Nirschel, 155 Ariz. 206, 208 (1987); see also (1988); State v. Sammons, 156 Ariz. 51, 56 (1988). Petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, 466 U.S. 668, 695-96 (1984).
>
> [Petitioner] claims ineffective assistance of counsel due to failure to conduct pretrial investigation. The defendant contends that if defense counsel conducted more thorough investigation he would have been advised differently by his attorney and would not have pled guilty to the court. [Petitioner] claims there was no proof his license was actually suspended/revoked and the state court not prove he should have known his license was suspended/revoked. […]
>
> Regarding the claim of failure to conduct pretrial investigation, defense fails

> to show any evidence to support how additional pretrial investigation would have resulted in a different outcome. [Petitioner's] own attachments show in several different ways that his license was suspended on July 22, 2016, and there were ways that he should have known that it was suspended. Given this, no amount of investigation would have changed these facts. Therefore, defense counsel's recommendation to plead guilty to the court would not have changed.

(Doc. 23-10 at 78) Addressing the attachments to Petitioner's first PCR petition and supporting affidavit, the superior court determined that Petitioner had been made aware of an interlock requirement on Petitioner's license; that Petitioner did not show that he completed the interlock requirement or that the case underlying his interlock requirement and license suspension was dismissed; that Petitioner had not shown that his license was valid or that his license was no longer suspended on July 22, 2016; and that in 2013 and later, Petitioner had only been issued identification cards, as opposed to driver's licenses. (*Id*. at 79-80) The superior court concluded that:

> [Petitioner] presents no evidence of ineffective assistance of counsel. The [Petitioner's] argument is that more investigation would have resulted in proof of a non-suspended/revoked license or some reason he would not have known of the suspension. More investigation would not have resulted in these outcomes because the facts show otherwise. More investigation does not change facts. Therefore, [Petitioner] has failed to show a colorable claim that there was any deficient performance by his attorney.
>
> The court finds [Petitioner] has failed to prove his attorney engaged in any deficient performance that fell below an objective standard of reasonableness. [Petitioner] has failed to meet the first prong of Strickland. 466 U.S. 668 (1984). On the second prong, as there was no deficient attorney performance, [Petitioner] suffered no prejudice due to his attorney's performance.

(Doc. 23-10 at 80)

In February 2019,[11] Petitioner filed a "Motion for Rehearing; Alternatively Motion for Reconsideration[,]" in which Petitioner argued that the trial court erred in denying PCR relief because Petitioner's priors were "unallegeable"; that Petitioner's trial counsel failed to adequately advise Petitioner and present Petitioner's criminal history for sentencing enhancement determinations; and that the trial court improperly found that additional

[11] Petitioner signed his motion on February 10, 2019, but certified that he handed his motion to prison officials for delivery on February 12, 2019 (Doc. 23-10 at 92); the clerk of court filed Petitioner's motion on February 21, 2019 (*id*. at 82).

investigation by trial counsel would not have resulted in a different outcome. (*Id*. at 82-92) On February 20, 2019, Petitioner filed a request for preparation of his PCR record. (*Id*. at 94-95) The superior court denied Petitioner's request for record preparation because Petitioner did not have a Rule 32 proceeding pending at the time. (*Id*. at 97)

On April 19, 2022, Petitioner filed a "Motion for Status; And Motion for Order and Ruling Pursuant to Rule 32.9 (b)(1-2), of right Ariz. R. Crim. Proc.)." (Doc. 23-11 at 3-8) On May 16, 2019, the superior court found that under Ariz. R. Crim. P. 32.9, Petitioner had fifteen days to request rehearing of the superior court's February 5, 2019, dismissal of Petitioner's PCR petition. (*Id*. at 10) Using the filing date rather than the date Petitioner handed his motion to prison officials for delivery,[12] the superior court found that Petitioner's motion for rehearing was filed on February 21, 2019, which was beyond the applicable deadline of February 20, 2019. (*Id*.) The superior court additionally found that Petitioner had not provided a sufficient factual or legal basis for rehearing. (*Id*.) Therefore, the superior court granted Petitioner's motion for case status and denied Petitioner's motion for rehearing. (*Id*.)

Petitioner submitted several filings in the superior court in support of what Petitioner titled a "Supplemental Petition." (*See* Doc. 23-11 at 12-43; Doc. 23-12 at 3-35, 37-78; Doc. 23-13 at 3-51, 53-62; Doc. 23-14 at 3-10, 12-23, 25-43, 45-54) On May 21, 2019, the superior court dismissed Petitioner's Supplemental Petition as "an impermissible attempt to avoid compliance with the page limit that applies to PCR Petitions." (Doc. 23-14 at 56-57) The superior court ordered Petitioner to file a compliant PCR petition by July 1, 2019, to avoid dismissal of Petitioner's Rule 32 proceeding with prejudice. (*Id*. at 57)

Petitioner submitted several additional filings, also in support of a "Supplemental Petition." (Doc. 23-14 at 59-72; Doc. 23-15 at 3-16, 18-30, 32-61; Doc. 23-16 at 3-42) On May 22, 2019,[13] Petitioner filed two identical motions for the superior court to reconsider

[12] *See* footnote 11, *supra*.

[13] Petitioner signed his motion on May 21, 2019, but certified that he handed his motion to prison officials for mailing on May 22, 2019. (Doc. 23-16 at 44, 46) *See Rosario*, 195 Ariz. at 266. The clerk of court filed one motion on May 23, 2019 (*id*. at 44), and the second motion on May 31, 2019 (*see id*. at 59).

its May 16, 2019, order denying Petitioner's February 2019 motion for rehearing as untimely. (Doc. 23-16 at 44-47, 49-51; *see also* Doc. 23-10 at 82-92; Doc. 23-11 at 10) Petitioner argued that the superior court misapplied the prison mailbox rule and that his motion for rehearing was timely filed. (*Id*. at 45-46)

On May 22, 2019, Petitioner filed a notice of appeal in the superior court[14] from the superior court's denial of Petitioner's PCR petition (*see* Doc. 23-10 at 77-80) and the superior court's denial of Petitioner's motion for rehearing (*see* Doc. 23-11 at 10). (Doc. 23-16 at 53-55)[15]

On June 6, 2019, the superior court dismissed Petitioner's supplemental petition, finding that Petitioner disregarded the superior court's directions regarding page limits and other PCR petition requirements. (*Id*. at 57) Regarding Petitioner's motion for the superior court to reconsider its denial of Petitioner's February 2019 motion for rehearing (*id*. at 44-47), the superior court denied Petitioner's motion. (*Id*.) The superior court stated that such a motion was "not countenanced by the Arizona Rules of Criminal Procedure" and stated that the court "originally rejected rehearing on the merits, and finds no reason to revisit that decision." (*Id*.) On June 13, 2019, the superior court denied Petitioner's second motion for reconsideration (*id*. at 49-51) as untimely by over two months. (*Id*. at 59)

On June 12, 2019,[16] Petitioner filed a motion for reconsideration of the superior court's June 6, 2019, order. (*Id*. at 61-66) The superior court construed Petitioner's motion for reconsideration as a motion for rehearing under Ariz. R. Crim. P. 32.9(a)(1) and ordered

---

[14] The notice of appeal was filed by the superior court clerk on May 24, 2019.

[15] In the notice of appeal, Petitioner states that on May 22, 2019, he mailed the notice of appeal to the superior court, to the Arizona Court of Appeals Division 1, to the Maricopa County Attorney, and to the Arizona Attorney General. (*Id.* at 55) The superior court's electronic docket for case CR2016-152809-001 reflects a "Court of Appeals Receipt" on June 6, 2019, and a court of appeals order on August 5, 2019, but does not specify what the court of appeals received and/or ordered: http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2016-152809 (last accessed September 28, 2022). The record before this Court does not contain the August 2019 court of appeals order.

[16] Petitioner signed his motion on June 10, 2019, but certified that he handed his motion to prison officials for mailing on June 12, 2019. (Doc. 23-16 at 64-65) *See Rosario*, 195 Ariz. at 266.

the state to respond to Petitioner's motion. (*Id*. at 68) In response, the state argued that Petitioner's motion was untimely and that Petitioner had not presented any colorable claim entitling Petitioner to relief. (*Id*. at 70-75) The state argued that Petitioner should have filed a petition for review in the court of appeals following the superior court's denial of Petitioner's PCR petition. (*Id*. at 74) Petitioner filed a reply in support of reconsideration, in which Petitioner argued claims of ineffective assistance of counsel, unlawful sentence, fraudulent conduct by the state, and lack of trial court subject matter jurisdiction. (Doc. 23-17 at 3-16)

On September 10, 2019, the superior court denied Petitioner's motion for rehearing, finding that Petitioner "fail[ed] to provide a sufficient factual or legal basis to rehearing." (*Id*. at 18)

While his motion for rehearing was pending, on June 25, 2019, Petitioner filed a "Supplemental Petition for Post-Conviction Relief Rule 32.6(c); Under Rule 32.1(e)(1-3) and (h)" in the superior court. (*Id*. at 20-72; Doc. 23-18 at 3-55; Doc. 23-19 at 3-44) Petitioner stated that his supplemental petition was intended to supplement his "first-of-right" PCR petition and incorporated by reference Petitioner's previously submitted exhibits. (*Id*. at 20) Petitioner raised five issues: (1) actual innocence and insufficient evidence to support Petitioner's guilt; (2) newly discovered and exculpatory evidence—previously undiscovered due to IAC—showing a "void order of implied consent" and no blood alcohol content; (3) that Petitioner's sentence exceeded the maximum authorized by rule or statute; (4) that the trial court lacked jurisdiction to render judgment or impose a sentence on Petitioner; and (5) IAC resulting from counsel's failure to investigate, failure to follow up on evidence and leads, and coercion for Petitioner to accept a guilty plea. (Doc. 23-17 at 22) On July 31, 2019, Petitioner filed a document titled "Exhibit 2 to Defendants, Supplemental Petition for Post-Conviction Relief; II Affidavit of Jessie Wilder Darrin." (Doc. 23-20 at 3-74)

On August 19, 2019, the superior court construed Petitioner's supplemental petition as a new PCR notice (hereinafter "second PCR petition"). (*Id*. at 76) The superior court

dismissed Petitioner's second PCR petition as an untimely and successive second Rule 32 proceeding. (*Id*. at 76-77) The superior court stated that Petitioner could not argue that trial counsel was ineffective under Ariz. R. Crim. P. 32.1(a):

> because an untimely and successive notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a); *see generally State v. Petty*, 225 Ariz. 369, 373, ¶ 11, 238 P.3d 637, 641 (App. 2010) (holding ineffective assistance of counsel claims are "cognizable under Rule 32.1(a)").
>
> [Petitioner] raised this issue in his first Rule 32 proceeding. The Court extensively analyzed the issues and found this argument to be without merit. Because [Petitioner] raised this claim of ineffective assistance of counsel in a previous Rule 32 proceeding, relief is precluded. See Ariz. R. Crim. P. 32.2(a)(2); *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002) ("Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded.") (emphasis in original). To the extent that he is raising a new Rule 32.1(a) claim, relief is still precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

(*Id*.) Regarding Petitioner's Ariz. R. Crim. P. 32.1(e) claims regarding newly discovered and material facts, the superior court stated that:

> [Petitioner] does not present any new facts that the Court did not consider in his first Rule 32 proceeding, nor would these facts change his verdict or sentence. [Petitioner] continues to raise the same issues regarding the suspension of his license. The Court has considered these issues and has found them to be without merit.

(*Id*. at 77)

On September 29, 2019,[17] Petitioner filed in the superior court a "Notice of Appeal; Alternatively Motion for Permission to File Delayed Appeal[.]" (*Id*. at 79-81) On October 11, 2019, the superior court found that Petitioner's notice of appeal was untimely under Ariz. R. Crim. P. 32.1, found there was "no cause" shown for the delay, and denied Petitioner's motion. (*Id*. at 83)

On October 21, 2019, the Arizona Court of Appeals sent Petitioner a letter informing Petitioner that the court of appeals received Petitioner's notice of appeal on October 11, 2019. (*Id*. at 85-86) The court of appeals stated that Petitioner's notice of appeal did not substantially comply with Ariz. R. Crim. P. 32.9(c).[18] (*Id*. at 85) The court of appeals

[17] *See Rosario*, 195 Ariz. at 266.

[18] This reference was to the then existing Ariz. R. Crim. P. 32.9(c). Effective January 1,

nevertheless allowed Petitioner thirty days to file a compliant petition for review. (*Id*. at 86)

On November 7, 2019,[19] Petitioner filed a petition for review in the Arizona Court of Appeals. (Doc. 23-21 at 3-43) Petitioner requested that the court of appeals review the superior court's decisions from February 2019, June 2019, and August 2019. (*Id*. at 3) Petitioner presented eleven issues for review: (1) whether trial counsel's failure to investigate, familiarize himself with facts and laws, and provision of erroneous advice to plead guilty rendered Petitioner's guilty plea unknowing, unintelligent, and involuntary; (2) whether the trial court imposed an excessive or unlawful sentence; (3) whether the state committed fraud by presenting "inaccurate and inadmissible elements"; (4) whether the trial court lacked subject matter jurisdiction; (5) whether the trial court coerced a guilty plea and induced guilt to "erroneously contrived offenses"; (6) whether "the material change in the factual basis of the 2011 Admin Per Se plead to during the settlement conference: 'Breach Plea Agreement; at "sentencing," through Novel Construction' of the 2010 DUIS' vacated conviction's VOID implied consent affidavit"; (7) whether the trial court erred in dismissing Petitioner's PCR petition; (8) whether the trial court's "novel construction" of a substantive element of DUI violated the ex post facto clause; (9) whether plain error is the appropriate standard of review when the government allegedly breached Petitioner's plea agreement; (10) whether a breach of Petitioner's plea agreement entitled Petitioner to an evidentiary hearing; and (11) whether the trial court erred in denying

---

2020, former Arizona Rules of Criminal Procedure ("Rules") 32 and 33 were abrogated, and new Rules 32 and 33 were adopted. *See* Arizona Supreme Court Order No. R-19-0012. As a general matter, the substance of former Rule 32 was divided among the two new rules based on whether a defendant was convicted at trial (new Rule 32) or had pled guilty or no contest (new Rule 33). *See id.*; Pet. to Amend (Jan. 10, 2019), at 4-5. New Rule 32 thus encompasses the rules applicable to a defendant's right to seek post-conviction relief when the defendant is convicted by trial. New Rule 32 and new Rule 33 apply to "all actions filed on or after January 1, 2020," and to "all other actions pending on January 1, 2020, except to the extent that the court in an affected action determines that applying the rule or amendment would be infeasible or work an injustice, in which event the former rule or procedure applies." Arizona Supreme Court Order No. R-19-0012.

[19] Petitioner signed his petition for review on November 4, 2019, but certified that his petition for review was mailed on November 7, 2019. (Doc. 23-21 at 27-28) *See Rosario*, 195 Ariz. at 266.

Petitioner's request for production of documents. (*Id*. at 7) In reply to the state's response to Petitioner's petition for review,[20] Petitioner submitted an affidavit. (*Id*. at 45-51)

On December 8, 2020, the Arizona Court of Appeals granted review but denied relief on Petitioner's petition for review. (*Id*. at 53-56) Although Petitioner requested that the court of appeals review the superior court's February 2019, June 2019, and August 2019 rulings, the court of appeals stated that:

> [Petitioner's] petition, however, was untimely as to the rulings in his first proceeding. *See* Ariz. R. Crim. P. 33.16(a)(1). We therefore address only the court's August [2019] ruling, issued in [Petitioner's] second proceeding.

(*Id*. at 55) The court of appeals affirmed the superior court's finding that Petitioner's claims under Ariz. R. Crim. P. 33.1(a), including ineffective assistance of counsel, prosecutorial misconduct, improper factual basis for the plea, breach of the plea agreement, constitutional error in sentencing, and error by the trial court, could not be raised in an untimely and successive PCR proceeding. (*Id*.) The court of appeals did not address Petitioner's claims of newly discovered evidence and actual innocence because Petitioner did "not adequately address" such claims on review. (*Id*.) As for Petitioner's claim that the trial court lacked subject matter jurisdiction, the court of appeals stated that:

> [s]uch a claim is not precluded in a successive proceeding, Ariz. R. Crim. P. 33.2(b)(1), and may be raised in an untimely proceeding, so long as it is brought "within a reasonable time after discovering the basis for the claim," Ariz. R. Crim. P. 33.4(b)(3)(B). But [Petitioner's] claim, to the extent we understand it, although couched as one of subject matter jurisdiction, relates instead to the sufficiency of the factual basis for his guilty plea. [Petitioner] raised claims relating to this issue in his first proceeding, and to the extent his claim now varies, such a claim could have been raised in that proceeding. It is therefore precluded. *See* Ariz. R. Crim. P. 33.2(a)(2), (b)(1).

(*Id*. at 56)

On February 5, 2021, Petitioner filed a petition for review in the Arizona Supreme Court. (Doc. 23-22 at 3-65; Doc. 23-23 at 3-55; Doc. 23-24 at 3-53) The Arizona Supreme Court denied Petitioner's petition for review on June 16, 2021. (Doc. 23-25 at 3)

D. Third PCR Proceedings

On June 25, 2021, Petitioner filed another PCR notice ("third PCR notice"). (*Id*. at

[20] The state's response is not in the record before the Court.

5-7) In his PCR notice, Petitioner checked boxes that he intended to raise claims that Petitioner received ineffective assistance of Rule 33 counsel in Petitioner's first Rule 33 proceeding; that the trial court did not have subject matter jurisdiction; that Petitioner's sentence was not authorized by law or the plea agreement; that newly discovered material facts existed that would probably change Petitioner's judgment or sentence; and that clear and convincing evidence existed to establish that no reasonable fact-finder would find Petitioner's guilty beyond a reasonable doubt. (*Id*. at 6-7)

On August 5, 2021, the superior court dismissed Petitioner's third PCR notice, addressing each claim that Petitioner intended to raise. (*Id*. at 9-11) The superior court stated that "[i]n sum, [Petitioner] has failed to allege any claims for which Rule 33 may provide relief. A Defendant bringing a successive Rule 33 proceeding must assert substantive claims and adequately explain the reasons for their untimely assertion[,]" which Petitioner failed to do. (*Id*. at 11)

On August 18, 2021, Petitioner filed a "Motion Request for Court review of Proceedings and Correction of Record, and Order to permit second PCR to file with appointed Counsel." (*Id*. at 13-26) Petitioner argued that his supplemental petitions were not a second PCR petition, and Petitioner asked for the opportunity to file a second PCR petition. (*Id*. at 13) Petitioner stated that his third PCR notice should therefore be considered his second PCR notice. (*Id*. at 14)

On October 28, 2021, the superior court denied Petitioner's motion. (*Id*. at 28-29) After summarizing Petitioner's pertinent filings, the superior court stated that Petitioner's June 25, 2019,[21] supplemental petition was construed as a second PCR petition because Petition had no pending PCR action at the time. (*Id*. at 29) The superior court found that Petitioner had filed two prior PCR petitions that were dismissed and that Petitioner had "not shown any lawful claim or right" for a third PCR action. (*Id*.)

The record before this Court contains no evidence that Petitioner filed a motion for

[21] In its ruling, the superior court identified the date of filing as July 1, 2019, which is when the clerk of court filed the supplemental petition. (Doc. 23-17 at 20)

reconsideration or a petition for review of the superior court's order in the Arizona Court of Appeals.[22]

II. PETITIONER'S HABEAS CLAIMS

Petitioner raises six grounds for relief in his December 23, 2021, Petition (Doc. 1), Supporting Brief (Doc. 2), and Affidavit (Doc. 3). In Petitioner's Supporting Brief, Petitioner requests an evidentiary hearing on the "factual allegations in" the Petition. (Doc. 2 at 41)

In Ground One, Petitioner argues that trial counsel provided ineffective assistance during settlement negotiations and sentencing by: failing to inform Petitioner of the elements of statutory aggravated DUI; failing to inform Petitioner of the correct sentencing range; and improperly advising Petitioner to plead guilty. (Doc. 1 at 6; Doc. 2 at 22-23, 27-33) Petitioner argues that his guilty plea was not knowing, intelligent, or voluntary due to trial counsel's improper advice. (Doc. 2 at 25-27)

In Ground Two, Petitioner argues that the trial court improperly denied Petitioner's motion for rehearing of Petitioner's first PCR petition; that Petitioner did not receive a "full and fair adequate hearing" in the trial court; and that the state courts impeded Petitioner's ability to file timely appellate claims. (Doc. 1 at 7) Petitioner argues that the state court actions violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Id.*)

In Ground Three, Petitioner argues that his convictions were based on constitutionally insufficient evidence; that the "admin per se" suspension element of Petitioner's offense was improperly substituted with "void implied consent; that the prosecutor did not present sufficient evidence to convict and changed the elements of the crime on appeal; and that Petitioner is actually innocent of his aggravated DUI convictions. (*Id*. at 8)

In Ground Four, Petitioner argues that the state and the state court improperly labeled his supplemental PCR petition and second PCR notice as his second and third PCR

[22] Further, the superior court's electronic docket for CR2016-152809-001 does not reflect a motion for reconsideration or a petition for review: http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2016-152809 (last accessed September 28, 2022).

petitions, respectively. (*Id.* at 9) Petitioner argues that the improper labeling of his filings prohibited Petitioner from raising claims related to ineffective assistance of PCR counsel; prevented Petitioner from having counsel appointed to raise ineffective assistance of PCR counsel; and prevented Petitioner from effectively raising claims of actual innocence. (*Id.*)

In Ground Five, Petitioner argues that he was improperly sentenced pursuant to "inaccurate and misleading information" regarding his prior convictions; was improperly sentenced as a category three repetitive offender; and is entitled to resentencing or a new trial under *Blakely v. Washington*, 542 U.S. 296 (2004). (Doc. 2 at 23-25) Petitioner also argues that trial counsel's failure to object to the use of four prior convictions constituted ineffective assistance under the Sixth Amendment. (*Id.* at 24)

In Ground Six, Petitioner argues that his first PCR counsel was ineffective for failing to raise a claim that trial counsel was ineffective during Petitioner's status conference and settlement negotiations. (*Id.* at 34-40)

In their Limited Answer to the Petition ("Limited Answer"), Respondents assert that Petitioner's Petition was untimely filed under 28 U.S.C. § 2244(d)(1)(A) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (Doc. 23 at 23-29) Respondents also argue that Grounds Two through Six of the Petition are non-cognizable for federal habeas relief (*id.* at 31-33) and that every ground of the Petition is unexhausted and procedurally defaulted without excuse (*id.* at 40-48).

Petitioner did not file a reply in support of his Petition despite that Respondents' Limited Answer reflects mailing of the Limited Answer to Petitioner at Petitioner's then current address. (Doc. 23 at 49; Doc. 20) The time for Petitioner's filing of a reply expired in early September. (*See* Doc. 11 at 5)

III. JURISDICTION

Despite Petitioner having been released from custody regarding the offenses underlying the Petition, Respondents concede that this Court retains subject matter jurisdiction over the Petition due to "collateral consequences" stemming from Petitioner's convictions. (Doc. 23 at 23)

A federal court has jurisdiction over writs of habeas corpus where a petitioner is "in custody pursuant to the judgment of a State court[.]" 28 U.S.C. § 2254(a). For purposes of 28 U.S.C. § 2254(a), a petitioner must be "'in custody' under the conviction or sentence under attack at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). Even where a petitioner is released from custody following the filing of his habeas petition, a federal court may retain jurisdiction over the petitioner's claims due to "an irrefutable presumption that collateral consequences result from any criminal conviction." *Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005) (citing *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), overruled by statute on other grounds).

Respondents are correct that this Court retains subject matter jurisdiction over Petitioner's habeas claims. In Maricopa County Superior Court case CR2016-152809-001, which is the matter on which Petitioner's claims are based, Petitioner was committed to the custody of the Arizona Department of Corrections Rehabilitation & Reentry ("ADCRR") in July 2017, and was released on July 5, 2022. (*See* Doc. 20; Doc. 23-1 at 57-61; Doc. 23-25 at 31)[23] At the time of the Petition's December 23, 2021, filing, Petitioner was in ADCRR custody for the convictions underlying the Petition,[24] resulting in this Court's jurisdiction over the Petition.

IV. TIMELINESS

A threshold issue for the Court is whether these habeas proceedings are time-barred by the statute of limitations. The time bar issue must be resolved before considering other procedural issues or the merits of any habeas claim. *See White v. Klitzkie*, 281 F.3d 920, 921-22 (9th Cir. 2022).

A. AEDPA's One-Year Limitations Period Start Date

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs Petitioner's habeas proceedings because he filed his Petition after April 24, 1996, the

[23] Further, ADCRR's inmate search website lists Plaintiff's incarceration date for his July 12, 2017, aggravated DUI sentence as July 14, 2017, and reflects that Petitioner was released on July 5, 2022. *See* https://corrections.az.gov/public-resources/inmate-datasearch (last accessed October 11, 2022).

[24] *See also* footnote 2, *supra*.

effective date of AEDPA. *Patterson v. Stewart*, 251 F.3d 1243 (9th Cir. 2001) (citing *Smith v. Robbins*, 528 U.S. 259, 267 n.3 (2000)). For AEDPA statute of limitations purposes, this Report and Recommendation uses December 23, 2021, the date Petitioner signed and filed the Petition, as the applicable filing date. (Doc. 1)

Under AEDPA, there are four possible starting dates for the beginning of its one-year statute of limitations period:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The latest of the applicable possible starting dates is the operative start date. *Id.*

Because the Petition's claims arise from a final judgment and sentence and the habeas record does not present circumstances for a later start date based on 28 U.S.C. § 2244(d)(1) subsections (B), (C), or (D), AEDPA's one-year statute of limitations start date is determined by 28 U.S.C. § 2244(d)(1)(A). AEDPA's one-year statute of limitations period runs from when the judgment and sentence became "final by the conclusion of direct review or the expiration of the time for seeking such review[.]" 28 U.S.C. § 2244(d)(1)(A).

In Arizona, a defendant who pleads guilty waives the right to direct appeal and may seek review only by collaterally attacking his convictions through PCR proceedings under

Arizona Rule of Criminal Procedure 32 (now Rule 33).[25] *See* Ariz. R. Crim. P. 17.2(a)(5) ("the defendant's plea of guilty or no contest will waive the right to appellate court review of the proceedings on a direct appeal" and "the defendant may seek review only by filing a petition for post-conviction relief under Rule 32 and, if it is denied, a petition for review"); A.R.S. § 13-4033(B) ("In noncapital cases a defendant may not appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation.").

At the time of Petitioner's sentencing, Arizona Rule of Criminal Procedure 32.4(a)(2)(C) required that an of-right PCR notice be filed within 90 days after entry of judgment and sentence. When the Rule 32 (now Rule 33) of-right proceeding concludes or the time for filing such expires, a conviction becomes "final" for purposes of § 2244(d)(1)(A) of AEDPA. *Summers v. Schriro*, 481 F.3d 710, 711, 716-17 (9th Cir. 2007); *see also* A.R.S. § 13-4033(B). When an Arizona petitioner's PCR proceeding is of-right, AEDPA's statute of limitations does not begin to run until the conclusion of review or the expiration of the time for seeking such review. *Summers*, 481 F.3d at 711, 716-17.

Petitioner was sentenced on July 12, 2017. (Doc. 23-1 at 57-60) Following sentencing, Petitioner had 90 days, until October 10, 2017, to file a PCR notice in the superior court. Petitioner timely filed his first PCR notice in the superior court on September 27, 2017. (*Id*. at 63-65) The superior court denied Petitioner's first PCR petition on February 5, 2019. (Doc. 23-10 at 77-80) Petitioner thereafter had thirty-five days to file a petition for review in the Arizona Court of Appeals, or fifteen days to file a motion for

[25] Effective January 1, 2020, former Arizona Rules of Criminal Procedure ("Rules") 32 and 33 were abrogated, and new Rules 32 and 33 were adopted. *See* Arizona Supreme Court Order No. R-19-0012. As a general matter, the substance of former Rule 32 was divided among the two new rules based on whether a defendant was convicted at trial (new Rule 32) or had pled guilty or no contest (new Rule 33). *See id*. New Rule 32 thus encompasses the rules applicable to a defendant's right to seek post-conviction relief when the defendant is convicted by trial. New Rule 32 and new Rule 33 apply to "all actions filed on or after January 1, 2020," and to "all other actions pending on January 1, 2020, except to the extent that the court in an affected action determines that applying the rule or amendment would be infeasible or work an injustice, in which event the former rule or procedure applies." Arizona Supreme Court Order No. R-19-0012.

rehearing in the superior court.[26] The record does not reflect that Petitioner filed a petition for review in the Arizona Court of Appeals within 30 days after the superior court's denial of Petitioner's first PCR petition.[27] Further, Petitioner's filing of a notice of appeal on May 22, 2019, in the superior court from the superior court's denial of Petitioner's PCR petition and the superior court's denial of Petitioner's motion for rehearing (Doc. 23-16 at 53-55) was not procedurally appropriate, and therefore was not properly filed; thus, the notice of appeal does not impact AEDPA's start date. Petitioner did not file a petition for review in the Arizona Court of Appeals regarding his first PCR proceedings until November 7, 2019. (Doc. 23-21 at 3-43) The court of appeals determined that Petitioner's petition for review was untimely with respect to Petitioner's first PCR proceedings. (*Id*. at 55)

Thus, Petitioner's conviction and sentence became final on March 12, 2019, when the time to file a petition for review expired.[28]

AEDPA's one-year statute of limitations period therefore commenced to run on March 13, 2019, and the period for Petitioner to file a timely habeas petition expired on March 12, 2020. *See Patterson v. Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001) ("Excluding the day on which [the prisoner's] petition was denied by the Supreme Court, as required by Rule 6(a)'s 'anniversary method,' [AEDPA's] one-year grace period began to run on June 20, 1997 and expired one year later, on June 19, 1998…"). Petitioner did not file these habeas proceedings until December 23, 2021, over a year and a half after AEDPA's statute

---

[26] *See* Ariz. R. Crim. P. 32.9(c)(1)(a) (providing that a petition for review must be filed within 30 days), which was the applicable rule at the time of Petitioner's first PCR proceedings; Ariz. R. Crim. P. 1.3(a) (providing that "[w]henever a party has the right or is required to take some action within a prescribed period after service of a notice or other paper and such service is allowed and made by mail, 5 days shall be added to the prescribed period."); Ariz. R. Crim. P. 32.9(a)(1) (deadline of 15 days to move for rehearing), which was the applicable rule at the time of Petitioner's first PCR proceedings.

[27] Further, the superior court's electronic docket for case CR2016-152809-001 does not reflect a petition for review of the superior court's February 5, 2019, order: http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2016-152809 (last accessed September 28, 2022).

[28] Respondents use an erroneous start date because Respondents state that the superior court denied Petitioner's PCR petition on February 4, 2019, and Respondents fail to provide five days for service. (Doc. 23 at 25) *See* Ariz. R. Crim. P. 1.3(a) & (c).

of limitations expired. (Doc. 1) Accordingly, these habeas proceedings were untimely filed unless statutory tolling, equitable tolling, and/or the actual innocence gateway apply to render these proceedings timely filed.[29]

B. Statutory Tolling

AEDPA expressly provides for statutory tolling of the limitations period when a "properly filed application for State post-conviction or other collateral relief with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). A collateral review petition is "properly filed" when its delivery and acceptance are in compliance with state rules governing filings. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). This includes compliance with filing deadlines. A state post-conviction relief petition not filed within the state's required time limit is not "properly filed," and the petitioner is not entitled to statutory tolling during those proceedings. *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) ("When a post-conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)."); *Allen v. Siebert*, 552 U.S. 3, 6 (2007) (finding that inmate's untimely state post-conviction petition was not "properly filed" under AEDPA's tolling provision, and reiterating its holding in *Pace*, 544 U.S. at 414). Once the statute of limitations has run, subsequent collateral review petitions do not "restart" the clock.

---

[29] In February 2019, Petitioner had filed a motion for rehearing in the superior court regarding the superior court's February 5, 2019, denial of Petitioner's first PCR petition. (Doc. 23-10 at 82-92) On May 16, 2019, the superior court denied Petitioner's motion for rehearing as untimely. (Doc. 23-11 at 10) The superior court stated that Petitioner's motion for rehearing was untimely filed on February 21, 2019, one day after the February 20, 2019, deadline. (Doc. 23-11 at 10) Although the clerk of court did not file Petitioner's motion for rehearing until February 21, 2019 (Doc. 23-10 at 82), Petitioner certified in the motion that he handed his motion to prison officials for delivery on February 12, 2019. (*Id*. at 92) Even if the superior court improperly failed to apply the prison mailbox rule to Petitioner's motion for rehearing, Petitioner did not file a timely petition for review in the Arizona Court of Appeals after the ruling on the motion for rehearing. Thus, Petitioner's convictions would have become final on June 20, 2019, AEDPA's limitations period would have began running on June 21, 2019, and AEDPA's limitations period would have expired on Monday, June 22, 2020. This does not lead to a different outcome on the Petition's untimeliness.

Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

Because an untimely PCR notice does not statutorily toll AEDPA's limitations period, *Pace*, 544 U.S. at 414, Petitioner's second and third PCR petitions did not toll the limitations period. The superior court determined that Petitioner's second PCR petition in June 2019 was untimely and successive, and the court of appeals affirmed this finding. (Doc. 23-20 at 76-77; Doc. 23-21 at 55-56) The superior court also correctly found that Petitioner's third PCR notice was also untimely,[30] and Petitioner did not seek review of this finding. Further, Petitioner's third PCR notice, filed in June 2021, was filed after the limitations period ended in March 2020. (Doc. 23-25 at 5-7) A PCR notice filed after the limitations period has expired does not restart the limitations period. *See Jiminez*, 276 F.3d at 482; *Ferguson*, 321 F.3d at 823.

Thus, there is no applicable statutory tolling of AEDPA's limitation period. Accordingly, these habeas proceedings were untimely filed unless equitable tolling and/or the actual innocence gateway apply to render these proceedings timely filed.

C. Equitable Tolling

The U.S. Supreme Court has held "that § 2244(d) is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). AEDPA's limitations period may be equitably tolled because it is a statute of limitations, not a jurisdictional bar. *Id.* at 645-46. Petitioner bears the burden of establishing that equitable tolling is warranted. *Pace*, 544 U.S. at 418; *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006) ("Our precedent permits equitable tolling of the one-year statute of limitations on habeas petitions, but the petitioner bears the burden of showing that equitable tolling is appropriate.").

The Ninth Circuit Court of Appeals will permit equitable tolling of AEDPA's

[30] Petitioner did not file his notice within 90 days of sentencing, *see* Ariz. R. Crim. P. 33.1, 33.4(b)(3)(A), did not raise his claims of IAC of PCR counsel within 30 days after the superior court's final order in his first PCR proceedings, *see* Ariz. R. Crim. P. 33.4(b)(3)(C), and did not explain his reasons for raising untimely claims. *See* Ariz. R. Crim. P. 33.2(b)(1).

limitations period "only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing." *Smith v. Davis*, 953 F.3d 582, 600 (9th Cir. 2020) (en banc). Put another way, for equitable tolling to apply, Petitioner must show "(1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstances stood in his way" to prevent him from timely filing a federal habeas petition. *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418). To meet the first prong, Petitioner "must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim in federal court." *Smith*, 953 F.3d at 598-99 (expressly rejecting the "stop-clock" approach to equitable tolling). The second prong is met "only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing." *Id.* at 600.

"The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Id.* at 653 (internal citations and quotations omitted). Whether to apply the doctrine of equitable tolling "'is highly fact-dependent,' and [the petitioner] 'bears the burden of showing that equitable tolling is appropriate.'" *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005) (internal citations omitted); *see also Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (stating that equitable tolling is "unavailable in most cases," and "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule") (citations and internal emphasis omitted).

In addition, there must be a causal link between the extraordinary circumstance and the inability to timely file the petition. *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013) ("[E]quitable tolling is available only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time and the extraordinary circumstances were the cause of the prisoner's untimeliness."). A literal impossibility to file, however, is not required. *Grant v. Swarthout*, 862 F.3d 914, 918 (9th Cir. 2017) (stating that equitable tolling is appropriate even where "it would have technically been

possible for a prisoner to file a petition," so long as the prisoner "would have likely been unable to do so.").

A petitioner's pro se status, indigence, limited legal resources, ignorance of the law, or lack of representation during the applicable filing period do not constitute extraordinary circumstances justifying equitable tolling. *See, e.g., Rasberry*, 448 F.3d at 1154 ("[A] pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling."); *see also Ballesteros v. Schriro*, CIV 06-675-PHX-EHC (MEA), 2007 WL 666927, at *5 (D. Ariz. Feb. 26, 2007) (a petitioner's pro se status, ignorance of the law, lack of representation during the applicable filing period, and temporary incapacity do not constitute extraordinary circumstances). A prisoner's "proceeding pro se is not a 'rare and exceptional' circumstance because it is typical of those bringing a § 2254 claim." *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000).

In his Petition, Petitioner asserts that the state court's failure to decide his "Motion for Rehearing; Alternatively Motion for Reconsideration"[31] impeded his ability to seek appellate review. (Doc. 1 at 7) Yet, the state court PCR proceedings did not prevent Petitioner from filing a timely habeas proceeding in this Court. Further, even if Petitioner's assertion were to be construed as an argument supporting equitable tolling, the record reflects that the superior court decided Petitioner's February 2019 motion for rehearing on May 16, 2019, after Petitioner filed a motion for status. (Doc. 23-11 at 10) In addition to finding the motion for rehearing untimely, the superior court found that Petitioner had not provided a sufficient factual or legal basis for rehearing. (*Id.*) Petitioner has not otherwise argued that any other circumstances prevented Petitioner from timely filing a habeas action during AEDPA's limitations period. (*See* Doc. 1 at 11)

Petitioner has not met his burden of showing that he has been pursuing his rights diligently and that some extraordinary circumstance prevented Petitioner from filing a timely petition for habeas corpus. Accordingly, equitable tolling is not appropriate on this record and does not apply here to render these proceedings timely filed.

[31] Petitioner appears to refer to his February 2019 "Motion for Rehearing; Alternatively Motion for Reconsideration." (Doc. 23-10 at 82-92)

D. Actual Innocence

In *McQuiggin v. Perkins*, 569 U.S. 383, 391-396 (2013), the Supreme Court held that the "actual innocence gateway" to federal habeas review that applies to procedural bars in *Schlup v. Delo*, 513 U.S. 298, 327 (1995), and *House v. Bell*, 547 U.S. 518 (2006), extends to petitions that are time-barred under AEDPA. *See Schlup*, 513 U.S. at 329 (petitioner must make a credible showing of "actual innocence" by "persuad[ing] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.").

To pass through the actual innocence/*Schlup* gateway, a petitioner must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). A petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup*, 513 U.S. at 327)). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. *See also Lee v. Lampert*, 653 F.3d 929, 945 (9th Cir. 2011); *McQuiggin*, 569 U.S. at 399 (2013) (explaining the significance of an "[u]nexplained delay in presenting new evidence"). Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumway v. Payne*, 223 F.3d 982, 990 (9th Cir. 2000) (citing *Calderon v. Thompson*, 523 U.S. 538, 559 (1998)).

In Ground Three of the Petition, Petitioner argues that he is actually innocent of his charged offenses because the evidence was constitutionally insufficient to obtain a conviction. (Doc. 1 at 8) Petitioner argues that the state substituted an admin per se suspension with a void implied consent suspension; that his conviction had no legitimate factual legal basis; that the prosecution presented misinformation and changed elements of the charged offenses on appeal; and that Petitioner had a valid driver's license at the time

of the charged offenses. (*Id.*; *see also* Doc. 2 at 25-26; Doc. 3 at 12)

To his Petition, Petitioner attached his September 2018 *pro se* PCR petition (Doc. 1 at 13-49); various motions in the superior court during Petitioner's three PCR proceedings (Doc. 1 at 50; Doc. 1-1 at 1-15, 22-32; Doc. 1-4 at 27-39); orders from the superior court and court of appeals (Doc. 1-1 at 16-19, 34-35; Doc. 1-2 at 21-22, 27-28, 31-33; Doc. 1-3 at 43-44, 46; Doc. 1-4 at 40); a February 2019 letter to Petitioner from Petitioner's first PCR counsel describing Petitioner's options following the superior court's denial of Petitioner's first PCR petition (Doc. 1-1 at 20-21); Petitioner's July 2019 supplemental PCR petition (*id*. at 33, 36-50; Doc. 1-2 at 1-20); Petitioner's June 2021 third PCR notice (Doc. 1-2 at 24-26); Petitioner's July 2021 request for the superior court record (*id*. at 29-30); Petitioner's September 2019 petition for review in the court of appeals (*id*. at 35-50; Doc. 1-3 at 1-11); a 2018 City of Phoenix "Traffic Complaint Disposition Suspension/Warrant Report" listing Petitioner's July 22, 2016, traffic violations (*id*. at 12); a July 22, 2016, Arizona Department of Transportation ("ADOT") Admin Per Se/Implied Consent Affidavit (*id*. at 13); a Phoenix Police Department incident report dated July 22, 2016, stating that Petitioner had a valid driver's license per MVD (*id*. at 14); a printout from the City of Phoenix Court Management System displaying Petitioner's pending and concluded cases (*id*. at 15-16); an excerpt from an unidentified document stating that Petitioner had an implied consent suspension[32] (*id*. at 17); a December 2018 public records request with the Arizona Department of Public Safety, submitted by Shannon Darrin (*id*. at 18); a November 2010 Admin Per Se/Implied Consent Affidavit, search warrant, "Scientific Analysis Request and Evidence Inventory" and report, and independent breath test advisory form (*id*. at 19-23); Petitioner's December 2019 reply and affidavit in support of his petition for review in the court of appeals (*id*. at 26-42); Petitioner's February 2021 petition for review in the Arizona Supreme Court (*id*. at 47-50; Doc. 1-4 at 1-21); and Petitioner's February 2021 "Affidavit in opposition to Material Changes Made in the

[32] This excerpt appears to be from the state's response to Petitioner's first PCR petition. (*See* Doc. 23-4 at 73)

Factual Basis," submitted to the Arizona Supreme Court (Doc. 1-4 at 22-25).

To his Supporting Brief (Doc. 2),[33] Petitioner attached Phoenix Police Department, Phoenix Municipal Court, and justice court records from 2016, accompanied by certifications of a records custodian (Doc. 2 at 48-50; Doc. 2-1 at 13, 15-28, 31-40, 45-46; Doc. 2-4 at 49-50, Doc. 2-5 at 1-2, 7-20; Doc. 2-6 at 35-39); a September 2016 "Traffic Complaint Disposition Suspension/Warrant Report" (Doc. 2-1 at 29); a June 2018 *pro se* motion to compel production of records in Phoenix Municipal Court (*id*. at 41-43); state documents filed in CR2016-152809-001 (*id*. at 48-50; Doc. 2-2 at 1-6); a December 22, 2016, initial plea offer (Doc. 2-2 at 8); Petitioner's 2017 written communications with his trial counsel Kenneth Countryman (*id*. at 9-19, 21-31); Petitioner's 2018 written communications with first PCR counsel, including a declaration against interest of Michael Dwayne Ybarra, a similarly-situated person (*id*. at 33-50; Doc. 2-3 at 1-38; Doc. 2-4 at 40-46; Doc. 2-6 at 41-50; Doc. 2-7 at 1-7); 2018 correspondence with the Phoenix Municipal Court (Doc. 2-3 at 42-43; Doc. 2-5 at 3-6); Encanto Justice Court records from 2011, 2013, and 2018 (*id*. at 45-49); records related to Petitioner's November 2010 DUI (Doc. 2-4 at 2-24, 26-38); copies of statutes for driving under the influence (Doc. 2-5 at 21-23); additional orders from the superior court and court of appeals in CR2016-152809-001 (Doc. 2-5 at 25-26, 28-33); Petitioner's April 2017 motion for change of counsel (*id*. at 39-46); February 2017 correspondence with the Maricopa County Office of the Public Defender, including attachments related to Petitioner's prior criminal cases (*id*. at 48-50, Doc. 2-6 at 1-27); and Petitioner's records from the Motor Vehicle Division, current as of November 2019 (Doc. 2-6 at 29-33)

To his affidavit in support of the Petition (Doc. 3), Petitioner attached a December 2015 traffic ticket (Doc. 3 at 19); January 2016 Phoenix Municipal Court records (*id*. at 20-21); excerpted transcripts from unidentified proceedings (*id*. at 22, 24, 32); an October 8, 2021, decision from the Arizona Supreme Court in Petitioner's child custody matter, as well as the Arizona Supreme Court's mandate (*id*. at 34-49); and a June 2017 declaration

[33] Petitioner attached duplicate documents to his Petition, Supporting Brief, and Affidavit. (Docs. 1, 2, 3) The Court does not list the duplicates here.

against interest of Anthony Vega (*id*. at 51).

Petitioner's attachments existed at the time of Petitioner's sentencing and/or PCR proceedings. To the extent that Petitioner argues that he had a valid driver's license at the time of the events leading to the convictions at issue in these habeas proceedings, Petitioner attached an "Admin Per Se/Implied Consent Affidavit" from the ADOT, reflecting that Petitioner's driver's license was suspended on November 15, 2010. (Doc. 2-4 at 26-27; *see also* Doc. 2-6 at 31) Petitioner's November 2010 suspension stated that Petitioner's license would be suspended "for 12 months, or 2 years if there is a prior implied consent refusal" and that the suspension would "not end until all reinstatement requirements are met including completion of alcohol or drug screening." (*Id*.) Petitioner's "Motor Vehicle Record," current as of November 2019, does not reflect that Petitioner's license was reinstated following Petitioner's November 2010 implied consent affidavit. (Doc. 2-6 at 31) To the contrary, Petitioner was issued identification cards, not driver's licenses, prior to July 22, 2016. (*Id*. at 29) Petitioner's Motor Vehicle Record states that Petitioner was under an implied consent suspension as of November 2019 and that Petitioner was under revocation; had a mandatory insurance suspension with court action required, owed multiple fees, and required an alcohol or drug screening. (*Id*. at 29-30) Petitioner's Motor Vehicle Record only reflects one implied consent affidavit, received on November 15, 2010. (*Id*. at 31) Petitioner does not show that his implied consent suspension was void, as he contends. (*See* Doc. 1 at 8) Further, Petitioner presents no evidence to support his argument that the blood draw leading to his November 2010 implied consent suspension was invalid. (*Id*.)

Petitioner also attached two Phoenix Police Department Incident Reports regarding the events underlying Petitioner's convictions on July 22, 2016. (Doc. 2-1 at 6-13, 15-19) Although the initial police report submitted on July 22, 2016, states that the responding officer "was provided with an Arizona identification card, but upon checking found that [Petitioner] had a valid driver's license per MVD" (*id*. at 13), a subsequent report submitted on September 8, 2016, states that "the City of Phoenix Prosecutor's Office has located

records to indicate suspect [Petitioner's] driving privileges were suspended for an open admin per se suspension at the time of this incident. Additionally, [Petitioner] was subject to an ignition interlock device requirement at this time" (*id*. at 19). Further, in a probable cause statement in a Release Questionnaire from the West McDowell Justice Court, Petitioner's arresting officer certified that Petitioner's "driving privileges were suspended for an Open Admin Per Se Suspension" at the time of Petitioner's charged offenses on July 22, 2016. (*Id*. at 45-46) An annotation states that Petitioner's suspension was served on November 15, 2010, and notice was mailed on April 10, 2012. (*Id*. at 45) Aside from his November 2010 Admin Per Se/Implied Consent Affidavit, Petitioner presented each of the aforementioned documents to the superior court during his first PCR proceedings. (*See* Doc. 23-6 at 4-8, 10-11; *see also id*. at 16-17) The superior court determined that Petitioner had not shown evidence that Petitioner's license was not suspended. (Doc. 23-10 at 77-80) Petitioner's attachments are therefore not new evidence.

Moreover, although Petitioner argues that his admin per se suspension did not apply until August 7, 2016, thereby demonstrating an insufficient factual basis for Petitioner's convictions, Petitioner's August 7, 2016, admin per se suspension resulted from Petitioner's July 22, 2016, DUI, separate from Petitioner's November 2010 suspension. (*See* Doc. 1-3 at 13) The effective date of Petitioner's August 2016 admin per se suspension does not affect whether Petitioner had a valid license on July 22, 2016.

Petitioner has not presented evidence that demonstrates his November 2010 suspension was not still in effect on July 22, 2016. None of Petitioner's arguments or materials constitute "new, reliable evidence" that more likely than not would have prevented a jury from convicting Petitioner. *Schlup*, 513 U.S. at 324. Petitioner has not met his burden to establish actual innocence that would excuse Petitioner's failure to timely file a habeas action.

E. These Proceedings Are Untimely Under AEDPA

Given the above, the December 23, 2021, filing of this action was untimely, and neither tolling nor the actual innocence gateway renders this action timely filed. Therefore,

these untimely proceedings should be dismissed with prejudice and terminated.

V. PROCEDURAL DEFAULT

A. Legal Framework

1. Exhaustion

A state prisoner must properly exhaust all state court remedies before this Court may grant an application for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1), (c); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Arizona prisoners properly exhaust state remedies by fairly presenting claims to the Arizona Court of Appeals in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-45 (1999); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). To be fairly presented, a claim must include a statement of the operative facts and the specific federal legal theory. *Baldwin v. Reese*, 541 U.S. 27, 32-33 (2004); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion.").

In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. *See Swoopes*, 196 F.3d at 1010; *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994); *Castillo v. McFadden*, 399 F.3d 993, 998 & n.3 (9th Cir. 2005). Fair presentment of claims to the Arizona Court of Appeals requires a description of "both the operative facts and the federal legal theory on which [a] claim is based so that the state courts [could] have a 'fair opportunity' to apply controlling legal principles to the facts bearing upon [the] constitutional claim." *McFadden*, 399 F.3d at 999 (quoting *Kelly v. Small*, 315 F.3d 1063, 1066 (9th Cir. 2003)).

It is not fair presentment, for example, that "all the facts necessary to support the federal claim were before the state courts … or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (internal citation omitted). It is also not enough to rely on a "general appeal to a constitutional guarantee as

broad as due process to present the 'substance' of such a claim to a state court." *Netherland*, 518 U.S. at 163; *see also McFadden*, 399 F.3d at 1002-03 (finding habeas petitioner did not give the state appellate court a fair opportunity to rule on a federal due process claim because "[e]xhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory," and the petitioner's claim in state court was a "conclusory, scattershot citation of federal constitutional provisions, divorced from any articulated federal legal theory").

Fair presentment is not achieved by raising the claim for "the first and only time in a procedural context in which its merits will not be considered," unless there are special circumstances. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). As example, raising a claim for the first time in a discretionary petition for review to the Arizona Supreme Court or in a special action petition is not sufficient to achieve fair presentment. *See Casey v. Moore*, 386 F.3d 896, 918 (9th Cir. 2004) ("Because we conclude that Casey raised his federal constitutional claims for the first and only time to the state's highest court on discretionary review, he did not fairly present them.") (footnote omitted).

2. Procedural Default

A corollary to the exhaustion requirement is the "procedural default doctrine." The procedural default doctrine limits a petitioner from proceeding in federal court where his claim is procedurally barred in state court and "has its roots in the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). If a petitioner fails to fairly present his claim to the state courts in a procedurally appropriate manner, the claim is procedurally defaulted and generally barred from federal habeas review. *Ylst v. Nunnemaker*, 501 U.S. 797, 802-05 (1991). There are two categories of procedural default.

First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. This is called an express procedural bar. An express procedural bar exists if the state court denies or dismisses a claim based on a procedural bar "that is both

'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989); *Stewart v. Smith*, 536 U.S. 856, 860 (2002) (Arizona's "Rule 32.2(a)(3) determinations are independent of federal law because they do not depend upon a federal constitutional ruling on the merits"); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) ("adequate" grounds exist when a state strictly or regularly follows its procedural rule).

Moreover, if a state court applies a procedural bar, but goes on to alternatively address the merits of the federal claim, the claim is still barred from federal review. *See Harris*, 489 U.S. at 264 n. 10 ("[A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.... In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.") (citations omitted); *Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003) ("A state court's application of a procedural rule is not undermined where, as here, the state court simultaneously rejects the merits of the claim.") (citing *Harris*, 489 U.S. at 264 n.10).

Second, the claim may be procedurally defaulted if the petitioner failed to present the claim in a necessary state court 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." *Coleman*, 501 U.S. at 735 n.1; *Boerckel*, 526 U.S. at 848 (when time for filing state court petition has expired, petitioner's failure to timely present claims to state court results in a procedural default of those claims); *Smith v. Baldwin*, 510 F.3d 1127, 1138 (9th Cir. 2007) (failure to exhaust claims in state court resulted in procedural default of claims for federal habeas purposes when state's rules for filing petition for post-conviction relief barred petitioner from returning to state court to exhaust his claims). This is called an implied procedural bar. *Robinson v. Schriro*, 595 F.3d 1086, 1100 (9th Cir. 2010). This type of procedural default is often referred to as "technical" exhaustion because

although the claim was not actually exhausted in state court, Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no remedies any longer 'available' to him.").

In Arizona, claims not properly presented to the state courts are generally barred from federal review because an attempt to return to state court to present them is futile unless the claims fit in a narrow category of claims for which a successive petition is permitted. *See* former rules Ariz. R. Crim. P. 32.2(a) (precluding claims not raised on appeal or in prior petitions for post-conviction relief), 32.4(a) (time bar), 32.1(d)-(h), 32.9(c) (petition for review must be filed within thirty days of trial court's decision); *see also* current rules Ariz. R. Crim. P. 32.4(b)(3) (time bar); Ariz. R. Crim. P. 32.1(b) through (h) and 32.2(b) (permitting successive PCR proceedings on certain grounds and specified circumstances); 32.16(a)(1) (petition for review must be filed within thirty days of trial court's decision).[34]

Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not properly raised on direct appeal or in prior Rule 32 post-conviction proceedings. *See, e.g.*, *Stewart*, 536 U.S. at 860 (determinations made under Arizona's procedural default rule are "independent" of federal law); *Smith v. Stewart*, 241 F.3d 1191, 1195 n.2 (9th Cir. 2000) ("We have held that Arizona's procedural default rule is regularly followed [or "adequate"] in several cases.") (citations omitted), *rev'd on other grounds*, *Stewart*, 536 U.S. 856; *State v. Mata*, 185 Ariz. 319, 334-36 (1996) (waiver and preclusion rules strictly applied in post-conviction proceedings). A petitioner who fails to follow a state's procedural requirements for presenting a valid claim deprives the state court of an opportunity to address the claim in much the same manner as a petitioner who completely fails to attempt to exhaust his state remedies. In Arizona, "ineffective assistance of counsel claims should be raised in post-conviction relief proceedings pursuant to rule 32, Arizona Rules of Criminal Procedure." *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th

[34] *See* footnote 18, *supra*.

Cir. 2001) (quoting *State v. Atwood*, 171 Ariz. 576 (1992)) (finding that failure to raise IAC claims on direct appeal did not bar federal habeas review). Further, a defendant who pleads guilty waives the right to direct appeal and may seek review only by collaterally attacking the conviction(s) by way of post-conviction proceedings under Arizona Rule of Criminal Procedure 32 (now Rule 33). *See* Ariz. R. Crim. P. 17.2(e); A.R.S. § 13-4033(B).

3. Excuse for Procedural Default

The Court may review a procedurally defaulted claim if the petitioner can demonstrate either: (1) cause for the default and actual prejudice to excuse the default, or (2) a miscarriage of justice/actual innocence. 28 U.S.C. § 2254(c)(2)(B); *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). "Cause" is something that "cannot be fairly attributable" to a petitioner, and a petitioner must show that this "objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753 (citation and internal quotation marks omitted). To establish prejudice a "habeas petitioner must show '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.'" *Murray*, 477 U.S. at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)). "Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial." *Id.*

The miscarriage of justice exception to procedural default "is limited to those *extraordinary* cases where the petitioner asserts his [actual] innocence and establishes that the court cannot have confidence in the contrary finding of guilt." *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) (emphasis in original). To pass through the actual innocence/*Schlup* gateway, a petitioner must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir. 2003). Significantly, "[t]o be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional

error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. *See also Lee v. Lampert*, 653 F.3d 929, 945 (9th Cir. 2011); *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (explaining the significance of an "[u]nexplained delay in presenting new evidence"). A petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 327)). Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumway v. Payne*, 223 F.3d 982, 990 (9th Cir. 2000) (citing *Calderon v. Thompson*, 523 U.S. 538, 559 (1998)).

B. Analysis

In their Limited Answer to the Petition, Respondents argue that all of Petitioner's claims, Petitioner's Grounds One through Six, are procedurally defaulted without excuse. (Doc. 23 at 34-48)

1. Exhaustion

As set forth below, Respondents are correct that Petitioner's Grounds One through Six are unexhausted.

a. Ground One

In Ground One of Petition, Petitioner alleges that trial counsel provided ineffective assistance during settlement negotiations and sentencing by failing to inform Petitioner of the elements of statutory aggravated DUI; failing to inform Petitioner of the correct sentencing range; and improperly advising Petitioner to plead guilty. (Doc. 1 at 6; Doc. 2 at 22-23, 27-33) Petitioner argues that his guilty plea was not knowing, intelligent, or voluntary due to trial counsel's improper advice. (Doc. 2 at 25-27)

Petitioner raised his Ground One claim in his first PCR petition in the superior court. (Doc. 23-3 at 6-28, 35) Petitioner raised his Ground One claim in his petition for review in the Arizona Court of Appeals following Petitioner's subsequent PCR proceedings. (Doc. 23-21 at 7, 12-19, 21) However, the court of appeals determined that Petitioner's petition

for review was untimely as to Petitioner's first PCR proceedings. (Doc. 23-21 at 55) To raise Ground One timely at the Arizona Court of Appeals, Petitioner must have petitioned the court of appeals for review within thirty days of the superior court's denial of his first PCR petition. *See* Ariz. R. Crim. P. 33.16. Petitioner did not do so. Accordingly, Petitioner did not fairly present his Ground One claim to the Arizona Court of Appeals. *See Swoopes*, 196 F.3d at 1010 (requiring fair presentment of a claim to the Arizona Court of Appeals through direct appeal or PCR proceedings for purposes of exhaustion); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (requiring petitioners to "invoke[e] one complete round of the State's established appellate review process"). Thus, Petitioner did not properly exhaust his Ground One claim for purposes of federal habeas review.

b. Ground Two

In Ground Two of the Petition, Petitioner argues that the trial court improperly denied Petitioner's motion for rehearing of Petitioner's first PCR petition; that Petitioner did not receive a "full and fair adequate hearing" in the trial court; and that the state courts impeded Petitioner's ability to file timely appellate claims. (Doc. 1 at 7) Petitioner argues that the state court actions violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Id.*)

Petitioner did not raise his Ground Two claim to the superior court or the Arizona Court of Appeals. In his petition for review in the Arizona Supreme Court following his second PCR proceedings, Petitioner presented an issue for review regarding whether the lower courts properly decided his motion for rehearing in a timely manner, thereby precluding Petitioner from pursuing appellate review "in an orderly fashion[.]" (Doc. 23-22 at 10) However, Petitioner did not present his Ground Two claim to the superior court or the Arizona Court of Appeals, where he was required to raise such. *See Swoopes*, 196 F.3d at 1010. Further, Petitioner did not present a federal legal basis for his claim in the Arizona Supreme Court. *See Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999) (a petitioner must present a claim's factual and legal basis to the state courts to constitute fair presentment and satisfy exhaustion). Therefore, Petitioner did not fairly present his Ground

Two claim to the state courts and did not properly exhaust his Ground Two claim.

c. Ground Three

In Ground Three of the Petition, Petitioner argues that his conviction was based on constitutionally insufficient evidence; that the "admin per se" element of Petitioner's offense was improperly substituted with "void" implied consent; that the prosecutor did not present sufficient evidence to convict and changed the elements of the crime on appeal; and that Petitioner is actually innocent of his aggravated DUI convictions. (Doc. 1 at 8)

In his first PCR petition in the superior court, Petitioner stated, in relevant part, that the evidence did not support the state's argument that Petitioner knew that he had a suspended license; that the state did not have a foundation to indict Petitioner; that a plea or conviction based on "the state's use of improper or inaccurate information" violated Petitioner's due process rights under the Fifth, Sixth, and Fourteenth Amendments; and that trial counsel should have presented a defense of innocence or mistake of fact. (Doc. 23-3 at 8-9, 19-20, 33-35) Petitioner appears to have framed these statements as part of a broader argument regarding trial counsel's ineffectiveness and the resulting prejudice to Petitioner. (*See id*. at 27-35) In his first PCR petition, Petitioner did not argue that an admin per se suspension was improperly substituted with an implied consent suspension.

In his petition for review in the Arizona Court of Appeals, Petitioner argued claims related to the insufficiency of evidence, factual innocence, and the alleged substitution of implied consent for an admin per se suspension. (Doc. 23-21 at 14-17, 22-26) These claims were partly framed as an IAC claim in Petitioner's petition for review. (*Id*. at 14-17) However, the court of appeals addressed the claims in Petitioner's petition for review as part of Petitioner's second PCR proceedings. (Doc. 23-21 at 55) The court of appeals determined that Petitioner's petition for review was untimely as to Petitioner's first PCR proceedings in the superior court. (*Id*.) To properly exhaust Ground Three timely, Petitioner must have petitioned the court of appeals for review within thirty days of the superior court's denial of his first PCR petition. *See* Ariz. R. Crim. P. 33.16. Petitioner did not do so. Therefore, Petitioner did not fairly present his Ground Three claim to the Arizona

Court of Appeals during his first PCR proceedings, where he was required to raise such. *See Swoopes*, 196 F.3d at 1010; *see also O'Sullivan*, 526 U.S. at 845.

Although Petitioner raised his Ground Three claim in his second PCR petition (Doc. 23-17 at 22, 43-51) and in his subsequent petition for review in the court of appeals (Doc. 23-21 at 7, 14-16, 22-26), a petitioner "is precluded from relief under Rule 33.1(a) based on any ground […] 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. 33.2(a)(3). A petitioner filing a successive PCR petition may also avoid preclusion where a claim alleges IAC of first PCR counsel, or where a claim falls within the exceptions of Rule 33.1(b) through (h) and a petitioner can explain why the claim was not previously raised or presented in a timely manner. Ariz. R. Crim. P. 33.2(b). Petitioner's Ground Three claim did not raise a claim that Petitioner could only waive knowingly, voluntarily, and personally. *See Stewart*, 202 Ariz. at 449. Although Petitioner's Ground Three claim falls within exceptions (e) and (h) of Ariz. R. Crim. P. 33.1, the court of appeals did not address on the merits Petitioner's claims of newly discovered evidence and actual innocence because Petitioner did "not adequately address" such claims on review. (Doc. 23-21 at 55) Petitioner therefore did not properly present his Ground Three claim to the state courts in his first or second PCR proceedings. *See Greene v. Lambert*, 288 F.3d 1081, 1086 (9th Cir. 2002) (exhaustion requires disposal on the merits by the state's highest court). Accordingly, Petitioner did not exhaust his Ground Three claim.

d. Ground Four

In Ground Four of the Petition, Petitioner argues that the state and the state court improperly labeled his first PCR supplement and second PCR notice as his second and third PCR petitions, respectively. (Doc. 1 at 9; *see also* Doc. 2 at 38-40) Petitioner argues that the improper labeling of his filings prohibited Petitioner from raising claims related to ineffective assistance of PCR counsel; prevented Petitioner from having counsel appointed to raise ineffective assistance of PCR counsel; and prevented Petitioner from effectively

raising claims of actual innocence. (*Id*.) Petitioner concedes that he did not raise Ground Four to the Arizona Court of Appeals. (*Id*.)

Petitioner did not raise his Ground Four claim in his first PCR petition, his second PCR petition, or his petition for review in the court of appeals, where he was required to raise such. *See Swoopes*, 196 F.3d at 1010. Petitioner did not raise his Ground Four claim until his petition for review in the Arizona Supreme Court during his second PCR proceedings. (Doc. 23-22 at 20-22) Further, Petitioner did not present a federal legal basis for his Ground Four claim in his petition for review in the Arizona Supreme Court. *See Weaver*, 197 F.3d at 364. Accordingly, Petitioner did not exhaust his Ground Four claim.

e. Ground Five

In Ground Five of the Petition, Petitioner argues that he was improperly sentenced pursuant to "inaccurate and misleading information" regarding his prior convictions; was improperly sentenced as a category three repetitive offender; and is entitled to resentencing or a new trial under *Blakely v. Washington*, 542 U.S. 296 (2004). (Doc. 2 at 23-25) Petitioner also argues that trial counsel's failure to object to the use of four prior convictions constituted ineffective assistance under the Sixth Amendment. (*Id*. at 24)

In his first PCR petition in the superior court, Petitioner argued that he was improperly sentenced as a category three repetitive offender and that the trial court sentenced Petitioner pursuant to inaccurate information. (Doc. 23-3 at 28-38) Petitioner did not present a federal legal basis for this claim insofar as Petitioner argues that the prosecutor and the trial court erred. *See Weaver*, 197 F.3d at 364. Petitioner did present a federal legal basis for his argument that trial counsel provided IAC by failing to object to the use and classification of Petitioner's prior offenses. (Doc. 23-3 at 27-28)

Petitioner thereafter raised his Ground Five claim in his second PCR petition (Doc. 23-17 at 22) and in his petition for review in the court of appeals (Doc. 23-21 at 7, 19-21). However, a petitioner "is precluded from relief under Rule 33.1(a) based on any ground […] 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. 33.2(a)(3). A petitioner filing a successive PCR petition may also avoid preclusion where a claim alleges IAC of first PCR counsel, or where a claim falls within the exceptions of Rule 33.1(b) through (h) and a petitioner can explain why the claim was not previously raised or presented in a timely manner. Ariz. R. Crim. P. 33.2(b). Petitioner's Ground Five claim did not allege a violation of a constitutional right that Petitioner could only waive knowingly, voluntarily, and personally. *See Stewart*, 202 Ariz. at 449. Although Petitioner's Ground Five claim falls under exception (c) of Ariz. R. Crim. P. 33.1, Petitioner did not explain why he did not previously raise the claim in a timely manner. *See* Ariz. R. Crim. P. 33.2(b). Further, the court of appeals denied Petitioner's Ground Five claim on procedural grounds, namely that Petitioner's Ground Five claim could not be raised in an untimely and successive PCR proceeding. (Doc. 23-21 at 55) Petitioner therefore did not fairly present his Ground Five claim to the court of appeals. *See Turner v. Compoy*, 827 F.2d 526, 530 (9th Cir. 1987) (where review is denied on procedural grounds, court assumes state remedies have not been exhausted); *see also Greene*, 288 F.3d at 1086. Accordingly, Petitioner did not exhaust his Ground Five claim.

f. Ground Six

In Ground Six of the Petition, Petitioner argues that his first PCR counsel was ineffective for failing to raise a claim that trial counsel was ineffective during Petitioner's status conference and settlement negotiations. (Doc. 2 at 34-40) Petitioner argues that his Ground Six claim is not procedurally barred under Ariz. R. Crim. P. 32.2(a)(3) or 33.2(a)(3) because the state courts allegedly mislabeled his second and third PCR proceedings. (*Id*. at 34, 37-38)

Petitioner did not raise his Ground Six claim in his first PCR petition in the superior court, his second PCR petition, or his subsequent petition for review in the Arizona Court of Appeals. Petitioner did not indicate that he intended to raise a claim of IAC of his first PCR counsel until his third PCR notice. (Doc. 23-25 at 6) The superior court denied Petitioner's claim on procedural grounds, noting that Petitioner could have raised an IAC

claim of first PCR counsel in Petitioner's second PCR proceeding. (*Id*. at 10) The record does not reflect that Petitioner raised his Ground Six claim to the court of appeals or that Petitioner filed a petition for review in the court of appeals in his third PCR proceedings.[35] Accordingly, Petitioner did not properly present his Ground Six claim to the state courts for one full round of review. *See O'Sullivan*, 526 U.S. at 845. Thus, Petitioner did not exhaust his Ground Six claim.

2. Grounds One through Six are procedurally defaulted

Petitioner's Grounds One through Six are not only unexhausted, but are procedurally defaulted. It is too late under Arizona procedure for Petitioner to return to state court to assert such claims. *See* Ariz. R. Crim. P. 33.2(a)(3)[36] (a defendant is precluded from relief pursuant to Rule 33.1(a) that was waived in a previous PCR petition); Ariz. R. Crim. P. 33.4(b)(3)(A) (claims filed pursuant to Rule 33.1(a) must be filed within 90 days after oral pronouncement of sentence); Ariz. R. Crim. P. 33.1(b)-(h), 33.2(b)(1), 33.4(b)(3)(B) (allowing a defendant to assert claims identified in Rule 33.1(b) through (h) "within a reasonable time after discovering the basis for the claim.") Arizona Rule of Criminal Procedure 33.1(b) through (h) identifies grounds for PCR relief where: (b) the court lacked "subject matter jurisdiction to render a judgment or to impose a sentence on the defendant"; (c) the sentence was not "authorized by law"; (d) the defendant is or will be in custody after his sentence has expired; (e) "newly-discovered material facts probably

[35] Further, the superior court's electronic docket for case CR2016-152809-001 does not reflect a petition for review of the superior court's October 28, 2021, order on Petitioner's third PCR notice: http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2016-152809 (last accessed September 28, 2022).

[36] Arizona Rule of Criminal Procedure 33.2(a)(3) provides that PCR relief is precluded on any claim "waived at trial or on appeal, or in any previous post-conviction proceeding, *except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant*." (emphasis supplied). The italicized language was added to the rules in January 2020, but even under the prior rule, Arizona courts limited an exception to preclusion only in circumstances where "an asserted claim is of sufficient constitutional magnitude." *Stewart*, 202 Ariz. at 449. The Arizona Supreme Court has instructed that examples encompassed by this phrase include the right to counsel, the right to a jury trial, and the right to a twelve-person jury. *See id.* Petitioner has neither argued nor shown that any of his procedurally defaulted claims at issue in this matter allege a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by a defendant.

exist" and such facts "probably would have changed the judgment or sentence"; (f) the failure to file a timely notice of PCR was not the defendant's fault; (g) "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence"; and (h) "the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt[.]" Ariz. R. Crim. P. 33.1(b)-(h).

Petitioner argues that the state courts wrongly labeled his second and third PCR petitions and thereby prevented Petitioner's claims from being considered on the merits. (*See, e.g.*, Doc. 1 at 5,7 10; Doc. 3 at 11) Specifically, Petitioner argues that his Ground Six claim is not procedurally barred under Ariz. R. Crim. P. 32.2(a)(3) or 33.2(a)(3) because the state courts allegedly mislabeled his second and third PCR proceedings. (Doc. 2 at 34, 37-39) However, Petitioner is precluded from relief on his Ground Six claim under Rule 33.1(a), because Petitioner failed to raise this claim in his second PCR proceeding. *See* Ariz. R. Crim. P. 33.2(a)(3), (b)(2) ("A defendant is not precluded from filing a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding."). Because Petitioner had already filed a second PCR petition (Doc. 23-17 at 20-72; Doc. 23-18 at 3-55; Doc. 23-19 at 3-44), Petitioner's third PCR notice was not a timely second PCR notice. Petitioner's Ground Six claim does not allege a violation of a constitutional right that Petitioner could only waive knowingly, voluntarily, and personally. *See* Ariz. R. Crim. P. 33.2(a)(3); *Stewart*, 202 Ariz. at 449. Further, Petitioner's Ground Six claim does not fall under an exception of Rule 33.1(b) through (h).[37] Accordingly, Petitioner's Ground Six claim was waived and precluded from relief, and Petitioner cannot return to state court to assert his Ground Six claim.

In addition, Petitioner's claims raised in his second and third PCR proceedings,

[37] Moreover, as discussed in Section VI(A), *infra*, Petitioner cannot argue in these proceedings that the state court improperly labeled his PCR petitions, because such a claim does not allege that Petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

including Grounds One, Three, Five, and Six, are expressly procedurally defaulted because the state courts applied a plain procedural bar. In Petitioner's second PCR proceedings, the superior court determined that the IAC claims in Petitioner's second PCR petition were precluded under then-Ariz. R. Crim. P. 32.2(a) because Petitioner raised such claims in a previous Rule 32 proceeding. (Doc. 23-20 at 76-77) The Arizona Court of Appeals determined that the claims in Petitioner's subsequent petition for review were also precluded under Ariz. R. Crim. P. 33.2(a) and (b). (Doc. 23-21 at 53-56) In Petitioner's third PCR proceedings, the superior court determined that the claims in Petitioner's third PCR notice were precluded under Ariz. R. Crim. P. 33.2(a) and (b). (Doc. 23-25 at 9-11) Ariz. R. Crim. P. 32 and 33.2 are "both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris*, 489 U.S. at 260; *Stewart*, 536 U.S. at 860 (recognizing independence of then-Rule 32); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (rejecting argument that Arizona procedural rules were applied unpredictably and irregularly and were therefore inadequate).

Accordingly, all of Petitioner's claims are procedurally defaulted.

3. Petitioner fails to establish cause and prejudice or miscarriage of justice/actual innocence to excuse the procedural default of Grounds One through Six

To excuse the procedural default of Grounds One through Six, Petitioner bears the burden of establishing either: (1) both cause and actual prejudice; or (2) a miscarriage of justice/actual innocence. *Coleman*, 501 U.S. at 570.

a. Cause and prejudice not established

In the Supporting Brief filed with his December 23, 2021, Petition, Petitioner argues that *Martinez v. Ryan*, 566 U.S. 1 (2012), establishes cause excusing his failure to raise claims that trial counsel was ineffective. (Doc. 2 at 34-40) Petitioner argues that his first PCR counsel's notice of completion of post-conviction review, stating that PCR counsel did not find any meritorious claims to raise, prevented Petitioner from raising IAC claims in his first PCR proceedings. (*Id*. at 37) Respondents assert that *Martinez* does not excuse Petitioner's procedural default of his Ground One claim because Petitioner was only

represented by first PCR counsel until PCR counsel submitted a notice of completion of post-conviction review; Petitioner proceeded *pro se* during the remainder of his PCR proceedings; and Petitioner did raise an IAC claim of trial counsel in his first PCR petition, yet failed to present an IAC claim in a timely petition for review in the court of appeals. (Doc. 23 at 40-41)

In *Martinez*, the U.S. Supreme Court held that PCR counsel's failure to raise ineffective assistance of trial counsel could constitute cause for procedural default of the IAC claim, so long as a petitioner's first opportunity to raise an IAC claim was in PCR proceedings. *Martinez*, 566 U.S. at 14. Respondents correctly point out that Petitioner has failed to establish that *Martinez* excuses Petitioner's procedurally-defaulted Ground One claim. Although Petitioner's first PCR counsel found no meritorious claims to raise on post-conviction review, Petitioner's first PCR counsel was ordered to remain as advisory counsel while Petitioner subsequently proceeded *pro se* during first PCR proceedings. (Doc. 23-2 at 13-14) First PCR counsel's notice of completion of post-conviction review did not prevent Petitioner from raising an IAC claim in his first PCR petition. (Doc. 23-3 at 6-28, 35) Moreover, Petitioner raised an IAC claim in his *pro se* first PCR petition, his second PCR petition, and his petition for review in the Arizona Court of Appeals. (Doc. 23-3 at 6-28, 35; Doc. 23-21 at 7, 12-19, 21; Doc. 23-17 at 22, 33-35) During Petitioner's first PCR proceedings, the superior court denied Petitioner's IAC claim on the merits. (Doc. 23-10 at 77-80) During Petitioner's second PCR proceedings, the superior court determined that Petitioner's IAC claim was precluded. (Doc. 23-20 at 76-77) The Arizona Court of Appeals determined that Petitioner had not filed a timely petition for review in his first PCR proceedings and affirmed the trial court's holding that Petitioner's IAC claim could not be raised in an untimely and successive second PCR petition. (Doc. 23-21 at 53-56) Under these circumstances, Petitioner has not established that his first PCR counsel's alleged failure to raise IAC claims constitutes cause excusing Petitioner's procedural default.

Even if Petitioner could establish that his first PCR counsel's alleged failure to raise

Petitioner's IAC claim constituted cause, Petitioner has not shown how PCR counsel's alleged ineffectiveness caused Petitioner prejudice. Petitioner does not make any express argument that PCR counsel's alleged failure to raise an IAC claim prejudiced Petitioner. Petitioner states that PCR counsel's alleged ineffectiveness prevented Petitioner from raising his IAC claim in a successive petition and that Petitioner's IAC claim should not be precluded or procedurally barred. As discussed above, Petitioner was able to raise his IAC claim in his first PCR petition (Doc. 23-3 at 6-28, 35), and the superior court addressed Petitioner's IAC claim on the merits. (Doc. 23-10 at 77-80) Any preclusion or inability to raise Petitioner's IAC claim in a successive petition resulted from Petitioner's ability to raise his IAC claim during his first PCR proceedings, not from first PCR counsel's alleged failure to raise an IAC claim. *See Coleman*, 501 U.S. at 753 (cause cannot be attributable to a petitioner).

In his Affidavit in support of the Petition, Petitioner also argues that the factual basis of his plea agreement was incorrect due to newly discovered evidence. (Doc. 3 at 13) Petitioner asserts that the state "offered a different evidentiary basis in support of the aggravating factor" of his charges, yet the trial court did not provide an evidentiary hearing for the state to prove the factual basis of the plea agreement. (*Id.*) Petitioner argues that the lack of an evidentiary hearing and the resulting insufficient evidentiary basis constitutes cause and prejudice under AEDPA. (*Id.*) Petitioner states that the court may consider this issue without Petitioner "having to prove anything further or show that prejudice had occurred in this particular case." (*Id.*) Petitioner asserts that he was prejudiced because his "children were taken away from thier [*sic*] mother by DCS on its succession, and because [Petitioner] was not available to take physical custody of children," resulting in Petitioner's children being adopted by a third party. (*Id.*) However, Petitioner does not explain how the trial court's failure to provide an evidentiary hearing constitutes cause excusing Petitioner's procedural default of Grounds One through Six. Petitioner does not show that an "objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753.

Accordingly, Petitioner has not met his burden to show cause and prejudice excusing his procedural default of Grounds One through Six.

b. Miscarriage of justice/actual innocence standard not met

Although Petitioner has not met his burden to show cause and prejudice excusing his procedural default of Grounds One through Six, Petitioner may alternatively establish a miscarriage of justice/actual innocence to excuse his procedural default. *Coleman*, 510 U.S. at 750. To meet this exception to procedural default, Petitioner must "support his allegations of constitutional error with new reliable evidence[,]" *Schlup*, 513 U.S. at 324, and "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 327). Petitioner fails to meet this burden, primarily because he does not present "new reliable evidence[,]" *Schlup*, 513 U.S. at 324, that would likely prevent a jury from convicting him. *See McQuiggin*, 569 U.S. at 399.

In Ground Three of the Petition, Petitioner argues that he is actually innocent of his convictions in CR2016-152809-001. (Doc. 1 at 8) Petitioner argues that the evidence presented was insufficient to obtain a conviction and that "no reasonable fact finder would have found [Petitioner] guilty[.]" (*Id*.) Petitioner therefore argues that his conviction, based on false and insufficient evidence, violated the Fifth, Sixth, and Fourteenth Amendments. (*Id*.) Petitioner asserts that he had a valid driver's license at the time of the events underlying the charged offenses, that during PCR proceedings the state substituted an administrative per se suspension with a "void" implied consent suspension, and that the MVD reinstated Petitioner's license prior to the events leading to Petitioner's charged offenses. (*Id*.; *see also* Doc. 3 at 4, 6-7, 9)

As discussed in Section IV(D), *supra*, Petitioner has not presented "new reliable evidence[,]" *Schlup*, 513 U.S. at 324, that would likely prevent a jury from convicting him. *See McQuiggin*, 569 U.S. at 399. Petitioner's attachments to the Petition (Doc. 1), his Supporting Brief (Doc. 2), and his Affidavit in support of the Petition (Doc. 3) existed at the time of Petitioner's sentencing or at the time of Petitioner's first, second, and third PCR

proceedings. Further, to the extent that Petitioner argues that he had a valid driver's license at the time of the events leading to charges in case CR2016-152809-001, Petitioner has not presented evidence that would likely prevent a jury from convicting him. Petitioner's attached Admin Per Se/Implied Consent Affidavit from the ADOT reflects that Petitioner's driver's license was suspended on November 15, 2010. (Doc. 2-4 at 26-27; *see also* Doc. 2-6 at 31) Petitioner's November 2010 suspension stated that Petitioner's license would be suspended "for 12 months, or 2 years if there is a prior implied consent refusal" and that the suspension would "not end until all reinstatement requirements are met including completion of alcohol or drug screening." (*Id.*) Petitioner's "Motor Vehicle Record" as of November 2019 does not reflect that Petitioner's license was reinstated following Petitioner's November 2010 implied consent affidavit. (Doc. 2-6 at 31) To the contrary, Petitioner was issued identification cards, not driver's licenses, prior to July 22, 2016. (*Id.* at 29) Petitioner's Motor Vehicle Record states that Petitioner was under an implied consent suspension as of November 2019 and that Petitioner was under revocation; had a mandatory insurance suspension with court action required, owed multiple fees, and required an alcohol or drug screening. (*Id.* at 29-30) Petitioner's Motor Vehicle Record only reflects one implied consent affidavit, received on November 15, 2010. (*Id.* at 31) Petitioner does not show that his implied consent suspension was void, as he contends. (*See* Doc. 1 at 8)

Petitioner also attached a Phoenix Police Department Incident Report regarding Petitioner's charged offenses on July 22, 2016. (Doc. 2-1 at 15-19) The report states that "the City of Phoenix Prosecutor's Office has located records to indicate suspect [Petitioner's] driving privileges were suspended for an open admin per se suspension at the time of this incident." (*Id.* at 19) Further, in a probable cause statement in a Release Questionnaire from the West McDowell Justice Court, Petitioner's arresting officer certified that Petitioner's "driving privileges were suspended for an Open Admin Per Se Suspension" at the time of Petitioner's charged offenses on July 22, 2016. (*Id.* at 45-46) An annotation states that Petitioner's suspension was served on November 15, 2010, and

notice was mailed on April 10, 2012. (*Id*. at 45) Aside from his November 2010 Admin Per Se/Implied Consent Affidavit, Petitioner presented each of the aforementioned documents to the superior court during his first PCR proceedings. (*See* Doc. 23-6 at 4-8, 10-11; *see also id*. at 16-17) The superior court nevertheless determined that Petitioner had not shown evidence that Petitioner's license was not suspended. (Doc. 23-10 at 77-80)

Further, although Petitioner argues that his admin per se suspension did not apply until August 7, 2016, thereby demonstrating an insufficient factual basis for the charged offenses, Petitioner's August 7, 2016, admin per se suspension resulted from Petitioner's July 22, 2016, DUI, separate from Petitioner's November 2010 suspension. (*See* Doc. 1-3 at 13) The effective date of Petitioner's August 2016 admin per se suspension does not affect whether Petitioner had a valid license on July 22, 2016.

Petitioner has not presented new evidence, nor do any of Petitioner's arguments or materials meet the required showing of actual innocence. Accordingly, Petitioner has not met his burden to establish actual innocence that would excuse his procedural default of Grounds One through Six.

VI. NON-COGNIZABLE CLAIMS

In addition to arguing that the Petition was untimely filed and that Grounds One through Six of the Petition are unexhausted and procedurally defaulted without excuse, Respondents also argue that Petitioner's Grounds Two through Six are non-cognizable in these habeas proceedings. (Doc. 23 at 29-33)

A. Grounds Two and Four

In Ground Two of the Petition, Petitioner alleges that the trial court improperly denied Petitioner's motion for rehearing of Petitioner's first PCR petition; that Petitioner did not receive a "full and fair adequate hearing" in the trial court; and that the state courts impeded his ability to file timely appellate claims. (Doc. 1 at 7) In Ground Four of the Petition, Petitioner argues that the state court improperly labeled his second and third PCR petitions. (*Id*. at 9) Respondents argue that this Court may not review Grounds Two and Four because each claim "merely allege[s] errors in the state post-conviction proceedings."

(Doc. 23 at 31-32) Respondents are correct that Petitioner's Grounds Two and Four are not reviewable in these proceedings. Under 28 U.S.C. § 2254(a), a federal court may only review applications for a writ of habeas corpus that allege a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." The Ninth Circuit has held that "a petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings." *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989). Because Petitioner's Grounds Two and Four claims do not allege that Petitioner is in custody in violation of the Constitution or laws or treaties of the United States, Petitioner's Grounds Two and Four claims are non-cognizable in these habeas proceedings.

B. Ground Three

In Ground Three of the Petition, Petitioner argues that his conviction was based on constitutionally insufficient evidence and that Petitioner is actually innocent of his charged offenses. (Doc. 1 at 8) Petitioner argues that the "claim-element of admin per se was Non-existent and substituted with VOID implied consent of which factual predicate could not have been previously discovered through due diligence[.]" (*Id*.) Petitioner asserts that his guilty plea lacked a factual basis and that his conviction was based on false material evidence. (*Id*.) Petitioner argues that his conviction therefore violated the Fifth, Sixth, and Fourteenth Amendments. (*Id*.) Citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993), Respondents argue that a claim of actual innocence does not state a ground for federal habeas relief because Petitioner only challenges the facts underlying his conviction, as opposed to arguing an independent constitutional violation. (Doc. 23 at 32)

In *Herrera v. Collins*, the Supreme Court stated that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. However, following *Herrera*, whether a freestanding claim of actual innocence is cognizable in a federal, non-capital habeas proceeding remains unresolved. The Supreme Court has assumed without deciding that

freestanding claims of actual innocence are cognizable on federal habeas review, but the threshold to establish such a claim may "require[] more convincing proof of innocence than *Schlup*." *House v. Bell*, 547 U.S. 518, 554-55 (2006). The Ninth Circuit has assumed without deciding that a freestanding actual innocence claim is cognizable, stating that the standard for establishing such a claim "is extraordinarily high and the showing for a successful claim would have to be truly persuasive." *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) (internal quotes and citations omitted).

Even if a freestanding actual innocence claim is cognizable in these proceedings, Petitioner's claim is without merit. As discussed in Sections IV(D) and V(B)(3)(b), *supra*, Petitioner has not presented materials or arguments that establish actual innocence of the convictions on which Petitioner's habeas claims are based. Because Petitioner cannot meet the standard in *Schlup*, Petitioner cannot meet the higher standard required for a freestanding actual innocence claim, assuming that such a claim exists. *See House*, 547 U.S. at 545-55; *Jones*; 763 F.3d at 1246; *see also Sosnowicz v. Shinn*, 2021 WL 2685652, at *5 (D. Ariz. June 30, 2021)); *Stuart v. Shinn*, 2020 WL 4369773, at *10 (D. Ariz. Jan. 23, 2020) (report & recommendation adopted at 2020 WL 3488596, at *1 (D. Ariz. June 26, 2020)) (recommending dismissal of actual innocence claim where Petitioner could not meet lower "miscarriage of justice" standard).

C. Ground Five

In Ground Five, Petitioner argues that he was improperly sentenced pursuant to "inaccurate and misleading information" regarding his prior convictions; was improperly sentenced as a category three repetitive offender; and is entitled to resentencing or a new trial under *Blakely v. Washington*, 542 U.S. 296 (2004). (Doc. 2 at 23-25) Petitioner also argues that trial counsel's failure to object to the use of four prior convictions constituted ineffective assistance under the Sixth Amendment. (*Id*. at 24)

Respondents argue that Petitioner has only alleged a state law claim under which Petitioner cannot obtain federal habeas relief. (Doc. 23 at 32) Respondents assert that Petitioner has not alleged a constitutional violation and that Petitioner's reference to

Blakely v. Washington does not transform Petitioner's state law claim into a federal claim. (*Id*. at 32-33)

Insofar as Petitioner's Ground Five alleges an error of state law, Ground Five is non-cognizable in these habeas proceedings. *See Smith v. Ryan*, 823 F.3d 1270, 1282 (9th Cir. 2016) (violations of state law normally non-cognizable on federal habeas review unless error rises to the level of due process violation). Here, Petitioner does not argue that any alleged state court error rose to the level of a due process violation. Further, as Respondents accurately point out, *Blakely* concerned sentencing enhancements based on certain facts, not on the basis of prior felony convictions as in Petitioner's case. *Blakely*, 542 U.S. at 305. *See also Apprendi v. New Jersey*, 530 U.S. 466 (2000).

As a subclaim of Ground Five, Petitioner also argues that his trial counsel's failure to object to the use of certain prior convictions was a violation of Petitioner's Sixth Amendment right to effective representation. (Doc. 2 at 24) Petitioner's Ground Five subclaim regarding IAC is cognizable in federal habeas proceedings as a violation of the Sixth Amendment right to counsel. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 686 (1984). However, as discussed in Section V(B)(1)(e), *supra*, Petitioner did not present the entirety of his Ground Five claim to this Court in a timely manner and procedurally defaulted his Ground Five claim without excuse.

D. Ground Six

In Ground Six, Petitioner argues that his first PCR counsel was ineffective for failing to raise an IAC claim of trial counsel. (Doc. 2 at 34-40) Petitioner argues that *Martinez v. Ryan*, 566 U.S. 1 (2012), excuses Petitioner's failure to raise his Ground Six claim earlier. (*Id*. at 34-37) Respondents correctly assert that under 28 U.S.C. § 2254(i), Petitioner may not make a claim regarding the ineffectiveness of PCR counsel. (Doc. 23 at 33) In federal habeas proceedings under 28 U.S.C. § 2254, a petition may not raise "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings" as "a ground for relief[.]" 28 U.S.C. § 2254(i). Accordingly, Petitioner's Ground Six claim is non-cognizable on federal habeas review.

VII. EVIDENTIARY HEARING

In his Supporting Brief submitted with the Petition, Petitioner requests that the Court conduct an evidentiary hearing "at which evidence maybe [*sic*] offered concerning the factual allegations in the petition[.]" (Doc. 2 at 41)

AEDPA imposes "an express limitation on the power of a federal court to grant an evidentiary hearing and [has] reduced considerably the degree of the district court's discretion." *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999) (internal quotation marks and citation omitted). Insofar as Petitioner requests an evidentiary hearing on his procedurally defaulted claims, Title 28, section 2254(e)(2) of the United States Code "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186 (citing *Williams*, 529 U.S. at 427-29). Section 2254(e)(2) provides that if a habeas petitioner:

> has failed to develop the factual basis of a claim in State court proceedings, no evidentiary hearing will be held in federal court unless the petitioner shows that—
>
> > (A) the claim relies on—
> >
> > > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> >
> > (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2); *see also Shinn v. Martinez Ramirez*, 596 U.S. ___, 142 S.Ct. 1718, 1738 (2022) ("[W]hen a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise admits or reviews new evidence for any purpose, it may not consider

that evidence on the merits of a negligent prisoner's defaulted claim unless the exceptions in § 2254(e)(2) are satisfied.").

Petitioner has not demonstrated that his procedurally defaulted claims meet the requirements of § 2254(e)(2), as he does not allege a "new rule of constitutional law" or present facts "that could not have been previously discovered through the exercise of due diligence[.]" 28 U.S.C. § 2254(e)(2)(A)(i)-(ii). Petitioner argues that trial or first PCR counsel should have presented evidence that existed at the time of Petitioner's plea agreement or PCR proceedings, none of which "could not have been previously discovered through the exercise of due diligence[.]" 28 U.S.C. § 2254(e)(2)(A)(ii). Further, Petitioner has not established by clear and convincing evidence that no reasonable fact-finder would find Petitioner guilty of the charges against him. *See* 28 U.S.C. § 2254(e)(2)(B). As discussed in Sections IV(D), V(B)(3)(b), and VI(B), *supra*, Petitioner has not shown evidence that his license was not suspended at the time of the events leading to the charged offenses. Accordingly, an evidentiary hearing on Petitioner's procedurally defaulted claims is not appropriate.

VIII. CONCLUSION

For the reasons set forth above, the December 23, 2021, filing of the Petition was untimely. Further, Petitioner procedurally defaulted all his claims, Grounds One through Six, without excuse and raised non-cognizable claims in Grounds Two through Six. Therefore, it is recommended that the Petition be dismissed and denied with prejudice and that this matter be terminated.

Assuming the recommendations herein are followed in the District Judge's judgment, the undersigned recommends that a certificate of appealability be denied because dismissal is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable, and Petitioner has not "made a substantial showing of the denial of a constitutional right[.]" 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

IT IS THEREFORE RECOMMENDED that Petitioner Jessie Wilder Darrin's

Petition Under 28 U.S.C. § 2254 For a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) (Docs. 1, 2, 3) be denied and dismissed with prejudice and that this matter be terminated.

IT IS FURTHER RECOMMENDED that Petitioner's request for an evidentiary hearing be denied.

IT IS FURTHER RECOMMENDED that 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 Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this 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. The parties shall have fourteen days within which to file responses to any 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 determination of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 18th day of October, 2022.

Honorable Deborah M. Fine
United States Magistrate Judge