WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jeffrey Joseph Hausner, Petitioner, vs. Charles L. Ryan, et al., Respondents.	CIV 15-0650-PHX-SPL (MHB) **REPORT AND RECOMMENDATION**

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

Petitioner Jeffrey Joseph Hausner, who is confined in the Arizona State Prison Complex, filed a *pro se* Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 9). Respondents filed an Answer (Doc. 15), and Petitioner filed a Reply (Doc. 16).

BACKGROUND[1]

Samuel Dieteman met Petitioner in 2004 at a bar – the Amber Inn. (Exh. P at 47.) In January 2006, Petitioner invited Dieteman, who was homeless and unemployed, to move in with him, his girlfriend, Celeste, and Celeste's 18-year-old son, Travis, at Celeste's two-bedroom townhouse located near Camelback Road and 91st Avenue. (Id. at 47-48, 51-52.) Travis had his own bedroom, Petitioner and Dieteman "shared the other bedroom," and

[1] Unless otherwise noted, the following facts are derived from the exhibits submitted with Doc. 15 – Respondents' Answer.

Celeste "slept on the couch." (Id. at 52.) In April 2006, Dieteman met Petitioner's brother, Dale Hausner. (Id. at 53.) Dale, who lived in Mesa, stopped by the townhouse "[q]uite often." (Id. at 53, 141.) Dale often picked up Petitioner and Dieteman and they would go to the International House of Pancakes (IHOP) near Thomas Road and 75th Avenue to eat. (Id. at 56-57.)

At about 10:00 p.m. on the night of May 17, 2006, Dale, Petitioner, and Dieteman went to dinner at IHOP, then drove around, stopping at a liquor store. (Id. at 63-64.) After leaving the liquor store they continued to drive "around"; Dale drove, Dieteman was in the front passenger seat, and Petitioner sat directly behind Dieteman. (Id. at 65.) At about midnight they were driving down Camelback Road when they saw a man, Timothy D., walking eastbound on Camelback, carrying a can of soda. (Id. at 65-66; Exh. O at 86-87.) Timothy was walking to a friend's house. (Exh. O at 86.)

Upon seeing Timothy, Dale said, "Oh, look at this idiot. Why don't you go get him, Sam." (Exh. P at 66.) Dieteman said he was "too drunk." (Id. at 67.) Petitioner told Dieteman, "You're getting to be weak man." (Id.) Petitioner then told Dale, "No, let me out. I'll do it. I'll get this guy." (Id.) Dale turned onto 73rd Avenue, made a u-turn, and Petitioner got out of the rear passenger side of Dale's car. (Id. at 65, 67; Exh. O at 89, 92.)

Timothy began cutting across a church parking lot, and Petitioner walked toward him. (Exh. O at 93.) Dale made another u-turn, he and Dieteman saw Timothy walk into the church parking lot, and Dale drove back down the street and turned into the church parking lot. (Id. at 94-95; Exh. P at 67.) Dale drove up to Timothy and began talking to him on the driver's side of the car to "distract him" so that Petitioner could "catch up." (Exh. O at 95, 98; Exh. P at 67-69, 73.) The windows of the car were "tinted" and Timothy could only see the driver, Dale. (Exh. O at 95, 98; Exh. P at 73.) Dale asked for directions, and told Timothy to "be careful because there is a lot of violence on that side of town." (Exh. O at 98-99, 116; Exh. P at 67-68, 101.)

Dieteman watched as Petitioner walked up from behind Timothy "with a knife in his hand," then saw him stab Timothy "four or five times." (Exh. P at 68, 74, 80.) Timothy felt "three stabs to [his] back," and began to turn around when Petitioner stabbed him again in the back and on the left side of his face. (Exh. O at 96, 100-01, 129-30.) Timothy dropped his soda can and ran off to the southwest, through the parking lot toward a 7-Eleven store about half a block away on the southeast corner of Camelback and 75th Avenue. (Id. at 96, 102; Exh. P at 6, 74.)

Petitioner ran around to the passenger side of the car, and got into the back seat, "laughing." (Exh. P at 74.) Dale turned on the "dome light," and Petitioner exclaimed, "Look at my knife. Look at my knife." (Id. at 74, 76.) The knife "was covered from the tip to the handle in the victim's blood." (Id. at 74.) The knife was a "very distinctive," "gun metal gray," "Gerber brand" folding knife with "an open-frame-type handle, or skeleton frame." (Id. at 74-75, 111.) Dale had previously given the knife to Petitioner; Dale had also given Dieteman a "Gerber brand" knife. (Id. at 111.) Dale then "took off back towards Camelback to try to find" Timothy. (Id. at 76.) They drove around for a while but "couldn't see him anywhere." (Id. at 76-77.) Dale then dropped Petitioner and Dieteman off at the townhouse. (Id. at 77.)

Meanwhile, Timothy had run to the 7-Eleven, realized he would get no "help" there, then ran about half a mile to the home of an acquaintance, David Zaloga, at 7709 West College. (Exh. O at 76-78, 102-05.) Timothy tapped on David's bedroom window and asked David to "help" him. (Id. at 79-80, 106.) David came outside, took Timothy into the garage, did his best to clean Timothy's wounds, then drove Timothy to Banner Estrella Hospital at 91st Avenue and Thomas. (Id. at 79-80, 106-07.) They arrived at the hospital at 12:45 a.m. and Timothy was administered medication to reduce his pain. (Id. at 107, 134-35.)

At about 12:52 a.m., Phoenix Police Officer John Gantt arrived at the hospital and contacted Timothy in the emergency room. (Id. at 134.) Timothy had already been administered medication and was not able to communicate "very clearly." (Id. at 134-35.)

He was "fading in and out," and said he was "attacked by three white males" at a "car wash at 75th Avenue and Thomas." (Id. at 135, 137.) Gantt surmised that the attack had occurred at a Weiss Guys car wash located at 4827 North 75th Avenue, just north of Thomas Road. (Id. at 137-38; Exh. P at 8-9.) Officers responded to the car wash, but could find no evidence of a crime scene. (Exh. O at 136.)

Timothy was treated at Banner Estrella Hospital, then air-evacuated to Good Samaritan Hospital. (Id. at 107-08; Exh. P at 14.) He suffered a punctured lung, lost 8 pints of blood, received numerous stitches, and spent about a week in the hospital. (Exh. O at 108-09.)

After dropping Petitioner and Dieteman off at the townhouse, Dale drove back to his home in Mesa, making two cell phone calls to Petitioner's home phone, and receiving two calls from Petitioner's home phone, between 12:21 and 12:54 a.m. (Exh. P at 77-78, 140-46.) During one of the calls, Dieteman heard Petitioner talking to Dale on the phone about "where we think the guy went." (Id. at 78.) He heard Petitioner say, "Yeah, he had to have died somewhere. Had to have dropped dead because he couldn't disappear like that." (Id.) The next day, Dale said "there was blood all over his door, his driver's door," and, "Man, I had to go to the car wash before work to get it all washed up." (Id. at 78-79.) Over the next week or so, while Petitioner and Dieteman were "sit[ting] around drinking," Petitioner commented on "how [the victim] could just disappear like that," stating, "What do you think ever happened to that guy? He's got to be dead. I don't know man." (Id. at 80.) Petitioner also "figured maybe he flagged down a car and got a ride to the hospital, or he just fell over in the bushes or something." (Id.)

Petitioner washed the knife he used to stab Timothy in the sink, "wiped it with alcohol," then "ran it through a cycle in the dishwasher and called it good." (Id. at 79-80.) In mid-June, Dale took custody of the knife and Dieteman saw it "on top of Dale's microwave in the kitchen, and also in the little cubbyhole area by his stereo in the front of his vehicle." (Id. at 79.)

In July 2006, Dieteman moved out of Petitioner's townhouse and moved in with Dale in his Mesa apartment because Petitioner and Celeste were moving into a smaller home, and Dieteman's and Dale's photographs "were all over the news" regarding arsons the two had committed at Walmarts, and patrons at the Amber Inn recognized Dieteman's photograph. (Id. at 53-54, 115.) On the night of August 3, 2006, Dieteman and Dale were arrested for the "serial shooter case." (Id. at 22, 36.) Dieteman was one of the shooters, and Dale, the other. (Id. at 22.)

Timothy D. was watching the news when Dale Hausner and Dieteman were arrested and immediately recognized Dale as the person who drove the car that had pulled up next to him just before he was stabbed. (Exh. O at 115-16, 128.) He was "100 percent" positive that Dale was the driver. (Id. at 116.) He also recognized Dale's car, which was also shown on the newscast. (Id.) Timothy did not call the police because he "figured it was too late for the police to do anything about it by then." (Id. at 117.)

Dieteman was interviewed on the morning of August 4th, and initially denied that he had personally "killed someone." (Exh. P at 36-39.) Dieteman was "trying to minimize [his] involvement in everything." (Id. at 37.) Eventually, however, Dieteman admitted shooting and killing Claudia C. on May 2, 2006 (2 weeks before Timothy was attacked). (Id. at 37-38, 116.)

From August 4th through September 27th, when he next spoke to the police, Dieteman was in the county jail and got "off the drugs and alcohol" and his memory improved. (Id. at 39-40.) On September 27th, Dieteman had a "free talk" with Detective Clark Schwartzkopf; his attorneys and a prosecutor were also present. (Id. at 40-43; Exh. O at 43-44.) There was "a considerable difference" in Dieteman's "recall of the facts." (Exh. O at 45.) Dieteman disclosed several additional incidents he and Dale had engaged in, and he "was able to recall all of the incidents with great clarity." (Id.; Exh. P at 40-41.) Dieteman went through the shootings he and Dale had engaged in, as well as, the arsons he and Dale committed at two

Walmart stores. (Exh. O at 46; Exh. P at 41-42, 112.) Dieteman made no mention of the May 2006 "stabbing," nor did he mention Petitioner. (Exh. O at 46; Exh. P at 43, 103-04.)

On April 4, 2008, Dieteman entered into a plea agreement with the State, wherein he pled guilty to the first degree murders of Claudia C. and Robin B., conspiracy to murder 13 other people, and agreed to have a jury determine whether he should be sentenced to death for the two murders. (Exh. P at 24-28, 43-44.) Dieteman also entered into a "testimonial agreement" wherein he agreed to provide "complete and truthful testimony regarding any and all crimes related to the investigation and/or the participation of Dale Shaun Hausner." (Id. at 31-32.) The testimonial agreement made no mention of Petitioner, or the May 2006 stabbing of Timothy. (Id. at 44, 104.)

On April 16, 2008, Detectives Schwartzkopf and Clifton Jewell conducted a "testimonial interview" of Dieteman to "talk to him about what he would be testifying to in the furtherance of these cases." (Exh. O at 4, 47; Exh. P at 44.) During the course of the interview, Dieteman mentioned a stabbing that occurred in mid-May, about 2 weeks after he and Dale murdered Claudia. (Exh. O at 48; Exh. P at 5-6, 44, 116, 123.) Dieteman related that he, Dale, and Petitioner were involved in the stabbing and that Petitioner stabbed the victim. (Exh. P at 45-46.) Dieteman could not recall the exact location of the stabbing, but believed it occurred somewhere between 67th and 75th Avenues and Indian School and Camelback Roads. (Id. at 5; Exh. O at 49.) He related that it occurred in a "church parking lot," and that a "canal" and "7-Eleven" were nearby. (Exh. O at 50; Exh. P at 5.)

The detectives were unaware of any such stabbing, so Detective Schwartzkopf conducted a computer search for any stabbings that had been reported in the area. (Exh. O at 49-50; Exh. P at 5-6.) Detective Schwartzkopf found "about four" stabbings in the area that occurred in 2006, and, 2 days later, Detectives Schwartzkopf and Jewell found the church parking lot at 73rd Avenue and Camelback, with a 7-Eleven at 75th Avenue and Camelback and "an irrigation canal that ran under that intersection." (Exh. O at 50; Exh. P at 5-6.)

The detectives then found Officer Gantt's report of the stabbing of Timothy D. which indicated that the stabbing "happened at a Weiss Guys Car Wash at 4800 North 75th Avenue." (Exh. O at 50; Exh. P at 8-9.) Detective Jewell located Timothy and told him he "wanted to speak to him about a stabbing that he was the victim of that happened in 2006." (Exh. O at 10.) Timothy stated, "Well, I know who stabbed me." (Id.) Detective Jewell asked Timothy to "[h]ang on" until they got to his vehicle and he turned on the recorder. (Id. at 11.) After arriving at the vehicle and turning on the recorder, Detective Jewell asked Timothy, "You said you know who stabbed you. Who stabbed you?" (Id. at 11-12.) Timothy replied, "Well, he didn't stab me. He was driving the car that the person was in that stabbed me." (Id. at 12.) Timothy said that, several months after he was stabbed, he was watching the news, saw "the two people that were arrested in the serial shooting case being taken out of the main police building on their way to be booked into the county jail," and "immediately recognized [Dale Hausner] as the person that was driving the car the night he was stabbed." (Id.) Timothy said he "did not recognize the other guy [Dieteman] that was being walked out." (Id. at 13.) Detective Jewell asked Timothy if he could "describe the car that Dale Hausner was driving." (Id.) Timothy answered, "[W]ell, it was the one that was on the back of the wrecker during the same news cast." (Id.)

Detective Jewell asked Timothy about his initial report to Officer Gantt that the stabbing occurred at a car wash. (Id. at 14.) Timothy said he "was on morphine that night" and did not remember talking to a police officer. (Id.) Detective Jewell asked Timothy to show him "exactly where" the stabbing occurred and Timothy directed him to drive north on 75th Avenue, then had him turn right on Camelback "where the 7-Eleven store" was located, then left on 73rd Avenue, then into "the middle of the church parking lot." (Id. at 14-15.) Timothy then showed Detective Jewell the route he had taken to David Zaloga's home after he was stabbed. (Id. at 15-16.)

Detective Schwartzkopf put together two photographic line-ups – one containing Dale Hausner's photograph, and the other, Petitioner's photograph. (Id. at 54-57.) Timothy

identified Dale's photograph as that of the person who drove the car. (Id. at 56, 118.) When he was shown the photographic line-up including Petitioner's photograph, Timothy was unable to identify anybody because he did not see the person who stabbed him. (Id. at 57, 109, 123.)

On July 16, 2008, the State filed an indictment in Maricopa County Superior Court charging Petitioner with one count of attempted first degree murder, a class 2 dangerous felony (Count 1), and one count of aggravated assault, a class 3 dangerous felony (Count 2). (Exhs. A, M.) The State subsequently filed allegations of historical prior felony convictions and aggravating circumstances other than prior convictions. (Exhs. B, C.)

The jurors convicted Petitioner as charged, finding both offenses dangerous. (Exh. R at 45.) The trial court found that Petitioner had a prior felony conviction, obviating the need for a jury trial on aggravating circumstances. (Id. at 3.) The trial court found that Petitioner had a historical dangerous felony conviction and imposed an aggravated sentence of 18 years' imprisonment on Count 1, to be served concurrently with a presumptive sentence of 11 ¼ years' imprisonment on Count 2. (Exh. W at 8, 15-17.) Those sentences were ordered to be served consecutive to the sentence imposed in Maricopa County Cause Number CR 2006-168158. (Id. at 4, 15.)

On direct appeal, Petitioner raised the following issues:

> 1. "Should [Petitioner] be granted a new trial because of prosecutorial misconduct relating to the prosecutor's repeated referencing and questioning about the serial shooting case/investigation, and other crimes committed by Samuel Dieteman and Dale Hausner, all of which did not involve [Petitioner]?"
>
> 2. "Did fundamental error occur, or [was Petitioner's] right to a fair trial violated by allowing admission of chronic prejudicial information involving references to the serial shooter's case/investigation, and other crimes committed by the serial shooters Dale Hausner and Samuel Dieteman, which were not at issue in the present trial?"
>
> 3. "The only evidence that ties [Petitioner] to this case comes from the self-serving statements of Samuel Dieteman, a man who had his own agenda to accomplish. Samuel Dieteman was desperately trying to spare himself from death row for the crimes and murders he committed as one of the serial shooters. Was the evidence sufficient to convict [Petitioner] of Count (1) attempted first degree murder, and Count (2), aggravated assault dangerous?"

> 4. "A defendant has a constitutional right to a jury trial. Verdict forms present options to a jury, typically either 'guilty' or 'not guilty.' But another option is 'unable to decide.' Must a general verdict form also give the jury the opportunity to return a general verdict of unable to decide?"

(Exhs. Y, Z, AA.)

On February 22, 2011, the Arizona Court of Appeals affirmed. (Exh. BB.) Petitioner did not seek review in the Arizona Supreme Court. (Doc. 9 at 3.)

On April 25, 2011, Petitioner filed a notice of post-conviction relief (PCR). (Exh. CC.) The superior court appointed PCR counsel on Petitioner's behalf. (Exh. DD.) Petitioner's PCR petition, filed February 7, 2012, raised the following claims:

> 1. Newly-discovered evidence: "Dale Hausner's testimony."
>
> 2. Newly-discovered evidence: "Katie Hausner Fisher's testimony."
>
> 3. Ineffective assistance of counsel: (a) Failure to file a motion for change of venue; (b) Failure to use Dale Hausner's cell phone records; (c) Failure to call Katie Hausner Fisher to testify on Petitioner's behalf; and (d) Failure to determine whether Petitioner could have stabbed the victim with his left hand.

(Exhs. EE, FF, GG, HH.)

On November 5, 2012, the superior court summarily dismissed Petitioner's PCR petition, finding that, for the reasons set forth in the State's response, he had failed to provide sufficient facts to support a finding that he had shown a colorable claim. (Exh. II.)

Petitioner sought review in the Arizona Court of Appeals (Exh. JJ), which granted review and denied relief on April 14, 2014. (Exh. LL.) Petitioner did not seek review in the Arizona Supreme Court.

In his Amended Petition for Writ of Habeas Corpus, Petitioner raises the following grounds for relief:

> Ground One: "Prosecutorial misconduct. Constitutional rights: The prosecutor's chronic remarks concerning unrelated serial shooter's case denied Jeffrey Hausner his right to due process and fundamental fairness under Constitutional Amendments 5, 14; § 2 Arizona Constitution, Article 2, § 4, 24. As well as his right to an impartial jury, U.S. Constitutional Amendment 6."
>
> Ground Two: "Did fundamental error occur, and was Jeffrey Hausner's right to receive a fair trial violated by allowing admission of chronic prejudicial information involving references to the serial shooter's case/investigation?"

Ground Three: "Insufficient evidence to support a conviction. Was the evidence sufficient to convict Jeffrey Hausner of Count 1 attempted first degree murder, and Count 2 aggravated assault?"

Ground Four: "Verdict forms. Must a general verdict form also give the jury the opportunity to return a general verdict of unable to decide? A defendant has a constitutional right to a jury trial. Verdict forms present options to a jury."

Ground Five (A): Petitioner's rights under Ariz. R. Crim. P. 32 were violated when the superior court failed to grant post-conviction relief based on the following "newly discovered evidence": (i) "Dale Hausner's testimony"; and (ii) "Katie Hausner-Fisher's testimony."

Ground Five (B): Ineffective assistance of counsel: (i) failure to file a motion for change of venue; (ii) failure to use Dale Hausner's cell phone records; (iii) failure to call Katie Hausner Fisher to testify on Petitioner's behalf; and (iv) failure to determine whether Petitioner could have stabbed the victim with his left hand.

DISCUSSION

In their Answer, Respondents contend that Ground Five (A) is procedurally defaulted. Respondents assert that the remainder of Petitioner's claims fail on the merits. As such, Respondents request that the Court deny and dismiss Petitioner's habeas petition with prejudice.

A. Exhaustion and Procedural Default

A state prisoner must exhaust his remedies in state court before petitioning for a writ of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and (c); Duncan v. Henry, 513 U.S. 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. See O'Sullivan v. Boerckel, 526 U.S. 838, 839-46 (1999). 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 v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

Proper exhaustion requires a petitioner to have "fairly presented" to the state courts the exact federal claim he raises on habeas by describing the operative facts and federal legal theory upon which the claim is based. See, e.g., Picard v. Connor, 404 U.S. 270, 275-78

(1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). A claim is only "fairly presented" to the state courts when a petitioner has "alert[ed] the state courts to the fact that [he] was asserting a claim under the United States Constitution." Shumway v. Payne, 223 F.3d 982, 987 (9th Cir. 2000) (quotations omitted); see Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996) ("If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court.").

A "general appeal to a constitutional guarantee," such as due process, is insufficient to achieve fair presentation. Shumway, 223 F.3d at 987 (quoting Gray v. Netherland, 518 U.S. 152, 163 (1996)); see Castillo v. McFadden, 399 F.3d 993, 1003 (9th Cir. 2005) ("Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory."). Similarly, a federal claim is not exhausted merely because its factual basis was presented to the state courts on state law grounds – a "mere similarity between a claim of state and federal error is insufficient to establish exhaustion." Shumway, 223 F.3d at 988 (quotations omitted); see Picard, 404 U.S. at 275-77.

Even when a claim's federal basis is "self-evident," or the claim would have been decided on the same considerations under state or federal law, a petitioner must still present the federal claim to the state courts explicitly, "either by citing federal law or the decisions of federal courts." Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000) (quotations omitted), amended by 247 F.3d 904 (9th Cir. 2001); see Baldwin v. Reese, 541 U.S. 27, 32 (2004) (claim not fairly presented when state court "must read beyond a petition or a brief ... that does not alert it to the presence of a federal claim" to discover implicit federal claim).

Additionally, under the independent state grounds principle, a federal habeas court generally may not review a claim if the state court's denial of relief rests upon an independent and adequate state ground. See Coleman v. Thompson, 501 U.S. 722, 731-32 (1991). The United States Supreme Court has explained:

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31. 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 fails to exhaust his state remedies. Thus, in order to prevent a petitioner from subverting the exhaustion requirement by failing to follow state procedures, a claim not presented to the state courts in a procedurally correct manner is deemed procedurally defaulted, and is generally barred from habeas relief. See id. at 731-32.

Claims may be procedurally barred from federal habeas review based upon a variety of factual circumstances. If a state court expressly applied a procedural bar when a petitioner attempted to raise the claim in state court, and that state procedural bar is both "independent"[2] and "adequate"[3] – review of the merits of the claim by a federal habeas court is barred. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court.") (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977) and Murray v. Carrier, 477 U.S. 478, 485-492 (1986)).

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 v. Reed, 489 U.S. 255, 264 n.10 (1989) ("[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

---

[2] A state procedural default rule is "independent" if it does not depend upon a federal constitutional ruling on the merits. See Stewart v. Smith, 536 U.S. 856, 860 (2002).

[3] A state procedural default rule is "adequate" if it is "strictly or regularly followed." Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Hathorn v. Lovorn, 457 U.S. 255, 262-53 (1982)).

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).

A procedural bar may also be applied to unexhausted claims where state procedural rules make a return to state court futile. See Coleman, 501 U.S. at 735 n.1 (claims are barred from habeas review when not first raised before state courts and those courts "would now find the claims procedurally barred"); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir. 2002) ("[T]he procedural default rule barring consideration of a federal claim 'applies only when a state court has been presented with the federal claim,' but declined to reach the issue for procedural reasons, or 'if it is clear that the state court would hold the claim procedurally barred.'") (quoting Harris, 489 U.S. at 263 n.9).

In Arizona, claims not previously presented to the state courts via either direct appeal or collateral review 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 Ariz.R.Crim.P. 32.1(d)-(h), 32.2(a) (precluding claims not raised on appeal or in prior petitions for post-conviction relief), 32.4(a) (time bar), 32.9(c) (petition for review must be filed within thirty days of trial court's decision). Arizona courts have consistently applied Arizona's procedural rules to bar further review of claims that were not raised on direct appeal or in prior 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. 2001) ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S.

856 (2002); see also Ortiz v. Stewart, 149 F.3d 923, 931-32 (rejecting argument that Arizona courts have not "strictly or regularly followed" Rule 32 of the Arizona Rules of Criminal Procedure); State v. Mata, 185 Ariz. 319, 334-36, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

The federal court will not consider the merits of a procedurally defaulted claim unless a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Coleman, 501 U.S. at 750-51; Murray, 477 U.S. at 495-96. Pursuant to the "cause and prejudice" test, a petitioner must point to some external cause that prevented him from following the procedural rules of the state court and fairly presenting his claim. "A showing of cause must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [the prisoner's] efforts to comply with the State's procedural rule. Thus, cause is an external impediment such as government interference or reasonable unavailability of a claim's factual basis." Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir. 2004) (citations and internal quotations omitted). Ignorance of the State's procedural rules or other forms of general inadvertence or lack of legal training and a petitioner's mental condition do not constitute legally cognizable "cause" for a petitioner's failure to fairly present his claim. Regarding the "miscarriage of justice," the Supreme Court has made clear that a fundamental miscarriage of justice exists when a Constitutional violation has resulted in the conviction of one who is actually innocent. See Murray, 477 U.S. at 495-96.

In Ground Five (A), Petitioner alleges that his rights under Ariz.R.Crim.P. 32 were violated when the superior court failed to grant post-conviction relief based on the following "newly discovered evidence": (i) "Dale Hausner's testimony"; and (ii) "Katie Hausner-Fisher's testimony."

Petitioner relies on the affidavit of his brother, Dale Hausner. In the affidavit, Dale concedes that he testified at trial that he was not present when the victim was stabbed, but rather was at home. However, now that he has been convicted, Dale admits that he testified

falsely, and claims that he and Dieteman were in the car, Petitioner was not there, and Dieteman had done the stabbing.

Petitioner also relies on the affidavit of his daughter, Katie Hausner Fisher, who purports to describe the night of May 16/17, 2006. Katie claims that at 11:00 p.m., when her father (Petitioner) was sleeping, Dieteman came into the house wiping a knife, which he put in the dishwasher. Katie claims that Dieteman stated "he could frame anyone and get away with it, [and] that he had done so in the past." In an attempt to explain her failure to give this testimony earlier, Katie alleges that she later moved out of state and was not aware that her father had been tried and convicted of stabbing the victim until she visited him in prison.

Ground Five (A) corresponds to Petitioner's post-conviction relief claim, in which Petitioner argued that the testimony of Dale and Katie constituted "newly discovered" evidence under Rule 32.1(e). (Exhs. EE, JJ.) In rejecting Petitioner's reliance on Dale's statements, the court of appeals stated:

> ¶ 8 Hausner's claim based on Dale's statements fails to meet the first requirement – he admits knowing at the time of trial the "substance of Dale's ... testimony." Hausner cites no authority suggesting we can ignore the requirement that evidence be discovered only after trial, much less that we should do so here. Permitting relief based on such testimony does nothing more than "encourage perjury to allow a new trial" once a codefendant has "determined that testifying is no longer harmful" because he may now "say whatever [he] think[s] might help [his] co-defendant, even to the point of pinning all the guilt on [himself], knowing [he is] safe from retrial." *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992).

(Exh. LL.)

In rejecting Petitioner's reliance on Katie's affidavit, the court found:

> ¶ 9 Hausner's claim of newly discovered evidence based on K.'s affidavit also fails. K. therein stated she had been home with Hausner the night of the incident and he only left the house with her. She further claimed that, while Hausner was asleep, Dieteman had arrived and wiped a knife clean before placing it in the dishwasher. Finally, she asserted Dieteman had told her "he could frame anyone and get away with it, that he had done so in the past." She claimed she was "afraid of" D[ie]teman and had not been aware that Hausner had been "tried and convicted" based on D[ie]teman's testimony until she visited him in prison after the conviction.
>
> ¶ 10 To conclude K.'s statements were plausible, the trial court would have had to accept that Hausner failed to inform his trial counsel that he had an alibi

> for the entire evening because he was with K. And we would have to accept K.'s claim that she had been unaware her father had been charged with crimes involving Dieteman despite her having discussed with Dale her upcoming testimony in his trial – specifically referencing Dieteman's testimony that Hausner had stabbed the victim with his left hand – and telling Dale about Hausner's upcoming court date. A trial court may properly reject a claim based on newly discovered evidence when the witness's affidavit in support of that claim is wholly incredible. *See State v. Serna*, 167 Ariz. 373, 375, 807 P.2d 1109, 1111 (1991). In light of the patently unbelievable assertions in K.'s affidavit, the trial court did not err in summarily rejecting Hausner's claim that her testimony could change the verdict.

(Id.)

Initially, the Court finds that Ground Five (A) is not cognizable under 28 U.S.C. § 2254, which allows the Court to take jurisdiction "only on the grounds that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." Here, Petitioner simply repeats his Rule 32 claim and then adds: "Constitutional rights. For the sake of brevity, the constitutional rights set forth in Ground 1 ... equally apply to the issues above. See also PCR/Petition for review, exhibits 2 and 3 hereto." (Doc. 9 at 12.) A petitioner may not transform a state law issue into a federal one merely by asserting "Constitutional rights." See, e.g., Poland v. Stewart, 169 F.3d 573, 584 (9th Cir. 1999); Engle v. Isaac, 456 U.S. 107, 119-21 (1982).

Even if this were deemed enough to render the claim cognizable, Petitioner did not fairly present the claim as a federal claim to the state courts. (Exhs. EE, JJ.) It was presented as a state law claim pursuant to Rule 32, Ariz.R.Crim.P. (Id.) Petitioner's failure to fairly present Ground Five (A) has resulted in procedural default because Petitioner is now barred from returning to the state courts. See Ariz.R.Crim.P. 32.2(a), 32.4(a). Although a procedural default may be overcome upon a showing of cause and prejudice or a fundamental miscarriage of justice, see Coleman, 501 U.S. at 750-51, Petitioner has not established that any exception to procedural default applies.

In his reply, Petitioner appears to argue cause based on the ineffective assistance of appellate counsel. Ineffective assistance of counsel may constitute cause for failing to properly exhaust claims in state court and excuse procedural default. See Ortiz, 149 F.3d at

932. However, ordinarily, to meet the "cause" requirement, the ineffective assistance of counsel must amount to an independent constitutional violation. See id. Accordingly, when no constitutional right to an attorney exists (such as in a post-conviction proceeding), ineffective assistance will not amount to cause excusing the state procedural default. See id. The Supreme Court has held that "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman, 501 U.S. at 752 (citations omitted). Thus, in Coleman, the Court held that the ineffectiveness of post-conviction counsel also could not establish cause to excuse a failure to properly exhaust state remedies and procedural default on a claim. See id.

However, in Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309, 1315, 182 L.Ed.2d 272 (2012), the Supreme Court established a limited exception to this general rule. The Court held that the ineffective assistance of post-conviction counsel "at initial-review collateral review proceedings" – while not stating a constitutional claim itself – may establish cause to excuse procedural default of claims of ineffective assistance of trial counsel when a post-conviction proceeding represents the first opportunity under state law for a petitioner to litigate such claims. See id. at 1315. In Nguyen v. Curry, 736 F.3d 1287, 1296 (9th Cir. 2013), the Ninth Circuit held that the Martinez standard for cause applies to all Sixth Amendment ineffective-assistance claims that have been procedurally defaulted by ineffective counsel in the initial-review state-court collateral proceeding. See id.

In this case, because the Martinez cause standard applies only to defaulted ineffective assistance of counsel claims, it does not apply to Petitioner's newly discovered evidence claim.

Additionally, Petitioner's status as an inmate, lack of legal knowledge and assistance, and limited legal resources do not establish cause to excuse the procedural bar. See Hughes v. Idaho State Bd. of Corr., 800 F.2d 905, 909 (9th Cir. 1986) (an illiterate pro se petitioner's lack of legal assistance did not amount to cause to excuse a procedural default); Tacho v.

Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (petitioner's reliance upon jailhouse lawyers did not constitute cause). Accordingly, Petitioner has not shown cause for his procedural default.

Petitioner has also not established a fundamental miscarriage of justice. A federal court may review the merits of a procedurally defaulted claim if the petitioner demonstrates that failure to consider the merits of that claim will result in a "fundamental miscarriage of justice." Schlup, 513 U.S. at 327. The standard for establishing a Schlup procedural gateway claim is "demanding." House v. Bell, 547 U.S. 518, 538 (2006). The petitioner must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial." Schlup, 513 U.S. at 316. Under Schlup, to overcome the procedural hurdle created by failing to properly present his claims to the state courts, a petitioner "must demonstrate that the constitutional violations he alleges ha[ve] probably resulted in the conviction of one who is actually innocent, such that a federal court's refusal to hear the defaulted claims would be a 'miscarriage of justice.'" House, 547 U.S. at 555-56 (quoting Schlup, 513 at 326, 327)). To meet this standard, a petitioner must present "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." Schlup, 513 U.S. at 324. The petitioner has the burden of demonstrating that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. at 327.

Petitioner cannot meet this standard. The alleged "newly-discovered evidence" is both suspect and, at best, it merely conflicts with other evidence. For example, Dale's proposed testimony comes from Petitioner's brother, who has already been convicted of participating in the same crime, and who had told a completely different story when testifying at trial. Moreover, the fact that Dale's new testimony implicated Dieteman is not convincing, because Dieteman testified against Dale in the serial shooter case. Further, as noted by the Arizona Court of Appeals, Katie's affidavit is "patently unbelievable" – particularly when

the story favors her father and targets the man who testified against him. And, at no point during trial did Petitioner argue that he was with Katie that evening.

The Court will recommend that Petitioner's claim as set forth in Ground Five (A) be denied and dismissed.

B. Merits

Pursuant to the AEDPA[4], a federal court "shall not" grant habeas relief with respect to "any claim that was adjudicated on the merits in State court proceedings" unless the state court decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring and delivering the opinion of the Court as to the AEDPA standard of review). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court ... ." Robinson, 360 F.3d at 1055.

A state court's decision is "contrary to" clearly established precedent if (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent." Williams, 529 U.S. at 404-05. "A state court's decision can involve an 'unreasonable application' of Federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir. 2002).

\\\

\\\

---

[4] Antiterrorism and Effective Death Penalty Act of 1996.

1. Grounds One and Two

Grounds One and Two both relate to an alleged claim of prosecutorial misconduct and Petitioner's rights to due process and to receive a fair trial. Specifically, in Ground One, Petitioner alleges that "The prosecutor's chronic remarks concerning unrelated serial shooter's case denied Jeffrey Hausner his right to due process and fundamental fairness under Constitutional Amendments 5, 14; § 2 Arizona Constitution, Article 2, § 4, 24. As well as his right to an impartial jury, U.S. Constitutional Amendment 6." In support of this claim, Petitioner argues:

> - "The prosecutor improperly referenced, or elicited from its witnesses, information concerning the unrelated serial shooting case an astounding total of 62 times."
>
> - "Since one of the two serial shooters happened to be Jeffrey's brother, Dale Hausner, the prosecutor took many opportunities to remind the jury that Dale, "the serial shooter', was the brother of the defendant, Jeffrey. ... Moreover, the details of the serial-shooting murders were discussed ... ."
>
> - "The prosecutor violated the [trial] court's pretrial ruling restricting Dieteman's testimony to Jeff's incident."
>
> - "The prosecutor and Dieteman made 19 references to the serial shooter case/investigation, including Dieteman's arson case."
>
> - "It was misleading of the prosecution to refer to Celeste's home phone as 'Jeff Hausner's landline/home phone number.'"

Ground One corresponds to Petitioner's first claim on direct appeal, which argued that Petitioner should be granted a new trial "because of prosecutorial misconduct relating to the prosecutor's repeated referencing and questioning about the serial shooting case/investigation, and other crimes committed by Samuel Dieteman and Dale Hausner, all of which did not involve [Petitioner]." (Exh. Y.)

In Ground Two, Petitioner claims that "fundamental error" occurred and Petitioner's "right to receive a fair trial" was violated by the "chronic prejudicial information involving references to the serial shooter's case/investigation." This claim corresponds to Petitioner's second issue on direct appeal ("Did fundamental error occur, or [was Petitioner's] right to a fair trial violated by allowing admission of chronic prejudicial information involving

references to the serial shooter's case/investigation, and other crimes committed by the serial shooters Dale Hausner and Samuel Dieteman, which were not at issue in the present trial?"), which the court of appeals addressed in connection with Petitioner's first issue.

In rejecting Petitioner's claims, the Arizona Court of Appeals stated:

> ¶ 9 The background on this issue, to the extent that the record reveals it, is as follows. Dieteman, who had pleaded guilty before trial to several offenses in connection with his role in the serial shootings, was the key witness against Hausner at trial. Before trial, Hausner withdrew his alibi, mistaken identity, and lack of intent defenses and notified the court that his defense would instead rely solely on putting the State to its proof by challenging Dieteman's credibility. Hausner's counsel said, "I think the case both lives and dies by that issue."
>
> ¶ 10 Based on this avowal, the trial court denied the State's Rule 404(b) motion to admit evidence of Hausner's conviction for aggravated assault arising from a prior stabbing that also involved Dale Hausner and Dieteman. The court later granted the State's motion to use the terms "recreational violence" or "random violence," but only "[a]s long as you make it this case ... rather than a series of acts" and "without him saying ['] we were out cruising like we had been on other occasions.[']" The court also directly admonished Dieteman before he testified that he was to limit his testimony to the stabbing at issue.
>
> ¶ 11 During a pre-trial hearing, Hausner acknowledged that "the pretrial publicity" would be the "biggest issue" during voir dire. Hausner further agreed to a statement of facts that the court eventually read to the venire panel to ascertain whether exposure to pretrial publicity on the serial shootings might affect their judgment in this case. The statement described the incident giving rise to the charges against Hausner but also referred in pertinent part to the serial shootings as follows:
>
> > Although this incident was reported to police, that night or early morning hours, no suspect was identified until the witness, Samuel Dieteman, was interviewed by police following his entry of a guilty plea to other crimes.
> >
> > During the interview Dieteman told them that he was inside the car when the stabbing occurred and identified the driver as Dale Hausner, and the assailant as the defendant Jeff Hausner.
> >
> > Sam Dieteman and Dale Hausner were arrested in August of 2006 for shooting and/or participating in shooting of several persons across the valley, and for committing or assisting in committing two arsons.
> >
> > The shootings happened dubbed [sic] by the media as the serial shooter. The plea agreement that Sam Dieteman entered into was in reference to the serial shooter case.

> * * *
>
> [T]he question is [ ] whether or not having been exposed to media coverage you can be a fair and impartial juror in this matter.
>
> The court excused all potential jurors who cited publicity or media coverage as the reason why they could not serve on the jury.

¶ 12 We have reviewed the entirety of the record and find no reversible error as to Hausner's claims of prosecutorial misconduct and erroneous admission of unfairly prejudicial evidence.[] We find unpersuasive Hausner's claim that, by referring to the serial shootings in argument and examination of witnesses, "the prosecutor was insinuating that Jeff was equally as violent and dangerous as his notorious brother Dale" or that "[t]he prosecutor's constant emphasis on the 'serial shooting case/investigation' was an attempt" to link Hausner to the serial shootings.

¶ 13 The prosecutor made clear in her opening statement that Dale Hausner and Dieteman were the two serial shooters, and Jeffery Hausner was on trial only for his role in this one stabbing. A review of the record indicates the prosecutor's references throughout trial to Dale Hausner and the serial shootings were not designed to unfairly prejudice Hausner by implying guilt by association. Rather, the references regarding the serial-shooter investigation and Dieteman's and Dale Hausner's role in this stabbing were relevant to prove Jeffery Hausner's responsibility for this stabbing. In his testimony, Dieteman himself made clear that he and Dale Hausner were the only two people involved in the serial shootings. Finally, when the jury asked questions about the shootings after Dieteman's testimony, the court advised the jury that it must only consider Hausner's role in this stabbing:

> Members of the jury, this is one count of aggravated assault.
>
> While we told you that Mr. Dieteman was involved in the serial shooter case, the only thing for you to be concerned with in this case is whether the State has proved this case beyond a reasonable doubt.
>
> So, I've restricted the lawyers in terms of questions. And so any question that has to do with what this in relationship [sic] to any other case in the serial shooter case is not relevant to this matter. And I stopped the lawyers from going into it, so I'm not going to ask any questions.
>
> So please confine your inquiry to this case and this case alone.

¶ 14 Also, because Hausner told the trial court before trial his defense rested on Dieteman's credibility, it was not improper for the prosecutor to argue in her opening that Dieteman was credible. During the opening statement, the prosecutor contended Dieteman was credible because he agreed to testify against both Dale and Jeffery Hausner even though he faced the death penalty and he confessed to the stabbing and implicated Jeffery Hausner despite being

labeled a snitch. Further, Hausner's brief opening statement consisted solely of telling the jury that the only evidence that would implicate him was the testimony of Dieteman, "an admitted murderer and an admitted liar ... [with] every reason in the world to lie."

¶ 15 Nor do we find it improper for the prosecutor in her opening statement to identify Dale Hausner as the second serial shooter and the brother of Jeffery Hausner, after outlining Dale Hausner's role in this incident. After all, the victim was expected to and did testify that he first identified Dale Hausner when he saw him on television in connection with the serial shootings.

¶ 16 Because police first learned of Hausner's identity while interviewing Dieteman about the serial shootings, it was not improper for the prosecutor to refer to the serial-shooting investigation in asking the investigating detectives what they learned, when they learned it, and whether they were able to verify the details that Dieteman provided about this stabbing. The context of Dieteman's revelation to police was highly probative on the issue of his credibility, the keystone of Hausner's defense. We are not persuaded that this testimony was unfairly prejudicial.

¶ 17 Nor are we persuaded that it was unfairly prejudicial or improper for the prosecutor to ask the victim if the detectives who interviewed him two years after the stabbing had initially told him that they were involved in investigating the serial shootings. Both detectives testified that the victim told them he knew who had distracted him that night because he had seen that person on television after the person was arrested in the serial shootings. In context, the prosecutor was simply attempting to confirm that the detectives had not predisposed the victim to identify Dale Hausner by first suggesting that his stabbing might be connected to the serial shootings.

¶ 18 We also find unpersuasive Hausner's argument that the prosecutor's references to Dieteman's role in the serial shootings while examining Dieteman were improper or unfairly prejudicial. In context, these references were highly probative on the issue of Dieteman's credibility. In offering Dieteman's testimony against Hausner, the prosecutor could hardly ignore Dieteman's initial unwillingness to admit to murder and his subsequent guilty plea to two murders and conspiracy with Dale Hausner to shoot thirteen other victims in the serial shootings. It was Dieteman's role in the serial shootings, and his initial unwillingness to admit to the killings, to which Hausner had alluded in his opening statement, as casting doubt on his credibility and supplying his motive to lie in this case.

¶ 19 We additionally find no merit in Hausner's argument that the prosecutor violated the court's ruling limiting Dieteman's testimony to the stabbing at issue. Hausner contends that the prosecutor went too far in eliciting testimony that Dieteman had murdered two women and conspired with Dale Hausner to shoot thirteen other victims; had subsequently pleaded guilty to these crimes; had signed an agreement to provide truthful information and testimony on related crimes; and had been charged with additional crimes, including arson, that he had told police about during a "free talk." The court had precluded Dieteman from testifying about other crimes he committed that would suggest to the jury that he and Dale Hausner had made a practice of engaging in recreational violence, and that this stabbing was part of that practice. The court

> did not indicate that it intended to preclude Dieteman's testimony about the terms of his plea agreement; the minimal details on the two murders to which he had pleaded guilty; or charges pending from other crimes, including arson, after he confessed to police.
>
> ¶ 20 Finally, the prosecutor clarified during closing argument that this stabbing was "not part of the serial shooter investigation." It was not improper to tell the jury that even if Dieteman had access to police reports on the serial shootings, Dieteman would not have been able to provide the information he gave police on this stabbing.
>
> ¶ 21 Therefore, the prosecutor's references to the serial-shooter investigation did not constitute prosecutorial misconduct or error, much less fundamental error.

(Exh. BB; Exh. Z at 14-18, 22-22, 26.) Lastly, in rejecting Petitioner's claim that the prosecutor engaged in misconduct by mentioning that a telephone in Petitioner's townhouse was "his" landline, the court stated:

> This argument also has no merit. The testimony revealed that the telephone was in the townhouse in which Hausner lived with his girlfriend and Dieteman. The reasonable construction of repeated references to "Jeff Hausner's home phone number" is that this was simply shorthand for the phone at the residence where Hausner lived. We cannot agree that this shorthand misled the jury, or that the prosecutor engaged in misconduct by failing to correct the witness each time he used this shorthand.

(Exh. BB at n.3; Exh. Z at n.5.)

Clearly established federal law provides that the appropriate standard of federal habeas review for a claim of prosecutorial misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974)). Therefore, in order to succeed on this claim, Petitioner must prove not only that the prosecutor's remarks were improper but that they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; see Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995) (relief on such claims is limited to cases in which the petitioner can establish that prosecutorial misconduct resulted in actual prejudice) (citing Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993)).

In determining if Petitioner's due process rights were violated, the Court "must consider the probable effect of the prosecutor's [comments] on the jury's ability to the judge the evidence fairly." United States v. Young, 470 U.S. 1, 12 (1985). To make such an assessment, it is necessary to place the prosecutor's remarks in context. See Boyde v. California, 494 U.S. 370, 385 (1990); United States v. Robinson, 485 U.S. 25, 33-34 (1988); Williams v. Borg, 139 F.3d 737, 745 (9th Cir. 1998). In Darden, for example, the Court assessed the fairness of the petitioner's trial by considering, among other circumstances, whether the prosecutor's comments manipulated or misstated the evidence; whether the trial court gave a curative instruction; and the weight of the evidence against the accused. See 477 U.S. at 181-82.

Initially, the Court finds that Petitioner has failed to demonstrate that the prosecutor's remarks, testimony elicited from witnesses, and argument regarding the serial shooter case were improper. As noted by the appellate court, the references regarding the serial shooter investigation and Dieteman's and Dale Hausner's role in this stabbing were "highly probative on the issue of Dieteman's credibility" (which Petitioner put at issue) and relevant to establish Petitioner's role in the stabbing – and were not designed to unfairly prejudice Petitioner by implying guilt by association.

Second, even assuming the prosecutor's remarks and references were improper, and given the weight of evidence against Petitioner, Petitioner has failed to show that the remarks and references "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181. And, moreover, the record reflects numerous instances throughout the proceedings wherein the court both guided and limited remarks and testimony regarding the serial shooter case, and issued curative instructions when appropriate. Jurors are presumed to follow the court's instructions. See Greer v. Miller, 483 U.S. 756, 766 n.8 (1987).

For these reasons, Petitioner has not shown that the appellate court's resolution of these claims were based on an unreasonable determination of the facts, or contrary to, or

based on an unreasonable application of, federal law. The Court will recommend that Grounds One and Two set forth in the Petitioner's habeas petition be denied and dismissed.

2. Ground Three

In Ground Three, Petitioner claims that there was insufficient evidence to convict him of attempted first-degree murder and aggravated assault. Specifically, Petitioner argues:

> - "There is no independent evidence to substantiate Jeff committed this crime other than the self-serving statements of convicted murderer Samuel Dieteman trying to avoid the death penalty."
>
> - "The victim was unable to identify his attacker." Moreover, "[w]e will never know whether [the victim] would have positively or negatively identified Samuel Dieteman as his attacker from a photo line-up, because the police elected not to show him one of Dieteman."
>
> - "Dieteman could not pick out the knife, allegedly used by Jeff to stab [the victim] – yet Dieteman was certain the knife at issue would have been inside Dale Hausner's apartment at the time of their arrest."
>
> - "Dieteman was certain he saw Jeff stab [the victim] 4 to 5 times"; but the victim had "3 stab wounds."
>
> - "[T]he prosecution's reliance on Celeste's home phone number being Jeff's home phone number was erroneous evidence and, therefore, highly prejudicial."
>
> - "[T]his case lacks independent evidence regarding fingerprints, DNA, or the knife itself to tie Jeff to this crime."

Ground Three corresponds to Petitioner's third issue on direct appeal, which the court of appeals rejected as follows:

> ¶ 24 The evidence was more than sufficient to sustain these convictions. Dieteman was an eyewitness to the stabbing and testified that Hausner stabbed the victim several times in the back. The victim testified that he could not see who stabbed him but recognized Dale Hausner as the driver who distracted him while the other person stabbed him in the back, consistent with Dieteman's testimony. The victim also recognized the car Dale Hausner drove the night of the stabbing and confirmed Dieteman's testimony about where the stabbing had occurred. Dale Hausner's cellphone records were consistent with the victim's and Dieteman's testimony; and, as we have discussed supra at note 3, we do not believe the reference to the phone at the residence where Hausner lived as "his" phone misled the jury.
>
> ¶ 25 We reject Hausner's argument that his conviction should be overturned because neither the victim nor forensic evidence implicated him in the stabbing. Nor do we find any merit in Hausner's argument that Dieteman's testimony was undermined by his failure to identify the weapon used from the knives found at Dale Hausner's residence and his purportedly inaccurate

> recollection as to the number of stab wounds inflicted. The issues above are issues of credibility and the weight of the testimony, and the evidence presented supports the jury's decision to believe Dieteman's testimony about Hausner's role in the stabbing. *See United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 286, 681 P.2d 390, 438 (App. 1983) (holding that a "verdict based upon conflicting evidence is binding upon the appellate court" when substantial evidence supports the verdict).
>
> ¶ 26 Therefore, viewing the evidence in the light most favorable to upholding the verdicts, we find sufficient evidence to support the convictions.

(Exh. BB.)

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The relevant United States Supreme Court precedent applicable to claims of insufficient evidence is set forth in Jackson v. Virginia, 443 U.S. 307 (1979): there is sufficient evidence to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. Thus, "the dispositive question under *Jackson* is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004) (quoting Jackson, 443 U.S. at 318.) A petitioner in a federal habeas corpus proceeding "faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to grant the writ, the habeas court must find that the decision of the state court reflected an objectively unreasonable application of Jackson and Winship to the facts of the case. See id. at 1275.

It is the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319. If the trier of fact could draw conflicting inferences from the evidence, the reviewing court will assign the inference that favors conviction. See McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir. 1994). "The relevant inquiry is not whether the evidence excludes

every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict." United States v. Dinkane, 17 F.3d 1192, 1196 (9th Cir. 1994) (quoting United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991)).

First, the record reflects that Dieteman's identification of Petitioner as the person who stabbed the victim in a crime unknown to the police was not "self-serving," and had no effect upon whether or not he would receive the "death penalty." The evidence established that Dieteman had already entered his plea agreement and had pled guilty prior to disclosing the stabbing incident. (Exh. P at 24-34, 43-45, 104-05.) Neither the plea agreement nor Dieteman's "testimonial agreement" required Dieteman to testify regarding the stabbing (id. at 104-05), and Dieteman had nothing to gain by disclosing the stabbing and identifying Petitioner as the assailant (id. at 32-34). Moreover, Dieteman's testimony regarding the locations and circumstances of the stabbing was corroborated by the victim. (Exh. O at 86-87.)

Second, the fact that Timothy was unable to identify his attacker is immaterial. Timothy was stabbed from behind and, when he began to turn around, his face was slashed and he was stabbed again. (Exh. O at 96, 101, 109, 129-30.) Since Timothy never saw his assailant or a second person in the car, he could not have identified Dieteman as either his assailant or the passenger in Dale's car. (Id. at 58, 95, 97, 109.) Moreover, Timothy would not have been able to identify Dieteman in a photographic line-up because he informed Detective Schwartzkopf that he had seen Dieteman on television when Dieteman and Dale were arrested and he did not recognize Dieteman. (Id. at 58.)

Third, the fact that Dieteman did not identify the knife Petitioner used to stab the victim only enhances Dieteman's credibility. It would have been easy for Dieteman to identify one of the knives as the weapon used by Petitioner, knowing there was no way his testimony could be refuted:

> Q. I showed you some knives from Dale Hausner's apartment and also from the car of Dale Hausner. Were any of those knives the knives that were used on the gentleman?

A. No, they were not.

* * * *

Q. ... You said this was a Gerber knife that you had in this photograph; is that correct?

A. That's correct. Dale got both me and Jeff Gerber brand knives.

Q. And why don't you just say that's the knife?

A. Because that's not the knife.

(Exh. P at 68-69, 111.)

Furthermore, Petitioner's assertion that "Dieteman was certain that the knife at issue would have been inside Dale Hausner's apartment at the time of their arrest" (Doc. 9 at 10), misstates the record. Dieteman testified that Dale took custody of the knife in "the middle of June" and he "believed" that it would have been in Dale's apartment when he and Dale were arrested on August 4th. (Exh. P at 79.) When asked, "[I]f it was not found there or not located, do you know where it went?" Dieteman answered, "I have no idea. I'd seen it on top of Dale's microwave in the kitchen, and also in the little cubbyhole area by his stereo in the front of his vehicle." (Id.) Again, Dieteman's refusal to simply identify one of the many knives found by the police enhances his credibility.

Fourth, although Dieteman had only a partial view of the attack, his testimony regarding "the number of stab wounds" is "accurate" and is consistent with Timothy's testimony. Timothy testified that he received "three stabs to [his] back," and when he began to turn around received another stab wound ("slash") to his face and a fifth to his left side. (Exh. O at 96, 101, 129-30.) Dieteman testified that, from where he was sitting in the passenger seat of the car, he had only a partial view of Timothy and Petitioner, but saw Petitioner come up from behind the victim with a knife in his hand and stab him somewhere in the back. (Exh. P at 68, 74.) He then saw Petitioner "raise up his arm" and saw him "motioning a few times" as he stabbed Timothy. (Id. at 68, 74, 80.) Dieteman testified that

he saw "at least four or five times that he had stabbed the victim." (Id. at 80.) Thus, both Timothy and Dieteman were consistent in the number of stab wounds.

Fifth, the State did not mislead the jurors regarding the calls made between Dale's cell phone and the "home" or "landline" phone where Petitioner was living with his girlfriend. Detective Buschler testified that the telephone number at issue "is the phone at Jeff Hausner's residence." (Exh. P at 141; Exh. BB at n.3.) There was no testimony regarding the identity of the subscriber. Whether Petitioner or his girlfriend was the subscriber is irrelevant. It was uncontroverted that Petitioner lived in the residence.

Finally, as to the lack of "fingerprints" or "DNA" linking Petitioner to the stabbing, or the fact that the knife was not found. The stabbing occurred nearly 2 years before Dieteman disclosed it. (Exh. P at 44.) The police initially believed that the stabbing occurred at another location, so the crime scene was never processed. (Exh. O at 135-36.)

Ultimately, the determination of whether Dieteman was a credible witness was a question for the jurors. Petitioner has failed to call into question the reliability and credibility of Dieteman's testimony, and Petitioner has failed to identify any specific errors in the formulation of the law, fact-finding, or application of law in the state court proceedings. Viewing the evidence in the light most favorable to the prosecution, the record evidence reasonably supports the jury's finding of guilt beyond a reasonable doubt. The appellate court's rejection of Petitioner's insufficient evidence claim was neither contrary to nor an unreasonable application of clearly established federal law. The Court will recommend that Ground Three be denied and dismissed.

3. Ground Four

In Ground Four, Petitioner claims that his "constitutional rights" were violated when the verdict forms used by the jury included "guilty" and "not guilty," but did not include the option "unable to decide." Petitioner states that the jury "was constitutionally entitled to an option of 'unable to decide' and therefore should have been informed of this."

In rejecting this claim on direct appeal, the Arizona Court of Appeals stated:

¶ 27 Hausner argues the court fundamentally erred in failing to include on the verdict form the choice of "unable to decide." He argues the absence of this choice "infringe[d] on [ ] defendant's constitutional right to a unanimous decision," and had "the potential to coerce a jury into reaching a decision of either 'guilty' or 'not guilty,' without realizing that 'unable to decide' is also an acceptable option." We disagree.

¶ 28 As Hausner concedes, our review is limited to one for fundamental error because Hausner failed to object to the verdict form at trial. *See Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608.

¶ 29 Hausner has failed to meet his burden to show any error, much less fundamental and prejudicial error. The Arizona Rules of Criminal Procedure provide that, except in specified cases not present here, "the jury shall in all cases render a verdict finding the defendant either guilty or not guilty." Ariz. R.Crim. P. 23.2(a). The rule's failure to direct that a jury be given the option of finding "unable to decide" does not offend the constitutional right to a unanimous verdict because "unable to decide" is not a verdict, but rather an inability to reach a unanimous verdict. The court instructed the jury in this case that the State had the burden of proving every element of each charge beyond a reasonable doubt and the jury could find that the State had done so on "all, some or none of the charged offenses." The court further instructed the jury that it must reach a verdict unanimously: "All 12 of you must agree on any verdict reached. All 12 of you must agree whether the verdict is guilty or not guilty." We presume that the jurors here followed the court's instruction on this issue. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) (holding that jurors are presumed to follow instructions). Accordingly, because the jury checked the box on the verdict form for each offense "guilty," the jury unanimously found Hausner guilty. *See id.*

¶ 30 This is not a case like the ones on which Hausner relies, in which the trial court failed to give the jury the option of finding the defendant "not guilty" on a lesser-included offense or failed to provide a special verdict form in a capital case for sentencing purposes. *See State v. Walton*, 159 Ariz. 571, 593-94, 769 P.2d 1017, 1039-40 (1989) (Feldman, V.C.J., and Moeller, J., concurring) (recommending that for purposes of sentencing, special verdict forms be provided to distinguish convictions for first-degree murder based on a felony murder theory in capital cases); *State v. Knorr*, 186 Ariz. 300, 304, 921 P.2d 703, 707 (App. 1996) (holding that it was fundamental error to fail to give the jury a verdict form for "not guilty" on a lesser-included offense).

¶ 31 Hausner's public policy arguments in favor of a new rule requiring a verdict form to include the choice of "unable to decide" are best directed to the Arizona Supreme Court in its rulemaking capacity, not this court sitting as an appellate court. *See* Ariz. R. Sup. Ct. 28 (setting forth procedure to petition the court to adopt, amend, or repeal rules of procedure).

¶ 32 Moreover, Hausner relies on speculation that some members of the jury may have felt coerced to convict him because they did not realize "unable to decide" was also an option. Speculation is an insufficient basis for establishing prejudice on fundamental error review. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (a defendant may not rely on speculation to meet his burden). On this record, the court did not err, much less

> fundamentally err, in failing to include "unable to decide" as one of the choices.

(Exh. BB.)

Initially, it appears that Petitioner is challenging the state's procedural rules (Ariz. R.Crim. P. 23.2) and the rule's failure to direct that a jury be given the option of finding "unable to decide" – which is not cognizable on habeas review. The Court can grant habeas relief "only on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treatises of the United States." 28 U.S.C. § 2254(a). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law grounds." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see Gilmore v. Taylor, 508 U.S. 333, 348-49 (1993) ("[M]ere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas."); Lewis v. Jeffers, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."). And, a petitioner may not "transform a state law issue into a federal one merely by asserting a violation of due process." Poland, 169 F.3d at 584 (quoting Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996)); see Engle, 456 U.S. at 119-21 ("While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law."). Thus, to the extent Petitioner challenges the state rule's failure to direct that a jury be given the option of finding "unable to decide," his claim is not cognizable on federal habeas review.

However, although a challenge to the application of state law is not a basis for federal habeas relief, a state law error may be cognizable if it "so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 72, 75 (finding the question of whether the jury instruction "so infused the trial with unfairness as to deny due process of law" cognizable in federal habeas"). A defendant's Sixth Amendment right to a fair trial is violated when the "essential feature" of the jury is not preserved. See Williams v. Florida, 399 U.S. 78, 100 (1970). "Due process dictates that each defendant in a federal criminal case

has the right to have his guilt found, if found at all, only by the unanimous verdict of a jury of his peers." United States v. Nelson, 692 F.2d 83, 85 (9th Cir. 1982) (citation omitted).

Petitioner has not specified any way in which the state court decision was unreasonably applied or was contrary to Supreme Court precedent, nor does he establish that the state court decision was based on an unreasonable factual determination. While the appellate court performed its fair trial analysis in the context of fundamental error, its analysis was consistent with existing Supreme Court precedent.

The appellate court properly instructed the jury that the State had the burden of proving every element of each charge beyond a reasonable doubt and the jury could find that the State had done so on "all, some or none of the charged offenses." The court further instructed the jury that it must reach a verdict unanimously: "All 12 of you must agree on any verdict reached. All 12 of you must agree whether the verdict is guilty or not guilty." As stated previously, jurors are presumed to follow the court's instructions. See Greer, 483 U.S. at 766 n.8. And, lastly, because the jury checked the box on the verdict form for each offense "guilty," the jury unanimously found Petitioner guilty. Thus, the appellate court properly concluded that no error had occurred.

The Court therefore concludes that the appellate court's resolution of this claim was neither based on an unreasonable determination of the facts, nor contrary to an unreasonable application of federal law. The Court will recommend that Ground Four as set forth in the Petitioner's habeas petition be denied and dismissed.

4. Ground Five (B)

In Ground Five (B), Petitioner claims ineffective assistance of counsel based on counsel's failure to: (i) file a motion for change of venue (IAC claim 1); (ii) use Dale Hausner's cell phone records to establish an alibi for Petitioner (IAC claim 2); (iii) call Katie Hausner Fisher to testify on Petitioner's behalf (IAC claim 3); and (iv) failure to determine whether Petitioner could have stabbed the victim with his left hand (IAC claim 4).

The two-prong test for establishing ineffective assistance of counsel was established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail on an ineffective assistance claim, a convicted defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See id. at 687-88.

Regarding the performance prong, a reviewing court engages a strong presumption that counsel rendered adequate assistance, and exercised reasonable professional judgment in making decisions. See id. at 690. "[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995) (quoting Strickland, 466 U.S. at 689). Moreover, review of counsel's performance under Strickland is "extremely limited": "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Coleman v. Calderon, 150 F.3d 1105, 1113 (9th Cir.), judgment rev'd on other grounds, 525 U.S. 141 (1998). Thus, a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690.

If the prisoner is able to satisfy the performance prong, he must also establish prejudice. See id. at 691-92. To establish prejudice, a prisoner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. A court need not determine whether counsel's performance was deficient before examining whether prejudice resulted from the alleged deficiencies. "If it is easier to dispose of an ineffectiveness claim

on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. at 697.

In reviewing a state court's resolution of an ineffective assistance of counsel claim, the Court considers whether the state court applied Strickland unreasonably:

> For [a petitioner] to succeed [on an ineffective assistance of counsel claim], ... he must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. Rather, he must show that the [state court] applied Strickland to the facts of his case in an objectively unreasonable manner.

Bell v. Cone, 535 U.S. 685, 698-99 (2002) (citations omitted); see also Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002) ("Under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied Strickland incorrectly. Rather, it is the habeas applicant's burden to show that the state court applied Strickland to the facts of his case in an objectively unreasonable manner.") (citations omitted).

(i) IAC claim 1

In alleging that his counsel was ineffective in failing to file a motion for a change of venue, Petitioner argues that:

> Here, had [defense counsel] presented a motion for a change of venue so that the trial court would have had the opportunity to move the trial to a different locality, the immediate association of Dale Hausner and Samuel Dieteman with Jeffrey Hausner, might not have been so apparent because jurors[] in another county did not have these crimes taking place in their own backyard. Thus, the result to [Petitioner] would have been a fair trial as to whether he (independent of Dale and Dieteman) did or did not commit these offenses.

(Doc. 9 at 14.)

This claim corresponds to PCR claim 2(A), which the Arizona Court of Appeals rejected on the merits, stating:

> Hausner cites no law or facts that suggests such a motion would have been granted in this case. Nor does he identify anything in the record suggesting he was prejudiced by his trial venue. Accordingly, he has not demonstrated resulting prejudice even assuming counsel's decision to not challenge venue had no reasoned basis.

(Exh. LL at ¶ 14.)

Petitioner fails to establish deficient performance. A motion for a change of venue must be supported by evidence of "presumed" or "actual" prejudice. See Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir. 1988); Alcarez-Guerrero v. Ryan, 2013 WL 5498247 (D. Ariz. 2013). To establish "presumed prejudice," the defendant must establish that "the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime," Harris, 885 F.2d at 1361, and a "reasonable likelihood" that the prejudicial news coverage "prevent[ed] a fair trial," Casey v. Moore, 386 F.3d 896, 906-07 (9th Cir. 2004). The court "rarely find[s] presumed prejudice because the 'saturation' is 'reserved for an extreme situation.'" Id. (quoting Harris, 885 F.2d at 1361); Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir. 1998). To establish "actual prejudice," the defendant "must demonstrate that the jurors exhibited actual partiality or hostility that could not be laid aside." Ainsworth, 138 F.3d at 795. "[J]urors need not, however, be totally ignorant of the facts and issues involved." Harris, 885 F.2d at 1363 (quoting Murphy v. Florida, 421 U.S. 794, 800 (1975). Furthermore,

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Murphy, 421 U.S. at 723.

Petitioner claims that his brother "was in the process of being tried for the Phoenix Serial Shootings, a high profile crime in the Phoenix Valley and Maricopa County," and Samuel Dieteman – who was testifying against Petitioner – had "openly admitted to being involved in those shootings." (Doc. 9 at 14.) Petitioner, however, simply speculates that a change of venue motion would have been granted, but he fails to provide any evidence establishing presumed or actual prejudice.

Petitioner also fails to acknowledge the court's efforts to protect Petitioner from jurors who might have been tainted by pretrial publicity. According to the record, prior to voir dire,

counsel agreed to a statement of facts that the court eventually read to the venire panel to ascertain whether exposure to pretrial publicity on the serial-shooting case might affect their judgment in this case. (Exh. L at 6.) The statement described the incident giving rise to the charges against Petitioner, and then referred to the serial shootings as follows:

> The reason we read the facts to you is because you may have watched newscast, you may have read articles in the newspaper, you may have read online articles in reference to that case, and the question [is] whether or not having been exposed to media coverage you can be a fair and impartial juror in this matter.
>
> And the key to that is, have you formed any opinions as to the guilt or innocence of Jeff Hausner in this matter, and can you keep an open mind and decide the case based upon the facts that will be presented in this trial against Jeff Hausner and exclude from your consideration anything that you read or heard in other cases?

(Id. at 6-15.)

Thereafter, the court questioned the potential jurors concerning impressions or opinions they may have formed based upon media accounts of the recently completed serial shooters trial, and excused any jurors who felt they could not be fair and impartial. (Id. at 15-21, 25-32, 35-51, 131-32, 141; Exh. QQ.)

In light of the above, the Court finds that Petitioner has failed to demonstrate that counsel was constitutionally ineffective in failing to file a motion for a change of venue. Accordingly, the Court finds that the state court's rejection of the claim set forth in IAC claim 1 was neither contrary to, nor an unreasonable application of federal law.

(ii) IAC claim 2

In alleging that counsel was ineffective in failing to use Dale Hausner's cell phone records to establish an alibi, Petitioner argues:

> At [Petitioner's] trial, the State introduced telephone record evidence to show that Dale's cell phone called [Petitioner's] land line, from somewhere in the vicinity of the stabbing incident. Prior to trial, Mr. Agan, Dale's attorney, provided [Petitioner's lawyer] with telephone records which indicated that it was Dale's cell-phone that called [Petitioner's] land line from an area near the incident. Had [Petitioner's lawyer] put those records into evidence or cross-examined the State's telephone custodian about them, this evidence would have shown that [Petitioner] was most likely at home that evening and not out driving around in a car with Dale Hausner and Samuel Dieteman, committing

> an assault on Mr. Davenport. These records would have shown that [Petitioner] was miles away from the incident when it happened and would have cast doubt on the State's theory of the case, and possibly leading to an acquittal.

(Doc. 9 at 14-15.)

This claim corresponds to PCR claim 2(B), which the Arizona Court of Appeals rejected on the merits, concluding that defense counsel's decision not to assert an alibi defense was a strategic decision to avoid the State's request to present evidence that Petitioner had pled guilty to another stabbing incident involving Dale Hausner and Dieteman:

> ¶ 13 Hausner next contends trial counsel was ineffective for failing to develop an alibi defense based on various telephone records purportedly showing calls from Dale's cellular telephone to Hausner's home telephone the night of the incident. But "disagreements about trial strategy will not support an ineffective assistance claim if 'the challenged conduct has some reasoned basis." *Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d at 101, *quoting State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). And counsel's decision to withdraw the alibi defense plainly was strategic[.] [T]hat decision prompted the trial court to deny the state's request to present evidence that Hausner had pled guilty in another stabbing incident involving Dale and Dieteman.

(Exh. LL at ¶ 13; Exh. GG at 17-22.)

The Court finds that Petitioner has failed to demonstrate deficient performance. Beyond his conclusory remarks, Petitioner fails to explain how the telephone records would have supported his claim. Moreover, as argued in the State's response to PCR claim 2(B), the phone records were just as likely to corroborate Petitioner's involvement in the stabbing as they were to create an alibi:

> To be clear, the phone records in question do not present a strong alibi for Defendant in that they do not show the identity of callers or the substance of discussion. The records show the exchange of phone calls between Defendant's landline and Dale Hausner's cellular phone around the evening of the stabbing. This evidence was just as likely to corroborate Defendant's involvement as it was to create an alibi. In other words, the weight of the evidence has circumstantial value for either party, not just Defendant. The State introduced the cell tower evidence and the jury was allowed to weigh it however they saw fit.

(Exh. GG at 22.)

Thus, the Court finds it reasonable for defense counsel to abandon such a defense because it had limited value and would have led to the admission of evidence that Petitioner

had pled guilty in another stabbing incident involving Dale Hausner and Dieteman. See Strickland, 466 U.S. 691 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ... ."); Campbell v. Wood, 18 F.3d 662, 673 (9th Cir. 1994) ("We will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight.").

Accordingly, the Court finds that the state court's rejection of the claim set forth in IAC claim 2 was neither contrary to, nor an unreasonable application of federal law.

(iii) IAC claim 3

In alleging that his counsel was ineffective in failing to call Katie Hausner Fisher to testify, Petitioner argues:

> Prior to trial, [Petitioner] repeatedly begged [his trial lawyer] to interview and call his daughter Katie Hausner-Fisher as a witness in his behalf. Had [defense counsel] followed up with basic interview of Katie, he would have found out that she was home at some point with her father during the evening in question, and most likely could have pin-pointed the times she was home and her father was home, thus creating a potential alibi. Had Katie's evidence been provided to the jury, it would have directly contradicted Sam Dieteman in one crucial detail, and provided other evidence that would have led to reasonable doubt in the jury's mind as to [Petitioner's] guilt, and thus to a potential acquittal. Katie's testimony here is crucial in that it not only provided a potential alibi for her father, but she also could have heard and did hear Mr. Dieteman make several statements that hinted at his own culpability and incredibility. She would have also witnessed guilty behavior on the part of Dieteman that Mr. Dieteman alleged Jeffrey Hausner to have done.

(Doc. 9 at 15-16.)

This claim corresponds to PCR claim 2(C), which the Arizona Court of Appeals rejected, as follows:

> ¶ 12 Hausner asserts his trial counsel was ineffective in failing to interview K. despite his having "repeatedly begged" counsel to do so. But Hausner does not claim he had told counsel that K. could provide testimony in support of an alibi or that she could offer any other useful information. And in her interview with police, K. said nothing suggesting she had any knowledge relevant to the case, and indeed stated she was not afraid of Dieteman. Hausner has not identified any reason for counsel to have believed that interviewing K. would have revealed information helpful to the defense and thus has not made a colorable claim that counsel's conduct fell below prevailing professional norms. *See State v. Denz*, 232 Ariz. 441, ¶ 14, 306 P.3d 98, 103 (App. 2013) ("Trial counsel is not required to pursue all avenues of investigation ... ."). And in

> light of the complete lack of credibility of the statements in K.'s affidavit, he has not shown prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

(Exh. LL at ¶ 12; Exh. GG at 23-24.)

Petitioner has failed to establish deficient performance. Petitioner speculates after-the-fact that Katie would have created a "potential alibi" with her testimony, but fails to demonstrate that at the time of trial he had told counsel that she could offer any useful information to the defense. And, as noted by the appellate court, the record indicates that Katie said nothing suggesting that she had any knowledge relevant to the case during her police interview.

Thus, the Court finds that the state court's rejection of the claim set forth in IAC claim 3 was neither contrary to, nor an unreasonable application of federal law.

(iv) IAC claim 4

In alleging that counsel was ineffective in failing to determine whether Petitioner could have stabbed the victim with his left hand, Petitioner argues:

> In his testimony, Mr. Dieteman indicated that [Petitioner] stabbed Mr. Davenport with his left hand. Prior to trial, [Petitioner] asked [defense counsel] to request a medical exam to verify whether it would have been physically possible for [Petitioner] to have stabbed anyone with his left hand, which is disfigured and has a permanent injury. [Petitioner] explained to [defense counsel] that he severely injured his left hand in circa 1994 (thereby rendering his left hand severely handicapped), for which he was treated at the Maricopa Medical Center (MMC) in Phoenix, Arizona. Despite his pleas to [defense counsel] (as well as later to his PCR attorney), [Petitioner] has yet to procure his medical records/x-rays of his left hand from the MMC. However, [defense counsel] never attempted to introduce any evidence to establish that [Petitioner's] left hand is visibly crippled and could not have been used as alleged by Samuel Dieteman, including by attempting to display [Petitioner's] clearly disfigured left hand to jurors for consideration during trial.

(Doc. 9 at 16.)

This claim corresponds to PCR claim 2(D), which the Arizona Court of Appeals rejected as follows:

> ¶ 15 Finally, Hausner asserts he informed counsel that he had a permanent impairment to his left hand that would have made it impossible for him to have stabbed the victim to death as Dieteman had described, but that counsel had never attempted to gather any supporting medical evidence or further investigate the matter. As a general rule, a trial court is required to treat a

> defendant's assertions made in an affidavit as true.[] *See State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004). And trial counsel's purported failure – absent some explanation – to investigate Hausner's alleged injury when it might have uncovered evidence to undermine the state's chief witness's version of events at least arguably falls below prevailing professional norms.
>
> ¶ 16 But we nonetheless conclude the trial court correctly rejected this claim. Although Hausner speculates that medical records supporting his claimed impairment could be obtained, he has not provided such records or any information about his injury that could permit us to conclude such medical evidence is available. "Proof of [counsel's] ineffectiveness must be a demonstrable reality rather than a matter of speculation." *State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983); *cf. State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). Accordingly, Hausner has failed to demonstrate any prejudice resulting from counsel's conduct. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

(Exh. LL at ¶¶ 15-16; Exh. GG at 25-26.)

As he failed to do in state court, here again, Petitioner fails to present the Court with either the "medical records" he claims exist, or competent medical testimony supporting his claim that his left hand is so "severely handicapped" and "visibly crippled" that he was incapable of stabbing another man with a knife. In any event, the Court finds the value of any such evidence de minimis as the question before the jury was not which hand Petitioner used to stab the victim, but whether Petitioner stabbed him at all. Petitioner has not satisfied either prong of Strickland. The Court finds that the state court's rejection of the claim set forth in IAC claim 4 was neither contrary to, nor an unreasonable application of federal law.

CONCLUSION

Having determined that Ground Five (A) is procedurally defaulted, and that the remainder of Petitioner's claims fail on the merits, the Court will recommend that Petitioner's Amended Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 9) be **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a substantial showing of the denial of a constitutional right and because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), 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); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file 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 timely to file objections to any factual determinations of the Magistrate Judge will 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 Rule 72, Federal Rules of Civil Procedure.

DATED this 22nd day of June, 2016.

Michelle H. Burns

Michelle H. Burns
United States Magistrate Judge