



1 **BACKGROUND**

2 The facts supporting Ochoa's convictions and the procedural history of his trial are  
3 summarized in the court of appeals' memorandum decision:

4 The victim, Miguel Sanchez ("Miguel") was introduced to Appellant  
5 and his cousin Luis Carlos Ochoa Munive ("Carlos") by Felipe Ortiz  
6 ("Palon"). Appellant and Carlos were engaged in selling methamphetamines.  
Miguel lived with his cousin, Ignacio Leon ("Nacho"), who was also involved  
in the drug trade.

7 Appellant and Carlos arranged for the sale of one-half pound of  
8 methamphetamines to Miguel and Nacho for \$4,000. After the drugs were  
delivered, Nacho gave Appellant and Carlos a down payment of \$700.  
9 However, the remainder of the money was never paid. Appellant and Carlos  
believed Miguel had possession of the money owed them.

10 On July 3, 1993, Appellant and Carlos attempted to find Miguel. They  
11 stopped at the apartment of one of his friends, Sandra Haros, who gave them  
information as to Miguel's whereabouts. They tracked Miguel to Nacho's  
12 house, saw Miguel arriving there in a taxi and forced him at gunpoint into a  
vehicle driven by Palon. They asked Miguel about the \$3,300 owed them, but  
13 Miguel denied having it.

14 At the direction of Appellant and Carlos, Palon drove Miguel to a  
deserted field. Appellant and Carlos took Miguel's wallet and told him that if  
15 he did not have the money, he was going to die. They forced Miguel out of the  
car and told him to kneel down. According to Miguel, both Appellant and  
16 Carlos began shooting at him and, afterward, Palon drove them away.  
However, ballistic tests could not conclusively establish whether one or more  
17 guns had been fired at the scene.

18 Miguel survived and dragged himself to a nearby street for help. When  
police arrived, Miguel said he had been shot by a friend of Palon, described the  
19 vehicle and said it was headed for Mexico. However, Miguel lied to police  
about why he was shot and denied at first that drugs were involved. Appellant,  
20 Carlos and Palon drove to San Luis, Sonora, Mexico. Police officers in  
Arizona coordinated search efforts with police officers in Mexico. Appellant,  
21 Carlos and Palon were later arrested in Mexico by local police officials and  
released the next day. Appellant was arrested a week later in Palm Springs.

22 Appellant, along with Carlos and Palon, was indicted for attempted first  
23 degree murder, aggravated assault, armed robbery, conspiracy to commit first  
degree murder and kidnapping. The State alleged that Appellant had two prior  
24 felony convictions and that he committed the instant offenses while on parole  
from California on a conviction for possession of controlled substances.

25 At trial, Appellant testified on his own behalf. He denied that he was  
26 involved in the crimes. He admitted he was in the car when Palon drove  
Miguel to the desert, but claimed that Carlos, acting alone, kidnapped,  
27 assaulted, robbed and attempted to murder Miguel. He sought to bolster his  
defense by reference to a Mexican police report (Exhibit "F") indicating that  
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1 Carlos had confessed to the Mexican police when arrested that he [Carlos] had  
2 “unloaded the clip on Miguel.”

3 Appellant was convicted of all charges. Appellant filed a motion for  
4 new trial and two addenda. The motion for new trial was denied. Prior to  
5 sentencing, Appellant filed a motion to reopen the motion for new trial, or  
6 vacate judgment, or grant post-conviction relief on the grounds of newly-  
7 discovered evidence along with supporting offers of proof.

8 Appellant was sentenced to concurrent terms of life imprisonment  
9 without possibility of parole for 25 years for each of the convictions.  
10 Subsequently, the trial court denied the motion to vacate judgment, leaving  
11 open the possibility of Appellant filing a petition for post-conviction relief.  
12 Appellant separately appealed from the convictions and sentences and the  
13 order denying the motions to vacate judgment. This Court consolidated the  
14 appeals.

15 (Doc. #20, Exh A at 2-4).

#### 16 Direct Appeal Proceedings

17 On appeal, Ochoa raised the following issues:

- 18 (1) The trial court abused its discretion by limiting the cross-examination of the  
19 victim regarding specific instances of conduct pursuant to rule 608(b), Ariz.  
20 R. Evid.;
- 21 (2) The trial court abused its discretion in denying the motion for new trial on the  
22 grounds that the jury did not have Exhibit “F” at the beginning of their  
23 deliberations and the prosecutor disparaged the contents of Exhibit “F” during  
24 his closing argument; and
- 25 (3) The trial court abused its discretion in denying the motion to vacate judgment.

26 (*Id.* at 4-5).

27 The court of appeals found no abuse of discretion in limiting the cross-examination of the  
28 victim because evidence of his prior arrest for bad checks, guns and drugs, and the fact that  
he was supporting a pregnant girlfriend, while indicative that he is not a model citizen, was  
not necessarily probative of his truthfulness (*Id.* at 6-7). The court of appeals also found no  
abuse of discretion in limiting cross-examination of the victim concerning the state’s  
agreement not to prosecute Miguel, in exchange for his favorable testimony at Ochoa’s trial.  
The court of appeals reasoned that there was no evidence that such an agreement existed, so  
the only purpose of cross-examining would be improper impeachment of the general  
credibility of a witness with a specific instance of misconduct (*Id.* at 7).

1           The court of appeals also found no abuse of discretion in the inadvertent misplacing  
2 of Exhibit “F” which resulted in the jurors not having it before them at the beginning of their  
3 deliberations. After receiving it, the jurors continued to deliberate, so the court found there  
4 was no prejudice to Ochoa (*Id.* at 9-10). Regarding the prosecutor’s comments during  
5 closing argument about Exhibit “F”, the court of appeals found the comments proper  
6 argument: that the Mexican police report was incomplete and inconsistent with the testimony  
7 of the State’s witnesses, including two eyewitnesses to the crime and Ochoa’s testimony  
8 regarding the circumstances of his arrest (*Id.* at 11). Regarding the prosecutor’s comments  
9 about alleged corruption of the Mexican police, the court of appeals reviewed the statements  
10 for fundamental error, because counsel had not objected to the comments. The court  
11 concluded that viewing the record as a whole, the comments were not capable of so  
12 influencing the jury as to deny Ochoa a fair trial (*Id.* at 12).

13           Finally, the court of appeals considered Ochoa’s motion to reopen the motion for new  
14 trial. He alleged newly-discovered evidence consisting of documents indicating that Carlos  
15 had been charged in Mexico with illegal possession of a firearm and released on bond.  
16 Ochoa argued that this supported his claim of prosecutorial misconduct because the  
17 prosecutor knew of this evidence and did not disclose it, and because it contradicted a state  
18 witness’s testimony that Carlos was never prosecuted and simply “turned loose.” The court  
19 of appeals agreed with the trial court that whether or not Carlos was charged with a crime and  
20 released was not relevant. Therefore, the court of appeals concluded that any error in not  
21 disclosing such a fact, if it existed, was harmless (*Id.* at 13-14). The Arizona Supreme Court  
22 denied review on July 18, 1997 (Doc. #20, Exh D).

### 23 Post-Conviction Proceedings

24           Several years after the supreme court denied review of Ochoa’s direct appeal, Ochoa  
25 filed a Petition for Post-Conviction Relief along with several discovery motions.<sup>2</sup> He later  
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27           <sup>2</sup>Although Ochoa filed a Notice of Post-Conviction Relief in 1996, that petition was  
28 never resolved. *See* Doc. #25 at 2, n. 1.

1 filed a supplemental petition in which he argued that certain specific constitutional rights  
2 were violated as follows: (1) when the prosecution withheld *Brady*<sup>3</sup> evidence; (2) by the  
3 mismanagement of the Yuma County Contract System and its adverse impact on trial  
4 counsel's representation; (3) by the prejudice caused by trial counsel's negligence and  
5 malpractice; and (4) by the Yuma County Jury Selection Process (Doc. #37, Exh J). He also  
6 argued that (1) additional disclosure was necessary to provide more proof of prejudice; (2)  
7 an evidentiary hearing was required; (3) his right to counsel was violated; and (4) his right  
8 to the effective assistance of appellate counsel was violated by counsel's acts and omissions  
9 (*Id.*).

10 The trial court dismissed the petition, finding in part as follows: (1) the *Brady* claim  
11 is both precluded and without merit because the court of appeals found no evidence of any  
12 agreements between the prosecutor, the victim and Sandra Haros, and the record is complete  
13 in showing there were no agreements; (2) the operation of the indigent defense contract  
14 system in Yuma County is totally irrelevant to Ochoa's claim of ineffective assistance of  
15 counsel; (3) Ochoa's claims of ineffective assistance of trial counsel do not amount to errors  
16 in representation, no facts claimed would create a reasonable probability of a different  
17 outcome, and the claimed incompetence regarding jury instructions is waived and now  
18 precluded; (4) appellate counsel cannot be ineffective for failing to raise issues which have  
19 no merit; (5) no evidence has been presented which suggests that the jury selection process  
20 employed by Yuma County systematically excludes certain minority groups, and in any case,  
21 Ochoa passed the panel without objections and did not raise the issue on appeal; and (6)  
22 Ochoa's Sixth Amendment claim was waived on appeal, is precluded, and is without merit  
23 (Doc. #20, Exh F at 3-5). In denying Ochoa's ineffective assistance claim, the trial court  
24 noted:

25 "Evidence of the defendant's guilt was substantial. This is not a case  
26 of the defendant being in the wrong place at the wrong time or a case of guilt  
by association. The defendant, a drug dealer sought retribution from the

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28 <sup>3</sup>*Brady v. Maryland*, 373 U.S. 83 (1963).

1 victim when full payment for a drug transaction was not forthcoming.  
2 Witnesses testified he participated in the kidnaping, assault and attempted  
3 murder of the victim. There was credible testimony that the defendant also  
4 shot the victim and left the victim to die in the field.

(*Id.* at 4).

5 Ochoa originally filed a 59-page petition for review in the court of appeals, which the  
6 court rejected for noncompliance with page limitations, and ordered that he file a petition not  
7 exceeding 25 pages. Ochoa then filed a 25-page petition for review, raising the following  
8 issues: (1) was it reversible error to deny all claims of *Brady* violations and other  
9 prosecutorial misconduct; (2) was it reversible error to deny every discovery request to  
10 confirm the quantity and quality of the *Brady* violations and prosecutorial misconduct; (3)  
11 did the Yuma County Indigent Legal Defense system in 1995-1996 operate in violation of  
12 *Joe U. Smith*<sup>4</sup>, given *Zarabia v. Bradshaw*<sup>5</sup> and case specific evidence; (4) were petitioner's  
13 Fifth, Sixth and Fourteenth Amendment rights to counsel and due process violated by  
14 multiple and extreme examples of *Strickland*<sup>6</sup> error; (5) was it reversible error to deny every  
15 motion for funds to access expert witnesses and investigators; (6) was it reversible error to  
16 deny all of Petitioner's discovery motions to prove *Joe U. Smith* violations or trial counsel's  
17 history of malpractice; (7) was it reversible error to deny an evidentiary hearing; (8) were  
18 Petitioner's Sixth/Fourteenth Amendment rights to counsel, due process and equal protection  
19 violated by appellate counsel's *Strickland* error; and (9) was it error for a Yuma judge to  
20 decide the Rule 32 litigation (Doc. #37, Exh K). The court of appeals and the supreme court  
21 denied review (Doc. #20, Exh H, I).

### 22 Habeas Petition

23 In his federal habeas petition, Ochoa raised the following eleven grounds:

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25 <sup>4</sup>140 Ariz. 355 (1984).

26 <sup>5</sup>185 Ariz. 1 (1996)

27 <sup>6</sup>*Strickland v. Washington*, 466 U.S. 668 (1984).

- 1 (1) Fifth and Fourteenth Amendment due process rights were violated in that the  
2 state courts erroneously found that Ochoa's *Brady* claims were asserted and  
3 denied on direct appeal;
- 4 (2) Fifth, Sixth, and Fourteenth Amendment due process rights and rights under  
5 *Brady* were violated in that the prosecution granted transactional immunity to  
6 key witnesses by dismissing pending felony cases against them under false  
7 pretenses and subsequently denied granting such transactional immunity;
- 8 (3) Fifth and Fourteenth Amendment due process rights were violated in that  
9 Ochoa was denied access to *Brady* material;
- 10 (4) Sixth Amendment right to counsel was violated in that Ochoa's trial counsel  
11 failed to conduct investigation/litigation regarding obvious prosecutorial  
12 misconduct;
- 13 (5) Fifth and Fourteenth Amendment due process rights were violated in that  
14 Ochoa was erroneously precluded from proving his post-conviction claims by  
15 subpoenaing records and/or calling witnesses at an evidentiary hearing;
- 16 (6) Sixth Amendment right to counsel was violated in that trial counsel failed to  
17 adequately conduct any phase of the pretrial or trial litigation in several  
18 respects;
- 19 (7) Sixth Amendment right to counsel was violated in that the Yuma County  
20 contract system guaranteed that there would be substandard lawyering on  
21 behalf of indigent defendants in the mid-1990s and that Ochoa's trial counsel's  
22 caseload impacted on the preparation of his case;
- 23 (8) Due process rights were violated in that the Rule 32 court denied every motion  
24 to obtain evidence to prove the Yuma County contract system caused habitual  
25 errors under *Strickland* and malpractice by Ochoa's trial counsel;
- 26 (9) The right to counsel under *Strickland* was violated in that appellate counsel  
27 committed malpractice in every possible way when offering the Opening  
28 Brief;
- (10) Sixth Amendment right to a fair trial was violated in that the Yuma county  
venire selection process caused systematic under-representation of minorities  
given the disparity of Hispanics/poor people on jury venires; and
- (11) due process rights were violated in that there was a denial of a change of  
venue, or recusal of the Yuma County bench, at the inception of the post-  
conviction process.

(Doc. #13 at 2).

Evidentiary Hearing

On August 14, 2008, the Court presided over an evidentiary hearing and the only  
testimony was provided by Ochoa's trial counsel, Paul Hunter, a 75 year-old retired attorney.  
Ochoa's attorney began with general questions about Hunter's legal career, which has

1 spanned several decades. It included jobs as both a prosecutor and in private practice as a  
2 criminal defense attorney. Hunter testified that he had probably tried thousands of cases and  
3 at some point became a certified specialist in criminal law. He testified that he had read the  
4 entire trial transcript once and the testimony of the major prosecution witnesses twice.  
5 During the course of the hearing, he testified numerous times when asked about a particular  
6 fact that he had read it in the transcript but had no independent recollection of that fact. At  
7 one point during the hearing, he specifically testified that he did not recall events leading up  
8 to his representation of Ochoa, what happened during his trial, and most of the events after  
9 the trial.

10 Ochoa's attorney then asked Hunter general questions about his practice, including  
11 his use of investigators, how often the judge paid for investigators, the practice of the Yuma  
12 County Attorney's Office regarding grants of immunity, and the use of interpreters. Hunter  
13 testified repeatedly that the reading of the transcript did not refresh his recollection of the  
14 trial, that he does not recall the trial, and that he can't bring back to memory any pictures of  
15 the trial or scenes of the trial. He testified that he had undergone five surgeries in the last six  
16 months of 2007, one in which surgeons replaced an aortic valve in his heart, and that since  
17 then his memory has been affected more than at any time prior to that.

18 Counsel then asked Hunter questions about 1995, the year during which the trial  
19 occurred, to explore his memory. Hunter testified that he had no independent recollection  
20 of either the contract system for hiring criminal defense attorneys that existed in Yuma  
21 County that year, or any aspects of his practice that year. He testified that he had a general  
22 recollection of certain aspects of criminal practice in Yuma County, but that it was not  
23 limited to any particular time frame. For example, he testified that he had a general  
24 recollection of the use of expert witnesses; the continuing legal education requirements;  
25 disclosures by the prosecutor, including police reports, taped or transcribed witness  
26 interviews, and crime scene photographs; and his subsequent review of the disclosure packet  
27 provided by the prosecutor. He also testified generally as to his practice of subpoenaing  
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1 police officers whose testimony contradicted the prosecution's theory of the case, and his  
2 preference for putting forth several defenses, if it was appropriate in a particular case.

3 In response to counsel's questions, Hunter gave general information as to his  
4 recollections about the use of and payment to investigators. He testified that he had no  
5 recollection as to whether he had used an investigator in the Ochoa trial. He testified  
6 generally about his motion practice during his career, including the filing of motions to  
7 compel and to suppress evidence, to seek funding for experts, and to make a record for  
8 appeal. When asked about the proper standard of care for developing a theory of defense,  
9 Hunter stated that the only standard he could recall was to use all his education and training  
10 and energy to defend each client to the best of his ability using the facts available in the case.  
11 This included interviewing witnesses and reviewing all available reports.

12 Ochoa's attorney then questioned Hunter about some specific aspects of the 1995 trial.  
13 While having no independent recollection of the trial, Hunter testified that he had requested  
14 a "mere presence" instruction more than once in his career, without any recollection as to  
15 whether he may have done so in this case. When asked why he would not have requested  
16 such an instruction in this case, he speculated that the judge may have let him know it would  
17 not be allowed, or that Hunter might have thought it would have a reverse effect because,  
18 from reading the transcript, he believed that there was more than mere presence existing in  
19 this case. He testified that he may have thought it would insult the jurors to suggest that  
20 Ochoa was "merely present" when the evidence indicated otherwise. He testified that this  
21 had been his experience with a previous jury, and that might have influenced his decision in  
22 this case, although he could not recall.

23 Ochoa's attorney next asked him about the use of a "third person responsible"  
24 instruction. Although Hunter could not recall, he believes he had requested that instruction  
25 during his career. When asked why he did not offer the instruction in this case, he testified  
26 that he did not recall. However, he testified that after reading the transcript, he had  
27 concluded that this was not necessarily a case with a good defense. When asked to explain  
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1 why, he pointed to the testimony of three eyewitnesses, including the victim who had been  
2 shot six times and lived, all of whom testified that Ochoa was the one who shot the victim.  
3 Hunter was then asked about disclosure requirements and the practice of the Yuma County  
4 Attorney's office with regard to disclosures. He testified that he had no independent  
5 recollection of any withholding of exculpatory evidence except for one case in which he had  
6 been involved. He also had no recollection of any other attorneys complaining about a  
7 practice by the Yuma County Attorney's office of withholding exculpatory evidence.  
8 Counsel then asked general questions about the proper cross-examination of a witness who  
9 had been drinking alcohol or using drugs or was mentally ill at the time of the incident about  
10 which he or she was providing testimony. He followed with questions about the proper  
11 impeachment of a key witness with his or her prior inconsistent statements. Although Hunter  
12 was able to give general answers to these questions, he had no recollection of any such cross-  
13 examination as a part of any particular strategy during Ochoa's trial.

14 Because of his memory deficit, he testified that he had no recollection of what steps  
15 he had taken during the trial to challenge the victim's credibility. He similarly had no  
16 recollection of whether he investigated the Yuma County Attorney's possible use of tacit  
17 grants of immunity with either the victim or the principal witnesses, or what efforts he made  
18 to investigate the ballistics evidence. He further had no recollection of telling the jury in  
19 opening statement that he would call Dr. Ridgemont as a witness, and the reason why he did  
20 not testify at Ochoa's trial. He had no recollection of whether he tried to contact Mexican  
21 police officers or whether he had asked an investigator to do so, although he did remember  
22 that during his career he had traveled to Mexico to interview police officers. He also had no  
23 recollection about the circumstances surrounding the decision to have Ochoa testify at trial.

## 24 **DISCUSSION**

### 25 Procedural Default

26 A state prisoner must exhaust his state remedies before petitioning for a writ of habeas  
27 corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-

1 66 (1995); *McQueary v. Blodgett*, 924 F.2d 829, 833 (9<sup>th</sup> Cir. 1991). To properly exhaust  
2 state remedies, a petitioner must fairly present his claims to the state's highest court in a  
3 procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 839-846 (1999). In  
4 Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by  
5 properly pursuing them through the state's direct appeal process or through appropriate post-  
6 conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9<sup>th</sup> Cir. 1999); *Roettgen v.*  
7 *Copeland*, 33 F.3d 36, 38 (9<sup>th</sup> Cir. 1994). A claim has been fairly presented if the petitioner  
8 has described both the operative facts and the federal legal theory on which the claim is  
9 based. *Bland v. Cal. Dep't of Corrections*, 20 F.3d 1469, 1472-73 (9<sup>th</sup> Cir.1994), *overruled*  
10 *on other grounds by Schell v. Witek*, 218 F.3d 1017, 1025 (9<sup>th</sup> Cir. 2000) (en banc); *Tamalini*  
11 *v. Stewart*, 249 F.3d 895, 898 -99 (9<sup>th</sup> Cir. 2001). The exhaustion requirement will not be  
12 met where the Petitioner fails to fairly present his claims. *Roettgen*, 33 F.3d at 38.

13         If a petition contains claims that were never fairly presented in state court, the federal  
14 court must determine whether state remedies remain available to the petitioner. *See Rose v.*  
15 *Lundy*, 455 U.S. 509, 519-20 (1982); *Harris v. Reed*, 489 U.S. 255, 268-270 (1989)  
16 (O'Connor, J., concurring). If remedies are available in state court, then the federal court  
17 may dismiss the petition without prejudice pending the exhaustion of state remedies. *Id.*  
18 However, if the court finds that the petitioner would have no state remedy were he to return  
19 to the state court, then his claims are considered procedurally defaulted. *Teague v. Lane*, 489  
20 U.S. 288, 298-99 (1989); *White v. Lewis*, 874 F.2d 599, 602-605 (9<sup>th</sup> Cir. 1989). The federal  
21 court may decline to consider these claims unless the petitioner can demonstrate that a  
22 miscarriage of justice would result, or establish cause for his noncompliance and actual  
23 prejudice. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman v. Thompson*, 501 U.S.  
24 722, 750-51 (1991); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Wainwright v. Sykes*,  
25 433 U.S. 72, 86 (1977); *United States v. Frady*, 456 U.S. 152, 167-68 (1982).

26         Further, a procedural default may occur when a Petitioner raises a claim in state court,  
27 but the state court finds the claim to be defaulted on procedural grounds. *Coleman*, 501 U.S.  
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1 at 730-31. In such cases, federal habeas review is precluded if the state court opinion  
2 contains a plain statement clearly and expressly relying on a procedural ground "that is both  
3 'independent' of the merits of the federal claim and an 'adequate' basis for the court's  
4 decision." *See Harris*, 489 U.S. at 260. A state procedural default ruling is "independent"  
5 unless application of the bar depends on an antecedent ruling on the merits of the federal  
6 claim. *See Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985); *Stewart v. Smith*, 536 U.S.856  
7 (2002). A state's application of the bar is "adequate" if it is "'strictly or regularly followed."  
8 *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (quoting *Hathorn v. Lovorn*, 457 U.S. 255,  
9 262-63 (1982)). In cases in which a state prisoner has defaulted his federal claims in state  
10 court pursuant to an independent and adequate state procedural rule, just as in cases  
11 involving defaulted claims that were not fairly presented, federal habeas review of the claims  
12 is barred unless the prisoner can demonstrate a miscarriage of justice or cause and actual  
13 prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51.

14 Respondents argue that several of Ochoa's habeas claims are not cognizable on habeas  
15 review and/or are unexhausted and procedurally defaulted. Specifically, they contend that  
16 the first, third, fifth, seventh, eighth, tenth and eleventh claims, and portions of the fourth and  
17 sixth claims are subject to dismissal without a discussion of the merits. The Court agrees.

18 Ochoa's first and eleventh claims - that the trial court violated due process in state  
19 post-conviction proceedings by finding his *Brady* claim precluded, and that he was denied  
20 due process by the trial court's denial of a request for change of venue or for a recusal of the  
21 entire Yuma County bench in post-conviction proceedings - were both presented to the court  
22 of appeals as violations of state law. His generalized references to due process are  
23 insufficient to establish exhaustion. *See Hiivala v. Wood*, 195 F.3d 1098, 1107 (9<sup>th</sup> Cir.  
24 1999). Although Ochoa mentions the due process clause in his petition, the issues involve  
25 an analysis of state law, and therefore cannot form the basis for federal habeas relief. *See* 28  
26 U.S.C. § 2254(a). This Court will not reconsider the state court's determination regarding  
27 state law; it will honor the trial court's statutory construction. *Estelle v. McGuire*, 502 U.S.

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1 62, 67-68, 112 S.Ct. 475, 480 (1991); *Melugin v. Hames*, 38 F.3d 1478, 1487 (9<sup>th</sup> Cir. 1994).  
2 Similarly, his seventh claim, contending that the Yuma County indigent defense contract  
3 system guaranteed substandard lawyering was presented to the court of appeals as a violation  
4 of state law, specifically *State v. Joe U. Smith* and *Zarabia v. Bradshaw*. The Court will not  
5 reconsider the issue. *Id.* His tenth claim, that the Yuma County jury selection process  
6 violated his right to a fair trial by systematic under-representation of racial and economic  
7 minorities was not presented to the court of appeals, and is therefore unexhausted. *Swoopes*;  
8 *Roettgen*. Because he would have no remedy were he to return to state court, it is  
9 procedurally defaulted. *Teague*.

10 In addition, the first, third, fifth, eighth and eleventh claims are not cognizable on  
11 habeas review because they allege only procedural errors in state post-conviction  
12 proceedings, and federal habeas review is not available to address such claims of error. *See*  
13 *Ortiz v. Stewart*, 149 F.3d 923, 939 (9<sup>th</sup> Cir. 1998); *Franzen v. Brinkman*, 877 F.2d 26 (9<sup>th</sup>  
14 Cir. 1989). Arguments related to a Rule 32 court's finding of preclusion (claim 1), denial  
15 of discovery requests (claims 3 and 8), denial of an evidentiary hearing (claim 5), and denial  
16 of request for change of venue or recusal (claim 11), all allege errors in state post-conviction  
17 proceedings, and provide no basis for habeas relief. *Id.*

18 Finally, Respondents contend that certain portions of Ochoa's ineffective assistance  
19 claims are unexhausted and procedurally defaulted because they were not presented to the  
20 Court of Appeals. Specifically, Ochoa raises three alleged instances of ineffective assistance  
21 in his sixth claim that Respondents contend are unexhausted: (1) failure to object to a  
22 renunciation instruction; (2) failure to object to the *Portillo*<sup>7</sup> reasonable doubt instruction;  
23 and (3) failure to object to the prosecutor's closing argument. Ochoa acknowledges that  
24 these claims were presented in his initial petition for review, which was rejected by the court  
25 of appeals as noncompliant because of excessive pages. He also acknowledges that his  
26 second petition for review did *not* include these claims. This is not a fair presentation of his

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27 <sup>7</sup>*See State v. Portillo*, 182 Ariz. 592 (1995).

1 claims to the court of appeals; the exhaustion requirement has not been met. *Roettgen*, 33  
2 F.3d at 38. In addition, because he would have no remedy were he to return to state court,  
3 the claims are procedurally defaulted. *Teague*. Ochoa does not argue that the page limitation  
4 is unfairly enforced; his requirement to abide by that procedural rule cannot constitute cause  
5 for a procedural default. *See Mueller v. Angelone*, 181 F.3d 557, 585 (4<sup>th</sup> Cir. 1999).

6 Merits Discussion on Remaining Claims

7 *Second Claim*

8 Ochoa argues that the prosecution failed to disclose evidence of tacit immunity  
9 agreements between the State and both Miguel and a witness, Sandra Haros, in exchange for  
10 their testimony at his trial. He contends that the state court did not rule on the merits of this  
11 claim, finding it precluded, thus entitling him to *de novo* review. What the trial court found  
12 precluded was the factual finding by the court of appeals that no agreement existed. *See* Doc.  
13 #20, Exh F at 3. The trial court did in fact conclude that there was no *Brady* violation, thus  
14 ruling on the merits. Ochoa cannot show that this ruling was either contrary to or an  
15 unreasonable application of *Brady*. The prosecutor informed defense counsel, the trial court,  
16 *and the jury* that Haros had been offered immunity for “any disclosures she had made in  
17 terms of drug crimes in her discussions with us” (Doc. #37, Exh P at 187-88). Although  
18 Haros testified that there was no such agreement, she admitted she had been arrested on four  
19 felony charges, including a drug charge, that she became an informant for the police because  
20 she believed the charges would be dismissed in exchange, that she was in fact never  
21 prosecuted for those charges, and that she believes it was because she had become an  
22 informant (*Id.* at 257-59, 262-65, 268). In light of Haros’s testimony, Ochoa cannot show  
23 any prejudice from the failure to disclose any alleged agreement. *See Strickler v. Greene*,  
24 527 U.S. 263, 281-282 (1999).

25 Regarding the failure to disclose any alleged agreement with Miguel, the court of  
26 appeals concluded “there was no evidence such an agreement existed” (Doc. #20, Exh A at  
27 5-7). This factual finding is presumed correct, and Ochoa has the burden of rebutting it by  
28

1 clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). This he cannot do. Miguel  
2 testified there was no such agreement; the prosecutor contended throughout both the trial and  
3 the post-conviction proceedings that there was no such agreement (Doc. #37, Exh P at 81,  
4 97, 125-28; Exh T: R.T. 4/27/01 at 71-83; Exh U: R.T. 8/3/01 at 121-42). The only evidence  
5 offered by Ochoa to rebut this claim is the fact that Miguel was not prosecuted on unrelated  
6 criminal charges for which he had previously been arrested. Both the trial court and the court  
7 of appeals correctly found that the mere fact of nonprosecution does not establish a leniency  
8 agreement (Doc. #20, Exh A at 5-7; Exh F at 3; Doc. #37, Exh T at 71-83; Exh U at 121-42).  
9 Ochoa has not rebutted this finding. In the absence of any agreement, there is no duty to  
10 disclose. *See Alderman v. Zant*, 22 F.3d 1541, 1555 (11<sup>th</sup> Cir. 1994).

11 *Fourth and Sixth Claims*

12 Ochoa first argues that trial counsel was ineffective for failing to object to alleged  
13 *Brady* violations. To establish ineffective assistance of counsel under the standard  
14 enunciated in *Strickland*, Ochoa must demonstrate that counsel's performance was deficient  
15 and that this deficient performance caused him prejudice. He must show that but for  
16 counsel's deficient performance, there is a reasonable probability that "the result of the  
17 proceedings would have been different." *Strickland*, 466 U.S. at 694. Because the state  
18 courts found no *Brady* violations, counsel cannot be considered ineffective for failing to  
19 pursue a meritless claim. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9<sup>th</sup> Cir. 1996). In addition,  
20 the record reflects that trial counsel did question both witnesses about possible leniency  
21 agreements.

22 Next Ochoa argues that trial counsel was generally unprepared. Specifically, he  
23 argues that counsel failed to file pretrial motions, but does not indicate what motions he  
24 should have filed. He asserts that counsel failed to "properly challenge the prosecution's  
25 case" in opening statement and failed to "adequately address" Haros's alleged lack of  
26 credibility but does not indicate what counsel should have done. He also criticizes counsel  
27 for failing to impeach Palon on the "disparity between his original charges and his plea  
28

1 agreement,” although the record shows he did cross-examine Palon about his plea (Doc. #37,  
2 Exh Q at 31-33). Ochoa falsely states that the judge admonished counsel. *See* Exh P at 216,  
3 239, 241-42. Ochoa also contends that trial counsel told the judge he was overworked in the  
4 case. However, the record reflects that counsel followed up by saying he disagreed with the  
5 court’s assessment that he was unprepared for trial (*Id.* at 251). More importantly Ochoa  
6 does not suggest how any of his examples of trial counsel’s alleged lack of preparedness  
7 actually prejudiced Ochoa. To argue that counsel’s closing argument was defective, thus  
8 implying that another lawyer would have handled it differently or better, is not grounds for  
9 a finding of ineffective assistance. The question is whether “counsel made errors so serious  
10 that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth  
11 Amendment.” *Strickland*, 466 U.S. at 687, 689. Ochoa has not met this burden.

12 Ochoa next argues that trial counsel failed to present exculpatory evidence by  
13 subpoenaing Mexican police officers to whom Carlos had allegedly admitted that he alone  
14 shot the victim, and to whom Ochoa had denied all responsibility. However, the record  
15 reflects that the individual who identified himself as “Ricardo Alonzo Andrade Ochoa” was  
16 five years older than Ochoa (Doc. #37, Exh R at 89-91). Although Ochoa testified the he  
17 was the individual who had identified himself to the Mexican Police Officers, if the officers  
18 had been subpoenaed and testified that he was not, that would have damaged his credibility.  
19 It appears to have been a tactical decision on the part of counsel not to subpoena the officers.  
20 Ochoa’s disagreement with a tactical decision made by his attorney cannot form the basis for  
21 a claim of ineffective assistance. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9<sup>th</sup> Cir. 2001).  
22 His claim that trial counsel should have called Dr. Ridgemont, who Ochoa alleges heard  
23 Sanchez say there was only one shooter, fails because the record does not establish such a  
24 statement was made (Doc. #37, Exh P at 135). His claim that trial counsel failed to subpoena  
25 Yuma officers does not fare any better because he does not specify how their testimony  
26 would have benefitted him.

1 Ochoa also contends that trial counsel was ineffective for failing to obtain expert  
2 testimony on “methamphetamine psychosis” to show that Haros’s drug-induced psychosis  
3 affected her credibility. However, the trial court denied his request for funding of such an  
4 expert because there was no evidence that Haros suffered from such a condition. In any case,  
5 Haros admitted her drug use at trial and the affect it had on her memory, so the jury was able  
6 to consider that in assessing her credibility. Her testimony at trial did not have any bearing  
7 on Ochoa’s role in Miguel’s kidnapping and shooting because she was not present with them  
8 at the time. Therefore, even if it could be determined that trial counsel’s actions constituted  
9 deficient performance, there was no resulting prejudice to Ochoa.

10 Trial counsel’s failure to obtain a second ballistics expert or to disclose preliminary  
11 ballistics notes is the next claim of ineffective assistance. This claim also fails under either  
12 prong of *Strickland*. Although the state presented expert testimony at trial that the use of a  
13 second weapon could not be ruled out, on cross-examination trial counsel was able to elicit  
14 the expert’s opinion that he could equally not rule out the use of a single weapon (*Id.*, Exh  
15 P at 164-65, 177-80). In addition, counsel argued in closing that there was a real possibility  
16 that Carlos was the only person with a weapon (*Id.*, Exh S: R.T. 1/17/96 at 34). Not only  
17 does Ochoa fail to allege what exculpatory potential was contained in the preliminary  
18 ballistics report, he also fails to show how the lack of a second weapon would have aided his  
19 case. Miguel testified that Ochoa stepped up to him and shot him. Palon testified that he saw  
20 Ochoa shoot Miguel, and did not know if Ochoa then gave the weapon to Carlos. Both could  
21 have used the same weapon. In any event, it was not necessary for the jury to decide whether  
22 or not Ochoa shot Miguel, because Ochoa was also charged as an accomplice. The testimony  
23 that Ochoa told Haros he would kill anyone who wronged him in a drug deal, that he helped  
24 Carlos force Miguel into the car, that he asked Miguel where the drug money was and told  
25 him that he would die if he could not come up with it, that he pistol-whipped Miguel, and  
26 that he got out of the car with Carlos immediately before the shooting, was more than  
27 sufficient evidence for the jury to convict him as an accomplice.

28

1           Finally, Ochoa contends that trial counsel was ineffective because of his failure to  
2 request a “mere presence” instruction. Assuming *arguendo* that there was sufficient evidence  
3 of Ochoa’s mere presence at the crime scene to allow such an instruction, the jury was  
4 instructed on this issue by other means. The trial court’s instructions on the presumption of  
5 innocence, the prosecution’s burden of proof, the elements of the crimes charged, and the  
6 scope of liability as either a principal or an accomplice, all informed the jury that they could  
7 not convict Ochoa based solely on his presence at the scene (*Id.*, Exh R at 118-30). In  
8 addition, his conviction for the conspiracy charge required separate specific findings by the  
9 jury that he had agreed with one or more persons to kill Miguel and that he had the intent to  
10 promote or assist committing the crime (*Id.* at 125). These findings, in addition to the above  
11 instructions, refute any notion that Ochoa was merely present at the time of the incidents  
12 charged; he therefore suffered no prejudice as a result of counsel’s failure to request the  
13 instruction. Ochoa’s claim that trial counsel should have requested a “third person  
14 responsible” instruction fails because he does not specify what the instruction would have  
15 said, and the trial court’s other instructions adequately informed the jury of the respective  
16 liability as either a principal or an accomplice.

17           *Ninth Claim*

18           Ochoa’s final claim is the ineffective assistance of appellate counsel; this claim also  
19 fails. Initially, the Court notes the strong presumption that appellate counsel’s performance  
20 was reasonable and competent. *Strickland*, 466 U.S. at 689. Ochoa first contends that the  
21 opening brief “guaranteed failure” because it was so poorly written. Counsel’s pleading  
22 adequately described the issues presented in order for the court of appeals to consider them.  
23 That it could have been better written does not constitute ineffective assistance. *Strickland*,  
24 466 U.S. at 687, 689. Ochoa has made no showing that his arguments on appeal would have  
25 succeeded if they had been presented more cogently.

26           His final argument concerning appellate counsel is that he failed to present the claims  
27 that were later urged by counsel in post-conviction proceedings. However, those claims were  
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1 rejected by the trial court as being without merit. As the Court earlier stated, it can never be  
2 deficient performance to fail to take a futile action. *Rupe*, 93 F.3d at 1445. More  
3 importantly, the very process of focusing on those arguments on appeal which are more  
4 likely to prevail, “far from being evidence of incompetence is the hallmark of effective  
5 appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986). Ochoa has not met his  
6 burden on any of his claims.

7 **IT IS THEREFORE RECOMMENDED** that Juan Daniel Ochoa’s petition for writ  
8 of habeas corpus be **denied and dismissed with prejudice** (Doc. #1).

9 This recommendation is not an order that is immediately appealable to the Ninth  
10 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
11 Appellate Procedure, should not be filed until entry of the district court’s judgment. The  
12 parties shall have ten days from the date of service of a copy of this recommendation<sup>8</sup> within  
13 which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules  
14 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within  
15 which to file a response to the objections. Failure timely to file objections to the Magistrate  
16 Judge's Report and Recommendation may result in the acceptance of the Report and  
17 Recommendation by the district court without further review. *See United States v. Reyna-*  
18 *Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any factual  
19 determinations of the Magistrate Judge will be considered a waiver of a party’s right to  
20 appellate review of the findings of fact in an order or judgment entered pursuant to the  
21 Magistrate Judge’s recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

22 DATED this 17<sup>th</sup> day of February, 2009.

23  
24 

25 \_\_\_\_\_  
26 David K. Duncan  
United States Magistrate Judge

27 <sup>8</sup>In light of the numerous previous continuances granted to the parties in this case, and  
28 the age of the case, the Court will not be inclined to grant any extensions of this deadline.