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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Luther Jernigan,)	No. CV-08-838-PHX-MHM (LOA)
Petitioner,)	REPORT AND RECOMMENDATION
vs.)	
Charles L. Ryan, et al.)	
Respondents.)	

This matter is before the Court on Petitioner’s Amended Petition for Writ of Habeas Corpus. (docket # 6) Respondents¹ have filed an Answer, docket # 13, to which Petitioner has replied, docket # 17.

I. Factual and Procedural Background

A. Factual Background

On August 3, 2005, a Maricopa County grand jury indicted Petitioner on one count of fraudulent schemes and artifices, one count of theft, one count of taking the identify of another, and three counts of forgery. (Respondents’ Exh. A) The State also alleged that Petitioner had a 1994 felony conviction for attempted theft, a class 4 felony. (Respondents’ Exh. B) The State subsequently amended the allegation of historical priors, asserting that Petitioner had three additional prior convictions in federal district court for: (1) dealing in

¹ Petitioner named Dora B. Schriro as a respondent in this matter. Charles L. Ryan, the current director of the Arizona Department of Corrections, is substituted for Dora B. Schriro pursuant to Fed.R.Civ.P. 25(d).

1 counterfeit obligations; (2) conspiracy to possess cocaine; and (3) unlawful possession of a
2 firearm. (Respondents' Exh. C) The State also alleged that Petitioner committed the
3 offenses charged in the indictment while on release from the federal convictions.

4 (Respondents' Exh. D)

5 On December 7, 2005, Petitioner entered into a written plea agreement pursuant to
6 which he pled guilty to: Amended Count 1, attempt to commit fraudulent schemes and
7 artifices, a class 3 felony, with one prior felony conviction; and Amended Count 2, theft, a
8 class 3 felony, non-dangerous and non-repetitive. (Respondents' Exh. E) In the plea
9 agreement, Petitioner admitted his 1994 felony conviction for attempted theft.

10 (Respondents' Exh. E) In exchange for Petitioner's plea, the remaining charges were
11 dismissed. (*Id.*)

12 At the December 7, 2005 change-of-plea hearing, the court² inquired whether
13 Petitioner had read the plea agreement, discussed it with counsel, and understood its terms.
14 (Respondents' Exh. F at 4-6) Petitioner responded affirmatively. (*Id.*) Petitioner stated that
15 he understood the plea agreement and that it contained everything to which he had agreed.
16 (*Id.* at 6) Petitioner further stated that he entered the plea voluntarily, of his own free will,
17 and that he was not forced or threatened to plead guilty. (Respondents' Exh. F at 6) The
18 Court explained Petitioner's sentencing exposure on both counts, including a possible
19 aggravated sentence of 16.5 years followed by community supervision. (Respondents' Exh.
20 F at 6-7) Petitioner stated that he understood the sentencing range. (*Id.*) The court further
21 explained the rights Petitioner was waiving by pleading guilty, and Petitioner indicated that
22 he wished to forego those rights and enter a plea. (Respondents' Exh. F at 9-10)

23 Petitioner's counsel, Susan Maga, presented the following facts in support of
24 Petitioner's guilty pleas. (Respondents' Exh. F at 2) As to Amended Count 1, Petitioner
25 and co-defendant Tina Ricketts acted in concert to complete a mortgage with CSI Mortgage
26 and Prescott Title on the Scottsdale home of Lucinda Maxfield, without Maxfield's

27
28 ² The Honorable Richard Gama presided.

1 knowledge or permission. (Respondents' Exh. F at 11) Petitioner had Ricketts pretend to
2 be Maxfield and provided her with the blonde wig she wore when completing the mortgage
3 paperwork. (Respondents' Exh. F at 11) After Petitioner and Ricketts received the money
4 from the mortgage, Ricketts again pretended to be Maxfield when she obtained a wire
5 transfer for some of the proceeds (\$125,000) from the mortgage to a Bank of America
6 account in the name of Richard Self (the "Self account"). (*Id.*) The Self account was
7 actually controlled by Petitioner. (Respondents' Exh. F at 11) Additionally, both Ricketts
8 and Petitioner were aware that David Robinson was paid money from the mortgage
9 proceeds, in exchange for his agreement to conceal the mortgage fraud from Maxfield.
10 (Respondents' Exh. F at 12) Petitioner admitted that the facts counsel provided in support
11 of Amended Count 1 were true. (Respondents' Exh. F at 12)

12 In support of Amended Count 2, counsel stated that Petitioner committed theft by
13 knowingly controlling, without lawful authority, CSI Mortgage's cash, with the intent of
14 permanently depriving CSI of the money. (Respondents' Exh. F at 13) Petitioner
15 controlled the money through the Richard Self bank account, to which Petitioner had access.
16 (*Id.*) Petitioner also admitted that the theft involved sufficient monetary value to make the
17 crime a class 3 felony. (Respondents' Exh. F at 13) Petitioner again attested to the truth of
18 the facts counsel provided in support of Amended Count 2. (*Id.*)

19 The court found that Petitioner made the guilty pleas knowingly, intelligently, and
20 voluntarily and accepted his pleas. (Respondents' Exh. F at 14)

21 Petitioner subsequently moved to withdraw from the plea agreement on the ground
22 that the factual basis in support of Amended Count 1 was inaccurate. Due to differences that
23 arose between Petitioner and his counsel over this issue, the court allowed Susan Maga to
24 withdraw and replaced her with Terri Capozzi. (Respondents' Exhs. G, H)

25 At the beginning of the May 12, 2006 sentencing hearing, the court addressed the
26 motion to withdraw the guilty pleas. (Respondents' Exh. I at 3) Petitioner's counsel,
27 Capozzi, requested a continuance so she could secure the presence of four individuals whose
28 testimony Petitioner wanted to present in support of his motion to withdraw. (Respondents'

1 Exh. I at 4) The court denied the motion to continue, noting that the matter had previously
2 been continued. (*Id.*) The court clarified that the motion to withdraw was before the court
3 for “oral argument” and declined counsel’s request that Petitioner testify. (Respondents’
4 Exh. I at 4) During oral argument, Petitioner’s then-counsel, Capozzi, argued that former
5 counsel, Maga, had permitted Petitioner to plead guilty based on “an incorrect and
6 inaccurate factual basis,” which that constituted the “manifest injustice that’s required to set
7 aside a guilty plea.” (Respondents’ Exh. I, Tr. 5/12/06 at 7) Counsel explained that
8 Petitioner’s “position is and has been . . .that he never provided a wig or disguise for Tina
9 Ricketts.” (Respondents’ Exh. I at 6) Counsel Capozzi further argued that Petitioner had
10 conveyed this information to his former counsel, Maga, but she ignored him. (Respondents’
11 Exh. I at 7) The State argued that, during the change-of-plea proceeding, Petitioner was
12 given several opportunities to express any disagreement with the asserted factual basis, but
13 said nothing. (Respondents’ Exh. I at 8-10) The court found that Petitioner did not satisfy
14 his burden of showing manifest injustice, and denied the motion to withdraw from the plea
15 agreement. (Respondents’ Exh. I at 12)

16 The court then proceeded to sentencing. The court found that Petitioner had been
17 convicted in 1994 of the alleged prior felony. (Respondents’ Exh. I at 13) The State
18 requested an “extremely aggravated term” based on Petitioner’s background and the facts of
19 the case. (Respondents’ Exh. I at 15-17) Defense counsel argued that the court should
20 impose “no more than [the] presumptive” sentence. (*Id.* at 22) The court concluded that an
21 aggravated sentence was appropriate on Count 1, finding three aggravating factors: the prior
22 felony conviction admitted in the plea agreement, the presence of an accomplice, and the
23 offense was for pecuniary gain. (Respondents’ Exh. I at 22) Accordingly, the court
24 sentenced Petitioner to an aggravated term of 16.25 years’ imprisonment on Count 1. (*Id.* at
25 23), see A.R.S. § 13-702.01(C)(1).

26 On Count 2, the court suspended the imposition of sentence and placed Petitioner on
27 supervised probation for 5 years to begin after Petitioner’s discharge from prison on Count
28 1. (*Id.* at 25)

1 **B. First Post-Conviction Proceeding**

2 On June 16, 2006, Petitioner filed a notice of post-conviction relief and requested
3 appointment of counsel. (Respondents’ Exh. J) The court appointed counsel who filed a
4 petition for post-conviction relief on December 20, 2006. (Respondents’ Exh. K) The trial
5 court denied relief on April 12, 2007. (Respondents’ Exh. L)

6 On May 31, 2007, Petitioner filed a petition for review in the Arizona Court of
7 Appeals, 1 CA-CR 07-0472 PRPC. (Respondents’ Exh. M) On February 5, 2008, the Court
8 of Appeals denied review. (Respondents’ Exh. N) Petitioner did not seek review in the
9 Arizona Supreme Court. (docket # 6 at 6-9)

10 **C. Second Post-Conviction Proceeding**

11 On August 27, 2007, Petitioner filed a second petition for post-conviction relief.
12 (Respondents’ Exh. O) On September 21, 2007, the trial court found Petitioner’s claims
13 precluded, pursuant to Ariz.R.Crim.P. 32.2(a). (Respondents’ Exh. P) The court also
14 rejected Petitioner’s argument that “newly-discovered” facts entitled him to relief. The
15 court noted that Petitioner could have discovered the information before pleading guilty, and
16 that by pleading guilty, he waived his right to contest the evidence against him. (*Id.*)

17 On or about October 16, 2007, Petitioner filed a *pro se* petition for review to the
18 Arizona Court of Appeals, 1 CA-CR 07-0872 PRPC. (Respondents’ Exh. Q) On March 12,
19 2008, the Arizona Court of Appeals denied review. (Respondents’ Exh. R) Petitioner did
20 not seek review in the Arizona Supreme Court. (docket # 6 at 6-9)

21 **D. Petition for Writ of Habeas Corpus**

22 On August 15, 2008, Petitioner filed a timely amended petition for writ of habeas
23 corpus in this Court. (docket # 6; docket # 13 at 6) Petitioner raises the following claims:
24 (1) “Violation of due process of law under the Fourteenth Amendment to the United States
25 Constitution. Petitioner can show manifest injustice has occurred and trial court refused to
26 hold an evidentiary hearing to allow Petitioner to withdraw from the plea;” (2) Petitioner
27 received ineffective assistance of counsel and suffered a “manifest injustice” because
28 counsel provided an incorrect factual basis for his guilty plea; and (3) Petitioner received

1 ineffective assistance of counsel because counsel (a) failed to subpoena witnesses to testify
2 in support of his motion to withdraw his guilty plea, and (b) failed to object to the
3 aggravated sentence. (docket # 6)

4 **II. Exhaustion**

5 Respondents assert that Petitioner has procedurally defaulted Ground Two and a
6 portion of Ground Three, and that those claims are barred from federal habeas corpus
7 review. As discussed below, the Court agrees.

8 **A. Relevant Law**

9 A federal court may not grant a petition for writ of habeas corpus unless the petitioner
10 has exhausted the state remedies available to him. 28 U.S.C. § 2254(b). When seeking
11 habeas relief, petitioner bears the burden of showing that he has properly exhausted each
12 claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981)(*per curiam*). The exhaustion
13 inquiry focuses on the availability of state remedies at the time the petition for writ of habeas
14 corpus is filed in federal court. *O’Sullivan v. Boerckel*, 526 U.S. 838 (1999). The prisoner
15 “shall not be deemed to have exhausted . . . if he has the right under the law of the State to
16 raise, by any available procedure, the question presented.” 28 U.S.C. § 2254(c). In other
17 words, proper exhaustion requires the prisoner to “give the state courts one full opportunity
18 to resolve any constitutional issues by invoking one complete round of the State’s
19 established appellate review process.” *O’Sullivan*, 526 U.S. 845. “One complete round”
20 includes filing a “petition[] for discretionary review when that review is part of the ordinary
21 appellate review procedure in the State.” *Id.* State prisoners may skip a procedure
22 occasionally employed by a state’s courts to provide relief only if a state law or rule
23 precludes use of the procedure, or the “State has identified the procedure as outside the
24 standard review process and has plainly said that it need not be sought for purposes of
25 exhaustion. *Id.* at 848, 850.

26 To exhaust state remedies, a petitioner must afford the state courts the opportunity to
27 rule upon the merits of his federal claims by “fairly presenting” them to the state’s “highest”
28 court in a procedurally appropriate manner. *Castille v. Peoples*, 489 U.S. 346, 349 (1989);

1 *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (stating that “[t]o provide the State with the
2 necessary ‘opportunity,’ the prisoner must “fairly present” her claim in each appropriate
3 state court . . . thereby alerting the court to the federal nature of the claim.”). In Arizona,
4 unless a prisoner has been sentenced to death, the “highest court” requirement is satisfied if
5 the petitioner has presented his federal claim to the Arizona Court of Appeals either on
6 direct appeal or in a petition for post-conviction relief. *Crowell v. Knowles*, 483 F.Supp.2d
7 925 (D.Ariz. 2007) (discussing *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999)).
8 Contrary to Respondents’ assertion, Petitioner was not required to present his claims to the
9 Arizona Supreme Court.

10 In addition to presenting his claims to the proper court, a state prisoner must fairly
11 present his claims to that court to satisfy the exhaustion requirement. A claim is “fairly
12 presented” in state court only if a petitioner has described both the operative facts and the
13 federal legal theory on which his claim is based. *Reese*, 541 U.S. at 28. It is not enough that
14 all of the facts necessary to support the federal claim were before the state court or that a
15 “somewhat similar” state law claim was raised. *Reese*, 541 U.S. at 28 (stating that a
16 reference to ineffective assistance of counsel does not alert the court to federal nature of the
17 claim). Rather, the habeas petitioner must cite in state court to the specific constitutional
18 guarantee upon which he bases his claim in federal court. *Tamalini v. Stewart*, 249 F.3d
19 895, 898 (9th Cir. 2001). Similarly, general appeals to broad constitutional principles, such
20 as due process, equal protection, and the right to a fair trial, are insufficient to establish fair
21 presentation of a federal constitutional claim. *Lyons v. Crawford*, 232 F.3d 666, 669 (9th
22 Cir. 2000), *amended on other grounds*, 247 F.3d 904 (9th Cir. 2001); *Shumway v. Payne*,
23 223 F.3d 982, 987 (9th Cir. 2000) (insufficient for prisoner to have made “a general appeal
24 to a constitutional guarantee,” such as a naked reference to “due process,” or to a
25 “constitutional error” or a “fair trial”). Likewise, a mere reference to the “Constitution of
26 the United States” does not preserve a federal claim. *Gray v. Netherland*, 518 U.S. 152,
27 162-63 (1996). Even if the basis of a federal claim is “self-evident” or if the claim would be
28 decided “on the same considerations” under state or federal law, the petitioner must make

1 the federal nature of the claim “explicit either by citing federal law or the decision of the
2 federal courts” *Lyons*, 232 F.3d at 668. A state prisoner does not fairly present a claim
3 to the state court if the court must read beyond the pleadings filed in that court to discover
4 the federal claim. *Baldwin*, 541 U.S. at 27.

5 In sum, “a petitioner fairly and fully presents a claim to the state court for purposes of
6 satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum, (2)
7 through the proper vehicle, and (3) by providing the proper factual and legal basis for the
8 claim.” *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005)(citations omitted).

9 A habeas petitioner’s claims may be precluded from federal review in either of two
10 ways. First, a claim may be procedurally defaulted in federal court if it was actually raised
11 in state court but found by that court to be defaulted on state procedural grounds such as
12 waiver or preclusion. *Ylst v. Nunnemaker*, 501 U.S. 797, 802-05 (1991); *Coleman*, 501 U.S.
13 at 729-30. Thus, a state prisoner may be barred from raising federal claims that he did not
14 preserve in state court by making a contemporaneous objection at trial, on direct appeal, or
15 when seeking post-conviction relief. *Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir. 1995)
16 (stating that failure to raise contemporaneous objection to alleged violation of federal rights
17 during state trial constitutes a procedural default of that issue); *Thomas v. Lewis*, 945 F.2d
18 1119, 1121 (9th Cir. 1991) (finding claim procedurally defaulted where the Arizona Court of
19 Appeals held that habeas petitioner had waived claims by failing to raise them on direct
20 appeal or in first petition for post-conviction relief.) If the state court also addressed the
21 merits of the underlying federal claim, the “alternative” ruling does not vitiate the
22 independent state procedural bar. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Carringer*
23 *v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (state supreme court found ineffective assistance
24 of counsel claims “barred under state law,” but also discussed and rejected the claims on the
25 merits, *en banc* court held that the “on-the-merits” discussion was an “alternative ruling”
26 and the claims were procedurally defaulted and barred from federal review). A higher
27 court’s subsequent summary denial of review affirms the lower court’s application of a
28 procedural bar. *Nunnemaker*, 501 U.S. at 803.

1 The second procedural default scenario arises when a state prisoner failed to present
2 his federal claims to the state court, but returning to state court would be “futile” because the
3 state courts’ procedural rules, such as waiver or preclusion, would bar consideration of the
4 previously unraised claims. *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Beaty v. Stewart*,
5 303 F.3d 975, 987 (9th Cir. 2002); *State v. Mata*, 185 Ariz. 319, 322-27, 916 P.2d 1035,
6 1048-53 (1996); Ariz. R. Crim. P. 32.2(a) & (b); Ariz. R. Crim. P. 32.1(a)(3) (post-
7 conviction review is precluded for claims waived at trial, on appeal, or in any previous
8 collateral proceeding); 32.4(a); Ariz. R. Crim. P. 32.9 (stating that petition for review must
9 be filed within thirty days of trial court's decision). A state post-conviction action is futile
10 where it is time-barred. *Beaty*, 303 F.3d at 987; *Moreno v. Gonzalez*, 116 F.3d 409, 410 (9th
11 Cir. 1997) (recognizing untimeliness under Ariz. R. Crim. P. 32.4(a) as a basis for dismissal
12 of an Arizona petition for post-conviction relief, distinct from preclusion under Rule
13 32.2(a)). This type of procedural default is known as “technical” exhaustion because
14 although the claim was not actually exhausted in state court, the petitioner no longer has an
15 available state remedy. *Coleman*, 501 U.S. at 732 (“A habeas petitioner who has defaulted
16 his federal claims in state court meets the technical requirements for exhaustion; there are no
17 remedies any longer ‘available’ to him.”).

18 In either case of procedural default, federal review of the claim is barred absent a
19 showing of “cause and prejudice” or a “fundamental miscarriage of justice.” *Dretke v.*
20 *Haley*, 541 U.S. 386, 393-94, (2004); *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To
21 establish “cause,” a petitioner must establish that some objective factor external to the
22 defense impeded his efforts to comply with the state’s procedural rules. *Id.* The following
23 objective factors may constitute cause: (1) interference by state officials, (2) a showing that
24 the factual or legal basis for a claim was not reasonably available, or (3) constitutionally
25 ineffective assistance of counsel. *Id.* Ordinarily, the ineffective assistance of counsel in
26 collateral proceedings does not constitute cause because “the right to counsel does not
27 extend to state collateral proceedings or federal habeas proceedings.” *Martinez-Villareal v.*
28 *Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996).

1 Prejudice is actual harm resulting from the constitutional violation or error. *Magby v.*
2 *Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice, a habeas petitioner
3 bears the burden of demonstrating that the alleged constitutional violation “worked to his
4 actual and substantial disadvantage, infecting his entire trial with error of constitutional
5 dimension.” *United States v. Frady*, 456 U.S. 152, 170 (1982); *Thomas v. Lewis*, 945 F.2d
6 1119, 1123 (9th Cir. 1996). Where petitioner fails to establish cause, the court need not
7 reach the prejudice prong.

8 A federal court may also review the merits of a procedurally defaulted claim if
9 petitioner demonstrates that failure to consider the merits of his claim will result in a
10 “fundamental miscarriage of justice.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). A
11 “fundamental miscarriage of justice” occurs when a constitutional violation has probably
12 resulted in the conviction of one who is actually innocent. *Id.* To satisfy the “fundamental
13 miscarriage of justice” standard, petitioner must establish that it is more likely than not that
14 no reasonable juror would have found him guilty beyond a reasonable doubt in light of new
15 evidence. *Schlup*, 513 U.S. at 327; 28 U.S.C. § 2254(c)(2)(B). Even if petitioner asserts a
16 claim of actual innocence to excuse his procedural default of a federal claim, federal habeas
17 relief may not be granted absent a finding of an independent constitutional violation
18 occurring in the state criminal proceedings. *Dretke*, 541 U.S. at 393-94.

19 **B. Application of Law to Petitioner’s Claims**

20 **1. Ground One**

21 In Ground One, Petitioner asserts a due process violation under the Fourteenth
22 Amendment. Petitioner argues that the factual basis provided by his counsel at the change-
23 of-plea hearing was incorrect and that the trial court refused to conduct an evidentiary
24 hearing on Petitioner’s motion to withdraw his guilty pleas on that basis. (docket # 6 at 6)
25 In his first petition for post-conviction relief, Petitioner alleged a federal due process
26 violation based on counsel’s failure to provide an accurate factual basis and the trial court’s
27 failure to hold an evidentiary hearing on the motion to withdraw the guilty plea.
28 (Respondents’ Exh. K at 6) The trial court rejected these claims. Petitioner raised the same

1 claims to the Arizona Court of Appeals. (Respondents' Exh. M at 3, 6) Thus, Petitioner
2 properly exhausted Ground One.

3 **2. Ground Two**

4 In Ground Two, Petitioner argues that counsel was ineffective for providing an
5 incorrect factual basis for his guilty pleas. (docket # 6 at 7, 12) Petitioner's first petition
6 for post-conviction relief also asserted a claim that trial counsel was ineffective for
7 "providing an incorrect factual basis." (Respondents' Exh. K at 6, 7) However, Petitioner
8 did not assert this claim in his petition for review to the Arizona Court of Appeals.
9 (Respondents' Exh. M at 3, 6-7) Accordingly, Petitioner did not properly present Ground
10 Two to the state courts and that claim is procedurally defaulted.

11 **3. Ground Three**

12 In Ground Three, Petitioner asserts a claim of ineffective assistance of counsel based
13 on: (a) counsel's failure to subpoena witnesses for the motion-to-withdraw/sentencing
14 hearing; and (b) not objecting to the trial court's failure give advance notice that it intended
15 to impose an exceptionally-aggravated sentence. (docket # 6 at 8) Petitioner raised both of
16 these claims in his first petition for post-conviction relief. (Respondents' Exh. K at 8) In
17 his petition for review to the Arizona Court of Appeals, Petitioner challenged counsel's
18 failure to subpoena witnesses but did not challenge counsel's failure to object to Petitioner's
19 aggravated sentence. (Respondents' Exh. M at 3, 7) Accordingly, Petitioner did not
20 properly present to the state courts his claim that counsel was ineffective for failing to object
21 to the aggravated sentence. Thus, he has procedurally defaulted Ground 3(b).

22 **C. Procedural Bar**

23 Petitioner's claims in Grounds 2 and Ground 3(b) are technically exhausted and
24 procedurally barred, because a return to state court to present those claims would be futile
25 because they would be procedurally barred pursuant to Arizona law. First, Petitioner is
26 time-barred under Arizona law from raising these claims in a successive petition for post-
27 conviction relief because the time for filing a notice of post-conviction relief has long
28 expired. *See* Ariz.R.Crim.P. 32.1 and 32.4 (a petition for post-conviction relief must be filed

1 “within ninety days after the entry of judgment and sentence or within thirty days after the
2 issuance of the order and mandate in the direct appeal, whichever is later.”) Although Rule
3 32.4 does not bar dilatory claims if they fall within the category of claims specified in
4 Ariz.R.Crim.P 32.1(d) through (h), Petitioner has not asserted that any of these exceptions
5 apply to him. Moreover, a state post-conviction action is futile where it is time-barred.
6 *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002); *Moreno v. Gonzalez*, 116 F.3d 409, 410
7 (9th Cir. 1997) (recognizing untimeliness under Ariz. R. Crim. P. 32.4(a) as a basis for
8 dismissal of an Arizona petition for post-conviction relief, distinct from preclusion under
9 Rule 32.2(a)).

10 Furthermore, under Rule 32.2(a) of the Arizona Rules of Criminal Procedure, a
11 defendant is precluded from raising claims that could have been raised on direct appeal or in
12 any previous collateral proceeding. *See Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d
13 1149, 1151 (1995) (capital defendant’s early petition for post-conviction relief raised limited
14 number of issues and waived other issues that he could have then raised, but did not); *State*
15 *v. Curtis*, 185 Ariz. 112,113, 912 P.2d 1341, 1342 (App. 1995) (“Defendants are precluded
16 from seeking post-conviction relief on grounds that were adjudicated, or could have been
17 raised and adjudicated, in a prior appeal or prior petition for post-conviction relief.”); *State*
18 *v. Berryman*, 178 Ariz. 617, 624, 875 P.2d 850, 857 (App. 1994) (defendant’s claim that his
19 sentence had been improperly enhanced by prior conviction was precluded by defendant’s
20 failure to raise issue on appeal). The claims asserted in Grounds 2 and 3(b) could have, and
21 should have, been properly raised on post-conviction review. Accordingly, the State court
22 would find those claims procedurally barred.

23 **1. Cause and Prejudice**

24 As set forth above, Petitioner’s claims in Grounds 2 and 3(b) are procedurally
25 defaulted and barred from federal habeas review absent a showing of “cause and prejudice”
26 or a “fundamental miscarriage of justice.”

27 To establish “cause,” a petitioner must establish that some objective factor external to
28 the defense impeded his efforts to comply with the state’s procedural rules. *Murray*, 477

1 U.S. at 488-492. The following objective factors may constitute cause: (1) interference by
2 state officials, (2) a showing that the factual or legal basis for a claim was not reasonably
3 available, or (3) constitutionally ineffective assistance of counsel. *Id.* Prejudice is actual
4 harm resulting from the constitutional violation or error. *Magby v. Wawrzaszek*, 741 F.2d
5 240, 244 (9th Cir. 1984). Where petitioner fails to establish cause for his procedural default,
6 the court need not consider whether petitioner has shown actual prejudice resulting from the
7 alleged constitutional violations. *Smith v. Murray*, 477 U.S. 527, 533 (1986).

8 Petitioner does not assert any specific basis to overcome the procedural bar. (docket
9 # 17) Rather, he generally argues that he is *pro se* and lacks legal assistance. Petitioner's
10 *pro se* status and ignorance of the law do not satisfy the cause standard. *Hughes v. Idaho*
11 *State Bd. of Corrections*, 800 F.2d 905, 908 (9th Cir. 1986); *Tacho v. Martinez*, 862 F.2d
12 1376, 1381 (9th Cir. 1988). Because Petitioner offers no legitimate "cause" which
13 precluded him from properly exhausting his state remedies, the Court declines to reach the
14 issue of prejudice. *Engle*, 456 U.S. at 134 n. 43.

15 **2. Fundamental Miscarriage of Justice**

16 Additionally, Petitioner has not shown that failure to consider his claims raised in
17 Grounds 2 and 3(b) will result in a fundamental miscarriage of justice. A federal court may
18 review the merits of a procedurally defaulted habeas claim if the petitioner demonstrates that
19 failure to consider the merits of his claim will result in a "fundamental miscarriage of
20 justice." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). A "fundamental miscarriage of justice"
21 occurs when a constitutional violation has probably resulted in the conviction of one who is
22 actually innocent. *Id.*

23 This gateway "actual innocence" claim differs from a substantive actual innocence
24 claim. *Smith v. Baldwin*, 466 F.3d 805, 811-12 (9th Cir. 2006). The Supreme Court
25 described the gateway showing in *Schlup*, 513 U.S. at 315-16, as a less stringent standard
26 than a substantive claim of actual innocence. *See also Carriger v. Stewart*, 132 F.3d 463,
27 476 (9th Cir. 1997) (suggesting that a "habeas petitioner asserting a freestanding innocence
28 claim must go beyond demonstrating doubt about his guilt and must affirmatively prove that

1 he is innocent.”). If Petitioner passes through the *Schlup* gateway, the court is only
2 permitted to review his underlying constitutional claims. *Smith*, 466 F.3d at 807. The
3 fundamental miscarriage of justice exception applies only to a “narrow class of cases” in
4 which a petitioner makes the extraordinary showing that an innocent person was probably
5 convicted due to a constitutional violation. *Schlup v. Delo*, 513 U.S. 298, 231 (1995). To
6 demonstrate a fundamental miscarriage of justice, Petitioner must show that “a constitutional
7 violation has resulted in the conviction of one who is actually innocent.” *Schlup*, 513 U.S. at
8 327. To establish the requisite probability, Petitioner must prove with new reliable evidence
9 that “it is more likely than not that no reasonable juror would have found petitioner guilty
10 beyond a reasonable doubt.” *Schlup*, 513 U.S. at 324, 327. New evidence presented in
11 support of a fundamental miscarriage of justice may include “exculpatory scientific
12 evidence, trustworthy eyewitness accounts, or critical physical evidence that was not
13 presented at trial.” *Id.* at 324, *see also*, *House v. Bell*, 547 U.S. 518 (2006) (stating that a
14 fundamental miscarriage of justice contention must involve evidence that the trial jury did
15 not have before it).

16 Petitioner has not established that, in light of newly discovered evidence, “it is more
17 likely than not that no reasonable juror would have found petitioner guilty beyond a
18 reasonable doubt.” *Schlup*, 513 U.S. at 324, 327.

19 **III. Analysis**

20 The Court will consider the merits of Petitioner’s claims after setting forth the
21 standard of review. As discussed below, whether or not procedurally defaulted, all of
22 Petitioner’s claims lack merit. *See* 28 U.S.C. § 2254(b)(2) (stating that the court may deny a
23 petition for writ of habeas corpus on the merits “notwithstanding the failure of the applicant
24 to exhaust the remedies available in the courts of the State.”) *Id.*

25 **A. Standard of Review**

26 In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
27 (“AEDPA”) which “modified a federal habeas court’s role in reviewing state prisoner
28 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court

1 convictions are given effect to the extent possible under the law.” *Bell v. Cone*, 535 U.S.
2 685, 693 (2002).

3 Under the AEDPA, a federal court may not grant a habeas petition “with respect to
4 any claim that was adjudicated on the merits in state court” unless the state court’s decision
5 was either (1) “contrary to, or involved an unreasonable application of, clearly established
6 Federal law, as determined by the Supreme Court of the United States;” or (2) “based on an
7 unreasonable determination of the facts in light of the evidence presented in the State court
8 proceeding.” 28 U.S.C. § 2254(d)(1),(2); *Carey v. Musladin*, 549 U.S. 70 (2006); *Lockyer v.*
9 *Andrade*, 538 U.S. 63, 75-76 (2003); *Mancebo v. Adams*, 435 F.3d 977, 978 (9th Cir. 2006).

10 To determine whether a state court ruling was “contrary to” or involved an “unreasonable
11 application” of federal law, courts look exclusively to the holdings of the Supreme Court
12 which existed at the time of the state court’s decision. *Mitchell v. Esparza*, 540 U.S. 12, 15-
13 15 (2003); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). Accordingly, the Ninth Circuit has
14 acknowledged that it cannot reverse a state court decision merely because that decision
15 conflicts with Ninth Circuit precedent on a federal constitutional issue. *Brewer v. Hall*, 378
16 F.3d 952, 957 (9th Cir. 2004); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

17 Even if the state court neither explained its ruling nor cited United States Supreme
18 Court authority, the reviewing federal court must nevertheless examine Supreme Court
19 precedent to determine whether the state court reasonably applied federal law. *Early v.*
20 *Packer*, 537 U.S. 3, 8 (2003). The United States Supreme Court has expressly held that
21 citation to federal law is not required and that compliance with the habeas statute “does not
22 even require awareness of our cases, so long as neither the reasoning nor the result of the
23 state-court decision contradicts them.” *Id.*

24 A state court’s decision is “contrary to” federal law if it applies a rule of law “that
25 contradicts the governing law set forth in [Supreme Court] cases or if it confronts a set of
26 facts that are materially indistinguishable from a decision of [the Supreme Court] and
27 nevertheless arrives at a result different from [Supreme Court] precedent.” *Mitchell v.*
28 *Esparza*, 540 U.S. 12, 14 (2003) (citations omitted); *Williams v. Taylor*, 529 U.S. 362, 411

1 (2000).

2 A state court decision is an “unreasonable application of” federal law if the court
3 identifies the correct legal rule, but unreasonably applies that rule to the facts of a particular
4 case. *Williams*, 529 U.S. at 405; *Brown v. Payton*, 544 U.S. 133, 141 (2005). An incorrect
5 application of federal law does not satisfy this standard. *Yarborough v. Alvarado*, 541 U.S.
6 652, 665-66 (2004) (stating that “[r]elief is available under § 2254(d)(1) only if the state
7 court's decision is objectively unreasonable.”) “It is not enough that a federal habeas court,
8 in its independent review of the legal question,” is left with the “firm conviction” that the
9 state court ruling was “erroneous.” *Id.*; *Andrade*, 538 U.S. at 75. Rather, the petitioner must
10 establish that the state court decision is “objectively unreasonable.” *Middleton v. McNeil*,
11 541 U.S. 433 (2004); *Andrade*, 538 U.S. at 76.

12 In conducting an analysis under the AEDPA, the habeas court considers the last
13 reasoned state court decision addressing the claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 803
14 (1991). Additionally, the habeas court presumes that the state court’s factual determinations
15 are correct and petitioner bears the burden of rebutting this presumption by clear and
16 convincing evidence. 28 U.S.C. § 2254(e)(1) (stating that “a determination of factual issues
17 made by a State court shall be presumed to be correct. The applicant shall have the burden
18 of rebutting the presumption of correctness by clear and convincing evidence.”); *Williams v.*
19 *Rhoades*, 354 F.3d 1101, 1106 (9th Cir. 2004).

20 Where a state court decision is deemed “contrary to” or an “unreasonable application
21 of” clearly established federal law, the reviewing court must next determine whether it
22 resulted in constitutional error. *Benn v. Lambert*, 283 F.3d 1040, 1052 n. 6 (9th Cir. 2002).
23 On habeas review, the court assesses the prejudicial impact of most constitutional errors by
24 determining whether they “had substantial and injurious effect or influence in determining
25 the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v.*
26 *United States*, 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 551 U.S. 112 (2007) (*Brecht*
27 standard applies whether or not the state court recognized the error and reviewed it for
28 harmlessness). The *Brecht* harmless error analysis also applies to habeas review of a

1 sentencing error. The test is whether such error had a “substantial and injurious effect” on
2 the sentence. *Calderon v. Coleman*, 525 U.S. 141, 145-57 (1998) (holding that for habeas
3 relief to be granted based on constitutional error in capital penalty phase, error must have
4 had substantial and injurious effect on the jury’s verdict in the penalty phase.); *Hernandez v.*
5 *LaMarque*, 2006 WL 2411441 (N.D.Cal., Aug. 18, 2006) (finding that even if the evidence
6 of three of petitioner’s prior convictions was insufficient, petitioner was not prejudiced by
7 the court’s consideration of those convictions because the trial court found four other prior
8 convictions which would have supported petitioner’s sentence.) The Court will review
9 Petitioner’s claims under the applicable standard of review.

10 **B. Ground One - Due Process Violation**

11 In Ground One, Petitioner argues that the trial court violated his right to due process
12 by failing to hold an evidentiary hearing on his motion to withdraw from the plea agreement
13 (docket # 6 at 6) In his motion to withdraw, Petitioner asserted that the factual bases for his
14 pleas were incorrect. (Respondents’ Exh. V) Specifically, Petitioner explained that the
15 factual bases were incorrect because, contrary to the facts recited by defense counsel during
16 the change-of-plea hearing, Petitioner denied providing Tina Ricketts with a wig or disguise
17 to impersonate Lucinda Maxfield. (Respondents’ Exh. I at 5-8; Exh. V) The trial court
18 denied the motion following oral argument, but not an evidentiary hearing, on the motion.

19 On post-conviction review, Petitioner challenged the trial court’s failure to conduct
20 an evidentiary hearing on the motion to withdraw. (Respondents’ Exh. K) The post-
21 conviction court rejected Petitioner’s claim. (Respondents’ Exh. L) The court noted that
22 Petitioner’s motion to withdraw was supported by “the general facts to which he expected
23 the witnesses to testify.” The court also noted that the motion included “a deposition
24 transcript, and documentation from a forensic laboratory.” (Respondents’ Exh. L at 2) In
25 rejecting Petitioner’s claim, the court found that: “Defense counsel read the factual
26 foundation for both counts into the record, and defendant agreed to the accuracy thereof.”
27 (Respondents’ Exh. L at 2) The court further noted that the “detective who led the
28 investigation . . . did not believe that the victim was involved or that the victim benefitted

1 from the scheme.” (*Id.*) The post-conviction court concluded that Petitioner had “not shown
2 error based on the Court’s denial of his motion to withdraw from the plea agreement”

3 (*Id.*) It further concluded that the court did not abuse its discretion in finding that
4 Petitioner’s pleas were made knowingly, intelligently, and voluntarily. (*Id.* at 2-3)

5 Petitioner has failed to establish that the state court’s decision was contrary to, or
6 involved an unreasonable application of, federal law. 28 U.S.C. § 2254. Petitioner pleaded
7 guilty pursuant to a written plea agreement which the trial court accepted. Where a
8 defendant pleads guilty, review is limited to whether the underlying plea was counseled and
9 voluntary. *United States v. Broce*, 488 U.S. 563, 569 (1989); *Boykin v. Alabama*, 395 U.S.
10 238, 242-43 (1969) (stating that to comport with due process, a guilty plea must be knowing
11 and voluntary); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (“When a criminal defendant
12 has solemnly admitted in open court that he is in fact guilty of the offense of which he is
13 charged, he may not thereafter raise independent claims relating to the deprivation of
14 constitutional rights that occurred prior to the entry of the guilty plea. He may only attack
15 the voluntary and intelligent character of the guilty plea by showing that the advice he
16 received from counsel was [deficient.]”).

17 The record demonstrates that Petitioner knowingly and voluntarily pleaded guilty
18 without force, threats, or promises. (Respondents’ Exh. F) At the change-of-plea hearing,
19 Petitioner advised the court that he had reviewed the charges and the plea agreement with
20 counsel. (Respondents’ Exh. F at 6) Significantly, Petitioner attested to the accuracy of the
21 factual bases for his guilty pleas. (Respondents’ Exh. F at 12-13) Petitioner’s “solemn
22 declarations in open court carry a strong presumption of verity.” *United States v. Rubalcaba*,
23 811 F.2d 491, 494 (9th Cir. 1987) (rejecting claim of involuntariness of guilty plea). In
24 accepting Petitioner’s guilty plea, the court noted that Petitioner had acknowledged that he
25 was guilty as charged, there was a factual basis for Petitioner’s pleas, and that he was aware
26 of his rights and waived those rights knowingly and voluntarily. (Respondents’ Exh. F at
27 14)

28

1 During the sentencing hearing, Scottsdale police detective, Paul Arnold, testified that
2 he did not believe Lucinda Maxfield, the victim, was involved in the mortgage scheme.
3 (Respondents' Exh. I at 15-17) Arnold testified that Petitioner provided crack cocaine to
4 Maxfield to keep her in a drug-induced state so she would not be aware that Petitioner and
5 Ricketts were obtaining a mortgage on Maxfield's property. (Respondents' Exh. I at 16)
6 This testimony was consistent with the factual bases for Petitioner's guilty pleas provided at
7 the change-of-plea hearing.

8 Petitioner has not established that the post-conviction court's rejection of his claim
9 that he was entitled to withdraw from his guilty pleas due to the inaccurate factual bases is
10 contrary to, or rests on an unreasonable application of, federal law. Although the state court
11 neither explained its ruling nor cited United States Supreme Court precedent, this Court
12 must look to Supreme Court precedent to determine whether the decision was a reasonable
13 application of federal law. *Early v. Packer*, 537 U.S. 3, 8 (2002). The Supreme Court has
14 held that citation to federal law is not required and that "a state court need not even be aware
15 of [Supreme Court] precedent, 'so long as neither the reasoning nor the result of the state-
16 court decision contradicts them.'" *Mitchell v. Esparaza*, 540 U.S. 12, 16 (2003) (citing
17 *Early*, 537 U.S. at 8).

18 First, any deficiency in the factual bases for Petitioner's guilty pleas does not give
19 rise to a constitutional violation. In federal court, Federal Rule of Criminal Procedure 11
20 requires that there be a factual basis for a guilty plea. Similarly, Arizona Rule of Criminal
21 Procedure Rule 17.3 requires that, before the trial court may accept a guilty plea, it must
22 satisfy itself that there is a factual basis for the plea. *State v. Herndon*, 109 Ariz. 147, 148,
23 506 P.2d 1041, 1042 (1973). However, neither the Rule 11 nor the Ariz.R.Crim. P. 17.3
24 procedure are "constitutionally mandated." *McCarthy v. United States*, 394 U.S. 459, 465
25 (1969). In other words, state courts are not constitutionally required to establish a factual
26 basis for an otherwise voluntary and intelligent guilty plea. *See North Carolina v. Alford*,
27 400 U.S. 25, 37-38 (1970); *Rodriguez v. Ricketts*, 777 F.2d 527, 528 (9th Cir. 1985)
28 (concluding that "the due process clause does not impose on a state court the duty to

1 establish a factual basis for a guilty plea absent special circumstances.”) Accordingly, to the
2 extent that Petitioner challenges the state court’s failure to comply with Ariz.R.Crim.P. 17.3,
3 that claim is based solely on state law and is not cognizable on habeas corpus review. *See*
4 *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (explaining that “it is not the province of a
5 federal habeas court to reexamine state-court determinations on state-law questions.”).

6 Moreover, the trial court’s rejection of Petitioner’s motion to withdraw from the
7 guilty plea was not contrary to, or an unreasonable application of federal law, or based on an
8 unreasonable determination of the facts. During the change-of-plea hearing, Petitioner
9 himself advised the court that the factual bases for his pleas were accurate. Specifically,
10 after counsel articulated the factual bases for the pleas, the court asked Petitioner if those
11 facts were true. Petitioner responded affirmatively as to the factual basis for his guilty plea
12 on each count. (Respondents’ Exh. F at 12, 13) In *Blackledge v. Allison*, 431 U.S. 63, 73-
13 74 (1977), the Supreme Court stated that although the defendant’s representations at the time
14 of the plea are not “invariably insurmountable,” when a defendant later challenges the
15 voluntariness of his plea, the defendant’s representations, and any findings made by the trial
16 court accepting the plea, “constitute a formidable barrier Solemn declarations in open
17 court carry a strong presumption of verity.” *See also Chizen v. Hunter*, 809 F.2d 560, 562
18 (9th Cir. 1986).

19 As previously stated, Petitioner argues that the trial court erred by failing to conduct
20 an evidentiary hearing on Petitioner’s motion to withdraw from the plea agreement based on
21 his assertion that the factual bases for those pleas were inaccurate. Had that trial court held
22 an evidentiary hearing, Petitioner essentially would have had testified that he had lied to the
23 trial court during the change-of-plea hearing when he told the court that the factual bases for
24 his guilty pleas were accurate. The court would have likely found this testimony unreliable.
25 *See Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. 1984). Moreover, Petitioner’s
26 credibility would have been impeached by the fact that during the change-of-plea hearing, he
27 had the opportunity to explain any inaccuracies in the factual bases for his pleas, but rather
28 stated that:

1 I really don't have anything to say. It's a shame people [are] not interested
2 in the truth, you know. We make up all these little stories but nobody knows
the truth. It's really sad. But I see no other thing.

3 (Respondents' Exh. I at 19)

4 Finally, the record before the state court supported Petitioner's guilty pleas. Under
5 Arizona law, the factual basis for a guilty plea may be determined from the extended record,
6 including the pre-sentence report, preliminary hearing transcripts, the defendants'
7 statements, proceedings before the grand jury, and other sources. *State v. Varela*, 120 Ariz.
8 596, 598, 587 P.2d 1173, 1175 (Ariz. 1978). During the change-of-plea hearing, Petitioner
9 advised the court that the factual bases for his guilty pleas were accurate. Petitioner's
10 subsequent statement that Maxfield was involved in the scam and that he did not provide
11 Ricketts with a disguise to impersonate Maxfield, were contrary to the record. At the
12 sentencing hearing, Scottsdale police detective Arnold advised the court that, in view of the
13 evidence he had reviewed, Maxfield was not involved in the mortgage fraud and Petitioner
14 was the "mastermind" of the scheme. (Respondents' Exh. I at 15-17) Petitioner's
15 involvement with co-defendant Ricketts in committing the crimes against Maxfield was
16 detailed in the police reports, which were cited in the pre-sentence report. (Respondents'
17 Exh. S at 1)

18 Petitioner has not established that, if the court had held an evidentiary hearing on his
19 motion to withdraw from the plea agreement, evidence would have been presented that
20 would have called into question the accuracy of the factual bases articulated by defense
21 counsel during the change-of-plea hearing. The pre-sentence report indicates that Ricketts
22 pled guilty to Count One and to Count Five, taking the identity of another. (Respondents'
23 Exh. S at 2) The addendum to Ricketts' plea agreement, which set forth the factual bases for
24 her guilty pleas, was attached to the State's response to the Motion to Withdraw.
25 (Respondents' Exh. T) That written factual basis establishes that: (1) the mortgage was
26 obtained without Maxfield's knowledge or permission; (2) Ricketts pretended to be
27 Maxfield; and (3) Ricketts wore a blonde wig provided by Petitioner as part of her disguise.
28 (Respondents' Exh. T)

1 Furthermore, even if evidence was presented indicating that Maxfield was somehow
2 involved in the mortgage scheme or that Ricketts created her disguise by herself, there
3 would still be a sufficient factual basis for Petitioner’s guilty plea. Petitioner knew about the
4 scheme and benefitted when proceeds from the mortgage were wired to his “Richard Self”
5 account. At sentencing, Petitioner’s counsel conceded that any participation by Maxfield in
6 the scheme, “does not exclude or excuse Mr. Jernigan’s participation in this”
7 (Respondents’ Exh. I at 19-20) Additionally, the pre-sentence report noted that Petitioner
8 admitted participating in the fraud, but attempted to minimize his culpability by claiming
9 that he “did not initiate or organize this fraud.” (Respondents’ Exh. S at 3)

10 In view of foregoing, Petitioner has not shown that the state court’s rejection of his
11 challenge to the trial court’s denial of his motion to withdraw his guilty pleas was contrary
12 to, or an unreasonable application of, federal law.

13 **B. Ground Two**

14 In Ground Two, Petitioner asserts that trial counsel, Susan Maga, was ineffective at
15 the change-of-plea hearing because she “provided an incorrect factual basis for the guilty
16 plea.” (docket # 6 at 7) Petitioner argues that the incorrect factual basis led the “court to
17 conclude that petitioner was the mastermind behind the crime and his sentence was
18 aggravated accordingly to a superaggravated sentence of 16.25 years.” (docket # 6 at 7)

19 The controlling Supreme Court precedent on claims of ineffective assistance of
20 counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner
21 must show that counsel’s performance was objectively deficient and that counsel’s deficient
22 performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687; *Hart v. Gomez*, 174 F.3d
23 1067, 1069 (9th Cir. 1999). To be deficient, counsel’s performance must fall “outside the
24 wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. When
25 reviewing counsel’s performance, the court engages a strong presumption that counsel
26 rendered adequate assistance and exercised reasonable professional judgment. *Strickland*,
27 466 U.S. at 690. “A fair assessment of attorney performance requires that every effort be
28 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of

1 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the
2 time.” *Strickland*, 466 U.S. at 689. Review of counsel’s performance is “extremely
3 limited.” *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir. 1998), *rev’d on other*
4 *grounds*, 525 U.S. 141 (1998). “A convicted defendant making a claim of ineffective
5 assistance must identify the acts or omissions of counsel that are alleged not to have been the
6 result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690. Acts or omissions
7 that “might be considered sound trial strategy” do not constitute ineffective assistance of
8 counsel. *Strickland*, 466 U.S. at 689.

9 To establish a Sixth Amendment violation, petitioner must also establish that he
10 suffered prejudice as a result of counsel’s deficient performance. *Strickland*, 466 U.S. at
11 691-92; *United States v. Gonzalez-Lopez*, 548 U.S. 140,147 (2006) (stating that “a violation
12 of the Sixth Amendment right to effective representation is not ‘complete’ until the
13 defendant is prejudiced.”) To show prejudice, petitioner must demonstrate a “reasonable
14 probability that, but for counsel’s unprofessional errors, the result of the proceeding would
15 have been different. A reasonable probability is a probability sufficient to undermine
16 confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Hart*, 174 F.3d at 1069; *Ortiz v.*
17 *Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). To prove prejudice in the context of a guilty
18 plea, petitioner must establish a reasonable probability that, but for counsel’s deficient
19 performance, he would not have accepted the offer but would have proceeded to trial.
20 *Strickland*, 466 U.S. at 693. The court may proceed directly to the prejudice prong. *Jackson*
21 *v. Calderon*, 211 F.3d 1148, 1155 n. 3 (9th Cir. 2000) (citing *Strickland*, 466 U.S. at 697).
22 The court, however, may not assume prejudice solely from counsel’s allegedly deficient
23 performance. *Jackson*, 211 F.3d at 1155.

24 Petitioner fails to establish that counsel was ineffective. First, he has not shown that
25 counsel’s performance was deficient. The factual bases which attorney Maga set forth
26 during the change-of-plea hearing were consistent with the record. The factual bases were
27 consistent with the police reports and with the factual bases for the guilty pleas entered by
28 co-defendant Ricketts. (Respondents’ Exh. S at 1-2, Exh. T) During a settlement

1 conference, the prosecutor described the facts the State would prove at Petitioner's trial.
2 (Respondents' Exh. U at 4-6) Petitioner did not contest the State's case, but rather entered a
3 plea agreement. Additionally, at the change-of-plea hearing Petitioner advised the court
4 that the factual bases articulated by counsel were accurate. (Respondents' Exh. F at 12, 13)

5 Petitioner has not presented any evidence supporting his allegation the factual bases
6 for his guilty pleas were false, that Maxfield was involved in the scheme, or that he did not
7 provide Ricketts with a blonde wig or otherwise assisted her impersonate Maxfield. Thus,
8 Petitioner has not shown that counsel's performance was deficient with respect to the factual
9 bases for Petitioner's guilty pleas.

10 Additionally, even assuming counsel's performance was deficient, Petitioner has not
11 shown that he was prejudiced thereby. In other words, he has not established that but for
12 counsel's deficient performance, he would have rejected the plea and proceeded to trial. *See*
13 *Wanatee v. Ault*, 101 F.Supp.2d 1189, 1204 (N.D. Iowa 2000) (to show prejudice resulting
14 from counsel's deficient advice, petitioner must offer more than self-serving statements;
15 rather he must present credible, nonconclusory evidence that he would not have pleaded
16 guilty had he been properly advised). Furthermore, even if counsel articulated inaccurate
17 factual bases, those inaccuracies did not affect Petitioner's decision to plead guilty. Rather,
18 Petitioner pled guilty despite his alleged knowledge that the factual bases were not true. *See*
19 *Lipscomb v. Secretary*, 2008 WL 434881, * 10 (M.D.Fla., Feb. 14, 2008) (stating that
20 "Lipscomb's acceptance of the favorable plea bargain was an informed election to forego
21 further pursuit of his known claim that the victim's accusations were not true.") Also,
22 Petitioner did not deny involvement in the scheme. Rather, he admitted participating in the
23 scheme, but claimed that he "did not initiate or organize [it]." (Respondents' Exh. S at 3)
24 He also conceded that any participation in the scheme by Maxfield, did not "exclude or
25 excuse" his participation. (Respondents' Exh. I at 19-20)

26 Petitioner also argues that the alleged inaccuracies in the factual bases articulated by
27 counsel led the court to believe Petitioner was the "mastermind," and to impose a super-
28 aggravated sentence. (docket # 6 at 7) Contrary to Petitioner's assertion, the aggravated

1 sentence was not based on the court’s conclusion that Petitioner was the mastermind behind
2 the crime. Rather, the court found the following aggravating circumstances: (1) Petitioner’s
3 1994 conviction, which Petitioner admitted; (2) the presence of an accomplice; and (3) the
4 offense was committed for pecuniary gain. (Respondents’ Exh. I at 22) Thus, even if
5 defense counsel’s factual bases wrongly led the court to consider Petitioner the mastermind,
6 Petitioner was not prejudiced because this conclusion was unrelated to the aggravating
7 circumstances supporting Petitioner’s sentence. Moreover, even if the court concluded that
8 Petitioner was the mastermind, there was sufficient evidence, aside from the factual bases set
9 forth by defense counsel, from which the court could have reached that conclusion. The
10 presentence report indicated that Petitioner orchestrated the scheme and that the State had
11 made a more favorable plea offer to co-defendant Ricketts. (Respondents’ Exh. S at 1-3)
12 Additionally, Scottsdale police detective Arnold testified at sentencing that “the fact that
13 [Petitioner] opened up a bank account using fictitious information, had a considerable
14 amount of money wire transferred after directing Miss Ricketts to initiate that wire transfer
15 to his account at Bank of America, then withdrew funds from the account, clearly led me to
16 believe that he was the mastermind, that he did orchestrate and benefit from this.”
17 (Respondents’ Exh. I at 16-17)

18 Additionally, Petitioner’s subsequent counsel, Ms. Capozzi, made the court aware of
19 Petitioner’s position regarding his role in the scam. At sentencing, she told the court, “it’s
20 my client’s strong position that Lucinda Maxfield was very much involved in this . . . That,
21 I understand, does not exclude or excuse Mr. Jernigan’s participation in this, but I do believe
22 those are some of the facts he’s alluding to in this case.” (Respondents’ Exh. I at 19-20) The
23 presentence report notes that, although Petitioner admitted participating in the fraud, he
24 claimed that he “did not initiate or organize [it].” (Respondents’ Exh. S at 3) Thus, even if
25 counsel’s factual bases inaccurately described Petitioner’s role in the scheme, any
26 inaccuracy was minimized by Petitioner’s statements in the presentence report and attorney
27 Capozzi’s rebuttal at sentencing to the State’s “mastermind” theory. *See Farrow v. United*
28 *States*, 580 F.3d 1339, 1361 (9th Cir. 1978).

1 In conclusion, Petitioner fails to establish that counsel was ineffective with respect to
2 the factual bases for his guilty pleas or for leading the court to believe that Petitioner was the
3 mastermind behind the mortgage scheme.

4 **C. Ground Three**

5 In Ground Three, Petitioner asserts that counsel was ineffective for (a) not
6 subpoenaing witness to support Petitioner's motion to withdraw from the plea agreement;
7 and (b) not objecting to the trial court's failure to give advance notice that it intended to
8 impose an exceptionally aggravated sentence on Count 1. (docket # 6 at 8)

9 The controlling Supreme Court precedent on claims of ineffective assistance of
10 counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner
11 must show that counsel's performance was objectively deficient and that counsel's deficient
12 performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687; *Hart v. Gomez*, 174 F.3d
13 1067, 1069 (9th Cir. 1999). To be deficient, counsel's performance must fall "outside the
14 wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. When
15 reviewing counsel's performance, the court engages a strong presumption that counsel
16 rendered adequate assistance and exercised reasonable professional judgment. *Strickland*,
17 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be
18 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
19 counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the
20 time." *Strickland*, 466 U.S. at 689. Review of counsel's performance is "extremely
21 limited." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir. 1998), *rev'd on other*
22 *grounds*, 525 U.S. 141 (1998). Acts or omissions that "might be considered sound trial
23 strategy" do not constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689.

24 To establish a Sixth Amendment violation, petitioner must also establish that he
25 suffered prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at
26 691-92; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (stating that "a violation
27 of the Sixth Amendment right to effective representation is not 'complete' until the
28 defendant is prejudiced.") To show prejudice, petitioner must demonstrate a "reasonable

1 probability that, but for counsel’s unprofessional errors, the result of the proceeding would
2 have been different. A reasonable probability is a probability sufficient to undermine
3 confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Hart*, 174 F.3d at 1069; *Ortiz v.*
4 *Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). The court may proceed directly to the prejudice
5 prong. *Jackson v. Calderon*, 211 F.3d 1148, 1155 n. 3 (9th Cir. 2000) (citing *Strickland*, 466
6 U.S. at 697). The court, however, may not assume prejudice solely from counsel’s allegedly
7 deficient performance. *Jackson*, 211 F.3d at 1155.

8 Petitioner challenges attorney Capozzi’s failure to subpoena the following four
9 people as witnesses to testify in support of his motion to withdraw from the plea agreement:
10 Lucinda Maxfield, David Robinson, William Flynn, and Stacey Scaife. (docket # 6 at 9)
11 Whether to subpoena a witness is a strategic decision based on counsel’s professional
12 judgment. *Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980). Counsel in this case
13 attempted to subpoena the foregoing persons, but advised the court that she was “unable to
14 get return of service on those individuals.” (Respondents’ Exh. I at 4) Counsel asked for a
15 continuance, but the court denied the motion because the matter had previously been
16 continued. (Respondents’ Exh. I at 4) Although counsel was unable to secure the
17 attendance of the foregoing individuals in person, she supported the motion to withdraw
18 Petitioner’s guilty pleas with excerpts from Scaife’s deposition in a civil case and forensic
19 documentation. (Respondents’ Exh. V, attachments) In view of the foregoing, counsel’s
20 performance was not deficient.

21 Additionally, Petitioner was not prejudiced by counsel’s alleged deficient
22 performance. The state court found that it did not need the testimony of Maxfield,
23 Robinson, Flynn, or Scaife to decide the motion to withdraw. (Respondents’ Exh. L) The
24 court noted the motion to withdraw from the guilty plea “stated the general facts to which
25 [Petitioner] expected the witnesses to testify and his position.” (Respondents’ Exh. I at 3)
26 The motion also included Scaife’s deposition transcript and documentation from a forensic
27 laboratory regarding signatures by Lucinda Maxfield. (Respondents’ Exh. L at 3; Exh. V,
28 attachment) The court concluded that “Defendant has failed to show a reasonable

1 probability that the result of the proceeding would have been different had counsel secured
2 the attendance of the witnesses at the hearing on the motion to withdraw the plea
3 agreement.” (Respondents’ Exh. L at 3) Petitioner has not shown that the state court’s
4 decision was contrary to, or an unreasonable application, of federal law. 28 U.S.C. §
5 2254(d).

6 Petitioner has not presented any evidence regarding the testimony the four witnesses
7 would have given that would have shown that the factual bases for Petitioner’s guilty pleas
8 were inaccurate. *Morgan v. Bunnell*, 24 F.3d 49, 53 (9th Cir. 1994) (stating that the court
9 was not convinced that testimony of uncalled witnesses would have been helpful.)

10 Petitioner has not presented any evidence indicating that there is a reasonable likelihood that
11 Maxfield would have testified that she was involved in the scheme. Nor is there any
12 indication that co-defendant Robinson would have contradicted the factual bases agreed to
13 by both Ricketts and Petitioner. Indeed, Robinson previously admitted to the police that he
14 received checks from Petitioner in exchange for “keeping the scheme hidden from
15 Maxfield.” (Respondents’ Exh. S at 1) In support of the motion to withdraw, attorney
16 Capozzi submitted excerpts from Scaife’s deposition from a civil case. (Respondents’ Exh.
17 V, attachment) Petitioner has not explained William Flynn’s relationship to this case, or
18 described how his testimony would have persuaded the trial court that the factual bases were
19 inaccurate and that Petitioner should be permitted to withdraw from his guilty pleas. In
20 view of the foregoing, Petitioner fails to show that counsel was ineffective for failing to
21 subpoena witnesses.

22 Petitioner further argues that counsel was ineffective for failing to object to the trial
23 court’s failure to give advance notice that it intended to impose super-aggravated sentence.
24 Even assuming counsel was deficient for failing to raise this issue, Petitioner has not shown
25 prejudice. There is nothing to suggest that, had counsel objected and the court continued
26 sentencing, the court would not have found the three aggravating circumstances or would
27 not have imposed the aggravated sentence.

28

1 **IV. Conclusion**

2 Based on the foregoing, the Amended Petition for Writ of Habeas Corpus be denied
3 and dismissed.

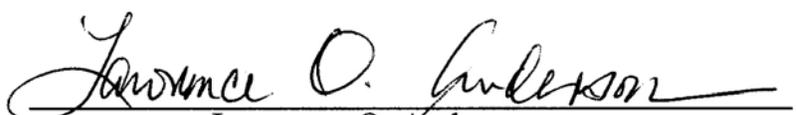
4 Accordingly,

5 **IT IS HEREBY RECOMMENDED** that Petitioner's Amended Petition for Writ of
6 Habeas Corpus (docket # 6) be **DENIED**.

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

20 DATED this 23rd day of April, 2009.

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Lawrence O. Anderson
United States Magistrate Judge