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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8

9 Eugene Boyd Johnson,

10 Petitioner,

11 vs.

12 The State of Arizona, et al.,

13 Respondents.
14

) No. CV-10-2096-PHX-GMS

) **ORDER**

15

16 Pending before this Court is a Petition for Writ of Habeas Corpus filed by Petitioner
17 Eugene Boyd Johnson. (Doc. 1). Magistrate Judge Steven P. Logan has issued a Report and
18 Recommendation (“R & R”) in which he recommended that the Court deny the petition with
19 prejudice; Petitioner has objected to the R & R. (Docs. 28, 29). Because objections have been
20 filed, the Court will review the petition de novo. *See United States v. Reyna-Tapia*, 328 F.3d
21 1114, 1121 (9th Cir.2003) (en banc). For the following reasons, the Court accepts the report
22 and recommendation, and denies the petition.

23 **BACKGROUND**

24 On August 30, 2004, Petitioner was found guilty after a jury trial in Superior Court,
25 Maricopa County, of one count of robbery and two counts of armed robbery. (Doc. 17-1, Ex.
26 B). Petitioner was sentenced to 31.5 years in prison on December 2, 2004. (Doc. 17-1, Ex.
27 C). Petitioner appealed his conviction, and the Arizona Court of Appeals affirmed the
28 conviction but added one day to his pre-sentence incarceration credit. (Doc. 17-1, Ex. A).

1 The Arizona Supreme Court denied review of the appeal. (Doc. 17-2, Ex. F).

2 On June 15, 2007, Petitioner filed a Notice of Post-Conviction Relief in the Maricopa
3 County Superior Court. (Doc. 23, Ex. R). After his court-appointed attorney stated that she
4 was unable to find any cause for relief in the record, Petitioner filed a pro se petition on
5 January 28, 2008. (Doc. 18-1, Ex. H). The petition was denied on April 21, 2008, and the
6 Court of Appeals denied review of Petitioner's appeal on October 2, 2009. (Doc. 18-4, Ex.
7 J; Doc. 19-1, Ex. M).

8 Petitioner filed a Petition for Writ of Habeas Corpus in this Court on September 29,
9 2010, and a Second Amended Petition for Writ of Habeas Corpus on January 27, 2011.
10 (Docs. 1, 10). Petitioner alleges nine grounds for relief, as follows: 1) The state prosecutor
11 committed misconduct during jury selection, 2) Petitioner's rights under the Confrontation
12 Clause of the Sixth Amendment were violated at trial, 3) Petitioner's right to compulsory
13 process was violated, 4) Petitioner's due process rights were violated because he was
14 convicted even though the evidence was insufficient to support a conviction, 5) Petitioner
15 never received an evidentiary hearing in his previous petitions, 6) Petitioner's trial counsel
16 provided ineffective assistance, 7) Petitioner's direct appeal attorney provided ineffective
17 assistance, 8) Petitioner's direct appeal attorney had a conflict of interest, and 9) Petitioner
18 was denied his due process rights by evidentiary rulings at trial. (Doc. 10). Respondent filed
19 a timely response, and Petitioner filed a 138-page reply. (Docs. 17, 26).

20 On March 27, 2012, Magistrate Judge Logan issued an R & R in which he
21 recommends that the Court find that Petitioner had failed to exhaust Grounds One, Three,
22 Four, and Eight, and that he was procedurally defaulted from returning to state court to
23 pursue them. Magistrate Judge Logan further recommends that the Court find that Ground
24 Five and Ground Nine are not cognizable on habeas review, and that it dismiss Grounds Two,
25 Six, and Seven on the merits.

1 **DISCUSSION**

2 **I. Legal Standard**

3 The writ of habeas corpus affords relief to persons in custody in violation of the
4 Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241(c)(3) (2006). The writ
5 may be granted by “the Supreme Court, any justice thereof, the district courts and any circuit
6 judge within their respective jurisdictions.” 28 U.S.C. § 2241(a). Review of Petitions for
7 Habeas Corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996
8 (“AEDPA”). 28 U.S.C. § 2244 *et seq.* (2006).

9 **A. Statute of Limitations under AEDPA**

10 Under AEDPA, petitions for habeas corpus must be filed within one year of the start
11 of the limitations period. *See Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (AEDPA
12 “establishes a 1-year statute of limitations for filing a federal habeas corpus petition”) (citing
13 28 U.S.C. § 2244(d)(1)). The limitation period begins to run when the state conviction
14 becomes final—either “upon ‘the conclusion of direct review or the expiration of the time
15 for seeking such review.’” *White v. Klitzkie*, 281 F.3d 920, 923 (9th Cir. 2002) (quoting 28
16 U.S.C. § 2244(d)(1)(A)). The limitations period is subject to statutory tolling under the terms
17 of AEDPA or equitable tolling under extraordinary circumstances.

18 **B. Exhaustion of State Remedies**

19 Habeas relief is not available to petitioners who do not properly exhaust their state
20 court procedural remedies prior to filing their federal petitions. 28 U.S.C. § 2254(b)(1). In
21 order to satisfy the exhaustion requirement, a petitioner must give state courts the opportunity
22 to pass upon and correct alleged violations of the prisoner’s federal rights. *Duncan v. Henry*,
23 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)); *see Coleman*
24 *v. Thompson*, 501 U.S. 722, 731 (1991) (holding that “a state prisoner’s federal habeas
25 petition should be dismissed if the prisoner has not exhausted available state remedies as to
26 any of his federal claims”) (citations omitted); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th
27 Cir. 1999) (“A habeas petitioner must give the state courts the first opportunity to review any
28 claim of federal constitutional error before seeking federal habeas review of that claim.”)

1 (citing *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982)). Except in cases “carrying a life
2 sentence or the death penalty, ‘claims of Arizona state prisoners are exhausted for the
3 purposes of federal habeas once the Arizona State Court of Appeals has ruled on them.’”
4 *Castillo v. McFadden*, 399 F.3d 993, 998 n.3 (9th Cir. 2005) (quoting *Swoopes v. Sublett*,
5 196 F.3d 1008, 1010 (9th Cir. 1999)).¹

6 **1. Fair Presentation**

7 To provide the state with the necessary opportunity to review the claim a petitioner
8 must fairly present the claim in each appropriate state court. A claim is not fairly presented
9 unless a petitioner “explicitly indicated” that “the claim was a *federal* one” in the state court
10 litigation. *Lyons v. Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *as amended*, 247 F.3d 904
11 (9th Cir. 2001) (emphasis in original). A petitioner explicitly indicates that a claim is federal
12 by including “reference to a specific federal constitutional guarantee, as well as a statement
13 of the facts that entitle the petitioner to relief.” *Gray v. Netherland*, 518 U.S. 152, 162–63
14 (1996). A petitioner does not fairly present a state court with a federal claim merely by
15 including “general appeals to broad constitutional principles, such as due process, equal
16 protection, and the right to a fair trial.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999)
17 (citing *Gray*, 518 U.S. at 162–63).

18 **2. Excuse from Exhaustion Requirement**

19 In certain limited circumstances, habeas petitions may be considered by the federal
20 court, even if the petitioner did not exhaust the claims by fairly presenting them in state
21 court. Excuse from exhaustion is available when either “(i) there is an absence of available
22 State corrective process; or (ii) circumstances exist that render such process ineffective to
23 protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B). The Ninth Circuit has held
24

25 ¹ Failure to exhaust state court remedies does not prevent a court from denying a petition
26 on the merits should it deem such denial proper. 28 U.S.C. § 2254(b)(2); *see Duncan v.*
27 *Walker*, 533 U.S. 167, 183 (2001) (Souter, J., concurring) (stating that the “AEDPA gives
28 a district court the alternative of simply denying a petition containing unexhausted but
nonmeritorious claims”).

1 that 28 U.S.C. § 2254(b)(1)(B)(ii) may be satisfied when “the highest state court has recently
2 addressed the issue raised in the petition and resolved it adversely to the petitioner.” *Sweet*
3 *v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981). It may also be satisfied when “there is no
4 opportunity to obtain redress in state court or if the corrective process is so clearly deficient
5 as to render futile any effort to obtain relief.” *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981).

6 **C. Procedural Default**

7 Habeas review is also not available to petitioners whose claims are procedurally
8 defaulted. A claim may be procedurally defaulted in one of two ways. First, a claim is
9 procedurally defaulted when it was raised in state court, but the state court denied relief
10 based upon “an independent and adequate state procedural rule.” *Coleman v. Thompson*, 501
11 U.S. 722, 750 (1991). Second, claims that were not exhausted in state court are procedurally
12 defaulted if the district court determines that a return to state court would be futile because
13 procedural rules would eliminate “the likelihood that a state court will accord the habeas
14 petitioner a hearing on the merits of the claim.” *Harris v. Reed*, 489 U.S. 255, 268–70 (1989)
15 (O’Connor, J., concurring). A federal court may only hear a claim that has been procedurally
16 defaulted if a petitioner “can demonstrate cause for the default and actual prejudice as a result
17 of the alleged violation of federal law, or demonstrate that failure to consider the claims will
18 result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750.

19 **2. Miscarriage of Justice**

20 Absent cause and prejudice for a procedural default, a petitioner must show that
21 failing to consider a habeas petition would result in a fundamental miscarriage of justice. To
22 meet this standard, a petitioner must show that “a constitutional violation has probably
23 resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327
24 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). A miscarriage of justice claim
25 is not a constitutional claim for relief, but merely “a gateway through which a habeas
26 petitioner must pass to have his otherwise barred constitutional claim considered on the
27 merits.” *Schlup*, 513 U.S. at 315 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

28 **D. Standard of Review**

1 A court reviewing a petition alleging that a state court violated a constitutional rule
2 can grant relief only if the state court decision was “contrary to, or involved an unreasonable
3 application of” clearly established law. *Williams v. Taylor*, 529 U.S. 362, 391 (2000). Clearly
4 established federal law consists of “the governing principle or principles set forth by the
5 Supreme Court at the time the state court renders its decision.” *Lockyer v. Andrade*, 538 U.S.
6 63, 71–72 (2003) (citing *Bell v. Cone*, 535 U.S. 685, 698 (2002)). Habeas is not granted
7 merely when a federal court disagrees with a state court’s constitutional interpretation: “the
8 most important point is that an *unreasonable* application of federal law is different than an
9 *incorrect* application of federal law.” *Williams*, 529 U.S. at 410 (emphasis in original).

10 **II. Analysis**

11 In the R & R, Magistrate Judge Logan recommended that the Court find that four of
12 Petitioner’s grounds for relief were never properly exhausted and have been procedurally
13 defaulted, two were not cognizable on habeas review, and three should be dismissed on the
14 merits. (Doc. 28). The Court has reviewed the original petition, Respondents’ answer,
15 Petitioner’s reply, Magistrate Judge Logan’s R & R, and Petitioner’s objections. (Docs. 10,
16 17, 26, 28, 29). After reviewing the R & R de novo in light of Petitioner’s objections, the
17 Court agrees with Magistrate Judge Logan and adopts all of the findings of the R & R. The
18 discussion below addresses only those issues specifically argued in Petitioner’s objections.

19 **A. Procedurally Defaulted Claims**

20 The R & R recommends that the Court find that Grounds One, Three, Four, and Eight
21 were not fairly presented in state court, and that because Petitioner would be barred from
22 bringing them in state court now, they are procedurally defaulted. The claims are discussed
23 below.

24 **1. Ground One**

25 In Ground One, petitioner claimed that the state prosecutor engaged in misconduct
26 when he asked potential jurors whether they would be able to find Petitioner guilty of armed
27 robbery even if there was no evidence that Petitioner was actually armed. (Doc. 10 at 5).
28 Petitioner did not bring this issue as a direct claim in any state court proceeding; instead he

1 claimed in his Rule 32 proceeding that his attorney was ineffective for not bringing it. (Doc.
2 18-1, Ex. H). In his objections, Petitioner argues the merits of the claim, but does not contest
3 the fact that he did not raise it on appeal. Instead, he again frames the claim within the
4 context of an ineffective assistance claim, writing that “[b]y not filing arguments on this issue
5 Appellate Counsel failed to defend the Petitioner’s Constitutional Rights and prejudiced any
6 further appeals on the issues.” (Doc. 29 at 3). As discussed below, the Court agrees with the
7 R & R that the ineffective assistance of counsel claim is meritless and does not provide an
8 excuse for the procedural default on Ground One. Ground One is procedurally defaulted.

9 **2. Ground Three**

10 Petitioner claims that he was denied his right to compulsory process under the Sixth
11 Amendment when his attorney failed to call two alibi witnesses. As Magistrate Judge Logan
12 noted, Petitioner “is challenging the actions of his own counsel, not the actions of the state
13 court or the state prosecutor,” and the claim is therefore better analyzed as part of the
14 ineffective assistance of counsel claim. (Doc. 28 at 8). To the extent that Ground Three
15 alleges denial of compulsory process by a state actor, Magistrate Judge Logan noted that the
16 claim was not fairly presented to state court and has since been procedurally defaulted. (Doc.
17 28 at 9). Petitioner’s objections do not address the fair presentation of this claim, but instead
18 argue the merits. (Doc. 29 at 5). Ground Three is procedurally defaulted.

19 **3. Ground Four**

20 In Ground Four, Petitioner claims that there was never evidence of an actual weapon
21 being used, and that the conviction for armed robbery therefore violated his Due Process
22 rights. (Doc. 10 at 6). As Magistrate Judge Logan notes, Petitioner never raised this claim
23 in any state proceeding, but instead argued in his Rule 32 proceeding that his trial lawyer had
24 been ineffective for not raising it. (Doc. 28 at 9; Doc. 18-1 Ex. H). Petitioner’s objections to
25 Magistrate Judge Logan’s recommendation regarding Ground Four are addressed to his
26 request for an evidentiary hearing, and do not counter the argument that the claim was never
27 presented to state court and has been procedurally defaulted. (Doc. 29 at 5–6). Ground Four
28 is procedurally defaulted.

1 **4. Ground Eight**

2 In Ground Eight, Petitioner argues that his appellate counsel, whom he claims was a
3 colleague of his trial counsel, failed to present claims that the trial counsel was ineffective
4 because of a conflict of interest based on their collegial relationship. (Doc. 10 at 9). As
5 Magistrate Judge Logan noted, Petitioner claims that his appellate counsel suffered from a
6 conflict of interest only in his original Rule 32 proceeding, and did not mention it in his
7 petition for review to the Arizona Court of Appeals. (Doc. 19-1, Ex. L). In his objections,
8 Petitioner again argues the merits of the claim, but does not address the issue of fair
9 presentation or procedural default. (Doc. 19 at 20) (“Bottom line here is Appellate Counsel
10 acted in interest other than this Petitioner and his constitutional rights on direct appeal by
11 refusing to file ineffective assistance on Trial Lawyer and disavowal of this Petitioner’s
12 attempts to do so.”). Ground Eight is procedurally defaulted.

13 **B. Non-Cognizable Claims**

14 Magistrate Judge Logan recommends that Ground Five and Ground Nine both be
15 dismissed because they are not cognizable on habeas review. The claims will be addressed
16 in turn.

17 **1. Ground Five**

18 Petitioner’s Fifth Ground for relief is a request for an evidentiary hearing. Magistrate
19 Judge Logan addressed the request for an evidentiary hearing and recommended that it be
20 denied because the “petition fails to raise any colorable claim for relief.” (Doc. 28 at 19). In
21 his objections, Petitioner states that he “would like to point out that multiple violations
22 constitutional rights and the magnitude of them are facts for this Court to plainly see.” (Doc.
23 29 at 6). As noted above and below, after reviewing the R & R de novo, the Court agrees
24 with its conclusions, and consequentially agrees that there are no grounds for an evidentiary
25 hearing.

26 **2. Ground Nine**

27 In Ground Nine, Petitioner argues that relevant evidence was excluded at trial in
28 violation of Arizona state law, and that he was thereby denied his Due Process rights under

1 federal law. (Doc. 10 at 10). Magistrate Judge Logan notes that Petitioner cited to the
2 Arizona Rules of Evidence, and noted that a petitioner may not “transform a state-law issue
3 into a federal one merely by asserting a violation of due process.” *Langford v. Day*, 110 F.3d
4 1380, 1389 (9th Cir. 1996). In his objections, Petitioner continues to argue that the evidence
5 regarding his physical appearance “clearly proves this Petitioner’s innocence.” (Doc. 29 at
6 20). Petitioner himself, however, describes the claim as comprising “repeated violations of
7 Rule 403 of Arizona Rules of Evidence.” (Doc. 29 at 20). The claim is not cognizable on
8 habeas review.

9 **C. Claims Addressed on the Merits**

10 Magistrate Judge Logan recommends dismissing Ground Two, Ground Six, and
11 Ground Seven under the AEDPA standard of review. *See* 28 U.S.C. § 2254(d).

12 **1. Claim Two**

13 Petitioner claims that his rights under the Confrontation Clause of the Sixth
14 Amendment were violated when a police officer was allowed to testify at trial about the
15 statements of a clerk at one of the stores that was robbed. (Doc. 10 at 6). As Magistrate
16 Logan noted, the Court of Appeals considered this claim and found that one of the statements
17 was admitted as an excited utterance, and other statements were elicited from the police
18 officer by Petitioner’s attorney. (Doc. 28 at 12–13). Applying *Crawford v. Washington*, 541
19 U.S. 36 (2004) and the invited error doctrine, the Court of Appeals found that there was no
20 violation. Magistrate Judge Logan found that the application of *Crawford* was not contrary
21 to clearly established federal law, and that the invited error doctrine was a procedural bar
22 precluding habeas review. (Doc. 28 at 15). In his reply, Petitioner alleges that the prosecutors
23 doctored the surveillance video and reiterates his Confrontation Clause argument, stating that
24 “[f]ace to face confrontation enhances the accuracy of fact finding by reducing the risk that
25 a witness will wrongfully implicate an innocent person.” (Doc. 29 at 4). Petitioner does not
26 address either the excited utterance doctrine or the invited error doctrine, and thereby does
27 not counter the grounds on which Magistrate Judge Logan recommended that Ground One
28 be dismissed. The Court adopts the R & R with respect to Ground Two.

1 **2. Ground Six**

2 In Ground Six, Petitioner alleges that his trial counsel provided ineffective assistance
3 because he a) did not object when the prosecutor asked potential jurors whether they could
4 convict for armed robbery in the absence of a finding that Petitioner was in fact armed, b) did
5 not raise the Confrontation Clause argument, and c) did not call Petitioner’s alibi witnesses.
6 Magistrate Judge Logan discussed the two-prong test of *Strickland v. Washington*, 466 U.S.
7 668 (1984), which requires that an ineffective assistance of counsel claim cannot succeed
8 unless a petitioner shows that a counsel’s performance fell below an objective standard of
9 reasonableness and that there is a reasonable probability that counsel’s errors prejudiced the
10 defendant. (Doc. 28 at 15).

11 Under Arizona law, a person may be convicted of armed robbery even if he is holding
12 only a simulated deadly weapon, and the Arizona Supreme Court has held that suggesting
13 a gun under a piece of clothing qualifies as a simulated deadly weapon. (Doc. 28 at 16). The
14 Court of Appeals thus found that the Confrontation Clause claim was meritless. Therefore,
15 failing to bring the Confrontation Clause claim at trial could not have constituted a deficient
16 performance that prejudiced Petitioner. (*Id.*). Further, the alibi witnesses were duplicative of
17 a witness that was called, and failing to call them “fell within the wide range of reasonable
18 assistance.” (Doc. 28 at 17).

19 In his objections to these determinations by Magistrate Judge Logan, Petitioner cites
20 to cases that affirm that prosecutorial misconduct can constitute a Due Process violation, but
21 does not address the fact that in his particular trial, the conduct of the prosecutor conformed
22 with well-established law. (Doc. 29 at 7). He states only that the Prosecutor used “improper
23 methods,” but offers no support for the statement other than stock citations to prosecutorial
24 misconduct cases. (*Id.*) (emphasis in original). Regarding his claim that his attorney was
25 ineffective because he did not make Petitioner’s Confrontation Clause argument, Petitioner
26 again cites only to general Confrontation Clause cases; he does not discuss the actual grounds
27 on which the claim was found not to be valid. (Doc. 29 at 10). Finally, he reiterates that the
28 alibi witnesses were available to testify, but does not address the finding that their testimony

1 would be duplicative. (Doc. 29 at 10).

2 Petitioner’s objections do not address the grounds upon which the Magistrate Judge
3 recommended that Ground Six be dismissed. With regards to the prosecutorial misconduct
4 claim and the Confrontation Clause claim, the Court adopts the R & R completely. Regarding
5 the claim that the trial attorney was ineffective because he failed to call the alibi witnesses,
6 the Court adopts the R & R but adds one fact from the record not discussed by either party.
7 Petitioner’s trial attorney filed a motion in limine to prevent the state from introducing
8 recorded telephone calls between Petitioner and the witnesses he now states his attorney
9 should have called. (Doc. 19-1, Ex. S at 47–49). On these recorded conversations, Petitioner
10 was speaking to these witnesses “about dates that he was with her and both of them about
11 people who could testify that that’s where he was,” even though “[t]hose dates and those time
12 frames are inconsistent with what each of those witnesses said at a subsequent interview.”
13 (*Id.*). The Court held that so long as the government did not disclose that the tapes were made
14 from jail, they could be introduced for impeachment purposes. (*Id.* at 52). The Court’s ruling
15 further suggests why a competent lawyer would choose not to call Petitioner’s alibi
16 witnesses.

17 **3. Ground Seven**

18 Petitioner claims that his appellate counsel was ineffective because she a) did not raise
19 the prosecutorial misconduct issue, b) did not raise the Confrontation Clause issue, c) did not
20 raise the Compulsory process issue, and d) did not argue that there was insufficient evidence
21 introduced at trial to convict him. (Doc. 10 at 8). Magistrate Judge Logan recommends that
22 the ground be dismissed because a) the prosecutorial misconduct argument was without
23 merit, b) the appellate counsel did raise the Confrontation Clause issue, c) the failure to call
24 alibi witnesses cannot be construed as a Compulsory process claim because the state did not
25 deny Petitioner’s right to call the witnesses, and thus there was no purpose in raising it on
26 appeal, and d) the appellate counsel did raise the issue with regards to one claim, and with
27 regards to the others the claim was meritless. (Doc. 28 at 18–19).

28 In his objections, Petitioner again states the reasons he believes the claims are valid,

1 which were considered and rejected elsewhere in the R & R and in this Order. (Doc. 29 at
2 12–19). He again does not address settled Arizona law that one can be convicted of armed
3 robbery by suggesting that one is armed with a hand under a piece of clothing. *See State v.*
4 *Bousley*, 171 Ariz. 166, 167, 829 P.2d 1212, 1213 (1992). He does not address the grounds
5 upon which the Court of Appeals found there was no Confrontation Clause violation. He
6 does not address the fact that his appellate attorney cannot bring a claim for the denial of
7 compulsory process when his trial attorney elected not to call witnesses. He does not address
8 the fact that his appellate attorney in fact argued that the evidence was insufficient to merit
9 a conviction. Petitioner does not address the reasoning supporting the R & R’s conclusions
10 in his objections, and this Court adopts the reasoning of the R & R.

11 **D. Cause for Procedural Default**

12 In his objections, Petitioner notes correctly that ineffective assistance of counsel can
13 constitute cause for procedural default. (Doc. 29 at 21–22). Since this Court adopts the R &
14 R’s recommendation that there was no ineffective assistance here, Petitioner has shown no
15 cause for procedural default. Petitioner additionally notes that procedural default may be
16 excused when “a constitutional violation has probably resulted in the conviction of a person
17 who is actually innocent.” *Murray*, 477 U.S. at 496. Petitioner states that some of the video
18 evidence that was not shown to the jury “could have revealed suspect had no tattoos on his
19 arms” when Petitioner in fact has tattoos on his arms. Nowhere in the record of this case is
20 there any suggestion that actual exculpatory evidence was withheld from Petitioner, and his
21 musings about what video evidence could have shown do not meet *Murray*’s high standard.
22 Petitioner’s procedurally defaulted claims will not be considered.

23 **E. Certificate of Appealability**

24 Pursuant to Rule 11(a) of the Rules Governing Section 2255 Cases, in the event
25 Movant files an appeal, the Court declines to issue a certificate of appealability because
26 reasonable jurists would not find the Court’s procedural rulings debatable, and would not
27 “find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*
28 *v. McDaniel*, 529 U.S. 473, 484 (2000).

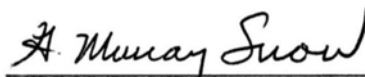
1 **CONCLUSION**

2 Magistrate Judge Logan’s R & R properly concludes that four grounds are
3 procedurally defaulted, two grounds are not cognizable on habeas review, and three grounds
4 should be dismissed on the merits. Petitioner’s objections merely re-argue the merits of his
5 claim and generally do not address the reasoning on which the R & R is based. In those cases
6 where Petitioner does challenge that reasoning, the Court finds that the R & R is correct.

7 **IT IS THEREFORE ORDERED:**

- 8 1. Petitioner’s Amended Petition for the Writ of Habeas Corpus (Doc. 10) is
9 **denied.**
- 10 2. The Report and Recommendation (Doc. 28) is **accepted.**
- 11 3. Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event
12 Petitioner files an appeal, the Court declines to issue a certificate of appealability because
13 reasonable jurists would not find the Court’s procedural ruling debatable. *See Slack v.*
14 *McDaniel*, 529 U.S. 473, 484 (2000).
- 15 4. The Clerk of Court shall **terminate this action.**

16 DATED this 25th day of June, 2012.

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18 _____
19 G. Murray Snow
20 United States District Judge
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