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

8 Carlos Gonzales,

No. CV11-0502-PHX-DGC

9 Petitioner,

**ORDER**

10 vs.

11 Charles L. Ryan, et al.,

12 Respondents.  
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15 Following a jury trial in Maricopa County Superior Court in 2006, Petitioner  
16 Carlos Gonzales was found guilty of second degree murder and aggravated assault.  
17 Doc. 11, Exh. E, F. The trial court sentenced Mr. Gonzales to 20 years in prison for the  
18 murder conviction and a consecutive term of 11.25 years for the aggravated assault  
19 conviction. Doc. 11, Exh. H. The Court also sentenced Petitioner to 9.75 years in prison  
20 for three prior felonies. *Id.*

21 Mr. Gonzales filed a petition for writ of habeas corpus pursuant to  
22 28 U.S.C. § 2254, alleging that the trial court's answer to the jury's question about  
23 accomplice liability and transferred intent was incorrect as a matter of law, thus calling  
24 into question the jury's verdict on the murder charge. Doc. 1 at 6. Mr. Gonzales alleges  
25 that the erroneous answer allowed the jury to convict on a legal theory in contravention  
26 of the Due Process Clause and the Sixth Amendment right to effective assistance of  
27 counsel. *Id.* The Court referred the petition to United States Magistrate Judge Edward C.  
28 Voss for report and recommendation ("R&R"). Doc. 3. Judge Voss recommended that

1 the Court deny the petition because Mr. Gonzales failed to raise the jury question on  
2 direct appeal in state court and failed to present a constitutional or federal issue with  
3 respect to this claim when he raised it for the first time in his state court petition for post-  
4 conviction relief (“PCR”). Doc. 14 at 4. Even construing Mr. Gonzales’ claim as  
5 presenting a constitutional issue, Judge Voss concluded that Mr. Gonzales failed to  
6 exhaust his claim in state court by seeking appellate review. *Id.* at 5. Because the time  
7 had passed for Mr. Gonzales to seek relief in state court, Judge Voss concluded that the  
8 claim was procedurally barred. *Id.*

9 Mr. Gonzales filed objections to the R&R. Doc. 15. For the reasons that follow,  
10 the Court will accept the R&R’s conclusions and deny the petition.

11 **I. Standard of Review.**

12 A party may file specific written objections to the R&R’s proposed findings and  
13 recommendations. The Court must undertake de novo review of those portions of the  
14 R&R to which specific objections are made. The Court may accept, reject, or modify, in  
15 whole or in part, the findings or recommendations made by the Magistrate Judge.  
16 Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

17 **II. Analysis.**

18 Mr. Gonzales objects to the statement in the background section of the R&R that  
19 he filed his habeas petition with this Court on March 14, 2010. Doc. 15 at 3. The Court  
20 finds that Mr. Gonzales filed his petition on March 16, 2011. Doc. 1. The Court will  
21 modify the background section to reflect the correct date. Mr. Gonzales does not object  
22 to any other facts in the background section, and the Court will accept the rest of the  
23 background facts as stated in the R&R.

24 Mr. Gonzales objects to the R&R’s finding of procedural default for his failure to  
25 file a petition for post-conviction relief with the state Court of Appeals because, he  
26 argues, he alleged both cause and prejudice and a fundamental miscarriage of justice, and  
27 the procedural default should be excused. Doc. 15 at 2. Mr. Gonzales argues that he  
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1 properly presented his jury question claim – including the federal theory of the claim – in  
2 his initial petition for post-conviction relief, and that his sole failure to submit his petition  
3 for review by the state Court of Appeals was due not to any fault of his own, but to  
4 abandonment by his post-conviction counsel. Doc. 15 at 4. Mr. Gonzales argues that the  
5 failure of his post-conviction attorney to submit an appeal, thus procedurally defaulting  
6 his claim, caused him prejudice because the constitutional violation at issue infected his  
7 trial. *Id.* at 2. Mr. Gonzales also argues that a miscarriage of justice would result if his  
8 petition is denied because he is actually innocent. *Id.*

9 Judge Voss addressed the question of whether Mr. Gonzales’ procedural default  
10 should be waived due to ineffective assistance of post-conviction counsel and determined  
11 that Mr. Gonzales had not raised this argument in his habeas petition and had not  
12 presented sufficient facts to show that his post-conviction counsel’s actions rose to the  
13 level of a constitutional violation. Doc. 14 at 5 (citing *Coleman v. Thompson*, 501 U.S.  
14 722, 755 (1991) (stating that ineffectiveness assistance of counsel does not show cause to  
15 excuse default when there is no constitutional right to counsel in state collateral review  
16 proceedings)). Mr. Gonzales has presented no specific objections to the R&R’s findings  
17 on this claim that require this Court to exercise de novo review. *See Thomas v. Arn*, 474  
18 U.S. 140, 149, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (stating that no review at all is  
19 required for “any issue that is not the subject of an objection.”); *United States v. Reyna-*  
20 *Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003) (same).

21 Mr. Gonzales has, however, presented new factual evidence for his ineffective  
22 assistance of counsel claim, including that counsel “dropped off the radar” while  
23 remaining counsel of record up to the time of default (Doc. 15 at 3), which requires the  
24 Court to determine whether it will consider these new facts. *See United States v. Howell*,  
25 231 F. 3d 615, 622 (9th Cir. 2000) (emphasizing that “in making a decision on whether to  
26 consider newly offered evidence, the district court must actually exercise its discretion,  
27 rather than summarily accepting or denying the motion.”). The Court will reject Mr.  
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1 Gonzales’ additional factual allegations as moot. Absent a constitutional requirement  
2 that Mr. Gonzales be represented by counsel on collateral review, the Court agrees with  
3 the findings in the R&R that counsel’s failure to file a timely post-conviction petition to  
4 the Arizona Court of Appeals does not constitute a constitutional violation as required for  
5 a waiver of procedural default under the Supreme Court’s decision in *Coleman*. Mr.  
6 Gonzales argues that “the Rules” precluded him from filing his own brief and that he was  
7 “powerless to remedy” counsel’s failure, but Mr. Gonzales does not cite any specific rule.  
8 Doc 15 at 3, 4. Nor has Mr. Gonzales raised the issue of cause for default in his federal  
9 habeas petition. Additionally, Mr. Gonzales raises no specific objections to Judge Voss’s  
10 finding that he failed to show that actual prejudice or a miscarriage of justice would result  
11 from a failure to consider his federal habeas claim on the merits. *See* Doc. 14 at 6. Mr.  
12 Gonzales merely cites to the arguments already made in his reply brief, and rejected by  
13 Judge Voss, that he would be prejudiced by procedural default because the trial court  
14 committed constitutional error and he was actually innocent. *See* Docs. 15 at 4; 14 at 4-5.  
15 Mr. Gonzales’ reference to arguments already presented is ineffective because it fails to  
16 make any specific objection to the findings of Judge Voss. *See Thomas v. Arn*, 474 U.S.  
17 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003);  
18 *Sullivan v. Schriro*, No. CV-04-1517, 2006 WL 1516005 (D. Ariz. May 30, 2006).

19 Mr. Gonzales also argues that the Court should dismiss his petition without  
20 prejudice to allow him to return to state court based on new facts and his ineffective  
21 assistance of counsel claim. Doc. 15 at 5. Mr. Gonzales makes this argument in a  
22 separately titled “Motion for Voluntary Dismissal” made “pursuant to Federal Rule of  
23 Civil Procedure 41.” *Id.* at 7, Doc. 16. Rule 41 allows the Court to dismiss an action  
24 upon plaintiff’s request “on terms that the court determines proper.” Fed. R. Civ. P.  
25 41(a)(2). The Court finds that dismissal is not proper because this Court’s adjudication  
26 of Mr. Gonzales’ petition does not preclude him from seeking remedy on the basis of new  
27 facts and excusable default in state court under Arizona Rule of Criminal  
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1 Procedure 32.1 (e) & (f). *See* Ariz. R. Crim. P. 32.2(b) (noting that adjudication in a  
2 collateral proceeding does not preclude claims brought under Rule 32.1(d)-(h)).

3 **IT IS ORDERED:**

4 1. The date of Mr. Gonzales' petition to this Court as stated in the background  
5 section of the R&R is **modified** to read March 16, 2011.

6 2. Magistrate Judge Edward C. Voss's R&R (Doc. 14) is **accepted**.

7 3. Mr. Gonzales' petition for writ of habeas corpus (Doc. 1) is **denied** with  
8 prejudice.

9 4. Mr. Gonzales' motion for voluntary dismissal (Doc 16) is **denied**.

10 5. A certificate of appealability and leave to proceed *in forma pauperis* are  
11 **denied** because Mr. Gonzlaes has made no substantial showing of the denial of a  
12 constitutional right. *See* 28 U.S.C. § 2253(c)(2).

13 6. The Clerk of the Court is directed to **terminate** this action.

14 Dated this 13th day of December, 2011.

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19 David G. Campbell  
20 United States District Judge  
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