

1 respect to procedural default, the Magistrate Judge found that Petitioner could not “return
2 to the Arizona Court of Appeals to seek review[.]” because such review would not be
3 timely under Arizona Rule of Criminal Procedure 32.9(c), which “requires that a petition
4 for review of the denial of a petition for post-conviction relief be filed ‘[w]ithin 30 days
5 after the final decision of the trial court.’” (*Id.* at 14:23-26).

6 Given that finding of procedural default, the Magistrate Judge necessarily
7 considered whether Petitioner had shown the requisite cause and prejudice to excuse such
8 default. The Magistrate Judge concluded that Petitioner did not establish cause for his
9 procedural default because he did not assert such cause in his reply or in his Petition. In
10 light of that no cause finding, there was no need, as the Magistrate Judge accurately
11 stated, to “examine the merits of Petitioner's claims or the purported ‘prejudice’ to find an
12 absence of cause and prejudice.” (Doc. 13 at 15:24-25) (citing *Engle v. Isaac*, 456 U.S.
13 107, 134 n. 43 (1982)). Finally, addressing actual innocence as cause, because Petitioner
14 did not “assert any basis for a finding that no reasonable juror would have found him
15 guilty[,]” the Magistrate Judge concluded that Petitioner’s “procedurally defaulted claims
16 must be dismissed with prejudice.” (*Id.* at 16:20-22). The Magistrate Judge thus
17 recommended dismissal of this Petition with prejudice and denial of a Certificate of
18 Appealability.

19 *Pro se* petitioner Holmes timely filed objections thereto (Doc. 14). No response
20 was filed. On March 10, 2017, Petitioner filed what the Court deems to be further
21 objections (Doc. 15).³ For the reasons set forth herein, the Court finds Petitioner’s

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23 ³ These objections are not timely. Nonetheless, the Court will briefly address
24 them. Petitioner is claiming, for the first time, that Magistrate Judge Metcalf “abuse[d]
25 his discretion” by filing the R & R three days after this case had been reassigned to this
District Court Judge. (Doc. 15 at 1). Petitioner believes that the foregoing violated his
constitutional rights. (*Id.* at 2).

26 Petitioner misunderstands the process for the assignment in this District of
27 a section 2254 Petition such as his. LRCiv 72.1(c) mandates that such a petition, among
28 others, “to which a District Judge has been assigned shall also be referred by the Clerk of
the Court to a Magistrate Judge according to Local Rules of Civil Procedure, Rule 3.7(e).
That Rule, in turn, provides in relevant part that “[t]he Clerk of the Court must randomly
assign . . . habeas corpus petitions to a District Judge *and* randomly refer them to a
Magistrate Judge.” LRCiv 3.7(e) (emphasis added). When his Petition was filed, in

1 objections to be without merit. The Court thus adopts and accepts the R & R, denies the
2 Petition and dismisses it with prejudice.

3 **I. Background**

4 The R& R provides a detailed recitation of the lengthy and at times somewhat
5 convoluted procedural history of this action, which includes four post-conviction relief
6 (“PCR”) proceedings and a Petition for Review to the Supreme Court. There is no need
7 to repeat that history here, except to clarify one statement in the R & R.

8 The R & R states, “On April 22, 2013, Petitioner filed in the *Arizona Court of*
9 *Appeals* a ‘Motion for Extension of Time to file Petition for Review by Supreme Court’ .
10 . . and a ‘Petition for Review by Supreme Court’[.]” (Doc. 13 at 5:8-10) (emphasis
11 added). In that Petition, as here, Petitioner sought application of the Supreme Court’s
12 decisions in *Frye* and *Lafler*. In any event, actually these two documents were filed in
13 the Supreme Court – not the Court of Appeals.⁴ This inadvertent misstatement does not

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15 accordance with those Rules, the Clerk of the Court assigned this case to District Court
16 Judge Susan R. Bolton and referred it to then Magistrate Judge Steven P. Logan. (Doc.
17 3). After granting Petitioner’s Application to Proceed *In Forma Pauperis*, Judge
18 Bolton referred this matter to then “Magistrate Judge Steven P. Logan pursuant to Rules
19 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report
20 and recommendation.” (Doc. 4 at 4:1-3). After the Petition was fully briefed, but before
21 the issuance of the R & R, then Magistrate Judge Logan was appointed to fill one of
22 several District Court Judge vacancies. Thereafter, Magistrate Judge Metcalf was
reassigned as the referral Magistrate Judge. (Doc. 11). Several months later, when the
newly appointed District Court Judges had all taken their oaths of office, the Clerk of the
Court randomly selected a number of cases for reassignment to the then recently
appointed District Court Judges. This case was among those reassigned from Judge
Bolton to this Court. As can be seen, the assignments and reassignments in this case
were all procedurally and administratively proper and in no way violated any of
Plaintiff’s constitutional rights.

23 ⁴ Admittedly, both the handwritten Motion and Petition include at the top the
24 phrase, “In The Court of Appeals State of Arizona Division One[.]” (Doc. 10-4 at 144
25 and 149). Also handwritten on both documents (presumably by Petitioner or someone
26 acting at his behest), is the Court of Appeals case number for Petitioner’s second PCR
27 proceeding, “No. 1-CA-CR-0268 PRPC[.]” wherein he did *not* raise an IAC based upon
28 *Frye* and *Lafler*. (*Id.*) There is no indication thereon or elsewhere in the record,
however, that either the Motion or the Petition actually was filed in the Arizona Court of
Appeals. Rather, as shown on the face of both documents and the Arizona Supreme
Court’s docket, the Petition and Motion were filed in that Court on April 22, 2013. (*Id.* at
144; 149; and 167). Thereafter, on April 30, 2013, the Supreme Court “granted the
motion to extend[.]” and deemed the Petition to be “filed as of April 22, 2013.” (*Id.* at
163). On August 20, 2013 the Arizona Supreme Court denied the Petition for Review.
(*Id.* at 165).

1 in any way change or diminish Magistrate Judge Metcalf’s sound reasoning. This is
2 because the R & R goes on to accurately explain, and the record establishes, that the
3 Motion for an Extension and the Petition for Review in the fourth PCR proceeding were
4 filed in the Supreme Court and that amounts to a procedural bar.

5 **II. Standard of Review**

6 “The Federal Magistrate Judge Act ‘distinguishes between nondispositive matters
7 under 28 U.S.C. § 636(b)(1)(A) and dispositive matters heard pursuant to 28 U.S.C. §
8 636(b)(1)(B)’ with respect to, *inter alia*, the standard of review.” *Velazquez v. United*
9 *States*, 2014 WL 2738524, at *6 (D.Ariz. June 17, 2014) (quoting *United States v.*
10 *Abonce–Barrera*, 257 F.3d 959, 968 (9th Cir. 2001)). “Generally, non-dispositive
11 motions are subject to review under the clearly erroneous or contrary to law standard, 28
12 U.S.C. § 636(b)(1)(A); and Fed.R.Civ.P. 72(a), whereas dispositive motions are subject
13 to *de novo* review. 28 U.S.C. § 636(b)(1); and Fed.R.Civ.P. 72(b)(3).” *Id.* (internal
14 quotation marks and citation omitted).

15 “Dispositive matters specifically embraced by [28 U.S.C.] § 636(b)(1)(B) include
16 applications for posttrial relief made by individuals convicted of criminal offenses[,]”
17 such as Petitioner. *Velazquez*, 2014 WL 2738524, at *6 (internal quotation marks and
18 citations omitted). “Thus, the governing standard of review here is *de novo*.” *Id.* Under
19 this standard, “[a]lthough a *de novo* hearing is not necessary, the district court must arrive
20 at its own independent conclusion about those portions of the magistrate judge's findings
21 or recommendations to which a party objects.” *Id.* at *7 (internal quotation marks and
22 citations omitted); *see also* Fed.R.Civ.P. 72(b)(3) (“The district judge must determine *de*
23 *novo* any part of the magistrate judge's disposition that has been properly objected to.”);
24 28 U.S.C. § 636(b)(1) (“A judge of the court shall make a *de novo* determination of those
25 portions of the report or specified proposed findings or recommendations to which
26 objection is made.”) With the foregoing firmly in mind, the Court turns to Petitioner’s
27 specific objections to the R & R.

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1 **III. Analysis**

2 **A. Procedural Default**

3 Carefully sorting through Petitioner’s various PCR petitions, the Magistrate Judge
4 “liberally construe[d] the Petition as asserting exhaustion of Petitioner’s state remedies in
5 his fourth PCR proceeding and that petition for review to the Arizona Supreme Court.”
6 (Doc. 13 at 6:24-26). Petitioner does not object to this construction and the Court finds it
7 to be fair and reasonable. What Petitioner does object to though is the Magistrate Judge’s
8 procedural default finding. In particular, Petitioner objects to the finding that he
9 procedurally defaulted as to his fourth PCR petition, by not seeking review in the Court
10 of Appeals and instead seeking Supreme Court review.

11 In making this objection, Petitioner states that the Supreme Court’s orders granting
12 him an extension of time in which to file his Petition for Review, and later denying that
13 Petition, “both identify this Petition for Review to the . . . Supreme Court []as *first being*
14 in the . . . Court of Appeals as 1 CA-CR 11-0268 PRPC.” (Doc. 14 at 3) (emphasis
15 added). The fact that those Supreme Court orders include the Court of Appeals case
16 number from Petitioner’s second PCR petition, does not establish, as Petitioner urges,
17 that he filed and sought review of his fourth such petition in the Court of Appeals prior to
18 seeking Supreme Court review.

19 Petitioner further claims that “supporting documentation *will prove* that while the
20 [Court of Appeals] number was first used in” his second Petition filed in the Court of
21 Appeals in 2001, “for some reason[,] [that same number] was used again in this action.”
22 (Doc. 14 at 3) (emphasis added). If Petitioner had any such supporting documentation, it
23 was his obligation to provide it as part of his Petition. He did not. Regardless, logically
24 it would appear that the Supreme Court’s orders simply reflected the Court of Appeals
25 case number from Petitioner’s second PCR Petition, as that case number was
26 handwritten on the Petition and Motion, both of which Petitioner or someone at his
27 behest drafted. Given that Petitioner filed his third and fourth Petitions for Review while
28 his second still was pending, it is not surprising that he, or someone assisting him,

1 became confused as to which Petition had been filed in which Court and when.

2 In discussing Petitioner's filing of a Petition for Review in the Supreme Court in
3 his fourth PCR proceeding, the Magistrate Judge noted that that Court's "Docket reflects
4 that the . . . Court of Appeals reported that there was no record to be provided in the
5 matter." (Doc. 13 at 5:16-18) (citation omitted). Relying upon the Court of Appeals
6 March 21, 2013 order striking his motion for consideration (Doc. 10-3 at 121), Petitioner
7 challenges the statement that there was no record to be provided in his fourth proceeding.
8 That order, however, pertained to Petitioner's second PCR Petition, not his fourth.
9 Further, the Court of Appeals docket as to Petitioner's second PCR Petition, indicates
10 that pursuant to the Supreme Court's request, a partial record was forwarded to the
11 Supreme Court in that case. (Doc. 10-4 at 30). Even if perhaps there was some
12 confusion as to which Petition was before the Supreme Court, the second or fourth, that
13 does not change the fact that Petitioner's IAC during the plea process based upon *Frye*
14 and *Lafler* was not presented to the Court of Appeals. Indeed, as the Magistrate soundly
15 reasoned, and as set forth below, Petitioner's failure to present that particular IAC to the
16 Court of Appeals barred his ability to seek federal habeas review of such claim.

17 Attempting to show that despite the Magistrate Judge's contrary finding, Petitioner
18 sought Court of Appeals review of his fourth PCR, Petitioner again directs the Court's to
19 the Court of Appeals March 21, 2013 order, wherein that Court struck Petitioner's motion
20 for reconsideration of that Court's February 27, 2013 order denying review of his second
21 PCR – not his fourth. (Doc. 10-4 at 159). Thus, this particular order does nothing to
22 advance Petitioner's argument that the Magistrate Judge erroneously found that Petitioner
23 procedurally defaulted as to his fourth PCR by not first seeking review in the Court of
24 Appeals.

25 Petitioner's objections to the finding of procedural default are even more
26 unpersuasive when the Court considers the Magistrate Judge's sound legal analysis, to
27 which Petitioner did not object. "Presentation at the supreme court level, but not at the
28 intermediate appellate court level was inadequate[.]" the Magistrate Judge found, because

1 "a petitioner must properly raise [his claim] on *every level* of direct review." (Doc. 13 at
2 14:7-9 (quoting *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004)) (emphasis added).
3 The Magistrate Judge further found that "Petitioner's Petition for Review to the Arizona
4 Supreme Court was neither a fair presentation to that court, nor was it sufficient to
5 exhaust an entire round of Arizona's post[-]conviction relief process[]" as to the IAC
6 during plea proceedings based upon *Frye* and *Lafler*. (*Id.* at 14:20-22). The basis for this
7 finding is the well-established principle, relied upon by the Magistrate Judge, that
8 "[s]ubmitting a new claim to the state's highest court in a procedural context in which its
9 merits will not be considered absent special circumstances does not constitute fair
10 presentation.'" (*Id.* at 14:17-19) (quoting *Roettegen v. Copeland*, 33 F.3d 36, 38 (9th Cir.
11 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). In short, upon de novo
12 review, the Court agrees with the Magistrate Judge and finds that Petitioner procedurally
13 defaulted his state remedies on the single ground raised in his Petition, that is, his IAC
14 based upon the plea proceedings.

15 **B. Failure to Transfer Petition for Review**

16 Switching gears, Petitioner is willing to assume for the sake of argument that he
17 did procedurally default by "filing his petition for review in the Arizona Supreme Court
18 instead of the Arizona Court of Appeals[.]" (Doc. 14 at 5). Nevertheless, Petitioner
19 contends that "Arizona law required that the petition for review be given to the Arizona
20 Court of Appeals[.]" (*Id.*) And because that was not done, Petitioner maintains that the
21 "Arizona Supreme Court took action which it had no authority to do and impeded [his]
22 opportunity to procedurally exhaust his State remedies." (*Id.*)

23 In making this argument, Petitioner is relying upon A.R.S. §§ 12-120.22(B) and
24 12-120.23. The former states, "No case, appeal or petition for a writ brought in the
25 supreme court or court of appeals shall be dismissed for the reason only that it was not
26 brought in the proper court or division, but it shall be transferred to the proper court of
27 division." A.R.S. § 12-120.22(B). This statute is inapplicable because the Supreme
28 Court did not dismiss the Petition for Review because it was not brought in the "proper

1 court or division[.]” *See id.* Rather, the Supreme Court denied that Petition without
2 comment. (Doc. 10-4 at 165). The Supreme Court was thus under no statutory
3 obligation to transfer that Petition to the Court of Appeals, as Petitioner claims.

4 Section 12-120.23 is inapplicable as well. That statute reads as follows: The
5 supreme court *may* transfer to the court of appeals for decision a case or appeal pending
6 before the supreme court if the case or appeal is within the jurisdiction of the court of
7 appeals.” A.R.S. § 12-120.23 (emphasis added). Given the discretionary nature of this
8 statute, there is no merit to Petitioner’s contention that Arizona law “required” that the
9 Supreme Court transfer his Petition for Review to the Court of Appeals. (*See* Doc. 14 at
10 6). Consequently, Petitioner’s objections to the R&R based upon the foregoing statutes
11 are not valid. Moreover, even if these statutes could somehow be read as applying here,
12 as the Magistrate Judge correctly found, albeit in a different context, “Petitioner[] cannot
13 now return to the . . . Court of Appeals to seek review.” (Doc. 13 at 14:23-24). It is
14 simply far too late in the day for that given that “Arizona Rule of Criminal Procedure
15 32.9(c) requires that a petition for review of the denial of a petition for post-conviction
16 relief be filed ‘[w]ithin 30 days after the final decision of the trial court.’” (*Id.* at 14:24-
17 26).

18 The Court has reviewed the remainder of Plaintiff’s objections and finds them to
19 be without merit.

20 **IV. Conclusion**

21 After performing its own de novo review, the Court has independently concluded
22 that the Magistrate Judge’s R & R is legally sound. Thus, based upon on the foregoing,

23 **IT IS ORDERED** that Magistrate Judge Metcalf’s R&R (Doc. 13) is **accepted**
24 and **adopted**. Petitioner’s Objections (Doc. 14) are overruled.

25 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus
26 pursuant to 28 U.S.C. § 2254 (Doc. 1) is **denied** and **dismissed with prejudice**.

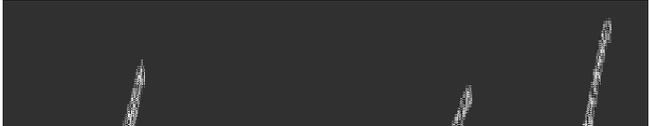
27 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing
28 Section 2254 Cases, a Certificate of Appealability and leave to proceed in forma pauperis

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on appeal are **denied**.

IT IS FURTHER ORDERED that the Clerk of Court shall terminate this action and enter judgment accordingly.

Dated this 8th day of May, 2017.



Honorable Diane J. Humetewa
United States District Judge