

1 as untimely pursuant to Rule 32.9(c), Ariz. R. Crim. P., and thereafter the Supreme Court
2 for Arizona denied review summarily, thus affirming the procedural bar which was itself
3 an independent and adequate basis for the dismissal.

4 The Court also agrees with Judge Burns’s conclusion that Petitioner’s ineffective
5 assistance of counsel ground as set forth in Claim Two of the Petition is and was not
6 exhausted in the state court, and therefore not cognizable in the instant action. Petitioner
7 argues vehemently in his Objection that he raised the ineffective assistance ground in the
8 state court review process. But his brief ignores the clear difference between the action or
9 omission that he argues constituted ineffective assistance in the state proceeding—that
10 his attorney did not raise a statute of limitations defense at the trial court level—and the
11 act or omission he now argues as ineffective assistance—that his attorney did not provide
12 him a picture of the victim in time for him to properly evaluate the acceptance of a more
13 favorable plea agreement. These are two different arguments, and Petitioner has no
14 answer for that fact or the truism that exhaustion cannot occur when the state court has
15 not had the opportunity to evaluate a charged error and correct it if necessary before a
16 federal court will have jurisdiction to do the same.

17 Having concluded that Petitioner’s claims are procedurally defaulted, this Court
18 will not consider the claims’ merits absent a showing of cause and prejudice, or a
19 fundamental miscarriage of justice. The Court finds Petitioner has made no such
20 showing. Finally, even were the Court to reach the merits of Petitioner’s limitations
21 claim, he waived that claim in the plea agreement, as Judge Burns correctly concluded
22 after amply setting forth the language of the valid waiver in that document.

23 For the foregoing reasons,

24 IT IS ORDERED denying and dismissing with prejudice the Petition for Writ of
25 Habeas Corpus in this matter (Doc. 1).

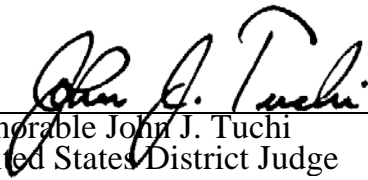
26 IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to
27 proceed *in forma pauperis* on appeal, upon a finding that dismissal of the Petition is
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justified by a plain procedural bar, and that jurists of reason would not find the ruling debatable.

IT IS FURTHER ORDERED that the Clerk of Court shall close this matter.

Dated this 6th day of November, 2017.



Honorable John J. Tuchi
United States District Judge