



1 opposed the petition. *Id.* at 42-59. Clark replied in the form of a Rule 32.9(a) motion for  
2 review. *See id.* at 61-81. The trial court found that Clark failed to raise a colorable claim  
3 and summarily dismissed the petition pursuant to Rule 32.6(c). *Id.* at 85.<sup>1</sup> Clark did not  
4 seek appellate review pursuant to Rule 32.9(c). *See* Doc. 19 at 2-3.<sup>2</sup>

5 Clark initiated this federal habeas proceeding in September 2017. Doc. 1. His  
6 amended petition asserts ineffective assistance of counsel, prosecutorial misconduct,  
7 double jeopardy, and due process claims. Doc. 19. Judge Willett recommends that the  
8 petition be dismissed because the claims are procedurally defaulted. Doc. 39.

## 9 **II. R&R Standard of Review.**

10 This Court “may accept, reject, or modify, in whole or in part, the findings or  
11 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). The Court  
12 “must review the magistrate judge’s findings and recommendations de novo if objection  
13 is made, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.  
14 2003) (en banc). The Court is not required to conduct “any review at all . . . of any issue  
15 that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985);  
16 *see also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

## 17 **III. Discussion.**

### 18 **A. The Exhaustion Requirement and Procedural Default.**

19 It is well settled that a “state prisoner must normally exhaust available state  
20 remedies before a writ of habeas corpus can be granted by the federal courts.”  
21 *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981); *see Picard v. Connor*, 404 U.S. 270, 275

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22 <sup>1</sup> Rule 32.6 was amended on January 1, 2018. The summary dismissal procedure  
23 for non-colorable PCR claims is now set forth in Rule 32.6(d)(1). *See State v. Conde*,  
24 No. 2 CA-CR 2017-0326-PR, 2018 WL 300275, at \*3 (Ariz. Ct. App. Jan. 5, 2018).

25 <sup>2</sup> Rule 32.9 governs review of decisions on PCR petitions and provides for both a  
26 rehearing by the trial court and appellate review. Ariz. R. Crim. P. 32.9(a), (c). As  
27 noted, Clark filed his motion for review pursuant to Rule 32.9(a). Doc. 29-4 at 63. The  
28 motion reasonably can be construed only as a reply brief given that it was filed in  
response to the state’s opposition and before the trial court had issued a decision on the  
petition. *See id.* at 42-85; *see also State v. Jackson*, No. 2 CA-CR 2017-0354-PR, 2018  
WL 1474882, at \*1 (Ariz. Ct. App. Mar. 26, 2018) (“Rule 32.9(a), governing motions for  
rehearing, refers only to the court’s ruling on a petition for post-conviction relief.”).

1 (1971) (citing *Ex parte Royall*, 117 U.S. 241 (1886)); 28 U.S.C. § 2254(b)(1). That  
2 exhaustion includes appellate remedies. As the Supreme Court has explained: “[b]ecause  
3 the exhaustion doctrine is designed to give the state courts a full and fair opportunity to  
4 resolve federal constitutional claims before those claims are presented to the federal  
5 courts, we conclude that state prisoners must give the state courts one full opportunity to  
6 resolve any constitutional issues by invoking one complete round of the State’s  
7 established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).  
8 PCR claims of “Arizona state prisoners are exhausted for purposes of federal habeas once  
9 the Arizona Court of Appeals has ruled on them.” *Castillo v. McFadden*, 399 F.3d 993,  
10 998 n.3 (9th Cir. 2005) (quoting *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir.  
11 1999)).

12 An unexhausted claim is procedurally defaulted in a federal habeas action where  
13 the claim would be barred in a return to state court. *See Teague v. Lane*, 489 U.S. 288,  
14 297-99 (1989); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002). A federal court may  
15 review the merits of a procedurally defaulted claim if the petitioner shows cause for the  
16 default and actual prejudice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).  
17 Review is also warranted where the petitioner shows that the failure to consider the claim  
18 would result in a fundamental miscarriage of justice. *See Hurles v. Ryan*, 752 F.3d 768,  
19 780 (9th Cir. 2014).

20 **B. Judge Willett’s R&R.**

21 Judge Willett found Clark’s claims to be unexhausted because he did not appeal  
22 the trial court’s dismissal of his PCR petition. Doc. 39 at 5-6. Because the claims would  
23 be denied as untimely if Clark were to return to state court and present them in a second  
24 PCR proceeding, *see* Ariz. R. Crim. P. 32.4, Judge Willett concluded that the claims are  
25 now procedurally defaulted. *Id.* at 6-7. Judge Willett further concluded that Clark has  
26 not shown cause and prejudice or that the dismissal of the claims would result in a  
27 fundamental miscarriage of justice. *Id.* at 7-10.

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1           **C. Clark’s Objection.**

2           Clark contends that he exhausted all available state remedies because the trial  
3 court’s dismissal of his petition under Rule 32.6(c) and purported denial of his  
4 Rule 32.9(a) motion precluded him from seeking appellate review. Doc. 40 at 3-6. This  
5 is not correct.

6           Rule 32.9(c) provides that within 30 days “after the entry of the trial court’s final  
7 decision on a petition or a motion for rehearing, an aggrieved party may petition the  
8 appropriate appellate court for review of the decision.” Ariz. R. Crim. P. 32.9(c)(1)(A).  
9 Pursuant to this rule, Clark clearly was entitled to seek appellate review of the trial  
10 court’s order dismissing his petition. Neither the dismissal of the petition under  
11 Rule 32.6(c) nor the denial of the Rule 32.9(a) motion affected Clark’s appellate rights.  
12 *See State v. Peterson*, No. 2 CA-CR 2015-0167-PR, 2015 WL 4931664, at \*1-2 & n.1  
13 (Ariz. Ct. App. Aug. 18, 2015) (granting review of the trial court’s orders summarily  
14 dismissing the petition and denying the motion for a rehearing filed pursuant to  
15 Rule 32.9(a)); *State v. Symonette*, No. 2 CA-CR 2017-0013-PR, 2017 WL 1365993,  
16 at \*1-2 (Ariz. Ct. App. Apr. 13, 2017) (granting review but denying relief because the  
17 trial court did not abuse its discretion in dismissing the petition under Rule 32.6(c)); *State*  
18 *v. Taylor*, No. 2 CA-CR 2013-0100-PR, 2013 WL 1920827, at \*1-2 (Ariz. Ct. App.  
19 May 8, 2013) (same); *see also State v. Sales*, No. 2 CA-CR 2017-0031-PR, 2017 WL  
20 977016, at \*1 (Ariz. Ct. App. Feb. 13, 2017) (explaining that a dismissal under  
21 Rule 32.6(c) is a “final decision” of the trial court contemplated by Rule 32.9(c)); *State v.*  
22 *Madueño*, No. 2 CA-CR 2015-0160-PR, 2015 WL 4747786, at \*1 (Ariz. Ct. App. Aug.  
23 10, 2015) (Rule 32.9(c) “permits review . . . of ‘the final decision of the trial court on the  
24 petition for post-conviction relief or the motion for rehearing’ filed pursuant to  
25 Rule 32.9(a)”).

26           Judge Willett correctly found that Clark’s claims are now procedurally defaulted.  
27 Doc. 39 at 5. Clark has not shown cause for the default. He claims that he did not know  
28 he could appeal under Rule 32 (Doc. 19 at 5), but his ignorance is not an objective

1 external factor that establishes cause. *See Schneider v. McDaniel*, 674 F.3d 1144, 1154  
2 (9th Cir. 2012) (“[A] pro se petitioner’s mental condition cannot serve as cause for a  
3 procedural default, at least when the petitioner on his own or with assistance remains  
4 ‘able to apply for post-conviction relief to a state court.’”); *Tacho v. Martinez*, 862 F.2d  
5 1376, 1381 (9th Cir. 1988) (petitioner’s arguments concerning his mental health and  
6 reliance upon jailhouse lawyers did not constitute cause); *see also Hughes v. Idaho State*  
7 *Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy not a sufficient factor for  
8 demonstrating cause).

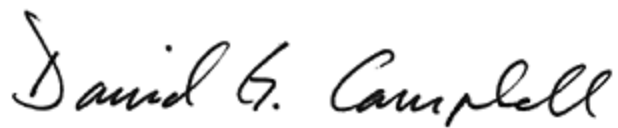
9 A fundamental miscarriage of justice occurs when “a constitutional violation has  
10 probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513  
11 U.S. 298, 327 (1995). To establish the requisite probability, the petitioner must prove  
12 with new reliable evidence that “it is more likely than not that no reasonable juror would  
13 have found petitioner guilty beyond a reasonable doubt.” *Id.* Clark presents no such  
14 evidence.

15 Clark’s objections to the R&R are without merit. Because his claims are  
16 procedurally defaulted and no exception applies, the Court will accept the R&R and  
17 dismiss the petition.

18 **IT IS ORDERED:**

- 19 1. Judge Willett’s R&R (Doc. 39) is **accepted**.
- 20 2. Clark’s amended petition for writ of habeas corpus (Doc. 19) is **dismissed**.
- 21 3. A certificate of appealability and leave to proceed in forma pauperis on  
22 appeal are **denied**.
- 23 4. The Clerk is directed to **terminate** this action.

24 Dated this 10<sup>th</sup> day of June, 2019.

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David G. Campbell  
28 Senior United States District Judge