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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Vincent Edward Taylor,

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CIV 10-8127-PHX-JAT (MHB)

10

Petitioner,

)

REPORT AND RECOMMENDATION

11

vs.

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Charles L. Ryan, et al.,

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Respondents.

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15 TO THE HONORABLE JAMES A. TEILBORG, UNITED STATES DISTRICT JUDGE:

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Petitioner Vincent Edward Taylor, who is confined in the Arizona State Prison

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Complex, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

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(Doc. 1.) Respondents filed an Answer on September 7, 2010 (Doc. 7), and Petitioner filed

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a Reply on September 20, 2010 (Doc. 8).

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BACKGROUND

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On October 12, 2000, an Arizona State Grand Jury for the County of Mohave charged

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Petitioner with one count of molestation of a child, occurring on or between May 1, 2000 and

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May 31, 2000, a Class 2 felony and a violation of A.R.S. § 13-1410. (Doc. 7, Exh. A.) On

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June 10, 2002, Petitioner entered into an Alford¹ plea with the State to a charge of attempted

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kidnapping, a violation of A.R.S. § 13-1304, a Class 3 felony, and a dangerous crime against

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children. (Doc. 7, Exhs. B, C.) The plea agreement specified that a Class 3 felony and a

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dangerous crime against children was punishable by a “presumptive term of imprisonment

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¹ North Carolina v. Alford, 400 U.S. 25 (1970)

1 of 10 years, which the court may increase to 15 years or decrease to 5 years" (Doc. 7,
2 Exh. B.) On July 8, 2002, the trial court suspended the imposition of sentence and placed
3 Petitioner on probation for a period of 5 years commencing upon the completion of a
4 sentence Petitioner was serving in La Paz County. (Doc. 7, Exhs. D, E.) The sentencing
5 minute entry indicates that the trial court advised Petitioner of his rights of appeal/review and
6 that written notice of those rights were provided. (Doc. 7, Exh. D.)

7 On March 31, 2005, nearly 3 years later, Petitioner sought the assistance of Mohave
8 County court personnel to resolve a dispute with the Department of Corrections. (Doc. 7,
9 Exh. F.) The trial court informed Petitioner that there was no matter pending before it that
10 would entitle Petitioner to a transcript of the sentencing proceedings. (Doc. 7, Exh. G.)
11 Thereafter, Petitioner filed a notice of post-conviction relief. (Doc. 7, Exh. H.) In response
12 to the issue raised therein, the trial court issued a minute entry clarifying the terms and
13 conditions of probation it imposed in 2002. (Doc. 7, Exh. I.) The trial court later dismissed
14 post-conviction proceedings when a petition was not filed. (Doc. 7, Exh. J.) Petitioner did
15 not seek review of the court's order.

16 On June 8, 2007, Petitioner appeared before the court on a petition that had been filed
17 to revoke his probation. (Doc. 7, Exh. K.) On August 24, 2007, the court ordered
18 Petitioner's probation revoked, and imposed an 8-year, mitigated sentence for the crime of
19 attempted kidnapping, a Class 3 felony and dangerous crime against children, and a violation
20 of A.R.S. § 13-1304. (Doc. 7, Exh. L.)

21 On October 3, 2007, Petitioner filed a notice of post-conviction relief. (Doc. 7, Exh.
22 M.) Petitioner was appointed counsel, and his appointed counsel filed an Anders Brief.
23 (Doc. 1, at 4.) On August 6, 2008, without a request for extension filed by Petitioner, the trial
24 court granted Petitioner a 45-day extension of time until September 19, 2008, to file a *pro*
25 *per* petition for post-conviction relief. (Doc. 7, Exh. N.) On August 7, 2008, the trial court
26 dismissed post-conviction relief proceedings after receiving Petitioner's *pro per* Motion for
27 Credit for Time Served, which the Court construed as the *pro per* petition for post-conviction
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1 relief, denying the relief requested therein on the merits.² (Doc. 7, Exh. O.) Petitioner did
2 not file a motion for rehearing, as permitted by Rule 32.9(a), Ariz.R.Crim.P., or any
3 additional pleading in the trial court dispelling the court of the notion that he had intended
4 his motion to be treated as a petition for post-conviction. On September 29, 2008, Petitioner
5 filed a petition for review in the Arizona Court of Appeals. (Doc. 7, Exh. P.) In the petition
6 for review, Petitioner categorized his claims as follows:

7 1. Violation of Defendant's right to a fast and speedy trial under the 6th
8 Amendment of the United States Constitution and, under Article 2, subsection
24 of the Arizona Constitution.

9 2. Violation of Defendant's right to not be put twice in jeopardy under the 6th
10 Amendment of the United States Constitution, and, under Article 2, subsection
4 and 10 of the Arizona Constitution.

11 3. Violation of Defendant's right to be present at all court proceedings under
12 the 14th Amendment and under Article 2, subsections 4 and 24 of the Arizona
Constitution.

13 4. Violation of Defendant's right to file a post-conviction relief (Rule 32)
14 under the 14th Amendment of the United States Constitution, and, Article 2,
subsections 4 and 24 of the Arizona Constitution.

15 5. Violation of Defendant's right to effective assistance of counsel under the
16 6th Amendment of the United States Constitution and, under Article 2,
subsections 4 and 24 of the Arizona Constitution.

17 6. Violation of Defendant's right to due process of law as outlined in Arizona
18 Rules of Criminal Procedure under the 14th Amendment of the United States
19 Constitution and, under Article 2, subsections 4 and 24 of the Arizona
Constitution.

20 (Doc. 7, Exh. P.) On December 8, 2009, the Arizona Court of Appeals denied review
21 without comment. (Doc. 7, Exh. Q.)

22 On July 19, 2010, Petitioner filed the instant Petition for Writ of Habeas Corpus
23 raising six grounds for relief. In Ground One, he alleges violation of his Sixth and
24 Fourteenth Amendment rights based on delays in bringing him to trial. (Doc. 1 at 6.) In
25 Ground Two, he alleges violation of his Fifth Amendment double jeopardy rights. (Doc. 1

26 ² Although the pleading Petitioner submitted to the trial court was not made part of
27 the record, in his Motion for Credit for Time Served, Petitioner requested that he receive 554
28 days of presentence incarceration credit for time served in custody since his arrest in La Paz
County.

1 at 7.) In Ground Three, Petitioner alleges a violation of his Fourteenth Amendment right to
2 present at all phases of the criminal proceedings. (Doc. 1 at 8.) In Ground Four, he alleges
3 violation of his Fourteenth Amendment right to file a post-conviction petition. (Doc. 1 at 9.)
4 In Ground Five, Petitioner alleges violation of his Fourteenth Amendment right to receive
5 credit for time served. (Doc. 1 at 10.) In Ground Six, he alleges violations of his Sixth and
6 Fourteenth Amendment rights to the effective assistance of counsel. (Doc. 1 at 11.)

7 Respondents filed an Answer on September 7, 2010 (Doc. 7), and Petitioner filed a
8 Reply on September 20, 2010 (Doc. 8).

9 **DISCUSSION**

10 In their Answer, Respondents contend that the claims presented in Petitioner’s habeas
11 petition are procedurally defaulted. Respondents argue that because Petitioner cannot
12 establish the requisite cause and prejudice or a fundamental miscarriage of justice, he is not
13 entitled to federal habeas review of these procedurally defaulted claims.

14 **A. Exhaustion and Procedural Default**

15 A state prisoner must exhaust his remedies in state court before petitioning for a writ
16 of habeas corpus in federal court. See 28 U.S.C. § 2254(b)(1) and (c); Duncan v. Henry, 513
17 U.S. 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991). To
18 properly exhaust state remedies, a petitioner must fairly present his claims to the state’s
19 highest court in a procedurally appropriate manner. See O’Sullivan v. Boerckel, 526 U.S.
20 838, 839-46 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona
21 Court of Appeals by properly pursuing them through the state’s direct appeal process or
22 through appropriate post-conviction relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th
23 Cir. 1999); Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

24 Proper exhaustion requires a petitioner to have “fairly presented” to the state courts
25 the exact federal claim he raises on habeas by describing the operative facts and federal legal
26 theory upon which the claim is based. See, e.g., Picard v. Connor, 404 U.S. 270, 275-78
27 (1971) (“[W]e have required a state prisoner to present the state courts with the same claim
28 he urges upon the federal courts.”). A claim is only “fairly presented” to the state courts

1 when a petitioner has “alert[ed] the state courts to the fact that [he] was asserting a claim
2 under the United States Constitution.” Shumway v. Payne, 223 F.3d 982, 987 (9th Cir. 2000)
3 (quotations omitted); see Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996) (“If a petitioner
4 fails to alert the state court to the fact that he is raising a federal constitutional claim, his
5 federal claim is unexhausted regardless of its similarity to the issues raised in state court.”).

6 A “general appeal to a constitutional guarantee,” such as due process, is insufficient
7 to achieve fair presentation. Shumway, 223 F.3d at 987 (quoting Gray v. Netherland, 518
8 U.S. 152, 163 (1996)); see Castillo v. McFadden, 399 F.3d 993, 1003 (9th Cir. 2005)
9 (“Exhaustion demands more than drive-by citation, detached from any articulation of an
10 underlying federal legal theory.”). Similarly, a federal claim is not exhausted merely because
11 its factual basis was presented to the state courts on state law grounds – a “mere similarity
12 between a claim of state and federal error is insufficient to establish exhaustion.” Shumway,
13 223 F.3d at 988 (quotations omitted); see Picard, 404 U.S. at 275-77.

14 Even when a claim’s federal basis is “self-evident,” or the claim would have been
15 decided on the same considerations under state or federal law, a petitioner must still present
16 the federal claim to the state courts explicitly, “either by citing federal law or the decisions
17 of federal courts.” Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000) (quotations
18 omitted), amended by 247 F.3d 904 (9th Cir. 2001); see Baldwin v. Reese, 541 U.S. 27, 32
19 (2004) (claim not fairly presented when state court “must read beyond a petition or a brief
20 ... that does not alert it to the presence of a federal claim” to discover implicit federal claim).

21 Additionally, under the independent state grounds principle, a federal habeas court
22 generally may not review a claim if the state court’s denial of relief rests upon an
23 independent and adequate state ground. See Coleman v. Thompson, 501 U.S. 722, 731-32.

24 The United States Supreme Court has explained:

25 In the habeas context, the application of the independent and adequate state
26 ground doctrine is grounded in concerns of comity and federalism. Without
27 the rule, a federal district court would be able to do in habeas what this Court
28 could not do on direct review; habeas would offer state prisoners whose
custody was supported by independent and adequate state grounds an end run
around the limits of this Court’s jurisdiction and a means to undermine the
State’s interest in enforcing its laws.

1 Id. at 730-31. A petitioner who fails to follow a state’s procedural requirements for
2 presenting a valid claim deprives the state court of an opportunity to address the claim in
3 much the same manner as a petitioner who fails to exhaust his state remedies. Thus, in order
4 to prevent a petitioner from subverting the exhaustion requirement by failing to follow state
5 procedures, a claim not presented to the state courts in a procedurally correct manner is
6 deemed procedurally defaulted, and is generally barred from habeas relief. See id. at 731-32.

7 Claims may be procedurally barred from federal habeas review based upon a variety
8 of factual circumstances. If a state court expressly applied a procedural bar when a petitioner
9 attempted to raise the claim in state court, and that state procedural bar is both
10 “independent”³ and “adequate”⁴ – review of the merits of the claim by a federal habeas court
11 is barred. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) (“When a state-law default
12 prevents the state court from reaching the merits of a federal claim, that claim can ordinarily
13 not be reviewed in federal court.”) (citing Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977)
14 and Murray v. Carrier, 477 U.S. 478, 485-492 (1986)).

15 Moreover, if a state court applies a procedural bar, but goes on to alternatively address
16 the merits of the federal claim, the claim is still barred from federal review. See Harris v.
17 Reed, 489 U.S. 255, 264 n.10 (1989) (“[A] state court need not fear reaching the merits of
18 a federal claim in an *alternative* holding. By its very definition, the adequate and
19 independent state ground doctrine requires the federal court to honor a state holding that is
20 a sufficient basis for the state court’s judgment, even when the state court also relies on
21 federal law. ... In this way, a state court may reach a federal question without sacrificing its
22 interests in finality, federalism, and comity.”) (citations omitted); Bennett v. Mueller, 322
23 F.3d 573, 580 (9th Cir. 2003) (“A state court’s application of a procedural rule is not
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25 ³ A state procedural default rule is “independent” if it does not depend upon a federal
26 constitutional ruling on the merits. See Stewart v. Smith, 536 U.S. 856, 860 (2002).

27 ⁴ A state procedural default rule is “adequate” if it is “strictly or regularly followed.”
28 Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Hathorn v. Lovorn, 457 U.S. 255,
262-53 (1982)).

1 undermined where, as here, the state court simultaneously rejects the merits of the claim.”)
2 (citing Harris, 489 U.S. at 264 n.10).

3 Furthermore, a subsequent “silent” denial of review by a higher court simply affirms
4 a lower court’s application of a procedural bar. See Ylst, 501 U.S. at 803 (“where ... the last
5 reasoned opinion on the claim explicitly imposes a procedural default, we will presume that
6 a later decision rejecting the claim did not silently disregard that bar and consider the
7 merits”).

8 A procedural bar may also be applied to unexhausted claims where state procedural
9 rules make a return to state court futile. See Coleman, 501 U.S. at 735 n.1 (claims are barred
10 from habeas review when not first raised before state courts and those courts “would now
11 find the claims procedurally barred”); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir.
12 2002) (“[T]he procedural default rule barring consideration of a federal claim ‘applies only
13 when a state court has been presented with the federal claim,’ but declined to reach the issue
14 for procedural reasons, or ‘if it is clear that the state court would hold the claim procedurally
15 barred.’”) (quoting Harris, 489 U.S. at 263 n.9).

16 In Arizona, claims not previously presented to the state courts via either direct appeal
17 or collateral review are generally barred from federal review because an attempt to return to
18 state court to present them is futile unless the claims fit in a narrow category of claims for
19 which a successive petition is permitted. See Ariz.R.Crim.P. 32.1(d)-(h) & 32.2(a)
20 (precluding claims not raised on appeal or in prior petitions for post-conviction relief, except
21 for narrow exceptions); Ariz.R.Crim.P. 32.4 (time bar). Because Arizona’s preclusion rule
22 (Rule 32.2(a)) is both “independent” and “adequate,” either its specific application to a claim
23 by an Arizona court, or its operation to preclude a return to state court to exhaust a claim,
24 will procedurally bar subsequent review of the merits of that claim by a federal habeas court.
25 See Stewart, 536 U.S. at 860 (determinations made under Arizona’s procedural default rule
26 are “independent” of federal law); Smith v. Stewart, 241 F.3d 1191, 1195 n.2 (9th Cir. 2001)
27 (“We have held that Arizona’s procedural default rule is regularly followed [“adequate”] in
28 several cases.”) (citations omitted), reversed on other grounds, Stewart v. Smith, 536 U.S.

1 856 (2002); see also Ortiz v. Stewart, 149 F.3d 923, 931-32 (rejecting argument that Arizona
2 courts have not “strictly or regularly followed” Rule 32 of Arizona Rules of Criminal
3 Procedure); State v. Mata, 916 P.2d 1035, 1050-52 (Ariz. 1996) (waiver and preclusion rules
4 strictly applied in post-conviction proceedings).

5 The federal court will not consider the merits of a procedurally defaulted claim unless
6 a petitioner can demonstrate that a miscarriage of justice would result, or establish cause for
7 his noncompliance and actual prejudice. See Schlup v. Delo, 513 U.S. 298, 321 (1995);
8 Coleman, 501 U.S. at 750-51; Murray, 477 U.S. at 495-96. Pursuant to the “cause and
9 prejudice” test, a petitioner must point to some external cause that prevented him from
10 following the procedural rules of the state court and fairly presenting his claim. “A showing
11 of cause must ordinarily turn on whether the prisoner can show that some objective factor
12 external to the defense impeded [the prisoner’s] efforts to comply with the State’s procedural
13 rule. Thus, cause is an external impediment such as government interference or reasonable
14 unavailability of a claim’s factual basis.” Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir.
15 2004) (citations and internal quotations omitted). Ignorance of the State’s procedural rules
16 or other forms of general inadvertence or lack of legal training and a petitioner’s mental
17 condition do not constitute legally cognizable “cause” for a petitioner’s failure to fairly
18 present his claim. Regarding the “miscarriage of justice,” the Supreme Court has made clear
19 that a fundamental miscarriage of justice exists when a Constitutional violation has resulted
20 in the conviction of one who is actually innocent. See Murray, 477 U.S. at 495-96.

21 **B. Grounds One through Six**

22 Having reviewed that record, the Court finds that Petitioner’s claims are unexhausted
23 and procedurally defaulted. As previously indicated, Petitioner filed a notice of post-
24 conviction relief on October 3, 2007. (Doc. 7, Exh. M.) The trial court dismissed post-
25 conviction relief proceedings on August 6, 2008, after receiving Petitioner’s *pro per* Motion
26 for Credit for Time Served, which the Court construed as the *pro per* petition for post-
27 conviction relief, and denying the relief requested therein on the merits. (Doc. 7, Exh. O.)
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1 On September 29, 2008, Petitioner filed a petition for review in the Arizona Court of Appeals
2 alleging six new grounds for relief. (Doc. 7, Exh. P.)

3 Presentation to the Arizona Court of Appeals for the first time is not sufficient to
4 exhaust an Arizona state prisoner's remedies. "Submitting a new claim to the state's highest
5 court in a procedural context in which its merits will not be considered absent special
6 circumstances does not constitute fair presentation." Roettgen, 33 F.3d 36, 38 (9th Cir. 1994)
7 (citing Castille v. Peoples, 489 U.S. 346, 351 (1989)). In Casey v. Moore, 386 F.3d 896 (9th
8 Cir. 2004), the court reiterated that to properly exhaust a claim, "a petitioner must properly
9 raise it on every level of direct review." Id. at 916.

10 In Arizona, review of a petition for post-conviction relief by the Arizona Court of
11 Appeals is governed by Rule 32.9, Arizona Rules of Criminal Procedure, which clarifies that
12 review is available for "issues which were decided by the trial court." Ariz.R.Crim.P.
13 32.9(c)(1)(ii). See also State v. Ramirez, 616 P.2d 924, 928 (Ariz. Ct. App. 1980) (issues
14 first presented in petition for review and not presented to trial court not subject to review).
15 In his Reply, Petitioner argues that the trial court erred in construing his Motion for Credit
16 for Time Served as a petition for post-conviction relief. Regardless of the trial court's
17 treatment of Petitioner's request for presentence incarceration credit, Petitioner failed to
18 utilize the State's procedural rules to preserve the claims for appellate review. Thus,
19 Petitioner's failure to present claims to the trial court before presenting them to the Arizona
20 Court of Appeals precludes a finding that they have been fairly presented. Moreover,
21 Petitioner would no longer have a remedy if he returned to the state court.⁵ As a result, his
22 claims are procedurally defaulted. Although a procedural default may be overcome upon a
23 showing of cause and prejudice or a fundamental miscarriage of justice, see Coleman, 501
24 U.S. at 750-51, Petitioner has not established that any exception to procedural default
25 applies.

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27 ⁵ The time has passed to seek post-conviction relief in state court pursuant to Rule
28 32.4(a) of the Arizona Rules of Criminal Procedure. Any attempt to return to state court to
properly exhaust his claim would be futile.

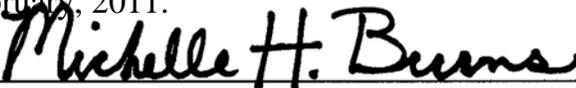
1 Accordingly, Grounds One through Six set forth in Petitioner's habeas petition are
2 procedurally defaulted, and Petitioner has not established cause for his failure to raise his
3 claims in state court, actual prejudice, or demonstrated that a miscarriage of justice would
4 result if these issues are not addressed. Thus, the Court will recommend that Petitioner's
5 Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

6 **IT IS THEREFORE RECOMMENDED** that Petitioner's Petition for Writ of
7 Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **DENIED** and **DISMISSED WITH**
8 **PREJUDICE**;

9 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
10 to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is
11 justified by a plain procedural bar and jurists of reason would not find the procedural ruling
12 debatable.

13 This recommendation is not an order that is immediately appealable to the Ninth
14 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
15 Appellate Procedure, should not be filed until entry of the district court's judgment. The
16 parties shall have fourteen days from the date of service of a copy of this recommendation
17 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);
18 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen
19 days within which to file a response to the objections. Failure timely to file objections to the
20 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report
21 and Recommendation by the district court without further review. See United States v.
22 Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any
23 factual determinations of the Magistrate Judge will be considered a waiver of a party's right
24 to appellate review of the findings of fact in an order or judgment entered pursuant to the
25 Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

26 DATED this 2nd day of February, 2011.

27 

28 Michelle H. Burns
United States Magistrate Judge