

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Michael Isidoro Sanchez,  
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,  
13 Respondents.  
14

No. CV-17-00224-TUC-RM

**ORDER**

15 On May 16, 2017, Petitioner Michael Isidoro Sanchez, who is confined in the  
16 Arizona State Prison Complex-Eyman, filed a pro se Petition for Writ of Habeas Corpus  
17 pursuant to 28 U.S.C. § 2254. (Doc. 1.) On September 1, 2017, this Court stayed the  
18 above-captioned matter pending resolution of a petition for review of denial of post-  
19 conviction relief which was then pending in the Arizona Supreme Court. (Doc. 16.)  
20 Petitioner subsequently filed a Notice of Status (Doc. 20), averring that the Arizona  
21 Supreme Court denied his petition for review on January 4, 2018.

22 Currently pending before this Court is Petitioner's Motion for Stay and Abeyance  
23 (Doc. 18). On June 26, 2018, Magistrate Judge D. Thomas Ferraro issued a Report and  
24 Recommendation (Doc. 21), recommending that this Court deny the Motion for Stay and  
25 Abeyance. Petitioner filed an Objection on July 6, 2018 (Doc. 22), and on July 9, 2018,  
26 Petitioner filed a Motion to Supplement the Objection (Doc. 23). Respondents have not  
27 responded to the Objection or the Motion to Supplement, and the time for doing so has  
28 now expired.

1     **I.     Standard of Review**

2             A district judge “may accept, reject, or modify, in whole or in part, the findings or  
3 recommendations” made by a magistrate judge. 28 U.S.C. § 636(b)(1). The district  
4 judge must “make a de novo determination of those portions” of the magistrate judge’s  
5 “report or specified proposed findings or recommendations to which objection is made.”

6     *Id.*

7     **II.    Discussion**

8             In his Motion for Stay and Abeyance, Petitioner states that he submitted a Notice  
9 of Post-Conviction Relief on August 8, 2017 to challenge the effectiveness of his first  
10 Rule 32 counsel. (Doc. 18 at 2.) Petitioner asks this Court to stay his federal habeas  
11 proceedings pending the conclusion of the new Rule 32 proceeding. (*Id.* at 4-5.)  
12 Petitioner attaches as an exhibit to the Motion a copy of an order from the Cochise  
13 County Superior Court in Case No. CR201300346, which indicates that Petitioner filed a  
14 Notice of Post-Conviction Relief on August 10, 2017. (Doc. 18-1.)

15             In his Report and Recommendation, Judge Ferraro indicates that he was unable to  
16 locate any currently pending proceedings related to Petitioner in the Cochise County  
17 Superior Court or the Arizona Court of Appeals via websites that provide public-access  
18 case information. (Doc. 21 at 2.) Judge Ferraro accordingly recommends that this Court  
19 deny Petitioner’s Motion for Stay and Abeyance and lift the stay put in place on  
20 September 1, 2017. (*Id.* at 3.)

21             In his Objection, Petitioner argues that Judge Ferraro’s recommendation to deny  
22 his Motion for Stay and Abeyance is based on a factual error, because the website that  
23 Judge Ferraro relied upon is missing information and is not up to date. (Doc. 22 at 1-2.)  
24 To show that Rule 32 proceedings are currently pending in Cochise County Superior  
25 Court, Petitioner attaches various exhibits to his Objection, including a Notice of Post-  
26 Conviction Relief filed August 10, 2017 in Cochise County Superior Court case number  
27 CR201300346 (Doc. 22-1 at 3-5). Petitioner’s exhibits show that he initiated a  
28 successive Rule 32 proceeding in Cochise County Superior Court on August 10, 2017.

1 In his Motion to Supplement, Petitioner avers that he received an order from the  
2 Cochise County Superior Court dismissing his Rule 32 proceeding, and that he is in the  
3 process of preparing and filing a motion for reconsideration. (Doc. 23 at 1-2.)<sup>1</sup> Petitioner  
4 attaches a copy of an order in Cochise County Superior Court case number  
5 CR201300346, dated July 2, 2010, which dismisses his Rule 32 proceeding. (Doc. 23 at  
6 4-5.) Petitioner also attaches a copy of his motion for reconsideration. (*Id.* at 6-14.) The  
7 undersigned’s law clerk contacted the Cochise County Superior Court, and confirmed  
8 that Petitioner’s motion for reconsideration was filed and had not yet been ruled upon as  
9 of July 25, 2018. Accordingly, this Court rejects the Report and Recommendation  
10 insofar as it concludes that Petitioner does not have any Rule 32 proceedings pending in  
11 state court.

12 Nevertheless, this Court accepts Judge Ferraro’s ultimate recommendation to lift  
13 the stay entered on September 1, 2017 and to deny Petitioner’s Motion for Stay and  
14 Abeyance. A motion for stay and abeyance should be granted “if the petitioner had good  
15 cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and  
16 there is no indication that the petitioner engaged in intentionally dilatory litigation  
17 tactics.” *Rhines v. Weber*, 544 U.S. 269, 278 (2005). Petitioner has not met this  
18 standard.

19 Petitioner could have exhausted a claim of ineffective assistance of Rule 32  
20 counsel earlier, and he has not shown good cause for his failure to do so. In Arizona, a  
21 pleading defendant may challenge the effectiveness of his first Rule 32 counsel in a  
22 second, timely Rule 32 proceeding. *See State v. Pruett*, 912 P.2d 1357, 1360 (Ariz. App.  
23 1995). However, “[a] defendant may raise an of-right claim of ineffective assistance of  
24 Rule 32 counsel in a successive Rule 32 notice” only if the notice “is filed no later than  
25 30 days after the final order or mandate in the defendant’s of-right petition for post-  
26 conviction relief.” Ariz. R. Crim. P. 32.4(a)(2)(C). Petitioner’s first, of-right Rule 32

27 \_\_\_\_\_  
28 <sup>1</sup> The Court will grant Petitioner’s Motion to Supplement, as it provides new  
information that could not have been brought to the Court’s attention earlier, and  
Respondents did not file a response in opposition to the Motion. *See* LRCiv 7.2(i).

1 petition was denied on May 24, 2016. (Doc. 1 at 4.) Petitioner then filed a second Rule  
2 32 petition, which was also denied.<sup>2</sup> The Rule 32 proceeding that Petitioner initiated on  
3 August 10, 2017 is his third Rule 32 proceeding, and it was filed more than 30 days after  
4 the final order or mandate in Petitioner’s first, of-right Rule 32 proceeding. Petitioner has  
5 not shown good cause for failing to raise in state court an of-right claim of ineffective  
6 assistance of Rule 32 counsel within 30 days after the final order or mandate in his first,  
7 of-right Rule 32 petition.

8 Accordingly,

9 **IT IS ORDERED** that the Report and Recommendation (Doc. 21) is **partially**  
10 **accepted and partially rejected** as follows:

- 11 a. The Report and Recommendation is **rejected** to the extent it finds that  
12 Petitioner does not have any Rule 32 proceedings pending in state court.  
13 b. The Report and Recommendation is otherwise **accepted**.

14 **IT IS FURTHER ORDERED:**

- 15 1. Petitioner’s Motion to Supplement (Doc. 23) is **granted**.  
16 2. Petitioner’s Motion for Stay and Abeyance (Doc. 18) is **denied**.  
17 3. The stay entered on September 1, 2017 (Doc. 16) is **lifted**.  
18 4. Respondents must answer the Petition for Writ of Habeas Corpus pursuant to 28  
19 U.S.C. § 2254 (Doc. 1) within **40 days** of the date this Order is filed. Respondents  
20 must not file a dispositive motion in place of an answer but may file an answer  
21 limited to relevant affirmative defenses, including but not limited to, statute of  
22 limitations, procedural bar, or non-retroactivity. If the answer is limited to  
23 affirmative defenses, only those portions of the record relevant to those defenses  
24 need be attached to the answer. Failure to set forth an affirmative defense in an  
25 answer may be treated as a waiver of the defense. *Day v. McDonough*, 547 U.S.  
26 198, 209-11 (2006). If not limited to affirmative defenses, the answer must fully  
27 comply with all of the requirements of Rule 5 of the Rules Governing Section


28 <sup>2</sup> As noted above, the Arizona Supreme Court denied a petition for review of the  
denial of the second Rule 32 petition on January 4, 2018. (Doc. 20.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

2254 Cases.

- 5. Regarding courtesy copies of documents for chambers, Respondents are directed to review Section II(D) of the Court’s Electronic Case Filing Administrative Policies and Procedures Manual, which requires that “a courtesy copy of the filing, referencing the specific document number, **shall be printed directly from CM/ECF.**”<sup>3</sup>
- 6. Petitioner may file a reply within 30 days from the date of service of the answer.
- 7. This matter continues to be referred to Magistrate Judge D. Thomas Ferraro pursuant to Rules 72.1 and 7.2.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation.

Dated this 30th day of July, 2018.

  
\_\_\_\_\_  
Honorable Rosemary Márquez  
United States District Judge

<sup>3</sup> See <http://www.azd.uscourts.gov/sites/default/files/documents/adm%20manual.pdf> (emphasis added).