IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

BUGGZ IRONMAN-WHITECOW AKA KIM ALLEN NORQUAY, JR., Petitioner, vs. JIM SALMONSEN and AUSTIN KNUDSEN, Respondents.	Cause No. CV 23-53-GF-DWM ORDER

This matter comes before the Court on Petitioner Buggz Ironman-Whitecow's Petition for a Writ of Habeas Corpus. (Doc. 1.) Ironman-Whitecow is a convicted state prisoner.[1] On November 9, 2023, the Court ordered Ironman-Whitecow to show cause why his Petition should not be dismissed as barred by the statute of limitations. (Doc. 6.) Ironman-Whitecow timely responded. (Doc. 7.) The Court reviewed his submission, determined that his Petition is timely, and required the State to file the record and answer. The State answered on October 29, 2024. (Doc. 23.) Ironman-Whitecow replied on November 12, 2024. (Doc. 24.) The State supplemented the record on December 16, 2024. (Doc. 28.) After review

[1] Ironman-Whitecow has legally changed his name. At the time of his conviction, and in the records of the Montana state courts, his name was Kim Allen Norquay, Jr. Direct quotations that refer to him as Norquay have not been altered.

of the briefing and the extensive records, Ironman-Whitecow's petition is denied and dismissed.

I. BACKGROUND

The following factual narrative, presumed to be correct under 28 U.S.C. §2254(e)(1), is taken from the Montana Supreme Court's decision affirming Ironman-Whitecow's convictions. It is provided here for background. Additional facts will be supplied where necessary.

> Nathan Oats (Oats) and Georgetta Oats (Georgetta) found Lloyd Kvelstad (Kvelstad) unconscious and severely beaten at about 1:30 a.m. on November 25, 2006. Oats testified that he found Kvelstad lying on a couch with his pants down around his legs at Melissa Snow's (Snow) house. Kvelstad's face was beaten beyond recognition and he had a black string around his neck. Oats told Georgetta to call 911.
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> Kvelstad, Norquay, James Main Jr. (Main), Billy the Boy (Billy), Jason Skidmore (Skidmore), Joseph Red Elk (Red Elk), and Thomas Anderson (Anderson) had gathered at Snow's house to drink alcohol earlier that night. Norquay, Main, Snow, and Billy were still at the house when Oats arrived and found Kvelstad. Georgetta announced that the police were coming and Main attempted to leave. Oats restrained Main and held him until the police arrived. Norquay fled out a side door. Paramedics determined that Kvelstad was dead.
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> The State charged Norquay with deliberate homicide on the theory that Norquay had participated in the commission of an aggravated assault of Kvelstad. The State also charged Norquay with tampering with physical evidence based upon a witness's statement that Norquay had wiped blood off his shoe. Norquay had an eight-day jury trial.
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> Red Elk testified to the events leading up to Kvelstad's death. Red Elk testified that several of the men had verbally and physically assaulted Kvelstad. Red Elk watched Main and Skidmore put Kvelstad into several choke holds that caused Kvelstad to lose consciousness.

> Skidmore pulled up Kvelstad's underwear until they ripped off. Red Elk testified that Norquay slapped Kvelstad's face and would not allow Kvelstad to sit down. He also testified that Norquay took his belt off, unbuttoned, and unzipped his pants, attempted to pull down Kvelstad's pants, and announced that he was going to "fuck" Kvelstad. Another of the revelers forced Norquay to stop. Red Elk also testified that he had heard Norquay talking with Main about whether the two of them should kill Kvelstad.
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> Kvelstad eventually passed out from intoxication. Red Elk watched Snow and Skidmore put Kvelstad in a bed. Red Elk left Snow's house with Skidmore shortly thereafter. Red Elk testified that Kvelstad was still breathing and was not bloody when he last saw him. Snow testified to a similar version of the night's events. She also testified that she saw Norquay remove the string from his sweatshirt. Another witness testified that Norquay told her that he had strangled Kvelstad using a string from his sweatshirt.
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> Several other witnesses testified that Norquay had made incriminating statements after Kvelstad's death. One witness testified that she overheard Norquay brag to someone on the phone, "Did you hear I'm a murderer?" Norquay voluntarily met with police. Norquay denied kicking, beating, or strangling Kvelstad. Norquay claimed that Kvelstad had passed out from drinking too much. The Deputy State Medical Examiner testified that Kvelstad had likely died as a result of blunt force trauma to the head and probable ligature strangulation.
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> One of the State's experts testified that the tread on Norquay's shoes corresponded with a bloody shoe impression left on Kvelstad's sweatshirt. Norquay's expert refuted this testimony. The State also provided testimony from a DNA expert with the Montana Crime Lab through a videotaped deposition. Norquay originally requested the DNA evidence from the State Crime Lab. The DNA expert provided both potentially exculpatory and potentially inculpatory testimony. Both parties relied on portions of the DNA expert's testimony to their advantage.

State v. Norquay, 2011 MT 34, ¶¶ 6-12.

On November 21, 2008, following an eight-day jury trial in Montana's Twelfth Judicial District, Hill County, Ironman-Whitecow was found guilty of accountability for deliberate homicide and tampering with evidence. (Doc. 1 at 2–3.)

Ironman-Whitecow appealed his conviction. The Montana Supreme Court affirmed on March 1, 2011. *State v. Norquay*, 2011 MT 34, ¶ 47. Ironman-Whitecow filed a state district court petition for postconviction relief on May 23, 2012. (Doc. 1 at 3.) After several years of delays, appointments of counsel, briefing, discovery, and an evidentiary hearing, Ironman-Whitecow's district court petition was denied on October 1, 2021. (The State provides a detailed recitation of the twists and turns of the state court proceedings that is not needed in its entirety here. (Doc. 23 at 23 – 43.)) Notably, the state district court held a four-day evidentiary hearing. (Docs. 13-119 through 13-127.)

Ironman-Whitecow appealed the denial of his postconviction relief to the Montana Supreme Court, which denied his appeal on August 29, 2023. *Norquay v. State*, 2023 MT 165N. Ironman-Whitecow was represented by counsel throughout his state court postconviction proceedings.

Ironman-Whitecow, now pro se, filed his federal petition on September 5, 2023. (Doc. 1). Ironman-Whitecow had filed a previous petition in this Court on December 2, 2021, while his state postconviction relief appeal was pending with

the Montana Supreme Court. *Ironman-Whitecow v. Salmonsen*, No. CV 21-119-GF-DWM. His prior petition included a request to stay the federal case while his state proceedings were underway. That request was denied, and the petition was dismissed without prejudice. *Id.*, at Doc. 6.

After initial review in this Court, the State was directed to file the state court record. Ironman-Whitecow objected to the absence of certain of his exhibits from the state court proceedings. (Docs. 16 and 17.) The State was directed to answer the Ironman-Whitecow's petition and filed its answer on October 29, 2024. (Doc. 23.) Ironman-Whitecow filed a reply to the answer on November 12, 2024. (Doc. 24.) The State filed the additional documents sought by Ironman-Whitecow on December 16, 2024. (Doc. 28.)

II. CLAIMS

Ironman-Whitecow's petition includes ten overlapping claims: no murder occurred; Ironman-Whitecow is factually innocent; someone destroyed evidence; the prosecution committed misconduct and *Brady* violations; counsel was ineffective; Ironman-Whitecow's due process and Sixth Amendment rights were violated; the jury received improper instructions; Ironman-Whitecow's sentence was disproportionate in violation of the Eighth Amendment; and cumulative error. (Doc. 1-1.) The appendix Ironman-Whitecow filed in support of his petition in this case is the same that he filed with his previous, premature petition, and thus, the

intervening fate of these claims at the Montana Supreme Court is not noted. The Montana Supreme Court addressed these claims in *Norquay v. State*, 2023 MT 165N.

In response, the State contends that Ironman-Whitecow's claims are mostly unexhausted and procedurally defaulted, or should be denied on the merits. (Doc. 23.) The State subdivides the third and fifth of Ironman-Whitecow's ten claims into multiple parts. (Doc. 23 at 12 – 13.)

Ironman-Whitecow's reply extensively discusses some procedural aspects of his state court proceedings, in which he filed a 334-page memorandum that was struck by the district court. (Doc. 24 at 2 – 3.) He contends the state district court violated his rights by limiting that original petition and that the State's response in this case is unfair. He asserts this issue is another independent constitutional violation. (Doc. 24 at 5.)

III. ANALYSIS

Despite the many years that have elapsed since Ironman-Whitecow's 2008 conviction, his petition is timely. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant a habeas corpus application "with respect to any claim that was adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2); *Knowles v. Mirzayance,* 556 U.S. 111, 114 (2009).

"'[C]learly established Federal law'… is the governing legal principle or principles set forth by the Supreme Court [in its holdings] at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-71 (2003). A state court's decision is contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000).

A state court's factual findings are unreasonable if "reasonable minds reviewing the record" could not agree with them. *Brumfield v. Cain*, 576 U.S.305, 313-14 (2015) (citations omitted). "For relief to be granted, a state court merits ruling must be so lacking in justification that there was an error…beyond any possibility for fair-minded disagreement." *Bemore v. Chappell*, 788 F. 3d 1151, 1160 (9th Cir. 2015). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101

(2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

A. Claims One and Two: Actual Innocence

Ironman-Whitecow's first two claims are variations on a theme: he is innocent of the crime, in two ways.

Ironman-Whitecow posited in the Montana courts and again here that the victim in his case, Lloyd Kvelstad, was not, in fact murdered; thus, Ironman-Whiteman cannot be guilty of accountability for deliberate homicide. (Doc. 1-1 at 1 – 9.) Ironman-Whitecow contends that Kvelstad died of hypothermia, or of having his head bagged by the police or the coroner, and not from any cause related to Ironman-Whitecow. This contention is based on Ironman-Whitecow's belief that Kvelstad moved after he was determined to be dead by EMTs. (Doc. 1-1 at 4.) The evidence to support this conclusion is that Oats, the witness who had initially concluded Kvelstad was dead and summoned the EMTs, drew a picture and described the location of Kvelstad's body that was slightly different from the photographs eventually taken at the scene. (Doc. 1-1 at 4.) Photographs of blood pools at the scene also support, Ironman-Whitecow contends, the conclusion that Kvelstad moved after he was determined to be dead by EMTs.

In the alternative, Ironman-Whitecow's other argument for innocence explains and justifies the events of the night Kvelstad died. He contends that he broke up a fight between the victim and another defendant, James Main, and that is

how he got blood on his clothes. (Doc. 1-1 at 10.) He asserts that he was drunk and passed out for the rest of the events of the evening, though he gives a detailed account of what he believes happened. (Doc. 1-1 at 10 – 13.) Ironman-Whitecow concludes "[t]he same set of facts that State used is set to a different narrative, one that proves [Ironman-Whitecow] did nothing to harm Lloyd Kvelstad." (Doc. 1-1 at 13.) Thus, Ironman-Whitecow again alleges he is innocent. (Ironman-Whitecow was also convicted of evidence tampering, after washing blood from his shoes after fleeing the scene of the homicide. *State v. Norquay*, 2011 MT 34, ¶ 1. Nowhere in his petition does he argue that he is innocent of that charge.)

The State responds to both of these innocence claims by arguing that Ironman-Whitecow failed to exhaust them before the state courts because he never fairly presented them as federal claims. (Doc. 23 at 51 – 52, citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), and *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995), and Doc. 23 at 60.) Thus, because he can no longer do so, his claim is technically exhausted and procedurally defaulted.

1. Actual innocence is not a ground for federal habeas relief.

As an initial matter, a standalone claim of actual innocence is not a cognizable basis for federal habeas relief. *Herrera v. Collins*, 506 U.S. 390, 393 (1993). "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution-not to

correct errors of fact. *See, e.g., Moore v. Dempsey,* 261 U.S. 86, 87-88 (1923) (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved")." *Id.* at 400. In light of the presumption of guilt that attaches after a constitutionally valid conviction, "it is fair to place on [a petitioner asserting a *Herrera* claim] the burden of proving his innocence, not just raising doubt about his guilt." *Id.* at 443 (Blackmun, J., dissenting).

The Ninth Circuit recently acknowledged it is an open question whether a freestanding federal actual innocence claim is cognizable in a non-capital context. *Prescott v. Santoro*, 53 F. 4th 470, 482 (9th Cir. 2022) (citing *Taylor v. Beard*, 811 F. 3d 326, 334 (9th Cir. 2016) (en banc)). Assuming such a claim exists, the new evidence presented by the petitioner must meet the "extraordinarily high" threshold showing of actual innocence to prevail on such a claim. *Id.* (citing *Herrera*, 506 U.S. at 417); *see also Carriger v. Stewart*, 132 F.3d 463, 477 (9th Cir. 1997).

Thus, Ironman-Whitecow's Claims One and Two that he is innocent do not provide an independent ground for this Court to grant his petition. His purported innocence is not, without more, a violation of his constitutional rights. These claims of innocence, if they are intended as a claim for exoneration based solely on factual innocence, must be denied as without legal basis in federal law.

2. Any federal innocence claim is procedurally defaulted.

The State argues on both Claims One and Two that Ironman-Whitecow failed to exhaust these claims before the state courts, and they are therefore now procedurally defaulted. State courts are co-equal adjudicators, with the federal courts, of federal constitutional issues. For that reason, a person who claims that a state's criminal judgment is unconstitutional under federal law must give the state courts the first opportunity to consider his claims. Before filing in federal court, he must exhaust available state judicial remedies with respect to each federal claim. 28 U.S.C. § 2254(b)(1)(A), (c). The exhaustion requirement is a "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Rose v. Lundy*, 455 U.S. 509, 520 (1982).

To meet the exhaustion requirement, a petitioner must (1) use the "remedies available," § 2254(b)(1)(A), through the state's established procedures for appellate review, *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); (2) describe "the federal legal theory on which his claim is based," *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008); and (3) describe "the operative facts . . . necessary to give application to the constitutional principle upon which the petitioner relies," *id.* *See also Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (discussing *Picard v. Connor*, 404 U.S. 270 (1971), and *Anderson v. Harless*, 459 U.S. 4 (1982)). A petitioner must meet all three prongs of the test in one proceeding.

The mere similarity between a federal claim and a state law claim does not satisfy the requirement of fair presentation. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam). General references in state court to "broad constitutional principles, such as due process, equal protection, [or] the right to a fair trial," are likewise insufficient. *See Hivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). To properly exhaust a claim, a petitioner must bring his federal claim before the state court by "explicitly" citing the federal legal basis for his claim. *Lyons v. Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *as amended*, 247 F.3d 904 (9th Cir. 2001).

There is no dispute that Ironman-Whitecow presented his contention to the state courts that Kvelstad did not die when or how the State claimed at trial. (Doc. 13-69 at 2 - 26.) However, nowhere in his presentation of the issue to the state courts did he identify what federal law was violated if the facts were as he asserted. In fact, he cited no legal authority at all that would provide a mechanism for the state court to decide his rights had been violated by the factual scenario alleged. That is, assuming the facts were as he asserted (and there are multiple parts to his factual scenario), what legal authority, federal or state, would require the state court to grant him relief? The State made this argument in the state court proceedings, that Ironman-Whitecow had not provided legal authority that would allow the district court to act on his contentions. (Doc. 13-71 at 6 – 7.) The State

also argued under Montana state law that Ironman-Whitecow was not entitled to relief.

The district court did not agree that Ironman-Whitecow had entirely failed to cite legal authority, concluding that his incorporation by reference of all of his prior filings, including a Table of Authorities, was sufficient. (Doc. 13-118.) In denying Ironman-Whitecow's petition, the state court referred to Mont. Code Ann. § 46-21-102 and Montana case law to analyze whether he had presented new evidence that "would establish that [he] did not engage in the criminal conduct for which [he] was convicted." (Doc. 13-118 2 - 15.) No federal law was cited. Neither of the Montana cases cited by the state district court, *Marble v. State*, 2015 MT 242, *overruled by Henderson v. State*, 2024 MT 253, nor *Herman v. State*, 2006 MT 7, ¶ 44, relies on federal law.[2] "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365–66. If Ironman-Whitecow wanted to rely

[2] The dissent in *Marble* discusses the federal standards regarding actual innocence, which are then discussed in depth in *Henderson*, which overruled aspects of *Marble*, but there is nothing about those cases or the district or the Supreme Court's discussion of Ironman-Whitecow's case that can be construed as a discussion of the federal due process standards that relate to claims of actual innocence. In *Henderson*, the Montana Supreme Court explained how Montana's statutes regarding actual innocence diverge from aspects of the federal law. *See* 2024 MT 253, ¶¶ 40–42.

on the due process arguments available under *Herrera* and *Schlup*, he had to argue those cases to the Montana courts. The district court made its determination of whether he had provided new evidence that entitled him to relief based only on Montana law, which has a specific statute and case law related to claims of innocence and exoneration. Mont. Code Ann. § 46-21-102.

On appeal of his postconviction denial, Ironman-Whitecow again argued that no murder occurred. (Doc. 23-7 at 11 et seq.) He again provided no legal argument whatsoever as to what the Supreme Court should do with his asserted evidence. He did not, as required above, describe "the federal legal theory on which his claim is based" or describe "the operative facts . . . necessary to give application to the constitutional principle upon which the petitioner relies." *Davis*, 511 F.3d at 1009. He merely concluded that "the totality of this newly discovered evidence proves [Ironman-Whitecow] didn't murder Kvelstad." (Doc. 23-7 at 27.)

The Montana Supreme Court affirmed the denial of the petition, citing only the "new evidence" provisions of Mont. Code Ann. § 46-21-102 and the Montana case law cited by the district court. There was no discussion of federal law whatsoever. The Montana Supreme Court concluded that, under state law, Ironman-Whitecow had not provided sufficient "new evidence" under Mont. Code Ann. § 46-21-102(2) to entitle him to relief. *Norquay v. State*, 2023 MT 165N, ¶ 15. "[A] state court's interpretation of state law, including one announced on

direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Both the state district court and the Montana Supreme Court found Ironman-Whitecow had not provided sufficient evidence of innocence to entitle him to state habeas relief. Ironman-Whitecow would have to show that the state courts made an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) in rejecting his claim. He fails to do so.

If the prisoner fails to present his claims to the state courts, but has no remaining state-court remedy, the claims are considered technically exhausted, but procedurally defaulted for purposes of federal habeas review. *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). (Ironman-Whitecow's reply reflects a misunderstanding of this standard. (Doc. 24 at 7.)) A claim that is procedurally defaulted cannot be reviewed unless the petitioner can demonstrate cause and prejudice for the default. *Coleman*, 501 U.S. at 750. As Ironman-Whitecow could not now return to the state courts, his claims of actual innocence are technically exhausted and procedurally defaulted.

Ironman-Whitecow replies by relying on what he calls his "Long Memorandum," his first amended petition in the state district court that was eventually stricken for being overlength. (Doc. 24 at 2 – 3.) Ironman-Whitecow was allowed by the district court to refer to various exhibits in the original petition,

but the petition itself was struck from the record. This peculiarity led to the state district court allowing Ironman-Whitecow to proceed on his actual innocence claim, as explained above, by referring to an incorporated list of cases as the supporting legal authority. Ironman-Whitecow now asserts that both the district judge and the Montana Supreme Court "had full access and opportunity to review [his] federal constitutional claims and their supporting facts and authorities before [he] filed" his petition in this Court. (Doc. 24 at 3.)

Ironman-Whitecow's position fails for three reasons. First, as to the district court's acceptance of his previous filings by incorporation, this practice is insufficient to fairly present his federal claims to the district court. Ironman-Whitecow argued no law whatsoever in association with his actual innocence claims, just the facts, leaving it to the district court to determine which of the incorporated documents would be relevant. In its order, the state district court relied on Montana state law to conclude Ironman-Whitecow was not entitled to relief based on any new evidence or proof of innocence. The State is correct the Ironman-Whitecow never made any federal argument regarding his innocence in the state courts. As such, even in the district court, there is no showing that Ironman-Whitecow argued a violation of federal law.

Second, whatever happened in the district court, Ironman-Whitecow did not

fairly present an issue of federal law to the Montana Supreme Court on his actual innocence claim. On appeal, the Supreme Court rejected Ironman-Whitecow's argument that the district court's rejection of his "Long Memorandum" deprived him of the opportunity to present his claims. His only citations to federal law before the Supreme Court were related to his ineffective assistance of counsel claims and his prosecutorial misconduct claims, which are discussed below. Ironman-Whitecow did not fairly present a federal claim to the Montana Supreme Court regarding his actual innocence. His claim is thus procedurally defaulted, and he cannot raise it here.

3. Ironman-Whitecow has not established a gateway claim.

Regardless of exhaustion, however, a claim of actual innocence may serve as a "gateway" through which a habeas petitioner can pass to have his otherwise barred constitutional claim considered on the merits:

> [A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, […] or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: [A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) (quoting *Schlup v. Delo,* 513 U.S. 298, at 329 (1995)). In this matter, if the State is correct that Ironman-Whitecow has procedurally defaulted many of his claims, his actual

innocence, were it established, could provide a gateway to consideration of any procedurally defaulted claims.

Nevertheless, any "gateway" innocence claim is foreclosed if the petitioner fails to produce any new evidence. *See, e.g.*, *Pratt v. Filson*, 705 F. App'x 523, 525 (9th Cir. 2017). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence— that was not presented at trial." *Schlup*, 513 U.S. at 324. "The gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *McQuiggin*, 569 U.S. at 401 (quoting *Schlup*, 513 U.S. at 316). After a four-day evidentiary hearing, the state district court concluded that Ironman-Whitecow had not provided new evidence that established his innocence. (Doc. 13-118.) The Montana Supreme Court, after review of the record, agreed.

Norquay v. State, 2023 MT 165N, ¶ 15.

The same conclusion is reached here. Ironman-Whitecow raises inconsistencies and questions, but he has not established, under the demanding standard required, that he did not commit the crime for which he was convicted. Several intoxicated people provided various conflicting stories regarding what

happened. Several people provided different drawings about who was where at the scene, including the victim. (Doc. 28-6.) Ironman-Whitecow has not established that he is innocent, and thus, any procedural default is not excused on that ground.

4. Ironman-Whitecow cannot excuse default with the state court page limit.

Ironman-Whitecow's response to the State's Answer argues that the Montana Supreme Court was wrong when it denied his claim on postconviction appeal that the district court had "deprived him of the opportunity to present his claims and evidence, which he claims denies him equal access to justice and violates his due process rights." (Doc. 24 at 5.) This claim is considered here as an additional argument to show cause to excuse his procedural defaults. It is once again unavailing.

The Montana Supreme Court relied on state law when it stated:

> The record does not support Norquay's contention that the District Court's rejection of his 312-page memorandum deprived him of the opportunity to adequately present his claims and evidence. Section 46-21-104(2), MCA, allows a petitioner to submit a supporting memorandum—not a novel. While rejecting Norquay's memorandum, the court still went well beyond its local rule's 20-page limit and allowed Norquay to file a 60-page postconviction petition and memorandum and incorporate references from past filings. The District Court then conducted a four-day hearing to allow Norquay to present his evidence. Norquay had every opportunity to fully develop the factual basis of his claims and, as the State correctly points out, he never indicated he was unable to do so before now. The District Court did not err by limiting the length of Norquay's petition and supporting memorandum.

Norquay v. State, 2023 MT 165N, ¶ 12. In his appeal, Ironman-Whitecow argued that the district court had improperly limited the length of his brief under Montana law. He referred to federal law, stating that the limitation of his claims would affect his future pursuit of them in federal court. (Doc. 23-7 at 42.) However, mentioning federal law does not turn his claim into a federal claim. There is no federal legal argument that says he is entitled to submit as many pages as he wants. The Montana Supreme Court decided under Montana law that the district court had authority to limit his submissions. He did not argue federal law regarding due process or access to justice to the Montana Supreme Court. The claim, if interpreted as a claim for constitutional error, is unexhausted and procedurally defaulted without excuse.

Nonetheless, it too may be considered as an attempt to argue cause for his defaults. But even in this Court, Ironman-Whitecow provides no legal argument in support of his conclusion that he should have been allowed to present as much information as he wanted, or in any form he wanted. The state courts did not prevent him from presenting his arguments, and, in fact, gave him a four-day hearing and sufficient briefing in which to do so. His contention otherwise is frivolous.

C. Claim Three: "*Youngblood* Destruction of Evidence"

Ironman-Whitecose further alleges evidence tampering, destruction, and

fabrication by the Havre Police Department. He also "lists numerous other exculpatory items of evidence that police did not collect," and other failures. (Doc. 1-1 at 13.) These arguments were not raised on direct appeal of his conviction. In the state postconviction proceedings, Ironman-Whitecow identified several pieces of evidence that, he claims, the police improperly failed to collect or destroyed. (Doc. 13-69 at 29–33.) He also alleges that the police intended to "deflect investigation away from their nefarious cover up," which, he asserts, relates to their misconduct. He cites Montana case law, which itself refers to the federal *Brady v. Maryland* standard. (Doc. 13-69 at 30.) He also cites civil case law regarding spoliation of evidence. He does not, however, explain how he meets either the *Youngblood* or *Brady* test.

The State responds that Ironman-Whitecow did not argue federal law before the state courts, and failed to raise this claim before the Montana Supreme Court. (Doc. 23 at 64.) The State divides Claim Three into two parts, because the controlling cases differ, depending on the facts alleged. In particular, Claim Three is captioned as an *Arizona v. Youngblood* violation, which requires a showing of bad faith on the part of the police if they mishandle or destroy evidence. *Arizona v. Youngblood*, 488 U.S. 51 (1988). A *Brady v. Maryland* claim, on the other hand, requires three components: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence

must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82.

As to any *Youngblood* claim, the State asserts that Ironman-Whitecow never argued the *Youngblood* standard to the state courts, and thus, that claim is technically exhausted and now procedurally defaulted. On postconviction appeal, Ironman-Whitecow did not assert error in the district court's legal analysis of this *Brady/Youngblood* issue. (Doc. 23-7 at 27–34.) He argued in great detail the factual assertions from his district court petition regarding photographic and video evidence, and whether the evidence was complete, accurately recorded, or "incompetent and inadmissible," in the wording of his brief. (Doc. 23-7 at 27–35.) But that is not the legal standard required by either *Brady* or *Youngblood*. Nowhere does he assert that this incompetence, as he called it, violated any federal right during his trial. Nor did he provide evidence of bad faith on the part of the police for failing to conduct the searches, tests, and interviews he demands, as required by *Youngblood*, 488 U.S. at 58. This issue is procedurally defaulted.

But even if this Court construes the Montana Supreme Court as having considered federal law, to the extent that its Order quoted the *Brady v. Maryland* standard, *Norquay v. State*, 2023 MT 165N, ¶ 18, there is nothing to support the conclusion that the state court misapplied federal law. Ironman-Whitecow provided no evidence, rather than speculation, that the State suppressed favorable

evidence to him, or that any evidence supposedly suppressed or not collected would have made the outcome of the proceedings different. Ironman-Whitecow does not show that the state court misapplied federal law or improperly found facts, and thus, this claim fails. 28 U.S.C. § 2254(d).

D. Claim Four: "Prosecutorial Misconduct and *Brady* Violations"

The main points of this hodgepodge claim are the conduct of the prosecutor in raising an issue of an uncharged rape, and various *Brady* violations, some of which relate to the photographic evidence discussed in Claim Three. (Doc. 1-1 at 14.) As noted above, the victim was found with his pants around his ankles, and a witness testified that Ironman-Whitecow had earlier threatened to sexually assault him. However, no related charges were brought, and no evidence was produced of a sexual assault. These claims, like the preceding evidentiary claims, were denied by the state district court, which characterized them as "representative of Petitioner's counsel's dissatisfaction with the overall investigation, prosecution, and trial of Petitioner and are generally speculative in nature, based on conclusory statement, and unsupported by facts." (Doc. 13-118.)

The evidentiary claims are discussed above, and are unexhausted, to the extent they rely on *Youngblood*, or without merit, to the extent they rely on *Brady*.

As to the prosecutorial misconduct claims, the State, in its Answer, agrees at least some were raised before the state courts. (Doc. 23 at 68.) On direct appeal of

his conviction, Ironman-Whitecow raised several claims of prosecutorial misconduct, for commenting on evidence, misstating the law, misstating evidence, and also related ineffective assistance of counsel claims for failure to object. (Doc. 23-4 at 39 – 50.) The Supreme Court was not persuaded and denied the claims. *State v. Norquay*, 2011 MT 34, ¶ 46. Ironman-Whitecow did not argue federal law regarding these claims in front of the Montana Supreme Court, and the Supreme Court relied solely on state law in denying them. *State v. Norquay*, 2011 MT 34, ¶ 46. Any federal law claim is procedurally defaulted.

On postconviction, the state district court rejected these claims as unsupported by facts, or as record-based, and thus procedurally barred on postconviction. (Doc. 13-118 at 19 – 20.) On appeal of that order to the Montana Supreme Court, Ironman-Norquay's claims shifted again, now adding alleged prosecutorial misconduct that occurred during his postconviction proceedings, when the prosecutor delayed various discovery, objected to other discovery, and refused to be deposed. (Doc. 23-7.) On postconviction appeal, the Supreme Court declined to revisit its prior evaluation of prosecutorial misconduct at trial. *Norquay v. State*, 2023 MT 165N, ¶ 16.

Ironman-Whitecow asserts in the current petition that he raised federal law regarding this claim in his postconviction appeal to the Montana Supreme Court. (Doc. 1-1 at 14.) This assertion is incorrect. (Doc. 23-7 at 34 – 35.) To the extent

he argued prosecutorial misconduct on postconviction appeal, he merely made factual assertions about the prosecutor's conduct, without citation to any state or federal statutory or case law. Ironman-Whitecow's claims are procedurally defaulted, or, to the extent they are not, are factually insufficient. A petitioner challenging the substance of the state court's findings must show "that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Hibbler v. Benedetti*, 693 F. 3d 1140, 1146 (9th Cir. 2012) (*quoting Taylor v. Maddox*, 366 F. 3d 992, 1000 (9th Cir. 2004)). A petitioner challenging the adequacy of the fact-finding process must show no appellate court could reasonably hold "that the state court's fact-finding process was adequate." *Taylor*, 366 F. 3d at 1000. Here, Ironman-Whitecow has consistently provided a smorgasbord of speculation that he asserts should add up to constitutional error, but he has never demonstrated that his claims are based in facts or that he was prejudiced at trial.

E. Claim Five: "Ineffective Assistance of Counsel"

Ironman-Whitecow's federal petition refers to four specific claims of ineffective assistance of counsel, including: failure to develop a defense to felony murder, failure to investigate the cause of death, failure to file pretrial motions, and failure to object to allegations of rape at trial. (Doc. 1-1 at 14.)

Ironman-Whitecow raised several IAC claims in his state postconviction

petition. (Doc. 13-69 at 37 – 47.) He never raised any legal argument for how any of the alleged missteps by counsel met the federal *Strickland v. Washington* constitutional standard. After the state district court hearing, the court concluded that nine of Ironman-Whitecow's IAC claims were record-based, and, thus, should have been raised on direct appeal. (Doc. 13-118 at 20.) This is a state law procedural bar found in Mont. Code Ann. § 46-21-105(2): "When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter." Ironman-Whitecow did not appeal this Montana state law conclusion on his postconviction appeal, and thus, there is no federal law question to consider. He has never argued a federal basis for any of his IAC claims to a Montana court.

The State concedes that failure to raise these record-based claims on direct appeal could be excused by a claim for ineffective assistance of appellate counsel in certain circumstances, under *Martinez v. Ryan*, 566 U.S. 1 (2012). (Doc. 23 at 71 – 73.) Ironman-Whitecow hints at that argument in the state district court on postconviction. (Doc. 13-69 at 37 ("[I]f the court determines any of the IAC claims against trial counsel are record-based, petitioner requests the court analyze those section(s) under IAC of Appellate Counsel for failure to raise the issue(s) on direct appeal.") But the only specific contention Ironman-Whitecow made in his district

court postconviction petition regarding appellate IAC was that appellate counsel failed to file a motion for relief from the judgment related to the *Allen* instruction, after the Montana Supreme Court had concluded it was constitutionally sound in Ironman-Whitecow's trial. (Doc. 13-69 at 46 – 47.) There is no reason to believe, the Montana Supreme Court just having affirmed the use of the instruction in Ironman-Whitecow's trial, that any motion based on the exact same issue would have been successful. Considered on its merits, a federal *Strickland* ineffective assistance claim related to that specific decision by appellate counsel would fail.

Ironman-Whitecow did not appeal the state district court's conclusion regarding the procedural bar of his record-based claims. He does not assert his record-based claims in his federal petition. Ironman-Whitecow has not provided a *Martinez* reason for this Court to revive his defaulted record-based IAC claims.

The state postconviction court assessed six IAC claims that it concluded were not record-based under the *Strickland v. Washington* standard. (Doc. 13-118 at 21 – 23.) A petitioner arguing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. In assessing a claim that counsel's representation did not meet the constitutional minimum, the court is to "indulge in a strong presumption that counsel's conduct f[ell] within the wide

range of professional assistance." *Id.* at 689. A petitioner bears the burden of showing the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002).

Therefore, this Court's review of the Montana Supreme Court's determination that counsel performed deficiently is "doubly" deferential. *Strickland* requires state courts to give deference to choices made by counsel, and AEDPA, in turn, requires this Court to defer to the determinations of state courts. *Harrington v. Richter*, 562 U.S. 86, 105, (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

The crux of Ironman-Whitecow's complaint against counsel is aimed at trial strategy. Counsel has responsibility for making decisions about strategy and tactics and is not bound by the instructions or wishes of the client on such matters:

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence."

McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018) (*quoting Gonzalez v. United States*, 553 U.S. 242, 248 (2008) (identifying "whether to plead guilty, waive the right to a jury trial testify in one's own behalf, and forgo and appeal" as the exceptions to this general rule)). Thus, the decision of whether to attempt to place the blame on Ironman-Whitecow's co-defendant was within the discretion of trial counsel. So, too, was whether to object at trial to references to sexual assault.

These claims were developed during the evidentiary hearing, when Ironman-Whitecow's trial counsel testified, and the district court heard evidence on the various alternate theories regarding the victim's death, the conflicting testimony of witnesses, etc. The district court applied the correct *Strickland* standard, despite the fact that Ironman-Whitecow had not argued the standard himself, and concluded that Ironman-Whitecow had established neither prong of the *Strickland* test. (Doc. 13-118 at 21 – 23.) (*Strickland* is mentioned once in the postconviction petition, in a footnote citing a Montana case that, in turn, cites *Strickland*. (Doc. 13-69 at 38).)

On postconviction appeal, Ironman-Whitecow did not argue the *Strickland* standard. (Doc. 23-7.) Instead, he contended that the district court judge had foreclosed his ability to develop his arguments because he was not allowed to examine Ironman-Whitecow's trial counsel regarding "strategies he failed to pursue." (Doc. 23-7 at 35.) His postconviction counsel also made, on appeal, a preemptive claim that against themselves, that they made unspecified errors on postconviction. (Doc. 23-7 at 36.) This claim is not renewed in Ironman-Whitecow's federal petition.

The Montana Supreme Court addressed Ironman-Whitecow's postconviction appeal IAC claims by stating:

> Norquay fails to demonstrate how his counsel's actions were deficient or how they fell below an objective standard of reasonableness, and we will not develop legal analysis to support his position. *State v. Hicks*, 2006 MT 71, ¶ 22, 331 Mont. 471, 133 P.3d 206 (We do not "conduct

> legal research on [an] appellant's behalf, [] guess as to his precise position, or [] develop legal analysis that may lend support to his position." (internal quotations and citation omitted)). The District Court correctly denied Norquay's claim of ineffective assistance of counsel.

Norquay v. State, 2023 MT 165N, ¶ 19. Ironman-Whitecow put this Court in the same position by not applying the law to any facts that he has established—or by failing to establish any facts that would even show deficient performance on the part of his counsel.

In his reply brief, Ironman-Whitecow overstates the record in the state court, stating that his trial counsel "admitted that if he'd known about the evidence tampering and coverup, he would have changed his trial strategy." (Doc. 24 at 24.) What Ironman-Whitecow's counsel actually said was that *if* there had been tampering, that *might* have changed his strategy. (Doc. 13-124 at 118–120 (transcript of counsel's testimony).) Speculation on an alternate set of facts is not the standard to which counsel is held under *Strickland*. Counsel strategized as he did when faced with the facts he had. Any alternate strategy that required facts that counsel did not possess is irrelevant. Ironman-Whitecow's argument otherwise is misplaced.

In short, Ironman-Whitecow has not overcome the presumption that counsel's actions "might be considered sound trial strategy." *See Strickland*, 466 U.S. at 689. Moreover, under § 2254(d), he has not shown that the Montana Supreme Court unreasonably applied the first prong of *Strickland* to the facts of his

case. Accordingly, this Court need not examine the prejudice prong when deficient performance is not established. *Id.* at 687. Ironman-Whitecow has not established that his counsel was ineffective.

F. Claim Six: "Due Process Violations"

Ironman-Whitecow makes a blanket claim that the various other substantive deficiencies so pervaded his trial that, as a result, he was deprived of due process. (Doc. 1-1 at 15.) This due process claim is different from what Ironman-Whitecow raised in his state petition, where he asserted specific claims regarding the constitutionality of the accountability to felony murder statute, and the trial court's *Allen* instruction. (Doc. 13-69 at 47 – 50.) The district court, in denying those claims, concluded they were record-based and should have been raised on direct appeal. (Doc. 13-118 at 23 – 24.) (The *Allen* claim was, of course, as discussed below.) Ironman-Whitecow did not appeal the district court determination of these issues. (Doc. 23-7.)

Now, he provides no legal or factual argument to support this nonspecific claim. A simple allegation of a due process violation, without more, does not warrant relief, especially when it was not raised before the Montana Supreme Court.

G. Claim Seven: "Deprivation of 6th Amendment Right to Fair Trial"

Ironman-Whitecow makes a blanket claim that the various other substantive

issues so pervaded his trial that, as a result, his Sixth Amendment rights were violated. (Doc. 1-1 at 15.) This claim was not raised on direct appeal, other than in the form of the ineffective assistance of counsel claims discussed above. (Doc. 23-7 at 39.) Because he has not established any other substantive claims, this claim fails.

H. Claim Eight: "Improper Jury Instructions"

Ironman-Whitecow asserts that the jury instructions had a "confusing and manipulative impact," which caused the jury to convict him. (Doc. 1-1 at 15.) This claim was not raised on direct appeal, but only in postconviction. *Id.* On direct appeal of his conviction, Ironman-Whitecow did raise an *Allen* claim regarding the trial court's so-called "dynamite instruction." The Montana Supreme Court rejected the claim. *Norquay*, 2011 MT 34, ¶¶ 29 – 43.

On state postconviction relief, Ironman-Whitecow contended that the trial court's instructions confused the jury, in part because it did not define the words "material," "criminal responsibility," and "accountable." He did not provide federal law to support these arguments. He also raised again his prior claim regarding the trial court's *Allen* instruction, but he has not argued that claim in his federal petition. (Doc. 13-69 at 51 – 52.) He did not appeal any of the district court's determinations regarding instructions. (Doc. 23-7.) The district court denied these claims because they are record-based and should have been raised on

direct appeal. (Doc. 13-118.) Thus, Ironman-Whitecow's claim regarding jury instructions is technically exhausted and procedurally defaulted. As explained above, he could have raised an appellate IAC claim related to the other jury instructions, but he did not. To the extent he raised these claims at all, it was on the basis of state law. Ironman-Whitecow's Claim Eight is denied.

I. Claim Nine: "Disproportionate Sentence in Violation of the 8th Amendment"

Ironman-Whitecow claims his sentence violates the Eighth Amendment as a "cruel and unusual sentence of 75 years for a crime Petitioner did not commit." (Doc. 1-1 at 15.) This claim was not raised on postconviction appeal.

In response, the State corrects Ironman-Whitecow's description of his sentence, pointing out that it is a 65-year sentence for deliberate homicide and a concurrent 10-year sentence for tampering with evidence, with a 25-year parole restriction. (Doc. 23 at 88.) The State asserts this claim is procedurally barred because he did not argue any federal claim before the Montana Supreme Court, either on direct or postconviction appeal. This claim is technically exhausted and procedurally defaulted. Ironman-Whitecow has not fairly presented this federal issue to the courts of Montana and cannot raise it first here.

But even on its merits, Ironman-Whitecow's position fails. He asserts that his sentence is illegal "now that I've proved I'm innocent." (Doc. 24 at 26.) Ironman-Whitecow's initial premise is not accepted, as explained above. Without

that, there is no additional basis to conclude that Ironman-Whitecow's 65-year sentence on a homicide conviction violates the Eighth Amendment. *Ewing v. California*, 538 U.S. 11 (2003).

J. Claim Ten: "Cumulative Error"

Because Ironman-Whitecow is unable to establish a single constitutional error in this case, there is nothing to accumulate to the level of a constitutional violation. *See Mancuso v. Olivarez*, 292 F. 3d 939, 957 (9th Cir. 2002).

IV. CERTIFICATE OF APPEALABILITY

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2255 Proceedings. A COA should issue as to those claims on which the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

None of Ironman-Whitecow's claims meets even the relatively low threshold required for a COA. Ironman-Whitecow has not met the threshold to establish actual innocence. Ironman-Whitecow does not identify any respect in which his

counsel's performance was unreasonable. He has not shown constitutional errors in the conduct of his prosecution or trial. Ironman-Whitecow has not presented a difficult or complicated question of law that warrants review. There is no reason to encourage further proceedings. A COA is not warranted.

Accordingly, IT IS ORDERED that:

1. Ironman-Whitecow's petition for a writ of habeas corpus is DENIED and DISMISSED.

2. The Clerk of Court is directed to enter by separate document a judgment in favor of Respondents and against Petitioner.

3. A certificate of appealability is DENIED. The clerk shall immediately process the appeal if Ironman-Whitecow files a notice of appeal.

DATED this 9th day of January, 2025.

14:37 P.M.

Donald W. Molloy, District Judge
United States District Court