NOT FOR PUBLICATION

FILED

OCT 29 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAVIER VELAZQUEZ ALARCON,

Petitioner - Appellant,

v.

RYAN THORNELL, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry, Director of the Arizona Department of Corrections; MARK BRNOVICH, Attorney General of the State of Arizona; ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents - Appellees.

No. 24-5837

D.C. No.
2:23-cv-00821-ROS

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Submitted October 27, 2026**
Phoenix, Arizona

Before: GRABER, HURWITZ, and BADE, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Javier Velazquez Alarcon appeals the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. We review de novo a district court's denial of a petition for writ of habeas corpus and "questions regarding procedural default." *Dickinson v. Shinn*, 2 F.4th 851, 857 (9th Cir. 2021) (internal quotation marks and citation omitted). Our review, however, is constrained by the deferential standards established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) as to "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), and we affirm.

1. Alarcon contends that a seven-month delay in appointment of counsel after his initial appearance violated the Sixth Amendment. We reject Respondents' argument that this claim is procedurally defaulted because Alarcon failed to exhaust it in state court.

Alarcon "fairly presented," and thus exhausted, his right-to-counsel claim by briefing it in the Arizona Court of Appeals. *See Peterson v. Lampert*, 319 F.3d 1153, 1155–56 (9th Cir. 2003) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999) (holding that the proper-forum requirement is satisfied by fair presentation to the Arizona Court of Appeals in non-capital cases). Alarcon argued in his opening state appellate court brief that he was "without counsel" and was "left without representation for more

than seven months." Alarcon also argued this claim in his reply brief, quoting *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), stating that "the right to counsel attached at the first appearance," and asserting that the seven-month delay in appointing counsel prejudiced him. Those statements sufficiently described both the factual and legal basis for Alarcon's constitutional claim. *See Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005); *cf. Picard v. Connor*, 404 U.S. 270, 275 (1971).

2. However, Alarcon's challenges to the Arizona Court of Appeals' decision rejecting his Sixth Amendment claims fail. The only Supreme Court opinion he cites in support of his claim that the seven-month delay violated the Sixth Amendment is *Rothgery*. But the holding in *Rothgery* was explicitly "narrow," and the Court expressly declined to "decide whether [a] 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights." *Rothgery*, 554 U.S. at 213.

And, Alarcon's argument that the state court improperly collapsed the "attachment" and "critical stages" issues in its Sixth Amendment analysis is contradicted by the Arizona Court of Appeals' decision, which separately analyzed and rejected Alarcon's "attachment" argument.

Similarly, Alarcon's argument that the state court applied the incorrect "critical stages" standard fails because he identifies no conflict between the state

court decision and clearly established federal law. Alarcon cites only Supreme Court cases holding that a plea bargain is a critical stage for purposes of ineffective assistance of counsel claims. *See Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (instructing courts to refrain from "framing our precedents at such a high level of generality" for fear that a "lower federal court could transform even the most imaginative extension of existing case law into clearly established Federal law . . ." (internal quotations omitted)).

3. Alarcon also argues that he has demonstrated cause and prejudice excusing the procedural default of his claim that trial counsel was ineffective for failing to object to the seven-month delay in appointing counsel. To demonstrate cause and prejudice, Alarcon must demonstrate, among other things, a reasonable probability that the result of the post-conviction proceedings would have been different had post-conviction counsel raised the claim. *See Martinez v. Ryan*, 566 U.S. 1, 14 (2012) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)); *Dickinson*, 2 F.4th at 857–58. He has not.

The Arizona Court of Appeals reasonably concluded on direct appeal that the record does not indicate "that Alarcon lost any significant rights." The post-conviction review court rejected his ineffective assistance of counsel claims as "speculative" and as contradicted by his own narrative. And the district court, analyzing those two levels of state review, correctly rejected Alarcon's claims of

prejudice. *See Strickland*, 466 U.S. at 694 (explaining that prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *Harrington v. Richter*, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable.").

AFFIRMED.