FILED

OCT 19 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE HOMER MARK, Petitioner-Appellant, v. AMY RABEAU, Respondent-Appellee.	No. 18-35821 D.C. No. 3:13-cv-00207-TMB District of Alaska, Anchorage ORDER

Before: O'SCANNLAIN, BERZON, and IKUTA, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the notice of appeal, dated September 30, 2018 and filed on October 2, 2018, was not filed or delivered to prison officials within 30 days after the district court's post-judgment order entered on August 14, 2017. *See* 28 U.S.C. § 2107(a); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional). To the extent appellant's October 2, 2018 notice of appeal challenges the district court's final judgment entered on April 25, 2016, it is duplicative of closed appeal No. 16-35600. Consequently, this appeal is dismissed for lack of jurisdiction and as duplicative.

DISMISSED.

MF/Pro Se

THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

JOE HOMER MARK v. AMY RABEAU,
Supt. Of Goose Creek Correctional Center

Case No. 3:13-cv-00207 TMB

By: THE HONORABLE TIMOTHY M. BURGESS

PROCEEDINGS: ORDER FROM CHAMBERS

Having reviewed Magistrate Judge McCoy's Initial Report and Recommendation on Petitioner's Amended Petition for Writ of Habeas Corpus (Docket No. 72), in conjunction with the parties' Objections and Responses (Docket Nos. 73 & 75), and the Magistrate's Final Report and Recommendation, (Docket 76), the Court hereby adopts and accepts the Final Report and Recommendation in its entirety. Consequently, Petitioner's claim seven of the Amended 28 U.S.C. § 2254 petition of habeas corpus (Docket 55) is DENIED.

IT IS SO ORDERED.

Entered at the direction of the Honorable Timothy M. Burgess, United States District Judge.

DATE: April 25, 2016

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JOE HOMER MARK,

Petitioner,

vs.

AMY RABEAU, Superintendent of the Goose Creek Correctional Center,

Respondent.

Case No. 3:13-cv-00207-TMB-KFM

INITIAL REPORT RECOMMENDING THAT MOTION TO DISMISS BE GRANTED
[Docket No. 27]

I. MOTION PRESENTED

Before the Court is Superintendent Amy Rabeau's (the state custodian's) motion to dismiss eight of the nine claims contained in Joe Homer Mark's amended 28 U.S.C. § 2254 petition of habeas corpus.[1] Mark filed an opposition[2] and the state custodian submitted a reply.[3] Neither the state custodian nor Mark requested oral argument and this Court has determined that additional argument is unnecessary.

This report recommends that the state custodian's motion to dismiss at Docket No. 27 be granted.

[1] Docket No. 27.
[2] Docket No. 32.
[3] Docket No. 36.

APPENDIX C

II. BACKGROUND

A. State Court Procedural History

Alaska charged Mark in a multi-count indictment with murder, sexual assault, and evidence tampering.[4] The case against Mark centered on the death of a woman who appeared to have fallen or been pushed from the third floor of an Anchorage hotel. Before trial, Mark asked the Alaska Superior Court to suppress evidence derived from two warrantless entries into his hotel room.[5] He also alleged a *Miranda v. Arizona*[6] violation, and asked the court to suppress statements he gave at the police station shortly after the police entries into his hotel room (the first police interview).[7] The trial court denied these motions. The jury returned guilty verdicts on all counts, and the court imposed a composite sentence of 129 years.[8] Mark appealed the three adverse suppression rulings to the Alaska Court of Appeals. He again alleged that the two police entries into his hotel room were unlawful, and asserted that his *Miranda* rights had been violated. The intermediate appellate court affirmed the trial court's three adverse suppression rulings in an

---

[4] Count 1 charged first degree murder (intentional killing), Count 2 charged second degree murder (acting with intent to cause serious physical injury), Count 3 charged second degree murder (extreme indifference murder), Count 4 charged second degree murder (murder during the commission of a sexual assault), Count 5 charged first degree sexual assault (sexual penetration of the victim's vagina), Count 6 charged first degree sexual assault (sexual penetration of the victim's anus), Count 7 charged second degree sexual assault (sexual penetration of the victim knowing she was incapacitated), and Count 8 charged tampering with physical evidence. Docket No. 27-4 at 17.

[5] *Mark v. Alaska*, No. A-7661, 2002 WL 341979, at *1 (Alaska Ct. App. Mar. 6, 2002).

[6] 384 U.S. 436 (1966).

[7] *Mark*, 2002 WL 341979 at *1.

[8] The court imposed concurrent 99-year terms on Counts 1 and 4; concurrent terms of 30 years on Counts 5 and 6; a 10-year term on Count 7; and a 5-year term on Count 8. The sentences on Counts 5 and 6 were concurrent with each other, but consecutive to Counts 1 and 4. The remaining sentences were concurrent. No sentences were imposed on Counts 2 and 3 as those Counts merged with Counts 1 and 4. Docket No. 27-4 at 17.

unpublished opinion.[9] Mark renewed his three suppression arguments before the Alaska Supreme Court.[10] That Court denied Mark's petition for discretionary review in an unpublished order.[11]

Next, Mark filed a *pro se* petition for post-conviction relief with the Alaska Superior Court, alleging multiple errors associated with his conviction.[12] Following appointment of counsel, Mark alleged, *inter alia*, that his appellate attorney was constitutionally ineffective in failing to argue certain legal issues on appeal.[13] In particular, Mark contended that his appellate counsel was constitutionally ineffective when he failed to argue that (1) the trial judge should have granted Mark's motion to suppress a second statement to the police because of a *Miranda* violation; (2) the trial court should have granted Mark's request for mistrial following final argument; and (3) there was insufficient evidence to support the convictions.[14] The trial court granted the State's motion to dismiss the post-conviction relief application because Mark failed to submit minimally sufficient evidence establishing a right to post-conviction relief.[15] Mark appealed this adverse ruling to the Alaska Court of Appeals. The intermediate appellate court affirmed the dismissal in an unpublished opinion.[16] The court reasoned that evidence that counsel failed to recall the reasons for his tactical choices on appeal was not sufficient to overcome the strong presumption of competence afforded to counsel.[17] Mark submitted a petition for discretionary review with the Alaska Supreme Court, arguing the lower courts improperly applied

---

[9] *Mark*, 2002 WL 341979 at *5.

[10] Docket No. 27-6.

[11] Order on Petition for Hearing, *Mark v. State*, S-10561 (Alaska June 26, 2002) (found at Docket No. 27-8).

[12] Docket No. 22-1.

[13] *Mark v. State*, No. A-10817, 2012 WL 5659291, at *1 (Alaska Ct. App. Nov. 14, 2012).

[14] *Id.* at 1, 3.

[15] *Id.* at 1.

[16] *Id.* at 3.

[17] *Id.*

the presumption of competence when appellate counsel could not recall the reasons for his tactical choices.[18] That Court denied Marks' petition for hearing in an unpublished order.[19]

B. Federal Court Procedural History

On August 8, 2014, Mark filed an amended 28 U.S.C. § 2254 petition with this Court, alleging that his conviction violated the federal Constitution. The arguments offered in Mark's habeas petition go well beyond those litigated in the state courts. The petition raises one Fourth Amendment search and seizure challenge, two Fifth Amendment due process challenges, two Fifth Amendment *Miranda* challenges, one Sixth Amendment effective assistance of counsel challenge against trial counsel, and three Sixth Amendment effective assistance of counsel challenges against appellate counsel.[20]

III. THE STATE CUSTODIAN'S MOTION TO DISMISS

As indicated, the state custodian has moved to dismiss eight of the nine claims set forth in the amended habeas petition. These claims must be dismissed, says the state custodian, because the Fourth Amendment claim is not cognizable in a federal habeas proceeding, and because three Fifth Amendment claims and the four Sixth Amendment claims are procedurally defaulted.[21] The state custodian contends that the only claim properly before this Court is the Fifth Amendment *Miranda* claim associated with Mark's first interview at the Anchorage police station.[22]

---

[18] Docket No. 27-12.
[19] Docket No. 27-13.
[20] Docket No. 22 at 5, 6.
[21] Docket No. 27 at 1, 2.
[22] Docket No. 36 at 1, identifying only Mark's seventh claim (absence of *Miranda* warning during an allegedly custodial interview); *see also* Docket No. 22 at 6.

IV. APPLICABLE STANDARDS

A. Fourth Amendment Habeas Standard

Ordinarily, Fourth Amendment claims are not cognizable under 28 U.S.C. § 2254.[23] The only exception is when the petitioner can show that he or she was not afforded a full and fair opportunity to litigate his or her Fourth Amendment claim in state court.[24]

B. Exhaustion and Procedural Default Standards

A petitioner seeking federal relief from a state court judgment must demonstrate that he or she has exhausted available state court remedies.[25] To satisfy the exhaustion doctrine, the petitioner must fairly present his or her claims to the state courts so that the state has the "opportunity to pass upon and correct the alleged violations of its prisoner's federal rights."[26] To satisfy the "fairly present" requirement, the petitioner actually must present his or her federal claim to "each appropriate court (including a state supreme court with powers of discretionary review)" so that the each court is alerted to the federal nature of the claim.[27] Judge Kleinfeld bluntly described the fair presentment requirement in *Galvan v. Alaska Dep't of Corr.*[28]

> Briefing a case is not like writing a poem, where the message may be conveyed entirely through allusions and connotations. Poets may use ambiguity, but lawyers use clarity. If a party wants a state court to decide whether she was deprived of a federal constitutional right, she has to say so. It has to be clear from the petition filed at each level in the state court system that the petitioner is claiming the violation of the federal constitution that the petitioner subsequently claims in the federal habeas petition. That is, "the prisoner must 'fairly present' his claim in each appropriate state court . . . thereby *alerting* that court to the federal nature of the claim." If she does not say so, then she does not "fairly present" the federal claim to the state court. It may not take much, and as we held in *Peterson*, the

---

[23] *Stone v. Powell*, 428 U.S. at 493.
[24] *Id.*
[25] *Picard v. Connor*, 404 U.S. 270, 275 (1971).
[26] *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curium).
[27] *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Duncan*, 513 U.S. at 365-66.
[28] 397 F.3d 1198 (9th Cir. 2005).

> inquiry is not mechanical, but requires examination of what the petitioner said and the context in which she said it. To exhaust a federal constitutional claim in state court, a petitioner has to have, at the least, explicitly alerted the court that she was making a federal constitutional claim.[29]

If state procedural rules now bar consideration of a federal claim, that claim is technically exhausted, even if it has not been fairly presented to all levels of the state court. The claim will still be deemed procedurally defaulted, however, unless the petitioner can show cause for his failure to exhaust the claim and prejudice from the purported constitutional violation.[30]

V. ANALYSIS OF THE FOURTH AMENDMENT CLAIM

The state custodian contends that Mark's Fourth Amendment search and seizure claim should be dismissed as not cognizable under § 2254.[31] Mark counters by arguing he did not receive a full and fair hearing on the Fourth Amendment claim before the state courts.[32] Mark centers his full and fair hearing argument on disagreement with the outcome reached by the state court on the suppression issue.[33] But, as will become clear, disagreement with the state court outcome does not make the Fourth Amendment claim cognizable in federal court.

A. Facts

Anchorage police found a woman's body was on the sidewalk next to a three story hotel in Anchorage.[34] It appeared she had fallen from a substantial height because she lay in a pool of blood and her head had split open.[35] Police quickly determined the woman must have fallen from the third floor because the second floor was closed for renovation and there was no

---

[29] *Id.* at 1204-05 (citations omitted).
[30] *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011).
[31] Docket No. 27 at 40.
[32] Docket No. 32 at 3, 5.
[33] *Id.*
[34] *Mark*, 2002 WL 341979 at *1.
[35] *Id.*

available roof access.[36] The woman's body lay directly beneath room 371.[37] Four police officers, with weapons drawn, and a uniformed hotel security officer converged on room 371.[38] One of the officers knocked and announced himself as a police officer.[39] No one answered, even after the knock and announcement was repeated several times.[40] The officer then used a hotel pass key provided by the security guard to unlock the door.[41] But the door opened only two or three inches because the security chain was engaged.[42] The officer again knocked and announced the police presence.[43] Mark, who was alone, shut the door from the inside, disengaged the chain, and reopened the door to the police.[44]

Two officers immediately entered and conducted a 20-second security sweep, while the remaining officers detained Mark in handcuffs in his underwear in the hotel hallway.[45] Their weapons remained pointed down and were never pointed at Mark.[46] Once the 20-second security sweep was completed, the officers holstered their weapons and removed the handcuffs from Mark.[47]

The police identified Mark and, during the colloquy that followed, the police asked for his permission to search room 371.[48]

Det. Jessen: Mark. Your last name is Mark, is that right?

Mark: Yeah.

---

[36] *Id.*
[37] *Id.*
[38] *Id.* at 1, 2.
[39] *Id. at* 1.
[40] *Id.*
[41] *Mark*, 2002 WL 341979 at *1.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 2.
[47] *Mark*, 2002 WL 341979 at *2.
[48] *Id.*

Det. Jessen: Okay, I'm Detective Jessen, [and] this is Sgt. Jackson and Officer Penman. The reason we're here is because of the dead lady on the sidewalk down there, okay? Looks like she might've fallen out of one of these windows. I know we've already scared you this morning, but we don't know if we have a homicide, we don't know what, we don't know if anyone else was hurt in this room. That's why we approached you like that, okay? I hope you understand.

What I'd like to do now is I'd like to get your permission to check the room real quick and make a quick search.

Mark: Okay.

Det. Jessen: Is that okay? Now you don't have to.

Mark: Okay. [laughs]

Det. Jessen: You know, it's up to you. If you want us to leave, we will. But I'd like your permission.

Mark: All right.

Det. Jessen: Okay.[49]

A search of room 371 followed.[50] Officers found blood on a bedspread and on Mark's pants and shoes.[51] Following that suppression hearing, the state trial court concluded that the first warrantless entry was permissible under the emergency aid exception to the warrant requirement, and that Mark voluntarily consented to the second warrantless entry. The Alaska Court of Appeals affirmed these holdings,[52] and the Alaska Supreme Court rejected Mark's petition for discretionary review challenging these holdings.[53]

---

[49] *Id.* at 3.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 1.
[53] Docket No. 27-8.

B. Mark Had a Full and Fair Hearing

With this record, Mark's argument that he did not have a full and fair hearing on his Fourth Amendment claim is not persuasive. Indeed, the factual recitation regarding the Fourth Amendment challenge comes directly from the evidentiary record created at the suppression hearing before the Alaska Superior Court. The law has long been settled that a Fourth Amendment search and seizure claim is not cognizable in a § 2254 proceeding when the record establishes that the state provided the state prisoner with a full and fair opportunity to litigate the claim in state court.[54] In evaluating whether the petitioner had a full and fair opportunity litigate the claim in state court, the issue does not depend on whether the petitioner litigated his claim, or, if litigated, whether it was properly decided.[55] Rather, the inquiry centers exclusively on whether the state court provided the petitioner with the opportunity to litigate his or her Fourth Amendment claim.[56]

In this case, the record plainly establishes Alaska did that. First, Mark filed a motion requesting that all evidence derived from the two police entries into room 371 be suppressed. Second, the state court calendared the request for an evidentiary hearing. Third, Alaska produced the officers who entered the room without a warrant, provided Mark with an opportunity to test their veracity through cross-examination, and then afforded him the opportunity to present evidence on his own behalf. The state trial court denied the suppression request only after conducting the above-described evidentiary hearing. Finally, Mark appealed the adverse result to the Alaska Court of Appeals, and next exercised his right to seek discretionary review from the Alaska Supreme Court.

---

[54] *Stone v. Powell*, 428 U.S. 465, 494 (1976).
[55] *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).
[56] *Id.*

Under these circumstances, this Court concludes that Mark had a full and fair opportunity to fully develop his Fourth Amendment search and seizure claim. His disagreement with the outcome is not sufficient to leverage habeas corpus jurisdiction on this Fourth Amendment claim. Consequently, *Stone v. Powell* and its progeny control and Mark's Fourth Amendment claim must be dismissed with prejudice.

VI. THE FIFTH AMENDMENT CLAIMS

Marks brings four Fifth Amendment claims—two Fifth Amendment *Miranda* claims and two Fifth Amendment due process clause claims. Those claims are as follows:

- Mark's Fifth Amendment right against self-incrimination was violated at an April 30, 1999 Anchorage police station interview because he was in custody and did not receive a prophylactic *Miranda* warning at the first police interview;[57]

- Mark's Fifth Amendment right against self-incrimination was violated at an June 25, 1999 Anchorage police station interview because his *Miranda* waiver was not knowing and voluntary at the second police interview;[58]

- Mark's Fifth Amendment right to due process of law was violated when the arresting officer failed to inform Mark of the nature of the charges for which he had been arrested prior to the second police interview;[59] and

- Mark's Fifth Amendment right to due process of law was violated when the trial court denied Mark's mistrial request following allegedly improper burden-shifting arguments by the trial prosecutor during closing argument.[60]

The state custodian concedes the Fifth Amendment claim relating to the absence of a *Miranda* warning at the first police interview is properly before the court.[61] However, she asserts that the second Fifth Amendment *Miranda* claim and the two Fifth Amendment due process claims

---

[57] Docket No. 22 at 6.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Docket No. 36 at 1.

should be dismissed because they were not properly exhausted and are now procedurally defaulted. As will be seen, the state custodian's arguments are persuasive.

The most efficient way to address the relevant three Fifth Amendment claims is to review the facts associated with each claim and then evaluate the parties' arguments on the state custodian's motion to dismiss.

A. Facts Relevant to the Fifth Amendment Claims

1. *Miranda* and due process claims relating to the second police interview

Transcripts from the state court suppression hearing reveal that Mark returned to Goodnews Bay in rural Alaska following the first police interview. The police investigation ultimately focused on Mark and, approximately two months after the first police interview, Anchorage police obtained an arrest warrant for Mark. After securing the arrest warrant, an Anchorage police detective telephoned Mark in Goodnews Bay, offering to fly him to Anchorage for another interview to complete the police investigation.[62] Mark agreed to fly to Anchorage.

The detective never attempted to have the arrest warrant executed in Goodnews Bay, nor did he tell Mark during the telephone call that he intended to arrest him after he arrived in Anchorage.[63] Instead, the detective met Mark at the Anchorage airport and drove him to the police station.[64] At the police station, the detective placed Mark in an interview room. The interview that followed was video-taped and transcribed.[65] Four pages into the transcribed interview, the detective advises Mark that he is under arrest and gives a *Miranda* advisement.[66] In the colloquy before the *Miranda* advisement, the detective told tells Mark that he is in a "bad

---

[62] Docket No. 22-7 at 54.
[63] *Id.* at 66.
[64] *Id.* at 56, 57, 74.
[65] *Id.* at 57; Docket No. 22-2.
[66] Docket No. 22-2 at 1, 2.

way,"[67] that Mark was in a position to "help [himself],"[68] and that the detective wanted to give Mark "a chance to look as good as [he] could, because right now it looks kind of bad."[69] Mark characterizes these statements as lies by the detective designed to "get [Mark] to talk."[70]

At the end of the *Miranda* advisement, the detective added the following:

> *Det. Baker:* And finally, I want you to remember that you have the right to tell me your side of the story if you want to. You understand that?
>
> *Mark:* (inaudible).
>
> *Det. Baker:* Havin' all those rights in mind, do you want to tell me what happened up in that room the other day? Do you wanta continue to look like a guy that's cooperatin' in this situation?
>
> *Mark:* Yeah.[71]
>
> *Det. Baker:* OK. I think that's the best move you can do. All I want from you Joe is the truth. That's all I want. How can I explain, do you have any question on these rights?
>
> *Mark:* Huh-uh.[72]

During the video-recorded interview that followed, Mark made incriminating statements.

Mark contends his Fifth Amendment right against self-incrimination was violated because the *Miranda* waiver at the second police interview was not knowing and voluntary.[73] Mark also asserts that his Fifth Amendment right to due process was violated when he was not advised of the nature of the charges for which he was arrested.[74]

---

[67] *Id.* at 1.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 2.
[72] Docket No. 22-2 at 2.
[73] *Id.*
[74] Docket No. 22 at 6.

2. Fifth Amendment due process claim relating to the mistrial request

At the conclusion of the state's initial closing argument, and immediately before defense counsel offered his final argument, the prosecutor made the following comment.

> The longer and longer I do this job, the less and less I become certain of many things. This thing I frankly, am fairly certain of: As sure as I'm standing here, when its [defense counsel's] turn to stand before you and argue this case, he will not argue consent. More than that, I won't say. But I'll say listen to his argument very carefully.[75]

Defense counsel moved for a mistrial alleging the prosecutor's argument improperly shifted the burden of proof beyond a reasonable doubt from the state to Mark.[76] The trial court denied the mistrial motion.

Mark now contends that the failure to grant this mistrial request violated the Fifth Amendment due process clause.

B. Analysis of the Three Fifth Amendment Claims

Mark's Fifth Amendment *Miranda* claim on the second police interview, his Fifth Amendment due process claim on the second police interview, and his Fifth Amendment due process claim on the prosecutor's alleged burden-shifting argument must fail because the record plainly establishes a failure to exhaust Alaska state court remedies.

First, Mark concedes that he did not challenge the second police interview on Fifth Amendment/*Miranda* grounds in the Alaska appellate courts.[77] Second, a review of the briefing submitted to the Alaska courts on direct appeal, and on post-conviction appeal, readily demonstrates that Mark never asked the Alaska appellate courts to address any Fifth Amendment due process issues related to the second police interview or to the alleged improper burden-shifting

---

[75] Docket No. 22 at 16 (citing trial transcript at 2727-28, found at Doc. 22-9 at 1, 3).
[76] *Id.* (*citing* trial transcript at 2862-64, found at Doc. 22-9 at 6-8).
[77] Docket No. 32 at 4.

argument.[78] Indeed, Mark does not even acknowledge the state custodian's exhaustion/procedural default arguments regarding the two Fifth Amendment due process claims presented for the first time in this Court.[79]

Under these circumstances, it cannot be said that the Alaska courts had a full and fair opportunity to pass on these federal constitutional claims. Accordingly, the motion to dismiss the Fifth Amendment *Miranda* claim as to the second police interview, as well as the motion to dismiss the two Fifth Amendment due process claims, should be granted for lack of exhaustion, and because they are procedurally defaulted.

VII. THE SIXTH AMENDMENT CLAIMS

Mark brings four Sixth Amendment claims—one against his trial counsel and three against his appellate counsel. Mark states his Sixth Amendment claims as follows:

- Mark's Sixth Amendment right to effective assistance of counsel was violated when his trial counsel failed to seek dismissal of the indictment based on improper grand jury testimony by a police detective;[80]
- Mark's Sixth Amendment right to effective assistance of counsel was violated when his appellate counsel failed to appeal the adverse suppression ruling on the second police interview;[81]
- Mark's Sixth Amendment right to effective assistance of counsel was violated when his appellate counsel failed to appeal the adverse ruling on Mark's mistrial request;[82] and
- Mark's Sixth Amendment right to effective assistance of counsel was violated when his appellate counsel failed to challenge the sufficiency of the evidence supporting his conviction on appeal.[83]

---

[78] Docket Nos. 27-3, 27-5, 27-6, 27-10, 27-12.

[79] Docket No. 36 at 13 ("Mark's opposition is completely silent as to the facts and legal analysis supporting the motion to dismiss" on the Fifth Amendment due process claims.).

[80] Docket No. 22 at 5.

[81] *Id.*

[82] *Id.*

[83] *Id.*

The state custodian contends that Mark's Sixth Amendment claims must be dismissed because he failed to exhaust state court remedies, because these claims now are procedurally defaulted, or because they were resolved on wholly-independent state law grounds.[84] Mark disagrees.

The most efficient way to address the four Sixth Amendment claims is to review the facts associated with each claim, and then evaluate the party's arguments on the state custodian's motion to dismiss.

A. Facts Relevant to Sixth Amendment Claim Against Trial Counsel

Mark contends his trial counsel violated his Sixth Amendment right to effective assistance of counsel by filing an incomplete motion to dismiss the eight-count June 22, 1999 grand jury indictment against him.[85] The state trial court denied a motion to dismiss this indictment based on allegations the evidence was not sufficient to support the sexual assault charges and the felony murder charge.[86] Mark contends that the motion did not meet Sixth Amendment standards because it failed to challenge an Anchorage detective's allegedly improper testimony before the grand jury.[87] Implicit is Mark's contention that, had the argument been included, the motion to dismiss probably would have been granted.

The grand jurors considering the June 22, 1999 proposed indictment expressed concern that the absence of injury to the woman's genital area might negate the proposed sexual assault counts.[88] The prosecutor elicited the following testimony from the investigating detective in direct response to this concern.

---

[84] Docket Nos. 27 at 23-33; 36 at 2-10.
[85] Docket No. 22 at 5.
[86] Docket No. 22-3.
[87] Docket No. 22 at 13.
[88] Docket Nos. 22 at 14; 22-4.

> Based on the investigative experience I've had and the training I've had, I'm not familiar — well, let's say this, I have never investigated a case that I know where the victim consensually had sex — usually the victim doesn't die. Consensual sex usually results in no injuries, for instance, bruising to both wrists — or to the wrist where she was . . . held down, choking, manual strangulation. These kinds of injuries to the body are all consistent with forcing a female into engaging into some activity that she did not want to have.
>
> . . . .
>
> That's my opinion. That's what I've seen over two decades of work.[89]

Marks claims that the detective's comments were plainly improper and that trial counsel's failure to challenge this grand jury testimony as part of the motion to dismiss the June 22, 1999 indictment violated the Sixth Amendment.

B. Analysis of the Sixth Amendment Claim Against Trial Counsel

The state custodian asserts that Mark's Sixth Amendment claims against trial counsel must be dismissed because he failed to exhaust state court remedies, and because this claim now is procedurally defaulted.[90] She argues that a review of the merit briefing and the post-conviction relief briefing submitted to the Alaska appellate courts readily demonstrates that Alaska was not afforded a full and fair opportunity to pass on the Sixth Amendment errors alleged in Mark's § 2254 habeas petition.[91] This is so, the argument continues, because the briefing submitted to the Alaska appellate courts completely failed to alert those courts that they were being asked to resolve a federal Sixth Amendment Claim.[92]

---

[89] Docket Nos. 22-4; 22 at 14.
[90] Docket No. 27 at 23-25.
[91] *Id.*
[92] *Id.*

Mark acknowledges that his briefing to the Alaska appellate courts failed to explicitly reference the Sixth Amendment claims against trial counsel.[93] However, relying on *Martinez v. Ryan*,[94] Mark seeks to excuse his trial counsel's procedural default by contending his **post-conviction appellate counsel** was constitutionally deficient in failing to pursue the improper grand jury testimony as a Sixth Amendment claim.[95] *Martinez* holds that, where a state requires ineffective assistance of counsel claims to be litigated in state collateral relief proceedings, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[96] Alaska ordinarily requires that ineffective assistance of counsel claims be prosecuted in collateral relief review proceedings.[97] However, it is not enough to simply allege ineffective assistance on the part of initial-review post-conviction relief counsel to excuse the default. Rather, "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective assistance of counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."[98]

The first obstacle Mark confronts is that the right to grand jury indictment, with the exception of structural errors related to the exclusion of potential grand jurors based on race or gender,[99] has not been applied to the states under the Fourteenth Amendment.[100] Consequently,

---

[93] Docket No. 32 at 4.

[94] 132 S. Ct. 1309 (2012).

[95] Docket No. 32 at 1, 2.

[96] *Martinez*, 132 S. Ct. at 1315.

[97] *Barry v. State*, 675 P.2d 1292, 1295-96 (Alaska Ct. App. 1984); *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 383 (Alaska 2007).

[98] *Martinez*, 132 S. Ct. at 1318.

[99] *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986) (race), *Ballard v. United States*, 329 U.S. 187, 193 (1946) (gender).

[100] *See Apprendi v. New Jersey,* 530 U.S. 466, 499 (2000) (Thomas, J. concurring) (*citing Hurtado v. California*, 110 U.S. 516 (1884) (Fifth Amendment right to grand jury presentment not among the rights made applicable to the state under the Fourteenth Amendment); *Herring v. New York,* 422 U.S. 853, 857 & n.7 (1975)); *see also James v. Reese,* 546 F.2d 325, 327-28 (9th Cir. 1976) (the Fifth Amendment grand

Mark's due process challenge to proceedings before the state grand jury does not present a question of federal law and is not cognizable on habeas review.

The second obstacle Mark confronts centers on his complaint that his post-conviction relief appellate counsel was constitutionally deficient because he failed to raise the alleged grand jury testimonial error on appeal.[101] As the state custodian correctly points out, the *Martinez* holding is limited to initial-review post-conviction relief counsel. Prior to *Martinez*, negligence by post-conviction relief counsel did not violate the federal Constitution because the Supreme Court concluded that the Sixth Amendment did not apply to post-conviction relief proceedings.[102] *Martinez* created an exception to the *Coleman* rule when state procedural rules required that Sixth Amendment right to effective assistance of counsel claims be litigated for the first time in collateral relief proceedings. As the *Martinez* court stated,

> [t]he rule of *Coleman*[103] governs in all but the limited circumstance recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts.[104]

Under these circumstances, Mark's Sixth Amendment claim against his trial counsel must be dismissed because it not cognizable under § 2254 and, in any event, because the claim is procedurally defaulted.

---

jury presentment requirement is not applicable to the states, and prosecution by information does not violate the federal Constitution); *Stumpf v. Kincheloe*, 78 Fed. App'x 19, 21 (D. Alaska Aug. 26, 2003) (introduction of testimony before the grand jury that was later determined to be perjurious did not violate defendant's right to due process).

[101] Docket No. 32 at 1, 2.

[102] *Coleman v. Thomson*, 501 U.S. 722, 752-54 (1991).

[103] *Coleman*, 501 U.S. at 754.

[104] *Martinez*, 132 S. Ct. at 1320.

C. Facts Relevant to the Sixth Amendment Claims Against Appellate Counsel

Next, Mark alleges three Sixth Amendment claims against his appellate counsel.

The first relates to appellate counsel's failure to appeal the adverse suppression ruling as to the second police interview. The trial court denied Mark's pretrial motion to suppress the second police statement as unknowing and involuntary. The facts surrounding the allegedly unknowing and involuntary *Miranda* waiver are set forth in Section VI.A.1., *supra*.

The second relates to appellate counsel's failure to appeal the adverse ruling on Mark's mistrial request. Mark had asked for a mistrial based on the prosecutor's allegedly improper burden-shifting argument during closing argument. The facts surrounding the mistrial request are set forth in Section VI.A.2., *supra*.

The third relates to appellate counsel's failure to challenge the sufficiency of the evidence supporting his conviction on appeal. Mark does not discuss any alleged evidentiary deficiencies, or explain why the evidence supporting the conviction is in any way suspect. In fact, Mark's only point appears to be a general complaint that appellate counsel failed to challenge the sufficiency of the evidence supporting his conviction on appeal.

D. Analysis of the Sixth Amendment Claims Against Appellate Counsel

The state custodian asserts that Mark's Sixth Amendment claims against appellate counsel must be dismissed because he failed to exhaust state court remedies and because these claims are now procedurally defaulted.[105] She argues that a review of the merit briefing and the post-conviction relief briefing submitted to the Alaska appellate courts readily demonstrates that Alaska was not afforded a full and fair opportunity to pass on the Sixth Amendment errors alleged in Mark's § 2254 habeas petition.[106] This is so, the argument continues, because the briefing

---

[105] Docket No. 27 at 23-25.

[106] *Id.*

submitted to the Alaska appellate courts completely failed to alert those courts that they were being asked to resolve a federal Sixth Amendment Claim.[107]

Mark acknowledges that his ineffective assistance of counsel briefing to the Alaska appellate courts failed to explicitly reference the Sixth Amendment claims against appellate counsel.[108] However, he contends that his failure to exhaust remedies should be excused because (1) he asserts that the effective assistance of counsel standard under the Alaska Constitution[109] is functionally identical to the effective assistance of counsel standard under the Sixth Amendment; and (2) the Alaska standard is less exacting, and therefore reference to the federal standard would have been futile.[110]

Mark's arguments here are simply not persuasive. Indeed, controlling Ninth Circuit authority is exactly contrary. Alaska's constitutional effective assistance of counsel provision differs substantially from and is more favorable to a defendant than the Sixth Amendment effective assistance of counsel provision.[111]

> Alaska law in this respect, as in others, is more protective of defendants' rights than the federal constitutional minimum. The [Alaska constitutional] standard of ineffective assistance is that the lawyer must perform at least as well as a lawyer with "ordinary training and skill in the criminal law," while *Strickland* requires only that the lawyer did not make "errors so serious that counsel was not functioning as the 'counsel' guaranteed [t]he defendant by the Sixth Amendment," i.e., that counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct . . . in light of all of the circumstances, were outside the wide range of professionally competent assistance." The [Alaska constitutional] standard of prejudice is that the defendant need only establish "a reasonable doubt that the incompetence contributed to the outcome," while *Strickland* requires that "the defendant must show that there is a reasonable probability that, but for counsel's

---

[107] *Id.*
[108] Docket No. 32 at 4.
[109] Alaska Const. art. 1, § 11.
[110] Docket No. 32 at 4.
[111] *Galvan*, 397 F.3d at 1203.

> unprofessional errors, the result of the proceeding would have been different."[112]

Mark's argument that the Alaska constitutional standard for ineffective assistance of counsel is functionally identical to the Sixth Amendment standard is simply unpersuasive. Consequently, Mark's sole reliance on the Alaska standard is not sufficient to fairly present a federal ineffective assistance of counsel claim. For these reasons, the Sixth Amendment claims have not been properly exhausted and are not procedurally defaulted.

IV. CONCLUSION

For all these reasons, the Court recommends that the state custodian's motion to dismiss eight of the nine claims contained in Mark's amended 28 U.S.C. § 2254 petition of habeas corpus at Docket No. 27 be granted.

DATED this 1st day of May, 2015, at Anchorage, Alaska.

/s/ Kevin F. McCoy
Kevin F. McCoy
United States Magistrate Judge

Pursuant to D. Alaska Loc. Mag. R. 6(a), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than the **CLOSE OF BUSINESS** on **May 15, 2015**. Failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. *Miranda v. Anchondo, et al.*, 684 F.3d 844 (9th Cir. 2012). The Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a party's objection to a magistrate judge's recommendation. *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000). Objections and responses shall not exceed **five (5) pages** in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before the **CLOSE OF BUSINESS** on **May 22, 2015**. The parties shall otherwise comply with provisions of D. Alaska Loc. Mag. R. 6(a).

[112] *Id.* (footnotes omitted).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment. *See* Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JOE HOMER MARK,

Petitioner,

vs.

AMY RABEAU, Superintendent of the Goose Creek Correctional Center,

Respondent.

Case No. 3:13-cv-00207-TMB-KFM

FINAL REPORT AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS [Docket No. 55]

I. MOTION PRESENTED

Before the Court is claim number seven of Joe Homer Mark's amended 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus.[1] This claim alleges a Fifth Amendment *Miranda* violation in connection with Mark's first police station interview.[2] Amy Rabeau (the state custodian) filed an opposition,[3] and Mark submitted a reply.[4] No party asked for argument, and the Court concludes that argument would not be helpful.

For the reasons set forth below, the Court recommends that the District Court, after independent review, deny claim number seven of Mark's amended petition for Writ of Habeas

[1] Docket No. 22.

[2] Docket No. 55; Mark's amended petition originally contained nine claims. In an earlier order, the District Court dismissed eight of Mark's nine claims. Docket Nos. 39, 46.

[3] Docket No. 62.

[4] Docket No. 69.

Corpus at Docket Nos. 22 and 55, and thereafter enter a judgment denying Mark's application for post-conviction relief.

II. BACKGROUND

A. Facts

1. Initial investigation

In the early morning of April 30, 1998, police found a woman lying on the sidewalk by the Anchorage Holiday Inn.[5] She was dead.[6] It appeared that the woman had fallen or been pushed from the third floor of the hotel.[7] The police suspected the body came from room 371 because it was the only hotel room occupied at the time[8] and because the body was found directly below the window to room 371.[9] Accordingly, four police officers went to the room.[10] No one responded when they knocked on the door and announced several times.[11] So, one of the officers used the passkey to open the door, but a latch chain prevented it from opening more than two or three inches.[12] When they knocked and announced again, Mark released the chain and opened the door.[13] Two officers entered immediately to perform a security sweep of the room.[14] The sweep took approximately twenty seconds.[15] During the sweep, Mark, dressed only in his underwear, was handcuffed and detained in the hallway.[16] The officers had their weapons drawn.[17] Once the

---

[5] Docket No. 62 at 3.
[6] *Mark v. State*, A-7661, 2002 WL 341979, at *1 (Alaska App. March 6, 2002) (unpublished).
[7] *Id.*
[8] Docket No. 55 at 2.
[9] Docket No. 62 at 3.
[10] *Id.*
[11] *Mark*, 2002 WL 341979, at *1.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at *2.
[17] *Id.*

sweep was completed, the officers holstered their weapons and removed the handcuffs from Mark.[18] The officers then asked Mark for permission to re-enter the room.

> Det. Jessen: What I'd like to do now is I'd like to get your permission to check the room real quick, and make a quick search.
>
> Mark: Okay.
>
> Det. Jessen: (interrupting) Is that okay? Now, you don't have to.
>
> Mark: Okay, that's good.
>
> Det. Jessen: It's up to you. If you want us to leave, we will. But I'd like your permission.
>
> Mark: All right.[19]

Following the second search, the officers briefly questioned Mark about blood they saw on his pants, on his shoes, and on the bedspread.[20] The officers then asked Mark to come to the police station for an interview.[21] Mark agreed.[22]

> Det. Jessen: Mr. Mark, I think you need to come down to the station with us and talk to us a little bit. Would you mind doing that?
>
> Mark: Okay.
>
> Det. Jessen: Is that okay with you?
>
> Mark: Yeah.
>
> Det. Jessen: Okay. Why don't you go ahead and get dressed and . . .
>
> Officer Penman: What? In those [pants]?
>
> Det. Jessen: No.

---

[18] *Id.*
[19] Docket No. 27-4 at 21; *Mark*, 2002 WL 341979, at *3.
[20] *Mark*, 2002 WL 341979, at *4.
[21] *Id.*
[22] *Id.*

Officer Penman: Okay.

Det. Jessen [to Mark]: Are these [other pants] your pants . . . too, sir?

Mark: Yeah.

Det. Jessen: Okay. Why don't you go ahead and [put them on], and Officer Penman and Officer Lutes are gonna give you a ride to the station. Okay?

Mark: Okay.

Det. Jessen: Is that okay with you?

Mark: Yeah.[23]

2. The first police station interview[24]

Two officers escorted Mark to a patrol car.[25] Before entering the patrol car, an officer checked Mark for weapons.[26] The officer found his wallet, which he allowed Mark to keep.[27] The officers then put Mark in the back of a patrol car and drove him to the police station.[28] Although Mark was not handcuffed, one of the officers, following his usual practice, locked the rear doors to the patrol car.[29] On the way, the officers stopped at a nearby jail to get Mark a pair

---

[23] *Mark*, 2002 WL 341979, at *4.

[24] The police questioned Mark at the police station on two occasions. The first occasion was on April 30, 1998. Docket No. 55 at 6. The second occasion was on June 25, 1998, after Mark accepted an invitation to fly from his home in Goodnews Bay to Anchorage for a second interview. *Id.* at 7; *see also* Docket No. 39 at 10. The District Court earlier dismissed Mark's claims related to the second police station interview because he failed to properly exhaust state court remedies. Docket Nos. 39 at 13, 14; 46. Claim number seven at issue here relates only to the first interview on April 30, 1998. The state court record at times indicates that the two interviews occurred in 1999 and at other times in 1998. *Compare Mark*, 2002 WL 341979, *1 (indicating that the interviews took place in 1999) with Docket No. 49-1 at 1 (indicating that the case was filed in 1998, as the state case number is 98-5378). This Court concludes that both interviews took place on the dates stated, but in 1998.

[25] *Mark*, 2002 WL 341979, at *4.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

of slippers, since his blood-stained shoes were left in the hotel room.[30] Once at the station, the officers placed Mark in a small interview room.[31] Detective Greg Baker came in, introduced himself to Mark, and then left.[32] The door to the interview room remained open.[33] There was an exit from the police station approximately 20 feet from the interview room.[34] When Detective Baker returned, he closed the door and began to question Mark.[35] After several background questions, the following colloquy ensued:

> Det. Baker: [Did] these cops treat you okay when they contacted you this morning?
>
> Mark: Uh-huh.
>
> Det. Baker: I mean, they were pretty nice guys?
>
> Mark: Yeah.
>
> Det. Baker: Okay. And they told you that you didn't have to come down here and talk to me?
>
> Mark: No.[36]
>
> Det. Baker: But you did it anyway because it's the right thing to do?
>
> Mark: Yeah, it's gotta be the right thing to do.
>
> Det. Baker: Oh yeah, it's got to be the right thing to do. You know, you want to straighten this thing out, find out what happened.
>
> Mark: Uh-huh.

---

[30] *Id.*

[31] *Id.* at *5.

[32] *Id.*

[33] *Id.*

[34] Docket No. 62-1 at 64.

[35] *Mark*, 2002 WL 341979, at *5.

[36] As will be seen, *infra*, the state court concluded that when Mark said no, he meant no he knew he did not have to come to the police station and submit to Detective Baker's questioning. Docket No. 27-14 at 2, 3.

Det. Baker: So you know that you don't have to be here if you don't want to be?

Mark: No.[37]

Det. Baker: Okay.

Mark: I don't mind.[38]

The questioning that followed lasted approximately 30 minutes.[39] After the interview, the officers applied for and received a search warrant for a sample of Mark's blood for DNA analysis.[40] A technician drew a small sample of Mark's blood.[41] The officers then drove Mark back to the hotel and dropped him off.[42] Approximately four hours transpired between the time Mark accompanied the officers to the station and the time they returned him to the hotel.[43]

B. State Procedural History

1. Mark's pretrial motions

Alaska charged Mark in a multi-count indictment with murder, sexual assault, and tampering with physical evidence.[44] Mark filed a number of pretrial motions, including the Fifth Amendment *Miranda*[45] motion at issue in claim seven here. Relevant to claim seven, Mark asked the Alaska trial court to suppress the statements he gave at the police station on April 30, 1998 (the first police station interview). After conducting an evidentiary hearing, the trial court denied Mark's motion to suppress statements from the first police station interview.[46]

---

[37] *Mark*, 2002 WL 341979, at *5.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Docket No. 62-1 at 65.
[42] *Mark*, 2002 WL 341979, at *5.
[43] Docket No. 62-1 at 96.
[44] *Mark*, 2002 WL 341979, at *1.
[45] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[46] Docket No. 27-14 at 2-3.

In determining that Mark was not in custody during the first police station interview, the state trial court concluded:

> . . . I'm convinced from what I heard from that tape that [Mark] knew that he was free to leave, that that (*sic*) was made clear to him by the interviewing officer, Baker. The defendant said he was there willingly. And I for one think that when he said no to Baker–when Baker said didn't the officers tell you you didn't have to be here and he said no, from what I heard on that tape, it's one of those answers that no means yes. He knew that, no, he didn't have to be there . . . . Officer Baker was not in uniform, the door was open, the exitway (*sic*) was nearby [and]. . . the atmosphere in the interview was not hostile. The defendant was not subjected to like a third-degree interrogation where somebody would think, oh, my God, they're really onto me, I've got to–I've got no chance, I can't leave here. That's not the tone. And, finally, the defendant was released after the interview ended.
>
> And the brevity of the interview . . . I think the length of the interview is 33 minutes, from 16 after the hour to 40–49 minutes after the hour. But the point is it was a relatively short interview.[47]

Regarding the drive to the police station, the state trial court found as follows:

> Now, a reasonable person on the way to the police station may well have figured they were in custody, but he wasn't questioned then. The questioning occurred after it was made clear that he was not in custody. And a reasonable person in his shoes would not have thought they were in custody after hearing the things that Investigator Baker said at the start of that interview.[48]

For these reasons, the state trial court denied Mark's Fifth Amendment motion to suppress the statements he made during the first police station interview.[49]

---

[47] *Id.* at 3.
[48] *Id.*
[49] *Id.*

2. Mark convicted and sentenced to 129 years

The jury empaneled for Mark's trial returned guilty verdicts on all counts, and the court imposed a composite sentence of 129 years.[50]

3. Mark's direct appeal

Mark appealed the adverse Fifth Amendment suppression ruling as to the first police station interview to the Alaska Court of Appeals, contending that his *Miranda* rights had been violated. The appellate court affirmed in an unpublished opinion.[51] Mark renewed his suppression argument before the Alaska Supreme Court.[52] That Court denied Mark's petition for discretionary review in an unpublished order.[53]

C. Federal Procedural History

On August 8, 2014, Mark filed an amended 28 U.S.C. § 2254 habeas petition challenging the lawfulness of his Alaska state court convictions. The petition raised nine claims, including a claim that the police obtained Mark's statements at the first police interview in violation of the Fifth Amendment *Miranda* requirement.[54] The District Court granted the state custodian's earlier motion to dismiss eight of Mark's nine claims.[55]

Thus, only Mark's Fifth Amendment *Miranda* claim regarding the first police station interview remains. In that claim, he asserts Detective Baker violated the Fifth Amendment by questioning him without first advising him of his Fifth Amendment rights to silence and to

---

[50] The court imposed concurrent 99-year terms on Counts 1 and 4; concurrent terms of 30 years on Counts 5 and 6; a 10-year term on Count 7; and a 5-year term on Count 8. The sentences on Counts 5 and 6 were concurrent with each other, but consecutive to Counts 1 and 4. The remaining sentences were concurrent. No sentences were imposed on Counts 2 and 3, as those Counts merged with Counts 1 and 4. Docket No. 27-4 at 17.

[51] *Mark*, 2002 WL 341979, at *5.

[52] Docket No. 27-6.

[53] Docket No. 27-8.

[54] Docket No. 22 at 6.

[55] Docket Nos. 39, 46.

counsel.[56] Mark contends he was in *Miranda* custody when Detective Baker questioned him because a reasonable person in his position would not have felt free to terminate the interview and leave.[57]

The state custodian disagrees.[58] At the outset, the state custodian urges this Court to apply the deferential standard required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[59] This standard permits relief only when the state court adjudication was (1) contrary to clearly established Supreme Court authority, or (2) involved an unreasonable application of clearly established Supreme Court authority. This means, the argument continues, that Mark's Fifth Amendment claim must be denied so long as fair-minded jurists could disagree that the argument or theories relied on and applied by the state court are inconsistent with Supreme Court precedent.[60] Stated another way, the state custodian contends that Mark has failed to demonstrate that fair-minded jurists would uniformly agree that Alaska's resolution of this Fifth Amendment question involved unreasonable application of or was contrary to clearly established Supreme Court authority.[61]

III. ISSUE PRESENTED

Did the Alaska Court unreasonably apply controlling Supreme Court authority when it determined that Mark was not in *Miranda* custody during the first police station interview?

IV. STANDARD OF REVIEW

Section 2254(d) bars re-litigation of a claim **"adjudicated on the merits"** in state court unless it is shown that **the earlier state court's adjudication** (1) **"was contrary to . . .**

---

[56] Docket No. 55 at 1.
[57] *Id.* at 12.
[58] Docket No. 62.
[59] *Id.* at 1.
[60] *Id.* at 2.
[61] *Id.* at 3.

clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "**involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States."**[62] Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decided a case differently than the Supreme Court has on a set of materially indistinguishable facts.[63] Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identified the correct governing legal principle from the Supreme Court's decisions, but unreasonably applied that principle to the facts of the prisoner's case.[64] The phrase "clearly established federal law" refers to the holdings, as opposed to the dicta, of the Supreme Court as of the time of the relevant state court decision.[65] Therefore, § 2254(d) restricts the source of clearly established law to the Supreme Court's jurisprudence.[66]

V. ANALYSIS

A. Alaska's Resolution of Mark's Fifth Amendment Claim was not an Unreasonable Application of Clearly Established Supreme Court Authority

Mark contends that the Alaska court's resolution of his first police station interview claim under the Fifth Amendment "involved an unreasonable application" of clearly established Supreme Court authority.[67] Mark's assertion is that Alaska correctly identified, but unreasonably applied, the controlling federal standard.[68] This claim must be denied because Mark has failed to

---

[62] *Harrington v. Richter*, 562 U.S. 86, 98, 100 (2011); *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

[63] *Williams*, 529 U.S. at 412-13.

[64] *Id.* at 413.

[65] *Id.* at 412.

[66] *Id.*

[67] Docket No. 55 at 24.

[68] Docket No. 69 at 1.

demonstrate that fair-minded jurists would uniformly conclude that he was in *Miranda* custody during the first police station interview. Hence, the absence of a *Miranda* advisement in this case did not violate the Fifth Amendment.

A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of that decision.[69] Section 2254(d) requires this Court to (1) determine what arguments or theories supported, or could have supported, the state court decision, and (2) then ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with a prior decision of this Court.[70] "[A] federal habeas court may not issue the writ simply because that court independently concludes that the state-court decision applied [the law] incorrectly."[71] An unreasonable application of federal law is different from an incorrect application of federal law.[72]

Even a strong case for relief does not make the state court's contrary conclusion unreasonable. Instead, § 2254(d) was designed to confirm that state courts are the principal forum for asserting federal constitutional challenges to state convictions.[73] It reflects the view that federal habeas corpus review is designed only to "guard against extreme malfunctions in the state criminal justice systems," not as a substitute for ordinary error correction through direct appeal.[74] For a habeas petitioner to be successful, he or she must demonstrate there was no reasonable basis for the state court to deny relief.[75] He or she also must show that the state court's ruling was so lacking

---

[69] *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

[70] *Harrington*, 562 U.S. at 102.

[71] *Yarborough*, 541 U.S. at 665 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (*per curiam*)).

[72] *Williams*, 529 U.S. at 410, 412.

[73] *Harrington*, 562 U.S. at 103.

[74] *Id.* at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)).

[75] *Id.* at 98.

in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.[76] Stated another way, he must show that fair-minded jurists would uniformly agree that the state court unreasonably applied controlling Supreme Court authority.

B. Standard for *Miranda* Custody

A person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*.[77] The Supreme Court defines "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[78] The *Miranda* test for custody is objective.[79] Evaluation of a *Miranda* custody claim requires: (1) an inquiry into the circumstances surrounding the interrogation, and (2) a determination whether a reasonable person in those circumstances would have felt free to terminate the interrogation and leave.[80] The ultimate inquiry "is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[81] Courts must weigh all of the circumstances surrounding the interrogation and decide how a reasonable person in the defendant's position would perceive his or her circumstances.[82] The subjective views of the interrogating officer or the person being questioned do not control.[83]

---

[76] *Id.* at 103.

[77] *Berkemer v. McCarthy*, 468 U.S. 420, 434 (1984).

[78] *Miranda*, 384 U.S. at 444.

[79] *Yarborough*, 541 U.S. at 663 (quoting *Stansbury v. California*, 511 U.S. 318, 323 (1994) (*per curiam*)).

[80] *Id.* (quoting *Stansbury*, 511 U.S. at 322).

[81] *Id.* at 662 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

[82] *Id.* at 663.

[83] *Id.* (quoting *Stansbury*, 511 U.S. at 323).

C. Application of the *Miranda* Custody Standard Using the AEDPA Lens

Mark relies heavily on facts in the record which arguably support a *Miranda* custody determination. But reference to those facts does not necessarily establish that fair-minded jurists uniformly would agree that Mark was in *Miranda* custody during the first police station interview. This is so because the record also contains facts that contradict the *Miranda* custody determination Mark advocates. A review of these facts helps clarify why fair-minded jurists would disagree over application of the *Miranda* custody determination in this case.

1. Facts militating against *Miranda* custody

There are facts that arguably support a finding that Mark was not in *Miranda* custody during the first police station interview. These facts include: (1) the police officers asked, but did not order, Mark to accompany them to the police station for an interview;[84] (2) the police officers told Mark that they would leave his hotel room if he requested;[85] (3) the officers did not threaten Mark or tell him they would arrest him if he refused to accompany them;[86] (4) once Mark arrived at the interview room, the door remained open until Detective Baker came to interview him;[87] (5) there was an exit some 20 feet away;[88] (6) Detective Baker was not in uniform during the interview;[89] (7) the interview was short, approximately 30 minutes long;[90] (8) the atmosphere surrounding the interview was not hostile and Mark was not subjected to "third degree

---

[84] *Mark*, 2002 WL 341979, at *4.
[85] *Id.* at *4.
[86] *Id.* at *3-5.
[87] *Id.* at *5.
[88] Docket No. 62-1 at 64.
[89] Docket No. 27-14 at 3.
[90] *Mark*, 2002 WL 341979, at *5.

interrogation;"[91] and (9) after the blood sample was drawn, the officers returned Mark to his hotel room.[92] Relying on these facts, the state court determined that Mark was not in *Miranda* custody.[93]

2. Facts supporting *Miranda* custody

But there are also facts in the record that arguably support a finding that Mark was, in fact, in *Miranda* custody during the first police interview. Those facts include (1) Mark was brought to the first police station interview in a patrol car;[94] (2) the officers locked Mark in the back of the patrol car on the way to the first police station interview;[95] (3) the officers stopped at a nearby jail to get Mark jail slippers because his shoes remained in the room as possible evidence;[96] (4) the interview took place at a police station;[97] and (5) approximately four hours transpired between the time Mark left with the officers for the police station and the time the officers returned him to the hotel.[98] Obviously, the state court discounted these facts when it determined Mark was not in *Miranda* custody.

Clearly there are facts in the record which favor a *Miranda* custody determination. However, the mere presence of such facts alone is not sufficient to demonstrate that fair-minded jurists uniformly would agree that Alaska's resolution of the issue constituted an unreasonable application of clearly established Supreme Court authority on the question of *Miranda* custody.

Here is why.

First, as should now be apparent, AEPDA precludes *de novo* review of Alaska's *Miranda* custody determination in this case. Second, the *Miranda* custody test is a general rule

---

[91] Docket No. 27-14 at 3.
[92] Docket No. 62-1 at 96.
[93] Docket No. 27-14 at 3.
[94] *Mark*, 2002 WL 341979, at *4.
[95] *Id.*
[96] *Id.*
[97] *Id.* at *5.
[98] Docket No. 62-1 at 96.

and "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."[99] Finally, and perhaps most importantly, Mark points to nothing in the record establishing that fair-minded jurists uniformly would agree that Alaska's resolution of the *Miranda* custody issue constituted an unreasonable application of clearly established Supreme Court authority on the question of *Miranda* custody.

Yarborough v. Alvarado,[100] illustrates why this is so. *Alvarado* involved federal habeas review of a California state court *Miranda* custody adjudication.[101] Alvarado was five months short of his eighteenth birthday when a suspected accomplice demanded money and keys from a pickup truck driver.[102] The accomplice shot and killed the driver when he refused.[103] After the killing, Alvarado helped hide the gun.[104] During the investigation that followed, a detective asked Alvarado's parents to bring him to a police station for questioning.[105] Once there, the detective rebuffed the parents' request to be present with their son during the interview.[106] As the parents waited in the lobby, a two hour recorded interview followed without a *Miranda* advisement.[107] When the interview ended, Alvarado rejoined his parents and was driven home.[108]

California ultimately charged Alvarado and the accomplice with murder and attempted robbery.[109] The state court denied Alvarado's Fifth Amendment *Miranda* challenge to the recorded statement. It reasoned there was no need for a *Miranda* warning because Alvarado

---

[99] *Yarborough*, 541 U.S. at 664.
[100] *Id.* at 652.
[101] *Id.* at 660.
[102] *Id.* at 656.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 658.
[109] *Id.*

was not in custody during the police station interview.[110] The prosecution used the recorded interview to contradict Alvarado's trial testimony. Alvarado was convicted, and sentenced to fifteen years to life.[111]

On direct appeal, the California courts relied on the *Miranda* custody test articulated by the Supreme Court in *Thompson v. Keohane*[112] to affirm.[113] But then, in post-conviction federal habeas proceedings, the Court of Appeals for the Ninth Circuit ruled that the deferential review standard set forth in 28 U.S.C. § 2254(d) did not preclude relief.[114] It reasoned that the state court erred when it failed to consider Alvarado's youth and inexperience when evaluating whether a reasonable person would have felt free to leave.[115]

On certiorari, the Supreme Court reversed. In doing so, the Court readily recognized that in Alvarado's case, just like in Mark's case here, there were facts which militated against a *Miranda* custody determination, as well as facts which supported a *Miranda* custody determination.

Facts militating against *Miranda* custody in Alvarado's case included (1) he was not threatened with arrest; (2) his parents remained in the lobby, suggesting the interview would be brief; (3) the interview focused on the accomplice's crimes; (4) the questioner appealed to Alvarado's interest in telling the truth and being helpful to the police; (5) the questioner twice offered Alvarado a break from the interview; and (6) Alvarado left the police station with his parents when the interview ended.[116] Facts supporting a *Miranda* custody determination included

---

[110] *Id.*
[111] *Id.* at 659.
[112] 516 U.S. 99 (1995).
[113] *Yarborough*, 541 U.S. at 659.
[114] *Id.* at 660.
[115] *Id.*
[116] *Id.* at 664.

(1) the interview occurred at a police station; (2) the interview lasted two hours; (3) Alvarado was never told he was free to leave; (4) Alvarado did not come to the police station of his own accord, but was taken there by his legal guardians; and (5) the detective rebuffed a parental request to be present at the interview, which might have led someone in Alvarado's position to feel more restricted than he or she otherwise would.[117]

Applying the deferential standard mandated by 28 U.S.C. § 2254(d), the Supreme Court determined that California's resolution of the *Miranda* custody determination did not represent an unreasonable application of clearly established Supreme Court authority.

> These differing indications lead us to hold that the state court's application of our custody standard was reasonable. The Court of Appeals was nowhere close to the mark when it concluded otherwise. Although the question of what an "unreasonable application" of law might be is difficult in some cases, it is not difficult here. The custody test is general, and the state court's application of our law fits within the matrix of our prior decisions. We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter. A federal habeas court may not issue a writ simply because that court concludes in its independent judgment that the state-court decision applied the law incorrectly. Relief is available under § 2254(d)(1) only if the state court's decision was objectively unreasonable.[118]

Mark's case is virtually identical to *Alvarado.* Like *Alvarado*, there are facts in this record that support Alaska's resolution of the *Miranda* custody determination. But, there also are facts some might view as contradicting that determination. But, again, that is not enough. Showing that a fair-minded jurist might have balanced these competing facts differently to reach the opposite conclusion does not establish that the Alaska courts unreasonably applied the *Miranda*

---

[117] *Id.* at 665.

[118] *Id.* (citations and internal quotation marks omitted).

custody test. Claim number seven in Mark's petition must be denied unless fair-minded jurists uniformly would agree that Alaska misapplied the *Miranda* custody test.

Mark relies on a number of circuit court cases to support his *Miranda* custody argument. However, these cases are not persuasive precisely because AEDPA authorizes relief only if the state court determination constitutes an unreasonable application of controlling Supreme Court authority. Even assuming *arguendo* that these cases are indeed inconsistent, they cannot control. This is so because clearly established Federal law refers only "to holdings, as opposed to dicta, of this Court's decisions as of the time of the relevant state-court decision."[119] The law precludes this Court from issuing a habeas writ only because a state court holding might be inconsistent with circuit court authority.[120]

Based on the foregoing analysis, this Court holds that the state court did not unreasonably apply Supreme Court precedent to the facts of the first police station interview, and therefore Mark's Fifth Amendment rights under *Miranda v. Arizona* were not violated.

VI. OBJECTIONS

Mark filed objections to the initial report and recommendation.[121] The State Custodian responded.[122] After careful consideration of Mark's objections, together with the State Custodian's response, the Court declines to modify its recommendations.

A. Objection to the Initial Report and Recommendation at Docket No. 39

Mark first objects to the earlier initial report at Docket No. 39, which recommended that eight of Mark's nine claims be dismissed.[123] This objection is not well-taken, first because

---

[119] *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams*, 529 U.S. at 412).

[120] *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 1999) (citing *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir. 1997)).

[121] Docket No. 74.

[122] Docket No. 75.

[123] Docket No. 74 at 1.

time for objection to the initial report at Docket No. 39 expired on May 15, 2015.[124] Second, and more importantly, Mark's objection to this initial report, which was adopted by the District Court,[125] fails to identify and provide either factual or legal support for the objection.

B. Objection to the State Court's Evaluation of Mark's Answer to the Detective

Mark next objects to this Court's recitation of a state court finding in the initial report, namely that "the state court concluded that when Mark said 'no' [in response to whether he was required to accompany the police to the police station for the interview], he meant 'no' he knew he did not have to come to the police station and submit to Detective Baker's questioning."[126] This objection is not well-taken because Mark has never before contended that this particular state court adjudication represented an unreasonable determination of the facts in light of the evidence. Moreover, Mark conceded in state court that "the videotape supports [the state trial court] finding that 'no' meant 'yes,' here, because Mr. Mark was nodding at the time he said 'no.'"[127] This unchallenged state court finding is presumed correct unless the prisoner presents clear and convincing evidence to the contrary.[128] Mark has not done so. And, as Mark told the state appellate court, the state trial court had the opportunity to review the video recording of the interview and watched Mark nod his head as he said "no."[129] Mark's nascent objection fails to demonstrate that this previously unchallenged state court finding was objectively unreasonable in light of the evidence presented to the state court.[130]

---

[124] Docket No. 39 at 21.
[125] Docket No. 40.
[126] Docket Nos. 74 at 2; 72 at 5 n.36.
[127] Docket No. 27-3 at 19 n.4.
[128] 28 U.S.C. § 2254(e)(1).
[129] Docket No. 27-3 at 19 n.4.
[130] *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

C. Objection to the Habeas Standard of Review

Finally, Mark objects to the standard of review employed in the initial report.[131] Relying on a quote from a plurality opinion from 2000,[132] Mark finds fault with this Court's articulation of the standard as requiring fair-minded jurists to uniformly conclude that he was in *Miranda* custody during the first police interview.

"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."[133] "The state court decision must be 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'"[134]

There is no practical distinction **between** articulating the standard as requiring fair-minded jurists to uniformly agree **from** articulating it as fair-minded jurists could disagree on the correctness of a state court decision so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. This recently was illustrated in *Zapien v. Martel,* [135] when Judge Kozinski, writing for a unanimous panel, rejected a state habeas Sixth Amendment claim by opining: "[u]nder the circumstances, we cannot conclude that all fairminded jurists would say that such a strategy rendered counsel's assistance ineffective."[136]

---

[131] Docket No. 74 at 3, 4.

[132] *Williams*, 529 U.S. 362.

[133] *Harrington,* 562 U.S. at 101 (quoting *Yarborough,* 541 U.S. at 664).

[134] *Woods v. Etherton,* 136 S. Ct. 1149, 1151 (2016) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

[135] 805 F.3d 862 (9th Cir. 2015).

[136] *Id.* at 870.

VII. CONCLUSION

For all these reasons, the Court recommends that the District Court, after independent review, deny claim seven of Mark's amended 28 U.S.C. § 2254 petition of habeas corpus at Docket No. 55 because the state court determination did not unreasonably apply Supreme Court authority, and then enter judgment denying Mark's application for post-conviction relief.

DATED this 21st day of April, 2016, at Anchorage, Alaska.

/s/ Kevin F. McCoy
Kevin F. McCoy
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.