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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15276

D.C. No. 2:12-cv-00682-ROS
District of Arizona, Phoenix

[Filed September 25, 2018]

COURTNEY VALLE BISBEE,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
CHARLES L. RYAN, Warden and THOMAS C. HORNE, Attorney General,	)
	)
Respondents-Appellees.	)

ORDER

Before: GRABER and M. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct

in its procedural ruling[s]." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-00682-PHX-ROS

[Filed February 6, 2018]

Courtney Valle Bisbee,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

In 2006, Petitioner Courtney Valle Bisbee was convicted in state court of two counts of molestation of a child. After extensive proceedings in state court, Bisbee filed a petition for writ of habeas corpus in this court. Magistrate Judge David K. Duncan issued a Report and Recommendation concluding Bisbee was not entitled to relief. Bisbee filed objections but, having reviewed each ground for relief identified in the Amended Petition, the Court agrees she is not entitled to relief.

FACTUAL BACKGROUND

As of early 2004, Bisbee was in her early 30s but was spending a substantial amount of time with a group of teenagers. Bisbee was especially close to J.V., who was thirteen at the time. (Doc. 41-5 at 46). In February 2004, Bisbee, J.V., and others were in a bedroom. Bisbee and J.V. were lying on the floor, side by side, underneath a blanket. Bisbee and J.V. kissed, Bisbee touched J.V.'s penis over his underwear, and Bisbee placed J.V.'s hand inside her underwear. As a result of that touching, Bisbee was arrested and later indicted on three counts of molestation of a child and three counts of public indecency to a minor. The three molestation counts were based on Bisbee touching J.V.'s penis, Bisbee having J.V. touch her genitals, and Bisbee having J.V. "fondle" her breast. (Doc. 41-2 at 5). The public indecency charges were based on Bisbee alleging touching J.V.'s penis while three other teenagers were in the room.

In November 2005, Bisbee elected to proceed to a bench, not jury, trial. At trial, both Bisbee and J.V. testified. The trial court credited J.V.'s version of events and found Bisbee guilty of two counts of molestation of a child based on her touching J.V.'s penis and having J.V. touch her genitals. (Doc. 41-5 at 46). The trial court determined there had been no evidence to support the other molestation count and the state had not carried its burden on the three counts of public indecency. (Docs. 41-3 at 195; 41-5 at 45). For the two counts she was convicted on, Bisbee was sentenced to eleven years of imprisonment.

Bisbee pursued a direct appeal but raised only one issue involving the trial court's exclusion of expert

testimony; her convictions were affirmed. Bisbee then pursued a petition for post-conviction relief in state court. That petition raised a variety of claims based on somewhat convoluted claims for ineffective assistance of trial counsel, "involuntary waiver of fundamental right to trial by jury," and newly discovered evidence involving statements by J.V. (Doc. 3-6 at 23). The trial court rejected all of those claims as did the Arizona Court of Appeals. Bisbee, acting pro se, filed a second and third petition for post-conviction relief in state court. Those later petitions also were rejected.

In March 2012, Bisbee filed the present petition in federal court. After some initial confusion regarding the status of her state post-conviction proceedings, Bisbee filed her Amended Petition asserting thirteen allegedly distinct claims for relief. (Doc. 32). Those claims, as best as the Court can understand them, are as follows:

1. Newly discovered evidence in the form of an affidavit by one of the teenagers establishes Bisbee's innocence;

2. Newly discovered evidence establishes Bisbee's statements to the police were "coerced and involuntary" and should not have been admitted at trial;

3. Bisbee was denied effective assistance of trial counsel in twelve different ways;

4. Newly discovered evidence establishes the prosecution failed to comply with its *Brady* obligations to disclose the entirety of J.V.'s statement to the police;

5. Newly discovered evidence establishes the prosecution failed to comply with its *Brady* obligations to disclose the criminal history of J.V.'s mother;

6. Newly discovered evidence establishes J.V. and his mother "were motivated by financial considerations to lie about the alleged molestation";

7. Bisbee's right to remain silent was violated through an "extensive interrogation" that led to her making incriminating statements;

8. Bisbee was denied due process by the police failing to obtain physical evidence or interview witnesses;

9. Bisbee was denied effective assistance of appellate counsel in three different ways;

10. Bisbee was denied due process and a fair trial because the prosecution "failed to present material inconsistencies in [J.V.'s] testimony to the grand jury";

11. Bisbee's rights were violated by the police entering "her home to conduct a warrantless arrest and search";

12. Bisbee was denied a fair trial by the exclusion of her proposed expert testimony; and

13. The trial court "erred" by not amending an order to correct a factual error.

(Doc. 32).

In responding to the petition, Respondents argued the first, ninth, and twelfth claims were procedurally defaulted. Respondents also argued five of the twelve subclaims within the third claim regarding ineffective assistance of trial counsel were procedurally defaulted. (Doc. 41 at 36). This meant Respondents agreed nine of the claims had been exhausted in their entirety as well as seven subclaims involving ineffective assistance of trial counsel.

On May 11, 2017, Magistrate Judge Duncan issued a Report and Recommendation ("R&R") recommending the petition be denied in its entirety. The R&R attempted to group Bisbee's often-overlapping claims into categories and then analyzed the similar claims together. The R&R concluded certain claims were procedurally defaulted, including at least one claim Respondents did not argue was procedurally defaulted.[1]

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[1] The R&R concluded Ground Ten was procedurally defaulted. (Doc. 99 at 21). Respondents, however, did not identify Ground Ten as procedurally defaulted. (Doc. 41 at 36). Instead, Respondents argued Ground Ten–at least portions of it–should be analyzed on its merits. (Doc. 41 at 76). While a district court may raise procedural default on its own, there are limits to when it is appropriate to do so and certain procedures must be followed. *See Boyd v. Thompson,* 147 F.3d 1124, 1128 (9th Cir. 1998) ("A habeas court must give a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal."). Instead of trying to determine the procedural posture of Ground Ten, it is simplest to analyze it, along with all of the other claims, on the merits.

And for those claims not procedurally defaulted, the R&R concluded they failed on their merits. Bisbee filed objections to the R&R and Respondents filed a response to those objections.

Throughout the entirety of Bisbee's federal proceedings there has been substantial confusion regarding the procedural status of each claim for relief. It is undisputed some of Bisbee's claims were resolved in state court such that they must be resolved on their merits. *Cf.* 28 U.S.C. § 2254(d) (standard of review for claims resolved in state court). But there appear to be other claims Bisbee did not raise in state court and those claims likely are procedurally defaulted. Determining the procedural posture of each claim, however, would require a substantial amount of work. Given the arguments Bisbee has made, it is simplest to analyze each claim under the de novo standard of review. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *Larson v. Palmateer,* 515 F.3d 1057, 1066 (9th Cir. 2008) (noting § 2254(b)(2) allows a court to "deny a claim on the merits notwithstanding the petitioner's failure to exhaust the remedies available in state court").

ANALYSIS

Instead of grouping Bisbee's claims into categories based on the underlying factual similarities between certain claims, the Court will analyze each claim in the order in which it is presented in the petition.

I. Newly discovered evidence in the form of an affidavit by one of the teenagers establishes Bisbee's innocence

Bisbee's first claim alleges there is "newly discovered evidence" that entitles her to relief. That evidence consists of post-trial statements by two individuals. The first statement comes from J.V's older brother who was in the room when Bisbee and J.V. had sexual contact. J.V.'s brother testified at trial but, approximately one year later, the brother allegedly recanted his trial testimony. The second statement comes from one of J.V.'s "close friend[s]." That friend came forward after trial and stated J.V. told her nothing happened between him and Bisbee. Based on these statements, Bisbee asserts her rights under the Fifth, Sixth, and Fourteenth Amendments were violated.

It is unclear how the mere fact that additional evidence now exists means Bisbee suffered a violation of her federal rights. It appears, however, that Bisbee is attempting to rely on this alleged new evidence to establish she is innocent. Assuming that is Bisbee's intent, this evidence falls well-short of what is required to establish a viable federal claim based on alleged innocence.

Assuming "a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the non-capital context," the standard for establishing such a claim is "extraordinarily high." *Jones v. Taylor,* 763 F.3d 1242, 1246 (9th Cir. 2014). To meet that standard, Bisbee would have to "go beyond demonstrating doubt about [her] guilt, and . . . affirmatively prove that [she] is probably innocent." *Id.* In determining if she has

made such a showing, the Court must review "all the evidence, old and new, incriminating and exculpatory," and reach a "determination about what reasonable, properly instructed jurors would do." *Id.* at 1247. Here, even accepting that J.V.'s brother recanted and that another individual heard J.V. claim nothing happened, Bisbee has not established her innocence.

"As a general matter, [r]ecantation testimony is properly viewed with great suspicion." *Id.* at 1248. That is especially true here given that, based on the allegations surrounding the crime, J.V.'s brother did not have personal knowledge regarding the crimes. That is, J.V.'s brother was not underneath the blanket during the relevant time, and, therefore, was not in a position to see whether J.V. and Bisbee had sexual contact. Thus, the brother's alleged "recantation" is of little value.

Similarly, the fact that J.V. told a friend nothing happened is of little value. According to the record, J.V. was telling "everybody . . . nothing happened" because he "want[ed] to stop talking about" it. (Doc. 43 at 80). It is not surprising that a teenager might be embarrassed by the relevant events, especially in light of mocking comments made by his peers. (Doc. 43 at 80) (Question: "[K]ids were calling you the nurse fucker and that type of stuff, right?" Answer: "Right."). Also, "nothing happened" from a teenager is ambiguous. It does not specifically refer to the alleged sexual activities. Thus, the alleged statement by J.V. to his friend does not meaningfully impact the core inquiry of guilt or innocence.

Viewing all the evidence presented at trial, the recantation by J.V.'s brother and the evidence that J.V.

denied the events took place to another individual does not seriously undermine confidence in Bisbee's conviction. Therefore, Bisbee's claim that this "newly discovered evidence" establishes her innocence is not convincing.

II. Newly discovered evidence establishes Bisbee's statements to the police were "coerced and involuntary" and should not have been admitted at trial

Bisbee's second claim involves a new statement from an expert witness. After Bisbee was convicted, she retained a "renowned expert on false confessions." (Doc. 32 at 9). That expert reviewed Bisbee's statements to the police and determined her statements were "coerced and . . . her denials of sexual contact with [J.V.] were likely truthful." (Doc. 32 at 9). It is unclear how, exactly, Bisbee believes the expert's testimony entitles her to federal habeas relief. But again, it appears she is relying on this new evidence as establishing her innocence. (Doc. 32 at 9).

To the extent Bisbee is attempting to establish this new evidence establishes her "actual innocence," this evidence similarly falls well short of meeting the "extraordinarily high" requirement for prevailing on such a claim. *Jones v. Taylor,* 763 F.3d 1242, 1246 (9th Cir. 2014). Considering this evidence together with the "newly discovered evidence" discussed earlier does not undermine confidence in the verdict. Therefore, the expert's opinion is not a sufficient basis for relief.

Beyond a claim involving her alleged innocence, Bisbee may be claiming the expert's opinion establishes her statement to police was coerced such that it should

not have been admitted at trial. Determining whether Bisbee's statement was voluntary and therefore properly admitted requires the Court "assess the totality of all the surrounding circumstances." *Clark v. Murphy*, 331 F.3d 1062, 1072 (9th Cir. 2003). Those circumstances include "police coercion, . . . the length of the interrogation, its location, . . . its continuity," whether the police advised Bisbee of her rights, and whether the police made any promises. *Id.* Here, nothing in Bisbee's interrogation establishes her statement was involuntary. And the opinion of the "expert on false confessions" does not change this conclusion. Thus, Bisbee is not entitled to relief on her second claim.

III. Bisbee was denied effective assistance of trial counsel in twelve different ways

Bisbee's third claim is based on the many ways her trial counsel allegedly provided ineffective assistance. Among other failures, Bisbee believes her counsel failed to conduct proper cross-examination, failed to make crucial objections, conducted an insufficient investigation, failed to call an expert witness, failed to file a motion to suppress, and inappropriately "induced [Bisbee] to waive her constitutional right to a trial by jury." (Doc. 32 at 11). These alleged failures are not a sufficient basis for relief.

To establish ineffective assistance of counsel, Bisbee must establish both prongs of the governing test. That is, she must establish her counsel's performance "fell below an objective standard of reasonableness," and her counsel's "defective performance actually prejudiced [her]." *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003). In conducting this analysis, the Court

must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689. And there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

On the first prong regarding defective performance, Bisbee identifies a great number of decisions she believes counsel should have made differently. But her analysis depends far too much on hindsight and the fact that those decisions did not lead to the result she desired. For example, absent unusual circumstances not present here, the precise scope of cross-examination and the objections to be made are matters of trial strategy, not matters that can be assessed as deficient based on the ultimate verdict. Similarly, the scope of the pretrial investigation and which witnesses to call involve strategic choices. While Bisbee believes her counsel should have acted differently, her counsel's performance fell inside the "wide range of reasonable professional assistance." *Id.*

Even if the Court were to agree with Bisbee that some of the alleged errors met the first prong for ineffective assistance of counsel, she has not established she suffered prejudice as a result of those errors. Given the crimes at issue, only J.V. and Bisbee knew the crucial facts. Thus, the verdict depended almost entirely on which individual the trial court believed. The extent of cross-examination of other witnesses, the lack of objections, the scope of investigation, and all the other alleged errors do not

change that core inquiry. And most importantly, none of the alleged failures by counsel would have materially impacted J.V.'s credibility. Bisbee has not, therefore, established a reasonable probability of a different result. *Strickland,* 466 U.S. at 693. Bisbee's claim for ineffective assistance of trial counsel fails under both prongs of the applicable test.

IV. Newly discovered evidence establishes the prosecution failed to comply with its *Brady* obligations to disclose the entirety of J.V.'s statement

Bisbee's fourth claim involves an alleged violation of her rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Bisbee argues the prosecution failed to turn over three pages of the written transcript of J.V.'s interview with the police. But Bisbee has not carried her burden of establishing that alleged failure entitles her to relief.

To establish a *Brady* violation, Bisbee must show the prosecution withheld the three pages of the transcript, the pages were favorable to her because they were exculpatory or impeaching, and the pages qualified as "material" to her guilt or innocence. *See Sanders v. Cullen*, 873 F.3d 778, 802 (9th Cir. 2017). The "materiality" requirement does not depend on showing Bisbee "more likely than not [would] have received a different verdict with the evidence, but whether in its absence [she] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

There is a threshold issue which remains unresolved and which complicates any analysis of this

issue. The parties disagree whether Bisbee's trial counsel did, in fact, receive the allegedly withheld transcript pages prior to trial. It is undisputed that other portions of J.V.'s interview were turned over and there is no obvious explanation why the prosecution would not have turned over the three pages. Similarly, there is no obvious explanation why Bisbee's counsel would not have inquired about the missing pages if they were, in fact, missing. Without conclusively establishing the pages were withheld, Bisbee's claim fails at the outset. In an abundance of caution, however, the Court will assume the pages were not turned over and analyze whether that failure violated Bisbee's rights under *Brady*.

Reviewing the three pages, they contain statements by J.V. regarding his interactions with Bisbee. Two of the three pages, however, do not contain any exculpatory or impeachment material. One of the pages consists of J.V. relaying a conversation where Bisbee told him she recently had sex with someone else. (Doc. 4-7 at 33). Another page consists of J.V. relaying a statement Bisbee allegedly made that "she doesn't really want to go out with kids but . . . she made an exception for [J.V.]." The statement that Bisbee recently had sex with someone else appears irrelevant and the statement that Bisbee "made an exception" to go out with J.V. is inculpatory. Bisbee does not cite any authority faulting the prosecution for not turning over irrelevant or additional inculpatory evidence.

The only possible portion of the pages that might qualify as information that should have been turned over is found in a statement by J.V. recounting the sequence of events that led up to the sexual contact.

(Doc. 4-7 at 32). That statement, however, is largely consistent with J.V.'s trial testimony. (Doc. 41-3 at 80-82). Contrary to Bisbee's statement, it is not a "radically different time sequence." (Doc. 101 at 3). Thus, even this statement is impeachment material of very little value. But accepting that small portion of J.V.'s statement should have been turned over, Bisbee still has not established a *Brady* violation.

Under the most charitable reading of the record, the prosecution did not turn over a single statement made by J.V. that Bisbee might have used for very minimal impeachment purposes. Given the limited nature of that statement, it does not undermine confidence in the verdict. As noted earlier, the trial came down to a credibility contest and the allegedly withheld statement would not have meaningfully undercut J.V.'s credibility. Therefore, Bisbee's due process rights were not violated by the prosecution's alleged failure to turn over the three pages.

V. Newly discovered evidence establishes the prosecution failed to comply with its *Brady* obligations to disclose the criminal history of J.V.'s mother

Bisbee's fifth claim is another claim that the prosecution violated its *Brady* obligations. According to Bisbee, J.V.'s mother had been arrested for shoplifting in the past but that information was not disclosed. Assuming this information was not disclosed, Bisbee cannot establish a violation of her rights.

The fact that J.V.'s mother had been arrested for shoplifting had some impeachment value. But that value is remarkably small. First, there was no

indication J.V.'s mother had been convicted. And an arrest, without conviction, may not be an appropriate way to impeach a witness. At the very least, an arrest without a conviction does not appear especially probative of her credibility. But, again in an abundance of caution, the court will assume the arrest record should have been disclosed. Even under that assumption, however, Bisbee falls short of any entitlement to relief.

The mother's testimony was a very small part of the evidence presented at trial. In fact, the mother did not offer testimony regarding the crucial events. Assuming Bisbee had the information and had successfully impeached the mother with her arrest, there is an overwhelming likelihood the result would have been the same. Therefore, cast in terms of a *Brady* claim, the mother's arrest record was not "material" to Bisbee's guilt or innocence.

VI. Newly discovery evidence establishes J.V. and his mother "were motivated by financial considerations to lie about the alleged molestation"

Bisbee's sixth claim involves another assertion that "newly discovered evidence" entitles her to relief. Bisbee believes she has "newly discovered evidence" that J.V.'s mother had "financial considerations to lie about the alleged molestation." The new evidence is that J.V.'s mother retained "civil counsel two years prior to [Bisbee's] trial . . . for the purpose of instituting [a civil] lawsuit." (Doc. 32 at 16). Bisbee apparently believes the fact that J.V.'s mother discussed the possibility of retaining civil counsel after the molestation establishes the entire episode was

fabricated. Bisbee does not explain the type of claim she is asserting based on this alleged newly discovered evidence, Respondents did not explain the nature of the claim in their response, and the Court cannot discern any obvious claim. The Court is left to guess how this evidence establishes a violation of Bisbee's constitutional rights.

If Bisbee is arguing this evidence establishes her actual innocence, it does not meet the demanding standard. Even viewed with all the other "newly discovered evidence" Bisbee points to, she has not established she is innocent. Alternatively, if Bisbee is arguing the prosecution had an obligation to turn this information over before trial, there is no indication the prosecution was aware of these facts before trial. The prosecution did not have an obligation to turn over information it neither knew nor should have known. Finally, to the extent Bisbee is attempting to make out some alternative claim based on the alleged financial motivations, she has not done so in a sufficiently clear manner to allow the Court to address such a claim.

VII. Bisbee's right to remain silent was violated through an "extensive interrogation" that led to her making incriminating statements

Bisbee's seventh claim involves her interrogation. She seems to believe the introduction at trial of her statements to the police violated her rights. The legal basis of this claim is not clear but it appears to be duplicative of her earlier claim that her statements to the police were involuntary. As set out above, Bisbee has not established her statements were involuntary. Thus, this claim fails.

VIII. Bisbee was denied due process by the police failing to obtain physical evidence or interview witnesses

Bisbee's eighth claim is based on the manner in which the police conducted their investigation. Bisbee believes the police intentionally conducted a shoddy investigation as evidenced by their failure to locate and interview all potential witnesses, failure to collect evidence, and failure to physically examine her when she was arrested. In sum, Bisbee argues the police did not investigate the crime in the manner Bisbee would have preferred and that failure means her conviction was a violation of her constitutional rights. That is not correct.

Bisbee does not point to any general constitutional right to have the police conduct an investigation in a particular way. And failures to interview certain individuals or collect certain evidence are not enough, on their own, to establish a due process violation. The only portion of Bisbee's claim that has some basis in existing law involves her claim that the police violated her due process rights by failing to collect certain exculpatory evidence. Even that portion fails, however, because "failure to preserve potentially useful evidence does not constitute a denial of due process of law" unless the police acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Bisbee has not made any showing that the police acted in bad faith. The claim based on the police's investigation fails.

IX. Bisbee was denied effective assistance of appellate counsel in three different ways

Bisbee's ninth claim is based on the actions of her appellate counsel. Bisbee claims she was denied effective assistance of appellate counsel because that counsel did not investigate the plan by J.V. and his mother to pursue a civil lawsuit, did not highlight discrepancies in J.V.'s trial testimony, and did not argue Bisbee's custodial interrogation should have been suppressed. As with her claims regarding trial counsel, Bisbee has not established either prong of the applicable test. That is, appellate counsel did not perform deficiently by failing to pursue these arguments nor has she established she suffered prejudice as a result of counsel's failures.

X. Bisbee was denied due process and a fair trial because the prosecution failed to present material inconsistencies in [J.V.'s] testimony to the grand jury

Bisbee's tenth claim is based on defects in the grand jury process. Bisbee believes she was denied due process when the prosecution did not highlight to the grand jury inconsistencies in J.V.'s testimony. Bisbee does not point to the legal basis for this claim and there does not appear to be one. Errors of the sort Bisbee alleges are not cognizable on federal habeas relief. "For federal constitutional purposes, a jury conviction transforms any defect in the grand jury's charging decision into harmless error because the trial conviction establishes probable cause to indict and also proof of guilt beyond a reasonable doubt." *Jones v. Annucci*, 124 F. Supp. 3d 103, 124 (N.D.N.Y. 2015).

XI. Bisbee's rights were violated by the police entering "her home to conduct a warrantless arrest and search"

Bisbee's eleventh claim is based on alleged violations of her Fourth Amendment rights. Bisbee seems to believe her warrantless arrest and search provide a basis for federal habeas relief. But it is well-established "[a] Fourth Amendment claim is not cognizable in federal habeas proceedings if a petitioner has had a full and fair opportunity to litigate the claim in state court." *Ortiz-Sandoval v. Gomez,* 81 F.3d 891, 899 (9th Cir. 1996). Bisbee had such an opportunity and this claim fails.

XII. Bisbee was denied a fair trial by the exclusion of her proposed expert testimony

Bisbee's twelfth claim involves the trial court's refusal to permit Bisbee to call an expert witness. Bisbee has not provided a clear explanation of how the exclusion of this witness violated her constitutional rights. In general, criminal defendants are entitled to call witnesses on their behalf. *Soo Park v. Thompson*, 851 F.3d 910, 919 (9th Cir. 2017) ("The right to compulsory process encompasses [t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary."). But "[a] party in a criminal case does not have unfettered discretion to call witnesses." *United States v. Ross*, 372 F.3d 1097, 1113 (9th Cir. 2004); *see also United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."). Bisbee has not established the exclusion of her proposed witness rose to the level of a violation of her rights.

XIII. The trial court "erred" by not amending an order to correct a factual error

Bisbee's final claim for relief appears to involve her belief that the trial court erred by not amending a prior decision to address newly discovered evidence regarding the alleged plan by J.V. and his mother to file a civil lawsuit. While difficult to understand, Bisbee appears to be claiming the trial court erred by failing to accept her arguments. The trial court was not obligated to change its decision based on the alleged newly discovered evidence regarding a civil lawsuit. Bisbee is not entitled to relief on this claim.

Accordingly,

IT IS ORDERED the Report and Recommendation (Doc. 99) is **ADOPTED** to the extent it is consistent with the analysis above and **REJECTED** to the extent it is inconsistent.

IT IS FURTHER ORDERED the Petition for Writ of Habeas Corpus (Doc. 32) is **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a Certificate of Appealability and leave to proceed in forma pauperis on appeal are **DENIED** because the petition does not make a substantial showing of the denial of a constitutional right.

Dated this 6th day of February, 2018.

/s/Roslyn O. Silver
Honorable Roslyn O. Silver
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-0682-PHX-ROS (DKD)

[Filed May 11, 2017]

Courtney Valle Bisbee,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

REPORT AND RECOMMENDATION

TO THE HONORABLE ROSLYN O. SILVER, SENIOR U.S. DISTRICT JUDGE:

Petitioner Courtney Valle Bisbee raises several, interwoven claims in her pursuit of habeas relief. Following additional briefing on several of those claims, the Court has concluded that an evidentiary hearing is not necessary.[1] As described below, the Court

[1] Although Bisbee has been released from custody (Doc. 97), this proceeding is not moot. *Spencer v. Kemna*, 523 U.S. 1 (1998); *Wood v. Hall*, 130 F.3d 373, 376 (9th Cir. 1997).

recommends that her Petition be denied and dismissed with prejudice.

Factual and Procedural Background

Bisbee, then 34 years old, began working as a nurse at Horizon High School in November 2003. (Doc. 41-4 at 7; Ex. V at 6:10) By January 2004, Bisbee had almost-daily contact outside of school with a group of middle- and high-school friends and siblings, including the Complainant and his brother, NV (Doc. 41-2, Ex. O at 85-89, 94, 111-12) This often involved spending time at one of the adolescent's house ("the Kemp house"). (Doc. 41-2, Ex. O at 68-69, 89-90) Complainant and his brother were living at the Kemp house during the relevant time. (Doc. 41-3, Ex. R at 5) NV perceived that Bisbee and Complainant had a different relationship, including "times that could be easily mistaken for flirting." (Doc. 41-3, Ex. R at 21:4)

On February 1, 2004, Bisbee and Complainant kissed; each said the other initiated the kiss. (*Compare* Doc. 41-3, Ex. R at 30-31 *with* Doc. 41-4, Ex. V at 52, 107) The following day, Bisbee—without authorization—signed Complainant out of school in the middle of the day and brought him back to her house so he could babysit her daughter. (Doc. 41-3, Ex. R at 33-34, 62-67; Doc. 41-4, Ex. V at 58-60) Complainant claimed Bisbee kissed him while they were at her house; she testified that she was only at her house for five minutes. (Doc. 41-3, Ex. R at 34; Doc. 41-4, Ex. V at 61)

On February 5, 2004, Bisbee was placed on paid administrative leave because she had signed Complainant out of school without authorization. (Doc.

41-4, Ex. V at 67) Later that day, she returned to the Kemp house. (Doc. 41-4, Ex. V at 68) Bisbee joined five teens, including Complainant, in a bedroom: BK and NV (Complainant's brother) were on the top bunk bed, BH and DK were on the lower bunk bed, and Complainant was sitting on the floor. (Doc. 41-3, Ex. R at 40; Ex. T at 34) NV testified that he tried to "shut everyone out." (Doc. 41-3, Ex. R at 18:12-13) Bisbee sat next to Complainant and used a blanket or sleeping bag to cover her legs and Complainant's legs. (Doc. 41-3, Ex. R at 40; Doc. 41-4, Ex. V at 83) Complainant, BH, and DK all testified that Bisbee and Complainant then kissed. (Doc. 41-2, Ex. O at 20:25 [DK]; Doc. 41-3, Ex. R at 40 [Complainant]; Doc. 41-3, Ex. T at 34 [BH]) Complainant testified that Bisbee touched his penis over his underwear, that his hand was inside her underwear, and that she felt "smooth." (Doc. 41-3, Ex. R at 41-43, 86:2-4) Subsequently, Mrs. Kemp came home and told Bisbee that she needed to leave. (Doc. 41-3, Ex. R at 43)

That evening, Mr. Kemp attempted to use the house's landline and realized that Complainant and Bisbee were talking on the phone in a "disturbing" manner about her sexual history and their relationship. (Doc. 41-2, Ex. O at 72-74) Mr. Kemp had his wife listen to confirm the identity of the voices. (Doc. 41-2, Ex. O at 74) He then called Complainant's mother on his cell phone, placed the cell phone next to the home phone, and she confirmed her son's voice on the call. (Doc. 41-2, Ex. O at 74-75; Doc. 41-4, Ex. Z at 251-52) Eventually, Mr. Kemp made his presence known on the call and told Bisbee that she should expect "to be contacted by the authorities and the school tomorrow." (Doc. 41-2, Ex. O at 76, 77:6-7) Mr.

Kemp went to talk to Complainant and found him already talking on a cell phone with Bisbee. (Doc. 41-2, Ex. O at 76) He took the phone and told Bisbee to not call or contact his son, Complainant, and NV. (Doc. 41-2, Ex. O at 77-78) Mr. Kemp confronted Complainant who admitted that Bisbee had touched him. (Doc. 41-3, Ex. R at 48-49; Doc. 41-2, Ex. O at 78) The police were contacted and, after interviewing Complainant and others, Bisbee was arrested, booked, and then interviewed by Scottsdale Police Detective Kinder. (Doc. 41-3, Ex. T at 12-13)

The interrogation was recorded and Det. Kinder read Bisbee her Miranda rights "about two to five minutes" after the interrogation began. (Doc. 41-4, Ex. V at 100; Doc. 42-1 at 100) Bisbee told Det. Kinder that she had talked to a lawyer about an injunction against harassment but she never requested counsel during the interrogation. (Doc. 42-1 at 101, 106) Bisbee told Det. Kinder that Complainant had kissed her on two different occasions but denied all other sexual contact. (Doc. 42-1 at 132)

In February 2004, the Maricopa County Grand Jury indicted Bisbee based in part on Det. Kinder's testimony that Bisbee had admitted to kissing and fondling Complainant. (Doc. 41, Exs. A, B) This was incorrect and, on remand, he testified that she had admitted to kissing him. (Doc. 41-1 at 7; Exs. C, D, F) The Grand Jury re-indicted Bisbee in April 2004 for three counts of molestation of a child and three counts of public indecency to a minor. (Doc. 41-2 at Ex. G)

In November 2005, Bisbee signed a waiver of her right to a jury trial and the Superior Court accepted her waiver. (Doc. 41-1 at Exs. J, K) Bisbee confirmed

her intention to waive a jury at the start of her trial. (Doc. 41-2 at 80) On cross-examination, Bisbee stated that during the previous two years, she had "lost a lot of faith in people, and that's why [she] asked for a bench trial and not a jury trial." (Doc. 41-4, Ex. V at 108:10-12)

As relevant here, Bisbee testified in her own defense and attempted to present an expert witness. (Doc. 41-4 at Exs. V, Z) The Court granted the State's motion to preclude her expert's testimony. (Doc. 41-5, Ex. BB at 9-10) At the conclusion of the six day trial, the Court found Bisbee guilty of two counts of molestation of a child. (Doc. 41-5, Ex. BB at 39-42; Ex. CC at 3) It appears that the Court never reduced its findings to writing. Instead, in its oral findings, the Court found that Complainant was credible and that his version of events was supported by the testimony of NV, DK, and BH. The Court found further corroboration from the testimony from DK's father, Bisbee's statements to the Scottsdale detective, and her trial testimony. (Doc. 41-5, Ex. BB at 41-42; Ex. CC at 3)

At some point after the trial, Complainant and his mother initiated civil proceedings against Bisbee and the Kemps. (Doc. 42-3 at 68) Bisbee also changed counsel and she was represented by Cynthia Leyh at sentencing. (Doc. 41-5 at Ex. EE) Around the time of her sentencing, Bisbee received a letter from a lawyer who was declining representation in her civil matter against "the Scottsdale Police Department, and possibly the Maricopa County Sheriff's Office" because of "a conflict of interest." (Doc. 42-1 at 10) The letter does not indicate anything more about the source of this conflict. (*Id*.)

On direct appeal, Bisbee was represented by Leyh for her opening brief and Ulises A. Ferragut, Jr. for her reply. (Docs. 3-2, 3-3, 3-4) The sole issue presented to the Arizona Court of Appeals was whether the Superior Court should have allowed the testimony from her expert witness. (Doc. 3-4)

Ferragut represented Bisbee in her first post-conviction proceedings in the Superior Court and on appeal to the Arizona Court of Appeals ("First PCR"). (Doc. 3-5; Doc. 41, Ex. QQ) Both courts reviewed Bisbee's claims and denied her relief. (*Id*.)

Bisbee represented herself in her second post-conviction proceedings ("Second PCR"). (Doc. 41, Exs. TT, ZZ) The Superior Court found that Bisbee had "failed to raise any new claims that can be heard in an untimely filed Petition for Post-Conviction Relief." (Doc. 4-6 at 3) Bisbee filed a pro se Petition for Review to the Court of Appeals. (Doc. 44 at 102, Ex. CCC) The Court of Appeals denied her review as did the Arizona Supreme Court. (Doc. 45 at 122, Ex. JJJ at 143, Ex. LLL) During the pendency of her Second PCR's appeal, she filed a Third PCR. (Doc. 41, Ex. VV)

In her habeas petition, Bisbee is represented by new counsel and raises several arguments. Bisbee timely filed an amended petition ("Petition") which governs these proceedings. (Doc. 32; Doc. 66 at 1) Bisbee's Petition raises 13 grounds for relief and each ground contains multiple claims. (Doc. 32)

Standard of Review

For the exhausted claims in Bisbee's Petition, the Court can only grant habeas relief if Bisbee demonstrated prejudice from the adjudication of a

claim that either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *Lambert v. Blodgett*, 393 F.3d 943, 970, n.16 (9th Cir. 2004); *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000).

It is undisputed that Bisbee's Petition contains several exhausted arguments that are properly before the Court. These claims fall into several substantive categories and so the Court will address them by category.

Brady Violations

Bisbee argues that her due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated in two different ways.[2] (Doc. 32 at 14-15) For relief under *Brady*, Bisbee must demonstrate that (1) the evidence was favorable to the accused, (2) the State knew of the evidence and suppressed it, and (3) the suppression was prejudicial. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). To be prejudicial, suppressed evidence must be material and "[t]he touchstone of materiality review is whether admission of the suppressed evidence would have created a 'reasonable probability' of a different result." *U.S. v. Jernigan*, 492

[2] Bisbee attempts to link these *Brady* violations to two murder cases also prosecuted by the Maricopa County Attorney's Office. (Doc. 35 at 44-47) The fact that her case was also prosecuted by this office, without more, does not entitle Bisbee to any relief.

F.3d 1050, 1053 (9th Cir. 2007) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995))

As described below, the Court concludes that Bisbee is not entitled to relief under either argument.

Ground Four: Interview Transcripts. In Ground Four of her Petition, Bisbee claims that the State's "failure to turn over pages of the Complainant's written statement" constituted a *Brady* violation. (Doc. 32 at 14) In the supporting facts, she states that her relative requested and received documents from the Scottsdale Police Department in 2010. The received documents included three pages of the transcript of Complainant's interview with Det. Kinder that "were never previously turned over to the defense. The newly discovered pages contain materials that could have been used to impeach the Complainant's trial testimony." ("2010 Pages") (Doc. 32 at 14) Bisbee further alleged that the 2010 Pages have impeachment value because they have a materially different timeline and confirm her assertion that she was only romantically interested in adult men. (Doc. 35 at 33)

The primary problem with this allegation is that Bisbee does not point to the baseline—what Bisbee's defense received from the State—and so the Court cannot compare what was disclosed by the State before trial with the 2010 Pages. Nor does the record contain any kind of declaration or affidavit detailing what Bisbee alleges was disclosed by the State. Instead, Bisbee has submitted an unauthenticated page of a transcript and alleges that this was the last page of the interview transcript disclosed by the State. (Doc. 43-2 at 22-24) This transcript page ends in the middle of a sentence and then says "(END SIDE B)." (Doc. 43-2 at

21) This is clearly not the end of the interview. Thus, even if, as Bisbee implies, the State had disclosed this as a final page, the Court would expect that Bisbee's counsel, Bisbee, and the Superior Court would have had notice to follow-up and request the complete transcript.

The 2010 Pages continue after the aforementioned interrupted sentence and, based on the context of the conversation and the "page 66 of 66" notation at the bottom of the page, appear to be the end of the interview.[3] (Doc. 43-2 at 22-24) In these pages, Complainant tells Det. Kinder that Bisbee told him that she had had sex with a 19 year old and that she really did not want to go out with kids but had made an exception for him. (*Id*.)

The impeachment value in these pages is not self-evident. Bisbee argues that these pages raise a question about the timeline of another sexual encounter but this is an immaterial issue in Bisbee's case. And the only man mentioned is a 19 year old who, although over the legal age of consent, was still a teenager. Moreover, as Respondents note, Bisbee was on notice that the Complainant told Det. Kinder that Bisbee would make an exception and date him because this statement was included as part of the State's pre-trial Response to Bisbee's Motion to Set Bond. (Doc. 41-1 at 46)

Even assuming that Bisbee had definitively shown that the State failed to produce these pages, she has

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[3] The Court notes that the signature space for someone to confirm the accuracy of the transcription is blank. (Doc. 42-3 at 24)

not shown a "reasonable probability of a different result." *Jernigan*, 492 F.3d at 1053. Accordingly, the Superior Court did not err in finding no merit to this claim.

Ground Five: Witness Arrest Record. In its rebuttal case, the State called Janette Sloan, Complainant's mother, as a witness. (Doc. 41, Ex. Z at 92) She testified that she had listened to a phone call where she heard Bisbee talking to someone and she identified that someone as her son, Complainant. (Doc. 41, Ex. Z at 93-94) She did not testify about anything else.

In her Petition, Bisbee claims that Sloan had been arrested for shoplifting before she testified and argues that the State violated *Brady* because it should have produced Sloan's arrest record but did not. (Doc. 4-7 at 46; Doc. 32 at 15; Doc. 35 at 40)

An arrest record can be relevant under *Brady*. *U.S. v. Price*, 566 F.3d 900, 911-12 (9th Cir. 2009). However, as noted earlier, *Brady* requires Bisbee to demonstrate that she was prejudiced by the suppression of material evidence. Assuming both that Sloan's arrest record could be authenticated and that Bisbee has satisfied the first two prongs of the *Brady* analysis, there is no evidence that Sloan's arrest record was material or that its suppression prejudiced Bisbee. Sloan's testimony was limited to identifying her son's voice. (Doc. 41, Ex. Z at 93-94) Bisbee has not explained (and it is not self-evident) how Bisbee's counsel could have used a shoplifting arrest to impeach or otherwise question the validity of a mother's testimony about her son's voice. Moreover, Sloan's testimony was mentioned once during the State's closing and was not mentioned at all by the Superior Court when explaining its grounds for

finding Bisbee guilty or at sentencing. (Doc. 41-5, Ex. BB at 40-42; Doc. 41-5, Ex. EE at 58-61)

The Superior Court found no merit in this claim and this Court agrees.

Civil Lawsuit

Bisbee argues that the civil lawsuit filed by Complainant and his mother against Bisbee and the Kemps entitles her to habeas relief. Her arguments were not persuasive to the state courts. This Court agrees.

Ground Six: Financial Motivation. Bisbee argues that Complainant and his mother, Janette Sloan, "were motivated by financial considerations to lie about the alleged molestation," and that "they had met with, and retained, civil counsel two years prior to [Bisbee's] trial, and even before [Bisbee] was indicted, for the purpose of instituting the [civil] lawsuit." (Doc. 32 at 16) During post-conviction proceedings, the Superior Court found this argument meritless. (Doc. 3-8) The timeline of events, detailed below, supports this conclusion.[4]

According to her then-husband, Paul Cathey, Sloan began discussing a civil lawsuit "within a week" of the initial allegations.[5] (Doc. 43-1 at 25) He did not indicate when she actually retained counsel and the record does

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[4] Bisbee does not argue that these allegations should be considered as part of a *Schlup* analysis.

[5] Mr. Cathey made these statements to an investigator hired by Bisbee but he never authenticated the transcript of that conversation. (Doc. 43-1 at 27, 75)

not reveal any information about when this occurred. Ultimately, Sloan did obtain legal representation and filed a civil lawsuit against Bisbee and the Kemps. (Doc. 42-4 at 88) It appears that this lawsuit was initiated on or about January 31, 2006, a date between Bisbee's conviction and sentencing. (Doc. 42-4 at 92 at 17:8)

In support of her claim about pre-trial motivations, Bisbee points to an April 7, 2006 letter that she received from a lawyer who was declining representation of her civil claim against "the Scottsdale Police Department, and possibly the Maricopa County Sheriff's Office" because of "a conflict of interest." (Doc. 42-1 at 10) The letter does not indicate that this conflict had anything to do with Sloan. (*Id*.)

Bisbee also argues her claim is bolstered by excerpts of Sloan's deposition in the civil suit. (Doc. 42-4 at 88) In her deposition, she stated that she did not meet with a civil attorney before the criminal trial and that she was initially interested in suing the school district to ensure that "kids were [not] released without IDs being checked." (Doc. 42-4 at 92 at 16:10-11, 17:12-14; 93 at 18-19) She also testified that she only talked to Complainant about a civil suit against the school district. (Doc. 42-4 at 120-121) Although Bisbee may not believe Sloan, she has not pointed to anything concrete to impeach Sloan's deposition testimony.

There is no evidence in the record to demonstrate that Sloan and Complainant colluded on his claims in order to file a civil lawsuit. There is also no evidence showing that Sloan retained civil counsel before

Bisbee's indictment.[6] This Court concludes that the Superior Court was correct. Bisbee is not entitled to relief for this claim.

Ground Thirteen: Trial Court's Statement about Civil Case. When dismissing Bisbee's First PCR, the Superior Court stated that there was no evidence that the Complainant contemplated a civil suit when he testified at her criminal trial. (Doc. 32 at 22) In her Second PCR, Bisbee provided a deposition excerpt from Sloan and from Complainant which, she claimed, showed that they had, in fact, contemplated a civil suit at that time. (Doc. 32 at 22; Doc. 43-2 at 36-45)

Here, Bisbee argues that she is entitled to habeas relief because the trial court should have reviewed her claim that Complainant and his mother had a "financial bias" and should have "amend[ed] its prior holding that there was no evidence that the Complainant had contemplated a civil lawsuit when he testified at trial." (Doc. 32 at 22) In support of this argument, Bisbee points to deposition testimony from Sloan and Complainant. (Doc. 32 at 22) As noted above, Sloan's testified that she had talked to Complainant about a lawsuit against the school district but never stated when that conversation occurred. (Doc. 43-2 at 39) During his October 2006 deposition, Complainant stated that he had met with a lawyer before the conclusion of Bisbee's criminal trial and that the first time he had met with a lawyer was "maybe two years ago." (Doc. 43-2 at 44)

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[6] Moreover, there is nothing inherently improper with attempting to hire civil counsel or initiating civil proceedings, with or without a criminal conviction.

Even if there may have been some evidence that Sloan contemplated a civil suit before she testified, Bisbee has not shown how this misstatement prejudiced her nor has she shown that this conclusion by the trial court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Accordingly, she is not entitled to habeas relief on this claim.

Police Conduct

Bisbee argues that she is entitled to habeas relief based on how law enforcement conducted its investigation, search, and arrest of her. Assuming that these claims are properly presented for habeas review, none of them entitle Bisbee to relief.

Ground Eight: Due Process Violations. Bisbee alleges six ways in which "the police intentionally" violated her due process rights. (Doc. 32 at 17-18) In the first set of these claims, Bisbee argues that her due process rights were violated when the police failed to conduct a proper investigation. Specifically, Bisbee argues that the police (i) failed to conduct a physical exam of Bisbee; (ii) failed to find witnesses to corroborate her pubic hair argument; (iii) failed to collect evidence such as Bisbee's clothing or the blanket which Complainant stated he and Bisbee were under; and (iv) failed to interview the three witnesses who

were present.[7] (Doc. 32 at 17-18) These four claims fail because, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). *See also Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1045 (9th Cir. 1994) ("the police have no affirmative obligation to investigate a crime in a particular way"); *Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985) (an inadequate investigation is not "sufficient to state a civil rights claim unless there was another recognized constitutional right involved"). Here, Bisbee has not presented any particularized evidence of bad faith by law enforcement and so these claims fail.

Next, Bisbee argues that "the police intentionally . . . (v) provided false information to the court; and (vi) purportedly committed perjury during the grand jury proceedings and withheld exculpatory evidence, such as pages from the Complainant's statement." (Doc. 32 at 17) It appears that these two claims both stem from Bisbee's argument that the lead detective failed to turn over the complete transcript of her interview and the additional pages could have been used to impeach Complainant's testimony. (Doc. 32 at 18) This claim is substantively similar to Ground Four, *supra,* with the added allegation of intent. However, Bisbee did not supply any basis to show intent and because these claims were not further developed by

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[7] Respondents are correct that Claim IV is listed in the Amended Petition but not developed in the facts or the supporting memorandum. However, assuming that it had been, Bisbee would still not be eligible for relief.

Bisbee, there is nothing substantive for this Court to review. Accordingly, this Court concludes that Bisbee is not entitled to relief for these claims.

Ground Eleven: Warrantless Arrest and Search. Bisbee claims that she is entitled to relief because the police, without a warrant, entered and searched her home and then arrested her. (Doc. 32 at 21) "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at h[er] trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976). Bisbee does not allege that the State denied her an opportunity to fully and fairly litigate this claim nor does she argue that this claim relates to evidence introduced at trial. Accordingly, even assuming this claim was exhausted and fully briefed, Bisbee is not entitled to habeas relief.[8]

Claims Related to Interrogation

Bisbee raises related claims about the propriety of her interrogation by Scottsdale Police Det. Kinder and the Superior Court's consideration of an expert report about her interrogation.[9]

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[8] Bisbee also alleges, without further explanation, that her Fifth Amendment rights were also violated. The Court considers this claim to be waived.

[9] Bisbee's attempt to conflate the Scottsdale Police Department with the Phoenix Police Department is unavailing. (Doc. 35 at 36)

Ground Two: Expert Report about Interrogation. Bisbee argues that "newly discovered evidence establishes that her statement obtained by the police was coerced and involuntary and, thus, should never have been admitted at trial." (Doc. 32 at 9) The "newly discovered evidence" is an expert report that was generated between the trial and her First PCR and concludes that Bisbee's statement that she and Complainant kissed "was coerced and likely untrue." ("Expert Report") (Doc. 3-6 at 118-129; Doc. 35 at 27)

Standard of Review. In her First PCR, Bisbee argued that her trial counsel was ineffective for failing to obtain the Expert Report. (Doc. 3-6 at 30-32) Although the section header for this portion of her First PCR brief argued that the Expert Report itself entitled her to relief, the substance of the argument only involved ineffective assistance of counsel. (Doc. 3-6 at 30-32) In response to her First PCR, the Superior Court construed this as an ineffective assistance argument and denied her relief. (Doc. 3-8)

In her Second PCR, Bisbee raised an argument about the Expert Report that is similar to the argument in her Petition, namely that the substance of the Expert Report entitles her to relief. (Doc. 4-5 at 7-13) In response to her Second PCR, the Superior Court found this claim was precluded because she had already raised it in her First PCR. (Doc. 4-6) This was incorrect and, as a result, Respondents argue that this Court should conduct a *de novo* review of this claim. (Doc. 41 at 61) *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) (when it "is clear that a state court has not reached the merits of a properly raised issue,"

habeas court reviews the claim under a *de novo* standard). The Court will proceed accordingly.

Analysis. First, the Court notes that it is not clear that the Expert Report meets the definition of "newly discovered evidence" because it was not "newly discovered," it was newly prepared. *See, e.g., Henry v. Ryan*, 720 F.3d 1073, 1081-82 (9th Cir. 2013) (a claim does not meet the requirements of Rule 32.1(e) when it "is not based on new evidence provided by the state but rather on new analysis of evidence that has been available to him for more than 20 years"); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2005) ("The failure to investigate or develop a claim given knowledge of the information upon which the claim is based, is not the exercise of diligence."). *See also Schad v. Ryan*, 595 F.3d 907, 931 (9th Cir. 2010) ("The petitioner bears the burden of showing diligence.")

However, even assuming that the Expert Report meets the requirements for "newly discovered evidence," it does not render Bisbee eligible for habeas relief because it is unrelated to the factual basis for Bisbee's convictions. The Expert Report focuses on Bisbee's statement about a kiss that (1) was not grounds for any of the six counts in her amended indictment and (2) was unrelated to Bisbee's three convictions. (Doc. 41 at Ex. G; Doc. 41-5, Ex. BB at 40) Thus, even if the Superior Court had received the Expert Report, agreed with it, and suppressed her statement about the kiss, the grounds for her conviction would remain untouched.[10]

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[10] In her Supplemental Memorandum, Bisbee argues that "her coerced statements were used to secure her conviction" in violation

Ground Seven: Interrogation. Bisbee raises three habeas claims stemming from the substance of her interrogation: (1) "her repeated requests for counsel" were ignored, (2) she was subjected to "an extensive interrogation that resulted in a coerced, false statement that was impermissibly used at trial" and (3) the Superior Court unknowingly reviewed an impermissibly edited video of her interrogation. (Doc. 32 at 16)

Requests for Counsel. Bisbee claims that she "twice requested to call an attorney" and Det. Kinder ignored her. (Doc. 32 at 16, 35 at 32) Bisbee does not provide cites to the transcript of her interrogation to support her claim and so she has waived this claim.

However, the Court has reviewed the transcript of her interrogation and, even if not waived, the transcript does not substantiate this claim.[11] (Doc. 42-1 at 98-143) At two points near the start of the interrogation, Bisbee states that she spoke to Larry Devis, an attorney, after she was served with an injunction against harassment and she described his advice about what could happen. (Doc. 42-1 at 101, 106) She mentions Devis' advice a third time, apparently an hour into the interrogation, when she says that Devis

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of her *Miranda* rights. (Doc. 81 at 14) This is the first formulation of that argument and the Court considers it waived.

[11] In her Supplemental Memorandum, Bisbee claims that "there is no objective record of her interrogation or evidence – either in writing or on video – to support any waiver of her rights." (Doc. 81 at 15) However, the transcript of Bisbee's interrogation was reviewed by her expert and is attached to her expert's report. (Doc. 42-1 at 99-143)

suggested setting up an appointment so they could discuss the allegations. (Doc. 42-1 at 131-32)

There is nothing in the transcript demonstrating that Bisbee requested counsel, that she had secured representation by Devis, or that she wanted to stop her interrogation to talk to Devis or any other lawyer. Accordingly, even if not waived, Bisbee is not entitled to relief on this claim.

"Extensive Interrogation" Resulting in "False Statement." Bisbee repeatedly claims that she was questioned "for three hours." (Doc. 35 at 33, 60) There is no evidence to support this claim and elsewhere Bisbee argues that her interrogation was approximately 94 minutes. (Doc. 35 at 61) Either way, she was not subjected to an "extensive interrogation."

Next, she argues that her interrogation resulted in a "false statement." Although never explained, it appears that the "false statement" was Bisbee's admission that she and Complainant had kissed. As described above, this statement was irrelevant to her conviction and so, even if not waived, this argument does not entitle her to relief.

Superior Court's Review of Interrogation. The Superior Court reviewed a video of Bisbee's interrogation and Bisbee was in the courtroom when this occurred. (Doc. 41-3 at 145-146) During this viewing, there were no objections and no requests to adjust the volume. During her cross-examination, she stated that she "could hear most of it." (Doc. 41-4, p. 105 at 104:10)

By comparing the length of the video to the start and stop times in the trial transcript and minute entry,

Bisbee claims the Court unknowingly viewed an edited video. In the trial transcript, the Court watches some of the video and then states: "It looks like [the tape] is at 20 minutes – 20:29, the timer on the TV" before taking a recess. (Doc. 41-3 at 145) The minute entry states that the Court resumes watching at 2:20 p.m. and then stands at recess at 3:09 p.m. (Doc. 41, Ex. U) At this point in the transcript, the Court says, "The Court has seen and heard the entirety of [the] Exhibit." (Doc. 41-3 at 146)

Adding together (a) the 20:29 noted in the transcript and (b) the 49 minutes noted in the minute entry, Bisbee concludes that the Superior Court viewed 69 minutes of her interrogation. She notes, accurately, that the video of her interrogation is 94 minutes long. (Doc. 45, Ex. MMM)

Bisbee's conclusion that the Superior Court only reviewed a portion of her interrogation involves adding apples and oranges: the transcript does not have time stamps and the Court never states on the record what the time clock shows at the end of the viewing. However, even assuming that she is correct and the Superior Court viewed an abbreviated version of her interrogation, Bisbee does not explain what prejudice flowed from this potentially truncated review. She does not suggest that the Superior Court missed something exculpatory and she does not point to any portions of the transcript that the Superior Court did not hear.[12]

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[12] Bisbee does not explain the inherent contradiction between this argument and her argument that her statement to Det. Kinder was involuntary: on the one hand, she argues that the Superior Court should have watched less of her interrogation and, on the

Accordingly, she has not shown that the Superior Court erred in denying her relief on this claim.

Ineffective Assistance of Trial Counsel

Under clearly established Federal law on ineffective assistance of counsel ("IAC"), Bisbee must show that her trial counsel's performance was both (a) objectively deficient and (b) caused her prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This results in a "doubly deferential" review of counsel's performance. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011). The Court has discretion to determine which *Strickland* prong to analyze first. *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998). A habeas court reviewing a claim of ineffective assistance of counsel must determine "whether there is a reasonable argument that counsel satisfied *Strickland*'s deferential standard, such that the state court's rejection of the IAC claim was not an unreasonable application of *Strickland.* Relief is warranted only if no reasonable jurist could disagree that the state court erred." *Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014) (internal citations and quotations omitted). In other words, this Court's "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Bisbee exhausted several claims of ineffective assistance of trial counsel to the state courts and it is undisputed that these claims are properly presented for

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other hand, she argues that the Superior Court should have watched more.

habeas review. (Doc. 41 at 63) However, as detailed below, this Court concludes that the Superior Court's application of *Strickland* was not unreasonable and, therefore, Bisbee is not entitled to relief for these claims.

Ground 3(a): Cross-Examination on Financial Motivation. Bisbee argues that her trial counsel should have cross-examined Complainant, his mother, or his brother about their financial motivation. (Doc. 32 at 11) The Superior Court found that there "was no evidence that any civil lawsuit was contemplated when [Complainant] admitted the touching to Mr. Kemp, to his mother, and to the police, let alone when he testified at trial." (Doc. 3-8 at 5) As this Court has detailed when discussing Grounds Six and Thirteen, *infra*, it appears that the lawsuit may have been filed between Bisbee's conviction and sentencing. Accordingly, the Superior Court's factual conclusion was not clearly erroneous and Bisbee has not shown any prejudice from this statement. Because Bisbee's trial counsel could not have rendered ineffective assistance on this point, Bisbee is not entitled to relief.

Ground 3(c): Objection During Closing. Bisbee claims that her trial counsel should have objected during closing when the State mischaracterized her testimony about whether Complainant had any motivation to lie. (Doc. 32 at 11; Doc. 35 at 57) Bisbee does not cite to the transcript nor does she explain or develop her argument. Accordingly, this claim was waived. However, the Court has reviewed the transcript and it appears that she was referring to the following exchange:

> Q: When [Det. Kinder] questioned you back on February 11th and asked you why did [Complainant] – why would [Complainant] lie about this, you had no response as to why he would lie.
>
> A: I don't know why he would like and do this. No, I don't know why.
>
> Q: Even today, you can't come up with a reason as to why he would lie about this, is that correct?
>
> A: I could come up with a lot of reasons why he would lie.
>
> Q: Yes or no, ma'am?
>
> A: Yes.

(Doc. 41-4, p. 107 at 106:6-16) At closing, the State described her response as follows: "Even when I asked the defendant why would [Complainant] come into this court and lie about this, the defendant didn't even have a response to that, because the response is he would have no reason to come into this court and lie." (Doc. 41-5 at p. 14, 10:19-24) Assuming this argument was not waived, the Court cannot say that the State mischaracterized her comment. Further assuming that Bisbee meant that Complainant's motivation to lie was financial recovery, there is no evidence in the record to show that Complainant was so motivated.

Bisbee also claims that she "consistently maintained that she never touched [Complainant] in a sexual manner." (Doc. 35 at 57) Thus, she argues that her trial counsel should have objected when the State's closing argued that Bisbee's statement to Det. Kinder

corroborated the testimony of the State's witnesses. (*Id*.) Again, Bisbee does not provide cites to either the closing statement or to her controverting testimony and so this argument was waived.

The Superior Court was not incorrect to deny her relief on this claim.

Ground 3(e): Witness SS. According to Bisbee, SS was a possible witness who had "participated" in a phone call between BH and DK where they "stated they had to help [Bisbee] because they knew she had not done anything to [Complainant]." (Doc. 32 at 12) Although Bisbee alerted trial counsel to SS's possible testimony, trial counsel did not notice SS as a witness and did not call her to testify. (Doc. 32 at 12; Doc. 35 at 58-59) Bisbee claims this constituted ineffective assistance by her counsel.

Although Bisbee characterizes SS as having "participated" in a phone call between BH and DK, SS's affidavit states only that she listened to this phone call on speaker-phone. (Doc. 3-6 at 53-54) There is no indication that she spoke, or was spoken to, during this call. This means that SS's testimony about the contents of the phone call between BH and DK would have been hearsay. Ariz. R. Evid. 801(c). Notably, Bisbee does not point to any exclusions or exceptions that would have provided a pathway to admitting this testimony. That trial counsel did not attempt to introduce inadmissible hearsay is not ineffective assistance.

Ground 3(g): Pubic Hair. Bisbee argues that her counsel should have attempted to undermine Complainant's credibility by presenting witnesses who would counter his description of Bisbee's pubic area as

"smooth." (Doc. 32 at 12-13) In post-conviction proceedings, the Superior Court concluded that her "proffer regarding her pubic hair status was not material [because] . . . even a touch over her panties would constitute sexual contact under the law." (Doc. 3-8 at 4)

Bisbee's proffer is a series affidavits that do not call into question whether any touching occurred. (Doc. 42-1 at 80, 82, 84; Doc. 42-2 at 122) Instead, they challenge Complainant's description of what kind of touching occurred and, as the Superior Court noted, indirect touching—which remains unchallenged by this line of inquiry—would still be sexual contact under Arizona law where "'[s]exual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." Ariz. Rev. Stat. § 13-1401(3). *See, e.g., State v. Mendoza*, 321 P.3d 424, 425–26, ¶ 6 (Ariz. App. 2014) ("The crime may be committed, therefore, either by the perpetrator indirectly touching the victim's genitals or by causing the victim to indirectly touch those of the perpetrator.") The Superior Court did not unreasonably apply *Strickland* by concluding that Bisbee could not establish any prejudice from her trial counsel's failure to pursue this line of questioning.

Grounds 3(h), (i), (k): Statement to Police. Bisbee raises three different arguments challenging how her trial counsel handled her statement to Det. Kinder. First, she argues that her counsel should have hired an expert on coerced confessions. (Doc. 32 at 10: Ground 3(h)) Next, she argues that her counsel should have

moved to suppress her statement because "it was induced by unconstitutional means" because she was interrogated for a "significant period," she never waived her Miranda rights, and was coerced into making a false statement. (Doc. 32 at 10, 13; Doc. 35 at 60) Finally, she argues that her counsel should have objected when the Court found her statement to Det. Kinder was voluntary. (Doc. 32 at 11: Ground 3(k))

When reviewing these claims, the Superior Court found that neither *Strickland* prong had been met. (Doc. 3-8 at 5) The Superior Court also noted that Bisbee's "verdict of guilt was based upon the Court's finding Complainant's testimony credible beyond a reasonable doubt." (Doc. 3-8 at 5) In other words, even if her statement to Det. Kinder had been suppressed, the grounds for her conviction–Complainant's credibility–would remain untouched. Accordingly, Bisbee had not demonstrated any prejudice. The Court cannot say that this finding was an unreasonable application of *Strickland*.

Unexhausted Claims Subject to a Procedural Bar

The Court initially concluded that some of the claims were barred and invited supplemental briefing on this analysis. (Docs. 66, 81, 88, 93) Bisbee has not demonstrated that the Court can review any of these claims.

Exhaustion and Implied Procedural Bar. A state prisoner must properly exhaust all state court remedies before this Court can grant an application for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1), (c); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Coleman v. Thompson*,

501 U.S. 722, 731 (1991). Arizona prisoners properly exhaust state remedies by fairly presenting claims to the Arizona Court of Appeals in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-45 (1999); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). To be fairly presented, a claim must include a statement of the operative facts and the specific federal legal theory. *Baldwin v. Reese*, 541 U.S. 27, 32-33 (2004); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Duncan*, 513 U.S. at 365-66. "A claim has not been fairly presented in state court if new factual allegations either fundamentally alter the legal claim already considered by the state courts or place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (internal quotations and citations omitted).

An implied procedural bar exists if a claim was not fairly presented in state court and no state remedies remain available to the petitioner. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Rose v. Lundy*, 455 U.S. 509, 519-20 (1982); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002); *Poland v. Stewart*, 169 F.3d 573, 586 (9th Cir. 1999); *White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989).

This Court can review a procedurally defaulted claim if the petitioner can demonstrate either cause for the default and actual prejudice to excuse the default, or a miscarriage of justice. 28 U.S.C. § 2254(c)(2)(B); *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman*, 501

U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *States v. Frady*, 456 U.S. 152, 167-68 (1982).

Ground Ten. In Ground Ten, Bisbee claims that, "upon information and belief," the State "failed to present material inconsistencies in the Complainant's testimony to the grand jury" and acknowledged that this "issue was not raised or developed on direct appeal." (Doc. 32 at 20) She raises this claim as a violation of her "constitutional rights to due process and a fair trial" and also as an example of the ineffective assistance provided by her appellate counsel.

Both as a due process claim and an ineffective assistance of appellate counsel claim, Bisbee acknowledges that Ground Ten was never presented on direct appeal or in her First PCR. (Doc. 32 at 20) As a result, these arguments were not exhausted and are now subject to an implied procedural bar. Bisbee referenced these arguments in her Second PCR. (Doc. 4-5 at 3) The Superior Court concluded that she had not "raise[d] any new claims that can be heard in an untimely filed" PCR. (Doc. 4-6 at 3) Bisbee has not shown that this was an incorrect conclusion because she has not provided any factual support for this argument and she has not made any arguments why this Court can review it. Accordingly, the Court will not do so.

Ground Twelve. In Ground Twelve of her Petition, Bisbee argues that she is entitled to habeas relief because the Superior Court should not have excluded

the testimony of her proposed expert witness.[13] (Doc. 32 at 21-22) As Respondents note, Bisbee raised this claim on direct appeal as a question of Arizona, not federal, law. (Doc. 3-2, 3-3, 3-4) This means that she did not fairly present this claim to the Arizona Court of Appeals and so this claim was not exhausted. Moreover, this claim is now subject to an implied procedure bar because it was not fairly presented and no state remedies remain available to Bisbee. Bisbee has not attempted to demonstrate cause and prejudice, or a miscarriage of justice. Accordingly, this Court cannot consider this claim.

Supplemental Briefing. In her supplemental briefing, Bisbee only concedes that one of these claims–Ground 3(l)–was not exhausted and is now subject to an implied procedural bar. (Doc. 81 at 22-23) Accordingly, the Court will detail its analysis of the remaining claims included in the supplemental briefing.

Ground One: Bisbee's First PCR raised the same claim and supporting facts as Ground One of her Petition. (Doc. 3-6 at 25-30) However, this claim was not raised or referred to in her appeal from the Superior Court's denial of her First PCR. (Doc. 41-3, Ex. QQ) Because the arguments about NV and SB were not presented to the Arizona Court of Appeals, these claims were not exhausted. Moreover, they are now subject to an implied procedural bar because Bisbee has no remaining state remedies.

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[13] Bisbee did not raise this issue as part of her ineffective assistance of appellate counsel claim. (Doc. 32 at 19-20, 21)

Bisbee notes that there was one mention of NV's affidavit in the Petition for Review from her First PCR and claims that the Court of Appeals was "appraised of the issue" and "put on notice of the claim" because of references in her Petition for Review from her Second PCR.[14] (Doc. 81 at 9) These disparate and superficial references do not constitute fair presentation of a claim: there was neither a sufficient development of the operative facts nor any analysis of a specific federal legal theory. Accordingly, Ground One was not exhausted.

Ground 3(b): In her Petition, Bisbee claims her trial counsel "failed to elicit on direct examination that a witness had overheard two prosecution witnesses discussing the fact that the Complainant had made up the claim of molestation." (Doc. 32 at 10) In the supporting facts, Bisbee states that she wanted her counsel to interview AH. (Doc. 32 at 11) In her supporting brief, she states that she wanted her counsel to interview SS. (Doc. 35 at 58-59) It appears that both AH and SS would have testified that they had overheard conversations where trial witnesses discussed the facts of the case.

Bisbee's First PCR raised claims relating to both AH and SS (Doc. 3-6 at 8, 17) In the Petition for Review from her First PCR, Bisbee did not mention AH; she did restate her claim about SS but provided no related

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[14] The Court notes that Bisbee's Supplemental Memorandum does not explicitly differentiate between the Petitions for Review from her First PCR and her Second PCR. (Doc. 81 at 9) The Court assumes this was merely unartful drafting and not a deliberate attempt to mislead the Court.

analysis. (Doc. 3-9 at 7-8) Thus, even if Bisbee did not waive Ground 3(b) by failing to clearly explain her argument, this claim was not exhausted because the Court of Appeals was not presented with any specific federal legal theory related to this argument.

Ground 3(d): Bisbee claims that her trial counsel "failed to investigate and interview the Complainant's father regarding the Complainant's bias and credibility." (Doc. 32 at 10) Bisbee presented this IAC argument in her First PCR. (Doc. 3-6 at 12-13) She did not present this argument in her Petition for Review from her First PCR. (Doc. 41-3, Ex. QQ) Bisbee argues that this issue was "identified for the Arizona Court of Appeals." (Doc. 81 at 20) In support of this allegation, Bisbee cites to a Petition for Review which was filed in the Arizona Supreme Court. *Compare* Doc. 4-3 *with* Doc. 44 at 102, Ex. CCC.[15] This is not enough to demonstrate fair presentation of an argument.

Ground 3(f): Bisbee argues that trial counsel "failed to properly cross examine State witness BH about inconsistencies in her testimony, including her prior statement that she did not observe Petitioner and the Complainant wrapped in a blanket." (Doc. 32 at 10) The First PCR did not raise this argument and instead raised a related argument, namely that trial counsel should have used SS as a witness because her

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[15] Exhibit CCC shows that this document was filed by the Clerk of the Supreme Court and Exhibit DDD is the State's response. (Doc. 45 at 1) Both Exhibits CCC and DDD use the case number 1 CA-CR 09-0624. Bisbee's reply is captioned for the Supreme Court. (Doc. 45at 113, Ex. GGG) The record does not contain the Supreme Court's denial of her petition. *See* Doc. 45 at 143, Ex. LLL (denying a petition for review under a different case number).

testimony would have undermined BH's testimony. (Doc. 3-6 at 17-20) This is fundamentally different from Ground 3(f)'s argument that trial counsel failed to properly cross-examine BH. Accordingly, the Court cannot say that this claim was fairly presented.

Ground 3(j): Bisbee argues that trial counsel "failed to object to the introduction of a copy, rather than the original recording, of Petitioner's custodial interrogation, especially where the copy was believed to be incomplete or edited to remove Petitioner's repeated requests for counsel during the interrogation." (Doc. 32 at 10) Bisbee's First PCR argued that her trial counsel was ineffective for failing to find and use an expert on false confessions. (Doc. 3-6 at 30-33) There are no other arguments about her interrogation and there is no reference to the recording viewed by the trial court. Because this is a fundamentally different argument from Ground 3(j)'s claim about trial counsel, the Court cannot say that this claim was fairly presented.

Ground Nine. Bisbee argues she received ineffective assistance of appellate counsel in three different ways. (Doc. 32 at 19) However, these arguments were not raised in her First or Second PCR and, therefore, they were not exhausted and are now subject to an implied procedural bar.[16]

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[16] In her Petition, Bisbee does not argue that her appellate counsel was ineffective because he also represented her during her first PCR proceedings. Instead, she first raised that argument in state court during the appeal from her Second PCR (Doc. 4-9 at 8) and in habeas proceedings in her Supplemental Memorandum. (Doc. 81 at 23) Accordingly, these claims cannot be reviewed.

Judicial Review. As noted above, this Court can review a procedurally defaulted claim if the petitioner can demonstrate either cause for the default and actual prejudice to excuse the default, or a miscarriage of justice. Bisbee did not expand on cause for her defaults in either her Petition or in her supplemental briefing. This means that, even with a showing of prejudice, she cannot meet the two part cause and prejudice standard. *U.S. v. Frady*, 456 U.S. 152, 68 (1982).

Bisbee's Petition states that she is innocent. (Doc. 32 at 8, 9) Accordingly, the Court assumes that she is trying to excuse her default under the "miscarriage of justice" analysis. To do so, Bisbee must show that she is actually innocent[17] by introducing reliable new evidence which the Court must review and ask whether "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence." *Schlup,* 513 U.S. at 326. This "standard is demanding and permits review only in the extraordinary case" and requires the Court to make "a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard. As a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact." *House v. Bell*, 547 U.S. 518, 538, 539–40 (2006) (internal citations and quotations omitted). Instead, the Court's analysis hinges on its evaluation of "the probative force of relevant evidence that was either

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[17] This analysis is different than a free standing claim of innocence. *See Herrera v. Collins*, 506 U.S. 390 (1993). In her Supplemental Reply, Bisbee argues for the first time that this Court should review her claim of actual innocence. (Doc. 93 at 20) Presenting this argument in this way means that she has waived it.

excluded or unavailable at trial." *Sistrunk v. Armenakis*, 292 F.3d 669,673 (9th Cir. 2002) (internal quotation omitted).

Bisbee's Petition describes the following as "newly discovered evidence": NV's Affidavit (Ground One), SB's Testimony (Ground One), the expert report on her interrogation (Ground Two), transcript pages of Complainant's interview with Det. Kinder (Ground Four), Complainant's mother's criminal history (Ground Five), and the financial motivation of Complainant and his mother (Ground Six). Accordingly, the Court will consider all of this "newly discovered evidence" for the requisite "holistic judgement about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House*, 547 U.S. at 539.

Ground One. Bisbee's first claim is that "newly established evidence, in the form of an affidavit from Complainant's brother who was present at the time of the alleged conduct, establishes that the Complainant lied about the alleged molestation." (Doc. 32 at 8) The supporting facts also refer to the testimony of another teen, SB, who stated during her deposition in the related civil case that Complainant told her several times that "nothing happened" with Bisbee.[18] (Doc. 32 at 8; Doc. 42-3 at 74, 23:12-13)

Analysis: NV Testimony. In his trial testimony, NV acknowledged that Bisbee and his brother had a

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[18] In the Supplemental Reply, Bisbee attempts to expand this argument to include an affidavit from the father of Complainant and NV. (Doc. 93 at 11-15) This argument is waived.

relationship that seemed to include flirting (Doc. 41-3, p. 61 at 21:4), that their relationship seemed like one between "two teenagers" (Doc. 41-3, p. 9 at 8:7), and their interactions "got a little weird after a while." (Doc. 41-3, p. 10 at 9:1) He testified that, when the other teens were in his bedroom, he was on the top bunk bed and tried to "shut everyone out." (Doc. 41-3, Ex. R, p. 58 at 18:12-13) He also testified that some of the things he told Det. Kinder may have been unintentionally wrong (Doc. 41-3, p. 17 at 16:9-12; p. 20 at 19: 5-9; p. 23 at 22:10-17) During closing, the State noted his reticence to participate in the case. (Doc. 41-5, p. 11 at 7: 9-13)

In his subsequent affidavit, NV stated that he "was unable to testify truthfully and accurately at Courtney Bisbee's criminal trial." (Doc. 42-3 at 88) He stated that he "felt threatened . . . to not testify truthfully and felt that [his] mother and the state officials were manipulating [him]." (emphasis in original) He stated that "nothing happened that day between my brother" and Bisbee but he "was not allowed to say that." He further stated that "[t]he state portrayed me as a corroborating witness, which is totally false." (*Id*. at 89)

The consistency of NV's position was noted by Bisbee's expert, James Michael Wood, Ph.D., who concluded that the "consistent position of [NV was] that no improper contact or kissing occurred." (Doc. 42-3 at 91) NV's ex-step-father also noted that "N[.] was pretty much steadfast on nothing did happen." (Doc. 43-1, p. 50 at 23:12-13)

Bisbee claims that there was "substantially material and probative" evidence from NV that was used by the Judge to support his finding of her guilt.

(Doc. 81 at 12) However, nowhere does she provide any citations or quotations to explain which part of NV's testimony forms the basis of this argument. Instead, she points out that the State referred to NV in closing. (Doc. 81 at 11-12)

The Court has carefully reviewed NV's testimony and cannot find any statements that are clearly contradicted by his subsequent affidavit. Because NV's affidavit is not particularly novel or different from his trial testimony, the Court cannot conclude that it would have any "likely effect on reasonable jurors applying the reasonable-doubt standard." *House*, 547 U.S. at 539.

Analysis: SB Testimony. SB was a friend of Complainant and she was deposed as part of the civil suit initiated by Complainant's mother. In her deposition, SB stated that Complainant told her that "nothing happened" with Bisbee. (Doc. 42-3 at 74, 23:12-13).

Before evaluating the potential impact of SB's testimony, the Court notes that her deposition testimony would likely not have reached any jurors since it was an out of court statement offered for the truth of the matter asserted and, therefore, hearsay. Nevertheless, even if SB had testified that Complainant told her "nothing happened," a reasonable juror would have also heard Mr. Kemp's testimony about the phone call between Complainant and Bisbee, Det. Kinder's testimony about his interviews with the other teenagers, and the other teens' testimony about Bisbee's relationship with them and with Complainant. In other words, even if reasonable jurors had heard

SB's testimony, the Court cannot conclude that it would have affected the outcome of Bisbee's trial.

Grounds Two, Four, Five, and Six. As described elsewhere, Bisbee's arguments about the expert report about her interrogation (Ground Two), the two additional transcript pages of Complainant's interview with Det. Kinder (Ground Four), Complainant's mother's criminal history (Ground Five), or the financial motivation of Complainant and his mother (Ground Six) are not compelling. Accordingly, the Court cannot say that "it is more likely than not that no reasonable juror would have convicted [her] in light of th[is] new evidence." *Schlup*, 115 S.Ct. at 867. As a result, Bisbee is not entitled to review of her otherwise procedurally barred claims.

IT IS THEREFORE RECOMMENDED that Courtney Valle Bisbee's amended petition for writ of habeas corpus be **denied and dismissed with prejudice**.

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

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See*, 28

U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

Dated this 11th day of May, 2017.

/s/David K. Duncan
David K. Duncan
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-00682-PHX-ROS

[Filed February 4, 2016]

Courtney Valle Bisbee,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

Petitioner Courtney Valle Bisbee is seeking federal habeas relief on her two state convictions for molestation of a child. (Doc. 32 at 1). Magistrate Judge David K. Duncan issued an order calling for supplemental briefing on some of Petitioner's claims and setting an evidentiary hearing on others. Respondents request the order setting the evidentiary hearing be set aside as clearly erroneous. Petitioner believes the evidentiary hearing should proceed.

BACKGROUND

In 2004, Petitioner was indicted on three counts of public indecency to a minor and three counts of molestation of a child. (Doc. 41 at 3). Petitioner waived her right to a jury trial and a bench trial was held in January 2006. Petitioner was acquitted of the public indecency charges and one of the molestation counts was dismissed, but she was convicted of two counts of molestation. (Doc. 35 at 15). Petitioner was sentenced to eleven years of imprisonment. After her direct appeal failed, Petitioner filed a petition for post-conviction relief. That petition raised arguments regarding actual innocence as well as ineffective assistance of counsel. As is commonplace, that petition was heard by the same judge who presided at Petitioner's trial.

The superior court did not hold an evidentiary hearing but, on June 15, 2009, the court issued a detailed opinion denying the petition. (Doc. 3-8). The opinion provided an overview of the facts and stressed that the trial had required the court assess the victim's credibility. The court explained the verdict had been based on finding the victim's "testimony credible beyond a reasonable doubt" and nothing in the petition for relief "undermine[d]" that credibility finding. (Doc. 3-8). Thus, the arguments regarding actual innocence were rejected. As for the ineffective assistance of counsel claims, the court merely stated: "This Court does not find either prong of *Strickland* has been met." (Doc. 3-8 at 5). Petitioner unsuccessfully sought review of this ruling. (Doc. 35 at 17). Petitioner filed a second petition for post-conviction relief in October 2010. (Doc.

35 at 18). That petition was denied at all levels. (Doc. 4-6); (Doc. 35 at 20).

After some initial confusion regarding the filing of her federal petition, Petitioner filed her amended federal petition in March 2013. (Doc. 32). The petition was referred to a magistrate judge for preparation of a report and recommendation. The petition identified thirteen separate "grounds" for relief. (Doc. 32). Many of those grounds included distinct subparts. As relevant here, "Ground Three" alleged "Petitioner was denied her federal constitutional right to the effective assistance of counsel" based on twelve different failings of trial counsel. (Doc. 32 at 10-11). In responding to the petition, Respondents argued Petitioner had "failed to fairly present" certain grounds in their entirety. (Doc. 41 at 36). With respect to her ineffective assistance of counsel claims, Respondents argued Petitioner had failed to fairly present "five of her 12 sub-claims . . . regarding ineffective assistance of counsel." (Doc. 41 at 36). Respondents conceded, however, that Petitioner had pursued seven of her 12 sub-claims such that those claims were exhausted and could be resolved on their merits. (Doc. 41 at 63). In addressing those seven sub-claims, Respondents made the following statement:

> Instead of ordering an evidentiary hearing or other factual development regarding whether any of Petitioner's trial or appellate attorneys rendered deficient performance on her remaining seven sub[-]claims, however, this Court should consider and reject those sub-claims because Petitioner has failed to show prejudice.

(Doc. 41 at 63). That statement was puzzling given the special limitations on conducting evidentiary hearings explored below. In any event, Petitioner filed a reply in support of her petition and the petition was ready for a decision.

On November 10, 2015, the magistrate judge issued an order addressing the timeliness and procedural posture of some of Petitioner's claims. The portion of the order relevant here involves the various sub-claims involving alleged ineffective assistance of trial counsel. The magistrate judge concluded five sub-claims "were not exhausted and are now subject to an implied procedural bar." (Doc. 66 at 3). The magistrate judge ordered supplemental briefing on those five sub-claims. As for the other seven sub-claims, the magistrate judge concluded Petitioner had exhausted those claims and he would "conduct an evidentiary hearing on these subclaims so that the Court can determine 'whether the state court's application of the *Strickland* standard was unreasonable.'" (Doc. 66 at 4) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). After unsuccessfully seeking reconsideration of the order setting the evidentiary hearing, Respondents filed an objection pursuant to Federal Rule of Civil Procedure 72. Petitioner opposed the objection, arguing the evidentiary hearing should proceed.

ANALYSIS

I. Standard for Objections to Magistrate Judge's Ruling

Respondents argue Federal Rule of Civil Procedure 72(a) entitles them to review of the magistrate judge's order setting an evidentiary hearing. Rule 72(a)

provides a district judge may refer "a pretrial matter not dispositive of a party's claim or defense" to a magistrate judge. Once a magistrate judge issues a written decision on that matter, a party may "file objections to the order." If objections are filed, the district judge "must consider" those objections and "modify or set aside any part of the order that is clearly erroneous or is contrary to law."

The Ninth Circuit has issued conflicting opinions on whether the framework of Rule 72 applies to habeas cases. *Compare Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1449 (9th Cir. 1989) ("Rule 72(b) does not apply to habeas corpus petitions filed under 28 U.S.C. § 2254.") *with Hunt v. Pliler*, 384 F.3d 1118, 1123 (9th Cir. 2004) (citing Rule 72 as applying to habeas petition). Based on the Advisory Committee's Notes to Rule 72, it appears Rule 72 does *not* apply. *See* Advisory Committee Notes to Rule 72(b) ("This rule does not extend to habeas corpus petitions, which are covered by the specific rules relating to proceedings under Sections 2254 and 2255 of Title 28."). Instead of Rule 72, it appears the applicable rule is Rule 10 of the Rules Governing Section 2254 Cases. That rule provides "[a] magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636." Pursuant to § 636(b)(1), a magistrate judge may be designated "to hear and determine any pretrial matter" except for listed exceptions. That same section provides a district judge "may reconsider any pretrial matter . . . where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."

Viewed together, it appears Rule 72(a) uses mandatory language while § 636(b)(1) does not. In other words, a district judge must hear objections under Rule 72(a) but need not do so under § 636(b)(1). In this case, the distinction does not matter because either Rule 72 mandates review or, if Rule 10 applies and review is discretionary, the Court will exercise its discretion to review the magistrate judge's order. However, should future disputes arise the parties should keep in mind the likelihood that any review is discretionary.

Under Rule 72 and § 636, the same standard applies to reviews of a magistrate judge's nondispositive order: a magistrate judge's order can be set aside only if it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. § 636. An "order is 'clearly erroneous' if, after considering all of the evidence, the district court is left with the definite and firm conviction that a mistake has been committed." *Gabriel Techs. Corp. v. Qualcomm Inc.*, No. 08CV1992 AJB MDD, 2012 WL 849167, at *1 (S.D. Cal. Mar. 13, 2012). And an order is "contrary to law" if it "fails to apply or misapplies relevant statutes, case law or rules of procedure." *Id.* Both of these standards require the district court give "great deference" to the magistrate judge. *United States v. Abonce-Barrera*, 257 F.3d 959, 969 (9th Cir. 2001). Accordingly, Respondents bear a substantial burden in showing the magistrate judge's order setting an evidentiary hearing must be set aside.

II. Petitioner is Not Entitled to Evidentiary Hearing at this Time

The evidentiary hearing was set to address the seven sub-claims of ineffective assistance of counsel

which were exhausted in state court. By statute and Supreme Court authority, a very specific framework applies to federal review of exhausted claims. Pursuant to 28 U.S.C. § 2254(d), federal habeas relief cannot be granted on "any claim that was adjudicated on the merits in State court proceedings" unless one of two situations exists. 28 U.S.C. § 2254(d). First, the state court's decision must have been "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Or second, the state court's decision must have been "based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."[1] 28 U.S.C. § 2254(d)(2). When assessing whether either situation exists, a federal court can look only to the state court record. *Cullen v. Pinholster*, 563 U.S. 170, 185 n.7 (2011) (noting (d)(1) and (d)(2) both require review "limited to the state-court record"). In

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[1] The Ninth Circuit has recognized a petitioner has two ways of satisfying (d)(2). First, a petitioner "may challenge the substance of the state court's findings and attempt to show that those findings were not supported by substantial evidence in the state court record." *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). Or second, she "may challenge the fact-finding process itself on the ground that it was deficient in some material way." *Id.* If the petitioner pursues the first type and challenges the substance of the state court's findings, she must show no court could "reasonably conclude that the finding is supported by the record." *Id.* If the petitioner pursues the second type and challenges the adequacy of the state court process itself, a similar standard applies: the petitioner must show "*any* appellate court to whom the defect [in the state court's fact-finding process] is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Id.*

other words, a federal court cannot use evidence not presented to the state court to determine if § 2254(d)(1) or § 2254(d)(2) is satisfied.

Based on the present briefing, it is not entirely clear which subsection of § 2254 Petitioner believes is applicable to her seven sub-claims of ineffective assistance of counsel. In her brief, Petitioner mixes the various standards and, towards the end of her brief, seems to change tactics entirely by arguing the seven sub-claims were not even resolved by the state court.[2] (Doc. 77 at 5-11) (arguing these claims "were not adjudicated on the merits in the state court proceedings"). Fortunately, the Court need not definitively resolve which part of § 2254(d) Petitioner is invoking nor must the Court determine whether the claims were, in fact, exhausted. The magistrate judge's order concluded the sub-claims were exhausted and ordered an evidentiary hearing on those claims. The Court will accept that framing and address whether Petitioner is entitled to an evidentiary hearing on claims adjudicated on their merits by the state court. At the present time, Petitioner is not entitled to an evidentiary hearing on these claims.

Based on § 2254(d) and governing case law, there is a relatively strict sequence a federal court should follow when adjudicating exhausted habeas claims.

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[2] In *Harrington v. Richter*, 562 U.S. 86, 98 (2011), the Supreme Court held "§ 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." Given this holding, and the fact that the state court summarily denied her claims of ineffective assistance of counsel, Petitioner's argument that her claims were not adjudicated on the merits is incorrect.

When a petitioner seeks relief on an exhausted claim, a federal court must first determine whether the petitioner can satisfy the "threshold restrictions in 28 U.S.C. § 2254(d)." *Renico v. Lett*, 559 U.S. 766, 773 n.1 (2010). That is, whether the "state court decision was contrary to or an unreasonable application of clearly established law or an unreasonable determination of the facts." *Crittenden v. Chappell*, 804 F.3d 998, 1010 (9th Cir. 2015). If, and only if, one of the subsections of § 2254(d) is satisfied should the federal court "consider evidence properly presented for the first time in federal court." *Id.* (quotation omitted). Accordingly, in all but the most extraordinary of circumstances a federal court should not hold an evidentiary hearing without first explaining which of the § 2254(d) requirements is met. This sequence of events is sensible because holding a hearing before ruling that § 2254(d) has been satisfied may result in an unwise expenditure of both the parties' and court's resources. After all, a hearing may be entirely futile if, based on the evidence presented to the state court, a petitioner cannot overcome the restrictions of § 2254(d). No federal court has yet held that Petitioner has satisfied § 2254(d). Therefore, Petitioner is not entitled to an evidentiary hearing at this time.

In arguing against this conclusion, Petitioner cites to *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014). According to Petitioner, the reasoning employed in *Hurles* allows for an evidentiary hearing here. Petitioner is mistaken. A careful reading of *Hurles* shows the Ninth Circuit followed the order outlined above. The majority in *Hurles* concluded the state court's resolution of the particular claim for relief rested "on an unreasonable determination of the facts."

Id. at 790. In other words, § 2254(d)(2) was satisfied. Having reached that conclusion, the petitioner in *Hurles* was entitled to an evidentiary hearing because he was also able to satisfy the criteria set forth in *Townsend v. Sain*, 372 U.S. 293 (1963). In the present case, however, no court has ruled the state court's resolution of Petitioner's claims was based on an unreasonable determination of the facts. Thus, Petitioner is not in the same position as the petitioner in *Hurles*.

Hurles also differs from the current case in that the underlying claim in *Hurles* was for judicial bias, not ineffective assistance of counsel. Under *Hurles*, fact finding by a state court when resolving a claim for judicial bias is subject to special skepticism. *Id.* at 791-92. But as noted by the Ninth Circuit in a more recent decision, that special skepticism is limited to the judicial bias context. *Boyer v. Chappell*, 793 F.3d 1092, 1099 n.5 (9th Cir. 2015). Outside that context, the normal standards apply. *Id.* Given that Petitioner is not presenting a claim for judicial bias, *Hurles* is of no help to her.

In sum, no federal court has determined the state court's handling of Petitioner's ineffective assistance of counsel claims "was contrary to or an unreasonable application of clearly established law or an unreasonable determination of the facts." *Crittenden v. Chappell*, 804 F.3d 998, 1010 (9th Cir. 2015). Absent such a ruling, Petitioner is not entitled to discovery or an evidentiary hearing. Therefore, the order by the magistrate judge must be set aside. It must be stressed, however, that this is not a ruling on the merits of Petitioner's claims. Based on a full review of

the record, Petitioner may or may not be entitled to discovery and an evidentiary hearing in the future. That evidentiary hearing, however, will only be held after Petitioner is found to have met the high bar of § 2254(d).

Accordingly,

IT IS ORDERED the objection (Doc. 71) to the magistrate judge's order is sustained such that the portion of the order allowing discovery and setting an evidentiary hearing is **VACATED**. The magistrate judge may proceed with the additional briefing previously ordered and may take any further actions necessary for preparing a report and recommendation consistent with this ruling.

Dated this 3rd day of February, 2016.

/s/Roslyn O. Silver
Honorable Roslyn O. Silver
Senior United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-0682-PHX-ROS (DKD)

[Filed December 11, 2015]

Courtney Valle Bisbee,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

After the Court ordered an evidentiary hearing, Respondents moved to reconsider and requested that the Court vacate the hearing under *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). (Docs. 66, 67) Per the Court's order, Petitioner Courtney Valle Bisbee filed a response. (Doc. 68) Both parties have requested expediting consideration of this matter.

The Court will "ordinarily deny a motion for reconsideration absent a showing of . . . legal authority that could not have been brought to its attention earlier with reasonable diligence." LRCiv. 7.2(g)(1). Respondents could have, but did not, raise the motion

to reconsider's arguments about *Pinholster* in their Answer. However, the Court will not proceed in a manner contrary to binding precedent and, therefore, it is appropriate to review the substance of Respondents' motion.

It is axiomatic that this Court is bound by the Ninth Circuit's interpretation and application of *Pinholster*.[1] The Ninth Circuit has not interpreted *Pinholster* to preclude evidentiary hearings. Indeed, the Ninth Circuit has explicitly "reject[ed]" the argument "that *Pinholster* and [28 U.S.C.] § 2254(e)(2) categorically bar [a habeas petitioner] from obtaining [an evidentiary] hearing or from presenting extra-record evidence to establish cause and prejudice for [a] procedural default." *Woods v. Sinclair*, 764 F.3d 1109, 1138, n. 16 (9th Cir. 2014). Accordingly, the Court's Order permitting additional briefing on Grounds One, Two, Three, and Nine stands. (Doc. 66 at 2-3)

However, *Pinholster* does prevent this Court from conducting an evidentiary hearing to determine "whether the state courts' handling of the petitioners' [habeas] claim 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' 28 U.S.C. § 2254(d)(1)." *Johnson v. Finn*, 665 F.3d 1063, 1069 n.1 (9th Cir. 2011). The wording in the Court's Order setting the evidentiary hearing in this matter could be interpreted as an attempt to do just

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[1] Respondents cite to cases supporting their argument from other Circuit Courts of Appeal and to one Ninth Circuit case, *Andrews v. Davis*, 798 F.3d 759 (9th Cir. 2015). (Doc. 67 at 7-8) After reviewing this opinion, the Court does not find that it is persuasive authority to vacate the evidentiary hearing.

that. It is therefore appropriate to clarify the Court's authority to conduct the evidentiary hearing and the scope of the hearing.

Under binding precedent, this Court must hold an evidentiary hearing on a habeas petitioner's claim if three conditions are met. *Hurles v. Ryan*, 752 F.3d 768, 791 (9th Cir.) *cert. denied*, 135 S.Ct. 710 (2014). First, the petitioner must show that she has not failed to develop the factual basis of her claim in state court as required by 28 U.S.C. § 2254(e)(2). "A petitioner who has previously sought and been denied an evidentiary hearing has not failed to develop the factual basis of h[er] claim and therefore satisfies § 2254(e)(2)." *Stanley v. Schriro*, 598 F.3d 612, 624 & n.8 (9th Cir. 2010) (state petition for post-conviction relief sought hearing; petition denied without a hearing). Here, Bisbee has done that: she requested, but did not receive, an evidentiary hearing as part of her state post-conviction relief proceedings. (Doc. 3, Ex. F)

Second, a habeas petitioner must show that she is entitled to an evidentiary hearing under one of the following six circumstances:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the

> state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend v. Sain, 372 U.S. 293, 313 (1963) (*overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)). Bisbee meets several of these requirements because "(1) the merits of the factual dispute [about whether she received ineffective assistance of trial counsel] were not resolved in the state hearing."[2]

Finally, a habeas petitioner must show that the allegations, if true, would entitle her to relief. *Stanley,* 598 F.3d at 624. *See also Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.") Bisbee meets this third requirement because she has properly presented seven different claims for ineffective assistance of trial counsel in her habeas petition which could entitle her to habeas relief.

Because Bisbee meets all three of these requirements, the Court will proceed with an

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[2] In Arizona, as under 28 U.S.C. § 2255, trial judges preside over subsequent post-conviction relief proceedings. *See, e.g.*, Advisory Committee Notes to Rule 4 of the Rules Governing Section 2255 Proceedings. In arguing that her trial judge was predisposed to find that her trial counsel was effective, it appears that Bisbee is also trying to raise an argument that there is a fundamental flaw in this judicial assignment process. (Doc. 68 at 6-8) The Court notes that Bisbee has not previously raised this procedural argument and, accordingly, it appears to be waived. *See, e.g., Hurles v. Ryan*, 752 F.3d 768, 788-92 (9th Cir. 2014) (judicial bias claim raised in habeas petition).

evidentiary hearing on Grounds 3(a), (c), (e), (g), (h), (i), and (k) of Bisbee's habeas petition. *See* Doc. 32 at 10-11; Doc. 66.

Dated this 11th day of December, 2015.

/s/David K. Duncan
David K. Duncan
United States Magistrate Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-0682-PHX-ROS (DKD)

[Filed November 10, 2015]

Courtney Valle Bisbee,	)
	)
Petitioner,	)
	)
v.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

Petitioner Courtney Valle Bisbee timely filed a protective Petition for Writ of Habeas Corpus. (Doc. 1) Following the conclusion of state court proceedings, she filed an Amended Petition and a supporting memorandum, and requested oral argument. (Docs. 32, 35) Respondents answered and Bisbee replied. (Docs. 41, 62)

Respondents' first argument against granting Bisbee's Amended Petition is that her Petition was untimely. (Docs. 41 at 26-33) This argument is unpersuasive because Bisbee has adequately demonstrated that she timely filed a protective petition

in this Court in compliance with *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005). (Docs. 1, 19) Next, Respondents argue that several of Bisbee's arguments were not exhausted in the state courts and are now subject to an implied procedural bar, and that the remaining claims fail on the merits. (Doc. 41 at 34-58)

Supplemental Briefing. After the Court's close review of the record, it appears that several of Bisbee's claims were not exhausted and are now subject to an implied procedural bar. Accordingly, the Court can only consider these claims if Bisbee can demonstrate either cause for the default and actual prejudice to excuse the default, or a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *United States v. Frady*, 456 U.S. 152, 167-68 (1982). Bisbee did not attempt to demonstrate either prong for the claims listed below and so the Court will offer the opportunity for supplemental briefing as described below.

Ground One: Nikolas Wayde Valles' Affidavit. In her Petition, Bisbee argues that the state courts violated her due process rights by not considering an affidavit from Nikolas Valles which states that she is actually innocent. (Doc. 32 at 8) Respondents argue that Ground One was not exhausted because it was not fairly presented to the Arizona Court of Appeals and is now subject to an implied procedural bar. (Doc. 41 at 36)

After a close review, it appears that Respondents are correct. In her habeas petition, Bisbee did not attempt to demonstrate either cause for the default and actual prejudice to excuse the default, or a

fundamental miscarriage of justice, such that the Court could review the claims in Ground One. Accordingly, the Court will accept supplemental briefing.

Ground Two: Coerced interrogation. Bisbee's Petition argues that her confession was coerced and false and, therefore, was admitted at trial in violation of her rights under the Fourth, Fifth, Sixth and Fourteenth Amendments. (Doc. 32 at 9) Respondents counter, without any legal citations, that her interrogation was constitutionally acceptable. (Doc. 41 at 61-63)

Bisbee first raised this argument in her second petition for post-conviction relief. (Doc. 41 at Ex. M) Although successive and untimely, Bisbee presented this as a claim under Arizona Rule of Criminal Procedure 32.1(e) and so the Superior Court should have addressed it. Ariz. R. Crim. P. 32.2(b). Instead, the Superior Court stated that this claim was precluded because it had been raised in her first Rule 32 proceeding. (Docs. 4-5; Doc. 41 at Ex. N) As Respondents acknowledge, this was incorrect. (Doc. 41 at 62) Because it "is clear that a state court has not reached the merits of a properly raised issue," this Court will review this claim under a *de novo* standard. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). Accordingly, the Court will accept supplemental briefing on Ground Two.

Ground Three: Ineffective assistance of trial counsel. In her Petition, Bisbee alleges her trial counsel was ineffective in 12 different ways. (Doc. 32 at 10-11) Bisbee raised an ineffective assistance of trial counsel claim in her first Rule 32 petition and the Maricopa County Superior Court found that Bisbee's claims did

not meet either prong of *Strickland v. Washington*, 466 U.S. 668 (1984). (Docs. 3-6, 3-8)

Following the Court's detailed review of the record, it appears that the following subclaims were not exhausted and are now subject to an implied procedural bar: Ground 3(b), Ground 3(d), Ground 3(f), Ground 3(j), and Ground 3(l). (Doc. 32 at 10) In her habeas petition, Bisbee did not attempt to demonstrate either cause for the default and actual prejudice to excuse the default, or a fundamental miscarriage of justice, such that the Court could review the claims in Ground Three. Accordingly, the Court will accept supplemental briefing on this point.

Ground Nine: Ineffective assistance of appellate counsel. Bisbee's Petition argues that she received ineffectI've assistance of appellate counsel because her appellate counsel failed to raise certain claims on direct appeal. (Doc. 32 at 19) Respondents argue that this ineffective assistance argument was not exhausted and is now subject to an implied procedural bar. (Doc. 41 at 45) The Court agrees. Again, Bisbee did not attempt to demonstrate either cause for the default and actual prejudice to excuse the default, or a fundamental miscarriage of justice, such that the Court could review the claims in Ground Nine. Accordingly, the Court will accept supplemental briefing on this point.

Evidentiary Hearing. Following the Court's detailed review of the record, it appears that Bisbee has exhausted the following subclaims of ineffective assistance of trial counsel: Ground 3(a), Ground 3(c), Ground 3(e), Ground 3(g), Ground 3(h), Ground 3(i), and Ground 3(k). (Doc. 32 at 10-11) Accordingly, these claims are properly before the Court. The Court will

conduct an evidentiary hearing on these subclaims so that the Court can determine "whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). *See also* 28 U.S.C. § 2254(e)(2); Rules Governing Section 2254 Cases, Rules 8 and 12.

IT IS ORDERED that an evidentiary hearing, as detailed above, will be conducted on March 14-15, 2016, at 9:00 a.m., Sandra Day O'Connor U.S. Courthouse, 401 W. Washington St., courtroom 305, Phoenix, Arizona.

IT IS FURTHER ORDERED that Petitioner Courtney Valle Bisbee may submit supplemental briefing as described in this Order on Counts One, Two, Three, and Nine by February 22, 2016. Respondents may respond to any supplemental briefing by February 29, 2016. Oral argument on this supplemental briefing will be conducted in conjunction with the evidentiary hearing.

IT IS FURTHER ORDERED that:

1. Discovery. All written discovery for this hearing shall be completed by January 8, 2016.

2. Depositions. All deposition shall be completed by February 5, 2016.

3. Prehearing Statement. On or before March 7, 2016, the parties shall file a joint prehearing statement, which shall:

a. Identify counsel who will appear at the hearing;

b. Identify any stipulated and uncontested facts;

c. Identify the contested issues of fact and law;

d. Identify the witnesses to be called at the hearing, including a brief description of their anticipated testimony; and

e. Identify the exhibits to be presented at the evidentiary hearing, noting any objection by the party against whom the exhibit is to be offered.

4. Proposed Findings. Proposed Findings of Fact and Conclusions of Law shall be filed separately by each party on the same date as the Joint Prehearing Statement.

5. Exhibit/Witness Lists. The parties shall prepare exhibit and witness lists as instructed at www.azd.uscourts.gov, under "Judges Information," "Orders, Forms & Procedures," and "Standard Forms Used by All Tucson Judges.

IT IS FURTHER ORDERED directing that counsel for Petitioner submit for the Court's consideration a writ of habeas corpus ad testificandum in order to secure the appearance of Petitioner at the evidentiary hearing.

Dated this 9th day of November, 2015.

/s/David K. Duncan
David K. Duncan
United States Magistrate Judge

APPENDIX G

SUPREME COURT
STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

Rebecca White Berch
Chief Justice

Janet Johnson
Clerk of the Court

January 31, 2013

RE: STATE OF ARIZONA v COURTNEY VALLE BISBEE
Arizona Supreme Court No. CR-12-0381-PR
Court of Appeals Division One No. 1 CA-CR 10-0969 PRPC
Maricopa County Superior Court No. CR2004-008034-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 31, 2013, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Berch, Vice Chief Justice Bales, and Justice Timmer participated in the determination of this matter.

There is no record to return.

Janet Johnson, Clerk

TO:
Courtney V Tilley-Bisbee, ADOC #205168, Arizona State Prison, –Perryville – Santa Cruz Unit
Kent E Cattani
Gerald R Grant
Ruth Willingham
lr

APPENDIX H

306D

**IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

**Court of Appeals
Division One
No. 1 CA-CR 10-0969 PRPC**

**Maricopa County
Superior Court
No. CR2004-008034-001DT**

DEPARTMENT A

[Filed August 16, 2012]

STATE OF ARIZONA,	)
	)
Respondent,	)
	)
v.	)
	)
COURTNEY VALLE BISBEE,	)
	)
Petitioner.	)
	)

O R D E R

Presiding Judge Peter B. Swann and Judges Patricia A. Orozco and Margaret H. Downie have

considered petitioner's request for oral argument and the petition for review from the trial court's denial of post-conviction relief.

IT IS ORDERED denying the request for oral argument.

IT IS FURTHER ORDERED denying review.

/s/Peter B. Swann
PETER B. SWANN
PRESIDING JUDGE

APPENDIX I

MDR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 12-682-PHX-ROS (DKD)

[Filed May 14, 2012]

Courtney Valle Bisbee,	)
	)
Petitioner,	)
	)
vs.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

On March 30, 2012, Petitioner Courtney Valle Bisbee filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and paid the filing fee. Petitioner is represented by local counsel, JoAnne Falgout, and by two out-of-state attorneys, Herald Price Fahringer and Erica T. Dubno, both of whom filed Applications for Admission to Practice *Pro Hac Vice.*

In an April 2, 2012 Order, the Court dismissed the Petition because it was premature and, therefore,

denied as moot the Applications for Admission *Pro Hac Vice*. In concluding that the Petition was premature, the Court noted that Petitioner has pending in the Arizona Court of Appeals a petition for review from the trial court's denial of a petition for post-conviction relief. The Court stated:

> If a prisoner has post-conviction proceedings pending in state court, the federal exhaustion requirement is not satisfied. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (pending appeal); Schnepp v. Oregon, 333 F.2d 288, 288 (9th Cir. 1964) (pending post-conviction proceeding). The prisoner must await the outcome of the pending state-court challenge before proceeding in federal court, "even where the issue to be challenged in the writ of habeas corpus has been finally settled in the state courts." Sherwood, 716 F.3d at 634. The pending state-court proceeding could affect the conviction or sentence and, therefore, could ultimately affect or moot these proceedings. Id.
>
> In light of Petitioner's pending petition for review, the Petition is premature and must be dismissed. See id.; Schnepp. The Court will dismiss the case without prejudice.

The Clerk of Court entered Judgment.

On April 12, 2012, Petitioner filed a "Motion for Reconsideration and to Hold the Petition in Abeyance Pending Resolution of the Unexhausted Claims by the

State Court" (Doc. 10).[1] Respondents filed a Response indicating that they took no position on the pending motion.

On May 2, 2012, Petitioner filed a "Notice Regarding Petitioner's Intent to Request the Appellate Court Hold Appeal in Abeyance to Await this Court's Ruling on Pending Motion for Reconsideration" (Doc. 14) and a Notice of Appeal (Doc. 15).

I. Jurisdiction–Notice of Appeal

Although the filing of a notice of appeal generally divests the district court of jurisdiction over those aspects of the case involved in the appeal, the district court's jurisdiction is not affected if a motion for reconsideration is pending at the time the notice of appeal is filed. See United Nat'l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1109 (9th Cir. 2001). Because Petitioner's Motion for Reconsideration was filed before her Notice of Appeal, the Notice of Appeal did not divest the Court of jurisdiction. Thus, the Court will consider the pending Motion for Reconsideration and to Hold the Petition in Abeyance.

II. Motion for Reconsideration and to Hold Petition in Abeyance

In her Motion, Petitioner states that her § 2254 Petition is a mixed one, containing both exhausted and unexhausted claims. She requests that the Court

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[1] Although Petitioner requested oral argument on this Motion, the Court has determined that the issues have been adequately briefed and that oral argument will not aid the Court in its understanding of the issues.

reconsider its dismissal of her Petition, reinstate the Petition, and hold the matter in abeyance pending the state court's resolution of her unexhausted claims.

A. Reconsideration

Petitioner seeks reconsideration pursuant to Local Rule of Civil Procedure 72(g). "Motions to reconsider are appropriate only in rare circumstances." Defenders of Wildlife v. Browner, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Such motions should not be used for the purpose of asking a court "'to rethink what the court had already thought through – rightly or wrongly.'" Defenders of Wildlife, 909 F. Supp. at 1351 (quoting Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)).

In her Motion, Petitioner states that she filed her § 2254 Petition on a Friday afternoon and that the Court dismissed it the next business day. She claims that her attorneys were "in the process of filing a motion for a stay when the habeas petition was dismissed—literally hours after it was filed." She suggests that "the Court may have inadvertently overlooked the fact that this mixed habeas petition presents at least one fully exhausted issue" and opines that "the Court may not have recognized that, through an outright dismissal of her Petition, it may be argued in the future that certain of [Petitioner's] constitutional claims are procedurally barred, even though they were timely filed in this Court." Moreover, Petitioner argues that "due to the virtually instantaneous dismissal of

her Petition, new facts, relating to [Petitioner's] effort and intention to request a stay, and legal authorities supporting such a stay, could not have been brought to the Court's attention with reasonable diligence."

The Clerk of Court is required to **promptly** forward a habeas petition to the judge, and the judge is required to **promptly** examine it. Rule 4, Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254. The Court must make an initial determination as to whether the Petitioner is plainly not entitled to relief and, if so, must dismiss the case. Id.

Petitioner asserts that the Court may have "inadvertently overlooked" the fact that she filed a mixed petition and "may not have recognized" that some of her claims could be procedurally barred in the future if they are dismissed now. Petitioner is incorrect. The Court is "not required to consider, *sua sponte,* the stay-and-abeyance procedure." Robbins v. Carey, 481 F.3d 1143, 1149 (9th Cir. 2007). It is unclear why Petitioner did not simply file a motion to stay and abey **with** her Petition.

However, the Court, in its discretion, declines to punish Petitioner for the failure to file the motion to stay with her Petition. The Court will vacate the Judgment and will consider the merits of Petitioner's request to hold the Petition in abeyance, which was raised, for the first time, in the Motion for Reconsideration and to Hold the Petition in Abeyance.

B. Request to Hold Petition in Abeyance

Petitioner was convicted in Maricopa County Superior Court, case #CR 2004-008034-001-DT, of two counts of child molestation and was sentenced to

concurrent, 11-year terms of imprisonment. In the Petition, Petitioner names Charles L. Ryan as Respondent and the Arizona Attorney General as an Additional Respondent.

Petitioner raises thirteen grounds for relief. She contends that she was denied her:

(1) Fifth, Sixth, and Fourteenth Amendment rights because newly discovered evidence establishes that the victim lied about the alleged molestation;

(2) Fourth, Fifth, Sixth, and Fourteenth Amendment rights because newly discovered evidence establishes that her statement to the police was coerced, involuntary, and should not have been admitted at trial;

(3) right to effective assistance of trial counsel;

(4) Fifth, Sixth, and Fourteenth Amendment rights because newly discovered evidence shows that the prosecution, in violation of Brady v. Maryland, 373 U.S. 83 (1963), failed to turn over pages of the victim's written statement, which contained exculpatory impeachment material;

(5) Fifth, Sixth, and Fourteenth Amendment rights because newly discovered evidence shows that the prosecution, in violation of Brady, failed to disclose critical evidence that could have been used to challenge the victim's mother's credibility;

(6) Fifth, Sixth, and Fourteenth Amendment rights because newly discovered evidence shows that the victim and his mother, both of whom testified at trial, were motived by financial considerations to lie about the alleged molestation;

(7) Fourth, Fifth, Sixth, and Fourteenth Amendment rights because the arresting officer violated her rights to remain silent and have an attorney present during questioning;

(8) Fourth, Fifth, Sixth, and Fourteenth Amendment rights based on omissions and conduct by the police;

(9) right to effective assistance of appellate counsel;

(10) Fifth, Sixth, and Fourteenth Amendment rights because the prosecution failed to present material inconsistencies in the victim's testimony to the grand jury and because her appellate counsel did not raise this issue on appeal;

(11) Fourth, Fifth, and Fourteenth Amendment rights because the police entered her house to conduct a warrantless arrest and search;

(12) Fifth, Sixth, and Fourteenth Amendment rights because the trial court precluded expert witness testimony about Petitioner's sexual interest in adults and lack of interest in adolescents; and

(13) Fifth, Sixth, and Fourteenth Amendment rights because the trial court failed to review and amend its ruling regarding Petitioner's claim that the victim and his mother had a financial bias and had contemplated a civil lawsuit when he testified at trial.

It appears that Petitioner presented the issue in Ground Three to the Arizona Court of Appeals and Arizona Supreme Court and the issue in Ground Twelve to the Arizona Court of Appeals. It appears that the issues in Grounds One, Two, Four through Eleven, and Thirteen are currently pending before the Arizona Court of Appeals in a petition for review of the denial of post-conviction relief.

Petitioner requests that the Court stay this case and hold the mixed Petition in abeyance pending resolution of her unexhausted claims. In Rhines v. Weber, 544 U.S. 269, 277-78 (2005), the Supreme Court held that a district court should stay a mixed petition where there is "good cause" for the failure to exhaust, the unexhausted claim is not plainly meritless, and the petitioner has not engaged in abusive litigation tactics or intentional delay.

The Court has reviewed the Petition, the attachments thereto, and Petitioner's request to stay. In addition, the Court notes that Respondents indicated that they took no position on the pending motion. The Court concludes that Petitioner has not engaged in abusive litigation tactics or intentional delay, her claims are not plainly meritless based on the limited information available to the Court, and there is good cause for the failure to exhaust. The Court notes

that two of Petitioner's claims involve newly discovered evidence that was allegedly withheld in violation of Brady. Thus, the Court, in its discretion, will grant Petitioner's request for a stay.

III. Applications for Admission *Pro Hac Vice*

In light of the Court's decision to reopen this case, Petitioner's attorneys are not precluded from filing new applications to practice *pro hac vice* that comply with Local Rule of Civil Procedure 83.1(b)(2).

IT IS ORDERED:

(1) Petitioner's Motion for Reconsideration and to Hold the Petition in Abeyance (Doc. 10) is **granted**.

(2) The April 2, 2012 Judgment (Doc. 9) is **vacated**.

(3) This case is **stayed** pending the conclusion of Petitioner's state post-conviction proceedings.

(4) Petitioner shall **file a Status Report** every 90 days, beginning 90 days after the filing date of this Order, informing the Court of the current status of her state post-conviction proceedings.

(5) The Clerk of Court must serve a copy of the Petition (Doc. 1), the Attachments (Docs. 3 and 4), and this Order on the Respondent and the Attorney General of the State of Arizona by certified mail pursuant to Rule 4, Rules Governing Section 2254 Cases.

(6) This matter is referred to Magistrate Judge David K. Duncan pursuant to Rules 72.1 and 72.2 of

the Local Rules of Civil Procedure for further proceedings and a report and recommendation.

(7) The Clerk of Court send a copy of this Order to the Ninth Circuit Court of Appeals and indicate that the Order relates to Bisbee v. Ryan, 12-16045.

DATED this 14th day of May, 2012.

/s/Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

APPENDIX J

MDR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 12-682-PHX-ROS (DKD)

[Filed April 2, 2012]

Courtney Valle Bisbee,	)
	)
Petitioner,	)
	)
vs.	)
	)
Charles L. Ryan, et al.,	)
	)
Respondents.	)
	)

ORDER

On March 30, 2012, Petitioner Courtney Valle Bisbee filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and paid the filing fee. Petitioner is represented by local counsel, JoAnne Falgout, and by two out-of-state attorneys, Herald Price Fahringer and Erica T. Dubno, both of whom have filed Applications for Admission to Practice *Pro Hac Vice* (Docs. 5 and 6). The Court will dismiss the Petition because it is premature and, therefore, will deny as moot the Applications for Admission *Pro Hac Vice*.

I. Petition

Petitioner was convicted in Maricopa County Superior Court, case CR-2004-008034-001-DT, of two counts of child molestation. She was sentenced to concurrent, 11-year terms of imprisonment. In her Petition, Petitioner names Charles L. Ryan as Respondent and the Arizona Attorney General as an Additional Respondent.

Petitioner raises thirteen grounds for relief in her Petition. She also states that she has pending in the Arizona Court of Appeals a petition for review from the denial of a petition for post-conviction relief.

II. Discussion

Before the court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). "In other words, the state prisoner must give the state courts an opportunity to act on h[er] claims before [s]he presents those claims to a federal court in a habeas petition." O'Sullivan, 526 U.S. at 842. The failure to exhaust subjects the Petition to dismissal. See Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983).

If a prisoner has post-conviction proceedings pending in state court, the federal exhaustion requirement is not satisfied. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (pending appeal); Schnepp v. Oregon, 333 F.2d 288, 288 (9th Cir. 1964) (pending post-conviction proceeding). The prisoner must await the outcome of the pending state-court challenge before proceeding in federal court, "even where the issue to be challenged in the writ of habeas

corpus has been finally settled in the state courts." Sherwood, 716 F.3d at 634. The pending state-court proceeding could affect the conviction or sentence and, therefore, could ultimately affect or moot these proceedings. Id.

In light of Petitioner's pending petition for review, the Petition is premature and must be dismissed. See id.; Schnepp. The Court will dismiss the case without prejudice.

IT IS ORDERED:

(1) Petitioner's Petition for Habeas Corpus (Doc. 1) and this case are **dismissed without prejudice.**

(2) Attorney Fahringer's and Attorney Dubno's Applications for Admission to Practice *Pro Hac Vice* (Docs. 5 and 6) are **denied as moot.**

(3) The Clerk of Court must enter judgment accordingly and close this case.

(4) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court declines to issue a certificate of appealability because reasonable jurists would not find the Court's procedural ruling debatable. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

DATED this 2nd day of April, 2012.

/s/Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

APPENDIX K

SUPREME COURT
STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

RACHELLE M. RESNICK
CLERK OF THE COURT

SUZANNE D. BUNNIN
CHIEF DEPUTY CLERK

April 15, 2011

RE: STATE OF ARIZONA v COURTNEY VALLE BISBEE
Arizona Supreme Court No. CR-10-0411-PR
Court of Appeals Division One No. 1 CA-CR 09-0624 PRPC
Maricopa County Superior Court No. CR2004-008034-001 DT

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 14, 2011, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Berch, Vice Chief Justice Hurwitz, and Justice Bales participated in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 15th day of April, 2011.

Rachelle M. Resnick, Clerk

TO:
Kent E Cattani
Gerald R Grant
Courtney Valle Bisbee, ADOC #205168, Arizona State Prison, Perryville – Santa Cruz Unit
Ruth Willingham, Clerk, Court of Appeals Division One
lr

APPENDIX L

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-008034-001 DT

12/14/10

[Electronically Filed December 15, 2010]

STATE OF ARIZONA	)
	)
MJC2 APPEALS COUNTY ATTORNEY	)
	)
v.	)
	)
COURTNEY VALLE BISBEE (001)	)
	)
COURTNEY VALLE BISBEE #205168 ASPC P O BOX 3200 GOODYEAR AZ 85395	)
	)
COURT ADMIN-CRIMINAL-PCR VICTIM SERVICES DIV-CA-CCC	)

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. Navarro
Deputy

MINUTE ENTRY

The Court has considered Defendant's Motion for Re-Hearing.

IT IS ORDERED denying said Motion.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp

APPENDIX M

306D

**IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

**Court of Appeals
Division One
No. 1 CA-CR 09-0624 PRPC**

**Maricopa County
Superior Court
No. CR2004-008034-001DT**

DEPARTMENT E

[Filed November 23, 2010]

STATE OF ARIZONA,	)
	)
Respondent,	)
	)
v.	)
	)
COURTNEY VALLE BISBEE,	)
	)
Petitioner.	)
	)

O R D E R

Presiding Judge Philip Hall and Judges Sheldon H. Weisberg and Peter B. Swann have considered this petition for review from the trial court's denial of post-conviction relief.

IT IS ORDERED denying review.

/s/Philip Hall
Philip Hall
PRESIDING JUDGE

APPENDIX N

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-008034-001 DT

11/10/10

[Electronically Filed November 16, 2010]

STATE OF ARIZONA	)
	)
MJC2 APPEALS COUNTY ATTORNEY	)
	)
v.	)
	)
COURTNEY VALLE BISBEE (001)	)
	)
COURTNEY VALLE BISBEE #205168 ASPC P O BOX 3200 GOODYEAR AZ 85395	)
	)
COURT ADMIN-CRIMINAL-PCR VICTIM SERVICES DIV-CA-CCC	)

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. McDonald
Deputy

MINUTE ENTRY

The Court has reviewed Defendant's Petition for Post-Conviction Relief filed on October 21, 2010. Defendant was found guilty by this Court during a bench trial on January 18, 2006 and was sentenced on April 14, 2006. The Defendant's direct appeal pursuant to Rule 31 of the Arizona Rules of Criminal Procedure ended on January 8, 2008 with a mandate from the Court of Appeals. This is Defendant's second Rule 32 proceeding.

Defendant raises various claims implicating Ariz. R. Crim. P. 32.1(a) in which she states that her conviction and sentence were obtained in violation of the Constitutions of both the United States and Arizona. However, she has previously raised these claims unsuccessfully in both her direct appeal, and her previous Rule 32 proceeding. Therefore, they are precluded from being raised again in a subsequent Post-Conviction Relief proceeding. Ariz. R. Crim. P. 32.2(a)(2).

The Defendant also raises a claim pursuant to Ariz. R. Crim. P. 32.1(e) in which she claims that she has discovered new material facts and that such facts probably would have changed the verdict of sentence. In an untimely filed petition for post-conviction relief, newly discovered facts can be a basis for obtaining a remedy from the Court. According to Ariz. R. Crim. P. 32.1(e), newly discovered facts must meet three criteria before they can become the basis for relief. First, the newly discovered material facts must be discovered after trial. The Defendant has met this requirement since the facts were discovered approximately four years after her trial. Second, the Defendant must have

exercised due diligence in securing the newly discovered material facts. The Defendant does not explain under what circumstances she discovered these new material facts or how she obtained these facts with due diligence. Since the Defendant fails to meet the second criterion, the Court need not discuss whether the newly discovered material facts are cumulative or not.

Defendant also claims, pursuant to Ariz. R. Crim. P. 32.1(g), that there has been a significant change in the law that if determined to apply to the Defendant's case, it would probably overturn the Defendant's conviction or sentence. Specifically, Defendant claims that there is precedent from the United States Ninth Circuit Court of Appeals that pertains directly to expert testimony in cases where the voluntariness of the confession is an issue. However, the Defendant has failed to give the citation or the name of the case and the case is still in the appeals process. Therefore, it does not constitute a significant change in the law that would warrant any relief under Ariz. R. Crim. P. 32.1(g).

Defendant has failed to raise any new claims that can be heard in an untimely filed Petition for Post-Conviction Relief.

IT IS THEREFORE ORDERED dismissing Defendant's Notice of Post-Conviction Relief.

APPENDIX O

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-008034-001 DT

06/15/2009

[Electronically Filed June 18, 2009]

STATE OF ARIZONA	)
	)
GERALD R. GRANT	)
	)
v.	)
	)
COURTNEY VALLE BISBEE (001)	)
	)
ULISES FERRAGUT JR.	)
	)
COURT ADMIN-CRIMINAL-PCR	)
VICTIM SERVICES DIV-CA-CCC	)
	)

HONORABLE WARREN J. GRANVILLE

CLERK OF THE COURT
B. McDonald
Deputy

PCR DISMISSED

This Court has reviewed Defendant's Petition for Post-Conviction Relief, the State's response,

Defendant's reply, the State's motion to strike, Defendant's response to motion to strike, each party's attachments, the Court of Appeals Memorandum Decision, and the trial transcripts, and make the following findings and rulings:

Defendant was charged with three counts of Public Sexual Indecency to a Minor and three counts of Molestation of a Child. After a trial to the Bench, this Court found Defendant guilty of one count of Molestation of a Child for fondling the victim's penis and one count of Molestation of a Child for having the victim fondle her genitals.

On April 14, 2006, this Court sentenced Defendant to concurrent mitigated terms of 11 years for each count.

On December 4, 2007, the Court of Appeals affirmed Defendant's conviction and sentence on direct appeal. The only issue raised on appeal was that the trial court had improperly precluded the testimony of a defense expert witness.

Defendant now seeks Rule 32 relief, claiming that she was denied the effective assistance of counsel because of numerous alleged failures by her attorney at the pretrial and trial stages. She also claims the prosecutor was guilty of misconduct and that newly discovered evidence entitles her to relief.

She complains that her attorney failed to contact that attorney or otherwise investigate the question of financial gain and failed to cross-examine Janette Sloan, Nikolas Valles and Jonathan Valles on these matters. She complains that her attorney failed to ask Amanda Hermann about her claim that she overheard

Brittany Heehler and Donovan Kemp talking about Jonathan Valles making allegations against Defendant.

Because Defendant's overriding and underlining claim is actual innocence, a detailed recitation of the facts found by the Court is warranted.

Defendant, 34 years old, began working at Horizon High School on November 9, 2003 as a nurse. Jonathan Valles was a 13 year old student attending a nearby middle school. Jonathan had a brother, Nikolas, who attended Horizon. The two brothers frequently hung out with Horizon students Donovan Kemp, Brittany Heeler, and Brian Keith.

By January, 2004, Defendant began associating with the five teens outside of school. It started with Defendant giving Brittany, Donovan, and the Valles brothers rides home from school. It evolved to having almost daily contact outside of school with the five, frequently spending time at Donovan Kemp's home. It was at the Kemp home where Defendant met Jonathan.

Michael Kemp, Donovan's father, came home on several occasions to find Defendant watching television or jumping on the trampoline with his children and their friends. It got to the point that Donovan's mother wondered whether Defendant had a "crush" on Jonathan.

Defendant admitted to kissing Jonathan in his bedroom at his home on February 1, 2004.

On February 2, Defendant admitted going to Jonathan's middle school and signing the name "Valle Tilley" on the school's sign-out sheet in order to take

him out of school. The sign-out sheet falsely indicated that Defendant was a relative and that she was taking Jonathan out of school because he was sick. She drove Jonathan and her daughter to her home. While her daughter watched a movie, Defendant kissed Jonathan in her bedroom.

On February 5, 2004, Defendant came to the Kemp home around 3:00 p.m. She wound up in Donovan's bedroom, along with Brittany, Brian and the Valles brothers. Donovan and Brittany were kissing on the bottom bunk, Nikolas and Brian were on the top bunk bed, and Defendant and Jonathan were sitting on the floor. Defendant asked Jonathan to lie down on the floor with her and asked Donovan to throw her a blanket. Defendant put the blanket over the two of them and began kissing Jonathan. She then unbuttoned their pants and put Jonathan's hand inside her pants and put her hand inside his. She left after Donovan's mother came home.

Around 10:00 p.m. on February 5, Mr. Kemp picked up his home phone to make a call, but instead heard Defendant talking to Jonathan. Defendant asked Jonathan how he felt about what had occurred between them earlier that day and discussed her sexual history with previous partners. Defendant asked Jonathan if he wanted to fuck her and he said yes. She told Jonathan that if they were boyfriend and girlfriend it would be an exclusive relationship and if it was not, she could see whoever she wanted to. Defendant asked Jonathan what Donovan and Nikolas thought about their relationship and mentioned the possibility of getting married in Utah because Utah doesn't have age

restrictions. She also asked Jonathan what he wanted to do to her sexually.

Mr. Kemp used his cell phone to call Jonathan's mother, Janette Sloan, and let her listen to the ongoing conversation between Defendant and her son. Mr. Kemp then told Defendant that he'd been listening in on the conversation and that she would be contacted by the authorities.

When Mr. Kemp later went to the boys' bedroom to talk to Jonathan, Defendant was talking to the boys on a cell phone. Mr. Kemp took the phone away and told Defendant not to have any further contact with his children.

Mr. Kemp then talked to Jonathan, who told him what had happened between him and Defendant earlier that day. Mr. Kemp relayed this information to Jonathan's mother, who called the police. Police interviewed Jonathan, the teens, the adults, and Defendant before arresting Defendant.

Defendant was convicted of touching Jonathan's penis and allowing him to touch her vagina. While the acts occurred in the presence of others, they were under a blanket and out of eyesight of anyone. This, there was no dispute that Defendant and Jonathan were in a position for the acts to occur, but there were no other percipient witnesses to the acts themselves. Jonathan said the touching happened, Defendant denied it.

Corroborating Jonathan was the fact that Defendant had an unusual personal relationship with the child. There were prior incidents of kissing. She had pulled Jonathan out of school without

authorization and taken him to her home. It had gotten to a point where Mrs. Kemp had asked Defendant whether she had a crush on Jonathan and Mr. Kemp had overheard a telephone conversation that he characterized as a girlfriend talking to a boyfriend.

Corroborating Jonathan was also the logical way the sexual acts got to the attention of the police. After overhearing what he perceived to be an inappropriate conversation between an adult and a child, Mr. Kemp confronted Jonathan the evening of February 5. Jonathan admitted the touching. He reported the conversation to Jonathan's mother, who again confronted Jonathan. When Jonathan again reported the touching, his mother called the police. Police investigated by interviewing Jonathan and the other students who were in the bedroom at the time.

Defendant seeks to undermine Jonathan's testimony that he and Defendant had engaged in sexual touching by positing that he and the other witnesses had a motive to lie. Much of Defendant's petition is spent challenging the motives and credibility of collateral witnesses. No witness had first-hand knowledge of the charged acts besides Jonathan and Defendant. So, accepting all of Defendant's proffered arguments as true *vis a vis* Jonathan's mother and other witnesses, they would not have affected the verdict. Defendant's verdict was based upon the Court's finding Jonathan's testimony credible beyond a reasonable doubt.

None of Defendant's petition points, attachments, or exhibits include a retraction by Jonathan that the sexual touching occurred. There was no evidence that any civil lawsuit was contemplated when Jonathan

admitted the touching to Mr. Kemp, to his mother, and to the police, let alone when he testified at trial.

None of the Petition's proffered witnesses' opinions of Jonathan's reputation for honesty, or even alleged instances of dishonesty, undermine this Court's finding of credibility of Jonathan's testimony regarding the few moments of time on February 5.

Defendant's proffer regarding her pubic hair status is also not material. Her status days before or days after is insignificant. Moreover, even a touch over her panties would constitute sexual contact under the law.

This Court does not find either prong of *Strickland* has been met. For these reasons, as well as the reason set in the State's response,

IT IS ORDERED dismissing Defendant's petition summarily pursuant to Rule 32.6(c).

APPENDIX P

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CR 06-0372

DEPARTMENT C

[Filed December 4, 2007]

STATE OF ARIZONA,	)
	)
Appellee,	)
	)
v.	)
	)
COURTNEY VALLE BISBEE,	)
	)
Appellant.	)
	)

MEMORANDUM DECISION
(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2004-008034-001-DT

The Honorab1e Warren J. Granville, Judge

AFFIRMED

Terry Goddard, Attorney General By Randall M. Howe, Chief Counsel, Criminal Appeals Section And Nicholas D. Acado, Assistant Attorney General Attorneys for Appellee	Phoenix
Farragut & Associates, P.C. By Ulises A. Farragut, Jr. Attorneys for Appellant And	Phoenix
Leyh, Billar & Associates, P.L.L.C. By Cynthia A. Leyh Attorneys for Appellant	Phoenix

W I N T H R O P, Judge

¶1 Courtney Valle Bisbee ('Appellant") appeals from her convictions and sentences for two counts of child molestation. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The case involves an incident that occurred on February 5, 2004, and allegedly involved mutual genital fondling between Appellant, a thirty-three-year-old woman, and J.V., a thirteen-year-old boy. Appellant waived her right to a jury, and after a trial at which Appellant testified on her own behalf, the trial court found her guilty of two counts of molestation of a child, each a class two felony and a dangerous crime against children. The trial court sentenced Appellant to concurrent, mitigated terms of eleven years' imprisonment in the Arizona Department of

Corrections and credited her for 142 days of pre-sentence incarceration.

¶3 Appellant timely appealed from her convictions and sentences. We have jurisdiction to decide her appeal pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ('A.R.S. ") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A) (2001.

ANALYSIS

¶4 On appeal, Appellant argues that the trial court committed reversible error in precluding the testimony of her expert, Dr. Gene Abel. Appellant contends that Dr. Abel's testimony 'was directly and inextricably relevant to the determination of the weight of credibility to give [Appellant]." We disagree.

¶5 Dr. Abel, a professor of psychology and a psychiatrist by training who specializes in the evaluation and treatment of child molesters, conducted various tests on Appellant and interviewed her on or around June 29, 2005,[1] to determine, among other things, Appellant's sexual interests. Prior to trial, the State moved to preclude Dr. Abel's testimony.

¶6 At a hearing conducted pursuant to Rule 104 of the Arizona Rules of Evidence, Dr. Abel opined that Appellant had a normal adult heterosexual interest pattern and did not have a sexual interest in adolescent boys. The State argued that Dr. Abel's

---

[1] The State refers to the evaluation as occurring in July 2005. The State appears to be referencing the date of Dr. Abel's report summarizing his findings, not the date of the actual evaluation.

testimony was irrelevant because, as Dr. Abel and Appellant admitted, a lack of sexual interest in children does not preclude someone from improperly touching children in a sexual manner.[2] The trial court agreed that the proffered testimony was irrelevant and granted the State's motion.

¶7 'In determining the relevancy and admissibility of evidence, the trial judge is invested with considerable discretion[, which] will not be disturbed on appeal unless clearly abused." State v. Hensley, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984) (citations omitted); see Ariz. R. Evid. 402, 702; State v. Altamirano, 116 Ariz. 291, 569 F.2d 233, 235 (1977) (holding that irrelevant character trait evidence may be excluded).

¶8 Appellant had sought Dr. Abel's testimony for his opinion that Appellant had a normal adult heterosexual interest and no aberrant interest in adolescent boys. Because Appellant did not testify as to her sexual interest at the time of the incident, we fail to see how Dr. Abel's opinion would have bolstered Appellant's credibility at trial. Moreover, the crime of molestation of a child does not require proof that a perpetrator has a "sexual interest" in the victim or in children in general. See A.R.S. § 13-1410(A) (2001) A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage

---

[2] Dr. Abel also testified that no testing can determine whether Appellant inappropriately touched J.V.

in sexual contact[3] . . . with a child under fifteen years of age."). The State also did not have to prove that Appellant was sexually motivated at the time of the incident to secure a conviction under A.R.S. § 13-1410.[4] See State v. Sanderson, 182 Ariz. 534, 542 n.4, 898 F.2d 483, 491 n.4 (App. 1995); cf. State v. Lujan, 192 Ariz. 448, 451, ¶ 7, 967 P.2d 123, 126 (1998) (stating that the language "knowingly molests" in former A.R.S. § 13-1410 requires that a defendant be motivated by sexual interest).

¶9 Furthermore, Dr. Abel himself testified that his opinion pertained to Appellant's sexual interest on the date of his evaluation; it was not "predictive" of Appellant's conduct at the time of the alleged incident. Thus, Dr. Abel's testimony was not relevant to the sole

---

[3] "Sexual contact' means any direct or indirect touching [or] fondling . . . of any part of the genitals . . . by any part of the body . . . or causing a person to engage in such contact." A.R.S. § 13-1401(2) (2001).

[4] Apparently in support of her argument that Dr. Abel's opinion was relevant to Appellant's credibility, Appellant states on appeal that her defense at trial was based, at least in part, on her lack of sexual interest in the victim. See A.R.S. § 13-1407(E) (Supp. 2006) (citing to the current version of the statute when no revisions material to this decision have occurred). However, Appellant raises this argument for the first time in her reply brief, and she does not include any reference to the record in support of her contention. See ARCAP 13 (requiring that briefs contain references to the record). Generally, an issue raised for the first time in a reply brief is waived. See State v. Guytan, 192 Ariz. 514, 520, ¶ 15, 968 P.2d 587, 593 (App. 1998). Even if not waived, Appellant misstates the record. Based on our review of the record, Appellant's entire defense consisted of denying that any sexual contact occurred; she presented no evidence that she was not sexually interested in J.V.

issue at trial, i.e., whether Appellant intentionally engaged in sexual contact with J.V. by touching his penis and putting his hand on her vagina. See Ariz. R. Evid. 401. The proffered testimony would not have been helpful to the trial court in determining this issue. Accordingly, the trial court did not abuse its discretion in precluding Dr. Abel's testimony.

CONCLUSION

¶10 Based on the foregoing reasons, Appellant's convictions and sentences are affirmed.[5]

/s/Lawrence F. Winthrop
LAWRENCE F. WINTHROP

CONCURRING:

/s/Michael J. Brown
MICHAEL J. BROWN, Presiding Judge

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[5] On October 31, 2007, Appellant filed a motion for release pursuant to Rules 6 and 7.2(b) of the Arizona Rules of Criminal Procedure with this court as well as a notice of post-conviction relief with the Maricopa County Superior Court. Appellant raises three "grounds" in her motion; (1) the State withheld exculpatory evidence, (2) there is newly discovered material evidence, and (3) ineffective assistance of counsel. These "grounds" appear to be more appropriate for a Rule 32 petition for post-conviction relief, which is filed with the trial court. See Ariz. R. Crim. P. 32.1(e), 32.4(a); see also State v. Spreitz, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (holding that claims of ineffective assistance of counsel must be first presented to the trial court in a petition for post-conviction relief). Accordingly, we deny Appellant's motion, but note that this decision does not preclude Appellant from pursuing her rights under her petition for post-conviction relief.

/s/Donn Kessler
DONN KESSLER, Judge