No._____

IN THE

SUPREME COURT OF THE UNITED STATES

MIGUEL DANIEL LEAL – PETITIONER

vs.

CHARLES L. RYAN, et. al. – RESPONDENT(S)

****

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NINTH CIRCUIT COURT OF APPEALS

****

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME I

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 30 2018

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

MIGUEL DANIEL LEAL, Petitioner-Appellant, v. CHARLES L. RYAN, Warden and ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 17-16897 D.C. No. 4:14-cv-02271-JGZ District of Arizona, Tucson ORDER

Before: CALLAHAN and MURGUIA, Circuit Judges.

On January 29, 2018, this court issued an order staying appellate proceedings pending disposition of the motion for reconsideration in the district court. On October 2, 2018, the district court denied the motion for reconsideration. The stay order filed January 29, 2018, is lifted and this appeal shall proceed.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability (Docket Entry Nos. 4 & 8) 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C.

Appendix A

p. 1

§ 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Miguel Daniel Leal, Petitioner, v. Charles L Ryan, et al., Respondents.	No. CV-14-02271-TUC-JGZ **ORDER**

On August 31, 2017, the Court entered judgment denying Petitioner relief. (Docs. 38, 39.) Now pending before the Court are two motions filed by Petitioner on September 26, 2017: Motion to Alter or Amend Judgment and Motion for Reconsideration of Petitioner's Objections to Report and Recommendation. (Doc. 42, 43.)

The motion to amend judgment is brought pursuant to Federal Rule of Civil Procedure 59(e). Rule 59(e) is an "extraordinary remedy to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quoting 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[4] (3d ed. 2000)). A motion for reconsideration under this rule "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

The motion for reconsideration does not specify the rule under which it is brought.

(Doc. 43.) Because the motion is timely filed under Rule 59(e), the Court construes it as a second Rule 59 motion. *See Schroeder v. McDonald*, 55 F.3d 454, 458-59 (9th Cir. 1995).

Discussion

1. Restated Arguments

Both of the pending motions bear similarity to Petitioner's previous filings. Large portions of Petitioner's motion to amend judgment are copied from Petitioner's Objections to the Report and Recommendation. (*Compare* Doc. 42 at 7-15 *with* Doc. 37 at 30-34, 50-56.) The text of the motion for reconsideration is identical to Petitioner's June 26, 2017 objections to the Magistrate Judge's Report and Recommendation. (*Compare* Doc. 43 *with* Doc. 37.) A motion for reconsideration is not the time to request that the Court "rethink what it has already thought through." *Libberton v. Schriro*, No. CIV 97-1881-PHX-EHC, 2007 WL 3101841, *1 (D. Ariz. Oct. 22, 2007) (quoting *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998)). Accordingly, the Court will deny the portions of Petitioner's motion to amend judgment that restate arguments identical to those already presented to and resolved by the Court, and deny in its entirety the motion for reconsideration.

2. Newly Discovered Evidence

In the motion to amend judgment, Petitioner suggests the Court should reconsider its decision based on newly discovered evidence. Petitioner lists thirteen pieces of "new evidence," identified as items A through L. (Doc. 42 at 2.)

Evidence is not "newly discovered" for purposes of Rule 59 if it was previously available to the litigant but not relied upon prior to the motion for reconsideration. *School Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001) (holding that a party cannot introduce new facts in a Rule 59(e) motion unless they were "previously unavailable"). Here, with the exception of items B and C, Petitioner previously submitted the items of evidence to the Court during the briefing of the case (although he

p. 4

did not necessary line each document to a particular claim). Petitioner acknowledges this fact in stating the purpose of the motion to amend is "to make sure this Court does not ignore the new evidence Petitioner presented to the Arizona Court of Appeals and the Trial Court in his Rules 32 PCR Petition, and the Courts have not acknowledged." (Doc. 42, p. 1.) With respect to items B and C, these items would have been available to Petitioner in 2005. Item B is identified as a Safeway pay stub from July 2005. Item C is identified as Petitioner's FMLA Certification of August 2005. Thus, none of Petitioner's evidence is newly discovered. Accordingly, it does not provide a basis for reconsideration.

3. Claims of Error

Even if the evidence were not newly discovered, it would not provide a basis for reconsideration or amendment of the Court's prior orders. The Court addresses this evidence in the remainder of this Order only to the extent Petitioner relies upon it to argue the Court committed clear error.

a. Evidence that Petitioner left town after confrontation call

Petitioner argues that he did not leave town after the confrontation call on July 20, 2005, and the new evidence listed in his motions would demonstrate that the courts' fact finding on this point was erroneous. Petitioner asserts that the State failed to produce a note; Petitioner did not write a note; and Petitioner proved that he did not leave Tucson, returned home on July 22, and was admitted into the hospital. Petitioner further asserts that if the trial court had known these evidentiary facts, it would not have given the jury the "damning and prejudicial" flight instruction.

The courts' fact finding regarding the Petitioner's departure from town and the presence of a note was not clear error based on the trial record. At trial, a confrontation call between Petitioner and his wife was admitted into evidence. At the end of the confrontation call, Petitioner's wife stated that she would be right home. (Doc. 33, Ex. XXX at 86, 88.) Testimony established that Petitioner was not at the house when his wife arrived and she noticed that Petitioner's shaving kit was gone. (*Id.* at 93.) According

to Petitioner's wife and the sheriff's deputies with her, there was a note from Petitioner that he had gone to get something to eat. (*Id.* at 91-92; Doc. 34, Ex. ZZZ at 41.) Petitioner claims this information was false and he denies writing such a note. However, Petitioner did not testify at trial.

The July 22, 2005 hospital record upon which Petitioner relies (Doc. 42, Ex. A), has been available to Petitioner since before trial and he was uniquely aware of his whereabouts after July 20. Although Petitioner submitted the hospital record to this Court within a 481-page document labeled "Factual and Legal Material in Support of Pending Writ of Habeas Corpus" (Doc. 23), he did not rely upon it at trial to refute the State's theory of Petitioner's flight after the confrontation call.[1] A post-judgment motion is not the occasion to raise an argument for the first time. *Kona Enters., Inc.*, 229 F.3d at 890 ("A Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation."). Moreover, even if the Court were to consider the one-page hospital admission record, it does not, without more, wholly refute the State's flight theory. Petitioner was not home after the confrontation call and his wife informed deputies the following day, July 21, that she believed he had gone to Texas. (Doc. 34, Ex. ZZZ at 48-49.) Petitioner was not located by authorities until his arrest in Texas. More importantly, as the Court previously found, "[t]here was more than sufficient evidence of Leal's guilt aside from the evidence of flight – the victim's testimony, evidence corroborating her testimony, and the confrontation call." (Doc. 36 at 23; Doc. 38.) Thus, the Court does not find it committed clear error in entering judgment against Petitioner.

For Claim 3

b. Evidence related to the confrontation call

Petitioner argues the Court should have considered his annotations on the transcript of the confrontation call. Petitioner provided this Court with a copy of the call

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[1] Contrary to the State's position, Petitioner did submit the hospital record to the PCR Court with his pro se PCR Petition. (Doc. 15-9 at 16-17.) However, the PCR court disregarded that petition, and considered only the petition filed by Petitioner's counsel. (Doc. 15, Ex. RR.)

P. 6

transcript, with his comments written onto it. The Court included portions of the confrontation call in its summary of trial evidence for purposes of evaluating fundamental miscarriage of justice. (Doc. 36 at 12-13.) The Court noted that it was not considering the annotations. (*Id.* at 12 n.6.) Petitioner contends that failing to consider his annotations precluded him from presenting his defense to the confrontation call.

As noted above, Petitioner did not testify at trial. Therefore, his "explanation" of his words during the call was not admitted. The annotations were not part of the trial evidence and, for that reason, were not included in the Court's summary. Additionally, Petitioner did not rely on the annotations to support his fundamental miscarriage of justice claim based on actual innocence. (*See* Docs. 20, 28.) And, even if he had relied upon the annotated document, it would not qualify as the type of new reliable evidence required by the Supreme Court, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Because Petitioner did not present any "new reliable evidence," he failed to clear the first hurdle to establish a fundamental miscarriage of justice. *See House v. Bell*, 547 U.S. 518, 537 (2006).[2]

c. Legal authority for Sixth Amendment claim

Petitioner argues that the Court erred in relying upon *Wheat v. United States*, 486 U.S. 153 (1988), to reject Claim 1, which alleged a Sixth Amendment violation of Petitioner's right to the counsel of his choice. Petitioner argues *Wheat* is distinguishable because it involved counsel for co-defendants whereas Petitioner's counsel represented Petitioner in the criminal matter and his family members in unrelated civil matters. Petitioner cites cases from the Seventh Circuit and from the Supreme Court of Iowa in support. Because those cases are not "clearly established Federal law" under § 2254(d)(1), this Court cannot rely upon them in evaluating the merits of Claim 1. *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) ("clearly established Federal law" under

[2]The annotated confrontation call is not relevant to the merits of any of the claims the Court found to be properly exhausted. Therefore, the Court does not find clear error in its handling of this evidence.

p. 7

§ 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.)

Petitioner also relies on *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). *Gonzalez-Lopez* addresses the Sixth Amendment right to counsel of one's choice, but it did not involve a conflict of interest. In addition, in *Gonzalez-Lopez*, the Supreme Court cited *Wheat* favorably as setting forth the standards to be applied when a court is faced with a potential conflict, as it was in Petitioner's case. 548 U.S. at 151-52. The Court concludes no error resulted from the reliance on *Wheat*.

d. Denial of request to present rebuttal witness

Petitioner briefly re-argues and cites law to support Claim 3, that his constitutional rights were violated when the trial court denied his request to present one of his sisters as a rebuttal witness. (Doc. 42 at 3 ll. 14-18, 6 ll. 12-23.) Petitioner's argument on this topic is cursory and points to no clear error in the Court's ruling on Claim 3. The Court will deny reconsideration.

e. Exhaustion of Claim 2

Petitioner argues that he exhausted Claim 2 by raising a claim in state court alleging that admission of the confrontation call violated 18 U.S.C. §§ 2510-2511. Claim 2 alleged a violation of Petitioner's Fourth, Fifth, and Fourteenth Amendment rights based on the admission at trial of the confrontation call. The statutes Petitioner cited in the pending motion are federal criminal statutes regarding wiretapping. Even if Petitioner alleged a violation of those federal statutes in state court, that would not fairly present a federal legal theory based on the Fourth, Fifth, and Fourteenth Amendments. *See Picard v. Connor*, 404 U.S. 270, 276-78 (1999). The Court finds no clear error in its determination that Claim 2 was procedurally defaulted.

Accordingly,

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IT IS ORDERED that the Motion to Alter or Amend Judgment (Doc. 42) and Motion for Reconsideration (Doc. 43) are **DENIED**.

Dated this 2nd day of October, 2018.

Honorable Jennifer G. Zipps
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Miguel Daniel Leal,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-14-02271-TUC-JGZ

ORDER

Pending before the Court is a Report and Recommendation issued by United States Magistrate Lynette C. Kimmins that recommends denying Petitioner's Habeas Petition filed pursuant to 28 U.S.C. §2254. (Doc. 36.) Petitioner filed an Objection to the R&R on June 26, 2017. (Doc. 37.) For the reasons stated herein, the Court will deny the Objection and adopt the R&R.

When reviewing a Magistrate Judge's Report and Recommendation, this Court "shall make a de novo determination of those portions of the report ... to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); *see also Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991) (*citing Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983)). Failure to object to a Magistrate Judge's recommendation relieves the Court of conducting de novo review of the Magistrate Judge's factual findings; the Court then may decide the dispositive motion on the applicable law. *Orand v. United States*, 602 F.2d 207, 208 (9th Cir. 1979) (citing

Campbell v. United States Dist. Ct., 501 F.2d 196 (9th Cir. 1974)).

As thoroughly explained by Magistrate Judge Kimmins, the claims in Petitioner's petition are procedurally defaulted and/or without merit. As Petitioner's objections do not undermine the analysis and proper conclusion reached by Magistrate Judge Kimmins, Petitioner's objections are rejected and the Report and Recommendation is adopted.

Before Petitioner can appeal this Court's judgment, a certificate of appealability must issue. *See* Fed. R. App. P. 22(b)(1) (the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)). Additionally, 28 U.S.C. §2253(c)(2) provides that a certificate may issue only if the applicant has made a substantial showing of the denial of a constitutional right. In the certificate, the court must indicate which specific issues satisfy this showing. *See* 28 U.S.C. §2253(c)(3). A substantial showing is made when the resolution of an issue of appeal is debatable among reasonable jurists, if courts could resolve the issues differently, or if the issue deserves further proceedings. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Upon review of the record in light of the standards for granting a certificate of appealability, the Court concludes that a certificate shall not issue as the resolution of the petition is not debatable among reasonable jurists and does not deserve further proceedings.

Finally, the Court notes that numerous filings by Petitioner violate Rule 5.2, Fed. R. Civ. P., in that they contain the name of an individual known to be a minor. The Court will order the Clerk of the Court to seal those filings.

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Accordingly, IT IS HEREBY ORDERED as follows:

1. The Report and Recommendation (Doc. 36) is accepted and adopted;
2. Petitioner's §2254 Petition (Doc. 1) is denied;
3. A Certificate of Appealability is denied and shall not issue;
4. The Clerk of the Court shall FILE UNDER SEAL Docs. 1, 20, 24 and 28; and
5. This case is dismissed with prejudice. The Clerk of the Court shall enter judgment accordingly and close the file in this matter.

Dated this 30th day of August, 2017.

Honorable Jennifer G. Zipps
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Miguel Daniel Leal,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

NO. CV-14-02271-TUC-JGZ

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 is denied and this action is hereby dismissed with prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

August 31, 2017

By s/ M Rodriguez
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Miguel Daniel Leal,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-14-2271-TUC-JGZ-LCK

REPORT AND RECOMMENDATION

Petitioner Miguel Leal, presently incarcerated at the Arizona State Prison in Kingman, Arizona, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. In accordance with the Rules of Practice of the Court, this matter was referred to Magistrate Judge Kimmins for Report and Recommendation.[1] Before this Court are the Petition (Doc. 1), Respondents' Answer (Doc. 15), and Petitioner's Reply (Doc. 20). The Court also has considered the multiple substantive documents Petitioner filed after the Reply. (Docs. 23-25, 28.) The Magistrate Judge recommends that the District Court, after its independent review of the record, deny relief.

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[1] This matter was referred to the current Magistrate Judge on May 10, 2016. (Doc. 27.) The Arizona Court of Appeals issued its mandate in April 2017, upon conclusion of Leal's post-conviction proceeding. *See* Mandate, *State v. Leal*, No. CR20053517 (Pima Cty. Super. Ct. filed Apr. 3, 2017). (This document is available on the Pima County Superior Court online database, http://www.agave.cosc.pima.gov/AgavePartners/ (last reviewed June 5, 2017).)

FACTUAL AND PROCEDURAL BACKGROUND

Leal was convicted in the Superior Court of Pima County of two felonies, sexual abuse of a minor under fifteen and sexual conduct with a minor under fifteen. (Doc. 15, Exs. F, G.) The judge imposed consecutive sentences totaling 15.5 years. (*Id.*, Ex. G.)

The Arizona Court of Appeals, interpreting the facts in the light most favorable to sustaining Leal's convictions, summarized the background facts as follow:

> After a family gathering, Leal's seven-year-old granddaughter, L., told her aunt that Leal had touched her inappropriately. L.'s aunt then informed her mother, L.'s grandmother, I., and her brother, L.'s father, about the allegations. They took L. to a hospital for examination.
>
> Working with a police officer at a child advocacy center a few days later, L.'s mother called Leal on the telephone to confront him about the accusations; the conversation was recorded. After L.'s mother had talked with Leal for awhile, she gave the telephone to Leal's wife, I., who continued the conversation. I. asked Leal many questions about the charges, and Leal made several incriminating statements in response. Leal moved to suppress these statements on the ground that, inter alia, they violated the marital communications privilege. Denying the motion, the trial court found that I.'s participation in the telephone call had been "voluntary" and that, consequently, the "privilege [did] not extend to the situation." Leal's statements were admitted into evidence at trial through the recorded call, which was played for the jury. Although I. also testified at trial, she did not testify about Leal's inculpatory statements.
>
> Before trial, the state filed a notice with the court regarding potential conflicts of interest on the part of defense counsel who simultaneously was representing Leal's wife, I., and his son, the victim's father, in civil matters relating to, respectively, visitation with and custody of the victim. The court found that conflicts existed, ordered counsel withdrawn from representation of Leal, and appointed new counsel.

(Doc. 15, Ex. O at 2-3.) The appellate court affirmed Leal's convictions and sentences. (*Id.*, Exs. I, O.) The Arizona Supreme Court denied review. (*Id.*, Exs. N, Q.)

Leal filed a notice of post-conviction relief (PCR). (*Id.*, Ex. S.) After several counsel withdrew (*id.*, Exs. U, W, CC), Leal filed a pro se PCR petition (*id.*, Ex. DD). Subsequently, appointed counsel filed a supplemental PCR petition raising six claims of ineffective assistance of counsel (IAC). (*Id.*, Ex. QQ.) The PCR court reviewed the two petitions and concluded that the pro se petition did not raise any colorable claims that were not also included in the supplemental petition; therefore, the court directed the State to respond only to the supplemental petition. (*Id.*, Ex. RR.) An evidentiary hearing was

held and Leal's counsel filed a supplemental brief as directed by the court, raising an additional IAC claim. (*Id.*, Exs. AAA, BBB; Doc. 29.) On March 19, 2015, the PCR court denied on the merits all seven of the IAC claims raised in the two supplemental PCR petitions. (Doc. 23 at 6-14.)

Leal filed a pro se petition for review. (Doc. 34, Ex. FFFF.) The court of appeals granted review but denied relief. *State v. Leal*, No. 2 CA-CR 2015-0318-PR, 2016 WL 2945197 (Ariz. Ct. App. May 20, 2016). The Arizona Supreme Court denied review.

DISCUSSION

Leal raises thirteen claims in the Petition. Respondents concede that Claim 1 is properly exhausted and the Court will review it on the merits. Respondents contend the other claims are procedurally barred, and the Court first reviews them for proper exhaustion. To evaluate exhaustion, procedural default, and the merits, this Court looks to the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-804 (1991) (directing courts to "look through" unexplained orders to a reasoned decision below); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005)).

EXHAUSTION AND PROCEDURAL DEFAULT

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To properly exhaust, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and PCR proceedings. A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may

be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available pursuant to Rule 32, the claim is "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly exhaust the claim in state court and prejudice from the alleged constitutional violation, or shows that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

ANALYSIS OF EXHAUSTION AND PROCEDURAL DEFAULT

Claim 2

Leal alleges his Fourth Amendment (privacy and search and seizure), Fifth Amendment (self-incrimination) and Fourteenth Amendment (due process) rights were violated by the admission of a recorded phone call at trial.

Leal challenged the admission of the recorded phone call on direct appeal based solely upon the state anti-marital fact privilege, but he did not fairly present a federal constitutional claim (Doc. 15, Ex. I at 27-39). *See Gray*, 518 U.S. at 163. "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in

federal court, but in state court." *Duncan v. Henry*, 513 U.S. 364, 366 (1995). The appellate court's ruling was based solely on state privilege rules. (Doc. 15, Ex. O at 7-8.)

If Leal were to return to state court now to litigate this multi-part claim it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Claim 2 is technically exhausted but procedurally defaulted.

Claim 3

Leal alleges his constitutional rights (due process, compulsory process, and to present a defense) were violated by the trial court's denial of his request to present one of his sisters as a rebuttal witness with respect to the State's theory that flight demonstrated guilt. Because Leal had not objected on constitutional grounds before the trial court, the appellate court found this claim waived except for fundamental error review. (Doc. 15, Ex. I at 40-52; Ex. O at 8.) The court assumed fundamental error but determined Leal suffered no prejudice. (*Id.*, Ex. O at 8-9.)

The Ninth Circuit has indicated that fundamental error review of a fairly presented constitutional claim may satisfy the exhaustion requirement. *See Huffman v. Ricketts*, 750 F.2d 798, 800 (9th Cir. 1984) (concluding that finding of no fundamental error encompassed merits analysis of constitutional claim); *Moormann v. Schriro*, 426 F.3d 1044, 1057 (9th Cir. 2005) (fundamental error review of a claim included in a petitioner's appellate brief may exhaust the claim). Here, the appellate court sufficiently considered the merits of Leal's constitutional claim in conducting its fundamental error review; thus, the Court finds the claim exhausted. *See Date v. Schriro*, 619 F. Supp. 2d 736, 774 (D. Ariz. 2008) (finding a claim exhausted by fundamental error review because the court identified the specific constitutional claim it was reviewing); *Church v. Schriro*, No. CV-07-1236-PHX-FJM, 2008 WL 2168998, at *16 (D. Ariz. May 22, 2008) (finding appellate court determination that there was no fundamental error implicitly addressed the merits of the claim); *Coppess v. Ryan*, No. CV 09-276-TUC-CKJ (HCE), 2011 WL

1480053, at *12 (D. Ariz. Feb. 2, 2011) (report and recommendation collecting cases on point). The Court will review Claim 3 on the merits.

Claim 4

Leal alleges (a) trial counsel was ineffective because he failed to (i) defend against the prosecution's flight theory by objecting orally and in writing to the jury instruction, presenting relevant evidence, and filing a special action; (ii) challenge admission of the confrontation call on constitutional grounds; (iii) secure rebuttal witnesses relevant to his presence in Texas; (iv) investigate the victim's mental capabilities; (v) present the rebuttal testimony of Patricia Romo and Perlita Rodriguez (Leal's sisters); (vi) challenge the improper testimony of Wendy Dutton; and (vii) protect Leal's speedy trial rights. He also alleges (b) appellate counsel was ineffective for failing to raise claims based on (ii) and (v)–(vii).

Sub-claim 4(b)(ii) was raised only in Leal's pro se PCR petition not in counsel's supplemental petition. (Doc. 15, Ex. D at 21-22.) The PCR court denied all claims in Leal's pro se petition (to the extent they were not included in counsel's supplemental petition) on the merits as not colorable. (*Id.*, Ex. RR.) Leal arguably raised this sub-claim in the Petition for Review by including it in an appendix. (Doc. 35, Ex. IIII at 15-16.) The remaining portions of this claim were presented in Leal's supplemental PCR petition. (Doc. 15, Ex. QQ at 7-14.) The PCR court denied these claims on the merits. (Doc. 23 at 6-14.) Petitioner then raised the claims in the Petition for Review. (Doc. 34, Ex. FFFF at 2-6.) The appellate court adopted the PCR court's merits rulings in entirety, as thorough and well-reasoned. *Leal*, 2016 WL 2945197, at *3. Therefore, Claim 4 is fully exhausted.[2]

Claims 5 to 12

In Claim 5, Leal alleges his constitutional right to a speedy trial was violated. In Claim 6, Leal alleges his Sixth Amendment right to confrontation was violated by the

[2] At the time Respondents' Answer was filed in this Court, on March 6, 2015, the PCR court had not yet ruled on these ineffective assistance of counsel claims. Thus, this claim was not fully exhausted at that time.

admission of Deanna Leal's recorded testimony. In Claim 7, Leal alleges prosecutorial misconduct based on: (a) the presentation of false witness testimony by Deanna Leal, Irene Leal, and the victim, and the bolstering of witnesses' credibility; (b) improper comments about recorded evidence; (c) improper comments regarding the first trial; and (d) lying to the court about the timing of defense disclosure. In Claim 8, Leal alleges he was subjected to double jeopardy by (a) use of the flight theory of guilt that had been disproven in prior proceedings; and (b) references in the second trial to the first trial in which Leal was acquitted. In Claim 9, Leal alleges his Fifth Amendment and Arizona constitutional rights to a grand jury were violated. In Claim 10, Leal alleges his right to due process was violated by the presentation at trial of the victim's unreliable testimony. In Claim 11, Leal alleges his rights to due process, equal protection, and a fair trial were violated by the testimony of Wendy Dutton. In Claim 12, Leal alleges his constitutional rights were violated by (a) the giving of an improper jury instruction regarding flight as an inference of guilt, and (b) the denial of requested jury instructions regarding (i) the confrontation call and (ii) the prosecution's loss of evidence.

In the pro se PCR petition, Leal raised Claims 5, 6, 7(a), 7(b), 7(c), 9, 10, 11, and 12(b)(i).[3] (Doc. 15, Ex. DD.) The PCR court denied all claims in Leal's pro se petition (to the extent they were not included in counsel's supplemental petition) as not colorable. (*Id.*, Ex. RR.) In the petition for review, Leal arguably raised the entirety of Claims 5-12. (Doc. 34, Ex. FFFF.) Thus, Leal fairly presented the claims that were included in both the pro se PCR petition and the petition for review. The Arizona Court of Appeals found all claims of trial error or prosecutorial misconduct, categories which encompass these claims, precluded for failure to raise them on appeal, citing Arizona Rule of Criminal Procedure 32.2(a)(3). *Leal*, 2016 WL 2945197, at *2. Therefore, Claims 5, 6, 7(a), 7(b),

[3] The pro se PCR petition is lengthy (115 pages), lacks clear organization, and includes documents within the document; therefore, it is challenging to parse out the claims Leal intended to raise therein. (*See* Doc. 15, Ex. DD.) The conclusion above as to claims raised in the pro se PCR Petition is the Court's inclusive reading of that document. Ultimately, Claims 5-12 are all procedurally defaulted whether included in the pro se petition (for failure to raise them on appeal) or not included in that petition (for failure to raise them therein).

7(c), 9-11, and 12(b)(i) are procedurally defaulted in this Court. *See Coleman*, 501 U.S. at 729-30.

Although Claims 7(d), 8, 12(a), and 12(b)(ii) were raised in the petition for review (Doc. 34, Ex. FFFF), they were not included in Leal's pro se PCR Petition nor counsel's supplemental petition (Doc. 15, Exs. DD, QQ). The appellate court found waived any claims not presented to the PCR court. *Leal*, 2016 WL 2945197, at *2. Therefore, these claims are procedurally defaulted. *See Coleman*, 501 U.S. at 729-30.

Claims 5 through 12 are procedurally defaulted in this Court because the Arizona Court of Appeals found them defaulted on state procedural grounds.

Claim 13

Leal alleges his Fifth Amendment right not to be deprived of property was violated when the trial court precluded his paid counsel from representing him. He also alleges this impaired contract obligations under the Arizona Constitution.

A habeas corpus petition is for the purpose of challenging imprisonment that violates federal law. 28 U.S.C. § 2254(a); *Preiser v. Rodriguez*, 411 U.S. 475, 484-86 ("the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and [] the traditional function of the writ is to secure release from illegal custody.") This claim, even if successful, would not alter Leal's conviction or sentence; therefore, it is not cognizable in a habeas petition. *See Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003) ("habeas jurisdiction is absent . . . where a successful [claim] . . . will not necessarily shorten the prisoner's sentence."); *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam) (requiring a habeas petition to challenge a person's detention). Additionally, Leal's subclaim based on the Arizona Constitution is not cognizable. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (holding that habeas court will not review state law questions). Claim 13 is not cognizable.

CAUSE AND PREJUDICE

The Court has found that Claims 2 and 5-12 are procedurally defaulted. Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective

factor external to the defense impeded [petitioner's] efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753.

At the time Leal filed his Reply brief in this Court, PCR proceedings were ongoing in state court. He argued that any defaults arose due to delays caused by PCR counsel and the state court.[4] (Doc. 20 at 14.) Since that filing, PCR proceedings have been completed. The Court has not found any claims defaulted based on an incomplete PCR process. Therefore, delay in PCR proceedings cannot operate as cause to excuse any defaults. Further, there is no basis to excuse compliance with the exhaustion requirement under 28 U.S.C. § 2254(b)(1)(B), as argued by Leal. (Doc. 20 at 13-18; Doc. 25.)

Next, Leal argues that the PCR court's denial of his pro se PCR petition denied him the right to appellate review of his claims. (Doc. 20 at 14.) The PCR court's denial of the pro se claims was on the merits not a procedural denial. It did not prevent Leal from appealing or raising those claims before this Court.

Finally, Leal argues the default of Claim 2 (admission of the confrontation call violated his constitutional rights) is due to counsel's ineffective assistance in not alleging the constitutional basis for the claim. (Doc. 1 at 9.) Before ineffectiveness of trial or appellate counsel may be used to establish cause for a procedural default, it must have been presented to the state court as an independent claim. *Murray v. Carrier*, 477 U.S. 478, 489 (1986). As determined above with respect to Claim 4(ii), Leal raised and exhausted a claim that trial and appellate counsel were ineffective for failing to raise constitutional issues related to the confrontation call. Thus, ineffectiveness of counsel as cause for the default of Claim 2 was properly exhausted. However, as analyzed below in the merits section (Claim 4(a)(ii), (b)(ii)), the Court has concluded that neither trial nor appellate counsel were constitutionally ineffective for failing to challenge the

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[4] In the Reply brief, Leal asserts an independent claim that delays in the PCR process violated his federal right to due process. (Doc. 20 at 1, 5.) All claims must be included in the petition; claims raised for the first time in a reply brief are waived. *Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008). Additionally, claims based on procedural errors in state PCR cases are not cognizable in a federal habeas corpus petition. *Franzen*, 877 F.2d at 26 (declining to address delay in state PCR proceeding).

admissibility of the confrontation call on constitutional grounds. Therefore, it cannot serve as cause to excuse the default of Claim 2. *See Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (recognizing the rule that, to establish cause, deficient performance by counsel must have been so ineffective as to violate the Federal Constitution) (citing *Murray*, 477 U.S. at 488-89).

Lead made no other cause and prejudice arguments in the Petition, Reply, or other substantive documents filed after the Reply (Docs. 23-25, 28). The Court finds Leal has not established cause and prejudice to overcome the procedural default of Claims 2 or 5-12.

MISCARRIAGE OF JUSTICE

Leal alleges that he is actually innocent.[5] To demonstrate a fundamental miscarriage of justice to excuse a procedural default, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). To establish the requisite probability, the petitioner must show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* The Supreme Court has characterized the exacting nature of an actual innocence claim as follows:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. . . . To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Id. at 324; *see also House v. Bell*, 547 U.S. 518, 538 (2006).

To the extent Leal contends he is innocent because he would not have been convicted absent the constitutional violations set forth in the Petition (*see* Doc. 20 at 12-13), the argument is facially insufficient because the standard requires new reliable

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[5] Leal set forth the same argument in the Reply (Doc. 20) and in a separate document captioned Declaration of Innocence Fundamental Miscarriage of Justice (Doc. 28). The Court considers both of them as the attached exhibits are slightly different.

evidence to support the alleged constitutional errors. Similarly, Leal's reliance on closing arguments from trial (*id.* at 19-20) falls short of satisfying the standard for fundamental miscarriage of justice.

Trial Evidence

The Court summarizes the most probative evidence from trial. On July 17, 2005, the Leal family had a gathering for an afternoon meal. (Doc. 33, Ex. XXX at 65.) After the meal, Leal's wife Irene went upstairs to join Leal for a nap. (*Id.* at 69, 70.) Irene napped for about fifteen minutes. (*Id.* at 71.) She heard a knock at their door but when she opened it, no one was there. (*Id.*) Her son Aaron testified that he went upstairs and knocked on his parents' door to say goodbye; no one answered right away and he went into the bathroom. (Doc. 34, Ex. YYY at 154-55, 166.) Aaron testified that while he was in the bathroom for five to ten minutes, he heard his parents' door open and he heard his sister Michelle's voice talking to someone; he did not have a clear memory of hearing any knocking on his parents' door. (*Id.* at 157-58, 159-60; Ex. ZZZ at 7, 9, 11-12.) When he came out, he saw his dad alone sleeping in his bedroom. (*Id.*, Ex. YYY at 157, 159.) He then went downstairs and left the house. (*Id.* at 155.)

Irene tried to go back to sleep after the knocking but she heard crying from her grandchildren so she went downstairs, leaving the door unlocked and Leal asleep. (Doc. 33, Ex. XXX at 71-72; Doc. 34, Ex. YYY at 14-15.) Irene believed Aaron had left before she came down from her nap. (Doc. 34, Ex. YYY at 9.) Downstairs, Irene saw the victim L.L. (Leal's granddaughter) in the living room. (*Id.* at 15-16.) Shortly thereafter, when the family did not see L.L., her Aunt Michelle went to look for her. (*Id.* at 16-17.) Michelle testified that the upstairs hall bathroom was empty at that time and Aaron left prior to her looking for L.L. (Doc. 33, Ex. WWW at 69, 113-14, 120.)

Michelle found her parents' bedroom door locked. (*Id.* at 70, 72; Ex. XXX at 74-75.) After unsuccessfully looking for a key and asking her mother for one, she went back upstairs. (*Id.*, Ex. WWW at 74.) She knocked on the door three to four times and jiggled the knob, for more than thirty seconds, until the door was opened. (*Id.* at 75.) Michelle

testified that Leal was on the bed, under the covers, and L.L. looked uneasy. (*Id.* at 76-78.) They went downstairs and Michelle asked if anything had happened; L.L. stated that her grandpa had her promise not to tell. (*Id.* at 80-81.) L.L. subsequently told her Aunt Michelle, that day, that Leal had played with her chest area and front private area (*Id.* at 86-90; Doc. 34, Ex. YYY at 89, 96.) L.L.'s father drove L.L. to the hospital that day, and he testified that during the drive she was dazed and not as talkative or lively as was typical for her. (Doc. 33, Ex. XXX at 36-37, 49.)

L.L. testified that on the afternoon of the family gathering Leal placed her on his bed, on her back, and took off her pants and underwear. (Doc. 34, Ex. YYY at 82-83, 110.) She testified Leal then licked her lower body "where the liquids come out," sucked her chest area ("raisins"), and rolled her onto her stomach and licked her butt cheeks. (*Id.* at 84-87, 102.) Leal made her promise not to tell. (*Id.* at 89.)

Three days after the family gathering, Detective William Thomason suggested to the victim's parents the possibility of doing a "confrontation call," which is a recorded and police-monitored phone call with the accused about the allegations. (*Id.*, Ex. ZZZ at 23-24.) The victim's mother, Deanna, agreed to do the call. (*Id.* at 24.) During the call, Leal asked to speak to his wife, Irene. (*Id.* at 26.) Irene was present in the building and agreed to participate. (*Id.* at 26-27; Doc. 33, Ex. XXX at 85-86.)

During the confrontation call, Leal denied touching L.L. inappropriately numerous times, professed to have been asleep all afternoon, and stated he didn't know what he had done. (Doc. 23-8 at 41, 42-43, 48; Doc. 23-9 at 9, 11, 13, 15, 19-20, 21.)[6] Deanna repeatedly told Leal she was going to contact the police if he did not tell her the truth that day. (Doc. 23-8 at 39, 42, 44, 47, 49.) At one point, Leal stated, "[b]ut anyway, my life is over so what the ff--, I'm a, I'm out, I'm out. . . . I'm out. I'm out, you guys, you do, put your lives together and go forward because, uh, I don't have nothin' to go forward from." (Doc. 23-9 at 9.) Leal also stated, "I touched her," and later when Irene asked him if he

[6] The Court does not have an official copy of the confrontation call transcript admitted at trial. Instead, this citation is to a copy supplied by Leal. The Court relies upon only the official words of the transcript not the annotations added by Leal.

thought what L.L. said was true, he said "yes." (*Id.* at 13, 18.) When Irene asked Leal why he touched L.L. and whether it was normal, Leal responded, "It's it's not normal, it, it's crazy, it's insane." (*Id.* at 19.)

At the end of the call, Irene told Leal she would be right home. (Doc. 33, Ex. XXX at 86, 88.) Detective Thomason dispatched two deputies to Leal's house out of concern for his safety. (Doc. 34, Ex. ZZZ at 39.) A short time later, the detective and Irene drove to the Leals' house. (*Id.* at 39-40.) The deputies were present and indicated no one answered the door when they arrived. (*Id.* at 40-41.) Irene entered the home and found a note on the kitchen counter in Leal's handwriting that stated he had gone to get something to eat. (*Id.* at 41; Doc. 33, Ex. XXX at 91-92.) Irene noticed that Leal's shaving kit was gone from the closet. (Doc. 33, Ex. XXX at 93.) Detective Thomason put out an attempt to locate with Pima County; he did not receive any response. (Doc. 34, Ex. ZZZ at 44.) The following day, July 21, Irene left a message for Detective Thomason with contact information for Leal's mother and sister in Lubbock, Texas, where she believed Leal had gone. (*Id.* at 48-49.) On July 22, the detective requested a warrant. (*Id.* at 46.) On August 9, he learned Leal had been arrested in Lubbock, Texas. (*Id.*)

Leal's defense relied on discrediting the victim based on inconsistent testimony and her having been coached by her aunt to make up the allegations. (*Id.*, Ex. AAAA at 37-58.) In particular, Michelle asked L.L. if anything had happened, asked her a second time if anything "bad" happened, and then stated "you need to tell me if anything bad happened." (Doc. 33, Ex. WWW at 137, 142-43.) When L.L. spelled out the word "plays" in response to questioning, Michelle suggested "what does he play with," and then suggested various body parts on the assumption that L.L. meant grandpa played with some part of her body. (*Id.* at 143-45.) Defense counsel cross-examined L.L. extensively on her incomplete recall and inconsistencies in her testimony. (Doc. 34, Ex. YYY at 109, 110, 111-12, 114, 117, 121, 122, 124-25, 129-30.)

The defense also argued that the abuse would have had to occur between Irene leaving their bedroom after her nap and Aaron leaving the bathroom, because he testified

to hearing Michelle talking in that area. Defense counsel contended there was not enough time for both the abuse and Michelle's search for L.L. to have occurred. (*Id.*, Ex. AAAA at 29-34.) Additionally, Irene and Aaron saw Leal sleeping. (Doc. 33, Ex. XXX at 70; Doc. 34, Ex. YYY at 11, 26, 27, 157; Ex. ZZZ at 13-14.)

New Evidence

Leal provides a personal declaration of his innocence (Doc. 20 at 18-19, 20) and affidavits from family members (*Id.* at 18-19, Exs. Z, AA; Doc. 28, Ex. BB).

Irene Leal attested, on October 6, 2005, that on the day of the assault, Leal was never alone with the victim. (Doc. 20, Ex. Z.) She completed a second affidavit on August 31, 2007, in which she attested to Leal's good character as a husband, father, and grandfather, and his willingness to help others. (Doc. 28, Ex. Z.) Irene further stated that she did not consent to have the confrontation call with Leal recorded and did not know it was recorded. (*Id.*) Further, she felt intimidated by law enforcement and participated in the call under duress. (*Id.*)

Aaron Leal attested, in an October 24, 2005 affidavit, that his father is honorable and of good character, and he knows him to be innocent. (*Id.*, Ex. AA.) Aaron recounted his participation with the family on the weekend of the sexual abuse and stated that his father had no opportunity to abuse the victim that weekend and his parents are always together. (*Id.*)

In an October 24, 2005 affidavit, Michael Leal, Petitioner's son, attested that his father is a loving person and always willing to help. (*Id.*, Ex. BB.) Michael further stated that he thinks either he or his mother was with Leal the entire weekend. (*Id.*) Fermin Romo, Petitioner's brother-in-law, a postal inspector, wrote a January 2, 2009 letter, attesting to Leal's good character and his belief in Leal's innocence. (*Id.*)

Leal also cites the victim's medical records, which were not presented at trial. (Doc. 20 at 20 & Ex. CC.) The exam of the victim did not identify any physical trauma to L.L.'s body on the day of the sexual abuse, and she was released from the hospital that day. (*Id.*)

Analysis

The Court questions whether any of Leal's evidence constitutes "new reliable evidence" as identified in *Schlup*. All of the affidavits are character references not material evidence bearing on the crimes charged. To the extent Irene, Aaron, and Michael aver that Leal was never alone with the victim, this contradicts the trial testimony. Irene testified that Michael left just after dinner when Leal and L.L. were still at the house. (Doc. 34, Ex. YYY at 8-9.) Similarly, when Aaron left that day, the victim and Leal were both still at the house. Irene testified that she left Leal upstairs in his room and, while she was downstairs, she did not know where L.L. was for some period of time. (Doc. 33, Ex. XXX at 72-75.) Finally, Michelle testified to finding L.L. and Leal locked alone together in his bedroom. (*Id.*, Ex. WWW at 76-78.) Although these affidavits were written only months after the July 2005 crime, the Court does not find them to be more probative then the testimony given under oath at the time of trial.

The absence of physical trauma to the victim is not highly probative in light of her testimony that Leal licked and sucked her body; she did not describe anything forceful. (Doc. 34, Ex. YYY at 84-87.) The new evidence does not bolster Leal's trial defenses, which the jury rejected. None of it bears upon his argument that there was insufficient time for the abuse to have taken place. Further, it does not impact the quality of the victim's testimony, which the jury found sufficiently reliable.

Leal's evidence is not such that the "court cannot have confidence in the outcome of the trial." *Schlup*, 513 U.S. at 316. Considering all of the evidence, that presented at trial and the new evidence, a reasonable juror could have found Leal guilty beyond a reasonable doubt. Leal has not established that there will be a fundamental miscarriage of justice if the defaulted claims are not considered on the merits.

MERITS

LEGAL STANDARDS FOR RELIEF UNDER THE AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) created a "highly deferential standard for evaluating state-court rulings' . . . demand[ing] that state-

court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)). Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (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).

"The threshold test under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 549 U.S. 70, 74 (2006).

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court]

precedent to a new context where it should not apply or unreasonably refuses to extend the principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent "unreasonable," the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Visciotti*, 537 U.S. at 25. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as '"fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based on an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (Miller-El II). In considering a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Landrigan*, 550 U.S. at 473-74; *Miller-El II*, 545 U.S. at 240.

MERITS ANALYSIS

Claim 1

Leal alleges he was denied his Sixth Amendment right to the counsel of his choice. Specifically, Leal argues there was at most a de minimus conflict, any conflict post-dated counsel's criminal representation, and it was rectifiable without removing counsel. As Respondents concede, this claim was exhausted on direct appeal. (Doc. 15, Ex. I at 12.)

Leal also raises two sub-claims that are not properly exhausted and are without merit. First, Leal alleges that after the trial court removed his retained counsel, he was left unrepresented for approximately eighty days. This claim was not raised on direct appeal (*see id.*, Ex. I) and is, therefore, procedurally defaulted. Regardless, the record establishes that it is without a factual foundation. The trial court found his counsel had a conflict on

September 21, 2006. (*Id.*, Ex. A.) On November 2, Leal appeared in court with his previously retained counsel, who stated that Leal did not have the financial ability to retain new counsel. (*Id.*, Ex. B.) Retained counsel was officially withdrawn from the case, as of that date, and the court directed Leal to complete a financial affidavit. (*Id.*) On November 13, after review of his financial affidavit, the court appointed the Pima County Public Defender to represent Leal. (*Id.*, Ex. C.) In January 2007, the public defender conflicted off the case and Tom Jacobs, who ultimately served as trial counsel, was appointed. (*Id.*, Exs. D, E.)

Second, Leal alleges that he asked the trial court to appoint a specific attorney (after he declared indigency), and rejection of that request again denied him counsel of choice. This claim was not raised on direct appeal (*Id.*, Ex. I), but Leal did argue this issue in his Petition for Review from denial of his PCR petition (Doc. 34, Ex. FFFF at 7-8). The Arizona Court of Appeals found all claims of trial error precluded for failure to raise them on appeal, citing Arizona Rule of Criminal Procedure 32.2(a)(3). *Leal*, 2016 WL 2945197, at *2. Therefore, this claim is procedurally defaulted. *See Coleman*, 501 U.S. at 729-30. More importantly, indigent defendants do not have a Sixth Amendment right to the counsel of their choice. *Gonzalez v. Knowles*, 515 F.3d 1006, 1012 (9th Cir. 2008) (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989)).

State Court Rulings

The trial court made the following findings when it determined that Leal's retained counsel had a conflict of interest:

> Defense counsel, Mr. Bertram Polis, is currently representing Mr. Miguel Leal who is charged with sexually molesting his Daughter (Victim 1), and Granddaughter (Victim 2), on separate occasions. Mr. Polis then later defended Mr. Leal's wife against the restraining order filed by the Mother of Victim 2. Mr. Polis then took the case to assist the father of Victim 2 to get a divorce from the Mother of Victim 2. Mr. Polis denies any real involvement in the divorce case because he says his associate is handling most of the work for the divorce. However . . . Mr. Polis did attend a deposition and opposed the . . . (Mother of Victim 2) on the divorce case while interviewing her regarding the alleged molestation in the case against Mr. Leal against Victim 1. . . . Mr. Polis would likely be considered to be counsel for the Son of the Defendant in his divorce proceeding.

The Mother of Victim 1 participated in the investigation by the police regarding the allegations of molest against Mr. Leal. Statements were given by the Mother of Victim 1, who is also the Grandmother of Victim 2.

Subsequently, after representation by Mr. Polis' office, the statements given by the Mother of Victim 1 and Grandmother of Victim 2 (that is the Wife of Mr. Leal) have changed.

. . . .

Joseph is a witness for the State, and Mr. Polis is representing him in a divorce action. Irene is a witness for the State, and Mr. Polis represents her in a restraining order proceeding and uses her as a direct witness in his defense.

. . . .

The Wife of Mr. Leal has already changed her answers regarding questions previously presented by the State. The State has now provided tapes and transcripts of earlier statements that she made prior to Mr. Polis being her counsel. Irene originally sought a divorce from the Defendant and recorded his address as "unknown fugitive" on August 1, 2005. However, she dismissed the Petition for Dissolution on October 7, 2005. Prior to this, Irene had supplied information to the State regarding her Daughter's reported sexual abuse that was allegedly admitted to her by the Defendant, Mr. Leal. Then Irene became allegedly scared that she too was going to be indicted for child neglect or abuse so she sought State's immunity, and Mr. Polis assisted her. On August 18, 2006, in an interview, she says she is recanting her statements of the sexual abuse after speaking with Mr. Polis. She further indicated that she thinks that the transcripts of the prior interview had been cut and pasted and that she was "ambushed" into incriminating her husband. Other circumstances have arisen regarding an interview with Victim 1 wherein she called the State and asked for an interview with the Wife of the Defendant, Irene, requesting that it be without Mr. Polis. The State held an interview at Mr. Polis' office that day. Irene arrived first and was represented by Mr. Polis. The transcript showed many interruptions and fervent discussions between the attorneys, which ultimately led to the State's filing this Motion.

Similar conflicts arise in the case involving the restraining order between Victim 1 and Irene.

Likewise, in the divorce case, it appears that custody of Victim 2 will be the primary issue and Mr. Polis would be advising the Father of Victim 2 regarding information that could influence both cases.

Pursuant to the above, the Court finds that there is a conflict of interest between Mr. Polis and his prior and present clients. Mr. Polis attempts to resolve this by a written waiver of potential conflict of interest signed by Mr. Leal, the Defendant, and Irene Leal, his Wife.

. . . .

At this time, the Court finds that the waivers and consents filed by Mr. Polis are general and open-ended and do not present to this Court a

reasonable likelihood that the clients will have understood the material risk involved.

(Doc. 15, Ex. A at 1-5.)

The appellate court affirmed the trial court's ruling:

> ¶ 7 The trial court found that counsel's representation of Leal's wife and son in various civil matters created an actual conflict. In his briefing, Leal appeared to concede that such a conflict existed, but clarified at oral argument that his intention had been to concede only that a "potential conflict" existed. Nevertheless, given the multiple representations that Leal's trial counsel chose to pursue, and the incomplete nature of the waiver, we conclude that the trial court was correct in finding that he had created an actual conflict. We must, therefore, determine whether the subsequent disqualification of counsel was the appropriate remedy.
>
> ¶ 8 Leal now argues the court had remedies other than disqualification of his counsel of choice and could have, for example, "referr[ed] the matter to the respective civil court judges." But the trial judge only had control over the case before him. And Leal does not cite any authority for the proposition that the judge was obligated to attempt to resolve the conflict in this manner first.
>
> ¶ 9 Leal contends his case is factually distinguishable from *Wheat.* In that case, the attorney the defendant wanted to hire was already representing his codefendants, and the trial court ruled that the conflict required it to refuse the defendant's request to substitute counsel, even though all parties had waived the conflict. *Wheat,* 486 U.S. at 162-64. Leal notes that his attorney's conflict arose after the commencement of the prosecution, that the government is not involved in the civil matters, and that the parties in the civil case have no Sixth Amendment right to counsel. Although he is correct, these factual distinctions do not materially distinguish this case from *Wheat.* The trial court here was [sic] faced a conflict, declined the partial waiver of the conflict, and disqualified counsel, as *Wheat* provides. *See id.*
>
> . . . .
>
> ¶ 11 The fact that continued representation by Leal's counsel of choice might not have constituted ineffective assistance does not mean the trial court erred by removing counsel due to the conflict. Furthermore, Leal provides no authority to support his assertion that because a defendant has the right to counsel of his choice, the remedy for an actual conflict would be something other than disqualification.
>
> ¶ 12 Where possible, the trial court has the responsibility to respect and facilitate a defendant's wishes regarding who represents him. *See Wheat,* 486 U.S. at 159-60, 164; *State v. Cromwell,* 211 Ariz. 181, ¶ 31, 119 P.3d 448, 454 (2005). And had the trial court made a better factual record with respect to its determination that an actual conflict existed and that Leal's counsel of choice needed to withdraw, it would have helped our review. Nevertheless, we cannot conclude the court abused its discretion in ordering Leal's counsel of choice to withdraw.

(*Id.*, Ex. O at 3-7.)

Analysis

The Sixth Amendment right to counsel includes the right, for a defendant that does not require appointed counsel, to select the counsel of his choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). Erroneous deprivation of this right is structural error, which is not subject to harmless error analysis. *Id.* at 150-52. However, trial courts have "wide latitude in balancing the right to counsel of choice against the needs of fairness." *Id.* at 152. Thus, courts:

> must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of an actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgement of the trial court.

Wheat v. United States, 486 U.S. 153, 164 (1988). Further, trial courts have "substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential conflict exists which may or may not burgeon into an actual conflict." *Id.* at 163.

The trial court thoroughly discussed the factual issues surrounding Mr. Polis's multiple representations, in which he represented Leal in the criminal matter as well as his wife and son in two family-related civil matters. The Court found an actual conflict because the wife and son were both witnesses for the State in the criminal matter. Leal's wife provided damaging testimony in Leal's criminal case. Additionally, statements given by Leal's wife to the State before and after her representation by Leal's counsel were not consistent and she said she was recanting her earlier statements (in which she reported that Leal admitted sexually abusing Victim 1).

The Court finds the facts recounted extensively by the trial court are sufficient to establish an actual conflict on the part of Leal's retained counsel. As noted by the appellate court, the judge presiding over the criminal case had no jurisdiction to have counsel removed from the civil matters; he had authority only to address the conflict

presented in the case before him. The trial court had "wide latitude" to reject the waivers of the conflict and it is justified when there is an actual conflict, such as found in this case. *Wheat*, 486 U.S. at 162 ("where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver"). Further, a defendant's Sixth Amendment rights are not violated because a different court could have justified the opposite conclusion; the evaluation of the particular circumstances is left to the trial court. *See id.* at 164. In light of the controlling Supreme Court law it was not objectively unreasonable for the state court to conclude that removal of Leal's retained counsel did not violate his Sixth Amendment rights.

Claim 3

Leal alleges his constitutional rights (due process, compulsory process, and to present a defense) were violated by the trial court's denial of his request to present one of his sisters as a rebuttal witness on the State's theory that flight demonstrated guilt.

The appellate court found no fundamental error:

> Even assuming, without deciding, that the court's decision amounted to fundamental error, we conclude it was not unfairly prejudicial.
>
> ¶ 17 "[T]he showing required to establish prejudice . . . differs from case to case," *id.* ¶ 26, and we evaluate the prejudicial effect "in light of the entire record," *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993). At trial, L. gave detailed testimony about Leal's acts against her. L. also testified that Leal had made her promise not to tell anyone what he had done. Additionally, during the telephone call, Leal stated that he would "disappear" and that "[his] life [was] over," and he said "I'm out." He admitted the allegations were true and what he had done was "not normal . . . [was] crazy[, and] . . . insane." Given the overwhelming evidence of Leal's guilt, we cannot find that precluding testimony rebutting the allegation of flight unfairly prejudiced Leal.

(Doc. 15, Ex. O at 8-9.)

Even if the trial court erred in precluding this evidence, Leal must demonstrate prejudice to obtain habeas relief in this Court:

> [H]abeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637, 113 S. Ct. 1710 (quoting *United States v. Lane*, 474 U.S. 438, 449, 106 S. Ct. 725, 88 L.Ed.2d 814 (1986)). Under this test, relief is proper only if the federal *2198 court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436,

> 115 S. Ct. 992, 130 L.Ed.2d 947 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Brecht, supra,* at 637, 113 S. Ct. 1710 (internal quotation marks omitted). The *Brecht* standard reflects the view that a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon v. Coleman,* 525 U.S. 141, 146, 119 S. Ct. 500, 142 L.Ed.2d 521 (1998) (*per curiam*).

Davis v. Ayala, 135 S. Ct. 2187, 2197-98 (2015).

Immediately after the confrontation call, Irene found a note at the house indicating Leal had gone for food. His shaving kit was gone and he was next located in Texas. Defense counsel represented during trial that Leal's sisters, Romo and Rodriguez, would each testify that "she called the defendant about his mother being sick in late July. She doesn't remember the precise date. The defendant said that he could be out there in a few days. A few days later he responds there until he got arrested a few weeks later." (Doc. 34, Ex. ZZZ at 37.) The testimony of Romo or Rodriguez would not have explained Leal's note suggesting he was not leaving the area. More critically, this evidence does not bear directly on the offenses against the victim. There was more than sufficient evidence of Leal's guilt aside from the evidence of flight – the victim's testimony, evidence corroborating her testimony, and the confrontation call. After review of the entire trial, the Court does not have grave doubt that the absence of testimony from one of Leal's sisters had substantial effect on the jury's verdict. The state court's denial of this claim was not objectively unreasonable.

Claim 4

Leal alleges (a) trial counsel was ineffective because he failed to (i) defend against the prosecution's flight theory by objecting orally and in writing to the jury instruction, presenting relevant evidence, and filing a special action; (ii) challenge admission of the confrontation call on constitutional grounds; (iii) secure rebuttal witnesses relevant to his presence in Texas; (iv) investigate the victim's mental capabilities; (v) present the rebuttal testimony of Patricia Romo and Perlita Rodriguez; (vi) challenge the improper testimony of Wendy Dutton; and (vii) protect Leal's speedy trial rights. He also alleges (b) appellate counsel was ineffective for failing to raise claims based on (ii) and (v)–(vii).

Subsection (iii) appears to be subsumed within subsection (v); therefore, the Court will address them together.

Standard for IAC claims

IAC claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. *Id.* at 687-88.

The inquiry under *Strickland* is highly deferential, and "every effort [must] be made 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." *Id.* at 689. Thus, to satisfy *Strickland's* first prong, deficient performance, a defendant must overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* "A failure to raise untenable issues on appeal does not fall below the *Strickland* standard." *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002).

Because an IAC claim must satisfy both prongs of *Strickland*, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." 466 U.S. at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed"). A petitioner must affirmatively prove prejudice. *Id.* at 693. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Claim 4(i)

Leal alleges trial counsel was ineffective for failing to defend against the prosecution's flight theory by objecting to the proposed jury instruction or the instruction as modified by the court. In ruling on this claim, the PCR court held:

> Had trial counsel objected to the instruction, the Court would likely still have given it because the facts supported it. Soon after the confrontation call, Petitioner left a note stating that he was going to get something to eat and that he would return shortly, but instead left the state and was ultimately apprehended in Texas. Given the proximity in time to the confrontation call, in which Petitioner made such statements as, "[b]ut anyway, my life is over so what the ff-, I'm a, I'm out, I'm out," and the deceptive note Petitioner left, leaving the state certainly invites suspicion of guilt sufficient to justify giving the instruction. The instruction itself did not direct the jury to assume that Petitioner left the state because he was guilty, but simply permitted the jury to consider it in light of the evidence presented. Thus, trial counsel's failure to object to the flight instruction did not prejudice Petitioner.

(Doc. 23 at 8.)

Prior to opening statements, counsel and the trial court discussed the evidence of Leal's flight from Arizona and a possible jury instruction on that topic. (Doc. 33, Ex. WWW at 4-8.) Defense counsel objected to the admission of flight evidence or reference to it during opening arguments, requesting an independent hearing on the evidence. (*Id.* at 5-7.) The trial court stated it would wait until later in the trial to decide whether to issue a flight instruction to the jury but would allow limited argument on the topic in openings. (*Id.* at 6-7.) The next day, the trial court overruled defense counsel's objection to admission of evidence of flight but expressed hesitation about a flight instruction. (*Id.*, Ex. XXX at 9, 10-11.) After the close of evidence, defense counsel objected to both argument on the issue of flight and a jury instruction on that topic. (Doc. 34, Ex. ZZZ at 84-87.) The trial court allowed evidence of flight over counsel's objection but continued to express concern about the flight instruction as proposed by the prosecution. (*Id.* at 90 (noting that flight instruction used to be a limiting instruction not something requested by the State).) Upon further inquiry by the Court, defense counsel stated that he would request a limiting instruction that stated simply, "that flight, by itself, is not enough to prove guilt. It must be considered with other evidence." (*Id.* at 91.) The court ultimately gave the following instruction:

> The flight of a person after being accused of a crime is not sufficient, in itself, to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt. The weight to which such circumstance is entitled is a matter for the jury to determine.

(*Id.* at 97.)

Leal argues counsel should have presented evidence to the trial judge that prior judges had released him pending trial and allowed him to travel to Texas, and that he was present for all required court appearances. (Doc. 1 at 14-15.) The trial court was aware of Leal's pretrial release. Further, that evidence had no direct bearing on whether Leal fled after the confrontation call prior to being charged with a crime. Even if counsel had argued this evidence there is not a reasonable probability the court would have denied admission of the prosecution's evidence of flight.

Defense counsel objected to argument, admission of evidence, and an instruction regarding flight more than once. Only after the trial court determined it would allow the prosecution to present, and argue about, evidence of flight, did trial counsel stop objecting to an instruction. Therefore, he was not ineffective for failing to object. There is no reason to believe the trial court would have given more weight to counsel's objection if he had put it in writing, as argued by Leal. Further, as found by the PCR court, if counsel had continued to object there is not a reasonable probability that no flight instruction would have been given.

Once the trial court admitted, and allowed argument on, the flight evidence, it was reasonable for counsel to mitigate the impact by acquiescing to an instruction advising the jury that guilt could not be based on flight alone. The instruction also informed the jury it was responsible to determine if flight was proven and, if so, the weight to which that evidence was entitled. Thus, the jury was reminded to treat evidence of flight the same as all other evidence presented at trial. (*See* Doc. 33, Ex. WWW at 12 (instructing the jury that it is their duty to determine the facts and apply the law to those facts to reach a verdict); Doc. 34, Ex. ZZZ at 97 (instructing the jury "to determine the importance to be given to the evidence regardless of whether it is considered direct or circumstantial").) It was not objectively unreasonable for counsel to consent to this instruction in light of the trial court's prior rulings on the flight evidence.

The PCR court's denial of this claim was not objectively unreasonable.

Claim 4(ii)

Leal alleges trial and appellate counsel failed to adequately challenge the constitutionality of admitting the recorded confrontation call. As set forth by the PCR court, Leal filed numerous pro se motions regarding the confrontation call. (Doc. 23 at 8-9.) The Court stated it would not rule on them unless appointed counsel adopted them, which he did not do. (*Id.* at 9.) The PCR court concluded Leal was not prejudiced by counsel's decision because the motions were without merit:

> Petitioner argues that the recording of the confrontation call violated Petitioner's Fourth Amendment rights because it constituted an illegal warrantless search and seizure. However, courts have held that recording a confrontation call does not violate the Fourth Amendment. *State v. Allgood*, 171 Ariz. 522, 831 P.2d 1290 (1992). Petitioner further argued that the confrontation call constituted a custodial interrogation. A "custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436 (1966). The confrontation call was not a custodial interrogation. During the confrontation call, Petitioner was not in custody, nor was he deprived of his freedom of action. He was in his own home and was free to end the call and leave his current location at any time.
>
> Finally, Petitioner argued that recording the confrontation call was illegal because Irene Leal did not consent to the recording of the confrontation call. Arizona law requires only one party's consent to record a phone call. A.R.S. § 13-3012(9). Although Petitioner argued in his motion that Irene Leal did not consent to the recording of the confrontation call, in a ruling dated April 28, 2006, the Court found that "the evidence demonstrates Irene Leal voluntarily agreed to participate in the confrontation call and knew it was being recorded."
>
> Because none of Petitioner's motions set forth any meritorious argument for suppressing the confrontation call and thus were highly unlikely to have been granted, he was not prejudiced by trial counsel's failure to file those motions on his behalf.

(*Id.*)

First, as found by the PCR court, the call at issue was not a custodial interrogation. Because Leal was on a phone in the privacy of his home and not questioned by an officer, his Fifth Amendment rights were not implicated by the call. *See Miranda*, 384 U.S. at 444. Second, the mere recording of a conversation, even by an agent of the police, does not violate the Fourth Amendment. *See United States v. Caceres*, 440 U.S. 741, 750-51 (1979). Third, as cited above, the trial court heard testimony and found that Irene Leal

consented to recording of the phone call, *see* Order at 2, *State v. Leal*, No. CR20053517 (Pima Cty. Super. Ct. filed May 1, 2006). *See supra* note 1. That finding is presumed correct. 28 U.S.C. § 2254(e)(1). Irene Leal's affidavit to the contrary, written after the fact (Doc. 28, Ex. Z), is not clear and convincing evidence to overcome the presumption. 28 U.S.C. § 2254(e)(1).

Leal has not established that any of the motions he contends trial counsel should have filed would have been meritorious. Similarly, appeal on these grounds did not have a reasonable probability of success. Therefore, the state court's denial of this claim was not objectively unreasonable.

Claims 4(iii) and (v)

Leal alleges trial counsel failed to secure and present the testimony of rebuttal witnesses Patricia Romo and Perlita Rodriguez (his sisters), as relevant to his presence in Texas after the confrontation call. Leal alleges appellate counsel was ineffective for failing to properly raise this claim on appeal. The PCR court denied the claim, finding that Leal was not prejudiced:

> Petitioner alleges that trial and appellate counsel were ineffective regarding the issue of two witnesses, Patricia Romo and Perlita Rodriguez, that Petitioner wished to present to rebut the State's contention that his departure from Arizona following the confrontation call was evidence of a guilty conscience. The trial court precluded these witnesses from testifying. Trial counsel did object, but not on constitutional grounds. On appeal, Petitioner's appellate counsel argued that precluding these witnesses violated several of Petitioner's constitutional rights. However, because trial counsel had not objected on constitutional grounds, the Court of Appeals reviewed only for fundamental error.
>
> Petitioner argues that trial counsel was ineffective for failing to subpoena Ms. Romo and Ms. Rodriguez and for not objecting to their preclusion on constitutional grounds, which would have permitted appellate counsel to argue the issue on constitutional grounds. Petitioner further argues that appellate counsel was ineffective for arguing the issue on constitutional grounds when no such objection had been made at trial, resulting in review only for fundamental error.
>
> In a letter dated December 30, 2010, appellate counsel concedes that his decision to argue the issue on a constitutional basis when it was not objected to on such basis below was an error, and states that he would be willing to admit fault in any future Rule 32 proceedings. The Petitioner does not state what constitutional arguments appellate counsel made or what arguments trial counsel made below.

> Regardless of the merit of any constitutional arguments that might have been made, Petitioner has not shown that had Ms. Romo and Ms. Rodriguez testified, there would have been a reasonable probability of acquittal. Their testimony did not bear directly on the facts of the alleged offense. Rather, the purpose of their testimony was to rebut the State's contention that Petitioner's departure from Arizona was not [sic] evidence of a guilty conscience. They would have testified about Petitioner's prior trips to Texas, the reasons for his trips to Texas, and statements made by Petitioner during his visits to Texas in order to show that Petitioner's was just one of Petitioner's [sic] typical trips to Texas and not an attempt to evade law enforcement. Countering this inference is the fact that Petitioner left immediately following the confrontation call even though there appears to be no evidence that he had been planning a trip previously, and the fact that Petitioner left a note seemingly intended to hide the fact that he was leaving for Texas.

(Doc. 23 at 10-11.)

As an initial matter, Leal argues that appellate counsel failed to present these constitutional claims. (Doc. 1 at 19.) However, as explained by the PCR court, appellate counsel argued that preclusion of these witnesses violated Leal's constitutional rights. Because no constitutional claim had been raised at trial, the appellate court reviewed the claim only for fundamental error. Thus, it appears Leal's contention is that appellate counsel did not argue the state law grounds upon which trial counsel relied. Regardless, this Court resolves the trial and appellate counsel claims on the same basis, prejudice.

As discussed above in Claim 3, Leal fails to establish actual prejudice arising from the absence of his sisters' testimony. There is not a reasonable probability that had either of his sisters testified at trial, he would have been acquitted. Defense counsel represented during trial that each of the witnesses would testify that "she called the defendant about his mother being sick in late July. She doesn't remember the precise date. The defendant said that he could be out there in a few days. A few days later he responds there until he got arrested a few weeks later." (Doc. 34, Ex. ZZZ at 37.) As pointed out by the PCR court, this does not undermine the evidence that Leal left town immediately after the confrontation call and left behind a note suggesting he was not leaving the area. Additionally, there was sufficient other evidence of Leal's guilt aside from the flight evidence – the victim's testimony, evidence corroborating her testimony, and the confrontation call. The state court's denial of this claim was not objectively unreasonable.

Claim 4(iv)

Leal alleges trial counsel failed to investigate the victim's mental capabilities in light of a car accident (occurring after the time of the abuse and before trial) in which she suffered a traumatic brain injury. Leal argues the relevance of the investigation would have been to determine if L.L.'s ability to recall had been affected by the injury.

Prior to the victim's testimony, defense counsel asked the trial judge if he was going to conduct a qualification of the victim. (Doc. 33, Ex. XXX at 18.) Counsel noted that the victim had been in a serious car accident and counsel could not interview her and had no way to investigate her ability to recollect past events. (*Id.* at 18-19.) The Court ruled that witnesses were presumed competent and he would not screen the witness. (*Id.* at 19.)

Counsel questioned L.L. on things she didn't remember or things she testified to at trial but did not mention in a prior interview. (Doc. 34, Ex. YYY at 109, 110, 111-12, 114, 117, 121, 122, 124-25, 129-30.) He also cross-examined L.L. about her recall of the events and the fact that she did not recall specifics of the nine times she alleged she was sexually abused by Leal. (*Id.* at 105-08.) Counsel moved for dismissal of Count 1, which charged continuous sexual abuse of a child, engaging in three or more acts of sexual conduct with a child under fourteen. Based on the victim's inability to provide any details about the first eight times she alleged Leal sexually abused her, the court granted counsel's motion to dismiss Count 1. (*Id.*, Ex. ZZZ at 83-84.)

The PCR court denied this claim finding that Petitioner was not prejudiced by counsel's actions:

> If trial counsel had used the accident at trial, it would have been to cast doubt on the credibility of the victim's testimony due to a possible diminishment of her recall abilities. In light of the fact that her testimony at trial was consistent with her prior statements, it is unlikely that the outcome of trial would have been different had trial counsel raised this issue. Any potential prejudice to Petitioner is further diminished by the fact that the victim's testimony was corroborated by other inculpatory evidence presented by the State.

(Doc. 23 at 10.)

Trial counsel extensively explored L.L.'s memory of the events and relied upon that testimony in successfully requesting dismissal of Count 1. Leal has not established prejudice arising from counsel failing to investigate any medical basis for L.L.'s recall abilities. Leal is required to affirmatively prove prejudice, which he has not done. The state court's denial of this claim was not objectively unreasonable.

Claim 4(vi)

Leal alleges trial counsel failed to challenge the testimony of Wendy Dutton based on her lack of necessary expertise and the irrelevance of her testimony. Leal also alleges that appellate counsel failed to raise this issue.

The PCR court noted that Dutton testified regarding "specific signs and symptoms of child abuse and disclosure issues associated with child victims." (Doc. 23 at 11.) The PCR court denied this claim:

> The conduct of trial counsel and appellate counsel did not fall below an objectively reasonable standard. Trial counsel did in fact file a Motion in Limine to Preclude Witness Wendy Dutton on September 6, 2007, raising the same issues Petitioner does now. Petitioner points to no alternative arguments that trial counsel should have made that he did not.
>
> Petitioner also has not shown that Appellate counsel fell below that standard. Appellate counsel determines which issues should be appealed. *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). Counsel need not raise every possible or even meritorious issue on appeal, and in fact, eliminating weaker arguments is part of effective appellate advocacy. *Id.* Petitioner has not shown that appellate counsel's decision not to raise the issue of Ms. Dutton's expert testimony on appeal was not a strategically sound decision not to pursue a weaker argument.
>
> Moreover, there is no indication that this argument would have succeeded on appeal. First, Petitioner argues that Wendy Dutton was not qualified to give expert testimony regarding the behaviors and motivations of child abuse victims. However, in *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (1996), the Court of Appeals found that Wendy Dutton was qualified to give expert testimony identifying and explaining behavior characteristics common to child sexual abuse victims. Second, Petitioner argues that Ms. Dutton's testimony was not relevant. However, testimony from Ms. Dutton regarding behaviors common to child abuse victims was clearly relevant to this case. If there were any unique circumstances making Ms. Dutton's testimony more or less applicable, appellate counsel could have reasonably concluded that they went to the weight and not the admissibility of Ms. Dutton's testimony.

(*Id.* at 11-12.)

As found by the PCR court, trial counsel filed a written motion to preclude Dutton's testimony because she lacked the requisite expertise and because it was irrelevant, Mtn in Limine to Preclude Witness Wendy Dutton, *Leal*, No. CR20053517 (filed Sept. 6, 2007). *See supra* note 1. The court held argument on the motion before denying it. (Doc. 32, Ex. RRR.; Minute Entry, *Leal*, No. CR20053517 (filed Oct. 10, 2007).) Therefore, trial counsel was not deficient for failing to challenge Dutton's testimony.

The appellate court adopted the PCR court's ruling agreeing that if appellate counsel had raised this issue there was not a reasonable probability it would have been successful. Therefore, appellate counsel was not deficient for failing to raise the claim and Leal was not prejudiced by that failure. *See Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) (failing to raise meritless claims on appeal is not ineffective); *Tuccio v. Ryan*, No. CV-12-565-TUC-DCB, 2014 WL 2048066, at *10 (D. Ariz. May 19, 2014) (finding no prejudice when state appellate court ruled claim would not have been successful if raised on appeal).

The state court's denial of this claim was not objectively unreasonable.

Claim 4(vii)

Leal alleges trial counsel failed to renew his argument for dismissal based on a violation of Leal's speedy trial rights. Leal also alleges appellate counsel failed to raise this claim. The PCR court set forth the following background facts:

> On December 14, 2007, the State moved to reset the trial date, which was scheduled for January 15, 2008. In response, trial counsel moved to dismiss for speedy trial violation. However, the trial court found extraordinary circumstances warranting continuation of the trial, vacated the January 15 date, and set the matter for a status conference for March 19, 2008. However, on March 11, 2008, trial counsel filed a Motion to Continue the status conference because he was scheduled to be out of town on March 19, 2008. Accordingly, the status conference was reset to March 27, 2008. At that time, the Court set the matter for trial on August 19, 2008. On August 1, 2008, trial counsel moved the Court to continue the status conference and trial because he had not yet been able to schedule an interview with the State's witness, Michelle Leal. The Court granted the motion, re-setting the trial and status conference on December 2, 2008. On November 17, 2008, trial counsel again moved to continue the status conference and trial because one of the defense witnesses would not be available on December

> 2. On November 25, 2008, the Court granted the Motion to Continue and set the status conference and trial for December 9, 2008.

(Doc. 23 at 12-13.) The PCR court found that trial counsel's actions were not objectively unreasonable because he did move to dismiss for a speedy trial violation. Counsel's failure to file a subsequent motion drafted by Leal was not objectively unreasonable. Further, the PCR court held that Leal failed to counter the presumption that appellate counsel's failure to include the issue was a sound strategic decision and there was not a reasonable probability that raising this issue would have resulted in a reversal of Leal's conviction. (*Id.* at 13.)

Leal does not contest the factual background as set forth by the PCR court, which is entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1). According to that timeline, counsel objected to continuing the trial from January to March 2008, based on a violation of Leal's speedy trial rights. The subsequent requests to delay trial were based on counsel's schedule, additional time needed by the defense for trial preparation, and the availability of a defense witness. Because counsel requested the extensions on Leal's behalf to allow counsel to be fully prepared for trial, it was not objectively unreasonable for counsel not to press a speedy trial violation. *See McNeely v. Blanas*, 336 F.3d 822, 827 (9th Cir. 2003) ("delay attributable to . . . tactical decisions by defense counsel will not bolster defendant's speedy trial argument.")

Under the circumstances of this case, there is not a reasonable possibility a motion or appeal based on a speedy trial violation would have been successful. The appellate court adopted the PCR court's ruling agreeing that if appellate counsel had raised this issue on appeal there is not a reasonable probability it would have been successful. Therefore, appellate counsel was not deficient for failing to raise the claim and Leal was not prejudiced by that failure. *See Wildman*, 261 F.3d at 840 (failing to raise meritless claims on appeal is not ineffective); *Tuccio*, 2014 WL 2048066, at *10 (finding no prejudice when state appellate court ruled claim would not have been successful if raised on appeal). The state court's denial of this claim was not objectively unreasonable.

EXPANSION OF THE RECORD

Leal asks the Court to expand the record to include additional parts of the state court record. (Doc. 20 at 6-7.) The Court ordered Respondents to supplement the record and now has all parts of the record it finds necessary to resolution of the case.

CONCLUSION AND RECOMMENDATION

Claims 1, 3 and 4 are properly exhausted but fail on the merits. Claims 2 and 5-12 are procedurally defaulted; Leal has not established cause and prejudice or a fundamental miscarriage of justice to overcome the defaults. Claim 13 is not cognizable in a federal habeas petition. Based on the foregoing, the Magistrate Judge recommends the District Court deny the habeas petition in entirety.

Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of the Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: **CV 14-2271-TUC-JGZ.**

Dated this 9th day of June, 2017.

Honorable Lynnette C. Kimmins
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 1 2019

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

MIGUEL DANIEL LEAL, Petitioner-Appellant, v. CHARLES L. RYAN, Warden and ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 17-16897 D.C. No. 4:14-cv-02271-JGZ District of Arizona, Tucson ORDER

Before: TROTT and MURGUIA, Circuit Judges.

Appellant's motion for extension of time and to exceed the page limit (Docket Entry No. 16) is granted.

Appellant's December 26, 2018, filing is construed as a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 17).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

Appendix D

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