Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 15 2020

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

DIMITRI ROZENMAN,

Petitioner-Appellant,

v.

DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Respondents-Appellees,

and

CHARLES L. RYAN,

Respondent.

No. 19-17561

D.C. No. 2:18-cv-01789-MTL
District of Arizona, Phoenix

ORDER

Before: CANBY and CALLAHAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 3 & 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

DENIED.

Appendix A

19-17561

Dimitri Rozenman, #253132
ASPC - ARIZONA STATE PRISON COMPLEX - TUCSON
Santa Rita Unit
P.O. Box 24401
Tucson, AZ 85734-4401

Appendix B

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dimitri Rozenman,

Petitioner,

v.

David Shinn[1], et al.,

Respondents.

No. CV-18-01789-PHX-MTL

ORDER

Pending before the Court is Magistrate Judge John Boyle's Report and Recommendation ("R & R") (Doc. 56), recommending that the Amended Petition for Writ of Habeas Corpus (Doc. 5) be denied and dismissed with prejudice. Petitioner filed an Objection to the R & R (Doc. 60), in which he also requests a Certificate of Appealability (Doc. 61). Respondents did not file a Response. After considering the R & R (Doc. 56), the Amended Petition (Doc. 5), the arguments raised in Petitioner's Objection (Doc. 60), and Respondents' Limited Answer to Petition for Writ of Habeas Corpus (Docs. 13 and 14), the Court will overrule the Objection and adopt Judge Boyle's recommendation for dismissal of the Petition.[2]

I. STANDARD OF REVIEW

When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254, "it must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Coleman v.*

[1] David Shinn, Director of the Arizona Department of Corrections, is substituted for Charles L. Ryan, former Director of the Arizona Department of Corrections, pursuant to Fed. R. Civ. P. 25(d).

[2] On October 17, 2019, Petitioner filed a "Notice Re: Objections to the Magistrate's Report and Recommendation" (Doc. 63) and another Motion for Certificate of Appealability (Doc. 64). These motions are untimely and will not be considered.

Appendix B

Thompson, 501 U.S. 722, 730 (quoting 28 U.S.C. § 2254). The Court may not grant a writ of habeas corpus to a state prisoner on a claim adjudicated on the merits in state court proceedings unless the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal Law; or unless the state court decision 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). A state court's decision is "contrary to" clearly established federal law if it applies a rule that contradicts the governing law set forth in Supreme Court cases or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003). If more than one state court has adjudicated a claim, the Court must analyze the last reasoned decision by a state court to determine if the state's denial of relief on the claim was clearly contrary to federal law. *See Barker v. Fleming*, 423 F.3d 1085, 1091-92 (9th Cir. 2005). Further, this Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman*, 501 U.S. at 729. This rule applies whether the state law ground is substantive or procedural. *See id.* (citing cases).

When reviewing a Magistrate Judge's R & R, this Court reviews de novo those portions of the report to which an 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). When reviewing a habeas claim, the federal courts must afford great deference to the state court's rulings with regard to issues raised in the petitioner's federal habeas action. *See Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (noting the "highly deferential" standard for evaluating state-court rulings, which demands that "state-court decisions be given the benefit of the doubt"). A determination of factual issues made by a state court shall be presumed to be correct and the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000).

II. PETITIONER'S FACTUAL OBJECTIONS

The R & R sets forth the following facts, which were taken directly from the Arizona Court of Appeals' memorandum decision affirming Petitioner's convictions:

> A grand jury indicted [Petitioner] in June 2009 on one count of conspiracy to commit first-degree murder, and one count of criminal damage of between $2,000 and $10,000, a domestic violence offense, charges stemming from damage to the vehicles of his ex-wife and her family and a plot to murder them. Following a trial in 2010, a jury convicted [Petitioner] of the charged offenses. The trial court granted a new trial on the ground that the state had failed, albeit inadvertently, to properly disclose to [Petitioner] one of the surveillance recordings of a February 13, 2009 meeting to discuss the murder conspiracy, the so-called Hawk recording.[3]
>
> . . .
>
> The trial court later denied [Petitioner]'s motion for new trial, which raised numerous issues relating to the four-month delay by police in impounding the recordings of surveillance and a confrontation call, and the admission of those and other recordings at trial. The trial court found it had no jurisdiction to decide [Petitioner]'s late-filed motion to vacate judgment, in which [Petitioner] argued that the testimony before and at trial of the investigating officers showed that they conspired to obstruct justice by deliberately concealing the existence of the Hawk recording. The court concluded, however, that if it had jurisdiction over the motion to vacate judgment, it would deny it.
>
> . . .
>
> The evidence demonstrated that in 2008 [Petitioner] hired L.N. at his cigar business. L.N. testified that [Petitioner] regularly complained about his wife and was angry she refused to sign a postnuptial agreement to accept $50,000 in the event of a divorce. L.N. also stated that [Petitioner] told him that if he and his wife "were still back in Russia, that she would be dead or they would kill her."
>
> [Petitioner] served his wife with divorce papers in March 2008, and directed L.N. to move her belongings to her parents' house. One night in October 2008, L.N. saw [Petitioner] puncture the tires of three vehicles belonging to his wife's family, and pour sugar into the gas tank of one of them. The repairs

[3] Petitioner was convicted by a jury at the second trial. After that jury returned its verdict, Petitioner moved for a new trial, which the trial court denied. *See State v. Rozenman*, 1 CA-CR 13-0458, 1 CA-CR 13-0898, ¶¶ 6, 7 (Ariz. App. Jan. 29, 2015) (mem.) (attached as Doc. 14-9, Exhibit DDD).

cost in excess of $2,000.

When the divorce decree ordering [Petitioner] to pay his wife approximately $500,000 was issued in late January 2009, [Petitioner] was "incoherent and really upset," and told L.N. he wished his ex-wife were dead. Sometime after that, L.N. testified, [Petitioner] approached him and proposed a plan whereby L.N. would hire people to force his ex-wife to sign a paper agreeing to relinquish all money awarded in the divorce decree, and then kill her and her family. [Petitioner] offered to pay L.N. $70,000 in installments, and later gave L.N. $5,000 in cash.

L.N. ultimately told [Petitioner]'s ex-wife of the plot, and agreed to allow police to hide video and audio recorders on him for a meeting L.N. arranged with [Petitioner] for the night of February 13, 2009. During the meeting, L.N. told [Petitioner] that his ex-wife had signed the documents, and she and her family had been bound up "execution style" and had been beaten. L.N. told [Petitioner] he was not going to give [Petitioner] "details of how they're gonna murder them," and talked about "hit guys," and when they would "go and shoot them people." [Petitioner] gave L.N. $500 in cash to get the hit men out of town. [Petitioner] indicated by nodding that all he wanted L.N.'s men to do was kill the ex-wife and her family, and he would handle disposing of the hit men. During that meeting, [Petitioner] never told L.N., "you're scaring me," threatened to call police, or called him crazy.

In a recorded confrontation call six days later, L.N. told [Petitioner] that his ex-wife and her parents were dead, to which [Petitioner] immediately asked L.N. when he was going to return to work. [Petitioner] did not call 9–1–1 that night to report that he had just been told his ex-wife and her family had been murdered.

When police called on [Petitioner] at his girlfriend's apartment early the next morning and told him about the "murders," and repeatedly asked him if he knew who might have done this, [Petitioner] never mentioned L.N. Police arrested [Petitioner] and served him later that day with a protection order from his ex-wife, and told him that his ex-wife and her family were safe. At that time, [Petitioner] told police that he was concerned that hit men hired to commit the murders might come looking for him.

(Doc. 60 at 1-3) (quoting *State v. Rozenman*, 1 CA-CR 13-0458, 1 CA-CR 13-0898, ¶¶ 5, 7, 10-15 (Ariz. App. Jan. 29, 2015) (mem.).

Petitioner makes numerous specific objections to the factual findings in the R & R.

1. First, Petitioner objects to the R & R's assertion that Petitioner is Russian,

claiming instead that he is "Ukrainian from Kiev, Ukraine." (Doc. 60 at 1.) The R & R, however, did not state that Petitioner was Russian. The R & R recounts testimony from L.N. wherein *L.N. said* "[Petitioner] told him that if [Petitioner] and his wife 'were still back in Russia, that she would be dead or they would kill her.'" (Doc. 56 at 2.) Though irrelevant, Petitioner's first factual objection is overruled.

2. Second, Petitioner objects to the factual assertion in the R & R that "[Petitioner] offered to pay L.N. $70,000 in installments, and later gave L.N. $5,000 in cash." (Doc. 60 at 1.) The sole basis for Petitioner's objection is that this factual finding was derived from the "uncorroborated testimony of [L.N.]." (Doc. 60 at 1-2.) It is not the province of the federal habeas court to re-weigh the evidence or re-determine the credibility of witnesses whose demeanor has been observed by the finder of fact. *See, e.g., Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (stating "28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."). The record amply supports the factual finding that Petitioner offered to pay L.N. $70,000 in installments and later gave L.N. $5,000 in cash, and Petitioner has not met his burden of demonstrating by clear and convincing evidence that the factual finding is incorrect. *See* (Doc. 13-5, Exhibit Q, R.T. 03/05/2013, at 133, 140) (L.N. testifying that Petitioner offered him $70,000 for the "whole project" and gave him $5,000).

3. Third, Petitioner objects to the factual finding that he "gave L.N. $500 in cash to get the hit men out of town." (Doc. 60 at 2.) For this objection, Petitioner references his Amended Habeas Petition, which challenges this factual finding because it was "based on the uncorroborated testimony of [L.N.]." (Doc. 60 at 2) (citing (Doc. 5 at 25).) The Court will not re-determine credibility of L.N. The record amply supports this factual finding and Petitioner has not met his burden of demonstrating by clear and convincing evidence that it is incorrect. *See* (Doc. 13-5, Exhibit Q, R.T. 03/05/2013, at 164) (L.N. testifying that Petitioner gave him $500 to get the hit men back to Kentucky).

4. Fourth, Petitioner objects (Doc. 60 at 2) to the factual finding that, during a

recorded conversation with L.N., Petitioner "indicated by nodding that all he wanted L.N.'s men to do was kill the ex-wife and her family, and he would handle disposing of the hit men." Petitioner asserts L.N. actually testified that Petitioner had only nodded in agreement to two of L.N.'s statements, neither of which had to do with Petitioner agreeing to kill the hit men. (Doc. 60 at 2.) The record belies Petitioner's assertion. At trial, L.N. testified on direct examination that Petitioner nodded in agreement to L.N.'s statement that Petitioner would have somebody else "take out" the alleged hit men. (Doc. 13-5, Exhibit Q, R.T. 03/05/2013, at 165, 167.) Petitioner, who represented himself, asked L.N. numerous questions on cross-examination about the statements to which Petitioner nodded during their recorded conversation. (Doc. 13-8, Exhibit V, R.T. 03/18/2013, at 117-124.) And L.N. consistently testified that Petitioner nodded in agreement to L.N.'s statement that Petitioner would "take care of" the hit men. (*Id.* at 122, 128.) Petitioner has not met his burden of showing by clear and convincing evidence that this factual finding is incorrect.

5. Fifth, Petitioner objects (Doc. 60 at 2) to the factual finding that "[d]uring the meeting [with L.N., Petitioner] never told L.N. 'you're scaring me,' threatened to call police, or called him crazy." He challenges this factual finding by disputing the reliability of the recordings, which were played for the jury. Again, it is not the province of the federal habeas court to re-weigh the evidence or re-determine the credibility of witnesses. Petitioner has not met his burden of showing that this factual finding is incorrect.

6. Sixth, Petitioner objects (Doc. 60 at 2) to the factual finding that when L.N. told Petitioner in a recorded confrontation call that Petitioner's ex-wife and her parents were dead, Petitioner asked L.N. when he was going back to work instead of calling 911 to report that his ex-wife and her family had been murdered. Petitioner challenges this factual finding by repeating his dispute about the reliability of the recordings. For the reasons stated above, the Court will not reweigh the credibility of the evidence. Petitioner has not met his burden of showing that this factual finding is incorrect.

7. Seventh, Petitioner objects (Doc. 60 at 2) to the factual finding that Petitioner told police after he was arrested and served with a protection order that "he was concerned

that hit men hired to commit the murders might come looking for him." *See* (Doc. 13-10, Exhibit Y, R.T. 03/25/2013, at 76) (detective testifying about Petitioner's statements). The basis of Petitioner's objection is the absence of a recording to corroborate the detective's statements at trial. (Doc. 60 at 3.) Petitioner has not met his burden of demonstrating by clear and convincing evidence that this factual assertion was incorrect; the record amply supports it and the Court will not engage in any redetermination of the detective's credibility.

8. Eighth, Petitioner objects to the R & R because it fails to mention that "on recordings of surveillance Petitioner's responses to have his ex-wife murdered are entirely inaudible." (Doc. 60 at 3.) The R & R adequately clarifies that Petitioner "indicated by nodding." (Doc 56 at 2.) Petitioner's objection is meritless.

9. Ninth, Petitioner objects to the R & R because it "fails to mention that there isn't a single piece of evidence that cannot be not attributed to malfeasance of the officers." (Doc. 60 at 3.) Petitioner's objection again invites the Court to reweigh the credibility of witnesses and the evidence, which the Court declines to do.

10. Tenth, Petitioner asserts that the R & R "fails to acknowledge that there is more to this story than meets the eye." (Doc. 60 at 3.) In this objection, he points to "evidence of collusion" between L.N. and his ex-wife, which the jury already rejected when it convicted him. *See* (Doc. 14-6, Exhibit PP, R.T. 04/25/2013, at 18) (Petitioner arguing to the jury that L.N. and his ex-wife framed him). The Court will not reweigh the credibility of the witnesses or the evidence. Petitioner has not met his burden of demonstrating by clear and convincing evidence the facts outlined in the R & R are incorrect.

11. Eleventh, Petitioner objects to the procedural history outlined in the R & R because it: (1) "does not clarify that no expert witness testimony was presented on direct appeal" (Doc. 60 at 3); (2) because it "omits that Petitioner requested" in his Rule 32[4] Petition to present testimonies of "experts" regarding the applicability of Phoenix Police

[4] Ariz. R. Crim. P. 32.

Department's Operations Order 8.1 to undercover recordings (Doc. 60 at 4); (3) because it omits the fact that Petitioner presented the Rule 32 court with an affidavit explaining "how easily each one of the recordings could have been altered" (*id.*); and (4) because it omits the fact that Petitioner requested this Court to either take judicial notice of Order 8.1 or hold an evidentiary hearing regarding its application. (Doc. 60 at 5). As revealed below, these procedural facts are irrelevant to the Court's federal habeas review and the Court will not amend the R & R to include them.

After de novo review of the factual objections raised in Petitioner's Objection (Doc. 60), the Court agrees with the findings of fact made by the Magistrate Judge in his R & R. However, the Court adds the following factual recitation from paragraph 6 of the Arizona Court of Appeals' memorandum decision, affirming Petitioner's convictions, into its Order adopting the R & R:

> [Petitioner] represented himself at the second trial, and a jury again convicted him of the charged offenses. The trial court sentenced [Petitioner] to life with possibility of parole after 25 years for the conviction on conspiracy to commit first-degree murder, and a concurrent sentence of 2 years on the criminal damage conviction.

See Rozenman, 1 CA-CR 13-0458, 1 CA-CR 13-0898, ¶ 6 (attached as Doc. 14-9, Exhibit DDD).

III. DISCUSSION OF PETITIONER'S AMENDED HABEAS PETITION

The Amended Habeas Petition (Doc. 5) raises six grounds for relief: (1) Petitioner alleges that his Fourteenth Amendment rights were violated due to a failure to preserve evidence; (2) he claims that his Fourteenth Amendment rights were violated when the Phoenix Police Department committed a *Brady*[5] violation; (3) he argues that his Fourteenth Amendment rights were violated based on "the Law of the Case Doctrine"; (4) he claims that his Sixth Amendment rights were violated based on the "Compulsory Process Clause"; (5) he alleges that his Fourteenth Amendment rights were violated based on the results of a "Professional Service Bureau Internal Affairs" investigation; and (6) he asserts that his Fourteenth Amendment rights were violated when the prosecutor used perjured testimony.

[5] *Brady v. Maryland*, 373 U.S. 83 (1963).

Except for various arguments raised by Petitioner in Ground Three, which the Magistrate Judge found were procedurally defaulted,[6] the R & R concludes that the Petition should be dismissed for lack of merit. (Doc. 56 at 16-17, 23.) Petitioner objects (Doc. 60) to the R & R's conclusions on Ground One, Two, and Four. The Court addresses each objection in turn.

A. Ground One—Non-Preservation of Evidence in Bad Faith

In Ground One of his Amended Habeas Petition, Petitioner alleged that his Fourteenth Amendment rights were violated by the State's failure to preserve the recordings of conversations between him and L.N. (Doc. 5 at 6.) Petitioner argues that there was "bad faith" in the non-preservation of the recordings, which he maintains is proved by the detective's failure to properly impound the recordings of Petitioner's conversations with L.N., and by the State's concealment of Phoenix Police Department's Order 8.1 (which Petitioner claims obligated the detective to impound the recordings on the day they were made). (Doc. 5 at 6, 39-40.) The R & R addresses Ground One on the merits, finding that: (1) Petitioner's claim "that the police failed to follow their policies is not a cognizable claim on habeas review" (Doc. 56 at 10); and (2) the state-court's Post-Conviction Relief ("PCR") ruling was not an unreasonable application of federal law under *Youngblood*[7] because Petitioner presented no evidence that the recordings were actually tampered with or destroyed. Petitioner raises the following objections to the R & R's disposition of Ground One.

---

[6] A state prisoner must exhaust a federal habeas claim in the state courts before the District Court may grant relief on the merits of the claim. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). To properly exhaust a federal habeas claim, the petitioner must fairly present the claim to the state's highest court in a procedurally correct manner. *Rose v. Palmateer*, 395 F.3d 1108, 1110 (9th Cir. 2005). In non-capital cases arising in Arizona, the "highest court" test of the exhaustion requirement is satisfied if the petitioner presented his claim to the Arizona Court of Appeals, either on direct appeal or in a petition for post-conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). The R & R concludes that Petitioner's "Law of the Case" arguments under Ground Three were not presented in the state courts and therefore are procedurally defaulted. (Doc. 56 at 17.) Petitioner does not object to this finding, and the Court therefore adopts this portion of the R & R without further analysis.

[7] *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (failure by the government to preserve potentially useful evidence constitutes a denial of due process of law if a criminal defendant can show bad faith on the part of the police).

1. Petitioner objects (Doc. 60 at 5-6) to the R & R's finding (Doc. 56 at 10) that Petitioner's claims regarding the detective's alleged failure to follow policies and the alleged concealment of such policies are not cognizable claims on habeas review. Petitioner argues that this finding misstates his argument. According to Petitioner, his arguments about the detective's alleged failure to follow policies and the alleged concealment of the policies were meant to "prove bad faith" under *Youngblood*, not to stand alone as a substantive argument. (Doc. 60 at 5.) Because the R & R additionally addresses Petitioner's arguments in the context of "proving bad faith" under *Youngblood* (*see* Doc. 56 at 10-12), Petitioner's objection is overruled.

2. Petitioner additionally objects to the R & R's ruling on Ground One because he argues that it mischaracterizes his claim about the policies as a state-law claim. (Doc. 60 at 6.) As discussed above, the sole claim characterized in the R & R as a state-law claim is Petitioner's assertion that the officers failed to follow their policies. (Doc. 56 at 10.) To the extent Petitioner raised an independent claim regarding the officers' adherence to departmental policies, the Court agrees that such a claim is not cognizable on federal habeas review. The objection is overruled.

3. As a threshold matter, the R & R finds that the state-court on PCR review properly rejected Petitioner's *Youngblood* claim because Petitioner failed to prove that any evidence was destroyed. (Doc. 56 at 11.) Petitioner maintains in his Objection (Doc. 60 at 6) that the R & R incorrectly states the holding of *Youngblood*, and that *Youngblood* does not require the criminal defendant to prove that the destroyed evidence had apparent exculpatory value before it was destroyed. (Doc. 60, at 6.) Petitioner's objection misses the mark. As the R & R correctly identifies, without proof of destroyed (or non-preserved) evidence, *Youngblood* is inapposite. The objection is overruled.

4. The R & R references Petitioner's argument about tampered evidence, which he raised on direct appeal and in Rule 32 post-conviction proceedings, to show why Petitioner's argument about "bad faith" was irrelevant. (Doc. 56 at 11.) Petitioner's objects to the R & R's reference to Petitioner's claim about tampered evidence because

Petitioner maintains that he abandoned that argument in earlier proceedings. (Doc. 60 at 6.) Because the non-existence of tampered or destroyed evidence was crucial to the state-court's *Youngblood* analysis, the R & R properly addresses "tampered evidence." The objection is overruled.

5. Petitioner claims in his fifth objection to the R & R's ruling on Ground One that the R & R incorrectly interprets *Youngblood* to require proof of destruction of evidence. (Doc. 60 at 6-7.) Because a *Youngblood* analysis is only triggered where the defendant can point to some "loss of evidence," however—which may occur where the government fails to preserve evidence *or* destroys it, *see Youngblood*, 488 U.S. at 57—the R & R properly concludes that the state-court's PCR ruling was not an unreasonable application of clearly established federal law. (*See* Doc. 56 at 11) (quoting Doc. 14-11, Exhibit NNN, at 113) (state-court denying relief on Petitioner's *Youngblood* claim because it found that "[a]t no time has [Petitioner] been able to establish...the failure to preserve evidence."). The objection is overruled.

6. In finding that the state court properly found no proof of lost evidence, the R & R notes that "[b]oth the State's and Petitioner's forensic experts testified that there was no evidence of tempering in respect to the recordings." (Doc. 56 at 12.) Petitioner objects to this factual finding, asserting (Doc. 60 at 7) that the State's audio expert "impeached himself [on cross-examination] by admitting that in 4 months['] time all of the recordings *could* have been altered and the Hawk recording, if altered, would have wrong dates, and that the date in Hawk shows that surveillance took place in the year 1899." (emphasis added). But whether the recordings *could* have been altered is a distinct question from whether there was actually loss of evidence that would trigger a *Youngblood* analysis. The Rule 32 state court found that there were no indicia that the recordings had been tampered with or altered.[8] Petitioner has not met his burden of showing that the state

[8] In rejecting Petitioner's argument on direct appeal that the recordings should have been excluded because they "*could* [have been] subject to tampering," the Arizona Court of Appeals also noted that Petitioner's expert could not say that there had been alterations in the recordings. *Rozenman*, 1 CA-CR 13-0458, 1 CA-CR 13-0898, ¶ 28 n.4 (emphasis in original). The Arizona Court of Appeals further noted after its independent review of the header on the Hawk recording that the header did not show an erroneous date of 1899. *Id.*

court's determination regarding the lack of lost evidence was based on an unreasonable determination of facts in light of the evidence presented in state court. The objection is overruled.

7. Finally, Petitioner objects to the R & R's conclusion under Ground One because it fails to mention "the explanations that [detectives] provided for why the recordings were not impounded." (Doc. 60 at 8.) Petitioner maintains (Doc. 60 at 10) that the detectives perjured themselves at trial regarding their reasons for not impounding the recordings after every shift and that the detectives' conduct violated Phoenix Police Department Operations Order 8.1. Because the R & R properly concludes (Doc. 56 at 11) that there is no proof of lost evidence, any bad faith on the part of the detectives is irrelevant. The detectives' alleged noncompliance with Operations Order 8.1 is not proof of lost or tampered evidence. The objection is overruled.

B. Ground Two—*Brady* violation for withholding Order 8.1

In Ground Two of his Amended Habeas Petition, Petitioner alleges (Doc. 5 at 7, 52) that the prosecution's "failure" to disclose Phoenix Police Department Operations Order 8.1 constitutes a violation of *Brady v. Maryland*. To establish a *Brady* violation, the defendant must demonstrate: that the suppressed evidence was favorable to him; that the evidence was suppressed by the government either willfully or inadvertently; and the evidence is material to the guilt or innocence of the defendant.[9] *United States v. Jernigan*, 492 F.3d 1050, 1053 (9th Cir. 2007). Evidence is material under *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-470 (2009). The R & R concludes (Doc. 56 at 13-14) that the state court's PCR ruling was not an unreasonable application of federal law because Operation Order 8.1 was publicly available to Petitioner

---

Petitioner does not even attempt to refute these factual findings because he incorrectly believes that the question turns on whether "recordings is [sic.] a type of evidence that *could* have been tampered with," not whether there was actually lost evidence. (Doc. 5 at 57) (emphasis added).

[9] The Court rejects the portion of the R & R's citation to *United States v. Jernigan*, 492 F.3d 1050, 1053 (9th Cir. 2007), which states that the evidence must be material to the guilt or innocence of *the victim*. (Doc. 56 at 13.)

at the time of his trial, and that therefore, it was not "suppressed" by the prosecution.

1. Petitioner objects to the R & R's conclusion under Ground Two, asserting that it fails to address his argument about the "state's sound expert . . . not perform[ing] the authentication analysis . . . ." (Doc. 60 at 11.) Petitioner asserts that because the state court did not address the lack of authentication, it did not properly consider a "reasonable probability of a different outcome." (*Id.*) But the fact that the State's sound expert did not perform an "authentication analysis" does not establish proof of suppressed evidence under *Brady*. (*See* Doc. 13-7, Exhibit U, R.T. 03/14/2013, at 79-80) (State's expert testifying that manipulating the 3GP file would have been easy to do, but obvious to detect; whereas the proprietary format of the Hawk recording makes it impossible to edit without the manipulations becoming obvious). The state court's PCR ruling is not based on an unreasonable determination of the facts in light of the evidence presented in state court. The objection is overruled.[10]

2. Petitioner also objects (Doc. 60 at 12) to the R & R's conclusion that Order 8.1 was publicly available. He claims that he failed to discover Order 8.1 prior to trial because he relied to his detriment on the detectives' pretrial assertions that they were not aware of any guidelines for impounding recordings. (Doc. 60 at 13.) And he likens Order 8.1 to the non-disclosed personnel records of the testifying officer in *Milke v. Ryan*, 711 F. 3d 998, 1017-18 (9th Cir. 2013), where the Ninth Circuit vacated the defendant's convictions because it found that the State suppressed personnel records in violation of *Brady*. (Doc. 60 at 12.) Preliminarily, the Court notes that the Phoenix Police Department's Operational Orders are available online, accessible instantaneously to anybody with just a few clicks of the mouse.[11] This is a far cry from the personnel records that purportedly took "a team of approximately ten researchers [in *Milke*] . . . nearly 7000

---

[10] Petitioner also argues in this objection (Doc. 60 at 12) that it "was objectively unreasonable, for the Rule 32 Court, to extend *Brady* beyond the 3 components in the holdings of *Strickler*, 527 U.S. at 281-82" but he does not identify with specificity how the state court purportedly expanded *Brady*. The Court therefore does not address this objection.

[11] https://www.phoenix.gov/policesite/Documents/operations_orders.pdf (last visited November 12, 2019).

hours sifting through court records" to find. *See Milke*, 711 F.3d at 1018. Because there was no suppression of Order 8.1 by the State, the R & R correctly finds that the state court's denial of post-conviction relief was not based on an unreasonable application of federal law.[12]

3. Petitioner argues (Doc. 60 at 13) that the R & R incorrectly cites the location of the state court's PCR ruling in the record. The state court's PCR ruling is attached to Petitioner's Amended Habeas Petition (Doc. 5 at 118) and to Respondent's Limited Answer to Petition for Writ of Habeas Corpus (Doc. 14-11, Exhibit NNN). The Court amends the R & R's citation (Doc. 56 at 14, lines 3-4) to the state court's ruling to: (Doc. 14-11, Exhibit NNN). The misplaced citation in the R & R is immaterial, however, and the objection is overruled.

4. Petitioner objects (Doc. 60 at 13-14) to the R & R's statement that "Order 8.1 is not exculpatory because the Police Department's internal procedure is not evidence that incriminated Petitioner." (Doc. 56 at 14.) Petitioner argues that, had the jurors known "that detectives violated rules for preservation of evidence . . . they would have made a reasonable inference that the reason why detectives violated Order 8.1 is because the recordings, had they been properly preserved, would have exculpated the Petitioner." (Doc. 60 at 14.) The Court agrees with Respondent (Doc. 13 at 26-27) that Order 8.1 does not clearly apply to police property, such as recordings. In any event, because the state court found no evidence that the tapes were altered, (Doc. 14-11, Exhibit NNN, at 113), the R & R correctly concludes that whether the officers adhered to Order 8.1 is not material to Petitioner's guilt or innocence. The objection is overruled.

5. Petitioner objects (Doc. 60 at 14) to the R & R's statement that "the jury heard any impeaching evidence 'concern[ing] the four-month delay in impounding the tapes.'" (Doc. 56 at 14.) Petitioner misreads this statement as a finding by the Magistrate

[12] The state court also found by implication that Petitioner failed to exercise due diligence in discovering Order 8.1, which is an independent state law ground sufficient to support the judgment. (Doc. 14-11, Exhibit NNN) ("He has cited alleged 'new evidence' in his Rule 32 filings, but he has failed to establish a colorable claim that this evidence meets the clear requirements of Rule 32.1(e)."); Ariz. R. Crim. P. 32.1(e)(2) (requiring defendant to show that he exercised due diligence in discovering new facts).

Judge that the jury knew about Order 8.1. The R & R correctly notes that the jury heard about the *four-month delay in impounding the recordings* (not Order 8.1) before it convicted Petitioner. Because the R & R does not imply that the jury knew about Order 8.1, the objection is overruled.

6. Lastly, Petitioner argues that the R & R incorrectly states his burden of proof and incorrectly cites 28 U.S.C. § 2254(d)(2). (Doc. 60 at 15.) The R & R correctly notes that it is Petitioner's burden to show that the state court's ruling was unreasonable, either because it resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law; or, because it 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)(1), (2). The R & R also correctly finds that Petitioner failed to meet his burden of proving that the state court ruling was clearly unreasonable under 28 U.S.C. § 2254(d). (Doc. 56 at 23.) The objection is overruled.

C. Ground Four—Compulsory Process

In Ground Four of his Amended Petition, Petitioner alleged that the trial court, in violation of his Sixth Amendment rights, improperly prevented the attorney who represented him during the first trial from testifying at the second trial to establish that the lead detective had originally mislead the defense as to the existence of the Hawk recording. (Doc. 5 at 9, 84-93.) The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend VI. The right to compulsory process encompasses the right to offer the testimony of witnesses and to compel their attendance if necessary. *Soo Park v. Thompson*, 851 F.3d 910, 919 (9th Cir. 2017) (citing *Washington v. Texas*, 388 U.S. 14, 18-19 (1967)).

The trial court precluded the proffered testimony from Petitioner's first counsel because it found that there was no evidence to suggest any concerted misconduct by law enforcement to conceal evidence. (Doc. 14-5, Exhibit NN, at 125.) The trial court allowed Petitioner, however, to question the investigating officers about whether they had

intentionally misled him as to the existence of the Hawk recording. (Doc. 14-9, Exhibit DDD, at 11, ¶ 35.) The Arizona Court of Appeals found that the trial court did not err in imposing the limits it did on Petitioner's presentation of his case. (*Id.*)

The R & R concludes that the Arizona Court of Appeals' decision was not an unreasonable application of Federal law because "Judges are afforded 'wide latitude' to exclude evidence that is 'repetitive[,] . . . only marginally relevant[,]' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" (Doc. 56 at 20) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). The R & R concludes that the subjective opinion of Petitioner's first counsel would have added little to the jury's understanding of the central issues. (Doc. 56 at 20.)

1. Petitioner objects to the R & R's conclusion under Ground Four because he states that it "fails to rebut [his] argument that the Court of Appeals' decision was an objectively unreasonable application of clearly established federal law." (Doc. 60 at 15.) The R & R adequately cites federal law that accords the trial judge discretion to exclude evidence that would confuse the jury, without violating the Compulsory Clause of the Sixth Amendment. (Doc. 56 at 20.) The objection is overruled.

2. Petitioner also objects to the R & R's conclusion under Ground Four because he claims that it "asserts that credibility of DW 'was only marginally relevant.'" (Doc. 60 at 16.) The R & R, however, finds that testimony of *Petitioner's first counsel* would have been marginally relevant. The R & R makes no claims under Ground Four regarding the relevancy of DW's testimony. The objection is overruled.

D. Certificate of Appealability

Petitioner alternatively asks the Court (Doc. 60 at 17) to issue a certificate of appealability. Petitioner must obtain a certificate of appealability before he may appeal this Court's judgment. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1); Rule 11(a) of the Rules Governing Section 2254 Cases. This Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Rule 11(a) of the Rules Governing Section 2254 Cases. A certificate of appealability may only issue when the

petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). With respect to claims rejected on the merits, a petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Petitioner asks the Court to issue a certificate of appealability because he claims he "has made a substantial showing of denial of a constitutional right." (Doc. 60 at 17.) Upon review of the record, the Court disagrees.

Accordingly, having reviewed Petitioner's objections,

IT IS ORDERED that the Report and Recommendation (Doc. 56) is adopted as modified herein.

IT IS FURTHER ORDERED that the Amended Petition for Writ of Habeas Corpus (Doc. 5) is denied and dismissed with prejudice.

IT IS FURTHER ORDERED denying Petitioner's request for a Certificate of Appealability (Doc. 61.) A Certificate of Appealability shall not issue, as the resolution of the petition is not debatable among reasonable jurists.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment.

Dated this 21st day of November, 2019.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dimitri Rozenman,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV–18-01789-PHX-GMS-JZB

REPORT AND RECOMMENDATION

TO THE HONORABLE G. MURRAY SNOW, UNITED STATES DISTRICT JUDGE:

Petitioner Dimitri Rozenman has filed a pro se Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 5.)

I. Summary of Conclusion.

Petitioner raises six grounds for relief in his timely Amended Petition. Petitioner's claims are either not cognizable, procedurally defaulted, or meritless. Therefore, the Court will recommend that the Petition be denied and dismissed with prejudice.

II. Background.

a. Facts of the Crimes.

The Arizona Court of Appeals set forth the following facts in its Memorandum decision, which affirmed the Petitioner's convictions and sentences on direct appeal:

> A grand jury indicted Defendant in June 2009 on one count of conspiracy to commit first-degree murder, and one count of criminal damage of between

Appendix C

$2,000 and $10,000, a domestic violence offense, charges stemming from damage to the vehicles of his ex-wife and her family and a plot to murder them. Following a trial in 2010, a jury convicted Defendant of the charged offenses. The trial court granted a new trial on the ground that the state had failed, albeit inadvertently, to properly disclose to Defendant one of the surveillance recordings of a February 13, 2009 meeting to discuss the murder conspiracy, the so-called Hawk recording.

. . .

The trial court later denied Defendant's motion for new trial, which raised numerous issues relating to the four-month delay by police in impounding the recordings of surveillance and a confrontation call, and the admission of those and other recordings at trial. The trial court found it had no jurisdiction to decide Defendant's late-filed motion to vacate judgment, in which Defendant argued that the testimony before and at trial of the investigating officers showed that they conspired to obstruct justice by deliberately concealing the existence of the Hawk recording. The court concluded, however, that if it had jurisdiction over the motion to vacate judgment, it would deny it.

. . .

The evidence demonstrated that in 2008 Defendant hired L.N. at his cigar business. L.N. testified that Defendant regularly complained about his wife and was angry she refused to sign a postnuptial agreement to accept $50,000 in the event of a divorce. L.N. also stated that Defendant told him that if he and his wife "were still back in Russia, that she would be dead or they would kill her."

Defendant served his wife with divorce papers in March 2008, and directed L.N. to move her belongings to her parents' house. One night in October 2008, L.N. saw Defendant puncture the tires of three vehicles belonging to his wife's family, and pour sugar into the gas tank of one of them. The repairs cost in excess of $2,000.

When the divorce decree ordering Defendant to pay his wife approximately $500,000 was issued in late January 2009, Defendant was "incoherent and really upset," and told L.N. he wished his ex-wife were dead. Sometime after that, L.N. testified, Defendant approached him and proposed a plan whereby L.N. would hire people to force his ex-wife to sign a paper agreeing to relinquish all money awarded in the divorce decree, and then kill her and her family. Defendant offered to pay L.N. $70,000 in installments, and later gave L.N. $5,000 in cash.

L.N. ultimately told Defendant's ex-wife of the plot, and agreed to allow police to hide video and audio recorders on him for a meeting L.N. arranged with Defendant for the night of February 13, 2009. During the meeting, L.N. told Defendant that his ex-wife had signed the documents, and she and her family had been bound up "execution style" and had been beaten. L.N. told Defendant he was not going to give Defendant "details of how they're gonna murder them," and talked about "hit guys," and when they would "go and shoot them people." Defendant gave L.N. $500 in cash to get the hit men out of town. Defendant indicated by nodding that all he wanted L.N.'s men to do was kill the ex-wife and her family, and he would handle disposing of the hit

> men. During that meeting, Defendant never told L.N., "you're scaring me," threatened to call police, or called him crazy.
>
> In a recorded confrontation call six days later, L.N. told Defendant that his ex-wife and her parents were dead, to which Defendant immediately asked L.N. when he was going to return to work. Defendant did not call 9–1–1 that night to report that he had just been told his ex-wife and her family had been murdered.
>
> When police called on Defendant at his girlfriend's apartment early the next morning and told him about the "murders," and repeatedly asked him if he knew who might have done this, Defendant never mentioned L.N. Police arrested Defendant and served him later that day with a protection order from his ex-wife, and told him that his ex-wife and her family were safe. At that time, Defendant told police that he was concerned that hit men hired to commit the murders might come looking for him.

(Doc. 14-9, Ex. DDD, at 61-64.)

b. Trial Proceedings.

On June 25, 2009, Rozenman (Petitioner) was indicted on one count of conspiracy to commit murder, a class 1 felony, and one count of criminal damage, a class 5 felony, in Maricopa County Superior Court case number CR-2009-007039. (Doc. 13-1, Ex. A, at 1.) On March 18, 2010, a jury found Petitioner guilty of the charged offenses. (Doc. 13-4, Ex. M, at 19.) Petitioner then filed a motion for a new trial, which was granted because the state failed to disclose a surveillance recording. (Doc. 14-9, Ex. DDD, at 61.) Petitioner proceeded pro se in a second trial and the jury again convicted him of the charged offenses. (*Id.*)

On January 29, 2015, Petitioner filed a direct appeal with the Arizona Court of Appeals, and the convictions and sentences were affirmed. (Doc. 14-9, Ex. DDD, at 72.) On August 24, 2015, the Arizona Supreme Court denied review. (Doc. 13 at 5.)

c. Petitioner's Post-Conviction Relief Proceeding.

On August 31, 2015, Petitioner filed a pro se post-conviction relief ("PCR") notice. (Doc. 14-9, Ex. EEE, at 74.) On September 28, 2016, the State PCR court dismissed the PCR proceeding because there was no colorable claim for relief under Rule 32. (Doc. 14-11, Ex. NNN, at 114.)

On October 21, 2016, Petitioner filed a petition for review of his PCR claim before the Arizona Court of Appeals. (Doc. 14-11, Ex. OOO, at 116.) The Court of Appeals granted review, but the court found no abuse of discretion and denied relief. (Doc. 14-11, Ex. QQQ, at 162.) On May 29, 2018, Petitioner filed a petition for review with the Arizona Supreme Court, but he was denied review. (Doc. 13 at 7.)

d. Petitioner's Federal Habeas Petition.

On June 8, 2018, Petitioner filed an Amended Petition for Writ of Habeas Corpus. (Doc. 5.) Petitioner raises six grounds for relief in his Amended Petition: (1) non-preservation of evidence in bad faith in violation of the Fourteenth Amendment; (2) *Brady* violation due to non-disclosure of Phoenix Police procedure Operations Order 8.1; (3) "The Law of the Case Doctrine" infringement in violation of the Fourteenth Amendment; (4) "Compulsory Process Clause" infringement in violation of the Sixth Amendment; (5) results of the Professional Service Bureau's Internal Affairs Investigation in violation of the Fourteenth Amendment, and; (6) prosecution's knowing use of perjured testimony in violation of the Fourteenth Amendment. (*Id.* at 6-15.) On October 5, 2018, Respondents filed a Response. (Doc. 13.) On January 4, 2019, Petitioner filed a Reply. (Doc. 31.)

On January 7, 2019, the Court ordered Respondents to supplement the record with additional exhibits. (Doc. 32.) On June 10, 2019, after several extensions were granted, Petitioner submitted a First Amended Reply. (Doc. 52.)

III. The Petition.

The writ of habeas corpus affords relief to persons in custody pursuant to the judgment of a state court in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § § 2241 (c)(3), 2254(a). Petitions for Habeas Corpus are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2244. The Petition is timely.

a. Procedural Default.

Ordinarily, a federal court may not grant a petition for writ of habeas corpus unless a petitioner has exhausted available state remedies. 28 U.S.C. § 2254(b). To exhaust state

remedies, a petitioner must afford the state courts the opportunity to rule upon the merits of his federal claims by "fairly presenting" them to the state's "highest" court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim").

A claim has been fairly presented if the petitioner has described both the operative facts and the federal legal theory on which his claim is based. *See id.* at 33. A "state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or brief . . . that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Id.* at 31-32. Thus, "a petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum . . . (2) through the proper vehicle, . . . and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (internal citations omitted).

The court may review the merits of an argument in the interest of judicial economy. *See Lambrix v. Singletary*, 520 U.S. 518, 524-525 (1997) (explaining that the court may bypass the procedural default issue in the interest of judicial economy when the merits are clear but the procedural default issues are not).

b. Merits Review.

The court may not grant a writ of habeas corpus to a state prisoner on a claim adjudicated on the merits in state court proceedings unless the state court reached a decision which was contrary to clearly established federal law, or the state court decision was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d); *Davis v. Ayala*, 135 S. Ct. 2187, 2198-99 (2015); *Musladin v. Lamarque*, 555 F.3d 834, 838 (9th Cir. 2009). The AEDPA requires that the habeas court review the "last reasoned decision" from the state court, "which means that when the final state court decision contains no reasoning, we may look to the last decision from the state court that provides a reasoned

explanation of the issue." *Murray v. Schriro*, 746 F.3d 418, 441 (9th Cir. 2014) (quoting *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000)).

> Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement.

White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (internal citations and quotations omitted). *See also Arrendondo v. Neven*, 763 F.3d 1122, 1133-34 (9th Cir. 2014).

> Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court. AEDPA requires "a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error . . . beyond any possibility for fair minded disagreement." *Harrington v. Richter*, [] 131 S. Ct. 770, 786–787, [] (2011). "If this standard is difficult to meet"—and it is—"that is because it was meant to be." [] 131 S. Ct., at 786. We will not lightly conclude that a State's criminal justice system has experienced the "extreme malfunctio[n]" for which federal habeas relief is the remedy. *Id.*, at ——, 131 S. Ct., at 786 (internal quotation marks omitted).

Burt v. Titlow, 134 S. Ct. 10, 15-16 (2013).

A state court decision is contrary to federal law if it applied a rule contradicting the governing law as stated in United States Supreme Court opinions, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Brown v. Payton*, 544 U.S. 133, 141 (2005).

> A state court decision involves an unreasonable application of clearly established federal law if it correctly identifies a governing rule but applies it to a new set of facts in a way that is objectively unreasonable, or if it extends, or fails to extend, a clearly established legal principle to a new set of facts in a way that is objectively unreasonable.

See McNeal v. Adams, 623 F.3d 1283, 1288 (9th Cir. 2010). The state court's determination of a habeas claim may be set aside under the unreasonable application prong if, under clearly established federal law, the state court was "unreasonable in refusing to extend [a]

governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000). However, the state court's decision is an unreasonable application of clearly established federal law only if it can be considered objectively unreasonable. *See, e.g.*, *Renico v. Lett*, 559 U.S. 766, 773 (2010). An unreasonable application of law is different from an incorrect one. *See id.*; *Cooks v. Newland*, 395 F.3d 1077, 1080 (9th Cir. 2005). "That test is an objective one and does not permit a court to grant relief simply because the state court might have incorrectly applied federal law to the facts of a certain case." *Adamson v. Cathel*, 633 F.3d 248, 255-56 (3d Cir. 2011). *See also Howard v. Clark*, 608 F.3d 563, 567-68 (9th Cir. 2010).

Factual findings of a state court are presumed to be correct and can be reversed by a federal habeas court only when the federal court is presented with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015). The "presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact." *Sumner v. Mata*, 455 U.S. 591, 593 (1982). *See also Phillips v. Ornoski*, 673 F.3d 1168, 1202 n.13 (9th Cir. 2012). Additionally, the United States Supreme Court has held that, with regard to claims adjudicated on the merits in the state courts, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). *See also Murray*, 745 F.3d at 998. Pursuant to section 2254(d)(2), the "unreasonable determination" clause, "a state-court's factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt*, 134 S. Ct. at 15 (internal quotation marks and citation omitted) (quoted by *Clark v. Arnold*, 769 F.3d 711, 724-25 (9th Cir. 2014)).

If the Court determines that the state court's decision was an objectively unreasonable application of clearly established United States Supreme Court precedent, the Court must review whether Petitioner's constitutional rights were violated, i.e., the state's ultimate denial of relief, without the deference to the state court's decision that the AEDPA

otherwise requires. *See Lafler*, 132 S. Ct. 1389-90; *Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007). Additionally, the petitioner must show the error was not harmless: "For reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (internal quotations omitted).

IV. Ground One – Failure to Preserve Evidence.

In Ground One, Petitioner argues that there was a bad-faith failure to preserve evidence because (1) the police did not properly impound evidence and (2) the detective concealed evidence, which suggested tampering had occurred. (Doc. 5 at 6.) During the investigation, an informant was equipped with several body-recording devices when he met with Petitioner to discuss a murder-for-hire. After that meeting, the detective took custody of the recordings but placed them in a locked desk rather than impounding them into an evidence vault. The Arizona Court of Appeals summarized these facts:

> The background on these issues is as follows. The lead detective testified at trial that he did not impound the recordings of the February 13, 2009 surveillance or the later confrontation call for four months because he continued his investigation until a grand jury met to consider the charges – more than four months after the date of the surveillance. He stated that during the four months prior to impound, when the recordings were not being used, he kept them secured in a locked drawer in his desk. The detective also asserted that this method of handling such evidence was not uncommon, and distinguished it from the practice of immediately impounding evidence such as ~~drugs, guns,~~ or money.

(Doc. 14-9, Ex. DDD, at 64.)

Petitioner argues that the detective violated internal police policies, which resulted in a Due Process violation. Petitioner also claims that his Fourteenth Amendment rights were violated because "had the state court correctly found that the recordings were not preserved in bad faith, such finding would require either a dismissal with prejudice or suppression of not impounded recordings." (Doc. 5 at 46.)[1]

---

[1] As noted above, on November 22, 2010, Petitioner was granted a new trial because the prosecution failed to disclose one of the recordings from the February 13, 2009, meeting between Petitioner and the informant:

a. Failure to Properly Impound Evidence.

Petitioner argues that police policies required the detective to impound the recordings rather than place them in a locked desk. (*Id.* at 33.) Petitioner asserts that Phoenix Police Department ("PPD") Operations Order 8.1 required detectives to impound evidence at the end of a shift. (*Id.*) Petitioner asserts that William Lee (a 22-year police officer) and Frank J. Rodgers (a 35-year PPD laboratory administrator) agreed that police policy required the recordings to be impounded. (*Id.* at 36.) Petitioner raised this claim on direct appeal. The Arizona Court of Appeals found that:

> Insofar as the record reflects, however, Defendant did not supply any expert or other witness who testified that such policy was violated by the conduct of the detectives in this case. Although both Defendant's and the State's expert testified that they found no evidence that anyone had altered or tampered with the recordings, Defendant nevertheless argued in his posttrial motion that the only reasonable explanation for the four-month delay in impounding the recordings was to allow the lead detective sufficient time to tamper with them.
>
> . . .
>
> To any extent that the ostensible police failure to follow Operations Order 8.1 can be construed as a failure to "preserve" the recordings for purposes of *Youngblood*, Defendant has failed to persuade us that the investigating

---

> Prior to trial the State disclosed a video CD that shows detectives placing 3 listening devices on Levi Nejar – two recording devices and a body wire transmitter concealed in a bandana. (Exhibit 14 admitted at Evidentiary Hearing) The police report details that Levi Nejar was outfitted with two recording devices and a transmitter. Levi Nejar disclosed in an interview that there were three devices. . . .
>
> Prior to trial, on November 18, 2009, the State provided the defense with a CD marked Audio Video Master. The Audio Video Master contained 3 items; (1) 3GP video file containing audio, (2) short audio clip, and (3) audio only recording made by a receiver carried by Det. Carody, technical surveillance detective for the City of Phoenix, from a signal transmitted by body wire worn by Levi Nejar. The State did not provide the defense with a copy of the Hawk recording marked as Exhibit 207 at trial prior to the trial or during the trial. The State attempted to have Exhibit 207 admitted at trial during the testimony of Det. Warner. The defense objected because Exhibit 207 had not been disclosed. Exhibit 207 was not admitted at trial and was retained by the Clerk of the Court for purpose of appeal.

(Doc. 13-4, Ex. O, at 105.) On April 26, 2013, Petitioner was found guilty after his second trial. (Doc. 14-6, Ex. RR, at 189.)

officers did so in bad faith. We accordingly find no merit in this argument.

. . .

> The record fails to reveal any testimony to support Defendant's claim that Operations Order 8.1 applies to the recordings at issue, that the investigating officers lied in testifying that it was common practice to retain surveillance recordings (rather than send them to the impound warehouse) while investigating the offense, or that anyone tampered with the recordings during the four months they were not impounded.

Rozenman, 2015 WL 404537, at *4-5.

Here, Petitioner's claim that the police failed to follow their policies is not a cognizable claim on habeas review. The writ of habeas corpus only affords relief to persons in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). Petitioner's state-law claim is not reviewable here. *See Nunes v. Ramirez-Palmer*, 485 F.3d 432, 443 (9th Cir. 2007) ("[I]n federal court, there is no right to bring a habeas petition on the basis of a violation of state law."); *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996) ("[A petitioner] may not, however, transform a state-law issue into a federal one merely by asserting a violation of due process."). Petitioner's claim would also not amount to a federal violation. *See United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995) (noting that "a defect in the chain of custody goes to the weight, not the admissibility, of the evidence introduced.").

b. Bad Faith Tampering with Evidence.

Petitioner argues that the detective acted in bad faith by concealing recordings, impound dates, and policy procedures. (Doc. 5 at 25-46.) Petitioner states that his "principal defense at trial was that recordings were not trustworthy to be relied on determination of fact" and that his ex-wife conspired with the informant to "frame the Petitioner." (*Id.* at 28.) Petitioner argues that the detective acted to conceal information from Petitioner, which proves that the detective acted in bad faith to violate his rights. (*Id.* at 39.)

The government violates a defendant's due process rights when it fails to preserve evidence in a criminal case if: (1) the evidence might be expected to play a significant role

in the suspect's defense; (2) the evidence has exculpatory value; (3) the exculpatory value is apparent before the evidence is destroyed; (4) the defendant is unable to obtain comparable evidence by other reasonably available means; and (5) the government acted in bad faith. *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993); *see also Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (citing *California v. Trombetta*, 467 U.S. 479, 488-89 (1984) (quotations omitted)). Petitioner must also show that the state court's determination on this issue was not merely incorrect, but unreasonable. *Wood v. Allen*, 558 U.S. 290, 302 (2010).

As noted above, on direct appeal, the Arizona Court of Appeals found there was no evidence of tampering of the recordings. *Rozenman*, 2015 WL 404537, at *4-5. On PCR review, the trial court ruled that:

> A common thread throughout his arguments herein as well as throughout the pre-trial, trial and post-verdict proceedings was that the failure to timely impound the recordings created a significant risk that the recordings could have been altered. Defendant does not, however, address the fact that experts who testified at the trial failed to find any indicia of the recordings having been tampered with or altered.
>
> Defendant has also raised what he characterized to be a "*Youngblood* Claim." He correctly cites the law but fails to link his claims to the evidence presented in the case. At no time has he been able to establish bad faith on the part of law enforcement or the failure to preserve evidence.
>
> Tampered Evidence is another claim raised by Defendant. He asserts that he now has a witness who could cause there to be questioning of the integrity of the recordings. Even if this court assumes that such a witness exists, the integrity of the evidence was a crucial issue addressed at trial. Under no circumstances can Defendant establish that there is a basis for Rule 32 Relief on this issue, particularly but not exclusively under any notion of newly discovered evidence.

(Doc. 14-11, Ex. NNN, at 113.)

On PCR review, the Arizona Court of Appeals granted review on the issue but denied relief. *Rozenman*, 2017 WL 6047727, at *1; (doc. 14-11, Ex. QQQ, at 162).

Here, even if Petitioner could prove bad faith on the part of the prosecution or law enforcement, he presents no evidence that evidence was destroyed. Petitioner argues he can prove his claim because the detective attempted to conceal PPD rules (doc. 5 at 39), the detective did not affirmatively state in a pretrial interview when the recordings were

"impounded" (*id.* at 40), and the impound logs suggest the recordings were impounded earlier than they were (*id.* at 41). He submits the detective lied about how many recordings existed in the case. (*Id.* at 42-43.)[2] But Petitioner presents no evidence that recordings were destroyed or tampered with. Petitioner acknowledges that the "prosecution's audio expert" testified that there was no evidence of tampering related to the Hawk recording. (*Id.* at 29.) He states that both the prosecution and defense expert witnesses agreed that there were "anomalies" in the recordings but those could have been merely from the "copying process." (*Id.* at 30.) He states that the defense expert testified that tape recordings "are uniquely susceptible to manipulation and alteration." (*Id.* at 31.) In his First Amended Reply, Petitioner argues that he did not have original recordings to demonstrate tampering occurred, but Petitioner again does not present evidence of tampering. (Doc. 52 at 40-60.) Both the State's and Petitioner's forensic experts testified that there was no evidence of tampering in respect to the recordings. (Doc. 13-7, Ex. U, at 24; Doc. 14-3, Ex. KK, at 22-23.) Petitioner presents no actual evidence of tampering here. Also, after all the recordings had been heard by the jury in the second trial, Petitioner was again found guilty. Petitioner cannot demonstrate that evidence was destroyed in his case. Petitioner fails to establish that the state court's rulings on this issue were unreasonable.

V. Ground Two – *Brady* Violation for withholding Order 8.1.

In Ground Two, Petitioner argues a *Brady* violation based upon a non-disclosure of Phoenix Police Procedure for Preservation of Evidence, Operations Order 8.1.[3] (Doc. 5

---

[2] Regarding concealment, Petitioner also argues that the detective attempted to hide the Hawk recording. (Doc. 5 at 43-44.) The Court notes Petitioner does not explain why, if the Hawk exhibit was tampered with and helpful to the prosecution, would the detective lie about its existence? He does not explain why a detective would conceal a recording but disclose it to the prosecutor and allow it to be marked as a trial exhibit. Because Petitioner fails to provide proof that any evidence was destroyed, the Court does not need to resolve these questions.

[3] Order 8.1 in the Phoenix Police Department's manual, which [Petitioner] claims obligated [the detective] to transfer the recordings to the "impound warehouse" on the day they were recorded:

1. RESPONSIBILITY FOR PROPERTY

at 7.) Petitioner argues that "[t]he prosecution distorted fact-finding process by suppressing the rules [and] jurors relied on testimonies of the detectives without knowing that they had been lied to." (*Id.* at 62.) Petitioner argues that Order 8.1 impeaches the detective's testimony regarding police impounding procedure. (*Id.* at 7.) To establish a *Brady* violation, the defendant must establish that (1) the suppressed evidence was favorable to the accused, (2) the evidence must have been suppressed by the government either willfully or inadvertently, and (3) the evidence must be material to the guilt or innocence of the victim. *Unites States v. Jernigan*, 492 F.3d 1050, 1053 (9th Cir. 2007).

The Arizona Court of Appeals held the following:

> The record fails to reveal any testimony to support Defendant's claim that Operations Order 8.1 applies to the recordings at issue, that the investigating officers lied in testifying that it was common practice to retain surveillance recordings (rather than send them to the impound warehouse) while investigating the offense, or that anyone tampered with the recordings during the four months they were not impounded. Under these circumstances, we are not persuaded that Operations Order 8.1 was evidence material to his guilt, as required to establish a *Brady* violation.

(Doc. 14-9, Ex. DDD, at 66.) On PCR review, the trial court found no *Brady* violation, and the Court of Appeals on PCR review affirmed the decision. (Doc. 14-11, Ex. NNN, at 114; Doc. 14-11, Ex. QQQ, at 162.)

Here, Order 8.1 was not suppressed because the Phoenix Police Department's Manual is publicly available. *Milke v. Ryan*, 711 F.3d 998, 1017-18 (9th Cir. 2013) (finding that if the defendant can find the *Brady* information on his or her own with reasonable diligence that the State's non-disclosure is not suppression).

> A. Employees will be responsible for the disposition of any property *coming into their possession* during the course of their shift.
>
> B. All property will be impounded prior to the end of shift, with the following exceptions
>
> 1. When authorized by a supervisor. . . .
>
> 2. Impounding of cash, jewelry, items of value, drugs, and drug paraphernalia will not be delayed.

(Doc. 13 at 26.)

Any non-disclosure of Order 8.1 is also not prejudicial because the court found the tapes were not altered, which means that the existence of Order 8.1 was not material to the guilt or innocence of the Petitioner. (Doc. 14-6, Ex. RR, at 189; Doc. 14-9, Ex. DDD, at 67.) Finally, Order 8.1 is not exculpatory because the Police Department's internal procedure is not evidence that incriminated Petitioner. And, any impeachment concerned the four-month delay in impounding the tapes, which the second jury heard before finding Petitioner guilty. (Doc. 14-9, Ex. DDD, at 65.) Petitioner fails to prove the State court's ruling was clearly unreasonable. *See* 28 U.S.C. § 2254 (d)(2); *Wood v. Allen*, 558 U.S. 290, 302 (2010).

VI. Ground Three – Erroneous Admission of Testimony.

In Ground Three, Petitioner argues that he was prejudiced when a witness was permitted to quote from a ruling made by the judge after the first jury trial. (Doc. 5 at 8.)

a. Factual Background.

As noted above, the prosecution failed to disclose the Hawk recording, which was one of the surveillance recordings of the February 13, 2009 meeting to discuss the murder conspiracy. The prosecution marked the recording as a trial exhibit, but it was not introduced during the first trial. After the first trial, the court held a hearing.[4] The court found the Hawk recording was not newly discovered because the detectives had documented its existence and discussed it.[5] But the court found there was a *Brady* violation because the prosecution did not disclose a copy of the Hawk recording and "there is a reasonable possibility of a different result at trial and the unavailability of the Hawk

---

[4] In its order granting a new trial, the court stated that it "took defendant's Motion to Vacate Judgment under advisement after evidentiary hearing. The Court has considered the pleadings submitted by both the Defendant and the State, the argument of the parties, and the testimony and exhibits introduced in the evidentiary hearing." (Doc. 13-4, Ex. O, at 103.)

[5] The court found that in "this case, the Hawk CD was disclosed in Supplement 20 of the Phoenix Police Departmental Report. Defense counsel saw the Hawk CD in the Phoenix Police Department Property Management Bureau on January 7, 2010 and did not request or obtain a copy of the Hawk CD then. Defense counsel was aware of the Hawk recording and referred to it in his pretrial interviews with Detectives Carmody and Warner." (*Id.* at 108.)

recording undermines the Court's confidence in the outcome of the trial." (*Id.* at 110.) The court also ruled: "The Court does not find that [the detectives] deliberately attempted to conceal evidence, but instead finds that any lack of disclosure was inadvertent." (*Id.*)

During the second trial, Petitioner agrees he "attempted to impeach Det. Warner on the basis of him intentionally suppressing the HAWK recording" prior to the first trial. (*Id.* at 8.) During cross-examination, Petitioner asked the detective "isn't it true . . . that at some point throughout these proceedings you suppressed the Hawk recording so that defense cannot ascertain for sure what exactly it says?" (Doc. 13-14, Ex. DD, at 73.) The prosecutor objected to the question, and the objection was overruled. (*Id.*) Shortly after, Petitioner repeated his question by asking: "Did you suppress the third recording throughout these proceedings at some point? Now we have it. Did you suppress it at some point?" (*Id.* at 74.) The detective answered: "No, I did not and I have a court entry from a judge in a previous matter. . . ." (*Id.* at 74.) The judge had the parties approach and the following discussion occurred:

> THE COURT: "You can't make the suggestion and not – use it as both a sword and a shield. I think that question not only opened the door, it opened the whole building. Now, I'm not going to allow the State to spend time questioning it, but after you've accused him of intentionally suppressing it, what you said, isn't it true you suppressed that, then he has the right to say no, not only didn't I, but another judge found that I didn't. Now, and you knew that would be his answer.
>
> Mr. ROZENMAN: Yeah.
>
> THE COURT: And there were other ways to go about this, but you asked him that question and this door has been opened, so I'm going to let him answer.
>
> . . .
>
> THE COURT: Sir, you can finish your answer.
>
> THE WITNESS: There was a previous -- in a previous hearing the judge stated, and I quote, "The second" -- "the second is that the defense exercised due diligence, the Hawk CD was disclosed in supplement 20 of Phoenix Police Department report." So it was disclosed. It was disclosed in supplement 20 of the original report.

(*Id.* at 75-76.)

b. Procedural Default.

Respondents argue that Ground Three is procedurally defaulted because it was not fairly presented as a federal constitutional claim in state proceedings. (Doc. 13 at 15.) Petitioner presents several claims in Ground Three.

1. Allowing a Witness to Quote a Prior Judicial Ruling.

Petitioner argues the judge in the second trial erred by allowing a witness to quote from ruling made by a judge from the first trial. (Doc. 5 at 8.) He asserts that this prevented him from impeaching the detectives' reliability when handling recordings. (*Id.*) In his direct appeal, Petitioner argued that the decision to allow the detective to quote a prior ruling "prevented impeachment [on the detective] on that very same issue. Such ruling is clearly erroneous. . . ." (Doc. 14-9, Ex. CCC, at 30.) He argued that "Defendant was prejudiced by DW reading erroneous ruling to the jury and did not receive a fair trial in violation of the XIV Amendment of the US Constitution and Art. 2 Sec 4 of Arizona Constitution." (*Id.* at 31.)[6] Liberally construing Petitioner's claim, he argues that the judge in the second trial erred by allowing the witness to read from the first judge's ruling. This is the argument that was denied by the Arizona Court of Appeals. He raised that as a federal claim, and renews that claim here when he argues that he was prevented from impeaching the detective because the second judge adopted the decision of the prior judge. This claim is not procedurally defaulted and will be reviewed below.

2. "Law of the Case" and Denial of a Hearing.

Petitioner presents other arguments in Ground Three that are unexhausted and procedurally defaulted. Petitioner argues that the trial judge improperly allowed the detective to refer to a court ruling during testimony without allowing him to contest that ruling. (Doc. 5 at 8.) He asserts this violates the "law of the case" doctrine. (*Id.* at 8, 69-71.) After the first trial, the court granted a new trial because the Hawk recording had not

---

[6] In Ground Three, Petitioner agrees that "[t]his ground was titled 'Obstruction of Justice and Erroneous Ruling by Judge Hoffman' on direct appeal in both courts . . . However, the law of the case doctrine is more appropriate considering the issue at hand." (Doc. 5 at 8.) The Court has reviewed that section of Petitioner's direct appeal based upon his assertion that his claim in Ground Three derives from that argument.

been disclosed to the Petitioner prior to trial. (Doc. 13-4, Ex. O, at 108.) The court also found that the detectives did not intentionally conceal the existence of the Hawk recording. (*Id.*) Petitioner argues "there never was a hearing, arguments or discussion on whether or not such suppression was intentional or inadvertent." (Doc. 5 at 8.) Petitioner argues that he should have been allowed to argue against that prior ruling in the second trial instead of the court adopting the ruling as the "law of the case." (*Id.* at 8, 70-71) Petitioner alleges that his prior trial counsel would have testified that counsel was misled by the detectives regarding the existence of the Hawk recording. (*Id.*) Petitioner also argues that "[b]ecause the state court made the law of the case findings without holding a hearing on the merits of the finding" that decision violates clearly established federal law. (Doc. 5 at 71.)

Petitioner did not present these arguments in the state courts. He did not argue on direct appeal that he was denied a hearing to contest whether "suppression was intentional or inadvertent." (*Id.* at 8.) Petitioner did not previously submit a "law of the case" argument. Petitioner now cites to several "law of the case" decisions, but he never argued these in the Arizona courts. The Court is mindful of its duty to liberally construe Petitioner's claims, but Petitioner's remaining claims in Ground Three are unexhausted and procedurally defaulted. Petitioner presents no cause and prejudice to excuse the default.

In his First Amended Reply, Petitioner argues that he submitted the "law of the case" claim when he previously argued that the trial court improperly allowed the witness to quote from the prior judge's ruling. (Doc. 52 at 28.) But these are two very distinct arguments. Whether the Petitioner "opened the door" to allow the witness to quote from a prior ruling is significantly different from asserting that Petitioner did not have the right to contest a prior ruling as "law of the case."

c. Merits.

The decision of the Arizona Court of Appeals regarding "opening the door" was not clearly unreasonable. During the second trial, Petitioner agrees he "attempted to impeach Det. Warner on the basis of him intentionally suppressing the HAWK recording" prior to the first trial. (Doc. 5 at 8.) The trial court found Petitioner opened the door to

allowing the witness to testify that the court found he had not "suppressed" the Hawk recording. Regarding this claim, the Arizona Court of Appeals held:

> [W]e find no error in the trial court's determination that Defendant had opened the door to the detective's recitation of a court's prior finding that the Hawk recording had been disclosed, by asking the detective if he had suppressed the recording. . . .

(Doc. 14-9, Ex. DDD, at 69.)

The decision to allow testimony from a witness is afforded wide discretion. *See United States v. Gilley*, 836 F.2d 1206, 1213 (9th Cir. 1988) ("A trial court has great latitude in the admissibility of evidence."). A court may permit additional testimony when one party has opened the door to a new issue. *See United States v. Osazuwa*, 564 F.3d 1169, 1175-76 (9th Cir. 2009) (if a party "opens the door by introducing potentially misleading testimony," the opposing party "may introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission" (citations and internal quotation marks omitted)); *United States v. Mendoza-Prado*, 314 F.3d 1099, 1105 (9th Cir. 2002) (finding the "government may introduce otherwise inadmissible evidence when the defendant 'opens the door' by introducing potentially misleading testimony.") (citation omitted). Petitioner knew the first trial judge ruled the detective had not suppressed evidence. The Arizona Court of Appeals was not clearly unreasonable when it determined Petitioner had opened the door to testimony regarding whether the witness had "suppressed" evidence in the case.

VII. Ground Four – Compulsory Process.

In Ground Four, Petitioner argues that the trial judge improperly prevented his attorney from the first trial from being a trial witness in the second trial. (Doc. 5 at 9.) He argues that the Arizona Court of Appeals was clearly unreasonable when it affirmed the trial court's preclusion of his ex-attorney as a witness. (*Id.* at 89-92.) In the first trial, the prosecutor marked the Hawk recording as a trial exhibit, but the Hawk recording had not in fact been disclosed. Petitioner alleges his attorney had been told by detectives that there were only two recordings, and he was led to believe that he was in possession of the Hawk

recording. (*Id.* at 9.) Instead, the defense had two other recordings that were of lesser quality. The judge in the first trial determined that the recording was withheld inadvertently. (Doc. 13-4, Ex. O, at 105, 111.) During the second trial, Petitioner (proceeding pro se) attempted to call his ex-attorney as a witness to establish that the Hawk recording was concealed purposefully. (Doc. 5 at 84-85.) The trial court ruled that the potential of confusing the jury would outweigh the value of his testimony and the Arizona Court of Appeals affirmed that ruling. (Doc. 14-9, Ex. DDD, at 11-12.)

a. Procedural Default.

Respondent argues that Ground Four is procedurally defaulted because it was not fairly presented as a federal constitutional claim at the State level. (Doc. 13 at 15.) In his First Amended Reply, Petitioner argues his claim was raised in the state courts. (Doc. 52 at 30.) The Court agrees with Petitioner. On direct appeal, Petitioner argued that "the defendant's right to present his defense was violated as guaranteed under the [Sixth] Amendment[.]" (Doc. 14-9, Ex. CCC, at 46.) Here, Petitioner raises the same claim. (Doc. 5 at 9.) Therefore, Ground Four is not procedurally defaulted.

b. Merits.

On direct appeal, Petitioner argued that his prior attorney (Ulises Ferragut) would have testified that the attorney was misled "on how many recordings existed and that he was led to believe that HAWK was a recording defense already had." (Doc. 14-9, Ex. CCC, at 45.) He argued that had "defendant been able to establish the above elicited facts through testimony of attorney Ferragut a reasonable juror would not have confidence in credibility of (the detective) and the recordings in his possession." (*Id.* at 46.)

The Court of Appeals held that the following:

> The trial court allowed Defendant considerable leeway in questioning the investigating officers, including the lead detective, on whether they had intentionally misled Defendant as to the existence of the Hawk recording or had suppressed it.
>
> . . .
>
> [W]e find no error in the trial court's preclusion testimony from Defendant's former counsel to establish that the attorney believed the lead detective had

> misled him as to the existence of the Hawk recording, on the grounds the potential to confuse the jury would far outweigh any probative value of this testimony. The court did not preclude Defendant from arguing in closing any reasonable inferences from the evidence, and specifically did not preclude him from arguing that the investigating detectives obstructed justice or that they suppressed the evidence.

(Doc. 14-9, Ex. DDD, at 11-12 (internal citations omitted).)

The Constitution guarantees a criminal defendant a meaningful opportunity to present relevant evidence in defense at trial. *See Taylor v. Illinois*, 484 U.S. 400, 408 (1988). This constitutional right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock v. Arkansas*, 107 S. Ct. 2704, 2711 (1987) (citation omitted). "[A]ny number of familiar and unquestionably constitutional evidentiary rules authorize the exclusion of relevant evidence." *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017 (1996) (plurality opinion). Judges are afforded "wide latitude" to exclude evidence that is "repetitive[,] . . . only marginally relevant[,]" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). In considering whether the exclusion of evidence violates due process, a court considers "the probative value of the evidence on the central issue[.]" *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir. 1985).

The Arizona Court of Appeals was not clearly unreasonable when it found the preclusion of Petitioner's prior attorney as a witness was justified under Rule 403. Whether Petitioner's attorney believed he was deceived by the detectives was only marginally relevant compared to amount of confusion it would have created. The subjective opinion of Petitioner's prior attorney on the side issue of concealment of recordings would have added little to the jury's understanding of the central issues. The court permitted Petitioner "considerable leeway in questioning the investigating officers, including the lead detective, on whether they had intentionally misled Defendant. . . ." (Doc. 14-9, Ex. DDD, at 11.) Petitioner's claim fails. *See United States v. Olano*, 62 F.3d 1180, 1204 (9th Cir.1995) ("[T]rial courts have very broad discretion in applying Rule 403[.]"); *United States v. Ness*, 665 F.2d 248, 250 (8th Cir. 1981) (affirming preclusion of defendant's witnesses regarding

defendant's intent because the "danger here is that the jury could easily accord too much weight to the pronouncement of a lay witness unfamiliar with the standards erected by the criminal law").

VIII. Ground Five – Motion for Discovery Regarding Order 8.1.

Petitioner submits that Ground Five "is listed as a ground [but] it should be construed as a motion for discovery." (Doc. 5 at 14.) Petitioner argues that three detectives were investigated by the Professional Service Bureau of the Phoenix Police Department regarding "their role in concealing Order 8.1" (*Id.*) Petitioner requests the Court obtain the personnel files and review them for "any undisclosed *Brady* material." (*Id.*)

Rule 6(a) of the Rules Governing § 2254 Cases provides that "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure[.]" Discovery may be permitted "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. 286 (1969).

Here, Petitioner fails to demonstrate that he would be entitled to habeas relief for a violation of Order 8.1. As discussed in Ground Two, a violation of Order 8.1 is not a cognizable habeas claim. Petitioner is not entitled to further discovery on a claim for which he cannot be granted relief. In his First Amended Reply, Petitioner argues that he presents a "due process claim under the XIV Amendment," which makes his claim cognizable. (Doc. 52 at 23.) Petitioner cannot convert a state claim under "Order 8.1" to a cognizable claim by asserting a denial of due process. *See, e.g.*, *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997) (stating that a petitioner "may not . . . transform a state-law issue into a federal one merely by asserting a violation of due process").

IX. Ground Six – Use of Perjured Testimony Regarding Order 8.1.

Petitioner argues that the prosecutor knowingly presented perjured testimony from the "lead detective" that some people "are exempt from impounding" evidence. (Doc. 5 at 15.) The detective testified that investigating detectives do not need to impound evidence

during an open investigation, and that they can share the evidence with the county attorneys. (Doc. 13-11, Ex. Z, at 157-159.) Petitioner argues that Order 8.1 "requires the detectives to impound all evidence prior to the end of shift" and eliciting contrary testimony resulted in a due process violation. (Doc. 5 at 95.) Petitioner renews this claim in his First Amended Reply. (Doc. 52 at 77-86.)

A violation of a defendant's rights occurs if the government knowingly uses false evidence in obtaining a conviction. *Giglio v. United States*, 405 U.S. 150, 153-54 (1971). Due process is violated even when the knowing use of false testimony applies only to a witness's credibility. *Napue v. Illinois*, 360, U.S. 264, 269 (1959). *See also Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008) (holding that a claim will succeed when "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material").

The Arizona Court of Appeals found the following:

> . . . Defendant contends that the prosecutor must have known that the lead detective was offering perjured testimony when the detective testified that the county attorney was allowed to have evidence during the course of an investigation. Defendant offers no support for his claim that this testimony was perjured, and we could find none in the record. We accordingly find no fundamental error on this basis.

(Doc. 14-9, Ex. DDD, at 72.)

Here, Petitioner fails to demonstrate that this decision was clearly unreasonable. Petitioner argues that Order 8.1 applied to the tapes in his case, but the Arizona Court of Appeals found otherwise. Petitioner presents no new evidence to support his claim. Mere inconsistencies in testimony do not establish a *Napue* violation. *See United States v. Zuno-Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995) ("Discrepancies in the testimony about the details [of certain events] could as easily flow from errors in recollection as from lies."); *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) ("The fact that a witness may have made an earlier inconsistent statement, or that other witnesses have conflicting recollections of events, does not establish that the testimony offered at trial was false.").

Also, Petitioner fails to establish that testimony regarding Order 8.1 had a meaningful impact on his case. A "conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *United States v. Bagley*, 473 U.S. 667, 680 n.9 (1985). But the Arizona courts found there was no evidence that the recordings had been altered. On PCR review, the court found that Petitioner failed to address "that experts who testified at the trial failed to find any indicia of the recordings having been tampered with or altered." (Doc. 14-11, Ex. NNN, at 113.) The Arizona Court of Appeals found that the "record fails to reveal any testimony to support Defendant's claim that Operations Order 8.1 applies to the recordings at issue. . . or that anyone tampered with the recordings during the four months they were not impounded." (Doc. 14-9, Ex. DDD, at 66.) Petitioner was convicted by two separate juries. He provides no proof of tampering to this Court. Even if there was false testimony regarding impounding these tapes, Petitioner fails to demonstrate it could have affected his verdict when there is no evidence the recordings were altered.

X. Conclusion.

The record is sufficiently developed and the Court does not find that an evidentiary hearing is necessary for resolution of this matter. *See Rhoades v. Henry*, 638 F.3d 1027, 1041 (9th Cir. 2011). Based on the above analysis, the Court finds that Petitioner's claims are timely, but procedurally defaulted or meritless. The Court will therefore recommend that the Amended Petition for Writ of Habeas Corpus (doc. 5) be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that the Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (doc. 5) be **DENIED** and **DISMISSED WITH PREJUDICE.**

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable, and because Petitioner has not made a substantial showing of the denial of a

constitutional right.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have 14 days from the date of service of a copy of this Report and Recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have 14 days within which to file a response to the objections.

Failure to timely file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order of judgment entered pursuant to the Magistrate Judge's Report and Recommendation. *See* Fed. R. Civ. P. 72.

Dated this 9th day of July, 2019.

Honorable John Z. Boyle
United States Magistrate Judge

Appendix D

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
09/30/2016 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-007039-001 DT

09/28/2016

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DIANE M MELOCHE
JAMES ARTHUR EAVES
ROBIN E BURGESS

v.

DIMITRI ROZENMAN (001)

DIMITRI ROZENMAN
#253132 ASPC TUCSON
UNIT SANTA RITA, P O BOX 24406
TUCSON AZ 85734
MARK HEATH
JAMES LEO LOGAN

COURT ADMIN-CRIMINAL-PCR

PCR RULING

This court is tasked with determining whether Defendant has presented a colorable claim in order to seek Rule 32 Relief. This court has extensive knowledge of this matter, having presided over the lengthy trial as well as significant post-verdict proceedings.

Presently, there are a number of pleadings that are part of this court's consideration.[1] The list includes the following:

- Defendant's Petition For Rule 32 Pro Se Evidentiary Hearing Requested (filed on December 7, 2015)

[1] There are a number of court rulings and other filings that are not listed, which have either been reviewed by this Court or were previously addressed by Judge Viola prior to this matter being assigned to this division for ruling. To ensure a complete review of the record, this court has also reviewed pleadings that were filed in advance of Defendant's Pro Se Petition.

Appendix D

- Defendant's Request For Funds (filed on December 21, 2015)
- Defendant's Motion To Verify That A New Pro Se Petition For Rule 32 Was Received By Court (filed on December 24, 2015)
- Letters from James Logan to Defendant (filed on December 30, 2015 and January 14, 2016)
- Petition For Rule 32 Pro Se Evidentiary Hearing Requested (filed on January 15, 2016)
- Supplement To Petition For Rule 32 Pro Se Filed on Dec 7, 2015 (filed on January 19, 2016)
- Notice of Filing of Petitioner's Supplemental Affidavit (filed by Attorney Mark Heath on March 16, 2016)
- Defendant's Affidavit Supporting Petition For Post Conviction Relief (filed on April 8, 2016)
- Defendant's Motion To Attach Original Affidavit To Petition For Rule 32 Relief (filed on April 8, 2016).
- Defendant's Motion To Compel Evidence, Trial Exhibit 109 (filed on April 8, 2016)
- State's Response to Petitioner's Motion To Compel Personnel Files (filed on April 15, 2016)
- State's Response to Petitioner's Motion To Compel Evidence (filed on April 15, 2016)
- State's Response to Defendant's Petition For Rule 32 Relief (filed on May 2, 2016)
- Defendant's Reply To State's Response to Petitioner's Motion To Compel Evidence (filed on May 5, 2016)
- Defendant's Reply To State's Response to Defendant's Petition For Rule 32 Relief (filed on May 26, 2016)
- State's Motion To Strike (filed on Jun 3, 2016)
- Defendant's Motion To Supplement Petition For Rule 32 (filed on June 17, 2016), which was granted by this Court in a minute entry dated July 7, 2016.
- Defendant's Supplement To Petition For Rule 32 (which appears to have been filed on both July 14, 2016 and July 21, 2016).
- Defendant's Motion To Compel (filed concurrent with the Supplement on July 21, 2016)
- State's Response To Defendant's Motion To Compel (filed on July 29, 2016)e
- Defendant's Reply To State's Response to Defendant's Motion To Compel (filed on August 8, 2016)

This case commenced following Defendant's arrest in 2009 on the charge of conspiracy to commit murder. A 2010 conviction for this offense was vacated by the Hon. Kristen Hoffman after finding actual or potential irregularities in the trial proceedings. A second trial was conducted by this court in 2013, following which Defendant was again convicted. It is from that proceeding that Defendant now seeks his Rule 32 Relief.

At trial, Defendant raised a number of issues relating to recordings that were admitted into evidence. He brings his claim under Rule 32.1(e) and asserts that there is newly discovered evidence relating to the efficacy of the impounding of those recordings. Within that claim, Defendant maintains that there were Brady violations. Additionally, he raises issues regarding the failure to provide a Willits Instruction.

A common thread throughout his arguments herein as well as throughout the pre-trial, trial and post-verdict proceedings was that the failure to timely impound the recordings created a significant risk that the recordings could have been altered. Defendant does not, however, address the fact that experts who testified at the trial failed to find any indicia of the recordings having been tampered with or altered.

Defendant has also raised what he characterized to be a "Youngblood Claim." He correctly cites the law but fails to link his claims to the evidence presented in the case. At no time has he been able to establish bad faith on the part of law enforcement or the failure to preserve evidence.

Tampered Evidence is another claim raised by Defendant. He asserts that he now has a witness who could cause there to be questioning of the integrity of the recordings. Even if this court assumes that such a witness exists, the integrity of the evidence was a crucial issue addressed at trial. Under no circumstances can Defendant establish that there is a basis for Rule 32 Relief on this issue, particularly but not exclusively under any notion of newly discovered evidence.

Defendant elected to self-represent at the second trial. While Defendant was questioned by this court as to the wisdom of that decision at that time, he elected to proceed in that fashion. Despite his lack of legal training, Defendant put forth a robust defense, and was given great latitude by this court in developing issues, including many relating to the integrity of the recordings. He has cited alleged "new evidence" in his Rule 32 filings, but he has failed to establish a colorable claim that this evidence meets the clear requirements under Rule 32.1(e). For that matter, this court has been unable to find any other basis for relief under Rule 32, even if this court assumes the factual basis alleged by Defendant.

This court notes that this matter is tragic on many levels. Fortunately, the tragedy did not result in the loss of life, but that fact is because of the ability of law enforcement to intercede before Defendant's plan could be acted upon. Nonetheless, the victim in this matter and her family suffered immeasurably because of the intentions of and actions taken by Defendant.

The court would be remiss not to note another tragic aspect of this case. Mr. Rozenman is a man of great intelligence. He had abilities that were far superior to the obstacles he

encountered, including coming to this country as an immigrant who lacked financial resources or language proficiency. He overcame those and other obstacles and was quite successful in business. He had aspects of his personality that were quite engaging. During and since the trial, this court has been unable to understand why a divorce and financial pay-out to an ex-wife would have led to such a dark and twisted decision by Mr. Rozenman to seek the murder of his wife. That is a question that only he can answer. In the meantime, this court can only focus on the legal issues before it.

Defendant has failed to present a colorable claim for relief under Rule 32.

IT IS ORDERED denying Rule 32 Relief.[2]

[2] It is the intention of this court for this ruling to be dispositive on all matters that are now before this court, including all motions that have been filed. Such motions are deemed denied based upon this ruling.

Appendix E

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Respondent,*

v.

DIMITRI ROZENMAN, *Petitioner.*

No. 1 CA-CR 16-0722 PRPC
FILED 12-7-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2009-007039-001
The Honorable Bruce R. Cohen, Judge

REVIEW GRANTED; RELIEF DENIED

APPEARANCES

Dimitri Rozenman, Tucson
Petitioner

Sanders & Parks, P.C.
By J. Arthur Eaves, Robin E. Burgess
Co-Counsel for Respondent

Appendix E

MEMORANDUM DECISION

Presiding Judge James P. Beene, Judge Randall M. Howe and Chief Judge Samuel A. Thumma delivered the following decision.

PER CURIAM:

¶1 Petitioner Dimitri Rozenman seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is Petitioner's first petition for post-conviction relief after direct appeal.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19, 278 P.3d 1276, 1280 (2012). It is petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, ¶ 1, 260 P.3d 1102, 1103 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find that petitioner has not established an abuse of discretion.

¶4 We grant review and deny relief.

Appendix F

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

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

TELEPHONE: (602) 452-3396

May 29, 2018

RE: STATE OF ARIZONA v DIMITRI ROZENMAN
Arizona Supreme Court No. CR-17-0614-PR
Court of Appeals, Division One No. 1 CA-CR 16-0722 PRPC
Maricopa County Superior Court No. CR2009-007039-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 29, 2018, in regard to the above-referenced cause:

ORDERED: Motion to Take Judicial Notice of Orders = DENIED as moot.

FURTHER ORDERED: Petition for Further Review in the Supreme Court of Arizona = DENIED.

A panel composed of Vice Chief Justice Brutinel, Justice Timmer, Justice Bolick and Justice Gould participated in the determination of this matter.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
James Arthur Eaves
Robin E Burgess
Dimitri Rozenman, ADOC 253132, Arizona State Prison,
Tucson - Santa Rita Unit
Amy M Wood

Appendix F

Appendix G

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DIMITRI ROZENMAN, *Appellant*.

Nos. 1 CA-CR 13-0458, 1 CA-CR 13-0898 (Consolidated)
FILED 1-29-2015

Appeal from the Superior Court in Maricopa County
No. CR2009-007039-001
The Honorable Bruce R. Cohen, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Michael J. Dew, Attorney at Law, Phoenix
By Michael J. Dew
Counsel for Appellant

Dimitri Rozenman, Buckeye
Appellant

Appendix G

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Donn Kessler and Judge Kent E. Cattani joined.

THOMPSON:

¶1 Defendant Dimitri Rozenman appeals his convictions and sentences for conspiracy to commit first-degree murder and for criminal damage, a domestic violence offense. This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defendant's appellate counsel has searched the record on appeal and found no arguable nonfrivolous question of law, and asks us to review the record for fundamental error. Defendant has filed a supplemental brief *in propria persona* in which he raises several issues for appeal.

¶2 We have searched the record for fundamental error and considered the issues identified by Defendant, and have found no reversible error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the convictions. Defendant was present and represented himself at trial and at sentencing, and was given the opportunity to speak at sentencing, at which time the court imposed a legal sentence except insofar as noted below.

¶3 We have noted an error in the sentencing minute entry. The sentencing minute entry ordered Defendant to "submit to DNA testing for law enforcement identification purposes and pay the applicable fee for the cost of that testing in accordance with [Arizona Revised Statutes ("A.R.S.") section] 13-610 [(Supp. 2013)]." However, A.R.S. § 13-610 does not authorize the superior court to order a convicted person to pay for the cost of DNA testing. *State v. Reyes*, 232 Ariz. 468, 472, ¶ 14, 307 P.3d 35, 39 (App. 2013). Therefore, we vacate that portion of the sentencing minute entry which requires Defendant to do so.

¶4 Accordingly, we affirm Defendant's convictions and sentences as modified.

I. Procedural Background

¶5 A grand jury indicted Defendant in June 2009 on one count of conspiracy to commit first-degree murder, and one count of criminal damage of between $2,000 and $10,000, a domestic violence offense, charges stemming from damage to the vehicles of his ex-wife and her family and a plot to murder them. Following a trial in 2010, a jury convicted Defendant of the charged offenses. The trial court granted a new trial on the ground that the state had failed, albeit inadvertently, to properly disclose to Defendant one of the surveillance recordings of a February 13, 2009 meeting to discuss the murder conspiracy, the so-called Hawk recording.

¶6 Defendant represented himself at the second trial, and a jury again convicted him of the charged offenses. The trial court sentenced Defendant to life with possibility of parole after 25 years for the conviction on conspiracy to commit first-degree murder, and a concurrent sentence of 2 years on the criminal damage conviction.[1] The trial court gave Defendant 1,565 days of presentence incarceration credit.

¶7 The trial court later denied Defendant's motion for new trial, which raised numerous issues relating to the four-month delay by police in impounding the recordings of surveillance and a confrontation call, and the admission of those and other recordings at trial. The trial court found it had no jurisdiction to decide Defendant's late-filed motion to vacate judgment, in which Defendant argued that the testimony before and at trial of the investigating officers showed that they conspired to obstruct justice by deliberately concealing the existence of the Hawk recording. The court concluded, however, that if it had jurisdiction over the motion to vacate judgment, it would deny it. Defendant filed timely notices of appeal of the convictions and the order denying his post-verdict motions and we have

---

[1] The presumptive sentence for this class 5 felony is 1.5 years. *See* A.R.S. § 13-1602(B)(3) (Supp. 2014); A.R.S. § 13-702(D) (2010). The jury did not find any aggravating circumstances, and the superior court did not mention any in sentencing Defendant to an aggravated sentence on this conviction. Defendant, however, did not object. It is possible the court meant to aggravate the sentence by a circumstance implicit in the verdicts. Moreover, the superior court gave Defendant 1,565 days, or nearly four years, of presentence incarceration credit on this sentence, and thus, any error under *Blakely v. Washington*, 542 U.S. 296 (2004), did not prejudice Defendant, as necessary for reversal on fundamental error review.

jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (Supp. 2014), 13-4031 (2010), and 13-4033(A) (2010).[2]

II. Discussion

A. Sufficiency of Evidence

¶8 Defendant argues on appeal that his conviction was contrary to the weight of the evidence because the evidence demonstrated he did not consciously agree to any plot to murder his ex-wife and her family. We review *de novo* the sufficiency of the evidence to support a conviction. State v. *West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We review for abuse of discretion the superior court's denial of a motion for new trial based on the weight of the evidence. *State v. Neal*, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984); *see* Ariz. R. Crim. P. 24.1(c)(1). The superior court abuses its discretion in denying a motion for new trial if the evidence is not sufficient to support the verdict. *Neal*, 143 Ariz. at 97, 692 P.2d at 276. In reviewing the evidence, we view the facts in the light most favorable to upholding the jury's verdict, resolving all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983); *State v. Henry*, 176 Ariz. 569, 577, 863 P.2d 861, 869 (1993). Credibility of the witnesses is an issue for the jury, not this court. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).[3]

¶9 The evidence at trial was more than sufficient to support the convictions. The offense of conspiracy to commit first-degree murder required proof in pertinent part that 1) "with the intent to promote or aid the commission of an offense"; 2) the defendant "agree[d] with one or more persons that at least one of them or another person [would] engage in conduct constituting the offense"; and 3) the intended conduct would constitute first-degree murder. A.R.S. § 13-1003(A) (2010); *see* A.R.S. § 13-1105(A)(1) (2010). Criminal damage requires proof that a defendant recklessly damaged property of another person. A.R.S. § 13-1602(A) (Supp. 2014).

¶10 The evidence demonstrated that in 2008 Defendant hired L.N. at his cigar business. L.N. testified that Defendant regularly complained

---

[2] We cite the current versions of the applicable statutes when no revisions material to this decision have since occurred.

[3] *Abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 242-43, ¶¶ 15-20, 274 P.3d 509, 512-13 (2012).

about his wife and was angry she refused to sign a postnuptial agreement to accept $50,000 in the event of a divorce. L.N. also stated that Defendant told him that if he and his wife "were still back in Russia, that she would be dead or they would kill her."

¶11 Defendant served his wife with divorce papers in March 2008, and directed L.N. to move her belongings to her parents' house. One night in October 2008, L.N. saw Defendant puncture the tires of three vehicles belonging to his wife's family, and pour sugar into the gas tank of one of them. The repairs cost in excess of $2,000.

¶12 When the divorce decree ordering Defendant to pay his wife approximately $500,000 was issued in late January 2009, Defendant was "incoherent and really upset," and told L.N. he wished his ex-wife were dead. Sometime after that, L.N. testified, Defendant approached him and proposed a plan whereby L.N. would hire people to force his ex-wife to sign a paper agreeing to relinquish all money awarded in the divorce decree, and then kill her and her family. Defendant offered to pay L.N. $70,000 in installments, and later gave L.N. $5,000 in cash.

¶13 L.N. ultimately told Defendant's ex-wife of the plot, and agreed to allow police to hide video and audio recorders on him for a meeting L.N. arranged with Defendant for the night of February 13, 2009. During the meeting, L.N. told Defendant that his ex-wife had signed the documents, and she and her family had been bound up "execution style" and had been beaten. L.N. told Defendant he was not going to give Defendant "details of how they're gonna murder them," and talked about "hit guys," and when they would "go and shoot them people." Defendant gave L.N. $500 in cash to get the hit men out of town. Defendant indicated by nodding that all he wanted L.N.'s men to do was kill the ex-wife and her family, and he would handle disposing of the hit men. During that meeting, Defendant never told L.N., "you're scaring me," threatened to call police, or called him crazy.

¶14 In a recorded confrontation call six days later, L.N. told Defendant that his ex-wife and her parents were dead, to which Defendant immediately asked L.N. when he was going to return to work. Defendant did not call 9-1-1 that night to report that he had just been told his ex-wife and her family had been murdered.

¶15 When police called on Defendant at his girlfriend's apartment early the next morning and told him about the "murders," and repeatedly asked him if he knew who might have done this, Defendant never

mentioned L.N. Police arrested Defendant and served him later that day with a protection order from his ex-wife, and told him that his ex-wife and her family were safe. At that time, Defendant told police that he was concerned that hit men hired to commit the murders might come looking for him.

¶16 This evidence was more than sufficient to prove beyond a reasonable doubt that Defendant caused more than $2,000 in damages to the vehicles of his ex-wife and her family, and later conspired with L.N. to murder them.

B. Other Issues Raised in Supplemental Brief

¶17 Defendant raises numerous additional issues in his supplemental brief, most relating to admission at trial of the recordings of surveillance (exhibits 96 and 97), the later confrontation call (exhibit 90), and questioning by police at his girlfriend's apartment (exhibit 100), and testimony relating to their impoundment and disclosure.

1. Delay in Impounding Recordings

¶18 Defendant raises a number of legal grounds for reversal related to the alleged failure of the investigating officers to properly impound three of the recordings for four months after they were created, and the fourth for one month after it was created.

¶19 The background on these issues is as follows. The lead detective testified at trial that he did not impound the recordings of the February 13, 2009 surveillance or the later confrontation call for four months because he continued his investigation until a grand jury met to consider the charges -- more than four months after the date of the surveillance. He stated that during the four months prior to impound, when the recordings were not being used, he kept them secured in a locked drawer in his desk. The detective also asserted that this method of handling such evidence was not uncommon, and distinguished it from the practice of immediately impounding evidence such as drugs, guns, or money. Another detective who had recorded Defendant's responses to police while being told that his ex-wife had been murdered testified that he did not impound the recording for about a month because it made no sense to travel the forty mile round-trip to the impound warehouse each time he needed to listen to the recording while he continued to work with other detectives on this complex investigation.

¶20 After trial, an associate of Defendant searched the internet and discovered Operations Order 8.1 within a 1,200 page manual on Phoenix Police rules, guidelines and procedures. Defendant's discovery of Operations Order 8.1 formed the basis, in large part, for Defendant's motion for new trial, in which he argued that pursuant to Operations Order 8.1, "[a]ll property will be impounded prior to the end of the shift" except when authorized by a supervisor. Defendant contended that he was thus denied a fair trial, having unsuccessfully sought police impound policies in pretrial discovery and having elicited testimony at trial from the investigating officers that they retained the recordings for investigative purposes as common practice. Insofar as the record reflects, however, Defendant did not supply any expert or other witness who testified that such policy was violated by the conduct of the detectives in this case. Although both Defendant's and the State's expert testified that they found no evidence that anyone had altered or tampered with the recordings, Defendant nevertheless argued in his posttrial motion that the only reasonable explanation for the four-month delay in impounding the recordings was to allow the lead detective sufficient time to tamper with them.

¶21 Following two days of oral argument, the judge denied the motion for new trial, reasoning that he had given Defendant great latitude during trial in presenting his defense, and that through cross-examination and argument, Defendant had raised these same issues with the jury, the fact-finder and the sole judge of credibility, and it had found him guilty.

a. *Youngblood* Claim

¶22 Defendant argues that his due process rights were violated pursuant to *State v. Youngblood*, 173 Ariz. 502, 844 P.2d 1152 (1993), because the investigating officers acted in bad faith in failing to impound the recordings at the end of the shift, per the plain wording of Phoenix Police Operations Order 8.1. Defendant argues that had the recordings been properly impounded, the audio and video might have been more accurate and might have exonerated him.

¶23 In *Youngblood*, our supreme court held that "absent bad faith on the part of the state, the failure to preserve evidentiary material which could have been subjected to tests, the results of which might have exonerated the defendant, does not constitute a denial of due process of law under the Arizona Constitution." *Id.* at 508, 844 P.2d at 1158; see Ariz. Const., art. 2, § 4; *see also Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (holding the same under the Due Process Clause of the Fourteenth Amendment to the United States Constitution). To any extent that the

ostensible police failure to follow Operations Order 8.1 can be construed as a failure to "preserve" the recordings for purposes of *Youngblood*, Defendant has failed to persuade us that the investigating officers did so in bad faith. We accordingly find no merit in this argument.

b. *Brady* Claim

¶24 Defendant also argues that the State violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and thereby deprived him of a fair trial by failing to comply with his pretrial request for the police department's policies and procedures for impounding evidence; by offering allegedly false testimony from officers on this issue; and by arguing in closing that "it is common police procedure not to impound evidence while conducting an investigation." In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

¶25 Evidence is considered "material" for purposes of *Brady* only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976) (holding that evidence of prior convictions of victim for possession of knives was not material notwithstanding defendant's claim of self-defense, in part because it was cumulative of other evidence that he had knives on him at the time of his murder).

¶26 The record fails to reveal any testimony to support Defendant's claim that Operations Order 8.1 applies to the recordings at issue, that the investigating officers lied in testifying that it was common practice to retain surveillance recordings (rather than send them to the impound warehouse) while investigating the offense, or that anyone tampered with the recordings during the four months they were not impounded. Under these circumstances, we are not persuaded that Operations Order 8.1 was evidence material to his guilt, as required to establish a *Brady* violation.

c. Denial of Motion for New Trial

¶27 Defendant also argues that the trial court erred in denying his motion for new trial based on the newly discovered evidence of Operations Order 8.1. We review a trial court's ruling on a motion for new trial based on newly discovered evidence for abuse of discretion. *State v. Orantez*, 183 Ariz. 218, 221, 902 P.2d 824, 827 (1995). To warrant a new trial, a defendant "must show that (1) the newly-discovered evidence is material; (2) the evidence was discovered after trial; (3) due diligence was exercised in discovering the material facts; (4) the evidence is not merely cumulative or impeaching, unless the impeachment evidence substantially undermines testimony that was of critical significance at trial; and (5) that the new evidence, if introduced, would probably change the verdict or sentence in a new trial." *Id.* at 221, 902 P.2d at 827. Again, in the absence of any testimony that Operations Order 8.1, in fact, applies to such recordings, or that anyone tampered with the recordings before they were impounded, we are not persuaded that this evidence was material, or that it "would probably change the verdict or sentence." Consequently, we conclude that the trial court did not abuse its discretion in denying Defendant's motion for new trial.

2. Denial of Motion to Exclude Recordings

¶28 Defendant next argues that the trial court abused its discretion in failing to exclude the recordings at trial based on the four-month delay in their impoundment, the delay in disclosing the existence of the Hawk recording, alleged perjury and witness tampering related to testimony on the Hawk recording, and anomalies in the recordings themselves. He contends that because both experts testified that the recordings *could* be subject to tampering, the "anomalies on the recordings,"[4] as well as unidentified evidence indicating that they were not

---

[4] Defendant's expert alluded to unidentified "anomalies" in the recordings but testified that he could not say that there were alterations in the recordings. The evidence does not support Defendant's claim on appeal that the header in the Hawk recording showed a date of 12/30/1899. Although during his cross-examination of the state's sound expert, Defendant announced that he was showing the jury a document with a 12/30/1899 date in the Hawk header, Defendant agreed with the sound expert that the document did not come from the expert's report. Moreover, Defendant failed to identify the source of the document from any exhibit number, nor did he seek an explanation from the sound expert as to what that date might mean in the context that it appeared. Our review of the header on the Hawk recording does not show such erroneous date.

the original recordings, suggest tampering and rob the recordings of trustworthiness.

¶29 Defendant filed several motions in limine to exclude the surveillance recordings at trial on the grounds that they lacked trustworthiness. The trial court denied Defendant's motions, reasoning that the issues that he raised went to the weight of the evidence and not its admissibility. The trial court, however, stated it would give Defendant significant leeway in asking the witnesses questions that he believed would shed light on the unreliability of the recordings.

¶30 "Whether a party has laid sufficient foundation for admission of evidence is within the sound discretion of the trial court." *State v. George*, 206 Ariz. 436, 446, ¶ 28, 79 P.3d 1050, 1060 (App. 2003). We find no abuse of discretion here. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Ariz. R. Evid. 901(a). Circumstantial evidence may be used to prove the authenticity of a sound recording. *State v. Lavers*, 168 Ariz. 376, 388 n.8, 814 P.2d 333, 345 n.8 (1991). The question for the trial judge is not whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic. *Id.* at 386, 814 P.2d at 343.

¶31 In this case, a detective testified that he created the original disks, the Hawk and audio/video recordings, shortly after the surveillance was concluded. Additionally, L.N. testified that he had reviewed both recordings, as well as the recording of the confrontation call, and believed they were fair and accurate depictions of what had occurred. Another detective likewise testified that he personally recorded the visit with Defendant to notify him of his ex-wife's death, and retained custody of the original recording for about a month before formally impounding it. The recording was admitted as an exhibit without objection.

¶32 We find no merit in Defendant's claim that the lead detective lied under oath and told other witnesses to lie under oath, in testifying how many recordings were obtained from the surveillance. Moreover, in light of the absence of testimony and evidence demonstrating that the recordings where tampered with or should have been impounded sooner, we are not persuaded that the delay in impoundment made the recordings unreliable. Therefore, we conclude that Defendant has failed to raise any genuine issue as to the trustworthiness of the recordings, and the trial court did not abuse its discretion, much less fundamentally err, in admitting the recordings at trial.

3. Limitations on Presentation of Defense Case

¶33 Defendant raises a number of issues related to the limitations he believed were imposed by the trial court prior to trial on his presentation of his case, in violation of his constitutional right to due process. Defendant first argues that the trial court erred in limiting his cross-examination of the investigating officers to questions that would reflect on their credibility and motive, thereby preventing him from referring to the lead detective's alleged obstruction of justice and intentional suppression of the Hawk recording in his opening statement. He also asserts that the trial court erred by allowing the lead detective to testify that the court had previously held that the Hawk recording had been disclosed, in response to Defendant's cross-examination question on whether the detective had suppressed the Hawk recording. Finally, he contends that the trial court erred in precluding him from calling his former defense attorney as a witness to testify that he was misled by the investigating officers before the first trial as to existence of the Hawk recording.

¶34 The constitutional rights to due process, compulsory process, and confrontation guarantee a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). A defendant's right to present evidence is subject to restriction, however, by application of reasonable evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). Although we ordinarily review evidentiary rulings for abuse of discretion, we review evidentiary rulings that implicate a defendant's constitutional rights *de novo*. *State v. Ellison*, 213 Ariz. 116, 120, ¶ 42, 140 P.3d 899, 903 (2006).

¶35 We have reviewed the entire record, and conclude that the trial court did not err, much less fundamentally err, in imposing the limits it did on Defendant's presentation of his case. The trial court allowed Defendant considerable leeway in questioning the investigating officers, including the lead detective, on whether they had intentionally misled Defendant as to the existence of the Hawk recording, or had suppressed it. We find no error in the trial court's admonishment to Defendant that he could not make arguments in his opening statement. *See State v. King*, 180 Ariz. 268, 278, 883 P.2d 1024, 1034 (1994). Nor do we find no error in the trial court's determination that Defendant had opened the door to the detective's recitation of a court's prior finding that the Hawk recording had been disclosed, by asking the detective if he had suppressed the recording. *See State v. Lawrence*, 123 Ariz. 301, 304-05, 599 P.2d 754, 757-58 (1979). Additionally, we find no error in the trial court's preclusion testimony from Defendant's former counsel to establish that the attorney believed the lead

detective had misled him as to the existence of the Hawk recording, on the grounds the potential to confuse the jury would far outweigh any probative value of this testimony. The court did not preclude Defendant from arguing in closing any reasonable inferences from the evidence, and specifically did not preclude him from arguing that the investigating detectives obstructed justice or that they suppressed the evidence.

¶36 Defendant also argues that the trial court erred in precluding him from offering the jury a transcript of the surveillance audio prepared by his sound expert as an aid during the expert's testimony, to show that after the surveillance, the detectives accidentally recorded themselves engaged in drug use. We have reviewed the record on this issue, and conclude that the trial court appropriately precluded use of this transcript on the grounds that the sound expert was not a party to the conversation, had no greater expertise in listening than anyone else, and to the extent the expert had used specialized equipment to increase audibility, had not prepared an enhanced recording for the jury to hear. *See* Ariz. R. Evid. 702. Nor are we persuaded (especially in light of our inability to hear any of the claimed evidence of drug use in our review of the exhibit) that the trial court erred in precluding Defendant from examining the lead detective on whether the recording revealed evidence of the detectives' drug use. *See* Ariz. R. Evid. 403.

4. Issues Related to State's Sound Expert

¶37 Defendant argues that the State violated his rights under *Brady* and the discovery rules by failing to disclose the report of its sound expert until after jury selection had begun, and not ordering the State to produce its expert for an interview before trial. *Brady*, 373 U.S. at 87. We review a trial court's rulings on discovery issues for abuse of discretion. *State v. Connor*, 215 Ariz. 553, 557, ¶ 6, 161 P.3d 596, 600 (App. 2007). "To the extent [d]efendant sets forth a constitutional claim in which he asserts that the information is necessary to his defense, however, we will conduct a de novo review." *Id.*

¶38 We find no merit in Defendant's argument that the delayed disclosure of the expert report violated his *Brady* rights and the discovery rules. To demonstrate a *Brady* violation, a defendant must show that the prosecution suppressed material evidence favorable to the accused. *Brady*, 373 U.S. at 87. The record shows that the State's sound expert was hired to provide enhanced recordings, and that his report summarizing the characteristics of the original disks and the measures he took to create the enhanced recordings was disclosed shortly if not immediately after it was

completed, which was four days before Defendant gave his opening statement and two weeks before the sound expert testified. Defendant has failed to show that the report itself contained any material evidence favorable to him, that is, evidence that impeached the credibility of the lead detective by casting doubt on the trustworthiness of the recordings. The favorable evidence cited by Defendant on appeal - a supposed 1899 date in the header of the Hawk recording, which Defendant argues was suggestive of tampering - was not in fact found in the sound expert's report, as Defendant himself conceded at trial. Under these circumstances, we conclude that the report contained no material evidence favorable to Defendant, necessary to establish a *Brady* violation. Moreover, in light of the record showing that the report was disclosed as soon as it was completed and two weeks before the sound expert testified, we are not persuaded either that the State violated Arizona Rule of Criminal Procedure 15.1, or that Defendant suffered any prejudice from the failure to disclose it earlier. *See State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985); Ariz. R. Crim. P. 15.1 (b)(4), (e)(3).

¶39 Further, the trial court did not violate Defendant's due process right by refusing to order the State to produce its sound expert for an interview before Defendant made his opening statement. Defendant first expressed an urgent need to interview the State's sound expert the day before jury selection was set to begin on February 25, 2013. Defendant did not, however, ask for a continuance to allow him to interview the sound expert before he made his opening statement. The trial court ordered the State to produce the expert for an interview as soon after February 25, 2013, as an interview could be arranged. The record reveals an avowal by the State that it produced its sound expert for an interview two days during the following week, the week of March 4, 2013, but Defendant "opted not to interview him until the week of March 11, 2013." The record also shows that Defendant's advisory counsel finally interviewed the State's sound expert on March 12, 2013, two days before the sound expert testified. The State's sound expert testified that it was possible to tamper with recordings, although such tampering would be easily detected, and he could find no evidence of tampering.

¶40 Under these circumstances, we are not persuaded by Defendant's argument that his inability to interview the sound expert before he made his opening statement somehow prejudiced him or constituted an unreasonable limitation on his presentation of his defense. Consequently, the court did not err, much less fundamentally err, in not requiring the report or the expert to be produced sooner.

5. Prosecutorial Misconduct

¶41 Defendant argues that the trial court erred in overruling his objection to the prosecutor's argument that the surveillance tape showed that Defendant nodded when L.N. asked Defendant if Defendant wanted him to "just stick to the initial contract, take care of Jana and them, and I'll leave the hit men for you to take care of later?" We find no merit in this argument: the prosecutor's argument represented a reasonable interpretation of the evidence.

¶42 Lastly, Defendant contends that the prosecutor must have known that the lead detective was offering perjured testimony when the detective testified that the county attorney was allowed to have evidence during the course of an investigation. Defendant offers no support for his claim that this testimony was perjured, and we could find none in the record. We accordingly find no fundamental error on this basis.

III. Conclusion

¶43 For the foregoing reasons, we affirm Defendant's convictions and sentences as modified by vacating the order that Defendant pay the fee for DNA testing.

¶44 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584–85, 684 P.2d 154, 156–57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

Appendix H

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

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

TELEPHONE: (602) 452-3396

August 24, 2015

RE: STATE OF ARIZONA v DIMITRI ROZENMAN
Arizona Supreme Court No. CR-15-0058-PR
Court of Appeals, Division One Nos. 1 CA-CR 13-0458
and 1 CA-CR 13-0898
Maricopa County Superior Court Nos. CR2009-007039-001
and CR2009-007039-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 24, 2015, in regard to the above-referenced cause:

ORDERED: Petition for Review by the Supreme Court = DENIED.

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

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Craig W Soland
Dimitri Rozenman, ADOC #253132, Arizona State Prison,
Yuma - Dakota Unit
Ruth Willingham
bp

Appendix H