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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

ROGER DARRYL WALDREP, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-16148 D.C. No. 2:17-cv-04609-DWL District of Arizona, Phoenix ORDER

Before: RAWLINSON and BRESS, Circuit Judges.

We have considered all filings submitted by appellant in support of his request for a certificate of appealability. The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

All pending motions and requests are denied as moot.

DENIED.

Appendix A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Roger Darryl Waldrep,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-17-04609-PHX-DWL

ORDER

On December 13, 2017, Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 ("the Petition"). (Doc. 1.) On December 20, 2019, Magistrate Judge Bibles issued a Report and Recommendation ("R&R") concluding the Petition should be denied. (Doc. 53.) Afterward, Petitioner filed objections to the R&R (Doc. 55), Respondents filed a response (Doc. 69), and Petitioner filed a reply (Doc. 71). For the following reasons, the Court will overrule Petitioner's objections to the R&R and terminate this action.

I. Background

The relevant factual and procedural background is set forth in the R&R. In summary, in late November 2013, Petitioner molested his 11-year-old step-daughter by rubbing her breasts, licking her vagina, and rubbing her anus. (Doc. 53 at 1.) A few days later, Petitioner made various admissions during a phone call that, unbeknownst to him, was being recorded by the police. (*Id.* at 2.) Petitioner also made similar admissions to his brother and to the victim's mother. (*Id.* at 2 & n.1.)

APPENDIX B

Following his arrest in December 2013, Petitioner was initially represented by retained counsel. (*Id.* at 2-3.) However, in May 2014, Petitioner's retained counsel withdrew from the representation and Petitioner obtained appointed counsel. (*Id.* at 3.) The trial court then "granted numerous motions to continue so that [new counsel] could investigate the case and conduct plea negotiations." (*Id.*)

In October 2015, Petitioner attended a settlement conference. (*Id.*) During the conference, the prosecutor offered a plea deal with a stipulated sentencing range of 20-24 years' imprisonment, which Petitioner rejected because "he would not acquiesce to a prison sentence." (*Id.* at 4.) Petitioner also "read a statement professing remorse for his actions" and "attribut[ing] his actions to a deer antler testosterone spray prescribed by his doctor for chronic fatigue." (*Id.*) After the settlement conference, Petitioner sought and obtained new appointed counsel. (*Id.* at 5.)

In February 2016, Petitioner attended a second settlement conference. (*Id.*) During this conference, the prosecutor informed Petitioner that his deer-antler-spray defense was "problematic because [Petitioner] had voluntarily used the deer antler spray, and voluntary intoxication was not a defense under Arizona law." (*Id.* at 6.) Nevertheless, the prosecutor informed Petitioner "that he was willing to deviate from the typical offer and offer [Petitioner] a sentencing range of 17 to 24 years' imprisonment," contingent upon obtaining supervisory and victim approval. (*Id.*) Petitioner responded by stating that a 17-to-24-year sentence would be a disproportionate and unreasonable punishment for "five minutes" when he "really screwed up." (*Id.*) After some additional back and forth, during which the prosecutor stated that no better plea offers would be forthcoming, the settlement judge stated that the conference was over and the trial date would be affirmed. (*Id.* at 8.) In response, Petitioner stated: "I won't turn it down yet." (*Id.*)

On March 3, 2016, Petitioner attended a third settlement conference. (*Id.*) During this conference, Petitioner's counsel acknowledged that the case against Petitioner was "relatively straightforward" because he had "confessed three different times to three different people." (*Id.* at 8-9.) After further discussion, during which the prosecutor again

confirmed that no better plea deals would be forthcoming, Petitioner stated that he wanted to have "a few days to talk with family" about whether to accept the current offer. (*Id.* at 9.)

On March 9, 2016, Petitioner signed a written plea agreement that provided for a stipulated sentencing range of 17-24 years. (*Id.*) During the change-of-plea hearing, Petitioner was represented by counsel and repeatedly confirmed that he understood the plea agreement and had not been forced, threated, or coerced into pleading guilty. (*Id.* at 9-12.)

On April 11, 2016, Petitioner's sentencing hearing took place. (*Id.* at 12.) Although the prosecutor asked for a 24-year sentence, the judge imposed the lowest possible sentence that was available under the plea agreement of 17 years. (*Id.* at 12-14.)

After sentencing, Petitioner filed a timely notice of post-conviction relief ("PCR") pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. (*Id.* at 14.) The trial court appointed PCR counsel, but counsel filed a notice averring that he was unable to identify any colorable claims for relief. (*Id.* at 15.) Petitioner thereafter filed a "revised" PCR petition that "included extensive exhibits" and listed "34 separate claims of error." (*Id.* at 15.)

On October 25, 2016, the trial court denied relief. (*Id.*) Among other things, the court concluded that Petitioner could not prevail on a claim of ineffective assistance of counsel ("IAC") because he could not demonstrate deficient performance or prejudice. (*Id.* at 15-16.)

On November 20, 2016, Petitioner filed a petition for review with the Arizona Court of Appeals that raised 28 claims of IAC. (*Id.* at 16-17.)

On November 29, 2017, the Arizona Court of Appeals granted review and denied relief. (*Id.* at 17-18.)

In December 2017, Petitioner filed the Petition. It asserts 65 grounds for relief. (*Id.* at 18-23 [summarizing grounds].)

Between December 2017 and the present, Petitioner filed an array of often frivolous

motions.[1] Additionally, Petitioner filed a petition for a writ of mandamus (Doc. 51), which the Ninth Circuit denied in November 2019 (Doc. 67), and a premature notice of appeal (Doc. 65), which the Ninth Circuit dismissed in February 2020 (Doc. 68).

The R&R was issued in December 2019. (Doc. 53.) It is 51 pages long and painstakingly analyzes each of Petitioner's 65 asserted grounds for relief. First, the R&R concludes that Ground 4 must be rejected because it alleges errors during the PCR process, which are not cognizable on federal habeas review. (*Id.* at 18 n.6.) Second, the R&R concludes that Grounds 1-3, 5-15, 17-18, 53-54, and 60 must be rejected because they raise pre-plea claims of non-jurisdictional error, yet such claims are considered procedurally defaulted under Arizona law upon entry of a guilty plea, this Arizona law constitutes an independent and adequate state ground barring federal habeas review, and Petitioner cannot evade these principles because his guilty plea was knowing and voluntary. (*Id.* at 24-26, 30-32, 37-40.) Third, the R&R concludes that Grounds 16, 56, and 64 must be rejected because Petitioner failed to present them to the Arizona Court of Appeals, rendering them procedurally defaulted without cause. (*Id.* at 26-29.) Fourth, the R&R concludes that Grounds 19-38, 40-42, 44, 46-47, 51-52, 55, and 58, all of which raise claims of IAC before or during the guilty plea, must be rejected because Petitioner cannot demonstrate deficient performance, Petitioner cannot demonstrate prejudice, and/or the claim is procedurally defaulted due to the guilty plea. (*Id.* at 33-37, 40-46.) Fifth, the R&R concludes that the remaining claims (Grounds 39, 43, 45, 48, 49, 50, 57, 59, 61, 62, 63, and 65) fail for various reasons. (*Id.* at 46-49.)

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[1] Doc. 3 (motion for judgment); Doc. 6 (motion for summary judgment); Doc. 9 (motion to vacate judgment); Doc. 10 (motion for relief); Doc. 14 (motion for answers to previous motions); Doc. 21 (motion to appoint counsel); Doc. 22 (motion to produce transcripts); Doc. 31 (motion for direct ruling); Doc. 33 (motion for judgment as a matter of law); Doc. 34 (motion for ruling); Doc. 36 (motion for ruling); Doc. 39 (motion to enter newly discovered evidence); Doc. 40 (motion for status update); Doc. 41 (motion for final judgment or summary judgment); Doc. 43 (motion for de novo review); Doc. 45 (motion for reconsideration); Doc. 46 (motion for change of judge); Doc. 47 (motion to vacate judgment); Doc. 49 (motion to appoint counsel); Doc. 52 (motion for status hearing); Doc. 61 (motion invoking mailbox rule); Doc. 62 (motion to stop *Brady* violations); Doc. 72 (motion for summary judgment).

II. Legal Standard

A party may file written objections to an R&R within fourteen days of being served with a copy of it. Rules Governing Section 2254 Cases 8(b) ("Section 2254 Rules"). Those objections must be "specific." *See* Fed. R. Civ. P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file *specific* written objections to the proposed findings and recommendations.") (emphasis added).

District courts are not required to review any portion of an R&R to which no specific objection has been made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise."). Thus, district judges need not review an objection to an R&R that is general and non-specific. *See, e.g., Warling v. Ryan*, 2013 WL 5276367, *2 (D. Ariz. 2013) ("Because de novo review of an entire R & R would defeat the efficiencies intended by Congress, a general objection 'has the same effect as would a failure to object.'") (citations omitted); *Haley v. Stewart*, 2006 WL 1980649, *2 (D. Ariz. 2006) ("[G]eneral objections to an R & R are tantamount to no objection at all.").[2]

III. Analysis

Although Petitioner has filed lengthy objections to the R&R (Doc. 55),[3] his objections are too vague and generalized to permit meaningful review. For example, the objections begin by asserting that "none of [Petitioner's] constitutional claims and

[2] *See generally* S. Gensler, 2 Federal Rules of Civil Procedure, Rules and Commentary, Rule 72, at 422 (2018) ("A party who wishes to object to a magistrate judge's ruling must make specific and direct objections. General objections that do not direct the district court to the issues in controversy are not sufficient. . . . [T]he objecting party must specifically identify each issue for which he seeks district court review . . . .").

[3] *See generally* Doc. 59 at 2 (denying Respondents' motion to strike Petitioner's objections but clarifying that "[t]o the extent the 'exhibits' to Petitioner's objections contain any arguments not presented in the 17-page objections, such arguments will not be considered by the Court").

supporting law, precedent of 100's of U.S. Sup[reme] C[ourt], and Fed[eral] District Court ruling were given PROPER CONSIDERATION or mentioned by Magistrate Bibles in the R&R" and that "[f]or this Court to be just, upon reviewing entire record ANEW, DE-NOVA, IT WILL GRANT RELIEF REQUESTED." (*Id.* at 2.) Similarly, on the next page, Petitioner contends that "[Petitioner] overcomes ALL PROCEDURAL BARS, DENIED ANY REVIEW OF CLAIMS, based on jurisdiction, state adjudicated claims 'ON MERITS' or ANY DEFAULTS denied by [Petitioner]." (*Id.* at 3.) These are not proper objections to an R&R—they offer only conclusions and fail to explain, with any specificity, why the R&R's analysis was erroneous.[4]

Similarly, although Petitioner has offered some citations to case law, those references merely consist (as Respondents point out in their response) of "list[ing] a number of legal propositions and cases without explaining how they even relate[] to his claims (let alone how they would allegedly undermine the R&R's reasoning)." (Doc. 69 at 2.) Once again, this is insufficient to permit meaningful review under Rule 72(b).

The bottom line is that Petitioner's generalized objections to the R&R leave the Court with nothing to review. *Warling*, 2013 WL 5276367 at *2; *Haley*, 2006 WL 1980649 at *2; Gensler, *supra*, at 422. Thus, the Court will adopt the R&R's recommended disposition.

Accordingly, **IT IS ORDERED** that:

(1) Petitioner's objections to the R&R (Doc. 55) are **overruled**.

(2) The R&R's recommended disposition (Doc. 53) is **accepted**.

(3) The Petition (Doc. 1) is **denied**.

(4) A Certificate of Appealability and leave to proceed in forma pauperis on

[4] Petitioner's reply is similarly filled with conclusory assertions. (*See, e.g.*, Doc. 71 at 2 ["[Petitioner] again proclaims all his 65 constitutional grounds presented in his habeas corpus petition, [Petitioner] PROVES ALL GROUNDS ARE PROVEN TRUE, and COLORABLE by his established records, transcribes, notarized affidavits of facts, audio recordings; video recordings presented in States EVIDENCE."]; *id.* at 3 ["[Petitioner] has clearly, unequivocally; has UNIFORMALLY pointed out all of his SPECIFIC CONSTITUTIONAL VIOLATIONS he suffered and has presented specific CASE LAW; rights, privileges, his transcripts, records, affidavits of facts; and AGAIN REQUESTS HIS DENIED BRADY MATERIALS."].)

appeal are **denied** because Petitioner has not made a substantial showing of the denial of a constitutional right.

(5) The Clerk shall enter judgment accordingly and terminate this action.

Dated this 29th day of April, 2020.

Dominic W. Lanza
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roger Darryl Waldrep,

Petitioner,

v.

Charles L. Ryan, Attorney General of the State of Arizona,

Respondents.

No. CV 17-04609-PHX-DWL (CDB)

REPORT AND RECOMMENDATION

TO THE HONORABLE DOMINIC W. LANZA:

Petitioner Roger Waldrep, proceeding *pro se*, filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on December 8, 2017. Respondents filed an answer to the petition for habeas corpus relief on November 21, 2018, (ECF No. 29), and Waldrep docketed a reply to the answer to his petition on December 3, 2018. (ECF No. 32).

I. Background

A. State criminal proceedings

The following facts are taken from the presentence report:

> On November 30, 2013, the defendant rubbed the breasts of his eleven year old stepdaughter, Victim A. He then licked her vagina twice and rubbed her anus with his hands. He went to touch her anus with his penis when Victim A pulled up her pants and ran away. On December 1, 2013, Victim A wrote a letter to her mother stating she did not want to do anything with Waldrep anymore[,] and the allegations were reported to the

> Gilbert Police Department. On December 3, 2013, police conducted a forensic interview with eleven year old Victim A and a confrontation call between [K.A.] (mother of Victim A) and the defendant. He admitted to licking Victim A's vagina and was subsequently arrested. He invoked his right to silence and a police interview was not conducted.[1]

(ECF No. 29-2 at 45; *see also* ECF No. 29-1 at 14[2]).

On December 6, 2013, at the conclusion of a hearing at which Waldrep was represented by retained counsel, the Maricopa County Superior Court found Waldrep was "Not Bailable as a matter of Right," and that he should not be released because he was charged with molestation of a child under the age of fifteen. (ECF No. 29-1 at 22). A Maricopa County grand jury indictment returned December 11, 2013, charged Waldrep with two counts of molestation of a child, one count of sexual abuse, and two counts of sexual conduct with a minor; all of the counts were charged as a dangerous crime against children. (ECF No. 29-1 at 46-48). All of the charged counts were alleged to have occurred on the same date and involved the same victim, Waldrep's eleven-year-old stepdaughter. *(Id.;* ECF No. 29-2 at 45).

On December 13, 2013, Waldrep's retained counsel moved the trial court for a hearing and asked the court to release Waldrep on his own recognizance, to a third-party, to pre-trial supervision, or on bond. (ECF No. 29-1 at 52-57). At the conclusion of a

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[1] Prior to contacting the police the victim's mother asked Waldrep if the victim's accusation of sexual contact was true and he "did admit to licking her anus and he said it was very quick." (ECF No. 29-1 at 31). During a confrontation call Waldrep denied having admitted to licking the victim but agreed he "caressed" her. (ECF No. 29-1 at 39). The police detective who investigated the case and conducted a forensic interview with the victim told the grand jury he had spoken to Waldrep's brother and Waldrep admitted to his brother that he had licked the victim as she described. (ECF No. 29-1 at 40).

[2] This exhibit attached to Respondents' Answer includes a Release Questionnaire dated December 6, 2013, which states:

> On December 3, 2013 at about 2100 hours, Roger Waldrep was arrested in Mesa, AZ and transported to Gilbert Police Department. At about 2140 hours I attempted to conduct an interview with Roger Waldrep. Upon walking into the room Roger stated that he wouldn't talk without his attorney present. I read Roger his Miranda Warnings and he remained silent. I concluded my interview at that time.

hearing conducted December 20, 2013, at which Waldrep was represented by his retained counsel, the state trial court concluded there was sufficient evidence Waldrep committed four of the counts alleged in the indictment and, accordingly, that he was not eligible for release on bond pursuant to Arizona Revised Statutes § 13-3961. (ECF No. 29-1 at 62-63).[3]

An initial pretrial conference was conducted January 31, 2014. (ECF No. 29-1 at 69). Waldrep was represented by retained counsel at this pretrial conference. (*Id.*). The parties were ordered to conduct a good faith discussion regarding settlement prior to the Comprehensive Pretrial Conference, which was set for March 5, 2014. (ECF No. 29-1 at 70). On February 4, 2014, Waldrep's retained counsel filed a Notice of Defenses, which included insufficiency of the State's evidence; insanity; lack of specific and criminal intent; diminished capacity; duress; and good character. (ECF No. 29-1 at 75-76). On March 5, 2014, the matter was deemed a complex case based on the number and nature of the charges against Waldrep. (ECF No. 29-1 at 83).

On May 1, 2014, Waldrep's retained counsel was given leave to withdraw because Waldrep could "no longer meet his obligations under the representation agreement," and Ms. Workman was appointed as Waldrep's counsel. (ECF No. 29-1 at 87, 90, 93). The trial court granted numerous motions to continue so that Ms. Workman could investigate the case and conduct plea negotiations. (ECF No. 29-1 at 92, 95, 96-97, 98, 99-100, 105, 111, 115-16). The trial court also permitted Waldrep to be tested for a "full psychological assessment," including a risk assessment and a psychosexual evaluation. (ECF No. 29-1 at 122, 124).

At a settlement conference conducted October 2, 2015, the State offered Waldrep a plea deal providing for a sentence of 20 to 24 years' incarceration, followed by lifetime

[3] This statute precludes release when "proof is evident or the presumption great that the person is guilty of the offense charged," and the charged offense charged is sexual conduct with or molestation of a minor under thirteen years of age.

probation. (ECF No. 29-6 at Exh. GGGG).[4] Waldrep responded that he was willing to serve a term of probation, but he would not acquiesce to a prison sentence. (*Id.*). The settlement judge noted the types of obstacles Waldrep might face if he went to trial. (*Id.*). The judge also explained that the jurors would not be aware of the applicable sentencing laws and that there was a legal difference between mitigation evidence and an affirmative defense. (*Id.*). The settlement judge told Waldrep he was not entitled to a plea offer and that a group of lawyers who specialized in this area, rather than a single prosecutor, determined the plea offered to Waldrep. (*Id.*). After each explanation, the settlement judge asked Waldrep if he understood and he responded, "Yes." (*Id.*).

At the settlement conference Waldrep, at times sobbing, read a statement professing his remorse for his actions. (*Id.*). He offered many instances of his past behavior as a good citizen, noting his lack of any criminal record, his lack of drug and alcohol abuse, and his history working as a corrections officer. (*Id.*). Waldrep attributed his actions to a deer antler testosterone spray prescribed by his doctor for chronic fatigue. (*Id.*). He claimed not to have any sexual interest in children, and asked to be placed on probation. (*Id.*)

The prosecutor responded by explaining that a plea offer in this type of case would normally be harsher, i.e., that given the age of Waldrep's victim the offer would typically require Waldrep to receive a sentence of 35 years' imprisonment. (*Id.*). The prosecutor also addressed Waldrep's claim that he had no sexual interest in children. (*Id.*). She stated that a portion of his risk assessment, the "objective able" test, indicated Waldrep had an interest in six to 13-year-old female children. (*Id.*). The prosecutor also noted that Waldrep had not been using the deer antler spray when he took the risk assessment test. (*Id.*).

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[4] Exhibits GGGG and HHHH to Respondents' Answer to the habeas petition are video recordings of Waldrep's first and third state pre-trial settlement conferences, conducted October 2, 2015, and March 3, 2016. *See* ECF No. 30. No court reporter was present at the hearings and the hearings were not transcribed. However, both conferences were preserved using a digital video recording. *Id.* The Court has thoroughly reviewed both video recordings to verify the accuracy of the Answer's factual statements as repeated in this Report and Recommendation.

The settlement conference judge told Waldrep that if he proceeded to trial the jurors would not have the results of the polygraph test or be able to take into account his use of the deer antler spray. (*Id.*). He explained that this information was "great mitigation," but if Waldrep went to trial and was convicted he would not be dealing with mitigation because of the nature of the sentence. (*Id.*). Waldrep stated that he intended to join a class action lawsuit regarding the deer antler spray, and the settlement judge explained that the results of any class action lawsuit would not implicate his guilt because under the law voluntary intoxication was not a defense to criminal charges. (*Id.*). The judge explained that, because Waldrep used the spray voluntarily, any condition caused by it would be considered voluntary intoxication notwithstanding that his doctor had prescribed the testosterone treatment. (*Id.*). The judge further explained that Waldrep could try to argue that the spray caused him to be insane, but noted that even if this argument was successful Waldrep would be committed to 35 years in the state mental hospital and if he "recovered" he would serve the balance of the sentence in state prison. (*Id.*).

After the settlement conference Waldrep moved to change counsel. (ECF No. 29-1 at 126-27). The court granted the motion. (ECF No. 29-1 at 129-30). Mr. Kimble was appointed and he represented Waldrep at the next settlement conference, conducted February 12, 2016. (ECF No. 29-1 at 146-48). During the second settlement conference a different state judge explained that he was there to help Waldrep understand his options. (ECF No. 29-1 at 153-58).

The prosecutor explained the penalties Waldrep faced if he went to trial:

> To get to the bottom line, if you're convicted at trial of the sex conduct with a minor, you could face up to life in prison because of the age of the victim and the nature of the act. That's pursuant to Arizona law.
>
> . . . They have to be mandatory consecutive, both of the sex conducts, and one of the molests has to be consecutive to that. But—and that means stacked, back to back to back. But at the end of the day, you're facing a life sentence. Okay? Or what could be a life sentence, depending on if you—if you're only convicted of one or the other. So your exposure is very large, as I'm sure you know.

(ECF No. 29-1 at 159-60).

The prosecutor further explained that if the case went to trial the jurors would hear the victim's testimony and the confrontation call, in which Waldrep had made some partial admissions. (ECF No. 29-1 at 160). The prosecutor also noted that Waldrep's defense—that he had been "under the influence of deer antler spray, hormonal spray" when abusing the victim—was a novel one that his office (which dealt exclusively with sex crimes) had never heard before. (ECF No. 29-1 at 160-61). He also explained that, aside from the novelty of the defense, it would also be problematic because Waldrep had voluntarily used the deer antler spray, and voluntarily intoxication was not a defense under Arizona law. (ECF No. 29-1 at 161).[5] The prosecutor told Waldrep he was willing to deviate from the typical offer and offer him a sentencing range of 17 to 24 years' imprisonment. (ECF No. 29-1 at 163). The prosecutor further explained that the offer of 17 to 24 years would be contingent on the prosecutor's ability to obtain approval from his supervisor and he would have to seek feedback from the victim's family. *(Id.)*.

In response, Waldrep listed what he believed were comparable sentences received by other inmates, arguing that the offer of 17 to 24 years' imprisonment was disproportional to his alleged crimes. (ECF No. 29-1 at 164-65, 168-69). He noted he had a "spotless record," that he had "passed two polygraphs," and that he had "self-reported [his actions] to [his] wife." (ECF No. 29-1 at 165). Waldrep argued that under these circumstances 17 to 24 years' imprisonment was an unreasonable punishment for the "five minutes of [his] life" when he "really screwed up." (*Id.*). Waldrep's counsel interjected that, although some individuals had received lighter sentences, the lighter sentences took into account the difference in the other defendants' relationships with their victims and the available evidence of their wrongdoing. (ECF No. 29-1 at 164-65). The settlement judge told Waldrep that he would be able to challenge the proportionality of

[5] Waldrep clarified that he had also used a prescribed synthetic testosterone "therapy," i.e., Axiron. (ECF No. 29-1 at 162; ECF No. 32 at 6).

his sentence on appeal if he went to trial and was convicted, but reminded him that the State was under no obligation to offer Waldrep a plea deal. (ECF No. 29-1 at 166).

The prosecutor noted many distinguishing facts in the cases cited by Waldrep, including that in one case the perpetrator was an eighteen-year-old involved in a consensual relationship with a thirteen-year-old, making the case "vastly different" than Waldrep's, which involved a 48-year-old man abusing his eleven-year-old stepdaughter. (ECF No. 29-1 at 169-70). He reassured Waldrep that he was not being treated "any differently than anyone else," asked Waldrep whether he was willing to go to trial and risk an even longer term of imprisonment than that provided by the plea agreement. The prosecutor reminded Waldrep that the State had already deviated from its typical offer:

> . . .[D]o you want to be sitting in prison for the rest of your life knowing that we gave you an offer—and it is a deviated offer. We start at 35 years in these cases. . . . I'm even offering to drop it down to an open range, a 17-to-24 range. Or do you want to take—or do you want to take a deal and at some point in your life be released? . . . You need to stop looking at other people around you because it doesn't really matter.

(ECF No. 29-1 at 170-71).

In response, Waldrep claimed that a psychiatrist had told him that testosterone treatment therapy made people "psychotic" and caused them to act out sexually. (*Id.*). Defense counsel pointed out that, even so, "there was a difference between sexual conduct with an adult female and sexual conduct with a minor." (ECF No. 29-1 at 172). The settlement judge reiterated that the defense would fail regardless because Waldrep voluntarily used the testosterone treatment. (ECF No. 29-1 at 172-73).

Waldrep asserted he deserved to serve only five years, stating "I'm not a criminal" and arguing the acts had only lasted five minutes and he had spent a lifetime working with "a thousand customers" but "not one complaint." (ECF No. 29-1 at 173). He stated he was unlike the "thugs" and "criminals" he had met in jail who were "bad people" and "really need[ed]" to be "put away for life." (ECF No. 29-1 at 174). He promised to be "a pillar in the society" if he were allowed to serve only five years. (ECF No. 29-1 at 174-75).

The settlement judge then expressed his belief that the State would not offer a plea agreement involving less than 17 to 24 years' imprisonment. (ECF No. 29-1 at 175). Waldrep replied he could not believe they were "talking about throwing [his] life away" when he had not had intercourse with the victim. (ECF No. 29-1 at 176). The prosecutor then stated:

> Well, I'm just going to say what the judge said is correct. It's not going to get any better. Okay? You're not going to get five years. That's just not going to happen. So either you are willing to come to grips and understand that you're getting a chance to get out at some point in your life, or we'll take you to trial and you take your chances there.
> WALDREP: So someone that self-reports gets treated much worse than someone who hides and does a crime well. That's what you're telling me. That doesn't make sense.
> PROSECUTOR: I'm just—I'm just going to tell you that's what your options are. . . .

(ECF No. 29-1 at 176-77). Because the parties had not reached an agreement, the settlement judge affirmed the trial date. Waldrep then spontaneously volunteered, "I wouldn't turn it down yet." (ECF No. 29-1 at 177).

A third settlement conference, which began as a status conference, was conducted March 3, 2016. No court reporter was present at the hearing and it was not transcribed, but it was recorded by videotape. (ECF No. 26-9. *See also supra* at n.1). During a bench conference defense counsel alerted the court that Waldrep might want to "go pro per." (*Id.*). Defense counsel stated that he was ready to go to trial because it was "not a difficult case," involved only "one incident," and "basically, [Waldrep] confessed three separate times to three different people, including the State." (*Id.*). When the judge asked Waldrep whether he was asking to represent himself, Waldrep replied, "Yes, I need an investigator." (*Id.*). The judge asked Waldrep why he wanted an investigator and he replied: "to investigate details of the case, certain cases, and the doctor's opinion." (*Id.*). During this discussion defense counsel noted he had explained to Waldrep that he "was asking for an investigator with respect to an issue that is not a legal defense at trial," and that both settlement conference judges had told Waldrep the same thing with regard to his

proposed defense regarding his use of testosterone therapy. (*Id.*). Defense counsel explained that because this was "a relatively straightforward case," he believed an investigator was unnecessary. (*Id.*). Waldrep then volunteered that he would "take a plea if it's soft time." (*Id.*). After further discussion the judge confirmed that the current plea deal was the most lenient the State would offer, and asked Waldrep if he wanted to take the plea. (*Id.*). Waldrep asked to have "a few days to talk with family" about whether he should take the plea offer, and the prosecutor agreed to keep the offer open for six more days. (*Id.*). The judge kept the scheduled trial date on the calendar "in case it doesn't resolve." ((*Id. See also* ECF No. 29-1 at 184).

The parties signed a written plea agreement on March 9, 2016. (ECF No. 29-1 at 184). Waldrep also initialed each paragraph of the written plea agreement. (ECF No. 29-1 at 186-88). Waldrep agreed to plead guilty to one count of molestation of a child (Count 1 of the indictment) and two counts of attempted molestation of a child (Counts 2 and 4 of the indictment, as amended). (ECF No. 29-1 at 186). The parties stipulated that all of the crimes occurred on November 30, 2013, when the victim was eleven years of age. (*Id.*). The plea agreement noted the minimum sentence of ten years' imprisonment, the maximum sentence of 24 years' imprisonment, and the presumptive sentence of 17 years' imprisonment on Count 1. (*Id.*). The agreement noted the minimum sentence of five years imprisonment, the maximum sentence of 15 years' imprisonment, and the presumptive sentence of ten years' imprisonment on Counts 2 and 4. (*Id.*). The plea agreement provided that Waldrep would serve a term of 17 to 24 years' imprisonment pursuant to his conviction on Count 1, and that he would be placed on lifetime probation pursuant to his guilty pleas on Counts 2 and 4. (ECF No. 29-1 at 187). In return for Waldrep's guilty pleas the State agreed to dismiss both remaining counts of the indictment. (*Id.*).

In the written plea agreement Waldrep agreed to "waive[] and give[] up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon

him consistent with this agreement." (*Id.*). Waldrep acknowledged that "[b]y entering this agreement, the Defendant further waives and gives up the right to appeal." (*Id.*). The signed plea agreement affirmed Waldrep had "discussed the case" and his "constitutional rights" with his counsel, and that his counsel had "explained the nature of the charge(s) and the elements of the crime(s)" to which Waldrep was pleading guilty. (ECF No. 29-1 at 188). In the plea agreement Waldrep also acknowledged he was waiving various constitutional rights, including his right to a "trial by jury to determine guilt," his right to be free of self-incrimination, and his right to confront the witnesses against him. (*Id.*). Waldrep averred his guilty pleas were "voluntary and not the result of force, or threat, or promises other than those contained in the plea agreement." *(Id.)*.

A Superior Court Commissioner conducted a plea colloquy with Waldrep on March 9, 2016, at a hearing where Waldrep was represented by counsel. (ECF No. 29-1 at 208-24). The Commissioner confirmed that Waldrep had read and understood the written plea agreement. (ECF No. 29-1 at 214-18). When the Commissioner asked Waldrep if he had taken any drugs, alcohol, or medication, Waldrep responded that he had taken medication, but clarified that the medication did not interfere with his ability to think clearly. (ECF No. 29-1 at 212-13). He confirmed he was thinking clearly and understood everything the Commissioner was saying. (ECF No. 29-1 at 213).

Although Waldrep initially implied that he had not fully discussed the plea agreement with defense counsel, he then averred that he had discussed the agreement with his counsel:

> THE COURT: Do the initials and signatures mean that you've gone over the plea agreement fully with Mr. Kimble?
> WALDREP: No, we haven't fully gone over the—
> MR. KIMBLE: Hold on.
> (Whispered conversation)
> THE DEFENDANT: Yes, we did.
> THE COURT: So you went over the plea agreement fully?
> THE DEFENDANT: Yes.
> THE COURT: And is that why you put your initials on each paragraph?

THE DEFENDANT: Yes.
THE COURT: Does that mean that you understand everything in the plea agreement?
THE DEFENDANT: Yes.

(ECF No. 29-1 at 214-15).

The Commissioner explained the charges and sentencing ranges, and Waldrep confirmed that he understood the charges to which he was pleading and the applicable sentencing ranges, including that he would receive a sentence of between 17 to 24 years' imprisonment pursuant to his conviction for molestation of a child and a term of lifetime probation pursuant to both convictions for attempted molestation of a child. (ECF No. 29-1 at 215-16). The Commissioner also explained that by pleading guilty Waldrep would be giving up his constitutional rights to be presumed innocent, to have the State prove the charges beyond a reasonable doubt, to confront and cross-examine witnesses, to subpoena witnesses, to present evidence in his own defense, to testify or not testify, to a jury determination of aggravating circumstances, and his right to an appeal. (ECF No. 29-1 at 211-12). Waldrep said he understood the rights he was waiving and that he was choosing to relinquish those rights by pleading guilty. (ECF No. 29-1 at 219). He also confirmed that nobody had forced or threatened him to plead guilty. (*Id.*). Waldrep denied that anyone had made him any promises in order to induce him to plead guilty. (ECF No. 29-1 at 219-20). Waldrep agreed that the terms of the plea agreement stated the "full agreement" between the parties, that he did not have any questions regarding the agreement, and that nothing had "been left out of the agreement that [he thought] should have been written down." (ECF No. 29-1 at 218). Waldrep averred he understood the only way he could "get out of the plea agreement [was] to show the [state court] [it was] necessary to correct a manifest injustice[.]" (ECF No. 29-1 at 219).

Defense counsel provided the factual bases for Waldrep's pleas, including that he had "touched the . . . vagina and buttocks of" his stepdaughter; "attempted to engage in an act of sexual contact against the victim . . . by attempting to touch the vaginal area or breasts of the child;" and "knowingly or intentionally attempted to engage in an act of

sexual contact against the victim . . . by again attempting to touch the vaginal area or breasts of the child." (ECF No. 29-1 at 220-21).

The Commissioner asked, "Sir, is everything your attorney just said true?" and Waldrep replied "Yes." (ECF No. 29-1 at 221). When asked if he had any additions or corrections regarding the factual basis for the guilty pleas, the prosecutor noted the victim's date of birth and the fact that the offenses had occurred at separate and distinct times on November 30, 2013. (*Id.*). The prosecutor further explained that the charges required Waldrep to admit to attempting to touch the vaginal area of the victim, rather than the "vaginal area or breasts" of the victim. (*Id.*). The Commissioner then asked: "With that correction, Mr. Waldrep, is everything both Counsel said correct?" and Waldrep replied "Yes." (ECF No. 29-1 at 221-22). The Commissioner found that Waldrep's plea was "knowingly, intelligently, and voluntarily" made, and that there was a factual basis for the plea. (*Id.*).

Waldrep was sentenced on April 11, 2016, at the conclusion of a sentencing hearing. Prior to the hearing defense counsel filed letters in support of Waldrep for the court's consideration of mitigation at sentencing. (ECF No. 29-2 at 4-13). Counsel also submitted certificates establishing Waldrep had completed several Bible study classes while incarcerated. (ECF No. 29-2 at 14-33).

At the sentencing hearing a victim's advocate read a statement on behalf of the victim. (ECF No. 29-3 at 15-16). The statement included the following:

> People who do bad things deserve to be punished for as long as possible . . . especially if a child is harmed . . . I feel that this would give me and my family closure. We all feel betrayed. I trusted him with my life . . . I have trust issues, depression, and I have to take pills to help me with my emotions. . . . This is a scar that will last forever.

(ECF No. 29-3 at 16-17). The victim's mother spoke at the hearing, stating: "I want her to be protected and not have to ever fear that this person will ever come back into her life." (ECF No. 29-3 at 18).

The prosecutor asked for the maximum 24-year prison term, arguing that no child should have to ever say what the victim had been forced to say in this case: "He licked my private part like ice cream." (ECF No. 29-3 at 19-20). Defense counsel argued in favor of the presumptive 17-year sentence based on Waldrep's lack of a prior criminal record, his family support, and his efforts to better himself through Bible study classes. (ECF No. 29-3 at 20-21). Counsel also noted Waldrep "did take responsibility upon being confronted with these incidents . . . It was only [after] he consulted with counsel prior to a police interview that he invoked his right to remain silent." (ECF No. 29-3 at 22).

Waldrep addressed the court, stating that "words could not express" how sorry he was "for all the deep pain and heartache" he had caused his "precious stepdaughter." (ECF No. 29-3 at 23). He claimed that he "would do anything to take back [his] actions and all of the hurt and stress" he had caused. (ECF No. 29-3 at 24). Waldrep stated: "There were special circumstances leading to this incident that the mitigation was turned into you, Your Honor. These charges represent the opposite of who I am and who I've been all my life. I do take responsibility for my sin." (*Id.*). He also told the court: "All my life I'll be broken hearted in the deepest sorrow, repentance, and disgust for putting [the victim] and all my family through this terrible time." (ECF No. 29-3 at 25). He blamed his actions on "the antler spray and testosterone treatment" he had been taking "for medical reasons for [his] shoulders and chronic fatigue." (*Id.*). Waldrep reported that after abusing his stepdaughter he "had the greatest feeling of guilt, shame, confusion, remorse, and shock." (ECF No. 29-3 at 26). He noted his prior "spotless record" and that he had been a "model citizen and a model inmate." (ECF No. 29-3 at 28.)

Waldrep then stated that he had been denied the services of a mitigation specialist, an investigator, and a paralegal. (ECF No. 29-3 at 29). He referenced a number of other cases involving defendants who received a lighter sentence than the minimum authorized by his plea agreement, including two sex abuse cases, a theft case, and a semi-truck accident resulting in death, and he requested a 10-year sentence. (ECF No. 29-3 at 29-31). After Waldrep was finished defense counsel explained that he had spoken to

Waldrep about a mitigation specialist, but that "OPDS" (the public defenders' office) would not authorize one in a non-capital case. (ECF No. 29-3 at 32).

Waldrep was sentenced to a term of 17 years' imprisonment pursuant to his conviction on Count 1, molestation of a child. The court explained that the aggravating factors balanced against the mitigating factors made the presumptive sentence appropriate. (ECF No. 29-3 at 32-33). The court found the aggravating factors to be the seriousness of the crime, the serious impact to the particular victim, and Waldrep's abuse of a position of trust. (*Id.*). The court found the mitigating factors to be Waldrep's lack of a criminal history and the fact that he "took responsibility right away." (*Id.*). In accordance with the plea agreement Waldrep was sentenced to two concurrent terms of lifetime probation pursuant to his conviction on the two counts of attempted molestation of a child. (ECF No. 29-3 at 33-34).

B. State post-conviction proceedings

Waldrep filed a timely notice of state post-conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. (ECF No. 29-3 at 53-55). He simultaneously filed a Rule 32 petition, checking boxes on a form asserting: he had been denied his rights to be free of self-incrimination and to the effective assistance of counsel; the unconstitutional suppression of evidence by the state; the unconstitutional use of perjured testimony by the state; his guilty plea was unlawfully induced; and the existence of newly discovered evidence warranting the vacatur of his conviction or sentence. (ECF No. 29-3 at 61). Waldrep stated he learned about the newly discovered evidence on April 20, 2016, i.e., he "learned specific constitutional rights," and he also noted: "involuntary confession, unlawful interrogation;" ineffective assistance of counsel; and "Miranda rights violated." (*Id.*). He also alleged that the convicting court did not have jurisdiction and that his sentence was imposed "other than in accordance with the sentencing procedures established by rule and statute." (*Id.*). Waldrep further asserted he had been denied his rights to due process and his rights pursuant to the "4th, 5th, 6th, [and] 14th Constitutional Amendment[s]," and "Title III, Procedural Error, Cumulative Effect

Jurisdiction Clause violation, rights depravation (sic) by courts, prosecution and defense counsel." (*Id.*). Waldrep did not present any argument or facts to support his claims for relief, stating that the facts would be "reviewed, compiled and organized upon assignement (sic) of new Rule 32 counsel . . ." (ECF No. 29-3 at 62).

The state trial court appointed post-conviction counsel. (ECF No. 29-3 at 65-66). Counsel filed a notice averring he was "unable to discern any colorable claim upon which to base a Petition for Post-Conviction Relief." (ECF No. 29-4 at 7). The trial court allowed Waldrep until October 3, 2016, to file a pro per petition for post-conviction relief. (ECF No. 29-4 at 13).

Waldrep filed another copy of his "check box" Rule 32 petition on August 9, 2016. (ECF No. 29-4 at 22). The State filed a response to the petition. (ECF No. 29-4 at 29). Waldrep then filed a "Motion to Withdraw" "the partial Post-Conviction Relief Petition" filed August 9, 2016. (ECF No. 29-4 at 37). On September 12, 2016, Waldrep filed a "Reply to State's Response In Petition for Post-Conviction Relief," which did not discuss the substance of his claims or the State's response. (ECF No. 29-4 at 46-47). Waldrep filed a "Petition for Post-Conviction Relief-Revised," on or about October 5, 2016, containing argument addressing his substantive claims for relief. (ECF No. 29-4 at 70-95). The petition included extensive exhibits, (ECF No. 29-4 at 96-162), including an "exhibit" titled "Disproportionate Sentencing" and an exhibit titled "Uninvestigated Mitigation Factors and Special Circumstances." (ECF No. 29-4 at 149, 150-55). "Exh. D" to the petition delineated Waldrep's claims of "ineffective assistance of counsel," listing 34 separate claims of error. (ECF No. 29-4 at 160-61).

The state trial court denied relief in Waldrep's Rule 32 action on October 25, 2016. (ECF No. 29-5 at 9-14). Citing the state's procedural rules, the trial court "addressed the claims raised in the revised petition." (ECF No. 29-5 at 9). With regard to Waldrep's ineffective assistance of counsel claims, the trial court concluded:

> The Defendant has not shown that but for the ineffectiveness of both trial counsel the Defendant would have received a more favorable result than what occurred in this case. . . . The Defendant has not shown a link

> between any arguments not made at the settlement conferences to the ultimate outcome of this case . . . the complaints the Defendant has about statements made by Judges Granville and Padilla at the settlement conferences were not error; those statements were not coercive. . . .
>
> The Defendant also alleges that he did not have the time to sufficiently review the plea agreement before the change of plea proceeding, however, when Commissioner Ireland asked the Defendant if he read over the plea agreement and understood everything in the plea agreement, the Defendant answered "yes."
>
> "Disagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 260 [] 1984. Both defense attorneys made strategic determinations about not using investigators or experts on sex offenders, not obtaining additional polygraph testing, not being present at the risk assessment, and not filing motions to challenge the indictment or the confrontation calls. The Defendant has not shown how these determinations would have changed the outcome of this case.
>
> "Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind." A.R.S. §13-503. The mental state required for child molestation is intentionally or knowingly. A.R.S. §13-1410(A). An attempted crime also requires intent. A.R.S. §13-1001(A). The Defendant argues that the medications caused him to not be able to think clearly. This falls squarely within the statute noted above. Arizona law does not allow voluntary intoxication as a defense in this situation.
>
> The Court finds that the Defendant has not shown that Ms. Workman's or Mr. Kimble's performance in this case was unreasonable. Additionally, the Defendant has not shown any reasonable probability that the outcome of this case would have been different based on Ms. Workman's or Mr. Kimble's performance. The Defendant has not established a colorable claim for ineffective assistance of counsel . . .

(ECF No. 29-5 at 12-13).

On November 20, 2016, Waldrep filed a petition for review, which included 28 separate claims of ineffective assistance of counsel. (ECF No. 29-5 at 38-40). Waldrep also asserted: he was denied his right to self-representation; violation of his Miranda rights and, accordingly, his right against self-incrimination; a defective indictment; "judicial error;" "prosecutorial misconduct;" "withheld evidence;" that he was denied his

right to present the defense of involuntary intoxication and diminished capacity; violation of his right to be free of double jeopardy; that he was wrongfully denied bail; sentencing error; and that his guilty plea was coerced and entered 'unknowingly, unintelligently, unvoluntarily [sic]." (ECF No. 29-5 at 28-32). Waldrep simultaneously filed an appendix containing notes from police reports regarding the forensic interview of the victim and the confrontation call between Waldrep and the victim's mother, partial notes from a medical exam of the victim, and statements from various family members in support of his claims. (ECF No. 29-5 at 55-134).

The Arizona Court of Appeals granted review and denied relief in a decision filed November 29, 2017:

> On review, Waldrep again raises constitutional and federal statutory arguments in regard to the confrontation call, claims his indictment was invalid, asserts violations of his right to due process and right against "[d]ouble [p]unishments," argues he received ineffective assistance of counsel, claims his plea was involuntary, and maintains his sentence was illegal. *Most of these complaints are about non-jurisdictional matters and "the entry of a plea waives all non-jurisdictional defects." []. Therefore most of Waldrep's claims are barred, and we do not address them. See Ariz. R. Crim. P. 32.2(a)(3).*
>
> *This principle also bars claims of ineffective assistance of counsel, except those that relate to the validity of the plea. []*. Waldrep's claims do not bear on the validity of his plea, except his claim that the plea was coerced. Even so, at his change-of-plea hearing, Waldrep stated that he had gone "over the plea agreement fully" with his attorney and "underst[oo]d everything in the plea agreement." The trial court explained the rights he would be giving up and discussed the possible penalties for each count. Waldrep stated that no one had threatened him or promised him anything in regard to the plea. To state a colorable claim Waldrep needed to do more than simply contradict the record. . . .
>
> As to Waldrep's claims of sentencing error, much of his argument relies on federal laws relating to presentence reports. Those statutes do not apply to Arizona sentencings. He likewise cites federal law as to his claim that his crimes should be "treated as a [s]ingle [o]ffense" in sentencing. Waldrep does cite the similar Arizona law, A.R.S. § 13–116, but it does not apply to sentencings for crimes, like Waldrep's, which are dangerous crimes against children under A.R.S. § 13-705. . . .

State v. Waldrep, 2017 WL 5899910, at *1-2 (Ariz. Ct. App. 2017) (emphasis added and internal citations omitted).

C. Federal Habeas Claims

Waldrep asserts 65 claims for relief in his habeas petition. Respondents have accurately represented Waldrep's claims as follows:

> **Ground 1** contends that Waldrep's Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated when the police used a confrontation call to secure evidence, arrest him, indict him, and induce him to plead guilty. (Docs. 1 at 6; 8 at 15.)
>
> **Ground 2(a)** claims that Waldrep received ineffective assistance of counsel because his counsel failed to file a motion to suppress the confrontation call, which he alleges amounted to an involuntary confession to police because during the confrontation call, his attorney was not present, and the Miranda warnings were not given. (Docs. 1 at 7, 9; 8 at 20.)
>
> **Ground 2(b)** implicitly claims that the confrontation call amounted to an involuntary confession to police. (Docs. 1 at 7, 9; 8 at 20.)
>
> **Ground 3** claims that Waldrep was deprived of his Sixth Amendment right to represent himself, despite making this request "on the record" to the court on March 3, 2016. (Docs. 1 at 11; 8 at 16.)
>
> **Ground 4** alleges that Waldrep was deprived of due process because the superior court dismissed his PCR petition before Waldrep had a chance to review transcripts pertinent to his claim that he had been denied the right to self-representation. (Docs. 1 at 12, 48; 8 at 10, 29.)[6]
>
> **Ground 5** alleges that Waldrep's Fifth Amendment right "not to bear witness against self" was violated on December 3, 2013 (the date of the confrontation call). (Docs. 1 at 15; 8 at 16.)
>
> **Ground 6** alleges that Waldrep's due process and Fourth Amendment rights were violated on December 3, 2013 (the date of the confrontation call). (Docs. 1 at 15; 8 at 16.)
>
> **Ground 7** alleges that Waldrep's equal protection rights under the Fourteenth Amendment were violated on December 3, 2013 (the date of the confrontation call). (Docs. 1 at 15; 8 at 16.)
>
> **Ground 8** alleges that the government violated § 1983 by recording his confrontation call, by presenting an "Illegal Communication Interception" to the grand jury and the court. (Doc. 1 at 15.)

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[6] This claim fails because alleged errors in state post-conviction proceedings are not cognizable in a § 2254 action. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997); *Villafuerte v. Stewart*, 111 F.3d 616, 632 n.7 (9th Cir. 1997).

Ground 9 alleges that on December 3, 2013 (the date of the confrontation call), the government "perpetrated [a] 'Conspiracy Against Rights.'" (Id.)

Ground 10 alleges that on December 3, 2013 (the date of the confrontation call), the government caused Waldrep to "suffer a "Depr[i]vation of Constitutional Rights." (Id.)

Ground 11 alleges that Waldrep's Sixth Amendment right to counsel was violated on December 3, 2013 (the date of the confrontation call). (Docs. 1 at 15; 8 at 16.)

Ground 12(a) alleges that his Waldrep's due process rights were violated because the state court lost jurisdiction before his arrest. (Doc. 1 at 16.)

Ground 12(b) alleges that Waldrep he was held on an indictment that was allegedly void because he had not been given the Miranda warnings before the confrontation call. (Id; Doc. 8 at 15.)

Ground 13 claims a "judicial abuse of discretion" due to allegedly coercive behavior of a judge during his first settlement conference who told him that he had "no defense" and that he would be better off if he took the plea a violation of Arizona Rule of Criminal Procedure 17.4 and Federal Rule of Criminal Procedure 11. (Docs. 1 at 16; 8 at 19, 29.)

Ground 14 claims that Waldrep's due process rights were violated by the prosecutor's statements during plea negotiations. (Docs. 1 at 16-17; 8 at 11.) To the extent Ground 14 also includes an allegation of judicial misconduct, it will be addressed in Ground 13.

Ground 15 alleges that Waldrep's Fourteenth Amendment rights to equal protection and due process were violated by the court, the prosecutor, and defense counsel during the settlement conference. (Doc. 1 at 17-21.) To support this claim, Waldrep argues that if he had been permitted to represent himself, he could have hired an investigator and expert witnesses prior to the settlement conference. (Id.; Doc. 8 at 11, 16, 19.)

Ground 16 alleges that the Arizona Court of Appeals abused its discretion by failing to grant relief from the denial of Waldrep's PCR petition. (Docs. 1 at 22; 8 at 26-27.)[7]

Ground 17 asserts that Waldrep's due process rights were violated by the trial court based on the denial of a motion to change counsel. (Docs. 1 at 22; 8 at 16, 27-29.)

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[7] This claim also fails because alleged errors in state post-conviction proceedings are not cognizable in a § 2254 action. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997); *Villafuerte v. Stewart*, 111 F.3d 616, 632 n.7 (9th Cir. 1997).

Ground 18 alleges that the prosecutor engaged in misconduct by "overzealous, vindictive prosecution, withheld exculpatory evidence, multiplicious [sic], overcharging, misrepresentation to grand jury, court, false statements, presented void indictment to the court against petitioner, violated Title III § 1983 Act, 'due process violations.'" (Docs. 1 at 22; 8 at 11, 16, 18.)

Ground 19 alleges "extreme" ineffective assistance of counsel ("IAC"), prejudice, malpractice, misrepresentation, and coercion, which violated Waldrep's rights protected by the Sixth and Fourteenth Amendment. (Doc. 1 at 24.)

Ground 20 alleges IAC [ineffective assistance of counsel] because Waldrep was "denied [an] investigator for preparation of defense." (Docs. 1 at 24; 8 at 21.)

Ground 21 alleges IAC because Waldrep was denied a record transcript to "Expert S.O. Witnesses." (Docs. 1 at 24; 8 at 21.)

Ground 22 alleges IAC because Waldrep was denied the statements of three treating doctors. (Docs. 1 at 24; 8 at 21.)

Ground 23 alleges IAC because Waldrep was denied a transcript of the confrontation call and the grand jury transcript. (Docs. 1 at 24; 8 at 21.)

Ground 24 alleges IAC because counsel was not present during "critical stages." (Docs. 1 at 24; 8 at 21.)

Ground 25 alleges IAC because Waldrep was denied review or examination of discovery for defects in the indictment, search warrant, confrontation call, electronic interception, police report, victim statements, or interrogation. (Docs. 1 at 24; 8 at 20.)

Ground 26 alleges IAC because Waldrep was denied "defense strategy" and investigation. (Docs. 1 at 24; 8 at 21.)

Ground 27 alleges IAC because defense counsel failed to present or discuss affirmative defenses. (Docs. 1 at 24; 8 at 21.)

Ground 28 alleges IAC for failing to challenge "unconstitutional statutes" or file a motion to suppress. (Docs. 1 at 25; 8 at 20, 22 ("failed to suppress, challenge 'fruit of poisonous tree evid[ence]'").

Ground 29 alleges IAC for failing to prepare a mitigation package. (Doc. 1 at 25.)

Ground 30 alleges IAC for denying Waldrep the guaranteed right to legal representation. (Docs. 1 at 25; 8 at 22.)

Ground 31(a) alleges IAC for failing to challenge rights "violated during sett[lement] conferences." (Docs. 1 at 25.)

Ground 31(b) alleges that counsel also "failed to protect 14th [A]mend[ment] [rights] in plea proceedings critical stage." (Doc. 8 at 22.)

Ground 32 alleges IAC for denying Waldrep's "multi[ple] requests" to review and discuss plea prior to his "inducement" to sign the "unread" guilty plea. (Docs. 1 at 25; 8 at 22.)

Ground 33 alleges IAC because he was denied "to have warnings, side effects from [various prescribed drugs]." (Docs. 1 at 25; 8 at 23.)

Ground 34 alleges IAC because he was denied the equal protections and privileges afforded to other defendants in similar situations for "defenses, mitigation, greatly reduced sentencing, and plea offers for other defendants." (Docs. 1 at 25; 8 at 23.)

Ground 35 alleges IAC because he was denied case citations of "recent, relevant cases showing [Waldrep's] disproportionate treatment, punishment, and sentencing." (Doc. 1 at 25.)

Ground 36 alleges IAC because he was denied information on involuntary intoxication, diminished capacity, and lack of intent. (Id.)

Ground 37 alleges IAC for failing to challenge the alleged "presumption of guilt" or the prosecutor's statements that voluntary intoxication is not a defense. (Docs. 1 at 25; 8 at 23.)

Ground 38 alleges IAC because he was denied investigation of "mental impairment from prescribed medication." (Docs. 1 at 25; 8 at 24.)

Ground 39 alleges IAC for failing to challenge or review the presentence report with Waldrep. (Doc. 1 at 26.) In his memorandum, he adds the allegation that "counsel [was] not present at critical stages of PSR interviews with probation." (Doc. 8 at 24.)

Ground 40 alleges IAC for failing to inform Waldrep of the constitutional right to effective counsel or "waivers of constitutional rights." (Docs. 1 at 26; 8 at 24.)

Ground 41 alleges IAC for failing to protect Waldrep's Fourteenth Amendment rights during a "critical stage" of plea negotiations. (Doc. 1 at 26.) In Waldrep's memorandum, he adds that his "conviction [was] based on involuntary confession obtained through police coercion violates due process clause." (Doc. 8 at 24.)

Ground 42 alleges IAC for failing to inform Waldrep of any minimum sentence prior to his signing of the allegedly unread plea agreement. (Docs. 1 at 26; 8 at 24.)

Ground 43 alleges IAC because he was denied "knowledge and opportunity to request a mitigation hearing to present expert testimony." (Docs. 1 at 26; 8 at 25.)

Ground 44 alleges IAC for failing to challenge the state court's jurisdiction due to a "fatally flawed indictment" that was allegedly "multiplicious" [sic] and had "due process violations." (Docs. 1 at 26; 8 at 16-18, 32.)

Ground 45 alleges IAC for failing to disclose the State's "aggravating factors" to Waldrep and failing to challenge them with evidence in support of mitigation. (Doc. 1 at 26.) In Waldrep's memorandum, he adds that counsel "failed to challenge state's aggravating

factors, offer mitigation materials" and states that "Apprendi held only jury can enhance sentence above stat. max." (Doc. 8 at 25.)

Ground 46 alleges IAC for allowing Waldrep to be induced by misrepresentations to sign the guilty plea. (Doc. 1 at 26.) His memorandum adds that counsel used "misrepresentation to induce signing of unread guilty plea." (Doc. 8 at 25.)

Ground 47 alleges IAC for purposely keeping Waldrep "unknowing of . . . rights, uninformed of discovery, charges, possible challenges, and defense strategies." (Docs. 1 at 26; 8 at 25.)

Ground 48 alleges IAC because he was denied the right to a presentencing conference and presentencing hearing to challenge alleged errors and inaccuracies. (Doc. 1 at 26.)

Ground 49 alleges IAC because he was denied his right to review and discuss the presentence report prior to sentencing. (Id.)

Ground 50 alleges IAC because Waldrep was denied the opportunity to present his own presentence report to the court. (Id.)

Ground 51 alleges IAC for failing to provide Waldrep with representation adhering to Arizona Rules of Court (Rule 42 ER 1.2, 2003 ER 1.3, 1.4, 1.6). (Doc. 1 at 27.)

Ground 52 alleges IAC for failing to pursue a matter on behalf of Waldrep, to take measures to vindicate him, or to discuss his rights as a client. (Id. at 24-27; Doc. 8 at 21.)

Ground 53 alleges that Waldrep's Fourteenth Amendment equal protection rights were violated because he was denied bail and pre-trial release. (Docs. 1 at 27; 8 at 30.)

Ground 54 alleges that Waldrep's right to be free of cruel and unusual punishment under the Eighth Amendment was violated because he was denied bail and therefore lost income during the 28 months of proceedings, which caused him to become indigent and lose his private attorney. (Docs. 1 at 27-28; 8 at 30.)[9]

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[9] . . . [A] federal court does not sit in appellate review of a state court's exercise of judicial discretion in its grant or denial of bail. *Young v. Hubbard*, 673 F.2d 132, 134 (5th Cir. 1982). . . . Only if no rational basis for denying bail appears in the record will there be a violation of a state prisoner's constitutional rights. *Id.* at 595, 601.

Collins v. California Dep't of Corr., 2015 WL 8477768, at *5 (N.D. Cal. Dec. 10, 2015). Accordingly, this claim is not cognizable because Arizona law prohibited bail based on the nature of the charged offenses. *See Kelly v. Springett*, 527 F.2d 1090 (9th Cir. 1975). To the extent this claim might be cognizable, it was waived by Waldrep's guilty plea. *See Wilkins v. Shirleson*, 2011 WL 4530113, at *15 (D. Ariz. Sept. 7, 2011), *report and recommendation adopted*, 2011 WL 4566438 (D. Ariz. Sept. 30, 2011); *Johnson v. Mendoza-Powers*, 2008 WL 5245991, at *14 (C.D. Cal. Dec. 12, 2008) ("Petitioner's claim that his bail was excessive—assuming that it states a constitutional violation at all—is clearly barred under *Tollett*.").

Ground 55 alleges that Waldrep's guilty plea was not knowing, intelligent, or voluntary due to coercion and misrepresentations by the court, prosecutor, and defense counsel. (Docs. 1 at 28; 8 at 11, 20, 30.)

Ground 56 alleges "prejudice" and "abuse of discretion" because the transcripts from Waldrep's sentencing and second settlement conferences were purportedly altered. (Docs. 1 at 28; 8 at 30.)

Ground 57 alleges that his two lifetime probation sentences violate a "statute against double punishments." (Docs. 1 at 18; 8 at 6, 16-18, 30-31, 32.)

Ground 58 alleges that defense counsel (Kimble) withheld exculpatory evidence from Waldrep in order to induce a guilty plea. (Docs. 1 at 29; 8 at 30-31.)

Ground 59 alleges that defense counsel presented "knowingly false aggravating statements" on the record to cause Waldrep to receive disproportionate, prejudicial sentencing. (Id.) (Docs. 1 at 29; 8 at 31.)

Ground 60 alleges that Waldrep "suffered extreme prejudice" because defense counsel was not present during his polygraph interview with Dr. Gray or during his presentence interview with a probation officer. (Doc. 1 at 30.)

Ground 61 alleges that the court wrongfully deleted Waldrep's "PSR Supplement" attached to the presentence report. (Id.; Doc. 8 at 32-34.)

Ground 62 alleges that Waldrep's two lifetime probation sentences violate an Arizona statute. (Doc. 1 at 30.)

Ground 63 alleges that the court failed to ask Waldrep if he had read or discussed the presentence report. (Id.)

Ground 64 alleges that Arizona violated Waldrep's due process rights because he was charged under unconstitutional statutes that caused the court to lose jurisdiction over the case. (Id. at 30-31.) He further claims that he would not have signed the plea agreement if counsel had notified him that the charges were unconstitutional. (Id. at 33; Doc. 8 at 6, 18, 35-36.)

Ground 65 alleges "newly discovered evidence" based on information Waldrep allegedly discovered in his file about mitigation and medical side effects that were purportedly potentially exculpatory, which he alleges had been wrongfully withheld by defense counsel for two years. (Docs. 1 at 33; 8 at 37.)

(ECF No. 29 at 37-45).

Respondents contend Waldrep's claims were waived by his guilty plea, are not cognizable in a § 2254 habeas proceeding, and are procedurally defaulted. (ECF No. 29 at 1). Respondents further maintain the claims which are properly presented to the Court are without merit. (*Id.*).

Waldrep's Reply is 82 pages in length, including 38 pages of exhibits. (ECF No. 32). In his Reply Waldrep reiterates the merits of his claims and presents a rebuttal to Respondents' "'Memorandum of Points and Authorities.'" (ECF No. 32 at 1-43, 4-18). Waldrep also alleges the State has engaged in a "cover-up" and that "The transcript has been altered, deletions made, as my last statement on Record was Quote 'I guess This System Is Run by SATAN!'" (ECF No. 32 at 9). Waldrep further avers that for "the Last five years I have consecrated myself to the Lord Jesus and to serve His ministry," and that he has "had NO Sexual sin or conduct, I have NOT Masterbated (sic), ejaculated, or performed any sexual activity in the Last Five Years!." *(Id.)*. Waldrep also asserts his Fourth Amendment and Miranda rights were violated during the investigation of his crimes; that his pre-plea proceedings violated his constitutional rights; and that his guilty plea was unknowing and coerced. (ECF No. 32 at 3-6).

II. Analysis

A. Exhaustion and Procedural Default

Absent specific circumstances the Court may only grant federal habeas relief on a claim which has been properly exhausted in the state courts. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). To properly exhaust a federal habeas claim the petitioner must afford the state courts the opportunity to rule upon the merits of the claim by "fairly presenting" it to the state's "highest" court in a procedurally correct manner. *E.g., Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Rose v. Palmateer*, 395 F.3d 1108, 1110 (9th Cir. 2005). In non-capital cases arising in Arizona, the "highest court" test is satisfied if the habeas petitioner presented his claim to the Arizona Court of Appeals. *See Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Date v. Schriro*, 619 F. Supp. 2d 736, 762-63 (D. Ariz. 2008).

A petitioner has not exhausted a federal habeas claim if he still has the right to raise the claim "by any available procedure" in the state courts. 28 U.S.C. § 2254(c). Accordingly, the exhaustion requirement is satisfied if the petitioner is procedurally barred from pursuing a previously un-presented claim in the state's "highest" court. *See Woodford v. Ngo*, 548 U.S. 81, 92-93 (2006).

> [The federal courts] recognize two types of procedural bars: express and implied. An express procedural bar occurs when the petitioner has presented his claim to the state courts and the state courts have relied on a state procedural rule to deny or dismiss the claim. An implied procedural bar, on the other hand, occurs when the petitioner has failed to fairly present his claims to the highest state court and would now be barred by a state procedural rule from doing so.

Robinson v. Schriro, 595 F.3d 1086, 1100 (9th Cir. 2010).

Because the Arizona Rules of Criminal Procedure regarding timeliness, waiver, and the preclusion of claims bar Waldrep from returning to the state courts to exhaust any unexhausted federal habeas claim, he has exhausted but procedurally defaulted any claim not presented to the Arizona Court of Appeals in his Rule 32 action. *See Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002).

Procedural default also occurs when a petitioner did present a claim to the Arizona Court of Appeals, but the appellate court did not address the merits of the claim because it found the claim precluded by a state procedural rule. *See, e.g., Atwood v. Ryan*, 870 F.3d 1033, 1059 (9th Cir. 2017).

> The doctrine of procedural default provides that a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule. A state procedural rule is adequate if it is regularly or consistently applied by the state courts and it is independent if it does not depend on a federal constitutional ruling. Where a state procedural rule is both adequate and independent, it will bar consideration of the merits of claims on habeas review unless the petitioner demonstrates cause for the default and prejudice resulting therefrom or that a failure to consider the claims will result in a fundamental miscarriage of justice.

McNeill v. Polk, 476 F.3d 206, 211 (4th Cir. 2007) (internal citations and quotations omitted).

The Arizona Court of Appeals concluded that all of Waldrep's claims of pre-plea non-jurisdictional error were waived by his entry of a knowing and voluntary guilty plea, pursuant to Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure. This rule has been found to be an independent and adequate state ground barring federal habeas review. *See Stewart v. Smith*, 536 U.S. 856, 861 (2002). The Ninth Circuit Court of Appeals has concluded this rule is "firmly established and consistently followed." *Murray v. Schriro*, 745 F.3d 984, 1016 (9th Cir. 2014). Accordingly, Waldrep has procedurally defaulted his federal habeas claims of pre-plea non-jurisdictional error, other than claims relating to the voluntary and knowing nature of his plea.

If a prisoner has procedurally defaulted a federal habeas claim in the state courts he is not entitled to a review of the merits of the claim absent a showing of cause and prejudice. *E.g.*, *Ellis v. Armenakis*, 222 F.3d 627, 632 (9th Cir. 2000). "Cause" is a legitimate excuse for the petitioner's procedural default of the claim, i.e., an objective factor outside of the defense's control, and "prejudice" is actual harm resulting from the alleged constitutional violation. *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011). It is the petitioner's burden to establish both cause and prejudice with regard to their procedural default of a federal habeas claim in the state courts. *Id.*; *Correll v. Stewart*, 137 F.3d 1404, 1415 (9th Cir. 1998). The Court may also consider the merits of a procedurally defaulted claim if the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Atwood*, 870 F.3d at 1059; *Cooper*, 641 F.3d at 327. A petitioner satisfies the "fundamental miscarriage of justice" test only by "establish[ing] that under the probative evidence he has a colorable claim of factual innocence." *Sawyer v. Whitley*, 505 U.S. 333. 339 (1992) (internal quotation marks omitted).

Furthermore, although relief may not be *granted* on an unexhausted claim absent a showing of cause and prejudice or a fundamental miscarriage of justice, a claim may be

denied "on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). *See also Kirkpatrick v. Chappell*, 926 F.3d 1157, 1166 n.2 (9th Cir. 2019); *Runningeagle v. Ryan*, 686 F.3d 758, 769 n.3 (9th Cir. 2012). The Ninth Circuit Court of Appeals has also found that a claim which was defaulted in the state courts pursuant to a state procedural rule may be denied on the merits. *See Ayala v. Chappell*, 829 F.3d 1081, 1096 (9th Cir. 2016); *Wafer v. Hedgpeth*, 627 F. App'x 586, 587 (9th Cir. 2015), *citing Runningeagle*, 686 F.3d at 777 n.10; *Salvador Montes v. Ryan*, 2019 WL 2011065, at *6 (D. Ariz. Apr. 3, 2019), *report and recommendation adopted*, 2019 WL 2009760 (D. Ariz. May 7, 2019).

Respondents contend Waldrep procedurally defaulted Grounds 16, 56, and 64, because he did not present these claims to the Arizona Court of Appeals in his Rule 32 action. Ground 16 alleges that the Arizona Court of Appeals abused its discretion by failing to grant relief from the denial of Waldrep's Rule 32 petition.[10] Ground 56 alleges "prejudice" and "abuse of discretion" because the transcripts from Waldrep's sentencing and second settlement conference were purportedly altered.[11] Ground 64 alleges that Arizona violated Waldrep's due process rights because he was charged under unconstitutional statutes that caused the court to lose jurisdiction over the case, citing *May v. Ryan*, No. CV 14-00409 PHX NVW. (ECF No. 1 at 30-31).[12] These claims been

[10] This claim is also not cognizable because federal habeas relief is not available to redress errors in state post-conviction proceedings. *See Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998) ("[F]ederal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings"); *Villafuerte v. Stewart*, 111 F.3d 616, 632 n.7 (9th Cir. 1997) (concluding a claim that the petitioner "was denied due process in his state habeas corpus proceedings" was not cognizable on federal habeas review).

[11] In his Rule 32 appeal Waldrep did not alleged he was denied transcripts, or that any transcripts he was provided were altered, although he asserted that a transcript of the first settlement conference was "missing." (ECF No. 29-5 at 56). Accordingly, the factual basis for this claim was never presented to the Arizona Court of Appeals.

[12] Waldrep could not have presented a claim based on *May* in his Rule 32 action because his petition for review was filed November 20, 2016, and Judge Wake's decision in *May* was issued March 28, 2017. In *May* Judge Wake concluded Arizona's child molestation law improperly shifted the burden of proof to the defendant with regard to the element of sexual intent, and that May's trial counsel was ineffective for failing to raise this claim. *See* 245 F.

procedurally defaulted because Waldrep did not present the claims to the Arizona Court of Appeals and Arizona's procedural rules regarding timeliness and the waiver of claims preclude him from returning to the Arizona court to exhaust the claims. Additionally, with regard to Waldrep's properly exhausted claims for relief, the state appellate court found the claims raised by Waldrep in his state Rule 32 proceeding regarding pre-plea non-jurisdictional error, other than his allegation that his guilty plea was not knowing and voluntary, were barred pursuant to a state procedural rule. Accordingly, these claims are procedurally defaulted. Habeas relief may not be granted on a procedurally defaulted claim unless the petitioner establishes cause and prejudice or a fundamental miscarriage of justice will occur absent consideration of the merits of the claim.

Supp. 3d 1145 (D. Ariz. 2017), *aff'd in part and rev'd in part*, 766 F. App'x 505 (9th Cir. 2019). Judge Wake concluded May's due process rights were violated by the statute's burden-shifting and by the instructions given to the jury. However, on appeal the Ninth Circuit Court of Appeals concluded May's counsel's failure to object to the constitutionality of Arizona's child molestation statute was not deficient performance:

> . . . we reach the same conclusion as did the state court with respect to May's claim that trial counsel was ineffective for failing to object to the constitutionality of the child molestation statute. Given the long-standing status of the law in Arizona that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation, *see State v. Sanderson*, 182 Ariz. 534, 898 P.2d 483, 491 (Ariz. Ct. App. 1995), which provided the background for the "prevailing professional practice at the time of the trial," *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam), we cannot conclude that trial counsel's failure to object to the constitutionality of the statute placing the burden of proving lack of intent on the defendant fell "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The district court erred in holding otherwise. . . .

May v. Ryan, 766 F. App'x 505, 506-07 (9th Cir. 2019). After Judge Wake's decision was issued the Arizona legislature amended the child molestation statutes. *See* H.B. 2283, 2018 Ariz. Sess. Laws, Ch. 266, §§ 1-3 (2d Reg. Sess.) (effective August 3, 2018). The amendment eliminated the affirmative defense of lack of sexual motivation in former Arizona Revised Statutes § 13-1407(E). *Id.* § 2. *See State v. Bieganski*, 2019 WL 4159822, at *1 (Ariz. Ct. App. 2019).

Because at the time of Waldrep's conviction the law had not been found unconstitutional, his conviction under this statute did not violate his constitutional rights. Furthermore, the "touching" involved in *May*—touching a child's genitals over their swimsuit while playfully tossing them in a pool—was not clearly done with sexual intent. *May*, 245 F. Supp. 3d at 1169-70. In this matter Waldrep admitted licking his stepdaughter's genitals and there would not appear to be any other motive for this behavior other than for sexual gratification.

With regard to the assertion that he procedurally defaulted most of his claims in the state courts, Waldrep asserts: "I Deny All Procedural Bars, Deny All waiver of rights, Deny making Guilty Plea without Coercion, Inducement, Threats, Misrepresentation of Law and Facts." (ECF No. 32 at 4). Waldrep also alleges, as cause for his procedural default of his claims: "Govt's concealment or Suppression of Evid. The State's Failure to provide pet. with Trans. needed for presentation of Fed. Claim. Precluded pet. from properly pursuing his claim in St. Ct." (ECF No. 32 at 22). Waldrep further contends that he would not have signed the plea agreement if counsel had notified him that the charges were unconstitutional. (ECF No. 1 at 33; ECF No. 8 at 6, 18, 35-36).

Waldrep fails to establish cause for his procedural default of his federal habeas claims in the state courts, i.e., that some external force prevented him from presenting his claims to the state courts in a procedurally correct manner. Nor do any of Waldrep's claims appear meritorious and, therefore, he is unable to establish any prejudice arising from his procedural default of his claims. Furthermore, with regard to the issue of whether a fundamental miscarriage of justice will occur absent consideration of the merits of Waldrep's defaulted claims, throughout his Petition and his Reply Waldrep does not assert his factual innocence of the crimes of conviction. Therefore, no fundamental miscarriage of justice will occur absent consideration of Waldrep's defaulted claims.

B. Standard of Review Regarding Properly Exhausted Claims

Waldrep's claims that his guilty plea was coerced and unknowing, and his claims of post-plea ineffective assistance of counsel and sentencing error, were not waived by his guilty plea. These claims were denied on the merits by the appellate court. Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Court may not grant a writ of habeas corpus to a prisoner on a claim adjudicated on the merits in a state court unless the state court's decision denying the claim was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Harrington v. Richter*, 562 U.S. 86, 98

(2011), *quoting* 28 U.S.C. § 2254(d). *See also Lafler v. Cooper*, 566 U.S. 166, 172-73 (2012). A state court decision is contrary to federal law if it contradicts the governing law established by United States Supreme Court, or if it reached a different result from that of the Supreme Court on a set of materially indistinguishable facts. *See, e.g., Brown v. Payton*, 544 U.S. 133, 141 (2005); *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004). Furthermore, the state court's decision constitutes an unreasonable application of clearly established federal law only if it is objectively unreasonable. *See, e.g., Renico v. Lett*, 559 U.S. 766, 773 (2010); *Runningeagle*, 686 F.3d at 785. An unreasonable application of federal law is different from an incorrect one. *See Harrington*, 562 U.S. at 101. "'A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision.'" *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016), *quoting Harrington*, 562 U.S. at 101. *See also Dixon v. Ryan*, 932 F.3d 789, 801 (9th Cir. 2019).

C. Waiver of Claims by a Knowing and Voluntary Guilty Plea

The state appellate court found many of Waldrep's claims waived by his entry of a guilty plea, and concluded his guilty plea was knowing and uncoerced and not the result of ineffective assistance of counsel. *Waldrep*, 2017 WL 5899910, at *2.

A habeas claim based on the alleged deprivation of a constitutional right, which violation is alleged to have occurred prior to the entry of the petitioner's guilty plea, is waived when the petitioner enters a valid guilty plea in the state court. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Lemke v. Ryan*, 719 F.3d 1093, 1097 (9th Cir. 2013). Because it constitutes a waiver of the defendant's constitutional rights, a guilty plea must be a voluntary, knowing, and intelligent act, made with sufficient awareness of the relevant circumstances and likely consequences resulting from the defendant's waiver of their constitutional rights. *E.g., Brady v. United States*, 397 U.S. 742, 748 (1970).

When determining the validity of a guilty plea the Court analyzes "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke v. Raley*, 506 U.S. 20, 29 (1992) (citation and internal

quotation marks omitted); *Brady*, 397 U.S. at 749. Additionally, a plea colloquy must satisfy several requirements before the resulting guilty plea may be found voluntary and knowing. *See, e.g., Tanner v. McDaniel*, 493 F.3d 1135, 1146-47 (9th Cir. 2007). A guilty plea is voluntary and knowing only if the defendant is informed of and waives his privilege against self-incrimination, his right to trial by jury, and his right to confront witnesses. *Id., citing Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). A plea is "knowing" if the defendant enters his plea with sufficient awareness of the rights he is waiving and the direct consequences of entering a guilty plea, i.e., the maximum sentence he faces upon conviction. *Brady*, 397 U.S. at 748, 755; *Little v. Crawford*, 449 F.3d 1075, 1080 (9th Cir. 2006). A plea is voluntary if it is uncoerced, *Brady*, 397 U.S. at 748, and a "plea is void if it is induced by promises or threats which deprive it of the nature of a voluntary act." *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986) (internal quotations omitted). However, "[m]ere advice or strong urging" by defense counsel to plead guilty "based on the strength of the state's case does not constitute undue coercion." *Iaea*, 800 F.2d at 867, *citing Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976).

Waldrep contends his guilty plea was "made void" by: "Threats, Coercion, Inducement by 'Fraud to sign Guilty Plea,' Unknowingly of Rights, Law; UnIntelligently by IAC, Judicial Misconduct, Prosecutorial Misconduct; Involuntarily made." (ECF No. 32 at 3). Waldrep asserts he "would never signed a plea if not for the Miranda Violations, Unconst. Statutes (Burden Shifting to defense for elements of crime . . .), Judicial Participation in Plea Negotiations . . . Denied Counsel before Interogation (sic) Recording, Denied Self-Representation by Judge Sinclair," and he asserts the Court should apply de novo review to the state court's denial of relief. (*Id.*). With regard to the nature of his guilty plea, Waldrep asserts, *inter alia*, his disclosures "in Interview with Probation, and 2nd Interview with Probation Supervisor - Coerced, Induced by Unlawful Recording, Invol. Confession used against Petitioner." (ECF No. 32 at 4-5). "Petitioner would have said nothing if not for Miranda Violation, using Con. Call in criminal proceedings to Elicit Inculpatory Statements. (Denied 6th Amend Rt. to Counsel)." (ECF

No. 32 at 5). He further alleges he was wrongfully denied bail and wrongfully denied certified transcripts of his settlement conferences. (*Id.*). Waldrep also asserts his plea was void because the indictment was "Made 'Void Ab Initio' by Unconstitutional Statutes in Indict./charging document (May v. Ryan Exh 101) I.S.C., and Due Process Violation (Exh 101), 'Unlawful Interception,' Recording made by Gilbert Police . . ." (ECF No. 32 at 3).

The state habeas trial court found Waldrep's guilty plea was knowing and voluntary and not the result of ineffective assistance of counsel. (ECF No. 29-5 at 12). The Arizona Court of Appeals specifically concluded that Waldrep's claim that his guilty plea was coerced was without merit, noting the transcript of the plea colloquy belied this claim. *Waldrep*, 2017 WL 5899910, at *1. The written plea agreement and the transcript of the plea colloquy confirm that Waldrep made a voluntary and knowing choice to plead guilty, i.e., that he was aware of the constitutional rights he was waiving by pleading guilty and the maximum sentence he faced upon conviction. Waldrep's contemporaneous statements during his plea hearing carry substantial weight in determining if his entry of a guilty plea was knowing and voluntary. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977). When considering whether a guilty plea was knowing and voluntary a reviewing court should summarily dismiss "conclusory allegations unsupported by specifics" or "contentions that in the face of the record are wholly incredible." *Id.* at 74.

Furthermore, as previously noted, *May* had not been decided prior to Waldrep's criminal proceedings, the confrontation call did not violate Waldrep's constitutional rights, and Waldrep was not misinformed regarding Arizona law on voluntary intoxication. Accordingly, the undersigned concludes Waldrep's guilty plea was knowing and voluntary. Furthermore, as explained more thoroughly *infra*, Waldrep's guilty plea was not the result of ineffective assistance of counsel.

D. Ineffective Assistance of Counsel Claims in the Plea Context

Ineffective assistance of counsel claims in cases involving a pleading defendant are governed by the doctrine of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985). To succeed on a *Strickland* claim the petitioner must establish that his counsel's performance fell below an objective standard of reasonableness and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 690. It is the petitioner's burden to demonstrate both prongs of the *Strickland* test. *Vega v. Ryan*, 757 F.3d 960, 969 (9th Cir. 2014).

In the context of a case involving a guilty plea, the petitioner satisfies the "deficient performance" prong of the relevant test by establishing that the advice he received from counsel as to the terms and potential benefits of the plea agreement was constitutionally deficient. *Hill*, 474 U.S. at 56-57. *See also Premo v. Moore*, 562 U.S. 115, 126-27 (2011); *Fairbanks v. Ayers*, 650 F.3d 1243, 1254-55 (9th Cir. 2011).

> [A] defendant has the right to make a reasonably informed decision whether to accept a plea offer. In *McMann v. Richardson*, the seminal decision on ineffectiveness of counsel in plea situations, the Court described the question as not whether "counsel's advice [was] right or wrong, but . . . whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771 []. Thus, for [the petitioner] to establish a claim of ineffective assistance, he "must demonstrate gross error on the part of counsel. . . ." *Id.* at 772, 397 U.S. 759 []. *The Third Circuit has interpreted this standard as requiring a defendant to demonstrate that the advice he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the plea offer.*

Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002) (emphasis added and some internal citations and quotations omitted).

Additionally, in the context of a pleading defendant the prejudice prong of the *Strickland* test is modified; the habeas petitioner must establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. The Court must assess the circumstances

surrounding the case to determine if the petitioner's allegation that he would have proceeded to trial is plausible. *See, e.g., Smith v. Mahoney*, 611 F.3d 978, 990 (9th Cir. 2010) (finding no *Strickland* prejudice where the petitioner had "little to no chance of prevailing on an affirmative defense"); *Weaver v. Palmateer*, 455 F.3d 958, 970 (9th Cir. 2006) (finding no *Strickland* prejudice where the petitioner's proposed defense "would have been unlikely to succeed"). And, notably, counsel's performance is neither deficient nor prejudicial when counsel "fails" to raise a non-meritorious claim. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (holding counsel's failure to take a futile action can never be deficient performance); *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (stating that "[a] lawyer's zeal on behalf of his client does not require him to file a motion which he knows to be meritless on the facts and the law.").[13]

There is no indication that Waldrep's counsel's performance was deficient, and the state habeas trial court, citing *Strickland*, found that counsel's performance was not deficient. (ECF No. 29-5 at 11-13). The Arizona Court of Appeals affirmed this determination and denied Waldrep's claims that his counsel coerced him to enter the plea agreement, noting the transcript of the plea colloquy belied this claim. *Waldrep*, 2017 WL 5899910, at *1. Because the plea agreement was extremely advantageous to Waldrep and there was substantial evidence of his guilt, his counsel's performance was not deficient nor coercive for advising him to accept the plea agreement. *See, e.g., Weaver*, 455 F.3d at 967.

[13] *Inter alia*, Waldrep asserts his counsel's performance was deficient because he advised Waldrep to plead guilty under an unconstitutional statute. However, at the time of Waldrep's plea proceedings in 2016 no court had concluded Arizona's child molestation statutes unconstitutionally shifted the burden of proof of an essential element of the crime to the defendant. *See supra* n.11. Counsel's performance is not deficient for failing to be "prescient about the direction the law will take." *Clark v.* Arnold, 769 F.3d 711, 726-27 (9th Cir. 2014). Therefore, the state appellate court's determination that counsel's advice to plead guilty was not deficient because counsel advised Waldrep to plead guilty rather than raising the defense later asserted in *May* was not an unreasonable application of federal law. *See May v. Ryan*, 766 F. App'x 505, 506-07 & n.1 (9th Cir. 2019).

Additionally, Waldrep is unable to establish prejudice with regard to any of his claims of pre-plea ineffective assistance of counsel because the admissible evidence against Waldrep was substantial, and a lawyer's advice to plead guilty in the face of strong inculpatory evidence does not constitute ineffective assistance of counsel. *See Lambert v. Blodgett*, 393 F.3d 943, 984 (9th Cir. 2004) (finding no *Strickland* prejudice from counsel's alleged failure to uncover evidence supporting the proposed defense prior to the entry of a guilty plea where there was "overwhelming evidence of guilt" and "little chance" that defense would have succeeded at trial); *Sophanthavong v. Palmateer*, 378 F.3d 859, 870-71 (9th Cir. 2004) (finding no *Strickland* prejudice where the petitioner's assertion that he would have rejected the plea offer and gone to trial had he been properly advised was not credible in light of the substantial evidence of his guilt and much higher potential sentence at trial).

To satisfy *Hill*'s prejudice requirement of Waldrep must show that but for counsel's alleged errors he would have rejected the State's plea offer and insisted on facing trial on all counts alleged in the indictment, a likely conviction, and an effective life sentence. Defense counsel's understanding of the facts and law regarding the charges against Waldrep and counsel's performance were within objective standards of reasonableness. Waldrep's guilt of at least one of the charges was established through his own admissions during the confrontation call (ECF No. 29-2 at 45-46), which did not violate any of his federal constitutional rights and would have been admissible at trial. The strong inculpatory evidence against Waldrep also included the victim's statements and Waldrep's statements to the victim's mother and his brother admitting his guilt. Under the circumstances, counsel's recommendation to accept the plea deal was reasonable. Furthermore, Waldrep is unable to show that, had he gone to trial, he could have obtained a better result. Waldrep's counsel was able to negotiate a plea agreement providing for a 17 to 24-year sentence, less than that usually and initially offered by the prosecution. Additionally, by presenting mitigation evidence and ably arguing Waldrep's case to the sentencing judge, counsel was able to achieve the least possible sentence

allowed by the plea agreement. Because it is extremely unlikely that, but for counsel's alleged errors Waldrep would have chosen to proceed to trial and the outcome of his criminal proceedings would have been more advantageous, his ineffective assistance of counsel claims regarding the entry of his guilty plea fail pursuant to the doctrine of *Hill*.

Because Waldrep entered a knowing and voluntary guilty plea, and his plea was not the result of ineffective assistance of counsel, the following claims for relief should be denied: Ground 32 alleges counsel was ineffective for denying Waldrep's "multiple requests" to review and discuss the plea prior to his "inducement" to sign the "unread" guilty plea with "threats, intimidation, undue influence, and misrepresentation." (ECF No. 1 at 25; ECF No. 8 at 22). This claim is belied by the record; Waldrep averred at his plea hearing that nobody had forced, threatened, or coerced him in any way to sign the plea agreement. (ECF No. 29-1 at 219-20). Ground 46 alleges counsel was ineffective for allowing Waldrep to be induced by misrepresentations to sign the "unread" guilty plea. (ECF No. 1 at 26; ECF No. 8 at 25). This claim belied by the record of the plea colloquy; Waldrep specifically stated that he had read the agreement and initialed each paragraph of the plea agreement. Ground 55 alleges Waldrep's plea was coerced by misrepresentations by the state court, the prosecutor, and his defense counsel. As noted by Respondents, the statements that Waldrep asserts "coerced" his acquiescence to the plea agreement "were merely accurate reflections of his dismal legal reality," (ECF No. 29 at 77), i.e., the strength of the evidence against him, the unavailability of a defense of intoxication or temporary insanity, the unavailability of a more lenient guilty plea, and the prospect of an effective term of life imprisonment if he chose to reject the plea offer and proceed to trial.

Ground 58 asserts defense counsel withheld exculpatory evidence from Waldrep in order to induce him to plead guilty. (ECF No. 1 at 29; ECF No. 8 at 31, 94). Waldrep describes the alleged exculpatory evidence as

> deviation letters, mitigation materials, claims of constitutional violations documented, prosecutorial misconduct, ineffective assistance of counsel claims showing coercion, misrepresentation, abuse of discretion, judicial

> errors, Fourth, Fifth, Sixth, Fourteenth Amendment violations, Title III § 1983 Act violations, denied [right] to counsel, Miranda warnings (prior to 44 question interrogation), denied [right] not to self-incriminate, [right] to remain silent, [right] against unlawful search and seizure, right to liberty, due process rights [and] denied [right] to self representation.

(ECF No. 8 at 94). Waldrep asserts his brother mailed this "evidence" to counsel and that the evidence was missing from his case file when counsel provided the file to him during his post-conviction proceedings. (*Id.*) However, the "evidence" was not truly exculpatory because none of this evidence would exculpate Waldrep given the weight of the admissible evidence against him. Waldrep fails to establish a reasonable probability that further investigation would have resulted in a more favorable plea bargain or an acquittal at trial, and he has not produced sufficient objective evidence to establish he would not have entered into the plea agreement but for counsel's failure to further investigate. *See Lambert*, 393 F.3d at 982 (where alleged deficiency was counsel's failure to investigate a potential defense, prejudice analysis is "objective" and "slim potential for success renders highly doubtful any conclusion that [petitioner] suffered prejudice").

The record in this matter establishes that Waldrep knowingly, voluntarily, and intelligently pled guilty, which was the most intelligent choice among the alternative courses of action available to him. Accordingly, his Grounds 32, 46, and 58 for relief, alleging that his guilty plea was not knowing, intelligent, or voluntary due to coercion, should be denied on the merits.

Additionally, because his guilty plea was knowing and voluntary, all of Waldrep's pre-plea non-jurisdictional claims are waived, including Ground 1 (asserting that his Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated when police used the confrontation call to secure evidence, arrest him, indict him, and induce him to plead guilty);[14] Grounds 2(a) and 2(b) (asserting that the confrontation call amounted to an

[14] As the state habeas trial court concluded (ECF No. 29-5 at 10-11), all of Waldrep's claims relating to the confrontation call are without merit; the federal courts have uniformly held that confrontation calls do not violate the defendant's Fourth and Sixth Amendment rights or the defendant's right to due process of law. *See Illinois v. Perkins*, 496 U.S. 292, 297 (1990); *Montgomery v. Morris*, 2019 WL 1034732, at *3 (D. Ariz. Mar. 5, 2019); *Leal v. Ryan*, 2017

involuntary confession to police because his attorney was not present and no Miranda warnings were given); Ground 3 (asserting that he was deprived of his Sixth Amendment right to represent himself on March 3, 2016);[15] Ground 5 (asserting that his First

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WL 3835938, at *16-17 (D. Ariz. June 9, 2017), *report and recommendation adopted*, 2017 WL 3783368 (D. Ariz. Aug. 31, 2017), *certificate of appealability denied*, No. 17-16897, 2018 WL 7821088 (9th Cir. Nov. 30, 2018), *cert. denied*, 140 S. Ct. 65 (2019). And because counsel's performance is not deficient nor prejudicial for failing to raise a non-meritorious argument, Waldrep's *Strickland* claims premised on counsel's alleged "failure" to challenge the confrontation call or the evidence derived therefrom, i.e., Grounds 2(a) and 41, are also without merit. *See, e.g., Reel v. Ryan*, 2013 WL 2284988, *18 (D. Ariz. May 22, 2013). Additionally, a Fourth Amendment claim is generally not cognizable in a federal habeas action. *See Stone v. Powell*, 428 U.S. 465, 494 (1976); *Crater v. Galaza*, 508 F.3d 1261, 1269 (9th Cir. 2007).

[15] It is arguable whether the entry of a knowing and voluntary guilty plea waives a claim that a defendant was denied their right to self-representation pursuant to *Faretta v. California*, 422 U.S. 806, 807 (1975).

> Only one federal court has held that a defendant who pleads guilty unconditionally may still maintain his *Faretta* challenge on appeal. In *United States v. Hernandez*, 203 F.3d 614, 626-27 (9th Cir. 2000) (Reinhardt, J.), the Ninth Circuit held that a guilty plea by a defendant wrongfully deprived of his right to self-representation was automatically involuntary because the defendant was "forced . . . to choose between pleading guilty and submitting to a trial the very structure of which would be unconstitutional." *Id.* at 626; *see also United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001) (following *Hernandez* as binding circuit precedent).

Werth v. Bell, 692 F.3d 486, 496 (6th Cir. 2012). To the extent this claim is cognizable, it may be denied on the merits because "the invocation of the right of self-representation must be clear, unequivocal, and timely." *McCormick v. Adams*, 621 F.3d 970, 978 (9th Cir. 2010). Waldrep did not make a "clear and unequivocal" assertion of his right to self-representation, but instead intimated to the state court that he might wish to go "pro per" if it would afford him the ability to retain an investigator; this was not a "clear and unequivocal" assertion of his *Faretta* right. *See Woods v. Sinclair*, 764 F.3d 1109, 1122 (9th Cir. 2014); *Wafer v. Hedgpeth*, 627 F. App'x 586, 587 (9th Cir. 2015). After discussing the issue with the settlement conference judge, Waldrep apparently understood that he would not be appointed an investigator even if he opted to represent himself and he never unequivocally asserted he wished to proceed pro per. Additionally, "the right may be waived through [the] defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982). A defendant may be deemed to have abandoned any invocation of *Faretta* when, as in this matter, the defendant acquiesces to counsel's representation during further proceedings. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); *Stenson v. Lambert*, 504 F.3d 873 (9th Cir. 2007). After mentioning and apparently abandoning the option of proceeding without counsel at the settlement conference, Waldrep consented to counsel finalizing a plea agreement and counsel's representation at his plea hearing and sentencing, thereby acquiescing to representation by counsel.

Amendment right not to bear witness against himself was violated by the confrontation call); Ground 6 (asserting that the confrontation call violated his due process rights and his Fourth Amendment rights to be free of illegal searches); Ground 7 (asserting the confrontation call violated his Fourteenth Amendment right to equal protection); Ground 8 (asserting that the confrontation call constituted a § 1983 violation); Ground 9 (asserting that the confrontation call constituted a conspiracy against his rights); Ground 10 (asserting that the confrontation call deprived him of "Constitutional Rights); Ground 11 (asserting that the confrontation call violated his Sixth Amendment right to counsel); Ground 12 (asserting the trial court "lost jurisdiction" before his arrest and the indictment and his conviction and sentence were void because "[w]hen petitioner's Due Process was violated by withholding Miranda Warnings [prior to the confrontation call], All Jurisdiction Ceased. This fatally flawed the Indictment."); Ground 13 (asserting a "judicial abuse of discretion" based on allegedly coercive behavior of a judge during his first settlement conference asserting that he would be better off if he took the plea, which Waldrep alleges violated Arizona Rule of Criminal Procedure 17.4 and Federal Rule of Criminal Procedure 11); Ground 14 (asserting his due process rights were violated by the prosecutor's statements during plea negotiations); Ground 15 (asserting his Fourteenth Amendment rights to equal protection and due process were violated by the court, the prosecutor, and defense counsel during one of his settlement conferences, and that if he had been permitted to represent himself, he could have hired an investigator and expert witnesses prior to the conference); Ground 17 (asserting the trial court violated his due process rights by denying his motion to change counsel); Ground 18 (asserting prosecutorial misconduct based on "overzealous, vindictive prosecution, withheld exculpatory evidence, multiplicious [sic], overcharging, misrepresentations to grand jury and court, false statements, presentation of void indictment to court"); Ground 53 (asserting Waldrep's equal protection rights were violated when he was denied bail and release); Ground 54 (asserting his right to be free from cruel and unusual punishment under the Eighth Amendment was violated because he was denied bail and lost income

during his pretrial proceedings); and Ground 60 (asserting Waldrep "suffered extreme prejudice" because defense counsel was not present during his polygraph interview).

In claims 19 through 52 Waldrep asserts he was denied the effective assistance of counsel. As noted *supra* and found by the Arizona Court of Appeals, all of Waldrep's allegations of pre-plea ineffective assistance of counsel, other than those asserting counsel's performance rendered his guilty plea invalid, were waived. Because Waldrep's guilty plea was knowing and voluntary, the waiver was valid and relief on these claims must be denied. Because the plea was knowing and voluntary and Waldrep has failed to satisfy the *Hill* test, Waldrep's claims that his counsel's performance rendered his guilty plea invalid must also be denied because the claims are without merit and the Arizona Court of Appeals' denial of the claims was not clearly contrary to nor an unreasonable application of federal law.

Grounds 19 and 30, construed broadly, summarily assert Waldrep was denied the effective assistance of counsel as a result of counsel's cumulative errors.[17] In some cases, although no single error is sufficiently prejudicial to warrant reversal, the cumulative

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[17] As his 19th claim for relief Waldrep asserts:

> Petitioner suffered 'extreme Ineffective Assistance of Counsel (IAC) Prejudice, Malpractice, Misrepresentation, Coercion, viol. of Rt. to Effective Councel (sic) 6th Amend. viol. of 14th Amend rights' by Ct. Appointed, State Paid Counsel L. Workman, R. Kimble. Facts: This petitioner shows Cause and Prejudice, as suffered Substantial Harm, Plaint, Fundamental Error in all critical stages of crim. proceedings during 28 month incarceration before any trial; Pet. presents the Ct. Record, Transcripts, Affidavits, documents (showing Colorable Claims - Thirty Separate-Indiv. violations of rights, that would have led to different outcome, had he been afforded his guaranteed Const. legal representation. per "Strickland."

(ECF No. 1 at 24).

As his 30th claim for relief Waldrep asserts: "Denied Sound, Guaranteed Rt. to Legal Representation to meet Ariz. Rules of Ct., Ariz. Const. and US Constitutional Rt. to counsel. (Exh. W.)." (ECF No. 1 at 25). Waldrep's index of exhibits to his petition describes Exhibit W is a reproduction of the Arizona Rules of Court - "Attorney duties," . (ECF No. 1 at 37), although this document is not attached to the pleading. Nonetheless, an attorney's alleged failure to comply with a "norm of practice" stated in a state rule or state bar standard, which are considered to be "only guides" as to counsel's conduct in defending a case, do not constitute a per se violation of the federal constitution's guarantee of the effective assistance of counsel. *See, e.g., Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

effect of several errors may still sufficiently prejudice a defendant to require his conviction be overturned. *Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003). Cumulative error is more likely to be found prejudicial when the state's case against the defendant is weak. *Cf. Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) (discussing cumulative error in the context of allegations of the violation of due process, and concluding: "If the evidence of guilt is otherwise overwhelming, the errors are considered 'harmless' and the conviction will generally be affirmed."). In this matter, however, all of Waldrep's ineffective assistance of counsel claims are based upon conclusory and unsupported allegations, or are without merit. When there is not even a single constitutional error, there is nothing to accumulate to satisfy the prejudice prong of the *Strickland* test. *Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011); *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

In Grounds 20 through 27 Waldrep asserts counsel denied him access to and review of discovery, counsel was not present during "critical stages" of his pretrial proceedings, he was not allowed to present his chosen "defense strategy," and he was denied an investigator.[18] In Ground 28 Waldrep alleges counsel was ineffective for failing to challenge "unconstitutional statutes" or file a motion to suppress the evidence of the confrontation call. All of these claims of pre-plea error were waived by Waldrep's knowing and voluntary guilty plea. Additionally, as previously noted, counsel was not ineffective for failing to assert that Arizona's child molestation statute was

[18] The state habeas trial court concluded Waldrep's claims that his counsel was not present at "critical stages" of his proceedings, in addition to his challenges to counsel's strategic decisions, were without merit because he was unable to establish a legitimate factual basis for these claims and he was unable to establish prejudice arising from any alleged error. (ECF No. 29-5 at 11-12). Under the "doubly deferential" standard of review, these conclusions were not an unreasonable application of *Strickland*; counsel's tactical decisions, such as the choice of a defense strategy, pursuing a particular line of inquiry, deciding what pretrial motions to file, and/or the employment of an investigator, are given "great deference" and "'[o]nce counsel reasonably selects a defense, it is not deficient performance to fail to pursue alternative defenses.'" *Elmore v. Sinclair*, 799 F.3d 1238, 1250 (9th Cir. 2015), *quoting Rios v. Rocha*, 299 F.3d 796, 807 (9th Cir. 2002).

unconstitutional nor was a motion to suppress the evidence of the confrontation call likely to succeed.

In Ground 29 Waldrep alleges counsel's performance was deficient for failing to prepare a mitigation package. This claim fails because, *inter alia*, counsel did present mitigation to the sentencing court and Waldrep's sentence was mitigated; he received the lowest possible sentence under the plea agreement. Accordingly, Waldrep is unable to establish he was prejudiced by this alleged error of counsel.

Ground 31(a) alleges counsel was ineffective for failing to challenge the purported violation of Waldrep's rights during the settlement conferences. Ground 31(b) alleges counsel "failed to protect 14th [A]mend[ment] [rights] in plea proceedings critical stage." (ECF No. 8 at 22). These claims are unsupported and conclusory and were both waived by Waldrep's knowing and voluntary guilty plea. Additionally, the claims are without merit because Waldrep is unable to establish prejudice. Waldrep's counsel obtained an advantageous plea deal, which deviated to Waldrep's benefits from the State's standard and initial offer, and Waldrep was sentenced to the least possible term of imprisonment allowed by the plea agreement.

Ground 32 alleges counsel was ineffective for denying Waldrep's "multi[ple] requests" to review and discuss the plea agreement prior to his "inducement" to sign the "unread" guilty plea. This claim is belied by the record, including Waldrep's statements at his plea colloquy. Furthermore, Waldrep is unable to establish prejudice because the plea agreement was reviewed with Waldrep by the Commissioner at the plea colloquy.

Ground 33 alleges Waldrep's counsel was ineffective because Waldrep was denied the opportunity to present "[the] warnings, side effects from [various prescribed drugs]" acknowledged by the trial court. (ECF No. 1 at 25; ECF No. 8 at 23). Ground 34 alleges counsel was ineffective because Waldrep was denied the equal protections and privileges afforded to other defendants in similar situations for "defenses, mitigation, greatly reduced sentencing, and plea offers for other defendants." (ECF No. 1 at 25; ECF No. 8 at 23.) Ground 35 alleges counsel was ineffective because Waldrep was denied citations

to "recent, relevant cases" showing his disproportionate treatment, punishment, and sentencing. (ECF No. 1 at 25). Ground 36 alleges Waldrep's counsel was ineffective because Waldrep was "denied information" on involuntary intoxication, diminished capacity, and lack of intent. (*Id.*) Ground 37 alleges Waldrep's counsel was ineffective because counsel failed to challenge the alleged "presumption of guilt" or the prosecutor's statements that voluntary intoxication is not a defense. (*Id.*) Ground 38 alleges Waldrep's counsel was ineffective because Waldrep was denied investigation of "mental impairment from prescribed medication." (*Id.*).

To the extent these claims were not waived they all fail on the merits because Waldrep is unable to establish counsel's performance was deficient for failing to present a "defense" contrary to Arizona law. Nor can Waldrep demonstrate prejudice arising from counsel's alleged deficient performance. The record indicates Waldrep's counsel was able to negotiate a plea agreement providing for minimum sentence of 17 years' imprisonment, far less than what other defendants accused of similar crimes were offered, and that due to counsel's presentation of mitigation Waldrep received the minimum sentence allowed by the plea agreement.

Ground 40 alleges counsel was ineffective for failing to inform Waldrep of his constitutional right to effective counsel or "waivers of constitutional rights." (ECF No. 1 at 26; ECF No. 8 at 24). Ground 42 alleges counsel was ineffective for failing to inform Waldrep of any minimum sentence prior to his signing of the allegedly unread plea agreement. (ECF No. 1 at 26; ECF No. 8 at 24). These claims fail on the merits because Waldrep's bald statements in his federal habeas petition are insufficient to overcome the statements made at his plea colloquy and his signature on the plea agreement affirming he had read the plea agreement and discussed the plea agreement with his counsel, and that he understood the plea agreement, the rights he was waiving by pleading guilty, and the sentence he faced by entering into the plea agreement.

Ground 41 alleges counsel was ineffective for failing to protect Waldrep's Fourteenth Amendment rights during a "critical stage" of plea negotiations. (ECF No. 1

at 26). This claim was waived by Waldrep's knowing and voluntary guilty plea. In Waldrep's memorandum, he adds that his "conviction [was] based on involuntary confession obtained through police coercion violates due process clause." (ECF No. 8 at 24). This portion of the claim in effect argues that the confrontation call violated Waldrep's federal constitutional rights, which is an incorrect statement of the law, and that counsel was ineffective for failing to assert that the confrontation call violated Waldrep's federal constitutional rights. As previously noted, the confrontation call did not violate Waldrep's constitutional rights and counsel's performance is neither deficient nor prejudicial for failing to raise a non-meritorious claim for relief.

Ground 44 alleges counsel was ineffective for failing to challenge the state court's jurisdiction due to a "fatally flawed indictment," which was allegedly "multiplicious [sic]" and had "due process violations." (ECF No. 1 at 26; ECF No. 8 at 16-18, 32). Waldrep asserts the indictment was invalid because it was "multiplicitous," i.e., it charged him with five crimes for what he argues was the same act. In his state habeas action Waldrep asserted a claim that the indictment "was prejudicial and defective because the two counts of child molestation are lesser included offenses of the sexual conduct with a minor charges." (ECF No. 29-5 at 10). The state habeas trial court denied relief on this claim, stating:

> . . . The Defendant further argues that this is double jeopardy as these offenses all arise from the same conduct. However, "[m]ultiplicitous charges alone do not violate double jeopardy, only resulting multiple convictions or punishments are prohibited." *Ortega*, *id.* at 323 []. The indictment was not defective because both child molestation and sexual conduct with a minor offenses were charged.
>
> The Defendant plead to and was sentenced on one count of child molestation and two counts of attempted child molestation. Those offenses occurred on the same day with the same victim, but the transcript of the change of plea proceeding clarifies that there were three distinct times where the Defendant touched or tried to touch the vaginal area of the victim on that day. The Defendant has not raised a colorable claim of double jeopardy.

(*Id.*). The Arizona Court of Appeals did not discuss this claim in affirming the trial court's denial of Rule 32 relief.

The indictment against Waldrep was not "multiplicitous" because there was a distinct and separate act of sexual conduct underlying each of the counts alleged in the indictment[19] and "[a] state may punish separate offenses arising out of the same transaction without violating the double jeopardy clause." *Walker v. Endell*, 850 F.2d 470, 476 (9th Cir. 1987). *See also Rhoden v. Rowland.* 10 F.3d 1457, 1462 (9th Cir. 1993) (it is "well settled that a single transaction can give rise to distinctive offenses under separate statutes without violating the Double Jeopardy Clause"). Because an allegation that the indictment included multiplicitous charges was without merit, counsel's performance was neither deficient nor prejudicial for failing to raise this issue.[20]

Ground 47 alleges counsel was ineffective for purposely keeping Waldrep "unknowing of . . . rights, uninformed of discovery, charges, possible challenges, and defense strategies." (ECF No. 1 at 26; ECF No. 8 at 25). This claim was waived by Waldrep's guilty plea and is belied by the record, which indicates Waldrep was thoroughly familiar and informed of the charges against him, the evidence against him, and the strength of his proposed defenses.

Ground 51 alleges counsel was ineffective for failing to provide Waldrep with "[r]epresentation that adheres to [Arizona Rules of Court] Rule 42 ER 1.2, 2003 ER 1.3, 1.4, 1.6." (ECF No. 1 at 27).[22] Ground 52 alleges counsel was ineffective for failing "to

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[19] The police detective told the grand jury that during the forensic interview the victim indicated Waldrep touched her anus with his hand; touched her anal area with his penis; touched her breasts, and twice licked her anus. (ECF No. 29-1 at 36-37).

[20] Furthermore, any deficiency in the indictment would not have deprived the trial court of jurisdiction. "[D]efects in an indictment do not deprive a court of its power to adjudicate a case." *United States v. Cotton*, 535 U.S. 625, 630-31 (2002). Arizona has plenary jurisdiction over the crimes committed within its borders.

[22] In his memorandum in support of his petition Waldrep "skips" from his 47th claim for relief to his 53rd claim for relief. (ECF No. 8 at 25-30). Waldrep apparently refers to the Arizona Superior Court Rules of Professional Conduct applicable to attorneys practicing in the state

pursue a matter on behalf" of Waldrep, and for failing "to take measures to vindicate a client's cause or" endeavor, and because counsel "failed to explain 'Client's Rights' in Client-Attorney Relationship." or to discuss his rights as a client. *(Id.)*. These claims were waived by Waldrep's guilty plea because they involve pre-plea actions not related to the voluntary and knowing nature of Waldrep's guilty plea and, additionally, the claims are without merit. Even if counsel's actions did not comply with the cited Rules of Court, this is not per se unconstitutionally deficient performance[23] and Waldrep has not established any resulting prejudice. Furthermore, to the extent Waldrep asserts he and his counsel disagreed as to certain aspects of pretrial strategy, it is well-established that the Sixth Amendment guarantees effective assistance of counsel, not a "meaningful relationship" between an accused and his counsel. *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

E. Merits of Claims Not Procedurally Defaulted or Waived

Waldrep's allegations of sentencing error were not waived by his entry of a knowing and voluntary guilty plea. Ground 39 alleges counsel was ineffective for failing to challenge or review the presentence report with Waldrep. (ECF No. 1 at 26). In his supporting memorandum Waldrep asserts he was "denied access to read, review, challenge PSR," adding the allegation that "counsel [was] not present at critical stages of PSR interviews with probation." (ECF No. 8 at 24). Federal Rule of Criminal Procedure

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courts. Rule ER 1.2 defines the scope of representation and the allocation of authority between the client and counsel; Rule 1.3 provides "A lawyer shall act with reasonable diligence and promptness in representing a client;" Rule 1.4 provides guidelines for communication between counsel and their client; and Rule 1.6 provides guidance regarding confidentiality of information.

[23] Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89.

32 and federal cases interpreting this rule require the probation officer interviewing a defendant to: give the defendant's attorney notice and a reasonable opportunity to attend the interview; provide the presentence report to the defendant and the defendant's attorney at least 35 days before sentencing; and require the sentencing court to "verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report" and give the defendant an opportunity to comment on excluded portions of the report. However, these provisions of the federal rules are not constitutional rights and do not apply to state court proceedings. *See United States ex rel. Gaugler*, 477 F.2d 516, 523 (3d Cir. 1973). Arizona's Rules of Criminal Procedure are less exacting than Rule 32 of the Federal Rules of Criminal Procedure and require only that counsel be given a copy of the presentence report. *See* Ariz. R. Crim. P. 26. Waldrep does not allege that counsel failed to receive a copy of the presentence report and counsel is not ineffective for failing to follow federal procedural rules. Nor has Waldrep demonstrated any prejudice from the alleged violations. He fails to explain how he would have received a different sentence if he had been allowed access to "read, review," or "challenge" the PSR.

Ground 43 alleges counsel was ineffective because Waldrep was denied "knowledge and opportunity to request a mitigation hearing to present expert testimony." (ECF No. 1 at 26; ECF No. 8 at 25). Waldrep is unable to establish he was prejudiced by counsel's alleged failure to present expert testimony regarding his use of a testosterone supplement or the deer antler spray to mitigate his sentence because the mitigation evidence presented by counsel was successful in achieving the last possible sentence allowed by the plea agreement.

Ground 45 alleges counsel was ineffective for failing to disclose the State's "aggravating factors" to Waldrep and failing to challenge them with evidence in support of mitigation. (ECF No. 1 at 26). Ground 48 alleges counsel was ineffective because Waldrep was denied a presentencing conference and hearing to challenge alleged errors and inaccuracies in the presentence report. (ECF No. 1 at 26). Ground 49 alleges counsel

was ineffective because Waldrep was denied his right to review and discuss the presentence report prior to sentencing. (*Id.*). Ground 50 alleges counsel was ineffective because Waldrep was denied the opportunity to present his own presentence report to the court. (*Id.*). Ground 59 alleges that defense counsel presented "knowingly false aggravating statements" on the record, causing Waldrep to receive disproportionate, prejudicial sentencing. (ECF No. 1 at 29; ECF No. 8 at 31). All of these claims of ineffective assistance of counsel with regard to Waldrep's sentence fail because Waldrep is unable to establish prejudice, i.e., that he would have received a lesser sentence but for these errors.

Ground 57 alleges that Waldrep's two lifetime probation sentences violate a "statute against double punishments." (ECF No. 1 at 18; ECF No. 8 at 6, 16-18, 30-31, 32). Ground 61 alleges that the court wrongfully deleted Waldrep's "PSR Supplement," allegedly attached to the presentence report. (ECF No. 1 at 29; ECF No. 8 at 32-34). Ground 62 alleges that Waldrep's two lifetime probation sentences violate an Arizona statute. (ECF No. 1 at 30).[24] Ground 63 alleges that the court failed to ask Waldrep if he had read or discussed the presentence report. (*Id.*). These claims fail because a federal habeas court is "bound by a state court's construction of its own penal statutes." *Souch v. Schaivo*, 289 F.3d 616, 623 (9th Cir. 2002). *See also Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Additionally, "[a]bsent a showing of fundamental unfairness, [even] a state court's misapplication of its own sentencing laws does not justify federal habeas relief." *Christian v. Rhode*, 41 F.3d 461, 469 (9th Cir. 1994). *See also Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 506 (9th Cir. 1994) (holding

[24] In Ground 62, Waldrep contends his two lifetime probation sentences violate "U.S.C. § 2099" and Arizona Revised Statutes § 13-116 because "in no event may [they] be other than concurrent." (ECF No. 1 at 30). The sentences of lifetime probation were ordered to be served concurrently. (ECF No. 29-3 at 4). He further argues a sentencing enhancement above the statutory maximum can only be decided by a jury. (ECF No. 1 at 30). He claims that his sentence "for a first time offender, 17 year flat, [with] additional two lifetime sentences of probation exceed maximum allowed for by law." (*Id.*). As previously noted, Waldrep admitted to the factual predicate for his convictions and was sentenced to the presumptive sentence and, therefore, he fails to state an *Apprendi* claim. *See Blakely*, 542 U.S. at 301-03.

the petitioner's claim that the state court erred in imposing consecutive sentences was not cognizable in federal habeas); *Hendricks v. Zenon*, 993 F.2d 664, 674 (9th Cir. 1993) (concluding the defendant's claim that the state court was required to merge his convictions was not cognizable); *Campbell v. Blodgett*, 997 F.2d 512, 522 (9th Cir. 1992) ("[a]s the Supreme Court has stated time and again, federal habeas corpus relief does not lie for errors of state law"); *Watts v. Bonneville*, 879 F.2d 685, 687 (9th Cir. 1989) (holding the petitioner's claim that the trial court violated a provision of state law in sentencing him was not cognizable).

In Ground 65, Waldrep argues that defense counsel withheld "newly discovered evidence" for two years before finally turning it over to Waldrep. (ECF No. 1 at 33-35). He asserts the denial of these materials enabled counsel to misrepresent the law and facts and force, induce, and coerce Waldrep into an involuntary, and unknowing guilty plea. (ECF No. 8 at 37). The alleged newly-discovered evidence is reproduced at ECF No. 1-6 at 17-22 in case number CV-17-00025 PHX SPL, Waldrep's prior federal habeas action which was dismissed without prejudice. The "evidence" consists of three internet printouts, including one dated October 20, 2012, and a bibliography referencing articles dating from 1994 and 2000, which describe a "psychotic reaction" associated with testosterone-boosting products, including "deer velvet preparation" and "deer antler velvet." Waldrep contends defense counsel prejudiced his criminal proceedings by deliberately withholding this "crucial evidence" that supported Waldrep's claims that his actions were caused by his application of topical testosterone and his use of deer antler spray.

This "evidence" does not support a conclusion that Waldrep's guilty plea was unknowing or involuntary. Waldrep repeatedly referenced this information in the settlement conferences, at his plea colloquy, and at his sentencing. Waldrep was accurately informed by the settlement conference judges and his counsel that this information did not provide a defense to the charges against him because he voluntarily used the testosterone products. The issue was not whether there was "proof" of the fact

that these products could cause a "psychotic reaction," but whether Waldrep voluntarily used the products, a fact he never denied. Furthermore, Waldrep is not able to establish any prejudice arising from his inability to present this specific "evidence" to mitigate his sentence because he received a mitigated sentence and the lowest possible sentence possible pursuant to the plea agreement and the plea agreement was more lenient than that offered by the State in cases involving the same type of offenses to which Waldrep admitted. Moreover, if a defendant claims that counsel did not pursue a particular defense instead of pursuing a plea agreement, the defendant must show that the defense likely would have been successful at trial. *Hill*, 474 U.S. at 59; *Lambert*, 393 F.3d at 979. Given that voluntary intoxication is not a defense in Arizona, Waldrep cannot meet this burden.

III. Conclusion

Waldrep's claims for federal habeas relief were procedurally defaulted in the state courts because they were not presented to the Arizona Court of Appeals, or they were waived by his entry of a knowing and voluntary guilty plea, or they are without merit or are not cognizable in a federal habeas action. "Habeas corpus is an 'extraordinary remedy' available only to those 'persons whom society has grievously wronged and for whom belated liberation is little enough compensation.'" *Juan H. v. Allen*, 408 F.3d 1262, 1270 (9th Cir. 2005), *quoting Brecht v. Abrahamson*, 507 U.S. 619, 633-340 (1993). Waldrep's federal constitutional rights were not violated by his state court criminal proceedings.

IT IS THEREFORE RECOMMENDED that Waldrep's petition seeking a writ of habeas corpus be **denied**.

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.

Pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Pursuant to Rule 7.2 of the Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length.

Failure to timely file objections to any factual or legal determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo appellate consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure to file timely objections to any factual or legal determinations of the Magistrate Judge will constitute a waiver of a party's right to appellate review of the findings of fact and conclusions of law in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." The undersigned recommends that, should the Report and Recommendation be adopted and, should Waldrep seek a certificate of appealability, a certificate of appealability should be denied because he has not made a substantial showing of the denial of a constitutional right.

Dated this 20th day of December, 2019.

Camille D. Bibles
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

ROGER DARRYL WALDREP, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-16148 D.C. No. 2:17-cv-04609-DWL District of Arizona, Phoenix ORDER

Before: TALLMAN and LEE, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 22).

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

All other pending motions and requests are denied. No further filings will be entertained in this closed case.

APPENDIX F

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