Order Denying COA - U.S. Court of Appeals - 9th Circuit
(one page)

Appx. A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 9 2021

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

SCOTT BAUER, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondent-Appellee.	No. 20-16677 D.C. No. 2:19-cv-01155-JAT District of Arizona, Phoenix ORDER

Before: McKEOWN and BUMATAY, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

Order Denying/Dismissing §2254 - U.S. District Court
(10 pages)

Appx. B

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Scott Charles Bauer,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-19-01155-PHX-JAT

ORDER

Pending before the Court is Scott Charles Bauer's ("Petitioner") Petition for Writ of Habeas Corpus. (Doc. 1). The Magistrate Judge to whom this case was assigned issued a Report and Recommendation ("R&R") recommending that the petition be denied. (Doc. 21). Petitioner filed objections, (Doc. 24), and Respondents responded to those objections, (Doc. 25). The Court now rules on the petition.

I. LEGAL STANDARD

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). But district courts are not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). "[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). This de novo review requirement applies only to "the portions of the [Magistrate Judge's] recommendations to which the parties object." *Klamath Siskiyou Wildlands Ctr. v. U.S.*

Bureau of Land Mgmt., 589 F.3d 1027, 1032 (9th Cir. 2009). Such objections must be "specific." Fed. R. Civ. P. 72(b)(2).

The petition in this case was filed under 28 U.S.C. § 2254 because Petitioner is incarcerated based on a state conviction. This Court must deny the petition as to any claims that state courts have adjudicated on the merits unless "a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law," or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)–(2). An unreasonable application of law must be "objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014) (internal quotation marks and citation omitted). A petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 419–20 (citation omitted). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court ...." *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004).

II. BACKGROUND

The R&R recounts the factual and procedural history of this case at pages 1–4. (Doc. 21 at 1–4). Neither party objected to this portion of the R&R and the Court hereby accepts and adopts it. In brief, that history is as follows:

Petitioner was convicted of storing nineteen images of children under the age of fifteen engaged in exploitive exhibition or other sexual conduct on the hard drive of his computer in violation of A.R.S. § 13-3553. (Doc. 21 at 1–2). He timely appealed and filed a *pro se* brief with the Arizona Court of Appeals, raising substantially the same issues he raises here. (*Id.* at 2). The Arizona Court of Appeals affirmed his convictions and sentences, and the Arizona Supreme Court denied review. (*Id.*). The Pinal County Superior Court denied him post-conviction relief. (*Id.* at 3). He filed a Petition for Review with the Arizona Court of Appeals, which granted review but denied relief. (*Id.*). That court likewise

denied his motion for reconsideration. (*Id.*). Petitioner then filed this Petition for Writ of Habeas Corpus. (*Id.*).

III. ANALYSIS

As a preliminary matter, the Court hereby adopts the Magistrate Judge's findings that Petitioner properly exhausted his state law remedies and timely filed this petition. (Doc. 21 at 4–6). Neither party objected to these findings.

Petitioner raises four grounds for relief in his Petition. (Doc. 1 at 6–9). He asserts in ground one that the indictment was constitutionally deficient, in ground two that the evidence presented at trial was insufficient to sustain a verdict, in ground three that the giving of an erroneous jury instruction violated his 14th Amendment due process rights, and in ground four that the assistance of his counsel was ineffective. As grounds one, two, and four depend wholly upon Petitioner's interpretation of the elements of §13-3553, the Court considers these grounds together before proceeding to a separate consideration of ground three.

a. Grounds One, Two, and Four

Petitioner's first, second, and fourth grounds for relief rest on his contention that the identity of a minor victim is an element of the crime of sexual exploitation of a minor under A.R.S. § 13-3553. In his first ground Petitioner claims that because the State's indictment omitted this purported element, the indictment was insufficient to provide him with adequate notice of the nature of the charges or to protect his right against double jeopardy. (Doc. 1 at 6). In his second ground Petitioner claims that the State's failure to prove the purported element means that there was insufficient evidence to sustain the verdict on all counts. (Doc. 1 at 7). In his fourth ground Petitioner claims that the assistance of his counsel was ineffective because his counsel did not object to the state's errors as alleged in grounds one and two. (Doc. 1 at 9).

In reviewing a habeas petition, a federal court is limited to determining "whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). "[I]t is not the province of a federal habeas court to

reexamine state-court determinations on state-law questions." *Id.* at 67–68. In fact, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (citations omitted).

Petitioner argues that the actual identity of a depicted minor is an element of A.R.S. § 13-3553. In so arguing he relies on the decisions of the Arizona Court of Appeals in *State v. Hazlett*, 73 P.3d 1258 (Ariz. Ct. App. 2003) and *State v. Olquin*, 165 P.3d 228 (Ariz. Ct. App. 2007). In *Hazlett*, the Arizona Court of Appeals held that the term "minor" in § 13-3551 refers to an "actual child." *Hazlett*, 73 P.3d at 1266. The *Olquin* court mentioned in passing that when a crime is defined as being against another person, "the victim is a distinguishing factor and the identity of the victim therefore is an element of the offense." *Olquin*, 165 P.3d at 232. Petitioner reasons that, because the sexual exploitation of a minor is a crime against another person, the identity of that person—that is, the name and age of the child—must be an element of the crime, and should therefore have been included in the indictment and proven at trial.

Petitioner's interpretation of Arizona state law is incorrect. As noted in the R&R, the Arizona Court of Appeals has repeatedly rejected this interpretation of § 13-3553, including in denying Petitioner's Motion for Reconsideration in this case.[1] The Arizona Court of Appeals squarely confronted and rejected the very argument Petitioner now advances in both *State v. Regenold*, No. 1 CA-CR 16-0436 PRPC, 2019 WL 1219624 (Ariz. Ct. App. Mar. 14, 2019) and *State v. Thompson*, No. 1 CA-CR 15-0622 PRPC, 2017 WL 1180247 (Ariz. Ct. App. Mar. 30, 2017). The *Regenold* court noted that "nothing in § 13-3553 suggests that identifying the child is an essential element," reasoning that the mere fact that "the children are 'victims' does not mean their identities are essential elements of

[1] (Doc. 21 at 7–8). A declaration of state law by a state court need not be precedential to be owed deference on federal habeas review. *See Bradshaw*, 546 U.S. at 76 (deferring to a state court interpretation of state law even though expressed as dictum where that statement was "perfectly clear and unambiguous"). Additionally, as noted in the R&R, Ariz. Sup. Ct. R. 111(c) provides that memorandum decisions may be cited "for persuasive value" if no published opinion adequately addresses the issue before the court. The Court agrees with the conclusion of the R&R that the unpublished opinions of the Arizona Court of Appeals interpreting § 13-3553 accurately represent Arizona state law.

the offense." *Regenold*, 2019 WL 121964 at *2. The *Thompson* court likewise found that "[n]one of the authority [Petitioner] cites required the State to prove the "actual identity" (i.e., the name and age) of the minor victim." *Thompson*, 2017 WL 1180247 at *2. These state-court statements of state law are "perfectly clear and unambiguous," and this Court must defer to them. *See Bradshaw*, 546 U.S. at 76.

Even examining Petitioner's arguments on the merits rather than deferring to Arizona state courts, this Court would reject them. The *Hazlett* holding requires not that persons depicted in the images be identified as opposed to unidentified, but rather that they be actual minors and not fictitious characters. *See Hazlett*, 73 P.3d at 1260–66. Identifying a minor would be one way to prove that a depicted person was both "actual" and a "minor," but manifestly not the only way. Here, as the R&R recounted, the state demonstrated these facts by expert testimony, and Petitioner himself admitted that the depicted persons were "obviously children." *State v. Bauer*, No. 2 CA–CR 2015–0018, 2016 WL 1704613 *1 (Ariz. Ct. App. Apr. 28, 2016).

Further, the Arizona Court of Appeals persuasively distinguished the portion of *Olquin* Petitioner relies on as dicta and declined to follow it in *State v. Villegas-Rojas*, 296 P.3d 981, 983–84 (Ariz. Ct. App. 2012). Petitioner urges that *Villegas-Rojas* is inapposite because it concerned a different type of offense, but he fails to explain how a statement which is dictum when applied to one case may transform into a holding when applied to another. (Doc. 24 at 3 n.2). Thus, this Court concludes that the identity of an actual minor is not an element of A.R.S. § 13-3553.[2]

Because Petitioner's interpretation of the elements of § 13-3553 is wrong, the Court agrees with the conclusions of the R&R that Petitioner's first, second, and fourth grounds for relief must fail. Regarding ground one, the indictment could not have been

[2] Petitioner cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as supporting his interpretation of § 13-3553. Even had he not waived this argument, (Doc. 21 at 6 n.3), his reliance is misplaced. The *Apprendi* Court held that any fact used to increase the sentence beyond the statutory maximum "is the functional equivalent of an element of a greater offense." *Apprendi*, 530 U.S. at 494 n.19. Here, Petitioner "fails to recognize that the additional fact required ... is a victim under the age of fifteen, not the victim's name." *Regenold*, 2019 WL 1219624 at *3.

constitutionally defective for failing to allege something which is not an element of the charged offense. It provided the date of the violation, the statutes violated, and the specific file name of each image at issue. (Doc. 10-1 at 16–20). Consistent with the R&R, this Court finds that the indictment was sufficient to provide Petitioner with adequate notice of the charges and protect his right against double jeopardy. (Doc. 21 at 8–9).

With regard to ground two, the state's failure to present evidence of a fact that is not an element of the charged offense could not have violated Petitioner's due process rights. The Court agrees with the conclusions of the R&R that the last reasoned decision by a state court shows that the evidence presented at trial addressed each actual element of the offense and was sufficient to sustain a guilty verdict. (Doc. 21 at 10–11).

Given that Petitioner's claims in grounds one and two are without merit, his claim in ground four must fail as well. The Court agrees with the reasoning of the R&R that, because counsel cannot be held ineffective for failing to raise meritless claims, Petitioner has not shown that his counsel's representation fell below an objective standard of reasonableness. (Doc. 21 at 14–15).

Thus, Petitioner's objections are overruled and the R&R is accepted on grounds one, two, and four. Relief on those grounds is denied.

b. Ground Three

In his third ground for relief Petitioner claims that he should be granted a new trial because the trial court gave an erroneous jury instruction. (Doc. 1 at 8). A portion of the instruction closely tracks the language of A.R.S. § 13-3556, which the Arizona Court of Appeals has held to be unconstitutionally overbroad. *Hazlett*, 73 P.3d at 1264 n.10. Petitioner argues that, because the erroneous instruction permitted the jury to infer from appearances that the depicted persons were actual minors, the instruction relieved the jury of its responsibility to find the elements of the crime beyond a reasonable doubt. (Doc. 19 at 21–22 (citing *Francis v. Franklin*, 471 U.S. 307, 317 (1985)). Petitioner further argues that this instruction constituted structural error not subject to harmless error review. (Doc. 19 at 23).

The only question for federal courts on habeas review of jury instructions "is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Martinez v. Ryan*, 926 F.3d 1215, 1230 (9th Cir. 2019) (quoting *Estelle*, 502 U.S. at 72). "[T]he instruction . . . must be considered in the context of the instructions as a whole and the trial record." *Id.* Where, as here, the instructed inference is permissive rather than mandatory, it "violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Hall v. Haws*, 861 F.3d 977, 990 (9th Cir. 2017) (quoting *Francis*, 471 U.S. at 314). The text of the relevant jury instruction, (Doc. 10-2 at 234), is as follows:

> In a prosecution relating to sexual exploitation of children, you may draw the inference that a participant was a minor if the visual depiction or live act through its title, text or visual representation depicted the participant as a minor.
>
> You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.
>
> In considering whether the participant was a minor, you are reminded that in the exercise of constitutional rights, a defendant need not testify. The alleged unlawful conduct may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.

The Court agrees with the conclusion of the R&R that the jury instruction did not so infect the entire trial that Petitioner's conviction violates due process. The inference permitted by the jury instruction allows a conclusion that is justified by reason and common sense in light of the proven facts before the jury. Here the inference the jury was permitted to draw was that the persons depicted in the images were actual minors. As discussed above and as recounted by the R&R, the "state's expert testified at length and specifically about the ages of the children depicted based on their sexual development." (Doc. 21 at 13 (R&R); Doc. 10-1 at 300–33 (expert testimony)). The Arizona Court of Appeals noted that the "images themselves clearly depict actual minors, not adults pretending to be minors."

Bauer, 2016 WL 1704613 at *1. Tellingly, Bauer himself admitted that the depicted persons were "obviously children." *Id.*

There is a clear common-sense connection between the evidence before the jury—expert testimony that the children were actual minors, Petitioner's own admission indicating that the children were actual minors, and the images themselves clearly depicting actual minors as noted by the Arizona Court of Appeals—and the conclusion that the depicted persons were actual minors. Indeed, the connection is so clear that the evidence supports the jury's verdict without need for reliance on the inference instruction. For example, one image viewed by the jury was entitled "3yo&8yosisters.jpg" and showed two girls who in the expert witness's opinion were under 13 and five years of age respectively based on their total lack of secondary sexual development. (Doc. 10-1 at 325–26). The expert witness commented that the younger girl was "so small" and looked "so young." (*Id.* at 326). In this example, jurors did not need to draw an "inference" to determine that this image depicted an actual minor under the age of 15 as the common knowledge of the average juror would allow them to recognize that a child that is, in the expert's opinion, under five years old is a minor under 15 years old. The Court agrees with the conclusion of the R&R that the erroneous instruction did not render the entire trial constitutionally deficient. (Doc. 21 at 13).

Petitioner cites *Francis* in arguing that the erroneous instruction relieved the jury of its responsibility to find each element beyond a reasonable doubt, thereby violating the Due Process Clause. (Doc. 19 at 21–22). But *Francis* makes clear that, by its very nature, "a permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Francis*, 471 U.S. at 314. Further, here, the jury instruction itself informs jurors that they are "free to accept or reject" the inference, and that "the State has the burden of proving each and every element of the offense beyond a reasonable doubt." (Doc. 10-2 at 234). Therefore, the jury instruction in this case complied with the requirement of the Due Process Clause that the accused be protected "against

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Francis*, 471 U.S. at 313.

Petitioner also argues that the jury instruction at issue is not subject to harmless error review, but this is incorrect. "A constitutionally deficient jury instruction is a trial-type error that is subject to harmless error analysis." *Hanna v. Riveland*, 87 F.3d 1034, 1038 (9th Cir. 1996). More importantly, because the Court has determined that a prerequisite federal constitutional error did not occur, harmless error review is not warranted. *See Fry v. Pliler*, 551 U.S. 112, 121 (2007) ("it would not matter which harmless error standard is employed if there were no underlying constitutional error") (internal quotation marks omitted). Nonetheless, if the Court reached this question it would conclude that any error was harmless because, given the strength of the evidence as discussed above, the jury instruction could not have had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).[3]

Based on the foregoing, Petitioner's objections to the R&R on ground three are overruled and relief on this claim is denied.

c. Certificate of Appealability

An appeal may not be taken from this order unless this Court issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1). A COA may issue only if a petitioner has made a "substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Silva v. Woodford*, 279 F.3d 825, 833 (9th Cir. 2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Generally, "a COA should issue unless the claims are utterly without merit." *See id.* (internal quotation marks and citation omitted).

Petitioner's first, second, and fourth grounds for relief are utterly without merit, premised as they are upon a legal interpretation repeatedly rejected by state courts. Ground

[3] *Brecht* gives the proper standard for assessing this question. *Fry*, 551 U.S. at 121–22. ("[I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht* . . . whether or not the state appellate court recognized the error ....").

three is also meritless. The common-sense connection between the proven facts and the conclusion permitted by the inference is so clear that reasonable jurists could not find the Court's assessment of the constitutional claim debatable. The Court hereby adopts the recommendation of the R&R to deny a COA on all grounds for relief because Petitioner has not made a substantial showing of the denial of a constitutional right. (Doc. 21 at 16).

IV. CONCLUSION

For the foregoing reasons,

IT IS ORDERED that the Report and Recommendation (Doc. 21) is accepted and adopted. The objections (Doc. 24) are overruled.

IT IS FURTHER ORDERED that the petition in this case (Doc. 1) is denied and dismissed with prejudice and the Clerk of the Court shall enter judgment accordingly.

IT IS FINALLY ORDERED that pursuant to Rule 11 of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a certificate of appealability because Petitioner has not made a substantial showing of the denial of a constitutional right.

Dated this 24th day of July, 2020.

James A. Teilborg
Senior United States District Judge

Notice of Appeal - Request for COA/In Forma Pauperis
(three pages)

Appx. C

Scott Bauer - ADC# 297583
ASPC-Florence, South Unit
P.O. Box 8400
Florence, Az. 85132-8400
Petitioner-Appellant, Pro-se.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Scott Charles Bauer,
Petitioner-Appellant,

v.

Charles L. Ryan, et al.,
Respondents-Appellees.

No. 20-16677
(USDC NO. CV-19-01155-PHX-JAT)

NOTICE OF APPEAL; REQUEST FOR CERTIFICATE OF APPEALABILITY AND LEAVE TO PROCEED IN FORMA PAUPERIS

Notice is hereby given that Petitioner-Appellant, Scott Charles Bauer, appeals from the U.S. District Court Order (Doc. 26) and Judgment (Doc. 27) of July 24, 2020, denying and dismissing his §2254 Petition for Writ of Habeas Corpus.

REQUEST FOR A COA

On July 24, 2020, the U.S. District Judge, James A. Teilborg, adopted in full the magistrate's Report and Recommendation to deny Bauer's §2254 habeas petition and dismiss the proceedings with prejudice (Doc. 26). Because (1) Judge Teilborg failed to do *de novo* review of "the portions of the [R&R] to which [Bauer] objected[ed]," Klamath SiskiyouWildlands Ctr. vs. U.S. Bureau of Land Mgmt, 589 F.3d 1027, 1032 (9th Cir. 2009); and (2) under correct analysis of Bauer's cited U.S. Supreme Court caselaw, jurists of reason would find Judge Teilborg's ruling on the constitutional claim debatable, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003), Bauer is entitled to have this Court settle the issues, and a COA should be granted.

MEMORANDUM

To begin, Judge Teilborg's adoption of the magistrate's R&R not only carries over the magistrate's erroneous parroting of the Respondents' waived defenses as to Ground One, but he then uses the magistrate's flawed analysis to deny an amalgomation of Grounds One, Two, and Four, simply "agreeing" with the R&R and with no mention *whatsoever* that the very logic on which he relies was waived by respondents in state proceedings on PCR. Bauer brought this to the attention of that court on Traverse (Doc. 18 at 1.) and again on Objection's to Magistrate's R&R (Doc. 24 at 2.) but to no avail. Thus, in order to do *de novo* review, Judge Teilborg — with no valid analysis provided by Respondents and relied upon in the R&R — would have had to actually consider Bauer's Ground One argument, set forth fully in his memorandum to traverse, and deconstruct his claims that the Arizona Court of Appeals' decisions in Bauer's case (and the unpublished memorandum relied upon to deny him) are untenable under U.S. Supreme Court caselaw *and* Arizona's own published law. (Doc. 19 at 3 through 17.) Because Judge Teilborg simply "agreed" with the R&R and, in his cursory analysis, parroted the Respondents' *waived* arguments on habeas without comment thereupon, Judge Teilborg failed to conduct the requisite and proper *de novo* review, an abuse of discretion which must be reversed by this Court. Bauer simply has not had the habeas review he deserved.

Accordingly, it cannot but be concluded that Judge Teilborg's analysis of Ground Three, and his denial based on the flawed reasoning in Grounds One, Two, and Four as to the constitutional claim are debatable among reasonable jurists. And, even if Bauer would seem to be not entitled to appellate relief, he is entitled to have this Court reasonably settle the issues. Bauer should be afforded a COA to move forward. Miller-El, 537 U.S., at 340.

Conclusion:

For all the foregoing and good cause appearing, your Petitioner-Appellant Scott Charles Bauer respectfully prays that this Honorable Court will now (1) GRANT his request for COA and to proceed In forma Pauperis; and (2) appoint CJA appellate counsel for all further proceedings before this Court.

DATED this 23rd day of August, 2020. RESPECTFULLY submitted,

Scott Charles Bauer

Scott Charles Bauer, Pro-se.
Petitioner-Appellant.

a copy of the foregoing was mailed/served on this 23rd of August, 2020, to:

J.D. Nielsen
Habeas Unit Counsel
Arizona Attorney General
2005 N. Central Avenue
Phoenix, AZ. 85004-1580

(via inmate legal mail system)

Scott Charles Bauer

Scott Charles Bauer

Magistrate's Report and Recommendation- U.S. District Court
(16 pages)

Appx. D

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Scott Charles Bauer, Petitioner, v. Charles L Ryan, et al., Respondents.	No. CV-19-01155-PHX-JAT (MTM) **REPORT AND RECOMMENDATION**

TO THE HONORABLE JAMES A. TEILBORG, SENIOR UNITED STATES DISTRICT JUDGE:

Petitioner Scott Charles Bauer has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1).

I. Summary of Conclusion.

Petitioner raises four grounds for relief, asserting a defective charging indictment, insufficient evidence to convict, an unconstitutional jury instruction, and ineffective assistance of counsel. All four grounds are without merit. Accordingly, the Court will recommend that the Petition be denied and dismissed with prejudice.

II. Background.

A. Factual Background.

On December 19, 2014, Petitioner was convicted of nineteen (19) counts of sexual exploitation of a minor in violation of A.R.S. § 13-3553. (Doc. 10-2, Ex. Y at 271). The

Arizona Court of Appeals set forth the following facts in Petitioner's direct appeal:

> Following a jury trial, appellant Scott Bauer was convicted of nineteen counts of sexual exploitation of a minor, dangerous crimes against children. The trial court sentenced him to presumptive, consecutive terms totaling 323 years' imprisonment.
>
> ....
>
> The evidence presented at trial showed Bauer had stored nineteen images of children under the age of fifteen engaged in exploitive exhibition or other sexual conduct on the hard drive of his computer.

State v. Bauer, No. 2 CA-CR 2015-0018, 2016 WL 1704613 *1 (Ariz. Ct. App. Apr. 28, 2016)(*Bauer I*).[1]

B. Direct Appeal.

January 9, 2015, Petitioner filed a timely notice of appeal (doc. 10-3, Ex. AA at 2). Petitioner's counsel submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) that indicated that counsel reviewed the trial record and found no arguable issues on appeal. (Doc. 10-3, Ex. BB at 11). On November 16, 2015, Petitioner filed a *pro se* brief with the Arizona Court of Appeals (Doc. 10-3, Ex. GG at 27). Petitioner raised three issues: (1) whether the State's failure to allege and prove the identities of the "actual minor" victims required reversal; (2) whether the indictment deprived the trial court of jurisdiction by failing to state the identities of the minor victims; and (3) whether the trial court committed reversible error by reading the permissive inference jury instruction drawn from A.R.S. § 13-3556. (*Id.* at 28).

On April 28, 2016, the Arizona Court of Appeals affirmed Petitioner's convictions and sentences. *Bauer I*, 2016 WL at *2. The Court concluded that the actual identities of the children in the images seized from Petitioner's computer did not need to be proven under A.R.S. § 13-3553; the indictment did not deprive the trial court of jurisdiction; and the jury instruction, while erroneous, was harmless error. *Id.* at *1-2. Petitioner sought review at the Arizona Supreme Court, which was denied. (*See* doc. 10-4, Ex. UU at 32). On January 9, 2017, the Arizona Court of Appeals issued its mandate. *Id.* The United States

[1] Under 28 U.S.C. § 2254(e)(1), the Court presumes that the state court's recounting of the facts is correct.

Supreme Court denied certiorari on May 15, 2017. *Bauer v. Arizona*, 137 S. Ct. 2123 (2017)(Mem.).

C. State Post-Conviction Relief Proceeding.

On January 9, 2017, Petitioner filed a Notice of Post-Conviction Relief ("PCR") under Rule 32 of the Arizona Rules of Criminal Procedure. (Doc. 10-6, Ex. ZZ at 20-22). Appointed counsel notified the Court on July 10, 2017 that the PCR notice presented no colorable claims for relief. (Doc. 10-6, Ex. AAA at 24). On August 31, 2017, Petitioner filed a *pro per* petition for post-conviction relief. (Doc. 10-7, Ex. DDD at 2). Petitioner raised the three issues from his direct appeal and raised an additional claim for ineffective assistance of counsel for failing to object to the indictment and failing to object to the trial on jurisdictional grounds. (*Id.* at 3-19).

On January 5, 2018, the Pinal County Superior Court rejected Petitioner's PCR petition. (Doc. 10-8, Ex. III at 30). The reviewing court determined that Petitioner's claims of ineffective assistance of counsel at both the trial and the PCR proceeding were without merit, and that even if counsel had made errors at trial, the errors were not prejudicial. (*Id.* at 31-32). Petitioner's Motion to Reconsider (doc. 10-8, Ex. JJJ at 34-39) was denied on January 29, 2018. (Doc. 10-8, Ex. KKK at 41).

On February 8, 2018, Petitioner filed a Petition for Review with the Arizona Court of Appeals. (Doc. 10-8, Ex. LLL at 43). On July 11, 2018, the Arizona Court of Appeals granted review but denied relief. *State v. Bauer*, No. 2 CA-CR 2018-0047-PR, 2018 WL 3409136 (Ariz. Ct. App. July 11, 2018)(*Bauer II*). Petitioner's motion for reconsideration was denied on August 2, 2018. (Doc. 10-9, Ex. QQQ at 2).

III. The Petition.

On February 19, 2019, Petitioner filed a Petition for Writ of Habeas Corpus (doc. 1). The Court in its March 15, 2019 Order (doc. 5) summarized Petitioner's claims as follows:

> Petitioner raises four grounds for relief. In Ground One, Petitioner asserts that the indictment was insufficient as a matter of law, and the trial court therefore did not have subject-matter jurisdiction over his case. In Ground Two, Petitioner alleges that the evidence was insufficient to convict him. In

> Ground Three, Petitioner claims the trial court committed reversible error when it gave an unconstitutional "permissible inference" jury instruction at Petitioner's trial. In Ground Four, Petitioner asserts that his trial counsel was ineffective for failing to know state law and advocate on Petitioner's behalf as to the insufficient indictment and allowing the trial to proceed in the absence of subject-matter jurisdiction.

(*Id.* at 1-2). On June 6, 2019, Respondents filed their Response (doc. 10). On October 17, 2019, Petitioner filed a Reply (doc. 18) to the Response, and a Memorandum in Support of the Reply (doc. 19)(Memorandum).

IV. Discussion.

The writ of habeas corpus affords relief to persons in custody pursuant to the judgment of a state court in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. §§ 2241(c)(3), 2254(a). Petitions for Habeas Corpus are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2244. Whether a petition is barred by the statute of limitations is a threshold issue that must be resolved before considering other procedural issues or the merits of individual claims.

A. Timeliness.

The Petition was timely filed. The AEDPA imposes a one-year limitation period, which begins to run "from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The Arizona Court of Appeals affirmed Petitioner's conviction on April 28, 2016; the conviction became final on May 15, 2017, after the United States Supreme Court denied the petition for writ of certiorari. Petitioner therefore had until May 16, 2018 to file his Petition with this Court, unless Petitioner is entitled to statutory tolling.

Petitioner is entitled to statutory tolling, based on his filing of a timely notice of post-conviction relief in state court. The AEDPA provides for tolling of the limitations period when a "properly filed application for State post-conviction or other collateral relief with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). In Arizona post-conviction review is pending once a notice of post-conviction relief is filed. *See Isley v. Arizona Dep't of Corr.*, 383 F.3d 1054, 1056 (9th Cir. 2004). *See also* Ariz. R.

Crim. P. 32.4(a)("A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred"). The PCR proceeding concluded on August 2, 2018, upon denial of Petitioner's Motion for Reconsideration. Petitioner filed his timely Petition on February 19, 2019, well before the deadline of August 2, 2019.

B. Exhaustion.

Petitioner properly exhausted his state law remedies. Ordinarily, a federal court may not grant a petition for writ of habeas corpus unless a petitioner has exhausted available state remedies. 28 U.S.C. § 2254(b). To exhaust state remedies, a petitioner must afford the state courts the opportunity to rule upon the merits of his federal claims by "fairly presenting" them to the state's highest court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004)("To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim"). In Arizona claims are considered "exhausted" in non-capital cases when considered by the Arizona Court of Appeals. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999).

A claim has been fairly presented if the petitioner has described both the operative facts and the federal legal theory of the claim. *Baldwin*, 541 U.S. at 33. Thus, "a petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum . . . (2) through the proper vehicle, . . . and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005)(internal citations omitted).

Petitioner presented all four grounds for relief to the Arizona Court of Appeals; Grounds One through Three were presented in Petitioner's direct appeal[2] (*see* doc. 10-3, Ex. GG at 28, 39-50), while Ground Four was presented in Petitioner's petition for review

[2] Petitioner's brief cites extensively to Supreme Court decisions interpreting the Due Process Clause of the Fourteenth Amendment. (Doc. 10-3, Ex. GG at 41, 45, 48-49). This is sufficient to satisfy the fair presentation requirement of *Baldwin*, even if the federal nature of Petitioner's claims was not made immediately apparent at the beginning of the direct appeal brief. *Baldwin*, 541 U.S. at 32. ("A litigant wishing to raise a federal issue can easily indicate the federal law basis [...] by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds").

of the denial of post-conviction relief. (*See* doc. 10-8, Ex. LLL at 54-56). Petitioner's claims were properly exhausted in state court.

C. Merits Review.

The court may not grant a writ of habeas corpus to a state prisoner on a claim adjudicated on the merits in state court proceedings unless the state court reached a decision which was contrary to clearly established federal law, or the state court decision was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d); *Davis v. Ayala*, 135 S. Ct. 2187, 2198-99 (2015). An unreasonable application of law:

> must be objectively unreasonable, not merely wrong; even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement.

White v. Woodall, 572 U.S. 415, 419-20 (2014)(internal citations omitted). Further, the petitioner must show the error was not harmless: "[f]or reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Ayala*, 135 S. Ct. at 2197 (internal quotations omitted).

1. Ground One.

Petitioner asserts that his federal due process rights were violated by an indictment that failed to provide adequate notice of the charges and omitted an essential element of the crime. (Doc. 19 at 4). Petitioner cites *Russell v. United States,* 369 U.S. 749, 763-65 (1962) for the propositions that an indictment must contain all the elements of the offense and provide adequate notice and protection against double jeopardy. Petitioner argues that the indictment was constitutionally defective for not providing the actual identity of the children depicted in the charged sexual images. (Doc. 1 at 6).[3]

[3] Petitioner also argues in the Memorandum that, under *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000), the fact that A.R.S. § 13-3553 constitutes a "Dangerous Crime Against Children" for purposes of sentencing under A.R.S. § 13-705 means that the State had to prove the actual identity of the children for a victim under A.R.S. § 13-705 to exist. (Doc. 19 at 10). Because this argument appears for the first time in a reply, the argument is waived by Petitioner. *Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008).

Respondents argue that Ground One is not cognizable on habeas review because it merely asserts that "the indictment was insufficient as a matter of law," which is a state law question. (Doc. 10 at 10-11). However, Ground One also claims that the indictment did not provide Petitioner with adequate notice of the nature of the charges against Petitioner, and that the indictment was not sufficiently definite enough to protect Petitioner's right against double jeopardy. (Doc. 1 at 6). Because these claims raise constitutional questions separate from the indictment's alleged infirmity as a matter of state law, Ground One is cognizable on federal habeas review.

a. Elements of the Charged Offense.

In habeas review, federal courts defer to state courts on questions of state law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005)("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus").

The Arizona Court of Appeals has repeatedly rejected the exact argument advanced by Petitioner. In *State v. Thompson*, No. 1 CA-CR 15-0622 PRPC, 2017 WL 1180247 (Ariz. Ct. App. Mar. 30, 2017), the Arizona Court of Appeals denied post-conviction relief to an individual claiming the state trial court should not have dismissed his petition for post-conviction relief because the State had failed to identify an "actual minor" under A.R.S. § 13-3553. *Id.* at *1. The petitioner in *Thompson*, like Petitioner in the present case, argued that *State v. Hazlett*, 73 P.3d 1258 (Ariz. Ct. App. 2003) *State v. Tschilar*, 27 P.3d 331 (Ariz. Ct. App. 2001), and *State v. Olquin*, 165 P.3d 228, 232-33 (Ariz. Ct. App. 2007), when read together, require the State to identify an actual minor to sustain a conviction under A.R.S. § 13-3553. *Id.* The Court of Appeals rejected that argument, reasoning that "[n]one of the authority Thompson cites required the State to prove the 'actual identity' (i.e., the name and age) of the minor victim." *Thompson*, 2017 WL 1180247 at *2.

State v. Regenold, No. 1 CA-CR 16-0436 PRPC, 2019 WL 1219624 (Ariz. Ct. App. Mar. 14, 2019) also rejected the argument that a conviction under A.R.S. § 13-3553

requires proof of the victims' actual names. The *Regenold* Court noted that "[n]othing in § 13-3553 suggests that identifying the child is an essential element of the crime of sexual exploitation of a minor." *Regenold*, 2019 WL at *2. Accordingly, the *Regenold* Court found that "even though the children are 'victims' does not mean their identities are essential elements of the offense." *Id.*, citing *Olquin*, 165 P.3d at 255. *See also*, *State v. Villegas-Rojas*, 296 P.3d 981, 983 (Ariz. Ct. App. 2012)("Thus, although the statute makes it clear the offense of endangerment is reckless behavior *placing another person at risk*, it does not require or imply that the *name or exact identity* of the victim is a necessary element of the offense" (emphasis added).

As Petitioner acknowledges (Doc. 19 at 11), the text of A.R.S. § 13-3553 does not specify that a child's identity is an element of the offense. Rather, as noted by the Arizona Court of Appeals in denying Petitioner's Motion for Reconsideration, *State v. Hazlett*, 73 P.3d 1258, 1262 (Ariz. App. 2003) held that the statute requires not identities but "actual children actually participating in the acts depicted." (Doc. 10-4, Ex. RR at 24). Consistent with the interpretation of the state courts, this Court rejects Petitioner's argument that his due process rights were violated by the failure of the indictment to include the actual identities of the minor children in the images of conviction. [4]

b. Adequate Notice and Double Jeopardy.

The charging indictment identified the date of the violation, the statutes violated, and for each count, the specific .jpg file that constituted "a visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." (Doc. 10-1, Ex. C at 16-20). The notice provided to Petitioner was not constitutionally defective. *See Nevius v. Sumner*, 852 F.2d 463, 471 (9th Cir. 1988)(plain language coupled with references to

[4] As Memorandum decisions, *Regenold* and *Thompson* are not precedential under Arizona law. *See* Ariz. Sup. Ct. R. 111(c). However, Ariz. Sup. Ct. R. 111(c)(1)(C) provides that memorandum decisions may be cited "for persuasive value" if no published opinion adequately addresses the issue before the court. As *Regenold* and *Thompson* addressed the exact issues raised by Petitioner, the Court concludes *Regenold* and *Thompson* accurately represent Arizona law. In a similar vein, a federal court sitting in diversity jurisdiction may consider unpublished state decisions insofar as they "lend support" to the contention that they "accurately represent" state law. *Emp'rs Ins. of Wausau v. Granite St. Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003).

specific statutes in the indictment provided adequate notice of the charges against defendant). Further, the factual details provided in the indictment provide adequate protection against Petitioner facing legal jeopardy for the same illicit images. *Compare United States. v. Hillie*, 227 F. Supp. 3d 57, 78-79 (D.D.C. 2017)("The broadly-worded and factually sparse child pornography counts in Hillie's indictment—none of which are tied to any particular act or video on the face of the charging document—suffer from the same defect, because the allegations are insufficient to establish the boundaries of the charged conduct").

c. Conclusion.

For the reasons described above, Petitioner has not established for Ground One that the Arizona Court of Appeals' denial of post-conviction relief was contrary to, or an unreasonable application of clearly established federal law. Ground One is therefore without merit.

2. Ground Two.

Petitioner's claims as to Ground Two lack merit.[5] Petitioner states that "[b]ecause the plain language of [relevant Arizona statutes] require an "actual minor" victim for a "Dangerous Crime Against Children" conviction to be sustained, the state's failure to prove the identity of any "actual" victim under the age of 15 provided insufficient evidence to sustain the verdicts on all counts." (Doc. 1 at 7). This claim is essentially a permutation of the claim in Ground One, though it goes to the facts presented at trial instead of to the charging document. As discussed above, the Arizona Court of Appeals' determination that actual identity is not required under Arizona law to sustain a conviction for a violation of A.R.S. § 13-3553 is not contrary to, or an unreasonable application of clearly established federal law. Therefore, Petitioner's due process rights were not violated by the lack of evidence at trial as to the actual identities of the children depicted in the images obtained

[5] The Court notes that Petitioner stated in the Reply that Petitioner "agrees with the Respondents' assertions in their Answer (*id.* at 4-9)." (Doc. 18 at 1). That portion of the Respondents' Answer also includes the *Bauer I* Court's determination that "the evidence presented at trial showed Bauer had stored nineteen images of children under the age of fifteen engaged in exploitive exhibition or other sexual conduct on the hard drive of his computer."

from Petitioner's computer.

A state prisoner is entitled to habeas relief if a federal court finds that "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The federal court's review of the evidence under *Jackson* is limited to the evidence introduced at trial. *McDaniel v. Brown*, 558 U.S. 120, 130-31 (2010). The Court is required to view the evidence in the light most favorable to the prosecution and presume that the jury resolved evidentiary conflicts in the prosecution's favor. *Kyzar v. Ryan*, 780 F.3d 940, 943 (9th Cir. 2015), citing *Jackson*, 443 U.S. at 326. A jury's credibility determinations are "entitled to near-total deference under *Jackson*." *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004).

The Court cannot conclude that no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The Court first looks to the "last reasoned decision" by the state court to determine if the evidence was sufficient to support a guilty verdict. *Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014). Because the Arizona Court of Appeals last considered the sufficiency of the evidence in *Bauer I*, the Court reviews that decision to determine if the evidence was sufficient to support a guilty verdict.

The evidence presented at trial was sufficient to support a guilty verdict. The Arizona Court of Appeals in *Bauer I* stated that the evidence at trial was sufficient to support the jury's verdict, as "[t]he evidence presented at trial showed Bauer had stored nineteen images of children under the age of fifteen engaged in exploitive exhibition or other sexual conduct on the hard drive of his computer." *Bauer I*, 2016 WL at *1. In the context of evaluating Petitioner's assertion that the jury instructions were erroneous, the Arizona Court of Appeals noted:

> [t]he state's expert testified at length and specifically about the ages of the children depicted based on their sexual development. The images themselves clearly depict actual minors, not adults pretending to be minors. Indeed, Bauer himself agreed the pictures depicted persons who were "obviously children." And Bauer directs us to nothing in the record to suggest the images were computer-generated or were otherwise deceptive as to the subjects' ages.

Id. In this case, the State was required to prove[6] that Petitioner (1) with knowledge, (2) possessed a visual depiction (3) of a minor engaged in exploitive exhibition or other sexual conduct; and (4) that the minor is under fifteen years of age. The State at trial introduced evidence that investigators tracked numerous exchanges of images exchanged with Petitioner's IP address. (Doc. 10-1, Ex. L at 420-29) The State also introduced evidence that multiple images were recovered by investigators on Petitioner's computer. (*Id.* at 499-503). Evidence of knowledge was also presented to the jury (*id.* at 509-10), as was evidence that Petitioner obtained the imagery for purposes of sexual arousal. (*Id.* at 510). Additionally, the State introduced testimonial evidence from Dr. Kathryn Coffman that the children depicted in the imagery were all under the age of fifteen. (Doc. 10-1, Ex. H at 303, 314-331). Based on its independent review of the record, this Court cannot conclude that no rational trier of fact could find beyond a reasonable doubt that Petitioner violated A.R.S. § 13-3553. Petitioner's claims as to Ground Two lack merit.

3. Ground Three.

Petitioner's claims as to Ground Three lack merit. Petitioner argues that the trial court gave an erroneous jury instruction that violated Petitioner's Fourteenth Amendment rights. Petitioner objects to the permissive inference jury instruction, which stated:

> In a prosecution relating to the sexual exploitation of children, you may draw the inference that a participant was a minor if the visual depiction or live act through its title, text or visual representation depicted the participant as a minor.
>
> You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make. Even with the inference, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.
>
> In considering whether the participant was a minor, you are reminded that in the exercise of constitutional rights, a defendant need not testify. The alleged unlawful conduct may be satisfactorily explained through other circumstances and other evidence, independent of any testimony by a defendant.

[6] Although Petitioner in Ground Two rests primarily on the argument that actual identity of the victims is a necessary element of the offense, Petitioner stated that insufficient evidence existed "on all essential elements of the alleged offenses." (Doc. 1 at 7). Accordingly, the Court reviews all essential elements of the offenses.

(Doc. 10-2, Ex. U at 234). Petitioner argues this instruction was erroneous because the Arizona Court of Appeals in *Hazlett* declared the instruction unconstitutionally overbroad. (Doc. 1 at 8, citing *Hazlett*, 73 P.3d at 1264 n.10).

To receive habeas relief for an erroneous jury instruction, a petitioner must show "the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The violative instruction must be considered in the context of all the jury instructions as well as the entire trial record. *Id.* Respondents assert that Petitioner did not establish prejudice from the erroneous instruction considering the factual record. (Doc. 10 at 19-20).

The Court cannot conclude that the jury instruction so infected the entire trial that Petitioner's conviction violated due process. First, while the instruction recites verbatim the language invalidated by *Hazlett*,[7] the instruction also stated that the jury was "free to accept or reject this inference as triers of fact." (Doc. 10-2, Ex. U at 234). The additional language did not cure the constitutional defect, but it did help reduce the risk of prejudice, by emphasizing the permissive nature of the potential inference.

A permissive inference only affects the sufficiency of the conviction in a criminal case if, given the facts of the case, "there is no rational way the trier could make the connection permitted by the inference." *Cnty. Ct. of Ulster Cnty., N.Y. v. Allen*, 442 U.S. 140, 157 (1979). If there is "a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed," then the permissive inference is constitutional. *Id.* at 165. The Ninth Circuit's decision in *Hall v. Haws*, 861 F.3d 977 (9th Cir. 2017) is instructive on this point. The *Hall* Court affirmed the district court's grant of habeas relief for an erroneous jury instruction that permitted a jury to infer from the defendant's possession of the victim's property that the defendant intentionally murdered the victim. *Id.* at 990. The *Hall* Court, applying the standard set forth in *Ulster County*, explained that "the presumed fact does not follow from the facts established." *Id.* In contrast, in the instant habeas there was substantial evidence from which a rational jury

[7] *Hazlett* did not specifically invalidate the jury instruction; the decision invalidated A.R.S. § 13-3556, from which the language in the instruction was taken.

could reasonably determine that the images seized from Petitioner's computer depicted minors under the age of fifteen engaging in sexually exploitive activity. Accordingly, even without the permissive inference instruction, by considering Dr. Coffman's testimony and viewing the images themselves, a rational jury could conclude that the victims depicted in the images were minors. As the Arizona Court of Appeals summarized, "[t]he state's expert testified at length and specifically about the ages of the children depicted based on their sexual development. The images themselves clearly depict actual minors, not adults pretending to be minors. Indeed, Bauer himself agreed the pictures depicted persons who were 'obviously children.'" *Bauer I*, 2016 WL at *1. The Court concludes that the erroneous instruction did not render the entire trial constitutionally deficient.

Petitioner argues that the erroneous jury instruction was structural error not subject to harmless error review. (Doc. 19 at 23, citing *Arizona v. Fulminante*[8], 499 U.S. 279, 309-10 (1991); *U.S. v. Alferahin*, 433 F.3d 1148, 1159 (9th Cir. 2006); *U.S. v. Prado*, 815 F.3d 93 (2d Cir. 2016)). Petitioner's reliance on these cases is misplaced; in fact, an erroneous jury instruction may be reviewed under the harmless error standard. In *Alferahin*, the Ninth Circuit did undertake a harmless error analysis, even if not stated as such. *Id.* at 1157. ("We recognize, as the government points out, that the omission of an element from jury instructions does not always 'affect' a defendant's substantial rights and that the failure to submit an element to the jury is not per se prejudicial.") The *Alferahin* Court held that a jury instruction that omitted a materiality requirement was not harmless error in the absence of other evidence regarding defendant's false statement on his permanent resident application. *Id* at 1158. ("In this case, we are unpersuaded that the evidence against Alferahin was so strong or convincing that the omission of materiality from the jury instructions did not affect his substantial rights"). *See also Prado*, 815 F.3d at 100. ("We review challenges to jury instructions *de novo* but will reverse only where the charge, viewed as a whole, demonstrates prejudicial error.")(internal citations omitted).[9]

[8] *Fulminante* is not on point, as it dealt with the admission of an involuntary confession, not a jury instruction. 499 U.S. at 309-10.

[9] Petitioner also argues in the Memorandum that the Arizona Court of Appeals in *Bauer I*

4. Ground Four.

Petitioner's claims as to Ground Four lack merit. To succeed in a claim of ineffective assistance of counsel, Petitioner must satisfy the two-pronged test laid out in *Strickland v. Washington*, 466 U.S. 668 (1984). First, he must demonstrate that "counsel's representation fell below an objective standard of reasonableness," with reasonableness being judged under professional norms at the time assistance was rendered. *Id.* at 688. Second, Petitioner must demonstrate that "there is a reasonable probability that, but for counsel's error the result would have been different." *Id.* at 687-96. A reasonable probability is a "probability sufficient to undermine confidence in the outcome. *Id.* at 688. The petitioner has the burden of proving his claim of ineffective assistance and must overcome a "strong presumption that the representation was professionally reasonable." *Id.* at 689.

As a threshold matter, Petitioner must demonstrate that the reviewing court's application of the *Strickland* standard was also objectively unreasonable. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). The Supreme Court has described this burden as "doubly deferential" to the state proceedings, requiring both a finding that trial counsel was deficient and that the deficiency prejudiced the Petitioner, and a finding that the reviewing court's decision to the contrary was itself objectively unreasonable. *Id.* As to Petitioner's ineffective assistance of counsel claim, the Arizona Court of Appeals stated that "[t]he core of [Petitioner's] argument is that the victim's identity is an element of the offense. We have rejected that argument. Thus, he cannot demonstrate that counsel fell below prevailing professional norms by failing to raise it, nor that he was prejudiced thereby." *Bauer II*, 2018 WL at *1.

Petitioner has not met his burden of proof as to the ineffective assistance of trial counsel. As in Grounds One through Three, Petitioner premises this claim on the assertion that the identity of the children in the images is a material element necessary to sustain a

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improperly placed the burden on Petitioner to prove that the children depicted in the images were not actual children. (Doc. 19 at 22). As with Petitioner's *Apprendi* argument, this was raised for the first time in the Memorandum and is therefore waived by Petitioner. *Delgadillo v. Woodford,* 527 F.3d 919, 930 n.4 (9th Cir. 2008).

conviction under A.R.S. § 13-3553. (*See* doc. 19 at 23). For the reasons stated previously, including that the Arizona Court of Appeals has rejected this argument, *see Regenold*, 2019 WL at *2; *Thompson*, 2017 WL at *1, this argument lacks merit. It is not objectively unreasonable for defense counsel to decline to make motions and legal arguments unsupported by statute and caselaw. *See Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012)("Counsel is not necessarily ineffective for failing to raise even a nonfrivolous claim, so clearly we cannot hold counsel ineffective for failing to raise a claim that is meritless.")(internal citations omitted). Therefore, Petitioner has not demonstrated that defense counsel's failure to object to the sufficiency of the indictment fell below an objective standard of reasonableness.

V. Evidentiary Hearing.

Petitioner requests that this Court order an evidentiary hearing (doc. 18 at 3-4). Petitioner does not proffer any new evidence or suggest that any evidence adduced at the hearing would, if true, entitle Petitioner to habeas relief. *See Schriro v. Landigran*, 550 U.S. 465, 474 (2007). Petitioner's challenge to the evidence presented at trial is that the State was obligated (and failed to) put on evidence of the victims' identities to obtain a conviction, not that there was some newly discovered evidence that demonstrates that Petitioner could not have committed the crime in question. (*See* doc. 1 at 7). An evidentiary hearing is not warranted in this case.

VI. Conclusion.

The record is sufficiently developed and the Court does not find that an evidentiary hearing is necessary for resolution of this matter. *See Rhoades v. Henry*, 638 F.3d 1027, 1041 (9th Cir. 2011). Based on the above analysis, the Court finds that Petitioner's claims are without merit. The Court will therefore recommend that the Petition for Writ of Habeas Corpus (Doc. 1) be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2244 (Doc. 1) be **DENIED** and **DISMISSED WITH PREJUDICE**.

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

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

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

Dated this 5th day of May, 2020.

Michael T. Morrissey

Honorable Michael T. Morrissey
United States Magistrate Judge

Objections to Magistrate's Report and Recommendation
(seven pages)

Appx. E

Scott Bauer #297583
P.O. Box 8400
Florence, Az. 85132-8400
Petitioner, Pro-se.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Scott Charles Bauer,
Petitioner,
v.
Charles L. Ryan, et al.,
Respondents.

No. CV-19-01155-PHX-JAT (MTM)

OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

TO THE HONORABLE JAMES A. TEILBORG, SENIOR UNITED STATES DISTRICT JUDGE:

Petitioner Scott Charles Bauer hereby lodges his objections to the Magistrate's Report and Recommendation ("R&R") that: "all four grounds are without merit" and that "a Certificate of Appealability ("COA") and leave to proceed *in forma pauperis* on appeal be [denied]" because Bauer has not substantially shown the denial of 14th Amendment Due Process "and because dismissal is justified by a *plain procedural bar and jurists of reason would not find the procedural ruling debatable.*" (Doc. 21 at 1, 16.) (emphasis added).

Here, relying on Arizona unpublished memorandum as "persuasive," the R&R applies untenable state court determinations which amount to state subterfuge to avoid federal review of Bauer's 14th Amendment violations. Then, the Magistrate fails to address the Respondents' waiver of defense due to their choice not to respond to the constitutional claims on the merits in state PCR proceedings. Furthermore, the R&R fails to correctly apply U.S. Supreme Court precedent as cited by Bauer which sustains his claims of 14th Amendment violations in his state-created indictment, unconstitutional jury instruction, sufficiency of the evidence, and assistance of counsel

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2. The Magistrate's Determination That Bauer's Ground One Has No Merit Is Itself An Unreasonable Determination Under The Facts And Law At Issue.

Here, the Magistrate binds the Court to the State court's unpublished memorandum decisions as "persuasive" and "lend[ing] support" to his contention that they "accurately" state Arizona law. (Doc. 21 at 8, fn. 4.) As such, Judge Morrissey allows untenable decisions which amount to a subterfuge to avoid habeas review and relief for clear constitutional violations to dispose of the matter.[2] The better course, however, would have been to *de novo* review the constitutional question of law as to what actually constitutes a "necessary" or "essential" element under the law in Arizona, Chaker v. Crogan, 428 F.3d 1215, 1221 9th Cir. 2005), to which this Court must defer. Bradshaw v. Richey, 546 U.S. 74, 76 (2005). The Magistrate's error of law stems from his short-sighted adoption of unpublished memorandum decisions which completely skirt the elements issue as set forth in State v. Hazlett, 205 Ariz. 523 (Ariz.App. 2003), State v. Tschilar, 200 Ariz. 427, 435 (Ariz App. 2001), and State v. Olquin, 216 Ariz. 250, 255, 9¶¶ 31, 25 (Ariz.App. 2007), and are untenable in light of Bauer's *Elements Discussion* on Memorandum to Traverse. (Doc. 19 at 5-10.)

Moreover, Judge Morrissey's failure to acknowledge the basis for the untenable determinations upon which the R&R relies — based on Bauer's arguments which clearly defeat the state courts' determinations (Doc. 19 at 10-14.) — is particularly troubling. Point by point, the subterfuge in the unpublished memorandums — including the two appellate decisions in his case — is deconstructed for this Court. And, importantly, the Magistrate's finding of "waiver" for Bauer's Apprendi analysis — which was properly raised and exhausted in Arizona and brought to this Court's attention as to *why* his state court decisions were untenable — is patently unreasonable since the Apprendi discussion

2. Such unpublished decisions do *not* bind this Court. Sanders v. Ratelle, 21 F.3d 1446, 1454, fn. 9 (9th Cir. 1994); and Osborne v. Ekenberry, 877 F.2d 1395, 1399 (9th Cir. 1989)(*cert. den.*) Also, State v. Villegas-Rojas is inapposite with a "recklessness" mens rea and not an "intentional" mens rea.

element of the offense. 216 Ariz. at 255, ¶¶ 21, 25. Clearly, under Arizona law, because the "essential element" of a "Dangerous Crime Against Children" was not before the jury, no amount of a pediatrician's "opinion" as to images of unidentified persons or Bauer's testimony as to what he *believed* he possessed can substitute for Olqum's holding. An essential element was not before the jury, thus *insufficient* evidence existed for all of Bauer's convictions under the U.S. Supreme Court cases cited. (Doc. 19 at 18.) With an "essential element" missing, i.e., evidence of any *authenticated* "actual minor" victim, no reasonable or rational trier of fact could find beyond a reasonable doubt that Bauer violated A.R.S. §13-3553.[5] The R&R is flawed; Bauer's Ground Two has merit, and the Magistrate's determination must be rejected by this Court.

4. The Magistrate's Determination That Bauer's Ground Three Has No Merit Is Itself An Unreasonable Determination Under The Facts And Law At Issue.

Inasmuch as Arizona caselaw *requires* that an "actual minor" victim be depicted in the sexual exploitation images at issue, Hazlett, 73 P3d 1258, 1262, and that the *identity* of the victim of a crime committed "against" another person is a "necessary element" of the offense, Olqum, 165 P3d 228, 232-33, one cannot but conclude that the giving of an "unconstitutionally overbroad" jury instruction — including the "additional language" that the Magistrate found to "help reduce the risk of prejudice, by emphasizing the permissive nature of the potential inference" — was *presumptively prejudicial* and not subject to "harmless error" analysis in light of the other evidence, i.e., a pediatrician's guesstimate of the age of persons depicted, but not authenticated, and Bauer's belief in what he appeared to possess. Simply put, Judge Morrissey failed to analyze Bauer's claim under Francis v. Franklin, 471 U.S. 307, 317 (1985). Here, since

[5] Jackson v. Va., 443 U.S. 307, 324 (1979).

the Magistrate, with his eyes firmly fixed on something in non-published memorandums that he erroneously believes states the law in Hazlett, Olquin, and Tschilar, determines that one may be prosecuted for sexually exploiting minors under the age of 15 years in Arizona without ever naming/authenticating an "actual" minor victim but by "appearances" alone — in direct violation of Hazlett, 73 P.3d at 1264 n.10 — and ignores the fact that the Hazlett court abrogated §13-3556 because:

> "13-3556 permits the trier of fact to convict a person under §13-3553 even if no actual child was a participant in the depiction..." (id. at ¶17), and that §13-3556 ran afoul of the holding in Free Speech Coalition "[b]y permitting the trier of fact to infer 'that a participant is a minor if the visual depiction or live act through its title, text, or visual representation depicts the participant as a minor.'" (¶17, n.10).

Yet, the Magistrate, citing "visual representation" by virtue of Dr. Coffman's testimony of age estimates (and Bauer's belief in what he "obviously" appeared to possess) as "sufficient evidence," awards an unconstitutionally overbroad instruction no effect whatsoever in the jury's convicting where no "actual minor" victims were ever identified/authenticated otherwise -- apparently not bound by the very logic the state court of appeals used to throw out §13-3556! The trouble is, not only has the Magistrate used an unconstitutionally overbroad analysis in finding no merit here, but the state court of appeals untenably denied Bauer I -- against their own clear precedent! See 2016 WL 1704613 * 1.

Moreover, the Magistrate's "waiver" of Bauer's claim that the state court "placed the burden" on him via its decision was misplaced. Bauer was once again refuting Respondents' argument that the state court decision was tenable -- a proper Traverse to an issue raised when Respondents "opened the door" in their Answer. Bauer is not raising a "burden shifting" claim now.

As such, Bauer's discussion as to Ground Three is well-taken, (Doc. 19 at 17-22), and the R&R as to "no merit" should be rejected.

5. In Light Of The Facts And Law When Correctly Determined, The Magistrate's R&R As To "No Merit" On Ground Four Should Be Rejected.

Ground Four is a simple matter: Judge Morrissey found no merit due to his myopic view of what constitutes an "essential" element for §13-3553. Based on the foregoing discussion and the argument in Bauer's Memorandum, (Doc. 19 at 22-24.), this Court should conclude that Bauer has stated a valid claim of ineffective assistance of trial counsel. Habeas relief is clearly warranted. Furthermore, contrary to the R&R, Bauer has met the requirements for an Evidenciary Hearing with CJA counsel. (Doc. 18 at 3-4.)

6. Request For A COA

Should this Court rule against Bauer, jurists of reason would find the ruling on the constitutional claim debatable. Thus, even if Bauer would seem to be not entitled to appellate relief, he *would* be entitled to have the 9th Circuit settle the issue(s), and must be afforded a COA to move forward. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

7. Conclusion.

For all the foregoing, and good cause appearing, the R&R should be rejected and habeas relief or a COA be GRANTED.

DATED this 13th day of June, 2020. Scott Charles Bauer
SCOTT CHARLES BAUER, Petitioner Pro-se.

a copy of the foregoing "Objections" was mailed/served on this 13th day of June, 2020, to: Jim D. Nielsen, Assistant Attorney General
2005 N. Central Ave., Phoenix, Az. 85004-1580
Attorney for Respondents