UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

DAVID LOPEZ GONZALES, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-17173 D.C. No. 2:18-cv-01907-ROS District of Arizona, Phoenix ORDER

Before: NGUYEN and FORREST, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 17) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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DAVID LOPEZ GONZALES, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-17173 D.C. No. 2:18-cv-01907-ROS District of Arizona, Phoenix ORDER

Before: WARDLAW and BADE, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability (Docket Entry Nos. 5 & 10) 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); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Lopez Gonzales,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-18-01907-PHX-ROS

ORDER

On November 2, 2020, Petitioner filed a motion for reconsideration regarding the Court's order adopting Magistrate Judge Fine's Report and Recommendation. (Doc. 74).

Under Local Rule of Civil Procedure 7.2(g)(1), courts "ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." Reconsideration is an "extraordinary remedy, to be used sparingly." *Kona Enterprises* v. *Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citation and internal quotations omitted). Reconsideration is not "to be used to ask the Court to rethink what it has already thought." *Motorola v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (citation omitted). Petitioner's motion asks the Court to rethink what it has already thought. The motion for reconsideration will be denied.

On November 2, 2020, Petitioner separately filed a motion for extension of time to file a certificate of appealability, which appears to have been intended for the appellate court. (Doc. 76). On January 28, 2021, Petitioner filed a motion for status update. (Doc.

81). On April 15, 2021, Petitioner filed another motion for a status update. (Doc. 82). All three will be denied as moot.

Accordingly,

IT IS ORDERED the motion for reconsideration (Doc. 74) is **DENIED**.

IT IS FURTHER ORDERED the motion for extension of time to file a certificate of appealability (Doc. 76) is **DENIED** as moot.

IT IS FURTHER ORDERED the motion for status update (Doc. 81) is **DENIED** as moot.

IT IS FURTHER ORDERED the motion for status update (Doc. 82) is **DENIED** as moot.

Dated this 22nd day of April, 2021.

Honorable Roslyn O. Silver
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Lopez Gonzales,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-18-01907-PHX-ROS

ORDER

In 2013, Petitioner David Lopez Gonzales ("Gonzales") was convicted in state court of seven counts of sexual abuse, one count of molestation of a child, and two counts of sexual conduct with a minor. After pursuing a direct appeal, as well as three post-conviction relief proceedings in state court, Gonzales filed a petition for writ of habeas corpus in this court. Magistrate Judge Deborah M. Fine issued a Report and Recommendation concluding Gonzales was not entitled to relief and that Grounds 1(c), 2(b), 2(c), 2(d), 2(h), 2(i), 5(g) through 5(j), 7(a) through 7(c), and 11 are technically exhausted and procedurally defaulted; Grounds 5(f), 6, and 8 are procedurally defaulted under an express procedural bar; Grounds 3, 5(c), and 7(d) are not cognizable under federal habeas review; and Grounds 1(a), 1(b), 2(a), 2(e), 2(f), 2(g), 2(h), 4, 5(a), 5(b), 5(d), 5(e), 9, 10(a) through 10(g), 12, and 13 fail on the merits. (Doc. 59.) Gonzales filed objections, and Respondents replied. (Docs. 60, 61.) Having reviewed each ground for relief, the recommendations will be adopted. Also, Gonzales' motions for discovery and for leave to file a reply will be denied.

BACKGROUND

Gonzales does not object to the factual background set forth in the Report and Recommendation ("R&R"). Therefore, that background will be adopted in full. The facts underlying his convictions are as follows. "Starting in 1990 or 1991, [Gonzales] began a romantic relationship with A.A., mother to T.Y., who was then six or seven years old. [Gonzales] began living with A.A. and her children, including T.Y., soon thereafter." (Doc. 59 at 2.) On four separate occasions when T.Y. was between ten and twelve years old, Gonzales touched T.Y.'s breasts with his hands, including one occasion on which T.Y. could feel Gonzales' "erect penis against her bottom." (Doc. 59 at 2–3.) On a fifth occasion, Gonzales asked T.Y. to touch his penis, "then held her hand on his penis and moved it around." (Doc. 59 at 3.) On a sixth occasion, Gonzales "touched T.Y.'s breasts with his hands and made her touch his penis with her hands and move them." (Doc. 59 at 3.) On a seventh occasion, Gonzales, "sitting on his and A.A.'s bed, directed T.Y. to kneel on the floor and close her eyes. When T.Y. opened her eyes, she saw [Gonzales] pulling back the skin of his penis. [Gonzales] then forced T.Y.'s head down so that the top of her lip touched his penis." (Doc. 59 at 3.) In addition, "T.Y.'s cousin C.S. lived with the family for two years, starting when she was eleven years old and T.Y. was ten years old." (Doc. 59 at 3.) Gonzales touched C.S.'s breasts in the context of play-wrestling several times, and once sucked on her breasts. (Doc. 59 at 3.)

These incidents occurred in the mid-1990s. A few years after the incidents, when T.Y. was in middle school, she told her mother about Gonzales inappropriately touching her and her sister, but A.A. did not take action. (Doc. 59 at 3.) T.Y. "felt betrayed by A.A. and did not again raise the matter with her," and did not contact law enforcement. (Doc. 59 at 3.) C.S. did not disclose Gonzales' conduct because "she did not trust anybody and wanted to put the incidents behind her." (Doc. 59 at 3.) In 2002, when T.Y. was 17, she was questioned at the scene of a violent altercation between Gonzales and one of her uncles and told a detective she had been victimized, although she recanted to a different detective "because she felt overwhelmed and afraid." (Doc. 59 at 3.) In 2011, A.A. asked T.Y. to

come forward to law enforcement, and T.Y. disclosed Gonzales' conduct. (Doc. 59 at 3.) T.Y. mentioned C.S. had been a victim, and C.S. then disclosed her own victimization. (Doc. 59 at 3.)

In 2012, Gonzales was charged with 18 counts of dangerous crimes against children, specifically: "five counts of sexual conduct with a minor, each a Class 2 felony; nine counts of sexual abuse, eight of which were charged as Class 3 felonies and one of which was charged as a Class 5 felony; and four counts of molestation of a child, each a Class 2 felony." (Doc. 59 at 4.) These counts were based on the acts involving T.Y. and C.S. as well as additional acts involving Gonzales' daughter, A.Y. Gonzales testified at trial and "denied ever having touched T.Y. or C.S. in any inappropriate manner, and his witnesses denied ever having seen any such behavior." (Doc. 59 at 4.) Gonzales "also disputed the timeline established by the state. According to the defense evidence, [Gonzales] did not begin dating and living with A.A. until 1995, and even thereafter was rarely around A.A.'s children because of his work obligations." Gonzales "testified that he had first heard of the accusations against him in connection with the 2002 altercation, and that the accusations resurfaced in 2011 at a time when he was engaged in a divorce and custody dispute with A.A. and had started dating another woman." (Doc. 59 at 4.)

Some of the charges were dismissed during trial, and the jury found Gonzales not guilty of several counts related to his daughter A.Y. and "not guilty of one count of sexual conduct with a minor as to T.Y." (Doc. 59 at 4.) The jury returned guilty verdicts for "two counts of sexual abuse as to C.S., five counts of sexual abuse as to T.Y., one count of molestation of a child as to T.Y., and two counts of sexual conduct with a minor as to T.Y." (Doc. 59 at 4.) The superior court sentenced Gonzales to the presumptive term for each count, consecutively, resulting in a total sentence of 92 years. (Doc. 59 at 5.)

On direct appeal, Gonzales' appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating counsel was unable to identify an arguable, nonfrivolous question of law. Gonzales filed *pro per* briefing arguing actual innocence, judicial bias, prosecutorial misconduct, and ineffective assistance of counsel. The Arizona

Court of Appeals ordered supplemental briefing on whether the conviction and sentence on Count 13 was fundamental error in light of the jury's not guilty verdict on Count 11. (Doc. 59 at 5.) The Arizona Court of Appeals subsequently vacated the conviction and sentence for but affirmed the convictions and sentences for the other counts. In doing so, the Arizona Court of Appeals addressed Gonzales' arguments regarding the grand jury proceedings jury composition, alleged prosecutorial misconduct, the trial court's amendment of the indictment, jury instructions and verdict forms, sufficiency of the evidence on Gonzales' convictions, legality of the sentences, and alleged judicial bias. (Doc. 45-3 at 74–86.)

In 2016, Gonzales filed a Notice of Post-Conviction Relief ("PCR") in state court, and Gonzales' appointed counsel then filed a notice of completion tendering "a good faith belief that no basis in fact and/or law for post-conviction relief exists on this record." (Doc. 45-3 at 128.) Gonzales proceeded *pro per* on a variety of claims. (Doc. 59 at 6.) The superior court denied relief, finding the claims of "prosecutorial misconduct; violation of fundamental fairness of the trial proceedings; unconstitutionally suppressed evidence: perjured testimony; violation of constitutional rights; insufficient evidence; failure to disclose exculpatory evidence; credibility of witnesses; flawed grand jury proceedings; improper 404(b) evidence; and the State's improper closing argument" to be precluded under Arizona Rule of Criminal Procedure 32.2(a) because those claims either should have been raised on direct appeal or had been resolved on direct appeal. (Doc. 45-4 at 72.) The superior court found Gonzales' claim of obstruction by the state of his right to appeal to be unsubstantiated, and found his claims of newly discovered evidence, actual innocence, and ineffective assistance failed on the merits. (Doc. 45-4 at 72–73.) The Arizona Court of Appeals affirmed the superior court's ruling, and the Arizona Supreme Court denied the petition for review. (Doc. 59 at 8.)

In May 2017, Gonzales filed a second PCR, arguing the law (specifically, the statutes regarding sexual contact, A.R.S. §§ 13-1404, 13-1407, and 13-1410) had been changed by *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017). (Doc. 45-5 at 104–107.)

The superior court summarily dismissed the second PCR, and denied Gonzales' subsequent motion for reconsideration. (Doc. 45-5 at 149–160.)

In October 2017, Gonzales filed a third PCR, arguing the "newly discovered material fact . . . that A.R.S. 13-604 in its entirety was recognized as unconstitutional." (Doc. 45-5 at 162–165.) The superior court held the third PCR untimely and successive, and dismissed it. (Doc. 45-5 at 175–178.) The Arizona Court of Appeals granted review and denied relief, finding Gonzales failed to show an abuse of discretion. (Doc. 45-5 at 181.)

Gonzales filed the present case in June 2018 and filed his Third Amended Petition for habeas relief in January 2019, broadly asserting 13 grounds for relief. (Doc. 33.) Respondents identified 38 claims or sub-claims and addressed them individually, and the R&R adopted Respondents' identification of sub-claims. The Court does so as well. The grounds of Gonzales' petition are as follows.

Ground 1: Prosecutorial misconduct in violation of constitutional due process rights under the Fifth, Sixth, and Fourteenth Amendments when the prosecution:

1(a) Violated its duty to disclose exculpatory evidence under *Brady v. Maryland*;

1(b) Improperly elicited false testimony by a government witness through leading questions and then failing to correct the false testimony; and

1(c) Relied on false or perjured testimony in closing argument.

Ground 2: Ineffective assistance of counsel in violation of due process protections under the Fifth and Fourteenth Amendments and right to effective assistance of counsel under the Sixth Amendment when:

Trial counsel:

2(a) Failed to investigate where Gonzales' victims lived during the time of the charges against Gonzales or otherwise investigate for evidence to impeach the prosecution's witnesses or evidence to support defense witness testimony;

2(b) Failed to consult with an expert or have an expert testify at trial;

2(c) Did not object when the superior court amended the indictment to conform to the evidence;

2(d) Did not object to Gonzales' alleged illegal sentence;

2(e) Allowed erroneous jury instructions;

2(f) Allowed erroneous verdict forms; and

2(g) Refused to file a notice of appeal.

Appellate counsel:

2(h) Filed an *Anders* brief when there were colorable claims to assert.

PCR counsel:

2(i) Filed an *Anders* brief although substantial claims could have been presented.

Ground 3: Violation of due process rights under the Fifth, Sixth, and Fourteenth Amendments when the trial court amended the indictment during a Rule 20 hearing to conform the indictment to the evidence.

Ground 4: Violation of due process rights under the Fifth, Sixth, and Fourteenth Amendments when a state official failed to disclose exculpatory and impeachment evidence.

Ground 5: Judicial error in violation of the due process right to a fair trial pursuant to the Fifth and Fourteenth Amendments when:

The trial court judge:

5(a) Permitted erroneous verdict forms to go to the jury;

5(b) Failed to give a jury instruction on the defense theory of the case;

5(c) Improperly amended the indictment to conform to the evidence;

5(d) Failed to give a jury instruction on defenses for sexual misconduct;

5(e) Allowed the jury to consider perjured and hearsay testimony during deliberation; and

5(f) Sentenced Gonzales to an illegal sentence.

The superior court, in the PCR actions:

5(g) Did not grant Gonzales an evidentiary hearing;

5(h) Did not consider Gonzales' new evidence;

5(i) Failed to consider Gonzales' ineffective of assistance of counsel claim; and

5(j) Did not compel the prosecution to disclose exculpatory evidence.

Ground 6: Illegal sentences in violation of Fifth and Fourteenth Amendment due process rights and of Gonzales' "right to have the jury determination to enhance [his] sentence from a nondangerous to dangerous in the first or second degree." (Doc. 33 at 11).

Ground 7: "Fatally flawed" grand jury indictment violated rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments.

Ground 8: Rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments were violated when Gonzales was convicted pursuant to A.R.S. §§ 13-1404, -1405, 1407, and -1410 without the state proving sexual intent.

Ground 9: Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated by the use of erroneous verdict forms that omitted a timeline, the actus rea, and the location of the crimes alleged.

Ground 10: Erroneous jury instructions violated Fourth, Fifth, Sixth, and Fourteenth Amendment rights because the instructions:

10(a) Did not include the defenses for sexual offenses;

10(b) Did not include the defense theory of the case;

10(c) Did not inform jurors that that the state was required to prove the essential elements of the crimes charged beyond a reasonable doubt;

10(d) Misled jurors into concluding that Gonzales "did not present any evidence";

10(e) Permitted jurors to consider hearsay statements during deliberation;

10(f) In effect "lowered the state's burden of proof"; and

10(g) Violated Gonzales' right to a complete defense.

Ground 11: Violation of due process rights under the Fifth and Fourteenth Amendments because the statute of limitations had expired.

Ground 12: Violation of Fourth, Fifth, Sixth, and Fourteenth Amendment rights by a fundamentally unfair judicial process under which false testimony was used to obtain Gonzales' indictment, hold him without bail, and convict him, while the state "refuse[d] to disclose the exculpatory evidence which will prove [his] actual innocence."

Ground 13: Actual innocence.

(Doc. 33.)

The R&R concludes that Grounds 1(c), 2(b), 2(c), 2(d), 2(h), 2(i), 5(g) through 5(j), 7(a) through (c), and 11 are technically exhausted and procedurally defaulted; Grounds 5(f), 6, and 8 are procedurally defaulted under an express procedural bar; Grounds 3, 5(c), and 7(d) are not cognizable under federal habeas review; and Grounds 1(a), 1(b), 2(a), 2(e), 2(f), 2(g), 2(h), 4, 5(a), 5(b), 5(d), 5(e), 9, 10(a) through 10(g), 12, and 13 fail on the merits.

ANALYSIS

I. Procedural Default: Grounds 1(c), 2(b), 2(c), 2(d), 2(h), 2(i), 5(f) through 5(j), 6, 7(a) through 7(c), 8, and 11

The R&R concludes that Grounds 1(c), 2(b), 2(c), 2(d), 2(h), 2(i), 5(g) through 5(j), 7(a) through 7(c), and 11 are technically exhausted and procedurally defaulted under Arizona Rule of Criminal Procedure 32.2(a)(3). (Doc. 59 at 18–23.) This rule precludes post-conviction relief on claims that could have been raised and adjudicated on direct appeal. And, pursuant to Arizona Rule of Criminal Procedure 32.4, many of these claims are now time-barred. The R&R also concludes that Grounds 5(f), 6, and 8 are procedurally barred because, as the superior court explicitly held in response to Gonzales' second and third PCRs, Gonzales could have raised the claims on direct appeal but did not, and the claims are precluded pursuant to Rule 32.2(a)(3). (Doc. 59 at 20, 22, Doc. 45-5 at 150, 176.) Gonzales objects to the R&R by claiming the failure to present these issues on appeal was due to the ineffective assistance of his trial and appellate counsel. (Doc. 60 at 17.)

Ineffective assistance of counsel can, in some circumstances, excuse the procedural default of claims. *See Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) ("A claim of ineffective assistance . . . generally must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.") (cleaned up). But, as explored later, Gonzales has not established he suffered ineffective assistance of counsel.

Nor has Gonzales established any other basis on which to excuse the procedural default of these claims, as the record does not support both the conclusion that Gonzales could demonstrate he is actually innocent of his convictions based on any new reliable evidence and a showing that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Gonzales is not entitled to relief on Grounds 1(c), 2(b), 2(c), 2(d), 2(h), 2(i), 5(f) through 5(j), 6, 7(a) through 7(c), 8, and 11.

II. Not Cognizable Under Federal Habeas Review: Grounds 3, 5(c), 7(d)

The R&R concludes Grounds 3 and 5(c) are not cognizable under federal habeas review because they essentially challenge the procedures used to amend the indictment, thus posing a state law issue rather than a federal one. *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999); Doc. 59 at 26. Further, the R&R concludes that, because the Due Process Clause "does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury," Grounds 3, 5(c), and 7(d) do not provide a basis for federal habeas relief. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); Doc. 59 at 26. Gonzales has not objected to these findings, and he is not entitled to relief on Grounds 3, 5(c), and 7(d).

III. Merits Review: Grounds 1(a), 1(b), 2(a), 2(e), 2(f), 2(g), 2(h), 4, 5(a), 5(b), 5(d), 5(e), 9, 10(a) through 10(g), 12, and 13

The R&R concludes Gonzales has failed to show that the state courts' rulings on Grounds 1(a), 1(b), 2(a), 2(e) through 2(h), 4, 5(a), 5(b), 5(d), 5(e), 9, 10(a) through 10(g), 12, and 13 were contrary to, or involved an unreasonable application of, clearly established

federal law, or that the rulings were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, and therefore fail on the merits. Doc. 59 at 26–51; 28 U.S.C. § 2254(d).

A. Grounds 1(a) and 4

Gonzales is currently incarcerated on nine counts: one count of sexual abuse of T.Y. at the "75th Avenue and Indian School address"; two counts of sexual abuse, one count of molestation of a child, and one count of sexual conduct with a minor of T.Y. at the "Central and Southern address"; two counts of sexual abuse of T.Y. at the "61st Avenue and Glendale address"; and two counts of sexual abuse of C.S. (Doc. 45-1 at 177–181, 183, 185–187.) The indictment charged with regard to T.Y. that the incident at the 75th Avenue and Indian School address took place between September 26, 1994 and September 25, 1995; the incidents at the Central and Southern address took place between September 26, 1995 and September 25, 1997; and the incidents at the 61st Avenue and Glendale address took place between September 26, 1996 and September 25, 1997. Doc. 45-1 at 7–9. And the indictment charged with regard to C.S. that the incidents took place between February 6, 1994 and February 5, 1995. (Doc. 45-1 at 9–10.)

Gonzales' argument, as set forth in his habeas petition, his objections to the R&R, and his various requests for exculpatory evidence, is that C.S.'s Child Protection Services ("CPS") and/or school records, and A.A.'s Section 8 records and/or T.Y.'s school records, constitute exculpatory evidence that should have been turned over. That evidence allegedly would have contradicted by the dates alleged in the indictment by establishing C.S. did not live with A.A. between February 6, 1994 and February 5, 1995 and T.Y. did not live at the 61st Avenue and Glendale address between September 26, 1996 and September 25, 1997. (Doc. 34 at 7–9; Doc. 64 at 3.) Thus, Ground 1(a) claims the state violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) when it failed to disclose the allegedly exculpatory CPS, school, and Section 8 records. (Doc. 33 at 6, 34 at 8–9.)

According to the record, Gonzales' trial counsel asked the prosecution for all "CPS

records relating to the alleged victims," the prosecution made a public records request for these records, and the CPS records were produced to Gonzales' trial counsel several months before trial. (Doc. 45-5 at 52, 54–55, 57–58.) Strangely, the Arizona Court of Appeals appears to have based its analysis on the assumption that the CPS records were not, in fact, produced to Gonzales. But accepting that the records were not produced, that court held Gonzales failed to show the CPS records were material, since Gonzales did "not dispute that [C.S.] lived with him at some point when she was less than fifteen years old, the age required to support his convictions." (Doc. 45-3 at 80.)

The R&R concludes Gonzales "fails to establish a *Brady* violation as to CPS records because those records were disclosed well prior to trial," does not demonstrate any school or Section 8 records were suppressed, and merely speculates those records would be favorable, which is "insufficient to state a *Brady* claim." *Runningeagle v. Ryan*, 686 F. 3d 758, 769-71 (9th Cir. 2012). Gonzales objects to this conclusion, but only in general terms, and by repeating the Ninth Circuit's *Brady* jurisprudence and his speculative claims regarding the exculpatory content of the records. (Doc. 60 at 10, 19–22.)

Brady/Giglio claims have three elements: "(1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *United States v. Kohring*, 637 F.3d 895, 901–02 (9th Cir. 2011) (quoting *United States v. Williams*, 547 F.3d 1187, 1202 (9th Cir. 2008)).

Gonzales' speculation regarding the possible content of unproduced evidence is not sufficient. Of particular importance, the Arizona Court of Appeals concluded that even if the records had established some discrepancy regarding the date of particular crimes, that would not have materially impacted the outcome because it was undisputed the victims lived with Gonzales at various times when they were under the age of fifteen. That was not an unreasonable application of *Brady* and Gonzales is not entitled to relief on Ground 1(a). Furthermore, Gonzales admits his Ground 4 claim "is a *Brady* claim," and for the reasons set forth above, Gonzales is not entitled to relief on Ground 4.

B. False Testimony: Grounds 1(b), 5(e), and 12

Grounds 1(b), 5(e), and 12 relate to the allegedly false testimony of Detective Scheffer, Gonzales' ex-wife A.A., and C.S. Gonzales does not object to the Magistrate Judge's recommendation that Grounds 1(b) and 12 be denied, and absent any objection, there is no need to review the Magistrate Judge's reasoning. Gonzales is not entitled to relief on Grounds 1(b) and 12.

Ground 5(e) is that the trial judge allowed the jury to consider perjured and hearsay testimony during deliberation. In particular, the trial judge allowed A.A. to offer inaccurate dates regarding her divorce and custody dispute with Gonzales. The R&R viewed this as presenting a *Napue* claim. *Napue* claims have three elements: "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (citing *Napue*, 360 U.S. at 269–71).The R&R, after examining the divorce decree, concludes A.A.'s first statement, that she was involved in a divorce and custody dispute with Gonzales in 2011, was accurate while "her subsequent contradictory statements . . . [were] not accurate." (Doc. 59 at 35.)

Based on the divorce decree, Gonzales has established that A.A. presented false testimony. But Gonzales has failed to establish the second element, that the prosecutor who elicited A.A's false testimony (that in July 2011, she was "already divorced" from Gonzales and had resolved custody) knew or should have known it was false. Gonzales objects it is "undisputed" that "[t]he police reports prove that [testimony] was a lie and the detective knew it was a lie." (Doc. 60 at 14.) But the R&R directly addressed this argument, stating first Gonzales failed to establish the detective knew about the timing of the divorce proceedings, and second Gonzales failed adequately to allege the prosecutor knew about the timing of the divorce proceedings. (Doc. 59 at 35.) Gonzales' only objection to this latter conclusion is "This is a complete contradiction with line 5." Line 5 of that page contains the R&R's conclusion that Gonzales did not establish the prosecution knew or should have known A.A.'s second statement was false. The Arizona Court of Appeals

concluded Gonzales' contentions were "unsupported," "[n]othing in the record suggests that the prosecutor engaged in misconduct, much less intentional misconduct, with respect to the evidence presented to the jury," and "the credibility of the witnesses was for the jury to decide." (Doc. 45-3 at 80.) Crucially, it is not clearly established that knowledge of a detective should be imputed to a prosecutor for purposes of a *Napue* claim. *Reis-Campos v. Biter*, 832 F.3d 968, 977 (9th Cir. 2016). Thus, even if the detective knew A.A.'s testimony was false, that is not enough.

While Gonzales' objections establish he disagrees with these conclusions, his objections do not establish those decisions would support relief under 28 U.S.C. § 2254(d). Gonzales is not entitled to relief on Grounds 1(b), 5(e), and 12.

C. Ineffective Assistance of Counsel: Grounds 2(a), 2(e), 2(f), 2(g), and 2(h)

The R&R recommends Grounds 2(a), 2(e), 2(f), 2(g), and 2(h) be denied. Gonzales objects only to the recommendation concerning Ground 2(a), inadequate investigation. Absent any objection, there is no need to review the Magistrate Judge's reasoning, and Gonzales is not entitled to relief on Grounds 2(e), 2(f), 2(g), and 2(h).

The superior court held neither the first prong of *Strickland v. Washington*, requiring deficient performance, nor the second prong, requiring prejudice, was met. Doc. 45-5 at 73; 466 U.S. 668, 687–88 (1984). The Arizona Court of Appeals summarily affirmed that ruling. The R&R does not address the first prong. Instead, the R&R concludes Gonzales cannot establish prejudice because his argument is based on speculation and he himself "testified about where and when he lived with A.A. and the girls," after paying $5,000 "to an investigator that trial counsel told them to hire." (Doc. 59 at 37-38.)

Gonzales now objects that his "family got the information . . . through a site on the internet" but his counsel "told [Gonzales] that we could not use that information because a person can get anything off the internet it does not mean it[']s true," and therefore his "family waste[d] $5,000 they did not have to waste." (Doc. 60 at 15-16.) Gonzales argues his counsel "failed to investigate this information and left [Gonzales] to assert these claims at trial without any substantial evidence to back it up." (Doc. 60 at 15.) Even assuming

Gonzales were able to establish deficient performance, he has not made a sufficient showing of prejudice because mere speculation about what the records might have contained, and how the jury might have weighed the evidence, "is plainly insufficient to establish prejudice." *Gonzalez v. Knowles*, 515 F.3d 1006, 1016 (9th Cir. 2008); *Strickland*, 466 U.S. at 694 (Gonzales must show "a probability sufficient to undermine confidence in the outcome" that, but for the allegedly inadequate investigation, "the result of the proceeding would have been different."); *see Djerf v. Ryan*, 931 F.3d 870, 883 (9th Cir. 2019) (speculation regarding "what evidence counsel would have uncovered had they more vigorously investigated . . . rarely creates a 'reasonable probability' that a different result would have occurred absent the purportedly deficient representation."). Gonzales fails to show the Arizona Court of Appeals' holding involved an unreasonable application of *Strickland*, and he is not entitled to relief on Ground 2(a).

D. Erroneous Verdict Form: Grounds 5(a) and 9

Gonzales provides no specific objection to the recommendation concerning Grounds 5(a) and 9, merely the general objection "if you look at the verdict forms you will see the magistrate is mistaken." Absent a specific objection, there is no need to review the Magistrate Judge's reasoning, and Gonzales is not entitled to relief on Grounds 5(a) and 9.

E. Jury Instructions: Grounds 5(b), 5(d), 10(a), 10(b), 10(c), 10(d), 10(e), 10(f), and 10(g)

Gonzales does not object to the Magistrate Judge's recommendation that Grounds 5(b), 5(d), 10(a), 10(b), 10(d), 10(e), 10(f), and 10(g) be denied, and absent any objection, there is no need to review the Magistrate Judge's reasoning. Gonzales is not entitled to relief on Grounds 5(b), 5(d), 10(a), 10(b), 10(d), 10(e), 10(f), and 10(g).

With regard to Ground 10(c), the Arizona Court of Appeals said the jury "was instructed on 'sexual contact' consistent with A.R.S. [section] 13-1401(2), which defines the term . . . without regard to the defendant's intent," but Gonzales objects that sexual interest was an essential element of the charged offenses "[a]t the time [the] crimes were alleged to have been committed," and the jury should have been so instructed. (Docs. 45-

3 at 81–82, 60 at 24.) Because sexual intent was not, in fact, an element of the offense at the time of Gonzales' crimes in 1994–1997, his objection lacks a viable legal basis. *May*, 245 F. Supp. 3d 1145, 1155 (D. Ariz. 2017) (noting in 1993 the statute was amended, and "the new language, which omitted the verb 'molests,' eliminated sexual intent as an element of the crime"). Gonzales fails to establish the Arizona Court of Appeals' conclusion was an unreasonable application of Supreme Court authority, and he is not entitled to relief on Ground 10(c).

F. Ground 13

Finally, with regard to Ground 13, the claim of actual innocence, the R&R notes the threshold for a freestanding innocence claim on federal habeas review of a non-capital crime is "extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 417 (1993); *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (a petitioner claiming actual innocence must "affirmatively prove that he is probably innocent") (quoting *Carriger v. Stewart*, 132 F.3d 463, 576 (9th Cir. 1997) (en banc)). The R&R notes Gonzales' claim of actual innocence is "based on his mere speculation that records exist that could establish that T.Y. and C.S. lived with him outside of the date range they testified he sexually abused them," and concludes "[i]f such evidence exists, it would not represent proof that Petitioner was probably innocent" because "the jury was presented with conflicting evidence on the dates where A.A. and Petitioner lived during the periods the sexual abuse occurred, but even Petitioner's testimony placed C.S. and T.Y. living with him when each was younger than 15." (Doc. 59 at 50.) Gonzales objects "An alibi defense if proven is not a freestanding claim of actual innocence." (Doc. 60 at 7.)

Gonzales has failed to establish the Arizona Court of Appeals' decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" the Supreme Court or that the decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d), and is not entitled to relief on Ground 13.

IV. Other Pending Motions

Gonzales has also filed a motion for leave to reply in support of his objections to the R&R (Doc. 62); a motion requesting discovery to obtain exculpatory material (Doc. 64); and a motion to place the state in default on his request for admissions (Doc. 69). Neither this Court nor the Federal Rules of Civil Procedure permit replies in support of objections to reports and recommendations, and Gonzales' motion for leave to reply will be denied. Nor is there a right to discovery in habeas cases. Fed. R. Civ. P. 26(a)(1)(B); *Bittaker v. Woodford*, 331 F. 3d 715, 728 (9th Cir. 2003). The Court declines to grant leave for discovery. Finally, the discovery motions are futile because *Cullen v. Pinholster* bars consideration of new evidence. 563 U.S. 170, 181 (2011) ("[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."); *see Runningeagle*, 686 F.3d at 773–74; *Kemp v. Ryan*, 638 F.3d 1245, 1260 (9th Cir. 2011). Gonzales' discovery motions will be denied.

Accordingly,

IT IS ORDERED the Report and Recommendation (Doc. 59) is **ADOPTED**.

IT IS FURTHER ORDERED the Third Amended Petition for Writ of Habeas Corpus (Doc. 33) is **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED Gonzales' motions for leave to file a reply (Doc. 62) and for discovery (Docs. 64, 69) are **DENIED**.

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IT IS FURTHER ORDERED a Certificate of Appealability and leave to proceed in forma pauperis on appeal are **DENIED** because dismissal of portions of the petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable and because the portions of the petition not procedurally barred do not make a substantial showing of the denial of a constitutional right.

Dated this 15th day of October, 2020.

Honorable Roslyn O. Silver
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

David Lopez Gonzales,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-18-01907-PHX-ROS (DMF)

REPORT AND RECOMMENDATION

TO THE HONORABLE ROSLYN O. SILVER, SENIOR UNITED STATES DISTRICT JUDGE:

This matter is on referral to the undersigned pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and recommendation. (Doc. 32)[1] Pending before the Court is Petitioner David Lopez Gonzales' Third Amended Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) filed on January 11, 2019.[2] (Doc. 33 at 20) Petitioner David Lopez Gonzales[3] filed his initial Section 2254 petition in June 2018 (Doc. 1), which the Court

[1] Citations to the record indicate documents as displayed in the official electronic document filing system maintained by the District of Arizona under Case No. CV-18-1907-PHX-ROS (DMF).

[2] The Petition was docketed by the Clerk of Court on January 14, 2019 (Doc. 33 at 1). The Petition contains a certificate of service indicating that Petitioner placed the Petition in the prison mailing system on January 11, 2019 (*Id.* at 20). Pursuant to the prison mailbox rule, the undersigned has used January 11, 2019, as the filing date. *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010) ("A petition is considered to be filed on the date a prisoner hands the petition to prison officials for mailing.").

[3] Petitioner David Lopez Gonzales is referred to as "Petitioner" or "Defendant" in this Report and Recommendation.

dismissed without prejudice for failure to comply with the court-approved form. (Doc. 6) Petitioner filed a First Amended Petition (Doc. 8), but subsequently also filed a motion requesting permission to file a lodged amended *pro per* brief (Doc. 16) that the Court construed as a motion to file a Second Amended Petition (Doc. 18 at 2). The Court dismissed the Second Amended Petition for failure to substantially comply with the court-approved form, but granted Petitioner leave to timely file a third amended petition. (Doc. 18 at 2-5) As noted, Petitioner successfully filed his Third Amended Petition ("Petition") in January 2019. (Doc. 33)

Respondents filed their Answer to the Petition on August 29, 2019 (Doc. 45), and Petitioner subsequently filed his reply on September 11, 2019 (Doc. 47). As is explained below, the undersigned Magistrate Judge recommends the Petition be denied and dismissed with prejudice and that a certificate of appealability be denied.

I. BACKGROUND

A. Factual Background

The factual basis for Petitioner's convictions and sentences was described in detail by the Arizona Court of Appeals in its June 2015 memorandum decision on Petitioner's direct appeal, as follows:

> The evidence presented by the state at the trial showed, in relevant part, the following. Starting in 1990 or 1991, [Petitioner] began a romantic relationship with A.A., mother to T.Y., who was then six or seven years old. [Petitioner] began living with A.A. and her children, including T.Y., soon thereafter.
>
> Initially, [Petitioner] and T.Y. had a positive relationship. Their relationship changed, however, following a series of interactions that began when T.Y. was ten years old and ended when she was twelve years old. The first interaction occurred when [Petitioner], purportedly inspecting T.Y. for bruises after A.A. hit her, lifted T.Y.'s shirt and training bra and touched her breasts with his hands. Another time, [Petitioner] touched T.Y.'s breasts with his hands as she lay on the family's living room couch after her mother and siblings left to purchase pizza. Later, [Petitioner] touched T.Y.'s breasts with his hands as she sat on his lap. Another time, [Petitioner] touched T.Y.'s breasts with his hands as he pressed up against her from behind in the family's basement. On this occasion, T.Y. could feel [Petitioner's] erect penis against

her bottom. Another time, when T.Y. was applying an analgesic muscle rub to [Petitioner's] legs, [Petitioner] asked her to touch his penis. He then held her hand on his penis and moved it around. On a separate occasion, in the family's bathroom, [Petitioner] touched T.Y.'s breasts with his hands and made her touch his penis with her hands and move them. Finally, [Petitioner], sitting on his and A.A.'s bed, directed T.Y. to kneel on the floor and close her eyes. When T.Y. opened her eyes, she saw [Petitioner] pulling back the skin of his penis. [Petitioner] then forced T.Y.'s head down so that the top of her lip touched his penis.

T.Y.'s cousin C.S. lived with the family for two years, starting when she was eleven years old and T.Y. was ten years old. During this period, T.Y. observed [Petitioner] touch C.S.'s breasts in the context of play-wrestling. C.S. testified that this happened several times. The first time, she thought that the contact was accidental, but she later came to believe that the contact was purposeful because [Petitioner's] hand would go directly to her breasts. C.S. further testified that one day, when she was crying in a room after having argued with A.A., [Petitioner] sucked on her breasts.

When T.Y. was in middle school, she wrote or helped to write a letter to her mother stating that [Petitioner] had inappropriately touched her and her sister, A.Y. A.A. questioned T.Y. and A.Y. about the letter and told them that the accusations could put [Petitioner] in jail. She also told them that she was going to confront [Petitioner], but when the children returned from school that day, [Petitioner] was home and their mother did not say anything to them. T.Y. felt betrayed by A.A. and did not again raise the matter with her. Nor did she contact law enforcement, both because she was afraid of retaliation by [Petitioner's] family members and because she did not want those individuals to view her differently. Similarly, C.S. did not disclose [Petitioner's] conduct. According to C.S., she did not trust anybody and wanted to put the incidents behind her.

In 2002, when T.Y. was seventeen years old, she witnessed a violent altercation between [Petitioner] and one of her uncles. When questioned at the scene, T.Y. told a detective that she had been victimized by [Petitioner]. But when later questioned at her high school by a different detective, T.Y. recanted because she felt overwhelmed and afraid. T.Y. did not again disclose [Petitioner's] conduct to law enforcement until 2011, after her mother asked her to come forward. When T.Y. mentioned in a forensic interview that C.S. had also been a victim, C.S. was interviewed and she too disclosed her victimization. [Petitioner] was interviewed and denied any abuse.

> For his case, [Petitioner] testified on his own behalf and presented the testimony of multiple relatives. [Petitioner] denied ever having touched T.Y. or C.S. in any inappropriate manner, and his witnesses denied ever having seen any such behavior.
>
> [Petitioner] and his witnesses also disputed the timeline established by the state. According to the defense evidence, [Petitioner] did not begin dating and living with A.A. until 1995, and even thereafter was rarely around A.A.'s children because of his work obligations. [Petitioner] also presented evidence that A.A.'s house was constantly full of visitors, some of whom were adult males. [Petitioner] further presented evidence that no child had ever disclosed to his relatives any inappropriate conduct by [Petitioner], that T.Y. had worked for [Petitioner] as a young adult, and that T.Y. had corresponded with [Petitioner] in a civil manner as recently as 2011. [Petitioner] testified that he had first heard of the accusations against him in connection with the 2002 altercation, and that the accusations resurfaced in 2011 at a time when he was engaged in a divorce and custody dispute with A.A. and had started dating another woman.

(Doc. 45-3 at 75-77)

B. Petitioner's Indictment, Trial, and Sentencing

On May 15, 2012, a Maricopa County Superior Court grand jury charged Petitioner on: five counts of sexual conduct with a minor, each a Class 2 felony; nine counts of sexual abuse, eight of which were charged as Class 3 felonies and one of which was charged as a Class 5 felony; and four counts of molestation of a child, each a Class 2 felony. (Doc. 45-1 at 4-10) Each of these eighteen counts was charged as a dangerous crime against children. (*Id.*) These counts related to four alleged victims: T.Y., A.Y., C.S., and R.F. (Doc. 45-3 at 75) Petitioner pled not guilty and was tried before a jury. (*Id.*) Some of the charges were dismissed during the trial. (*Id.* at 75-76) On the remaining charges:

> [a]fter considering the evidence and the parties' closing arguments, the jury returned verdicts finding [Petitioner] guilty of two counts of sexual abuse as to C.S., five counts of sexual abuse as to T.Y., one count of molestation of a child as to T.Y., and two counts of sexual conduct with a minor as to T.Y., but found him not guilty of one count of sexual conduct with a minor as to T.Y. The jury further found [Petitioner] not guilty of several counts related to A.Y.

(*Id.* at 77)

In September 2013, Petitioner was sentenced by the superior court on Counts 7 through 11 and 13 through 17. (Doc. 45-1 at 206-207) He was sentenced to the presumptive term on each of the ten counts, which sentences were ordered to run consecutively, for a total term of 92 years. (*Id.*) Petitioner filed a timely notice of appeal. (*Id.* at 220)

C. Direct Appeal Action

In May 2014, appointed counsel filed an opening brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating they were unable to identify an arguable, nonfrivolous question of law. (Doc. 45-1 at 222-231) Petitioner filed a *pro per* supplemental brief in June 2014. (*Id.* at 244-253) Petitioner argued judicial bias by the trial court, insufficient verdict forms and jury instructions, the court's improper amendment of a count of the indictment, and prosecutorial misconduct. (*Id.*) Petitioner also filed a motion for in camera review of state Child Protective Services records for a determination on whether the records contained *Brady*[4] materials. With permission from the superior court, Petitioner filed a supplemental *pro per* opening brief. (Doc. 45-2 at 7-51) His briefing addressed his arguments: (1) that he was innocent; (2) "judicial bias and or misconduct (erroneous jury instructions and verdict forms)"; (3) prosecutorial misconduct by "using leading questions, knowingly putting the state's witnesses on the stand to commit perjury[,] not providing the defense with *Brady* material"; and ineffective assistance of counsel. (*Id.* at 7)

In September 2014, the court of appeals ordered supplemental briefing on whether, in light of the jury's not guilty verdict on Count 11, Petitioner's conviction and sentence on Count 13 was fundamental error given that the verdict form for Count 13 described "Sexual Conduct with a Minor ([T.Y.] to wit: same incident as Count 11 – [Petitioner] had victim masturbate his penis)." The parties filed the supplemental briefs on October 14, 2014. (*Id.* at 85-91, 97-111) Petitioner filed three additional *pro per* supplemental briefs in the court of appeals. (*Id.* at 56-83, Doc. 45-3 at 2-11, 13-71)

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

In a memorandum decision filed on June 16, 2015, the Arizona Court of Appeals affirmed Petitioner's convictions and sentences except it vacated the conviction and sentence for the Count 13 offense, which had been the subject of the supplemental briefing ordered by the court. (Doc. 45-3 at 74-86) The court of appeals addressed Petitioner's arguments respecting his grand jury proceedings, the effectiveness of his trial counsel, the jury composition, alleged prosecutorial misconduct, the trial court's amendment of the indictment, jury instructions and verdict forms, the sufficiency of the evidence on Petitioner's convictions, the legality of his sentences, and alleged judicial bias. (*Id.*) On petition for review (*Id.* at 88-120), the Arizona Supreme Court denied the petition without comment (*Id.* at 122).

D. Rule 32 Post-Conviction Relief Actions

1. Initial Post-Conviction Relief petition

Petitioner timely filed a Notice of Post-Conviction Relief ("PCR") on February 16, 2016. (Doc. 45-3 at 124-126) Petitioner's appointed counsel filed a notice of completion of PCR review and stated he did not "believe that a sufficient factual or legal basis exist[ed] upon which to ground a good faith Rule 32 claim" and requested an extension to permit Petitioner to file a supplemental petition *pro per*. (*Id.* at 128-129). The superior court filed Petitioner's *pro per* supplemental brief in August 2016. (Doc. 45-4 at 2-32) Petitioner argued he was eligible for relief based on: his actual innocence; prosecutorial misconduct for failure to disclose Child Protection Services reports and the use of perjured witness testimony; ineffective assistance of counsel for failure to object to the prosecution's misconduct or to adequately investigate; ineffective assistance of counsel with regard to jury instructions, verdict forms and Petitioner's sentencing hearing; the suppression of evidence by the state; the use of perjured testimony at trial; newly-discovered evidence that would require the court to vacate his convictions and sentences; obstruction by the state of Petitioner's right to appeal; insufficiency of the evidence; violation of his *Brady* rights; and violation of his constitutional guarantees to a fair trial. (*Id.* at 2-3, 5-29)

In its November 2016 ruling, the superior court found precluded under Arizona Rule of Criminal Procedure 32.2(a) Petitioner's claims of: (1) prosecutorial misconduct; (2)

violation of fundamental fairness of trial proceedings; (3) unconstitutionally suppressed evidence; (4) perjured testimony; (5) the violation of constitutional rights; (6) insufficiency of the evidence; (7) the failure to disclose exculpatory evidence under *Brady*; (8) the lack of credibility of witnesses; (9) "flawed" grand jury proceedings; (10) the use of improper Rule 404(b) evidence; and improper closing argument by the prosecution. (Doc. 45-5 at 72) The superior court held that these claims had been considered and decided by the Arizona Court of Appeals on direct appeal. (*Id.*) The superior court also found that Petitioner's claim of obstruction by the prosecution of his right to appeal was unsubstantiated because Petitioner had not provided any basis for this claim. (*Id.*)

Petitioner argued that after trial he had obtained newly-discovered evidence relating to Child Protective Services ("CPS"), school, and Section 8[5] records as well as his divorce decree and Facebook posts related to his ex-wife, A.A. (Doc. 45-5 at 61-63) The superior court rejected Petitioner's newly-discovered evidence claims pursuant to Arizona Rule of Criminal Procedure 32.1(e), finding that Petitioner did not establish that:

> (1) [t]he newly discovered evidence is material; (2) [t]he evidence was discovered after trial or sentencing; (3) [d]ue diligence was exercised in discovering material facts; (4) [t]he evidence is not merely cumulative or impeaching, unless the impeachment evidence substantially undermines testimony that was of critical significance at trial; and (5) [t]he new evidence, if introduced would probably change the verdict or sentence.

(*Id.* at 72) The superior court listed Petitioner's ineffective assistance of counsel claims as follows:

> counsel's (1) Alleged failure to inform the judge of prosecutorial misconduct and move for a mistrial; (2) Alleged failure to object to nondisclosure; (3) Alleged failure to conduct an adequate investigation and present an alibi defense; (4) Alleged failure to effectively cross-examine witnesses; (5) Alleged failure to bring in corroborative evidence of defense witness testimony; (6) Alleged failure to argue that the statute of limitations had tolled; (7) Alleged failure of appellate counsel to file notice of appeal; (8) Alleged failure to prepare for the 404(b) hearing; (9) Alleged failure to request jury instruction of defense theory of case; (10) Alleged failure of allowing erroneous verdict forms to be presented to the jury; (11) Alleged ineffective assistance of counsel at sentence; (12) Alleged failure of appellate

[5] Section 8 records involve A.A.'s involvement in low-income housing.

> counsel to argue that the trial court improperly considered [Petitioner's] claim of innocence as lack of remorse; (13) Alleged failure to impeach victim; (14) Alleged ineffective assistance during the *Simpson* hearing; and (15) Alleged failure to challenge the grand jury indictment.

(*Id.* at 72-73)

The superior court addressed the two-pronged *Strickland* standard for a finding of constitutionally ineffective assistance of counsel. (*Id.* at 73, citing *Strickland*, 466 U.S. at 687-89)) The court emphasized the Supreme Court's jurisprudence requiring a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance'" and that a finding of prejudice depends on a showing of "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*Id.*, citing *Strickland*, 466 U.S. at 694) The court concluded that Petitioner had failed "to establish any of his ineffective assistance claims. [Petitioner] has not demonstrated that trial counsel nor appellate counsel were deficient. Further, [Petitioner] has not demonstrated prejudice." (*Id.*)

The superior court concluded Petitioner had not raised any colorable claims for relief in his PCR action and dismissed it. (*Id.*) In December 2016, Petitioner filed a petition for review in the Arizona Court of Appeals. (*Id.* at 75-93) The court of appeals granted review and denied relief, holding that Petitioner had not met his burden to establish the superior court abused its discretion when it denied his PCR petition. (*Id.* at 102) The Arizona Supreme Court denied Petitioner's petition for review of the court of appeals' decision. (*Id.* at 100)

2. Petitioner's May 2017 PCR action

Petitioner filed a Notice of Post-Conviction Relief in May 2017 asserting an exception to the timeliness requirements of Rule 32 based on his assertion pursuant to Rule 32.1(g) that that there had been a significant change in the law impacting Arizona Revised Statutes ("A.R.S.") §§ 13-1404, 13-1407, and 13-1410 which, if found applicable to his case, would likely overturn his convictions or sentences. (Doc. 45-5 at 105-106) Petitioner relied on the order in *May v. Ryan*, 245 F. Supp. 3d 1145, 1164 (D. Ariz. 2017), in which District Judge Wake held that the burden-shifting inherent in A.R.S. § 13-1410 from the

state to the defendant to show a lack of sexual intent "violates the Fourteenth Amendment's guarantees of due process and of proof beyond a reasonable doubt." Petitioner further argued appointed counsel in his initial PCR action was ineffective for not arguing the issue addressed in *May v. Ryan*. (*Id.* at 107) Petitioner reiterated these arguments in his petition for PCR. (*Id.* at 108-122)

The superior court filed its ruling in August 2017 summarily dismissing the May 2017 PCR action and found Petitioner had failed to raise any colorable claims for relief. (*Id.* at 149-150) The court determined that Petitioner's claims were precluded pursuant to Rule 32.2(a)(3) because he did not raise his challenge to A.R.S. sections 13-1404, -1407, or -1410 on direct appeal, and did not raise his ineffectiveness of counsel claim on this ground in his initial PCR action. (*Id.* at 150) The superior court further declared that even if

> [Petitioner's] claims were not legally precluded, [Petitioner] has not established that *May v. Ryan* presents a significant change in the law . . . that is retroactively applicable to [Petitioner's] case. Further, assuming arguendo that *May v. Ryan* applies to [Petitioner's] case, [Petitioner] has not established the likelihood of a different outcome. This is especially true given [Petitioner's] testimony that he did not have any sexual contact with the victims.

(*Id.*) Petitioner filed a motion for reconsideration with the superior court (*Id.* at 152-158) which it denied without comment (*Id.* at 160).

3. Petitioner's October 2017 PCR action

In October 2017, Petitioner filed another notice of PCR (Doc. 45-5 at 162-166) and *pro per* brief (*Id.* at 167-173) contending there existed a newly-discovered material "fact" that one of the statutes under which he had been sentenced, "A.R.S. § 13-604 in its entirety was recognized as unconstitutional." (*Id.* at 162-173) He also argued that his sentences had been in error and his counsel was ineffective for not challenging his sentences. (*Id.*)

The superior court held that Petitioner's third PCR action was untimely and successive. (*Id.* at 175) It found that Petitioner's argument that A.R.S. § 13-604 had allegedly been found unconstitutional was a newly-discovered legal, not factual, argument that would not support relief under Arizona Rule of Criminal Procedure 32.1(e) and that in

any case Petitioner had not "demonstrated reasonable diligence in bringing this issue to the Court's attention." (*Id.* at 177) Regarding Petitioner's argument that the alleged unconstitutionality of A.R.S. § 13-604 represented a significant change in the law and would therefore bar preclusion of his untimely claim under Rule 32.1(g), the superior court rejected the argument on "multiple levels." (*Id.* at 177-178) The superior court concluded that Petitioner's "Rule 32.1(e) and Rule 32.1(g) claims are more properly characterized as claims under 32.1(a) and Rule 32.1(c)[,]" which could not be raised in an untimely and successive Rule 32 proceeding. (*Id.* at 176-177) The superior court further rejected Petitioner's ineffective assistance of counsel claims pursuant to Arizona Rule of Criminal Procedure 32.2(a)(2) because he could have raised the claims in a prior PCR action. (*Id.* at 176)

On petition for review, the Arizona Court of Appeals granted review and denied relief, finding that Petitioner had failed to show the superior court abused its discretion.

E. Petitioner's Habeas Claims

Petitioner broadly asserts thirteen grounds for relief in the Petition. (Doc. 33) Under Grounds 1, 2, 5 and 10, Petitioner alleges sub-claims, a number of which he did not exhaust in state court. In other instances, Petitioner alleges the same sub-claim under more than Ground. Accordingly, Respondents have identified 38 claims or sub-claims and have addressed them individually. The undersigned recognizes the necessity of reviewing the sub-claims under Grounds 1, 2, 5, and 10 individually and adopts Respondents' identification of sub-claims. Broken down by sub-claims where necessary, the Petition asserts the following grounds for relief.

Ground 1: Petitioner argues his constitutional due process rights under the Fifth, Sixth, and Fourteenth Amendments were violated when the prosecution committed prosecutorial misconduct by:

Ground 1(a) – violating its duty to disclose exculpatory evidence under *Brady v. Maryland*;

Ground 1(b) – improperly eliciting false testimony by a government witness through leading questions and then failing to correct the false testimony (*Id.*); and

Ground 1(c) – relying on false or perjured testimony in closing argument. (Doc. 33 at 6)

Ground 2: Petitioner contends that his due process protections under the Fifth and Fourteenth Amendments and his right to effective assistance of counsel under the Sixth Amendment were violated when trial counsel:

Ground 2(a) – failed to investigate where Petitioner's victims lived during the time of the charges against Petitioner or otherwise investigate for evidence to impeach the prosecution's witnesses or evidence to support defense witness testimony;

Ground 2(b) – failed to consult with an expert or have an expert testify at trial;

Ground 2(c) – did not object when the superior court amended the indictment to conform to the evidence;

Ground 2(d) – did not object to Petitioner's alleged illegal sentence;

Ground 2(e) – allowed erroneous jury instructions;

Ground 2(f) – allowed erroneous verdict forms; and

Ground 2(g) – refused to file a notice of appeal.

(Doc. 33 at 7) Petitioner alleges the same constitutional protections were violated when his:

Ground 2(h) – appellate counsel filed an *Anders* brief when there were colorable claims to assert; and

Ground 2(i) – PCR counsel filed an *Anders* brief although substantial claims could have been presented.

(*Id.*)

Ground 3: Petitioner asserts his due process rights under the Fifth, Sixth, and Fourteenth Amendments were violated when the trial court amended the indictment during a Rule 20 hearing to conform the indictment to the evidence. (*Id.* at 8)

Ground 4: Petitioner contends his due process rights under the Fifth, Sixth, and Fourteenth Amendments were violated when a state official failed to disclose exculpatory and impeachment evidence. (*Id.* at 9)

Ground 5: Petitioner avers judicial error violating his due process right to a fair trial pursuant to the Fifth and Fourteenth Amendments when the superior court judge:

Ground 5(a) – permitted erroneous verdict forms to go to the jury;

Ground 5(b) – failed to give a jury instruction on the defense theory of the case;

Ground 5(c) – improperly amended the indictment to conform to the evidence;

Ground 5(d) – failed to give a jury instruction on defenses for sexual misconduct;

Ground 5(e) – allowed the jury to consider perjured and hearsay testimony during deliberation; and

Ground 5(f) – sentenced him to an illegal sentence.

(*Id.* at 10) Additionally, Petitioner contends that in his PCR actions, the superior court:

Ground 5(g) – did not grant him an evidentiary hearing;

Ground 5(h) – did not consider Petitioner's new evidence;

Ground 5(i) – failed to consider Petitioner's ineffective of assistance of counsel claim; and

Ground 5(j) – did not compel the prosecution to disclose exculpatory evidence.

(*Id.* at 10).

Ground 6: Petitioner argues his sentences were illegal in violation of his Fifth and Fourteenth Amendment due process rights and of his "right to have the jury determination to enhance [his] sentence from a nondangerous to dangerous in the first or second degree." (*Id.* at 11)

Ground 7: Petitioner asserts his grand jury indictment was "fatally flawed" and violated his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. (*Id.* at 12)

Ground 8: Petitioner contends his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments were violated when he was convicted pursuant to A.R.S. §§ 13-1404, -1405, 1407, and -1410 without the state proving sexual intent. (*Id.* at 13)

Ground 9: Petitioner claims his Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated by the use of erroneous verdict forms that omitted a timeline, the *actus rea*, and the location of the crimes alleged. (*Id.* at 14)

Ground 10: Petitioner alleges violation of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights by the use of erroneous jury instructions that were improper because the instructions:

Ground 10(a) – did not include the defenses for sexual offenses;

Ground 10(b) – did not include the defense theory of the case;

Ground 10(c) – did not inform jurors that that the state was required to prove the essential elements of the crimes charged beyond a reasonable doubt;

Ground 10(d) – misled jurors into concluding that Petitioner "did not present any evidence";

Ground 10(e) – permitted jurors to consider hearsay statements during deliberation;

Ground 10(f) – in effect "lowered the state's burden of proof"; and

Ground 10(g) – violated Petitioner's right to a complete defense.

(*Id.* at 15)

Ground 11: Petitioner argues his due process rights under the Fifth and Fourteenth Amendments were violated because the statute of limitations had expired. (*Id.* at 16)

Ground 12: Petitioner asserts his Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated by a fundamentally unfair judicial process under which false testimony was used to obtain his indictment, hold him without bail, and convict him, while the state "refuse[d] to disclose the exculpatory evidence which will prove [his] actual innocence." (*Id.* at 17)

Ground 13: Petitioner argues his Fifth and Fourteenth Amendment due process rights have been violated by his conviction and sentences in the face of his actual innocence. (*Id.* at 18)

Respondents urge the Court to dismiss the Petition and deny relief on Grounds 1(c), 2(b) through (d), 2(h), 2(i), 5(f) through (j), 6, 7, 8, and 11 as procedurally defaulted. (Doc.

45 at 4) They further ask the Court to deny relief on Grounds 2(i), 3, 5(c), 5(g) through 5(j), 6, 7, 11, and 13 the basis of federal habeas non-cognizability. (*Id.*) Additionally, Respondents argue that Grounds 1(a), 1(b), 2(a), 2(e) through 2(h), 4, 5(a), 5(b), 5(d), 5(e), 9, 10(a) through 10(g), and 12 should be denied and dismissed as without merit. (*Id.*)

II. LEGAL FRAMEWORK

A. Exhaustion of Remedies and Procedural Default

A state prisoner must properly exhaust all state court remedies before this Court may grant an application for a writ of habeas corpus. 28 U.S.C. § 2254(b)(1), (c); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Arizona prisoners properly exhaust state remedies by fairly presenting claims to the Arizona Court of Appeals in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-45 (1999); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). Arizona's "established appellate review processes" consist of a direct appeal and a PCR proceeding. *See* Ariz. R. Crim. P. 31, et. seq. and Rule 32, et. seq.; *see also Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) ("To exhaust one's state court remedies in Arizona, a petitioner must first raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction relief pursuant to Rule 32.").

To be fairly presented, a claim must include a statement of the operative facts and the specific federal legal theory. *Baldwin v. Reese*, 541 U.S. 27, 32-33 (2004); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion."). A claim can also be subject to an express or implied procedural bar. *Robinson v. Schriro*, 595 F.3d 1086, 1100 (9th Cir. 2010). An express procedural bar exists if the state court denies or dismisses a claim based on a procedural bar "that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989); *Stewart v. Smith*, 536 U.S. 856, 860 (2002) (Arizona's "Rule 32.2(a)(3) determinations are independent of federal law because they do not depend upon a federal constitutional ruling on the merits"); *Johnson v.*

Mississippi, 486 U.S. 578, 587 (1988) ("adequate" grounds exist when a state strictly or regularly follows its procedural rule). An implied procedural bar exists if a claim was not fairly presented in state court and no state remedies remain available to the petitioner. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Rose v. Lundy*, 455 U.S. 509, 519-20 (1982); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002).

This Court may review a procedurally defaulted claim if the petitioner can demonstrate either: (1) cause for the default and actual prejudice to excuse the default, or (2) a miscarriage of justice/actual innocence. *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). "Cause" is something that "cannot be fairly attributable" to a petitioner, and a petitioner must show that this "objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753 (citation and internal quotation marks omitted). To establish prejudice a "habeas petitioner must show 'not merely that the errors at ... trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Murray*, 477 U.S. at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170) (1982) (emphasis in original). "Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial." *Id.*

The miscarriage of justice exception to procedural default "is limited to those *extraordinary* cases where the petitioner asserts his [actual] innocence and establishes that the court cannot have confidence in the contrary finding of guilt." *Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) (emphasis in original). To pass through the actual innocence/*Schlup* gateway, a petitioner must establish his or her factual innocence of the crime and not mere legal insufficiency. *See Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo v. Stewart*, 340 F.3d 877, 882–83 (9th Cir. 2003). A petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup*, 513

U.S. at 327)). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. *See also Lee v. Lampert*, 653 F.3d 929, 945 (9th Cir. 2011); *McQuiggin*, 569 U.S. at 399 (2013) (explaining the significance of an "[u]nexplained delay in presenting new evidence"). Because of "the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." *Shumway v. Payne*, 223 F.3d 982, 990 (9th Cir. 2000) (citing *Calderon v. Thomas*, 523 U.S. 538, 559 (1998)).

B. Ineffective assistance of counsel

Under clearly established Federal law on ineffective assistance of counsel, a petitioner must show that his counsel's performance was both (a) objectively deficient and (b) caused him prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under federal habeas review, this results in a "doubly deferential" review of counsel's performance. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (explaining that in a 28 U.S.C. § 2254 case, deference is due both to defense counsel's performance and to the state court's ruling). The Court has discretion to determine which *Strickland* prong to apply first. *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998). A habeas court reviewing a claim of ineffective assistance of counsel must determine "whether there is a reasonable argument that counsel satisfied *Strickland*'s deferential standard, such that the state court's rejection of the ineffective assistance of counsel claim was not an unreasonable application of *Strickland*. Relief is warranted only if no reasonable jurist could disagree that the state court erred." *Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014) (internal citations and quotations omitted).

C. 28 U.S.C. § 2254 – legal standard of review

On habeas review of claims adjudicated on the merits in a state court proceeding, this Court can only grant relief if the petitioner demonstrates prejudice because the adjudication of the claim either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This is a "'highly deferential standard for evaluating state court rulings' which demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)). In making this determination, a federal court "looks to the last reasoned state court decision to address the claim," *White v. Ryan*, 895 F.3d 641, 665 (9th Cir. 2018) (citing *Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1192 (2018)).

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). For a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409.

The Supreme Court has emphasized that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Accordingly, to obtain habeas relief from this Court, Petitioner "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 fairminded disagreement." *Id.* at 103.

With respect to § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). As the Ninth Circuit has explained, to find that a factual determination is unreasonable under § 2254(d)(2), the court must be "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984, 1000 (9th Cir. 2014). "This is a daunting standard—one that will be satisfied in relatively few cases." *Id.*

III. DISCUSSION

A. Grounds 1(c), 2(b) through (d), 2(h), 2(i), 5(f) through (j), 6, 7, 8, and 11 are Procedurally Defaulted

For the reasons provided below, the undersigned recommends the Court find that Grounds 1(c), 2(b), 2(c), 2(d), 2(h), 2(i), 5(g) through 5(j), all but one sub-claim under Ground 7, and Ground 11 are technically exhausted and procedurally defaulted, and that Grounds 5(f), 6, and 8 are procedurally defaulted under an express procedural bar.

1. Ground 1(c)

Under Ground 1(c), Petitioner alleges that the prosecution "relied on false/perjured testimony in its closing argument." (Doc. 33 at 6) Respondents declare that Petitioner failed to raise this claim of prosecutorial misconduct on direct review in the Arizona Court of Appeals, and that when he initially raised this claim on PCR review, the superior court found the claim was precluded pursuant to Rule 32.2(a)(2). (Doc. 45 at 19) Respondents are correct that Petitioner did not assert this claim on direct review. (*See* Doc. 45-1 at 244-253; Doc. 45-2 at 7-51, 56-65; Doc. 45-3 at 2-11, 13-71) However, when Petitioner asserted this claim in his initial PCR action (Doc. 45-4 at 12; Doc. 45-5 at 63), the superior court

found that Petitioner's claims of prosecutorial misconduct were precluded under Rule 32.2(a)(2) "as they have been ruled upon by the Court of Appeals." (*Id.* at 72) Because Petitioner did not raise his Ground 1(c) claim in his direct appeal, this claim had not been expressly precluded under Rule 32.2(a)(2) as "finally adjudicated on the merits in an appeal." Ariz. R. Crim. P. 32.2(a)(2). Instead, the claim is technically exhausted and procedurally defaulted under Rule 32.2(a)(3) because Petitioner could have, but did not, raise the claim on direct appeal and the state court "to which [Petitioner] would be required to present his claim[] in order to meet the exhaustion requirement would now find the claim[] procedurally barred." *Coleman*, 501 U.S. at 735 n.1.

2. Grounds 2(b), 2(c), 2(d), 2(h), and 2(i)

Respondents assert that Petitioner's ineffective assistance of counsel grounds identified herein as Grounds 2(b), 2(c), 2(d), 2(h), and 2(i) are procedurally defaulted because either they were not raised in state court or because the state court recognized an express procedural bar to asserting the claim in a subsequent PCR action. (Doc. 45 at 19-21)

In Petitioner's Ground 2(b) claim, he argues that trial counsel "did not consult with an expert or have an expert testify at [Petitioner's] trial." (Doc. 33 at 7) In Ground 2(c), Petitioner contends his trial counsel was ineffective for not objecting when the superior court "improperly amended the indictment to conform to the evidence." (Doc. 33 at 7) Under Ground 2(d), Petitioner asserts trial counsel provided ineffective assistance of counsel when counsel failed to challenge Petitioner's allegedly illegal sentence. (*Id.*) Petitioner's Ground 2(h) claim is that his counsel on direct appeal was ineffective "for filing an *Anders* brief when there were arguable issues that could have been presented to the court." (*Id.*) In Ground 2(i), Petitioner argues his PCR counsel "provided ineffective assistance for filing an *Anders* brief[6] when there [were] substantial claims which could have been presented." (*Id.*)

Petitioner did not raise any of the claims he argues in Grounds 2(b), (c), 2(d), 2(h),

[6] Undersigned assumes Petitioner intends to assert that his PCR counsel was ineffective for filing a notice of completion pursuant to Arizona Rule of Criminal Procedure 32.4(c)(2).

or 2(i) in his initial PCR action filed in February 2016. (Doc. 45-4 at 17-32)[7] Accordingly, these claims were precluded under Arizona Rule of Criminal Procedure 32.2(a)(3). (*See* Doc. 45-5 at 150; *Id.* at 176) Further, pursuant to Arizona Rule of Criminal Procedure 32.4, it is too late for Petitioner to return to superior court to assert the issues raised in these claims. The claims identified as Grounds 2(b), 2(c), 2(d), 2(h), and 2(i) are technically exhausted and procedurally defaulted.

3. Grounds 5(f), 5(g), 5(h), 5(i), 5(j) and Ground 6

In Ground 5(f), Petitioner argues the trial court violated his Fifth and Fourteenth Amendment rights to a fair trial by imposing an illegal sentence. (Doc. 33 at 10) Under Ground 6, Petitioner complains his Fifth and Fourteenth Amendment due process rights were violated when the trial court sentenced him to an enhanced sentence without a finding of aggravating factors by the jury. (*Id.* at 11) Petitioner did not assert these arguments on direct appeal. (Doc. 45-1 at 244-253; Doc. 45-2 at 7-51, 56-65; Doc. 45-3 at 2-11, 13-71) As found by the superior court when Petitioner attempted to raise in his third PCR action claims that the trial court had "erroneously applied the sentencing statutes to his convictions and sentenced Petitioner to unconstitutional penalties," relief on such claims was precluded because the claims could have been raised on direct appeal. (Doc. 45-5 at 175-176) Thus, Grounds 5(f) and 6 were expressly precluded by application of a procedural bar.

Under Ground 5(g), Petitioner argues the PCR court erred by not giving him an evidentiary hearing. (*Id.* at 10) His Ground 5(h) claim is based on the claim that the PCR court did not consider his "new evidence." (*Id.*) Petitioner asserts in Ground 5(i) that the PCR court did not consider his ineffective assistance of counsel claim, and in Ground 5(j) that the PCR court did not compel the state to disclose exculpatory evidence. (*Id.*)

[7] In Petitioner's Amended Pro Per Brief he further states that his trial counsel provided ineffective assistance of counsel when he: (1) failed to consult with an expert and was thereby unable to establish any defense; (2) failed to instruct the investigator Petitioner's family hired on the type of evidence that would be important to Petitioner's defense; and (3) declined to present the investigator as a witness at trial. (Doc. 34 at 22-24) Petitioner did not assert either these details or his more general Ground 2(b) claim in his initial PCR action in state court. (*Id.* at 19-21)

However, Petitioner did not raise these arguments in any of his three PCR actions. (Doc. 45-4 at 2-32; Doc. 45-5 at 104-122, 162-173) Accordingly, each of Petitioner's claims presented under Grounds 5(g) through 5(j) is technically exhausted and procedurally defaulted.

4. Ground 7

In Ground 7, Petitioner contends that the grand jury indictment was flawed and violated his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments because: (1) it did not provide him "with clear notice of the charges that [he] had to defend against; (2) the indictment was [duplicative] for charging two offenses in the same count; (3) the timeline regarding his offenses was "too broad to allow [him] to prepare a defense"; and (4) the indictment was "obtained by the use of false testimony." (Doc. 33 at 12) Petitioner argued on direct appeal only the fourth claim, that his indictment was based on the prosecution's presentation of perjured testimony. (Doc. 45-1 at 244-253; Doc. 45-2 at 7-51, 56-65; Doc. 45-3 at 2-11, 13-71) Accordingly, Petitioner's Ground 7 arguments identified under (1) through (3) above are technically exhausted and procedurally defaulted for Petitioner's failure to raise them on direct appeal and because he is time-barred from returning to state court to present such claims. As is explained below in Section III(B)(1), Petitioner's claim that the indictment was obtained through the use of false testimony is not a cognizable claim in federal habeas review.

5. Ground 8

Petitioner's Ground 8 argument is that his Fourth, Fifth, Sixth and Fourteenth Amendment rights were violated by his convictions on charges under A.R.S. §§ 13-1404, 13-1405, and 13-1410 and the defenses provided under A.R.S. § 13-1407 because his convictions did not require the state to prove Petitioner's sexual intent. (Doc. 33 at 13; Doc. 34 at 54-61) Petitioner did not raise this claim in his direct appeal. (Doc. 45-1 at 244-253; Doc. 45-2 at 7-51, 56-65; Doc. 45-3 at 2-11, 13-71) In his initial *pro per* supplemental brief Petitioner contended that the trial court erred when she left out of jury instructions the phrase "with the intent to arouse or gratify the sexual desire of any person" in the context

of the definition of "sexual contact." (Doc. 45-1 at 248; Doc. 45-2 at 26, 29, 60; Doc. 45-3 at 33, 36) Nowhere on direct appeal or in his first PCR action did Petitioner contend that §§ 13-1404, 13-1405, 13-1407, or 13-1410 were unconstitutional or discuss which party bore the burden of proving sexual intent. Instead, Petitioner first raised this issue in his second PCR action. (Doc. 45-5 at 106-107) The superior court found Petitioner's Ground 8 claim precluded for Petitioner's failure to raise it in his direct appeal, which was an express procedural bar. (*Id.* at 150)

6. Ground 11

Under Ground 11, Petitioner argues his Fifth and Fourteenth Amendment due process rights were violated because the statute of limitations had run on his charges before he was indicted. (Doc. 33 at 16, Doc. 34 at 67-68) Petitioner did not assert this claim on direct appeal. (Doc. 45-1 at 244-253; Doc. 45-2 at 7-51, 56-65; Doc. 45-3 at 2-11, 13-71) Because it is too late for Petitioner to return to state court and argue his Ground 11 claim, it is technically exhausted and procedurally defaulted. Ariz. R. Crim. P. 32.2(a)(3); *Coleman*, 501 U.S. at 735 n.1.

7. Petitioner fails to establish excuse for procedural default

As is discussed above, Grounds 1(c), 2(b) through (d), 2(h), 2(i), 5(f) through (j), 6, three of the four sub-claims under 7, and Grounds 8 and 11 are procedurally defaulted. As noted above in Section II(A), this Court may consider these procedurally defaulted claims if the petitioner can demonstrate either: (1) cause for the default and actual prejudice to excuse the default, or (2) a miscarriage of justice/actual innocence. *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman*, 501 U.S. at 750.

For claims not adjudicated on the merits in state court, generally federal review is not available when the claims have been denied pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In Arizona, there are two avenues for petitioners to exhaust federal constitutional claims: direct appeal and PCR proceedings. Arizona Rule of Criminal Procedure 32 governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised

on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3).

Because Arizona's preclusion rule (Rule 32.2) and time-bar rule (Rule 32.4) are both "independent" (they do not rely upon a federal constitutional ruling on the merits, *Stewart v. Smith*, 536 U.S. 856, 860 (2002)) and "adequate" (they are strictly or regularly followed, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)), when specifically applied to a claim by an Arizona court or when precluding a return to state court to exhaust a claim, they procedurally bar subsequent review of the merits of that claim by a federal habeas court. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (finding determinations made under Arizona's procedural default rule are "independent" of federal law); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) (finding that unexhausted claims were procedurally defaulted because petitioner was "now time-barred under Arizona law from going back to state court"); *Ortiz v. Stewart*, 149 F.3d 923, 931–32 (9th Cir. 1998) (rejecting the argument that Arizona courts have not "strictly or regularly followed" Rule 32); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (rejecting the assertion that Arizona courts' application of procedural default rules had been "unpredictable and irregular"); *State v. Mata*, 916 P.2d 1035, 1050–52 (Ariz. 1996) (noting that waiver and preclusion rules are strictly applied in post-conviction proceedings).

The Court may review a procedurally defaulted claim if Petitioner can demonstrate either: (1) cause for the default and actual prejudice to excuse the default, or (2) a miscarriage of justice/actual innocence. *Schlup*, 513 U.S. at 321; *Coleman*, 501 U.S. at 750; *Murray*, 477 U.S. at 495-96. Petitioner does not establish cause or actual prejudice for any of his defaulted claims. Further, the record does not support a conclusion that Petitioner could demonstrate he is actually innocent of his convictions based on any new reliable evidence and a showing that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup*, 513 U.S. at 327)). Petitioner fails to establish excuse for the procedural default of Grounds 1(c), 2(b) through (d), 2(h), 2(i), 5(f) through (j), 6, three of

four sub-claims in 7, and Grounds 8 and 11, and the record provides no reasonable basis for such excuse to procedural default.

B. Non-cognizable claims in Grounds 3, 5(c), and 7

1. Grounds 3, 5(c), and Petitioner's argument regarding false testimony and his indictment in Ground 7 are not cognizable under federal habeas review

Respondents assert that Petitioner's Grounds 2(i), 3, 5(c), 5(g) through 5(j), 6, 7, 10(f), 11, and 13 are not cognizable claims in federal habeas review. (Doc. 45 at 26-31) However, because Petitioner's Grounds 2(i), 5(g) through 5(j), 11, and three of four sub-claims under Ground 7 are procedurally defaulted without excuse, as is discussed above in Section III(A) above, and because Ground 10(f) fails on the merits as set forth below in Section III(C) below, the undersigned will not address Respondents' cognizability arguments on these claims. As explained below, Grounds 3, 5(c), and Petitioner's claim the indictment was obtained through the use of false testimony in Ground 7 are not cognizable under federal habeas review.

In Ground 3, Petitioner contends that the trial court violated his rights under the Fifth, Sixth, and Fourteenth Amendments when it amended Count 15 of the indictment to conform to the evidence. (Doc. 33 at 8, Doc. 34 at 31-33) Under Ground 5(c), Petitioner asserts that his due process rights under the Fifth and Fourteenth Amendments were violated when the trial court erred by "improperly amending the indictment to conform to the evidence." (Doc. 33 at 10) Petitioner's sole non-precluded sub-claim under Ground 7 is that his constitutional rights were violated when his indictment was obtained through the use of false or perjured testimony. (Doc. 33 at 12)

The factual basis of Petitioner's claims about amendment of the indictment follow. At the end of the State's case, defense counsel requested a directed verdict pursuant to Rule 20 of the Arizona Rules of Criminal Procedure. (Doc. 56-4 at 61-67) The parties discussed Count 14, originally charged in the indictment as Count 15. (*Id.* at 65-66) Count 14 charged Petitioner with sexual abuse, a Class 3 felony and dangerous crime against a child, alleging that Petitioner "intentionally or knowingly engaged in any direct or indirect touching,

fondling, or manipulating of any part of the female breast of [T.Y.], a minor under fifteen years of age, (to wit: mouth on breast – 61st Avenue and Glendale address) . . . ." (Doc. 45-1 at 9)

The parties addressed T.Y.'s trial testimony that Petitioner had put his hands on her breasts but did not put his mouth on her breasts during the incident. (Doc. 56-4 at 65) Because the parenthetical "to wit" language in Count 14 was inconsistent with T.Y.'s testimony that Petitioner had touched her breasts with his hands not his mouth, the prosecution asserted the count properly could be amended. (*Id.* at 65-66) The prosecution argued to the trial court that the "to wit" language was not an element of the crime and that regardless of whether Petitioner's mouth or his hands were on T.Y.'s breasts it would still be sex abuse under the statutes. (*Id.* at 65) The prosecution told the trial court that changing the "to wit" language would merely be a technical change to the count and that the defense had been on notice about the count because T.Y. discussed this "last incident" during a forensic interview. (*Id.* at 65-66) Defense counsel did not object to amendment of the count but said he left the decision to the court's discretion. (*Id.* at 66) The trial court ordered the count to be amended "to conform with the evidence that has been presented in the case, and therefore in the parentheses where it says, to wit, the word mouth will be changed to hands[.]" (*Id.*)

The Arizona Court of Appeals addressed Petitioner's claim on this issue on state law grounds, explaining:

> Under Ariz. R. Crim. P. 13.5(b), a charge "may be amended ... to correct mistakes of fact or remedy formal or technical defects[,] ... [and t]he charging document shall be deemed amended to conform to the evidence adduced at any court proceeding." "A defect is formal or technical when its amendment does not change the nature of the offense or otherwise prejudice the defendant." *State v. Buccheri–Bianca,* 233 Ariz. 324, 329, ¶ 17 (App. 2013). An amendment changing the body part that Defendant used to contact T.Y.'s breasts did not alter the nature of the offense or otherwise prejudice him. *See* A.R.S. §§ 13–1404 (sexual abuse requires "sexual contact"), –1401(2) ("'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the ... female breast *by any part of the body* . . . ." (emphasis added)). Count 15 was therefore automatically deemed

> amended to conform with the evidence that Defendant had used his hand to touch T.Y.'s breasts.

(Doc. 45-3 at 81)

Petitioner argues the amendment of the count violates his federal constitutional rights. However, a habeas petitioner cannot "'transform a state law issue into a federal one merely by asserting a violation of due process.'" *Poland v. Stewart,* 169 F.3d 573, 584 (9th Cir. 1999) (quoting *Langford v. Day,* 110 F.3d 1380, 1389 (9th Cir. 1996)). In Grounds 3 and 5(c), Petitioner essentially challenges the procedures used to amend the indictment, which involves the interpretation and application of Arizona law and is not cognizable on federal habeas corpus review.

Although the Due Process Clause guarantees defendants a fair trial, "it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury." *Alexander v. Louisiana,* 405 U.S. 625, 633 (1972). For this additional reason, Petitioner's claims in Grounds 3, 5(c) and his sub-claim under Ground 7 do not provide a basis for federal habeas relief. *See Roe v. Baker,* 316 F.3d 557, 570 (6th Cir. 2002) (beyond notice, a claimed deficiency in a state criminal indictment is not cognizable on federal collateral review); *Bae v. Peters,* 950 F.2d 469, 478–79 (7th Cir. 1991) ("Since Bae was not entitled to a grand jury indictment, his claim that the indictment's amendment deprived him of his right to a grand jury indictment states no federal claim upon which to grant a writ of habeas corpus."). *See also Goines v. Ryan,* No. CIV 11-2584-PHX-PGR (MHB), 2013 WL 1498909 at *4 (D. Ariz. 2013). For these reasons, Grounds 3, 5(c), and Petitioner's sub-claim under Ground 7 arguing his indictment was obtained through false testimony are not cognizable on federal habeas review.

C. Merits review of Grounds 1(a), 1(b), 2(a), 2(e), 2(f), 2(g), 2(h), 4, 5(a), 5(b), 5(d), 5(e), 9, 10(a) through 10(g), 12, and 13

As is discussed above, on habeas review of claims adjudicated in a state court proceeding on the merits, this Court can only grant relief if the petitioner demonstrates prejudice because the adjudication of the claim either "(1) resulted in a decision that was

contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). For the reasons set forth below, each of Petitioner's claims in Grounds 1(a), 1(b), 2(a), 2(e), 2(f), 2(g), 2(h), 4, 5(a), 5(b), 5(d), 5(e), 9, 10(a) through 10(g), 12, and 13 fails on the merits.

1. Ground 1(a) – Brady claim

In Ground 1(a), Petitioner contends his Fifth, Sixth, and Fourteenth Amendment due process rights were violated when the "state violated its duty to disclose exculpatory evidence." Petitioner explains that the alleged exculpatory evidence he addresses includes victim C.S.'s Child Protection Services and/or school records indicating with whom C.S. lived from February 6, 1994, to February 5, 1995. (Doc. 34 at 8) Petitioner says this evidence would "prove that there was a physical impossibility that [he] could have committed the charges against [C.S.]" (*Id.*) Additionally, Petitioner contends the prosecution failed to "disclose [victim T.Y.'s] school records or [A.A.'s] section 8 records," which Petitioner asserts would establish a "physical impossibility that [he] could have committed the charges against [T.Y.] [at] the 61st Ave and Glendale address" between September 26, 1996 through September 25, 1997. (*Id.* at 9) Petitioner claims this evidence would also establish that C.Y. and a police detective gave false testimony and would also have corroborated the testimony of defense witnesses. (*Id.* at 8-9)

Petitioner relies on *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972) as support for this Ground 1(a) claim of a disclosure violation. (*Id.* at 7, 16-17) The Ninth Circuit instructs that:

> There are three elements of a *Brady/Giglio* violation: "(1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *United States v. Williams*, 547 F.3d 1187, 1202 (9th Cir. 2008) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 144 L.Ed.2d 286 (1999) (internal quotation marks omitted)).

United States v. Kohring, 637 F.3d 895, 901-02 (9th Cir. 2011). To determine if undisclosed evidence is material, *Brady/Giglio* requires an "inquiry into whether 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different[.]'" *Mellen v. Winn*, 900 F.3d 1085, 1089 (9th Cir. 2018) (quoting *Turner v. United States*, __ U.S. __, 137 S. Ct. 1885, 1888, 1893, 198 L. Ed. 2d 443 (2017)).

In September 2012, Petitioner's trial counsel in a discovery request to the prosecution asked for, among other evidence, "CPS records relating to the alleged victims." (Doc. 45-5 at 52)[8] The prosecution then made a public records request addressed to CPS counsel, asking for "any and all Child Protective Services records pertaining to [Petitioner's] physical and/or physical abuse involving [Petitioner's alleged victims] be made available to the State for disclosure to [Petitioner]." (*Id.* at 54) In March 2013, Petitioner's counsel obtained the CPS records on a CD. (*Id.* at 58) Petitioner's trial was conducted in July 2013. (Doc. 45-1 at 23-155)

The last reasoned decision on Petitioner's Ground 1(a) claim was provided by the Arizona Court of Appeals decision on Petitioner's direct appeal:

> [Petitioner] contends that the prosecutor engaged in prosecutorial misconduct by knowingly violating *Brady v. Maryland*, 373 U.S. 83 (1963). According to [Petitioner], the state failed to disclose documents—in particular, C.S.'s Child Protective Services ("CPS") records—that would have shown that C.S. wrongly identified the years during which she lived and interacted with him. [Petitioner] asks that we conduct an in camera review of the records and enter an order compelling their disclosure. We deny this request and find no error. Under Ariz. R. Crim. P. 15.1 and *Brady*, 373 U.S. at 87, the state is required to timely disclose evidence material to guilt or punishment. When a witness's reliability may be determinative of guilt or innocence, material evidence affecting the witness's credibility must be disclosed. *Giglio v. United States*, 405 U.S. 150, 154 (1972). [Petitioner] has made no showing of materiality—though he argues that C.S. did not live with him during the years she claimed, he does not dispute that she lived with him at some point when she was less than fifteen years old, the age required to

[8] The record does not suggest that Petitioner or his counsel made any request for his victims' school records or his ex-wife A.A.'s section 8 housing records, or that Petitioner obtained this information.

> support his convictions for sexual abuse as a class 3 felony. *See* A.R.S. § 13–1404.

(Doc. 45-3 at 80) Accordingly, the court of appeals found Petitioner had not established he had been prejudiced by the alleged failure to disclose documents. (*Id.*)

Petitioner contends that the Arizona Court of Appeals' decision was an unreasonable application of Supreme Court precedent, arguing that the age of the victim "required to support the conviction" is not at issue, but rather the issue is the timeline established in the indictment of on or between February 6, 1994, through February 5, 1995, as to the counts involving victim C.S. (Doc. 47 at 19-20)

Petitioner fails to establish a *Brady* violation as to CPS records because those records were disclosed well prior to trial. Further, Petitioner does not demonstrate that Respondents suppressed any school or Section 8 records. Moreover, Petitioner merely speculates that the records he claims Respondents suppressed would be favorable, which is insufficient to state a *Brady* claim. *Runningeagle v. Ryan*, 686 F.3d 758, 769-70 (9th Cir. 2012).

The verdict forms for Counts 15 and 16 applicable to victim C.S. required the jury to find Petitioner either guilty or not guilty on the charges of Sexual Abuse for the "first incident" (Count 15) and on the "day victim ditched school" (Count 16), and also to find that Petitioner was at least eighteen years old and the victim was under fifteen years old. (Doc. 45-1 at 186-187) A.R.S. § 13-1404(A) provides that a "person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person . . . who is under fifteen years of age if the sexual contact involves only the female breast." Petitioner testified at trial that he in fact lived with T.Y. when she was 12 and 13 years old, and with C.S. in 1996, when she was 13 or 14 years old. (Doc. 56-5 at 87-88, Doc. 56-3 at 5) Thus, as the Arizona Court of Appeals concluded, Plaintiff fails to show that the documents he claims the State suppressed were material because he does not dispute that both T.Y. and C.S. lived with him at some point when each was less than fifteen years old, "the age required to support his convictions for sexual abuse as a class 3 felony." (Doc. 45-3 at 80)

It should also be noted that Petitioner asserted a blanket denial to the sexual abuse and other charges on which he was tried. Therefore, the date ranges listed in the indictment, which occurred before the victims turned 15, did not prejudice Petitioner in defending those charges. *See Qualls v. Goldsmith,* 178 Fed. Appx. 767, 771 (9th Cir. 2006) (rejecting claim that indictment was duplicitous due to its lack of time specificity when petitioner denied that any acts of sexual misconduct had occurred or could be the basis for the indictment).

Because Petitioner has not shown prejudice, his claim that the prosecution suppressed exculpatory records and violated his due process rights fails. Petitioner has not established that the Arizona Court of Appeals' rejection of Ground 1(a) was contrary to, or an unreasonable application of, federal law or was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

2. *Grounds 1(b), 5(e), and 12 – false testimony-related claims*

In Ground 1(b), Petitioner alleges the prosecution elicited "false testimony from [Detective Scheffer, Petitioner's ex-wife A.A., and C.S.] by the use of leading questions, to dispute the defense theory of the case" and that the state failed to correct this false testimony. (Doc. 33 at 6, Doc. 34 at 8-18) In Ground 5(e), Petitioner argues the trial court violated his due process rights by permitting the jury to consider hearsay and A.A.'s perjured testimony. (Doc. 33 at 10, Doc. 34 at 8-18, 43) Petitioner's Ground 12 claim is that his Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated throughout his judicial proceeding through the use of false testimony and the State's refusal to disclose "exculpatory evidence which will prove [his] actual innocence." (Doc. 33 at 17, Doc. 34 at 69-70)

"The knowing use of false evidence by the state, or the failure to correct false evidence, may violate due process." *Towery v. Schriro*, 641 F.3d 300, 308 (9th Cir. 2010) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). In order to establish a *Napue* claim, a movant must demonstrate "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir.

2003) (citing *Napue*, 360 U.S. at 269-71). "Under *Napue,* false testimony is material, and therefore prejudicial, if there is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Schad v. Ryan*, 671 F.3d 708, *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (quoting *Hayes v. Brown,* 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (citation omitted)).

Petitioner asserts that C.S.'s CPS and/or school records would prove where C.S. lived between February 6, 1994, and February 5, 1995, and would establish that it was "a physical impossibility that [Petitioner] could have committed" the charged offenses against C.S. (Doc. 34 at 8) Petitioner claims that these records would establish that C.S. gave false trial testimony and the prosecution failed to correct it, and that Detective Scheffer gave false testimony at Petitioner's *Simpson* hearing and also at Petitioner's trial, and the prosecution failed to correct that testimony. (*Id.* at 7-8) Similarly, Petitioner alleges that T.Y.'s school records or A.A.'s housing records would "prove there was a physical impossibility" that Petitioner could have committed the charged offenses against T.Y. at an address near 61st Avenue and Glendale Avenue on or between September 26, 1996 through September 25, 1997. (*Id.* at 9)

Petitioner further contends that Detective Sheffer and the prosecution "fabricated" charges against Petitioner involving T.Y. and argues that T.Y. never testified that Petitioner touched her breast in her mother's bedroom located at 75th Avenue and Indian School when T.Y. was 10 years old, and never testified that Petitioner had ever touched her genitals. (*Id.* at 9-10) Petitioner additionally argues that the prosecution elicited false testimony from A.A. on re-direct after she was asked by the jury whether it was fair to state that she started contacting the police about Petitioner in 2011 after their divorce proceedings began and Petitioner was seeing another woman. (*Id.* at 12-14) Similarly, Petitioner asserts the prosecution elicited false testimony from C.S. about when she lived with Petitioner and A.A. (*Id.* at 15-16)

Addressing Petitioner's arguments on misconduct by the prosecution, the Arizona Court of Appeals stated:

> [Petitioner] next contends that the prosecutor engaged in misconduct at trial by eliciting false testimony and inadmissible hearsay, by asking leading questions, by showing an edited version of a video clip, and by preventing the admission of exculpatory evidence by not calling certain witnesses and by making objections when defense counsel examined witnesses. [Petitioner]'s contentions are unsupported. Nothing in the record suggests that the prosecutor engaged in misconduct, much less intentional misconduct, with respect to the evidence presented to the jury. To the extent [Petitioner] contends that his convictions were based on false testimony, the credibility of the witnesses was for the jury to decide. *State v. Cox,* 217 Ariz. 353, 357, ¶ 27 (2007).

(Doc. 45-3 at 80) The court of appeals also considered and rejected Petitioner's arguments alleging the presentation of false testimony before the grand jury:

> [Petitioner] contends that he was indicted based on the state's presentation of false and perjured testimony to the grand jury. Though generally we may not review grand jury findings on appeal, we may review whether an indictment was based on perjured material testimony. *State v. Moody,* 208 Ariz. 424, 439–40, ¶ 31 (2004). A witness commits perjury by making "[a] false sworn statement in regard to a material issue, believing it to be false." A.R.S. § 13–2702(A)(1). [Petitioner] contends that during the grand jury proceedings, a detective falsely testified that T.Y. and C.S. lived with [Petitioner] at all relevant times. But nothing in [Petitioner's] description of the allegedly perjured statements conflicts with T.Y. and C.S.'s trial testimony, and [Petitioner's] claim that "school records and other records" would demonstrate falsity is unsupported by the record. There is no indication that the detective gave false testimony before the grand jury, much less that he knowingly gave false testimony.

(*Id.* at 78)

Petitioner does not establish that any of the testimony on material facts provided by Detective Scheffer, A.A., or C.S. was false. Petitioner's reliance on what he speculates might be contained in school records and A.A.'s low-income housing records is not sufficient to establish false evidence. If an assertion that testimony was perjured rests on "mere speculation," it is insufficient to establish a claim under *Napue*. *See United States v. Aichele*, 941 F.2d 761, 766 (9th Cir. 1991).

At trial in July 2013, C.S. testified that she was born in February 1983. (Doc. 56-3 at 5) She stated that CPS placed her with A.A. when she was 11. (*Id.* at 9) On cross-

examination, C.S. confirmed that when she was interviewed by Detective Scheffer she said that her abuse by Petitioner occurred between 1995 and 1996, when she was about 11. (*Id.* at 18) She stated she left A.A.'s home when she was "probably about 12 . . . or 13." (*Id.* at 26) On redirect, the prosecution clarified with C.S. that the incidents with Petitioner occurred during the year while she was 11. (*Id.* at 27) Testifying on rebuttal, C.S. said that Petitioner's testimony that she had come to live with A.A. and him when she was 13 was not accurate because when she was 13 she had run away and had been placed in juvenile detention. (Doc. 56-5 at 153)

Petitioner argues that A.A. provided inconsistent testimony with regard to the timing of her divorce from Petitioner and when she notified authorities about her concerns of Petitioner's sexual abuse of the girls. (Doc. 34 at 11-14) On rebuttal testimony during the last day of trial, the court posed a juror question to A.A., initiating the following questioning and testimony:

> THE COURT. You never called the police ever until 2011 about [Petitioner]. Is it fair to say that you started calling the police on [Petitioner] when divorce proceedings started and [Petitioner] was seeing other women?
>
> [A.A.] That's a negative. I called the police because my daughter [K.G.] went to go stay with [Petitioner], and I had suspicion that he did something to her. I talked to my daughters and I told them they needed to tell me the truth, if he actually did something to them, because I was worried that he did something to my daughter, and that's when I called the police.

(Doc. 56-5 at 187) Subsequently, defense counsel questioned A.A. further:

> Q. And one of the jury questions was asked about the timing of it all. You have a different reason for it, but you don't dispute that in 2011, according to your prior testimony, you were going through a heated divorce and child custody proceeding; is that true?
>
> [A.A.] After I had suspicion that he had did something to my daughter, yes.
>
> Q. And most of these answers call for a yes or no [answer], so if I'm not being clear, please let me know. Yes or no, is it at this time you were going through a child custody and divorce proceeding, yes or no?
>
> [A.A.] Yes.

Q. And were you aware that he was seeing another woman at this time as well?

[A.A.] Yes.

Q. So it's just a coincidence that these allegations remained untouched for 20 years and now you call law enforcement when you're going through a child custody, divorce, and you were aware that he was dating another woman, that's just a pure coincidence, yes or no.

[A.A.] Yes, it is a pure coincidence.

(*Id.* at 191-192) Immediately thereafter, the prosecutor questioned A.A. as follows:

Q. You were actually already divorced from [Petitioner] in July of 2011?

[A.A.] Yes.

Q. And custody by that time had been resolved?

[A.A.] Yes.

Q. So were there any pending court proceedings at that point in time?

[A.A.] No.

Q. Did you care at that point in time if [Petitioner] was seeing another woman?

[A.A.] No, I didn't.

Q. You were divorced?

[A.A.] Yes.

Q. And 2011 isn't the first time that you had heard [A.Y. and T.Y.] come forward about things that [Petitioner] had done to them?

. . .

[A.A.] No, it's not the first time.

(*Id.* at 192-193)

The state PCR record includes a copy of the decree of dissolution of A.A.'s and Petitioner's marriage dated March 7, 2012, in the Maricopa County Superior Court. (Doc. 45-4 at 37-42) The decree indicates that A.A. filed a petition for dissolution on February

4, 2011. (*Id.* at 37) Accordingly, it appears that A.A.'s first statement that she was involved in a divorce action in 2011 was accurate, and that her subsequent contradictory statements that she was divorced and that custody of the children had been resolved in 2011 was not accurate. Petitioner, however, does not establish that the prosecution knew or should have known that A.A.'s second statement was false. Petitioner's argument that the prosecutor knew or should have known that A.A.'s second statements were false is that: (1) A.A. made the first statement, that is, "clearly" answering "yes" to the question about whether she was in the midst of divorce proceedings when she made the allegations leading to Petitioner's prosecution; and (2) "the detective knew at the time [A.A.] brought these charges . . . that [Petitioner and A.A.] were going through a Child Custody/Divorce proceeding and that [Petitioner and A.A.] had a [c]ourt appearance the next morning." (Doc. 47 at 10) Petitioner provides no support for the statement that Detective Scheffer knew about the timing of divorce proceedings. Further, because Petitioner alleges a police officer, not the prosecutor, knew about the timing of divorce proceedings this does not "adequately allege a violation of clearly established federal law with respect to [Petitioner's] *Napue* claim." *Reis-Campos v. Biter*, 832 F.3d 968, 977 (9th Cir. 2016). The Arizona Court of Appeals rightly concluded that A.A.'s conflicting testimony was an issue of witness credibility for the jury to decide.

To the extent that C.S. provided inconsistent testimony, Petitioner has failed to show that the testimony was false. That there may be contradictions in testimony does not establish a due process violation. *See, e.g.*, *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) (fact that a witness makes inconsistent statements, or that other evidence conflicts with a witness's testimony, does not alone establish that the witness offered false evidence); *Zuno-Arce*, 339 F.3d at 889 (9th Cir. 2003) (rejecting *Napue* claim where petitioner failed to demonstrate testimony at trial was "actually false"); *Lambert v. Blackwell*, 387 F.3d 210, 249, 252 (3rd Cir. 2004) (discrepancies in testimony do not mean testimony is perjured). (Doc. 45-3 at 80)

Petitioner failed to demonstrate that the Arizona Court of appeals' decision rejecting Grounds 1(b), 5(e), or 12 would support relief under 28 U.S. § 2254(d).

3. Grounds 2(a), 2(e), 2(f), 2(g), 2(h) – ineffective assistance claims

Petitioner asserted the claims of ineffective assistance of counsel in Grounds 2(a), (e), (f), (g), and (h) in state court in his first PCR action. (Doc. 45-4 at 2-32) The last reasoned decision on these issues was the November 22, 2016, decision of the superior court, which stated that:

> [t]o establish [an ineffective assistance of counsel] claim, [Petitioner] must show that counsel's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). Deficient performance is established when "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In determining deficiency, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. This presumption of reasonableness means that not only does the court "give the attorneys the benefit of the doubt," it must also "affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, __U.S. __, 131 S. Ct. 1388, 1407 (2011). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under this standard, the court asks "whether it is 'reasonably likely' the result would have been different." *Harrington v. Richter*, __U.S.__, 131 S. Ct. 770, 792 (2011) (quoting *Strickland*, 466 U.S. at 696). That is, only when "[t]he likelihood of a different result [is] substantial, not just conceivable," *id.*, has the defendant met *Strickland*'s demand that defense errors were "so serious as to deprive the defendant of a fair trial," *id.* at 787–88 (quoting *Strickland*, 466 U.S. at 687).
>
> Defendant fails to establish any of his ineffective assistance claims. Defendant has not demonstrated that trial counsel nor appellate counsel were deficient. Further, Defendant has not demonstrated prejudice.

(Doc. 45-5 at 73)

Petitioner's Ground 2(a) claim is that trial counsel "did not investigate where, when and with whom the complainants lived during the statutory time limit presented [i]n the

indictment." (Doc. 33 at 7, Doc. 34 at 21) Petitioner argues that such an investigation may have "established an alibi defense" and "prove[d] there was a physical impossibility that [he] could have committed the charges against" the complainants. (*Id.*) Petitioner contends that an investigation may have yielded evidence useful to cross-examining prosecution witnesses and examining defense witnesses. (*Id.*)

Counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. "This includes a duty to investigate the defendant's 'most important defense,' ... and a duty adequately to investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence on the verdict .... However, 'the duty to investigate is not limitless[.]'" *Bragg v. Galaza,* 242 F.3d 1082, 1088 (9th Cir. 2001) (citations omitted.) Courts may not find prejudice based on speculation about what evidence an investigation might have uncovered. *Grisby v. Blodgett,* 130 F.3d 365, 371 (9th Cir.1997); *see Hendricks v. Calderon,* 70 F.3d 1032, 1042 (9th Cir. 1995) ("Absent an account of what beneficial evidence investigation into any of these issues would have turned up, Hendricks cannot meet the prejudice prong of the *Strickland* test.").

Further, Petitioner has not established ineffective assistance of counsel because his prejudice argument is based on speculation. *See Gonzalez v. Knowles,* 515 F.3d 1006, 1014–16 (9th Cir. 2008) (claims "grounded in speculation" do not establish prejudice under *Strickland*); *Bragg,* 242 F.3d at 1088–89 (mere speculation that further investigation might lead to evidence helpful to petitioner was insufficient to demonstrate ineffective assistance due to failure to investigate). On direct examination by his trial counsel, Petitioner himself testified about where and when he lived with A.A. and the girls and how old victims C.S. and T.Y. were at specific periods. (Doc. 56-5 at 74, 87-93, 122-123) On cross-examination, Petitioner explained that he had not independently recalled the dates he lived with A.A. and that his family had paid "somebody to find out when [A.A.] lived in these places." (*Id.* at 117) Petitioner states that his family paid $5,000 to an investigator that trial counsel told

them to hire. (Doc. 47 at 30) This circumstance supports the conclusion that Petitioner cannot establish prejudice on his Ground 2(a) claim.

Petitioner's Ground 2(e) claim is that his trial counsel "allowed erroneous jury instructions to be presented to the jury." (Doc. 33 at 7) His Ground 2(f) claim is that trial counsel "allowed erroneous verdict forms to be presented to the jury." (*Id.*) Petitioner, however, does not specify what jury instructions or which verdict forms he alleges were erroneous. Petitioner provides mere "conclusory suggestions" that his trial counsel provided ineffective assistance that "fall far short of stating a valid claim of" ineffective assistance of counsel. *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995). Petitioner has wholly failed to meet his burden on either Ground 2(e) or Ground (f) of overcoming the strong presumption that his trial counsel's "conduct [fell] within the wide range of reasonable professional assistance . . . ." *Strickland*, 466 U.S. at 689.

In Ground 2(g) Petitioner alleges his trial counsel "refused to file a notice of appeal for me even after I instructed him to do so" leaving him without counsel at a critical stage of his proceeding. (Doc. 33 at 7) Although Petitioner recognizes that he has the burden of proving prejudice on this claim, he fails to argue what prejudice he suffered from his trial counsel having allegedly refused to file a notice of appeal. (Doc. 34 at 27-28) In fact, the record conclusively shows that Petitioner filed a timely notice of appeal and that he was represented by appointed counsel on appeal, who filed an *Anders* brief. (Doc. 45-1 at 220-231)

Petitioner argues in Ground 2(h) that his appointed appellate counsel was ineffective "for filing an *Anders* brief when there were arguable issues that could have been presented to the court." (Doc. 33 at 7, Doc. 34 at 28-29) Petitioner's claim of ineffective assistance of appeal counsel is evaluated under the *Strickland* standard. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). The *Strickland* standard requires Petitioner to establish his appellate counsel was "objectively unreasonable . . . in failing to find arguable issues to appeal" and also to "show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Id.* at 285-86. The Supreme

Court instructed that a court will "presume that the result of the proceedings on appeal is reliable," and that the defendant is required to "prove the presumption incorrect in his particular case." *Id.* at 287.

Petitioner fails to establish that his appellate counsel was objectively unreasonable in deciding to not raise the issues Petitioner alleges. On all of Petitioner's claims on direct appeal except that involving multiplicity of counts, the Arizona Court of Appeals considered and rejected the claims. (Doc. 45-3 at 78-86) Petitioner does not argue or establish that had his appellate counsel raised these issues, the result in the court of appeals would have been any different.

On Petitioner's multiplicity of counts claim, the Arizona Court of Appeals concluded that Counts 11 and 13 described the same offense and noted the jury had found Petitioner guilty as to Count 13 and not guilty as to Count 11. (*Id.* at 83) The court of appeals found that entry of judgment on Count 13 was fundamental error that prejudiced Petitioner. (*Id.*) The court vacated the conviction and sentence on Count 13 but affirmed Petitioner's convictions and sentences on all other counts. (*Id.* at 86) Although the court of appeals found fundamental error in the superior court's entry of judgment on Count 13, Petitioner did not suffer any prejudice that may have been caused by appellate counsel's failure to assert the multiplicity claim because the court of appeals vacated his conviction and sentence on Count 13. Petitioner has not demonstrated a reasonable probability that, but for his appellate counsel's error in failing to raise the multiplicity issue in a merits brief, the result of the appeal would have been different.

In addition to Petitioner's listing of issues that appellate counsel declined to raise which Petitioner believes were material, Petitioner also alleges that appellate counsel declined his invitation to meet with T.Y. after T.Y. requested a meeting with Petitioner's sisters. (Doc. 34 at 29) Petitioner concedes that no one knows what T.Y. "was going to say" but he concludes that "there is a reasonable probability [T.Y.] was going to say that [Petitioner] was innocent." (*Id.*) Petitioner's claim regarding appellate counsel's decision

to not meet with T.Y. is speculative on its face and fails to establish either that counsel's representation was objectively deficient or that Petitioner suffered any prejudice as a result.

Accordingly, with regard to Grounds 2(a), 2(e), 2(f), 2(g), and 2(h), Petitioner has not established a claim of ineffective assistance of counsel and has not shown that the state court's resolution of this claim was based on an unreasonable determination of the facts, or that it was contrary to, or based on an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d).

4. Ground 3 – Obstruction by state official of right to appeal

Under Ground 3, Petitioner asserts that his rights under the Fifth, Sixth, and Fourteenth Amendments were violated when his right to appeal was obstructed by a state official in refusing to disclose exculpatory evidence. (Doc. 33 at 9, Doc. 34 at 34-36) Petitioner claims the Maricopa County Attorney's office is withholding C.S.'s CPS records "which will prove where and with whom she lived on or between February 6, 1994 through February 5, 1995. As well as [A.A.]'s section 8 records, [that] will prove when [T.Y.] lived at the residences in question." (*Id.* at 35)

Although Petitioner characterizes his Ground 4 claim as a claim that the State obstructed his right to appeal, this claim is a reassertion of his Ground 1(a) claim of *Brady* violations. (Doc. 34 at 34-36) For the reasons set forth in Section III(C)(1) above, Petitioner's claim is without merit. Further, the record clearly reflects that Petitioner pursued his state right to direct appeal of his convictions and sentences and to post-conviction relief. Petitioner has failed to demonstrate that the superior court's decision rejecting his Ground 4 claim would support relief under 28 U.S. § 2254(d).

5. Grounds 5(a) & 9 – Erroneous verdict form

In Ground 5(a), Petitioner contends the trial court erred by allowing erroneous verdict forms to go to the jury, thus violating his due process rights pursuant to the Fifth and Fourteenth Amendments. (Doc. 33 at 10, Doc. 34 at 40-42) Petitioner's Ground 9 claim is that his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments were violated when erroneous verdict forms were presented to the jury. (Doc. 33 at 14, Doc. 34 at 62-63)

Petitioner argues the verdict forms were legally insufficient by omitting a "timeline," and that some verdict forms omitted the "act of what [Petitioner] was actually accused to have done" or the "location of where [he] was accused to have committed [the] crimes." (*Id.* at 41, 62)

Petitioner's claims rely on the United States Supreme Court's holding in *In re Winship* that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (Doc. 34 at 63, citing *In re Winship*, 397 U.S. 358, 364 (1970))

Addressing Petitioner's verdict form claims on direct appeal, the Arizona Court of Appeals stated:

> Defendant contends that the jury received improper instructions and verdict forms. His primary argument is that the instructions and verdict forms were impermissibly vague because they did not specify or require the jury to consider the dates, locations, and details of each count. This argument is unfounded. The verdict forms specified the location of each offense and provided a brief description identifying each offense—such as "mother's bedroom—75th Avenue and Indian School address" and "defendant put his penis on victim's lips-Central and Southern address." Such statements were sufficient to distinguish the charges, thereby enabling the jury to weigh the evidence related to each—including the conflicting evidence regarding when and where Defendant lived with the victims. Contrary to Defendant's contention, the jury was not deprived of the information necessary to consider his defenses.

(Doc. 45-3 at 81)

The record confirms that the trial court instructed the jury on the essential elements of: (1) sexual conduct with a minor in Counts 1, 3, 9, 11, and 13 (Doc. 45-1 at 62-63); (2) sexual abuse in Counts 2, 6, 7, 10, 12, 14, 15, and 16 (*Id.* at 63); and (3) molestation of a child in Counts 4 and 8 (*Id.*). The jurors were supplied the instructions in a packet for use while deliberating, which clearly identified all of the essential elements of the charged counts. (Doc. 45-1 at 54, Doc. 54 at 205) The verdict forms for each count included the charge, the identity of the victim, a location or reference to another charge alleged to have occurred at the same location, and a finding that the defendant was at least 18 and the

victim was under 15. (Doc. 45-1 at 173-187) Each of the counts also included a specific identifier for the act alleged, such as a description of the act, a description of where at the location the act occurred, or a reference to an activity taking place when the act occurred. (*Id.*)

Petitioner fails to demonstrate that the Arizona Court of Appeals' decision finding that the jury was instructed on the essential elements of each count against him was contrary to clearly established federal law, was an unreasonable application of such law, or was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

6. Grounds 5(b), 5(d), and 10(a) through 10(g) – jury instructions

In Grounds 5(b), 5(d), and 10(a) through 10(g), Petitioner alleges claims associated with erroneous jury instructions. (Doc. 33 at 10, 15; Doc. 34 at 41-43, 64-66) These claims assert the jury instructions: (1) failed to instruct the jury on the defense theory of the case (Grounds 5(b),10(b)) or on defenses to sexual misconduct (Grounds 5(d), 10(a), 10(g)); (2) did not inform the jury about the essential elements of each charge (Ground 10(c)); (3) misled the jury into thinking the defense presented no evidence (Ground 10(d)); (4) allowed the jury to consider hearsay statements (Ground 10(e)); and (5) erroneously instructed on the state's burden of proof (Ground 10(f)).

To warrant federal habeas relief, an error in jury instructions "cannot be merely 'undesirable, erroneous, or even "universally condemned,"' but must violate some due process right guaranteed by the fourteenth amendment." *Prantil v. California,* 843 F.2d 314, 317 (9th Cir. 1988) (quoting *Cupp v. Naughten,* 414 U.S. 141, 146 (1973)). Petitioner must demonstrate that the erroneous charge "'so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire,* 502 U.S. 62, 72 (1991) (quoting *Cupp,* 414 U.S. at 147). In making its determination, a court must evaluate the challenged jury instructions "'in the context of the overall charge to the jury as a component of the entire trial process.'" *Prantil,* 843 F.2d at 317 (quoting *Bashor v. Risley,* 730 F.2d 1228, 1239 (9th Cir. 1984)). Petitioner's burden is "especially heavy" when the court fails to give an instruction. *Henderson v. Kibbe,* 431 U.S. 145, 155 (1977).

a. Absence of instructions on defenses or defense theory

As noted, in Grounds 5(b), 5(d), 10(a), 10(b), and 10(g), Petitioner asserts his federal constitutional rights were violated when the jury was not instructed either on the defense theory of the case or on available defenses to sexual misconduct. (Doc. 33 at 10, 15; Doc. 34 at 41-43, 64-66) Petitioner contends that one of his defenses was an alibi defense, such that he was not present at the times and locations the alleged crimes had been committed. (Doc. 34 at 41) He argues that an instruction should have been given requiring the jury to find beyond a reasonable doubt whether Petitioner was present at the place and time the alleged crimes occurred. (*Id.* at 42) Petitioner further states that he had maintained his innocence throughout the prosecution and that the jury should have been instructed on the defenses for sexual misconduct. (*Id.* at 42, 64)

The trial court discussed final jury instructions and addressed defense counsel's request for instructions on defenses to sexual misconduct charges, as follows:

> THE COURT: You had asked for defenses - - all the defenses for sexual misconduct cases to be put in the jury instructions and I advised that I didn't feel that this case warranted those defenses.
>
> [DEFENSE COUNSEL]: And if I may, Your Honor, just briefly. We are always going with that and I believe, off the top of my head, it was [A.R.S. §] 13-1407, subsection E, and it talked about the requirement, at least for the child molest and sex abuse counts, 1407 - - or 1405 and 1410 respectively, that there was also a requirement that the defense be shown it was not for a sexual - - due to - - motivated by sexual interest, and what I had in mind is just the alleged wrestling and alleged touching of the female breasts in that process.
>
> THE COURT: Well, that would - - I would consider that, but your client testified that he never had any contact in that respect with the girls.
>
> [DEFENSE COUNSEL]: And I will abide by the Court's decision on that, Your Honor.
>
> THE COURT: All right.

(Doc. 45-1 at 52-53)

The Arizona Court of Appeals addressed Petitioner's arguments as follows:

> Defendant contends that the jury received improper instructions and verdict forms. His primary argument is that the instructions and verdict forms were impermissibly vague because they did not specify or require the jury to consider the dates, locations, and details of each count. This argument is unfounded. The verdict forms specified the location of each offense and provided a brief description identifying each offense—such as "mother's bedroom—75th Avenue and Indian School address" and "defendant put his penis on victim's lips-Central and Southern address." Such statements were sufficient to distinguish the charges, thereby enabling the jury to weigh the evidence related to each—including the conflicting evidence regarding when and where Defendant lived with the victims. Contrary to Defendant's contention, the jury was not deprived of the information necessary to consider his defenses.
>
> Defendant next contends that the jury instructions contained several specific errors. First, Defendant contends that the instructions erroneously defined "sexual contact." According to Defendant, contact is "sexual contact" only if it is undertaken for the purpose of arousing or gratifying sexual desire. Defendant is incorrect. The jury was instructed on "sexual contact" consistent with A.R.S. § 13–1401(2), which defines the term as meaning "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact," without regard to the defendant's intent.

(Doc. 45-3 at 81-82)

Petitioner's defense theory of the case was that he was innocent of all charges, which Petitioner also asserts in Ground 13 of the Petition. Petitioner argues further that he had an alibi defense in that he was not present at the time and place of the allegations. (Doc. 34 at 41) He asserts that he has consistently claimed actual innocence, which he declares "means that [he] did not do these crimes for sexual interest or any other reason." (*Id.* at 42)

The jury was instructed on the elements of the charges against Petitioner, each of which required that the victim be under 15 years old. (Doc. 45-5 at 205) The jury also was instructed that "[t]he law does not require a defendant to prove innocence. Every defendant is presumed by law to be innocent. You must start with the presumption that the defendant is innocent." (*Id.* at 200) The jury was instructed further that the "State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the State must prove

each element of each charge beyond a reasonable doubt." (*Id.* at 201) Moreover, in closing argument defense counsel repeatedly emphasized his "timeline" argument, which relied on defendant's and defense witness testimony that he did not move in with A.A. until 1995, later than A.A., T.Y. and C.S. testified to. (Doc. 45-1 at 101-102, 109, 112, 117, 121-125, 129, 131, 133) At the conclusion of his closing argument, defense counsel declared that "[t]he timeline really crushes a lot of these counts. There is question after question after question." (*Id.* at 133) Defense counsel further emphasized that A.A. pursued allegations against Petitioner around the same time that she and Petitioner were involved in divorce proceedings and a custody dispute. (*Id.* at 120) Additionally, as the trial court noted, Petitioner had consistently testified at trial that he had never wrestled with the girls (Doc. 56-5 at 88), never engaged in any inappropriate touching of the girls (*Id.* at 89, 97, 98, 102, 106, 116, 131, 134), and even testified that in all the time he was with A.A. he had never once been alone with any of the children (*Id.* at 144).

Petitioner's alibi evidence was comparatively weak in relation to the prosecution's case, particularly given that Petitioner agreed that T.Y. and C.S. each lived with him for periods of time before they were 15. Although an alibi instruction or instruction for defense of sexual misconduct were not given, the instructions as a whole "in light of all of the evidence in the case, were sufficient to afford due process under the standard by which [federal courts] review state court convictions in habeas cases under 28 U.S.C. § 2254." *Duckett v. Godinez*, 67 F.3d 734, 746 (9th Cir. 1995). The Arizona Court of Appeals' conclusion that "the jury was not deprived of the information necessary to consider his defenses" (Doc. 45-3 at 81) does not support relief under § 2254(d).

b. Jury instructions about the essential elements of each charge

Petitioner's Ground 10(c) claim is that the jury instructions did not inform the jury of the essential elements of the charges against him. (Doc. 33 at 15, Doc. 34 at 40) As is discussed above in Section III(C)(5), the jury was explicitly instructed on the essential elements of the charges against him. (Doc. 45-5 at 205) Moreover, as Respondents argue, the verdict forms provide an identifier or identifiers referencing the incident charged for

each count. With this information, and the evidence in the trial record, the jury was able to come to verdicts on all the challenged counts in the Petition without violating Petitioner's constitutional rights. *McGuire*, 502 U.S. at 72-73.

Considering the instructions as a whole, the Arizona Court of Appeals' decision on Ground 10(c) was not contrary to clearly established federal law, was not an unreasonable application of such law, and was not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

c. Whether the instructions misled the jury

In Ground 10(d), Petitioner argues that the jury instructions "misled the jury into thinking that my witnesses and I did not present any evidence." (Doc. 33 at 15, Doc. 34 at 65) Petitioner refers to the italicized portion of the instructions below, stating:

> Evidence of any Kind. The State must prove guilt beyond a reasonable doubt based on the evidence. The defendant is not required to produce evidence of any kind. The decision on whether to produce any evidence is left to the defendant acting with the advice of an attorney. *The defendant's decision not to produce any evidence is not evidence of guilt.*

(Doc. 45-5 at 202) Petitioner contends that this instruction was misleading because he testified at trial and put on several defense witnesses who also testified, and that this testimony was evidence. (Doc. 34 at 65) Petitioner concludes that because the trial court gave this specific instruction, the jury had been misled into concluding that none of this testimony could be considered as evidence. (*Id.*)

Addressing this claim, the Arizona Court of Appeals stated:

> Defendant contends that because he presented evidence on his own behalf, the jury should not have been instructed that "[t]he defendant's decision not to produce any evidence is not evidence of guilt." But even if this accurate instruction did not apply, Defendant identifies no prejudice and we discern none.

(Doc. 45-3 at 82)

The trial court also instructed the jury that it was to "[d]etermine the facts only from the evidence produced in court. When I say evidence I mean the testimony of witnesses and the exhibits introduced in court." (Doc. 45-1 at 54) Moreover, the court instructed that

"[a]s you determine the facts, however, you may find that some instructions no longer apply. You must then consider the instructions that do apply together with the facts as you have determined them." (*Id.* at 55) Accordingly, the jury was informed that Petitioner's and his defense witnesses' testimony was in fact evidence the jury should consider and that some instructions might be inapplicable. There is no evidence that the jury did not follow all of the instructions, as this Court must presume it did. *See Doe v. Busby*, 661 F.3d 1001, 1017 (9th Cir. 2011) (a habeas court must presume a jury follows its instructions).

Viewing the instructions as a whole, the Arizona Court of Appeals' decision on Ground 10(d) was not contrary to clearly established federal law, was not an unreasonable application of such law, and was not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

d. Jury consideration of a hearsay statement

Under Ground 10(e), Petitioner contends that his constitutional rights were violated when the jury instructions "allowed the jury to consider [a] hearsay statement during their deliberation." (Doc. 33 at 15) The jury instruction addressed evidence at trial about a shooting incident involving Petitioner after which police reports documented allegations of past inappropriate behavior against Petitioner and also evidence of alleged inappropriate behavior by Petitioner against his biological daughter K.G. The instruction was under the caption "Other Acts" and read:

> Evidence of an alleged shooting and evidence of alleged inappropriate behavior against [K.G.] has been presented. You may consider these acts only if you find that the State has proved by clear and convincing evidence that the defendant committed these acts. You may only consider these acts as it relates to any explanation of the timing of a victim's disclosure. You must not consider these acts to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character trait and therefore committed the charged offense.

(Doc. 45-5 at 202-203) Petitioner argues that the allegation about K.G. was hearsay, based on lies by his ex-wife A.A. and that A.A. allowed their biological daughter K.G. to spend

time with him after making the allegations, tending to show that the allegation was false. (Doc. 34 at 65-66)

The Arizona Court of Appeals rejected Petitioner's claim, stating that although Petitioner alleged the evidence was inadmissible hearsay, no objection had been made at trial. Further the court of appeals concluded that even assuming for the sake of argument that the court had erred in admitting hearsay statements as Petitioner alleged, such an error would not risen "to the level of fundamental error." (Doc. 45-3 at 82)

As Respondents accurately point out, this claim is based on Petitioner's speculation which is not supported by record evidence. More importantly, Petitioner has failed to show, assuming that this instruction was error, that it "so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire,* 502 U.S. at 72. The instruction carefully confined how the jury must consider the evidence, assuming the jury first found the State had proven the other act evidence by clear and convincing evidence. As noted, the Court must presume a jury followed its instructions. *Busby*, 661 F.3d at 1017. For the above reasons, Petitioner failed to establish basis for relief under 28 U.S.C. § 2254(d) on Ground 10(e).

e. Erroneous instruction on the state's burden of proof

Petitioner's Ground 10(f) claim is his bare allegation that the instructions "lowered the State's burden of proof." (Doc. 33 at 15) The Arizona Court of Appeals addressed Petitioner's claim that the instructions "erroneously defined the state's burden of proof." (Doc. 45-3 at 82) The court of appeals rejected Petitioner's claim and explained that:

> [i]n describing the state's burden to prove Defendant's guilt beyond a reasonable doubt, the court stated: "If ... you think there is a real possibility that [Defendant] is not guilty, you must give him the benefit of the doubt and find him not guilty." Defendant argues that the word "real" should not have been used. This argument is meritless. The instruction comported exactly with the language that our supreme court has approved and repeatedly upheld, *State v. Forde,* 233 Ariz. 543, 565, ¶ 86 (2014), and with the model instruction set forth in the Revised Arizona Jury Instructions ("RAJI"), RAJI (Criminal) Stand. Crim. 5b(1) (3d ed. 2013).

(*Id.*) Petitioner does not identify which part of the jury instructions he believes lowered the state's burden of proof. However, the instructions properly detailed that Petitioner was "presumed by law to be innocent" and that the State bore the burden of proving Petitioner guilty on "each element of each charge beyond a reasonable doubt." (Doc. 45-5 at 201-202) Even if the Court were to assume that the trial court's instructions on the State's burden of proof were erroneous, Petitioner has neither argued nor established that the giving of jury instructions "so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. at 72. Moreover, the undersigned discerns no basis in the record for such a conclusion. Accordingly, Petitioner failed to demonstrate he is entitled to relief under 28 U.S.C. § 2254(d) on Ground 10(f).

7. Ground 13 - Actual Innocence

Petitioner's Ground 13 claim is that he is actually innocent and for that reason his confinement violates his Fifth and Fourteenth Amendment due process rights. (Doc. 33 at 18) He contends that the State "refuses to meet its obligation to disclose the exculpatory evidence which will prove [his] innocence . . . ." (*Id.*) Respondents argue instead that the United States Supreme Court has never recognized a freestanding actual innocence claim and urges that the claim be dismissed as non-cognizable on federal habeas review. (Doc. 45 at 31)

Although the Supreme Court has not expressly recognized a freestanding innocence claim on federal habeas review of a non-capital crime, the Court has assumed that such a claim may be cognizable and noted that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). The Ninth Circuit has analyzed freestanding innocence claims similarly. *See Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014). The Ninth Circuit has instructed that its "cases suggest that relief would be available, if at all, only in very narrow circumstances. [A petitioner] must 'go beyond demonstrating doubt about his guilt and must affirmatively prove that he is probably innocent.'" *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc)). *See also*

Morris v. Hill, 596 F. Appx. 590, 591 (9th Cir. 2015) (unpublished decision) ("Here, we need not decide whether to recognize a freestanding actual innocence claim, because even assuming that such a claim is cognizable in a non-capital case, Morris has failed to satisfy this high standard.") No federal appellate court has found a free-standing claim of actual innocence. *See* Brian R. Means, *Freestanding Claim of Actual Innocence,* Postconviction Remedies § 6:17 (July 2019 update); and LaFave, et al., *"Freestanding," "Stand-alone," or "Bare" Innocence Claims,* 7 Crim. Proc. § 28.3(e) (4th ed.) (Nov. 2018 update).

Even assuming a freestanding claim of actual innocence in a non-capital case would be recognized, Petitioner's claim of "actual innocence" is based on his mere speculation that records exist that could establish that T.Y. and C.S. lived with him outside of the date range they testified he sexually abused them. If such evidence exists, it would not represent proof that Petitioner was probably innocent. Importantly, Petitioner himself testified that both T.Y. and C.S. lived with him when they were younger than 15.[9] Further, Petitioner testified that he and A.A. lived at their various residences at different dates than prosecution witnesses had testified to and explained that his family had paid someone to research the dates he then testified about. Thus, the jury was presented with conflicting evidence on the dates where A.A. and Petitioner lived during the periods the sexual abuse occurred, but even Petitioner's testimony placed C.S. and T.Y. living with him when each was younger than 15. Petitioner's claim of "actual innocence" is not founded upon any affirmative evidence of his innocence but rather upon speculation of evidence that would not establish actual innocence.

As previously discussed, under a merits review pursuant to 28 U.S.C. § 2254, relief is not warranted unless Petitioner establishes the Arizona Court of Appeals' decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as

[9] Petitioner testified that C.S. lived with him and A.A. in 1996 and lived with them for about a year. (Doc. 56-5 at 88) C.S. was born in February 1983 (Doc. 56-3 at 5) and under Petitioner's version of the facts would have turned 13 in 1996. Petitioner testified that T.Y. always lived with A.A. and that they lived at the addresses where T.Y. testified Petitioner abused her starting in December 1993 through 1998. (Doc. 56-5 at 91-92) T.Y. was born in September 1984 (Doc. 56-3 at 71) and under Petitioner's version of the facts would have been ages 9 through 14 during that period.

determined by" the Supreme Court or that the decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Petitioner failed to demonstrate he is entitled to such relief on Ground 13.

IV. CONCLUSION

For the reasons set forth above, undersigned concludes that Petitioner has failed to establish that habeas relief is warranted on his Petition. It is therefore recommended the Petition be denied and dismissed with prejudice. Further, undersigned finds that dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable; Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and jurists of reason would not find the Court's assessment of Petitioner's constitutional claims "debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Thus, undersigned recommends that a certificate of appealability be denied.

Accordingly,

IT IS RECOMMENDED that David Lopez Gonzales' Third Amended Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) (Doc. 33) be denied and dismissed with prejudice.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability be denied because dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the procedural ruling debatable; further, Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and jurists of reason would not find the Court's assessment of Petitioner's constitutional claims "debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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) of the Federal Rules of Appellate Procedure should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this

recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which to file responses to any objections. Failure to file timely 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 file timely objections to any factual determination of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 11th day of March, 2020.

Deborah M. Fine

Honorable Deborah M. Fine
United States Magistrate Judge